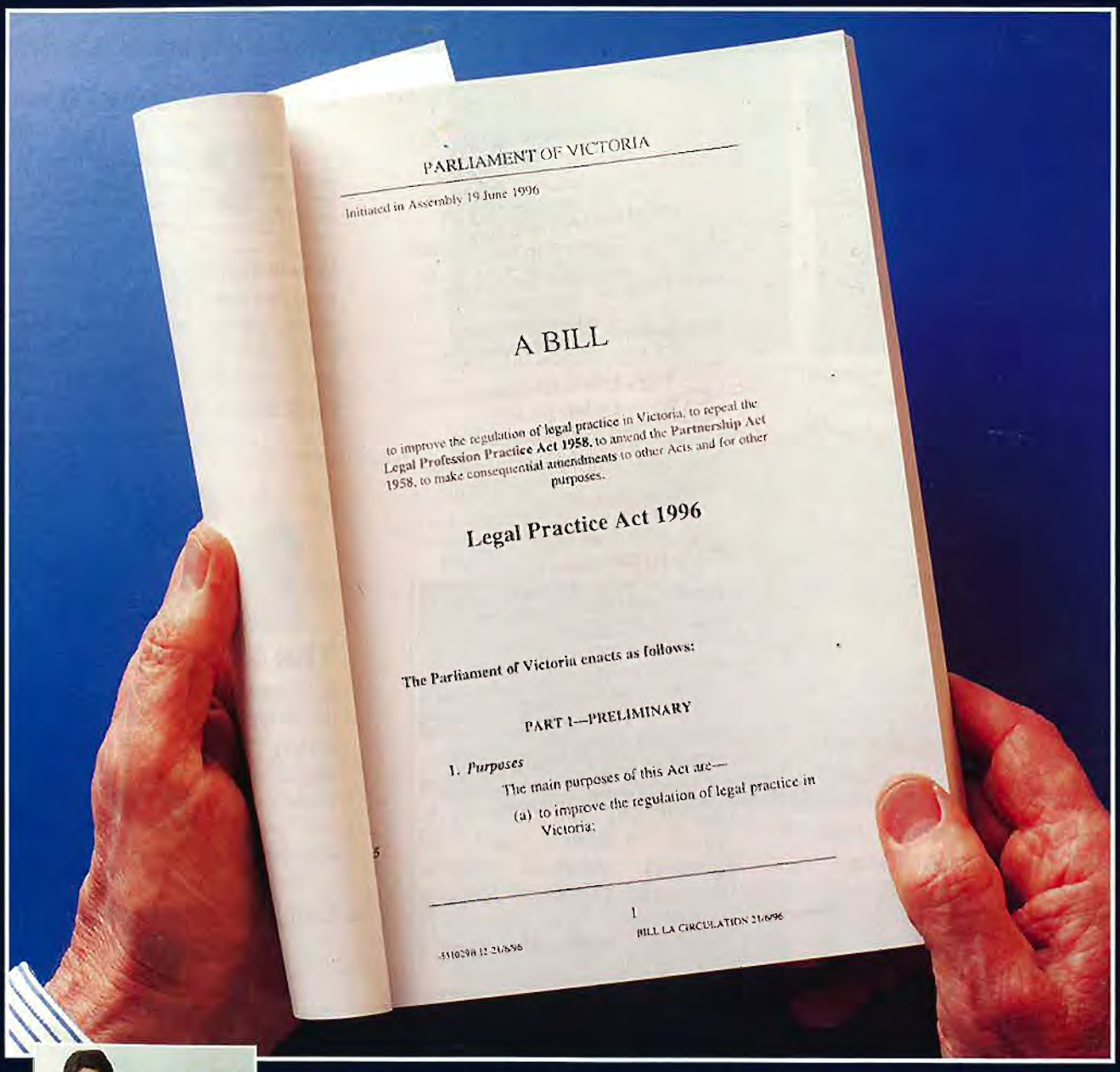
VICTORIAN BAR NEWS

No. 98 SPRING 1996

THE LEGAL PRACTICE BILL PREVIEWED



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Medical Negligence: Crisis or Beat Up?
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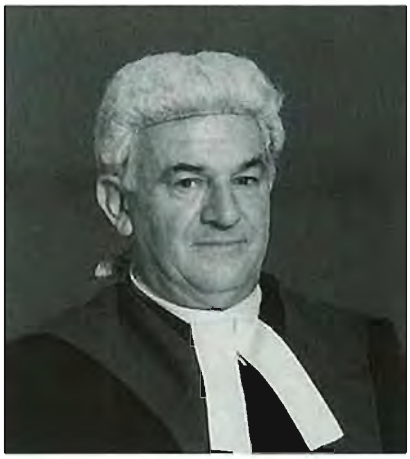

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Is the Winter of Discontent Over?

IT has been grey for so long. Will it ever change? Is there a sunny burst of spring around the corner? Will it be blue skies for Victorians and blue skies for the Victorian Bar?

This issue contains a short summary of the effects of the new Legal Practice Bill which will become law on 1 January 1997. How will this affect the Bar? Will things be better for Victorian barristers and for Victorians?

There is no point debating the changes to the profession. They will become law. But how will they affect the average barrister? Perhaps the most fundamental change is that of fees. Solicitors will not be liable for barristers' fees under the Bill. It cannot be assumed that the delivery of a brief makes the solicitor rather than the client liable for fees. There must be a specific agreement between a barrister's clerk or the barrister himself and the solicitor, that the solicitor will be liable if the client defaults or refuses to pay. If not, then there should be an insistence on payment of the fees with delivery of the brief or prior to work being performed.

If a solicitor says that neither of these options is on, then the barrister will have to decide as to whether the client is worth the risk. Undoubtedly this will pose a dilemma, especially for junior members of the Bar. Further a barrister should make sure that the retaining solicitor has complied with the Act in supplying the client with a written statement setting out information about costs, billing cycles, an estimate or range of the costs of litigation and the client's rights in the event of a dispute, amongst other information. It will be worthwhile for barristers' clerks to have standard written agreements to cover these variable payment arrangements. Some of the fee agreements used by our New South Wales brethren are truly incredible pieces of drafting. Aah, but these changes are designed to simplify things . . .

But you don't have to have a *clerk* after 1 July 1997. You can do it all yourself. Does this mean a sudden desertion from the present clerking system. The very successful and very unsuccessful may decide to go their own ways. The rich and powerful may decide that they don't need a clerk and set up Sydney-type chambers, with a secretary/clerk servicing a select group in premises/chambers somewhere other than under the control of Barristers Chambers Ltd. For compulsory chambers from B.C.L. will be abolished. Some may decide that there is no need for clerks or chambers at all. A mobile phone and the boot of a car will be enough. But it is doubtful whether the majority of barristers will wish to change their professional arrangements, or in microeco-talk their "industry networking infrastructure". It has worked for many years, why change things. There do not appear to be dozens of barristers clamouring to have direct access with clients and all its attendant problems. As for co-advocacy many would love to be the junior to the senior partner in one of the large firms at solicitor fee rates.

But with all the changes to fees, clerking and chamber arrangements will one anomaly be removed? That is no pay for a barrister if his case is not reached? Perhaps there needs to be a clause in the new fee agreements whereby either the solicitor or the client will pay regardless of the case being reached. The next step is to make such costs recoverable on a taxation. If we are in an industry and not a profession why can't we charge like the T.V. repairman or plumber?

Further what about tax relief? Why can't we run our "small businesses" like all others? Why can't we incorporate in the real sense and gain the appropriate tax advantages? Because suddenly for tax purposes we become a profession and not a business.

MEDIATION

On Thursday 19 September an excellent seminar was organised by Bill Martin Q.C. concerning mediation, and in particular, the short mediation. The panel was chaired by Professor John Wade of Bond University. Particular discussion revolved about the Victorian experience of court-ordered mediations which usually take half a day. A clear difference between personal injury and other mediations emerged.

It was noted that the Victorian Bar is now a leader in the field of mediation in Australia. Practical and worthwhile exchanges between practitioners in this expanding area of practice are to be encouraged.

The Editors

Mister Justice, or Madam Justice?

Sir,

THE author of the welcome to Balmford, J., in the last edition of *Victorian Bar News*, wrote:

"Justice Balmford — we assume that now that there is a non-male member of the Supreme Court the style of address used in the Federal Court and High Court will percolate into the Supreme Court . . .".

Now, no-one would be so unfair to the author as to attribute a desire that this alteration in style should take place, but the assumption that it will do so might not be unwarranted, either.

One might have been forgiven for thinking that a simple "Madam Justice" would be the appropriate and dignified counterpart to the masculine "Mr. Justice", which is sanctioned by ancient and honourable usage.

However, our modern media have taught us the new way. Its practitioners (existing, apparently, on an almost exclusive diet of American television) constantly inform us that our judges use gavels and that witnesses before them "take the stand". Australian courtroom dramas show counsel wandering around the court at will and shaking their fingers in the faces of witnesses. In an age of overfamiliarity, no news service will refer to a judge without using his or her Christian name ("Today, Justice John Smith said . . .").

We could make things easier for reporters by having little signs up on the Bench saying 'Judge John Smith presiding'.

So, the writer in your last edition is, unfortunately, probably right in making the assumption he does.

Yours faithfully,
Michael King

History in the Making: 1996

Dear Sirs,

FURTHER to your reporting of Mr. Junior Silk's speech to the 1996 Bar Dinner published in the Winter edition of the *Victorian Bar News*, I wish to correct a statement made by Kim Hargrave Q.C. In listing the numerous achievements of the Honourable Mrs. R. Margaret Lusink A.M., Mr. Hargrave Q.C. stated . . . "you are the only daughter of a Victorian female barrister to ever practice at the Bar . . ." I humbly point out that this is NOT SO.

Natalie Greenberg, my daughter, signed the Roll of Counsel in May 1996 and I believe actually made history in doing so. This is the first time a mother and daughter are practising at the Bar AT THE SAME TIME.

Having read Isabel Carter's book *Woman in a Wig — Joan Rosanove Q.C.* it appears that the very distinguished Joan Rosanove Q.C. retired from practice in June 1969 at a time when her daughter was practising as a solicitor, having been admitted to practice in 1966. It was not until about five years after her mother retired from the Bar that Mrs. Lusink, as she then was, signed the Roll of Counsel.

Yours sincerely,
Michele S. Lasky

Betty Hotchin Writes

Dear Mr. Nash

YOUR archivist, Alison Adams has sent me the issue of your journal in which there is an article about my father, the late S.K. Hotchin. It is a pleasure to me to see him recognised.

I have very little information about his earlier life when he was active at the Bar, because he did not marry till he was 43, and by the time I would have been aware of his career he was editing the *Argus Law Reports*.

I enquired recently from the Bar Council office and also from the descendants of the solicitors with whom he worked, and whose names I remembered, but had no success.

Mr. Justice Stanley and Judge Stafford shared No. 28 Selborne Chambers with him in turn, probably in the 1950s.

Thank you for printing the article.

Yours sincerely,
Betty Hotchin

Berlin: A Chance to Win

THE International Bar Association, of which the Law Council of Australia is a member, is holding its twenty-sixth biennial conference in Berlin, Germany, from 20–25 October.

By requesting a copy of the 72-page Berlin Preliminary Program, lawyers in Australia will be automatically entered into a prize draw for one of six IBM VoiceType dictation systems, which come with a 25,000 word vocabulary for legal dictation designed for corporate and private practice lawyers.

The Berlin conference will feature a Plenary Session on "Freedom of Expression — Privacy versus Freedom of the Press" and separate working programs covering a plethora of topics on business law, general practice, energy and natural resources law and many other areas. There will also be a special program for guests.

Requests for the Preliminary Program must arrive at IBA in London by 1 September to qualify for entry in the draw. Contact the International Bar Association, 271 Regent Street, London WIR 7PA, England. Fax: +44 (0)171 409 0456. Phone: + (0)171 629 1206.

Bar's Benefits for Young Counsel

THE Victorian Bar has always held a special responsibility to its new members, and has always relied on the well-being of junior barristers for the preservation of the Bar's own long-term interests.

This responsibility and reliance will be made more acute with the passage of the Legal Practice Bill. We expect the Bill to be debated in Parliament in September and to take effect from 1 January 1997. Practising Certificates will need to be applied for on or before 15 February 1997 for those who are financial members of the Victorian Bar as at 1 January 1997.

All members of the Victorian Bar should by now be aware of the key provisions of the Legal Practice Bill. Floor meetings were convened in early September to inform our members as to some of the practical effects of the Bill. An outline of the Bill prepared by Elisabeth Wentworth appears in this edition of *Bar News*.

A number of important decisions will need to be made by all barristers (including our junior members). One of the possible effects of the removal of some impediments to direct access will be that young barristers will be able to take work that might otherwise have been handled by solicitor advocates. The abolition of the compulsory chambers rule will mean that young barristers will be able, if they so choose, to lease rooms from landlords other than Barristers' Chambers Limited. The abolition of the compulsory clerking rule (as and from 1 July 1997) will allow barristers to no longer employ a clerk. The fact that a person can practise without being a member of the Victorian Bar will mean that a barrister need not belong to our association of advocates. Indeed, a person seeking to work as a specialist advocate may choose not even to be regulated by the Victorian Bar.

The Victorian Bar will have as a priority over the next few months to explain the advantages of remaining a member of the Victorian Bar, and to explain the continuation of the Bar's role which has, in the past, promoted the interests of junior counsel. We will use the Bill as an opportunity to revise and invigorate our approach to new members of the Bar, primarily through membership services

Barristers who choose to be regulated by the Bar and who choose to be members of the Bar will continue to have access to a range of convenient, smart and affordable chambers leased from a restructured Barristers' Chambers Limited, without any exorbitant down payments to a floor or list. As a change incidental to the Legal Practice Bill, Barristers' Chambers Limited will allow a more flexible approach to the sharing of chambers. Further changes are being considered to cater for this new environment.

Members of the Bar will continue to have access to Bar Council approved clerks, who will, from 1 January 1997, be able to handle trust funds on behalf of the barrister. Clerks, I am sure, will be considering ways to improve their services. For a junior barrister, a clerk will continue to provide many services which would cost a great deal more elsewhere.

The highly successful readers course will continue to serve as a benchmark of the skill of new Bar members. The Bar Council has met the cost of refurbishing Level 2 of Four Courts Chambers to be used for the readers' course. Other educational services, which will continue to be offered to members, are expected to be of a great relevance to young counsel: for example, only Bar members will be able to complete Bar mediation courses, and have access to the Bar's mediation and arbitration facilities. The Bar Council has recently refurbished Level 3 of Four Courts Chambers to serve as an improved mediation centre.

Bar members will be able to seek the advice of the Ethics Committee on ethical and professional matters, a service which is of particular utility to people in the process of establishing a practice. Membership of the Bar will obviate the need for young barristers to maintain an extensive and expensive library, with Bar members soon to have access to on-line legal research services as well as access to the Bar Library. Barristers' Chambers Limited accommodation may be able to contain common library areas. We hope and expect that the establishment cost going to the Bar in Victoria can continue to be among the lowest in the country, without any sacrifice of privileges and benefits of Bar membership.

The Bar is also aware that many young barristers are not only establishing a practice but also establishing a family. The Child Care Facilities Committee has endorsed two services specialising in emergency, occasional and nanny care services, which have been advertised *In Brief*. The Council is currently considering submission of the Committee for the creation of a Parents' Room.

As the provision of legal services becomes more exposed to market forces, the Bar Council itself will perhaps more than ever before, embody a powerful means by which the junior Bar will be able to have its voice heard across a wide range of law reform and policy issues.

And finally, it must be remembered that no-one benefits more from an ethos of collegiality than the junior barrister. The spirit of shared knowledge and experience allows new barristers to learn and to flourish. Proximity to each other engenders the accumulation of information and exchange of ideas, all for our mutual benefit.

The Bar will be doing all it can to meet the challenges of the next months with an assertion of the principle that the Victorian Bar exists primarily not for the investigation of complaints and disputes involving its "regulated practitioners", but for the fostering of a highly skilled professional community in which no small part is played by its junior members. It is with a spirit of optimism that our Bar should now enter this new era, and move forward as an organisation of successful and excellent advocates.

Some Reforms Proposed for Courts and Tribunals, and Friendly Societies

A number of Bills will be introduced in the Spring session of Parliament. Members of the Bar may be interested in some reforms proposed for Courts and Tribunals and Friendly Societies.

COURTS AND TRIBUNALS

The Courts and Tribunals (General Amendment) Bill will increase the jurisdictional limits in the Magistrates Court for personal injuries matters from $5,000 to $40,000 and for the general jurisdiction from $25,000 to $40,000. This is consistent with other States and Territories.

The current limits were set in 1989. The amendments reflect a level that is slightly higher than increases to wages and the cost of living over the period but is appropriate as adjustments are not made annually.

This will have the benefit of reducing waiting times in the County Court and provide for cheaper resolution of disputes through the Magistrates Court.

The new limits also provide consistency with the Workcover jurisdiction where the limit is $40,000.

The Bill will establish a scale of costs for criminal matters dealt with by the Magistrates Court. This is an effort to promote greater consistency in fees and create a basis for speedy negotiation of bills.

The Bill amends section 21 of the *Supreme Court Act 1986*, which enables the Attorney-General to apply to the Supreme Court to have a person declared a vexatious litigant. Since the original enactment of this legislation, many tribunals have been established which provide new avenues for litigation and therefore for abuse of the judicial system. The Bill therefore enables the Supreme Court to have regard to past proceedings in any court or tribunal in Victoria.

The Bill enables the Supreme Court to make an order prohibiting a vexatious litigant from commencing a "type of proceeding" as specified by the Court without first seeking leave of the Court. A lower court or tribunal is also able to assess an application for leave. Removing a litigant's right to litigation is a drastic step and I want to ensure that the legislation is not unnecessarily broad. Therefore, the Court is limited to prohibiting proceedings of the kind undertaken by the litigant.

FRIENDLY SOCIETIES

Friendly Societies are to be subject to national uniform supervision and are to be integrated into the existing Financial Institutions Scheme. Victoria was seen as the most appropriate jurisdiction to develop and introduce template legislation as most of the industry's assets are managed by societies based in Victoria. It will be adopted by other jurisdictions through an application of laws mechanism.

The Friendly Societies (Victoria) Bill will provide for the formation, registration, management and regulation of Friendly Societies. Friendly Societies will be supervised by State Supervisory Authorities which will have similar duties and powers as they currently have for the supervision of building societies and credit unions under the Financial Institutions legislation.

The Australian Financial Institutions Commission will be the national coordinating body and will be responsible for the development of prudential standards.

The legislation will allow easier interstate trading by ensuring consistency in the supervision practices of the State regulatory bodies. It will also facilitate mergers between societies by including procedures similar to those in the Financial Institutions legislation.

CHILDREN'S COURT — PRINCIPLE NOT CONVENIENCE

The recent publicity surrounding the attempt by the Auditor-General to conduct a performance audit of the Children's Court was more concerned with sensationalism than facts or constitutional principles.

The facts are simple. The Auditor-General neither has, nor is intended to have, authority to conduct a performance audit of any Victorian court.

In the form of the *Audit Act 1994*, Parliament has authorised the Auditor-General to conduct, and report to Parliament upon, performance audits of authorities. "Authority" is defined in that Act as a "department" or a "public body". By "department" is meant any of the public service departments listed in Schedule 1 of the *Public Sector Management Act 1992*. No court is included in that list. By "public body" is meant any of the bodies listed in the definition of that term in s.4 of the Audit Act. Again, none of them is a court or in any way resembles a court.

It is fundamental to the Victorian constitutional system that the executive and legislative arms of government do not interfere in the performance of its functions by the judicial arm. This is the separation of powers principle and is the reason why all courts are omitted from the Audit Act.

As the chief legal officer of the State it was my obligation, once I became aware of the audit, to ensure that the Auditor-General was informed of his lack of authority to conduct a performance audit of the Children's Court. To this end, he was provided with advice from the Solicitor-General.

To his credit, the Auditor-General, when provided with that advice, immediately acknowledged his lack of authority and withdrew his report. If the Auditor-General had appreciated the situation before the start of the audit or the drafting of his report, it is unlikely that the audit would have taken place. It should be noted that the Auditor-General is in the same position as the Ombudsman, where a specific legislative limitation on the investigation of matters relating to courts has been accepted for many years.

Unfortunately, the mere existence of a draft report, its withdrawal and general ignorance of the legal position combined to give rise to totally unfounded allegations of ulterior motives on my part. Such a reaction from the media was perhaps no surprise. What was not expected was the negative reaction of some members of the legal profession who should have both understood and supported my very public re-affirmation of the concepts of separation of powers and judicial independence in Victoria. It is to be hoped that on further reflection they will revise their opinions.

Quite apart from the legal and constitutional position, the draft report illustrated in many ways the unsuitability of a person unfamiliar with law and legal practice to undertake a performance audit of a court. I will give two examples:

- It is a fundamental principle that anyone exercising judicial power must maintain strict independence from the parties. *All* parties must have confidence that they can fully present their case and receive a fair and impartial hearing. While courteous and co-operative to all, a court should not develop a special relationship with any party.
- Secondly, it is the role of a judicial officer to decide matters on the evidence before the court. A judicial officer is not required to be skilled or expert in all aspects of the matters that fall for decision. Evidence is often expert evidence introduced to ensure that the court fully understands the issues. The required judicial skill is to determine the matters before it only after careful assessment of evidence before the court.

On the mistaken, and very unfair, basis that magistrates are not appropriately skilled to be the judicial officers of the Children's Court because they, allegedly, have little or no experience in relation to child welfare matters and child development, the draft report proposes that the magistrates should develop a special relationship with officers of the Department of Human Services and jointly with them decide the best outcome for the children before the court.

Such a proposal is entirely contrary to each of the principles that I have identified and displays a fundamental lack of understanding of the judicial process and the role of the judicial arm of the government.

The draft report is itself evidence of the danger of allowing unqualified persons to attempt to assess the performance of any court. One of the functions of the Audit Act is to prevent that very danger materialising.

Constitutional and legal principle, not ministerial convenience, was the basis for rejecting the attempted audit of the Children's Court.

Jan Wade, M.P.
Attorney-General

The Hon. Mr. Justice Crockett

WILLIAM Charles (Bill) Crockett was born on 16 April 1924. He was educated at Geelong College and went from there to the University of Melbourne where he took out the Supreme Court Prize.

On graduation he joined the Royal Australian Naval Reserve and served in the Navy in 1945 and 1946. He was admitted to practice in 1948 and immediately signed the Roll of Counsel. In 1962 at the age of 38 he was appointed one of Her Majesty's Counsel for Victoria.

He was a judge of the Supreme Court of Victoria for some 17 years. He was a leader of the Common Law Bar for seven years before that. He was appointed an officer of the Order of Australia in 1987. He was awarded the degree of LL.D. from the University of Melbourne in 1995.

His entry in *Who's Who* runs to a simple six lines.

One of the remarkable characteristics of Bill Crockett is that he is essentially a very private man. He is at the same time a very definite man.

Outside the law and his family, Bill Crockett's greatest love is racing.

It was apparently common to see his Honour during the 70s and 80s at the stables of the late Tommy Woodcock on Sunday morning engaged in a post-mortem with his close friend Bill Stutt and the late Sir Reginald Ansett.

He was elected a Member of the Moonee Valley Racing Club in 1962, elected to the committee of Moonee Valley in 1974, and Vice-Chairman of Moonee Valley from 1978 until 1988 when he retired. He was elected a member of the VATC in 1961. In 1995, he was made an honorary life member.

As a judge, he had the capacity to grasp almost immediately the essence of any problem no matter how difficult. He is a warm man, a concerned man with a tight (some might say tough) analytical mind who could, on occasion, display enormous patience with counsel who failed to see the issues as clearly as he did. It was rare for him to be reversed on appeal. Judges sitting on an appeal from Crockett J. started from the (justifiable) assumption that his Honour was right.

In the case of *Meeking* v *Crisp*, Crockett J., ruling on the relationship between, and effect of, paragraphs (a) and (b) of section 49(1) of the *Road Safety Act*, held for the defendant. The Full Court took a different view of the legislation. Before the matter went to the High Court counsel appearing to uphold the Full Court decision was told: "You've got one vote against you to start with. Dawson will always follow Crockett". And he did!

Mr. Justice Crockett

His Honour's broad and deep knowledge of the law, and his intuitive feeling for the spirit of the common law, combined with his incisive mind and his tight and lucid reasoning made it a pleasure to appear before him. If he disagreed with your argument he made it clear that he did so and why. If there were issues as to which he did not need to be convinced he also made this clear, quickly and simply.

His Honour's capacities were seen at their best, possibly in the Practice Court and in the Court of Criminal Appeal where he was a dominant and powerful personality.

In the Court of Criminal Appeal he did much to develop the criminal law and to stress that legislation should not too easily be taken to override fundamental common law principles.

In the Practice Court, he would quickly determine what was the essential issue in dispute, focus the attention of counsel on that issue, sometimes articulate for them the basis of their argument and then without pause give a concise, lucid, logical and often learned extempore judgment. It was almost frightening to see how easy he made the task look.

His Honour Judge Fricke

GRAHAM Lewis Fricke was born on 5 December 1935. After obtaining an Honours Degree at the University of Melbourne (in those days about standard practice from Melbourne High School students at Melbourne Law School) he tutored in the Law School before going on to post-graduate studies at the University of Pennsylvania.

On completing an LL.M. at Pennsylvania he took up a lectureship at the University of Tasmania. The Law School to which he went was one which had recently suffered a mass exodus of staff by reason of the continuing repercussions of the Orr case. It was a challenging job but one with which the then young Fricke coped cheerfully and efficiently. Amongst his students were young men called Heerey, Bennett, Green, Cox, Underwood, Wright, Rae, Hodgman.

The first six are now respectively Heerey J., Bennett Q.C., His Excellency Sir Guy Green, Cox C.J., Underwood J., Wright J. The others became Senator Peter Rae and the "Mouth from the South", the Hon. Michael Hodgman Q.C., the Minister for the A.C.T.

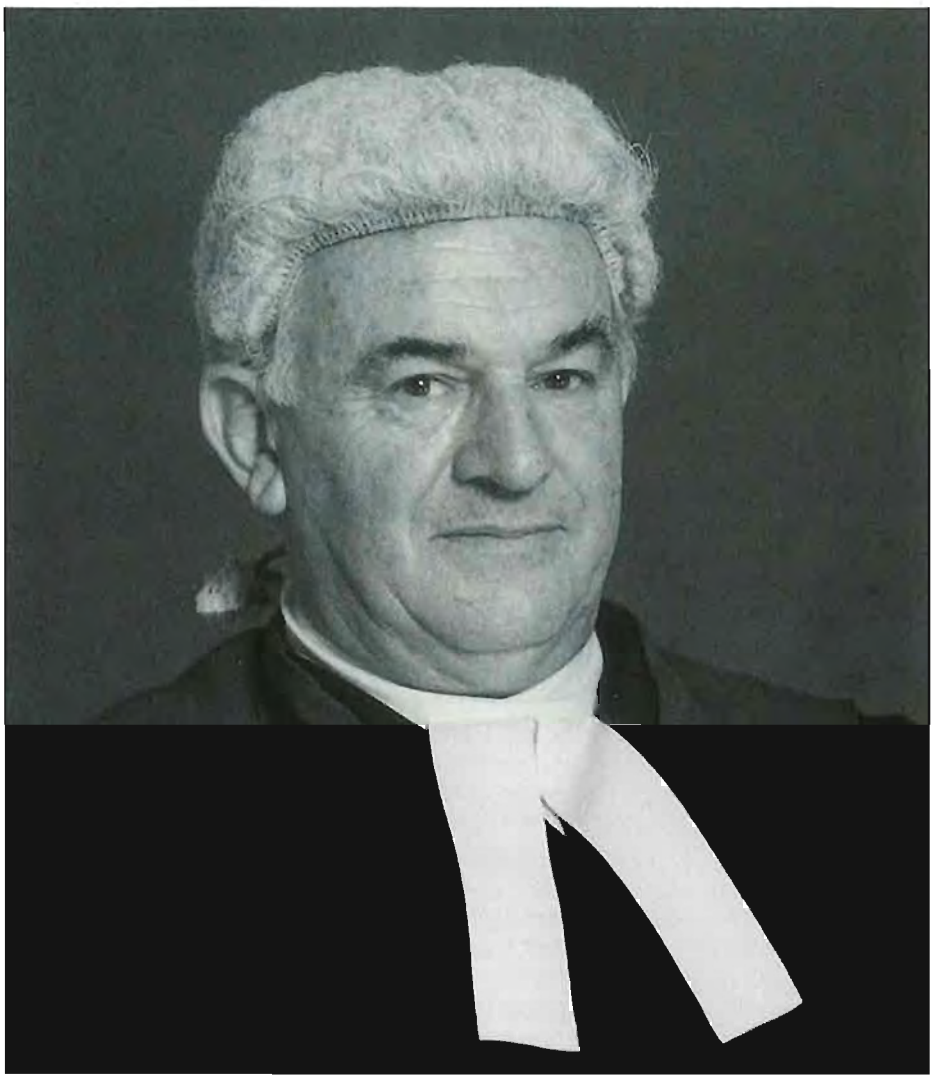
Graham Fricke left Tasmania at the end of 1960, returned to Melbourne and signed the Roll of Counsel. But he did not renounce academia entirely at that stage. He managed to combine a busy practice with teaching Evidence at RMIT and subsequently The Law Affecting Journalism at Melbourne and Evidence at Monash.

His first book, *The Law of Trusts in Victoria* was published in 1964, *Compulsory Acquisition of Land in Australia* in 1975 (with a second edition in 1982).

He took Silk in 1979 and was appointed to the County Court in 1983. Even judicial office could not stop him from bursting into print. *Libels, Lampoons and Litigants* was published in 1984, *Judges of the High Court* in 1986 and *Profiles of Power* in 1990.

Graham Fricke was, while at the Bar, always his own person, popular but not gregarious. As a judge he was knowledgeable in the law, impartial, clear minded and fair. He was one of those before whom it was a pleasure to appear. But he could not always restrain a dry sense of humour.

In the speech of farewell given by Graham Uren Q.C. as Vice Chairman of the Bar when his Honour last sat Graham told the story of the "occasion on which your Honour was hearing a plea in Bendigo on behalf of a man who had pleaded guilty to a number of counts of interfering with young boys. Upon being told by John Constable that his client had had a successful career as a furniture manufacturer, your Honour expressed the hope that he didn't specialise in tall boys".



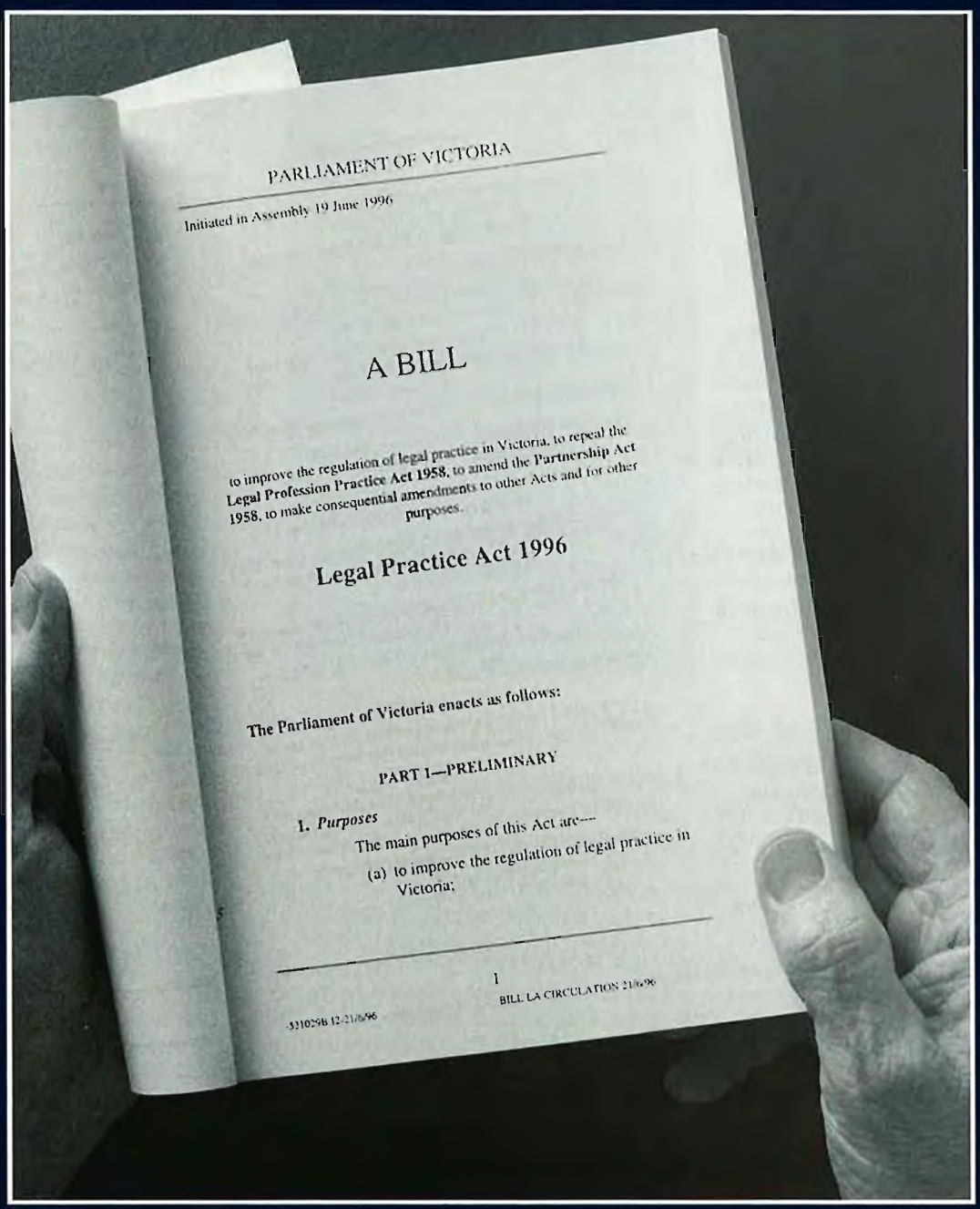
Judge Fricke

Perhaps the greatest tribute to Graham Fricke, the man, is the fact that he is still remembered by his students of nearly 40 years ago. When they held a weekend celebration to mark 25 years in practice Graham Fricke was one of the very few of their former lecturers whom they invited. When the University of Tasmania celebrated the centenary of the Law School, Graham Fricke was an honoured guest.

He has not departed the law merely (some would say) shed responsibility and gone back to academia. He has retired from the County Court to take up a post at Deakin University. There he will be able to carry out the writing and research which we suspect constitutes his first and true love. He brings to that writing and research an excellent judicial mind broadened and invigorated by 23 years at the Bar and sharpened and more insightful after 12 years on the County Court Bench. His departure is the County Court's and the Bar's loss.

We wish his Honour well and we congratulate Deakin Law School.

Everything You Always Wanted to Know About the Legal Practice Bill . . .



PARLIAMENT OF VICTORIA

Initiated in Assembly 19 June 1996

A BILL

to improve the regulation of legal practice in Victoria, to repeal the **Legal Profession Practice Act 1958**, to amend the **Partnership Act 1958**, to make consequential amendments to other Acts and for other purposes.

Legal Practice Act 1996

The Parliament of Victoria enacts as follows:

PART 1—PRELIMINARY

1. ***Purposes***

The main purposes of this Act are—

(a) to improve the regulation of legal practice in Victoria;

1

BILL LA CIRCULATION 21/6/96

5210298 12/21/6/96

THE LEGAL PRACTICE BILL

1. *What does it do?*

   • Replaces the *Legal Profession Practice Act 1958.*
   • Reforms or changes the regulation of legal practice in Victoria.
   • Amends the *Partnership Act 1958.*

2. *Whom does it affect?*

   Everyone connected with the practice of law.

3. *When does it start?*

   1 January, 1997.

NEW ENTITIES CREATED BY THE BILL

1. *A legal practitioner:* that is, a lawyer who is admitted as a barrister and solicitor of the Supreme Court of Victoria.

2. *A current practitioner:* that is, a legal practitioner who has a Practising Certificate.

3. *Recognised Professional Associations.* These will work with the Legal Practice Board to regulate practitioners. The Bar will be one as will the Law Institute, for a period of two years from 1 January 1997. After that, all RPAs will have to be approved under the legislation.

4. *Legal Practice Board — what does it do?*

   • The Board will keep a register of all practitioners and firms.
   • It will allocate new practitioners to an appropriate RPA.
   • It will keep electoral rolls.
   • It will regulate practitioners who choose not to be or are not eligible to be regulated by an RPA.
   • It will administer three funds — the Public Purpose Fund, the Fidelity Fund and the Legal Practice Fund.

5. *The Legal Ombudsman — what will he or she do?*

   • The Ombudsman will have overall supervision of the handling and investigation of complaints.
   • The Ombudsman will also have an investigative and review role in relation to complaints.
   • The Ombudsman will also have responsibility for investigation of anti-competitive behaviour.

6. *The Legal Profession Tribunal*

   The Tribunal will hear charges of professional misconduct or unsatisfactory conduct arising from complaints and/or independent investigations.

7. *Other new bodies created*

   A new Board of Examiners, Legal Costs Committee, Legal Practitioners Liability Committee.

PRACTISING CERTIFICATES

1. *Who needs one?*

   Everyone who wants to practise.

2. *Where do you get them?*

   From your RPA or the Legal Practice Board.

3. *How long do they last?*

   One calendar year.

4. *How much will they cost?*

   To be determined, probably approximately $250.

5. *What do you get for your money?*

   The right to practise.

6. *How do you get one?*

   By filling out the prescribed form accompanied by a statutory declaration and proof that you are insured together with your Practising Certificate fee.

7. *What don't you get with a Practising Certificate?*

   Any membership benefits of an association over and above purely regulatory matters.

RECOGNISED PROFESSIONAL ASSOCIATIONS

1. *Where will their money come from?*

   • Practising Certificate fees — to be applied to regulatory functions.
   • Membership subscriptions — to be applied to membership services.

2. *Can you choose any RPA?*

   Yes, subject to being eligible under its rules. Only practitioners who agree to be bound by the Practice Rules of the Bar will be able to be regulated by the Bar. Therefore, the Bar will regulate those who have chosen the Bar and are eligible as well as those who are allocated to the Bar by the Legal Practice Board for regulation. The Bar will not have the right to refuse allocated practitioners.

3. *Can you be a member of more than one RPA?*

   You can only be regulated by one RPA. However, assuming that RPA's will offer membership services in return for subscriptions, practitioners are free to be or not to be *members* of any one or more RPAs or indeed any voluntary association of lawyers.

4. *What will the Bar as an RPA have to do and by when?*

- By 1 April 1997, collect Practising Certificate fees from and issue certificates to all barristers who are to be regulated by the Bar.
- By 31 January 1997, provide the Legal Practice Board with the full name, date of birth and date of admission of all practitioners regulated by the Bar.
- Send a copy of its Practice Rules to the Ombudsman by 15 January 1997.
- By 15 January 1997, forward a copy of the Practice Rules then in force to all practitioners regulated by the Bar.

INFORMATION

1. *What do you have to tell your client?*

   If you haven't been retained by another legal practitioner (e.g. briefed by a solicitor) you must give the client a written statement setting out information about costs, billing cycles, the client's right to negotiate a costs agreement, the name of the legal practitioner who will primarily perform the work, an estimate of the total legal costs if possible, the range of costs likely to be involved at any litigation, the name and address of your RPA and the client's rights in case of a dispute. If you are a practitioner retaining another retaining (e.g. counsel) you have to give the above information to your client in respect of that other practitioner.

2. *When do you have to tell your client?*

   Information about your method of costing legal services, billing arrangements and the client's right to negotiate a costs agreement must be given to a client before you are retained by them. All other information set out above must be given as soon as practicable after being retained. Progress reports must also be given to the client at agreed intervals.

3. *What happens if you don't tell your client?*

   On an assessment or on the determination of a dispute, your costs may be reduced as a penalty for the failure to give the information.

4. *What about costs?*

   They are recoverable under a costs agreement, on scale or on a quantum meruit basis.

5. *How will a practitioner recover unpaid costs from a client?*

   First by giving the client a bill of costs. Then waiting 30 days. Then suing unless the client has by then lodged a notice of dispute about the costs in which case legal proceedings are stayed.

6. *When won't a practitioner recover costs from a client?*

   If you have entered into a contingency fee arrangement, a conditional fee agreement in which the uplift is greater than 25 per cent, or a conditional costs agreement where you have entered into it without a reasonable belief that a successful outcome of the matter is reasonably likely.

7. *What happens if the client doesn't like the costs?*

   The client may lodge a written notice of dispute with your RPA or the Board. This will trigger Part 5 Division 1 which provides for conciliation, stay of proceedings and possible referral to the Tribunal for hearing.

COMPLAINTS ABOUT CONDUCT

1. *What sort of conduct may lead to disciplinary action?*

   Unsatisfactory conduct which includes negligence and misconduct which includes misconduct at common law. Breach of the Practice Rules of your RPA may constitute unsatisfactory conduct.

2. *Who can make a complaint?*

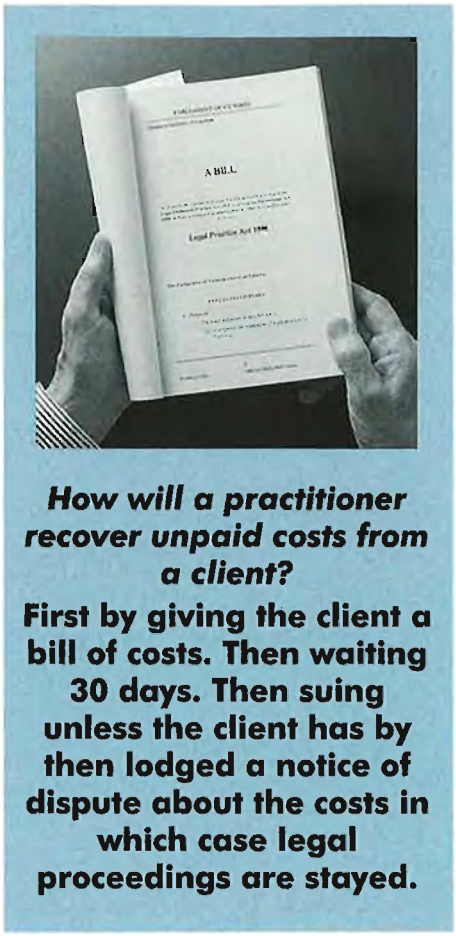
   Any person, an RPA or the Board. The Ombudsman may also investigate matters on his or her own initiative.

3. *To whom is the complaint made?*

   The practitioner's RPA, the Ombudsman or the Board.

4. *How long has one got to make a complaint?*

   Six (6) years unless there was reasonable cause for the delay or it's in the public interest to extend the limitation period.



5. *In what form is the complaint made?*

   Writing. An RPA is required to give assistance to a complainant in completing any prescribed form of complaint.

6. *What happens after one has made the complaint?*

   It may be dismissed, by the Ombudsman an RPA or the Board. Reasons must be given and notice given to the complainant. If the complaint doesn't raise matters of conduct but instead could constitute a costs dispute, it can be treated as a dispute. If thought appropriate, the Legal Ombudsman may investigate the complaint or refer it to the RPA to investigate.

7. *Who decides what?*

   An RPA can make a decision to dismiss a complaint. After investigation, the RPA is required to lay charges in certain circumstances, principally where there is a reasonable likelihood that the practitioner or firm would be found guilty of misconduct. If the reasonable likelihood is that the practitioner or firm would be found guilty of unsatisfactory conduct (which is not misconduct), laying a charge is discretionary and the RPA or the Ombudsman may instead reprimand or caution the practitioner or take no action. If satisfied that there is no reasonable likelihood the practitioner would be found guilty either of misconduct or unsatisfactory conduct, further action must not be taken.

8. *What if you don't like the decision?*

   A complainant can apply to the Ombudsman to review a decision of an RPA or the Board to dismiss a complaint or reprimand the practitioner. That must be done within three months. The Ombudsman may also review a decision of an RPA or the Board on his or her own initiative. If charges are brought they will be heard by the Tribunal which has a range of powers depending upon whether the conduct is categorised as unsatisfactory conduct or misconduct. Appeals from an order of the Tribunal constituted by the Registrar or Deputy Registrar are to the Full Tribunal. Appeals from the Full Tribunal are to the Court of Appeal on a point of law.

CLIENTS' MONEY

1. *Who can handle it?*

   Only approved clerks and practitioners authorised to handle trust monies may set up and use a trust account.

2. *Who can't handle it?*

   A practitioner with a Practising Certificate that does not authorise the handling of trust monies. Insolvent practitioners. Employees except in certain circumstances.

3. *If you are allowed to handle it, what do you have to do?*

- Maintain a trust account that complies with the requirements under the Bill.
- Keep accurate trust account records.
- Have your trust account records audited annually.
- Lodge annual reports of your trust account's audit with your RPA.

- Deposit a prescribed amount of your trust account balance with the Legal Practice Board in the first year.
- Pay a Fidelity Fund contribution.
- Pay a levy if required.

4. *What happens if you lose it?*

   If you lose a client's money without reasonable excuse you will have committed an indictable offence with a maximum penalty of ten years' imprisonment.

5. *What do you do if you think your lawyer has lost your money?*

   Make a claim against the Fidelity Fund.

PROFESSIONAL INDEMNITY INSURANCE

1. *Who has to have it?*

   Everyone other than corporate practitioners.

2. *Who can insure you?*

   Either the Legal Practitioners' Liability Committee which is a successor to the Solicitors' Liability Committee or any other insurer. There will be an open market.

3. *What will the liability committee do?*

   Issue policies, collect premiums and administer the Legal Practitioners' Liability Fund.

SPECIAL PROVISIONS WHICH AFFECT THE VICTORIAN BAR

- There will be no *compulsory* clerking, as from 1 July 1997.
- There can be no unreasonable limit on direct access by clients.
- There can be no unreasonable limit on co-advocacy.
- Members cannot be required to rent chambers from BCL.

The above is a *summary* of the principal provisions of the Bill.

Each legal practitioner must become familiar with the Bill's provisions and the Practice Rules of the Victorian Bar. Do not rely upon the above summary other than as a guide.

Excerpt from pages i–xv

LEGAL PRACTICE ACT 1996
ACT NO.

TABLE OF PROVISIONS

Excerpt from pages 55–59

PART 3 — THE MANNER OF LEGAL PRACTICE

Division 1 — Principles of legal practice

64. *General principles of professional conduct*

The general principles of professional conduct, to be reflected in the practice rules, are that a legal practitioner or firm, in the course of engaging in legal practice, should —

(a) in the service of a client, act —
  (i) honestly and fairly in the client's best interests; and
  (iii) so as not to engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law; and
  (iv) with all due skill and diligence; and
  (iv) with reasonable promptness; and
(b) report regularly to a client on the progress of the matter for which the practitioner or firm has been retained to provide legal services; and
(c) maintain a client's confidences; and
(d) avoid conflicts of interest —
  (i) between the practitioner or firm and a client; and
  (ii) between 2 or more clients; and
(e) refrain from charging excessive legal costs; and
(f) act with honesty and candour in all dealings with courts and tribunals and otherwise discharge all duties owed to courts and tribunals; and
(g) observe any undertaking given to a court or tribunal, the Legal Ombudsman, the Board, an RPA or another practitioner or firm; and
(h) act with honesty, fairness and courtesy in all dealings with other practitioners and firms in a manner conducive to advancing the public interest; and
(i) conduct all dealings with other members of the community and the affairs of clients that affect the interests of others with honesty, fairness and courtesy and in a manner conducive to advancing the public interest.

65. *Co-advocacy*

(1) In any proceeding, 2 or more current practitioners may appear together as co-advocates.
(2) The practice rules of an RPA or the Board may reasonably limit the application of sub-section (1).

66. *Client access*

(1) A legal practitioner or firm may accept instructions in a matter from a client whether or not the client has retained any other legal practitioner or firm in that matter.
(2) The practice rules of an RPA or the Board may reasonably limit the application of sub-section (1).

67. *Compulsory clerking prohibited*

(1) An RPA must not require, as a condition of membership or eligibility for membership, that a member of the RPA employ or engage as a clerk any person licensed or approved by the RPA or any other person or body.
(2) The practice rules of an RPA or the Board must not require a regulated practitioner to employ or engage as a clerk any person licensed or approved by the RPA, the Board or any other person or body.
(3) Nothing in this section takes away from the requirements of Parts 6 and 12 in relation to the receipt of trust money.
(4) Nothing in this section applies to the employment or engagement of articled clerks or managing clerks.

68. *Compulsory chambers prohibited*

(1) An RPA must not require, as a condition of membership or eligibility for membership, that a member of the RPA engage in legal practice in premises —
  (a) obtained from a specified person or body or a person or body approved by the RPA or by any other person or body; or
  (b) situated in a specified location.
(2) The practice rules of an RPA or the Board must not require a regulated practitioner to engage in legal practice in premises —
  (a) obtained from a specified person or body or a person or body approved by the RPA, the Board or by any other person or body; or
  (b) situated in a specified location.
(3) Nothing in this section allows a legal

practitioner or firm to avoid the obligations of any lease or contract of sale.

69. *Sole practice by barristers*

The practice rules of an RPA may require that a regulated practitioner —

(a) must practise as a barrister only;

(b) must not carry on, engage in or practise any business, profession or occupation that is inconsistent with practice as a barrister;

(c) must not practise as a barrister in partnership with any person or as an employee of any person;

(d) must not share the income from practice as a barrister with any person —

except to the extent, if any, permitted by the rules.

70. *Compulsory robing abolished*

(1) Despite any rule of practice or custom to the contrary, it is not necessary for a legal practitioner to robe to appear before any court or tribunal in any civil proceeding not involving a jury or in any summary criminal proceeding.

(2) An RPA must not require, as a condition of membership or eligibility for membership, that a member of the RPA appear robed before a court or tribunal in any civil proceeding not involving a jury or in any summary criminal proceeding.

(3) The practice rules of an RPA or the Board must not require a regulated practitioner to appear robed before a court or tribunal in any civil proceeding not involving a jury or in any summary criminal proceeding.

(4) Nothing in this section prevents a legal practitioner from robing voluntarily in any proceeding in which robes were customarily worn immediately before the commencement of this section.

71. *Regulation of other businesses carried on by current practitioners*

The Governor in Council, on the recommendation of the Board, may make regulations for or with respect to —

(a) prohibiting current practitioners from carrying on, engaging in or practising any business, profession or occupation; or

(b) regulating the manner in which a current practitioner carries on, engages in or practises any business, profession or occupation —

that is inconsistent with legal practice or that may cause a conflict of interest between the practitioner and a client.

South Africa in Transition: Some Issues of Land, Law and Politics

B.A. Keon-Cohen

DURING September 1995, I visited South Africa as a consultant to World Vision. My objective was to inquire into, and report to World Vision about land reform (especially the recognition of indigenous land rights) and related constitutional reforms, in order to assist World Vision in its activities. I here present some impressions gathered a year ago, taking into account recent developments.

CAVEATS, PERSPECTIVES AND CONSTITUTIONAL REFORM

First, some caveats are in order. In South Africa today, two overriding constraints must be constantly remembered: the devastating legacy of apartheid which, I was repeatedly informed, will take two generations to overcome; and limited national resources to deliver improved living standards to millions of citizens. That said, today's Republic of South Africa, being a free society which has overthrown apartheid through peaceful and constitutional processes, remains a clear improvement on the old; and its 45 million people represent a vast resource of vitality and creativity. The ambitious reform programs introduced, and the significant achievements already of the (now abandoned) Government of National Unity across a wide spectrum are recognised and applauded. In the private sector, I met a rich abundance of people and non-government organisations of great ability and good will working towards a better South Africa. However, many problems of good governance obviously remain.

As an Australian middle-class white lawyer, it is necessary to establish from what values such judgments are made. In broad the choice is between Western values and African values. One system is not necessarily better than the other: they are simply different. The tension concerning "values" arises particularly because South Africa has now adopted Western values in the shape of its new Constitution[1] and the principles driving the national Government.

The new Constitution, following an exhaustive public consultation process, was

King Goodwill Zwelithini, King of the Zulus, and the author at his palace, Northern Kwa Zulu Natal Province.

1. See *Constitution of the Republic of South Africa* 1996; B. De Villiers (ed.) *Birth of a Constitution* (Juta, 1994).

Tourist beach resort on the "Garden Valley Route", S. Eastern coastline.

finally adopted by the Constitutional Assembly of the National African Parliament on 8 May 1996. It is an impressive document, including parliamentary representative government, separation of powers, federal structures, and an elaborate Bill of Rights.[2] These institutions incorporate all the democratic values which an Australian lawyer readily recognises and accepts. However, it seems to me that governments both national and provincial, bureaucracies both black and white, and private sectors including the legal profession of South Africa, have not yet appreciated the full impact of such constitutional structures, and do not fully appreciate, or choose not to understand, what is required in daily practice to follow through on those principles. This extends to many examples of manifest waste and

corruption amongst governments at local, provincial and national levels. If half of the allegations about government corruption and unlawful conduct I read and heard of are true, the good governance of South Africa is in serious decline. Such allegations have now reached President Mandela himself, through testimony given by one of his own ministers — Mr. Holomisa — to the Truth Commission[3] — i.e. that Mr. Mandela accepted R2m ($A571,428) from a casino magnate, which Mr. Mandela secreted in a private bank account. The evident difficulties of maintaining honesty, efficiency and accountability in public life is the most obvious example of South Africa's slippage into third-world conditions, but also raises questions concerning the leadership's priorities in this difficult transition phase. Even the Australian financial press have now expressed concern that the Government lacks "a clear sense of priorities; there seems little effective co-ordination of its ambitious policies to rebuild the nation".[4]

Parliamentary Problems: As to the national legislature, it is clear to me that its proper functioning is facing severe transition problems. Parliamentarians lack the basic resources to do their job. Secretarial, research, and electorate assistance

If half of the allegations about government corruption and unlawful conduct I read and heard of are true, the good governance of South Africa is in serious decline.

for back-benchers with heavy committee responsibilities (let alone normal backbenchers) are pitifully inadequate. Sharing one secretary amongst dozens of politicians appears to be the norm in Parliament House, Capetown. This merely frustrates the democratic process. Without wishing to be "ethno-or-euro-centric", my further hunch is that many able and committed candidates, elected to Parliament for the first time in 1994, after three generations of disenfranchisement, require considerable assistance if they are to perform their parliamentary tasks adequately. Equally, politicians I met in Capetown heavily engaged in processing 1.9 million written public submissions[5] as part of an extensive consultative constitutional reform process struck me as admirable in every way, and very hard-working. But they too needed a major injection of resources to read all this material and deliver sensible proposals.[6]

Such difficulties — and others — also face provincial parliaments and their members. Some such parliaments appear to be in crisis. For example, it was reported that the Kwa Zulu Natal Parliament is broke; that "it has spent all of its R26M ($A742,857) budget in four months and now faces a debt of R47m ($A1,342,857)"; and that government monies have been mis-appropriated to

2. See *Constitution*, 1996, Ch. 2, ss. 7–39. These deal substantially with "Equality; human dignity; life; freedom and security of the person; slavery servitude and forced labour; privacy; freedom of religion, belief, opinion, expression, assembly, demonstration, picket petition and association; political rights; citizenship; freedom of movement, residence, trade, occupation and profession; labour relations; environment; property; housing; health care; food water and social security; children; education; language and culture; cultural religious and linguistic communities; access to administration; just administrative action; access to courts; arrested detained and accused persons". Rights may be derogated from in a declared state of emergency; or otherwise "may be limited only in terms of law of general application to the extent . . . reasonable and justifiable in an open and democratic society . . ." (s. 36(1)).

3. "Mandela Caught up in Minister's Corruption Claims", *Age* 19/7/1996, p. A9; "Pressure Mounts on Mandela to Go", *Weekend Australian* 24–25/8/96, p. 14.

4. *Financial Review*, 21/11/1995, Special Report, p. 45.

5. Capetown Week End *Argus*, 23/9/1995, p. 11.

6. *Ibid.*

Meeting of Land Committee and author at squatting township near East London. The Committee was seeking to access the government's land reform and land restitution programs.

pay Inkatha Freedom Party (IFP) "self-protection unit members", i.e. bodyguards.[7] To me, this underscores the need to enact laws to establish national police forces, and that these powers should be vested solely in the national Parliament. The Constitution does not provide for this.

One-Party Democracy and African "Chiefs": South Africa currently enjoys a vigorous and free press — one essential element in any open society. However, some ministers in the national government, being from the African National Congress (ANC), party officials, and party faithful appear to take the view that they are beyond criticism; or that criticism of the government's performance (especially its obvious failure to deliver on election promises regarding a key national program entitled Reconstruction and Development Program (RDP)) should not occur, since this disrupts "reconciliation" and "national unity".

Thus one (white) legal academic and ANC party member told me in Capetown that I should cancel all my interviews already arranged with blacks, since even seeing a lawyer empowered people, and any agitation for land rights in the courts would cause division, bloodshed, and undermine national reconciliation and unity. I ignored his advice.

These attitudes, reminiscent of African respect for "the Chief", are now applied to individuals, newspapers, courts and travelling foreigners. Respect for and the authority of chiefs is still strong amongst black communities, and many chiefs perform important traditional leadership and administrative roles. I learnt this during a luncheon provided for my benefit by His Majesty King Goodwill Zwelithini, King of the Zulus.[8] This occurred at one of the King's six palaces. The King stated, at length, that all strikes attacking government policies should be banned;[9] that he disapproved of federalism since this caused tension and conflict (kings do not share power); and that he much preferred negotiation of indigenous land claims to use of the courts.[10] One does not argue

Cape Town waterfront tourist development with Tabletop Mountain in background.

7. See Durban *Mercury* 27/9/95, p.2.

8. A direct descendent of King Shaka (1816–1828) the Napoleonic figure who created a "nation", conquered vast areas of South Africa, and conducted the first Zulu wars (1820s–1879). He has six kraals or palaces, five wives, at least three children he spoke of, and a recently imposed royal budget of R17m pa i.e. $A4.85m approx.

9. cf. *Constitution* 1996 s. 17: "Everyone has the right . . . to picket . . ."; s. 23(2)(a) "Every worker has the right . . . to strike."

10. Meanwhile, the King has had all traditional lands in Kwa Zulu Natal vested in him as trustee by the provincial government shortly

with a Zulu king — especially a direct descendent of King Shaka. One hesitantly suggests possible alternatives. I was reminded of royal status and power when His Majesty asked "would I like wine with lunch?" "Yes sir, thank you." A snap of the royal fingers and into the room came the wine, on a tray, carried by a black waiter — on his knees! Having achieved the remarkable feat of successfully filling my glass from this position the waiter retired — backwards, still on his knees! His Majesty gaily proposed a royal toast to my trip and of course, I joined him. That single glass created more than the usual confusion to my personal principles. But then, I had sought the audience.

Meanwhile informal censorship of public debate, especially criticism of government, continues and a "one party democracy", seen elsewhere in Africa, is now emerging in South Africa. When ANC Deputy Environment Minister Mr. Bantu Holomisa[11] testified about past ANC corruption to the Truth Commission last August, he reportedly "infuriated the party big-wigs", was accused of "indiscipline and bringing the party into disrepute" and when he refused to backdown, was fired.[12] This fracas is seen as "the final signpost on the ANC's journey from the old 'broad church' incarnation to an autocracy with no room for debate".[13]

prior to the April 1994 elections; and has obtained court orders to evict squatters from his land.

11. The military ruler of the Transkei homeland before it was incorporated into the new province of Kwa Zulu Natal in 1994.
12. *Age*, 19/8/1996, p. A9.
13. *Ibid.*

The sheer arithmetic of the South African electorate (in round figures, 40 million blacks and coloureds, five million whites) suggests that South Africa is likely to follow many other African states, and level out as a one-party "democracy". Whilst such a trend may be of great concern to the five million minority, provided (1) such a result is reached by the free will of the people; and (2) it is accompanied by appropriate amendments to the Constitution and political rhetoric, so be it. In other words, that future "undemocratic" South Africa, through its written Constitution, and political debate, should not pretend to its citizens or the world to be something other than what it truly is.

It is perhaps worth adding that I spoke with numerous people who may be described as falling within the white/business/professional sector. Unhappily, almost all of them asked about life in Australia, and prospects of immigration for themselves or their children. Many of these were concerned for themselves and their families in the new South Africa; and some had already located their children abroad. The maintenance of a vigorous opposition to the Mandela-led ANC (being the political position which, I assume, most of these "whites" would support) may assist to arrest this damaging loss of expertise.

The Rule of Law: South Africa is now journalistically described as "the most violent country in the world, outside a war-zone".[14] During 1995 "about 2,700 vehicles went missing every month".[15] About 20,000 people have died in Kwa Zulu Natal since 1985 "in a bloody power struggle between Zulu ANC supporters and those aligned to Chief Buthelezi's Zulu Nationalist IFP".[16] Clearly, the country faces a severe breakdown in the rule of law. Murders, car hi-jackings, property thefts and the like are widespread and police are apparently unable to prevent, or investigate and prosecute most of these offences. In the province of Kwa Zulu Natal, an undeclared civil war is underway. The South African Human Rights Commission has described Kwa Zulu Natal as facing "a situation of near anarchy".[17] When my wife and I hired a

14. J. Margo "Carnage", *Weekend Australian Review* 15–16 June 1996, p. 1.
15. *Ibid.*, p. 2.
16. *Australian* 24/6/1996, p. 16; see also "Pretoria Fiddles while Kwa Zulu Natal Burns" *Mail and Guardian* (Capetown) 22–28/9/1995, p. 10.
17. see *Mail and Guardian* 22–28/9/95, p. 10.

One of the King's six palaces, where the author had lunch.

car in Capetown, I asked a charming Avis lady some questions and got the reply: "When you go for a drive, you do three things: wind up the windows; lock the doors from the inside; and if you approach red traffic lights where blacks are hanging about, do a U-turn or run the lights, but for Christ's sake, don't stop! We want our car back." Stupid me! We hired the car, followed the first two rules, and fortunately never needed the third. Other tourists during September 1995 were not so fortunate. Four English girls were hijacked by black men in a kombi-van at a remote rural location; were repeatedly raped over several hours; and left naked in the bush. After a massive press outcry in South Africa and in the London tabloids, and following the "biggest" police operation in years, several alleged perpetrators (black) were quickly arrested, conveyed to a rural jail — and promptly escaped. Apparently someone left the door open. Some were re-captured, some remained at large, when I left. A year later, in September 1996, President Mandela admitted that "crime was out of control", and the ANC announced it was considering re-introducing the death penalty.[18]

On the other side of the law-and-order ethnic and economic divide, in many government departments, quality staff cannot be retained, such that important laws are simply not administered. The Attorney-General of the Transvaal has spoken of "unremitting stress, an extraordinary workload, non-commensurate remuneration, and career uncertainty" afflicting his staff, such that, without urgent action, "President Mandela's policy concerning crime and law enforcement would come to naught".[19] Further, the federal Attorney-General's and Taxation Departments are unable to collect a large proportion of personal income tax revenues. It seems that significant tax evasion is proceeding unchecked amongst the business community in South Africa. These departments appear incapable of attracting sufficient human or financial resources to properly prosecute these offenders. A senior private Johannesburg solicitor servicing the top-end of town told me that in one tax prosecution, 35 files suddenly disappeared from the relevant departmental section, an event which must (he thought) involve corruption. The prosecution collapsed, much to his client's dismay.

President Mandela admitted that "crime was out of control", and the ANC announced it was considering re-introducing the death penalty.

These difficulties are deeply entrenched. Forty million blacks, now enjoying "freedom at last" after the overthrow of apartheid, appear to me to know "the rule of law" solely as an instrument of brutal oppression wielded by their former white masters. This coupled with often extreme poverty and the sight of current government ministers, senior officers of the former army and security police, and others granted amnesties from past alleged crimes, or simply not prosecuted, suggests to me that many of these 40 million citizens have, understandably, absolutely no interest in or respect for the rule of law. No doubt some see no reason why they should not pursue criminal activities unrestrained by any concept of social responsibility. For example, when I arrived, Steve Biko's widow and children were complaining in the press[20] that after twenty years,[21] his tormentors have not only never been prosecuted: they remain employed and promoted in the police force. There are thousands of "Steve Biko's" (still alive) in South Africa. Some of them are now appearing before the Truth Commission. Doubtless they are wondering what the new South Africa, with its laudable Bill of Rights, offers them.

In this general area of the rule of law, another unexpected deficiency was revealed to me, i.e., the inability of a citizen

18. "Mandela Admits to Crime Crises", *Age* 3/9/1996 p. A8. *The Constitution* 1996, s.11 states, however: "Everyone has the right to life", and in 1995, the new Constitutional Court, in its first case, struck down laws imposing the death penalty. See, for the work of this Court, Deputy President Ismail Mahomed, "Constitutional Court of South Africa" in C. Saunders (ed.) *Courts of Final Jurisdiction* (Federation Press, 1996) 167–73.

19. see "Crisis in SA Judicial System", Durban *Mercury*, 27/9/95, p. 9.

20. Capetown *Star*, 12/9/1995, p. 12.

21. In August 1977, Steve Biko, a medical student, was arrested by the security police near Port Elizabeth. "For 19 days he was left naked and manacled to iron grilles at the security headquarters in Port Elizabeth, and subjected to lengthy interrogation. In a 'scuffle' he suffered brain damage . . . A false medical certificate was issued and later Biko, still naked, was driven in the back of a Landrover to a prison hospital in Pretoria, 1,000 km, away. [There] he died in a cold cell, unattended." *Star*, 12/9/95, p. 12.

to purchase statutory laws passed by national or provincial governments, especially provincial laws dealing with blacks and their former homelands. Despite visiting major legal publishers and government offices, I could not purchase such laws. The *Kwazulu-Natal Act on the Code of Zulu Law*[22] is one example — I finally

Family accommodation of an established type, rural Kwa Zulu Natal Province.

xeroxed it at a private legal aid office funded by European and North American foundations. This is simply not good enough. And having sighted (again)[23] the statute I now say : this Code is a disaster on any test. It is complex in its language; out of date; undesirable in that it artificially freezes customary law, and removes control of that law from the traditional people; in clear conflict with the Bill of Rights; unavailable; and in any due process sense, unworkable. It should be repealed.

Truth and Reconciliation Commission: These problems take us directly to the "Truth Commission". Under the relevant legislation[24] the Mandela/de Klerk Cabinet has appointed 17 senior persons, chaired by Archbishop Desmond Tutu, to the Truth and Reconciliation Commission (TRC). Its task is to investigate and report upon "the nature causes and extent of gross violations of human rights" committed under Apartheid between 1 March 1960 and a "cut-off date", set at 5/12/93; to recommend "the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed . . . during the said period; recommend compensation and reparation to victims; and other functions.[25] The crucial phrase "acts associated with a political objective" is elaborately defined.[26] The Commission has coercive powers, sits in public, and "shall function without political or other bias . . . and shall . . . be independent" (s. 36(1)). Essentially, the TRC is to unearth "the truth", achieve national reconciliation, and allow South Africa to come to terms with its past. This is a very large task.

The Commission's statutory regime, coupled with scarce resources, however, severely restrict its ability to achieve these objectives. The Commission must complete its work within 18 months (though this may be extended to two years by the President if deemed necessary) it has no power to recommend, let alone institute prosecutions (compared to amnesties); and its three operating committees concerned with human rights violations, amnesties, and reconciliation and reparation have a budget of R50m ($A1,428,857) for the first year. Yet:

> "Human rights monitors estimate that over 200 political assassinations took place in South Africa during the Apartheid era; while over 15,000 people died in factional violence and dozens of prisoners died in custody. More than 2,000 applications for amnesty were (Feb. 1996) awaiting consideration. In February 1996 the Human Rights Abuses Committee was expecting up to 100,000 cases to be heard."[27]

The Commission is now hearing victims' stories and is considering applications for amnesties from perpetrators of gross human rights violations. It will make recommendations on reparation to victims. Harrowing stories are emerging, publicly, of appalling atrocities committed by the Apartheid regime. Thus, last July "an anguished mother told of her student activist son being given rat poison in jail as part of a torture program in April 1982".[28] And "a man told of the terrible pain when he was given electric shock through wires inserted into his rectum".[29]

Harrowing stories are emerging, publicly, of appalling atrocities committed by the Apartheid regime.

As mentioned, no prosecution arm is involved with the TRC, although significant criminal trials have commenced. For example on 28 August, after a 26-month trial a high-ranking police officer Colonel Eugene De Kock, who led a counter-insurgency unit within the force, was convicted of 89 charges, including six of murder, plus fraud, abduction and illegal possession of explosives.[30]

Great controversy surrounds the TRC, as might be expected. Given the country's serious lack of resources, the TRC might be seen by many blacks who lack the most basic living standards as an expensive, backward-looking luxury. Chief Buthelezi's IEP sees it as a "witch-hunt against IFP leaders by its political rivals".[31] He has boycotted the Commission, whilst former National Party President F.W. de Klerk, said to have been instrumental in dismantling Apartheid, has appeared. He stated that murder, assassination and torture were never ordered by himself or senior leaders.[32] Police fearful of being named see it as "a stunt for the blacks" and have taken action in the courts to protect themselves.[33]

The Truth Commission, the police, the government and the courts are now clearly locked into a titanic struggle. In my view the TRC is vitally important as an instrument to contribute to the future health of South African society, especially to those suffering the worst deprivations of Apartheid. If a well-resourced and independent TRC, backed up by an equally well-resourced and independent prosecution office, is seen to be fair and vigorous

22. Act 16 of 1985 — GN 105 of 1986.
23. I first studied it in 1978–1981 when working with the Law Reform Commission on the recognition of Aboriginal customary law. So I knew it existed.
24. Entitled *Promotion of National Unity and Reconciliation Act* No. 34 of 1995.
25. *Ibid.*, preamble, s. 3.
26. *Ibid.*, s. 20(2).(3). Criteria set out include motive, context, legal and factual nature of the act, objective, whether the act was committed in the execution of an order, and others.
27. I. Liebenberg, *The TRC in South Africa: Context Future and Some Imponderables* (Centre for Constitutional Analysis, HSRC, Pretoria, MS, March 1996) p. 31.
28. *Age*, 30/7/96, pp. 14–15, an article by John Cain, former Victorian Premier.
29. *Ibid.*
30. *Age*, 29/8/96, p. A10.
31. *Age*, 8/5/1996, p. A12.
32. *Australian*, 22/8/1996, p. 8; *The Age*, 29/8/96, p. A10.
33. *Age*, 30/7/1996, pp. 14–15.

in its activities, then a healing process may occur, and South Africans in future may be encouraged to take a more responsible attitude to their obligations in a civilised society.

One must again acknowledge the severe resource limitations applying across all government activities; that such limitations must also impact upon the TRC; and that limits must be sensibly set on the scope of its inquiries and of prosecutions for alleged past crimes. It is obviously not practical for South Africa to now inquire into all of the thousands of unsolved crimes committed during Apartheid between 1913–1994 by whites upon blacks (or whites), or by blacks or black homeland administrations upon blacks (or whites). As to "commercial" crime by former homeland administrations, for example, reports speak of "the chaotic state of the finances of the former (homelands) of Transkei and Siskei"; and the "wholesale financial looting of the former (homeland) Ka Ngmane Government" and others on the eve of their dissolution prior to the 1994 elections.[34] Above and beyond this, is the well-documented brutality of black police and vigilante squads operating in the former homelands pursuant to the policies of subservient black governments placed there under Apartheid.[35] South Africa is truly complex.

In my view a balance has not been achieved with the Truth Commission. Whilst avoiding a "witch-hunt", the most serious crimes (whether political or otherwise and irrespective of race, including crimes allegedly committed by persons currently holding Cabinet or senior bureaucratic positions in the National Government) should be investigated and if necessary, prosecuted. I would therefore upgrade, in terms of government priorities, the Truth Commission; and support it by an independent, well-resourced prosecutor's office, charged with the responsibility of, amongst other prosecutorial duties, receiving briefs from the Truth Commission and making its own independent decisions about prosecutions. I thus see the murder prosecution launched in recent months against the former Defence Minister Magnas Malan and 19 other military and intelligence officers[36] as indicative not of democracy's "darkest hour"[37], but the opposite: that democracy is alive and well in South Africa. The defendants are accused of organising black-on-black death squads to eliminate opponents of Apartheid. The allegations focus on a 1987 raid in Kwa Zulu Natal when 13 people, mostly women and children, were shot dead in the house of anti-apartheid activist Victor Ntuli. He was not at home at the time.[38]

Land Reforms: The Mandela–De Klerk GNU introduced, and the current ANC government continues to implement, significant and far reaching land

A traditional Zulu house, re-constructed in Kwa Zulu Natal Province.

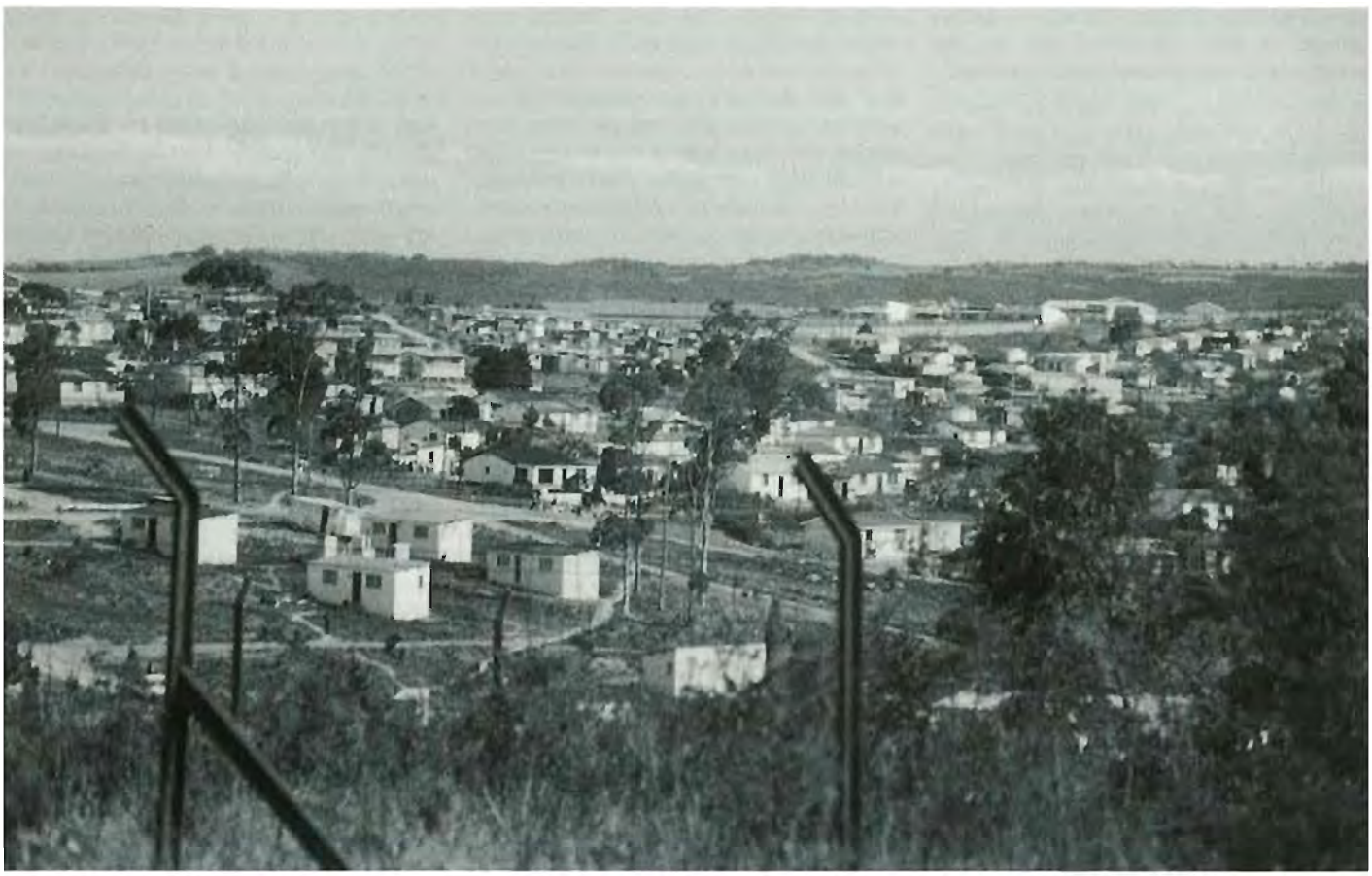
34. See K. Nyatsumba, "No Need For Selective Harassment", *Argus* (Capetown) 13/9/95, p. 22.
35. See Platzky & Walker, *The Surplus People: Forced Removals in South Africa* (Raven Press, Johannesburg, 1985) — for a substantial NGO account.
36. See *Age*, 15/3/1996, p. A10; 18/4/1996, p.A 14; *Australian* 5/3/1996, p. 10. The indictment names four ex-military generals, a vice-admiral, six senior army officers, a police colonel, and Inkatha's deputy secretary-general Zakhele "MZ" Khumalo.
37. As claimed by Afrikaan apologists.
38. *Age*, 18/4/1996, p. A14.

reforms.[39] These initiatives are intended "to redress the injustices of apartheid; to foster national reconciliation and stability; to underpin economic growth; and to improve household welfare and to alleviate poverty".[40] As to the legacies of apartheid, the government estimates that 3.5 million people were forcibly removed between 1960 and 1980 from one location to another (often more than once) to accommodate complete racial segregation[41] — the cornerstone of grande apartheid — and notes that the Constitution explicitly requires remedial action for these people. These problems must be addressed since today, landlessness and homelessness have led to land invasions and massive squatter settlements throughout the country.[42]

The national government has introduced three major land reform programs. First, Land Redistribution is "to provide the urban and rural poor, farm workers, labour tenants,[43] women[44] and entrepreneurs, with land for residential and productive purposes." The program encourages group schemes, but eligible individuals and groups may seek a settlement/land acquisition grant of R15,000 ($A4,285) per household for the purchase of land from willing settlers, including the State. Five pilot programs were commenced at the end of 1994 in various parts of the country.

Second is Land Restitution.[45] The purpose here is"to restore land and provide other remedies to people dispossessed by forced removals under racially discriminatory legislation and practice"[46] since 19/6/1913, being the date of the first discriminatory Land Act[47] following union in 1910. This program under the relevant legislation, involves the filing of a restitution claim with a statutory body, the Commission on Restitution of Land Rights. The

39. See *Our Land: Green Paper on South African Land Policy* (Dept. of Land Affairs, (1996). Eight major Acts have been passed between 1993–1996 implementing these reforms.
40. *Ibid.*, p. (i).
41. See *The Surplus People, op. cit.*
42. e.g. Soweto is a city of four million people located 30 km from Johannesburg. Some enterprising entrepreneurs bus tourists through this massive shanty-town, along carefully pre-arranged routes. I entered a similar squatting town of over two million, near East London.
43. See *Land Reform (Labour Tenants) Bill* 1995.
44. Heavily discriminated against under apartheid and customary laws. Under the Bill of Rights, such discrimination is now unlawful.
45. See *Interim Constitution* 1993 ss. 121–123; and *Restitution of Land Rights Act* (Act 22 of 1994).
46. *Our Land*, p. (iii).
47. See *Natives Land Act* 1913. Since then "rights to own, rent or even share-crop land in S.A. depended upon a person's race classification". *Our Land*, p. 9.



Squatting towns in rural South Africa.

claim is mediated there, or proceeds to a hearing before a Land Claims Court. As at February 1996 almost 5,000 claims had been lodged, and hearings have now commenced in the Court. Most complex are "urban claims", of which 2,119 had been submitted to the Commission. As at February "the restoration of land rights to twenty rural communities had been approved, and was being implemented".[48] For successful claims, restitution can take the form of "restoration of the land from which claimants were dispossessed; provision of alternative land; payment of compensation; a combination of the above; or priority access to government housing and land development programmes".[49]

The cut-off dates imposed upon the Land Restitution Commission (1913) and its sunset clause imposing a five-year life span is undesirable. On my information, large numbers of claimants will simply miss out; and the pressures upon the several Commissioners appointed under the Act to complete their tasks are already enormous. Further, under the scheme, many traditional owners are denied any process, save the regular (inaccessible) courts, to agitate loss of their rights where that loss occurred not due to racially based legislation, or prior to 1913. This is obviously unjust and may alienate millions of Africans who relate to tribal areas, being in the main, the former homelands.

Third and perhaps most complex is land tenure reform. Its purpose is "to extend security of tenure to all South Africans under diverse forms of tenure. [This] will enable citizens to hold and enjoy the benefits of their land, their homes and their property without fear of arbitrary action by the State, private individuals or institutions."[50] The GNU thus set out to re-organise and re-define a chaotic and complex situation of land tenure, registration of interests, resolution of disputes etc., being yet another legacy of apartheid. Given generations of entrenched rights, and of land administration based on race, especially since the advent of grande apartheid in 1948, this is no easy task. This applies to both urban areas, towns and rural settlements outside of the designated homelands; and land in the former homelands. As to homelands, the Government's Green paper provides a succinct summary:[51]

"Historically, land in the former homelands was held communally in terms of customary law. This land was held in trust and administered by traditional authorities on behalf of the community . . . However, past colonial and apartheid government laws and policies as well as the pressure on land availability contributed to growing disorder in communal land allocation and management systems throughout the country, and resulted in widespread tenure insecurity. The reasons for this include the forced relocation of millions of black South Africans into the former homeland areas, resulting in severe overcrowding. Existing landholders and stable communities were forced to accommodate large numbers of new residents. In many cases this created overlapping and competing tenure systems on the same land. Overcrowding also

48. *Our Land*, p. 20.
49. *Ibid.*, p. (iv).
50. *Ibid.*, p. (iv).
51. *Ibid.*, p. 21.

contributed to violence among competing groups of land claimants, and to the emergence of warlords and squatter 'patrons'.

Moreover, national and homeland governments actively intervened in community affairs to advance political agendas. Traditional leaders unwilling to implement government policy were removed from office and replaced with leaders more accountable to state agencies and distant political authorities, and less to community-level decision-making bodies. The politicisation of traditional leadership has had the effect of shifting the accountability of traditional leaders away from their own people to central government authorities. This . in turn resulted in a concentration of more powers over communal land in the hands of traditional authorities than was ever intended by traditional or pre-colonial customary law or practice. As a result, many traditional authorities have claimed personal proprietary rights over land which was historically held by them in trust on behalf of the community.

The combined effect of overcrowding and administrative disorder is that many landholders under communal tenure are vulnerable to arbitrary loss of rights, to the sale of common lands historically used for grazing, and to other practices that result from tenure insecurity. Communal tenure systems have become increasingly informal, unsystematic and localised.

Uncertainty and insecurity have been increased further by the absence of the administrative and legal support necessary for the smooth operation of any land tenure system. This has hindered service provision and infrastructural development with many agencies reluctant to finance projects where the local community does not have legally secure rights to the land on which the development would take place. Record keeping systems are poor or non-existent and site allocation for business purposes is sometimes subject to corrupt practices."[52]

Thus, in South Africa today, especially in the former homelands, considerable confusion reigns when one seeks to understand who (be it state agencies or private persons) owns, or has registered or informal interests in, what areas of lands, waters or natural resources. I was told very often, that land "deeds" were unprocurable or inaccurate. Further, the abovementioned disregard for the "rule of law" and the African preference for oral informal agreements, indicates that even where deeds or leases are entered into with binding terms and conditions, such written instruments, and operative laws, appear to be ignored with impunity and to be considered of no real consequence. Such an attitude, for example, was expressed to me by a provincial minister in Kwa Zulu Natal. As acknowledged in the above extract, the entire land administration and registration systems need urgent reform and upgrading. A culture of respect for contractual and property rights, be they rights governed by customary law, legislation or common law, should be pursued alongside the other significant land reforms now underway, i.e. land restitution, redistribution and tenure reform.

This particular apartheid legacy — the horror of the overcrowded, barren, insecure and violent Bantustans or homelands — has caused millions of blacks to vote with their feet, exercise their new-found constitutional right of freedom of movement, and leave. One result can now be seen in many massive squatting townships clustered around major cities throughout South Africa, themselves the cause of a new range of severe housing, health, employment and infrastructure problems. Further, the brutal realities of limited resources means that on any view, the promised land reform programs will simply not be achieved. The Reconstruction and Development Program promised by the ANC in the lead-up to the 1994 elections included a target of building one million homes and redistributing 13 per cent of arable land.[53] Significant additional resources are required if these goals are to be achieved, let alone if, for example, the members and staff of the Land Restitution Court are to discharge their duties properly, especially given the sunset clause of five years in the relevant legislation.

INDIGENOUS ISSUES

(a) *Tribal Chiefs:* As indicated above, an "impartiality" issue particularly arises concerning tribal Chiefs exercising powers in traditional areas over their followers pursuant to customary law, and/or pursuant to national or provincial statutes codifying customary law and conferring such powers upon them. A serious problem arises here of procedural fairness, of blatant failure to apply the law equally or at all, and of justifying a chief's decision which may accord with customary law (e.g. women may not own land) but which may contradict provisions in the Bill of Rights. The fact is that regrettably, in many instances, the institution of "Chiefs" as currently practised, and the "customary laws" which they administer are an apartheid-driven perversion of the original system. Many chiefs are not hereditary chiefs at all but partisan political appointees of the prior regime. It appears to me that such chiefs' decisions (e.g. about land) are in many instances patently unlawful, let alone unjust; that the potential for abuse of power is apparent; that such abuses occur far too often; and that serious reforms of the entire system should be introduced. Whether something approximating a modern and workable customary law system can be isolated and introduced I do not know. This problem particularly arises if the land reform process now underway results in large areas of lands being vested in tribal communities, where significant powers over the administration of those lands is wholly or partly vested, under current schemes, in the local chiefs.

(b) *Indigenous Law:* On one view the recognition of indigenous or customary law has already been enshrined in the *final* Constitution.[54] If this is correct, then traditional rights in land, being rights sourced in customary law, may now be similarly enshrined for many communities. On this understanding, millions of South Africans who were forcibly removed during apartheid but who allege that they continue to enjoy traditional rights to their ancestral lands, either as an individual or as a member of a community headed by a chief, or those who avoided forced removal and were left on their lands (e.g. the homelands) today have rights (subject to proof) in those lands which must be respected. Thus for example, if a chief (as alleged in the newspapers during September) sells off prime tribal land along the Transkei coastline for a paltry sum of "R200 ($A57) and a bottle of brandy"[55] to a white developer without the permission of his followers, such a sale would at the least appear to be in breach of the chief's trustee duties (let alone lawful obligations) to his followers. Those followers may seek legal relief, e.g. injunctive orders from an appropriate

52. Ironically the (now disbanded) GNU minister responsible for this condemnation of Apartheid policy and practice — Derek Hanekom — was from de Klerk's National Party — the same party that administered Apartheid since 1948. All NP ministers as of 30 June 1996 left the GNU, and are now in opposition. See *Australian* 5/6/1996, p. 14.

53. See *Business Day*, 12/9/95.

54. See *Interim Constitution* s. 181(1); *Schedule 4* Clauses 2, 11, 12, 13 and 34 (as amended); *Constitution 1996* ss. 211–212.

55. *Mercury* (Durban) 28/9/1995, p. 3.

state or national court; and avoidance of the transaction.

But such redress for misappropriation of traditional lands rarely occurs. There are many reasons. Based on my discussions, basically the principles of lawful conduct and adherence to trust responsibilities are not understood amongst tribal chiefs or their followers, of if they are, they are abused with impunity. Thus, for example, when I asked (through an interpreter) a tribal chief in the north of the country to show me his copy of the Code of Zulu law, he showed me a different statute altogether (written in English); and indicated firmly that he did not use, and didn't need, any legal assistance in his administration of these laws. This chief claimed 40,000 "followers" and significant power over them and the tribe's traditional lands.

However, it gets worse. In some instances, nor are these principles understood amongst provincial officials, national bureaucrats, lawyers or NGOs that I visited. The chief's difficulties are understandable; the apparent ignorance of this latter group is rather surprising. As to the bureaucracy, it was repeatedly alleged to me that the ideological baggage of Apartheid, as espoused by the Dutch Reform Church and Afrikaners (who dominated the administration and who continue to do so) remains alive and well in South Africa today, even to the point of non-implementation or active frustration of the new government's reforms. A young Afrikaaner anthropologist[56] employed in the federal Department of Constitutional Reform, and involved in delivering reforms to 40 million blacks, explained to me the Afrikaners' attitudes to blacks. These were heavily based on the Dutch Reform Church's teachings that according to the Bible, the black man was cursed.[57] Further, Afrikaners were now outnumbered; they felt seriously threatened at many levels, including security of employment due to the GNU's affirmative action programs; and unlike British South Africans, they had no other country to go to. Thus they had to fight for their rightful place in the new South Africa. This situation emphasises, inter alia, the long and rocky road ahead to overcome the unseen legacies of Apartheid; entrenched racism in powerful positions; and the need for nationwide education, legal and otherwise.

(c) *Customary or Native Title:* I encountered considerable uncertainty as to who qualified as "indigenous";[58] what precisely is meant by "indigenous" or "customary" land rights; where such rights are now being enjoyed; who enjoys them; whether currently applicable land law in South Africa (an amalgam of Roman-Dutch and British principles) recognises continuing native title for South Africa's indigenous people and if so, in what parts of the country; and the desirability of agitating such claims in the courts in the first place. I found these uncertainties very surprising — as is the further observation that few people — with one academic exception[59] — seem concerned to resolve them. Indeed, some legal informants considered a "test case" as highly undesirable, as contrary to "reconciliation", likely to cause serious tribal conflict, and as unnecessary in any event. I thought the question should be explored in South Africa, especially in the interests of those claimants excluded from the Land Restitution Commission or land redistribution programs. This issue may be seen as part of the tenure reform program. Alternatively, to avoid costly litigation, a special tribunal could be established, to process such customary claims. None of a dozen or so federal Land Department bureaucrats agreed when I raised these issues in a seminar in Pretoria.

However, South Africa has re-entered the world, and Africa itself. Some legal specialists had heard of, and read, Mabo No. 2,[60] and one community has now commenced Mabo-style court proceedings. The 250 remaining Khoisan people — the so-called "Bushmen" of the Kalahari Desert — have now claimed 4,000 square kilometres of the Kalahari Gemsbrook National Park, in the north east.[61] Right across the border in Botswana, the Khwe bushmen, whose traditional country also occupies the Kalahari Desert, have now appealed to the United Nations to prevent their eviction from their ancestral lands to make way for tourism.[62] Like the deserts of Australia, the Kalahari has for thousands of years been occupied by traditional communities still relatively untouched by the South African colonial era, which commenced merely in 1652 with the arrival of the Dutch.

CONCLUSIONS

No democracy is squeaky-clean; look at New South Wales and its police. South Africa is no different, but is now in a state of great structural and social tension. Perhaps because of the euphoria and heightened expectations surrounding the 1994 elections, and utilising my "Western" stand-point, I came away disappointed. I agree with the *Financial Review*: "little seems to be happening to change the bleak reality of daily life for most black South Africans, and the country is becoming mired in bureaucracy, corruption and violent crime".[63] Depending upon your perspective, the state of the nation may be described as a third-world one-party democracy with a stable economy, a vibrant society and constitutionally, an uncertain future; a first world parliamentary democracy in rapid decline, accompanied by a serious breakdown of the rule of law; or a mixture of both. Many (not all) of these difficulties arise from the legacy of Apartheid and will, it seems, take a long time — up to two generations — to overcome: In the interim, the question remains: at what level will the decline I see be arrested and the country achieve its new balance as an African state? My judgments may be entirely misconceived. The difficulty is however that South Africa, in its Interim and final Constitution, has pre-empted that debate: it has irretrievably locked itself into constitutionalism, into aspiring to the values and maintaining the processes of a first-world developed nation with an entrenched Bill of Rights. This gives rise to a large part of the transitional tension, and some justification for the critical comments expressed above. The question then is: given the brutal population and electoral arithmetic of South Africa (40:5), has the long-oppressed but awakening majority had imposed upon it a system of government which reflects the prior Apartheid facade, rather than the reality of South Africa today?

56. His father was a minister in the Dutch Reform Church. Given its philosophies, the inbuilt conflicts this "anthropologist" faced astounded me.
57. The Old Testament apparently contains such a passage.
58. Afrikaners have raised an argument, seriously, that they qualify because during the great trek of 1836–38, they arrived first in the Transvaal.
59. See T.W. Bennett (University of Capetown Law School) "Redistribution of Land and the Doctrine of Aboriginal Title in South Africa", (1993) 9 *South African Journal on Human Rights*, 443–476.
60. (1992) 175 CLR 1.
61. *Age*, 8/1/1996, p. 6. Their lawyer reportedly stated: "The Mabo case, adapted, would be one of our legs." *Ibid.*
62. *Weekend Australian*, 6/4/1996, p. 10.
63. *Financial Review*, 21/11/1995. Special Report, p. 45.

Medical Negligence: Crisis or Beat Up?

John T. Rush Q.C.

TRADITIONALLY the legal profession and the medical profession have enjoyed a reasonably close relationship.

However in the past 12 months one can detect a sharp change in the approach of the various groups that are the public face of the medical profession. The Australian Medical Association (AMA) and the College of Surgeons for example have taken up an obvious and concerted campaign against the legal profession and the Courts.

In the media we have read the headlines "Epidemic in Medical Litigation" — "Legal Claims Hit the Community" — "AMA Push For Expert Court Panel" "Law Suits Inflate Surgery Bill". The media has been used to create a mentality of crisis. Last week we read that Sydney was a "Cowboy Town" for medical negligence and that medical malpractice was being "manipulated by unscrupulous lawyers".

The statements these days of the so-called leaders of the medical profession are more akin to those of rogue union leaders than responsible heads of professional bodies.

Dr. David Wheedon, President of the AMA, wrote to The *Age* on 12/7/95.

He referred to medical litigation being directed by lawyers "to win the lottery for their clients". Recent judgments had extended the concept of "duty of care to ridiculous levels". Courts, i.e. judges, had even made findings that "conflict with the views of expert medical witnesses and learned colleagues". How dare the Courts take an objective view of the evidence of a medical witness!

Attack the Courts, attack the lawyers, this is the medical profession's answer to medical negligence. Those that read the newspapers might wonder if medical negligence exists at all.

The extension of the duty of care that is referred to by Dr. Wheedon is the High Court judgment of *Rogers* v. *Whittaker* (1992) 175 CLR 479. The High Court clarified the legal responsibility of a doctor to properly warn patients concerning the risks of proposed medical treatment

The context of the case was as follows.

An ophthalmic surgeon failed to warn a very concerned patient for many years almost totally blind in one eye of the small risk that surgery to that eye may lead to the loss of sight in the patient's good eye. The patient developed sympathetic ophthalmia consequent upon the surgery and as a result the patient was rendered almost totally blind. The High Court determined that, despite evidence from a body of medical practitioners that they would have acted in the same way as the surgeon involved, the surgeon was negligent for not giving the patient all the information — particularly as to the risk of blindness. The patient's evidence was to the effect that she would not have had the surgery if she had been informed of that risk.

The High Court rejected the legal approach contended for by the surgeon set out in the English decision of *Bolam* v. *Frierin Hospital Management Committee* (1957)1 WLR 582 at 584:

"A doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular act."

In other words medical defence could no longer trot out a witness or two to say the practice was acceptable and therefore no negligence.

The argument that Dr. Wheedon would contend for is that the standard of care is a matter for "expert witnesses and learned colleagues". They should set what is reasonable. In this scenario it seems the plaintiff's witnesses are mere hacks of no standing. One may well ask, what is it about a section of expert medical evidence that should give it such unquestioned authority? Should an action fail because a medical witness testifies the particular practice under question is acceptable? Why should the law sanction an outdated or inherently bad medical practice?

The High Court stated:

"Whilst the evidence of acceptable medical practice is a useful guide to the Courts, it is for the Courts to adjudicate on what is the appropriate standard of care after giving weight to the paramount consideration that a person is entitled to make his own decisions about life."

(*Rogers* v. *Whittaker* at 487)

Is this concept of duty unreasonable or unfair? Is it a statement that should cause the union leaders of the medical profession to attack the Courts so vehemently? The fact is that the High Court applied a standard to the medical profession that is the same as for any other profession. The problem is that the public face of the medical profession propounds a view that the medical profession is beyond criticism.

The medical beat up was continued later on in 1995.

Professor Fiona Stanley, Director of the Western Australian Institute for Child Health enjoyed a high media profile in the eastern States in August 1995. Her brief it seemed was to malign Courts, lawyers and the legal system.

The fact that her attack was inaccurate and unfair of course was irrelevant to those organising her media time — those responsible for creating a mentality of crisis.

In the second Eleanor Shaw lecture (Melbourne 29/8/95) she referred to "Debendox" litigation to show that "clever lawyers" are in some way or another "manipulating the system". Manipulation is a favourite word of the critics, very evocative. I understand Professor Stanley is not a professor of medicine. I understand her speciality interest is statistics and epidemiology. In this context one could expect informed comment and analysis of case statistics.

Has there been one "Debendox" trial in Australia? In stating:

"30 trials over 13 years from 1,700 suits with many being settled out of Court resulted initially in a 30% success rate for the Plaintiffs. One as recently as 1991."

Professor Stanley failed to mention that these figures had no relevance to this country at all. These were statistics apparently from the USA. They were

used (quite disgracefully) to form a plank of attack against the Australian legal system.

As hard as it is for Professor Stanley and others to understand, Australia is not the USA. Our system is different. Of course if misinformation fits in with the scare campaign — if it assists in the object of discrediting — use it.

The fact is that Dr. William McBride at the time of his "Debendox" research was a famous Australian medical researcher. He linked Debendox with birth defects. It was left to Norman Swann, doctor/journalist at the Australian Broadcasting Commission to expose McBride's fraudulent data. Perhaps it was McBride's previous work on thalidomide that blinded the Australian medical profession. So much for medical panels and peer review.

Stanley in passing referred to AIDS but of course not the Australian litigation. That perhaps would have been embarrassing. What did we as a community learn from that litigation? That a vacillating medical approach was countenanced to a serious public health issue and as a consequence innocent people died and continue to die. That was the lesson of the Australian litigation. It's not a lesson that Professor Stanley chose to refer to.

"Alarming" is a word that punctuated Stanley's address. It is also a favourite of the medical defence unions in the context of litigation. Stanley used it to describe the increasing number of cerebral palsy cases coming before the Courts due to obstetric negligence. Her statistics form the major plank in her attack on lawyers and the Courts. The facts are of 250,000 babies born in Australia each year "500 will ultimately show features of cerebral palsy that obstetric negligence will be the cause in only 15–20. About 5 of these will seek and receive compensation by way of legal action" (Dr. P. Niselle — *Age* 1995). That is the context that Professor Stanley failed to give. Of course if the facts get in the way of a good story it is sometimes better to ignore them.

Professor Stanley's attack was just wrong in some of its assertions and criticisms. It was mostly irrelevant. Yet those running the propaganda campaign put her forward, using her academic status to further the mentality of crisis.

It was Dr. Wheedon's turn again in February 1996. "AMA Chief Takes Lawyers to Task" (*Age*, 16/2/96). This time "truth" was being compromised by some lawyers who shopped for "experts".

". . . Incorrect evidence had been given in recent Court cases and had resulted in rulings that did not reflect desirable medical practice."

Just what does Dr. Wheedon mean? Perhaps he means the font of desirable medical practice lies only with those doctors that are prepared to give evidence for a defendant medical practitioner.

Of course what he does not refer to is the extreme reluctance of the medical profession to publicly recognise the patient who is the victim of medical negligence.

If anything demonstrates the change in attitude in the past 12 months it was the address by Mr. Brendan Dooley of the Royal College of Surgeons splashed over page 6 of the *Age* on 7/5/96 "Law Suits Inflate Surgery Bill".

In 1995 Professor Stanley's manipulating lawyers were "clever". In 1996 we are "unscrupulous" — the decline has been very rapid.

The inflammatory attack on the legal profession reached new heights. According to Mr. Dooley the "definition of malpractice had been manipulated by unscrupulous lawyers and extended to cases where there has been none".

In 1995 Professor Stanley's manipulating lawyers were "clever". In 1996 we are "unscrupulous" — the decline has been very rapid. Unfortunately the newspaper did not report the cases Mr. Dooley was referring to that substantiated this astounding claim.

Mr. Dooley was further reported as follows:

"Australian Courts were far too liberal — Sydney "was a cowboy town — like the wild west second only to California, I understand."

Mr. Dooley then adopted the medical trade union line — medical negligence really does not exist.

"Very few cases against doctors involve true malpractice. More often a bad result for a patient was due to the natural progress of an illness or the risk inherent in any operation."

Mr. Dooley seems to have backtracked on his position as expressed in a letter to the *Age* on 6/7/95. Then he estimated "10–15%" of adverse medical outcomes were the result of "bad medicine". The statistics seem to have dramatically changed along with the manipulating lawyers!

Mr. Dooley concluded his letter last year with the desire for the medical and legal professions to work together.

"The debate on medical negligence and medical litigation, like the doctor patient relationship can benefit from simple, honest communication."

That plea was last week cast asunder by the very person who made it with an outrageous and unsubstantiated attack which was hardly based on honest communication.

I wonder if it has occurred to Mr. Dooley that any increase in medical litigation may be due to a general deterioration of standards in the medical profession.

When I see billboards offering laser eye surgery I probably feel the same as he does on seeing "no win no fee".

When Mr. Dooley claims that medical negligence is "corrupting the very basis of medicine — the trust between doctor and patient" I realise from my professional experience as a barrister and my personal experience as a patient he is in an ivory tower — not the real world.

Does the doctor patient relationship exist in a surgery where a so-called leading surgeon sees well over 30 women for breast examinations, advice and counselling in a morning — where to achieve the ultimate in production line technique there are two examination rooms and the surgeon runs between them. Is it medicine or is it greed? Do we have an under supply of doctors?

Where is the doctor patient relationship in the radiological clinic? For the doctor certified by a specialist college admission to a partnership of one of these clinics/businesses guarantees enormous income straight out of the public purse? For some doctors it seems the bottom line in modern medicine is the dollar.

The fact of the matter is in many of the cases where there is medical negligence the patient has been treated with a flippant arrogance and disdain by his or her doctor.

Mr. Dooley was quoted as follows:

"Some cases, such as the Nadia Maffei suit against two prominent breast cancer specialists should never have been allowed in Court."

Why not? Because Nadia Maffei took a case against prominent breast surgeons? Is "prominence" to be some benchmark?

Nadia Maffei accepted the verdict of that jury with grace and composure. As her barrister I accept the verdict without hesitation.

For 12 months I have resisted the

temptation to comment publicly on this case. But how dare Mr. Dooley assert that the case should never have been allowed to go to Court. Has it come to the stage that the medical trade unions would even deny citizens access to the Courts?

Nadia Maffei was a highly intelligent and articulate woman. Nadia Maffei was referred by her surgically qualified general practitioner to a specialist because of a lump in her breast. It was her claim that the lump persisted through 1992. The surgeon who saw her in March, May and November 1992 claimed that examination in November 1992 demonstrated an area of induration in a different part of the breast to the first two presentations. He wrote to the general practitioner in the following terms that on one view were contradictory to his evidence in Court:

"It is clinically quite benign and has not changed since I first saw her in March when she was breast feeding at the time. It is of some concern but as I say it is clinically benign and I think that observation is appropriate."

The question of whether there had been a change in the lump was a highly significant one.

By letter dated 22/3/93 Nadia Maffei was referred back to this surgeon by her obstetrician and gynaecologist — she was pregnant. The obstetrician and gynaecologist in his referring letter described a 3 centimetre lesion in her left breast that required further opinion.

Aspirate was taken from the breast on 16/4/94 by the defendant surgeon. It demonstrated cancer. The surgeon stated he was surprised by the finding and it was "a matter of luck that I struck the area of in situ disease".

Nadia Maffei claimed it was the same lump throughout — so did her mother who had examined her breast. Nadia Maffei's case relied on this evidence. It was hotly in dispute. It is difficult to recount after a case the many factors that in a court are important. However, I have been a barrister long enough to know that Nadia Maffei had a case that was entitled to be heard. The prominence of the surgeons involved should not impact on that right.

The statement of Mr. Dooley that her case should not have got to Court indicates a general ignorance that tends to explain his more outlandish comments.

Lawyers belong to a conservative profession. Lawyers have been reluctant to answer the campaign of abuse and disinformation yet surely that time has come for the professions' representative bodies. It has to be appreciated with the AMA and like organisations that we are dealing with well-funded, well-staffed and highly active trade unions vociferously promoting members' welfare arguably at the expense of the rest of the community.

In this context let us reconsider the recently published Tito report studiously ignored by the medical advocates.

1. There is not a strong pattern across the various jurisdictions of a massive increase in claim numbers. The number of claims reaching Court is in fact very small. (172,000,000 medical services a year some 1,500 Court cases.)

Lawyers belong to a conservative profession. Lawyers have been reluctant to answer the campaign of abuse and disinformation yet surely that time has come for the professions' representative bodies.

2. Premiums for insurance cover have increased (but not for the reasons put forward by the AMA and others). The major factor is the crisis, due to the under funding during the 1980s which left medical defence organisations without funds to meet their liabilities.
3. Research demonstrates the positive affect of the common law. Litigation has caused doctors to inform and consult patients — doctors speak with patients more — doctors keep better notes and records, doctors seek second opinions when not sure of what they are doing, doctors are not practising outside their specialities.

These are all significant matters — conduct that leads to better patient care. Have we heard anything about this in the "medical attack"? Of course not, it's not in the doctor's interest to refer to the positive.

Unlike the medical profession the legal profession has been the subject of great scrutiny in recent years. Many changes through competition policy and trade practices have occurred. I for one do not agree with all the change. Nevertheless as the Federal Attorney General, Daryl Williams Q.C., recently pointed out the legal profession has reacted positively and co-operatively.

Our Courts have actively encouraged mediation and pretrial negotiation. Specialist Court Lists have been established in an effort to obtain speedier and less expensive justice. The Victorian Bar in its submissions to the Victorian Law Reform Commission has supported structured settlements.

Our profession must continue to self-criticise, adapt and change. While we do we will remain responsive to the needs of the community — the common law will remain the system best equipped to deliver rights, justice and compensation to persons injured and maimed through irresponsible acts of others.

Whilst the medical unions continue to trot out propagandists like Professor Stanley and the recently radicalised Brendan Dooley the medical profession will become increasingly isolated and removed from the real situation blinkered and irrelevant with little insight into the problems affecting average Australians.

For a profession funded by the taxpayer to the tune of hundreds of millions of dollars a year this is a highly unsatisfactory state of affairs.

Crisis or beat up, I rely on the facts.

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A Judge on Sabbatical

Judge Frank Walsh

In the *Macquarie Dictionary,* which is published by the Macquarie University, the word "sabbatical" is defined alternatively as "bringing a period of rest" or "pertaining to the Sabbath".

"Sabbatical Leave" is defined as "a year, term, or other period of freedom from teaching granted to a teacher, as for study or travel". Such leave is said to be available "in certain universities" etc.

IT is well established that entitlements accrue to members of the judiciary to sabbatical leave after substantial periods of service and the main thrust of this contribution will be to extol the virtues of that principle.

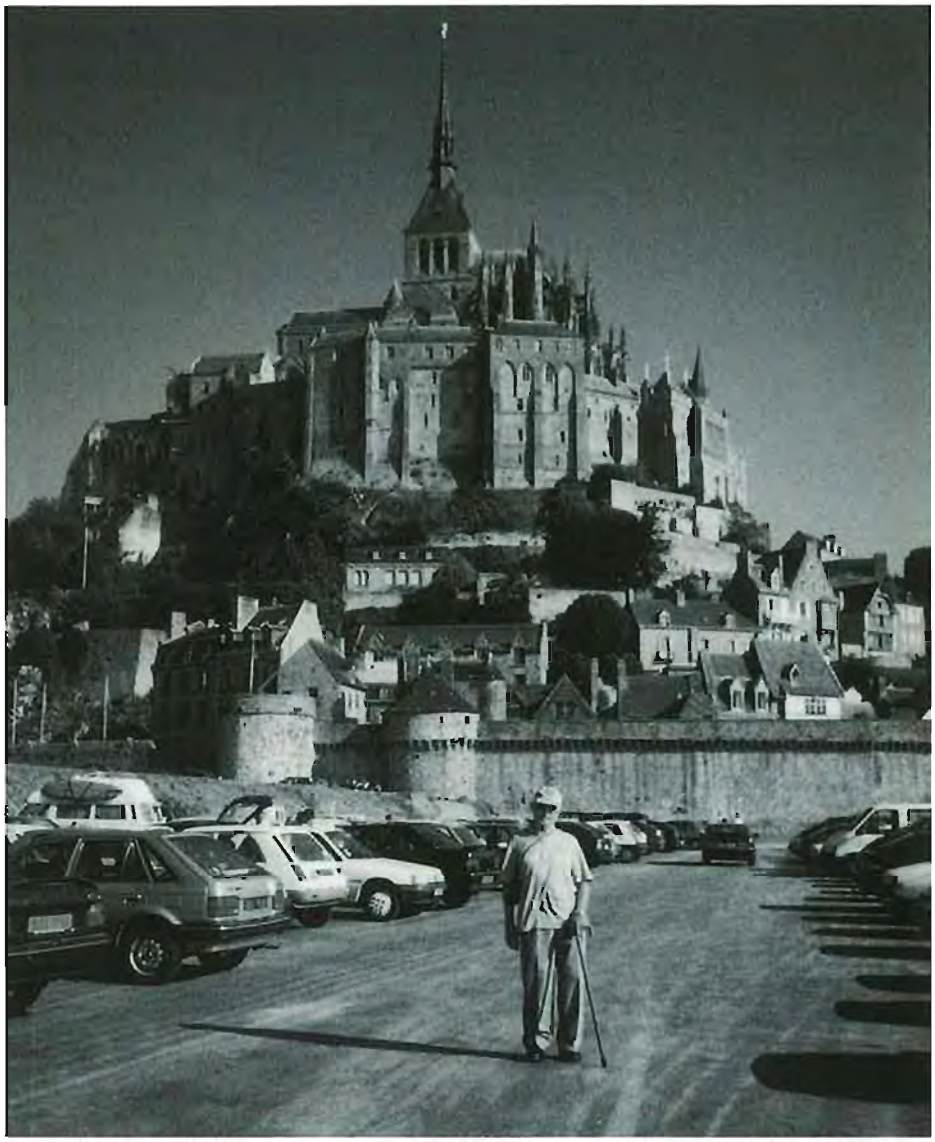
After a period in excess of 14 years continuous service as a judicial member of the County Court, I have recently taken a period of three months' sabbatical leave. The profession and the community may be assured that the benefits which have accrued therefrom to this particular member are inestimable. I devoted two of the three months to travel and was rewarded with a wealth of experience and achievement as this short contribution to the *Victorian Bar News* will demonstrate.

My wife, Mary, and myself have had the good fortune in the past to visit the United States of America (San Francisco, New York, New Orleans, Florida), Canada (the Rocky Mountains, Vancouver and Vancouver Island), Africa (Kenya, Botswana,

←*One person described this as two of the Wonders of the World, both ready to fall.*

Outside the home of Anna Frank, Amsterdam.

At Assisi, the Italian countryside.



Le Juge et le Mont St. Michel.

Nigeria and Ghana), England (London only), Ireland, Scotland and New Zealand. We had never enjoyed a visit to mainland Europe or a tour of the English countryside. Indeed it has been my ambition for many years to explore portions of Europe and to absorb the medieval and modern history of several countries and their culture as well as their religious significance. Specifically I had yearned to circumnavigate France and England at the wheel of appropriate motor vehicles and to communicate with the French people in their own language. All this was achieved during a journey of eight weeks which, when viewed in retrospect, was reasonably well planned.

We flew to London via Singapore where we stayed one night. After two days in London which included visits to Kew Gardens and Windsor Castle with friends, we participated in a tour of Europe by motor coach which occupied twenty-three days. The highlights of this tour included the following:

- Our arrival in Amsterdam during the celebrations of the birthday of Queen Beatrix. The entire population of that city appeared to be in the streets and in festive mood. It conjured for us the image of the Victory in Europe celebrations at the conclusion of the Second World War.
- A visit to the home of Anna Frank and our consequent involvement in the history of this brave young woman and her family. This home stands as a perpetual reminder to the world that inhumanity of such proportions must never again be tolerated. One of my favourite photographs is taken of Mary and myself outside this home.
- Our involvement at Salzburg in the life of Mozart and at Vienna in the eccentricities of Beethoven. Salzburg was memorable as a city of music as well as Vienna in which a musical culture abounds.
- Assisi — the home of St. Francis which is situated in a position which commands a sensational view of the northern Italian countryside.
- The once entombed city of Pompeii with the volcanic mountain Vesuvius towering ominously almost overhead.
- The eternal city of Rome with all its ancient splendour and the Vatican where

At the gate of the medieval city of Carcasonne, avec deux gendarmes.

A friend in France.

some tourists pray but all tourists communicate with the artistic wizardry of Michaelangelo and other artists.

- The wondrous tower of Pisa where I found that my particular imbalance which has accompanied me since shortly after my birth enabled me to emulate one of the Wonders of the World.
- The concourse of tunnels which facilitate movements of traffic from Italy to Monte Carlo and the Cote d'Azur of France.
- The Route Napoleon — Geneva and the mountains of Switzerland.
- The wonderland of architecture and light over which the Tour Eiffel and the Arc de Triomphe preside with glittering dignity.

However, the best was yet to come.

The second portion of our adventure involved the hire of a motor car and a tour de France by this means. We remained at Paris for five days because my courage extended only so far as to drive a motor car through the streets of Paris on a Sunday morning when traffic could be expected to be light.

During the days in Paris we visited Sacre Coeur Cathedral and Mont Martre. We walked from La Place de la Concord to the Arc de Triomphe and accordingly we walked the entire length of the Champs Elysees. This in itself was the fulfilment of a long-held ambition for the writer. We went from the sublime (the Louvre, several museums and Notre Dame) to the ridiculous (an evening at the Can Can). The small Renault Clio automatic motor car then became our conveyance for fourteen days. We emerged intact from Paris, found our way to Fontainbleu and then proceeded south ultimately to St. Tropez. During our journey to the south we met several friends. After three days at St. Tropez where the climate allowed enjoyment of the beach resort we went west through Aix en Provence, Nimes and Arles to the medieval city of Carcasonne. There two French gendarmes graciously consented to be photographed with the Judge at the gates of the city. I revealed my identity as a "Juge de la Cour de Justice" from Melbourne Australia in the process of this request. They were most obliging and I must say that the French people were courteous and helpful. We found that, if an effort was made to communicate with them in their own language, they were most co-operative and, if all else failed, the conversation would often revert to the English language. I was referred to on several occasions as "Monsieur Le Kongaroo".

We visited the pilgrim city of Lourdes at the foot of the mountains, the beautiful area of the Dordognes and we then proceeded north to St. Malo and le Mont St. Michel. Upon our arrival at Calais I breathed a sigh of relief but I emphasise that the sense of achievement was exhilarating. I sat in the lounge of the great ferry which traversed the English Channel and ordered and consumed a pint of English beer.

The final segment of the journey was a tour of England. We hired a Ford motor car at Dover. I was relieved to be back on the correct side of the road. Mary was equally delighted to be back in communication in our own language. We toured the south of England — Devon–Cornwall–Somerset — and were enthralled at the beauty of the English countryside. While we were visiting Mevagissey in Cornwall we walked out on to a pier or jetty to view the sea from the land and the land from the sea. Approximately 200 metres inshore and also on the jetty a conversation occurred between two people who were also visiting the area. The substance of the conversation was as follows:

Saccardo to Galbally Q.C.: "Peter, there is a gait out there on the pier which appears familiar."

Galbally Q.C. (after some consideration)**:** "Yes, it does appear familiar, but I did not think that they still allowed pirates in this part of the world."

It was good to see Peter and Frank by such a coincidence and readers of the *Bar News* will be able to embellish in future the story of that chance meeting.

While we were in England we visited the home of Jane Austen and the birthplace of Shakespeare. We toured both Oxford and Cambridge in an open air bus with historical commentary provided and we visited many of the institutions of learning in those cities. We journeyed to the Cotswolds in the west and the Lake District in the north. We crossed the Yorkshire Dales and visited the historic city of York. We inspected the historic courthouse and gaol at Dover, went to the door of the prison at Dartmoor (the town of granite), and inspected the court complex at York. Finally, after literally circumnavigating England we boarded another great aeroplane and returned to the greatest county on earth. An English woman whom we met at Sarlat la Caneda in central France referred to us with good humour as "privileged colonials". She did not realise how close she was to the absolute truth.

It will be well known in the profession that I am eligible to retire. However, I now join the body of judges who have enjoyed sabbatical leave for the purpose of study or travel and who extol the virtue of the concept.

Refreshed and revitalised I propose to work on, secure in the knowledge that I may yet again choose to embark upon some similar adventure in the foreseeable future and secure also in the knowledge that the achievement of a successful career of service to the profession and to the community is enhanced by "a period of freedom from judicial duties granted to a judge, as for study or travel".

New Directions from the Commonwealth AAT

THE Administrative Appeals Tribunal has revised a number of existing directions and has issued new directions with effect from 30 September 1996. The President advises that:

(i) a new section 37 practice direction replaces the practice direction which has been in operation since 26 April 1991;

(ii) a new practice general direction replaces a number of earlier directions which have been revoked as from 30 September 1996. The directions so revoked are: the general practice direction issued on 30 June 1993; the practice direction: procedures relating to medical evidence in the hearing of applications before the tribunal issued on 7 August 1992; the practice direction: Working with Interpreters issued 8 February 1993; the practice direction: Costs Ordered in Compensation Jurisdiction issued on 30 June 1993; the practice guidance note: Consent Decisions and Consent Dismissals — Use and Procedures — section 34A, 42A and 42C Administrative Appeals Tribunal Act 1975 issued on 30 June 1993; the practice guidance note: Procedures in relation to the taking of evidence by telephone or closed-circuit television issued on 2 December 1993;

(iii) the new general practice direction applies to all applications lodged throughout Australia in cases in which the applicant is represented. It does apply to unrepresented applicants. The procedures set out in the direction may be varied by specific directions of the tribunal where the case so requires.

The text of the general practice direction and the section 37 practice direction are set out below.

ADMINISTRATIVE APPEALS TRIBUNAL

General Practice Direction

This practice direction has effect from 30 September 1996.

This practice direction sets out the procedures to be adopted for applications lodged in the Tribunal throughout Australia where the applicant is represented. This procedure can be varied by specific directions of the Tribunal.

1. Section 37 Documents

Within 28 days of receipt of the section 29 notice the decision maker is required to lodge a copy of the section 37 documents with the Tribunal and to send a copy of these documents to each party. Further copies may be requested if the matter proceeds to a hearing. A full explanation as to the preparation and presentation of the section 37 documents is contained in a separate practice direction.

This time period may be shortened in appropriate cases if application is made pursuant to section 37(1A) of the *Administrative Appeals Tribunal Act 1975*. The time period may also be lengthened by the Tribunal under section 37(1).

2. Conferences

In most applications a conference will be conducted by a Tribunal member or Conference Registrar. Where it is both possible and appropriate for an application to proceed to hearing without a conference, it should be listed for hearing. This will mainly occur in applications where all evidence for the hearing is in existence and has been exchanged between the parties or can be exchanged quickly.

In many cases, however, two conferences will be necessary.

3. First Conference

3.1 *Date and mode*

Because a period of 4 weeks is allowed for the provision of section 37 documents, the first conference will usually be held within 6 to 10 weeks of the lodging of the application for review. The conference can either be in person or by telephone. Notice of the conference will be sent to the parties at their address for service following receipt of the section 37 documents. If there are any special circumstances, a party may request that a conference be held at an earlier date.

3.2 *Statement of issues*

A brief statement setting out what the applicant and the respondent consider to be the issue or issues in dispute is to be exchanged and lodged with the Tribunal at least one working day prior to the first conference.

3.3 *Medical appointments*

If medical reports are to be obtained by either party, any appointment for an examination should be made prior to the first conference and details of the appointment should be provided at that conference.

3.4 *At the conference*

The issues in dispute and the need for any further evidence may be discussed and the prospect of settlement explored. The future conduct of the application will be discussed. Directions may be given if a member presides at the conference or directions may be sought from a member by the Conference Registrar where necessary.

Matters discussed at a conference cannot be relied upon as evidence by any party. If a member presides at a conference a party may object to that member participating in any subsequent hearing of the matter (section 34(4)).

4. Statements of Facts and Contentions and Witness Statements

Subject to any relevant legislative provision, parties must exchange and lodge copies of all relevant material and documents they intend to rely on at any future hearing as early as possible in the proceedings.

At least 14 days before the second conference the applicant is to lodge and serve a statement of facts and contentions. This statement must clearly and concisely set out the facts upon which the party relies and any contentions to be drawn from those facts, and should include references to relevant legislation and case law. All ex-

pert reports and the statements of all witnesses must also be exchanged and lodged at this time.

At least 7 days before the second conference the respondent is to lodge and serve a statement in reply, together with all expert reports and witness statements.

If the facts are not in dispute, an agreed statement of facts should be lodged 14 days before the second conference. The applicant and respondent will then have 7 days to lodge a statement of the contentions which they say should be drawn from those facts.

5. Second Conference

The second, and in most circumstances final, conference is held as soon as practicable after the first conference, taking into account the nature of the case and the matters arising out of the first conference. The second conference can be either in person or by telephone. The evidence and the merits of the respective cases are discussed with a view to settlement. If settlement is not reached then the future conduct of the matter, including the possibility of mediation and the requirements for a hearing, will be discussed. If the matter is to be listed for hearing then both parties will give details of the witnesses they will call, state whether the evidence of particular witnesses can be tendered by consent with no cross examination, and give an estimate of the hearing time. The parties should also be prepared to discuss venue and other matters relating to the listing of the hearing.

6. Hearing Certificate

Within 7 days after the second conference, if a matter has been unable to settle, both parties are to lodge and serve a completed hearing certificate. Hearing certificates can be obtained from the appropriate registry.

7. Adjournments

Once a matter has been listed for hearing before the Tribunal, an adjournment will not be granted unless good reasons are demonstrated by the party requesting the adjournment.

8. Directions Hearings

A directions hearing may be listed at any time if the matter requires it or if the parties have not complied either with this General Practice Direction or with specific directions made in the matter. Either party can make a request for a directions hearing in any matter if the need arises. The request should be in writing and set out the reasons for which the directions hearing is sought.

9. Medical Witnesses

Subject to compliance with any statutory time limits, the lodging and serving of a medical report will make it material to be taken into account at the hearing, whether or not the author of the report gives oral evidence.

A party may require the attendance for cross-examination of a medical practitioner making such a report. Whether that party procures that attendance by the issue and service of a summons or otherwise, the medical practitioner will not thereby become the party's witness, but that party could be liable to pay conduct money or witnesses' expenses.

A directions hearing may be listed at any time if the matter requires it.

A party who procures the attendance of a medical practitioner as mentioned above must, as soon as practicable, inform all other parties to the proceedings that he or she has done so.

Failure of the medical practitioner to attend in these circumstances will not, in itself, render the report incapable of being taken into account. Such failure, however, may be relevant in assessing the weight to be given to such a report.

Where a medical practitioner making a report is cross-examined, the party tendering the report may re-examine the witness.

10. Summons to Produce

Under section 40 a summons to produce documents or things must be returnable at either a directions hearing or a hearing.

The person summonsed to produce may deliver the required documents or things to the appropriate Registry at any time before the return date of the summons. If the items are so produced, access will not be available to any party before the return date when directions will be made by a member.

11. List of Cases

Both parties are to lodge and exchange a list of cases on which they intend to rely at the hearing at least two working days before the hearing date.

12. Interpreters

Interpreters will be provided by the Tribunal to unrepresented applicants only. Represented parties must make their own arrangements if an interpreter is required. Interpreters should be accredited at the first professional level ("Interpreter" — formerly Level 3) with the National Authority for the Accreditation of Translators and Interpreters (NAATI). Only in languages where no professional level interpreter is accredited may a "Paraprofessional Interpreter" (formerly Level 2) be utilised. In languages where there is no NAATI accreditation, a NAATI certificate of recognition should be provided.

13. Telephone or Video Proceedings

At the discretion of the presiding member, part of any hearing may be conducted either by telephone or video link. A party seeking to have evidence taken in this manner should seek the other party's written consent before applying to the presiding member for an appropriate direction. The presiding member may wish to conduct a directions hearing before exercising this discretion.

Where evidence is to be given either by telephone or video link, the party whose witness it is will make all necessary arrangements and provide the relevant registry with details of the proceedings, the witness, location, telephone numbers and the date, time and estimated duration.

The costs shall be borne by the party who calls the witness subject to the discretion of the presiding member to waive charges. If no specific direction as to waiver is obtained, application can be made to the Registrar or District Registrar to waive the charges where the party concerned meets the criteria set out in regulation 19(6) of the *Administrative Appeals Tribunal Regulations*.

Details of costs can be obtained from the appropriate registry.

14. Consent Decisions and Dismissals and Withdrawals

As long as the decision is within the powers of the Tribunal, at any stage in the proceedings the Tribunal may make a consent decision in accordance with written terms on which the parties have agreed (section 42C). If such an agreement is arrived at in the course of a mediation, the Tribunal may make a consent decision under section 34A.

If the consent decision is favourable to

the applicant, then any application fee paid by the applicant will be refunded if the Tribunal certifies that the application has ended in a manner favourable to the applicant. The parties should include a notation to the effect that the matter has concluded in a manner favourable to the applicant in the terms of the consent agreement.

Consent dismissals should only be used where the terms of settlement agreed by the parties are outside the powers of the Tribunal. An applicant may at any time notify the Tribunal in writing to the effect that the application is discontinued or withdrawn. If such notification is given, the Tribunal is taken to have dismissed the application.

If a matter is concluded by a consent dismissal or withdrawn, the application fee cannot be refunded.

15. Refund of Application Fees

Application fees can only be refunded if the Tribunal has certified that the application has been determined in a way that is favourable to the applicant. The member signing a decision will determine whether the decision is favourable to the applicant.

16. Costs

The Tribunal has the power under the *Safety, Rehabilitation and Compensation Act 1988*, the *Seafarers Rehabilitation and Compensation Act 1992*, the *Freedom of Information Act 1982*, the *Mutual Recognition Act 1992* and the *Lands Acquisition Act 1989* to order or recommend that the respondent pay the costs, or part of the costs, of a successful applicant. Under the Safety, Rehabilitation and Compensation Act the Tribunal may also award costs to a person where the application has been instituted by the Commonwealth.

Unless the order determines otherwise, the costs payable may include:

- witness expenses at the prescribed rate;
- all reasonable and proper disbursements; and
- 75 percent of all professional costs, including counsel's fees, which would be allowable under the Federal Court Rules.

Costs will be assessed on a party and party basis.

Costs may be agreed between the parties. Where there is no agreement, the Registrar or a Deputy Registrar will tax the bill and on the taxation will have the powers of a taxing officer under the Federal Court Rules, but may refer any question for the direction of the Tribunal. Either party may apply to the Tribunal for a direction on any question related to costs.

Justice Jane Mathews
President
21 August 1996

Practice Direction

Procedures Relating to Section 37 of the Administrative Appeals Tribunal Act

The following practice shall apply from 30 September 1996 with respect to statements and documents lodged with the Administrative Appeals Tribunal under section 37 of the *Administrative Appeals Tribunal Act 1975*. It replaces the practice direction issued on 26 April 1991.

The 28 day time period may be shortened in appropriate cases if application is made to the Tribunal pursuant to section 37(1A).

Within 28 days of receipt of the section 29 notice the decision maker is required to lodge one copy of the section 37 documents for the use of the Tribunal. The decision maker is also required to send a copy of these documents to each other party within that period (section 37(1AE)). The Tribunal may direct that additional copies be lodged at a later date (section 37(1AA)).

The 28 day time period may be shortened in appropriate cases if application is made to the Tribunal pursuant to section 37(1A). The time period may also be lengthened by the Tribunal under section 37(1).

A statement lodged with the Tribunal pursuant to section 37 of the *Administrative Appeals Tribunal Act 1975* must:

- identify the decision and the person supplying the reasons if that person is not the decision maker;
- set out the findings on material questions of fact;
- refer to the evidence or other material on which those findings were based;
- give reasons for the decision; and
- be accompanied by a legible copy of every other document that is in the decision maker's possession or under their control and considered to be relevant to the review of the decision.

The section 37 documents shall be arranged and fastened as follows:

(1) the first document will be the application for review;
(2) the second document will be the section 37 statement and reasons for decision;
(3) thereafter will follow all other documents, including documents referred to in the section 37 statement and reasons, in chronological order from the earliest to the latest date. These must include a copy of the decision under review if made in writing (if not made in writing, a copy of a document which recorded the decision) and a copy of any document notifying the decision and a copy of any reconsideration.

The statement and documents must be accompanied by an index in which a brief description of each document and the date of each document in its sequence is recorded. Each document should be identified with an exhibit number commencing with the application for review as "T1", succeeding documents bearing "T" numbers in sequence. Each page will be numbered and the pagination will be set out in the index.

Justice Jane Mathews
President
21 August 1996

As Others (Wisely) See Us (or the Excellence of the Victorian Bar)

At the 1996 NSW Bench and Bar Dinner, Justice Gummow spoke of his dealings with the Bar when he was a solicitor with Allens. He spoke in particular of one visit to Melbourne to consult with Sir Keith Aickin. As reported in the (NSW) *Bar News* Winter 1996, Justice Gummow said:

"On one memorable occasion Gleeson and some senior partners from my firm and some captains of industry went down to see Mr. Aickin Q.C. in Victoria. Why do people go to Melbourne? Well, they go to Melbourne because the barristers have read the brief before they arrive. When they get there they're ready for them and when they go in and sit down they're not on the telephone all the time to other clients looking for a better brief."

Verbatim

Eternal Power

County Court of Victoria

J. Jordan for Plaintiff (a District Nurse seeking damages for an injured back while lifting an elderly patient during a home visit)
F. Sacardo for Defendant
Coram: Judge Dove and Jury

Jordan leading evidence from the plaintiff about the difficulty of the task of lifting the infirm and co-operative old lady was told: "Plaintiff. She was so old she had given her brother a 'power of eternity' over her affairs."
Jordan: So it was a fairly long-term condition.

Go Ahead, Stanley

County Court of Victoria

Coram: Judge White
Ibrahim v *Royal Eye & Ear Hospital*

Mr. Stanley: Alright. Now you heard Ms. Blackwood telling his Honour what happened with you last Thursday week . . . Yes please. What happened?
Mr. Ruskin: Well does this arise out of my cross examination?
Mr. Stanley: No, it doesn't but none of your cross examination rose out of the leave that his Honour gave to cross examine.
Mr. Ruskin: But two wrongs don't make a right, Mr. Stanley.
His Honour: Just go ahead Mr. Stanley.
Mr. Stanley: Your Honour I seek leave to put.
His Honour: Yes go ahead.

Youse Smooth-Talkers, Youse

Supreme Court of Victoria

Coram: Harper J
Naxakis v *State of Victoria*

Mr. Gillies (to witness): I suggest also you told the investigator the plaintiff's solicitor smooth-talked you and you felt upset and that was the reason you told the plaintiff's solicitor some incident occurred on the school oval. What do you say to that?
Witness: Same thing what I said before.
Mr. Gillies: You admit you told him that you explained what you said to the plaintiff's solicitor on the basis he smooth talked you and you were upset.
Witness: About the biggest thing I am upset about at the moment is that well youse are all very smooth talkers, aren't youse?
Mr. Gillies: I will sell you a used car one day.

Judicial Job Satisfaction

Supreme Court of Victoria

Practice Court
Coram: Hampel J
11 July 1996

Ms. Sparke: One of the issues in this case is the effect of the intermeddling executors.
Hampel J: Intermeddling executors? Gosh, last week I had serial caveators. This is an interesting job.

Building a Lease from Stolen Parts

Supreme Court of Victoria

Olga Investments Pty. Ltd. v *Citipower Ltd.*
16 November 1994
Coram: Judge McInerney
Flower for Plaintiff
Buchanan Q.C. and Cawthorn for defendant a director of which is being cross examined

Flower: Someone provided you with a precedent and you adopted it for your own purpose? . . . I am not saying somebody provided it, but it may have come to me through various transactions and I us ed that as a basis for drafting my lease. In other words, I may have stolen parts from various leases and put them together, if I may use that expression.
Judge McInerney: I don't think you're really meant to use that expression.
Dr. Buchanan: I didn't mean your Honour to hear it.
Judge McInerney: I meant the expression your client used.

Not Quite Rice

Supreme Court of Victoria

R v *Elliott*
12 August 1996
Coram: Vincent J.

Woinarski Q.C.: We say in this case there is nothing in the way in which this evidence has been obtained which affects its cogency.
Vincent J.: That situation reminds me of one of the American authorities where the suspect was in the process of eating the evidence and the enthusiastic police member put his fingers down his throat to get it regurgitated and everyone said that this was a pretty nasty assault but could be forgiven in the circumstances. The evidence once eaten would emerge in a quite different form and in that circumstance cogency was dramatically affected.
Woinarski Q.C.: Obviously not on rice paper, one presumes.

Appellations, Oui; Trademarks, Non

Federal Court of Australia

Coram: Heerey J
Comite Interprofessionel des Vins des Cotes de Provence v *Bryce*

Heerey J refers to an affidavit of Mme. Helin who "is a French lawyer and is the Chief of the Legal and Foreign Division of the second applicant" . . . Mme. Helin deposes: "In contrast to other intellectual property rights, appellations of origin are not intellectual creations, but are the fruit of the intimate link which unites a group of people to the soil which supports them. In this matter appellations of origin are indefeasible and inalienable, in contrast to trademarks which live and die as their proprietor pleases."

Self Protection

Extract from Statement of Claim filed in the Magistrates Court

"12. Further, by reason of the foregoing matters, the plaintiff unwittingly purchased the car. Her purchase of it is, and was, undesirable and imprudent — for which she claims general damages from the defendant."

Instructions to Counsel

A member of the Bar recently received instructions from an articled clerk in a city firm. The instructions contained the following: "This matter has yet to be listed for hearing in the County Court of Victoria at Melbourne since the Statement of Claim will be drafted by you."

Nit Picking

Anti-Discrimination Tribunal

Victoria Police v *Victorian Police Association*
Hammond for the Commissioner of Police
Borenstein for the Association
Coram: Ms. C. McKenzie, President, Ms. C. Morfuni, Member, Mr. D. Rechtman, Member

Hammond: My copy of page 2 has a slight, I think it is a misprint. It is actually an error in the photocopying because the first — the second word of my letter reads: 'The Lice Association', but I see looking at my learned friend's copy it should read: 'The Police Association'.

No Permanent Orders

In some New South Wales jurisdictions it appears that not all judgments are final:
In the Land and Environment Court of New South Wales
No 10776 of 1994
Stein J
12 May 1995
Maybury v *Minister for Planning & Anor*
Extemporary Judgment on Notices of Motion

Indonesian Visitors to the Bar

IN April this year the Bar Council entertained at lunch the members of a team of five Indonesian officials who came to Australia with the assistance of the Asian Law Centre and the Law School of the University of Melbourne. The purpose of the visit was to observe the Australian legal system and report on what might be appropriate for adoption in Indonesia.

The official report of the visit says: "In Melbourne the group were welcomed with the dinner hosted by the Indonesian Consul-General's representatives. They started their tour with a breakfast meeting with Justice Hampel of the Supreme Court who spoke about the Victorian Bar Readers' Course and the Australian Advocacy Course. They discussed case management with Chief Justice Black and Justice Graham of the Federal Court and met a number of other judges as well as barristers over lunch with the Victorian Bar Council. Later Chief Magistrate Brian Barrow demonstrated the new 'video court' system and spoke about the work of magistrates. There was also time spent with representatives from organisations such as the Australian Centre for International Commercial Arbitration, the National Crime Authority, the Australian Institute for Judicial Administration, the Attorney-General's Law Reform Council, the Leo Cussen Institute and the Banking Ombudsman."

Mr Ketut Gede Widjaja, Head of Strategic Planning in the Indonesian Attorney-General's Department, addresses the Bar luncheon.

At the lunch given by the Bar Council the Chairman of the Bar Council, John Middleton Q.C., canvassed with our visitors the changes in the administration of the legal profession about to take place in Victoria. But he assured them that, although the Bar might change, it would continue to provide the specialist advocates necessary to the maintenance of the rule of law in a democratic society.

(Left to right) Alister McNab, A.G. Uren Q.C. (Vice-Chairman), John Middleton, Q.C. (Chairman), Michael O'Connell, Chief Justice Black, Hampel J, and Lisa Ting of the Asian Law Centre, and Mr Widjaja.

Judicial Statistics

The last time judicial statistics appeared in the *Bar News* was in 1988. Since then there have been many changes in all the Courts listed.

We now publish the current statistics, which will no doubt be of interest to those in waiting for an appointment, to those who may wish to plan their own celebrations upon the retirement of their favourite persona and those who play "Legal Trivia Pursuit".

Collated by Gavan Rice

High Court

Name of Judge	*Age at 1/10/96*	*Date of Birth*	*Date of Appointment*	*Date of Retirement*
Brennan, C.J.	68	22/05/1928	1981	1998
Dawson, J.	62	12/12/1933	1982	2003
Toohey, J.	66	4/03/1930	1987	2000
Gaudron, J.	53	1943	1987	2013
McHugh, J.	60	1/11/1935	1989	2005
Gummow, J.	54	9/10/1942	1995	2012
Kirby, J.	57	18/03/1939	1996	2009

Federal Court

Name of Judge	*Age at 1/10/96*	*Date of Birth*	*Date of Appointment*	*Date of Retirement*
Black, C.J.	56	22/03/1940	1/01/1991	22/03/2010
Northrop, J.	71	10/08/1925	1/02/1977	
Jenkinson, J.	68	14/11/1927	28/10/1982	14/11/1997
Gray, J.	50	9/05/1946	10/05/1984	9/05/2016
Ryan, J.	55	3/06/1941	29/09/1986	3/06/2011
Olney, J.	61	7/10/1934	21/05/1988	7/10/2004
Heerey, J.	57	16/02/1939	17/12/1990	16/02/2009
Sundberg, J.	53	21/04/1943	10/07/1995	21/04/2013
Marshall, J.	40	17/11/1955	17/07/1995	17/11/2025
Merkel, J.	55	4/07/1941	5/02/1996	4/07/2011
North, J.	48	12/09/1948	3/10/1995	12/09/2018

Retirement age 70 for all appointments after July 1977.

Supreme Court

Name of Judge	*Age at 1/10/96*	*Date of Birth*	*Date of Appointment*	*Date of Retirement*
J. H. Phillips, C.J.	63	18/10/1933	17/12/1991	2003
Winneke, P.	58	19/03/1938	7/06/1995	2008
Brooking, J.A.	66	7/03/1930	22/07/1977	2002
Tadgell, J.A.	62	15/03/1934	4/03/1980	2006
Ormiston, J.A.	61	6/10/1935	22/11/1983	2007
Phillips, J.A.	60	16/10/1936	22/05/1990	2006
Hayne, J.A.	51	5/06/1945	7/04/1992	2015

Supreme Court (continued)

Name of Judge	*Age at 1/10/96*	*Date of Birth*	*Date of Appointment*	*Date of Retirement*
Charles, J.A.	59	21/07/1937	7/06/1995	2007
Callaway, J.A.	51	10/11/1945	7/06/1995	2015
Beach, J.	65	16/02/1931	18/07/1978	2003
Southwell, J.	70	1/11/1926	3/04/1979	1998
Hampel, J.	63	4/10/1933	16/03/1983	2005
Nathan, J.	60	14/11/1936	20/04/1982	2008
Vincent, J.	59	3/10/1937	4/12/1984	2009
Teague, J.	58	16/02/1938	13/10/1987	2008
Cummins, J.	57	9/11/1939	16/02/1988	2009
McDonald, J.	59	3/03/1937	19/05/1988	2007
Smith, J.	57	5/08/1939	11/07/1988	2009
Ashley, J.	54	2/02/1942	21/08/1990	2012
Hedigan, J.	65	2/09/1931	30/01/1991	2001
Coldrey, J.	54	18/01/1942	19/02/1991	2012
Byrne, J.	56	31/05/1940	20/08/1991	2010
Harper, J.	53	29/06/1943	11/03/1992	2013
Eames, J.	51	26/11/1945	26/05/1992	2015
Batt, J.	61	22/09/1935	8/03/1994	2005
Hansen, J.	54	14/10/1942	6/04/1994	2012
Mandie, J.	54	25/09/1942	10/05/1994	2012
Balmford, J.	63	15/09/1933	7/03/1996	2003

Justices appointed after 1/7/86 are required to retire at age 70.

County Court

Name of Judge	*Age at 1/10/96*	*Date of Birth*	*Date of Appointment*	*Date of Retirement*
Waldron	65	25/11/1930	3/02/1982	24/11/2002
O'Shea	69	4/04/1927	29/04/1969	3/04/1999
Byrne	70	22/10/1925	1/03/1972	21/10/1997
McNab	71	2/06/1925	31/10/1972	1/06/1997
Rendit	67	11/06/1929	12/07/1977	10/06/2001
Cullity	68	10/02/1928	19/07/1977	9/02/2000
Dyett	63	6/04/1933	24/10/1978	5/04/2005
Mullaly	67	9/07/1929	10/04/1979	8/07/2001
Dixon	67	13/11/1928	4/03/1980	12/11/2000
Kelly	62	14/05/1934	12/03/1980	13/05/2006
Nixon	61	18/07/1935	3/03/1981	17/07/2007
Walsh	65	1/02/1931	10/03/1982	31/01/2003
Ostrowski	61	9/09/1935	20/09/1983	8/09/2007
Hassett	59	17/05/1937	15/05/1984	16/05/2009
Fagan	59	5/02/1937	14/08/1984	4/02/2009
Duggan	54	24/08/1942	12/12/1984	23/08/2014
Hart	59	12/10/1936	19/03/1985	11/10/2008
Crossley	55	21/10/1940	20/03/1985	20/10/2012
Neesham	64	11/05/1932	1/08/1985	10/05/2004
Jones	55	19/01/1941	28/01/1986	18/01/2013
Hanlon	57	3/11/1938	12/05/1986	2/11/2010
Kimm	64	7/04/1932	3/04/1988	6/04/2002
Higgins	52	28/04/1944	3/06/1988	27/04/2014
Lewis, F.B.	61	4/01/1935	1/08/1988	3/01/2005
Keon-Cohen	55	22/06/1941	2/08/1988	21/07/2011
Strong	49	15/01/1947	6/09/1988	14/01/2017

County Court (continued)

Name of Judge	*Age at 1/10/96*	*Date of Birth*	*Date of Appointment*	*Date of Retirement*
Ross	61	4/05/1935	8/11/1988	3/05/2005
Meagher	63	2/09/1933	6/09/1988	1/09/2003
Lewis, R.P.L.	58	10/04/1938	21/11/1989	9/04/2008
Stott	59	21/10/1936	12/12/1989	20/10/2006
Smith	60	12/04/1936	30/01/1990	11/04/2006
Barnett	53	19/05/1943	30/01/1990	18/05/2013
Dee	59	1/12/1936	1/01/1990	30/11/2006
Lewis, G.D.	62	15/03/1934	19/06/1990	14/03/2004
Kellam	50	14/09/1946	10/11/1993	13/09/2016
Curtain	42	17/01/1954	10/11/1993	16/01/2024
Williams	53	31/08/1943	10/02/1994	30/08/2013
Davey	58	25/09/1938	6/04/1994	24/09/2008
Campbell	56	14/12/1939	7/06/1994	13/12/2009
Morrow	55	1/03/1941	7/07/1994	28/02/2011
McInerney	48	7/12/1947	21/06/1994	6/12/2017
Rizkalla	43	23/01/1953	11/07/1994	22/01/2023
Wodak	55	11/10/1940	16/08/1994	10/10/2010
Shelton	54	26/01/1942	5/09/1994	25/01/2012
White	54	9/03/1942	28/02/1995	8/03/2012
Duckett	59	26/09/1937	22/03/1995	25/09/2007
Dove	63	7/12/1932	30/05/1995	6/12/2002
Harbison	44	7/12/1951	5/02/1996	6/12/2021
Gerbhardt	60	23/08/1936	14/05/1996	22/08/2006

Family Court

Name of Judge	*Age at 1/10/96*	*Date of Birth*	*Date of Appointment*	*Date of Retirement*
Nicholson, C.J.	62	19/08/1938	1987	2008
Fogarty, J.	63	9/06/1933	1976	–
Frederico, J.	65	1/10/1931	1976	–
Kay, J.	51	21/04/1945	1986	2015
Joske, J.	64	22/08/1932	1976	–
Smithers, J.	62	14/04/1934	1977	–
Hase, J.	64	20/11/1931	1979	2001
Wilczek, J.	59	9/09/1937	1985	2007
Graham, J.	58	11/07/1938	1987	2008
Mushin, J.	51	28/06/1945	1990	2015
Brown, J.	46	28/05/1950	1993	2020
Dessau, J.	43	1953	1995	2023
Morgan, J.	–	–	1995	–

Retirement age 70 for appointments after 1977. No compulsory retirement age for appointees prior to this date.

Magistratisches Bezirks

Reader's Competition Winners

THE *Bar News* has stumbled upon a new initiative by the Attorney-General which we believe is an asylum for magistrates who have gone beserk. We believe that under the Attorney's new policy initiative some will be allowed out to Court on daily passes, some will be forced to reside temporarily and an unfortunate few will be required to permanently reside here.

A secret study of dementia among magistrates by the Attorney has revealed a large number of distinct categories of dementia leading to episodes of beserk behaviour. These include:

1. Delusions of being a High Court judge.
2. Panic attacks caused by complex submissions of senior counsel.
3. Despair induced by the long-winded verbiage of numerous members of the legal profession.
4. Despair brought on by the bleak prospects of rehabilitation of accused persons appearing before them.
5. Dementia caused by government cuts.
6. Embarrassment at being named on "A Current Affair".
7. Fear of Michael Adam's dog.

The Attorney-General has refused to comment on the new asylum and has threatened to prosecute the *Bar News* for publishing a classified and top secret photograph. The editors of the *Bar News* intend to vigorously defend any prosecution using the defences of truth and public interest.

"New Asylum for Magistrates"

In conclusion, we applaud the Attorney-General for her perception in being the first State attorney to seriously attempt to deal with this problem which has deleteriously affected the practices of many at the Bar over recent years.

Gavan Rice

Runners Up

1. Mad Judge Disease Reaches Europe

I enclose, for your consideration, my caption and explanation for the competition photo which appears on page 39 of *Victorian Bar News* (No. 97 edition).

The European Commission's ban on British beef exports came too late to prevent mad judge disease breaking out on the Continent. The EC has lodged a high level protest.

The British Agriculture Secretary, Mr. Douglas Hogg, said that there had been Masters in Lunacy at Westminster Hall for hundreds of years and the EC's reaction was typical of its unrealistic views on Britain. Mr. Hogg said that Britain was proud of its lunacy jurisdiction and was glad that the Europeans were finally following suit. "The EC go bezirk at the drop of a pat," he said.

Steven Rares

2. Small-time Claims

A new division of the Melbourne Magistrates Court adopting an overseas case management system where the jurisdiction is limited to small claims of not more than $25 million; decisions are final to minimise litigants' legal costs and to stop wasteful appeals clogging the legal system.

Stephen Smith.

3. Guggenheimer Museum

(i) Paul Guggenheimer dedicates his new Bavarian Country House (bought with the proceeds from County Court appeals); or

(ii) An asylum for deranged German magistrates (where I live, we just send them to Mildura).

Patrick Southey

Norman Invasion of Legal Language

THE effect on the English language of the Norman invasion is well known and easily observed even now.

From 1066 until Normandy was lost by King John in 1204, the ruling class in England was comprised largely of nobles whose native land was France. After 1204, a sense of allegiance to France became progressively less relevant. By that time however, a large number of Anglo-Saxon words had been displaced by Norman French equivalents.

Because the Norman rulers were truly a conquering force, they did not assimilate in quite the same way as the Scandinavians had 200 years earlier. Thus, the influence of French on English is greatest where the influence of the ruling invaders was greatest. So, the language of government, law, military leadership, and the baronial table is dominated by French words. The language of the farm, the fields and the trades shows a healthy survival of Anglo-Saxon words.

In *Ivanhoe*, Sir Walter Scott identified the language divide between farm and table: the English serfs tended the Anglo-Saxon *boar*, *calf*, *cow*, *bull*, *deer*, *ox*, *sheep*, *pig* and *swine*. At table, the Norman overlords ate the French *brawn*, *veal*, *beef*, *venison*, *mutton*, *pork* and *bacon*. (It is tempting to add *ham* to this list. The connection with the French *jambon* (leg) and Italian *gamba* is obvious and plausible. However, *ham* existed as *homme* before the Norman conquest, meaning the part of the leg at the back of the knee.)

In the language of the law, it is difficult to find words which do not derive from the Norman influence. Apart from obviously French words (*tort*, *oyez* and *terminer*, *assize*, *malfeasance*, *puisne*), many others are French but are so completely naturalised as to pass unnoticed: *arrest*, *accuse*, *acquit*, *convict*, *punish*, *pardon*, *plead*, *sue*, *damage*, and so on.

Indict is a Norman French word. It derives in turn from the Latin *dictare*, to say or declare. So, originally, it was a statement or declaration by which a person was made aware of charges against them. Its use was not confined to the law, however. As late as the 18th century, Handel wrote the Coronation Anthems, one of which is called "My Heart is Indicting", the sense of which is that heart-felt sentiments for the new King George are put into words.

Parliament is another obvious Norman French word. It comes from *parlement* speaking. The Anglo-Saxon

word it replaced was *witenangemot*: discussion of the wise men (perhaps circumstances would eventually have forced the abandonment of that word in any event). Although *witenangemot* has not been used since the 11th century, it has left a small legacy to modern English. The constituent roots are *witan* (wise men) and *mot* (discussion). *Mot* was a variant form of *moot*, a discussion or debate. It survives in our *moot courts*, and in the idiom *moot point.*

It is not uncommon to hear it said that "the point is moot", with the intended meaning that the point does not arise for debate, especially because it is hypothetical. A *moot point* is one which is debatable or doubtful. It is not accurate to use it as meaning *hypothetical*, although a hypothetical question clearly can be debatable.

Another interesting by-product of the French influence on English courts is *culprit*. At least from the time of the Year Books, when a prisoner had pleaded not guilty, the Clerk of the Crown would assert the guilt of the prisoner (*culpable*) and announce the readiness of the Crown to prove its charge (*prest d'averrer nostre bille*). This form is found repeatedly in the Year Books. The word *prest* was also written as *prist*, *prit* and *pret*. It corresponds to the modern French *prêt*, ready. The written record of a trial often used abbreviations for formulaic portions of the proceeding. Thus, it is thought, the formula *culpable: prest d'averrer nostre bille* was abbreviated to *cul.prest* or *cul.prist.* It was later mistaken for a mode of addressing the prisoner. *Culprit* is first recorded as a word in 1678, in the record of the trial of the Earl of Pembroke. The OED gives the following quotation:

1678 *State Trials* (1810) VI. 1320/2 (*Earl of Pembroke*) *Clerk of Crown.* Are you guilty, or not guilty? *Earl.* Not guilty. *Cl. of Cr.* Culprit, how will you be tryed? *Earl.* By my Peers. *Cl. of Cr.* God send you a good deliverance.

At least one legal expression in common use, *by-law*, escaped the Norman influence, and survives as a reminder of the earlier Scandinavian influence on English. The Danish *by* and the old Norse *byr* mean *town* or *settlement. By* is found as a suffix in many place names, such as Derby, Normanby, Whitby, Rugby, Kirkby, and so on. It was readily assimilated into Anglo-Saxon because of its similarity to *burg* and (Scottish) *burgh* (English: *borough*). *By-laws* were, and generally still are, the local laws of a town or region.

Julian Burnside

First We Count All the Lawyers

A new report from the Centre for Legal Education dispels the myth that Australian universities are producing too many lawyers.

Career Intentions of Australian Law Students surveyed more than 4,000 final year students at 26 universities. Less than half gave as their first preference for a career practising as a solicitor or barrister in the private profession. The study shows that the broader benefits of a law degree are well understood by today's students who look to their legal knowledge to enhance their career options.

It is often said that young people enter the legal profession because it will bring "high income" and "high status". In this survey, while these issues were mentioned, the most popular reason for studying law was "an interest in the subject matter of law".

A surprisingly large number of respondents (22 per cent) planned to work in the private legal profession for not more than five years — again showing the tendency for the law to be the underpinning of a broad range of careers.

For one quarter of the respondents law was a graduate degree and 34 per cent were mature age students. More than a quarter of the students were enrolled in law combined with "business-related" studies.

Career Intentions of Australian Law Students is the latest report from the Law Foundation's Centre for Legal Education. The CLE promotes and advances legal education by conducting policy oriented research, collecting and disseminating information and providing support to other bodies involved in legal education.

They produce a quarterly newsletter and regular digests and reports. For more information about Career Intentions of Australian Law Students or any other publication you can contact the Centre on (02) 9221 3699, fax 9221 6280 or email cle@il.asn.au. Copies of the report are $30.00.

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☐ provide a short (and apocryphal) explanation as to why the man in the hat is pointing his finger at the words BAR NEWS.

The three most amusing explanations and captions will be published in the Summer issue of *Victorian Bar News*.

The entrant who provides what the Editors believe to be the most entertaining caption and explanation will receive a Mont Blanc Ballpoint Pen and Leather Notebook, supplied by Pen City, with a combined retail value of $365.00.

No member of the Board or Committee of *Victorian Bar News* and no relative of a Committee or Board member is eligible for the prize.

☐ Entries to Gerry Nash Q.C., c/- Clerk Spurr, Owen Dixon Chambers West, by 29 November, 1996.

Positive Lifestyle Program: A Sentencing Alternative

OLD institutions such as Pentridge are to fall under the hammer. Prisons are going private. Psychiatric centres and rehabilitation centres are being closed down. The Government and the community are washing their hands of the daily chore of running prisons, psychiatric centres, drug rehabilitation centres and these institutions are either passing into the hands of private organisations or are just ceasing to exist.

There is though one organisation that seems to be there picking up the slack and that is the Salvation Army.

The services of the Salvation Army are varied but some of their work which largely goes unnoticed in the wider community is their work in the prisons and court system. The Positive Lifestyle Program, implemented and co-ordinated by Major Ashley Davies provides a practical approach to help the courts with an alternative sentencing disposition and addresses some of the underlying problems which contribute to so much of the crime in our community.

A judge or magistrate might usually impose a fine or consider a term of imprisonment in respect to repeat offenders for example, shoplifting, but now the Salvos provide The Positive Lifestyle Program as a real sentencing alternative. The program usually consists of 10 sessions which incorporate a commonsense approach to people's needs and does not take a religious tack at all. It promotes self esteem and awareness and the individual's rights and obligations in the community. Where the victims are retailers in the example of shoplifting, the parties are brought together and issues of the offence are discussed. With the help of the program offenders are less likely to reoffend.

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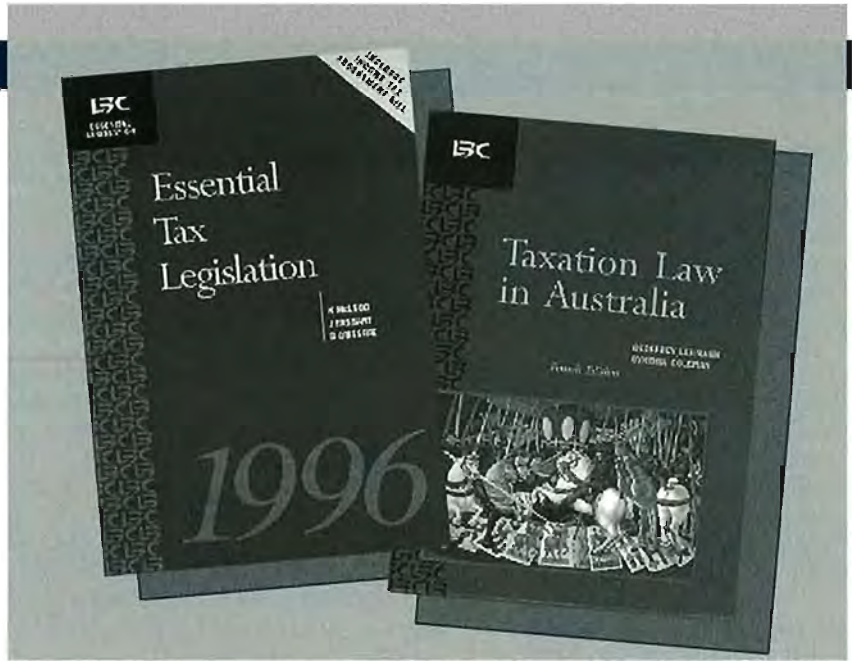
Major Ted Gray at Dandenong Magistrates Court has had some stunning results. In the 22 months leading up to June 1996, 540 people have passed through the program and of these only 22 have re-offended and 17 of those were in the first week. Astounding statistics! — especially to the court and members of the legal profession who are so used to seeing individuals coming time and time again before the courts for similar offences. This represents an enormous saving to the community leaving aside the spin-off that 100 of the 540 have left the welfare system and have obtained full-time employment.

Our community is derogating its responsibilities to others but it is important to note who is picking up the burden and ask — how can we lighten it?

We can help the Salvation Army and lighten their burden by making donations available to them. Barristers and solicitors may request, and members of judiciary can direct, that some of the money to be paid into the Court Fund be specifically earmarked for the Salvation Army. Individuals can apply pressure on the Government to increase the Government and the community's contributions to charitable organisations such as the Salvos. These steps are the least that we can do as members of the community to acknowledge that we have not totally abrogated our responsibility to all the members of our community.

A.B.J. Combes



Taxation Law in Australia (4th edn)

by Geoffrey Lehmann and Cynthia Coleman
The Law Book Company 1996
pp. i–xxvi, 1–1417

Essential Tax Legislation (5th edn)

By Neil Mcleod and John Passant
The Law Book Company 1996
pp. i–xxxix, 1–714

THE text by Lehmann and Coleman is now in its Fourth Edition. This is an encyclopedic reference work which provides ready access to leading case law, statutory references, income tax rulings and accounting standards. The complex and ever expanding nature of the subject matter has required the authors to firstly, divide the work into 10 main topics and an introduction and then, to commence each separate topic with a contents index. This organisation, along with the cumulative index over 60 pages and the substantial case, ruling and statute tables at the commencement of the work mean that the book is of immense value to all practitioners.

The book confronts its subject matter on both a theoretical and a practical basis. Intellectually challenging High Court decisions interpreting the law are explained simply and easily in their effect on the general application of various provisions. I was particularly impressed by the chapter on "decision making" an everyman's guide to dealing with the Tax Office, the Commissioner, the Tribunal and the Court hierarchy involved in the application and interpretation of taxation law.

Taxation Law In Australia is recommended to all practitioners. It is invaluable to have in one's library such a general reference work which is updated every three or four years and which affects most areas of legal practice.

Essential Tax Legislation appears to be published by the Law Book Company as an accompanying volume to the general text, *Taxation Law In Australia.* It contains extracts from the taxation legislation more likely to be used or referred to by students and practitioners.

The benefit of such a reduced statutory reference book is that it slims the four or five volumes of legislation into a single volume. In a general commercial practice such a reference work can provide quick and easy access to the main sections of the taxation legislation. It might also mean that you won't be carrying four or five volumes to and from court or home.

There is a significant drawback in this collection of statutory extracts. The editors of the work have seen fit to add section headings, section numbers and underlining. In particular, the underlining of words purports to identify: "the core sense of each section".

Such editorial additions may well mean that the work is of little value to Barristers who might want the legislation to hand up to judges. Some may think that the underlining of statutes to import emphasis really interferes with the more acceptable guides to statutory interpretation [case law and/or S.15AB of the *Acts Interpretation Act 1901* (Cth)]. It reminds me of trying to write an essay on an English text in HSC when the text had previously been "marked up" by an older brother or sister.

Sam Horgan

Minority Shareholders' Remedies

by Elizabeth Boros
Clarendon Press, Oxford
pp. i–xlv, 1–340 (including index)
$95.00

DR. Boros has written an important book on a problem that arises in relation to public companies and small proprietary companies.

The author has usefully divided the tables of cases into various countries, for example United Kingdom, South Africa and the like. Dr. Boros has separated her examination into four sections: The Problem, Prevention, Remedy and Conclusion. She considers both publicly listed companies and private companies. The type of complaints that she considers range from a disregard of rights by the dominant shareholders that are either granted by statute or by the articles, negligent and inefficient management through to the compulsory acquisition of shares or other rights.

Dr. Boros emphasises the role that is played by institutional investors in influencing the company, whether solely or together with other institutional investors. Whilst that role may be beneficial, it may also operate detrimentally to private smaller investors who do not have sufficient holding to ensure a measure of influence. She points out that the institutional investor may have available lines of communication that are not available to the private shareholder. The author provides tables which show in Britain the rapid increase in the percentage of shares held by institutions. The percentage change is not as rapid in Australia. When examining the continuing obligation of disclosure, Dr. Boros examines and contrasts the UK Listing Rules (the "Yellow Book") with the recommendations of the Cadbury Report and our ASX Listing Rules.

Dr. Boros deals with the problems that face shareholders of private companies, by considering what she describes as self help and the more traditional remedies through the courts. By self help, she dis-

cusses how shareholders might seek to protect themselves through the company's articles and shareholder agreements. She refers to both the UK legislative provisions as well as to the Corporations Law. Aside from reference to the various authorities, what is most useful is that the author provides reference to various journal articles that have been written. The author observes that shareholders' agreements may be invalid if the agreement conflicts with statute, not only directly contravening provisions of an Act but where it may be against the policy of the Act. For instance, a contract not to alter the articles may be invalid or unenforceable.

Part 3 of the book is concerned with remedies that are available. The history of the remedies are traced and Dr. Boros makes the point the statutory remedy was limited by the winding up provisions on the just equitable ground, so that a practice developed of adjourning the case before making a winding up order, to enable the parties to reach an agreement amongst themselves. In her analysis she contrasts the English provisions to that found in the Corporations Law and undertakes an analysis of what is contained in the concept of objective unfairness "judged by the departure from legitimate expectations" of the members. Those expectations are to be contrasted between a universal expectation and a personal expectation, the latter being confined to a quasi partnership relationship.

For those whose practices are concerned with commercial law and, in particular, shareholders' rights, this work is an important addition to one's library. Dr. Boros has discussed the authorities with clarity and her conclusions point the way to the development of law in this area.

John V. Kaufman

Memoirs of a Barrister and Judge

by Eric E. Hewitt Q.C.
Viridia Books
pp. 1–118
$19.95

ERIC Hewitt, who retired as a judge of the County Court of Victoria on 3 November 1989 has written memoirs which are partly autobiographical, partly anecdotal and which give an insight not only into his life as a young barrister, Q.C. and judge but, in passing, cast many of those who walked the legal stage over the four decades immediately following World War II in a fresh and interesting light.

It is not a book with which to sit down for a long and leisurely read. It is a book for "dipping into" on a quiet afternoon. It is also a book of translucent honesty.

Where the author believes that he has been right or that a decision of his has been vindicated, he does not hesitate to say so. Equally he has no hesitation recognising and acknowledging his own human foibles where they arise.

It is a book I recommend both to those who knew Eric Hewitt in his prime and to those who have come more recently to the Bar.

Older readers will enjoy the opportunity to re-visit old friends and acquaintances as they appear throughout the book. Younger readers will be provided with intriguing glimpses of a past era.

Gerard Nash

Mabo: What the High Court Said

by Peter Butt and R. Eggleston
The Federation Press 1993

Essays on the Mabo Decision

The Law Book Company 1993

Lawyers in the Alice: Aboriginals and Whitefella's Law

by Jon Faine
The Federation Press 1993

WHAT would it have been like for an indigenous Australian to make a claim for native title in the 1980s. I guess that it was like lining up on the football field to find the crowd against you, the umpires against you and the time-keeper sound asleep. And the ground itself was clearly the property of everybody but you.

Whether or not the imbalance has been significantly affected by the Mabo decision and the subsequent passing of the Native Title Act remains a moot question. However it is beyond doubt that the High Court bravely trod where more timid, and less inspired, legislators had feared to go. By now the word "Mabo" has entered the mainstream Australian vocabulary although in some places it is spoken with respect, while in others it rolls less easily off the tongue.

Any person wanting to gain an insight into the Court's decision should turn to *Mabo: What the Court Said* by Peter Butt and Robert Eggleston. Do not reach for your highlighting pen for you will soon realise that nearly every line on nearly every page will be glowing. It is concisely written and easy to read. There is no commentary but any reader must inevitably gain a practical knowledge of native title. Importantly, the differing views of the judges are highlighted in a fashion that is significantly easier to comprehend than by reading the official judgment.

For those seeking a more academic consideration of the broader issues then the Law Book Company's *Essays on the Mabo Decision* is a very useful starting point. The contributors include key players in the field of native title such as Robert Blowes, Garth Neittheim and Richard Bartlett. Its chapters raise issues concerning the Mabo decision, the Racial Discrimination Act and the role of government. For the uninitiated it is not always easy going but there is at least one impressive picture. The book's striking cover depicts a red sand dune somewhat reminiscent of the country claimed recently by the Martu people of the Gibson Desert. Their claim covers 219,400 square kilometres of vacant crown land and National Park — all of it desert.

The sand dune is significant. The picture leaves little room to wonder why people like the Martu have great difficulty accessing sound and consistent legal advice. The lot of a native title lawyer is not always a happy one. But inspiration is at hand. Jon Faine has written a book entitled *Lawyers in the Alice: Aboriginals and Whitefella's Law.* While the book gives real life accounts of the involvement of lawyers in the legal issues that confront Aboriginal people, it could also pass for a resume of a sizeable section of Victoria's Supreme Court Bench. Their Honours Geoff Eames, Frank Vincent and John Coldrey feature prominently. This is consistent with the role that they, and other Victorian lawyers, have played in advancing the cause of Aboriginal legal rights.

Graham B. Powell

Retreat from Injustice: Human Rights in Australian Law

by Nick O'Neill and Robin Handley
pp. i–xxviii, 1–508
Price: $55.00 (soft cover)

RETREAT from Injustice is a major Australian study of the sources and application of human rights laws in this country. The book's title is a reference to the belated development and acknowledgment over the last two decades of legislative and judicial means to assert, enforce and protect people's rights.

This is a detailed work which covers almost all key aspects of Australian human rights. The introductory chapter comprises an historical overview of the concept of human rights, from the natural law philosophies of the ancient Greek scholars to the international organisations of the twentieth century.

The next three chapters focus on the Australian Constitution as both a direct and indirect source of human rights law. Chapter 3 examines the explicit human rights which are contained in the Constitution, like the guarantee of trial by jury, the free movement between States and the freedom of religion. Chapter 4 is concerned with the implied constitutional limitations on the legislative powers of the Commonwealth Parliament, and the associated notions of the doctrine of fundamental rights and silent constitutional principles.

Chapter 5 reviews the role of the common law as both a protector and denyer of human rights. Chapter 6 examines the institutions and mechanisms which exist in Australia for the protection and enforcement of human rights, in particular the Human Rights and Equal Opportunity Commission and the increasingly active role assumed by the High Court in striking out legislation which affect fundamental rights. In chapter 7 the protection of human rights on the international level is considered. The crucial role of the United Nations, and that of UNESCO and the International Labour Organisation, are the focus of this chapter.

Chapters 8 to 13 concern various civil and political human rights. The rights to liberty and security of the person, the rights of an accused to a fair trial, the treatment of persons in custody, freedom of peaceful assembly, freedom of association and freedom of speech are all given detailed treatment.

The following seven chapters explain Australia's laws in relation to various issues which may concern or affect a person's rights, including censorship (chapter 14), contempt of court (chapter 15), defamation (chapter 16) and discrimination (chapters 17–19).

Chapters 21 to 24 deal with human rights in relation to Aboriginal and Islander people, while the final chapter is devoted to the rights of immigrants and refugees.

Retreat from Injustice is an extremely impressive academic study. The authors are to be commended for managing to cover such a wide range of contemporary topics in such a clear and thorough manner.

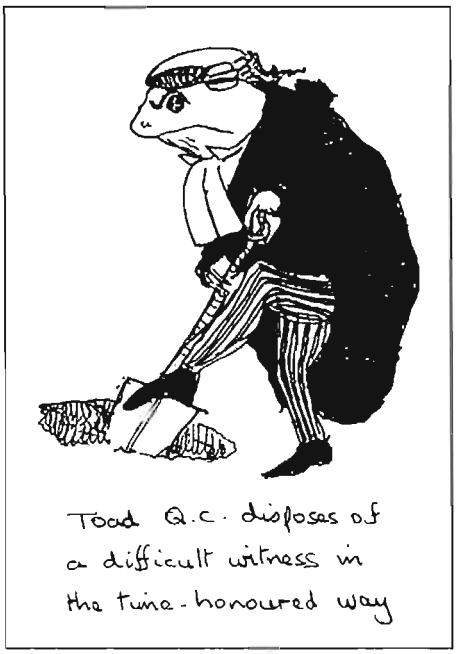
Anna Ziaras

Conference Update

1. **6–9 October 1996:** Darwin. Law Asia Energy Section Eighth Biennial Conference.
2. (a) **11–13 November 1996:** Vienna. Seminar on Successful Use of the FIDIC Contract Conditions in International Construction Projects.
   (b) **2–5 December 1996:** London. Seminar on Liability and Damages in International Commercial Contracts.
   (c) **9–12 March 1997:** Reading, England. Seminar on European Banking and Financial Law.
   (d) **9–12 March 1997:** Reading, England. Seminar on Banking Fraud and Crime.

   Contact The Study Group for International Commercial Contracts, London SW152. Fax +44(0) 1817857649.
3. (a) **17–19 October 1996:** Berlin. Human Rights Seminar.
   (b) **20–25 October 1996:** Berlin. IBA 26th Biennial Conference.
   (c) **20–25 October 1996:** Singapore. Financial Law Seminar.
   (d) **26 December 1996:** Greece. IBA/CCBE Conference.

   In respect of all these conferences contact International Bar Association, 2 Harewood Place, Hanover Square, London.
4. **15–16 October 1996:** Hong Kong. Professional Training on Practical Issues in Maritime Law. Contact Inside Asia Consultancy Ltd (Hong Kong). Fax: 852 25301089, Tel: 852 28698511.
5. **17–20 October:** Noosa Heads. Australian Plaintiff Lawyers' Association Annual Conference. Contact John Peacock. Tel: (02) 99048200, Fax: (02) 94118585.
6. **19 October 1996:** Melbourne. Australian Advocacy Institute Workshop. Forms available from Barristers' Clerks.
7. **27–30 October:** Salsburg. International Licensing and Competition Law Conference. Contact Centre for International Legal Studies, Salsburg, Austria. Tel: (662) 435200. Fax: (662) 432628.
8. **30 October–1 November 1996:** Singapore. Conferences on International Law. Contact The Conference Secretariat, 1-AIR DMC Pte. Ltd., Singapore. Tel: (65) 336 8855, Fax (65) 336 3613.
9. **7–9 November 1996:** Gold Coast. Stamp Duties Symposium. Contact IBC Conferences. Tel: (02) 9319 3755, Fax: (02) 9699 3901.
10. **26–28 February 1997:** Gold Coast. Superannuation 1997. Contact Dianne Rooney, Tel: 9602 3111, Fax: 9670 3242.



Legal Services to be Included in ABS Survey of Business Services Organisations

AS part of the Australian Bureau of Statistics (ABS) ongoing program of service industries surveys, questionnaires are being despatched in late August to organisations in the business services sector. These include legal services, accounting services, computing services, real estate services and consulting engineering services.

The questionnaires will seek information for the 1995/96 financial year, with results from the survey being available in mid 1997. The ABS has worked closely with organisations in the above mentioned fields regarding the detailed content and design of the survey. Information collected will provide a picture of the contribution the sector makes to the economy and will be a valuable resource for planning, policy formulation and decision-making.

The survey will seek a breakdown of gross income, expenses, assets, liabilities, capital expenditure and disposal of assets which are all readily available from annual reports and audited accounts. Additional questions on employment and transactions with non-residents will also be asked. As with all ABS surveys the information provided will remain strictly confidential to the ABS and will only be released in aggregate form.

If you would like further information about the Business Services Survey please contact Kathleen Horgan on (03) 9615 7642 or toll free on 1800 678 770, or write to the following address:

Service Industries Surveys Section
GPO Box 2796Y
Melbourne, Vic 3001

Lawyers Admission Handbook

Third Edition — July 1996

The *Lawyer's Admission Handbook* contains information on the implementation of the Mutual Recognition Scheme and the adoption of the Uniform Admission Rules throughout Australia. It is not a step-by-step guide to admission in another jurisdiction, but does provide considerable practical information about the current state of play in each of the eight Australian jurisdictions. The handbook includes three tables which outline the implementation of the Mutual Recognition Scheme and the Uniform Admission Rules throughout Australia, and compares the current admission rules in each jurisdiction with the proposed Uniform Admission Rules. It also outlines the requirements for admission in each of the jurisdictions, as well as a copy of the Uniform Admission Rules.

Uniform Admission in Australia is a companion handbook ($25), which contains the two reports of the Consultative Committee of State & Territorial Law Admitting Authorities.

The *Lawyer's Admission Handbook* is $20.00 each (plus $2.50 surface postage overseas) or $15.00 where an order of five or more copies is placed.

To order please contact:
Centre for Legal Education,
GPO Box 232, Sydney NSW 2001,
Australia.
Tel: [61] (02) 9221 3699
Fax: [61] (02) 9221 6280
E-mail: cle@fl.asn.au
[DX 984 Sydney]

New Sentencing Option

In a spirit of co-operation we are only too pleased to offer the following suggestion to the Victorian Parliamentary Law Reform Committee should they be seeking to expand the range of sentencing orders available to the courts contained in section 7 of the *Sentencing Act 1991*.

Computer hacker/cyber-criminal Kevin Mitnick was arrested in early 1995 in Raleigh, North Carolina after being tracked down by one of his victims, Tsutamu Shimomura, a computer scientist from the San Diego Supercomputer Centre. It was Mitnick's third bust arising from his enthusiastic use of other people's computers.

What to do with young Kevin? His lawyer, John Yzurdiaga throws up his hands, sincerely baffled — no-one was harmed physically, nothing was sold, nobody profited — what is a suitable punishment? Even his victim Shimomura thinks that a protracted jail sentence is, as Shimomura puts it, not an elegant solution.

Perhaps an elegant solution is that provided by Richard Sherman, the brash opinionated lawyer for one of Mitnick's co-offenders in an early 1980s computer prank:

"You know what they should do to Kevin Mitnick? Kevin Mitnick should have his pants taken down for six months so everyone can see what a little weenie he has."

Hafner and Markoff, *Cyberpunk: Outlaws and Hackers on the Computer Frontier* (1995) 363; Hafner, "Kevin Mitnick, Unplugged", (August 1995) 124 (2) *Esquire* 80 at 88.