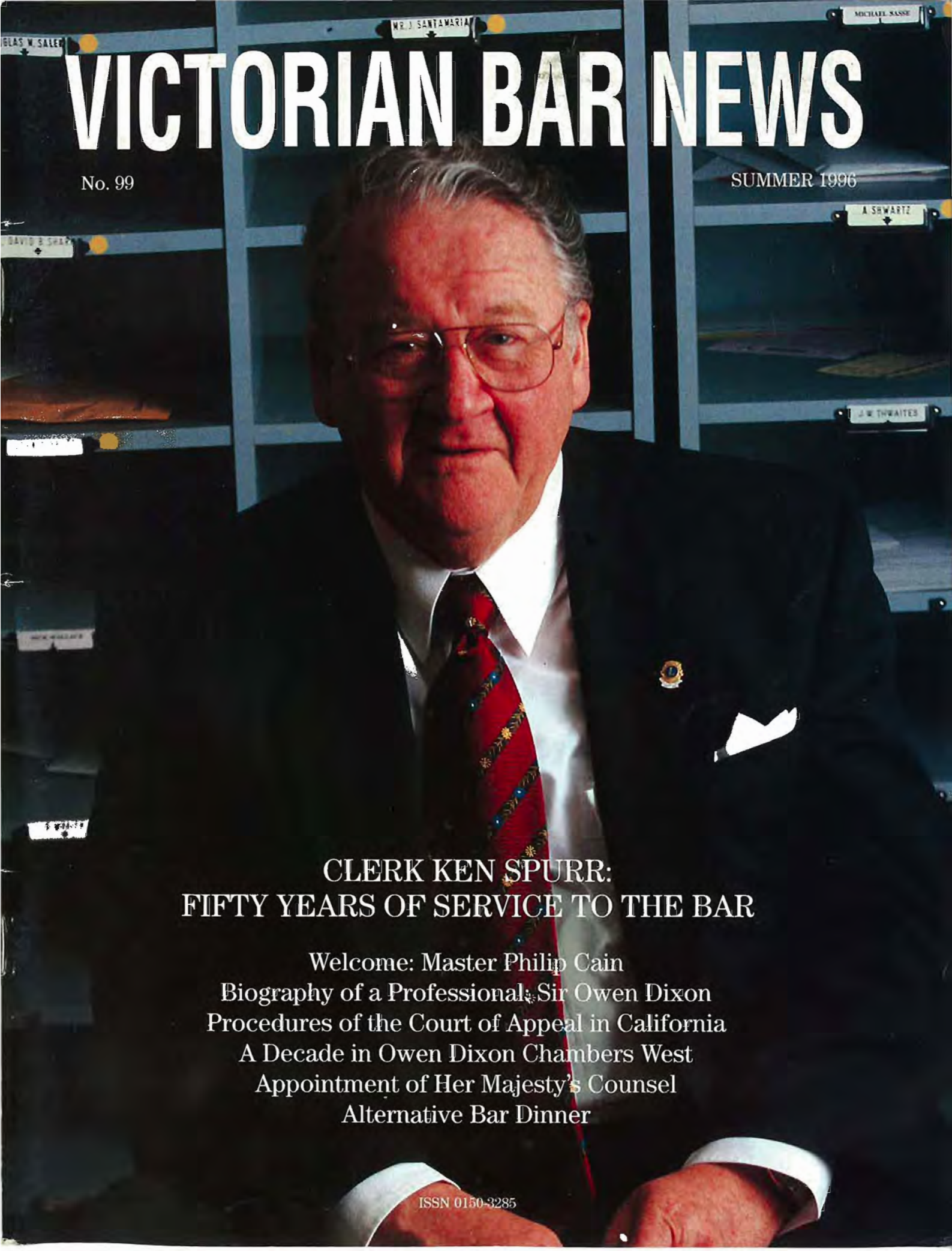
VICTORIAN BAR NEWS

No. 99

SUMMER 1996



CLERK KEN SPURR: FIFTY YEARS OF SERVICE TO THE BAR

Welcome: Master Philip Cain
Biography of a Professional: Sir Owen Dixon
Procedures of the Court of Appeal in California
A Decade in Owen Dixon Chambers West
Appointment of Her Majesty's Counsel
Alternative Bar Dinner

ISSN 0150-3285

VICTORIAN BAR NEWS

No. 99 ISSN 0150-3285 SUMMER 1996

Contents

EDITORS' BACKSHEET
5 Fighting for the Rights of the Individual

CHAIRMAN'S CUPBOARD
7 Council Members Again Given "Portfolios"
8 The 1996/97 Bar Council
9 Council Members' Portfolios: Looking to 1997

ATTORNEY-GENERAL'S COLUMN
12 Using Technology to Provide Best Effective Access to Justice

WELCOME
15 Master Philip Cain

ARTICLES
17 Clerk Ken Spurr: Fifty Years of Service to the Bar
26 Biography of a Professional: Sir Owen Dixon
29 Procedures of the Court of Appeal of California

NEWS AND VIEWS
32 A Decade in Owen Dixon Chambers West
36 Appointment of Her Majesty's Counsel
41 Verbatim
43 Alternative Bar Dinner
46 A Feast of the Senses
47 A Bit About Words: Lean-to or Penthouse?
48 "Chips" Visits Us

SPORT
50 Bar Hockey: A Fair Thrashing by the Institute

LAWYER'S BOOKSHELF
51 Books Reviewed
54 Conference Update

Cover: On page 17, we feature an interview by Bill Martin Q.C. and Nicola Hoobin with Clerk Ken Spurr on the eve of his retirement after 50 years' service to the Victorian Bar.

Welcome: Master Philip Cain

A decade in Owen Dixon Chambers West

Appointment of Her Majesty's Counsel

Alternative Bar Dinner

Bar Hockey

VICTORIAN BAR COUNCIL
for the year 1996/97
* Executive Committee

Clerks:
G *Middleton Q.C., J.E. *(Chairman)*
B *Young Q.C., N.J. *(Vice-Chairman)*
F *Uren Q.C., A.G. *(Vice-Chairman)*
R *Redlich Q.C., R.F.
D *Bongiorno Q.C., B.D.
B Kaye Q.C., S.W.
H *Rush Q.C., J.T.
B *Curtain Q.C., D.E. *(Honorary Treasurer)*
A Derham Q.C., D.M.B.
W *Ray Q.C., W.R.
W Brett Q.C., R.A.
F Colbran, M.J.
D Beach, D.F.R. *(Assistant Honorary Treasurer)*
D McIntosh, A.J.
A Caine, B.N.
A Tsalanidis, J.
A O'Bryan, J.
F Bryant, D.
G McLeod, F.M.
D Riordan, P.J.
W Neal, D.J.
A Moloney, G.J. *(Honorary Secretary)*
R Burchell, S.E. *(Assistant Honorary Secretary)*

Ethics Committee

F Zichy-Woinarski Q.C., W.B. *(Chairman)*
D Lyons Q.C., J.F.
F Guest Q.C., P.M.
H Wright Q.C., H.McM.
A Macaw Q.C., R.C.
H Rush Q.C., J.T.
S Magee Q.C., E.N.
R Kenny Q.C., S.C.
A Pagone Q.C., G.T.
A Crennan, M.J.
W Stoikovska, R.
D Davies, J.
G McInnes, R.J.
H Williams, K.M. *(Secretary)*
S Story, F.J. *(Assistant Secretary)*

Chairmen of Standing Committees of the Bar Council

Academic and Continuing Legal Education Committee
F Bennett Q.C., D.M.

Applications Review Committee
R Redlich Q.C., R.F.

Bar Constitution Committee
D Barnard Q.C., J.E.

Bar Staff Committee
G Middleton Q.C., J.E.

Child Care Facilities Committee
R O'Brien, F.I.

Counsel Committee
F Uren Q.C., A.G.

Equality Before the Law Committee
G Lewitan Q.C., R.A.

Ethics Committee
F Zichy-Woinarski Q.C., W.B.

Human Rights Committee
D Fajgenbaum Q.C., J.I.

Indonesian Legal Aid Committee
D Fajgenbaum Q.C., J.I.

Past Practising Chairmen's Committee
D Francis Q.C., C.H.

Professional Indemnity Insurance Committee
D Gillard Q.C., E.W.

Readers' Practice Course Committee
G Burnside Q.C., J.W.K.

Victorian Bar Dispute Resolution Committee
S Martin Q.C., W.J.

VICTORIAN BAR NEWS

Editors
Gerard Nash Q.C. and Paul Elliott

Editorial Board
David Bennett Q.C.
Julian Burnside Q.C.
Graeme Thompson

Editorial Consultant
David Wilken

Editorial Committee
Peter Lithgow (Book Reviews)
Richard Brear (Editorial Assistant)
Carolyn Sparke
Mal Park
Michael Silver (Photography)
Published by the Victorian Bar Council,
Owen Dixon Chambers, 205 William Street, Melbourne 3000.
Opinions expressed are not necessarily those of the Bar Council or the Bar.
Printed by The Craftsman Press Pty Ltd, Burwood, Victoria
This publication may be cited as (1996) 99 Vic B.N.

Fighting for the Rights of the Individual

THE WAY WE ARE?

AS noted in the last issue of *Bar News* deregulation is on the move. No more compulsory clerking! No more compulsory chambers! No more Bar as we know it?

There may be a thinning of the ranks at the Bar as some few individuals or groups opt to practise under the aegis of the Law Institute. There will be those who will "leave the nest" by moving into their "own" chambers. But, because the system works and has worked relatively well, and because change requires effort and rethinking, most of us will stay as we are.

We are, however, being thrust into the commercial world of the 20th century (at a rather late stage in that century) and we will need to adjust to commercial reality. That is probably our biggest challenge.

USER PAYS AND THE RULE OF LAW

At a less personal level, the editors express their continued concern at the fact that the Queen's Courts are in reality no longer open to all. Filing fees and daily hearing fees combine to make it much less clear that the unrepresented litigant has a right of access to the Queen's justice. Perhaps the principle of "user pays" has gone too far and the Queen's Courts are now open to all — provided they can pay.

COMPETITION AND THE RULE OF LAW

We are told we have to be more competitive. Deregulation will make us more efficient. That is today's universal truth. But it may not be tomorrow's. For economic truth appears to be primarily a creature of fashion. In this century western economies, pursuing the chimera of economic truth, have gone from "laissez-faire" to State regulation and control — often extending to the establishment of government monopolies — back to deregulation, privatisation and "free competition".

Like all ideal economic models, the "model" of "free trade", which we espouse at an international level, and the model of "free competition" are both much better than the reality. "Free trade" is as "free" as the economies of Japan, the USA and the European Union choose that it should be. Free competition in the "pure" sense of the term may well lead to the creation of monopolies in the hands of individuals. Therefore, of course, "free competition", like the equality of Aristotle and George Orwell, should be not absolute but qualified.

More importantly, perhaps, theories based on concepts of "free competition" and "efficiency" ignore the fact that the quality of art or music is not to be determined by the number of paintings painted per year or the number of scores written per year. One cannot judge the value of a medical practitioner in terms of the number of patients he processes nor the value of the lawyer by the speed with which he settles cases.

Lawyers do provide a service industry. In commercial matters where they facilitating negotiations, where they draft agreements which leave no room for future dispute or litigation, they are facilitators of economic growth and development. In this area one may properly measure their worth or value in economic terms.

Where, however, a barrister or a solicitor acts on behalf of an individual against the State — whether in the administrative law area or the criminal law area — or where a lawyer acts on behalf of the State in either of those areas, his or her value is not to be measured in economic terms. A viable independent legal profession is an essential component of the sort of democratic society which we have enjoyed — or purported to enjoy — for many years in this country. Every step that is taken to test the "efficiency" of our administrative law procedures — or our administrative lawyers — or of the criminal justice system or those who practise in it by economic criteria is a step towards the destruction of the rule of law.

We are promised a brave new world as from 1 January 1997. Let us hope it is not the world that Aldous Huxley foretold.

It should not be forgotten that, at least in the State sphere, there is a considerable capacity in a powerful executive to undermine the rule of law. It is not a capacity or even a tendency which is limited to any

one political party, nor is it necessarily malevolent in intent. A powerful executive, knowing that it has policies to implement which are for the good of the community as a whole, becomes impatient at lawyers who say "This cannot be done".

THE HIGH COURT AND STATE POWERS

In this context, the recent decision of the High Court in *Kable* v *DPP (NSW)* (1996) 70 ALJR 814,Z is to be welcomed.

The NSW legislature had enacted the *Community Protection Act 1994* which required the making of an order, if the conditions specified in s. 5(1) of the Act were satisfied, depriving Gregory Wayne Kable of his liberty "not because he has breached any law, whether civil or criminal, but because an opinion is formed . . . that he is more likely than not to breach a law by committing a serious act of violence as defined in s.4 of the Act. That is the antithesis of the judicial process. One of the central purposes of which is, as I said in *Re Nolan; Ex parte Young*, to protect 'the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained'. It is not a power that is properly characterised as a judicial function, notwithstanding that it is purportedly conferred on a court and its exercise is conditioned in terms usually associated with the judicial process": per Gaudron J. at 841.

It was accepted that there were no relevant inhibitions in the State Constitution preventing the State legislature from enacting such legislation.

"But in my opinion none of the foregoing considerations mean that the Constitution contains no implications concerning the powers of State legislatures to abolish or regulate State Courts, to invest State Courts or State judges with nonjudicial powers or functions, or to regulate the exercise of judicial power by State Courts and judges": per McHugh J at 843.

The Court held that the legislation was invalid because it infringed the separation of powers embodied in Ch.III of the Commonwealth Constitution.

Although the State Courts are the creatures of State legislation, the High Court appears prepared to use its power as guardian of the Commonwealth Constitution to ensure that State Courts in which is vested federal judicial power, are protected, so far as possible, from executive and legislative interference in the exercise of their judicial function.

THE FUTURE

Members of the Bar will need to be more "commercial" in their approach to life than may have been the case before. It is vital, however, that the "competitive" approach espoused by the politicians and economists of this decade does not destroy our professionalism. It is vital that the legal profession keep clearly before it the fundamental role of the lawyer in protecting the rights of the individual. We must continue to be prepared to fight for the rights of the individual against government, against big corporations and against big trade unions.

Our responsibility as members of the only profession which stands between the individual and his political and economic masters must not be abandoned in the pursuit of "efficiency" or in the name of "free competition".

We believe that the Bar will survive as an entity not very different from the entity that exists today. If it does not, we shall have moved one step further towards government by the executive — a disturbing trend which is not confined to Victoria or to this country.

The Editors

Council Members Again Given "Portfolios"

The following are the list of portfolios:

Chairman:	John Middleton Q.C.
Membership Matters/Law Reform:	Graeme Uren Q.C. and Fiona McLeod
Bar Rules:	Robert Redlich Q.C. and Michael Colbran
Legal Aid:	Robert Redlich Q.C., David Curtain Q.C. and David Beach
Court Liaison:	Stephen Kaye Q.C. and Robin Brett
Clerking and Law Council of Australia:	Jack Rush Q.C. and Peter Riordan
Readers' Course and Coninuing Legal Education:	Robin Brett and Bruce Caine
New Barristers:	Ross Ray and David Neal
Costs and Barristers' Fees:	Bernard Bongiorno Q.C. and Diana Bryant
Barristers' Chambers Limited:	Neil Young Q.C. and Andrew McIntosh
Library and Resources:	Mark Derham Q.C. and Justin O'Bryan
Mediation/ADR:	Andrew McIntosh and Joseph Tsalanidis

SO that the work of the Bar Council can be done efficiently, we have again implemented a system of allocating "portfolios" to Council members. A number of significant matters have been allocated to a senior and a junior member of the Council. The responsible Council members will also report to the Bar Council Meetings on a regular basis in relation to their particular responsibility. Members of the Bar should feel free to approach the designated Council representative if any problem or concern arises. Of course, any member of the Bar remains free to raise matters of concern with me on any topic.

I am honoured to have been re-elected Chairman. I indicated before and after the election that the purpose of my standing for re-election was to provide continuity up until the introduction of the transitional provisions of the *Legal Practice Act 1996*, which received Royal Assent on 6 November 1996. Therefore, I propose that my term as Chairman will not continue beyond the 31 March 1997, on which date I propose to resign as Chairman and the Bar Council to elect one of its members to take my place.

By the time of publication of this edition of the *Bar News*, the Legal Practice Board, although not formally in operation, would have been effectively established, with the initial appointments having been made to the Board. I am delighted that the Attorney-General has accepted our nominations of Alan Goldberg Q.C. and Susan Crennan Q.C. as members of the first Legal Practice Board. It is very important for the initial membership of the Board to have a full understanding of the profession, and also to have an understanding of the changes that have been made and the requirements of the new Competition Code. Both Alan Goldberg Q.C. and Susan Crennan Q.C. have had an active involvement for some years in the formulation of the Legal Practice Act and in the various reforms and changes that have been suggested by various institutions over that time.

I am delighted that the Attorney-General has accepted our nominations of Alan Goldberg Q.C. and Susan Crennan Q.C. as members of the first Legal Practice Board.

I am looking forward to the next few months and to completing a number of projects commenced by the last Bar Council. Hopefully there will soon be put into place an organisation that will be ready for the implementation of the changes and reforms brought about by the Legal Practice Act. I cannot think of many years in the Bar Council's history where so much has been demanded of its members. The reforms to the regulation of the legal profession that the Government in this State has introduced have placed great pressure and responsibilities on all members of the Bar Council. I think that it is in no small part thanks to the previous Bar Council and its members, some of whom have now retired, that we are able to say that the Victorian Bar will, come 1 January 1997, be in an excellent position to deal with the new regulatory regime, the impact of the Competition Code, and the winds of change.

J.E. Middleton Q.C.
Chairman

The 1996/97 Bar Council

The photograph shows the following members of the Victorian Bar Council for the year 1996–97 :

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

(Standing) Justin O'Bryan, Andrew McIntosh, Samantha Burchell (Assistant Secretary), Bernard Bongiorno Q.C., Robin Brett Q.C., Mark Derham Q.C.

Absent: Stephen Kaye Q.C., Jack Rush Q.C., Ross Ray Q.C., Michael Colbran, David Beach (Assistant Treasurer), Bruce Caine, Joe Tsalanidis, Diana Bryant, Peter Riordan, Gary Moloney (Secretary).

Council Members' Portfolios: Looking to 1997

The Chairman announced the appointment of Portfolio's for selected Council Members (page 7 of this issue). Here is how eight members see their responsibilities in 1997.

Costs and Barristers Fees — Bernard Bongiorno Q.C. and Diana Bryant

ALTHOUGH the general acceptance of competition principles means that the Bar no longer even recommends fees for counsel, there are still some areas in which the Bar Council needs to take a vigilant position to ensure that its members are not disadvantaged when decisions are made concerning scales of costs and similar matters which can affect a barrister's income. Whilst scales of costs are maintained as setting the level of recovery between litigants on a party/party basis it is necessary for the Bar to ensure, in the interests of the public as well as in its own interests, that the scales keep up with the increasing costs of practice.

The Costs Co-Ordination Committee, under the chairmanship of the Chief Justice, was established many years ago to ensure that increases in scale costs were relatively uniform across the three Courts in the system. Its membership includes not only representatives of the Institute and the Bar but people with experience in industrial tribunals and economics. It recommends increases in scale costs to the various councils of judges and magistrates who review the scale in each of the courts.

The Bar uses its own resources to provide submissions to the Costs Co-Ordination Committee prepared by outside economic consultants. Recently, we have been successful in having scales of costs in the County Court and Magistrates Court increased relying on work done by Price Waterhouse Urwick. If scales of costs are to remain as the criteria against which party/party orders for costs are assessed (unlike, say, in New South Wales where they have now been abolished) it is essential that the Bar look after its members' interests upon each review of those scales.

In 1997 it is proposed that we undertake an enumeration of scales of costs in light of the recent New South Wales experience. It may be found that some more flexible method of assessing party/party costs needs to be decided in the interests of the Bar and the public it seeks to serve.

Membership Matters/Law Reform — Graeme Uren Q.C. and Fiona McLeod

AS the title suggests, this portfolio covers the two somewhat disparate areas — membership and law reform. Bar members should contact either of us if they have any concerns or queries in either area.

Being responsible for "membership" means in general that we are concerned with the operation of the rights and responsibilities of members of the Victorian Bar with respect to the Bar, the Bar Council and the profession. In particular this involves:

- keeping members informed about changes to legal practice legislation;
- informing members of the Bar Rules and raising concerns about the rules at Bar Council meetings;
- ensuring compliance with the Bar Rules through the work of the Counsel Committee;
- considering and where appropriate

granting exemptions to the Bar Rules through the Counsel Committee;
- addressing members' concerns regarding their relationship to the Bar and the Bar Council;
- assisting members in bringing membership matters to the attention of the Bar Council.

The Bar's involvement in law reform has been basically by way of response to government requests for comments on government proposals, although there has not been much requested in that regard recently, except in respect of reform of the legal profession. But we would like members of the Bar to consider bringing forward for consideration matters which they come across in the course of their practices in relation to:
- law reform generally;
- proposed changes to legislation;
- problems with existing legislation;

which we can have referred for consideration by the appropriate Bar Committee or Association.

We would especially like to encourage junior members of the Bar to approach us on these law reform matters. Worthwhile suggestions can be taken up with government, and who knows, something might be done!

Court Liaison — Stephen Kaye Q.C. and Robin Brett Q.C.

THE principal matters which are currently being dealt with in this portfolio concern the implementation of new procedures for civil case management in the Supreme Court and in the Federal Court. Our role has been to communicate to the courts the attitudes and comments of the Bar in relation to the proposed reforms. In doing so, we have endeavoured to involve other members of the Bar in meetings with justices of both courts in order that the views which are communicated to the courts are properly representative of members of the Bar.

It is hoped that the portfolio will be a useful vehicle by which members of the Bar can communicate to the courts their concerns and suggestions concerning sundry matters relating to the day to day business of the court. The implementation of new procedures by the courts is one example of this. It is important that the Bar as a whole plays an ongoing and constructive role in assisting the courts to evolve procedures which can cope with the complexities of modern day litigation, both criminal and civil. For that purpose, we would welcome the suggestions and views of members of the Bar. Although our focus so far has been on the implementation of new procedures in the Supreme Court and Federal Court, the portfolio is intended to cover all jurisdictions.

Library and Resources — Mark Derham Q.C. and Justin O'Bryan

A major topic for the new year is a proposal that the Bar Council and BCL consider developing a plan for facilitating the cost effective access by members to digital data transmission (particularly through the resources of the Internet) via the telephone system. It is anticipated that this will involve reviewing the capability of the telephone system and the feasibility of increasing its capability, setting software and hardware specifications, negotiating group discounts for hardware, software, access to the Internet and computer access to legal research materials.

The future housing of the Richard Griffith Library is also under review. Shelf space in the existing library on the 13th Floor, ODCE, has run out.

The provision by the Bar of a Parent's Room, with facilities for nursing mothers, is also under consideration.

Comments from members on the above are welcome.

Using Technology to Provide Best Effective Access to Justice

THE Government introduced the Victims of Crime Assistance Bill 1996 in the Spring session of Parliament. It will take effect from 1 July 1997. I wish to take the opportunity in my column to inform Bar members of reforms for victims of crime and also reforms the Government is making in the Evidence (Visual and Audio Linking) Bill.

VICTIMS OF CRIME

The Government is changing the focus of assistance to victims of crime from limited compensation to restoring health and quality of life.

Short-term counselling by way of voucher system will be available to all victims immediately after the crime is reported, followed by more counselling if required.

A referral service will be established. The lack of such a service now results in many victims never finding help and support. Groups representing victims have consistently called for this assistance. The referral service will ensure that all victims who are eligible for assistance are aware of that fact. The existing scheme does not assist all victims as many are not aware of it and do not make an application for compensation. Under the new scheme, all victims will be advised of the assistance available and will be provided with counselling immediately after the crime if they so wish.

Financial assistance up to $60,000 will be available to victims. This covers lost income up to $20,000, counselling, medical expenses and, in exceptional circumstances, other expenses. These other expenses may be for relocation where a horrific offence has been committed in the victim's home or for a self-defence course.

Similar assistance up to $50,000 will be available for people who personally witness a violent crime or, in the case of child victims, are the parents of the child and see or are told about the crime and injury.

When a victim dies, financial assistance from a pool of up to $100,000 will be available for those closely related to the victim. An individual will be entitled to up to $50,000.

The assistance will include counselling, funeral expenses, lost income the person would have received from the victim, medical expenses and other reasonable costs. It may include an amount in respect of personal distress.

Victims will be able to seek compensation for pain and suffering from convicted offenders in the court which convicted the offender. Where appropriate, the State will pursue offenders for damages and any money recovered in excess of compensation paid by the State will be paid to the victim.

These and other measures all aim at assisting victims and those around them to recover from the effects of crime. The counselling service in particular will systematically offer victims the opportunity to immediately address the psychological effects of the crime. Research suggests that early intervention reduces later psychological injury. Currently many victims do not have that opportunity until far too long after the crime.

The new services will not include payments for pain and suffering. Medical research suggests that while these payments may benefit victims, compensation does not alter later symptoms of psychological suffering. Instead, resources will be directed at providing essential services that will meet the needs of more victims immediately following the reporting of a crime.

Further, while it is argued that there is symbolic merit in payments for pain and suffering, the amounts awarded are not reflective of the victims suffering and injury. In fact some victims have described the amounts as insulting.

The new legislation will give victims the right to make a claim to the Victims of Crimes Assistance Tribunal and have their experience acknowledged.

EVIDENCE (VISUAL AND AUDIO LINKING) BILL

This Bill reflects the Government's commitment to enhancing access to the courts in Victoria and its recognition of the benefits technology can bring. Consultation has taken place with the legal profession, the courts and police who have responded favourably to the Government's proposals.

The Bill provides that in appropriate cases persons may appear before the courts by audio or audio visual facilities rather than be required to appear physically before the court. The use of this technology will in all cases be subject to the court's ability to control the transmission, and its over-riding discretion to order that a person appear in person if considered appropriate in the interests of justice. Both the accused and prosecution can apply for the physical appearance of the accused.

This technology will enable receipt of evidence from witnesses in distant locations who may currently suffer loss and hardship in being absent from home, business or employment in order to travel to distant court venues. It will enable expert witnesses to give evidence more conveniently and cheaply. The Bill makes provision for the courts to determine by

whom and to what extent the costs of the link will be paid by the parties. It is anticipated that the use of the technology will prove less expensive for many parties and their witnesses who reside at distant locations from the court.

The technology will enable courts to receive evidence from witnesses and parties in domestic violence or other urgent applications in rural areas where a court may not be available or sitting on a particular day.

The technology will also be used to receive evidence from defendants in custody in preliminary hearings. These matters are bail and remand hearings other than the first hearing, mentions, status hearings, applications for adjournment and arraignments that take place on a date prior to the trial or plea date. It will have benefits for the court by improving scheduling of matters with fewer delays resulting from the movement of prisoners. Prisoners will benefit by avoiding the inconvenience of transfer to the court for minor matters and the State will benefit by cost savings and greater prisoner security.

The Bill provides that for committals, the trial, hearing of the charge, sentencing and appeals, it will be presumed that the accused person should appear physically before the court. An application may be made for the accused to appear by audio visual link and may be granted if consented to by all parties and the court is satisfied it is in the interests of justice.

In any case where an accused person applies to use video link facilities in substantial hearings the Bill provides victims with the right to make a submission before the court who may have a legitimate interest in seeing the accused person physically before them.

To ensure that an accused person in a remote area can communicate in private with his/her counsel, the Bill provides that both the court and the prison facility must be equipped with facilities that enable private communication and the transmission of documents between these persons. Such communication is confidential and as such, inadmissible as if it occurred in each other's presence. The Bill creates an offence if these communications are deliberately intercepted, or the information is used in an unauthorised manner.

Accused persons who are children are dealt with separately in the Bill. For children, the presumption is that they will always appear physically before the court but an order for video link may be made if all parties consent, the court is satisfied that it is in the interests of justice or exceptional circumstances exist.

The Government is committed to providing quicker, more efficient and more cost effective access to the justice system. The Government is also committed to ensuring that Victoria embraces the use of developing technologies where appropriate. This Bill combines both these aims while ensuring that adequate safeguards are in place to maintain the integrity of the system.

Jan Wade, M.P.
Attorney-General

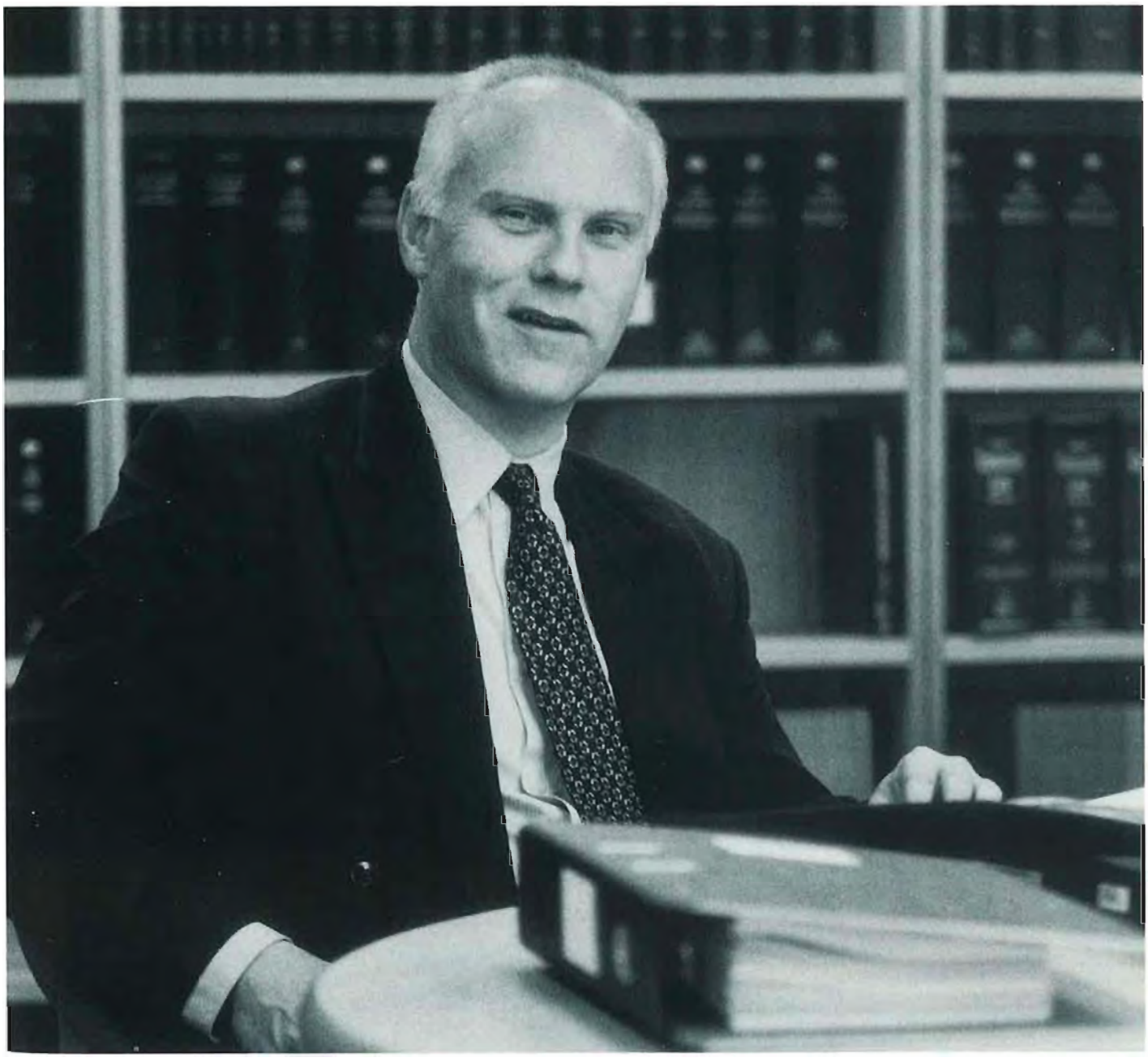
Master Philip Cain

ON 26 November 1996, the Governor in Council appointed Philip Lawrence Cain as the 27th Master of the Supreme Court of Victoria.

The professional background of the new Master is so rich and varied that it is difficult to find an area of legal employment in which he has not had experience. It is reputed that at each stage of his career to date, the Master has kept a letter of resignation in his brief case, ready for the day on which he decided another career move was necessary.

On the day before his appointment, the Master resigned as Deputy Registrar of the Court of Appeal. His new responsibilities as a Master will be primarily for civil appeals heard by the Appeal Division of the Court. However, Master Cain's appointment is a general one and he will exercise all the usual powers of a Master.

The Master was born on 5 September 1953 at Leongatha. His father, Des Cain, was for many years a partner in the firm Oakley Thomson, until he took up a three-year posting as Principal Registrar of the Supreme Court of Vanuatu.



Master Cain

His son, Philip, was educated at Xavier College and the University of Melbourne where he graduated in 1977. His first experience in practice was with Oakley Thomson, first in their city office and later in their branch offices at Birchip and Donald.

In 1980 Philip Cain became Associate to Justice John Keely of the Federal Court of Australia. In March 1982 he came to the Bar where he read with Graham Anderson. His clerk, John Dever, ascribed to him an expertise in difficult testator family maintenance disputes involving large rural estates, no doubt because of his experience as a country solicitor. After 18 months, Master Cain left the Bar for employment with the Victorian Director of Public Prosecutions, John Phillips.

In 1986 Master Cain joined the office of Parliamentary Counsel. During this time he spent five years as the Secretary of the Supreme Court Rules Committee, serving with many of the members of the present Court of Appeal including Justices Tadgell, Ormiston, Phillips and Hayne and with Justice Batt and Senior Master Mahony. It was during this period that the new Rules of Procedure for Civil were developed and refined and the other Chapters of the Rules were drafted.

In the late 1980s the Master assisted in the preparation and drafting of new provisions of the Supreme Court Act to improve the conditions of the Masters of the Supreme Court. Until that time, their conditions of remuneration had been regarded as archaic and Master Cain can accept some of the credit for his foresight in moving masters from a participatory superannuation scheme to terms and conditions similar to judges in this State.

In 1990 the Master joined Blake Dawson Waldron. After 18 months he moved to Sydney where for two years he worked in legal publishing and was responsible for editing a number of the Law Book Company publications.

In 1994, the Master returned to Victoria by invitation to take up an appointment in Courts' Administration with the Department of Justice. He was appointed Deputy Registrar of the Court of Appeal assisting the Registrar, Jack Gaffney, with civil appeals. It will be primarily in this role which the new Master will continue his work with the Court.

During his period with the Court of Appeal the Master has built up an impressive reputation with practitioners for his knowledge and helpfulness. He has, from his wide background, an appreciation of the difficulties of practitioners and the need to balance these with the demands of the Court.

At the time of his appointment, Master Cain also served as Secretary of the Attorney-General's Advisory Committee on the appointment of members of boards, tribunals and magistrates.

The Master has always been a person of wide interests and extensive contacts. His general knowledge, which extends far beyond matters of courts' procedure and administration, was tested some years ago in a brief, but not unsuccessful, appearance on "Sale of the Century". Similarly, the breadth of his personal and professional contacts merely reinforces the idea behind the recent film *The Six Degrees of Separation*, which involves the notion that there are no more than six degrees separating any two persons on Earth.

The Bar congratulates Master Cain on his appointment and wishes him every success.

The Cause of Death (Apocryphal?)

AT the 1994 annual awards dinner given by the American Association for Forensic Science, AAFS president Don Harper Mills astounded his audience in San Diego with the legal complications of a bizarre death. Here is the story:

On 23 March 1994, the medical examiner viewed the body of Ronald Opus and concluded that he died from a shotgun wound to the head. The decedent had jumped from the top of a ten-storey building intending to commit suicide (he left a note indicating his despondency). As he fell past the ninth floor, his life was interrupted by a shotgun blast through a window, which killed him instantly. Neither the shooter nor the decedent was aware that a safety net had been erected at the eighth floor level to protect some window washers and that Opus would not have been able to complete his suicide anyway because of this.

Ordinarily, Dr. Mills continued, a person who sets out to commit suicide ultimately succeeds, even though the mechanism might not be what he intended.

That Opus was shot on the way to certain death nine storeys below probably would not have changed his mode of death from suicide to homicide. But the fact that his suicidal intent would not have been successful caused the medical examiner to feel that he had a homicide on his hands.

The room on the ninth floor whence the shotgun blast emanated was occupied by an elderly man and his wife. They were arguing and he was threatening her with the shotgun. He was so upset that, when he pulled the trigger, he completely missed his wife and the pellets went through the window striking Opus. When one intends to kill subject A but kills subject B in the attempt, one is guilty of the murder of subject B. When confronted with this charge the old man and his wife were both adamant that neither knew the shotgun was loaded. The old man said it was his long-standing habit to threaten his wife with the unloaded shotgun. He had no intention to murder her, therefore the killing of Opus appeared to be an accident. That is, the gun had been accidentally loaded.

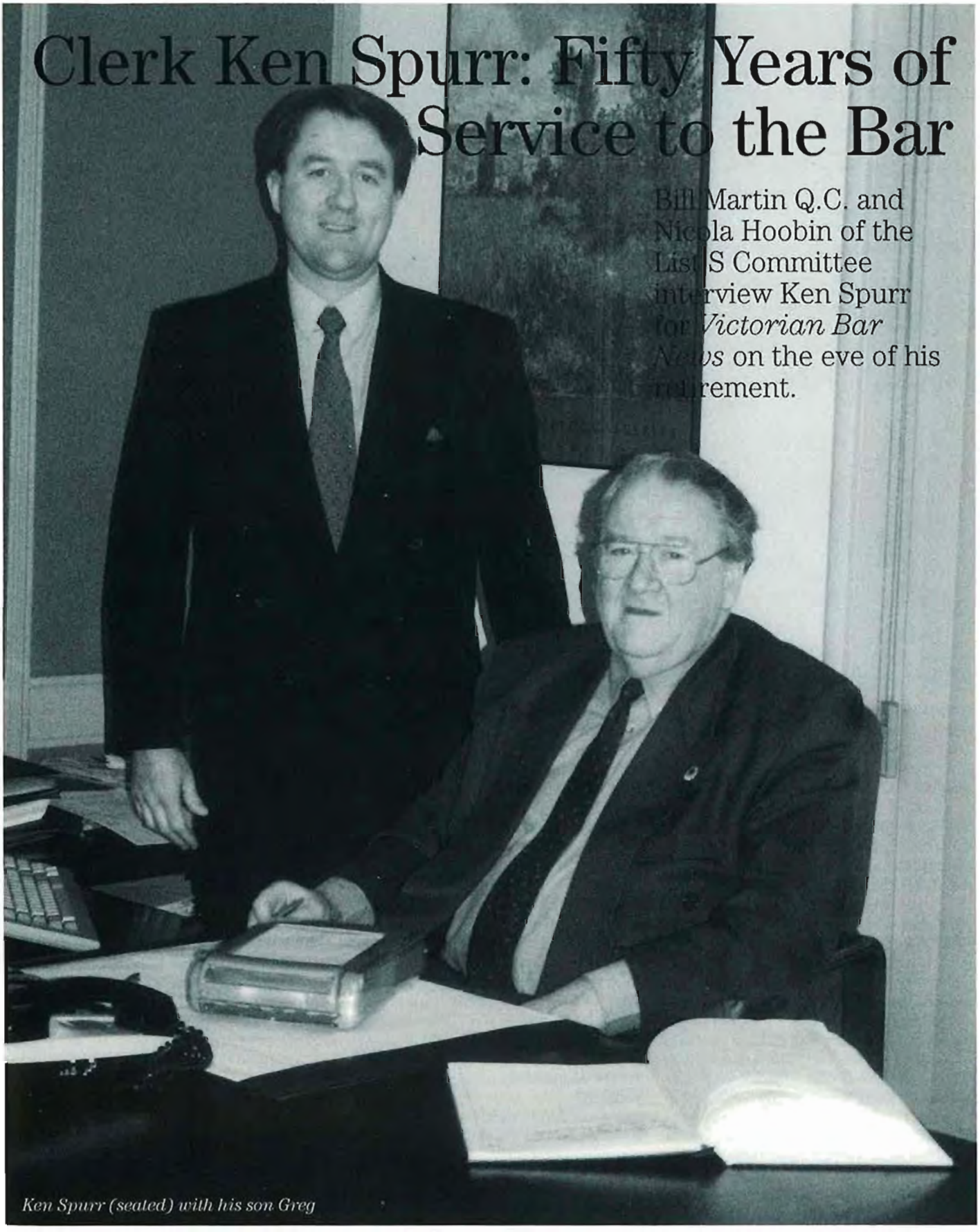
The continuing investigation turned up a witness who saw the old couple's son loading the shotgun approximately six weeks prior to the fatal incident. It transpired that the old lady had cut off her son's financial support and the son, knowing the propensity of his father to use the shotgun threateningly, loaded the gun with the expectation that his father would shoot his mother. The case now becomes one of murder on the part of the son for the death of Ronald Opus.

There was an exquisite twist. Further investigation revealed that the son, one Ronald Opus, had become increasingly despondent over the failure of his attempt to engineer his mother's murder. This led him to jump off the ten-storey building on March 23, only to be killed by a shotgun blast through a ninth storey window.

The medical examiner closed the case as a suicide.

Clerk Ken Spurr: Fifty Years of Service to the Bar

Bill Martin Q.C. and Nicola Hoobin of the Lists Committee interview Ken Spurr for *Victorian Bar News* on the eve of his retirement.



Ken Spurr (seated) with his son Greg

BM: Ken I would like to ask you something about where you were born and brought up.

KS: I was born in Albury, New South Wales on the 23rd of September, 1931. My father worked for the State Rivers and Water Supply Commission and we lived on the site of the Hume Dam or my mother was when she went across the border to the NSW side and I was born in Albury. Right in the centre of town where the Civic Centre is now.

NH: How long did you stay in Albury?

KS: Well, I didn't stay in Albury. I was only there when I was born. We left there in about 1935 and went to Yarrawonga where they built the Yarrawonga Weir. We lived in that township for three years and when that was completed we moved to the Lauriston Reservoir near Kyneton.

BM: Where was most of your primary education spent?

KS: Well, I started school in Yarrawonga in the catholic school there, with the nuns, and then we went to Kyneton. I was with the nuns there for one year I think. The second grade and then went on to the Marist Brothers for about a year and a half.

BM: At Kyneton as well?

KS: At Kyneton. I was there before Frank Walsh. But then we came to Melbourne. My mother became ill and we had to come to Melbourne for treatment. Dad had to give his job away with the State Rivers and that was in 1941.

BM: How old were you then?

KS: I was ten, but we came down in July 1941 and I was 10 in September 1941.

BM: When did you start getting ideas, or how did you learn, about barristers clerks as it was an obscure sort of job?

KS: To begin with, I went to the technical school and did engineering. I got an intermediate technical certificate of the higher standard and I won a government scholarship and I went to Footscray and I did a year of a Diploma in Engineering.

BM: How old were you then?

KS: I turned 15 in September 1946. However, I became ill and contracted pneumonia. In those days we didn't have antibiotics. It took about six weeks to get over it and I didn't complete the year and then funds ran out and I had to start work. What happened was my local grocer (where I used to cash my scholarship cheques) had a son-in-law who worked at Blake & Riggall. He recommended me to A.B. Nicholls. At that stage I didn't know much about barristers or clerks or anything in that area.

I was interviewed by Perc Dever on a Saturday morning. He explained to me that "that was a brief with pink tape around it". Perc could sell anything.

BM: How old would he have been at that time?

KS: He was about 30. He'd come back from the war. He had just started working for Nicholls about nine months before I did. He was employed by A.B. Nicholls. He was the fellow I first started with. He was the leading clerk in Melbourne at the time. Doug Muir's father was still alive. Jim Foley had not been appointed.

BM: Who were the clerks then?

KS: There were two clerks A.B. Nicholls and Fred Muir. We were in Room 27 Selborne Chambers and they were opposite. I can't recall the room number.

NH: Do you recall how many barristers there would have been at that time?

KS: I would say there would have been about a maximum of say 50 or it could have been 60. Nicholls had about 30 odd and Calnin had a few in Equity. I think about 20. There could have been 50 barristers I'd say offhand.

BM: So there were three clerks?

KS: No there weren't. You see when Jim Foley was appointed after Fred Muir died Dave Calnin was given the equity branch of their office. He had a branch office over there. Then there became three.

BM: What were your early thoughts about working in a clerk's office Ken?

KS: I always enjoyed my job even as a messenger and a clerk when I arrived back in chambers and relieved the telephonist who was on the board at the time. I always enjoyed my job.

NH: How much were you paid when you first started?

KS: Two pounds a week less sixpence tax. Most of my friends were getting thirty shillings a week.

BM: So you were well ahead.

KS: No, well I thought it was quite reasonable at the time.

BM: When did you start harbouring ideas of being a clerk yourself?

KS: Well, I suppose possibly about the age of 20. I suppose I thought it would be nice.

BM: What age were you when you started here?

KS: Fifteen and a quarter.

BM: It took another, what, 20 odd years before you actually managed to be a clerk yourself?

KS: Seventeen years, I was there.

BM: When did you open up your own clerking operation?

KS: 26 August 1963.

BM: After starting up with Nicholls & Dever what happened in the meantime between opening up your own clerking office and staff? Did you stay with Nicholls & Dever or what happened?

KS: I was with Nicholls & Dever and moved into Owen Dixon Chambers from 1961–1963. When we came to the building they'd decided that they would need a couple more clerks. The Bar was growing. I didn't really apply because there was a great war going on and I was the meat in the sandwich sort of thing.

BM: What was the war?

KS: Well Nicholls & Dever were sort of split down the middle and they were going to separate. Nicholls said "will you come with me" and I said "right", sort of thing but that didn't come to fruition. At about that time Harvey rang the office. He said "My name's Harvey, I was a barrister's clerk in England" and he asked me what the chances of starting up over here were. I said "well you had better go and talk to Oliver Gillard" because he was the

Ken Spurr (seated) and office staff: (L-R) Shirley Durran, Ida Postuma, Antoinette Tardio, Melissa Gilhome, Simon Collins, John Papadatos, Tom Salter, Kathryn Janes, Mike Rowan and Greg Spurr. Missing: Pauline Eccles-Gordon and Trish Fox.

chairman of the committee which organises these things. They were impressed with Harvey and they gave him the job and then he eventually defalcated and when he did there were applications for the vacant position of clerk. Dougie Muir put in. I didn't put in because I was happy in a way, I had a good job with reasonable pay, a young family and a mortgage. Xavier Connor Q.C. approached me to take it on. Then there was a counter-offer from Nicholls & Dever. They offered me a fifth going up to nearly half in five years' time.

I decided to go on my own because I wanted to do things my way.

BM: Taking over the barristers on Harvey's List?

KS: That's right, Harvey's List and a few silks who were on the Bar Council who came.

NH: Who were those silks at that time?

KS: Well, the people who were silks on the List were, Dr. Coppel and George Lush, Xavier Connor. There were about eight. Kevin Anderson, Peter Coldham, Peter Murphy, Jack O'Driscoll.

BM: Who were the leading juniors in those days — back in 1963?

KS: On what, on this List? Well we didn't have a really strong middle bar. Fellows like Tolhurst, Woodward, Griffith (I don't think he was a silk at that stage), Dick Griffith, Ken Marks. I mean fellows like Tadgell, J.D. Phillips, Ormiston. They were relatively junior at the time. Yet they were quite busy barristers.

NH: At what age did barristers come to the Bar at that time — straight after completing articles?

KS: It varied. But there were more I think came soon after their articles, at about the age of 25.

BM: Do you have any views about that — whether they should come either at a young age or an older age?

KS: Oh, I think if they are good enough — if they are brilliant they could come straight away — great academic records. Nowadays, people are tending to get more experience before they come and networking — at least that does help.

BM: What have your views been generally about being a clerk? How has it gone as a business, career path?

KS: I've enjoyed it greatly up until now.

BM: What is the yardstick of a good day?

KS: When we were getting plenty of work — most people were happy. I was making a profit. It is a bit different with some of these people now. I went into debt when I went into the business, which I couldn't afford. The barristers guaranteed me my account but I had to get out of trouble myself. They weren't actually paying it out of their pocket they just guaranteed my overdraft. It took me a couple of years for me to get out of it.

BM: When do you think the best periods of being a clerk were?
KS: Probably the 1970s as far as I was concerned. That is financially. You see when we were in the old building at one stage I had the biggest List — over 110 which was extremely busy. We had about half the staff we've got now.
BM: This is in the early 1970s wasn't it?
KS: That could have been probably the early 1970s but since we came over here (Owen Dixon Chambers) — probably the late 1970s I suppose — we had the little bit of a hiccup in the early 1980s didn't we — commercially — it affected everyone, including us.

We used to live on motor accidents and traffic matters and now a lot of things have dried up. A lot of paperwork has almost disappeared.

BM: We have some recessions from time to time and we are not in good economic times now. How has that affected, obviously, the business?
KS: We have as you know had different groups who have left the List. We lost quite a few to the new clerk Tippett when he set up with that arrangement there.
NH: What other significant changes can you recall in your history of being a clerk that spring to mind?
KS: Changes in the jurisdictions. In being a clerk, you know I mean we used to live on motor accidents and traffic matters and now a lot of things have dried up. A lot of paperwork has almost disappeared. People used to have tons of paperwork. It kept them busy when they were out of court and kept their minds occupied. Less time to think about their problems I suppose.
BM: What's your view about whether a clerk should be salaried or whether we should have percentage clerking? As you know our List has again confirmed the percentage arrangements.
KS: Well, percentage gives you a bit more incentive I think, particularly you'll have your halcyon days and you'll make a few bob. I had about three good years I'd say you know which more or less set me up. We were never allowed to incorporate which was quite wrong I think and as a result of incorporation we have been able to provide for our retirement years. Things have changed in that direction.
BM: What are the attributes of a good clerk?
KS: You have to be everything. One of the main things is to be diplomatic. I mean you can sell people in your way. You just can't go the hard sell because solicitors react in the opposite way. You have to pick your mark — each solicitor is different — each client is different. You have to treat each one differently. It's a matter of experience and knowledge and nouse is a big thing. You see, despite what a lot of the barristers think, solicitors don't want to be given an enormous amount of detail about individuals unless they particularly ask for it. Most people ring up and say "who's available" and most of them believe they know who is the best at everything anyway — you know the experienced ones. Basically they don't want to hear when you were born and where you went to school and you know all this sort of thing. They want to know what you have done as a barrister.
BM: Has there been any change in the attitude of solicitors in their relationships with clients over the years?
KS: Yes, they tend (which I think is a bad mistake) to go direct to barristers who often are not there and they ring their phones and they don't answer — they've got them diverted somewhere and the phone doesn't answer — doesn't come back to the clerk. In the old days they did things through the clerk, we negotiated fees with them — we never had any problems when we negotiated fees — you know, very rarely. The clerk did the job and everyone finished up happy. Now some barristers want to fix their own fees and you get reactions that "he charges too much" and solicitors can't say things to the barrister that they can say to the clerk.
BM: What sort of things are you talking about that they can say to clerks they can't say to barristers?
KS: Well, "it's too much" or "it's exorbitant" or "I don't think you're worth it". You know what I mean, they talk more frankly which is only natural.
NH: What do you think of the changes to the profession due in January 1997?
KS: I think they are drastic personally.
BM: What are your views about whether clerks should be compulsory and secondly, what do you think about the future for clerks even if they are not compulsory?
KS: Personally I think they should be compulsory. Anyone who belongs to the Victorian Bar should contribute towards the welfare of the Bar for everyone's sake. From the solicitors' point of view, they know where to go when they want a barrister. If you have barristers spread all

over the country in little places, delivery of briefs becomes a problem, contacting the individuals becomes a problem. In most cases they are going to have to employ people anyway to do the jobs that we do now and I think the majority of barristers would realise that.
BM: So you think that there is a future for clerks because of the services they provide?
KS: I think so. Things can change. This business of being entrepreneurial and all that sort of thing. I doubt actually just how much work that will bring in to individuals really. I mean you might pick up an odd client here or there and solicitors are now tending to do a lot of their own work anyway. I don't think they are going to change that attitude — their own appearances — doing their own paperwork and I think it is going to be hard for the Bar myself. Quite a number won't survive — that's my view.
NH: Can I ask you Ken about your relationship with the other clerks over the years?
KS: Well, we all got on extremely well and

(L-R) Ken Spurr, Bill Martin Q.C. and Nicola Hoobin "interviewing".

we still do. We have been discouraged from doing that by Professor Fels' idea that we have to be very competitive and we are not allowed to sort of share getting the lists or something like that and its just not practical and we get on extremely well. The normal active clerk who is helping to bring along the junior bar is very cooperative. We help each other. I mean you get the situation of the lists they have in the Supreme Court and they say "oh well we'll send the clerks one copy" you know they are not going to send out 12. Anyway, if they send 12 it takes too long to come through so they send one copy and then one of the clerks is going to distribute them. We pick up the Federal Court list — Tom goes over and gets that list and distributes it to all the clerks. We don't have to do that but it's something some of the others do with another list. That's the only way we can provide the service of a barristers clerk.

NH: Have you ever socialised with the other clerks outside of work?

KS: Yes, in fact we are having a night out on 29 November 1996 — the present clerks and some of the former clerks and their wives. We have a marvellous relationship with the other clerks and I hope it continues. In the *Bar News* of Spring 1990 there is a picture of the clerks who were around at the time and I note that three of them, Kevin Foley, Barry Stone and Doug Muir, are now deceased. We all got on extremely well. There is the competition there. If everyone wants to get a solicitor in he can and get his work. The transferring of briefs has always been amicable and we can operate with each other extremely well.

BM: Tell us about whether you think there has been any changes in standards amongst the barristers over the years.

KS: Any changes in standards?

BM: Or practices or behaviour — professionality — that sort of thing.

KS: I don't think that the same camaraderie or loyalty or ethics is practised these days as they were in the early days.

BM: What are the ethical things that you don't like at the moment that you see?

KS: Oh, sort of untrustworthiness between barristers. I mean a barrister is a man of his word — you get cases where people don't practise that.

BM: Sharp tactics — that sort of thing?

KS: That sort of thing — having matters struck out in court for counsel running a bit late or something like that — that never would have happened years ago.

NH: Is that a sign of the times or merely the fact that there are now more barristers at the bar?

KS: Sign of the times, nothing to do with more barristers. I mean we've had 1100 or 1200 barristers for years. Everyone, in general, like the community is cut-throat and vicious.

BM: And what about the change in demand for barristers? Any comment about that?

KS: Well, there is not the demand for barristers that there used to be. The solicitors are doing a lot of their own work now.

BM: Do you think that is a bad thing?

KS: Bad, as far as we are concerned — but good from the solicitors' point of view because they have to do it to survive. Their practices have changed. Years ago they would not have been able to leave their offices in most cases to go and appear in court — now they have to do it to survive.

NH: Have some solicitors that originally briefed you when you started out as a clerk remained briefing the List?

KS: They all do basically. You do get a drift whatever you do, new people go to new offices, but basically we have an enormous loyal background who brief us whenever they have got anything — when they are jammed basically or something that is a bit too heavy for them — they still brief us — they haven't dropped off our List — people might think so.

NH: Ken, you were obviously here when the Bar, or barristers, were of the male gender only. Were there any significant changes when women started appearing in the court rooms of Victoria?

KS: When I started there were no lady barristers — women barristers. Joan Rosanove came a bit later — she had been practising as a solicitor and doing court work I think before she came. Molly Kingston was the next one and then Elaine Kiddle came — she was on Nicholls List and Elaine Kiddle was here for a while.

NH: What were they like? What were those women like as people?

KS: Oh, well, they were very nice but they had to a bit more aggressive than the normal woman I suppose.

NH: Did they drink with the men in the bar after court?

KS: No, I don't think so. Not positive — not Molly — no.
BM: You have actually had a large number of females on your List.
KS: I know, but we've lost a few in recent times. I don't know what it is, but our women have done very well really when the work has been there. You know there is not the volume of work. I had the reputation, I believe, for giving women a fair go — I might say — that's why they came — one of the reasons I suppose.
BM: One of the topical things that barristers always wonder about is (and you have a very good reputation for this) distributing the work fairly. How do you do that in practice?
KS: Well we are used to giving the solicitors what they want. If they want a certain person in a certain jurisdiction to do a certain job we try to do that. If there is a bit of a choice and Joe Bloggs for instance is very busy and they are happy to brief another person, we'll direct it that way. Or people say "just get me someone to do that" and if they know someone can do this particular job and that he or she is capable. The other thing is that you have to also get people who are compatible with certain people. For example, solicitors say to me "you know the sort of person I want". You get certain people that you know just would clash with that solicitor so you have to tend to look after that aspect of it.
NH: What is it like when a member of the List takes silk or is appointed to the bench. Does your relationship as a clerk change as a result of such elevations of counsel?
KS: Not particularly, not in my case, I don't think — I never really had that problem.
BM: On that topic, you have had a lot of judges over the years.
KS: An enormous lot of judges.
BM: Have you ever worked out whether it's more than any other List has had?
KS: I'd be surprised — it would be very hard to beat. The Supreme Court is full of them — people that I acted for. The County Court — we filled it up over the years — we have only got one in the High Court — that's Daryl Dawson — the only Victorian on the High Court bench. Michael Black is the Chief Justice of the Federal Court and before that Ken Jenkinson and Ted Woodward. Some people who have been on the Industrial Court, and died like Jimmy Robinson and Peter Coldham; I had Barry Madden at one stage. We have had an enormous amount of judges go through the List — Tolhurst from the County Court (who died unfortunately) — at one stage we had Anderson, Murphy, Lush on the Victorian Supreme Court — probably more that I can't think of — Ken Hayne is over there at the moment. Some of those people were established when I took over, but they were with me for some period — Tony Murray was another one.
BM: Ken, tell us who have been the really colourful barristers that you know or have known of over the years.

We are used to giving the solicitors what they want. If they want a certain person in a certain jurisdiction to do a certain job we try to do that. If there is a bit of a choice and Joe Bloggs for instance is very busy and they are happy to brief another person, we'll direct it that way.

KS: Going back to my youth I'd say John Starke was probably one of the most colourful fellows I saw, unusual; his predecessors were legal people, judges, His father was on the High Court and his uncle was Chief Justice of the Supreme Court at one stage, Gavan Duffy. John Starke was about 6'4" and he would come into Selborne Chambers and he'd have a scarf on that his mother knitted him when he was in the army. The scarf used to hang down to his feet. He would wrap it around his neck a couple of times and it would hang back to his feet again. I think it had a bit of moth hole in it but apart from that he dressed normally. Old Donny Campbell. He had two irons on his legs. He and Smithers used to come through the doors each morning. Selborne Chambers had two swinging doors. When Donny Campbell came in in the morning you could always hear him — his irons in his legs would thump thump thump and then he would cough so everyone would know he was there. Then Smithers came through the door one day and Ken Gifford had just come to the Bar. Now Ken was of a small statue with a pale face, a very energetic fellow, and as he passed them he said "Morning Smithers, morning Campbell" his first day virtually at the Bar. Donny Campbell said "Who was that little white rabbit?" so the name the "white rabbit" stuck with Ken Gifford for many years.
BM: Other more recent ones?
KS: Woodsy Lloyd would have to be right up there. Woodsy Lloyd, I mean he was the fellow who fancied himself as a bit of an engineer. He built this miniature cannon and he demonstrated it in his chambers one evening. He blew a hole in the front of his desk so he had this hole in his desk. Then later, in more recent years, he built a full-sized cannon and he fired it down on his property at Merricks. He was a very colourful character. He had been on a logging camp in Canada at one stage before he came to the Bar and did all sorts of things like that — adventurous. He was also an extremely good advocate.
BM: Do you think there are reasons why we don't have any colourful characters at the moment?
KS: Yes, but there's still the odd one around I think.
BM: Who are the odd ones at the moment? Colourful, I mean.
KS: I think Sandy Robertson is a very colourful character. He is a large size, his habits. He barracks for the St. Kilda Football Club and he goes along there with his big red white and black scarf around his neck and I think he's a very colourful character. He's done extremely well. John Healy — you always know when John's around. He's a colourful character. I think most of the silks are a bit more conservative.
BM: Ken, tell us about how you've managed to balance having a pretty full-on job 8.30 to 6.00 plus work you do at night I've no doubt with family life — you've got a large family haven't you — four or five kids?
KS: Four sons. Three of them married and I've got five grandchildren. Actually what I wouldn't like to go back to is the early days. It was a lot more difficult then because I was working about 80 hours a week when I started on my own with a very small staff. In those days Bob Bloomfield and I had to do our banking at the end of the day, so we knocked off in those days at about twenty past five or so and closed up shop. Then we got into the banking and we had to do it all by hand, basically, although we had a little adding machine, and then we had to take it home at night. We had to sort out the mess that Harvey had left because he didn't leave proper records. In addition to that, we had to balance the books for two years of Harvey and that took time as well. Plus the fact that I had to go out and do a bit of PR

in my spare time trying to get some clients from the big fellows. I was taking on Foley and Hyland and Dever who were all established — Calnin was still going and so we had to try and attract work.

NH: How did you practise PR then?

KS: Mainly over drinks. We did a lot of our PR in hotels in those days. You went along and you would be surrounded by any number of solicitors and their clerks and that's the way it mainly was done — might have some to dinner occasionally or lunch.

NH: Has it changed now?

KS: Yes. I don't go to hotels anymore. I mean over the years I have had a lot of contacts with people at the RACV Club where an enormous amount of solicitors go — that's one of the main contact areas there — the odd lunches — people are more inclined to go out to lunches these days I think.

BM: Who are the colourful solicitors that you've seen over the years?

KS: Well the first one I'd say was old Septimus Jones. Jones was an elderly fellow with striped pants in Chancery Lane down there and he used to deliver a brief written out in old English by hand. I thought he was a very colourful character. A bit unusual — I think he is the grandfather of Ben Morry who is a solicitor. You see in those days there were a lot of colourful fellows like Mal Clarke and Tony McNamara and Jack Hearle, they were all common law fellows, they were very busy running down insurance men and they'd go to court and get Mornane and all these fellows going in about four jury lists — then they'd come back to Arthur Nicholls about 11 a.m. and say "come around and have a scotch at Menzies". That was 11.00 a.m. they used to start. They used to really drink in those days — they did their job too in the common law. They had it all organised.

BM: What about other colourful solicitors?

KS: Michael O'Phelan. He was a character. If you struck him in a bar he would say "oh no he wouldn't drink that Scotch whisky he had to have Irish whiskey". There was only one whisky and it probably tasted much the same anyway, I think. He maintained he was a descendant of royalty in Ireland. He was a colourful fellow well known around the profession.

BM: Any others that you can remember?

KS: Clarke was a very colourful fellow and very capable fellow but he was also a diabetic and he was one of the ones who used to come down for a whisky in the morning and he shouldn't have been drinking at all probably. But he was a colourful character — he was very well respected. He was one of the ones who liked a little nip at about 11.00 a.m.

BM: What is the worst mischief you got up to with these blokes, Ken?

KS: We used to have these nights out on Friday night and some of the people who were there in those days were Barry Beach, Austin Asche, Leo Lazarus, Peter Wilson. Different bodies used to go but Friday night was a night you played. We used to down to Hosies Hotel and have a meal. And then you would have the odd solicitor with us. Mates. So we did a bit of PR at the same time. But those are the sort of things we used to get up to in those days. It was recognised that Friday night was play night for the males you see but that's probably changed now too.

BM: Yea, I bet it has. You don't get that sort of thing now do you?

KS: No, never.

BM: Ken, tell us, Norma has obviously been a good supporter for you over the years.

KS: Oh yes, for sure. Without her I would not have been able to do the job. The children give you the incentive to go on too.

BM: Norma's health hasn't been too good lately. How is she at the moment?

KS: Well, she's as good as she'll ever be I think. You know she still suffers with arthritis and she aches a lot and has trouble walking too far. Her feet are sore. To look at her she looks quite good on the outside.

BM: What are your plans for your retirement?

KS: Well, we do hope to travel a bit. See more of Australia.

BM: You haven't travelled much at all — you haven't been overseas have you?

KS: No, I've been to Tasmania.

BM: Yea, and that's about it.

KS: This business, particularly in the early days, it was impossible to get away for any length of time. People don't realise just how busy we used to be. I mean you'd come in in the morning and you wouldn't have time to take your coat off. The phone didn't stop ringing. You wondered what had hit you around 5.30 (as it was in those days we used to knock off) or usually you were there until about 6.00 anyway. So you didn't have a lot of time. As for taking a few weeks off to go overseas that wasn't possible and in the early days I couldn't afford it anyway — for some years.

NH: Your son Greg has been working as a clerk in your office. How many years has he been working with you and what has it been like having him work with you?

KS: Well, we've got on very well, probably because we're reasonable sort of people. You can have little difficulties but we've survived and he's been here 19 years, I think. He first came in when he was at school, on holidays, and sent out a bit of mail and things like that, when he was about 14. He has a fair amount of experience around the place.

NH: Ken, now that you are leaving the Bar are you satisfied with what you have achieved in your career here?

KS: Definitely. I would have liked my son to carry on, naturally, but I think possibly it could have been done with the help of the staff he's got there but that's not to be. That's the only disappointing factor.

NH: What would you say has been your greatest achievement?

KS: Well, you know I have not achieved a great deal myself. I've been very happy that we've had a very good List for a long time and most of them have been pretty successful until recent times when things are very tough. I still have successful people. I've only done the job that I'd set out to do, basically, and one of things was to try to be fair to everyone. I've helped everyone. I helped people who were their own worst enemies. John Bennett and Sam Granat and all those fellows. Tried to help them whenever I could.

NH: You've also got a diversity of staff in the office ranging from Tom Salter who is 87 years old to quite young people who all seem to get along well enough with each other. Can you tell us more about the office?

I've only done the job that I'd set out to do, basically, and one of things was to try to be fair to everyone. I've helped everyone. I helped people who were their own worst enemies.

KS: Yes, Tom came to us about 23 years ago to help us out as a messenger and he did an extremely good job. He can only work part-time at the moment. He can only claim a small amount of money and from his point of view he is happy to be working there — keeps him going. A lot of people are very happy to have him there. Some people think he should be retired or something but as far as I am concerned he does a very good job. I've always had the problem you get people who say "they are not up to scratch" but you can't get Rhodes scholars to deliver briefs and if

you do they leave you. Well that's what I found over the years and at one stage in the career you couldn't get people that would work you had to take what you could get. Now there are more people readily available and we have probably a wider choice but our staff are extremely good, we back up each other. We have been able to provide a continuity of service which you can't do by having a skeleton staff.

BM: Tell us what your thoughts are going to be when you walk out the door in January 1997.

KS: I'll be sad to leave. I mean after 50 years everything is going to change. But in a way I'm happy. You've got to do it sometime and I believe the burden will be off my shoulders and I only hope I can settle down to a new life.

BM: What does the new life involve — golf, bowls?

KS: Well, I'm going to try those things. I haven't really played much of either. I used to play other sports. I never ever really had half a day to spare to play golf in my younger days. I try those things — they tell me you can become addicted and tied down to some of these things which take your life right over which wouldn't please my wife very much.

NH: Are you going to see a lot more footy matches?

KS: Oh, about the same number of matches I think — all of them. We have this dog which is fairly old and not in very good health and my wife is frightened to leave it with anybody and the family have got their own dogs and children and we are both a bit tied down with this dog. So first of all, we will probably go down to Dromana and have a few weeks after I've left — sort of a holiday. We'll spend a bit of time down there and we do hope to travel a bit, but then it's a bit of a handicap because of Norma's inability to walk too far. I said to her the other night that I should get a babysitter and go overseas.

BM: Ken, Nicola and I would like to wish you all the best obviously and I am sure everybody else on the List does too. Thank you.

KS: Thank you.

Beware the International Con Man [Letter Received by Counsel]

Confidential and Urgent

Attn: Chairman/Managing Director

Sir,

Re: Our urgent request for your unallowed co-operation/transfer of US$22,500,000.00 (twenty-two million five hundred thousand U.S. dollars only) and the importation of industrial goods.

WE are a team of top officials who are highly placed with the Nigerian National Petroleum Corporation (NNPC), as well as the Federal Government of Nigeria contract review committee, who are interested in commencing an immediate business relationship with you. We hereby solicit strongly for your assistance, to enable us transfer (forex) funds total US$22,500,000.00 (twenty-two million, five hundred thousand U.S. dollars only) into a reliable bank overseas, which you will have absolute control over. (This is very important.)

SOURCE:

During the last interim government here in Nigeria, government officials set up companies and awarded themselves contracts which were grossly over-invoiced in various ministries. The present military government set up a contract review panel and we have identified a lot of inflated contracts funds which are presently floating in Central Bank of Nigeria ready for payment. However, by virtue of our position as top civil servants and members of this panel, we cannot acquire this money in our name. Therefore, I have been delegated as a matter of trust by my colleagues of the panel to look for an overseas partner into whose account we would transfer this sum of US$22,500,000.00 (twenty-two million, five hundred thousand United States dollars only), hence we are writing you this letter.

SHARE:

We have agreed to share the money thus:

1. 30% for the account owner (you)
2. 60% for us (the officials)
3. 10% to be used in settling taxation and all local and foreign expenses.

It is from the 60% that we wish to commence the importation business. Please note that this transaction is, 100% risk-free and we hope to commence the transfer latest five (5) banking days from the date of the receipt of the following information by fax, your bank's name, company's name, address, account number, telex and fax.

The above information will enable us prepare letters of claim and job description respectively. This way, we will use your company's name to apply for payment and reaward the contract in your company's name. We are looking forward to doing this business with you and solicit your confidentiality in this transaction. I will give you more information as soon as I hear from you.

Yours faithfully,
Dr. Victor Okon

Biography of a Professional: Sir Owen Dixon

Discussion paper delivered at the conference, "History and the Professions", History Institute, Victoria, Stonnington, Deakin University, by J.D. Merralls Q.C.

IN this company I do not have to say that I am not a practising historian. But I should say that if I profess to be a practising biographer it is only in the sense that I am trying to acquire the skills by trial and error that may some day permit me to perform in public. Law not history is my profession and it has been as a lawyer with a keen but nevertheless amateur interest in history that I have been engaged for some time upon a biography of Australia's greatest lawyer.

The biography of a person whose distinction was intellectual or artistic may be attempted either by a generalist or by a specialist in the subject's own field of activity. The choice will sometimes be determined by the nature of the speciality. But the purpose of the work is important too. A biography of a specialist which is intended mainly for readers in his own field usually will be written by a specialist. A biography which is intended to introduce a specialist to a general readership will often be undertaken by a writer who has to learn on the job. The distinction is not clear cut. Not all specialists lack the expository skills or the wider knowledge that a generalist is presumed to possess. Where they have both, a work of the breadth, depth and elegance of Skidelsky's life of Keynes may emerge. Where they do not, it will be that of a Roy Harrod.

The nature of the task will often determine the qualifications of the author. It is hard to imagine a work about a specialist intended for specialists not being written by a specialist. The nature of the task will determine not only the qualifications of the author but also the assumptions that can be made of the reader's knowledge. A writer for a general readership has the initial problem of assessing the knowledge and comprehension that can be assumed and the consequent one of writing within the limitations imposed while expanding knowledge and enhancing comprehension. There is a problem for all of deciding what can be left unsaid.

The difficulty in writing about specialist matters for a universal readership was demonstrated to me when I sent two sample chapters of the biography I am writing of Sir Owen Dixon to Sir John Young. Sir John, like me, spent a term as a young barrister as Dixon's Associate and knew him well. The chapters I sent him were the first, the family "pre-history", and a later one which dealt with an arcane constitutional case in which Dixon was involved in an unsuccessful attempt by the Victorian Government to have the Engineers' Case reversed. I had found neither chapter easy. The first required much biographical detail to be compressed in a very short space and the historical setting to be sketched. I thought the chapter unsatisfactory, its characters lifeless and its style jerky. The other chapter pleased me. I thought that I had managed to explain the constitutional issues and the stratagem Dixon with R.G. Menzies as his junior had devised so that they would be intelligible to a layman and yet provide new information for a lawyer or constitutional historian. Sir John was good enough to reply:

The difficulty in writing about specialist matters for a universal readership was demonstrated to me when I sent two sample chapters of the biography I am writing of Sir Owen Dixon to Sir John Young.

I found the first chapter very interesting as it was all new to me. It must have been a difficult chapter to write because of all the similar names and the lack of information. I think it could do with a little editing but that no doubt will be done by your publisher's editor. I do not think there is much to be done but in one or two places a few additional words might make it easier for the reader to follow.

The [other] chapter is a difficult matter . . . [T]he whole story is not easy. I can follow it but I doubt whether a layman would. I suggest that you might submit the chapter to a layman to read and to advise you whether he can follow it.

. . .

I would urge you to submit your chapter to a layman now and not wait until you have written more. My reason is that what the layman says might well affect the manner in which you handle the other "legal" questions later in the book. The layman selected should be a real layman — not half a lawyer!

It will be gathered from these comments that the biography is addressed not only to lawyers. Studies of Dixon's legal work almost certainly will be written. But mine is to be a work in answer to the non-lawyer's questions, "Why is Sir Owen Dixon regarded as the greatest Australian lawyer? How was he pre-eminent?" The answers require him first to be fixed in time and place, but also to be removed from them.

Confinement by time and place determines the structure of the work. Most biographies are chronological. But narrative description can easily become chronicle without theme. There is a particular risk that the biography of a professional may develop merely as a chronicle. The events of professional lives are largely circumstantial and the individual activities may not form part of a tapestry of historical events which gives them greater significance. The battle is part of the war, the war a bridge between eras. So the record of a soldier's career need not be vignette or cameo. Not so the

professional's. It is usually determined by external events. The chronicle may demonstrate the gaining of wisdom. It is more likely merely to illustrate a brilliant career. The chronological structure of the life of a professional thus may constrain the development of themes in a way that it does not in the biography of a man of action or affairs. Another comparison is with the biography of a thinker or creative artist. Here chronology is usually ancillary to theme.

There are other problems in devising a satisfactory structure for a biography of Sir Owen Dixon. His career was as a jurist, that is one versed in the law. His legal career was as a barrister, which was quite short, and as a judge, which was for 35 years. But there were two important interruptions to his judicial career. During the Second World War he held responsible positions in the organisation of the Australian wool industry and merchant shipping and for two and a half years he was the Australian Minister to Washington. In 1950 he spent six months as the United Nations mediator between India and Pakistan in the dispute over the territory of Kashmir. How are these interludes to be incorporated into the scheme? The tapestry method is not appropriate because the tapestries are too large and Dixon's involvement was adventitious and incidental to his life's main work. Yet precious space must be used to explain what he was doing and why. The main significance of the two episodes in a life of Dixon lies in the application of his disinterested legal method to administrative and diplomatic activities that were unused to it. Kashmir demonstrates the limitations of the judicial method at its highest and best where means of enforcement are absent and interests or emotions are intense. His work in these interludes also illuminates the man. Letters from his deputy in Washington to the secretary of the department in Canberra provide insights to Dixon's personality that it is harder to obtain from his legal work.

His approach to problems is intellectual, factual, realistic, ironical, pessimistic. He distrusts broad generalizations, impressions, intuitions. He wants facts, all the facts, and upon them he will make an independent judgment. He is extremely witty, but his humour induces admiration rather than laughter. Irony makes few friends, least of all in the United States of America . . . I sometimes leave his room wondering whether he is extremely far-sighted or incredibly short-sighted. He thinks far beyond the immediate problem — fifty or one hundred years ahead. Yet his estimate of the present at times seems to me blind or pigheaded or inaccurate because over-pessimistic.

Dixon's sojourn in the United States was also important to the strengthening of his international reputation as a lawyer as he developed a firm friendship with the prominent Supreme Court Justice Felix Frankfurter who had previously been a professor at Harvard and had maintained his association with the law school there.

Dixon's legal career presents fewer problems for a biographer than those of many other leading lawyers. His career was long and he was concerned as barrister and judge with so many cases at the highest level that his professional work was not only consistent but also systematic. He was truly jurist as well as adjudicator. His dominance over his judicial colleagues for most of his time on the bench led to the development of legal ideas which can be identified as "Dixonian". He also delivered occasional papers in which his thoughts upon many subjects that especially interested him were developed in a systematic way that the circumstances of judgment-writing did not allow. As a senior member of the Victorian Bar he prepared a submission to the 1929 Royal Commission on the Constitution which gave public expression to ideas which were later to inform his judicial work. The evidence he gave before the commission surpassed its report in significance. The Dixonian method, particularly when applied to public or constitutional law, has often been described as legalistic. Indeed, upon his being sworn in as Chief Justice of the High Court in 1952 he said, in a passage which is often quoted in denigration of his method: "It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism." Sir Owen Dixon once told me that he regretted having used that phrase because it had been much misunderstood. It is one of the tasks of a biographer to explain Dixon's judicial method to lawyers and non-lawyers by reference to what he did and what he said about what he did and to do so in a way that can be followed by a layman who is not half a lawyer.

Dixon's legal career presents fewer problems for a biographer than those of many other leading lawyers. His career was long and he was concerned as barrister and judge with so many cases at the highest level that his professional work was not only consistent but also systematic.

Dixon professed to dislike aphorisms, which he said were apt to obscure thought, but he was also fond of using them. This habit was noted in an article about him in the Melbourne *Punch* as early as 1924, where it is said:

Dixon is the most delightful talker. He seems to have found time for reading something beside law, and his running comments on life and literature are pungent and witty. Unconsciously he talks in epigrams; his one-line descriptions of his contemporaries are always telling, and his stories of Court incidents should one day be chronicled. Anything like the "dry-as-dust" individual of the popular imagination could not be found.

His epigrammatic style is well illustrated by the following passage from a letter to an English judge. He used the same epigram on other occasions and seems to have enjoyed it.

After a long time at this business of ultra vires in legislation I am dead against rigid constitutions. Of course in [the United States] they have a constitution rigid and the judges flexible while in Britain the judges are rigid and the constitution flexible. Here our judges are still rigid but so is the constitution, which perhaps is the worst case of the three politically, though not morally.

Note the sting in the tail which is characteristic of Dixon. Another example:

I have been tempted to say that among those who study and pursue the law two classes now exist, those who try to ascertain what is the present state of the law by reasoning from the past and those who reason from the future and seek to determine the present content of the law by reference to their hopes of what it is going to be.

Yet another, taken from a letter written to an Australian friend on a visit to the United States in 1950, contains an element of confession:

The Supreme Court is by no means good. Recent appointments have made it even more

political than it was, and its legal equipment is low. Frankfurter himself seems to me to be more lonely, and his judgments show that he has allowed his tendency to reflective utterance, and to the use of smart sayings, to increase at the expense of his analytical capacity. I think it less a sign of age than a desire to say something which will interest himself, knowing it will scarcely be likely to interest his colleagues. There are examples in Australia of this, or at any rate there was one until I left.

Since he was a letter-writer and diarist, Dixon is a biographer's joy in that he can be caught informally as well as in public utterances. The biographer of Dixon is not impeded by a scarcity of private papers as, for example, Zelman Cowen was in writing about Isaacs. Dixon kept a daily diary for more than 30 years which allows us to follow his footsteps. So sharp are the comments that there is a strong temptation for a biographer to sit back and let the subject speak for himself. The diaries and letters raise a further problem. Dixon moved amongst public men and they frequently confided in him and sought his advice. Sir Percy Spender told me that R.G. Menzies, who had been Dixon's pupil at the bar, regarded him so highly that he was the only person to whose opinion he would defer to his own. The diaries and letters record conversations and events which are of historical significance but which are not directly relevant to Dixon's own career. Dr. Martin drew upon them in the first volume of his biography of Menzies and will probably do so in the second since they contain material pertinent to a number of notable political events of the fifties. The problem for the biographer is to define his field. It is tempting to stray.

Most important is the span of Dixon's life. He was born in 1886 and died in 1972. Both his parents were English born but had come to Australia with their parents as young children. Dixon's mind was formed before the First World War. He did not fight in it. But like most of his generation he was affected by it. I think it important that he was of first generation Australian birth but born of parents who had not grown to adulthood in the United Kingdom. His inherited attitudes were thus derived from parents who had left their homeland in childhood. He received all his formal education in Melbourne. He was an intense Anglophile, but his affection for things English was a product of the intellect as much as the emotions. His attitudes were succinctly expressed in a speech in Washington in February 1943. The speech had a patriotic purpose but the sentiments expressed are distinctively Dixon's own.

> Australia has a strong British sentiment which naturally leads her to stand with other British people in any crisis. The British Commonwealth of Nations has provided a solution of the problem of maintaining a wider patriotism, that of a British patriotism for the whole Commonwealth and also a narrower patriotism for the Dominion, which is itself a nation. Australia has an intense national spirit of her own which all Australians share. But that spirit has been found perfectly compatible with the existence of a strong British feeling; a sentiment for Great Britain and a pride in her own membership of the British Commonwealth of Nations in whose burdens as well as glories she claims to share.

Dixon never deviated from this strong attachment to Britain yet as a member of the first generation born in Victoria after the influx of population of the 1850s he shared the intense national spirit for Australia to which he referred. He was possibly the first outstanding Australian-born to obtain an international reputation without studying or working abroad. Yet much as he admired things English he refused a suggestion made by Sir John Simon when he appeared before the Privy Council in 1925 that he should join the London bar. And for various reasons he always refused to sit as a member of the Judicial Committee of the Privy Council though often invited to do so. Over the years the distance of Australia from the home country lent less and less enchantment to his views of much of modern English life. Yet he remained in mind and spirit a member of the larger society as well as of the component unit. He neither sought the honours of the world nor refused them. But those that pleased him most were an honorary Doctorate of Civil Law from Oxford and admission to the Order of Merit. It was typical that he considered his career to be beyond the terms of the Order. It would be easy to dismiss Dixon's Anglophilia as the product of an upbringing in a provincial society. But it would be a mistake to do so. Dixon was a man of high intellect whose classical education fed his natural scepticism and gave him a measure of detachment unusual in any place or time. Sir Paul Hasluck has referred to his "knowledge and urbanity to be able to talk without any thought of showing off and the grace to assume that others would naturally converse in the same way" when "the language is choice but without pretension, and the subjects are drawn from the wisdom of ages". Hasluck offers the judgment that "Dixon has the most distinguished mind I have been privileged to know amongst fellow Australians". The study of the lives of the most distinguished members of any community tells us much about the times and the society in which they lived. Dixon exemplified the qualities of Australian colonial society at the turn of the century at their highest and best — English values but stripped of much of their social and political overlay. I hope that my work may leave a stitch or two in the tapestry of our history after all.

Procedures of the Court of Appeal of California

Douglas Graham Q.C., Solicitor-General, visited the Conference of the Australian Bar Association in San Franscisco, in April 1996. His comments follow.

One of the sessions of the Conference of the Australian Bar Association held in San Francisco in August 1996 was devoted to the subject "Advocacy: The Written Submission and The Abbreviated Oral Submission". The speakers included two members of the Court of Appeal of California, namely the Hon. Justice Carl Anderson and the Hon. Justice Carol Corrigan, and two attorneys with extensive experience in that Court. Some of the information which I obtained during that session from the papers circulated in advance of it and from discussions held with other members of the Court of Appeal of California may be of interest.

THE State of California has a population of over 31 million people. The State judiciary comprises over 1500 judges and there are more than 140,000 legal practitioners in the State. Some of the more notable features of the Californian judicial system are as follows:

(a) The highest court of the State is the Supreme Court of California comprising seven justices and, for almost all purposes, it is the ultimate court of appeal for all cases arising in California.

(b) The Court of Appeal of California, which was constituted in 1905, comprises 88 judges.

(c) The Californian judicial hierarchy also includes the Superior Courts, which equate to the Trial Division of the Supreme Court and to the County Court, and the Municipal Courts which equate to the Magistrates Court. Those courts sit in all major cities and provincial centres.

(d) The Court of Appeal is divided into six Districts, the most important of which are the First (San Francisco), the Second (Los Angeles), the Third (Sacramento) and the Fourth (San Diego).

(e) Appeals are heard by panels of three Judges, there being no provision either for a two-judge panel or for the constitution of a Full Bench.

(f) Subject to one exception there are several divisions of the Court in each District. A division comprises either three or four judges who are permanently appointed to that division. The exception is the Third District where there are no divisions and the judges sit in panels constituted at the direction of the Presiding Justice for the purpose of hearing specific cases. In the Districts where there are divisions, cases are allocated to divisions by lot.

(g) The Constitution of the State of California requires every court to give its judgment, including the reasons therefore, in writing.

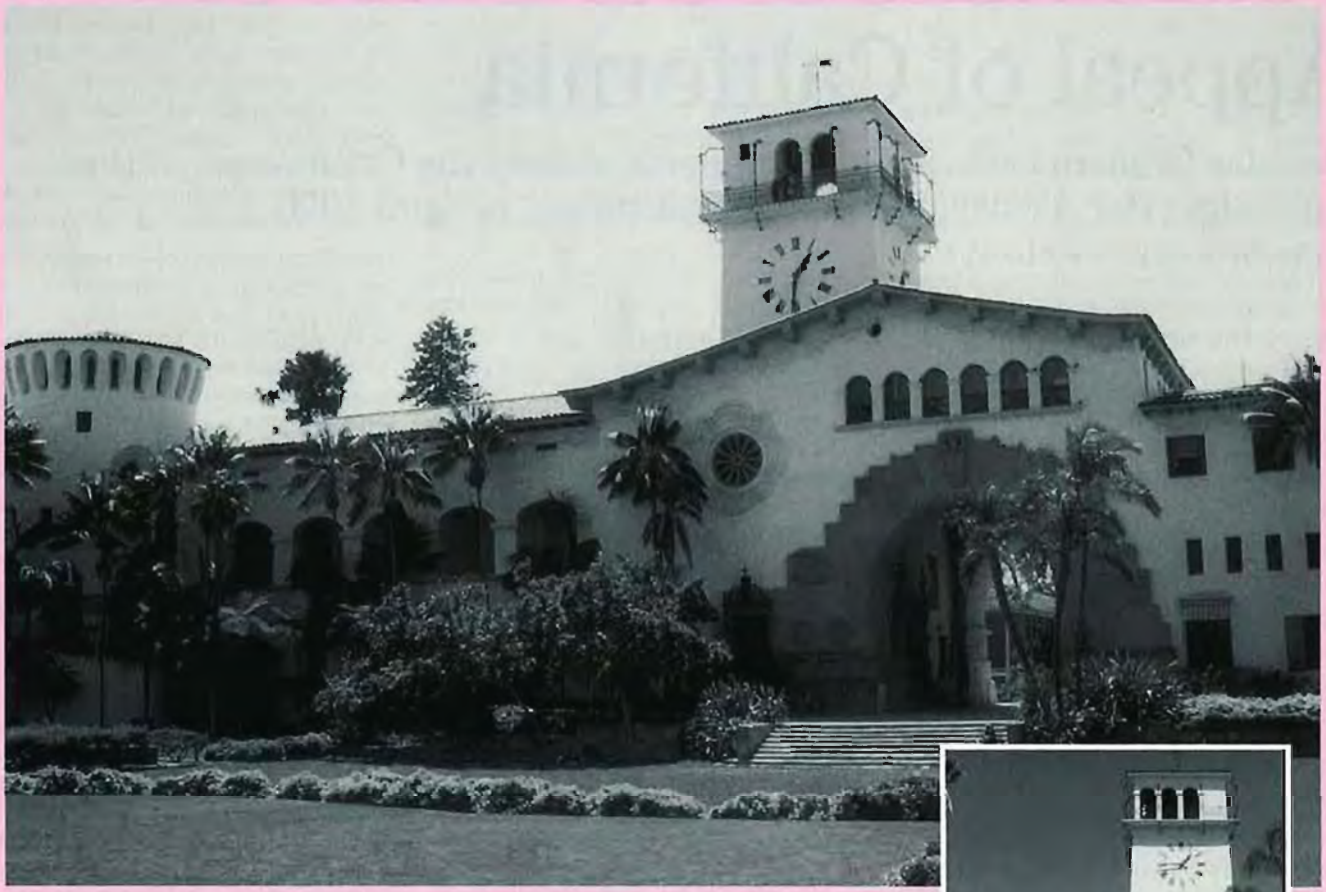
(h) The Constitution also provides that where a court fails to deliver judgment in a case within 90 days after the conclusion of argument, payment of the salary of the judge who heard the case is suspended until judgment is given and, where the bench comprised more than one judge, payment of the salaries of all the judges comprising the court is suspended until judgment is given.

In each District there is an Administrative Presiding Justice who, in addition to being the Presiding Justice of one of the divisions of the Court of Appeal for the District, has responsibility for managing the financial affairs of the Court in relation to the District under what appears to a "one-line appropriation" system.

The case-load of each member of the Court of Appeal is very heavy. About 50 per cent of all cases dealt with by the Court of Appeal are criminal appeals, and many such appeals without any substance or merit are instituted because of a system of legal aid which has been established in response to rulings by the United States Supreme Court relating to the "right to counsel". Approximately 95 per cent of appeals in criminal cases are dismissed. On the civil side, the success rate is somewhat higher, ranging up to 30 per cent. The so-called "three strikes" legislation has resulted in a significant increase in criminal appeals. In cases where the death penalty has been imposed, there is an automatic appeal, and in such cases the appeal is brought directly to the Supreme Court of California rather than to the Court of Appeal.

Approximately 95 per cent of appeals in criminal cases are dismissed. On the civil side, the success rate is somewhat higher, ranging up to 30 per cent.

The volume of business dealt with by the Court of Appeal of California is very substantial. Each judge of the Court of Appeal is involved in the disposition of over 400 cases per annum and, having regard to the manner in which the task of writing judgments is allocated, each judge would be involved in writing judgments in about one-third of that number of cases each year. The Court of Appeal does not observe an annual vacation or recess, and sits 12 months per year. On the other hand, the Supreme Court of California does not sit in the months of July and August.



Court Buildings in California

THE Supreme Court of California is based in San Francisco rather than in Sacramento, the State capital. The fine building which the Court occupied was severely damaged in the 1989 earthquake and has yet to be repaired.

Some of the other court buildings in California are very elegant, notably that in Sacramento, and the lovely Spanish mission style court house in Santa Barbara (pictured).

Each member of the Court of Appeal has two clerks, who are qualified legal practitioners and some of whom have many years' experience as clerks. In addition, there are several legally qualified research assistants attached to each of the Court's Districts.

A very large number of cases are tried by jury, not only at the level of the Superior Court but also at the level of the Municipal Court. The right to trial by jury is firmly entrenched by the Constitution of California, the rule being that any case which, by the common law of England in 1850, was then required to be tried by jury must still be tried by jury in California. The result is that almost all cases in tort and most cases in contract are tried by jury.

Much time is consumed in the process of empanelling a jury, principally because of the right to question members of a jury panel individually. However, the fact that so many cases are tried by jury has produced the result that issues are greatly simplified and, because of strict requirements that exceptions be taken in the course of a trial or after the trial judge's summing-up, the scope for challenge to a jury's decision on appeal is very limited. The enormous volume of business which is dealt with by the Court of Appeal of California has brought about a complete departure from what we would regard as the traditional method of preparation for the hearing of an appeal and the traditional method of presentation of a case before an appeal court. The position has now been reached where the primary process for the presentation of argument to the Court is through the written brief of each party to the appeal, whilst oral argu-

ment has been reduced to a minimum, and in many cases, eliminated altogether. This is also the position elsewhere in the United States, both in Federal and State Courts.

Under fairly strict timetables prescribed by Rules of Court, written briefs must be filed by the parties to an appeal with the Registrar of the relevant District. When an appeal is allocated to a division which comprises more than three judges, the panel of three judges to deal with the case will be determined by the Presiding Justice at an early stage and, in every case, primary responsibility for the disposition of the appeal will be allocated to one of the judges comprising the panel. The filed briefs will be closely scrutinised by the judge to whom primary responsibility has been allocated and by that judge's clerks, and, in the ordinary course of events, a draft judgment will be prepared before oral argument and circulated to the other two judges. Oral argument is strictly limited, the maximum time allowed under the Rules of Court (subject to a discretionary power to enlarge) is thirty minutes per side, but it is normal that argument on each side will not exceed fifteen minutes. In many cases the right to oral argument is waived so that the entire case is disposed by the Court on the basis of the written briefs.

There are strict limitations imposed by the Rules of Court upon the length of the written briefs and those limitations cannot be evaded by such devices as closely spaced typing, narrow margins and small typeface. The time limits relating to oral argument are treated on a reasonably flexible basis, especially where the Court discovers that oral argument is proving to be helpful, persuasive or likely to alter the result contemplated by the circulated draft judgment. Judgment is always reserved at the conclusion of oral argument and reasons for judgment are provided to the parties by mail. It is only in rare cases that the Court announces the result of an appeal in open court at the conclusion of argument.

The most notable consequence of the system described above, unfamiliar and exotic as it may seem, is the preparation of briefs of exceptionally high quality in cases which raise substantial issues. This was demonstrated both by the sample briefs provided to those attending the conference and by other briefs which I saw when meeting with judges in Los Angeles and in Sacramento. They were succinct, clear, persuasive, extremely well written and, above all, highly readable. They tended to focus on the truly arguable issues in the case and engaged in a minimum of citation of authority. Preference appears to be given, in citing authority, to the judgments of judges of the particular District rather than in other parts of the State and certainly in preference to the judgments of judges of other States. Further, preference is given to authorities which are recent and contain within the judgment, a full reference to earlier relevant authorities.

The most useful lesson to be learned from the Californian experience, in my opinion, lies in the preparation and content of the written briefs . . . the members of any appeal court would be greatly assisted by briefs of such quality provided in advance of an oral hearing.

Materials provided to those attending the conference also indicated that the process of preparing briefs is regarded as involving a very high level of legal skill and accomplishment and is by no means regarded as a formality. This must necessarily be so under a system where the main process of advocacy and the task of persuasion are to be carried out in written form and not orally.

The process of oral argument appears to have a wholly different place in the judicial process from that to which we are accustomed. In each of the six Districts, there is only one court room set aside for the hearing of oral argument, even in the case of the Second District which has seven divisions. That is because each division sits only on one or two days each month to hear oral argument and, on each of those days, it may schedule oral argument in as many as 50 or even 60 cases. Nevertheless, it appears to be accepted that the process of oral argument still retains an important function, despite the fact that, in almost all cases, a draft judgment has been written and circulated in advance of oral argument. Counsel appearing before the Court of Appeal do not expect to be able to cover all of the points raised by the notice of appeal or by the brief, but will tend to utilise the available time in dealing with selected points and in responding to questions addressed by the bench. There appears to be no room, under the Californian system, for the presentation of a structured or complete argument in support of the party whom counsel represents.

Judges with whom I met all expressed some familiarity with the procedures adopted by the English Court of Appeal and clearly recognised the vast difference between the Californian system and that of the English Court of Appeal. The inevitable justification given was that it would be impossible to dispose of the case-load of the Court if a procedure analogous to that of the English Court of Appeal were followed.

The most useful lesson to be learned from the Californian experience, in my opinion, lies in the preparation and content of the written briefs. As already indicated, their quality was most impressive and there can be no doubt that the members of any appeal court would be greatly assisted by briefs of such quality provided in advance of an oral hearing. Whether it is desirable for oral argument to be so severely truncated as is the case in California is another question.

History of List D

THEOPHILOS Druce began operation as a clerk for this List in 1860. He was born at Liverpool, England, in 1841 and migrated to Australia in 1852. He lived at Emerald Hill and as a very young man established his business at Temple Court. Druce moved his business to Mischie's building, which for some time was the home of the bar. Selbourne Chambers was built in 1881 and Druce and most of his List moved there at that time. In 1892 Druce was joined by his son Frank. Frank Druce became the clerk in 1911 after his father died; Arthur Nicholls joining Frank Druce after the 1914–18 war. Percy Dever came to work for Arthur Nicholls in March 1946, after being employed as a law clerk with Blake & Riggall. Arthur Nicholls took Percy into partnership in 1953. With Arthur Nicholls retiring from the practice in 1964 Percy Dever acted as the clerk until he passed away in 1985, a span of 39 years. Anthony John Dever came to work for his father in 1973, taking over as the clerk in 1985.

A Decade in Owen Dixon Chambers West

Fifth Floor, 10th Anniversary drinks

Owen Dixon Chambers West is now a decade old. It is just 10 years since the first tenants moved in. On 1 November 1996 counsel on the fifth floor — with some judicious judicial assistance — celebrated their tenth birthday in ODCW. Set out below is a transcript of what was said at their birthday party.

Roger Gillard in full flight.

(Left to right): Stephen Maloney, Alex Chernov, Francis Tiernan, Val Walker, Andrew Tinney, Meredith Patterson and Peter O'Callaghan.

Roger Gillard

THIS little gathering celebrates the 10th anniversary of our membership of the fifth floor of Owen Dixon Chambers West. It is interesting to note that at least half of those who are still present on the floor, came here more than 10 years ago.

We, as barristers, tend to take for granted those fellow members who devote a lot of their time to making things come to pass. All of us owe a great debt to those members of the Bar who made up the Building Panel which was responsible for the design and supervision of the construction of this great edifice in which we all work.

Peter O'Callaghan was, in fact, the Chairman of the Building Panel and, undoubtedly, in that position prepared himself well for his new position as commissioner of the Roman Catholic Church. Indeed, he would have learned more perhaps being chairman of the Building Panel than holding any other position. David Byrne's not here but we also owe him a great debt. He, in fact, held the role of Ombudsman. [David Byrne arrived later on.] I recall ringing up David on one occasion and complaining about the noise being made by the construction of this building. My chambers, next door, happened to front onto this building. I told David it was very noisy. I told him I had had nine readers and I can withstand a lot of noise, but I was finding it very difficult to concentrate at that moment.

There was a silence at the end of the line and then he asked me if you want us

to bloody well stop the building. I said no and he said well you'll have to put up with it. All of us are very indebted to David because, he more than the others, played a very important role in answering our enquiries.

There was a silence at the end of the line and then he asked me if you want us to bloody well stop the building. I said no and he said well you'll have to put up with it.

Alex Chernov was a member of the panel, as well, but as Maurice Phipps pointed out, he couldn't hack "the stress" and resigned to become Chairman of the Bar. Brind Woinarski was also a member of that committee. Brind's not here. He's left. We owe a great debt to him as well. David Harper was also a member. At least he stayed on and completed his membership of the panel, before he became Chairman of the Bar. I'm not quite sure what role he actually played, but I'm sure it was a very important one. And then we had such notables as Douglas Graham, who was Chairman of the Fitout Committee. Doug's probably had more publicity than he's ever wanted over the past few days, so I won't say too much. Douglas did look after our interests every time the architects wanted to put our books behind cupboard doors. Do you remember that? He looked after our interests.

Then there is my friend Hartley Hansen who was Chairman of the Room Allocation Committee, which comprised himself I think. Was there anyone else on the committee? I used to nobble Hartley to try and get good chambers, but he said we had to be objective about it. I want to commend him on his objectivity, because he moved into a room around which, within three weeks of his moving in, they erected scaffolding. It really was turned into, I think it was Stephen Kaye said it, a prison. We are indebted to you all and we thank you for your efforts.

S.E.K. Hulme is not here. He was Chairman of the Board of Barristers' Chambers Ltd at the time. We are generally indebted to S.E.K. as well.

I may have omitted to mention everybody associated with construction of this great building. Members of the Bar do tend to forget those who work and look after our interests. So often we take their efforts for granted. Rest assured, on this occasion, we haven't taken your efforts for granted and so we invited you along to this special gathering which was the brainchild of someone I have forgotten, Maurice Phipps, who, too, was a member of the Building Panel. I remember Maurice did a lot of running around and in the process attended to many tasks. [Phipps interjecting: I'm your landlord at the moment.] I'll remember that. Do we have many members of the board here? Can we have a meeting here and now? [No, we've only got one, sorry.]

In any event, it's my function, to call upon Hartley Hansen who was the senior member of our fifth floor for a number of years to say a few words and to perhaps recall his membership of it.

Hartley Hansen

Well, it's a great pleasure to be here Roger and thanks Maurice. [Gillard interjecting: For defamation purposes this speech is being recorded so you've got to be careful. And it's not an occasion of qualified privilege.] This is terrific. The Bar has never changed. Maurice rings up a few days ago and says, Oh look we're having a drink. The fellas on the fifth floor and the girls are getting together after 10 years and would you like to come along. I said why not. You know we'll probably have a few words. And I got a sixth sense about this because I got a letter from him the other day that said "Thank you very much for coming along and agreeing to speak". It was an absolute verbal. And so I rang him this morning and I said whose coming, just give me a picture about this.

(Left to right): John Arthur, Nick Jones, Paul Cosgrave, Samantha Burchell and Phillip Marzella.

The Solicitor-General makes a point.

(Left to righ): Samantha Burchell, Maryanne Loughnan and Lesley Fleming.

(Left to right): Mr. Justice David Harper, Mr. Justice Hartley Hansen, Stephen Kaye, Ted Fennessy, Tony Southall, Chris Connor, Douglas Graham and Mark Derham.

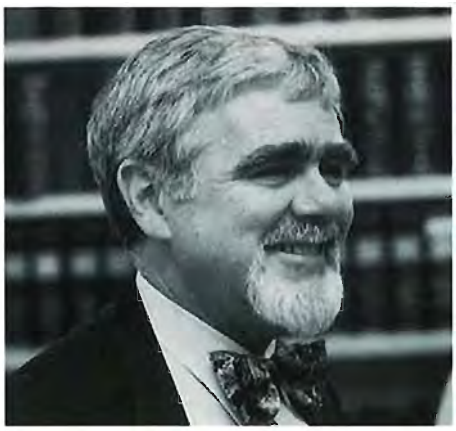
And he said oh we've asked about 50 people in addition to the floor.

Every person that was ever involved in an official capacity and Gerry Nash is coming and he's going to record everything you say for the future.

And what do you want me to talk about? Oh well if you could just give us a rundown of everything that happened. That's 12 years ago. [That's why you're a judge. Now you realise how difficult it is to be a witness in a case.] Very difficult indeed. But it's a great pleasure to be here as a former tenant of the floor with Roger and everyone else. It was a lot of fun being here. I'm glad to see Stephen Kaye's got his shoes on. As it was, he would paddle around [the interesting thing Hartley is that it would be the same pair of shoes he had 12 years ago. And once more his mum bought them for him].

I just want to say while Peter's here it's a shame that S.E.K.'s not here. S.E.K. was Chairman of BCL at the time when the building work was going on and I know it was a great backstop for Peter as Chairman of the Building Committee and Alex who was Chairman of the Bar Council at the time.

It was a great thing this building was built. It represented a sign of tremendous



Former Bar News *editor, Mr. Justice David Byrne.*

optimism from the Bar and you've got to keep being optimistic. There's a great future at the Bar. The moment you stop being optimistic you'll sell your properties, you won't develop, you won't buy the next property. I've got no doubt the Bar's got a great future. I think the standard of advocacy is terrific and it's getting better and better I think and so long as you provide a good service at a competitive fee there's no reason to have any doubt for the future.

What a great thing it is that a few years ago when things were looking a little hard we didn't sell Four Courts or to put it more accurately what a great thing there was no one who would buy it. Or the block of land or whatever. But Roger you're talking about what happened. I don't want to talk very long, it's Friday night. There I was at home one Sunday morning. I remember this call quite distinctly. Oh, Roslyn said, Alex Chernov on the phone for you. Well, he said Hartley, and the sugar almost came down the phone. He said look that accommodation committee of yours, it doesn't seem very busy at the moment and we are just wondering whether we are going to have to arrange the move of all the tenants into this new building of ours. Could you look after that? Well, what can you say?

So that was it and it was a very interesting exercise. David Harper was on my committee and John McCardel and Ed Fieldhouse because Ed was behind most committees. [Boris Yeltsin and the others!!!] But it was a very interesting exercise because we had to provide a set of rules which broke or bent most of the previous rules about application for the tenancies being determined on the basis of seniority so we allowed what group applications . . . what do you call them . . .

and added all sorts of things all designed to induce people out of their present tenancies and it worked.

It was a great success wasn't it Peter? And as far as I was concerned it involved a bit of detail in thinking out how the rules would work. We had a few meetings of my committee. At about the second meeting I think John McCardle said, "I'm not sure if I need to come to this committee meeting. It seems to be running very well". And David Harper said, yes I think you should call us when you have a problem. And they were never seen again. Ed Fieldhouse had no alternative. [He took the minutes.] But it did work very well and the thing that I can remember was that if I had a problem Peter O'Callaghan would answer it on the spot.

Alex would have an answer for the next Bar Council meeting. And we got Dorothy Brennan back to run an office with all the floor plans so people could look at them. And deal with the applications etc. And we knew after the first week of applications — I can't remember now whether it was for the first floors from the top or the bottom or sideways — but we knew the building was going to work because we had so many applications that you knew you were home and hosed and by the end of the second round of applications a week or two later we were ahead in a sense. I think that's right isn't it Peter? And the Bar was terrific. I think in the whole process there was only one person who complained about the room they got or whatever. [It was me. I got two rooms instead of one you may recall.]

Roger never complained but it's absolutely true what he said. We came in here and I had left myself to the last, you know being a noble sort of fellow. But the truth of the matter is that I could never persuade Roger to pay the increased rent so we got left behind and none of you would believe a story like that about a Gillard.

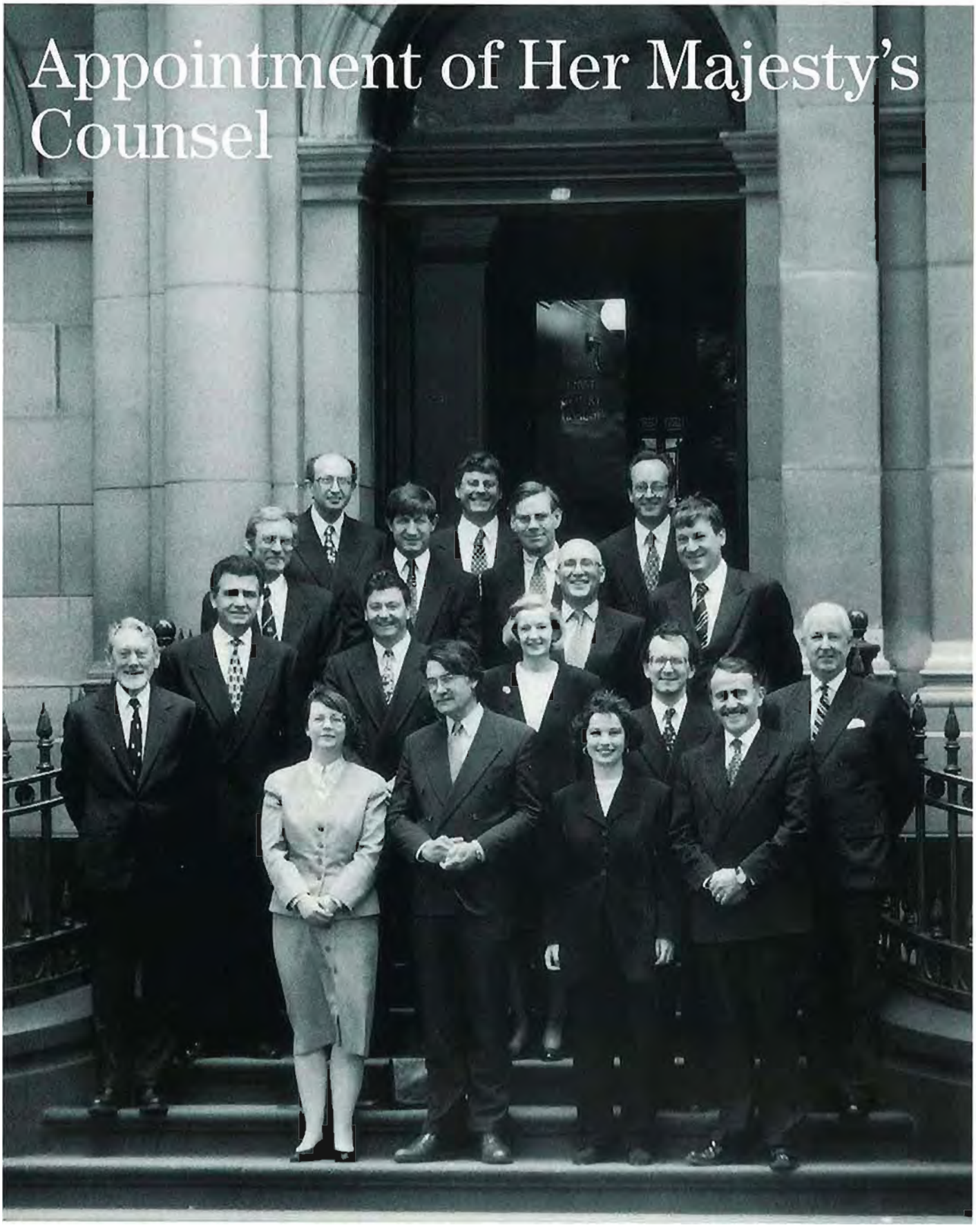
Anyway finally Southall agreed to come along and Cosgrave was a bit reluctant but along he came and we got a group going. Blow me down it just seemed a twink of an eyelid and up went the scaffolding to make the walkway to the County Court. I was livid I had no idea about this. So after a while I wrote and complained to BCL and said look this is a bit rough, I should have a discount or something. So O'Callaghan came down several months later and says to me I'm from the Board of BCL and you've written about the scaffolding.

He said is there any way in which I could help? I felt at that stage like the lass in the Scottish Court who was asked to put up her right hand and take the oath and said I don't do things like that I'm a Protestant.

Anyway we resolved all of that. I think it turned out very well. We had a lot of fun on this floor. Lovely to see Meredith here who was our secretary for 10 years or so. And then Alex Chernov suggested I go up to the 17th floor. I felt able to do it because as a result of talking to Roger on a constant basis, I was six years ahead with every view on politics, economy, international affairs or St. Kilda football and anything else you could care to think of. [He certainly was six years ahead of me on the St. Kilda Football Club.]

Thanks very much. I think from all of us who were on some committee or whatever . . . Where's David. You've been mentioned in despatches.

Appointment of Her Majesty's Counsel



THE Chairman of the Bar Council was informed that on 26 November 1996 the Governor-in-Council appointed as Her Majesty's Counsel the persons listed below, in order of precedence:

1. Michael Peter Taussig
2. Colin Howard
3. Ian Campbell Robertson
4. William Harry Morgan-Payler
5. Jeremy Ruskin
6. David Norman Galbally
7. William Ross Ray
8. John Udorovic
9. Robin Alfred Brett
10. Peter John Jopling
11. Anthony Lewis Cavanough
12. James Gregory Judd
13. Susan Coralie Kenny
14. Felicity Pia Hampel
15. William Thackray Houghton
16. Gaetano Tony Pagone
17. Rodney Mark Garratt
18. Clarinda Eleanor Molyneux
19. Bryan Andrew Keon-Cohn

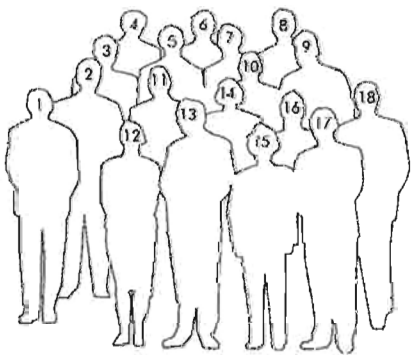
In respect of the appointment of Michael Peter Taussig he has precedence next after Kim William Spencer Hargrave Q.C. and other persons named in the Schedule are granted precedence in relation to Michael Taussig and to each other in order in which their names are set out above.

The Bar warmly congratulates them on their appointment.

Full Name:	**Robin Alfred Brett**
Date of Admission:	1 March 1976
Date of Signing Bar Roll:	April 1979
Readers:	Abe Herzberg, Christopher Sexton, Elizabeth Hollingworth, Sarea Soi (PNG), Anna Ziaras, James Paterson, Gregory Harris, James Gorton
Areas of Practice:	Commercial, Equity, Trusts
Reason for Applying:	Advancing age.
Reaction on Appointment:	Pleasure and apprehension.

Full Name:	**Anthony Lewis Cavanough**
Date of Admission:	2 April 1979
Date of Signing Bar Roll:	19 June 1980
Readers:	Kelly Naru (PNG), Denny Meadows, Kathryn Rees, Samantha Burchell, Peter Morrissey, John Buxton, Peter Gray
Areas of Practice:	Administrative Law, Industrial Law, General Civil
Reason for Applying:	The chance of a more appealing professional lifestyle.
Reaction on Appointment:	Delighted.

Key to appointees:



1. Colin Howard Q.C.
2. John Udorovic Q.C.
3. William Morgan-Payler Q.C.
4. Gaetano Pagone Q.C.
5. William Houghton Q.C.
6. Anthony Cavanough Q.C.
7. Robin Brett Q.C.
8. Rodney Garratt Q.C.
9. James Judd Q.C.
10. Peter Jopling Q.C.
11. David Galbally Q.C.
12. Susan Kenny Q.C.
13. Bryan Keon-Cohn Q.C.
14. Clarinda Molyneux Q.C.
15. Felicity Hampel Q.C.
16. Jeremy Ruskin Q.C.
17. William Ray Q.C.
18. Ian Robertson Q.C.

Absent: Michael Taussig Q.C.

Full Name:	**David Norman Galbally**
Date of Admission:	3 April 1975
Date of Signing Bar Roll:	1 December 1983
Readers:	Angela Bolger, Rosie Tremayne, Robert Skinner
Areas of Practice:	Criminal Law, emphasis on Commercial Crime
Reason for Applying:	Seemed like a good idea at the time!
Reaction on Appointment:	Honoured and delighted.

Full Name:	**Rodney Mark Garratt**
Date of Admission:	1 April 1980
Date of Signing Bar Roll:	24 November 1983
Readers:	Phillip Corbett, Ian Stewart, Nicholas Frenkel, Gregory Ahern, Michael Sasse
Areas of Practice:	Commercial, Company, Trade Practices, Equity, Intellectual Property, Taxation
Reason for Applying:	". . . a man's reach should exceed his grasp, or what's a Heaven for?"
Reaction on Appointment:	Delight.

Full Name:	**William Thackray Houghton**
Date of Admission:	3 March 1980
Date of Signing Bar Roll:	19 November 1981
Readers:	Michael Pearce, Scott Stuckey, Gina Schoff, Mathew Harvey, Peter Fox
Areas of Practice:	Commercial, Media
Reason for Applying:	Too many good juniors.
Reaction on Appointment:	Delighted.

Full Name:	**Dr. Colin Howard**
Date of Admission:	3 May 1965
Date of Signing Bar Roll:	5 February 1987
Readers:	Nil
Areas of Practice:	Constitutional, Administrative, Commercial
Reason for Applying:	Pride.
Reaction on Appointment:	Satisfaction.

Full Name:	**Felicity Pia Hampel**
Date of Admission:	3 March 1980
Date of Signing Bar Roll:	12 March 1981
Readers:	Susan Borg, Sandra Davis, Hilary Bonney
Areas of Practice:	Crime, Anti-discrimination
Reason for Applying:	Same reason as Sir Edmund Hilary's for climbing Mt. Everest.
Reaction on Appointment:	Unlike Gertrude Stein's reaction to suburbia — once you get there, there's no there there. There is a there there.

Full Name:	**Peter John Jopling**
Date of Admission:	1978
Date of Signing Bar Roll:	1980
Readers:	Patrick L'Estrange, Rayne De Gruchy, Michael Garner
Areas of Practice:	Commercial Law, Trade Practices Law
Reason for Applying:	Time to move on.
Reaction on Appointment:	Numbness and thereafter elation.

Full Name:	**James Gregory Judd**
Date of Admission:	1 May 1979
Date of Signing Bar Roll:	March 1981
Readers:	Peter Hanks, Albert Koolmees, David Gilbertson, Norman O'Bryan, Danielle Huntersmith
Areas of Practice:	Commercial and Administrative Law
Reason for Applying:	It was time to move on.
Reaction on Appointment:	A sense of relief, followed by pleasure.

Full Name:	**Susan Coralie Kenny**
Date of Admission:	1 October 1979
Date of Signing Bar Roll:	2 March 1981
Readers:	Stephen McLeish, Mark Mashinsky
Areas of Practice:	Constitutional Law, Administrative Law, Commercial Law
Reason for Applying:	A desire to be a part (though a small one) of a venerable tradition.
Reaction on Appointment:	Honoured.

Full Name:	**Bryan Andrew Keon-Cohen**
Date of Admission:	2 June 1980
Date of Signing Bar Roll:	22 October 1981
Readers:	Di Phelan, H.R. Carmichael, L.C. Carter, G.T. Connellan, M. Trevisiol
Areas of Practice:	Native Title, Administrative Law, Migration, Constitutional, Human/Civil Rights
Reason for Applying:	Most of my opponents in Mabo have been elevated — and they lost!
Reaction on Appointment:	Delighted, terrified and contemplating options for the 19th man.

Full Name:	**Clarinda Eleanor Molyneux**
Date of Admission:	1 April 1980
Date of Signing Bar Roll:	May 1984
Readers:	Susan Dowler
Areas of Practice:	Family Law
Reason for Applying:	—
Reaction on Appointment:	Thrilled!

Full Name:	**William Harry Morgan-Payler**
Date of Admission:	1 December 1972
Date of Signing Bar Roll:	9 September 1981
Readers:	B.R. Keating, S.T. Russell, J.J. Lavery, J. Gibson, C. Burnside
Areas of Practice:	Crime
Reason for Applying:	I like the fabric.
Reaction on Appointment:	Delighted.

Full Name:	**Gaetano (Tony) Pagone**
Date of Admission:	3 March 1980
Date of Signing Bar Roll:	28 March 1985
Readers:	Fergus Farrow, Dr. Jane Hendtlas, Fiona Phillips
Areas of Practice:	Tax and other grey areas of law
Reason for Applying:	The same as Groucho Marx's would have been.
Reaction on Appointment:	Not the same as Groucho Marx's would have been.

Full Name:	**William Ross Ray**
Date of Admission:	3 November 1975
Date of Signing Bar Roll:	12 February 1976
Readers:	S.E. Pullen, S.E. Grant, A.L. Hands, P.R.C. Southey, G.E. Howse, J.L.R. Francis, J.J. Gates, L. Raponi, R.W. Taylor, Moses Murray, Wemin Boi and John Kaui
Areas of Practice:	Criminal Law, Occupational Health and Safety, EPA and Disciplinary Tribunals
Reason for Applying:	—
Reaction on Appointment:	Honoured.

Full Name:	**Ian Campbell Robertson**
Date of Admission:	1 December 1970
Date of Signing Bar Roll:	17 February 1972
Readers:	Klemens, Burnett, Clohesy
Areas of Practice:	Personal Injuries, Medical Negligence
Reason for Applying:	—
Reaction on Appointment:	—

Full Name:	**Jeremy Ruskin**
Date of Admission:	1 May 1973
Date of Signing Bar Roll:	1 September 1979
Readers:	John Searle, Michael Wheelehan, Michael Thompson, John Simpson, Peter Riordan, Andrew Strum, Francis Trindade, Ann McGarvie
Areas of Practice:	Common Law, Insurance Law, Media Law
Reason for Applying:	Two reasons: (a) I thought I might break the habits of a lifetime, and show some courage. (b) I wanted to experience working carefully on one case at a time — á la R.J. Stanley Q.C.
Reaction on Appointment:	Like when they put me on the Space Mountain ride at Disneyland — ecstatic terror.

Full Name:	**John Udorovic**
Date of Admission:	March 1976
Date of Signing Bar Roll:	1976
Readers:	I. Mawson
Areas of Practice:	Family Law
Reason for Applying:	After 20 years in the trenches I thought it was time.
Reaction on Appointment:	I hope I was right! And much humility.

Verbatim

Cheap Eats

Supreme Court of Victoria

Coram: Gray J.
16 August 1996
Sudholz v. *Sudholz*
A.Uren Q.C. and R.K Davis for the Plaintiff
J. Nunns for the Defendant administrators
R. Meldrum Q.C. and N. Bird for the Second Defendant
J. Arthur for two witnesses seeking to set aside subpoenas

At the commencement of the trial, application was made by the witnesses to set aside the subpoenas on the ground of relevance and that the conduct money of $40.00 given to each witness was inadequate. The subpoenas were served on the witnesses in Natimuk and Glen Isla in Western Victoria. Meldrum Q.C. (whose client had served the subpoenas) in reply noted that the bus fare from Natimuk to Melbourne was $36.00.
His Honour: Mr Meldrum if the bus fare is $36.00 that leaves $4.00 for lunch. $4.00 is not enough to pay for lunch. I suggest, it would not pay for your lunch Mr Meldrum.
Meldrum Q.C.: Your Honour, it would not even pay the corkage!

Day After the Cup

Federal Court of Australia

Drummond J.
Wednesday, 6 November 1996

Mr. J.G. Santamaria Q.C.: How did you get on yesterday, Your Honour?
His Honour: I am not going to enter into any discussion on that. It is a question full of ambiguity.

Typically Male

Federal Court Directions Hearing

Mid-October 1996
Coram: Merkel J.
Elspeth Strong appearing

After His Honour unsuccessfully urged many prior matters in the list into mediation, Strong's matter came on for hearing.
Merkel J: What about mediation?
Strong: Your Honour, I am interested in mediation and my client is interested in mediation.
Merkel J: So you're consenting to mediation then.
Strong: (stepping back from the lectern, hand on hip, as if to make a statement) Your Honour, that's a typically male response — I say I'm interested and you infer consent!

Winding Up

Supreme Court of Victoria

Coram: Senior Master Mahoney
28 August 1996

Wardell, applying to adjourn a winding-up petition of a supermarket, which sells, inter alia, fruit . . .:
Wardell: Master I am simply saying that the last adjournment bore fruit and another adjournment may bear more fruit.
Mahoney: Ms Wardell, I am not convinced you *have* any fruit.

Same day, same time and place.

Barrister (unknown) asking for costs of the adjournment to be reserved rather than ordered against his client:
Barrister: Master, if the winding up notice is based on a bad judgement, then this whole action is based on a bad notice. Therefore, "but for" the service of the notice, these costs would not be necessary.
Master: You might as well say that the State of Victoria should pay the costs, because you wouldn't be here "but for" the State incorporating the other party in the first place!

Stolen Koran

Supreme Court of Western Australia

Coram: Ackland J.
29 May 1985

Majed Mahmoud Haouchar about to give evidence.
Ackland J: Yes. What sort of an oath does he take?
Mr. McGrath: Your Honour, he is prepared to swear on the Bible.
Ackland J: He is not a Christian, is he?
Mr. McGrath: No, Your Honour, he is not.
Ackland J: Why would he swear on the Bible if he is not a Christian?
Mr. McGrath: Perhaps I have misled him, Your Honour. I have told him that, swearing on the Bible, he would simply be swearing before God that he would tell the truth; perhaps I have misled him on that.
Ackland J: Perhaps if he takes an affirmation it would be more appropriate in the circumstances. I am not sure at the moment what — He is a Muslim, is he?
Mr. McGrath: Yes, he would traditionally swear on the Koran.
Ackland J: Unfortunately the court's Koran has been stolen; it is not available.
Mr. McGrath: Perhaps he could take an affirmation, Your Honour.

Not a Confessing Christian

Same court same day

JENNIFER MARILYN MONCRIEFF, called:
Ackland J: Are you a Christian?
Moncrieff: No.
Ackland J: What religion are you?
Moncrieff: Anglican.
Ackland J: You are not a Christian; an Anglican. All right. Take the Bible in your hand and read aloud the oath.

Not Responsible for High Court Changes

Extract from *Disciplinary Tribunals*, 2nd ed. by J.R.S. Forbes, Federation Press 1996

"By way of disclaimer which should now appear in all legal texts the writer accepts no responsibility for sudden or unpredictable changes to the law which the High Court, in its legislative jurisdiction, may see fit to make."

Rampant Centralism

Federal Court

Bankruptcy list
20 November 1996

Applicant (in person to Mr. Justice Jenkinson)**:** I believe that this Court has jurisdiction over the Supreme Court . . .
Jenkinson J: I think they'd be surprised to hear that.

Speedy Hearing

County Court

Directions List
15 November 1996
Judge Keon-Cohen

Solicitor appears to advise the Judge that the application for pre-trial discovery has been resolved and will not be proceeding.

Judge: Can I give you a trial date?

Solicitor: It's pre-trial discovery — there are no proceedings yet.

Judge: Why can't I give you a trial date?

(It is very likely that this interchange resulted from a misunderstanding or lack of hearing, but it illustrates how quickly the processes of the Court take place!)

Power Brings Peace of Mind

Supreme Court Practice Court

10 October
Coram: Hedigan J.

Hedigan J: If I recall it rightly the rule is unfettered. Judges like unfettered powers. It helps us sleep well at night.

University of Tasmania, Faculty of Law Summer Courses

13 January–1 February 1997: Heritage Law.
20 January–6 February 1997: Environmental Law.

- Undergraduates and non-degree enrolments welcome.
- College accommodation is available.

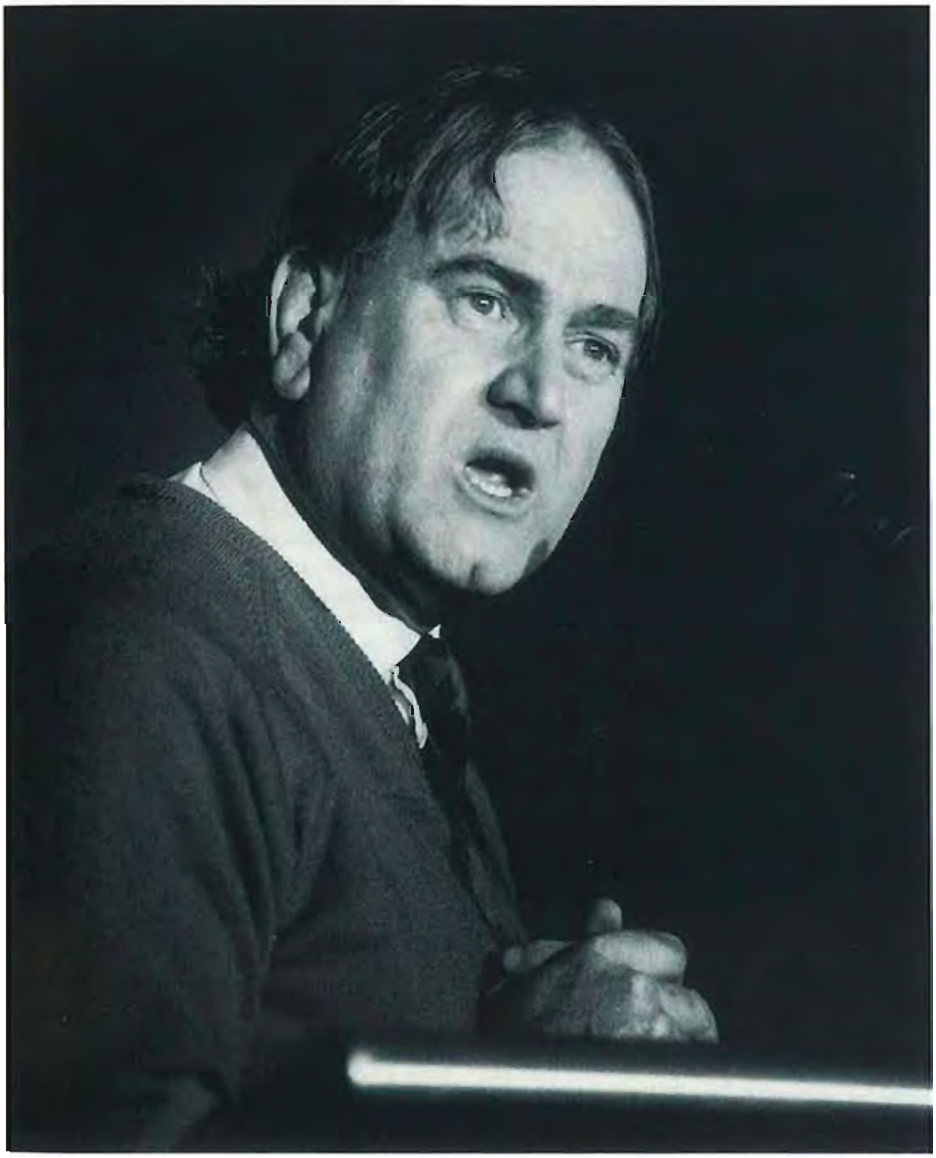
For further details please contact: Sherrye Finglas, Law School, University of Tasmania, Telephone: (03) 6226 7510 Fax: (03) 6226 7623 Email: sherrye.finglas @aw.utas.edu.au.

Alternative Bar Dinner

IMAGINE it is the year 2000. Imagine that John Muddleton Q.C. to the stars is still Chairman of the Bar Council. Imagine that the Courts' Reform Legislation has been taken to its logical end. The Constitution of Victoria has been changed. The Supreme Court has been abolished. All Courts have been abolished and have been replaced by — of course, Tribunals. The Court of Appeal is no longer. It is replaced by the "Peak Tribunal". Helen and Alan Aardvark, Chairpersons, have replaced President Winneke and his fellow judges. But one thing remains, Q.C.s. That is because everyone is becoming a Q.C. Helen Aardvark has become a Q.C. without the necessity of having any legal training whatsoever.

This was the setting for the Alternative Bar Dinner which took place before a full house in the Essoign Club on 4 December 1996. Although the whole legal system had changed the format of the bar dinner had not. John Muddleton Q.C., Q.C., (Douglas Salek) complete with glistening golden tips in his thinning hair toasted the Queen and recited the new Bar Grace to all solicitors who had helped him in his career. There followed Mr. Junior Silk who really wasn't really Mr. Junior Silk, he was just number 20 out of 21. Peter Pavarotti Q.C. (alias Simon Wilson, Q.C., Q.C., Q.C.,) had the wonderful task of welcoming 153 guests.

These guests were the new Tribunal persons. Unfortunately the whole judiciary had resigned. The ranks of the public service had been ravaged in order to find 153 people to staff the Tribunals. Mr. Jun-



Alan Aardvark, Peak Tribunal Person.

John Muddleton Q.C.

John Muddleton Q.C. and "Stewie".

Peter Pavarotti Q.C.

Clark Grainger.

The Compere, Andrew Maryniak.

Adams Q.C. admonishes.

Campbell and Wood, country duo.

Elizabeth and Dick.

The President and Bernie.

Mr. & Mrs. Ross Ray Q.C. get the bill.

Georgie tells Diggers — off!

David Bennett Q.C. gives tips . . .

ior Silk proposed to speak for some five hours mentioning each of these honoured guests. It was somewhat unfortunate that Pavarotti Q.C. spent most of his speech talking about himself and by the time he reached the first of the guests his oratory became so defamatory that dear John Muddleton had to escort him from the podium. Alas 151 guests remained unwelcomed!

Thereafter in reply the dinner was regaled by the remarkable wit of Mr. Alan Aardvark peak Tribunal Person. Alan outlined his career as a former R.A.C.V. driving instructor which fitted him perfectly for his new role. His life had been changed by wine bottlings despite the fact that he was a teet otallor. A chance meeting at the Deep Dean Young Liberals with Jeff and Jan rocketed his career forward. Armed with an Associate Diploma in Case Flow Management Alan's career progressed through the ranks until he and his wife, as a joint team, were appointed to the peak Tribunal. Alan outlined the deep changes he was going to make particularly to the decor of the former President's Chambers. To use Alan's words, he did not understand what the Bar was so upset about. After all, the Constitution has been changed before and it will be changed again. The word "court" is only a word, so is the word "litigation". He was sure he could work hand in hand with those members of the Bar who were not public school boys.

The whole evening was wonderfully compered by Andrew Mariniak. Set in the Myer Mural Hall Andrew's wonderful voice and mellow tones described the long list of sponsors of the dinner which of course included the Dever List.

The night was a great success particularly with Douglas Salek doing one of his usual impersonations of the great Muddleton. John will be permanently armed with a mirror and a clothes brush from now on in. Simon Wilson, despite the fact of not singing, provided great humour as Pavarotti. The show was devised and produced by Paul Elliott, who, by the way, also played Alan Aardvark.

The dinner is hoped to stimulate further entertainments in the Essoign Club. The committee hopes to attract more people into the Club. Many said that it was great to simply have a night of humour without any need for serious speeches. A new program of entertainment is being devised for the new year and hopefully the Club will attract new members. The problem is, by the year 2000, many of these predictions may be true.

Win a Mont Blanc Ballpoint and Leather Notebook Worth $365.00 in this new *Bar News* Reader's Competition

Consummate workmanhip, uncompromising selection of materials, and loving attention to detail are what elevate the Mont Blanc Leather Accessories above all others.

RETAIL VALUE:
$120.00

This Mont Blanc Meisterstuck *Ballpoint Pen displays all the masterful craftsmanship, classic design, and finest materials characteristic of Mont Blanc.*

RETAIL VALUE:
$245.00

What you have to do to win

Reader's are invited to:

- ☐ provide a caption for this photograph ····· ❹
- ☐ provide a short (and apocryphal) explanation as to what is going on in William Street.

The three most amusing explanations and captions will be published in the Autumn 1997 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 10 February 1997.

A Feast of the Senses

Women Barristers' Association Annual Dinner

ON Friday, 11 October 1996, the Women Barristers' Association held its third annual dinner at the post-modern and somewhat deconstructed George Ballroom in the George Hotel, Fitzroy Street, St. Kilda.

The evening was marked by an air of energy, enthusiasm and style, set by the venue — soaring, ornate ceilings, stone, candles, white tablecloths and ivy. Everything and everybody (all 175) glittered and sparkled. And it was loud. Everybody talked to everybody and anybody. There were judges of the High Court, Court of Appeal, Supreme Court and County Court, a table of women magistrates, Q.C.s, barristers, solicitors — three tables from the Australian Government Solicitor, a table from Slater & Gordon, solicitors from Arthur Robinson & Hedderwicks, Phillips Fox, Hogg & Reid and more. And, of course, our very special guest speaker, The Honourable Justice Beazley, J.A. from New South Wales. Charles, J.A. reported that he was greeted enthusiastically by a young man at the door: "Hello Mr. Charles". The young man was a friend of the judge's son.

Elizabeth Kennedy, Rachelle Lewitan Q.C. and Olivia Nikov.

Justice Merkel and Ada Moshinsky Q.C.

Georgina Grigoriou, Jelena Popovic, Lisa Hannon and Sandra Horovitz.

Sue Crennan, Q.C. and Felicity Hampel Q.C.

Helen Symon, Justice Charles and Margaret Beazley.

The formal proceedings were launched by the Association's Convenor, Helen Symon, who introduced a moving grace, reminding us of the achievements, not only of the women in the room and in our profession but of women right around the world.

Sandra Horovitz and Mr. Justice Cummins.

After a sumptuous meal, Beazley, J.A. spoke on the topic, "Should Women be Let Off the Financial Hook?" She focused on recent decisions of the New South Wales Court of Appeal developing the principles applicable to women seeking to set aside securities given in support of their husband's business ventures. It was not the usual after-dinner speech. In the course of it, the judge departed fairly and squarely from "literary convention" and gave us some frank insights into the way judges think and work together.

The evening was an outstanding success, due in no small part to the efforts of Lisa Hannan and Georgina Grigoriou who, between them, pretty much pulled the whole thing together. There is no doubt that WBA functions have a different feel and add a new and exciting dimension to life at the Bar. Keep your eyes open for the next one and put it in your diary.

Lean-to or Penthouse?

IN previous articles, I have discussed words whose meanings have drifted over generations of use. However, many words which still bear their original meaning take a form which has drifted from the original form.

The corruption of form is generally due to difficulty of pronunciation coupled with frequent use, or confusion of an unfamiliar term with a similar but familiar term.

One of the commonest forms of corruption is *aphesis*: "The gradual and unintentional loss of a short unaccented vowel at the beginning of a word" [OED 2nd edn].

Cute is an aphetic form of *acute*; *longshore* is the truncated form of *alongshore*. This explains the American usage *longshoreman* for our *stevedore*. *Stevedore* is itself an aphetic adaptation of the Spanish *estivador*, which drives from *estivar*: to stow a cargo.

Likewise, *sample* is an aphetic form of *example*; *backward* is an aphetic form of *abackward*; and *vanguard* was once *avauntguard*, from which *avantguard* also derives.

Ninny is an aphetic and abbreviated form of *an innocent*. More recently, we have *squire* from *esquire*, *specially* for *especially*. In the language of the law, several ambiguous forms survive: *vow* and *avow*; *void* and *avoid*.

The *goanna* was originally the *iguana*. The *opossum* is now the *possum*. However, it is difficulty of pronunciation which gives us *bandicoot* from the Telugu word *pandi-kokku*, meaning *pig-rat*. (The *pandi-kokku* is a very large, very destructive Indian rat, the size of a cat. Our bandicoot is a different species, but somewhat resembles the Indian rat.)

The process also happens in reverse, by which the original form takes on an additional letter, typically the *n* from the indefinite article. An example of this is *apron* which originally was a *naperon*. Its connection with *napery* and *napkin* is obvious. Equally obvious is the spoken sound of a *naperon* coming to be spoken as an *apron*. It is odd that we do not say *apkins*, specially since most of us use them more often than we use *aprons*.

Another example is *orange* which comes originally from the Arabic *naranj*, in Persian *narang*, *naring*: cf. late Sanskrit *naranga*, Hindi *narang*; and Persian *nar* pomegranate. The Italian was originally *narancia* but is now *arancia*. The Spanish is still *naranja*.

That hallowed hero of the sporting arena, the *umpire*, used to be the *numpire*. The word comes from the Old French *non pair* — "not equal". Its earliest recorded spelling in English was *noumpere* (so spelled in 1364, and also in Wyclif's Bible, 1420). The corrupted form emerged soon afterwards, and went through a variety of spellings during the next 200 years (*owmpere*, *ovmper*, *ompar*, *umpere*, *vmppere*, *umpeer*, *umper*, *unpar*, *umpyer*, *impier*, *umpyre*), until it stabilised on the current spelling in about the 17th century.

That great and traditional accompaniment to festive occasions in Australia, the *saveloy*, is a corruption of the French *cervelas*.

We have a much more recent expression of closely similar derivation: *au pair*. It has not quite become naturalised in English. It means literally *on equality* or *on equal terms*. Its first recorded use in English dates from late last century:

1897 *Girl's Own Paper* 16 Oct. "An arrangement . . . frequently made is for an English girl to enter a French, German or Swiss school and teach her own language in return for joining the usual classes. This is called being *au pair*."

Examples of other agents of word-corruption abound. The Australian *plonk* meaning cheap wine comes from the French *vin blanc*, notwithstanding that it equally (or more frequently) refers to red wine or other liquor.

That great and traditional accompaniment to festive occasions in Australia, the *saveloy*, is a corruption of the French *cervelas*: a *highly seasoned cooked and dried sausage*. We have corrupted the thing as much as we have corrupted the word which signifies it.

That fabric so loved by American tourists, *seersucker* is an East Indian corruption of Persian *shir o shakkar*, literally "milk and sugar".

The strange glow which sometimes surrounds a ship's mast at sea is called *Saint Elmo's fire*. This is a corruption of *Saint Erasmus*, an Italian bishop who was martyred in 303 AD. He was the patron saint of Mediterranean sailors. It comes to us by way of *Sant Ermo*, *San Telmo* and *Sant Helmo*.

Devotees of square dancing or Nashville sounds will recognise *do-si-do* as one of the caller's instructions. It is a corruption of the French *dos-à-dos* and describes a figure in which two people pass around each other back to back and return to their places.

The word *nickname* has always seemed a curious construction. It has been suggested that it is an invocation of the Devil ("Old Nick"). However, that piece of folk etymology is wrong. Originally, it was an *eke-name*. To *eke* is to supplement; so the person who *ekes* out a living doing odd jobs is supplementing their other income. It is widely misused. An *eke-name* is a supplementary name. By the 15th century, its corrupted form was emerging: the OED gives an instance from 1440, which refers to ". . . neke name or eke name . . ."

Real estate agents, who offer *penthouses* for sale as the very height of luxury living at the very top of a building, might be forgiven for not knowing that it was originally a lean-to or covered-in walk-way. *Penthouse* combines the effects of several agents of change. Its earlier form is *pentice*, which comes from Old French *apentis*, *apendis*, from medieval Latin *appendicium*, "a small sacred building dependent upon a larger church". From that original meaning and form, it came to mean any small dwelling attached to a larger one. In 1592 the records of the Manchester Court Leet refer to ". . . settinge upp a slated pentis or hovell". The recent development of the word may be discerned from the following quotations from OED 2nd edn:

1921 *Country Life* Apr. 65/1 Two of the elevators were designed to run to the roof, where a pent-house . . . was being built.

1937 *Sunday Dispatch* 28 Feb. 2/7 You all know from American lyric writers that a penthouse is a thing stuck on a roof. It may comprise one or two floors.

1945 E. Waugh *Brideshead Revisited* i. viii. 194 They're going to build a block of flats, and . . . Rex wanted to take what he called a "penthouse" at the top.

Julian Burnside

"Chips" Visits Us

Reader's Competition Winners

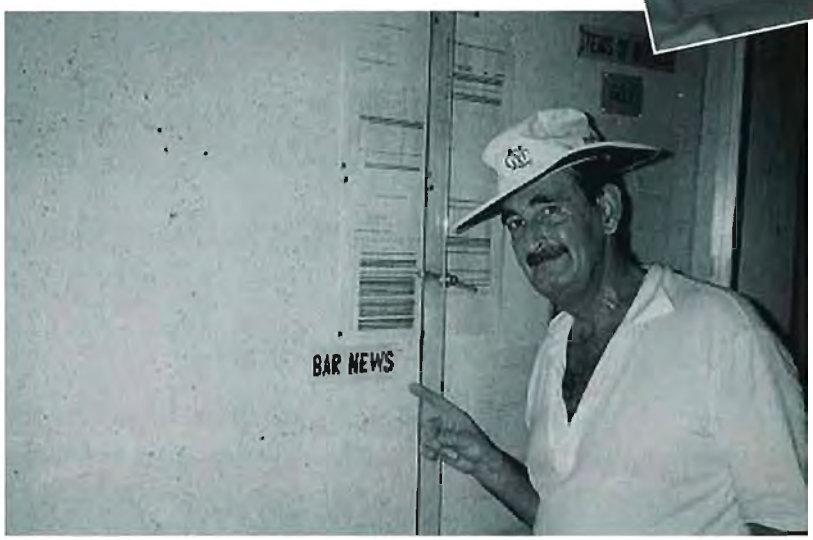
THE Victorian Bar was honoured recently to receive a visit from famous Oz-actor, "Chips" Rafferty.

"Chips" had come to entertain and be entertained at a special Silks' dinner organised in his honour. He was shown around the various Chambers and other Bar venues; when viewing the Bar Mediation Centre, he remarked humorously: "Cripes, the fellas at Tobruk could've used one of these with Rommel!"

On visiting the Bar noticeboard (see photograph), "Chips" was astounded at the vast expanse of space, and remarked humorously: "Cripes, the fellas at Tobruk had more news than this! — and we didn't even have a bar!"

A fine dinner at the Essoign Club was enjoyed by all, and in his after-dinner speech, "Chips" remarked humorously: "Cripes, the fellas at Tobruk could've used tucker like this!"

Jonathan Brett



"Cripes, the fellas at Tobruk had more news than this! — and we didn't even have a bar!"

Runners up

Sole Survivor

The 1968 Inaugural Bar v Law Institute Bermuda Triangle Cricket Match resulted in the loss of all hands — save for the twelfth man (who was out picking oranges at the time). He returned to find that there was no Bar (and no Bar News).

Anne Wardell

Bill Sulks

"Well, if you don't put me in the Firsts, this is what happens — there's just no news."

Chris Caleo

No Substance

"Well, looks like Nash and Elliott have put together another edition with a complete absence of content!"

Anne Wardell

Departmental Spy

"I'm looking for a job; would this mob employ me?"

On advice from the Attorney-General, and in a bid to find out just what is going on in the real world, the Attorney's Chief Adviser, Mr. Greg Ravenlunatic entered Owen Dixon Chambers last week disguised as a member of the Administrative Appeals Tribunal to peruse the Bar Notice Board.

When caught out by an alert Security Officer from the Corps of Commissioners, Mr. Ravenlunatic adopted an innocent pose by pointing at the Bar News label and muttering, "I'm looking for a job; would this mob employ me?"

It is rumoured that the Attorney was particularly interested in discovering whether or not *Bar News* had caught wind of the proposed amendments to the Road Safety Act which are to be introduced in the Spring Session of Parliament.

This new Act entitled the *Road Safety (Hat) Act 1996*, is designed to overcome traffic accidents caused by hat-wearing drivers. A portable hat-detection device has been issued to members of the newly formed Traffic Hat Squad, a division of the Victoria Police Traffic Operations Group, in preparation for the coming into operation of the legislation.

Senior Sergeant Blowharder of the new squad recently told a member of *Bar News* in licensed premises, that the new device was necessary to indicate whether or not the alleged offending driver had worn a hat within the three preceding hours before being requested to accompany the member to the hat bus for a formal hat test.

In view of the proposed legislation, *Bar News* advises Members of Counsel not to drive within three hours after removal of their wigs.

Peter Billings

Bar News Not Going World Wide

The actual explanation of the photograph of Gillard Q.C. on p.52 of the Spring Edition of the *Bar News* may be as follows:

EXCLUSIVE!!
***Bar News* Not Going World Wide!!**

Ex-Chairman Gillard shows where the *Bar News* may soon have been available at the Royal Barbados Cricket Club. As part of the Murdoch Super League victory, Senior Counsel for News Limited negotiated an agreement whereby the company undertook to distribute the *Bar News* world-wide through bars and locker rooms at selected sporting clubs.

The Editors were advised that as part of the deal Rupert required the following alterations and additions to the existing layout:

1. Page 3 to feature a topless photograph of a female barrister or judicial person.
2. Page 4 to be a monthly rotating judicial portrait entitled "Grumpy Old Men".
3. Page 7 to feature exclusive exposes of (mis)behaviour of Counsel such as "Two Nights on the Town — Top Sydney Silks on the loose in Canberra".
4. A Family Law column to be entitled "What Dire Offence from Common Causes Springs?".
5. A Common Law column to be entitled "What Mighty Contests Rise from Trivial Things?"
6. The business advice column — first edition to feature "How many shares can you own before having a conflict of interest (ignoring perceived conflicts of interests)?"
7. The Paparazzi Section, featuring shocking photographs on topics such as:
   a) Judicial Power And Glamour — The 1996 Portfolio;
   b) "Worst Dressed Barrister?";
   c) "Just Good Friends??";
   d) "Pissed again?".
   (all published solely in the public interest)

The Editors were warned of photographs taken with a long lens showing highly compromising scenes supposedly shot through the windows of the Supreme Court courtyard, in well-known restaurants throughout the country and on yachts off the Queensland coast!

The Editorial Committee has determined that embracing the Murdoch conditions may well have seriously jeopardised their future careers (and personal safety) and has therefore recommended to the Bar Council that the *Bar News* remain independent!

Gavan Rice

Author of the winning entry in the first of the new Reader's Competitions, Gavan Rice (right) received his Mont Blanc pen from the proprietors of Pen City, John Di Blasi and Terry Jones.

A Fair Thrashing by the Institute

WE must have celebrated over much after last year's victory against the Law Institute.

This year they got their act together, marshalled a large number of extremely skilful and younger players, and gave us a fair thrashing.

The annual warm-up game against RMIT produced a 2–4 result which gave hope to the Bar team that this year might see further success against the Law Institute. This was particularly so given that one of their stars has left being a solicitor to become a stand-up comic.

To our horror, however, when we arrived at the State Hockey Centre we discovered that they had recruited two or three other outstanding players who play top level hockey.

Our tactic of refusing to allow them to play a ring-in goalkeeper backfired badly when they recruited a Pennant "C" player, and all in all the Law Institute team was outstanding.

Before the game — optimism.

The Bar started well and scored two (disallowed) goals and for the first quarter of an hour we were well in the game.

Thereafter, the Law Institute simply ran over the top of us and emerged as worthy 5–1 winners. The Bar team's goal was scored by Andrew Tinney.

Despite the heavy scoreline, the Bar team played extremely well and the standard of this year's game was far the highest for years.

Thanks are due to Paul Morris and Michael Archer of RMIT who umpired the game and to Richard Brear for his organisation as usual. Thanks also to the enthusiastic rabble who played for the Bar who were as follows:

Tom Lynch, Lachlan Wraith, Peter Burke, Stuart Wood, Meryl Sexton, John Coldrey, Andrew Tinney, Michael Tinney, Andrew Robinson, Richard Brear, Geoff Dickson and Hitelai Polume.

Philip Burchardt

Owning up. Coldrey J. hands over the cup.

Misleading and deceptive conduct — we'd just lost.

Half time — 4–0 down, 'nuff said!

The Annotated Rules of Court 1996

By Richard Cooke
Australian Law Books
pp. i–xxiv, 1–706

A single volume. Comprehensive. Pithy annotations and "easily portable and logically arranged" (Phillips, C.J.).

This is a useful book. It covers the Rules of the Supreme Court (Chapter 1), the County Court and the Magistrates Court — all in a single volume, with commentary throughout.

It is a user-friendly book. Some small things:

- the varying typeface sets the Rules apart from the commentary in an organised style. No chaos or confusion here;
- the legislative history of these Rules is recorded in italics in a logical position in respect of each Rule;
- the Index is comprehensive (15 pages) and distinguishes the jurisdiction of the indexed items;
- the Forms of the three jurisdictions are clearly set out;
- at the foot of each page bold type highlights the subject matter of that page;
- the Scale of Costs of each jurisdiction is set out at the end of the volume. (However, the Magistrates Court Scale is already out-of-date.) The layout of the Scale leaves plenty of scope for future amendment.

The book is not meant to replace the multi-volume Practice and Procedure manuals. It is a work built for briefcases rather than bookshelves. It could, perhaps, have been given a stronger binding (I suspect the cover will disintegrate with use) but application of a clear plastic contact covering may stiffen its spine.

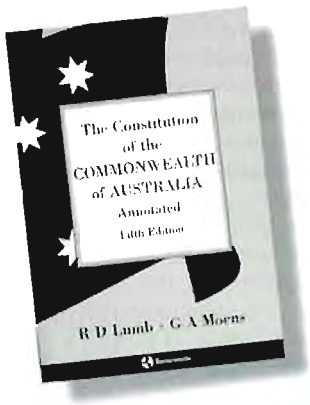
It is also a budget price work. A mere $79.95. For an additional $15.00 the publishers will provide three quarterly bulletins during 1996/97 which, they assure, will detail major changes to the Rules.

In his forward to the work the Chief Justice concludes:

> The Annotated Rules of the Court will, I am sure, become a constant companion for many Victorian Practitioners."

That's pretty high authority. The author also boasts some authority in expertise of matters of Rules. He is a former editor of *Jacobs County Court Rules* and has succeeded in the task he set himself of providing a single volume easy-to-manage guide book to the Rules in the respective jurisdictions.

G.B. Wicks



The Constitution of the Commonwealth of Australia (Annotated) (5th edn)

By R.D. Lumb and G.A. Moens
Butterworths, 1995

AFTER a fairly comprehensive introduction, this book deals with each section of the *Commonwealth of Australia Constitution Act* in detail.

Each relevant section or part thereof is quoted in full, boxed and placed in italics for ease of reference and distinction from the annotated text.

The commentary (in numerical paragraphs) covers a reference to Quick & Garran's *Annotated Constitution*, published in 1901, as well as the recommendations of the Australian Constitutional Convention, the Constitutional Commission and the Republic Advisory Committee. It also covers references to the statutes enacted under the authority of the particular head of power or which come within the scope of the section. Case references are comprehensive with useful obiter exerpts.

The Introduction deals with a number of topics including: pre-Constitution aspects such as the acquisition of sovereignty by Britain, the making of the federation; significant issues such as separation of powers, judicial review, locus standi and constitutional amendment.

This edition deals with some recent significant cases as well.

- *Mabo.*
- the *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106 in which the High Court implied into the Constitution a right to communication in relation to political matters.
- The *Tasmanian Crayfish* case on the High Court's new interpretation of section 92.

Law of Torts (2nd edn)

By R.P. Balkin and J.L.R. Davis
Butterworths 1996
pp. i–cxiv, 1–850, Index 851–890

IN the preface to the 1st edition of *Law of Torts*, the authors note that the genesis of this work was a suggestion from the publishers to prepare an Australian edition of *Street on Torts* (then in its 7th edition). This suggestion no doubt arose from a recognition that there was a divergence in the law as applied in different common law jurisdictions. The Privy Council confirmed recently that the common law may develop differently in the various common law jurisdictions particularly in areas where the law was still developing (see *Invercargill CC* v. *Hamlin* [1996] 1 All ER 756). The capacity of the common law to evolve in response to local needs is a strength of the common law, however this will be either an inspiration or a bane of a textbook author's life. Balkin and Davis, the authors of *Law of Torts* were inspired, and instead of

confining themselves to adapting *Street on Torts* to Australasian conditions the authors used it as a framework in expounding the principles of tort law as currently applied in the courts of Australia and New Zealand. To this end, *Law of Torts* straddles the common law world while focusing on the law as applied in Australia and New Zealand. Consequently there is a strength and breadth to the exposition of the law in *Law of Torts*.

The 2nd edition of *Law of Torts* is broken down into eight broad parts, the first being the introduction. Part II deals with the intentional invasion of personal and property interests and is concerned particularly with actions derived from the tort of trespass. These include trespass to the person (battery and assault), trespass to goods (conversion and detinue) and trespass to land. In addition there is a chapter dealing specifically with defences to these intentional torts.

Part III covers negligence and includes chapters utilising the traditional analysis of negligence, that is, duty of care, breach of duty, causation and defences. There are also specific chapters dealing with personal injury claims (two chapters) that include some discussion of statutory compensation schemes in Australia and New Zealand and a chapter on the negligent infliction of purely economic loss. Damage is dealt with in Part VIII.

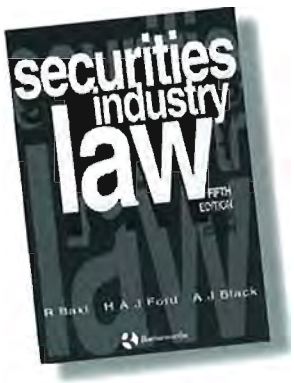
Part V is essentially devoted to deformation and includes discussion of *Theophanous* v *Herald & Weekly Times Limited* (1994) 182 CLR 104 and *Stevens* v *West Australian Newspapers Limited* (1994) 182 CLR 211, cases that provide a qualified defence for false and defamatory statements concerning government and political matters, and that may be subject to further consideration by the High Court of Australia.

Part VI deals with the protection of trading or business interests. This part is principally concerned with the economic torts (i.e. interference with contracts, conspiracy, injurious falsehood, passing off and deceit) but as in the first edition a chapter has been included in relation to the statutory form of the passing off and injurious falsehood actions as embodied in Section 52 of the *Trade Practices Act 1974* (and similar State legislation). Strictly speaking of course an action pursuant to Section 52 does not create a new tort, but in view of the prevalence of this form of action over the traditional forms the authors are to be commended for their good sense in including a chapter dealing specifically with Section 52.

Parts IV, VII and VIII contain an eclectic collection of topics including chapters on nuisance, animals, interests protected by statute, family relations, malicious prosecution, maintenance and champerty, vicarious liability, remedies (and their extinction), parties (i.e. the Crown, trade unions, minors, bankrupts, assignees, etc.) and multiple tortfeasors (joint and concurrent). It is also in this part (at pages 754–6) that the rule in *Rylands* v *Fletcher* finds its last resting place as a result of the decision in *Burnie Port Authority* v *General Jones Pty Ltd* (1994)170 CLR 520.

The authors are to be commended. The second edition maintains the high standard of the first. *Law of Torts* presents a comprehensive statement of the law of torts in Australia and New Zealand. The authors have achieved their goal of providing a sufficiently detailed analysis (including comprehensive footnotes) to make the work ideal for practitioners. It is also written so as to provide a suitable text for students. The exposition of the law as it stands is clear and concise. The authors have contributed to the continuing development of tort law by indicating possible developments in the law or inconsistencies in the application of the law as it currently exists. The work will surely find a niche on students' and practitioners' shelves alike.

P.W. Lithgow



Securities Industry Law (5th edn)

By Baxt, Ford and Black
Butterworths
pp. 400 including index and contents
Recommended retail price $69.00

THIS is the fifth edition of the book that was first published in March 1977. The book is principally aimed at the student and practitioner. When first published it was published as *An Introduction to the Securities Industries Acts* by Baxt, Ford and Samuel. The last edition of the book was published in 1993.

The authors examine securities in relation to corporations in their various forms. The examination includes a section on prescribed interests with particular reference to the interpretation of prescribed interest and participation interest as considered by the courts. The authors discussed the various "associations" or interests that may be considered to be prescribed under the Corporations Law.

Another section of the book is concerned with the regulation of the offering of securities and the consequent need to protect the investing public. The author offers a clear path through the labyrinth imposed by the Corporations Law and regulations.

There is also a very interesting discussion both under the Corporations Law and under the Trade Practices legislation of liability for statements or non disclosures in relation to the marketing of securities. In the discussion on causation (paragraph 406) the authors consider the difference between causation and what might otherwise be seen as contributory negligence, and refer to the case of *Tefbao Pty Ltd* v *Stannic Securities Pty Ltd* (1993) 118 ALR 565 as well as the article by C.J. Campbell in Volume 67 of the *Australian Law Journal*.

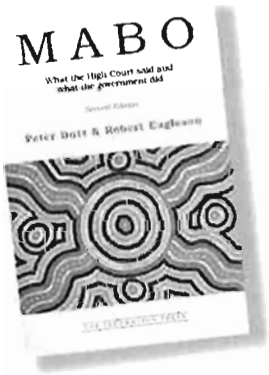
What I find attractive about the book is the clarity in which it examines the various issues. That provides an invaluable guide for those wishing to advise their clients upon the possible consequences of their actions in their dealings with securities.

The book considers in detail the internal and external regulation of stock exchanges and the effect of non compliance with those regulations. As would be expected, the relationship between a broker and his or her client and the conduct of a securities business each receives separate treatment. The authors discuss the introduction of the CHESS System, which commenced in 1994. The CHESS system is concerned the electronic transfer of securities which has its own regulatory problems. Whilst one may find discussion of legal principles, such as the fiduciary nature of the broken client relationship, in other texts, it is extremely useful to have all of the information relating to the various topics collected in a book such as this and commented upon by

the authors whose reputations in this areas is unsurpassed.

Consequently, this is a text that I would recommend for those concerned with company securities and it is very useful as a primary resource when confronted with problems that do arise in this area from time to time.

John V. Kaufman



Mabo: What the High Court said and what the Government did (2nd edn)

by Peter Butt and Robert Eagleson
The Federation Press 1996
Foreword by the Hon. P.J. Keating

THIS book contains extracts from the High Court judgments in the *Mabo* decision, (*Mabo* v *Queensland* (No. 2) (1992) 175 CLR 1). For ease of understanding most technical terms, bibliographical references, quotations and footnotes have been omitted. Further, the authors have re-arranged the various judgments in the High Court and grouped extracts from each of the five separate judgments in the High Court under appropriate chapter headings. This enables the reader to see how particular issues were approached by the various judges.

The dissenting judgment of Justice Dawson is treated in a discrete chapter.

To the 1st edition the authors have added a chapter "After Mabo — What the Government Did". This chapter discusses the *Native Title Act 1993* (Cth) together with further analysis of the likely approach to native title issues by the Coalition Liberal and National Party Government elected on 2 March 1996. The authors also draw upon the policy statement issued prior to the election and amendments to the Native Title Act proposed in the Federal Government's May 1996 paper "Towards a More Flexible Native Title Act".

As with the 1st edition, the style of this work retains the meaning and integrity of the *Mabo* judgment. Indeed from a lawyer's point of view the judgments read like literature and no doubt this will enhance the accessibility of the judgments in this edited format to all Australians and hopefully further community understanding of the often misunderstood principles and rationale of the *Mabo* decision.

In view of the possibility of further changes to the Native Title Act, the High Court's forthcoming decision in the Wik Case and the current Yorta Yorta claim, the hearing of which has recently commenced, readers may be hoping that further editions of this work will be prepared to incorporate these developments in relation to native title. This book is commended to all those who seek an understanding of the *Mabo* decision and the changes it brings to Australian law and society.

P.W. Lithgow

Dissolution and Annulment of Marriage by the Catholic Church

By Eileen Stuart
The Federation Press, 1994

THIS is an esoteric little text comprising a history of the topic as well as an explanation of the process of achieving an annulment of a marriage within the judicial process of the Roman Catholic Church.

It effectively started out as a thesis for the author's Masters of Laws degree but is of enough broader appeal to warrant publication.

It has a fine jurisprudential analysis of the kinds of law that exist from Eternal and Divine Positive Law to Human Positive Law comprising Canon and Civil Law as well as Customary Law and Natural Justice.

The Catholic Church of course does not grant dissolution of marriage. It does not recognise divorce — except for cases that come within the "Pauline/Petrine Privilege".

It can only declare a marriage as a nullity. The grounds of nullity are various: some are obvious such as marriage to a person still lawfully married or marriage within the prohibited degrees of consanguinity. However, it's the broadening of those grounds that is of most interest to persons interested in this process.

Interestingly, the Church does require the parties to have obtained a civil law dissolution before proceeding with the annulment application through Church Tribunals.

I believe this is a worthwhile read for any family lawyer to get a wider perspective from a particular religious viewpoint.

2497A.D.: Chief Justice to a Colony

By Peter Trevorah
Published by the author
pp. 1–263

IMAGINE it if you can. You've had a fairly ordinary career at the Bar. Most of your working life has been spent in and out of suburban Magistrates Courts. Your few forays into a higher court inevitably have you before the Ollie Olliphant of the County Court. The culmination of your career is being "slotted" overnight for what His Honour held was contempt and what you felt was reasonable but fearless pursuit of putting forward your client's case.

Whilst inside you espy a job ad that is suddenly very appealing. You are successful. You become the only lawyer amongst thousands of frozen earthlings on their way to colonise a far off planetary system. Unfortunately, the need for lawyers is not great and you are not defrosted for some 500 years whereupon your indecisiveness has you exiled . . .

You have your dictaphone with you throughout. So does the lady someday to be your wife and your time travelling grandson. This book is the transcription of these dictaphonic journals. It is a bit of a

poor man's Rumpole meets Isaac Asimov, Arthur C. Clarke and H.G. Wells.

Although it is hard to get into initially — the author has a somewhat irritating habit of inserting parenthetic bits and pieces in most sentences and the typeface is small and grey and doublespaced — it is a yarn well worth persevering with especially if you have a penchant for science Fiction and don't mind ideas you may have read before.

It is especially recommended for those going away or just taking a break from practice over the Christmas–New Year period. It would be worth reading in those few days at the end of the break when loins need girding. It arguably may contain salutary lessons for those who may otherwise return to the fray a little more exuberant than usual.

If none of those reasons appeal, buy it because the author was once of our Bar and obviously befriended his dictaphone in some of those apparently endless moments between the last brief and the next which had not yet appeared over the horizon. You know what I mean!

(Fortuitously, an advertisement for this book appears in this erstwhile journal.)

Clive Penman

Panadol Recommended

Dear Sirs,

Re: *Carter* -ats- *Woodhouse*

WE acknowledge receipt of your letter dated the 8th October.

You query what paragraph 1 and paragraph 2 mean by containing namely "[....] (etc.)".

We advise that Justice Hedigan has delivered a judgement wherein he advised that, when particulars of a defence and counter claim are amended and words are taken out of an original defence and counter claim, you are required to put in the documents the four dots in inverted brackets to indicate that, this is where words have been taken out. We trust this clarifies your enquiry.

We have forwarded your request for further and better particulars to Counsel and will forward same in due course. Can you advise us your suggestions in respect of medication?

Yours faithfully,
HOLLOWS

Dear Sirs,

Re: *Woodhouse* v *Carter*

We refer to your letter of 14 October 1996 and thank you for your assistance in paragraphs 2 and 3 thereof.

With regard to the last sentence in such letter we are unaware of your particular condition and can only, in these circumstances, recommend Panadol. We hope this assists.

Yours faithfully
W.E. PEARCEY & IVEY

Conference Update

27–28 January 1997: Honolulu. The Inter-Pacific Bar Association Conference on Strategic Planning for Businesses and Professionals.

26–28 February 1997: Gold Coast. Superannuation 1997. Contact Dianne Rooney. Tel: 9602 3111, Fax: 9670 3242.

7–9 March 1997: Gold Coast. Queensland Law Society and Bar Association Annual Conference. Contact Tel: (07) 3842 5888, fax (07) 3221 9329.

9–12 March 1997: Reading, England. Seminar on European Banking and Financial Law. Contact The Study Group for International Commercial Contracts, London SW152, fax +44(0) 1817857649.

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.

28 April–2 May 1997: Kuala Lumpur. Seventh Annual Inter-Pacific Bar Association Conference. Information available from Seventh Inter-Pacific Bar Association Annual Conference c/- Shearn Delamor & Co., 2 Benteng, 50050 Kuala Lumpur, Malaysia. Tel: 03 – 2300644, fax 03 – 2385625.

1–6 June 1997: Thessaloniki. Sixth Greek Australian International Legal and Medical Conference. Brochures available from Bar Council Offices.

3–7 June 1997: San Francisco. Congress on Family Law and Children's and Youths' Rights. Contact Ms. Gail Hawke. Tel: (02) 9252 3388, fax (02) 9241 5282.

23–27 June 1997: Bali. Criminal Lawyers' Association of the Northern Territory Sixth Biennial Conference. Contact Lyn Wild on (03) 9723 3173, fax (03) 9723 3597.

22–24 August 1997: Sydney. AIJA Asia-Pacific Courts Conference. Contact Carol (02) 9241 1478, fax (02) 9251 3552.

27–31 August 1997: Manila. Fifteenth Biennial Law Asia Conference. Contact Law Asia Secretariat, Darwin. Tel: (08) 8946 9500, fax (08) 8946 9505.

1–7 September 1997: Florence. Thirty-Fifth Annual Congress and International Association of Young Lawyers. Contact Michelle Sindler (02) 9210 4444, fax (02) 9235 2711.

25 October–1 November 1997: Cape Town. Eleventh CMJA Triennial Conference.