# VICTORIAN BAR NEWS

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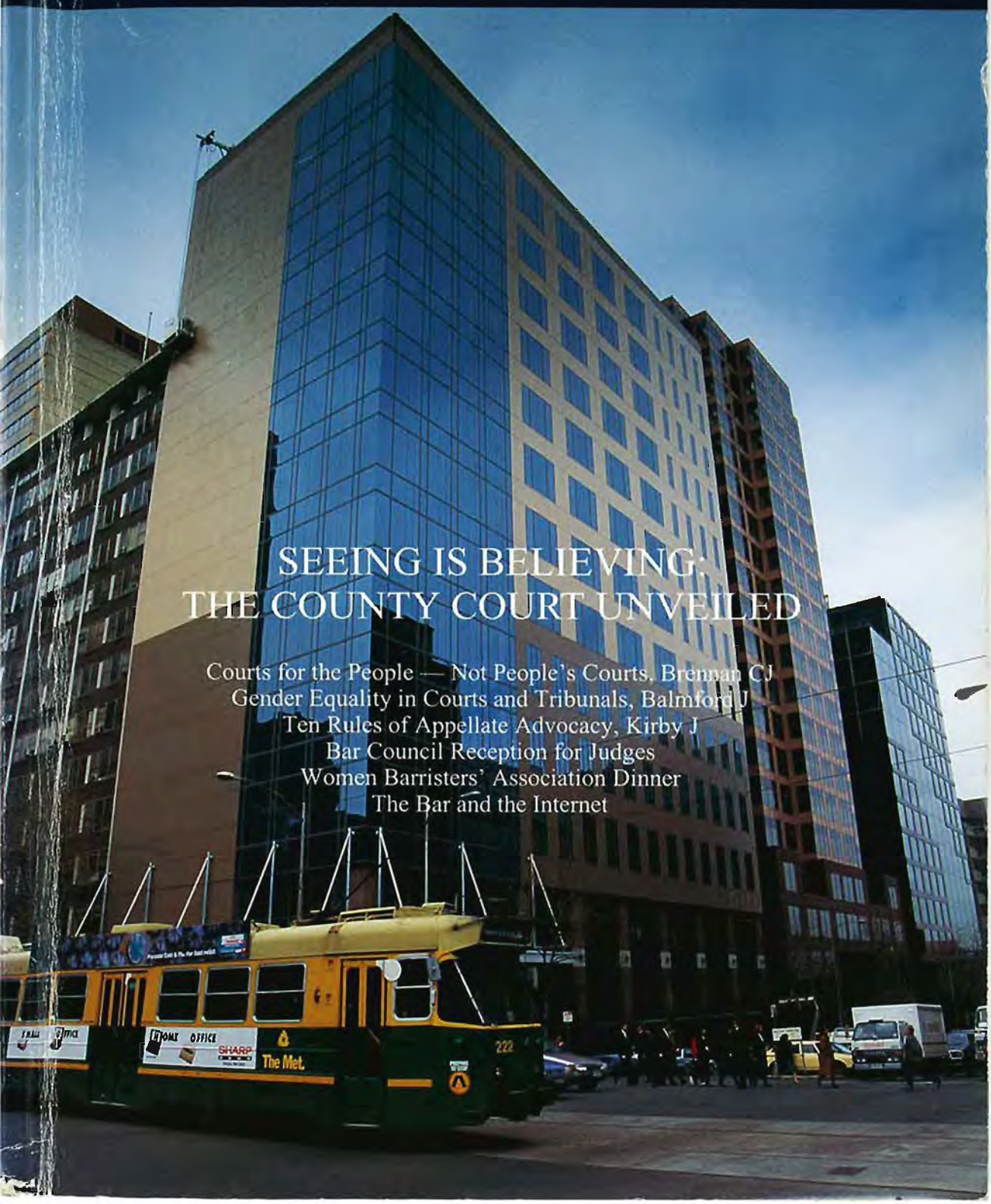


## SEEING IS BELIEVING: THE COUNTY COURT UNVEILED

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# VICTORIAN BAR NEWS

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*Cover: The Winter 1992* Victorian Bar News *cover featured the scaffolded County Court, under the prophetic remarks of Mr. Frank Tucker, retiring supervisor of civil jury pools, made upon its site excavation in 1966, that "this new building will be unworthy of Melbourne". Happily, its apparently never-ending restoration was completed this month, and the scaffolding removed at last. Andrew Chapman recorded this momentous achievement.*

*Welcome Judge Dove*

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# EDITORS' BACKSHEET

WE REALLY FEEL SORRY FOR THE unfortunate young woman who was recently gaoled for claiming to be a solicitor/barrister. After all she had attended lectures and even tutorials at the University of Melbourne (checking rolls has never been a strong point of the Law School). Other students borrowed her notes and got honours. She attended a graduation ceremony. She purchased a wig and gown from Ravensdale, the outfitters to the law.

When she decided that she should become a barrister, she celebrated by having an extremely large party at the Windsor Hotel. Television accounts showed her speaking in a very clear and forceful manner to a large gathering complete with wig and gown.

There was no doubt that she had a great deal of business acumen as well. It appears that she managed to accumulate something like $660,000 in the two years in which she was in "practice". This was unfortunate for some people. Therefore she earned, as we all know, a little more than she would have as an articled clerk and/or first year barrister.

Taking into account the proposed amendments to the legal "industry", why shouldn't she be able to appear in courts? The only thing lacking with her credentials was a degree, professional training and honesty. But as the journalists tell us, all lawyers are dishonest anyway, so this was not a drawback. Under the new proposals should this poor girl be persecuted? She was simply a little bit ahead of her time.

Unfettered by the restrictive practices of the professional guilds she wended her way through society in a remarkably successful manner. No doubt with the loosening of the law industry along microeconomically correct lines there will be many people similar to this young woman setting themselves up as "lawyers". There may also be some minor problems where people give them money, lose their houses, and are incompetently represented. But this is a small price to pay for the perceived lessening in fees to the "consumer". When these unrestricted non-members of guilds fall into small amounts of trouble, then undoubtedly the new government bureaucracy, which will be set up to govern the industry, will say that these miscreants have been hidden by the guilds for years. We look forward to the bureaucrats organising the profession. Whoops, the industry!

MEDIATION

Alternative dispute resolution (ADR) is certainly the go. Mediation of court cases is the in thing at the moment. The new scheme entitled Portals announced by the Chief Justice is to be applauded. Mediation can be regarded as a quick and cheaper way of resolving even the most complex of litigation. To extend its operation to all jurisdictions is laudable.

However, with the spectre of ever-increasing mediation a new government organisation has arisen. It is called the Dispute Settlement Centre of Victoria and it is part of the Department of Justice. This body began life solving simple neighbour disputes. It now has moved into the field of motor vehicle mediations in the Magistrates' Court (see article at p. 58 Winter edition, *Bar News*, 1995).

Alternative dispute resolution (ADR) is certainly the go. Mediation of court cases is the in thing at the moment.

This dispute settlement body appears to be manned by folk who don't really like lawyers. In fact it could be said that they are there to discourage the attendance of lawyers at mediations. It could be of concern that this body may attempt through the new Portals scheme to spread its wings past the motor vehicle cases into other areas and eventually move from the Magistrates' Court into the higher courts. In other words, the government sets up a body under the Department of Justice to decide and mediate upon disputes in the absence,

in most cases, of lawyers. Also of concern is the fact that the people running these mediations will not be members of the practising profession but rather government and/or non-government lawyers or in many of the cases government non-lawyers.

POLICY

The draft policy of this dispute settlement causes concern. These are some of its quotes:

It is the history of the Disputes Settlement Centre program that only the stakeholders in the outcome of a mediation session attend the mediation session. It is these people who know most about their issues and concerns that are in dispute and who know which of the options generated at mediation are most satisfactory to themselves . . .

Support persons and parties are not bound by the confidentiality provisions of section 21M of the *Evidence Act*. It is therefore important, given that the confidential nature of mediation is one of the factors in its success rate, that the number of support persons be kept to a minimum.

To say that lawyers are unable to keep confidences is a disgrace. Further, to lump them in with other people who are there to "maintain the balance of power" is laughable.

Support persons including *lawyers*, family and relevant others, *may* attend the mediation session when necessary to maintain the balance of power (physical and emotional), knowledge and confidence between the parties provided that all persons who are to attend the mediation session agree to that person's presence, and where it is considered by the dispute assessment officer that their presence is in good faith and will not impede the process of mediation .

Where a party requires legal or other advice during a mediation session, that advice can be accessed by a telephone or the session may be adjourned by the mediator to a later date to allow such information to be obtained.

Well, the poor old stakeholders cannot trust lawyers because lawyers cannot be said to be able to keep confidences. Following from this logic therefore, lawyers are grouped together with other "support persons". In most cases the lawyers won't be there.

This policy misses the point in relation to mediations. Lawyers are trained in handling people and their problems. To say that lawyers are unable to keep confidences is a disgrace. Further, to lump them in with other people who are there to "maintain the balance of power" is laughable.

It is clear that this centre will become a centre of competition for mediators who are part of both the solicitor and barristerial sides of the profession. The profession should turn its mind to making attempts to limit and control this group of people before it acquires excessive powers in the legal system.

WE WERE WRONG

This would be an extremely dull magazine if the editors ever got it completely right. Some of the photographs in the articles concerning the opening of the Court of Appeal contain an unfortunate error. Not that many members of the Bar have picked it up. The error is in the description of the judges of the Court of Appeal as A.J. This does not mean Appeal Justice, but Acting Justice! All members of the Court apart from the Chief Justice and the President should have the letters J.A. after their names.

The members of the Supreme Court are described in s.75 of the *Constitution Act* 1975 as "Judges".

Sub-sections (1) and (2) of s.75A provide:

"(1) The Court is divided into:
  (a) the Court of Appeal; and
  (b) the Trial Division.
(2) The Court of Appeal consists of:
  (a) the Chief Justice, who is the senior member of the Court of Appeal;
  (b) the President of the Court of Appeal;
  (c) the other Judges of Appeal;
  (d) the additional Judges of Appeal appointed or acting under section 80B."

The surnames of Judges of Appeal are followed by "J.A." signifying "Judge of Appeal". It seems clear from the *Constitution Act* that a Judge of Appeal should not be described as "Mr. Justice of Appeal", but as "Mr. Justice".

We apologise for our misdescription.

We should also point out that the photograph of Mr. Justice Callaway used in the winter issue of *Bar News* was one obtained by *Bar News*, not one provided or even approved by His Honour.

THEY WERE WRONG

Members of the Court of Appeal and the Chairman of the Bar Council were invited to the launch of the winter issue of *Bar News*.

David Habersberger Q.C. arrived five hours early. Winneke P. arrived 24 hours late.

The Editors

# CORRESPONDENCE

Dear Sirs,

I wish to draw attention to some errors in the last issue of the *Bar News*: (1995) 93 Vic.B.N. Some of the errors are my responsibility, some not.

1. Whilst it is true that the new President of the Court of Appeal was a Hawthorn footballer (50 games between 1960 and 1962, premiership player in 1961), as was one Colin Robertson (116 games between 1980 and 1986, premiership player in 1983), the President of the ACT Bar who attended our Bar Dinner and was mentioned on p.60 and pictured on p.62 is actually Gordon Richardson S.C. and not Colin Robertson Q.C.
2. In my Chairman's Cupboard (p.10) I referred to four barristers who had practised as members of the Victorian Bar for over fifty years. Two others should have been mentioned — Stanley Lewis, the grandfather of our present member Tony Lewis, who practised between 1901 and 1964 and Max Bradshaw who practised between 1936 and 1992. Each was still in practice at the time of his death.
3. In the welcome to Charles J.A. mention was made at p.35 of His Honour's eight readers. In fact, Stephen Charles, as His Honour then was, had a ninth reader — me. The learned author of the article was obviously too busy sharing a joke with Merralls Q.C. and Costigan Q.C. to count correctly (see p.29).

Yours faithfully,
David J. Habersberger

Dear Sir

In your "Chairman's Cupboard" of the winter edition of the *Victorian Bar News* you wrote of the four members of the Bar who had practised for over 50 years. There were at least five. The fifth was my grandfather, Stanley Lewis Q.C.

Stan signed the Bar Roll on 1 March 1901. He was appointed as Kings Counsel in 1949 and died on 30 March 1964, thus remaining on the roll of practising barristers for over 63 years.

He had a busy commercial practice, both as a junior and silk. He appeared in many notable cases including the *Bank Nationalisation* case and those which determined the eight-hour working day awards. He was renowned for his deep knowledge of the law and his acid tongue. He was wont to use the latter on both opponents and judges he considered ignorant of the law. Unlike his grandson he never had to justify his language (see (1984) C.L.R. 682). I suspect that this was because his reputation for ferocity and accuracy protected him.

He is probably best remembered at the Bar for having purchased Selbourne Chambers on its behalf in 1923. This he achieved with the aid of a 10,000 pound overdraft, rapidly arranged when he discovered a bookmaker eyeing the then home of the Bar.

Through seniority he secured the best room in Selbourne Chambers, overlooking Bourke Street, and never moved, remaining there even when the rest of the Bar had moved to Owen Dixon Chambers. I visited him there as late as 1962, the musty smell and the open fire leaving an indelible mark on my memory.

Are there any barristers who remained in practice longer?

Regards
Tony Lewis


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# CHAIRMAN'S CUPBOARD

I WOULD LIKE TO COMMENCE BY THANKing and congratulating David Habersberger Q.C., perhaps the most well known and popular of all chairmen, on his term in office. He continued the work of Susan Crennan Q.C., and has dedicated his time and efforts to the Victorian Bar over many years. His contribution to the Bar Council will be sadly missed.

A number of important events took place during the Habersberger chairmanship. Undoubtedly the most significant was the launch of Victoria's first Court of Appeal. Other significant events included the official opening of the new Melbourne Magistrates' Court complex, the launch of the Victorian Bar Directory, the rejuvenation of Barristers' Chambers Limited and, of course, the football win of the Victorian Bar over Mallesons Stephen Jaques!

The next year will be a period of consolidation and will see the implementation of a number of changes/reforms made to the legal profession (including the Victorian Bar). A great deal of very good work has been undertaken in the past few years, but the challenge is now ahead of us all. As an institution we must continue to be vigilant to demonstrate that an independent Bar is essential for the proper administration of justice. As individuals, we must continue to provide excellent advocacy services to the public and to the court.

I believe it is important for the Bar Council to retain or obtain (as the case may be) the confidence of politicians, public servants, members of the press, and community leaders. We need to be able to consult and negotiate with the policy makers, as well as have the opportunity to persuade the public, through one means or another, of the importance of the independent Bar. We should also consult with community leaders to determine their views about the legal profession itself — we should not allow to be repeated the criticism made in A'Beckett's *Comic Blackstone*, "(t)he opinion of the Public has not been elicited — this is a matter of small importance naturally to the lawyers, who swallow the oyster while their clients hold the shells".

*John Middleton*

I am extremely optimistic about the Victorian Bar's future. In the past we have been forced to look at ourselves and consider some of our own practices and traditions. We are the stronger for this exercise. The members of the Victorian Bar are and will continue to be providers of excellent advocacy services.

The improved financial position of Barristers' Chambers Limited is a factor which contributes to my optimism. It will permit the Bar (as an institution) to continue to support its members and to improve our facilities. The work of Alan Myers Q.C. and his co-directors must not go unrecognised, and we all owe a debt of gratitude for their efforts over the last year.

Finally, I must say that I am looking forward to the forthcoming year. The Bar Council will endeavour to identify the important current issues confronting its members, and then it can establish goals and implement its objectives. We will need to call upon our members for help and advice, but in the past individual barristers have always been very willing to assist on specific issues.

# ATTORNEY-GENERAL'S COLUMN

IN THIS ISSUE, I WILL DISCUSS IMPROVEments to court and tribunal facilities, the proposed reforms to the domestic building industry and the Appeal Costs Fund.

## COURT AND TRIBUNAL FACILITIES

The government is committed to improving the accommodation and facilities of public agencies. The provision of modern court and tribunal buildings has been a major priority. New court buildings have been constructed: Frankston Court complex (September 1993); Dandenong Magistrates' Court (August 1994); and City Magistrates' Court (November 1994).

In addition, a number of tribunals (the Victorian Administrative Appeals Tribunal, the Small Claims Tribunal, the Residential Tenancies Tribunal and the Credit Tribunal) have been accommodated in a refurbished building in King Street, Melbourne, and the Court of Appeal division of the Supreme Court of Victoria is located in a spectacularly refurbished Supreme Court Annexe (June 1995). The improvement of court facilities will continue with the construction of a North Eastern Court complex.

It is important to ensure that court and tribunal buildings are capable of meeting the increasing demands placed on them. One objective is to provide these buildings with modern facilities to cope with their increased use. For example, the former Springvale, Oakleigh and Dandenong Magistrates' Courts were deficient in satisfactory heating, cooling and lighting. Public waiting areas, interview rooms, administrative offices and magistrates' chambers were also insufficient. The courts were replaced by the new Dandenong Magistrates' Court which, in addition to providing efficient modern facilities, comprises eight magistrates' chambers, 17 private interview rooms, and extensive office accommodation for court staff, legal aid personnel, Salvation Army, Court Network and other welfare agencies. Its ability to accommodate additional growth was carefully considered. The design and construction of the court took into account the anticipated population growth of the serviced area and the likely corresponding increase in criminal activity and civil litigation.

Another objective in improving court and tribunal accommodation is to provide specialist facilities. Attendance at courts and tribunals generally causes considerable anxiety and stress to victims of crime. The government places a high priority on introducing initiatives to support these victims. In doing so, the government is addressing the perception in the community that there has been too much emphasis placed upon the rights of offenders, with a consequent neglect of the interests of victims. With this in mind, the various designs of the new courts have incorporated features to alleviate the anxiety and stress suffered by victims of crime. For example, special rooms have been provided in the new courts to enable victims to wait for cases to commence without meeting the accused or his or her family. It is obviously desirable to introduce these specialist features into existing accommodation. Significant progress was made in this regard with the establishment of a witness waiting room in the County Court in 1993.

Court and tribunal buildings must also be capable of accommodating technological initiatives. Steps have been taken to improve the efficient operation of our courts and tribunals with the introduction of, for example, the electronic data interchange system in the Magistrates' Court. Closed circuit television facilities have also been introduced in some of our courts to allow victims and protected witnesses to give evidence without coming face to face with the accused. Another initiative has been the introduction of an innovative file tracking and case-flow management system for a number of tribunals falling within the Attorney-General and Fair Trading portfolios.

Consideration is currently being given to the implementation of further measures to ensure that our courts and tribunals are equipped to provide the most efficient and user-friendly service possible for all Victorians.

## DOMESTIC BUILDING INDUSTRY

Legislation reforming the domestic building industry will be introduced in the coming Spring parliamentary session. The objectives of the reform are to: improve the standards of domestic builders; to reduce the number of consumer/builder disputes; to provide a cost-effective, timely mechanism to facilitate the resolution of disputes; and to introduce private competition to the insurance/warranty system offered on new and renovated domestic buildings. It is hoped that the reforms will increase consumer confidence in the

domestic building industry, and assist that industry by introducing more efficient processes.

One of the major causes of current disputation is the lack of consumer comprehension of domestic building contracts. The current legislation, the *House Contracts Guarantee Act* 1987 ("the Act"), currently prescribes a number of minimum terms which must be included in every building contract. However, a disproportionate number of complaints and building disputes are seen to arise under the Act by reason of a lack of clarity and certainty as to respective rights and obligations of the parties, and appropriate contractual remedies which will reflect a fairer allocation of risk. The inclusion in legislation of additional minimum terms is under consideration.

The existing dispute resolution mechanisms regarding domestic building contracts comprise the courts, the Administrative Appeals Tribunal, the Housing Guarantee Fund ("the Fund") and compulsory arbitration. One of the main criticisms directed against the existing system is that it does not satisfactorily deal with the resolution of mid-contractual disputes, that is, those disputes which arise between the builder and consumer prior to the completion of the building contract. The Fund has often relied on standard arbitration clauses found in most standard building contracts to resolve these disputes, and has generally declined to become involved in disputes once arbitration or some other dispute resolution mechanism has been invoked. The consequence of not effectively resolving these disputes is that problems escalate and relationships between the builder and consumer often degenerate. Another criticism has been directed at the compulsory arbitration system. The system is seen as unduly costly, legalistic and protracted. It is therefore proposed to reform the existing dispute resolution mechanisms to create a more efficient and expeditious process.

The procedure regarding the registration of builders is also under consideration. The Fund currently acts as a de facto registration body in relation to domestic builders because the Act provides that only builders approved by the Fund can lawfully build or renovate domestic houses. Builders are "registered" upon the Fund being satisfied as to their technical competency; financial capacity; and work capacity. Many consumers perceive that the Fund is reluctant to deregister builders who have proved to be incompetent, or who have behaved in a disreputable manner. They also query the effectiveness of deregistration in circumstances where reregistration has subsequently occurred under a different corporate name. The Fund has also criticised the existing system as not providing adequate statutory authority to deal appropriately with delinquent builders.

Registration of all building practitioners, other than domestic builders, currently occurs under the *Building Act* 1993. One option is to extend this Act to cover the registration of domestic builders. By centralising the registration of all builders in a single agency efficiencies would be achieved. It would also enable the application of appropriate standards.

APPEAL COSTS FUND

In a previous issue, I foreshadowed the application of part of the revenue raised from the revision of court fees to enable the ceiling on the Appeal Costs Fund civil awards to be increased. Effective from July, the former ceiling of $4000 for applications under sections 14, 19 and 19A(l) of the *Appeal Costs Fund Act* 1964 was increased to $50,000, and from $200 to $2000 for applications under section 14B. There had been no increase in these amounts since 1971. These revised amounts reflect more closely the costs associated with litigation, and represent another initiative by the government to increase the opportunities for legal assistance.

Jan Wade, M.P.
Attorney-General



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# REPORT OF THE FAMILY LAW BAR ASSOCIATION

THE ASSOCIATION CONTINUES TO HAVE A strong level of membership amongst those practising in the area of family law.

The year has seen proposals for significant statutory change to important areas of family law, including the role and responsibilities of estranged parents and property division (specifically superannuation). Whilst no such changes have yet been made it seems likely that they will be passed by the Parliament shortly.

Discussion also continues in the endeavour of the Family Court to simplify and streamline court forms and procedures. Lengthy delay has taken place in its deliberations and that which was planned to come into effect on 1 January 1995 at the time of our last report is now scheduled for 1 January 1996.

This year has seen, as in other areas of practice, proposals by the Legal Aid Commission of Victoria for a change in the basis of family law funding. For what are basically described as reasons of administrative convenience, the Commission is contemplating payment to solicitors of a "lump sum" fee (inclusive of the cost of retaining counsel) for many applications, particularly interlocutory applications. Moreover, the Commission is contemplating increased provision of salaried legal officers. Representations were made to the Commission on behalf of the Bar by its Chairman, Habersberger Q.C., Burnside Q.C. as Chairman of the Fees Committee and by a representative of the Association. The Commission indicated a preparedness to re-examine its attitude in the light of submissions put. No substantive response has as yet been received.

Increasing pressure upon the Legal Aid Commission can be expected because of community demand for assistance in family matters, exacerbated by the greatly increased frequency of separate representatives being appointed to represent the interests of children.

The year has also seen ongoing pressures upon the Family Court to "personalise" court procedures, arising from apparently frequent complaint from litigants that they have not had court procedures adequately explained to them by the Court itself or by those representing them. Whilst proper explanation and information is essential for litigants, some steps undertaken by the Court have not met with the full approval of the Association. In recent times, for example, counsel has been required in the Registrars Court to have their client sit with them at the bar table and to have the presiding Registrar then explain to the client orders made or proposed to be made. This practice was adopted without prior consultation with the Association, which has requested consultation with the Court as to this new practice.

In April 1995 His Honour Justice Brian Treyvaud died suddenly. His Honour was a friend of the Bar and of the Association. His courtesy, good humour and common sense were hallmarks of his approach both to the profession and to litigants. The affection and respect he commanded was well evidenced by the overflowing attendance at his funeral, attended by many members of the judiciary, and members of the profession from all jurisdictions.

The end of the financial year also saw the retirement of His Honour Justice Geoffrey Walsh. His Honour was appointed following long and distinguished service as a solicitor including a term as President of the Law Institute. His Honour similarly was a friend of the Association and attended many of its annual functions. Many members of the Association were at the farewell to congratulate him upon his achievements and to wish him well in his retirement.

Their Honours' places have been taken by two new judges. The first of these was Justice Linda Dessau. Her Honour had practised relatively briefly at the Bar in the family law jurisdiction before a period in Hong Kong as a Crown Prosecutor and, upon her return to Australia, was appointed a Magistrate. Her Honour maintained throughout an interest in the family law jurisdiction.

The second appointment was Justice Susan Morgan. Her Honour had a distinguished record as an academic before coming to the Bar in 1984, firstly on a part-time basis but in more recent years, full time. Whilst maintaining an interest in diverse jurisdictions she practised predominantly in family law. She was a member of this Association.

The social side of the Association cannot be ignored and particular mention must be made of the annual dinner held at "The Botanical" on the 1 September 1994. A gathering of approximately 70 experienced "new age" food in trendy surroundings. The hard work of those responsible was evidenced by the number of those in attendance.

Paul Guest

# WELCOMES

## JUSTICE SUNDBERG

ROSS ALAN SUNDBERG WAS BORN ON 21 April 1943, and was educated at Haileybury College and Ormond College.

His Honour's academic achievements are brilliant. He took his LL.B. at Melbourne University with first class honours and was a Supreme Court Prize winner. In 1969 he was awarded the degree of Bachelor of Civil Law at Oxford, with first class honours. He was Vinerian Scholar at Oxford and received a standing ovation from his College, Magdalen. His Honour is one of the select band of Victorian Vinerians, the others include Sir Zelman Cowan, Shaw Q.C. and Weinberg Q.C.

In 1967 His Honour was awarded the degree of Master of Laws by Monash University for a thesis entitled "The Prerogative Writs of Certiorari, Prohibition and Mandamus in English and Australian Administrative Law: An Assessment of their Adequacy as a Means of Judicial Control of Administrative Action and an Examination of the Judicial Response to Criticism of these Writs". In 1979 Monash awarded him the degree of Doctor of Philosophy for a thesis called "Some Aspects of the Completion of the Administration of a Deceased Estate". In 1982 Melbourne University awarded him the degree of Master of Arts for a thesis entitled "The Origins of the Judicature Chapter of the Australian Constitution and its Development to the End of the National Australasian Convention of 1891". The last two awards were obtained in the midst of a busy full-time practice at the Bar.

His Honour taught at Melbourne University while completing his articles at Oswald Burt & Co. He was articled to Peter Bowen-Pain, who was later appointed to the Supreme Court of South Australia. His Honour was admitted to practise on 2 May 1966. He signed the roll of counsel on 16 October 1969, and read with J.D. Phillips, now Mr. Justice J.D. Phillips of the Court of Appeal. His Honour took only one reader, Frank Callaway, now Mr. Justice Callaway of the Court of Appeal. It can be seen that His Honour specialises in judicial appointments for his Masters and readers.

His Honour was probably the last of the old time equity practitioners. His lineage of Masters was Lowe, Fullagar, Adam, Newton and J.D. Phillips JJ. His Honour as a junior had an extensive constitutional law practice. See, for example: *Russell* v. *Russell* (1976) 134 CLR 495; *The Queen* v. *Joske; Ex Parte Shop Distributive and Allied Employees Association* (1976) 135 CLR 194; *Ansett Transport Industries (Operations) Pty Ltd* v. *The Commonwealth* (1977) 139 CLR 54; *Attorney General (W.A.)* v. *Australian National Airlines Commission* (1976) 138 CLR 492; *The Queen* v. *Demack; Ex Parte Plummer* (1977) 137 CLR 40; *Superannuation Fund Investment Trust* v. *Commissioner of Stamps (S.A.)* (1979) 145 CLR 330; *Gazzo* v. *Comptroller of Stamps (Vict)* (1981) 149 CLR 227; and *State Superannuation Board* v. *Trade Practices Commission* (1982) 150 CLR 282. In *Breavington* v. *Godleman* (1988) 169 CLR 41 His Honour's opponent, before the proceedings reached the High Court, thought His Honour's argument so persuasive that when he got to his feet he was momentarily convinced of its correctness.

After taking early silk in 1984, His Honour's practice diversified particularly into the areas of taxation, administrative law and the unusual area of tertiary educational institutions.

Although in recent years His Honour's practice had a large advisory component, he was widely recognised as a consummate advocate. In *Higgins* v. *Wingfield* [1987] VR 689 at 702 the Full Court said "Dr. Sundberg argued the matter exhaustively and with consummate skill". His Honour appeared in the Privy Council.

His Honour had a capacity for extraordinarily hard work. The Bar is glad of his appointment as His Honour had a huge practice which will now support many others. His Honour's ability to generate paper work was legendary.

Not only that, His Honour has reported for the *Commonwealth Law Reports* since 1969. His career as a law reporter got off to an inauspicious start. No doubt basking in the reflected glory that was soon to be his, His Honour wrote in reply to the current editor's invitation to join the team of reporters, "I have just yesterday finished the exams in BCL. I think my days of efficient exam prepara-

*Justice Sundberg*

tion ended years ago. I have no memory now. My mind has set in hard lines and has lost what flexibility it had". However, His Honour found the time to do the reports each weekend. The meticulous editor marvelled at His Honour's skill, proficiency and swiftness. For example, in the now famous Volume 180 of the *Commonwealth Law Reports*, of the 30 cases reported His Honour reported 25. In fact His Honour has reported some complete volumes. He will be absolutely irreplaceable. There will need to be at least four more reporters appointed to fill the void.

His Honour's achievements are great, and a mere recitation of them does not do justice to the time spent and excellence reached in all of them. His Honour was lecturer in Executors and Trustees/Succession at the University of Melbourne (1972–82), Lecturer in Land Law at the Council of Legal Education (1970–75), Lecturer in Evidence at the Inns of Court School of Law (1968), Senior Teaching Fellow at Monash University (1966–67), and Director of Studies in Law at Ormond College (1969 -79). His Honour wrote many learned articles, and edited the second and third editions of Griffith's *Probate Law and Practice in Victoria*. He still found time to be a Director of Barristers' Chambers Limited (1972- 80), Book Review Editor of the *Australian Law Journal* (1975–90), a member of several Chief Justice's Law Reform Sub-Committees, a member of the Legislation Committee at the University of Melbourne, and Chairman of the Discipline Committee there.

His Honour's life does not revolve entirely around the law. His Honour is also a keen bagpiper, having been a member of the Haileybury Pipe Band and the Ormond College Pipers, the latter group of pipers not being nearly as formally convened as the former. His Honour was responsible, with others, for waking at least one former Governor from his sleep at an unconscionably early hour in the morning, in order to wish him "Happy Birthday". When he went to Oxford His Honour took with him a set of bagpipes and managed to accomplish the not inconsiderable feat of piping, beside sundry lochs in Scotland, the tune named after each loch.

On His Honour's return from Oxford he came, appropriately, with a Rolls Royce. His Honour's passion for "Royces" has remained with him. His Honour has had many happy incident- and accident-free miles of motoring with his various Royces except for one unfortunate occasion when, on a dark and stormy night, His Honour mistook the grass verge in Royal Parade for something else and managed to park the Royce across the median strip with neither the front nor the rear wheels touching the ground. The fate of his present Royce is uncertain. It is hoped it does not suffer the indignity of a car pool.

His Honour's appointment is inspired. Those responsible are to be congratulated. His Honour takes with him an extraordinary capacity for hard work and the most formidable academic record coupled with a tremendous ability to get to the heart of a problem and give a clear practical judgment.

# JUSTICE MARSHALL

SHANE MARSHALL WAS WELCOMED AS A Judge of the Industrial Relations Court of Australia on 18 July 1995. His Honour became a judge after more than 14 years at the Bar specialising in Industrial relations and employment law and appearing in many of the major cases in that area. His family background had something of the "flavour" of the industrial relations scene. His mother was a migrant whose family fought as partisans in WWII and his father, grandfather and uncle worked as "wharfies" on the Melbourne docks. He often told stories about their experiences on the waterfront and it was apparent that those experiences helped shape his understanding of life in the industrial workplace.

With the added benefit of a secondary education at St Bede's Mentone and degrees in Economics and Law at Monash University, His Honour served articles under the now Deputy President Williams of the Industrial Relations Commission and was admitted to practice on 1 April 1980, signing the Bar Roll on 19 November 1981. At the Bar the judge read firstly with Jim Kennon, later Attorney-General for Victoria, and then Peter Gray, now Justice Gray of the Federal Court and the Industrial Relations Court. Both these masters had busy industrial practices and His Honour doubtless benefited greatly from his pupillage with them.

He had a very busy practice at the Bar aided by his commitment to long hours of hard work and an encyclopaedic index to every imaginable relevant case. "Marshall's index" as it was (and is) known, was (and is) eagerly sought after by colleagues at the Bar. The judge kept it up to date and gave others ready access to it. Now it is to be supposed that while His Honour will continue to keep it up to date, it may be an open question how readily others (at least at the Bar) will be able to access it.

Between the contents of "Marshall's index" and his experience of being in and reading cases, the judge became one of those lawyers who when asked for an authority, readily cite not only the case reference but the page as well. It can safely be assumed that the skill will be retained, although now utilised for the benefit of all at the Bar table.

His Honour has a happy family life with Lyn and daughters Kate and Amy. Any industrial practice as successful as the judge's puts strain on family life, not least because of the requirement for a great deal of travel interstate. It is to be hoped that his appointment might relieve some of that strain, especially the extra burden such absences have placed on Lyn over the years. His Honour has at least two other notorious passions: Collingwood and racing. He had a penchant for wearing black and white when the football calendar seemed to raise some faint hope for Collingwood. He not only dressed that way, he insisted on drawing attention to it! And then of course when the Collingwood hope had faded, normal hues were resumed. One certainly knew where His Honour stood about football teams. On racing, however, there seemed to be somewhat greater reticence. But it is true that there were reports of lengthy phone conversations with other "punters", though the contents were never revealed. In all of that the bet was usually 50 cents.

His Honour was also a very active and regular participant in the Rostrum Club. And his own success at the Bar is at least in part testimony to the value of those regular Rostrum sessions. He gener-

*Justice Marshall*

ously gave much time as a Rostrum "critic" to assist others in the pursuit of speaking skills and personally encouraged others to make use of the opportunity the Rostrum sessions offered.

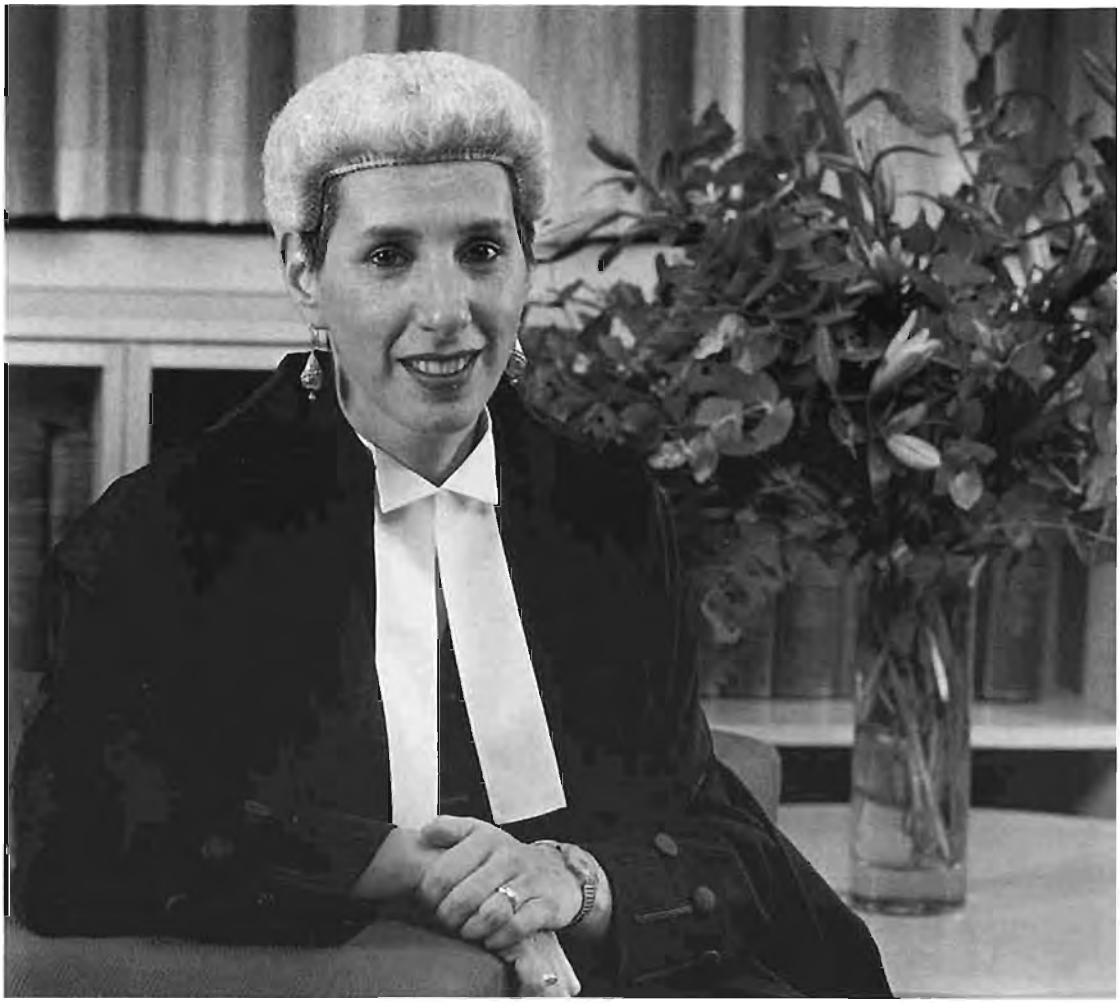
Granted His Honour's relative youth and good state of health, he has many years of judicial service ahead. His humour, thoroughness and dedication to duty will stand us all in good stead.

# JUSTICE DESSAU

LINDA MARION DESSAU WAS WARMLY welcomed to the Family Court on 20 June 1995, the third woman to be appointed to the court in Victoria. A large contingent of family, friends and colleagues, including a long line of brothers and sisters from the Magistrates' Court, participated in her welcome.

Her Honour was born in Melbourne on 8 May 1953. She was educated at St Catherine's Girls School and matriculated at the age of 16. She graduated LL.B(Hons.) from the University of Melbourne in 1973, its youngest law graduate. Following articles at Vale & McBrian she practised for three years with Wisewoulds, in family law and commercial litigation. She then spent 18 months overseas, with 12 months in Paris. Returning to Australia, she signed the Bar Roll in March 1979, and read with Paul Guest Q.C. At the Bar she became friends with Sally Brown (now Her Honour Justice Brown), their friendship spanning their time at the Bar, the years working together as magistrates, and now as judges.

In 1982 Her Honour married Tony Howard of the Bar, and with him spent two and a half years as a prosecutor in Hong Kong. In 1985 the Dessau/Howard team returned to Melbourne, and Her



*Justice Dessau*

Honour became a part-time Referee of the Small Claims Tribunal in 1986. She was briefed by the Crown Solicitor to advise the Attorney-General's Criminal Justice Committee on murder sentencing and service of presentments, until she was appointed a Magistrate on 1 July 1986.

Her Honour quickly earned a reputation as a Magistrate who was an excellent lawyer, and who was thorough, fair and kind. She spent significant periods of time at the Children's Court, the Coroner's Court, and co-ordinating the civil jurisdiction. Her Honour had a great interest in and flair for an analytical approach to the improvement of the committal system in the Magistrates' Court, and assisted in the formulation of policy to streamline the committal process through the mention system. She was a member of the Pegasus Committee which worked towards reducing delays in the criminal trial process, at all levels.

In 1994, Her Honour was awarded a Churchill Fellowship, and spent several months in the United States, Canada and Great Britain, examining strategies employed in these jurisdictions to reduce delay. She brought back with her the benefit of her observations, and continued to co-ordinate the running of committals in the Magistrates' Court, with substantial success in reducing delay at both the committal and trial stages.

Her Honour made a significant personal contribution during her time as a Magistrate to promote community understanding of the legal system as far as the Magistrates' Court was concerned, often addressing community groups, educational institutions and conferences. Beyond the law, she is actively involved in her local school council, having recently completed a term as president. She is a skilled communicator, just as she is an avid and interesting conversationalist, and is always happy to share her time and generous hospitality with friends and colleagues.

Her Honour's somewhat limited spare time is filled with varied interests, including opera, art, tennis, bushwalking, and the production of splendid meals. But outranking all of these is the pleasure she has in being with her family — Tony and their two sons — both at home in Melbourne and at their house on the coast. The Magistrates' Court has lost a hard-working and much valued colleague, but the gain to the Family Court is obvious. Her Honour brings to her new job intelligence, tenacity, patience and fairness, qualities which make her eminently suitable to be a Judge of the Family Court. Everyone who has worked with her knows the calibre of her contribution, and that the community will gain from her appointment.

# JUSTICE MORGAN

SUSAN MARY MORGAN WAS APPOINTED as a Judge of the Family Court on 4 July 1995. Justice Morgan was educated at Sacre Coeur in Melbourne and before that in Brisbane. She graduated from the University of Melbourne Law School in 1964 and completed her articles at Weigall & Crowther where she was articled to George Crowther.

*Justice Morgan*

In 1965 she was appointed as research assistant to the then Dean of the Law School, Professor Zelman Cowan. She subsequently took an appointment as senior tutor at the University of Melbourne Law School until she travelled overseas and lived in New York City for three years where for a time she was a visiting scholar at Columbia Law School. On her return to Melbourne she was re-appointed to the University of Melbourne Law School and ultimately held the position of lecturer before she resigned to read with Ray Finkelstein in 1984–85 and then resigned to continue her practice as a barrister. From 1991 she was a member of the Bar Ethics Committee and was elected to the Bar Council in 1993.

During her time at the University of Melbourne Law School, Her Honour was responsible for teaching contract, property, trusts and family law. This range of learning has stood her in good stead in establishing a general practice at the Bar, although it has meant that in her practice as a barrister she in her own words "has been taught by her pupils", a salutary experience for all those lucky enough to enjoy it.

Her Honour has not only taught but published widely and maintained an interest in commercial and mining law as well as in property and family law. For a time she was seconded as a consultant to the Registrar of Titles in Victoria and she has a deep knowledge of real property law. Her practice at the Bar has been catholic although in later years has concentrated in the area of family law. Her experience in Ray Finkelstein's chambers and for a briefer period in the chambers of His Honour Hahum Mushin as he now is, provided her with a range of expertise and depth of knowledge and pleadings, which in combination with her academic experience and learning provided an excellent foundation for her maturity as a barrister.

Her Honour has been a strong advocate of the independence and collegiality of the Bar. At her welcome, she spoke warmly of the benefits to younger barristers and flowing through them to their clients of the traditions of the independent Bar in freely given advice from senior and experienced barristers to the most junior. The system of shared chambers and the ready camaraderie of the profession has enormous advantages to the public in the delivery of legal services although they are not often recognised.

Her Honour was married to Dr. Francis Morgan in 1966. They have four children, Philippa, Victoria, Charles and Caroline. Her Honour has a wide range of interests including travel to exotic locations, bushwalking, art, reading and opera.

Justice Morgan is warmly remembered by her former students and colleagues at the Law School as a tolerant and forgiving friend and teacher.

As a barrister appearing in the Family Court she was known and respected for her common sense and compassion and it is an honour to welcome her to the bench where her legal skills and depth of knowledge in combination with theses qualities will eminently suit her for her appointment.

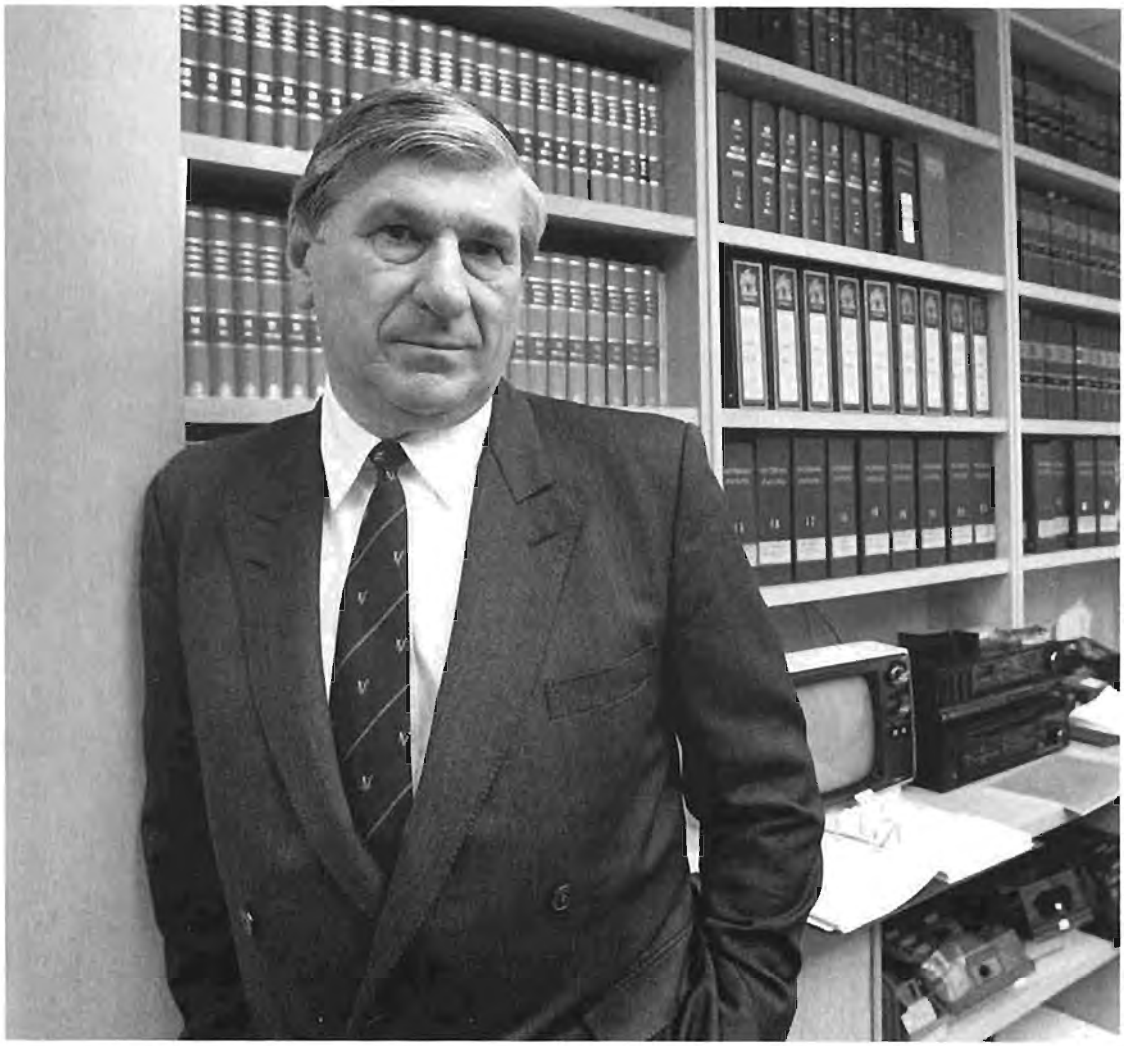
# JUDGE DOVE

BARRY ROBERT DOVE IS THE KEENEST OF racing men. Therefore it is appropriate that, in recent years, the certainty of his imminent appointment was the subject of some spectacular plunges. It all seemed so logical, inevitable and correct. In 1995 the coat-tuggers and tipsters were at it again. This time they were right. This most worthy of appointments was over the line.

A story that typifies Barry Dove the barrister comes from the dim past and is set in the bone-chilling gloom of a Ballarat winter. A then youthful solicitor, later to become his first reader, was instructing Dove for the defence. The severely injured plaintiff opened the tiniest window of opportunity in his evidence. Counsel dispatched instructor through the sleet to the offices of the Ballarat *Courier*. For what seemed interminable hours, in conditions that would make Mawson Sound seem tropical, the solicitor ploughed through seasons of football results for every minor league around Ballarat, checking every goal kicker and best player. Finally, gold was struck. In the midst of his most debilitating period of incapacity, the plaintiff, playing in some obscure competition, had strung together a series of best-on-ground performances, which had then suddenly ceased. Back to court, damp but elated. The response of Counsel – good, but not good enough. Back to the freezer in the bowels of the *Courier* office. There it was, previously unnoticed. A minute paragraph, explaining why the plaintiff's purple patch of form had come to an abrupt halt. Using his unusable arm, he had pole-axed an opponent, thereby incurring the wrath of umpire and tribunal. The plaintiff was then carved up with polite but surgical precision.

That was His Honour the advocate. Courteous, meticulous, formidable. Ethical to a fault.

Not that His Honour was always a defendant's man. While he frequently donned the black hat on circuit, he also regularly appeared for the good guys, particularly later in his career and particularly after taking silk at an impressively early age. Similarly when, inevitably, he appeared in a



*Judge Dove*

number of prominent racing cases, he was briefed at times both for and against the stewards. His career, like the man himself, was balanced and even-handed.

His Honour had a veritable gaggle of readers, whose subsequent collective careers contained more twists and turns than the Hampton Court maze. It is illustrative and typical of his generosity that he took them on in the first place, and that, through the peaks and troughs, his shoulder was there to lean on, or to cry, upon. Those who sat at his feet learned well.

Outside the litigation arena, His Honour's name has long been associated with racehorses, good food, fine wines, many friends, a liking for sojourns in the sunny North, and, as the rhyme of a certain C.W. Villeneuve-Smith reminds us, a loving family. The man does have a darker side. He and the same Villeneuve-Smith used to follow regularly, and with passion, the fortunes of the Carlton Football Club. This disease still manifests itself from time to time, but, happily, is of a milder strain. A total cure is yet possible.

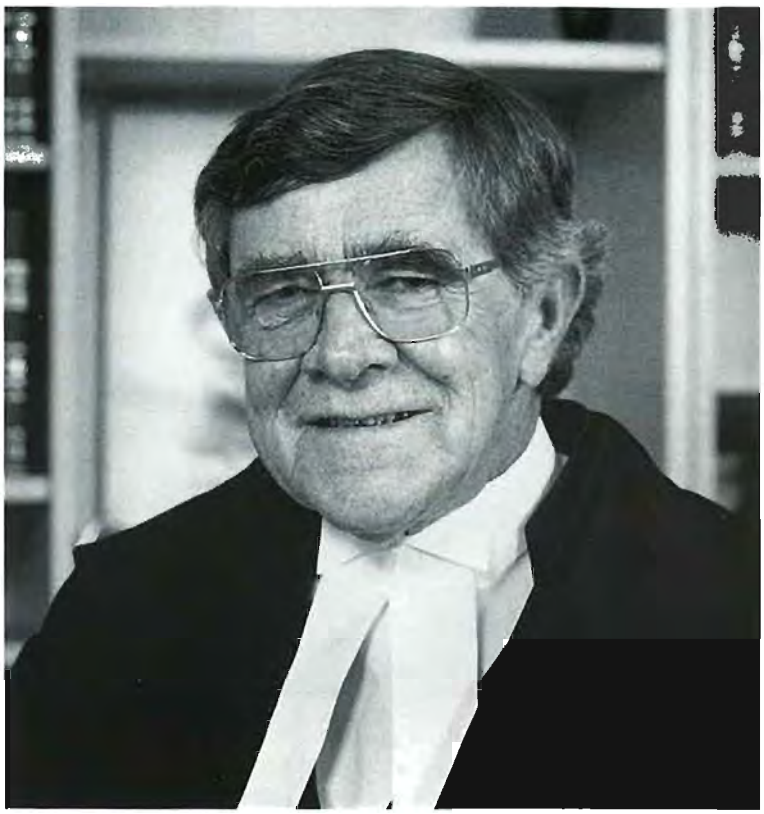
His Honour was also an outstanding schoolboy cricketer. He went on to play at District level and ultimately to captain the Bar cricket team. (This may mean that he actually gave orders to E.W. Gillard. This will be investigated further. It may give new meaning to the phrase "a courageous judge".)

Marion, Michelle, Jackie, Chris and Simon are justly proud of His Honour's appointment. His many friends, and the profession as a whole, rejoice in it. Those punters who collected on the bet "Dovey for the Bench" are advised to double up on the proposition that this will be a judicial career spoken of only in the most glowing of terms.

# FAREWELL

## JUSTICE WALSH

ON 11 APRIL 1995, MEMbers of the legal profession, friends and family gathered in the Family Court to farewell the Honourable Justice who retired as a Judge of the Family Court. His Honour was appointed a judge on 4 January 1977. His retirement comes after 17 years as a judge of a court which has seen dramatic changes over this period.



*Justice Walsh*

His Honour was born on 31 December 1925. He was educated at Scotch College. He was admitted to practise in 1952 having completed the Articled Clerk's course. His principal was Mr. Bob Vroland of Messrs. Vroland Pearce & Webster. His Honour later returned to study completing a Bachelor of Laws degree in 1969. In 1959 he established his own legal firm in Box Hill known as Walsh & Spriggs and remained a member of that firm until appointment to the Bench.

As a solicitor His Honour had a general practice. In later years it tended more towards divorce and family law. His Honour was among the first solicitor advocates to appear frequently before the Family Court. During his time in office there was great change in the evolution of practice of family law. His Honour contributed significantly to the Court's ability to meet many challenges which confronted the Court.

His Honour is a keen sportsman. He is a golfer and a sailor. As a sailor His Honour has a reputation of being "firm but fierce". He has earned the affectionate nickname of "Captain Bligh" from his crews. His Honour has an aversion to running foul of "snags". On one memorable occasion His Honour was competing in the Mahogany Point race in the Gippsland Lakes. Navigating in the dark through a narrow channel, His Honour took a course along the edge hoping to catch whatever gusts of wind were available. One of His Honour's crew members, Michael Nolan, was ordered to put his legs over the side to fend the boat off from any snags that might impede the boat's progress. Apparently there were none. However, under His Honour's command Mr. Nolan ended up in the water. From that day forth His Honour has been very wary of the potential presence of snags in whatever way they present themselves!

The Victorian Bar wishes Your Honour well in retirement after a long career of service to the profession and to the Court.

# OBITUARIES

## JUSTICE TREYVAUD

ON WEDNESDAY, 8 MARCH 1995, THERE was a ceremonial sitting of the Family Court of Australia in Melbourne, presided over by the Chief Justice the Hon. Justice Alistair Nicholson and attended by 21 other judges of the court, to honour the late Justice William Brian Treyvaud who died suddenly on 3 March 1995.

Brian Treyvaud was born in Melbourne on 8 July 1929, and was educated at Glen Iris State School, Geelong College and the University of Melbourne. His Honour graduated Bachelor of Laws in 1952 and after serving his articles with the late Sir Arthur Rylah, commenced practice as a solicitor in Geelong. In 1963 His Honour signed the Bar Roll and thereafter practised as a member of the Victorian Bar until his appointment as a Judge of the Family Court of Australia in 1977. His reputation at the Bar was that of a formidable advocate in common law cases, and one whose common sense and charm presented great appeal to juries.

Justice Treyvaud came to the Family Court a little more than a year after it was established. His Honour's unfailing good humour, common sense and hard working disposition soon earned him a reputation as a first-class trial judge, a reputation he held until his death. In speaking of Justice Treyvaud at the ceremonial sitting, the Chief Justice said:

> I regard him as one of the best, if not the best, trial judge in the court. He was rarely appealed against and if he was, it was usually on an issue of principle, about which opinions could reasonably differ.

In recent years Justice Treyvaud made a number of visits to the United Kingdom for the purpose of studying family law as it operated in that country. He was the Court's representative on the Family Law Council where he made very significant contributions to the development of the Family Law Reform Bill which incorporates many of the features of the *English Children Act*. So high was the regard in which His Honour was held in the United Kingdom that in 1993 he was invited to be a visiting fellow at Wolfson College, Oxford.

*Justice Treyvaud*

Justice Treyvaud was a wise and fair judge who took time to listen to the problems of others whether within the law or the Anglican Church with which he was so closley associated. He will be remembered as a good and loyal friend by those who knew him.

Justice Treyvaud is survived by his wife Joy, his daughters Robyn and Penny, his son Phillip and his sister Mrs. Jennifer Burger.

# PATRICK IAN BERKELEY PENDER

PATRICK PENDER DIED ON 18 JULY 1995. IT was typical of his tenacity that for over a year before his death doctors were unable to explain how his weakened physical heart could sustain him.

On a bitterly cold day, his family and friends gathered at The Necropolis to remember him. After the words by the bier were spoken, we filed outside to Patrick's widow, Susan, and their children, Sam and Skye. We signed our names on a page held down by a funeral attendant against the biting wind. This was the end of the life of a courageous man of whom colleagues and friends were never heard to say a critical word.

Patrick was born on 8 April 1930 in Adelaide. After Geelong Grammar, Patrick studied law at the University of Melbourne. He was articled to Mr. John Harper of Arthur Robinson & Co. whose son, Richard Harper, was to be Patrick's medical specialist in the last years of Patrick's life. In March 1964, at an elegant country wedding, Patrick married Susan Rymill. He signed the Roll of Counsel in April 1964 and then read with Harry Mighell. Thereafter, Patrick practised at the Bar until about two years before his death, when ill health prevented him from continuing.

Throughout his life at the Bar, Patrick struggled against the consequences of crippling injuries he suffered at the age of 26.

A frustrated racing car driver, Patrick was a flag marshall at the 1956 Albert Park Olympic Grand Prix. One of the racing machines left the track and, slithering out of control, scythed through Patrick's lower legs. Surgeons wanted to amputate both Patrick's legs that very day but Patrick's father, a general practitioner, refused to permit the operations. According to Patrick, his father gave up medical practice to guard Patrick's bed in case there were any second thoughts about the matter. During this time, in the bed next to Patrick, lay the racing driver whose car had left the track.

Operations and complications with skin grafts consumed Patrick's life for the next few years. In the result, Patrick was left with lower legs he described as "mostly tin" and a lifetime dependence on crutches or a stick. In the following years of his life, he was to have nearly 30 further leg operations.

Patrick sustained his pain and frustrating limitations without recrimination or complaint while maintaining his dry, beautifully placed, wit. Indeed, his stoicism presents a dilemma in writing this obituary; how much should one give away of what Patrick hid so well?

It is obviously impossible, nevertheless, to underestimate the impact upon Patrick and his family of the injuries to his legs. It was difficult for him to bear the weight of books for court or to stand

*Patrick Pender*

through a day. His Bar career suffered from absences for major operations and, as a result, he spent many more hours in his chambers than his ability deserved. Most of us at the Bar know the anxiety and frustration that a silent telephone can bring. Patrick wore much of that, always with hope and determination. Eventually, after some years at the Bar, Patrick's health settled somewhat and, to his great satisfaction, he developed a steady practice in the family law jurisdiction.

Patrick enjoyed the life of the Bar with his colleagues. He was often at 13th floor coffee and lunch and relished Bar dinners. He was a genial, amusing companion with perfect manners. Well informed about current political events, he always had a view about them and expressed it in his Jack Hawkins voice with droll, understated humour.

Outside the Bar, Patrick had a great interest in cars and wine. For years he drove a succession of Jaguars, all the latest model and kept immaculately. To see Patrick hauling up at a suburban Court of Petty Sessions in one of these wire-wheeled beauties was the juridical equivalent of a James Robertson Justice entry to a scene in "Doctor at Sea". He drove fast and well and relished driving, before radar checks, to family occasions at Penola, South Australia.

In winter 1970, Patrick and Susan planted vines, riesling, shiraz and cabernet sauvignon, on 35 acres south of Naracoorte. This land was all that remained of many thousands of acres, originally known as Mosquito Plains, settled by Patrick's paternal great-grandfather, John Robertson. Robertson, travelling by dray, had squatted on the

land and established a property which came to be known as Struan.

The vineyard is on classic Coonawarra wine country; terra rossa soil over limestone. The Pender wines were sold under the name, Riddoch Estate. Although never produced in large quantities, they were admired for their quality — and a Clifton Pugh label. It tells something about Patrick's life that the main customers for the wines were the Essoign Club, Maxims restaurant in South Yarra and the Melbourne Club. Allen Myers Q.C. bought Riddoch Estate in 1991 and remains the owner. Patrick is to be buried close to the vineyard, on his family's private cemetery at Struan.

About two years ago a fall and a deep gash in his leg led to a serious decline in Patrick's health. In February 1994 his doctors declared that, owing to heart disease and other complications, he could not be expected to live for more than two weeks. Visitors found, however, that Patrick was still joking, hassling his son about errands, and showing no sign of submitting. His survival a conundrum for his hospital, Patrick was transferred to a hospice. He was there for three months. Eventually, accepting that Patrick had more heart than physically observable, he was transferred to a rehabilitation hospital and, finally, back to his home. There he lived for months until almost the end.

It was typical of Patrick's self-deprecatory humour that, after returning to his home from hospice and hospital, he told his clerk: "I've failed hospice. I couldn't even get that right."

Patrick died leaving Susan (his executor), Sam aged 24 and Skye aged 21. He also left a group of close friends to whom he had been a loyal and stout support. We will treasure our memories of him and pray that, on his next lap around the track, Patrick has the clearer run that he deserves.

David Bennett

# JOHN GINNANE

JOHN GINNANE, A MEMBER OF THIS BAR from 1988 until January 1995, died as a result of a pedestrian accident on 12 August 1995 aged 76.

John Ginnane had practised as a solicitor under his own name in Footscray since the late 1940s, and also for about ten years at Temple Court in the city. He sold his practice to Arthur Secomb & Co. in the early 1980s. After a time as a consultant to that firm, he later became a mentor at the Leo Cussen Institute where he passed on to his "beloved scholars" the skills he had learned over a lifetime. He was a born teacher and was well loved by his students, taking a real interest in their development as people.

John had been an all-rounder as a solicitor, just as at home appearing in court as in carrying out conveyancing. His clients trusted him unreservedly and it was not uncommon for the grown-up children of clients to return to seek his services years after their parents had first been his clients.

John's deep faith affected all aspects of his life. In younger days he had been involved in Catholic lay affairs as a member of the Campion Society and on the *Catholic Worker* newspaper.

Before practising as a solicitor John had been private secretary to Mr. J. Beasley, a Cabinet Minister in the Curtin war-time Government, and had seen the great figures of the day at close hand.

John lived in Footscray most of his life and wondered why anyone would live elsewhere, pointing to its parks, river and proximity to the city. He was a kind and compassionate man, widely known and respected throughout the western suburbs and beyond as a solicitor who would look after the "battler", often not sending bills to those with limited means.

*John Ginnane*

At the Bar he read with and received much assistance from Howard Mason and developed a practice essentially in the criminal courts where he had gained experience years earlier. He became a familiar figure at the Bar with a kindly word or

friendly wave to those he met every day. Courtesy and gentleness were a feature of his dealings with people.

As an advocate he was a master of the felicitous phrase, particularly when making a plea. Notable was his advice to one young offender to make a good confession — to be followed by attending Holy Communion! He believed fervently in what he called the "3 Vs" of advocacy — verve, vigour and vitality, believing that the greatest sin was to leave a court bored. He took some small measure of satisfaction in appearing in his first jury trial at 73 years of age.

John is survived by his wife Eileen and five children, two of whom, Tim and Philip, are currently at the Bar.

John died after visiting Eileen at a nursing home. His parish priest, speaking at the rosary the night before John's funeral, made mention of John's deep faith, his devoted care for his wife and others and asked, "If John Ginnane is not in heaven, who would want to go there?" All who knew John agreed.

## THE SHAPE AND COLOUR OF JUSTICE

IT WAS NOT UNTIL THE 1930S THAT IDAHO judges adopted the wearing of robes. Previously it had been "thought to be elitist" according to a current Idaho Supreme Court Justice.

With all the zeal usually associated with recent converts, the Idaho Supreme Court has rapidly outdistanced its brethren in the other United States. Following a suggestion by Justice Linda Copie Trout, the Idaho Supreme Court has decided to allow the state's judges to wear robes in any colour and any fabric "so long as choices fit the decorum of a courtroom". Justice Trout had tired of the traditional, staid black robes and brought up her idea during an informal discussion with her fellow justices.

Justices can choose from a catalogue with a range of colours from purple to gold to aqua while fabric choices range from polyester to brocade.

Is the designation of the civil and criminal jurisdictions of Victoria's Court of Appeal as red and green courts a harbinger of further developments along these lines? If so, we trust that the court will not be dispensing polyester justice.

*Bar News* has already referred to the views of Chief Justice Warren Burger regarding dress: *qv* 87 *Vic. BN* 71 (Summer 1993).

Burger's predecessor as Chief Justice of the United States was Earl Warren and his transition from Governor of California to C.J. was so sudden that Warren had insufficient time to be fitted with a judicial robe. "While packing for the journey to Washington DC, Warren included his academic gown naively believing that it would suffice in the interim. Upon his arrival it was determined that this was not to be and Supreme Court staff hurriedly rummaged through the accumulated detritus of long departed justices to find a judicial gown to fit the tall Warren. The best they could find had previously been worn by an even taller ex justice with the consequence that Warren tripped on the trailing hem. As he described in his memoirs he "literally stumbled on to the bench".

Since the beginning of this year Burger's successor as Chief Justice, William Rehnquist has been sporting a black robe with four gold stripes on each sleeve. The significance of this is not clear. Is the C.J. over-compensating for the disappointment of not being appointed to "sixer" of his boyhood Cub Scout troop or does it denote years of service — like a venerable old oak tree will he add a ninth ring next year and another with each succeeding year? A more prosaic explanation is the difficulty of remembering his position on the bench. It's all very well for the Supreme Court's most junior member. All Stephen Breyer has to do is seek out the only remaining vacant seat as he follows his fellow eight justices on to the bench. As C.J., Rehnquist does not have this luxury. [At *Bar News* we are unable to confirm the allegation made on Friday afternoon in the Essoign Club by a member who "had dined well" that one member of the Victorian judiciary has a discreet "L" embroidered on one sleeve of his robe and an "R" on the other.]

Chief Justice Rehnquist, through the Supreme Court press office, said he got the idea from seeing a production of Gilbert and Sullivan's operetta *Iolanthe* in which the character of the Lord Chancellor wears a similar robe to that which he has now adopted.

The other Supreme Court justices have yet to announce any alteration to their own robes and a Court spokesperson said the addition of the gold stripes is "very likely permanent". The spokesperson did not make any reference to the possibility of the adoption of a full-bottomed wig as worn by the Lord Chancellor in *Iolanthe*. Such headwear could only assist counsel arguing before the Court. The experience is sufficiently daunting without the distraction of reflections of light emanating from the pilgarlic brows of judicial wisdom.

ABA Journal, *"Technicolour Judges", April 1994, page 39 and "Showing his stripes: Operetta inspires Chief Justice to alter his robe", March 1995, page 35.*

# COURTS FOR THE PEOPLE — NOT PEOPLE'S COURTS

The Honourable Sir Gerard Brennan, AC, KBE
Chief Justice of Australia

*The inaugural Deakin Law School Oration was given by the Honourable Sir Gerard Brennan, AC, KBE, Chief Justice of Australia on 26 July 1995.*

*With the kind permission of the Chief Justice and the Deakin Law School,* Victorian Bar News *is proud to publish the text of that oration below. The Oration will be published in the* Deakin Law Review. *The Editors wish to express their special thanks to the Dean of Law, Professor Philip Clark for his assistance in making the paper available.*

ALFRED DEAKIN, WHILE A MINISTER AND even while Prime Minister, was an anonymous contributor of articles on Australian affairs to the London *Morning Post*. An article which appeared in that journal on 16 November 1903 spoke of the difficult passage which the *Judiciary Act* had had through the Parliament of the Commonwealth. Deakin, who was then Attorney-General, wrote:[1]

> No measure yet launched in the Federal Parliament was so often imperilled, skirted so many quicksands, or scraped so many rocks on its very uncertain passage.

The *Judiciary Act* marked the fulfilment of Deakin's legislative ambition for the creation of the High Court as the ultimate constitutional tribunal for the Australian Commonwealth. Deakin had fought for this in the movement for federation. He had been a protagonist for cl.74 of the draft Bill for the *Commonwealth of Australia Constitution Act* which would have eliminated appeals to the Privy Council in constitutional matters while allowing appeals in other matters subject to limitation by the Commonwealth Parliament.[2] While the Australian delegates were in London to secure the passing of the Bill, a divisive battle raged over the inclusion of cl.74. Chamberlain's government, in coalition with some colonial representatives, were for deleting cl.74 entirely. Deakin recalls in *The Federal Story*[3] that the "Conservative classes, the legal profession and all people of wealth desired to retain the appeal to the Privy Council and had heartily and openly supported Chamberlain's proposed abolition of clause 74". The most significant colonial government to support the deletion of cl.74 was Queensland, influenced by Sir Samuel Griffith, then Chief Justice of the Colony. However, it was he who made the suggestion that appeals to the Privy Council in *inter se* matters should depend on leave to be granted by the High Court itself and that suggestion, says Deakin, "provided the golden bridge over which the delegates passed to union".[4] Deakin, Barton and Kingston had stood firmly in favour of cl.74 throughout the controversy. Ultimately, they salvaged what became s.74 of the Constitution. That section contains the legislative power which was exercised in time to abolish all appeals from the High Court to the Privy Council.[5]

Deakin's second reading speech on the Judiciary Bill, delivered in the year before its final passage, was immediately hailed in the House as an example of his "great ability and eloquence".[6] Much of what he said is as true today as it was 93 years ago. Indeed, it states the basic conceptions on which a federation under the rule of law operates. "What are the three fundamental conditions to any federation authoritatively laid down?" he asked rhetorically. He answered:[7]

> The first is the existence of a supreme Constitution; the next is a distribution of powers under that Constitution; and the third is an authority reposed in a judiciary to interpret that supreme Constitution and to decide as to the precise distribution of powers . . . The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme. The federation is constituted by distribution of powers, and it is this court which decides the orbit and

boundary of every power. Consequently, when we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others — the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the "keystone of the federal arch".

He took that descriptive phrase from another eloquent speaker, Josiah Symon, the chairman of the judiciary committee of the Constitutional Convention meeting in Adelaide in 1897. Symon said that:[8]

unless you have not only a powerful High Court but a High Court which shall be constituted under such a Constitution that it will maintain its fortitude under all conditions, you will damage what is really the keystone of the federal arch.

The rule of law depends on and is perhaps synonymous with confidence in the courts.

The founding fathers clearly saw an independent High Court to be essential to the existence of the proposed Australian Commonwealth. The hard-fought compromise over appeals to the Privy Council could not have been achieved if it were not for the confidence that was then reposed by all parties in the competence and integrity of the judiciary of the Australian colonies. Without that confidence, it is unthinkable that Chamberlain's government would have permitted any limitation of appeals to the Privy Council or would have allowed the Commonwealth to limit the matters in which leave to appeal to the Privy Council might have been asked. It is not without significance that the final great issue that stood in the way of federation was the finality of the jurisdiction to be allowed to the courts of this country. As we approach the centenary of Federation, it is useful to consider the importance of public confidence in the courts of the Commonwealth, States and Territories and the means by which that confidence is maintained.

The rule of law depends on and is perhaps synonymous with confidence in the courts. If we regard the law as the expression of the values of our civilisation, to govern the conduct and the relationships of powerful and weak, rich and poor, government and governed, the majority and a minority, there must be an arbiter whose authority will be accepted by all parties. The law would not be effective if conformity to its precepts depended on force or the imminent threat of force. Such a situation would consume the resources of the nation if it did not first destroy the nation itself. And, in such a situation, what would happen if the State, the enforcing power, refused to accept the arbiter's decision? No, the rule of law must rest on a surer foundation than force or the imminent threat of force. It must rest on the common acceptance, by all who are subject to the jurisdiction of the courts, of the authority of the courts to determine cases and controversies. The rule of law in a free society can be maintained only if, in the event of dispute, it is accepted that curial judgments will prescribe the norm to which all parties will conform.

The rule of law assumes its equal application. The principle of equality under the law is based on respect for the equal dignity of every person. By equal application of the law, the rule of law is made to govern every case, so that justice according to law is administered. It is a corollary of the principle of equality that no person is so powerful or so privileged as to avoid the law to which that person is subject. These principles can operate in practice only if there be such a degree of public confidence in the courts that neither power nor riches, nor political office nor numerical superiority can stand against the weight of the court's authority.

To destroy public confidence in the courts is to destroy the foundation of the rule of law. Without the rule of law as we know it, we would experience tyranny and oppression. Professor Winterton, commenting on the *Communist Party Case*,[9] said that it "demonstrated that our freedom depends upon impartial enforcement of the rule of law, of which courts are the ultimate guardians. Although, of course, not infallible, impartial and fearless courts determined to exercise their proper powers are our final defence against tyranny".[10] Of course, we take the rule of law for granted. We do not perceive a risk to the capacity of our courts to exercise their allotted jurisdiction. Ours is a settled and secure society. That, at least, is the public rhetoric and the private assumption. Reflecting on the factors which inspire public confidence and those which sap it, history demonstrates what can be done to create and sustain it, but some contemporary phenomena reveal a risk to its maintenance. Public confidence in the courts arises from the public perception that judges are men and women of competence and unshakeable integrity.

## JUDICIAL COMPETENCE

The rule of law is effective only if its true terms are discovered and applied. You need competent people to do that. Competence, as well as authority, was the concern of Lord Coke's famous rejection in the case of *Prohibitions Del Roy*[11] of King James I's pretensions to judge:

then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace.

Recruiting from the ranks of barristers of proved competence went a long way towards ensuring that the judges would not only know the law but also would have the practical ability to try cases expeditiously and to determine the relevant facts on the evidence adduced.

Back to the time of Edward I, so Holdsworth[12] tells us, the bench was "recruited from among those who had passed their lives practising at the bar". This training ground of the judiciary produced judges who were learned in the law so that, as Maitland[13] pointed out, the qualities that saved the common law in the Tudor age were "strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries". Recruiting from the ranks of barristers of proved competence went a long way towards ensuring that the judges would not only know the law but also would have the practical ability to try cases expeditiously and to determine the relevant facts on the evidence adduced.

Not all the British colonies were as fortunate as the Mother Country. Anthony Stokes,[14] writing in 1783, noted that:

> Wherever a salary is annexed to the office of [a colonial] Chief Justice, and the income is sufficient to induce a man of abilities to accept of it, a proper person is appointed from England to fill such office; but . . . the Assistant Judges are, in general, appointed [by] the Governor, and are almost always unacquainted with the law.

He instanced some gross miscarriages of justice as the result.

Familiarity with the sources of law not only ensures that a judge can apply the law; it enhances the judge's ability in controversial cases to speak with the authority which inspires public confidence in the court's application of the rule of law. Thus Judge Learned Hand said in his tribute to Justice Cardozo:[15]

> His authority and his immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it — if it is to stand against the passionate resentments arising out of the interests he must frustrate

The need for judicial competence increases with the increasing complexity of the law. When I first practised at the Bar, the assessment of damages for personal injury was a relatively simply matter. Actuarial calculations would then have been regarded as clever attempts to confuse what was essentially a matter of impression. By the time I sat on *Todorovic* v. *Waller*,[16] the significance of discount rates had been explored at appellate level on many occasions. Today's plethora of statutes and statutory instruments, the contemporary appellate development of the law in various fields, the surfeit of published decisions from all courts and tribunals and the explosion of legal sources on computer data bases tax the ability of any lawyer to ascertain confidently the law to be applied in a problematic case. In *Grant* v. *Downs*,[17] the Court spoke of the law as "being a complex and complicated discipline". There is practically no field of law within the jurisdiction of superior courts today in which problems drawn from other fields of law do not intrude.

A judge who is incompetent in finding his or her way through the areas of law touching the jurisdiction to be exercised is a bull in the judicial china shop. Not all the broken pieces can be put together on appeal and, even if they be restored, the pecuniary and personal cost is unacceptable. Sometimes, in discussions about judicial appointments, the criterion of professional merit seems to receive mere lip service. Yet, since it is one of the critical factors in the capacity of the courts to maintain the rule of law, it is one of the most important factors on which public confidence in the courts depends. Competent, well-furnished lawyers, with the experience and capacity to preside over trials of complex issues are needed to constitute the benches of the trial courts. They are in short supply and many who are fitted for judicial appointment decline or defer acceptance for years.

## JUDICIAL INTEGRITY

Confidence in the courts would be destroyed if judicial integrity were suspect. Judicial integrity in

a system that applies the rule of law equally to all is manifested by impartiality between the parties, procedural fairness and a rigorous application of the law. Impartiality, as Lord Devlin remarked, is the supreme judicial virtue. The judge must not only be but also appear to be impartial. Lord Devlin commented:[18]

> The Judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails. Want of impartiality poisons the stream of justice at its source; an appearance of partiality dries it up.

Judicial impartiality is not a quality that is picked up with the judicial gown or conferred by the judicial commission. It is a cast of mind that is a feature of personal character honed, however, by exposure to those judicial officers and professional colleagues who possess that quality and, on fortunately rare occasions, by reaction against some instance of partiality. Impartiality may produce a peaceful and courteous demeanour in court, but it produces more than demeanour. This indefinable quality governs the conduct of the proceedings, the evaluation of evidence, the conclusion of facts and the analysis and application of legal rules.

The appearance of impartiality is as critical to the confidence reposed in the courts as impartiality itself. No unsuccessful party should be left with any reasonable apprehension of bias affecting the decision. Nor should the public have any ground for concern on that score. For that reason, the courts themselves have laid down the rule[19] that a challenge to a decision on the ground of bias will succeed if "in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him".[20]

The second aspect of judicial integrity is procedural fairness. That is a fundamental postulate of the common law[21] on which the courts insist. In an adversary system, the parties must be left to conduct their cases as they see fit, but the procedure must be such that each party has a fair opportunity to present his or her case.[22] And, in the case of an unrepresented person on trial for a criminal offence, a further duty is imposed on the trial judge: the judge must inform the accused of his procedural rights.[23]

Judicial integrity also calls for a rigid application of the relevant rule of law. In the lower courts, the relevant rule of law must be ascertained in strict accordance with the decisions of courts higher in the curial hierarchy. But, in the higher appellate courts and particularly in the High Court, the relevant rule of law must be ascertained in strict accordance with the judicial method. The judicial method allows for some development of legal principle, but it is subject to clear limitations. No court is authorised to change a rule of law fixed by the Constitution of the Commonwealth or the Constitution of a State or fixed by a valid statutory provision. Those areas apart, the higher appellate courts have the authority — indeed, the responsibility — by analogical reasoning and by reference to the enduring values of the society which the law is designed to serve, of maintaining the rules of law in a state which commands the respect of the contemporary community. That is not to say that the outcome of particular cases will be pleasing to all or even to a majority of the community. But it does mean that a fair and informed analysis of the principles which have determined the outcome will be found to be in accord with enduring values. Enduring values are not to be equated with popular opinion on some issue of transient interest. Enduring values are the bonds of a civilised society that lives in peace; lesser values are the stuff of controversy within such a society, settled if need be by the political process.

This is not the occasion to expound the scope of the jurisdiction of appellate courts to develop the law. It is sufficient to rebut the notion that courts which develop the law or reveal the implications of a constitutional or statutory text are exceeding their proper function. There is a natural tension between maintaining the certainty of the law and developing the law to answer contemporary needs, but that has to do with the desirable pace of change and the weight attributed to different factors relevant to legal reasoning. That tension is not unique to this country. Activism and self-restraint are the descriptions given to the differing approaches of courts in the common law world. It is interesting to note that the tension between them has been experienced in Europe as a Judge of the Court of Justice of the European Community recently remarked:[24]

> In Europe the problem was not dressed up as activism/self-restraint; because of different historical circumstances, it remained as a problem of respect for the separation of powers.[25] However, the historic necessity came to Europe too, with the Community, and rendered the activism of the Court of Justice expedient . . .[26]

In 1902, Deakin did not envisage the function of the High Court to be the exposition of the static content of the Constitution. He saw the Court as an interpreter of the Constitution as an organic instrument, answering the needs of the nation as it grew and changed. In his second reading speech on the Judiciary Bill,[27] a passage appears which, despite its length, is worth remembering 93 years later:

> the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time

to transfuse into it the fresh blood of the living present, is the Judiciary . . . It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.

So long as the judges are impartial, procedurally fair and rigorous in the application of the law, the judiciary has done what it can to preserve that confidence in the courts which ensures that our society enjoys freedom under the rule of law.

Mr. Conroy interjected:

But we cannot read into the Constitution something which is not there.

To this, Deakin replied:

Perfectly true. Yet if he takes the doctrine of implied powers as developed by the Supreme Court of the United States, I will undertake to say that the ablest of its earliest lawyers — even Hamilton or Madison — could not have discovered the faintest evidence of the existence of a power which now authorises many of the greatest operations of its government, and which has been of incalculable advantage to the United States. Why? Because the law, when in the hands of men like Marshall or those trained in his school, or of the great jurists of the mother country, becomes no longer a dead weight. Its script is read with the full intelligence of the time, and interpreted in accordance with the needs of time. That task, of course, can be undertaken only by men of profound ability and long training. It is to secure such men that we desire the establishment of a High Court in Australia.

It is not for me to say whether the present Court, which happily includes a distinguished woman in its membership, answers that lofty description. But when activism is paraded as a ground of criticism, it is as well to remember that, from a time before its creation, the Court was intended to speak with a voice that interpreted the spare text of the Constitution for each generation of the nation. In today's changing world, the courts would forfeit their integrity if they failed to exercise their legitimate jurisdiction to declare the general law in terms which, while truly giving effect to organic and statutory law, accord with the enduring values of our society.

So long as the judges are impartial, procedurally fair and rigorous in the application of the law, the judiciary has done what it can to preserve that confidence in the courts which ensures that our society enjoys freedom under the rule of law.

Of course, that does not guarantee, nor should it guarantee, immunity from criticism. Nor do judges expect to be immune from criticism. Sir Frank Kitto, in his splendid paper "Why Write Judgments?"[28] said:

Every Judge worthy of the name recognises that he must take each man's censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all.

That is a statement of prudence; it is also a statement of the resoluteness of a judge. Every judge is conscious that, at some time, a judgment will be unpopular with the powerful, or hurtful to one whom the judge would not needlessly hurt, or satisfying to a cause with which the judge has no sympathy. The foresight of such consequences cannot be permitted to influence the judgment. Independence from improper influences is, in the first place, something that each judge must consciously and self-confidently achieve. Nevertheless, if our system is to buttress the fortitude of mind expected of a judge, it must afford the judge some protection against external influences. Chief among these influences is the power of the political branches of government.

## EXTERNAL INFLUENCES

Hamilton,[29] observing that the judicial branch of government did not command the force of the executive or the power of the legislature, held the judicial branch of government to be "the weakest of the three departments of power". He thought "that all possible care is requisite to enable it to defend itself against [the] attacks [of the other two departments]" and that "from the natural feebleness of the judiciary, it is in continual jeopardy of being over-powered, awed, or influenced by its coordinate branches". The safeguards devised to protect the judiciary from the executive branch of government and, at the same time, to facilitate the exercise of judicial power independently of other alien influences were put in place by the Act of Settlement 1701.

Prior to that time, English judges were appointed by the Crown during the Crown's pleasure. Those judges who opposed the Crown were often dismissed. The Crown consulted the judges on forthcoming cases, particularly if they were of a political nature. In 1637 in *Hampden's Case*[30] the judges upheld the Crown's power to exact ship

money in the exercise of the Royal prerogative without the authority of Parliament. But a compliant judiciary was the harbinger of revolt. Holdsworth regards the judgment in *Hampden's Case* as containing the most logical expression of the theory of sovereign prerogative power just before its final overthrow.[31] Then, after the Bill of Rights reined in the prerogative, s.3 of the Act of Settlement provided that upon the Hanoverian accession:

In recent times, security of tenure has been legislatively undermined.

> Judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them.

Tenure and conditions of service conferred security and independence on the judiciary. Elsewhere[32] I have described tenure and conditions of service as the "twin pillars" of independence. Tenure and an irreducible salary are secured for federal judges by s.72 of the Constitution. The tenure of State and Territory judges of superior courts is not constitutionally entrenched except in New South Wales.[33] In recent times, security of tenure has been legislatively undermined. Nominal tenure of judicial office has been preserved in some cases while the jurisdiction of the court to which the judge was appointed has been removed. Examples can be found in the statutes of both the Commonwealth and the States.

The undermining of security of judicial tenure by this device has been attributable to the desire of governments either to strip a particular appointee of jurisdiction or to redistribute a specialist jurisdiction. In other words, governments have sought to undo decisions which have proved unsatisfactory to the government of the day. Government decisions on the creation of specialist courts, on the vesting of particular jurisdictions and on the appointment of judges have a long life. If judicial independence is to be maintained as a cornerstone of our society, these decisions, once made, must be recognised as beyond recall. They must therefore be made with all due deliberation. They should not be undone by interfering with the security of tenure which is essential to the protection of judicial independence. The risk of such interference for the impartial application of the rule of law is manifest.

Of further concern is the want of an adequate mechanism for determining judicial remuneration. Inflation was not a concern when the Commonwealth Constitution precluded the reduction of judicial salaries. But the recent report on remuneration by Professor Winterton for the Australian Institute of Judicial Administration[34] has demonstrated that the political branches of government have acquired what they were denied by the Act of Settlement, namely, financial power over the judiciary. The report cites[35] a Canadian Commission on Judicial Remuneration which remarked:

> the mere appearance of the judges having to negotiate with the executive branch would only erode the public perception of judicial independence.[36]

The AIJA report proposes an independent tribunal to review remuneration annually.[37] That proposal seeks to reconcile judicial independence with Parliament's control over appropriation. That would remove the possibility, not unreal, that satisfaction with a court's decisions by the Executive or by those who influence the Executive might be a condition of updating remuneration.

## JUDICIAL IMMUNITY

At the same time as English judges acquired security of tenure under the Act of Settlement 1701, the judges of the superior courts of record developed a common law immunity from civil suits[38] for an act done judicially in good faith and in the belief that there was jurisdiction to do it.[39] If a judge were subject to civil liability in respect of his or her judicial acts, the judge would be tempted — and, where the aggressive and powerful were involved, the temptation would be hard to resist — to decide cases in such a way as to eliminate or reduce the risk of being sued. The equal application of the rule of law would be impossible generally to maintain.

## THE MAINTENANCE OF PUBLIC CONFIDENCE

This is a brief and incomplete review of the factors which, on the one hand, maintain public confidence in the courts and, on the other, present some risk to the maintenance of public confidence. Public confidence depends both on the reality and the perception of a judiciary that is competent, of unshakeable integrity and isolated from influences that might improperly affect the administration of justice according to law. Its awesome powers must be exercised always in the service of others. It must always respond to any application duly made to it. And it must account publicly and to the parties for the reasons for its decisions. It is a judiciary for a society living under the rule of law. Its standards must be, and be seen to be, unimpeachable.

Our traditions and our system know nothing of decisions reached according to mass opinion or popular acclaim. If mass opinion or popular acclaim were the reference points, courts could trim

their decisions to accord with public sympathy or outrage, or the policies of the government of the day, or popular political opinion, or the pontifical pronouncements of the columnists. But they could not maintain the rule of law. In our courts, popularity of decisions is no criterion of the true discharge of judicial duty. The rule of law must stand, when needed, against the power of public opinion and those who might influence it. That is not to discount the enduring values of society but it does mean that the true accord between society and the law by which it is ruled is to be found in the principles of law expounded in a court's reasons for judgment — not necessarily in the result.

**Our traditions and our system know nothing of decisions reached according to mass opinion or popular acclaim.**

The reasons for judgment give a public account for the exercise of judicial power. The judge, who is bound by the law and by the facts of the case but who is accountable to no government, must expose the reasons for judgment to public examination and criticism. To quote Sir Frank Kitto again:[40]

> The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance. Jeremy Bentham put the matter in a nutshell . . . when he wrote . . . :
>
> > Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying on trial.

Given the safeguard of publicity, the exercise of judicial power according to law can command the continued confidence of the community. Of course, publicity is not always accurate and criticism is not always informed. That must be accepted. Judges are not fitted to promote or defend themselves or their decisions. Not for them are information agencies, confidential briefings or personal relationships with the moulders of public opinion. They have neither talent nor time to seek public favour for decisions reached in discharge of their duty. Even if there be a scandalous disparagement of a court or judge, the judge will regard "the good sense of the community [as] a sufficient safeguard".[41]

Perhaps there are risks in that sanguine approach, for it would be an injury to society itself if the courts were so portrayed as to lose public confidence or if misleading publications disheartened the judges in discharging their lonely duty. Inaccuracy of reporting, trivialising of issues, misunderstanding of principle or a desire to subject a remote judiciary to the buffeting of public opinion could erode public confidence in the courts. But that stage has not been reached. To be sure, there are some petulant or pusillanimous annoyances from time to time but these are seen by the community and by the judiciary alike to be insubstantial. Far more important are the large debates on issues of principle. These debates are to be welcomed. When they are fostered by informed reports, the community gains an interest in the legal principles which govern important aspects of our lives and relationships. By such debates, Australians have been informed about native title, the treatment of refugees, the power to impose taxes, the operation of corporations, the investigation and punishment of crime and the awarding of compensation for loss. It is a sign of vigour in the judicial branch of government that informed discussion on the administration of justice is, and always has been, a feature of Australian life.

After a lifetime in the law, I count myself fortunate to have known the Australian judiciary as an institution who, by their competence and unshakeable integrity, have given the nation its confident freedom under the law. That is the aspiration which Deakin entertained for the Australian courts. It is an aspiration which the graduates of the Deakin Law School may entertain as they place their talents and their training at the service of the nation.

NOTES

1. Reproduced in J.A. La Nauze (ed.), *Federated Australia — Selections from Letters to the Morning Post 1900–1910*, (1968), p.119.
2. See cl.74 in the final draft Bill in the *Official Record of Debates of the Australasian Federal Convention*, vol.v, p.2536.
3. Deakin, *The Federal Story - - The Inner History of the Federal Cause*, (Robertson & Mullens, Melbourne) (1944), p.156.
4. *The Federal Story*, p.156.
5. *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth).
6. *Hansard*, 18 March 1902, p.10989.
7. *Hansard*, 18 March 1902, pp.10966–7.
8. *Official Record of Debates of the Australasian Federal Convention: Adelaide 1897*, vol.iii, p.950.
9. *Australian Communist Party* v. *The Commonwealth* (1951) 83 CLR 1.

10. (1992) 18 *Melbourne University Law Review* 630 at 658.
11. (1607) 12 Co Rep 63 at 64–5 [77 ER 1342 at 1343].
12. *A History of the Laws of England*, vol.ii, p.229.
13. *Selden Society Year Book Series*, vol.I, xviii; cited by Sir Owen Dixon in "De Facto Officers", *Jesting Pilate*, p.229.
14. *A View of the Constitution of the British Colonies in North-America and the West Indies*, (1783), pp.264–5.
15. (1939) 52 *Harvard Law Review* 361.
16. (1981) 150 CLR 402.
17. (1976) 135 CLR 674 at 685.
18. "Judges and Lawmakers", (1976) 39 *Modern Law Review* 1 at 4.
19. The rule does not apply when, of necessity, a particular judge must sit on a case.
20. *Grassby* v. *The Queen* (1989) 168 CLR 1 at 20 per Dawson J. citing *Livesey* v. *New South Wales Bar Association* (1983) 151 CLR 288 and *Reg.* v. *Watson; Ex parte Armstrong* (1976) 136 CLR 248.
21. *Cooper* v. *Wandsworth Board of Works* (1863) 14 CB (NS) 180 at 194 [143 ER 414 at 420].
22. See, for example, the procedural steps insisted on in *Smith* v. *N.S.W. Bar Association* (1992) 176 CLR 256.
23. *MacPherson* v. *The Queen* (1981) 147 CLR 512.
24. Judge C.N. Kakouris, during the ceremony of his nomination for an honorary Doctorate of Laws at the University of Athens, ms. par.25.
25. "Constitutional courts were established in Europe only after World War II. In Germany and Italy initially, as a reaction to totalitarian regimes. And their activism — without the term — was observed mainly in connection with human rights, together with the renaissance of natural law. The German Bundesverfassungsgericht, however, did mention activism in its judgments."
26. The Judge notes that "the Court of Justice is not bound by its previous judgments, unlike the Supreme Court [of the United States] with its *stare decisis*, which constitutes some limitation. Another method of self-restraint is the so-called 'political question doctrine', which is reminiscent of the doctrine of acts of government in Europe".
27. *Hansard*, 18 March 1902, pp.10967–68.
28. Delivered 1973, published in (1992) 66 *Australian Law Journal* 787 at 790.
29. *The Federalist Papers*, No.78 (1961 Mentor ed.), pp.465–6.
30. (1637) St Tr 825.
31. *A History of English Law*, vol.vi, p.28.
32. "Courts, Democracy and the Law" (1991) 65 *Australian Law Journal* 32 at 40–1.
33. *Constitution Act* 1902 (N.S.W.) s.53, entrenched by s.7B after the 1995 referendum.
34. "Judicial Remuneration in Australia" (1995).
35. at p.77.
36. *Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits* (5 March 1990), p.6.
37. at pp.81–4.
38. Holdsworth, *A History of the English Law*, vol.vi, p.234.
39. See *Sirros* v. *Moore* [1975] 1 QB 118
40. "Why Write Judgments?" (1992) 66 *Australian Law Journal* 787 at 790.
41. (1983) 152 CLR 238 at 243; *Nationwide News Pty. Ltd.* v. *Wills* (1992) 177 CLR 1 at 33.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# GENDER EQUALITY IN COURTS AND TRIBUNALS

Judge Rosemary Balmford*

*An edited version of a paper presented to the Thirteenth Biennial Conference of District and County Court Judges of Australia, which was held in Melbourne from 29 June to 1 July 1995*

WHEN THE CHIEF JUDGE ASKED ME TO prepare this paper I took particular notice of the title which it had already received. It is a paper about gender equality — not about the more fashionable subject of gender bias. The difference is, perhaps, only a question of emphasis — but of the positive emphasis of those who planned this conference. In preparing the paper, I started from no particular position. For the most part I have not distinguished between courts and tribunals in what I have to say, but there is one place where a useful distinction can be made.

I have been concerned principally with the composition of, and conduct in, courts and tribunals. Generally, I have not considered the substantive law which courts and tribunals apply, although that might be thought to fall within the title of the paper.

My object has been to make judges aware of what is being said about us, and to initiate discussion. We may or may not think that the system is perfect as it is: but whatever we think, it is important to know what other people are thinking and saying.

One must, as always, begin by defining one's terms. Norma Wikler, a sociologist, takes credit for inventing the term "gender bias", because it sounded better than "sexism". "Gender bias", she said, "sounds more like a disease of some sort that is nobody's fault". So, adapting her definition of "gender bias" I would propose to define "gender equality".[1]

Gender equality exists in the absence of attitudes or behaviour reflecting:

- stereotypes about the true nature and proper roles of women or men — for example, that men's role is to earn money (as, for example, by the practice of the law), while women's role is to care for children;
- cultural assumptions about the relative worth of women and men — for example, that a boy baby is to be preferred to a girl baby;
- myths and misconceptions about the economic and social realities of either sex — for example, that an equal distribution of assets on the termination of a marriage will necessarily do justice to both parties; and
- the imposition of burdens on one sex that are not imposed on the other — for example, assuming that the whole burden of supporting women and children should fall on men.

In this paper it seems appropriate to consider and respond to the criticisms which are levelled at us, the judges, by those who perceive an absence of gender equality in courts and tribunals.

## GENDER EQUALITY AND THE APPOINTMENT OF JUDGES

There is an enormous amount of published writing on this subject. Much of it seems to assume that the judiciary is a self-perpetuating oligarchy, and that accordingly it is male judges who have decided that there should be few or no women judges. In 1993 an editorial in the *Age*,[2] a newspaper which should have known better, made that assumption and drew a stinging rejoinder from the Chairman and Deputy Chairman of the Victorian Bar.[3] Having said that, I was interested to read an address by the Chief Justice of Western Australia[4] in which he describes and applauds the procedures whereby in all Australian jurisdictions the Attorney-General, in considering appointments, consults at least with the head of the relevant court, and often more widely. But the responsibility for appointments, of course, lies always with the Attorney, and ultimately with Cabinet.

Given that we bear no responsibility for the gender balance of the courts, it is still, I think, important that we are aware of what is said on that

*I acknowledge with gratitude the assistance which I have received in the preparation of this paper from Maureen Hickey Q.C. and my associates, Gabriella Trifiletti and Peter Matthews, none of whom, however, is responsible for any of the views herein expressed.

subject. It is not in issue that most judges in this country are men, and that many of the women judges are of relatively recent appointment. Whether, as is often said, the male judges are all white, Anglo-Celtic, over 50 and educated at expensive schools are matters which are not before me and as to which I make no finding. It is not in issue that, as with the women judges, most, but not all of them, have practised as barristers.

*Judge Balmford*

Nor is it in issue that the number of women being admitted to practise is now more or less equal to (if it does not exceed) the number of men,[5] but that at the time when most of the judges here present were admitted, there were considerably fewer women being admitted than men. Nor is it in issue that it seems highly probable that there will always be a higher leakage of women than of men from the profession, largely because of cultural assumptions relating to the care of children.

Nevertheless, those of us who have said for many years that there would be more women appointed to the Bench when there was a large enough pool of eligible women from which to draw, have had the view for some time now that, with little being drawn off from it, the pool is lapping at our feet.

### *Why Appoint Women Judges?*

A number of arguments are produced in support of the view that more women should be appointed to the Bench. All of the arguments are interesting, and some have substance. Those which relate to the judge as decision-maker proceed on the assumption that all decisions in courts are made by judges, and totally ignore the role of juries, and the special position of trial judges, who must, after all, constitute the majority of judges in any jurisdiction. The trial judge may set, or at least control, the style and tone of the hearing, but has a less dynamic role than that envisaged by most writers.

In my view, an overwhelming argument for making all qualifications, professions, jobs and activities within the community available to women equally with men, is that their exclusion wastes the abilities of half the population.

Further, the woman judge has, and will have for many years, an undoubted function as role model — for witnesses, parties, the legal profession and those who read accounts of cases.[6] Her visible presence helps to demolish stereotyped views of the role of women in society, and she serves as an example to all women. Thus each appointment of a woman judge makes its own contribution to gender equality in the wider community, as well as in the legal profession.

The Commonwealth Attorney-General's Department has suggested that the community cannot be expected to respect a judiciary that is drawn from a narrow sector of society and does not represent the diversity of the community.[7] To that one might say that the community has always been expected in the past to respect such a judiciary and has done so; although conceding that the community is better educated, more sophisticated and more critical than, say, 100, or even 50, years ago. Further, that suggestion could justify a policy of deliberate appointment of judges from many sectors of the community other than the women who make up 50% of it. The community can be divided according to race, religion, place of residence, political commitment, and a host of other bases besides gender. These divisions, of course, cut across gender lines as they cut across each other.

The Attorney-General's Department discussion paper produced significant criticism, from the Law Council of Australia among others, on the ground that it seemed to imply that appointments to federal courts would in future be intended to render the judiciary more representative of particular groups in society. The Law Council produced the unthink-

able analogy of selecting an Australian cricket team on that basis.[8] At a conference in November 1994 the Attorney-General, Mr Lavarch, dissociated himself from that position, drawing a distinction between a judiciary that "reflects the community which it serves" and the unacceptable concept of "a judiciary that represents sectional interests in society".[9]

The distinction between "reflection" and "representation" seems to me to relate more to the purpose of the appointment than to the nature of the appointment. To appoint a woman (or, say, an Aboriginal or a Moslem) judge in order that the Bench may "reflect" the community is perceived as legitimate. To do so in order that that judge may "represent" women, Aboriginals or Moslems is not. But, whatever its purpose, the appointment has still been made.

Chief Justice Malcolm[10] also supports the concept of a judiciary "which has a composition which broadly reflects the composition of society", which he sees as a development naturally occurring over time with changes in the composition of the legal profession. At the present rate of progress, however, it will be a long time.

The English legal writer David Pannick[11] says that the work of judges should be done by people of disparate backgrounds in terms of age, race and sex, because it is inequitable in a democratic society that one set of values should predominate on the Bench. This begs the questions of whether all middle-aged male judges have the same values, and of whether, if yes to that question, those are in any case the appropriate values to guide, if they do, the performance of the judicial function.

Another suggestion from the Commonwealth Attorney-General's Department is that women judges may help eliminate gender bias in the law by using their understanding of women's experiences in their decision-making.[12] This view was shared by Cooke P. in the New Zealand case of *Phillips* v. *Phillips*,[13] an appeal from a judgment setting aside a consent order as to the division of property following the breakdown of a *de facto* relationship which had continued intermittently for some 12 years over a total period of 20 years and produced four children. His Honour said:

> The six judges who have sat on this case in the two Courts are all men, most of us of more than middle age. This is a type of case suggesting that a woman's insight would be helpful on at least one of the Benches in assessing the claims, personality and situation of a litigant woman and arriving at justice between man and woman. I do not feel confident enough to make a finding of unconscionability against the husband when the trial Judge has made none.

I should assure those who read this paper that His Honour was not, as might appear, abdicating his responsibility. The next paragraph of his judgment begins: "Fortunately the case can be decided on other grounds". But I think that most judges, male or female, would feel, regardless of their gender, that they have experience in assessing the "claims, personality and situation" of a variety of both men and women, which they draw upon to resolve the myriad human problems which come before them.

But there is a need for a conscious awareness among those involved in the appointment process that women should be considered for appointment alongside men and according to the same, indistinguishable, criteria.

### *Which Women Should Be Appointed Judges?*

The Chief Justice of the High Court has said that it is desirable for the judiciary to reflect to a greater extent the composition of the community, and that he expects an increase in appointments of women of merit. But he stresses, as we all would, that those appointing judges must have regard to paramount criteria based on merit: which he defined as professional qualifications, skill, experience and integrity.[14]

However, those of us who, for whatever reason, believe that the appointment of women judges is desirable, have a concern that appointment in the past on the basis of merit has not yet led to the proportion of women to men on the Bench corresponding to the proportion of eligible women to eligible men in the legal profession. (To support that statement by statistics would involve an extensive examination of the meaning of the word "eligible" in this context, upon which I do not propose to embark.) Deliberate appointment of women in preference to men is, like deliberate appointment of men in preference to women, utterly inappropriate. But there is a need for a conscious awareness among those involved in the appointment process that women should be considered for appointment alongside men and according to the same, indistinguishable, criteria.

The Australian Law Reform Commission report *Equality Before the Law* recommends in this context that there should be a commission to advise the Attorney-General on suitable candidates, that judges should be appointed part time to enable

women to carry out their family responsibilities, and that the selection criteria for judges should be identified and publicised.[15] I have reservations about all of these recommendations, but they are based on developments being considered in other jurisdictions.

Sean Cooney, a Melbourne academic lawyer, recommends a program to ensure that assumptions in the concept of merit which operate against the appointment of women should be removed.[16] This is a more general approach and therefore perhaps easier to implement. Before that can be done, however, those assumptions must be identified.

An anonymous leader-writer in the *Australian Financial Review* has written:

> To artificially accelerate [the appointment of women judges] would be an insult to all female judges and, even worse, would of necessity deprive the community of what it really wants from the judicial system: the best judges.
>
> It would also be patronising. Women use the courts to obtain a definitive ruling on their rights and obligations, not to bask in the sisterhood's achievements.[17]

What is wanted is that judges should be selected, according to appropriate criteria, from the best people available. If this is to be achieved, those who make appointments to the Bench must give the same sort of consideration to eligible women as they do to eligible men.

## GENDER EQUALITY AND MEMBERSHIP OF TRIBUNALS

Here it is appropriate to embark on a small digression relating to tribunals. With 10 years' experience as a Senior Member of the Commonwealth Administrative Appeals Tribunal and two years' experience as a Judge of the County Court of Victoria, I have a useful familiarity with the Commonwealth tribunal system, and some anecdotal awareness of Victorian tribunals. My subjective feeling that the proportion of women on tribunals was significantly higher than the proportion of women on courts was justified by investigation, for the purposes of this paper, of such information as is readily available to me.

In the year 1992–93 there were 100 serving non-judicial members (full time and part time) of the Commonwealth AAT, of whom 20 were women.[18] In 1992, there were approximately 220 members of the Commonwealth Social Security Appeals Tribunal, in four separate categories. Of the legal, medical, and full-time (departmental) members approximately 50% were men and 50% women. Of the welfare members, 75% were women.[19] As at 31 December 1994, of 52 non-judicial members (full time, part time and sessional) of the Victorian AAT, 14 were women (25%).[20]

There are several characteristics of tribunals which in this context distinguish them from courts and which might explain their higher proportion of women members. Many of their members are not lawyers, and they may be members of professions, such as social work, in which women predominate. Appointments to tribunals are normally made or recommended by a Minister, and although sometimes this is an Attorney-General or Minister for Justice, in many cases it is a Minister of a non-legal department.[21] Part-time appointments, common in tribunals, may be seen as attractive to women with other responsibilities. Perhaps the concept of "merit" is differently perceived in the tribunal context. Often, although not invariably, there will be an advertisement seeking applications from persons interested in membership. This last factor might lend support to the argument that, when those responsible for making appointments are men, they are unlikely to think of women as potential appointees unless the names of women are brought to their attention, by application or otherwise. My own appointment to the AAT resulted from my answering an advertisement. Needless to say, my appointment to the County Court did not.

### *Will Women "Judge" Differently?*

Judges pride themselves on their objectivity and impartiality. But many feminist writers suggest that the point of view which judges perceive as objective is, in fact, a male point of view.[22] It is difficult for a woman who has spent many years in the legal profession to respond to that suggestion. One can be challenged as having been institutionalised (or perhaps self-selected) into the adoption of male norms. Here we have a catch. A woman with sufficient experience of the law to justify her appointment to the Bench may be seen as having adopted the male point of view. Accordingly, her appointment will do nothing to alter the male judicial perspective - if the so-called objective perspective is in truth male. If that is so, there are problems with the suggestion made by those feminist writers that women judges will change that perspective.

However, let us assume for the moment that the male view is the view generally considered appropriate to inform the administration of justice. If that is the case, where do we get if we leaven that male view with a so-called female view — always supposing that a woman judge has preserved her female view through her years of practice?

#### *Women judges: a "different voice"?*

A number of writers, chiefly in North America, who begin with the assumption that the male view is not generally appropriate, have attempted to support an argument for the appointment of more women judges by speculation as to the likely effect

of their presence on the Bench.[23] However, their speculations tend to be inconclusive, reminding one of the angry King Lear:

I will do such things,
What they are, yet I know not: but they shall be
The terrors of the earth.[24]

Sometimes the reader receives the impression that some of these writers assume that a woman judge will always be biased towards a woman litigant and a male judge towards a male litigant.

Suzanna Sherry[25] goes further than some other writers, expressing the view that "a feminine society [whatever this may mean] . . . makes decisions based on what is right under the circumstances, not on who has rights in the abstract". I would expect that this view, if accepted, would be perceived by all participants in this conference, to be an argument against the appointment of women judges. We have all of us, men or women, regretted the necessity to make decisions on the basis of "who has rights in the abstract", which we have felt not to be "right under the circumstances". But we make our decisions according to law. Sherry does not appear to me to be accurately describing different characteristics of men and women; she is certainly not describing different characteristics of men and women judges.

*Problems with the "different voice" theory*

A major problem, for me, with all this speculation, is that once you start justifying the appointment of women to the Bench by generalisations suggesting that women have a special perspective and a special way of deciding things, you are adopting the kind of decision-making on the basis of generalisations about groups in the community which equal opportunity legislation was designed to overcome.

This point was recently made by Sheryle Bagwell in the *Australian Financial Review*, discussing the appointment of women to company boards.[26] The argument that women should be on boards because they bring different skills and concerns to the boardroom, she said, "is the same sort of stereotyping that in the 1950s kept women in the kitchen, barefoot and pregnant. Women are better cooks and have little interest in anything else, right?"

In considering appointments to the Bench, individuals must be looked at as individuals, with the qualifications, life experiences, personality traits and abilities which each individual has, rather than as members of a class with certain characteristics perceived as attributable to all members of that class. Personally, I am conscious of a difference in experience between myself and most of the other judges on the County Court in that I have not practised as a barrister. In a professional context, I find that a greater difference than the fact that I am a woman and most of them are men. (Having said that, I should make clear that my consciousness of that difference comes from myself alone, and not from anything said or done by any of the other judges.)

A hundred years ago or so, the generally accepted view seems to have been that men and women were so inherently different, and women so inferior, that a woman could never become a lawyer, let alone a judge. (This view, of course, ignored the traditional roles of women as publican, brothel-keeper or reigning sovereign.)

By the time when I was a student and a young lawyer, in the 1950s and 1960s, the atmosphere had changed. Those of us who were in the small minority of women law students and women lawyers saw ourselves as unusual, by virtue of being a minority, but not as relevantly different from men. The atmosphere seems to have changed again. Today, much writing on the subject seems to be informed by the assumption that women are inherently and relevantly different from men, and accordingly should be appointed to the Bench because of what they have to contribute on the basis of those differences. I am concerned at the possible extensions of the application of that assumption.

If it is accepted that women's thinking relates more to an optimum outcome for all individuals involved rather than to concepts of winning or losing,[27] and a woman judge is therefore likely to decide cases which come before her on different principles from a male judge, will forum shopping take on a new dimension? More importantly, from the point of view of women lawyers, will there be a backlash against the appointment to the Bench of these strange, different animals whose decisions cannot be justified on what have hitherto been perceived as "normal", "proper" grounds?

*Women judges and women's experience*

It is often said that women judges will bring to the courts an empathy and insight into women's problems based on their own experiences as women, or their awareness of the experiences of other women. An Australian illustration of this principle is readily to hand.

*Singer* v. *Berghouse (no. 2)*[28] was an appeal to the High Court from a decision of the New South Wales Court of Appeal dismissing an appeal from the Master against the dismissal of a testator's family maintenance application. One matter defined as relevant by the legislation[29] was the "contribution [by the applicant] . . . whether of a financial nature or not . . . directly or indirectly to . . . the welfare of the deceased person". The applicant had given up her employment to be with and look after her husband. On that point Gaudron J. said:[30]

The tendency of the courts to overlook or undervalue women's work, whether in the home or in the paid work force, has often been remarked upon. To my mind, that is what is involved in the failure to acknowledge the significant contribution involved when a wife gives up paid employment to be with and look after her husband. . . the failure to acknowledge that by giving up her paid employment Mrs Singer made a significant contribution to her husband's welfare amounted to a failure to have regard to a relevant circumstance.

Gaudron J., the only woman member of the High Court, was the only member of the Court to mention this specific matter.

*Australian research*

There has been little Australian research on whether women judges in fact decide cases differently from men — there are obvious problems in setting up a research program. However, Roger Douglas and Kathy Laster of La Trobe University examined the experience of the Victorian Magistrates' Court in which some 20% of the magistrates are now women, the first women having been appointed in 1985.[31] In their interesting paper they examine the limited research which has been done elsewhere on whether women decide cases differently from men and find the results to be inconclusive.

They suggest that the evidence, such as it is, may indicate that there are in fact few differences between male and female decision-makers, one reason being the criteria used by those who appoint them, which will lead to selection of similar people each time a selection is made. Another reason might be that "positions constrain the incumbent . . . The most important determinant of judicial decisions is the law. It is not surprising therefore that the gender of the decision-maker is no more important than other personal attributes of the decision-maker". A third possibility is that the impact of gender-based differences may be relatively subtle, affecting style rather than substance.

All of these suggestions are appealing. The researchers examined differences in response between male and female magistrates to recent reforms in the jurisdiction. They believed that any differences of approach between men and women which they had found might reflect the different background and experience of the women magistrates rather than gender itself. Similarities were, in their view, likely to reflect the fact that recent reforms to the jurisdiction represented a "feminisation" of the traditional authoritarian approaches to the management and style of the lower courts. These conclusions are also appealing.

## GENDER EQUALITY IN AUSTRALIA AND NORTH AMERICAN DATA

Much of the polemic about the desirability of appointing more women judges is informed by the view that, as Bertha Wilson expresses it, "the existing law, in some areas at least, cannot be viewed as the product of judicial neutrality". Writing as a Canadian, she cites American research, summarised in 1980 by Norma Wikler, as showing that "gender difference has been a significant factor in judicial decision-making, particularly in the areas of tort law, criminal law, and family law" and that "sexism is the unarticulated underlying premise of many judgments in these areas".[32]

I do not propose to delve into the enormous topic of whether these generalisations apply with the same force to this country. Of course there are areas where they do,[33] but much has changed since 1980, notably in most, if not all, Australian jurisdictions, as to the statutory regulation of the conduct of trials for sexual offences.

I would, however, issue a warning to those who would extend to this country the results of work done in societies which are very different. The attitudes of judges in North America are not necessarily the attitudes of judges in Australia. One simple example will suffice, not directly related to the substantive law, but relating to the treatment of women by judges – another field in which there is a temptation to assume that Australian experience will mirror the experience of women in North America.

The Canadian Bar Association, in August 1993, published the report of its gender equality task force. As to judges, a survey was sent to the 200 woman judges in Canada, of whom 132 replied. About 45% of those had experienced discrimination while on the Bench, often on their arrival on the court. They were made to feel unwelcome, it was suggested to them that their appointment was made on the basis of gender, not merit (which may, of course, have been true), and that women who called themselves "feminists" were unsuited to the judicial role. Some were not assigned to sexual assault cases because of the perception that they would not be able to be objective. (Given that the accused in such cases is normally male, one can see problems, on that basis, in assigning any judge to hear them.) There were in fact some reports of sexual harassment.[34]

I cannot speak of other courts or judges. I and my two sisters on the County Court of Victoria have a total of almost five woman-years as members of the Court. Our brothers have, from the beginning, been uniformly courteous, welcoming and helpful to us, as indeed they are to each other. Our allocation to cases has been as random as theirs. None of us has suffered any experience of the kinds described by the Canadian women judges.

Are Victorian County Court judges more courteous, less prejudiced, than Canadian judges? We do not know. The paper by Douglas and Laster re-

ferred to above describes an atmosphere among magistrates in the Melbourne Magistrates' Court across the road, similar to that which we find here.

And the two of us who were first appointed are accustomed to the surprise which greets our description of the way we are treated by our brethren. We find that some people seem to assume, and to prefer to assume, that the experience of a woman judge among male judges will be unhappy; that her arrival on the court will be resented, that she will be discriminated against, and badly treated.

A few years ago, when there was no woman judge in Victoria, the suggestion was made more than once that several women should be appointed at the same time, because it would be unfair to appoint one — she would be the focus for hopes, fears and misogyny, the pressures on her would be too great.[35] This suggestion denigrates all professional women — and is symptomatic of the victim mentality which so many women writers have apparently acquired from North American writings and experiences. Having been for several months the only woman judge in this State, I can say unequivocally that there was no substance in it at all. Victim mentality is no way to advance gender equality.

I should perhaps make clear that, in discussing the judges of the County Court of Victoria, I have been concerned only to point the contrast with the Canadian data as to the treatment of women judges by male judges on the same court, and not to express any views about my fellow judges in any other relevant context. I have used this example simply to emphasise that Australia and North America are not necessarily the same. This must be borne in mind when considering data from North America relating to the bases of legal principles or the treatment of women in courts. The unthinking adoption in Australia of North American problems and complaints, without serious investigation of whether they have any local application, can only do harm.

Which said, I do not deny for a moment that there are problems in this country in the way women are treated in court. If data to support that statement were needed, they are to be found in the evidence given to the Senate Standing Committee on Legal and Constitutional Affairs in the context of its reference on gender bias and the judiciary.[36] I now turn to consider some of those problems.

## GENDER EQUALITY AND THE TREATMENT OF WOMEN IN COURT

Everyone here would agree that an overwhelming duty of a judge is to treat with courtesy those people who come before the court in which we pre-


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side. As a young lawyer I was shocked to hear a story, still well known around the Victorian Bar, and attributed to Sir Charles Lowe.

The story goes that when the witness gave his name, which sounded like "Peach", he was asked to spell it for the benefit of the shorthand writer, and he replied "P-I-E-T-Z-C-H". "Really?" His Honour is said to have said. "I wonder how the witness would spell 'apricot'!" This seemed to me, and still seems, to demonstrate (if true) an inexcusable and utterly unthinking discourtesy from a person in a position of power and authority, in total command of the situation, towards another person who had come to court because he was required to do so, and was in an unfamiliar world, no doubt trying to do his duty as best he could.

As I have worked on this paper, it has seemed to me that many of the manifestations complained about as demonstrating gender bias on the part of judges are, in fact, only unthinking breaches, like that of Lowe J., of a judge's essential duty of courtesy. Those who suggest that the Bar should establish a formal grievance procedure for dealing with manifestations of gender bias might consider extending that procedure to cover all instances of discourtesy from the Bench. And it is important to remember that discourtesy may be the outward and visible sign of a dislike or a contempt for its object: and may often be so perceived.

I was fortunate enough to attend the International Conference of Women Judges held in Wellington, New Zealand, in September 1993. In discussion during the closing session, which was open to the public, and well attended by both men and women, a male New Zealand judge made a plea from the heart.

> I have never complimented any female lawyer on her attire in public . . . Neither has it ever crossed my mind, I think, to disbelieve a witness because she is a woman . . . What I find rather sinister about all this is that, unbeknown to me over the years, I may have been quite wrong and [every time that I have disbelieved a woman it] might have been the result of gender bias and have nothing to do with the quality of her evidence . . . Now, I don't know how the male judges are going to be expected to deal with the problem. Is it that a male judge is incapable of detecting this bias? . . . I have never heard the criticism in any court that I have sat in, from a woman practitioner, that "You demeaned me".

In response, Justice Elizabeth Evatt said:

> I think it is a pity to try to see this as a personal criticism of men by women or any kind of a war. It is not that at all. It is really a much deeper issue than that. It is really part of what is happening to the judiciary as a whole these days, that is to say, all of us as judges, whether we are male or female, are asked to be much more aware of where we come from in society, what is our culture, our class background, our race background — all our values. We are asked to know where we stand, where we are located in our society and the way we look at everyone else in our society. And that is something that as men and women judges we have to do.
>
> We are being asked by the community to do that more and more now and "gender bias" is a label given to one of those aspects. That is to say, we are asked, and it could be women as well as men, to look at where we stand on these stereotyped assumptions about the roles of men and women in society. I am sure you wouldn't willingly demean a woman in your court, but this is a deeper issue than that. You and I have preconceptions, they may be racial, religious, cultural, class — I don't know what. It is really important if you are judging values, to know where you stand and where others are.[37]

This statement of principle was greeted with prolonged applause. In the specific context of gender, I propose to deal with some examples of its application.

### *Gender Equality And The Treatment Of Women Advocates*

Compliments by a judge on the appearance of a woman advocate, however courteously meant, are not courteous. To treat a woman advocate more favourably than a male advocate is as discourteous as to treat her less favourably. As a barrister, she is attempting to compete on equal terms with (frequently) a man at the other end of the bar table, and, more generally, with all other barristers, the majority of whom are men. The implication that a woman advocate should be judged by different criteria from a man, or that she needs more encouragement or more protection than a man, serves only to belittle her.

On the other hand, a judge may on occasion feel it appropriate to give encouragement or protection to a barrister, whether male or female, who, for whatever reason, appears to the judge to be in need of that treatment, and the barrister may well feel nothing but gratitude. But if the barrister is a woman, she may feel that the encouragement is demeaning — and the judge should be prepared for this. Many women are, understandably, very sensitive about being treated differently on the basis of their gender, and will perceive that as the basis of the treatment when it relates solely to the woman as an individual.

To castigate a woman advocate, as judges have been known to do, for the style of her dress in a court or tribunal where advocates do not robe, is discourteous in the extreme. If there is a real problem with the dress of any member of the profession, male or female, it can be dealt with in chambers. It is interesting to note the dress which jurors, male and female, nowadays consider appropriate for attendance in court — smart casual, for the most part.

The Family Court, feeling sensitive on this

issue, has consulted the organisation Feminist Lawyers for advice on a dress code for practitioners. The advice they received was that courts should not prescribe acceptable attire — it was enough to say that practitioners in court should be neat and tidy.[38] There are some Rumpolesque male barristers of whom this could not be said, even when they are robed, but I have heard no stories of their being disciplined by the Bench. If women's dress is thought to be a proper subject for judicial criticism, men's dress should be treated in the same way.

The Family Court . . . has consulted the organisation Feminist Lawyers for advice on a dress code for practitioners.

*Gender Equality And The Treatment Of Women In Court Generally*

It is not only woman barristers who are on occasion treated differently from their male colleagues. Tucker J. of the English High Court was recently reported as saying in a speech at a Bar conference that, "it goes down extremely well if at 3.30 on Friday afternoon the judge suggests that the ladies on the jury might like some time to do their weekend shopping".[39] If he wants to finish at 3.30 on Friday — an entirely laudable desire — he should relate that to the needs of all concerned, rather than making outdated distinctions. The "ladies on the jury", like the men, are performing a public duty, and their pretty little heads are not necessarily dominated by the need to do the shopping. Some men shop too.

To treat women differently from men on the basis of matters arising indirectly from child-bearing or the menstrual cycle (I am not talking about maternity leave) is to perpetuate a myth that women are the victims of their own physiology. If premenstrual tension is accepted generally as a defence, all women will soon be retreating to the ghetto.[40] I note, however, the comment of Helena Kennedy Q.C. that in her (English) experience as a mother of three children, judges are benign when faced with a pregnant barrister, and worry about being seen to argue with her. "I have been tempted", she writes, "to consider making it a permanent state in the interests of my clients".[41]

Another problem arises from the needs of breast-fed babies. Many women would say that men embarrass far more easily than women do. A year or so ago a magistrate in Ballina, New South Wales, earned some notoriety by effectively directing a breast-feeding woman to leave his court.[42] The suggestion was apparently put by the magistrate on the basis that the woman would be more comfortable outside the court; but the problem was his, not hers. If a woman who has a breast-fed child needs to attend court, she must, given the inevitable unpredictability of court timing, bring the child with her. A crying child is disruptive — a breast-fed child is easily quietened. Male embarrassment at public breast feeding overlooks the biological function of the breast. But there is no reason for the breast to be embarrassingly visible, so as to disturb male sensitivities. Breast feeding can be utterly unobtrusive and normally is so.

When proposing to use the expression "this lady" to refer to a woman party, witness or advocate, it is a good idea to think whether, if the person in question were male, one would refer to him as "this gentleman". While normally intended as a courtesy, "lady" can be perceived as demeaning. A "lady" is not a particularly useful member of society. No lady could study law, let alone preside in a rape trial — the evidence is totally unsuitable for a lady's ears. "This gentleman" is, in court, normally reserved for one who the speaker wishes to belittle, and "this lady" can carry the same overtones.

A few weeks ago, the plaintiff's counsel in my court put to his client's wife the question, "And you gave up work when your first child was born?" We have all heard that question many times. The witness in fact had a crippled husband and four children, including two-and-a-half-year-old twins. To suggest that the daily life of such a woman does not constitute "work" is offensive and demeaning to all women who have the care of a home and family. My practice is, when such a question is asked, to say something to the effect of, "Mr X, I think you meant to ask the witness about her participation in the paid work force".

*Gender Equality And Sentencing*

Fox and Freiberg[43] refer to a well-entrenched bias towards lenient sentencing of women, with an understandable resulting sense of injustice in a male co-accused when, all other things being equal, he receives a heavier sentence than his female co-offender. Appeals by males on the ground of such disparity, they say, are usually unsuccessful. "The reasons given by the Full Court for the bias in favour of leniency for women vary widely and for the most part are singularly unconvincing in a society where discrimination on the basis of sex is now officially no longer countenanced." They cite McInerney J. in *Stokes*[44] as rejecting a basis of chivalry, but Jenkinson J. in the same case expressing the belief that public opinion may still sanction a more merciful sentence for a female than for a male. It might be thought that this

approach is less usual today: I note that it is not adopted in the *Victorian Sentencing Manual*.[45]

Inequality in sentencing, on the grounds of gender, is gender inequality of the worst kind, and can only create resentment among members of the less favoured sex. Judges relying on authorities which prescribe or justify such inequality should bear in mind whatever anti-discrimination legislation applies in the relevant jurisdiction, which may not have been taken into account in the older cases.

The fact that a particular human being, man or woman, has to care for children may well be relevant to a sentencing decision. (I recently gave a young man an intensive correction order, rather than a custodial sentence, one reason being that he had the care of his four children. It proved to be a mistake.) Bronwyn Naylor, studying 1,301 cases in the Magistrates' Court in 1991, found that women received lighter sentences than men, but generally because of family responsibilities rather than other criteria such as prior convictions or the seriousness of the offence.[46] After all, someone always has to look after the children.

### *Gender Equality And Sexual Offences*

It may be true that a woman who wears seductive clothing, goes down dark streets at night, and accepts a lift from a stranger, is more likely to be raped than if she does none of these things. But this is irrelevant to the question of guilt or innocence of the accused, and also to the issue of sentencing, unless it is accepted that that behaviour of the woman excuses the rapist. To accept that view is to accept the myth that men are some kind of ravenous beasts, unable to control their sexual appetites.

Many people here will by now be familiar with the decision of the Supreme Court of Canada in *Seaboyer* v. *R; Gayme* v. *R*[47] and in particular with the judgment of L'Heureux-Dubé and Gonthier JJ., setting out 10 stereotypical perceptions of rape victims and rapists which may distort the criminal justice system. I will do no more than enumerate them briefly: otherwise, I do not propose to go over that ground again. The question of judges' views of alleged rapists and their alleged victims has been discussed and written about *ad nauseam*.

The myths there set out are: that a woman cannot be raped against her will. That interaction between friends or relatives does not result in rape. That every woman can be categorised as good or bad — a madonna or a whore. That a woman living on welfare or who drinks or uses drugs will have consented to sex with the defendant, perhaps for money. That a woman who has been raped will be visibly upset afterwards. That a woman will be too upset and ashamed to report rape, and that she will be so upset that she will report it - both expectations existing simultaneously. That women seek revenge on past lovers. That in order to get back into the good graces of her parents or her husband or the community, a woman will claim to have been raped when she consented to sex that she was not supposed to have. That women fabricate charges of rape as part of a fantasy life or out of spite. That all rapists jump out of the bushes, attack the victim, and then abruptly leave.

It is important for judges not to base their treatment of women on a misguided sense of chivalry.

### *Gender Equality And Chivalry*

It is important for judges not to base their treatment of women on a misguided sense of chivalry. When the question of equal pay for men and women doing the same job was a live issue, a number of years ago, many men were heard to say that if women received equal pay they would no longer stand up for them in public transport. Any man who thinks that a woman would rather have his seat in a tram than be paid at an equal rate has a strange set of values; and chivalry has a strange set of values. It involves giving women a shadow, in a manner indicating that the shadow is a great prize, while withholding the substance from them.

Mark Girouard, writing of the revival of the code of chivalry in Britain which began in the late 18th century, ends at the First World War, concluding, "The absence of so many men at the front had put women in a position of responsibility which made many of them distrust chivalry as a form of slavery".[48]

The first case heard under the *Sex Discrimination Act* 1975 (UK) was *Peake* v. *Automotive Products Ltd*[49] in 1978. The respondent operated a factory with 4,000 manual workers of whom 400 were female. All workers finished at the same time, but women were allowed to leave the factory five minutes earlier than men so that over a year men spent on the premises two-and-a-half days more than women. The respondent's explanation was that this practice was intended to ensure that women could leave the factory safely. A male employee claimed that the practice amounted to discrimination against the men. The Court of Appeal, without reserving, found that the practice did not amount to discrimination for the reason *inter alia* that, in the words of Lord Denning M.R., "It is not discrimination for mankind to treat womankind with the courtesy and chivalry which we have been taught to believe is right conduct in our society". Perhaps that decision would be different today.

Let us be clear about the original reason why women and children go first into the lifeboats and women were until very recently discouraged from front-line military service. It is not because of any special virtue of women. It is because, if you are a small city-state, and you conquer the territory of the adjoining city-state, but in the process of doing so lose all your women under 45, in 20 years' time you will not have the population to hold the territory which you have conquered. Insofar as chivalry involves the preservation of women of childbearing age, it is for the general good of the community, not for the preservation of women as an end in itself. In that context, men are expendable.

In dealing with women in the courts, in whatever capacity, judges should not assume that it is proper to give them the shadow which is chivalry, and assume that this is appropriate treatment. This is only an illustration of the principle that any litigant, witness, accused person or advocate should be treated as an individual, and not given any favourable or unfavourable treatment which is based upon gender.

## GENDER EQUALITY AND PUBLIC CONFIDENCE IN THE SYSTEM OF JUSTICE

It is important to be aware that we now find ourselves in a world where, in contrast to the world in which most of us were educated, the average person is better educated, more inclined to question and challenge, more likely to resent what is said, or what is perceived to have been said, and less inclined to accept authority because it is there. In this world, it seems to me, if the courts are to continue to be respected by the ordinary citizen, we as judges should take care not to express, or to appear to be governed by, stereotypical views of any person who comes before us, in whatever circumstances. It is a matter of courtesy, as I have already said, but it is more than that. The effect of discourtesy will be to do harm to ourselves and to our courts and the system of justice of which we are part. As we all know, justice must not only be done, but must manifestly be seen to be done.

We can no longer assume that we will in future pass our lives in a closed circle where everybody thinks the same and where everybody laughs at the same jokes. When my father was a young man at the Victorian Bar he was in that kind of world. That is the 1930s. We are in the 1990s and we are not there any more.

In this context of what you laugh at, I cite a passage from a novel by Rose Macaulay which was written in 1923. She is speaking of a character, a young woman to whom for some reason she gave the name Stanley, in 1905:

> Stanley in 1905 was ardent in Liberal hope. She hoped for everything, even for a vote. This sex disability in the matter of votes oppressed her very seriously. She saw no sense or reason in it and resented the way the question, whenever it was raised in Parliament, was treated as a joke like mothers-in-law or drunkenness or twins. Were women really a funny topic? Or rather, were they funnier than men? And if so, why? In vain her female sense of humour sought to probe this subject but no female sense of humour, however acute, has ever done so. Women may and often do regard all humanity as a joke, good or bad, but they can seldom see that they themselves are more of a joke than men, or that the fact of their wanting rights as citizens is more amusing than men wanting similar rights. They can no more see it than they can see that they are touching, or that it is more shocking that women should be killed than that men should, which men see so plainly. Women in fact cannot see that they should not be treated like other persons. Stanley could not see it. To her the denial of representation in the governing body of her country on grounds of sex was not so much an injustice as a piece of inexplicable lunacy, as if all persons measuring, say, below five foot eight had been denied votes.[50]

Women are not a joke; and judges can no longer amuse themselves and others with the assumption that they are.

Sir Anthony Mason, when Chief Justice of the High Court, said that it is important that public confidence in the judiciary should not be eroded by lack of sensitivity on gender issues.[51] In this context, gender is only one of a wider range of issues with which we must deal. Judges must, as Justice Evatt said in the passage cited ealier, examine their preconceptions as to race, religion, culture or class. It may well be that class bias in courts is more significant than gender bias: and in a world where discussion of gender is fashionable and discussion of class is not, class bias is more insidious and may be more pervasive. Women, of course, may be affected by both gender bias and class bias.

We, as judges, pride ourselves upon our fairness, our objectivity, our lack of bias, our neutrality. But some at least of what we have learned from the experience of the world and the courts which we feel has fitted us to accept appointment can, if looked at carefully, be characterised as biases and prejudices. No one can avoid this — all we can do is to become aware of it and do our best to overcome it. The Chief Justice of Western Australia has summed up the problem in the words, "The comfortable self-image of neutrality suppresses the very sensitivity which is necessary to achieve the necessary level of equality".[52]

### *Judicial Education*

When this paper was delivered, it was intended that another speaker, well qualified to do so, would deal with means whereby judges may be made aware of their own attitudes and encouraged to

overcome them. Unfortunately he was at the last minute unable to attend, and I regret that this paper is incomplete because it does not deal with that subject. But there are a few things which I would wish to say.

Mr Justice Young of the Supreme Court of New South Wales has adopted with approval a statement by a journalist[53] that the community does not need "judges educated . . . in the various fashionable theories and political orthodoxies which are current among feminists, environmentalists, social reformers, deconstructionists or whatever". With (as counsel say to us) the greatest possible respect to His Honour, if judges are not educated in these theories and orthodoxies, which are part of the intellectual climate in which we and other educated people live today, the courts will fail, and continue to fail, the community which they should serve.

To be educated about another person's point of view is not, although it may be, necessarily to accede to that point of view. But to understand may be, at the very lowest, to tolerate; and to be enabled to discuss and perhaps to forgive. Judges must be aware of the possibility of bringing the courts into disrespect by unthinking expression of views, on gender and other issues, which once seemed to us to be obvious and unchallenged but which now are neither. If, having examined and understood other points of view, we remain committed to our own, our expression of those other points of view will be different, and will be made in an atmosphere of understanding and sympathy, not of ignorant and seemingly arrogant confrontation. As Mr Justice Nicholson of the Supreme Court of Western Australia has said:[54]

> The judiciary must come to understand gender bias . . . Provided . . . the information is delivered to judges in the broad, and without reference to particular cases, it is properly to be seen, in my view, as an educated step quite unrelated to the resolution of particular matters to which judicial independence must attach. As thought processes in society change rapidly, it is important that the judiciary be seen to be aware of those changes in order that public confidence can be maintained in the court system.

## CONCLUSION

The object of this paper has been simple: to assist judges to become aware of some of the things which are being said about us in the context of gender equality, and to give an opportunity for discussion on the subject. If that discussion is conducted in the spirit in which the paper was written, the paper will have achieved its aim.

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4. Malcolm C.J., "The Appointment of Judges", Supreme Court and Federal Court Judges' Conference, Adelaide, 24 January 1995
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6. Suzanna Sherry, "The Gender of Judges" (1986) 4 *Law and Inequality* 159 at 160.
7. Attorney-General's Department, *Judicial Appointments — Procedure and Criteria*, AGPS, Canberra, 1993, paras. 5.59–5.62. Cited in The Law Reform Commission, *Equality before the Law: Women's Equality*, Report No. 69 part II, Sydney, 1994, para. 9.40.
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13. [1993] 3 NZLR 159 at 172.
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26. Sheryle Bagwell, "Stereotyping still not the way to go" *Australian Financial Review*, 22 March 1995.
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# TEN RULES OF APPELLATE ADVOCACY

The Honourable Justice M.D. Kirby, AC, CMG*

*The paper below was given by the Honourable Justice M.D. Kirby, AC, CMG, President of the New South Wales Court of Appeal at the Appellate Skills Workshop conducted by the Australian Advocacy Institute at the Supreme Court of New South Wales, Sydney on 5 May 1995. The paper is reproduced with the kind permission of the Australian Advocacy Institute and the Honourable Justice Kirby.*

## TEACHING ADVOCACY

UNTIL RECENTLY IT WAS ASSUMED THAT advocates were born, not made. The only instruction was in the school of hard knocks. The legal profession, in its hierarchical organisation, provided the lawyer, during a typical life's journey, with opportunities to watch and copy, cringe and avoid. Such written instruction as there was on the art of advocacy was found in books,[1] judicial essays[2] or commentaries by respected advocates[3] trying to explain conduct which seems too instinctual and spontaneous when observed but, when missing, is painfully and embarrassingly obvious.

Through the work of the Australian Advocacy Institute and the reading courses conducted by the various independent Bars in Australia, this is now changing. The change can only be for the better. Lord Nolan, lately elevated to the House of Lords, has commented on the need for improvement at the Bar:

> We all could improve. The Bar is improving. The new advocacy training is overdue.[4]

The advocacy training to which his Lordship was referring was itself inspired by the Australian initiative. In this way, we are repaying, in part, our debt to the great tradition of the advocates of England. To the system of law which they and the judges of England built, we in Australia are heirs.[5]

The object of the advocacy course is to give the participants an opportunity to observe themselves on videotape and otherwise to be submitted to the constructive criticisms of experienced advocates and of their peers. Attention is paid to eradicating clear mistakes and to identifying repeated failings in the art of advocacy. This is an important advance. It will be critical that the Institute, judges and the advocates themselves monitor the extent to which the lessons learned survive the transit to real life situations in the courtroom and endure throughout the years of stressful demanding work which is involved in the life of an advocate.

Many commentators have sought to identify the particular characteristics of outstanding advocates. They have done so upon the assumption that, if the qualities could only be identified, perhaps they could be taught and copied. Clearly, inherited intellectual gifts will allow one person a capacity to see issues, analyse problems, foresee perils and synthesise material more quickly than the next. Of Sir Garfield Barwick it was said that his power to recall detail and then to speak of it with simplicity represented his greatest skills as an advocate.[6] Many commentators talk of the primary talent of the advocate as being the capacity to reduce complex matters to bare essentials by thinking out the issues necessary for decision and then presenting them to the decision-maker attractively and with precision.[7]

The recent emphasis, in the written work of lawyers, upon the rules of plain English expression may also have its reflection in oral communication. Short sentences. Speaking in the active voice. Avoiding circumlocution and cliches. These rules are as important to the advocate as to the drafter.[8] Of course, there are still those who doubt the possibility of teaching the art of good advocacy and who

*President of the New South Wales Court of Appeal. Formerly Deputy President of the Australian Conciliation and Arbitration Commission and Judge of the Federal Court of Australia.

question the wisdom of even trying to do so. Congenital gifts of intellect are matched, but not always accompanied, by gifts of oral communication. There is no point in seeking to analyse why it should be so. Why some people can express themselves more clearly and vividly than others. Physiologists might trace the reasons to the connectors of the ganglia or the speed of electric messages in the brain. Psychologists might offer explanations in terms of the individual's childhood upbringing, communication with family or feelings of self-assurance and inner peace. Sociologists might suggest explanations in terms of the inclination of some people to escape their own bodies and to act, on a public stage, the dramas of others. But whatever the explanation, we all know that some people can argue with greater power and persuasiveness. Their voices sound more pleasing to the ear. Their physical presence commands attention. Perhaps their faces or their eyes demand notice. These are the stamps of nature which no course in advocacy can replace. Those who are the lucky ones may make the most of such gifts. But they may squander them. Those with fewer natural advantages may seek to compensate by learning basic rules which improve their daily performance.

The object of advocacy is not, ultimately, to please the ego of the advocate. Nor is it, in the end, functionally directed at impressing an instructing solicitor (if the advocate is a barrister), colleagues and opponents, important though that may be for professional success. It is not even satisfying the client, win or lose, that the case has been put with an appropriate command of the facts, a good grasp of the law and as persuasively as the facts and law permit. In the end, the object of advocacy is, by communication, to persuade. It is to influence the decision-maker (judge, magistrate, tribunal member, juror) to accept the propositions advanced by the advocate leading to the success of the advocate's cause.

If this is the object, it is ultimately targeted upon that moment in the decision-maker's process of reasoning when he or she takes the final leap to judgment that determines the decision (order, award, ruling, etc.) which is to be made. If only one could identify, in every case, what that point of decision will be, and what will influence its course — leading on one opinion to a conclusion favourable to the advocate and on another to failure — the teaching of advocacy could be directed, with laser precision, to its proper object. There is precious little writing upon the process of judicial decision-making. Few judicial officers stop, themselves, to analyse what it is that led them, in a particular case, to this decision or that. Few judicial officers have the time for such introspection. But it is an important question, for all formal decision-making, to determine the magical point at which, effectively, the decision will be made. If that point can be identified, the advocate can fasten upon it.

Sometimes, a decision-maker will reach a preliminary view on reading the papers. I have known judges who were very difficult to shift from such a view. But judicial open-mindedness and a willingness to attend to the argument is both the assumption[9] and the requirement[10] of our legal system. Sometimes, a critical and even dramatic moment will be reached in the course of argument in an appeal. A telling point will be made. A judicial officer, obviously heading in one direction, will visibly come to a halt. A silence may fill the courtroom sending the trumpets of victory to one side and the muffled drum of defeat to the other. We have all experienced those moments. They do not come in every case. But when they come, and an advocate has truly turned the opinion of the decision-maker by argument, it is so rewarding that the advocate will endure days of pain to recapture the feeling. Advocates are rarely rewarded with such Perry Mason moments. Often, they will walk from the court, like the decision-makers themselves, uncertain as to what the outcome will be. Sometimes, signals sent during the course of argument will produce false expectations. Like every judge, I have left the courtroom convinced that an appeal must succeed or fail. There follows a time of research, reflection and preparation of reasons, at any point of which the decision may change. Sometimes, I have even commenced the exposition of reasons expecting to arrive at one result only to reach a point where the decision changes and the opposite result follows.[11] I have asked myself, many times, what it is that alters the conclusion. Is it a fact seen in a new light which demands a particular conclusion? Is it a passage in the reasoning of an earlier judge which falls heavily on the facts of the particular case? Is it a phrase in the legislation that takes it toll on the argument? Is it some half-remembered phrase of the advocate, insisting on legal authority or urging the justice of the case, that clinches the result?

Because that critical moment of decision is the ultimate object of the appellate's skills, it is important that he or she should consider, in advance, the predicament of the decision-maker — seeking to identify what that moment will be. If a single item cannot be perceived, the skilful advocate will nonetheless try to identify the salient issues. It is the advocate who puts himself or herself into the position of the decision-maker, and strives to see the problem from their perspective, who is likely to have most influence on the outcome of the contest.

To lay down rules for appellate advocates is a presumption. To suggest that appellate advocacy can be reduced to ten rules is a fantasy. To purport to offer suggestions derived from a decade's service in one appellate court (concededly the busiest

in Australia) for all appellate courts suggests plain error. To call the "rules" the "Ten Commandments", as I was originally inclined to do, suggests either heresy or the ultimate result of a life too long lived in the judiciary — intimate identification with the deity.

No simple set of rules will ever suffice to encapsulate the basic requirements of good appellate advocacy. No amount of time thinking about my rules will substitute for the experience of conducting, or even closely watching the conduct of good advocates in, a number of appeals. Nevertheless, the "rules" may help to organise some thoughts which the advocate, seeking to succeed before appellate courts, will do well to consider.

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## TEN RULES

### *1. Know the court*

The first rule is to know the court. In the New South Wales Court of Appeal there was a time when the Court would not disclose in advance its constitution for particular appeals. Generally, the Court of Appeal sits in Divisions of three and sometimes five judges. The theory behind the refusal to inform the parties (and the advocates) of the constitution of the Court was that the Court was a single institution and "playing the judges" was to be discouraged. A plaintive letter on behalf of the Bar from Mr David Bennett QC, written with every advocate's skill, eventually persuaded the Court to indicate on the afternoon before the hearing the names of the judges rostered to participate. Informed advocates will know, or soon find out, the general predilections, philosophy and attitude of the judges assigned to the case. Pre-supposition about judicial opinions, based upon result-oriented analysis may be dashed in a particular case. But every experienced appellate advocate will know that different judges have different interests and distinct approaches to those three determinants of many an appeal: legal authority, legal principle and legal policy.[12]

Having discovered the constitution of the court, it will be no bad thing if the advocate can find authority, particularly recent authority, from the assigned judges relevant to the issue in hand. It is important to check the recent cases. The judges will tend to know these because the probabilities are that one at least of them will have participated.[13] Nowadays, there are electronic systems which permit speedy analysis of legal issues, including by reference to the opinions of particular judges. There are also extremely useful services which provide up to date information on the decisions of the appellate courts. In New South Wales, the Court of Appeal itself produces a monthly *Judgments Report*.[14] This is now distributed, free of charge, to the Bar Association, Law Society, libraries and courts. It may be copied. Its purpose is to ensure that the judiciary and the legal profession are kept up to date by a monthly report of all judgments of the Court of Appeal, analysed according to the legal issues dealt with. In addition, there is the *New South Wales Judgments Bulletin* with its excellent parallel services on the judgments of the High Court of Australia, the Federal Court of Australia, the various State and Territory Supreme Courts and the *Australian Sentencing Bulletin*.[15] Both for regular players and for occasional visitors to an appellate court, it is important to keep up to date in the knowledge of relevant legal authority.

Knowing the court is not simply a matter of pandering to particular judicial egos. It is also vital to know how the court operates. In New South Wales, the Court of Appeal works under very great pressure. There are ten Judges of Appeal (including the Chief Justice and the President). Occasional assistance is provided by the Chief Judges of the Divisions and by other judges specially appointed for particular cases or periods. A recent amendment to the *Supreme Court Act* permits the Court to be constituted by two judges in certain damages appeals.[16]

It is no secret (for I have revealed it before) that, to cope with its very heavy workload, the Court has adopted a procedure for sharing the load. Each month, the President settles the Court of Appeal sitting list. In every appeal or summons listed for hearing, the President will have assigned a primary obligation to one of the Judges of Appeal, not necessarily the presiding judge. In certain cases, where it is thought that an *ex tempore* judgment may be appropriate, the list available to the judges (although not to the advocates) will assign the responsibility of preparing for the first *ex tempore* judgment to one judge. In all other cases, a judge will be assigned to prepare the first draft opinion. Of course, if an appeal proves unsuitable, in the opinion of any judge, to *ex tempore* judgment, the Court will order that judgment be reserved. This system of judgment writing assignment is

important for the handling of the hearing of the appeal. Although all judges will usually have read the judgment under appeal and reviewed the written submissions of the parties, typically one judge will have a more detailed knowledge of the appeal papers and of the issues. The art of the advocate may be to attempt to carry that judge. But if it appears that he is antagonistic, it may be vital for the advocate to work particularly hard on the other judges — seeking to fill gaps in their knowledge which the primary judge may not feel that he suffers.

*2. Know the law*

It is vital that any advocate appearing before an appellate court should know the basic procedural rules which govern the bringing of the proceedings to the court. It is astonishing, more than twenty years after the *Supreme Court Act* 1970 and the new Rules of Court were introduced, that many advocates remain blissfully ignorant of the proper nomenclature for parties to motions (claimant/opponent), the requirements to bring summonses for leave to appeal within fourteen (not twenty-eight) days[17] and the obligation to file, in support of a summons for leave to appeal, a statement setting out the basic facts and explaining why leave should be granted.[18] Checking that the appeal is in the right place may also be important for, at least in New South Wales, some appeals and summonses are assigned to single judges of the Supreme Court with further appeal only by leave of the Court of Appeal.[19] It may also be a wise precaution to check, at least in important cases, that the required written submissions and other documentary material (e.g. chronologies, affidavits and narratives) have been received by the judges. It should not always be assumed that the material filed belatedly in the Court's Registry will have reached the judges in time for the hearing. It tends to be the advocates, not those behind, who suffer the irritation of a court delayed, when things go wrong in such practical matters.

Commanding the detail of the facts of the case and thoroughly researching the applicable law go without saying as prerequisites of the successful advocate. The advocate who has not really mastered the papers is soon exposed by sharp appellate questioning. Once so revealed, it is very difficult for that advocate to recapture the confidence of the court, at least in the case in hand. The court is then forced to the realisation that it will receive inadequate assistance and be obliged, unaided, to research the facts, or the law, for itself. Advocates who present in this way on a couple of occasions may have good excuses. They may be too busy. But the result will be that their reputations in the appellate court will be shattered. They may be able to deceive their clients and those instructing them. But they will rarely deceive a busy appellate court working under great pressure.

Certain legal developments of a general character must be understood by any appellate advocate in Australia today. One of them affects the gateway to appellate review of facts. I refer to that line of authority of the High Court of Australia which limits the power of appellate courts to disturb primary decision-making where it rests, directly or indirectly, upon judicial findings based on the credit of parties or witnesses.[20] In a series of decisions, the High Court has insisted upon restraining the interference of appellate courts, even where they have concluded that the merits of the case warrant a disturbance of the orders under appeal. Where the primary judge has not expressed reliance upon findings as to credit, but has necessarily done so to reach the conclusion under appeal[21] or where the primary judge may have been affected by the "subtle influence of demeanour",[22] the appellate court must stay its hand unless the truly exceptional circumstances of the case permit interference. The exceptions are very narrowly defined. They include a case where incontrovertible evidence shows that the primary judge misused the advantage of observing the witnesses and conducting the trial or where the conclusion is otherwise palpably wrong.[23]

Science casts serious doubt upon the capacity of a judicial officer, or anyone else, to decide the truthfulness of a witness' testimony by appearance — and particularly in the artificial circumstances of a courtroom. Some observers consider that a far greater advantage of the primary judge over an appellate court is the opportunity to see the whole of the evidence unfold in sequence, to absorb its detail and to have the opportunity to reflect upon it, in its entirety.[24] Typically, the appellate judge does not have the time to read every page of the appeal papers. The judge is often heavily reliant upon the advocates to highlight crucial passages of the evidence. But whatever the opinions of others may be, the binding rule which governs all appellate courts in Australia is that of restraint. It is a rule which upholds finality of primary decision-making. It affects the conduct of a great many appeals. It is crucial that advocates should fully advise their clients on this limitation. Otherwise false expectations may be raised by the process of appeal. Where credit is not in issue, and the judge has determined a matter, in agreed facts, strictly as an issue of law or where the judge has followed the logic of the evidence, the appellate court, in a rehearing, may reach its own conclusions.[25] But in many other cases, the appellate court is controlled in what it can do by credibility findings made at first instance. If there are such findings, they will also control what the advocate can do. They will oblige him or her to address the appeal in a way

conforming to binding legal authority. An appeal, even by way of rehearing, is not an occasion for a revisit to all of the supposed wrongs of the trial. It is not an opportunity to salve the wounded feelings of an advocate who thought the trial was won. It should never be forgotten that the process is an *appeal*. It is necessary to show that the primary decision is wrong. In finely balanced decisions, upon which differing judicial minds could reach differing conclusions, appellate courts will properly give respect to the advantages and opinions of the primary judge. The process of appeal is thus concerned with demonstrating error. This fact governs the way in which the good advocate will present the appeal in a quite different way than the primary hearing was conducted. It is also a reason why advocates who are wonderful in the constructive work of a trial may be less impressive in the often critical and destructive business of appeals. Ruth Bader Ginsberg, now a Judge of the Supreme Court of the United States, acknowledged the common reputation of appellate judges among their trial brethren. "They are the ones who lurk in the hills while the battle rages; then, when the battle is over, they descend from the hills and shoot all the wounded."[26] There is more than a grain of truth in the accusation. It derives from the abiding appellate search for error.

3. *Use the opening*

The opening words of the advocate in an appeal can be an important opportunity to seize the attention of distracted and over-worked decision-makers. The point of attention may be the merits or justice of the case. It may be an interesting issue of legal policy. It may be the clear requirement of legal authority. Sir Anthony Mason suggested that advocates should search for an exhilarating or humorous way to catch the attention of the court at the outset.[27] One leading advocate has, rightly in my view, cautioned against forced humour.[28]

Many judicial officers, myself included, usually commence their opinions with a sentence or two explaining the central issues at stake in the appeal: a citation from authority designed to achieve the same object; or a reference to an arresting fact which will intrigue the reader and capture attention. The advocate should seek to do likewise. The opening is generally the one moment when the advocate has the undivided attention of all members of an appellate court. The moment should not be squandered. Yet so often it is. The advocate plunges straight into reading a tedious extract from legislation or a lengthy citation of authority. The opening is the headline. It is the chance to communicate the advocate's basic point of view. It is a moment for selectivity. First impressions are often important.[29] The good advocate will therefore give a lot of thought to the opening words of argument and to the strategy of explaining the case to the decision-makers.

One very important point to understand is that the advocate will usually know much more about the case than any of the judges. No matter how clever the judges, and experienced, the pressure of work upon them is such that few, if any, will have read the appeal papers from cover to cover. Few will have had a lot of time to identify the key issues, still less to have thought about them at any depth. The system of judgment assignment, at least in the New South Wales Court of Appeal, makes it important that the advocate opening the case does not over-estimate the knowledge of the whole court about the case. It is important for the advocate to lay out the issues and at least the principal facts. This should be done, even in the face of some judicial resistance. Otherwise, it may not be possible ever to communicate the key issues to the minds of the decision-makers. Persistence in the face of judicial discouragement may be important until it is plain that all of the decision-makers have an appreciation of the crucial facts and issues or that persistence in the endeavour to secure that end is proving distinctly counter-productive.

4. *Conceptualise the case*

The minds of busy decision-makers hurry to the strongest (and weakest) points in a case.[30] Most decision-makers are interested in the merits and in correcting injustices, if they lawfully can.[31] Thus, the advocate will do well to exercise discipline and to think through the issues — identifying the strengths and weaknesses of the argument to be pleaded. Directness in an advocate is a great strength. Candid acknowledgment of a problem may even enlist the assistance of the court, if the merits suggest that course. In the end, the law may not permit the correction of an apparent injustice. Then the decision-maker must conform to the law. But the merits of the case are usually very important to any judicial officer sworn to do justice. Depending upon whether the decision-maker reaches a provisional conclusion in the mind, in the heart or still lower down in the visceral anatomy, it is rarely a waste of time to present an appellate body, quite early, with the perspective of the merits as seen by the clients who are represented. In most cases, the parties have a perspective of their own merits and of justice. Even if the justice to which they appeal is simply the consistent and neutral application of a binding rule of law. The advocate who succeeds will usually have mastered the ability to conceptualise and communicate such merits.

5. *Watch the Bench*

Communication is more than a skill with words. It involves the eyes and indeed the whole body of the advocate. It is vital that advocates should watch

those to whom they are addressing their arguments. In this way, they will be more likely to follow the tendencies of thought which may be expressed as much by body language and attitude as by oral expression. How many advocates I have seen clutching the podium as a support, lost in their books and in their reading and ignoring the very people whose decision is vital to their client's cause? Courtesy and tact will suggest that, in a multi-member bench, the advocate will look not only at the presiding member but at all members in due turn. Otherwise, the ego of neglected participants may be bruised or their attention lost.

I do not under-estimate the difficulty of capturing the attention of all members of a multi-member body. Different judicial officers, for example, have different attitudes to particular tools of advocacy. Thus, some dislike and even discourage the presentation of Ministerial Second Reading Speeches. Justice Meagher makes no secret of his view that they are generally worthless. Their limitations must be acknowledged.[32] Other judges, including myself, find it useful to have such material offered. The advocate must show deference to the one and persistence to the other. Such differences, in multi-member courts, may even extend to the choice of a dictionary to be used in argument about the meaning of words. Some judges prefer the *Macquarie Australian Dictionary*. Others cling to the *Oxford Shorter English Dictionary*. Some judges are attracted, in appropriate cases, to international human rights jurisprudence. Others regard it as heretical or irrelevant.[33] A good advocate, faced with such divergencies, will play the field with gentleness but persistence: winning the one with good humour without losing the other.

Watching the decision-makers' reactions to arguments can help the advocate know how far to push an issue and when enough has been said. Invariably, the advocates who make the biggest impact on an appellate court are those who, at least for a time, stand away from their books and engage in a conversation with the Bench. They have thought through their case. They can encapsulate its strengths and acknowledge its weaknesses. They show the appellate judge the way, if possible, to reach a just and lawful conclusion. If they can embellish these skills with a sense of confidence, an understanding of the legal complexities and a touch of elegance, they will make the decision-maker's task seem worthwhile, even perhaps enjoyable. That may not win the appeal. But they will attract sympathy for an expressed point of view that might otherwise be overlooked.

*6. Substance over elegance*

It is, of course, preferable that everything should be done in a courtroom with style. In an appellate courtroom, which misses much of the drama of the trial, the central skills are somewhat different. I have always thought that good appellate advocates will concentrate on substance. That is what their audience is usually interested in. If substance can be presented with style, so much the better. Many times, at the end of argument, I have watched and waited as counsel of high talent go through their notes to make sure that every point of importance has been covered by their submissions. Such waiting is often worthwhile. Nowadays appellate courts are more lenient in permitting post-hearing submission of supplementary written arguments, by leave. But it is preferable that points should be covered before the judges depart the bench lest they hasten to judgment before brilliant, but late, thoughts occur to the advocate. The advocate will also keep an eye on statements which could later embarrass or even incriminate a client or involve a concession damning to the client's interests. Difficult as it may be, the good advocate will attend to the impact of oral argument but consider matters of substance that are recorded in the notes of the judicial officers or in the transcript of argument.

It is preferable that points should be covered before the judges depart the bench lest they hasten to judgment before brilliant, but late, thoughts occur to the advocate.

*7. Cite authority with care*

The tedious recitation of authority and the endless reading of old cases is the surest way of losing the attention of the decision-maker. Where an earlier decision is read, the advocate should always state at the beginning or at the end, or both, the holding which is extracted or the principle for which the case stands. In the welter of case law today, it is necessary to show great discernment in the reading of cases. Analogous reasoning by reference to previous decisions involves a subtle process. The court will be helped if the advocate can quickly and accurately summarise the relevant facts of the case, state the decision and proceed to the briefest possible recitation of the crucial passage. Nowadays, the New South Wales Court of Appeal imposes a limitation of five authorities without special order. This is because the Court

found that large numbers of books were being brought to court. Rarely were more than five read. It is useful for the headnote and key passages (particularly in foreign or unreported decisions) to be photocopied and handed to the court.

One big change which has occurred during my ten years service as President is that the citation of English authority has declined as that of the courts in the other Australian jurisdictions, New Zealand, Canada, the United States and elsewhere has increased. This is a process which is sanctioned by the High Court of Australia.[34] Yet advocates still appear who cite a decision of the House of Lords as if it were a binding statement of Australian law. It is not. Unless it is adopted by applicable Australian authority, the court will remain obliged to consider whether what the English court has said is appropriate and should be accepted as part of the Australian law. Now that there are a number of courts of appeal in Australia, it is inappropriate to refer, as long we did, to the English Court of Appeal as "the Court of Appeal". Lawyers, above all, should be aware of the constitutional developments which have made the Australian legal system completely independent. This imposes on the judge and advocate alike the obligation to develop the Australian common law and to interpret Australian statues in a way appropriate for this country which is no longer subservient, in legal matters, to any other.

*8. Honesty at all times*

The corollary of the immunity from being sued, which advocates enjoy for what they do as advocates, is that they are obliged at all times to be honest to the court.[35] In the appellate court, this usually means that the advocate who discovers binding or even important persuasive authority which stands in the way of the propositions advanced to the court is duty-bound to bring that authority to notice. Difficult passages in judgments of the High Court, or another appellate court, should be brought to attention. Advocates who do this faithfully are much valued by the judges. Their honesty is remembered. It adds to the most priceless possession of an advocate — reputation. It is easy today for a judicial officer, or other decision-maker to overlook a change of the law or to be unaware of recent statutory developments which may affect the case in hand. The advocate who brings to notice apparent difficulties of which the judicial officer was unaware, and then seeks to explain a way around those difficulties, will often enliven appreciative assistance, so far as the law permits. As the range of persons performing advocacy expands, it may be hoped that this marvellous relationship of honesty and support which has long existed between the Bench and the Bar will be preserved.

*9. Courage under fire*

A silent judge is a positive menace who may occasion an injustice by not exposing preliminary views.[36] But nowadays, the actors in the appellate courts of Australia rarely complain of judicial silence. The bad old days of appellate rudeness and even bullying have generally been replaced with a mixture of courtesy, insistence and efficiency. The advocate must be ready to move with the judicial questions. If it is thought that insufficient time has been allowed to express the factual or legal foundation of the argument, a request for further time, courteously addressed to the court, will rarely be denied. Courage and determination are wonderful qualities in advocates. They must not wilt under fire. They may not be required to concede that their case is meritless or doomed to fail. Few judges will seek to extract such concessions.

If it appears that a particular member of a multi-member body is irretrievably lost to the advocate, it will often be necessary for the advocate to concentrate attention on those who remain to be persuaded. The advocate, under fire from one member of an appellate court, may courteously acknowledge: "I can see that that is your Honour's view. I must therefore address my remarks to those who may not share that opinion." It is always possible that the other members of the court are as irritated by their colleague as the advocate may feel. The seemly conduct of proceedings requires the invariable display of tact and courtesy. Strong personalities will occasionally clash. In such a circumstances, the advocate must, I am afraid, bite the tongue. The privilege of emotional release will only be counter-productive to the clients' interests. Advocate and decision-maker must be aware of personality clashes. No judge should play favourites or disadvantage a litigant because of a dislike of an advocate. The law of bias will redress the most serious cases of judicial ill-temper.

Without indulging in intellectual pride, the advocate before an appellate court should sometimes press on even if the court appears antagonistic. Perhaps one judge will be induced into dissent which may attract a higher court, future development of the law or the High Court of the Law Reviews.

*10. Explain policy and principle*

Once a case comes on appeal, certainly to the Court of Appeal and even more so to the High Court of Australia, it is essential that the advocate should have considered the issues of legal principle and of legal policy which lie behind the case in hand. At least at these levels of the judicial hierarchy, it is usual for the decision-makers to be reflecting, as they consider the arguments, about the differential consequences of upholding, or rejecting, the contentions advanced in the appeal. In about a third of appeals, the facts are clear, the

law is well known and the outcome is virtually automatic. But for the balance, there is real room for the advocate to manoeuvre. It may be in giving meaning to ambiguous words of a statute. It may be urging an extension of the common law. This is where a mistake is commonly made by advocates. They think that only one outcome is possible. They consider that the answer is to be found solely in authority. But the words of statutes and of earlier judicial reasoning are rarely such as to admit only one answer at the appellate level. A decision must be made. The decision-maker must be aided in the process of opting for one conclusion rather than another.

It is because of the pressure on judges and advocates that resort is increasingly had to academic writings.

Principle and policy can be derived both from the context of the law under consideration and from a deep knowledge of the fundamental principles of our common and statute law and its history. In the life of an advocate (or of an appellate judge) there is rarely time to pause and think for an extended period about legal principle and legal policy. Such thoughts must occur, if at all, in the spare available moments of reflection in and out of the courtroom. Ideas about legal policy sometimes arise, by serendipity, when reading a decision in another case. The judge will suddenly see its significance for other tasks and note it for its utility there.

It is because of the pressure on judges and advocates that resort is increasingly had to academic writings. No longer do the judges unreasonably require the authors to perish before their thoughts may be read to a court. Appellate courts in Australia today generally welcome the tender of law review articles or references to academic textbooks. Their authors may have had the time and inclination to analyse statute or case law, to see old principles in a broader context and to provide the conceptualisation that will help the court to place the decision in hand in its proper context in the mosaic of the law. At least in the Court of Appeal, no advocate should be diffident about handing up relevant material which may assist in the consideration of legal principle and policy. Of course disputes may arise in such matters. Depending on the approach of the decision-makers involved, such material may be deemed important or insignificant. But the old days when legal principle and policy was ostensibly ignored in appellate decision-making and advocacy have gone forever. With greater candour about judicial choice, comes a larger realisation of the need to assist that choice with more than old case law, mutually inconsistent rules of statutory construction and the citation of dictionaries which please everyone and no one.[37]

## THE FUTURE

Doubtless every observer of the appellate scene in Australia today could add new or different rules to the list which I have proposed. Perhaps, in time, like President Wilson, I will find another four — four more than the Almighty. Perhaps the foregoing could be reduced to seven, always a magic number for the Hebrews and equally important in the seven steps towards Buddhist enlightenment.

Advocacy, like judging, is changing. With the increase in the workload of the courts, there is a growing pressure to commit more argument to writing. It is thus more important today to recognise the special skills of written advocacy. On average, the written word can be read four times more quickly than the same word can be spoken. Hence the introduction of written submissions, designed to shorten oral hearings and to ensure that the advocate has truly focused attention on the issues in hand.

This process will probably go further. Whether it will go so far as the preparation of written briefs, such as are presented to United States appellate courts, or whether something different will be tried in Australia, remains to be seen. In the New South Wales Court of Appeal, there is already a requirement in at least two areas for the parties to produce a narrative statement of relevant facts. This obligation arises where there are more than four appeal books and in damages appeals, where the Court may proceed to an *ex tempore* judgment. These are simply new ways by which advocates are invited to provide the courts with, what Oliver Wendell Holmes Jr once called the "implements of decision".

If the pressure on appellate courts continues to increase, and if the appointment of more judges is either unacceptable or thought undesirable, new techniques will be required. More appeals will require leave. More decisions will be given without reasons or with only short reasons. More of the load will be shifted to the advocate. I do not rule out the possibility of requiring advocates, in effect,

to prepare submissions in the form of a draft opinion which, in some cases, the court could accept as its own, with or without modifications. That would certainly require the advocate to cast his or her mind into the judicial mode and to see the case as the decision-maker must do.

It will be important that the Australian Advocacy Institute's work is closely monitored — both by the Institute and by the legal profession. Its only utility is as it secures long-term improvement in the skills of advocates, which endures beyond the immediate recollection of the course. There may be a tendency of advocates to fall back upon ways that are natural to their particular modes of communication. I do not under-estimate the difficulty of changing something which is so basic to the personality of each one of us. After all, communication to a court is only one projection of the personality of the individual who happens to be an advocate. Being conscious of the basic rules, and practising them in daily life, represents the goal of advocacy training. But just as the Institute teaches that, ultimately, the advocate's criterion is the impact of argument on the decision-maker, so the Institute's success must be measured by its capacity to sustain improvement throughout the stressful, demanding work which advocates undertake.

Who would be an advocate? A kind of intellectual actor grappling with a drama in which the script changes, often unpredictably, every minute. A show-off with discipline. A person of command and authority searching for directness and the gift of clarity.[38] In the troughs of despair over an argument poorly executed or questions poorly asked or answered may be found the profound melancholy of public and private humiliation. But in bending the mind of another human being, with power of legal decision, to arguments successfully addressed which turn the tide and lead to forensic triumph — there can be few moments of human activity so rewarding. Certainly, there are few vocations that offer such excitement. That is why the skills of the advocates must be sharpened and improved. To avoid the moments of despair. To multiply the moments of deserved exhilaration.

NOTES

1. See e.g. R Du Cann, *The Art of the Advocate,* Penguin Books, London, 1964; B. Lynn, *Appellate Litigation,* 2nd ed, Austin and Winfield, San Francisco, 1993, 269; Robert J. Martineau, *Appellate Justice in England and the United States, A Comparative Analysis,* W.S. Hein, Buffalo, 1990, 101.
2. See e.g. A.F. Mason, "The Role of Counsel and Appellate Advocacy" (1984) 58 *ALJ* 537; H.T. Gibbs, "Appellate Advocacy" (1986) 60 *ALJ* 496.
3. See e.g. D.F. Jackson, "Appellate Advocacy" (1992) 8 *Aust Bar Rev.* 245.
4. Lord Nolan quoted Institute of Advanced Legal Studies (1995) 19 *Bulletin* 8, 12.
5. See Gaudron J. in *Oceanic Sun Line Special Shipping Co Inc* v. *Fay* (1988) 165 CLR 197, 263 ["Our legal heritage is the gift of the common law of England . "]
6. Gibbs, above n 2, 497.
7. Mason, above n 2, 342.
8. J.C. Godbold, "Twenty Pages in Twenty Minutes – - Effective Advocacy on Appeal", 30 *Southwestern LJ* 801 (1976), 812.
9. See *Stead* v. *State Government Insurance Commission* (1986) 161 CLR 141, 145.
10. *Escobar* v. *Spindalari* (1986) 7 NSWLR 51 (CA), 55; *Galea* v. *Galea* (1990) 19 NSWLR 263 (CA), 280 applying *Jones* v. *National Coal Board* [1957] 2 QB 55 (CA) (SLR).
11. A recent example where this happened is *Sydney City Council* v. *Reid* (1994) 34 NSWLR 506 (CA) (SLR).
12. See Deane J. in *Oceanic Sun Line* case (above, n 5), 252.
13. J F. Dubina, "Effective Appellate Advocacy", ABA, *Litigation,* Vol. 20. No. 2 [Winter 1994], 3 at 4.
14. Court of Appeal (NSW), *Judgments Report,* produced monthly by the CA Research Officer.
15. The series is published by Legal Bulletin Service. There are also other well-known hardcopy legal update services such as *ALMD Advance,* published by the Law Book Company Limited
16. See s 46A.
17. See Pt 51 r 3(3) SCR (NSW).
18. See Pt 51 r 3(7) SCR (NSW). The rule requires a statement of (a) the nature of the case; (b) the questions involved; and (c) the reasons why leave should be given.
19. See e.g. certain appeals from Masters of the Supreme Court of NSW. See Pt 60 r 10 SCR (NSW).
20. See e.g. *Jones* v. *Hyde* (1989) 63 ALJR 349 (HC), 351; 85 ALR 23 (HC), 27
21. See e.g. *Brunskill* v. *Sovereign Marine and General Insurance Co Limited* (1985) 59 ALJR 842 (HC), 844
22. See e g. *Abalos* v. *Australian Postal Commission* (12988) 171 CLR 167, 179.
23. See e.g. *Devries* v. *Australian National Railways Commission* (1993) 177 CLR 472.
24. See e.g. *Lend Lease Developments Pty Limited* v. *Zemlicka* (1985) 3 NSWLR 207 (CA), 210f.
25. (1979) 142 CLR 531, 551; 23 ALR 205, 225.
26. See R.B. Ginsburg, "Remarks on Writing Separately", 64 *Washington L. Rev.* 133 (1990), 143.
27. Mason, above n 2, 542.
28. Jackson, above n 3, 250.
29. L.H. Silberman, "Plain Talk on Appellate Advocacy" in ABA, *Litigation,* Vol. 20 No. 3 [Spring 1994], 3, 4; Dubina, above n 13, 4.
30. Gibbs, above n 2, 497.
31. Ibid, 498.
32. See e.g. *Ex parte Beane; Re Bolton* (1987) 162 CLR 514, 518.
33. See e.g. the differing opinions expressed in *Young* v. *Registrar, Court of Appeal [No 3]* 32 NSWLR 262 (CA). See also *Mabo* v. *Queensland [No 2]* (1922) 175 CLR 1, 42.
34. See *Cook* v. *Cook* (1986) 162 CLR 376, 390.
35. Goldbolt, above n 8, 816; Mason, above n 2, 538.
36. See *Galea,* above n 10.
37. See Scalia J. in *United States* v. *Smith* 113 S Ct 2050 (1993), 2060f.
38. As to the premium on directness see Gleeson C.J. noted in NSW Bar Association, *Bar News* (1993) 46. For the position in New Zealand see NSW Bar Association *Bar News,* Winter 1993, 33.

# SHOULD THE *COURTS (CASE TRANSFER) ACT* 1991 BE REVIEWED?

Master Patkin*

THE *COURTS (CASE TRANSFER) ACT* 1991 commenced operation in 1991. The legislation changes the law concerning the transfer of proceedings between the Supreme, County and Magistrates' Courts and places all the law concerning such transfers under the one Act. The legislation has two other objectives. First, to ensure a balance of workload in the hierarchy of the civil courts in Victoria and, secondly, to enable the seriousness of a case to be matched to an appropriate court.

This paper examines the operation of the *Courts (Case Transfer) Act* 1991 ("the Act") and *Courts (Case Transfer) Rules* 1991 ("the Rules") and concludes that there are a variety of problems which are in need of attention. Although there are some benefits introduced by the new system I am of the opinion that in some significant matters the old procedure is superior and should be restored.

The law prior to the operation of the Act dealt with three situations: where a counterclaim exceeded the jurisdiction of the County and Magistrates' Courts; where a proceeding was to be transferred to a more appropriate court; and where there were related proceedings in different courts. The application to transfer a case was generally initiated by a party. It was an accepted principle of law that the plaintiff had its choice of court. An argument as to *forum conveniens* existed in regard to interstate courts where the selected court was clearly inappropriate. The legislation regulated, in some measure, what court was appropriate in relation to the County and Magistrates' Courts by reason of those courts' jurisdictional limits. The Act widens the power where a proceeding may be transferred to a more appropriate court and enables officers of the court to initiate a transfer to another court.

Under the old procedure a transfer of proceedings was generally initiated by a summons or originating motion being filed by a party in the higher court's practice court. Thus it was the higher court that had control and the matter was determined at a hearing in that court's practice court.

**As abridged by the editors due to space requirements.*

The Act introduces a radically different system. Not only are there a variety of methods to transfer proceedings but there are different parts of the court, hereinafter referred to as "tribunals", that determine if a proceeding should be transferred.

## GENERAL TRANSFER

The General Transfer results from an agreement between the courts that a workload problem in one court can be alleviated by the transfer of a number of cases to another court. That agreement involves a principle of "shared responsibility". This principle lies at the heart of the new procedure. The parties to a case can object to the transfer of their case. The proceeding is rather involved and I am of the opinion that it will not be invoked unless there is a serious workload problem between the courts. To some extent the procedure created for the individual transfer has been used to transfer proceedings in the Supreme Court to the County Court.

Not only are there a variety of methods to transfer proceedings but there are different parts of the court, hereinafter referred to as "tribunals", that determine if a proceeding should be transferred.

## THE INDIVIDUAL TRANSFERS

The procedure to transfer individual cases under the Act is not complicated. What creates problems and makes the procedure involved are:

1. The number of methods to transfer cases.
2. The various parts of the court that are involved in the transfers.
3. The relationship between the methods of transfer.

The old and new procedures may be compared by considering a transfer of a County Court matter

to the Supreme Court. Under the new procedure the application may be:

1. Pursuant to section 17 where an officer of the County Court or a party refers the matter to the Designated Judicial Officer of the County Court. The parties may then file written submissions and the Designated Judicial Officer of the respective courts consider the matter, without any appearance by the parties. There is a right of appeal, by way of a notice of objection, to the Senior Judicial Officers of the respective courts.
2. By way of an administrative transfer, pursuant to section 27, in certain circumstances, when the defendant files a certificate with the Registrar of the County Court. The Registrar, without any appearance by the parties, must then make an order that the proceeding be transferred.
3. Unlike the old procedure, under the new procedure it is the lower court that initially controls the situation and the application is not determined in open court, but by the Designated Judicial Officers of the respective courts or the Registrar.

## THE PROBLEM OF MULTIPLE PROCEEDINGS

The serious problem introduced by the Act is that it inhibits the ability of the courts to prevent related proceedings being heard in different courts. The situation where there are two or more related proceedings in different courts is generally undesirable. Apart from a duplication of work there is the risk of *res judicata* or an *issue estoppel* arising which may generate an injustice to one or more of the parties. There is also the possibility of inconsistent decisions between the courts hearing the cases. The courts cannot tolerate a system which promotes a multiplicity of related proceedings in different courts (see *Todd* v. *Jones* [1969] VR 169 and *Hinchcliffe* v. *Carrol* [1969] VR 164).

If there was a matter in both the Supreme and County Courts, then under the old procedure a party could bring an application in the Practice Court in the Supreme Court and that tribunal would determine if the matters were to proceed separately or together. If they were to be heard together then the County Court matter was generally transferred to the Supreme Court where they could be consolidated, heard together or heard one after the other. Not only does the procedure under the Act facilitate the problem of multiple proceedings, but its provisions probably prevent the superior court dealing with the problem save for the provisions of section 17(8).

Section 17(8) of the Act provides that a judge or a magistrate can make an order that stops the transfer application being continued before the Designated Judicial Officers. The lower court has control of the situation in these circumstances, not the higher court as under the old law. Unless there is:

1. a successful appeal from this decision; or
2. the higher court matter is transferred to the lower court; or
3. the lower court matter is discontinued and fresh proceedings commenced in the higher court;

there is a problem of related proceedings in different courts, which the higher court, apart from the appeal process, is powerless to control.

Section 17(8) provides another opportunity for *issue estoppal* or *res judicata* arising which, apart from an appeal, the superior court has no control over. I am of the opinion that for this reason section 17(8) should be repealed or be limited to a judge of the Supreme Court stopping a transfer from the Supreme Court to the County Court or Magistrates' Court. The rationale for the power lies in the transferor court having control of its own case. However, where there are related proceedings in different courts the overriding principle is that the proceedings, as a general rule, should be heard in one court. Thus section 17(8) cannot be a power that can be exercised by the inferior courts in relation to related proceedings in superior courts.

There are significant problems because the Act does not regulate what is to happen when the various methods of transfer, or stopping a transfer, occur simultaneously. What happens if the defendant satisfies the provisions of section 27 and the Registrar makes an order to transfer the matter while the Designated Judicial Officers are still in the process of considering a section 17 transfer? It seems that the matter is transferred and the jurisdiction of the Designated Judicial Officers lapses. When this has occurred the Designated Judicial Officers have concluded that the jurisdiction under section 17 lapses. Likewise the hearing of a section 17(8) application must lapse if the Registrar or the court has made an order to transfer pursuant to section 21 of the Act. What happens if the Designated Judicial Officers have merely made a determination to transfer the matter?

A variety of difficult questions of law arise. Is the question of which proceeding takes precedence simply a race which is determined by what order is made first? Does an order date from the time of application or when the order is made? When is the application made to the Registrar? What is the process to review these matters? Where does the court's inherent jurisdiction lie to solve some of these problems?

## CONFLICT IN PRINCIPLE

If there is a conflict in opinion between the Judicial Officers in section 17 applications, sections

17(5) and 20(3) provide that the opinion of the higher court's officer prevails. This provision in the Act reveals a clear principle that the superior court should have control of the matter. However section 17(8) contradicts this principle by allowing a member of the lower court to veto a section 17 transfer.

The Act has created a problem when different parts of the courts are able to consider the same or related applications at the same time.

The multiplicity of tribunals is again illustrated if a party, or an officer of the Supreme Court, applies to the Designated Judicial Officer of the Supreme Court pursuant to section 17 of the Act, to transfer a matter in the Supreme Court to the County Court. While this application is being processed the plaintiff could apply to the Prothonotary for the transfer pursuant to section 26 of the Act. At the same time an application could be made to a judge of the Supreme Court pursuant to section 30 of the Act to transfer the matter to the County Court. Again an application could be made to the same or a different judge of the Supreme Court to stop the transfer under section 17(8) of the Act. Thus up to four applications could be considered simultaneously. What happens if at the same time there are applications made in related proceedings in the County Court?

The Act has created a problem when different parts of the courts are able to consider the same or related applications at the same time. It is improbable that the above scenario will occur. The more likely scenario is that an order can be made pursuant to one method of transfer while another method of transfer is being considered. For this reason alone the provisions of the Act need urgent attention.

## THE PROVISIONS AGAINST RE-TRANSFER

Difficulties will also arise in preventing related proceedings being heard in different courts by reason of the provisions against subsequent transfers in sections 14, 23 and 33 of the Act. Thus a matter transferred from the Supreme Court pursuant to section 17 cannot be transferred back to the Supreme Court. If a related matter is commenced in the Supreme Court after the transfer, then a problem arises unless the proceeding in the Supreme Court is transferred to the County Court, or the County Court proceeding is discontinued and recommenced in the Supreme Court. It is an embarrassment if the transfer was initiated by the court and opposed by the parties. The reason for the existence of this law is obvious. Administrative efficiency cannot tolerate transfers back and forth between the courts. However that this law must be repealed is also beyond argument. Justice must prevail over administrative efficiency.

## THE ACT AND PRINCIPLE OF SHARED RESPONSIBILITY

It is obvious that a principle of "shared responsibility" should be the preferred basis of a "General Transfer" which involves the transfer of a number of cases between courts. The only other basis would be that the attitude of the higher court governs the transfer of such cases.

The question is whether the principle of "shared responsibility" should also apply to the transfer of individual proceedings. I am of the opinion that it should not apply to all problems involving the transfer of an individual case. The nature of the problems involving an individual case concern jurisdiction, matching the seriousness of a case to an appropriate court, cost considerations, forum shopping and related proceedings in another court. It is only the last problem that involves two proceedings. In dealing with problems as to jurisdiction there is no need for any principle of "shared responsibility" and this is accepted by the existence of the administrative transfer pursuant to section 27. Rarely could individual transfers interfere with the workload of courts. The fact that a plaintiff can transfer down pursuant to section 26 by way of administrative transfer also supports an argument that a plaintiff should be able to transfer up by such a transfer.

The power of the court matching a case to its "seriousness" is inconsistent with the principle that the plaintiff may select its own forum. However why have a principle of "shared responsibility" to deal with the problem? I am of the opinion that the superior court could decide this question. Transfers down the hierarchy because the parties desire to reduce costs do not require both courts to be involved in considering the transfer of the case. The existence of section 26 of the Act, section 37 of the *County Court Act* 1958 and section 101 of the *Magistrates' Court Act* 1989, which allow the parties by consent to commence proceedings in the lower courts exceeding the jurisdiction of those courts, reinforces the argument that parties should be able to consent to the transfer of a case to a lower court to save costs. Under the present scheme such a transfer can be made pursuant to sections 30 and 26. However if the proceeding ex-

ceeds the jurisdiction of the lower court then the parties need to proceed by a section 17 reference.

## THE INDIVIDUAL TRANSFER IN THE SCHEME OF CASE TRANSFER

What must be appreciated is that the original reason for the interest in case transfer between the civil courts was a concern solely with the inability to transfer cases when a court was overloaded. Any bulk transfer obviously required both courts to be involved in this novel process. The question of the courts' limited ability to match the seriousness of a case to an appropriate court was another objective which one could argue requires a principle of "shared responsibility".

The new responsibility was not to change the "criteria" whereby individual cases were to be transferred. The Act merely consolidated all the legislation into one Act. What has happened is that a policy for adjusting workload and matching a case to its appropriate court has been engrafted onto the law relating to individual transfers and the unfortunate consequences of that step were not appreciated by the creators of this legislation. The considerations relevant to transferring a single case do not cover the problems of related proceedings in different courts.

Under the old procedure the party seeking a transfer followed the standard procedure of filing and serving a summons and affidavit in support of the application. Thus any respondent to the application was aware of the grounds of the application and could file affidavits in response to the applicant's case. On the return of the summons before the court, each party could ensure that not only was all the material before the court, but that the court was seized of the essential issues in the case. Likewise the parties, being before the court, could answer any questions concerning the application.

Pursuant to section 17(1) and rule 11 a section 17 application is initiated by a "reference" to the court to transfer the matter to another court. Although the applicant should serve on all parties a copy of the reference, as noted in form 4, the applicant does not incorporate the reasons for the transfer in the "reference". The court pursuant to section 17(2) and rule 12 in response, sends a notice of the reference in accordance with form 5 to the parties, inviting written submissions. The notice does not inform the parties who has made the reference to the court. It follows that where the applicant has not served all parties with notice of the reference then those parties may be unaware of who is the applicant. In some cases it is obvious. Accordingly the form used by the County Court now specifies which party, or whether an officer of the court, has made the reference.

The parties pursuant to rule 27 should serve a copy of any submission or document filed on all other parties. There is an immediate problem for any party to make written submissions, when they do not receive the applicant's reasons for the transfer, or receive them after they write their written submissions. In some cases the applicant's reasons will be obvious. Thus the counterclaim may exceed the jurisdiction, or the claim may be beyond the jurisdiction. However if there are related proceedings in another court then until the submissions arrive it may be impossible for the respondent to know what to say.

Where the applicant does not file or serve written submissions then neither the court nor the respondents may appreciate the basis of the application.

There is an immediate problem for any party to make written submissions, when they do not receive the applicant's reasons for the transfer, or receive them after they write their written submissions.

The procedure whereby a "contested" matter is considered in the absence of the parties is undesirable. First of all there is no procedure to ensure that the submissions made by the parties are before the Designated Judicial Officers. A variety of problems occur and it can be discovered later that all the material was not considered. It was assumed by those who created and considered the new procedure that as a rule the written submissions would enable the Designated Judicial Officers to consider the matter properly. This reasonable expectation has not materialised. In far too many applications the submissions quickly reach a conclusion without an adequate basis being established for that conclusion.

In comparing the time involved to transfer proceedings the old procedure seems clearly superior. Under a section 17 reference, even if the parties and court act reasonably expeditiously, an application takes more than six weeks to process. There was no problem under the old process, for the urgent application could be processed in a few days.

A proceeding in the Supreme Court for say $250,000 may be transferred to the County Court, as the latter court, pursuant to section 37(2) of the *County Court Act*, has jurisdiction pursuant to such a claim if the parties consent. However a proceeding whereby the Supreme Court derives jurisdiction from cross vesting legislation or from

the Commonwealth legislation should not be transferred. If however such a proceeding is transferred, then section 22(2) provides that the inferior court has jurisdiction to hear the case.

## THE COSTS OF THE APPLICATION TO THE PARTIES

Whether or not the new procedure is cheaper to the parties is debatable. In some cases the written submissions alone make the procedure under section 17 more expensive than a simple application in the practice court. It is conceded that a consent or unopposed application made by way of a section 17 application or by administrative transfer is probably cheaper to the parties. However it must be remembered that under the old procedure many applications would be by consent or unopposed. On receipt of the affidavit in support the respondent would often consent or not oppose the application. Again, the receipt of an affidavit in opposition by the applicant would often trigger off a consent or unopposed order.

## THE POWER TO AWARD COSTS

The Act does not empower the Designated Judicial Officers to award costs of applications. In numerous cases parties seek an order for costs of the application. There are a variety of situations that occur where the Designated Judicial Officers should have a power to order costs. Some references are misconceived and rejected. In some cases the applicant does not submit written submissions. Yet it is the applicant's reference that puts the respondent to expense. Some applications are withdrawn.

## THE POWER OF THE COURT TO REQUIRE AN UNDERTAKING AS TO THE COSTS OF A PROCEEDING

Practitioners readily appreciate the issue as to the costs incurred in an application to transfer proceedings. However, they are generally unaware that there is no power to order such costs. There is rarely any understanding shown about the provisions in the Act as to the power to order a party to provide an undertaking as to costs in the proceedings as a condition for either the transfer, or not transferring proceedings to another court. I am of the opinion that the provisions in the Act are confusing and should be amended to provide a general discretion to the Designated Judicial Officers to make orders as to costs in the proceeding.

## THE APPEAL PROCESS

The Act provides an appeal process by way of objection in sections 18, 19 and 20. Section 18 should be amended to require the court to inform the parties of a decision, even if that decision is not to transfer the proceeding. Pursuant to rule 13 the court has always informed the parties of the result of a decision.

Section 19 requires amendment to allow an objection, not only if a proceeding is transferred, but also if the decision is made not to transfer a case.

There is also a problem with section 20 which seems to provide that only the party objecting to the Designated Judicial Officer's decision may file written submissions in support of the objection and be invited to be heard by the Senior Judicial Officers.

## ADMINISTRATIVE TRANSFERS

The Act provides for administrative transfers. These transfers, in contrast to a section 17 transfer, were intended to be a transfer by an administrative act without any opportunity for a respondent to object to the transfer. Thus a question does arise whether a respondent may object to an administrative transfer?

Any redress for an unjustified transfer would be made by way of a re-transfer back to the transferor court. I am of the opinion that to provide for a redress after the event is not only a procedure to deal with the problem after the horse has bolted, but it will often not redress a wrong. A case could be ready for trial in a few days in the County Court. However if a defendant certifies that the counterclaim exceeds the jurisdiction and that the plaintiff will not consent to the counterclaim being determined by the County Court, and there is no right to object, then the Registrar pursuant to section 27, "must" order that the proceeding be transferred to the Supreme Court. The plaintiff could be hammering on the door of the Registrar trying to allege there is no counterclaim. The plaintiff desires to argue that the counterclaim has been dismissed pursuant to the operation of self-executing rules in Order 14A of the County Court Rules. Alternatively, that the defendant has never sought the plaintiff's consent, or maybe that the consent has been given, or as mentioned above, the counterclaim has not been served, or is irregular as being out of time. Even if the defendant has been guilty of delay, or even if there has been an order for a speedy trial in the County Court, it seems to me that the Registrar may have no discretion but must transfer the matter to the Supreme Court. The inconvenience to the plaintiff, the plaintiff's practitioners and witnesses are all ignored. The situation where there are multiple parties is not considered. It seems that one defendant may make a section 27 application. The objections of the other defendants are ignored except by way of an application to re-transfer.

That procedure created by the administrative transfer has merit where an application to transfer is unopposed or by consent. It would then be

quicker and cheaper than an application being made in court. However, where there is any opposition then the matter should be referred in the practice court of the transferor court, as was the limited form of administrative transfer under the old law pursuant to section 57A of the *County Court Act* 1958. Where there is a related proceeding in a higher court, the matter should be referred to the higher court. A question does arise as to the jurisdiction of the transferor court to set aside an order made by the officer of the court to transfer a matter. Assume that the Registrar of the County Court makes an order transferring a proceeding to the Supreme Court on the basis of a certificate filed by the defendant pursuant to section 27 of the Act that there is a counterclaim which exceeds the jurisdiction of the County Court and that the plaintiff has not consented to the counterclaim being determined in the County Court. Does the County Court have any jurisdiction to set aside the order? It would seem that the Act should be amended to provide that the court officers can refer an application that is opposed to the practice court. Another method to deal with the situation could be to provide that if the court officer makes a decision based upon facts certified by a defendant which are challenged by other parties, the respondents have a specified number of days after being informed of the Registrar's decision to apply in the practice court for a rescission of the order.

## THE APPROPRIATE COURT AND DELEGATED JURISDICTION

In some cases it may be clear that a lower court is the appropriate court. For example, at the moment certain proceedings governed by the Corporations Law can only be determined in the Supreme Court. The problem is that section 22(2) provides that if an exclusive jurisdiction is transferred then the transferee court has jurisdiction to hear the case. It must follow that any transfer is validated by section 22(2). It seems that the Designated Judicial Officers could transfer such a case, but the difficult question is whether they should. Is the answer influenced by the attitude of the defendant? What if the defendant consents to the transfer, or does not oppose it, or even opposes it?

It is obvious that re-transfers ought not be allowed unless there are special circumstances. However a case could be transferred and then by reason of the addition of parties or amendments to any claims the case's significance could change dramatically. There is danger when any law prevents the court exercising a discretion in the circumstances of each case. Administrative efficiency or convenience must never override the justice in a case. If one of the main objectives of the case transfer procedure is to match a case to an appropriate court then no provision should exist in the Act which frustrates that objective.

## THE POWER TO TRANSFER BY CONSENT

There is no power to transfer proceedings by consent. Such a power is inconsistent with the court, or courts in "shared responsibility", having control of the respective workload between the courts and matching a case to an appropriate court. To allow the parties to determine in what court a matter should be decided is in some respects contrary to the underlying policy in that Act. This absence of power to transfer matters by consent increases the cost to both the parties and the courts in transferring matters. It also prevents a speedy transfer in urgent situations.


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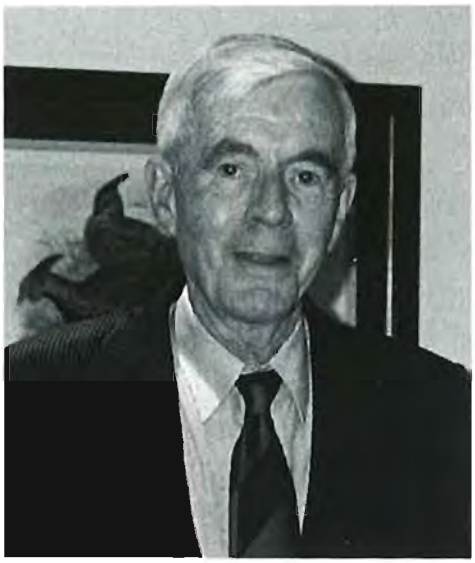
# RETIREMENT OF DEPUTY PRESIDENT WEBB

A FORMAL FAREWELL WAS HELD AT THE premises of the Administrative Appeals Tribunal of Victoria on 5 May 1995 to mark the occasion of Deputy President Walter E. Webb's retirement from the Tribunal.

Deputy President Webb became a full-time Chairman of the then Town Planning Appeals Tribunal on 31 July 1981, having served for 12 months as a part-time Chairman during the period 1978–79. He continued as Chairman with the Tribunal and its successor, the Planning Appeals Board before becoming a Deputy President of the Administrative Appeals Tribunal following that Tribunal's absorption, in 1988, of the functions of the Planning Appeals Board.



Walter Webb was born on 4 January 1926 and his school days were spent in Melbourne. In January 1944, at age 18, he volunteered to join the AIF and saw front line service with the 728th in both Malaya and Borneo.

After the war he studied law at the University of Melbourne, graduating in 1953 and with articles undertaken at the firm of Alfred Abrahams and Fraser. He soon became a partner with James P. Ogge and Webb and from 1962 to 1981 was a partner with Gair and Brahe Solicitors.

In 1960 he joined the Australian Army Legal Corps and remained in the Corps until 1985 attaining the rank of Corps Colonel. He both prosecuted and defended.

At his farewell Mr. Chris Canovan Q.C., of the Victorian Bar, Mr. Ian McP. Pitt of Best Hooper Solicitors and Mr. David Whittney of Perrot Lyon & Mathieson, Town Planning and Development Consultants, all thanked Deputy President Webb for the service he had given to the Tribunal and its predecessors. Special recognition was given to his open and informal approach to the conduct of hearings and for his kindly treatment of parties who, within the Tribunal's jurisdiction are frequently unrepresented by legal counsel. The considerable administrative load which Deputy President Webb had taken on in more recent times and the efficient manner with which he had executed this task was also drawn attention to.

In replying, Mr. Webb acknowledged the difficult periods during his Deputy Presidency, noting in particular the changeover from the Planning Appeals Board to the Administrative Appeals Tribunal and the administrative burden caused by the development boom of the late 1980s and early 1990s when the Tribunal's case load expanded considerably. He also drew attention to what he regarded as future challenges for the Tribunal notably in the areas of tenure and remuneration. He suggested that the independence and high regard with which the Tribunal is held within the community can only be maintained if greater consideration is given to security of tenure, and if remuneration levels take account of the social and economic importance of the Tribunal's jurisdiction and the need to attract members of high standing and with appropriate qualifications.

It is hoped that Deputy President Webb will enjoy a long and happy retirement with his wife Judith, their three children and an increasing number of grandchildren. He has most certainly earned it after a lifetime of service to the law and planning law in particular.

# INTERVIEW WITH DEPUTY PRESIDENT WEBB

*At the farewell to Walter Webb there was an interesting exchange between Mr Webb and Judge Fagan, the President of the Administrative Appeals Tribunal. With the permission of the participants a shortened version of that exchange is reproduced below.*

**President:** Well, thank you all for coming here. There must be about 35 or 40 people and it's a very pleasant but sad occasion. The reason why I have asked people to come together is to squeeze out of the retiring Walter some of the wisdom that he has collected over the years in a life devoted to planning law and to the Tribunal.

It won't be known to you but I first met Walter in about 1961. He was then employed by a firm of solicitors in Prahran, I think he was a partner there and the firm was called James P. Ogge and Webb and I was an unsuccessful applicant for a job as an articled clerk there. I have never pursued the reasons why but I'm sure they were justified. I was determined to go to the Bar at the time and eventually did articles at Pavey Wilson Cohen and Carter and went to the Bar on the day my articles finished and then read with Bill Crockett. That was in 1961 and my introduction to planning law was through Walter in about — I'll be corrected on dates — but I think it might have been in the early 70s. Walter by this time had no doubt sold his interest in Ogge and Webb for a great fortune and then went to Gair and Brahe. It was while he was a partner at Gair and Brahe that he briefed me in one of the first town planning cases — it was heard by the delegates of the Minister for Local Government — I think it was at the time.

**Webb:** I think your history is a bit wrong Judge — in fact that was in 1961 — in fact you were briefed by Gair and Brahe and I appeared for one of the parties and it was a question of whether or not there should be a service station in Williams Road, Prahran. Gair and Brahe acted for the owner of one property and I acted for the owner of another — both those people wanted a service station as they had entered into a contract of sale with the Shell Oil Company. There was a great kafuffle because it was alleged that the mayor of Prahran at the time had an interest in one of the properties and Gair and Brahe issued Supreme Court proceedings against the City of Prahran to have all sorts of things stopped. By the 1970s they were no longer delegates they were the Town Planning Appeals Tribunal. We were successful.

**President:** Well, I say that he introduced me to planning law. I can remember distinctly going into the room at 61 Spring Street and being confronted by two delegates — Hal Chipman and Widdop. At all events I was intimidated by them in the way no doubt people are still when they are new coming to these tribunals and further intimidated when told by Walter "Now sit down, shut up and say nothing" which I did. He told me that we were on the same side. I didn't realise it at the time but I was able to rely on what he said as it turned out. That was my introduction to Walter. Now I have actually looked at my old fee books to find out the exact date of that case but I started too late in looking. Do you remember the names of the parties involved?

**Webb:** Yes, my client's name was Little — if I remember rightly. I've forgotten the name of your client — it's a Jewish name — Samuel or Freeman. He owned a shop in Chapel Street.

**President:** How was it that — was it just coincidence I was briefed by Gair and Brahe in that case?

**President:** And you later became a partner at Gair and Brahe.

**Webb:** I am not certain about that. It wasn't long after that I went to Gair and Brahe. In fact I had shortly after that or I had accepted the offer that I would join and as for selling out my practice for a large sum you didn't know Jim Ogge very well.

**President:** I must say do you remember what year it was that you went to Gair and Brahe?

**Webb:** Yes, 1962.

**President:** Well, I can say looking back through these old fee books of mine — on almost every page there is a brief from Gair and Brahe — and in this particular case I was going to ask Walter if he remembered what he charged compared with what I was paid.

**Webb:** I can tell you what I charged — it would have been 25 pounds. That meant instructions as well as appearing and it was late in the afternoon too.

The food that was served was not very appetising — it was Vietnamese cold vegetables — but they all seemed to like it and I gave them a very short history about planning law.

**President:** It was one of the early cases. Just looking at it from the other end of the telescope — at the end of last year Maddock Lonie & Chisholm asked me to go down to a lunch that they were putting on for some visiting North Vietnamese government officials and lawyers and there were about 30 of them in the room. The food that was served was not very appetising — it was Vietnamese cold vegetables — but they all seemed to like it and I gave them a very short history about planning law and how it's developed here and it all had to be translated through an interpreter and they all seemed to be fairly taciturn and stony faced about it all until I said "and the reason why the Town Planning Appeals Tribunal was set up was because there had been many allegations of bias and corruption against politicians in the handing out of permits to their friends and others no doubt for consideration and it was thought here that an independent tribunal was required" and these people fell around the place laughing their heads off and you've never seen anything like it and at the end of all that the leader of that delegation made a little reply in which he said to the interpreter — "You can tell the Judge that we think an independent tribunal is a good idea for our country too". It's a universal problem with governments and government authorities handing out licences and the permits and the like.

**President:** At the time that you first became interested in planning law were there many planning lawyers around the place?

**Webb:** No, I think the one who set himself up as the expert in those days was one Kenny Gifford. He wrote a handbook on it in the early 50s at that time. Cec Hooper of Best Hooper Rintoul & Shallard was in fact the solicitor for the MMBW and he had been engaged by the MMBW to assist in drafting the first IDO and he was most incensed when Ken Gifford came out with his little handbook on a guide to town planning because Mr Gifford was a great salesman.

**President:** Were there any other solicitors who were early in on the field?

**Webb:** Yes, I think Best Hooper was the first one and I think, if I rightly remember, the other one involved was Macpherson Robinson & Kelly. Of course, Macphersons were particularly involved.

**President:** What about Maddock Lonie & Chisholm?

**Webb:** And Russell Kennedy and Cook were very much involved.

**President:** Maddocks?

**Webb:** Yes, Maddock Lonie & Chisholm because they acted for a great number of councils and it was Ian Lonie — rather Frank Lonie — Ian's father — was one of the leading lights.

**President:** And apart from Kenny Gifford at the Bar, were there any others?

**Webb:** I really can't remember any one — Jim Gobbo of course.

**President:** I think he was in that case that we did together for somebody or another — would that be right?

**Webb:** I think he might have appeared for the Prahran Council and he lost.

**President:** Yes, I think that's right.

**Webb:** So, you know, it's very hard to remember facts that far but certainly Jim Gobbo — Garth Buckner — because Garth was with Russell Kennedy & Cook before he went to the Bar — he used to do a lot of Local Government — that's the first time I ever met Garth and he was prosecuting a poor client of mine over boarding house regulations and there were something like 25 charges — Garth appeared for the council and we pleaded guilty to one charge and the other 24 were dropped and she was fined two pounds.

**President:** Did Jim Gobbo make a contribution to the jurisprudence of planning appeals?

**Webb:** Very much so, and in fact Jim became the leading light really in advocates in the planning law and local government law, in my view anyway.

**President:** What were his contributions would you say?

**Webb:** I think his ability to grasp what were the essentials of the case and the planning law applicable to it and he did it in a very unassuming way.

**President:** He is credited with having devised the idea that the way to win a case with this Tribunal was to get an expert in the area to come along and

give technical evidence about the area rather than to leave it to what we might otherwise have thought was commonsense. He had an eye for collecting experts one way or another - - there weren't many areas of activity that he wasn't able to subject to some form of expert criticism or evidence.

**Webb:** Yes, I agree with you - - in my view he'd most probably excel now for the number of witnesses. Michael Wright and Tony Hooper and also Chris Canavan are all for having the appropriate number of witnesses.

**President:** Yes, all that technique if that's what it is able to be called in one way or another to sound experts, smell experts, engineer experts, planning experts. You've seen the growth of a planning profession over that period. In the beginning who were the planners of note?

**Webb:** Les Perrott, . . .

**President:** There weren't a lot though were there in the beginning?

**Webb:** Very few. That is a profession that has grown enormously over the last 25 years anyway. Planners were almost unheard of 30 years ago.

**President:** Has that profession made a contribution to the design of the city?

**Webb:** I wouldn't be game to say no, having regard to the number of planners there are now. Each profession I believe has had their part to play in framing what the city looks like and also of course avoiding some of the mistakes that might have been made if the engineers had their way. And also architects for that matter too because sometimes architects become so convinced of their design that they very often don't have regard to other factors such as the rest of the streetscape and other people's amenity.

**President:** Just turning to another matter. What are your views about independence and tenure on the Tribunal?

**Webb:** I thought that the problem had been overcome with the *Planning Appeals Board Act* where there was a power to appoint for a seven-year term.

**President:** That was in 1980.

**Webb:** It was the 1980 Act. When there was a power to appoint members for seven years because prior to that time members were appointed for a period of usually three years and then reappointed at the end of three years and it was an ongoing thing if they wanted to be reappointed. I thought that if there was some longer tenure so that they weren't left wondering - - it was a bit ridiculous we felt to expect people to give up their professional practices to become a member of a Tribunal for a period of three years without any surety that they were going to be reappointed. I think that's what governments still don't understand and I thought because at that stage the Liberal Party was the government and they are now but it appears they have forgotten the lessons of history and have gone back to this business of three-year appointments which I think is a grave mistake because it leads you to the conclusion - - well you know if you are hearing a matter and if your appointment is coming up shortly that if the government is involved you would be more likely to make a decision in favour of the government than against it and there's always that undertone.

**President:** Do you perceive it as an actual problem. Do you know of any instances where a decision has been affected by that consideration or do you merely put it on the basis that it's apparent?

**Webb:** I don't know of any and I would be surprised if there were but there is always that perception that it could happen and that's not to say that it wouldn't happen.

**President:** Well, I can say to you quite distinctly but not with this present Tribunal that I've known it to in fact occur.

**Webb:** I wouldn't be surprised.

**President:** Yes, and it's not a happy thing. What do you think — a five or six-year appointment might make any difference.

**Webb:** Well, I think it would make a great deal of difference but I think even five or six-year terms are too short. I think a minimum term should be seven years. I think going back to the principle of the Planning Appeals Board — I don't see why a term shouldn't be seven years. The last one in recent history who was appointed for seven years was Russell Byard in 1988. Now Russell had a good practice at the Bar and his term is coming up and while he might be prepared to take an appointment for seven years with a prospect of being reappointed — I doubt very much if Russell would have given up his practice at the Bar for a term of three years. Now Russell could answer that one.

**Byard:** No way.

**Webb:** No way, and I think it's very difficult and I think that there's also another problem — there is always the possibility that you are going to get people that will take a three-year term appointment - - "look I'll go to the Planning Division of the Tribunal and I'll get a real knowledge of it and you know after it's all over I'll go back to the Bar" or you have the possibility that it might be said that that person is going to be pretty favourable to certain solicitors in his/her decisions because that person might well be the person who's going to send me a brief and that's why short-term appointments to the Tribunal of this nature are completely wrong.

**President:** The Tribunal has often been publicly criticised as the source of unnecessary delay in planning and development in the community — what would you say?

**Webb:** I think that that on occasions has occurred. I don't think it's a problem with the system. It has been a problem with resources — in the sense that we haven't had the people to deal with the flow of

work — if you jump say from 2,400 appeals a year to 4,500 you know in a space of two years and what with lesser resources you can't expect that it is going to turn over as quickly as possible. But I just wonder if those people want to think about whether or not the system they've got causes delay what — wouldn't there be a far greater delay if you had a situation where the only avenue for people to go was to a court and then they had to sit in a waiting list in a court waiting to get on. Yet you know if we get an appeal on in at most 10 weeks and sometimes it's a lot less than that, e.g. where that case is listed within three or four weeks if the parties are ready — what court would do that?

**President:** In NSW there are no third party appeals or what we call objector appeals — is there a place for objector appeals like we have them in Victoria?

**Webb:** The thought of going to a situation where you have no right as a citizen to object to what is going to take place next door to you or across the road from you would concern me — quite frankly it would lead to a situation where you could have very disgruntled citizens because after all what is permitted by a planning authority that resident has to live with it for the rest of the time that they reside in the area and I think to some extent that very often the fact that there have been objectors who have appealed against a proposal has resulted in firstly a bad proposal that was not going ahead or secondly in a redesign of the proposal so that you got a much better proposal which could be accommodated in a community without causing any disruption and that is the beauty of having a third party objector.

**President:** How would you deal with a problem occasionally and I emphasise "occasionally" that occurs where you have parties to an appeal here fishing for technical points to take on appeals so as to delay a development and in the hope of forestalling it on holding charges, interest and costs. How would you deal with that problem in the community interest?

**Webb:** Well, I think it is a balancing act. How often would that occur when you consider the number of appeals and I would have thought that it is only generally when you have two commercial people fighting one another not the residents who are trying to stall it — not the individual residential people — it is the economic competitor. Now we have provisions in S.150 of the Act to impose a penalty on a person where it is found that the only reason for the appeal has been one of economic competition or to try and stop it.

**President:** Has that power ever been used by the Tribunal?

**Webb:** Yes, it has but rarely. I think two or three times it has been exercised. But I think the answer lies that if in fact an applicant for a permit believes that it is trying to be stymied by an economic competitor generally they are aware of that and they apply to the Tribunal and generally we try and expedite the hearing of that appeal or if there are certain points that could be dealt with by a directions hearing then we bring it on for a directions hearing.

**President:** Is there any noticeable difference in result or effect between legal representation and representation say by a skilled planner?

**Webb:** I don't agree that there is. Quite frankly, I think that very often you find a lawyer will win on a technical point of law but I think that when it comes down to a planning issue I don't think lawyers have any greater effect on it than the planners do, certainly not from my point of view.

**President:** You were going to mention some of the notable characters who have wandered through the Tribunal from time to time.

**Webb:** I only intended to mention a few because I think that sometimes not many people recognise some of the types of people we have had at the Tribunal and I'm not talking about the lawyers — I'm talking about the other members and I'll talk about one former member — I understand he is in fact .. whenever he has had a difficult case to decide at the end of the day the scotch would come out.

**President:** Did you join him in that exercise?

**Webb:** In fact he had gone by the time I came to the Tribunal. For example, there was one member of the Tribunal and I just want to reflect on what these three characters had done. One was a bloke by the name of Hal Watt. Now Hal Watt was a business administrator — he had been a senior executive at Pacific Dunlop. Not many people realise that during the war years Hal Watt served in the 7th Division. For the younger people who have never heard of Nadzab of course there was in fact an airborne landing by a brigade of the 7th Division in Nadzab in Papua New Guinea. Hall Watt was in fact the architect and all the troops, apart from a handful had never used parachutes in their lives and they also dropped artillery as well as troops. Hal Watt was the principal planner of that campaign.

Another one of course was Ron Chambers who people are likely to remember although they might not have realised that he was once sentenced to death. He won a Military Medal in the Middle East with the 6th Division. He was captured on Crete and was a sergeant. A German officer had struck an Australian soldier and Ron hit him and he was then sentenced to death by court martial. That sentence was commuted to five years in prison on appeal. He spent three and a half years in solitary confinement in a POW camp. When Ron came back of course — he was the Chief Engineer for what was the combined council of Pakenham and Berwick and when that split up, Ron was the Chief Engineer for Pakenham before he became a mem-

ber of the Tribunal. The other one of course was Basil Elms, my old friend. Basil was involved in planning at a very early stage in his career. He was in the British army of course. In 1945 Basil was in charge of planning for 200,000 British troops and their families as one of the occupiers of Germany and in fact in Hamburg accommodated over 200,000 people in a city that had been bombed extensively by the allies.

I don't think it's often recognised that as part of a community service those members of the Bar gave up a great deal of their time to the old Town Planning Appeals Tribunal.

Apart from that there is something else that people might not realise. Going back at one stage in time the Town Planning Appeals Tribunal kept on growing and they set up a new division, but what very often they did do was that they would call on members of the Bar to act as acting chairman of a division of the Tribunal to get rid of some of the work. And of course there have been some notable people apart from the Judge, people like Michael Wright, Richard Evans, John Winneke just to name a few. I think that planning owes a great deal to those members of the Bar who gave up a great deal of money to sit as a chairman of the Town Planning Appeals Tribunal for a while because the salary was not great — you will remember, what some of those people commanded at the Bar — and I don't think it's often recognised that as part of a community service those members of the Bar gave up a great deal of their time to the old Town Planning Appeals Tribunal.

**President:** Did they include the present State Solicitor General and the present Commonwealth Solicitor General?

**Webb:** Yes, Doug Graham and Gavin Griffith. There were a lot of people who used to practise in this jurisdiction — and a couple of others who have become Judges. Michael Black, among others.

**President:** Just before you go, can I get your comments about some other notable people who have walked through these places. Did you come across Kevin Holland?

**Webb:** Kevin Holland, of course, I should have mentioned him because in fact he was one of Ron Gould's colleagues who used to sit with Ron with Phil Opas. I won't mention Phil because he is known to all, but Kevin Holland of course was a former Labor Party parliamentarian and also a Melbourne City Councillor after he left Parliament. A real gentleman — you wouldn't have known — although he has been a staunch Labor politician — you certainly would never have known what Kevin's political beliefs were when he was sitting as a member of a division. He is still around, he used to walk to work from Flemington every day and walk home again. I occasionally see him at the races and he doesn't look a day older than when he retired from the Tribunal back in 1982. Of course, you all know Tony Hooper so I don't need to mention him — you know but there have been some interesting characters in this place from time to time and I hope that we don't cease to have them — I think we have got a few at the moment. I won't express any views on their characteristics at this stage.

**President:** Well, I simply would like to finish by saying that you started off teaching planning law to me in the way that I have described it already and you have been up until today — that's about 30 years of my life as a lawyer and for that I want to thank you among many other reasons. Thank you for coming here today.

**Webb:** Before I depart I might go back to how all this started out. When Warren came to me and sought articles I had a theory about taking articled clerks. I was running a very busy practice and I believed that if you took an article clerk on you had a duty to teach him with the result that I being in private practice I have only ever had three article clerks because if I decided if I had an article clerk I would teach him. My last article clerk was Gareth Evans — a bit of a disappointment — not about the law — but he didn't take my advice either. At the time he was articled to me he was in for four scholarships — one of them was the Rhodes scholarship, one was the Shell scholarship — he was down to the last four but then Shell told him he had to either accept their scholarship or forget it so that they could award it to somebody else so he took the Shell scholarship which took him to Oxford for two years. When he came back from Oxford he came to see me and sat down and I asked him what he was going to do and he said he was going to University of Melbourne to lecture. I said, "You're mad. You should forget all that and go to the Bar and find out what life is about". And I think that is the greatest mistake Gareth made because he might have gone anywhere if he had gone to the Bar and learnt what the rough and tumble was rather than going to the academic world. As I said he became a Labor politician.

Another became an adviser to Malcolm Fraser so I have had both sides of the political spectrum and the third is a partner in one of the larger firms in Melbourne. His mother had in fact worked for me when I was in Prahran — she was a qualified solicitor.

# THE BAR AND THE INTERNET

ONE CAN SCARCELY PICK UP A NEWSpaper or a magazine without seeing some article or advertisement which refers to the Internet. This electronic superhighway, whether one likes it or not, is quickly becoming an important source of information. Analysts project that users in Australia will exceed 1.5 million by mid-1996, a projection more likely given the imminent entry into the ranks of Internet service providers of such giants as Microsoft, Telstra and News Corp. Already some 40 million people around the globe are said to have access to the Internet.

For the uninitiated, the Internet is an anarchic, uncoordinated series of links between separate computers all over the world. The methodology of the system was devised to enable computer communications to survive nuclear attack. The loss of any one computer, or any one link, has no effect on the operation of the Net. By entering the Internet access can be obtained to a vast amount of information. A great deal of it is worthless, but increasingly useful and important information is finding its way on to the Net.

The current enthusiasm of Internet users stems from the graphics capability of modern computers to present information in a "user-friendly" manner. Gone are the days when long strings of seemingly incomprehensible letters and figures had to be laboriously typed to access another computer. In what is known as *Hypertext* the text appears on the

The Victorian Bar
welcomes you to its WWW Home Page.
Click here for a welcome from the Chairman of the Victorian Bar, David Habersberger Q.C.

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screen with some words in a different colour or font. Clicking on this text (or on a screen graphic) with the mouse or screen pointer automatically causes the links preprogrammed into the highlighted words or graphic to be established, and off you go along the superhighway to another document, another computer in another Australian State, or another continent.

Perhaps the major reason for members of the Bar to consider a link to the Internet will be to use email, or electronic mail facilities. Email in years to come may well replace the fax. It allows communication of information in printed form, and so is an improvement on a telephone conversation, and yet it allows the sender and recipient to communicate in a far more immediate fashion than trusting their correspondence to the vagaries of the postal service. Unlike the fax, the message is protected from prying eyes, and can be collected by the recipient at his or her convenience wherever that person happens to be, whether in chambers, at home, or in a hotel room.

Persons or organisations with information which they wish to make available to others via the Net commonly establish what is called a *World Wide Web* (WWW) page. The Federal Government, and the Victorian Government, have pages on the Internet. The Federal Budget was "published" on the Internet, together with supporting schedules and charts, at 8.00 p.m. on Budget night. Many companies (such as Law Book Co.), public bodies and organisations (U.S. Supreme Court) and private legal firms are establishing pages on the World Wide Web. In a short space of time, unreported cases and, possibly, judgments of the High Court will be published in full on the Net. Before too long we can expect that information on court listings will be available, allowing a barrister at home, for example, to find out in which court and at what time his or her case is to be heard the following day.

I have proposed that the Victorian Bar endeavour to establish its own WWW page. This would mean that anyone around the world with Internet access could access the Victorian Bar's WWW page which would lead them through to other information. At the moment it is suggested that information such as the Bar Constitution, the identification and membership of Bar committees and committees on which the Bar is represented, the Bar Rules, and the Bar telephone directory be accessible. In the longer term the page will be a gateway to others established by organisations such as the courts and Federal and State Governments.

The Bar's WWW page is now up and running. The Internet address is

**http://www.lawnet.com.au/law/vicbar**

The Victorian Bar News

Since the early 1970s a Quarterly magazine entitled ***The Victorian Bar News*** has been published by The Victorian Bar for its members. It is available on subscription. If you wish to subscribe to *The Victorian Bar News* please complete the subscription form.

Certain articles from the Bar News are available for reading on-line. Click here to read a recent article by Gerry Nash Q.C. on a topic of great practical interest, namely *The Right to Silence* (13kb). Alternatively if the Mabo case is of interest, click here to read an illuminating article by Dr Robin Sharwood with his erudite reflections on aboriginal land rights (49kb).

An Editorian Board oversees the publication of the Bar News. The Editors would be grateful for any articles or verbatim for submission. Please contact the Editors directly.

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Anyone who has an email address which they would like to be entered in the electronic Victorian Bar directory accessed on the Internet or who has ideas or requests for further information which should be published in the page should contact me. I suggest messages be sent to

**dlevin@lawnet.com.au**

David Levin

# INTERNET, THE WEB AND ALL OF US

THERE HAS BEEN AN EXPLOSION OF publicity recently for the Internet. The excitement has most often resolved itself to a prurient fascination for the reports of pornography said to be available on the Net. (For those deeply interested: Yes, there is pornography available on the Net. Yes, it covers the full spectrum of human sexual ingenuity. And incidentally, it would be rather easier to get the same material at a bookshop.)

Why all the recent excitement? Shortly stated, Internet represents the most dramatic single jump in dissemination of information since printing was invented.

First: what is it? Internet is a global network of computers owned by universities, businesses, government departments and individuals. Think of it as a network of telephones, but there are computers attached. If two people have computers attached to a phone line, their computers can exchange information.

Many of those computers make their files (or some of their files) available to anyone who logs onto the system. An increasing amount of information is now available this way. In the same way, messages can be sent between people at different computer sites. This is called e-mail. If you think of each computer as an answering machine, e-mail is like the messages you can leave for someone. The difference is that the e-mail message is not limited to a short "ring me back" — type message. It can be a memo, a letter, a large word processor file or a court document; in fact, anything that can be stored on a computer can be sent by e-mail. When it is received, an e-mail message is in electronic form, so it can be taken straight into the receiver's word processor (or whatever) if the receiver wants to manipulate it electronically

Not every computer user wants to be hooked up to the Net permanently, but wants to be able to use it to find information and to send e-mail. Some organisations on the Net make a living by letting others use their computer as a gateway to the Net, and as an e-mail letter-box. Compuserve and Oz-email are examples.

By using Lawnet or Compuserve (for example) as a gateway to the Net, your system does not become part of the Net, but can access it at will. Compuserve gives you an e-mail address. That address is on its machine. E-mail sent to your address sits in Compuserve's computer until you log on and retrieve it. It's like an electronic Ausdoc. In addition, Compuserve lets you access the entire Internet via its machine, which is permanently connected to the Net. That means you can send e-mail to anyone in the world who has an e-mail address. It also means that you can find information on the Net.

So, what information is available on the Net? The answer is out-of-date as soon as it is given, because the amount and range of accessible information is growing at an incredible rate. Relevant for lawyers, the following is a sample of material available. It is all full text, searchable, and up-dated daily:

- U.S. Supreme Court decisions;
- U.S. Court of Appeals decisions for the 3rd, 6th, 9th and 11th Circuits;
- New York Court of Appeals decisions;
- the U.S. Code;
- the U.S. Uniform Commercial Code;
- Australian Commonwealth Acts and Regulations;
- reports of the Scrutiny of Acts and Regulations Committee;
- various law journals;
- law library catalogues from Australian and foreign universities;
- *Encyclopaedia Britannica.*

That is a list of 11 "sites". There are approximately 100 million sites on the Net.

The Net has existed for over a decade. It has only recently become popular for general access. The reason is simple: until recently, you had to be fairly adept with a computer to be able to navigate the Net. That has all been changed by the World Wide Web. Leaving aside the technical details, the Web provides a simple and enjoyable way to use the Net. It has one very important feature, which is the use of hypertext links. A hypertext link simply means that you only have to click your mouse on any highlighted item which interests you, and the computer automatically takes you to more information about that item. That may take you to another document held on the same computer, or it may involve logging you onto another computer on the other side of the world, but that doesn't matter, because the computer does it automatically.

One feature of the Web is the idea of a "home page". The home page is a document which lives

Internet Sources of Legal Interest

- Commonwealth Legislation (1167 Acts and 556 Regulations) capable of being searched using the AustLII's new search engine, SINO
- **Lawnet: The Legal Gateway** including unreported Victorian Criminal Cases database, unreported High Court cases and a wealth of other material.
- Australasian Legal Information Institute. Users of this service may be interested to read the article by Graham Greenleaf & Andrew Mowbray (co-directors of AustLII) in (1995) 69 ALJ 581.
- All Australian Federal, State and Local Government Sources
- Federal Government Hansard (experimental service)
- **Aickin Chambers Home Page** including "Forensic Links".
- Recent High Court unreported decisions are available to be searched now.
- Yahoo Index of Legal Organisations
- Yahoo Index - Business and Economy:Companies:Law
- Australian Institute of Judicial Administration (AIJA)
- American Bar Association Lawlink™ Legal Research Jumpstation
- New South Wales Law Reform Commission (NSWLRC)
- Library of Congress' *THOMAS* Legislative Information on the Internet
- Villanova's *Center for Information Law and Policy*
- La Trobe University Library
- Federal Budget 95
- E-Law (School of Law, Murdoch University)
- Australasian Law on the Net including Australian, New Zealand, Papua New Guinea and other sources of legislation (n.b. 24kb can be slow during day)
- The ABC (Australian Broadcasting Commission)

Searching the Internet

- David Levin's Search the Internet Page

Searching the Internet for Legal References

- David Levin's Legal Page

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- Return to Main Index

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*This site maintained by David Levin.*
*It was last updated on 6 September 1995. Please let me have any comments, criticisms or contributions you may have about this page. Your comments will assist in providing a useful service to the community via the Internet.*

on a computer, and contains whatever information the owner of the home page wants to publish. Most home pages also contain hypertext pointers to other Web sites which happen to catch the imagination of the owner. The Web is a vast array of home pages, all over the globe. There are about six million home pages on the Web at the moment.

The Victorian Bar now has its own home page: it went live on Hiroshima day. All credit to David Levin, who came up with the idea in the first place, and then wrote the home page. (For the Web-literate, the address of the Bar's home page is http://www.lawnet.com.au/law/vicbar). Incidentally, I have not been able to find on the Web any other Bar organisation which has a home page. David Bennett's chambers in Sydney has one, of course. The American Bar Association has one (as does the Law Institute) but that's different. As an example of the way in which all this magnificent technology can be trivialised, I scouted around on the World Wide Web to find some material suitable for the *Bar News*, bearing in mind the criteria recently promulgated by the Editors in the lifts.

## VERBATIM FROM THE WEB

What follows was downloaded from various American Web sites. It took rather less than three minutes to find and download the articles . . .

*God, Plaintiff* v. *President Ronald Reagan* (Cite as: 1986 WL 3948 (E.D.Pa.)

FULLAM, District Judge

[After granting plaintiff leave to proceed in forma pauperis]

Plaintiff names as defendants President and Mrs. Reagan, the United States Government, Congress, and the citizens of the United States and foreign countries. Her complaint is lengthy, rambling, and at times incomprehensible. It seems that plaintiff's basic claims are that she is god of the Universe and that citizens of the Universe, former Presidents Nixon, Ford, and Carter, and President Reagan have perpetrated crimes against her through the use of an electronic eavesdropping device. The majority of her complaint is composed of a request for relief in which she asks that the court award her items ranging from a size sixteen mink coat and diamond jewellery to a three bedroom home in the suburbs and a catered party at the Spectrum in Philadelphia.

She didn't win.

*****

*TXO Production Corp.* v. *Alliance Resources Corp.*, 419 S. E.2d 870, 887–8 (W.Va, 1992):

Generally [punitive damages] cases fall into three categories: (1) really stupid defendants, (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.

*****

Advertisement in the *University of Virginia Law Weekly*:

West Virginia's infamous once and future Chief Justice Richard Neely, America's laziest and dumbest judge, seeks a bright person to keep him from looking stupid. Preference will be given to U. Va. law students who studied interesting but useless subjects at snobby schools. If you are dead drunk and miss the interviews, send letters.

*****

In Houston, computer enthusiast Shawn Kevin Quinn, 17, pleaded nolo contendere to a charge that he had tried to hire a hitman for $5.30 and seven computer programs to kill the boyfriend of the girl he had a crush on. He was fined $500 and got 10 years' probation, and was ordered to reduce his computing from his daily eight hours to 90 minutes.

*****

In Flint, Michigan, Michael Allen, 26, appeared at his hearing on charges stemming from a house robbery wearing a green double-breasted suit that he hoped would make a good impression on the judge. Instead, the victim announced, "He's wearing my suit." A check of the custom made suit's label verified the claim.

*****

A 16-year-old in Elizabeth N.J., under court order to make restitution for the damage that he caused in a stolen car chase, was arrested when he tried to make his weekly payment with $6 cash and a $10 vial of crack cocaine. According to Union County police officer Daniel Ward, the 10th grader asked his probation officer for a receipt for the cash and crack payment, but "did not appear high or intoxicated at the time".

*****

To warn the public about 4 July brush fires, sheriff's deputies and firefighters gathered at a remote bomb-disposal range outside San Diego to blow up thousands of illegal fireworks for the media. Sparks from the demonstration fell on a nearby hill, causing a 10 acre bush fire that required 50 firefighters, two water dropping helicopters and a bulldozer to extinguish.

*Downloaded from Inter-Law's(tm) 'lectric Law Library(tm) WWW: http://www.inter-law.com*

## INSURANCE VERBATIM

The following are actual statements found on insurance forms where car drivers attempted to summarise the details of an accident in the fewest possible words. They serve to confirm that even incompetent writing can be highly entertaining.

- Coming home I drove into the wrong house and collided with a tree I don't have.
- The other car collided with mine without giving warning of its intention.
- I thought my window was down, but I found it was up when I put my head through it.
- I collided with a stationary truck coming the other way.
- A truck backed through my windshield into my wife's face.
- The guy was all over the road. I had to swerve a number of times before I hit him.
- I pulled away from the side of the road, glanced at my mother-in-law and headed over the embankment.
- In an attempt to kill a fly I drove into a telephone pole.
- I had been shopping for plants all day and was on my way home. As I reached an intersection a hedge sprang up, obscuring my vision and I did not see the other car.
- I had been driving for forty years when I fell asleep at the wheel and had an accident.
- I was on the way to the doctor with rear end trouble when my universal joint gave way causing me to have an accident.
- As I approached an intersection a sign suddenly appeared in a place where no stop sign had ever appeared before. I was unable to stop in time to avoid the accident.
- To avoid hitting the bumper of the car in front I struck a pedestrian.
- My car was legally parked as it backed into another vehicle.
- An invisible car came out of nowhere, struck my car and vanished.

# Aickin Chambers

Aickin Chambers consists of two sets of barristers chambers; suite A contains the **Criminal** barristers and suite B the **Civil** barristers.

## Criminal:

Phillip DunnDavid GalballyAnthony Howard QC Juliuan LeckiePaul MarinReg Marron Richard PirrieRobert Richter QC Stephen Shirrefs Mark TaftCampbell ThomsonRosie Tremayne John Walker QC

## Civil:

Ron Castan QCRay Finkelstein QC Alan H Goldberg QC Ron Merkel QCJohn E Middleton QCDr Clifford Pannam QC

## Forensic Links:

Forensic Web Home Page
This page contains general www forensic/police/legal "jump-off" points.

Zeno's Forensic Page
A good place place to start your forensic search. It even has a "Searching Forensic Literature" button.

American Society of Crime Lab Directors
American forensic societies, forensic education sites worldwide and international forensic sites.

David Ransons's Explorer Page
Lots of links to medical, legal, forensic, criminological, occupational health and safety and disaster management resources.

Victorian Institute of Forensic Pathology
Based at Monash this site contains administrative info about the institute and the Australian Society of Forensic Dentistry.

Medical Resources on the Internet
Over 50 sites (mostly universities) linked to this page, provide ways of accessing medical info on the web.

UK Police and Forensic Web
Brilliant page authored by a Mr Plod. Extensive links to Police and Forensic sources world wide. Even has a link to the Sherlock Holmes page.

Metro-Dade Police Dept Crime Lab
Mostly links to other agencies with some real info accessible.

WWW drug Information Server
Pharmacological and sociological info relating to alcohol, cannabis, cocaine, LSD, heroin and many other drugs.

The Bioguide
Hard info about DNA.

DNA Fingerprinting in Crime.
More info about DNA.

Forensic Entomology
Ever wanted to know how to estimate the time of death by reference to the development of "bugs" on a corpse ? Or perhaps your interest is in the use of forensic entomology in investigating contraband trafficking.

Index of Computer Crime
Mostly brief reports of American computer crime cases.

Computer Crime Directory
US Supreme Court decisions, computer crime sentencing guidelines and articles on hacking.

Standards in Forensic Science
Article about the Evolution of Forensic Science, with an index of catagories of FS and images that may be downloaded relating to, (amongst others), gunshot residue and DNA analysis.

Crime Scene Investigation
Looks good with - crime scene photography, blood stain interpretation, fingerprints, impression evidence and trace

- I told the police that I was not injured, but on removing my hat found that I had a fractured skull.
- I was sure the old fellow would never make it to the other side of the road when I struck him.
- The pedestrian had no idea which way to run as I ran over him.
- I saw a slow moving, sad faced old gentleman as he bounced off the roof of my car.
- The indirect cause of the accident was a little guy in a small car with a big mouth.
- I was thrown from my car as it left the road. I was later found in a ditch by some stray cows.
- The telephone pole was approaching. I was attempting to swerve out of the way when I struck the front end.

*Downloaded from Inter-Law's(tm) 'lectric Law Library(tm) WWW: http://www.inter-law.com*

VERBATIM: JOB INTERVIEWS

Vice presidents and personnel directors of the 100 largest corporations were asked to describe their most unusual experience interviewing prospective employees.

- A job applicant challenged the interviewer to an arm wrestle.
- Interviewee wore a Walkman, explaining that she could listen to the interviewer and the music at the same time.
- Candidate explained that her long-term goal was to replace the interviewer.
- Candidate said he never finished high school because he was kidnapped and kept in a closet in Mexico.
- Balding candidate excused himself and returned to the office a few minutes later wearing a headpiece.
- Applicant interrupted interview to phone her therapist for advice on how to answer specific interview questions.
- Candidate dozed off during interview.

The employers were also asked to list the "most unusual" questions that have been asked by job candidates:

- "What is it that you people do at this company?"
- "Why aren't you in a more interesting business?"
- "Why do you want references?"
- "Do I have to dress for the next interview?"
- "I know this is off the subject, but will you marry me?"
- "Would it be a problem if I'm angry most of the time?"
- "Does your company have a policy regarding concealed weapons?"
- "Why am I here?"

Also included are a number of unusual statements made by candidates during the interview process:

- "I have no difficulty in starting or holding my bowel movement."
- "At times I have the strong urge to do something harmful or shocking."
- "Sometimes I feel like smashing things."
- "Women should not be allowed to drink in cocktail bars."
- "I get excited very easily."
- "Almost everyone is guilty of bad sexual conduct."
- "I must admit that I am a pretty fair talker."
- "My legs are really hairy."
- "I think I'm going to throw-up."

Julian Burnside

# BARNARD GOES FOR GOLD

AS MOST MEMBERS OF THE BAR ARE probably aware, John Barnard Q.C. is a keen fisherman. He is also the owner of a refrigerated fresh water dispenser located on the 17th floor of Owen Dixon Chambers West.

In July this year *Bar News* received word that Barnard's latest fishing trip had been more than usually successful. Informants advised that

evidence of this could be found inside the fresh water dispenser. Investigation revealed that the dispenser contained at least half a dozen fish each of which (we are reliably informed) was caught by John Barnard single handed. The fish in the dispenser were all (rather appropriately in view of Barnard's prowess) "gold".

Barnard apparently denies that the fish are "his". But at the time of *Bar News*' investigation he still retained possession of the fish. Of equal importance, Barnard, or someone acting on his behalf, has decided that John should take commercial advantage of his fishing skills and that the water dispenser provided an appropriate shop front.


*Bar News* investigators are trying to track down the source of the gold fish and of the suggestion (allegedly defamatory) that John Barnard has "gone professional". Inquiries to date reveal a number of suspects, including:

1. Paul Santamaria, of whose room, newly painted green, Barnard said some three years ago, "It looks like a bloody aquarium". Paul's room is close to the water dispenser (motive and opportunity).
2. Joseph Santamaria, whose "yuppie" image suffered a set-back when his furtive and illegal use of the water dispenser was detected and stopped. He also has a room on the 17th floor (motive and opportunity).
3. Phil Kennon, whose motivation is not clear, but who has been acting suspiciously for some time and has been seen feeding the fish. A fishing magazine has also been found in his room (similar facts?).
4. Michael Crennan who has been known to indulge in fly-fishing in the past (similar facts), who lives on the 17th floor (opportunity) and who, when accused, broke down and uttered the words "She's a set up . . . I'm just a patsy". Unfortunately, the confession was not recorded. There is a suggestion that he may be "covering" for someone.
5. Frank Costigan, also on the 17th floor whose computer screen-saver has a format of fish floating across the screen and who may well have been tempted to turn fantasy into reality (insanity defence?).
6. Alex Chernov, who is reputed to have asked the question, "Who would do a thing like that to those nice fish?" How did Chernov know the nature of the fish unless he had some acquaintance with them?
7. Sue Crennan. She has an alibi. She claims to have been prosecuting Mr. Farrow at Geelong for the whole of the week in which the fish appeared. She is the only member of the 17th floor of ODCW who went to the trouble of acquiring an alibi. How did she know that an alibi would be necessary? What is her relationship with suspect No. 4?
8. John Barnard. He has accused other persons of the act. But the following facts suggest the contrary:
   (a) it is not without significance that the fish turned up immediately after he returned from his last fishing trip;
   (b) he brought his friends to look at the fish in the dispenser;
   (c) he has made a record on film of the precise swimming patterns of the fish.

Is this some deep laid scientific experiment the results of which will be used on Barnard's next fishing trip? The evidence is circumstantial and the motivation is not clear.

*Bar News* is continuing its investigations.

Bar News *investigator on 17th floor*

# CLIVE PENMAN DOES NOT GO ON HOLIDAYS

READERS WILL BE AWARE OF THE TRIALS and tribulations suffered by my family in our last two attempts at a planned annual holiday. One would have thought that "twice burned — thrice shy". However, Mrs. Penman is nothing, if not an optimist. On that, as with many things, our children take after her.

So, notwithstanding past experiences, our house began to resemble a travel agent's waiting area with pamphlets on all sorts of holidays strewn all over the place. At the same time conversations began to be initiated with "Shouldn't we start looking at where we are going at the end of the year?", "Daddy, where are we going for our holidays this year?", "Wouldn't it be nice to travel northwards again?", "Everyone in our class is going to Surfers/ Ayers Rock/Queensland/Disneyworld/Western Australia/New Zealand/ Europe this year . . .", "I've had a great idea, why don't we go to Surfers/ Ayers Rock/etc."

At the same time, and indeed for a much longer period, we have been the subject of an orchestrated campaign from the twins for a pet. We thought that we had solved the pet problem when we purchased a budgerigar. We had gone into the pet shop to buy some goldfish but ended up with a small "finger tame" albino budgie. It eventually transpired that we had bought Melbourne's most anti-social bad tempered bird. We think it might have been as a result of being billeted with a large family during our holidays. Whatever the cause it was never the same again — it doesn't like leaving its cage, it pecks the finger proffered to it, it hardly sings and it gets quite aggressive when blinds are opened or closed near it. As a device to avoid purchasing a cat, dog, guinea pig, chicken or whatever it was an unmitigated failure. It did call off the hounds, as it were, for a while.

But early this year the campaign began again, and given the previous experiences of the twins, and the fact they were each a year older, made it all the more intense and unrelenting. Yours truly managed to hold firm until Mrs. Penman broke ranks and agreed in principle to the idea of getting a puppy. As far as the twins were concerned it then became a *fait accompli* and the subject turned to what brand of dog would best serve the interests of the Penman household.

One twin wanted a Cavalier King Charles Spaniel, another wanted a Jack Russell Terrier. Mrs. Penman thought a home-needing stray from one of the lost dog homes "would be nice". Mini-Pomeranians, Cairn Terriers and other medium sized dogs also got a mention. Unbeknownst to me at that time the twins had borrowed a large illustrated book on Australia's favourite breeds from their school library. One wonders what a school library is doing with such a book unless it is part of the universal campaign against parents.

For my part, I was rather taken by the idea of a Labradoodle or even a Labradoubledoodle. The former, for the uninitiated were bred by mating Labradors with poodles to produce a seeing eye dog with the temperament of a Labrador and the non-allergenic qualities of a poodle. The result struck me as a rather nice-looking medium sized dog. The latter apparently are the product of mating a pair of Labradoodles. The kids, merely to humour me, agreed with the concept of getting a Labradoodle or doubledoodle, reasoning that such attitudes would better secure them the much desired dog.

Although the deep and meaningful discussions about the relative merits of different breeds of dogs took some time and held off the inevitable for a few months it soon came to pass that we were scouring the "Livestock for Sale" pages of the daily newspaper. There were no ads for Labradoubledoodles and a few for Labradoodles. There never seemed to be any available on those weekends we were able to go out for a look.

Not to be discouraged, we started out on the search by targeting those places which had advertised Labradoodles and/or appeared quite large. The few places we checked out were either pet shops or pet shop sized dog-only places. One in an expensive eastern suburb had a suitably toffee nosed proprietor who actively discouraged the twins from getting close enough to the cages to see what she actually had. What she had were large, unimpressive and very expensive. She also had the only indoor dog toilet that we saw in our searches.

Another was in the Carlton precinct. It was so smelly that our otherwise enthusiastic kids spent the whole time we were there outside the door gasping for breath. All was not lost for we ventured next door for afternoon tea. Mrs. Penman had her best ever date pudding with caramel sauce. I thought the half mouthful allowed me was rather moreish.

The other pet shops had limited numbers of unexciting dogs except for one place in a large suburban shopping centre which had a cluster of Mini-Poms. It took a lot of tugging to get the twins away without dog.

In the meantime, Mrs. Penman rang an advertiser of a "Labradoodle plus accessories free to

good home" only to be told that the owners were going overseas, it was a large dog — more Lab than poodle, it had destroyed the garden, it was undisciplined but "it was good with kids". Mrs. Penman instantly decided against checking it out further.

It was then onto to the larger establishments. So off to Sydney Road North Coburg where we went to see a place which advertised "hundreds of puppies". While it had more puppies, and a wider range, than anywhere visited before or since, "dozens" would have been more accurate. It was a very clever place. It had lots of young enthusiastic part-time staff. All the dogs were in open pens and children were encouraged to pet them — the first place we had visited which allowed contact — but more sneakily it had a large area fenced off with straw bales where potential owners could go and road test the puppies.

The twin who had pressed hardest for the dog, and wanted a quiet lap dog, lost her heart to a very small, frightened bitzer which had just come in that day. It was a sandy coloured ball of fluff not much larger then an elongated tennis ball. It sat quietly in her lap moving not a single hair. The other twin, who tends to be a little more boisterous, chose a puppy which was somewhat larger and keen to be petted and played with. "Just wait until he gets to the play area", said the permanent staffer of the dog, "it will go beserk". And it did. Obviously it had lots of character — but was not for Mrs. Penman, who perceived an independently minded dog not amenable to Penman discipline. A bit like the twins, I thought.

With very unconvincing explanations we eventually managed to drag the twins away from the puppies with which they had so successfully and in their view "permanently" bonded. "We should look around a bit more"; it was suggested. "We can always come back again", it was proposed with a seeming lack of conviction.

The next day we ventured out to an outer eastern suburban shopping area and a Sunday market which both advertised large numbers of puppies. It turned out that while they were two separate establishments they were owned by the same people.

To cut a long story short, notwithstanding the intention to get a middle sized, pure breed or a Labradoodle, we walked out with a Maltese toy poodle that was also sandy coloured, untidily fluffy and "so cute, Daddy". As well we had purchased a sleeping basket, a fortnight's supply of top of the range canned dog food, a similar supply of top of the range dried dog food, a hair brush, toys for dogs, things for dogs to chew, a collar and a leash. At least we had two weeks free vet attendances!

Unbeknownst to the twins, and I suspect Mrs. Penman, that put an instant end to holidays at year's end. We couldn't take the dog on a long trip and "it wouldn't be fair to leave him in kennels for a couple of weeks".

Two weeks later it was off to buy a kennel, four weeks' supply of premium canned dog food (it had decided it would not touch the dried dog food even if it was close to death from starvation) and more toys.

From that moment our life had changed, and changed radically. It was like having another baby, but one that doesn't wear nappies! It cried the whole of the first night, most of the second night and half the third night when it was locked up in the laundry in its basket with "its teddy" kindly supplied by the less boisterous twin.

It loves chewing that twin's feet, leaping up at the other twin, rolling over on its back to have its tummy tickled by Mrs. Penman and wrestling with yours truly. Mrs. Penman bought a book on bringing up your puppy — without exception we do and continue to break every rule of disciplining your puppy.

It wakes up every morning at 6.20 a.m. precisely, whether weekday or weekend. It loves turning over freshly cleaned-up garden beds, it considers all clothing within reach to be fair game, and it is of the view that Penman food scraps are infinitely preferable to any form of manufactured canine food!

Now one would not call Mrs. Penman overly protective but "Scruff" visited the vet twice in the free fortnight. Once because of a perceived irritation at the base of his tail and behind one ear. The other occasion was late one Saturday when Scruff whimpered after each mouthful of dinner and was sensitive to touch. The vet was of the view that either he had an infected throat – which was going around puppyville at that time - - or had been bitten on the nose by a bee or wasp. He was treated for both and as it turns out the latter was obviously the cause of the complaint.

Mrs. Peman has had the joy of taking the puppy to have its inoculations and - - seeing she is so insistent – will have the pleasure of attending to have it (as it will be) "done".

The novelty has begun to wear off. The children, who were so adamant that when "we have a puppy we will do all the looking after of it", have become less than enthusiastic about taking it outside (yes, unaccountably we have a house dog!), fight over whose turn it is to walk the dog (or rather whose turn it isn't), can never be found when it is time to feed the dog and no longer find playfulness all that much fun.

Still, every cloud has its silver lining, and talk of end of year holidays away has dissipated — at least temporarily. The problem is, that as the puppy grows and its novelty wears off the scruples about dumping it in a kennel will fast wear off.

# BAR COUNCIL RECEPTION FOR JUDGES

AS IS THE WAY OF THINGS THE BAR entertained the judges of all jurisdictions in the Essoign Club in August.

A large crowd attended. These are enjoyable events. They are also very useful for junior members of the Bar.

Often it is said by juniors that the Essoign Club is intimidating. That all the older barristers seem to know each other and there is no room for the new.

Especially, some say, it is a waste of money to go to the Judges Reception. If you don't know any judges and you don't appear regularly in the higher jurisdictions, why bother?

This is wrong. At some stage the now older barristers were junior. At some stage they knew no-one. But they got over that barrier.

It is useful to, at least, have your face known by a Judge. When you come before her/him for the first time, you may have said hello at the reception. The Judge at least has a nodding acquaintance and will (normally) listen. A completely unknown face does not get such a reception (to begin with). On the other hand, becoming tired and emotional at Judges' receptions can have the opposite effect.

It was good to see the Chief Justice and other members of the new Court of Appeal present. His Honour denied the rumours that the Blue Court was named after Melbourne Grammar, the Red Court Scotch and the Green Court — not Ireland — but Geelong College. It seems the blue is the sky, the green the grass and the red the soil of the law. Or something like that.

# WOMEN BARRISTERS' ASSOCIATION DINNER

*Justice Mathews*

THE WOMEN BARRISTERS' ASSOCIATION held its second annual dinner on the evening of 2 August 1995 at the Essoign Club. A wide range of people from all areas of the legal profession attended, and in large numbers. The key-note speaker was Justice Jane Mathews of the Federal Court of Australia. His Honour Judge Waldron proposed the toast. Justice Mathews spoke of her early life at the Bar and experiences as a woman on the Bench over 15 years, leaving her audience with much to ponder regarding the changing circumstances of women in the law. Her observations and insights were greatly appreciated by those present. Judge Waldron coped admirably with conflicting instructions as to who or what he was supposed to toast (Justice Mathews, the Association or both!) and did so with aplomb.

Like the event the previous year, the dinner was vastly oversubscribed. The Essoign Club went into overdrive to fit in as many people as possible and succeeded in accommodating over 140 diners, who enjoyed terrific food and great hospitality. The Association is grateful to Jane at the Club for the effort she made to accommodate an ever expanding guest list and the style with which this was achieved. The Association considers it both appropriate and desirable that it conduct its events on its own turf, and will continue to support the Essoign Club whenever possible.


*Chief Judge Waldron proposes toast*

The dinner forms part of a series of events organised by the Association in 1995 to promote its objects of increasing awareness of gender issues in the law and its administration, contributing to discussion and debate on relevant matters both within and outside the Bar, and providing a point of contact for women at the Bar who wish to engage in and contribute to these debates. This year has seen the establishment of contacts with legal bodies in other States and ongoing participation in State-based and national committees dealing with law reform and reforms to the administration of justice. The Association's contributions to seminars and to the formulation of policy positions within the Bar have continued, and there has been an ongoing round of meetings with members of the judiciary, both of a professional and social nature. The Association looks forward to a further year of contributing to the process of growth and change at the Bar.

# VERBATIM

## Federal Court of Australia

2 May 1995
Coram: Heerey J.
*Henderson* v. *Amadio Pty. Ltd.*

Cast of thousands — three rows of counsel in Court 1 of the Federal Court.
**Bristow** (allegedly floundering around): My name is Bristow. I appear on behalf of Mr. Gray and Winter in this matter. Mrs. Morgan, your previous investments, part from that invest pack- . . .? . . . Yes.

. . . were only in relation to the fishing industry; is that right? . . . Yes, that's correct.

And is it true that you purchased one of the fishing boats? . . . Yes.
**His Honour:** Yes, I am just waiting for somebody to ask what has this got to do with the price of fish? . . . Yes, naturally it's dependent on the price of the fish.

19 May 1995

**Chernov Q.C.** *(allegedly trying to orchestrate the right answer from a witness named Spark)*: Now, what you are really saying there, is it not, that if you are a country accountant or any accountant for that matter because you lack knowledge you have just got to work a bit harder; is that what you are saying? . . . No. Like any accountant who is outside this sphere of expertise, he has to . . .

Work harder to get on top of it? . . . To certainly satisfy himself that he brings himself to an appropriate level.

Certainly. It is like a lawyer who is asked to advise on maritime law. He has never done it, he has got to make sure he knows something about the maritime law before he gives advice. That is the sort of thing you are saying? . . . Or perhaps he may say it is not my cup of tea and I will not accept the brief.

Yes. That is one option. The other option is he says, well, I can swat this up? . . . That's possible.
**His Honour:** There is a famous saying at the Victorian Bar Mr. Spark, "Can you play tuba, no, but I can by next Thursday".

## County Court of Victoria

13 February 1995
Coram: Judge Barnett
*R* v. *Phillips and Shegog*
M. Baczynski for Phillips
D. Drake for Shegog

Drake cross-examining witness whose name is Streich:

Your version, Mr. Streich, I suggest to you, is perhaps described as simply a stretch of the imagination, isn't it? . . . No.

## County Court of Victoria

Bendigo
11 July 1995
Coram: Judge Crossley

Record of Interview.

"Did you see anyone fitting your description with a walking stick in the vicinity of the library at about 4.50 p.m.?"

"Not that I can recall."

"It has been alleged that while you held the young woman to you that you stated words similar to 'you're beautiful and I like you'. What do you say about that comment?"

"No comment."

"Did anyone give you permission yesterday in front of the library to assault?"

"No comment."

"Are you suffering from any disability?"

"Physical disability and mental disability."

"What is your mental disability?"

"Buggered if I know actually."

"Is it possible that you have no recollection of this incident?"

"Yes."

"Do you suffer from black outs?"

"I don't know, I can't recall, I might."

"Have you ever received treatment for memory loss?"

"I can't remember."

## Supreme Court of Victoria

26 July 1995
Coram: Nathan J.
*BP Australia Ltd.* v. *Convenience Plus Pty. Ltd.*
D.G. Collins for the Plaintiff
P.K. Searle for First to Fifth Defendants
R.H. Miller for Sixth Defendant

**His Honour:** Will you stop for a minute. So what?
**Searle:** I'm sorry, Your Honour.
**His Honour:** So you're establishing that BP screws its franchisees? . . . Yes. So you've done that. Assume for a moment you've done that. So what?
**Searle:** Well, then I have to go on to prove various other things to prove its actionable screwing rather than that they have just done them over.
**His Honour:** Well, even if it's actionable screwing, you are suing on misrepresentations.

## Supreme Court of Victoria

7 February 1995
Coram: Hayne J.
Commercial List
*Jasain (AMC) Pty. Ltd. & Ors.* v. *The Australis Marketing Corporation (Int.) Pty. Ltd.*
Archibald Q.C. with Corbett for the Plaintiffs
Goldberg Q.C. with Kelly for the Defendant

The proceeding concerned the construction of the expression "practices" in a sale agreement.
**His Honour:** That may be so but nor does it help you accept them to be accounting practices.
**Goldberg**: But then they do not get their declaration.
**His Honour:** The speed with which you slid over that chasm Mr. Goldberg was indeed breathtaking and admirable. Go on.
**Goldberg:** Let me play the film in reverse and I'll go back like Superman does. Remember with the San Andreas fault — and brace it together to save Lois Lane.
**His Honour:** I won't follow the analogy out, Mr. Goldberg, it is far too tempting.
**Goldberg:** I am keeping my clothes on, Your Honour.

## Supreme Court of Victoria

16 June 1995
Coram: Hansen J.
*Zorita Nominees Pty. Ltd.* v. *ANZ*

Southall for a firm of defendant solicitors (previously sitting on the sidelines of the litigation). Due to an amendment to pleadings, the profile of the solicitors in the litigation is raised.

Southall rises to express his concerns at a directions hearing.
**Mr. Southall:** Yes, now, Your Honour. I am not making an application. I want to give Your Honour some background in this matter because it seems to have taken on vastly different legs over the course of the last few weeks, very much to the detriment, we say, of my clients who have been catapulted from the back row stalls in this action very much — not only the front row stalls but maybe on the stage out of the spotlight.
**His Honour:** That is the trouble.
**Mr. Southall:** Without trying to be too offensive, Your Honour, we think we have been raped but we are not too sure at the present time. We want to find out a bit more about it basically.

## Prahran Magistrates' Court

15 June 1995
Coram: Golden M. (hearing a charge of cultivating cannabis) to prosecutor:

"Why do the criminal history sheets now get printed out like a dog's breakfast? You could swear that it was the computer itself that was on cannabis."

## County Court of Victoria

17 August 1995
Coram: Judge Fricke
*French* v. *Hinch and Channel 7 Pty. Ltd.*

Ruskin (cross-examining)

Now, Mr. French, I am going to ask you some questions on behalf of Channel 7. Do you understand that? . . .Yes, I do, sir.

Good. Just for the edification of Channel 7, can you tell us whether there is a curse on Channel 7 at the moment?

. . . You mean currently?

Yes, currently today, 17 August? . . . No, I couldn't be sure about that; I don't know.

Is there any way we can find out? . . . No — well, I don't know.

Well, could you find out for us? . . . You would like me to speak to God tonight, would you?

If you could? . . . . Yes, all right.

And tell us in the morning? . . . I will see what he has got to say.

See what he has got to say? . . . Yes.

Is there some particular way you get this information? . . . No.

No. No, there's not really.

Do you just sit there and it comes to you? . . . He sends messages to me; he gives it to me in dreams. He even drops it into my brain with an eye-dropper of a night-time sometimes.

Does he. What he . . .? . . . It just slips into my brain, you know.

Does he come along in a particular way, like we see him in the films with the big beard? . . . No, no, no.

Does he come along as an angel? . . . No. Well, God isn't an angel. He's in charge of all the angels, you know.

He doesn't look like Casper the Ghost, or anything like that?

. . . No.

No. How does he come along and pop the eyedropper in? How does he? . . . Well, that's just my interpretation. That's just how I see it happen really, you know, in my mind, you know.

Are you able to get in touch with him, as you have kindly suggested, tonight to give us this information? . . . No, no, I was only joking really.

You were pulling my leg, were you? . . . He contacts me.

Were you pulling my leg? . . . Yes.

You were, were you? . . . Well . . .

Come on; own up. You were, weren't you? . . . Well, I was just — a little bit of humour maybe.

That's all right. But you were pulling me leg, were you? . . . I think you was pulling mine too, wasn't you?

Well, perhaps we were pulling each other's legs, were we? What do you think? . . . Maybe.

## Federal Court of Australia, Sydney

6 April 1995
Coram: Hill J.
*Allstate Life Insurance Co.* v. *ANZ*

Tom Hughes cross-examining Peter Hayes Q.C.

**Mr. Hughes:** You drafted, did you — correct me if I am wrong — the statement of claim in the first of the common law proceedings to be filed in the Supreme Court of New South Wales? . . . Yes, in the well honed traditions of a lot of the junior Bar I had a brief to settle and I ended up drawing it and discussed it with my learned junior

Well, you should not yield to such temptations, perhaps, assume such burdens, perhaps.

**His Honour:** Settled by your junior, I take it? . . . They're good settlers, your Honour.

**Mr. Hughes:** Was it settled by your junior and drafted by your? . . . Close to it.

## What's in a Name

In the *Australian Legal Monthly Digest* there appears the following entry:

"The Use of Hyphenated Names for Children in Broken Marriages": *Mahoney* v. *Mckenzie* (L. Crowley-Smith): (1994) 18 UQLJ 131.

# A BIT ABOUT WORDS

IT WAS INTERESTING TO SEE THE MINOR outburst of heat in the wake of the recent discussion about *cacophemious* (which, I suspect, has now been used often enough to justify inclusion in the very dictionaries from which its absence provoked the original discussion).

This is not a further contribution to that debate. But I supect that some people may have misunderstood my purpose in writing as I did in the last edition of *Bar News*. If so, I must take the blame for not making my point clear. The English language develops by many mechanisms. Two of the most fruitful are the mechanisms of back-formation and parallel construction. *Cacophemious*, if treated as an utterance in English rather than classical Greek, appears to be an instance of parallel construction; modelled on an existing pattern provided by the related group of *euphony–euphemy–euphemism* it is easy to infer *cacophemy* from the existence of *cacophony*. From there, *cacophemious* is but a short step.

There are many instances of parallel construction. Many start life as a conscious attempt at humour, and gradually mature into general acceptance. So, from the original *Marathon* (named after the place where one victorious Athenian started his long homeward run with the good news of victory) we get the obvious *marathon* for a race over the same distance; thence *jogathon, talkathon, phonathon,* and so-athon. Similarly, from alcohol (an Arab word, *al koh'l*, the name for *corrylium*, a fine powder for colouring the eyelids) comes alcoholic; and from that *chocaholic, workaholic, spendaholic,* and *computerholic*. From the Russian *sputnik* we have *beatnik, straightnik, kibbutznik.* However, each of these seems to be fading as the 1950s recede from current cultural memory.

Generally, the process happens because an affix is recognised but not fully understood for its original meaning. A prolific prefix to have undergone this transformation is *mini-*. It became a vogue prefix in the 1960s when British Leyland released its hugely successful Mini Minor. It is a reminder of the linguistic novelty of the name at the time, that the car was initially released in Australia as the Morris 850: *Mini Minor* was thought a bit racy for delicate Australian linguistic tastes. But it soon became celebrated world-wide as the Mini Minor, and was followed by a flood of *mini-* words which has not since abated: *minicab, minicam, mini-coat,*

*minicomputer*, *miniskirt*, and even *minimarathon*. There are very few noun compounds which cannot accept *mini-* as a prefix and be readily understood.

It is interesting (but irrelevant) that *mini-* derives from a misunderstanding, and that the original use of *mini-* was a parallel construction as much as its followers. The word which inspired *Mini Minor* was *miniature*. Everyone understands *miniature* in its main current signification as *a reduced image or representation*. It was not always so. In the days before the movable-type printing press made written material widely accessible, books were written and illustrated by hand. Each book was intrinsically valuable, because of the amount of time necessarily spent on its creation. Pious monks spent their lives transcribing important texts. Not surprisingly, they included some elaborate flourishes: initial letters were often highly elaborate, red-lead was used to add highlights and decorative illustrations. Although the practice was known in Egyptian times, it is first seen in Greek and Roman texts in the 4th century AD, and in Byzantium in the 5th century. Until the 7th century in Byzantium, the style was relatively restrained, but the art blossomed from the 7th to the 16th century, by which time it had become a self-conscious indulgence, in view of the spread of the printing press.

The style of illumination of manuscripts became increasingly elaborate, and by the 7th century, other colours were being used to supplement red. But red-lead was the original and dominant pigment. The Latin word for red-lead was *minium*. The process of using it in illuminations was called *miniating*, and the product was *miniature*. Thus the first definition given to *miniature* by OED2 is "The action or process of rubricating letters or of illuminating a manuscript".

Since Latin has *minimus* and *minor*, both with meanings associated with smallness, it is not surprising that *miniature* came to have its current dominant meaning.

Back-formation is likewise a fruitful source of new words. It has a lot in common with parallel construction, since each depends on the mind's instinctive recognition of patterns in word structures. A back-formation is the creation of a new word from an existing word, on the pattern of existing pairs of words which show the same pattern of construction. In 1791 there existed *creditor* and *credit*. *Editor* existed, and Enfield assumed or invented *edit*. There is an astounding number of back-formed words in the language (including *back-formed*). A few examples, with the dates on which the back-formation is first recorded:

*suckling* >> *suckle* (1408)
*grovelling* >> *grovel* (1593)
*sightseeing* >> *sightsee* (1960)
*cobbler* >> *cobble* (1496)
*hawker* >> *hawk* (1542)
*part taker* >> *partake* (1561)
*eavesdropper* >> *eavesdrop* (1606)
*burglar* >> *burgle* (1870)
*sculptor* >> *sculpt* (1934)
*procession* >> *process* (1814)
*intuition* >> *intuit* (1840)
*electrocution* >> *electrocute* (1889)
*automation* >> *automate* (1950)
*television* >> *televise* (1950)

The OED2 identifies 947 words as back-formations, from *ablate* (back-formed from *ablation*, 1542) to *york* (back-formed from *yorker*, 1882).

The process is an endless source of new words for the language, available as need arises. On first hearing a new-coined word, various people react differently (unless they react indifferently). The English-speaking world might be divided into those who rail against these processes of language change; those who do not notice or care (the largest group); and those who care but discriminate. The last group (in which I would claim a place) might not all apply the same criteria for distinguishing those changes which are to be welcomed from those which are to be resisted as barbarisms. Let me suggest a few criteria to test the legitimacy of a new word or usage:

- Does it duplicate an already existing word or usage, or does it fill a gap?
- Is it elegant or clumsy?
- Is it coined consciously, or by mistake for an existing word with the same meaning?
- Is it a useful extension to the language, or an expedient to help the writer finish a badly constructed sentence?
- Above all, does its use serve to aid comprehension, or to confuse the writer's meaning?

Does the last sentence cause difficulty? How can the last item in a list begin "above all"? Can the fourth-last sentence be meaningfully referred to as the last sentence? What is the meaning of the fourth-last sentence?

Julian Burnside

## ARE WOMEN HUMAN?

IT SEEMS THAT THE MELBOURNE *AGE* HAS some doubts as to the status of women as human beings. On page 1 of the *Age*, 18 August 1995, Tim Colebatch writes: "Australia is the sixth best country in the world in which to be a woman, a United Nations Agency has concluded. But it is only the eleventh best place in which to be a human being."

# CLIVE PENMAN'S TRAVELLER'S CHEQUE

AS READERS ARE AWARE, I DID NOT TAKE holidays this year. In fact the cash flow has barely been enough to keep up with the twins' eating habits. And, somehow, there was still a demand from the Deputy Commissioner that I pay a tax instalment on 1 September 1995. I paid the instalment.

On 7 September I got a lift into chambers. I thought I'd buy a cup of coffee but found I had no money. I didn't even have my fare home. I rummaged through my brief case looking for odd coins that may have percolated to the bottom. I found 35 cents; but I also came across two traveller's cheques in deutschemarks which I bought from American Express when I went to Scotland to visit my father's family in 1992.

I took one traveller's cheque for 50DM to the Commonwealth Bank on the ground floor of Owen Dixon. The friendly lady at the counter agreed to cash the cheque so I signed it. She asked, "What country are deutschemarks, Scotland?" I replied "No, I thought so too. But it's Germany."

She pressed some buttons and then said, "On the exchange you are entitled to $44.05 but there is a $10 transaction fee so you get $34.05. Is that all right?" I said that it was not all right. I said that I hadn't realised that traveller's cheques were subject to transaction fees of this kind. I got angry and said that, because the traveller's cheque had been signed it could not be cashed elsewhere, so I wanted to "swap" my traveller's cheque for a fresh one issued by the Commonwealth Bank. "I'm not prepared to pay a 25% commission on top of what it costs me to buy the traveller's cheques. It's useless to me now. Give me a fresh one!"

In the upshot the Commonwealth Bank decided to waive the $10 transaction fee.

I had my fare home and some money to spare.

I have asked the Editors of *Bar News* to draw the attention of readers to my experience. So far as I know American Express does not advertise that the Commonwealth Bank (and perhaps other banks) will charge a $10 fee for cashing a foreign currency traveller's cheque — presumably one for as little as US$10.

# A FAIRY TALE (CONTINUED)

NOW GATHER AROUND ME MY DEARS whilst I continue the tale of the VicBees. There have been many changes in the life of most VicBees since last I spoke to you.

The most significant happened not so long ago. Early one morning as the VicBees flew out of their hive on their way to their many diverse fields they experienced a feeling of disorientation, something was not right, things felt quite strange, the world seemed more spacious and eerie. The VicBees did not know what to do and for a long time they hovered around the entrances to their hives, then they flew in circles and eventually they went back into their hives to try and work out what it was that did not feel quite right.

Many VicBees still do not know what it was that affected them that day but whatever it was they have got used to it and now fly in and out of their hives as if nothing had happened. Of course, it turned out to be something quite simple. Overnight, the hive next to the VicBee hives unexpectedly lost all the pipes, and wires, and bits of timber, and accumulated junk that had hung off its walls for so long. In fact, for a great many VicBees the debris had been there longer than they had been VicBees.

For the older VicBees the shock was greater because the hive had undergone an extraordinary transformation underneath all of that debris. It had gone from being somewhat shabby to looking a bit like a newer version of the great big pink VicBee hive but of course it was not pink. Because it was reminiscent of the great big pink hive many VicBees liked its new look. But even they became disenchanted and somewhat disappointed; for when they entered that new-looking hive it was just the same as it ever was — cramped, shabby, busy, slow, disorganised. Even the devices that moved VicBees up and down that hive were as crowded and slow as ever. For some VicBees it was reassuring to find such continuity in these times of great change.

That was not to be the case for those VicBees who ventured up the hill to another hive which had undergone great change, or apparent great change. Unlike the hive I have just spoken about, its outside stayed the same as it ever had been. Inside was quite something again. It too had a device that

moved VicBees up and down. There was only one such device and it too moved in a leisurely manner — but it was greatly different. It was a machine that spoke to you. It told you where you had been and where to go. For some VicBees, lucky enough to have flown to a place called Disneyland, it reminded them of the train that went around that place.

In fact, there were many, many things about this newly changed hive that reminded some VicBees of Disneyland. It was colour coded. On the bottom it was coloured red to remind the VicBees of the *terra rosa* from which grew their favourite drink. In the middle it was green to remind them of the colour they became when they had too much of their favourite drink. At the top it was coded blue which was the way they felt if either they had had none of their favoured drink or it had turned them green the day before.

Like Disneyland it also had huge, spotlessly clean places where VicBees could dispose of their favourite drink. Everything in those places was bigger and better than many of them had seen before. They even had balconies out the back from which VicBees could launch themselves if they felt too blue or were in too much of a hurry to return to the *terra rosa* level.

There were many other things about that building that gave rise to thoughts of Disneyland but I am not allowed to tell you about them. Suffice it to say, that there were even lots of people there who liked to dress up in colourful costumes in stark contrast to the dull black and white plumage of the normal VicBee.

All of this change was too much for the VicBees so back to the staid familiarity of their great big hive they rushed. Having got there they heaved a great big sigh and returned to their favourite occupation of navel gazing and/or complaining to other VicBees about life's misfortunes which are always greater for VicBees than any other Bee. Even then it turned out that VicBees were not immune from change.

Until recently VicBees living in the great big pink hive had got used to their stores of honey being severely depleted each month for the pleasure of their continued residence in the hive. They had even got used to being promised a reduction in the levels of honey depletion and seeing nothing come of it. Many even consigned such tales to the realms of the Tooth Fairy. Yes, I know it is hard to understand why a VicBee would not want to believe in the Tooth Fairy. It is only recently that some VicBees gave up believing in the Tooth Fairy. After all who was it, but the Tooth Fairy, who gave them their great big pink hive!

Well, despite the non-believers, the cynics, the Luddites and such like (no I do not know what a Luddite is either) the tale turned out, eventually, to be true and much to the great surprise of most VicBees they began to notice that their supplies of honey were beginning to last a bit longer. And for many that was just in time because they had found honey gathering to have become very, very difficult over the past couple of years — although no VicBee would ever admit that to any other Bee except the TaxBee and sometimes their BankBee.

It does seem that generally honey gathering is starting to pick up a bit. That too may be a false dawn, for the AGBee has moves afoot to get the GovBees to change the rules so that almost any Bee, who wishes to, can compete with VicBees in harvesting their honey.

It seems appropriate on such a sad note to end there and send you off to your beds. Sweet dreams my dears.

(To be continued?)

## JUSTICE SHOULD NOT ONLY BE ELEGANT, BUT SHOULD MANIFESTLY AND UNDOUBTEDLY BE SEEN TO BE ELEGANT

[IN THE LONG-RUNNING ITALIAN CORRUPtion scandal investigation code-named "Operation Clean Hands" the fashion industry has come under scrutiny in what has been dubbed "Armanigate and Operation Clean Skirts".]

Shortly after Milan fashion designer Gianfranco Ferre was interrogated by Judge Antonio Di Pietro [investigating bribery and extortion by a band of rogue tax inspectors,] Ferre summed up his reaction in an interview with the Milan daily *Corriere della Sera* in rather more aesthetic than legal terms, describing the judge as "simpatico, very intelligent, very well informed, and elegant in his grey cashmere jacket".

Friedman, "The Cosi fan tutti defense",
The *New Yorker* Magazine (November 7, 1994)
page 200.

# LUNCH

## Daniel's STEAKHOUSE

ARE YOU GETTING TIRED OF SHAVED parmesan on a bed of rocket? Are you thoroughly sick of shiitake mushroom risotto or even lamb shanks on a tomato coulis? Perhaps you're fed up with the Southgate school of waitering — that is, persons in long aprons with pony tails who sneer and ultimately get the orders wrong? Whatever the sex of the thing under the pony tail and apron, it makes no difference to the standard of service and condescension provided. Perhaps you're sick of pieces of butchers' paper stuck over bistro tables or noisy wooden floors and outrageous prices for mucked up food.

If this is the case, Daniel's Steakhouse is a bit of a blast from the past. It is what it says it is, a steakhouse. Daniel's has recently opened up in Collins Street next to the Rialto directly across from the Stock Exchange. In fact it is rather difficult to find the door to the restaurant. It is near the York Butter Factory which houses yet another branch of Schwobs rather over-priced sandwiches.

Inside there are high timbered ceilings and restored bluestone. There is a lot of starched linen everywhere and a friendly bar. In winter there are fireplaces. I lunched there with a party which included Peter Jones Esq. Therefore because of the dulcet tones of Peter's voice it was suggested that our group dine in the private dining room. This was very wise of the management because a decent number of bottles of Coriole Shiraz induced Peter to one of his best lunch time performances. I of course sipped on mineral water and watched the performance.


*Daniel's is located in a 150-year-old bluestone building in Collins Street, next to the Rialto*

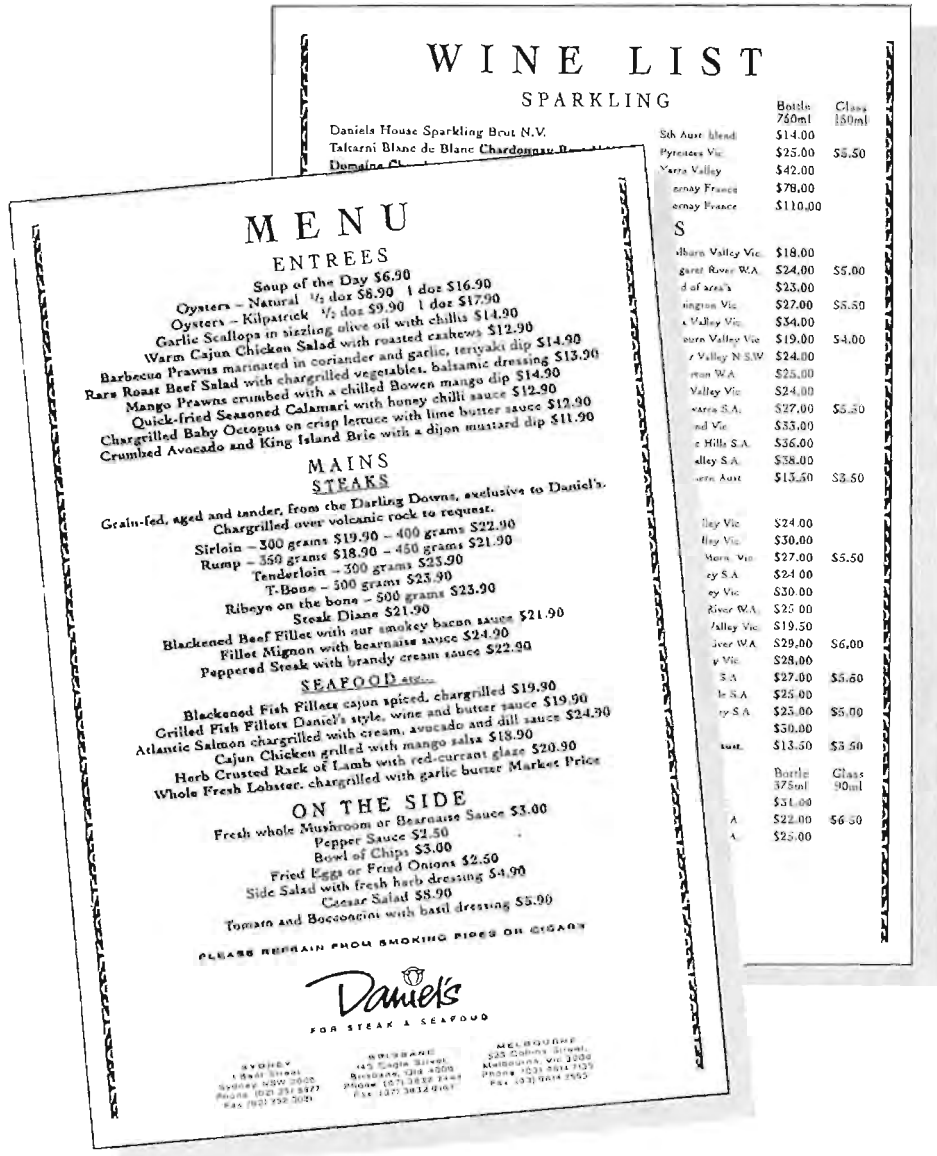
*A 350 gram aged sirloin steak served with baked potato, vegetables, salad and a sauce*

To start with the staff at the restaurant are very courteous and friendly. It seems that they are all female. I did not spot a pony tail nor an ankle length apron anywhere. Nobody sneered.

The menu harkens somewhat back to the heady days of the 70s and the 80s. Therefore it is comforting. A recent reviewer said it was like eating good club food. Perhaps that reviewer was a member of the Celtic Club because this food has nothing to do with club food, nor is the place anything like any of the decent clubs in Melbourne. But that reviewer perhaps was a journalist.

The starters range from oysters through to garlic scallops, barbecue prawns, calamari and crumbed avocado and King Island brie. There was also a soup of the day. But the main event is definitely the steaks. The restaurant provides grain fed aged and tender steaks from the Darling Downs.

These are exclusive to the restaurant. They can be char-grilled over volcanic rock if you wish. I'm not sure whether I had a rock grilled steak or not. I opted for the ribeye on the bone. This is of the 500 gram variety. Meals at this restaurant are not cheap. The ribeye on the bone is $23.90. A 300 gram sirloin is $19.90, a 400 gram sirloin is $22.90. For reasons that escape me the rump steak comes in different dimensions. A 350 gram rump steak is $18.00 whilst 450 gram sells at $21.90. There is also fillet mignon, peppered steak and



WINE LIST

SPARKLING

Daniels House Sparkling Brut N.V.
Talcarni Blanc de Blanc Chardonnay

| | Bottle 750ml | Glass 150ml |
|---|---|---|
| Sth Aust blend | $14.00 | |
| Pyrenees Vic | $25.00 | $5.50 |
| Yarra Valley | $42.00 | |
| ernay France | $78.00 | |
| ernay France | $110.00 | |

S

| | | |
|---|---|---|
| lbarn Valley Vic | $18.00 | |
| garet River W.A. | $24.00 | $5.00 |
| d of area's | $23.00 | |
| ington Vic | $27.00 | $5.50 |
| Valley Vic | $34.00 | |
| ourn Valley Vic | $19.00 | $4.00 |
| y Valley N.S.W | $24.00 | |
| ston W.A | $25.00 | |
| Valley Vic | $24.00 | |
| varra S.A. | $27.00 | $5.50 |
| nd Vic | $33.00 | |
| e Hills S.A. | $36.00 | |
| alley S.A. | $38.00 | |
| ierra Aust | $13.50 | $3.50 |
| | | |
| lley Vic | $24.00 | |
| lley Vic | $30.00 | |
| Moris Vic | $27.00 | $5.50 |
| ey S.A. | $24.00 | |
| ey Vic | $30.00 | |
| River W.A. | $25.00 | |
| Valley Vic | $19.50 | |
| River W.A | $29.00 | $6.00 |
| y Vic | $28.00 | |
| S.A | $27.00 | $5.50 |
| le S.A | $25.00 | |
| ey S.A | $25.00 | $5.00 |
| | $30.00 | |
| ount | $13.50 | $3.50 |

| | Bottle 375ml | Glass 90ml |
|---|---|---|
| | $31.00 | |
| A | $22.00 | $6.50 |
| A | $25.00 | |

MENU

ENTREES

Soup of the Day $6.90
Oysters – Natural ½ doz $8.90 1 doz $16.90
Oysters – Kilpatrick ½ doz $9.90 1 doz $17.90
Garlic Scallops in sizzling olive oil with chillis $14.90
Warm Cajun Chicken Salad with roasted cashews $12.90
Barbecue Prawns marinated in coriander and garlic, teriyaki dip $14.90
Rare Roast Beef Salad with chargrilled vegetables, balsamic dressing $13.90
Mango Prawns crumbed with a chilled Bowen mango dip $14.90
Quick-fried Seasoned Calamari with honey chilli sauce $12.90
Chargrilled Baby Octopus on crisp lettuce with lime butter sauce $12.90
Crumbed Avocado and King Island Brie with a dijon mustard dip $11.90

MAINS

STEAKS

Grain-fed, aged and tender, from the Darling Downs, exclusive to Daniel's.
Chargrilled over volcanic rock to request.
Sirloin – 300 grams $19.90 – 400 grams $22.90
Rump – 350 grams $18.90 – 450 grams $21.90
Tenderloin – 300 grams $23.90
T-Bone – 500 grams $23.90
Ribeye on the bone – 500 grams $23.90
Steak Diane $21.90
Blackened Beef Fillet with our smokey bacon sauce $21.90
Fillet Mignon with bearnaise sauce $24.90
Peppered Steak with brandy cream sauce $22.90

SEAFOOD etc...

Blackened Fish Fillets cajun spiced, chargrilled $19.90
Grilled Fish Fillets Daniel's style, wine and butter sauce $19.90
Atlantic Salmon chargrilled with cream, avocado and dill sauce $24.90
Cajun Chicken grilled with mango salsa $18.90
Herb Crusted Rack of Lamb with red-currant glaze $20.90
Whole Fresh Lobster, chargrilled with garlic butter Market Price

ON THE SIDE

Fresh whole Mushroom or Bearnaise Sauce $3.00
Pepper Sauce $2.50
Bowl of Chips $3.00
Fried Eggs or Fried Onions $2.50
Side Salad with fresh herb dressing $4.90
Caesar Salad $8.90
Tomato and Bocconcini with basil dressing $5.90

PLEASE REFRAIN FROM SMOKING PIPES OR CIGARS

Daniel's
FOR STEAK & SEAFOOD

SYDNEY
1 Bent Street
Sydney NSW 2000
Phone (02) 251 5977
Fax (02) 252 2031

BRISBANE
145 Eagle Street
Brisbane, Qld 4000
Phone (07) 3832 3444
Fax (07) 3832 3161

MELBOURNE
525 Collins Street
Melbourne, Vic 3000
Phone (03) 9614 7525
Fax (03) 9614 2552

would you believe it, wonderful steak Diane. Steak Diane appears to be making a comeback. There is nothing like the Worcestershire-based sauce which accompanies this thin little slice.

All members seemed to have opted for one of the steaks and didn't try any of the seafood. However there are blackened fish fillets together with the fish of the day. The other mains include cajun chicken grilled with mango salsa. This would appear to be one of the rare concessions to modern times. There is a rack of lamb and a whole fresh lobster, char-grilled with garlic butter. I never have a whole fresh lobster because always next to the word lobster is the phrase "market price". I have always had trouble with market price.

My quibble with the restaurant is the vegetables. I like vegetables. I also like chips. I don't believe it is appropriate that one has to purchase on the side a bowl of chips for $3.00. The steaks come with a baked potato, a squarish piece of pumpkin and some broccoli. These were particularly uninteresting. The charming manageress informed me that they are indeed reviewing the vegetables and perhaps they will be upgraded to provide something rather more exciting. However since Daniel's has branches in Sydney and Brisbane the punters in those States obviously like blocks of pumpkin.

On the side one can get, would you believe it, a fried egg. This is a marvellous Australian touch.

Next time I'm there I will insist on having steak and eggs with chips. There is also some side salads available for $4.90. Again I do not think much of these. In fact I'm getting heartily sick of crinkly bits of lettuce-type things with silly halves of tomato with julienned carrots scattered about. Indeed there was far too much julienned carrots scattered about most of the plates.

Another thing I hate in restaurants is garnishes. Why waste a piece of parsley by shoving it on the plate? Why cut up some orange and squiggle it around? It simply is a waste of ingredients. Further you get the impression that it is an attempt to fill the plate up to make it look better than it is.

These are small criticisms. Daniel's is a place that is perfect for many members of the Bar. It has a calm atmosphere with excellent and dare I say it, attractive service.

As to the other important aspect, the Wine List, this is not cheap. The said Coriole Shiraz (and I think our party drank the last bottle available) is $25.00. A Craiglee Shiraz is $30.00 whereas the Lindemans House Cabernet Shiraz is $13.50. Of the whites again the Lindemans House Chardonnay is $13.50 ranging to a 1993 Mountadam Chardonnay at $38.00.

I believe a guide to the price of Wine Lists is to look for the Chateau Tahbilk Marsanne. One should attend Dan Murphy's and price this wine in order to ascertain the mark ups on restaurant Wine Lists. The Chateau Tahbilk Marsanne I think presently is ranging between $6.90 to $7.90. On this Wine List it sells at $19.00. The Savage Club sells it for $18.00 and believe it or not, the Melbourne Club sells it at $15.00. So it could be said that the wines are a trifle expensive. But if you stuck to the house wines then it would not be so bad.

Daniel's is an excellent addition to the restaurants of Melbourne. It is a perfect place for barristers to escape from the rigours of microeconomic reform. Thankfully the food is not of the mucked up bistro variety which is endlessly touted around this city. Especially it is not double-mucked-up-Sydney-type food. As my ribeye on the bone was of the largest variety I did not partake of any dessert. However desserts are of the same solid ilk as the mains and entrees.

Daniel's is not a restaurant for a quick snack. The prices are serious and the atmosphere is serious. However on those rare occasions, particularly on a Friday, it is a perfect place for a longish lunch.

**Daniel's for Steak and Seafood,**
525 Collins Street next to the Rialto.
Phone: 9614 7135.
Open lunch and dinner - - Monday to Friday.

Paul Elliott


# Victorian Bar News Advertising Rates

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# FOOTBALL

## *The Bar* v. *Mallesons Stephen Jaques*

THE MORNING OF SUNDAY 20 AUGUST 1995 dawned. The day of the annual clash, the moment of truth had arrived. The recruiting, the preparation, the training, would it all be worthwhile?

The venue was the famous Glenferrie Oval, in its day the most despised ground in the VFL and in more recent times the training venue for the successful Hawthorn Football Club.

The players arrived at the ground anticipating the forthcoming clash and aware of the great traditions of the Glenferie Oval. Names such as Peter Hudson, Peter Crimmins, Brandon Edwards, John Kennedy and of course John Winneke sprang to mind. Here was a source of inspiration.

But there was more. A few days before, the funeral of the great Ted Whitten had taken place and a milestone was being reached by the great stalwart of the Bar team Lex Lasry who was to play his tenth game for the Bar.

### THE FIRST QUARTER

The game started off at a furious pace with Damian Sheales providing plenty of drive from the ruck and our on-ballers Scott Wotherspoon and Chris Townsend taking full advantage. The Bar was constantly in attack with Peter Lithgow showing great form at centre half forward and the elusive Andrew Donald grabbing the opportunities presented. Unfortunately Mordy Bromberg, former Bar captain and St. Kilda star pulled a hamstring in the first quarter but not without first registering a major.

At the end of the first quarter the Bar was in the lead having scored 5–4 (34) to Mallesons 1–1 (7).

Goal kickers: Donald 2, Bromberg, Townsend, Lithgow 1.

### THE SECOND QUARTER

The Bar continued to dominate the game during the second quarter playing first-class football.

*Back Row: Damien Maguire (Coach), Lex Lasry Q.C., Mark Gamble, Jason Dunstall (Damian Sheales), Chris Gamble, Warrick Strangwood, Matthew Barrett, Phil Kennon Q.C., Michael Turner.*
*Middle Row: Mark Gibson, Chris Wallis, Paul Graham, Patrick Southey, Mordy Bromberg, Steve Grahame, Scott Wotherspoon, Sean Grant, James Gates, Dominic Lay.*
*Front Row: Andrew Laird, Chris Townsend, Michael Flynn, Savas Miriklis, Paul Santamaria, Rob Williams, Andrew Donald.*

*Andrew Donald, Paul Santamaria and our Mallesons opponents searching for the football.*

The prematch tactics were succeeding magnificently, the team playing with great skill and team work which belied the short association of the team mates.

Scott Wotherspoon was in everything, Patrick Southey had time to give a quote to the *Sunday Age* about the Timbertop controversy, apply a temporary tattoo and play great football in the centre. Michael Turner another first-year player was a focal point up forward and first gamer Paul Graham on the wing provided great drive.

*Michael Turner enjoying a well-earned break.*

*A spare full back.*

In the back line Steve Grahame, Mark Gamble, James Gates, Chris Gamble and Savas Miriklis combined to completely shut down the Mallesons forward line.

Michael Flynn in his first game scored a major.

During the second quarter the Bar kicked 5–4 to equal its score in the first quarter while Mallesons was unable to score.

At half time the score was the Bar 10-8 (68) to Mallesons 1-1 (7).

Goal kickers in the second quarter:

*Andrew Laird handballing in his inimitable fashion.*

Wotherspoon 2, Donald, Graham and Flynn 1.

THE THIRD QUARTER

In the light of the state of the game it was time to make some changes in the third quarter by bringing on the interchange bench. Silks Kennon and Lasry were fit and primed so they entered the play with Nick Hopkins (a former Mallesons captain), Jim Grant, Rob Williams and Matthew Barrett.

The Bar continued to dominate scoring 5 goals 7 behinds to Mallesons 1 behind.

Score at three-quarter time: Bar 15–15 (105), Mallesons 1–2 (8).

*Phil Kennon in full flight, with Chris Townsend pleading forlornly for a handpass. Andrew Donald watching in awe.*

Goal kickers: Turner 2, Williams, Lithgow and Graham 1.

THE FINAL QUARTER

The final quarter saw further wholesale interchanging of players with Damian Sheales going to full forward, Nick Turner and Michael Flynn sharing the ruck duties. The Bar continued its dominance delivering the ball regularly to the forward line and presenting the forwards with plenty of opportunities. Unfortunately Lex Lasry desperate for a goal couldn't score and Damian Sheales had numerous opportunities but was unable to score a goal.

*Andrew Laird again handballing this time under pressure.*


*Nick Hopkins (as he was late for the team photo he got photographed by himself).*


*A classic ruck duel involving Damian Sheales with the Bar on-ballers Scott Wotherspoon, Chris Townsend and Patrick Southey ready to pounce. Nearby is Mark Gibson keeping a watchful eye.*

In the result the Bar kicked 2 goals 8 behinds to Mallesons 1 behind with goals to Andrew Donald and Paul Santamaria.

The scores at the final siren were Bar 17–23 (125) to Mallesons 1–3 (9).

The result was a record winning margin for the Bar team and a tribute to the ability of the players involved.

This win means that the Bar football team remains undefeated in the period 1993–95.

GOAL KICKERS

Andrew Donald 4, Peter Lithgow, Paul Graham, Scott Wotherspoon, Peter Turner 2, Mordy Bromberg, Chris Townsend, Michael Flynn, Rob Williams and Paul Santamaria 1.

BEST PLAYERS (in no particular order)

Andrew Donald, Mark Gamble, Steve Grahame, Paul Graham, Peter Lithgow, Damian Sheales, Patrick Southey, Chris Townsend, Nick Turner, Scott Wotherspoon.

HIGHLIGHTS

Andrew Donald's "Daicos-like" 4 goals were inspirational.

The appearance of first gamers Matthew Barrett, Warrick Strangwood, Michael Flynn, Chris Gamble, Paul Graham, Nick Hopkins, Dominic Lay, Michael Turner and Scott Wotherspoon was a major factor in our win.

Mallesons' players, despite being outplayed on the day, continued to play out the game in the finest tradition of our great Australian game.

Chris Wallace and Mark Gibson both highly credentialled umpires did an excellent job and they were ably assisted by John Lee and Hardy Kennon goal umpires and Rory Maguire boundary umpire.

PROSPECTS

Next year is already looming as the biggest year yet in the history of the Bar football team. There have already been challenges made by teams wanting to capture glory by defeating the triumphant Bar team. Let's celebrate now but let us also prepare ourselves for 1996.

*Scott Wotherspoon perfectly tackled by a Mallesons opponent.*

# LAWYER'S BOOKSHELF

## 1995 Supplement to Retail Tenancies (2nd Ed.)

**by Dr. Clyde Croft**
**Published by the Leo Cussen Institute**
**pp. i–iv; 1–40 Appendices pp. 41–83**

The second edition of Dr. Clyde Croft's book, *Retail Tenancies* was published in 1994. Subsequent to the publication of the second edition the *Retail Tenancies (Amendment) Act* 1995 (the "amending Act") together with consequential amendments to the *Retail Tenancies Regulations* 1987 were enacted.

The amending Act clarifies the prohibition on a landlord from obtaining key-money. The amending Act also introduces an entirely new Part 3 containing provisions for compulsory conciliation or mediation. In addition to a text discussing these various substantive changes (together with several routine "housekeeping" amendments introduced by the amending Act), the author has helpfully included amongst the appendices the Explanatory Memorandum and second reading speech applicable to the amending Act.

The Supplement is timely and although it follows hot on the heels of the second edition of the substantive text it is a welcome addition to that text. The supplement is as a result of the amending Act an indispensable accompaniment to the second edition of Dr. Croft's book *Retail Tenancies*.

P.W. Lithgow

## Cases on Torts (2nd Ed.)

**by J. Swanton, B. McDonald & R. Anderson**
**The Federation Press, 1994**
**pp. i–xxvi, 1–493**

This relatively short case book is compiled for students. The text contains extracts from "core cases". The authors' contribution is limited principally to the selection of cases. Where appropriate the authors provide a brief exposition of the facts or findings in the lower court. The authors also link together the extracted passages and provide notations as to concurring or dissenting judgments.

It is commendable that the authors have let the judgments speak for themselves. Thankfully there is an absence of hypothetical and cryptic questions designed for but rarely considered by students such as are so often included in case books.

The contents of the book are comprehensively set out under 15 chapter headings with various chapters then containing sub-chapters. However, this comprehensive listing of the contents does not make up for the complete absence of an index in any form. The absence of the index is more unusual when in addition to the Table of Contents there is a comprehensive Table of Cases and Table of Statutes.

Although there is some cross referencing in the text (to a chapter, but not a page reference), these cross referenced cases are not referred to in the Table of Contents. Further, the cross referencing does not appear to be comprehensive, for instance the book contains an extract from *Myer Stores Ltd.* v. *Soo* [1991] 2 VR 597 in the chapter dealing with damages, however there is no cross referencing that enables the reader to also review this extracted passage in reference to actions for false imprisonment.

The absence of an index means it is not possible to research "Negligent Statements" or "Professional Negligence" unless the reader knows an appropriate case that is extracted in the book or the reader has the where-with-all to look under the chapter heading of "Purely Economic Loss" where there are extracts from, inter alia, *Hedley Byrne & Co Ltd.* v. *Heller & Partners Ltd.* [1964] AC 465 and *Shaddock & Assocs Pty Ltd.* v. *City of Parramatta* (1981) 150 CLR 225 and under the chapter heading "Immunity from Liability" where *Giannarelli* v. *Wraith* (1988) 165 CLR 543 is extracted.

Similarly, the important recent High Court case of *Burnie Port Authority* v. *General Jones Pty Ltd.* (1994) 179 CLR 520 is found under the chapter heading of "Concurrent Liability". Insofar as the *Burnie Port* case represents part of a continuing trend in the expansion of the law of negligence (see

also *Bryan* v. *Maloney* (1995) 69 ALJR 375, a case reported after publication of this case book) it deserves fuller cross referencing in the text and is a clear example of why an index is both appropriate and necessary.

The cases selected include substantial materials related to negligence as well as other torts such as trespass and nuisance (in various forms) together with chapters on breach of statutory duties, defences, concurrent liability and damages.

This work is suitable as a case book for use by students. It may also act as an aide-memoire for those versed in the law of torts, however the absence of an index limits the usefulness of this case book.

P.W. Lithgow

## Securities Regulation in Australia and New Zealand

**Editors: Gordon Walker and Brent Fisse**
**Publisher: Oxford University Press, 1994**
**pp. ix–xlvi, 1–909**
**Price: $130.00 (Softcover)**

## Enforcing Securities

**Editors: John Greig and Bryan Horrigan**
**Publisher: The Law Book Co. Ltd., 1994**
**pp. v–xxvii, 1–304**

## Securities Over Personality

**Editor: Michael Gillooly**
**Publisher: The Federation Press, 1994**
**pp. iii–xxxii, 1–319**
**Price: $75.00 (Hardcover)**

Compilations of essays and seminar papers are proving to be very popular with legal publishers in the 1990s, in particular the Federation Press and the Law Book Company. These three recent collections of essays, which all concern "securities" of some sort and feature the writings of many prominent Australasian academics and practitioners, continue this trend.

Gordon Walker and Brett Fisse's new publication is a massive collection of analytical essays concerning, as the title suggests, the securities regulations of Australia and New Zealand. The editors in their introduction indicate that this compilation is intended to serve as an additional navigational aid for people working in the main channels and straits which crisscross the reefs of Australasian securities regulation.

There are 33 chapters in all, with 14 of them devoted specifically to the situation in New Zealand. The book is divided into 10 parts, and as can be seen from these sections, most aspects of the law of securities regulation are addressed in the essays.

The first part — titled Securities Regulation in the 1990s — is an outline of various themes which presently dominate this area of the law.

The second part analyses securities regulation in its historical context.

Part 3 is concerned with the securities markets of Australia and New Zealand.

Policy issues are the theme of the fourth part, with Paul Latimer's essay on what securities regulation laws are trying to achieve (chapter 8) of particular interest.

Aspects of capital raising, the regulation of the secondary market and insider trading are dealt with in parts 5, 6 and 7 respectively.

The international organisation of securities commissions (chapter 28) and the extra-territorial implication of Australia's laws (chapter 29) are discussed in the eighth part.

Part 9 looks at takeovers, and the final section is devoted to derivatives.

The majority of the contributions to *Securities Regulation in Australia and New Zealand* are both of practical relevance and theoretical interest, with most of the authors making liberal references to the latest case law. Another pleasing aspect of this collection is the extensive bibliography which has been prepared by the editors.

Despite the fact that this is a very impressive publication with 37 contributors and nearly 1000 pages, one cannot help but observe that, at the retail price of $130, it is quite costly for a publication that is not intended as, and in fact is not, a primary source of reference. Nevertheless, the editors should be commended for compiling such a huge collection of topical essays from so many experts in the field.

The same observations can be made about Michael Gillooly's *Securities Over Personality*, a compilation of 10 essays from the Western Australian Centre of Commercial and Resource Law. This publication concentrates on the patchwork of Federal and State laws relating to securities over personality, both in the context of existing legislation and the applicable case law, as well as in the light of recommendations by various law reform agencies to substantially revise the personal securities laws of Australia and New Zealand.

Its contributors include some of Australia's leading legal academics, as well as two practitioners from Western Australia, and all the articles are clearly presented with abundant practical examples and detailed references to legislation and case law.

The topics discussed in this work are equitable securities (chapters 1 and 2), security over receivables (chapter 3), circular priorities (chapter 4), the common law of pledges (chapter 5) and the commercial pledges of documents. The last four

chapters are concerned with various aspects of law reform, and include a reproduction of the recommendations of the Australian Law Reform Commission on reforming the law of personal property securities.

The final publication, Greig and Horrigan's *Enforcing Securities*, is a compilation of just six essays relating to the enforcement of security holders' interests over assets.

The topics covered by the contributors include injunctions against mortgagees (chapter 2), possessory and third party securities (chapters 4 and 6), securities arising out of operation of law (which is also contained in chapter 4) and competing priority claims to fixtures (chapter 5).

Although this work has only six chapters, it is appealing for the detailed treatment the authors have given to key issues of security enforcement from both the theoretical perspective and in terms of practical application.

Anna Ziaras

# CONFERENCE UPDATE

**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 Australian Institute of Criminology. Tel: (06) 274 0224. Fax: (06) 274 0225.

**28 October–1 November 1995:** Perth. 1995 Annual Conference of the Aviation Law Association of Australia and New Zealand. Contact Mr. John Farquharson. Tel: (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. Tel: (06) 247 3788.

**11 November 1995:** Canberra. Discussion on the High Court, Police surveillance, privacy, euthanasia. Contact ANU Legal Workshop. Tel. (06) 249 4454.

**12–13 November 1995:** Innovations in Trauma Rehabilitation. Contact Diana Crebbin. Tel: (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. Tel: (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. Tel: (02) 364 6300.

**8–9 February 1996:** Canberra. Asia Pacific Economic Law Forum. Contact Marian Jones. Tel: (06) 201 2731. Fax: (06) 201 5999.

**22–24 February 1996:** Annual National Superannuation Conference for Lawyers conducted by Law Council of Australia in conjunction with Leo Cussen Institute. Contact Dianne Rooney. Tel: (03) 602 3111. Fax: (03) 670 3242.

**24–29 March 1996:** Prague. IBA Section on Energy and Natural Resources Law, 12th Advanced Seminar, Contact IBA (see above).

**28–29 March 1996:** Hong Kong. Second Law Asia Business Conference. Contact Mr. Graham Morrison. Tel: (852) 28461888.

**9–13 April 1996:** Dunedin. 1996 New Zealand Law Conference. Contact New Zealand Law Society. Tel: (04) 472 7837. Fax: (04) 473 7909.

**14–16 April 1996:** Hertfordshire University. Commonwealth Magistrates' and Judges' Association Seminar "Perceptions of Justice". Contact D.B. Armati. Tel: (02) 289 8701. Fax: (02) 289 8819.

**22–26 April 1996:** Adelaide. Sixth International Interdisciplinary Congress on Women. Contact Festival City Conventions. Tel: (08) 363 1307. Fax: (08) 363 1604.

**25–29 August 1996:** Vancouver. Eleventh Commonwealth Law Conference. Contact Ms. Elizabeth Cordeau, c/o Commonwealth Lawyers' Association Vancouver. Tel: 1 604 664 7641. Fax: 1 604 688 3105.

**13–18 October 1996:** Canberra. Seventh National Family Law Conference. Contact Ms. Julie O'Donnell. Tel: (06) 247 3788. Fax: (06) 248 0639.