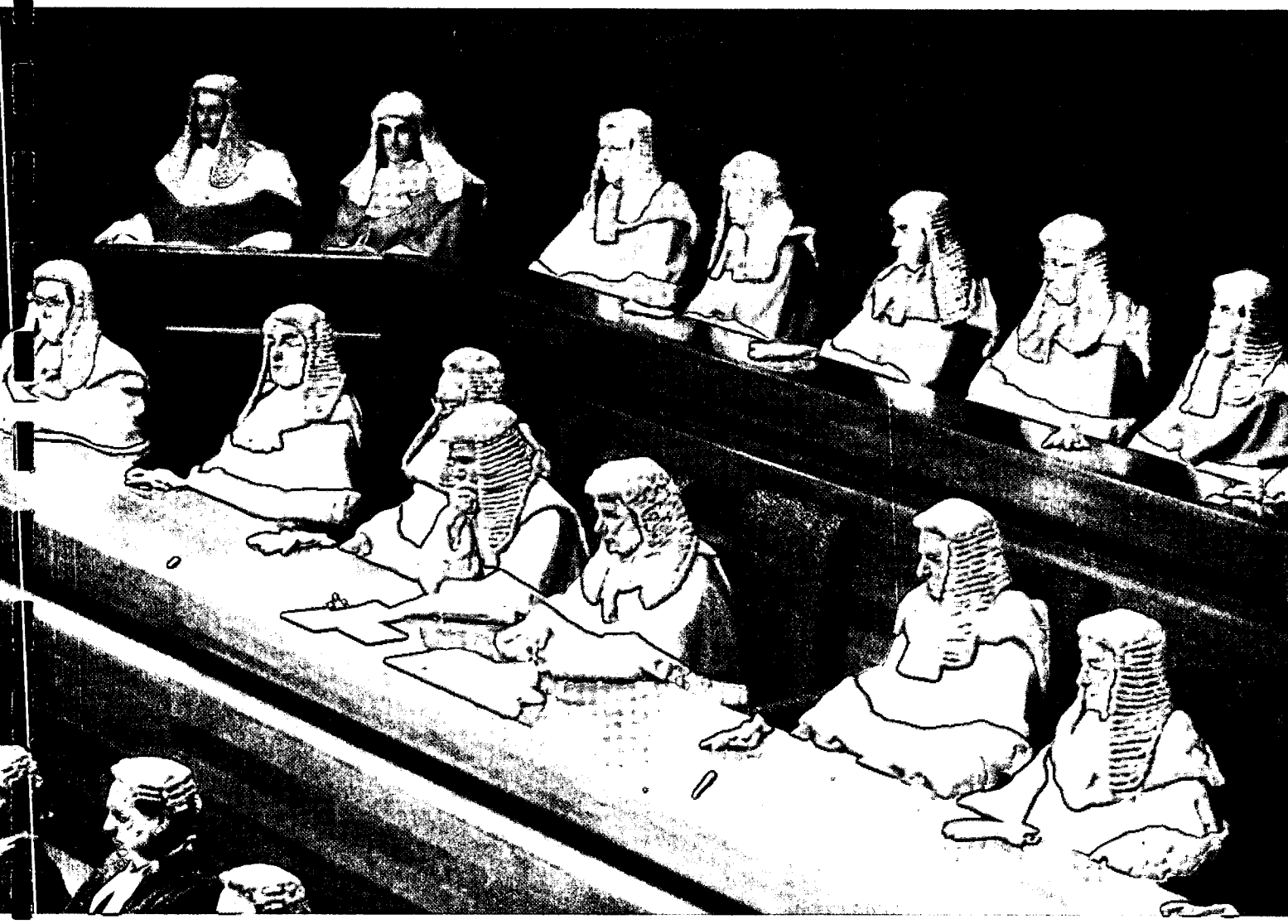
Bar News

The journal of the NSW Bar Association



Changing of the guard

Winter 1985

In this issue

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WHAT THE BAR NEEDS

In the early part of this century an American Vice-President, Thomas Riley Marshall, rescued himself from the obscurity that usually overtakes holders of that office by observing: "What this country needs is a good five-cent cigar."

In one respect time has not dealt kindly with his proposition. Changes in the value of money have produced the result that a five-cent cigar would today be a disgusting article, quite unlikely to be made of tobacco.

Worse still, the recreational practice to which he referred is now widely regarded as acceptable only when indulged in by consenting adults in private. The ash-tray is as useful in polite company as the cuspidor.

Nevertheless, the homespun wisdom underlying the thought is to be admired. It is based on the recognition that to complicated problems there are often simple solution, and that the remedy to public difficulties may be found at a more private level.

The problems of the bar in 1985 are more than sufficient to tax us. We know well enough what we do not need.

To identify our enemies and declare them anathema would be emotionally gratifying, but politically unprofitable. A more positive solution may be to concentrate upon a revival of our corporate spirit.

A new carpet in the Bar Common Room (tastefully furnished in the style of former President McGregor, indulgently elaborated by Meagher QC, and now in a state of aesthetic collapse) might draw more members to a central meeting place.

There is reason to believe that funds for such lavish expenditure will soon be available. However, the answer to all our problems does not seem to lie in interior decoration.

If, however, an appeal is directed to the mind rather than to the senses we may achieve a result. That is the idea of this publication.

It is hoped that it will provide, on a different level, some of the facilities of the Common Room: a medium for scandalous information; an occasion of privilege for defamation; and a forum for ideas about the Bar.

What the Bar needs if a good free journal. The people who have participated in this enterprise are to be congratulated. Its success could be important to us all.

A.M. GLEESON

Bar notes

Provisional liquidators: undertakings as to damages

The Bar Association has recently been informed that the judges of the Equity Division propose to adopt the English practice outlined in *re Highfield Commodities Limited* 1984 3 All E.R. 884 as to the giving of undertakings as to damages in connection with the appointment of provisional liquidators.

The general practice as stated in *re Highland* is to require an undertaking as to damages if a provisional liquidator is appointed ex parte but not where the appointment is made inter partes.

The reason for the distinction was said to be that the protection of the undertaking would be required where the company had had no opportunity of providing any answer or explanation to contentions which might prove to be wholly unfounded.

The difference in practice from that in relation to the grant of interlocutory injunctions in relation to which undertakings as to damages are virtually always required appears to be that there is nothing in an ordinary case of obtaining an interlocutory injunction corresponding to the presentation of a winding up petition, or the filing of a summons seeking a winding up order.

The claim of a defendant who will not ordinarily suffer any damage until an interlocutory injunction is granted to be given an undertaking as to damages when the order is made is thought to be considerably stronger than the claim of a company which has already suffered an injury, without receiving any undertaking, by reason of the application for winding up being made.

Practitioners are reminded of the necessity of being armed with instructions to give an undertaking as to damages when making an application in which one may be required, and of the need to ensure that the client understands the nature of the undertaking.

This is, in essence, that if the Court in its descretion so orders, he will pay to the party subjected to the relevant order such compensation as the Court may assess.

An order for compensation may be made where the plaintiff is later found not to have been entitled to the injunction or other order, whether or not there was misrepresentation or default in obtaining it *(Griffith v. Blake* (1884) 27 Ch.D. 474).

Although the ordering of compensation is discretionary, it has been said that "generally speaking, so long as the claim for damages is not trivial or trifling an enquiry should be directed and the defendant will be entitiled to recover the loss which is the natural consequence of the grant of the injunction" *(Air Express Limited v. Ansett Transport Industries (Operations) Pty. Limited* (1979-81) 146 C.L.R. 249 at 323).

Supreme Court building and engineering list

It is proposed that there be constituted a special list within the Common Law Division of the Supreme Court for building and engineering cases.

Rules to regulate this have been formulated (as part 14A of the Supreme Court Rules) and are likely to come into effect within the near future.

Rule 14 envisages the appointment of a court expert to advise the judge on any technical question which may arise in such proceedings.

Such an appointment cannot be made where all parties oppose it.

There is no provision obliging the judge to acquaint the parties with the substance of his communications with the adviser.

The Bar Council regards this as an undesirable aspect of the rules and draws the attention of members to the potential dangers inherent in the proposal.

New Supreme Court scale of counsel's fees

A new scale for counsel's fees came into operation in the Supreme court in respect of briefs delivered on or after 1 June 1985.

The recommended fees were arrived at by the Chief Executive Officer and Principal Registrar of the Supreme Court after taking into consideration the National Wage increase in April 1984 (4.1 per cent) and in April 1985 (2.6 per cent).

Captain Duchesne has circulated a copy of the new scale to all members of the Bar Association.

New Barristers' committee

The Committee was set up initially following a resolution by the Bar Council on June 12, 1975 and was then entitled "Young Members' Committee".

The concept, formation and purpose of the Committee was set out in a report by J.R.T. Wood (as he then was) dated June 12, 1975.

The Committee consists of four persons elected by members of less than five years standing, one of the two members of the Bar Council of less than five years standing, and one senior member of the Bar Council.

The Committee is now known as the New Barristers' Committee and, in substance, is an avenue for identifying and if possible solving problems affecting new members, advancing the interest of new members in the Bar Association, and where appropriate making recommendations to the Bar Council.

The 1985 Committee has been holding at least one meeting a month and minutes are circulated to all notice boards.

So far this year the 1985 Committee has considered a number of matters raised by new members and on February 26, 1985, held an open forum in the Bar common room which was well attended.

The open forum discussed issues including accommodation, new chambers, fees and a social function.

Details relating to the date and venue of the social function for new members will soon be circulated and a further open forum will be held.

In the meantime the 1985 committee would greatly appreciate the names of new members who are prepared to assist in work experience programmes for school students.

New members are also reminded that matters may be raised for the consideration of the Committee either by approaching a member of the 1985 Committee or through the Registrar.

European young lawyers

The Association Internationale des Jeunes Avocats ("AIJA" or the International Association of Young Lawyers) was founded in 1962.

The objects of the Association are:

- to study advanced problems of law and questions facing young lawyers;
- to help in the formation of groups of young lawyers in countries where they do not yet exist;
- to further the interests of young lawyers;
- to take an active part in the development of the legal profession and in the harmonisation of its professional rules;
- to intervene when the right of lawyers to practise freely or the rights of persons to be legally represented and to receive a fair trial are threatened;
- to defend those principles common to and indivisable from the notion of justice and law.

These ends are achieved by the following means, among others:

(i) An annual conference lasting one week and which is usually held between the end of August and the beginning of September.
(ii) Two or three meetings each year of the Executive Committee.
(iii) Regional meetings between young lawyers of neighbouring countries.
(iv) Permanent commissions.
(v) Introductory courses to the main legal systems of the world.
(vi) The publication of an annual directory.
(vii) A quarterly magazine.

The 1985 Conference will be held in Lisbon, Portugal from September 24 to 28 inclusive. The topics are:

- Legal protection of software.
- The removal of minors from one jurisdiction to another.
- The legal status of company directors, their civil and criminal responsibility.
- Free movement of goods in the EEC.

A very friendly atmosphere pervades the Conference. There is also an opportunity to dine in the homes of local lawyers.

These, and the social programme, are features of the Conference which set it apart from those of other organisations.

Membership and conference information may be obtained from Cowan or from the Association Internationale des Jeunes Avocats, Avenue Louis Le Poutre 59, Bte 20, B-1060 Bruxelles, Belgium.

Coming events

Bar Association events — short term

July 5 — Bench and Bar dinner (guest of honour, Dame Leonie Kramer)
August 5 — Tennis Day (contact Don McCredie)
August 23 — Dinner in honour of retiring Registrar

Bar Association events — long term

Nov. 1986 — NSW Bar Association Centenary Ball (University of Sydney Great Hall and front lawn)

Other events

July 26-27 — Building Industry Liability Conference organised by the Royal Australian Institute of Architects. Speakers include J. Dorter of Allen Allen & Hemsley and G. Masel of Phillips Fox & Masel. (Contact: The Practice Division, RAIA, 30 Howe Crescent, South Melbourne, Victoria.

August 24 — Seventh National Conference, Australian Society of Labor Lawyers, Melbourne (contact: The Australian Society of Labor Lawyers, GPO Box 736F, Melbourne 3001).

August 5-9 — Twenty-third Australian Legal Convention "Destinations in Law", Melbourne. Registration fee $275 for delegates and $90 for accompanying persons.

Sept. 24-28 — 1985 Conference International Association of Young Lawyers Lisbon, Portugal (contact: D. Cowan).

Computerisation: our servant not our master

*By Sir Laurence Street, Chief Justice of NSW**

The year 1984 saw the inauguration of this State's Computerised Legal Information Retrieval System.

For the price of basic equipment and a monthly charge, this service provides immediate access to an enlarging data bank.

Already many NSW and Victorian statutes have been keyed in. Commonwealth legislation from the Commonwealth's Scale System complements this basic primary material.

Within the next few months all NSW and Victorian current sessional legislation and most reprints of statutes of practical utility in both States will be added.

On the case law side, reported cases, and a selection of unreported cases, in recent years from NSW and Victoria are included. Access is available to all the Commonwealth Law Reports through the Scale System together with a further 15 secondary data bases.

Nineteen additional secondary bases with major emphasis on commercial fields are planned. The loading of case law will continue, moving backwards in time and extending out to specialised reports such as Australian Criminal Reports.

The prospect of a comprehensive and up-to-the-minute data bank of statutory and related material is exciting. I view, however, with some reservation the prospect of too widely ranging use of computers as storage banks for case law.

Computerisation of judicial decisions in readily accessible form will prove to be a most valuable servant, but we must be on our guard lest it abandon its role of service and tend towards dominating the practice and administration of the law.

There is a risk of the system overtaking the substance of our law. By this I mean that there is room for justifiable fears that the day-to-day administration, and even more importantly the development, of the law may be crushed under too great a weight and proliferation of decided cases being fed into the data base.

There is, moreover, a concomitant risk of dehumanising the essential process of the law.

The common law has been able to grow and develop in order to meet the changing requirements of society over the decades and over the centuries. This has been a gradual process justifying Tennyson's tribute to the English legal system as one in which

> *Freedom broadens slowly down from precedent to precedent.*

That couplet catches the essence of the common law —the broadening from precedent to precedent.

We are no longer required to give lip service to the ancient fiction that the common law exists in an entire and pure state of perfection so as merely to involve its being ascertained from the precedents and applied to the case in hand.

It is respectable now to acknowledge the undoubted truth that, in determining what should be the form and content of the relevant modern common law rule, the body of case law provides the context against which we evaluate a particular public or social problem as perceived by the court.

Within the ordinary limits of the human mind and capacity for research, it has been neither possible nor practicable until now to collate and attempt to use too many or too detailed individual examples of the application of the law in judicial decisions.

Lawyers have had, perforce, to be selective in their references to case law.

This has tended to preserve an appropriate recognition of the differing status between a case which can properly be regarded as an authoritative and reliable precedent on the one hand and, on the other hand, a case of doubtful authority or a case involving no question of principle and amounting to no more than the application of a well settled rule to the particular issues in suit.

The computer enables us to break the limiting bounds of the ordinary human intellect and research capacity. There will no longer be the same absolute necessity for selectivity and subjective evaluation of those cases that are of real worth.

At the press of a key we will be able to have the lot. And herein lies the risk to which I draw attention.

By the availability of access to an enormous number of detailed individual instances we run the risk of over systematising the law. The computer technologists will be

**From an address delivered to the Law Society of New South Wales on 29th January, 1985.*

able to create a matrix so rigid and so detailed that it could de-personalise the day-to-day operation of the law.

This is a stage at which computerisation will have ceased to be a servant and have taken over instead a dominating role in the practice and administration of the law.

We in the market place, who work within the law, must assist those whose task it is to select cases for inclusion in the data bank by making plain the nature and extent of our requirements and by drawing attention to the risks and dangers of undue liberality in the process of selection.

We must encourage them to be ruthlessly selective in the case law and similar material approved for inclusion in the computer. Cases must be responsibly evaluated as justifying inclusion in the comprehensive data bank.

We need easier and surer on-going access to all the current and past cases of sufficient worth to justify consideration when deciding other cases. That is the extent of our need.

It would be a tragedy if the computer became little more than an unedited means of providing access to a great deal more cases than we have been able thus far to accommodate intellectually. I dread the prospect of being inundated by simply an enlarged multiplicity of cases.

It is quality, not numerical preponderance, that must be the hallmark of the data bank.

Underlying all of this is a fear that computerisation, unless properly controlled and used, has the potential to de-personalise the practice and administration of the law. We are, of course, as lawyers all involved with the affairs and problems of individual human beings, irrespective of whether they be concerned personally or as staff members of major corporations or government departments.

If we are to continue our never-ending struggle to equate law and justice we must preserve such elements of flexibility and discretion as have thus far enabled the law to be fairly and justly applied in individual instances. A system involving arbitrary, computer-dominated determinations of legal problems inevitably will dehumanise the administration of the law and encumber our on-going task of pursuing true justice.

I should make it clear that I do not intend to reflect adversely upon the policy currently being pursued by those responsible for the CLIRS project. In fact, quite contrary to being critical, I warmly endorse the controlled selectivity that is being pursued in that project.

What I fear is the offering of some additional facility that will multiply the number of cases in the data bank.

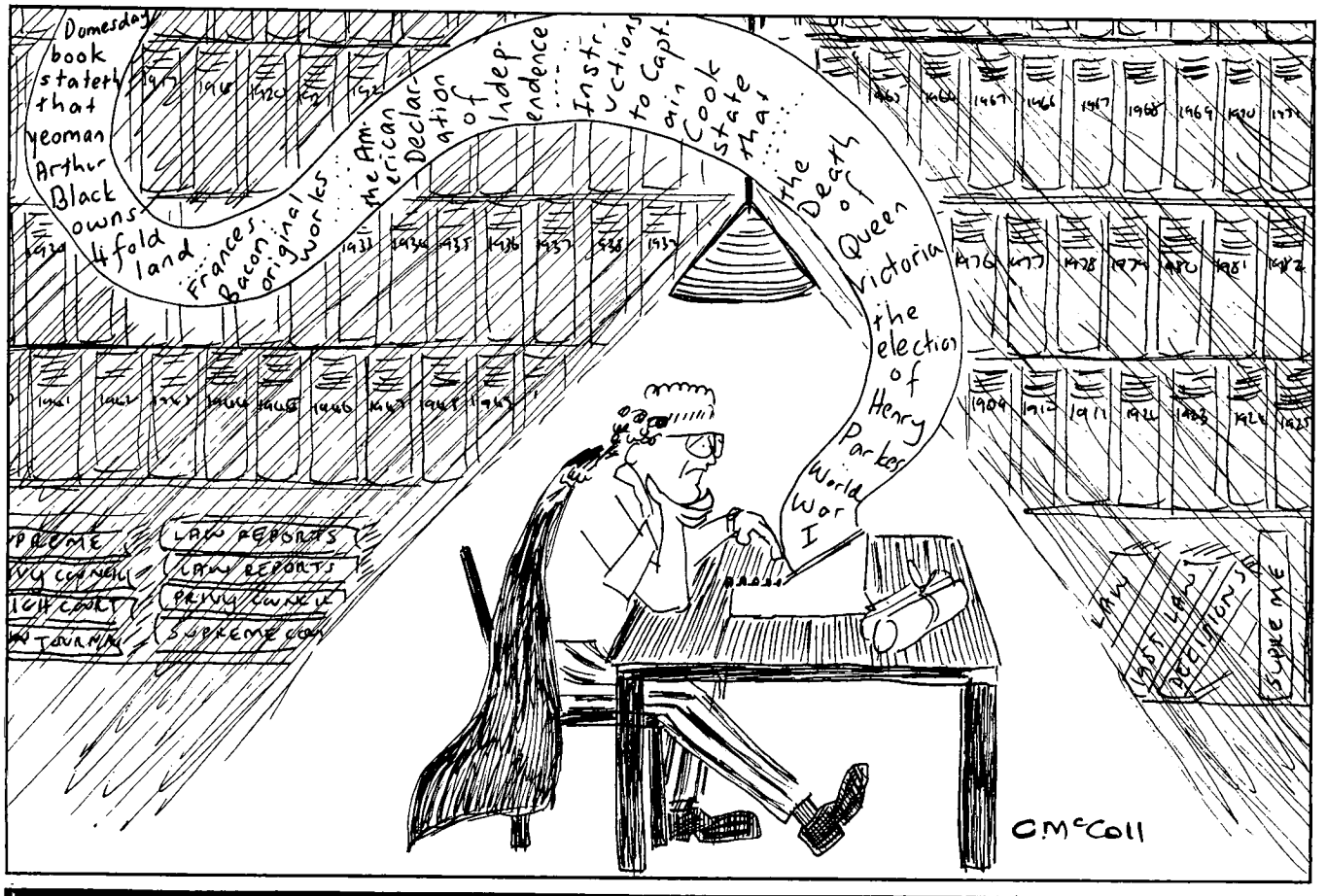
The current project has involved a major task in catching up decisions of the past. Once that catching up process is complete there may be a temptation — indeed there may even be urgings from some sources — to lower the selection criteria so as to utilise excess computer capacity, and, perhaps, available staff time.

The CLIRS project, as presently administered, will have enormous benefit and I am looking forward with enthusiasm to its fruits becoming widely and economically available. It will provide access to a data bank surpassing the research material available in the ordinary practitioner's library.

My anxiety is that we do not, in later years, find ourselves surrendering our individuality, and the law's flexibility and humanity, all of which are of the very essence of a just and equitable legal system.

Excessive dependence on past decisions is a temptation presented by computerisation. If we yield to that temptation we will have upset the delicate balancing of case law against changing social needs and expectations that has always been part of the genius of the common law.

Computerisaton of case law must be our valued servant and not our unyielding master.



Ave Atque Vale

Speech given by R. Meagher QC at a dinner held on Friday, 22nd March, 1985 in honour of Kenny QC, Officer QC and Sullivan QC.

When one contemplates our three elderly colleagues, recently retired* from our ranks, one is immediately struck by how much nicer they are than those who remain.

Compare them to Gleeson, for example. People call him "The Smiler".

This, no doubt, is on the *lucus a non lucendi* principle. It was on this principle that the ancient Greeks called the awful Avenging Furies "you kindly ones".

When one visits Gleeson — at any of his homes — one passes fish ponds wherein contented piranhas glide between the bones of inefficient solicitors and discarded juniors and arrives eventually at a grey house and ultimately The Baleful Presence itself.

In a recent newspaper article it was said that Shand has less charm than Gleeson. Poor Shand! He must be an unnaturally deprived person.

By contrast our guests are warm, charming, caring.

One could not imagine Janet Coombs, for example, laying her weary head on Gleeson's caring breast. Yet I have seen her do it to old Kenny. And in the lift.

Come to think of it, I have also seen him playing bumps with the tea-lady in the 8th floor kitchen. I am not suggesting he is a menace to public morals; his actions are more ludicrous than actually obscene.

Besides this humanity, each has several characteristics in common.

Each has been at the Bar nearly 50 years. Each of them had an enormous practice.

Each of them lives in a suburb I have never heard of, which probably means that they all come from disadvantaged backgrounds. This is very fashionable.

None of them cries. None of them accepted judicial office.

Meagher QC

I regret to say each of them indulged in physical exertion; in Sullivan's case, Rugby League; in Kenny's case, horseback riding and after-dinner swimming — or perhaps I should say sinking; in Officer's case, somewhat improbably, it was square dancing.

Each of them had major clients. In Sullivan's case, it was the trade unions, particularly in the Wollongong area.

With unvarying success he appeared for applicant after applicant in the Workers' Compensation Commission — where he worked before he came to the Bar — and plaintiff after plaintiff in the common law courts.

He was largely responsible for keeping the profits of BHP and the colliery companies pared to a minimum.

Indeed it was said that the only rare occasions when his sunny temperament became at all clouded was when a threat of a verdict for the defendant emerged. But generally he was relaxed — never more so than when he migrated to the 6th floor Wentworth and was forced to mingle with Denton and Ted Perrignon, who taught him to tipple strong waters.

Actually, each of our guests has a similar tendency. Every evening at 5 o'clock you can see old Kenny stomping around the corridors of the 8th floor, howling for whisky.

And when Officer went to Gove Peninsula before that famous Privy Council case, towards the end of a picnic lunch in his honour he was observed physically sinking into the sand and had to be pulled out by Lockhart and Gleeson. (Imagine how one would feel if one were saved by Lockhart and Gleeson!)

He attended dinner sitting in a chair in total silence, but was up fishing at 5.00 am the following day — with his tinnies.

In Officer's case his major clients were the Commissioner of Stamp Duties and the Valuer-General, two colourful characters. They would brief no-one else.

In case after case he went to the Privy Council on behalf of those monsters and forced the people of New South Wales to pay the maximum amount of tax possible on property values which were artificially high.

In Kenny's case, the major client was that more amiable, even buffoonish, character, the Commissioner of Railways.

Whenever, on some remote railway station, a gaping rustic (half-witted, epileptic and cleft-palated), fell beneath an oncoming engine, Kenny would be trundled up there to prosecute his mangled remains before the local justices for (of all things) trespassing on enclosed lands.

But there were differences. Sullivan, for example, was a member of the Labor Party; Officer was not; Kenny, being Irish, one was never sure whether he was or not.

Mr Justice Myers liked Officer, detested Kenny and had never heard of Sullivan. They practised in different jurisdictions.

Sullivan was a common lawyer; Officer was an equity chap: he once said to me, "Never go to common law — I made that mistake — twice"; Kenny would practise anywhere.

Again, Sullivan became Solicitor-General; Officer did not; Kenny, being Irish, is still hoping.

Officer was a keen Presbyterian, devoted to Knox College and St Andrews and a Procurator of the Presbyterian Church; that cannot be said of Sullivan or Kenny.

Each of them had a sense of humour, although I must say in the cases of Kenny and Sullivan I keep forgetting.

Before going to the Parks and Gardens Court before that mad Marxist Mr Justice Cripps, Officer's junior asked him which authorities to bring, and Officer replied: "Rafferty on Rules".

In the cases of Officer and Sullivan, they seemed to be well regarded by the Bench. But a Court of Appeal Judge said to me of Kenny, "He's impossible. He will argue anything."

The truth of the first observation is obvious. The second may need demonstration.

I remember once hearing him in the old Supreme Court arguing before Mr Justice Clancy the question whether he, Kenny, was losing his temper; he argued this question at length and with passion.

When argument on that topic eventually terminated, unassisted he proceeded to argue a second question, namely whether his Honour was losing his Honour's temper.

I heard all this quite clearly because I was sitting in a pub on the opposite side of the road.

We salute all three of them for their success at the Bar and for the lessons they have taught us in craft, intelligence, hard work, good manners and integrity; and we wish them every happiness in their leafy autumn.

*(*Orator's licence: Kenny QC has not actually retired.)*

The view from across the Dingo fence

May I make an immediate disclaimer. The title is not mine.

It was invented by Murray Gleeson QC as he sat beside me at the recent annual general meeting of the Law Council of Australia.

"Write something," he said. "Write something in a light-hearted vein, something that will at the same time make my constituents laugh and justify the resistance by Queenslanders to the intrusion of southern practitioners into the Queensland courts."

I saw immediately the complete compatability of the two objects.

The title suggests a defensive attitude which neither I nor most of the members of the Queensland Bar believe exists, or is necessary.

The Queensland Bar's view, and indeed as I understand it, the views of the Queensland Government are that there should be a strong Queensland Bar, and ready access by the Queensland public to that Bar: that that strength and access should not be put in jeopardy by an unrestricted right of practice by other barristers from out of Queensland.

One of the principal reasons why Queensland resists unrestricted right of practice is that most commercial activity in Queensland is carried out by companies with bases in New South Wales and Victoria.

It is possible to identify to my certain personal knowledge several major corporations whose most remunerative business is conducted in Queensland, but whose Boards, administrative staff and head offices are located in Sydney and Melbourne.

What is sometimes overlooked in other places is the extent of decentralisation in Queensland. More people in Queensland live outside Brisbane than in Brisbane.

There is a network of circuits in Queensland and many regional Court centres which require strong local Bars.

In practice, it is thought those who service these demands should have the opportunity of doing what is perhaps the more attractive work in Brisbane.

It has often been said that in practice interstate counsel would not wish to exercise, or exercise to any intrusive degree, the right to practice in Queensland. This seems to be contradicted by the Western Australian experience.

I am told that there are eight resident silks in Perth, but that twenty-seven visiting silks have taken advantage of the right to practice there.

Views may of course change, even, it may be said, in Queensland.

There is no doubt that the expansion of the Federal Court has brought counsel in all States into more frequent contact with one another. This will no doubt be an increasing trend.

It may be that with time a more relaxed attitude will develop but it would be ingenuous to believe that any changes will occur quickly.

There is a suspicion in Queensland — we are usually neither suspicious nor, I observe here, xenophobic — that perhaps it is presently a little easier for a junior to make a beginning in Queensland than elsewhere.

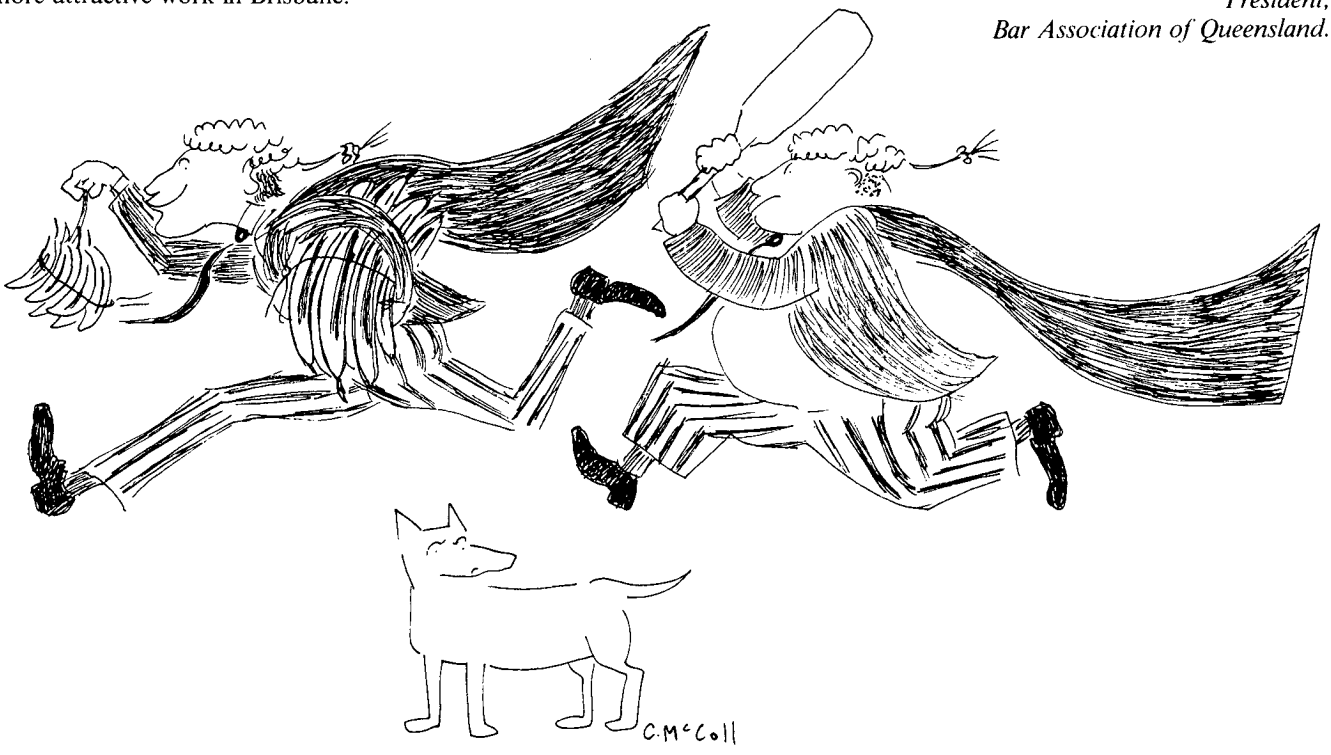
It is rather unlikely that Queensland juniors would wish to put at risk this advantage, if advantage there be.

As unpersuasive as all this may be to you in the south, with apologies to L.P. Hartley, I would point out that Queensland, like the past, is another place, and because we sometimes do and see things differently here, we find the arguments canvassed here and other arguments compelling enough for us.

The argument is no less compelling because nobody here really believes that true reciprocity is likely, that is the appearance of Queensland counsel in southern Courts.

Finally, may I thank you for allowing me to volunteer, military fashion, to write an article for what I understand to be the inaugural magazine of the New South Wales Bar Association. I congratulate you on it, and wish you and it all the best for the future.

I.D.F. Callinan, QC
President,
Bar Association of Queensland.



THE SEVEN DEADLY SINS

The Hon. Justice Michael Kirby, CMG
*President of the Court of Appeal**

Court of Appeal: changing docket

After nearly 10 years as Chairman of the Australian Law Reform Commission, it was (as you will imagine) something of a shock to the system to return to the daily life of the courtroom.

I want to say something about the Court of Appeal, as I have found it. I then want to outline a modern catalogue of "deadly sins", as they are viewed from the Bench.

I will then refer to the issues of policy, which appear almost as vivid in an appeal court as in a Law Reform Commission.

I will conclude with things ancient and modern: a few observations about the Judicial Committee of the Privy Council, and the way of the future.

First a few rudimentary facts. They will be known to most lawyers.

The first Judges of the Court of Appeal of the Supreme Court of New South Wales were appointed to hold their commissions as Judges of Appeal from January 1, 1966. Since the establishment of the Court of Appeal, there have been twenty-two Judges of Appeal.

Three of them have later served as Justices of the High Court of Australia, namely Sir Cyril Walsh (1966-69); Sir Kenneth Jacobs (1966-74) and Sir Anthony Mason (1969-72).

I am the fifth President, my predecessors being Wallace, P, Sugerman, P, Jacobs, P and Moffitt, P.

The Court at any time has eight Judges of Appeal including the Chief Justice and the President. Happily, the Chief Justice is sitting in an ever increasing number of cases, despite his many other judicial and administrative burdens.

I say happily, because every lawyer in New South Wales knows of the outstanding qualities of Sir Laurence Street as a fine and innovative lawyer. His contribution to the development of declaratory relief is just one of his many monuments in the civil law side.

The work of the Court of Appeal comprises motions (which are taken on Mondays), short appeals (which are generally taken on Mondays and Tuesdays) and major appeals which are taken during the rest of the week. On average, Judges of Appeal sit nearly four days each week.

The work load of the Court is heavy and it is increasing. The statistics of completed reserved judgments over the last calendar years are as follows:

1980	227
1981	213
1982	269
1983	227
1984	221
1985	55 (2 months)

The last statistic shows the rapid, recent increase in the business of the Court of Appeal. If the current numbers of appeals continue at the present rate, it can be expected that, by the end of the year, the Court will be disposing of about 300 appeals.

This is a major increase in the Court's business. It can be attributed to the changing nature of the Court's work docket.

Nor is the nature of the work coming to the Court unchanged. In the past year, damages appeals, which lend themselves more readily to immediate ex tempore judgments, have decreased.

At present, they appear to constitute only about five per cent of the Court's work load. In the past damages appeals sometimes constituted up to 30 per cent of the business of the Court.

The space left by the decline of damages appeals has been quickly filled by appeals in challenging new areas of innovative legislation: administrative law, land and environment, equal opportunity and so on.

One of the most important decisions handed down by the Court of Appeal since my appointment concerned the rights of persons affected to have reasons stated by administrators in certain circumstances. *Osmond v Public Service Board of NSW*, unreported CA, December 21 1984 (1985) NSWJB.2.

Beyond gluttony and lust

As you would expect, the change in lifestyle in moving from the Chairmanship of the Australian Law Reform Commission to Presidency of the Court of Appeal is a radical one.

I must leave it to others to judge the success of it. But just to prove that the metamorphosis from law reformer to Judge is as orthodox and predictable as that from barrister to Judge, I wish to use this early opportunity to catalogue my seven deadly sins.

I call them the deadly sins because the original list of deadly sins has become, if not actually compulsory, at least something of a bore in modern society.

Nowadays, people do not get very upset about gluttony. Leo Schofield positively encourages it. And lust is promoted in some quarters as a modern consumer right.

However, seven deadly sins still exist in the courtroom. My catalogue includes lawyers':

- Failing to state at the outset the basic legal propositions which the lawyer hopes to advance in the course of the argument.
- Reading large passages of legal authority on the apparent assumption that literacy is confined to the Bar table and is lost upon elevation to the bench.
- Failing to plan adequately the structure of legal argument so that it moves swiftly and economically to the central factual and legal issues of the case.
- Failing to supply proper written submissions, and the chronology now required, in good time before the hearing.
- Failing to supply lists of legal authorities in time to permit the books to be got out.
- Squandering the great value of oral advocacy which remains, from first to last, to enter the judicial mind and to persuade.

**Notes of a speech delivered by the President of the Court of Appeal Mr Justice Kirby to a luncheon of the Sydney University Law Graduates Association at the Wentworth-Sheraton Hotel, Sydney, on Tuesday, April 16, 1985, in the presence of the Chief Justice, the Attorney-General, Judges and members of the legal profession.*

- Failing to add a proper touch of interest and humour to advocacy, including, worst of all, failing to laugh appropriately at judicial humour, injected deftly to relieve the tension or tedium of the court.

For the authoritative pronouncement these and other sins I invite your attention to Sir Anthony Mason's *The Role of Counsel and Appellate Advocacy* (1984) 58 ALJ 537.

Policy Issues

If I were to name the chief sin which I have noticed, moving from the Law Reform Commission to the Court of Appeal, it is the inability or unwillingness of some lawyers to address important policy questions which inevitably arise in the course of much appellate litigation.

By the time issues come to an appeal court, there are frequently important policy choices to be made.

Of course, it is not always so. Quite often the answer is clearly and authoritatively laid down by binding legal precedent. Sometimes, the legislation may be absolutely plain.

However, in very many cases, particularly where the meaning of the words in a statute is in question, both contentions being urged upon the court can find legal support.

It is then a case of examining the law books to find what the law is. This search should take the modern lawyer into a scrutiny of the underlying principles of the law.

American lawyers call this "policy", being more candid about such things. We, being more British, tend to talk of "legal principles".

However, it is important, at the appellate level, that lawyers should assist the courts in the identification, clarification and development of legal principle. This cannot be done by pretending that every problem has one only simple solution.

This "automation" theory of the law, I categorically reject — as if one only has to press the button to produce the result.

The process of appellate decision-making is much more complex. It relies heavily upon lawyers at the Bar table.

This is both their responsibility and opportunity to contribute to our living legal system.

Our basic problem in addressing issues of legal principle goes back to legal education. In the past, it was often thought sufficient to read vast slabs of earlier case law to an appeal court which would divine the solution to a present case from the interstices of past cases.

In the future we shall certainly look to the binding principles of the past and adhere to them. But we will do so with a clearer perception of the deep undercurrents of policy which our law reflects.

A remarkable anachronism

Whereas the changes I have outlined in the work of the Court of Appeal are clearly steps in the right direction, the phenomenon of the recent growth of Privy Council appeals is a most remarkable anachronism.

Before June 1984 there were relatively few appeals to the Privy Council from decisions of the Court of Appeal. In the year prior to June 1984 there were only three such appeals.

In June 1984, the rules governing appeal to the High Court of Australia were changed. Thereafter following the *Judiciary (Amendment) Act* 1984 (Cth) there were no appeals "as of right" to the High Court.

As befits the final, constitutional court of our country, appeals were limited to matters which were of sufficient importance to warrant the High Court's giving leave to appeal.

However, this wholly beneficial reform has had a most unintended result. It is that appeals are now being taken to the Privy Council in London *as of right* instead of to the High Court in Canberra, where *leave* is necessary.

The consequence is that the Australian legislation designed to enhance the role of the High Court of Australia (and, incidentally, of the Court of Appeal) is being circumvented.

See *Lloyd v David Syme & Co. Ltd,* unreported CA, March 15 1985 (1985) NSWJB.43; *A. Hudson Pty. Ltd. v Legal and General Life of Australia Ltd,* unreported CA, April 4, 1985 (1985) NSWJB.54.

Instead of the Court of Appeal being, as was planned, a final appeal court, subject to leave being given to appeal by the High Court of Australia, appeals are now being taken in increasing number to London.

In the nine months since June 1984 the number of appeals so taken has increased from three to 11. It is understood that more are pending.

The same thing is happening in the other Australian States. The result is:

- an increase in the number of appeals going to London;
- a proliferation of the problems of our legal system with its two final courts of ultimate authority;
- an undermining of the policy to make the High Court Australia's final court of appeal;
- an undermining of the policy to make the Court of Appeal a final court, save for cases where the High Court grants leave to appeal on grounds of the importance of the case.

There should be the earliest possible completion of the discussion between Australia and British authorities to determine residual appeals to the Privy Council.

It is uniquely difficult to work within a system where it was always necessary to check, and sometimes to reconcile, differing streams of legal authority emanating from London to Canberra.

Australian appeals to the Privy Council — this magnificent imperial anachronism into which new life has unexpectedly been breathed — should, in my view, be terminated without delay.

It has made many notable contributions to our jurisprudence in the past. But the time has come for Australian lawyers to shoulder the responsibility of their own legal system and to rise to the challenge which only legal independence from the Privy Council will facilitate.

Silicon before silk

It is likely that, in the next 20 years, many important changes will come about in the procedures of the court of Appeal. I would offer the following check list:

- the likely increase in the use of written argument, to reduce the time taken in oral argument;
- the increase in the time devoted to judges discussing cases between themselves;
- the increased use of single court judgements, to avoid the repetitious individual judgements which are such a feature of Australian courts;
- more attention to cost effectiveness of appeal procedures including time limits on argument, having regard to the public costs involved in providing appeal benches;
- growing interest of the court in monitoring the administrative progress of cases brought before it;

- possible introduction of "the Brandeis Brief", as in the United States, with identification and frank discussion of relevant policy issues involved in appeals, including economic and social data;
- introduction of pre-hearing conferences to permit more economic use of Full Bench time;
- possible introduction of two member appeal courts in minor and procedural appeals. This has already been introduced in England;
- introduction of computerisation and improved technological support.

In terms of technology, the courts lag far behind the rest of the community and even behind the legal profession.

We see the spectacle of major take-over battles, with millions of dollars turning upon them, and with seried rows of lawyers, every one with a computer and a word processor at the finger tips, whilst the judge must struggle along with manual typewriters, without benefit of word processor.

I have purchased my own personal computer to permit the organisation of legal material. I suspect that the judges will be the last members of the legal profession to have the computerisation of legal data made available to them from the public purse.

I simply gave up waiting and bought my own in Hong Kong.

If we expect the continuance of the highest standards of excellence in the judiciary, our community should be ready to pay for it. This may mean less emphasis upon ceremonial robes and more attention to computers, research assistance and word processors.

The battle cry for the legal profession, and for the courts, in the next two decades should be: Silicon before Silk!

Famous last words

At the time the President of the Court of Appeal, Mr Justice Kirby, was appointed to the Conciliation and Arbitration Commission in 1975, he was appearing with Mr Justice McHugh (then McHugh QC) in an equity case.

They were representing that fearless and tireless upholder of the interests of the BLF — Mr Norman Gallagher. In the course of the case the following exchange occurred:

KIRBY: I am going to take a job on the Arbitration Commission.
McHUGH: What! As a Commissioner?
KIRBY: No. As a Judge.
McHUGH: Michael, you are only 35. If you take that job you will sink like a stone. Nobody will ever hear of you again.

Encounters of a legal kind

STITT QC: I would like to put a couple of propositions to you.

WOMAN WITNESS: You would? My luck has changed at last.

HIS HONOUR: I think you had better wait until you hear what the proposition is.

At the next adjournment Stitt QC happened to be in the same lift as the witness and the exchange continued:

WITNESS: Still interested in that proposition?

STITT QC: You have to realise, whatever I get, my junior gets two-thirds.

Never ending stories

The inquest currently proceeding before Wilson, M, in respect of the Sutherland Bushfire (which occurred in January 1983) produces interesting statistics.

At the date of going to press, it had lasted 243 days.

There were 9400 pages of transcript of evidence and, with submissions, the transcript was approximately 12,000 pages long.

There were 13 appearances before the Magistrate, eight counsel and five solicitors.

Over the 243 days, six different people have assisted the Coroner. It is hoped that the inquest will conclude in June.

The bushfire lasted three days.

Invitation to contribute

Bar News welcomes contributions in the form of articles, photographs or cartoons on topics of interest to members of the Bar.

These may be a learned treatise or a matter for amusement.

Readers' participation in the columns of this magazine is vital to it achieving its aim of providing a lively forum for all practitioners.

Contributions from members of chambers outside Sydney are especially welcome.

Please address all material to Ruth S. McColl at 7th floor, Wentworth Chambers, Sydney, NSW 2000 or DX 399 Sydney.

RIGHT OF APPEARANCE OF COUNSEL — POWERS OF A JUDGE

A member sought a ruling as to the powers of a Judge to interfere with the right of appearance of counsel on behalf of a party to the proceedings. The Bar Council gave the following ruling.

A Judge's power to control the conduct of counsel appearing in his court depends upon the law relating to contempt committed in the face of the court.

This type of contempt is dealt with comprehensively in *Borrie and Lowe* "The Law of Contempt" 1973 at pp9-34. See also *Ex Parte Bellanto re Prior* 63 SR 190 at 192, 198-208.

The matter is the subject of long standing local authority. In *Reg. v. O'Neill* (1885) 6 NSWLR 43 at 45 Martin C.J. said:

There can be no doubt that a Judge of the District Court, as well as the Judges of this and all other Courts, have necessarily entrusted to them the power to preserve order and decency in the courts where they preside. If any person appeared as an advocate before a Judge, whatever his position might be, and used expressions which were insulting to the Bench, or misconducted himself in any way — for instance, by persisting in doing things which were contrary to the ruling of the Judge . . . or interfering in any way with the administration of justice — the Judge had power to exclude him and in some cases had power to do more than exclude him . . .

I am of opinion that the Judge had power to exclude from the Court, or prevent appearing in a case, any person who came before him.

Subsequently in *Reg. v. Matthews* (1887) 8 NSWLR 45 the Full Court explained and distinguished the decision in *Reg. v. O'Neill* (above).

In that case a Chairman of Quarter Sessions had refused to allow two attorneys to jointly conduct the defence of a prisoner and had insisted on the defence being conducted by one only of those attorneys.

There was no suggestion that either or both of the attorneys had misconducted themselves in any way in the course of the proceedings.

Local legislation provided that every accused person should be allowed to make full answer and defence in all Courts by counsel, and counsel was defined as including an attorney.

The Full Court set aside the conviction on the ground that the Judge had deprived the accused of a statutory right in relation to the conduct of his defence and that this amounted to a substantial wrong or miscarriage of justice. Referring to the judgement of Martin C.J. in *Reg. v. O'Neill* (above) Darley C.J. said at pp 49-50:

I do not think that the late Chief Justice himself thought of going to the full extent to which these words would seem to go —that a Judge should have the power, without giving any reason for it, to say to a counsel who was conducting himself properly — I shall not hear you Mr So and So, I desire to hear somebody else — nor in my opinion has a Judge any right to say to counsel appearing before him on behalf of the client — I will only hear the junior counsel or the senior counsel in the case.

Unless there be some special or general rule of Court, such as that by which only one counsel is heard on each side in demurrers, the Judge has no power to refuse to hear counsel. . .

(His Honour then referred to the earlier part of the passage quoted above from the judgement of Martin C.J. and continued).

Now it was cases of this sort that were in His Honour's mind when he spoke of the power of a Judge to exclude anyone who came before him. With that limitation there can be no doubt as to the law laid down in that case. Here there is no pretence that these two gentlemen misconducted themselves in any way . . . or interfered in any way with the administration of justice. This is simply an arbitrary rule laid down by the Judge . . .

In the same case Innes J. said at page 52:

I concur with what their Honours have said about Reg v O'Neill. *It seems to me that it is only in reference to acts or misconduct or breaches of decorum that the Judge has a right to refuse to hear counsel. It is obvious that such a principle is well founded.*

The principle that it is the duty of counsel to comply with rulings and directions of the presiding Judge was also stated by Lord Goddard in *Shamdasani v. King Emperor* (1945) AC 264 at 269 where His Lordship said:

If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding Judge he may very properly be adjudged guilty of contempt of Court, but then the offence is the disregarding of the ruling and setting the Court at defiance.

See also *Ex parte Bellanto re Prior* 63 SR 190 at 195.

The relevant principles accordingly seem to be as follows:

(i) An accused person has a right to be represented at his trial by the counsel of his choice and in the absence of any misconduct on the part of that counsel the presiding Judge is not entitled to refuse to hear him in the conduct of the case. See *Hired v. The King* (1944) AC 149 at 155 and *Smith v. Commissioner of Corrective Services* (1978) 1 NSWLR 317 at 325-6.

(ii) It is the duty of counsel appearing in proceedings to observe and comply with the rulings and directions of the presiding Judge, however erroneous they may be, and failure or refusal to do so can constitute a contempt in the face of the Court. In these circumstances the Judge would be entitled to decline to further hear that counsel and counsel could be ordered to leave the court or even fined or committed to prison. See authorities cited above and compare also *Lloyd v. Biggin* (1962) VR 593.

Captain Cook slips the painter

Since the start of 1985 Captain Bill Cook, Registrar of the New South Wales Bar Association since 1971, has been "showing the ropes" to his successor, Captain Tim Duchesne.

On April 17, Captain Duchesne assumed the office of Registrar. Captain Cook will assist him as a consultant until July 5, 1985.

Prior to joining the Bar Association as assistant to his predecessor, Sep Osborne, in 1965, Captain Cook had a long and distinguished career in the Royal Australian Navy.

He joined the RAN in 1930 when he was 13.

During World War II he served in a number of "hot spots". He was First Lieutenant on *HMAS Voyager* (not *the* one) when it was part of the "Scrap Iron Flotilla" supplying provisions to the Rats of Tobruk. He also saw action in Crete, Singapore and New Guinea.

He was on the first Australian ship into Tokyo Bay on August 29, 1945.

After the war his career included serving as Staff Officer for the Royal visit in 1954 and standing by in England during the construction of *HMAS Melbourne* (now China-bound). He retired with the rank of Captain in 1960.

During his years with the Bar Association, Captain Cook saw the members of the Bar Association swell from 423 to 981 and barristers' chambers disperse from Phillip Street to the surrounding streets, suburbs and country towns.

• **Captain Cook**

• **Captain Duchesne**

He also observed, with approval, the easing of the Bar's rules concerning public appearances.

Over the years Captain Cook became a familiar figure in Phillip Street. He was seen daily bustling around the corridors of chambers, cheerful, smiling and helpful.

His successor, Captain Duchesne, is also ex-Navy although his career started in England. He joined the Royal Navy as a Boy Seaman in 1945.

In 1952 he joined the Royal command. In 1967 he transferred to the Royal Australian Navy as a Lieutenant Commander.

He served in the Australian Submarine Squadron including commanding *HMAS Otway* until 1972 when he was promoted to Commander. From 1973 to 1976 and 1982 to 1984 he had command of the Squadron.

From 1976 to 1982 he served as Staff Officer in Defence Central (Canberra) and then as director of submarine policy in Navy Office.

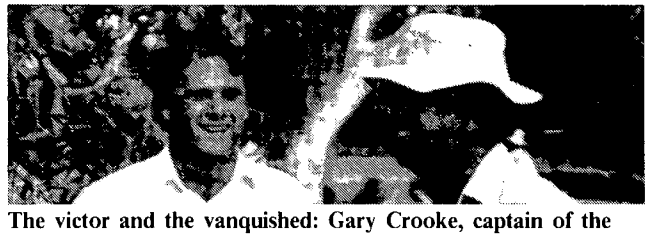
A dinner in honour of the retiring Registrar will be held on August 23, 1985.

Bar XI vanquished

The Bar's Bradman, Bruce Collins, made a special reappearance to captain the Bar XI in its attempt to restore lost pride and dignity in the annual match against the Queensland Bar, following successive losses in last year's fixture and to the Victorian Bar XI.

The cleverly organised "blockade" of Queensland led to a 7.15 am flight from Sydney on the morning of the match —Saturday, April 19.

Following a disastrous loss of the toss, the New South Wales early order batsmen were still rubbing sleep from their eyes and batted accordingly, with the exception of Stirling Hamman (47). Fortune smiled but rarely, although Gyles QC was dropped twice off Callinan QC.



The victor and the vanquished: Gary Crooke, captain of the Queensland team and Bruce "matey" Collins, captain of NSW.

Things looked grim as last batsman, Francis Douglas, strode to the crease to join Larry King in a 10th floor double.

To the delight, not to say amazement, of all concerned, a record last wicket partnership of 52 saw the total reach 185.

Unfortunately the new ball attack of Douglas and King had exhausted itself with the bat (and the 10th floor dinner at Len Evans the night before) and were not their frisky selves.

Despite the valiant efforts by Collins and Hamman the Queenslanders cruised to an easy victory with only four wickets down. Callinan QC hit the winning run.

Asked to comment on the loss "Bruiser" Collins said, "It's back to the drawing board, mate".

Anyone who wants to help salvage the pride of the NSW Bar XI or participate in the next debacle should contact Larry King, Peter Hastings and Stirling Hamman.

Persons who have had their names removed at their own request from the roll of Barristers to the roll of Solicitors from Friday, 31st August, 1984 to Friday, 3rd May, 1985 inclusive:

Friday, 31st August, 1984:
Francis Patrick Riley
Paul Reginald Rumble
Philip Francis Kelso
Robert King
Paul Francis Mansfield
Lorraine Judith Bevan

Friday, 2nd November, 1984:
Kenneth Thomas Batterham
David Myles Bennett
Stephen Arthur Hibbert
Estelle Denise Aylward-Dyne

Friday, 20th December 1984:
Daya Nand
Maurice Jocelyn Castagnet
Michael John Kirby
Keith Robert Spencer
Ian Phillip Barnett
Peter Michael Fraser
Gail Frances Madgwick
Maurice Milton Martin
George John Toussis

Friday, 8th February, 1985:
Craig Kiernon Smith
Edith Brigitte Pers

Friday, 8th March, 1985:
Robert Stephen Angyal
Michael Anderson Taylor
John Edward Bolzan
Barry Bunton
John Anthony Levingston

Friday, 3rd May, 1985:
Roger Anthony A. Spain
Michael John Frankel
Malcolm Bligh Turnbull
Jennifer Ethel Betts

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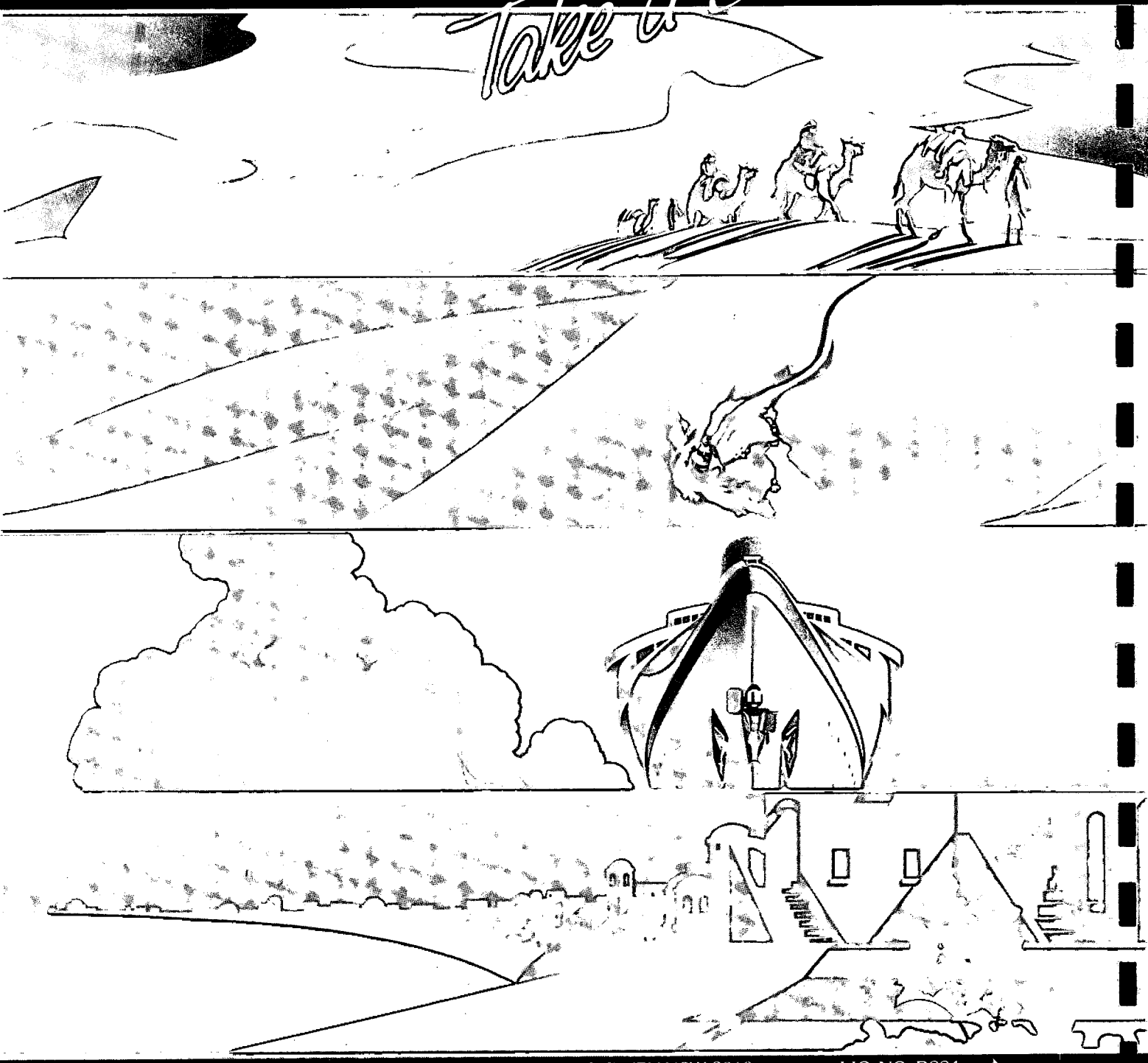

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