

Bar News

The journal of the NSW Bar Association



THE WINTER TOURNAMENT - 1992 SUPREME COURT SPECIAL SITTINGS

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Spring/Summer 1992

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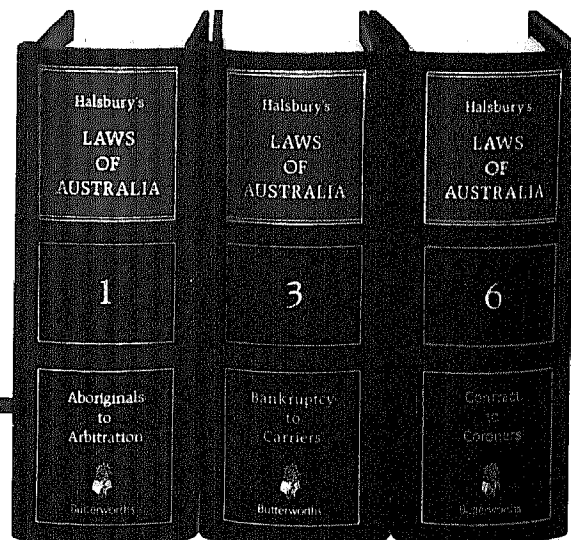
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Barristers wishing to join the Editorial
Committee are invited to write to the Editor
indicating the areas in which they would be
interested in assisting.

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Queen's Counsel for 1993

The Governor-in-Council has approved of the appointment of the following persons as Queen's Counsel:

RATTRAY Peter (Victoria)
KELLAM Murray Byron (Victoria)
MIDDLETON John Eric (Victoria)
BARR Graham Russell (NSW)
SEMMLER Peter Clement Bronner (NSW)
BASTEN John (NSW)
SLATER Anthony Hugh (NSW)
STEELE John Joseph (NSW)
HASTINGS Peter Selby (NSW)
BARRY Christopher Thomas (NSW)
ROBB Stephen David (NSW)
SLATTERY Michael John (NSW)
CATTERNS David Kenneth (NSW)
LITTLEMORE Stuart Meredith (NSW)
JACOBSON Peter Michael (NSW)

Bar Council New Executive 1993

The Council has elected the following as its Executive:

President:	John Coombs QC
Senior Vice-President:	M H Tobias QC
Junior Vice-President:	DMJ Bennett QC
Treasurer:	RJ Burbidge QC
Honorary Secretary:	R S McColl

Death Penalty Policy

The Bar Council has adopted the following as standing policy.

1. The Council is opposed to the imposition or execution of the death penalty and supports the objective of its abolition worldwide; and
2. The Council is opposed to the penalty of amputation and to all cruel and unusual punishments and supports the objective of their abolition worldwide. □

Human Rights

The Chairman of the Bar Association's Human Rights Committee, Cowdery QC, has been appointed a Vice Chairman of the International Committee on Human Rights and a Just Rule of Law. He is the only Australian on a committee of international lawyers charged with implementing the IBA Human Rights Action Plan adopted earlier this year. His appointment gives the Australian profession (he is also Chairman of the Law Council's Human Rights Committee), and the NSW Bar in particular, access to and a significant role in this increasingly important area. □

Farewell Michelle Goodwin

The Association must record its sadness at the departure of the its esteemed Education Officer, Michelle Goodwin.

Michelle commenced as Education Officer at a time of great change and upheaval - the implementation of the full-time reading program. Her contribution was huge. Her capacity was enormous.

As one of seventeen children (yes, seventeen!) raised in the country, Michelle had the right upbringing for dealing with members of the Bar - the good, ol' knock 'em down and drag 'em out style. At the same time (or almost the same time) she demonstrated great sympathy and concern for those who were in difficulty or disadvantaged.

Michelle was involved in conducting the last five full-time courses, many workshops and CLE sessions. In so doing, she has had a significant input into the training of the newest 230 barristers to the Bar. As well as being long remembered by them, there are also the many hundreds of barristers and judges who participated in those programs who will fondly remember Michelle's cajoling words when she was seeking their assistance.

Following her success with the Bar, Michelle has taken the challenge of training officers of the DPP. We wish her the very best of good luck. □

Indemnity Costs

On 23 October 1992 Master Malpass determined, in *Fowdh v Fowdh & Anor*, that the plaintiff who had recovered a personal injury verdict in excess of a figure which she had, by offer of compromise made in accordance with SCR pt 22, been prepared to accept, was not entitled to indemnity costs under SCR pt 52 r 174. The essential reason for this decision was that the offer was expressed to be open for acceptance for 28 days only: see pt 22 r 3(3). Counsel should note the ruling; it suggests that to be effective, offers should be formulated in much broader terms (eg, as open until the expiry of the time proscribed by r 3(8). □

Paper Admission in Queensland

The Queensland Barristers' Admission Rules have been amended to allow an interstate practitioner to be admitted but not to have to attend an admission ceremony in the Supreme Court of Queensland. Instead, once a certificate of compliance with the Barristers' Admission Rules has been issued, the interstate practitioner is required to attend on the Registry or Prothonotary of the Supreme Court of the State or Territory in which the practitioner is practising not later than 30 days after the day proposed for hearing the motion for the practitioner's admission, to take the oath or affirmation of allegiance and the oath or affirmation of office as a barrister and to sign the Supplementary Roll of Barristers. □

From the President

It would be a blessing, Brother Cadzeal (Ellis Peters' medieval detective) said, to live in boring times. The year has been a very arduous one for all Bar Councillors, and especially for the Executive members of it.

I mentioned in my earlier Report (part of the Annual Report) communication problems, ABA Rules, the Cost of Justice Inquiry, Law Reform Commission and Discipline and Trade Practices. I will not repeat what I said in that, nor what I said in the recent "Stop Press".

As well, the Council dealt with 99 complaints, dismissing 74 of them. There is perhaps some misunderstanding of the process. The Bar Council is *bound* to refer a complaint to the Tribunal if it involves a *question* of professional misconduct. This means that from time to time the Council is obliged to refer matters which it is confident will be dismissed. I have many times asked (various) Attorneys General to amend the Act to give us a *May v O'Sullivan*-type power to dismiss, ie. even though a *prima facie* case existed, the Council could dismiss if it was of the view that no reasonable tribunal, properly directing itself, would uphold the complaint. No Attorney so far has given the Council that power, which remains a matter for concern.

The problems with the Legal Aid Commission (LAC) are, if anything, worsening, notwithstanding our representations to the Attorney(s) General and our importuning of the Chairman and Director(s) of the LAC.

The LAC is now paying the private profession 90 days after memo approval and would require a cash injection of \$8m to reduce that to 30 days. This reflects a monstrous failure of public funding. The LAC Chairman's report says:

"I cannot over-estimate the critical situation in which the Commission finds itself at 30 June 1992. As a result of chronic under-funding of its programs by successive Governments - State and Federal - the Commission requires an injection of about \$8 million in order to be able to achieve its target of payment of the accounts of the profession within 30 days."

The latest decision, to "brief" solicitor advocates at rates higher than those paid to the junior bar, and including preparation fees, appeared at first blush to be designed to exclude the Bar from all but the longer, more complex trials. As you all know, long trials are now proffered on a maximum "lump sum" fee basis.

This has led me to make urgent representations to the Attorney General and the Chairman of LAC urging adoption of a dock-brief system, devised by James QC, Horler QC and others (which will leave the client with a choice of barrister advocate, not a "given" solicitor advocate) and as well insisting on a "same fee for same work" scale. I am assured by both

Rayment QC and the Attorney that there is, and will be, no policy of preference for solicitors.

The money in the SIA is public money. It is the interest earned on the money of clients of solicitors, held in trust accounts. The Trustees would not, I am sure, apply any of the funds in a way that was for the benefit of the members of the Law Society to the exclusion of other lawyers.

I am also assured that there will be fee parity. We may have to amend our rules to permit people doing legal aid work to do limited solicitor-type work like arranging witnesses and taking initial proofs. Dock Briefs were always done without an instructing solicitor of course.

Negotiations are continuing.

The Law Society has also refused to make a statement supporting the existence of a separate bar. Mr Marsden says that he does not want to adversely affect relations between solicitors and barristers, nor between the Society and the Association, but that his Council felt that no occasion for such a statement had arisen. Relations are, I believe, at a low ebb, although we have striven for improvement and ought continue so to strive. The Law Society's submission to the TPC expresses support for a separate bar of specialist advocates practising as we do and that is most welcome.

The bar needs unity at this time. I hope and pray that we can achieve it. Nobel Prize winner Friedrich Hayek,

in his book *The Fatal Conceit*, reminds us that our civilisation depends on cultural traditions which have *evolved* over centuries, including the law. These traditions, he points out, are useful in ways which no-one can fully understand.

He says of the professional reformers (whom he calls "second hand dealers in ideas") that they "appoint themselves as representatives of modern thought, as persons superior in knowledge and moral virtue to any who retain a high regard for traditional values, as persons whose very duty it is to offer new ideas to the public - and who must, in order to make their wares seem novel, deride whatever is conventional. For such people, due to the positions in which they find themselves, 'newness', or 'news', and not truth, becomes the main value, although that is hardly their intention - and although what they offer is often no more new than it is true."

Let us not be victims of the fatal conceit. Remember how clever the media thought abolition of articles of clerkship was. The Law Society is reintroducing articles.

The role of the President is more time consuming every year. I have not done all that I should have, but I have done all that I could, consistent with the entirely reasonable demands of my bank manager, the tax office and my extended family's needs. I have served with great pride. □

John Coombs QC
President



Letters to the Editor

Dear Editor

I refer to an item appearing at page 27 of the edition of *Bar News* Winter 1992 headed "Is This A Record?" and comprising a photocopy of a letter from the Legal Aid Commission of NSW to Mr I R Sanderson of Counsel dated 31 December 1991, which referred to payment of a memorandum of fees dated 25 October 1984.

The item gives the impression that the commission has been tardy to the extent of seven years in the payment of fees to counsel.

The facts, as evident from the commission's papers, are that the fees were rendered by Mr Sanderson to his instructing solicitor in July and October 1984, but that the solicitor did not forward them to the commission until 21 August 1991.

The commission paid the fees in December 1991.

T A Murphy
Acting Director, Legal Aid Commission of NSW

Dear Editor

I refer to your story headed "Is this a record?" on page 27 of the *Bar News* Winter 1992. I enclose, for your information, a copy of a cheque advice slip which will be immediately recognisable to those of us receiving payment from the Legal Aid Commission in relation to criminal matters.

You will note that the advice letter is dated 23 March 1992, following on an invoice dated 18 March 1992.

My covering letter to the memorandum of fees was in fact dated 9 March 1992, but was probably not received in the commission until the 11th or 12th. Not a bad effort in any event, with the added bonus that the amount allowed was in fact equivalent to the amount claimed.

Michael M Kozlowski
Church Street Chambers, Newcastle

PS: The cheque was attached (and quickly banked, in case of error!).

Dear Editor

I refer to the letter appearing on page 27 of the *Bar News* under the question "Is this a Record?". The answer is "No".

I enclose a copy of a letter* I received in late 1991, also from the Legal Aid Commission. I suppose it's possible I was spared a 20% deduction in view of the date on which the solicitor forwarded the memo to the commission. The fees were ultimately paid on 27 February 1992.

John Whittle
Blackstone Chambers

*Accompanying letter from the Legal Aid Commission of NSW is dated 10 December 1991. Reference is made to Mr Whittle's memorandum of fees dated 29 July 1983, forwarded to the Commission by his instructing solicitors on 11 April 1991. The Commission states that the "memorandum has been approved in full in the sum of \$1,125.00 and a cheque for this amount will be forwarded to you in due course". Mr Whittle advises payment was received 27 February 1992. ... Editor

Dear Editor

Miles CJ has obviously stirred the proverbial hornet's nest with his letter concerning the taking of the oath.

I recall an incident in Newtown Court of Petty Sessions many years ago where the magistrate was attempting to swear a witness who was deaf in his left ear. The court constable handed him the Bible and gave him the usual instruction, at the commencement of which the witness moved the Bible to his left hand, cupped his right ear with the other hand and replied, "Eh". Patiently the constable moved the Bible across and started again. With equal patience the witness repeated the earlier pantomime. After this had gone about three times, the magistrate, attempting to restrain his laughter, allowed the oath to be administered south paw.

Fun as these reminiscences are, the manner of taking the oath is not of great moment. Section 11A of the *Oaths Act* does not identify the hand in which the Book is to be held. Of more importance, it provides that the oath shall not be regarded as invalid if the section is not followed and provides, in ss 6, a general saving of the common law.

D I Cassidy QC
Chalfont Chambers

Dear Editor

Proof of foreign law is often regarded as vexed and difficult. The International Trade and Business Law Committee of the Law Council of Australia is interested in researching practical problems associated with proof of foreign law. If, as is suspected, significant problems are being experienced by the profession, the committee will work towards solutions to those problems.

The committee would like to hear from members of the profession about their experiences in proving foreign law. We are particularly interested in the following:

- (a) Under what circumstances has proof of foreign law been necessary?
- (b) On how many occasions has proof of foreign law been required?
- (c) How did you locate an appropriate expert?
- (d) What was your experience with the process?
- (e) Was there a genuine conflict, in the litigation context, between the various experts called to prove foreign law.

The committee is also contemplating the establishment of a register of foreign law experts. If any of your members are admitted to practise in an Australian jurisdiction as well as a foreign jurisdiction, or if any member has a foreign law qualification, the committee would appreciate his or her contact with us giving relevant details of qualification and/or experiences.

Kindly forward any response to Ms Ivy Kristo, International Law Section, Law Council of Australia, GPO Box 1989, Canberra ACT 2601.

Mary Anne Hartley
on behalf of the
International Trade and Business Law Committee
of the Law Council of Australia

The 1992 Supreme Court Special Sittings - A 3-Dimensional Perspective: The Judge, The Barrister and the Clerks

Billed as bigger than "The Last Emperor" (more Judges involved, more members of the profession, more cases to be dealt with in a fortnight than ever before, more coffee drunk... etc. etc.), the Supreme Court of New South Wales's Special Sittings designed to dispose of the backlog in the Common Law list took place between 20-31 July 1992. In November 1991 1,229 cases were selected for inclusion in the Special Sittings. Selection itself had a remarkable effect in causing cases to settle. By 20 July 1992, the day the Special Sittings commenced, only 472 cases remained to be heard: 585 had been settled, 168 had been removed from the list, and 34 disposed of.

By 31 July 1992, only 3 cases were left and they were part-heard. 225 had settled before hearing, 136 had been settled during hearing, 88 had proceeded to verdict and 20 had been removed from the list.

As at 9 October 1992, 21 appeals had been lodged from cases heard during the Special Sittings.

The objective success of the Special Sittings has been such that two more such sittings are to be conducted in 1993, albeit in a slightly modified manner (see Practice Note 75). The exercise has already been emulated interstate: Victoria is currently conducting such a sittings billed as a "Spring Offensive".

In order to assess the subjective success of the Special Sittings Bar News obtained a bird's eye view of the exercise from three points of view: a judge, a barrister and the barristers' clerks. Not surprisingly, each had a slightly different perspective ...

The Judge

Justice John Bryson presents the judicial perspective of Common Law lists in general and the 1992 Special Sittings.

When I first worked in a law office in 1955 somebody told me that cases took 50 months between being set down for trial and coming on for trial. As I was not long out of school much of the information I received about life and the world consisted of tall tales told by mischievous elders, and I dismissed this as another such story. With three and half centuries to fix things up since the thorough rubbishing in Hamlet's soliloquy, I knew it could not be true. But the truth soon dawned; it was true.

People who had been hit by motor cars burning rationed petrol while the British ruled India and Palestine, or during the Berlin blockade, appeared in court daily and poured out their troubles to believing jurors. As I grasped the truth, I became incredulous at the lack of outcry. I have seen the waiting time shorten and lengthen many times since then. Australia has experienced enough change for two or three revolutions since then, but the difficulty of managing the common law list seems to be a reliable constant in a mutable world.

The Court now has well over twice as many judges as it had then. In those days almost every common law case was tried by jury. The process seemed very elaborate but it is surprising to recall that most trials finished within about two days. They were conducted in a highly combative way, with a style of advocacy which hardly exists any more. The mainspring

seems to have been a view that the jury was poorly educated and that no argument was too ridiculous to be given a go.

It was no longer true, even then, that the jury was poorly educated, but there was an amazing readiness to debate the undebatable, even descending to the right of way at intersections, with elaborate expositions for the benefit of the jury that it was their function and no-one else's to apply the negligence standard, and that the decision was special to the case before them.



It was treated as a serious character flaw to make any admission of any kind; even that the defendant was driving his own car. If any admission were made, opposing counsel seized on it and endlessly referred to it, apparently attributing to the jury the idea that a litigant who admitted something was a worthless person. This extended to the out-of-pockets; the plaintiff sat in the witness box reciting his chemist's bills and the amounts spent on taking taxis for x-rays, to be cross-examined on the

availability of a tram.

The world changed, the rules changed, the juries faded away in most cases, styles of advocacy changed and it seems to me that the expectations of the court that people will fight issues which really exist have changed also. But lengthy common law lists remain. I suspect that there is some deep unanalysable

character trait in the people of NSW which makes them more ready to engage in litigation than the people of other States. But there is no proving this idea, so belief should be reserved. Disputes, the likely outcome of which seems transparently obvious in retrospect, seem to have remarkably long lives, to find settlement only immediately before or soon after the hearing commences.

The identifying characteristic of the NSW judiciary has been established in these pages by Sir Maurice Byers QC as genial brutality. I will not at the moment dispute this assessment, although I do not aim to fulfil it. In the past I remember a number of endeavours to reduce delays and speed up disposal rates, the main element of which was a diminution in geniality. The scheme for the Special Sittings of 1992, smilingly introduced by Chief Justice Gleeson in 1991 in the form of Practice Note 72, relied on a more holistic attack on the problems. The large disadvantage in the scheme was the running list; instead of a fixed day on which a case would be started, every case became a swinger, and stayed so from day to day until it was reached.

Against this disadvantage were many advantages. One advantage was the concentration of judicial resources; five teams of seven judges, each team with its own running list, team leader and Registrar. (In fact some teams were larger at times, as judges not involved in the Special Sittings became free for a few days and attached themselves to a team). The heart of the scheme was preparation, extending over the previous eight months, for the crowded fortnight.

Practice Note 72, sent to each solicitor involved in November 1991, in 37 pellucid paragraphs of cold command communicated the unmistakable message that the bugle had blown, the sleeping princess had been kissed and that the hour had arrived for determined action. The mood of the document may be gauged from paragraph 26(a) - "Where a case is struck out of the General List a letter will be sent directly to the plaintiff advising why the case was struck out ...". Detailed requirements were made about all preparations reasonably likely to be outstanding for the cases selected, for most part personal-injury claims which had been pending for some years, often over five years, where there had been a very full opportunity for preparation already. A full account of the state of preparation was required to be given to a Registrar at a call-over in March 1992. A full exchange of the statements of witnesses and the reports of medical and other experts, and of schedules summarising the particulars of the claims was required. During the months of supervised preparation, the parties and their representatives were urged into positions of full knowledge and appreciation of their strengths and their weaknesses. In this

process, settlement became achievable in many cases. By the opening of the Special Sittings on Monday 20 July, about three-quarters of all cases listed had been settled and 472 remained.

On the opening day, I faced a list of five matters, with hearing estimates which in sum exceeded a fortnight. By 4 o'clock, three of these had been settled, one after three hours of hearing; one had been adjourned and one was an hour into its hearing with a jury, a hearing which was to continue until 7 pm the following Friday. On each succeeding day I again faced a list of four or five matters but with the flexibility of listing before a team and with the aid of settlements, each case found a niche. Cases which I could not reach were sent off by my team leader, Grove J, who was able to find a place for everything.

Through the door of the court I was distantly aware of throngs of witnesses, litigants, jurors and lawyers proceeding purposefully hither and yon; but the jury case before me claimed my close attention. A modern and direct style of advocacy prevailed; no-one spoke down to jurors. Just as well, as they were conscientious, careful and intelligent; they would have laughed at the Serjeant Buzfuz style.

At the end of each day there was a progress report and, for the competitively minded, a comparison of the disposition rate of each group. After a week the pending case load had fallen from 472 to 138; 276 cases had been settled and 51 had been decided; 7 had been adjourned. By Wednesday 29 July there were only 35 left, but many of these proceeded to a verdict; any case which was going to be settled had been settled by then.

This initiative disposed of almost 2,000 cases; but thousands remain. It achieved success by the concentration of resources; the resources so concentrated were not available for a fortnight for cases of other kinds. Relative certainty of the date of commencement was sacrificed; and flexibility in assigning cases among judges in teams must have made for some uncertainties and confusion. Still, in my impression, the cases which were argued before me had been well prepared and were presented smoothly and comprehensibly.

Special Sittings are to continue. Practice Note 75 sets out preparation for two Special Sittings in 1993, two weeks in May and two weeks in November, to involve almost all common law judges and Masters, and to be prepared for in similar ways. As long as delays in the common law list continue, I think it is to be expected that Special Sittings will also continue. In a perfect world, no pending litigation would have been started more than two years ago. I have never inhabited a perfect world, and much litigation is disposed of more quickly than that. Close management of pending case loads by judges and registrars, and (at least on some occasions) running lists without real certainty of hearing dates seem to be the shape of the future. □



The Barrister's View

Cliff Hoeben presents a personal view of the sittings.

By the way of disclaimer, I should point out that the following comments are personal to the author and are based upon his observations and experiences during the Special Sittings and are not necessarily the experience of the Bar generally. The opportunity has been taken, however, to refer to hearsay material concerning other counsel.

The earliest indications the Bar had that something different was occurring in July were the interlocutory steps which were being taken to prepare cases which had been placed in the Special Sittings. Instead of an advice on evidence, counsel were being asked to interview witnesses at a much earlier point in time and to settle or draft statements by those witnesses as to the evidence which it was expected (hoped) they would give at the hearing of the matter. At issues and listings conferences, registrars were analysing the merits of cases more closely than usual and much greater efforts were being made both by the profession and by registrars to settle the cases or, alternatively, to narrow the issues in dispute.

It was my experience that where counsel attended the issue and listings conferences, there was a much better chance of settlement. This is no reflection on the competence of solicitors but, where counsel attended, it usually indicated that the case had been more fully prepared and there was a greater appreciation of both the strength and weaknesses of the case. It was certainly easier to obtain a settlement where one could talk directly with the person who would be ultimately running the case. It also became apparent at those issues and listings conferences that some insurance companies had entered into the spirit of the sittings and were genuinely making efforts to

resolve cases whereas others were not.

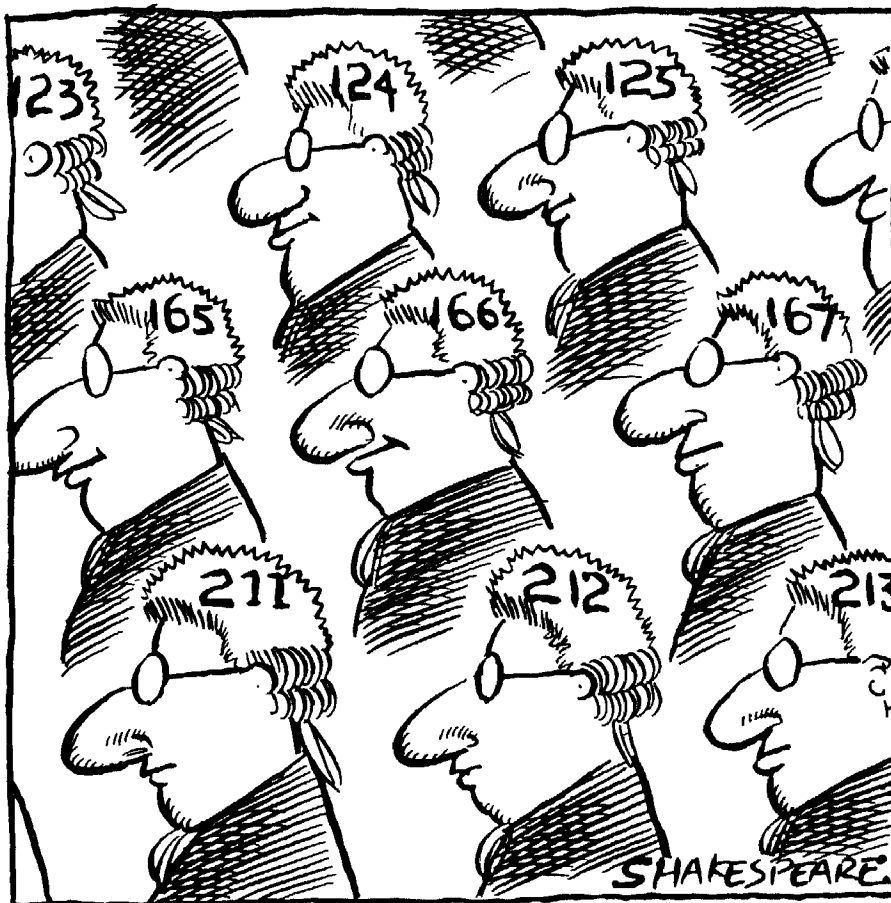
From my own point of view, I found that I was able to settle approximately a third of the cases in which I had been briefed before the sittings commenced. This was almost entirely due to the increased emphasis on identifying issues at the conferences and also the willingness of some insurance companies to try to resolve matters at an early point in time.

Of course, some of the interlocutory steps were a little unusual. Being briefed to underline or highlight parts of medical reports which were considered important was something none of us had done before. What use was ultimately made of some of these brightly coloured notations I never knew.

As the sittings approached, the dilemma facing the Bar was how to minimise the disruption to clients and solicitors by reducing occasions when briefs would have to be passed at the last moment. A

number of discussions took place on an informal basis between members of the common law bar. Some suggested that barristers should only take briefs in one particular group. Another alternative which was followed by some defendants was to have a panel of barristers available between whom briefs could be rapidly passed. All were agreed that it was necessary to have a comprehensive advice prepared in each matter so that if other counsel were obliged to pick up the brief at short notice they could quickly learn the important features of the matter. It would be fair to say that none of the suggested solutions really worked.

I started the sittings with 20 matters - 15 defendant, 5 plaintiff. Like others, I waited with trepidation on the evening of Thursday 16 July. *Disaster!* Six matters listed on the first



day in six different lists over four different groups. Two of the matters were in group D at Darlinghurst. Friday was spent in feverish negotiations with other counsel in the same difficulty. Unfortunately, no settlements could be achieved and the two Darlinghurst matters were passed on Friday afternoon so that new counsel would have the weekend to work them up. Two gone, eighteen left.

The first day of the sittings, 20 July, could only be described as "different". I will never forget arriving on the eighth floor of the Supreme Court to find instead of the usual gentle whisper of legal principle, a milling throng of litigants, legal advisers, counsel and jury panels. Those of us who had got our early "blood and bones" experience in the Workers Compensation Commission, when ten or more matters used to be listed before one judge, were at least familiar with such a scene, but none of us ever expected to see it re-enacted in the Supreme Court.

One problem which was immediately apparent was that there was no room for private consultations with one's client. Every available room was used as a jury room. This led to some interesting conversations between legal advisers and clients taking place in the main corridor.

To my observation, although some of the conversations appeared to be rather heated, no-one was seen to come to actual blows. Once again, the scene was somewhat reminiscent of early days in the Workers Compensation Commission.

Between 10.00 am and 11.15 am I patrolled three floors of the Supreme Court attempting to settle some of my cases. My only consolation was that those counsel with whom I was dealing looked as harried as myself. All of us were waiting for one of our cases to start. The inevitable occurred for me at approximately 11.15 am. That case was a multi-defendant jury trial. It continued for the rest of the day.

Shortly after 4.00 pm I emerged to consult with my clerk about what was happening the next day. The score at that point was two matters settled, one matter passed, one running.

I was advised by my clerk that three matters were listed for the next day. As usual, they were in three different lists spread across three different groups. Having made telephone calls to my opponents on the Monday afternoon, it became clear that one matter could not possibly settle but that two had reasonable prospects and, in any event, they were well down their respective lists and might not start on Tuesday. I therefore passed the case which I regarded as being unsettled and retained two.

In reaching that decision I failed to take into account the law of increasing catastrophe. If things are going badly, they will get worse. The unsettled case settled shortly after I passed it, whereas the other two matters defied all attempts at settlement. Meanwhile, the matter which had started at 11.15 am on Monday continued.

That set the pattern for the first week. By Friday afternoon the Monday case was still running. The score at that stage was eight matters passed (seven of which settled shortly after they left my clinging hands), nine matters settled, one matter running and two matters fixed for the second week.

Although I felt somewhat hard done by that my original "portfolio" of twenty matters had been substantially reduced, it was nothing like that of a fellow junior who started the Special Sittings with sixteen matters. All of those matters were listed in the first two days of the sittings. Of the sixteen matters, he ran one, settled one, and was obliged to pass fourteen. The Special Sittings finished for him on Thursday of the first week and he took his family to the snow in disgust. There is the story of the silk who went into the sittings with three matters and had to pass two.

The problem with the Sittings from the Bar's point of view as I saw it was the unpredictability of matters starting. Counsel who had restricted themselves to matters in only one group found that it was just as possible to get jammed within a group as it was to be jammed between cases listed for different groups. Even when one had cases in the same list and it was unlikely that those matters would be reached, they could be removed from that list at short notice. Counsel concerned were in just as much trouble (particularly if they were in the case which was running) as if they had made no effort to restrict their commitments to cases in the same list.

The only solution to emerge was to be quick on one's feet, to have nerves of steel, for one's instructing solicitors to have nerves of steel and to have a fair share of luck. The best thing to come out of the sittings was the way in which so many matters were able to be resolved at the interlocutory stage. The losers were the plaintiffs who were placed under very great pressure by the sittings. That pressure was produced by not knowing when or whether witnesses would be available, particularly medical and expert witnesses, by not being sure whether counsel with whom they had been dealing over a period of time would be able to run their case and not being able to discuss the merits of their case in a relatively calm atmosphere.

As a one-off solution to the question of court delays, the Special Sittings would have to be regarded as a success. As an answer to court delays generally, and as something which ought to be repeated on a regular basis, I have my doubts as to whether such sittings will survive the test of time. For the sittings to succeed, goodwill on the part of all those participating plaintiffs, practitioners, judges and, above all, defendants is essential. Once such Special Sittings become a normal event rather than something "special" I suspect that the disposal rate of cases will drop to that normally achieved by the Common Law Division.

Speaking as a veteran of the first sittings, I don't know whether my nerves will be able to stand a second. □

A Barristers' Clerk

Anon

God looked down on his slightly bored and staid judiciary and legal profession and decided what was needed to revive flagging spirits in these hard times was an old-fashioned tournament. The quest: to attack and reduce the common law waiting list. The tournament was to last two weeks, commencing on Monday, 20 July 1992 at 10 am and concluding at 4 pm on Friday, 31 July 1992.

He organised his crusaders (the Judiciary) into five platoons, A, B, C, D and E. Each platoon would consist of seven crusaders (Judges or Masters) supported by two squires (Registrar and List Co-ordinator). Leading each platoon was a captain or list judge.

God also decreed that all platoons, where possible, be equal in experience, ability, age and physical condition - thus the tall, short, thin and portly were evenly divided.

The defenders of the common law waiting list (we shall refer to the lists as the statistics) would be the other side of the profession: the barristers and solicitors, known as infidels, and their slaves (or clerks).

To umpire and oversee the tournament he appointed the Supervising List Clerk (David Beling), well-known for impartiality and fair play. He, in turn, had the protection of two mobile phone-toting henchmen - Warwick Soden and Brian Davies - a fierce duo to face when lodging a protest.

Months of pre-tournament skirmishes occurred. The media played an important role in building up the atmosphere.

Finally the great day arrived. The atmosphere was electric. The infidels and their slaves scurried about to secure the best positions. The crusaders paced nervously behind their barricades.

Then, as the clock on the Barracks Building struck the last chime at 10 o'clock, a cry rang out from the umpire ("Let the battle begin") and 35 crusaders lowered their tipstaves and charged headlong into the infidels. Oh! What a glorious sight! Never before in the history of the law in this State have so many owed so much to so few. Thirty-five bold and brave crusaders against approximately 400 battle-hardened infidels, armed with precedents and objections, backed up by their attentive

clerks - oops, I mean slaves.

The battle raged for the first five days, both sides withdrawing behind their respective lines each evening to regroup and burn litres of midnight oil preparing battle plans for the next day. At the end of the first week, honours were fairly even. However, the Chief of the crusaders, although not honoured with a team captain's position in battle, had two brilliant ideas: first, he put a keg on in his tent on the first Friday night and many "high fives" were handed out to his weary troops; second, he called up a secret commando unit comprising Mahoney JA, Meagher JA, Rogers CJ Comm D and Rolfe J and threw them into the frontline. When this was detected by the slaves' intelligence unit, cries of "foul", "breaches of the

Geneva Convention" and the fact that they were not even registered, were hurled at the umpire, but his two henchmen pointed their mobile phones in a menacing fashion at the slaves and their protests dissipated. "Play on," said the umpire, but it was all over, bar the shouting. By the evening of the eighth day, only a few pockets of resistance were left and they were cleared out by the tenth day. The Chief ordered another keg to be bunged in his tent, which was accompanied by more

"high fives" and several choruses of *We are the Champions* rang out until late that night - a truly euphoric atmosphere.

Meanwhile, back in the infidels' camp, the ever-faithful slaves helped their warriors to their banks and were rewarded with pats on the head and promises of a lunch and a glass of claret. No doubt the tournament will be referred to with awe for many moons to come.

An overview of the tournament found that some statistics, or litigants, were discontented about the lack of feeling, but those behind them in the waiting list rejoiced because it had been shortened by twelve to eighteen months.

Crusaders and their squires, infidels and their slaves found a camaraderie that had not been seen for years.

Finally, the fat lady sang.

No correspondence will be entered into regarding the above and, like Justinian, the author has no material assets so it would be useless to sue. □



A letter from the Managing Editor of CCH Australia Limited

"... trials by the adversarial contest must in time go the way of the ancient trial by battle and blood."

That was how the US Chief Justice saw the legal process developing nearly 10 years ago¹ and, over the years since, we have seen in this country steps along that predicted path being taken ... with the recent giant strides in enterprise bargaining being probably the most significant.

The situation is now that enterprise bargaining is part of federal and six States' laws. The concept is nationally recognised but the details vary from jurisdiction to jurisdiction.

At the federal level — and this includes the Territories — there is specific legislation on enterprise bargaining even though the technical nature of Australia's Constitution makes it difficult to form, operate and enforce enterprise bargains under federal law.

In New South Wales, there are specific provisions on enterprise bargaining contained in the *Industrial Relations Act 1992* (NSW). The general administration of enterprise bargains under NSW law is controlled by the Commissioner for Enterprise Agreements.

Queensland, South Australia, Western Australia and Tasmania have implemented enterprise bargaining through their State Wage Cases. Their general approach has been to adopt the system of enterprise bargaining as a legitimate alternative to the centralised systems controlled through the State industrial tribunals.

And then, of course, the new Victorian government is dedicated to promote the concept to the extent that it will probably shortly assume the vanguard in this area.

Clearly this is a subject that Australian practitioners must keep up to date with ... and that's exactly what our new service, **Australian Enterprise Bargaining Manual** is being designed to do ... that is, it will provide a comprehensive service on enterprise bargaining as it develops throughout the country.

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To make much the same point as Warren Burger did, but in perhaps a more homely and allegorical way, lawyer Louis Nizer told this story:

A farmer, before sunrise on a cold and misty morning, saw a huge beast on a distant hill. He seized his rifle and walked cautiously toward the ogre to head off an attack on his family. When he got nearer, he was relieved to find that the beast was only a small bear. He approached more confidently and when he was within a few hundred yards the distorting haze had lifted sufficiently so that he could recognise the figure as only that of a man. Lowering his rifle, he walked toward the stranger and discovered he was his brother.

④ ④ ④

"Every day the dog and I we go for a tramp in the woods. And he loves it! ... Mind you the tramp is getting a bit fed up."

Sounds like a piece from a vaudeville routine but it raises a point of considerable relevance ... which is that in each jurisdiction there's a statutory cause of action in relation to injuries caused by dogs.

Take, for example, the recent report of a case on the NSW legislation² which imposes liability on the owner of a dog to a person suffering "bodily injury caused by the dog wounding that person ... in the course of attacking that person". The NSW Court of Appeal has recently held that an indirect wounding fell within the statutory cause of action.

The plaintiff was a motor cyclist who collided with a dog which ran out at him. The Court of Appeal found liability established under the section. The action of the dog in running at the plaintiff constituted an "attack", and the injuries sustained in the accident constituted a "wounding" by the dog even though the direct cause of the plaintiff's injuries was the accident rather than the dog.³

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The privilege against self-incrimination has come to the fore in two different reports recently.

The first, and the more interesting to practitioners, is of course the Federal Court's rejection of the argument that legal professional privilege had been abrogated (along with the express abrogation of the privilege of self-incrimination) by sec 597 of the Corporations Law.

What raised this point was a liquidator's order for people to attend court and produce certain documents. The court upheld the claim that some of the documents were protected from inspection by legal professional privilege.⁴

In the second report the privilege hasn't fared so well. Remember when Caltex was last year charged with pollution offences and one of its claims in relation to a notice to produce was that it was entitled to the common law privilege against self-incrimination. Against that it was argued that the privilege only attaches to natural persons, not to corporations. Well, the court permitted Caltex to claim the privilege,⁵ but our **Australian Pollution Law** service reports that the privilege has now been abrogated by statute — the Corporations Law has been amended to make the privilege against self-incrimination unavailable to bodies corporate being prosecuted under the criminal law.

④ ④ ④

Near to home (particularly if home is in NSW) and close to day to day practice is Audrey Balla's **New South Wales Motor Accidents Practitioners Handbook**.

This is one of those publications that our advertising department can (and probably will) claim is *by popular demand*.

NSW practitioners, especially those who have had anything to do with motor accident claims, will remember Audrey's book on this topic. It became so essential a practice text that making it into a loose-leaf service (so it can be kept up-to-date by three reports each year) was the only way to go to meet practitioner requirements.

... and this unhappily is one area of the law that just isn't going to go away (as they say, "the motor car did away with the horse and is now working on the rest of us").

④ ④ ④

Extract from transcript

Cross-examination of a witness in a country courthouse went thus:

"Are you acquainted with any members of the jury?"

"Yes, more than half of them."

"Are you willing to swear that you know more than half of them?"

"If it comes to that, I'm willing to swear that I know more than all of them put together."

④ ④ ④

1. Warren Burger CJ, speaking to the American Bar Association in 1984.

2. Sec 20 of the *Dog Act 1966*.

3. *Eadie v Groombridge*, 11 August 1992, NSW Court of Appeal, noted at *Australian Torts Reporter*, ¶7-580.45.

4. *Re Compass Airlines Pty Ltd* reported in our 1992 *Australian Company Law Cases* at p 1,380.

5. *Caltex Refining Co Pty Ltd v SPCC* (1991-1992) 25 NSWLR 118.

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SL11/92

Stars and Bars

Lee J. W. Aitkin, Solicitor of the Supreme Court of New South Wales.

Stars, I have seen them fall,
But when they sink and die,
No star is lost at all
From all the star-sown sky

Henry Erskine, the Scottish barrister, reproved by George III for his relative lack of success when his finances were compared with those of his brother, the greatest English pleader, replied, "Your Majesty will please to remember ... my brother is playing at the guinea table and I am at the shilling one".

Compared with those days,² the emoluments which may be commanded by the bellwethers of the Australian Bar³ are modest indeed, particularly when the depredations of the Commissioner are taken into account. That has not discouraged the Commonwealth Attorney, profiting politically from the public distaste for lawyers, from suggesting that "it is the restrictive trade practices and high fees of the legal profession which are the greatest single inhibitor to access to justice".⁴

It is, perhaps, some psychical comfort to those QCs who do not obtain preferment that at present, with judicial salaries effectively frozen,⁵ their earnings surpass those of the Bench by a factor of 6 or 7 in the larger States.⁶ (Even at a governmental level, we are told, those exercising important forensic functions on the behalf of the Commonwealth⁷ are receiving much less than their due in return for a putative reversion to a puisne judgeship.)⁸

Competition, fungibility and saucers of milk

It has been suggested by the ill-informed⁹ that some form of "cartel" is operating which deliberately aims to limit the number of Queen's Counsel created; this, it is said, drives up the fees those silks may charge. That allegation implies an unlikely conspiracy by the Federal and State Attorneys-General, some of whom have launched inquiries into legal fees¹⁰ and the

1. With apologies to William Boyd.
2. Heuston, *Lives of the Lord Chancellors* Vol I p.xxii, "... the worldly rewards of the Bar have greatly diminished in the last two centuries."
3. The jurisdiction of the Federal Court, especially in complicated company matters, means that for "top silk" the Bar is national in scope; nothing is now more likely, for example, than the sudden intervention of Bullfry QC from Sydney or Melbourne in some benighted takeover in Perth or Adelaide.
4. Comments of Mr Duffy, quoted in the *Financial Review* of 19 September 1991, p.7. See, too, the Senate's inquiry, noted by Professor Starke, "Discussion of barristers' fees by Senate Standing Committee on Legal and Constitutional Affairs" (1991) 65 ALJ 579.
5. A fact which has led, we are informed, to an unfortunate exchange of correspondence between the Chief Justice of the Commonwealth and the Attorney-General.
6. I have suggested elsewhere that this will lead to a drop in the standards of the Bench: see, "Success at the Bar: Lessons from Literature and Prosopography" (1990) 6 Aust Bar Review 169.
7. It had been announced that the Solicitor-General was being granted leave for one year in a "highly unusual arrangement approved by Cabinet" to repair fortunes depleted by the London insurance market, but after an outcry the Attorney revoked his decision.

8. There is a profound paradox here which the Attorney, inveighing against the low salary vouchsafed by the legislature to the Solicitor-General while simultaneously complaining about the high fees of the profession, fails entirely to address. Why is it, if he may by departmental ukase control the fees offered by the Commonwealth to the private Bar, that he expects that the present S-G would command a multiple of six times his present salary were he to resign as S-G and then, presumably, appear for the Commonwealth in a private guise. Although he does not explain this (perhaps because he has not considered it), the answer is surely the "peanuts principle" explored in depth in the text below.
9. The exchange in the letters page of *The Financial Review* may be briefly outlined. On 7 August 1991 (p.15) under the misleading rubric, *Economics Extra*, Mr Michael Stutchbury wrote an article entitled "Rigged Market for Queen's Counsel" which picked up some suggestions of Mr Chris Sumner, Attorney-General of South Australia. Senator Schacht weighed in on 13 August with a letter in which he spoke of a system "riddled with vested interests and primarily concerned with protecting its position". Mr De Carvalho, NSW Law Society President, replied to the Senator ("Sporadic Activity a Cause for Concern", 19 August) with an *ad hominem* suggestion that the latter rarely attended his own inquiry. Frank Stevens, warming up for subsequent quotation in the *Herald*, commented on 29 August ("Weaknesses in process for Selecting QCs") and Senator Schacht rebutted Mr De Carvalho on 30 August. Barry O'Keefe QC, President of the NSW Bar Association, provided details of the selection process for QCs with figures on 3 September ("Appointment of QCs on Merit").
10. One obvious way of driving down fees for "top silk" would be for the Crown law offices to offer less for appearances; the litigators for the Crown, however, are as susceptible to the "peanuts" argument outlined below as any other instructing solicitors. It is this point which Mr Marshall Perron fails to address in his recent suggestion that the title of QC be abolished: see Stutchbury, "The States may not have a bar of making silks", the *Financial Review*, 1 June 1992.

profession generally. The existence of those inquiries must make the objective observer doubt any "conspiracy" to limit supply. Moreover, for reasons explored below, any attempt to "improve" the supply-side by the introduction of "Ersatzsilk" would be doomed to failure. The South Australian Attorney has suggested just such a course: "First, the title of QC could be abolished. Alternatively, the market could be flooded with QCs in an attempt to devalue the title."¹¹

After all, what determines legal fees? "Competition", which is, no doubt, why barristers in certain States strove so long to keep out brethren from southern climes.¹² The problem is that "competition" necessarily requires *that like be compared with like*. For that simple reason, it will not matter a jot how many professors emeritus or superannuated senior partners are created Queen's Counsel since they are not in any relevant market to provide a forensic service. Even amongst QCs there exists a category of the unbriefable,¹³ known to all *cognoscenti* in the jurisdiction,¹⁴ whom in the immortal words of Barwick CJ, "you could float on a saucer of milk".

The situation is different with solicitors. With respect to the cartel which fixes the "hourly rate" of the largest firms of solicitors, there is no doubt that competition¹⁵ is the fundamental factor, try as each might to differentiate its products,¹⁶ since those services are essentially fungible. (The actual "hourly rate" itself is a function of the overhead which must be paid by the firms for their addresses in the CBD, the employment of a large number of back-room staff, and the provision of waterfront homes and sabbaticals for the more senior partners. Only some of this may be clawed back in the photocopying fees¹⁷ levied on unsuspecting clients and unfortunate opponents by the firm's inaptly titled "service company".)

The consequences of 'non-fungibility'

It is a fundamental but rarely recognised fact that the doctrine of fungibility, as a determinant of selection (and therefore payment) of counsel, does not hold true for the top end of the Bar. (The stress is on top end: there is a huge disparity between the fashionable and favoured few and the Rumpolesque journey-man plodding his way through the list at the Manly Local Court.) Although most experienced litigation solicitors recognise that for all routine matters¹⁸ the services of advocates are completely fungible, so that one person will do as well as another, at the top end this is not the public perception at all, a perception sedulously fostered by the fawning media,¹⁹ which love the involvement of "top silks". Accordingly, a premium is charged and paid for their services in a gullible marketplace. Although the directors of Pan-Australia Holdings Ltd all love the screen-image of Rumpole, they would not want him opening for them in a contested takeover, or (to be more realistic nowadays) scheme of arrangement.

Furthermore, if the stakes are very high, the modest demands of top silk will be but a token to be put in the equation. The fact that someone wants, say, \$4,000, \$5,000 or \$6,000²⁰ a day for a fortnight when Pan-Australia Holdings may be faced with paying on a guarantee worth \$32 million is not likely to cause any consternation whatever to those asked to remit the funds.

Solicitors, for reasons explored below, foster this feeling in clients. Nothing would disturb a lay-client more than to be apprised of the appearance-reality gap between a firm's publicly expressed view of "leading counsel" and those of instructing solicitors over their sandwiches. Litigation solicitors have a

11. Mr Michael Stutchbury quoting Mr Chris Sumner. The title, of course, has been devalued in Canada by the wholesale politicisation of the appointment process, but that has not affected Edward Greenspan's fees by one dollar.
12. See, now, *Street v Queensland Bar Association*. Similarly, it is argued that restrictive admission is necessary to develop and maintain the indigenous quality of some Asian Bars - which a cynic may doubt.
13. Some, because of prandial extravagance, only fall into this category *after* lunch.
14. For this reason Mr Perron is wrong in regarding taking silk as a licence to print money. For a percentage of silks, the preferment marks the beginning of the slow but inevitable decline in their practice since they may be quite competent at paperwork but unfitted to advocacy; the latter weakness is very soon publicly revealed.
15. Which now involves "fashion parades" and tendering for the legal work on large projects.
16. All mega-firms now use extensive public relations campaigns to convince clients that their own services are different and superior to those of their competitors. Like airlines, the differences usually go no deeper than the colour of the waiting room and the view of the Harbour unless, of course, you poach a proven "rain-maker".

17. For a full exposition of how, in the United States, charging disbursements may be made into an art form, see "Skaddenomics: The Ludicrous World of Big-firm Billing", the cover-story in September 1991 *American Lawyer*, which details the extraordinary items (photocopying, overtime, staff lunches) which managed to find their way into Skadden, Arps bills. Are our own mega-firms any less adept?
18. There are only so many styles and so many different results which may be used and achieved in standing a summons over for three weeks.
19. Consider the risible article in *The Sydney Morning Herald's Good Weekend* of 26 October 1991, "The Money Belt - Inside the Privileged World of the QC" which, while purporting to examine the QCs critically, in fact lionised them: "Machiavellian tactician", "tenacious engaging larrikin air", "patrician", "part-time vigneron"(!).
20. In the depressed capital of the South, a silk and junior may be had for about \$6,000 all up: see the suggested security for costs in *Interwest Ltd (receivers and managers appointed) v Tricontinental Corp Ltd* (1991) 9 ACLC 1,218 1,222-1,223 per Ormiston J: "... Included in those costs are estimated preparation fees to senior and junior counsel at a rate (for both) of \$6,000 for 40 days ..."

love-hate relationship with counsel (especially leading counsel) since only counsel can, by a sort of *viva voce* examination in conference with the lay-client, demonstrate to the client what dolts, from a legal viewpoint, he or she has been unfortunate enough to retain as solicitors. Should the solicitors disagree, or be displeased, with the way the matter is conducted, they are hoist on their own petard since much of their "litigation expertise" rests on their access to and a discerning choice of counsel. How, then, do the solicitors explain to the client that they have made a completely inappropriate (negligent!?) choice?

But this is, perhaps, to be overly psychological and to discuss perceptions best left unexamined. For the most part, solicitors are exceedingly grateful to counsel for arguing a case which they are temperamentally averse to doing themselves. Differing levels of moral fibre and the reluctance of most people to bear ultimate responsibility for their opinion or face judicial ridicule for expressing it²¹ are potent reasons why any endeavour to fuse the professions will never occur as a matter of reality.²²

Counsel provides the solicitor with an excuse if matters go bad, as well as a modest protection for the firm's indemnity policy. As to this last, the solicitor will always bear in mind the paradoxical rule that solicitors may be liable for negligence even if they act on counsel's advice whereas counsel is not normally liable for actions inside court.²³

Peanuts, monkeys and wounded bulls

In selecting a Star to brief, the solicitors whether they do little litigation or a lot, will act, in an important case, on the "monkeys and peanuts" principle,²⁴ expressed in saloon-bar vernacular as: "He charges like a wounded bull, but by God, he's good!"

The phenomenon is perfectly described in the following passage, in which a solicitor, appalled by the fee suggested by Sir Edward Carson's clerk in a matter against Rufus Isaacs KC, asked to see the great man himself to negotiate a lower fee.

"For a moment or two Carson said nothing. Then he got up from his chair, and taking the solicitor by the arm led him to the window. He pulled up the blind to reveal a sight familiar to every inhabitant of the Temple. There were scores of other barristers' chambers, each one with its lighted windows, through which could be seen men poring over their books and papers, holding conferences or consultations with their clients, or just idly talking and waiting for work to come in. These were the gentlemen of the Bar, making their fortunes or with their fortunes to make.

'D'ye see all those rooms?' said Carson. 'In every one of those rooms there's a light, isn't there?' The solicitor nodded. 'In all of them,' Carson went on, 'you may assume there's one man, probably two or three, who'll do the case as well as I'll do it myself, and most of them will charge a far more reasonable fee.'

'Oh, no,' answered the solicitor, 'that's not my point. I wouldn't dream of letting anyone but you do it, with Mr Isaacs on the other side.'

'Well, if you're such a fool as that, after all I've shown you,' rejoined Carson, 'you'll just have to pay what my clerk asks you to pay.'"²⁵

'Get me Bullfry!'

There is a strong commercial underpinning to the "peanuts" principle. All large litigation firms maintain a "soup list"²⁶ of preferred counsel who, with luck, will be available as a priority to the firm should a suitable or urgent matter arise. Counsel are well aware of this. As the barrister-hero of the late Mr Justice Glass's novel, *Discord within the Bar*²⁷ notes, "Solid practices could not be built on random briefs from solicitors with occasional litigation. They depended upon an established connection with firms who had access to an organised flow of work".²⁸ The mega-firms pride themselves on being able to obtain access to the "stars" because such access is demanded by their largest commercial clients with whom, by judicious directorships, they have the closest relationships.²⁹ Woe betide, then, the litigation partner³⁰ who is unable upon demand

21. Weaker counsel, as well, will often wish to be "on the right side" of any dispute. Walter Monckton KC was not in the highest flight of counsel because, as MacKenna LJ said, "He was not a great fighter and he did not like unpleasantness. Nor did he like to fight uphill battles": Birkenhead, *Walter Monckton* (1969) p.76.
22. As the Victorian, Canadian and United States experiences amply demonstrate.
23. So, for example, solicitors will be negligent if they fail to instruct suitable counsel for a matter, notwithstanding that counsel hold themselves out as able to handle the matter.
24. "If you pay peanuts, you get monkeys."
25. Marjoribanks, *Carson*, p 151.
26. Theoretically, of course, there is a "cab rank" and solicitors make a detailed appraisal of the problem before instructing any counsel - in fact, human nature and habit mean that the same counsel will be retained by the firm to handle any matter generically within his or her practice.

27. Benjamin Sidney, *Discord within the Bar* (1981) Law Book Co. How prescient that title appears in present circumstances!
28. P.10 (emphasis supplied).
29. Better still, they may have a former associate or partner "in-house" as legal counsel.
30. In a mega-firm, they will, as a matter of partnership-politics (a simple function of billing), invariably carry less weight in the partnership so their "position" to some extent depends upon access to counsel. True, in straitened economic times, the litigation team may carry the firm, but usually because of the amount they may premium bill, the commercial partners are the most powerful in any partnership. In good times, businesspeople doing deals are less likely to scrutinise a bill for premiums which will, after all, be "absorbed" by someone somewhere along the line. Not so with litigation, since any wise businessperson abhors being in court and rigorously inspects all accounts rendered.

to produce for the managing director of Pan-Australia Holdings an immediate conference with Bullfry QC when some unfortunate internal memorandum is leaked to the press by a vexatious ex-employee or off-shore currency borrower. The managing director, by definition, *has no professional opinion on who should be retained*. He knows he has a serious problem and Bullfry QC is, so the *Financial Review* informs him, the doyen of the Sydney Bar - "Get me Bullfry!"

One may simply multiply the call for Bullfry's services across a city of several million³¹ to appreciate the wisdom of Sir Garfield Barwick's apothegm that the only protection a leading silk has against overwork are the fees he charges. The wonder is not that Bullfry charges so much but that he charges so little! He is a monopolist since the Pan-Australia perception, vigorously encouraged by the firm with access to him, is that no-one else can do what he does.

The mind of Bullfry

Now, Bullfry QC, despite his junior's views,³² is no fool in matters financial, if only because the Commissioner, his ex-wives, and his factor on the property at Scone, constantly focus his attention upon them.³³ Bullfry knows well that his own *per diem* charge will appear modest when compared with that of those instructing him, if three or four³⁴ young thrusters³⁵ and two partners are charging their "usual hourly rate".³⁶ Yet,

31. If a Pan-Australia approach is taken, the possible problems requiring Bullfry's expertise are legion.
32. "No-one is a hero to his pupils": C P Snow, *Time of Hope*, p. 344.
33. When young, I raised with diffidence the question of fees for arguing a matter which had gone beyond its fixed time with a distinguished silk, now a judge, who had come south for the case. (His clerk, of course, was still at base in Sydney.) I thought to catch him off-guard by broaching the topic while he was in his underpants and about to put on his striped trousers. "There's nothing I like discussing more than my fees," was his disarming response. He did, subsequently, turn down a High Court brief to go skiing with his family ("a promise I cannot break") and, consequently, I have always thought the more highly of him.
34. In order to avoid such "overmanning" many large corporations in the U.S. now specify that no more than two attorneys may work on a matter without specific client approval.
35. In a heavy matter, a pair of reasonably senior associates at 10 hours a day will cost in the region of the silk on their own.
36. An observation recently confirmed by a barrister acquaintance who, by mistake, was sent by the client both his own cheque and that of the solicitors, a mega-firm: the latter was six times his own, although he had drafted all the relevant papers and argued the matter.
37. One can well understand Sir Garfield Barwick using a similar expression when describing the fees he charged for saving the banks from nationalisation.

ultimately, Bullfry is bearing all the responsibility. Only the most naive would expect Bullfry not to charge a "king's ransom"³⁷ to hose down Pan-Australia's problems before the next shareholders' meeting. Since the Pan-Australia board will comprise many who know the price of everything and the value of little, the "peanuts principle" will mean Bullfry's fee-note evokes small concern (and, more likely, admiration), *win, lose or draw*.

That simple construct is the reason why (short of price-control) all the inquiries and tribunals and commissions in the world will have absolutely no effect on the fees commanded by the Stars of the Bar.

The soup list: Remarkable Rocket or Young Comet?

As a consequence of client pressure for access to *la crème de la crème*, junior litigating solicitors face a perennial problem: the "soup list" of the firm rapidly becomes outdated. The neophytes of five years ago who were happy to attend a mention for a few hundred now find it *infra dig* to saunter out to a District Court beyond easy reach of the CBD's luncheon venues. Even worse, the competent juniors (whom we will call without hyperbole, "young comets") have become fashionable and are beyond reach, tied up in some monstrous receivership in the South, land like Bullfry QC, publicly perceived as being at the peak of their powers, may only be retained for very large fees and with months of advance notice. (The giants of yesteryear have retired to the nursing home in Moss Vale, or gone to that last great call-over in the sky.)

Litigators, then, will be constantly scanning the firmaments in the hope of surprising new comets with whom they can develop an abiding relationship before their merits become generally recognised and well-known. There is a simple test to determine whether one has attained "comet" status: may you, with impunity, charge the largest firms of solicitors a "cancellation" or "commitment"³⁸ fee or not? If you cannot, you may still be merely what Wilde described in *The Remarkable Rocket* - ie you will be actively fostering a certain hauteur, and like the Rocket, you will believe that the "only thing that

38. The term in Sydney is "cancellation" fee; in England, "commitment" fee. "A commitment fee is now quite a common feature of the terms under which Counsel accept instructions in a substantial case - at least at the Commercial Bar": per Phillips J in *Norjal v Hyundai* [1991] 1 L.L.R. 260, 267 deciding that a barrister-arbitrator should agree such a fee in advance of appointment. On appeal ([1991] 3 All E.R. 211, 225) Leggatt LJ noted the strong resistance of firms to paying such a fee; in the long run he felt this would be "as hopeless an endeavour as the experiment of King Canute". In *Commissioner of Police v Rizzi* (21 June 1991, unreported - noted by E F Frohlich in October 1991 ACT Law Society Newsletter pp 20-21) Wilcox J deprecated the charging of such fees and is reported as saying: "In 21 years at the Bar, from 1963 to 1984, I never heard of such fees being asked ... " - how times have changed.

sustains one through life (as a Junior) is the consciousness of the inferiority of everybody else ...".³⁹

The young comet

In Sydney, the "young comets" will have found themselves saddled⁴⁰ with a huge financial burden if they have been unwise enough to purchase company title shares in a select centre in the central business district. They will have been working frenetically for seven-odd years to service the debt and roll-over 180-day bank bills, hoping that interest rates will fall. If commercially astute, they may have decided it is more profitable to engage in "chamber work" by wisely buying and selling the chambers themselves as a business,⁴¹ rather than drafting pleadings. In a rising market, they have enjoyed the success (and dangers) of other better-known entrepreneurs. Having now at last begun to reduce their principal debt, they should be in a position to enjoy the fruits of their labours.

There is nothing avaricious in their own fees since the larger part of them will be going to service loans and provisional tax. The only way in which their fees for the majority of matters would be much less would be for matters to be taken on contingency, or for some charity to erect a large, purpose-built office block next to the courts in which rents were pegged, and amortise its cost over 400 years - in other words, establish a counterpart to the Inns of Court. Yet, even the Inns of Court are faced with the pressures of occupying a prime site in the middle of London and obtaining far less than an open-market return upon it.⁴²

Is Melbourne any better? There, barristers must have chambers approved by the Bar Council. "A practical effect of this rule is that most barristers must lease their offices from Barristers Chambers Limited (BCL), a company that is beneficially owned by the Victorian Bar and directed by appointees of the Bar Council.⁴³ The wisdom of this "exclusive dealing" has been doubted since it is hardly conducive to camaraderie for 1,200 barristers to be "spread among seven city office towers."⁴⁴ Although costs are reduced, at the expense of existing members of the Bar, the cheapness is only relative to the astronomic costs payable in Sydney.⁴⁵

Barriers to entry

The NSW Bar Association has been astringently described by a lay-commentator as the "most exclusive and highly-paid trade union closed shop".⁴⁶ But to know all is to forgive all. As a matter of *training*, there are few barriers to entry at all. Some, of course, come to the Bar with their academic honours thick upon them as Dean of some great law faculty, but others may simply leave their dairy farm, or the motorcycle branch of the NSW Police Force, and enjoy equal success. (Grip is more important than mere erudition. The concept of "legal genius" is an oxymoron since law is but a social science; some may be more adept than others at "doing things with rules" but "stickability" is a far more valuable asset than brains.)

No, counsel are expensive simply because it costs a large amount to commence practice in the larger metropolises, especially Sydney.⁴⁷ In Sydney, this has been due to the prices paid for certain sets of chambers which are perceived to attract a lot of work. Their popularity is a result of the "soup list" mentality among the largest firms. There is, accordingly, much to be gained by being in a building full of Bullfrys who will, naturally, suggest a contiguous "young comet" as junior *faute de mieux*. How nice to be in a spot where "all the work is kept on the floor".⁴⁸

The Marie Celeste

The present price structure threatens to break down in Sydney as the physical plant itself collapses. The relevant buildings are devoid of amenity.⁴⁹ With wholesale desertions to more modern premises, some floors have been likened to the *Marie Celeste* aboard which only a few "cabin-boys", coming late to the Ponzi, now find themselves adrift.

39. Wilde, *The Fairy Stories of Oscar Wilde*, "The Remarkable Rocket", p. 70.

40. They may, of course, licence or "squat", but both are only short-term options. Equally, they may start in far-flung chambers but the "peanuts principle" will militate against their acquiring a large commercial practice.

41. To repeat an aperçu of Grieve QC.

42. Lord Benson, "The Future of the Bar", *Counsel*, July 1991, p. 14: "The Inns are in possession of a large and very valuable area of land and buildings in Central London, and the Bar is thus one of the best-endowed professions in the United Kingdom ... For a great many years, until recently, *proper commercial rents were not charged, with the result that instead of showing a substantial surplus of revenue each year and building up reserves to finance modernisation, the financial returns have been indifferent*" (emphasis supplied).

43. Law Reform Commission of Victoria, *Access to Law: Restrictions on Legal Practice* Discussion Paper No 23, July 1991 para 44.

44. *Id* para 46.

45. *Id* para 45.

46. Gosman, "Gloves off at the Bar", *Sun-Herald*, 22 September 1991, p. 19.

47. I once lamented this fact to a judge to whom I was an Associate. He looked at me acerbically and said, "When I came back from the war, the only time I had a room was when someone went to lunch. If you wanted to run a fish-shop you would have to invest some capital!"

48. An experienced clerk makes a great difference. On one occasion, when Bullfry wasn't available, a clerk managed to "sell me" on another silk whom I had used in an unrelated type of matter *after I had worked my way through the unavailability of three other silks on the same floor*.

49. It would be comical, were it not sad, to relate the joy a "young comet" experiences on moving to any outside room, or perhaps, obtaining a "light shaft" down which the occasional ray of winter sun finds its way. Only the author of *Bird Man of Alcatraz* could do justice to such emotion.

(Astute "comets" have recently been taking their capital gain, leaving the *Marie Celeste* and moving to rental premises because they no longer depend upon closeness with Bullfry QC to generate work. This situation can only continue while there are sufficient would-be "rockets" prepared to stump up the entry premium. When lenders become chary of financing such risks, the market will presumably collapse.)

It would be entirely wrong, however, to expect that things will change with a complete destruction of the premises, catastrophic as that would be to present shareholders. This has nothing to do with the alleged greed of counsel, whether they be "rockets", "comets" or "Bullfrys". It is a function of simple economics as explained above.

Moreover, there is no economic alternative. To rent a modern, airy, attractive office on a floor in the heart of the city, close to the courts, will cost about three/fifths of the carrying cost of a cabin aboard the *Marie Celeste* without any premium for entry. The sting lies in those last words.

Baron Brampton and the moneylender

Practice at the Bar is pre-eminently personal. No goodwill attaches to it. So as soon as a "comet" self-indulgently vanishes to become S-G of Vanuatu (tax-free) for 18 months, his or her practice disappears; if Bullfry is unavailable, his simulacrum will be "sold" by the litigation partner to the board of Pan-Australian.⁵⁰

This has always been the case and laypeople fail to realise the consequences of it. Henry Hawkins once had a conversation on the topic with Sam Lewis, a famous moneylender.⁵¹

"Why, Mr Hawkins," said he, 'you seem to be in almost everything. What a fortune you must be piling up!'

'Not so big as you might think,' I replied.

'Why how many,' he rejoined, 'are making as much as you? A good many are doing twenty thousand a year, I dare say, but -'

Here I checked his curiosity by asking if he had ever considered what twenty thousand a year meant.

He never had.

'Then I will tell you, Lewis: you may make it in a day, but to us it means five hundred golden sovereigns every week in the working year'.

As Baron Brampton acutely concludes, "nothing in the chapter of the Bar is more erroneous than the talk of the tremendous incomes of counsel".

It is the very fact that *practice is entirely personal* which contributes indirectly to the high price of chambers. In olden times, the premium which a "cabin" commanded had a large element of "goodwill" built into it. It could rightly be regarded as a sort of superannuation fund to support a modest retirement annotating unreported judgments of the Court of Appeal.

Things will not change if the *Marie Celeste* founders, flinging its passengers out into surrounding office blocks. Within a short time, *key money* or some *entry premium* will be payable there as well.⁵² The amount to be paid will depend entirely on how much work a particular set of chambers is perceived to attract, and the level of commercial rents generally. Commercial rents will rise inexorably without the prospect of

an assured capital gain, and the absence of the latter at retirement will mean that the level of fees charged here and now will include some provision for the future.

Unless, therefore, those present members of the Sydney Bar generously decide to erect at the Bar's expense a multi-storey edifice capable of accommodating every barrister with room for growth, it will continue to be as expensive for average people to retain counsel as it is for them to shop at Cartier. Most of the cost is a direct function of the price of renting or purchasing a room with payment of the entry fee.

Why, then, the Bar?

A most distinguished commentator,⁵³ editorialising, has suggested that increasingly the cleverest graduates from university will avoid the Bar and enter, for life, the largest firms of solicitors. But that view ignores the reality that the ranks of "remarkable rockets" and, subsequently, "young comets", are drawn almost entirely from those who have served, *ex necessitate*, a doleful apprenticeship as a solicitor. Only those scions of the greatest legal houses, with the most impeccable connections, may forego the "rite of passage" involved in travelling steerage as a deck-hand for several years aboard a mega-firm.

The scions⁵⁴ may do so because family or other connections will help them find a ready place aboard the *Marie Celeste* with Bullfry, no doubt a family retainer of many years' standing, to assist their faltering steps; since the lowliest matters are fungible in the skills they require, a scion needs to do no more than avoid gross negligence to advance to rocket status, at least.⁵⁵

In this scheme of apprenticeship, Australia is (fortunately) entirely unlike England, where ideas of "class" still predominate⁵⁶ and most barristers commence immediately into practice from university. Lord Hailsham has candidly admitted that "for the first four years I must, but for the indulgence of my opponents and the occupants of the Bench, have been something

50. See footnote 47.

51. Baron Brampton, *Reminiscences of Sir Henry Hawkins*, Volume I, p. 179.

52. This happens now in chambers in many commercial office towers.

53. Professor J G Starke, "Current Topics - Growing preference of talented law graduates to become solicitors rather than barristers" (August 1991) 65 ALJ 435.

54. For those desperate non-scions, marriage to the second daughter of a managing partner may be hazarded.

55. Preferment beyond that level depends on legal talent, but our novice will already be high up many "soup lists".

56. Which seem to flow from the quaint 19th century social distaste that a common attorney may support himself from commencement of practice while a "gentleman" of the Bar must, perforce, have independent means to see himself over four or five briefless years at the start. The Bar in England now offers scholarships for pupillages, and rent relief. Most juniors survive on overdraft for their early years.

of a danger to the public, deeply mortified as I would have been to be told it at the time".⁵⁷

At the Australian Bar, unsurprisingly, that usually does not occur *because no-one here is prepared to pay you while you learn your job at their expense*. By definition, if you think you have reached "rocket" status you have at least as much knowledge as the most junior tier of litigation solicitors who will be instructing you in "rocket" matters. Your advice then counts for something - moreover, given the cost structure of the firm it is usually cheaper for the client to instruct you (with a paralegal in attendance) than to have even the most junior sailor⁵⁸ from the mega-firm appear.

For this reason, despite recent suggestions, there is no chance of any mega-firm developing a genuine "in-house" advocacy section.⁵⁹ What large corporate client would want an associate, rather than a partner, from the mega-firm arguing its matter? Yet "rockets", to gain experience, invariably first appear in a court which no-one can find in a matter of no importance to anyone - a mega-firm will not let such a small-scale claim walk through its marbled portals; it cannot afford to. And if only large matters are taken in-house, how will the junior solicitor advocates obtain any training? No-one of any ambition or self-respect will wish at the age of 32 to be a "bag-carrier" or trolley-pusher, watching some senior partner's being mauled by an unsympathetic Bench.

Furthermore, the cost structure of the mega-firm depends upon leverage: ie, the litigation partners may safely pay themselves more than they bill because they manage a "team" of five assistant solicitors; they can earn much more by such management⁶⁰ than by inducing a massive heart attack by actually *arguing* a matter for several hours of the day.

The Capital E

Furthermore, although it is true that "the mega-firms specialise in a multiplicity of branches of the law, to a depth which most members of the Bar are not called upon to reach in their practices",⁶¹ that comment ignores two Capital Es: Economics and Ego, which may be decisive of career choice.

Economics: the vaunted "specialisation" they achieve is forced on solicitors if they are to be *profitable*⁶² and may represent no more than a life devoted to the leveraged lease. Ego: if a "shooting war" breaks out, it will be the opinion of

Bullfry QC which is beseeched by the firm and its client on the operation of that very lease, not the befuddled insights of the senior partner, located at last by portable phone on a Li-Lo at the IBA Conference in Caracas.

Why throw over the chances of "the chairmanship of statutory bodies", "overseas travel or extended leave"?⁶³ The matter is essentially one of perception and temperament. Bernard Shaw contrasted two sorts of life with characteristic pungency:

"This is the true joy in life, the being used for a purpose recognised by yourself as a mighty one; the being thoroughly worn out before you are thrown on the scrap heap. ... And ... the

only real tragedy is the being used by personally minded men for purposes which you recognise to be base."⁶⁴

We will leave it to the reader's own experience, to determine which description better fits someone who has enjoyed for a lifetime all the perquisites and advantages of working as purser (or perhaps even second officer) aboard a mega-firm as opposed to risking an independent though vicissitudinous existence at the Bar. □

*"No-one here is
prepared to
pay you while
you learn your
job at their
expense."*

57. Hailsham, *A Sparrow's Flight* (1990) p. 100.

58. This is so because the "rocket's" overhead is much lower than even the most junior sailor's.

59. It has been suggested that the mega-firms are banding together to attack the "restrictive work practices" of the Bar. See, Gosman, "Rumpole vs LA Law" *Sun-Herald*, 10 May 1992, p. 33 in which Mr Graham Bradley is quoted as saying: "Large firms will develop an internal bar of lawyers specialising in such areas as environmental advocacy, intellectual property law, taxation law and in arbitration and alternative dispute resolution." Interestingly, these are all "boutique" areas of practice where inconveniences such as strict rules of evidence are unlikely to apply.

60. In the present economy, it may be that a firm will make more by attempting to deploy the partner in court. Such ideas will disappear with the first economic upturn which permits full leveraging.

61. J G Starke loc cit p. 435.

62. Accordingly, anyone aspiring to partnership will want two year-long, mundane matters upon which it is possible to bill ten hours a day, rather than 55 interesting matters per week which are completely "unbillable".

63. Professor J G Starke loc cit p. 436 listing some of the advantages of being a senior solicitor. With respect, some of the professor's comments are hard to follow, unless he is speaking tongue in cheek. For example, what does he mean by noting that a senior partner may earn "a much larger income than might be earned either as a Queen's Counsel or even as a member of the judiciary (emphasis supplied) when the present salaries of the latter group are universally regarded as far too low?"

64. George Bernard Shaw quoted by Cooke in "Bertrand Russell" in *Six Men* (1977) p. 200.

Further Thoughts on the Advocacy Institute Workshop

Brian Donovan QC reports his experience at the first Advocacy Teacher Training Workshop

On 17 and 18 July 1992 the first of the Advocacy Teacher Training Workshops at the NSW Bar Association was carried out by the Australian Advocacy Institute. There have been workshops previously at the Bar for advocates but not for teachers of advocates. I have previously written about the workshops for advocates.

The moderator for the workshop was Mr Justice George Hampel of the Victorian Supreme Court. The first session on Friday evening dealt with some guidelines for what teachers should be able to do for advocates. This involved the nature of communication from teacher to advocate rather than the communication from advocate to tribunal. The purpose is to teach advocates technique. Perhaps eighty per cent of our craft is technique and the balance is that sometimes elusive concept of art.

Important features of effective teaching were emphasised, some absolutely fundamental. First, the teacher must convey only one, or at most two, messages to the advocate. Thus, if the advocate has a number of problems on technique, select only one problem to discuss with the advocate; for example, leading questions during examination in chief. Then do not generalise on that topic, but rather pick one flawed question asked by the advocate and explain *specifically*:

- (a) What was wrong with the question;
 - (b) Why it is best not to ask such questions;
 - (c) How the question could be asked properly;
- Then actively demonstrate to the student how to do it.

On the Saturday, the teacher workshop practice took place. These workshops were similar in format to the advocacy workshops. Advocates presented their extracts of evidence in chief and cross-examination. The trainee teachers offered their guidance to the advocates but in the presence of instructors who then criticised the trainee teacher. It was no place for fragile egos.

The advocates then were requested to say what they had learnt from the trainee teacher and this was a revelation to many of the trainee teachers. The advocates' responses showed frequently that we had failed to convey what we intended to convey, we had tried to cover too much material, we had confused and overloaded the advocate and, disaster, we had even conveyed the opposite message - eg, do not use leading questions in cross-examination. The importance of the teacher's ensuring that the advocates received the right message became obvious.

Humiliation for the trainee teachers arose when the teacher was not able to stand up and demonstrate how to ask the question properly.

Further, it was important in indirect ways to illustrate a point to the advocate, for example, if the advocate had shuffled papers, the teacher, when commenting on the performance, had to ensure he or she did not shuffle papers.

There was more humiliation for the teacher when the advocate was asked to do the performance again and made the same error. Obviously, the instruction had not been effective

for that advocate.

An area of difficulty for the trainee teacher was making sure that, when correcting or assisting, the teacher first of all checked with the advocate that the teacher understood what the advocate was trying to do or to achieve. Thus, if the advocate was trying to do one thing and the teacher thought he or she was trying to achieve something else, the two ended up at cross purposes and this left the advocate in confusion.

There were 6 guidelines put forward for advocacy teachers to use. These were:

- (a) "Headnote" - ie, tell the advocate at the start what is the point the teacher wishes to raise.
- (b) "Playback" - on what the advocate did. Point specifically to the faulty question and even quote it.
- (c) "Rationale" - explain what was wrong with the question and why it is better to do it differently.
- (d) "Prescription" - or how to do it differently. Tell the advocate how to correct the question, including saying the question correctly. It is most important that this be done slowly and clearly.
- (e) The emphasis on correcting or assisting advocates should be on substance, not matters of mere style.
- (f) Make the point shortly. Many of us tended to go on and elaborate and, in elaborating, we blurred the point.

As a trainee teacher, I found I learnt a great deal about my own technique and ways of teaching technique. For example, Mr Justice Hampel in the Friday session suggested that in chief it was generally preferable to use "when", "where", "how" and "why" questions rather than "did you", "were you" type of questions.

For many older advocates the use of leading questions allows us to tell the story in our way as counsel. Yet it was suggested that the more convincing, and less self-centred way may often be to let the witness tell his or her own story but with our assistance. The telling of an ordered story is central to the leading of evidence, not just for the tribunal, but for the witness as well so that the witness can recall and recount the sequence of events.

Later on Saturday, the advocates presented applications to a mock court. In examining the presentation of applications, Mr Justice Hampel explained how important it was to remember that judges are persuaded by the feeling of the need to act. The object is to move the judge from inaction to action and this will be done best by creating in the judge the feeling for the need to act. This may be created sometimes by conveying the sense of urgency, the sense of danger, the sense of justice, the sense of the rights of the person. In general, judges feel the requirement to act first and the intellectual reasoning and justification come later. A method of doing this is to ensure that in the first 30 to 60 seconds only the salient points are mentioned and there is no digression into detail.

All who were involved in the workshop found it stimulating and, more importantly, challenging to many of our long-standing attitudes. □

On Common Law Riots in New South Wales 1985-1992

Billy Purves, Crown Prosecutor, has had first hand experience with recent trials involving charges of riot. He discusses the history of the charge and the effect of its replacement by Part 3A of the Crimes Act.

On 6th April this year the Court of Criminal Appeal quashed the convictions of Arthur Murray and Albert "Sonny" Bates on charges of riot. That was the final chapter in the Brewarrina riot of 1987 which followed the funeral of a young man who had died in police custody a week earlier. A total of 17 Aboriginal people had been committed for trial on riot charges.

The CCA judgment in *Murray & Bates* not only closed the chapter on that particular riot, it also closed the book on the offence of common law riot in NSW.

The insertion in the *Crimes Act* of Part 3A dealing with "Offences Relating to Public Order" will have a significant impact on the conduct of any future riot trials.

The author of this article, now a Crown Prosecutor, appeared for several accused in each of the four series of trials which occupied so much of the District Court calendar at Penrith and Bathurst between 1987 and 1991. His appearance for 15 clients in 10 separate trials gave him an unusual insight into the phenomenon of riotous assembly - and the legal problems involved with subsequent trials.

The four riots were:

1. The Mt Panorama "Bikies Riot" in Bathurst in April 1985: More than 100 people, mostly young men, were arrested and charged with riot and sundry related offences. About 35 went to trial for riot, between 1987 and November 1988, at Penrith.
2. The Bourke Bowling Club Riot in August 1985: Ten young Aboriginal men stood trial in Bathurst in August 1989.
3. The Bourke Post Office Riot in August 1986: Nine young Aboriginal men stood trial in Bathurst in August/September 1990.
4. The Brewarrina Hotel Riot of August 1987: Seventeen Aboriginals were committed for trial. Nine men stood trial on riot in Bathurst. Another three pleaded guilty to lesser offences. The charges against the remaining five are not expected to proceed.

The author here reflects on riots, the trials, evidentiary problems, the changes in the law and associated matters.

When the jury returned its verdict of not guilty for my client Guy Gibbs on 6 May 1991, I had a double reason to sigh with relief. Apart from the obvious satisfaction of the verdict, I was aware that this was certainly the last common law trial for riot in NSW: no longer would I have the physical and mental baggage of some 30 cases defining or illustrating some element of riot.

A file of cases had been compiled for me in June 1987 by Angela Avouris of the NSW Legal Aid Commission when she instructed me in the trials of two young men, Peter Andersen and Colin McPhail - each of them now commemorated in the surprisingly short list of Australian cases saying anything about riot.

For what strikes one immediately about the cases pre-1987 is the absence of Australian authorities. Two Victorian cases in the file were relevant only to sentencing: *Aitken and Ors* (1980) 3 A Crim R 14 and *R v McCormack and Ors* (1981) VR 104. There were a couple of cases on the NSW statutory summary offence of unlawful assembly - both cases incidentally in which the appellants were allegedly expressing determination to "get the scabs" in industrial disputes: *Munday v Gill and Ors* (1930) 44 CLR 38 and *R v O'Sullivan* (1948) WN (NSW) 155.

The English cases pre-1987 were the only relevant authorities on what constituted a riot. They also disclosed a great deal of the social and political history of England between 1839 and 1980.

Any barrister in Australia researching the law on riot in 1990 might have found cases on:

- . 19th century bare-knuckle prize fights: *R v Coney* (1882) 8 QBD 534 and *R v Billingham* 2 C & P 234.
- . An election riot in the village of Great Marlow where a mob supporting the losing candidate (no party affiliations mentioned) wrecked 90 buildings, including the Crown Hotel, headquarters of the successful candidate, Colonel Williams: *Drake v Footitt* (1881) 7 OBD 201.
- . A mob attending a theatre for the purpose of interrupting the performance, their noise rendering the actors inaudible. No physical violence and no damage to property - nonetheless it was a riot: *Clifford v Brandon* (1809) 2 Camp 358.
- . A crowd ransacking a grocer's shop and dwelling, then setting it on fire: *R v Howell* (1839) St Tr NS Vol 3 1087.
- . A street corner gang in "a low neighbourhood" in London knocking down part of a brick wall by running at it with their hands extended: *Field & Ors v Receiver of Metropolitan Police* (1907) 2 KB 853 - the seminal case of modern common law riot.
- . Students assaulting guests at a social function at Cambridge University: *R v Caird & Ors* (1970) 54 Cr App R 499.

Perhaps the most poignant case in the whole file was that of *R v Joseph Rayner Stephens* (1839) St Tr NS Vol 3 1189. Mr Stephens was an outspoken Methodist minister who had described the Bishop of London as "an episcopal devourer of widows' houses". But he was on trial in 1839 for his part in "a great riot, rout, disturbance, tumult and tumultuous assembly".

In fact, he had addressed what Australians would regard as a rather rowdy demonstration, calling for better wages and working conditions, reform of the Poor Law, universal suffrage and a secret ballot at parliamentary elections. He urged the torchlight rally of 3,000 to fight for their rights. When he asked if they were armed, several shots were fired in the air. The crowd, led by a band, then marched through the town of Hyde and eventually dispersed peacefully.

No-one was injured and no property was damaged. Two of the Crown witnesses were local mill-owners whose factories

had been the targets of previous complaints by the accused.

All part of what historians call the rich tapestry of English life. Mr Stephens conducted his own defence. The Attorney-General, later Lord Campbell, the Lord Chancellor, led a team of five prosecuting attorneys.

Needless to say, he was convicted, and sentenced to imprisonment in the House of Correction at Knutsford for the term of 18 calendar months.

Until recently, these cases were the authorities that counsel in NSW relied on in riot trials.

The recent additions to the NSW *Crimes Act* will certainly make life simpler for the practitioner in criminal law. Section 93B is a distillation of centuries of legal argument and refinement. However, the draftsman ought not to feel flattered by this assessment - Section 93B is a virtual carbon-copy of the *English Public Order Act 1986* Section 1. Section 93B sets out the five elements of the offence which deal succinctly with the main questions that have arisen in the common law:

- (1) Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her own personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot and liable to penal servitude for 10 years.
- (2) It is immaterial whether or not the 12 or more persons use or threaten unlawful violence simultaneously.
- (3) The common purpose may be inferred from conduct.
- (4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
- (5) Riot may be committed in private as well as public places.

The most obvious change is that riot now requires a minimum of 12 participants compared with the smaller common law riot of three persons.

The CCA in *Murray & Bates* quashed the convictions on riot because the accused had been indicted with one other accused - and that person had been acquitted. In effect, the CCA held that it was legally impossible to have a common law riot of two people.

The maximum penalty is set at 10 years, compared with the previous possible maximum of life imprisonment. (S93B(1)).

Sub-section 5 resolves the question that arose in *Kamara v DPP* (1973) 57 Cr App 880. A group of students from Sierra Leone resident in Britain occupied their country's High Commission building in London in a demonstration. They were charged with unlawful assembly, not riot (although a toy pistol was used to frighten the occupants into submission). The House of Lords found, with almost brutal brevity, that it was not necessary to show that fear was engendered beyond the bounds of the building.

Sub-section 4 appears to resolve a more complex point: can there be a riot if there is no-one actually present to be put in a state of "fear for his or her own personal safety"? The common law had provided no certain answer.

In *Kamara v DPP* at 889 Lord Hailsham said:

"I consider that the public peace is in question when either

an affray or a riot or unlawful assembly takes place in the presence of *innocent third parties*" (emphasis added).

In the same year, in *Taylor v DPP* (1973) 57 Cr App R 915 at 928 Lord Reid of Drem discussed this point without having to decide it in a case of "affray". He concluded:

"But I am much more doubtful about suggestions in some cases that no-one but the combatants need be present at all, or even within earshot ... that it is enough that, if *someone had been present*, he would have been terrified" (emphasis added).

The author shares his fellow-Scot's doubt about the legal situation. It may all, however, be a purely hypothetical concern.

If the Reverend Mr Stephens had led his torchlight procession around the Yorkshire Moors in the depth of winter, letting off their flintlocks and frightening a few sheep, could that have constituted a riot? Under Section 93B(1)-(4) it certainly could, but the courtroom reality is that witnesses must testify to the facts constituting the elements of riot; and if the only persons present are the alleged rioters?

Certainly, in all the reported cases this has *not* emerged as a real problem. And in the four riots in NSW between 1985 and 1987 there was no shortage of witnesses to testify to their fear and terror.

On the contrary, police officers sometimes seemed to be vying to find the most emotive terms to describe their feelings. A former soldier in the Australian Army said Mt Panorama had been more frightening than anything he had experienced in Vietnam: even the Vietcong with Kalashnikov assault rifles, grenades and mortars had not inspired the terror that a bunch of drunken Australian bikies armed with bottles, sticks and stones could instil.

Perhaps it is not surprising therefore that there has not been any real issue in the four NSW cases about the occurrence of a riot per se. Most accused, through their counsel, have conceded that there was a riot in progress at the relevant time. The principal issues on which juries were asked to find a reasonable doubt were identification, alibi and fabrication of evidence.

Before examining some of the issues that arose in the cases of the 45 - accused of whom I have personal knowledge - it might be of value to bear in mind the low conviction rate in these cases. In the 17 cases from Mt Panorama of which I had some personal acquaintance, only *three* resulted in eventual conviction. (Two others were convicted at first instance but had their convictions overturned on appeal and were acquitted on re-trials).

Of the 28 on trial in the three "race riots" only five were eventually convicted of riot. (Several were convicted of an alternative count of unlawful assembly, a much less serious offence than riot).

In all the Mt Panorama cases and most of the "race riot" cases the key Crown witnesses were police officers. At least two and as many as six officers testified that they had seen the individual accused throwing a stone, stick, bottle, Molotov cocktail or all four missiles at them or other officers. No police officer to my knowledge ever admitted even the possibility that he might be mistaken. Yet of the 45 accused I have mentioned,

only 8 were convicted of riot.

The Mt Panorama Riot

This riot is in a different category from the other three NSW riots for these reasons:

- Its size and duration. Over a period of at least four hours, several hundred people, mostly young men, attacked a police station surrounded by a high wire fence and protected by about 100 police officers.
- The other three matters involved only 20 to 50 "rioters" and as few as 10 police, they were much briefer, estimates varying from 15 to 45 minutes.
- The other three could fairly be described as "race riots". All the accused were of Aboriginal descent. In each of those riots the principal activity was a violent physical conflict with police officers, none of them Aboriginal.
- There was also damage in these three riots to property owned or patronised by "whites"- the Bourke Bowling Club and the Brewarrina Hotel in particular.
- In the "race riots" the Aboriginal participants were predominantly young men, not only known to each other, but often related.
- Most of the police in these riots knew at least some of the Aborigines, frequently through prior arrests or having seen them in court.
- Most of the young men put on trial after the Mt Panorama riot were of prior good character. Others had had only minor brushes with the law prior to April 1985 and raised their "good character" at their trials.
- Very, very few of the 36 Aborigines committed for trial in the "race riots" was able to put character in issue. I remember only one - and he was convicted. Nearly all had been convicted more than once; the offences ranged from petty thefts, through "street offences" to quite serious assaults. Some men aged about 30 had police records covering two or three pages.

There had been clashes between campers and police at Mt Panorama before the 1985 Easter races. Because of this, staff from what is now the Charles Sturt University at Bathurst were present during the riot - armed only with pens, notebooks and tape-recorders. They are better qualified than a mere lawyer to explain why a large number of young Australians should embark on a prolonged and, at times, ferocious attack on the compound and the officers guarding it.

IDENTIFICATION

This was the most contentious legal issue to arise in the four riots, especially the Mt Panorama one. It will continue to be. The *Crimes Act* will not affect that aspect of the law.

What the Mt Panorama cases did bring to light was a practice instituted by the police, which in the author's opinion is wide open to abuse and may well have led to the conviction of innocent persons.

During the riot, police arrested many suspects after charging in groups at the crowd and grabbing "offenders".

Others were arrested at camp sites on the mountain during the next day by police who claimed to recognise those arrested as offenders from the previous night's disturbance.

All of those arrested were marched to the compound and photographed - a standard procedure for all persons charged with serious offences. But these photographs were different. The standard photograph is a black and white shot, showing head and shoulders of the offender, usually against a marked wall-chart showing the height of the person. Usually there is a full-face and a profile shot.

Previous disturbances at Mt Panorama had created problems for the police. Suspects had apparently swapped clothes after their arrest and photography, creating difficulties for the arresting police who were also the witnesses to the alleged offences.

To counter this, the police photographed all those arrested standing with the arresting officer(s) - most of the photographs showed a suspect standing between two police. These were coloured, Polaroid photographs, thus linking an individual arrested with the arresting officers.

The photographer in most cases took an extra photograph - the same suspect in the same company. That second photograph was then handed to the senior of the arresting officers. Alarm bells would immediately start ringing in the minds of criminal trial lawyers.

What prevents that officer from showing that coloured photograph on its own to any number of police present during the riot? How great is the temptation for police who may have been assaulted over a prolonged period by someone who *looks* like the man in the photograph? It should not come as any great surprise that police officers did show the photographs to other officers not present at the arrest; and those other officers did "identify" the person in the photograph as an offender.

At the trials police officers backed away from suggestions that they had been *shown* the photographs; some claimed they had seen the particular photograph as one of a group of photographs at a police station; or, in one case, that he had just happened to see the photograph on another officer's bed in passing.

Fortunately for the accused, the police had not foreseen the legal and factual problems when making their pre-trial statements. The phrase "Sergeant Bloggs *showed* me the photograph" left little room for verbal manoeuvre in the courtroom, although valiant efforts were made to explain the phrase.

The police photographer concerned testified that he had taken a *second* photograph in *every* arrest. But at the subsequent trials in which I was involved no second photographs were produced - despite the issue of subpoenas. All had apparently evaporated or self-destructed. Most police officers simply denied getting a second photograph - flatly contradicting the police photographer. The Court of Criminal Appeal, however, saw nothing inherently wrong in the procedure: see *McPhail & Tivey* (1989) 36 A Crim R 390.

Mr McPhail had been identified in court by at least three officers who admitted having seen the photograph, but denied having been shown it in isolation. He was granted a re-trial on another ground. At his re-trial, with the same Crown witnesses

giving the same evidence, and the same defence counsel conducting a virtual carbon-copy of the first trial, the jury retired for only 25 minutes and acquitted him. Such is the glorious uncertainty of life at the Bar.

It is the author's submission that when police officers are the victims, the witnesses, the arresting officers and the investigating agents, then special precautions are needed: first to limit or remove the temptations and opportunities to exaggerate or fabricate evidence; second to protect the accused against over-zealous police and their compliant colleagues.

IDENTIFICATION PARADES

There seems to be a widening gap between the pronouncements of superior courts and the practices of the NSW police. The High Court believes that a properly conducted identification parade "provides the most reliable method of identification": *Alexander v the Queen* (1981) 45 CLR 395 at 400. The NSW Court of Criminal Appeal in *R v Moussa* (unreported 5 July 1984) said:-

"... It has been said many times in courts of the highest authority that the absence of an identification parade and the substitution of identification through some other method, for example by photograph, in a court or in a police station may result in so weakening the identification evidence as to lead to a case being withdrawn from a jury." (Approved in *R v De-Cressac* (1985) 1 NSWLR 381 at 385).

The fact is that identification parades are very rarely held in NSW.

In the many trials I have appeared in over the past 10 years when identification was an issue I can recall only one where a parade was held. A rugby league team from Green Valley was alleged to have wrecked a service station near Newcastle on an end-of-season outing. Police tried to hold a series of identification parades, using off-duty police and local rugby league players to make up the numbers. The service station proprietors nominated *some* of the Green Valley Hornets, and quite a few of the locals, as their attackers. Anecdotal evidence from police officers suggests that this is not an uncommon occurrence.

No identification parades were attempted after the Mt Panorama riots, although significant numbers of young men of similar appearance were in custody at Bathurst police station and, theoretically at least, available for such parades.

In the space of those few years from 1987 to 1991, this State saw more riot trials than in the previous 50 years. Future historians may wonder what caused this surge of civil unrest. Were these mass confrontations between police and young men a social phenomenon that flared up, never to be repeated? Time will tell.

But at least any counsel in future trials will be spared the burden of those English 19th century cases defining riot. □

Judicial Embellishment

Writing judgments can, on occasions, be even more mind-numbing than chamber work. Not suprising then that judges occasionally seek to enliven their work with literary and other allusions. Here are a few samples. (Contributions to this column will be gratefully received.)

Proprietors of Strata Plan 20754 v Hawkesbury City Council & Anor Kirby P Mahoney JA Priestley JA

Kirby P: "On the facts disclosed in these proceedings Franz Kafka would have found a rich seam of raw material with which to enliven his writings about modern government. Fully explored, the facts could, of course, present a different complexion from that which emerged from the uncontested material presented to the Court. Behind the facts which the parties chose to litigate, may lie explanations and justifications of their conduct which did not emerge at the trial. Doubtless Kafka's officials had their own private excuses for their conduct. "

Macleay Pty Ltd t/as Wobbies World v Anne Moore (Victorian Supreme Court)

Brooking J: "When Dante reached the gate of hell the first thing he saw was an inscription which ended with the words, "All hope abandon, ye who enter here." Dante read the notice with care and, turning to Virgil, his guide, exclaimed, "Master, these words import hard meaning".

When Anne Moore arrived at the gate of Wobbies World, an amusement park in Nanawading, and passed through the turnstile, she must have come within inches of a sign which, while not as alarming as the one Dante encountered, was not in encouraging terms -

'PERSONAL INJURY OR PROPERTY LOSS OR
DAMAGE IS YOUR RESPONSIBILITY

Your entry is your acceptance of these conditions.'

Unlike the inscription over the gate of hell, the characters of which were "in colour dim", the sign at the amusement park was in bright red lettering, and, instead of being "over a portal's lofty arch", it was at eye level, just to the right of the turnstile facing those who were about to click their way through into Wobbies World. "

TTS Pty Ltd v Griffiths (Supreme Court of the Northern Territory of Australia Asche CJ, 20 December 1991)

"I note that in one part of the transcript he is reported as inspecting "trains" but I take that as a misprint for "cranes" since the opportunity to inspect the former in the Territory would be somewhat limited; the Commonwealth Government having apparently taken the view that it should not be stamped into honouring express contractual obligations undertaken a mere eighty or so years ago to construct a railway line from Darwin to the South Australian border " □

Researching American Authorities - An Introduction

The Winter 1992 Bar News told readers how to evaluate (and cite) American authorities. Inspired by the response and further requests, the author, Robert Angyal, enlisted the assistance of Jane Williams BA (Hons) LLB, research assistant to DMJ Bennett QC, to provide a guide to researching American authorities.

1. Introduction. The last issue of *Bar News* (Winter 1992) explained how to understand and use references to American authorities (they call them "precedents"). That article provoked quite a number of requests for a guide to researching American case law. Here it is.

Warning: Everyone has his or her own way of finding case law. In this article we describe the standard approaches, based on the resources that are available in Sydney. There is, of course, no one foolproof method.

A number of law libraries in Sydney have a wide range of American case law resources, including online access to Lexis. The Supreme Court and both University of Sydney Law School and University of NSW libraries have large holdings and computer-aided research facilities. The Supreme Court collection may be accessed only by way of a bar-coded card which may be applied for at a cost of \$20 per day for the casual user or more for a yearly pass. Lexis facilities are able to be accessed only by judicial users of the Supreme Court Library. Charges are levied by all public libraries for Lexis use.

2. Textbooks are often a good start to finding case law. Here are some of the better-known American texts on areas likely to be of interest to Australian lawyers. The major texts are easily identified by the name of the original author "on" a particular topic. Those most relevant for Australian use are generally civil law texts which are found at 346.73 in the Dewey classification system. Some constitutional and criminal law texts may also be of interest and these may be found only in the larger collections. Their Dewey references are 342.73 and 345.73 respectively. Holdings in collections in the Sydney CBD are noted.

Collier on Bankruptcy 15th edition; looseleaf; 9 volumes plus 4 appendices **Holdings:** Supreme Court

Corbin on Contracts 8 volumes (1963) incl index plus supplements **Holdings:** Supreme Court, Bar Association

Couch on Insurance 2d 26 volumes **Holdings:** Supreme Court

Milgrim on Trade Secrets 4 volumes; looseleaf

Holdings: Supreme Court

Modern Intellectual Property Epstein; 2nd edition; looseleaf **Holdings:** Supreme Court

Nimmer on Copyright 5 extended volumes; looseleaf

Holdings: Supreme Court, Sydney University Law School

Powell on Real Property 7 extended volumes plus index and table of cases; looseleaf

Holdings: Supreme Court

Prosser: The Law of Torts 5th edition; 1984

Holdings: Supreme Court, Bar Association

Scotton Trusts 4th edition; 6 extended volumes plus supplements **Holdings:** Supreme Court, Bar Association, Sydney University Law School

Trusts and Trustees Bogert; 2nd edition revised; 24 volumes **Holdings:** Supreme Court

Wigmore on Evidence 10 volumes plus supplements

Holdings: Supreme Court, Bar Association, Sydney University Law School

Williston on Contracts 3rd edition 1957-1978, 18 volumes plus index; 4th edition 1990; looseleaf **Holdings:** Supreme Court, Bar Association, Sydney University Law School

Williston on Sale Revised edition; 4 volumes

Holdings: Supreme Court, Bar Association.

3. The Restatements of the Law are also an invaluable tool to researching a particular subject area. The Restatements are promulgated by The American Law Institute and include coverage of the law on agency, contracts, conflict of laws, property, restitution and torts. Each of the major libraries, including the Bar Association, has comprehensive holdings of the various Restatements.

The Restatements attempt to state the consensus of American courts on particular areas of law. They do so succinctly and, because of this, they are particularly useful to Australian lawyers, since conventional research methods, such as digests, can often produce a blizzard of authorities which are difficult to evaluate (see further on this problem later in this article). The Restatements are regarded by American courts as persuasive, perhaps more so than any other secondary material, and are themselves often cited by American courts. But because they attempt to state the consensus view, they are by nature backward-looking: they are not the place to find authorities on novel points.

4. Looseleaf Services. There is a vast array of specialised US looseleaf services. Most are unlikely to be available here except by direct subscription. A number of the larger texts are also published in looseleaf format as noted above. Here are some others that are available.

Biotechnology and the Law Boardman

Holdings: Supreme Court

Copyright Law Reporter CCH **Holdings:** Supreme Court

Environment Reporter BNA

Holdings: Sydney University Law School

Federal Securities Law Reporter CCH

Holdings: Supreme Court

Federal Standard Tax Reporter CCH

Holdings: Supreme Court, Sydney University Law School

Human Rights - The Inter-American System 5 volumes

Holdings: Sydney University Law School

Law of Liability Insurance 4 extended volumes; Long

Holdings: Supreme Court

Personal Injury Schwartz; 6 volumes

Holdings: Supreme Court

Products Liability Fumer and Friedman; 5 extended volumes

Holdings: Supreme Court

Prosecution and Defence of Forfeiture Cases Smith; 2

volumes **Holdings:** Sydney University Law School

Securities Fraud and Commodities Fraud Brumberg; 6

volumes **Holdings:** Supreme Court

Securities Regulation Gadsby; 11 extended volumes **Holdings:** Supreme Court

5. **Encyclopaedias.** There are two frequently used American encyclopaedias which, like *Halsbury's*, attempt to state the law on a very broad range of topics. The first is *Corpus Juris Secundum*, published by West Publishing Company in 159 volumes with annual supplements. The second is *American Jurisprudence 2d*, published by The Lawyers Co-operative Publishing Company in 82 volumes plus supplements and indexes.

Availability is as follows:

Corpus Juris Secundum
Supreme Court
University of Sydney Law School
University of NSW
Macquarie University

* Note: The Bar Association library has *Corpus Juris* only.
American Jurisprudence 2d
Supreme Court
University of Sydney Law School
University of NSW
NSW Bar Association

6. **The Wests Digests.** To go beyond the resources described so far, you need to understand the West Key Number system, around which a huge series of research tools is structured. Wests assigns Key Number to each sub-topic in much the same way as in the *Australian Digest*. Once you find a relevant authority, you note its Key Number - for example, "Offer and Acceptance" is key 16 under Contracts. You can then go to the *Wests Digests* or *Corpus Juris Secundum* for other cases on point. Or you may be able to go direct to a digest and find relevant case references there. *Corpus Juris Secundum*, which also uses the Key Number system, is another way of getting into the system, although Key Numbers and topics between the two systems are not directly equivalent but are extensively cross-referenced. There is a considerable range of digests published by Wests.

Most of these may be found in the Supreme Court or University of Sydney Law School or University of NSW libraries. Macquarie University library has about half of the available reporters and digests.

The *West's Digests*. This system is the most comprehensive of the *West's* reporters. The system covers all reported decisions of all courts. It consists of the Century Edition covering the period 1658-1896 and ten Decennial Editions, each covering a decade. It is continued by *West's General Digest* 7th and currently 8th series. There are also more specialised *West's* digests such as:

Federal Digest
Federal Reporter Digest
North-Eastern Digest
US Supreme Court Digest

The *West's Digests'* strength - their comprehensiveness - is also their weakness. To ensure you have all the law on point, you need to look at all the digests covering every ten-year period. On any significant point they will throw up a large and rapidly increasing number of authorities. The Eighth Decennial Digest (1966-1976) has 50 volumes. Its successor, the Ninth Decennial Digest (1976-1986), has 86 volumes. The Tenth

(1986-1996), plus the general digests which update it, already has 129 volumes.

Wests also produces a wide range of reports which are key-noted in the same way as the digests. These include the *US Supreme Court Reporter*, *US Supreme Court Reporter Lawyers' Edition* (annotated), and the twelve separate series of reports known as the *National Reporter System* including the *Federal Reporter*, *Federal Reporter 2d* and *Federal Supplement* and the various regional reporters (described in the previous article).

Of the specialised subject reporters produced by Wests, only *Wests Bankruptcy Reporter* is available in Sydney in a formidable 140 volumes currently and is held by the Supreme Court library.

7. **Shepard's Citators.** There are citators produced for each of the series in the *National Reporter System* by Shepard's. Each contains lists of citations, arranged in tabular form by volume number and page showing where reported cases have been cited in later cases. Shepard's citators are available on Lexis and have not been stocked by the Supreme Court library since 1988 for this reason, but Sydney University Law School has up-to-date sets.

8. **Computerised Legal Research.** There are two primary computerised legal research systems available which cover American law, Lexis and Westlaw. As its name suggests, Westlaw is offered by the West Publishing Company, but is not available in specialised law libraries in Sydney. Lexis is available through libraries or by direct subscription. Both are full text services. This is not the place for an introduction to using full text retrieval systems for case research, but readers not familiar with the techniques for using such systems should note that they are quite different from the concept-based research methods we have traditionally used. Rather than searching for cases organised by reference to a concept (such as Offer and Acceptance), you search for words likely to occur in the cases you want to find.

Lexis generally charges by a combination of a search fee and an hourly online cost. For private access to Lexis the search fee is currently around \$50 plus small hourly charges, although the search fee can be avoided by the use of a citation directly. There are differing levels of access and pricing and these should be checked when using the system. The University of Sydney Law School library, for example, charges online costs for Lexis use plus a \$5 surcharge for staff and students or a \$50 surcharge for non-members of the university. Small online searches of under 5 minutes generally do not incur a charge.

9. **Dictionaries.** There are a number of legal dictionaries and smaller encyclopaedias of American law available in Sydney for both specialised and general reference. These include the following:

Black's Law Dictionary Published by Wests; 6th edition 1990
Holdings: Supreme Court
(earlier editions available in other libraries)
Ballantine's Law Dictionary 3rd edition
Holdings: Supreme Court

Dictionary of Medicine and Traumatic Surgery for the Attorney
10 volumes plus encyclopaedia

Holdings: Supreme Court, Law School, Bar Association
West's The Guide to American Law 12 volumes; 1985

Holdings: Law School

West's Words and Phrases - Permanent Edition 46 volumes
Holdings: Supreme Court

10. **The American Law Reports** approach reporting from a perspective unfamiliar to Australian lawyers. They only report the most important cases. Each volume contains a comprehensive discussion ("annotation") of the law on a number of areas, each prompted by an important recently-decided case (which is also reported in full). For example, at 3 ALR 5th 784 (volume 3 of the fifth series of the ALR at page 784), you will find a 66-page account of the law on the admissibility of tape recordings of telephone calls to the 911 emergency number (equivalent to our "000" number). The annotation was prompted by a decision of the Court of Appeals of Virginia, *Bowling v Commonwealth* 403 SE2d 375 (Va App 1991), admitting a tape recording of a murder victim's telephone call to 911 under an exception to the hearsay rule. The annotation not only discusses the law, it also lists relevant texts, practice aids, statutes and even suggests the appropriate Lexis search request ("tape! or record! or transcript w/8 911 w/15 admiss! or admit! or inadmiss!").

Once you find the right ALR much of your research will already be done for you. The trick, of course, is finding the right annotation among the 13,000 or so published to date. To this end, there are comprehensive indexes. If you have the name of a relevant case, Lexis' "Autocite" feature will give you all ALR annotations that referred to that case. And the ALRs will also give you the relevant West's Key Number so that you can also look in all the West's publications for authorities. There is also an ALR Federal series (now about 107 volumes) containing annotations on federal law questions, held by Sydney University Law School Library.

11. **General Pointers.** The greatest difficulties Australian lawyers have with American authorities are finding them; not being overwhelmed by them; and evaluating their persuasiveness. This article and its predecessor should help solve the first two problems. The third is the hardest. To some extent, it is made more complex by the fact that American lawyers tend to regard the newest precedent as the best, while Australian lawyers tend to think that the best authority is an old one that has stood the test of time.

Apart from this, the problem really lies in assessing the relative persuasiveness of decisions from the 52 jurisdictions making up the United States (and bearing in mind that the Federal Courts comprise the US Supreme Court, the 13 US Courts of Appeals, the 94 US District Courts and sundry specialised Federal courts). Ultimately you must be guided by commonsense: a decision of the highest court of New York is likely to be more persuasive (even giving all due respect to President-elect Clinton) than that of the highest court of Arkansas. □

Dogged

Miles CJ & Jury

"Just stopping you there. Will you tell us then, where did you hear the noise from?" — "Well, I couldn't tell you where I heard the first noises from, but there was mainly - it was outside, the garage - it sounded like someone was throwing rocks either on the garage or towards the side of the shed, or something, and we heard the side gate opening, and on another occasion there was a really big, loud bang, like somebody had dived through a wall, or something, in the spa area, in that room there."

"That is the spa that you have to gain access from outside?" — "From outside, yes. And there was just - like, the dog was really scared and the dog wasn't usually frightened much at all."

"Whose dog are we speaking of?" — "Jason's dog."

His Honour: "Well, you can't really say what is in the mind of another person, so, I can't see how you can say what is in the mind of a dog, but —?" — "Because the dog was crawling on its hands and knees practically with its tail between its leg and it wouldn't go outside the house."

"All right. Well, the jury may assume from that that the dog was scared. I don't know - it is a matter for the jury." □

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Law Council of Australia

New Executive

Rob Meadows, of Perth, is the new President of the Law Council of Australia. Mr Meadows was elected to the office at the annual general meeting in Perth on 5 September. He succeeds David Miles. The new executive is:

President	Robert Meadows (WA)
President-elect	Stuart Fowler (NSW)
Vice President	John Mansfield QC (SA)
Immediate Past President	David Miles (Vic)
Treasurer	Michael Phelps (ACT)
Member	Barry O'Keefe AM QC (NSW)
Member	Peter Short (Qld)
Secretary-General	Peter Levy

Law Institute of Victoria

The task force set up to examine the concerns of the Law Institute of Victoria about the Law Council is continuing its work following extensive debate at the LCA's annual general meeting on the LIV's proposed withdrawal from the LCA. The task force is examining proposals put forward by the LIV, and other issues discussed at the AGM. It will report back to the council.

Australian Law News

The Law Council's monthly magazine, *Australian Law News*, is to have a major overhaul, with a new design and new features. The magazine will be printed on higher quality paper, with more colour and more articles about people in the law. The first issue in the new format is expected to be published in November.

TPC Study of Profession

The Council at the AGM asked the Executive to continue its efforts to have the scope of the Trade Practices Commission's study of the legal profession confined to relevant issues. The President later raised this matter in discussions with the Attorney-General, but Mr Duffy made it clear that he would not intervene with the TPC and that the LCA should press its concerns directly with the Commission.

Legal Professional Privilege

The LCA will be making another submission - its third - to the TPC on the doctrine of legal professional privilege. The council is concerned that the commission may be taking a limited view of the importance of legal professional privilege in the administration of justice, seeing it simply as something that gives lawyers a competitive edge over accountants - a view being fostered by the accountants.

Mutual Recognition

The LCA is continuing to make representations to Commonwealth, State and Territory governments seeking changes in the draft legislation to give effect to mutual recognition of professional qualifications throughout Australia. This legislation will give effect to "national admission" to legal practice.

COJI

The Senate Committee inquiring into the cost of justice is drafting its report (expected to run to something like 800 pages) and hopes to release it in late November or early December.

Pro bono Program

The Law Council and its constituent bodies will promote widely the *pro bono* programs conducted by those bodies. The LCA will also promote the concept of access to legal advice through the legal-advice schemes established by constituent bodies and will encourage those bodies that do not yet have such schemes to introduce them.

The council will promote the adoption by the legal profession of Community Legal Centres and/or special-interest community centres to assist with service delivery, test cases and public-interest cases.

Lobbying Program

The Secretary-General reported to the AGM in Perth that the Law Council and its Sections and committees had lodged 84 submissions with government, courts and other authorities in the six months since the previous council meeting, and that 81 matters were under consideration.

Migration Agents

A High Court challenge to the constitutional validity of the Federal Government's scheme to regulate migration agents is to be sponsored by the Law Council. The challenge will be to part of the *Migration Amendment Act* (No 3) 1992, which requires barristers and solicitors to register with a government agency in some circumstances before carrying out their normal business of giving advice to clients on migration matters.

Political Ad Ban

The High Court has rejected the Federal Parliament's ban on political advertising on radio and television. The Law Council strongly opposed the ban. □



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Led by
Rupert Balfe

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Failure to Comply with the Construction List Practice Note

*Advance Bank Australia v Tyndall Life Insurance
Australia Ltd*

Coram: Rogers CJ Comm D
21 September 1992

His Honour: By summons, filed on 10 December 1991, the plaintiff sought a declaration as to the proper construction of policies of insurance issued by the defendant as well as an order for the payment of some \$480,000. The return date for the summons was 7 February 1992. It came before Mr Justice Cole on that date. Relevantly for present purposes, I should mention that counsel for the plaintiff then told his Honour that the dispute was "a short construction point". It is also relevant to note that, on that occasion, his Honour mentioned that he was concerned that the purported beneficiaries of the policies were not parties to the action and he wanted to have some assurance as to their position when the matter next came before the court on 21 February.

Various orders were then made for the future progress of the matter. A defence and a cross claim were filed on 19 February. A reply and defence to cross claim were filed on 14 March. The matter was again before the court for directions on 27 March. On that occasion his Honour directed that the matter should be in the call-over list on 15 April for the allocation of a date for hearing and directed that, on that occasion, the parties hand to the court an agreed statement of issues. When the matter came into the call-over list on 15 April his Honour allocated four days for the hearing of the action commencing on 28 September 1992. He made the Usual Order for Hearing in accordance with the Construction List Practice Note. That, amongst other requirements, contains a provision that statements of the evidence proposed to be relied upon be exchanged one month prior to the date fixed for hearing.

His Honour was told that the agreed statement of issues was not available, there was a draft in circulation and a further two weeks was required. That statement was made by both counsel. Thereupon his Honour extended the time for the filing of an agreed statement of the issues to 1 May. So far as the court file is concerned, even today it appears barren of any statement of issues, agreed, or otherwise. Whether that be the true position or not the fact indubitably is that there has been a complete failure to comply with the requirements of the Construction List Practice Note in so far as exchange of statements is concerned. The plaintiff says that it had difficulties in getting instructions; that a great deal of work had been done, but nonetheless there was an inability to comply with the provisions of the Practice Note. I would have thought myself that it would have been appropriate for the solicitors to draw the attention of the Court to their inability to comply when that

became manifest. That was not done.

The defendant equally appears to have no explanation, satisfactory, or otherwise, for the failure to comply with the provisions of the Practice Note. The legal representatives and their clients should realise that there is a real purpose in the provisions of the Practice Note. They are not promulgated merely to make the judges feel better. The whole point of exchange of statements is in order to expose the strength and weaknesses of each party's case to the other, to allow the parties to focus on what the genuine issues are and to allow counsel to prepare his, or her, cross-examination so as to reduce the time required to be taken in court.

It is the experience of the Judges that a timely exchange of statements often times leads to a settlement of a dispute or, at least, to the exchange of realistic offers of settlement, which may later lead to more appropriate orders for costs being made than would otherwise be the case.

For the parties to fail to comply with the court's directions defeats each and every one of those purposes and accordingly works to deflect the proper and purposeful administration of justice. The courts are not here to accommodate the idiosyncrasies of clients or legal advisers in the preparation of the case. They are here to administer justice in accordance with the directions and requirements of the Court.

The proceedings came into the list last Friday on an application to amend the reply and defence to cross claim. At one stage, at any rate, that application was opposed by the defendant on the basis that, some at least, of the proposed material was futile and accordingly would not further the proper resolution of the dispute. The application was stood over until this morning when there was a more substantial examination of the position.

It was then that the details of the neglect of the parties emerged in full flower. I was told that, as a result of the receipt of some statements from the defendant the plaintiff would be unable to proceed on the date fixed some five months ago, whether or not, the late amendment sought was granted. The plaintiff is still, at the present time, looking for an expert to meet the evidence recently produced by the defendant.

The defendant, for its part, is unable to meet the case which is the substance of the amended reply and amended defence to cross claim sought to be propounded by the plaintiff. In the result, not only have the parties failed to comply with the directions of the Court, but they are now unable to proceed on the date fixed for hearing. The consequences of that are not only the ones I have already mentioned. It means that the Court will be unable to usefully occupy the time of a judge which would have been devoted to the hearing of this case. Further, if the matter were to remain in the Commercial Division, it would be

necessary to allocate a new date and thereby deprive some other and likely more deserving party from the opportunity of getting that date for the hearing of its case. I trust I do not have to explain to two commercial organisations how that would impact on the efficiency of the Court. There is repeated and steadfast complaint from the community as to the cost and expense of litigation and of delay in hearings. The Commercial Division attempts to give parties an early date for hearing. That attempt is defeated by events such as these which I am presently addressing. If the commercial community wishes to have an efficient and working Commercial Division it is incumbent that it and its legal advisers co-operate with the Court.

The usual consequence of a failure to adhere to the Court's orders and, more particularly, the failure to utilise the date for hearing allocated, is to remove the matter from the Commercial Division and allow the matter to take its place in the general list where the delay is somewhere in excess of eighteen months.

I have been asked not to make an order removing the matter from the Commercial Division because the parties are presently giving consideration to having the dispute between them mediated by Sir Laurence Street or some other appropriate person. Alternatively, it is said, the parties may wish to utilise the provisions of Part 72 of the Rules and have the dispute referred for enquiry and report by some appropriate person. Even that would only solve part of the difficulty because when that report came in it would then be necessary to

devote Court time to a consideration of the referee's report. Nonetheless, I think it is appropriate that I should try and maintain such momentum as there may be in the disposition of the case by not removing it from the Commercial Division at the present time, whilst ever the parties consider how they should best try and bring about a resolution of the dispute.

There is one other matter to which I should refer. The discussion with counsel has led to an exploration of the question whether the undertaking which had been offered to Cole J, pursuant to the remark he made, concerning the position of beneficiaries of insurance policies, adequately takes care of the difficulties which might conceivably arise. Now is not the time to take up that question but I trust that the parties will, if this matter is not otherwise disposed of, give proper consideration to the undoubted difficulties which exist.

The orders I make are:-

By consent I give leave to the plaintiff to file and serve amended reply and an amended defence to the cross claim in the form of documents filed in Court.

I vacate the date fixed for hearing.

I will stand the matter over for directions to 9.30 am 6 October.

I direct the parties to forward a copy of what I have said to the Chief Executive of their respective clients.

I will reserve the costs of the motion to amend, of Friday and of today. □



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Douglas Gordon Patrick McGregor

Douglas McGregor died on 10 July last, aged 77. He had a distinguished legal career. He was admitted to the Bar of this State in 1948 after service in the British Army and in the AIF and, after considerable work preparatory to the conduct of the War Crimes Trials in the Pacific area. He took silk in 1964 and was appointed to the Federal Court of Australia in 1977. For a period he served full time as a judge of the Supreme Court of the Australian Capital Territory where he and his wife, Gwenda, lived for several years. He was an indomitable advocate and an indefatigable worker. On his retirement from the Bench on 14 June 1985 he lectured at the University of NSW and at the Bond University. He visited Fiji twice on work connected with the preparation for publication of decisions of the Supreme Court of Fiji. He also worked at the Redfern Legal Centre and was engaged there two days before he died.

His work on the Bar Council and as its president and vice-president placed the Bar in his debt. He was in this respect also a tireless worker. He had a high regard for judicial office and took an austere view of the responsibilities it entailed. Nonetheless he enjoyed the office and was meticulous in discharging its duties.

He was a man who believed that one should live as the dictates of conscience required and that is how he behaved. He was nevertheless an hospitable and convivial man with a vast cellar which he enjoyed sharing with his guests. Few things gave him greater pleasure than presiding at a table of friends over one of Gwen's dinners. He will be sadly missed.

He is survived by his wife Gwenda, in whose presence he died, and their eight children. Sheila and Eve are practising lawyers and Lisa, while qualified, prefers to work with the ABC for which Gwen also worked for a number of years. Richard is the Tokyo correspondent for *The Australian*, Alexander is a freelance journalist based in Los Angeles and Peter and Fiona are a painter and a writer respectively. Michael is studying Mandarin in Tai-Pei.

Our sympathy is extended to them upon their loss. □ Sir Maurice H Byers CBE QC

John Hartigan

John Hartigan died on Tuesday 11 August 1992. He was 56 years young.

Every one of those 56 years was lived to the full, and if ever a man left the world a better place for his having been in it, that man was Jack Hartigan.

He was born in 1936 in Tamworth and, even though he always comported himself like a wild Irishman, he was in fact of Scottish descent. At an early age his family moved to Muswellbrook and he attended the High School there. As a school student, he was a NSW age champion in sprinting and the long jump; and when he moved to Newcastle University to study engineering he achieved a measure of fame as a rugby winger.

Upon completion of his studies in Newcastle he found work in Victoria, and in 1959 he represented that State against the touring 1959 British Lions XV.

The following year he gained selection in a Combined Victorian and South Australian team which played the All Blacks in, of all places, Orange. The famous New Zealand rugby historian, T P McLean, said of his performance in that match: "Among the opposition the wing Hartigan made such an impression as to rank among the better three-quarters the All Blacks met on their entire tour."

In 1962 Jack came back to NSW to pursue his rugby with Sydney University and Gordon and hone his burgeoning skiing skills at Thredbo. At the same time he put his head down long enough to graduate in law.

He was admitted to the Bar in 1968, floated on the 5th floor of Wentworth for a time, took his own room at Forbes Chambers, and ultimately in about 1972 joined the 10th floor of Selborne. He remained there for eight years and in 1980 moved to Edmund Barton Chambers, being one of the founding members of the Fighting 43rd.

Over the next decade he developed a substantial practice in Canberra, but he remained an active member of the 43rd to the date of his untimely death.



J C Hartigan

His forte was the rough and tumble of the common law and he became one of the most respected and able practitioners in that field. By the 1980s he was performing like the fine old clarets which he enjoyed so much after work. By the 1990s he was a Chateau Latour. His dedication to the Bar was not confined to advocacy in the court room. He played cricket and golf regularly in the various annual fixtures, never missed a 15 Bobber or a dinner, and generally enjoyed the companionship of his fellow counsel at every opportunity.

It is fair to say that he enlivened every company which was fortunate enough to count him among its number.

He told very good jokes very poorly; he laughed endlessly with a rippling smile at the slightest provocation, and he utterly charmed everyone who ever met him.

While he loved the Bar and he loved his sport and he loved his wine and he loved his skiing, he reserved his primary devotion for his wife Sally and their two girls Phoebe and Georgia. One of the tragedies of his death is that it happened when they were all so young.

The greatest tragedy was that the world lost a man of such vitality and spirit and affection for his fellow man.

We are the poorer for his passing. □ C.P. Crittle

Obituary

Lieutenant Commander C B Dillon VRD LLB RANR (Rtd)

Abridged version of a eulogy delivered by Captain L M Hinchliffe DSC RAN (Rtd) at HMAS Watson in the Chapel of St George the Martyr on Tuesday 28 July 1992.

Clive Barker Dillon, better known to all and sundry as "Dickie" Dillon, was born on 24 February 1913. He was the eldest of three children and was educated at North Sydney High School, Sydney Grammar School and the University of Sydney where he read law, graduating in 1935, and being admitted to the Bar in May 1937.

Between graduation and admission he was articled to Faithfull, Murdoch and Baldock and was associate to both Mr Justice Owen and Mr Justice Miller Stephen, both of the Supreme Court of NSW, and then commenced practice on his own. His legal career continued after WWII, when being a Naval Reserve Officer he had the inevitable break, until his death last week. He was in fact the senior junior barrister (ie, one who had not taken silk), and indeed was the longest serving of all members practising at the Bar.

His advocacy suffered from a lack of aggression, and this was no doubt due to his gentle manner of dealing with all people - a manner which was not always appropriate when dealing with some of them.

I have never heard anyone denigrate Dick in the fifty years plus that I knew him and I have only one memory of him loathing any one person. I'm perhaps the only one who knew of this because he seldom mentioned it even to me. All the other parties are deceased. "*De mortuis nil nisi bonum*," as Bacon wrote.

I had only one occasion to use him as a lawyer and that was during his training period in the ship in which I was serving. This was to advise on a court martial. The miscreant pleaded guilty and so the case fizzled in so far as legal argument was concerned and Dick had no opportunity to shine.

Dick played rugby and boxed from time to time, but his real love was sailing, starting off in 16 footers. He became a very experienced round-the-buoys and ocean-racing sailor and a very competent helmsman. He took part in Montague Island races and other well-known ocean races and some six Hobart races. He joined the RAN Sailing Association, becoming a life member.

He also joined the Royal Prince Alfred Yacht Club, but resigned in 1969 when that club vacated its city rooms for its new Clubhouse on Pittwater.

His love of the sea moved him to join the Naval Reserve but he could only do so as a Paymaster. So he became a Paymaster Sub Lieutenant (on probation) with seniority 1 October 1936 and commissioned on that date. He didn't really like this branch and when the Anti-Submarine branch advertised for officers in 1938 he requested to change, was accepted and became a seaman officer as he originally wanted to be.

He qualified as a trained a/s officer just before the war and at the outbreak of WWII was expecting to be called up. Of

course, it was not possible to mobilise all Reserve officers at once and he was not called up until October. He then found that if he wished he could proceed to the UK, as the Admiralty was short of trained a/s officers of the type turned out by the Australian A/S School.

On his return to Sydney after active service in the Norway campaign, the Mediterranean and the Indian Ocean, the Pacific War was being wound up and he was reverted to RAN service and demobbed finally in February 1946. The Reserves were reformed for peacetime and he was reinstated. By this time he was a Lieutenant Commander proper. He continued doing reserve service as required until retired at age 60.

He had had a very long service, seeing more active service - seagoing - than most, and had been awarded a MID, the Volunteer Reserve Decoration with two bars. He was one of the very few Australians awarded virtually every theatre medal possible, both British and Australian.

In addition, he was presented with the Greek Crete Medal (he enjoyed! being kissed by the Greek general) and with the Murmansk Convoy Medal by the Russians.

Since retirement from the Reserve, Dick maintained contact by being a member of the RUSI, RANSA, KUTTABUL Wardroom and the League of Ancient Mariners of NSW.

His legal practice after the war embraced divorce, family law, common Law, a period with the Employers Industrial Group, and local courts towards the end of his long career. His last brief was in June in Wollongong.

He helped many naval people in one or more of the above jurisdictions. He also had the privilege of moving the admission of his nephew Ian Sanderson to the Bar of NSW, and also of Commodore Brian Cleary, much appreciated by both these gentlemen.

As I said earlier, I never heard him denigrated. Why he did not marry was, as he put it: "*Because I set a standard, which has not been reached. I wanted to marry a nymphomaniac whose father owned a brewery.*" And, of course, it never was reached.

He must have set a record as a cruise-ship "traveller" if that is the word. At a rough guess, he must have taken at least ten cruises out of Sydney in the past years - I lost count. The Russians acknowledged his patronage quite recently. So if you did not get an answer to a phone call, you knew he was AOC - absent on a cruise.

I for one shall miss him, with his finger brushed hair, that distinctive mannerism, more of a sweeping shrug than a wave, when for reasons I could never fathom, he constantly hoisted his coat back onto his shoulder, always with a glass in hand, and of course his dry sense of humour. □

A Defence of the Status Quo

M F Adams QC defends an accused person's "right to silence".

Most will be aware that Mr Kevin Waller, erstwhile coroner and magistrate, is now a columnist on legal matters for *The Sydney Morning Herald*, almost invariably espousing a conservative line, spiced with the odd bit of lawyer-bashing. In August, he attacked the rights to silence and to make a statement from the dock. Such attacks have become more frequent and from more eminent sources. Unfortunately, they frequently reflect not so much a concern with justice as merely a desire for efficiency.

In the *Herald* of 13 August 1992, Mr Waller, asserting concern about delays in trials, advocated the abolition of the right to silence and the imposition of an obligation to answer questions posed by a police officer investigating a crime. There seemed to be no consciousness at all of the extent to which such a change constituted an attack on some of our most valued conceptions of justice.

One of the most obvious results of his proposal would be that trial in a police station by police officers would, in effect, be substituted for trial by judge and jury in open court. We can all see that a great deal of time would be saved. But even in an apathetic democracy such as ours, with a Government largely controlled by a burgeoning bureaucracy, Parliament almost completely emasculated by party discipline, the media dominated by a few businessmen and most journalists seemingly combining cynicism, ignorance and self-importance in fairly equal proportions, I do not believe that we have yet reached the stage where most people would accept this as consistent with justice.

It is, of course, not a question of whether the police are honest, but whether we are committed to the rule of law as a fundamental value of our social order. Nor is it so much a question of what the individual in the dock deserves (although that is important) but what we must do in order to maintain our own self-respect as a moral (I hesitate to say Judao-Christian) civilisation.

At all events, of course, it is not true that in every case a lawyer would or should advise a client to remain silent. But, even if it were, is it not perfectly reasonable that a citizen might wish to give his account, not in a police cell, but to a jury of his or her fellow-citizens? Just as real a problem is that, very often, at the time a suspect is questioned, not all the relevant facts are known and false assumptions, mistakes of description, of chronology, of ambiguity and of expression may well lead to a quite unjustified firming or even "proof" of wrong suspicions. Even where a trial follows it is sometimes difficult, if not impossible, to correct this and the terrible consequence of the conviction of an innocent person may result. But I suppose that those who support Mr Waller would regard such a result, if it happened rarely (and how would we know?), as just one of those unfortunate incidents that any efficient administrator would just have to put up with. One recalls, with a chill, Lord Denning's advocacy of capital punishment upon the ground that it renders later inquiry about innocence unlikely.

I find myself quite baffled by attacks on the statement from the dock. One must accept that its existence depends, like many valuable social facts, upon an accident of history. But

surely it is simply right that a person who is charged with a serious criminal offence should be able to tell her or his side of the case by whatever means, consistent with the due and dignified administration of justice, she or he thinks proper. I have no doubt that juries are quite capable of assessing the weight of such an account as contrasted with evidence that has been tested, and the fact that it is not tested is pointed out to them. I oppose comment on the opportunity to give evidence upon the ground, chiefly, that it deflects attention from the critical issue, which is whether the prosecution has proved its case beyond reasonable doubt. After all, people completely innocent might well doubt their ability to survive a cross-examination and fear quite justifiably that he may not be able to do their case justice. The practical problems involved in attempting to show a jury why, in the particular case, no adverse inference should be drawn against the accused for having chosen to make a statement are, I think, too great to allow comment to be made.

The suggestion, at all events, that abolition of the right to make a statement would shorten trials is self-evidently absurd. What really underlies this proposal is a distrust of juries and a refusal to take seriously the presumption of innocence. □

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Retirement

Keppel Earl Enderby

Address by Jeff Shaw QC MLC to the dinner sponsored by the NSW Society of Labor Lawyers, 11 September 1992, to mark the retirement of the Hon Justice K E Enderby from the Supreme Court of NSW.

In a life which reflects the symbiotic relationship between the law and politics, Kep Enderby has shown a commitment to the Enlightenment values of freedom and equality.

There are many aspects of this Renaissance man's activities that should be noted - his golfing prowess (being the 1946 NSW Amateur Gold Champion); his war service in the RAAF; his championing of the cause of the international language Esperanto; and his active interest in international affairs.

However, it is Kep Enderby's role as a lawyer and politician that I shall discuss.

After growing up in Dubbo, and attending the local high school, Kep studied law at Sydney University and took a Master's degree from London University. He was admitted to the NSW Bar in 1955. After working away at the Sydney Bar for some years, Enderby changed course, and in 1963 took a job as senior lecturer in law at the ANU. This academic phase lasted only a few years and, by 1965, he was building up a successful practice at the Canberra Bar.

As a member of the Canberra branch of the Labor Party in the late 1960s, Kep witnessed much internal controversy. The long-time local member, Jim Fraser, was an earnest, parochial politician. He had been the member since 1931. But the local branches, full of academics, public servants and others concerned with the big issues of the day, were disenchanted. The old-style, stalwart MP faced rebellion. In the tradition of the Labor Party, he clung to his seat until he died in 1970. The newly preselected candidate was K E Enderby, local barrister, who duly won the seat of Canberra in a by-election on 30 May 1970.

Enderby quickly proved himself in this new environment. Perhaps surprisingly to some, he managed to get himself elected by the Labor Caucus to the first Whitlam ministry - a numbers game in the Caucus which must have been a hard-fought scramble, after all those long years in Opposition.

On 19 December 1972, Whitlam appointed Enderby Minister for the Australian Capital Territory and the Northern Territory. Later, in October 1973, he was appointed Minister for Supply; in June 1974, the Minister for Manufacturing Industry; and in February 1975, the Minister for Customs and Excise. But it was the appointment of Kep Enderby as Attorney-General on 10 February 1975 that marked the most significant phase of his career as a Cabinet Minister and the beginnings of nine months and one day of activism in law reform.

It was the formidable task of Kep Enderby to carry through the law-reform momentum which had been generated in the preceding hectic years when Lionel Murphy was Attorney-

General. Whitlam has said: "I appointed Enderby as Attorney-General to continue and complete Murphy's pioneering and innovative work." It was Kep who finalised the passage of the *Family Law Act*, the *Racial Discrimination Act*, the *Administrative Appeals Tribunal Act*, the *Ombudsman Act* and the *Federal Court of Australia Act*.

Some other reforms were pushed by the new Attorney-General which were unable to be completed before the demise of the Government, and these included a Bill to abolish appeals to the Privy Council, the legal aid Bill and a uniform companies' law. The correctness of all those measures has been vindicated by subsequent history.

It was Kep Enderby's fate to become a leading player in the maelstrom of controversy which surrounded the dismissal of the Whitlam Government by Sir John Kerr. As Attorney-General, Enderby, in co-operation with the Solicitor-General, Maurice Byers QC, provided advice to the Governor-General that the use of the reserve powers, in the way being urged by the Opposition, in the circumstances of November 1975, would be wrong and contrary to principle.

The ensuing election, of course, saw Enderby out of office and out of Parliament.

He returned to the Sydney Bar to re-establish a practice as a silk. And he did so with success from the newly opened Ground Floor of Wentworth Chambers. Briefs came in both civil and criminal matters.

This period back at the Bar was cut short by his appointment to the Supreme Court in 1982. There followed 10 years of distinguished service as a judge - predominantly in the Common Law Division, but also sitting in the Administrative Law Division, on criminal cases and on the Court of Criminal Appeal. This did not stop Kep taking an active interest in international matters, and in preserving his relations with old friends from political and legal days gone by. He was certainly not an aloof judge, but rather one who remained very much in touch with community feelings and values.

Enderby J's independence of mind was readily apparent as a member of the Court of Criminal Appeal. He was prepared to dissent, including on questions of penalty.

The judge was a great defender of the tolerance and commonsense which the jury brought to a trial. And he contrasted this with the judges, whom he said (at the opening of the Wollongong sessions in 1987) could become "callous, cranky and intolerant".

This is a story of achievement and commitment. And the retired judge has more to contribute yet to our public life. □

Multiplicity

by Jacob A Stein *

In his book *Six Memos for the Next Millennium*, Italo Calvino, the Italian novelist, describes an aspect of the modern novel he calls Multiplicity. He says the contemporary novel employs a method where "the least thing is seen as the centre of a network of relationships that the writer cannot restrain himself from following, multiplying the detail so that his descriptions and digressions become infinite. Whatever the starting point, the matter in hand spreads out and out, encompassing ever vaster horizons, and if it were permitted to go on further and further in every direction, it would end by embracing the entire universe."

Calvino's words immediately clarified nebulous thoughts I have been carrying around concerning the litigation process.

I became acquainted with the process in the late forties, when I first went to court. In those days the trial lawyers were practical people, a somewhat roguish bunch who had never heard the word "litigator" and who took neither themselves nor their calling too seriously. It was a matter of faith with them to be kind to those met on the way up because you met them all over again on the way down. They worked their cases with a bundle of key facts and a few documents. The court file did not amount to much in the way of paper. There were the pleadings, a deposition or two, and that was it. Litigation did not take very long and it was inexpensive.

There was another group of lawyers who saw the law as a branch of jurisprudence, a demanding intellectual pursuit conferring an opportunity to exercise great powers of analysis. They shied away from trial work, which they considered somewhat vulgar. Trial work required spending time with witnesses who were never at home and never on time for a meeting.

Then in the sixties the big law firms discovered there was real money in trial work if properly understood. This drew into the game those who should have pursued solipsistic philosophy, astronomy or experimental biochemistry. All people untrained to grasp the obvious. Such minds when hooked up to \$250 an hour produce trouble. Let me repeat Calvino's words: "Whatever the starting point, the matter in hand spreads out and out, encompassing ever vaster horizons, and if it were permitted to go on further and further in every direction, it would end by embracing the entire universe." There is the trouble.

Lawyers called litigators appeared and found that the rules of discovery encourage the matter in hand to go on further and further in every direction. Each fact discovered, each deposition taken, each expert opinion rendered, requires further exploration. So many facts, so many opinions, so many legal memoranda. So much Lexis, Westlaw, Prodigy and CD-ROM. A concoction inviting one to select, manipulate, and create in accordance with the wishes of the well-funded client. Those with a gift for bringing about the convergence of infinite relationships, past and future, real or possible, gradually took charge of the game.

The principle of Multiplicity is also at work in events such as the Kennedy assassination. Too many lines of inquiry are pursued. Disagreements are created rather than resolved. Too

many witnesses who cannot be found are identified. Experts discover ways to disagree on key issues. The information expands so no clear conclusion is possible no matter how obvious the events were at the beginning. The seeker after truth passes it by without suspecting he or she has seen it.

I offer two solutions. First, the law. There is too much of it that has no promise of present likelihood.

Samuel Johnson, known as Dictionary Johnson, liked to talk law with his lawyer friend and biographer, James Boswell. Boswell recorded a conversation in which Johnson made the point that when there were few legal precedents, a lawyer's ability to reason logically was prized, but with the increase in precedents, a lawyer's skill depended less on the ability to reason and more on a talent for finding a controlling precedent. If true when Johnson said it, circa 1776, what is the situation today? We are asphyxiated by legal precedent.

For every decision supporting a legal theory there is a countervailing decision discrediting it. All those five-to-four decisions of the Supreme Court chill the tendency toward warm stability. What can we do about it?

I suggest that a lawyer who wishes to cite a case decided before 1950 must pay a fine of \$250. A lawyer who wishes to cite any law review article must pay a fine of \$1,000. It would be a felony to cite a case decided before 1935.

Now the facts. The rule of relevance must be changed. As one commentator said, the rule of relevance is the concession of the law to the shortness of life. Things must be brought to a conclusion by excluding evidence. Rule 401 of the US Federal Rules of Evidence

says, "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

That is much too low a standard, given the enormous resources of information that surround us. Try this modification: "Relevant evidence means evidence having some real likelihood of making the existence of a fact of consequence to a determination of the action significantly more or significantly less probable than it would be without the evidence, having in mind the backlog." Any thoughts? □

* Jacob A Stein is a senior partner with the US law firm of Stein, Mitchell & Mezones. (First published in The Washington Lawyer. Reproduced with permission.)



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Publication by Butterworths of *Halsbury's Laws of Australia* is on schedule with the release of Volume Three, covering the titles "Bills of Exchange", "Building and Construction" and "Carriers".

The thirty-volume *Halsbury's Laws of Australia* is one of Australia's most ambitious publishing projects and, when completed in 1996, will provide a comprehensive and accurate statement of Australian law across all jurisdictions.

A major title in Volume Three is "Building and Construction", written by Justice David Byrne of the Victorian Supreme Court, and Brian Ernst, a partner with Corrs Chambers Westgarth, Brisbane.

According to volume editor Amanda Hemmings, the "Building and Construction" title will become an essential first reference point for legal practitioners seeking a clear and complete statement of the law in this area.

"*Halsbury's Laws of Australia* has been designed as a practical and efficient reference source that will meet the needs of busy practitioners by stating the law accurately and concisely," said Ms Hemmings.

"It is especially helpful for practitioners who may be working outside their usual field of expertise. For example, solicitors in general practice may need to resolve a problem arising from a highly specialised building contract. *Halsbury's* is the ideal "one-stop" reference for situations like this.

"We have concentrated on keeping material practical and logical in its presentation, while ensuring it is current and comprehensive in its approach."

The "Carriers" title has been written by Andrew West, a Queensland barrister, and is a comprehensive guide to the law relating to the carriage of goods and people throughout Australia. "Bills of Exchange and Other Negotiable Instruments" has been prepared by Gregory Burton of the NSW Bar.

"The material in *Halsbury's Laws of Australia* represents the most up-to-date and concise statement of Australian law available," Ms Hemming said. "Like the two other volumes already available, this volume will be indispensable to all practitioners who need access to a full encyclopaedic statement of the law in force in Australia."

Halsbury's Laws of Australia is written in the propositional style established by *Halsbury's Laws of England*.

All propositions of law are supported by the relevant case law or legislation and duplication is kept to a minimum by the use of extensive cross-references to other paragraphs. The work also features cross-references between titles and other important practice works.

It is published in looseleaf format, and is supplemented and updated by *Australian Current Law*. Updates will also be made simpler through block issues of update material.

In coming months, Volume Three will be supplemented by titles on "Betting, Gaming and Lotteries" and "Bankruptcy". More material will also be added to the "Building and Construction" title.

The first of *Halsbury's* thirty volumes, covering "Aboriginals and Torres Strait Islanders" to "Arbitration" was published in October 1991 and was followed in April this year by Volume Six, dealing with "Contract" and "Coroners".

The thirty volumes of *Halsbury's* cover ninety different topic areas. Two further volumes, dealing with "Consumer Law", "Contempt" and "Constitutional Law" (Volume Five), and "Defence", "Dependencies" and "Employment" (Volume Ten) will be released later this year.

Butterworths publishes a wide range of legal texts, looseleaf works, reports series and journals. Among these are many leading reference works and court practice manuals, as well as the popular *Australian Law Reports*. □

MEMORANDUM

TO: ALL FLOOR MEMBERS
FROM: THE FLOOR EXECUTIVE
DATE: 11 SEPTEMBER 1992
RE: TOILET BREAKS

In the past, floor members have been permitted to make trips to the toilet without limit. This has proven unsatisfactory. Effective immediately, a toilet policy will be established to provide a more consistent method of account for each floor member's time thereby ensuring equal treatment of all members.

Under this new policy, on the first of each month floor members will be given twenty toilet credits. These credits may be accumulated.

Within two weeks, the entrance doors to the toilets (both Wentworth and Selborne) will be equipped with personnel identification stations and computer linked voice print recognition devices. These voice print recognition stations will be operational but not restrictive for the rest of this month. Employees should acquaint themselves with the stations during this period.

If the individual toilet bank balance reaches zero, the doors to the toilets will not unlock for that member's voice until the FIRST of the next month. In addition, all toilet bowls are being equipped with timed paper roll retractors. If the toilet is occupied for more than three minutes, an alarm will sound. Immediately after the alarm sounds, the roll of paper will retract into the dispenser, the toilet will flush and the toilet door will open. If the toilet remains occupied your picture will be taken.

The picture will then be posted on the noticeboard and an explanation required. If you have any questions about the policy, please ask the floor executive.

□ D H Bloom

Book Reviews

Breach of Contract (2nd edition)

J W Carter, Law Book Company Limited

RRP \$125.00

The 1980s was a decade which saw a great increase in academic and professional interest in the law of contract, and a surge of publications in the field. One of the early major publications was the first edition of this work in 1984.

Although by his extensive writings Professor Carter has established himself as a leading authority in the field, this particular work seemed to escape the widespread recognition that its substance merited.

For this reader, the reason is the form and layout of the book. It is structured upon 75 propositions expressed in articles, à la *Bowstead on Agency* or *Dicey & Morris on Conflict of Laws*. But a *Bowstead* or *Dicey & Morris* it is not. The law of breach of contract does not happily lend itself to this structure, which requires much restatement, definition and cross-referencing.

With this structure it must be well nigh impossible to combine accuracy with a fluency which makes the book easy to read. Professor Carter chooses accuracy. Yet it is inevitable that the dogmatic propositions in the articles must often be read with qualifications expressed only in the text, or footnotes.

As the principles of estoppel and restitution, and remedial legislation such as the *Contracts Review Act*, assume increasing importance in the working out of contractual disputes, it is essential that fundamental contract doctrine is expounded clearly and precisely. Until the law is known the application of equity or of remedial legislation is impossible. One of the virtues of this book is the author's insistence on precision in classification. Whether it be conditions and contingencies, dependent and independent obligations, repudiation and anticipatory breach, implication of terms in fact and in law, or election and estoppel, Professor Carter delineates the role of each concept with care.

It is when Professor Carter allows himself the luxury of extended discussion that the book is at its best. His discussion of *White & Carter (Councils) Limited v McGregor* (1962) AC 413 is illuminating. He provides the comparison with American law to demonstrate the essential point of principle which that case raises. Is a party faced with repudiation bound to mitigate by accepting the repudiation, if continuing with performance would increase the sum for which the defendant would be liable? Or is there no obligation to mitigate before the plaintiff suffers damage from the defendant's breach, so that if the repudiation is not accepted and the plaintiff continues his performance (assuming it not to depend on the defendant's co-operation) he can insist on the price? The House of Lords, of course, answered that the plaintiff was not bound to accept the repudiation and could continue performance.

One senses that Professor Carter has little sympathy for the fuzzy notions that are suggested to overcome the perceived unreasonable consequences of the decision. Assessing the

legitimacy of the plaintiff's interest, or his reasonableness, does not give the certainty which the proper application of contract law should give. Professor Carter, although recognising the possibility that an Australian court might manufacture a novel equitable jurisdiction to restrain an "unreasonable" election, would clearly have the matter resolved by the logical application of contractual principle, even if that means reconsidering the basis of the decision.

Perhaps the best sections of the book are those on repudiation and anticipatory breach, and the interpretation of time stipulations, where the analyses are thorough and stimulating.

In general, the exposition throughout the book is clear once readers have fixed in their minds the particular article under discussion.

For an advocate or adviser wanting to refine their propositions with precision this book provides valuable assistance. For a practitioner it provides a valuable source of references to the English as well as the Australian and New Zealand cases. Comparisons are frequently drawn with American law. The book repays study and deserves widespread acceptance as a work of reference. □ R W White

Taken On Oath, A Generation of Lawyers Jon Faine

Federation Press November 1992 RRP \$35.00

Adapted from the acclaimed radio series broadcast on ABC Radio National's Law Report, *Taken On Oath, A Generation of Lawyers* fills a gap in the contemporary history of the legal profession in Australia.

Thirty old lawyers talk about the past: thirty trustees of a treasure chest of stories about the evolution of our law, our legal system and, of course, our lawyers.

So much has changed in the way we "do" law, just in the working life of the people in the book. From the time when a will was prepared on parchment for a few shillings, in a woodpanelled room with a lino floor, through to personal computers and fax machines in the skyscraper-based, marble-clad offices now common amongst the mega-firms.

But it is not just the physical surrounds that have changed. The ethics, the methodology, the entire culture of the practice of law have been transformed in the fifty or sixty years documented here.

People from NSW interviewed in the book include Leycester Meares, Elizabeth Evatt, John Bowen, Hal Wootten, Fred Newnham and barristers' clerk Ken Hall. Interviews of people from other States include Dame Roma Mitchell, former SA Chief Justice John Bray, Sir John Starke from the Supreme Court of Victoria, Sir Reginald Smithers, formerly of the Federal Court, Sir Edwin Stanley, formerly of the Supreme Court of Queensland, and pioneering women lawyers Joan Heenan and Molly Whitehouse, respectively from WA and Queensland. □

Maritime Law in Australia

D A Butler & W D Duncan

Legal Books RRP \$85.00

Until recently, those interested in Australian maritime law had no purely Australian text available for reference. That situation has changed dramatically with the publication of *Shipping Law*, Davies & Dickey (1990), *Australian Maritime Law*, White (1991) and *Maritime Law in Australia*, Butler & Duncan (1992).

The student and practitioner now have a choice of ready reference books. Inevitably, there is some duplication in the texts, but the three publications are also complementary and worthy of consideration for your library.

Maritime Law in Australia has the advantage of being the latest publication, with references to such recent events as the EXXON Valdez disaster in Alaskan waters in March 1989. It addresses new statutory provisions and conventions up to early 1992: for example, the *Limitation of Liability for Maritime Claims Act* 1989 and the *Carriage of Goods by Sea Act* 1991 (COGSA). The 1989 *Salvage Convention*, forming the basis of the Lloyds Open Form (1990), is also examined.

It comments upon recent legislative activity such as COGSA, which introduces the "Amended Hague Rules" for contracts of carriage entered into after October 1991. This Act also contains provision for the adoption of the "Hamburg Rules" in lieu of the "Amended Hague Rules", if at some future time such adoptions are considered desirable.

An innovative chapter is that covering "pollution at sea". This is an area of increasing interest and importance to the maritime lawyer, following introduction of legislation in each of the States and the Northern Territory (which is in each case a virtual re-enactment of the *Commonwealth Protection of the Sea [Prevention of Pollution from Ships] Act* 1983); and the strengthening of international conventions.

Maritime Law in Australia also examines in detail marine insurance; covers the provisions of Lloyds Open Form Rule 90 salvage agreement, which imposes on the salvor a new, additional duty to prevent or minimise damage to the environment; and explains clearly the rule of law relating to the carriage of goods by sea.

This book is very clearly laid out and well indexed; indeed, in these respects it is a model for legal texts. In each section it uses very clear examples from case law as illustrations and has very useful worked examples to demonstrate the new limitations of liability regime: one of the examples used is the loss of the Russian cruise ship *Mikhail Lermontov* off New Zealand in 1986. Whilst it is essentially an introductory text for the maritime lawyer and student, it is a most useful unified book for ready reference and a worthwhile addition to any practitioner's library. □ D D Farthing

The High Court and the Constitution

(3rd edition) L. Zines

Butterworths Hard Cover RRP \$89.00

Professor Zines of the Australian National University has already made a highly significant contribution to the literature of Australian constitutional law. His publications include not only the two previous editions of the book under review, but also *Federal Jurisdiction in Australia* (with Sir Zelman Cowen) and, more recently, *Constitutional Change in the Commonwealth* (Cambridge University Press 1991). *The High Court and The Constitution* has already achieved a notable place among text books in this area. Students, academics and practitioners have available to them many outstanding annotated commentaries on the Constitution (beginning with the work of Quick and Garran in 1901) which digest exhaustively the reported decisions on each section of the Constitution. This is not Professor Zines' approach. His work on the Constitution has from its first edition focussed on some of the more important and difficult questions of constitutional law rather than on a complete digest of every reported decision on each section. Thus, characterisation, the incidental power and the enigmatic section 92 all receive detailed consideration over a number of chapters. Further, the various difficulties surrounding the interpretation of chapter III of the Constitution also receive minute attention.

Professor Zines' latest edition comes at a most exciting time in Australian constitutional law. In the last five years there have been a number of quite revolutionary decisions: for example, in *Cole v Whitfield* (1988) 165 CLR 360 the Court articulated a new test for the interpretation of section 92. Other important developments include the *Incorporation case* (1990) 169 CLR 482 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501. All of these cases are discussed in detail. Also included is a chapter entitled "Common Law, Tradition and Individual Liberty" in which Professor Zines examines certain constitutional implications and assumptions which have been discerned by the High Court in the interstices of the written words of the document. In this area too, the High Court has been most active in the period since the last edition of this book in evaluating various implicit rights in the Constitution. This is perhaps the most interesting chapter of the book, particularly given the dearth of other detailed treatments of this area. The importance of such implied guarantees of personal freedom has been resoundingly emphasised in the twin cases of *Nationwide News Pty Limited v Wills* (1992) 108 ALR 681, and *Australian Capital Television Pty Limited v The Commonwealth* (1992) 108 ALR 577 and it is notable that Professor Zines' writings were expressly referred to by Brennan J in his judgment in the *Nationwide News Case*.

Like its predecessors, this third edition is destined to take its place as a classic of Australian constitutional law. □

A Dream of Fair Judges

In the late 19th Century a whimsical lawyer, believed to have been John Gavan Duffy, wrote "A Dream of Fair Judges" about the judges of the Victorian Supreme Court. In 1932 Owen Dixon (as he then was) wrote an explanatory note about it to Dr Waddell, then a prominent Sydney lawyer.

A Dream of Fair Judges

After Lord Tennyson (A Long Way)

I read before my eyelids dropped their shade
The code of tenures writ in Law French fair
By him who thro' the feudal mazes strayed
Ere Coke and Blackstone were;

Great Littleton the Lawyer whose sweet breath
Preceded those black letter tomes that fill
The learned Courts of Great Elizabeth
With doubts that echo still.

And for a while his "Treatise on the Use"
Held me entranced in intellectual pain
And wonder at the art that can confuse
Things in themselves most plaint

Feoffment and fine, feigned issue, plea of right
And all the jargon of the Lawyer Priest
Muddled my mind with surfeit of delight
Like mixed wines at a feast.

And lo! I dreamt that I too had passed out
From the fair fellowship of human kind
And felt the full immunity from doubt
Of the judicial mind.

All human weakness that can mar a man
Slipped from me like a garment and I stood
A judge beyond men's blessing or their ban
Like H—s or like H—d.

And then methought I sat enthroned afar
Among my peers in scarlet ermine-bound
Remote from the base rabble of the bar
That stood expectant round.

And a clear undertone from close beside
Thrilled thro' mine ears in that exalted sphere
"Welcome good brother," here thou mayst abide
Free from desire and fear".

And by me stood a form I knew of old
With dome-like brow a sweet mouth firmly set
Features clear cut as newly minted gold
And eyes of calm regret.

"I drank delight of battle with my peers
My name was once the people's battle cry
Alas what is the end of hopes and fears,
Splendid security."

Then firm tones fell like strokes on silver pure
Tones to my weary ear familiar long
In laboured judgments lucidly obscure
Perspicuously wrong.

"What wonder-at thy word on battle field
Myself, illustratious Chief had boldly died"
I answered free and turning I appealed
To one that stood beside.

But he with sick and scornful looks averse
To its full height his stately stature draws
"My prime" he said "is blasted with a curse
And this man is the cause.

"I am cut off from hope in dull despair
A wretched puisne who should be a chief
My father suffered so, and now I bear
Hereditary grief.

"And much it chafes me that I cannot bend
His will, nor stir the calm propriety
Of my slow solemn colleague. Prythee friend
How fares the great Q.C.?"

"The man my leader in the olden time
He of the fluent tongue and brazen brow
With him I rode on fortune's neck sublime
Our paths are parted now."

"Alas, Alas!" a low voice full of care
Murmured beside me "turn and look on me;
My youth in drafting settlements did fare
My prime in Equity.

"And to the dreadful Moloch of the Law
I gave my human heart and brain of fire
Toiling with stern resolve and modest awe
And hope that would not tire.

"I won success and wear it, what avails
Tis but a right to labour at the oar,
To sift with painful toil discordant tales
And o'er dull pleadings pore.

"For me life has no leisure and no fun
No rest from long debate of wrong and right
Visions of work undone and to be done
Do haunt me day and night."

The Explanation

Judges' Chambers
High Court of Australia
1st July, 1932

To whom in accents clear and free from care
Replied his benchfellow of Equity
"I am that happy judge whom men call fair
Take comfort then from me.

"I work, I play, I make the mad world rail
I never lose my temper or my time
My judgment and digestion never fail
From merry chime to chime."

His cheerful words stirred all the silence drear
Like soft winds walking on a torpid sea;
Sudden I heard a voice that said "Come here
That I may look on thee."

I turning saw the idol of my youth
When life had idols in the years gone by
The man of iron will and fearless truth
And matchless loyalty.

He, flashing forth a haughty smile had spoke
But that I stayed him with preventing tongue
And thro' all forms with glad impatience broke

As if I still were young.

"Oh Master, since the judgment-seat you fill
What chemic change confuses all your blood
That in your eyes the deeds of men are ill
And no cause seemeth good?"

"Have all things turned to sinfulness and shame
Is there no virtue now outside yourself
Is honour dead, and goodness but a name
And no god left but pelf?"

"Why greet your former friends with savage sneer
Or with contemptuous pity's chilling frosts
Why should all victor litigants appear
Unworthy to have costs?"

More had I spoken but his wrathful eyes
Blazed on me till I trembled and awoke
And lo! my Littleton before me lies
And the dull embers smoke.

And so I saw not him who left us last
Of whom men murmur with admiring stare
"Behold ideal justice fair and fast
But less fast were more fair."

Dear Dr Waddell,

Many thanks for the copy of the "Dream of Fair Judges" which you so kindly sent me.

The Excellence of its Versification is only equalled by the aptness of its illusions to the men with whom it deals. The Chief was then Higginbotham who had been an aristocratic radical. The puisne "who should be a chief" is Sir Hartley Williams, whose father Edward Eyre Williams was appointed in 1852 and retired in 1874. He considered that he should have been made chief when Salwell was appointed in 1857. Hartley Williams thought that Higginbotham's appointment was a political denial of his own claims to the Chief Justiceship but when, two or three years after the poem was composed, the office again fell vacant Madden was put over his head. The "low voice full of care" is that of Holroyd, perhaps the best of Victorian judges, a very clear headed man with a thorough knowledge of Equity. He was a son of a Comr. of Bankruptcy in England and a grandson of Holroyd J. of the K.B. The "accents clear and free from care" are a Beckett's, a whimsical mind free of all vanity and full of common sense. His family were the founders of Quack and include the writer of the "Comic Blackstone".

Hodges comes next. He came to the bench with a high reputation as an able common lawyer but proved uncertain and irascible. He was entirely without humour and it is said that when he read the poem he said to one of his friends "Did you see what Duffy wrote about me? My wife thinks it funny."

Hood comes last. He was an older but frequent adversary of Duffy at the bar. He proved a very good common law judge something of the style of Pring.

With many thanks and kind regards,

Yours sincerely, Owen Dixon



CHRISTIAN MEDITATION GROUPS

Two ecumenical Christian Meditation groups meet in the crypt of St James' Church at the top of King Street in the city.

One meets on Wednesday mornings at 7.45 a.m. and concludes at 8.30 a.m. The other meets on Fridays at 12 noon, concluding at 1.00 p.m.

The groups follow the method and teaching on Christian Meditation of Benedictine Monk John Main and are affiliated with a network of similar groups.

Anyone who already meditates, or who is interested in starting to meditate is welcome. Enquiries:

Richard Cogswell 285 8813 (W)
810 2448 (H)

Restaurant Reviews

Circuit Food 1992

The general standard of out-of-town food continues to rise as the Ryde College of Catering churns out first-class technicians who can "read" food, as well as a few with real imagination and flair. They go west, looking for jobs or their own sites and we all benefit. Having said that, there are some disappointments.

The Cellar Bistro in Tamworth has gone way off. The Power House, also in the City of Light and Country Music, is not what it was: the hearty pies are gone and the crumbed brains with aioli, so distinguished in 1991, were pre-cooked frozen and dry when I got them this time. The place is still fair enough, but too pricey for its present standard.

In Wagga the Pavilion Motor Inn has the best room-service menu and quality in the State. I mention in particular the Singapore Stir Fry - prawns, beef, pork and chicken pieces, lots of capsicum and onion and enough chilli, all in light rice and with teriyaki sauce. This made a lovely Sunday supper in front of the television with *Rumpole*.

The Rocks in Byron Bay has changed chef (he went over the road to the new Beach Hotel where he does super fast food but the restaurant isn't much) and is different but still very, very good. Snapper fillets with Tim Clarke's special batter and chips and one of their excellent mixed salads made a great meal. The Supreme Court and the Compensation Court were both in the area the same week and the Cape Mentelle ran out.

But the Ringmaster's award for the Circuit Meal of the Year goes to the George & Dragon in East Maitland. This is a restaurant and guesthouse in an old and brilliantly restored hotel building circa 1845. We checked in about 6 pm to a large well-appointed high-ceilinged room with no phone and no television, so we read and held hands for an hour or so with a couple of Cascade Stouts for company.

The dining room is quiet and elegant with room between the tables. The service left nothing to be desired. A Gin Dry Martini straight up with an olive and no twist was James Bond standard and the Whisky Sour, *real* lemon juice, good Scotch, egg-white and no maraschino, was absolutely correct.

The entrées were Lobster Feullette and Lamb Kidneys. (No, I am not in a rut: I had the lobster). The lobster was sliced in a fan shape and served between a puff pastry shell in a creamy leek sauce with dill garnish. It was fresh, tender and delicious. The kidneys were sliced, cooked lightning fast and served in a grainy mustard and red wine sauce. Yum.

For mains, the party of the second part had Squab with Morels, locally grown "wild" mushrooms in a brown sauce. The squab was a little bit chewy but otherwise excellent. I had oxtail. It came in three excellent knuckles, with just its own gravy and a fine Julienne of carrot and celery with chives sprinkled on top. It looked fabulous for a moment, and then the meat fell off the bones at the touch of a fork. It is rare for me to think oxtail as good as I make myself, but this certainly raised the standard.

The vegetables need their own paragraph: potatoes parboiled, peeled and cubed then baked in cream to just a tinge of brown on top. A provincial touch of perfection. Broccoli, carrot and snow peas steamed or microwaved to al dente and the

butter just waved at them provided fun and fibre.

A Margaret River Riesling in a half bottle and one of those four-number Lindemans Hunter River Reds of about 1984 just slid along nicely with it all.

No sweets thank you; although they looked good, we were done.

In the morning, breakfast is self-serve. Orange juice is in the fridge. A huge bowl of mixed fruit is on the bench of the nicely appointed and spotlessly clean kitchen. Muesli and commercial cereals in packets, breads and muffins are laid out for choice. There are eggs if you want to cook them, but fruit, toast and Vegemite did us. Quality coffee, and a plunger machine and *real* milk to warm up, left us full of fight for the long drive north.

You'll need to book, especially if you want to stay, and only two rooms have an en suite. The bath is slippery in the end room, so use the rubber mat with its suction pads in gear!

□ John Coombs

The George & Dragon
48 Melbourne Street
East Maitland NSW 2323
Phone: (049) 33 7272

Circuit Food Part Two: Papua New Guinea

Well, hardly circuit, but only four hours to Port Moresby and, acting as Counsel Assisting to Graham Ellis, felt more like coming home than going overseas.

PNG turns out to be a food perve's delight. Fresh fruit, salads and vegetables abound, with the sweetest pineapples and the biggest passionfruit leading the pack. The salad bar and buffet at the Islander is probably the best lunch: a "national" daily smorgasbord - Mexican, Indian, French and so on, and the salads varied and fresh.

The big surprise was the departure lounge at the Gateway which serves the best pizza (no, not in LA, not in Tuscany, in Port Moresby). The Taal is spicy with pepperoni, salami, zucchini, capsicum and onion and a dash of Worcestershire sauce on a crisp but thick enough base, a *fresh* tomato sauce and not too cheesy. With a glass tankard of ice-cold South Pacific draught it was superb. The other half was a Stromboli, a vegetarian combination with fresh zucchini, eggplant, capsicum, onion, tomato pieces and lots of garlic. Likewise yummy.

The Japanese Steakhouse, where the table is the hot plate for rapid frying of superb seafood, steak, chicken and the rice with egg and onion. The is done with flair and style and provides a floor show while your mouth waters.

The crocodile fillets and the grilled and boned half chicken and the fettuccine with seafood from the Gateway room service (you can't miss *Columbo*, and the ads in Pidgin are entertainment, not irritant) deserve honourable mention.

But the award must go to *Agnes' Cooking Pot* where the proprietor and maître d is Luke Lukas, previously the world's most overworked electoral commissioner.

He serves a daily Dutch special, a range of Indonesian dishes and Filipino delights. Everything is good, so we kept going back like a muslim to Mecca. The entrée I liked best was Bitter Ballan, Dutch crumbed balls of a veal ragout served with German mustard. The party of the third part had Indonesian-style spring rolls with seafood and lots of vegetables, which were crisp and delicious.

On our first visit we ordered Gado Gado as an entrée. It is a *big* main course, and absolutely superb. Traditional salad and vegetables, including carrot, lettuce, zucchini, cauliflower, steamed and served with a freshly-made spicy peanut and chilli sauce. It was garnished with an elephant's dandruff style fried noodles and slices of hard-boiled egg. The presentation was elegant, the steaming timed perfectly for each vegetable. The lettuce was still crisp and the cauliflower cooked enough. Not easy! We all loved it.

The bitan goreng, fried noodles with prawns, chicken, chilli, vegetables and a fried egg on top was crispy and delicious.

A Saturday special is Rosboef, roasted fillet, nice and rare, with baked potatoes, a thick gravy and delicious green beans with garlic.

For Friday, the Capucijners met Spek, brown beans topped with finely chopped onions, small cubes of bacon with vinegar and pepper, hot potatoes and gravy is definitely a *no* entrée and *no* sweets - just a main course, thanks - but excellent too.

A culinary adventure. Mention my name to Luke if you go in: he'll give you all the best gossip! ☐ John Coombs

Childcare.

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TAKEN ON OATH A Generation of Lawyers

Jon Faine

An enlightening view of the people behind the law giving us glimpses over the last 60 years of the profession. These candid interviews with 30 Australian lawyers are witty, warm and engaging:

Dame Roma Mitchell • Edwin Stanley • Joan Heenan • Sir John Starke • Leycester Meares • Geoffrey White • Sir Esler Barber • Mary Whitehouse • Sir Reginald Smithers • Virgil Power • Sir Kevin Anderson • John Bray • Mary Cameron • Harry Haggarty • Elizabeth Evatt • David Aronson • John Wheatley • Col Bennett • Tom Molomby • Hal Wootten • Ray Triado • Charles Page • John Bowen • Fred Newnham • Ken Hall • Reginald Withers • Geoffrey Hollidge • Phillip Twigg • Nathaniel Hargrave and Joseph Dixon.

Jon Faine is the presenter of "The Law Report" on ABC's Radio National.

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Pussyfooting

(ICAC - Cmr Beazley QC)

Mr Greenwood: "You don't have a copy of this?"

Mr Campbell: "I don't think I do."

Mr Greenwood: "I'm surprised. You see for the Saturday 14 July there's a notation of 'Meeting Serge 4 pm?' "—" That says 'Ring' ".

"'Ring', does it, 'Serge 6 pm', right, thank you. The little Felix the cat sticker appears from time to time, does that have any significance?" "—" It's a reminder to worm my cat."

"You have no recollection of ringing Mr Borgeholz on that Saturday afternoon?" "—" No, I don't."

"Or what you might have spoken about?" "—" No, I don't. "☐

Like the Nose on Your face

Coram: Court of Appeal: Gleeson CJ, Kirby P, Meagher J hearing an appeal from Young J concerning the construction of a clause giving a bank the right to call upon a party to provide security for a debt.

Gleeson CJ delivered an ex tempore judgement dismissing the appeal.

Kirby P said: "I agree".

Meagher JA said (inter alia): "I dissent. In my view it is clear beyond argument that this appeal should succeed."

(*Fountain & Anor v Bank of America National Trust & Savings Assoc* 23 October 1992)

Mediation Column

Dispute Resolution Handbook Available

The Australian Commercial Disputes Centre (Level 4, 50 Park Street, Sydney 2000) has released the *Australian Dispute Resolution Handbook*, by Michael Ahrens and Gavin Witcombe. Published with a grant from the Law Foundation of NSW, it is available free with a self-addressed envelope with a stamp value of \$1.20.

The handbook is designed to assist in the choice of an appropriate dispute resolution clause for insertion in contracts. It describes the various dispute resolution methods and organisations, such as ACDC and LEADR. And it includes a series of contract clauses to provide for mediation, expert determination, domestic arbitration, and so on.

Readers should be aware that the clauses providing for consensual means of dispute resolution (such as mediation) may need to be reviewed critically in the light of *Hooper Baillie Associated Limited v Natcon Group Pty Ltd & Ors* (unreported, 13 April 1992, Supreme Court of NSW, Giles J). That decision would seem to require such clauses to be in *Scott v Avery* form and to be fairly certain in operation in order to be enforceable.

Training Barristers to be Mediators

Through LEADR (Lawyers Engaged in Alternative Dispute Resolution), the Bar Association has now provided training to 65 barristers wishing to be mediators. The first four-day course, limited to 30 barristers, was fully subscribed within about 10 days of being advertised and was held in August. It seems to have been very favourably received by those attending it. The second course, held at the end of October and in mid-November, was stretched to allow 35 participants. If demand keeps up, it seems likely that the Bar Association will organise further courses in 1993. Those interested should contact Robert Angyal or Mary Walker, both members of the Bar's ADR Task Force.

Settlement 'Week' 1992

Settlement 'Week' 1992 ran from October 12-30 this year. Organised by the Law Society's Dispute Resolution Committee, with \$100,000 funding from the Law Foundation and the NSW State Government, Settlement Week 1992 will ultimately involve the mediation of about 500 Supreme Court and District Court cases, and 10 Family Court cases. Many cases will not actually go to mediation until November or even December, partly because many parties were slow in paying the \$400 fee per party required to pay the mediators, and also because many matters were volunteered late.

About 13 barristers are among the 124 mediators to whom Settlement Week cases were assigned. The panel of mediators was closed before the Bar's two courses for barristers wishing to be mediators had been completed.

Those barristers who are trained as mediators who wish to be considered for future Settlement Week panels should write to:

Mrs Bridget Sordo
Responsible Legal Officer,
Dispute Resolution Committee
Law Society of NSW
DX 362 SYDNEY

Mediation of Computer Disputes in Florida

According to *Litigation News*, the newsletter of the American Bar Association's Section of Litigation, the Florida Bar has set up a voluntary mediation process exclusively for computer hardware and software disputes. The project offers some 15 specially trained mediators with a strong background in computer litigation, plus mediation rules adapted for computer-related disputes. One unusual aspect of the rules is that they allow the mediator to hire an independent technical expert. □

Robbin' Who?

Commonwealth Director of Public Prosecution v Machias

In the Court of Criminal Appeal
Gleeson CJ
Handley JA
Badgery-Parker J

7 August 1992

(The respondent had pleaded guilty to 159 charges of forgery contrary to s 67(b) of the *Commonwealth Crimes Act* in relation to cheques. The DPP appealed on the ground that the sentence of imprisonment for a fixed term of 6 months imposed by the sentencing judge was inadequate. The forgeries had defrauded the Commonwealth Bank of approximately \$495,000.)

Scragg (Counsel for the respondent): "In this case your Honours, the crimes were not directed against members of the public or against the respondent's employer but against the Commonwealth Bank which is a large and wealthy institution. The objective criminality of these offences is therefore somewhat less than otherwise might have been the case."

Handley JA: "That is the principle recognised in the case of *The Crown v Hood*, is it not?"

Scragg: "I am not aware of that case your Honours, but we would rely upon it."

Gleeson CJ: "The case in question is *The Crown v R Hood*, Mr Scragg."

Scragg: "Yes, your Honour. But we submit that it is a mitigating factor in this case that these crimes were committed against the Commonwealth Bank."

Gleeson CJ: "The case that Mr Justice Handley was referring to concerned a Mr Robin Hood, Mr Scragg."

The Court subsequently allowed the Director's appeal and in his reasons for judgment the Chief Justice rejected the submission of counsel for the respondent that the objective criminality of the offences was reduced because the victim was the Commonwealth Bank. □

Admission Boards Course to be Reviewed

A major review of the Admission Boards course has recently commenced. The course, often known as the SAB or BAB, now has over 3,800 students enrolled. This makes it one of the largest law courses in the world.

The review is to be carried out by the Centre for Legal Education. The centre is an initiative of the Law Foundation of NSW. One of its aims is to carry out policy-oriented research for the admitting authorities and professional bodies, and thus seek to support more informed decision-making in regard to legal education in NSW.

Mr Justice Cohen, the Presiding Member of the Barristers and Solicitors Admission Boards, in announcing the review, said:

"The review is not the result of any decision to close down the course. What we are looking for is comprehensive and reliable information on the course, both as to the students and their performance, and the course as an academic activity. So we see the review as supplying information for decision-making."

He also said that:

"Whilst the Admission Boards course has been dealt with in some length in the Bowen and Pearce reviews of legal education, this will be the first review initiated by the boards themselves. Previously we have not had the resources to undertake such a review. Now, through the work of the Centre for Legal Education, the Boards will have comprehensive and detailed reports on the course. This will enable us to make better-informed decisions in the future."

The review will be in two parts. The first will involve a statistical analysis of data on the students in the course. Information will be collected and analysed on matters such as the different groups of students in the course (graduates, mature age, etc) aspects of their performance in the course, including their relative success rates; and the time they take to complete the course. Discernible trends over time will be a matter of particular interest.

To supplement this, all students in the course will receive a questionnaire which will seek to answer two questions:

- Why the Admission Boards course is their chosen method of studying law; and
- What they plan to do with the qualification when they finish the course.

This information will be correlated with other statistics to provide useful information for a range of areas, including future numbers in the profession.

This will then lead on to the second stage, which will be a comprehensive review of the course itself. The centre will work with a leading academic with experience in law curriculum design and review. In this part of the review, matters such as the overall aims of the course, the subjects offered, the teaching and assessing methods, and the procedures for appointment of teachers and examiners will be scrutinised.

In reviewing the course itself the boards will be doing what all law schools must regularly do as part of their good management techniques within an academic institution. □

Report on the District Court Rules Committee

In the past year the Rules Committee has made startling and far-reaching changes to the rules which will serve to revolutionise the conduct of litigation in NSW. Those changes include the following:

- reducing the qualification for entry into the commercial list from more than 4 days to more than 2 days;
- permitting third parties to move to set aside subpoenas or recover costs in complying with subpoenas;
- introducing rules relating to *Motor Accidents Act* proceedings requiring preparation of cases before proceedings are commenced;
- strengthening the costs sanctions supporting notices to admit;
- declaring the court's power to direct that evidence be given other than orally;
- omitting the court holiday on Easter Tuesday(!);
- introducing practice notes relating to costs sanctions on the overuse of expert witnesses and relating to out-of-pocket expenses;
- generally creating greater uniformity between the District Court rules and the Supreme Court rules.

It is anticipated that these changes will further ease the delay between commencement of proceedings and hearing and further reduce the backlog of cases.

In the past two years the backlog has been reduced from 20,000 to 9,000. The number of fresh proceedings commenced has also markedly decreased.

If the profession uses the court rules to effect, cases can be more efficiently and cheaply prepared and completed. □

The Curran Foundation St Vincent's Hospital

The Curran Foundation is an important source of funding for St Vincent's Hospital.

Established in 1984 with the aim to build a capital fund of \$5 million, the income from which is granted to support hospital works which otherwise would not be funded.

All donations over \$2 are fully tax deductible and assist to build a permanent discretionary fund for the benefit of *all* medical departments at St Vincent's.

In giving, "small can be beautiful", and it is the timing and availability of the money when needed that make the impact, rather than the size of the donation.

Membership is offered to individuals contributing \$5,000 over five years.

Bequests and gifts through wills are vital to this fundraising program.

Donors are reassured their wishes are executed as intended by the Trustees of the Paul and Elizabeth Curran Foundation, with each Trustee a representative of the hospital, the Church and legal profession.

For further information please contact the Executive Director. □

Environmental Law Conference Hong Kong - October 1993

Following on from the success of the Second International Environmental Law Conference, held in Bangkok in August 1991, the National Environmental Law Association of Australia (NELA) has decided to hold its Third International Conference on Environmental Law in Hong Kong commencing on 17 October 1993.

The theme of the conference will be "Developing Asia and the South Pacific Rim - Environmental Consequences and Legal Solutions". LAWASIA was a co-host of the Bangkok Conference and it is hoped that it will be involved again with the Hong Kong conference.

For those who are not familiar with NELA, it is a multi-disciplinary body which believes that a multi-disciplinary approach is essential to finding the right solutions to matters affecting the environment. Membership of NELA is open to individuals, be they members of public-interest groups, lawyers, planners, architects, engineers, scientists, government officers or students, who have an interest in the law relating to the environment. NELA has developed a reputation for organising national and international conferences which are highly successful and relevant to current issues. The Hong Kong conference promises to live up to and enhance this reputation.

All inquiries concerning the conference or membership of NELA should be directed to the Executive Officer, National Environmental Law Association, Private Bag 6, PO Deakin ACT 2600 □

Julius Stone Scholar

The first Julius Stone Scholar has been appointed following the successful establishment of the endowment in honour of the late Julius Stone. The scholar is Kam Fan Sin. Mr Sin comes to Sydney from Hong Kong. His doctoral work will address problems of unit trusts, a timely focus in the light of the impact that the Maxwell family trusts are having upon the late Robert Maxwell's fallen media empire.

Mr Sin graduated from the University of Hong Kong Law School in 1979, winning the Simon K Y Lee Medal. He also holds a Master of Laws from the same university. Mr Sin is also the author of *Building Project Finance in Hong Kong: Law and Practice* (1987).

Co-convenor of the Foundation, David Knoll, said "the quality and number of applications were outstanding, and reflected well upon the prestige of being associated with the name of Julius Stone. Mr Knoll also announced that "the scholarship is 80% endowed and will be offered perpetually to support young legal scholars, to whom Stone was particularly dedicated. The Foundation was delighted by the generosity of the many lawyers and friends who contributed financially to the scholarship, even in difficult economic times.

For further information contact David D Knoll (bus) 390 2159 (ah) 398 1658. □

Extraordinary Service

On 10 September 1992 the Attorney-General, the Honourable John Hannaford, attended a unique event in Barristers' Chambers. On this day, Mr Greg Isaac, clerk to the 12th floor Wentworth Chambers attained the age of 65 and this event, together with 20 years of service as a clerk to that floor was celebrated.

Greg Isaac retired as a Chief Petty Officer with the Royal Australian Navy in 1956. In July 1957 he became clerk to Chalfont Chambers. He was clerk there to several barristers who are now serving on the Bench, including their Honours Sheller and Sharpe and the late C D Monohan, former Chairman of the District Court Judges.

In 1963 Greg Isaac became clerk to Mena House Chambers. He served in this capacity from 1963 to 1972 and during this time was clerk to more than 42 barristers. In 1972 he became Clerk to the 12th Floor of Wentworth Chambers. He is one of the three longest-serving clerks in Sydney and during this twenty-year period he has clerked for a total of 43 judges and masters, including 19 judges and 2 masters currently serving in the Supreme Court; 10 judges currently serving in the District Court; and 4 judges currently serving in other jurisdictions, including the Family, Land and Environment, and Industrial courts.

The photograph reproduced records the presentation of a silver tray to Greg Isaac by the Attorney-General which was inscribed:

PRESENTED TO
GREG ISAAC

on the occasion of his Sixty Fifth Birthday
by

The Honourable John Hannaford - Attorney General
in the State of N.S.W. on behalf of the Barristers of
the 12th Floor Wentworth Chambers.

In recognition of the loyal and painstaking service
he has rendered to them during the past 20 years.

12.9.92

□ Dennis A Cowdroy QC



Golf -Bench and Bar v Services

In excess of thirty members of the Bench and Bar engaged an approximately equal number from the services in the annual Bench and Bar v Services golf match on 17 July 1992. The event was held in very pleasant conditions over the Pagewood course of Bonnie Doon Golf Club.

An extremely enjoyable feature of the day was the presence, in addition to our own Bar, of eight members of the Bar of Northern Ireland. The Ulstermen were here on holiday partly in response to the visit of some of us to Scotland and Ireland in 1990. They were admitted to our Bar just prior to the golf match.

Despite the contribution to the Bench and Bar team by the Ulstermen, some of whom hold single-figure handicaps from clubs such as Royal Portrush, Royal Belfast and Royal County Down, we were trounced by the services 11 matches to 5 with 2 matches drawn.

The winners in both A Division and B Division were from the services, but it is pleasing to report that Peter Kite of the Bar, and Bonnie Doon, won a bunch of bananas for the long drive on the 18th, a wallop that was not only prodigious in its length but finished right in the middle of the fairway.

Bob Toner should have won a prize for the most number of excursions into the rough. Every time I saw him he seemed to be intent on killing several snakes - there could be no other explanation for the number of times he ferociously wielded an iron club in knee-high grass. One of the Irishmen commented that he thought Bwana Bob had mistaken the course for a Kenyan game park and had decided to go on safari.

Sixty-four people, some of whom had not played golf, dined in the evening in our dining room and, given the lateness of the hour when they were hosed out the door, it seems everyone had a great time.

Our Irish guests very kindly presented to the Bar Association a sterling silver medal in a handsome presentation case fitted with a silver plate onto which can be inscribed the names of winners of the trophy. The Irishmen thought that it would be appropriate for the medal to be played for on an annual, or other, basis and consideration will be given to an appropriate format for such an event.

The medal can be inspected in the "Gleeson cabinet" in the common room.

Those interested in receiving notice of future golfing events please contact Eva in the Bar Association office and ask for your name to be added to the relevant mailing list. □

John Maconachie

Tennis

The Bar Association has shown its heart, yet again, in having been one of the principal sponsors in a Charity Tennis event in aid of the House With No Steps. Because of our special status, we had the opportunity to field a team of three for the tournament, which was fixed for one day in the October long weekend at the Darling Harbour Sporting Complex.

The format involved the team theoretically playing a number of games of doubles. The fourth person for each of the teams was made up by one of the number of tennis professionals who gave up their time for the charity. In so far as the Australian Indoor Tennis Titles were being held in the following week, a number of notable current professionals were present.

In any activity relating to success in court, we expect the Bar team to win. The same can be said in relation to matters on court.

WE WON! What hope did these bankers, insurers, stock brokers or real estate valuers have against the Bar's command in all courts. Well done, Mr Justice Priestley, Coombs QC and Callaway. Each was given a new tennis racquet.

Unfortunately, play in the actual tournament was washed out. Our victory occurred when we were the party named as the winner following a draw out of a hat.

In the period while the competitors were waiting for a break, John Alexander interviewed the other tennis professionals. Our President showed his potential for a future television career when in due course he interviewed John Alexander.

An adjourned tournament was conducted in a friendly and informal manner on October 16. The double default, by reason of the unavailability of Coombs QC and later Mr Justice Priestley, in no way reflected any fears on their part that their prizes had to be handed back. Jack Callaway appeared and was absolved by merely omitting to bring his prize!!

Although the afternoon was fine, our team (Stevens QC, Callaway and Powell) had to cope with almost gale-force winds. Callaway's third hit of the day, which sidelined Brad Drewett, earned him the shot of the day. Unfortunately, neither it nor anything approaching it was thereafter repeated.

Stevens QC foolishly partnered Callaway thereafter and ended up complaining of back problems, no doubt associated with carrying his partner. Powell demonstrated excellent brickwalling tactics which earned him praise from Mark Edmondson.

Importantly, it was when socialising that the wider benefits of the Bar's charitable gesture could be seen. We aced the Law Society merely by being there. Let us hope the new Bar Council continues the support of charity.

Perhaps next year the paparazzi may be present to snap a few shots. □ C J Stevens QC



"It is a pretty compelling argument if one could say, 'Not only did we win, but we prepared our case with meticulous care, and that meant the trial lasted half as long as it should have.'"

*The Hon. Mr. Justice J.H. Phillips, Chief Justice of Victoria, Supreme Court.
Assoc. of Litigation Support Managers Conference 1992*

Largest cases held in history

The handling of the now famous volume of documents in the recent '**Spedley Case**' has shown the latest innovations in computerised litigation support. The Barristers in the case had in court a briefcase-sized computer that held the entire transcript – including the previous day – fully linked to exhibits, statements, other documents and graphics.

Each Barrister was able to add personal remarks and bookmarks which instantly returned them to important places marked in the transcript.

Scantext's computerised litigation support was obviously a substantial feature of the case. The software used was the Folio VIEWS package – the same one used by WordPerfect and the Novell Corporation – and was in place to assist the Barristers in their 'out of court' settlement negotiations.

In another recent matter, '**The Occidental Case**', the Commonwealth Bank of Australia recovered a great proportion of its \$57 million claim.

The ANZ bank did not use Scantext's computerised litigation support. Its position after the case was, 'unfortunate'...

*Computerisation is a thing of the present.
As His Honour, Justice O'Bryan said in the
'Occidental Case' "I am sure you can get a
reminder from the gentleman on your left.
He has got a computer ..."*

Write to Scantext (c/- DX 325 Sydney) or phone on (02) 261 4511 for technical details on the best computerised litigation support for even the smallest cases.