Bar News

The journal of the NSW Bar Association

Winter, 1986

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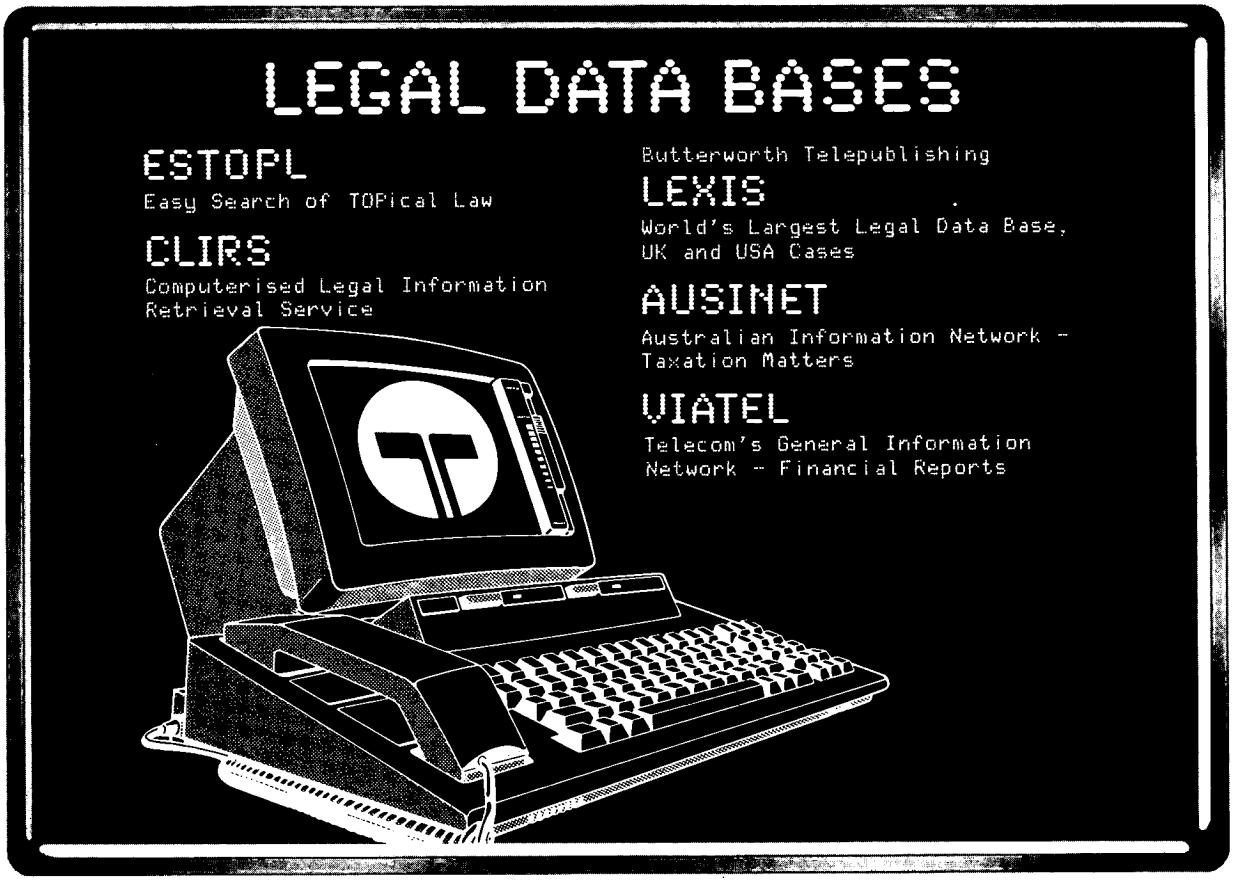

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In this issue

Published by: NSW Bar Association
174 Phillip Street, Sydney, NSW 2000

Editor: R.S. McColl

Editorial consultant: A.Fisher

Photographs: of Bar Boat Race kindly provided by Judge Moore

Cover drawing: by Simon Fieldhouse
Framed origional is for sale, phone (02) 231 2377

Produced by: Publishing Management Services
3rd floor, 204 Clarence Street, Sydney, NSW 2000
Telephone: (02) 264 9611 Telex: 70508 NEWSY

Advertising: Rosalind Davies
10 Glen Street, Milsons Point, NSW 2061
Telephone: (02) 922 3255 Telex: 70508 NEWSY

Printed by: Beaver Press
29 Alberta Street, Sydney, NSW 2000

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ISSN 0817-0002

Australian Bar Association

At the recent ABA Convention held in Alice Springs, Charles QC retired as President of the ABA. Gyles QC was elected as President with Chernov QC (Victorian Bar) and Duggan QC (South Australian Bar) as Vice-Presidents.

David Harper (Victorian Bar) is the Treasurer. Dorothy Brennan, former administrative officer of the Victorian Bar Association, is Honorary Secretary.

Interpreters in the Justice System

The Standing Committee of Attorneys-General has developed a series of national guidelines on the use of interpreters in the legal system. The guidelines are set out hereunder.

Barristers are encouraged wherever practicable, to endeavour to adhere to them.

NATIONAL GUIDELINES BY THE STANDING COMMITTEE OF ATTORNEYS GENERAL ON THE USE OF INTERPRETERS IN THE AUSTRALIAN LEGAL SYSTEM

Each jurisdiction should seek to ensure:
(a) the reasonable availability of qualified independent interpreters, both in metropolitan and rural areas, and free of charge in criminal proceedings;

(b) Such interpreters:
- possess linguistic competence;
- possess sufficient understanding of ethnic community cultures and social customs;
- possess an understanding of the legal system and legal terminology; and
- understand the proper role of the interpreter in legal interpreting including the need for impartiality and confidentiality;

(c) Persons involved in the legal system possess an adequate knowledge of legal interpreting services with a view to:
- ensuring that legal interpreting services are provided in appropriate circumstances;
- avoiding any reluctance to utilise such services where they are necessary;
- reducing any possible abuse of the use of interpreters; and
- increasing understanding of the technical difficulties which may be associated with interpretation and the difficulties which a non-English speaking person who is unfamiliar with the Australian legal system may encounter;

(d) The existence of legal interpreting services are widely publicised, particularly in publications which circulate widely in ethnic communities.

(e) The services of a qualified interpreter is used wherever practicable in preference to others.

(f) Where appropriate, undertakings regarding confidentiality are obtained.

ALOA Briefs - a Warning

The recent experience of a member of the Bar has prompted the Bar Association to warn the Bar of some of the risks associated with accepting a brief on the basis that the fees are to be met by the Australian Legal Aid Office.

The barrister appeared in a matter which occupied five hearing days. He rendered his memorandum of fees to the Australian Legal Aid in August 1985. He heard no more. His fees were not paid.

In June 1986 his solicitors forwarded to him a letter ALAO had sent them advising that because of an alleged failure of the client to provide certain information ALAO had decided to suspend the grant of legal aid and warning the solicitor that if the information was not provided within two months the grant would be terminated ab initio.

He wrote to ALAO remonstrating with their action and received a response which stated, inter alia, that "if the grant of legal aid is terminated then no further payment will be made by this office".

Members are advised that they should satisfy themselves prior to accepting briefs in which ALAO is to be responsible for the fees, that that office has made an unconditional grant of legal aid. Further, all memoranda of fees should be forwarded to the solicitor, not ALAO as that office is of the view it is to the solicitor that Counsel must look, initially, for fees.

Accident Compensation Symposium

The NSW Bar Council has arranged a discussion entitled "Common Law Damages or Weekly Payments — A Symposium". Prominent speakers, expert in compensation and rehabilitation have been invited to speak, including Mr Justice McInerney and Dr John Yeo of the Spinal Unit at Royal North Shore Hospital. A detailed programme will be advertised and circulated to members.

The convenor, John Coombs QC, emphasised the speakers were invited to express their own views without regard to any views the Bar might hold.

The venue is the Women's College within the University of Sydney, and the symposium will be between 10 am and 4 pm on Saturday 23 August, 1986, after morning tea at 9.45 am. A buffet luncheon will be served at 1 pm.

Members interested in either accident compensation or rehabilitation are urged to attend, question speakers and offer views.

APPELLATE ADVOCACY

Address to the Second Biennial Conference of the Australian Bar Association, Alice Springs, 3 July 1986, byThe Right Honourable Sir Harry Gibbs, GCMG, KBE, Chief Justice of Australia.

This is the Second Biennial Conference of the Australian Bar Association and, like the first, its programme includes a paper on appellate advocacy. It is not for me to attempt to explain why the organisers of the Conference appear to be obsessed with that topic. But I should explain at the outset the limits which the topic imposes on the speaker.

Advocacy is an art or a skill. Success as an advocate may come from the development of innate abilities, particularly by practice and experience, or by observing, and perhaps imitating, those who are expert, but it is not achieved, in my opinion, by study or instruction. Of course the appellate advocate must have acquired, by study or otherwise, a sufficient knowledge of the law to enable him to attempt his task, but that necessary precondition has little to do with the qualtity of advocacy.There are, it is true, certain general principles, mostly rather trite, of which anyone who aspires to be an advocate ought to be aware.

It will be seen that I am about to enter a field which is both narrow and well-tilled, and that I shall be compelled to expatiate on the obvious. It is tempting for one dealing with this subject to attempt to divert attention from the sterility of one's own discussion by deploring the decline in professional standards that has occurred since he himself was at the Bar. There would be nothing new in such a lament — writers have been taking that line ever since Quintilian wrote his work on the decay of oratory in the First Century AD. However I shall avoid it, mostly because I am by no means satisfied from my own observation that this sad decline has in fact occurred.

There is a further limitation which I shall impose on myself in this address. I shall speak mostly about advocacy in the High Court. During my judicial life I have sat on appellate courts at three levels, but my longest experience has been on the High Court. One obvious principle which must guide any advocate is to keep in mind the nature of his audience. There is an essential difference between a court of last resort and an intermediate court of appeal.

Although appeals to the Judicial Committee have finally been abolished in Australia only this year, the High Court has, for all practical purposes, been in the position of a final appellate tribunal since 1975. Although the members of an intermediate court of appeal may long to soar on the wings of policy, the net of authority casts its threatening shadow over their endeavours. However a final court of appeal can be persuaded to depart from established precedent and indeed at the present time many such courts, including the High Court, have shown an increased readiness to do so.

Lord Griffiths has suggested that the greater freedom of a final appellate court means that arguments based on emotion are more likely to succeed in such a court than in an intermediate court of appeal. I am not so sure

that that is so, but it does serve to reinforce the view that an argument in the High Court may require some differences in technique from argument in other appellate tribunals in Australia. There would be little point in my now saying much about advocacy before the Judicial Committee. One essential difference between the methods of that tribunal and those of the High Court is that the Judicial Committee conducts its business with the intention that at the conclusion of the argument all the members of the Board will be in a position to express their conclusions as to the result of the case, whereas in the High Court the judges will sometimes depart from the courtroom just as undecided about the fate of the appeal as when they entered it.

The aim of advocacy is to persuade, and in the case of appellate advocacy the primary aim is to persuade the appellate tribunal to take a particular course of action, namely, to allow or to dismiss the appeal. The advocate will, of course, seek to lead the court to the desired result by inducing it to accept a particular argument of fact or law, which, if correct, means that the appeal must have the fate which the advocate wishes it to have.

It may be noted that persuading the court to accept a particular argument is only subsidiary to the main purpose of winning the appeal, and that the arguments on which the advocate initially relied may sometimes be abandoned or modified in the light of the perceived views of the members of the court. Nevertheless, in most cases the task of the advocate is to formulate the argument that is most likely to persuade the court to take the course that he wishes it to follow and to present that argument as clearly and forceably (and, preferably, as succinctly) as possible.

It is traditionally said that in our courts arguments are presented orally. This is now only partly true. In all appeals to the High Court counsel is required, usually at the commencement of his argument, to hand up to the Court a written outline of the submissions on which he relies. This outline forms an important part of the argument, since if skilfully drawn it can immediately attract the attention of the Court to the strongest points of counsel's submission. Moreover, it is an enduring part of the argument. There is a latin phrase (platitudes often sound better in latin) *literae scriptae manet* (written words remain) and the written outline of submissions remains visible when the sound of counsels' voices no longer vibrates in the memory.

There is no doubt a possible danger that a court may attach too much importance to a written outline but certainly no counsel should underestimate its importance. It should be brief and clear, and should set out the heads of argument which counsel actually intends to present, and not something which the junior has thought up and the senior has abandoned. It does not tie counsel's hand if in one way or another the argument is made to depart from its intended course.

I seek pardon for digressing to mention two matters. First, I have been somewhat disturbed to learn that some counsel charge a fee for the preparation of the written outline. I should have thought that any advocate who knows his job would in any case have prepared some similar sort of outline for his own use, simply to provide a framework for the argument which he intended to present. It was certainly never intended that the preparation of a written outline should be added to the cost of litigation.

Secondly, written outlines are not to be confused with a written submission or a written brief, United States style. Now that American methods are becoming increasingly fashionable in the law, there are some who advocate an increased use of written submissions. I am not amongst them. My experience has been that written submissions are not as effective as oral argument in bringing the attention of the court quickly to the heart of the problem. Moreover in oral argument, counsel can, as the argument progresses, perceive and immediately correct any misunderstanding that may arise and dispel doubts that would otherwise remain unresolved.

When I have sat on the Privy Council I have never found that the written cases of the parties enlarged the understanding that one had already gained by reading the judgments. I suspect that the system of written cases before the Privy Council was devised at a time when it was not the practice of judges in England to read judgments under appeal before the commencement of the hearing — that, of course, has become the practice in the United Kingdom only quite recently.

In the High Court, on the rare occasions when written submissions have been extensively used, I have found that they added more to the costs of the litigation than to the understanding of the argument. Sometimes written submissions have been found useful as a supplement to oral argument, particularly in cases where the facts are technical or complex, but although on occasion useful as a supplement, they can never in my opinion be a satisfactory substitute for oral argument.

I have said that the task of the advocate is to persuade. What are the qualities that an appellate advocate needs to succeed in this objective? Sir Garfield Barwick, one of the greatest appellate advocates of his age, often used to attribute his success to his power of recall. A gift of that kind is of course particularly useful in enabling counsel to answer a question from the Bench with confidence and accuracy, and an apt answer to a question on a crucial matter not infrequently swings the opinion of the judge in favour of counsel's argument. However, given the necessary equipment which any counsel who appears in an appellate court ought to have — a requisite knowledge of the law, an ability to marshal facts and a clarity of expression — in my opinion, the two qualities most necessary for success in appellate advocacy are a sense of relevance and tact.

Quintilian (if I might mention him again) said *Festinat enim judex ad id quod potentissimum* (the judge hurries to get to the strongest point). That statement is true of the High Court and it ought to be true of counsel. Fundamental to success in appellate advocacy is the ability to perceive the point or points on which the resolution of the appeal will depend and to cut a path directly to those points, without meandering to explore side issues, however interesting, or worse still, entangling the court in a thicket of irrelevancies of fact or law. The skill lies in discerning what are the critical issues and in distinguishing between what is and what is not necessary to be presented to enable the argument directed to those issues to be properly understood.

Tact (by which I include tactical skill) is required at almost every point in the delivery of an argument. Let me give some examples. Almost every judge (if not every judge) can be influenced by the merits of the case;

the judge hopes that the law will permit a decision which accords with the merits as he sees them. Almost every judge, however, is annoyed and insulted to think he can be deflected from the strict path of justice by a vulgar appeal to his emotions. One of the most demeaning things that a counsel has to do is to put forward what Sir Garfield Barwick used to call "points of prejudice" in a way which will not antagonise the Bench.

A second task of some difficulty is knowing whether or not to accept a suggestion from a judge, which is intended to be helpful, but which is obviously out of line with the apparent views of the rest of the Bench and which counsel himself may have already rejected as not worth pursuing. Some counsel, it is true, are so suspicious by nature that they reject the most helpful of suggestions, fearing that they may conceal a trap. However, assuming that the suggestion is recognised as the gift which it is intended to be, counsel has to make a quick decision whether to accept it, thus possibly winning the vote of the judge who thought up the argument but possibly alienating the other judges, who may conclude that the suggested argument and the argument which counsel principally advanced stand or fall together, so that if the judge's suggestion, when examined, is seen to rest upon faulty logic or upon a misunderstanding of fact or law, the main argument should also fail.

A rather similar difficulty sometimes arises when counsel has alternative arguments, each regarded by him as sound. As I hope I have already indicated, to advance a bad argument when a good one is available is the essence of bad advocacy. However it not infrequently happens that an argument can possibly succeed by alternative paths, one perhaps short and attractive, the other long, slow and tortuous, both, however, resting on sound ground. It requires considerable courage in such a case to abandon the less attractive argument. I have seen Sir Garfield Barwick do so with success, but it is a tactic which one would expect to succeed only in a few cases and is not recommended for beginners.

I would give a final example of the sort of situation where great tact is required on the part of counsel. To what extent may it safely be assumed that the court is seized of a knowledge of the relevant facts and legal principles?

The fact that the court has read the judgments does not mean that every member has noticed, or remembers, every circumstance which is vital to counsel's argument. The court may also be assumed not to be completely ignorant of the law, and in some fields on which it has frequently or recently pronounced, to have rather more than an elementary knowledge, but an argument cannot be presented without a starting point in legal principle.

One counsel (and a very competent one) against whom I frequently appeared almost always acted on the assumption that the tribunal which he was addressing had no knowledge whatever of the facts of the case or the legal principles involved; no doubt some unfortunate experience had led him to this somewhat cynical approach. The only court in whose favour he made an exception was, for some reason, the Privy Council. The method of argument which resulted from this distrust of judicial knowledge and memory did not endear him to his audience, but it did ensure that if his arguments did not succeed it was not because the court overlooked some vital fact or failed to appreciate the signficance of an important authority. Fixing the critical matters in the mind of the judges without losing the sympathy of the court in the process sometimes requires steering a narrow and perilous course.

It should go without saying that another quality which an advocate should endeavour to acquire, even if he has not had it bestowed on him by nature, is that of candour.

Sir Owen Dixon said that candour could be used as a weapon in advocacy; certainly the absence of candour can prove to be an Achilles heel. Nothing can be more destructive to an argument than for a court which has viewed it with favour to discover, when opposing counsel comes to address, or when the court retires to consider the matter, that counsel who was putting the argument has failed to refer to some fact, statutory provision or decision that seems to present an insuperable obstacle to the acceptance of his argument.

On the other hand, nothing is more effective than to direct the court's attention to what seems to be one's opponent's strong point and to reveal its hidden weakness before the opponent can fortify his position. It is pleasing that ethical requirements and pragmatism coincide in this respect and that virtue can be its own reward. There is no reward however for counsel who spends hours distinguishing authorities that have nothing to do with the case.

It is an enormous advantage if the argument is an interesting one. Some counsel can bring life and sparkle to a patent case; in other hands the most lurid crime of passion is given a patina of somniferous dullness. Elegance and wit never go astray, if the former is not too high flown and the latter not too laboured.

The art of using the reply to mount a deadly counterattack is one which Sir Garfield Barwick was accustomed to use with great advantage. It is an art not often attempted nowadays. It is not easily mastered and is another tactic not recommended for beginners.

A distinctive feature of advocacy in the High Court is the need for brevity and compression. Effective High Court advocacy requires the tactics of a blitzkrieg rather than those of a war of attrition. That does not mean that any point of substance should be omitted or glossed over in argument, but that each point should be reached and dealt with as quickly as is consistent with its proper appreciation by a group of persons who, it may be expected, are where they are because they are able, with reasonable speed, to grasp a proposition of law or fact.

They can also read, and do not wish to have read to them long passages from judgments when it is possible, by judicious selection, to find in a few sentences a clear expression of the views upon which reliance is placed.

There are one or two matters of practice prescribed by directions of the High Court to which I would refer, because they are sometimes misunderstood. The outline of submissions which I have already mentioned is to be handed up in open court and is not to be given to any Court official beforehand. There are two main reasons for this — first, that the outline is part of the argument and therefore must be delivered in public view; and secondly, if it is prepared beforehand, it may not contain an accurate outline of the argument which counsel wishes to present on the day. The appellant's

outline is handed up when he commences his address and normally the respondent's outline is handed up when he commences his address, although sometimes the respondent's argument may be sought earlier in the proceedings, for example, at an adjournment. An outline is supposed not to exceed three pages, although the Court usually takes a liberal view if it is a little longer. It should state the principal authorities in support of each contention that needs authority, but it is not intended to take the place of the list of authorities next to be mentioned, and should not degenerate into a mere recital of cases. A chronology may be appended if that seems appropriate.

A list of authorities is to be handed to the Court forty-eight hours before the hearing is listed to commence. Inexperienced counsel often misunderstand the purpose of this list. Its sole purpose is to enable the tipstaves to have the necessary volumes in court and to enable photocopies to be made where that is necessary to achieve that result. It will be helpful if the list is prepared with some discrimination; on the one hand inconvenience will be caused and money wasted if, as often happens, the list contains many cases which are not cited in argument; on the other hand, the argument will suffer if the necessary volume is not available when counsel cites a case. The latter fault will be remedied if counsel provides the Court with photocopies of cases which are actually going to be cited but which were not put on the list of authorities.

It is particularly important that the Court should have before it copies of statutes whose construction is in question and the better practice is for counsel to hand up copies of any such statutes and for the list of authorities to indicate that this course will be taken. It is a minor irritation when counsel cites a case by reference to its number in the list without at the same time mentioning the volume and page of the report in which it appears; it is also irritating if counsel gives a citation other than to Commonwealth Law Reports when the case is reported in those reports, or refers to a case in one of the specialised series of reports when the case is reported in the ALJRs or in the ALRs. It is helpful if both counsel cite from one series of reports; for example, if both refer to the ALJRs or the ALRs, although it is not always possible to arrange for that to be done; in any case it is useful, when the case is reported in both of those series to be given both references even though the citation is to be made from one only.

The excuse for this discussion of matters which are for the most part obvious or trivial is that it is of great importance that the standards of advocacy in all appellate courts should be maintained at the highest possible level. If the court can rely on counsel to direct its attention to all the relevant matters of fact and law, and to refer to all authorities that are truly relevant, it is very greatly assisted in performing its task. Counsel form an integral and important part of our curial system, which could not operate in its present form without their assistance. And a court is much more likely to function successfully, and to achieve a just result, if counsel on both sides have followed what is, in short, the governing principle of advocacy — to say what can usefully be said in support of one's client's position and to say it well.

Bench and Bar Dinner

Barry Toomey QC introduces the Attorney-General at the 1986 Bench and Bar dinner:

Today is 27 June. Few of you would know that it is the nineteen hundred and twentieth anniversary of a day in the year 66AD when the Emperor Nero, sitting in the Coliseum watching one of the weekly Christian versus lions games, saw brought out into the arena an Angle named Fred. When I say an Angle I mean someone from Anglia you understand and this Angle named Fred was also, as it happens, extremely angular — in fact it was said that the widest part of Fred was his feet.

The lion was released into the arena — a ravenous lion, ravenous, hadn't been fed for a couple of weeks. In fact he was so ravenous and Fred was so angular that when he leapt to Fred he missed him and he rolled in the dust and Fred did a bit of leaping himself, jumped to the lion's side, whispered something in the lion's ear and this ravening beast got to its feet, stuck its tail firmly between its buttocks and slunk out of the arena.

Nero turned to one of the chaps beside him and he said (he was an Italian chap Nero) and he said: "Bringa thata man here." So Fred was brought up before Nero, front and centre, and Nero said to him, he said: "Whata you saya to my lion" and Fred said: "I told him: 'You realise that after the dinner you would be expected to say a few words'."

Now, the man who told me that I would, after the meal, be expected to say a few words, was that Honorary Secretary of the Bar Association since the memory of man runneth not — that man with his past in front of him, Dennis Wheelahan. (I told him to take a note so that the Statement of Claim is accurate). So when Wheelahan told me that, asked me, I suppose, although it sounded like a summons rather than a request, would I propose the toast to the Attorney-General I had some apprehension because I remembered the last two dinners I had attended within these hallowed walls at which the guest of honour was a senior politican.

The first of those dinners was one in 1972 when Kenneth McCaw, then Attorney-General of New South Wales, was the guest of honour. The second was in 1973 when Gough Whitlam was guest of honour.

Dealing with the latter first, that was a splendid occasion when the New South Wales Bar celebrated the fact that one of its own, the first of its own since William Morris Hughes, was Prime Minister of Australia and celebrated too a tradition which I don't need to tell you goes back to the first Prime Minister of Australia, Edmund Barton, a New South Wales Silk.

It happened that Glass, who was then of Queens Counsel and the President of the Bar Association, wrote to invite not only, of course, the Prime Minister, but

also the Chief Justice of New South Wales, Sir John Kerr. Sir John Kerr, who was then acting Governor, communicated with Glass and told him that he would come on condition that he should be seated on the right hand of the chair because he said as the Queen's representative he must take precedence over any other person present.

Glass had to face the terrible dilemma of getting onto Whitlam and saying that you are the guest of honour but you're going to have to sit on the left of the chair. Anyway, he told me at the time he heard with immense relief the words of Whitlam which, in retrospect, lean down the years with the purest knell of sibylline prophecy. Whitlam said: "I don't care where Kerr sits, ever since I met him he's been moving farther and farther to the right."

Now the second occasion, the first in time, was when Ken McCaw was the guest of honour and the junior on that night was Mary Gaudron. I don't suppose she would like to be called Mrs Junior or Miss Junior so I suppose we will have to call her Ms Junior. Mary's speech which in retrospect was obviously meant to be funny and I guess was funny in retrospect took the form of a highly critical examination of the legislation which had been passed by the Government under the aegis of the then Attorney-General. The silence deepened and dismay grew darker. It might have been meant to be funny but it went over as if all the lead from all the mines in Broken Hill had been tied to the string of a balloon.

After she had been going for about five minutes, Reynolds JA, whom I suppose one could describe as a sort of judicial minder for the Attorney-General, got to his feet, said: "I'm not going to take any more of this", and walked out whereupon the Attorney-General said: "Come back, come back." Gaudron said: "I'm sorry", and sat down. To say it created a sensation is an understatement and bearing in mind as I say that those were the last two dinners I attended at which senior politicans were the guests of honour I firmly determined tonight that I would make no remarks whatsoever which could be taken as being critical of placing large sums of money on racehorses or for that matter even small bets of say a couple of thousand dollars.

Well now, turning to the Attorney-General. Terrance William Sheahan comes as some of you will know from the Irish clan, the O'Sheahan, whose borough was in Canello in County Limerick near I might say the lands of the O'Toolma from whom I spring and it's nice to think that over a couple of thousand years perhaps the Sheahans stole a cow or two from the O'Toolma and the O'Toolma stole a black-eyed dark haired maiden or two from the O'Sheahans.

Anyway, one has one's priorities. But I ought to tell you that in the fact that the Attorney belongs to the O'Sheahans is to be found a clue to the logical and orderly mind which he displays because the O'Sheahans spell their name, I swear, in the following manner although it is pronounced in the Irish Gaelic as it is pronounced in English. The O'Sheahans spell their name Osiodhachain and that is pronounced O'Sheahan.

Now this logical and orderly mind can be found, of course, in the conduct of the Attorney's Department. That Department, as you know, is very large and has a very large budget and it is sort of an elephant you might think among the Public Service Departments and in fact I heard just the other day this great Department of State and the manner in which it is conducted is compared to the sex life of an elephant. It was said that it resembled

"... AND BEARING IN MIND THAT PRIOR TO THE RHYZOLYSIS PROCEDURE YOU, SIR, WERE COMPLETELY UNABLE WITHOUT CONSTANT AND UNREMITTING PAIN TO PURSUE THE CONTEMPLATIVE JOYS OF SITTING AND STRAINING AT TOILET, I WOULD LIKE TO ASCERTAIN WHEN IT WAS THAT YOU WERE ABLE TO TIGHTEN YOUR DIAPHRAGM FOR THE FOREGOING PURPOSES WITHOUT THE CONCERN OF THE ACCOMPANYING AND FORMERLY CRIPPLING AGONY ASSOCIATED WITH SUCH STRAINING, FOR THE STATED PURPOSE..?"

"... I DON'T UNDERSTAND DE KVESCHUN."

BENCH: "WHEN DID YOU LEARN YOU COULD FART WITHOUT FEAR"

"... JUST NOW..."

BENCH: "ADJOURN THE COURT..."

an elephant's sex life because first, all action took place at a very high level. Secondly, any movement forward was accompanied by loud trumpetting noises and third, it took absolutely years before any developments occurred.

Well now, I don't want it to be thought that I am being unkind to the Attorney and I must tell you that I regard him as a man who is not, as some Attorneys-General in the past have been, unworldly. For instance, it is recorded of Sir Thomas Inscape that when he was the Attorney-General he rose before the House of Lords to argue a gaming case and he opened the case to their Lordships as follows:

"Me Lords, this is a case concerning the game of roulette — unlawful at common law — which as your Lordships know is a game played with cards."

There was a ruminative silence before the Lord Chancellor delivered what Lord McMillan has since described as a shattering monosyllabic correction. The Lord Chancellor said: "Balls".

Now, as I say, the Attorney is not unworldly like Sir Thomas Inscape but I wouldn't want you to think that he is a cynical and uncompassionate man. He and I were walking down Darlinghurst Road the other night, about 3am, and as we came to the corner of Darlinghurst Road and William Street there were these two women, one dressed in orange hot pants and the other in leopard skin tights and one said to the other: "Now where are you living now Daisy?" The other said: "Oh, I've got a new flat", and she said, "You know", she said, "if I've been up them stairs once tonight, I've been up thirty times". Anyway, the Attorney and I walked on and after a few minutes he turned and he said: "Toomey, did you hear that poor woman". I said: "Yes, Mr Attorney I did". He said: "Look, up the stairs thirty times in the one night. Her poor feet".

Well now, it is the fact, of course, the Attorney-General, Terrance William Sheahan is the son of a famous father whom you will find is Patrick Sheahan who was Attorney-General of New South Wales between 1953 and 1956. And it is an extraordinary thing that within a generation, almost precisely within a generation, father and son should be Attorney-General of this State and so far as I know it's unprecedented.

It is an office of great honour which dates back to 1399 when it is said William Delottington was the First Attorney-General as opposed to the King's Attorneys who were appointed for specific purposes and may I say briefly that one hopes that in his deliberation about the future of the Bar the Attorney-General will remember some words of that great constitutional lawyer Dicey. Dicey said in lecturing the students of the law Faculty of Harvard in 1908:

"You must remember that there are ancient truths as well as ancient prejudices."

The Attorney-General responded to Toomey's toast in kind. Unfortunately his humorous remarks were off the cuff and, as a result, were not recorded for posterity. He then turned his attention to the serious question of the reform of the Bar.

The Hon. T.W.Sheahan, Attorney-General.

The recommendations made by the Law Reform Commission regarding the so-called reform of the legal profession have been the subject of continuing consultation between my department and the governing bodies of the profession, often involving me personally.

In this exercise we commence with acceptance of the fundamental principle that an independent profession is a cornerstone of our legal system. Therefore, I do not propose that its regulation should be dominated by either government or the public in general.

Rather, I see it as desirable that a balance be achieved between the broad concepts of self-regulation and the requirements of public accountability without compromising the interests of the profession or the interests of the community.

This requires the continuance of a major role for the Bar Association, and the Bar Council in particular. My own view is that certain statutory functions should be vested in the Bar Council for the purposes of regulating practising barristers. These powers would be similar to those currently vested in the Council of the Law Society, and would include the issue of practising certificates, a function I regard as being of fundamental importance.

An associated question is the need for some form of practical training for members of the profession who intend to practise as barristers and this issue requires further consideration and consultation.

The Government would continue to rely on the Bar Council to regulate the day to day practice and conduct of practitioners, and to fulfil its traditional role of providing one source of advice and assistance to the Government on matters affecting the profession.

The Government cannot overlook expressions of community concern as to the delivery of legal services at all levels. I am convinced that there is a legitimate need for community involvement remedying these concerns. I therefore support lay representation on committees of the Bar Council and the Law Society.

The Attorney-General and government of the day need, and should have access to, an advisory body capable of presenting a broad response to modern demands on the legal profession. For this reason it is highly desirable that such a body consist of community as well as Bar Association and Law Society representatives. I envisage it would tender advice to the Government on the regulation of the legal profession and the delivery of legal services.

Other areas examined by the Law Reform Commission, namely complaints, discipline and professional standards, stand out as overdue for reform despite the good work of the Ethics Committee of the Bar Council and the Law Society's Professional Conduct Division.

The problem remains that the only remedy currently available in cases of improper conduct (other than any civil rights a client may be able to pursue) is to seek removal from the Roll of Practitioners.

While this is appropriate for cases where the person is unfit to continue as a member of the profession, there is no effective remedy for other failings, falling short of professional misconduct, such as delay, improper attention to a particular case, poor advice and so on.

The profession tends to dismiss such concerns as relatively minor and trivial, but they are certainly not so regarded by the clients who suffer them or those, such as MPs, to whom they turn for assistance.

I am therefore convinced of the need to develop substantive proposals for the investigation of complaints and, where necessary, the discipline of erring lawyers.

Here again I believe that the primary responsibility rightly rests with the professional bodies to investigate complaints and take action where required. Further, there must be substantial input from the profession in the Government's consideration of disciplinary tribunal proposals.

The Law Reform Commission recommended a two-tier disciplinary system comprising a Professional Standards Board, which would make rulings in cases of unsatisfactory conduct — or what the Commission calls "bad professional work" — and a Disciplinary Tribunal, headed by a Supreme Court Judge, which would deal with the more serious cases of conduct, demonstrative of unfitness to practice.

These recommendations have much to commend them. In some ways they are similar to the present arrangements (the Bar Council takes major matters to the Supreme Court but deals with minor matters itself), but they ensure that the investigative and disciplinary bodies will have full power to deal adequately with a broad range of complaints and poor conduct.

Hopefully, the disciplinary systems will never have to be used to any great extent, but we do not live in a perfect world, and appropriate responses must be available if required.

The response does not have to be particularly onerous in each case. I would envisage the lower tier, for example, having a broad range of positive remedies designed to assist the practitioner to reach a higher level of professional standard.

The penalty does not have to be a reprimand, fine or suspension of a Practising Certificate. Some cases call rather for expert advice, counselling, assistance in the management of a practice, requiring the person to undertake a course of continuing legal education, or even to work under the supervision of a senior member of the profession.

In this way, the competence of the practitioner will be enhanced, the standard of the profession lifted and the community as a whole better served.

I also see the need for public participation in the disciplinary system, just as there is in the procedures for the general regulation of the profession.

In this way, additional experience and wisdom will be available to the disciplinary bodies, and the profession should thereby become more responsive to the needs of the general community.

My consideration of these issues on behalf of the Government is not, and should not be portrayed as, lawyer bashing.

There has been and must be a close relationship between the Government and the profession, and I intend to continue to involve the professionl bodies in the matters before me.

So far as changes in the regulation of the legal profession are concerned, I believe the proposals I have mentioned will:

- modernise the legislative framework under which practitioners operate,
- enable the profession to more readily respond to the changing needs of the community,
- provide for a more efficient and accountable profession, and (with continued reliance on self-regulation) ensure the profession remains a strong and independent feature of our society.

Australia's Lawyers on the World Stage

His Honour, Mr Justice Rogers, examines the desirability of Australian lawyers participating in the preparation of international legal conventions.

A recent experience has convinced me that members of the legal profession should be regularly involved in the formulation and presentation of Australia's attitude on "legal harmonisation". There is almost unprecedented activity in the international formulation of rules for trade, banking and associated topics. In relation to some of the topics, where international agencies have already formulated conventions or rules, Australia is considering adhesion or adoption. A by no means complete list of areas of activity and concern is impressive or frightening, depending on one's view.

I. Projects of The Hague Conference on Private International Law

- Draft Convention of the Law Applicable to Contracts for the International Sale of Goods (not to be confused with the differing UN Convention on Contracts for the International Sales of International Goods 1980)
- The Hague Evidence Convention
- The Law Applicable to Transport Contracts
- The Law Applicable to "Unfair Competition"
- Conflicts of Laws Occasioned by Extraterritorial Applications of Laws Regulating Competition and Similar Economic Regulation
- Revision of the Hague Convention on the Choice of Court 1965

II. Projects of the UN Commission on International Trade Law (UNCITRAL)

- Hamburg Rules 1978 (shipping)
- Model Law on International Commercial Arbitration
- Draft Convention on International Bills of Exchange and International Promissory Notes
- Liability of Operators of Transport Terminals
- Legal Guide on Electronic Funds Transfer (EFT)
- Draft Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works

III. Projects of the International Institute for the Unification of Private Law (UNIDROIT)

- International Financing Leasing Convention
- Codification of International Trade Law
- International Factoring Convention
- Hotelkeepers Contracts
- Civil Liability for Carriage of Hazardous Cargoes by Road, Rail and Inland Navigation

IV. Projects of the UN Commission on Trade and Development (UNCTAD)

- Transfer of Technology Code
- Draft Law on Restrictive Business Practices

V. UN Centre on Transnational Corporations (UNCTC)

- Draft Code of Conduct on Transnational Corporations

Unfortunately, the impact of the private profession has been minimal. The Trade Law Committee of the Law Council does its best. Occasionally, the Attorney General's Department looks to an individual practitioner for assistance. Generally, the professional remains unconcerned, as does the business community.

This attitude of benign neglect is not unique to Australia. A member of the International Legal Affairs Committee of the American Corporate Lawyers' Association has written to complain of the same state of affairs in the US. At least there, the State Department, which is responsible for US participation in such multilateral negotiations, maintains a Private International Law Advisory Committee. Due to insufficient funding (a not unfamiliar refrain), amongst other causes, that body is not as effective as it could be.

During my recent sabbatical, I attended the conference on framing the Model Law for International Arbitration held by UNCITRAL as an alternate delegate for Australia. I am convinced that there is a niche for specialist practitioners, including some members of the judiciary, in the national delegations to many international conferences embracing legal topics. I suggest that the appropriate professional bodies discuss with the Attorney General the inclusion in future delegations of persons whose practical day to day experience would be useful in formulating the delegation's proposals. Let me illustrate the validity of this suggestion by reference to my own experience.

Some years ago, the General Assembly of the United Nations resolved to commission UNCITRAL to examine the feasibility of and to draft a model law for international arbitration. The desirability of such a legal regime was self-evident. For various reasons, some good, some not so good, there is always an apprehension in international trade in submitting to the jurisdiction of the courts of a foreign country in which the defendant is resident. Although provision for arbitration may remove the apprehension of an unsympathetic hearing from a foreign judge, it may involve proceedings and procedures in accordance with rules of arbitration with which the trader may not be familiar.

It seemed desirable that there should be prepared, for adoption by member nations, a set of rules which could

serve as a model for an international regime for the conduct of international commercial arbitration.

It was decided fairly early that, instead of producing a Convention to which nations could subscribe with or without reservations, the more convenient course was to produce a model law which could be adopted by member countries, hopefully with very few alterations, but nonetheless preserving to sovereign states the opportunity of making such alterations to the model as were deemed to be crucial.

A working party was established which, in twice yearly meetings, laboured to bring about a reconciliation in conflicting philosophies. Australia was represented on the working party usually by the Solicitor General, first Sir Maurice Byers QC and more recently Dr Griffith QC, assisted by officers of the Attorney General's Department. Nobody would question the learning and high standing of either of the occupants of the office of Solicitor General. However, I do not think that either of them would claim to have extensive special expertise in the field of arbitration. By contrast, the United Kingdom delegation was led by Lord Justice Mustill who, as well as being the author of Mustill and Boyd on *Commercial Arbitration,* conducted a considerable number of arbitrations whilst at the Bar, heard appeals from awards whilst a judge of the Commercial Court and maintains regular contact with arbitration as a member of the Chartered Institute of Arbitrators.

The Russian delegation was led by Professor Lebedev who is the president of the Maritime Arbitration Commission at the USSR Chamber of Commerce and Industry. The Peoples Republic of China delegation was led by Mr Tang Houzhi, the Deputy Secretary General of the Foreign Economic and Trade Arbitration Commission. The United States delegation included Mr Howard Holtzman whose life in the law was spent in arbitration and who is currently a member of the US Iranian Claims Tribunal.

It can be seen therefore that contributions to the debate were made by persons eminently qualified as specialists in the field of arbitration. Again, the matters that were debated did, in a considerable number of instances, call for a close familiarity with the working of the arbitral system.

Probably, the most contentious matter for debate was the extent to which curial supervision of the arbitral process and of awards should be permitted. The civil law countries, joined by the United States, argued for the widest freedom from court control. They felt that, so long as natural justice was afforded to the parties, and absent any charge of fraud or dishonesty, there should be no resort to the courts and the award should be allowed to stand.

In contrast, the British delegation wished to maintain the same minimum judicial scrutiny of proceedings and of awards as that prescribed by the 1979 Arbitration Act. This was no arid philosophical debate. Its consequences in acceptability to the commercial community were of profound importance. This is well illustrated by the on-going British debate on the question whether the Model Law should be adopted. In order to formulate an appropriate Australian stand between these two competing approaches, it was advantageous to have a reasonable amount of practical experience of arbitrations, both as an advocate and as a judge reviewing arbitral procedures and awards.

The same experience was called for in the debate as to whether parties should be permitted to invoke court intervention at any time prior to the delivery of the award and whether the arbitral proceedings should be suspended if curial proceedings were commenced. To illustrate the nature of the problem, there was lengthy debate whether, in a case where there was doubt as to the jurisdiction of the arbitral tribunal to encompass one or more facets of the claim, the party objecting should be allowed to commence proceedings at any time prior to delivery of the award and, if so, whether the court should have power to stay the arbitral process pending a decision.

The competing considerations were clear enough. On the one hand the substantial raison d'etre of the arbitral process, a speedy resolution of the dispute, might be defeated if a stay could be and was granted, and, on the other hand, substantial costs could be thrown away in obtaining determination of a point which may ultimately be held to be outside the jurisdiction of the arbitral tribunal. Questions of this nature could only be approached in the light of practical experience of arbitral procedures and difficulties of the nature under consideration. There were many other instances in the course of the two week discussion where it was helpful and expedient to draw on specialist practical experience.

I have used the Conference on Model Law of International Arbitration as a convenient illustration because of the personal experience I enjoyed. It should not be thought that it is in any way unusual or exceptional as an example or topic in respect of which specialist lawyers may be of considerable assistance to the country's delegate. UNCITRAL is also considering a draft convention on international bills of exchange and international promissory notes. There are many others.

I appreciate that the Bar Association, Law Council, and indeed other professional organisations, at times have an opportunity of making a contribution to the formulation of Australia's views and stance on particular topics prior to the despatch of a delegation to any given conference. However, as I understand it, that is very much an ad hoc arrangement. Furthermore, I do not think that such random consultation sufficiently publicises the forthcoming conference or tests business and public response. Whilst prior consultation is a highly desirable course, I do not think that it meets the whole of the need. Quite obviously, in the thrust of debate, new problems are posed, new attitudes need to be formulated and often the problems evolve in unexpected ways.

Again, at the other end of the spectrum, it is too late for the profession to seek to make an input into governmental policy once a Convention has been agreed to by the international parties and the only question is one of Australian accession.

It behoves the profession to offer to make a more extensive input in the formulation and presentation of the country's views on issues on which it has special skills to offer. It goes without saying that the self-sacrificing practitioner giving his or her time could considerably enjoy such as period of public service.

Great Bar Race brings Sydney Harbour to a standstill

The largest fleet yet assembled faced the starter in the December 1985 Annual Great Bar Race sailed on Sydney Harbour. Weather conditions were perfect for exciting sailing with a prevailing north-westerly of 15 to 20 knots gusting to 30 knots as Buckworth flagged away the competitors under the watchful eye of Dave Goode, the official handicapper.

The fleet comprised some 21 yachts of various shapes and sizes and included several Sydney/Hobart entrants and such aptly named boats as *Hoodlum, Riff-Raff, Fickle Tart II* and *Corfu* skippered by — you guessed it — that colourful Greek identity, Poulos!

Curtis didn't quite make the start line in *Dilemma* as his helmswoman manoeuvred him overboard with the boom and Moore J reached the finish line via St Vincents Hospital as a result of a similar indiscretion.

It was expected that the "bewigged keel" secretly fitted to *Witchdoctor* would give it a decided advantage, notwithstanding its 32 member crew. However, the strong winds completely split its headsail in the early stages of the race. This incident did nothing to interrupt the serenity of its champagne sipping skipper Pritchard QC, as his many juniors fought desparately to bring the 40 footer under control.

As the fleet bunched into Chowder Bay, Kelly, much to the consternation of his opthalmic surgeon co-owner, Delaney, hoisted his gown as he drove for the Camp Cove buoy in *Blind Justice*. This daring tactic earned him a 20 minute penalty for flying a spinnaker contrary to race rules.

There was little in the race as the lead boats rounded the Camp Cove buoy and headed down to the Manly buoy and on to the final leg to Store Beach.

It is rumoured that some skippers didn't round the Camp Cove buoy! Whilst the race committee was anxious to hear any protest, no-one seemed prepared to produce the protest fee of 12 bottles of Dom Perignon.

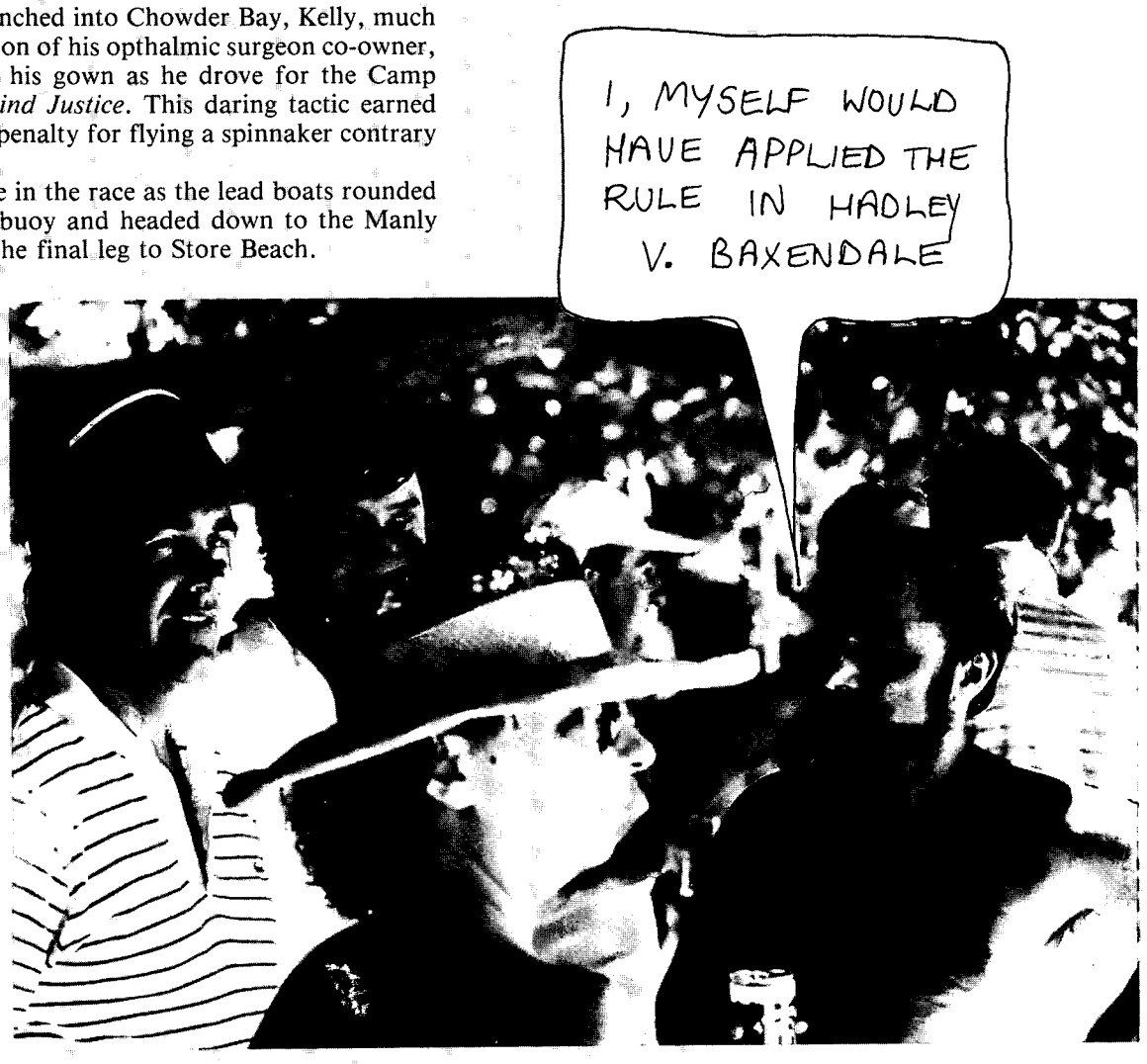
The race committee is considering a number of options to ensure compliance with the race rules in this year's race including granting summary jurisdiction to Smythe J to deal with any offenders.

The finish proved exceedingly close with at least five boats finishing within two minutes. The winner was *Billycan* skippered by Catterns. McGuire J presented him with the "Great Bar Race Sailing Trophy" kindly donated by the Law Book Company. The runner up was Vernon in *Dancing Mouse* and Egan who skippered *Misty*. The skippers of the three leading boats were presented with pewters donated by the Bar Association. Wheelahan, who was to present these trophies, failed to attend the ceremony after the race committee refused his entry of a 250 hp speedboat.

The post-race social activities at Store Beach proved so enjoyable and riotous that the photographs taken by the official photographer, Moore J, had to be heavily censored.

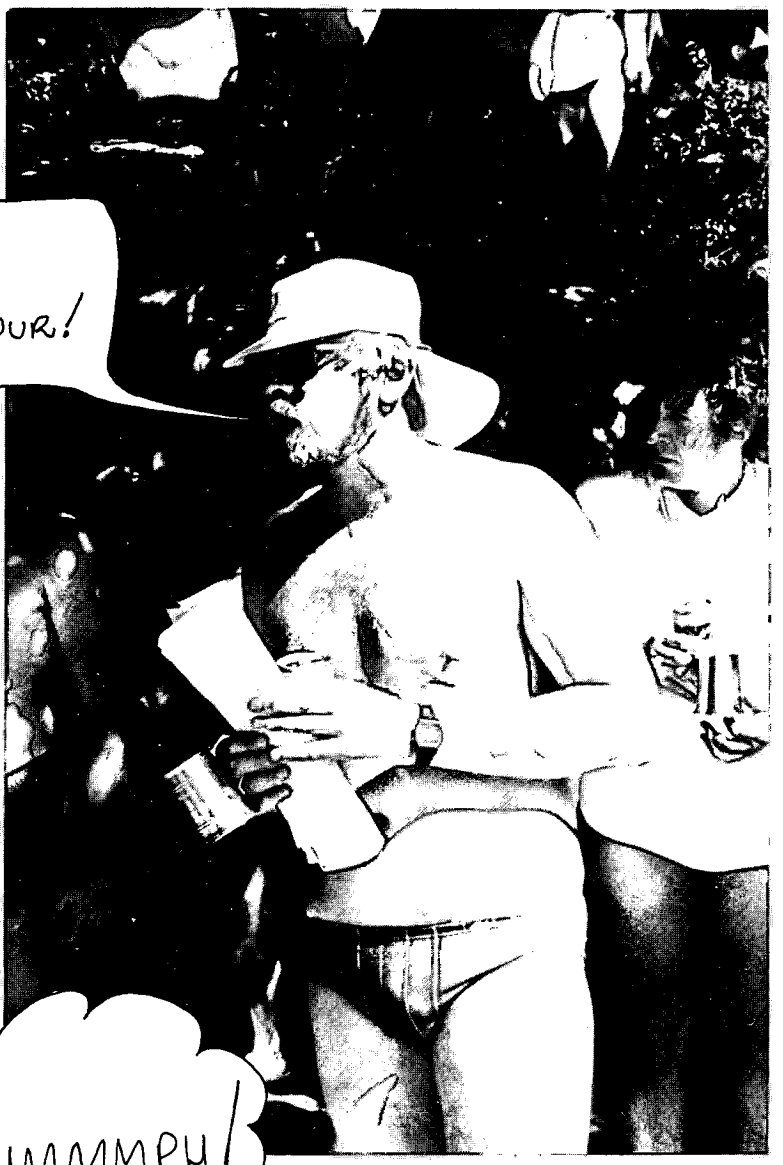
The 1986 race will take place on the Harbour on Monday, 22 December and all skippers and crew are encouraged to commence early training for what, no doubt, will prove to be another exciting and memorable day.

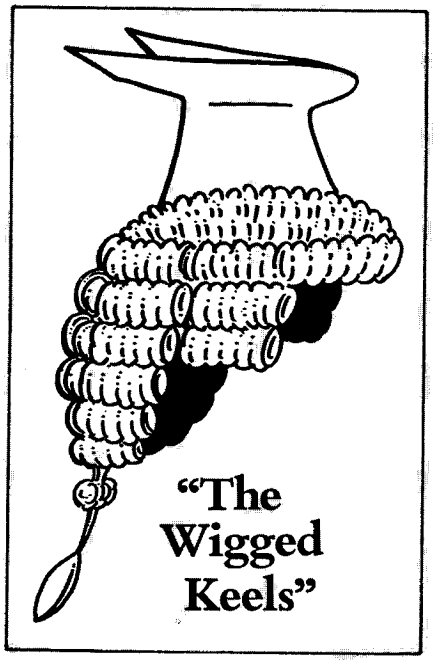
— *THE BOXING KANGAROO*



Poulos educates Inglis and Moore

Norrish makes a naked submission. Catterns marvels at his temerity.





Judge Maguire is not impressed

Motions & mentions

When best is not enough

After the conference at Alice Springs and Ayers Rock, a number of delegates including Sir Harry Gibbs and Lady Gibbs went on a post-conference tour to Kakadu, Katherine Gorge and Darwin. During the visit to Kakadu, the group spent a morning on the Alligator River inspecting crocodiles. At the end of the tour the guide, having heard the group consisted of lawyers, asked whether anybody was a Justice of the Peace because he needed a witness for his liquor licence renewal application. Sir Harry, on the basis of some obscure constitutional doctrine which deems Justices of the High Court to be Justices of the Peace, immediately volunteered and witnessed the signature "H.T.GIBBS, Chief Justice of Australia". The guide then proceeded, in language not normally heard in the High Court, to complain that his form had been ruined because he needed a Justice of the Peace and in any event he obviously had serious doubts about the authenticity of the attestation.

Bets are being taken on the likelihood of the form being accepted by the Northern Territory Liquor Licensing authorities.

Coming events

5-6 September1986: Canberra. National Environmental Law Association Conference. Contact: Richard Arthur, GPO Box 946, Canberra ACT 2601. (062) 48 5222.

7-12 September 1986: New York. International Fiscal Association Annual Congress. Contact: Roger Hamilton, DX 361 Sydney (02) 234 7380.

7-13 September 1986: Jamaica. 8th Commonwealth Law Conference. Contact: Compass Travel, PO Box 222, Albert Park, Victoria 3206 (008) 331 429.

11 September 1986: San Francisco, CA. Resolution of International Commercial Disputes. Contact: IBA, 2 Harewood Place, London W1R 9HB.

14-19 September 1986: New York. International Bar Association, 31 Bienniel Meeting. Contact: IBA (see above).

18 September 1986 (for 8 or 12 days): Hong Kong, China. Family Law Conference — Queensland Family Law Practitioners Association and Queensland Law Society. Contact: Jenny Hansen, QLS (07) 229 3911.

17-19 October 1986: Hobart. Ninth National Conference of Labor Lawyers. Contact: Judy Jackson, 7 Beddome Street, Sandy Bay, Tas. 7005.

1-3 November 1986: Canberra 13th International Trade Law Conference. Contact: Keith Holland, Attorney-General's Department (062) 71 9111.

13-14 November 1986: Hong Kong. Protection of Sellers in Transnational Sales: Letters of Credit and Beyond. Contact: IBA (see above).

20-21 November 1986: Brussels. Trading with and Involvement in China. Contact: IBA (see above).

24-25 November 1986: Frankfurt. National and International Financing of Commercial Real Estate. Contact: IBA (see above).

27-28 November 1986: London. International Competition Law. Contact: IBA (see above).

Classifieds

Supreme Court of NSW

Appointment of Sittings for 1987

Court	Commencing date	Duration of Sittings (weeks)
Central Criminal Court	Monday 2nd February	46
Others:		
Sydney	Monday 2nd February	46
Albury	Monday 2nd March	3
Armidale	Monday 9th November	1
Bathurst	Monday 12th October	3
Broken Hill	Monday 10th August	3
Coffs Harbour	Monday 18th May	2
Dubbo	Monday 1st June	3
Goulburn	Monday 9th February	3
Grafton	Monday 31st August	3
Griffith	Monday 21st September	3
Lismore	Monday 22nd June	3
Narrabri	Monday 10th August	1
Newcastle	Monday 9th February (Civil—Jury)	3
	Monday 9th March (Criminal)	2
	Monday 30th March (Civil, Non-Jury)	2
	Monday 27th April (Criminal)	2
	Monday 25th May (Civil—Jury)	3
	Monday 22nd June (Civil—Non—Jury)	2
	Monday 13th July (Criminal)	2
	Tuesday 4th August (Civil, Jury)	3
	Monday 7th September (Civil—Non Jury)	2
	Monday 12th October (Criminal)	2
	Monday 9th November (Civil—Jury)	3
Orange	Monday 2nd March	3
Tamworth	Monday 27th April	3
Wagga Wagga	Monday 13th July	3
Wollongong	Monday 16th February (Civil—Jury)	3
	Monday 30th March (Criminal)	2
	Monday 27th April (Civil, Non-Jury)	2
	Monday 1st June (Civil—Jury)	3
	Monday 6th July (Criminal)	2
	Monday 24th August (Civil, Non-Jury)	2
	Monday 26th October (Criminal)	2
	Monday 16th November (Civil—Jury)	2

The fixed vacation begins on 21st December, 1987 and the first day of term in 1988 will be 1st February.

Letters

Dear Editor,

In the course of his curious article in your last issue, unusually replying at length to a review of his own book (and, even more unusually, personally bucketing the reviewer), Moffit QC suggested that, in some way (the vagueness of the point being his, not mine), membership of a body such as a "Labor Lawyers Society" is inconsistent with membership of, or support for, an independent legal profession.

This is nonsense born of ignorance. Theoretically, it is obvious that for a group to share a general philosophic common ground with a government implies no necessary inability for the group to speak and act independently of that government. More importantly, the New South Wales Society of Labor Lawyers has far more often than the Bar Association had occasion to attack decisions of the Wran Government and, I venture to say, has done so far more trenchantly. In other words, independence has been amply demonstrated in fact.

We see the essential justification for our existence in the deep political conservatism of the vast majority of lawyers and the promotion, unconsciously or otherwise, by the Bar Association and Law Society of conservative views and values. We jealously preserve our independence of Labor Governments because another role we see for ourselves is that of "keeping them honest" in issues affecting the law.

If Moffit did not know these facts from reading the papers, as any lawyer with the slightest political tutoring would, a phone call to anyone connected with the Society could, in seconds, have established them for him. No such enquiry was apparently made before the slur upon us.

Minor though this matter is, it nevertheless provides scant incentive for broaching the book so vigorously, if leadenly, trumpeted by its author.

Yours faithfully,
Stephen C. Rothman

Dear Editor,

One enjoyed the light relief in your penultimate page item 'D.U.I.' (*Bar News* Autumn 1986); however may I respectfully submit a correction.

I do so in respect of the "1950 formula," with the authority of being in *practice* since 1949 (in the *true sense* as suggested by John de Meyrick — same *Bar News*).

I recall countless occasions when "Constable Careful" said the eyes were *not* just "bloodshot", they were *always "bloodshot and watery"*, and the speech as *not* just "slurred", it was *"thick and slurred"*.

On *pleas* to D.U.I. the sum total of all these indices only ever produced an assessment of "slightly to moderately affected". They took on a different aspect however if one had the temerity to challenge them.

They were good days and a good area in which to cut the adverserial teeth.

Yours faithfully
G.G.Buckworth

Butterworth Battles On

David Catterns reviews Civil Litigation *written by Mr Justice Young and published by Butterworths (1986).*

His Honour Mr Justice Young has written "A Practical Guide for Advocates" which should become an indispensable tool for all newcomers to the Bar and a valuable reminder for more senior advocates.

The vehicle for his Honour's instruction is a year in the life of the alliterative Brian Butterworth — a senior junior whose years of devoted attention to the various causes of Ms Carol Carson is justly capped by his receipt of Her Majesty's Commission and a free lunch at the hands of his pupil Isabel Ibsen.

Brian Butterworth is the perfect barrister. He is a stickler for the letter and the spirit of the Bar Rules, unfailingly generous of time and advice to his stable of pupils, a dynamo of preparation, and fabulously knowledgeable in all areas of law. I look forward to appearing against him but tremble at the probable result. It would be more trying to appear as his junior.

The basis of the book is Butterworth's brief for Ms Carson, whose years of litigation, as the learned author says, "encompass almost every problem that could happen to man or woman." The reader is shown how Butterworth approaches the legal and procedural aspects of each of these problems and we follow his successes and (thankfully) failures as each case is run or settled. By this means, new advocates and many others obtain very valuable practical and theoretical guidance in an endeavour which all of us think can be learnt, but never taught.

Ms Carson has a mountain of problems. She is an attractive women who had a promising career in administration in her father's nightclub but, as a result of a fall (Chapter 34 *Common Law Proceedings Before a Jury*) can't concentrate and has to work in the Club, playing strip poker, and giving and receiving beatings in various stages of undress. Despite this, she wins the custody case (Chapter 28) with her answer, under savage cross-examination by David Dancey, with this answer:

> "Well, Mr Dancey, if you had an injury so that you couldn't use your head or concentrate, and you had a child to support, and the only asset you had was your body, would you not do like me and support your child by using that asset."

One imagines Dancey blushing modestly and, as the author says, "Butterworth noted that the judge seemed to understand". Despite the usual disclaimers about resemblance to persons living or dead, readers can have hours of harmless fun identifying Dancey's body and the judge's face.

Ms Carson's catalogue of woes, each of which is the basis of a chapter, also include the following:

- Application for Injunction (the mother of Carol's late de facto wants possession of his house — Butterworth obtains an injunction)
- Petty Sessions Proceedings (Carol loses her drivers' licence but Butterworth persuades the magistrate to recommend that she be issued with a new one)
- An Inquest (Butterworth is jammed but Charles Coulson handles the inquest into the de facto's death so well that the fact that his trousers and underpants were below his knees when he drove into a telegraph pole does not come out in evidence)
- Witness Porceedings in Equity (Carol sues the de facto mother-in-law for a declaration of trust — held, that the house was beneficially owned by Carol and the late de facto as tenants in common)
- District Court Litigation (Carol claims damages for loss of goodwill suffered by her wine bar as a result of its purchase and use of deteriorating peanuts — verdict for the defendants)
- A Property Summons in Equity (variation of a covenant — Butterworth loses)
- Family Provision Act Proceedings (Carol gets half of her father's estate)
- Professional Negligence (her solicitor's conduct on the purchase of the wine bar — settled for $79,000 inclusive)
- The Probate Suit (Carol's mother's will is challenged by her brother — probate in solemn form granted)
- Company Matters (Carol holds all the shares in her late de facto's building company — Butterworth staves off a winding up following a s364 notice)
- Building Cases (the building company has a net win in the District Court)
- Commercial Causes (Carol sues for fraudulent misrepresentation of the wine bar's turnover — she is disbelieved by the judge)
- Common Law Proceedings (Carol sues a supermarket for her fall on a banana skin — she gets $395,000)

In each of these cases, Butterworth's analysis of the law and, more importantly, his advice and example on its preparation and running is of immense benefit to his pupils — and should be to the readers of this book.

Although Butterworth gives useful advice as to the desirability of trying to settle cases, and he's obviously a tough negotiator, I think his technique could be modified a little. Some of the barristers I know wouldn't react kindly to the following response to a settlement overture:

> "I'm always happy to settle anything Gladys, provided it can be done honourably. Have you thought about the figures."

Despite these minor quibbles about Butterworth's personality, the use of "the year in the life" technique avoids the problems which appear in other books on advocacy — they are either a listing of helpful hints without factual context, or a recounting of the advocate's finest moments.

It is often at the level of the simpler procedural matters that the new advocate has trouble and this is another strength of the practical emphasis of this book. For example, his Honour gives, via Butterworth, very useful material on preparation, ethics, motions lists, adducing evidence, affidavits, and so on. I think, however, that Butterworth's approach to legal research — write everything down in case it becomes relevant — would become a little tedious and his leisurely thoroughness could lead to the odd unpleasant telephone call about late chamber work.

Most of this book was written while his Honour was at the Bar. He adds a rather terse postscript from the point of view of one who has had appear before him a number of barristers of lesser perfection than Butterworth.

One final question: bearing in mind that the attractive Ms Carson finished the year more than a million dollars in front, did she have lunch with Butterworth too?