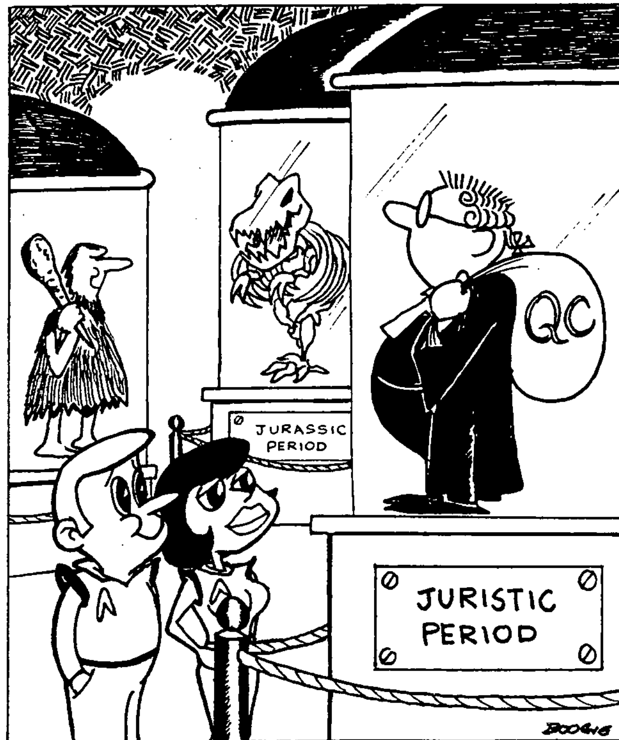
The Last QC

Lee Aitken casts an ominous eye to the future.

A chill wind swept down the street, and in the Ministry of Truth the clocks were striking thirteen - it was late in the dreary October of a most immemorial year. From his eyrie on the 85th floor of the Babette Smith Memorial Tower, Bullfry QC could vaguely descry a hapless junior, caught in the wind's vortex, being blown helplessly against the glass spires of St Mary's.

"When had the rot really set in?" he wondered, as he struggled out of his all-in-one "Barzoot" (Ede and Ravenscroft pat. pen) in which, like a fireman's uniform, wig, jabot, bar jacket and stripey trousers were artfully combined into a single inelegant garment; it saved vital minutes changing before seeking special leave, a thing lately too little requested of him.

Certainly, the introduction of the new Part IVAAA provisions ("Barristers' Anti-competitive Practices") into the *Trade Practices Act* in the late '90s had caused some problems. The "competitive" requirement that the prospective client be advised to seek the services of a member of the large firms' own "in-house" advocacy "teams" as the junior had had a chilling effect on the lower levels of practice, to put it mildly. (The fact that this inevitably resulted in a much higher cost to the client because of the overhead involved had finally occurred to the gurus of the Commission, but not before the "experiment" had been judged a great success and a whole generation of the junior Bar had been wiped out.)



And had it been wise, Bullfry wondered, to allow direct client access to the Bar with the possibility of conveyancing and trust accounts thrown in? The huge Bar-led trust defalcations which had occurred during the early years of the new century, had caused a massive increase in the insurance premiums. (He had had a recent happy postcard from old "Sponger" Snodgrass who, beating the account inspectors, the world-wide *Mareva*, and the extradition proceedings, was living out life merrily with his catamite somewhere on the Costa Brava.)

A higher premium, however, was in any event probably inevitable with the judicial repeal of the "antiquated" notion of in-court immunity - a whole new profession, colloquially called "transcript traducers" had sprung up, devoted solely to a computer-assisted analysis of cases with a view to finding negligence in an unguarded aside, or a faulty question. (Poor old Blenkinsop had been bankrupted on a sexist joke in the Court of Appeal which had not found favour with the President and caused the appeal to be lost. Cover had been denied because of the "laughter-in-court" exclusion in the 2008 amendment to the policy. Blenky had thought of going "bare" against just such an eventuality many years before, but the marital vagaries of the third Mrs Blenkinsop had unwisely caused him to hesitate.)

Had the Australia-wide practising certificate been a good idea? Only the other day, after he had advised, copiously and irrelevantly, on a complicated point of Queensland constitutional law, had he remembered with horror that it was a unicameral legislature. On his last appearance in Victoria, in a befuddled state after too long a pre-trial sojourn in the "Gold Clipper Lounge", he had found himself involved in fisticuffs with his opponent over which side of the Bar table to occupy. Only an abject apology had forestalled his immediate imprisonment for contempt on view. No wonder they used to say, "Get me Bullfry, but get him before lunch".

He walked over and rebooted his "Jurimetron-9000" and put on the "virtual reality" wig. What a boon these new programs were. Nothing better than a hard workout with a difficult Court of Appeal - the hologram of the Chief Justice was particularly amusing! He carefully selected "Angry-Judge (3)" as the third member of the Bench and punched in *Foxwell v Van Grutten* as the precedent in issue. But somehow the argument wouldn't flow and he found himself back at the window.

Relations with the "cadet branch" of the profession - as he liked to call it - had been difficult of late, the more so because most of them were now junior "partners" in one of the "Big Six" accounting firms. He had always maintained a certain reserve between himself and his instructors, a reserve now increased because of their accounting associations. No matter how hard the forensic *sharia* had become, he had always followed the precept of Hemingway's hunter in *Francis Macomber* - "I'm still drinking their whisky!" he would reply to any inquirer in the express lift.

And court itself had become so difficult. The requirement that all argument be first reduced to writing and then submitted on disc for scrutiny under the COMPUJUDGE program (a Windows 2015 update) to exclude any sexist, racist or other exceptionable material had caused problems to the older players, as had the new Practice Direction [No 298 of

2030] that *only* unreported decisions could be relied on. He was wise enough to realise that he had long reached the age when any change to routine upset him greatly, as did the appointment of "whippersnappers" to the Bench. The thought caused him to cast an avuncular smile at the autographed ("To my raging bull with admiration") photo - bikini-clad - of the present President, a former reader, taken years before at a Bondi Floor Bar-B-Q - "what winsome dimples". But what of these other new jurists?

The introduction of general quotas in appointment to judicial office had been bad enough, but the requirement that a certain percentage of particularly gullible people be appointed (selected by a refined version of the Luscher colour test) in order to be fair to applicants in section 52 claims had been the last straw. (An attempt to appoint a specified number of recidivists to sit as "assessors" in the Court of Criminal Appeal had only been rejected by a single vote.) The old days, when ascent to the "velvet footstool" was a reasonable expectation for those who did not linger too long over their potations, had long passed.

In any event, as old "Snorter" had been saying to him only this afternoon in the Common Room, the "ten-minute" rule on oral argument, rigorously enforced by the strobe light and the klaxon, had eliminated much of the pleasure of advocacy, in the same way as the abolition of common juries had removed the possibility of its exercise.

But, then, financially at least, practices had been revived by the introduction of the Legalcard in 2006. Those wonderful judges on the High Court, reinterpreting section 80, had managed to find an implied right to senior counsel in every matter, civil or criminal, which would have involved a jury had the case been tried in 1900! The S-G, over lunch, had put it down to a new view on "denotation". The subsequent run on the dollar had been unfortunate, but it had introduced "bulk billing" to the Bar which had saved the day for many. He had also been fortunate to be retained in the "mesothelioma-led" recovery among his own comrades early in the new century as a result of some strange material escaping into the cooling and air-conditioning units of the old Supreme Court building before its final destruction by fire.

And the class actions! Only the other day he had received a letter before action from one of the biggest "contingency" firms in the city, intimating a claim on behalf of 22 students in his Legal History class who had failed the course and, consequently, been deprived of the chance of attending the College of Law. What was the point of being the Challis Lecturer in Late Twentieth Century Jurisprudence if you couldn't fail people!

Regrets? He'd had a few. Ever the jurist manque, his only real chance destroyed after that unfortunate breach of the "Meagher Rules" on sexual harassment - as he had told the Tribunal, it had been a *very* crowded lift. At least he had "made" some new law on the defence of irresistible impulse - the condition of practice that in future he keep his hands in his pockets had subsequently caused its own difficulties before a comely Deputy Registrar, but that was best forgotten.

He felt a sudden malaise. He glanced up at his favourite objet d'art, the skull on his bookshelf, incautiously purchased from the executrix of a former appellate judge, with its mordant brass caption, "hodie mihi, cras tibi". It seemed to be speaking to him - what was it: "the horror, the horror" - or "Part 8 rule 12"? - or were they the same thing?

He must have fallen; through the astro-felt underlay of the carpet he could but faintly hear the fading beat of his heart. ❑

The Referendum We Had To Have

I am probably the only person still alive today who knows the inside story of the successful referendum which led to an amendment of the Australian Constitution empowering the Parliament to legislate with respect to domestic air travel. I was, at the time, 1928(?) a law clerk articled to Alfred Stephen Henry, a solicitor carrying on a sole practice in Pitt Street. His brother, Goya, was a most likeable, happy-go-lucky fellow who had a passion for flying and a strong dislike of civil aviation officials.

One morning he stormed into his brother's office and said, "The bastards are after me again. They reckon they'll probably slap another summons on me for something they didn't like last Saturday."

Alfred said, "I suppose you'll want me to go down to court again and plead guilty when they do".

Goya replied, "I hate this pleading guilty business. Isn't there some way we can fight them?"

His brother said, "Only if you're prepared to take it to the High Court and possibly the Privy Council. It's my belief the regulations are ultra vires."

"What are we waiting for?" was Goya's response.

"Well, first you have to get a summons" said his brother. "If you were to take that crate of yours up over Mascot some Saturday and spend the afternoon doing anti-clockwise turns or whatever it is you're not supposed to do, that might start the ball rolling."

"No problem", said Goya with a happy grin.

He was duly summoned and Alfred briefed senior counsel who argued that when the Constitution was adopted there was no civil aviation in Australia and it followed that Parliament could not have been given power to legislate with regard to it. The High Court reserved its decision for a very lengthy period and finally upheld the argument, holding that the regulations were ultra vires except as to those covering international flights which were covered by the treaty-making powers of the Commonwealth: *Henry v The Commonwealth* (1936) 55 CLR 608.

The decision made it essential that the Constitution be amended to give Parliament the necessary power and in the referendum which was subsequently held, a majority of voters in a majority of States approved the amendment. ❑

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