Bar News

The journal of the NSW Bar Association

Incorporating the 51st Annual Report of the N S W Bar Association 1987 and the Annual Report of the Barristers Benevolent Association of N S W

Summer 1987

A letter from the Managing Editor of CCH Australia Limited

The last chapter of Michael Coper's ***Encounters with the Australian Constitution*** is entitled *Rewriting the Music* and towards the end of that chapter he discusses the role of the High Court:

"The High Court is frequently criticised for being too legalistic; the Supreme Court of the United States is frequently criticised for not being legalistic enough. That the grass is always greener on the other side has been described as only one facet of the many

> ... contrapuntal themes of the judicial process: the simultaneous demand for stability and change, the dual function of settling particular disputes and making general rules, the tension between institutional constraints and the pressure to get the 'right answer', the inconclusiveness of the legal materials and the invidiousness of going outside them, the simultaneous demand for practical reason and for the categorical imperative, the opposite pulls of dogmatism and doubt, of scepticism and faith. In truth, we expect the judge to combine the Platonic concept of the philosopher-king with the Aristotelian concept of the rule of law.'

There is no easy resolution of the dilemma."

This brief quote may well be sufficient to whet the appetite ... if not, let's look at the comments so far:

The Governor-General in his foreword suggests that Coper "may have committed the primal sin of converting constitutional law into reading for pleasure".

Gough Whitlam at the launch described it as a "jolly good read".

Professor Colin Howard, writing in *The Australian*, concluded that this book is "one of the best things to come out of the Bicentenary so far".

A recent report to our ***Australian Torts Reporter*** noted the case brought by a solicitor against two policemen for malicious prosecution.[1] The court found that both officers had prosecuted the solicitor without foundation and with malice. At the time of laying the charge against the solicitor — a charge which was subsequently dismissed — the police at no time interviewed the two barristers who'd been standing with him at the time that he, the solicitor, was alleged to have illegally passed money to a prisoner (being his client). During the course of the judgment in this case, Dowsett J. made this comment:

"... there is no reason why a Court should accept the evidence of a barrister with any greater degree of enthusiasm than the evidence of any other person, however it would be unrealistic for a police officer investigating an offence not to take account of the fact that two barristers were witnesses to the alleged offence ..."

It was the same judge, Dowsett J., who at the suit of a solicitor restrained the police from disclosing the contents of a conversation they'd recorded by bugging the interview room at a local police station. The police, his Honour held, had clearly overstepped their powers to use the listening device. (This unreported case is discussed in the new writings on Privacy recently added to our ***Australian Torts Reporter***.)

Until the new independent statutory body, the Australian Securities Commission, actually takes over from the NCSC — as Attorney-General Bowen announced that that's what the Government plans — the rulings of the current body play an important part in the regulation of corporate affairs law. Take as a simple example the announcement (inserted in full text into our ***Australian Company Law & Practice*** in September) that take-over schemes which include a cap on the consideration offered won't in future be registered. The Commission's decision to that effect arose out of a recent scheme in which alternative considerations were offered to offerees, but in which there was a limit or cap on the total amount of the more attractive consideration which would be offered.

Caps, the Commission believes, offended against the prohibition on pro rata bids.

In *Scintillae Juris*, Mr Justice Darling wrote:

"A compliment is a forensic anaesthetic. Many people will complacently undergo a fatal interrogation if they be well flattered all the while; and more men are likely to be caught by a compliment to their ability than by a tribute to their virtue."

and

"Admissions are mostly made by those who do not know their importance."

Probably this should be under a heading like *Where the Action Is*; the fact is that between February and September this year we've reported in ***Australian Tax Cases*** in full text almost 280 tax decisions (i.e. income, sales, pay-roll and land taxes and stamp duties) released by the Courts and the Administrative Appeals Tribunal.

This represents an increase of 14% over the number of cases of these kinds reported for the whole of 1986.

Vauvenargues wrote in 1746 "Few maxims are true in every respect", to which the comment normally is "including that one" ... and Norman Mailer has now recently added "The platitude turned on its head is still a platitude".

1. *Brooke v. Grimpel & Anor* (1987) Aust. Torts Reports ¶80-108.

If you're interested in seeing any of the publications noted on this page — or indeed any publication from the CCH group — contact CCH Australia Limited (02) 888 2555.

In this issue

COVER

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Bar Notes

Bar opposes waste of Public Money on Staffing Judicial Commission of New South Wales.

The President has criticised the waste of public monies in appointing an array of senior executives to the recently formed Judicial Commission of New South Wales which is to investigate complaints into the conduct of State Judges and Magistrates.

The Commission budget will cost New South Wales taxpayers $648,000 in its first year including some $300,000 for salaries for senior staff. The backlog of cases awaiting trial in the District Court is 4,000 for the State and actions recently commenced in the Supreme Court are subject to delays of seven (7) to ten (10) years in the case of jury trials and four (4) to six (6) years in the case of non jury trials. It would be a more efficient use of public monies to pay for the appointment of more Judges to hear cases rather than dissipate it on a Commission for which there is little perceived need and which has recently been criticised by the Chief Justice of the High Court, Sir Anthony Mason as encouraging groundless complaints by disappointed litigants. This serves to detract from the reputation and standing of Judges.

The Bar opposed setting up of the Commission. Disclosure of the extent of the bureacracy to keep Judges under surveillance only confirms our worst fears. □

Right of Appearance of Former Judges Changes

The Bar Council has amended Rule 7 of the Bar Association Rules. The effect of the amendment is that a barrister who is a former judicial officer may not practise as a barrister in any court or before any officer exercising judicial or quasi-judicial functions if he or she has been a member of or presided in such court or exercised such function nor in any court inferior to that of which he or she was a member for a period of a minimum of two years to a maximum of five years. The length of the prohibition on appearance during the two to five year period will depend upon the duration of the former judicial officer's term of office. The Council retains a general discretion to vary the Rule in particular cases.

The recent spate of judicial resignations has lead to much discussion of this topic, and it was the subject of a session at last year's Australian Bar Association conference at Ayres Rock. It has been debated in the Bar Council in each of the last three years. Recent consultations with the Chief Justice of New South Wales, the Chief Judge of the Federal Court, and the New South Wales Attorney General made it clear that the Association would receive no practicial assistance in enforcing its Rule prohibiting a former Judge from appearing in his or her former Court. The Council therefore concluded that amelioration of the Rule was inevitable. □

Extension of Arbitration to Personal Injury Actions in Sydney District Court.

The President has accepted in principle the Government's decisions to extend the existing system of arbitration by lawyers to personal injury actions in the District Court in Sydney.

A system of arbitration by lawyers has been in operation in the District Court and Magistrates' Courts since 1983. However the District Court matters had been restricted to claims for $20,000 or less which effectively ruled out most personal injuries actions.

Under the new proposal the consent of the parties is not required before matters may be referred to arbitration, but either party has the right to demand a rehearing by a Judge if they are dissatisfied with the arbitrator's decision. This allays the Bar's concern at any measure which prevents a litigant being able to approach the Court.

The proposal requires 30 new arbitrators to be appointed, 15 from the Bar and 15 solicitors.

The Bar will assist the Government in the implementation of the scheme in the hope that it will be successful in reducing the backlog of actions. □

Appointments

The Association congratulates the following members on their appointments since the last report. (Styles and titles as at the date of appointment).

FEDERAL COURT OF AUSTRALIA
Judge: W.M.C. Gummow, Q.C.
M.R. Einfeld, Q.C.

SUPREME COURT OF NEW SOUTH WALES
Judge: Jane H. Mathews
P.J. Newman

DISTRICT COURT OF NEW SOUTH WALES
Judge: J.X. Gibson, Q.C.
J.B. Phelan
D.D. Levine, Q.C.
D.A. Wheelahan
W.H. Knight
P.J. Phelan

LAND & ENVIRONMENT COURT
Judge: N.A. Hemmings, Q.C.

CROWN PROSECUTORS
L.M. McSpedden, J.P. Booth
P.J.P. Power, L.J. Attard, B.M. James

Obituaries

With deep regret the Association records the names of those members and ex-members who have died since the last report.

The Honourable S. Isaacs, Q.C.
The Honourable E.P.T. Raine, C.B., E.D.
N. Mackerras
G.A. Crawford
P. Griffin
L.G. Tanner, Q.C.

From the President

There have been some matters of general concern during the last couple of years.

One is the position of the judiciary. A number of factors have affected the institution. They include — criminal charges against judges and a magistrate; the establishment of the pernicious Judicial Commission in New South Wales; the continuing controversy over the Family Court; the resignation of judges before time and their return to the Bar in some cases; the recent appointment of a solicitor to the Supreme Court of Victoria; the continued proliferation of ad hoc tribunals to take jurisdiction from the ordinary courts; the public championing of alternative dispute resolution as superior to decisions by judges; and the continuing erosion of salary and conditions of service. Above all there is a tendency by some politicians and journalists to treat judges as if they are merely functionaries who form part of the political and bureaucratic machinery rather than as a distinct arm of government separate from and not inferior to the legislature and the executive.

All of this is making the bench a less attractive place and recruitment of the most able will become more difficult. The task of presiding over trials and making decisions which affect litigants is not for the enthusiastic amateur, no matter how intelligent or well versed in other branches of the law. Courtroom expertise is not acquired by any other means than constant practical experience.

Another is the bureaucratisation of criminal justice. It is increasingly being administered by a State run prosecution and a State run or State funded defence, with a listing system which, if not designed to keep members of the private bar out of this important area of work, certainly has that effect. It will not be possible to sweep the ethical and practical problems involved in these developments under the carpet for much longer.

Another is the increasing readiness of the government to take away access to the courts to redress wrong. The abolition of the common law right to sue for personal injury arising from road and work accidents was an appalling precedent, and there are ominous signs that elements in the government would wish to extend the process much further. Politicians and bureaucrats have no love for an independent judiciary.

As far as the profession is concerned, the enactment of the legislation governing it is a most significant event. The incoming Council will have to grapple with the myriad of problems associated with it, and we will all have to put up with the effects of the elaborate new disciplinary procedures.

Issues arising relating to the administration of justice are increasing each year in both number and complexity. The Association has a difficult task in servicing the need to accommodate this, in view of our small numbers and consequent small staff. The appointment of a legally qualified Public and Professional Affairs Director is an endeavour by the Council to deal with these issues in a world which is increasingly sceptical of, and often hostile towards, the independent professions.

In conclusion, I would like to acknowledge the support I have had from members of the Council of the Association, particularly the executive. It is a privilege to serve on the Council and it is important that members who stand for election are prepared to pull their weight if successful. I also thank those many members who have assisted the Bar in various ways during the year. □

R.V. Gyles

1987 Silks

The following barristers (listed in order of seniority) have been appointed as Queens Counsel by the Attorney-General of NSW.

Arthur Leolin Price, (U.K.)
James Walter Black, (U.K.)
David Francis Jackson, (Qld)
Bernard Daniel Bongiorno, (Vic)
David Rudd Thompson
Alexis Chernov, (Vic)
Terence Fenwick Marley Naughton
Nicholas Richard Cowdery
Allan James Myers, (Vic)
Mark Anthony MacAdam
Michael Joseph Williams
Clifford Roy Einstein
John Dyson Heydon
John Robertson Sackar
Thomas Michael Jucovic
David Harold Bloom
Mark Samuel Weinberg, (Vic)
Charles Augustine Sweeney
Thomas Frederick Bathurst
Michael Frederick Adams
David Graham Russell, (Qld)
Terence John Higgins, (A.C.T.)

Book Review

Australian Insurance Law

(A.A. Tarr, Law Book Company — 368 pp. $49.50)

Dr. Tarr says in the preface to this work that it is designed primarily for law students and those taking examinations for insurance qualifications, though he expresses the hope that the commentary on the new insurance legislation and reference to recent decisions will be useful to legal practitioners and people working in the insurance field. It is difficult not to conclude that Dr. Tarr has strained to achieve that which he has set out to do. The book is certainly a useful first port of call for practitioners, giving, as the author has intended, some analysis of recent legislation and detailed footnotes to many recent decisions. However, it is not a substitute for a comprehensive Australian text on insurance law as one is led to believe on occasions by the extent of the footnoting. To be fair it does not set out to be one.

As a student's text the book covers major areas of concern, often in considerable detail and, usefully for students, by means of discussion of leading cases. One criticism which can be made is that the frequently quite detailed treatment of areas covered has not left room for often ignored areas in insurance books such as private international law, the obligation of good faith upon the insurer, reinsurance and rectification. Of these topics the last is treated very briefly and the remainder are substantially untouched. Given that a significant portion of Australian insurance and reinsurance is placed in London and given that the book is aimed (at least in part) at those hoping to qualify for practice in the industry, these omissions seem regrettable.

The index is somewhat brief and sketchy and contains at least one serious omission: such discussion of rectification as appears at pp. 291-3 is not referred to in the index. Another disappointment was the lack of discussion of the recent English Court of Appeal decision in *C.T.I. v. Oceanus* [1984] 1 Lloyd's Rep 476 in the discussion on the notion of materiality. While in New South Wales the Court of Appeal in *Barclay Holdings Pty. Limited v. British National Insurance Co.* [1987] 4 A.N.Z. Ins. Cas. 60-770 has decided not to follow *CTI* the debate concerning the notion of materiality is important and is not entirely irrelevant to the inquiry under s. 21 of the Insurance Contracts Act.

On the whole, however, the book fulfils a useful role for the practitioner as a convenient, clearly laid out first reference work with many topics of some difficulty briefly and succinctly discussed, e.g. the payment of premium and the recent cases on the principle of indemnity and illegality (though the discussion of illegality must now be read in the light of the following of Parker J in *Bedford Insurance* by the Court of Appeal in *Phoenix General Insurance Co.* of Greece Sa (1986) 2 Lloyd's LR 552.) □

J.L.B. Allsop

Reflections on Life at the Bar

A revised version of an after dinner speech given by Mr Justice Bryson to a Master & Reader's dinner.

I should like to take the opportunity to deliver a budget of advice and wisdom ground small in the mills of my two decades of practice at this Bar. I do not believe in hijacking rostrums and addressing astonished audiences of pig-breeders or brain surgeons about the burning issues of the day, so I will leave them to glow at one side.

The profession of the law is not like others.

There is nothing to be certain about: nothing building up for your old age, no Annual Holidays Act or sick leave, except what you pay for yourself. You get no necessary advancement or respect for seniority; mere survival is not enough. You only get what people are prepared to give you. If it ever were true that young barristers received steady or even glittering briefs on the strength of family or old school ties it was never true in my time, and merits have always been to my observation indispensable. The Bar exposes itself to all the laws of supply and demand in as unmitigated a form as exists in Australia. Protection and subsidy are as Australian as tomato sauce, but they do not work for us. A year or two's experience will show you that any measures which really changed this would soon sink the Bar out of sight. Only the hard driving, self-motivated, learned and energetic could make any success of it. A secure barrister lacks the quality summed up by the prince of clerks, Ken Hall, who told me early: "A good barrister is a hungry barrister." Barristers must all to some degree be adventurers to have made their way to the Bar: willing to give up the years which others give to climbing ladders in large organisations, or even willing to jump off the ladders after climbing a good way up, to invest all savings and almost all leisure time in trying what can be done. Everybody's favourite economist, Adam Smith, saw it all two centuries ago and gave his explanation of barristers' fees in these terms in "The Wealth of Nations":

> "Put your son apprentice to a shoemaker, there is little doubt of his learning to make a pair of shoes; but send him to study the law, it is at least twenty to one if ever he makes such proficiency as will enable him to live by the business. In a perfectly fair lottery, those who draw the prizes ought to gain all that is lost by those who draw the blanks. In a profession where twenty fail for one that succeeds, that one ought to gain all that should have been gained by the unsuccessful twenty. The counsellor at law who, perhaps, at near forty years of age, begins to make something by his profession, ought to receive the retribution, not only of his own so tedious and expensive education, but that of more than twenty others who are never likely to make anything by it. How extravagant soever the fees of counsellors at law may sometimes appear, their real retribution is never equal to this . . .
>
> . . . with regard to all the counsellors and students of law, in all the different inns of court, . . . you will find that their annual gains bear but a very small proportion to their annual expense, . . . The lottery of the law, therefore, is very far from being a perfectly fair lottery; and that, as well as many other liberal and honourable professions, are, in point of pecuniary gain, evidently under-recompensed.
>
> Those professions keep their level, however, with other occupations, and, not withstanding these discouragements, all the most generous and liberal spirits are eager to crowd into them."

Whether barristers enjoy this recompense to the full or not, they will realise in the course of 3 or 4 years whether the Bar is to be the career for them. Less time than that is not enough: more time than that is not certain. It is no stigma to have tried the Bar and left it; this is a valuable experience for many other walks of life. The failure would be to try but not for long enough.

The Bar has great potential for rewards. Not all the rewards are financial. A great reward, for me, of a career at the Bar is admittance into the company and society of other lawyers. Every newspaper tells all who have 40 cents that lawyers are dull and narrow: I have never found this true. All sorts of people are lawyers, all sorts of characters, backgrounds, prior careers, hobbies and interests; variety everywhere: as various as humanity is various. They are all clever, some up to a point, some beyond it, and they all have something to say. Stimulating company is one of life's joys: not having it is a great fear, and the Bar provides it. Of course, human society, human relationships, art, culture and intellectual interests tend to become minor themes of life's music behind the crescendo of tomorrow's brief. To have friends is to give hostages: if you value the regard of other people, this assists you to govern your behaviour well. Everything a barrister does in court is public; the failures and humiliations are public, the criticisms attracted are public, the triumphs are public and the blunders and misjudgments are all over Phillip Street in two hours. Gossip is discipline: to have a good regard for other people is to wish for their good regard, and this is a valuable discipline and confers great benefits on the community

Enjoying the 1972 Bench & Bar Dinner: (L to R) D.F. Oakes, Judge Torrington, J.P. Bryson & M.E. Pile, Q.C.

as well as on individuals. It would not be wise to attempt to practise outside this Association. If you find that you do not come to the Bar Association for lunch, not ever, and cannot bear to do so, ask yourself whether this is avoidance of scrutiny. It is easier to treat other barristers honourably if you know them and know they know you, if you look down future decades in which you must deal with them and need the courage to look each of them in the face.

The greatest reward of the Bar is the work itself. There can be few experiences more challenging or more stimulating to the wits and the adrenalin than the contest, criminal trial or commercial cause, in which two, three, five or more defendants, cross defendants or hangers on with their counsel circle around each other seeking the opportunity to precipitate trouble for the others. Nothing could be more stimulating, more demanding, could take more attention, could get more out of one's resources, and put more in, than sharpening competition with other nimble wits. As well as the money and the excitement, the work itself is manifestly important. Ask a client if this is so, ask him if you dare whether his case is important. The presentation of opposite side of a case by adversaries is a vital element in the emergence of the true and just solution. Nothing less could stimulate the necessary efforts. A Bar which was lazy or uncaring would not be useful and soon would not exist. It would be replaced by a miasma of welfare workers and clerks shuffling papers about, scribbling scraps of misunderstandings and disposing of person and fortune by rote and rule of thumb. It really seems unlikely that a building stuffed with clerks shuffling files can improve on the courts as an engine of justice, although the idea has its supporters. The real winners would be the sellers of the filthy blue cardigans so favoured by government clerks, each with baggy pockets containing Champion ready rubbed tobacco: the end of the reformer's goal of deconflictualisation.

Challenge, stimulus and response, application and fire in the needed hour are a barrister's life. There is no easy way, and the sacrifice of hours required is unmeasured. The interest of the work is always absorbing: the challenges to imagination and creativity, learning and craftsmanship in recognizing, constructing and presenting legal arguments are present daily. There can be little more exciting to a trained mind. The conflicts themselves are of great importance. Counsel stands between the individual and the large, the collective and the powerful; the vast company, the government. Governments always and everywhere claim to be desperately short of money, but governments build pyramids and fire moon rockets and when they enter forensic contests they always prove to be well funded. It is largely the Bar which stands against dominance by government and, to speak closer to the problem, the people who make up and nominally serve governments.

The most visible and in detail and in the small incidents of life potentially the most threatening organ of oppression is the police and the prosecuting system. I say this with respectful acknowledgement of the community's debt to police, on whom we all depend, but no-one least of all counsel can be blind to the dangers which their powers create.

It is in this respect that we must be mindful of the high importance of the resolution by juries of conflicts which in reality involve the values which people think their governments should observe. Jury trial in criminal cases is of the first importance. It is even more important than ever since in the last one or two centuries our institutions have found themselves in an age where the community is democratically governed and in truth must look to itself to govern itself.

A very strong popular legend or mythic explanation of life in our time is based on the thought that the government is different to the people, and is hostile. There is probably some trace of reality in this perception, but in a democracy it should comfort no-one. A jury is a committee of a self-governing community and if the things they decide are unsatisfactory to the community it cannot dump the blame on an elite, or on a caste, or on a profession. Participation in jury trials is as important a thing as a barrister can do. I include not only the criminal work but the civil cases which mark out and enforce the limits of the conduct of officers of government, particularly of police and other services who handle people's liberty. The right way in principle as well as the effective way to maintain the limits of official conduct is through the verdicts of juries. The damages sued for fade into insignificance: this is truly a venue for fighting cases on principles and establishing the principles. If there are no professional advocates and indeed Judges who understand jury work, liberty is not well defended.

One advantage which no longer can be held out to young barristers in the way it was to me is the prospect of overseas travel. In March 1986 it became impossible to bring any more Privy Council appeals from Australia. The last appeal from New South Wales was heard in June 1987 and the judgment delivered on 27 July. A long era has ended. Their Lordships in their time heard appeals from judicial decisions of Governor Phillip. In Australian natural history they will soon join the Diprotodons. They are facing a further large loss of business when Hong Kong, now their main source of work, passes out of British hands in 1997. But it was pleasant for me to be briefed twice to travel to London, to sit in court behind a leader and — holding a brief for a respondent for two days — to hear the best legal minds in Britain tear the appellant's case to shreds, and then to hear them say that they did not wish to hear any submissions from us and that the decision under appeal would be affirmed. Their Lordships' method was that the most senior Law Lord and the most Junior had completely mastered the volumes of transcript and argument which had been sent over from Australia several months before: they alternated in hectoring counsel from different parts of the Board while the other three sat like their grandsires cut in alabaster, lending nobility but little else to the scene. That is the true history of my career of advocacy in England: with it came two return tickets, a significant advantage. Their Lordships are lawyers entitled to great respect, but the idea of sending litigants to London to fight a case was a great idea whose time had gone. This was the close of a significant chapter.

Let me tell the very junior Bar one or two secrets about Judges.

They really want to hear from you. The challenging or dismissive observations which ring across the Court are not truly intended to make you crawl away or gape in astonishment or fear, or vomit between your knees. I have seen some of these responses, but they are not what is required. The sharp or firm observations are attempts to evoke your response: give it: crackle with inward fire and produce an accurate and ingenious response. The judges are all really interested in what you have to say, and wish to promote your expressions. Not many, or perhaps any, fit these two examples, taken from Professor Shetreet's "Judges on Trial":

> "In his *Victorian Chancellors,* Atlay reported the scant attention that Lord Brougham would give to counsel's argument: 'He would write letters, correct proofs, read the newspapers, do anything, in short, but follow the arguments and listen to the affidavits.'
>
> Sergeant Ballantine in his memoirs gave a very good account of Lord Campbell's impatience:
>
> I remember upon on occasion during the speech of a very able counsel, now a judge, that after having shown many signs of irritation, his Lordship could no longer keep his seat but, getting up, marched up and down the bench, casting at intervals the most furious glances at the imperturbable counsel and at last, folding his arms across his face, leaned as if in absolute despair against the wall, presenting a not inconsiderable amount of back surface to the audience."

Young barrister going to Court — 1966

Now I will point out to you how judges may come to grief and what they might get up to if they are not carefully watched. You must all have been wondering about this so I will explain what can be done, but to avoid treading on any toes I will stay a few centuries away from our own time and tell you about Lord Macclesfield. He was the Lord Chancellor and he came to grief in 1725. He was then entitled to appoint Masters in Chancery, in an age when the Auditor-General and the idea that government money should be put in a bank had not been invented. The Masters in Chancery had the keeping of money paid into court for the benefit of widows and orphans, and what better investment but to pay standard interest to the widows and orphans and buy shares for one's self in the South Sea Trading Company. When the bubble burst and the peevish widows began to complain of hunger, it was found that people had been buying the office of Master in Chancery from the Lord Chancellor at very high prices, which they had paid out of the funds in Court. One paid 1575 pounds — 1500 guineas — and was immediately ushered up the stairs and sworn in by his Lordship, who was in bed at the time. Another had to go to 5000 guineas: he sent the money round in a washing basket, with gratifying results. Later on when the bubble burst he asked for it back, but received back only the basket. He had offered 5000 pounds but his Lordship's clerk replied: "Guineas are handsomer". I suppose he learnt to haggle when his Lordship was at the Bar. Lord Macclesfield was tried before the House of Lords, fined 30,000 pounds and removed from public life. The trial took 13 days in May 1725.

Another person worth mentioning is Harry Claiborne. He falsified statements to the revenue officers, while he was a judge, and managed to get himself sent to prison for it. He was impeached and removed from office. His trial took two days. This took place in the U.S. Senate in November 1986, the first such trial in fifty years. Of course, there are many demands on parliamentary time. But I will not trespass into the controversial.

The relationship between Masters and readers is capable of being a poor and tenuous thing. That would be an error. The base exists for a life-long friendship and sharing of ideas, punctuated by the occasional clash when you find your Master briefed against you in later years. The Master's mind is there to use, and he needs yours. Share your knowledge and thoughts and do not disappear into the background at the end of your reading year. The first year at the Bar is the opportunity for some vicarious experience and the observance of pitfalls. The best repayment is to give your own time patiently to explanation, and to assist others as pupils in due time.

Please accept a short closing homily in praise of patience, openness to criticism and a mind ready to hear the other person's problem. The lawyer has many clients and does not belong to any of them: but if lawyers stop listening, the system will die. The client will deceive himself if he is all demands and insistence on service and results. All he will get will be a sycophant: he will not have the benefit of a splash of cold water over his ideas before they cost him too much money. The lawyer cannot be all arrogance, confidence and finality. He will not notice when he is being told something important. □

The Last Hurrah!

The last Australian appeal to the Privy Council, *Austin v. Keele & ors.* was heard in late June and early July. Ireland appeared for the appellant, leading Ryan. Emmett Q.C. appeared for the respondents leading S.R.W. Emmett and Street.

At the conclusion of the hearing on 1 July 1987 the following speeches were delivered:

"Mr. Emmett: My Lords, I understand that after several false starts, perhaps false stops, this is the last appeal which Your Lordships will consider from the Commonwealth of Australia. It is therefore an appeal of some historical significance.

All of the counsel at Your Lordships' Bar in this case are novices before Your Lordships and I am sure we all regard it as a great honour to have appeared, first of all before this Board in any event, and secondly in this last appeal. I should perhaps in that regard observe that my learned juniors' family at least are not novices to this Board. Their father has been before the Board in two capacities, one as counsel and one of course as the other end of an appeal. Their grandfather and great grandfather also have been subject to appeal before Your Lordships although they never appeared before the Board themselves.

I understand that more eminent counsel than I have made remarkes about the great contribution that this Board has made to jurisprudence in Australia and I can only endorse those. It has been a long line of authority from the Privy Council keeping the colonies on the straight and narrow path of the common law. No doubt we are now approaching our manhood. Our bi-centenary of course is due next year and it is perhaps appropriate, that, before that occurs, we have finally put ourselves in the position where we can look after our own affairs. Maybe our sister dominion across the Tasman will soon see the light and follow suit and I suppose it is also fitting that New Zealand is represented on the Board by Sir Duncan McMullin.

My Lords, I don't think I can say anything more than express the appreciation of Australian lawyers. Of course it has never been a great imposition to come across to appear in London — Wimbledon in early July and the like — and one has to accept those benefits with the burdens of overseas travel.

My Lords, may I say this, some two thousand years ago Catullus, lamenting the loss of his brother, made some remarks in one of his Carmina. *'Atque in perpetuum, frater, ave atque vale'.* Perhaps I could adapt that in translation — 'And so, forever, my Lords, hail and farewell'.

Lord Keith of Kinkel: Thank you Mr. Emmett. I am assured that this is indeed the last appeal, not only from New South Wales, but from any of the States of Australia. From time to time over the last year, when we had the last appeal from various States, I have said how much their Lordships have always appreciated hearing Australian counsel. The association has been a very happy one. Their Lordships have enjoyed having it and are indeed sorry that historical events necessarily lead to the conclusion that it must come to an end now. While it is a matter of regret there it is, things must take their courses. Their Lordships have appreciated the argument in this present case very much indeed. It has been well up to the standard of advocacy which we're accustomed to hear from New South Wales and their Lordships will consider what advice they will humbly tender to Her Majesty.'' □

Membership

1092 practising barristers were members as at 6th October 1987. They were in chambers as follows:

Wentworth	224
Selborne	180
University	62
Wardell	77
Edmund Barton	74
Blackstone	31
Frederick Jordan	61
Chalfont	23
Culwulla	16
Garfield Barwick	50
Windeyer	91
Mirvac	5
Lionel Murphy	8
H.B. Higgins	10
Crown Prosecutors and Public Defenders	20
A.C.T.	19
Newcastle, Wollongong, Parramatta, Coffs Harbour, and Others	75
Interstate and Overseas	66

There were 16 Life Members and 296 Ordinary Members Classes "B" and "C", the total membership being 1404. □

Draconian overreach in organised crime control

Professor Brent Fisse of the University of Sydney and Director of the University's Institute of Criminology spoke at the 4th Annual Law Society Criminal Law Dinner of the vices of the Proceeds of Crime Act 1987

DISTINGUISHED colleagues in crime, my choice of topic might confirm all your worst fears about academic irrelevance but I have chosen it because I believe that the recent Commonwealth prohibitions on money-laundering are unparalleled in their departure from basic principles of criminal liability. The so-called war against organised crime has generated a new despotism in criminal legislation, a new despotism wherein serious offences are defined in such scattershot terms that the scope of liability depends very little on law and very much on administrative discretion. This despotism is not only ethically indefensible but has gone to the extent of exposing lawyers, accountants, stock-brokers and financial institutions to an unwarranted risk of prosecution in their everyday professional or business lives. The dangers of the recent legislation seem to have passed without critical comment, and since those dangers may impinge on the ability or willingness of lawyers to act for persons accused of crime, I have taken it as my brief to discuss them tonight.

The legislation in question is the *Proceeds of Crime Act 1987,* the acronym for which is *POC.* Essentially, *POC* seeks to combat organised crime by focusing on the money trail, and while there is much to be said in favour of this approach, undue focus has led to extremes. I refer in particular to two new crimes on the Australian scene, money-laundering under s.81, and, under s.82, receiving or possessing money or property reasonably suspected to be the proceeds of crime.

The money-laundering offence under s.81 represents a species of the offence of receiving stolen goods but differs in a number of important respects:

1. the maximum penalty is much higher (for individuals, $200,000 and/or jail for up to 20 years; cf. receiving under *Crimes Act* (NSW), s.188 — 10 years);
2. the metal element under s.81 requires that D know or *ought reasonably to know* that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity (cf. knowledge or belief under e.g. *Crimes Act* (NSW), s.188; *Raad* [1983] 3 NSWLR 344);
3. it appears that there is no defence of claim of right nor any defence of intent to return money or property to the police or the rightful owner; and
4. "proceeds of crime" may be derived directly or indirectly (even if the proceeds are not traceable at equity) from a wider range of offences than theft or offences against property.

The offence of receipt or possession of suspected proceeds of crime under s.82 is roughly akin to the offence of being in custody of something reasonably suspected to be stolen (cf. *Crimes Act* (NSW), s.527C) but again there are significant differences:

1. the maximum penalty is higher (2 years, cf. 6 months);
2. under s.82 there must be reason to suspect that the money or property amounts to proceeds of crime whereas under *Crimes Act* (NSW), s.527C there must be reasonable suspicion that the thing in D's custody is itself stolen *(Grant [1981] 147 CLR 503)*; and
3. under s.82 there is no requirement of unlawfulness or acting without lawful or reasonable excuse (cf. *Crimes Act* (NSW), s.527C, which requires that D's custody of the suspected item be unlawful).

It should also be mentioned that, under s.85, corporations and individual persons are vicariously and hence strictly liable for the conduct or mental states of agents acting within the scope of their authority. Section

85 closely resembles s.84 of the *Trade Practices Act* but it should be noticed that, unlike the offences under the *Proceeds of Crime Act,* the offences and violations under the *Trade Practices Act* do not expose defendants to jail sentences.

The ethical and practical implications of the offences under ss.81 and 82 are profoundly disturbing. So broad is the definition of the actus reus and the mental element and so limited the range of defences and exemptions that the legislation proscribes much conduct that is relatively harmless or even completely innocent.

Take the case of a solicitor or barrister representing an accused charged with a major tax fraud. If the solicitor or barrister accepts a fee from the accused he or she may easily be in jeopardy of committing an offence against s.81 or s.82. The money handed over may well amount to "proceeds of crime", as widely defined under s.4, and receiving such proceeds is plainly a prohibited transaction. Whether an offence is committed will then depend on whether the solicitor or barrister ought reasonably to have known that the money was of illicit derivation or, under s.82, on whether it is possible to prove on the balance of probabilities that there was no reason for him or her to suspect that the money came from some form of unlawful activity. These objective tests of reason to know and reason to suspect are very far-reaching and may all too easily catch the lawyer who does not go to considerable lengths to try to ensure that his or her fees come from a legitimate original source. By contrast, the offence of receiving stolen goods requires knowledge or belief that the items received were stolen, and in practice this requirement of knowledge or belief largely precludes the risk of lawyers committing the offence of receiving by accepting fees for acting on behalf of great train robbers and others of similar ilk.

Consider next the effect of the vicarious liability provisions under s.85 of *POC.* If for example one partner of a law firm commits an offence against s.81 or s.82 then by virtue of s.85 all partners in the firm are vicariously and hence strictly liable for the same offence. This extension of vicarious liability to individual persons for offences punishable by lengthy jail terms is virtually unprecedented in the Western world.

Perhaps even more remarkable is the absence of any provision for those who, in dealing with the proceeds of crime, should be regarded as acting with lawful authority or reasonable excuse (cf. *Customs Act (Cth)* s.233B). Assume that a bank innocently receives money from a client only later to discover that the money represents the proceeds of crime. If the bank then continues to possess the money but notifies the A.F.P. it nonetheless seems to contravene s.82 because, unlike the position under s.527C of the *Crimes Act* (NSW), there is no requirement under s.82 that the possession be unlawful. And if the bank gives the money to the A.F.P. there is seemingly a money-laundering transaction within the wording of the prohibition under s.81.

The last-mentioned absurdities might possibly be avoided by means of a benign application of s.15AA of the *Acts Interpretation Act,* but the objective tests of reason to know or reason to suspect imposed under ss.81 and 82, together with the imposition of vicarious liability under s.85, are much more difficult to overcome in that way. Doubtless, the wise exercise of prosecutorial discretion will do much to minimise the risk of injustice, but belief in the infallibility of Mr Temby and his officers is no substitute for the guarantees provided by rule of law.

Why have our legislators gone to the extremes we see in ss.81 and 82, and s.85? The approach taken flies in the face of the emphasis on subjective tests of liability for serious offences which has been taken in a long line of High Court decisions, from *Parker [1963] 111 CLR 610,* to *Crabbe [1985] 156 CLR 249,* to *He Kaw Teh [1985] 157 CLR 523* and *Giorgianni [1983] 156 CLR 473.* Moreover, the offence under s.82, although claimed to be similar to that under s.527C of the *Crimes Act* (NSW), is much more broadly defined and is quite inconsistent with the policy concerns expressed by Sir Harry Gibbs, Lionel Murphy and other members of the High Court in *Grant [1981] 147 CLR 503* in 1981. It should also be realised that ss.81, 82 and 85 go far beyond the scope of the money-laundering offences enacted under US law in 1986; for instance, under the US provisions knowledge is the minimal mental element required. The NSW legislation (the *Crimes (Confiscation of Profits) Act*), I am glad to say, does not contain any offences of money-laundering or possession of illicit proceeds of crime.

Few would deny that the money trail is highly significant in combating organised crookery but under the *Proceeds of Crime Act* our legislators, aided and abetted by the National Crime Authority, appear to have embarked on a militaristic crusade. The money trail has become the Ho Chi Minh Trail in the war against organised crime, with indiscriminate bombing now administered not by B52 but by s.81 and s.82. This martial artistry reflects little credit on the politicians who introduced the *Proceeds of Crime Bill* into the Australian Parliament; the legislation was rushed through with little apparent effort to attract or allow public comment.

To conclude, the real dirt in money-laundering lies not so much in the perceived practices of criminals and their laundries as in the actual abuse of principle by those responsible for the *Proceeds of Crime Act.* In the cleansing words of Felix Frankfurter:
"[The criminal process] should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers. The contrast between morality professed by society and immorality practised on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were . . . hot-water . . "

Speaking of hot water, I have no fear of washing this topic in public; there is a protest to be registered and acted upon by abolishing or substantially redefining the offences which I have criticised. □

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The journal of

Of Prefaces Forewards and Dedications

Like jewellery they tell us something at a glance, commonly they are unimaginative, some are modest, others are outrageous; the best are those which arouse interest, in the subject addressed.

Spencer Bower said of a Preface:—

> "It has been insisted by a courtly writer of the eighteenth century that a preface to a book is, in all case, a seemly concession to the ceremonial conventions and amenities, if not to the decencies, of literature. 'A preface', he observes, 'is part of the habit of a book, and no author can appear full dressed without it'.
>
> The convention referred to can no longer claim the universal allegiance it enjoyed in the days of Queen Anne; but it is still true to say that a preface is expected from any work which aspires to deal with a scientific or serious subject. An explanation of this demand, conceived in a spirit of sardonic gloom and somewhat overdone modesty, is given by the late Sir Leslie Stephen, when introducing to the world his Science of Ethics: 'a preface is generally the most interesting, and not seldom the only interesting, part of the book. It is useful to the hasty critic who wishes to avoid the trouble of reading at all, and to the more serious student who wishes to have the clue to the author's speculations put into his hands at the earliest possible period.' This deliverance sounds a rather harsh note, and seems gratuitously churlish to the prospective critic. The author who was accustomed to describe the lector benevolus as "that beast, the general reader," did not do so in a preface." (*The Law of Actionable Misrepresentation,* George Spencer Bower)

In May 1860 Bullen & Leake commended to their colleagues their precedents of pleading which Sir Frank Kitto later described as "that noble ornament the system of pleading that shines in third edition . . ." with these words:—

> ". . . it is now presented to the profession with sincere diffidence, but with a hope that it may serve in some degree to supply the existing want".

(In his Foreward to the First Edition of *Equity Doctrines and Remedies* Meagher, Gummow & Lehane)

No such modesty had inhibited W.R. Cole in November 1856 whose great work on Ejectment is prefaced:—

> "The Common Law Procedure Acts of 1852 and 1854, and the New Rules, have rendered all previous Treatises of Ejectment of little or no value.
>
> Having practised as a Common Law Barrister and Conveyancer for eighteen years, I hope I may, without presumption, venture to offer to the Professional a New Treatise of Ejectment, &c. I have taken great pains to render it as complete and accurate as possible. As a general rule no case is cited at second-hand, or with reference only to the Marginal Note; but I have read and maturely considered every case and authority cited, with few exceptions."

I suppose every set of Chambers has such a member but rarely does history vindicate their self confidence.

A rather different attitude may be discovered in some Australian practice and text books. R.G. Walker announced his Forms and Precedents for use in the Supreme Court of New South Wales:—

> "I express the fervent hope that the publication of this work will in no way result in the practice of law being considered a matter lightly to be enterprised by the unqualified.
>
> Nevertheless, I express my regret — not so profound, I fear — to the few practitioners who have assiduously collected precedents over the years only to find that the unthrifty are now placed on an equal footing." (*Forms And Prececents For Use In The Supreme Court of New South Wales,* R.E. Walker, B.Ec., LL.B.)

One may well imagine that the late F.C. Hutley was a little disappointed, not to say embarassed when B. Sugerman, then a Judge of Appeal, prologised that "Cases and Materials on Succession" "may not be without some utility to practitioners".

R.G. Reynolds in the first edition of Ritchie was unable to predict much future for a commentary on the

incandescent language of the Supreme Court Rules in the drafting of which he had played a large part as a member and later Chairman of the Law Reform Commission of New South Wales:-

> "It is hoped that the rules need no commentary by way of paraphrase and little by way of explanation. A well-drawn provision should need no informal gloss.
>
> Jeremy Bentham, in his View of a Complete Code of Laws written about two hundred years ago, said:
>
> 'If any commentary should be written on this code, with a view of pointing out what is the sense thereof, all men should be required to pay no regard to such comment: neither should it be allowed to be cited in any court of justice in any manner whatsoever, neither by express words nor by any circuitous designation.'"

Meagher Q.C. has used Prefaces & Forewards to fulminate:—

> "Two years after the publication of the First Edition of this work, Lord Diplock, with the apparent approval of his colleagues, delivered himself of a pronouncement in **United Scientific Holdings Ltd v. Burnley Borough Council** [1978] AC 904 at 924, that to speak (as we have) of the rules of equity as an identifiable part of the present law was "about as meaningful as to speak similarly of the statute of uses or of Quia Emptores". This speech represents the low water-mark of modern English jurisprudence. Lord Diplock did not explain how equity vanished or what were the consequences of its disappearance. Moreover, when he spoke, Quia Emptores remained in force as a pillar of English real property law.....
>
> If Baron Parke were to survey the common law today, he would be baffled and understandably dismayed by what he saw. But his great equity contemporaries would, at least if they migrated to this country, be of good heart." (*Equity — Doctrines and Remedies,* Meagher, Gummow, Lehane.)

Of Sir Frederick Jordan he wrote:—

> "In 1897 he graduated from Sydney High School, an academy which had not at that time been favoured with Government degrading.
>
> .....
>
> As with Mr Justice Dixon and Mr Justice Kitto, despite an almost exclusively equity background, he also proved himself to be a consummate master of the common law. (The reverse process never happens.)
>
> .....
>
> Almost every judge of the High Court of Australia, for example, has at some time lectured at a University law school. In England this has never been the case. Most judicial members of the House of Lords not only have not lectured at any law school (and glory in not having done so), but many of them — like Lord Diplock — have never even attended one. English law has not benefited from that experience." (Sir Frederick Jordan — *Select Legal Papers*)

In my only venture into Canon Law I found that Meagher (who is reputed to be fluent in Latin) was my opponent and that the English translation of the Code of Canon Law contained in its Introduction a warning that Papal permission for the translation into the vernacular was "subject in particular to the clear understanding that the only official and binding version of the Code is the Latin text".

Dedications to spouses, relatives and anonymous lovers are usually self indulgent, esoteric and dull; an exception may be found in the First Edition of Stroud's Judicial Dictionary which is dedicated:—

> "TO THE CHERISHED MEMORY OF
> H.S.,
> FRIEND AND WIFE
>
> Ever, and in all things, full of wise counsel and steadfast courage,
> Who took an affectionate interest in this enterprise,
> But whose too early death has taken away its charm.
>
> THIS BOOK
> is reverently and lovingly
> DEDICATED
>
> Easter, 1890." □

P.M. Donohoe

Review of Commonwealth Criminal Law

The Committee for Review of Commonwealth Criminal Law has published two discussion papers. The first of these deals with the onus of proof and averments and the second deals with Common Law Offences and the Commonwealth. The Association has presented submissions on both these papers to the Committee.

One of the matters raised in the first paper is the onus passing to the defendant to establish certain defences. The distinction is drawn between statutory provisions which require this and the traditional evidential onus. In the latter the prosecution must disprove the matter beyond reasonable doubt. Despite the criticism of the phrase "evidential onus" by the Privy Council in *Jaecina v The Queen (1970) A.C. 618* the phrase has established tradition. Although the using of the word "onus" is misleading it is still used as a standard phrase for the method for a defendant to raise a defence for the prosecution to disprove.

One of the problems which results from the statutory defence on the balance of probabilities is that there are two standards of proof used in criminal cases. If there were to be one onus only then, although the defence must raise the defence, it need only "prove it" to the extent of raising a reasonable doubt.

The Association is considering this approach. It seems acceptable in principle although there may always be room for exceptions given particular legislation.

The Review Committee attempts to find a formulation of the defence consistent with one standard of proof in criminal matters. The Committee refers to the formulation of the Senate Standing Committee in Constitutional and Legal Affairs as follows:

"There is sufficient evidence to raise an issue with respect to that matter."

That formulation has the benefit of not imposing any express onus on either party to lead such evidence. All that is needed is that the evidence be there. The use of the word "sufficient" could cause some difficulty. It has associations with sufficient evidence for a *prima facie* case. The Review Committee suggested possible alternative formulations.

It may be that the placing of the onus on the balance of probabilities on the defendant is based on an unjustified fear in the authorities that unpredictable judges will hold there is no case to answer or irrational juries will acquit. Such fears are unfounded — although it is always possible to have an irrational jury it must be very rare indeed. The use of 12 jurors in criminal cases is to avoid such situations.

The Review Committee draws attention to the different formulations of the reversal of the onus in different statutes and the very heavy burden which can be imposed in some; eg. where the defendant must prove they did not know and could not reasonably be expected to know — thus imposing both a subjective and objective test for the state of mind of the defendant. Such an approach is disapproved both by the High Court and by the House of Lords.

In discussing "Exceptions to the Rule in *Woolmington's* Case" the Committee refers to the distinction drawn between statutory provisions where the statute, having defined the ground of liability, introduces by some distinct provisions a matter of exception or excuse and, on the other hand, provisions where the definition of liability contains within it the statment of the exception or qualification. (*Dowling v Bowie* (1952) 86 C.L.R. 136 at p.139). In the first case, the onus lies on the defendant to prove the exception or excuse. In the second case, the onus lies on the prosecution.

The Committee refers to s.233B(1)(c) of the Customs Act 1901 and to the decision of the High Court in *R v He Kaw Teh* (1985) 157 C.L.R. 523. The Committee notes that this decision, in overruling earlier decisions, established that it must be proved the defendant knew of the existence of the goods in whatever receptacle he was carrying them or was wilfully blind to the possibility of their existence.

Averment provisions are discussed with the Committee noting that "In short, an averment provision in modern legislation authorises the prosecutor or plaintiff to aver in the information, or like document, matters of fact and such an averment is prima facie evidence of the matters so averred."

It is suggested by the Committee that averment provisions should be kept to a minimum and should only be used to prove formal matters not relating to the conduct of the defendant, or if the matter relates to the conduct of the defendant, it should be a matter peculiarly within the defendant's knowledge.

In the second paper the Committee discusses whether, an Act consolidating Commonwealth criminal law should abolish common law offences where such offences are already dealt with in that Act and in other Commonwealth laws.

The paper thereafter discusses the various Commonwealth common law offences, some of which the Committee notes are already subsumed in existing legislation, eg. cheating the public revenue — s29D of the *Crimes Act,* and some are archaic, eg. refusal to serve in a public office, and can be ignored for the purposes of a modern Commonwealth criminal law. The Committee also recommends that extended versions of some offences be included in the future Act, eg escape, as being an extended version of s47 of the *Crimes Act*.

In regard to the offence of bribery and corruption the Committee welcomes submissions on whether the future Act should include an extended version of sections 73 and 73A of the *Crimes Act* covering circumstances where the bribe proposal related to an exercise of duty, authority or influence either real or apparent. The Committee also deals with a modified version of the common law offence of extortion, namely, wrongful taking of money by an officer under colour of his office, knowing that the money was not due. Offences such as perverting the course of justice and conspiracy are reserved for further discussion.

Under the general description of official misconduct the Committee refers to the offences of wilful neglect of duty (nonfeasance); malicious exercise of official power (misfeasance); and wilful excess of official authority. As regards nonfeasance the Committee notes that *ex parte Kearney* (1917) 17 S.R. (N.S.W.) 578 was an unsuccessful attempt to invoke this common law offence in relation to an industrial dispute. "In present day circumstances,

creation of a statutory offence with the full width of the common law offence of nonfeasance would, the Review Committee believes, be publicly unacceptable. It would be interpreted as intruding into industrial relations and indeed the facts in *ex parte Kearney* would support such an interpretation." The Committee does however put forward the possible point of view that, if there were to be abolition of common law offences, new offences covering some of the ground of the common law offences should be created; for instance where a public official wilfully fails to carry out a duty of his office, knowing or having reason to believe that his failure might cause loss of life, personal injury or serious property damage.

The Committee raises an interesting point in regard to common law offences and the Commonwealth — "Is there a *separate* Common Law of the Commonwealth?" The Paper states that even if it is correct to say that there is a separate common law of the Commonwealth, it does not follow that, for Commonwealth purposes, the common law operates unaffected by State statutes although the question is perhaps arguable. The Review Committee is disposed to think that the matter would be governed by the relevant State statute in force in the State where the proceedings are brought subject, of course, to its consistency with the Constitution and any law of the Commonwealth. Where the locality is a Commonwealth place, the State law will generally be applied by the *Commonwealth Places (Application of Laws) Act 1970.* □

B.H.K. Donovan

New Equity Procedures

The following procedures are to be introduced in the Equity Division in 1988.

1. A short notice list is to be instituted. The notice given to the parties on the list is to be a minimum of three days.
2. Cases to go automatically on the list are those which are estimated to last one day or less. Other cases may be placed on the list by consent. That consent could be given at any time on or after entry in the General List.
3. Matters to be compulsorily placed in the list will be so placed by the Registrar when he is satisfied that the case is ready for trial or, if the matter of its category is in doubt, by a Master after reference to him by the Registrar.
4. For voluntarily submitted cases, application to be placed on the list should be made to a Master, who will give directions.
5. The list will be kept by the Registrar. Details kept should include the estimated length of trial.
6. When judges have notice of the settlement of a case fixed for hearing before them they will advise the Registrar who will then give the requisite notice to the parties in the case occupying the highest place in the list of cases in that category (i.e. short matters if only one day available, two day cases if two days available).
7. For those cases presently in the list which have had readiness hearings but have had no hearing date fixed, an opportunity to be listed will be given by advertising for the space of a week in the daily law list. Applications must be made to the Master as detailed in paragraph 4 above.
8. Other cases in the General List will be placed in a callover as at present, but the Registrar will fix only a provisional date for hearing, and will also fix a date for a directions hearing before the trial judge four weeks before the provisional date. If the case cannot be made ready by the provisional date, that fixture will be aborted and the place taken either by another matter in the General List or by a matter or matters in the Short Notice list.
9. Readiness hearings are to be abandoned.
10. There will be two judges dealing only with expedited matters. □

Reports from Bar Council Committees

Criminal Law Committee

Three significant things have occurred this year in the area of review of Criminal Law. The first is the establishment of the Committee for the Review of Commonwealth Criminal Law chaired by Sir Harry Gibbs. This Committee has published two discussion papers. The first dealt with the onus of proof and averments and the second with the role of the Common Law in Commonwealth criminal law. The Association's Criminal Law Committee made submissions in response to the two papers.

The second matter is the move to establish a Criminal Law Section of the Law Council. The Committee has taken an interest in this development although at this stage the Section has not been fully set up. In the meantime the Association's Committee has had referred to it a number of matters in the area of Criminal Law by the Law Council. Apart from the *Proceeds of Crime Act* of the Commonwealth the matters referred did not cause any great concern. The *Proceeds of Crime Act* did cause a great deal of concern. The Association is in the process of drawing a submission in opposition to much of it even though the Act has already been passed. It was passed with little discussion or publicity.

The third matter has been the creation of the New South Wales Criminal Lawyers Association. The Association is currently running a series of seminars chaired by The Honourable Mr Justice Lee. The Association aims to have lawyers from all areas of practice of the criminal law and the Bar Association's Committee hopes that the Bar will be influential in this new Association.

The Association's Committee has made representations on a number of matters to various authorities but the most controversial has been the Task Force on Violence Against Women and Children. In discussion papers issued by its Task Force it was suggested that certain evidence be taken by video monitor and that certain material obtained during the investigation may not be made available to the defence. The Association made written and oral submissions to the Task Force and joined with the Law Society in opposition to these proposals.

Criminal Injuries Compensation has also been under review this year. There have been suggestions that the process should be dealt with by specialised tribunals, not by Courts. The Committee has opposed the use of specialised tribunals in all areas of criminal law and has opposed their use both as a matter of principle and of practice in cost efficiency and justice. □

Family Law Committee

The Family Law Sub-Committee met approximately eight times during the year and made some important contributions as a result of those meetings in regard to Counsel's fees, the Sydney premises of the Family Court of Australia, listing problems, legal aid fees for Counsel appearing in family law, the issue of the Family Court being a division of the Federal Court, the Court procedures, including enforcement of access and maintenance orders and contempt in the Family Court.

Counsel's Fees in Family Law

The Judges Rules of the Family Court of Australia now give power to Judges through their committee to make rules in relation to Counsel's fees. The Family Law Sub-Committee, in conjunction with the Family Law Section Executive of the Law Council of Australia, has made contributions towards the Judges Rules Committee in relation to Counsel's fees.

The Family Law Section Executive made a written submission to the Judges and then made oral comments on that written submission to the Judges Rules Committee on 27th July 1987. Prior to that, there had been discussions between Handley Q.C., on behalf of the New South Wales Bar Association, with the representatives of the Victorian Bar Council and the Queensland Bar Council in respect to that scale of fees proposed by the Family Court Judges. The New South Wales Bar Council supported the Family Law Section Executive proposals as to the quantum of that scale. The Judges Rules Committee proposed to write to each of the Bar Councils inviting them to make reply in order that such replies should be all available when the report of the Judges Rules Committee to the whole of the Judges of the Family Court of Australia was to be made in November 1987.

Such request has not been received, but when received will be replied to in accordance with the proposals earlier outlined.

Sydney Court Premises

For some considerable time there have been complaints that the Sydney premises of the Family Court of Australia are inadequate. Not only have the Judges and staff been complaining to the extent that the staff have been going on strike but the profession, including the solicitors and the New South Wales Bar Council have made representations by letter and otherwise to the Federal Attorney General.

The Federal Attorney General met a delegation of members of the profession in May 1987 to deflect the proposal by the Attorney General to move the Family Court to premises in William Street, Sydney. Towards the end of 1986 the premises at 75 Elizabeth Street, Sydney were remodelled to allow greater security for the Judge and more Courts made available. This is not adequate and still leaves a shortage of space and adequate accommodation for the profession and the public in these premises.

Court Procedures and Delays

The Sydney Registry has been battling with delay in the hearings of matters in the Family Court for a considerable time. Approaches have been made to the Judges in regular quarterly meetings with the Sydney Judges to overcome the delay. A new listing procedure came into force in September 1987 whereby there is a rolling list of long defended matters. The Family Law Sub-Committee has made submissions to the Judges on this and other procedures, including case management, during the year to ensure that there is effective dealing with all matters including long defendeds, short defendeds and duty matters.

The Family Law Sub-Committee and the New South Wales Bar Council is not yet satisfied that the problem has so far been overcome but is continuing its negotiations with the Attorney General and the Judges to overcome delays.

Family Court and Federal Court

Representations have been made to make the Family Court a division of the Federal Court. There have been many obstacles to this suggestion, which has been supported by many branches of the family law profession throughout Australia.

It appears that the recommendation of the Constitutional Commission dealing with that part of its report related to the Judiciary, recommends that the Family Court be gradually integrated into the Federal Court.

Apparently, the Federal Judges do not want the Family Court to be part of the Federal Court and the probability of the Family Court remaining as a separate Court will continue despite the plea by the then Chief Justice of the High Court of Australia, Sir Harry Gibbs, in August 1985 that the Family Court should no longer remain a separate Court.

Reference of Power and Cross Vesting

Both these matters have been the subject of discussion and submissions to the Attorney General during the year. Cross vesting legislation has now been passed by the Commonwealth and by New South Wales, Victoria and South Australia (all of the latter three will come into force in 1988) but the reference of power legislation has still not passed through the Parliament.

New Legislation

The Family Law Sub-Committee has been aware that the Federal Government proposes to introduce new legislation to give jurisdiction to magistrates of the various States to hear some property matters (with a limit of civil jurisdiction appropriate in each State) and in relation to the hearing of divorces by magistrates in State Courts.

Although the Family Law Sub-Committee has joined with other bodies in opposing this legislation, they have so far been unsuccessful. The new legislation giving jurisdiction to magistrates, giving powers to Masters and using the reference of powers provisions to overcome the dichotomy between Federal and State Courts on custody matters will be introduced into the Parliament in November 1987. □

Fees (Scale) Committee

During the course of this year success has been achieved in obtaining approval of a new scale of Supreme Court fees which will, in accordance with recognised procedures, become reflected in the updating of the District Court fee scales.

In addition, an application has been made for the loadings for country work to be increased to accord with current costs and the result of this application is awaited.

A previous study involving the possibility of change to charges by counsel on the basis of a daily fee or part thereof for portions of a day, in lieu of the long established system of brief fee plus refreshers (the latter on a two-thirds basis) has been presented to the Fees Committee chaired by Mr. Justice Priestley and is understood to be under current consideration. □

Fees (Recovery) Committee

This Committee has carried out a large amount of the routine work involving a large number of matters involving fees outstanding to counsel, the great bulk of such work being carried out by Biscoe, whose efforts have been substantial and appreciated. In a limited number of cases a situation has developed where a few solicitors have determined not to pay fees even where the question of entitlement of counsel has been the subject of arbitration under the joint statement. The Law Society has apparently not yet determined to regard the non payment of fees under an arbitration award as amounting to professional misconduct. There is a present need for the establishment of such a proposition.

Further problems have emerged in relation to the "black" list where there have been mergers of listed firms or of partners formerly part of listed firms with the result that the solicitor carrying the obligation for unpaid fees has become divorced from the listed firm. The view has been taken that the incidents of listing should be carried to the firm with whom the solicitor has become associated. This needs clarification in the Bar Rules. Furthermore, a similar problem has emerged in relation to the obligations of counsel not to accept a brief where satisfactory arrangements have not been made for the payment of counsel previously briefed. In this instance the view has been held that the obligation resting upon counsel still exists, regardless of the solicitor having moved to a different firm and having taken the matter with him. Again, clarification of the Rules is called for. □

Legal Aid

Members may be assured that the Association is doing something about the legal aid scale of counsel's fees in criminal matters. This is overwhelmingly the most important task of this Committee. Present fees are, of course, quite unrealistically low. The Association adopted, therefore, a "mould-breaking" approach in its submission to the Legal Aid Commission, Donovan's contribution to the compilation of our submission merits specific recognition. Negotiations and discussions have taken place with senior staff of the Commission, and it is understood that the matter is now being considered at Commission level. We hope that a decision is not too far off. No doubt, there are budgetary restraints upon the Commission. However, the community knows that effective provision of legal aid in criminal matters requires the involvement of the Bar. What is necessary to ensure that continuing involvement is the payment by the Commission of decent fees for counsel.

In civil matters the new court scales mean that the remuneration for this type of legal aid work has, at last, been increased. Here there is no prospect of the Commission changing its policy of paying 80% of the fees prescribed by court scales. Those scales must, accordingly, be updated.

The merger of the ALOA with the Commission appears to have gone ahead fairly well. Complaints about payment difficulties have declined. The Committee is, of course, available to assist members with specific problems in their dealings with the Commission. □

Law Reform Committee & Accident Compensation Committee

The time and attention of the members of this Law Reform Committee and the Accident Compensation Committee were heavily engaged during the year in dealing with the State Government's proposals for changes to the legislation governing the Legal Profession, Workers Compensation and Road Accident Compensation.

By arrangement with the Attorney-General the Hon. Terry Sheahan M.P. and his officers the Bar Association was supplied with drafts of the proposed Legal Profession Bill and given the opportunity to comment on the form of those drafts. The Council took full advantage of this opportunity and a total of 59 amendments were suggested to the Attorney-General and all but two of them were adopted.

The Council's suggested amendment to the definition of professional misconduct in the Bill was not accepted, nor was its suggestion that the Q.C.-Solicitor provision in the Legal Practitioners Act be phased out.

Discussions are continuing with the Attorney-General on the new statutory definition of misconduct. The Attorney-General has written to the Council agreeing to 1st July 1988 as the commencement date for the new system of practising certificates. The new disciplinary system will commence on 1st January 1988.

An article summarising the aspects of the Legal Profession Act of particular relevance to barristers appeared in the Bar News of Winter 1987.

Prior to June members of the Accident Compensation Law Reform Committees were active in examining various "Green Papers" prepared for the State Government which proposed changes to the Workers Compensation Act 1926 as amended and to the Motor Vehicles Third Party Insurance Act 1942 as amended. The Council and its Committees co-operated with the Law Society and its Committees in this work. Submissions in answer were prepared and distributed to members of Cabinet, its Policy and Planning Committee and to members of Parliament. Ultimately representatives of the Council and the Law Society were given the opportunity to make verbal representations and to speak to their written submissions before a Sub-committee of Cabinet presided over by the Premier.

The Council did not adopt a negative approach but made numerous positive suggestions for reforms to the system which were believed to effect significant cost savings. However throughout it argued strongly for the continuance of substantial common law rights involving in most cases lump sum assessment of damages by the Courts.

In relation to proposed changes to the Workers Compensation Act the Council argued strongly for the retention of common law rights in respect of industrial accidents.

In the end, as members will be aware, the Government rejected the submissions made by the Bar Council and Law Society, and legislation has been passed abolishing common law in relation to industrial accidents, and practically abolishing such rights in respect of motor vehicle accidents in this State.

Articles summarising the effect of the new Workcover and Transcover legislation appeared in the Bar News of Winter 1987.

Since the commencement of the new legislation on 1st July 1987 the Council has undertaken a limited advertising programme in major daily newspapers directed to the victims of serious motor vehicle accidents and their friends and relatives advising of the continued need of such victims for legal advice and assistance. At the same time the Accident Compensation Sub-committee prepared a brochure for use by solicitors summarising those aspects of the Transcover system which busy solicitors would need to know in order to handle enquiries from the public.

This brochure was distributed to all floors, and further copies are available on request from the Registrar.

This brochure was made available to the Law Society which distributed copies to all firms of solicitors in the State. The President of the Law Society also wrote to all firms commending the brochure to them and encouraging those who had accident compensation practices to continue acting for seriously injured victims of road accidents.

The Law Reform Committee also worked in conjunction with the Law Council in an unsuccessful attempt to persuade the Federal Government and later the Opposition and the Democrats to retain the first instance jurisdiction of the State Supreme Courts in Federal taxation appeals.

The Council and its Sub-committees are still active in the Accident Compensation field with a view to maintaining the involvement of solicitors in the provision of advice and assistance for the victims of serious road accidents and in arousing public awareness of the significance of the loss of common law rights.

The Council and its Sub-committees have also been active, so far without result, in attempts to restore common law rights in industrial accidents through Federal or State industrial awards. □

Professional Conduct Committee No.1

The Committee met on a fortnightly basis throughout the year and was greatly assisted by the participation of Sir Frederick Deer. The seven person committee was able to make recommendations upon a number of complaints referred to it which have been acted upon by the Bar Council. There were also a number of urgent rulings given to junior cousel. Although a substantial number of complaints were dismissed following recommendations to the Bar Council there were however a number of instances where counsel had failed to comply with the standards and obligations set out in the Bar Rules. The impropriety of direct communications with the client and acting in the role of a solicitor were some of the serious breaches dealt with by the Committee. Disregard of the client's interests and late passing of briefs was another area of serious breaches of the Bar Rules.

The Committee would like to express its appreciation for the efficient assistance from the Registrar and staff, in particular Miss Kerry Taylor. □

New Barristers Committee

The New Barristers Committee was unfortunately not quite as active as it might otherwise have been. Although there were some functions held by the Committee it is hoped that there will be more lively social functions held in 1988. The New Barristers Committee was created following the preparation of a detailed research paper by Mr J.R.T. Wood, Q.C., as he then was, and to some extent the think-tank function ran out of think. With the ever increasing size of the Bar there are a number of matters including communication, continuing education and accommodation to be addressed by the Committee in 1988. □

Professional Conduct Committee No. 2

The activities of this Committee have been carried on at a high level. The burden of work has been considerable and the discharge of it has been a credit to all members of the Committee, including in particular the Hon. C.L.D. Meares Q.C., whose efforts have been outstanding.

Features of the problems presented have been, first, the considerable number of complaints lacking in real character as allegations of professional misconduct, which have been readily disposed of but nonetheless time consuming and, secondly, the dilatoriness of some members of the Bar in responding to notice of complaints so as to enable prompt attention to be given to them. □

Professional Conduct Committee No.3

So far this year PCC3 has disposed of 27 ethical matters. Five were references from barristers seeking advice. Four related to alleged incompetence on the part of the barrister. Three related to barristers making allegations in court which were said to be untrue. Three related to barristers having alleged conflicts of interest in proceedings. Four related to alleged incompetence on the part of the barrister. Two related to alleged failures on the part of the barristers to achieve a promised result. Two related to barristers being involved in alleged conspiracies against the complainant.

Of the 23 complaints received, 21 were dismissed, one was referred to a disciplinary tribunal and one has resulted in action being taken to have the barrister struck from the roll. In that latter case, the alleged default on the part of the barrister related to his conduct as a solicitor before he came to the Bar.

The committee currently has ten matters before it.□

Legal Education and Reading Programmes

The Reading Programme

The continuing development of the Association's reading programme over the last few years has laid firm foundations for the Bar to come to terms with the *Legal Profession Act*. This is anticipated to commence early next year.

The Association proposes to issue a certificate to Readers who satisfactorily complete the required programme. The first certificates should be issued in February or March 1988. Their issue will depend on, and reflect, the attendance of Readers at lectures and tutorials, their participation in case presentations, reading with Crown Prosecutors and Public Defenders and attendance generally on their respective Masters.

With the introduction of a system of practising certificates in mid-1988, newly admitted Barristers will be issued with practising certificates conditioned on their satisfactorily completing their reading. The Association's proposed certification procedures will facilitate the fair and efficient administration of the new legislation's practising certificate requirements.

The emphasis of the reading programme continues to be on practical exercises. Short case presentations (involving the preparation and presentation "in Court" of cases designed to confront commonly occurring practical problems) are now an integral part of the programme. They complement a full range of lectures and tutorials. They have recently been supplemented by Readers having an opportunity to observe — as invitees of Kirby P — the operation of the Court of Appeal on a busy motions day.

The Association acknowledges with thanks the assistance it continues to receive from Judges, judicial officers and the practising Bar. Without that assistance and the efforts of our Education Officer, the reading programme could not be maintained.

The Association also acknowledges the continuing assistance of the Law Foundation of New South Wales which has allocated funds for an independent review of the reading programme. It is hoped that this review will help to ensure that the effectiveness of the programme is maintained and improved.

The C.L.E. Programme

This year's continuing legal education programme has been a great success. In many ways it has been a golden year.

Sheppard and Young JJ, with commentaries from Handley Q.C. and Tobias Q.C., spoke at seminars on the new *Courts (Cross Vesting and Jurisdiction) Legislation*, providing both a Federal and State perspective in relation to this legislation.

The Association was also able to have a number of distinguished overseas visitors to take part in the programme. Lord Ackner entertained and instructed us with his insights into appellate advocacy in the House of Lords. Professor Furmston spoke with erudition on "Sileene as Consent," a significant contribution to current debates on the role and purpose of contract law. As this report goes to press R.S. Alexander Q.C. (of the English Bar) and Hughes Q.C., are scheduled to speak at a seminar on defamation law.

The issue of a series of papers on the law of defamation has been well received, as have the reading notes which have been offered for sale to members of the Association.

The Association thanks all who have participated in, and supported, its C.L.E. programme and who have made the reading course possible.

The Legal Education and Reading Committee welcomes suggestions as to appropriate C.L.E. topics and speakers. It also reminds members that the *Australian Bar Review* and the Association's *Bar News* provide outlets for the publication of articles written by, and for, the practising Bar. □

A Question of Balance

A telephone conversation between a senior counsel and a very senior counsel was interrupted by the latter exclaiming:

"Hold on a minute. There's some other bastard on the other telephone."

Pause and then to some person unknown:—

"Look, tell the Premier I will see him this afternoon.:

The telephone conversation then resumed.□

Counsel's Fees

On 27 October 1987, the President of the Bar Association, R.V. Gyles Q.C. and the President of the Law Society K.H. Dufty signed a Joint Statement on Counsel's fees which is to regulate the charging of fees and procedures for their recovery.

Joint Statement

1. It is desirable that counsel's fees be marked on a brief by a solicitor before it is delivered.

   As an alternative to marking a fee the solicitor may endorse the brief in any of the following ways:

   "Top Supreme Court Scale unless otherwise agreed."

   This means that counsel is entitled to mark his fee at the top scale applicable for the time being in the Supreme Court:

   "Mid Supreme Court Scale unless otherwise agreed."

   This means that counsel is entitled to mark his fee at the mid scale applicable for the time being in the Supreme Court:

   "Lowest Supreme Court Scale unless otherwise agreed."

   This means that counsel is entitled to mark his fee at the lowest scale applicable for the time being in the Supreme Court.

   Similarly, briefs may be marked at top, mid or lowest District Court scale and corresponding meanings will attach to those expressions. These markings can be used even where the Court in which counsel has been briefed is not the Court referred to in the marking.

   Where a brief is so marked, or where a brief is marked with a Brief on Hearing fee only, in the absence of a special arrangement counsel should not charge for preparation or a time fee for reading a brief as this is already allowed in the brief fee. Similarly, counsel should not charge a set fee for each witness interviewed. The Court scales allow fees for conferences based on an hourly rate and this should be the only basis upon which counsel charges.

2. The circumstances of the litigation may be such that the marking of a fee is inappropriate, in which case an arrangement should be made between the solicitor and counsel as to the fees to be charged by counsel in various eventualities. Such arrangment should be made before the brief is delivered or as soon as possible thereafter. It is preferable that it be in writing.

3. If no fee is marked on the brief by the solicitor and no arrangement is made, counsel is entitled to and should mark his fee on the brief before the work is carried out.

4. The solicitor personally is in honour bound to pay to counsel whatever fees are charged by counsel unless:

   (a) A fee was marked on the brief and the fees claimed are not in accordance with such marking; or

   (b) An arrangement as to fees was made between solicitor and counsel and the fees claimed are not in accordance with that arrangement; or

   (c) In a case where no fee was marked on the brief and no arrangement was made, the fees claimed are unreasonable, or contrary to the practice of the Bar —

   but in each case the solicitor remains bound to pay the proper fee.

5. Counsel are entitled to prompt payment of their fees and it is the duty of solicitors to avoid delay or procrastination in dealing with memoranda of counsel's fees or in clearing up differences as to fees properly chargeable.

6. If counsel is unable to obtain payment from a solicitor of fees to which he considers he is entitled, he should report the matter to the Bar Association or, if he considers that professional misconduct on the part of the solicitor is involved, lodge a complaint with the Law Society. Counsel is also entitled, if he has reason to believe that the solicitor has received the fees from the client, after notice to the solicitor, to enquire of the client whether the client has in fact paid the amount of the fees or any part of them to the solicitor.

7. If a solicitor considers that the fees charged by counsel are in excess of what (having regard to para 4 above) he is bound to pay, or that he is not bound in all the circumstances of the particular case to pay

fees at all, and after his views have been fully represented to counsel the latter still presses a claim which the solicitor considers unjustified, he should report the matter to the Law Society which will take it up with the Bar Association.

8. Except as hereinbefore provided, a direct approach to clients by counsel on any question relating to counsel's fees is clearly improper.

9. If a solicitor does not within three months of the delivery of counsel's memorandum of fees dispute his liability to pay the fees charged, the fees shall be deemed not to be disputed provided, however, that where a solicitor establishes to the satisfaction of the Joint Tribunal hereinafter referred to:
   (a) That there are good grounds for disputing the fees charged; and
   (b) that, in the special circumstances of the case (including the circumstances associated with a delay beyond three months) the solicitor ought not to be precluded from disputing them- the preceding part of this paragraph shall not apply.

10. Where, in accordance with the provisions of para 7 above, a solicitor has reported a dispute as to fees to the Law Society, the Bar Council will enquire of the counsel concerned whether he still presses his claim and, if he still presses his claim, whether he is willing to have the dispute arbitrated by the Joint Tribunal on fees. If counsel still presses his claim but is not willing to have the dispute so arbitrated, the Bar Council will take no further action to assist counsel in obtaining payment of the fees in question. If the solicitor should refuse to submit to arbitration, the Law Society will not thereafter assist him.

11. The Joint Tribunal on fees shall consist of the President for the time being of the Bar Association (or such other member of the Bar as such President may from time to time nominate) and the President for the time being of the Law Society (or such other member of the Law Society as such President may from time to time nominate).

12. Where a dispute is to be arbitrated by the Joint Tribunal on fees:
   (a) The members of the Joint Tribunal on fees shall, before commencing upon the arbitration, select by lot, from a pool of names kept for that purpose and comprising not less than six representatives of each body, the name of an umpire to act in the event that they disagree as to the result of the arbitration; and
   (b) the parties may appear on their own behalf or be represented and may call evidence if they wish or, alternatively, the Joint Tribunal on fees may, if both parties agree, determine the dispute in the absence of the parties and on the basis of such written material and/or submissions (if any) as the parties may wish to put before it.

13. An agreement to arbitrate shall be deemed to be an agreement by the solicitor that he shall pay within twenty one (21) days of the publishing of the order made by the arbitrators or umpire (as the case may be) any amount stated therein to be due to counsel. □

Interpretation Act 1987

The Interpretation Act, 1987 came into operation on 1 September 1987. It repeals the Interpretation Act 1897.

In many ways the new Act is intended to re-enact provisions of the 1897 Act, albeit expressing those provisions in "modern language". In addition there are several significant new provisions.

S.33 requires a court when interpreting an Act or statutory rule to prefer a construction that would promote the purpose or object underlying the Act.

S.34(1) enables a court when interpreting an Act or statutory rule to consider extrinsic material either to confirm the ordinary meaning of the words contained in the legislation or, in the event of there being an ambiguity, to determine the meaning of the word. S.34(2) recites a list of extrinsic material which may be considered including, for example, reports of a Royal Commission of Law Reform Commission laid before either House of Parliament before the provision was enacted, relevant reports of a committee of Parliament or of either House of Parliament before the provision was enacted or made, the second reading speech and any document declared by the Act to be a relevant document for the purposes of s.34(2).

S.23 provides that unless otherwise provided an Act shall commence twenty eight days after the date of assent. This replaces the old rule whereby Acts commenced on the day on which Royal assent was given. It is intended to ensure that an Act is available for purchase at the time it becomes operational.

S.56 enables monetary penalties in legislation to be described by the use of penalty units rather than a dollar amount. A penalty unit is to read as a reference to an amount of money equal to the amount obtained by multiplying $100 by that number of penalty units. This means that the dollar amount of penalties can be increased by a simple amendment thus keeping penalties in line with inflation.

The second reading speech in respect to the new Act in the Legislative Assembly can be found in N.S.W. Hansard 3 December 1986 p.7920 and in the Legislative Council on 31 March 1987 p.9605. □

Classifieds

FOR SALE/LEASE:

Chambers in established group plus single car park in "Inns of Court", North Quay, Brisbane. Phone John Gallagher on (W) 07.221.7582 or (H) 07.870.9770

FOR SALE:

N.S.W Weekly Notes (Half calf complete set) $3,000
C.L.R. (Half calf complete to 1986) $12,000
N.S.W.L.R. (1971(2) to date) $Neg.
Phone P.H. Baldwin (066) 84 1404

Motions & Mentions

Staying Out of Touch

In the Winter issue, *Bar News* explained how Counsel could make absolutely sure that their case got on to the front page of the newspaper. A new twist has been added to that proposition by the efforts of Cassidy Q.C. who got his name into the newspaper, but not on the front page and, further, so enraged a journalist that he promised never to mention Cassidy Q.C.'s name again.

Cassidy Q.C. was appearing for a doctor before the Medical Disciplinary Tribunal and asked for a ruling that his client's name not be allowed to be published because the case was "the sort of thing that appeals to the yellow press". According to the report which appeared in the *Stay in Touch* column of The Sydney Morning Herald on 7th October 1987, Judge Sinclair then asked Cassidy Q.C. to explain what he meant by the term "yellow press" and was informed that it meant "the daily press . . . or the media".

Clearly stung by this bold, all embracing submission, *Stay in Touch's* response was to report the incident and then to vow "this will probably be the last time his name (i.e. Cassidy Q.C.) will appear in this yellow column".

Cassidy Q.C.'s submission had satisfied the golden rules for ensuring one's case gets into the newspaper: "keep it short, keep it snappy and be up-to-date". This was not, however, his ostensible purpose and this leads *Bar News* to remind counsel of the golden rules to be invoked when no publicity is sought i.e. have the case put back as long as possible, extend each sentence to the length of the average paragraph, use obscure multi-syllable literary allusions, as much Latin or law French as the judge will permit and speak quickly.

Self-effacing counsel are reminded of the availability of all the above rules which should be moulded to suit the occasion.

At least Cassidy's application appears to have resulted in such reports of the case as appeared in the Herald's news columns thereafter being less unfavourable to the doctor than is often the case.□

International Union of Lawyers

The Union Internationale des Avocats (International Union of Lawyers) is the oldest International Association of Bars and Lawyers having been founded in 1927. Its primary objectives are to establish and maintain regular communication and exchanges on an international level between participating bars and individual members, to promote the development of legal research in all areas and to study problems of professional organization and ethics. It holds a congress every two years and regular seminars in different parts of the world. In August 1987 it held a congress in Canada in which topics included bank security in international contracts, technology transfer, the role of lawyers in malpractice suits, family law, professional secrecy, etc. Members who wish to join the U.I.A. may contact Ian Hunter Q.C. at 4 Essex Court, Temple, London EC4Y 9AJ England (Fax: (Groups 2 and 3) 01.353-3421).

Canberra Legal Convention to mark Australia's Bicentenary

The Law Council of Australia has announced that a special Bicentennial Convention (the 25th Australian Legal Convention) will be held in Canberra in 1988.

The Bicentennial Australian Legal Convention will run from Sunday 28 August to Friday 2 September, and will be addressed by some of the world's leading jurists. The Convention is an Endorsed Bicentennial Activity.

The Convention theme will be 'BEYOND 200' and will focus attention on what the legal profession has learned from Australia's first 200 years that can be put to good use as the nation enters its third century.

The Governor-General, Sir Ninian Stephen, will open the Convention at the Canberra Theatre on Monday 29 August, and sessions during the week will be held mainly at the Lakeside Hotel and the new Hyatt Canberra (the rebuilt and enlarged historic Hotel Canberra).

The Convention is being planned by a committee of representatives of the Law Society of the ACT and the ACT Bar Association, the Convention host organisations. Committee chairman is Mr David Crossin OBE.

The legal profession and Australia will be honoured by the presence of three leading world legal figures at the Convention:

> The Chief Justice of the United States Supreme Court, the Hon. William Rehnquist
>
> The Vice President of the Supreme People's Court of the People's Republic of China, Mr Ren Jianxin
>
> Lord Justice Sir Michael Mustill of the UK Court of Appeal.

There will be many other distinguished international and Australian speakers leading the wide variety of business sessions during the Convention.

The principal sponsor of the Convention will be computer hardware and software and business systems marketers STC.

It is expected that many lawyers and their families from throughout Australia will want to take advantage of the opportunity to visit Canberra at the height of the spring season in 1988 and to see Australia's striking new Parliament House which will have been opened by the Queen and taken over by the Parliament shortly before the Convention.

Accommodation demands will be very heavy in Canberra throughout next year and early registration for the Bicentennial Convention will be essential.

Registration information will be available early in 1988.

Those interested in attending the Convention are invited to contact

> Bicentennial Australian Legal Convention
> Capital Conferences Pty Ltd
> PO Box E345
> Queen Victoria Terrace
> CANBERRA ACT 2600
> (062) 85 2048

so that further information can be provided. □

Repayment of, and Preclusion from Social Security Benefits after 1 May, 1987

Inquiries through the Bar Council have revealed that in most instances involving workers' compensation settlements the attitude of the Department of Social Security is in accordance with the Schedule hereto.

Members are advised that there may be some variations depending upon the exercise of the discretion of the individual delegates, however so far enquiries have revaled that practice has been in accordance with the Schedule.

It is stressed that the formula provided here was one in connection with a workers' compensation lump sum redemption under s.15 of the old Act. There may be some different considerations applicable in respect to common law settlements. This may well require some consideration to apportionment of settlement monies to isolate the pain and suffering and general damages components from loss of earning figures.

Members of course should be reliant on their own assessment of the legislation referred to. This information is provided only as a guideline not as a definitive statement of the law.

Members are invited to pass on their comments and any information as to the operation of this system to the Registrar so that a continual review of the practice of the Department can be maintained. In the event of any difficulties the Department will be further approached for guidelines.

Schedule

If your client is awarded a full rate of Workers' Compensation payments, your client would owe the Sickness Benefits received for the duration of the award. If the Workers' Compensation payments are ongoing, further benefits are precluded until the award payments are ceased. If the award is for a partial incapacity payment, and the weekly rate is less than that for Sickness Benefits, the charge on past benefits will be assessed at the reduced rate of the award, and future benefits will be reduced on a dollar for dollar basis according to the Workers' Compensation award rate.

In the case of a lump sum settlement, the standard method of charge calculation is as follows:—

- Section 10 and 16 allowances are deducted from the total lump sum Redemption.
- The remainder, termed the "economic loss compenent" is divided by the Average Male Weekly Earnings at the time of settlement.
- The product is a figure in a number of weeks known as "the Preclusion Period."
- The Preclusion Period is extended from the day after the date last worked or the day after the last date of weekly Workers' Compensation payment, whichever is latest.

For the duration of the Preclusion Period all Sickness Benefits paid prior to and on 30.4.87, and all benefits paid on or after 1.5.87 are recoverable. Where the Preclusion Period ends in the future, benefits are precluded until the last day of the Preclusion Period, after which benefits may again become payable. Where the last date of the Preclusion Period falls in the past, no benefits are recoverable after that date.

At the time of an award or settlement, the insurance companies involved are legally obliged to inform the Department, and to settle the financial obligation to the Department prior to release of moneys to the claimant. □

Gifts

The following gifts were presented to the Association:

A white bordered, burgundy table runner and 24 napkins, all of Irish linen — for the Boardroom table — by the Silks of 1985.

A portrait titled "The Judge" by Francis Lymburner — by the Silks of 1986. These Silks also presented the following books to the Library:

The Oxford Dictionary of Quotations
The Oxford Companion to Art
The Oxford Companion to English Literature
The Oxford Companion to Music
The Oxford Illustrated Dictionary
Hallan's "Domesday Book Through Nine Centuries" 1986.
Prest's "Rise of Barristers: A Social History of The English Bar 1590-1640" 1986.
Postema's "Bentham and the Common Law Tradition" 1986.
Rickard's "H.G. Higgins" 1984.

Still life "Flowers" by Chris Capper — by Meagher Q.C. and B.W. Walker.

NSW Bar Association Annual Reports 1964-1983, and NSW Law Almanacs 1958-1986, also Benjamin Sidney's "Discord Within the Bar" — by the Honourable H.H. Glass Q.C.

National Court Rules of Papua New Guinea — by Sir William Prentice M.B.E.

Two copies of the Royal Commission of Inquiry into the Chamberlain Convictions — by the Honourable Mr. Justice Morling.

Reports of the 51st and 54th Conferences of the International Law Association; report of the 1962 International Congress of Jurists; photograph of the opening ceremony of the First Commonwealth and Empire Legal Conference (1955) in Westminster Hall — by H.J.H. Henchman Esq., Q.C.

New South Wales Act, Vols 0-48 (1894-1952) — by Bannon Q.C.

Chart of principal source materials in respect of the Humber Ferry case (1348) — by Baldock.

27 Volumes of Ruling Cases — by His Honour Judge Bell.

Hogan's "The Honourable Society of King's Inn" 1986 — by Cowan.

McDonald's "Australian Bankruptcy Law and Practice" — 5th edition — by G. Ellis.

Beattie's "Crime and the Court in England 1660-1800" 1986 — by Korn.

Fricke's "Judges of the High Court" — by B.W. Walker.

The Association appreciates these gifts and thanks the donors. □

Listing

State of the common law list in the Supreme Court at August 1987

Common Law Division

Number of Matters awaiting Hearing

Motor Vehicle List	**July**	**August**
General List	(1098)	1154
Readiness Hearing — Notices Issued	(893)	925
Total Matters in List	(1991)	2079
Non Jury Matters		
General List	(3033)	3244
Readiness Hearing — Notices Issued	(882)	657
	(3951)	3901
Jury Matters		
General List	(2772)	3020
Readiness Hearing — Notices Issued	(1166)	1060
Total Matter in List	(3938)	4080
Total Number of Matters awaiting Hearing		
Motor Vehicle List	(1991)	2079
Non Jury List	(3915)	3901
Jury List	(3839)	4080
	(9745)	10,060

Of the matters presently in the General List hearing dates for matters will be allocated as follows:—

Motor Vehicle List	August	50
	September	40
	November	50

All matters where a Notice to Set Down for Trial before **21st December, 1984** will be allocated a hearing date.

Non Jury List	August	50
	September	40
	November	50

All matters where a Notice to Set down for Trial before **18th October, 1984** will be allocated a hearing date.

Jury List

All matters where a Notice to Set Down for Trial before **25th January, 1983** have been allocated a hearing date.

Commercial List

Average delay from
Commencement to Hearing — 8 months

Report of Professional & Public Affairs Director

My first assignment was to assess the implications for the administration of the Bar of the Legal Profession Act 1987 which is likely to be proclaimed in January 1988.

I soon formed the opinion that it would be necessary to computerise the Bar Association if it were to effectively and efficiently meet its obligations under the new Act, in particular the issue of Practising Certificates and the new disciplinary proceedings.

I discussed the matter with various executives of the Law Society and investigated a number of options.

A consultant, Mr Marc Demarchelier, was subsequently appointed and he has now assumed responsibility for the project.

In order to assist the Bar Association in funding the cost of computerisation an application for a grant has been made to the Law Foundation.

I have also been involved in discussions with the Attorney General's Department concerning amendments to the Legal Profession Act and the preparation of Regulations and administrative procedures to facilitate implementation of the Act.

I have dealt with a number of enquiries from Members, academics, Crown employees and non-practising barristers in industry about different aspects of the new legislation.

I have participated in several accident compensation committee meetings and have continued to liaise closely with the Bar Association's Public Relations consultant in the area, Dougherty Communications. The Bar's Transcover advertising campaign has precipitated a number of enquiries from the public and we are hopeful a popular television show will soon run a before and after 1 July 1987 story to demonstrate the reduced damages available under Transcover.

The problem of court delays have caused the Bar Association great concern and it was against this background that the President asked me to prepare a submission to Bar Council on the English Recorder system. Council has now approved the recommendations of a working party and the scheme based on a model operated successfully in Britain has been proposed by the President to the Attorney General. The President has also asked me to prepare a paper on "Official Referees" as another method of combating court delays.

I have enjoyed the work to date, finding it both important and stimulating. I look forward to continuing contact and co-operation with all members of the Bar. □

Law Reform

Australian Law Reform Commission

Product Liability

The Federal Attorney-General has referred the question of product liability to the Australian Law Reform Commission pursuant to s.6 of the Law Reform Commission Act 1973 to review and report on the following matters:

(a) whether the laws to which that Act applies, including the Trade Practices Act 1974, relating to compensation for injury and damage caused by defective or unsafe goods are adequate and appropriate to modern conditions;
(b) the appropriate legislative means of affecting any desirable change to the existing laws in relation thereto, having regard to any constitutional limitations on Commonwealth power; and
(c) any related matter.

Any members with any preliminary views on the matters covered by the reference which they would like the Commission to take into account should forward them to:

Stephen Mason,
Secretary and Director of Research,
The Law Reform Commission of Australia,
DX 1165 SYDNEY

Insolvency Inquiry

The Australian Law Reform Commission has published a discussion paper reviewing insolvency law and practice, copies of which may be obtained from the Commission. The Commission is to hold public hearings to hear submissions on the discussion paper, whether orally or in writing, in Sydney on Tuesday 1 December and Wednesday 2 December on the 10th Floor, 99 Elizabeth Street, Sydney between 10.30a.m. and 5.00p.m. Members are invited to obtain a copy of the discussion paper and to make such submissions as they deem appropriate on the above dates. Futher information may be obtained from Mr. Barry Hunt, Australian Law Reform Commission, telephone (02) 231.1733.

New South Wales Law Reform Commission

The New South Wales Law Reform Commission is considering a proposal to recommend to the State Government that the new Evidence Act recommended by the Australian Law Reform Commission in its 1987 Report on Evidence (A.L.R.C. 38) be adopted in New South Wales with the principal objective of uniformity of legislation.

To this end the New South Wales Law Reform Commission invites submissions on that proposal and, in particular, interested persons and bodies are invited to suggest:

* matters for inclusion which are not addressed by the A.L.R.C.'s proposal; and
* areas in which the objective of uniformity should give way and the New South Wales proposal should vary from that of the A.L.R.C.

Submissions should be sent by 11 December 1987 to:

Mr. John McMillan,
Secretary,
N.S.W. Law Reform Commission,
Level 16,
Goodsell Building,
8-12 Chifley Square,
SYDNEY N.S.W. 2000
(DX 22 Sydney) □

Motions & Mentions (cont.)

Religious Services

Services to mark the beginning of the Law Term were held as follows:

On Monday 2nd February Red Mass was celebrated in St. Mary's Basilica. The Celebrant and Preacher was His Lordship Bishop John Heaps, D.D., M.B.E., Bishop of the Eastern Region.

Also on Monday 2nd February the Reverend Peter J. Hughes, B.A., P.Phil., the Rector of St. James', preached at a Service held in St. James', Queen's Square.

On Wednesday 4th February a Service was held in the Greek Orthodox Cathedral of the Annunication.

On Saturday 7th February a Law Sabbath Service was held in the Great Synagogue. The Minister was the Rabbi Apple. □

Changing Rolls

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday, 25th September 1987:

William Clinton
Francine Maria Bancroft
Robert Wilcox Gillroy
Martin Michael Kinsky
Daniel Elwain Tyler
Peter Kenneth Cashman
John Cranston Thompson
Craig Henry Paul Colbourne
Ching Aun Teo
James Phillip Murray
Pauline Therese O'Connor □

This Sporting Life

The Bar has been indolent since the last issue and has either played no sport of note or, has been too busy to write it up for posterity.

Bar News publishes instead a statement of claim issued out of the London High Court and an opinion thereon, published through the good graces of McKeand.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

[ ]

1981 . G , No.

Between

HOMO SAPIENS BRITTANORUM — Plaintiff

and

GOD THE FATHER,
GOD THE SON,
GOD THE HOLY GHOST — Defendants

To the Defendant's GOD THE FATHER, GOD THE SON and GOD THE HOLY GHOST
of no fixed abode.

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the back.

Within [14 days] after service to this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office mentioned below the accompanying ACKNOWLEDGEMENT OF SERVICE stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgement within the time stated, or if you return the Acknowledgement without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued from the Central Office of the High Court this day of 1981

Note: This Writ may not be served later than 12 calendar months beginning with that date unless renewed by order of the Court

IMPORTANT

Directions for Acknowledgement of Service are given with the accompanying form

MIKE GATTING

Statement of claim

1. At all material times the Defendants were and are partners in a firm called The Holy Trinity

2. On or about the first day the 1st Defendant created heaven and earth.

3. On or about the second day the 1st Defendant created the firmament and divided the waters which were under the firmament from the waters which were above the firmament.

4. On or about the sixth day the 1st Defendant created man in his own image.

5. In or about the 600th year of Noah the 1st Defendant resolved to destroy man by flooding the earth.

6. In or about the 600th year of Noah the 1st Defendant covenanted with Noah and his seed after him that there would not "any more be a flood to destroy the earth" the aforesaid covenant being sealed with a bow in the clouds.

7. In or about the 18th Century the Plaintiffs invented a game called cricket relying on the aforesaid covenant.

8. In or about April 1981 the Defendants caused it to rain incessantly in breach of the aforesaid covenant.

9. Because of the rain the Plaintiffs have been unable to engage in the game of cricket and have thereby suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

(1) There has been an absence of the sound of leather on willow

(2) There has been an absence of the smell of new mown grass

(3) That the score is never 320 for 3 on a sunny summer's afternoon

10. The Plaintiffs believe they will continue to suffer loss and damage unless the Defendants are restrained.

AND the Plaintiff claims

1. An injunction against the Defendants to restrain them from causing the rains to fall, and

2. Damages, and

3. Costs.

Advocatis Diaboli.

(Signed) .....

THIS WRIT was issued by Messrs. Theodore Goddard & Co., of 16 St. Martin's-le-Grand, London, ECIA 4EJ

Reference: 117 — Telephone 01-606 8855

Solicitor for the said plaintiff whose address is: This Other Eden, Demi-Paradise.

OPINION

I am asked to advise Homo Sapiens Brittanorum in his claim for an Injunction and Damages against God The Father and Others.

I see no difficulty in establishing that the Defendants convenanted as alleged. However, Paragraph 4 of the Statement of Claim should be amended by substituting "Englishmen" for "man". It would be quite impossible to prove that anyone living south of Dover was created by the First Defendant in his own image. Indeed, all the evidence is to the contrary. Moreover, the Court will take judicial notice of the fact that the First Defendant is a member of the M.C.C. It follows from the above amendment that the Title of the suit should be amended to read "Homines Sapientes Albi Anglini Saxonii Protestantes Britannorum".

It seems certain that, if they have not already done so, the Defendants will instruct Charles Russell & Co. Such a step will not necessarily be fatal either to the Plaintiffs' (as they now are) or the Defendants' case. But the essential consideration is whether or not it can be proved that the Plaintiffs relied on the breach of covenant. Various Defences are open to the Defendants other than the question of contract, in particular that the facts disclose an act of God. I do not think that this latter Defence is open to them because it cannot be right in principle for them to rely on a Defence which involves one or all of them being the author of the Plaintiffs' misfortune.

It is, nevertheless, a difficult question as to whether the Plaintiffs were acting as reasonable men in relying on the covenant. It seems likely that the Court will import into its construction of the contract the notion of the reasonable men. This is a favourite device of the judiciary and only Lord Diplock, who normally presides in the House of Lords, can give a definitive, if embarrassingly turgid, answer to this unanswerable proposition. Lord Bridge will undoubtedly do his best to provide a solution but this may not be good enough for ordinary men like the Plaintiffs.

On balance, I feel that the Courts will uphold the Plaintiffs' claim and find them to have acted reasonably. It is surely not unreasonable to expect cricket to be played in this country during May and June. In various parts of the world it is considered proper to play cricket during the Winter (see *Boycott v. Gandhi* 79 Commonwealth Reports, 1981, p. 836).

In my opinion, the Plaintiffs should proceed with their claim at least until a Defence is filed. Any payment into Court should be considered with care, bearing in mind that the Defendants mitigated the damages by providing much sunshine in August and September.

Notwithstanding this mitigation, if the Plaintiffs succeed, their Damages will be enormous and of great benefit to the Marylebone Cricket Club, whose servants the Plaintiffs and everyone else are.

ROGER GRAY

Queen Elizabeth Building,
Temple, E.C.4.

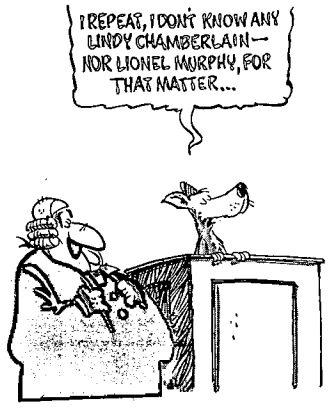
November 10th, 1981.

Forensic Science and the Dingo

In the vile jargon now endemic amongst social workers and others, and which seems to be creeping into the law, the Chamberlain case took us almost to the interface of law and science. The two did not quite meet, however, but seemed to pass like ships in the night, neither quite understanding the other.

Mr. Justice Morling's inquiry often seemed like running through treacle but we discovered nevertheless, a lighter side to forensic science. A question frequently raised was how it might be determined, by controlled experiments, what a dingo would do in the circumstances postulated by the defence. There were difficultites. The first was that, on any view, a great many facts remained unknown. Other difficulties were practical. Consider the nature of the dingo. He is a hunter, not far removed from our pet dogs, but not the same: genus, Canis; species, Familiaris; sub-species, Dingo. Not Canis Lupus, but not far away. He is similar to a coyote, (but not the same) identical to the wild dog of India and South-East Asia, and a larger edition of the singing dog of Papua New Guinea.

There are very few dingoes in captivity, and those that are behind wire have adjusted to a placid existence untroubled by the need to hunt for survival and be constantly alert for predators bent upon their destruction. Dingoes in the wild demonstrate no ready compliance in submitting themselves to scientific experiment, no matter how worthy the cause. It was arguable anyway that dingoes at Ayers Rock would behave eccentrically because of their contact with tourists over a number of years.



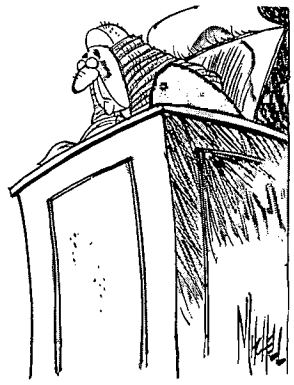
One suggestion made was to capture some wild dingoes, equip them with radio transmitters, leave out for them meat sewn in the clothing of babies, let them go and see what would happen. A place available for such an experiment on the coastal plains of the Northern Territory near the South Alligator River was discarded as a reasonable proposition, partly because the probability was that neither the dingoes nor the transmitters nor the clothing would be seen again, and partly because the meat would also be of great interest to wild pigs, eagles, and crocodiles, which would probably intrude to the extent of depriving the exercise of any relevance.

A suggestion that it be done at Ayers Rock was discarded partly because of the presence of a large number of domestic dogs owned by Aboriginals, partly because of the dingoes' exposure to people, and partly because of the inevitable attraction the exercise would have for journalists, whose interest in the Chamberlain case verged upon the obsessive, and who might be expected to very quickly reduce any such experiment to a sort of circus, at least in the public perception. Another factor of course was the cost.

So it was decided to do the thing in a more modest way. There is a wildlife sanctuary in Victoria which contains a few contented dingoes who apparently have adjusted to domestic life to the extent that not only do they not hunt for food; they are happy to eat Pal out of plastic bowls. To me it says little for the basic integrity of the dingo that he is prepared to forego hunting, and eat Pal, but there it is. I suppose his first instinct is survival.

There were two experiments. Each excited much debate as to its true significance. Each in the end may not have been of much value. In the first instance some pieces were removed from the bodies and heads of some plastic dolls. The cavities were filled with Pal and the holes covered with pigskin. The dolls were given to the dingoes, who were then filmed. Not much happened. On one view the result showed no more than that dingoes fed on Pal in bowls have little interest in extracting the food from the bodies of plastic dolls. Some espressed the view that the experiment demonstrated the finesse with which a dingo might deal with his prey.

In the second experiment the animals were fed fresh meat sewn inside fabric. This experiment did excite their interest. Perhaps it was more of challenge, but the fabric did not for long remain intact. What it all proved was a matter for debate, beyond demonstrating what damage a dingo might be expected to inflict upon fabric with meat sewn inside it. From a scientific, and forensic, point of view, the basic difficulty was trying to replicate circumstances many of which were unknown.



On another memorable occasion a dingo fancier proceeded to attempt to demonstrate to the Commissioner and others how a dingo could get his jaws around an object the size of a child's head. The object used was not a child's head, none being readily available, but a No.3 chicken, which the man attempted to induce the animal to grasp by forcing it into the dingo's mouth. The immediate result of the exercise was that the dingo took great exception to being so used and, to the untutored, the limbs, if not the life, of the animal's handler seemed to be in some jeopardy. Unfortunately, at that moment the man himself was suddenly and acutely troubled by an old back injury, which froze him in a crouching position next to an increasingly indignant dingo. A terrible crisis was averted when the animal gave us all a glance of withering contempt, and stalked off.

One way and another the experiment failed. One reason, as the dingo owner explained, when he was able to assume an upright position, was that the animal had unfortunately only recently undergone dental treatment, which accounted for his apparent hostility. Such are the vicissitudes of scientific endeavour. The question is, did the lawyers really appreciate what the experts were doing? Did it matter?

We returned to the hearing, to listen to textile experts talk about the behaviour of cotton and nylon fibres under stress. Dingoes under stress were more interesting. □

Ian Barker