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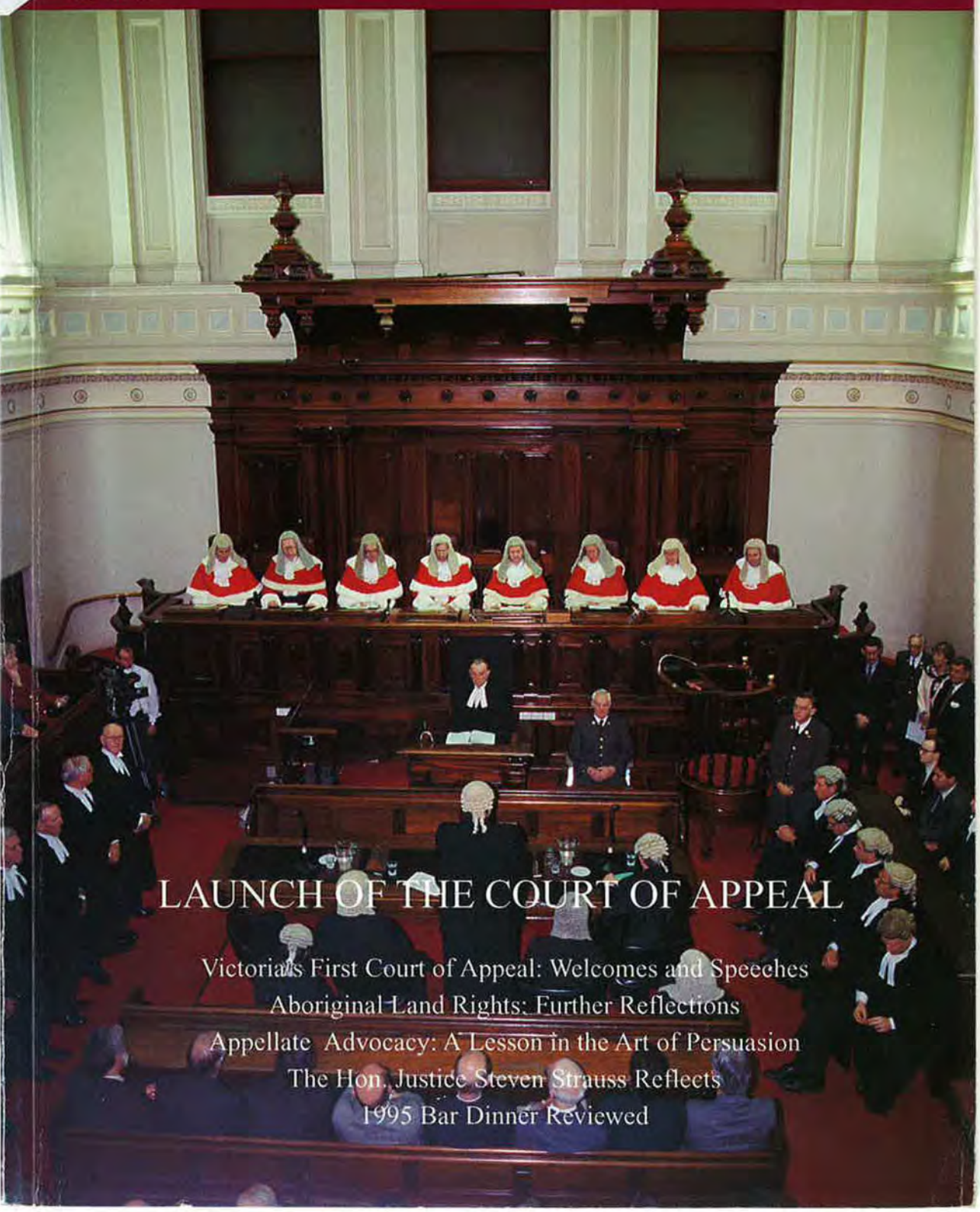

LAUNCH OF THE COURT OF APPEAL

Victoria's First Court of Appeal: Welcomes and Speeches
Aboriginal Land Rights: Further Reflections
Appellate Advocacy: A Lesson in the Art of Persuasion
The Hon. Justice Steven Strauss Reflects
1995 Bar Dinner Reviewed

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An historic cover marking an historic event: the launch of Victoria's new Court of Appeal. Photograph shows eight of the nine Justices (Tadgell A.J. was overseas) at the ceremonial opening in the Twelfth Court.

President Winneke

Justice of Appeal Charles

Justice of Appeal Callaway

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EDITORS' BACKSHEET

COURT OF APPEAL

THERE CAN BE NO DOUBT THAT THE MOST significant event of the Victorian legal year is the establishment of the Court of Appeal. With the appointment of Jack Winneke Q.C. (as he then was), the presidency has come to Victoria much earlier than the more publicised and more putative presidency canvassed by Paul Keating.

As from 7 June 1995 Victoria has a Court of Appeal separate and distinct from the Trial Division of the Supreme Court.

The establishment of the court involves a break with the Victorian tradition. It will mean that no longer do judges of the Supreme Court find themselves sitting on appeal from judgments of their brothers, who, in turn, at some later stage will in all probability sit on appeal from them.

The change has a number of advantages: members of the court can be appointed having regard solely to the special skills required of appellate judges; as a permanent body the court has a much greater capacity to streamline its procedures and practices; the members of the court, acting only as appellate judges, have a greater opportunity to strengthen their collective memory and hone their individual skills.

The change does, however, have the disadvantage that sitting only on appeals, the members of the Court of Appeal may over a period of time become removed from the hurly burly of the trial court to the extent that they will not have the same empathy with, or understanding of the realities of the trial process as do those who sit as trial judges in one month and find themselves sitting as part of an appellate court the next. For those who doubt that an appellate court can become remote in this sense, we refer the reader to the direction in respect of excessive self-defence which the High Court prescribed in *Viro* v. *R* (1978) 141 CLR 18 8.

The members of the new Court of Appeal take office at a time when the executive exercises dominion over the legislature and feels little inhibition in changing the law to remove common law rights which may stand in the way of government policy. The Justices of Appeal face the prospect that during their tenure of office the tension between the judicial and executive arms of government is more likely to increase than decrease.

We congratulate the members of the Court of Appeal and wish them well.

LENGTHY TRAILS

Unfortunately most members of the public do not appreciate the significance of the court's role in protecting the individual from the power of the State. Equally unfortunately, the executive does appreciate the capacity of the legal system to protect individual rights and, in some cases, thereby to impede the implementation of government policy.

In two recent decisions the Court of Criminal Appeal has drawn attention to the fact that excessively lengthy trials may not only confiscate an abuse of the system; they may also lead to the demise of the system.

It may be that cases have become more complex; it may be that counsel are more thorough in their preparation; it may be that counsel are more ingenious in finding fine points; it may be that the advent of Legal Aid has meant that points which have little chance of success may be taken without any penalty in costs. Whatever the reason, it is clear that trials — not just the very long trials, but all trials — tend to be much longer than they were 30 or 40 years ago.

The introduction, by the *Crimes (Criminal Trials) Act* 1993, of the power to order the filing and serving of a prosecution case statement and a defence response creates a potential to limit the issues before the court. That potential needs to be exploited with care but also with an eye to reality.

The Court of Criminal Appeal in *R* v. *Wilson and Grimwade* [1995] 1 VR 163 at 180 sounded a warning that unnecessarily long trials may have an adverse affect on the administration of criminal justice as we know it.

> Let it be understood henceforth, without qualification, that part of the responsibility of all counsel in any trial, criminal or civil, is to cooperate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed . . . This is not to deny that counsel are entitled and obliged to deploy such skill and discretion as the proper protection of their clients' interests demands. Whether the cost of legal representation be privately or publicly borne, counsel are to understand that they are exercising a privilege as well as fulfilling a duty in appearing in a court of law; and neither privilege

nor duty will survive the system of justice of which this court is part. We derive no satisfaction from making these observations save, by doing so, to give public notice of the peril to which, by this re-trial, the system of justice was put.

If the system becomes too expensive or too unwieldy, there are always those who are willing to change it. In the move to "law and order" there are many who would consider that too much public money is spent on "criminals" and the proof of their guilt; that too much public money is paid to lawyers; and that a system which can result in year-long trials needs to be overhauled. It is almost inevitable that any such reform would be detrimental to the rights of the individual and directed to ensuring the speedy conviction of the guilty at the least possible expense to the community. Such changes would reduce public expenditure and enhance the power of government. They would also diminish the rule of law.

CONTROL OF THE LEGAL PROFESSION

Reform of the legal profession and the legal process has been in the air for a long time. "All lawyers are fat cats." "All lawyers make too much money." "Lawyers do not provide value for money." "Lawyers are charlatans and nit-pickers." This is the image which has been projected to the public. It is an image which in one form or another has existed for a long time, largely because most members of the public do not understand what we do. It is also an image which the media and the politicians are prone to encourage.

Since Bob Hawke's days of "consensus" (or perhaps it started with Gough Whitlam's fiddling with the "permanency" of our top public servants), there has been a gradual move towards a "collectivist" state, in which the rights of the individual stem from his rights as a member of a group. Aboriginal land rights, affirmative action, John Howard's proposal for a "People's Convention" — whatever their merits — all reflect the theory of the corporate state — or, as it was more commonly called during World War II and the years immediately following, "fascism". The lawyer who blocks government policy or who impedes "reforms" on behalf of a mere individual, whose rights are not put forward as representative of the rights of some group, does not fit easily into this system.

The proposal that control of the Victorian legal profession be vested in a government board caused Justice P.W. Young in the June 1995 issue of the *ALJ* to say:

> It may very well be argued that the reforms should not introduce much change in practice, at least in the short term. However, experience shows that in the long term bodies which are over-influenced by local politics do employ political considerations in their determinations as to who is to be admitted as a lawyer. In some of the southern states of America, the rights of the black minority were denied for many years by the simple expedient of banning any interstate lawyers from appearing in the state courts and by a strange coincidence, those local lawyers who did appear for blacks, found themselves being disbarred or not being admitted . . . That scenario may not happen in Victoria, but why anyone should try and set up a situation where it might occur is rather hard to comprehend. Perhaps the lessons of history have not been learnt."

We endorse, with respect, His Honour's statement.

PROTECTION OF INDIVIDUAL RIGHTS

The most essential role of the legal profession and the courts — and in one sense especially of the new Court of Appeal — is to stand as a buffer between the rights of the individual and the power of the state. It is important that the legal profession does not lose sight of that vital role and that the courts do not, in their attempts to facilitate the implementation of the will of the legislature (often in reality the will of the executive) reject "technical" arguments or "nice points" of statutory interpretation. If legislation does not implement the will of the legislature, it is within the power of the legislature to alter it.

The individual has no comparable power.

RENT REDUCTIONS

While the establishment of the Court of Appeal is clearly the most significant event of 1995 in the administration of law in this State, many members of the Bar would regard the 40 per cent reduction in rents in Owen Dixon Chambers West as of more immediate importance.

It is clear that, whatever interpretation the experts may place upon the economic indicators, the recession is sill being felt by the Victorian legal profession, and in particular by the Victorian Bar. The fact that Barristers' Chambers Limited has finally managed to negotiate a settlement with Schroeders not only makes a difference in the net income of members of the Bar. In some cases it may well have made the difference between individuals staying at the Bar and leaving.

Ironically it is the abolition of the Compulsory Chambers Rule which gave Barristers' Chambers Limited the leverage to negotiate the deal which has been reached. The reduction in rents has both reduced the pressure for the establishment of alternative chambers not under the aegis of Barristers' Chambers Limited and increased the viability of many practices.

We congratulate BCL on a deal well done.

The Editors

CORRESPONDENCE

Dear Sirs,

Re: Equality in Education/A response to Gerard Nash

I think it appropriate to write in response to Gerard Nash's article, 'Equality in Education' (1994) 91 Vic B.N. 68.

The Monash Law Faculty's new grading system sets presumptive quotas in respect of subjects with an enrolment of over 100 as follows:

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

Mr. Nash criticises the decision to introduce this system but fails to refer to the reasons for the decision or to the grading systems in operation in other universities within Victoria and across Australia. This information was fully set out in papers accompanying the recommendations made to the Monash Faculty Board.

Some years ago the University of Melbourne introduced the following presumptive quotas:

H1	5%
H2A	10%
H2B	10%
H3	25%
Total	50%

The effect of this decision taken by the University of Melbourne was that Melbourne law students received honours at more than twice the rate of Monash law students. This placed our students at a great disadvantage when competing with students from the University of Melbourne for articles, for jobs and for scholarships. It should be noted that under the new Monash system the Monash Law Faculty remains significantly less generous than the Melbourne Law Faculty in its award of honours grades. To criticise the decision taken at Monash without reference to comparisons with Melbourne is, in my view, quite unfair.

The new system at Monash was designed not just bearing in mind comparisons with the University of Melbourne. Regard was also had to systems in operation in other Monash University faculties and in other Australian law schools. A situation in which, as was the case, Monash law students received fewer honours grades than students in other Monash University faculties and other Australian law schools was clearly to the detriment of our students and needed to be addressed.

I should also comment on Mr. Nash's nostalgia for days when "it was assumed that those who attained university entrance had a reasonable degree of intelligence". If his remarks are intended as applicable to the Law Faculty at Monash, I can only say his views run counter to my own experience. I believe today's undergraduate law students are more talented, hard-working, dedicated and professional than has ever before been the case. Far from standards declining, I believe they are rising and that today's law students reach for levels of legal learning that their predecessors did not often attain.

Yours sincerely,
C.R. Williams
Dean of Law

Dear Sirs,

Re: Finger Print Evidence

The article by Ron Clark (Summer 1994) evokes memory of a case as far back as 1937 in which I as a law clerk with Roy Schilling, "instructed" Leo Little on the trial of Colin McKenzie. He was presented on several counts of office breaking.

His alleged modus operandi was to spend each Saturday afternoon in a selected city office building. His breaking tool was a strip of celluloid which he would insert under the office door and work it up the side of the door until it came in contact with the Yale lock which would spring and open the door. This was long before deadlocks and coded locks.

Once inside the office, he would only take cash which experience and instinct enabled him to find easily. Visiting several offices in the block, he would net about fifty pounds for an afternoon's work. Considering that an employee solicitor might earn six pounds per week, he was able to support an affluent life style. Traps were set for him, but as it was never known where he would turn up next, he was hard to catch.

Eventually he was caught on the stairs between floors in a bank building where breakings had taken place. The strip of celluloid was not in his possession when he was caught.

He gave some cock-and-bull story as to why he was in the building, and although he had some twenty pounds in his pocket, he was in full-time employment and he claimed that he had been saving up for some time to buy some furniture.

Unfortunately for him, fingerprints, allegedly his, were found in these offices.

It is rare to have a case in which the only direct evidence linking the accused to a crime is his fingerprints. This was such as case.

In order to prepare the brief, I obtained a book on fingerprints and studied it. I sought and was granted permission to visit the fingerprint section at Russell Street where a helpful detective explained the system of recording and identifying prints.

There are four types — arches, loops, whorls and composite. Ridges are counted from the centre or core of the print outwards to the extremity of the finger. Based on the type, a numerator/denominator value was assigned to the print and in those days, long before computers, the prints were filed in a card-index system depending on type and numerical value.

For the purpose of the instant case all I had to go on was the sample supplied by the police which placed photos of the prints found in the offices alongside photos of prints undeniably those of McKenzie. The prints were slightly enlarged to the size of a large postage stamp with some 19 points of similarity in the two prints marked.

It seemed to me that as the prints were so vital, they should be greatly magnified. I made a crude but effective epidiascope from a small wooden box lined with a small sheet of tin to prevent the wood catching alight. Today one would use aluminium foil. I cut out holes at the base to introduce two 25 watt globes each side of an Ovaltine tin with both ends removed so that it was open at the back but in the front I fixed a magnifying glass. The tin

fitted into a hole in the front of the box but was loose enough to permit adjustment of the tin to focus.

The back of the box was hinged to permit raising and lowering. Whatever was required to be projected was then attached upside down by thumb tacks to the back of the box. When the lights were switched on the two sets of finger prints were projected on a screen or a white wall so greatly magnified that the distance between ridges was about 1 cm.

Where the police identified 19 points of similarity, I found 32. Leo Little put this to good use. The cross-examination went along these lines:

Q: A fingerprint is an unforgeable signature isn't it?

A: Yes.

Q: No identical fingerprints have ever been discovered anywhere in the world belonging to two or more different persons have they?

A: Not as far as I know.

Q: Prints, barring accidents disfiguring the fingers remain unaltered from birth to death, don't they?

A: Yes.

Q: Of course it follows that if I can point even to one point of difference, they can't belong to the same person can they?

A: No, but there are no differences.

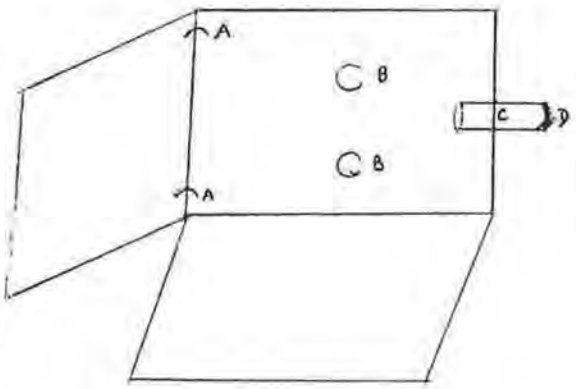
Q: All right, Sergeant. You have shown us 19 points of similarity. I am going to show you 32 points of dissimilarity.

At this stage permission was obtained for me to set up a screen and operate the epidiascope. The witness was taken by surprise and ad libbed his answers to each of the 32 dissimilarities.

Broadly he stated that the prints taken by the police were obtained under perfect conditions, each finger being pressed on an inked pad and carefully rolled over a clean surface so that each feature of the finger was indelibly recorded.

On the other hand, prints found in the office were accidentally imprinted so that only that part of the finger which made contact with the surface was imprinted.

However the fact remained that in the perfect print, lines or ridges were shown as continuous while in the print found in the office, the lines in 32 places were broken. It was then a matter of informed judgement — or as Leo Little put it — guesswork as to whether a man's liberty depended on reading into the imperfect print something that demonstrably was not there.



A: Hinged door to which object to be displayed is affixed upside down.
B: 2 X 25 watt lamps.
C: Cylindrical can open at one end.
D: Magnifying glass inserted in can.

The jury was allowed to take the epidiascope into its room and use it.

After six hours the jury announced it could not agree. The practice then was to discharge the jury after six hours and remand the accused for a fresh trial.

On the re-trial, Leo Little was unavailable and a different Counsel was briefed. The element of surprise had gone. The finger print expert was prepared to explain away all the apparent differences. This time the jury accepted his evidence and the accused was convicted. He had very considerable "form" and received a lengthy sentence.

I met him after the war. He assured me he had gone straight for a long time. He had studied stock exchange operations while in Pentridge. He had put this knowledge to good use and owned two blocks of flats in South Yarra.

Incidentally the epidiascope is easy to make and will project in the colour of the card or photo being displayed but be sure to affix the text upside down to the flap at the back of the box.

I enclose a somewhat crude sketch.

Yours faithfully
Philip Opas

CHAIRMAN'S CUPBOARD

IN THIS ISSUE I WANT TO MENTION A number of matters which have no connection other than that they concern recognition of a number of our members.

First, I wish to extend the Bar's congratulations to the founding members of the Court of Appeal. It is an extremely strong Court and under the leadership of the President, it will, I am sure, have a lasting and beneficial effect on the administration of justice in this State. In particular I would like to congratulate the three new members of the judiciary, Winneke P. and Charles and Callaway JJA. Their presence at the Bar will be greatly missed as each, in his own way, has made an outstanding contribution to the Victorian Bar. (More detailed appreciations of their contributions appear elsewhere in this issue.)

David Habersberger

Secondly, I would like to publicly acknowledge the dedication and hard work shown by the directors of Barristers' Chambers Limited over a number of years, but particularly in recent months as they strove to bring the negotiations with Schroders to a successful conclusion. It was my observation that the announcement of the result of those negotiations was virtually unanimously applauded and that it caused a significant lift in the morale of members of the Bar. Whilst further steps are still required, I believe we can now look forward with some confidence to the survival of BCL and its emergence as a commercially viable competitor in the brave new world of a non-compulsory chambers regime. All of the Bar owe a debt of gratitude to the directors of BCL for their recent efforts which, I know, have been most time-consuming.

Those of you who attended the Bar Dinner will be aware that the Bar Council invited to the Bar Dinner as special guests, Brian Thomson Q.C. and Charles Francis Q.C. Both Brian and Charles have now been in active practice for over 45 years, an achievement which the Bar Council decided was worthy of special recognition. In fact, over 46 years ago, on 9 September 1948, Brian Thomson signed the Bar Roll as No. 408 and, on 4 February 1949, Charles Francis signed the Bar Roll as No. 416. Each of them has appeared in numerous cases, including some of great significance, both before and after they took silk, which Charles did in 1969 and Brian in 1970. Not only have they been practising at the Bar since before the vast majority of the Bar were even born, they were appointed Queen's Counsel long before many other current silks had started reading. I congratulate Brian and Charles on their most significant achievement.

Charles Francis has informed me that the Victorian Bar has had four members who have practised for over fifty years. They were S.K. Hotchin and P.A. Jacobs who signed the Bar Roll in September 1900, Sir James Tait who signed in September 1919 and Louis Voumard who signed in November 1921. Both Thomson and Francis are well on the way to joining this select group.

Next, I wish to draw to your attention the creation of the Independent Expert Evaluation Panel. This body was set up at the suggestion of the Victorian WorkCover Authority, with the cooperation of the leading plaintiffs' and defendants' firms of solicitors, in an effort to cope with the backlog of cases concerning common law injuries prior to 1 December 1992. These cases are by agreement to be submitted to an independent expert who will determine what is a fair figure in all the circumstances and the Authority has bound itself to make an offer of that amount if it exceeds the Authority's last offer. It is matter of some satisfaction, I believe, that when it came to the selection of independent experts acceptable to both sides all of those chosen were barristers. This exercise has shown, once again, that despite the criticisms sometimes directed at the Bar, when sensible and practical changes are suggested, the Bar is prepared to play its part in meeting the challenge.

Finally, I note that on 25 May last another 38 readers signed the Bar Roll. In stark contrast to the numbers of Francis Q.C. and Thomson Q.C., the last reader to sign on that occasion was No. 3000. By all accounts the March 1995 intake is an excellent group of readers and thus the future of the Bar seems assured for many years to come.

ATTORNEY-GENERAL'S COLUMN

IN THIS ISSUE, I WILL DISCUSS THE *EQUAL Opportunity Act* 1995, the reforms to the Legal Aid Commission, the establishment of the Law Aid Scheme and the operation of the Children's Court pre-hearing conference facility.

EQUAL OPPORTUNITY ACT

Victoria's new equal opportunity legislation was passed during the 1995 Autumn session of Parliament. The *Equal Opportunity Act* 1995 repeals and replaces the *Equal Opportunity Act* 1984. It is anticipated that the new Act will be proclaimed and become operational in September or October 1995.

New grounds of discrimination

Under the 1984 legislation, discrimination was prohibited on the basis of sex, marital status, parental status, impairment, religious and political beliefs or activity. In addition to retaining these, the Act introduces seven new attributes on the basis of which discrimination is prohibited: age, status as a carer, lawful sexual activity, pregnancy, physical features, industrial activity and personal association.

Age

As a corollary to the prohibition on age discrimination, the Act also prohibits compulsory retirement. Schedule 2 to the Act repeals legislative provisions which provide for compulsory retirement or which prevent individuals above a specified age from being appointed to certain offices. However, the prohibition on compulsory retirement will not come into effect until one year following the proclamation of the Act. During the one year lead-in period an employer may compulsorily retire his or her employees.

Status as a carer

The Act prohibits discrimination on the basis of a person's status as a carer when providing ongoing care and attention to another person on a non-commercial basis.

Lawful sexual activity

Discrimination which is based on a person's lawful sexual activity or imputed activity is prohibited under the Act. This new ground of prohibited discrimination is intended to protect homosexuals and heterosexuals, or people perceived to fall into a particular category from discriminatory actions. Lawful sexual activity does not include paedophilia or bestiality.

Pregnancy

It has been held in the past, under the 1984 Act, that discrimination on the ground of pregnancy was sex discrimination on the basis that pregnancy is a characteristic relating to the female sex. The new Act establishes pregnancy as a separate ground of prohibited discrimination.

The Act introduces seven new attributes on the basis of which discrimination is prohibited.

Physical features

Victoria is the first jurisdiction in Australia to prohibit discrimination on the basis of a person's physical features, which is defined in the Act to mean a person's height, weight, size or other bodily characteristics.

Industrial activity

The new ground of industrial activity contained in the Act will afford protection from discriminatory actions for persons who are members or non-members of employer or employee unions or other professional organisations. Discrimination which is based on a person's participation or non-participation in a lawful activity (such as strike activity) organised or promoted by an industrial organisation is also prohibited.

Personal association

Discrimination based on the attribute of personal association is prohibited under the Act. This ground of prohibited discrimination is intended to protect people who are discriminated against because of their association, whether as a relative or otherwise, with a person who has any of the attributes specified in Part 2 of the Act.

Prohibition of direct and indirect discrimination

The Act prohibits discrimination on the basis of actual or imputed characteristics. It also prohibits direct and indirect discrimination. For the purposes of direct and indirect discrimination, the Act specifies that a person's intention in discriminating or awareness of the discrimination is irrelevant.

The Act adopts a new and comprehensive definition of sexual harassment which parallels the definition of sexual harassment in the Commonwealth *Sex Discrimination Act* 1984.

Areas of discrimination

Part 3 of the Act specifies the areas of activity where discrimination is prohibited. The main areas of activity where discrimination is prohibited include employment, accommodation and the provision of goods and services. A new area of activity where discrimination is prohibited is in relation to the disposal of land. The Act also clarifies the circumstances in which discrimination in sport will be unlawful.

Exceptions

The Act contains a number of limited exceptions where discrimination in the circumstances specified in the Act will not be unlawful. Many of the exceptions re-enact similar exception in the 1984 Act. The significant new exceptions are:

Employment

- an employer will be able to limit the offering of employment to people of a particular sex where it is a genuine requirement of the occupation;
- an employer who employs no more than five employees, in addition to the relatives of the employer, will be able to discriminate in determining who should be offered employment;
- the Act enables employers to set and enforce standards of dress, appearance and behaviour for employees that are reasonable taking into account the nature and circumstances of the employment;
- the Act provides an exception in relation to employment that involves the care of children. Under this exception, an employer will be able to discriminate against an employee or prospective employee on the basis of any attribute specified in Part 2 of the Act, if all of the specified conditions are satisfied.

Education

The Act enables an educational authority to set and enforce reasonable standards of dress, appearance and behaviour. The Act deems a standard set by a school to be reasonable if the educational authority administering the school took into account the views of the school community when setting the standard.

General exceptions

Discrimination based on statutory authority

Discrimination which is necessary to comply with or is authorised by a legislative provision will not be unlawful. Most of the legislative provisions that provide for compulsory retirement are repealed by Schedule 2 to the Act.

Religious bodies and religious schools

Religious bodies are provided with an exemption in the Act which is similar to an exemption that existed in the 1984 Act. However, while being exempt from Part 3 of the Act, religious bodies will be subject to the sexual harassment provisions of the Act.

The Act also provides a limited exemption for educational institutions (established by individuals or bodies) that are to be conducted in accordance with particular religious beliefs or principles.

Religious beliefs or principles

The Act provides an exemption for discrimination which is necessary to comply with a person's genuine religious beliefs or principles.

Other unlawful conduct

Sexual harassment

The Act adopts a new and comprehensive definition of sexual harassment which parallels the definition of sexual harassment in the Commonwealth *Sex Discrimination Act* 1984. Sexual harassment is prohibited in employment, in educational institutions, in the provision of goods and services, in the provision of accommodation and in clubs.

Procedural changes

The Act makes very few changes to the procedural framework established under the 1984 Act.

The significant changes are:

- change of name for the Equal Opportunity Board to the Anti-Discrimination Tribunal;
- specific provision made for the lodging of complaints with the Equal Opportunity Commission by children;
- conciliation agreements given a formal status under the Act;
- specific provision made for a complainant to initiate an expedited hearing;
- the introduction of a 'special complaints' procedure for the determination of a specified class of complaint. A 'special complaint' is required to be determined by the Supreme Court.

LEGAL AID COMMISSION

The Government is committed to improving access to justice for all Victorians. One of the objectives in this regard has been to reform the operations of the Legal Aid Commission ("the Commission"). There have been two recent reviews of the Commission: a performance audit conducted by the Auditor-General in 1993; and a joint Commonwealth/State review conducted by Mr. Don Cooper, of the national law firm, Sly & Weigall, in 1994 ("the Cooper Report"). Both reviews recommended extensive changes to the structure, management and operations of the Commission in order to improve its efficiency and effectiveness.

Many of the recommendations of the Auditor-General have now been implemented, or are currently in progress. For example, the implementation of tendering and franchising arrangements in relation to grants for legal assistance were the subject of the *Legal Aid Commission (Amendment) Act* 1994.

Following the tabling of the Cooper Report in Parliament in December 1994, an interim committee on legal aid was established, which comprised both Victorian and Commonwealth representatives. Its primary objective was to review the recommendations contained in the Cooper Report, and to plan the content and extent of change to the Commission. Recent reforms to the Commission, as embodied in the *Legal Aid Commission (Amendment) Act* 1995, are based on the recommendations of the interim committee, which in turn are based on the recommendations contained in the Cooper Report.

The Commission is to be replaced by a new corporate body to be known as Victoria Legal Aid ("VLA"). VLA will essentially take over the functions, powers and duties of the Commission. It will be comprised of a five-member board of directors, the membership of which includes a chairperson and a managing director. Both the State and the Commonwealth will be able to nominate representatives on the board. The position of Director of Legal Aid will be replaced by a Managing Director who will have control of the day to day running of VLA, subject to the overall supervision of the board. It will be the role of the board to oversee the management of VLA. It is envisaged that the board will be positioned to enable forward strategic planning, which will in turn lead to the more effective, efficient and economical use of available resources.

The Act also establishes a new Community Consultative Committee, whose role will be to advise the board on any matter referred to the committee by the board. The committee will consist of representatives of some of the interest groups currently represented on the board of commissioners of the Commission, and any other persons that the board wishes to include.

The reforms to the Commission have been made with the primary objective of ensuring that efficient and effective use is made of available legal aid resources.

The reforms to the Commission have been made with the primary objective of ensuring that efficient and effective use is made of available legal aid resources.

LAW AID SCHEME

To ensure that legal services in Victoria will be more readily accessible to members of the community, the *Legal Aid Commission (Amendment) Act* 1995 facilitates the implementation of the Law Aid Scheme ("the scheme"). The purpose of the scheme is to facilitate the provision of financial assistance by the private legal sector for civil litigation matters. The Government has committed a grant of $1 million as seed capital to establish the scheme. Beyond this initial capital grant, the scheme is expected to become financially viable and self-sustaining. Both the Law Institute of Victoria and the Victorian Bar Council are responsible for the establishment and operation of the scheme.

When in operation, the scheme will accept applications for civil litigation assistance from mem-

bers of the public who cannot afford to fund civil litigation out of their own resources, and who may not be eligible for legal aid. Specifically, the scheme will fund the expenses of conducting litigation, other than solicitors' and barristers' fees, in return for a contribution of up to 10% of the amount awarded or settled in the case of a successful outcome. Solicitors and barristers conducting the case will do so on a speculative "no win, no fee" basis. It is to be noted that the introduction of the scheme makes no change from the existing prohibition on the use of contingency fees by lawyers. Such fees remain prohibited.

The Government believes that the scheme will provide a major boost to the Victorian legal system, and provide assistance to people who could not otherwise afford to go to court.

PRE-HEARING CONFERENCE PROGRAM

The *Children and Young Persons Act* 1989 ("the Act") was amended in 1992 to provide for the holding of pre-hearing conferences in the Family Division of the Children's Court. They were introduced as a pilot program, and were intended to operate for a period of twelve months, from 14 June 1993. In 1994, the Act was amended to extend the pre-hearing conference program for a further 12 months. That period was due to expire on 30 June 1995.

Pre-hearing conferences take place prior to a formal court hearing. They are used in protection applications for children. An order for referral to a pre-hearing conference is made by the Family Division of the Children's Court, either on the application of a party, or without any application. The pre-hearing conferences are conducted by conference convenors and are intended to assist the Children's Court to dispose of its caseload more effectively by providing an alternative, less adversarial forum to contested hearings for the parties to resolve the dispute.

The pilot program for pre-hearing conferences was formally evaluated by a team of researchers from the School of Social Work in the University of Melbourne. The evaluation was undertaken for the period between November 1993 and September 1994. The report concluded that the pre-hearing conference program "has proved itself to be a valuable addition to the present responses to child protection matters". It recommended that the conferences should continue to be funded. In addition, the report concluded that:

- there was a steady increase in the number of pre-hearing conferences scheduled for each month. The report states that this increase is to be expected, as the program gradually gains credibility with Magistrates, Health and Community Services protection workers, and legal representatives;

The pilot program for pre-hearing conferences was formally evaluated by a team of researchers from the School of Social Work in the University of Melbourne.

- pre-hearing conferences have resulted in an agreement of 60 per cent of cases under dispute. In a number of cases that did not reach settlement, pre-hearing conferences provided a venue for narrowing and clarifying the terms and matters in dispute; and
- the length of time taken by the average pre-hearing conference was approximately 3.25 hours, compared to three or more days for a contested hearing in the Children's Court. The report concludes that when magisterial and court staff time, party representative and witness attendance, and associated costs in relation to contested hearings are taken into account, pre-hearing conferences represent a considerable saving in time and costs to the parties, and to the community.

Due to the success of the pre-hearing conference program in providing an efficient and cost-effective alternative for resolving protection applications, the Government decided to continue the pre-hearing conference program indefinitely.

Jan Wade, M.P.
Attorney-General

LAUNCH OF THE COURT OF APPEAL

ON WEDNESDAY 7 JUNE 1995 VICTORIA'S first Court of Appeal was sworn in at Government House.

On that occasion the Chief Justice was re-sworn and the President and Judges of Appeal (except Mr. Justice Tadgell who is overseas) were sworn. At that swearing a new practice for swearing Supreme Court judges was initiated as a result of amendments to Victoria's Constitution last December.

The *Constitution Act* 1975 makes provision by ss.6A to 6D for the exercise of the powers of the Governor if there is not a Governor available to exercise them. If neither the Governor nor the Lieutenant Governor is available, the powers are to be exercised by the Chief Justice or most senior judge of the Supreme Court available. Depending upon the circumstances those powers would be exercised as administrator or as Governor's Deputy. By section 6A(6) and 6D a new requirement has been introduced under which a person cannot act in either of those capacities until he or she has taken an oath or affirmation of allegiance and of office in respect of the particular office.

Consequently, to use the words of the official secretary to the Office of the Governor "to avoid the risk of a judge acting without taking the oaths and also to provide for an emergency where it might be necessary for a judge, as administrator, to assume administration and act quickly, all judges will on appointment take the two oaths (or affirmations) as well as the oath or affirmation of office as a judge".

All members of the Court of Appeal consequently took the oath of allegiance, the oath of office as a judge and the oath of office as administrator or Governor's Deputy.

Oath of Office as a Judge

I, JOHN SPENCE WINNEKE, swear by Almighty God that as a Judge and as the President of the Court of Appeal of the Supreme Court of Victoria, I will at all times and in all things do equal justice to the poor and to the rich, and discharge the duties of my office according to law, and to the best of my knowledge and ability, without fear or favour, affection or ill-will.

Oath of Office as Administrator or Governor's Deputy

I, JOHN SPENCE WINNEKE, swear by Almighty God that if and whenever, having become Administrator I assume the administration of the Government of the State of Victoria or am appointed the Governor's Deputy, I will in administering the Government as Administrator or in acting as the Governor's Deputy well and truly serve Her Majesty Queen Elizabeth the Second and Her Majesty's heirs and successors and do right to all manner of people after the laws and usages of the State, without fear or favour, affection or ill-will.

SWEARING IN OF THE JUDGES

ON THE OCCASION OF THE SWEARING IN of the judges of Victoria's first Court of Appeal the Governor of Victoria, His Excellency the Honourable Richard E. McGarvie A.C. gave the following address.

Chief Justice, President, Judges of Appeal

Speaking as a Governor does, on behalf of the whole community, I congratulate you on being now fully constituted members of Victoria's first Court of Appeal

By the office and oaths you have taken, you have accepted a weighty responsibility of leadership in an arm of government vital to the well-being of this community. A priceless possession of the community is its democracy. More than any other system of government, a democracy depends fundamentally for its successful operation on its judges being strong, respected and independent.

As the first members of this Court of Appeal, each of you has a guaranteed place in history. The nature of that place will depend on the assessment history makes of your contribution in the three areas of judicial responsibility today.

First, it will assess the way in which you exercise your judicial powers. Your conduct on and off the bench and the quality of your judgments will be scrutinised. In your conduct on the bench it is assured that you will be friendly and understanding judges. Judges in Victoria have always forsworn fear, favour and affection. Due to a change in Victoria's Constitution last year, you are the first judges to forswear also ill-will.

Secondly, history will ask whether you accepted and exercised your responsibility to be active to ensure that in administration and operation your Court and court system are efficient. Citizens will not respect judges whose courts or systems are inefficient. In attaining efficiency judicial leadership is crucial.

Thirdly, your reputation will depend on whether history regards you as having given leadership in the promotion and preservation of judicial independence. Judicial independence means no more and no less than that judges be free from influences which could deflect them from deciding cases on an impartial finding of the facts, an impartial application of the law and an impartial exercise of any discretion.

The Governor and the Attorney-General

You will hold office at a time when, in democracies throughout Australia and the world, there will be pressures from the Executive against judicial independence of a degree not seen for centuries. In this area posterity will measure the leadership you give within your Court and your Council of Judges, and within the organisations of judges and the judicial arm of government, in practical support of the structures, practices and protections which enhance judicial independence.

I know you all and regard each of you as a friend. I am confident that in its verdict, history will give each of you an honoured place on all counts.

OPENING OF THE COURT OF APPEAL BUILDING

Attorney-General opens the new Court of Appeal building with the Chief Justice of Victoria

CEREMONIAL SITTING OF THE COURT OF APPEAL: SPEECHES

The Attorney-General

Chief Justice Phillips: Madam Attorney.

The Attorney-General: May it please the court. It is my honour to make the first appearance on behalf of the Government of Victoria before this Court of Appeal. I do so with some trepidation. The universal reaction of barristers upon hearing the names of Your Honours as appointments to the court has been to mutter some variation on, "That's a strong court" in much the same tones as a football player who, when told he will play on Gary Ablett next week, tries to put a brave face on it, saying, "He's not a bad sort of player". I may say that in view of the identity of the President of the Court of Appeal, I have had no hesitation in employing a football analogy on so solemn an occasion, although it has been suggested to me that a reference to Mr. Ablett may be in bad taste as constituting a higher authority than anyone present today.

President Winneke, the Attorney-General, and Chief Justice Phillips

Mercifully, however, in view of Your Honours' reputations I do not find myself in the position of having to persuade the court of any proposition more contentious than that the Victorian Government proffers its heart-felt congratulations upon Your Honours' appointment to the court. On this point I trust that the rapier-like minds assembled on this court may safely be left sheathed.

I do not propose to speak at length on this occasion. However, I believe that it is appropriate that on behalf of the Government of Victoria I express my gratitude to each of Your Honours for accepting the burdensome task of acting as a Judge of Appeal.

It is no secret that judicial office can be a mixed blessing and one that some leading members of the Bar have not cared to have had applied to themselves, yet, all the judges of the Court of Appeal have stood at the very pinnacle of their profession, whether in a judicial or barristerial capacity and all have accepted the call to appellate duty. This evokes memories of perhaps a more glorious legal past in Victoria and I trust it points to a still more glorious future. In fact, it is to this future that I believe we must look.

The creation of the Court of Appeal and the appointment of Your Honours to it offers a magnificent opportunity for Victoria to take up a leadership position in the development of the law in Australia. Indeed, as one considers the composition of the new Court of Appeal Division of the Supreme Court, no State in our federation can be better equipped than Victoria for the role of legal leadership. This opportunity for leadership is made all the greater by the tremendously strong foundations already existing in Victoria in terms of appellate judicial structures. For many years the Full Court of the Supreme Court of Victoria has been acknowledged as a world class appellate court. The creation of the Court of Appeal does not bring that tradition to an end, it merely builds upon it.

As I said yesterday at the opening of the Court of Appeal building, the Government of Victoria trusts that in legislating for the creation of a Court of Appeal it is continuing the tradition of legal excellence in Victoria. It is a tradition which stretches back over 100 years and one which the Government has no doubt will be continued in the capable hands of the present Court of Appeal.

May it please the court.

The Solicitor-General

Chief Justice Phillips: Mr. Solicitor.
The Solicitor-General: May it please the court. I would begin with a short quotation:

> The problems which present themselves to the courts at the present day are much more complicated and difficult than those of a century or even half a century ago. For their adequate solution, ample time for consideration and the ability to give them attention, undisturbed by the demands of work of a different kind, are required. If possible, in the serene atmosphere of a permanent appellate court than in a court constituted anew each term or, as often happens, for each case, from amongst judges, most of whose time is taken up with coping with the work at first instance.

Those observations which I have just quoted would be entirely apposite if they were made for the first time today. In fact, they appeared in a short article published in the *Australian Law Journal* in June of 1937. Although it is often said that the movement towards the establishment in the Australian States of permanent Courts of Appeal may be traced back to an address given at the University of Melbourne in August 1951 by Lord Evershed, the then Master of the Rolls and Head of the Court of Appeal of England, that movement has earlier origins. The article from which ' I quoted was written by the then editor of the *Australian Law Journal*, Mr. Bernard Sugarman, K.C., and it is of interest for at least two further reasons.

First, it sets out one of the most compelling arguments in favour of the establishment of a separate and permanent Court of Appeal in at least the larger States of Australia. Secondly, although the Court of Appeal of New South wales did not come into existence until almost 30 years later, the author of the article, most appropriately, was one of the original judges of appeal appointed to the new court and later served as its second president from 1970 until 1972.

In the course of the address which I mentioned earlier, Lord Evershed referred to a proposal then under consideration in England, that intermediate appellate work be done by the judges of first instance sitting as a Full Court. In explaining why he considered that proposal should not be adopted, Lord Evershed provided another compelling argument for the establishment of a permanent Court of Appeal. He said that:

> It must be remembered that as I have said, our Court of Appeal is in fact the final court for 95 per cent of the civil cases and it is, therefore, surely important that the court should have the status, the experience and also the uniformity of outlook appropriate to that fact.

Although Lord Evershed's address was published later in 1951 in the *Australian Law Journal*, there appears to have been little immediate response in this country.

The course of events on the other side of the Tasman was rather more rapid. The Full Court system prevailed in New Zealand as it did in the Australian States. As a New Zealand practitioner put it in a published article, the New Zealand Court of Appeal was formed, and I quote,

> By the judges of the Supreme Court who withdraw from time to time from their duties in that court to constitute the Court of Appeal and to engage in what one of them once ironically described as the melancholy pleasure of reversing each others, judgments.

An article by a senior Queen's Counsel published in the *New Zealand Law Journal* in 1954 argued strongly in favour of the establishment of a permanent Court of Appeal in that country. Its publication was soon followed by the establishment on 1 January 1958 of the New Zealand Court of Appeal. Exactly eight years later, that is on 1 January 1966, the Court of Appeal of New South Wales was established. In addition to the Chief Justice, it comprised the President and six Judges of Appeal. Unlike its New Zealand counterpart, its jurisdiction did not extend to criminal appeals but in its civil work the New South Wales court soon established a high reputation both for the quality of its work and for the prompt despatch of its business.

In Victoria, there was no immediate movement to follow the New South Wales example. The Civil Justice Committee was established by the previous Government in 1982 to undertake a broad review of the civil court system in this State and in September 1984 it delivered a very full and valuable report. However, it expressed the view that it would not be advisable to establish a separate Court of Appeal for Victoria constituted by permanent appellate judges.

The tide of opinion, however, began to turn in favour of the establishment of a Victorian Court of Appeal. In an article which appeared in the edition of the *Victorian Bar News* published in winter 1987, Your Honour Mr. Justice Charles, then recently retired as Chairman of the Victorian Bar Council, criticised the efficiency of the appellate system on the civil side in Victoria and advanced powerful arguments in support of the establishment of a Court of Appeal in this State. The article was provocative but like Mr. Sugarman's article it was also influential. By a happy coincidence, the article by Your Honour Mr. Justice Charles had in due course been followed, as in the case of Mr. Sugarman, by an equally appropriate appointment as an original member of the Court of Appeal. It is fortunate that Your Honour only had to wait a mere eight years rather than 30 for your labours to be recognised.

Soon afterwards, in September 1987, Sir

Anthony Mason, the then Chief Justice, entered the debate. In an address to the Australian Legal Convention which was also published in the *Australian Law Journal*, he said this:

> Appellate and trial work call for different judicial qualities. Recognition of this difference overseas has led to the establishment of permanents courts of appeal consisting of full time appellate judges. In this way in England the Court of Appeal has played a very important part in the development of the law, as has the New Zealand Court of Appeal. In Australia, the establishment of the New South Wales Court of Appeal has been an undoubted success and there is now strong professional support for the establishment of similarly constituted courts in Victoria and Queensland.

Not long afterwards, the judges of this court established the Appeal Division of the Supreme Court as part of an internal reorganisation and that system has continued to function to the present time. Meanwhile, the previous Government published a response to the report of the Civil Justice Committee. That response included a firm proposal that there be a Court of Appeal established as a separate division of the Supreme Court and various options for implementation were outlined. Nevertheless, that proposal was not then indicated but the response did show that the foundation of a permanent Court of Appeal in this State enjoyed bipartisan political support.

Perhaps some further impetus was provided by the establishment in Queensland of the Court of Appeal of that State on 14 December 1991. In addition to the Chief Justice, it comprised a president and three other judges of appeal. Unlike its New South Wales counterpart, its jurisdiction extends to criminal as well as civil appeals.

On 12 September last year the Victorian Attorney-General announced the decision of the present Government to establish a Court of Appeal within the Supreme Court of Victoria and on 20 December last year the *Constitution (Court of Appeal) Act* 1994 received the Royal Assent. That Act is, of course, similar in many respects to those already enacted elsewhere in Australasia. The most significant difference from New South Wales is that the Victorian Court of Appeal, as in England, New Zealand and Queensland, has jurisdiction to hear criminal as well as civil appeals.

Yesterday, the legislation came fully into operation and in addition to the Chief Justice, the President and the new Judges of Appeal were sworn in. It is worth noting that, as was the case in New Zealand, New South Wales and Queensland, the appointees as members of the new court have been drawn from outside as well as from within the existing court.

On a personal note, may I say that it has been a fascinating as well as a rewarding experience to have been involved in the preparation of the Charter of this court and I would publicly acknowledge the assistance received from past and present members of the judiciary, both in this State and interstate.

The appointees as members of the new court have been drawn from outside as well as from within the existing court.

The legislation draws extensively upon the precedents and experience of other jurisdictions and includes provisions designed to enhance the capacity of this court to function efficiently as well as to fulfil its role as the premier judicial institution of this State. In appropriate cases it will be possible for a court comprising two judges only to be convened and a single Judge of Appeal sitting alone will be able to deal with some routine applications under the rules of the court. Most importantly, the legislation provides mechanisms whereby a member of the Trial Division may act as an additional Judge of Appeal. This may occur either under a temporary appointment by the Governor in Council or at the instance of the President upon the nomination of the Chief Justice. These mechanisms will enable this court to draw upon the resources and experience of the other judges of the Trial Division.

Today we mark an event of major significance in the constitutional development of this State as we inaugurate a new institution within the judicial arm of government. We also mark an event of major importance in the history of this court, its significance being equalled I would suggest only by the enactment by the Victorian Legislative Council in January of 1852 of the Act which created this court, by the appointment of its first Chief Justice and its first puisne judge by Governor La Trobe in the same month and by the enactment of the legislation which, as from 1 July 1884, introduced the English judicature system into this State.

It is a very great privilege, both as law officer and as a member of the Victorian Bar, to address the Court of Appeal of Victoria at this its inaugural sitting. As a new court, you are fortunate to have a magnificent refurbished building as your new home, which many of us have already seen. I am sure that all present will join with me in congratulating the members of the court upon their appointments and in offering to the court our support and best wishes.

May it please the court.

Mr. Habersberger

Chief Justice Phillips: Mr. Habersberger.

Mr. Habersberger: May it please the court. It is my great privilege to appear today on behalf of the Victorian Bar on this historic occasion, being the first ceremonial sitting of the Court of Appeal of the Supreme Court of Victoria.

The establishment of a permanent Court of Appeal for this State is the recognition of the importance to Victorian litigants and to the legal profession generally of the efficient provision of the beneficial activities of appeal and judicial review. This is not to say that Victoria has not been well served by the past members of its Full Court, nor is it to deny that there are good arguments both for and against the establishment of a permanent court.

The President, The Chief Justice and Brooking A.J.

The idea of a higher court reviewing a case already tried by a lower court is one that has established itself only by slow and painful steps in our system of jurisprudence. The notion of separate courts to hear appeals from trial courts was not generally accepted in England by the time of the establishment of the Australian colonies. To the extent that the notion has been adopted in Australia, it has come contemporaneously with, but independent of, the development of the appellate system in England.

The first recorded case in the colonies of an application to a Full Court for a new trial was in 1845. A general Australian Court of Appeal was proposed as early as 1849 and came to fulfilment in the Australian Constitution.

The importance of an effective appellate court is without question, whatever form it takes. As Mr. Justice Kirby, President of the New South Wales Court of Appeal has said, "Any community which seeks to attract and hold commercial business must provide an efficient court system including an efficient appellate system". In this case, the needs of business and the needs of the individual coincide. In essence, however, the strongest arguments for a permanent Court of Appeal are practical. As argued, for example, by Lord Evershed in his 1951 address at the University of Melbourne and by Charles Q.C., as Your Honour then was, in the article in the winter 1987 edition of the *Bar News*:

> Appellate work involves functions and skills different in kind from those performed by trial judges and so, by inference, the repeated performance of the different functions should enhance the quality of the performance of the Judges of Appeal. Mechanical and practical problems arise from having a rotation of judges in a court with a heavy work load, which is the case in this State. Returning to trial work may make the writing of judgments unfairly burdensome particularly where resources are scarce. Opportunities for consultation and discussion, with appellate colleagues are necessarily reduced by dispersal from the Bench. Importantly, a permanent appellate court can permit the introduction of innovative procedures which may be harder to obtain in a court of constantly varying membership.

As Mr. Justice Frankfurter once said of the Supreme Court of the United States:

> The task of appellate decision making requires time for reflection.

May Your Honours have that time.

It is a matter of great pride for the Victorian Bar that the inaugural Court of Appeal consists of such highly respected lawyers who have all been outstanding advocates in their time at the Bar. Although superficially homogeneous, this court, in fact, contains a great diversity of strengths and skills, accompanied by independent minds of the highest calibre.

It has been said that the judges of the superior courts of this country have a rare opportunity to influence the shape of justice in our society and this is particularly so where judges sit in appeals. The responsibility attendant upon such a role is onerous but one I believe which is well entrusted to Your Honours, the foundation members of this court. The Victorian Bar regards the establishment of this court as an exciting development in the legal system of this state and the constitution of this court is a great tribute to those who will be seated upon its Bench.

On behalf of the members of the Bar, I congratulate each of Your Honours on your appointment and wish you well in the important and challenging tasks that lie ahead.

If the court pleases.

Mr. Woods

Chief Justice Phillips: Mr. Woods.
Mr. Woods: May it please the court. I appear this morning on behalf of the solicitors of this State on the occasion of the inauguration of the Court of Appeal Division of the Supreme Court of Victoria.

After three erudite and interesting addresses, it will not surprise Your Honours that there is little further of novelty to be said.

The stated objectives of the establishment of the court outlined both in Hansard during the course of the debates on the Bill's introduction and by my honourable and learned friend the Attorney-General yesterday afternoon, are twofold. Firstly, to contribute to the expeditious and efficient handling of appellate work in this State and, secondly, to facilitate a higher level of consistency among appellate decisions and the coherent development of legal principle. The combination of the central nucleus of permanent members and retention of the opportunity for other judges of the Supreme Court to sit on appeals will, it is hoped, contribute to the realisation of these objectives.

The Law Institute is of the view that the structure introduced to constitute the Victorian Court of Appeal allows the best chance of achieving the stated objectives.

Of course, as my learned friends have said, there have been other courts of appeal around the world on which this Court of Appeal may have been modelled and from which experience can be drawn. The English Court of Appeal whose effective overall judicial head is the Master of the Rolls, has a long history of establishing legal principles and has been seen by some observers as having more importance in the development of the common law than the House of Lords. Sir John Donaldson who formerly occupied that office, addressed the Australian Legal Convention here in Melbourne some ten years ago and said, and I quote him:

> The reason for this greater importance is the sheer weight of numbers of appeals dealt with by the court and the small fraction thereof which are taken further.

The same comments, in my submission, could be said about this court.

The ceremonial opening in the Twelfth Court

In any event, the Law Institute is of the view that the structure introduced to constitute the Victorian Court of Appeal allows the best chance of achieving the stated objectives. We can draw from, as has been said, across the Tasman. In New Zealand a Court of Appeal has existed in law for more than 130 years but for its first century of operation comprised judges of the Supreme Court, as it was then known, sitting in turn. Since 1958, however, the working membership has consisted of permanently appointed judges augmented by visiting High Court judges.

That is not, however, the experience elsewhere. In other jurisdictions, for example Canada, Ireland, India and most American States, courts of appeal at

State or provincial level are comprised only of permanent judges of appeal. There seems no reason for this other than the vagaries of history. There certainly appears to be a lack of jurisprudential enquiry in these jurisdictions on the question of whether permanence of appointment without the flexibility of augmentation actually leads just to consistency or to quiescence.

An observation of the overseas and, to some extent, interstate experience has been the complexity of and confusion in arrangements for the hearing of criminal and civil appeals. The Victorian Court of Appeal is an expression which will, in my submission, be easily understood by members of the community and that is the important thing.

Finally, it would be remiss of me not to note the contributions made by the present serving and previous judges of the Supreme Court to the effective discharge of appellate work in this State. That our Full Court has performed this function hitherto with great distinction has been in spite of the inadequacies in its structure. It has been a testament, in my respectful submission, to the calibre of the occupants of the Bench.

The Law Institute welcomes the commencement of this division of our Supreme Court and wishes its members well. It also pledges its cooperation in the development of the court's endeavours.

May it please the court.

Chief Justice Phillips

Chief Justice Phillips: Madam Attorney, Mr. Solicitor, Mr. Habersberger, Mr. Woods, on behalf of the judges of the Court of Appeal, I thank you for your congratulations, your good wishes and your kind words.

Our colleague, Mr. Justice Tadgell and Mrs. Tadgell, are with us this morning in spirit. In person, they are en route for the soft mists and purple heather of the Outer Hebrides.

It would appear that, by reason of the coming into existence yesterday of the Court of Appeal, I have been made a judge for the fourth time, a truly awesome experience, akin, it has been suggested to me, to repeated renewal of one's marriage vows. Lord Denning was, of course, offered an opportunity to be a judge for a fifth time but he declined it, allegedly adding that he would rather die than go back to the House of Lords.

I have decided after nearly eleven years, that in being a judge everything is relative. I must tell you that last Christmas Mr. Justice Vincent and I attended a function at Fairlie Prison. We were introduced to the prisoners by Dame Phyllis Frost. Introduced as Chief Justice of Victoria, I was accorded what I would describe as very scattered but polite applause. Introduced as Chairman of the Parole Board, Mr. Justice Vincent received a standing ovation.

Now to some history about appeals in Victoria. In the early 1840s, appeals from the first Supreme Court judge to sit in Melbourne, Mr. Justice Willis, were heard by a Full Court in Sydney, involving a sea voyage by counsel and litigants. As the Melburnians of those times found out to their cost, for he summarily imprisoned a large number of them for contempt of court, Mr. Justice Willis was no ornament to the Bench. It is recorded that when the Full Court in Sydney set aside one of his decisions, this irascible judge read out their judgment in open court and poured scorn on the judges responsible for it. The Chief Justice, he declared, "had the brains of a cavalry officer". There was a certain inevitability about Mr. Justice Willis' later removal from the Bench by the Governor in Council.

The new colony of Victoria came into being on 1 July 1851 and S.28 of the *Separation Act* enabled the Queen, by letters patent, to appoint a court to be styled the Supreme Court of the Colony of Victoria. Sir William a'Beckett was appointed first Chief Justice of the Court on 24 January 1852. The puisne judges were Mr. Justice Barry and Mr. Justice Williams. The court sat in a building which had been erected on the corner of Latrobe and Russell Streets in 1841.

I have searched for any record of the first sitting of the Full Court and have encountered a problem. There is a gap in Victorian law reporting from the

The families of the Justices

end of 1851 until 10 October 1856 when *The Victoria Law Times* and *Legal Observer* first appeared. The reason for this, according to the historians, lies in one word — gold. All the erstwhile law reporters, it seems, had gone to the diggings to make their fortunes. The verse of Henry Lawson captures the scene superbly. He wrote:

> Oh who would paint a gold field
> and paint the picture right
> as old adventure saw it
> in morning's early light.
> The rattle of the cradle,
> the clack of windlass boles,
> the flutter of the crimson flags
> above the golden holes.

During this century, many outstanding judges performed appellate work in this court. I will mention in particular Sir Leo Cussen and Sir Henry Winneke.

Even the Chief Justice's clerk deserted his service and a'Beckett, using the pen name Colonus, dashed off a pamphlet lamenting the disintegration of society caused by the gold rush.

I have, however, discovered a newspaper report of a'Beckett, Barry and Williams sitting in Banco on Thursday, 26 August 1852. This may have been the first sitting, as such, because at that time practitioners were usually admitted to practice by a single judge. From reading the newspaper report, the sitting appears rather like what we would now call an Applications Day. The court disposed of no less than eleven matters. Proceedings concluded with the Chief Justice demanding that the Government offer a large reward for the capture of the miscreant who had recently torn a page from the register book and complaining "at length", as the *Argus* newspaper put it, about the set up of the court room, the inconvenience of the adjacent offices and the delay in the carrying out of the remedial work. Successive Attorneys-General since that time might be moved to say, nothing much has changed.

I have found another report of the three judges sitting in Banco on 5 April 1856. The question to be determined by the court was whether a plaintiff, who had not been cross-examined, had given sufficient evidence of damages by adopting the contents of an affidavit which referred to them. The judgment of the court is a model of economy of language. Sir William a'Beckett simply said this:

> It is impossible to say there was not some evidence, and that uncontradicted. Rule discharged.

Until consequential reforms here in 1914 which followed the establishment of the English Court of Criminal Appeal, the appeal procedure in Victoria was unsatisfactory on the criminal side. A new trial might be ordered if the original trial was accompanied by some grave irregularity, like gross misbehaviour on the part of the jurors. Otherwise, a trial judge might reserve a question of law for the consideration of the Full Court. But such a reservation lay entirely in the judge's discretion and if that discretion was exercised adversely to a prisoner, then that was that, as Ned Kelly found when tried by Sir Redmond Barry in 1880 for the murder of Trooper Lonigan.

During this century, many outstanding judges performed appellate work in this court. I will mention in particular Sir Leo Cussen and Sir Henry Winneke. It was apparent to me as a member of the Bar in the 1960s that Sir Henry Winneke had determined on, and carried out, a policy of very careful review and supervision in both civil and criminal matters. In appeals against sentence, he established a system of extempore but detailed judgments, a tradition which has been continued to the present day.

It is proper that I now acknowledge our families here present and say to them in front of this assemblage that it is their love and their support, so freely and fully given, which has sustained and will sustain us in all that we do.

I also acknowledge the attendance here this morning of so many members of the profession. Ladies and gentlemen, you honour us by your presence. This proceeding gives me the opportunity to thank you for the loyalty you have shown, both to me as Chief Justice and to the judges. Whenever you have been asked to participate in a new initiative in the public interest, you have always responded wholeheartedly and generously, and I for one shall not forget that.

I believe that as judges of the Court of Appeal, we must accept two particular responsibilities. The first is, while accepting innovation, to continue the traditions and to maintain the reputation of the appellate side of this court. Those traditions include constant application to the work and careful attention to detail and I am proud to be able to say that they have resulted in time frames for the disposition of appeals which are superior to any other court in Australia with a comparable workload. Our second responsibility is to ensure that, although we are part of the court, we are part of a united court. While the Supreme Court's constitutional authority is based on its equality with the legislature and the executive, our practical authority is, I believe, essentially corporate, depending on the sum total of the integrity and expertise of each and every one of the judges.

I shall now ask Mr. President to address us.

The President

The President: Madam Attorney, Mr. Solicitor, Chairman of the Victorian Bar, President of the Law Institute of Victoria, distinguished guests here this morning and members of the profession, on behalf of the members of this court I join with the Chief Justice in expressing our gratitude for the sentiments of encouragement and support which have been expressed by you.

As the Solicitor-General has indicated, the restructure of the Supreme Court of Victoria into the two divisions of Trial and Appellate is the product of a fairly lengthy debate both within and without the profession. It is gratifying for us as we embark upon our task to know that the restructure has the unified support of the profession. We recognise that during the last ten years with the introduction of the special leave requirements of the High Court and the abolition of appeals to the Privy Council, the State Appeal Courts have become for the majority of litigants the ultimate Court of Appeal. These changes have clearly imposed additional responsibilities upon the State Appeal Courts, a responsibility that we look forward to discharging in cooperation with the profession. In discharging those responsibilities, we will be building upon the outstanding traditions which have been left to us by the great judges of this court, both past and present, who until today have discharged both trial and appellate functions.

In order to enable us to discharge our functions, the Government has provided us with what I think might legitimately be called state of the art facilities in the new Court of Appeal building, facilities of which I think both the profession and the community will be justly proud. The refurbishment of the building is a tribute to the architectural merit and skills of Mr. Peter Lovell. He in his turn has been assisted and advised by an executive committee of the existing judges of this court, headed by His Honour Mr. Justice Alan McDonald. We ourselves would like to pay this formal and public tribute to the work which has been done by His Honour Mr. Justice McDonald.

Furthermore, we have been provided with a Registry of Appeals under the stewardship of Mr. Jack Gaffney who will be responsible for the preparation of appeals in both the criminal and civil divisions of the court. He will need — and I think he will be entitled to expect — full cooperation in his task from both branches of the profession. To this end we warn you now that the judges of this court will probably be making from time to time amendments to and refinements of the rules of practice and procedure which govern the institution and preparation of appeals to this court. If, and as and when, such changes are made, we will, in turn need the cooperation of the profession in their implementation so that we may discharge our functions in the manner in which the litigants will expect.

It does nothing I think to diminish the significance of this occasion if I remind the profession that the Court of Appeal and the Trial Division will hereafter comprise the two constituent components of the Supreme Court of Victoria. The status of our court will depend upon the efficient functioning of each of these two components, the Trial Division which comprises judicial officers of high calibre is and will remain the engine-room of the court, providing as it does the interface between the court and the public. Through judicious use of the co-opting provisions of the *Constitution (Court of Appeal) Act*, it will be necessary from time to time for this division of the court to call upon the collective wisdom and experience of members of the Trial Division to enable us to more efficiently and effectively dispose of our own anticipated heavy workload.

We look forward with enthusiasm to both divisions working harmoniously to promote and enhance the reputation of the Supreme Court of Victoria.

WELCOME TO JUSTICES WINNEKE, CHARLES AND CALLAWAY

Habersberger Q.C. welcomes the new Justices of the Court of Appeal

Charles A.J., President Winneke and Callaway A.J.

Merralls, Chernov and Costigan Q.C.s

The scene in the First Court

WELCOMES — COURT OF APPEAL

PRESIDENT WINNEKE

THE APPOINTMENT OF THE HONOURABLE John Spence Winneke as the first President of the Court of Appeal has delighted everyone. Rarely has a judicial appointment been so pervasively and sincerely welcomed. Nothing better signifies the importance of this new division of the Supreme Court and secures its status, than the choosing of His Honour, to be "responsible for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Court of Appeal".

His Honour has impeccable judicial credentials, including his lineage. He was born on 19 March 1938, his father being the late Sir Henry Winneke, *inter alia* Chief Justice of the Supreme Court (1964–1974) and then Governor of Victoria. The President's grandfather was a Judge of County Courts from 1913 "and became one of Victoria's most respected and best liked judges" until his death in 1943.

The young Winneke was educated at Scotch College and the University of Melbourne. His Honour was admitted to practise on 1 March 1962 and signed the Roll of Counsel on 9 March 1962, He read with Gordon Just (later Judge Just of the County Court) who had read with Sir Henry. In turn Gordon's son Donald Just read with the President.

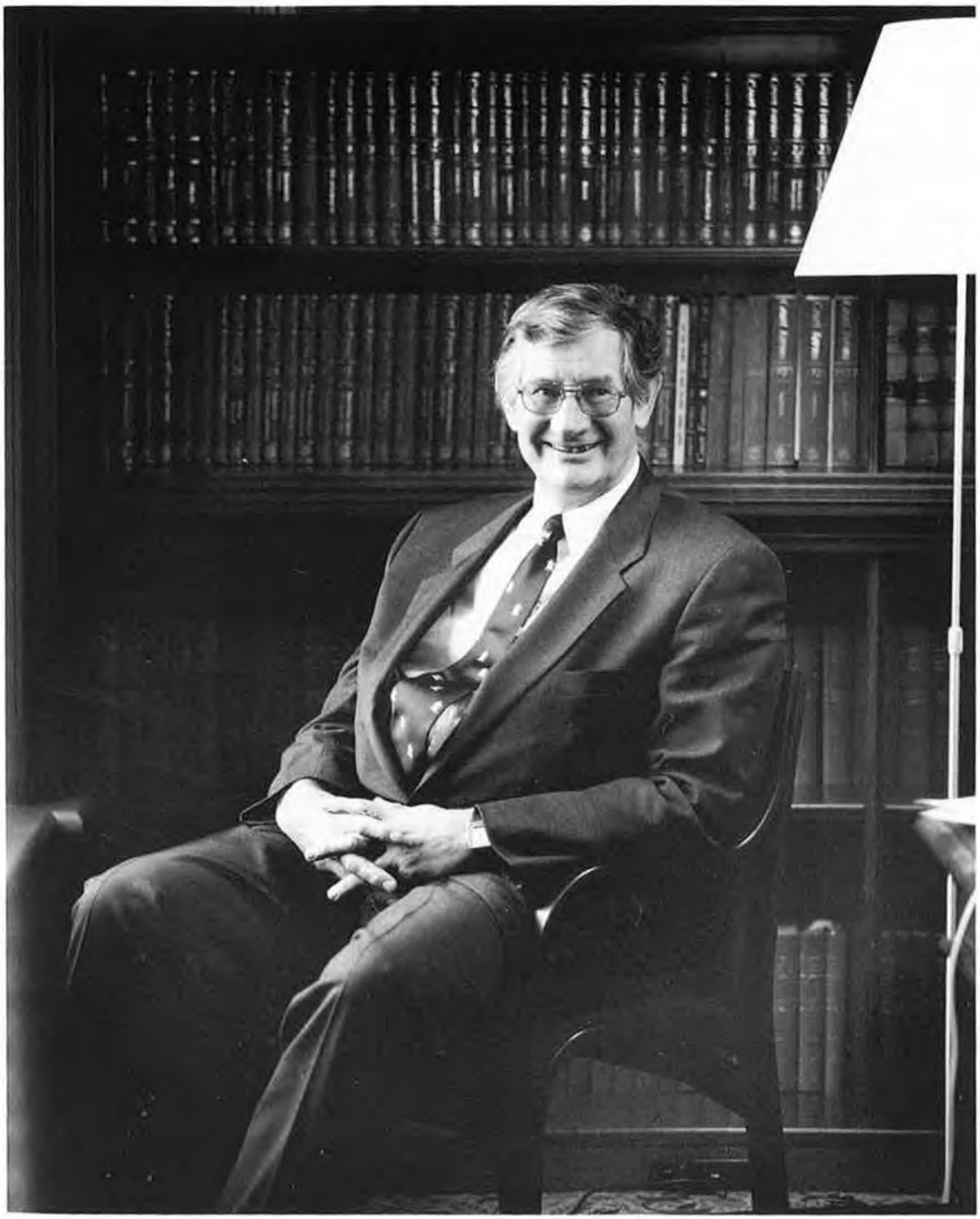
It was by no means all work and no play for the young Jack Winneke. He was an outstanding sportsman playing cricket, tennis and golf with well above average ability, but it was at football he excelled. He was best and fairest in A grade amateurs in 1959, and then played with Hawthorn from 1960 until 1964. Winneke was a dominant player in Hawthorn's 1961 premiership side, the first after decades "in the wilderness". Despite his relatively short career, a measure of his stellar quality is provided by his selection in the Hawthorn All Star team for the era 1961–83, the selectors for which included the legendary John Kennedy.

His Honour is a great raconteur and after dinner speaker. Many an audience has been delighted with His Honour's tales from his footballing years, A favourite tale is of His Honour's introduction to the renowned and fearsome South Melbourne ruckman Ken Boyd, who "at the commencement of hostilities" at Winneke's first match at the old Lakeside oval forecast that His Honour's big nose would be broken by half time. That forecast was "spot on". Many years later the same Boyd rang His Honour pointing out that because the latter had dined out on this story so frequently, justice required he should "sing for his supper" at a dinner of insurance executives of whom Boyd was one. The President happily complied.

His Honour has however shown an uncharacteristic reluctance to include in these tales his account of what Ron Carter, the football writer for the *Age*, reported as "the turning point" of the 1961 second semi-final between Hawthorn and Melbourne, This was the unforgettable "fainting" of Melbourne's talented and pugnacious Laurie Mithen. It is not suggested that there is evidence His Honour had a relevant connection with the aforementioned incident, albeit that popular myth would suggest otherwise. In any event, with the obvious exception of a particular group of supporters, there has been general endorsement of whosever action it was which caused Laurie to "lie down". Such support was epitomised by Jack Dyer who approvingly noted that "he done what had to be done".

Following retirement as a player His Honour was soon involved in football administration. He was a Hawthorn committee man, and then a member and chairman of the VFL Players Tribunal, a further rich source of highly entertaining stories. Another member and later long-time chairman of that tribunal was Mr. J.B. Gaffney, who is now the Registrar of the Court of Appeal,

His Honour was also chairman of the VFL and AFL Appeals Board and his career as an administrator culminated in his appointment as one of the founding Commissioners of the AFL Commis-



President Winneke

sion. The Commission in an era of expansion and reform has made many momentous decisions, to which His Honour's wisdom and experience has greatly contributed. His Honour's necessary resignation was received with great regret by all concerned with football and its administration.

The following does not purport to be a full or adequate description of His Honour's career at the Bar. Chapters rather than pages would be necessary for that. His Honour both as a junior and upon taking silk in November 1976 practised in virtually all jurisdictions with complete mastery and

aplomb. He had a commanding presence, exuding a calm but powerful authority, highly persuasive to judges and juries alike. His openings were succinct and cogent, he was a renowned cross-examiner, and had an absolute command of the relevant facts, and applicable law. Allied to all this was a prodigious memory, not only for the immediate facts of a case, but for those in which he had appeared twenty or more years ago.

In the criminal jurisdiction, His Honour from his earliest days at the Bar has appeared on both sides of the criminal coin. He was a superb advocate for the defence, eloquent and persuasive, resourceful, a master tactician and having a great rapport with juries. His Honour appeared in many notable criminal trials, and in recent times his consummate advocacy before the Morling Enquiry was instrumental in redressing some of the injustices suffered by the erroneously convicted Mrs. Lindy Chamberlain.

Victoria generally and the legal profession in particular are fortunate to have such a man as the President of the Court of Appeal.

His Honour was a most formidable prosecutor. His mastery of the facts, law and nuances of the particular case ensured that the guilty criminal was highly likely to be confirmed as such. But above all His Honour was balanced and fair. His appreciation of the rights and duties of a prosecutor, and the way in which he conducted the case for the prosecution should serve as an example to a number of prosecutors (and not only the tyro), that undue fervour and zeal for a conviction is contrary to tradition and proper practice, and often defeats due process.

His Honour had a very large civil practice being equally at home before a jury in a personal injury case as he was in the most complex of commercial causes. His Honour specialised in defamation law and was much sought after by plaintiffs and defendants alike, the latter predominantly comprising the major newspaper and media outlets. In this context His Honour frequently attended at and contributed to IBA conventions, establishing and maintaining the highest of reputations with international practitioners,

His Honour frequently appeared as counsel in royal commissions and inquiries, including many of the most important during the last 30 years. An early example was his appointment in 1987 as counsel assisting Mr. William Kaye Q.C. (later Mr. Justice Kaye of the Supreme Court) in the "Abortion Inquiry", which resulted in widespread reforms to Victoria's police force.

His Honour, in addition to appearing in a number of maritime inquiries and being an Officer in the Royal Australian Naval Reserve, was a member of the Judge-Advocate Panel and a Defence Force Magistrate for many years. He was appointed a Royal Commissioner by the Commonwealth and Victoria to enquire into the affairs of the Builders' Labourers Federation and produced a most important report, the implementation of which had a far reaching and beneficial impact on the building industry.

His Honour served on the Bar Council between March 1988 and September 1991, The current Chairman David Habersberger Q.C. said of His Honour that he "was an invaluable member of the Executive of the Council", an accurate and deserved tribute from a person in an unrivalled position to give it. He was also the long standing Chairman of the Folley List Committee, whereby he gave to so many barristers (particularly those starting out) assistance and sage advice, which reflected His Honour's unwavering conviction in the essentiality of an independent Bar. The value of the contribution made by His Honour to the maintenance of the clerking system in particular and the ethos of the Bar in general cannot be measured, but will be gratefully remembered. Unsurprisingly His Honour had a large number of readers: Bill A'Beckett, Morrie Alexander, Peter Gray (now Mr. Justice Gray), Don Just, David Belson, Tim Wood Q.C., John Larkins, Chris Wren and Stephen Kaye Q.C.

His Honour is married to Sue, who is herself a most competent and experienced barrister, and held in great esteem and affection by all who know her. His Honour has three children: Christopher, Andrew and Anna.

His Honour's many and notable achievements, necessarily briefly described, have attracted many deserved accolades. But the most frequent and generally made reference to His Honour is that he is a "good bloke", which by any standard he is. He enjoys respect and affection from all who know him. When that is combined with his conspicuous general and legal erudition, his clarity of thought and expression, his sense of fairness and manifest common sense, it is little wonder that his appointment was welcomed as it was. Victoria generally and the legal profession in particular are fortunate to have such a man as the President of the Court of Appeal.

The Victorian Bar delightedly congratulates and welcomes His Honour the President.

JUSTICE OF APPEAL CHARLES

ON 13 JUNE 1995 MR. JUSTICE CHARLES was welcomed by the legal profession on the occasion of his appointment to the newly established Court of Appeal of the Supreme Court of Victoria. This event was part of an historic joint welcome of the three new members of that Court who were appointed to it directly from the Bar, the other two members being Winneke P. and Callaway J.A.

Charles J.A. has many qualities which make him eminently suitable to sit on the highest court in this State and in that role, play an important part in developing the law into the twenty-first century. His Honour has a keen sense of justice, a deep knowledge of the law and of its administration. He also has a wide range of experience both within and outside the law on which he will be able to draw in his new vocation. Similarly, he has a keen interest in and a good understanding of, social and other public issues and a preparedness to keep an open mind in relation to them. These and other qualities such as wisdom, a sense of humour, leadership and lack of fear of change, will ensure that His Honour will play a significant part in developing the law in this State and beyond.

An examination of His Honour's remarkable career makes one wonder how he has been able to achieve so much in a relatively short period.

His Honour was born on 21 July 1937 in London and came to Australia in 1949. His father was a doctor who settled on a property in the Snowy Mountains region, near Cooma. Dr. Charles' association with the Snowy Mountains Scheme gave young Charles an introduction to that engineering feat and he spent some of his vacation working there. The same environment gave him a taste for fly fishing, a hobby which he took up later in life with mixed success.

His Honour was educated at Geelong Grammar and the University of Melbourne. His active life while a student at the University of Melbourne and a resident of Trinity College, no doubt contributed to shaping his personality and attitudes. Always at the centre of activity, Charles became involved in student politics during a period when radical movements were developing and when Germaine Greer was strutting the stage. That he was destined to take a leading role in public life, became evident during this period. He displayed his usual skills of leadership and became President of the SRC and contributed substantially to university life and its development.

Notwithstanding his many extracurricular activities at Trinity College, some of which are now best forgotten, His Honour completed a brilliant law course, sharing the Supreme Court prize for the top law student in 1959. He was articled to Mr. Birch of the then Messrs. Middleton McEachern Shaw and Birch. After completing articles, he lectured in Mercantile Law at the University of Melbourne. Later, he taught Property and Conveyancing at the Articled Clerks' course conducted by the Council of Legal Education. On 26 October 1961, His Honour signed the Bar Roll and read with the late W.O. (Bill) Harris, later Mr. Justice Harris of the Supreme Court.

It is said that during his early days at the Bar, Charles specialised in Crown briefs prosecuting those concerned with the promotion of dirty books, dirty plays and obscenity cases generally. This is, of course, completely exaggerated. It is true, however, that he did prosecute those immediately associated with the play, *Boys in the Band*, which contained the line "whom does one have to f... to get a cup of coffee". In the Magistrates' Court, the learned judicial officer took what could be regarded as a pragmatic approach to the charge and dismissed it on the ground of triviality. His Honour's client appealed against that decision, questioning the power of the SM so to dismiss the charge. Charles' advocacy prevailed before the late Little J. who did not regard the matter as trivial and morality prevailed.

Although cases dealing with this area of the law took up some of His Honour's time during his early years at the Bar, the bulk of the briefs from the Crown were concerned with points of law, often raised by orders to review, that related to the administration of justice in the State. In this way, Charles played a significant part in the development and the articulation of the law which affected the rights of the citizen and the administration of justice.

It was not long after coming to the Bar, however, that Charles was also briefed on behalf of major clients in complex cases, various inquiries and royal commissions, often appearing as junior counsel to such notable silks as Aicken Q.C., Young Q.C. and Starke Q.C. His Honour appeared, for instance, as junior counsel to Starke Q.C. in the King Street Bridge Royal Commission.

As junior counsel, Charles was constantly in demand. His workload became so enormous that he had to take silk in November 1975 in the (unrealistic) hope, if not fear, that work would come in manageable proportions. Contrary to his own expectations, as a silk Charles Q.C. was inundated with major cases that took him throughout Australia (and beyond). Travel became a feature of his practice. He held silk in every jurisdiction in Australia and appeared in nearly all of them in numerous important cases. He also appeared in many High Court cases in leading constitutional and general law cases. They included litigation concerning Section 90 of the Constitution, the *War Crimes Act*

Justice of Appeal Charles

case, and the case involving the deregistration of Builders' Labourers Federation, just to mention a few. From the point of view of the Bars, his most notable success was the *Giannarelli Case.*

Inevitably, His Honour's practice developed an international flavour. He appeared before the Privy Council on three occasions. But for his elevation, he would have appeared again before the Judicial Committee in the not too distant future in a case on appeal from New Zealand. Charles Q.C. was the first Australian silk to acquire a practice in New Zealand where he regularly appeared in significant cases. He was also appointed as one of the three arbitrators in the dispute between Mobil Oil and the New Zealand Government over the production of petrol produced from natural gas. The other arbitrators were Sir Graham Speight and Professor Maureen Brunt. His Honour also appeared in cases in Vanuatu, Fiji and New York.

International travel was required of His Honour not only for the purpose of appearing in cases. The need to confer with clients and witnesses took him offshore on frequent occasions. In the course of one particular year, work took him to Vila, Singapore, Hong Kong, Korea, China, South Africa, the U.S. (including Hawaii), France and England.

Somehow, in the midst of this blossoming career, Charles Q.C. found time to become involved in a meaningful way in many other activities, where he again displayed energetic leadership and an ability to contribute to the project at hand. A great deal of his time was given to the Bar as well as to issues completely outside the law.

Charles became the first Assistant Honorary Secretary of the Victorian Bar Council in 1966. He was its Honorary Secretary between 1967 and 1969 and thereafter, was a member of the Victorian Bar Council for many of the years between 1969 and 1983. During this period he served on and later chaired the Ethics Committee. In March 1983, he became Vice-Chairman of the Bar Council and was its Chairman from September 1983 until March 1985. During the time of his involvement with the Bar Council the numbers at the Bar increased significantly putting its administration, including the provision of accommodation and clerking, under great strain. Charles Q.C. gave the Bar strong and wise leadership, enabling it to put its own house in order and to withstand many ill-conceived attacks on it by the Government and other groups. He was also a member of the Executive of the Australian Bar Association for three years and its President in 1985–86 and served as a member of the Barristers' Disciplinary Tribunal since 1990.

His Honour was a good friend, companion and teacher of many at the Bar. He had eight readers (Roland Price, Clive Rosen, Robert Miller, Peter Murdoch, Michael Wright, Bernard Davis, Michael Pryles and Ross Macaw) all of whom still cherish his friendship. He was a source of great wisdom, not only to them, but also to the numerous readers at the Bar who were subjected to the rigors of the Bar Readers' Course under his Chairmanship between 1987 and 1992. His door was always open to all members of the Bar. Despite his busy practice and frequent absences from Melbourne, His Honour established long-lasting friendships at the Bar and his lunches with Dowling Q.C., Graham Q.C. and others, are legendary.

Charles Q.C. also somehow found time to write many learned articles for the benefit of those concerned with the practice and administration of the law. For instance, he showed leadership and disregard for the potential unpopularity of his cause by writing the now famous paper on the need for a Victorian Court of Appeal. This paper was published in the *Bar News*, in its Winter edition of 1987. At that time, the majority of the judiciary and others probably disagreed with His Honour's views, but it was only a matter of time before they became converted to the Charles' way of thinking on this topic. It is widely accepted that the creation of a Court of Appeal was in no small way due to compelling arguments put forward in that article. Similarly, his contribution to the teaching of barristers was not confined to this Bar. He helped other Bars in this area. For example, Charles gave a paper on the presentation of legal argument to the graduating readers of the Queensland Bar. Although presented to new barristers, it is a paper from which experienced counsel can learn a great deal. Fortunately for our Bar, it was reproduced in the Autumn 1991 edition of *Bar News*.

In 1964, Charles married Jenny Wood. They have four children, Lucy, Julia, Patrick and Thanh, a Vietnamese child who was adopted by the Charles' in 1973. They also have a foster daughter, Ha Tran. It has been said that His Honour gained much from his family, in particular, from the objective and forthright views that were freely expressed by its members about his undertakings and attitudes.

During the 1970s His Honour played a significant part in helping Australians to adopt Asian and, in particular, Vietnamese babies and children. He gave a considerable amount of his time to this project and in the course of it, visited Vietnam on numerous occasions to secure the future for many orphans of that war torn-country.

Charles' exposure to the world of commerce was not confined to matters raised by his cases. As a member of the Board of the Macquarie Bank, he helped to steer it successfully through the heady days of the late 1980s and the recession that followed.

Art was another area which occupied a good deal of His Honour's time. The Charles' are well known for their involvement with art. Jenny has had a long association with the National Gallery of Victoria and the Heide Museum of Modern Art. Stephen is a member of the board of Heide. He is also chairman of the Georges Mora Foundation which successfully raised funds for the purchase and exhibition of major works of modern art. The Charles' active and practical involvement with this famous gallery has resulted in them being described by a local magazine specialising in the arts, as part of the Melbourne Medici group.

More recently, His Honour has turned his skills to gardening at the Charles' Red Hill property. On the occasions when he can temporarily escape from his many activities, Charles enjoys the challenge of developing the new garden and in particularly, mothering the recently planted chestnut trees through the unkind Australian weather patterns of drought and excessive rains.

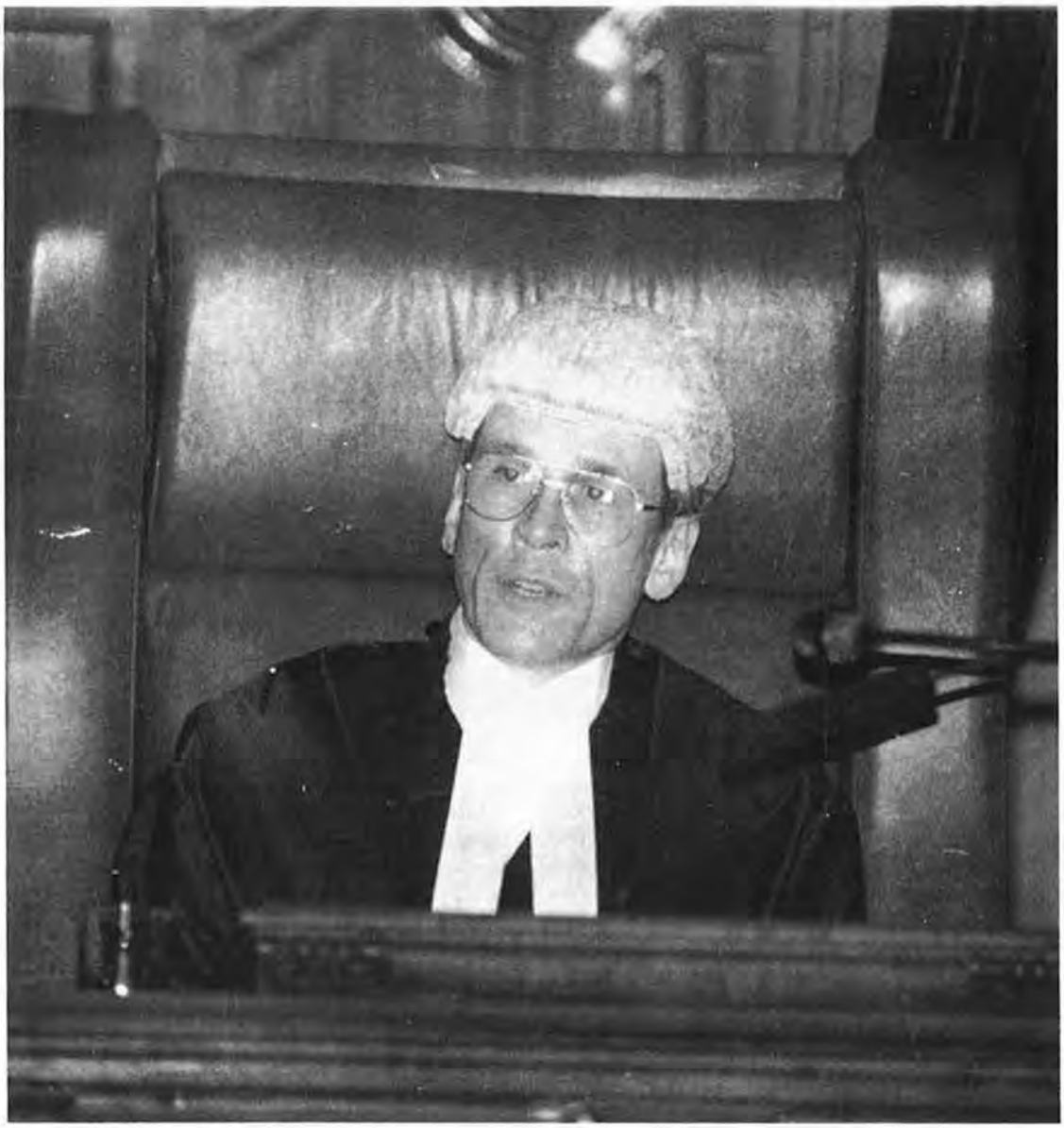
His Honour is held in high esteem both within and outside the legal profession. It is not surprising, therefore, that his elevation was universally welcomed. The community is fortunate that Charles J.A. will play a major role in the development of the law.

JUSTICE OF APPEAL CALLAWAY

FRANK HORTIN CALLAWAY WAS BORN, on 10 November 1945 in Sydney. His Honour's father, a banker, and mother, perhaps recognising the infant child's legal potential and the qualities of Victorian legal education, moved to Melbourne.

His Honour announced the commencement of an outstanding and exceptional academic career by winning an entrance scholarship to Wadhurst, Melboume Grammar in 1958. His Honour won a Junior Government Scholarship in 1959, and a Senior Government Scholarship in 1963. His Honour matriculated in 1963 with Special Exhibitions in Latin and French as well as a General Exhibition and a Trinity College Exhibition. In the following year, when His Honour repeated Matriculation, as was then the custom at Melbourne Grammar, he was a school prefect and Captain of Bruce house. He also obtained four first class honours as well as being the school librarian and a cadet under officer.

His Honour completed a first class honours Law degree at the University of Melbourne and, in His Honour's final year, 1968, won the EJB Nunn Scholarship, the Robert Craig Exhibition in Com-



Justice of Appeal Callaway

pany Law and the Supreme Court prize. Upon His Honour's arrival to tutor in the senior common room of Trinity College it was noted that "(he was) covered with academic gloire with the Supreme Court prize in Law, and was presently articled to an eminently respectable firm in the city and combined it all with being adjutant to the University Squadron".

Although not an outstanding sportsman — indeed His Honour's greatest indignity was suffered when, as captain of winter tennis at Melboume Grammar, both he and his vice-captain failed to be selected in either team in the competition — His Honour is probably one of the few judges to have commanded a Leopard tank. A member of the Australian Army Reserve primarily attached to the legal corps with cameo attachments to artillery and armoured corps (motto: one flash and you're ash), His Honour was rapidly promoted to the rank of Lieutenant Colonel. His Honour was presented with the Reserve Force Decoration in 1990 although His Honour had earnt it much earlier. For the six years prior to His Honour's retirement from the Army in 1993 His Honour was consultant to the Director of Army Legal Services, Canberra. His Honour's skills were then evident in *Re Tracey: Ex Parte Ryan* (1980) 166 CLR 518.

His Honour was articled to Colin Trumble at Mallesons. His Honour's admission was moved on 1 April 1969 by Merralls (as he then was) ten years to the day after Merralls' admission. Admitted to the partnership in 1975 he retired in 1977. His Honour was the first Mallesons partner to leave the partnership to go to the Bar since 1852 (when Mallesons commenced). An ancient Mallesons consultant observed that his early entry into the Melbourne Club had undone him; he realised too early that he could be a barrister. Upon coming to the Bar His Honour read with Sundberg who, it is said, was so shaken by the experience that he never again took a reader. His Honour only took one reader, Monichino.

His Honour's practice was immediately in areas in which he was greatly experienced: Company Law, Trade Practices, Constitutional Law and Legal Drafting. His Honour has always retained an interest in crime conceding that aspects of Criminal Law are intellectually fascinating.

His Honour appeared, unled, before the Privy Council in *Coachcraft Ltd.* v. *SPV Fruit Co Ltd.* (1980) 28 ALR 319 and in *Hamersley Iron Pty. Ltd.* v. *The National Mutual Life Association of Australasia Ltd.* (1985) 60 ALJR 70. On both occasions the Judicial Committee of the Privy Council was complimentary ("this argument was attractively put by Mr. Callaway for the applicant") and, on the second occasion, His Honour took over an extremely complicated appeal from a decision of the Full Court of the Supreme Court of Western Australia when his leader, S.E.K. Hulme, was incapacitated by illness. Indeed, His Honour succeeded on an argument which had been abandoned before the Full Court but was revived by the Judicial Committee itself.

His Honour took silk in the exceptionally short time after ten years in 1987. Just prior to taking silk His Honour had taken the courageous and ultimately rewarding step of only appearing in the appellate jurisdiction. It is doubted that any other advocate has taken such a step. As a result, His Honour appeared in many jurisdictions particularly in Victoria and Western Australia. Although primarily a commercial practitioner, that did not stop him applying his appellate talents to many other areas including Taxation (*Coles Myer Finance Ltd.* v. *Federal Commissioner of Taxation* (1993) 176 CLR 640), Constitutional Law (*The Owners of the Ship "Shin Kobe Maru"* v. *Empire Shipping Company Inc.* (1994) 181 CLR 404) and Family Law (*S* v. *S* (1991) 174 CLR 639. Although unsuccessful His Honour was vindicated in *ZP* v. *PS* [1994] 122 ALR 1).

His Honour's appellant advocacy was marked by clarity, simplicity and meticulous preparation. Indeed, as in life, nothing was left to chance. Before a recent trip to Greece, upon reading an item in a newspaper that a person had been arrested at the Greek customs for carrying a pharmaceutical, His Honour wrote to the Greek Embassy to inquire if aspirin was a prohibited substance.

His Honour wrote many legal works and articles including *Winding Up on the Just and Equitable Ground*, and *Drafting Notes*. Those two publications have become standard works, *Drafting Notes* having been used by the College of Law in New South Wales to educate a generation of drafters. His Honour's LLM by thesis was in Company Law. The thesis was supervised by Professor Harry Ford. In the introduction to the first edition of Professor Ford's seminal text, His Honour is one of only three scholars whose assistance is acknowledged. His Honour has always given freely of his time to those, especially beginners, who have asked.

His Honour's back garden reflects the order that he brings to all legal problems. He travels regularly overseas and reads widely, particularly about philosophical matters. His Honour's formidable intellect has brought order even to the chaos of Nietzsche.

His Honour's capacity for hard work and formidable legal talent not to mention an inventive and resourceful mind will bring distinction to the Court of Appeal. The Bar wishes him well and looks forward to receiving the benefit of His Honour's clarity and pithiness in previously clouded areas of law.

SUPREME COURT JUSTICES APPOINTED TO THE COURT OF APPEAL

IN ADDITION TO THE CHIEF JUSTICE, THE President of the Court of Appeal and Justices Charles and Callaway welcomed earlier in these pages, five judges already serving on the Supreme Court bench have joined the Court of Appeal. The Bar congratulates them on their appointment.

JUSTICE OF APPEAL BROOKING

Robert Brooking was appointed a judge of the Supreme Court of Victoria in 1977. He was educated at Wesley College, duxing in his class in most years, and matriculating with honours. To Latin maxims he is no stranger, as Latin was one of the subjects in which he attained first class honours. He entered the University of Melbourne in 1948 graduating with honours in Law and Arts. He then completed articles at Hall & Wilcox. He came to the Victorian Bar in 1954 and read with Kevin Anderson. He took silk in 1969.

His Honour is the learned author of a number of leading text books including *Landlord and Tenant Law, The Law and Practice relating to Building and Engineering Agreements* and *Insurance Law in Australia and New Zealand.*

His Honour's practice at the Bar epitomised that of a tireless student of the law who was dedicated to hard work. He was briefed for many large commercial interests and State instrumentalities such as the Melbourne and Metropolitan Board of Works and the Victorian Railways. His practice was wide ranging including jury work, commercial and building and contract law.

JUSTICE OF APPEAL TADGELL

Robert Clive Tadgell was appointed a Judge of the Supreme Court in 1980. His Honour was born in Brisbane and educated at Brighton Grammar School and Wesley College. On leaving school His Honour took employment as a trainee wool buyer and completed his matriculation by part-time study. He commenced his law course at the University of Melbourne in 1954 and graduated with honours in 1957. After graduating he served as associate to Sir Reginald Sholl, and was thereafter articled to Sir James Forest of the firm Hedderwick, Fookes & Alston. He was admitted to practice as a barrister and solicitor on 1 March 1960 and signed the Bar Roll on 1 April 1960. He read in the chambers of the former Chief Justice Sir John Young.

His Honour's practice as a barrister included appearances in many commercial and revenue related matters. He appeared as counsel before the Royal Commission investigating the collapse of the Westgate Bridge. He was the inspector appointed to investigate the affairs of the General Mutual Insurance Group. He took silk in November 1974.

His Honour assisted in the writing of a number of learned publications including Wallace and Young's *Australian Company Law*. He was the Australian revising editor of an Australian supplement to Charlesworth's *Mercantile Law.*

JUSTICE OF APPEAL ORMISTON

William Frederick Ormiston was appointed a Judge of the Supreme Court in 1983. His Honour was born on 6 October 1935. He was educated at Melbourne Grammar School and the University of Melbourne. He graduated with an honours Law degree in 1958, he subsequently studied at the London School of Economics. He was articled to the late G.V. Harris of Oswald Burt & Co. He was admitted to practice on 2 March 1959. He signed the Bar Roll on 18 December 1961. He took silk on 25 November 1975. He read in the chambers of the late R.G.DeB. Griffith (later Mr. Justice Griffith). His Honour had a wide ranging practice including crime, commercial and equity.

JUSTICE OF APPEAL J.D. PHILLIPS

John David Phillips was appointed a Judge of the Supreme Court in 1990. His Honour matriculated from Scotch College in 1953 where he was equal dux of the school. This followed a highly successful academic career when he graduated with honours from the University of Melbourne having been awarded the Supreme Court prize. After completing his articles with W.J. Clark & Co., His Honour was appointed as associate to Sir Douglas Menzies, Justice of the High Court of Australia. He signed the roll in March 1961 and read with Richard Newton, later the Honourable Justice Newton of the Supreme Court. His Honour developed a highly successful practice in company, commercial and insurance law,

It would have been understandable that while at the Bar His Honour would have a concern about his identity. In the early years he had to explain that he was not related to J.D. Phillips Q.C. Later he

often had to remind enquirers for his services at a "committal" that there were two Phillips' at the Bar, J.H. and J.D. and that he was "Equity Jack" not "Criminal Jack". For a time that problem was solved by him becoming known as John D., but then the real John Dee (now His Honour Judge Dee) came to the Bar. Sometimes he even had to explain although he was J. Phillips he had not taught insurance or industrial law at the University of Melbourne. Having lived through this confusion for so many years, there is little reason to think that the presence of two (unrelated) John Phillipses on the Supreme Court Bench had troubled him at all!

JUSTICE OF APPEAL HAYNE

Kenneth Madison Hayne was appointed a Judge of the Supreme Court in 1992. He completed his secondary education at Scotch College. His Honour completed an Arts and Law degree at University of Melbourne graduating with honours and the Supreme Court prize. He completed his articles with Grant & Co. before attending Oxford University as a Rhodes Scholar. His Honour signed the Bar Roll in 1971. At the Bar His Honour was a much sought after commercial barrister appearing in company, insurance and tax cases.

WELCOMES – COUNTY COURT

JUDGE WHITE

WILLIAM REX WHITE WAS RECENTLY appointed as a Judge of the County Court of Victoria. To this office he brings many qualities. Besides nearly 30 years experience in the practice of the law in a variety of areas, His Honour additionally has a reputation for fairness, compassion, good humour and wit.

Born in Richmond in 1942, His Honour was educated at St. Kevins College, Toorak. Whilst at school, His Honour, a keen sportsman, achieved notoriety in athletics as a sprinter, in football as a wingman, and in sailing as skipper of a cadet dinghy representing Victoria in interstate championships.

Like all young men, at the age of about 14, His Honour faced a crisis as to his future. The recruiting department of the Christian Brothers realised that this was the right age for young men to consider their vocation. A questionnaire was put out to all Form 3 students requiring them to indicate how they would like to spend the rest of their life. The hope being that they would wish to join a religious order and preferably the Christian Brothers. In answering the question, His Honour showed a great sense of vision of what would many years later become a politically correct movement termed "feminism". Having seen the vision, His Honour immediately wished to be part of it. His Honour knew what he would be. "A nun" he answered. It is of course understandable that by reason of his youth, His Honour at that time was not fully aware of the vows that his then chosen vocation would require him to take. Thankfully His Honour merely had a transient attraction to this calling.

Besides having visions, His Honour also became interested in miracles. At a retreat conducted by the Franciscan Order in Kew, a question box was provided for young men to anonymously seek guidance about spiritual matters troubling them. His Honour obliged with the question "Is it a miracle to see smoke rise from behind the grotto?" I believe the answer His Honour obtained is still troubling him to this day.

Judge White

His Honour graduated as Bachelor of Laws in 1965 and was admitted as a Barrister and Solicitor of the Supreme Court of Victoria on 1 April 1966. His Honour entered articles with the very prestigious firm of Oswald Burt & Co. (articled to Mr. Harris, to whom the articled clerks referred as "the cardinal") where His Honour learned much about the law and life, and also formed a number of friendships that have endured to this day. Thereafter, His Honour practised as a solicitor with a

number of firms, the last being Collins and McGovern.

On 10 July 1969, His Honour signed the Bar Roll and, following his good friend Judge Crossley, read in the chambers of the late Judge Tolhurst. His Honour immediately engaged in the down to earth work of a junior barrister appearing in the Magistrates' Court in a variety of matters, criminal trials, family law and personal injury cases. Later in his career, His Honour appeared in a number of difficult criminal trials and inquests. Difficult personal injury cases became His Honour's forte, although from time to time His Honour also dabbled in more varied areas such as T.F.M. applications and sale of land cases. His Honour's good nature was demonstrated in one criminal trial (an armed robbery trial) in which the presiding Judge, sitting with a jury, constantly referred to His Honour as "Mr. Black". This reference was doubly worrying to His Honour. Not only was he Mr. White, but Mr. Black was a co-accused in the same trial. His Honour was not phased and ultimately both Mr. White's client and Mr. Black were acquitted.

His Honour's keen sense of self-discipline is demonstrated by his self-imposed rule of not discussing the law or legal issues once the day's legal work is done. His Honour has kept to this rule without exception for nearly 30 years. For this effort his family is eternally thankful. His Honour's wife, Pam, has been a great support to him, as have his children Emma, who is a nursing sister and Adam, who is studying marketing.

His Honour is fortunate to join a bench on which a number of his friends sit and with whom he can continue to enjoy the camaraderie which commenced while they were all members of the Bar. His friends who remain at the Bar will miss him. The Bar welcomes His Honour's appointment and wishes him success and satisfaction in his new office.

JUDGE DUCKETT

HIS HONOUR WAS BORN ON 26 SEPTEMBER 1937. He was educated at Caulfield Grammar, Wesley College and the University of Melbourne. He was admitted to practice on 1 March 1962 having completed his articles of clerkship with Coltman, White & Anderson, solicitors. Later His Honour worked for the firm of W.E. Pearcey & Ivey in Melbourne. Following a period of pupillage, His Honour signed the roll of counsel in 1963. His Honour practised as a barrister at the Victorian Bar until 1966 when he moved to Hong Kong to work in the Crown Law Office. After returning to the Victorian Bar in the late 1970s His Honour again "succumbed to the lure of the orient" and returned to Hong Kong in 1980. He was employed in the prosecutions division of the Attorney-General's Department and later as Deputy Crown Prosecutor. In 1984 he took silk. From the late 1980s His Honour was the Hong Kong Deputy Director of Public Prosecutions. For some time he filled the role of acting DPP. During his commission His Honour handled many major criminal prosecutions both in the High Court and the Court of Appeal of Hong Kong including high profile criminal fraud cases.

His Honour comes to the County Court bench with considerable experience of appearing in the criminal courts. He appeared five times as leading counsel in appeals to the Privy Council in London. From January 1983 until October 1984 His Honour was acting Solicitor-General for Hong Kong. In that role he was directly responsible to the Attorney-General for a wide range of complex and demanding legal policy issues. His Honour chaired a working party which had the difficult task of establishing a Hong Kong Court of Final Appeal to take over the role of Privy Council after the transfer of power in Hong Kong takes place in 1997. His Honour also chaired a working party into the issue of treatment of young offenders. His wide experience in the criminal law will no doubt serve him well in his new role as a Judge of the County Court of Victoria.

Judge Duckett

On 4 April 1995, His Honour's wife Frances and three of His Honour's five children — the missing two being in Los Angeles and London respectively — joined members of the legal profession at his welcome. The Victorian Bar congratulates His Honour on his appointment and wishes Him well in his role as a Judge of the County Court.

ABORIGINAL LAND RIGHTS: FURTHER REFLECTIONS

Dr. Robin L. Sharwood

Delivered at a Meeting of the Medico-Legal Society held on 15 October 1994 at 8.30 pm at The Athenaeum Club, Collins Street, Melbourne. The Chairman of the Meeting was the President, Dr. John McL. Emmerson.

IF THERE IS ONE MORAL TO BE LEARNED from the movie industry, it is that sequels are generally a mistake. Most sequels that I can bring to mind have been sadly disappointing, and one shudders to think of what we might be confronted with in "Gone with the Wind, Part II", which as I understand it is already in production.

So I may have committed a major blunder in agreeing to produce a sequel to the address which I delivered to this Society 13 years ago, in August 1981, entitled "Aboriginal Land Rights: The Long Shadow of the Eighteenth Century".[1]

Yet the basis for the invitation was reasonable enough: in the interval the High Court has decided the *Mabo Case* — probably, at the moment, the most widely referred to of all the hundreds of decisions the Court has made in its 91-year history. To be precise, I delivered my lecture to the Society on 15 August 1981; Eddie Mabo and four other Torres Strait Islanders began their action in the courts eight months later — on 20 May 1982; and the High Court delivered its final judgment after 10 years, on 3 June 1992.[2]

How reasonable, therefore, how entirely appropriate, that I should be offered the opportunity to revisit my original address in the light of *Mabo* and all that goes with it! How could I do other than accept so very kind an invitation from such a distinguished Society?

Yet there is always the awful possibility that this will prove to be my "Gone with the Wind, Part II". I can only hope and pray that it will not be quite as bad as that. At least (unlike Hollywood) I am operating with most of the original cast.

Let me say at the outset that tonight's address is not going to be a close examination of the *Mabo* judgments (although of course I shall be referring to them), still less a review of the quite enormous body of writing to which these judgments have already given rise, and most of which I have not ever seen, let alone made the object of study. Nor do I intend to discuss Commonwealth and State legislation in response to *Mabo*, partly because the most contentious Acts are presently under challenge before the High Court and are therefore strictly *sub judice*.[3] Rather, as the title of tonight's paper indicates, I should like to offer some "further reflections" on the material I presented 13 years ago, and to indicate how far the events of those 13 years (including *Mabo*, of course), and my own independent reading, have led me to revise or refine my earlier views. That, I believe, was the basis of the invitation to me from your Committee.

So what was in agreement 13 years ago? I must obviously attempt to summarise it as briefly as I can, and then select from it those points on which I think more could or should be said. (As it happens, my 1981 paper was reprinted a month or so ago in the *Victorian Bar News*;[4] some of you may therefore have recently read it, but I must assume that most of you have not.)

I began by noting the strange and unsettling paradox that, whereas the Australian courts (at that time) were clearly of the view that "the Australian colonies became British possessions by settlement and not by conquest" (to quote Mr. Justice Gibbs, as he then was),[5] the historians were convinced that there *had* been at least some sort of "conquest", given incontestable evidence that the Aborigines had resented and resisted European occupation from the very beginning, and had fought, and largely lost, what I described as "a long guerrilla war against those whom they conceived as invaders".

I suggested that it was important to try to unravel this paradox, because much of the Aboriginal land rights controversy stemmed from the apparently perverse legal insistence that Australia was merely "settled", not "conquered". If Australia were merely "settled" that is, if the Australian colonies were to be classified as "settled colonies" —

then, under the legal rules prevailing at the end of the 18th century, especially as expounded by the distinguished 18th century jurist Sir William Blackstone, the colonists brought their own legal system with them, in this instance the English common law and relevant statute law; that became the exclusive legal system of the colony. And in the *Gove Land Rights Case* of 1971 (*Milirrpum* v. *Nabalco Ltd.*), the first Australian case to raise the Aboriginal land rights point, Mr Justice Blackburn (of the Supreme Court of the Northern Territory) held that the common law at the relevant time did not recognise the form of legal interest in land for which the Aboriginal plaintiffs in that case were contending, namely, "communal native title".[6]

So the classification of the Australian colonies as "settled" had the most profound and far-reaching consequences, so far as Aboriginal claims to land were concerned. Because, by contrast, had the colonies been classified as obtained by "conquest", existing Aboriginal laws would have been recognised (unless and until overruled or replaced by the conquering power), and hence some forms of Aboriginal land title might have been conceded. That, at any rate, was the orthodox theory as to "conquered" colonies, as endorsed by Blackstone.

Why, then, were the colonies classified as "settled", and not "conquered" (a decision for the executive, the Crown, incidentally, not for the courts)?

In my 1981 lecture, I suggested that the answer was again to be found in Blackstone, and the writings upon which he himself drew.

Blackstone said that "settled" colonies could be established where "the lands are claimed by right of *occupancy* above, by finding them desert and uncultivated and peopling them from the mother country".

To use the language of international law (although Blackstone himself did not do so), Blackstone was saying that where newly-discovered lands were "*terra nullius*", then "settled colonies" (in the legal sense) could be established there.

"*Terra nullius*" — lands belonging to no-one, lands which were "unoccupied" in the relevant legal sense, lands over which no-one else had "sovereignty".

But how could Cook, Phillip and the authorities in London have possibly regarded eastern Australia (and, eventually, the whole continent) as "unoccupied", as "*terra nullius*", when, very plainly, an indigenous people lived there?

The reason, I suggested, was that the concept of "occupancy" had in this context — namely the law (both international and municipal) relating to the acquisition of territory — a special meaning. It was a legal term of art. Whether lands were "occupied" or not, did not turn on whether they were "inhabited", in the ordinary sense of that word. Certainly they did need to have inhabitants, but something more was required. What was that "something more"? In 1981, having examined various possibilities, I suggested that "occupancy", as used in this area of the law at the end of the 18th century, was defined in terms of whether the territory in question was *under cultivation* — that is, in terms of whether the inhabitants engaged in agriculture. I called this "the cultivation test". Blackstone himself had used that criterion, and I traced some of its long pedigree in legal, philosophical and theological writings, all the way back to the Book of Genesis.

And, judged by this criterion, eastern Australia *was* "unoccupied", in that special legal sense; for all the early observers, including Cook (at some length), and many later observers for that matter, took note of the fact that the Aboriginal peoples did not "cultivate" the land in any sense known to Europeans. There were not agriculturalists; they appeared to be exclusively hunter-gatherers.

So this, I suggested, was why the British plantations in Australia could be (as they were) regarded as "settled colonies" in "*terra nullius*", with all the legal consequences which were thought to flow from that classification, including the failure to recognise any form of "native title" to land under their own (native) rules and customs.

That, in very broad outline, was my 1981 thesis. I did make a number of other substantial points, and some I may advert to when I discuss the *Mabo* judgments , but I do not want to repeat them now. The outline of my principal argument is what is important. I concluded in 1981 by saying something about what we would now call "the process of reconciliation", and I shall do the same again tonight in due course.

The great question, however, to which I must now turn, is how far my 1981 thesis stands up in the light of *Mabo*.

There can be no easy answer to that question. This is partly because of the route by which the issue (or set of issues) reached the High Court, and partly because of the way in which its seven justices divided in their handling of the issues.

For the benefit of the non-lawyers present especially, I need to say a little on these two preliminary points.

First, the route by which the issues reached the High Court. With this, in fact, I think most of you will be broadly familiar. The plaintiffs were Torres Strait Islanders, and they sought from the Court a declaration they had native title to their traditional lands on the Murray Islands. These islands had never, in any relevant sense, been settled by Europeans, and their formal annexation to the Colony of Queensland did not occur until as late as 1879. So from the very beginning this case was in some

respects off-centre. The islands in question had not formed part of the eastern Australia claimed by the British at the end of the 18th century. And the indigenous people, the Torres Strait Islanders, were ethnically and culturally distinct from the Aborigines of the Australian continent in quite significant ways. In particular, of Melanesian origin, they were a settled people (not nomadic), cultivating gardens, and with a clear system of social organisation.

From the very beginning this case was in some respects off-centre. The islands in question had not formed part of the eastern Australia claimed by the British at the end of the 18th century. And the indigenous people, the Torres Strait Islanders, were ethnically and culturally distinct from the Aborigines of the Australian continent in quite significant ways.

Thus *Mabo* was not an "Aboriginal land claim" in the familiar mainland sense. At the very least, this has complicated an understanding of the decision. Some have gone further, and argued that it led the High Court to go seriously astray.[7]

That, then, is the manner in which these issues finally reached the High Court — a rather unfortunate manner, not by any means the ideal case to test the various issues from a mainland-Australia point of view, but that is how it was.

Now as to how the seven justices of the High Court divided on these issues.

There were four major and lengthy judgments. That of Mr. Justice Brennan may be considered the principal majority judgment, in that the Chief Justice (Sir Anthony Mason) and Mr. Justice McHugh were content to concur with him, in a brief joint opening statement — a not-unimportant opening statement, however, because, in so far as it summarised the outcome of the case, it had been endorsed by all members of the Court. There were two other majority judgments: a joint judgment by Justices Deane and Gaudron, and a separate judgment by Mr. Justice Toohey. Thus, to extract and understand the majority position, one must read and analyse three separate, closely argued essays in judicial reasoning, running to a total of 117 pages (in the report of the case I am using).[8]

The dissenting judge was Mr. Justice Dawson, who wrote an opinion of 45 pages. But in describing him as "the dissenting judge", I must add an immediate qualification — although that is the way he is usually described. He was the dissentient in the sense that he was the only member of the Court to hold that no land was now held by native title on the Murray Islands, and that the action, therefore, failed. But over the *range* of issues before the Court, its members divided in different ways. Let me give you a few examples. (I do this merely in order to highlight the difficulty of interpreting *Mabo*, not necessarily because I shall be returning to these issues.) Thus, *all* the judges, including Mr. Justice Dawson, held that there *could* be traditional native title which survived annexation;[9] Mr. Justice Dawson differed from the other members of the Court in holding, on the historical evidence, that in this instance it had not survived. Again *all* the judges, including *all* the majority judges, held that such title could be "extinguished" by either legislative or executive action showing a clear and plain intention so to extinguish; on this point, Mr. Justice Dawson alone found such clear and plain intention. But on the question of whether any compensation was payable on such extinguishment, the Court was divided four to three. Three of the majority judges (Mason, McHugh and Brennan), together with Mr. Justice Dawson, found against any requirement of compensation; the dissentients on this point were Justices Deane, Gauldron and Toohey.

Mabo, therefore, was no seamless web!

To return, then, to the great question, having explained how these issues came before the Court and something, at last, of the complexity of the Court's response — the great question, at least, from my point of view tonight: how far does my 1981 thesis stand up in the light of the *Mabo* judgments?

Well, I can take some comfort from the fact that the status of the Australian colonies as "settled colonies" in the Blackstonian sense was affirmed by the whole Court. They were not, legally speaking, "conquered" colonies (and, of course, the question of "cession" simply did not arise). All members of the Court agreed that the mode of acquisition of new territories at the relevant time was a matter for the Crown in the exercise of its prerogative powers; and that, on the evidence, all the Australian colonies had been acquired as "settled" colonies. With such acquisition, Great Britain had acquired "sovereignty" over those territories. Not only had this been the conclusion reached in all previous cases in relation to the Australian position, few in number though they were, so that the finding was in accord with precedent, but as the acquisition was an "act of State", to use the technical legal term, it could not be questioned in any mu-

nicipal court. The point had been put very neatly in an earlier High Court case, *Coe* v. *The Commonwealth* (1979), by Mr. Justice Gibbs (as he then was), with whom Mr. Justice Aickin concurred: "It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest".[10]

So far, so good, you might be tempted to say. But these findings, although unanimous, were essentially formal: the Court considered that it was not at liberty to hold otherwise. It did *not* follow that members of the Court were happy with the mode of the acquisition, or with the classification of the colonies as "settled". Indeed, the majority of the Court made it perfectly clear that they were far from happy on these points, and, while they accepted that they could not alter the established legal position, they did their formidable best to undermine its rationale.

So what, for our purposes tonight, I might be allowed to call "my" *terra nullius* argument was dealt a devastating blow. All that 18th century theorising which I outlined earlier was, it seems, rejected, as no longer of any legal consequence. At any event, that has certainly been the general perception of *Mabo* — namely, that the majority judgments totally rejected the idea that Australia had ever been *terra nullius*. (Incidentally, and by way of a necessary footnote, let me stress that I do not claim that the *Murray Islands themselves* could have been regarded as *terra nullius*, by any test, when annexed by Queensland in 1879. But, as I say, the majority of the High Court appeared to hold that *the whole of Australia* had never been *terra nullius* — a much more sweeping proposition.) In addition to the countless newspaper headlines which have advanced this view, let me quote just two scholarly comments to the same effect: from the Introduction to the book of essays *Mabo: A Judicial Revolution*[11] — "in *Mabo* v. *Queensland* (1992) 66 A.L.J.R 408 the *terra nullius* idea was discarded";[12] from the essay by Fr. Frank Brennan, SJ. in the same volume — "the High Court upheld the Islanders' claim, ruling by six to one that the lands of this continent were not *terra nullius* or 'practically unoccupied' in 1788".[13] And the coping-stone, it might seem, was put upon this position by the Commonwealth Parliament itself, when it stated in the Preamble to the *Native Title Act* 1993: "The High Court has . . . rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement . . ." (A preamble may not, strictly, be part of an Act of Parliament, but it is nonetheless legally significant.) I do not want to pretend that these perceptions of the majority position in *Mabo* are unwarranted. That would be at best naive, at worst down-right dishonest. Such perceptions are very plainly warranted, and I could quote or refer you to long passages in the majority judgments to demonstrate that.[14] Thus, Fr. Brennan's comment draws on the exact words of Deane and Gaudron JJ.[15]

But, with my back to the wall, as it were, I would like to suggest to you that the position about *terra nullius* and the "settled colony" categorisation is not as clear as the Court, the Parliament and some of the commentators seem to think, and that some aspects of the Court's assessment of the situation are open to question. That is not to say that I think that there is the slightest possibility that the majority's views on all these issues are likely to be over-ruled in any foreseeable future, especially now that they have a form of parliamentary endorsement.[16] And, as I shall show shortly, from the point of view of the legal outcome of the case, their views on these issues, paradoxically, don't really matter. There are some points, however, on which I should like to set the record straight, at least as I see it.

In the first place, it has been argued by some that the *terra nullius* concept was rightly rejected, not because it was necessarily wrong (either in itself or in its application), but because it was legally irrelevant.

Let me put to one side Mr. Justice Dawson's contention to this effect because it was of a special and particular nature and did not go to the general issue. He looked closely at the manner by which the Murray Islands had been annexed by Queensland, noting that on annexation the law of Queensland had been expressly declared to be in force. There was no need, therefore, he said, "to classify the Murray Islands as conquered, ceded or settled . . . [or] to resort to notions of *terra nullius* . . ."[17] For Mr. Justice Dawson, then, on the approach which he took to the issues before the Court, an examination of *terra nullius* and the Blackstonian classification was simply not called for. In this sense, *terra nullius* was legally irrelevant. And, given Mr. Justice Dawson's chosen mode of analysis, I would respectfully agree.

But the argument for legal irrelevance has taken another form. In his Foreword to the volume I have already mentioned, *Mabo: A Judicial Revolution*, Sir Harry Gibbs, a retired Chief Justice of the High Court, contends that "the expression '*terra nullius*' seems to have been unknown to the common law", and that "it was not the question asked at common law to determine whether a colony, admittedly under the sovereignty of Great Britain, was acquired by settlement". "Public understanding" of the relevant common law principles, he argues, "is not assisted when those principles are described by a phrase which is misleading and perhaps emotive".[18] Well, nothing Sir Harry Gibbs says should be treated lightly, but I do not believe that we can dismiss *terra nullius* as easily as that.

It is perfectly true that *terra nullius* is a concept

— an ancient concept — of *international* law, of customary international law. But it has been accepted as an orthodoxy since at least the 18th century that customary international law is *part of* the common law. Blackstone himself said so: ". . . the law of nations . . . is here [i.e. in England] adopted in its full extent by the common law, and is held to be part of the law of the land".[19] And this view is upheld by modern commentators, at least so far as *customary* international law is concerned.[20] Certainly there are difficult jurisprudential problems about the over-all relationship between municipal law and international law, but we need not go into those; the orthodox position remains as I have stated it. Even if we concede, then, that *terra nullius*, strictly speaking, has its origins in international law, and has principally to do with the acquisition of sovereignty, nevertheless it intersects, conceptually, with the common law of colonisation at the point of the Blackstonian classification, a point which Brennan J., for one, expressly recognises.[21] For my part, therefore, I cannot agree that it is improper or misleading to examine the concept of *terra nullius* in a case such as *Mabo*. It is not legally irrelevant, and I agree with the majority of the High Court in not seeing it as irrelevant.

The much more serious argument which I have to face, however, is that to the effect that the application of the *terra nullius* concept to Australia was legally *incorrect*. That those, such as myself, who thought that a case for its application could be made were, quite simply, wrong — terribly wrong: wrong intellectually, wrong morally, wrong on every count; wrong, wrong, wrong. There are emotional passages in some of the judgments which justify this theatrical way of putting it.[22]

If this were true, it would be a most painful burden to live with. But I do not believe it is true.

I consider that much of the High Court's examination of the *terra nullius* doctrine and its application to Australia rests upon a misreading of an important case decided by the International Court of Justice in 1975: *The Advisory Opinion on Western Sahara*[23] — a case expressly relied upon by four of the majority judges (Brennan, Mason, McHugh and Toohey JJ.),[24] and, hence, by a majority of the Court.

The Western Sahara was colonised by Spain in 1884, the colony being known as Spanish Sahara. As part of the world-wide process of decolonisation, Spain arranged to hold a referendum under UN auspices in Spanish Sahara on the question of self-determination. At that point, however, two other States, Morocco and Mauretania, made claims to the territory, so the UN General Assembly in 1974 requested an Advisory Opinion from the World Court. The Assembly posed two questions, only the first of which we need to note: "Was Western Sahara . . . at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?" The Court held unanimously that it was not.

Now, there is no doubt that the World Court exhibited some dislike for the *terra nullius* concept. This was not so marked in the principal joint judgment, but it was very marked indeed in the separate judgment written by Judge Ammoun, the Vice-President of the Court, in a passage twice quoted at length in *Mabo*.[25] Judge Ammoun concluded that "the concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonisation, stands condemned".

There is no doubt that the World Court exhibited some dislike for the *terra nullius* concept. This was not so marked in the principal joint judgment, but it was very marked indeed in the separate judgment written by Judge Ammoun, the Vice-President of the Court, in a passage twice quoted at length in *Mabo*.

Why do I think the High Court got the *Western Sahara Case* wrong, as I do? Well, in the first place, they were clearly very influenced by the remarks of Judge Ammoun. But Judge Ammoun was *not* speaking for the whole Court. His was a separate opinion. The joint opinion of the overwhelming majority of the judges, which is technically the Opinion of the Court, contains no passage comparable to that of Ammoun as quoted in *Mabo*, and certainly does not endorse Ammoun's sweeping and condemnatory conclusion. Authoritative text-writers such as Crawford[26] and Harris[27] have seen the court's Opinion as affirming the place of the concept of *terra nullius* in the history of international law, albeit with some qualifications.

But the second error in interpretation (as I believe it to be) is even more grave. The High Court failed to note what the World Court actually *did* in the *Western Sahara Case*. Briefly, what the World Court did in that case was to apply what is known as "the inter-temporal rule".

"Oh dear, another piece of dreadful legal jargon", I hear you say. But the rule is really very straightforward and simple, and, I think, makes eminent commonsense. Let me quote the statement of the rule as it appears in a modern textbook of international law:

the fact is that in many instances the rights of parties to a dispute derive from legally significant acts . . . very long ago. Sir Gerald Fitzmaurice [an earlier commentator on the inter-temporal rule] states the rule applicable in these cases: 'It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised . . . in the light of the rules of international law as they existed at the time, and not as they exist today'.[28]

In a celebrated international arbitration of 1928 (the *Island of Palmas Case*), the rule was stated this way: "judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".[29]

And so, in the *Island of Palmas Case*, for example, the Arbitrator held that he must determine the effect of that island's discovery by Spain in the 16th century "by the rules of international law in force in the first half of the 16th century . . ."[30]

The rule, I suggest, makes very good sense. Some such rule is absolutely necessary if there is to be stability in international affairs. Questions of sovereignty cannot be constantly re-opened. If the position were otherwise, then, to quote another distinguished international lawyer (Jessup), "(e)very state would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a reacquisition".[31]

So that is the "inter-temporal rule", and the rationale for it. And this was the rule applied by the World Court in the *Western Sahara Case*.[32] The question was whether the territory in question was *terra nullius* according to the international practice of *1884*, the date of Spain's colonisation. The Court's Opinion is quite clear on the point. The relevant date was *1884*, not 1974 (when the dispute arose) or 1975 (when the Court wrote its Opinion). And the Court determined, by applying the standards of *1884*, that the territory in question was not *terra nullius*.

This significant aspect of the *Western Sahara Case* seems to have been completely over-looked by the majority of the High Court in *Mabo*. There is no acknowledgment of the "inter-temporal rule" at all, even though, as plaintiffs' counsel recognised, an earlier High Court seems to have applied it in a case in 1974.[33] In *Mabo*, the *terra nullius* concept is discussed in modern terms, with reference to present-day views about indigenous peoples and their societies; and, in these terms, it is not surprisingly rejected as applicable to Aboriginal Australia. But that approach, in my view, was in error. Under the "inter-temporal rule", which itself must probably be regarded as part of the common law, the question in *Mabo* was whether the Blackstonian concept, lying behind and intersecting with the Blackstonian classification of colonies as it does, was properly applied to eastern Australia *in 1788* — that is, was properly applied in accordance with international law and practice as it stood at the end of the 18th century, *not* at the end of the 20th century, or even of the mid-19th century, and upon the factual situation as it was then honestly perceived to be.

I would, of course, contend that it was properly so applied. That was the principal thesis of my 1981 paper, as I outlined it earlier, and nothing I have read since 1981 has led me to change my mind. On the contrary, the more I have studied the matter the more convinced I have become that my assessment of the late 18th century situation is thoroughly defensible. Only a few months after I had delivered my 1981 paper, the respected historian Professor Alan Frost published an article which came to essentially the same conclusions — and, incidentally, gave me much comfort coming as it did from a fully professional historian.[34] The same author, in his later biography of Governor Phillip, summed up his position in a single sentence: "the colonisation [Phillip] pursued was, in *contemporary* terms, a legal and a moral act".[35]

There is no time tonight to review all the additional evidence I have dug out since 1981, but I would draw attention to the influential views of the writers of the so-called "Scottish Enlightenment". I was not aware of the significance for our purposes of this movement when I spoke in 1981. The "Scottish Enlightenment" occurred roughly in the third quarter of the 18th century. Today, the best known member of this school is, I suppose, Adam Smith, who published *The Wealth of Nations* in 1776; but at the time there were others who were widely read and just as significant — men like Adam Ferguson,[36] Lord Monboddo[37] and Henry Home.[38] In their writings, which went into multiple editions, these men set out what purported to be a rational and scientific analysis of the various kinds of societies to be found in the world, ranking them in ascending order from the primitive to the sophisticated. Their view was that it was only when a people turned to *agriculture* that anything that could reasonably be called a "civil society" really began.[39]

Sir William Blackstone was a contemporary of these Scottish writers I have mentioned. The Scottish Enlightenment, therefore, may be added to those 18th century sources which supported his adoption of a "cultivation test" for the purpose of determining whether a colony established in inhabited territory was to be classified as "settled" or "conquered".

But, as I say, I cannot place all my evidence before you tonight, both old and new. I can only repeat that I believe my 1981 thesis still stands up, when judged, as it should be, in late 18th century terms.

I would conclude, therefore, that the High Court's view that it was obliged to accept the British classification of eastern Australian as a "settled colony" when it made its (unreviewable) claim to "sovereignty" was not something which called for any apology, legally speaking. Despite the distaste which the majority displayed towards the *terra nullius* concept, the "inter-temporal rule", when properly understood and applied, fully justified the formal legal findings. There was no need for breast-beatings and confessions of shame and the acknowledgement of something very close to communal moral guilt.

Let us concede, however, that to all intents and purposes, and whether rightly or wrongly, necessarily or unnecessarily, the Court, by majority, *did* effectively reject the *terra nullius* classification as ever properly applicable to eastern Australia. So, at all events, the Commonwealth Parliament seems to have decided.[40] Such rejection could not lead in any automatic way to a finding in favour of native title. After all, the Court did accept that Australia must be regarded as a "settled colony" which had inherited the common law. And Mr. Justice Blackburn in the *Gove Land Rights Case* (1971) had held that the common law could not accommodate the concept of native title. A finding in favour of native title would only be possible if that aspect of Blackburn's decision could be over-ruled.

This was not a matter which I chose to advert to in my 1981 paper, but in fact I had always held the view (and taught it) that this was the most vulnerable part of Blackburn's impressive, conscientious and monumental judgment (it runs to 147 printed pages in the Reports). And I *do* think it was an impressive and conscientious judgment. One of the contributors to the book *Mabo: A Judicial Revolution* chose to describe Blackburn's judgment as "infamous".[41] I regard that epithet as insulting and uncalled for. But Blackburn's finding that the common law could not accommodate native title was open to question (and was questioned) at the time.[42] Over the following years, researchers in the area uncovered a wealth of evidence, both judicial and non-judicial, which had been largely misunderstood, over-looked or forgotten, and which all pointed to the conclusion that the common law at all relevant times could recognise forms of native title[43] — a conclusion very strongly reinforced by modern decisions in the Canadian courts, especially the Supreme Court decisions of *Calder* (1973)[44] and *Guerin* (1984).[45]

So the High Court's decision to this effect in *Mabo* really came as no surprise to many of us who had been following the matter. As a legal historian, I am quite comfortable with it. It does not shock me at all. It may be said that it is deeply regrettable that it took so long — until 1992 — for the point to be established authoritatively in its Australian context, given that (as Professor Henry Reynolds in particular has shown) some at least of the ingredients for the decision had been present in the historical record for a very long time. But I am not sure that, until comparatively recently, the climate was appropriate for such evidence to be properly assessed, especially given Australian *practice* in the area. In any case, much of the evidence has been rescued from obscurity only since the *Gove Case*, and the influential Canadian decisions are all later than Gove — two being as recent as 1990 and 1991.[46] There has always been speculation as to whether Blackburn's decision on the point in *Gove* would have been reversed if it had been taken on appeal to the High Court at the time. Well, we shall never know, of course, but I am inclined to doubt it. Twenty years ago, the time, I think, was not yet ripe.

One odd consequence of *Mabo* is that the distinction between "settled" and "conquered" (or "ceded") colonies has been virtually eliminated, at any rate in relation to native title to land. That is why I said earlier that, in the result, and paradoxically, the classification of Australia as "settled" rather than "conquered" may no longer really matter. This Blackstonian distinction was a basic premise of my 1981 paper, and I have to concede that it has been severely shaken. Whether it has entirely disappeared, as some would argue, depends on whether the *Mabo* decision has implications for other areas of Aboriginal law. That is a fascinating, difficult and provocative question into which I cannot possibly go tonight; but you should be aware that some are arguing that *Mabo* does, logically, carry such implications, and that aspects of Aboriginal criminal law, for example, should now be recognised by the common law.[47]

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I should like to conclude my paper tonight in much the same way as I concluded my 1981 paper, but more briefly than on that occasion.

I asked the question then, "what should we do now?" I said that I could see no point in trying to re-write history, quoting the late Professor Stanner, a wise, compassionate and respected anthropologist in this field, who wrote: "We can neither undo the past nor compensate for it. The most we can do is to give the living their due". I then looked, first, at the possibility of enacting "land rights" legislation; and, finally, and with some enthusiasm, I examined and commended the work of the then Aboriginal Treaty Committee, founded in 1979 under the chairmanship of Dr. Coombs. I was a subscribing member of that movement.

On both these approaches to "giving the living their due", I am now however, considerably disillusioned.

True, there was some land rights legislation in most if not all of the States and in the Northern Ter-

ritory in the pre-*Mabo* period, and various parcels of land, some of very considerable size, became vested in Aboriginal communities. But attempts at the national level to enact some sort of general land claims scheme were unsuccessful, as they were here in Victoria. In neither case, I believe, was there lack of goodwill on the part of the governments involved. The principal problem, which proved intractable in both cases, was to find a representative Aboriginal group with which to negotiate, and which could come to some sort of agreement amongst themselves on what they really wanted. There is an extremely delicate point involved here, but it must in all honesty be made: the Aborigines of Australia are not a united community by any means, and they have widely differing perceptions of themselves, their inter-relationships, their place in Australian society overall, their aspirations and their needs. I simply make the point: I prefer not to elaborate upon it, but its implications in this context are obvious.

The *Mabo* decision itself called for a legislative response. The High Court had recognised native title, and had defined it up to a point; but the post-*Mabo* situation called for some legislative scheme or schemes if confusion and endless litigation were to be avoided. Two major but very different schemes were enacted by Western Australia (the State most likely to be affected by *Mabo*) and by the Commonwealth, and both are currently under challenge before the High Court. It would not, therefore, be proper for me to offer detailed comment on them, even if I felt competent to do so.[48] But I would venture a pessimistic prediction: whatever scheme or schemes, at whatever level, may finally emerge to (in effect) implement *Mabo* I cannot imagine that they will work to the general satisfaction. I foresee an endless series of very bitter and unhappy disputes. The evidentiary problems alone are massive.[49] If any support were required for this conclusion, I need only refer you to the article in today's *Age* on the Yorta Yorta land claim, the first Victorian case to be accepted for adjudication by the Native Title Tribunal. Still in its very early stages, it has already led to deep divisions and mistrust.[50]

Finally, I turn to the proposals for some sort of "treaty".

Of course, at this stage in our history, no agreement could be a "treaty" in any legally accepted sense of that term, and in fact many who supported Dr. Coombs' initiative of 1979 preferred to use the Aboriginal word "Makarrata", a non-legal term meaning "a settlement following a long dispute". But even the word "Makarrata" seems now to have disappeared from the vocabulary of the debate, and, despite continuing occasional references to a "treaty", it has become more usual to talk in rather vague terms about bringing about "an act of reconciliation", preferably by or at the time of the centenary of federation. The final paragraph of the Preamble of the Commonwealth's *Native Title Act* describes that statute as "intended to further advance the process of reconciliation among all Australians".

Well, it is no doubt an admirable enough objective — nobody could actually quarrel with the idea of "reconciliation". But what form would an "act of reconciliation" take? Who would be the parties to it? Is the idea, to be blunt, at all realistic?

Once again, I tend to be pessimistic. Dr. Coombs' Committee faced the hard truth that it was getting nowhere, and wound itself up.[51] The problems which thwarted earlier attempts to secure general land rights legislation, and which will assuredly haunt the implementation of any post-*Mabo* legislation to survive the High Court, make the likelihood of achieving some honest and properly negotiated "act of reconciliation" (or "treaty" or whatever you like to call it) highly unlikely, at least in the short or medium term. In the *long* term, however, it may be a different matter. It has been observed that the very decision in *Mabo* is likely, over time, to create a greater sense of unity amongst Aborigines — that it is (to quote one commentator) "'one brick in the wall' in rebuilding Aboriginal self esteem and cultural integrity", and "in establishing a legal bridge-head it presages a quantum leap in the potential for innovative political and legal polemics".[52]

So the conditions for some kind of worthy and workable "act of reconciliation" may well eventually emerge in post-*Mabo* Australia. I suggest, however, that we should do well to allow the situation to evolve at its own pace, and I close this overlong address, appropriately, I think, with the words of a prominent Aborigine — Mr. Mick Dodson, very active in the Aboriginal land rights movement, the Aboriginal and Torres Strait Islander Social Justice Commissioner, and co-chairperson of the Working Group on Indigenous Populations (a committee of the U.N. Commission on Human Rights). As recently as 6 October, Mr. Dodson was reported as saying this: "Genuine reconciliation . . . will only occur through shifts in the attitudes and actions of individuals and communities. It cannot be achieved by government action alone".[53] Those, it seems to me, are wise words — and encouraging words. Perhaps I am, almost in spite of myself, just a little bit optimistic. Perhaps, after all, hope has not altogether "gone with the wind".

END NOTES

1. XIV *Proceedings of the Medico-Legal Society of Victoria* 93.
2. *Mabo and Others* v. *State of Queensland* (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1.
3. On 16 March 1995, the High Court unanimously upheld

the Commonwealth's *Native Title Act* 1993 and found invalid Western Australia's *Land (Titles and Traditional Usage) Act* 1993: *Western Australia* v. *The Commonwealth, The Wororra Peoples and Another* v. *Western Australia; Teddy Biliabu and Others* v. *Western Australia* (1995) 128 ALR 1.

4. (1994) 89 *Victorian Bar News* 34.
5. In *Coe* v. *The Commonwealth* (1979) 24 ALR 118 at 129; 53 ALJR 403 at 408. The proposition, he said, was "fundamental to our legal system".
6. (1971) 17 FLR 141. With this exception, I have not repeated for the purposes of the present resumé the citations of authority which I attached to my 1981 lecture.
7. Notably S.E.K. Hulme, Q.C.: see his "Aspects of the High Count's Handling of Mabo", (1993) 87 *Victorian Bar News* 29; being an address to a conference of The Samuel Griffith Society, Melbourne, 31 July–1 August 1993.
8. (1993) 107 ALR 1. All later citations are to this report of the case.
9. Dawson J.'s position was rather more subtle than this (see 98–99), but I believe the generalisation can stand.
10. See footnote 5. Curiously, *Coe* is not discussed in *Mabo*. It is mentioned once only, and then in a footnote: Brennan J. at 20.
11. UQP, 1993. These publication details are not repeated in subsequent citations.
12. *Op. cit.*, xv.
13. *Op. cit.*, 25.
14. For example, Brennan J. at 27–29, 41–42; Deane and Gaudron JJ. at 78–83; Toohey J. at 141–142.
15. At 82–83.
16. Indeed, the High Court itself was to reiterate this position in the 1995 decisions cited in footnote 3.
17. At 106.
18. At xiv.
19. *Commentaries on the Laws of England*, Book 4, Ch V, 67.
20. For example, Brownlie, I., *Principles of Public International Law*, Clarendon Press, Oxford, 3rd ed., 1979, 45–49, citing "a long line of authority". An earlier High Court decision to this effect is *Chow Hung Ching* v. *The King* (1948) 77 CLR 449.
21. At 20–21.
22. For example, Brennan J. at 29, and especially Deane and Gaudron JJ. at 82.
23. [1975] ICJR 12.
24. Brennan J. (with whom Mason CJ. and McHugh J. concurred) at 27–28; Toohey J. at 141–142.
25. *Ibid.*
26. Crawford, J., *The Creation of States in International Law*, Clarendon Press, Oxford, 1979, 179–181.
27. Harris, D.J., *Cases and Materials on International Law*, Sweet and Maxwell, London, 3rd ed., 1983, 165–167 (reading extract in context).
28. Brownlie, *op. cit.*, 131–133.
29. As quoted in Harris, *op. cit.*, 153.
30. *Ibid.*
31. As quoted in Harris, *op. cit.*, 158.
32. Harris, *op. cit.*, 165–167, extracts the *Western Sahara Case* as an example of the application of the "inter-temporal rule". See also case-note by Oelofsen, P.D. in (1975) 1 *South African Year Book of International Law* 155, especially at 157–158: " . . . it was therefore clear that the words 'Was Western Sahara . . . a territory belonging to no one (*terra nullius*)?' should be interpreted by reference to the law in force at the time of colonization" (157).
33. From the plaintiffs' written submission, as quoted by Castan, R. and Keon-Cohen, B. (of their counsel) in "Mabo and the High Court: A Reply to S.E.K. Hulme, QC", (1993) 87 *Victorian Bar News* 47 at 50: "the High Court in *Daera Guba* (1974) 130 CLR 365 held that the correct law to now apply in respect of early land transactions in a territory which later becomes a British colony, is the local custom and usage applicable to such land *at the time of such transactions*" (emphasis added). While the "inter-temporal rule" is not referred to by name in *Daera Guba*, it was effectively applied; see especially Gibbs J. at 437–438.

    Daera Guba is referred to a number of times in *Mabo*, but not on this point: Brennan J. at 35; Deane and Gaudron JJ. at 66fn., 69–70, 72fn; Toohey J. at 151 fn.
34. "New South Wales as *terra nullius*: the British denial of Aboriginal land rights", (1981) 19 *Historical Studies* 513.
35. *Arthur Phillip, 1738–1814: His Voyaging*, OUP, 1987, 261 (and see his footnote 20). Emphasis added.
36. Ferguson, Adam, *An Essay on the History of Civil Society*, Edinburgh, 1767.
37. Burnet, James (Lord Monboddo), *Of the Origin and Progress of Language*, Edinburgh, 1773.
38. Home, Henry (Lord Karnes), *Sketches of the History of Man*, Edinburgh, 1774.
39. For an examination by a modern Australian historian of the 18th century concept of the "progression" of civil societies, see Dixon, R., *The Course of Empire*, OUP, 1986.
40. And see footnote 16.
41. Noel Pearson at 75.
42. For example, Hookey, "The Gove Land Rights Case . . .", (1972) 5 *Federal Law Review* 85; Priestley, "Communal Native Title and the Common Law", (1974) 6 *Federal Law Review* 150; Hookey, "Chief Justice Marshall and the English Oak: Comment", (1974) 6 *Federal Law Review* 174.
43. See especially Reynolds, H., *The Law of the Land*, Penguin Books Australia, 1987.
44. *Calder* v. *Attorney-General of British Columbia* (1974) 34 DLR (3d) 145.
45. *Guerin* v. *R* (1984) 13 DLR (4th) 321.
46. *R* v. *Sparrow* (1990) 70 DLR (4th) 385. *Delgamuukw* v. *British Columbia* (1991) 79 DLR (4th) 185; order varied on appeal: (1993) 104 DLR (4th) 470 (the judgments on appeal run to 300 pages).
47. See, for example, Mulqueeny, K.E., "Folk-Law or Folklore . . ." in *Mabo: A Judicial Revolution* 165. In December 1994, however, the High Court rejected the contention that customary Aboriginal criminal law continued to exist within the common law: *Walker* v. *New South Wales* (1994) 69 ALJR II 1; 126 ALR 321 (Mason CJ.).
48. But see now footnote 3 above.
49. For an examination of some of these problems, see Keon-Cohen, B., "Some Problems of Proof. The Admissibility of Traditional Evidence" in *Mabo: A Judicial Revolution* 185.
50. "Deep social ruts appear in land claim", *The Age*, 15 October 1994. Four days later (19 October 1994), *The Age* ran a further story: "Negotiations for Yorta Yorta land claim struggling". On 30 May 1995, *The Age* reported the failure of mediation talks between parties to the claim and the referral of the matter to the Federal Court; more than 400 groups were registered as parties to the claim, and "a lengthy, complicated and costly courtroom battle" was expected ("Yorta Yorta talks fail, now for Federal Court"). As of the end of May, 1995, no claim under the Native Title Act had succeeded anywhere in Australia.
51. For Dr. Coombs present, more open-ended position, see his *Aboriginal Autonomy Issues and Strategies*, CUP, 1994.
52. Mulqueeny, K.E. in *Mabo: A Judicial Revolution* at 168.
53. *The Age*, 6 October 1994 ("Buyer to return Aboriginal artefacts").

APPELLATE ADVOCACY: A LESSON IN THE ART OF PERSUASION — THE CONSUMERS' PERSPECTIVE

ON 24 FEBRUARY 1995 THE CRIMINAL BAR Association held a Continuing Legal Education seminar on Appellate Advocacy attended by over 70 members of the Victorian Bar and solicitors. The speakers were their Honours Justices Hampel and Southwell.

His Honour Mr. Justice Hampel spoke first. He began by referring to an observation made by the then Chief Justice of the High Court, Sir Anthony Mason that: "too often, appellate counsel forget that advocacy is an exercise in persuasion rather than a defence or a statement of a position".

Mr. Justice Hampel has found that advocates seem to take the view that they do not need to perform the same exercise in persuasion before an Appellate Court that they are required to perform before a jury or a judge sitting alone in a contested matter. An appeal, His Honour pointed out, is an argument and it is made in the context of the advocacy system. To persuade the judges of an Appellate Court *or* a jury, the advocate needs a persuasive argument *persuasively* put.

The most important requirement of the art of persuasion is "good communication skills". A requirement preliminary to good communication skills is that of "good preparation". Without good preparation the most able communicator is but an empty vessel.

Good preparation, according to His Honour, consists of a thorough familiarity with the material and the development of a consistent "case theory". This preparation should be reflected in the grounds of appeal and summary of submissions which, together, should provide the Court with a written structure/outline of the case for which the advocate is contending. The third element of good preparation referred to by His Honour, is "performance preparation". That is, "how" (not "what") you are going to argue. The quality of your "performance preparation" depends upon the development of "good communication skills".

Essentially, the concept of communication in the Court room is the *relationship* between the advocate and the bench, because a good communicator establishes a relationship with the listener. He or she does so by considering "what are the needs of the listener?" In the case of an advocate before an Appellate Court, this involves a consideration of: "What does the Court know?" and "what does the Court need to know?" Too often advocates wrongly assume either that the Court is au fait with each factual and legal intricacy to which the case being appealed gives rise, or that the Court convenes newborn and blind. In the first case, the advocate may consider it unnecessary to sign post to the Court a particular point, why it is being made and where it fits into the scheme of the argument as a whole. In the second case, obvious and trite matters of fact and law are described and explained irrespective of the fact that the Court could hardly have overlooked them.

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With respect to the question "what does the Court know?", the Court is provided with summaries of the case from the Crown and summaries of counsel's submissions before the hearing. It usually is not possible for the Court to be totally familiar with all of the material (i.e. depositions etc.) in the case. If an advocate intends to refer the Court to any piece of material — transcript of evidence, record of interview, a witness statement — it is al-

1. "The Role of Counsel and Appellate Advocacy" (1984) 58 *Australian Law Journal* 537 at page 538.

ways important to ascertain whether the Court has the document, has read it and to what extent it is familiar with it. Then the advocate can decide in what detail it is necessary to refer to that material. (Of course, it is also necessary for the Court to communicate with the advocate and, His Honour assured his audience, that in this respect the judges of the Appellate Division of the Supreme Court of Victoria constitute perhaps the kindest and most nurturing, caring, loving Court he has ever seen.)

If the Court is unfamiliar with the material upon which a submission is to rely, the advocate then should act as informer/teacher to the Court with respect to that material. This is the ideal natural opportunity for a relationship based on dialogue between the advocate and the judges to develop, wherein the advocate is assisting the judges and is able to point the way — his (or her) way. Once the advocate has ensured that the Court knows the factual basis upon which the advocate's legal submission relies, then he or she is ready to proceed with the submission and is in the best position, intellectually and psychologically, to persuade.

In proceeding with a submission, His Honour advised that one should always first state the proposition for which you are contending and then support it (by reference to the material and the law). His Honour emphasised the necessity of formulating each proposition with precision and clarity. It is not good advocacy if the Court has to make numerous attempts to rephrase your submission to make sense of it.

His Honour next examined the role of "pace" in the art of good communication and therefore persuasion. You may have been absorbed in your case for days, even weeks. The Court is a "first time listener". You must be able to deliver your submissions at a pace that allows the Court to assimilate the information you present and offically evaluate your argument. Each judge should thereby be in a position, as you proceed to support your submission, to raise matters that concern him, matters with which he disagrees or considers unsupported by the material. You, the advocate, are thereby best placed to satisfy those concerns and *persuade as you go*. The dialogue, established at the beginning of the hearing, continues.

Dealing effectively and politely with questions put to you during the presentation of your argument is an important skill of the appellate advocate. It is vital that in your presentation your approach and structure is flexible, so that you can leave your intended order to deal with a matter raised by one of the judges and then return smoothly to your argument. Appellate advocates, in preparation, should try to anticipate questions that may be asked, and use them as another way of explaining their essential case — another tool in the persuasion process. It may be just the angle needed to highlight an important, but hitherto overlooked aspect of the argument.

A good advocate caters to the needs of the judge who has asked a question. Sometimes it is a testing of an argument and therefore requires your response (an obvious element of communication and persuasion). Sometimes it is a "cry for help" and that there is a coherent and reasonable response to it, again, is essential for communication and thus persuasion.

You must be able to deliver your submissions at a pace that allows the Court to assimilate the information you present and offically evaluate your argument.

His Honour next examined the actual involvement between the advocate and the judges with reference to a pre-eminent appellate advocate, Murray Gleeson. One feature of Gleeson's advocacy style that made him so successful in appellate advocacy was his engagement of each member of the Court. He would take each judge carefully through his process of thinking and would not turn from that judge until he was satisfied that the judge had absorbed the information he wanted the judge to know, his argument and the way in which his argument was put. He would involve each judge as if it were a matter only between that judge and him. And he would do that for each member of the Court. He was compelling by means of his use of eye contact, energy and modulated intensity.

This compelling style of advocacy was contrasted with that of an experienced appellate advocate from New South Wales (unnamed) who presented an excellent submission to a Bench of three Appellate Advocacy teachers, one who waved and then slid under the table, another who quietly left the Bench during the submission and a third who was doubled over with silent laughter. The advocate noticed nothing. He had sought to persuade by content alone and read his piece to the Court without once looking up. The eloquence was all in the Bench.

His Honour made a number of further points. He advised advocates not to read to the Court before it is ready to listen and absorb. They should pause and wait for the Court to find the relevant passage in the relevant text and check with the Court that it has.

A good advocate does not read trite law to an experienced Court, although there is a dilemma if one judge is less familiar with that area of law than the rest of the Court and that is a technical decision that depends on all of the circumstances (and the judges).

His Honour was reminded by the Chief Justice of the Supreme Court, Mr. Justice Phillips, to emphasise that a good advocate should not forget that the client, the Applicant, is the other consumer of advocacy in an Appellate Court hearing. It is important to tell the Applicant that the appellate process is the testing of a proposition or argument and that criticism or argument from the Bench does not always equate with ultimate rejection by the Bench of the case being put by the advocate.

In conclusion, his Honour emphasised that, apart from intellectual ability, it is the ability to communicate that makes an excellent appellate advocate.

Following His Honour Mr. Justice Hampel, His Honour Mr. Justice Southwell then spoke. He examined a number of "dos and don'ts" with respect to preparing grounds of appeal.

His Honour first considered the difficult task of deciding which of the possible grounds of appeal that arise from an examination of the material do you include in your grounds of appeal ultimately filed with the Court. He advised that a good advocate should not include a ground that the advocate ultimately cannot justify or sustain in argument with the Court. When you are loathe to delete a possible ground that, though weak, you feel may just be the one that sways the Court — think again. Where should it be argued? It is not good advocacy to commence or to end your appeal upon a weak ground — where then do you hide it? If that is the dilemma in which you find yourself with respect to such a ground, leave it out altogether, His Honour recommended.

With respect to the actual drafting of the grounds of appeal, His Honour suggested that it is imperative to be concise and to be precise. A ground of appeal ought not to be rambling nor should it be argumentative. It should allow the reader (here, the three judges in particular) to immediately see what the real point is in that ground. For example, if the complaint is about the wrong admission of evidence, refer briefly to the subject matter and to the transcript page reference. The following example of imprecision was given:

> That the learned trial judge failed to direct the jury adequately or at all as to how it should treat the evidence of witness X.

In argument it appeared that the complaint was that the trial judge had not given a standard accomplice direction or alternatively had not given a direction that the particular witness was unreliable. His Honour suggested that a preferable formulation of that ground was as follows:

> The learned trial judge misdirected the jury in that he failed to warn the jury to carefully scrutinise the evidence of X who was an accomplice or alternatively was a suspect or tainted witness.

This formulation makes clear the nub of the complaint. In the case referred to by His Honour, he advised that it was some way into counsel's argument before the Court understood what that ground meant.

With respect to the order in which grounds of appeal are set out, His Honour advised that there was really no set "advocacy rule" as to whether the order of grounds should be "strongest point argued first" or "leave the best until last". It is a matter of judgment. His Honour preferred that grounds of appeal be set out in a logical sequence. For example, a jurisdictional point that goes to the heart of the proceeding, should be stated first. Following that, grounds should be raised in the order in which the events giving rise to them occurred in the trial. If there is a complaint, for example, with the admissibility of part of the evidence of first witness "A", place that ground of appeal before the perhaps slightly stronger ground that refers to the evidence of witness "K". If however there were an incident in the trial that it is argued causes a mistrial, that may be so strong and important a point that it should be the first ground of appeal, regardless of where in the course of the trial it arose. It gains the immediate attention and interest of the Court and, if the point is strong enough, is likely to have an effect upon the Court's attitude to the remaining grounds of appeal. The final grounds of appeal would deal with alleged misdirections by the trial judge. His Honour said that there is no set rule, but if the Court receives a set of grounds and arguments that support them that appear to follow

His Honour preferred that grounds of appeal be set out in a logical sequence. For example, a jurisdictional point that goes to the heart of the proceeding, should be stated first. Following that, grounds should be raised in the order in which the events giving rise to them occurred in the trial.

a logical sequence, it is easier for the Court to follow, it looks tidier and allows the advocate to make a well-structured and well-argued opening to the appeal.

With respect to grounds of appeal against sentence, His Honour stated that you first must decide whether you are going to argue identifiable error. If there is identifiable error, then identify it. For example — "Since the Applicant suffered mental abnormality, the judge erred in holding that general deterrence was of paramount importance". This immediately focuses the Court on the relevant issues and cases. Another example — "The judge erred in holding that little weight should be given to the Applicant's previous good character". The outline of argument in respect of this ground, should include the transcript page reference and the relevant direction verbatim. This shows the Court that counsel has been able to get straight to the point and it allows the Court to do so also.

If the ground is that the sentence is manifestly excessive, His Honour suggested that it is not good drafting nor good advocacy to rely upon a lot of complaints about what the judge must have failed to do or has done too much of. Where that occurs, the Court is obliged to read the sentencing remarks to try to find out where the judge went wrong. In most cases, His Honour observed, it is impossible to identify an error in the reasons of the trial judge. Where the complaint is that the sentence is manifestly excessive, it is neither necessary nor desirable to particularise the complaints you want to make in your submission as an actual ground of appeal. That a sentence is manifestly excessive means "manifestly excessive in all the circumstances" and the judges sitting on an Appellate Court know that.

In concluding his remarks in respect of grounds of appeal, His Honour stated that, in the final analysis, in deciding what grounds to include you must leave no stone unturned to do your best for your client — but the crunch comes when you get to your feet; are you prepared to argue that ground or do you think as a matter of realistic assessment, as an advocate, you will serve your client better by abandoning it.

The seminar was then thrown open for discussion and a number of interesting points were raised.

With respect to the content of outlines of submissions, their Honours advised that the outline should be a series of basic and briefly stated propositions, not the whole argument. In a moment's reading, the Court knows what the thrust of the argument is. This also reduces the temptation for the advocate to stand before the Court and read the submissions rather than speak to them. They also advised that counsel should get the outline to the Court as soon as possible.

With respect to the advisability of counsel who appeared at the trial appearing on the appeal, their Honours took the view that if there is a question as to significant error of judgment by counsel at the trial, then the same counsel should not appear on the appeal. His Honour Mr. Justice Southwell observed that nevertheless, a trial advocate should in general not be concerned about doing an appeal. If you can do a good trial, you can do a good appeal (although maybe not vice versa).

The seminar provided many insights into the art of appellate advocacy, from the consumers' perspective. As Sir Anthony Mason observed in the paper referred to by Mr. Justice Hampel at the beginning of the seminar: "Persuasion calls not only for mastery of the materials but also for an element of constructive imagination and boldness of approach". All who attended this seminar will agree that these elements were amply represented in their Honours' addresses.

Janine Perlman

STEVEN STRAUSS REFLECTS

In a farewell speech given by the Honourable Justice Steven Strauss at the Savage Club on 22 November 1993, His Honour canvassed some of the experiences of his youth. With kind permission that speech is reprinted below. For many readers it will give reality to facts which they have previously seen only as history.

I THOUGHT I MIGHT GIVE YOU A SHORT sketch of my early life. Many people have asked me about it, but I have not told much of it, not even to my family.

I was born on 3 September 1921 in Lauterbach in the State of Hesse in Germany. That is a small town which then had about 5000 inhabitants. They were mainly Lutherans, there were a small number of Catholics and there were 36 Jewish families of which we were one. My given name upon birth was SIEGFRIED, but I changed that in 1945 when I was in the Australian Army and was about to become naturalised, because I did not like the connotation of the name. You all know that Siegfried was a Germanic hero.

My father was born near Lauterbach in 1875, and my mother also not far away in 1887. I had one sister who was born in 1924. I believe that in his earlier days my father had been a trader in livestock. He served four years in the German Army and became a sergeant major. As I remember him, he was not a trader then, but he was the arbitrator of the livestock association for the district. He seemed to be very busy and I remember that we had a young man who worked in the office in our house.

My father died of heart disease shortly before his 55th birthday in 1930. I was not quite nine at that time. Politically, my father had been active as a Social Democrat. I started State School in Lauterbach in 1927. In 1931 I went to the local gymnasium, which is the High School.

In January 1933 Hitler came to power. I remember that on the next morning men in brown uniforms came along and took away political opponents. I saw them take away one of our neighbours who was a communist. My mother then said something to the effect that she was glad that my father was not alive.

After that things got very uncomfortable for me at school. I had frequent fights and arguments with other children. My mother decided to send me to Berlin to my uncle Siegfried Meyer, who was a silk merchant and also an inventor. His claim to fame, such as it is, was that he invented the Simpak suitcase, which is, I think, the forerunner of the suit bag we carry on planes. His invention was that he designed a suitcase in which suits and trousers could be hung and carried on hangers. Uncle Siegfried did not really know what to do with me. He and his wife had no children. After a few weeks at a Jewish school in Berlin, I was sent to a Jewish boarding school at a village called Caputh. That is near Potsdam and not far from Berlin. Caputh was on the bank of the Havel River which consists of a series of lakes in that area. Several of the rich and famous residents of Berlin had their summer residences in Caputh. Albert Einstein had his summer house on an allotment which was next but one to the school. The name of the school translated into English was "Country Boarding School Caputh".

When Hitler came to power, Einstein was abroad. As I have been told, Einstein was warned by friends not to return to Germany. The school needed additional accommodation for children who like me, were better off away from their homes, and so the school rented Einstein's house for additional accommodation. I was in this house many times. Einstein's visitors' book was there, his correspondence was there and all his other belongings which he normally kept in the house. It was as if he had just left overnight. I don't remember all the famous names in the visitors' book but one of them was Mahatma Gandhi.

The school rented Einstein's house until 9 November 1938. On 9 November 1938 there was what has become known as the Crystal Night. That was the night when Jewish synagogues were burnt

The Honourable Justice Steven Strauss

including the one where I had become Barmizvah, and when tens of thousands of Jewish men were taken to concentration camps. Einstein's house was then confiscated and the school had to vacate it. I was then no longer a pupil there, but was at a school in Berlin. I had kept in touch with the teachers in Caputh. One of these teachers contacted me and asked me to take Einstein's visitors' book and his private correspondence to the French Cultural Attache in Berlin. I did this. The episode looked a bit like a cloak and dagger operation. The documents had been put into a large envelope which had written on it in the English language: "A stone of wisdom". The translation of the English words "a stone" into German is "Ein Stein".

I had three happy years at Caputh. We were sheltered and had little contact with the general population.

By Easter 1936, I had finished the schooling available at Caputh, which stopped two years short of matriculation standard. The question then was, what to do next. My uncle in Berlin could not take me to live with him because he had sublet part of his flat for economic reasons. I went to live at a Zionist Youth Hostel in Berlin in the hope that I might be able to emigrate to Palestine. The difficulty which Jewish people had in those days was not that you could not get out of Germany, it was that we had difficulty getting into other countries. One of the few hopes I had was that I might get to Palestine. After some months at the hostel I went to a retraining school and did a course in cabinet making. That is where I met David Denby's father who was a pupil there also. Then I heard that a new Jewish High School was to be opened by the Jewish Community of Berlin at the beginning of the school year commencing at Easter 1937, and that that school would go to matriculation. At that stage, a Jewish child could not get into ordinary schools and there were no jobs to be had. I went to that school and passed my matriculation at Easter 1939.

In about March 1937, at the age of 15½ years I rented a room in a flat occupied by a Jewish family which was near the school and lived there until I migrated to England in July 1939. By that time an uncle in America had provided an Affidavit of Support for me so that I might be able to migrate to the United States. But there was a long waiting list.

There was a quota for German citizens which also applied to Jewish people and I would have had to wait for years. A former teacher of mine had migrated to England. He was able to persuade an organisation concerned with helping Jewish children in Germany to arrange for my stay in England pending my migration to the United States. They

had to deposit 50 pounds sterling and arrange matters so that I would not be a financial burden on the English public. I went on a children's transport to England on 3 July 1939. I last visited my mother and sister in June 1939. They too had moved from Lauterbach in about 1934 to a town called Fulda. That was the last time I saw either of them. After my internment in 1940 I received several letters from my mother and sister through mail which could be sent to internees. The last of these letters was dated 30 March 1942. As I have since ascertained, shortly after March 1942 my mother and sister were deported to a concentration camp in or near Riga. A survivor whom I knew told me that my sister was taken out of the camp in a truck one day and did not return. I do not know how my mother died. My sister was 18 when she was murdered.

I landed in England on 4 July 1939. I was able to take with me a suitcase of clothing and 10 German marks which was the equivalent of 17 shillings and sixpence. That was all I had. The landing permit went something like this: "Leave to land granted this 4th day of July 1939 at Harwich on condition that the holder of this permit does not enter into any employment paid or unpaid while in the United Kingdom".

I was sent to a prep school at Bayswater in London as a pupil, but, of course, there was nothing I could be taught at a prep school. I had done four years of English at High School. So I was made an assistant master — without pay. On Sunday 3 September 1939 (which was my 18th birthday) I took a group of 15 or 16 boarders for a walk in the nearby Kensington Gardens. I was standing near a barrage balloon. The R.A.F. people who were in control of that balloon had a radio and I there heard Chamberlain declare war on Germany. I was just getting the children together to take them back to school, when the first air raid sirens went off. So the children and I dashed into an air raid shelter. A few days later the school was moved to Richmond in Surrey. I did not go to Richmond but was sent to a hostel for young refugees in Stamford Hill in the north of London. Although I was not able to take a regular job, I was allowed to become a trainee and receive some small remuneration for it. The people who ran the hostel arranged for me to become a trainee in a clothing factory near Oxford Circus. There I was taught to match up linings and buttons for ladies' garments. I was paid one pound a week. This pound was handed over to the hostel which provided me with food, fares to and from work and all other necessaries such as toiletries, haircuts and the like. I was allowed sixpence pocket money a week. However, I was able to save a penny on the bus fares on the way to work and a penny on the way home from work by walking between Bloomsbury Square and Oxford Circus. That gave me an extra shilling pocket money a week.

After a few months I was able to make a more favourable financial arrangement by going to live with a Mr and Mrs Reubens in the East of London. Whilst living with them, I heard about Toynbee Hall. That was a workers' education establishment in the East of London. One of the subjects taught there was dramatic art. As I had usually played a leading part in school plays, I fancied myself a bit as an actor and I decided to take lessons in acting. The teacher at Toynbee Hall told me that if I wanted to take a walk on part in the production of *King Lear* at the Old Vic Theatre, she would make the necessary arrangements for me to do so. The pay was four shillings a performance. I was able to keep my job in the factory and take the walk on part as well and that seemed enormous riches to me. The cast of *King Lear* was a splendid one. It included Gielgud as Lear. Jack Hawkins and Lewis Casson had parts in it and if I remember rightly Jessica Tandy played Cordelia.

I played a soldier or one of the murmuring crowd and did such other jobs as shaking tin plate to imitate the sound of thunder during the storm on the heath.

It all came to an end after a few short weeks. On 16 May 1940, two burly men arrived at the factory and told me that I had to accompany them, because I was to be interned. They took me home, where I collected my suitcase and a satchel I had acquired and then took me to some army barracks. This was the first time I had the experience of having a machine gun pointed at me. Next day we were taken to Kempton Park Racecourse, where barbed wire enclosures were being erected in haste. Shortly afterwards, we were taken to Bury in Lancashire, where we were kept in a disused cotton factory and then we were sent to Onchan on the Isle of Man. We had been interned there for a short time when we were told on 9 July 1940 that a ship was going to Canada next day and that they wanted a certain number of people from the camp to go on that ship. It was decided by the spokespersons for the internees that those men should go who did not have wives and children in England. I wanted to go to Canada because I thought it would get me closer to my uncle in America.

Before I say any more about the ship *Dunera* I want to say that Britain was one of the few places in the world which made it possible for a large number of children and youngsters to obtain shelter there on the same or a similar basis as I did. I am sure that if I had not got to England, I would not be alive today. The other thing I want to say is this: although some things on the *Dunera* were quite nasty, almost everybody survived. There were only two accidental deaths. If we had been on a German ship, none of us would have survived.

On 10 July 1940 we were taken on to the

Dunera. As we walked aboard, we had to leave our luggage on the deck. We were searched. Money, watches and other valuables were taken from us. On the second day at sea I and many others saw soldiers go through our luggage. They forced cases open with bayonets and otherwise and took what they wanted and threw other things and suitcases overboard.

On the second day at sea I and many others saw soldiers go through our luggage. They forced cases open with bayonets and otherwise and took what they wanted and threw other things and suitcases overboard.

As this was going on there was a loud bang, seemingly against the side of the ship. People screamed "torpedo". I had been so sea sick I could hardly move. I jumped up and everybody tried to get up the stairs which led from the hold to the deck. I thought I would never make it. I sat down thinking that this was the end. But the torpedo had not struck the ship. I understand that it exploded before striking the ship, and that a second torpedo which had been fired missed the ship.

I have since been told the following story, but am not able to say whether it is true or not. The story is that a newspaper in Frankfurt published an account from the commander of the U Boat which fired the torpedoes and that he stated that as the torpedo was fired he saw objects which he thought were people jumping from the ship. After the *Dunera* was out of sight, the U Boat surfaced and the U Boat crew then found floating in the water objects which had German labels on them and that for that reason the *Dunera* was not attacked again.

If the ship was to go to Canada as I thought it would, it had to travel west. Hence it was difficult for us to understand, why it kept travelling generally south. The ship took on water in Freetown on the coast of Africa and then berthed a few days later at Capetown. We knew then that we would not go to Canada.

On 26 August 1940, the ship berthed at Fremantle in Australia where I was given an Australian "Certificate of Registration of Internee". The ship berthed at Melbourne on 3 September 1940, my 19th birthday. We disembarked in Sydney on 6 September 1940 and were taken under guard by train to an internment camp at Hay in New South Wales. After 56 days of sparse and poor food on the *Dunera*, it seemed that I had never tasted anything better than the sandwiches and fruit in the railway lunch box.

We remained in Hay until about May 1941. I played a lot of soccer and handball and did some acting. During a soccer match I got a broken fibula. I was sent to the camp hospital, which was in fact the old gaol at Hay. I was kept there for a couple weeks in a bed in a room which used to be the prison workshop. About the end of May 1941 I was sent to an internment camp at Orange in New South Wales. In about July 1941 we were sent to an internment camp at Tatura in Victoria. In Tatura the internees set up a camp school with the aid principally of Miss Margaret Holmes, the secretary of the Australian Students Christian Movement. That organisation supplied us with textbooks and made arrangements enabling us internees to sit for the Victorian School Leaving Certificate in the Internment Camp. In those days, the school leaving certificate qualified one to enter university. The teachers were internees who had appropriate qualifications or skills. I started lessons about August 1941 and sat for the examinations in about October 1941. I had to sit for a supplementary examination in mathematics in February 1942.

Shortly after Japan entered the war at the end of 1941, we were informed that we could get out of the Internment Camp, if we were willing to join an aliens labour corps of the Australian Army. We would go fruit picking first, and then join the army. As soon as I had sat for the supplementary examination in mathematics in February 1942 (which I passed), I volunteered to join the Army. I went fruit picking for some weeks at Ardmona and Kyabram. On 8 April 1942 I was inducted into the 8th Australian Employment Company, which except for some non-commissioned officers consisted exclusively of former internees. I was stationed first at the Caulfield Racecourse and then at other places in or near Melbourne and at and near Albury and Tocumwal. The general nature of my duties was loading and unloading goods at railway sidings, the wharves and in ordnance depots. In 1944, whilst in the army, I enrolled as a correspondence student at the University of Melbourne and passed a total of four Arts subjects in 1944 and 1945.

I was discharged from the Army in February 1946 and commenced the law course at the University of Melbourne in March 1946 as a C.R.T.S. (Commonwealth Reconstruction Training Scheme) Student.

I shall end the story of my early life here.

In conclusion, I shall cite a passage from *King Lear* which has some relevance to my present circumstances.

In the opening scene Lear enters the stage and announces his impending retirement saying: "and 'tis our fast intent to shake all cares and business from our age conferring them on younger strengths while we unburdened crawl towards death".

MEDIATION IN MOTOR VEHICLE DISPUTES: A PILOT SCHEME

MEDIATION ADJUDICATION AND ARBITRATION

UNLIKE ADJUDICATION AND ARBITRAtion, mediation is a much more flexible and cooperative process. Disputants face each other across the table, in a non-threatening atmosphere and are helped by trained mediators to work through their dispute. A great benefit of mediation is that it encourages parties to focus on their interest rather than their fixed positions.

The process is extremely flexible and not restrained by rules of evidence and other formal court processes. (Dispute Resolution Project Committee, *Neighbourhood Mediation Service* (Victoria Government Centre 1985), pp. 14–25 at 14.)

Mediation has been defined as "a voluntary and confidential process in which a mediator, independent of the disputants, facilitates in the negotiation by the disputants of their own solutions to their dispute by assisting them systematically to isolate the issues in dispute, to develop options for their resolutions and to reach an agreement which accommodates the interests and needs of the disputants."

A report on the interim guidelines was developed at the National Best Practice Workshop August 1994, Centre for Dispute Resolution, University of Technology, Sydney.

COURT ANNEXED MEDIATION

The annexing of mediation to existing court process is being increasingly supported by government funders and the judiciary. "The time has passed for discussing what mediation is, and agreeing that it is a good thing. Someone has to tackle the question of why it is not done. It is time somebody said, Well why aren't you doing it? Why aren't lawyers telling their clients mediation should be tried?" (Mr. Ken Marks Q.C., Chairman of the Conflict Management Centre, "No Excuses", *Victorian Law Institute Journal*, August 1994, p. 682.)

The Law Institute of Victoria and the Victorian Bar have both endorsed the introduction of mediation, by setting up their own mediation services and guidelines.

DISPUTE SETTLEMENT CENTRE MEDIATION IN MOTOR VEHICLE DISPUTES

Mediation is not an inferior type of justice but rather a different type of justice from that dispersed by the formal court proceedings.

The Dispute Settlement Centre of Victoria is piloting a mediation scheme for resolving property disputes of less that $5,000 arising out of motor vehicle collisions.

The Centre has a pool of mediators who have had special training in resolving these disputes and addressing the problems such as the power imbalance between an unrepresented party and an experienced insurance claims officer.

Mediation is a free service available:

To the owner and driver of vehicles damaged in a collision.

The annexing of mediation to existing court process is being increasingly supported by government funders and the judiciary.

Where the cost of repairs to each vehicle is under $5,000.

Mediation can take place whether or not the parties are insured and it can take place even if legal action has started.

The project has been designed not to compromise or replace court proceedings.

The disputants retain their entitlements to a court determination should agreement not be reached.

Mediations which do not end with a formal agreement being reached may still be very worthwhile for the disputants by identifying which issues are in dispute and which are not, exploring each other's needs and discussing possible solutions, taking one problem at a time. It may well be that the disputants leave with two unresolved problems having come to the mediation process with six.

Interpreters are available both over the phone and at the individual negotiations at no cost to the disputants.

When the initial contact is made over the telephone to the Dispute Settlement Centre, the trained intake staff have an extensive referral list to such agencies as Community Legal Centres for legal advice and will set up the mediation by contacting the other party.

The Vehicle Property Damage Pilot Steering Committee
Dispute Settlement Centre of Victoria

THE BAR DINNER

WAS IT A FUNERAL? IT CAN'T HAVE BEEN. There was a 40 per cent drop in rents to celebrate. Barristers Chambers Ltd. would not go under. But why was black the colour of the evening. The little black dress will not go away. Nor will the big black dress for that matter. Some were still wearing sequins and black at that!

A stern representative of the Women Barristers' Association reminded the *Bar News*' reporter that all the men *always* wore black. So why couldn't the women! She was, of course, not quite right. There was one stunning gent in a white tuxedo. A fashion much encouraged by the former Chief Justice Young.

There was the obligatory lad in a tartan skirt. Unfortunately not a member of the Victorian Bar, but Colin Robertson Q.C. head of the ACT Bar.

Simon Wilson Q.C. explained that he normally would have worn his white tuxedo but it was suffering a bad case of overstained chocolate ice-cream. His black version hid such things. He claims that he will not be wearing a tartan skirt next year but instead a tartan tuxedo!! At this very moment it is being tailored by Wong Moon Gai, Hong Kong Tailors. It is being modelled along the lines of that worn by the late Desi Arnez in "I Love Lucy". That *will* brighten things up.

However it appears the rash of black dresses has another explanation. An internal memorandum to the W.B.A. from the Justice Department had been leaked. The Attorney General it seems, was proposing to, and indeed did wear a *black* dress. Therefore according to De Bretts (no relation to Robyn or Jonathan) *Book of Etiquette* Volume 1 page 26, those attending balls, soirees, levies and melees (including hunt balls) should dress in similar form and colour as dukes, viscounts, marquises *and* ministers of the Crown. Hence a great rush to the salons of Toorak Road and K Mart for purchases of black dresses. Portmans' manageress said that she had never seen more of her regular customers buying black, black, black. In any case it was good to see etiquette prevailing at last! The Attorney General looked very much at home surrounded by so many black dresses. Of course a colour much seen in the Supreme Court.

Judge Campbell said that he had been wearing his black tuxedo since 1961 and he saw no reason to change, etiquette or no etiquette. As he had remarked to *Bar News*, when he was Stewart

The law at Leonda

Mr. Junior Silk, Michael Watt Q.C.

Graeme Uren Q.C., the Honourable Sir Daryl Dawson and Gary Crook Q.C.

John Middleton Q.C. and the Attorney-General, Jan Wade M.P.

Campbell as he then was, the 1960s were the high point of fashion. (See *Bar News*, Winter 1992.)

Although in black, Kingsley Davis had made his usual effort to brighten things up. My word, no-one had seen pink and paisley frills, and stovepipe trousers since the Strangers (without Ross Ray on drums) played the Newman Ball in the Old Royal Ball Room. Kingsley denied that he had ever crashed such events by climbing through the toilet windows. But all the family lawyers present did admire his pointed shoes. Evidently indispensable down at Marland House.

Talking of family lawyers didn't Michael Watt do a marvellous job as the Junior Silk. Goodness he had custody of 13 very different guests and he allowed the audience a real weekend access to each and every one of them. Years of interfacing with the *Family Law Act* certainly have had a profound affect upon him. Such a nice voice.

There were of course, lots and lots of other speeches too deep and meaningful to talk about. But David Habersberger did a splendid job as M.C. Close sources revealed that he has polished up his act whilst moonlighting at the Camelot Reception Centre during the latter period of the Pyramid Inquiry when funding dried up a little. Many have noticed a great improvement in the levity levels of his welcome speeches!

But Judge McInerney's was undoubtedly the most deep, meaningful, warm, caring and sharing speech of the night. His Honour spoke in a heart

James Watson, Grevis Beard and Liz King

Graeme Uren Q.C., John Middleton Q.C. and Colin Robertson of the ACT Bar

Chairman Habersberger, M.C.s

Murray Tobias Q.C.

felt manner of the dilemma of being a SNAJ a "sensitive new age judge". Tony Howard Q.C. was noticed actually weeping during the course of His Honour's speech. Tony and Michael (as he then was) are both SNAGS ("sensitive new age guys") who go a long way back.

Tony has written extensively on the subject (see *Bar News*, Spring 1993). Tony was of course, comforted by his delightful wife Linda Desau M. (as she then was) who it must be said did not wear black and looked, as usual, very Barbra Streisand. (See *Bar News*, Winter 1992, p. 63.)

As the evening wore on it didn't seem like a funeral after all. Indeed many eschewed black. Debbie Weiner had a very vivid model on. She showed everyone the label. Betty King Q.C. was her most colourful self. There were table loads of juniors and readers. Mr. Justice Cummins literally sparkled whilst hoards of the younger set hung on his words. Reader Joanne Piggot admitted she had made a mistake wearing some straps which resembled a black dress. Next year she promises pink, pink and more pink — perhaps a crushed velvet.

As some careered about the room at the end of the evening, clutching a small port glass and a bottle of chardonnay, you knew that another bar dinner had come to a close — especially when the management turned the lights off.

So it was off to Silvers for many, hopefully not to be attacked in the toilets. The only regret is that the best things are usually said in Leonda's toilets. But the collegiate cone of silence prevents the printing of such things. And so to next year and a 40 per cent cut in rent. No more funerals for the Bar.

JUNIOR SILK SPEECH — 1995

Michael Watt Q.C.

MR. CHAIRMAN, DISTINGUISHED GUESTS, members of the Victorian Bar.

Honoured as I was to be made a silk and to find myself in the position of Junior Silk, I must confess that when the modest list of honoured guests intimated in the first letter from the Chairman of the Bar Council increased to that number superstitiously associated with ill fortune, I felt I might be the target of some novel form of divine retribution. Perhaps this should not have come as a surprise. After all, I grew up in a religious tradition in which the marriage ceremony included something approaching a permanent injunction in these words: "Those whom God has joined together let no man put asunder". After many years of putting asunder, and for reward at that, perhaps the surprise should have been that the retribution had not arrived earlier.

Mr. Junior Silk, Michael Watt Q.C.

Although those who practice in family law may lack a patron saint, we do not want for high profile patrons among the ranks of the serial monogamists who keep us employed. In preparing for tonight I was reminded of a complaint allegedly voiced by the seventh husband of Zsa Zsa Gabor, who on the eve of his nuptials, confided in a friend, "I know what's expected of me, I just don't know how to make it interesting!"

Making it interesting for Your Excellency the Governor of Victoria is quite a challenge as Your Excellency has been an honoured guest of this Bar at a number of dinners in the past. Indeed the *Bar News*, of which Your Excellency was founding editor in 1971, is replete with accounts of your distinguished career which included taking silk in your 13th year of practice at the age of 37, and your appointment 13 years later to the bench of the Supreme Court of Victoria where you served with distinction for 16 years until your appointment as Governor of this State in 1992.

Tonight we celebrate Your Excellency being made a Companion of the Order of Australia in the Queen's Birthday Honours List for service to the Crown as Governor of Victoria, to the law and to the community.

Typical of the important cases which came before Your Excellency in your time as a justice of the Supreme Court of Victoria was the first case in Australia in which negligent transmission of the HIV/AIDS virus was alleged, the case of *PQ* v. *Australian Red Cross Society and others*. The passage of time since Your Excellency left the bench is marked by the fact that one of the juniors who appeared in that case appears tonight as another of our honoured guests, having been appointed to the bench of the County Court.

Since taking office, Your Excellency has been an accessible Governor to the people of Victoria and an interview with you was published in a local magazine earlier this year under the eye-catching title "The Queen and I". The article gives some insights into the active Vice Regal life which has

The Chief Justice of Australia, the Honourable Sir Gerard Brennan

lead in part to Your Excellency receiving the award which we celebrate with you tonight. Insights into Your Excellency's understanding of the role of Governor are to be gained from Your Excellency's article "Governorship in Australia today" which appeared in the Spring 1994 edition of the *Victorian Bar News*. In it Your Excellency examines the finely balanced constitutional powers which have served Australia so well for so long.

Your Excellency has brought a level of distinction and independence to the office of Governor which highlights the difficulties facing those who propose constitutional reforms which include the abolition of your office. In Government House, Your Excellency and Mrs. McGarvie occupy one of Victoria's most attractive assets and one which has not yet had a "For Sale" sign put upon it. From both constitutional and aesthetic perspectives, I wish Your Excellency many years of continuing occupancy before such a sign appears.

SIR GERARD BRENNAN A.C., K.B.E.

The Victorian Bar is privileged tonight to have as one of our honoured guests the recently appointed Chief Justice of the High Court, Sir Gerard Brennan. Your Honour was called to the Queensland Bar in 1951, took silk in 1965 and in 1975 to 1976, served as President of the Queensland Bar Association. Your Honour also represented the Queensland Bar on the Law Council of Australia where Your Honour consistently supported the rights of the underprivileged in such areas as legal aid and civil liberties.

In 1976 Your Honour was appointed a judge of the Australian Industrial Court and became the first president of the Administrative Appeals Tribunal. In 1979 Your Honour became a judge of the Federal Court of Australia and of the Supreme Court of the Australian Capital Territory. Two years later Your Honour was appointed to the bench of the High Court of Australia and knighted.

Your Honour, it has been said that there are three types of barrister in Australia, those who are members of the Victorian Bar, those who wish they were, and those who have no ambition at all.

I am informed that Your Honour's move to Canberra in no way diminished Your Honour's desire and willingness to help the underprivileged but when, together with Lady Brennan, you discussed participation in a door knock collection for the St. Vincent de Paul Society, it was decided between you that it might be prudent for Your Honour to participate in the door knock in a suburb on the other side of Canberra from that part in which you resided. The desired anonymity was to elude Your Honour on this occasion, however, and at the first house at which Your Honour called, the woman answering the door said "Good morning judge, How nice to see you". Your Honour's first call had been to the home of Frank Jones, for so many years the Registrar of the High Court.

Your Honour, it has been said that there are three types of barrister in Australia, those who are members of the Victorian Bar, those who wish they were, and those who have no ambition at all. On this test, Your Honour's son Frank cannot be said to be lacking in ambition, for between 1978 and 1984 he practised as a member of this Bar. His presence among us did give rise to some curiosity on the part of those who were aware that Your Honour and Your Honour's father before you had both been members of the Queensland Bar and justices of the Supreme Court of Queensland. I am told by one who was close to Frank during the early stages of his membership of this Bar, that when asked why he had chosen the Victorian Bar, Frank would sometimes respond that he was here because his father had told him that the Victorian

Bar produced the best barristers in Australia. Not wanting to accept too eagerly this manna-like sustenance for the body of this speech, I ran the proposition that Your Honour might have said this past two people both of whom know Your Honour and Frank quite well. The first thought for a moment or two and said "I really can't imagine Jed ever saying that". The second didn't hesitate for a second before saying "Only a Victorian would believe he said that". Perhaps the lesson is that Frank learnt as much about diplomacy as he did about advocacy while a member of this Bar.

At the Victorian Bar dinner of two years ago, one of the honoured guests was Ron Castan Q.C. who appeared for Eddy Mabo in the case of that name in which Your Honour's was the leading judgment. My predecessor as Junior Silk on that occasion, Geoff Nettle said: "Depending upon one's point of view, the decision in *Mabo* may be seen as a paragon of national contrition, a profound recognition of the legitimate expectations of the indigenous people of this nation, or a judicial policy statement of unprecedented proportions." However it may be properly characterised it cannot, I believe, be disputed that the decision in *Mabo* has caused Australia to attempt to move closer towards the achievement of reconciliation between its occupants of largely European origin and its indigenous peoples, and that such a reconciliation is an essential step towards maturity as a nation.

The Victorian Bar acknowledges Your Honour's enormous contribution to both jurisprudence and justice in this country and looks forward to Your Honour's term as leader of its highest appellate court.

THE HONOURABLE JUSTICE WILLIAM CHARLES MONTAGUE GUMMOW

On the same day, Friday 21 April 1995, on which Sir Gerard Brennan was installed as Chief Justice of the High Court of Australia, Justice Gummow was sworn in as a justice of that Court. Although not a practising member of this Bar at any stage, Your Honour was already well known to us in print. For many years Your Honour's writings as co-author of Meagher Gummow and Lehane on *Equities, Doctrines and Remedies* and as one of the editors of *Jacobs' Law of Trusts* in Australia have been standard and much relied upon points of reference. Your Honour has contributed to other books, to learned journals and has given papers both locally and overseas. Since Your Honour's appointment to the bench of the Federal Court in 1986, Your Honour's learned and scholarly judgments have become the hallmark of Your Honour's judicial career to date.

A former colleague of Your Honour's at the New South Wales Bar, now a member of the New South Wales Court of Appeal, not only gave generously of his time in helping me to prepare for tonight but also sent me a copy of a soon-to-be-published article by him welcoming Your Honour's appointment to the High Court. Drawing on His Honour's knowledge of Your Honour's personality, character and temperament, he has written, and I quote: "He is widely read in areas outside the law, particularly history. He eschews frivolity. Any tendency towards wildness of thought is tempered by a proper respect for antiquity. Apart from toying in his youth with skiing he holds no truck with sport. His discourse is incisive but not charitable. He drinks gin and tonic. He speaks no language except English and his native tongue." When I inquired of His Honour what Your Honour's native tongue might be, I was told with obvious delight that I was but the first to have been taken in by that reference.

Judge Morrow, Judge Campbell and Mr. Justice Rowlands

In fact Your Honour was born in Australia, in Sydney, in October 1942. The year is significant because Australia was at that time at war and some months before Your Honour's birth, your father lost his life on active service with HMAS *Perth*. It is, I suggest, appropriate that in this year when we commemorate the 50th anniversary of the end of a war in which so many Australians gave their lives that the son of one who died defending our rights and freedoms from attack by a foreign enemy should be appointed to the bench of the court best placed to protect them from internal attack and erosion.

The Victorian Bar wishes Your Honour a long and satisfying career on the bench of the High Court.

REAR-ADMIRAL JUSTICE A.R.O. ROWLANDS A.O., R.F.D., R.D., R.A.N.R.

Our next guest in order of precedence, Justice Rowlands, was honoured in the Queen's Birthday Honours List by being made an Officer of the Order of Australia, Military Division, Royal Australian Navy, for distinguished service and exceptional

performance of duty to the Royal Australian Navy and the Australian Defence Force, particularly as the Judge Advocate-General. Your Honour is well known to the Victorian Bar, having signed the Roll of Counsel in March 1963 and having taken silk in 1982. Your Honour's judicial career commenced in November 1983 when you became a judge of the County Court of Victoria. In 1985, Your Honour became the foundation President of the State Administrative Appeals Tribunal, a post which Your Honour held until 1988 when you were appointed as a justice of the Family Court of Australia of which you are now Judge Administrator, Eastern Region, a position which has required you to live in Sydney in recent years.

If the court is replaced by an administrative tribunal, Your Honour's experience as president of such a tribunal would leave you well placed to make a smooth transition to the new regime.

Your Honour's association with the Navy came first through Your Honour's father who was Surgeon-General to the Royal Australian Navy.

From the humble position of a cadet in the Royal Australian Navy Reserve which Your Honour held as a teenager, you have progressed to the exalted rank of Rear Admiral and hold the position of Judge Advocate-General of the Australian Defence Force. Lest it be thought that membership of the Bar is enough, of itself, to ensure promotion through the ranks of the reserve forces, I thought I would mention one of Your Honour's colleagues from your days at this Bar whose career in the Army Reserve was contemporaneous but by no means parallel with your own. Neil Forsyth Q.C. informs me that he was commissioned as a Captain in the Army Reserve at about the same time that Your Honour was commissioned in the Navy. He recently attained the retiring age of 55 and received a letter which summarised his situation in this way: "Army Personnel Agency . . . advises that you were retired with effect from the expiration of 30 August 1994. As from that date you have no military title nor any further obligation with regard to commissioned rank in the Australian Army." The letter is addressed to Captain Forsyth the rank with which he was commissioned so many years ago. Clearly Your Honour's promotion to the rank of Rear Admiral and the award we celebrate indicate a devotion to duty of a somewhat higher level.

As a judge of the Family Court, Your Honour is well aware of the intractable disputes which arise between marriage partners which require the intervention of a tribunal for their resolution. I think the statement which best epitomises why there will always be a requirement for such a tribunal is one attributed to the French writer Alexander Dumas who is reputed to have said, "The chains of matrimony are so heavy that it takes two to carry them, sometimes three".

Now although there will always be a need for a tribunal for the resolution of such disputes, it is by no means certain that it will continue to be in the form of the Family Court. After all, only last week a member of the Federal Government was quoted as calling for the establishment of "The Commission of the Family" which he described as being "a lawyer-free environment" for the resolution of family disputes. It does not seem to me, however, that Your Honour should be troubled by these uncertainties. After all if the court is replaced by an administrative tribunal, Your Honour's experience as president of such a tribunal would leave you well placed to make a smooth transition to the new regime. And if, in the midst of some future constitutional crisis, the civil authorities could no longer govern and the military saw fit to take the reigns of power, Your Honour's experience as Judge Advocate-General would no doubt place Your Honour well to continue to hold office through yet another change.

The Bar welcomes Your Honour to Victoria to celebrate this much deserved award and to renew many long standing friendships.

I now have the pleasure of welcoming, as honoured guests of the Bar, eight members of the bench of the County Court appointed in the past year. They are: **His Honour Judge Campbell, His Honour Judge Morrow, His Honour Judge McInerney, Her Honour Judge Rizkalla, His Honour Judge Wodak, His Honour Judge Shelton, His Honour Judge White, His Honour Judge Duckett**. Their backgrounds are as diverse as the cases over which they preside. Their places of birth include a remote country town in Western Australia, Broken Hill in NSW, and Singapore. They include an appointee from the ranks of Victoria's solicitors and an appointee who has spent 22 of the last 28 years in practice overseas. They include the first woman to be appointed to the office of Stipendiary Magistrate in the State of Victoria and only the second person to have been appointed to the County Court bench from the Magistracy. I now address a few words to each of them in turn, starting with Judge Campbell.

HIS HONOUR JUDGE STEWART CAMPBELL

I am informed that about 10 days ago, Your Honour was travelling in a lift in which members of counsel were present and one of them asked if Your Honour was looking forward to tonight. Your Honour answered that you were not concerned in the slightest because there are absolutely no true stories concerning Your Honour which could be told in public. Having carefully sifted the large number of unsolicited offerings received from near and far, I have come to the view that Your Honour is quite correct about this. When I approached Your Honour's former secretary in the hope of finding an exception to the rule, she said "No, it's quite true. And he's going to get away with it again."

The geography of Your Honour's life includes having been born in Katanning in Western Australia and having served in Papua New Guinea as associate to the then Chief Justice, Sir Alan Mann, travelling the highlands of that country with Sir Alan while he presided over a number of murder trials. This was in 1960–61. Following your admission in Victoria in 1963 you travelled to London and became a postgraduate student at London University, graduating Master of Laws in 1966. In your 27 years as a member of the Victorian Bar preceding your appointment to the bench in 1994 Your Honour practised extensively in common law, particularly personal injuries matters, and travelled shorter distances than previously, but with much greater frequency. I refer to Your Honour's regular appearances on circuit, particularly at Warrnambool and many short voyages by sea in pursuit of Your Honour's passion for the sport of yachting. Whether on circuit, sailing or simply socialising with colleagues from the Bar here in Melbourne, Your Honour has a reputation for being the essence of conviviality.

One of the practices for which Your Honour is best remembered at the Bar was that of renaming people with whom Your Honour came into frequent contact. Thus one member of counsel of considerable stature and passion, to whom Your Honour was often opposed, was renamed "The Towering Inferno". Another as tall but less passionate became "The Towering Iceberg" before he too was appointed to the County Court bench. A leader of similar physical stature and even greater volubility became "Mr. Noisy". Not all Your Honour's sobriquets were quite so self explanatory, however, and those who were not part of Your Honour's yachting circle still wonder at how one of Your Honour's closest colleagues from the Bar in that activity became known as "The Wombat".

HIS HONOUR JUDGE DAVID MORROW

Our next honoured guest, Judge David Morrow, could also produce a sobriquet when the occasion

Judge McInerney in SNAJ mode

demanded. When the County Court first occupied premises at 471 Little Bourke Street where civil jury trials were conducted, Your Honour is said to have coined the name "Whiplash Valley" and it became known by this name amongst your common law colleagues. But Your Honour's practice at the Bar which spans some 25 years was by no means confined to common law and Your Honour practised in areas as diverse as family law, crime, insurance law, administrative law and testators family maintenance. At a time when many of us were moving into narrow fields of specialisation, Your Honour retained a truly generalist practice and seemed to keep on top of the law and practice in each area, no doubt explaining Your Honour's recent remark at a social gathering that "the Practice Court isn't as bad as they paint it".

Your Honour has been active in the Royal Australian Air Force Legal Reserve serving as a judge advocate and being awarded the Reserve Forces decoration in 1985. Your Honour's interest in matters military extends also to the collection and restoration of miniature model soldiers, an activity in which I understand Your Honour displays considerable artistic skills.

Your Honour has travelled extensively both in Australia and overseas and it was brought home to me that we both live in a big country but a small world when I almost literally ran into Your Honour

as we both plied our way along one of the dusty tracks which passes for a major road on Cape York Peninsula about 10 years ago. I recall that we settled the dust of the road in the traditional fashion — at about 10 o'clock in the morning — and then continued our separate expeditions.

HIS HONOUR JUDGE MICHAEL MCINERNEY

In extending the Bar's good wishes to Judge Michael McInerney upon his appointment to the County Court bench, I have to remark that unlike Judge Campbell, Your Honour does not have friends at the Bar and on the bench who were clamouring to tell hair-raising tales of Your Honour's exploits. I did consider borrowing some of the stories told about Judge Campbell and telling them about Your Honour but there were two considerations which deterred me from this course. Firstly, Judge Campbell would undoubtedly have objected in the middle of my address and claimed credit for the exploits. No doubt those present who know either him or you or both, and they are many, would have upheld the objection. Secondly, I understand Your Honour has a right of reply a little later in the evening and I could not see our chairman granting me any time for rebuttal.

Your Honour was a relatively youthful appointee to the bench and had not completed your 17th year at the Bar at the time of your appointment. It is said that the fact that the name "McInerney" is well known in Melbourne judicial circles may have assisted and accelerated the early stages of your career. For the first five years of your time at the Bar, the late Sir Murray McInerney was a member of the bench of the Supreme Court of Victoria. Now Sir Murray was certainly not your father, but many solicitors assumed that he was. Sensing that solicitors might feel particularly comfortable about briefing a young upcoming barrister who was also the son of a Supreme Court judge, when the inquiry "How's your father?" was addressed to you by them, Your Honour would respond with a truthful account of your father's state of health albeit the answer was unrelated to the way Sir Murray felt on any particular day.

Whether or not Your Honour's career at the Bar was assisted by this assumption of paternity, there is no doubt that Your Honour's practice developed quickly, initially in common law, expanding in time to include licensing, administrative law and planning. Your Honour's work in licensing law was not all for the benefit of clients. The Bar as a whole benefited from the fact that Your Honour took a major role in the establishment of the Essoign Club, being the founding Secretary, and prime mover in the club's successful application for a liquor licence.

HER HONOUR JUDGE MARGARET RIZKALLA

Your Honour Judge Rizkalla is by far the most youthful of our honoured guests this evening, having been born in the year in which Sir Gerard married, and His Excellency completed his first year at the Victorian Bar. Although Your Honour was born and spent your early years at Broken Hill, Your Honour's university studies were completed at the University of Melbourne and Your Honour signed the Bar roll in December 1976 having read with David Byrne, now Justice Byrne of the Supreme Court of Victoria. Your Honour had a varied practice appearing in the Children's and Magistrates' Courts, the County and Supreme Courts and in the Family Court. Family law and criminal law were your main areas of practice. After a short period of service as a part-time referee of the Small Claims and Residential Tenancies Tribunals, Your Honour was appointed to the magistracy in Victoria in September 1985, the first woman and the youngest person to be so appointed.

The Attorney-General Jan Wade M.P., David Curtain Q.C. and Judge Rizkalla

Your Honour's appointment to the magistracy did not mean that Your Honour's career became in any way static. In 1987 Your Honour was appointed chair of the Police Disciplinary Board and a short time later you were appointed President of the Equal Opportunity Board. In that capacity, Your Honour made a number of important decisions with wide ranging effects upon a community coming to terms with the fact that discrimination is not only unacceptable, but also prohibited by law. One of Your Honour's decisions gave women the right to train in a university sports facility previously reserved for men while another decision enabled men to have access to a swimming pool at the same time as women, contrary to earlier practice. Your Honour's determination that the scratch tickets proposed for the Melbourne transport system were discriminatory towards some sections of the community was found to be correct by the High

Court. From May 1988, Your Honour was also Deputy President of the Administrative Appeals Tribunal, a position which Your Honour held until your appointment to the County Court bench on 11 July last year.

Although Your Honour already brings many varied attributes to the County Court bench, I am informed by one of Your Honour's colleagues from your days at the Bar that there is a characteristic not yet mentioned of which all who appear before you should be well aware. This is that you have extremely acute hearing and it was put to me that Your Honour can conduct three conversations at once while listening in on another four.

Judge Duckett, Geoffrey Flatman D.P.P. and Judge Wodak

Those members of the Bar who are given to making *sotto voce* remarks to their instructing solicitors about the opposition, the bench or the strength or otherwise of their client's case would do well to note this and bear in mind that an enigmatic smile from Your Honour during a hearing may not be an indication that Your Honour's mind is elsewhere.

You have extremely acute hearing and it was put to me that Your Honour can conduct three conversations at once while listening in on another four.

HIS HONOUR JUDGE TOM WODAK

On 16 August last year Your Honour was appointed to the bench of the County Court. Your Honour was born in Singapore to where your parents had moved from Czechoslovakia in the 1930s. Your Honour's family had the good fortune to be evacuated to Australia before the Japanese occupation of Singapore and after a period spent in Scotland while your mother undertook the additional medical studies necessary to enable her to practice in Australia, the family settled here in 1950. Your Honour graduated from Melbourne University in law in 1965 and for nearly eight years following your admission in 1966 practised as a solicitor until becoming a member of this Bar in December 1974. Your Honour therefore spent a total of 28 years in practice as solicitor then barrister before your appointment.

Over time, Your Honour's practice became focused on common law claims and in later years, the most difficult and challenging of these, including the AIDS transmission by blood transfusion case to which I made reference in the course of my remarks addressed to His Excellency.

Your Honour was also retained in a number of the asbestosis cases in which CSR was the defendant for whom you appeared. In one particularly difficult such case, in 1988, your client decided to bring in Tom Hughes to lead you. This decision was communicated to Tom Hughes more quickly than to Your Honour and when the phone rang quite early one morning at Your Honour's home and the voice at the other end of the telephone said, "Tom Hughes here", Your Honour responded with an expletive intended to indicate that the friend or family member making this prank call should go away and engage himself in productive activities, or more specifically, reproductive activities. When the voice at the end of the phone responded, "Do you always address senior counsel in this fashion?" I understand that Your Honour paused to reflect and soon thereafter there developed a working relationship between Your Honour and Tom Hughes which was both forceful and effective.

The same instructing solicitor who informed me of how you first became acquainted with Tom Hughes reminded me that Your Honour's enthusiasm for the game of hockey and conviction that Your Honour's interpretation of the rules is the correct one produced the situation where on the eve of Your Honour's appointment Your Honour was sent from the field of play for arguing with the umpire.

Your Honour was for many years an active committee member of the Common Law Bar Association and is remembered by Your Honour's colleagues in that Association as one who showed the same tenacity in pursuing the interests of its mem-

bers as Your Honour did in pursuing the interests of your clients.

HIS HONOUR JUDGE FRANK SHELTON

Your Honour was the last appointment to the bench of the County Court for 1994, being appointed on 5 December. Your Honour spent 30 years with Minter Ellison Morris Fletcher (as it now is) as articled clerk, solicitor and partner. Your Honour's interests outside the law are diverse. As a student, Your Honour combined degrees in law and arts choosing to major in mathematics and Latin. This liking for self-inflicted pain is also demonstrated in Your Honour's undying support for the Collingwood Football Club. Inflicting pain on others has so far been confined to the musical efforts, during your student days, of a singing group called "The Hollichords". No impediment to advancement in the law flowed from this, however, as demonstrated by the appointment of another member of the group, John Coldrey, to the bench of the Supreme Court of Victoria.

Although never a member of this Bar, Your Honour sought to atone by marrying the sister of two members of it. I understand that Your Honour specialised in building law. When you first holidayed with the Riordan family, it was at their holiday home at Jamieson, and they decided to take advantage of this expertise. The shack at Jamieson was being renovated. Your Honour quickly demonstrated that any knowledge you had was academic. A call for a "nogging" —a horizontal piece of wood to strengthen brickwork — was interpreted by Your Honour as a "noggin". You repaired to the kitchen, returning with a round of beer. This proved to be Your Honour's most useful contribution.

Your Honour's involvement in the teaching and practice of arbitration led to Your Honour being recognised and utilised as an arbitrator both locally and internationally. Your Honour has arbitrated in cases from such far flung outposts of the common law as Bangladesh and Fiji. Many and weighty were the commercial and building matters with which Your Honour dealt as a solicitor and as an arbitrator. Not all your clients at Minters, however, had such weighty problems. One of Your Honour's former clients instructed Your Honour's firm to sue a vet who had thoughtlessly albeit routinely tattooed the ear of her show cat, "Cindy", being the usual indicator that the cat has had "the operation". The owner alleged that Cindy became much less of a prize winning prospect as a result of the tattoo. I am informed that during the lengthy conduct of her matter, the owner would call Your Honour at least once per day to inquire as to the progress of her case and to ensure that Your Honour had the most up to date information about Cindy's progress both in competitions and in life generally. The prospect of appointment offered, *inter alia*, escape from these phone calls and your letter to this client, informing her of your future unavailability, was the last to be dictated and signed as part of your tidy-up at Minters on Saturday 3 September 1994, your appointment being announced the following Monday. Your Honour's former secretary, Cheryl, wants Your Honour to know that she has not forgotten the client, nor the timing of the letter. She inherited the phone calls. The County Court "inherited" a wealth of wisdom and experience and the Bar wishes Your Honour well.

HIS HONOUR JUDGE BILL WHITE

Judge White was the first appointment to the County Court bench for 1995, being appointed on 28 February this year.

Judge Campbell, Ross Ray and Judge White

Your Honour was admitted to practice less than two months after decimal currency was introduced in Australia. Your Honour would therefore this year have completed your 29th year in practice, and 26th at the Victorian Bar but for your appointment. Your Honour's early years in practice were spent in crime but in later years you developed an extensive practice in personal injuries. Never lost for a colourful analogy, Your Honour in addressing the Commission into the disastrous bushfires at Mount Macedon in 1983 commenced your final submissions: "History tells us that when Rome burnt Nero fiddled. History will say that when the SEC fiddled, Macedon burned."

The fact that Your Honour's surname was shared with another member of the Victorian Bar, Peter White, apparently caused some short-term diminution in Your Honour's practice when Peter White was appointed a magistrate. A number of Your Honour's instructing solicitors, thinking it was Your Honour who had been appointed to the magistracy, no longer called your clerk to check on your availability.

Another crisis of identity may await Your Hon-

our yet. On the night of the last national census, Your Honour was aboard a yacht in the Whitsunday Passage. Ready, willing, and probably able as Your Honour and Your Honour's fellow travellers were to provide the requisite information, no representative of the Commonwealth Statistician swam, rowed or motored to your craft to collect it. Whatever queries may be raised when next Your Honour completes a census form about your whereabouts on the occasion of the last census, Your Honour will not be alone in having to provide an explanation, nor will there be a shortage of creditworthy witnesses, for on board that craft on that particular night were also Judge Crossley of the County Court and the Chief Justice of the Family Court, Justice Alastair Nicholson.

Your Honour frequently undertook the duties of Director of Public Prosecutions including management responsibility for over 110 professional officers and for the prosecution of major criminal trials and appeals. In these years Your Honour conducted seven substantive appeals before the Judicial Committee of the Privy Council in London.

On the bench Your Honour has demonstrated patience and tolerance in your dealings with counsel and very recently, a good deal of tact. I understand that in recent weeks Your Honour was on circuit in Sale and heard a personal injuries matter in which the plaintiff gave evidence as to how, during one of the operations needed to correct some grave injuries she had sustained to her leg, she had experienced "out of body" travel and had been observing the operation from the roof. Your Honour sat very late one afternoon, and counsel attempted to persuade Your Honour to sit even longer in order to dispose of a witness who was available to be called at that time. Rather than tell counsel that he had been having trouble keeping Your Honour awake that afternoon anyway, and another witness wasn't going to improve the situation, Your Honour tactfully rejected his application, telling him that you had been experiencing some out of body travel that afternoon and thought it unwise to proceed further.

HIS HONOUR JUDGE TONY DUCKETT

My earlier reference to a judge who had spent most of his professional life practising overseas was of course a reference to Your Honour Judge Duckett. Although Your Honour was admitted to practice in 1962 and signed the roll of counsel in 1963, Your Honour moved in 1966 to Hong Kong and spent the next eight years employed as Crown Counsel and Senior Crown Counsel in the prosecutions division of the Attorney General's Chambers. Returning to Australia and the Victorian Bar in 1974 Your Honour practised here until 1980. During this time, Your Honour was usually to be found at the defendant's end of the criminal bar table in the County and Supreme Courts and also as junior to Dowling Q.C., the two of you assisting Sir Gregory Gowans Q.C. in his role as the Commissioner inquiring into land purchases by the Victorian Housing Commission.

In 1980 Your Honour returned to Hong Kong and resumed your position as a prosecutor becoming, in 1982, Deputy Crown Prosecutor. In May 1984 you were admitted as a member of the Middle Temple and in June of that year, as one of Her Majesty's Counsel in Hong Kong.

In the years which followed, Your Honour frequently undertook the duties of Director of Public Prosecutions including management responsibility for over 110 professional officers and for the prosecution of major criminal trials and appeals. In these years Your Honour conducted seven substantive appeals before the Judicial Committee of the Privy Council in London.

Your Honour's lengthy absences from Australia caused some information gathering problems for those who were to speak at your welcome to the bench of the County Court on 4 April this year. When research provided slim pickings, Mr. Rod Smith, the then President of the Law Institute, resorted to ingenuity and I think the introductory passage of his welcome bears repetition: "In preparing to welcome Your Honour back to Melbourne from the trading port of Hong Kong it crossed my mind that Your Honour may well have had ancestors who lived in the trading port of Venice. I say this because, as lovers of Shakespeare will recall, the climax of the play, the *Merchant of Venice*, involves a complicated bankruptcy hearing involving a pound of flesh and 3,000 ducats."

Ingenuity and literary allusions aside, Your Honour, what seems perfectly clear is that by appointing someone with Your Honour's diverse experience and long and distinguished service to the law to the bench of the County Court, the Government of Victoria has repatriated an asset of consid-

erable value. The Bar welcomes Your Honour home and wishes you much satisfaction from your years on the bench.

MR. GEOFFREY FLATMAN, DPP

To conclude my duties this evening it is my pleasure to extend the Bar's good wishes to Geoffrey Flatman who, on 21 February this year, was appointed Director of Public Prosecutions for Victoria. A contemporary of our Chairman at Wesley and Queens, Mr. Director, you were a keen sportsman playing both tennis and football with distinction at school and later in college. Your active involvement in sport continues to this day.

While at university you combined an Arts degree with your law course and your Arts degree included studies in the subjects of psychology and politics, both fields of knowledge likely to be of value to a Director of Public Prosecutions in Victoria today.

Having been tutored in politics by Michael Black — now Chief Justice of the Federal Court — you later read with him and signed the roll of counsel on 6 December 1971.

Your practice developed into one in which crime dominated and ultimately ruled. You were an early member of the well-known 5th Floor crime group in Owen Dixon Chambers which included Leider, King, Kent, Dane, Thomas, Lopes and last but not least in any dimension, Barnett, now Judge Barnett. You were appointed a Crown Prosecutor in June 1994. Although your time in the office of Director of Public Prosecutions has been too short for any perceptible trends to emerge, I have garnered two stories which may help understand your likely approach.

In your days at Queens College, you shared rooms with another law student who also became, and remains, a member of this Bar. His father was a Methodist minister who would visit his son in college from time to time and on one visit he observed you in a state which lead him to believe that you had not been adhering to the Methodist pledge of abstinence. To your chagrin he counselled you to take the path of reform. On a later occasion the same clergyman again came to Queens to visit his son only to find he had not yet returned from his classes and so rested comfortably in the sun on the college lawn. Sleep overcame him as he waited and it was in this state that you found him on your return to college. As the story is told, you seized the opportunity to redress the earlier slight, went inside, and reported to the Master that there appeared to be a drunk asleep on the lawn outside. The record is not clear as to what steps the Master then took.

A later incident indicates that you have experience of an overzealous prosecutor. This occurred some years after you came to the Bar. By this time your home was in a leafy and unsealed road in semi-rural Eltham. When the council proposed to seal the road you strenuously objected. Some time later you appeared for a defendant in a police matter in the local court. The prosecuting sergeant was a member of the council which wanted to seal your road and well knew that you were the source of the objection which was holding up the project. When you concluded your submissions on behalf of the defendant, the prosecutor said to the magistrate words to the effect: "Don't take any notice of him, he's just a local troublemaker."

Mr. Director, the duties of the DPP are weighty and, as Judge Duckett well knows, involve significant administrative as well as legal responsibilities. The Bar has every confidence in your capacities to meet the challenges of demanding service to the public in your new role.

CONCLUSION

The Bar extends its congratulations and best wishes to the appointees, recipients of awards and holder of public office who are our guests here this evening.

Would you now charge your glasses for the toast to our honoured guests.

Our honoured guests.

Toad Q.C. disposes of a difficult witness in the time-honoured way.

A BIT ABOUT WORDS

THE BAR'S WEEKLY NEWS SHEET "In Brief" has recently carried a raging debate about the word *cacophemious*. I was content to be a silent spectator until the anonymous editor declared the poll, and in so doing compounded and concealed his/her original error.

Even that circumstance might not have moved me to thumbnail and tar, but the whole episode is a good demonstration of a common mechanism by which language evolves.

For those whose busy practice prevented them from following the debate, a recap. Issue No. 54 of "In Brief" (21 February 1995) introduced a new column titled "'Briefly': Compliments, Complaints and Cacophemism". It was to be a forum for readers' letters "of 50 words or less". That limitation was flagrantly ignored by Habersberger Q.C. in Issue No. 55, and again by Nicholson C.J. and Lord Nicholls in Issue No. 56. Power chatters, and endless power chatters endlessly.

The true polemical style of the column got going with the help of Jessup Q.C. on 4 April (Issue No. 57). He said he did not want to sound *cacophemious* but questioned the new cheap-photocopy look of the Bar's Own Thunderer. The editor attempted to stir debtate on that fascinating question, but got instead a debate about the existence, etymology and meaning of *cacophemious*.

Carolyn Sparke (No. 58, 24 April) asserted (correctly) that the word does not (yet) find a home in any serious dictionary. Ross and Guidice (No. 59, 9 May) dressed it up with spurious etymologies and attributed a meaning to it accordingly. The editor thereupon declared Ross and Guidice right, and Sparke wrong: a cowardly escape from his/her original solecism.

Cacophemy (and by extension *cacophemious*, and while we are at it, what about *cacophemity* and *cacophemeral*) is an error for *cacophony*, presumably modelled on the example of *euphony* — *euphemy* — *euphemism*. Because its root is familiar, and its erroneous form follows a familiar example, the intended meaning is tolerably clear.

Guidice made the point that it is a quibble that the word is not in the dictionary. That is the endpoint of Lewis Carroll's Humpty Dumpty principle: words mean what I say they mean, nothing more and nothing less. The fact remains that the coin is newly minted, and nonetheless counterfeit for having passed into circulation at full value.

The process is as old as language itself. English has many words, now eminently respectable, which are originally corrupt or erroneous forms of "real" words. For example:

avoirdupois (properly: averdepois)
compost (compot)
curfew (couvrefeu)
filibuster (free booter)
sciatic (ischiatic)
lingo (lingua)
scruff (of neck) (scuff of neck)
syllabus (sittubas)
talisman (tailasan)
alligator (al lagarto)
apron (naperon)
bandicoot (pandi-kokku)
banister (baluster)
denim (de Nimes)
cartridge (cartouche).

The process occurs in at least two ways. First, with commonly used words which are difficult to say, the pronounciation rapidly erodes, and the commonly accepted form is thereby altered (*hautbios* became *hoboy* then *oboe*; *peruke* became *periwig* then *wig*). Second, words used only rarely are inaccurately recalled, but are understood by virtue of their similarity to the true word, and the context in which they are used (*cacophony* becomes *cacophemy* and thence *cacophemism, cacophemious* and so on).

Oddly, the process sometimes reverses itself. In the 17th century, *asparagus* became *sparagrass* then *sparrow-grass*. In 1791, Walker's Pronouncing Dictionary said: "'Sparrow-grass' is so general that 'asparagus' has an air of stiffness and pedantry". The wheel turned full circle in the mid-19th century; *asparagus* "returned into literary and for like use, leaving *sparrow-grass* to the illiterate . . ." (*OED* 2).

A final example of the process is *curare*. Originally, it was *wurari* or *wurali*. As is well known, it is a poison formerly used by South American Indians on their arrow tips. Its botanical name is *Strychnos toxifera*. Well named, because the Greek *toxos* is an archer's bow, *toxophily* is archery. A *poison arrow* might be considered a tautology.

Julian Burnside

THE FIRST STONE

THIS IMMENSELY MOVING AND BEAUTIfully crafted book by Helen Garner contains two sad tales. One is about the public scandal that erupted when two young women accused the head of an Establishment institution of assault. He was acquitted, but the scandal was too great for him to stay. The women won a settlement, but their notoriety means that their lives may have been permanently blighted. Rightly or wrongly, people feel uneasy when they find out that they are standing near someone who has caused a big bomb to go off.

The other story is the personal odyssey of the author in finding that she has been betrayed by her political children. Hers was the generation of women that stood up and fought when the fight was there to be lost. They did so to enlarge people's lives. The author finds the present lot to be driven by anger and fear. She thinks they are intent on assigning women to a helplessness that requires state intervention, even to the extent of calling the cops to deal with a *faux pas*.

*****

Ormond College is an old part of Melbourne University. It is part of the Establishment. If the picture in this book is correct, it is an awfully inbred relic of colonial privilege. It is the sort of place where you find well-off children ashamed of their good fortune and determined to take themselves off centre, and become radical. They feel a need to feel oppressed. Yet those studying law are on their way to membership of the most exclusive elite in the country.

If you saw yourself as a victim or a radical wanting to make a political bang to shake up the Establishment, this would be the place, just ahead of Melbourne Grammar, and just behind the Melbourne Club. The Master who is the subject of the story was also an ideal target. His Establishment credentials were not all that they might be. He was not Public School. The first Australian Master of Ormond was vulnerable.

There was a traditional dinner at the College. It was full of ritual and booze. One student complained that the Master assaulted her (by putting his hand on her breast while dancing). The other student complained that the Master propositioned her (in language that was on any view extraordinary) and then assaulted her (by putting his hand on her breast). This was the second weakness of the Master. He allowed himself to be left in a room alone and inebriated with a student. The allegation when made could not be adequately tested.

Of course, we will probably never know what happened on that night, but for the purposes of this book it does not matter whether the Master did it or not, whatever it may have been.

The students initially approached the Vice-Master. They then went to the Chairman of the Council. They did so, anonymously, through an intermediary and with unsigned statements. They were put off by the formality of the Chairman, who was a High Court judge. They got cold feet and asked for the statements to be torn up. They did not wish to go to a city law office because it, like the judge, may have been too intimidating.

A campaign of smear and hate started. It too was anonymous. The students then caused the police to lay charges. As must have been predicted, the Master denied the charges on oath. As must have been predictable, the charges were dismissed with costs. Even putting the unblemished record of the Master to one side, it is very rare for a one on one case to result in proof beyond reasonable doubt.

Later the women won a settlement through the intervention of the bureaucracy. They got a statement of regret of tortured banality and, it seems, some money. In the meantime the crucifixion of the Master and the agony of his family were complete. When confronted with due process he had won, but in every other way he had lost. God knows how long it will take the College to recover from all this fear and hate.

It is ironic that these two young women — old enough to vote, fight for their country and to be hanged for treason — cannot be named, even when they go to Court to see whether they can suppress publication of this book, while their adversary succeeds in Court, but is destroyed by the publicity. They are dancing namelessly on the grave of a person found by the law to be not guilty.

It may be a good thing to seek to protect a victim in cases involving sexual assault, but perhaps

we need to give some more thought to understanding who the victim may be. We should look at this in the interests of equality between the sexes, and between the accuser and the accused.

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Helen Garner tells this sad story in prose that is crisp and assured. She tells it with an honesty that makes the pain raw. Thank God that a woman, and a feminist, wrote the story. For heaven's sake, Garner even refers to the complainants as "*these girls*". If one of the boys had been so incorrect, he would have got the cuts. In today's climate no man could safely have described the erotic power of one of the complainants in the following terms:

> It is impossible not to be moved by her daring beauty. She is a woman in the full glory of her youth, as joyful as a goddess, elated by her own careless authority and power.

Only a feminist could nowadays safely describe conciliation as a psychologically feminine — almost a motherly — way of settling a dispute. No man could, with the same conviction, have expressed the conclusion:

> The formula was chemical: a precise mix of prissiness, cowardice and brutality. A click of a fingertip, and up it went. The pieces fell all over the countryside; perhaps they are still falling.

Above all, no man could have launched the full-blooded charge on those who Garner thinks are currently perverting feminism and denying life: "*Feminism is meant to free us, not to take the joy out of everything*". A man would be at best laughed at for concluding, as Garner does, and Carlyle may have, that the whole bloody mess would not have happened *"If only the whole gang of them hadn't been so afraid of life"*.

A mere man who had the balls to deliver the following blast would have done so at the risk of going through a number of rounds of counter humiliation at the hands of the thought police:

> But feminism too is a conduit for Eros. Women's struggle for fairness is a breathing force, always adapting and changing. It is not the exclusive property of a priggish, literal-minded vengeance squad that gets Eros in its sights, gives him both barrels, and marches away in its Blundstones, leaving the gods' messenger sprawled in the mud with his wings all bloody and torn.

*****

A trial lawyer reading this book must feel anxious about whether the two students were well served by their supporters. (I exclude from this group the immediate legal advisers of the students.) A trial lawyer knows there is no such thing as absolute truth in litigation. So does any member of the public who can remember the case of Lindy Chamberlain. Some people condemned Mrs Chamberlain because she did not appear to act as a mother should act when she is falsely accused of murdering her child.

Similar sorts of speculative nonsense have been uttered about the case at Ormond College. Somehow the Master is said to have betrayed his role as a father. But the truth is that you never know the truth. That is why lawyers have devoted a millennium to devising rules of due process to protect the innocent, like the presumption of innocence and the burden of proof.

What the students needed was advice that was mature and dispassionate. I have no doubt that the lawyers they retained gave advice that was thought through and that was considered to be appropriate. What I fear is that additionally they got offered a lot of free advice that was worth less than what they paid for it, and that was not expert.

The truth is that you never know the truth. That is why lawyers have devoted a millennium to devising rules of due process to protect the innocent, like the presumption of innocence and the burden of proof.

The mature advice would have been that the legal process does not handle some disputes well, and that this sort of dispute is one of those; that a prosecution would be likely to do more harm than good; that it is doubtful if the women could afford to win the case, much less lose it; and that in any event the probabilities were significantly in favour of their losing it. You may or may not have thought that these likely consequences reflected well on the system, but if you were advising these two students, your political views would be irrelevant. What matters is what *does* happen not what *should* happen.

The dispassionate advice would have been that whatever good may have come to others, or to some cause being pushed by others, as a result of a prosecution being launched, it was difficult to envisage such litigation doing any good for the complainants personally. On the contrary, it must have been possible to see that their lives could be changed for the worse by being a part, even an innocent part, of a major public scandal.

*****

What I fear is that these students took fireside advice from others. Perhaps they were offered gratuitous guidance by the likes of those who are *"clever and determined, who had an agenda, as they say"*. It is a shame if this is what happened. It is difficult to imagine a more dangerous source of legal advice for a sensitive case like this than a group of ideologically driven academics who did not have sufficient experience of what happens in the practice of the law.

It would, of course, have been a particularly dangerous fallacy to conclude that if the law offered only one avenue, and the students had a legal right to pursue it, that the students should therefore be encouraged to go down it. There is a simple distinction between doing something because you have a *right* to do it, and doing something because you have an *interest* in doing it. I may have a right to shoot a gun, but that does not mean I should exercise that right by shooting myself in the foot. I may have the right to sue someone for libel for having a go at me, but that does not mean I should exercise that right if I will end up worse off. Look at Oscar Wilde.

If prosecution was the worst available option — which I think it was — the students should not have been encouraged to pursue it just because it was the only legal option left to them by the law — which it was not. Putting self help to one side, they had a number of options. They included the following: (1) doing nothing; (2) putting the allegation to the Master (this used to be called natural justice); (3) pursuing formal complaints within the College and the University; (4) seeking to have the matter informally arbitrated or conciliated; (5) seeking conciliation or other intervention from the bureaucracy (under anti-discrimination legislation); (6) writing a formal letter of demand through solicitors; (7) bringing civil proceedings for assault (where the standard of proof is lower, discovery is available, and where they would at least have had a chance of obtaining a settlement that may have saved some face on both sides); (8) asking the police to initiate a criminal prosecution; and (9) bringing their own criminal prosecution.

But, to repeat, your views about the political merits of the various legal options, and as to whether or not people in the position of the complainants should have more legal options, would be entirely irrelevant if you were giving legal advice to these young women as to how they might best proceed in their own personal interests.

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If these women were intimidated by a private consultation with a judge, or the prospect of a meeting in a large city law office, how did their supporters hope that they would cope with the inevitable maelstrom when they went public? It must have been apparent that the trial process was going to be wounding to the complainants — win, lose or draw. The law recognises this by allowing the complainants to remain anonymous. These complainants are clinging tenaciously to this right. They are still trying to contain the damage.

If the lawyers retained by the students gave the kind of advice that I think a trial lawyer would regard as appropriate, the students did not act on it. They then have only themselves to blame for any problems they now face. They are, after all free, white and adult, and they have access to much more power and privilege than most Australians.

But I find it hard to rid myself of the impression that they have been let down not by the lawyers acting for them, but by those of their supporters who were seeking to achieve some political end. That may be why their supporters still ringfence them and hiss and threaten a feminist from the older generation who wants to talk to them so that she can understand them.

Although Garner leaves you with the impression that the forces behind the students were intent on an execution, the impression I have is that it was the two students who may have been set up, not the Master. Sure they may have been confidently told that it was within their power to blow the Master out of the water, but were they explicitly warned that they might become Kamikaze pilots in the process?

Did their supporters make it clear that in the end it would be the students, not the urgers, who would make the dive? When I refer to an explicit warning, I refer to the sort of clear and careful spelling out of the range of potential consequences that judges now require as a matter of professional standards from doctors and lawyers who give advice to people on how they might proceed where there is an element of risk involved. On any view, the course that the students embarked on was fraught with risk.

I have not acted or advised in many sexual harassment cases, but those that I have been involved in, on either side, indicate that they require experience and sensitivity. They exemplify the truism put forward by the greatest lawyer this country has produced, namely, that experience of forensic contests confirms the truth of the common saying that one story is good until another is told.

I have, however, been engaged in fighting litigation for 25 years and in hearing and deciding cases involving difficult issues of credit for nearly 10 years. On the basis of that experience, I find it extremely difficult to envisage the grounds upon which these students may have been advised that the prosecution of the Master of Ormond represented the best option in their own interests. It is idle to compare suffering, but it seems certain that these two students have suffered a lot as a result of

going after the Master of Ormond in the way in which they chose to do so.

*****

Frank Hardy wrote of the personal tragedy of a fall from ideological grace in *But The Dead Are Many*. It was the gut-wrenching story of how Australian Communists in the fifties reacted to a betrayal. The story of Helen Garner is no less poignant because its consequences are less terminal.

Garner sets the story of the two students in a description of her own investigation. The supporters of the complainants seem intent on promoting a conspiracy theory about their role in the scandal. They resolutely band together to prevent Garner getting access to the complainants. They snarl and growl at her.

Garner writes with intellectual and emotional honesty of her own experiences. The *leitmotif* is her passivity, and the passivity of other women, in the face of sexual aggression against the helplessness that she sees radical feminists consigning women to. She has trouble with the immature inability of the second wave of feminists to see shades of grey, and the doctrinal imperative to see everything in black or white.

Garner reports one appalling outburst about a man (as it happens, the Prime Minister) showing some physical bonding to a woman and being accused of being sexist. She says this is insane. She is sickened when she compares the life denying ordinances of these new radical feminists with Christina Stead's exultant exuberance in her own sexuality.

Her generation fought hard without the assistance of Big Brother. Now her political offspring have turned on her. Garner has an adolescent daughter. She understands the differences between the generations. Garner wonders whether after fighting men all of these years, a happy marriage may have softened her up. But she cannot accept the cold-blooded lust for retribution and the inability of these mutated feminists to allow women to be women, to enjoy love and sex, to enjoy and celebrate life.

It is curious how when each generation turns on the one that has gone before, it does not pause to think what it might be like when it comes to be their turn to get it in the neck. Garner thinks that her generation fought so that women could enjoy the responsibility of their own freedom. The new generation has abandoned this fight, but at the same time has somehow become more savage. This personal part of the book is a reprise of the proposition attributed to Shaw, that freedom means responsibility — that is why most men fear it.

*****

Garner describes in chilling terms the continuing climate of fear and hate at Melbourne University. A senior lecturer got wind that he was the subject of graffiti charges. (There are many comparisons with the Red Guards.) He did not know what he may have done to offend the latterday Sisters of Charity.

Finally I thought that maybe blokes like me, who make all the right noises — who claim to be capable of redemption — are the worst of the lot. At least with rednecks women know where they are, whereas blokes like me just sweeten the pill of the patriarchy. I was frightened, though. Frightened the rumour would get round that I was a sleazebag.

When you come to think of it, a university would have to be the setting of this sort of tragic farce. Where else do people get the time to take themselves so seriously?

Or, as Garner says in another context, *"So this was how they got the Ormond blokes on the run"*.

You always get this problem when people go to excess in trying to get change. The maddies on one side inflame the baddies on the other side and things get worse. The extremity of the zealots incites the badness of the rednecks: if you cannot understand them, much less placate them, why bother to try? The zealots do no service to anyone, least of all women.

When you come to think of it, a university would have to be the setting of this sort of tragic farce. Where else do people get the time to take themselves so seriously? Who was it who made that bitchy remark that academic brawls are so grisly because the stakes are so small?

*****

In the end, the story of Helen Garner and her sad journey of discovery is just as compelling as the story of the disaster that befell the students and the Master, because it shows how that disaster happened. The two stories of the three women finally come together. The meeting point is not so much the failure of the system, as the story of how three women have been let down by a good cause gone bad. I think that this is the point of the book. It should be fairly considered and answered.

It is hard, off-hand, to think of any *-ism* that is not dangerous. But, as a feminist colleague reminds me, if *feminism* is not part of *humanism*, it is nothing. These new feminists do not look or sound humane to me. They present a visage which suggests that contrary ideals cannot penetrate their

minds. If the response is that humanism is the creation of men, we are in danger of madness.

If, as *The First Stone* suggests, there are in our universities people in faculties dedicated to humanism who are intent on spreading doctrine that derives from an aversion to others under the name of feminism, then the universities should consider their position. Are they there to teach or preach? Are they there to open minds or to close them?

If the people who urged the two students on, or those now aligned against Garner and her generation, represent the new feminists, what university would want to have anything to do with them by giving them a platform to preach their politics under the guise of teaching knowledge?

Over the past few years, I have noticed students coming out of law school who appear worried and confused about matters that are now said to involve gender politics. When you try to talk to these young men or women about what is troubling them, you often get a response that suggests that they are muddled and timid. It is as if their brains have been scrambled and they are afraid of each other. I know that the publication of *The First Stone* has taken a load off their minds.

*****

This book will be anathema to the theoreticians of feminism, for all sorts of reasons. This book is written by a real woman who is a real writer. It is beautifully constructed and written. It does not seek to hide emotional attitudes behind long winded tertiary tripe. It is about real people and real events. It is written by someone who has had success in the world and in a career outside of university. It is written by a woman who has found happiness and contentment in her own sexuality, not to say femininity, and who has the care and custody of a young growing daughter.

The book is written by someone who has fought the fight, and who has not fretted in fear in some dark corner of thought. It is written by someone who has acquired sense and judgment through experience. Above all, it is written with compassion. That is something that will not be manifest in many of her feminist critics on the right of the party. Compassion is not a word that comes readily to mind when you look at them.

This important book shows how the legal system cannot resolve some personal conflicts. That is not new. What is new is the suggestion by someone qualified to make it that there is a bunch of twisted people out there intent on twisting the minds of a generation of young women and men. If a literate, sensitive, and sensible feminist woman cannot understand any of this, how can any mere man or child?

Geoffrey Gibson

VERBATIM

The Sound of Mediation

Application by Jack Strahan for inclusion on the Bar's List of Accredited Mediators concluded:

"Could you call me when you have a moment and inform me whether I am now entitled to call myself qualified/accredited and have my name included on any and what lists, or what further I need to do to bring this about? . . .

P.S. It would also be useful to have some large letters after my name. Am I now a Fellow in Alternative Resolution Techniques . . .

County Court of Victoria

25 May 1995
Coram: Judge Higgins in Chambers

D. Connell resisting application by Blackburn for two separate proceedings to be heard together because of a common injury to the plaintiff.

Judge: Are you aware of authorities Mr. Blackburn?

Blackburn: The reasons there aren't many is that these applications are usually not opposed Your Honour.

Judge: I see you haven't changed your style Mr. Blackburn.

Connell: Could my learned friend be sworn in before he gives any further evidence.

Magistrates' Court of Victoria

15 December 1994
Coram: Mr. Hicks, M.
Police v. *Elliott & Ors.*
Richter Q.C. and Hammond for Elliott

Richter cross-examining National Crimes Authority lawyer in relation to a claim for legal professional privilege in respect of a document.

And seeing legal professional privilege is claimed, I take it that it seeks or receives or gives advice? . . . Yes.

In relation to the terms of reference? . . . Yes.

To the NCA? . . . Yes.

And this advice, and I obviously can't canvass it, it is in August 1990, and it follows upon the fact that the NCA was already invoking the coercive powers in relation to the FX matters back in July of 1990, right? . . . Yes.

The advice that was being sought, was that sought from an in-house or out-house lawyer? The advice that was sought, was that sought from an NCA lawyer or counsel briefed to give it? . . . I briefed counsel.

Magistrates' Court of Victoria

16 February 1995
Coram: Mr. Couzens, M.
The Police v. *Z. Zayler*

Mr. Shirrefs: Did you put two keys in the envelope? . . .

Witness: (Inaudible)

Mr. Shirrefs: Looking at the prosecution won't assist you, Mrs. Hofer?

Witness: I was looking at that mug, I'm sorry.

His Worship: That's no way to speak about prosecuting counsel, Mrs. Hofer, either one of them.

Supreme Court of Victoria

14 March 1995
Coram: Harper J.
Gaga Nominees v. *Bank of Melbourne & Ors.*
Burnside Q.C. with Harrison for Plaintiff
Joe Santamaria with T. North for the Defendants

Mr. Santamaria: You spoke to His Honour about the letter at page 494. That's a letter addressed to the manager of the National Bank. Are you able to remember what his name was? . . . Mr. Vickers.

His first name? . . . I think it was Bill.

Mr. Bill Vickers, yes, I see. Was he himself acquainted with your affairs, to your knowledge? . . . Not what I would say as a long term, in the short term because the bank managers used to change like the weather.

Not quite like the weather, you don't quite mean that, do you?

Mr. Burnside: No. The weather sometimes gets better.

The insider

On 6 February 1995 the telephone rings in Jack Hammond's Chambers. He answers it.

Caller (female voice): G'day. Could I speak to Felicity Hampel please?

Hammond: I'm sorry you've got the wrong number. If you hold on for a moment, I'll get her number for you.

(Hammond looks up Hampel's phone number in the Bar's internal telephone directory.)

Hammond (whilst turning the pages): Are you ringing from inside or outside?

Caller: Inside. I'm in Fairlea.

THE DAY A CAMERA CAME TO COURT

THE SCENE OUTSIDE COURT 2 OF THE Supreme Court, Thursday morning, 18 May 1995, was an unusual one. Police guarded the entrance to the Court and directed the large number of people wanting to go in to the two police officers taking down names, addresses and occupations. The impatient queue of about 100 people included members of the legal profession unused to being kept out of court, members of the media and anxious family and friends of the accused and the victim but very few members of the general public. The first filming of sentence being passed in a criminal proceeding in Australia was about to begin.

By a quarter past ten, only family members and journalists were allowed into the Court. Ironically, bringing the camera in had meant that everyone else had to be shut out. Inside the Court, things were relatively calm. Only those who could be seated could be accommodated and those who had seats waited patiently for the judge to come in. Occasionally, the scratching of an illustrator's pencil could be heard, the lawyers at the bar table chatted quietly amongst themselves and the police, although polite, looked like it was all just one more headache that they didn't need. It took a while to find the camera — it was placed, discreetly, upstairs in the middle of the front row of the gallery. The cameraman had long grey hair and the camera operator's uniform of a bomber jacket, an open neck shirt and jeans. He looked like a senior cameraman, as was fitting, and as if he was conscious that he was soon to become a celebrity in his own right. At 10.20 an announcement was made by one of the police officers that we would have to stay seated until the accused was removed from the Court. "It is our responsibility to look after the accused," he said.

Finally, the judge came in, sat down and delivered sentence. After a hesitant start, there was nothing to indicate that he was conscious of the cameras. Certainly, he reassured the accused that the sentence he was about to pass would not be affected by the fact. Those in the Court listened intently and the silence was broken only twice. Once by a beep from the Associate's computer which startled those around her and the second time by the sound of sobbing as the judge described the murder. For those who have heard sentences handed down for the murder of children, it followed the usual course. One senior lawyer who watched it on television would be reported in the press the next day as saying "as a lawyer, I found it boring". The only unexpected statement by the judge was a biblical reference whereby he compared the change of heart experienced by the accused, which saved the life of his second victim, to that of St. Paul. The allusion was puzzling to most of those in the Court — although the defendant looked young and angelic. It is most unlikely that he will ever be regarded as a saint.

What the television cameras did not convey was the enormous tension in the Court. Unlike those who saw the news that night, those in the Court did not know until the very end that the sentence imposed would be life. A young man, a friend of the victims' family, sat white-faced throughout the judge's remarks then, when the sentence was announced, quietly nodded as if satisfied. The most dramatic moment, again unrecorded by the television camera, was when the accused was removed from the Court, when a lone voice was raised to shout, "You'll never be in there long enough Nathan I hope you die in there!"

If this was an experiment, and not a precedent, was the experiment a success? In the end, I think not. Ironically, allowing the camera in meant that the public were denied access to the body of the Court and it is only in the body of the Court that one feels the tension. It is only in the body of the Court that one can not only see the expressions on the faces of all those involved judges, lawyers, family, accused but can use one's other senses to take in the full drama and gravity. It we wish to intrude on such a serious occasion, it is only proper that we be prepared to see it out. To edit any part of the drama is to diminish the tragedy for those concerned.

Elisabeth Wentworth

MOUTHPIECE

WHERE EVER THERE ARE GATHERED members of Counsel their conversations are apt to develop into matters of great moment and complexity. It is not uncommon for there to be an exchange of views on the significance and import of the latest High Court decision. Highly learned are these discussions. The more members of Counsel that are involved in the discussions, the greater the range of views expressed and the more esoteric are the conclusions eventually reached. Yes, conclusions are more often reached than not. It is rare indeed that members of counsel remain divided in their opinions after their frank exchanges of views. Not for them the interchange of bread and butter issues. Take for instance, this recent conversation over a bracing cup of Caffe Latte:

David: "Things are getting better aren't they?"
Davina: "Do you think so?"
David: "Yeah"
Davydd: "I wouldn't have thought so."
Davina: "Can't say I have noticed much improvement."
David: "Don'tcha think work's picking up a bit?"
Davina: "Do you really think so?"
David: "Yeah"
Davydd: "I would've thought work's still down generally."
David: "That may be for others but my practice has picked up in the last few weeks."
Davina: "Mine has too but I think lots of others are really struggling."
Davydd: "My Clerk says we're not over the worst of it yet."
David: "Mine too."
Davina: "I don't really get to speak with my Clerk very often I find I am too busy."
David: "Me too — I usually catch my Clerk between Court and conference. He always tells me how well I am doing."
Davina: "So does mine."
Davydd: "Mine too!"
Davina: "The money's a bit slow coming in."
David: "Yeah, isn't it just!"
Davydd: "Well, I even had enough to pay my provisional on time this time around."
Davina: "Sounds like you didn't have much to pay eh?"
Davydd: "I did too. You should've seen the bill."
David: "I reckon it is a bit rich having to pay provisional. I mean, no sooner do you get a good pay in and think that finally have yer head above water than the tax man is there with his great big mitt stuck out."
Davydd: "I always take the view that you only have to pay tax if you earn the money."
David: "Me too!"
Davina: "I still reckon the money's slow coming in."
David: "It always is around provisional tax time — that's when sollies have to pay theirs."
Davina: "How would you know!? You make it sound as if you've been around a while."
David: "Well, I have."
Davydd: "You haven't. You came to the Bar when we did."
David: "But I worked for a while before I came here."
Davina: "What! As a public servant. Come off it."
Davydd: "Yeah!"
Davina: "Well, I still reckon the money's slow coming in — the bills aren't though."
David: "Yeah. And some of them don't wait for months like we do."
Davydd: "And they don't have clerks saying to go easy because they are good supporters of the list."
Davina: "Do you get that from your Clerk too?"
David: "All the time."
Davina: "I don't reckon there's a solly who owes me money who isn't 'a good supporter of the list'."
Davydd: "Ain't that the truth!"
Davina: "Well some of my creditors aren't as patient as we are — not that I have many of course.'"
David: "Yeah what about 'Legal Publishers Inc.'"
Davydd: "You've had them on your back have you?"
David: "Have I what!"
Davina: "Me too. A hundred bucks I owed them and I was 60 days late and I get the nasty threatening letter."
David: "You mean the one that started with the insult about not being able to pay your bills?"
Davina: "Yep that's the one!"
Davydd: "I got one of those too. I paid up straight away."

David: "I rang up and gave them a piece of my mind."
Davydd: "Did it work?"
David: "Nope. The accounts clerk told me what a great job she did, how poor payers were members of our bar and if I couldn't afford to pay . . . I slammed the phone down."
Davydd: "And then you paid?"
David: "Nope. I refused as a matter of principle."
Davina: "Good onyer."
Davydd: "What happened next"
David: "They cut off my service."
Davina: "I suppose you told them to put it where it hurt them most."
David: "Er no. I paid up. I needed the service."
Davina: "I wrote to her boss . . ."
David: "Good onyer."
Davina: "Yeah! My master gave them a real blast. He told them what a good customer he'd been; how he always paid every six months; how much he was insulted; boy did did he give it to them. I thought I'd do the same."
Davydd: "I can't understand them. I've owed 'Brown and Duff' heaps more — not often mind — and they just ring up and gently enquire as to what I am going to do. We always reach an amicable agreement — not that we've had to do it much at all."
David: "ABC are the same. What did her boss say Dav?"
Davina: "He reminded me of their 30 day terms; hinted that I ought not to buy what I couldn't afford; and said he thought she did a good job."
Davydd: "So you paid up!?"
Davina: "Not immediately. I wrote again and said that if that was their attitude I was immediately cancelling one of their services and would do the same if I got another of those letters. I was goin' to cancel the other service anyway — I found I wasn't using it much."
David: "And what effect did that have."
Davina: "They didn't seem to care. They sent me a sticker to put on the spine to say it was no longer updated and a letter telling me how to resume the service."
Davydd: "So you cancelled the other?"
Davina: "I couldn't. I needed it too much. I did get another letter
Davydd: "I thought you said you could pay your bills?"
Davina: "Of course I can. I just let it fall behind again out of spite. I rang them up to give them a piece of my mind."
David: "Why bother?"
Davina: "Well, I got another girl. She said that the other one had got the sack — she hinted it was because of those letters."
Davydd: "I got news for you . . ."
Davina: "Yeah my master told me. She didn't get the sack. She's just on maternity leave. She'll be back terrorising us all again. Her manager thinks she's the best — not that I regularly get behind in my bills."
David: "Me neither."
Davydd: "Don't look at me. I am doing all right thanks."
David: "Yeah!"
Davydd: "Yeah."
Davina: "If you're doin' so well you can pay for the coffees and my cheesecake."
Davydd: "Well, if you need it so badly."
David: "*I* don't."
Davina: "Me neither . . . but seein' you're doin' so well."
David: (Under his breath, of course) "Bloody hell!"

And so Davydd and Davina left David to settle the bill. He just managed to do so. It cleaned him out. They then repaired to their respective clerk's offices to exchange pleasantries about how tough it is for every one these days. As you can see from this illustration, it is only the weightiest of matters that distract counsel from their ongoing contemplation of the finer aspects of the law.

SYMBIOTIC OR PARASITIC

THE EDITORS ARE INDEBTED TO JACK Hammond for the photograph set out below. A bottle of Essoign Claret will be awarded to the reader who, in 500 words or less gives a short history and/or analysis of the relationship between the two practices.

Harrison, Arkansas, U.S.A.
Taken by Jack Hammond in January 1995.

FAVOURITE LEGAL ANECDOTE

From John Parris, *Under My Wig* (1961) pp. 8–11

AS A YOUNG CLERK IN THE BRITISH CIVIL Service Parris's first encounter with the legal profession inspired him to read for the Bar.

On a chilly winter day in the early part of the war, I stood outside a once-elegant Georgian building. There were long lists of barristers' names on each side of the doorway, and I read them, searching for the one in whose Chambers I had to present myself for a conference. I wondered how on earth all those people could find space to work in the apparently limited accommodation available. It was long, afterwards that I learned, by experience, that when a barrister first gets what is termed 'a seat' in Chambers the last thing he is likely to get is a chair, let alone a desk or a room to himself.

The name I sought was in the centre of one list, and I made my way up the unwashed bare boards of the staircase, decorated only with dirty milk bottles, to a door with the same list.

The room inside was scarcely wider than the staircase. A long table, partly covered with yellowing briefs tied with red tape and spread with what looked like snuff, occupied most of the opposite wall. On it was a telephone switchbox with an impressive number of lines, although the only instrument in sight was one of the old-fashioned stem variety.

The rest of that wall was filled by a mantelpiece, on which stood other briefs, somewhat fresher in appearance and all marked with big fees in nice round figures. Only later, when I came to practise at the Bar, did I realise that this was a piece of window-dressing favoured by many barristers' clerks; and that these ponderous documents were not necessarily connected with any case, past or present.

Beneath the mantelpiece burnt a gas fire. It looked like the first of all gas fires, and most of the bars were broken. The walls of this sanctum had once perhaps been cream. Time had coated them liberally with dirt, through which trickles of condensation had traced tea-coloured furrows.

In an ancient swivel chair before the table sat the barrister's Clerk, clothed in a rusty imitation of his master's black and stripes. Our solicitor was already there, seated beside the fireplace in the only other chair.

"I'll find out if counsel can see you," said the Clerk, addressing me, and leant over confidentially to the solicitor. "He's engaged in a very heavy commercial matter at the moment, but if this prosecution comes on tomorrow — he'll have to leave it."

"Of course, the Director must come first," he added, with an ingratiating chuckle.

The Clerk got up and vanished into an inner room, through another door. A few minutes later, the same door opened and out hurried several young men dressed in black jackets and with umbrellas. They were as much alike as a litter of black kittens, and as they clattered down the staircase they talked energetically in high-pitched drawls.

After what seemed a very long time, the door opened again and the Clerk came in. "Counsel will see you now," he announced in the voice of invocation.

He stood aside, ushering us into the room and across to two chairs placed in front of a large desk. Like a server handling the sacraments, he placed a brief in front of the figure dimly discernible behind the desk and silently withdrew.

The room had the holy gloom of a crypt. The walls were filled with books from the ceiling to the floors. I was not to know then that they were mostly obsolete textbooks and ancient law reports never touched in a decade, and that they were there partly to impress clients with the aura of learning and partly to conceal the fact that the wall behind had not been decorated for a century. (The last time I was in that room, not so long ago, it was still the same, although the counsel who that day sat behind the desk has long since passed to the County Court Bench and to his grave.)

The conference for which we were present was about a prosecution on indictment for evasion of Purchase Tax. The trial was due to start the next day, and, as the principal witness for the Crown, I had been instructed to attend on the counsel nominated for the prosecution.

The matter was really of the simplest possible nature. The defendant was a registered wholesaler; he had collected Purchase Tax from retailers and appropriated it for himself by omitting entries in his books.

With the solicitor, I spent three hours in conference with counsel, trying to explain to him the significance of the documents in the case and how the Purchase Tax worked. All of this, of course, was already set out in detail in his brief. When we left neither of us thought that he had really grasped it.

The next day was spent, in company with other witnesses, hanging about the draughty corridors of

a Court waiting for the case to come on. Our counsel did not appear, though his clerk paid fleeting visits from time to time to see if there was any danger of his being required. At four o'clock we were all sent home, and told to be there in time for ten-thirty the next morning.

The next day was passed in similar fashion. Witnesses in other cases came and went, but we remained.

Eventually, about mid-day on the third day, our case started. Although I was a prosecution witness, I was allowed to stay in Court, with the consent of the defence, to assist counsel with documents, during the opening and the rest of the evidence. The defendant pleaded "Not Guilty", and was represented by an elderly K.C. and junior counsel.

When counsel for the prosecution opened the case, both I and the solicitor for the department quickly realised that our suspicions were more than justified. Counsel was incoherent and incomprehensible, and floundered amidst the mass of documents. Not only did he not understand how the Purchase Tax scheme worked but he had no grasp of the elements of simple book-keeping or of the ordinary commercial practices of buying and selling. By the time he had finished, neither the judge nor the jury had the faintest idea of what the case was all about.

As the case proceeded the obscurity grew, as did the impatience of the judge. Leading counsel for the defence was an experienced and wily old man who, I suspect, understood the case perfectly but saw that the only hope of saving his client was to add to the confusion. This he did most effectively; not least of all by quoting and misquoting our counsel. By the time I was called to give evidence, the picture of the defendant presented to the jury was that of a poor honest little trader harassed by an incompetent revenue department. It was a picture calculated to evoke the instinctive sympathies of any jury.

When the case was all over, the judge called me back into the witness box and commended me for the manner in which I had made the inquiries and the way I had given evidence.

"You greatly assisted the Court by explaining what appeared to be a difficult matter with the lucidity one normally expects from counsel," he said, with a barbed glance towards the prosecution bench.

The accused went to prison for eighteen months.

Our counsel turned to us as he wrapped up his brief. "Well I think that went rather well, don't you?" he remarked jovially.

Neither I nor the solicitor said anything.

It was then that I saw the fee which had been marked on his brief. It was more than I earned in three months in the Civil Service.

Outside the Court, the solicitor turned to me.

"You ought to become a barrister yourself," he said casually.

"You've seen — any bloody fool can do it."

INTERSTATE ADMISSIONS

The Centre for Legal Education in New South Wales has prepared a "Lawyer's Admission Handbook". The press release below gives details of that handbook.

A new handbook is now available which gives information on the implementation of the Mutual Recognition Scheme, and the adoption of the Uniform Admission Rules, throughout Australia.

The handbook, called *The Lawyer's Admission Handbook*, is primarily for those interested in applying for admission outside their "home" jurisdiction. It is not a step-by-step guide but it does provide considerable practical information about the current state of play in each Australian jurisdiction.

The handbook contains three tables which outline the implementation of Mutual Recognition Scheme throughout Australia, the implementation of the Uniform Admission Rules throughout Australia, and compares the current admission rules in each jurisdiction with the proposed Uniform Admission Rules.

The handbook then deals with the requirements for admission in each of the eight Australian jurisdictions.

It also contains a copy of the Uniform Admission Rules, and details in regard to the various admitting authorities throughout Australia.

Another, complementary handbook, containing both of the so-called Priestly reports, is also available. These are the reports of the Consultative Committee of State and Territorial Law Admitting Authorities. This committee has recommended a number of important changes, including uniform academic and practical training requirements.

The handbooks are available from the Centre for Legal Education, GPO Box 232, Sydney, NSW, 2001 — fax number (02) 221 6280. The cost of each handbook is $20.00 or $15.00 where an order for five or more is placed. Orders can be sent to the Centre with a cheque in its favour, or an order can be placed by telephone and the handbook sent with an invoice. The telephone number is (02) 221 3699.

LUNCH

SOME THINGS NEVER change! For instance, the inability of the English cricket team to win Test matches; the attack by the AFL on the continued separate existence of the Fitzroy Football Club; and, *Bar News*'s search for eating places for its readers.

Some time ago, *Bar News* visited a number of restaurants in search of a relative cheap eatery to reflect the straitened times facing many of its readers ((1994) 90 Vic B.N. 84 at p. 86). Amongst the restaurants visited was the Rajah Sahib in Bank Place.

Rumour had it that Rajah Sahib had up stumps and shifted to Carlton and had adopted "Balti cooking". *Bar News* was greatly interested in "Balti Cooking" having been given a Balti-cookbook for his birthday by Mrs. *Bar News* who in turn had heard much about this style of cooking from friends and family back home in Britain where it was the latest fad.

So it was that *Bar News* gathered to him some intrepid colleagues and off we strolled to the top of Queen Street. The Rajah Sahib now occupied a building which had once been a bank but looked externally not a lot different to an older style inner suburban pub. We ventured in and were overwhelmed by an overpowering sense of *deja vu* — like the older style Rajah Sahib the walls, mantelpieces, side tables and anywhere else available were strewn with photographs of cricketers from all nations who were obviously enjoying a night at that restaurant. Like old times all but one table were unoccupied, and that had but two persons at it, and there was only Larry Mendonca waiting tables.

After Larry had introduced us to the photographs ("there's Boonie, and AB, and Imran, and Beefy, and Mike Atherton, and McDermott . . .") and the thought of a half of Tetley bitter we concurred with his proposal to have the Balti Banquet. Soon thereafter the roti bread with avocado chutney and Indian versions of dim sum arrived. Towards the end of the first pot of Tetley Curtain Q.C., Steve Grahams and an instructor arrived to occupy a third table. Much time then passed, no further diners arrived and neither did any main courses. We speculated upon the possibility that Larry needed time from his tour of the photographs and the pulling of pints to take a spell in the kitchen.

The main courses eventually arrived at the three occupied tables along with further serves of the roti bread and another half pint of Tetley. The banquet consisted of three smallish woks respectively filled with chicken, beef and vegetable baltis. The food was sort of stir fried with fairly thick dry and tasty sauces. Each of the dishes tasted distinctively different to the others and each displayed quite marked flavours. With the aid of the multiple serves of roti (each of which arrived unrequested but were separately billed and completely consumed) the three dishes proved to be deceptively filling.

A cup of good English tea followed and it was back to work we went. The bill (including two large Tetley bitters each, many serves of roti, tea and the usual condiments with the main course) for three persons totalled $105.00.

Should you desire a leisurely, different, good value meal *Bar News* recommends the [new] Rajah Sahib and its [new] menu. Should you have an aversion to cricket and particularly the poms or rousing English songs such as "Jerusalem", "Land of Hope and Glory" and "Rule Britannia" repeatedly rendered we suggest you venture elsewhere.

Graham Devries

A FAIRY TALE (CONTINUED)

NOW GATHER AROUND ME MY DEARS whilst I continue the tale of the poor VicBees. So much has happened since I last spoke to you that I almost do not know where to begin.

We have talked about their great big pink hive many many times. As you know, it has been a source of much consternation and gnashing of feelers for the VicBees. Due to a combination of decisions, made well in the depths of antiquity by then elder VicBees, and an alleged intransigence by the real owners of the great big pink hive, VicBees living in the pink hive have had to use up more and more of their honey to be allowed to stay in the hive during times when they have had less and less honey to use.

From time to time, Senior VicBees had said to the LandlordBees "If you do not reduce your demands for honey we will move out and you will be stuck with a hive that no one else will want to live in." The LandlordBees did not believe them. The LandlordBees were right. It was a big bluff and the stand off continued year after year. The only problem was that the VicBees had to continue handing over large amounts of honey to the LandlordBees who became even more convinced that they were dealing with pushoverbees — and it seems that they were.

You see the VicBees had tried another tactic. They threatened to leave the grouping that ran their hives for them. They told the LandlordBees that they would be stuck with a grouping that owed more honey that it had. Unfortunately, that ploy was doomed to failure as each VicBees received advice that the grouping was not really as badly off as everyone thought. Of course, a copy of that advice fell off the back of some honeycomb into the hands of the LandlordBees who fell around laughing their antennas off.

It was only when the VicGovBees, who do not seem to like VicBees, decided that VicBees shouldn't be allowed to tell each other which hives they must live in, that things started to change. It was quite ironic really. The VicGovBees thought that decision would finally do away with VicBees as we know them. "Ho, Ho, Ho," said the VicGovBees, "The VicBees will all fly off in their many separate directions, set up minute hives, assimilate into the population, never be seen again and never be able to sting us anymore." VicBees had seen this coming but they were still mortified.

However, their mortification was nothing compared to that of the LandlordBees who foresaw their lucrative little honey earner dry up overnight. "Have we got a deal for you," they suddenly said to the VicBees. "Why don't you sell the land under the pink hive to us for half of what it is worth; why don't you forget about buying back the pink hive on the never-never; why don't we agree to reduce your rent by half of what we should; and, why don't we agree to not increase your rent again for a short while?" It all sounded too good to be true. But, by some fancy feeler work on the abacus that meant that VicBees in the pink hive could now be told that they would be allowed to stay there for only three-fifths of the honey they had previously had to hand over. So the "new deal" was trumpeted to the world at large. Even the JournoBees got into the act. And then the VicBees started to clamber over each other in their eagerness to move back into the pink hive.

The funny thing is that many weeks have passed and no one has seen any benefit from the new deal. Maybe, the VicBees buzzed a little too soon. Maybe it was all done with mirrors. I don't really know. I'll tell you next time.

In all the toing and froing over the great big pink hive, the VicBees bombsite has not yet been forgotten. It has been sold and unsold and it is still there. Whilst bomb sites all around are converted into car parks, mini-golf courses, Sunday Markets or whatever, it remains as a bottomless honey pit cleverly disguised as a bombsite. It may be that I can tell you of the commencement of weekly safaris into the jungle being grown there.

I think I have told you how all the rusty pipes that blocked the entrances to the great big pink hive were coming down. Well they are. It looks as if the Smaller JudgeBees' hive is almost complete in its transformation into a dull gunmetal coloured copy of the great big pink hive as befits a neighbour to such hive. Some VicBees were beginning to mourn the departure of what many had grown

accustomed to and believed to be a permanent fixture to negotiate as they flew in and out of their hives. There was the beginning of more wailing and gnashing of feelers at the disappearance of something so near and dear.

It is now apparent that their sadness was premature. You see, over the way from the great big pink hive is the hive of the Larger JudgeBees. It used to have its own rusty pipes all around it. They were there for only a short time and went away. It seems that they went away so as to leave a space in which could be placed the rusty pipes from the Smaller Judgebees' hive. Unfortunately, not all VicBees will benefit from the new home of the rusty pipes for it is usually only the bigger and sleeker VicBees who go to visit the Larger JudgeBees in their hive. Some other smaller and less sleek VicBees pretend to visit Larger JudgeBees but in reality only get as far as the library. Hardly ever are Larger JudgeBees to be seen in their library.

Lest you be misled by outside appearances let me tell you of the changes going on inside the Larger JudgeBees hive. In fact, their hive is being made into two hives, or one part of their hive is being decorated in gold and other nice colours. It seems as if there is going to be a smallish hive of Even Larger JudgeBees. Their hive will not need any rusty pipes around it because it is not expected that very many VicBees will get to visit, or even want to visit, the Even Larger JudgeBees in their new hive.

Returning to the great big pink hive for a moment. A long time ago I told you about the portraits of the older, wiser VicBees that were placed in the bottom of the pink hive. I told you that one of the portraits was magic because unlike the others it changed from being black and white to being in colour and then unaccountably it changed back to black and white. It seems that the ghosts of times past were very angry at the change back to black and white for they marked the black and white portrait with a purple stain in the shape of lips set to show anger. To show that they were not to be toyed with they made the stain disappear and reappear a number of times.

To turn to the matters of bread and circuses for a moment. It seems that the VicBees, like all other Bees, are going to be entertained by a great big guessing game. Every Bee is going to be asked if every other Bee wants the most important Bee of all changed from a QueenBee to a very special AussieBee. Although the GovBees are telling everyone that the new special AussieBee will do exactly the same things as the QueenBee and life for all the Bees will not really change they seem to be really keen to make the change. If it isn't going to change anything why are they so keen to change things? Then again, why are those who do not want things to change so keen not to have the change made if it isn't really going to change anything anyways

My head is reeling. Your heads are dropping. I think that is enough of the VicBees and it is time for sleep. More again on another day.

(To be continued?)

CRICKET

The Victorian Bar v. *Mallesons Stephen Jaques First XI*

PAST *BAR NEWS* HAVE RECORDED THE depths to which the Bar's cricketing performance had sunk. Perhaps this was the reason why the Bar's selectors apparently adopted the English method of selecting a captain first and then another ten players, rather than selecting the best eleven players and then appointing one of them captain. This is the most charitable explanation of how our Chairman found himself leading the Bar First XI. It certainly cannot have been his recent form. Rather more sensibly, the selectors also decided to broaden the base from which players could be chosen by including staff from the clerks' offices and Domino's Restaurant. This policy of looking to the wider Bar family matched Mallesons' past practice of including non-solicitors in their team. Regrettably, the Bar was unable to match Mallesons in another selection area by including female players.

Mallesons won the toss and batted first. However, they were quickly in trouble when Rob Williams clean bowled one of their openers (1 for 1) and Tony Cavanough trapped the other in front (2 for 14). A potential match winning partnership then developed, but it was brought to an end when the Mallesons star batsman lifted an off-drive from the bowling of Andrew Donald into the large but safe hands of Habersberger Q.C. (3 for 46). When Jonathon Sampson, from Domino's, clean bowled the next batsman the Bar was well on top (4 for 53). Worse was to follow for Mallesons when their batsmen attempted to take a quick single to mid-off only to be beaten home by a return from David Habersberger (5 for 53). Leg-spin, in the shape of Bruce Robinson from Howell's Office, was then introduced into the attack and a classic dismissal soon followed when the Mallesons' captain was out, stumped by Mordy Bromberg, as he lunged forward (6 for 67). Jonathon Sampson chipped in with another two quick wickets, one bowled (7 for 68) and the second brilliantly caught in the gully by Robinson (8 for 84). The leg-spinner picked up another wicket caught by Cavanough (9 for 97). As Mallesons were one short, the batsman who had been run out batted again, only to be run out a second time when he tried for a third run and was found wanting by a lovely throw from Sampson. All out for 104. All of the Bar's bowlers performed well — even when not taking wickets they were tight. Sampson with 3 for 15 from 6 overs, Robinson with 2 for 16 from 4 overs and Cavanough with 1 for 7 from 5 overs were the best of a small group. The required seven bowlers were not used because Mallesons were dismissed after only 29 of the allotted 35 overs.

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Although the Bar lost Peter Couzens for 2 early in the piece, its batsmen quickly established supremacy. Jonathon Sampson, the other opener, made a hard hitting 25 and Mathew Parnell, a stylish left-hander from Meldrum's Office, retired after reaching 41. Solid contributions came from Bromberg who made 15 and Bill Gillard Q.C. who limped off, unbeaten, with his score on 24. With victory assured, the tail end batsmen scored freely. Robinson retired on 23, Donald made 20 and Cavanough remained not out 21. The other not out batsman was a jubilant Bar captain on 2.

After the game, Opas Q.C. presented the new First XI trophy, which has been named after him, to Habersberger Q.C. The trophy has gone to the engravers to have the past victories recorded as well as this year's well-deserved win by the Bar. It goes without saying that the members of the Bar's wider family played a significant role in this year's victory.

Victorian Bar 2nd XI thrashed by Mallesons Stephen Jaques

THE VICTORIAN BAR'S 2ND TEAM LOST TO Mallesons Stephen Jaques in a cricket match in which illness, injury, age, infirmity, and the absence of a player reduced the Bar's 2nd XI to a 2nd X. If further excuses for the Bar's pathetic performance are to be allowed, it must be said that there were only three (relatively) mobile members of its team moving (as opposed to standing still or sitting) on the field by the end of the match.

Playing on the Wesley College's No. 2 ground on Sunday 19 March 1995, the Bar batted first and scored 140 runs. The top scorers were Alan Hands (27 runs), Steven Mathews (25 runs) and David Myers (24 runs). Ernie Burrows (19 runs) and Michael Shatin Q.C. (15 runs) were the only other players to reach double figures. Paul Elliott, who bravely played although he was suffering from flu, was run out before he had a chance to score.

When it came to bowling, only David Myers (1 wicket), Ernie Burrows (2 wickets), Alan Hands (1 wicket), and David Myers' young son, Harley (1 wicket), troubled the scorers or, indeed, the MSJ batsmen.

Easy catches were dropped, injured and ill fielders were unable to stop singles, let alone boundaries and, to be frank, if it had not been for MSJ's policy of retiring batsmen to give every member of their team a chance to thump the bowling around the park, they probably could have batted themselves to victory in about an hour. Only Alan Hands and Phil Trigar performed well in the outfield. It should be noted that everyone except the wicketkeeper was ultimately forced by the MSJ batsmen into the outfield.

Phil Opas Q.C. played for Mallesons and, at 77 years of age (give or take a year) seemed fitter and more mobile than many of the Bar's players, some of whom are near to half his age.

As a tribute to Phil we now have the Phil Opas Shield for 2nd XI matches (as well as 1st XI matches) between the Bar and MSJ and, needless to say, Phil had great pleasure in presenting it to the MSJ captain.

The Bar's Second XI (or X) appreciated MSJ's excellent organisation which made the match as enjoyable as any humiliating day of defeat could be. We also congratulate our First XI on winning its game against MSJ and receiving the Phil Opas Shield for First XI matches.

It is the opinion of several senior members of the Bar's cricketing fraternity that efforts should be made by the Bar Council to require the clerks to employ one or two ex-Sheffield Shield and Test players now that the Bar is able to call upon the wider "Bar Community" in the Annual Challenge matches against MSJ. Possibly Habersberger Q.C., as Chairman of the Bar and Captain of the Bar's 1st XI, could discuss the possibility of Dean Jones being appointed to a position with a clerk or, if that fails, to be an honorary silk.

It should be mentioned that two of the Bar's regular cricket players were unavailable because they were playing for South Yarra Cricket Club in its victorious premiership team in the Mercantile Cricket Association's "B" grade which concluded on the same day as the MSJ game was played. Chris Connor led SYCC to its first MCA premiership, and was clearly "the Man of that Match".

If any of the younger members of the Bar can play cricket (or have even been to a cricket match) at any level, they are requested to make themselves known to Tony Radford or Chris Connor in their eternal search for teams that can win with a little more frequency than has been the case during the past century.

Michael Shatin Q.C.

ROYAL TENNIS

Bar and Bench v. *Solicitors*

FOR THE UNINITIATED, ROYAL TENNIS IS the fore-runner of this modern invention called lawn tennis. Thus Shakespeare wrote:

First Amb: "*. . . He [the Dauphin] sends you, meeter for your spirit,*

This fun of treasure . . ."

K Henry: *"What treasure, uncle?"*

Exe: *"Tennis-balls, my liege"*

To which King Henry replied:

"When we have match'd our rackets to these balls

We will in France, by God's grace, play a set

Shall strike his father's crown into the hazard"

Henry V, Act I, scene II

The first match for the Box Cup for competition between bench/bar and solicitors was played at the Richmond courts on 20 December 1994 with the solicitors winning. After the match an excellent and lengthy lunch was had.

The scores were:

John Lewisohn v. Mike Tuckfield 6/4

John Kaufman–Mark Derham v. Tony Melville –Alan Kirsner 3/6

S.E.K. Hulme–Murray Kellam v. Mike Tuckfield–David Stagg 6/4

John Kaufman v. Tony Melville 3/6

John Lewisohn–S.E.K. Hulme v. Mike Tuckfield–David Stagg 6/4

Murray Kellam v. David Stagg 2/6

Mark Derham v. Alan Kirsner 4/6

John Lewisohn–S.E.K. Hulme v. Tony Melville–David Stagg 3/6

The Box Cup was kindly donated by Judge Kellam who has also provided the following short history of Judge Box. Judge Burnett Box (1843–1931) was born in Staffordshire on 10 March 1842 and arrived in Melbourne at the age

of six. He practised at the Victorian Bar from the 1870s, having previously been called to the Inner Temple after completing his tertiary education at Trinity College, Cambridge. He became one of the instigators of what was to become the Royal Melbourne Tennis Club. On 27 May 1881, the first committee meeting was held in his chambers at Temple Court, Collins Street. He was a distinguished early player in Australia and won the "Champion Gold Racquet" in 1882 and a number of subsequent years.

Box is very important to the history of the Victorian Bar. Subsequent to the *Legal Professional Practice Act* 1891, which provided that members of the profession be amalgamated, an informal association of those practising as barristers was established. That association was abolished in 1892. However, in 1890 Box took the initiative and convened a meeting of persons practising as barristers alone to set up an organisation. He was instrumental in setting up a Bar roll. Between the years 1895 and 1905 he edited the Victorian Reports. He was also Chairman of the Bar Committee from 1900 through to 1905.

Box was appointed to the County Court bench in 1905 where he served on the bench until his retirement at the age of seventy years. Dean, in his book described him as ". . . one of the most honourable of advocates, rather too jocular and too talkative on the bench" and ". . . a very unconventional old gentleman".

John V. Kaufman

LAWYER'S BOOKSHELF

Studying Law (5th ed.)

by Christopher Enright
The Federation Press, 1995
pp. i–xli, 1–612

NOTHING, IT SEEMS, CAN DAMPEN THE enthusiasm of school leavers, students in other higher education courses, and mature age students for embarking on the study of law. Nary a year goes by without a new law school somewhere on this continent opening its doors for business. Within the legal profession there is angst: the supply of lawyers will soon far outstrip the demand for legal services. The angst may be overstated since these days the career destinations of law graduates range far and wide beyond practice as a barrister or solicitor. Despite a protracted period of economic decline, there are not a lot of unemployed law graduates.

Whatever the outcome in terms of supply and demand in the next decade or thereabouts, one effect of the popularity of law and legal studies courses is that there is an ever growing market for textbooks introducing students to the Australian legal system and the study of law.

Christopher Enright of the Australian Catholic University has produced the fifth edition of his book, *Studying Law*, now published by The Federation Press. The stated aim of the book is to provide a comprehensive introduction to the study of law in a context where the basic theme is "that making and interpreting law involve a choice" (p. v). *Studying Law* realises its aim impressively. Enright divides his treatment up into six parts: Introduction, Institutions, Sources of Law, Legal Reasoning, Legal Research, and Skills. This is a conventional methodology except that these days more time is devoted to imparting basic skills. *Studying Law* incorporates practical exercises, ample lists of further reading, and nine specific appendices which reinforce the extensive investigation of basic legal skills.

Enright writes clearly and, although 30 years ago his approach to choice in lawmaking — especially judicial lawmaking — might have been labelled as slightly "Bolshie", it reflects what Australian appellate courts now freely acknowledge as their creative role. When set beside the dubious influence on sections of Australian legal education of some fashionable forms of critical social theory (postmodernism, deconstruction and the like), Enright's approach to the social and political context of Australian lawmaking is a model of dogma-free clarity.

L.W. Maher

Riley's Annotated Bills of Exchange Act and Cheques and Payment Orders Act

by Ken Robson
The Law Book Company, 1994
pp. v–lii, 1–1350

THE LAW BOOK COMPANY PUBLISHES A number of excellent annotated works concerning Commonwealth legislation. One such publication is Ken Robson's book, an important and much respected reference work in the area of banking and finance.

Unlike many other annotated works, *Riley's Annotated Bills of Exchange Act and Cheques and Payment Orders Act* has not had many alterations since it was first published in 1953. Indeed, this is only the third time the book has been updated in over 40 years, and this latest edition comes nearly 20 years after the publication of the previous one. The author even admits in his preface that in some ways little has changed in the courts' interpretations of the *Bills of Exchange Act* 1909. In fact, this piece of legislation has only been amended twice in the last two decades! For these reasons, it is likely that this edition will remain current for quite some time, making it a very worthwhile purchase for practitioners concerned with the laws relating to negotiable instruments. For those who do have a previous edition of this book, Ken Robson's updated version should be appealing for its inclusion of the *Cheques and Payment Orders Act* 1986 with annotations.

Anna Ziaras

Evidence — Commentary and Materials (4th ed.)

by P.K. Waight and C.R. Williams
The Law Book Co. Ltd, 1995
pp. i–lxxx, 1–946

IN THE FOURTH EDITION OF THEIR TEXT, *Evidence — Commentary and Materials*, Mr. Waight and Professor Williams have provided both a comprehensive student text and a valuable source of extracts from leading, and some not so well- known, authorities. The work is therefore of very considerable value for anyone who is in practice in such of our courts as still have regard to the rules of evidence.

The arrangement of the work is under the conventional topics, thus enabling the user who has had the advantage of a conventional education in the rules of the law of evidence to find the required section of the volume. An advantage of the work is the attention which the authors have placed upon providing a concise explanatory statement of the principles of law and suitable extracts from the authorities which are relevant. The extracts from the judgments in the cases selected by the authors appear to be of sufficient length to allow the presentation of a fair view of the decision. The authors provide a short but sufficient statement of the relevant facts to allow an understanding of the judgments selected.

At the end of the various chapters there are suggestions for further reading and questions posed for the consideration of students. Whilst these features may be of considerable importance in a text used as a teaching tool, barristers will find the more valuable aspect of the book the ready reference which it allows them to make to a doubting judge or magistrate of the authorities which support their argument. The book is thus a very convenient point of reference whilst engaged during the course of a hearing in some heated argument about the finer points of the *res gesta*.

This fourth edition of the work makes substantial additions to the third edition to reflect the changes in the law and to provide, where relevant, references to the provisions of the new Commonwealth *Evidence Act*.

The work is highly recommended for daily use — a sort of bunny rug for the advocate.

John Larkins

Retail Tenancies (2nd ed.)

by Clyde Croft
Leo Cussen Institute, 1994
pp. iv–x, 1–289
$50.00 (softcover)

CLYDE CROFT'S *RETAIL TENANCIES (Second Edition)* is a practical and procedural guide to all aspects of the *Retail Tenancies Act* 1986 (Vic). This work was first published in 1992, but given the wealth of new case law and legal developments in the area, it is not surprising that Dr. Croft has chosen to comprehensively revise his book just two years after it was initially released.

Retail Tenancies proved to be a very popular work when it was first published, and many practitioners have found it particularly helpful in interpreting and applying the *Retail Tenancies Act* 1986 to the practice and procedure of landlord and tenant disputes. This second edition is a much expanded version of the 1992 edition, with the addition of many new cases for the period 1992–October 1994, so Dr. Croft's hopes that its popularity will continue should be realised.

Indeed, this book is worthwhile. It is clearly written and well set out with thorough indexes and liberal references to case law and other commentary. It also contains various precedents for, amongst other things, Notices of Dispute, Originating Motions, Affidavits in Support and the Law Institute's standard leases of 1989 and 1993.

I do not hesitate to recommend this work.

Anna Ziaras

Business Law of Australia (8th ed.)

by R.B. Vermeesch and K.E. Lindgren
Butterworths, 1995
pp. i–lxxxvi, 1–1316

PROFESSOR VERMEESCH AND MR. JUSTICE Lindgren have produced the eighth edition of their now standard reference work on Australian business law. The learned authors are ably assisted with contributions from nine colleagues.

The book is not intended as a specialist practitioner's text. Its biggest market is likely to be in the seemingly ever-expanding legal education industry which for this purpose includes courses offering business, economics and accounting degrees. This accounts, for example, for the three very detailed background chapters on the Australian legal system. Professor Vermeesch's account of the law of contract is the most sustained and detailed element of the book.

As a student's textbook, the latest edition of Vermeesch and Lindgren, maintains the high standard of earlier editions. The treatment of some topics, e.g. the impact of the criminal law and the law of torts on business activity, is necessarily compact, but no less effective for that. For a book with several authors the overall writing style is marked by a uniformity of directness and clarity.

The book will, however, also be of use as a general reference work for legal practitioners who want an overall treatment of such a wide-ranging topic within a single text, or who are looking for a starting point on a particular topic whether, for example, it is sale of goods, bills of exchange, insurance, or trade practices.

Again, as a sign of the times, purchasers of the book also obtain a tutorial disk (Windows 3.0 and DOS). This, of course, is primarily intended as a student's aid and as such adds to the value of the hard text. Overall, the program is very easy to use, but a rather slow process when used as a practitioner's refresher course.

Some of the tutorial questions and answers strike this reviewer as a bit quirky. Moreover, it can be a humbling experience to respond to a question thoroughly and in all earnestness only to be met with a menu which contains the confronting question: *"Is this a serious answer?"* My immediate reaction (driven in part by lingering Celtic stubbornness) was to risk everything and answer in the affirmative. I nevertheless scored full marks! Thus emboldened, I decided to experiment with the answers and in those sections (e.g. law and society) where there is ample scope for a range of policy positions the program did not readily welcome a mildly progressive response, but again was content to give me full marks.

L.W. Maher

Butterworths's Student Companions:

Insolvency and Bankruptcy

by Adam Townley

Administrative Law (2nd ed.)

by Anne Ardagh

Corporations Law (3rd ed.)

by Graeme Wiffen

Torts (3rd ed.)

by Duncan Holmes
Butterworths, 1994

BUTTERWORTHS' *STUDENT COMPANIONS* is a series of booklets on specific areas of the law, including family law, trade practices, equity, real property, contracts, tax, criminal law and evidence. New editions of the *Torts*, *Administrative Law* and *Corporations Law* volumes were released in mid-1994, as was a new subject in this series — *Insolvency and Bankruptcy*.

These publications are specifically aimed at the student market. They do not pretend to be of any practical relevance to non-students and are, in fact, of very limited value to practitioners. Each booklet in the series simply comprises short summaries of some of the more important Australian and overseas cases on the relevant topics covered. None of the recently released titles contains any commentary. Furthermore, the summaries themselves are on the whole extremely brief and, in many instances, are even more condensed than those which are to be found in corresponding headnotes in the relevant law reports.

Anna Ziaras

CONFERENCE UPDATE

1–4 August 1995: Kobe, Japan — 1995 Annual Meeting of the Research Committee on Sociology of Law of the International Sociological Association. Contact Faculty of Law, Kobe University.

3–9 August 1995: Chicago — 1995 American Bar Association Annual Meeting. Contact American Bar Association, Illinois (312) 988 6179.

6–19 August 1995: University of California — Advanced U.S.A. Law. Contact Director U.S.A. Programs, University Extension, University of California (916) 757 8894.

13–17 August 1995: Washington DC — 33rd Annual Congress of the International Association of Young Lawyers. Contact Michelle Sindler (02) 210 4444.

16–20 August 1995: Beijing — Fourth Biennial Law Asia Conference. Contact Mr. John Heeley, Secretary-General, Law Asia (09) 221 2303.

19–23 August 1995: Winnipeg — Annual meeting of Canadian Bar Association. Contact Canadian Bar Association (613) 237 2925.

8–10 September 1995: Melbourne — Conference on "The Mason Court and Beyond". Contact Prof. Cheryl L. Saunders (03) 9344 6206.

24–28 September 1995: Brisbane — 29th Australian Legal Convention. The full convention program is available in April 1995. Contact Convention Secretariat, 29th Australian Legal Convention, P.O. Box 1280, Milton, Queensland, 4064, Tel: (07) 369 0477.

6–10 October 1995: Beijing — The Seventh International Anti-Corruption Conference. Contact Mr. Tao Hao, IACC 95 Secretariat, Tel: (861) 257 7950, 257 2213.

14 October 1995: Ecuador — The Role of a Bar Association in Modern Society. Contact Ms. Lorna Macleod, Public Relations Officer, IBA, 2 Harewood Place, Hanover Square, London, WIR9HB, England.

27–28 October 1995: Sydney — Australian Institute of Criminology First National Conference on Violence against Gays and Lesbians. Contact Glenys Russel, (06) 274 0224.

28 October–1 November 1995: Perth — 1995 Annual Conference of the Aviation Law Association of Australia and New Zealand. Contact Mr. John Farquharson. (09) 288 6000.

3–5 November 1995: Gold Coast — Family Law Mediation Workshop organised by Australian Institute of Family Law Arbitrators and Mediators. Contact Ms. Julie O'Donnell. (06) 247 3788.

12–13 November 1995: Innovations in Trauma Rehabilitation. Contact Diana Crebbin. (02) 439 6744.

24–26 November 1995: Bombay — IBA's Asia Pacific forum. Contact IBA (see above).

6–13 January 1996: Aspen — Australian Lawyers' Conference. Contact Creative Conference Management, 289 Broadway, Glebe, NSW 2037. Tel: (02) 692 9022.

15–16 January 1996: Ho Chi Min City — The Development of Dispute Resolution Law and Institutions. Contact Philip Bushby. (02) 391 3800.

18–20 January 1996: Second International Mediation Conference: Mediation and Cultural Diversity. Contact Ms. Cathy Tobin, Techsearch Inc., G.P.O. Box 2471 Adelaide, SA 5001.

20–23 January 1996: Agra, India — Law Asia Second General Practice Conference and Third Family Law and Children's Rights Conference. Contact Wendy Broun. (02) 364 6300.

24–29 March 1996: IBA Section on Energy and Natural Resources Law, 12th Advanced Seminar, Prague. Contact IBA (see above).

28–29 March 1996: Hong Kong — Second Law Asia Business Conference. Contact Mr. Graham Morrison. (852) 2846 1888.

22–26 April 1996: Sixth International Interdisciplinary Conference on Women. Contact Festival City Conventions. (08) 363 1307.