VICTORIAN BAR NEWS

No. 92
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AUTUMN 1995

THIS SPORTING BAR

CRICKET

SAILING

TENNIS

GOLF

MEMORIES OF A GLORIOUS SUMMER

Reports:

Common Law Bar Association

Commercial Bar Association

Women Barristers' Association

Opening of the New Administrative Appeals Tribunal

Sparke in China

Inaugural Great Debate

VICTORIAN BAR NEWS

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EDITORS' BACKSHEET

ANOTHER YEAR

AND SO ANOTHER LEGAL YEAR HAS opened. Ceremonies have come and gone at St. Paul's, St. Pat's and the Synagogue. Each year it gets a little bit harder to forget the enjoyment of holidays and that perhaps other people have an easier life than barristers.

The first jolt into reality is the need for most to prepare taxation returns. The second jolt is to acquire sufficient money to pay the provisional tax instalment on 1 March. The third jolt is the news from the accountant that if by some miracle your income has gone up then there will be large further amounts to be paid within a very short time. This will necessitate the chasing up of those long standing accounts. The telephoning of the clerks accounts department, the perusing of the long list of solicitors names and the writing of many letters. Of course the problem of collecting these amounts in order to pay the June taxation instalment means that the income goes up again and so the provisional tax spiral continues. But as the journalists tell us we're all earning $6,000.00 a day so it really doesn't matter.

In preparing the tax return there is one little heading that always stands out. It is Rental of Chambers. It's usually at this time of year that many realise that twelve months rent is a very large amount. Especially if you are leasing rooms in Owen Dixon West. This causes knocking upon the doors of members of the Bar Council. Much complaint of inflated rates and what is happening with the recalcitrant landlord.

This conversation usually leads to a gloomy discussion of the future of Barristers Chambers Ltd. Rumours are rife that the Government is about to change the rules. Compulsory chambers leased from the Bar will be a thing of the past. How will this affect rent? How will this affect the whole Bar? Will it see those very successful leaders charging key money for entrance into their chambers? Will it see a diminution of the position of clerks? Will the very successful set up Sydney-type chambers?

And what of the Junior Bar? Much complaint comes from the Junior Bar but rather little contribution. But will the majority of them wish to leave the organisation as it now is? Will it only be the desperate who will resort to practising from car phones and bungalows?

What if the Government makes it non-compulsory to be a member of a professional legal organisation? Will there be a mass exodus from the Law Institute. This will achieve a greater variety of complaints from society. The Government may use this to say that it reinforced the fact that self government by the professions was ineffectual. How ridiculous.

The Bar Council does not get much praise. However there are many who are spending long hours working and negotiating. There are delicate negotiations being undertaken in relation to Owen Dixon West. The Bar's case has been clearly put to the Government. There has been a great deal of waiting, perhaps within the next few months there will be some clarification as to what the future holds.

The Supreme Court itself is changing. There has been great speculation as to the composition of the new Court of Appeal. Further, the Chief Justice of the High Court is about to retire. More speculation and rumour surrounds the appointment of a new Chief Justice.

The Law Council has adopted a blueprint for a national legal services market with proposals for practising certificates and disciplinary procedures involving an independent statutory body. The prospect of control by Canberra causes immense depression.

And what would Hasie Ball have thought of all this? Hasie Ball was the oldest and longest serving member of the Bar who died on 7 February 1995. It was at the last Bar Christmas party that one of the editors spoke with Hasie. He had just been opposed to Hasie in a longish case. Here was a man in his eighties who was still able to maintain a successful practice as an advocate. He had attended every Bar Christmas party since 1945. He was dismayed at the prospect that perhaps this tradition is to come to an end and that people really don't

think some of the traditional functions of the Bar need to be supported any more. It is doubtful whether many of us will live as long as Hasie or be able to practise at such an age. A tribute to this enduring member of the Bar is contained in this issue. To his wife and family we extend our condolences.

Can things get lighter? Last year there was the inaugural Great Debate on the Bar. For a change, humour and entertainment were thought to be a proper topic. The Debate was a great success and it is hoped that this can become, dare we say it, a continued tradition in the Bar — whatever the Bar will be in the coming year.

The Editors

CORRESPONDENCE

Dear Sir/Madam,

With the passing of Sir John Erskine Starke a slice of history has been cut from a most momentous cake. As a resident of the Mount Eliza area from the age of four, I can say it was some cake.

My father, Garnet Beaumont Frost, formerly a Portland solicitor, died in Mornington after a short practising career after WWII. His funeral which I remember so vividly was conducted by the Rev. George Hall whose mother had always been so hospitable at St Peters vicarage, to us young Sunday school children, at fetes and after nativity and other plays we put on. Her cakes were most sought after and soon consumed.

Subsequently the time came for the Rev. George Hall and his mother sadly to move to another parish, All Saints Hawthorn — their parting was a great loss to St Peters Mornington, myself and my mother no less so than parishioners generally.

The shock of Mrs. Hall's murder at the vicarage in Hawthorn was to hurt us all beyond the belief of human imagination as she was murdered in circumstances that cut deep into the heart of all who knew her or not.

As circumstances would have it I acquired the branch office in Mount Eliza of my father's firm which had been sold by my father to A.J. Hunt (just two weeks before my father's passing). Then trading as Frost & Hunt.

For more than 20 years I practised as Frost & Assoc. (A.J. Hunt being consultant for a year and, more than I am sure he expected, informally thereafter).

It was in these circumstances I came to know Sir John Starke, having more knowledge of the much publicised trial of Ronald Ryan, but aware of his successful defence of Robert Peter Tait which I suppressed in the background.

Judge Starke was one whose presence outside my office virtually every evening (my office was above the local newsagency) remained a constant reminder of those events which made for such a large slice in the cake.

As a young law student, I toured Pentridge Gaol with others where we met Robert Peter Tait, for me a sickening experience of which I wrote at length to the *Age* (never published).

At a dinner party where I was the guest of the Southey family in Mount Eliza, Mrs. Starke and Mr. Justice Starke opened up in a manner I had not heard or read of before.

I would be pleased to convey my recollections to anyone who has the honour to write a biography on this most exceptional judge.

All of us in Mount Eliza will remember him collecting his newspaper, driving his old Kingswood Holden to nearly the very end. I personally favour capital punishment for horrendous crimes, but not an "eye for an eye". However, never in my estimation was there a more kindly couple in Mount Eliza.

Yours faithfully
Russell R. Frost LL.B.

CHAIRMAN'S CUPBOARD

ALTHOUGH BY THE TIME THIS EDITION OF the *Bar News* is published some of this article is likely to be out of date, I thought it might be appropriate to report on recent developments concerning the reform of the legal profession. These have occurred on both the national and the state level and at the time of writing the end result is far from certain.

The first matter to report concerns the Australian Bar Association's Uniform Rules of Conduct. Members will no doubt recall that our new Rules which came into force on 24 May 1993 followed a period of extensive consultation between representatives of the constituent bodies of the A.B.A. However, it seemed that no sooner had the A.B.A. adopted its Uniform Rules of Conduct than the New South Wales Bar Association was forced to change its Rules apparently to take account of the changes made to that State's *Legal Profession Act.* Thus, for some time now the A.B.A. has been considering amendments to its Uniform Rules to deal with the altered situation in New South Wales. A number of meetings of representatives of the constituent bodies of the A.B.A. have been held and the proposed new A.B.A. Uniform Rules have been drafted to encompass any changes suggested at these meetings. John Middleton, Q.C. and Michael Fleming have performed a considerable amount of work in this area. A final draft of these Rules will shortly be considered by the Bar Council. As with the earlier set of Uniform Rules it is possible to provide for local variations.

Other developments at the national level concern the Law Council of Australia. At its meeting in July 1994 the Law Council adopted a blueprint for a National Legal Services Market. This was an attempt to show that the profession itself could meet the demands for such a market which could operate in a competitive environment, without the need to introduce a regulatory bureaucracy based in Canberra. The proposal has been amplified and refined at a number of subsequent Law Council meetings. Final consideration of the proposal is to take place at a meeting to be held on Saturday, 1 April 1995. If adopted it will then be submitted to the meeting of the Council of Australian Governments ("COAG") to be held on the following Monday.

David Habersberger

There are four major topics dealt with in the Law Council's proposal. The first is "Professional Conduct and Ethical Rules". For our purposes the only relevant part of the proposed rules are the Advocacy Rules which are presently based on the current form of the proposed A.B.A. Uniform Rules. I anticipate that any changes in the form of the new A.B.A. Uniform Rules will be automatically included in the Law Council's Advocacy Rules. It is interesting to note that, following the changes in the New South Wales legislation, the New South Wales Law Society adopted as its Advocacy Rules those passed by the New South Wales Bar. It appears that up until then, none of the major Law Societies/Institutes had any ethical rules specifically governing the conduct of their members when acting as advocates.

The second major topic dealt with by the Law Council proposal is that of "Practising Certificates". Until recently the only practising lawyers who did not have to take out practising certificates were the members of the Victorian Bar and of the Bar Association of Queensland. Members of the New South Wales Bar Association were required to do so. Members of the smaller Bars were in the same position except that their practising certificates were not issued by the Bar Association but by either the local Law Society or some

independent body. It seems clear that in the future all lawyers in private practice will have to hold practising certificates even if they are members of an independent Bar. The proposal currently before the Law Council supports the issuing of two types of practising certificates — a certificate as a "barrister and solicitor" and a certificate as a "barrister". It is contemplated that the former would be issued by the State or Territory Law Society or existing issuing authority of such certificates and the latter by the State or Territory Bar Association or existing issuing authority of such certificates. Unfortunately the Queensland Law Society has expressed its opposition to this point as it wishes to be the sole issuing authority of practising certificates in that State. Needless to say, the Bar Association of Queensland categorically rejects this idea.

The other important aspect about practising certificates is that the Law Council's current proposal provides that any legal practitioner holding an appropriate practising certificate in his or her principal place of practice should be entitled to automatic recognition of that practising certificate in the other States and Territories of Australia without any additional requirement. If such a provision were implemented it would certainly remove a number of restrictions in the way of, and lower the costs of, practising nationally. The unintended, but nevertheless drastic, effect that the removal of the practising certificate fees paid by interstate practitioners would have on the budgets of some of the smaller professional associations has meant that this proposal has encountered considerable opposition. Compromise proposals are currently being investigated.

The next topic is that of "Disciplinary Processes". The proposal currently before the Law Council suggests that any disciplinary processes for the legal profession should encompass the following elements:

- a three-tiered structure at the pinnacle of which is the relevant Court;
- the preservation of self-regulation;
- accountability, which is achieved by the inclusion of significant lay involvement at the level of a statutory disciplinary body.

The three tiers are as follows:

(1) The professional body or other body which is responsible for receiving and investigating complaints and either:
   - resolving the complaint by conciliation or otherwise;
   - dealing with a majority of matters which can be dealt with by way of fine or similar; or
   - laying charges before an independent statutory body.

(2) An independent statutory body incorporating significant (but not majority) lay representation to deal with:
   - charges laid by professional or other body;
   - appeals by any party from determinations of the relevant professional or other body; and
   - (possibly) matters referred by the Attorney-General.

(3) The Supreme Court, which should retain its right to regulate the profession, to deal with:
   - appeals from the independent statutory body;
   - serious matters referred to it by either the professional (or other) body or the statutory body; and
   - matters which the Court may determine to pursue on its own motion.

Our existing disciplinary processes clearly fall within this broad scheme.

The final topic in the Law Council proposal concerns "Trust Accounting Obligations and Fidelity Funds". As this does not apply to barristers I shall say nothing further about it.

I turn, therefore, to recent developments concerning the reform of the legal profession at the state level. All members of the Bar should have received the Attorney-General's discussion paper on this topic entitled "Reforming the Victorian Legal Profession: An Agenda for Change". Presumably this is a good guide to her preliminary thoughts on the topic. The working party set up by the Attorney-General has yet to finalise its recommendations. The Bar Council has made submissions to members of the working party on a number of occasions although it has not been easy to respond to proposals which were outlined only in general terms in the Attorney-General's paper.

The real issue at the state level is whether the Attorney-General's eventual proposals will be able to be implemented or whether "the reform of the legal profession" will be carried out at the national level with the profession being regulated by the Trade Practices Commission or its successor. At the COAG meeting in Darwin late last year the Victorian Premier with the support of some of the other Premiers successfully argued that regulation of the legal profession should remain with the States. At the time of writing it is said that this is still the position of these Governments. The Law Council's proposal is based on a State regulated system. It envisages that the constituent bodies in each State and Territory would approach their Attorney-General seeking to have support for any amendments to the relevant legislation which would be required to enable the Law Council's proposal to be implemented.

The movable feast continues. Meanwhile the under resourced Courts struggle to cope with the increasing demands placed on them.

ATTORNEY-GENERAL'S COLUMN

IN THIS ISSUE, I WILL EXPLAIN THE operation of the electronic data interchange system (EDI), the benefits arising from the recent increase in court fees and the Judicial Remuneration Tribunal.

ELECTRONIC DATA INTERCHANGE

On 16 June 1994, I officially launched EDI in the Magistrates' Court. EDI is essentially the paperless transmission of data via computer. Although EDI is used widely in many industries, including retailing and communications, Victoria is one of the first jurisdictions in the world using EDI in the judicial system. In fact, four months after its launch, the EDI technology employed by the Department of Justice won the National Award for Excellence in Information Technology in recognition of its innovation, quality, and productivity.

Initially, EDI was introduced in the Magistrates' Court to facilitate the expeditious and efficient issue of civil complaints. Under existing arrangements, a participating solicitor enters the details required on a civil complaint into his or her office computer, which is then transmitted to the Department of Justice Courts' Computer Centre via electronic mailboxes maintained by the IBM network. Upon validation of the data by the Computer Centre overnight, the solicitor receives an acknowledgment message the following morning confirming the court case number and the date of filing. The complaint has now been issued and the solicitor is in a position to print the complaint, and effect service.

It was necessary to amend the Magistrates' Court Civil Procedure Rules to enable the use of EDI to commence civil proceedings. Pursuant to the new Rules, which came into effect on 1 April 1993: all complaints are validated by the presence of the court case number and the date of filing; it is no longer a requirement for the Court seal or the signature of the Registrar to appear on the complaint; and a copy of the complaint must be retained to be filed at the Court if requested.

The advantages of EDI transmitted complaints are many: attendance at the Magistrates' Court is not required; the procedure is paperless; complaints are issued overnight, rather than taking one to two weeks; the one process enables complaints to be issued at any Magistrates' Court in the State; and better defined and consistent rules regarding content of complaints minimise rejections. Furthermore, court fees and transaction costs associated with EDI can be electronically withdrawn from an account nominated by the solicitor, thereby achieving greater administrative efficiency to the procedure.

Currently, EDI transmitted complaints comprise approximately 15 per cent of the total number of complaints issued by the Magistrates' Court. EDI is therefore proving to be a successful initiative. Its initial success has enabled the procedure to be extended to other areas. Applications for default orders in respect of liquidated claims can now be filed electronically under a similar procedure to that regarding civil complaints. Currently, practitioners are required to file paper copies of the affidavit of service and the application for order. It can take from one to two weeks before the practitioner receives a response from the Court. However, the process is more expeditious and efficient under new arrangements. After entering the service details and the terms of the order sought into an office computer, the solicitor transmits the data, together with the issued complaint, to the Computer Centre. If the data is acceptable, the solicitor receives confirmation of the terms of the order the following morning.

It is apparent that EDI has many possible applications within the judicial and tribunal system, and discussions are presently taking place to enable the extension of EDI to both the Supreme and County Courts, and other justice agencies such as, the Titles Office and Sheriff's Office.

APPEAL COSTS FUND

Following public consultation by way of a regulatory impact statement, new scales of fees

were introduced in the Supreme, County and Magistrates' Courts. Consistent with the policy of the Government to improve access to the judicial system, the revised fee levels will be accompanied by a provision contained in the Courts (General Amendment) Bill enabling the fees to be waived in circumstances of financial hardship.

The revised fee levels will permit the Government to increase the opportunities for legal assistance. Treasury approval was secured for a major portion of the increase in revenue raised from the revised court fees to be retained by the Department of Justice and be applied to improve some aspects of the judicial system. For example, I propose to apply part of the revenue to enable the ceiling on the Appeal Costs Fund civil awards to be increased.

Under the *Appeal Costs Act* 1964, an unsuccessful party to a civil appeal may apply to the Fund for reimbursement of some of the expenses incurred in legal proceedings. One of the purposes of the Fund is to remedy the injustice caused when one party is called upon to pay the entire costs of legal proceedings in circumstances where an appeal has been brought by the other party by reason of an error of law, such as the failure of a tribunal to comply with the rules of natural justice. It is appropriate that the costs of the party are borne by the community, so far as is possible, because the appeal is in the broader public interest. For example, it is a basic premise of our adjudicatory system that citizens are entitled to expect that a tribunal or court will make its decision according to law. The appeal process ensures that any legal defect is corrected and that subsequent proceedings will hopefully be free of that particular fault. There is also the additional consideration that an unsuccessful party should not be financially responsible for some error in law on the part of the court or tribunal, or through some other shortcoming in the legal system.

Under existing provisions, the current maximum amount that may be awarded in respect of civil appeals is $4,000, and this has remained unchanged for over 20 years. It is obvious that a revision of the maximum amount that can be awarded is long overdue, and I anticipate that the review of the Appeal Costs Fund will be completed by the end of the year. By increasing the maximum amount that can be awarded in respect of civil appeals, the Government will be increasing the opportunities for legal assistance in deserving circumstances.

JUDICIAL REMUNERATION TRIBUNAL

In order to distance the executive from the judicial remuneration process, the Judicial Remuneration Tribunal Bill establishes a Judicial Remuneration Tribunal which will make recommendations to the executive with respect to the remuneration of Judges and Masters of the Supreme and County Courts, and Magistrates. The Tribunal will consist of three part-time members appointed by the Governor in Council. It will be entitled to receive written and oral submissions, will not be bound by the rules of evidence, and will be able to inform itself in whatever manner it thinks fit.

The Tribunal will be required to prepare a written report as soon as practicable following the commencement of the Act, and not less than every two years thereafter. The Attorney-General will be required to table the report in both Houses of Parliament within ten sitting days after the report is received. If the Attorney-General does not accept, or wants to vary any of the recommendations of the Tribunal, reasons must be tabled in Parliament within ten sitting days of the tabling of the Tribunal's report. Whenever recommendations are accepted, the Attorney-General will be required to issue a certificate that the remuneration of the members be increased accordingly.

Under existing arrangements, the executive is not required to explain its reasons in determining the level of increase in judicial remuneration. The Bill provides objectivity and transparency to this procedure by ensuring the accountability of the executive government. In particular, the requirement that the Attorney-General table in Parliament a statement of reasons why a determination of the Tribunal is not accepted or varied reflects appropriately the responsibility of the executive to Parliament in matters of judicial remuneration,

The Bill breaks the nexus that currently exists between salary increases of Federal Court Judges and our Judges. In this regard, it is to be noted that the existing nexus does not compel the executive to increase the remuneration of our Judges by an amount equal, or even comparable, to the increase awarded to the Federal Court Judges. Rather, provision exists under existing arrangements for the executive, after taking into account all the matters it is bound to consider, to approve a nominal increase only in judicial remuneration. It should also be noted that the Commonwealth Remuneration Tribunal, in determining the appropriate level of remuneration for the Federal Court Judges, does not take into account factors germane to Victoria. The establishment of our own Tribunal will ensure that the appropriate amount of remuneration will be assessed with reference to matters of direct relevance to Victoria.

The provisions of the Bill represent a sound compromise in maintaining the independence of the judiciary, by ensuring the accountability of the executive government in matters of judicial remuneration, while at the same time preserving the duty of the executive government to responsibly manage the financial affairs of the state.

REPORT OF COMMON LAW BAR ASSOCIATION

AS NO REPORT HAS BEEN SUBMITTED since the Winter 1994 edition, I have not had the opportunity of publicly paying tribute to the great service given to the CLBA by Tom Wodak. Secretary from 1986 until his appointment to the County Court Bench, Tom has been one of those indispensable constants that keep such loose-knit associations together. He was also one of those responsible for getting the CLBA more active at a time when many important issues concerning common law practitioners needed addressing. Not the least, Tom's assistance to me has been tremendous. Thanks Tom, and may you have many happy and rewarding years on the Bench.

The state of civil lists, particularly those in the County Court, has continued to be a matter of grave concern. Notwithstanding the appointment of four additional judges to the County Court, the waiting time in the Lists continues to increase.

It has become obvious that the answer to this problem lies in a reform to VWA policies concerning section 135B(4) conferences, and the refusal of the Authority to indulge in post conference negotiations. The appointment of extra judges can have only a minimal effect. This problem has been taken up with the Department of Justice which has been very supportive. Submissions have also been made to a number of members of Parliament. I believe that at last the message has been accepted at government level and culminated in the Minister on 20 December 1994 issuing further directions for common law conferences. Clause 13 of these directions relates to settlement or compromise after section 135B(4) conferences and provides:

(a) in any proceeding in which a section 135B(4) conference has been held and concluded without settlement or compromise of the claim occurring, direct that the authority may

  (i) settle or compromise any such claim following upon and in accordance with the findings made and decision reached through alternative processes such as assessment by a duly appointed independent expert or by mediation;

  (ii) either during the conduct of the procedures referred to in (a)(i) above or generally on reappraising the issues associated with any claim, make a further or other offer in settlement or compromise of that claim.

(b) develop and employ such systems and procedures as may be necessary to give full force and effect to the Directions given in (a) above.

The state of civil lists, particularly those in the County Court, has continued to be a matter of grave concern. Notwithstanding the appointment of four additional judges to the County Court, the waiting time in the Lists continues to increase.

As at February the VWA is attempting to establish a procedure whereby these cases are submitted to "Independent expert evaluation". The Victorian Bar, on the recommendation of the CLBA, has given its support to this procedure subject to caveats:

(i) that this is to be a one off attempt to reduce the existing backlog and should be confined to those cases concerning injuries occurring before 1 December 1992; and

(ii) that it is not to exclude the facility for achieving settlement pursuant to clause 13(a)(ii) of the Minister's Directions.

The Committee is in contact with several of the larger plaintiff's firms which are concerning themselves with the procedure that the VWA is

attempting to set up for the proposed evaluation. There is concern at the Bar, and amongst these solicitors, that to date the VWA has not given effect to clause 13(a)(ii). The solicitors with whom discussions have taken place have indicated that they too are likely to make the implementation of clause 13(a)(ii) settlements a condition of their participation in the scheme for independent evaluation.

Clause 10(iv) of the Transport Accident (General Amendments) Bill 1994 has also been a matter of considerable concern, as it was designed to affect the rights of the Plaintiff under Part II of the *Wrongs Act* by taking away:

(i) the right to damages for loss of services provided by the deceased, and

(ii) interest on judgment.

Submissions were made to several members of Parliament who took the matter up on our behalf, and as a consequence the right to recover interest on judgment was retained.

The Parliamentary Law Reform Committee has been asked by the Government to review certain aspects of jury service in Victoria. It has issued a discussion paper and the Bar has been invited to comment. From the point of view of this Association there is little of concern, however several suggestions have been made to the Bar Council, largely relating to the broadening of representation on juries. Further, it may be desirable to extend the Metropolitan Jury District; in this day and age it does not seem appropriate that the residents of Frankston and most of Dandenong should be immune from jury service.

David Kendall

ONLY IN CALIFORNIA!

Williams, Robert *(white) 1956 California.*

Williams was convicted of first-degree murder and sentenced to life at the age of 18. He had falsely confessed to the murder to kindle interest from his girlfriend, who he believed was about to marry someone else. He was paroled in 1975 and three years later established that he was completely innocent; police records showed that he had been in custody at the time of the murder. In 1978, after testimony on Williams's behalf from the former prosecuting attorney (who nonetheless was not totally convinced of Williams's innocence) a superior court judge ordered his release from parole.

Williams, Robert *(white) 1958 California.*

Williams was convicted of murder and sentenced to life imprisonment. While in prison on a previous conviction (see preceding paragraph), he falsely confessed to a murder in order to convince the prison authorities that an innocent person could indeed be convicted on a false confession. For the second time, he was proved right. In 1975 he was paroled, and in 1978 he was released from parole.

Radelet, Bedau & Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (1992) 354.

ADMINISTRATIVE APPEALS TRIBUNAL

NEW LAND VALUATION DIVISION

PART 3 OF THE *VALUATION OF LAND (Amendment) Act* 1994 came into operation on 23 January 1995.

As a result, a Land Valuation Division of the Administrative Appeals Tribunal has been created. The Division has replaced the Land Valuation Boards of Review.

The Land Valuation Division is located at 55 King Street, Melbourne, together with the Tribunal's other Divisions.

Mr. Bill Beckwith is the Deputy Registrar of the Tribunal responsible for the Land Valuation Division. The number for telephone enquiries is 628 9780.

COMMERCIAL BAR ASSOCIATION

THE COMMERCIAL BAR ASSOCIATION AT the Victorian Bar was formally established at a meeting of Counsel held in the Essoign Club on Thursday 24 November 1994. Approximately 100 members of Counsel attended and endorsed the appointment of the First Committee of the Association. The Inaugural President of the Association is Alan Goldberg Q.C. At the formal launch Goldberg Q.C. addressed the meeting and outlined the purposes for which the Association had been established and the aims of the Association to be implemented by the Committee and the Secretaries to the Chairmen of Sections.

Goldberg launches

The meeting was informed that the objects of the Commercial Bar Association are:

(1) to provide a forum for meetings of Barristers who practise in or have an interest in commercial law and to foster closer working and social relationships between them;

(2) to bring to the attention of members, through the medium of regular meetings, matters of concern or interest or both relating to commercial law and to conduct discussions and formulate position statements or recommendations or both for submission to such person or body as the Committee may deem proper;

(3) to establish communications and actively liaise with Courts, Tribunals, authorities, government departments and instrumentalities and other associations and bodies concerned with or interested in commercial law;

(4) to seek representation on and liaison with committees of the Victorian Bar connected with matters of concern to members;

(5) to liaise with the Bar Council of the Victorian Bar in relation to matters of concern to members of the Association and to ensure that, as far as practicable, consultation between the Bar Council and the Committee takes place before the Bar Council formulates policies or makes decisions on commercial law matters;

(6) to encourage participation by members in continuing, legal education programmes, conferences and other outlets whereby the legal profession, other interested profes-sional groups and the public may increase their knowledge and understanding of commercial law.

The Association had its genesis in a circular distributed by David Denton, through the clerks, to all members of Counsel seeking to gauge the opinion of members of the Victorian Bar as to whether there was any interest in the establishment of an Association for commercial barristers. This circular, which was followed up by a notice placed in *In Brief*, resulted in more than 250 barristers responding positively to the enquiry. Consequently, a Steering Committee comprised of Alan Goldberg Q.C., David Denton, Melanie Sloss, Dr. Susan Kenny, Graeme Clarke and Stewart Anderson was charged with the responsibility of founding the Association. The Steering Committee settled the Statement of Purposes and the Rules of the proposed Association. The Steering Committee recommended that the Association be incorporated pursuant to the provisions of the *Associations Incorporations Act* 1981. Incorporation was recommended as it is envisaged that the Association will be engaged in contractual activities (depending upon funds). The

The President

Association intends to arrange for interstate Judges and leading members of interstate Bars to address the Commercial Bar Association and its respective Sections. The Association is keen to be informed of developments in practice and procedure in respect to the States and Territories of the Commonwealth.

Due to the increasing specialisation of a barrister's practice 14 Sections have been established, each chaired by Senior Counsel familiar with the area. In turn, each Section Chairman has appointed a Secretary to coordinate the activities of that Section. The day to day running of each Section will be left in the hands of the Secretary. Membership of the Commercial Bar Association will allow a member to be informed of the activities of each Section of the Association without a member necessarily being a member of each Section being formerly a member of that Section.

It is a goal of the Executive to move towards arranging a conference in July of 1995 or July 1996, possibly in Bali. Members of the Association will be informed of developments in this respect.

In Goldberg Q.C.'s address he reminded those attending that the development of the law requires, at times, the voice of barristers to be heard. This was no less true than in the area of commercial law which, by its nature, embraces many areas of practice. Goldberg stated that it was not the intention of the Association to take over the activities of the Victorian Bar in matters which affect all Counsel. Rather it is the intention of the Association to be advocates in the interests of commercial barristers and in the law as it affects commercial law matters.

The office bearers of the Association and the Secretaries to the Section Chairmen are as follows:

President	Alan Goldberg Q.C.
Senior Vice-President	Ray Finkelstein Q.C.
Vice-President (Convenor)	David Denton
Treasurer	Melanie Sloss
Chairmen of Sections	
Alternative Dispute Resolution	Henry Jolson Q.C.
Banking & Finance Law	S.E.K. Hulme Q.C.
Commercial List	Ross Robson Q.C.
Constitutional & Administrative Law	Jack Fajgenbaum Q.C.
Construction Law	John Digby Q.C.
Corporations & Securities Law	Neil Young Q.C.
Environmental, Planning & Local Government Law	Greg Garde Q.C.
Insolvency Law	Ian Sutherland Q.C.
Insurance Law	Dr Peter Buchanan Q.C.
Intellectual Property & Trade Practices Law	Ross Macaw Q.C.
International Law	Alan Archibald Q.C.
Practice & Procedure	Simon Wilson Q.C.
Property Law	John Middleton Q.C.
Revenue Law	Ada Moshinsky Q.C.
Committee	Dr. Susan Kenny
Committee	Graeme Clarke
Committee	Stewart Anderson
Secretaries to Section Chairmen	
Alternative Dispute Resolution	Marc Bevan-John
Banking & Finance Law	Ian Martindale
Commercial List	Peter Riordan
Constitutional & Administrative Law	Dr. Susan Kenny
Construction Law	Richard Manly
Corporations & Securities Law	Albert Monichino
Environmental, Planning & Local Government Law	Stephen Jones
Insolvency Law	Nunzio Lucarelli
Insurance Law	Peter Cawthorn
Intellectual Property & Trade Practices Law	Graeme Clarke
International Law	Brendan Griffin
Practice & Procedure	William Lye
Property Law	Nimal Wikrama
Revenue Law	Terry Murphy

Membership fees have been set at $50 for Counsel of 3 years standing or less; all other Counsel $75 per annum. Any further enquiries about the Association may be directed to David Denton (ext. 7020).

David H. Denton

WOMEN BARRISTERS' ASSOCIATION

Launch of Constitution

ON 15 MARCH THIS YEAR THE HONOURABLE MICHAEL BLACK, CHIEF JUSTICE OF THE FEDERAL COURT OF AUSTRALIA LAUNCHED THE CONSTITUTION OF THE WOMEN BARRISTERS' ASSOCIATION. SET OUT BELOW, WITH KIND PERMISSION OF THE CHIEF JUSTICE IS THE SUBSTANCE OF HIS ADDRESS ON THE OCCASION OF LAUNCHING THAT CONSTITUTION.

I WAS VERY PLEASED TO ACCEPT YOUR President's invitation to launch the Constitution of the Women Barristers' Association. Precisely how you launch a constitution I'm not sure, but clearly champagne is involved and the occasion is one for celebration and I see that everyone here tonight is in that mood.

The purposes of the association, set out in its new constitution are ones which I hope will command general and strong support, particularly from members of the bar. They are:

a. To promote awareness, discussion and resolution of issues which particularly affect women;
b. To identify, highlight and eradicate discrimination against women in law and in the legal system;
c. To advance equality for women at the bar and the legal profession generally; and
d. To provide a professional and social network for women barristers.

Judge Balmford proposes toast

These purposes are of great importance to the bar, the courts and the community. I propose to mention only a few of the many reasons why that is so.

I begin with the appointment of judges. I am very pleased that the Federal Court now has five women judges, two of whom are heads of other jurisdictions and three of whom do the full range of trial and appellate work of the court. It must, however, be said immediately that there are over 30 judges with primary commissions on the Federal Court, and over 40 when one includes territory judges and heads of other jurisdictions who also hold Federal Court commissions. So the proportion is still small, but the numbers are growing and we can look forward confidently to the day when there will be many more women judges in Australia, all appointed as they are at present because of their demonstrated and abundant possession of the qualities that the office requires.

Although the bar is no longer the exclusive source from which judicial appointments are made, it is likely to remain as a principal source. It is therefore vitally important to the development of the legal system in this country that women should not be discouraged from following careers at the bar. It is clear that women are welcome to the Victorian Bar as readers — a development I witnessed through the 1980s — but it is necessary to determine whether there are barriers at a later stage in a woman bar-

Chief Justice Michael Black and Judge Rosemary Balmford with Constitution

NSW. There has been valuable cooperation between courts. As well, the AIJA's initiatives in this area have received widespread support. The WBA has a very important part to play too — indeed it is a part that the association has been playing since its inception.

In addressing gender issues as they affect the judiciary communication is obviously a vital matter. Discourse is of the greatest importance and in that regard I would like to take this opportunity to express my appreciation to the WBA for its willingness to engage in that discourse with members of my court here in Melbourne. It has been very valuable and I hope it will continue.

Of course what some of this discourse has revealed is that some of the issues we classify as gender issues are really aspects of much broader "people issues". Let me give just one example, which touches on a whole range of such issues. Take the woman barrister who is a mother and whose case is to be adjourned to January — the month of the year she has the best chance of spending uninterrupted time with her children. Should she ask for the case to be heard earlier or later on that ground? Of course that ground could never be decisive, anymore than another commit-

rister's career and, if there are, to do all that can be done to remove them.

Nor, of course, can the community afford to lose women from the ranks of the specialist advocates who pursue the calling of a barrister and nor should women be denied the satisfaction and rewards that the bar can offer.

Plainly, there is no shortage of work for the WBA to do. It begins its work, however, at a time that ought to offer some encouragement to it.

Although even the most superficial study of gender issues and the law will reveal the dangers of complacency it is safe, I believe, to say that there have been significant changes in the approach to those issues within the law over the past two years. Because of the way in which the issues developed historically much of the initial reaction to them tended to be defensive. That reaction may have been understandable but it was hardly constructive or suggestive of change. I believe that the period of defensive reaction has largely passed and that what has been developing instead is a far deeper appreciation of the issues involved and concern about them.

The Federal Court has done its own work in this area and will continue to do so, but it has also had the benefit of initiatives taken by the Family Court of Australia and in the Supreme Court of

Jan Pannam and Chief Judge Waldron

Justice Keeley with Jenny Davies and son Rohan

ment in court during January would be decisive. But why should it be in order to rely on work as a reason for asking that a case be listed earlier or later but not professionally acceptable to mention the needs of a family? And why, for that matter, should we think it odd if it were a man who made such a request?

In using this simple example what I am saying is that if we are to make real progress in many of these areas in the administration and practice of the law, as indeed in society at large, not only do we need to be better informed and to care about these issues, but we also need to examine some of our priorities. We need to examine our structures, we need to be more flexible and we need to be more imaginative. If we are, then perhaps one day the WBA, having achieved its aims, will pass into history. But until then it has a most important role to play in the development of one of our vital social institutions.

I wish the Association every success and I now have great pleasure in declaring the Constitution of the Women Barristers' Association duly launched.

FOLLOWING THE LAUNCHING OF THE CONSTITUTION HER HONOUR JUDGE ROSEMARY BALMFORD OF THE COUNTY COURT PROPOSED A TOAST TO THE ASSOCIATION. IN JUDGE BALMFORD'S CASE, THE TAPING WAS ONLY PARTIALLY SUCCESSFUL. CONSEQUENTLY *BAR NEWS* HAS RELIED ON JUDGE BALMFORD'S MEMORY.

JUDGE BALMFORD

I WAS VERY HAPPY TO BE ASKED TO propose this toast because of the similarities between the Women Barristers' Association and the old Legal Women's Association, more recently the Women Lawyers' Association, now unfortunately deceased. I speak of the time thirty years ago when I was President, and it was, of course at that time, an organisation almost entirely of solicitors. It is very good to see that there are now enough women barristers in Victoria to enable them to establish this Association.

It was in and because of the Legal Women's Association that I realised how much help women

The Chief Magistrate and Judge Riskalla

lawyers can be to each other. The concept of networks had not been articulated at that stage, but a network was what it was. I made many friends in that association, who have remained my friends, and over the years I have received help and encouragement from them in all kinds of ways.

It has often been my women friends who have drawn my attention to job advertisements, who have recommended me to positions, who have given me moral support when I needed it. I know that the Women Barristers' Association will be a source of that kind of help and encouragement for its members. And if any barrister here is wondering what job advertisements and positions have to do with the career of a barrister, I ask her to consider the careers of the four women judges presently serving in Victoria, or, in ascending order of seniority, of the President of the Industrial Relations Commission, and of the only woman on the High Court. For women, more than for men, the way to preferment seems to have been through a variety of forms of practice.

Having said that, I think it is important that women in the profession should not dwell too much on their need for help. It is easy to say, men in the profession are rude to me because I am a woman, I never get any briefs because I am a woman, women have a terrible time, and there is a glass ceiling which means that women never get anywhere anyway.

I think it is important that women in the profession should not dwell too much on their need for help . . . if you go through life expecting that treatment, that treatment is what you will get.

I know very well that sometimes some of that is true. But if you go through life expecting that treatment, that treatment is what you will get, and that is my message to all women here, barristers or other members of the profession. Stories about rudeness or discrimination are bandied around and

Chairman Habersberger with Genevieve Overall and Sue Blashki, M.

repeated. Much of the published writing on the subject comes from North America, and is repeated, unthinkingly, as though it had been proved to have application here. Of course it happens. But if you stop expecting it you will perceive it less. Expectations can produce false perceptions.

> But do not go through your practising life expecting problems. Just keep walking forwards, and doing what you are there to do.

I grew up in a world where there were very few women in the profession, where we were regarded as peculiar, only because we were a very small minority. There had been a very small minority of women in the profession ever since 1903, when the Flos Greig Enabling Act was passed — that is to say, the *Legal Profession Practice Act* 1903, the long title of which is "An Act to Remove some Anomalies in the Law relating to Women". We knew that we were peculiar because of being a small minority. But we did not think that we were different from men in any relevant way. No-one had told us that we should think so. We did not think that, as women, we had a particular contribution to make to the practice of law. No-one had told us that we should think so. We did not expect to be treated differently from men, and we were not treated differently from men.

From time to time you will come across problems in the way you are treated. It may be because you are a woman; or it may be for some other, quite justified, reason. But do not go through your practising life expecting problems. Just keep walking forwards, and doing what you are there to do. So often, when you walk forward into a situation, what you thought was a problem vanishes entirely.

So I would say, stop worrying about being a woman, keep walking forward and get on with the job.

It is with great pleasure that I propose to you the toast of the Women Barristers' Association.

REFLECTIONS ON SIR JOHN STARKE

Who Considereth the wind and the rain,
shall neither sow nor reap.

Eccles. 11:4

JACK STARKE WAS THREE YEARS OR so my senior. We attended the same school. At the age of eight, I entered the school boxing championships. No suitable weight division was provided for one my size but my entry could not be rejected, because I earned a point for my house by taking part. My opponent was two years older, much taller and a stone heavier. He was under threat from the master refereeing the bout that if he laid a glove on me he would get a caning. He was promised the verdict.

In the result he held me off so that I couldn't reach him while I fanned the air for three rounds. I was the only one trying to fight.

Jack Starke thought I should have won and let everyone know. After that we became friends in a lifetime friendship.

This incident typified Jack's life. He always sought a just result, championed the weak against the strong, and he did not care who might be offended by what he said or did.

At University, he was a rebel. When a senior lecturer, P.D. Phillips, in the course of a lecture made disparaging remarks about the judicial calibre of his father, Sir Hayden Starke, Jack came to the rescue of his father's reputation by "clocking" the lecturer. He narrowly escaped being sent down.

During the war, Jack served with distinction in an artillery regiment attaining the rank of major. One may rest assured that his principal concern was the welfare of the troops under his command. So far as he was concerned, the officers could look after themselves.

I saw nothing of him during the war as I was in a different service.

When we were demobilised, we agreed to set up Chambers jointly in a large room in Selborne Chambers so we could share rent and expenses. The room was divided in half by a movable wooden screen. Although this was a visual barrier, it did not prevent Jack's colourful language being clearly audible when I was holding a conference, sometimes with female clients.

On one occasion when I was phoning a gynaecologist to inquire about the symptoms of gonorrhoea which I needed to know about in some divorce case, Jack called out after I hung up, "What's the matter with you — ain't you ever had the fuckin' fish hooks?"

Starke was a fine classic student in Latin and Greek. He was also an excellent lawyer. His affectation of dropping g's and h's disguised the fact that he could argue law with the best of them. He was painstaking and thorough in research and preparation of his cases. Strangely he seemed ashamed of his erudition and preferred to play the larrikin.

We shared Chambers for about two years until we could each afford to go our separate ways. It was a happy association when we were often opposed to each other, and tended to be briefed by mostly the same group of ex-servicemen solicitors.

Starke quickly became the acknowledged leader of the Common Law Bar excelling in jury trials.

He hated pomposity, and delighted in deflating puffed-up egos. During the inquiry into the establishment of off-course TABs, Jack vigorously attacked Sir Chester Manifold, who as Chairman of the Victoria Racing Club opposed any betting medium which would reduce attendances at race meetings. In his final address, Starke referred to him as "this titled humbug".

For all his veneer of toughness, in reality he was "as soft as butter". He had great compassion for the underdogs and the battlers. He took up the cudgels for the convicted murderer, Stuart, in the famous Royal Commission into his conviction and sentence of death. Stuart was an illiterate Aboriginal and Starke was convinced that he had never had a fair trial. He did not keep secret his

contempt for the South Australian judicial system which led to this injustice.

The Bar guaranteed the Public Solicitor that a silk would always be available to represent a person on a capital charge. A roster was drawn up to ensure this. It was Starke's turn when Peter Tait was charged with the rape-murder of the 84-year-old mother of a vicar. It was one of the most shocking crimes to come before the court, and there was no public sympathy for the accused. Despite the unpopularity of his cause, Starke threw himself wholeheartedly into the hopeless defence. Although there was no room for doubt that Tait committed the crime, Starke was a very relieved man when due to an amendment to the Statute defining insanity, Tait avoided execution. Starke was strongly opposed to capital punishment.

It is remarkable when a newly appointed judge is ferried across the Stygian waters of William Street, how often he or she receives divine revelation on stepping ashore. The knowledge that the last pleader has left Owen Dixon Chambers is accompanied by the certainty that there is no wisdom left on the west bank. The role is then assumed to write voluminous judgments designed to keep University dons forever employed interpreting the oracle.

Starke on the bench never followed the pattern. His judgments were comparatively rarely reported because he saw his role as deciding the case before him. Facts decide cases and law should not be allowed to prevent a just decision. Litigants only understand the last line declaring the winner and what the tote pays. All that precedes is of passing interest to lawyers who will try their utmost to distinguish the decision based on its peculiar facts if at any time it suits them to do so.

In the result Starke was an excellent judge. Most counsel and litigants were at ease before him, and all taking part appreciated that they were receiving a fair hearing from a caring, compassionate judge. Common sense and good humour were permanently resident in his Court.

I last appeared before him in the case of the last man to hang. Nobody had a fairer trial. Starke regretted having to tell Cabinet that he believed Ryan was guilty because he was opposed to hanging. It was not in his nature to lie or misrepresent his view whatever the consequences.

Although Starke was convinced of Ryan's guilt, to my dying day I shall remain equally convinced of his innocence. We agreed to differ, and over many a jug at various racecourses afterwards, we never discussed the matter but concentrated on the quest for an elusive winner.

Vale, Jack. We will never see your like again — and we are much the poorer for it.

Philip Opas Q.C.

SENATE'S CONSULTATION — A "TOKEN EFFORT"

THE PRESIDENT OF THE LAW COUNCIL OF Australia, Mr. Stuart Fowler, has branded the Senate's Committee procedures a "token" effort at community consultation in some cases, in light of the extremely short periods of time allowed for public inquiries.

In a letter to the President of the Senate, Mr. Fowler cited recent cases in which the Law Council had been asked to prepare and present submissions to the Senate Legislative Committee on Legal and Constitutional Affairs, with only two and a half days' notice.

"Clearly such short time frames make it extremely difficult for the Law Council, or indeed any community-based organisation, to present well-reasoned and constructive viewpoints on behalf of the legal profession and the community," he said.

"Like many representative bodies, we are a diverse organisation, and consequently strive to present a position which genuinely reflects the views of our membership and the public interest.

"As we rely extensively on the contributions of busy private practitioners, such short periods of time make it near impossible to provide worthwhile comment.

"There is no doubt that a longer period of time to consider legislation, would result in a higher quality of submissions and a broader range of viewpoints.

"This in turn, would ensure the Senate Committees' work provides the genuine democratic channel which it is intended to offer.

"The Senate Committees are a vital link between the community and the Parliament. The work of the committees is highly valued by the Law Council, the community and by Senators, and when properly utilised, allows for more informed and democratic decision-making.

"It is important for all members of the community that the Committee system has the time to gather a wide and representative range of perspectives and opinions.

"The Law Council respects the Senate's desire to deal with legislation as quickly as possible. However the current procedures are clearly undermining the consultation process, and reducing its value to the Senate and the community," Mr. Fowler said.

Melissa Dent

FAREWELL

HIS HONOUR JUDGE CAIRNS WILLIAM VILLENEUVE-SMITH

HIS HONOUR JUDGE CAIRNS WILLIAM Villeneuve-Smith retired on 15 February 1995. He had an honourable and distinguished career as barrister and judge. His Honour was born in Adelaide in 1923. To use a parlance with which His Honour is familiar his breeding for the law was impeccable. His late father Frank Villeneuve-Smith K.C. is a legendary figure renowned for his advocacy, wit and erudition. His son emulated him.

His Honour was educated at St. Peter's school and then served in the A.I.F. from 1942 to 1945. By all accounts, not excluding those of His Honour, his army career was not such as to excite the military historian. Charitably stated, the relationship appears to have been uneasy. However, His Honour's close observation of (and some involuntary involvement with) the army's disciplinary processes, in particular those of the military police, was valuable experience for one who in later legal life was astute to detect and prevent injustice.

Following a mutually agreeable discharge His Honour studied law at Adelaide University, and following graduation practised as an amalgam in Adelaide. Predominantly His Honour specialised in advocacy and his reputation grew rapidly.

Then came the Stuart Royal Commission. This was a watershed in the life of His Honour and his wife Pamela. The saga of Rupert Max Stuart is a true *cause célèbre*. Stuart, an Aboriginal, was convicted in April 1959 of the murder of a young girl, Mary Hattam, at Ceduna on 20 December 1958. Unsuccessful applications for leave to appeal to the High Court and the Privy Council followed. The High Court commenced its judgment. "Certain features of this case have caused us some anxiety" and concluded "as we have said this case has caused us a good deal of anxiety". (101 CLR 1 at 1 and 10.)

The Government then set up a Royal Commission to investigate new evidence. It comprised three judges of the Supreme Court, Napier C.J., Reed and Ross JJ. The Chief Justice, not unfamiliar with the matter, had presided over Stuart's appeal to the Court of Criminal Appeal. A fortiori Reed J., who had been the trial judge.

His Honour appeared as junior to J.W. Shand Q.C. Some time into the hearing Shand protesting palpable injustice at being denied the opportunity to ask a particular question, walked out. Villeneuve-Smith followed his leader. Shand's successor was the late and legendary John Starke Q.C. Villeneuve-Smith remained as junior. Having obtained leave to appear Starke (with his junior's strong encouragement) "got things going" by asking as his first question the very question that Shand had been denied from asking. It was answered.

Encouraged by Starke, Villeneuve-Smith made the difficult and momentous decision to leave his native state, where his family had been for generations, and signed the Bar roll in Victoria.

The consequence of the Commission was that His Honour, J.D. O'Sullivan, and Helen Devany were effectively ostracised by the "Adelaide establishment". Encouraged by Starke, Villeneuve-Smith made the difficult and momentous decision to leave his native state, where his family had been for generations, and signed the Bar roll in Victoria. Happily any misgivings about his decision were soon proved groundless.

Initially His Honour's practice was primarily in the criminal courts where he rapidly achieved a reputation for fearless and outstanding advocacy.

Resourceful, with a magnificent command of language, a penetrating cross-examiner, backed by erudition in law and literature His Honour's practice rapidly expanded, particularly to civil juries, which became and remained the predominant part of his practice.

His Honour had a large circuit practice principally at Warrnambool, Ballarat and Geelong. By day he was a formidable and dangerous opponent, by night a dangerous and distractive companion, the latter reflecting an absolute lack of objection to good food, good wine and good company.

By day he was a formidable and dangerous opponent, by night a dangerous and distractive companion.

McLeod v. *Lind* is an epic poem written by His Honour, around a civil jury trial at Ballarat. "Cairns William Villeneuve-Smith", the conspicuous and only hero is contrasted with four other counsel whose traits and idiosyncrasies are searchingly "done over". The poem inspired by a "nil" offer from the solicitor for the defendant who later "copped the lot" is a classic, brilliantly capturing the camaraderie and ethos of the circuit Bar.

His Honour appeared in a number of boards of enquiries and royal commissions. These included the Abortion Enquiry conducted by William Kaye Q.C. (as he then was). His Honour's clients had problems from which they were much relieved by great advocacy based upon "confess and avoid". In 1975 His Honour was appointed counsel assisting the Board of Enquiry into the Victorian Police Force conducted by Mr. B. Beach Q.C. (as he then was). At his farewell the Attorney-General said of his role in the Beach enquiry that His Honour,

> Exhibited all the attributes of steely independence and resolute fulfilment of the requirements of your brief which are the hallmarks of a truly great advocate.

His Honour took silk in 1975 and his career as a leader flourished, culminating in his appointment in 1983. His Honour, unsurprisingly, adorned the Bench.

His sense of justice and fair play, his legal erudition and common sense made it a rewarding experience for all who appeared before him. His Honour has been a long-time member of the Racing Tribunal and will remain in that post. It is entirely appropriate that he should.

To say that His Honour's principal recreation is the turf is an understatement. His fealty to racing easily subjugates a somewhat fair weather support (at least in latter years) of Carlton. The hero in *McLeod* v. *Lind* "was a figure spare with quite ascetic air". This is not evident when along the rails there is a relevant movement in the market. Aqualinity pervades as His Honour swoops to get the point above. In days gone by His Honour with the late Judge Martin raced a notable chaser Premium. Earlier still His Honour owned another quadruped "Will too Mick" a well-remembered but undistinguished South Australian greyhound. His Honour's retirement should deservedly ensure his continued concentration on and love of the turf.

His Honour was farewelled at a "not even standing room" occasion on 15 February. Speeches were delivered by the Attorney-General, the Chairman of the Bar Council and the President of the Law Institute. His Honour's reply was a vintage example of his felicity in the English language. His Honour's tribute to his wife was,

> In 1960 . . . my wife and I came as strangers to this city, launched upon a venture the outcome of which neither of us could predict. My wife sacrificed her own career in order to successfully promote and maintain mine in that enterprise; but she did far more than the mundane but essential drudgery of secretary/driver to a barrister. When I stumbled she steadied me. When I faltered she stood firm beside me. When I doubted she rallied me. I look back through the arches of the years and I am staggered at the immensity of my indebtedness to her, and on this gathering, and on this day, I acknowledge all of these things. I thank her and I salute her.

His Honour dealt pithily with current problems.

> If the recent troublous times by which the profession and especially the Bar have been much buffeted are now gradually and mercifully receding, yet there remains peril enough for the Bar to confront and overcome; not the least the existence of a noisy and hostile minority, constituted in the main by an unappetising melange of academics, social engineers, bureaucrats, media illiterati and, it must be said Madam Attorney, sadly, some politicians, state and federal.
>
> These are inspired through concealed and diverse motives with incorrigible hostility towards the Bar. It may be safely predicated that scarcely one of them has ever pulled on a gown and taken up the lonely responsibility of standing between an accused person and ruin, or of such safeguarding the rights of citizens in many difficult circumstances. But they seek, and they often attain the ear of power and influence, and they can do great harm unless their malignity is contained. They do not sleep, nor should the Bar in its defence.

The Victorian Bar with gratitude, affection and best wishes, salutes and farewells His Honour.

OBITUARY

HASLEWOOD BALL

WHEN HASLEWOOD BALL DIED ON 7 February he was the oldest and longest practising member of the Victorian Bar, his number on the Roll being 403. In fact "Hasie" (as he was always known) had been at work earlier that day to complete a Memorandum of Advice, a matter he considered more important than the operation scheduled for him that evening and which he failed to survive.

Hasie was born on 12 August 1913 in Perth, the youngest and fourth child of Albert Ball, a bank manager. The family moved to Queensland, but his mother died when Hasie was a small boy, and he was brought up by an aunt. His secondary education was completed at the South Brisbane High School after which he gained an Arts degree at Queensland University. Hasie was also a competent soccer player, and a skilled amateur boxer, so good that promoters wanted him to turn "pro", offers which he wisely refused.

Hasie then worked in Brisbane in the Public Service where he first met his future wife Gladys Cooling. In his spare time he served in the militia gaining his commission, but above all he painted. He had reached a firm decision that he would be an artist, and decided he would go to the Sorbonne to study art in September of 1939. All that, however, was interrupted by the 1939–45 War. Hasie soon transferred to the Sixth Division of the A.I.F. as a lieutenant. On 8 July 1940 the day before his embarkation, he made another very important decision. He took Gladys to lunch, asked her to marry him, and they were married that evening.

By August 1940 he had reached England where he joined the 2nd/1st Anti Tank Regiment as a reinforcement. Reinforcements are always looked at somewhat critically by older members of any military unit. His fellow officers remember Hasie as a man of unfailing courtesy, but one who also conveyed the impression of real strength and determination. Hasie was soon chosen to be a reconnaissance officer. From England his regiment went to Cairo, serving in the Middle East and then to Vevi in Greece near the Yugoslav border.

Haslewood Ball

The Greek campaign in April 1941, where relatively small British, Greek and Australian forces were confronted by some twenty German divisions is now a matter of history. In the rear guard action from Vevi the 2nd/1st are recorded to have given "a magnificent account" of themselves. Stuart Foote, his immediate superior officer, says of Hasie, "No one was more courageous. He was impenetrable, extremely brave under fire and showed no sign of fear whatever". It is hardly surprising that years later, when he was under fire in

the Law Courts (as we all are from time to time), Hasie was equally fearless.

In the Greek campaign, whenever on equal terms, the Australians demonstrated they could beat or at least match the German Army, and thereafter, despite the defeat, had shown the Germans were not invincible.

Those of Hasie's regiment who survived, escaped to Crete, fought in Syria, and then returned to the Middle East. By that time Sir Edmund Herring had become G.O.C. commanding the Sixth Division in that area, and demanded he be given the best lieutenant as his Aide-de-Camp. Hasie Ball was the immediate choice. When Sir Edmund was brought back to Australia, Hasie returned to his regiment as a captain, but when Hasie himself returned to Australia in 1942, Sir Edmund was appointed to take command in New Guinea, and again asked that Hasie should be his aide.

As a general Sir Edmund never sought to avoid the dangers of the front line, and with him Hasie served in the victories of the New Guinea campaign — the battles of Kokoda, the beach heads of Buna, Sananda and Gona, and the battles for Lae and Salamau. More than 6,000 died in those battles. Despite his strong constitution, the debilitating climate of New Guinea and its diseases took its toll on Hasie, and in September 1943 deeply infected with malaria, he was brought back to Australia on sick leave.

With the battle for New Guinea drawing to a successful close Sir Edmund Herring accepted the post of Chief Justice of Victoria, and when Hasie was discharged on medical grounds, Herring secured him as his Associate, a post Hasie took up early in 1944. Hasie then worked as an Associate by day, studying law by night and graduating in 1947. As his friend and mentor Sir Edmund also played a significant part in Hasie's life. Herring was part of that old Anglican tradition of service to God, the State and one's fellow men and there can be little doubt that it was Sir Edmund's example which led to Hasie's adoption of the Anglican faith, a faith he firmly retained for the rest of his life.

Hasie was admitted to practise in May 1948, and signed the Bar Roll on 16 July of that year, reading with the late Llewellyn Jones. Within only a few years Hasie came to be regarded as an eminent junior, with a wide Supreme Court practice, and a particular interest in the personal injury field. He was the complete professional with a total dedication and devotion to his client's cause. Hasie accepted his client's instructions without hesitation; he always treated his client with complete courtesy and respect and never forgot that to the client the case was always a matter of the greatest importance. After Reg Smithers became a silk in 1951, Hasie often appeared as his junior and together they proved a most formidable combination.

Hasie worked hard and fought his cases hard. In his first months at the Bar he had to be gently reminded by a Magistrate that "the War was over". It was little wonder he soon acquired a fine reputation and a big following amongst solicitors, many of whom continued to brief him in his last years at the Bar. Hasie saw his task as a barrister to be somewhat like that of the artist. He later told his readers that just as an artist depicts what he sees, the barrister needs to convey a picture of his case to the Court. As one of our judges (now retired) has said of Hasie, "He was a measured efficient operator. When others became excited he simply proceeded on in the even tenor of his ways, and he had a most magnificent ability to remain unflappable at all times".

We all knew Hasie as a fine orator and when by skilled cross examination he scored an important point, there was an affable smile, and often that little chuckle which spelt disaster for the opposing side. In his later years, when his hearing was no longer perfect, Hasie would sometimes indicate he had not heard a particularly good answer, so that it had to be repeated before the jury. Curiously this never happened with the damaging answer. He had a number of readers all of whom have achieved distinction. His pupils were Mr. Justice Nathan, the late Mr. Justice Treyvaud, Rupert Balfe Q.C., David Blackburn, Stuart Stribling and Richard Lawson. To them all he was a generous master, ever ready with his assistance and good counsel.

In his private life Hasie was for more than 50 years an adoring and completely devoted husband to Gladys, and a loving father to his three children Kent, Anthea and Damien. His continuous success at the Bar enabled him to provide very well for them all in a succession of family homes at Camberwell, the magnificent "Cloyne" in Toorak Road and the final family home "Chayle", all of which were veritable castles. There were also houses at Lorne and later a log cabin, and the house at Burleigh Heads, Queensland where winter holidays were spent.

Throughout his life Hasie continued to paint and with considerable talent. To many of his friends he gave his paintings, which became treasured gifts. Some of his works hang in the office of his clerk John Dever. Hasie was also a generous person, and gave financial help to many friends in need. His generosity, which included paintings to be sold at the fetes of the Lorne Anglican Church, made possible the beautiful stain glass window there.

In his last years at the Bar Hasie remained a formidable opponent. By that time he was, in truth, an institution. The Bar conveys its deep sympathy to his wife Gladys and his family. Hasie Ball will long be remembered as a man of great courage, of complete integrity and, in every sense, the true professional.

Charles Francis

WOMEN AND DEBT

This article is an edited transcript of a paper presented to a meeting of the Women Barristers Association, based on a research paper 'Gender Issues in Insolvency Law', Adelaide Law Review Research Paper No. 6.

THE RELATIONSHIP BETWEEN FEMINIST theory and insolvency law may not seem readily apparent. However, several issues which demonstrate the connection are of considerable significance to practitioners. They are:

1. The position of women guarantors.
2. The position of inactive women company directors.
3. The related but less prominent question of the liability of women's proprietary interests to claims by the mortgagee of a spouse or male associate on insolvency.

Commercial law has been the Cinderella of feminist jurisprudence. Gender based analyses of law have tended to concentrate on areas where women constitute a clearly identifiable subject group, in the context of problems which seem more urgent, such as domestic violence, pornography and sexual assault.

However, during the past decade (a period of widespread personal and corporate insolvency), problems associated with the liability of guarantors and inactive company directors have become prominent. The special, though not exclusive, impact of those problems on women has gained a considerable degree of public recognition under newly coined terms such as "sexually transmitted debt".

Although each of the issues important in this context is distinct, all three often co-exist. It is not uncommon to find, in a small family company, a woman who:

(i) is a co-director with her husband or other male associate;
(ii) has also given a personal guarantee of the company's liabilities;
(iii) has an equitable or other proprietary interest in a property (perhaps a matrimonial home)

which has been mortgaged to a creditor of the business.

The woman may have played no role in the business conducted by the company for a variety of reasons. She may not have been aware of the obligations imposed on her, or she may have been actively excluded from participation and information. She may have no ownership of the enterprise, and no guarantee or prospects of a share in its possible prosperity.

Although excluded from participation, control and ownership of the business, if insolvency intervenes, such a woman is potentially liable on a number of bases:

1. Liability as a company director under the insolvent trading provisions of the *Corporations Law* — s.592 for debts incurred prior to 23 June 1993 and the co-existent revised regime of s.588G, applicable to debts incurred after that date.
2. Liability for breach of general duty of a director under s.232 of the *Corporations Law* — perhaps for want of care and diligence in relation to negligent acts or omissions, or perhaps for breach of fiduciary duty if she has participated in voting for improper or extraneous purposes, or transactions involving conflicts, and the like.
3. Her proprietary interest in a matrimonial home (or other real estate) might be lost in competition with a secured lender who enforces the mortgage.
4. Personal liability under the guarantee.

Although only the guarantor is technically a surety, all the above categories in substance share the identifying hallmark of suretyship — the woman is potentially answerable for the debts, defaults and obligations of another.

Several questions arise in this context:

1. Why should the liability of guarantors and inactive company directors be seen as a problem?
2. And if it is, on what basis does it qualify as a "gender" problem, given that the same issues affect male claimants?

WHY IS IT A PROBLEM?

The law should strive to provide adequate protection for all vulnerable persons and groups. In particular, it should respond to the dilemma of people who receive conflicting messages, as women do in this context — on the one hand, they are subject to traditional stereotypes which commend passivity, reliance on males and retreat from active involvement with business. However, when they come into competition with the male associate's creditors, they may be harshly sanctioned for that very conformity. Moreover, the law should not tolerate, much less foster, traps for the unwary. The ability to assume directorships without adequate warning of the obligations and liabilities entailed may constitute such a trap.

WHY IS IT A GENDER BASED PROBLEM?

Although since *Salomon* v. *Salomon & Co Ltd* the necessarily associational nature of a company has been a fiction, a company currently requires at least two directors. In an essentially "one person" incorporated business, it may be necessary to co-opt a passive person to serve as the second director. In some cases, that person may be a vulnerable male associate who assumed the office of director with its attendant potential liabilities, in order to satisfy legislative requirements. Nevertheless, the vast majority of cases involves an inactive woman director or guarantor, while the conductor of the business is a man.

All women to varying degrees experience the impact of stereotypes which idealise those qualities of passivity, reliance on male associates in public matters and confinement to the domestic sphere.

The sheer weight of relative numbers therefore raises a gender question. Moreover, the numerical incidence itself seems directly related to, and demonstrative of, principal factors feminist theory has identified with the subordinate position of women, that is, their confinement to the so-called "private sphere" of household and family, their concomitant relative exclusion from public life, commercial activity, significant networks and experience, and their consequent dependence on male associates to mediate for them in commercial matters. Feminist theorists have also stressed, in this context, the role of emotional dependence, and at the other extreme, physical coercion or the fear of it. All women to varying degrees experience the impact of stereotypes which idealise those qualities of passivity, reliance on male associates in public matters and confinement to the domestic sphere.

3. If it is a gender problem, what are most effective legal responses?

In particular, is this an area where gender neutral law (the ideal of classical liberal feminists) is appropriate? Alternatively, is it an area where a degree of separate treatment, a preservation and even an extension of equity's traditional "special tenderness", for women is justified? Special treatment might be the characteristic approach urged by radical feminists, who have stressed that women's subordination has survived the achievement of ostensibly gender neutral law. Radical feminists, most notably Catherine MacKinnon, argue:

> first, that so long as women as a group remain substantively subordinate, the application of identical treatment will not produce a fair result — "the equal treatment of unequals is not equity".

and:

> secondly, they have stressed that the supposed gender neutrality of modern Western law is often merely illusory — and that in fact, ostensibly gender neutral law often imposes a male standard of conduct largely based on characteristic male experiences and judged from a largely male perspective. That has been asserted in relation to criminal law, and the potential is also present in the context of insolvency law.

The defences of the *Corporations Law* insolvent trading provisions illustrate that potential. The *Corporations Law* s.592(2)(b) provides a defence if the director (or other defendant) did not have reasonable cause to expect that the company could not pay its debts. In *3M Australia Ltd* v. *Kemish* (1986) 4 ACLC 185 Foster J. suggested illness, or the fact that a particular managerial post did not bring the defendant into contact with the relevant information might constitute reasonable cause not to expect insolvency. The subsequent case of *Metal Manufacturers Ltd* v. *Lewis* (1980) 4 ACLC 739 (at first instance) (1988) 13 NSWLR 315 (Court of Appeal) involved an inactive woman company director whose husband had told her that she was a director of the family company "only for signing purposes". She was actively excluded from information and control, and her attempts at participation were rebuffed. The woman, for a considerable period, was not aware that she was a director and had no notion of the duties entailed (as in *Statewide Tobacco Services Ltd* v. *Morley* (1990) 8 ACLC 827). It is possible that in such situations any persistent attempt to participate — or even to resign — might entail some personal risk. However, in *Metal Manufacturers Ltd* v. *Lewis* it was not considered that, due to her situation, the defendant had no reasonable cause to expect insolvency. She was therefore unable to rely on the defence in s.592(2)(b) although a liberal interpretation of the alternative defence in s.592(2)(a) — (non-authorisation of the incoming of the debt) allowed her to escape liability. This latitude subsequently evaporated when the Courts, led by Victoria, in cases such as *Statewide Tobacco Services Ltd* v. *Morley* (supra) and *Commonwealth Bank of Australia Ltd* v. *Fredrich* (1991) 4 ACLC 946 adopted a tougher approach to inactive directors.

It may be that in these legislative contexts, the reasonable director informing such provisions is in fact a reasonable male director — and that the provisions are interpreted with characteristically male life situations in mind.

The new insolvent trading regime now provides a defence (*Corporations Law* s.588H(4)) to a director who, at the time the debt was incurred, because of illness or "some other good reason" did not take part in the management of the company.

While illness and absence abroad may constitute a good reason, it may be questioned whether this provision be interpreted to cover the situation of a woman who has been prevented from participating in management by a domineering spouse or associate.

Similarly, the general directors' duty provision in the *Corporations Law* s.232 was amended in December 1992, and now defines the necessary degree of care and diligence by reference to a reasonable person in a like position in the corporation.

If a "reasonable person" or "reasonable director" in fact imposes a male standard, and judicial construction fails to take account of the characteristic life situations of women, this will bear out Catherine McKinnon's caveat that gender neutrality cannot benefit women (and indeed cannot really be achieved), while "man remains the measure of all things".

Ironically, in times of insolvency, when a tougher legislative and judicial approach to company directors generally is adopted, it may have a particularly severe impact on those women who most conform to the stereotypical ideals of passive femininity, deference to spouses and non-involvement in business. This may partly be because, although in more prosperous times, courts react sympathetically on an ad hoc basis to such women (as in *Metal Manufacturers Ltd* v. *Lewis*) that sympathy seems a luxury in times of insolvency, when creditors justifiably seek adequate remedies against delinquent and inactive directors. Where standards are raised, and defendants are held to them more stringently, if they are in fact male standards the impact on women who have simply behaved in a way that society encourages and endorses in other contexts, is severe.

DRAWBACKS OF SPECIAL BENEFIT DOCTRINES

On the other hand, while gender neutrality in this context may be either illusory or unfair, special treatment also entails serious drawbacks.

Most significantly, if the law provides excessive protection to women in this area, it will effectively, if not formally, erode significant aspects of their relatively recently won legal capacity. Creditors will not, in practice, be willing to enter transactions with women if the law ensures their universal and ready escape from liability. Moreover, it is important to avoid crude dichotomies between creditors and women. Many women are creditors themselves, or otherwise dependent on recovery by a creditor.

A further downside of the special benefit or special treatment approach is that it does constitute a "labelling" which may be said to perpetuate the notion of women as vulnerable or as victims.

Creditors will not, in practice, be willing to enter transactions with women if the law ensures their universal and ready escape from liability.

WOMEN GUARANTORS

The competing advantages of "special benefit" as distinct from gender-neutral approaches have been expressly considered in relation to women guarantors.

This is an area where total gender neutrality does not yet apply in Australia — an element of "special tenderness" is preserved, originally predicated, Dixon J. explained in *Yerkey* v. *Jones* (1939) 63 CLR 649 on the married woman's limited legal capacity prior to the *Married Women Property Acts* and other ameliorating legislation. Prior to those Acts (1870 and 1882) a married woman's property vested in her husband on marriage at common law. (Personal property vested in the husband absolutely. Leaseholds and real estate vested in him for the duration of the marriage.) The husband's creditors (business or otherwise) gained access to a wife's independent property by virtue of marriage itself — there was no need for, or capacity to guarantee a husband's debts at common law. However, equity permitted married women a separate equitable estate, which principally benefited women of the wealthier classes. Unlike Roman law, which simply prohibited women from entering guarantees, equity permitted married women to bind their separately owned property to benefit their husbands. However, it imposed protective presumptions "of an invalidating tendency".

YERKEY v. *JONES*

Dixon J. in *Yerkey* v. *Jones* acknowledged the uncertainty of the law, but recognised a unique ground of vitiation for married women guarantors. In addition to the generally available grounds:

that is:

1. misrepresentation, undue influence or special disadvantage of which a creditor has notice; and
2. the "quasi agency" situation.

Yerkey v. *Jones* indicated that in the case of married women, there is a unique prima facie right to set aside a guarantee of her husband's liabilities on the basis that she did not understand the transaction. The onus would then be on the creditor to ensure that she did understand, or at least to provide a reasonable explanation which she apparently understood.

In *Yerkey* v. *Jones* itself, ironically the creditor had fulfilled its obligations — the wife did not succeed. The presumption may be rebutted, and the rule does not impose an undue burden on creditors.

BARCLAYS BANK v. *O'BRIEN*

Yerkey v. *Jones* represents a surviving vestige of special benefit in Australian law. It has recently been rejected by the House of Lords, which took an opportunity to clarify and reformulate an admittedly uncertain area of law.

In *Barclays Bank* v. *O'Brien* [1994] 1 AC 180 the House of Lords stated that the special rule had no justification, and indeed, no real authority other than *Yerkey* v. *Jones* itself. Further, it limited the availability of the matrimonial home as security in credit transactions.

The House of Lords proceeded to place the law relating to guarantees on a gender neutral footing. It held that in the case of all cohabitants, a creditor would be fixed with constructive notice of a vitiating factor, such as misrepresentation or undue influence, unless it had taken reasonable steps such as warning the surety of the liability and recommending independent legal advice.

In the course of extending protection to all cohabitants (based on constructive notice on the basis of cohabitation) the House of Lords withdrew the unique ground of vitiation previously available to married women guarantors. It established that henceforth, a legal wrong of some kind would be required.

Yerkey v. *Jones* is generally accepted as binding authority in Australia, but its status, scope and justification are increasingly questioned. The

recent rejection of the principle in *Yerkey* v. *Jones* by the New South Wales Court of Appeal in *Atkins* v. *National Australia Bank* (discussed below) has created uncertainty.

Further, the extent to which the rule in *Yerkey* v. *Jones* is now applicable in a corporate context, given the new stance on company directors is unclear. Cases such as *Morley* and *Commonwealth Bank of Australia Ltd.* v. *Fredrich* have now established that directors must possess certain financial competencies, and must be active in the discharge of their obligations.

It has been held that the principle in *Yerkey* v. *Jones* is nevertheless applicable in a corporate context, prima facie, but will be excluded if the woman has a substantial interest (variously defined) in the enterprise. In Victoria, Hansen J. in *ANZ Bank* v. *Dunosa Pty Ltd* v. *O.D. Vissaritis* (Supreme Court of Victoria unreported judgment 22 June 1994) recently stated that he regarded the principle in *Yerkey* v. *Jones* as binding, and applicable in the corporate context. However, he considered that the wife in that case received a benefit from the business conducted by the company which was "considerably greater than [housekeeping money] as the business provided for the family's living including housekeeping money given to her, and payments on her mortgage" [at p.61]. His Honour therefore considered that her interest was "sufficient to oust the application of *Yerkey*".

In contrast, the New South Wales Court of Appeal in *Akins* v. *National Australia Bank* (1994) 34 NSWLR 155 considered the *Yerkey* principle in the light of the criticisms expressed in *Barclays Bank PLC* v. *O'Brien* and considered that Dixon J. alone expressed the special principle. Clarke J.A. (with whom Sheller J.A. agreed) considered that the special rule in *Yerkey* v. *Jones* should no longer be applied. In his view, the principles of unconscionability expressed in *Commonwealth Bank of Australia Ltd* v. *Amadio* (1983) 151 CLR 447 provided an adequate basis for equitable relief. Following *Akins*, in *Teachers Health, Investment Pty. Ltd.* v. *Wynne* (New South Wales, Supreme Court, unreported 18 August 1994) Hunter J. took the view that there was conflicting authority from the Court of Appeal and he wasw therefore bound by *Yerkey* until the High Court overruled it.

Some judges have also voiced concern that the special principle of *Yerkey* v. *Jones* is incompatible with the dignity and equality women have achieved. Rogers J. in *European Asian* v. *Kurland* (1985) 8 NSWLR 192 and Kirby J. in *Warburton* v. *Whitely* (1989) NSW Conv R 55–453 have adopted this approach.

Finally, from a feminist viewpoint, the principle of *Yerkey* v. *Jones* is of limited application, being restricted to married women.

Nevertheless, those who see special protective doctrines as no longer necessary may mistake aspiration for reality. On the assumption that women as a group remain subordinated, it may be premature to jettison the principle in *Yerkey* v. *Jones*. Pragmatically speaking, although limited, it is another option which may assist a significant group of women, and it does not impose an undue burden on creditors.

Whatever approaches are adopted, the problems that surface in this area are not capable of legal resolution. Feminists have long since abandoned their early faith in the law's power to effect radical social change.

Perhaps at best, the law can ameliorate, refrain from making things worse and provide leads. In relation to directorships, better warnings of the liabilities should be provided to intending office holders. The law should abandon the fiction that corporations necessarily involve associational activity. (The Corporate Law Simplification Bill 1994, if enacted, will introduce a one person company. This may remove the incentive to co-opt women as directors for so-called "signing" purposes.) Legislative provisions should be cast and interpreted with the life experiences of women equally in mind.

OPENING OF THE NEW ADMINISTRATIVE APPEALS TRIBUNAL

22 November 1994

His Honour Judge Fagan: Madam Attorney?
The Honourable Attorney General: Your Honour, I am very pleased to be here with my learned friends, The Chief Judge, Mr. Michael Wright and Mr. Rod Smith at the opening of these new premises at 55 King Street.

In accordance with the Government's ongoing programme to provide the state courts and tribunals with appropriate accommodation and client facilities these premises were secured to accommodate the Administrative Appeals Tribunal and a number of other quasi-judicial tribunals and boards. These include the Land Valuation Board of Review, the Residential Tenancies Tribunal, Small Claims Tribunal, the Credit Tribunal and Appeal Costs Board. The Equal Opportunity Board, Your Honour, will also be accommodated in this building in the New Year when designs and plans are settled and the necessary refurbishment takes place.

The provision of this new accommodation fulfils two objectives of the Government: to replace existing unsatisfactory accommodation with accommodation designed to meet the needs of members of the Tribunal and people appearing in cases before the Tribunal and to ensure that boards and tribunals operate in a cost effective and as efficient a manner as possible.

It has been apparent for some considerable time that the Administrative Appeals Tribunal had outgrown its previous accommodation and the Tribunal would experience severe overcrowding for its members and its administrative support staff. There were insufficient hearing rooms to meet the needs of the Tribunal and its clients. The Government was very well aware of these problems and is pleased that we were able to make this new accommodation available.

Other boards and tribunals which are to be located in this building had other needs and other problems which made it highly desirable for them to co-locate with the Administrative Appeals Tribunal.

These new premises have been refurbished at a cost of approximately $750,000 to provide an environment where Tribunal members and their support personnel can provide timely access to the users of tribunals at any one of 21 hearing rooms and associated accommodation. We ensured that the plans were drawn up with reference to the courts design guide of the Department of Justice with regard to accessibility to clientele; security; facilities for members and facilities for staff; facilities for people using this Tribunal, including people with disabilities; and always keeping in mind the specific needs of each board and tribunal.

We have a number of private interview rooms, witness rooms for the use of clients, we have provided something that I have ensured we have provided in all our new court buildings and that is a baby care room, a client enquiry counter, and Victoria Police security station.

We have in this building provided some quite impressive amenities. We have a number of private interview rooms, witness rooms for the use of clients, we have provided something that I have ensured we have provided in all our new court buildings and that is a baby care room, a client enquiry counter, and Victoria Police security station. We have also provided comprehensive library facilities for the use of members of boards and tribunals and I understand that they will also be available by arrangement with tribunal users.

The administrative support staff who are located on the 7th floor will provide a wide range of services to the boards and tribunals and the people who use them. This single administrative unit replaces separate registry offices which previously served each board and tribunal.

The building will allow for the employment of a fully integrated computer system which will run an efficient case scheduling and case diary system with the ability to deliver relevant management information and statistical reports. That system will also be used by the Guardianship and Administration Board at Carlton.

Your Honour, as most people here today will be aware, I have convened a working party to review the operation of the boards and tribunals which fall within my responsibility in my portfolios as Attorney-General and Minister for Fair Trading. The working party is composed of a range of experienced administrative lawyers and will make recommendations for reform to the functions, structures, appeal processes and procedures. It is anticipated that the deliberations of the working party will be completed early in 1995.

Your Honour will be aware that in the meantime we are amending the *Valuation of Land Act* with a Bill before the current session of Parliament which establishes the Land Valuation Boards of Review as a separate division of the Administrative Appeals Tribunal.

Your Honour will also be aware that the Residential Tenancies Tribunal, the Small Claims Tribunal, and the Credit Tribunal, formerly within my Fair Trading portfolio, were transferred to the Courts and Tribunals Division of the Department of Justice to demonstrate their independence from related administrative agencies.

Other initiatives in relation to boards and tribunals, and indeed the justice system generally, will include a revision of the ceiling on the Appeal Costs Funds civil awards. The current maximum amount has remained unchanged since 1971 and is hopelessly inadequate because it does not come close to meeting the reasonable costs of litigation. Revenue gained from increased court fees and savings from more efficient use of resources will help determine the new ceiling on these awards.

Your Honour, we are all keen to improve access to justice and I know that you yourself have a number of initiatives that you look forward to implementing in this new environment.

In conclusion, I am sure that the co-location of the boards and tribunals will assist in the introduction of further reforms as well as facilitating the more efficient use of resources and providing boards and tribunals with first class facilities. I am advised that once the Equal Opportunity Board is co-located in this building the annual saving in rent will be approximately $180,000. It is also estimated that co-location will result in an increase in efficiency by approximately 10 to 15 per cent. Your Honour, in regard to that, I would like to say that saving of money is not an end in itself, but a saving in respect of one aspect of our functions can mean that new initiatives then become possible. Your Honour, I would like to extend my thanks to all those who have been involved in this programme and trust that everyone here will continue to be involved in further exciting developments in the administrative justice system.

His Honour Judge Fagan: Thank you, Madam Attorney. Mr. Wright?

Mr. Wright: If the president and your illustrious predecessors please, I appear today on behalf of the Victorian Bar to wish the Administrative Appeals Tribunal all the best in its new accommodation. Our chairman, Mr. David Habersberger, Q.C., is unfortunately not able to attend this afternoon but sends his best wishes to you, Mr. President, and to the former presidents in attendance here today and to all other members of your tribunal.

Your Honour, launches, whether they be of ships or buildings, involve some element of risk for those participating. It was, I think, the aircraft carrier *Ark Royal* that was launched shortly before the Second World War with much pomp and ceremony as the state of the art fighting vessel. Unfortunately, someone had left the seacocks open, whether as a result of Glaswegian indulgence or otherwise I do not believe has ever been discovered, and the ship's progress down the launching ramp continued unabated to the bottom of the River Clyde. I do not suggest that this is in any way an omen, but for those uncharitable enough to think otherwise, I should add that the vessel was retrieved and performed splendidly for King and country during the ensuing hostilities. Nor, Your Honour, is the risk confined to the launched object. When the refurbished Queen's House at Greenwich was launched by King George III, His Majesty inadvertently pulled the wrong lever which released a flood of Thames mud and sewage onto a large gathering of assembled dignitaries. There is, Your Honour, perhaps an element of self-interest in relating this anecdote because I understand Your Honour has access to a number of different buttons and buzzers underneath the Bench.

The move by the Administrative Appeals Tribunal to new quarters coincides almost to the day with the tenth anniversary of the establishment of this Tribunal under the *Administrative Appeals Tribunal Act* of 1984. During the past decade the Tribunal has become an essential component of both the administration of justice and the process of dispute resolution in this State. Its jurisdiction spreads far and wide and at last count, which I might add was approximately mid-morning this morning, it is empowered to review decisions made under 79 different Acts of Parliament. Your tentacles, Mr. President, range from the politically sensitive, which brings to mind applications under the *Freedom of Information Act*, to the exotic,

such as the suspension of a breeding licence under the *Prevention of Cruelty to Animals Act.* Your decisions determine the destiny of planners, pugilists, and private detectives.

My own involvement with the Tribunal has, of course, been predominantly with the planning division. It may be of some interest that in this division at least the Tribunal is carrying on traditions that pre-date the common law itself by some millennia. My attention has been drawn to reports of recent archaeological excavations which have unearthed the code of Lipit Ishtar who was the ruler of Ison between 1868 and 1857 BC. This is apparently the earliest known codification of laws. A pertinent extract from this code reads, "If a man cut down a tree in the garden of another man he shall pay one half minor of silver". Here then is not only the first planning control, but also the first manifestation of the conservation movement and the first known application of the penalty unit principle.

If it is to operate independently all members of the Tribunal must be given sufficient security of tenure of office to operate free of government fear or favour and to be publicly seen to be so operating.

There can be no doubt, Your Honour, that the tribunal has made a significant contribution to the community of this State during its first ten years. However, if it is to operate independently all members of the Tribunal must be given sufficient security of tenure of office to operate free of government fear or favour and to be publicly seen to be so operating. This is all the more important given the large number of government decisions at all levels, and including decisions of many statutory authorities which the Tribunal is empowered to review.

Your Honour, on behalf of the Victorian Bar, I wish the Tribunal and all its members all the best in your new home.

His Honour Judge Fagan: Thank you, Mr. Wright. Mr. Smith?

Mr. Smith: Mr President, Your Honours, it is a great pleasure to appear on behalf of the Council and members of the Law Institute of Victoria to celebrate — I think is the correct word — the official opening of the new premises of the Administrative Appeals Tribunal. It is indeed a pleasure to do so in the presence of all the former presidents of the Tribunal and at least one president or chairman of a predecessor body. As the third speaker today I think wisdom dictates that I should be brief and I will not delve into Icelandic law as my friend, Mr. Wright, has done.

Can I say that in the 10 years since the Administrative Appeals Tribunal of Victoria was established it has truly consolidated its position as a respected forum of merits review of administrative decisions in this State. Furthermore, since the planning division came on stream, I think in 1988, the Tribunal has established a fine reputation of responsible decision making in an area which is nevertheless a subject of frequent public and media debate.

In relation to the work of the general division of the Tribunal I think it can be rightly said that Victoria has perhaps the most advanced system of administrative law in Australia. This is all the more significant when nationally we are at the leading edge. In development of reforms in this area, notably in freedom of information, Victoria has clearly been a leader.

In relation to freedom of information law I think it can be said that the Tribunal has endeavoured with some success to strike an appropriate balance between the right to know and the preservation of good government. This is something which is not always easy and there are always various forces at work expressing differing views as to where that balance lies.

The Tribunal has also successfully struck another balance, that between informality and accessibility on the one hand, and the need to maintain and uphold due process on the other. I think the planning area is a great example of this latter attribute and I refer in particular to the way in which the Tribunal has fairly assisted unrepresented persons in presenting cases before it.

My side of the profession has at all times been greatly appreciative of the extremely good rapport which exists and has existed between members of the Tribunal and members of the profession. In particular, the liaison between the Tribunal and the Law Institute's Environmental Law Section has been instrumental in resolving occasional problems in a speedy and appropriate manner. It has also, I think, greatly assisted the ongoing reform process.

The Tribunal has managed during its relatively short history to embrace and administer a wide range of jurisdictional areas and has done so to the

significant benefit of the Victorian community. Its breadth of operation itself has prevented the burgeoning of statutory tribunals in a number of areas and this has been alone a significant advantage.

The time is well overdue for the Tribunal to have more appropriate premises within which to despatch important business and I trust that the move to this building will ensure that the Tribunal can move forward into the future efficiently and effectively and with that independence which is vital to its functioning. On behalf of the Law Institute of Victoria may I wish you, Mr. President, and the members and staff of the Tribunal, well in these new premises.

His Honour Judge Fagan: Thank you, Mr. Smith. I must say, sitting here, that I feel somewhat nervous in this gathering, lest I press one of those buttons to which Mr. Wright referred and activate the folding doors that divide these two rooms and thereby cut myself in half.

The installation of the Administrative Appeals Tribunal in these purpose-built facilities at 55 King Street is an occasion requiring to be marked by an opening ceremony such as this in recognition of its place in this community and the efforts of all who have contributed to it.

On behalf of the Tribunal and its members I would like to acknowledge the presence here today of our many distinguished guests. May I mention in particular the Attorney, Mr Justice Rowlands, and Chief Judge Waldron of the County Court, and of course, Mr. Wright and Mr. Smith whom you have just heard. I mention also the presence of Deputy President, Judge O'Shea.

I want to make special mention of my four predecessors in office as successive presidents of the Administrative Appeals Tribunal, each of whom we are all delighted to have seated here this afternoon. I refer, of course, to Justice Rowlands, and Judges David Jones, James Duggan and Anthony Smith. Their presence is especially fitting given that 5 December 1994 sees out a decade of operation of the *Administrative Tribunals Act.* I hope that they will each take this invitation to return as a mark of special respect offered by the members of the Tribunal by way of both affection and of acknowledgement for their undoubted contributions to the creation and shaping of the structure and character of the Tribunal. It is to them in a large sense that is due the credit for the qualities of the Tribunal, now widely known for its accessibility, informality and fairness.

Justice Rowlands was of course the foundation president of the Tribunal. We are delighted he is able to attend. To him the community owes much. At the opening sitting of the Tribunal on 1 February 1985, Justice Rowlands described the function of the Tribunal as "to provide an objective and independent review of administrative action, wholly free from self-interest or indeed group interest". He demonstrated the need for such a Tribunal by reference to the report of the Commonwealth Administrative Review Committee of 1971 which said, "Parliament, through its own procedures is unable to deal with all cases in which a citizen feels aggrieved. Furthermore, the success of such parliamentary procedures and representation depends on the administration conceding that it has erred. They do not provide any means whereby the administrative decision is subjected to independent review". The currency of all those observations revives in the mind when we think of disputes nowadays about town planning, casinos, freedom of information, the mental health institutions, to mention but a few topics. The need for independent review is just as strong now as it was in 1984. The Tribunal lives in a constant state of tension between competing factors on all fronts. There are the pressures for informality as opposed to efficiency, independence versus tenure, accessibility against cost effectiveness, legislative expansion against erosion of jurisdiction, legalism against fairness. Community standards are never static and it is good to see that the Government has boards and tribunals under current review.

We are delighted also to have the presence of Chief Judge Waldron whose connection with the Tribunal is less well known. He had in 1983 substantial input into the content of the *Administrative Appeals Tribunal Act* 1984 and, in particular, to the relationship between the Tribunal and the County Court and its judges. The Chief Judge procured from a meeting of judges of the County Court on 1 October 1984, and not without some debate, a resolution which defined the nature and form of the participation of the judges in the work of the Tribunal. The Act subsequently passed reflected the requirements of that resolution, and especially those provisions requiring the President to be a judge and the approval of the Chief Judge for the secondment of a judge to duties on the Tribunal. I am happy to say that those arrangements have worked well in the interests of the Tribunal and the Court and I think the community.

We recognise the Attorney and the Secretary of the Department of Justice, Mr. Warren McCann; and the Director of Courts and Tribunal Services, Dr. Fitzgerald; and his deputy, Mr. Gidley, for their support in the provision of these new facilities. They have been sorely needed for some time and are very much appreciated by all of us who work here.

I would like to particularly express my thanks to our Chief Executive Officer, John Ardlie, and his deputies and our administration staff for their tireless work in our smooth transfer to these new premises from the old, and that they were at the

same time able to keep the work of the Tribunal flowing.

We of the Tribunal also welcome the Chairman of the Land Valuation Board of Review, Mr. Tony Lyons; the Chairman of the Equal Opportunity Tribunal, Ms Cate McKenzie; the Chairman of the Credit Tribunal, Mr. Michael Levine; the Chairman of the Residential Tenancies and Small Claims Tribunals, Mr. Richard Wright; and the Chairman of the Appeals Costs Board, Mr. Tony Cooper, Q.C. We look forward to co-occupation of these facilities with the members of those organisations.

I think it is appropriate on an occasion like this, and all the more so as we approach a decade of existence, to trace a short history of this Tribunal. I might say that I have had distributed a number of papers that outline this history and I merely propose to speak briefly about that paper. (Copy annexed).

Although the Commonwealth Administrative Appeals Tribunal was set up in 1976 and the Victorian Administrative Appeals Tribunal some ten years later, the true origins and traditions of administrative review in Victoria, in my view, are to be found in the history of town planning legislation in this State. Prior to 1944 such town planning as there was, was the result of activities of such as the Central Roads Board which was in existence for only four years, and then a number of local government shires, drainage authorities, and the Melbourne and Metropolitan Board of Works, and later, councils. Town planning was by administrative decision and action, by local by-laws and all very much on an ad hoc basis.

As the Second World War was coming to a close the original *Victorian Town and Country Planning Act* of 1944 was passed. In substance, that Act authorised local councils to prepare planning schemes for their own areas. The Act was re-enacted in a general consolidation of legislation in 1958, and between 1958 and 1961 applications for permits under planning schemes or appeals from council decisions under planning schemes were often heard by the Minister for Planning or Local Government or equivalent, and later by delegates chosen by him, whose powers were limited to making recommendations to him. These powers were within his area, discretionary and very wide. Over the years, community criticism of this method of handling planning problems drew substantial criticism on the basis of a lack of overall and co-ordinated planning within the state and between the municipalities and authorities, the exercise of absolute and autocratic power within his area by the Minister, the absence of notice to or an opportunity to oppose applications and appeals, the hearing of applications and appeals without notice to interested parties and behind closed doors. These features of the procedure invited suspicion of the exercise of cronyism and corruption in the granting of permits.

These problems were well understood by 1961. In that year the *Town and Country Planning Act* 1961 was enacted. It set up a planning procedure, established certain principles and certain limited open procedures for the making of planning schemes and interim development orders, and made certain provisions for interested persons to object to applications made to responsible authorities, councils and others for planning permits. Under that Act, appeals were heard by the Minister or his delegates, and it was not until the amendment of the *Town and Country Planning Act* in 1968 that there was set up a method of appeal by applicants and objectors to a tribunal independent of the Government of the responsible authorities and of the parties, namely, the Town Planning Appeals Tribunal. The original chairman was the then Mr., later Justice, now Sir James Gobbo.

The period between 1945 and 1980 saw enormous development in Victoria and in particular, Melbourne; a planning profession of expert planners emerged

When moving the 1968 amendment in the Legislative Assembly, the then Minister for Public Works, Mr. Porter, said, "The government considers it would be more fitting to have a competent, independent administrative tribunal of three persons so constituted as to hold the confidence of the parties who will appear before it and have to abide by its decisions".

The period between 1945 and 1980 saw enormous development in Victoria and in particular, Melbourne; a planning profession of expert planners emerged; controls by way of planning schemes and interim development orders became detailed and sophisticated; planning authorities imposed layer upon layer of interim development orders and planning schemes, often administered by different planning and responsible authorities. The solution to planning disputes became complex, time consuming and they were, after 1968, handled in the area of appeals to the Town Planning Appeals Tribunal, in open hearing, with

speed, accuracy, and without any suggestion of corruption or sharp practice.

A feature of the Tribunal was that by s.21(1) of that Act it was provided that the "Appeals Tribunal shall act according to equity and good conscience and the substantial merits of the case without regard to technicalities or legal forms and shall not be bound by the rules of evidence but subject to the requirements of justice, may inform itself on any matter in such manner as it thinks fit". In one form or another that notion has been an outstanding characteristic of the Tribunal ever since.

From 1968 the Tribunal's members were drawn from many areas of professional life and comprised experts in law, town planning, public administration, commerce and industry. They were then generally appointed for terms of three years. The original permanent Tribunal comprised Harold Chipman, Talbot Widdop, and Alan Whalley, some of whom many of you will have known.

Up to 1984 they were succeeded by many notable chairmen and members including Francis Lonie, John F. Kearney, Q.C., George A. Robinson, Anthony Hooper, Q.C., and Walter Webb. Members have included later Justices Harry Emery, David Byrne, Chief Justice Alistair Nicholson, Justices Timothy Smith, Alwynne Rowlands and Peter Gray. Its membership has included the present Commonwealth and state Solicitors General, Messrs Gavin Griffiths, Q.C. and Douglas Graham, Q.C.

By the 1970s public criticism did emerge about the complexity of the layers of interim development orders and planning schemes and the multiplicity of responsible authorities. They culminated, it is fair to say, in a report by the Building and Development Appeals Committee of 1979.

In the meantime, the Environment Protection Authority Appeals Board (under Dr. P.H.N. Opas, Q.C.), and the Drainage Tribunal (under Russell Barton) were set up. By the *Planning Appeals Board Act* 1980, the Planning Appeals Board was established. It was presided over by Dr. Opas. It merged the jurisdiction of the Town Planning Appeals Tribunal, the Environment Protection Appeals Board, the Drainage Tribunal, and functions of the arbitrator under the *Local Government Act* of 1958.

The members of the Planning Appeals Board were initially appointed for a term of seven years or until they attained the age of 72.

By the *Administrative Appeals Tribunal Act* of 1984, which commenced on 5 December 1984, the Administrative Appeals Tribunal of Victoria was established, largely following the Commonwealth model. The initial jurisdiction of the Tribunal was relatively limited. Its principle areas of jurisdiction covered review of decisions of government authorities and boards concerned with awarding compensation for injuries received in motorcar accidents and injuries from crimes, and with freedom of information decisions and decisions concerning state taxes, superannuation and estate agents.

A common feature of its various heads of jurisdiction was the review of previous decisions by some government functionary. Its first members were His Honour, now Justice Alwynne Rowlands, President; His Honour Judge Michael Higgins; Mr. Brian McCarthy; and Her Honour Judge Elizabeth Curtain. It is fair to say that under the founding president of the Administrative Appeals Tribunal the Tribunal emulated the behaviour and traditions of the Town Planning Appeals Tribunal and the Planning Appeals Board and maintained their high standards.

The current Act provides by s.31(1) that the procedure of the Tribunal is within the discretion of the Tribunal, the proceedings shall be conducted with as little formality and technicality and with as much expedition as the requirements of every relevant enactment and proper consideration of the matters before the Tribunal permit; and the Tribunal is not bound by the rules of evidence, but may inform itself on any matter in such manner as it thinks appropriate. The Tribunal is thereby conceived to be obliged to observe the requirements of natural justice. For that reason it is no surprise that by the *Planning Appeals Amendment Act* of 1987 the Administrative Appeals Tribunal absorbed the Planning Appeals Board by its abolition and the establishment of the Planning Division of the Administrative Appeals Tribunal. By the Act, all members of the Planning Appeals Board, as at 1987, became members of the Administrative Appeals Tribunal.

To round this matter off I should perhaps mention that in an effort to simplify the substantive planning laws, the *Planning and Environment Act* 1987 was passed. In effect, it sought to convert statements of planning policy and planning schemes, interim development orders and planning orders into planning schemes. It did, however, create hierarchies within planning schemes to that there are state, regional and local levels for the making and amending of planning schemes. It is fair to say, I think, that the complexities in these hierarchies and the language of planning instruments these days are re-emerging and they are certainly not helped by the exercise of unfettered ad hoc powers, administrative decisions or like procedures such as used to occur, as I have described, before the Act of 1961.

Between 1984 and the present time the jurisdiction of the Administrative Appeals Tribunal

has grown enormously. I think in tribute to the way its members over many years have performed the difficult and important decision making duties assigned to it, it now has jurisdiction in a vast range of areas, including jurisdiction by the latest count under more than 100 different enactments.

Since its inception as the Administrative Appeals Tribunal of Victoria, the Tribunal has always had a strong connection with courts and the judges of the courts and as deputy presidents. The remaining deputy presidents are all legally qualified, as is the senior member and a number of the full-time, part-time and sessional members. In addition, the Tribunal has among its membership a wide range of expertise appropriate in its various areas of jurisdiction. Members are qualified in town planning, civil engineering, coastal engineering, industrial chemistry, economics, pharmacology, architecture, geology and surveying.

The Tribunal and its predecessors used to sit when it sat as Minister for Planning or Local Government in the Minister's parliamentary offices in Spring Street or as his delegates in a small room at 20 Spring Street, Melbourne, until about 1968, and then as the Town Planning Appeals Tribunal at 480 Collins Street, Melbourne, until about 1972. These premises it quickly outgrew and it then sat as that Tribunal and then the Planning Appeals Board and the Administrative Appeals Tribunal at 500 Collins Street and 474 Little Bourke Street, Melbourne, which sets of premises it also outgrew requiring its relocation to 55 King Street.

The present position is that apart from the president, there are 11 judicial deputy presidents, seven deputy presidents, one senior member, five full-time members who are legally qualified, nine full-time members who are qualified in fields other than law, two permanent part-time members, and 26 sessional members who are also multidisciplinary. The range and importance of the heads of jurisdiction of the Administrative Appeals Tribunal, its association with the courts, its position as a place of resort for the citizen between the executive government and the courts and the history of bipartisan support within the Parliament for its continued existence should fairly ensure the Tribunal's continuance into the future as one of those instrumentalities of the state which are of constitutional significance.

Members of this Tribunal are glad to note that the present Government has, as have its predecessors, taken steps to review the role of the Tribunal. It is to be hoped that as a result of the review the plethora of boards and tribunals which history has left us in Victoria may be rationalised, that the independence of the Tribunal may be enhanced by attention to members' tenure, and that the Tribunal will be able to play a wider and increasingly independent and respected part in the affairs of the State.

Ladies and gentlemen, distinguished guests, I thank you for your attendance here this afternoon and I invite you to go to the floor below, that is, the fourth floor, and partake in refreshments.

A SHORT HISTORY OF THE ADMINISTRATIVE APPEALS TRIBUNAL

Although the Commonwealth Administrative Appeals Tribunal which was set up in 1976 under the *Administrative Appeals Tribunal Act* 1975 of the Commonwealth and the Victorian Administrative Appeals Tribunal some ten years later in 1985 by the Victorian *Administrative Appeals Tribunal Act* 1984, the true origins and traditions are to be found in the history of town planning legislation in this State.

Prior to 1944 such town planning as there was, was the result of activity by such bodies as the Central Roads Board 1853–1857 (see 16 Vic. 40, 8 Feb. 1853 and 21 Vic. 31, 24 Nov. 1857) and the then local government shires and councils and their successors such as the Board of Land and Works, the various Drainage Authorities and the then Melbourne and Metropolitan Board of Works together with the various later local councils and shires. Town planning was by administrative decision and action and by local by-laws, all very much on an ad hoc basis.

As the Second World War was coming to a close the original Victorian *Town and Country Planning Act* 1944 was passed.

The authors of "Planning and Environment Service (Victoria)", Morris, Barker and Hooper, state at p.2011:

> In the Second Reading Speech on the Bill the Minister, Mr Oldham, said that "the Act would help provide better housing, schools, open spaces, facilities for care of mothers and infants, and hospitals for returned service men and women. The Act would bring Victoria into line with other States, as Victoria and New South Wales were the only Australian States with no planning legislation. In addition, architects, town planners and municipalities had been demanding town planning legislation for a number of years": *Victorian Parliamentary Debates*, 12 September 1944, pp.842–3. Another reason he did not mention was that the existence of "adequate legislation" for "town planning" was one of the conditions with which Victoria was required to comply before the Commonwealth Government would make funds available for housing: *Housing (Commonwealth and State Agreement) Act* 1946 (Vic), No 5114, Schedule, Cl 3; *Housing Act* 1958, No 6275, 4th Schedule; and *Victorian Parliamentary Debates*, 17 October 1944, p.1480.

In substance that Act authorised local councils to prepare planning schemes for their own areas.

That Act was re-enacted in the general consolidation of legislation in 1958.

Between 1958 and 1961 applications for permits under planning schemes or appeals from council decisions under planning schemes were often heard by the Minister for Planning or Local Government or equivalent and later by delegates (chosen by him) whose powers were limited to making recommendations to him. His powers were within his area discretionary and very wide.

These features of the procedure invited suspicions of the exercise of cronyism and corruption in the granting of permits.

Over the years the community criticism of this method of handling planning problems drew substantial criticism on the basis of a lack of overall and coordinated planning within the State and between the municipalities and authorities, the exercise of absolute and autocratic power within his area by the Minister, the absence of notice to or an opportunity to oppose applications and appeals, the hearing of applications and appeals without notice to interested parties and behind closed doors. These features of the procedure invited suspicions of the exercise of cronyism and corruption in the granting of permits.

These problems were well understood by 1961. In that year, the *Town and Country Planning Act* 1961 was enacted. It set up a planning procedure establishing certain principles and more open procedures for the making of planning schemes and interim development orders and made certain provisions for interested persons to object to applications made to Responsible Authorities (councils and others) for planning permits. Under that Act appeals were still heard by the Minister or his delegates (Act of 1961, s.19, s.48(2)).

It was not until the amendment of 1968 (*Town and Country Planning (Amendment) Act* 1968) s.14(1) to the Act of 1961 that there was set up a method of appeal by applicants and objectors to a Tribunal independent of the Government, of the responsible authorities and of the parties, namely, the Town Planning Appeals Tribunal. The original Acting Chairman was the then Mr. (later Justice) now Sir James A. Gobbo, Kt.Cr.

When moving the 1968 amendment in the Legislative Assembly, the then Minister for Public Works, Mr. Porter, said:

> The Government considers it would be more fitting to have a competent independent administrative Tribunal of three persons so constituted as to hold the confidence of the parties who will appear before it and have to abide by its decisions. The procedure in relation to appeals and hearings will be generally the same as at present, but details are being improved in the interests of fairness to all parties and of the saving of time. The Tribunal is being required to give reasons for its decisions and to have important or typical determinations and reasons therefore published for the information of authorities and persons concerned with planning."
>
> (*Hansard*, 20 February 1968, p.3230.)

The Opposition spokesman on the Bill, Mr. Wilkes, supported the amendment and in doing so made reference to the previous method of dispute resolution and said of it:

> This system has a number of disadvantages. One has been that the appellant has never known why his appeal has been rejected, and because of this principle it has not been possible to establish any case law or any precedents in respect of appeals. In my view, this would have been far less costly in the long term, with people appealing from decisions already made, and reasons being given to substantiate them . . .

Mr. Wilkes referring to the amendment continued:

> The Appeals Tribunal will be a better system than the present procedure because case law will be established and reasons will be given for the decisions. This will reduce the cost of preparing appeals, and thus people who feel aggrieved by town planning decisions will be assisted.
>
> (*Hansard*,12 March 1968, pp.3561–2)

The period between 1945 and 1980 saw enormous development in Victoria and in particular Melbourne. A planning profession of expert planners emerged. Controls by way of planning schemes and interim development orders became detailed and sophisticated. Planning authorities imposed layer upon layer of interim development orders and planning schemes often administered by different planning and responsible authorities. The solution to planning disputes became complex and time consuming but were after 1968 handled in the area of appeals to the Town Planning Appeals Tribunal in open hearing with speed, accuracy and without any suggestion of corruption or sharp practice. A feature of the Tribunal was that the Act of 1968 by s.21(1) provided that on the hearing of any appeal the Appeals Tribunal "shall act according to equity and good con-

science and the substantial merits of the case without regard to technicalities or legal forms and shall not be bound by the rules of evidence but, subject to the requirements of justice, may inform itself on any matter in such manner as it thinks fit". In one form or another that notion has been an outstanding characteristic of the Tribunal ever since. From 1968 the Tribunal's members were drawn from many areas of professional life and comprised experts in law, town planning, public administration, commerce or industry. They were generally appointed for terms of three years. The original permanent Tribunal comprised Harold Chipman, Talbot Widdop and Alan Whalley. Up to 1980 they were succeeded by many notable chairmen and members including Francis H. Lonie, John F. Kearney, Q.C., George A. Robinson, Anthony Hooper, Q.C. and Walter E. Webb. Members have included Messrs later Justices, Harry E. Emery, David Byrne, Chief Justice Alistair Nicholson, Justices Timothy H. Smith, Alwynne Rowlands, and Peter R.A. Gray. Its membership has included the present Commonwealth and State Solicitors General, Messrs Gavan Griffiths, Q.C., and Douglas Graham, Q.C.

By the 1970s public criticism did emerge about the complexity of the layers of interim development orders and planning schemes and of the multiplicity of responsible authorities. They culminated it is fair to say in a report by the Building and Development Appeals Committee (BADAC) of 1979.

In the meantime an Environment Protection Authority and an Appeals Board presided over by Dr. P.H.N. Opas O.B.E., Q.C., had been set up pursuant to the *Environment Protection Act* 1970. Proposals for development controlled by planning legislation were often affected under that Act as well. Hearings concerning the same proposals were often necessary before the Environment Protection Appeals Board as well as the Town Planning Appeals Tribunal. Then in 1976 under the *Drainage of Land Act* 1976 a Drainage Tribunal chaired by Russell Barton was established to hear claims in respect of the flow or interference with water onto other land.

By the *Planning Appeals Board Act* 1980 and the *Planning Appeals Act* 1980 (commencement 1 December 1981) the Planning Appeals Board was set up. It was presided over by Dr. P.H.N. Opas. It merged the jurisdictions of the Town Planning Appeals Tribunal, the Environment Protection Appeals Board, the Drainage Tribunal and the functions of the arbitrator under the *Local Government Act* 1958 in respect of street construction schemes.

The members of the Planning Appeals Board were initially appointed for a term of seven years or until they attained the age of 72.

By the *Administrative Appeals Tribunal Act* 1984 (commencement 5 December 1984) the Administrative Appeals Tribunal of Victoria was established largely following the Commonwealth model. The initial jurisdiction of the Tribunal was relatively limited. Its principal areas of jurisdiction covered reviews of decisions of government authorities and boards concerned with awarding compensation for injuries received in motor car accidents and injuries from crimes and with freedom of information decisions and decisions concerning state taxes, superannuation and estate agents. The common feature of its various heads of jurisdiction was the review of a previous decision by a government functionary.

Its first members were His Honour Judge (now Justice) Alwynne Rowlands (President), the now His Honour Judge Michael Higgins, Mr. Brian McCarthy and Her Honour Judge Elizabeth Curtain.

It is fair to say that under the founding president of the Administrative Appeals Tribunal, the Tribunal emulated the behaviour and traditions of the Town Planning Appeals Tribunal and the Planning Appeals Board and maintained its high standards.

Under the founding president of the Administrative Appeals Tribunal, the Tribunal emulated the behaviour and traditions of the Town Planning Appeals Tribunal and the Planning Appeals Board and maintained its high standards.

The Victorian *Administrative Appeals Tribunal Act* by s.35(1) provides:

(a) the procedure of the Tribunal . . . is within the discretion of the Tribunal . . .

(b) the proceeding shall be conducted with as little formality and technicality, and with as much expectation, as the requirements . . . of every . . . relevant enactment and a proper consideration of the matters before the Tribunal permit; and

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate

and the Tribunal is obliged to observe the requirements of natural justice — see *Spano* v. *Estate Agents Board* F.C. S.C. 4 December 1986; *Rosebud Village P.L.* v. *City of Doncaster & Templestowe* S.C. 10 July 1989.

It was then no surprise that by the *Planning Appeals (Amendment) Act* 1987 (commencement 1 August 1987) the Administrative Appeals Tribunal absorbed the Planning Appeals Board by its abolition and the establishment of a Planning Division of the Administrative Appeals Tribunal. By the Act all members of the Planning Appeals Board as at 1987 became members of the Planning Division of the Administrative Appeals Tribunal.

Between 1984 and the present time the jurisdiction of the Administrative Appeals Tribunal has grown enormously.

To round this matter off, I should perhaps mention that in an effort to simplify the substantive planning laws the *Planning and Environment Act* 1987 was passed (commencement 27 May 1987). In effect it sought to convert statements of planning policy, planning schemes, interim development orders, and planning orders into planning schemes. It did however create hierarchies within planning schemes so that there are State, Regional and local levels for the making and amendment of planning schemes. It is fair to say I think that complexities in these hierarchies and the language of planning instruments are re-emerging and they are certainly not helped by the exercise of unfettered ad hoc powers, administrative decision or like procedures such as used to occur before the Act of 1961.

Between 1984 and the present time the jurisdiction of the Administrative Appeals Tribunal has grown enormously, I think in tribute to the way its members over many years have performed the difficult and important decision making duties assigned to it.

It now has jurisdiction in a vast range of areas including jurisdiction under more than 100 different enactments.

Since its inception as the Administrative Appeals Tribunal of Victoria, the Tribunal has always had a strong connection with the courts. Not only was the president required to be a Judge of the County Court but a number of the deputy presidents were also Judges of the County Court. The remaining deputy presidents were all legally qualified as were the senior member and a number of the full-time, part-time and sessional members. In addition, the Tribunal had among its membership a wide range of expertise appropriate to its various areas of jurisdiction. Members were qualified in town planning, civil engineering, coastal engineering, industrial chemistry, economics, pharmacology, architecture, geology and surveying.

LOCATION

The Tribunal and the predecessors to the Tribunal sat as Minister for Planning or Local Government, in the Minister's parliamentary offices, or as his delegates in a small room at 20 Spring Street, Melbourne, until about 1968, then as the Town Planning Appeals Tribunal at 480 Collins Street, Melbourne, until about 1972, which premises it quickly outgrew and then as that Tribunal and the Planning Appeals Board and the Administrative Appeals Tribunal at 500 Collins Street and 474 Little Bourke Street, Melbourne, which sets of premises it also outgrew requiring its relocation in 1994 to 55 King Street, Melbourne.

PRESENT POSITION

Currently, apart from the president, there are 11 judicial deputy presidents, 7 deputy presidents, 1 senior member, 5 full-time members who are legally qualified, 9 full-time members who are qualified in fields other than the law, 2 permanent part-time members and 26 sessional members who are multidisciplinary. That makes a total of 61 members. The range and importance of the heads of jurisdiction of the Administrative Appeals Tribunal, its association with the courts, its position as a place of resort for the citizen between the executive government and the courts and the history of bi-partisan support within the Parliament for its existence should fairly ensure the Tribunal's continuance into the future as one of those instrumentalities of the state which are of constitutional significance.

The members of this Tribunal are glad to note that the present Government has, as have its predecessors, taken steps to review the role of the Tribunal. It is to be hoped that as a result of the review the plethora of boards and tribunals which history has left to us in Victoria may be rationalised, that the independence of the Tribunal may be enhanced by attention to members' tenure, and that the Tribunal will be able to play a wider and increasingly independent and respected part in the affairs of the State.

PERSONALITY OF THE QUARTER

Tom Salter

IN 1974 YOUNG TOM SALTER RETIRED from the Government Aircraft Factory at the age of 65. He then came to the Bar as a messenger in Ken Spurr's office. He is still here.

John Kaufman interviews Tom Salter for *Bar News*.

J: Tom, how old are you?
T: 86.
J: You would have been born in 1909.
T: That's right.
J: Where did you live in your early days?
T: I lived in a place called Melson Road, South Melbourne.
J: Ah, an old South Melbourne boy.
T: That's right and always will be. I follow South in the football. And played junior football.
J: Who did you play football for, Tom?
T: CYMS Junior Team, local CYMS. The same colours as South Melbourne.
J: You never played any higher than that grade.
T: No, I was too small.
J: And what did you do after you left school?
T: It was in the depression.
J: The 1930s?
T: The 1930s. For three years there was no work and I didn't go on the dole and I had a good mother and father and brothers and sisters that kept me going and I didn't forget them after I got a job.
J: Why didn't you go on the dole?
T: Ah, I don't know. I don't know what their idea was. I'm sure I don't know now. You had to be pretty poor to be on the dole.
J: What was your first job, Tom?
T: My first job I worked in a boot shop as a salesman.
J: Where was that?
T: Wallace's, over in King Street.
J: King Street in the city?
T: Yes.

John Kaufman (right) interviews Tom Salter (left) for Bar News

J: And how long were you with them there?
T: I was there for about a couple of years and then I went down to a brass foundry, shovelling sand for14 moulders. I was 19 then. For two pounds ten a week.
J: You would get a bit more now.
T: Ah yes you would.
J: So how long did you stay there?
T: They put me off when I was getting onto 21. So there was no what do they call them?
J: No youth wage.
T: No unions around much those days. As soon as you got onto twenty-one they put you off.
J: Oh, dear me. So that would have brought you up to nearly into the 1940s.
T: That's right.
J: And what happened during the 1940s? Did you go to the war?
T: No, I didn't. I was in the army but I got booted out on account of having one eye.
J: Yes.
T: I'm blind in one eye. But I was in it for twelve months and then they booted me out.
J: So what did you do then?
T: And then I went to a place in Albert Park, driving a truck for a cake firm. I was there because a fella hurt his arm and he couldn't no longer cart the stuff in and so he asked me whether I would take it on and I said oh yeah and I'll give it a go. I was there for ten years.
J: And were you living in South during that time?
T: For ten years, . . . I didn't get married till later. I was still about Albert Park, that's right, St. Vincent Place, with my mother and father and my brothers and sisters were there. And then after that I happened to be having a drink with a chap in a hotel and he said "I think I can fix you up where I work" and I asked him where that was and he says down the aircraft factory, on a printing machine at Fisherman's Bend and I was there for 24 years. And then from there I came straight here and got a job here.
J: What, with Ken Spurr?
T: Ken Spurr.
J: How long have you been with Ken?
T: I've been with Ken for going on for 21 years.
J: Oh, you came to Ken in the 1970s.
T: That's right because I retired from the aircraft in about 1974 and came straight here.
J: Where was Ken then?
T: Ken was over in East and I had an interview with him and he put me on straight away.
J: How did you find out about Ken?
T: Well, there's a chap called George Wallow I used to work with.
J: George.

T: Remember George?
J: Yes.
T: Well George was the one that gave the idea that Ken might put me on.
J: George used to be with the navy, didn't he?
T: That's right, the navy. Then he died suddenly. He was 69 he was when he died.
J: Tell me Tom, when did you marry?

In 1974 young Tom Salter retired from the Government Aircraft Factory at the age of 65. He then came to the Bar as a messenger in Ken Spurr's office. He is still here.

T: I married in 1942.
J: And how many kids have you got?
T: None.
J: You have no kids.
T: No kids.
J: You were wise, were you?
T: I don't know whether I was wise but always too busy, I think.
J: And you just lost your wife?
T: That's right, two years ago. And we had our 50 anniversary.
J: 50 marriage?
T: Yeah.
J: That's tremendous.
T: Yes, very nice.
J: Tell me Tom, things have changed a bit since you first came to Ken.
T: Yes, they have.
J: What do you see as the changes?
T: I see the city changed a lot.
J: In what way?
T: Well, all these building going up and, way back in my time, we could fire a cannon out some of the streets and wouldn't hit anybody.
J: When you came to Ken in the seventies, things have changed in the Bar, haven't they?
T: Oh, I'll say so. Let me see what they are. Oh, different readers come here you know and me being pretty ancient at the time, they asked me for a bit of advice.
J: Well, that's pretty good.
T: And I'd say to them "Now if you don't get any briefs for a while, don't worry. You'll have to knock some of them back after a while if you have to, having so many". I gave them a lot of encouragement.
J: Well, that's good.
T: Yes. Ken said I would have made a good PR man.
J: And Ken moved over to Owen Dixon West and you moved over with him.
T: Yes.
J: Have you noticed much change in the Bar itself? The way that people act now towards each other?
T: You know, I get on very well with them all because I treat them as they treat me.
J: And how long do you think you're going to continue working?
T: Well, I don't see any reason why I couldn't go till ninety.
J: Well, I think that's probably right.
T: And the reason why to is another thing. Why sit at home and look at four walls when there is something to do? And it's not a hard job.
J: Where are you living now Tom?
T: I'm living at Middle Park now. My own home.
J: Have you ever left the South Melbourne, Middle Park area?
T: No, I started at South Melbourne, lived in Albert Park and now Middle Park.
J: All in the one spot.
T: That's right. I've seen a lot of changes in that time too.
J: What have you seen of the changes in South Melbourne?
T: South Melbourne. We lost our great football ground for a start. And now they're having a racing track there, digging up all the grounds.
J: What do you think of that?
T: Well, I mean actually I don't think it will affect me much. I suppose it's progress, you got to look at that too.
J: And how do you find being a South supporter working with Spurr?
T: Alright, we get on alright. We have our talks about the different players, I know all the players and practically all the sides and I can tell Ken about all his players too, where they should play and all that sort of thing.
J: And what do you think about the young people coming to the Bar now? What advice have you got for them?
T: I think they'll . . . What advice have I got for them?
J: Yes.
T: Oh well, to settle down and do work and work hard and you'll get somewhere.
J: Fair enough.
T: Like some of the older ones like yourself.

A CHINESE SPARKE

The stunning sculptured landscape of Guangxi province.

THE EDITORS OF THIS ILLUSTRIOUS publication did not want to be seen to be the only ones self-indulgent enough to write about their overseas travel, so they asked me if I would be foolish enough to do the same. As I am both foolish and self-indulgent, I was delighted.

My impressions of the country were pretty strong, so I have no doubt that there will be a few sinophiles (or sinophobes) with comments of their own.

I recently spent a month travelling alone in China. An extraordinary place. For a lawyer, even more extraordinary, as the absence of a rule of law is noticeable everywhere.

Travelling alone, with some grasp of the language gave me a great insight. There are many things I have missed and misunderstood, no doubt. But there are many places I went where I was not with other westerners, where I was able to sit and drink tea with a temple-keeper just because I happened to be there. I spent a short time with a western friend (another lawyer) who was teaching English in south-western China, who also gave me some strong insight into the culture and the people.

The country is a mix of cultural and economic extremes. The ancient nature of the civilisation is noticeable only in the temples and the villages. Modern Chinese grasp for the newest, most western ideas and ways. They embrace karaoke music, plastic wall decorations and the art of making money with equal ease. The villages are stricken with poverty — entire villages living at malnutrition level, where the nearest health care is two hours away by bus, the ratio of boys to girls is 65:35 and villagers still kidnap girls from the city to marry or boys from the city (once they are old enough to be productive) to work the land.

The Chinese have no equivalent to our Summary Offences Act . . . "It is an offence to drive a dog or goat harnessed through a public place."

I went there believing it to be a socialist paradise. Boy, was I wrong! The state does not provide health care, fire brigades, or secondary education. The individual pays for everything.

The Chinese way of thinking has developed, it seems, in response to the population size. Life is terribly cheap — I and an American tourist rendered first aid to a man whose face was cut by a flying rock, to the amazement of the people around us. They were astonished that someone would bother to act to help another.

Workplace safety — non-existent. A law of tort — you must be joking. Quality or pollution

controls on manufacture — would reduce the profits. (Thus a farmer mixes and sells a chemical crop spray, in completely uncontrolled conditions, which results in the death of the crops, poisoning of the villagers and poisoning of the soil for 10 years to come. He is executed. The villagers shrug their shoulders, bury their dead and try and find other land. Or live off their relatives, because there is no other land.)

The state only barely provides a legal system. There is a system of independent judges of sorts. I believe they are appointed by the Party, but no longer have the view that "if the police have charged you, you must be guilty, otherwise they would not have charged you". But they are poorly paid and with little or no status in society.

If you think lawyers have a poor status here, think again. Chinese people hate going to a lawyer. Going to a lawyer only means you are in trouble. They apparently have a lower status than manual workers. The lawyer's role used to be to tell you how best to confess. I doubt that the role has changed much.

The primary operand in the legal system is "guangshi" — "pulling strings". By money, by gifts or by contacts, the parties influence the judges. Family law dispute? Whoever has the most guangshi will get the property. (Forget the children, sorry, child — of course they go with the wife. And there is no single mother's welfare benefits, or maintenance system either.)

And that forms part of the basis of the failure of the rule of law. The laws do exist, but they are subject to the interpretation of the local party officials at any given time. They are universally disobeyed, with little consequence for the average person. (Admittedly, when enforced, they result in execution or forced labour — for example, if you breach copyright, by copying "Coca Cola", you will be executed. China is very keen to join GATT and to look like they exercise real control over intellectual property rights.)

A car accident results in being beaten up (yes, I saw it). Alternatively, a breach of road rules will result in you paying a bribe (yes, policeman in the streets take bribes quite noticeably).

If you are a westerner involved in a fight with a local, where you are the victim, you will be found guilty and ordered to pay a fine because to find the Chinese person guilty will result in them being executed (for beating up a westerner) so on balance it's the better result.

For genuine redress for wrongs, there is nowhere to go but for a system which favours those with money, Party connections or this week's interpretation of the law.

Mah-jiang players in a muslim hangout in Kunming.

(Left): The real Rule of Law — the dead hand of Mao Zedong is apparent everywhere. In rural China, Mao is still held in great respect (Deng Xiaoping is hated), even though he killed anyone who failed to display the appropriate signs on their homes.

(Centre): A "guardian" of a Buddhist temple outside Kunming. (Tadgell J. on a good day?)

(Right): An open air dentist in a market in western Yunnan Province. (Marginally less painful than an appearance before the Full Court?)

Commercial law? Hah! Contracts are rubbery things in China. They are apparently treated as a "statement of intention". My friend, whose teaching contract was water-tight in Australia, had to threaten to leave the school (and the country) to have her contract entitlements given to her. When she demanded her entitlements, she was told, "ah, now it's time to renegotiate".

Lying seems to be an everyday experience. Cheating is so endemic in schools that teachers are being paid extra for each student they fail. My friend took cheat notes away from people in exams and was criticised for doing so.

It is partly based on people not wanting to displease. Therefore they will answer "yes", rather than admit they don't know/you are not right/ they have made a mistake. (Never, never, never admit to a mistake — the legendary fear of "losing face" rules everybody's lives, every day). If you word the question differently, you get a different answer. If you point out the lie, it may be denied (even in the face of direct evidence) or it may be admitted, together with a hearty laugh.

Having raved about the Chinese mind (and I admit — as best a tourist with limited language skills and travelling for only one month can do), the country itself is extraordinary.

The temples are places of beauty and serenity, where people tend gardens and drink tea in peace. The mountains are stunning — the scenery is quite extraordinary in many places — the stylised landscapes of many Chinese paintings are not stylised at all — they actually exist. In Guangxi Province, the mountains look like those in classic Chinese art.

The Yellow River is as enormous as its legendary status demands. It provides a life-blood of transport in inhospitable mountains.

Every square inch of the country is cultivated. Thus there are rolling green hills everywhere — rice paddies, corn and soya bean. (Mostly tended by the women, I might add, whilst the men play cards in the roadway. It is quite clear that women do the larger proportion of the work in the home and in the fields.)

The minority peoples are very different from the Han Chinese — their villages and dress set them apart, and I found the minority areas to be the most fascinating part of my travels. Shorter, more impoverished and more medieval than even the Han Chinese villagers, the minority peoples have to some extent managed to keep their own cultures intact. Some are more related to the various South East Asian "hill tribes" than they are to the Chinese.

The cities are huge, congested, polluted and (hooray) full of bicycles. Being a cyclist here, I felt very much at home. Three million bicycles in Beijing alone makes for a formidable force. Needless to say, bicycles have the right of way everywhere, (except if you are a westerner and have to fight through crowds of people stopped, staring and shouting "hello" at you). If the rapidly growing middle class ever seriously moves from the bicycle to the car, China will be a wreck.

I could rave for hours. I no doubt already have. Despite the grim picture I paint, I was fascinated. I'll hopefully be going back next year, to the LawAsia conference in Beijing.

(With any luck the editors won't be so foolish as to ask me to write again.)

Carolyn Sparke 沢宝

GRENDEL'S CHAMPION WAGES BATTLE WITH JUDGE BEOWULF

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BAR NEWS DOES NOT PANDER TO THE prurient curiosity of quidnunc readers. We are confident that our readers are not such persons seeking a cheap frisson of excitement, and it is on that basis we publish this discussion of a lawyer's fee award case.[2]

So as not to ruffle the feathers of our fellow practitioners we have chosen the fee award litigation involving the US constitutional lawyer Laurence Tribe.

GRENDEL'S CHAMPION

Born in China, Tribe emigrated with his parents to California. He exhibited the precociousness early of a child destined to go far. Entering Harvard University on a scholarship, Tribe enrolled successively in medicine, mathematics and then settled on law. His maths background is demonstrated in his legal writings and choice of titles to his learned articles, e.g., "Trial by Mathematics: precision and ritual in the legal process",[3] "Constitutional Calculus: equal justice or economic efficiency"[4] and "The curvature of Constitutional Space: what lawyers can learn from modern physics"[5] wherein the author cites Kline,[6] Hawking and Israel,[7] Einstein,[8] Davies,[9] Gamow[10] and Hawking,[11] and at page 17 makes reference to Heisenberg's *Uncertainty Principle.*

After a stint as law clerk to Supreme Court Justice Potter Stewart, Tribe was offered academic positions at both Harvard and Yale Law Schools. At Yale, his interviewing panel included Robert Bork. Tribe settled on Harvard and has taught there since the age of twenty-seven and holds the Tyler chair in Constitutional Law. He has been named as one of the US's ten best law professors by *Time* magazine while the *National Law Journal* nominated him as one of America's 100 most powerful lawyers in public or private life. His text *American Constitutional Law* received the Coif Award in 1980 for the most outstanding legal writing in the country and is generally accepted as the leading work on US Constitutional Law.[12] Tribe has written more than a dozen books and approximately 100 articles, he is a frequent witness before the US Congress and has appeared as counsel in many important Supreme Court cases. The *National Law Journal* said in 1984 that he had a better record in the Supreme Court "than any other attorney after the US Solicitor General". According to the *American Lawyer*, many a "hopeless case" has ended up in Tribe's "long string of successes" because he "probably knows the mind of the Court better than any other advocate now appearing before it".[13] He first argued before the US Supreme Court in 1980. Even his critics acknowledge his creativity as a constitutional scholar.

He is described as "an all-purpose commentator on the Supreme Court".[14] Indeed, the day after the resignation of Justice Lewis Powell from the US Supreme Court was announced, Tribe was lecturing in West Germany and about to begin a month's vacation in the south of France with his family. Notwithstanding the difficulty of geographic inaccessibility, the ABC TV network's

"This Week with David Brinkley" had Tribe commenting on the import of Powell's retirement and the implications of his replacement. Increasingly, it seemed that no event of constitutional significance had really occurred until Tribe commented on it.[15] He is not unaware of his place in American constitutional law, the joke among the Harvard law students being that Tribe can never be appointed to the Supreme Court because of the constitutionally mandated separation of church and state and Tribe's belief that he is God.

Like Robert Bork, Tribe was mentioned constantly as a likely nominee to the US Supreme Court. Tribe came out against the Bork nomination (by President Reagan in 1987). This was not surprising. Two years earlier he had described his views of such nominations. He sought balance.[16] He had not publicly opposed the appointments of Sandra Day O'Connor or Antonin Scalia or the elevation of William Rehnquist to be Chief Justice[17] although he did assist Senator Edward Kennedy in preparing the Senator's opposition during the Senate confirmation hearings.[18] He did not initially publicly oppose Bork but merely advised those Senators opposed to the Bork appointment.[19]

His advice was born of his dismay at the imbalance on the court and because of specific instances where Bork had made public utterances limiting individual liberty of the citizen. His role changed from that of behind-the-scene-advisor and tutor to public witness in the Senate confirmation hearing.[20] This public and televised hearing greatly increased his fame and notoriety.[21] As a consequence, the Right has vowed, after losing the Bork nomination battle, that a Tribe nomination to sit on the Supreme Court was the one event for which they would go to war. Not only because he is a feared liberal advocate but also because of his highlighted role in the defeat of the Bork nomination.[22] Conservatives and Senate Republicans would never forgive him.[23] Tribe was exceptional,[24] and an unusually successful litigator.[25] Quick, attuned to questions from the bench and possessing an encyclopaedic knowledge of US constitutional law, he would use a justice's question to advantage. He would furnish a tidbit of information in response and then use it to launch into a key point of his argument.[26] Attorneys who consulted him were astonished at his high fees but waxed poetic about his nimble mind and his ability to grasp intricate legal arguments in minutes and to extend them beyond what they had imagined.[27]

As Bronner writes, as of 1987, of twelve cases Tribe had argued in the Supreme Court, he'd won nine . . . and he had done well financially from his litigation. Tribe's assessment of his worth and his mode of quantifying that worth are the point of this article.

Of course, not everyone is so enthusiastic regarding Tribe. The unsuccessful nominee, perhaps not recognizing that his own unpreparedness born of confident assumption was as much responsible as the opposition to his appointment of which Tribe was only a figurehead has this to say:[28]

> Laurence Tribe's constitutional theory is difficult to describe, for it is protean and takes whatever form is necessary at the moment to reach a desired result. This characteristic, noted by many other commentators, would ordinarily disqualify him for serious consideration as a constitutional theorist. But Tribe's extraordinarily prolific writings and the congeniality of his views to so many in the academic world and in the press have made him a force to be reckoned with in the world of constitutional adjudication.

The real obstacle to Bork's confirmation was that in a public career of nearly two decades he had left behind himself an easily discerned paper trail of his legal philosophy — a philosophy that the Senate refused to swallow.

The real obstacle to Bork's confirmation was that in a public career of nearly two decades he had left behind himself an easily discerned paper trail of his legal philosophy — a philosophy that the Senate refused to swallow. Those seeking public office are well advised to keep their thoughts to themselves as those who seek to appoint them (the US President) increasingly cast their net for the "stealth" nominee — such as President Bush's nomination of David Souter to fill the vacancy when Justice Brennan announced his retirement in 1990. The nominee had spent so little time on the US Court of Appeals that he had published no legal opinions. Thus the pundits and second-guessers were forced to study the opinions of the New Hampshire Supreme Court where Souter had sat prior to his appointment to the Court of Appeals. Souter had not written any articles or made speeches on controversial topics, and his New Hampshire court opinions dealt mostly with dry issues of state law. "About the only thing you can tell by reading New Hampshire Supreme Court opinions," one law professor observed, "is that you wouldn't want to be a New Hampshire Supreme Court judge."[29]

It would seem that New Hampshire has had a bad press when it comes to things legal; Martin Mayer interviewed a New Hampshire attorney and wrote that "[Joseph] Millimer's work is entirely in civil trials ('There isn't anything in New Hampshire worth stealing.')"[30] and Philip Gove's biographer describes his father's career choice thus: "After graduation [John] entered [Boston University] law school, but after a year changed his mind and decided to enrol in the Boston Institute of Osteopathy. He wrote his fiancee, Florence Babcock, that prospects for osteopaths looked very much brighter than those for lawyers [in New Hampshire]. . ."[31]

Discretion on the part of a public office seeker may be well advised to prevent his nominator learning too much about the nominee — consider the experience of Solicitor General Charles Fried nominated by President Reagan:

> The value of privacy that Fried favoured, as a law clerk to Justice Harlan and as a young scholar, was embraced by the Supreme Court in its landmark decision about abortion, *Roe* v. *Wade*. Among his Harvard colleagues, Fried applauded this ruling and defended it from attack by others then on the faculty, including his colleague John Hart Ely. To Fried's fortune as a prospect for political appointment [as Solicitor General] in the Reagan Administration, he did not emphasise his support for *Roe* v. *Wade* in print. One of his lawschool colleagues said, "Right before he went to Washington, we were together and someone asked him flat out: 'Does the Administration know your position on abortion?' He smiled and said, 'Well, I've never written it down.'"[32]

1977 AND ALL THAT

One of the nine wins described by Bronner was the Grendel's Den litigation. In 1977 Grendel's Den purchased a liquor licence from Scopio's, Inc. and sought its transfer by applying to the Cambridge Licence Commission (CLC) and the Alcoholic Beverage Control Commission of Massachusetts (ABCC). Pursuant to the then State law the licence application was disallowed upon the written objection of the Holy Cross Armenian Catholic Parish of Cambridge, Massachusetts because Grendel's premises were within 500 feet of the Church. The Church's objection was based on Grendel being the twenty-sixth application for a licence within the designated area and Grendel's premises being only ten feet from the Church. The Church had not opposed all the other twenty-five applicants. Furthermore, the Church objected that it had already had "plenty of noise, dirt, and abuse from Grendel's Den, Inc." since it had been established as unlicensed premises in 1971.[33] Grendel filed suit alleging violation of the First[34] and Fourteenth Amendments to the US Constitution. Ultimately, in 1982, the US Supreme Court upheld Grendel's claim that the State law permitting the Church veto violated the First Amendment.

In 1980 the District Court found in favour of Grendel.[35] Several months later the US Court of Appeals (Ist Circuit) reversed the District Court judgment,[36] then, rehearing *en banc* was granted, the Court of Appeals reversed itself and restored the District Court decision.[37] Consequently the CLC and the ABCC appealed to the Supreme Court which, in 1982, affirmed the Court of Appeal's *en banc* decision and that of the District Court.[38] The dissenting judgment of Rehnquist J. (as he then was) commenced:[39]

> Dissenting opinions in previous cases have commented that "great" cases, like "hard" cases, make bad law [citations omitted]. Today's opinion suggests that a third class of cases — silly cases — also make bad law.

Thereafter the CLC granted Grendel its licence over the Church's opposition and on April Fools' Day, 1983, Grendel began serving booze to its thirsty clientele. Shortly afterwards the Massachusetts State legislature amended its law to comply with the US Supreme Court decision.

Having prevailed in its constitutional challenge, Grendel now sought attorney's fees pursuant to the *Fees Act*. Grendel sought US$345, 290.91 being $17,348.73 for counsel's fees and expenses for the fee litigation and $327,942.18 in fees and expenses for the original litigation being made up of expenses of $7,489.68 and counsels' fees of $176,137.50 (Professor Tribe), $21,750 (Professor David Rosenberg) and $15,747.50 for Mr. Ira Karasick and a 50% "upward adjustment" of counsels' fees ($106,817.50) to reflect the contingent nature of the fee, the long delay in payment and the significance of the results achieved.[40] [We interpolate here to note that surely the contingent nature of the fee and the significance of the results achieved — a "success fee" — are but two ways of looking at the same thing. Isn't this a case of the successful plaintiff "double dipping"?]

Surprisingly, Professors Tribe and Rosenberg, given their intention from the outset to seek attorneys' fees and expenses, if Grendel prevailed, did not keep time records.[41]

Initially, the District Court upheld the fees and expenses claimed although it disallowed the 50% "upward adjustment" and Mr. Karasick's fee of $15,747.50. The court disallowed Karasick's fee on the basis that he served primarily as an intern and that his costs should be considered as part of the overhead of Professors Tribe and Rosenberg. Regarding the 50% "upward adjustment", the court held that while it was merited, the failure to keep accurate time records precluded such an adjustment. Thus the District Court awarded

$222,725.91 of the $345,290.91 sought.[42] By disallowing Mr. Karasick's fee, the District Court neatly sidestepped prejudice to his future career as a lawyer as, at the relevant times, Karasick was a law student and legal assistant to Professor Rosenberg. The CLC's opposition to Grendel's fee award application included the objection that Mr. Karasick's services to the plaintiff amounted to the unauthorized practice of law.[43]

The CLC and the ABCC appealed to the Court of Appeals, First Circuit.

Many thought Anderson a "pluperfect snob" and worse. Archibald Robinson was more tolerant: "If you *like* to put on dog, and *got* the money to put on dog, and know *how* to put on dog, I think you ought to be able to put on dog without being ridiculed."

JUDGE BEOWULF

On appeal to the US Court of Appeals, the fee litigation was heard by Senior Circuit Judge Cowen and Circuit Judges Coffin and Bownes. The opinion of the court was written by Circuit Judge Frank M. Coffin.

Ten years later Judge Coffin described his approach to and his disposition of the case:[44]

> One example was an attorney's fee case at the end of an important litigation. The attorney was claiming a very large fee. I left to my clerk the statement of the factual and procedural background and the setting forth of the legal authorities relevant to the standard of review and factors to be considered in fee allowances. My job was to dig into the details of the time spent, the work done, and the amounts claimed for each segment. This was a case where I knew my clerk could find the appropriate law but felt I should develop my own "feel" for the work done by the lawyer.

Two important cases referred to by Judge Coffin in his opinion were *Hensley* v. *Eckerhart*[45] and *Blum* v. *Stenson*.[46] These cases, presumably researched by Judge Coffin's clerk, concerned the approach of a court to fee litigation and awards. Both opinions were written for the US Supreme Court by Associate Justice Lewis Powell.

LEWIS POWELL, JR, ASSOCIATE JUSTICE OF THE US SUPREME COURT 1972–1987

After graduating in law from the Washington and Lee College (LL. B., 1931) and Harvard (LL. M., 1932), Lewis Powell joined the Virginia firm of Christian, Barton and Parker and two years later was enticed to join the biggest firm in town: Hunton, Williams, Anderson, Gay and Moore of Richmond , Virginia.[47] There he met name partner Henry W Anderson. Anderson's one-time fiancee, the Pulitzer Prize-winning novelist Ellen Glasgow, described Anderson thus:

> Long before I knew him, he had reached the top of his ladder and the ground below was liberally strewn — or so malice remarked — with the rungs he had kicked aside. If there was any social top in Richmond, he was standing upon it. People might laugh at him . . . They might ridicule his English accent . . . They might ridicule his slightly pompous manner and his too punctilious way of living. They might ridicule his English clothes, his valet, his footmen in plum-coloured livery; but it was his accurate boast that only death kept them away from his dinners.

Many thought Anderson a "pluperfect snob" and worse. Archibald Robinson was more tolerant: "If you *like* to put on dog, and *got* the money to put on dog, and know *how* to put on dog, I think you ought to be able to put on dog without being ridiculed." A later name partner George Gibson first met Anderson when he initially interviewed for his first job. He was ushered into the august presence and asked whether he could "look up law". "I think so," said Gibson, "I can certainly try." "Well, that is a good thing," Anderson responded, "for to put me to that task would be like putting a thoroughbred to the plough."

Although nominally working under another partner, the young Lewis Powell was seconded to Anderson who, at the time, was receiver of the Seaboard Air Line. The two of them commuted from Richmond to New York in a private railroad car and were met at Penn Central Station by a black limousine and taken to the Ritz-Carlton at 46th and Madison Avenue, where Anderson would go directly to his suite. He never bothered to check in or pay a bill. After their first meal, Powell asked whether Anderson had forgotten to pay. "No," said Anderson, "I don't sign anything here." Only later did Powell learn that the great man's custom was to send at Christmas a freight car of hams and produce to be divided among the hotel employees.[48]

LEARNING THE ROPES

When Powell proposed to bill the client for the firm's services, he discovered that "Colonel" Anderson did not keep records of his time. "I'm not a plumber," Anderson announced, "or a bricklayer. I don't charge by the hour." He simply assigned a figure to his services, which were rarely undervalued. "I can be of more help to a railroad client thinking about problems while I shave in

the morning," he told Powell, "than most of you could be in a month." Unfortunately, it fell to Powell to give this explanation to the Interstate Commerce Commission when the firm applied for its fee, but the commissioners knew Colonel Anderson and accepted his valuation.[49]

Unfortunately for Professor Tribe, Judge Coffin was not so ready to accept such cavalier assertions fifty years (and several binding precedents — including two written by Powell) later.

"I can be of more help to a railroad client thinking about problems while I shave in the morning," he told Powell, "than most of you could be in a month." Unfortunately, it fell to Powell to give this explanation to the Interstate Commerce Commission when the firm applied for its fee.

In WWII Powell enlisted in the Air Force and worked in intelligence where, after a year in North Africa, he was returned to Washington and thence to England as US military liaison with the codebreakers at Bletchley Park. Notwithstanding the strictures of life in rationed England, Powell was able to occasionally enjoy the finer things in life while staying in the flat of CBC radio correspondent Ed Murrow (a university friend from the early 1930s). At Bletchley Park he met the legendary Alan Turing,[50] the mathematics *wunderkind* behind the early primitive computers used to decode the Ultra and Enigma signals of the German and Japanese military communications. In view of his later assertion of innocence — I've never met a homosexual — his naivety was profound as the following incident described by his biographer illustrates:[51]

Five years later, Lewis F. Powell III was born. Knowing it was her last pregnancy, Jo had hoped for twins. Powell was so ecstatic at the birth of a son [after three daughters] that he could not quite believe his good fortune and asked the nurse if she was sure of the sex. "I have been looking at naked babies for twenty years," she answered disdainfully, "and have not yet made a mistake."

Powell's naivety was expressed during deliberations in *Bowers* v. *Hardwick*[52] — decided June 30, 1986, one year before his retirement. His plaintive assertion that he'd never met a homosexual[53] was interpreted by his colleagues as his never recognising that he'd met homosexuals. This is born out as one of his law clerks at the time and Alan Turing were homosexual. His clerk deliberated whether to 'fess up to his boss to allow him to see the "human face" of homosexuality. Ultimately the clerk decided not to and Turing and WWII were of a time when gays stayed inside the closet.

Bowers v. *Harwick* was one of Tribe's losing three out of 12 Supreme Court appearances and it was a narrow and, to Tribe, a disappointing loss. Deliberations were in Tribe's favour five to four (with Powell in the majority). However, as he later confessed, Powell switched and formed a new majority in favour of upholding Virginia's anti-gay laws. He later confessed, four years into his retirement, that he now believed that his change of mind was a mistake[54] — small consolation to the disappointed Tribe.

As has been already noted, it was Powell's retirement in 1987 that brought on the confrontation between Robert Bork and Laurence Tribe.

The links between Tribe and Powell are emphasised when one considers Tribe's views on the application of the mathematical rules of probability theory to judicial fact-finding.[55] Alan Turing had devised a measure of weight for evidence of "decibans" which was later mathematically described by Claude Shannon.[56]

JUDGE BEOWULF'S DETERMINATION

The District Court award of $222,725.91 was challenged by the CLC and the ABCC on two grounds: the time claimed and the hourly rate for such time.

The overriding principle is to award fees "adequate to attract competent counsel but which do not produce windfalls."[57] Whereas the District Court is usually thought to be best placed to determine a fair and reasonable award, this case involved absence of contemporary time records, extraordinarily high hourly rates ($275 for Tribe and $125 for Rosenberg) and claims for time spent in the most punctilious appellate research and preparation.[58]

(I) ABSENCE OF CONTEMPORANEOUS TIME RECORDS

Professor Tribe described his process of reconstructing his time records thus:[59]

I surrounded myself with masses of paper, consisting of the briefs, of some notes in connection with the briefs.

I looked at the calendar to figure out when I had filed certain briefs, because in some cases I don't think we actually had the date on it. When my calendar didn't indicate when a brief was filed and when the brief

didn't indicate, I tried to find out from others — sometimes even calling the Attorney General's Office — because my own records are just not that comprehensive. Then I tried to work backwards. For example, I know the practices that I go through in preparing for an oral argument. I lock myself in a room and think about it. I know roughly during which periods before an argument I would have done that. And I also know — I can remember vividly staying up all night on a number of nights before filing a petition for rehearing. And so I sat down and tried to figure it all out.

Henceforth, the First Circuit announced,[60] "we serve notice the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance. In the instant case we feel it would be unfair to apply this standard, but subject the retrospectively created record of time spent to a more exacting scrutiny . . ."

(II) REASONABLENESS OF TIME SPENT

As he later described in his book Judge Coffin undertook to reconstruct the time spent by Professors Tribe and Rosenberg by looking at the court documents to determine a reasonable number of hours necessary to conduct the case.

As a first step Professor Rosenberg was docked 13 hours from his 174 claimed hours because his reconstructed time records only added up to 161 hours. No other penalty was exacted for shoddy arithmetic but we sure hope his legal research was of a higher standard than his adding up.

Similarly, both professors claimed 19 hours each in oral argument. Professor Rosenberg was lopped eight (back to 11), giving him the benefit of any doubt, in that his presence was as support for Professor Tribe and not entirely necessary. Judge Coffin noted that of the claimed eight hours oral argument before the Supreme Court, that only in the most extraordinary case does the Supreme Court permit a party more than half an hour or one hour total oral argument for the whole case.

Professor Tribe was held to have spent an inordinate number of hours analysing the opposing briefs, research and preparing for oral argument. As evidence, 25 hours to produce a compelling 40 page brief was used as a benchmark by Judge Coffin to assess all other research.

Thereafter, the Court was convinced, "the early economy of effort and careful focus upon only what was necessary was lost in the heat and excitement of litigating an interesting First Amendment case."

Thus, in the early stages of the litigation, Professor Tribe expended 10 hours to digest a 58 page brief filed by the ABCC and drafting a 37 page response in 16 hours. Thereafter, however, Professor Tribe was engaged five to seven hours each day for 11 days preparing for oral argument for the 1980 Court of Appeals argument (66 hours preparation for oral argument in a case in which the total argument of both sides occupy one hour at most).

Thus the Court concluded: Grendel's fee application assumed that "the service to be rendered and compensated is one of perfection, the best that illimitable expenditure of time can achieve."[61]

But just as a criminal defendant is entitled to a fair trial and not a perfect one, a litigant is entitled to attorney's fees for an effective and completely competitive representation but not one of supererogation.[62]

The Court halved the 121 hours claimed for pre-argument preparation and post-argument petitioning to 60 hours.

It is simply not conceivable to us that the ablest of lawyers, having covered the same ground in arguments in the District Court, would have required the equivalent of a full week and a half of billable hours to prepare for oral argument.[63]

Consequently the Court halved the 121 hours claimed for pre-argument preparation and post-argument petitioning to 60 hours.[64]

SUPREME COURT PREPARATION AND ARGUMENT

This item, for which Grendel was seeking indemnity amounted to 308 hours ($84,700). The Court noted that "most of what Grendel presented in oral and written argument had already been argued at earlier stages of the litigation", and "Professor Tribe is an acknowledged authority in constitutional law and not a novice. . . Professor Tribe's efforts seemed to the Court to have been excessive."

A FROLIC OF HIS OWN

Further, "Half of the 14 page Amendment portion of Grendel's brief was devoted to a historical analysis, largely in four footnotes. While this analysis may be fresh and interesting, it was only briefly referred to in a footnote in the Supreme Court opinion . . . Professor Tribe spent 20 hours (billed at $5,500) producing an 18 line footnote on

three ancient English statutes." This comment by the court led the author of a law review article to suggest that Tribe's footnote was perhaps the most expensive in legal history.[65] It would appear that neither Judge Coffin nor the anonymous law review author were aware of the great Dr. Johnson's dictum that what is written without effort is in general read without pleasure.[66]

Thus Tribe's hours for the Supreme Court case were cut from 308 to 200 (his total hours for the whole litigation was cut from 640.5 to 468.5) and Professor Rosenberg's cut from 174 to 150.

> "Professor Tribe spent 20 hours (billed at $5,500) producing an 18 line footnote on three ancient English statutes." . . . perhaps the most expensive in legal history.

(III) HOURLY RATE

The Court accepted $125 per hour for Professor Rosenberg. However, notwithstanding Professor Tribe's credentials, it held that $275 per hour for litigation in the late 1970s and early 1980s was a bit rich in that Tribe's well-earned reputation was earned since the Grendel litigation.

At page 956 the Court said "Professor Tribe was not a particularly experienced litigator during this period and the factual elements of the case were so simple that they only took three pages to summarize." At the appellate levels, the legal problems ultimately reduced to a single, clearly understandable issue and as a consequence, the Court fixed an hourly rate of $175 as reasonable.

EXPENSES

Court of Appeals printing ($876.51) was disallowed *in toto* because Tribe had failed to make a timely application for such costs to be reimbursed by the Federal government despite being warned or advised to by the clerk. The Court held that Grendel's neglect to seek reimbursement from the government did not permit it to now seek an order against the appellants. The printing costs associated with the Supreme Court appeal of $3,306.31 were disallowed because the Supreme Court Rules required each party to bear their own and Tribe's accommodation claim of $917.24 was reduced to $400 (Tribe had actually incurred $1,543 but he conceded he had been accompanied by his family).

COSTS AWARDED FOR THE FEE LITIGATION

Professors Tribe and Rosenberg had engaged attorney Jonathon Shapiro to represent them in the fee litigation. The court was of the view that "[t]he two professors failure to keep contemporaneous records had needlessly increased the difficulty of Shapiro in familiarizing himself with the case and fees could not be recovered for time spent on Mr. Karasick's unsuccessful application for fees." Consequently the Court reduced 136.7 hours at $125 to 110.2 at $100 per hour.

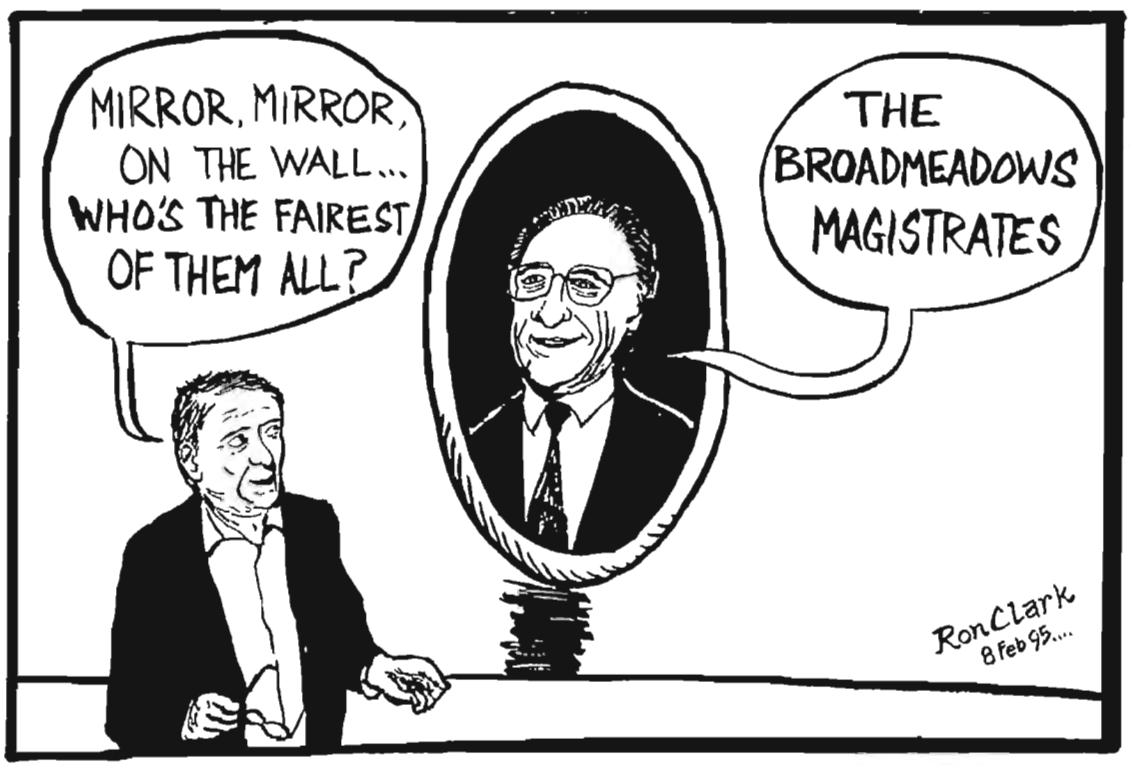
Thus the Court awarded Professor Tribe (and Professor Rosenberg) $113,640.95 out of a total $345,290.91 claimed and no order was made for costs and fees in respect of the appeal heard and determined by Judge Coffin and his colleagues.

In a later edition of *Bar News* we will be bringing you the saga of the fee award of more than $1 million against the plaintiffs' attorneys — Yes, the attorneys, not the plaintiffs.

ENDNOTES

1. With an "e", David, with an "e"!
2. We note that the two co-defendants discharged in the long-running Elders preliminary hearing were each seeking in excess of $1m for legal costs: the *Age*, 13 Dec. 1994, p.1.
3. **84** *Harv L Rev* **1329 (1971).**
4. **98** *Harv L Rev* 592 (1985).
5. **103** *Harv L Rev* 1 (1989).
6. *Mathematics and the search for knowledge* (1985) cited at **103** *Harv L Rev* 1 at 4, footnote 7 (1989).
7. *Three hundred years of Gravitation* (1989) cited at **103** *Harv L Rev* 1 at 4, footnote 7 (1989).
8. *The meaning of Relativity* (5th ed, 1956) cited at **103** *Harv L Rev* 1 at 4, footnote 8 (1989).
9. *God and the new physics* (1983) cited at **103** *Harv L Rev* 1 at 5 footnote 12 (1989).
10. *One, two, three . . . infinity* (1961) cited at **103** *Harv L Rev* 1 at 6 footnote 18 (1989).
11. *A brief history of time: from the big bang to black holes* (1988) cited at **103** *Harv L Rev* 1 at 6 footnote 18 (1989).
12. Biographical note, *God Save This Honorable Court; how the choice of Supreme Court Justices shapes our history* (1985).
13. *Ibid.*
14. Savage, *Turning Right: the making of the Rehnquist Court* (1992) 385.
15. Bronner, *The Battle for Justice: how the Bork nomination shook America* (1989) 37.
16. *God Save This Honorable Court* (1985).
17. Bronner 297.
18. Abraham, *Justices and Presidents: a political history of appointments to the Supreme Court* (3d ed, 1992) 350.
19. Schwartz, *Packing the Courts: the Conservative campaign to rewrite the Constitution* (1988) 137.
20. Simon, *Advise and Consent: Clarence Thomas, Robert Bork and the intriguing history of the Supreme Court nomination battles* (1992) 311.
21. Bronner 297.
22. *Ibid* 298.
23. Savage 385.
24. Savage 385.
25. Bronner 129.
26. Savage 385.

27. Savage 385.
28. Bork, *The Tempting of America: the political seduction of the law* (1990) 199.
29. Savage 355.
30. *The Lawyers* (1967) 32.
31. Morton, *The story of Webster's Third: Philip Gove's controversial Dictionary and its critics* (1994) 13.
32. Caplan, *The tenth justice: the Solicitor General and the rule of law* (1987) 13.
33. 662 F 2d 88 at 89 (1981).
34. Congress shall make no law respecting an establishment of religion . . .
35. 495 F Supp 761 (1980) *per* Tauro J.
36. 662 F 2d 88 (1981) *per* Circuit Judge Campbell and Senior District Judge Hoffman, Chief Judge Coffin dissenting.
37. 662 F 2d 102 (1981) *per* Chief Judge Coffin and Circuit Judge Bownes, Circuit Judge Campbell dissenting.
38. 459 US 116 (1982).
39. 459 US 116 at 127–128 (1982).
40. 749 F 2d 945 at 949 (1984).
41. *Ibid* at footnote 3.
42. 582 F Supp 1220 (1984) *per* Tauro J.
43. 582 F Supp 1220 at 1229 (1984).
44. Coffin, *On Appeal: Courts, Lawyering, and Judging* (1994) 208.
45. 459 US 116 (1983).
46. 465 US 886 (1984).
47. *The Oxford Companion to the Supreme Court of the United States* (ed Hall, 1992) 660, Jeffries, *Justice Lewis F Powell, Jr, and the era of Judicial Balance* (1994).
48. Jeffries 49–50.
49. *Ibid* 50.
50. Jeffries 90.
51. Jeffries 120.
52. 478 US 186.
53. Jeffries 521 and 528.
54. O'Brien, *Storm Center: the Supreme Court in American Politics* (3d ed, 1993) 272–4, *Oxford Companion to the Supreme Court of the United States* 80, Jeffries 540.
55. "Trial by Mathematics: precision and ritual in the legal process", **84** *Harv L Rev* 1329 (1971).
56. Hodges, *Alan Turing: the Enigma of Intelligence* (1983) 196–7 and 250, Shannon, "A mathematical theory of communication" (1946) **27** *Bell System Tech J* 379 at 392–9 reprinted in Shannon and Weaver, *The Mathematical Theory of Communication* (1962); Good, "Enigma and Fish" in Hinsley and Stripp (eds), *Codebreakers: the inside story of Bletchley Park* (1993) 149 at 154–5.
57. *Hensley* footnote 4.
58. *Grendel's Den, Inc* v. *Larkin* 749 F 2d 945 at 950.
59. 749 F 2d 945 at 951.
60. 749 F 2d 945 at 952.
61. 749 F 2d 945 at 953.
62. 749 F 2d 945 at 953–4.
63. 749 F 2d 945 at 954.
64. 749 F 2d 945 at 954
65. Aside, "Don't cry over Filled Milk: the neglected footnote three to Carolene Products", **136** *U Penn L Rev* 1553 at 1558 (1989).
66. Also "easy reading, hard writing" (Sheridan); "I did not have the time to shorten my letter" (Pascal); "Of every four words I write, I strike out three" (Boileau); and "I have made this letter longer than usual, only because I have not had the time to make it shorter" (Mark Twain quoted in Lasson, "Scholarship Amok: excess in the pursuit of truth and tenure", **103** *Harv L Rev* 926 at 942 (1990)) *qv* Murray, *Caught in the Web of Words: James A H Murray and the* Oxford English Dictionary (1977) 208–9



CHILDREN'S CHRISTMAS PARTY

THE BAR CHILDREN'S CHRISTMAS PARTY continues to be one of the most enjoyable functions of the year.

This year's party was, as is traditional, held at the Botanical Gardens. Simon Wilson performed with panache and style his large, red-suited role. (To use Simon's words, the Court of Appeal will pale into insignificance.)

One wonders what the children think of Santa's deep insight into the minds and hearts — and aspirations — of the members of the Victorian Bar.

This year there were about 40 barristers of both sexes in domestic harmony with their offspring and spouses on the grass. Dress was informal. As in other years, there was only one tie to be seen.

The age of the children ranged from about five months through to late teenagers attending with younger brother or sister. The age of the parents covered a much wider spectrum. Jim Merralls, complete with his new baby, was far from the oldest patriarch.

The day was perfect. The sun shone but did not bite. The children played happily. Some of them showed remarkable patience, particularly those who ranked number 50 or later on Santa's present list. The parents talked and ate and drank.

Santa's barbs slid over heads or between ribs. And Christmas was nearly on us. And there was no tomorrow. Certainly there was no sign that any of yesterday's certainties had been shattered. We recommend the Bar Children's Christmas Party even to those who do not have children.

SUPREME COURT OF VICTORIA — BUILDING CASES LIST

NOTICE TO PRACTITIONERS NO. 1 OF 1995

IN 1995 THE JUDGE IN CHARGE OF THE list will be the Honourable Mr. Justice Byrne. His Honour's associate is Mr. Peter Nugent and, from March, will be Mr. Paul Norris (Tel: 603 6358 Fax: 670 8408).

The practice of holding monthly Building Cases List days for the disposition of interlocutory matters will continue. Generally speaking, these will be held on the last Friday of the month. The following will be the Building Cases List days for 1995:

Friday, 3 February	Friday, 28 July
Friday, 24 February	Friday, 25 August
Friday, 31 March	Friday, 29 September
Friday, 28 April	Friday, 27 October
Friday, 26 May	Friday, 24 November
Friday, 16 June	Monday, 18 December

Notice of orders sought on any of these days should be served and filed one clear day previously. Any exhibit to an affidavit should be delivered to His Honour's associate one clear day before it is proposed to be read.

On Building Cases List days his Honour will be available at 9.30 a.m. to hear consent orders. Other matters will be heard as advertised in the Law List.

Where it is appropriate to do so His Honour will himself try questions which can be disposed of shortly and which may assist the resolution of the proceeding. For this purpose he may set aside such other day as may be available. Practitioners should consider whether such a question arises in their proceedings.

Where it is appropriate to do so His Honour will also hear and determine other urgent disputes arising out of building projects which might otherwise be brought in the Practice Court notwithstanding that the proceeding has not been entered in the Building Cases List. Such matters include applications for interlocutory injunctions and applications under the *Commercial Arbitration Act* 1984. See also Notice to Practitioners No. 3 of 1995, dated 1 January 1995 (Williams, *Civil Procedure Victoria* [12,504]). Practitioners wishing to avail themselves of this facility should address themselves to His Honour's associate.

From 1 October 1994 a special court fee of $1,500.00 is payable upon entry of a case to the Building Cases List. Where an order is made for entry to the list pursuant to Ch II R. 3.03(2), the Court will accept an undertaking for payment of this fee. This fee is not payable for applications referred to in the preceding paragraph, where the proceeding is not entered in the list.

The Regulations now provide for payment of a hearing fee of $250.00 for every day or part of a day of hearing at trial. Excepting the rare case where the application is for final relief, matters before the Judge on Building Cases List directions days are not considered to be "hearings at trial". (See *Supreme Court (Fees) (Amendment) Regulations* 1994.)

Documents for use by the Judge must be filed in the usual way with the Prothonotary and not with the associate. The present practice of filing documents with the associate during hearing will continue.

His Honour meets from time to time with a "Users' Group" representing legal and other practitioners concerned with building disputes. Practitioners wishing to offer suggestions for the more efficient conduct of the Building Cases List may address themselves to any member of this committee. Members are:

George Golvan QC Owen Dixon Chambers West (Tel: 608 7703)	David Levin Owen Dixon Chambers West (Tel: 608 7043)
John Sharkey C/- Sly & Weigall (Tel: 608 0411)	Tim Garood C/- Baker & McKenzie (Tel: 617 4200)
Brian Gallagher Building Consultant (Tel: 801 9814)	John Permewan Architect (Tel: 866 4566)

This Notice to Practitioners is in substitution for that dated 1 January 1994 (Williams, *Civil Procedure Victoria* [12,512]).

Dated 1 February 1995

Peter Nugent
Associate to Byrne, J.

NOTICE TO PRACTITIONERS NO. 2 OF 1995

Consent Matters

1. A consent matter is one where all of the terms are consented to.
2. His Honour will be available at 9.30 a.m. to deal with consent matters.
3. The case will not be called on for hearing until a completed blue form has been presented to His Honour's tipstaff or associate. It would be of assistance also if two copies of the proposed draft order were also provided.
4. Pro-formas of draft orders are available from His Honour's associate.

Contested Matters

5. Contested cases will be dealt with as advertised in the Law List.
6. The case will not be called on for hearing until a completed blue form has been presented to His Honour's tipstaff or associate.
7. Where possible any party requiring an order should prepare a draft in duplicate and present them to His Honour's tipstaff or associate. Where parties seek conflicting orders each should comply with this direction.
8. Practitioners are reminded that Practice Direction No. 3 of 1992 [1993] 1 VR 250, must be complied with wherever possible.

"Truth in Pleading"

9. It is particularly important in a judge-managed list that the real issues between the parties be exposed in the pleadings. For this reason the requirements of Rules 13.02(1)(a), 13.03 and 13.07(1) will be strictly enforced. The attention of pleaders is also drawn to Rule 13.06. Where standard form contracts are pleaded it is sufficient that the term be identified by number. These terms should not be set out in full unless the precise words are of significance.
10. Evasive pleading will not be tolerated.
11. The requirements of Rule 13.10 will be strictly enforced. It is the responsibility of the pleader to include in the pleading all necessary particulars. Unless good cause is shown, the costs of providing further particulars, including any request for these, will be borne in any event by the party in default.

Orders for Directions

12. His Honour's associate will ordinarily assume responsibility for the preparation of orders for directions made on Building Cases List days. Accordingly, in each case where this is done the last paragraph of the order will state:

    "This order be signed by a judge".

13. The associate will prepare the order. After it is signed he will send a copy to each party. Consequently, there is no need to lodge a request for authentication with the prothonotary.
14. In the appropriate case a draft only of the order will be circulated to all parties with a request that any party who wishes to speak to its terms should give notice to the associate. Upon the expiration of the period set out in the letter if no such notice is given, His Honour will sign the order in the terms of the draft.

Liberty to Apply

15. Parties in the Building Cases List have a general liberty to apply. Practitioners are urged to avail themselves of this liberty if difficulties arise between Building Cases List days. They may do this by addressing themselves to His Honour's associate by telephone (603 6358), letter or fax (670 8408). In the appropriate case an application may be brought before His Honour on short notice.

Trial

16. When all interlocutory steps are complete and the proceeding is ready for trial His Honour will make an order fixing the trial date or referring the proceeding to the Causes List or to the Long Cases List. The order will normally dispense with compliance with Rule 48.2 (Notice of Trial and Certificate of Readiness). The order will also recite that the proceeding is ready for trial and the estimated duration of the trial.
17. Estimates of likely duration must be realistic outside estimates.

    Where the estimate is less than ten sitting days his Honour will, if possible, fix a trial date. The plaintiff should ensure that a copy of the order is delivered forthwith to the Listing Master so that she may give effect to it. Note that, even when a date is fixed, practitioners must attend the relevant Callover or the date will be lost.

    Where the estimate is greater than ten sitting days the summons for directions will be adjourned to the Judge in charge of Long Cases who will assume responsibility for allocating a trial judge and a date.
18. As the proper despatch of business depends upon the accuracy of recitals referred to in the paragraph 16 parties and their practitioners should be aware that amendments or other applications may be refused where they may have the consequence of causing an

adjournment of the trial date or an extension of the trial beyond the estimated time. Practitioners should therefore ensure that the pleadings and particulars are in order before an order for trial is sought.

19. The order setting down a proceeding for trial will also include a provision empowering the Judge in charge of Long Cases or the Listing Master (as the case may be) to exercise the powers of the Court in relation to the proceeding.

This Notice to Practitioners is in substitution for Notice to Practitioners No. 2 of 1994 dated 1 January 1994 (Williams, *Civil Procedure Victoria* [12,516]).

Dated 1 February 1995

Peter Nugent
Associate to Byrne, J.

NOTICE TO PRACTITIONERS NO. 3 OF 1995

APPLICATION FOR LEAVE TO APPEAL *COMMERCIAL ARBITRATION ACT* 1984 S.38

Practitioners who wish the Judge in charge of the list to hear an urgent application for leave to appeal against the award of an arbitrator in a building case must lodge with the Judge's associate (Mr. Peter Nugent and, after February, Mr. Paul Norris. Tel: (03) 603 6358; Fax 670 8408) the following material:

1. A brief statement setting out the time the application is expected to take and the reasons for urgency.
2. A precise statement of the question of law arising out of the award on which the appeal is sought to be brought.
3. A copy of the proposed summons.
4. A copy of any affidavit filed in support together with exhibits.
5. When the exhibits are voluminous a note identifying the passages relied on.

Opposed matters should comply with Practice Note 3 of 1992.

The associate will advise the practitioner for the applicant whether the Judge considers the application appropriate to be heard by him and of the time and place of the hearing. The $1,500 fee payable upon entry of an action in the Building Cases List is not required. The hearing of the appeal, itself, (as opposed to the hearing of leave to appeal) being the trial of the proceeding attracts the $250.00 daily hearing fee prescribed by the Regulations.

This Notice to Practitioners is in substitution for that dated 11 February 1993 (Williams, *Civil Procedure Victoria* [12,504].

Dated 1 February 1995

Peter Nugent
Associate to Byrne, J.

MORE HELPFUL ADVICE

Brien Briefless

Lawyer: the only person in whom ignorance of the law is not punished.

Jeremy Bentham (readers doubting the veracity of Bentham's dictum are referred to *Jones* v. *Jones* [1970] 3 W.L.R. 20)

Everyone is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labour in finally determining what the law is.

per Paterson J., *Allen* v. *Allen*, 95 Cal 184 at 199 (1892)

It is ignorance of the law rather than knowledge of it that leads to litigation.

Cicero, *De Legibus*

Ignorance of the law does not prevent the losing lawyer from collecting the bill.

Brandreth, *The Law Is an Ass* (1984) 58

He says he took the advice of counsel. We suppose from the quality of the advice that he must have obtained it *gratis*; but, if he paid for it, he might be able to recover damages from his attorney for giving such advice.

per Bleckley C.J., *Treadwell* v. *Beauchamp*, 82 Ga 736, 9 SE Rep 1040 (1889)

Applying that decision, it seems to me that the advice given by these ambulance chasers to Mrs. Howell was on a par with the advice given by the works manager to Mr. Dodd. Mrs. Howell was advised by completely unqualified people that she had no claim in law. That means that she was in ignorance of one of the material facts, namely, that the driver or conductor were negligent and that the bus company were liable in law for the negligence of their servants.

per Lord Denning M.R., *Howell* v. *Midland PTE* [1973] 1 Ll Rep 199 at 201 (CA)

MODERN TECHNOLOGY

The original arrangement with the telephone was that an annual rent was paid, but calls were free. When, in due course, a halfpenny charge was levied on each call, one uncompromising barrister sent his clerk on foot to arrange his appointments daily in advance. The clerk, in revolt, arranged all appointments simultaneously on a particular day, ensuring that "two of the crankiest solicitors in Sydney" were among the callers. Suffice to say that in this case the telephone triumphed over parsimony.

A History of the N.S.W. Bar (ed. Bennett, 1969) 206

PUBLIC SERVICE

When it was suggested that a certain library should extend the hours during which the public could make use of it, the librarian objected on the ground that "readers interfere with the work of the library". That is the attitude of the courts and judges today. They give no signs of appreciating that they exist as public servants to serve the public. Everything must be subordinated to their convenience.

Parris, *Under My Wig* (1961) 186

GREATER LOYALTY HATH NO ATTORNEY . . .

Jenkins, Lonnie (white), 1931. Michigan. Jenkins was convicted of first-degree murder and sentenced to life imprisonment for killing his wife. Initially, a coroner's jury found that Mrs. Jenkins had committed suicide by shooting herself. Jenkins was later arrested, charged with murder, and convicted largely because a teenage girl testified that she had forged the wife's suicide note at Jenkins's instigation. Subsequent investigations by Jenkins's dedicated daughter revealed that the handwriting was indeed her mother's, however, and that the testimony against her father had been perjured.

Jenkins's attorney had conducted a prior investigation also showing Jenkins's innocence. In a macabre twist of fate, the attorney shot himself in the head while presenting a simulation of Mrs. Jenkins's suicide. In 1940 a motion for a new trial was granted. The prosecutor informed the court that a mistake had been made, and Jenkins was released after nine years in prison.

Radelet, Bedau and Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (1992) 317

JUSTICE TURNED BOTTOM-SIDE UP

Though the County Court may order an election *nunc pro tunc* it is beyond the powers of the Court, or of an Act of Parliament, to recall a day that has passed, or to make a thing which happened not have happened.

per Maule J., *Mayor of Berwick* v. *Osward* (1854) 3 El & Bl 653 at 670

Except in topsy-turvy land, you can't die before you are conceived, or be divorced before you ever marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons . . . a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e. before a judicial remedy is available to the plaintiff.

per Frank J., *Dincher* v. *Marlin Firearms Co.*, 198 F 2d 821 at 823 (1952)

The improbable — by definition being not impossible — sometimes does occur.

per Frank J., *Old Colony Bondholders* v. *NY, NH & H Railroad Co.*, 161 F 2d 413 at 443 (1947)

. . . it is always probable that something improbable will happen.

per Bleckley J., *Warren* v. *Purtell*, 63 Ga 428 at 430 (1879)

The Court grants judicial review and relief to the group while refusing it to the individual. So far as I can recall, this is the first time this Court has held rights of individuals subordinate and inferior to those of organized groups. I think that is an inverted view of the law — it is justice turned bottom-side up.

per Jackson J., *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 US 123 at 186 (1951)

EARNING THE LOYALTY OF YOUR STAFF

[Justice William O.] Douglas could be nice — very nice — Justice Marshall recalled, but most of the time "he was awful rough on his staff". One time the brethren got a memorandum that said, in effect, "I apologize for the mistake in not having done something on a motion. This was caused solely by the stupidity of my secretary." The memorandum had been typed by that same secretary, which seemed a terrible thing to Marshall. He went down the hall to Douglas's chambers to tell her how upset he was at this callousness on her boss's part. She responded: "It doesn't matter to me; I get worse than that. But I love the man. He is a great man."

Justice Brennan confirmed that Douglas's secretaries tolerated a great deal of bad behaviour from him, including frequent bawling outs, firing them one minute and rehiring them the next.

He Shall Not Pass this Way Again: The Legacy of Justice William O. Douglas (ed. Wasby, 1990) 42

LEGAL EDUCATION

When Robert Hutchins was Dean of Yale Law School, he had a brief conversation with William Howard Taft, then Chief Justice of the U.S. Supreme Court. "Well, Professor Hutchins," said Taft, "I suppose you teach your students that the judges are all fools."

"No, Mr. Chief Justice," replied Hutchins, "we let them find that out for themselves."

Adler, *Philosopher at Large* (1977)

At Yale Law School there was the inimitable Thurman Arnold, who led classes in civil procedure. It mattered little what Arnold was formally charged with teaching, because it was the brilliance of his mind and his unique wit that entranced the students. An absent-minded genius, Arnold would frequently bring his dog Duffy to class, and threaten to pose questions to the poor creature if the class did not shape up.

Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* (1988) 10

AFFIRMATIVE EMPLOYMENT ACTION

The perennial problem soon arose: the most qualified individuals, for the most part, were Jews. [Harold] Ickes maintained that Jews did not predominate in the entire Bitumenous Coal Division, but only on its legal staff, and he defended their presence there. His "principal difficulty," the Secretary said, was finding good Gentile lawyers to carry on the legal work of a division that addressed a greater variety of legal issues than any other sphere of government except the Department of Justice. "What can one do if he wants legal ability and those who possess it and who offer themselves are preponderatingly Jewish?" Ickes replied to someone who had asked him how many Jews the Coal Division employed. "Even so, I try to keep a good balance except among my legal staff."

Fortas worried about balance too. After Kreeger hired a group of Jewish law review men from Ivy League schools, Fortas asked to see him. "It doesn't matter to me, [and] it probably doesn't matter to the Secretary of Interior, but could you hire some Gentiles?" Fortas requested. Kreeger promised to do his best. He soon found a blue-eyed, blonde Bostonian named Joseph Dunn. Though Dunn had not excelled at Harvard, Kreeger decided to lower his standards for an Irish Catholic. Fortas, he recalled, was "so pleased" by the news of the appointment. Then came the Jewish holidays. When Dunn asked whether he would have to work on Rosh Hashanah and Yom Kippur, his colleagues learned for the first time that Dunn was Jewish.

Kalman, *Abe Fortas: A Biography* (1990) 68–9

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EARNING YOUR FEE

I'm not a potted plant. I'm here as his lawyer. That's my job.

Brendan Sullivan Jr. on being told to allow his client (Lt.-Col. Oliver North) to object for himself if he wished to do so at the Iran-Contra Senate hearing (9 September 1987)

A VIEW FROM THE OTHER SIDE

A barristers' clerk was dining at a window table in a fashionable and expensive restaurant with a colleague when one of his barristers passed by. "There goes one of those bastards," said the clerk, "who take 95% of everything I earn."

GIVE AN ACCURATE ESTIMATE OF THE HEARING'S DURATION

Sir William Owen from the bench said, "You have a great pile of books on the table, Sir Julian [Salomons]. Do you intend to cite from all of them?"

"No, not if Your Honours know the law," was the reply; and then he added very deliberately, "but I expect I shall have to cite most of them. Yes, I think my argument must run the whole day."

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

CONFIDENCE IN YOUR PROFESSIONAL BRETHREN

Keep a sharp eye on your coat. This place is filled with lawyers.

A *Chicago Tribune* gossip column, reporting a conversation overheard in the cloakroom of the Chicago Bar Association's members-only restaurant.

Andrew Heine seemed particularly nervous in his first days at his new home. Partners informed him that they had a million-dollar "key man" life insurance policy on Kumble, lest anything happen to their primary rainmaker. Heine listened with interest. But he was so accustomed to being disliked that he began to tremble when it was suggested that a similar policy be taken out on his life.

"One of you bastards will push me out the window," said Heine with no hint of a joke.

Eisler, *Shark Tank: Greed, Politics, and the Collapse of Finley Kumble, One of America's Largest Law Firms* (1990) 50

LOOK A GIFT HORSE FROM YOUR COLLEAGUE IN THE MOUTH

Janet Dulles [wife of John Foster Dulles] wore to the inauguration [of President Eisenhower in 1953] an emerald necklace that had been given to her by William Nelson Cromwell. Only when it was appraised after she died nearly two decades later did her children learn that the necklace was a fake. Each generation has its own reasons for remembering Cromwell.

Lisager and Lipsius, *A Law Unto Itself: The Untold Story of the Law Firm Sullivan and Cromwell* (1988) 106

SOLICITUDE TOWARDS YOUR OPPONENT'S CLIENT

[The plaintiff] Fraser was asked by the defendant's counsel, Helenus Milmo: "Do you seriously suggest that an honest law-abiding citizen would think one whit the worse of you because you gave information to the police?"

To this Fraser very frankly replied, "I do not know what would be in an honest person's mind".

"I appreciate your difficulty," observed Mr. Milmo.

Hooper, *Public Scandal, Odium and Contempt: An Investigation of Recent Libel Cases* (1984) 70–1

PRIDE IN YOUR CHOSEN PROFESSION

There used to be a time I'd be embarrassed to tell people what I did for a living. "I do social work among the rich," I would say.

Chicago divorce lawyer Joseph DuCanto quoted in 69 *ABA Journal* 31 January 1983)

BREAKING THE BAD NEWS GENTLY

"But I've learnt an awful lot of law listening to you, Counsel. And if I go to jail, I'll use my time learning some law. Perhaps I'll become a solicitor when I come out." I told him, as gently as I could, that I thought he wasn't dishonest enough.

Abrahams, *Lunatics and Lawyers* (1951) 86

AN OLD SAW

Judge [to counsel]: If what you say be the law, I'd better burn my law books!

Counsel: Your Lordship would do well to read them first.

THE JUDGE DESCENDS INTO THE ARENA

An old story tells of a lawyer whose witnesses were constantly being taken out of his hands by an impatient judge, and who grew alarmed at the judge's line of questioning.

"Your Honour," he said, "I have no objection to your trying my case for me — but for God's sake don't lose it!"

Mayer, *The Lawyers* (1967) 498

AN EVASIVE DEFENDANT

Engelbert Humperdinck was a difficult party to serve process upon in a suit initiated by a star-struck young woman who alleged that he was the father of her child. According to the plaintiff, Humperdinck's *modus operandi* was to select an attractive girl in the first few rows of the audience at his concerts and invite her up onto stage with him and thereafter to the privacy of his dressing room.

The plaintiff's lawyer said that "private detectives tried for months to serve [the] court papers". They finally hired a pretty girl to sit in the front row of a Humperdinck concert. When he invited her on stage she handed him a bundle of red roses with the green court papers wrapped around the stems.

"You should have seen his face when he realised what was happening," said private detective Jim Sarno. "It sure spoiled his song."

The (Melbourne) *Herald* (17 March 1979) 3

FAMILY LAW

She cried — and the judge wiped her tears with my chequebook.

Multi-married Tommy Manville describing one of his divorces

RESPECT YOUR DEPARTED COLLEAGUES

One high-ranking judge tells of a time when he arrived late at a funeral service. The first man he saw was Hugo Black, controversial U.S. Supreme Court Justice. Black was only present because he was expected to be; in fact, he'd always felt a dislike for the deceased.

The tardy guest tip-toed over to Black and asked him, "How far has the service gone?"

Black muttered to the other judge, "They just opened for the defence".

"How far has the service gone?"
Black muttered to the other judge, "They just opened for the defence".

ASKING THE QUESTION WITHOUT KNOWING THE ANSWER

On one exceptional and memorable occasion it was a mild and quiet young man giving evidence who had the last word and scored off F. E. Smith:

"Whom did this man marry?"

"A woman."

"Don't be stupid. Did you ever hear of anyone who didn't marry a woman?"

"Yes, my sister married a man."

TASTEFUL DECORATION OF YOUR CHAMBERS

At a time when the existing standard of law office decor was rolltop desks and cracked leather sofas, Dulles preferred the elegance of wall-to-wall carpets and a winding staircase connecting the floors. One of the partners of Davis, Polk, Wardwell, Gardiner & Reed came over and commented, impliedly comparing the decor to a call house, "It's very nice; I might stay for a drink, but I don't think I'll go upstairs".

Lisager and Lipsius, *A Law Unto Itself: The Untold Story of the Law Firm Sullivan and Cromwell* (1988) 106

ANOTHER VIEW FROM THE OTHER SIDE

When I was at the Bar I'm bound to say that I found some judges extraordinarily wooden-headed. I had to say the same thing over and over to them. Now I'm on the Bench I can't understand why counsel are always repeating themselves.

Mr. Justice Clavell Salter

THE INAUGURAL VICTORIAN BAR GREAT DEBATE

THE INAUGURAL VICTORIAN BAR GREAT Debate was held by the Bar Council at the Essoign Club on 1 December 1994. When the idea of a debate was first proposed, the Chairman had grave reservations. These are serious times and surely some things are just not funny. Lawyer jokes, for example. There are 20 pages of them in the new *Penguin Book of Australian Jokes* — not one of which is in the least amusing. A quick survey of the senior Bar confirmed the Chairman's worst fears. "A debate?", said Mellans, "Too frivolous!".

And yet, as Merralls' French cousin, Rabelais, said, "Laughter is what characterises man" (and woman, he *should* have said). There is no doubt that humour is born of adversity, or in the Bar's case, adverse publicity. As Woody Allen said, "More than any time in history, mankind faces a crossroad. One path leads to despair and hopelessness. The other, to total extinction. Let us pray that we have the wisdom to choose correctly."

The proposition debated was *That Being a Barrister is Not What It Used To Be* and to the surprise of none but the negative, the affirmative won. The brave and soon to be legendary participants comprised judges, silks and juniors — men and women who all shared an extraordinary quality in a lawyer, and a fundamental requirement for participation in the Great Debate — the ability to speak for seven minutes and then stop. Her Honour Judge Curtain, Hayes Q.C. and Paul Elliott for the affirmative; The Hon. Justice Heerey, Whelan and McLeod for the negative. The debate demonstrated that humour breaks down all barriers — in this case between silks and juniors, men and women, debate and vaudeville.

Each speaker also demonstrated the ability to tread the fine line between what is funny and what is correct. For those who overstepped the mark, the Great Debate witnessed, for the first time in Australian debating, the use of a device hereafter to be known as the Gender Bias Alert Alarm for the Maintenance of Political Correctness (B.A.A. for short). The B.A.A was wielded with extraordinary restraint by Georgina Grigoriou. Paul Elliott, to his great satisfaction, received the most gongs.

Whelan wheedles

McCloud menaces

Hayes harangues

Meldrum mauls

It's curtains for this Judge

Elliott mimes Marcel Marceau

Heerey hurls humbugs

The highlights included Hayes' preview of barrister-sponsored television programs — pick the sponsor of "Hey Dad", "The Travel Show", "Man O Man", Heerey J.'s masterful vision for a Court of Appeal, Elliot's cathartic mime and McLeod's demonstration of the Q.C. Lift Nod. Whelan demonstrated what a well-aimed F.O.I. application can achieve. A number of confidential documents were uncovered by him in highly suspicious circumstances. Whence did they come — we have a right to be told!

Meldrum Q.C. adjudicated, although scathing condemnation is probably a better description of his comments which reduced all but two of the debaters to tears. Having said cruel things such as "Whelan, don't give up your night job", he then proceeded to stray from the topic in the most incorrigible way in his exploration of what abalone divers and the Victorian Bar have in common — quite a lot as it turns out.

Following the success of the inaugural debate, and before the organisers can be enjoined by order of the court or otherwise, other debates are planned. Expressions of interest are sought from any barrister with the aforesaid ability to speak for seven minutes and then stop — self-regulation of the cruelest kind.

TERRY McCRANN COMMENTS ON N.R.M.A. CASE

"THE LATEST COURT DECISION HAS BOTH cleared the air and muddied the waters — perhaps more importantly, it has done nothing to bridge the yawning gap between the two sides, and in fact cemented them in their bunkers."

A BIT ABOUT WORDS

MANY PEOPLE REGARD PHILOLOGY AS A dry subject. Not surprisingly, many people assume that all philologists are therefore dry and humourless people. That may well be true for the generality, but in even the most arid desert an oasis can be found.

I have not met many philologists. Those whom I have met have ranged from intellectual stick-insects to crusty pedants. I have read many books written by philologists. A significant number of them are works of dry and humourless authors. However, there is a surprising number of philologists (or at least published philologists) whose wit crackles and sparkles across the page, and marks them as people who would have been fascinating to meet, if not likeable.

Of all those who write about words, writers of dictionaries seem to have spent their time at the end of the personality queue. Perhaps that is because their purpose is so serious. Perhaps it is because dictionaries are mostly written by committees. The *Oxford English Dictionary*, in all respects a splendid work, is nevertheless soulless and dry. You will read thousands of its pages before encountering anything that could pass as witty, much less flippant. This, notwithstanding that Dr. James Murray, who was the guiding spirit of the First Edition, was a fascinating, scholarly and gentle man.[1] Furthermore, because the OED is based on historical principles, it records the facts about the way words have been used, but rarely expresses opinions about that usage. Of course, it characterises words as *obs*, *vulg* or *archaic*. Likewise, it notes some spellings and usages as erroneous. But these opinions are expressed by use of typographer's marks, or discreet abbreviations in brackets.

Likewise, the *Macquarie Dictionary* is neither humorous nor opinionated. The Macquarie is not based on historical principles. It cannot claim that excuse for its blandness. Conceived in the 1970s and born in 1981, the Macquarie is a monument to post-war permissiveness. It reflects in language the tolerance advocated by Dr. Spock until he racanted after seeing the living results of a generation of his teaching. It embodies the non-judgmental ideals which mask lazy pedagogy ("it doesn't matter what they say or how they say it, as long as they express themselves").

By contrast with the OED's stoic aloofness, and the Macquarie's non-judgmental blandness, Dr. Johnson's dictionary had real character. Johnson wrote the dictionary by himself. Whilst he had some limited research support, the writing is his. When published in 1755, his was the first great dictionary of the English language. It was immediately hailed as the greatest dictionary of any living European language. What is remarkable in such a great work of philology is that Johnson's brilliant intellect and salty personality is evident on every page. There are many famous examples. I offer just a few:

PATRON. One who countenances, supports, or protects. Commonly a wretch who supports with insolence, and is paid with flattery.[2]

OATS. A grain, which in England is generally given to horses, but in Scotland supports the people.

FOXHUNTER. A man whose chief ambition is to shew his bravery in hunting foxes. A term of reproach used of country gentlemen.

GALLEYFOIST. A barge of state; and by our old authors applied to the Lord Mayor of London's barge.

GOOSE. A large waterfowl proverbially noted, I know not why, for foolishness.

LEXICOGRAPHER. A writer of dictionaries. A harmless drudge.

There can be no aspect of English usage or vocabulary that has not been the subject of countless books by countless philologists. So far as it is possible to form a picture of their authors, faceless behind the torrents of words, it is apparent that the writers are not always as interesting as their subject. But, as with dictionaries, so here there are

those whose strong opinions or quirky personality demand attention or even affection. My favourite amongst these is H.W. Fowler.[3] Fowler was as opinionated and as acerbic as Johnson. The *Oxford Companion to the English Language*[4] says of Fowler at p.415:

Fowler was a gifted amateur scholar . . . he remained essentially unaware of the linguistic controversies sweeping through the Universities of Europe and the New World. He did not read the learned journals and books in which scholars . . . were propounding the doctrine of prescriptive linguistics. His models were the classical languages of Greece and Rome, modified to suit the facts of the English language as he saw them. The responses of writers and scholars to his work have varied, journalists tending towards praise and even adulation, academic linguists towards caution and even reproof . . . (dates 1858–1933).

Fowler's great contributions to philology are four: he edited the First Edition of the *Concise Oxford English Dictionary*; he edited the First Edition of the *Pocket Oxford English Dictionary*; with his brother Frank he wrote *The King's English*; and he wrote *Modern English Usage*.

With all the confidence of one who worked for the *Times* before Rupert Murdoch took it over, Philip Howard seems the self-appointed angry young man of philology.

The structure of *The King's English* is that of a fairly orthodox grammar. However, its contents show nicely that the Fowler brothers were not afraid of expressing their views. *Modern English Usage* was planned by the brothers jointly but it was written by H.W. alone, due to the death of F.G. from tuberculosis contracted during the Great War. In one of Fowler's few public acts of humility, he dedicated *Modern English Usage* to his brother, and touchingly lamented that Frank could not have contributed to the writing of it.

Modern English Usage[5] is nothing if not quirky. It comprises a series of articles, arranged alphabetically: simple enough but for the fact that many of the articles have such idiosyncratic titles that only a person who has read the work would have the slightest idea where to look for information on a particular subject. For example: *Wardour Street* (on quaint and anachronistic language), *barbarisms* (any usage Fowler doesn't like), *battered ornaments* (linguistic flourishes past their use-by date) and *sturdy indefensibles* (usages which are wrong and yet persist despite the complaints of such writers as Fowler).

Just as the article titles are idiosyncratic, so the content of the articles is unmistakably H.W. Fowler. For example:

Stock pathos. Some words and phrases have become so associated with melancholy occasions that it seems hardly decent to let such an occasion pass unattended by any of them. It is true that such trappings and suits of woe save much trouble; it is true that to mock at them lays one open to suspicion of hard heartedness; it is also true that the use of them suggests, if not quiet insincerity, yet a factitious sort of emotion, and those are well advised who abstain from them . . .

Split infinitive. The English speaking world may be divided into (1) those who neither know nor care what a split infinitive is; (2) those who do not know, but care very much; (3) those who know and condemn; (4) those who know and approve; and (5) those who know and distinguish . . .

Pedantry. May be defined, for the purpose of this book, as the saying of things in language so learned or so demonstratively accurate as to imply a slur upon the generality, who are not capable or not desirous of such displays. The term, then, is obviously a relative one; my pedanty is your scholarship, his reasonable accuracy, her irreducible minimum of education, and someone else's ignorance. It is therefore not very profitable to dogmatise here on the subject; an essay would establish not what pedantry is, but only the place in the scale occupied by the author; and that, so far as it is worth enquiring into, can be better ascertained from the treatment of details, to some of which accordingly, with a slight classification, reference is now made . . .

The Second Edition[6] of MEU was edited by Sir Ernest Gowers. Unfortunately, Gowers has none of Fowler's spiky opinions. The Second Edition has lost some of the personality which characterised the First. Happily, Robert Burchfield is in the process of producing a Third Edition. It should be worth getting.

More recently, Philip Howard manages to capture some of Fowler's striking individuality. With all the confidence of one who worked for the *Times* before Rupert Murdoch took it over, Philip Howard seems the self-appointed angry young man of philology. No one could agree with him all the time, and sometimes he does take liberties, but he is eminently readable. But I do not have the time or the space now for a discussion of Philip Howard; nor of Ivor Brown; nor the gentle

Professor Ernest Weekly, MA. Of them, something next time.

Instead, for balance and symmetry, the Australian Fowler: Nicholas Hudson. His *Modern Australian Usage* was published in 1993 — appropriately enough by Oxford University Press. Like Fowler, his article headings are unpredictable, and his prejudices are plainly exposed. For example:

Repetitions and refreshers. If St Paul had had a keen sense of economy and less sense of theatre, he might have written "charity . . . beareth, believeth, hopeth, and endureth all things". However, he was repetitious: "charity . . . beareth all things, believeth all things, hopeth all things, endureth all things" . . .

A second use of repetition is the refresher. The term is borrowed from commerce, where it refers to the sums which have to be fed at regular intervals into time-based devices like parking meters and barristers . . .

Respect. In utterances starting *Mr. Chairman, with respect* . . . the phrase *with respect* is a conventional signal that what follows is a dissent from the Chairman's ruling. It is thus a hypocritical euphemism. Nevertheless, the convention which demands it is a good one, giving the Chairman an opportunity to retreat on a specific point while maintaining overall authority . . .

Ploddery. There is a curious idiolect which is associated, not entirely unfairly, with Mr. Plod, the police witness in a court of law, and is hence called *ploddery.* It is noted for pleonasm, for self-conscious use of less common words . . . for malapropisms . . . and for using everyday words and phrases in ways which, while they are in the dictionary, are not the ways these words are normally used, e.g. *to acquaint with* (= to tell), *to effect* (= to make), *to occasion* (= to cause), *particulars* (= facts) . . .

The other characteristic of ploddery is to construct sentences of quite unnecessary complexity, often starting with adverbial clauses which hang about in the corners of the Court, waiting for a main verb. Some people can do this sort of thing and get away with it. There are radio interviewers whose control of immensely long and complex sentences never ceases to astonish me. Just as I am thinking that they must have lost the thread, the ends are joined up and out comes an immaculate finished garment. Mr. Plod, on the other hand, just runs the sentence on and on . . .

Chastened by that, I end.

Julian Burnside

1. See *Caught in a Web of Words*
2. For the background to this insouciant definition, see his famous letter to his patron, Lord Chesterfield.
3. 1858–1933
4. Oxford University Press 1992
5. First published 1926
6. 1968

VERBATIM

Industrial Relations Court of Australia

Glimshold v. *Australian Unity Friendly Society*
5 December 1994
Coram: Judicial Registrar Ryan

During the course of proceedings one Richard McGarvie of Counsel had the opportunity denied his father of cross-examining one Murray McInerney.

Family Court

Melbourne
17 February 1995
Coram: Judicial Registrar Ramsden
Appearances: Ross Hutchins for the husband

The Court was asked to make the following order:

That the wife permit the said child . . . to attend either Victoria Park, the Melbourne Cricket Ground or Football Park Waverley on a Friday night or Saturday whenever Collingwood Football Club plays an AFL match at such venue.

His Honour queried whether such an order could be said to be beneficial to the welfare of this child. Counsel for the husband said "not only is the order in the interests of this child but beneficial to the interests and welfare of every child"!

Supreme Court of Victoria

Starkey v. *Connell and Ors.*
Coram Mandie J
R. Meldrum Q.C. for R. Middleton for the Plainfiff
D. Curtain Q.C. and D. J. Martin for the First and Fourth Defendants
R. J. Stanley Q.C. and J. Ruskin for the Second and Fifth Defendants
R. Gillies Q.C. and D. Graham for the Third and Sixth Defendants

8 December, 1994:
Gillies Q.C. (when advising His Honour as to the number and identity of witnesses whom he proposed to call): We propose to call Dr. Peter Stanley, who is an infectious diseases expert, coincidentally the brother of my learned friend Mr. Stanley. We are calling him as an important witness, not just to demonstrate the achievements of the Stanley family, nor just to see whether Mr. Meldrum gets on better with Dr. Stanley than he does with Mr. Richard Stanley Q.C., but I anticipate that Mr. Meldrum will enjoy cross-examining Dr. Stanley. Neither one is all that economical with words, and I would anticipate that he would not be a short witness.

8 February 1995:
Meldrum Q.C. (to witness): The Plainfiff has got, of course, two wounds — one in the clavicle at the insertion site of the catheter, and one at the exit site under her right breast. I am pointing to my left side because I have been seduced by my learned friend Mr. Gillies who constantly points to the left when he means the right.
Gillies Q.C.: That is a horrible prospect, Your Honour.
His Honour: Indeed.

10 February, 1995:
Meldrum Q.C. (in the course of his final submissions): The time gaps between the various testings varied . . .
Stanley Q.C. (sotto voice): So what?
Meldrum Q.C.: The irrepressible Mr. Curtain says, "So what."
Martin: He's not even here.
His Honour: If he was here, that's what he would have said: 'So what'. He is sill haunting you now, Mr. Meldrum.

Supreme Court of Victoria

Re Warland
8 December 1994
Coram: Beach J
Nash Q. C. for Applicant
Sparke for Respondent
(not contributed by Nash)

Nash explains that he is acting for the trustee of a deceased estate who wants directions from the court as to the filing of tax returns in England . . .
Beach J.: The English tax authorities have no right to any tax relating to Australian assets. In fact, they have no moral right to anything.
Nash Q.C.: (explains that the English beneficiaries of the Estate could be landed with a large tax bill).
Beach J.: Have they considered moving to Australia?
Nash Q.C.: Any Englishman who hasn't realised the value of moving to Australia by now — it's too late for them.
Beach J.: Why don't they move all their assets to one of those island tax havens and avoid the problem?
Nash Q.C.: I have endeavoured to find a similar solution to the problem as your Honour is considering. The best I came up with is that they should pay *me* the distribution from the estate and I move to one of those tax havens
Beach J.: Make that two tickets, would you? One way.

Supreme Court of Victoria

Kaye Q.C. (for a financier claiming against a solicitor) cross-examining a solicitor. The witness asks for a document. He is given it by a member of counsel at the bar table.

Cross-examination is completed. Witness hands back the document.
Witness: I am indebted to my learned friend . . .
Kaye Q.C.: No, Mr. X, you are indebted to my client.

Supreme Court of Western Australia

R v. *Pinkstone*
17 January 1995
Coram: Owen J.
S. O'Sullivan for the Crown
T.F. Percy for the Accused

(His Honour was considering an application to discharge the jury.)
Owen J.: That is the matter which had me reflecting before old tapes of Brideshead Revisited at 1 o'clock this morning . . . Just in case my last remark indicates a breach of the copyright laws, I might indicate that the tapes Brideshead Revisited were hired from a video shop.

Supreme Court of Western Australia

R v. *Mason & Robinson*
16 December 1994
Coram: Owen J.
K. Bates for the Crown
T. Percy and T. Monaghan for Robinson
L. Roberts-Smith Q.C. and B. Illari for Mason

Percy: Had you been drinking a lot that night?
Witness: I had had a few.
Percy: Had a few?
Witness: But I was driving so I didn't have many.
Percy: It doesn't necessarily go together, does it?
Witness: Maybe not for you.

An Entry Sent from Canada

Federal Court of Canada

Trial Division
18 November 1994
Coram: Muldoon J.

Between:
RATNASABAPATHY KONESASUBRAMANLAM
PUSPAVATHY KONESASUBRAMANLAM
(PUSPAVATHY KUMARASAMY (KONESASUBRAMANLAM))
NIROSAN KONESASUBRAMANLAM
NIROJA KONESASUBRAMANLAM
Applicants
and
MINISTER OF CITIZENSHIP AND IMMIGRATION
Respondent

ORDER

UPON the applicant's motion, pursuant to Rule 324 for an order setting aside the decision (U93–06877, –06880, –06885 & –06887) dated 26 November, 1993 by the Convention Refugee Determination Division of the I.R.B., and remitting the matter back for (re)determination [true, lawful determination] of the applicant's refugee claims, to a newly constituted panel of the tribunal; and

UPON noting the respondent's consent (not as Minister of Citizenship and Immigration which ought to be, and is nunc pro tunc the designation herein), which consent is sere and barren of all grounds for failing or declining to respond in this matter of public law, thus inflicting upon this judge the task of doing the respondent's lawyer's work (a state of affairs which will not long endure) if the respondent is not to be publicly embarrassed, now

THIS COURT ORDERS that the respondent's designation be, and it is nunc pro tunc, modified to be that which appears above, and

THE COURT FURTHER ORDERS that the within tribunal decision (U93–06877, –06880, –06885 and –06887) be and it is hereby quashed and set aside because:

1. the tribunal failed to list even one contradiction or implausibility in the applicant's testimony;
2. the tribunal appears to have expected that these, if not all, refugee claimants to arrive in Canada with their papers all in order, contrary to the Appeal Division's decision in *Attakora* v. *M.E.L.* (1989) 99 N.R. 168; and
3. there was documentary material suggesting that many Tamil refugee status claimants make bogus claims and give false information upon which the tribunal found that these particular applicants must be lying and going false information, too

and this matter is referred back to a newly constitute CRDD panel, which is to adjudicate the applicant's claims of refugee status anew in an independent, without fear-or favour manner in the attempt to determine the truth and without shackling or fettering the Refugee Hearing Officer's performance of his or her duty to help the tribunal in determining the truth about the applicants' convention refugee claims and whether a real practical Internal Flight Alternative exists for them.

Melbourne Magistrates' Court

Police v. *B. Quinn*
9 November 1994
Coram: Linda Dessau M.

Phillip Dunn for Quinn cross-examining Graham Lanyon about maintenance work at his own home.
Dunn: After the house was painted between 85 to 90, the house was maintained and painted?
Witness: There were a couple of occasions — a few occasions that they came round and touched up where little children have gone through walls etcetera. You know, boys will be boys.
Dunn: Absolutely — and luckily girls will be girls — sorry, Your Worship.
Her Worship: You just looked up and remembered, did you?
Dunn: How could I forget? I'm sorry, Your Worship.
Her Worship: That's all right.

Queensland Court of Appeal

R v. *Fegan*
24 August 1994
Coram: McPherson J.A.

Applicant: And when I contacted the Criminal Justice Commission, the senior investigator there told me precisely what you told me. He said there was nothing more you can do about it. Just go on living your life as if it never happened. Now that is a very glib statement to make: but in a small town like Longreach where men are men and

women appreciate it, a charge of this nature is a very very embarrassing charge.
McPherson J.A.: I certainly understand that.

We have met the enemy and they are us

In 1971 President Nixon nominated Lewis Powell to sit on the U.S. Supreme Court. It was necessary for the President's nomination to be approved by the Senate and to that end the Senate held a confirmation hearing:

On [one] occasion Powell was backed up against the wall of the Senate Office Building by a group of women's rights activists. "Ladies", he ventured, "I've been married for thirty-five years and have three daughters. I'm too old for you". The levity was not appreciated. In fact, Powell was later opposed by the National Organisation for Women, not for anything in particular he had said or done but because of the "absence of any documented evidence of his affirmative action vis-a-vis women". (Luckily for Powell, the NOW president was not a persuasive witness. She began by telling the Senators of her "considerable doubt" that they had the desire or the capacity to understand her testimony, and later suggested to this panel of lawyers that Supreme Court Justices did not need law degrees. It would be better, she thought, to appoint a behavioural scientist — as she, no doubt coincidentally, happened to be.)

Jeffries, *Justice Lewis F. Powell, Jr, and the Era of Judicial Balance* (1994) 233.

CLIVE PENMAN ON HOLIDAYS (AGAIN)

Dear Reader,

YOU WILL RECALL THAT LAST HOLIDAYS we decided to lash out and have an "overseas holiday", albeit that it was to Tasmania. You also may remember that it was somewhat marred by what could be called "difficulties" experienced with the "Spirit of Tasmania".

Although, I thought that enough had been enough, I was prevailed upon by the rest of the family to give consideration to allowing TT Lines a second chance especially as we had so enjoyed ourselves within the "Apple Isle" itself. Flying was out of the question especially during school holidays and when car hire would have been a necessary addition. Whilst I did not venture the opinion aloud, I wondered how we would take a car load of luggage on a plane.

Thus it was that I wrote once more to the Managing Director of TT Lines reminding him of my previous correspondence, pointing out that we wished again to visit Tasmania and to that end were weighing up the competing claims of airlines and TT Lines. I concluded by asking if he could assure me that, if we opted for TT Lines, we would not have a repeat of last year's experiences.

I had long given up expecting a reply when a letter arrived from TT Lines. It was a very long letter. It appears that the managing director had resigned. It further seemed that TT Lines now appreciated that it had problems adjusting [still!] to its bigger, newer and more modern ship. Thus, he had been appointed as a "consultant" to look into the problems. He certainly had a massive brief — the problems he listed were at least a score in number and took two close typed pages to describe in summary. Of course, none of them were the fault of TT Lines! However, if we advised him just before sailing he would see what he could do to ensure we did not have a repeat performance. Apart from that he could not give guarantees. Not the kind of stuff to engender confidence in the reader.

I thought his belated courtesy required a reply. I suggested his all too recent appointment bespoke an all too late recognition that problems existed and that as he had just begun his brief I thought the risk too great to chance. I said I'd be happy enough to await future assurances and wished him the greatest of luck. There has never been a reply to that letter which was fortunate indeed because other arrangements had been made.

Mrs. Penman's very best friend had in the meantime convinced her that we should holiday with them on the mid North Coast of NSW. She had visited there often as a young child and had happy memories of the beach, the nearby township and so on. She and her Husband and their only child were visiting his folks in Northern NSW for Christmas and suggested we join them after that. "I haven't seen Mary for years. Her taste is immaculate. Let's", said Mrs. P. who had only so recently pressed so vigorously for another Apple Isle sojourn. "We never have beach holidays and all our friends always go to the Beach and why can't we", wailed the twins who had so recently and tearfully proclaimed that only a Tasmanian holiday would appease them.

I tried reason. "It's such a long drive. You know that we only have to leave the outskirts of Melbourne and the kids chuck all over the car. We can't leave until after Christmas — your mother will disinherit you if we miss Christmas with her again and I have to be back by mid-January. We'll barely be there and we have to turn around and come back. We'll be so tired by the trip back it will not be worth it. And what's more you know what an absolute pain in the neck Mary's spoiled brat is!"

"Yes dear" was the terse response and I knew we would be holidaying on the mid North Coast of NSW. "I'll ring Mary and see what she could suggest."

Mary was never one to be backward about making suggestions or expressing them in prescriptive tones. She was also good at taking the proverbial mile upon being offered barely an inch.

Forty-eight hours later it was all arranged. Mary had recommended these absolutely infallible car sickness pills; Mary had an "absolute brainwave" by which we were to overnight in Gundagai on the way up to a brief break in Sydney; Mary knew that we would just love Sydney; and, Mary had already booked us a week in a duplex at this "absolutely fabulous" resort. "Better still", Mary and her family would be in the adjoining duplex.

I really wasn't worried when I could not find mention of the absolutely fabulous resort in the RACV Guide to Australian accommodation. Nor was I overly concerned when we very soon thereafter received a terse note from the resort acknowledging our interest, enclosing a minute brochure and demanding an immediate holding deposit of $100. We rang Mary to thank her for making the booking. "It looks absolutely fabulous doesn't it? My cousin has been there and he still raves about it."

So we rushed off the deposit by return mail. That was quickly responded to with another terse note demanding payment of the remainder of the 50% "deposit" within seven days or our booking for two adults and one child would be lost. We got another copy of their "brochure".

Mrs. Penman thought that a telephone call would sort it all out. She certainly got sorted out. "Don't blame us if you don't know how many children you have. We'll see what we can do to fix up the booking. Why haven't you read our brochure?" We read it. It certainly had a few dos and a massive list of don'ts. It looked alright in the photo. On top of that the area scrubbed up well in the NSW Tourist Bureau Mid North Coast glossy brochure I had picked up. Anyway as doubting Thomas me was told, "You know how choosy Mary is. She wouldn't go there unless is was top class."

With the help of the NSW Tourist Bureau we made bookings in Sydney and Gundagai for the way up and just Sydney for the trip back. We thought that after the restful time at the beach we would not need more than one break on the way back.

A lot of planning was then gone into. First of all, there were the many discussions initiated by me in an endeavour to keep the luggage down to no more than one boot load. Secondly, we got in a large supply of car sickness tablets and trialled them on a day trip to Ballarat. They worked a treat. The kids fell asleep for half an hour 20 minutes after taking them. The only problem was the half hour of peace made the squabbling for the rest of the time that much more noticeable.

(We considered and quickly discarded the strategy used by an old workmate of Mrs. P. who used to travel to Noosa non-stop each year with the children of his first wife. His ploy was to leave about 3 a.m. so the kids slept until well after Melbourne was cleared. When inevitably they woke up complaining of being hungry he would pull over into the first hot food place and load them up with a large breakfast. That guaranteed a few hours more sleep. When they woke up again he would promise a hamburger with the lot plus chips if they remained quiet for a while. On a good day this bought up to two hours of peace. A few hours after the hamburgers, chips, Coca-Cola and whatever else, boredom rendered them sleepy so he pulled over for another large meal to ensure more sleep and quiet. And so until Noosa was reached and the same again on the way back. It probably worked because he refused to allow his kids to have any fast foods except on holidays and McDonald's was probably unknown in those days anyway. It wouldn't have worked with the twins because they were no stranger to fast foods and the suggested diet would have ensured many bouts of up-chucking).

Then a brain wave was had by yours truly, or so

it seemed at the time. "Let's get each of them a Walkman and a heap of tapes — at least 12 hours of tapes."

We trialled the car sickness tablets and the Walkmen with some old Play School tapes on a day trip to Bendigo. They worked.

The next stage of our planning was to obtain from the RACV all of its brochures on the Hume Highway, Princes Highway from Sydney to Brisbane, Gundagai, Sydney and the mid North Coast. We likewise raided the shelves at the NSW Tourist Bureau. To that large bundle of material we added relevant articles from the dailies. Nothing was read until after we had left the place in question.

The ABC Shop was visited and Father Christmas brought along a lot of cassette tapes: music, short stories, long stories, and so on.

We trialled the car sickness tablets and the Walkmen with some old Play School tapes on a day trip to Bendigo. They worked.

Christmas came and went and Mrs. Penman's mother came and went. Enough said. Boxing Day was spent distributing the pets around various friends and attempting to pack for the trip. It was truly amazing just how many items that we considered unnecessary the twins declared to be absolutely, positively essential. Keeping the luggage to one large bootload was a noble thought. It is amazing how much luggage can be stowed in and around passengers within the body of an average family car. We had no room for the .2!

The planned departure time of 7 a.m. came and went. First of all the house required a final spruce up. Secondly, Grandma rang and just had to speak to the twins — for the first time for the year apart from their birthday. Thirdly, the twins just had to go to the toilet. And fourthly, Mrs. Penman just had to check over, again, her recently re spruced up house.

So it was that we pulled away to the strains of "A.M.". We wended our way out to the Hume Highway. Filled up at Craigieburn and we were off. The pills worked their magic and the twins slept to just short of Seymour. Shortly thereafter, a chorus of "I'm thirsty" broke out from the back to be joined by an "It's my morning tea time" from the front. We managed to make it to the rest area near the Shepparton turn off to be greeted by a fast food van. A few "It's too early for a hot dog. Chips!!! No you can't have any jam doughnuts either . . . or icecreams" later and barely sated by very ordinary instant coffees, left over Christmas Cake and the ubiquitous "Primas" we were on our way again.

This was to be big test of the Walkmen. They worked a treat at least for about an hour and a half. That was how long it took each of the twins to exhaust their individual Christmas present tapes. World War Three then broke out in the back seat with the disputed territory being the jointly received tapes. Of course, both twins just needed to listen to the same tape at the same time. Armistice was only achieved when the United Nations in the front seat agreed to play the disputed tapes on the car cassette player. However, before the negotiated settlement could be put into effect Albury hove into view.

I can still hear the increasingly louder pleas ringing in my ears. In rough chronological order they were:

"Could we have McDonald's?"

"Look there's a Pizza Hut! I wanna Pizza!"

"Oooh KFC. I desperately need a chicken and chips."

"Look Mum, Dad Sizzlers! We haven't been to Sizzlers for a long time!!"

"How about Hungry Jack's?! I'm *dying* of starvation!!"

"There's another Pizza Hut! Pizza's healthy. I am so so hungry."

"McDonald's, McDonald's McDonald's".

And so Albury was negotiated. Sweet reason about it being too early for lunch failed. Some chocolate from Mummy appeased the twins.

Holbrook was reached a little while later and to unanimous acclamation we pulled in for lunch at a place recommended in one of the newspaper food columns. The children opted for sandwiches and sausage rolls, Mrs. P. went for the salad sandwich and lamington and yours truly lashed out on a crocodile pie and sausage roll. These were eaten in the local park. Can't say I would ever eat a crocodile pie again although it certainly had lasting qualities — I could still feel it weighing down my stomach 12 hours later.

Sated, we drove off for Gundagai and our overnight stop. Gundagai brought back many memories of trips to and from Canberra and Sydney in my university days. There was the traffic policeman at 2 a.m. in North Gundagai and his fast writing pen. There was the long wooden bridge and a dawn skid all the way across on black ice en route back home. Although Gundagai is now bypassed by a freeway the motels are all within earshot and it is amazing just how many semi trailers have to shift gear in the middle of the night apparently just outside our room.

That evening we dined at the Cafe. Its claim to fame was the hosting of the War Cabinet late one night as they were en route back to Canberra. The crockery, cutlery and menu used 50 odd years ago still grace the cafe's window. The menu hadn't changed in that period, I suspect. I recommend the mixed grill if you need a massive injection of cholesterol.

So it was that we pulled away to the strains of "A.M.". We wended our way out to the Hume Highway. Filled up at Craigieburn and we were off.

After a somewhat fitful sleep courtesy of the non-stop Hume Highway traffic we had an early start. Once again the car sickness tablets worked their magic and we had just over an hour's peace. They awoke to morning tea and then it was a collective listening to "Watership Down" until the outskirts of Sydney. Mrs. Penman, with her usual flair for navigation only lost us once although, as she tells the story, it was all my doing. We eventually found our hotel in North Sydney and it was well worth all four stars allocated to it by the RACV.

It was with a great wrench that we left Sydney at dawn two days later. Doyles on the Beach via a ferry trip, Taronga Zoo, the Opera House, The Rocks, the coat hanger and Darling Harbour were all forgotten as property rights to various tapes were asserted and "it's my turn" became the constant war cry. We tried to enjoy the scenery as the traffic built up steadily but it was difficult with the cacophony in the backseat. The various tapes had outlived their novelty, "I Spy" soon lost its novelty and tempers started to fray. Lunch was a welcome break. Soon after that we arrived at our location.

We arrived at 2 p.m. — two hours after our room was supposed to be available. We booked in and were immediately asked to pay the remainder of our fees. "Sorry, but the cheque book is at the bottom of our suitcases." That did not stop us receiving a roneoed set of sheets with a few new dos, a score of new don'ts and the entertainment guide for the next week. Happy hours, bingo, sausage sizzles, "discos" and scavenger hunts were the order of the week.

We then drove past a quasi-retirement village of over-capitalised mobile homes, through a large campsite, around a gathering of on-site vans, and on to a group of Duplex Units cowering under some sizeable gums. To say the least, we were a bit concerned to see a car parked by our wide open door with a gentleman lazing in the shade. It was hot and humid and we had notions of getting out of the car into comfortable surroundings, unpacking and going for a swim. We did not need a lengthy discussion about the non-fully-operational shower screen or to see the small fridge with its door wide open in the very early stages of the defrosting of a huge lump of ice in and around the freezer compartment. One would have had difficulty slipping a cigarette paper into the freezer compartment.

A quick perusal elicited huge footprints of the beaten workman and carpets that gave every indication of not being vacuum cleaned since the previous residents left. Things barely improved. The owners were almost hostile at the thought that they should have the carpets vacuumed and that we should be concerned about the lack of availability of the fridge for the three hours it took to defrost it with the aid of masses of boiling water.

It took us only minutes to discover that it was an occupier's liability practitioner's dream. We each quickly scored multiple bruises to the sides of our left knees from the protruding corners of our bed which were so cleverly hidden by the bedspread. Subsequently, we found that the bannister on the very steep ladder like stairs to the mezzanine floor was very loose indeed and we tried not to think what would happen if either of the twins fell out of bed and rolled to the edge of the mezzanine floor. The single railing was about 30 or 40cm from the floor and it was a huge drop thereafter.

Some days later, we discovered the other hidden trap when Mary's brat sliced open his big toe on the huge block of concrete that served as a too-narrow, too-high, ill-lit step to our front door. Although we had brought small personal fans for the twins they turned out to be useless given the absence of power points on the mezzanine floor. Still whilst the uninsulated roof created a wonderful kiln effect on the top floor during the day it did cool off under the onslaught of the tropical rain tattooing on the tin roof most nights.

Notwithstanding the limitations of the accommodation, we still enjoyed the wonderful beaches nearby, the tennis court, the fishing, a day wandering around Coffs Harbour, Nambucca Heads RSL with its reasonably priced food and priceless view over the river, the local over taxed fish and chip shop, and Mary's cooking. She insisted on assembling three course dinners whenever we could not drag her away to one of the aforementioned eateries. I do not know how she did it because the oven/griller did not work if more than two ele-

ments were used in our duplexes. Her son found the surf provided endless hours of distraction. Her Husband found solace in the Test Cricket.

It was with great regret, however, that we headed off down the endless Hume Highway with its absence of rest areas equipped with toilets north of the border

It was almost with regret that our week came to an end and we were away before the bewitching hour of 10 a.m. (or another day *will* be charged — is this a pale imitation of Butlins?). Somehow the six hour drive to Sydney (with breaks) did not seem all that daunting and we had another brief stay in North Sydney beckoning us. It was with great regret, however, that we headed off down the endless Hume Highway with its absence of rest areas equipped with toilets north of the border and the thought of another working year starting the next day. At least it was a three day fixture with a guaranteed start and a sizeable brief fee. It ought to have settled when it wasn't reached previously.

"Don't be surprised if we get home and it has settled," I warned.

"What!!! We cut short our holiday unnecessarily," said she.

"Things weren't so good last year. At least they'll start off better this time," I offered.

"Just don't ring me up at 10 o'clock tomorrow and say you are coming home," was the ominous warning.

The discussion put me right off a repeat of the ever-repeating crocodile pie and discouraged me from venturing into a "gourmet" emu pie. The rest of the trip was like the way up but longer, louder and more enervating. It was with a mixture of relief and exhaustion that we greeted McDonald's at Campbellfield. It is amazing the quietening effect two "Happy Meals" have.

It wasn't 10 o'clock the next morning but midday that I rang. The Judge had disposed of my three day matter in two hours. Apart from a Chambers matter and a plea later in the month it was a quiet January indeed. I got all my filing done, Chambers spring cleaned, the garden spruced up and previously unanswered Christmas mail finally responded to. None of those things paid the Bills!! I think the Penmans may stay home next Christmas!! Apart from anything else, they may not be able to afford a holiday anywhere.

Best Wishes,
Clive

AN ENDANGERED SPECIES?

THE FOLLOWING NEWS ITEM FROM THE *Sunday Age* of 12 February 1995 (p.3), illustrates how far a court protection order may extend.

SURGERY: Man tries to sever penis

A Townsville man, 32, required 11 stitches after trying to sever his penis following a domestic dispute with his de facto wife on Friday night.

The man will be charged with breaching a court protection order.

UK TRANSFER TEST FOR AUSTRALIAN LAWYERS

QUALIFIED AUSTRALIAN LAWYERS WHO wish to qualify as solicitors of the Supreme Court of England and Wales can do so after passing an aptitude test. The Qualified Lawyers Transfer Test ("The QLTT") is a conversion test which enables lawyers qualified in jurisdictions outside England and Wales to qualify as Solicitors in that jurisdiction. It is conducted by The College of Law of England (through the QLTT Board) as agent of The Law Society of England and Wales,

At present tests are held twice a year (in Spring and Autumn) in London, Hong Kong and (since November 1994) Toronto. Since the QLTT was established in 1991, a total of 876 Australian lawyers have travelled to one of these countries to sit the test.

Lawyers qualified in Australia are required to sit only one of the four sections of the test namely Professional Conduct and Accounts. They are generally exempt from the other three sections (Property, Litigation and Principles of Common Law).

A separate department of The College of Law, which is the largest legal education provider in Europe, provides instruction for the QLTT in the form of distance learning packages for all sections of the test and a lecture programme for Property, Litigation and Professional Conduct and Accounts. Traditionally lectures have been held only in London but beginning in 1995 a four-day revision programme will be held in New York in conjunction with the Practising Law Institute of New York. Subject to demand, the College could run a similar programme in Australia.

The College has established an excellent reputation for supplying quality distance learning courses for the QLTT so that lawyers can prepare for the examination in their own homes, at their own pace and at convenient times. Study materials include manuals, assignments which are marked by experts and returned with comments and model answers, and a 24 hour telephone helpline in the UK. For overseas candidates, tutors deal with enquiries by fax. All the tutors are full-time staff at the College and are qualified as solicitors or barristers. They have many years experience of providing training to both trainee and qualified solicitors. The College is accredited by The Council of Accreditation of Correspondence Courses in the United Kingdom.

Nick Olley, Head of QLTT Tuition at The College of Law said: "We are looking to run more preparatory courses for Australian lawyers. Our distance learning courses are likely to prove the most popular but the College would be prepared to put on a lecture programme in Australia if the demand was there. With increasing commercial links between countries it is becoming essential for lawyers to have an understanding of the law of other nations and international firms in Australia will see the advantages of having an English qualified solicitor on the staff. We also expect interest from Australian qualified lawyers already working or about to work in England and Wales."

Further information on preparatory courses for the QLTT is available from:

The Distance Learning Department
The College of Law
Brabouef Manor
St Catherine's
Guildford
Surrey GU3 1HA
England
Telephone 44 483 460225
Fax 44 483 480305

Regulations, syllabus and entry form for the test may be obtained from the Clerk to the QLTT Board, The College of Law, 14 Store Street, Bloomsbury, London WC1E 7DE, England,

Telephone 44 71 291 1313
Fax 44 71 291 1312

Before entering for the test, prospective candidates must apply to The Law Society of England and Wales for a Certificate of Eligibility. This may be obtained from The Law Society, Transfer Unit, Ipsley Court, Redditch, Worcestershire B98 0TD, England, Telephone 44 527 517141 Fax 44 527 510213.

FROM A SECURITY POINT OF VIEW

RICHARD BREAR INTERVIEWS KAY (A.K.A. KATHY) WOODS — M.S.S. SECURITY OFFICER.

Bar News: How long have you been a Security Officer working at the buildings of Barristers' Chambers Limited?
Kaye: For 2 years.
Bar News: Have you enjoyed working here?
Kaye: Yes.
Bar News: Do you have any recommendations for Barristers?
Kaye: Please turn off photocopiers, urns and coffee machines when you have finished using them.
Bar News: Regarding clients visiting these buildings, what do you recommend?
Kaye: I recommend some facilities for refreshments. Of course, Barristers do make coffee and tea for their clients. After hours, family or friends of clients, who are waiting outside the chambers, have asked me if there are any facilities provided for tea or coffee.

Of course, I have told them that unless the Barrister provides the facilities, none are available.
Bar News: Regarding Barristers having appointments after hours, what have you noticed?
Kaye: I have found clients waiting outside or wandering lost around the building until they find myself or someone else to direct them.

They are confused by Owen Dixon Chambers East or Owen Dixon Chambers West.

It could be indicated to clients that the Barrister is in a building which has its main entrance facing WILLIAM or LONSDALE STREET and is called Owen Dixon Chambers East or Owen Dixon Chambers West. 205 William Street — as an address — can be confusing if the Barrister is in 525 Lonsdale Street.

They say "Why don't they put the right address on the letter in the first place?" — but not always as nice as this question.
Bar News: What advice do you have about fire alarms or sirens "going off"?
Kaye: This year we had a multi-sector fire alarm — which gives different siren sounds and means that everyone should vacate the building via the stairs.

First, I checked the fire panel, then I went to the Essoign Club and informed some people up there about what was happening.

M.S.S. Security Officer, Kaye Woods

I was totally shocked as there were two parties on that night and it appeared to me no one took the alarm seriously, except the former Essoign Club Manager, Patrick Gilbert, who went to investigate.

Next, I went "downstairs" and found out that someone there had accidentally broken the glass alarm. The "upstairs" people seemed to show no concern at all.

In nearly ever building I have worked there is a syndrome or attitude of — It will never happen here.

Most people take it that they are false alarms. One day it will not be.
Bar News: What do you recommend about Chamber and Foyer doors?
Kaye: I recommend that tenants lock their doors as I find many doors open all the time.
Bar News: Have you found any trespassers or burglars yet?
Kaye: No, not yet, thank goodness! However, that does not mean someone may be around when I am not.

Even if a Barrister is inside chambers, it is still easy for anyone to walk past and remove keys from the Chamber door.

One numerous occasions I have been asked if I have removed keys from Chamber doors. If I find keys in doors after hours, then I leave them inside the Chamber together with my M.S.S. card and then lock the door behind me.
Bar News: Thank you.

FAVOURITE LEGAL ANECDOTES

from Blacket, *May It Please Your Honour* (1927) pp. 229–31

WAITING FOR THE VERDICT

IT OCCURRED IN THE DARLINGHURST Central Criminal Court one evening about thirty years ago. The term "evening" is used advisedly. To an Australian, in the country districts at least, "evening" is any time after 2 p.m., but this "evening" was just after 7 p.m., as indeed it should be.

The jury had gone out at five: at five-thirty they sent out to say that they would stay out to tea: the, menu was accordingly sent in to them and at seven expectation as to their verdict again was evidenced. The Bench and Associates' Box of course, were empty. The Judge and his "off-sider" would consider it beneath their dignity to wait in court for a verdict. The court-keeper was in sole charge at seven. Then Junior Counsel for the defence came in, very closely followed by Moses Manasseh instructing, and with him an aged man with a long white beard, who went and sat on one of the back seats under the court clock. He was a rugged patriarch of agricultural appearance but of great present importance, for he was putting up the money for the defence. Then Senior Counsel for the defence, with two or three friends who had sat at meat with him, appeared and Moses Manasseh took out a clean handkerchief made ready for the occasion and said, "I know that you fellows think that I'm just a money-grubbing Jew" — there were suppressed, easily suppressed, murmurs of dissent — and he continued, "but I can tell you that it makes my heart bleed to look at that poor old man over there. Fancy him being dragged down from his cows and his barley to a place like this! And there he sits wondering whether he will have to go home and tell his wife that his son has been sent up for five years. You know Docker will give him five of the best if the jury send him along. My God it's awful." And he dabbed his handkerchief to his eyes and covered them with it while sobs shook his frame. "You fellows that have no children can't understand the agony of that poor old man with the long white beard sitting there in silent sorrow. My God it's awful!" His eyes were shrouded by his handkerchief once more, then with a strenuous effort he composed himself and looked calmly at his venerable client and then at the court clock above him. "Hullo," he said, "twenty past seven! Twenty past two to twenty past seven is five hours isn't it? I must go over and tap old Melchisedec for another refresher."

SPORTSMEN AT THE VICTORIAN BAR

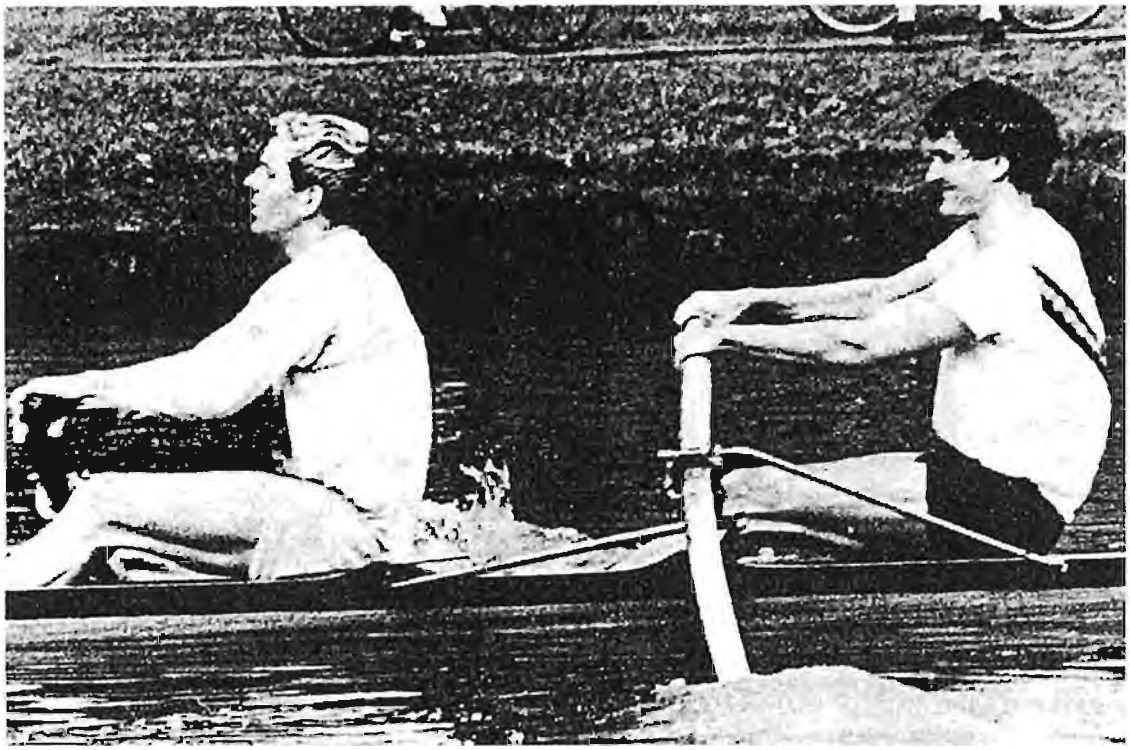
The Editors have decided to recognise the many non-legal talents possessed by members of the Bar. This issue focuses on the arena of sport: Paul Guest Q.C. is recognised by the *Bar News* for his achievements in Rowing.

IN THE SPLASH AND DIP OF THE WORLD of rowing few oarsmen have been selected to represent the State of Victoria in the Kings Cup. From these, only a handful have made it to international success and competed in the Olympic Games. Paul Marshall Guest has competed in not one, but three Olympics. He rowed in the 1960 Olympic Games at Rome (coxless pair); the 1964 Olympic Games at Tokyo (eight oared event); and the 1968 Olympic Games in Mexico (coxless pair). On any view he is a rowing champion.

At Wesley College he rowed in the first eight in 1956 and 1957. Success came early. On 18 November 1961, Banks crew with Guest sitting in number 7 seat rowed to its first senior eight win in 64 years. This ensured his continued selection as a member of the Victorian King's Cup squad. In his early rowing days with Banks, Paul devised a strategy to demoralise opposition crews at the end of a close, hard but successful race. Always the good actor, he would sit up comfortably in the boat and cheerfully congratulate the rest of the crew without showing any signs of fatigue! The effect on opposition crews, slumped in their seats and defeated, with every fibre of their body aching, was amazement at the strength of their opposition!

The record book shows he was a member of the Victorian King's Cup squads in 1959, 1960, 1962, 1963, 1964, 1965, 1969, 1970 and 1972. He has rowed at international level for Australia in the World Rowing Championships in Switzerland (1962) (Finalist); Yugoslavia (1966) and Canada (1970) (Finalist). He rowed in the Australian Eight at the US National Titles 1966 and 1970 (Runners Up) and the Australian Eight at the British Empire and Commonwealth Games in Perth 1962 (Gold Medal). It was his long and sustained physical training program in those events which prepared him for Olympic rowing. There can be no greater accolade for a sportsman than to represent your country at the Olympic Games.

Rowing has and always will be an amateur sport. It has nothing to offer by way of monetary rewards. It requires years of practice to gain proficiency. It is a team game. There is no "best player"; no star full forward. You are part of a crew. There is no public acclaim for the individual. It is a sport that offers no second chance. Catch a crab and you cannot stop momentarily to recover from the mistake. The whole boat goes



Australia's pair without coxswain, Mexico Olympics, 1968: Stroke — D. Ramage, Bow — P. Guest

out of gear; the race is lost. In rowing everything is a sacrifice to the interests of crew unity. It is to these principles that Guest has immersed himself in his rowing career. It has taken him to the status of an Olympian.

In rowing everything is a sacrifice to the interests of crew unity. It is to these principles that Guest has immersed himself in his rowing career.

Alan Jacobsen, his coach of many years when training him for the Victorian King's Cup squad said:

Paul Guest is an extrovert personality. He had whimsical ideas. He kept himself, and everybody else, motivated and entertained, while the serious business of training and repetitive, and sometimes monotonous, practice continued. His volatile wit seemed to be a happy relief to the crew after my own rather dour criticisms, and rare praise. When Paul Guest was of a mind for it, his rowing would be copy-book. For all his natural ability, however, he could be absolutely wayward. No one could bolt on the roller rails quite so fast and exasperatingly as he. "When he was good, he was very very good, but when he was bad he was wicked!" Although one could add — always with charm.

In 1962 Guest rowed in the Australian Eight at the World Rowing Championships in Switzerland. Rowers then took themselves around the world at their own expense. The crew trained at Lake Rotsee. To help finance the trip the coach engaged a film maker, Mr. Boeniger. Mr. Boeniger was a cigar smoking personality in arty clothes with beret — true to the style of the European school of film making. The film he made records the personality of Paul Guest. It was a delightful sunny afternoon. The crew was accelerating from "slow rowing" to "hard rowing". The conditions were ideal. The crew was at "slow rowing" tempo. Guest noticed two charming Swiss girls seated on the bank. He raised his hand in cheery salute. Unfortunately just at that moment the coach gave the order for "hard rowing". Instead of an inviting gesture from Guest, he found himself flying in a

high pirouette from the boat, ejected by the "crab" he had caught! He still cannot forgive his crew for his fall from grace. His pride was damaged but not irredeemably. He is currently training for the World Masters Championships in 1996 (Bled, Yugoslavia) in "D" Division Coxed Four and Eight.

The talents of Paul Guest as a barrister are known. He should also be taken seriously as a sportsman. After all, lawyers privately, if not publicly, acknowledge the law is truly a professional sport.

Graeme P. Thompson

AN EGG SHELL

AUSTRALIA'S pair for the Olympic Games rowing, David Ramage (left) and Paul Guest, trained today in the new featherweight shell they will use in Mexico.

The boat, believed to be the lightest yet built in Australia, weighs only 50 lb. It is a mere 13½ in. wide but 18 in. longer than a standard pair.

The boat is to be christened "J. C. Guest," after the chairman of the Commercial Bank of Australia, at a special ceremony at Banks Club on Sunday morning.

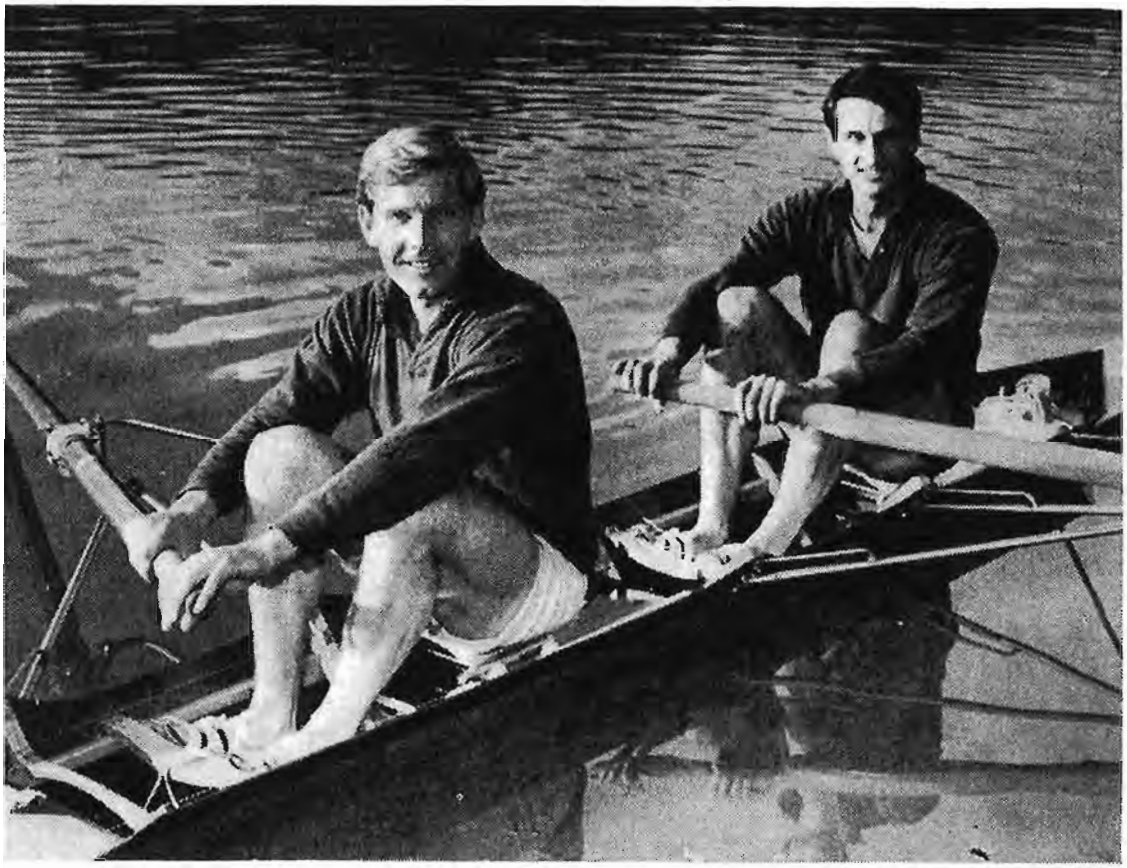
Mr Guest is not related to Guest the oarsman.

Guest, 29, who has been elected captain of the Australian rowing team for Mexico, will be appearing in his third Olympic Games.

He was a member of Australia's coxed-pair at Rome and rowed with the national eight in Tokyo. He started his rowing career at Wesley College.

Ramage, 29, who began rowing at Geelong College, also was a member of the Australian eight at the Tokyo Games.

He lives in Geelong and comes to Melbourne every day for training on the Yarra.—RAY TODD.



The Herald, *5 September 1968*

LAWYER'S BOOKSHELF

Towards an Australian Bill of Rights

Edited by Philip Alston
Human Rights Equal Opportunity Commission
Centre for International and Public Law, 1994
pp.i–xv; 1–383, indexed

THE NEED FOR AN AUSTRALIAN BILL OF Rights has been somewhat overshadowed by the public debate as to whether Australia should retain its links with the Crown or become a republic. In the foreword to this book, the then Human Rights Commissioner, Brian Burdekin, reminds us that the debate on the need for a Bill of Rights is one of the most important in contemporary Australia. Our current legal system is inadequate in protecting many of the rights of those disadvantaged and non-disadvantaged groups in the community.

Most of the contributions to the book originated in papers that were presented to a conference organised by the Australian National University's Centre for International and Public Law held in July 1992.

The book is divided into three sections: "Putting the Debate in Context", "A Bill of Rights?" and "International Dimensions". Contributors are predominantly lawyers such as Justice Sir Gerard Brennan of the High Court, Justice Michael Kirby president of the Court of Appeal New South Wales, Justice Murray Rugledge Wilcox, the Chief Justice of the Industrial Relations Court of Australia and Elizabeth Evatt. William Alex Hollingsworth, Professor Colin Hughes, the Foundation Professor of Political Science at the University of Queensland, and Brian Galligan, a Professor in the Division of Politics and Economics of the Research School of Social Science at ANU are also amongst the contributors.

In the introductory article, Philip Alston, who is a Professor of Law at ANU, writes that aside from any act on the part of government or the people of Australia to adopt a Bill of Rights, there are two processes which will conspire to bring about a defacto Bill of Rights. The first is the evolution of the judicial role in protecting individual rights and responses to changing social attitudes and the second is the influence of international human rights regimes and commitments which Australia, together with other countries, has undertaken. We have seen a recent example of the first in the High Court decision in *Capital Television Pty Ltd* v. *The Commonwealth*.

The second point made by Philip Alston finds expression in the widening of the external affairs powers as shown in the *Tasmanian Dams case* and in the adoption of the Convention Concerning the Termination of Employment and the amendments made in consequence to the *Industrial Relations Act* 1988 (Cwth). In the current debate over the Bill of Rights, Professor Alston considers that there has to be a broader discussion as to the need for fundamental reforms to the Australian system of government.

Professor Alston argues that the final resort and the most effective way of diminishing the extent to which Australia is called on to account to international supervisory bodies will be through the adoption of a Bill of Rights to enable each violation of international standards to be determined by domestic courts. He sees two principal objections to the Bill of Rights. The first is that it inevitably involves the adoption of a set of values which may not affect Australia's particular experience and value system. However, he believes that there will be every reason to assume that Australian courts will adopt their own interpretation rather than simply following the interpretation of other countries. The second objection relates to the role of the courts in interpreting the Bill of Rights and this relates to the competition between the judiciary and parliamentary sovereignty. He concludes that the time has come to begin a major national debate over the contents and nature of the Bill of Rights.

Professor Hilary Charlesworth, in a paper titled "The Australian Reluctance About Rights", points to the acceptance of the philosophy that responsible government is the " . . . ultimate guar-

antee of justice and individual rights" (Prime Minister Menzies). As Professor Charlesworth says that the party system on which parliament operates and the need for electoral approval is unlikely to provide a safeguard. Australia has a poor history of constitutional reform and the application of the common law has not proved to be an effective safeguard. In 1973 a Human Rights Bill was introduced into parliament but, after controversy, did not survive the second reading speech. A second attempt was made in 1983 to enact a Bill of Rights which, amongst other matters was to be an interpretative guide for the judiciary in the case of ambiguous provisions in state and federal legislation. However, with the calling of the federal election in December 1984 and the subsequent change of Attorney-General, a revised Bill of Rights was introduced into parliament together with a bill establishing a Human Rights and Equal Opportunity Commission. This third proposed Bill of Rights attracted controversy and was allowed to lapse in 1986.

Jenny Morgan in an essay entitled "Equality Rights in the Australian Context: A Feminist Assessment", validly makes the point that many rights have no determinate of fixed context. She argues that a Bill of Rights turns political questions into legal questions and its resolution may appear to be value free. In her conclusions she argues that what is worth debating "is a gendered equality right", that is, one that addresses the inequality of power between women and men so that it is understood in that person's terms, rather than attempting to ensure mere formal inequality.

It is not the purpose of this review to consider each contribution but, suffice to say the contributions made ensure that issues are explored that are central to public concern.

As can be seen from this brief excerption, this book is critical for a proper consideration of the issues that concern the debate. The debate over a Bill of Rights will not go away as it is central to the fabric of our society and these essays give a clearer understanding of the topic and make essential reading.

John V. Kaufman

Business Valuation Practice

By Lloyd M. Collard & William J. Pallot
Law Book Company Limited, 1994
Paperback pp.(i)–(xiv), 1–353

THIS BOOK APPEARS TO BE A TEXT FOR use in a valuation course. In its style and approach it reminds me of a university textbook for Legal Process. That is, it tries extremely hard to make a very dull subject interesting.

The style of the book is annoyingly disjointed with some chapters reading like abbreviated lecture notes.

There may be some value in the book in relation to its discussion of different methods of calculating damages claims. In particular, the book provides examples to indicate the varying modes of valuation available. I found the chapters on goodwill and valuing minority share interests as particularly useful. The book certainly should provide some guidance and assistance to those who deal with and instruct expert business valuers for court purposes.

Sam Horgan

Skunk Works: a personal memoir of my years at Lockheed

Ben Rich (with Leo Janos)
Little, Brown & Co., Boston, 1994
pp.370 including index

The story of *Webster's Third*: Philip Gove's controversial dictionary and its critics

Herbert Morton
Cambridge University Press, New York, 1994
pp.332 including notes and index

THESE ARE NOT BIOGRAPHIES OF TWO notable twentieth century Americans although, of necessity, biographical detail is included.

Gove was of old New England stock while Rich was a naturalised Jewish immigrant whose British family arrived in California from the Philippines several months before the bombing of Pearl Harbor and the entry of the USA into WWII. The teenage Rich worked alongside his father in a Los Angeles machine shop and his delayed commencement of tertiary education saw him relinquish his intention to study medicine and instead graduated as a mechanical engineer in 1949. For Gove the delayed entry of the US into the war permitted him to complete his Ph.D. thesis where his post-graduate research was conducted in wartime Britain during 1939–40. His service during the war was in the US Navy. Upon demobilisation he wrote on "spec" to the G. & G. Merriam company — the publisher of *Webster's Dictionary*.

In 1951 the Merriam company appointed Gove as the Editor-in-Chief for the proposed new *Webster's Third New International Dictionary* scheduled for publication in 1959 to replace the 1934 *Webster's Second*. With a schedule "life" of 25 years between successive editions Gove's *Third* came in two years late in 1961 and the

yet-to-be published *Fourth* is already nearly a decade overdue. The birth pains of the *Third* were no more than could be expected of such a major undertaking. What was unexpected was the massive campaign of vilification directed against the Dictionary and its editor upon publication of which remnants still exist today. One outlandish allegation was that the Dictionary was a communist inspired plot to subvert the American way of life. This possibly originated from the witty observation made by a *New York Times* critic who noted the similarity between the name and that of the communist Third International formed in 1919. Unfortunately the humourless epigone took this suggestion seriously. There was also a proposal for patriotic citizens to band together to buy out the Merriam company with a view to reprinting the *Second* edition pending the preparation of a *Fourth* and junking the *Third* altogether.

Well able to oversee the publication of the *Third*, Gove was ill-equipped to respond to the critics and by the time he got into stride, his defence (as with that of others) was published in obscure professional journals of little moment compared to the likes of the thundering *New York Times*. To little avail did the defenders point out to the *New York Times* that many of the faults it found in the criticised edition were also in its favourite familiar and comfortable *Second* edition. Similarly, if the *New York Times* critics found fault with the "permissive" *Third*, the newspaper's own usage of words was countenanced by the *Third* but not by its approved *Second*.

It would seem that the critics of the *Third* had not read (if a dictionary can be read) it and were not familiar with the *Second*. This did not stop the assistant managing editor of the *New York Times* from issuing a directive to staff that they were to continue using the 28-year-old *Second*. Unfortunately, other critics, including the American Bar Association, adopted the complaints of the *New York Times* without verification and added to the chorus of condemnation.

The criticism was born of the time. A different dictionary with a different editor would have received the same unless the publishers merely reprinted the venerable *Second*. British observers pronounced favourably upon the Dictionary and were bemused by the US furore.

Today the *Third* stands on its own, vindicated by itself although showing its age. A remarkable achievement, as was the *Second*, as will be the *Fourth*. Morton's story of the *Third* is a worthy companion to *Caught in the Web of Words, James A.H. Murray and the* Oxford English Dictionary (1977) by Murray's granddaughter.

"Skunk Works" is not accorded an entry in the *Third* or even the 20 volume second edition of the OED (1989). It does appear in the 1987 second edition of the *Random House Unabridged Dictionary*. It is a secret experimental division producing innovative products. The term is derived from the clandestine liquor still operated by Injun Joe (or Big Barnsmell) to produce Kikapoo Joy Juice from worn-out boots and dead skunks in Al Capp's comic strip *Li'l Abner*. Its current usage sense derives from the clandestine division of the aircraft manufacturer Lockheed which produced the U2 spy plane, the SR-71 blackbird and the "stealth" fighter-bombers that figured prominently in the bombing of Baghdad in the 1991 Desert Storm war.

Unlike Gove's, the tribulations in Ben Rich's professional life were not in the public gaze and all occurred in pre-production: until the bugs were ironed out production did not commence. Joining Lockheed in 1950 at age 25 Rich was seconded to "Kelly" Johnson's legendary skunk works in 1954 for a few weeks to assist in the design of the air intake for the U2 — he stayed 36 years, 15 as the boss after Johnson retired.

During that time he participated in the design and development of the F104 Starfighter, the U2 (still in service after 40 years), the highest flying and fastest aircraft yet built — the SR-71, and the F117A stealth fighter — the plant that undetected by radar delivered the "smart bomb" on the first night of Desert Storm which was replayed over and over on our TV screens.

One can only speculate on the reaction of the Russian aerospace boffins inspecting the wreckage of Gary Powers's downed U2 in May 1960. The U2's engine sprayed hot volatile oil (20 quarts every mission) onto the cockpit windshield

containing the pilot breathing pure oxygen. The problem was intractable until a veteran mechanic suggested, "Why don't we just stuff Kotex around the oil filter and absorb the mess before it hits the windshield." Rich ordered industrial-size cartons of sanitary napkins and the problem was solved. What the Russians made of this example of leading edge hi-tech Yankee know-how is not recorded.

The Cold War produced much irony. The U2 overflights of Russia commenced in 1956 and ceased in 1960 after Powers was downed. During that time the Russians silently seethed over the illegal flights. They were unable to publicly complain without admitting their technical inability to stop such flights. Similarly, President Eisenhower was in possession of the perfect defence to allegations by his political opponents that his administration had permitted a Russian gain in fire-power over the US. That there was no "missile gap" could not be disclosed without admitting to the illegal overflights that provided the evidence that the Russians were not ahead.

Rich closes his book extolling the virtues of the "skunk works" approach: Ford produced the 1994 Mustang with a saving of one year and $300,000 over the projected expenditure of four years and $1 billion. Similarly, the only success IBM has had in the last twenty years was their PC developed in the early 1980s in a backwater Florida facility away from the mainstream corporate ethos of their head office.

Ben Rich died of cancer on 5 January, 1995 at 69 years of age, four years after retiring as head of the Skunk Works.

Briefless

Labour Law: An Introduction (2nd ed.)

Breen Creighton & Andrew Stewart
The Federation Press, 1994.

THIS IS THE SECOND EDITION OF LABOUR Law: An Introduction, which was first published in 1989. The authors point out in the preface that monumental changes in the field of labour law and labour relations in Australia necessitated a complete rewrite of almost the entire book.

When the first edition of this book was published, Conchita Poncini (*International Labour Review*) described it as being, "a valuable contribution to our understanding of the role of Australian labour law in the labour relations system. It is written in a concise and readily intelligible way."

The second edition of the book has retained the same concise and intelligible style, and most importantly brings the reader up to date with the major changes in the field of labour law in Australia. Amongst the major changes covered are:

- the major alterations to the federal industrial relations system introduced by the *Industrial Relations Reform Act* 1993, including new laws on enterprise bargaining, unfair dismissal and the right to strike;
- the reforms in each of the state systems, particularly Victoria;
- the emerging role of international standards and obligations (new chapter);
- the growth and impact of "marginal forms" of employment such as casual and contract labour.

It is a credit to the authors that in covering such a wide field they have managed to produce a concise and readable introduction to labour law. As a useful aid to further study, they have also included an extensive reference to secondary sources. I recommend this book to anyone with an interest or practice in this area.

Jane Compton

Protecting Designs — Law and Litigation

by Dr John Phillips
The Law Book Company Limited, 1994
pp.v–xxxviii, 1–425

THE AUTHOR OF THIS WORK INDICATES in the preface that it has been written from the perspective of the litigator. It is obviously intended to be read mainly by lawyers involved in litigation and as such it is of particular interest to barristers.

The law in relation to registered designs is becoming increasingly complex and difficult to keep abreast with, particularly in the area of copyright overlap, and constant vigilance is necessary to keep pace with the legislators (one sometimes wonders whether the effort is worthwhile given the registered proprietor's dim prospects of success in a design infringement action). Dr Phillips has provided valuable assistance to the vigilant practitioner with this comprehensive work. The law is clearly expressed and the work usefully deals not just with registered designs but also with aspects of passing off, trade practices and copyright which are relevant to design protection.

Alas, subsequent to publication of this work the Australian Law Reform Commission released Discussion Paper 58 which is bristling with proposals for reform of the law relating to designs. This practitioner at least has the feeling that further assistance will be required from Dr Phillips in the form of a second edition in the not too distant future.

Adrian Ryan

Australian Encyclopaedia of Forms and Precedents — Desk Edition on disk

BUTTERWORTHS HAVE FOR MANY YEARS published an *Australian Encyclopaedia of Forms and Precedents* in 15 volumes. More recently a selection from the full encyclopaedia has been published as the *Desk Edition* containing 27 of the most popular titles from the 15 volume encyclopaedia. The electronic disk edition contains in electronic form those selected forms and precedents printed in hard copy in the *Desk Edition*, using the same numbering notation as is used in the printed encyclopaedia and the *Desk Edition*. It also contains, as separate electronic documents, the table of contents, the tables of statutes and cases, and an alphabetical listing of the precedents. In this review I have concentrated on the technical aspects of the publication, rather than the forms themselves.

The package supplied contained seven floppy disks and a printed *User Guide*. I installed the disks on the hard disk of a 486 notebook, running Microsoft Word for Windows 6.0a. It took about ten minutes to complete the installation. The precedents were then further indexed under Isys to permit individual word searching across the entire body of documents, a process which took less than three minutes.

The instructions provided by Butterworths are clear and generally well written. It is perhaps unfortunate that the user is told in the *User Guide* that one should have received six floppy disks, when seven disks were provided. This is somewhat disconcerting.

Of course the user must have some knowledge of his or her own computer system, and disk operating system (DOS) conventions in order to install and run the package. The most satisfactory installation will be to place the precedents onto the user's hard disk. The instructions correctly advise that the fastest method of copying the files from the floppy disks to the hard disk is to use the XCOPY command in DOS rather than copy in Windows. Having created a directory named PRECEDNT it properly instructs the user to enter the DOS command

XCOPY A:\ *.* C:\PRECEDNT/S/E/V

As every letter, character and space in the above instruction is important, and as some users might be less familiar with DOS commands, there might be some merit in providing the DOS repeat of the prior instruction (F3 or UP ARROW depending on DOS version used) rather than instructing the user to repeat the XCOPY command line for each of the six (in fact, seven) floppy disks. Use of the DOS repeat instruction removes any risk of error caused by mistyping.

Each disk has a printed notation "Current until 13 January 1995". The *User Guide* informs the user that updates are published three times a year. The complete set of disks are republished in each update, even though not all of the precedents are altered. Thus when opening a particular precedent many of the precedents in the reviewed set had the notation "Current until 31 August 1994". This suggests that some event or enactment may come into force from after that date which would make the precedent invalid or at least suspect. I do not think that is the intention of the publisher. The choice of phraseology is unfortunate.

The *User Guide* suggests that a search program such as Isys[1] can be used to permit word searching of the precedents. Such an installation is very simple if one is fairly conversant with the Isys Utilities program and is a sensible suggestion. However it might be useful for the *User Guide* to suggest that the list of common words in Isys be edited to remove the word "will" from the Isys list of common words, so as to permit the user to search for that word. Of course most of the 1200 references to the word 'will' are references to future tenses of verbs, but there are many references to clauses in wills which might be the subject of useful search, at least in conjunction with other words (such as "executor").

Precedents are not good bedtime reading. They are used for a particular purpose in a specific situation. In the circumstances this reviewer was surprised at the lack of any reference to s.55 of the *Commercial Arbitration Act* 1984 in the *Scott* v. *Aveoz* precedent. It may well be that there are other forms and precedents which could be usefully supplemented by up to date annotation.

For practitioners who regularly refer to the Butterworths' *Australian Encyclopaedia of Forms and Precedents* (who I would suggest are more likely to be solicitors rather than barristers), this electronic selection is a very useful adjunct to general word processing systems.

David Levin

1. Isys Text Retrieval program produced by Odyssey Development Inc.

Business Law (7th ed.)

Peter Gillies
The Federation Press, 1995
pp.i–lii, 1–882
Price: $49.95 (soft cover)

I FIRST REVIEWED PETER GILLIES' *Business Law* for the *Victorian Bar News* in 1993. It is with great pleasure that I do so again, not only

because it is a treat to receive the updated version of this book but also because it gives me the opportunity to correct an error I had made in my earlier review. On first examination of the text, I had concluded that this was a basic work, more appropriate for students and business people than for lawyers seeking a detailed analysis of business law in Australia. How wrong I was!

Business Law is an excellent and concise source of legal principles in over 40 different areas of the law, and is a text which can be resorted to time and time again by lawyers with diverse commercial practices. It is without exaggeration that I say Professor Gillies' book should be kept close at hand at all times. (I even relied on the Intellectual Property chapter when preparing for one of Ann Dufty's trade marks exams.)

This latest edition, the seventh in as many years, has been updated to October 1994 to incorporate new case law as well as many recent legislative developments, including the *Industrial Relations Reform Act* 1993 (Cwlth), the boycott provisions of the *Trade Practices Act* 1974 (Cwlth), the *Plant Breeders' Rights Act* 1994 (Cwlth) and various amendments to the *Corporations Law*. A new paragraph numbering system has also been adopted, presumably to make this easy-to-use book even easier to use.

Anna Ziaras

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Dr. John Phillips
The Law Book Company Ltd, 1994
pp.v–xxxviii, 1–425

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Adrian Ryan

CONCLUDING WORDS OF AN ARTICLE DEALING WITH JURY SECRECY RECENTLY SUBMITTED TO A REFEREED JOURNAL FOR PUBLICATION

"IT IS HOPED THAT THROUGH THE generation of understandings about jury decision-making, the development of jury administration policy may stimulate the possibility of critically analysing the significant processes and symbolic institutions of criminal justice beyond the interests of politics or populism."

A FAIRY TALE (CONTINUED)

NOW GATHER AROUND ME MY DEARS whilst I continue the tale of the VicBees. Was Father Christmas good to you? I am pleased. He was not good to the VicBees. None of them received any honey for Christmas and very few of them received much work for the New Year.

Furthermore, all was not right with their hives when they returned. The big pink hive had been made to look like the bombsite the VicBees had acquired for their next hive. Its bottom looked like a hurricane had been through. All of the flooring had lifted up and had developed a weird, stale unpleasant odour. No wonder it seemed as if all of the ancient, venerated Bees whose photographs graced the walls just above the worst hit areas looked as if their noses were wrinkled in disgust.

But their disgust was premature. The loosest, smelliest and most unpleasant coverings were removed and what remained was a veritable smorgasbord of old coverings. Many layers could be seen at once. The archaeologists moved in, fenced off the site and went to work peeling back layer after layer in their search for clues as to how past generations of VicBees lived. No one knows what artefacts they found and what may one day find their way into museums around the nation for they have been most unforthcoming about their researches.

After the archaeologists moved out and their fencing was removed VicBees could again move backwards and forwards through the bowels of their proudest hive. They did have to move quickly though for someone had placed flypaper down and those who tarried were forever caught there to rot under the gaze of the stern old venerated VicBees.

But apart from the odd transfixed VicBee nothing has changed and I must say that the new look bowels grow on you after a while. They soon become engaging in their own way. The VicBees are now awaiting a National Heritage classification of the site. They may need to keep it that way for they could soon lose their bombsite. Some Landbees have placed hoardings all over it offering to give other Bees vast sums of honey to take it away, or that is what it seems. Otherwise, why would they invite other Bees to come and tenderise it? But what nasty Bee would want to take this most unprepossessing site from the VicBees who were so keen to retain it that they invested large amounts of honey to retain it in its present form.

To add further insult to injury some supposedly well meaning Bees have started to remove the rusty pipes that have adorned the entrances to the two biggest hives for so long. Is there no feeling left in our community? Is there no end to the deprivations being wrought on the VicBees? First of all the bombsite, then the pipes, what next?

Perhaps it will be the VicBees themselves. There is buzzing afoot that the GovBees have not ceased in their efforts to take the VicBees from their hives and spread them around the SollyBees' places. It also seems that if the GovBees wait long enough they will not have to try very hard because more and more VicBees are disappearing from the Hives, or at least more and more cells are becoming empty. It seems as if natural attrition is now finally exceeding the ingress of new VicBees. With sufficient time VieBees may just fade quietly into the sunset.

In the meantime, the VicBees may soon have to reduce their Hives by one. That will not be easy because VicBees do not like making decisions. Everyone knows that when they are asked to make important decisions about their very future they become frozen into inactivity. There can be little doubt that the same will happen if, and when, it becomes necessary to decide which Hive should be abandoned.

If all of that potential decision making was not enough, the poor old VicBees continue to be the subject of much muttering, rumbling and speechifying by MPBees both of the Vic and of the Oz variety. Both groups say that the VicBees are inherently evil and greedy but neither group can explain how they come to such a conclusion except perhaps to say that those Bees they listen most to think it must be so because they don't like the VicBees very much.

On top of the worries about whether there will be any colonies left of VicBees in the future and whether the GovBees will bulldoze them to the ground there are the concerns of the many individual VicBees who are finding it harder and

harder to garner honey and to make ends meet. Being forever optimists VicBees thought that last year was the end of the depression for them and things could not and would not get worse. Rather, they convinced themselves that it was the natural order of things that once the bottom was reached things would start to swing back up again. (VicBees have always been devotees of the much discredited "swings and roundabouts" school of economic theory.) Oh how wrong they were. The bottom has not yet been reached and even if it were to be there is no guarantee that for VicBees, at least, there will be a way up. So many other Bees, including many SollyBees, have come to realise that they can live without VicBees or at worst only need them very occasionally.

Oh woe, oh poor VicBees. What is going to happen to you?

IS THE "GLITTERING PRIZE" STILL THE BAR'S DESTINY?

(With apologies to Lord Chancellor Birkenhead)

The morning sun, when it's in your face, really shows your age.

ROD STEWART'S GOLDEN OLDIE "MAGGIE May" was blaring from the car radios as the cricket players drove to the Albert Ground for their annual clash against the Law Institute on 19 December 1994. What could those words of the song portend? Surely no Delphic utterance could have been more obscure or as difficult to decode as this? Perhaps it was a reference to the appearance of the old pavilion on the western side of the oval? But no, on arrival at the ground, that classic structure was found to have been extensively refurbished at great expense by the Melbourne Cricket Club, and now had carpet even in the changing rooms. Perhaps then, it referred to the condition of the Sir Henry Winneke Cup, which had been languishing with the solicitors of late? Happily no, for when the trophy was brought along it had been burnished so brightly you could see the reflection of the manufacturer's logo on your cricket shirt.

By the end of the game, however, the omen was sadly revealed for what it was — the tragedy of the Bar cricketers is not the players that they are, but the players that they have ceased to be.

Looking back, the prognostic signs should have been divined much earlier. Youth would have had no such vacillation, but, in anticipation of winning

the right to elect whether to first bat or bowl, the Bar's captain consulted his fellow players individually, and after changing his mind 10 times, put the choice to a team vote. By the narrowest of margins a majority judgment (is this why a cricket team has an uneven number of players?) was given in favour of sending the opposition into bat. The toss was duly won, and the Bar bowled. At first (as usual), our performance in the field was quite competitive. When lunch was taken, the solicitors, after 31 overs, were 5 for 110. Rob Williams and Joe Forrest had opened the bowling and both bowled tightly, with Forrest gaining the initial breakthrough. However, after the adjournment, from the remaining 9 overs, the solicitors were able to score more freely, and reached 7 for 170 at the compulsory closure. Together with Forrest, Nick Pane, bowling his spinners, returned the best figures for the Bar. Forrest took 2 for 18, and Pane, with the assistance of some good catching, finished with 3 wickets for 38.

When the Bar batted David Neal and Denis Gibson started soundly, but although the batsman down the order tried to push the score along, the solicitors' bowlers remained rather frugal. Despite a late flurry, the Bar was still well short of its target when its allotted number of overs had been delivered. Chris Connor, who was bowled in the last over, top scored with 43 runs. Next best was Jeff Gleeson with a well compiled 41. Jim Ryan was once more the solicitors' most successful wicket-taker. The Bar's score at stumps was 6 for 143. Congratulations to the Law Institute for yet another victory.

The team was Chris Connor (c), Geoff Chancellor, Andrew Donald, Joe Forrest, Denis Gibson, Jeff Gleeson, Neville Kenyon, David Neal, Nick Pane, Tony Southall and Rob Williams. Undeterred, each player immediately resolved to strive again for the glittering prize in twelve months time.

C.C.

Bar 2nd XI match v. *L.I.V.* Monday, 19 December 1994

Pre-match fever was ever present with the selectors presented with a fantasy land of past performances, undocumented deeds and promise. Noticeably these representations did not come from those under 10 years call. The Bar's sides were duly selected with due regard to form.

With independent (Sub-District 1st XI) umpires again on duty, on a fine cool day at Old Scotch, the L.I.V. were sent in. Tight bowling, especially 8 overs for 19 from D. Maguire and 2 for 23 off 6 overs from Myers, saw only 65 off the first 20 overs. Mathews 2 for 10 amidst some later run chasing was also impressive. L.I.V. was 8/161 at the close.

Lunch arranged by Ron Salter (and his firm's caterer) was refreshing and most pleasant under the trees.

In reply some new Bar batsmen were to arrive at the crease. Neal led solidly, as ever, for 17. H. McM. Wright also opened gingerly. Maguire starred with 18, batting at No. 10. The rest of the story was 3/30, 4/30, 5/30, 6/30, 7/31, all out for 60. In the chaos, one batsman saw 4 fall for 1 run. Yes, there were 4 ducks (names on application)!

The story is then, like England's current malaise. Does the Bar cricket fraternity wish to be competitive? If so, some thinking should occur along the following lines:

1. There must be some real interest from the younger Bar. Perhaps the N.B.C. can take a hand.
2. Mandatory disclosure of past and any *active* current participation in the game, on signing the Bar Roll, should be required.
3. One day foregone for a game can surely be afforded. Life cannot be so desperate near Christmas that one pleads "I have a brief".
4. Occasional net practice, e.g. at 'Bat and Ball' and a session or two with Rod Marsh in Adelaide, might help. (A class action in the Federal Court in Adelaide will do. Circuit fees could pay for the course.)
5. A number of practice games before December could be considered; one might be the *Over 40s* v. *The Rest*. There are many suitable venues.
6. *Compulsory* retirement for the over 40s *before* any further game or *during* any game, is *not* a preferred option.
7. Applications for future Bar cricket selection are welcome from any member of the Bar. Is there no member of the Bar playing women's cricket?
8. Is there no one to offer Zoe Goss or another, a scholarship to Melbourne University Law School?
9. A bevy of supporters — a Bar Army — might encourage better players to emerge.
10. Any other serious suggestions to improve the quality of Bar cricket teams, should be made to the Editors of *Bar News* or to the selectors.

TR

RUPERTSWOOD — BIRTHPLACE OF THE ASHES

ON CHRISTMAS EVE 1882, THE TOURING English cricket team led by The Hon. Ivo Bligh visited the home of Sir William and Lady Clarke at Rupertswood, Sunbury. Sir William was the President of the Melbourne Cricket Club and played host to the Englishmen over Christmas at Rupertswood. He had been present at The Oval in London in August 1882 when the Australians defeated the locals in "The Great Match" and would no doubt have read the now famous notice in the *Sporting Times* of 2 September 1882:

In Affectionate Remembrance of
ENGLISH CRICKET
which died at The Oval
on
29th August, 1882
R.I.P.

N.B. — The body will be cremated and the ashes taken to Australia.

A social match was played at Rupertswood on Christmas Eve between the visiting Englishmen and some local residents and workmen. Following the game, that evening Lady Clarke burnt one of the bails and placed them in a tiny urn that she presented to the English skipper, Ivo Bligh. He took the urn back to England but it was not to be the only remembrance he had of Sunbury. At Rupertswood the dashing captain had fallen in love with the music governess, Florence Morphy. They married 18 months later and the urn returned with the newly weds to the Mother Country and remained at their home at Cobham Hall in England. Ivo became the Earl of Darnley in 1900 and the same year became President of the Marylebone Cricket Club. After his death in 1927 his widow, the former Florence Morphy, presented the urn to the Marylebone Cricket Club where it is still kept at Lords. That humble urn has arguably become the most famous sporting trophy in the English speaking world.

Over the last 70 years Rupertswood has been the location of the Salesian Fathers Secondary College in Sunbury. Upon becoming aware of the Ashes connection with Rupertswood in 1986 when his eldest son attended the College, John Jordan became interested in this piece of cricket history. He founded the Rupertswood Cricket Club in 1990 and it now fields 3 senior teams and 3 junior under age elevens in the local Gisborne District Cricket Association. John is still president and has captained the 1st XI since the club's inception. John also was a foundation committee member of the Birthplace of the Ashes Society formed in October 1992 to promote the historical connection. Sir Rupert Clarke is the Society's patron.

Deep discussion with David Gower about the English batting order!

The club played host on 18 January, 1995 to the St George Bank Origin of the Ashes Match played on the main oval at Rupertswood between elevens captained by Allan Border and David

The Presidents: L–R. Bob Lloyd, MCC Vice President; John Mitchell, MCC President; John Jordan, Rupertswood Cricket Club president.

John welcomes Dean Jones to Rupertswood.

Gower. The highly successful game was televised direct on ABC television and was promoted by inter alia, the Shire of Bulla and Tourism Victoria. The game attracted close to 15,000 spectators. It featured such legends as Dean Jones, Jeff Thomson, Paul Sheehan and Keith Stackpole for Australia while Alan Lamb, Mike Gatting and Derek Randall donned the creams for England. Over 600 runs were scored for the day and England, batting first, emerged the victors.

The 1994 Melbourne Test started on Christmas Eve, the birthday of Lady Clarke's presentation of the urn 112 years ago, and at the toss of the coin a flame was ignited by the captains, Mark Taylor and Mike Atherton, and carried by torch back to Sunbury. John Jordan was also involved in the organisation of the MCG ceremony and his third son was one of the young cricketers who carried the torch in a lap of honour before the Test. The torch then left the stadium and was carried on its journey to Rupertswood. It was used in a bail burning re-enactment after the 18 January match and the ashes presented to the victorious David Gower by members of the local theatrical society dressed in period costume. Several members of the Bar and many other cricketers in the legal profession attended the match.

It is hoped on future tours that further celebratory events will be conducted so cricket followers can enjoy this fascinating chapter in the history of cricket.

WIGS AND GOWNS SQUADRON

THE WAGS CONDUCTED ITS 10TH Regatta on 19 December 1994 at the Royal Yacht Club of Victoria, Williamstown. It was a double celebration for it was the first occasion that a yacht entered by Solicitors participated and it is to be hoped that this will continue in the future.

Although weather conditions were balmy and humid early, by 11.30, race time, the clouds lifted and a westerly breeze sprung up and a course was set and "handicaps" imposed.

Rosamund Duncan, carrying the Commodore's flag, led across the start line, without protest, to co-owner Judge Stuart Campbell's cry, "Give us a willing foe and plenty of sea room." She proceeded to take full advantage of her handicap on the first leg and led at the first mark off St Kilda. Andrew McIntosh and Dick Pithouse, sailing *Patrol*, overtook *R.D.* on the second leg up to Station Pier and was in turn overtaken on this leg by the two Etchells skippered by Ian Crisp and Garry Moore. Matt Connock's *J 24* and Egils Stoekens in *Panache* followed.

Former Commodore Ken Liversidge, in a borrowed Gin Palace appropriately called *Doghouse* engaged *R.D.* in water fights during the last leg in a scintillating display of sportsmanship as both yachts fought out the wooden spoon.

The last leg back to Royals provided a testing time for the slower boats and the Race Committee (Judge Campbell, Ken Liversidge and Tim Wood) had little difficulty in finding the result on corrected time.

Judge Campbell — "my feet are killing me" — watched by a shoeless (not legless) Meldrum.

Liversidge and crew in Doghouse.

Barnard helms Rosamund Duncan *with crew in racing mode.*

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Liversidge and crew in Doghouse.

Barnard helms Rosamund Duncan *with crew in racing mode.*

Liversidge calls up more supplies

The supplies arrive

Ian Crisp was a most worthy winner, followed by Egils Stoekens and Andrew McIntosh. Customary refreshments were partaken at Royals where Master Chef James Logan barbecued for all.

Ken Liversidge graciously accepted the Judge Advocate General's Perpetual Trophy for outstanding service to the WAGS. Judge Crossley took great delight awarding Ken the coveted prize and quipped, "It just goes to show those with a low centre of gravity are always the real winners."

T.D.W.

BENCH AND BAR v. LAW INSTITUTE GOLF DAY

THE BENCH AND BAR SUCCESSFULLY defended the Sir Edmund Herring trophy at Royal Melbourne Golf Club on 19 December 1994. In perfect golfing weather a large contingent of Bench and Bar players again managed to triumph over the Law Institute.

It was pleasing to see the number of Judges participating, including Mr. Justice Hansen from the Supreme Court and Judges Jones, McInerney, Keon Cohen, Ross and Williams from the County Court.

The best score for the Bar was returned by Robert Miller and Bryan Keon Cohen with +12. Unfortunately they were beaten on a count back for the trophy by the Law Institute pair of Thompson and Carresco. Other high scoring Bar teams were Mr. Justice Hansen and Doug Williamson Q.C. with +11, Shane Newton and Philip Bernstein +8, Judge McInerney and Leo La Fontaine +7, Tim Margetts and Greg Lucas +7 and Tony Kelly and Ken McFarlane +7. We look to defending the title in December 1995.

Lally Q.C. hits a big drive.

Lithgow, Rice, Smith and Lally Q.C. plan their tactics.

Rice accepts trophy from Rod Smith, President of the Law Institute, under the watchful eye of Malcolm Howell, Law Institute.

ANNUAL TENNIS MATCH

BENCH AND BAR V. SOLICITORS

ON TUESDAY 20 DECEMBER 1994 AT Kooyong Lawn Tennis Club the annual match for the J.X. O'Driscoll Cup was played between the Bench and Bar against the Solicitors. According to the inscription on the Cup (which the Solicitors were kind enough to allow us to examine prior to returning it to its usual place of repose at the Law Institute) the first of these matches was played in 1967, although some players present who had longer memories than the rest suggested that tennis between the two branches of the profession had been played on an organised basis even earlier than that year.

Regardless, a team of 24 men and women assembled early on the day to do battle. Initial indications were promising, as by 10 a.m. a full contingent from the Bar was in attendance, but the opposition was nowhere to be sighted. Some wags suggested they had thought of a novel way to win more of their cases by having no opponent. In fact it eventuated that the Solicitors had been given a later starting time and they duly trickled along. However it was a useful guide to who had finished work for the year and who hadn't.

Once we had opponents present, unfortunately all thoughts of breaking the Solicitors' stranglehold upon the Cup vanished. Each side formed 12 pairs, and divided into the "A" Team, the "B" Team and four mixed pairs. The mixed teams were an experiment, this having in earlier years been a men-only competition. On 1994 form, perhaps the match should be completely mixed, as the Bench and Bar Team won this division convincingly, 10 sets to 5. Chris Wren and Debbie Mortimer were undoubtedly the stars for the Bar Team, winning all 4 of their sets. There were also solid performances from David O'Callaghan, and the "German Import", Martina Skirde, who as part

The teams

of her training for the judiciary (German) is reading with Mason. During lunch some of the judges seemed particularly keen to gain an insight into what they might expect if judicial training is introduced here. K. Judd, A. Wardel and M. Hines also turned in creditable performances.

In "B" Section, each side engaged in some chicanery and finessing in seeking to gain an advantage. Collis, long the great white hope of the Bar, sought to play in "B", "So I don't have to run so hard after those young blokes." Sensing some such stratagem, Mayberry, captain of the Solicitors and long one of their stars, dropped himself to "B" also and succeeded in preventing Collis and Judge Roly Williams from executing a clean sweep of their sets. The transferees, Teague J. and Judge Tony Smith eagerly embraced by the Bench and Bar soon after their elevation to the Bench some years ago, performed strongly as usual, and David Curtain and Ross Middleton made valuable contributions. Honours were even in this Section overall at 6 sets apiece.

Unfortunately, the imbalance between the two teams was most apparent in "A" Section where the Bench and Bar failed to win a single set. Mark Gibson and John Simpson put up a valiant effort and went close to a victory. Danos and Gilbertson fought hard, as did Ray Gibson and his partner Mike Turner, but victory proved far too elusive. Judge Fred Davey and Grant Holley tried, but were obviously hampered by the injured judicial hamstring (hamstrung in their performance, did someone say?). Hase J. and Les Schwartz played some inspirational tennis but without producing the success warranted.

The Combine team was sadly unbalanced and depleted by some significant last-minute returns of briefs, as the Practice Court in the several different jurisdictions exercised its peculiar pre-Xmas fascination for litigants and their lawyers and claimed a number of our erstwhile stars, thus requiring drastic last-minute reshuffles of the side. Nevertheless, for those able to attend, it was a most enjoyable day, providing a mixture of sport, socialising and relaxation in a convivial atmosphere on the beautiful grass courts at Kooyong. Our heartfelt thanks go to the Manager and his staff at the Club for their quiet assistance to ensure that the day was such a great success.

If there are other members of the Bar interested in playing in the 1995 match, particularly those competing in "A", "B" or "C" Pennant, please contact Chris Thomson.

Chris Thomson

WHEN ARE CIRCUMSTANCE SUSPICIOUS?

ACCORDING TO THE *HERALD* OF 17 March 1986 (p.2), the NSW police of the day were reluctant to jump to hasty conclusions.

Police Study Body

SYDNEY — Scientific police were today examining a headless and armless body found by a jogger yesterday to see if there were any suspicious circumstances.

The jogger tripped over the badly decomposed male body during a predawn run at Long Reef Breach in Sydney's north.

Police said they had been unable to identify the body.