



Maverick Litigants





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*A History of Vexatious Litigants
in Australia 1930–2008*

Simon Smith

Maverick Publications
2009

Published in Melbourne by Maverick Publications
ABN 91374120334
13 Scott Street Elwood, Victoria 3184 Australia
T: 03 9531 5278
E: naylor-smith@gmail.com

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National Library of Australia
Cataloguing-in-Publication entry

Smith, Simon.
Maverick Litigants: a history of vexatious litigants in Australia
1930–2008 / Simon Smith.
1st ed.
ISBN 978 0646514642 (pbk).
Includes index.
Bibliography.
Actions and defences — Australia — History.
Civil procedure — Australia — History.
Pro se representation — Australia — History.
Frivolous suits (Civil procedure) — Australia — History.

347.9405

Edited and indexed by Sandra McCullough, Kyneton

Typeset by Last Word, Melbourne

Printed and bound by BPA Print Group Pty Ltd, Burwood, Victoria, 3125
Australia

Cover: Supreme Court building, corner of William and Little Bourke Streets,
Melbourne. *Melbourne Truth* 1931. Courtesy State Library of Victoria.
Design by Dominique Hanlon, Motion Advertising and Design Pty Ltd.

For Bronwyn



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Acknowledgements

This book has been fun. It grew out of my discovery in the 1980s that a small group of people called vexatious litigants haunted the superior courts. Indeed, as a lawyer then working in Springvale Victoria at Australia's first and busiest community legal centre, I was part of the vexatious litigant circuit. Well-meaning Supreme Court judges would refer persistent litigants direct to me for free grass-roots advice, presumably in the hope that I would either advise successfully against further action or take the case on and shape it for a final determination. I was never successful. However, I was intrigued by these litigants who had such unquestioning faith that the legal system would deliver them "justice" despite constant rebuffs. They would arrive bearing a suitcase stuffed with papers and clippings and display endless patience and courtesy. Although invariably their matters were out of time and faced other formidable legal hurdles it was sometimes possible to detect an underlying injustice. It was clear that there was a story to be told. I resolved that when circumstances permitted I would return to them and perhaps write a book.

In July 2004 I began the task. It has taken me to all parts of Australia and introduced me to some fascinating Australians. Over nearly four years of part-time research and writing I have intersected with many people and been shown remarkable generosity. I have been to Nambour in Queensland, looking for litigant documents and stories. There, stumbling among the cobwebs under a "Queenslander" and sorting through decades-old court papers, I was also shown such incidental treasures as a piece of the Eureka flag. I have been to Perth in Western Australia, where I was given photos of that State's first vexatious litigant and stories to match. I have been to the nation's capital, Canberra, where the records of the High Court, the National Archives and the National Library gave up remarkable treasures. And I have been to Prato, Italy, for the "Access to Justice" conference that confirmed that vexatious litigants are an international phenomenon.

My research efforts have benefited greatly from the assistance of many people and organisations with their unstinting interest and generosity of time. Unfortunately, there are too many to name specifically lest I offend by inadvertent omission. First, there are the descendants and families of litigants, practitioners, former judges, former politicians and friends of the litigants who allowed me to interview them. Their knowledge and insights were invaluable. Then there are the many libraries, archives and other organisations that maintain and preserve the nation's legal heritage through documents and books and make them available for research. Here, I specifically acknowledge the

generosity of the following who have granted permission for me to reproduce various images: John Barlow; Berta Butler; Graeme Bienvenu; Sir Zelman Cowen; the Elsa Davis Collection; Alan and Barbara Leary; Brendan and Bernard Millane, the National Australian Archives; the Royal Society for the Prevention of Cruelty to Animals of Victoria and the State Libraries of Victoria and Western Australia.

I also appreciate the wise counsel and assistance of numerous friends and colleagues during this journey. However, I particularly recognise and thank Dr Elise Histed for her support as PhD supervisor and Sandy McCullough for her generous help with production editing.

Finally, special thanks to the Naylor girls in my life: Bronwyn, Rebecca and Jessica. Your tolerance, interest in and understanding of my pursuit of the vexatious made it all possible. Now for the documentary!

Simon Smith
August 2009

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PART ONE

**Background to the
vexatious litigant
sanction**



CHAPTER ONE

Introduction

The reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man.

George Bernard Shaw (1903)

Access to justice is a fundamental tenet of a democratic society. Historically, its roots trace to the *Magna Carta* in 1215 when the Barons, arguably the first litigants in person, secured from King John the right to petition the Crown about their grievances. Since then, the common law has evolved a judiciary independent from the Crown that ensures access to redress for the ordinary citizen. In modern times, particularly since the 1970s, access has been promoted further through justice initiatives such as community legal centres, legal aid, *Law Handbooks*, freedom of information (FOI) laws, tribunals, industry ombudsman schemes and online tool kits. More recently, access has been further enhanced through the development of global human rights principles.

The reverse side of access to justice occurs when the courts take the unusual step of formally declaring a person who has repeatedly abused their processes to be a “vexatious litigant”. This means that person can no longer initiate any further legal proceedings without first obtaining the permission of the court. Although obscure, the sanction was first enacted in England as the *Vexatious Actions Act 1896*¹ and wholly adopted in Australia (Victoria) in

¹ 59 & 60 Vict c 51. It read:

1. It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the court or judge that such legal proceeding is not an abuse of the process of the court, and that there is prima facie ground for such proceeding. A copy of such order shall be published in the London Gazette.
- 2(1) This Act shall not extend to Scotland or Ireland.

1928.² However, we know little about the sanction and this lack of knowledge raises many questions. Where did it come from and why? How many people have been declared under its provisions? Why? What do we know about them? What happens to them after they are declared vexatious? How does the legal system go about dealing with them both before commencing declaration proceedings and afterwards? How do the media portray them? What does use of the sanction tell us about the workings of the legal system? What is the current role of the sanction? Does it work anyway?

There is little written or published about the sanction, the socio-political context in which it operates or about the stories of individual declared vexatious litigants. This book seeks to fill some of that void. The research is timely, as it comes in a period when discussion of human rights principles and the importance of access to justice are on the ascendant globally yet, in Australia, State Governments appear to be turning increasingly to the vexatious litigant sanction in order to control what they perceive to be unreasonable litigant activity. One example is the enactment in Queensland of the *Vexatious Proceedings Act 2005*. This Act modernises the sanction in that State and serves as model uniform legislation intended for adoption in every Australian superior court jurisdiction. Another example was the Victorian legislative proposal in 2008 to give the Victorian Civil and Administrative Tribunal (VCAT) power to declare persistent FOI applicants vexatious litigants. That Bill proposed, for the first time, that State Government departments would have standing to seek such orders. The proposal was editorialised by the Melbourne *Herald-Sun* as “a powerful weapon in the hands of obstructionist public servants”.³ The Bill was defeated in the Legislative Council.⁴ That same year the Victorian Government received the *Civil Justice Review* report of the Victorian Law Reform Commission that contained a number of recommendations in relation to vexatious litigants.⁵ Then, in late 2008, the Law Reform Committee of the Victorian Parliament presented its final report on a specific reference on issues relating to vexatious litigants.⁶ For its part, the Commonwealth Government has been quiet.

² *Supreme Court Act 1928* (Vic), section 33. It is now the *Supreme Court Act 1986* (Vic), section 21.

³ 7 February 2008.

⁴ Victoria, 477 *Parliamentary Debates*, Legislative Council, 28 February 2008, 456.

⁵ See, for example, Recommendations 124 to 132, Victorian Law Reform Commission, *Civil Justice Review: Report 14*, 40–41. See further at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe72602960b930/VLRC%20Civil%20Justice%20Review%20-%20Report.pdf> (29 May 2008).

⁶ Parliament of Victoria, *Inquiry into Vexatious Litigants: Final Report*, Law Reform Committee, 2008. See <http://www.parliament.vic.gov.au/lawreform/inquiries/Vexatious%20Litigants/final%20report.pdf> (5 February 2009). See also <http://www.parliament.vic.gov.au/lawreform/default.htm> (8 March 2008).

Who then are vexatious litigants? A common view is that they are litigants who:

...may or may not be represented. They often engage in “solicitor shopping” and excessive interlocutory and pre trial-manoeuvres. They may raise spurious claims or defences, flout time limits to cause delays, pursue unmeritorious applications, refuse reasonable settlement offers, fail to pay orders for costs and launch frivolous appeals. The conduct of unreasonable litigants impinges on the effectiveness and efficiency of the justice system and makes the process of litigation more expensive and protracted for everyone..⁷

This is the view promoted by at least one State Law Reform Commission,⁸ the tabloid press and a major Australian law journal, all of which describe such litigants as “serial pests”⁹ or, rather dismissively, as “these people”.¹⁰

I argue in this book that there is another perspective that contradicts these common assumptions. I will demonstrate that the number of Australians declared as vexatious litigants over 75 years is low. Nor, in real terms, is the number increasing. Further, I will demonstrate that the sanction is largely ineffective, even if modernised, in stopping continued litigation by declared litigants. It is a blunt weapon that is broad in its reach but largely ineffective in addressing the issues surrounding the individual vexatious litigants. A particular weakness is that the sanction does not recognise that some vexatious litigants may have an underlying mental health issue that drives their behaviour. Importantly, by closely examining the stories of six litigants and bringing them fully into the public arena for the first time, I will suggest a view of vexatious litigants as an alternative to that of “serial pest”. I will argue that through the prism of history many, although not all, can be properly described as people of ideas and as reformers and activists seeking to advance those ideas, causes and talents through the legal system; and that a democratic society is stronger for that. In other words they can, as a group, be more fairly described as “maverick litigants”.¹¹

⁷ Law Reform Commission of Western Australia, *Civil and Criminal Justice System*, Report 92, 1999, 161.

⁸ *Ibid.*

⁹ For example, see Michael Pelly, “Nuisances in court: judges get tough on serial pests”, *Sydney Morning Herald*, 27 May 2004, 18; “Justice warns off pest”, *The Daily Telegraph*, 1 October 2004, 24; and “Pests cost \$6.2m”, *Herald Sun*, 11 September 2007, 4.

¹⁰ Peter Young, “Litigant Pests cost \$6.2M”, (2007) 81 *ALJ*, 907.

¹¹ Originally an American term, the word “maverick”, derives from a Texan farmer, lawyer and politician Samuel Maverick (1803–1870). In the 1840s–60s he stubbornly refused to brand his cattle and the name came to be applied to unbranded cattle. Samuel Maverick was a person who refused to be branded with the mob. See further at: http://en.wikipedia.org/wiki/Samuel_Augustus_Maverick (10 May 2008).

Defining vexatious litigants

The law defines vexatious litigants circumspectly. The Victorian provision is typical of that in most Australian States. They are people who:

habitually and persistently and without any reasonable ground instituted vexatious legal proceedings (whether civil or criminal) in the court, an inferior court or a tribunal against the same person or a different person.¹²

Upon finding those facts established, only a superior court judge can declare someone to be a vexatious litigant. This is rarely done. A litigant-in-person behaving unreasonably is not necessarily a vexatious litigant although, as we shall see, there is a tendency to equate the two. Nor, as recent corporate litigation indicates, is a vexatious litigant necessarily always an in-person litigant. Pivotal to the definition is an understanding of what constitutes “vexatious legal proceedings”.

Vexatious legal proceedings can be broadly categorised into one or other of two streams. The first involves cases where parties re-litigate a matter or matters previously before the court. Judicial control of litigants in this group places great reliance on the abuse of process principles *res judicata* and issue estoppel and the principle that states “a matter which should have been raised in earlier litigation may be barred” (otherwise known as the extended principle or the rule in *Henderson’s Case*).¹³ None of these principles is mutually exclusive and all reflect the rule of public policy that there must be finality in litigation. These principles find expression in the maxim *interest reipublicae ut sit finis litium*.¹⁴ This stream is most prominent in the six case studies below.

The second stream contains those cases that ostensibly come before the court as original, even imaginative, litigation but are nonetheless brought inappropriately and/or for an improper purpose. Control of cases in this group relies on the more generic principle of abuse of process¹⁵ a term noted for its lack of precision. Distinguishing this second group can be a difficult task as “today’s frivolity may be tomorrow’s law”.¹⁶ Examples of such cases can involve “forum shopping” and “collateral abuse”.¹⁷ Litigants involved in such

¹² *Supreme Court Act 1986* (Vic), section 21.

¹³ *Henderson v Henderson* (1843) 3 Hare; 67 ER 313. The description of these three principles is taken from the judgment of McGarvie J in *Port of Melbourne Authority v Anshun* [1980] VR 321, 324-325.

¹⁴ Tr: It concerns the commonwealth that there be an end of law suits.

¹⁵ For example, in *Packer v Meagher* [1984] 3 NSWLR 486.

¹⁶ D Risinger, “Honesty in Pleading and its Enforcement: Some ‘Striking’ problems with Federal Court Rule of Civil Procedure 11”, (1976) 61 *Minn LR* 1, 57.

¹⁷ For example, in *Packer v Meagher* [1984] 3 NSWLR 486 the court struck out, with an order for costs, the defamation action of a press baron against counsel assisting a Royal Commission. The court found that action had been brought for the ulterior purpose of investigating the origin of an allegation made before the Costigan Commission that Mr Kerry Packer was a powerful underworld figure codenamed “The Goanna”. The Commission had commenced in 1984 to investigate alleged corruption in the Painters

cases do not emerge as a major grouping among declared vexatious litigants. However, a linking theme between the two streams for vexatious litigant proceeding purposes is that the proceedings have been totally unsuccessful and have been “habitually and persistently” brought.

Once an application to declare someone a vexatious litigant is before a court, the court is not obliged to approach its task of determining reasonableness by examining each piece of litigation. Rather, it should take a global approach. For example, in 1897 *In re Chaffers Ex Parte The Attorney-General*,¹⁸ in declaring Alexander Chaffers the world’s first vexatious litigant, Wright J said:

...the consideration of whether a person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground does not depend on a minute examination of whether in each particular action there was or was not a reasonable ground: we must consider the number of actions brought, their general character and their results.¹⁹

That these are things to be determined objectively and not subjectively is clear from the 1960 decision of Omerod LJ of the English Court of Appeal in another vexatious litigant application under the English legislation. In *In re Vernazza*²⁰ His Honour said:

...the question is not whether they have been instituted vexatiously but whether the legal proceedings are in fact vexatious. I suppose most proceedings are vexatious to the person against whom they are directed, and, therefore the further question has to be considered whether, though they may be vexatious, they have been brought without any reasonable ground. This is a matter for the court to decide. But if, in the opinion of the court, the proceedings are vexatious and there is no reasonable ground for bringing them, then they are within the category at which this section aims.²¹

The words “habitually”, “persistently” and “without reasonable cause” in the legislation make it clear the volume of the litigation, its time span and its ultimate (unsuccessful) result are all factors that the court will take into account. In turn, these things will be demonstrated by such factors as the constant naming of the same defendant(s) and the continued failure or non-completion of the (re)litigation. For example, Alexander Chaffers was successful only

and Dockers Union but its focus gradually switched from the union to the activities of a hugely powerful figure, the Goanna. He was alleged to be the untouchable godfather of Australian crime, involved in tax evasion, corporate fraud, pornography, drug importation, money laundering and even murder. Through his lawyer, Malcolm Turnbull, Mr Packer denied the allegations. Prime Minister Hawke wound down the Commission in 2004 and no charges were ever laid against Mr Packer. See Elizabeth Krantz, “The Goanna is dead: long live the Goanna”, *Australian News Commentary*, 31 December 2005. See further at: <http://www.australian-news.com.au/Packer.htm> (10 April 2008).

¹⁸ (1897) 45 WR 365.

¹⁹ *Ibid*, 366.

²⁰ [1960] 1 QB 197.

²¹ *Ibid*, 208. This view has been regularly approved in Australia. See, for example, *Attorney-*

once in 48 actions over 40 years and regularly named the Speaker of the House of Commons and several Law Lords as defendants.²²

As a result, the court does not seek to explore any underlying basis for the litigation. Consistent with the English common law tradition, it eschews an inquisitorial function. The significance of this distinction will be a major theme of this book, as I will argue that the reluctance of the courts to go behind the presenting format of the litigation of in-person litigants, in particular, contributes to litigant frustration and continuing litigation.

The nature of the maverick litigant

Australia cherishes its eccentrics, dissenters, rascals, ratbags, cranks and agitators. There are numerous books celebrating that fact.²³ To explain this phenomenon authors and commentators draw variously on Australia's convict past, the forced emigration from Britain of political dissenters such as the Chartists, the isolation from Europe, the early privations of life in the bush and even the presence of unique fauna and flora. Within this odd mix egalitarian values that eschew a class system are celebrated. However, in the legal sphere at least, the environment is more restrained. It is an arena where the form of documentation, time limits, case law, wigs and gowns and the skills and courtesies of the professional advocate that make the system work, dominate. It is less tolerant of the litigant-in-person. It is as if they were an interloper.

This is not to say that the legal system does not appreciate the role of the dissenter and agitator in the broader social context. In *Neal v R*²⁴ the High Court had before it an appeal from an aboriginal elder, Percy Neal. He had been convicted and sentenced to two months in gaol by a magistrate for assault when he spat at a white man on an Aboriginal reserve in Queensland. His action followed a series of grievances over government administration of the reserve. On appeal to the Queensland Court of Criminal Appeal on the basis that the sentence had been manifestly excessive, his custodial sentence had been increased to six months. On further appeal, the High Court set aside the Court of Appeal sentence. Justice Murphy said:

That Mr Neal was an "agitator" or stirrer in the Magistrate's view obviously contributed to the severe penalty. If he is an agitator, he is in good company. Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown. As Wilde aptly pointed out in "The Soul of Man Under Socialism",

General v Wentworth (1988) 14 NSWLR 481, 490.

²² *In re Chaffers Ex Parte The Attorney-General* (1897) 45 WR 365; England, 42 *Parliamentary Debates (4th Series)* Cols 1410-1412, Lord Halsbury.

²³ For example, Keith Dunstan, *Wowsers*, 1968; Bill Wannon, *Legendary Australian: a colonial cavalcade of Adventurers, Eccentrics, Rogues, Ruffians, Heroines, Heroes, Hoaxers, Showmen, Pirates and Pioneers*, 1974; and Robert Holden, *Crackpots, Ratbags & Rebels: a Swag of Aussie Eccentrics*, 2005.

²⁴ (1982) 149 CLR 305.

“Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilization”. Mr Neal is entitled to be an agitator.²⁵

More recently, in a speech to students of Sydney University, McHugh J of the High Court (as he then was) confirmed the importance of agitators in a democratic society. He said:

Without agitators, societies stagnate and, as the communist dictatorships of Eastern Europe demonstrated, implode. Societies need “interfering, meddling people” that question the rules and practices that most of the community accepts without question.²⁶

Even then, though, His Honour’s bias was towards confining that agitation to traditional channels, as shown when he also said:

The law needs lawyers who will challenge the status quo, who will critique the current rules and principles, who will sow seeds of discontent in relation to those rules and principles when they are out of touch with contemporary society and thus bring the change that is required.²⁷

Conclusion

Accordingly, this book is in two parts. The first part constructs and explains the various dimensions of the vexatious litigant or, in medical terms, the querulent. It explores the differences in litigation across jurisdictions and the evolution, modernisation and effectiveness of the vexatious litigant sanction. It also offers, for the first time, an Australia-wide register of all known vexatious litigants from the introduction of the statutory sanction in 1928 to the present day. In particular, this first part canvasses the tension between litigants-in-person and vexatious litigants and queries whether the courts and government have misunderstood the cause(s) of current case management pressures, driven by an increase in litigants-in-person, leading them to misconceive the need for and nature of reform of the sanction.

The second part analyses, in depth, six case studies that capture the stories of seven of the first 10 declared litigants in the period 1930–1980 (excluding the Family Court). This part argues the central thesis that many, although not

²⁵ *Ibid*, 317. Justice Murphy has also been described as a maverick. See Graham Fricke, “A Tale of Two Maverick Judges”, Seminar: The Lionel Murphy Legacy in Troubled Times, Australian National University, 21 October 2006. See: http://law.anu.edu.au/nissl/Murphy_Fricke.pdf (10 May 2008).

²⁶ Justice M McHugh, “The Need for Agitators – the Risk of Stagnation”, Address to Sydney University Law Society Public Forum, Sydney 12 October 2005, 1. See further at: http://www.hcourt.gov.au/publications_05_2.html#MichaelMcHugh (8 March 2008).

²⁷ *Ibid*, 6.

all, vexatious litigants can be properly seen as people of ideas and as reformers and activists seeking to advance those ideas, causes and themselves through the legal system. They can be more fairly described as “maverick litigants”. The case studies cover the first 50 years operation of the sanction. The two parts to this book inform each other.

CHAPTER TWO

Different dimensions of the vexatious litigant

Introduction

Until recently individual vexatious litigants had not been studied nor their stories published. However, the work of a New Zealand academic, Professor Michael Taggart, is the exception. His first article, “Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896”,¹ was published in 2004. The paucity of historical scholarship in the area may reflect the relatively recent origin of the sanction, the lack of a critical mass of litigants declared vexatious and the problems associated with obtaining access to public documents while they are still “live”. These inhibitors have diminished now that a century has passed since the sanction was first enacted in England. There now exists in Australia a group of declared litigants that has moved into history and is capable of being studied.

The scarcity of publication is also evident in the official law reports. Not until the recent advent of online reporting have decisions declaring a litigant vexatious appeared with some regularity in the official Australian law reports. Between 1930 and 1980, the period canvassed by the case studies in this book, only the declaration of Rupert Millane was reported.² This is surprising, given the rarity of the order and the fact that access to justice is a fundamental tenet of the democratic system. One would have thought an order limiting that access would be worthy of reportage, especially given the precedent value of the early decisions interpreting new legislation. However, it is unlikely that this is an accidental omission. More likely it reflects a deliberate but unstated policy of report editors not to give vexatious litigants the oxygen of publicity.

Nevertheless, there is a growing literature on the relatively new phenomenon of litigants-in-person, particularly from England and Australia, while the themes of abusive and frivolous litigation receive extensive coverage in the

¹ Michael Taggart, “Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896”, (2004) 63 *Cambridge Law Journal* 656. More recently Professor Taggart has published “Vexing the Establishment: Jack Wiseman of Murrays Bay”, [2007] *New Zealand Law Review* 271.

² *In re Millane* [1930] VLR 381.

United States. In that country the unique combination of multiple State and federal jurisdictions, contingency fee incentives, a “no costs rule” in civil proceedings and constitutional guarantees of access to courts in criminal cases converge to give prominence to a high volume of abusive and frivolous cases. In this context the self-represented or *pro se* litigant³ receives considerable attention. The American literature examines the various causes of this litigation and critiques the political and legislative responses. The recent development of an American vexatious litigant sanction has also been the subject of some attention. These matters are discussed further below.

In the Australian context the literature has emerged from two different but related directions, the courts and psychiatry. The first has focused on management and control of the perceived rise in numbers of litigants-in-person in the court system. This has been a recent development. The literature not only explores explanations, such as reduced funding for legal aid and the rise of high volume courts such as the Family Court, but also develops a profile of the typical litigant-in-person. There is an implied assumption that a litigant-in-person is commonly a vexatious litigant. This reflects a loose use of terminology. The literature focuses on responses to this rise in unrepresented litigants, describing the development of case management systems and guidelines for judges hearing cases involving litigants-in-person. The literature is largely uncritical. However, commentators in the family law arena suggest that family law reforms sympathetic to the litigant-in-person and designed to encourage parental responsibility may in fact have led to increased vexatious litigation in that jurisdiction.⁴

The rise in numbers of litigants-in-person has also prompted government review of the vexatious litigant sanction and has led to model uniform legislation being enacted through the Queensland Parliament.⁵ This model legislation has “modernised” the sanction. This development will be discussed in Chapter Three.

The second source of Australian literature comes from the mental health discipline and, in particular, the research of psychiatrists Mullen and Lester.⁶ They have studied the identification and management of persistent complainants,

³ *Pro se* is Latin, meaning “for self”. In the United States the status is sometimes known as *propria persona*.

⁴ Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: the First Three Years*, 2000, para 4.88. See also Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, 2001, 1.

⁵ *Vexatious Proceedings Act 2005* (Qld).

⁶ Grant Lester, Beth Wilson, Lynn Griffin and Paul Mullen, “Unusually Persistent Complainants”, (2004) 184 *British Journal of Psychiatry* 352, 353-354 and Paul Mullen and Grant Lester, “Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour”, (2006) 24 *Behavioural Sciences and the Law* 333.

or querulents, in the alternate dispute resolution arena. From their research they propose an informed profile of a likely vexatious litigant based on physical characteristics in the format and content of presenting documentation. In turn, this offers the future prospect of a multidisciplinary approach to the better management of vexatious litigants.

Abusive and frivolous litigation: an old challenge

Abusive and frivolous litigation is not new. From earliest times the courts have faced the challenge of litigants who seek to use the legal system in an unfair way. From time to time the English Parliament intervened to provide statutory support. For example, in 1601, in the first Elizabethan period, Parliament passed an Act “For avoiding the infinite number of small and trifling suits commenced or prosecuted against sundry her Majesty’s good and loving subjects in her Highness courts at Westminster”. The Act introduced a costs sanction that applied when cases were brought in the superior courts rather than in the more appropriate inferior courts.⁷ A century later Parliament again intervened in trespass actions with “An Act for the better preventing frivolous and vexatious suits”.⁸ However, as will be discussed more fully in Chapter Three, it was the court itself that fashioned its inherent jurisdiction and rules of court to deal separately with each instance of litigation that it deemed abusive.

Abuse and frivolousness in the United States

The United States has long been regarded as having the most litigious society in the common law world. One American commentator has described the scene in the following terms:

America faces no shortage in supply of cases that seem too big for the courts, cases that seem too small, and cases that should never have been cases at all. At one end of the spectrum are the mega suits that ambled along for decades, wreaking financial havoc on all but the lawyers. At the other end of the spectrum are trivial pursuits: football fans who sued referees, prison inmates who wanted a legal right to chunky rather than smooth peanut butter, mothers who asked a court to resolve a playground match between their three year olds, fathers prepared to litigate over their fifteen year olds’ positions on the high school athletics teams, a purchaser of Cracker Jacks who demanded damages for a missing prize, and a McDonald’s customer who sought \$15,000 for damage to his teeth and marital relations caused by a defective bagel.⁹

Clearly, the volume and variety of litigation reflects the wealth and large population of that country. But commentators also identify a number of distinct promoters of litigiousness, in particular, contingency fees and the “American

⁷ 43 Eliz c 6.

⁸ 8 & 9 W 3 c 11.

⁹ Deborah Rhode, “Frivolous Litigation and Civil Justice Reform: Miscasting the Problem. Recasting the Solution”, (2004) 54 *Duke LJ* 447, 448.

rule” on costs. Contingency fees, where the client agrees that their lawyer can take a share of the proceeds of a court victory commonly on a “no win no fee” basis, are regarded as encouraging lawyers to conduct speculative cases and to engage in time-wasting procedures. (To be fair, though, there is a cost and a real risk to the lawyer involved.) In addition, the “American rule” of allowing costs to lie “where they fall” (where both sides meet their own costs), rather than “following the event” (where the loser is ordered to pay the winner’s costs) as in England and in Australia, provides far less restraint on speculative litigation than in the latter countries. A further factor is the constitutional guarantee of due process in criminal matters provided by the First and Fourth Amendments to the American *Constitution*. This right of access to the courts, combined with concurrent jurisdictions of State and federal courts means that *pro se* prisoner litigants, often with the practical support and guidance of “jailhouse lawyers”, initiate a significant proportion of unsuccessful litigation. In Australia large volume prisoner-initiated litigation and the “jailhouse lawyer” are unknown.¹⁰

A theme that runs through the American literature on abusive and frivolous litigation is the activist role of attorneys and the subsequent professional and legislative attempts to temper that engagement. A key control has been Rule 11 of the *Federal Rules of Civil Procedure*.¹¹ Amended a number of times since its inception in 1938, Rule 11 requires an attorney or *a party personally* to certify when filing court documentation that, to the best of their knowledge, information and belief:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by non frivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will be likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.¹²

Schiller and Wertkin, two leading American commentators in the area, argue that the deterrent effect of the rule has been softened since it was first substantially amended in 1983.¹³ Specifically, they refer to the fact that in 1993

¹⁰ Only two Australian prisoners have persistently pursued legal actions to the point where they have been declared vexatious litigants. They are Dennis Fritz (Queensland, 1987) and Julian Knight (Victoria, 2004).

¹¹ This rule is mirrored in State-based civil procedure rules.

¹² See: <http://www.law.cornell.edu/rules/fcrp/Rule11.htm> (17 January 2008).

¹³ See Erin Schiller and Jeffrey Wertkin, “Frivolous Filings and Vexatious Litigation”, (2001) 14 *Geo J Legal Ethics* 909, 911. For an examination of the 1983 amendments, see Howard DuBosar and Ubaldo Perez, “Ask Questions First and Shoot Later: Constraining Frivolity in Litigation Under Rule 11”, (1985-1986) 40 *U Miami L Rev* 1267.

rule makers removed the mandatory imposition of sanctions such as costs, making them discretionary, and introduced a “safe harbor” provision allowing 21 days for parties to remove or correct challenged documents.¹⁴ A subsequent legislative attempt in 1995 to tighten the provision again by eliminating the “safe harbor” provision, reintroduce mandatory sanctions that not only deterred but compensated and to introduce the “English rule” on costs, all failed when the federal *Attorney Accountability Bill 1995* did not reach the Senate.¹⁵ Australian court rules place no such certifying obligations on litigants-in-person, although there has been a recent shift toward making legal practitioners accountable for acting in proceedings that “have no reasonable prospect of success”.¹⁶

That attorneys are believed to be behind the promotion of much of the frivolous and vexatious litigation in America can be seen in other federal legislative attempts to pre-empt certain types of litigation. Schiller and Wertkin give as one example the political campaign to enact *The Commonsense Product Liability Legal Reform Act 1995*. This arose out of the “Contract with America” policy manifesto generated by the Republican Party in the lead-up to the 1994 Congressional election. The campaign fed into popular perceptions, encouraged by media portrayals, that attorneys abused the legal system for personal gain to the detriment of business and the economy.¹⁷ These cases are commonly referred to as “tort tales”. The legislation focused on setting limits on awards, including punitive damages, to people who sue for damage caused by defective products such as lawn mowers, toasters and artificial hearts. Interestingly, the legislation made no attempt to curtail contingency fees or attorney conduct. President Clinton vetoed the Bill. Another and more successful legislative attempt was the passage of the *Y2K Act 1999*. The fear of trillions of dollars in frivolous lawsuits following the dawn of the new millennium saw Congress enact a number of provisions pre-empting State product liability laws and thus limiting exposure of Y2K defendants. In the end, it is common ground that the Y2K litigation fears were largely overblown.

Despite the emphasis given to attorney conduct in the United States as a driver of frivolous and vexatious litigation, estimates suggest that the majority of litigants proceed *unrepresented* in State courts. When extrapolated nationally, some three out of five cases are said to have at least one unrepresented party.¹⁸

¹⁴ See *Attorney Accountability Act*, HR 988, 104th Cong § 4 (1995), referred to in Erin Schiller, and Jeffrey Wertkin, “Frivolous Filings and Vexatious Litigation”, (2001) 14 *Geo J Legal Ethics* 909, 916–917.

¹⁵ *Ibid*, 917.

¹⁶ For a discussion, see Nicholas Beaumont, N “What are ‘reasonable prospects of success’?” (2004) 78 *ALJ*, 812.

¹⁷ Erin Schiller, and Jeffrey Wertkin, “Frivolous Filings and Vexatious Litigation”, (2001) 14 *Geo J Legal Ethics* 909, 914.

¹⁸ Figures quoted in Alicia Farley, “An important piece of the bundle: How limited appearances can provide an ethically sound way to increase access to justice for Pro Se litigants”, (2007) 20 *Geo J Legal Ethics* 563, 564.

Common explanations include the cost of legal representation and the lack of legal aid.¹⁹ Within the *pro se* group the literature focuses on persistent prisoner-initiated litigation, whether or not with the assistance of “jailhouse lawyers”, as being frivolous and vexatious. Indeed, government research suggests that, before 1996, 19 per cent of all prisoner lawsuits were frivolous; and that in 1995 prisoners filed 40,000 new federal civil lawsuits or 19 per cent of the federal civil docket.²⁰ The following are some examples of the law suits referred to in the literature and regarded as frivolous:

1. Death row inmate sued corrections officials for taking away his Gameboy electronic game.
2. Prisoner sued 66 defendants alleging that unidentified physicians implanted mind control devices in his head.
3. Prisoner sued demanding LA Gear or Reebok “Pumps” instead of Converse.
4. Inmate claimed that his rights were being violated because he was forced to send packages via UPS rather than US Mail.
5. Two prisoners sued to force taxpayers to pay for sex-change surgery while they were in prison.
6. Inmate sued because when he got his dinner tray, the piece of cake on it was “hacked up”.²¹

Two federal responses to this litigation, again as part of the “Contract with America” policy push, were the enactment of the *Prison Litigation Reform Act 1996* (PLRA) and the *Antiterrorism and Effective Death Penalty Act 1996* (AEDPA). The PLRA sought to restrict prisoners’ right of access to federal courts and stop what was described as “putative micromanagement of state prisons by federal courts”. It introduced fees and costs and banned future prisoner civil claims after three or more previous ones had been dismissed as frivolous or malicious, or failed to state a claim upon which relief could be granted. This last sanction introduced for the first time a “vexatious litigant” sanction targeting a specific group — prisoners. Prisoners’ rights activists, while conceding some litigation was frivolous, unsuccessfully opposed the legislation, noting that there are legitimate claims that deserved to be

¹⁹ See Howard DuBosar and Ubaldo Perez, “Ask Questions First and Shoot Later: Constraining Frivolity in Litigation Under Rule 11”, (1985–1986) 40 *U Miami L Rev* 1267 and Alicia Farley, “An important piece of the bundle: How limited appearances can provide an ethically sound way to increase access to justice for Pro Se litigants”, (2007) 20 *Geo J Legal Ethics* 563.

²⁰ Figures quoted in Jessica Feerman, “‘The Power of the Pen’: Jailhouse Lawyers, Literacy, and Civic Engagement”, (2006) 41 *Harv CR – LL Rev* 369, 381.

²¹ Referred to at footnote 57 in Erin Schiller, and Jeffrey Wertkin, “Frivolous Filings and Vexatious Litigation”, (2001) 14 *Geo J Legal Ethics* 909.

addressed. They said: “History is replete with examples of egregious violations of prisoners’ rights. These cases reveal abuses and inhumane treatment which cannot be justified no matter what the crime”.²² For its part, the AEDPA also limited prisoner access to the civil courts and, in particular, to *habeas corpus* petitions by imposing rigid time limits. The effect of both pieces of legislation has been to limit prisoner access to the courts.²³

At the local level a number of States have introduced specific vexatious litigant legislation in order to control abusive litigation by litigants-in-person or *propria persona*, including prisoner litigants.²⁴ This is in recognition that Rule 11-type sanctions have a limited deterrent impact, particularly when a litigant’s poor financial circumstances make any order for costs unenforceable. Among other things, the sanction allows the court to make what is known in America as a “pre-filing order”. This bans a declared vexatious litigant from filing any additional litigation without prior judicial leave. California was the first State to adopt the pre-filing order and did so 40 years after it was adopted in Victoria and almost 70 years after England.

However, there are differences between the Australian and Californian sanctions. In particular, under the Californian legislation a vexatious litigant is someone who, in the immediately preceding seven-year period, has commenced, prosecuted or maintained *in propria persona* at least five litigations that have been finally determined adversely to the person or unjustly permitted to remain pending for at least two years without having been to trial or hearing. As will be seen in Chapter Three and in the case studies, this is tighter than the traditional Australian definition of someone who has “habitually and persistently and without any reasonable ground instituted vexatious legal proceedings” — a definition that leaves much to the discretion of the judge. The Californian definition also allows the litigant’s conduct, and whether they have been declared vexatious in another State or federal jurisdiction, to be considered. By contrast, the consideration of such criteria only became possible in some Australian States after 2005, with the development of a model vexatious litigant sanction through the Standing Committee of Attorneys-General (SCAG). This is discussed further below. Although the vexatious litigant sanction has now

²² Senator Paul Simon speaking in the US Senate on 19 March 1996, quoted in Erin Schiller, and Jeffrey Wertkin, “Frivolous Filings and Vexatious Litigation”, (2001) 14 *Geo J Legal Ethics* 909, 917.

²³ Jessica Feierman, “‘The Power of the Pen’: Jailhouse Lawyers, Literacy, and Civic Engagement”, (2006) 41 *Harv CR. – LL Rev* 369, 389.

²⁴ California: CAL. CIV P CODE § 391 (1963); Texas: TEX CIV PRAC & REM CODE ANN § 11.001 – 004 (1997); Ohio: OHIO REV CODE ANN § 2323.52 (1998); Hawaii: HAW REV STAT § (1999) and Florida: FLA STAT § 68.093 (2000). See further, Lee Rawles, “The California Vexatious Litigant Statute: a viable judicial tool to deny the clever obstructionists access?”, (1998) 72 *SCALR* 275; Erin Schiller, and Jeffrey Wertkin, “Frivolous Filings and Vexatious Litigation”, (2001) 14 *Geo J Legal Ethics* 909, 919-929 and Deborah Neveils, “Florida’s Vexatious Litigant Law: An end to Pro Se Litigant’s Courtroom Capers?” (2001) 25 *Nova L Rev* 343.

been introduced to a number of American States, as in Australia, it would appear that it is seen as a sanction of last resort and, in the eyes of at least one American commentator, it is “ineffective”.²⁵

Litigants-in-person and the English experience

In England, the literature on litigants-in-person is relatively new. It has arisen in the context of the access to justice reforms generated by the 1996 Woolf Report.²⁶ At the forefront is the 2002–2003 research of Moorhead and Sefton for the Department of Constitutional Affairs.²⁷ The commissioning of that research reflected, in part, a concern that a decline in legal aid would mean courts would have to deal with increasing numbers of unrepresented litigants. It also recognised that there was minimal previous concrete research work on unrepresented litigants.²⁸ However, the research is indicative only. It canvassed just four geographically separate civil courts (including the Family Court) of first instance in England and Wales. It did not include the superior Court of Appeal.²⁹

The research had three main aims, which were:

1. Establish estimates of the number of unrepresented litigants and how their prevalence differs by court types and categories of work.
2. Define the different ways in which unrepresented litigants manifest themselves within proceedings.
3. Explore difficulties posed by such cases to unrepresented litigants, court staff, judges and opponents.³⁰

Moorhead and Sefton conducted both qualitative and quantitative research collected from 2432 computerised court records, 748 case files and a series of structured interviews and focus groups.³¹ In their findings they concluded that unrepresented parties were common; they were usually defendants; and, at best, there was only modest evidence that cases involving unrepresented litigants took longer. However, Moorhead and Sefton saw little evidence of an

²⁵ Lee Rawles, “The California Vexatious Litigant Statute: a Viable Judicial Tool To Deny The Clever Obstructionists Access?” (1998) 72 *SCALR* 275, 310.

²⁶ Woolf, the Right Hon the Lord, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, 1996, HMSO, London.

²⁷ Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented Litigants in First Instance Proceedings*, Department of Constitutional Affairs, London, 2005. Further reference to this research will be in the short form “Moorhead”.

²⁸ Moorhead, n 27, 2.

²⁹ For a discussion on the difficulties of dealing with obsessive litigants in the Court of Appeal and that court’s innovative response, see *Bhamjee v Forsdick (No 1)* [2003] EWCA CIV 779 and *Bhamjee v Forsdick (No 2)* [2003] EWCA CIV 1113. These cases are further discussed in Chapter Three.

³⁰ Moorhead, n 27, 4.

³¹ Moorhead, n 27, 15ff.

explosion in the numbers of litigants-in-person although they cautioned that the position was unclear in the family courts and that there was recent evidence suggestive of an upward trend. They also noted that a large part of the reason for non-representation, especially in civil cases, was in fact non-participation. Where there was participation by unrepresented litigants it was generally of a lower intensity and, furthermore, most participation took place via the court office and not the courtroom itself.³²

Significantly, in the context of this book, the research concluded that obsessive or difficult litigants were a very small minority of unrepresented litigants generally, but posed considerable problems for court and staff.³³ Moorhead and Sefton noted in the course of their research how readily lawyers, academics, court staff and others framed the research issues in terms of difficult, troublemaking or vexatious litigants-in-person — thereby reflecting the popular and powerful place the obsessive litigant has in the legal imagination.³⁴ However, there was a strong consensus among the interviewees that, despite their small numbers, the behaviour of obsessive litigants had a significant impact on the administration of the courts and on their opponents.³⁵

An important narrative to emerge from this research (and one subsequently developed by Moorhead) is the challenge that the presence of litigants-in-person and, in particular, the obsessive litigant with their apparent disregard for procedures and legal principles, makes to traditional court adversarial paradigms. Moorhead refers specifically to the traditional roles of the judge (passive arbiter) and court staff (passive administrator).³⁶ This traditional understanding of the judge as “passive arbiter” is central to our understanding of the adversarial system of justice. As Moorhead notes, it assumes that permitting the parties to control the handling of their own cases is the most effective method of dispute resolution because:

- the parties can best describe their own case to maximum advantage;
- the parties typically have more information than a third party (or a judge) would and so are best placed to decide what methods of case development are best suited to them; and
- freedom of disputants to control the basis and presentation of their claims constitutes the best assurance that they will subsequently believe that justice has been done regardless of the outcome.³⁷

³² Moorhead, n 27, i.

³³ *Ibid.*

³⁴ Moorhead, n 27, 79.

³⁵ Moorhead, n 27, 82.

³⁶ Moorhead, n 27, ii. See also Richard Moorhead, “A Challenge for judgecraft”, (2006) *New Law Journal* 156.

³⁷ Richard Moorhead, “The Passive Arbiter: Litigants in person and the Challenge to Neutrality” (2007) 16 *Social and Legal Studies* 405, 415.

In addition the theory is also said to protect the impartiality and deliberative skill of the judge as it emphasises independence and neutrality.³⁸

In cases involving litigants-in-person this paradigm is challenged when “inexpert, sometimes emotional and procedurally naïve litigants”³⁹ lead a judge to intervene to bring the case to a conclusion. Moorhead and Sefton’s research noted that this intervention varied in intensity and consistency from telling a litigant to get legal advice, to a more direct engagement such as providing *de facto* advice, to taking up direct lines of questioning on a litigant’s behalf. The result was that the role of the neutral arbiter was reduced or abandoned in favour of what is described as that of an “inquisitorial judge”.⁴⁰ In the early 20th century, the period canvassed by the six case studies in this book, the judiciary would most likely have perceived their role as the passive arbiter and eschewed active engagement lest that affected their actual and perceived neutrality.

In more recent times the literature in England (and the United States⁴¹) has argued that the traditional theory that judges are passive arbiters can inhibit fair and effective adjudication in cases involving litigants-in-person. Moorhead, in particular, has argued for an alternative and less rigid approach based on what he describes broadly as “principles based communication”. He identifies four main areas of possible activity:

- the reconstruction of procedural rules and the relaxation of notions of legal “relevance”;
- a related move away from formalism towards more principle (as opposed to rule) based dispute resolution;
- greater emphasis on procedural notions of justice and, in particular, the active engagement and participation of all parties to a dispute through manageable communication;
- improved training, monitoring of, and feedback for, judges on their handling of the difficult balancing act presented by litigants in person.⁴²

This new discourse is a work in progress. However, the growing recognition that litigants-in-person, let alone obsessive or vexatious litigants, present an ongoing challenge to the administration of justice will ensure that it continues.

³⁸ *Ibid.*

³⁹ Moorhead, n 27, 261.

⁴⁰ *Ibid.*

⁴¹ For example, see Richard Zorza, “The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications”, (2004) 17 *Geo J Legal Ethics* 423.

⁴² Richard Moorhead, “The Passive Arbiter: Litigants in person and the Challenge to Neutrality”, (2007) 16 *Social and Legal Studies* 405, 422.

Is there a “rising tide” of the litigant-in-person in Australia?

In Australia there is no obvious presence of large-scale lawyer-promoted abusive or frivolous litigation. As a result there has not been the political engagement on the topic as there has been in the United States. A number of factors explain this — some structural, others cultural. Compared to the United States there is a smaller Australian population and fewer courts. There is the existence of a legal profession split between solicitors and barristers and the closeness of the latter to a conservative English legal culture. There is also the “English rule” that costs follow the event and, until recently, the absence of contingency fee arrangements. These have all combined to deter speculative and frivolous litigation. Nor are there, at the moment, constitutional guarantees that secure access to the courts for prisoners — although this does not fully explain the apparent absence of both “jailhouse lawyers” and a culture of prisoner-initiated litigation. It may be that this absence reflects the smaller prison population in Australia. However, the 2002 declaration of Julian Knight as a vexatious litigant following his persistent and unsuccessful prison-related litigation might hint at an emerging phenomenon.⁴³

Nevertheless, there is a regularly repeated view that there a “rising tide” of litigants-in-person in Australia, although empirical data are sparse. To one judicial observer this “is the greatest single challenge for the civil justice system at the present time”.⁴⁴ To another it is of “hydra-headed dimension”.⁴⁵ Such litigants take longer in court and require considerable patience and interpersonal skills from registry staff and judges.⁴⁶ As a result, some judges predict that the progress of cases will decline to a “glacial speed”.⁴⁷ The vexatious litigant is at the extreme end of the category of litigants-in-person and it may be that the very persistence and occasional outrageousness of this group, as will be evidenced by the case studies below, gives them a prominence in the judicial

⁴³ *Attorney-General of Victoria v Knight* [2004] VSC 407. Knight, a convicted murderer, conducted litigation mainly against prison authorities. It related to the conditions of his incarceration such as his continued placement in solitary confinement. See further, Hugh de Kretser, “Even Julian Knight is entitled to basic human rights”, *The Age*, 24 November 2003, 3.

⁴⁴ Geoffrey Davies, “The Reality of Civil Justice Reform: Why we must abandon the essential elements of our system”, (2003) 12 *JJA* 155, 158.

⁴⁵ Comment of Justice Guest of the Family Court upon his retirement. See further, Kate Legge, “Justice of the Peace”, *The Weekend Australian*, 13 May 2008, 2. By contrast, recent research by Professor Moorhead of Cardiff University suggests that in England the “explosion in numbers” of litigants-in-person is probably a myth and that the number of difficult, even vexatious, litigants is low. See further, Richard Moorhead, “A challenge for judgecraft”, (2006) 156 *New Law Journal* 742, 743.

⁴⁶ Interviews with Ken Toogood (Principal Registrar, Queensland Supreme Court) 13 April 2006 and Frank Jones (Former Principal Registrar High Court) 24 February 2005.

⁴⁷ Comment of Justice Guest of the Family Court upon his retirement. See further, Kate Legge, “Justice of the Peace”, *The Weekend Australian*, 13 May 2008, 2.

mind far beyond their numbers. Researchers and commentators variously give as explanations for the apparent recent increase in unrepresented litigants:

- the reduced availability of legal aid;
- the perceived high cost of lawyers' fees;
- the extended reach of law and litigation; and
- the demystification of law and the growth in self-help culture through information kits, Internet sites and clinics.⁴⁸

To this list could be added the creation of new courts and tribunals at the federal level, such as the Federal Court (in 1977) and the higher volume Family Court (in 1976).

The growth in litigants-in-person, although not fully established statistically, "is certainly accepted anecdotally".⁴⁹ It appears that, as yet, the States and Territories do not keep figures. Nor does the Federal Court, even though its specialist jurisdictions of immigration and bankruptcy, for different reasons, are disposed to large groups of litigants-in-person. Immigration figures relate to people present in Australia without a valid visa who are seeking to be allowed to stay, or at least to defer deportation. They pursue every legal avenue possible in pursuit of that objective. Many are refugees in mandatory detention, a policy determinedly pursued by the former Howard Government designed to deter what has been described as (immigration) "queue jumping".⁵⁰ The other Federal Court specialist area of bankruptcy involves litigants-in-person who are being pursued for debts owing. As economic conditions deteriorate, these numbers expand. As will be demonstrated in the case studies below, in this arena the litigants are on the defensive and are obliged to appear in court. They appear for themselves usually for no other reason than that they lack the funds to employ legal representation.

Only the High Court and the Family Court collect relevant data. For example, in the High Court in 2006–2007, 70 per cent (495) of all civil special leave applications filed were by self-represented litigants. Analysis of those figures indicates that immigration matters dominated this caseload (within the total of 702 civil special leave applications, 62 per cent (439) related to immigration; self-represented litigants filed 95 per cent (417) of these applications).⁵¹ It should be noted, though, that neither the Federal Court nor the High Court

⁴⁸ John Dewar, Bronwyn Jerrard, and Fiona Bowd, "Self-representing Litigants: A Queensland Perspective", (2002) 23 *The Queensland Lawyer*, 65.

⁴⁹ Nicholson, R, "Australian experience with self-represented litigants", (2003) 77 *ALJ* 820.

⁵⁰ See http://en.wikipedia.org/wiki/Mandatory_detention_in_Australia (10 April 2008).

⁵¹ Responding to this challenge, in 2005 the court commenced hearing special leave applications on the papers. In 2006–2007 50 per cent of applications were determined in this way. See High Court of Australia, "Annual Report 2006–2007", 11–12. See <http://www.hcourt.gov.au> (30 November 2007).

has declared a litigant as vexatious based on persistent and unsuccessful immigration proceedings.

Despite the absence of official data, the challenge of litigants-in-person has been the subject of a number of reviews over the last decade. Professor Stephen Parker's 1998 report for the Australian Institute of Judicial Administration (AIJA), *Courts and the Public* (the Parker Report), was an early catalyst for courts in recognising the challenge that the growth in self-represented litigants presented to the administration of justice. In particular, Professor Parker's report called for all courts to have a Self-Represented Litigants Plan "that deals with every stage in the process, from filing through to enforcement, or the equivalent in criminal matters".⁵² The AIJA followed the Parker Report with a 2001 publication, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, that provided guidance to court administrations on the development of the plans. To varying degrees, these plans have been implemented.⁵³

However, it is the high volume Family Court where research and judicial guidance provide particular insight into issues surrounding the growth of litigants-in-person and the subset of vexatious litigants. Again, data are incomplete but in 2006–2007 the number of cases involving a self-represented litigant in this court at trial was estimated to be as high as 34 per cent.⁵⁴ Characteristics of these litigants are said to be that:

- they are more likely than the population as a whole to have a limited formal education, limited income and assets and to have no paid employment;
- a significant group of them are dysfunctional serial litigants.⁵⁵

Recognising the challenge litigants-in-person represent, the Family Court has laid down guidelines as to a judge's obligations when determining a case involving one or more unrepresented parties. The guidelines recognise that the judge will be more interventionist. Accordingly, they seek to balance the obligation to remain impartial with the obligation to conduct a full and complete inquiry into all relevant issues, especially where children are concerned. First outlined by the Full Court of the Family Court in 1997,⁵⁶ the guidelines were

⁵² Stephen Parker, *Courts and the Public*, AIJA, 1998, 107. For a recent English perspective, see Richard Moorhead, "A challenge for judgecraft", (2006) 156 *New Law Journal* 742, 743.

⁵³ For example, see the range of assistance offered to unrepresented litigants by the Supreme Court of Victoria at: <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Unrepresented+Litigants/> (30 January 2008).

⁵⁴ Family Court of Australia, "Annual Report 2006–2007", Table 3.21, 54. See: http://www.familycourt.gov.au/presence/connect/www/home/publications/annual_reports/2006_2007_annual_report (30 January 2008).

⁵⁵ John Dewar, Barry Smith and Cate Banks, *Litigants in Person in the Family Court of Australia*, A Report to the Family Court of Australia, Research Report No 20, Family Court of Australia, 2000, 1.

⁵⁶ *Johnson v Johnson* (1997) FLC 92-764.

reviewed by the Full Court in 2001 in *Re: F: Litigants in Person Guidelines*.⁵⁷

They are:

- A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.
- A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses.
- A judge should explain to the litigant in person any procedures relevant to the litigation.
- A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.
- If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.
- A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.
- If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.
- A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated (*Neil v Nott* (1994) 121 ALR 148 at 150).
- Where the interests of justice and the circumstances of the case requires it, a judge may:
 - draw attention to the law applied by the Court in determining issues before it;
 - question witnesses;
 - identify applications or submissions which ought to be put to the Court;
 - suggest procedural steps that may be taken by a party;
 - clarify the particulars of the orders sought by a litigant in person or the bases for such orders.
- The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.⁵⁸

Despite such initiatives it is well recognised that family disputes generate determined, difficult and even “dysfunctional serial litigants”. Accordingly, it is not surprising that the Family Court, of all 11 Australian superior courts,

⁵⁷ (2001) FLC 93-072.

⁵⁸ *Ibid.*

has declared the most vexatious litigants. Although section 121 of the *Family Law Act 1975* (Cth) places restrictions on the publication of proceedings, Her Honour Bryant CJ has publicly noted that in the 30-year period 1976–2006 the court had made 195 declaratory orders. This is five times greater than the total number of declarations made by the other 10 superior courts combined since the sanction was introduced in 1930. A number of commentators have suggested that family law reforms sympathetic to the litigant-in-person and designed to encourage parental responsibility may, in fact, have led to increased vexatious litigation:

...the reforms have created greater scope for an abusive non-resident parent to harass or interfere in the life of the child's primary caregiver by challenging her decisions and choices. As one counsellor noted, the concept of ongoing parental responsibility has become "a new tool of control" for abusive non-resident parents. This also means constant disputes and an endless cycle of court orders.⁵⁹

For this reason alone, the lack of research into the nature and incidence of vexatious litigation in the court should be, and is, seen as a matter of concern.⁶⁰

The other superior courts have also sought to tighten the ways in which they deal with what they identify as an increasing problem of vexatious litigants. Their approach has been to encourage government to design and adopt model vexatious litigant legislation designed to promote consistency of approach throughout Australia.

The psychiatric perspective

Australian psychiatry has also recently given attention to the challenge of managing vexatious litigants or, in medical parlance, "querulents". These are broadly defined as individuals who exhibit:

a pattern of behaviour involving the persistent pursuit of a personal grievance in a manner seriously damaging to the individual's economic, social, and personal interests, and disruptive to the functioning of the courts and/or other agencies attempting to resolve the claims.⁶¹

This interest has been stimulated by the emergence over the last two decades of alternate dispute resolution (ADR) schemes, such as industry ombudsman schemes that promote accessible, speedy and informal dispute

⁵⁹ Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: The First Three years*, 2000, para 4.88. See also AIJA, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, 2001, 1.

⁶⁰ Belinda Paxton, "Domestic Violence and Abuse of Process", (2003) 17 *Family Lawyer* 7, 11.

⁶¹ Paul Mullen and Grant Lester, "Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour", (2006) 24 *Behavioural Sciences and the Law* 333, 334.

resolution for consumers. This access, free of fees, expensive lawyers and procedural formality, has given access to dispute resolution on a large scale but has also increased the numbers of persistent complainants. Even so, the actual numbers appear small, with complaint agencies suggesting a frequency as low as 0.2 per cent to 0.3 per cent of all clients.⁶² It is estimated that these complainants absorb between 15 per cent and 30 per cent of scheme resources, out of all proportion to their number.⁶³ As a result, the management of this group has placed pressure on the good functioning of the ADR schemes as they operate outside the legal hierarchy and do not have access to the traditional sanctions of costs, contempt orders or a vexatious litigant sanction. This has led the ADR schemes to seek multidisciplinary solutions. Australian psychiatrists Paul Mullen and Grant Lester have been at the forefront of this research.⁶⁴ Their research is valuable as there is an obvious crossover between persistent complainants in ADR forums and vexatious litigants in the courts.

Mullen and Lester trace the interest of psychiatry in the querulent and the paranoid litigant to the late 19th century. They note that such people were seen as inhabiting the borderline between delusional psychosis and the fanatical preoccupations of psychopathic personalities.⁶⁵ However, by the 1980s, with some notable exceptions,⁶⁶ the study of querulousness had disappeared from medical literature. Mullen and Lester suggest that this reflects a professional view of the time that any study was overtly judgmental and was simply “pathologising those with the energy and commitment to pursue their rights”.⁶⁷ Put another way, “[t]he danger exists that use of a psychiatric label (such as ‘paranoid’) might deprive such an individual of legitimate rights and prerogatives”.⁶⁸ Eccentrics and maverick social reformers are at particular risk

⁶² There is no information on the incidence of querulousness in the general community. See Grant Lester, Beth Wilson, Lynn Griffin and Paul Mullen, “Unusually Persistent Complainants”, (2004) 184 *British Journal of Psychiatry* 352, 353-354.

⁶³ Paul Mullen and Grant Lester, “Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour”, (2006) 24 *Behavioural Sciences and the Law* 333, 335.

⁶⁴ Their initial research in 2003 involved a questionnaire drawing upon the experience of experienced complaint professionals from six ombudsman’s offices. See Grant Lester, Beth Wilson, Lynn Griffin and Paul Mullen, “Unusually Persistent Complainants”, (2004) 184 *British Journal of Psychiatry* 352.

⁶⁵ Grant Lester, Beth Wilson, Lynn Griffin and Paul Mullen, “Unusually Persistent Complainants” (2004) 184 *British Journal of Psychiatry* 352. For a discussion of the European perspective, see Alan Murdie, “Vexatious Litigants and de Clerambault Syndrome”, (2002) 152 *New Law Journal* 61.

⁶⁶ For a study of the English scene, see Michael Rowlands, “Psychiatric and legal aspects of persistent litigation”, (1988) 153 *British Journal of Psychiatry* 317. For an Australian perspective, see Ian Freckelton, “Querulent Paranoia and the Vexatious Complainant”, (1988) 11 *International Journal of Law and Psychiatry* 127.

⁶⁷ Grant Lester, Beth Wilson, Lynn Griffin and Paul Mullen, “Unusually Persistent Complainants”, (2004) 184 *British Journal of Psychiatry* 352.

⁶⁸ Robert Goldstein, “Litigious Paranoids and the Legal System: The Role of the Forensic Psychiatrist”, (1987) 32 *Journal of Forensic Science* 1009, 1014.

of being labelled as paranoid or querulent. Certainly, as the case studies below demonstrate, it is hard enough for judges to identify justified complaints within a torrent of persistent litigation, let alone for a medical person untrained in the law to do so. In addition to this understandable lack of legal expertise is the fact that the vexatious litigant does not come readily into the clinical view of the mental health professional. Again as the case studies below show, such litigants, although obsessed with their litigation, otherwise function as citizens and within the law. In civil litigation, unlike cases in the criminal jurisdiction, there is also no immediate “pre sentence option” that enables the judge to direct a medical report and thus compulsorily bring the litigant into structured medical review and/or management.

Mullen and Lester argue that querulousness is foremost a disorder of behaviour and only secondarily an abnormality of mental function. As such, they challenge the older research that focused on paranoid or delusional disorders as the primary driver.⁶⁹ In their view there can be a number of contributors to querulous behaviour, such as personality traits, social situation, contemporary sources of distress and disturbance, and even the dispute resolution systems themselves. Mental disorder is only one further contributor.⁷⁰ Mullen and Lester therefore suggest that querulents are not born, rather they are made, most likely after a “key event”. They conclude that querulousness is a legitimate concern for modern mental health professionals and that individuals that are “caught up in a querulous pursuit of their own notion of justice” are amenable to treatment. In turn, this can provide insights conducive to better management of querulent or vexatious complainants or litigants in courts and complaint organisations.

Of particular interest, given the focus of this book, is the profile of the querulent that Lester and Mullen derive from the psychiatric literature and their own research. Querulousness is said to develop most commonly in the middle-aged adult between 30 and 50. There is a preponderance of male querulents (4:1) and before onset the individual is said to have functioned competently, had a sound secondary education and fair work history. Relationships are more problematic, with only 30 per cent ever having married, 18 per cent being divorced and 50 per cent never married.⁷¹

The identifying characteristics that Mullen and Lester draw from the written communications of querulents that they examined as part of their 2003 research are of further interest. I will demonstrate that these characteristics are

⁶⁹ For a summary of the earlier research, see Paul Mullen and Grant Lester, “Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour”, (2006) 24 *Behavioural Sciences and the Law* 333, 334.

⁷⁰ *Ibid*, 348.

⁷¹ Paul Mullen and Grant Lester, “Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour”, (2006) 24 *Behavioural Sciences and the Law* 333, 338 and Grant Lester and Simon Smith, “Inventor, Entrepreneur, Rascal, Crank or Querulent: Australia’s Vexatious Litigant Sanction 75 years On”, (2006) 13 *Psychiatry, Psychology and Law Journal* 1, 14–15.

also evident in the court documentation of the litigants in the six case studies examined below. They are:

Form

- Curious formatting.
- Many, many pages.
- Odd or irrelevant attachments eg, copies of letters from others and legal decisions, UN Charter on Human Rights etc, all usually extensively annotated.
- Multiple methods of emphasis including
 - Highlighting (various colours)
 - Underlining
 - Capitalisation.
 - Repeated use of “ ”, ???, !!!.
 - Numerous foot and marginal notes.

Content

- Rambling discourse characterised by repetition and a pedantic failure to clarify.
- Rhetorical questions.
- Repeated misuse of legal, medical and other technical terms.
- Referring to self in third person.
- Inappropriately ingratiating statements.
- Ultimatums.
- Threats of violence to self or others.
- Threats of violence directed at individuals or organizations.⁷²

The value of the Mullen and Lester research is the contribution it offers for the better management of potential vexatious litigants at both complaint agency or court level and by the mental health professional. In the latter context they note the challenge of developing a therapeutic relationship, particularly in the absence of compulsory cooperation. Where that cooperation exists they are positive on the potential of modern anti-psychotic medication, combined with psychotherapy, to normalise the behaviour and thinking of the patient over a period of months.

Lester suggests 10 management guidelines for judicial officers. These are designed to influence the environmental factors affecting the behaviour of the individual toward a better outcome for themselves and the court. They are:

1. “First do no harm”. A medical aphorism, which highlights your goals, which should be safety and containment rather than completion and satisfaction.
2. Recognition via the six V’s – they display *volatile* emotions, feel *victimised*, seek *vindication*, produce *voluminous* and *vague* communications, and *vary* their demands.

⁷² Listed in Paul Mullen and Grant Lester, “Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour”, (2006) 24 *Behavioural Sciences and the Law* 333, 336.

3. Maintain rigorous boundaries. They will rapidly form attachments to those they feel are “favouring” them and feel catastrophically betrayed if the favourable treatment is not maintained.
4. They are responsive to hierarchy and the formality of the court must be maintained.
5. While they appear legally hyper-competent, they have a very shallow knowledge of the law. All communication with them should be simple, repetitive, and there should be recognition that their understanding of the law is generally no deeper than the average citizen.
6. It is important to clearly and repetitively maintain their focus on what the court is able to offer in terms of outcomes.
7. More time granted will lead to more confusion. They are disorganised and overwhelmed and more time rarely changes this.
8. Take all threats seriously and be aware of the psychological, as well as physical, safety of self and court staff.
9. Any recommendations that they seek psychiatric support or evaluation will lead to extremely angry and potentially threatening responses. The role of psychiatry is generally limited. However, for those individuals who threaten self harm or harm to others, or carry out aggressive behaviour, mandated psychiatric treatment is important.
10. Never seek to specialise in an individual. Always share the load with others.⁷³

It remains to be seen to what extent the judiciary will embrace these suggestions. Nonetheless, the re-engagement of mental health professionals with querulents and/or vexatious litigants is to be welcomed. One English legal commentator summed it up in the following words:

Hopefully, an awareness that vexatious litigants are not simply people who are a nuisance to the court system but individuals in need of psychiatric attention will both help with our understanding of them and enable the formulation of more appropriate responses to a psychiatric, rather than legal condition.⁷⁴

Conclusion

The challenge of abusive litigation and litigants is an international one, although the nature, the scale and the responses differ among nations. The United States stands out as having the most active and politicised jurisdiction where the particular dynamics of its legal system, such as the “American costs rule” and constitutional guarantees of court access, have thrown up challenges that do not manifest in other countries. In particular, there are the speculative product liability or “tort tales” cases and the *pro se* prisoner litigation. As a result,

⁷³ Grant Lester, “The Vexatious Litigant”, (2005) 17 *Judicial Officers Bulletin* 17, 19.

⁷⁴ Alan Murdie, “Vexatious litigants and de Clerambault Syndrome”, (2002) 152 *New Law Journal* 61, 62.

sanctions directed at curbing the enthusiasms of speculative attorneys reflect a focus that is not evident elsewhere. The sub-group of vexatious litigants comes very much as a late development. In the absence of data it is not clear whether this also reflects a rise in litigants-in-person and a confused identification of them as vexatious litigants. However, the relatively recent enactment of the specific “pre-filing” sanction in a handful of States suggests increasing activity of a small group of vexatious litigants.

For its part the Australian discourse has been dominated by the recent perceived challenge of litigants-in-person. The smooth administration of the adversary system relies heavily on the expertise of professional advocates. This rise in litigants-in-person has seen the judiciary and court administrators, particularly in the high volume Family Court, respond with visible management guidelines and protocols. This is in marked contrast to the political engagement that occurs in the United States. At the same time there has been the re-emergence of a mental health perspective. For the small numbers of litigants-in-person who are also persistently vexatious with their litigation there is the prospect of an innovative multidisciplinary approach to the challenge they present, not only in Australia but also internationally.

In overseas jurisdictions it is hard to quantify accurately the numbers of vexatious litigants. There is an absence of public registers of declared litigants. The quest is not assisted by the absence of research into the stories of individual declared vexatious litigants. The anecdotal evidence suggests that they are small in real numbers, something confirmed by research for this book. This also suggests that the size of the challenge presented by vexatious litigants is most likely, on a *pro rata* basis, no larger than it has ever been — but this has been obscured by the rise in litigants-in-person and the challenge they present to the smooth running of the courts. It is common ground that vexatious litigants take up an inordinate amount of court time and resources and this is a major driver for resort to the sanction. However, whether vexatious litigants tie up more resources overall than do some corporations who duel in court for tactical and strategic reasons, is moot. For example, the case of “Channel Seven v The World” was five years in the Federal Court, took 120 hearing days and the (tax deductible) legal costs were estimated to have been in the region of \$200 million. Eventually dismissing the case after finding that the plaintiff had proved none of its claims, Sackville J said:

It is difficult to understand how the costs incurred by the parties can be said to be proportionate to what is truly at stake, measured in financial terms. In my view, the expenditure of \$200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful, but borders on the scandalous.⁷⁵

⁷⁵ *Seven Network Limited v News Limited* [2007] FCA 1062, 1064. The case concerned allegations by Channel Seven (C7) that the then dominant pay-TV operator Foxtel and its owners News Ltd, Publishing and Broadcasting Ltd (PBL) and Telstra, plus Channel Ten, Optus and the Australian Football League had conspired to prevent C7 getting pay-

Finally, although the six case studies (1930–1980) discussed below predate modern developments of litigant-in-person guidelines and other case flow management reforms, it is arguable, with the benefit of hindsight, that such strategies would have had an effect. They would have provided guidance to judges and prevented their losing perspective. Similarly, the re-emergence of the mental health perspective suggests a multidisciplinary approach that may have been effective in all cases with the possible exception of Constance Bienvenu (Chapter Eight). This, of course, assumes a level of litigant cooperation. Nonetheless, the six case studies below make it clear that the vexatious litigant sanction did not work.

In the next chapter I will describe how the vexatious litigant sanction evolved and was gradually adopted by State jurisdictions and Commonwealth courts. This will include reference to the data and a critique of the remodelled statutory sanction.

football rights. See further, John Dixon, “Australia’s most expensive court case ends”, *The National Business Review*, 29 July 2007 and Michael Pelly, “C7 mega-litigation takes its full toll as Judge Sackville retires”, *The Weekend Australian*, 12–13 April 2008, 35.



CHAPTER THREE

Judicial and statutory control of vexatious litigants

Introduction

Whether or not courts or governments have correctly identified the distinction between litigants-in-person and vexatious litigants, both bodies have developed sanctions seeking to control persistent litigants. This has been an evolutionary process over the last 130 years. The early efforts of the courts focused on their inherent power to protect court processes from abuse. This was on a case-by-case basis and concentrated on the merits of the presenting litigation rather than on controlling the individual litigant. In time this power was formalised in every superior court jurisdiction into rules of court. The major contribution of government has been to develop a specific statutory sanction that allows a superior court to ban an individual litigant from initiating new legal proceedings. The impact of such an order is to transfer the focus of the litigant from third party defendants to the court, as they must apply to the court for permission to issue new legal proceedings.

In this chapter I will set out the framework of the judicial and statutory control of vexatious litigants in Australia. I will discuss the early use of the inherent power and the emergence of the specific statutory sanction. I will canvass, as a threshold issue, whether there is a right of access to the court to have a dispute resolved; and draw a distinction between the controls and sanctions available in cases where there is representation and where the litigant self-represents.

I will also trace in this chapter, in chronological sequence, the emergence of the statutory sanction in each of the 11 superior Australian jurisdictions¹ and identify whether that emergence was the response to a particular litigant or more in the nature of “good housekeeping”. This discussion will include details of people declared vexatious in each jurisdiction from the date of inception

¹ There are six State Supreme Courts: New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. There are five Federal Courts: the High Court, the Family Court, the Federal Court, and the Supreme Courts of the Northern Territory and the Australian Capital Territory.

of the sanction until 31 December 2008. I will also refer to the 2008 reform proposals of the Law Reform Committee of the Victorian Parliament and the Victorian Law Reform Commission. Both bodies have examined the vexatious litigant sanction.² And I will provide a critical review of a new model statutory sanction developed through the Standing Committee of Attorneys-General (SCAG). My concluding theme will be that the sanction, even as modernised, is an incomplete answer to the challenge of persistent and vexatious litigants.

Legal sources of the right to access the courts

In considering how and when a court may deny a litigant access to the court there is a preliminary question. Is there a fundamental right to access the court in the first place? Expressed another way, is there a right to invoke the state's power to resolve disputes between citizens? Litigants, especially vexatious ones, regularly assert that such a right exists. The judiciary also endorses that view. Ironically, in recent times, such judicial expressions have usually been made just before denying an application of a declared vexatious litigant. For example, in 1996 in *Attorney-General (Cth) Ex parte Skyring* Kirby J said, "[t]he rule of law requires that, ordinarily, a person should have access to the Courts in order to invoke their jurisdiction".³ A few years later in *Attorney-General (NSW) v Spautz* Brownie AJ said, "[t]he right of the ordinary citizen to commence and continue legal proceedings without requiring the consent or leave of any other person is one of the foundations of a free society, as we know it in Australia".⁴ However, such expressions are not based on any local *Bill of Rights* or constitutional guarantees. There are none. Historically, they draw on common law principles evolved from the *Magna Carta* when, in 1215, the English Barons secured the right to petition the Crown about their grievances.⁵ In particular, the following two clauses outlined the rights of the Barons and their entitlement to access the courts:

² See Parliament of Victoria, *Inquiry into Vexatious Litigants: Final Report*, Law Reform Committee, 2008 at: <http://www.parliament.vic.gov.au/lawreform/inquiries/Vexatious%20Litigants/final%20report.pdf> (5 February 2009) and Victorian Law Reform Commission, *Civil Justice Review: Report 14*, at: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe72602960b930/VLRC%20Civil%20Justice%20Review%20-%20Report.pdf> (29 May 2008).

³ (1996) 135 ALR 29, 32. Alan George Skyring has the unique record of having been declared a vexatious litigant in three jurisdictions: the High Court (1992); the Queensland Supreme Court (1995) and the Federal Court (1999). The general theme of his litigation has been that it is beyond the constitutional power of the federal Parliament to make paper money (as distinct from gold) legal tender of Australia.

⁴ [2000] NSWSC 45. The NSW Supreme Court declared Michael Edward Spautz a vexatious litigant in 1990. His declaration grew out of persistent litigation challenging the academic record of an academic at the University of Newcastle. See further, John Biggs, "The University of Newcastle: prelude to Dawkins", in John Biggs and Richard Davis, *The Subversion of Australian Universities*, 2002, 127–148.

⁵ William Holdsworth, *A History of English Law*, Volume 2, 1966 Reprint, 54 ff.

(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

(40) To no one will we sell, to no one deny or delay right or justice.⁶

This right to redress was further developed in favour of the ordinary citizen over the subsequent centuries with the emergence of a judiciary independent from the Crown. By 1765 Blackstone was able to write in his *Commentaries* of “the right of every Englishman” to apply “to the courts of justice for redress of injuries”.⁷ The symbolism of this heritage is widely recognised, in particular, by vexatious litigants as demonstrated below in the case studies of Millane (Chapter Four), Collins (Chapter Seven) and Soegemeier (Chapter Nine). All these vexatious litigants referred to the *Magna Carta* as a principal source of authority underpinning their litigation.

By contrast, in the United States, litigants and *pro se* prisoner litigants in particular can point to a right of access having been formalised through constitutional amendments. For example, the First Amendment to the United States *Constitution* guarantees, among other things, that citizens can “petition for redress of grievances”.⁸ However, this right is far from absolute and the United States Supreme Court has concluded that the petition clause does not provide a substantive right of access to the courts unless the free speech rights are also implicated, thus narrowing its scope. Similarly, in Europe, although the right to fair (criminal) trial contained in Article 6 of the *European Convention on Human Rights* has been held to contain an inherent right to access the civil court,⁹ it too is limited. In this respect, the European Court of Human Rights has determined that signatory states can impose limitations on the right of access if they have a legitimate purpose and are proportionate to the goal they seek to achieve. Limits on access for vexatious litigants have been held to be within that scope.¹⁰ This, of course, is apart from the practical problems of exercising rights under the Convention and then, if successful, of effective local enforcement.¹¹

⁶ See at: <http://www.bl.uk/treasures/magnacarta/translation.html> (29 November 2007).

⁷ William Blackstone, *Commentaries*, Book 1, Chapter 1, 137. See at: <http://www.yale.edu/lawweb/avalon/blackstone/bk1ch1.htm> (13 December 2007).

⁸ The First Amendment provides, “Congress shall make no law...abridging the freedom of speech, or of the press: or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances”.

⁹ In *Golder v United Kingdom* (1975) 1 EHRR524, E Ct HR a convicted prisoner had been refused permission to write to his solicitor with a view to instituting libel proceedings against a prison officer. The court held that a right of access to the court was inherent in Article 6(1). See further Lord Lester and David Pannick, *Human Rights Law and Practice*, 1999, 139-141.

¹⁰ Lord Lester and David Pannick, *Human Rights Law and Practice*, 1999, 139-141.

¹¹ The process requires that before application all domestic remedies must have been exhausted. Then, if the convention has not been fully entrenched into local law, enforcement

In Australia recent attempts to formalise rights of access to justice have drawn on two sources. One is the *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a signatory. In particular, Article 14 of this treaty provides in part that:

All persons shall be equal before the courts or tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹²

The other approach seeks to imply such rights by emphasising the separation of judicial power from other governmental powers under Chapter III of the Australian *Constitution*. Although not mutually exclusive, reliance on either source has had only limited success. The High Court has been prepared to hold that the *Constitution*, particularly the external affairs power (section 51(xxix)), supports legislation enacted to implement international treaty obligations¹³ but has been reluctant to adopt international conventions into Australia when they have not been enacted into Australian law, as is the case with the ICCPR. The High Court decision in *Dietrich v The Queen*¹⁴ brought both threads together. It concerned the nature of the right to a fair trial where the defendant in a serious criminal case was unrepresented, legal aid having been refused. The case raised directly the applicability of Article 14. Although some members of the court were prepared to find human rights based on overseas treaties implied into the Australian *Constitution*,¹⁵ the majority held that there was no absolute right to have publicly funded counsel in a criminal matter.¹⁶ In 2005 in *APLA Ltd v Legal Services Commissioner (NSW)*¹⁷ the High Court had the opportunity to consider again whether Chapter III supported an implied right to access legal advice as an important aspect of access to justice. This time the case concerned a challenge to State regulations prohibiting advertising for civil personal injury claims. Again the court declined, upholding the validity of the State legislation.¹⁸

Finally, a further factor inhibiting claims of a right of access is the preliminary power granted to court registrars to refuse to seal or accept documents (including initiating documents) that seem to be irregular or an

becomes a matter of political goodwill. For a discussion see James Spigelman, "Access to Justice and Human Rights Treaties", Supreme Court of New South Wales, 1999, at: http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_221099 (20 November 2007).

¹² See <http://www.ohchr.org/english/law/ccpr.htm> (29 November 2007).

¹³ See, for example, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Commonwealth v Tasmania* 158 CLR 1 (The Tasmanian Dams Case).

¹⁴ (1992) 177 CLR 292.

¹⁵ (1992) 177 CLR 292, (Dean and Gaudron JJ).

¹⁶ (1992) 177 CLR 292, (Mason CJ, McHugh, Dean, Gaudron and Toohey JJ).

¹⁷ (2005) 224 CLR 322.

¹⁸ *Ibid.*

abuse of the process of the court.¹⁹ The origin and impact of this pre-emptive power will be discussed further below.

Control through representation

Despite the absence in Australia of a formal right of access to the courts it is clear that, historically, the “fathers of federation” anticipated litigants-in-person. They provided in section 78 of the *Judiciary Act 1903* (Cth) that “the parties may appear personally or by such Barristers or Solicitors”. This provision has been adopted in varying forms by the rules of modern day courts.

The distinction between appearance in person and through legal representation is an important one. The latter brings with it the ethical duties of the legal practitioner to the client, to the law and to the court that have evolved over the previous century. In the period covered by the case studies it is clear that an advocate was (and is still) expected to maintain the dignity of the profession, to be courteous to the presiding judge and to guard against being a channel for questions intended only to insult or annoy. Above all, an advocate must avoid misleading the court in relation to both fact and law. Breaches of these duties can bring sanction by the court, under its inherent jurisdiction to protect the procedures of the court, and disciplinary action by the professional regulating body.

No such professional obligations restrain the litigant-in-person. Yet it would be difficult for a judiciary drawn almost exclusively from professional advocates to suppress an expectation that litigants in person would also “play by the rules”. The six case studies will demonstrate how a judicial frustration created by the denial of this expectation can come to the surface.

As Professor Dal Pont makes clear, the advocate’s paramount duty to the court traditionally carries with it a level of independence. An advocate is not solely a hired gun for the client. They are expected to exercise an independent judgment that will assist the court in performing its role of administering justice.²⁰ This is particularly so in relation to advocating what are described as “hopeless cases”.²¹ Simply advocating a case as instructed by a client is not enough to discharge the duty to the court. A lawyer is obliged to have investigated the claim to form an opinion as to whether a cause of action exists or is likely to succeed. If the claim is weak, then the advocate can proceed in good faith provided the case is at least arguable and the client has been informed of the fact. If the claim is not arguable then, even if the client agrees to go forward, it is regarded as a breach of duty for the lawyer to proceed. The case would be struck out with costs awarded against the losing party. In addition, there has recently been a shift to awarding costs against lawyers

¹⁹ For example, see Order 27.06 of the *Victorian Supreme Court (General Procedure) Rules 2005*.

²⁰ Gino Dal Pont, *Lawyers’ Professional Responsibility*, 2006, 385.

²¹ *Ibid*, 401.

personally.²² At the same time the development in Australia, since 1997, of model ethical rules and legislative sanctions has formalised the obligation of lawyers to screen weak or hopeless cases to ensure cases are conducted efficiently and expeditiously.²³ In part, this follows the American path shaped by Rule 11 of the *Federal Rules of Civil Procedure*. Consistent with this trend, recent recommendations of the Victorian Law Reform Commission's (VLRC's) Civil Justice Review suggest a move towards the development of ethical guidelines for Victorian lawyers dealing with self-represented litigants. The VLRC recommends that the guidelines canvass matters such as protocols for communication, record-keeping, conduct during negotiations and personal security.²⁴ This is an interesting development because, if accepted, it would represent an attempt to influence the conduct of litigants-in-person by placing obligations on opposing counsel.

Even though these duties have been formalised only in recent times, the impact of the difference in cases where the litigant is not represented, and is therefore less restrained or inhibited by professional rules and obligations, will be demonstrated in the six case studies below.

The inherent jurisdiction, the statutory rules and the rise of a phoenix

The range of judicial remedies available to control vexatious litigation and vexatious litigants is extensive. Before the courts formalised most of these powers in rules of court, the judges had long claimed their source derived from an inherent jurisdiction to protect the court's procedures from abuse. As Mason CJ has noted,²⁵ the remedies include injunctive relief, removing and/or

²² See generally, Duncan Webb "Hopeless cases: In defence of compensating litigants at the advocate's expense", [1999] *VUWL Rev* 39.

²³ For example, Practice Rules of the Victorian Bar, effective 1 August 2007, read in part:

16. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and the instructing solicitor's desires where practicable.
17. A barrister will not have breached the barrister's duty to the client, and will not have failed to give reasonable consideration to the client's or the instructing solicitor's desires, simply by choosing, contrary to those desires, to exercise the forensic judgments called for during the case so as to:
 - (a) confine any hearing to those issues which the barrister believes to be the real issues;
 - (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or
 - (c) inform the court of any persuasive authority against the client's case.

²⁴ Victorian Law Reform Commission, *Civil Justice Review: Report 14*, Recommendation 114, 583. See at: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe72602960b930/VLRC%20Civil%20Justice%20Review%20-%20Report.pdf> (29 May 2008).

²⁵ Anthony Mason, "The Inherent Jurisdiction of the Court", (1983) 57 *ALJ* 449, 453.

amending improper documents and pleadings through to staying proceedings (absolutely or conditionally) or summarily dismissing the action. In addition, courts have the ability both to award and seek security for costs and the power to gaol for contempt. Of these remedies the ability of the court to summarily or peremptorily stay or dismiss an action is a key judicial weapon when dealing with a vexatious litigant.²⁶ The alternate approach of allowing the amendment of abusive or inadequate pleadings and/or allowing the litigation to go full-term and then deal with it according to substantive principles is far less satisfactory. The latter approach can lead to delay, wasteful use of legal resources, hardship to other litigants and an erosion of confidence in the administration of justice.

An early example of the English courts' exercise of an inherent power to summarily control abusive litigation followed sensational civil proceedings involving the "Tichborne claimant". This was a case with a strong Australian connection and concerned an unsuccessful attempt by a Wagga Wagga butcher, Thomas Castro, to claim an English baronetcy. Although represented for much of the proceedings, Castro was unsuccessful. This led to a subsequent conviction for perjury and a 14-year gaol sentence. In 1875 he attempted to reopen the criminal conviction and have the gaol sentence set aside. When a court clerk refused to issue proceedings in the absence of the Attorney-General's fiat, Castro sought *mandamus* against the clerk. The court, clearly at the end of its tolerance for the litigation, drew on its inherent power and summarily stayed the action as frivolous and vexatious and an abuse of process. On appeal, the Court of Exchequer in *Castro v Murray*²⁷ agreed. Baron Bramwell said, "[this action] is absolutely groundless, and it is one in which the Court, in the exercise of its discretion, ought to stop the proceedings as being an abuse of the process of the Court".²⁸

In Australia an early example of restricting particular litigation through the courts' inherent jurisdiction is the Victorian Supreme Court decision in *Foran v Derrick*.²⁹ In that case Foran believed himself libelled by a report prepared by a government ministry. A first action was non-suited with costs because of Foran's inability, in those pre-FOI days, to have the responsible Minister produce the report. A second action was stayed because of non-payment of the earlier court costs. Foran then brought third proceedings. They were summarily dismissed as vexatious. Chief Justice Madden said:

The duty of the Court is the administration of justice, and wherever it is proper that for the satisfaction of justice a person should not be thwarted for want of

²⁶ In Victoria this power is now contained in Order 23 of the *Supreme Court General (Civil Procedure) Rules 2005*.

²⁷ (1875) 10 LR 213. See also, Robyn Annear, *The Man Who Lost Himself: the Unbelievable Story of the Tichborne Claimant*, 2002.

²⁸ *Ibid*, 218. The decision was promptly approved in *Dawkins v Prince Edward of Saxe Weimar* [1876] 100 App Cas 210.

²⁹ (1893) 14 ALT 284.

means, the court will give such person every consideration and assistance to assert his right or to have his wrong redressed. But it must be remembered that there are two parties at least to be considered where justice is being administered, and while a person of small means is not to be forgotten, his antagonist should also be remembered.³⁰

These decisions reflect a narrow approach to dealing with a persistent litigant through the merits of each presenting case. However, in 1905 the English courts took a bolder step in *Grepe v Loam*³¹ when the Court of Appeal stayed *further* moves in proceedings without prior leave of the court. This indicated a preparedness to take a pre-emptive position focused on the litigant. The facts behind that case concerned litigation that had culminated in a final decision in 1882. Between 1886 and 1887 various applications were made to set aside the 1882 judgment. All had been dismissed with costs, none of which had been paid. When another challenge was made in 1887 the court of its own motion dismissed it and, recognising the futility of costs as a deterrent, issued a direction restricting *further* applications in the action without prior leave. The court stated:

That the said applicants or any of them be not allowed to make any further applications in these actions or either of them to this court or to the court below without the leave of this court being first obtained. And if notice of any such application shall be given without leave being obtained, the Respondents shall not be required to appear upon such application, and it shall be dismissed without being heard.³²

This was a development that was supported in both England and Australia.³³

However, there was a subtle distinction between *further* proceedings and *future* proceedings. Further proceedings usually involved continuing applications involving the same subject matter and parties. Future proceedings involved a new action, even if it related to the same subject matter and involved the same defendants. Traditionally, the courts felt unable to draw upon the inherent power to make an order restricting a litigant from initiating new or *future* proceedings. The leading case in Australia is the 1974 High Court decision in *Commonwealth Trading Bank v Inglis*.³⁴ In that case the bank had successfully defended a case at first instance. Inglis had appealed and the bank applied for a *Grepe v Loam*-type order seeking to have the current application

³⁰ *Ibid*, 285. See also, *Davison v Colonial Treasurer* (1930) 47 WN 19.

³¹ (1887) 37 Ch 168.

³² *Ibid*, 169.

³³ See *Lord Kinnaird v Field* [1905] 2 Ch 306 and *Davison v Colonial Treasurer* (1930) 47 WN 19. For commentary on the latter decision, see Anon, "Vexatious Litigation – Restraint of Further Proceedings", (1930) 3 *ALJ* 414.

³⁴ (1974) 131 CLR 311. Kathleen Isobel Inglis appeared in person. At the time Inglis worked in the library of the Australian Parliament in Canberra, indicating a familiarity with legal form and procedure. Interview with Edward Woodward, South Yarra, 1 February 2006.

dismissed and Inglis banned from issuing future proceedings. The reason given was that Inglis had previously habitually and persistently instituted vexatious applications and generally wasted time. In refusing the application for a future ban, the court said:

In our opinion, it is not surprising that the courts do not appear (so far as we have been able to discover) to have taken the further step of intervening in a summary way to prevent the commencement, except by leave, of actions and other proceedings by a particular person or persons but have limited themselves to exercising their powers in relation to proceedings which have been taken in a court and thus have been placed under its control. It may be that the exercise of supervision, by means of a requirement that leave should be obtained for the bringing of proceedings, could have been justified logically as a proper safeguard against abuse of the court's process in cases where it has been shown to be probable that a person would continue bringing groundless proceedings. But in our opinion, it is apparent that the courts, both in England and in this country, have declined to regard themselves as having power to do so, except where such power has been conferred upon them by Act of Parliament or by Rules promulgated under statutory authority. This is demonstrated, not merely by the absence of reported cases in which such orders have been made under the inherent power of the court, but by the fact that it has been thought necessary to deal with specific cases of the bringing of numerous unfounded proceedings by legislation rather than by invoking the inherent power of the court.³⁵

In *Inglis* the court noted the difference between control of abusive litigation through the inherent power and control of individual vexatious litigants through a statutory sanction. It undertook a full historical review of the emergence of the statutory vexatious litigant sanction since the passage of the *Vexatious Actions Act 1896* (UK). It recognised that the English Parliament and the Australian State Parliaments had laid out an almost identical process and had reserved to a class of nominated senior law officers the power to initiate an application to have someone declared a vexatious litigant.³⁶ By its nature, that involved political considerations and drew a demarcation line between the executive and the judiciary and their responsibilities. Although they made no comment on the fact, it would not have escaped Their Honours' notice that it was the bank, and not a senior law officer, that had sought a vexatious litigant-type order in *Inglis*.

For nearly a century the accepted view was that the inherent jurisdiction did not support a power to ban a litigant from issuing *future* legal proceedings.

³⁵ *Ibid*, 314–4.

³⁶ See, for example, section 21(1) of the *Supreme Court Act 1986* (Vic) where standing to apply is restricted to the Attorney-General. In the High Court Order 44A was inserted into the Rules on 9 March 1943. The relevant rule is now Regulation 6.06 of the *High Court Rules*. Standing is reserved to a law officer, the Australian Government Solicitor or the Principal Registrar of the High Court.

As a result the state had filled the gap by creating a statutory vexatious litigant sanction.

However, in 2000 this view was challenged in a series of English Court of Appeal cases. Like a phoenix rising from the ashes, *Grepe v Loam*-style orders were revived. In *Ebert v Venvil*; *Ebert v Birch*³⁷ and, in 2004, in *Bhamjee v Forsdick*³⁸ the court asserted a jurisdiction, based upon the inherent jurisdiction, to prevent future proceedings. In both cases the court was careful not to overreach itself. In *Ebert* the order restrained all future proceedings by named parties but only in relation to the bankruptcy proceedings that formed the basis of the original dispute.³⁹ In *Bhamjee* the court built on *Ebert* and outlined a new framework by which it would provide a remedy preventing a litigant from instituting proceedings without its prior permission. This framework, styled “general civil restraint orders”, restricted a litigant’s right to seek permission to appeal if it could be shown they had persistently abused the process. They also gave standing to the other party or parties to apply for the restraint order, thus not requiring the Attorney-General’s intervention. Importantly, indicating judicial restraint, the orders were to last no longer than two years, although they were extendable.⁴⁰ The explanation for the re-emergence of the inherent jurisdiction power reflects the court’s concern to protect its procedures from abuse in the face of a perceived growth in vexatious cases and the consequent strain on resources. Impliedly, it is also a comment on the perceived tardiness of the Attorney-General in bringing applications for vexatious litigant declarations before the court.

This English development has been criticised by Professor Taggart as “audacious quasi-legislative activity” and “law reform via the backdoor”. It would only “weaken, if not destroy, the law officers’ monopoly over the initiation of the statutory power, and in many cases will render the century-old statutory power redundant”.⁴¹ That is a rather dramatic overstatement. As the case studies show, the statutory sanction has never been a full solution to the problem of vexatious litigants. Fashioned to meet a particular problem a century ago of litigation focused on public figures and institutions, it is even less responsive to the litigant challenges of the 21st century. It is for this reason that it has been under review, not only overseas⁴² but also by the Australian Standing Committee of Attorneys-General (SCAG) that has developed a

³⁷ [2000] Ch 484.

³⁸ [2004] 1 WLR 88.

³⁹ [2000] Ch 484, 486 and 495-496.

⁴⁰ [2004] 1 WLR 88, paragraph 57.

⁴¹ Michael Taggart, “Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896”, (2004) 63 *Cambridge Law Journal* 656, 681.

⁴² For India, see Law Commission of India, *192nd Report on Prevention of Vexatious Litigation*, 2005, <http://lawcommissionofindia.nic.in/reports.htm> (11 January 2008) and for Canada, see Law Reform Commission of Nova Scotia, *Vexatious Litigants*, 2006, http://www.lawreform.ns.ca/final_reports.htm (11 January 2008).

model uniform statutory sanction.⁴³ The reforms proposed, such as widening the standing provisions about who may make an application,⁴⁴ make it less likely that Australian courts would need to follow the English development. However, should that reform process stall, the courts have shown they are aware of the English development⁴⁵ but have not so far been prepared to apply *Bhamjee* further than restriction orders related to extant proceedings. In essence, the courts have confirmed *Inglis*.⁴⁶

Emergence of the statutory control and the Australian response

England

The statutory vexatious litigant sanction was introduced first in England in 1896 and was progressively adopted in Australian jurisdictions. For the first time it enabled a superior court to ban *future* legal proceedings on application of the Attorney-General. Traditionally, the unsuccessful litigation of Alexander Chaffers has been said to be the catalyst for the enactment of the *Vexatious Actions Act 1896* (UK). Between 1891 and 1896 he brought 48 actions, primarily against public figures, including judges of the High Court, the Speaker of the House of Commons, the Archbishop of Canterbury and the Trustees of the British Museum.⁴⁷ However, as Professor Taggart has noted in his thorough examination of Chaffers and the genesis of the sanction, it is just as likely that the legislation was a response to the litigation of a larger group of litigants in person who were active in the second half of the 19th century, including a protégé of Chaffers, Georgina Weldon.⁴⁸ In introducing the Bill, the Lord Chancellor, Lord Halsbury, noted as much when he said:

The practice of bringing absolutely wanton and vexatious actions by persons of no responsibility whatever on every conceivable subject, had now become such a scandal that the time had arrived when some sort of stop should be put to such proceedings. The misfortune was that such proceedings were apt to create an example and multiply themselves, and, although a particular plaintiff

⁴³ See Second Reading speech of Hon LD Lavarch, Attorney-General of Queensland, *Parliamentary Debates*, Legislative Assembly, 9 August 2005, 2207.

⁴⁴ *Vexatious Proceedings Act 2005* (Qld), section 5(1).

⁴⁵ See *Attorney-General for Victoria v Kay* [2006] 9 and *Attorney-General for Victoria v Kay* [2006] 11.

⁴⁶ For example, see *Wentworth v Graham and Anor* [2003] NSWCA 307; *von Risefer v Permanent Trustee Company Limited* [2005] QCA 105 and *Idoport v National Australia Bank and Anor* [2006] NSWCA 202 paragraph 113.

⁴⁷ *In re Chaffers Ex Parte The Attorney-General* (1897) 45 WR 365.

⁴⁸ Michael Taggart, "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896", (2004) 63 *Cambridge Law Journal* 656, 678. See also, Anthony Clark, "Vexatious Litigants and Access to Justice Past Present and Future", Access to Justice Conference, Monash University, Prato Italy 2006, http://www.judiciary.gov.uk/publications_media/speeches/2006/sp300606.htm (19 December 2007).

might be estopped, he would have many successors, and the practice would go on undiminished.⁴⁹

The legislation did have its detractors. Mr JF Oswald had concerns that it was being “thrust on the country at the last moment of an expiring Session” and that it could be used to “shut the doors of the courts to the whole of Her Majesty’s subjects, because Her Majesty’s subjects were inclined to be litigious (Laughter)”.⁵⁰ He was opposed to the clause:

[b]ecause it infringed the first principle of public justice, namely, that it should be free to all alike. The Queen’s Courts were public Courts, and all classes of litigants were entitled to free and unimpeded access thereto. The clause might lead to abuse: the courts had already ample power to summarily and inexpensively stop any vexatious or frivolous action.⁵¹

Nonetheless, the Bill passed into law and the vague criterion it formulated of a vexatious litigant being someone who “habitually and persistently and without any reasonable ground” instituted vexatious legal proceedings was the one largely adopted in those jurisdictions around the world that introduced the sanction over the next century. In 1897 Chaffers became the first declared vexatious litigant. In resisting the application he argued, among other things, that the Act should not apply retrospectively.⁵² As will be seen, this unsuccessful argument and other aspects of the Chaffers case resurfaced in the application to declare Rupert Millane vexatious in Victoria 30 years later.

Victoria

The State of Victoria, Australia, was the next common law jurisdiction to adopt the statutory sanction.⁵³ In 1928, in haste to access the sanction, the State, rather than persist with its own legislation in Parliament, simply adopted the

⁴⁹ England, 42 *Parliamentary Debates (4th Series)*, House of Commons, Col 1410.

⁵⁰ England, 42 *Parliamentary Debates (4th Series)*, House of Commons, Col 455-6.

⁵¹ *Ibid.*

⁵² *In re Chaffers Ex Parte The Attorney-General* (1897) 45 WR 365. For a further description, see Michael Taggart, “Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896”, (2004) 63 *Cambridge Law Journal* 656.

⁵³ In 1930 Canada was the next country to adopt the sanction. See *Vexatious Proceedings Act 1930* SO (Statute of Ontario), c 24, followed by India in 1949: see *Madras Vexatious (Prevention) (Act 8 of 1949)*. South Africa followed in 1956: see *Vexatious Proceedings Act 1956* (South Africa) section 2(1)(b). New Zealand adopted the sanction in 1965: see *Judicature Amendment Act 1965* (NZ) section 3 and Michael Taggart, “Vexing the Establishment: Jack Wiseman of Murrays Bay”, [2007] *New Zealand Law Review* 271. In the United States California was the first American jurisdiction to introduce the sanction, known there as a “pre filing order”: see 1990 Cal Stat 621, § 3. For background on California’s attempt to deal with vexatious litigants since the 1960s and a discussion on the “pre-filing” initiative, see Lee Rawles, “The California Vexatious Litigant Statute: a Viable Judicial Tool to Deny the Clever Obstructionists Access?” (1998) 72 *SCALR* 275.

entire English provision as part of that year's consolidation of the *Supreme Court Act*. It became section 33 and read:

- (1) If on application made by the Attorney-General under this section the Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings whether it is in the Court or any inferior Court and whether against different persons the Court may after hearing that person or giving him an opportunity to be heard order that no legal proceedings shall without the leave of the Court or a Judge thereof be instituted by him in any Court and such leave shall not be given unless the Court or Judge is satisfied that the proceedings are not an abuse of the process of the court.
- (2) If the person against whom an order is sought under this section is unable on account of poverty to retain counsel the Court shall assign Counsel to him.
- (3) A copy of any order made under this section shall be published in the *Government Gazette*.

The unusual nature of the original adoption of the provision, rather than via the traditional passage of legislation, fed the conspiracy theories of litigants for many years to come. As with its English counterpart, the provision was a response to the extraordinary litigation of a particular litigant, Rupert Millane, unequivocally the “Prince” of Australian vexatious litigants. In 1930 he was the first Australian to be declared a vexatious litigant but not before the Full Court of the Victorian Supreme Court, in apparent haste to invoke the sanction, had refused to accept two substantive and probably meritorious submissions made on behalf of Millane. The first was that the new law offended the general rule of common law that a statute changing the law ought not, unless the intention appears with reasonable certainty, apply to facts or events that have already occurred.⁵⁴ In its published reasons the Full Court simply omitted to address the argument.⁵⁵ Further, in a bold move for the time, Their Honours also distinguished the conflicting English decision *In re Boaler*⁵⁶ to enable the words “legal proceedings” to include criminal proceedings.⁵⁷ Both these submissions are discussed further in Chapter Four.

⁵⁴ For a review of the authorities supporting the principle, see *Maxwell v Murphy* (1956-1957) 96 CLR 96, 263 ff. Section 33 became effective in December 1929. After that date, and until the hearing, according to the affidavit material filed in support of the application, Millane issued only one Petty Sessions Court proceeding. See *In re Millane* [1930] VLR 381, 383.

⁵⁵ *In re Millane* [1930] VLR 381.

⁵⁶ (1915) 1KB 21.

⁵⁷ *In re Millane* [1930] VLR 381.

For many years the provision was known colloquially as the “Blackfellows Act”.⁵⁸ Substantially the same, it is now section 21 of the *Supreme Court Act 1986* (Vic).⁵⁹

In the 50-year period 1930–1980 the Victorian Supreme Court made six vexatious declarations or approximately one per decade. As Table 1 demonstrates, over the next 27 years (1981–2008) numbers doubled with

⁵⁸ The then Mr Rupert Hamer (later Sir Rupert) used the expression in 1963 when introducing an amendment to the provision. See Victoria, *Parliamentary Debates*, Legislative Council, 10 September 1963, 89. Hamer’s view was that the term referred to declared litigants being treated as “non persons at law”. This is said to be a reference to the pre-1967 position in the Australian *Constitution* that treated the Australian Aboriginal people as “non persons” so that they were not given the vote or counted in the census. Letter from Hamer to the author, 7 July 1987. An alternate view is that the expression derives from a similar provision in licensing law of the period that “enjoined” publicans from selling alcohol to people placed under the provisions of the legislation. People affected were usually Aborigines. See further, Kevin Anderson, *Fossil in the Sandstone: The Recollecting Judge*, 1986, 23.

⁵⁹ It reads:

- (1) The Attorney-General may apply to the Court for an order declaring a person to be a vexatious litigant.
- (2) The Court may, after hearing or giving the person an opportunity to be heard, make an order declaring the person to be a vexatious litigant if it is satisfied that the person has –
 - (a) habitually; and
 - (b) persistently; and
 - (c) without any reasonable ground –
 instituted vexatious legal proceedings (whether civil or criminal) in the Court, an inferior court or a tribunal against the same person or different persons.
- (3) An order under subsection (2) may provide that the vexatious litigant must not without leave of –
 - (a) the Court; or
 - (b) an inferior court; or
 - (c) a tribunal constituted or presided over by a person who is an Australian lawyer –
 do the following-
 - (d) continue any legal proceedings (whether civil or criminal) in the Court, inferior court or tribunal; or
 - (e) commence any legal proceedings (whether civil or criminal) in the Court or any specified inferior court or tribunal; or
 - (f) commence any specified type of legal proceedings (whether civil or criminal) in the Court or any specified inferior court or tribunal.
- (4) Leave must not be given unless the Court, or if the order under subsection (2) so provides, the inferior court or tribunal is satisfied that the proceedings are not or will not be an abuse of the process of the Court, inferior court or tribunal.
- (5) The Court may at any time vary, set aside or revoke an order made under subsection (2) if it considers it proper to do so.
- (6) The Attorney-General must cause a copy of any order made under subsection (2) to be published in the Government Gazette.
- (7) The Court, when exercising a power under this section, must be constituted by a Judge.

a further nine declarations. That of Julian Knight (2004) is one of only two declarations in Australia involving a prisoner.⁶⁰

During 2008 the VLRC⁶¹ and the Law Reform Committee (LRC) of the Parliament of Victoria⁶² both submitted final reports to the Parliament that made recommendations for reform of the vexatious litigant sanction. This was despite the fact that Victoria had recently been a party to the agreed model reform Bill developed through the SCAG. The VLRC project was a wide ranging review of the civil justice system while the LRC focused exclusively on issues surrounding vexatious litigants. Both inquiries declined to make any specific recommendations about incorporating a medical dimension within the sanction. Both inquiries drew, to different degrees, on published and unpublished research for this book. Although both inquiries worked independently and reported months apart, there is much common ground in their recommendations.

However, a major point of difference is the recommendation by the LRC that the existing vexatious litigant sanction be repealed and be replaced by a new three-tiered graduated system renamed “litigation limitation orders” (Recommendation 13).⁶³ This recognised that the traditional approach saw orders made only as a last resort and a system of “graduated orders” was likely to be a more effective management tool. The LRC acknowledged that this was the direction in the United Kingdom. The suggested renaming of the sanction also recognised that the traditional name of the sanction was value laden and that a more neutral term was to be preferred. The key elements of the three tiers recommended were:

Limited litigation limitation orders

- Effect of order would prohibit further applications in *existing* litigation.
- Threshold test of order should be two or more applications in existing litigation brought without merit.
- *All courts and VCAT* would have power to make order.
- Attorney-General and Solicitor-General could apply for order.

⁶⁰ The other prisoner declared is Queensland’s Dennis Melvin Fritz (1987). His attempts to have his convictions overturned were supported by his father Leslie Harold Fritz, who was declared vexatious at the same time.

⁶¹ Victorian Law Reform Commission, *Civil Justice Review: Report 14*. See further at: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe72602960b930/VLRC%20Civil%20Justice%20Review%20-%20Report.pdf> (29 May 2008). Further reference to this report will be in the short form VLRC.

⁶² Parliament of Victoria, *Inquiry into Vexatious Litigants: Final Report*, Law Reform Committee, 2008. See at: <http://www.parliament.vic.gov.au/lawreform/inquiries/Vexatious%20Litigants/final%20report.pdf> (5 February 2009). See also <http://www.parliament.vic.gov.au/lawreform/default.htm> (8 March 2008). Further reference to this report will be in the short form LRC.

⁶³ LRC, n 62, xiii.

- Parties to meritless applications or people with “sufficient interest” can also apply for order subject to leave.⁶⁴

Extended litigation limitation orders

- Effect of order would prohibit the continuance or further applications or proceedings against people or organisations named or on issues described in order.
- Threshold test of order should be that the person has *frequently* brought legal proceedings without merit.
- Only the Supreme Court, Chief Judge of the County Court, the Chief Magistrate and the president of VCAT could make the order.
- Attorney-General and Solicitor-General could apply for order.
- Parties to meritless applications or people with “sufficient interest” can also apply for order subject to leave.⁶⁵

General litigation limitation orders

- Effect of order would prohibit the continuance or bringing of any legal proceedings without leave.
- The test for the order would be that the person has *persistently and without reasonable ground* brought legal proceedings that are without merit.
- Only the Supreme Court could make the order.
- Only the Attorney-General or the Solicitor-General could make the application.⁶⁶

The LRC also made a number of other specific suggestions that mirrored those made in the VLRC report. They include:⁶⁷

1. Development of ethical guidelines to assist lawyers in dealing with vexatious litigants (Recommendation 4).
2. Enhanced “preventive” control by expanding the power of the courts to refuse to accept or seal documents, including in respect of interlocutory applications subject to judicial supervision (Recommendation 7).
3. The new legislation should define “institute”, “proceedings” and “proceedings that are without merit” (Recommendation 20).
4. Applications for leave be dealt with on the papers (Recommendation 27).
5. Creation of a public register of orders (Recommendation 31).

The report was presented to Parliament in December 2008. As at May 2009 the Victorian Government was still considering its response to both reports.

⁶⁴ LRC, n 62, Recommendation 14, xiii.

⁶⁵ LRC, n 62, Recommendation 15, xiii.

⁶⁶ LRC, n 62, Recommendation 16, xiv.

⁶⁷ LRC, n 62, xi-xvii.

Table 1: Victorian register of declared vexatious litigants (1928–2008)

Source of power: *Supreme Court Act 1986* (Vic), section 21.

No	Date	Name	File No
1	5.9.1930	Rupert Frederick MILLANE (1887–1969)	4360
2	21.7.1941	Edna Francis Davis ISAACS (1907–1989)	501
3	27.3.1953	Goldsmith COLLINS (1902–1989)	M2072
4	6.9.1963	Geza LASZLOFFY (1931–2002)	M4693
5	12.12.1969	Constance May BIENVENU (1912–1995)	M7029
6	5.9.1977	William COUSINS (1904–1982)	M12263
7	17.3.1981	Abdul BEN HEMICI	M14544
8	17.7.1981	Kathleen GALLO	M15122
9	16.7.1998	David James LINDSEY	7476/1997
10	23.2.1999	Ian KAY	6562/1998
11	9.8.2001	Gabor HORVATH	7832/2000
12	27.8.2004	Michael WESTON	7711/2001
13	19.10.2004	Julian KNIGHT	9420/2003
14	17.5.2007	Brian William SHAW	9997/2006
15	2.5.2008	John Gerard MORAN	10356/2006

Western Australia

Western Australia enacted the sanction as the *Vexatious Proceedings Restriction Act 1930* (WA). This too was the legislative response to the litigation of a particular litigant, one Ellen Barlow (Chapter Five). In drafting the provision, the Western Australian Parliamentary draftsman indicated that he had learnt from the Chaffers (UK) and Millane (Victoria) cases on the issue of retrospective application, as a provision was specifically included permitting the court to take into account proceedings instituted habitually or persistently without any reasonable ground “either before or after the commencement of this Act”.⁶⁸ In 1931 Barlow became the first Western Australian and the second Australian to be declared a vexatious litigant.

For almost 50 years Barlow was the only person declared in Western Australia. Since 1980, as Table 2 indicates, there have been a further five declarations. In 2002 the increase in orders saw the sanction repealed and replaced by the *Vexatious Proceedings Restriction Act 2002* (WA). That

⁶⁸ *Vexatious Proceedings Restriction Act 1930* (WA), section 3. A handwritten note dated 19 September 1930 in a file of the Victorian Parliamentary Counsel indicates that there was contact between the two State Governments over the legislation. It referred to the Bill introduced by the Western Australian Attorney-General, TAL Davy. See further PROV, VPRS 10265, P000, Unit 103.

legislation followed a comprehensive report by the Law Reform Commission of Western Australia (LRCWA) that described the 1930 legislation as “largely ineffectual” and, in a uncharacteristically passionate recommendation, called for an amended Act to be renamed the *Malicious Proceedings Restriction Act*.⁶⁹ Although it did not produce substantive data to support the contention that the Act was “ineffectual”, the LRCWA highlighted the perceived problems of the existing Act:

- The narrow test of habitual and persistent issuing of originating proceedings as constituting a vexatious litigant;
- The failure to consider the issuing of interlocutory and appellate proceedings;
- The failure to consider proceedings before tribunals and quasi-judicial bodies;
- The failure to consider the manner of conduct of proceedings;
- The exclusive power of the Supreme Court to declare a litigant vexatious;
- The difficulty in locating information and previous litigation by a litigant and
- The limited categories of parties who can bring an application to have a litigant declared vexatious.⁷⁰

The Western Australian Government accepted most of the reform suggestions but declined to use the word “malicious”. They were no doubt mindful of the extra evidentiary burden that such a change could introduce into vexatious litigant applications. The reforms that were accepted included removing the monopoly of the Attorney-General to initiate applications by widening standing provisions to include people with “sufficient interest”⁷¹ and allowing the court to look beyond the litigation complained of to be able to consider the litigant’s conduct.⁷² Despite this “modernisation” of the sanction in Western Australia there have been only two further declarations since the 2002 reforms. This is hardly evidence of a build-up of cases frustrated by earlier legislative inadequacy. It also supports the hypothesis that the problem of vexatious litigants may be more perceived than real and is driven by the frustrations caused by the growth of litigants-in-person rather than vexatious litigants specifically.

⁶⁹ Law Reform Commission of Western Australia, *Civil and Criminal Justice System*, Report 92, 1999, 165. See also Clare Thompson, “Vexatious litigants – Old phenomenon, modern methodology: A consideration of the Vexatious Proceedings Restriction Act 2002 (WA)”, (2004) 14 *JJA* 64.

⁷⁰ Law Reform Commission of Western Australia, *Civil and Criminal Justice System*, Report 92, 1999, 165.

⁷¹ *Vexatious Proceedings Restriction Act 2002* (WA), section 4(2)(c).

⁷² *Vexatious Proceedings Restriction Act 2002* (WA), section 3.

Table 2: Western Australian register of declared vexatious litigants (1930–2008)

Source of power: *Vexatious Proceedings Restriction Act 2002* (WA).

No	Date	Name	File No
1	26.5.1931	Ellen Cecilia BARLOW	A21/1931
2	9.12.1980	Paul DESMOND	2397/80
3	19.4.2000	Oisin Geoffrey KEATING	CIV2181/1999
4	2.8.2002	Lindsay HUNTER	CIV1655/2002
5	23.12.2004	Brian William SHAW	CIV2264/2004
6	16.9.2005	Shawky Shafeek MICHAEL	CIV1374/2004

South Australia

The South Australian statutory sanction was introduced in 1935 as part of a consolidation of Supreme Court legislation in that State.⁷³ The comprehensive reform was led by Napier J of that court and seems to have adopted the vexatious litigant sanction simply as a matter of good housekeeping.⁷⁴ There is no evidence that the introduction of the sanction was a response to the litigation of a particular person.

As in other jurisdictions, a Parliamentarian resisted the introduction of the provision. In particular, the Leader of the Opposition, Mr Lacey, said:

[The provision] appears to give the Attorney-General for the time being too much power. Notwithstanding the fact that a person may be fanatical with regard to bringing actions, it does not gainsay the fact that he may have a reason for appealing to the Supreme Court at some time, and he should not be barred from doing so. Most of us recognise that the courts are good places to avoid but, notwithstanding that, every person should have the right of appeal.⁷⁵

As Table 3 indicates, the sanction was not utilised until over 60 years later.

⁷³ *Supreme Court Act 1935* (SA), section 39.

⁷⁴ South Australia, 1935 *Parliamentary Debates*, Legislative Assembly, 14 November 1935, 1517.

⁷⁵ South Australia, 1935 *Parliamentary Debates*, Legislative Assembly, 21 November 1935, 1669.

Table 3: South Australian register of declared vexatious litigants (1935–2009)

Source of power: *Supreme Court Act 1935* (SA), section 39.

No	Date	Name	File No
1	20.2.1997	Philip Damian BURKE	SCGRG 95/1240
2	12.9.2003	Stephen Glenn HEINRICH	SCCIV 02/822
3	11.11.2005	Henriette PIEPKORN	SCCIV 05/459
4	30.1.2009	Andrew GARRETT	SCCIV 96/2244

The High Court

The High Court adopted the sanction in 1943. In distinction to the States, the sanction was not inserted by statutory amendment but as new Order 44A in the *High Court Rules*.⁷⁶ The insertion of the Rule was prompted by a series of writs issued by a group of Tasmanians in 1942 against Latham CJ, McTiernan, and Starke JJ. The group believed, among other things, that there should be reform of the monetary system and that war loans were unnecessary. Their activities also led to a special wartime Board of Enquiry.⁷⁷ Despite the introduction of the provision, vexatious litigant proceedings were not actually brought against any members of the group.⁷⁸ However, the rule change was significant as it widened the standing provisions to initiate an application from beyond the Attorney-General to include the Commonwealth Crown Solicitor and also the Principal Registrar of the High Court. It also introduced the concept of a vexatious litigant acting in concert with other parties. A further rule change at the same time introduced, for the first time, a pre-emptive power for the

⁷⁶ Order 44A, inserted 9 March 1943, read:

1. Upon the application of a Law Officer of the Commonwealth or the Crown Solicitor of the Commonwealth or of the Principal Registrar of the High Court if any Justice thereof is satisfied that any person frequently and without reasonable ground or that any other person in concert with the person hereinbefore mentioned has instituted vexatious legal proceedings may after hearing such person or any other person or giving him an opportunity of being heard order that no legal proceedings shall without leave of the Court or a Justice thereof be instituted by such person or other person in the High Court.

Such leave shall not be given unless the Court or a Justice thereof is satisfied that the proceedings are not an abuse of the process of this court and that there is a prima facie ground for the proceedings.

2. A copy of any Order made hereunder shall be published in the Commonwealth Gazette.

⁷⁷ NAA: A432, 1943/220.

⁷⁸ See further, Frank Jones and James Popple, “Vexatious Litigants” in Tony Blackshield *et al*, *The Oxford Companion to the High Court*, 698-699. See also Anon, “Vexatious Litigation”, (1943) 17ALJ 9. Interestingly, two litigants actually declared vexatious by the High Court also based their litigation around the constitutionality of Commonwealth statutes relating to banking and finance, having regard to the scope of “legal tender” in section 115 of the *Constitution*. See further *Jones v Skyring* [1992] 66 ALJR 810 and *Jones v Cusack* [1992] 66 ALJR 815.

Registrar to seek judicial direction not to issue a writ or process that appeared to be an abuse of the process or a frivolous or vexatious proceeding.⁷⁹

The sanction was first used in 1952 against Goldsmith Collins (Chapter Seven). But it was not until 1992 in *Jones v Skyring*,⁸⁰ a case involving the only Australian to have been declared vexatious in three jurisdictions,⁸¹ that the court clarified the legal basis of the vexatious litigant power. Justice Toohey held that the power derived from the rule-making power contained in section 86 of the *Judiciary Act 1903* (Cth). In essence, the Rule was concerned with practice and procedure. Justice Toohey said it was simply “reinforcing the power of the court to protect its own process against usurpation of its time and resources and to avoid loss to those who have to face actions which lack substance”.⁸² In His Honour’s view that was ample to sustain it against being in conflict with any constitutional or statutory provision.⁸³

As Table 4 indicates, the High Court has used the sanction sparingly. Three of the four people declared have also been declared in other jurisdictions — which reflects the appellate nature of the High Court’s jurisdiction.⁸⁴

Table 4: High Court register of declared vexatious litigants (1943–2007)

Source of power: *High Court Rules*, Order 63, Rule 6.

No	Date	Name	File No
1	13.6.1952	Goldsmith COLLINS (1902–1982)	1952/25
2	19.8.1971	Constance May BIENVENU (1912–1995)	1970/8
3	27.8.1992	Alan George SKYRING	S92/005
4	27.8.1992	Patrick Leo CUSACK	S92/006

Queensland

In October 1943 Queensland, presumably following the lead of the High Court, also amended its *Supreme Court Rules* to introduce the vexatious litigant sanction.⁸⁵ As in South Australia, there was no particular litigant prompting the change. Again, it appears simply as good housekeeping. It was not until 1966 that the first declaration was made. The second under the Rules was that of Dieter Soegemeier in 1980 (Chapter Nine). His persistent litigation showed

⁷⁹ Order 58 Rule 3. It is now Regulation 6.07.

⁸⁰ *Jones v Skyring* [1992] 66 ALJR 810.

⁸¹ The others are the Queensland Supreme Court (1995) and the Federal Court (1999).

⁸² [1992] 66 ALJR 810, 814.

⁸³ *Ibid.*

⁸⁴ Collins: Victoria (1953); Bienvenu: Victoria (1969) and Skyring: Queensland (1995) and Federal Court (1999).

⁸⁵ Order 60A was published in the *Queensland Government Gazette* on 9 October 1943, 1248–9.

deficiencies in the Rules and led to the enactment of the *Vexatious Litigants Act 1981* (Qld).

As Table 5 indicates there has been a surge of orders made in Queensland since 1981, with a further 12 declarations, including the first order in Australia involving a prisoner, Dennis Melvin Fritz (1987).⁸⁶ It is not clear why there have been so many orders when contrasted, say, with New South Wales, a more populous State. Eleven of the orders pre-date the 2005 modernisation of the provision, so that is not an explanation. It may just be one of the accidents of history. In any event, it has seen Queensland take a leadership position over the other States and the Commonwealth through the SCAG in the development of model vexatious litigant proceedings legislation. This is intended to encourage a uniform approach throughout Australia.⁸⁷ As a result, in 2005 Queensland passed the *Vexatious Proceedings Act*.

**Table 5: Queensland register of declared litigants
(1943–2007)**

Source of power: *Vexatious Proceedings Act 2005* (Qld).

No	Date	Name	File No
1	19.1.1966	Margeret Lillian ROCKWELL (?–2001)	OS 8/66
2	19.2.1980	Dieter SOEGEMEIER (1933–2005)	OS 65/80
3	12.10.1983	Robert William Franklin VAN HAEFF	OS 705/83
4	21.7.1987	Leslie Harold FRITZ	OS 418/97
5	21.7.1987	Dennis Melvin FRITZ	OS 418/97
6	5.5.1995	Alan George SKYRING	OS 178/95
7	5.3.1996	Donald James CAMERON	APL 112/95
8	16.12.1999	John Murray ABBOTT	S 10813/99
9	22.5.2000	Peter Alexander GARGAN	S 1888/00
10	16.10.2001	John Gary SARGENT	S 6670/01
11	4.12.2002	William Peter TAIT	S 5757/02
12	16.4.2003	Richard Stephen GUNTER	S 11734/02
13	27.2.2004	Geoffrey James BIRD	S 7790/03
14	13.4.2007	Dayal Hassaram MANSUKHANI	BS4770/06

⁸⁶ Also declared at the same time was his father Leslie Harold Fritz, who supported his son's litigation. The second prisoner declared was (Victorian) Julian Knight (2004).

⁸⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 August 2005, 2207.

New South Wales

Although the oldest Australian superior court jurisdiction, with a rich tradition of persistent litigants,⁸⁸ New South Wales only considered introducing the vexatious litigant sanction in 1935 when other States were doing the same. The sanction was included in a draft *Supreme Court Bill* of that year. That Bill was part of a wider reform effort seeking to fuse the equity and law divisions of the court and otherwise modernise procedures. This had been unsuccessfully attempted on a number of occasions since 1880. The 1935 effort also foundered⁸⁹ and it was not until 1969, when the recommendations of the New South Wales Law Reform Commission (NSWLRC) were adopted, that the sanction was introduced as section 84 of the *Supreme Court Act 1970* (NSW). In 2006 the court introduced a public register of people declared vexatious under section 84.

As Table 6 indicates, the first full vexatious order made by the Supreme Court was in 1986.⁹⁰ The New South Wales court has also shown a preparedness to refuse to make a declaration when it is not satisfied the grounds are made out.⁹¹

**Table 6: New South Wales register of declared litigants
(1970–2007)**

Source of power: *Supreme Court Act 1970* (NSW), section 84.

No	Date	Name	File No
1	8.5.1986	Eddie SOLOMON	4954/86
2	13.6.1990	Michael SPAUTZ	14464/89
3	19.11.1992	Raymond Stanley WEST	16208/90
4	15.11.2002	Drago JAMBRECINA	10820 and 20019/2002
5	5.3.2003	Con TSEKOURAS	S5757/02
6	10.12.2003	Pranay Kumar BHATTACHARYA	10904/03
7	5.2.2004	Dominic Wy KANAK	013056/03
8	30.9.2004	Craig Andrew BETTS	13264/03
9	25.5.2005	Michael Jacob BAR-MORDECAI	10622/04

⁸⁸ For the example of the determined litigation of Edward Eagar, see Kevin Smith, *Colonial Litigant Extraordinaire: the Edward Eagar story 1787-1866; layman, attorney, merchant, lobbyist*, 1996.

⁸⁹ New South Wales, Law Reform Commission, *Supreme Court Procedure*, Report 7, 1969, 7–8 and 14.

⁹⁰ In 1976 “partial” vexatious orders under section 84 were made against Roger Pedler (1934–1994) and his mother Stella Pedler (1900–1989) in *Hunters Hill Municipal Council v Pedler and Anor* [1976] 1 NSWLR 478. The orders only restricted proceedings launched against the local council.

⁹¹ See *Attorney-General v Wentworth* (1988) 14 NSWLR 481. In 2003 in *Wentworth v Graham & Anor* [2003] NSWCA 307, paragraph 43, Ipp and Brownie JJ “partially

Family Court

When the Family Court of Australia was established in 1976 its enabling legislation included the vexatious litigant sanction (section 118 of the *Family Law Act 1975* (Cth)). Interestingly, the provision widened the standing to initiate an application to any “party to the proceedings”.⁹² However, section 121 of the Act also placed restrictions on the publication of proceedings of the court that make it difficult to access the numbers of vexatious litigant orders the court has made. But Her Honour Bryant CJ has publicly reported that in the 30-year period 1976–2006 the court has made 195 orders.⁹³

Federal Court

The Federal Court of Australia was established in 1977.⁹⁴ It obtained the vexatious litigant sanction in 1979 when Order 21 of the *Federal Court Rules* was first promulgated. As Table 7 indicates, there have been only two full orders made since that time.⁹⁵ A factor here may be that the establishment of the Federal Magistrates’ Court in 2001 has seen an effective transfer to that jurisdiction of the high volume litigant-in-person subject matter, namely, immigration and bankruptcy cases. As a result, that lower court has become the focus of most of the litigants-in-person.⁹⁶

The first person declared in the Federal Court was Alan Skyring, the only person to have been declared in three superior courts.⁹⁷

vexated” Katherine Wentworth. Rather than being a blanket ban prohibiting the issue of any future proceedings without leave, the ban was limited to nominated parties. This followed repeated and unsuccessful applications for judges to disqualify themselves from hearing Wentworth’s cases on the basis of bias. She was precluded from making further applications without first applying in writing to the court. See also, “Nuisances in court: judges get tough on serial pests”, *Sydney Morning Herald*, 27 May 2004, 18.

⁹² Section 118(1) reads:

The Court may, at any time of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious-

- (a) dismiss the proceedings;
- (b) make such orders as to costs as the court considers just; and
- (c) if the court considers appropriate, on the application of a party to the proceedings – order that the person who instituted the proceedings shall not, without leave of a court having jurisdiction under this Act, institute proceedings under this Act of the kinds specified in the order.

⁹³ Diana Bryant, *Self Represented and Vexatious Litigants in the Family Court of Australia*, Access to Justice Conference, Monash University, Prato, Italy 2006.

⁹⁴ *Federal Court Act 1976* (Cth).

⁹⁵ See *Horvath v Commonwealth Bank of Australia* [1999] FCA 504 for an example of a “partial” vexatious order made by the court.

⁹⁶ Philip Kellow (Deputy Registrar), email to author, 3 April 2008.

⁹⁷ The others are the High Court (1992) and the Queensland Supreme Court (1995).

**Table 7: Federal Court register of declared vexatious litigants
(1979–2007)**

Source of power: *Federal Court Rules*, Order 2,1 Rule 1.

No	Date	Name	File No
1	6.7.1999	Alan George SKYRING	Q93/1999
2	10.5.2001	Merrilee Margaret SLATER	A81/2000

Tasmania

Notwithstanding the fact that it was a group of Tasmanians that prompted the High Court to introduce the vexatious sanction into its rules in 1943,⁹⁸ Tasmania itself did not adopt the sanction until 1994. That year the *Supreme Court Civil Procedure Act 1932* (Tas) was amended by the introduction of section 194G. As in certain other States, this was not a response to a particular litigant; again being a housekeeping measure. The Tasmanian Government readily conceded that it would be needed “rarely”.⁹⁹

Once more, the Opposition unsuccessfully opposed the introduction of the sanction. In their view it indicated:

...an attitude of mind of the Government; it also indicates an attitude of mind of the community at large, where we say, “If you’re out of step, if you are a nuisance, we’re going to make it even harder for you anyway”. One of the problems with this type of legislation is that we frustrate people who are whistleblowers, or who have problems and who become fixated on their problems, and cut off one access, it is like putting the lid on a pressure cooker — it breaks out somewhere else. The courts are the best place to deal with this type of problem.¹⁰⁰

No orders have been made under the provision in the period 1994–2007.¹⁰¹

Australian Capital Territory

In 1998 the Australian Capital Territory (ACT) introduced the sanction as section 67A of the *Supreme Court Act 1933*. In speaking to the amendment, Attorney-General Humphries was conscious that, at that time, the ACT and the Northern Territory were the only two superior court jurisdictions in Australia not to have the sanction.¹⁰²

⁹⁸ See further, Frank Jones and James Popple, “Vexatious Litigants” in Tony Blackshield *et al*, *The Oxford Companion to the High Court*, 2002, 698–699. See also, Anon, “Vexatious Litigation”, (1943) 17ALJ 9.

⁹⁹ Tasmania, *Parliamentary Debates*, House of Assembly, 4 August 1994, 1391 (Mr White MLA).

¹⁰⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 4 August 1994, 1391-2 (Mr White MLA).

¹⁰¹ Registrar Elizabeth Knight to author, 30 January 2008.

¹⁰² Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 November 1998, 2654 (Mr Humphries, Attorney-General).

In unsuccessfully opposing the amendment, the Opposition suggested that the case for sanction had not been made out, although they mused upon whether the introduction of the sanction was a response to a persistent ACT litigant, Leonard Munday.¹⁰³ That he was not a catalyst is supported by the fact that no orders have been made under the provision in the period 1998–2007.¹⁰⁴

Northern Territory

In 2006 the Northern Territory became the last superior court jurisdiction in Australia to adopt the sanction when it enacted the *Vexatious Proceedings Act 2006*. It was not a response to problems of a local litigant. Rather, it followed participation in the SCAG development of a model Bill designed to encourage a uniform approach to vexatious litigants.¹⁰⁵

The Act came into force on 24 April 2007. As at 31 December 2008 there have been no orders made.

Pre-emptive control through the rules

Running alongside the statutory sanction is the ability of a court registrar to pre-empt possibly vexatious litigation by refusing to issue originating documents. This can be done where they form the view that the documents are irregular or an abuse of process. The High Court pioneered an early form of this power in 1943 at the same time as it obtained the vexatious litigant sanction.¹⁰⁶ Originally, the power required the High Court Registrar to seek an order of a justice (usually in chambers) not to issue a writ or process that is, on its face, an abuse of process or is frivolous or vexatious. It is now at the Registrar's discretion whether to seek an order from a justice. It is not known how often the power is exercised, as no data are published.¹⁰⁷ However, review of High Court files relating to the case studies in this book revealed the power was used in 1975 in the case of Soegemeier (Chapter Nine), who was never

¹⁰³ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 November 1998, 3503 (Mr Wood). For a list of Munday's legal actions, successful and unsuccessful, see: http://www.austlii.edu.au/cgi-bin/sinosrch.cgi?meta=/austlii&query=munday&method=auto&mask_world=:austlii:au&mask_path=+au/cases/act+au/legis/act+au/other/actlrc (22 December 2007).

¹⁰⁴ Deputy Registrar Elizabeth Trickett to author, 28 March 2008.

¹⁰⁵ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 15 June 2006 (Dr Toyne, Justice and Attorney-General).

¹⁰⁶ Originally Order 58 rule 3, it is now Regulation 6.07. It reads:

If any writ, application, summons or other document appears to a Registrar on its face to be an abuse of the process of the Court or to be frivolous or vexatious, the Registrar may seek the direction of a Justice who may direct the Registrar to issue or file it or to refuse to issue or file it without the leave of a Justice first had and obtained by the party seeking to issue or file it.

¹⁰⁷ Any appeal against an order made by a justice in chambers is dealt with "on the papers". This saves court time and is apparently very effective in reducing appeals against rejection. Interview with Chris Doogan (Principal Registrar), 18 August 2005.

actually declared a vexatious litigant in the High Court. In the case of Collins (Chapter Seven), the pre-emptive procedure was unnecessary as the court had moved quickly in 1952 to a formal vexatious litigant declaration. That enabled the Registrar to quietly place the increasingly erratic Collins documentation on his file.

In 1986 the Victorian Supreme Court became the first State Supreme Court to adopt a similar preliminary control. No other State court¹⁰⁸ directly vests the Prothonotary (Registrar) with the power to refuse to accept originating documents without reference to a justice¹⁰⁹ although, in practice, the Victorian Prothonotary defers or seeks the approval of a justice in chambers when seeking to exercise the provision. It is understood that the provision is used regularly.¹¹⁰ However, it was not a control available to State courts in the 50-year period canvassed by the six case studies discussed in this book. Had it been available, it may well have pre-empted much of the litigation in those cases.

The lack of transparency, and thus accountability, surrounding the use of this pre-emptive power is a cause for concern. This is particularly so in Victoria, where the power vests with a non-judicial officer. One possible safeguard would be the introduction of annual reporting that would shine a light on how often and when the power is exercised. The importance of such an accountability mechanism is made even more desirable if the power is to be extended to include interlocutory matters.

¹⁰⁸ For example, see Rule 4.15 of the *Uniform Civil Procedure Rules 2005* (NSW); Rule 15 of the *Uniform Civil Procedure Rules 1999* (Qld); Rule 53 of the *Supreme Court Civil Rules 2006* (SA); Rule 82A of the *Supreme Court Rules 2000* (Tas) and Rule 82A of the *Supreme Court Rules 2000* (WA).

¹⁰⁹ Originally Rule 27.06(1), it is now Order 27.06 of the *Supreme Court (General Procedure) Rules 2005*. It reads:

- (1) The Prothonotary may refuse to seal an originating process without the direction of the Court where the Prothonotary considers that the form or contents of the document show that were the document to be sealed the proceeding so commenced would be irregular or an abuse of the process of the Court.
- (2) Where a document for use in the Court is not prepared in accordance with these Rules or any order of the Court –
 - (a) the Prothonotary may refuse to accept it for filing without the direction of the Court;
 - (b) the Court may order that the party responsible shall not be entitled to rely upon it in any manner in the proceeding until a document which is duly prepared is made available.
- (3) The Court may direct the Prothonotary to seal an originating process or accept a document for filing.

¹¹⁰ This has the effect of providing a “hearing” and is usually an end of the matter. Interview with Joe Saltamacchia (Prothonotary), 8 September 2005.

A remodelled statutory sanction

Since 2000 there has been a 190 per cent increase in vexatious litigant orders made when compared to the previous 70 years (see Appendix A). This is so even when the considerable Family Court figures discussed above are excluded. The increase has been particularly noticeable in Western Australia and Queensland and those States have been at the forefront of efforts to reform the sanction.¹¹¹ Although they are outside the period canvassed by the case studies in this book, it will be seen below that the reforms that have resulted do reflect the experience demonstrated by the case studies. The explanation for contemporary vexatious litigant orders may be different from that for the 1930–1980 period but the common theme behind the reforms is to combat those litigants whose repeated unsuccessful actions waste court resources and harass defendants. There is no evidence of any wider inquiry into the nature of the litigants themselves nor of why they pursue their litigation so persistently.

The Queensland *Vexatious Proceedings Act 2005* was developed through the SCAG of the Commonwealth, State and Territory Governments as a template for nationally consistent legislation.¹¹² It focuses on widening the standing provision on who may initiate a vexatious application, definitional issues and procedural changes. The reforms are silent on the prospect of introducing a medical dimension to the sanction. Two key provisions read:

- s 5(1) Any of the following persons may apply to the Court for a vexatious proceedings order in relation to a person mentioned in section 6(1)(a) or (b) –
- (a) the Attorney-General;
 - (b) the Crown solicitor;
 - (c) the registrar of the Court;
 - (d) a person against whom another person has instituted or conducted a vexatious proceeding;
 - (e) a person who has sufficient interest in the matter.
- (2) An application may be made by a person mentioned in subsection (1)(d) or (e) only with the leave of the Court.
- s 6(1) This section applies if the Court is satisfied that a person is —
- (a) a person who has frequently instituted or conducted vexatious proceedings in Australia; or

¹¹¹ See, for example, Western Australia Law Reform Commission, *Civil and Criminal Justice System*, Report 92, 1999, p 591. See also, Clare Thompson, “Vexatious litigants – Old phenomenon, modern methodology: A consideration of the Vexatious Proceedings Restriction Act 2002 (WA)”, (2004) 14 *JJA* 64.

¹¹² Queensland, *Parliamentary Debates*, Legislative Assembly, 9 August 2005, 2207 (Ms Linda Lavarch, Attorney-General). The model Bill was approved by SCAG at its meeting in November 2004.

- (b) a person who, acting in concert with a person who is subject to a vexatious proceedings order or who is mentioned in paragraph (a), has instituted or conducted a vexatious proceeding in Australia.

In all, the Queensland Act has introduced six key changes to the traditional “regime”. First, section 5(1) confirmed the trend of widening the class of people with standing to bring applications for vexatious orders to include defendants and people with “sufficient interest”. These applications require the preliminary leave of the court (section 5(2)). There is also an express provision that the court may make an order upon its own initiative.¹¹³ These changes combine to place the court squarely in control of preventing its processes from being abused and de-emphasise the role of the Attorney-General and the inherent jurisdiction discussed above. However, rather than simplifying the procedure, the changes raise new challenges. There will be a whole new area of jurisprudence and evidentiary challenge to determine what constitutes “acting in concert”. And if the court or its officers too readily assume the role of initiating vexatious litigant applications, then the spectre of perceived bias is raised. Such a role moves the court towards an unsatisfactory dual role of prosecutor and judge. This is an inappropriate direction to be taking in the area of vexatious litigants.

Secondly, the court will be able to take into account legal actions brought outside the State (section 6(1)(a)). This is intended to forestall “forum shopping” between jurisdictions.¹¹⁴ However, given that only four litigants have ever been declared in more than one jurisdiction, the change would appear to reflect an anticipated problem rather than a current reality.¹¹⁵ Once again it raises new legal and evidentiary challenges in relation to the question of what are “vexatious proceedings” in different jurisdictions — because although the Queensland Act has changed the wording, it has not in fact improved the traditionally vague criteria.

Thirdly, the court can now also declare as vexatious people whom they find acting in concert with a vexatious litigant (section 6(1)(b)). This provision is directed at combating supporters of “primary” vexatious litigants. However, it is not clear whether the test of vexatiousness will, in practical terms, be a lesser or greater one than for the principal “vexator”. Will it lead to guilt by association? The introduction into a civil sanction of such traditional criminal law phrases such as “acting in concert” opens up a whole new area of legal interpretation and possible dispute.

¹¹³ *Vexatious Proceedings Act 2005* (Qld), section 6(3).

¹¹⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 August 2005, 2207.

¹¹⁵ The four litigants are Goldsmith Collins: High Court (1952) and Victorian Supreme Court (1953); Constance Bienvenu: Victorian Supreme Court (1969) and High Court (1971); Alan Skyring: High Court (1992), Queensland Supreme Court (1995) and Federal Court (1999) and Brian William Shaw: Western Australian Supreme Court (2004) and Victorian Supreme Court (2007).

Although the catalyst for this particular change is not clear, it appears to be a response to the activities of Alan Skyring and his supporters¹¹⁶ in Queensland and their claims, among other things, that Australian paper currency is not legal tender.¹¹⁷ The case studies show there is some empirical evidence that vexatious litigants do support each other and join what Francis has colloquially described as the “vexatious bar”.¹¹⁸ Skyring, Davis, Collins, Bienvenu and Soegemeier are in this category. In this respect the model legislation has addressed one of the continuing problems of the sanction but, in doing so, has introduced other problems.

Fourthly, the Queensland Act introduces a new definition of what constitutes vexatious proceedings. Although there is a movement away from the traditional formula of “habitually and persistently and without any reasonable ground”, the new definition does not necessarily offer greater precision. Phrases such as “harass or annoy” and “cause delay or detriment” will require their own judicial interpretations. The new definition stops well short of introducing a quantitative and chronological formula of unsuccessful litigations within a certain period that would have picked up on the Californian approach discussed in Chapter Two. Instead, the new definition introduces an express focus on the conduct of the litigant, as distinct from the traditional painstaking review of each piece of litigation. Much is still left to the discretion of the judge and that will inevitably increase evidentiary challenges, the potential for inconsistency and even increase the possibility of unintended consequences. For example, in this last category the strategic, even harassing court duelling by large corporations (as seen in the “Channel Seven v The World” litigation) could well fall within the legislative remit¹¹⁹ as section 4 defines vexatious proceedings to include:

- (a) a proceeding that is an abuse of the process of a court or tribunal; and
- (b) a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- (c) a proceeding instituted or pursued without reasonable ground; and
- (d) proceeding conducted in such a way as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

Fifthly, the Queensland Act introduces the concept of a publicly accessible “vexatious litigant register”.¹²⁰ This enables litigants and courts alike to

¹¹⁶ One of his supporters has been Patrick Cusack. He was declared vexatious by the High Court in 1992 on the same day as Skyring. See further, *Jones v Cusack* (1992) 66 ALJR 815.

¹¹⁷ For example, see *Re Skyring* [1995] QSC 55.

¹¹⁸ Charles Francis, “Valete Goldie”, *Victorian Bar News*, Winter Edition, 1982, 20.

¹¹⁹ *Seven Network Limited v News Limited* [2007] FCA 1062.

¹²⁰ *Vexatious Proceedings Act 2005* (Qld), section 9. The registers would remain State-based. There has been no proposal that, when developed, they be harmonised on a national basis. Possibly without any sense of irony, in March 2008, Attorney-General Hulls (Victoria) called for a national register of court suppression orders. See at: <http://www.dpc.vic>.

identify those people who have been declared as vexatious litigants. In 2006 Queensland was the first jurisdiction to establish such a register, followed later that year by New South Wales.

Finally, the Queensland Act establishes for the first time a formal and rigorous procedure to be followed by declared vexatious litigants seeking leave to issue new proceedings. Key parts of section 11 read:

- (3) The applicant must file an affidavit with the application that —
 - (a) lists all occasions on which the applicant has applied for leave under —
 - (i) this section; or
 - (ii) before the commencement of this section, the *Vexatious Litigants Act 1981*, section 8 or 9; and
 - (b) lists all other proceedings the applicant has instituted in Australia, including proceedings instituted before the commencement of this section; and
 - (c) discloses all facts material to the application, whether supporting or adverse to the application, that are known to the applicant.

Section 11 goes on to outline service obligations relating to the application and makes it clear that “the applicant may not appeal from a decision disposing of the application”.¹²¹ The court is then directed that it *must* dismiss a leave application if the affidavit does not substantially comply with section 11(3).¹²² The legislation is silent on whether it is intended that applications will be dealt with in private “on the papers”. The current practice of the High Court in respect of special leave applications and Recommendation 131 of the VLRC review both indicate that this is the inevitable direction. These requirements are onerous and will lack transparency to the point of being unfair, particularly for litigants-in-person. In many respects, they take a similar path to that of the micro-management adopted toward prisoner litigation in the United States through legislation such as the *Prison Litigation Reform Act 1996*. Such changes are inconsistent with a fair and accessible legal system. Indeed, such changes may in the future come under attack as being inconsistent with human rights law. On this general point Spigelman CJ of the New South Wales Supreme Court has noted the rapidly growing and irresistible momentum of human rights law and its likely elevation in the law of Australia. In examining the English experience His Honour has said, “many areas of criminal justice will be radically transformed and certain other areas, such as family law, will also result in significant new litigation activity”.¹²³ As other States, and

gov.au/domino/Web_Notes/newmedia.nsf/798c8b072d117a01ca256c8c0019bb01/4602f4786e080d60ca2574180073649b!OpenDocument (9 April 2008).

¹²¹ *Vexatious Proceedings Act 2005* (Qld), section 11(6).

¹²² *Vexatious Proceedings Act 2005* (Qld), section 12(1)(a).

¹²³ JJ Spigelman, “Access to Justice and Human Rights Treaties”, (200) 22 *Sydney L Rev* 141, 148.

indeed the Commonwealth, inevitably join Victoria and the Australian Capital Territory in the enactment of specific human rights legislation that prospect must accelerate.¹²⁴

As at the end of 2008 only Queensland, the Northern Territory and New South Wales had enacted the model legislation, although the earlier Western Australian reforms contained in the *Vexatious Proceedings Restriction Act 2002* (WA) are consistent. The recommendations of the VLRC are also consistent, although the proposal for an enhanced pre-emptive control by expanding the power of court registrars to refuse to accept or seal documents, including in respect of interlocutory applications, and the appointment of a special Master to guide difficult cases through the system, would both break new ground.¹²⁵ The first proposal may well pre-empt harassing and unmeritorious proceedings at an early stage but in a way that is invisible and puts at risk public confidence in the administration of justice. The second proposal also offers the prospect of earlier settlement, diversion or completion of potentially difficult litigant-in-person cases. Much will depend on the skills and qualities of the person appointed to the special senior position of Master. However, the recommendations of the LRC of the Victorian Parliament depart from the thrust of the VLRC's recommendations, particularly its proposal to rename the sanction and introduce a graduated system of "litigation limitation orders". As at March 2009 it was not clear how the Victorian Government would respond to these competing recommendations.

It also remains to be seen how promptly and comprehensively the other States and the Commonwealth jurisdictions, particularly the Family Court, implement the SCAG provisions in support of a uniform national approach. They are free to modify the provisions according to their own policy positions and drafting styles. The delay in adopting the model legislation by the various jurisdictions no doubt reflects the traditional vagaries attached to obtaining consistency in the federal system. Most likely, it also indicates that vexatious litigants do not actually represent the same immediate problem for Parliamentarians that they may do for the judiciary. The data collected for this book would support both these views.

Conclusion

Just over 100 years ago England introduced the statutory vexatious litigant sanction. It was designed to remedy a weakness in the common law after the judiciary took the view that the remit of the inherent jurisdiction did not extend to banning all future litigation from a particular litigant. Since then the sanction

¹²⁴ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹²⁵ See Recommendations 30 and 110, Victorian Law Reform Commission, *Civil Justice Review: Report 14*, 40–41. See further at: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe72602960b930/VLRC%20Civil%20Justice%20Review%20-%20Report.pdf> (29 May 2008).

has spread, and is still spreading, to other parts of the common law world. As has been shown, the introduction of the sanction is commonly not a response to a large volume of persistent and vexatious litigants. Indeed, the numbers, as demonstrated by the few declarations made in Australia over a 75-year period, are low (see Appendix A). Rather, it has been a specific response to a few particular, although troublesome, litigants. Certainly, the jurisdictions of Victoria (Millane), Western Australia (Barlow) and Queensland (Soegemeier) and probably the High Court (the Tasmanians) acted on that catalyst. In other Australian jurisdictions the sanction has been adopted as a good housekeeping measure in order to “be prepared”. The fact that the number of declarations in other jurisdictions, with the notable exception of the Family Court, is low or nil is further evidence of a numerically small problem.

The recent modernisation of the sanction through the development of the model legislation, the *Vexatious Proceedings Act 2005* (Qld), demonstrates frustration by the judiciary and court administrators on two main points. First, there is the vagueness of the traditional criteria defining vexatious proceedings, namely “habitually and persistently and without reasonable ground”. Its replacement by wider, but no more specific, criteria that focus on the behaviour of the litigant may enable the court to eschew a detailed legal examination of unsuccessful litigation and instead focus on the surrounding “harassing” circumstances. However, the new definition also introduces a whole new set of potential jurisprudential challenges, such as the meaning of “acting in concert” and determining what is a “wrongful purpose” or vexatious in another jurisdiction. It is arguable whether the new criteria can speed up declarations and they may also be unfair. It is this very difficulty that the court has in getting behind the *form* of the vexatious litigant’s matter to engage with its *substance* that contributes to the litigant’s frustration and persistence.

Secondly, the standing provisions have been widened to permit applications from defendants and people with “sufficient interest”, and the power to control applications has been placed squarely with the judge. This change suggests a frustration with what Professor Taggart described as the law officer’s “monopoly” over the initiation of the power¹²⁶ and presumably also with the political and slow nature of that decision-making procedure. In part, this is an explanation for the low number of declarations in Australia. That the same frustration existed in other jurisdictions is also reflected in the re-emergence of the inherent power in England through the series of Court of Appeal cases that culminated in *Bhamjee v Forsdick*.¹²⁷ Although the model legislation minimises the likelihood of Australian courts reverting to the inherent jurisdiction to expedite access to a vexatious sanction, it remains to be seen whether the wider standing provisions will see an acceleration in the numbers of applications and

¹²⁶ Michael Taggart, “Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896”, (2004) 63 *Cambridge Law Journal* 656, 681.

¹²⁷ [2004] 1 WLR 88.

declarations. This is not without its problems. A vigorous promotion of court-initiated applications will raise the concern of perceived bias by the court in its use of the sanction. In any event if, as history suggests, the number of such litigants is low, then it is unlikely that there will be an increase. As a result, the model legislation is unlikely to reduce whatever frustration exists among the judiciary and legal practitioners.

I would argue that the real driver of the change is the rise in the numbers of litigants-in-person and of unmeritorious cases and the frustration to the smooth running of the courts that this has generated. Anecdotally, three broad (legal) groups can be isolated: immigration, bankruptcy and family law. These groupings reflect the current social, economic and political dynamics of society. Arguably, changes in governmental policy direction and other structural reform could minimise the number of people using the courts to advance their positions in those areas. However, that is something beyond the remit of this book. Whether this increase has also brought with it, on a *pro rata* basis, a surge in actual vexatious litigants is not evident. Certainly the Federal Court, with its specialist immigration and bankruptcy jurisdictions, has not generated any vexatious litigants from those areas. It is only the Family Court where it can be said that there is a problem.

Accordingly, putting to one side any further reforms that may come from the 2008 Parliament of Victoria report, three things stand out as unresolved in any discussion of the modernisation of the sanction. The first is that, despite the faith placed in it by the judiciary and administrators, it is not anywhere near a complete answer to the activities of a persistent litigant. In many respects it has been a failure. This is abundantly clear in the six cases studies discussed in this book. Although the model legislation will limit the ability of the declared litigant to simply change jurisdiction or work through other litigants, it does not fully deal with their persistence. If the sanction does anything it mainly shifts the focus to the courts and away from the defendants. This is because, once declared, the need to get leave in order to issue new proceedings makes the court the primary focus. By this late stage the litigant, as the case studies make clear, is usually tiring anyway, the scale and intensity of the litigation has diminished and they gently fade away.

Secondly, the special nature of family disputes in generating vexatious litigation needs further examination. That they form a special class is made clear by the huge volume of orders made in the 30-year history of the Family Court and by the case studies of Barlow and Davis. It is unfortunate that the legislative restrictions prevent detailed research on whether, for example, substantive law changes may in fact be encouraging vexatious litigation in that jurisdiction.

Finally, the modernisation process is only slowly picking up on the possibility of incorporating a medical path as part of the sanction. The VLRC recommends that this issue be examined further. It may well be a way forward.

PART TWO

Six maverick litigants



CHAPTER FOUR

Rupert Frederick Millane Inventor, entrepreneur, crank

Rupert Frederick Millane (1887–1969), inventor, entrepreneur, land developer, transport pioneer and self-taught litigator was, by any measure, an extraordinary man. A gentle soul, he could spot the “big idea”, would promote it determinedly but could not implement it. His persistence in using the courts to protect and promote his ideas went far beyond reason and led the Victorian Government to enact three different Acts of Parliament in an effort to curb his activities. One enactment, in 1928, was the vexatious litigant provision that

empowered the Supreme Court to prohibit issue of proceedings by such litigants without the court’s prior leave.¹ In 1930 Millane became the first person in Australia to be declared a vexatious litigant. The legislation provided the model for similar provisions in all superior court jurisdictions in Australia.



Rupert Frederick Millane

Rupert Frederick Millane
in 1916 aged 29.

Courtesy Brendan Millane

An entrepreneurial family

Born in 1887, in the Melbourne suburb of Hawthorn, Rupert Millane was the fourth of five children of Patrick and Annie Millane.² Both sides of the

¹ Originally section 33 of the *Supreme Court Act 1928* (Vic), it is now section 21 of the *Supreme Court Act 1986* (Vic).

² His brothers and sisters were George James Millane (1879–1898), Florence Augustus Millane (1882–1951), Gilbert Patrick Millane (1885–1955) and Lillian Geraldine Millane (1889–1894). Interview with great nephews Bernard Millane, Brendan Millane and Brian

family were of Irish descent and had emigrated during the Victorian gold rush.³ Both sides were also active entrepreneurs, inventors and engaged in public affairs. A maternal grandmother wrote to the Victorian Chief Secretary in 1878 urging the vote for women,⁴ while in 1899 Millane's mother sought copyright protection around Australia for her "improved Roller Blind".⁵ However, it was Patrick Millane who was the most active. A land surveyor by training, in 1877 he proposed a bold railway construction programme, including a railway bridge, through the Royal Botanic Gardens. It was well received but ultimately rejected.⁶ By the 1890s Patrick Millane had dabbled extensively in real estate and, in common with many others, became swept up in the financial collapse of that period.⁷ In an audacious plan to rid himself of debt he offered 105 separate parcels of land by promoting a sweepstake-style property syndicate. His lots included one farm, five large residences (including his Elsternwick home) and 99 vacant blocks.⁸ The novelty of the approach did not impress the authorities. Both he and the scheme's solicitor, Gerald Rickarby (a brother-in-law), were prosecuted for a gaming offence under the *Police Offences Act 1890* (Vic). Both were convicted. Patrick Millane, as the scheme's promoter, received the heavier fine of £15 with £25 costs. Showing a determination and self-confidence that his son later emulated, and representing himself, he immediately took his conviction on review to the Supreme Court. He lost.⁹

For Rupert Millane this was an exciting environment in which to grow up, although tempered with sadness following the early deaths of two of his siblings.¹⁰ As a result, Rupert Millane became the youngest child and family legend suggests that he was indulged by his family, especially by his mother with whom he would live until she died in 1953.¹¹ Millane's early family years

Millane, 17 February 2005. Further reference to this interview will be in the short form "Millane interview".

³ The Millane family arrived in Melbourne in June 1852 on the sailing ship *Mangerton*. Email from Brian Millane to author, 7 December 2005.

⁴ Letter from Catherine Rickarby to Chief Secretary, 9 August 1878 (in the possession of Dr Geoffrey Rickarby (2005), Eleebana, New South Wales).

⁵ National Archives of Australia: Application for registration of Queensland Patents: A12572, 5177. Further references to material accessed from this source will be in the short form of "NAA". In 1900 Patrick Millane registered the same patent in England. See at: <http://www.v3.espacenet.com/textdoc?DB=EPODOC&IDX=GB190012386&F=0&QPN=G> (accessed 3 October 2005).

⁶ "Scheme for connecting Melbourne and Oakleigh", *Argus*, 28 February 1877, 7b; "Mr Millane's Railway Scheme", *Argus*, 1 August 1877, 7c; *Melbourne Punch*, 26 July 1877, 299.

⁷ In 1891 it was estimated that upwards of 3000 houses in Melbourne were empty of tenants and that the vacant land in subdivisions was valueless. See further, Henry Turner, *A History of the Colony of Victoria, Volume 2, 1854–1900*, 1904. Republished 1973, 299.

⁸ "Distribution of Property", Public Notices, *Argus*, 20 January 1894, 15.

⁹ *Potter v Millane and Rickarby* (1894) 15 ALT 226.

¹⁰ They were George James Millane (1879–1898) and Lillian Geraldine Millane (1889–1894).

¹¹ Millane interview, n 2.

were spent in the comfortable surrounds of a Victorian land boom mansion in Elsternwick, an inner-Melbourne suburb.¹² His formal education was typical of the period. He spent his primary years at the local Christian Brothers College, East St Kilda, and a secondary year at St Patrick's College, East Melbourne.¹³

Rupert Millane left school in 1902, aged 15, and by 1906 he was established as a motor agent importing and selling gasoline and kerosene out of offices in Lonsdale Street, Melbourne.¹⁴ A self-taught engineer, in 1907, aged 20 and probably at his father's urging, he lodged for approval in England a patent entitled "Improvements in and relating to internal combustion engines".¹⁵ This interest in transport matters, particularly public transport, would be a lifelong passion. In later life, Millane would attribute this interest to his Irish grandmother who, he said, rather than pay the £18 demanded by Cobb and Co for the journey, had walked to the Castlemaine goldfields with her family upon landing as assisted immigrants at Port Henry, Geelong, in 1852.¹⁶

Promoter of petrol railroad cars

By 1909, aged 22, Millane had an office in Flinders Street, Melbourne, and promoted himself as the Australian representative for the Union Pacific Railroad Company of the United States and its subsidiary, the McKeen Motor Car Company. McKeen had recently started to market single-carriage petrol-powered railroad cars and for the Victorian Government they offered a possible solution to complaints about the slow and infrequent train service in the bush. Millane, recognising that interest, started an enthusiastic sales correspondence with Premier John Murray.¹⁷

Millane argued that McKeen's railroad cars were the modern alternative to steam or electrification. His self-typed letters on ever self-aggrandising letterhead (including colour) invariably made expansive claims about the cars and included pages of supporting testimonials full of facts and figures. There is a liberal use of capitals for emphasis. His enthusiasm to close a sale and his lack of insight into the more measured pace of the machinery of government is clear from the increasingly urgent tone of the letters. In July 1909 alone he sent the Premier four full letters, complete with typing errors, that contained detailed personal suggestions on how the cars might be best employed.¹⁸ His urgings continued through 1910 and, in 1911, at the Premier's request, the

¹² 13 Gladstone Parade, Elsternwick Vic 3185.

¹³ "Persistent Litigant", *People*, 11 February 1953, 38 and Head, M, *More than a school: a history of St Patrick's College East Melbourne 1854–1968*, 1999, 248.

¹⁴ Sands and McDougall's, *Directory of Melbourne and Suburbs 1906*.

¹⁵ It was accepted 29 April, 1908. See at: <http://www.v3.espacenet.com/textdoc?DB=EPO DOC&IDX=GB190709951&F=0&QPN=G> (accessed 3 October 2005).

¹⁶ "Persistent Litigant", *People*, 11 February 1953, 38.

¹⁷ Premier of Victoria 1909–1912.

¹⁸ Public Record Office of Victoria, VPRS 421/PO, Unit 78, 1915/15019. Further reference to this archival source will be in the short form "PROV".

Railway Commissioners met with Millane. Their report was not supportive: “....in returning the attached memorandum they desire to invite the attention of the honourable the Premier to the intemperate character of Mr Millane’s remarks, which in some cases are distinctly offensive and merit retribution”. They did not detail the remarks.¹⁹

As Millane became increasingly derogatory about the railway management, a wary Premier kept him at arms’ length;²⁰ although the Premier did make it clear that his personal view was that a motor train should be acquired and run as an experiment.²¹

Millane’s passion for McKeen cars also spilled over into the public arena. In 1911, drawing upon the 1877 proposal of his father, he published a report advocating the use of McKeen cars, complete with route map. He directed this report to the Traffic Commission inquiring into Melbourne’s suburban rail and tramway systems. An extraordinarily confident document, having regard to Millane’s youth and lack of formal engineering credentials, the submission contained detailed suggestions for completely revamping the entire “inter-urban” network, including the construction of an elevated circular terminus over the Princes Bridge Rail Yards.²²

In the end the Victorian Government purchased only two McKeen cars. They were trialled on country lines but they were not powerful enough and proved unreliable.²³ The Victorian Government was wary of Millane’s marketing and departmental officers regularly contradicted his more extravagant claims in internal memos.²⁴ They declined to deal through him and dealt direct with McKeen in the United States. The departmental officers also refused Millane access to performance data of the two test McKeen cars, no doubt cautious as to how he might use the material.²⁵ McKeens appear to have been similarly wary. They made it clear that Millane could not bind their company although they permitted him to act as their Australian representative and to receive a commission for any cars sold.²⁶ The Victorian Government purchased no more

¹⁹ PROV, VPRS 421/P0, Unit 78.

²⁰ PROV, VPRS 421/P0, Unit 78, 1910/9768. Murray to Thomas Tait (Chairman of Victorian Railway Commissioners) 9 June 1910, seeking advice on Millane’s suggestion that McKeen cars be used on the Outer Circle line rather than steam trains. In that he draws Tait’s attention to “the contemptuous terms in the third paragraph”.

²¹ “Slow and infrequent trains”, *The Age*, 3 May 1910.

²² PROV, VPRS 421/P0, Unit 79. The elevated circular terminus would be where Federation Square is now located.

²³ They were trialled on the Ballarat/Maryborough and Warrnambool/Hamilton lines. See PROV, VPRS 421/P0, Unit 78, 1915/5464 copy memorandum of Chairman, Victorian Railway Commissioners to Minister for Railways, 13 May 1915, and Leo Harrigan, *Victorian Railways to 1962*, 1962, 240.

²⁴ PROV, VPRS 421, P0, Unit 78, 1914/6282. See, for example, report of Superintendent of Passenger Train Service, 5 May 1914.

²⁵ PROV, VPRS 421/P0, Unit 78, 1914/11251. Acting Secretary Victorian Railway Commissioners to Millane, 22 June 1914.

²⁶ PROV, VPRS 421/P0, Unit 78, 1913/5495. William McKeen to Secretaries of the Victorian, Queensland and New South Wales Railways, 3 March 1913.

McKeen cars; but Millane continued to promote and defend them publicly.²⁷ He even designed a modification that saw them have more success in Queensland²⁸ and this appears to have contributed to his appointment as a full member of the 1914 San Francisco International Engineering Congress.²⁹

Shipyard entrepreneur

In March 1917, aged 30, Millane had started to draw up plans for a small shipyard in Geelong similar to those he had seen operating on a visit to American west coast cities in 1912–1913. He believed he was assured of capital support if he could guarantee no “labour troubles”.³⁰ Later that year the project suddenly grew in size after wartime speeches by Prime Minister Billy Hughes urged an increase in local shipbuilding capacity.³¹ In response, Millane proposed the establishment of a “Co-operative Ship Building Company” based at Corio Quay, North Geelong. The company would be the vehicle for raising £1,250,000 capital. It would prepare the site for four slipways, workshops, foundry and engineering works. It would build 12 6300-ton ships and sell them for £317,520 or higher price. Millane calculated that investors would share a profit on each ship of £152,520 and he was confident that there would be no industrial trouble as labour would be shareholders in the profit.³²

Millane moved on his scheme with incredible speed despite conceding in his own documentation that he was “not a shipbuilder, though I know a good bit about it”.³³ He started to raise money and, between July 1917 and June 1918, when he was forced to abandon the idea, he had written 17 letters to the Prime Minister and his department.³⁴ As with his McKeen endeavour, the letters are full of facts and figures, engineering detail and free flowing ideas. They refer to the existence of many supporters and his personal ability to mobilise “over 460 experienced and willing steel and iron workers, many experienced on ship construction here and in England, Scotland, Belfast and America, willing to drop their present occupation and make a satisfactory started [sic] ship yard a success”.³⁵ The letters press constantly for a meeting with the Prime Minister and support from government.

²⁷ *Argus*, 22 March 1915, 4, Letter to the Editor by RF Millane of McKeen Motor Co.

²⁸ Interview with Colin Kelly (McKeen historian), 17 June 2005.

²⁹ This appointment is referred to in the *Argus*, 4 July 1914. The informant was Rupert Millane.

³⁰ NAA: A2, 1918/128J, Part 2, Millane to HW Churchin, 6 February 1918. Millane would appear to have worked in the USA for Union Pacific *circa* 1912–1913, for which he was paid \$US6000. See NAA: A2, 1918/1285, Part 2, Millane to Hon WA Hughes, 10 August 1917.

³¹ “Ship building in Australia”, *The Age*, 20 July 1917, 9.

³² NAA: A1336, 6597. See application for copyright of literary work of “Prospectus bringing about industrial and financial co operation”.

³³ NAA: A2, 1918/128J, Part A, Millane to BW Churchin, 31 January 1918 at p 4.

³⁴ See generally, NAA: A2, 1918/128J, Part 2.

³⁵ NAA: A2, 1918/128J, Part 2. Received in PM’s Department 25 February 1918.

For its part the Australian Government was less enthusiastic. The advice to the Prime Minister was that the scheme was impractical and that Millane's attempts to register the cooperative name, raise money and issue a prospectus was in breach of various wartime regulations. Indeed, he had been prosecuted and fined on these matters in August/September 1917. Millane was advised in no uncertain terms that he should stop promoting the company, otherwise further legal action would be taken.³⁶ But, clearly convinced of the merit of the scheme, he continued to promote it well into 1918. He even lodged for copyright registration as an original literary work his personally produced prospectus, replete with ship photographs, ambitious claims about his personal ability to manage labour (in capitals for emphasis) and a lengthy and flattering personal profile.³⁷

By November 1918 Millane recognised that the scheme was dead. He wrote a stinging letter to Acting Prime Minister Watt, protesting the government treatment of him and claiming compensation. He regretted:

having to take this action, but I am certain that investigation, impartially, or before proper authority, you will see I was most shamefully treated, lost considerable money, as well as prospects of establishing the finest engineering works and steel shipyards in the country.³⁸

His letter stopped short of threatening legal action but it was a cry for justice and a sign that a new theatre of activity was about to open up.

Rail system visionary

In 1921, undeterred by his shipyard setback, Millane returned to the family rail network theme with a proposal for the formation of a "Traffic League".³⁹ He had picked up on the pressures faced by a rapidly growing city in the "roaring twenties" and the need for an accessible and efficient public transport system. Melbourne's cable car and train system was struggling to meet the demand generated by expansion, particularly in the northern and western suburbs. It also suffered regular congestion at key central spots such as Flinders Street railway station.⁴⁰ Millane's solution, building on the 1877 proposal of his father and to be promoted by the League, proposed a reorganisation of the city's traffic outlets and inlets and the erection of a new central railway station in the vicinity of the Exhibition Gardens. In order to lobby support for this "Direct

³⁶ NAA: A2, 1918/128J, Part 2. See memorandum to Secretary of PM's Department, 26 November 1917.

³⁷ NAA: A1336, 6597, 25 April 1918.

³⁸ NAA: A2, 1918/128J, Part 2. Letter dated 25 November 1918.

³⁹ NAA: A1336, 9187.

⁴⁰ "City traffic congestion: the cause and the remedy", *The Age*, 4 June, 1920, 8a. See generally, Susan Priestley, *The Victorians: Making Their Mark*, 1984, 155 ff, 166 ff.

and Central Railway”, Millane self-published a journal called *Traffic*,⁴¹ to be published monthly with a subscription set at one shilling. Millane claimed:

“TRAFFIC,” the first and only public railway and tramway publication attempted in this country, undertaking more than a public object.

The object seems “TOO BIG” for some people, but it is only plain simple railway track — no difficulties, a little pick and shovel, brick and structural steel work — that means Millions to the City improvement, and means commercial development and saving of a month per annum to nearly all future users. So WHY NOT rally up and join in such a beneficial campaign, and later on be in the first train of pioneer supporters to run over the new route?⁴²

The 34-page journal contains advertisements by traders and merchants and extensive newspaper quotes on traffic congestion. It is freely illustrated with photographs of busy Melbourne intersections, maps and proposed engineering solutions, such as an elevated rail track along Lonsdale Street out to Heidelberg.⁴³ Again, much of the free flowing copy is in capitals for emphasis. Millane also invited subscribers to invest with him in the purchase and development of properties along the proposed rail routes, it being “INVESTMENT FREE FROM EXTRAVAGANT SPECULATION OR RISK”.⁴⁴

Although the journal claimed to be supported by companies such as Myer (Melbourne) and other leading merchants and businessmen, there is no record of its having gone to a further issue. Possibly this is connected to the death in June that year of Millane’s father at the age of 77. The elevated rail track and the station in the Exhibition Gardens were never built.

Omnibus pioneer

By 1922 authorities were grappling with how to meet Melbourne’s transport needs. One issue being debated through the newspaper columns was the electrification and modernisation of the cable car tramway system.⁴⁵ Inevitably, Millane had a view on this and appeared at public hearings conducted by the Railways Standing Committee. Describing himself as an engineer with American experience, he favoured an underground electric conduit system. When questioned on whether he had consulted the Tramways Board about the matter, he gave a reply that hints at his growing maverick status. He replied: “The Board resented information coming from anyone outside the service”.⁴⁶

⁴¹ NAA: A1336, 9187.

⁴² NAA: A1336, 9187, 1.

⁴³ This last proposal was an earlier idea. Millane and his father Patrick had claimed copyright in the plans as a literary work in 1916. NAA: A1336, 5014.

⁴⁵ NAA: A1336, 9187, 33.

⁴⁶ “City Traffic: Tramway conversion: cable or electric system”, *Argus*, 8 August 1922, 8 and “Overhead wires: an abomination”, *Argus*, 10 August 1922, 9.

⁴⁶ “City Traffic: Tramway conversion: cable or electric system”, *Argus*, 8 August 1922, 8.

Issues of electric conversion were soon overwhelmed by the belated arrival, in 1923, of the petrol omnibus on Melbourne's roads.⁴⁷ These vehicles proved immediately popular with commuters because of their route flexibility and speed and they were given a fillip when the tram system went on strike in April 1923.⁴⁸ However, two new issues soon dominated: the collapse of tramways' revenues from bus competition; and the damage suddenly caused to the roads by the solid wheels of increasing numbers of heavy buses. Throughout 1923 and 1924 newspaper columns were filled with articles and editorials such as "Motor Bus competition",⁴⁹ "Trams v Buses"⁵⁰ and "Private enterprise a parasite"⁵¹. Under pressure to act, the Victorian Government moved to control the previously unregulated buses. In introducing the *Motor Omnibus Bill 1924*, Honorary Minister Webber was clear on the Government's purpose:

This Bill has been introduced for the purpose of controlling and regulating motor omnibuses with a view to providing safeguards for the travelling public, and of protecting the railways and tramways from unrestricted competition. At the same time it will provide municipalities with funds to assist them in maintaining roads in their districts. The Bill applies only to omnibuses plying for hire within the City of Melbourne proper, and within an area of 8 miles from the corporate limits of the city.⁵²

The legislation proposed a "seat tax" and gave control of bus licences, route allocation, designation of stops, passenger limits and related issues to the Hackney Carriages Licensing sub-committee of the Melbourne City Council (MCC).⁵³ The entrepreneurial bus proprietors and their many supporters saw the changes as an interference with free market forces. "Proprietors indignant",⁵⁴ "Scotching the Buses",⁵⁵ "Hysterical Legislation",⁵⁶ "Putting back the clock",⁵⁷ "Competition or confiscation",⁵⁸ "Housewives protest"⁵⁹ declared just some of the many newspaper headlines of the period.

⁴⁷ In the *Revenue Bill 1905* (Vic) provision was made for the purchase by the Government of eight motor omnibuses at £1300 each. In response to a question, Thomas Bent MLA said, "it had not yet been determined where they would run". See Victoria, 110 *Parliamentary Debates*, Legislative Assembly, 2 August 1905, 716. In Sydney an omnibus fleet of four had commenced in 1910. By 1922 the fleet exceeded 200 over 95 routes. See "Motor Bus Service", *Argus*, 31 January 1923, 8.

⁴⁸ "Tramway strike: Extension to Footscray: Men's determined mood", *Argus*, 14 April 1923, 8.

⁴⁹ *Argus*, 29 January 1924, 9.

⁵⁰ *Argus*, 2 January 1924, 8.

⁵¹ *Argus*, 11 July 1924, 13.

⁵² Victoria, 167 *Parliamentary Debates*, Legislative Assembly, 21 October 1924, 1001.

⁵³ *Motor Omnibus Act 1924* (Vic).

⁵⁴ *Argus*, 23 October 1924, 11.

⁵⁵ *Argus*, 29 January 1925, 8.

⁵⁶ *Argus*, 15 July 1924, 12.

⁵⁷ *Argus*, 30 January 1925, 6.

⁵⁸ *Argus*, 2 February 1925, 12.

⁵⁹ *Argus*, 4 February 1925, 22.

It was into this politically hostile environment that Millane inserted himself. He had identified the omnibus as his next big commercial opportunity, having already had some success promoting bus lines.⁶⁰ In October 1924, in what was arguably a politically naïve intervention, he sought to influence the debate raging over the “seat tax”. In his capacity as promoter of a new bus firm, Highway Motors, Millane sent the Victorian Government a letter that acting Minister John Cain⁶¹ used as evidence that buses could in fact pay the proposed tax. In Parliament Cain described the author as “a great an [sic] authority of the subject”.⁶² Although Cain did not name Millane as the author, the identified residence of Ivanhoe and the style are both his. The letter, read into *Hansard*, was full of facts and figures and grand, even exaggerated, plans as it described the “contemplated service of a fleet of 45 passenger buses of far superior type to any ordinary buses”.⁶³

The legal challenges begin

On 1 February 1925 the new regulatory system began. Routes would be allocated only to registered buses and allocation would be valid for 12 months. Within weeks the numbers of buses running collapsed; down from 320 to 40. Proprietors blamed taxation costs and lack of route security.⁶⁴ Previously successful bus proprietors announced their closure amid much resentment.⁶⁵

It was in this situation that Millane suddenly suggested a loophole. He had been researching the law on passenger vehicles at the Supreme Court Library.⁶⁶ On 17 February 1925, appearing for Highway Motors and on behalf of five bus owners whose services operated in and around Reservoir in Melbourne’s northern suburbs, Millane applied at the Melbourne District Court for licences under the *Carriage Act 1915* (Vic). He argued that the *Motor Omnibus Act 1924* (Vic) had not repealed this earlier Act, which could be traced to William IV and beyond, and that it provided an alternative (and cheaper) licensing system. Millane also noted that the routes in question had a starting point over eight miles from the city centre and thus were not caught by the new law. He

⁶⁰ In 1923 Millane successfully pioneered a Melbourne to Geelong run, although an inability to comply with time limits resulted in the lapse of an application to patent designs for a “Stepless Motor bus”. See Victorian Supreme Court File 4360 of 1930, Application to a Supreme Court Judge in Chambers for an extension of time to seal Letters Patent 13331/1923 in Affidavit of Rupert Frederick Millane sworn 28 July 1930 and Affidavit of James Bastian Richards sworn 20 June 1930.

⁶¹ Cain was later Premier 1943, 1945 and 1952–1955. His son, also John Cain, was Premier 1982–1990.

⁶² Victoria, 167 *Parliamentary Debates*, Legislative Assembly, 28 October 1924, 1154

⁶³ The Millane family had moved to Ivanhoe around 1912. See also, Victoria, 167 *Parliamentary Debates*, Legislative Assembly, 28 October 1924, 1154–1158.

⁶⁴ “Only 40 Buses running”, *Argus*, 17 February 1925, 12.

⁶⁵ “Kintrak Service to end”, *Argus*, 30 January 1925, 11.

⁶⁶ “You can’t beat Millane: down a dozen times but stills fights back”, *Truth*, 11 August 1928, 1 and “Persistent Litigant”, *People*, 11 February 1953, 36.

convinced the two Justices of the Peace who made up the court and the licences were granted.⁶⁷ Millane immediately foreshadowed further applications and his almost daily applications over the next three months became increasingly bizarre. They included an application for a licence to carry three passengers in his 1912 Hupomobile car between Mildura and Mallacoota and back, a distance of 640 miles. The application was refused.⁶⁸ Days later he made a blanket application for 1000 licences. This too was refused as “absurd”.⁶⁹

Other proprietors seized on these developments and applied for stage carriage licences in Petty Sessions Courts all over the city. The Commercial Motor Users Association (CMUA) met with Millane and also decided to seek stage carriage licences.⁷⁰ Intervening, the Government sent the leading barrister of the time, Owen Dixon KC⁷¹ to argue its case in the Petty Sessions Court against the CMUA legal counsel. Millane then withdrew his applications from those of the CMUA. He wanted to go it alone. Dixon argued that the whole of the *Carriage Act* dealt particularly with horse drawn vehicles and its very terms were applicable only to horses and coaches. As such, the motor omnibus legislation was based upon the assumption that the *Carriage Act* applied to horses only and the new law should prevail.⁷² Magistrate Cohen did not agree and decided that cars could be registered as stage carriages.⁷³ Millane would cite this “victory” against the Government for the rest of his life.

Emboldened by these events Millane and other proprietors continued to make stage carriage licence applications. The Government regrouped and moved next to test the validity of the bus law by having the MCC inspectors launch criminal prosecutions for non-compliance.⁷⁴ In particular, they targeted four owners and drivers — one of whom, Samuel Michaelis, was linked to Millane. Michaelis was the beneficial owner although the bus was in Millane’s name.⁷⁵ Again, Dixon KC appeared for the Government and this time was successful, although the same magistrate presided. The magistrate held that “motor buses may not be run validly as stage carriages”.⁷⁶ The MCC, as the licensing authority, then resolved to enforce the omnibus law and prosecute

⁶⁷ “Stage Carriage Act not repealed”, *Argus*, 17 February 1925, 12. See also, “Motor Bus Licences: More Applications”, *Argus*, 18 February 1925, 20.

⁶⁸ “Motor Bus licenses: further applications”, *Argus*, 20 February 1925, 11.

⁶⁹ “1000 Licenses wanted: ‘Magistrate says it is ‘Absurd’”, *Argus*, 24 February 1925, 12.

⁷⁰ “Stage Carriage Act: further applications possible”, *Argus*, 19 February 1925, 14.

⁷¹ Appointed a High Court judge in 1929; he was Chief Justice 1952–1964. See 14 *ADB* 7.

⁷² “Motor Bus Licenses, Applications adjourned”, *Argus*, 21 February 1925, 34. See also, “Persistent Litigant”, *People*, 11 February 1953, 36.

⁷³ “Motor Bus Licences, Magistrates decision”, *Argus*, 27 February 1925, 9.

⁷⁴ A written directive was given to the Council Licensed Vehicle Committee by the Public Works Department to prosecute non-complying owners/drivers in the Petty Sessions Court and any appeals in the Supreme Court. See PROV, VPRS, 9309/P1, Unit 14, Minutes dated 11 March 1925, Item 25/1330; PROV, VPRS, 4035/P0, Unit 14, Item 25/1330.

⁷⁵ “Bus test prosecutions: decisions reserved”, *Argus*, 3 April 1925, 9.

⁷⁶ “Bus Licenses: Ministry upheld: Test cases decided”, *Argus*, 9 April 1925, 9.

unlicensed buses. In their view “ample time had been given to motor bus owners to comply with the Act”.⁷⁷

As prosecutions and costs mounted against Millane and his supporters, he refused to acknowledge their legitimacy and counter-attacked. He issued summonses against the two MCC inspectors for issuing prosecutions that exceeded their powers and “that offended against the Stage Carriage Act”. The Town Clerk described this as a retaliatory “act of spleen”.⁷⁸ The Justices of the Peace dismissed the case without hearing evidence.⁷⁹ Millane would continue to issue unsuccessfully against the MCC inspectors and the Tramways Board for the rest of the year.⁸⁰ As well, in what might be interpreted as an effort to intimidate dissenting bus proprietors into joining a proposed Stage Coach Operators League, he began to issue summonses against them for not having stage carriage licenses.⁸¹ In one such case, counsel for Ventura Buses told the court:

that a perfectly ridiculous charge has been brought against my client. The same informant has brought a number of ridiculous charges against various people lately, and the only way to protect other people from such charges is to penalise the informant by awarding costs against him.⁸²

Toward the end of 1925 the Government acknowledged that the MCC was having difficulty administering the new legislation. Unlicensed buses were “pirating” bus routes and fees were too high but, principally, there was a need to tighten the definition of omnibus to exclude the stage carriage option. Despite protest meetings in December 1925 by the Stage Coach and Motor Transport Owners Association, no doubt promoted by Millane,⁸³ the Government introduced and passed what could be described as a “Millane amendment”. It made definitions “watertight” so that omnibuses had to be registered, made it harder for litigants to take technical points and increased maximum fine thresholds.⁸⁴

Millane’s immediate response to the Parliamentary clarification was to lift the level of his litigation at both summary and superior levels. In 1926 he regularly issued summonses in the Melbourne Court of Petty Sessions against the Lord Mayor, the police and the Minister for Public Works. His claims

⁷⁷ “Unlicensed buses: prosecutions authorised”, *Argus*, 12 June 1925, 11.

⁷⁸ PROV, VPRS, 4035/P0, Unit 14, Minutes of Licensed Vehicle Committee, dated 28 May 1926.

⁷⁹ “Council officers charged: strange prosecution fails”, *Argus*, 12 June 1925, 18. See also, PROV, VPRS 4035/P0 Unit 14, Minutes of Licensed Vehicle Committee, dated 20 January 1926.

⁸⁰ “Stage Carriage Act: bus prosecution fails”, *Argus*, 16 June 1925, 13 and “Tramways Buses: Licences challenged: costs against informant”, *Argus*, 17 July 1925, 4.

⁸¹ “Stage Coach prosecution: Dismissed with costs”, *Argus*, 3 July 1925, 16.

⁸² “Stage Carriage Act: bus prosecution fails”, *Argus*, 16 June 1925, 13.

⁸³ “Protests against Bus Act”, *Argus*, 28 December 1925, 13.

⁸⁴ *Motor Omnibus Act 1925* (Vic) and Victoria, 170 *Parliamentary Debates*, Legislative Assembly, 3 December 1925, 2589.

were creative. An example was one against the Tramways Board for “using cars exceeding 11 inches greater width than wheels of cars”.⁸⁵ This and other summonses would draw heavily on his Supreme Court Library researches and his discovery of the recently enacted *Imperial Acts Application Act 1922* (Vic) that had reviewed and confirmed which Imperial legislation was still law in Victoria.⁸⁶ Almost using the Act as a primer, Millane’s proceedings referred to concepts such as the deprivation of licence without trial and prosecution, unlawful ejection and the rights of British subjects. All were struck out or dismissed for lack of jurisdiction.⁸⁷ His subsequent affidavits and other court documents would quote extensively from that 1922 Act.

Meanwhile, in the Supreme Court, Millane issued three writs against the Minister of Public Works, the Tramways Board and the Mayor, Councillors and Aldermen of the Melbourne City Council. Newspaper reports of the time refer to pages of closely-typed claims that are both confusing and sweeping in their content. Drawing variously upon the *Carriage Act 1915* (Vic) and the “rights of British subjects under the *Imperial Acts Application Act 1923*” [sic] the writs sought, among other things, penalties against the Tramways Board and the MCC for running buses without stage carriage licences and for depriving citizens of roadway use by introducing laws prohibiting left and right-hand turns at city intersections. All three writs were struck out summarily as disclosing no reasonable cause of action,⁸⁸ although in one case, when asked by the judge whether he intended to engage proper legal assistance, Millane replied: “We would like to, if we could get some Barristers who know the difference between an omnibus and a Stage carriage. (Laughter)”.⁸⁹

Later that month, in yet another review application, an exasperated Mann J advised:

Although I have every desire to help you, I find that it is quite impossible to make any proceeding out of the papers which will result in anything. If I made an order it would only land you in further expense and more and more costs. It is quite impossible for a man of your mental calibre to conduct legal proceedings to a successful issue by yourself. I am only telling you again, as you have been told before, in your own interest, that for a very small sum of money you can see a Solicitor and get what you require done. It would not be proper for the Court to oblige you. I cannot give the order for which you ask.

⁸⁵ Victorian Supreme Court File 4360 of 1930, Affidavit of Frederick Charles Percy Hill, Schedule A, sworn 1 July 1930, and “Pegged out Goldmine in city in law battles”, *Truth*, 6 October 1951, 2.

⁸⁶ It was published with full Explanatory Memorandum and the Report of the Joint Select Committee. It was essentially the result of a research by Cussen J.

⁸⁷ Eleven summonses were issued at the Melbourne District Court in 1926. See Victorian Supreme Court File 4360 of 1930, Affidavit of Frederick Charles Percy Hill, Schedule A, sworn 1 June 1930.

⁸⁸ “Tramways and buses: two Supreme Court writs”, *Argus*, 25 January 1926, 9; “Writ against Minister”, *Argus*, 30 January 1926, 29.

⁸⁹ “Writ against Council; Judge reproves litigant”, *Argus*, 13 April 1926, 9.

Millane – Could you rule that I could get an order to review if I had a Solicitor?
I have another case.⁹⁰

By the end of 1926 the “bus wars” were coming to an end. The tramways were no longer losing money, roads were being improved and most bus proprietors had become reconciled to the new system of regulation.⁹¹ Millane took a different view. He continued to seek stage carriage licences⁹² and assisted other rogue operators and drivers to review lower court decisions in the Supreme Court on points of law.⁹³ He also started to move the litigation into the High Court with requests for special leave to appeal. His self-typed affidavits in support, peppered with legalese relating to stage carriage provisions, are verbose and confused. His applications were all unsuccessful.⁹⁴

Showing growing frustration, the Government again moved to solve the “Millane problem” through a second legislative change. In December 1927 they amended the *Motor Omnibus Act 1924* to increase the penalties for running unregistered buses. In introducing the one-page Bill into the Legislative Council the Minister for Public Works, the Hon JP Jones, made the target of the legislation unequivocally clear:

Since the passing of the Motor Omnibus Act in 1924 the owner of certain motor omnibuses has been operating them in the metropolitan area without a licence, and, notwithstanding that he and his drivers have been prosecuted no fewer than 109 times, he continues to operate the omnibuses and to treat the Act with contempt. His conduct proves conclusively that the existing penalties are inadequate to enforce the provisions of the Act. The chief By Laws prosecuting officer of the City Council, in a report on the subject in June last, states that on practically every occasion on which the owner and his driver have appeared before the court a strenuous defence has been entered upon.⁹⁵

Millane was unmoved. Having now obtained the taste for legal action, in September 1928 he intervened in yet another transport issue confronting Melbourne motorists. It was the long discussed introduction by the City of Melbourne of car parking fees, designed to deal with the growing number

⁹⁰ “His own lawyer: Judge discourages litigant”, *Argus*, 29 April 1926, 9.

⁹¹ “Control of Buses: Mr Cameron satisfied: Tramways revenues again normal”, *Argus*, 30 June 1926, 23.

⁹² “Stage Coach Licence: officially considered valueless”, *Argus*, 28 December 1929, 14.

⁹³ In one unsuccessful order to review proceeding on behalf of his driver Frank Ziino, objection had been taken to the improper issue of the summons. The issuing Justice of the Peace had used a “rubber stamp” of his signature. Dixon KC informally counselled the MCC against further use, PROV, VPRS 3183/P3, Unit 18, File 27/727 and “Rubber Stamp signature: is it legally sufficient?”, *Argus*, 10 February 1927, 9. See also, “Vacation practice notes: Bees and Motor cars: litigant’s illustration”, *Argus*, 9 July 1926, 9.

⁹⁴ NAA: A10074, 1927/9, Affidavit of RF Millane, sworn 19 March 1927. Special leave refused on 24 March 1927.

⁹⁵ Victoria, 175 *Parliamentary Debates*, Legislative Council, 22 December 1927, 4054.

of vehicles clogging the commercial areas.⁹⁶ Millane's interventions were typically novel. He charged the Town Clerk and Mayor with making unlawful threats and menaces by demanding the one shilling parking fee.⁹⁷ In support he quoted the *Road Toll Act 1835* (UK) and the Statutes of Elizabeth I and Henry VI.⁹⁸ He then created his own parking business by pegging out a miner's claim for parts of Queen Street near the corner of Bourke Street. Armed with a licence to carry on the business of livery stables and car parking, Millane had a pamphlet printed promoting his new service, only to be prosecuted by the police for distributing a pamphlet without showing the publisher's name and address. He retaliated by prosecuting publishers of all Melbourne newspapers for the same offence. When By-laws Officer O'Toole removed the miner's pegs, he found himself prosecuted a number of times for "unlawfully removing survey or boundary pegs contrary to the Mines Act". None of Millane's actions was successful, which was also the fate of the stable and car park business.⁹⁹

Meanwhile, in Heidelberg ...

The inventor, local government and more legal challenges

By 1912 the Millane family had moved to Locksley Road, Ivanhoe, in the then Shire of Heidelberg.¹⁰⁰ The purpose of the move appears to have been land development and, in September 1922, Millane was in correspondence with the Shire about subdividing the land parcel into a number of shopping sites. The Shire rejected his preliminary plans but indicated future approval if "a proper surveyor's subdivisional plan" were submitted.¹⁰¹ This comment was most likely not appreciated by Millane, his surveyor father having only just died in June. Perhaps because of this loss the project went nowhere. It was overtaken in October 1925 by what the Shire Building By-law Committee described as a proposal for "an extraordinary reinforced concrete construction" at the Locksley Road site.¹⁰²

⁹⁶ "Prohibition of parking: Introducing new By-Law: cannot operate for several months", *Argus*, 29 September 1926, 25. "Parking problems: Lord Mayor's plea: 'Bear with City Council'", *Argus*, 16 February 1927, 22.

⁹⁷ Victorian Supreme Court Melbourne, Supreme Court File 4360 of 1930, Affidavit of Frederick Charles Percy Hill, sworn 1 June 1930. Further reference to this source will be in the short form of 'Supreme Court file'.

⁹⁸ "Persistent Litigant", *People*, 11 February 1953, 37.

⁹⁹ Supreme Court file, n 97, Affidavit of Frederick Charles Percy Hill, sworn 1 June 1930. See also, "Persistent Litigant", *People*, 11 February 1953, 38.

¹⁰⁰ The 1912 Sands and McDougall *Melbourne Directory* lists at Locksley Road, Millane, his father Patrick and his brother Gilbert (Builder). In 1920 sister Florence was listed as living nearby at 84 Lower Heidelberg Road. Millane would also use this address in court documents.

¹⁰¹ PROV, VPRS 1748/P2, Unit 8, 441.

¹⁰² PROV, VPRS 4339/P1, Unit 1, 8 October 1925, 22.

The radical proposal was for a fireproof house made of empty kerosene tins and reinforced concrete. Again, the timing reflects Millane's identification of a commercial opportunity. It coincided with a housing shortage and public discussion of the use of alternative building materials such as steel and rubber. The State Savings Bank also had a proposal for workmen's houses at Fisherman's Bend (Garden City) and called for tenders to build 88 houses, including six at Heidelberg.¹⁰³ Millane's proposal was an audacious response to this environment. He had conceived it some years earlier while he was working as a travelling motor cycle sales distributor in the Mallee, an area then being settled under a post-war soldier settlement scheme. There Millane noticed a farming customer living in a hessian humpy surrounded by literally hundreds of empty petrol tins left over from fuelling tractors. Millane's response was to suggest a house made of tins to form lightweight cellular walls. They would be composed of 85 per cent sealed air, the rest reinforced concrete, offering high insulation against summer heat and winter cold, as well as being fireproof, light, strong and cheap.¹⁰⁴

The Patents Office did not share Millane's enthusiasm for the concept. In December 1924 they rejected his application "shorn of superfluous verbiage" for a patent for a "Hollow Core Monolithic Concrete Building". The product was not an "article of new manufacture" or an outcome of "skilful ingenuity". Millane challenged this rejection but, no doubt preoccupied with stage carriage matters throughout 1925, let it lapse until 1926 when his four chamber applications in the Supreme Court failed on procedural and evidentiary grounds.¹⁰⁵

Despite this lack of official endorsement, in early 1926 Millane started building a large 21-square prototype with technical support from the University of Melbourne and financial support from the English, Scottish and Australian Bank.¹⁰⁶ For Millane, the idea was given further cogency by the death toll in the 1926 bushfires.¹⁰⁷ However, the Shire was unconvinced and in May 1926 sent him a registered letter citing breach of building regulations and their decision "without qualification to insist upon this building being

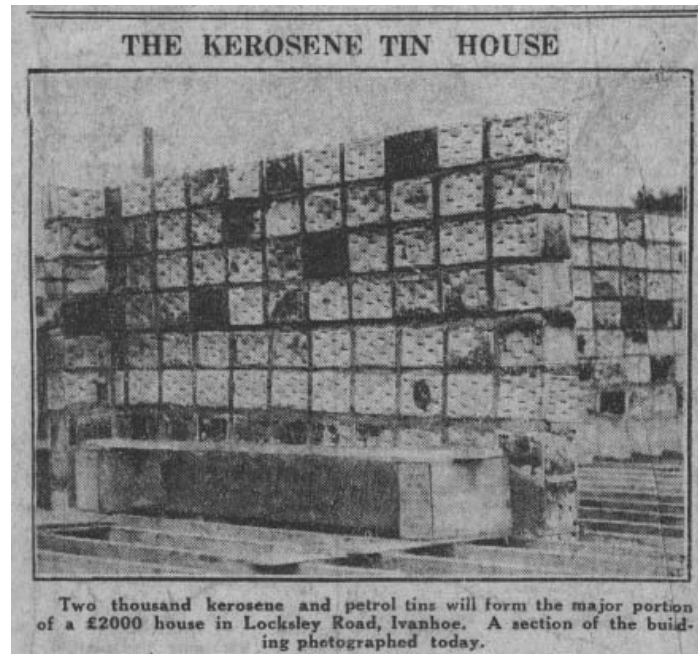
¹⁰³ "Baldwin's Ministry Plan: 2000 Steelhouses in Scotland: labour opposition", *Argus*, 13 February 1926, 35; "An all rubber house", *Argus*, 8 May 1926, 14; "Savings Bank Houses tenders", *Argus*, 31 May 1926, 12; "Fisherman's Bend: Bank's new proposal", *Argus*, 16 June 1926, 20.

¹⁰⁴ "Persistent Litigant", *People*, 11 February 1953, 36-37. At that time empty kerosene tins were also being used for all manner of household items, such as beds, chairs, stoves, buckets and meat safes. See further, Richard Broome, *The Victorians: Arriving*, 1984, 141-142.

¹⁰⁵ Supreme Court file, n 98, Affidavit of James Bastian Richards (Prothonotary of the Supreme Court), sworn 20 June 1930.

¹⁰⁶ Supreme Court file, n 97, Affidavit of Rupert Frederick Millane, sworn 28 July 1930.

¹⁰⁷ Fifty one people lost their lives in the 1926 bushfires. See WS Noble, *Ordeal by fire: the week a state burned up*, 1977.



Kerosene Tin House. Only known image of the Heidelberg Kerosene Tin House. *The Herald* (1926).

Courtesy State Library of Victoria

demolished immediately”.¹⁰⁸ Instead, Millane rose immediately to the defence of his concept. He wrote numerous and long letters to the Shire Council.¹⁰⁹ He prosecuted the Shire for sending “a letter showing malicious intent in ordering him to demolish a building”,¹¹⁰ sought an injunction, issued a writ claiming £9250 damages on the basis of a Statute of Charles I¹¹¹ and appeared in person before the Shire Council to state his case.¹¹² However, all was to no avail and the part-completed house was demolished on 9 August 1926 on the basis that “insufficiently perforated tins were used instead of expanded metal, that the slashed tins were rusty, greasy, and painted, and that the studs were not uniform”.¹¹³ From a nearby corner Millane watched as a team of men set

¹⁰⁸ PROV, VPRS, 1748/P2, Unit 10, Council Minutes dated 20 May 1926, 744.

¹⁰⁹ PROV, VPRS 1748/P2, Unit 10, 813.

¹¹⁰ “Kerosene-Tin House: Owners prosecutions fail”, *Argus*, 18 June 1926, 15.

¹¹¹ The writ against 10 councillors and the Shire Building Inspector was summarily dismissed by Schutt J in the Practice Court. Millane lodged an appeal. An application for an injunction pending appeal was dismissed by McFarlan J. See PROV, VPRS 4361/P0, Unit 1, Building Inspector’s Report 15 July 1926; PROV, VPRS 4361/P0, Unit 1, Minutes 10 June 1926, 45 and “Writ against Council: struck out by Court”, *Argus*, 19 June 1926, 16.

¹¹² VPRS 9531, P1, Unit 12, Council Minutes, 30 July 1926, 30.

¹¹³ “Kerosene-Tin House: Owners prosecutions fail”, *Argus*, 18 June 1926, 15.

**£2000 HOME MADE OF
KEROSENE TINS**

Surprise For Ivanhoe

**NEW IDEA FOR SUBURBAN
HOUSES**

An eight-roomed house, to consist chiefly of discarded petrol and kerosene tins, is being built by Mr. R. F. Millane in Locksley Road, Ivanhoe.

Mr Millane estimates that when it is completed the house will be worth from £1800 to £2000. The house will consist of:—

2000 petrol and kerosene tins.
200 bricks.
10 cwt. of cement, and
enough timber to cover the floor.

The framework of the building is up today. It consists of tins—new, rusty, labelled, battered — held by one-inch layers of cement.

COVERING OF CEMENT

There are no vertical beams of timber supporting the tins. Each tin has more than a dozen perforations, made for the purpose of binding the cement which will cover the entire outside after the skeleton has been completed.

Little timber is being used on the building. The main supports for the flooring of the eight rooms, and the floors themselves, will be of wood, but the rest of the structure, with the exception of the chimneys, which are of brick, comprise tins and concrete. The new house stands within 50 yards of a £5000 mansion.

COUNCIL TO SUPERVISE

Mr Millane, who has figured prominently in court fights against the Building Act, has registered his idea at the Patents Office, and, if the venture proves successful, will erect other such houses.

The necessary plans have been passed by the Heidelberg Shire Council. When informed that tins would be the main ingredient, councillors received quite a shock, but the Public Works Committee, after careful investigation, permitted the erection to be made, under the supervision of the council's officials.

£2000 Tin House. The £2000 Tin House in Heidelberg is front page news. *The Herald* (1926).

Courtesy State Library of Victoria.

about the demolition. A report of the event written some years later described him as:

...well dressed in the fashion of the times. His long single breasted coat was buttoned and he wore a red carnation in his buttonhole. In a few hours the house was a heap of rubble. The young man looked dejectedly at what had once been his home and walked slowly away.¹¹⁴

The demolition unleashed an avalanche of prosecutions and litigation against the Shire, its councillors, its officers, its lawyers and others drawn into the saga. Seeking justice for this event became an obsession with Millane for the rest of his life.

Over the next two years, until the start of 1930, Millane issued a bevy of criminal informations and summonses in the Heidelberg and Melbourne Petty Sessions Courts. They showed remarkable ingenuity. A councillor was prosecuted for being a competing builder and voting on the resolution to demolish Millane's house. The Shire was charged with destroying a work of art and illegal detention of (demolished) goods. The Shire lawyers were charged with sending letters demanding money with menaces and unlawfully deceiving various courts. Millane also convened a jury at the site of the demolition that awarded him damages of over £1000. All proceedings were struck out with costs, usually for want of jurisdiction.¹¹⁵ Far from being rebuffed by this lack of success, Millane had the decisions reviewed in the Supreme

¹¹⁴ "Pegged out Goldmine in City in Law Battles", *Truth*, 6 October 1951, 3.

¹¹⁵ Supreme Court file, n 97, Affidavits of Arthur Coyte Tingate (Heidelberg Petty Sessions Clerk), sworn 25 June 1930 and Frederick Charles Percy Hill (Melbourne Petty Sessions Assistant Clerk), sworn 1 July 1930.

Court, regularly filing lengthy and often rambling affidavits full of legalese in support. He typed his own documents and appeared in person. Dismissal in the Practice Court inevitably led to appeals to the Full Court¹¹⁶ and then to the High Court¹¹⁷ which, conveniently for Millane in those pre-Canberra days, was in Little Bourke Street, just next door. All the proceedings lapsed or were struck out.

Under this assault, in October 1926, the Shire resolved to bankrupt Millane for non-payment of costs of £54.4s. The purpose was to gain legal control of Millane's ability to both continue and issue future legal proceedings.¹¹⁸ Unusually, in these proceedings Millane was represented by counsel, who resisted the petition on the basis that the Shire Council's motives were improper and designed to stifle the pending compensation action.¹¹⁹ This argument was rejected and in August 1927 McArthur J ordered that the estate be sequestrated. It is an indication of Millane's unreasonableness that at the time his assets greatly exceeded the debt and totalled £4938.¹²⁰

Although he was discharged from bankruptcy in 1930,¹²¹ the bankruptcy unleashed further litigation, particularly as the Shire moved to sell Locksley Road.¹²² Although the bankruptcy stalled a Supreme Court action,¹²³ Millane maintained his rage in the Petty Sessions Courts.¹²⁴ In one predictably unsuccessful prosecution against the Shire lawyers (alleging they obtained a debtor's summons by fraud and deceit), the magistrate provided the following advice:

Why do you not get some good legal advice instead of giving yourself, the Court, and the defendants much unnecessary bother and expense? If you are

¹¹⁶ Supreme Court file, n 97, Affidavit of James Bastian Richards, sworn 20 June 1930.

¹¹⁷ Between 1928 and the start of 1930 Millane filed five affidavits and requests for special leave to appeal in the High Court Melbourne Registry. None was successful. See, for example, NAA: A10074, 1928/8.

¹¹⁸ VPRS 1748/P2, Unit 10, Shire Secretary to Fink Best and Miller, Solicitors, 22 October 1926, 284.

¹¹⁹ "Estate sequestrated", *Argus*, 4 August 1927, 7.

¹²⁰ The insolvency petition was adjourned when first heard. Justice Lowe stood down to prevent perception of bias, as fees due to him as counsel made up part of the Shire's claim. See "Possibility of bias", *Argus*, 29 July 1927, 15.

¹²¹ Certificate of Discharge granted 4 May 1930 subject to payment of £15.15s.0d costs to creditors. It appears never to have been paid. Supreme Court file, n 98, Affidavit of George Neville Almond (Solicitor's Law Clerk), sworn 30 June 1930. Millane was so troublesome to the Registry of the Court of Insolvency with his constant "unintelligible" filings and applications that the Official Accountant requested that federal Attorney-General Latham permit the Registry to decline to receive further papers unless directed to by a judge. See NAA: A432, 1929/930, Report 12 March 1929.

¹²² The property was eventually sold by the Trustee in Bankruptcy for £277.10s but only after being delayed by litigation. "You can't beat Millane: Down a dozen times but still fights back", *Truth*, 11 August 1928, 1.

¹²³ *Millane v President etc of Shire of Heidelberg* [1928] VLR 52.

¹²⁴ "Old legal phrases: Land cases at Heidelberg", *Argus*, 25 May 1928, 5.

wise, you will get some work and build yourself up bodily and mentally so that you will become a reputable citizen instead of being a court ghost.¹²⁵

A law to deal with “cranks” — history is made

As early as January 1926 the MCC had had enough of Millane’s seemingly endless litigation. They received advice from the solicitor and legendary World War One General, HE “Pompey” Elliott¹²⁶ “that there appeared to be no satisfactory mode of restraining Millane except to request the government to pass an Act on the lines of the *Vexatious Actions Act 1896* of England”.¹²⁷ That legislation had been introduced to curtail the vexatious litigation of Alexander Chaffers against public figures such as the Archbishop of Canterbury, the Speaker of the House of Commons, judges and the trustees of the British Museum.¹²⁸ Accordingly, in February 1926, the Melbourne Town Clerk wrote to Attorney-General Slater requesting that the MCC and public bodies be given similar statutory protection.¹²⁹ An indication that the Government was less concerned about the urgency of the situation was reflected in an *Argus* report on the matter, published some months later, that reviewed the history of such litigants in the Supreme Court:

At present there is an old woman who enters any room that she finds vacant and writes incoherent letters against both Bench and Bar. Late one afternoon she stood in the quadrangle and “coo-eed” loudly several times. An attendant asked her what was the matter. “I am “coo-eeing for an honest judge”, she replied, “but I do not think there is the slightest hope of finding one about here”.¹³⁰

In September 1927, after further prompting from the MCC,¹³¹ the Government finally introduced into the Parliament the *Supreme Court (Vexatious Actions) Bill*. It was a repetition of the short English provision and targeted people who habitually and persistently, without reasonable grounds, issued vexatious legal proceedings. Only a senior law officer could initiate the motion and the person concerned must be given an opportunity to be heard. It was then for a Supreme

¹²⁵ “‘A Court Ghost’: Magistrate’s advice to Plaintiff”, *Argus*, 11 November 1927, 20.

¹²⁶ HE Elliott was a distinguished World War One soldier and politician. His successful, although troubled career, offers a contrast to Millane’s. See Ross McMullin, *Pompey Elliott*, 2002.

¹²⁷ PROV, VPRS 4035/P0, Unit 14, Minutes of Licensed Vehicle Committee 20 January 1926.

¹²⁸ For a discussion of the history of that legislation see Michael Taggart, “Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896”, (2004) 63 *Cambridge Law Journal* 656.

¹²⁹ PROV, VPRS 4025, P0, Unit 144, Letter 10 February 1926, 190.

¹³⁰ “Vexatious Actions: State Bill Contemplated: Suppression of ‘Cranks’”, *Argus*, 5 August 1926, 11. An early persistent litigant in Victoria was Joseph Slack. See further, Graham Fricke, “The Injustice Collectors”, (1978) 52 *ALJ*, 316, 317.

¹³¹ PROV, VPRS, 4025/P0, Unit 152, Town Clerk to Attorney-General, 24 May 1927.

Court judge to control the issue of any further legal proceedings.¹³² That Millane was the target is made clear from specific references to him during debate.¹³³

The Bill met opposition in the Lower House. Members wanted to know how many cases constituted “habitually” and how was it possible to “differentiate between a sane man and a crank?”¹³⁴ In particular, labour lawyer Maurice Blackburn¹³⁵ opposed the Bill. He argued that there had been insufficient time to consider the provision, that it was dangerous and that the right of the citizen to bring a grievance before the court should be inalienable. “That right must not be taken away simply because one or two cranks have instituted a few frivolous actions, or a dozen such actions.”¹³⁶ He succeeded in having debate on the Bill adjourned to allow further consideration. The Bill was subsequently withdrawn altogether while the Lower House was sitting “in camera”.¹³⁷

The Bill was never reintroduced. Late in 1928 the vexatious litigant provision was quietly inserted into the 1928 consolidation of the *Supreme Court Act*.¹³⁸ In an arcane piece of legislative drafting, Parliament simply adopted the entire English *Vexatious Actions Act 1896* as section 33 of the Victorian law without further debate. As a result, the unusual circumstances surrounding the passage of the provision fed the conspiracy suspicions of Millane and other litigants over the next few decades as they questioned the validity of its passage.¹³⁹ Nonetheless, the provision had support and the journal of the Law Institute of Victoria was moved to comment: “Nearly all barristers and solicitors in Melbourne know Mr Millane and while marvelling at the industry of this famous litigant, will welcome the proposed legislation”.¹⁴⁰

By 1929 the Heidelberg Shire, still under litigation siege from Millane, had become frustrated at the lack of action by the Government (to whom the legislation gave sole standing to initiate a vexatious application). The Shire had received 235 documents from Millane and the Shire President interviewed him 101 times at his private residence. In the President’s view, “the thing had

¹³² Victoria, 173 *Parliamentary Debates*, Legislative Council, 13 September 1927, 1228 ff.

¹³³ Victoria, 173 *Parliamentary Debates*, Legislative Assembly, 15 September 1927, 1358, 1363 ff.

¹³⁴ Victoria, 173 *Parliamentary Debates*, Legislative Assembly, 15 September 1927, 1358.

¹³⁵ See further, Susan Abeyasekera, “Blackburn, Maurice McCrae”, (1979) 7 *ADB*, 310.

¹³⁶ Victoria, 173 *Parliamentary Debates*, Legislative Assembly, 15 September 1927, 1361 ff.

¹³⁷ Victoria, 175 *Parliamentary Debates*, Legislative Assembly, 22 December 1927, (97). See also, “Legislative Assembly: End of session rush: Incident of long sitting; ‘Strangers’ ordered out”, *Argus*, 23 December 1927, 11. On the same day the Bill was withdrawn the Legislative Assembly also raised penalties for breach of the *Motor Omnibus Act 1924*. See further, Victoria, 175 *Parliamentary Debates*, Legislative Council, 22 December 1927, 4054 ff.

¹³⁸ Victoria, 178 *Parliamentary Debates*, Legislative Assembly, 13 December 1928, 3418 ff.

¹³⁹ For example NAA: A10074, 1970/8, Constance May Bienvenu Affidavit 13 May 1970 (declared Victoria, 1969).

¹⁴⁰ (1929) 3 *Law Institute Journal*, 120.

gone beyond the humorous stage”.¹⁴¹ The Shire instructed their solicitors to “take what action possible under the new Act to prevent Mr Millane from embarrassing the Council with further litigation”.¹⁴²

In July 1930 the Victorian Attorney-General finally took action. He brought proceedings to have Millane declared a vexatious litigant. Mr WM Irvine appeared for the Attorney-General and the application was supported by six affidavits from clerks of courts and a solicitor’s clerk. They showed that since 1925 Millane had issued “87 Supreme Court writs, 53 summonses out of the Heidelberg Court, 58 out of the City Court, and 15 out of the Court at Preston. In all 213 writs and summonses had been issued in four years”.¹⁴³



Millane and the legal earthquake.

News coverage of extraordinary Millane litigation. *Melbourne Truth* (1930).

Courtesy State Library of Victoria.

Because of the special nature of the proceedings the case was referred direct to the Full Court and they appointed a young barrister, Mr JW Roger Thomson, as Millane’s counsel. Predictably, the instructing solicitors were Maurice Blackburn and Tredinnick. All acted in a *pro bono* capacity. Thomson argued two main points. First, that the new law offended the general rule at common law that a statute changing the law ought not, unless the intention appears with reasonable certainty, apply to facts or events that have already occurred. This

¹⁴¹ *Ibid.*

¹⁴² PROV, VPRS, 9531/P1, Unit 13, Council Minutes, 17 December 1929, 71.

¹⁴³ “Prolific Litigant: 213 cases in four years: Court asked to restrain”, *Argus*, 18 July 1930, 7. See also Victorian Supreme Court file, n 97.

is known as the presumption against retrospectivity.¹⁴⁴ In support, Thomson noted that all but one of the proceedings relied upon by the Attorney-General predated the 1928 legislation.¹⁴⁵ Their Honours did not accept what would appear to have been a substantive point. However, their reasons are not known as they made no reference to the line of argument in their judgment. Millane would have been entitled to suspect that this reflected judicial expediency and determination to give effect to the Government's stated intention to curtail his litigation. That the retrospectivity point had merit is reflected in changes made to similar legislation enacted in Western Australia later that year. In that State, section 3 of the *Vexatious Proceedings Restriction Act 1930* (WA) specifically permitted the court to examine proceedings instituted "before or after the commencement of this Act". It is clear that the Western Australian Parliamentary Counsel had liaised with his counterpart in Victoria.¹⁴⁶

Secondly, Thomson sought to have excluded from consideration the large amount of criminal proceedings that Millane had brought in the Petty Sessions Courts.¹⁴⁷ In support, Thomson relied on a 1915 Court of Appeal precedent, *In re Boaler*.¹⁴⁸ That case interpreted the words "vexatious legal proceedings" in the 1896 English vexatious legislation to exclude criminal proceedings from consideration. In that case Scrutton J was quite clear about the rights of the citizen and the ability of Parliament to restrict them. He said:

One of the valuable rights of every subject of the King is to appeal to the King in his courts if he alleges that civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any statute should be jealously watched by the court, and should not be extended beyond its least onerous meaning unless clear words are used to justify extension.¹⁴⁹

Somewhat conveniently, the Full Court distinguished *In re Boaler*. They noted that the English Parliament had been prompted to enact the 1896 legislation because of persistent vexatious civil proceedings, whereas the Victorian

¹⁴⁴ For a review of the authorities supporting the principle, see *Maxwell v Murphy* (1956–1957) 96 CLR 96, 263 ff.

¹⁴⁵ Section 33 became effective in December 1929. After that date until the hearing, according to the affidavit material filed in support of the application, Millane issued only one Petty Sessions Court proceeding. See *In re Millane*, [1930] VLR 381 at 383 and Supreme Court file, n 97.

¹⁴⁶ A handwritten note dated 19 September 1930 in a file of the Victorian Parliamentary Counsel indicates that there was contact between the two State Governments over the legislation. It referred to the Bill introduced by the Western Australian Attorney-General, TAL Davy. See further, PROV, VPRS 10265, P000, Unit 103.

¹⁴⁷ *In re Millane* [1930] 381, 384.

¹⁴⁸ (1915) 1KB 21.

¹⁴⁹ *Ibid.*

Parliament had acted because of persistent vexatious criminal proceedings. The two cases were different and thus Parliament must have intended criminal proceedings to be within the remit of the legislation.¹⁵⁰ How Their Honours knew this is unclear, given that the canons of statutory interpretation of the time should have precluded the court from drawing upon *Hansard* debates and similar extrinsic material. Once again, this does not reflect well on the judiciary. It indicates an over-familiarity with the Millane challenge and a determination to give effect to the vexatious sanction.

On 5 September 1930 Rupert Frederick Millane became Australia's first declared vexatious litigant.¹⁵¹ It would be the only Australian vexatious declaration to reach the law reports in the next 50 years.¹⁵² Millane was 43 years old.

Through his counsel Millane appealed to the full bench of the High Court. It listened for half an hour before Isaacs CJ refused his request for special leave.¹⁵³ No reasons were reported and, given the close nature of Melbourne legal circles at that period, it is hard to escape the suggestion that the High Court also wanted an end to the Millane litigation. Chief Justice Isaacs, of course, had other matters on his mind at the time. He would have been privy to Prime Minister Scullin's determined struggle with Buckingham Palace to have Isaacs appointed as the first Australian-born Governor-General.¹⁵⁴ In a quirk of fate, a decade later Isaacs would himself become involved in legal proceedings that led to his sister-in-law, Edna (Davis) Isaacs, becoming Victoria's second vexatious litigant.¹⁵⁵

Litigation post-declaration: the quest for leave

Although the declaration coincided with the end of Millane's entrepreneurial career, it also signalled a new phase in his litigious activity. The requirement

¹⁵⁰ *Ibid*, 386. Ironically, 50 years later when enacting the *Supreme Court Act 1986* the Victorian Parliament expressly excluded criminal proceedings from the section 3 definition of "legal proceedings". In 2000, in a case involving another vexatious litigant, faced with these express words the Supreme Court had no hesitation in finding criminal proceedings were excluded. Somewhat superfluously it reversed the decision in *In re Millane*. See *Kay v Attorney-General* [2000] VSCA 176. In 2003 the Government amended section 21 of the *Supreme Court Act 1986* (Vic) to reinstate "criminal proceedings" within the definition of "proceedings" for vexatious sanction purposes. See Victoria, 462 *Parliamentary Debates*, Legislative Assembly, 5 June 2004, 2190.

¹⁵¹ *In re Millane* [1930] VLR 381. See also, "Suppressing a Litigant: Case under new Act: Motion against Rupert F. Millane", *Argus*, 12 August 1930, 7 and "Millane sits on mountain of law awaiting legal earthquake", *Truth*, 9 August 1930, 13.

¹⁵² *In re Millane* [1930] VLR 381.

¹⁵³ NAA: A10074, 1930/47. Special leave refused 16 October 1930. For a subsequent application, see NAA: A10074, 1930/51.

¹⁵⁴ Scullin eventually prevailed and Isaacs served as Governor-General of Australia in the period 1931–1935. See further, Christopher Cuneen, *Kings' Men*, 1983, 173 ff.

¹⁵⁵ Edna Francis Davis (1907–1989) (also known as Isaacs and Laszloffy), declared 21 July 1941. See Victorian Supreme Court file 501 of 1941. See also Chapter Six.

that he seek leave before he issued proceedings moved the focus to the superior courts and away from the defendants and inferior courts. The Supreme and High Court Registries and Practice Courts became the focus of Millane's prodigious numbers of affidavit filings and in-person motions. However, the subject matter had familiar themes, namely stage carriage licenses and compensation from the Heidelberg Shire.

The declaration was not an immediate success. Millane continued to show his legal ingenuity. In October 1930 he issued proceedings against the Mayor, aldermen, councillors and burgesses of the City of Melbourne and prosecuting officer O'Toole for barratry (the common law misdemeanour of habitually exciting or maintaining suits or quarrels).¹⁵⁶ This was in response to MCC prosecutions for running unlicensed buses. The Attorney-General promptly brought contempt proceedings in the Supreme Court. There, Millane gave an undertaking not to issue further proceedings but not before he requested an order "that other parties cannot take proceedings against me?" In response, MacFarlan J said: "You have an Act all to yourself. You can always defend any action brought against you, but you cannot defend by bringing another legal proceeding".¹⁵⁷

This advice foreshadowed Millane's surge of activity through 1931. In April of that year Millane and two of his supporters, Noble Kerby¹⁵⁸ and Frederick Hampton, renewed the stage carriage campaign. They determinedly ran their unlicensed and dishevelled buses up and down Sydney Road to Coburg, pirating tramways customers. In response, licensing authorities conducted a massive campaign against them, resulting in repeated prosecutions and fines. Newspaper headlines of the day give the flavour: "Competition with trams: Complaint about Bus service",¹⁵⁹ "Millane fined £50 for Bus offence: Gives Notice of Appeal",¹⁶⁰ "Motor Omnibus Act: Further prosecutions",¹⁶¹ "Motor Bus prosecutions: Developing into farce".¹⁶² Then, on 29 May 1931, Millane succeeded in getting leave to proceed by counsel to appeal the fines

¹⁵⁶ Osborn P, *A Concise Law Dictionary*, 1964, 45.

¹⁵⁷ "Contempt alleged: Attorney-General acts: Action against R. F. Millane", *Argus*, 9 December 1930, 5.

¹⁵⁸ An inventor and engineer, Kerby (1899–1958) was also a partner in Highway Motors. His full name was "Noble Victoria's Champion Kerby". His father had bestowed it to honour the victory of his Bungaree (near Ballarat) tug 'o war team that coincided with his son's birth. Kerby did not care for the full name and during World War One even returned a letter to his mother unopened after she addressed it with those initials. Letter of Colin Kerby (son) to author, 1 December 2005. As a self-taught engineer, in 1927 Kerby lodged a patent in France for an improved axle spring for an automobile. See <http://v3.espacenet.com/textdes?DB=EPODOC&IDX=FR627064&F=0&QPN=FR627> (3 October 2005). In later life he would hold the lease for the iconic kiosk on St Kilda Pier. See further, Richard Peterson, *A Place of Sensuous Resort: Buildings of St Kilda and their People*, 2004, 10.

¹⁵⁹ *Argus*, 11 May 1931, 5.

¹⁶⁰ *Argus*, 22 May 1931, 9.

¹⁶¹ *Argus*, 29 May 1931, 13.

¹⁶² *Argus*, 30 May 1931, 19.

and challenge the regulations under which the proceedings were taken. This had the effect of adjourning 80 further prosecutions pending the outcome of the challenge.¹⁶³ In June, Millane had another success when an ageing Irvine CJ ordered a stay “of all Summonses part heard or pending in the courts of Petty Session”.¹⁶⁴ His Honour apparently misunderstood Millane’s rambling application and made the wrong order.¹⁶⁵ This, combined with a successful application for an order to review on behalf of Kerby, caused speculation about “Will the buses come back?”.¹⁶⁶



Millane drives Stage Coach through Bus Law.

Millane litigation exposes loopholes in new bus law. *Melbourne Truth* (1931).

Courtesy State Library of Victoria.

However, it was not to be and, urged on by Parliamentary¹⁶⁷ and local government¹⁶⁸ pressure, by the end of the year the authorities overcame these legal setbacks. Hampton¹⁶⁹ and Kerby¹⁷⁰ were gaoled and served eight and six months respectively before being released on special licence. Kerby was determined to continue campaigning and as he was taken to prison announced he was standing as an independent candidate in the electorate of Melbourne Ports in the December 1931 federal election.¹⁷¹ He was unsuccessful and his campaign dissolved.

¹⁶³ This was an order of Mann J referred to in notes of Barry J, dated Aug/Nov 1950, contained in Victorian Supreme Court file 4360 of 1930. See also, “Millane drives Stage Coach through Bus law”, *Argus*, 8 August 1931, 12.

¹⁶⁴ NAA: A10074, 1953/24. Extract of Order of Full Court, dated 27 May 1953.

¹⁶⁵ Kevin Anderson, *Fossil in the sandstone, the recollecting judge*, 1986, 129 and also Supreme Court file n 98, Affidavit of Rupert Frederick Millane, 20 November 1940.

¹⁶⁶ “Millane drives Stage Coach through Bus law”, *Argus*, 8 August 1931, 12.

¹⁶⁷ Mr Keane MLA, Victoria, 186 *Parliamentary Debates*, Legislative Assembly, 26 August 1931, 2549 ff.

¹⁶⁸ PROV, VPRS, 3183/P3, Unit 189, File 4775, Coburg Town Clerk to Town Clerk, City of Melbourne, 27 October 1931.

¹⁶⁹ 1931 *Police Gazette*, week ending 6 August, 847.

¹⁷⁰ 1931 *Police Gazette*, week ending 2 June, 628.

¹⁷¹ “Candidate arrested: Mr Noble Kerby: He says campaign will go on”, *Herald*, 7 December 1931, 1, “Prison candidate: Must conduct his campaign by proxy: N. Kerby’s position”, *Herald*, 8 December 1931, 8.

With his buses temporarily seized to pay fines¹⁷² and a warrant issued for his arrest, Millane left the jurisdiction and moved to Albury, New South Wales. From there he continued litigating. In 1932 alone he had seven matters active in the High Court. In one, on behalf of Highway Motors, he sought £10,600 compensation from the State of Victoria, the Attorney-General, the Treasurer and the City of Melbourne for the gaoling of Hampton and Kerby, the loss of four stage carriages, fines imposed and general legal expenses.¹⁷³ In another, using the trading name Union Oil, he sued the Commonwealth Government claiming, among other things, that customs duties were *ultra vires* (that is, beyond the power of) the *Constitution*. In the High Court Millane's former adversary in the stage carriage licence disputes, now Dixon J, found the action incomprehensible and stayed it forever. In Millane's absence Dixon J ruled: "The state legislation relating to vexatious litigation might also apply in Commonwealth jurisdiction. It might be that Mr Millane was not sufficiently competent to conduct his own litigation (Laughter)".¹⁷⁴

In March 1933 Millane returned to Victoria and was promptly arrested for non-payment of £1276 in fines and sent to Pentridge Prison for four years. However, in September, as with Kerby and Hampton, he was released on special licence after serving only six months.¹⁷⁵ During his imprisonment he served 23 days solitary confinement and was assessed by two police medical officers for removal to an asylum¹⁷⁶ before being released following representations by solicitor LP Le Grand of Brunswick.¹⁷⁷ Possibly the Government was wary of creating a "stage carriage martyr". However, the event did give rise to a continuing grievance on Millane's part.

Hardly missing a litigious beat, two months later Millane brought confusing proceedings in the Hawthorn Petty Sessions, seeking to introduce "fresh evidence of ownership" relating to the four seized buses. An exchange between the magistrate and Millane indicated how the courts would now deal with his actions. They would defer them.

Mr Stafford – I will have to go into it. I will do nothing about it today.

Millane – The Chief Justice wants you to determine matters of fact.

¹⁷² "Coburg 'Bus service: Police seize vehicles: Distress warrant for unpaid fines", *Argus*, 5 September 1931, 21, "Seizure of Motor-buses", *Argus*, 19 September 1931, 24; PROV, VPRS 4035/P0, Unit 15, Item 31/3852.

¹⁷³ NAA: A10074, 1932/7.

¹⁷⁴ "Law Suit stayed for ever: Millane's action: High Court Judge's comment", *Herald*, 29 July 1932, 8. "For ever stayed": Action by R.F. Millane", *The Age*, 30 July 1932. See also, NAA: A10074, 1931/3.

¹⁷⁵ 1933 *Police Gazette*, week ending 23 September, 935. See also, "Persistent Litigant: Committed to Prison", *Argus*, 24 March 1933, 8.

¹⁷⁶ Supreme Court file, n 97, Affidavit of Rupert F Millane, sworn 20 November 1940.

¹⁷⁷ PROV, VPRS 251/P0, Unit 136, Item 5023.

Mr Stafford – When the Chief Justice directs me to take evidence as to facts I will do so.

I will adjourn the matter until next year.¹⁷⁸

A litigant slowed but not stopped

As the 1930s began Millane's fortunes were in decline. The combined effect of failed business ventures, legal expenses and fines took their toll. Millane family resources were not enough and older sister Florence's support for her brother saw her own property sold by the bank, but not before the now customary Millane legal tussle in the Supreme Court.¹⁷⁹

Mother Annie, brother Gilbert, and later Florence, all took up residence in Brighton — first at 90 Male Street, a modest brick dual occupancy and then in 1939 in a more substantial Victorian house at 837 Hampton Street.¹⁸⁰ Millane now derived his income by working with his brother in a bicycle business¹⁸¹ and with general buying and selling of cars and other mechanical parts. Indeed, their yard became full of old cars and bits of machinery.¹⁸²

In 1935 Millane obtained leave to revive his compensation claim against the Heidelberg Shire, although he was ultimately unsuccessful.¹⁸³ Over the next few years he maintained a correspondence with the Government, seeking compensation for wrongful imprisonment¹⁸⁴ and seeking copyright for two pages of rules for "Popular Radio Contests".¹⁸⁵ In 1936, after a three-year hiatus, Millane again brought actions in the High Court. There, the Victorian declaration did not apply.

One action in 1938 sought to appeal his dispute with the Heidelberg Shire. Justice Owen Dixon dismissed it with no apparent concern for any growing perception of bias.¹⁸⁶ Another action, in 1943, against the Chief Electoral

¹⁷⁸ "Rehearing of cases: Sought by Rupert Millane", *Argus*, 30 November 1933, 5.

¹⁷⁹ Florence Millane had bought 84 Lower Heidelberg Road, Ivanhoe, in 1922. Through the 1920s this was a common address for service of court documents for Rupert Millane. The bank commenced foreclosure proceedings in 1930. See *Commissioners of the State Savings Bank of Victoria v Millane* [1931] VLR 18.

¹⁸⁰ *Circa* 1948 the council reconfigured the address of the corner property to 19 Stanley Street.

¹⁸¹ Millane family legend suggests that Gilbert Millane was a mechanical genius and had invented a new form of bicycle gear that was marketed by (later Sir) Bruce Small. Small patented it in his own name and established the very successful Malvern Star bicycle business, much to the disadvantage of Gilbert Millane. Interview with great nephews Bernard Millane, Brendan Millane and Brian Millane, 17 February 2005.

¹⁸² NAA: A10074, 1955/59, Affidavit of RF Millane, sworn 15 February 1956.

¹⁸³ The action had been stayed in 1927 upon Millane's bankruptcy. See *Millane v Shire of Heidelberg* [1928] VLR 52. See also *Millane v Shire of Heidelberg* [1936] VLR 8.

¹⁸⁴ PROV, VPRS 251/P0, Unit 140, Item No 72 and PROV, VPRS 251/P0, Unit 143, Item 2001.

¹⁸⁵ NAA: A1336, 32749.

¹⁸⁶ NAA: A10074, 1938/28.

Officer, challenged Millane's defeat as an independent Senate candidate in the 1943 federal election. In a disjointed two-page affidavit Millane analysed the meaning and source of a "Free" election and, relying on his view of the *Imperial Acts Application Act 1922* (Vic), argued that "all or any 'Rules or Regulations' have no validity at all against the general public, or prosecuting powers in any Court of Law".¹⁸⁷ This latter point was no doubt a response to the many past by-law prosecutions launched against him.

Millane did not ignore his creative side. He was still busy inventing and making suggestions. As with his shipbuilding scheme in 1917, he responded to the war effort. In March 1942 he wrote to the Commonwealth Government with suggestions for "miniature semi submarine" motor boats with torpedoes. He was politely thanked.¹⁸⁸ Later that month he suggested motor torpedo warhead boats, outboard motor boats and hydroplanes. The Government responded more tersely "that your proposals do not add to information already available".¹⁸⁹ Then in 1947–1948 Millane sought copyright for two literary works. One was entitled "Election Progress Report" but he failed to submit a copy of the work.¹⁹⁰ The second, "Tabulated Race Guides and Charts" comprised three closely-typed pages of horse names and calculations.¹⁹¹ Neither work made it to commercial implementation.

Litigating through a brother — who needs leave?

In 1939 the Millane brothers, unmarried and now in their 50s, were conducting a bicycle frame manufacturing and general buying and selling business from their Hampton Street home. That year Gilbert signed an option to purchase the property for £1175 on terms from a Mr James G Hone but, due to wartime controls on property dealings, the transaction did not progress. Instead, weekly payments of £2.2s were made. In 1946, immediately after the war, Millane discovered that the owner, now a Mrs Eileen M Bosher, was selling to an Arthur Lyne Browne, a city merchant. Seeking to forestall a loss of property rights and showing a belated understanding of conveyancing processes, Millane attempted to lodge a caveat to protect his and Gilbert's interests. The Registrar of Titles rejected it as the Commonwealth Bank, mortgagee for the new owners, had already lodged (although not yet registered) a title transfer. This unleashed a decade of litigation on the intricacies of caveat law that progressed through the Supreme Court, the High Court, the Privy Council and

¹⁸⁷ NAA: A10074, 1943/18. Millane received 1025 primary votes.

¹⁸⁸ NAA: MP150/1, 356834.

¹⁸⁹ NAA: MP150/1, 514/201/1826, Secretary, Ordinance, Torpedoes and Mines to Millan, 21 March 1942.

¹⁹⁰ NAA: A1336, 45218.

¹⁹¹ NAA: A1336, 46393.

back again, effectively culminating with Millane's forced eviction, 10 years later, on 21 October 1955.¹⁹²

The contents of the many litigation files held in the National Archives concerning this case show Millane's remarkable persistence. The documentation is almost all generated by him. It is in a self-typed loose affidavit format in an increasingly repetitive and emphatic style with liberal use of legalese and capitals.¹⁹³ Most applications were initiated in Victoria in the Practice Court rather than through the normal issue of a writ that then proceeded on appeal to the High Court. Browne, the Commonwealth Bank and the Registrar of Titles were all drawn into the proceedings at various times. Millane, to get round his vexatious status, attached Gilbert's name to a number of the applications and sat with him in court, prompting him with questions.¹⁹⁴ In response, the court ordered that Gilbert proceed only through counsel — a none too subtle extension of Millane's vexatious litigant declaration. This order also generated appeals.¹⁹⁵

Despite regular dismissals Millane simply filed further affidavits and made more applications. Attempts by Browne to get possession of the property dragged through the 1940s into the 1950s. In 1952 Browne suffered a further setback when Coppel J gave Millane leave to file a caveat.¹⁹⁶ This could not defeat Browne's interests as the title had been transferred to his name in March 1946. However, by the mid 1950s things had drawn to a close. In December 1954 the Victorian Full Court ordered that the caveat be removed. A month later Gilbert was declared bankrupt for failing to pay legal costs¹⁹⁷ and in October 1955 he died. Ten days after Gilbert's funeral Millane was unceremoniously evicted. His words in an affidavit suggest the poignancy of the moment:

Complainant with his Solicitors and van loads of police and truck removers suddenly entered premises before 10am and put me off the premises 9.48am and thereafter proceeded to remove (damage or otherwise) all household furniture, furnishings, bed, living, dining room equipment and accumulation of deceased estates for over 100 years, engineering business papers etc. of household value £1050 taking every piece of clothing except what I was wearing. Took away two vans loads of best furniture and effects £1000 (which were attached by bankruptcy Court for £543) also two van loads of second rate utility furniture etc. to Brighton and Moorabbin Girls & Boys Orphanages. Burnt all miscellaneous which fell or broke, and several 5-ton tip loads of steel

¹⁹² This précis of the facts is drawn variously from affidavits and judges' notes contained in Supreme Court file n 98, and NAA: 10074, 1948/29; NAA: A10074, 1951/17, NAA: A10074, 1955/59.

¹⁹³ See, for example, NAA: A10074, 1951/17; NAA: A10074, 1951/18.

¹⁹⁴ NAA: A10074, 1954/3. Counsel for Browne was (now Sir) Edward Woodward. Interview with Sir Edward Woodward, 1 February 2006 and Woodward, E *One Brief Interval*, 2005, 48.

¹⁹⁵ Supreme Court file, n 97, Notes of Sholl J, 30 April 1952 and NAA: A10074, 1954/3.

¹⁹⁶ NAA: A10074, 1954/4.

¹⁹⁷ NAA: A10074, 1955/56.

materials, business goods from yard and sheds, workshops, 4 dozen bicycles, 40-cub. Capacity concrete moulds, truck load of salvaged good motor tyres and later after detention for some weeks refused to give me papers in the house or goods out of yard and sheds mainly some seven motor cars, 5 motor cycles machinery equipment. Building trade – benches – tool. Total value £3645. Only thing salvaged was two suit cases of paper and typewriter and used clothing then wearing – jewelry, valuables and title deeds for land were all wilfully removed and burnt.¹⁹⁸

Millane endeavoured to fight a rear guard action in the High Court. He obtained leave from the Victorian court to appeal to the Privy Council.¹⁹⁹ It went nowhere. Meanwhile, the High Court Registry now refused to file his documentation, because it was not in the correct form and was on its face an abuse of the process of the court.²⁰⁰ Random filings of increasingly incoherent affidavits continued until 1959. They contain a stream of consciousness narration of the events over the past 30 years. The case then faded away.²⁰¹

During all this time Millane did not let go of the themes of his earlier litigation. He remained busy in the Supreme Court and the High Court. Indeed, from the date of his declaration at the end of 1930 until 1955 he made 81 separate filings in the Supreme Court. Mainly personal affidavits, they supported in-person applications in the Practice Court for writs of *certiorari*, prohibition and *mandamus*, reflecting Millane's comfort with the language of the law.²⁰² There are occasional subject matter changes, such as in 1947 when he sought to intervene in a gas dispute by having the Attorney-General ordered to do what may be described as "strike breaking",²⁰³ but mainly Millane tried to have both the Heidelberg Shire and stage carriage matters reviewed. In words suggestive of an unintentional pun Barry J dismissed a number of them, saying:

Without expressing any opinion as to whether Certiorari is available or appropriate vehicle to bring these matters before this court, I am clear that it is not open to the applicant to ask successfully for an Order in such an *omnibus* [author's emphasis] form.²⁰⁴

In 1951, once again showing legal versatility, and under commercial pressure in his bicycle business, Millane sought leave to prosecute the Cycle Traders Association for what in modern times might be described as price fixing or

¹⁹⁸ NAA, A10074, 1955/59 Affidavit of RF Millane, sworn 15 February 1956.

¹⁹⁹ Order of Martin J, dated 6 October 1955, Victorian Supreme Court file 4360 of 1930.

²⁰⁰ For example, Order of Fullagar J, dated 5 November 1956, in NAA: A10074, 1955/59.

²⁰¹ NAA: A10074, 1959/42.

²⁰² Supreme Court file, n 97.

²⁰³ Supreme Court file, n 97, Affidavit of RF Millane, sworn 17 April 1947.

²⁰⁴ NAA: A10074, 1953/24, notes of Barry J, dated Aug/Nov 1950. Affidavit of RF Millane, sworn 15 February 1956. In 1953 the Full Court of the Victorian Supreme Court did spend some time listening to an in-person appeal on the stage coach matters. It was dismissed. See Order of Duffy, Sholl and Smith JJ, dated 28 May 1953.

cartel behaviour. His affidavit railed against their “intimidation”.²⁰⁵ Two months later, following publicity in the *Truth* newspaper, Millane sought leave to issue defamation proceedings against the publishers for wilful and malicious libel in their full-page article with photo, “Pegged out Goldmine in City in Law Battles”.²⁰⁶ The seven-page affidavit that was filed provided Millane with the opportunity for a complete, although disjointed, review of events relating to stage coaches and Heidelberg Shire.²⁰⁷ It appeared that Millane cooperated with the publicity but disliked the result.



Millane defamed? The press article that saw Millane attempt to issue defamation proceedings two decades after his declaration.

Melbourne Truth (1951).

Courtesy State Library of Victoria.

One successful leave application in this time followed the death of his sister, Florence, in 1951. As the appointed administrator of her estate Millane was given leave to institute legal proceedings to collect a workers compensation debt due to the estate. A former frock manufacturer, Florence was owed £493.15s by Sportscraft Sportswear. There is no record of any action ever having been taken.²⁰⁸

About this time Millane befriended another self-represented litigant, Goldsmith Collins. During the 1950s they were regularly seen around the corridors of the courts, in the Supreme Court Library and in barristers' chambers, assisting each other with research and various applications: Millane

²⁰⁵ Supreme Court file, n 97, Affidavit of RF Millane, sworn 30 August 1951.

²⁰⁶ *Truth*, 6 October 1951, 3.

²⁰⁷ Supreme Court file, n 97, Affidavit of RF Millane, sworn 25 October 1951.

²⁰⁸ PROV, VPRS 28/P4, Unit 206, Order of Dean J, 10 December 1951.

ever courteous and Collins rude and aggressive.²⁰⁹ The Supreme Court declared Collins a vexatious litigant in 1953. The working relationship between Millane and Collins will be explored further in Chapter Seven.

Persistent to the end

As the 1960s arrived Millane entered his 70s. His immediate family had all died.²¹⁰ His only source of income was the old age pension and he was dependent on friends and family for accommodation.²¹¹ He moved from stables²¹² to a warehouse, then to a garage, taking with him a suitcase of papers and other paraphernalia. He had lost most of his sight and used a white cane to get around. His court filings became infrequent.²¹³ However, Millane was not forgotten and his now legendary activities were mentioned in Parliament in 1963, with some affection, during discussion of amendments to the vexatious litigant provision (by then known as the “Blackfellows Act”²¹⁴):

I wish to rise to the defence of Rupert Frederick Millane. He is a poor old chap who at the moment is very ill. Over the years he has had this complex, or what I might term this obsession. I had not long been a member of this House when in 1955 Mr Millane asked me to present a Petition to the House. After investigation by the then Clerk of the House and Mr Speaker, it was decided, because of certain irregularities in the Petition, not to accept it. In those days Mr Millane lived in Brighton. From that day — I hope I am not using strong words — he pestered the life out of me.²¹⁵

Millane also remained a familiar figure, shuffling around barristers’ chambers and the courts wearing a battered hat with brim and a scruffy overcoat but always with a fresh flower in his lapel. Well recognised as a polite and gentle soul he patiently waited in the Practice Court to make his leave applications for

²⁰⁹ Interviews with Barney Cooney, 25 February 2005; Gordon Spence, 9 March 2005; Philip Opas, 16 and 21 March 2005; Charles Francis, 17 March 2005 and Edward Woodward, 1 February 2006. See also, Charles Francis, “Valete Goldie”, *Victorian Bar News*, Winter Edition, 1982, 20.

²¹⁰ Millane’s mother, Annie E Millane, died in 1953, aged 94.

²¹¹ Noble Kerby’s son Colin provided accommodation for a time in his Middle Park warehouse. Letter from Colin Kerby to author, 6 October, 2005. Millane also stayed in a garage at 2 College Street, Hawthorn, the home of his Millane cousins. Interview with Brendan and Bernard Millane (great nephews), 17 May 2005.

²¹² “After 27 years he approaches court”, *Sun News Pictorial*, 8 March 1957, 16.

²¹³ In 1961 he filed an affidavit in the Supreme Court seeking to assist a fellow St Kilda tenant from being detained under the *Mental Hygiene Act 1958* (Vic). In 1963 he filed a rambling document against the Housing Commission ostensibly seeking temporary accommodation for Goldsmith Collins, then being evicted from his premises in Northcote. Both matters did not progress, simply being allowed to lie on the court file. See further, Supreme Court file, n 97.

²¹⁴ The then Mr Rupert Hamer (later Sir Rupert) used the expression in 1963 when introducing an amendment to the provision. See further at Chapter Three, footnote 58.

²¹⁵ Mr John Rossiter MLA (Brighton). Victoria, 271 *Parliamentary Debates*, Legislative Assembly, 6 November 1963, 1813.

review and appeal.²¹⁶ He was familiar to the judges, and now that the political intensity of the subject matter was history, they were patient with him. In one case before Tom Smith J (the elder) Millane sought an extension of time to file a new statement of claim. He was given 21 days. Millane replied that that would be difficult as he was going to be busy in the High Court tomorrow and then in the Heidelberg Magistrates' Court in the afternoon. Justice Smith replied, with a straight face: "Mr Millane, the trouble with you is that you have too broad a practice".²¹⁷

Even toward the end Millane remained alert for a commercial opportunity and, when introduced to a licensed surveyor in the middle of the 1960s, commenced to solicit assistance for an adverse possession claim. The property was a vacant block "used as a horse paddock and contractor's motor salvage yard" behind his former Male Street, Brighton, home. His claim was outlined on a typed statutory declaration, his signature written by a now frail hand. While as ambitious as ever, and as usual lacking support, the claim did not proceed.²¹⁸ It was most likely Millane's last legal venture.

Millane died at a Prahran hospice on 7 December 1969 of a cerebral thrombosis. Perhaps conscious that he was the last of his line, a few years earlier he had arranged for the grave to be inscribed with the names of his family. Unusually, he added the further inscription, "Erected by Rupert F. Millane 15th August 1965 RIP". He was buried according to Roman Catholic rites in a family grave at the St Kilda Cemetery, Melbourne. He was 82.

Conclusion

Two themes help us understand the life and litigation of Rupert Millane. They are the closeness of his family and the pioneering environment for adventurers in the early 20th century. For Millane these were a powerful combination and his inability to reconcile them was a key factor in his descent into litigation.

Although he was obviously talented and creative, most of Millane's early enterprises reflect a strong paternal influence. Like his father, he placed a high, even excessive, value on his ideas and sought recognition by formally protecting them, as can be seen from the patent applications for his petrol engine modification (1907) and "Kerosene Tin House" (1924). There was also his copyright attempt for his "Election Progress Report" (1947). Like his father, Millane saw himself as a real estate entrepreneur and transport visionary. It is clear that he modelled himself on that example. There was the bold scheme to import McKeen railway cars (1909), the audacious shipbuilding scheme

²¹⁶ Recollections of this period are gathered from interviews with Graham Fricke, 13 February 2005; Barney Cooney, 25 February 2005; Gordon Spence, 9 March 2005 and Philip Opas, 21 March 2005.

²¹⁷ Interview with Philip Opas, 21 March 2005.

²¹⁸ Interview with RL "Dixie" Lee, 13 October 2005. See also undated copy of Statutory Declaration provided by Brendan Millane, 17 May, 2005.

(1917), the railways scheme (1921), the omnibus adventure (1924) and the “Kerosene Tin House” development (1926). Like his father, Millane did not shy away from public engagement. Both wrote to newspapers and appeared in public forums. Both boldly engaged in legal proceedings, although in this last arena Millane completely outdid his father. However, unlike his father, Millane impatiently sought to do these things full-time rather than as an extra interest and lacked the insight to recognise when a proposal had run its course. Had he been able to accept rebuff and adapt, any one of his ventures may well have proved viable and a financial bonanza. In some respects, it was as if the idea was the thing and not the implementation. When Millane became impatient with a lack of progress he simply moved on to another project. Significantly, his promotion of new initiatives came to an end shortly after his father’s death in 1922. It was as if a creative influence and driving force had been extinguished. Thereafter the focus was on continuing to promote the same ventures through litigation.

The influence of a close family also manifests in the way Millane was given rein in his early ventures with no apparent parental dissuasion. Family legend suggests that he was his mother’s favourite following the early deaths of two children and that she paid his various legal costs and fines, to the detriment of the family fortune. This allowed his legal activities to continue unabated. He lived with his brother and mother until their deaths and there is no evidence that they were frustrated or impatient with his activities. If anything, they appear to have been quiet participants.

Millane was also a product of his era. The first three decades of the 20th century were an amazing period of global inventiveness, in particular the development of the petrol engine and the machines that came with it, such as planes, cars, trucks, tractors and buses. It was also a period where the untrained inventor/ adventurer could readily succeed: Henry Ford and Charles Kingsford Smith were just two examples. Millane was swept up in this environment. Although without formal credentials, by 27 years of age he had patented a new design for a motor engine, attended an international engineering conference in San Francisco and was established as an entrepreneur. At the same time the intimacy of Melbourne society, then the nation’s capital, gave him direct access to political and civic leaders such as Premier Murray and Prime Minister Billy Hughes in order to advance his schemes beyond his ability. Such access would not be available in modern times.

When Millane’s attention turned to the law to advance his ideas it became yet another obsession — and the dominant one. Its intricacies fascinated him, particularly the heritage of the imperial connection. Although constantly rebuffed he did not become disenchanted with the system. He just tried again. His great self-confidence probably explains why he never sought to train as a lawyer in order to prosecute his causes more successfully. Yet Millane’s lack

of insight into the futility of his litigation is shown in the decades he spent researching, typing out documents and frequenting the courts.

For its part, the legal system of the 1920s struggled to deal with Millane. His volume of proceedings and persistence was exceptional. He directly challenged the accepted norms and procedures of the court and its reliance on custom, form, precedent and professional advocacy to promote solutions to the cases presented. Millane was a phenomenon outside the experience of a judiciary drawn exclusively from the ranks of advocates and untrained in alternate dispute resolution techniques. Their frustration was demonstrated in 1930 in the way they so determinedly brushed aside legal precedent and common law principles to give effect to the sanction that they hoped would curtail the Millane litigation. This is, unfortunately, precisely the type of behaviour that spurs on the vexatious litigant, feeds suspicions and paranoia and indeed validates those suspicions and paranoia.

The nature of the passage of the vexatious sanction, as part of the 1928 consolidation, was unfortunate. Given that the sanction was designed to curtail free access to the court in selected cases, the lack of transparency in its passage was a mistake and only served in later cases to raise the spectre of conspiracy about the procedure. That said, in Millane's case, the sanction was only of limited effect. By 1930, when it was activated, the intensity of his litigation had wound down although it did turn his focus towards the court and applications for leave and away from specific defendants. Further, the order did not apply to other jurisdictions, such as the High Court. Millane remained free to issue proceedings there. It is a reflection of the more benign nature of Millane's activities after 1930 that this jurisdiction never sought to declare Millane vexatious, even after it obtained the power in 1943. The High Court simply tolerated his activities.

As Millane aged, the immediacy of the litigation subject matter faded away. However, a key to the mellowing of judicial responses was Millane's polite and self-effacing manner and the fact that his litigation became about advancing his ideas rather than pursuing a personal vendetta. Most of his litigation targeted councils and government bodies and in Millane's mind it may have been akin to a David v Goliath struggle. Indeed, Millane was never dealt with by the courts for contempt. His only period of imprisonment related to non-payment of fines. As is demonstrated in the chapters on Elsa Davis and Goldsmith Collins, the judiciary was less patient when faced with aggressive, even violent, litigants and would respond promptly and harshly.

Undoubtedly, there is a medical explanation to the Millane story. Most likely he was a querulent, as defined by Mullen and Lester, demonstrating:

a pattern of behaviour involving the persistent pursuit of a personal grievance in a manner seriously damaging to the individual's economic, social, and personal

interests, and disruptive to the functioning of the courts and/or other agencies attempting to resolve the claims.²¹⁹

The amount of material in the public domain suggests such a diagnosis. Millane's gender and single status also fit the profile. At the onset of major litigation he was in the typical age range (39). There is his voluminous legal documentation that cascades over ever increasing targets over a 30-year period. The documentation itself exhibits a level of increasing excitement and emphasis, with generous use of exclamation marks, capitals, underlinings and marginalia. Then there is the apparent transfer of focus from the original grievances to the legal process. However, at the time Millane was declared, the solution was seen as unequivocally legal, rather than medical. In the nearly 80 years that have elapsed since then the growing medical understanding of the challenge only now offers the possibility of an effective multidisciplinary response. Whether he would have voluntarily cooperated in such a response is more problematic. We will never know.

In the end the story of Rupert Frederick Millane is a personal tragedy. A life that had opportunity and showed much promise eventually just faded away. However, along the way he made a contribution to advancing inventive and entrepreneurial ideas in the community and to keeping the legal and political systems accountable. Surely not the sign of a crank.

²¹⁹ Paul Mullen and Grant Lester, "Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour", (2006) 24 *Behavioural Sciences and the Law* 333.

CHAPTER FIVE

Ellen Cecilia Barlow Legal pioneer

Ellen Cecilia Barlow¹ (1869–1951) was a Western Australian pioneer. A diminutive but determined woman, whose early life was marred by personal tragedy, she made a fresh start on the 1890s goldfields north of Kalgoorlie and, for a time, built a modest property portfolio around Fremantle. However, her true, if unintended, pioneering status is found in her persistent and unsuccessful 1920s’ litigation, mainly against her estranged husband. Her legal activity prompted the passage of the *Vexatious Proceedings Restriction Act 1930* (WA). Under this law Barlow was the first person to be declared as a vexatious litigant in Western Australia (1931) and the second person declared in Australia.



Ellen Cecilia Barlow.

Ellen Cecilia Barlow circa 1890 aged 21.

Courtesy John Barlow.

Early life

Little is known of Barlow’s early years. In her court documentation she referred rarely to her parents or early

¹ For consistency, the surname Barlow will be used when referring to Ellen Cecilia. She took this name in 1898 when she married her second husband, Thomas Reginald Barlow, and it was the one under which she was declared a vexatious litigant.

life and, if she spoke of it to her children, it was not passed down to her descendants.² What is now known has been gathered from official records.

Ellen Barlow was born in 1869 at Boggy Creek, Pambula,³ near Eden, a quiet coastal village in New South Wales, 473 kilometres south of Sydney. She was the second of nine children of Irish-born farming folk, John and Catherine Theresa Cusack.⁴ Barlow next appears in 1892 at Wagga Wagga, New South Wales, when, aged 23, she married 31-year old English immigrant, Joseph Littlebury. A widower, Littlebury gave his occupation as “Clerk” and Barlow gave hers as “Domestic”.⁵ How they met and why they were in Wagga Wagga is unknown.⁶ Of coincidental interest is that Wagga Wagga was also the marriage place of another litigant who obtained legal notoriety. He was Thomas Castro, the “Tichborne claimant”, who married in 1865 and left Australia the next year for England to make his unsuccessful claim for the Tichborne baronetcy.⁷

Joseph Littlebury surfaces next in Victoria. Most likely the move was driven by the scarcity of jobs during the 1890s’ depression.⁸ In any event, in 1896 Littlebury was working as a house steward at The Australian Club, (still) an exclusive Melbourne dining and accommodation retreat for men. As Littlebury lived at the club it is presumed that his wife Ellen remained in New South Wales. However, tragedy struck on 5 November 1896 when Littlebury died after falling down the lift shaft at the club from the second floor. The coroner’s inquest convened five days later concluded that he had been sober at the time and that it was an accidental death.⁹ In his deposition to the inquest, club secretary

² Interview with Barlow grandchildren, John Barlow and Frances Kininmonth, 23 November 2006.

³ New South Wales Registry of Birth Deaths and Marriages, Birth Certificate Marriage of *Ellen Cecilia Cusack*, dated 28 April 1869, Registered Number 1869/010360. For a short history of Pambula, see J Higgins, *Pambula’s Colonial Days: a Short History of the Period 1797–1901*, 1983.

⁴ See New South Wales Registry of Births Deaths and Marriages, Death Certificate of *Catherine Theresa Cusack*, dated 25 August 1905, Registration Number 1905/008666.

⁵ New South Wales Registry of Birth Deaths and Marriages, Marriage Certificate of *Joseph Littlebury* and *Ellen Cecilia Cusack*, dated 6 January 1892, Registration Number 1892/007347. Littlebury arrived in Melbourne, Victoria, as an unassisted immigrant in February 1888. He had sailed from London on the SS Liguria. See PROV, VPRS 7666/P0, Fiche 493, Page 005.

⁶ In March 1892 Joseph Littlebury appears to have been living at the “Rosehill Hotel”, Redfern, Sydney, where thieves stole his gold watch, silver Albert chain and Roman Catholic medal. See *NSW Police Gazette* 1892, 6 April 1892, 116.

⁷ Thomas Castro’s unsuccessful claim for the baronetcy was the legal sensation of its time. In 1874 it resulted in a criminal conviction for perjury and a 14-year gaol sentence. In 1875 he sought to reopen the conviction through civil proceedings. The case became a leading decision on the inherent power of the court to stop process that is frivolous, groundless and an abuse of process. See further, *Castro v Murray* (1875) 10 Ex 213; Robyn Annear, *The Man Who Lost Himself: the unbelievable story of the Tichborne Claimant*, 2002, 6 and M Roe, “Orton, Arthur (1834–1898)”, 5 *ADB*, 1974, 374.

⁸ For a general description of the financial crisis of this period see further, Manning Clark, *A History of Australia: V The People Make Laws*, 1981, 65 ff.

⁹ PROV, VPRS 24/P0, Unit 665.

Johnston made it clear that Littlebury, as staff, “had no right to use the lift” and although he “left a wife” he “did not know if he has left a family”.¹⁰ After all, Littlebury had only been working there 11 months! Perhaps reflecting the class structure of the period, the incident passed without mention in the minutes of the club committee.¹¹

Suddenly a widow, Barlow suffered a further blow soon after when her purse and “small gold ring set with two rubies”, possibly her wedding ring, was stolen from a draper’s shop in Pitt Street, Sydney.¹² Having been dealt these two losses in quick succession she may have surmised that, at age 28, she was ready to start afresh.

A fresh start

A new start came on 1 August 1898 when Barlow married Thomas Reginald Barlow in St Mary’s Cathedral in Sydney according to the rites of the Roman Catholic Church. Ellen Barlow’s strong commitment to the Catholic faith would be a factor in her later litigation. Thomas Barlow was the 34-year old bachelor son of John Barlow, a pioneer wine maker from Wahgunyah in northeast Victoria. How and where they met is not known but their marriage certificate lists her occupation as “Trained Nurse” and his as a “Storekeeper of Menzies, Western Australia”.¹³

It was to Menzies that Thomas Barlow promptly returned with his bride, most likely by ship. A daughter, Mercia Cecilia, was born there in 1899.¹⁴ Menzies, 132 kilometres north of Kalgoorlie, is now a very small town but in the late 1890s it was a booming gold mining town. At its peak it had two breweries, 13 hotels and a population of over 10,000. Easterners or “Tothersiders” escaping the 1890s’ depression flocked to it and other nearby goldfields in quest of a quick fortune.¹⁵ Thomas Barlow must have been an early adventurer, arriving not long after the discovery of gold in 1894. His decision to be a storekeeper rather than a prospector was no doubt a shrewd business one. Nonetheless, life in Menzies would have been hard for Ellen Barlow and a baby. It was a hot, treeless, dusty place and had what Blainey has described as a “general

¹⁰ *Ibid.* Deposition of John Kent Johnston, sworn 10 November 1896.

¹¹ Letter from Kenneth A Loomes, General Manager, The Australian Club, to author, 23 March 2007.

¹² *NSW Police Gazette* 1897, 17 February 1897, 56.

¹³ New South Wales Registry of Birth Deaths and Marriages, Marriage Certificate of *Thomas Reginald Barlow* and *Ellen Cecilia Littlebury*, dated 1 August 1898, Registration Number 1898/004631. In this certificate the occupation of John Cusack is noted as a (land) Selector.

¹⁴ Birth Registration Number 1197 of 1899 see at: http://www.justice.wa.gov.au/_apps/pioneersindex/default.aspx?uid=0308-0996-4747-9523 (23 March 2007).

¹⁵ See further, Norma King, *Daughters of Midas: Pioneer Women of the Eastern Goldfields*, 1988, 51. See also <http://www.smh.com.au/news/Western-Australia/Menzies/2005/02/17/1108500208290.html> (23 March 2007).

insanitariness".¹⁶ It was not an environment conducive to a settled family life. By the turn of the century not only was the boom and the future of Menzies in decline but the Barlows' relationship had begun to fray.

By 1901 Ellen Barlow was living in Perth, where further tragedy struck when she gave birth to a stillborn female child.¹⁷ It was also the year that she would later claim as the one when her husband had assaulted her. She would allege that while she was holding a pan of boiling fat he knocked her to the ground and placed his foot firmly on the red-hot pan, causing it to burn her ankle to the bone. She suffered great pain as the wound refused to heal. Thomas Barlow would vigorously deny the allegation when it was raised in 1920s' litigation,¹⁸ although a leg injury and responsibility for the medical expenses generated by it would be a recurring point of dispute between the couple.

Living separately

By 1903 the Barlows had started to live separately.¹⁹ Thomas, like other men of the period, was away in the bush looking for work. Notably, he worked as an inspector²⁰ on the rabbit-proof fence, one of the grand Western Australian infrastructure projects of the period. Constructed between 1901 and 1907, its purpose was to keep rabbits and other agricultural pests out of Western Australia.²¹ Although ultimately unsuccessful as a barrier, the project was a valuable source of income for the Barlow family and Thomas remitted regular payments to support them.²²

For her part, Ellen Barlow settled around Fremantle. Visits from Thomas became infrequent although a son, John "Jack" Beresford, was born in 1904²³ followed by another son, Marcus Thomas, in 1909.²⁴ Now in her 40s, life as a single parent with three children under 10 would have been tough for

¹⁶ Geoffrey Blainey, *The Golden Mile*, 1993, 25.

¹⁷ Registration number 4200 of 1910 see at: http://www.justice.wa.gov.au/_apps/pioneersindex/default.aspx (25 March 2007).

¹⁸ "WOMAN SUES HER HUSBAND. Claim for £1,000 Damages. Expensive Experience of the Law", *West Australian*, 29 October 1926, 13.

¹⁹ State Records Office of Western Australia, WAS 202, Cons 3580/586, Supreme Court Appeals, Judgment of McMillan CJ, 17 December 1924. Further reference to archives from State Records will be in the short form "SROWA".

²⁰ Extracted from the diary of John T Rutherford (undated), forwarded by Secretary of Bruce Rock (WA) Historical Society to author, April 2007.

²¹ See generally, Frank Broomhall, *The Longest Fence in the World*, 1991, 55. Another large infrastructure project commenced in this period was the "Coolgardie Pipeline" that carried water overland from the west coast to Kalgoorlie. See further, Geoffrey Blainey, *The Golden Mile*, 1993, 56–76.

²² SROWA, WAS 202, Cons 3677/1440, Supreme Court Appeals, Evidence of Ellen Barlow, 10 December 1926.

²³ Registration number 5156 of 1904 http://www.justice.wa.gov.au/_apps/pioneersindex/default.aspx (1 April 2007).

²⁴ Interestingly, no parents are listed in the official record. See Registration number 39 of 1909 http://www.justice.wa.gov.au/_apps/pioneersindex/default.aspx (1 April 2007).

Ellen Barlow. She had no immediate family to provide support²⁵ and what income there was consisted of payments from Thomas and her work as a cook at the Hotel Cleopatra in Fremantle.²⁶ By 1914 the separation was becoming permanent. That year Thomas, at 50 and getting too old for outdoor work, started a general store, “The Trading Company”, at the newly established town of Bruce Rock, 243 kilometres from Perth in the eastern wheat-belt region. He also increased his weekly payments to £2.5s.0d,²⁷ although to that point there is no suggestion that either party viewed the marriage as at an end. However, it was probably in serious decline.

An early legal success

In 1917 Ellen Barlow had her first engagement with the legal system and it was a successful one. It gave a financial bounty that allowed her to enter the property market and provided her with direct insight into the mechanisms of the legal system and how they could be used to advance her own endeavours. It also introduced her to various officers of the court with whom she would interact for the next 30 years.

In December 1916 she and her daughter Mercia (17) had been passengers on a train from Subiaco to West Perth. After leaving the train they had walked over the overhead bridge where Barlow had stepped into a hole in the bridge flooring. The heel of her shoe had become stuck and she was thrown down the steps and sustained injury to her legs, arms, head and “serious nervous shock”. She was incapacitated as a result and, although then 47, claimed to have suffered a miscarriage. She sued the Railway Commissioner for negligence.²⁸

Five months later the case came before Northmore J and a jury in the Perth Supreme Court. Barlow was represented by two barristers; the Commissioner by a King’s Counsel and the Crown Solicitor. The case ran for three days and Barlow was vigorously cross-examined. The defence attacked the *bona fides* of the claim by calling a doctor who had treated Barlow. Consideration of medical ethics does not appear to have been a restraint. A newspaper report of the time says:

Dr Couch gave evidence that the Plaintiff had not miscarried. He said he visited her three times. On one occasion she told him that she had been offered £5

²⁵ Ellen Barlow’s parents and siblings lived in New South Wales. Her mother, Catherine Therese Cusack, died near Pambula, New South Wales, in 1905 aged 65 years. See New South Wales Registry of Births Deaths and Marriages, Death Certificate of *Catherine Theresa Cusack*, dated 25 August 1905, Registration Number 1905/008666.

²⁶ “WOMAN SUES HER HUSBAND. Claim for £1,000 Damages. Expensive Experience of the Law”, *West Australian*, 29 October 1926, 13.

²⁷ SROWA, WAS 202, Cons 3677/1440, Supreme Court Appeals, Evidence of Ellen Barlow, 10 December 1926. See also, Iris Bristow, *Seedtime and harvest: a history of the Narambeen District 1888–1988*, 1988, 39.

²⁸ “Alleged Negligence: action against Commissioner for Railways”, *West Australian*, 24 May 1917, 6.

in compensation for her accident. Witness told her that £50 to £100 would be ample as she had practically recovered. Plaintiff then said she wanted six months' holiday in the East at the expense of the Government, to which witness had jokingly replied that she had better claim £1000. On the following day plaintiff said to him: "I want you to be my friend in getting the £1000." Witness replied that he would do no such thing, and that such a claim would be absolute blackmail on the Government. Witness refused to visit the plaintiff anymore.²⁹

However, the jury did not accept the defence's suggestion that the claim was a dishonest or inflated one. They awarded Barlow £250, a significant sum for the period.³⁰

Barlow appears to have applied the money to purchase four rental properties bounded by Swan and De Lisle Streets and Willis Avenue, North Fremantle.³¹ Although, for a time, these properties provided a source of income, they also generated tenancy disputes that led to persistent litigation with both tenants and the local council. These legal disputes ran parallel to those with Thomas Barlow.

Maintenance dispute with Thomas Barlow: early days

Toward the end of 1916 Ellen Barlow's increasing demands through various solicitors³² for more money had prompted Thomas Barlow to engage his own solicitor, Arthur Haynes.³³ Haynes, a member of one of Western Australia's pioneering families,³⁴ would become a long-term participant in the subsequent legal actions and would be pivotal in the eventual vexatious litigant proceedings.

Typically for the period there was no suggestion that custody of the children would be with anyone other than the mother. Money was the main area of disagreement and, in October 1917, a verbal agreement was made between the parties that Thomas would increase weekly payments to £3.³⁵ However, by 1920 Barlow was pressing for more and, in an effort to put "an end to all

²⁹ "Alleged Negligence: Commissioner of Railways sued", *West Australian*, 25 May 1917, 4.

³⁰ "Action against Commissioner of Railways", *West Australian*, 26 May 1917, 8.

³¹ Western Australia, Certificate of Title, Volume 757 Folio 1, 27 September 1920. By the late 1990s the properties had been demolished and the streets absorbed into a modern industrial estate.

³² Two solicitors were WM Nairn in 1918 and JP Dwyer of Unmack and Thomas in 1920. See SROWA, WAS 202, Cons 3580/586, Supreme Court Appeals, Judgment of McMillan CJ, dated 17 December 1924.

³³ SROWA, WAS 202, Cons 3677/1440, Supreme Court Appeals, Evidence of Arthur Goodwin Haynes, 10 December 1926.

³⁴ His father was Richard Septimus Haynes (1857–1922), lawyer and politician. Haynes senior was a powerful advocate in the 1880s–1890s for electoral reform. He also established a large legal firm and appeared in several leading cases. In legal circles he was known as a "last ditcher", possessing a caustic, witty tongue. See further, T Stannage, "Haynes, Richard Septimus (1857–1922)", 9 *ADB*, 1981, 241–242.

³⁵ *Barlow v Barlow* (1927) 30 WAR 8, 9.

differences”, Haynes negotiated directly with her on terms for a separation agreement. In November 1921 Haynes thought he had agreement and he drew up a deed. It outlined that the parties would live separately; Barlow would receive weekly payments of £3 for six months and thereafter £2.5s.0d; Thomas would meet reasonable educational expenses for 12-year-old son Marcus at the Marist Brothers College at New Norcia and make a one-off payment of £100 to allow Barlow to purchase furniture. In return, in words that provide some insight into events to that stage, Barlow was to covenant that:

she will not in any manner whatsoever molest annoy or interfere with her said husband and will not bring or cause to be brought any actions suits or demands against her said husband either for separation, maintenance or any other matter whatsoever.³⁶

Three months later, in February 1921, Barlow intimated to Haynes that she could not sign the contractual agreement “on religious grounds”.³⁷ Her strong Catholic faith precluded her from initiating State-based divorce or judicial separation proceedings, a necessary preliminary step in order to access the Supreme Court’s matrimonial power to determine ancillary matters such as alimony (maintenance).³⁸ Thus the primary legal mechanism of the period for finding a solution to marital disputes was effectively closed off.³⁹ This puts to one side the question of whether grounds for a divorce even existed. In that pre-*Family Law Act* period the system was “fault-based”. It was first necessary to establish in open court one of a number of grounds known as “matrimonial crimes”, such as adultery, desertion for three years, habitual cruelty or drunkenness or imprisonment for a capital crime.⁴⁰ This was not an easy task and one that carried the risk of a costs order if unsuccessful. Further, divorce in the period was uncommon and a sure way to attract public attention and opprobrium — although from subsequent events that appears unlikely to have mattered to Ellen Barlow.⁴¹

³⁶ Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931.

³⁷ *Ibid.*

³⁸ Percy Joske, *The Law of Marriage and Divorce*, 1925, 291.

³⁹ *Divorce Amendment Act 1911* (WA), section 2. In this period each State had its own laws in respect of divorce despite the federal *Constitution* also giving an exclusive power to the Commonwealth. See *Commonwealth of Australia Constitution*, section 51(xxi) and (xxii). The first federal assumption of the power was the *Matrimonial Causes Act 1959* (Cth) followed by the *Marriage Act 1961* (Cth). This latter Act was repealed by the *Family Law Act 1975* (Cth). The 1975 Act created an entirely new divorce and family law regime although Western Australia would be the only State to exercise that jurisdiction through its own state legislation. See *Family Law Act 1997* (WA). See also, Henry Finlay, *To Have But Not to Hold*, 2005, 240–267.

⁴⁰ Percy Joske, *The Law of Marriage and Divorce*, 1925, 23.

⁴¹ In 1923 there were only 101 divorces granted in Western Australia. See Henry Finlay, *To Have But Not to Hold*, 2005, Table 5, 263.

Religious grounds would also appear to be the explanation why Barlow did not seek to access, from the following year, the *Married Women's Protection Act 1922* (WA). This enabled the issue of maintenance proceedings in a summary court independent of divorce proceedings. That legislation also contained the “matrimonial fault” eligibility criteria of cruelty, adultery, desertion and wilful neglect.⁴²

Although Barlow would not sign the formal agreement, negotiations continued and her persistent claims through Haynes led to further verbal agreements in March and December 1921. They saw Thomas advance £100 for the furniture and increase monthly payments to £16.⁴³ Things then quietened down for a time. Barlow's financial position improved as her tenancies provided a further weekly income of £5;⁴⁴ son Marcus went off to school (for a short time) at New Norcia⁴⁵ and Thomas established a second store at the new eastern wheat-belt settlement of Narambeen. To do so he hauled a 45-year old building from Westonia to Narambeen. “Little did he realize that 70 years on, his store would mainly be remembered as the oldest building in Narambeen.”⁴⁶

It would be another 18 months before money issues re-emerged. In the meantime Barlow was attending to other matters that would light a slow fuse for subsequent self-represented legal proceedings.

The problems of a landlady and other matters

In 1922 Barlow fell into dispute with local council authorities and, for the first time, intersected with the criminal law. It started in February 1922 when the health inspector condemned one of her North Fremantle properties. As a result the tenants, James Andrew and his wife, left the house and repudiated the lease. Five years later Barlow would commence unsuccessful legal proceedings against them for non-payment of rent but, in the meantime, her solicitors engaged in an exchange of correspondence with the council health officials.⁴⁷ Other tenants, Mrs AJ Snook and family, also vacated their furnished premises. When Barlow sued for breach of tenancy in August of that year, Mrs Snook told the court that when her family moved into the place they found it to be

⁴² Section 2.

⁴³ Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931.

⁴⁴ *Ibid.*

⁴⁵ SROWA, WAS 202, Cons 3677/1440, Supreme Court Appeals, Evidence of Marcus Barlow, 10 December 1926.

⁴⁶ Iris Bristow, *Seedtime and harvest: a history of the Narambeen District 1888–1988*, 1988, 39.

⁴⁷ SROWA, WAS 202, Cons 3677/1509, Supreme Court Appeals, Evidence of James Andrew, 16 December 1927 and “FULL COURT: A Belated Rent Claim”, *West Australian*, 22 March 1928, 12, Col 6. See also SROWA, WAS 202, Cons 3677/1404, Supreme Court Appeals, Evidence of Reginald Frederick Cooper, 2 August 1925.

dirty and inhabited by bugs. Mrs Snook said that as soon as they could get another house they left and sent the keys back to Barlow. Although represented, Barlow lost and had costs awarded against her.⁴⁸ Barlow's property portfolio had started to unravel.

Meanwhile, in June 1928, Barlow was charged on summons and appeared at the Perth Court accused of stealing a scarf and jumper from Brennan's Limited. The prosecution followed a visit to Barlow's house by police acting on their suspicion that Barlow was shoplifting. Although the magistrate dismissed the charge, Barlow would claim that she suffered much from the incident and years later said that people were still "throwing it up at her".⁴⁹ This incident, too, would lead to protracted litigation with the storeowner, James Brennan, at the end of the decade.⁵⁰

The maintenance dispute returns and escalates

In 1923, having chosen not to use divorce law to pursue an alimony claim, Barlow consulted her solicitor Reginald Cooper about alternative causes of action. His advice was to issue civil proceedings for breach of contract on the basis of implied agreement.⁵¹ This option had emerged following the decision a few years earlier by the English Court of Appeal in *Balfour v Balfour*.⁵² That case had decided that the traditional presumption against an intention to create legal relations in domestic agreements was rebuttable. Accordingly, in June 1923, a Supreme Court writ was issued against Thomas, claiming that an implied contract existed whereby he owed Barlow £690.8s.4d, being the amount she had paid since 1918 for the maintenance, education and advancement of the three children. This was over and above the 1917 verbal maintenance agreement whereby Thomas paid £3 per week. The extra expenditure, set out in a detailed statement of claim, was said to be at the request of Thomas, "such request being implied".⁵³

While Barlow waited for the case to be heard she transferred her properties into the name of her daughter Mercia, now 24 and teaching in Sydney, while she retained a power of attorney to collect rents and otherwise deal.⁵⁴ This showed an increasing shrewdness, as she was seeking to minimise her asset position

⁴⁸ *West Australian*, 3 August 1922, 6.

⁴⁹ "AN ITCH FOR LITIGATION: Mrs Barlow Fails Again", *West Australian*, 7 June 1928, 11.

⁵⁰ NAA: A10078, 1929/5.

⁵¹ SROWA, WAS 202, Cons 3677/1404, Supreme Court, Appeals, Evidence of Reginald Frederick Cooper, 2 August 1925.

⁵² [1919] 2 KB 571.

⁵³ Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931, See Statement of Claim, Attachment "B".

⁵⁴ Copy Transfer 3085/1924 dated 15 April 1924 in possession of John Barlow (2006), Perth, Western Australia. See also NAA: A10074, 1939/1, Appeal Book Item 5, Statement of Defence, Paragraph 8, Supreme Court of Western Australia 86/1928

lest Thomas be able to raise that by way of defence.⁵⁵ Barlow also insisted that Cooper arrange for Mercia to corroborate her case by providing evidence from Sydney on commission instead of returning to Perth. The extra expense of this would later see Barlow engage in protracted litigation with Cooper.⁵⁶ Then, in a direct attempt to persuade Thomas to settle before hearing, Barlow visited him in Bruce Rock at the end of 1924. Accompanied by their two sons John (20) and Marcus (15), she embarked upon a letter-writing and public campaign to garner local official support for her position and to embarrass Thomas into increasing payments.⁵⁷ Her campaign was unsuccessful.

The case eventually came before McMillan CJ in late December 1924. Showing no inclination to provide a landmark decision nor to provide fuel to the then current “Housewives’ Wages Debate”,⁵⁸ the judge dismissed the case. Although there may have been an express agreement in 1917 for maintenance for the wife, His Honour noted that this was not sued upon. In a judgment that reflects the rigid family structures of the period he found no evidence to support an implied contract that Thomas reimburse Barlow for any money expended on the children. Chief Justice McMillan said, “I think it very unlikely that he would have given her a blank cheque of this kind to make expenditure in connection with the children over which he would have no control”.⁵⁹ Chief Justice McMillan also gave no weight to the evidence of the children. The boys were too young at the relevant time and Mercia was “unconsciously repeating what she has heard her mother suggest to her”.⁶⁰ In describing the proceedings as “a very unfortunate dispute between husband and wife”, His Honour went on to reject efforts to bring the parties together. “When the parties are living a cat and dog life together to suggest that they should patch up their differences is only to encourage them to go on living as cat and dog.”⁶¹ His Honour also

⁵⁵ See Percy Joske, *The Law of Marriage and Divorce*, 1925, 311. See also, “‘WIFE’S CLAIM FAILS’: Lively Interludes: Question of Costs”, *West Australian*, 30 October 1926, 13.

⁵⁶ SROWA, WAS 202, Cons 3677/1404, Supreme Court Appeals, Evidence of Reginald Frederick Cooper, 2 August 1925.

⁵⁷ Public officials at Bruce Rock who were lobbied for support included the local stationer Philip Pinel JP and policeman Constable Ernest Maloney. See “‘WIFE’S CLAIM FAILS’: Lively Interludes: Question of Costs”, *West Australian*, 30 October 1926, 13.

⁵⁸ In the 1920s the establishment of an award setting the level of financial remuneration for a housewife’s domestic labour was a topic of public discussion throughout Australia. In 1921 a proposal for an award was even debated in the Western Australian Parliament. In 1924 wages for a cook were £2 pw and a housemaid received 30 shillings weekly. In this context £3 pw maintenance paid by Thomas Barlow would appear to be “in the range”. See further, Louie Traikovski, “The Housewives’ Wages Debate in the 1920s Australian Press”, (2003) 78 *Journal of Australian Studies*, 9.

⁵⁹ Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931, Judgment of Chief Justice McMillan in *Barlow v Barlow*, dated 17 December 1924, Attachment “C”.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

rejected Cooper's submission that costs not be awarded, although he suggested to counsel for Thomas that "the defendant should not exercise the order as to costs unless he is harassed by her in the future".⁶²

It was not the end of the matter by a long way.

Barlow falls out with her solicitor and meets "Grief"

No doubt disappointed with the decision, Barlow refused to pay Cooper's bill of costs that also included invoicing for his advice and assistance in a number of tenancy matters. Accordingly, in 1925, Cooper successfully sued her in the local Perth Court for £75.8s.2d; Barlow being unable to produce any receipts to support her defence that she had paid.⁶³ She immediately appealed in person to the Supreme Court and was successful in having the matter sent back to the Local Court for a rehearing. When she lost again she appealed once more, starting what would become regular "in-person" appearances. Her simple, handwritten appeal notice became her model appeal document in subsequent litigation. There were just two grounds:

1. The Judgement was wrong in law.
2. The Judgement and the finding of the Magistrate was against the evidence and weight of evidence.⁶⁴

Later that year the litigation came before the Full Supreme Court of McMillan CJ and Northmore J, to whom Barlow had become well known. Rather than conduct yet another case, a no doubt frustrated Cooper agreed to reduce his bill to an all-in figure of £52.1s.4d and the matter settled by consent.⁶⁵ However, 12 months later when Barlow had not paid the judgment amount, Cooper refused to hand over Barlow's files. This led to yet another court hearing where Cooper's right to claim a lien pending payment was confirmed.⁶⁶

Barlow's appearance in the Perth courts had now become frequent. At least one appearance saw her spend time in Fremantle gaol, apparently for living in a condemned house. It did not appear to deter her and she later commented, "I was in the gaol hospital for my leg and was waited upon hand and foot".⁶⁷ Perth in this period had a small population of 72,000⁶⁸ and only four Supreme

⁶² *Ibid.*

⁶³ SROWA, WAS 202, Cons 3677/1395a, Supreme Court Appeals, Statement of Magistrate, 11 June 1925.

⁶⁴ SROWA, WAS 202, Cons 3677/1404, Supreme Court Appeals, Reg F Cooper and Ellen C Barlow. Notice of Appeal, 14 September 1925.

⁶⁵ *Ibid.* Court Order, 17 November 1925.

⁶⁶ "Detention of Legal Documents", *West Australian*, 27 November 1926, 10.

⁶⁷ "'WIFE'S CLAIM FAILS': Lively Interludes: Question of Costs", *West Australian*, 30 October 1926, 13.

⁶⁸ Western Australia, *Statistical Register of Western Australia for 1926*, Government Printer, Perth.

Court judges,⁶⁹ so it is not surprising that Barlow became well known, if not notorious. In one case her brother-in-law Percy Barlow advised the court, “I only have to go outside the door and people say, ‘Are you any relation to Mrs Cecilia Barlow?’ (Laughter)”.⁷⁰ Similar views appear to have been held by lawyers around the courts. One solicitor, Charles Grief, found himself sued for slander by Barlow in November 1925. He apparently said to her, “You are a thorough bad woman”.⁷¹ With the assistance of Arthur Haynes, Grief succeeded in having the case remitted from the Supreme Court to the Local Court and eventually dismissed.⁷² However, Barlow’s main litigation game was with Thomas Barlow. It was about to flare up once more.

More maintenance litigation

In June 1926 Barlow issued a further writ against Thomas for damages for wilful neglect and payment of £111 for clothes and medical expenses for sons Marcus and John, even though John, at 22, was now an adult. She also claimed damages for breach of an alleged contract to pay £20 per month instead of £16 per month by way of maintenance.⁷³ When the case came before Burnside J and a jury of six in October 1926 it was a media sensation of its time. “WOMAN SUES HER HUSBAND; Claim for £1000 Damages: Expensive Experience of the law”⁷⁴ read just one newspaper headline. Alleging an assault in 1901 by Thomas, Barlow conducted her own case in a confused and rambling style. Counsel for Thomas was an up-and-coming politician, Thomas AL Davy,⁷⁵ instructed by Haynes.⁷⁶ In his cross-examination Davy wasted no time, characterising Barlow as a “litigious person”. The cross-examination also gave some insight into Barlow’s motivation:

Mr Davy: How many lawsuits have you had — I don’t know.

Have you had 20? — I might have; some were for recovery of rent.

How many in the Supreme Court? — seven.

⁶⁹ They were McMillan CJ, Burnside J, Northmore J and Draper J. The District Court that is now the intermediate level between the Magistrates’ Court and the Supreme Court was not introduced until 1970.

⁷⁰ “WOMAN SUES HER HUSBAND: Claim for £1,000 Damages: Expensive Experience of the Law”, *West Australian*, 29 October 1926, 13.

⁷¹ “WRIT FOR SLANDER”, *West Australian*, 30 October 1926, 13.

⁷² Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931.

⁷³ *Ibid*, paragraph 13.

⁷⁴ *West Australian*, 29 October 1926, 13.

⁷⁵ The 1908 Western Australian Rhodes Scholar, in 1924 Davy was elected to the West Perth seat in the Legislative Assembly, defeating Edith Cowan. Appointed Attorney-General in 1930, his political career ended when he died suddenly of a heart attack in 1933, aged 43. For a profile of Davy, see D Black, “Davy, Thomas Arthur Lewis (1890–1933)”, 8 *ADB*, 1981, 242–243.

⁷⁶ ““WIFE”S CLAIM FAIL’: Lively Interludes: Question of Costs”, *West Australian*, 30 October 1926, 13.

His Honour: Seven! You can't do that on £3 a week.

Mr Davy (to the plaintiff): One might describe you as a litigious person? — You can't help it. If you get hit you must hit back.⁷⁷

When Barlow cross-examined Haynes, their testy exchange indicated his close involvement:

Mrs Barlow said witness had been telling deliberate falsehoods in the witness-box.

Witness: You always say these things about myself and your husband.

Mrs Barlow: I have never been so hot before.

Witness (indulgently): But you get hot over me every time.

His Honour (to Mrs Barlow): You are not asking this gentleman questions. You are making a speech.

Mrs Barlow: He has only done this to upset me.

His Honour: You seem to assist him in doing it.

Witness: Always, after you blow off steam you ----.

His Honour: Oh don't worry her, Mr Haynes. You are as bad as her — almost.⁷⁸

When he addressed the jury, Davy suggested one explanation for what motivated this and earlier litigation. He said, "Barlow had got it into her head that her husband was wealthy beyond the dreams of avarice, and she had all the time been battling to squeeze more out of him".⁷⁹ The jury quickly dismissed Barlow's claim. Although Burnside J described Barlow's case as "concentrated nonsense", he appeared not to have heard of *Balfour's case*. In his concluding remarks he "said it was clear that a husband and wife could not sue each other, and neither could they make an enforceable contract with each other".⁸⁰

This appeal point must have escaped Barlow, for three months later her attention was on fresh proceedings, rather than appeals. In February 1927 she supported son John when he issued a writ against Thomas alleging breach of agreement to pay £252 rent for a furnished house. The case was dismissed, as was the subsequent appeal.⁸¹ Then in March 1927 Barlow had a win when the Supreme Court allowed an appeal. She had claimed Thomas underpaid her £92, based on the 1917 agreement. This time McMillan CJ and Northmore J followed *Balfour*.⁸² It would be her only win in court against Thomas in 30 years of litigation against him.

⁷⁷ "WOMAN SUES HER HUSBAND: Claim for £1000 Damages: Expensive Experience of the law", *West Australian*, 29 October 1926, 13.

⁷⁸ "'WIFE'S CLAIM FAILS': Lively Interludes: Question of Costs", *West Australian*, 30 October 1926, 13.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ "SON v FATHER: An Appeal dismissed", *West Australian*, 22 September 1927, 14.

⁸² *Barlow v Barlow* (1927) 30 WAR 11.

Peace on the home front but battles on the flanks

Then, suddenly, peace! In March 1928 Haynes brokered an extraordinary agreement with an unrepresented Barlow that, even more amazingly given what had gone before, she signed. The agreement fixed maintenance at £5 per week. In return Barlow agreed “not to molest, annoy or otherwise interfere with my said husband in any way whatsoever”. She also agreed to procure the children’s signed endorsement of the agreement as their acknowledgment that “their father is not indebted to them” and “that they will not hereafter institute or carry on any action against him”. Failure to carry out any of the undertakings was to give Thomas “the right to withdraw and forfeit any instalments until such time that I give an assurance in writing that I will abide by the terms herein set out”.⁸³ Upon signing the agreement Barlow is reputed to have said “Well, here ends a lot of fun!”.⁸⁴

The agreement had been literally signed at the door of the court and it was announced to a surprised Supreme Court later that morning. The court had convened to hear Barlow’s application for a judicial separation, she having apparently reconciled her religious objection to those proceedings. In advising the court that “eight or nine years of continuous litigation” had settled, Haynes told Northmore J, “I suppose your Honour is not sorry”, to which His Honour replied, “I did not believe it until I heard the plaintiff say that it was so”.⁸⁵ As a result of the settlement the court did not make a formal separation order.

However, Barlow was not finished with court proceedings. In fact she was rather busy. In one case the Full Court dismissed her appeal on a 1922 rent claim against the Andrews. The Chief Justice queried why she had waited until 1927 to bring the proceedings, to which Barlow replied, “I have been too busy. There are 30 more similar cases”.⁸⁶ Then in June she failed in a damages action for malicious prosecution brought against James Brennan. It related to her 1922 shoplifting appearance in the Perth Police Court. Once more responding to an enquiry from the Chief Justice as to why she had not brought the proceedings earlier, she said, “I have been so busy. I have had 100 cases since then. His Honour: I can very well believe that”.⁸⁷ In dismissing the case and awarding costs against her, the judge went on to say, “Mrs Barlow has an itch for litigation. It is bad for her and bad for judges. It may be good for

⁸³ Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931, paragraphs 22 and 30 and Attachment “L”.

⁸⁴ *Ibid*, paragraph 22.

⁸⁵ “BARLOW LITIGATION ENDS: Settlement after many years”, *West Australian*, 17 March 1928, 18.

⁸⁶ “FULL COURT: A belated rent claim”, *West Australian*, 22 March 1928, 12. See also SROWA, WAS 202, Cons 3677/1509, Supreme Court Appeals, Ellen C Barlow and JW Andrews.

⁸⁷ “AN ITCH FOR LITIGATION: Mrs Barlow Fails Again”, *West Australian*, 7 June 1928, 11.

Counsel appearing against her, but it is bad for those who have acted for her on different occasions”.⁸⁸

However, the Brennan matter still had a distance to run. In January 1929, exercising the new federal jurisdiction,⁸⁹ Northmore J bankrupted Barlow on the petition of Brennan. He was chasing court costs of £85.8s.5d. Using her now standard appeal format, Barlow immediately appealed to the High Court, thus opening a new theatre of litigation for herself. To Brennan’s frustration, she won on the technicality of a defective bankruptcy notice.⁹⁰ An earlier handwritten letter by Barlow to Morris Crawcour, Brennan’s solicitor, indicated her attitude, lack of possessions and thus the futility of the proceedings:

Well deerie I aint got nuttin so you will have to cross it off.

Some old stokins & old fashioned dresses dont think Mrs. Dwyer or Mrs. Croker would be able to meet big bugs in them for bridge and siggertes, there I know my spelling is all rong but my dear old parents were decent old fashioned goodies & there were 9 of us they were not inlitened like you.⁹¹

It was enough for Brennan. He stopped his pursuit. In the meantime however, Barlow had rethought her position on the 1928 agreement with Thomas.

Second thoughts on the 1928 agreement: the High Court as mediator

When Barlow signed the 1928 agreement she was not well and was under financial pressure. This is clear from a long and bitter letter written by Mercia, then 29, to her estranged father. On a return visit from Sydney Mercia had found her mother suffering from severe leg ulcers and her brother John in poor health. She implored her father:

As you know I am not very strong, and though I don’t want to appeal for myself Father, surely your children have had to suffer degradation and shame enough because, through your stubbornness you refused to do your duty toward either mother or us. I would if circumstances allowed, force Mother away from this hateful place but I cannot even give her my help, and you must see it. All there is left is to return tired and dis-spirited to take up this burden afresh.

Your daughter, Mercia⁹²

⁸⁸ *Ibid.*

⁸⁹ The Commonwealth Government only assumed full responsibility for the area from the States when it enacted a consolidated *Bankruptcy Act 1929*.

⁹⁰ NAA: A10078, 1929/5, judgment of Full Court 11 January 1929. Always a technical jurisdiction, the early cases brought to the surface many irregularities. For example, see “BANKRUPTCY LAW: APPARENT ILLEGALITY: Technicalities not Observed”, *West Australian*, 22 March 1930. See also, “MRS BARLOW’S ESTATE: Sequestration Ordered”, *West Australian*, 12 January 1929, 14.

⁹¹ NAA: A10078, 1929/5, Barlow to Crawcour *circa* July 1928. The references in the letter to Mrs Dwyer and Mrs Croker are probably the wives of lawyers JP Dwyer and M Crawcour.

⁹² NAA: A10074, 1930/6, Appeal Book, Paragraph (11), Exhibit “C”, MC Barlow to TR Barlow, dated 17 January 1928.

By April 1928 Barlow had reconsidered her position and had sufficient stamina to rejoin battle with Thomas. She had a particularly testy exchange of correspondence with Haynes, providing a further indication of how involved and unprofessional he had become in the dispute. For example, in June he wrote:

Your effusion of even date has reached me. You are a most extraordinary person.

You seem to revel in the fact that you cannot be put down. I agree that it is impossible so far as human effort is concerned to hold you in check. Your brain seems to be unceasingly active, and you are forever inventing some new method of irritating your husband and myself. For my part, I am used to these things, and that is the only reason that I can put up with you. What I do ask you to do when you send your screeds to me is to write them so that they can be read, and please do not write all around the margins as if there was no other paper left on the Universe.⁹³

In reply Barlow was equally forthright:

Your insulting and lying letter I got when I came home yesterday. I am sending this note by my son and am going to Fremantle this morning to present my last cheque for payment, brings my maintenance up to the 25th April 1929 and you stop it if you dare and I will at once act as you and Thomas Barlow are carrying this dirty, cheating plot too far, I say but I know too well it is you as that poor coward wouldn't have the pluck enough to cheat me as he has done only he is egged on and propped up by you, but why you have done this God only knows; I suppose as others you and Barlow find that I am tougher than you thought and think all this cowardly stuff will prove too much for me and I will brake down — No, I won't — I will go on till I drop dead on my rotten leg first and show you set of cowards that though crippled I am no coward.⁹⁴

In September Barlow applied to have the 1928 agreement set aside on the grounds of misrepresentation⁹⁵ and also issued proceedings against Haynes for libel based on the comments in his letters.⁹⁶ Earlier, tragedy had struck again when son John died suddenly in June 1929.⁹⁷ He was 25. He had been ill since a meningitis attack in 1918. Such was the family animosity that Thomas

⁹³ NAA: A10071, 1936/68, Haynes to Barlow, dated 18 June 1929, referred to in Affidavit of Ellen Cecilia Barlow, sworn 17 September 1937.

⁹⁴ NAA: A10071, 1936/68, Barlow to Haynes, dated 18 June 1929, referred to in Affidavit of Ellen Cecilia Barlow, sworn 17 September 1937.

⁹⁵ NAA: A10074, 1939/1, Appeal Book Item 5, Paragraph 7(c) Statement of Defence in Supreme Court of Western Australia 86/1928.

⁹⁶ The action would be dismissed in 1930 for want of prosecution. See Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931 paragraph 27.

⁹⁷ Although his death appears not to have been officially registered, he is buried with his mother in the Roman Catholic section of Karrakatta Cemetery near Fremantle. See at: <http://www.mcb.wa.gov.au/NameSearch/details.php?id=KB00039438> (14 April 2007).

declined to attend the funeral, as he “was loath to risk a regrettable scene”.⁹⁸ The pressure also showed on son Marcus, now 20, who wrote formally to his father indicating that he was “leaving Perth shortly for a considerable time and will be unable to give my mother any support”. He warned his father that he would sue him if not reimbursed for money spent so far.⁹⁹

Meanwhile, Barlow had launched a barrage of Supreme and Local Court cases against Thomas, alleging overdue maintenance payments. In the period April 1928 to August 1930 she issued no less than three Supreme Court writs and five Local Court summonses. All were dismissed.¹⁰⁰ She was also unsuccessful as a defendant in an assault prosecution by an Albert Cook. The case was heard at the Fremantle Petty Sessions Court in August and Barlow was convicted and fined 10 shillings in default of 14 days imprisonment. She immediately appealed.¹⁰¹

In an effort to stop the litigious onslaught, Haynes advised Thomas to take bankruptcy proceedings against his wife because, theoretically, as a bankrupt she would be unable to issue proceedings.¹⁰² Haynes duly issued a bankruptcy notice, alleging indebtedness due to a breach of the 1928 agreement. Just as promptly, Barlow, following her success in Brennan’s case, applied to have set it aside. In May 1930 Northmore J dismissed the application and Barlow immediately appealed to the High Court.¹⁰³ When the matter reached that court in September 1930 “the Bench expressed the desire that a settlement should be come to and the matter was referred to Mr Justice Rich in Chambers”.¹⁰⁴ After negotiations, with Rich J as mediator, an agreement was reached based on the 1928 agreement and increasing the weekly payment to £6. This time Barlow agreed to “give her undertaking to the High Court of Australia that she would not hereafter bring any further actions against her said husband”.¹⁰⁵ The case then returned before the Full Bench, the terms were noted and the appeal dismissed.¹⁰⁶ Thomas did not resume the bankruptcy proceedings.

⁹⁸ NAA: A10071, 1936/68, Haynes to Barlow, dated 29 June 1929, referred to in Affidavit of Ellen Cecilia Barlow, sworn 17 September 1937.

⁹⁹ NAA: A10074, 1930/6, Appeal Book, Paragraph (11), Exhibit “B”, M Barlow to TR Barlow, dated 26 April 1930.

¹⁰⁰ For a summary of actions, see NAA: A10074, 1939/1, Appeal Book Item 5, Paragraph 7(c) Statement of Defence in Supreme Court of Western Australia 86/1928.

¹⁰¹ SROWA, WAS 202, Cons 3677/1642, Supreme Court, Appeals, Affidavit of Ellen Cecilia Barlow, sworn 2 September 1930.

¹⁰² Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931, paragraph 23.

¹⁰³ NAA: A10074, 1930/6, Appeal Notice dated 19 May 1930. See also “Much Litigation”, *West Australian*, 11 June 1930, 14.

¹⁰⁴ Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931, paragraph 25.

¹⁰⁵ *Ibid.*

¹⁰⁶ NAA: A10074, 1930/6, Order of Full Bench dated 10 September 1930.

However, the authorities had seen enough Barlow litigation. They moved to stop it.

A new law

The catalyst for seeking a new weapon for the court's armoury was the comments by Draper J in May 1930. In dismissing Barlow's application to set aside the 1928 agreement for alleged misrepresentation, His Honour said:

It is unfortunate that in this State we have no legislation which corresponds to the Vexatious Actions Act in force in the United Kingdom. Under the Act, the Attorney-General satisfies the Court that a person is habitually and persistently instituting vexatious legal proceedings without reasonable grounds, the court may order that no legal proceedings shall be instituted by such person in any court, without first obtaining the leave of the High Court or some judge of it.¹⁰⁷

Justice Draper's comments reflected the view that access to justice was a fundamental principle of law and that there was a limit to the powers of the court when dealing with abusive litigants. The court rules or the inherent jurisdiction focused on *existing* litigation and provided a range of remedies, including injunctive relief, removal and/or amendment of improper documents through to staying proceedings¹⁰⁸ or summarily dismissing the action. In addition, there was the power to both award and seek security for costs and to gaol for contempt.¹⁰⁹ Banning *future* proceedings, and restricting a litigant's access to the courts, was quite a different thing and the accepted view was that it required a specific legislative base. England had pioneered the way in 1896¹¹⁰ in responding to the challenge of Alexander Chaffers¹¹¹ and, in Australia, Victoria had adopted the English legislation in its entirety in 1928 when dealing with the extraordinary litigation of Rupert Millane.¹¹²

¹⁰⁷ "VEXATIOUS LITIGATION: A Judge's Strictures", *West Australian*, 30 May 1930, 6.

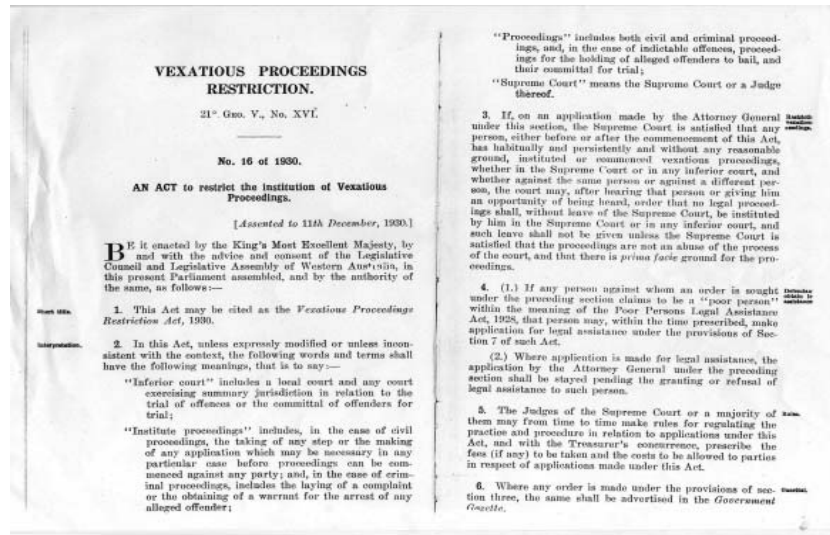
¹⁰⁸ An early example of an English court exercising its inherent power to summarily control abusive litigation involved the "Tichborne claimant", once of Wagga Wagga. See *Castro v Murray* (1875) 10 Ex 213.

¹⁰⁹ See generally, Anthony Mason, "The Inherent Jurisdiction of the Court", (1983) 57 *ALJ* 449, 453. See also, Simon Smith, "Vexatious Litigants and their Judicial Control: the Victorian Experience", (1989) 15 *Mon LR* 48, 49–52.

¹¹⁰ *Vexatious Actions Act 1896* 59 and 60 Vict c 51.

¹¹¹ For a discussion of this litigant, see Michael Taggart, "Alexander Chaffers and the genesis of the Vexatious Actions Act 1896", (2004) 63 *Cambridge Law Journal* 656.

¹¹² *Supreme Court Act 1928* (Vic), section 33. For a discussion of the origins of the Victorian legislation, see Grant Lester and Simon Smith, "Inventor, Entrepreneur, Rascal, Crank or Querulent: Australia's Vexatious Litigant Sanction 75 Years On", (2006) 13 *Psychiatry, Psychology and Law Journal*, 1.



The Ellen Barlow Law. The two-page Western Australian law prompted by Ellen Barlow's litigation. 1930.

Courtesy State Library of Western Australia.

There is no doubt that the comments of Draper J resonated with the newly appointed Attorney-General in the Mitchell Government of Western Australia. He was that Mr TAL Davy who had appeared for Thomas in the 1926 litigation and, in November 1930, he introduced the *Vexatious Proceedings Restriction Bill* into the Legislative Assembly. In his Second Reading speech, making no reference to his previous involvement with Barlow, the Attorney-General said:

I make no apologies for this measure. Every member of the legal profession, every judge, and a great many members of the public are well aware that one particular form of mania in the human mind is the litigious form. The ordinary normal human being, of course, would be quite unable to conduct litigation of any magnitude without the assistance of the legal profession. But there are a few quaint people who have acquired sufficient knowledge of the procedures of the courts to get themselves before the courts without help. And apparently, as soon as they have acquired that knowledge, they spend most of their time in bringing absurd actions. Every state in Australia has one person who is well recognised as a public nuisance.¹¹³

The Bill moved through the Parliament without dissent and, in May 1931, Assistant Crown Solicitor Woolf applied to the court for a vexatious litigant order against Barlow. He relied on a lengthy affidavit of Haynes that detailed the history of the litigation and concluded, "I am firmly of the opinion that

¹¹³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 November 1930, 1526.

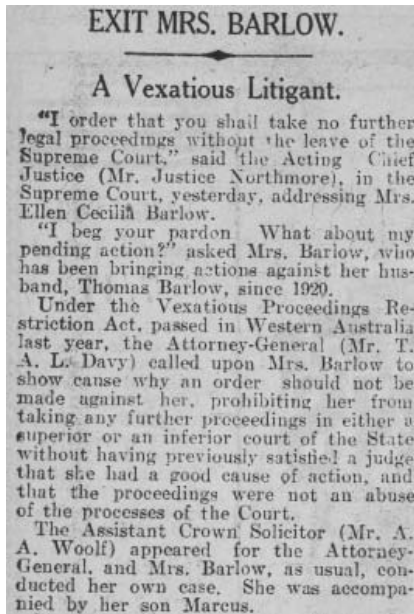
the litigation brought by the said Ellen Cecilia Barlow against her said husband is solely brought for the purpose of annoying him and involving him in expense".¹¹⁴ Barlow filed no answering affidavit and her attempt to revisit the history of the litigation when addressing the court was firmly dealt with by Draper J. After listening to her he made the formal order and, on 26 May 1931, at 62 years of age she became the first person to be declared a vexatious litigant in Western Australia and the second in Australia.¹¹⁵ Later that day a perjury charge she had brought against Haynes for what he had said in his affidavit was struck out in the Perth Police Court.¹¹⁶

Despite the groundbreaking nature of the decision, it was not reported in the law reports.

Could it be peace at last?

Post-declaration challenges

Four years later Barlow applied to the High Court for special leave to challenge her declaration. The delay, she explained, was "[o]wing to the High Court of Australia not sitting in Perth since 1930. I have been unable to appeal as I did not have the means to go to the East".¹¹⁷ Barlow's main ground of challenge was that the retrospective nature of the vexatious legislation was beyond the competence of the Western Australian Parliament. She argued that most of her unsuccessful litigation had taken place before the passage of the Act and should not have been considered in the Attorney-General's application.¹¹⁸ Most likely, she was aware that the only other declared vexatious litigant, Rupert Millane of



Exit Mrs Barlow. Press coverage of declaration of Barlow as the first vexatious litigant in Western Australia. *West Australian* 1931.

Courtesy State Library of Victoria.

¹¹⁴ Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 v Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931, paragraph 31. See also "EXIT MRS BARLOW: A Vexatious Litigant", *West Australian*, 27 May 1931, 12.

¹¹⁵ "EXIT MRS BARLOW: A Vexatious Litigant", *West Australian*, 27 May 1931, 12.

¹¹⁶ "A Charge Struck Out", *West Australian*, 27 May 1931, 12.

¹¹⁷ NAA: A10074, 1934/19, Affidavit of Ellen Cecilia Barlow, paragraph 6, sworn 28 August 1934.

¹¹⁸ *Ibid*, paragraph 3.

Victoria, had used the same argument when he had applied for special leave.¹¹⁹ Like Millane, Barlow was also unsuccessful in her application. In *Millane* the Victorian court had sidestepped the issue of retrospectivity but with Barlow the Western Australian Supreme Court was assisted by express words of the statute that enabled them to consider legal proceedings instituted “before or after the commencement of this Act”,¹²⁰ thoughtfully inserted into the Bill by the Parliamentary Counsel when adapting the Victorian legislation.¹²¹

Two years later Barlow made another High Court application for special leave, this time in Sydney. Presumably, she was visiting her daughter Mercia and her own siblings. The application listed a number of new grounds that suggested conflict of interest and bias, including that the *Vexatious Proceedings Restriction Act* “was instituted and put through by the late Attorney-General T.A.L. Davy who was solicitor for Thomas Barlow”,¹²² “that the trial judge had on 30th June 1930 told Ellen Cecilia Barlow that he had been told she was mad, but she was worse than that”; and “that the proceedings were maliciously introduced and she has suffered damages by the wrongful making of the Order and publicity of the same”.¹²³ The court was not persuaded and dismissed the application.¹²⁴

Meanwhile, back in Western Australia, both Barlow and Thomas faced other problems.

Hard times

Barlow had been in dispute with the North Fremantle Council (NFC) over her tenanted properties since the early 1920s. In 1936 the NFC successfully prosecuted her in the Police Court for allowing a condemned property to be occupied¹²⁵ and had moved to sell the Swan Street properties at auction for non-payment of rates.¹²⁶ Attempts by son Marcus to resist the sale through the

¹¹⁹ NAA: A10074, 1930/4, Judgment of Isaacs CJ 16 October 1930 refusing special leave. See also *In re Millane* [1930] VLR 381 and Grant Lester and Simon Smith, “Inventor, Entrepreneur, Rascal, Crank or Querulent: Australia’s Vexatious Litigant Sanction 75 Years On”, (2006) 13 *Psychiatry, Psychology and Law Journal*, 1.

¹²⁰ *Vexatious Proceedings Act 1930* (WA), section 3.

¹²¹ NAA: A10078, 1934/19, Judgment of Rich J for the court. See also (1934) 9 *ALJ*, 314. A handwritten note dated 19 September 1930 in a file of the Victorian Parliamentary Counsel indicates that there was contact between the two State Governments over the legislation. It referred to the Bill introduced by the Western Australian Attorney-General, TAL Davy. See further PROV, VPRS 10265, P000, Unit 103.

¹²² Davy died from a heart attack in 1933 aged 43.

¹²³ NAA: A10071, 1936/68, Fresh Grounds of Appeal dated 17 November 1936.

¹²⁴ NAA: A10071, 1936/68, Order of Court dated 23 November 1936.

¹²⁵ SROWA, WAS 514, Cons 4546/994, Municipality of North Fremantle, Hardwick, Forman & Slattery to Town Clerk, 25 March 1936. Barlow was fined £1.8s.0d and costs £2.10s.0d costs and in default nine days gaol.

¹²⁶ Barlow’s application for leave to sue the North Fremantle Council was refused by Draper J on 13 May 1937. On appeal, the Full Court held there were no grounds.

courts failed.¹²⁷ An attempt by Barlow to sue the NFC also foundered when she was unable to get leave to sue. Her appeal to the Full Court was dismissed when Northmore CJ ruled that “if an appeal were allowed it would appear that the Act would tend to encourage rather than to restrict vexatious proceedings”.¹²⁸ However, Barlow was hard to shift and one of the purchasers, Robert Bates, had to take legal proceedings to evict her from 70 Swan Street. On appeal, Barlow unsuccessfully argued that Bates may have bought the land but he “did not buy those houses”.¹²⁹

In the meantime, Thomas was in financial trouble in Narambeen. The depression of the 1930s was in its darkest days and, while farmers got some relief from debt repayments through legislation such as the *Farmers Debt Adjustment Act* 1935 (WA), local storekeepers had no such help. Thomas, who had helped a number of farmers with extended credit, was particularly affected. As one farmer recalled:

When the Debts Adjustment came in it knocked him that rotten that it broke him. He carried on for a year or two and then things started to get better, but the majority of farmers by that time had gone onto the Debts adjustment and they'd pay all their debts to Tom Barlow at two shillings in the pound. Of course he didn't have enough money to pay his commitments that he owed the firms in Perth for carrying them over. So he closed his store and went to Perth.¹³⁰

Nonetheless, Barlow continued to pursue Thomas for money and in 1937 received leave from Dwyer J to claim £2133 arrears of maintenance under the 1928 agreement.¹³¹ However, the Full Court dismissed the claim. In 1939, just as her appeal was due to be heard by the High Court sitting in Adelaide, the news came through that Thomas had died. He was 75.¹³² He had spent his last years “in the old men's home in Perth and he was on the old age pension”.¹³³ The appeal would lie dormant until 1948, when Barlow applied for moneys paid into court as security for costs to be returned to her. The Official Receiver of Thomas's bankrupt estate consented and the appeal was struck out.¹³⁴ Thirty years of matrimonial litigation was over.

¹²⁷ SROWA, WAS 514, Cons 4546/Item 994, Municipality of North Fremantle, Hardwick, Forman & Slattery to Town Clerk, 14 August 1936.

¹²⁸ *Barlow v North Fremantle Municipality* (1936) 39 WALR 89, 90.

¹²⁹ SROWA, WAS 202, Cons 3677/1992, Supreme Court Appeals, Magistrate's Notes of Evidence, 25 September 1937.

¹³⁰ Iris Bristow, *Seedtime and Harvest: a History of the Narembeem District 1888–1988*, 1988, 62–63.

¹³¹ NAA: A10074, 1939/1, Order of Dwyer J dated 2 February 1937.

¹³² NAA: A 10074, 1939/1, Affidavit of Arthur Goodwin Haynes, sworn 26 September 1939.

¹³³ Iris Bristow, *Seedtime and Harvest: a History of the Narembeem District 1888–1988*, 1988, 63.

¹³⁴ NAA: A 10074, 1939/1, Order of Full Court dated 13 September 1948.

Last skirmishes

Approaching 80 years of age, Barlow was not finished with litigation. In 1947, in an application that echoed her 1917 case against the Railway Commissioner, she sought leave to sue West Australian Newspapers Limited for negligence. She alleged she had fallen and injured her leg and back when entering the building. Although Woolf J granted leave to proceed, subject to payment into court of £50, there is no record of further action.¹³⁵

Then, in 1948, Barlow was in the High Court fending off a bankruptcy application by one George Flood. He had sought to recover costs following a failed property purchase from daughter Mercia, through Barlow. No doubt drawing on her Brennan experience, Barlow unsuccessfully sought leave to have the bankruptcy notice set aside. She then appealed to the High Court. In 1951 the appeal was dismissed for want of prosecution.¹³⁶

Tenancy matters also continued to occupy Barlow's time. In 1949 she obtained leave to sue Paul and Marie Smith for outstanding rent. They were tenants sharing her home at 25 Monument Street, Mosman Park, a property in Mercia's name. When they failed to make good Barlow obtained further leave to issue eviction proceedings.¹³⁷ It was her last application. She would live out her life at that address alone.

On 2 August 1951 Barlow died and was buried with her son John in the Roman Catholic sector of Karrakatta cemetery. She was 82.

Conclusion

It is 90 years since Ellen Barlow first sought to resolve her matrimonial dispute through the legal system. Since then there have been considerable changes in the way the law approaches family disputes. The *Family Law Act 1975* (Cth) introduced a national approach that abolished "fault" or "matrimonial crimes" as a basis for a dissolution and replaced them with the single ground of "irretrievable breakdown" based on one years separation.¹³⁸ The Act also introduced alternative approaches of confidential dispute resolution, including early intervention and counselling. These initiatives minimise the scope for family disputes to be conducted publicly. Significantly, although maintenance applications are no longer contingent on there being grounds for a divorce, the role of the court has narrowed significantly following the passage of the *Child Support (Assessment) Act 1989* (Cth). This has made assessment of

¹³⁵ SROWA, WAS 936, Cons 4239/1803, Supreme Court, Court Orders and Cases, Order of Woolf J, 24 April 1947.

¹³⁶ NAA: A10078, 1948/11, High Court Principal Registrar to Perth Registry, dated 5 June 1951.

¹³⁷ SROWA, WAS 936, Cons 4239/1818, Supreme Court, Court Orders and Cases, Affidavit of Ellen Cecilia Barlow, 22 March 1950.

¹³⁸ *Family Law Act 1975* (Cth), section 48. The parties must have formed and acted on the intention that the separation is permanent. See *Pavey v Pavey* (1976) FLC 90-051.

child maintenance essentially an administrative matter. Importantly, all these changes have been accompanied by changed community attitudes to family break-up and there has been a softening of religious objection to divorce.

These changes provide a stark comparison to the legal mechanisms available to Barlow in the 1920s. By contemporary standards the system then was narrow and rigid. The very title of legislation such as the *Married Women's Protection Act 1922* (WA) reflects that. Nonetheless, *Balfour* indicates that the common law was evolving in its approach to legally enforceable domestic arrangements. However, it is arguable, even if Barlow had been able to access the modern regime, whether her persistence, even obsession, in pursuing Thomas would have been different. The fact that she was still pursuing him in the late 1930s after his business had failed indicates the litigation was being driven by personal rather than practical considerations. That family disputes attract this obsessiveness is well known.

Barlow was clearly an able and determined woman. This is evident from the way she not only raised a family alone but started a property portfolio in a period when women faced significant social obstacles in business. Similarly, her 100 or more legal actions show that the legal system did not intimidate her. But it was this same fearlessness, a propensity to exaggerate and lack of proportion that saw her push the legal boundaries beyond what was reasonable. As a result her credibility suffered and her notoriety rose. In the face of such a litigant the traditional sanctions of the system, such as costs and bankruptcy, have no impact and the professionalism of practitioners drawn into the litigation vortex also suffers. Arthur Haynes and TAL Davy both allowed themselves to be drawn into the litigation in this way. Certainly, Barlow was shown remarkable tolerance by the Perth judiciary. In a 30-year period she regularly appeared before the same small group of judicial officers in her matrimonial and other litigation. Probably the relative intimacy of the jurisdiction gave her litigation leeway beyond that which a larger, less personal jurisdiction would have tolerated.

With the benefit of hindsight, Barlow's behaviour exhibited a pattern consistent with the Mullen and Lester definition of querulousness. She was uncompromising in her persistent pursuit of her grievance against Thomas Barlow to the point that it was damaging to her economic, social and personal interests and to the functioning of the courts. She was also in the age range for the querulent profile although, as a woman, she was in the smaller gender grouping. Further, the form and content of her court documentation was also consistent with the profile, although perhaps not at the extreme edge. It nonetheless had its share of curious formatting and methods of emphasis. It also contained regular employment of ultimatums, rhetorical questions and "inappropriately ingratiating statements".¹³⁹ However, as with Millane, the

¹³⁹ *Ibid*, 336.

prospect of a multi-disciplinary approach to the challenge of her litigation was something in the future.

For his part, Thomas Barlow remains somewhat of an enigma, his persona being obscured by the representations of his wife and those of his solicitor Haynes. While it is common ground that the couple was incompatible, it is unclear why he did not initiate divorce proceedings. Was he reluctant to have the further expense or provide Barlow with another court forum? Was his legal advice that he lacked an appropriate “fault” ground, such as adultery, desertion or cruelty? Did his Catholic faith also pre-empt that option? However, it is clear that he was estranged from his children and that they showed hostility toward him — although it is hard to gauge whether or not, as McMillan CJ suggested in 1924, they were just “unconsciously repeating” what Ellen Barlow suggested.¹⁴⁰ But Thomas Barlow was a respected member of the Bruce Rock and Narambeen communities and regarded as an “outstanding personality of the town”, a pioneer who “was a typical example of the early day country storekeeper who did so much towards opening up the districts right throughout the wheat-belt”.¹⁴¹



Thomas Barlow in Bruce Rock. Thomas Barlow (second left) and staff outside his store in Bruce Rock. 1923.

Courtesy Mrs Berta Butler.

¹⁴⁰ Western Australia Supreme Court, Perth, *In the Matter of the Vexatious Proceedings Restriction Act 1930 and In the Matter of Barlow*, File 31/A21, Affidavit of Arthur Goodwin Haynes, sworn 6 May 1931, Judgment of Chief Justice in *Barlow v Barlow*, dated 17 December 1924, Attachment “C”.

¹⁴¹ Extracted from the diary of John T Rutherford (undated), forwarded by Secretary of Bruce Rock Historical Society (WA) to author, April 2007.

Finally, it is clear that the introduction of the vexatious litigant sanction was not a success in respect of Barlow. A sanction of “last resort”, it certainly did not stop her litigation. At best, it slowed her down. But as she was aged 62 when the order was made, it may well be that she was slowing anyway. The sanction also moved the focus of her litigation from defendants to the Supreme Court judges and then to the Commonwealth courts. First, she required leave to issue and then, if unsuccessful, she transferred her attention to the federal jurisdiction where the declaration did not apply.

In the end it was Barlow who lost the most from all her litigious activity. She suffered financially and she pushed her family away. Both her surviving children, while supportive, chose to live outside Perth where the name Barlow was less notorious. Mercia moved to Sydney and Marcus to near Bunbury.¹⁴² At the end Barlow was living alone in a derelict house without power.¹⁴³

It is probably of little consolation to be known by history as a legal pioneer.

¹⁴² Interview with Barlow grandchildren, John Barlow and Frances Kininmonth, 23 November 2006.

¹⁴³ *Ibid.*

CHAPTER SIX

Elsa Davis

Entertainer, composer, eccentric

Frances Edna Davis (1907–1989)¹ was an entertaining person. She was also, in 1941, Australia’s third declared vexatious litigant.² A musical child prodigy, she toured Australian capital cities in the 1920s playing the xylophone to rave reviews. As a young woman she travelled overseas and performed to popular acclaim. In the 1930s she had considerable success as a composer, notably with the *Centenary March*, celebrating Melbourne’s centenary in 1934. However, in the 1940s, Davis’ sensational and determined litigation, mainly with her then brother-in-law, the former Governor-General Sir Isaac Isaacs, led to her being declared a vexatious litigant and was a *cause celebre* of its time. Two decades later, litigation with the then Gas and Fuel Corporation, through her second husband Geza (Fred) Laszloffy, saw him also declared a vexatious litigant in 1963. They were the first husband and wife so declared. Sadly, Davis’ ensuing career as a composer-performer never reached the heights suggested by her early success, although it traversed music-hall, film and television. She did return belatedly to the limelight when aged in her 70s. In the 1970s the convergence of coming-of-age “baby boomers”, a lively theatre restaurant scene in Melbourne and emerging variety television provided new audiences and forums for Davis’ 1920s-style vaudeville act. She gathered a minor cult following.

¹ During her life Davis used various names. Registered at birth as Frances Edna Davis, her family knew her as Edna. Although she married twice (Isaacs in 1938 and Laszloffy in 1954) she achieved national recognition in the 1970s–1980s when using the stage name of Elsa Davis. For consistency, this chapter will use that name except where the use of another name is specifically referred to in the supporting material.

² The first was Rupert Fredrick Millane (1887–1969), declared in Victoria in 1930; and the second was Ellen Cecilia Barlow (1869–1951), declared in Western Australia in 1931. See Chapters Four and Five for details.

Early days: “Australia’s Champion Xylophonist”

Davis was born in a single-fronted house in Carlton (Melbourne) in 1907.³ Her parents, Solomon and Rebecca Davis, were Jewish although Davis was coy about this ancestry in later life.⁴ The second of three daughters, she received an ecumenical education, having attended Presbyterian Ladies College⁵ and the (then) local Catholic Loreto Convent.⁶ From a young age Davis showed extraordinary musical aptitude, a talent she suggested derived from a family connection to German conductor/composer Richard Strauss.⁷ Trained in pianoforte⁸ and opera singing but self-taught on the xylophone, at age six she performed on the stage of Melbourne’s Princess Theatre with noted Australian flautist John Amadio.⁹ Davis also claimed to have performed, aged eight, with English variety entertainer “Wee Georgie Wood” at the Tivoli¹⁰ although that is unlikely, as he did not tour Australia until 1922, when Davis was 15.¹¹ Although she did perform later with Wood, this muddying of dates and facts became a familiar practice of Davis over the years as she constructed a preferred life story.

There is no doubt that she had considerable success on the stage as a young teenager. The books of clippings and original programmes from the 1920s that survive are testament to that.¹² An early performance was in 1921,

³ Davis was born on 24 November 1907 at 105 Lee Street, Carlton. Her Australian-born father was 30 years old and listed as an importer. Her mother, Rebecca (formerly Price), was 27 years old and had been born in Newcastle, England. See further, Births, Deaths and Marriages, Victoria, registered birth 7318/1908.

⁴ Interview with Mary Murphy (Elsa Davis’ theatrical agent), 19 May 2005.

⁵ In 1918 she was enrolled at the Presbyterian Ladies College, then in East Melbourne. Email from Jane Dyer (PLC Archivist) to author, 20 June 2007.

⁶ At the time the convent was in South Melbourne. See National Archives of Australia: B 160, 131/41, Transcript of oral evidence of Edna Frances Isaacs, given 16 September 1942.

⁷ Although unconfirmed, the connection is said to be through Davis’ maternal grandmother. Interview with (nephew) Alan and Barbara Leary by author, 23 January 2006 and “A XYLOPHONE EXPERT”, *The Geraldton Guardian and Express*, 4 October 1930.

⁸ In 1921 she sat Pianoforte Examinations (Practical) at the Melbourne Conservatorium of Music. She achieved a pass Level VI and honours in Level V. Email of Suzanne Fairbanks (Melbourne University Archives) to author, 15 May 2007. At that period the Melbourne Conservatorium of Music was under the leadership of (later Sir) Bernard Heinze. See “COMPOSER EDNA DAVIS MAY MISS A NEW NOTE”, *Truth*, 12 October 1935, 3. In later years Heinze would commend her compositional work. See “MUSIC FOR THE ROYAL PROGRAM”, *The Jewish News*, 19 October 1934.

⁹ “MUSIC FOR THE ROYAL PROGRAM”, *The Jewish News*, 19 October 1934. In his early career, Amadio performed with JC Williamson’s Italian Opera Company and as principal flautist for Dame Nellie Melba on her 1911 Australian tour. Between 1909 and 1920 he taught flute at the Melbourne Conservatorium of Music and it is likely that is where he met Davis. She sat pianoforte and opera singing examinations there. See also Mimi Colligan, “Amadio, John (1883-1964)”, 7 *ADB*, 1981, 49-50.

¹⁰ For example, referred to in “‘King George’s Coronation March’: Elsa Davis’ Latest Composition Broadcast Through 3AR”, *Listener In*, 27 February 1937.

¹¹ Frank Van Straten, *Tivoli*, 2003, 71.

¹² This material will be described as the “Elsa Davis Collection” and is held by her nephew, Alan Leary of Melbourne.

aged 13, at a “Grand Concert” in aid of the “Ukrainian Jews Relief Fund”. Davis played a solo and was already being billed as “The Wonderful Child Xylophonist”.¹³ This was also a period when silent movie theatres screened their films with orchestras and elaborate stage presentations.¹⁴ Davis was a natural for these performances and she would appear at more than one theatre in an evening. Indeed, the family recalls that Davis, most likely with mother and younger sister “Baby Olga”, would travel around Melbourne by taxi in order to meet engagements.¹⁵ Venues included the Palais de Danse and Victory Theatre in St Kilda; the Renown in Elsternwick, the Regent in Thornbury, the New Malvern and Armadale and Hoyt’s theatres in Camberwell and Essendon.¹⁶ Accompanying billing, often with a photograph of Davis with her xylophone, waxed lyrical with leads like “Little Edna Davis: the Celebrated Child Xylophonist”, “Edna Davis: Australia’s youngest Xylophonist” and “Australia’s Champion Xylophonist”.¹⁷

By the end of 1922, aged 15, Davis had started touring interstate to rave reviews. In Sydney she did perform with “Wee Georgie Wood” and her performance was described as a “revelation”,¹⁸ while further north, the *Brisbane Sun* said, “though just entering her teens the remarkable skill of the little artiste is phenomenal”.¹⁹ In 1923, back in Victoria, Davis continued “to play her way into popularity” at Geelong²⁰ and at the Tivoli, where she was “assisted by baby Olga who sings sweetly, and also plays the xylophone”.²¹ Olga was six at the time. Later that year Davis performed at the Prince of Wales in Adelaide to “tumultuous applause”²² and then in Perth, also at a Prince of Wales, where she roused “her audiences to a pitch of wild enthusiasm with her masterful control of the brass cylinders”.²³



“Baby” Olga and Edna Davis
“Baby” Olga and Edna Davis at
the keyboards. Circa 1923.

Courtesy Elsa Davis Collection.

¹³ Programme dated 11 July 1921 in the Elsa Davis Collection.

¹⁴ Frank Van Straten, *Tivoli*, 2003, 67.

¹⁵ Interview with Alan Leary (nephew) and Barbara Leary by author, 23 January 2006.

¹⁶ *Ibid.*

¹⁷ Located in the Elsa Davis Collection.

¹⁸ “THICKER THAN WATER: Georgie Wood Scores Again at Tivoli”, *Sunday Times*, 3 September 1922.

¹⁹ 1 October 1922.

²⁰ “Geelong Theatre”, *Geelong Advertiser*, 17 January 1923.

²¹ “THE TIVOLI: A Fine Programme”, *Table Talk*, undated, in the Elsa Davis Collection.

²² “REMARKABLE DARING: Extraordinary Vaudeville Turn”, *The Advertiser*, 28 May 1923.

²³ “Prince of Wales Theatre, Perth”, *Western Worker*, 12 October 1923.

For the next few years Davis earned a good income as she performed in the capital cities on the eastern seaboard²⁴ and locally.²⁵ However, as she moved out of her teenage years and her draw as a “Child” star naturally faded, dark clouds had formed on the horizon. In late 1928 *The Jazz Singer*, the first “talkie” had arrived in Australia and was shown in Sydney. As Van Straten noted, the impact on live entertainment was “swift and dramatic”.²⁶ Attendances tumbled. For Davis this meant the loss of natural venues and audiences and a hold on her performing career. *The Jazz Singer* also contained irony as it told the story of a Jewish child who broke his mother’s heart by leaving home to become an entertainer.²⁷ However, Davis’ mother had her own problems. Her marriage had been difficult for some time and she finally separated from her husband in 1927.²⁸ The convergence of these events opened new horizons for Davis.

On the international stage, a radio career and a composing triumph

It seems probable that the collapse of Rebecca Davis’ marriage prompted the 1929 family trip to England. Most likely it included a return to Mrs Davis’ hometown of Newcastle upon Tyne. For Elsa Davis, the sea journey to Europe with her mother and 13-year old Olga was the opportunity for an international tour and she made arrangements for paid performances at ports along the way.²⁹ Although unconfirmed, Davis later claimed to have also performed in Paris, London and the English provinces.³⁰ Meanwhile, her mother and sister Olga would take time out to meet the triumphant 1930 Australian cricket team at Lords.³¹

A similar performance schedule followed on the voyage home, 12 months later.³² Again Davis received generous billing. For example, “Les celebres Xylophonistes Australiennes EDNA et OLGA DAVIS” exclaimed the VOXY

²⁴ In December 1924 she performed at the Lyceum in Sydney. See *The Everyone Book*, 10 December 1924. In January 1925 she performed at the Valley Theatre in Brisbane. See *The Truth*, 25 January 1925.

²⁵ In 1928 she was again performing at the Tivoli. See Frank Van Straten, *Tivoli*, 2003, 88.

²⁶ *Tivoli*, 2003, 92.

²⁷ Manning Clark, *A History of Australia: VI The Old Dead Tree and the Young Green Tree*, 1981, 304.

²⁸ Victorian Supreme Court, Divorce File *Davis v Davis*, 451 of 1932. The marriage was dissolved on 7 April 1933 on Rebecca Davis’ Petition citing continuous desertion by Solomon Davis of three years.

²⁹ The family travelled via the Suez Canal on the SS *Esperance Bay*. Letter to Thomas Cook, Cairo, from unidentified Melbourne travel agent, dated 6 January 1929, located in the Elsa Davis Collection.

³⁰ “LATEST FROM ABROAD: Returning Tourists’ Impressions”, *The Sun News-Pictorial*, 4 December 1930, 12.

³¹ Davis and her mother obtained the autographs of most of the team, including a young Don Bradman. Autograph book located in the Elsa Davis Collection.

³² “A XYLOPHONE EXPERT”, *The Geraldton Guardian and Express*, 4 October 1930.



**Edna Davis and "Baby" Olga
Egypt poster.**

Marketing flyer issued in Egypt as part
of the "World tour". 1930.

Courtesy Elsa Davis Collection.

Palace in Cairo.³³ Arriving at Perth, she disembarked and left her family to continue on home without her. Davis meanwhile detoured to Geraldton to perform.³⁴ Eventually arriving home in December 1930 she commented to the press that "her best reception [was] from a garrison of British soldiers at Abbassieh Barracks" in North Africa.³⁵

Back in Melbourne Davis, now aged 22, set about securing a living. Before her European tour she had performed on the newly established wireless through ABC stations 3LO and 3AR.³⁶ She

returned to that medium and gathered a growing public profile. She also started composing music and lyrics and commenced a lifetime practice of linking her musical work to public events. In 1933 she lodged for copyright registration the *Centenary March*³⁷ and, in 1934, *The Shrine* and *He's the Smartest Thing*.³⁸ All were designed to coincide with the celebrations marking the centenary of the establishment of Melbourne³⁹ and the dedication of the Shrine of Remembrance by the Duke of Gloucester on Armistice Day 1934.⁴⁰ The third composition, a foxtrot, was also an unashamed attempt to curry favour with the visiting royal. It worked. Both the work and Davis were presented to him.⁴¹

The *Centenary March*, in particular, was a popular success. It greeted the Duke as he sailed up Port Phillip Bay and he heard it again at Government

³³ *Prosperi Journal No 183*, 16–22 January 1930 in the Elsa Davis Collection.

³⁴ "A XYLOPHONE EXPERT", *The Geraldton Guardian and Express*, 4 October 1930. The reason for the detour to Geraldton appears to have been to visit a close male friend, Dr Basil Williams, then working as a general medical practitioner in the nearby gold mining town of Mount Magnet. According to sister Olga he was keen to marry Davis but she was not enthusiastic about the role of the doctor's wife in outback Australia. Email from Alan Leary (nephew) to the author, 15 May 2007.

³⁵ "LATEST FROM ABROAD: Returning Tourists' Impressions", *The Sun News-Pictorial*, 4 December 1930, 12.

³⁶ "THE CLEVEREST LADY XYLOPHONIST IN AUSTRALIA", *The Listener In*, 4 September 1929, 1 and "Versatile Young Artiste", *The Listener In*, 5 January 1935, 16.

³⁷ National Archives of Australia: A1336, 25038.

³⁸ NAA: A1336, 25468.

³⁹ Other events included an air race between London and Melbourne, sponsored by the local "Chocolate King", Macpherson Robertson. Englishmen Charles Scott and Thomas Campbell Black won it. See further, Jill Robertson, *The Chocolate King*, 2004, Ch 15.

⁴⁰ The Shrine of Remembrance was dedicated to those who had fallen in the Great War 1914–1918. See further, Manning Clark, *A History of Australia: VI The Old Dead Tree and the Young Green Tree*, 1981, 464.

⁴¹ "Made the Grade", *Truth*, 10 November 1934 and Swift, J, "Songs for the Duke", *The Sun News Pictorial*, 17 November 1934.

House functions and at the Melbourne Cup.⁴² As a result, Davis enjoyed much publicity and received royal acknowledgement when the Duke's Private Secretary wrote saying, "The Duke of Gloucester asks me to thank you for your music and letter of November 6. His Royal Highness is most grateful for your three compositions".⁴³ This was the first of many such courtesy exchanges from which Davis would conclude she had close friendships with the rich and powerful. The replies, kept in albums and handbags, would be proffered as evidence to all who asked and many who didn't.⁴⁴

In 1935 Davis enjoyed further composing success with her compositions *Dancing Bells*, *Dream Prince* and *King George's Jubilee March*.⁴⁵ The third piece recognised that milestone in the reign of King George V and Davis showed her developing flair for self-promotion when her efforts prompted a letter from the State Governor, Lord Huntingfield, saying "that the Governor-General has sent to the King a leather bound copy of the march, together with a portfolio of Australian newspaper cuttings referring to Miss Davis and her work".⁴⁶ For Governor-General Sir Isaac Isaacs, this was the start of dealings with Davis that would last until his death in 1948. These future dealings would be less benign.

In the meantime Davis enjoyed a social whirl. She featured regularly at social functions and mixed with local and national glitterati.⁴⁷ In September 1935 she hosted her own party for 150 guests at "The Denne" in Dandenong Road, East St Kilda.⁴⁸ It was in honour of the "Little Doctor", Dr William Maloney MHR, a Labor Party pioneer and, at 81, one of Melbourne's "best loved citizens".⁴⁹ In accepting Davis' invitation Maloney had written a personal note saying, "God willing wild horses will not keep me away to spend one of those delightful evenings with you".⁵⁰ The friendship was significant as most likely it was Maloney that introduced Davis to his close friend and former

⁴² The Public Service Band played the march from the bay steamer *Weeroona* as it met the Duke as he sailed up Port Phillip Bay before disembarking at St Kilda pier. See "Music for Royal programme", *Herald*, 26 September 1934; "Music for the Royal Program", *The Jewish Weekly News*, 10 October 1934.

⁴³ "Compositions accepted by H. R. H. The Duke", *The Jewish Weekly News*, 23 November 1934.

⁴⁴ For example, her television interview by Roy Hampson, host of the programme *Everyday*, ATVO Channel 0 (Melbourne), June 1979 in the Elsa Davis Collection.

⁴⁵ NAA: A1336, 26746 and "MISS E. DAVIS' COMPOSITIONS: Letter from the Duke", *The Age*, 6 December 1934.

⁴⁶ "AUSTRALIAN'S JUBILEE MARCH SENT TO KING", *The Herald*, 3 June 1935.

⁴⁷ For example, in December 1934 she contributed to a Flood Relief concert. See "Tomorrow night! Regent Theatre: Flood Relief Concert", *The Herald*, 8 December 1934. Then in July 1935 she was a major draw at the "At Home" of the Victoria Centenary Club at which the guests of honour were Brigadier-General Sir Carl and Lady Jess. See "CLUB'S MUSICAL 'AT HOME'", *The Herald*, 24 July 1934.

⁴⁸ "PARTY TONIGHT FOR DR W. MALONEY", *The Herald*, 26 September 1935.

⁴⁹ Geoffrey Serle, "Maloney, William Robert (Nuttall) (1854–1940)", 10 *ADB*, 1986, 389–390.

⁵⁰ Maloney to Davis, 3 August 1935 in the Elsa Davis Collection.

State Parliamentary colleague, John Isaacs.⁵¹ Davis would marry John Isaacs in 1938 and Maloney would give her away.⁵²

The party was a triumph. Davis wore an “attractive frock of rose pink taffeta made on early Victorian lines with a frilled skirt” and sister Olga provided accompaniment when Davis played her xylophone.⁵³ In the custom of the time press notices provided full lists of those invited and one name, although not prominent, would become significant in the legal events about to unfold. That name was “Mr E. Kuehn”.⁵⁴

Piano lessons, an older man, money and a first court appearance

Despite her popular success Davis needed an income and somewhere to live. She no longer lived with her mother, who had remarried in 1933.⁵⁵ Her new stepfather, Israel Frieze (1865–1937), was 16 years older than her mother and had been a successful tailor. Later events suggest that the financial security offered by an older man was not lost on Davis. In any event, in early 1935 she had taken a flat in Barkly Street, St Kilda, from which she gave music lessons. She also became very friendly with the elderly owner of the flats, William Westbury, a retired city chemist and regular Yarra Bank speaker.⁵⁶ It is common ground that Westbury took piano lessons for some months from Davis, practising for hours in her flat. It is less clear that it was a professional arrangement. However, he does appear to have become enamoured with her to the point of promising “to make a settlement on her”.⁵⁷ But by August 1935 the friendship had soured and money was the main reason. Westbury had been pushing for overdue rent and Davis responded by claiming payment for piano lessons at the rate of 7s.6d an hour. No doubt the regular presence in the Davis flat of a younger German man, Edward Kuehn, later described as her fiancé,⁵⁸

⁵¹ Isaacs (1863–1944) had been the member for Ovens in the Victorian Legislative Assembly from 1894–1902. Maloney was the member for West Melbourne in the period 1889–1904.

⁵² “SIR ISAAC SALUTES THE BRIDE”, *The Sun News-Pictorial*, 14 April 1938, 1.

⁵³ “PARTY TONIGHT FOR DR W. MALONEY”, *The Herald*, 26 September 1935.

⁵⁴ *Ibid.*

⁵⁵ Births, Deaths and Marriages, Victoria Registered Marriage 1933/11021.

⁵⁶ The Yarra Bank was Melbourne’s “Hyde Park Corner” in the period 1925 to the 1970s. On any Sunday speakers could simply mount one of 10 or more speaker’s mounds and speak on a subject of their choosing. It was also a major rallying point for political rallies. The Sunday forums eventually fell victim to alternative discussion forums, such as universities and the media. The site is now enveloped by the Tennis Centre and Birrarung Marr. See further, Jeff and Jill Sparrow, *Radical Melbourne: A secret history*, 2001, 83–87.

⁵⁷ “COMPOSER EDNA DAVIS MAY MISS A NEW NOTE”, *Truth*, 12 October 1935, 3.

⁵⁸ Kuehn, described as an “Instrument Maker” of Gregory Street, Melbourne, appears to have been a close friend of Davis since 1932.

may also have contributed to the falling-out. By October the dispute was in the St Kilda court.⁵⁹

This was Davis' first case as a litigant and it introduced themes that recurred in later litigation. There was the assertion of a contractual arrangement without written evidence.⁶⁰ There was the use of provocative material in cross-examination to attack the credit of the other party. In this case Westbury was accused of illicitly supplying drugs without a licence and lecturing on the Yarra Bank "that there was no God".⁶¹ In addition, there was the evidence of Davis delivered in what became a trademark coy, even evasive, style. For example, in response to questions by Westbury's solicitor, Roy Schilling,⁶² she objected to proving other music students existed: "I would lose my pupils if I mention their names in court". Only after being pressed did she write down the names, although omitting the fees she charged.⁶³

Despite being represented⁶⁴ Davis lost the case and was ordered to pay £12 rent and £11.3s costs.⁶⁵ Westbury continued to hold a grievance, although he may have had some satisfaction from subsequent headlines like "COMPOSER EDNA DAVIS MAY MISS A FEW NOTES: It was the Yarra Bank lecturer who called the tune: But now the World's Wonder Zylphonist has to pay the



World's Wonder Zylphonist in court.

Melbourne Truth coverage of early litigation. 1935.

Courtesy State Library of Victoria.

⁵⁹ *Truth*, n 57, 3.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Thirty years later Schilling, as lawyer for the RSPCA (Vic), would find himself embroiled in litigation with another vexatious litigant. See Simon Smith, "Constance May Bienvenu: Animal Welfare Activist to Vexatious Litigant", (2007) 11 *Legal History*, 31. 37. See also Chapter Eight.

⁶³ *Truth*, n 57, 3.

⁶⁴ Mr PJ Ridgeway represented her. He would also act for her in later litigation.

⁶⁵ *Truth*, n 57, 3.

Piper”.⁶⁶ The upside for Davis, if there was one, was probably the publicity. She was, after all, an entertainer!

Marriage and the Isaacs family

Sometime during 1936 the friendship between John Isaacs and Davis became serious and he became a regular visitor to her new flat in Riversdale Road, Hawthorn.⁶⁷ Isaacs, a solicitor and until then a confirmed bachelor, was her senior by 44 years. He was no doubt captivated by her vivacity and worldliness, as her live musical and broadcasting career had reached new heights. Indeed, in early 1937 another composition, *King George's Coronation March*, had received wide coverage and acclaim.⁶⁸ For her part, Davis possibly warmed to the advantages of something more serious following the death of her stepfather in August 1937. That event had left her mother the owner of two properties in Vale Street, St Kilda.⁶⁹

Isaacs's commitment to the relationship was tested in April 1937 when he received an anonymous letter from “Joe” about Davis' past and asking him what he was doing “mucking about with a woman in Hawthorn”. The letter also alleged that Davis was an immoral woman.⁷⁰ Davis denied the allegations. She also emphasised that she was just friends with Kuehn. She assuaged Isaacs's concerns when she formalised her denial with a declaration in an exercise book.⁷¹ Possibly “Joe” was Westbury or even Kuehn but, in any event, the letter and its contents would be raised regularly in later litigation to attack the virtue and thus the character of Davis.⁷²

In March 1938 news of the engagement of Davis and Isaacs was the talk of the social pages.⁷³ Most reports emphasised that Isaacs was the younger brother of the former Governor-General and High Court Chief Justice, Sir Isaac Isaacs.⁷⁴ In April 1938 they married quietly in a private ceremony at the Isaacs home at 1 Goodall Street, Auburn. Dr Maloney gave the bride away and Sir

⁶⁶ *Truth*, 12 October 1935, 3.

⁶⁷ “MRS ISAACS TERMED ‘A WICKED WOMAN’: P.M. Rejects Claim For Maintenance”, *Truth*, 20 June 1942.

⁶⁸ “Edna Davis' Latest Composition Broadcast Through 3AR”, *The Listener In*, 25 February 1937, 10.

⁶⁹ Public Record Office Victoria, VPRS 311/702. The three adult children of Israel Frieze lodged a caveat against the estate but it lapsed. Further reference to this archival source will commence with the short form “PROV”.

⁷⁰ “MRS ISAACS TERMED ‘A WICKED WOMAN’: P.M. Rejects Claim For Maintenance”, *Truth*, 20 June 1942.

⁷¹ *Ibid.*

⁷² NAA: B160, 131/41, Copy of Reasons for Judgment of Martin J annexed to Affidavit of Joseph Davis, sworn 24 September 1946.

⁷³ For example, see *Argus*, 16 March 1938; *Jewish News*, 25 March 1938 and “Barrister's Romance”, *The Age*, 9 April 1938.

⁷⁴ Sir Isaac Isaacs (1855–1948) was Governor-General of Australia from 1931 to 1936. He was also Chief Justice of the High Court in 1930. See further, Zelman Cowen, “Isaacs, Sir Isaac Alfred (1855–1948)”, 9 *ADB*, 1986, 444–450.

Isaac was the best man. Davis' family was not present. For the marriage certificate, Davis gave her age as 26, a five-year slippage in her favour.⁷⁵ For the rest of her life she would be coy about her actual age. Although there was no formal reception, young society photographer Athol Shmith captured the event for the press in a series of posed photographs.⁷⁶ There was no mention of a pre-nuptial agreement.

Marital breakdown and sowing seeds of legal discontent

For the next few months life was good. Although not a wealthy man, Isaacs was "comfortable" and Davis embarked upon a busy social life, spending what there was. This meant the life of "a lady in luxury, with a motor car and chauffeur, champagne parties, rolls of bank notes, fine clothes and £6 to £7 a week pocket money".⁷⁷ She also maintained her performance profile when she appeared at the "Celebrity Concert" in aid of the "Black Friday" Bushfire Relief Fund in February 1939.⁷⁸ However, it was too good to last. On St Patrick's Day 1939 there was a big dispute between Davis and Isaacs at his city office. The catalyst was her discovery that in the previous August, just months after the marriage, Isaacs had secretly converted his sole ownership of 1 Goodall Street into a joint tenancy with his brother, Sir Isaac. This meant that on his death the property would pass directly to Sir Isaac and

SIR ISAAC ISAACS' BROTHER WEDS



Sir Isaac Isaacs, former Governor-General of Australia, acted as best man yesterday when Miss Edna Davies was married to his brother, Mr. John Isaacs. The bridegroom is shown assisting the bride to cut the cake at the reception which followed the ceremony.

Edna Davis weds John Isaacs.

Isaacs' wedding photo.

(L-R) Sir Isaac Isaacs, Edna and John Isaacs. "The Argus" 1938.

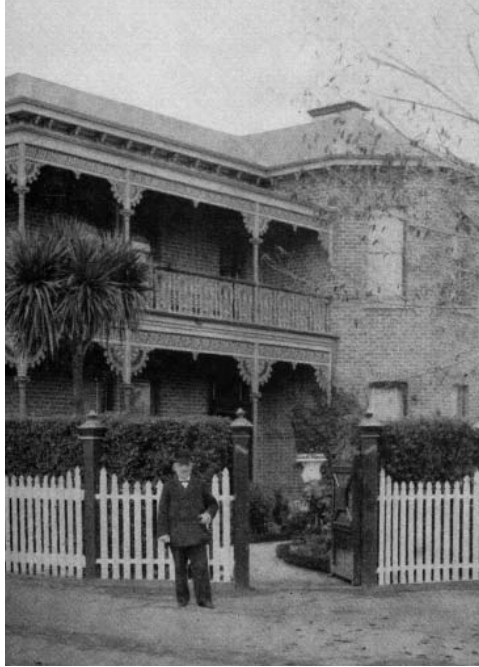
Courtesy State Library of Victoria.

⁷⁵ "MRS ISAACS TERMED 'A WICKED WOMAN': P.M. Rejects Claim For Maintenance", *Truth*, 20 June 1942.

⁷⁶ "SIR ISAAC SALUTES THE BRIDE", *The Sun News-Pictorial*, 14 April 1938; "SIR ISAAC ISAACS' BROTHER WEDS", *The Argus*, 14 April 1938 and "FORMER GOVERNOR GENERAL AS BEST MAN", *Table Talk*, 21 April 1938, p IV.

⁷⁷ "GAOL THREAT TO MRS ISAACS: Heated Clashes In Maintenance Case", *Truth*, 23 May 1942, 17. The chauffeur would also regularly collect Davis' mother and younger sister and take them to 1 Goodall Street for a visit. Interview with Alan and Barbara Leary, 27 April 2007.

⁷⁸ The "Black Friday" bushfire of 13 January 1939 claimed 71 lives. The fundraiser was held in the Melbourne Town Hall on 12 February 1939. Programme in the Elsa Davis Collection.



1 Goodall Street Auburn.
The John Isaac's matrimonial home:
1 Goodall Street Auburn. Circa 1930.
Courtesy Sir Zelman Cowen.

not to his wife. Davis was livid as “he had promised her that the property would be hers” and a stream of accusations erupted.⁷⁹ She accused Isaacs of immoral conduct with his lady law clerk and Sir Isaac of having “relations” with a family servant of long standing.⁸⁰ Davis left 1 Goodall Street the next day.⁸¹

For Isaacs, after 11 hectic months, that was the end of the marriage. Reports suggested he had endured Davis abusing him, throwing cups and a whisky decanter at him and had been chased around the house by her wielding a stick.⁸² On 27 March 1939, nine days after Davis left, he executed a new will appointing Sir Isaac as executor and sole beneficiary.⁸³ A short time later Isaacs told Davis not to return.⁸⁴ By June

he too had left the house and gone to board with a Mrs Girton in Burwood Road, Auburn, where he would live until his death in 1944.⁸⁵ Almost immediately, Davis returned to 1 Goodall Street, only to be advised through her husband's solicitors, Gillot Moir and Ahern,⁸⁶ that the £5 weekly maintenance payment

⁷⁹ NAA: B160, 131/141, Copy of Reasons for Judgment of Martin J annexed to Affidavit of (Law Clerk) Joseph Davis, sworn 24 September 1946. The property had been in the Isaacs family since 1888. See Zelman Cowen, *Isaac Isaacs*, 1967, 6.

⁸⁰ NAA: B160, 131/141, Copy of Reasons for Judgment of Martin J annexed to Affidavit of (Law Clerk) Joseph Davis, sworn 24 September 1946.

⁸¹ ““NO CASE SAYS JUDGE”: Mrs Isaacs Fails”, *Argus*, 6 December 1940, 2.

⁸² NAA: B160, 131/41, Evidence of Isaac's domestic servant Miss Meagher referred to in Copy of Reasons for Judgment of Martin J annexed to Affidavit of Joseph Davis, sworn 24 September 1946.

⁸³ PROV, VPRS 28/P3 Unit 4195. The will was dated 27 March 1939.

⁸⁴ ““NO CASE SAYS JUDGE”: Mrs Isaacs Fails”, *Argus*, 6 December 1940, p 2.

⁸⁵ Sir Isaac would also pay for a housekeeper to care for him. See PROV, VPRS 28, P3/4195 Paragraph 35, Affidavit of Edna Frances Isaacs, sworn 28 July 1945.

⁸⁶ Two decades later Gillots would be involved in litigation with another vexatious litigant, Constance May Bienvenu. That next time they would be on the other side. See Simon Smith, “Constance May Bienvenu: Animal Welfare Activist to Vexatious Litigant”, (2007) 11 *Legal History* 31, 40. See also Chapter Eight.

would be reduced as it was contingent on her living “separate and apart from him”. The solicitors went on to say:

The position has unfortunately now reached such an impossible one that reconciliation is out of the question and Mrs Isaacs should realise that the harassing tactics being adopted by her cannot succeed. Our Client said [sic] that his wife’s behaviour is such that he cannot possibly live amicably with her and it would have a detrimental effect on his health. You must realise that he is an old man and requires peace which he cannot get from his wife.⁸⁷

With maintenance reduced to £3 per week and funds short, Davis pawned a wedding ring given to her by John Isaacs. She received £50 from pawnbrokers New South Wales Mont de Piete.⁸⁸ Three months later Sir Isaac retrieved it. It had belonged to his mother Rebecca and Sir Isaac claimed ownership, a point readily conceded by the pawnbrokers.⁸⁹ By pawning it, Davis had touched a sensitive nerve. As his biographer (Sir) Zelman Cowen makes clear, Sir Isaac’s mother emotionally dominated him until her death to the point “that his mother meant more to him than did his own wife and family”.⁹⁰ By showing disrespect to his mother’s memory Davis had made a formidable and uncompromising opponent.

Davis found herself besieged at 1 Goodall Street. Alleging that she was trespassing and “with the object of driving [her] out of the house”, Sir Isaac arranged that the electricity, gas, telephone and water be turned off.⁹¹ A few days later, on 17 June 1939, Wridgway Bros Pty Ltd, carriers and storage removalists, suddenly arrived at the house in the early morning. Bert Wridgway, Cyril Martin and a large number of men then removed most of the furnishings from the house.⁹² Later that year the house title would be quietly transferred to Sir Isaac absolutely and the following year sold to place the asset and proceeds at further distance from Davis.⁹³ However, Sir Isaac was at pains to emphasise his fairness. On the subject of the furniture claim he told his daughter:

⁸⁷ PROV, VPRS 28/P3 Unit 4195, Gillot Moir & Ahern to Alfred S Abraham, 6 June 1939, quoted in paragraph 11, Affidavit of Edna Frances Isaacs, sworn 28 July 1945.

⁸⁸ “ISAACS RING DISPUTE: Wife’s £350 Claim”, *Argus*, 28 May 1940, 5.

⁸⁹ NAA: B160, 131/41. The ring was returned to Sir Isaac on 22 September 1939. See Coy & England to NSW Mont de Piete, 4 January 1941. The pawnbroker appears to have had no doubts about the authenticity of Sir Isaac’s claim. Most probably overawed by his prestige, they did not seek to invoke the procedure in section 37 of the *Pawnbrokers Act 1928* (Vic) to have the local justices determine ownership.

⁹⁰ Zelman Cowen, *Isaac Isaacs*, 1967, 6-7.

⁹¹ PROV, VPRS 28/P3 Unit 4195, Affidavit of Edna Frances Isaacs, sworn 8 May 1945.

⁹² PROV, VPRS 28/P3. Unit 4195, Affidavit of Edna Frances Isaacs, sworn 8 May 1945. See also “Ownership of Furniture”, *Argus*, 12 October 1940, 2.

⁹³ The transfer to Sir Isaac was registered on 18 December 1939 and the sale registered on 13 September 1940. See Victoria, Department of Sustainability and Environment, Certificate of Title Volume 2020 Folio 403804.

We were careful to leave her no excuse for saying she was harshly treated. Her bedroom was not entered and Wridgway wrote on her door in chalk the words "Keep out". Those words are there still.⁹⁴

As his adversaries discovered during his long and accomplished political and legal career, Sir Isaac was a formidable and uncompromising opponent. Even aged 84, he still pursued his aims with "relentless and unflagging energy".⁹⁵ His consuming focus was now Davis and his strict moral code had become outraged on discovery that she had been sexually involved with men when unmarried. He engaged Eugene Gorman KC,⁹⁶ a leading barrister of the period, to advise him and his brother. A letter to Gorman demonstrates Sir Isaac's increasing and inflexible involvement in the dispute:

I consider it not only a private right, but a public duty to tell the true story of his wife's conduct towards my brother and myself and in doing so make the community aware of her life and character.

And further:

For I have now become much more fully acquainted with the manner in which my brother was entrapped into marriage in a manner in which he was ashamed even to let me know until recently but which he is now prepared to relate in court. I have also become acquainted with the misrepresentations made regarding her past life, misrepresentation which will be fully proved in detail by independent evidence of eye witnesses in more than one place.⁹⁷

Shortly afterwards, Sir Isaac was in Sydney co-hosting a formal dinner at Government House with the Governor of New South Wales. In a letter to his brother about the occasion, pausing to observe that "while I was there Menzies⁹⁸ came in. I shook hands with him", Sir Isaac indicated how much his brother's affairs were beginning to consume his waking moments. He wrote:

I shall write out tomorrow a "scheme" showing the way your wife laid her plans to get your property – that is whatever property you had. She thought you were rich and schemed, step by step. "Lying" was her main instrument, and I think I shall put it down step by step so that Gorman can, if he has the chance, let her see how we have pierced her intentions and her acts.⁹⁹

⁹⁴ National Library of Australia, Isaac Isaacs Papers, MS 2755, 1/527, Isaac Isaacs to Marjorie [Cohen], 21 June 1940. Further reference to correspondence from this collection will be in short form "NLA".

⁹⁵ John Barry, "From Yackandandah to Yarralumla: the Enigma of Isaac Isaacs" (1967) XV1 *Meanjin*, 445.

⁹⁶ Barry Jones, "Sir Eugene Gorman (1891–1973)", 14 *ADB*, 1996, 229–300.

⁹⁷ NLA, M 2755, 2/85, Isaacs to Gorman, 20 July 1939. In a later letter to his daughter Sir Isaac would explain the basis of his moral outrage by referring to the anonymous letter from "Joe" as alleging that Davis had given him venereal disease. See Isaacs to Marjorie, 21 May 1942.

⁹⁸ Prime Minister of Australia 1939–1941 and 1949–1967.

⁹⁹ NAA: M2568, 61, Sir Isaac Isaacs to John Isaacs, 29 July 1939.

By engaging Gorman, Sir Isaac indicated his determination. But he had totally underestimated Davis. He would spend the last decade of his life deeply involved in litigation with her. The battle lines had been drawn.

The Ring Case

By January 1940 Sir Isaac was aware that Davis was not one to let matters rest. She took legal action over the loss of the ring. In a regular letter to his daughter Sir Isaac advised that, "I shall welcome the chance to show her up if she dares".¹⁰⁰ She did dare, although her target was New South Wales Mont de Piete, from whom she claimed £350 damages for the loss of the ring. Sir Isaac monitored the case as it made its way to hearing and, after corresponding with his daughter over British Prime Minister Chamberlain's appeasement of Hitler, went on to say:

There is another Hitler we are concerned with at the present moment. But the Monster is in Female form and signs herself "Edna". We expected the case to come on before this but the list was longer than anticipated. The Judge has fixed the 27th for the trial. She keeps on bombarding Uncle Jack with protestations of love for him and denunciations of me and also of Mr. Davis the Managing clerk of our Solicitors, for ill-will and persecution of a poor innocent and much injured woman.¹⁰¹

The matter came before Clyne J¹⁰² in the County Court in May 1940. It was the first of a number of engagements that judge would have with Davis. Although represented, Davis lost. This was a surprising result given she had originally received the ring from John Isaacs in the lead-up to the marriage. The court preferred the evidence of the distinguished Sir Isaac that he had only loaned the ring to his brother and thus it was not possible for him to give it to Davis and in turn for her to pledge it.¹⁰³ Judge Clyne was also incensed by the extravagant way in which Davis behaved in court. In what would prove to be an oft-repeated judicial warning, Clyne J told Davis that her prevarication during cross-examination might lead to her being "lodged somewhere else if you are not careful".¹⁰⁴

The decision brought Davis more public reviews. "WOMAN CRITICISED IN RING CLAIM: Judgement For Company"¹⁰⁵ and "CRITICISM OF WOMAN: Isaacs Ring Case"¹⁰⁶ were just some of the headlines. Sir Isaac

¹⁰⁰ NLA, M 2755, 1/507, Isaacs to Marjorie, 10 January 1940.

¹⁰¹ NLA, M 2755, 1/525, Isaacs to Marjorie, 11 May 1940.

¹⁰² Over the next 20 years Clyne J, as the main bankruptcy judge, would preside in cases involving other vexatious litigants declared in that period, especially Collins and Bienvenu (see Chapters Seven and Eight).

¹⁰³ Interestingly, Davis does not appear to have been subsequently prosecuted for unlawfully pawning the goods. See section 38 of the *Pawnbrokers Act 1928* (Vic).

¹⁰⁴ "ISAACS RING DISPUTE: Wife's £350 Claim", *Argus*, 28 May 1940, 5.

¹⁰⁵ *Herald*, 25 May 1940.

¹⁰⁶ *Argus*, 30 May 1940, 3.

thought the result “satisfactory” and, showing his growing obsession, he reported to daughter Nancy on how the judge had not been taken in by Davis’ performance:

She was a brazen looking creature. Her facility for lying was very apparent. The Judge got her measure very quickly. She dressed differently on the three days. First a black costume, hair down & unpainted face. She wanted to look nearer my brother’s age. Next day a fine fur coat (it cost Jack 20 guineas) & nice hat and painted face. Today a modest brown dress (only modest thing about her). All to no effect. The Judge wouldn’t take the “glad eye”. Outside the court, after the judgement she said to us while passing “You just got away with daylight robbery you pack of thieves”.¹⁰⁷

Sir Isaac was pleased to receive congratulations on the result from friends in high places, reflecting the power of the legal networks in which he circulated: “Justice Evatt has congratulated me — Dixon has expressed his pleasure”¹⁰⁸ being two responses. However, this was only a “curtain raiser”. The season still had many performances to run.

The removalists

Davis was not one to let the loss of the furniture go unchallenged. In June 1940, three weeks after judgment in the “ring case”, she sued Wridgway Bros for wrongful conversion, trespass and £5000 damages.¹⁰⁹ For this and later cases Davis found it difficult to find lawyers to assist her. Sir Isaac and his formidable legal resources would have been a deterrent, though no doubt assessment of the merits of the claims and the inability of Davis to pay costs on account would also have influenced prospective counsel. However, the lack of a solicitor was no obstacle. Davis conducted her own case, although there was assistance behind the scenes. In Sir Isaac’s words: “She has legal help from a suburban Solicitor who sits in the background. He prepares the bullets and she fires them. But his law is poor — the ‘facts’ are worse”.¹¹⁰ The action soon split into two, with a preliminary interpleader hearing with John Isaacs over who owned the furniture followed by the Wridgway Bros damages case.

Sir Isaac closely, even obsessively, monitored developments:

I am fearfully rushed with the approaching Trial and hardly have time to get a moment’s leisure. She is slanging everybody. She has even charged Mr Davis the Managing Clerk to our Solicitors with stealing £3 her maintenance money. She has written accusing mother [Lady Isaacs] with plotting to get her furniture

¹⁰⁷ NLA, M 2755, 1/525, Isaacs to Nancy [Cullen], 28 May 1940.

¹⁰⁸ NLA, M 2755, 1/535, Isaacs to Marjorie. Herbert Vere Evatt and Owen Dixon were both High Court judges at the time and would have both appeared before Isaacs when he was on the bench and they barristers.

¹⁰⁹ Victorian Supreme Court File 501 of 1943, Affidavit of Joseph Davis, sworn 8 July 1941.

¹¹⁰ NLA, M 2755, 1/1109, Isaacs to Marjorie, undated.

for her residence and threatened to get a search warrant. Thank heaven the case will soon be on and I shall try my utmost to expose her wickedness thoroughly. That is the only way to put a stop to her.¹¹¹

And later:

The “lady” is still in vigorous form. She has just issued a Writ in the Supreme Court against poor Greta, the maid for “aiding and abetting” the trespass and taking away of her goods and valuables from her “Residence”, that is in plain English the removal in June 1939 (15 months ago) of her furniture, and she is asking of Greta the very moderate sum of £500. Well dear I am still working at this “Case”, and if it does nothing else it keeps me from feeling bored.¹¹²

Though busy, Sir Isaac still had time to comment on national affairs: “I saw Evatt has made a dashing attack, not on Menzies personally, but on his ability to lead Australia at this critical time. I wonder what the outcome of it all will be”.¹¹³

The interpleader was heard before Foster J in the County Court in October 1940. It was a public sensation. Davis had subpoenaed a bevy of witnesses to tell her life story from musical success and engagement to Isaacs to her exclusion from 1 Goodall Street. The witnesses included the Isaacs’s maid, representatives of furniture suppliers and even the Board of Works man who had turned off the water.¹¹⁴ Davis examined and cross-examined with extravagant and outrageous vigour. Dr Coppel KC, counsel for Wridgways, and Mr Mulvany for John Isaacs continually objected to the relevance.¹¹⁵ Judge Foster also repeatedly warned Davis that he “would send her to gaol for contempt of Court if she persisted in asking witnesses improper questions”.¹¹⁶ His Honour also ordered that Davis remove an enlarged photograph of herself with her husband and Sir Isaac which she kept propped up in front of her on the bar table. Mulvany had objected to the “picture gallery”.¹¹⁷

Evidence in the case ranged far and wide. Davis sought to show there had been a written pre-nuptial agreement giving the furniture to her as well as half the house and that Sir Isaac had composed anonymous letters besmirching her moral character.¹¹⁸ Mulvany referred to her as a “gold-digger”¹¹⁹ and attacked

¹¹¹ NLA, M 2755, 1/544, Isaacs to Marjorie, 6 September 1940.

¹¹² NLA, M 2755, 1/545, Isaacs to Marjorie, 26 September 1940. The writ against Margaret (Greta) Meagher, the maid, was later struck out. See further, Victorian Supreme Court File 501 of 1943, Paragraph 9, Affidavit of Joseph Davis, sworn 8 July 1941.

¹¹³ NLA, M 2755, 1/544, Isaacs to Marjorie, 6 September 1940.

¹¹⁴ “OWNERSHIP OF FURNITURE: Domestic Dispute:”, *Argus*, 12 October 1940, 2.

¹¹⁵ *Ibid.*

¹¹⁶ “GAOL THREAT TO WOMAN: Judge’s Warning in Isaacs Case”, *Argus*, 15 October 1940, 5 and “WOMAN WARNED AGAIN: Conduct in Court”, *Argus*, 16 October 1940, 5.

¹¹⁷ “WOMAN WARNED AGAIN: Conduct in Court”, *Argus*, 16 October 1940, 5.

¹¹⁸ “OWNERSHIP OF FURNITURE: Domestic Dispute”, *Argus*, 12 October 1940, 2.

¹¹⁹ “WOMAN WARNED AGAIN: Conduct in Court”, *Argus*, 16 October 1940, 5.

her character by referring to the Westbury matter.¹²⁰ While this was happening, Davis mounted a collateral attack by issuing writs against witnesses Sir Isaac and the Manager of New South Wales Mont de Piete, claiming £15,000 for alleged libel and slander.¹²¹ These claims were ultimately struck out by consent in early 1941.¹²² Finally, after five days of hearing, Foster J found that Davis had “completely failed to establish any claim whatever” to the furniture.¹²³ Showing the strong feelings the case had aroused in him, His Honour said of Davis:

Protected by her privilege of summoning under the King’s Command, witnesses; relying on the leniency usually conceded to an unassisted litigant, and upon her sex: she has deliberately, in spite of all my efforts, my repeated warnings and requests, ignored and abused the Court’s rules and procedure; utilised the opportunities her own cunning had devised to defame and denounce her own witnesses, and those of the Defendant, and even those unconnected with this litigation. Nothing could stop her, not even threats of imprisonment. She was utterly unworthy of any credence. That she perjured herself again and again is clear. That she was guilty of gross prevarication was made manifest throughout the hearing. Her conduct reveals an unbounded malice and vindictiveness and the evidence revealed that her motive was greed. I find no redeeming feature in any part of this litigation.¹²⁴

Davis was not in court to hear the decision. She was in hospital suffering “neurasthenia, insomnia and low blood pressure”.¹²⁵ Judge Foster believed she was “malingering”. Showing his bias he refused a request for an adjournment and sentenced Davis to 14 days in custody “for flagrant abuse of justice” for her conduct during the case.¹²⁶ By not giving her the opportunity to know the charge or offer a defence before proceeding to sentence her, His Honour offended the basic rules of natural justice. With financial assistance from her mother for representation,¹²⁷ Davis challenged the sentence. In *The King v Foster ex parte Isaacs* the Supreme Court agreed that Foster J had offended “the essence of justice” and quashed the gaol order.¹²⁸ It was a rare win for Davis.

The “furniture case” still had some way to run. Earlier, separate actions against Bert Wridgway for £3000 and Cyril Martin (Wridgways) for unspecified

¹²⁰ “ISAACS CASE GOES ON: Apology to Counsel”, *Argus*, 17 October 1940, 6.

¹²¹ “WRIT FOR £15,000”, *Argus*, 17 October 1940, 6.

¹²² Victorian Supreme Court File 501 of 1943, Paragraph 9, Affidavit of Joseph Davis, sworn 8 July 1941.

¹²³ “14 DAYS FOR MRS ISAACS: Stern criticism By Judge”, *Argus*, 19 October 1940, 5.

¹²⁴ Victorian Supreme Court File 501 of 1943, Quoted in paragraph 6, Affidavit of Joseph Davis, sworn 8 July 1941.

¹²⁵ “14 DAYS FOR MRS ISAACS: Stern criticism By Judge”, *Argus*, 19 October 1940, 5.

¹²⁶ “14 DAYS FOR MRS ISAACS: Stern criticism By Judge”, *Argus*, 19 October 1940, 5 and “ISAACS ORDERED INTO 14 DAYS CUSTODY”, *Sun News Pictorial*, 19 October 1940.

¹²⁷ NLA, M 2755, 1/551, Isaacs to Cohen, 10 November 1940.

¹²⁸ [1941] VLR 77; “CRITICISM OF JUDGE: ISAACS WARRANT”, *Argus*, 16 November 1940, 6 and “GAOL ORDER QUASHED’ Mrs Isaacs Wins”, *Argus*, 5 December 1940, 11.

damages had been struck out before reaching hearing.¹²⁹ The second part of the case against Wridgway Bros was still on foot, although with ownership of the goods having been determined it lacked substance. It reached court in December 1940. Once more Clyne J presided and again it was a public sensation. After watching Davis wave “her arms about dramatically as she addressed the jury from the bar table”, Clyne J nonsuited her without requiring the defence to make submissions. His Honour said the issues had already been determined at the earlier hearing and, in any event, the Isaacs brothers, as joint owners of 1 Goodall Street, “are entitled to possession of it”.¹³⁰ In 1940 there was no *Family Law Act* upon which a wife could base a claim for an equitable interest in the property. Again, costs were awarded against Davis.¹³¹

No doubt fuming, in early 1941 Davis issued two more writs, both claiming £10,000 damages. They were her seventh and eighth actions in 18 months. On both occasions Bert Wridgway and Cyril Martin from Wridgway Bros and Sir Isaac were defendants. Joseph Davis from Gillotts was also named as a defendant in the seventh proceeding. In both cases Davis sought to argue that “the defendants were trying to prevent her from getting a hearing before the Supreme Court” and that “all she wanted was to get back goods that had been taken from her”.¹³² The actions were either stayed or dismissed in response to the defendants’ applications that the actions were an attempt to re-litigate decided matters and as such were “frivolous, vexatious and an abuse of the process of the court”.¹³³

However, this marked the end of Sir Isaac’s patience.

A Blitzkrieg!

Things at the front do not look bright. Of course we only have one thing to do. We must WIN.¹³⁴

So said Sir Isaac in a letter to his daughter in April 1941. He was, of course, referring to the war in Europe but he might just as easily have been referring to his litigious struggles with Davis. In the same letter he said of her:

She has written to Uncle Jack that she intends to go on, and so I must be on the spot, for I couldn’t manage it from a distance. Also we intend to Counter Attack. Uncle Jack is altogether unable to do any business. He has not since his illness

¹²⁹ Victorian Supreme Court File 501 of 1943, referred to in paragraph 9, Affidavit of Joseph Davis sworn, 8 July 1941. See also “£3000 ACTION STRUCK OUT: Mrs Isaacs Claim”, *Argus*, 2 November 1940, 2.

¹³⁰ NAA: B 160, 131/141, Judgment of Clyne J given 5 December 1940, quoted in paragraph 2 of Affidavit of Edward Alexander Cook, sworn 5 September 1941.

¹³¹ “‘NO CASE’ SAYS JUDGE, Mrs Isaacs Fails”, *Argus*, 6 December 1940, 2.

¹³² “MRS ISAACS IN COURT AGAIN: £10,000 Claim Stayed”, *Argus*, 26 March 1941, 5 and Victorian Supreme Court File 501 of 1943, paragraph 9, Affidavit of Joseph Davis, sworn 8 July 1941.

¹³³ *Ibid.*

¹³⁴ NLA, M 2755, 1/564, Isaacs to Marjorie, 11 April 1941.

been to his office. I have been clearing it up, burning papers and am now trying to dispose of his office books. Then he will give up his office altogether, and then her Maintenance money will stop, and then a blessed HULLABALOO. So I cannot be away for a considerable while. DON'T make this public. It will come better as a Blitzkrieg.¹³⁵

The “Counter Attack” was a reference to a forthcoming application by the Victorian Attorney-General under section 33 of the *Supreme Court Act 1928* (Vic). That provision gave the Attorney-General sole standing to request that the Supreme Court declare a litigant “vexatious” once satisfied that the litigant has “habitually and persistently and without reasonable ground instituted vexatious proceedings”. Once declared, the litigant cannot issue *new* proceedings without the prior permission of a Supreme Court judge. Judge Foster in the earlier interpleader matter had made a judicial plea for the sanction to be invoked:

And now, I am bound — out of regard to the administration of justice, if not out of regard to possible future victims of this woman’s irresponsibility, or spite — to indicate as I did to her during the trial that her unrestrained irresponsibility is both a menace to justice and an unwarrantable danger to innocent people. In the interests of both she should suffer some legitimate restriction, such, for instance, was imposed in another notorious case.¹³⁶

The other “notorious case” was that of Rupert Millane, whose extraordinary stream of unsuccessful litigation in the 1920s had led to the insertion of section 33 and the “pioneering” declaration of him as a vexatious litigant in 1930. Sir Isaac would have known about both the provision and Millane as, when Chief Justice, he had refused Millane special leave to appeal to the High Court.¹³⁷

On 18 July 1940 Attorney-General Bailey’s application came before MacFarlan J. Affidavits from Joseph Davis, the Prothonotary, and the solicitor for Wridgway Bros outlined that between January 1940 and June 1941 Elsa Davis had issued nine writs or summonses against various defendants. Four had been struck out, two dismissed, two stayed and one nonsuited.¹³⁸ Representing herself, Davis filed an affidavit in response that brimmed with passion. It contained 55 paragraphs that recounted the story of her marriage and dispossession of furniture and house. With liberal use of capitals and underlinings the affidavit painted Sir Isaac as the villain:

The Defendant’s brother, John Isaacs, had stated to me that his brother (the said defendant) “WAS NOW THE JOINT OWNER AND THAT I HAD NO RIGHT

¹³⁵ NLA, M 2755, 1/565, Isaacs to Marjorie, 11 April 1941.

¹³⁶ Victorian Supreme Court File 501 of 1943, quoted in paragraph 6, Affidavit of Joseph Davis, sworn 8 July 1941.

¹³⁷ NAA: A10074, 1930/47, Judgment of Isaacs CJ 16 October 1930 refusing special leave to appeal.

¹³⁸ Victorian Supreme Court File 501 of 1943. See also “MRS ISAACS A ‘VEXATIOUS LITIGANT’”, *Argus*, 22 July 1941, 2 and “Judge Cramps Mrs. Isaacs’ Style”, *Truth*, 25 July 1941, 22.

AS AGAINST HIS BROTHER'S WISH TO REMAIN IN THE HOME, AND THAT I SHOULD NOT STAY THERE AS HE WAS FRIGHTENED OF HIS BROTHER", AND HE ALSO SAID "THAT I MUST SEEK BOARD AND LODGING ELSEWHERE" to which I replied "THAT I HAD NOWHERE TO GO".¹³⁹

This did not convince the court. On 21 July 1941 Davis (as Edna Isaacs) became the third person (and second woman) in Australia to be declared a vexatious litigant. She was 34 years old. Despite the significance of the decision it was not mentioned in the law reports.

But it was not the end by a long shot. A new act in a new theatre was about to open.

The removalists respond: a new theatre!

Wridgway Bros disliked being defendants. Two days after Davis was declared a vexatious litigant they went on the offensive and commenced bankruptcy proceedings against her, having already sued John Isaacs for recompense.¹⁴⁰ Wridgways issued a bankruptcy notice based on the non-payment of £104.8s.9d. court costs.¹⁴¹ This was a tactical error. The Supreme Court vexatious order did not apply in courts exercising Commonwealth jurisdiction and, in any event, it banned Davis only from *issuing* proceedings not *defending* them. Wridgways, by initiating the proceedings, provided Davis with a new theatre in which to present her story. Over the next four years, to their cost, they came to understand this.

Obligingly, the bankruptcy notice formally invited Davis to make "a counterclaim, a set off, or cross demand against Wridgway Bros".¹⁴² She then engaged in lengthy correspondence with court officials and filed counterclaims and set-offs as part of a rambling 12-page affidavit. Typed in a free-flowing style with much underlining and use of capitals for emphasis, the affidavit recited Davis' version of the story and argued Wridgways:

HAD LEFT ME STRANDED... AND THAT THE DEFENDANT COMPANY CANNOT EXPECT A CLAIM AFTER THEY HAD DEPRIVED HER OF EVERYTHING IN HER POSSESSION.¹⁴³

Justice Lukin did not agree and, on 5 September 1941, he declared Davis bankrupt.¹⁴⁴ Davis immediately appealed to the High Court which, as noted in

¹³⁹ Victorian Supreme Court File 501 of 1943, paragraph 18 Affidavit of Edna Frances Isaacs, sworn 16 July 1941.

¹⁴⁰ NLA, M 2755, 1/572, Isaacs to Nancy, 20 June 1941.

¹⁴¹ NAA: B160, 131/41. Bankruptcy Notice, dated 24 July 1941.

¹⁴² *Ibid.*

¹⁴³ NAA: B160, 131/41. Affidavit of Edna Frances Isaacs, sworn 29 August 1941.

¹⁴⁴ NAA: B160, 131/41. See also "Mrs Edna Isaacs Bankrupt", *Herald*, 5 September 1941, 3.

Chapter Four, was then next door to the Victorian Supreme Court.¹⁴⁵ A month later Davis appeared in person and addressed the court for 35 minutes before the appeal was dismissed. The court did not require Dr Coppel KC, counsel for Wridgways, to address them.¹⁴⁶ Wridgways' legal expenses climbed nonetheless.

Throughout 1942 the Official Receiver tried in vain to get to the bottom of Davis' meagre finances. A 27-page transcript makes it clear that her oral examination in September 1942 was a frustrating and evasive performance. She deposed that she lived with her mother, had no assets or income and, in between speeches about the activities of the Isaacs and Wridgway Bros, could remember little of the whereabouts of any of her own jewellery.¹⁴⁷ Then, in what must have been a provocative move, in November she foreshadowed an application for discharge.¹⁴⁸

Davis' first application for discharge came before the Bankruptcy Court in May 1943. For the third occasion Davis found the presiding judge was Clyne J.¹⁴⁹ His Honour showed no hint of embarrassment or concern about perceptions of bias. Nor did Davis take the point, this time. Through their counsel, Wridgway Bros and John Isaacs opposed the application. Voumard appeared for Wridgways and Mulvany for Isaacs.¹⁵⁰ This time Davis had her own counsel, Mr RC Heatley, again paid for by her mother. Heatley sought to persuade Clyne J to exercise his discretion to discharge "in the community interest". It was not enough. His Honour viewed with "suspicion" an attempt by Davis' mother to prove a debt as a creditor and thus dilute claims of other creditors. His Honour also had "grave suspicion" about Davis' lack of knowledge about important pieces of her jewellery. He dismissed the application and awarded costs.¹⁵¹ Recognising that they could not recover costs, Wridgways cut their losses and dropped away. They never recovered from Davis. For Sir Isaac, the case was still very much alive and he would fight Davis' applications for discharge from bankruptcy up to the High Court.¹⁵²

¹⁴⁵ Between 1904 and 1980 the main Registry of the High Court was in Little Bourke Street, Melbourne, adjacent to the Supreme Court. It did not move to Canberra until 1980.

¹⁴⁶ NAA: A10074, 1941/22, Reasons for Judgment, delivered 14 October 1941. See also, Full Court Minute Book, Volume 9, dated 14 October 1941, High Court of Australia, Canberra.

¹⁴⁷ NAA: B160, 131/41. Transcript of examination of Frances Edna Isaacs, dated 16 September 1942.

¹⁴⁸ *Ibid.* For example, Edna Isaacs to Keith (Deputy Registrar), 24 November 1942.

¹⁴⁹ He was appointed a specialist federal Bankruptcy Court judge in 1943 and sat in that jurisdiction until 1962. He was knighted (Sir Thomas) in 1955.

¹⁵⁰ NAA: B160, 131/41. Transcript of hearing before Clyne J, 28 May 1943.

¹⁵¹ *Ibid.* See also Order of Court dated 28 May 1943.

¹⁵² Full Court Minute Book, Volume 10 14 October 1944, High Court of Australia, Canberra.

A “HULLABALOO” in St Kilda

1942 was a busy year in the courts for Davis. Aside from the Wridgway proceedings she commenced a maintenance action in the St Kilda court against John Isaacs. He had discontinued his £3 per week maintenance in August 1941 after just seven days notice.¹⁵³ At that time maintenance law was a State responsibility, so it was necessary for Davis to get judicial leave before issuing enforcement proceedings under the *Maintenance Act 1928* (Vic). This she did in April 1942.¹⁵⁴ It was the first of two occasions on which she would obtain leave over the next 40 years.

Sir Isaac had been right in his prediction a year earlier that a “HULLABALOO” would occur when the maintenance stopped. The maintenance proceedings were another public sensation. The newspapers revelled in the notoriety of the case with headlines like “COURT TOLD OF ELDERLY HUSBAND’S PROPOSAL”¹⁵⁵ and “GAOL THREAT TO MRS ISAACS: Heated Clashes in Maintenance Case”¹⁵⁶ all accompanied by unflattering photos of the key participants. Davis appeared in person and Mulvany appeared for a frail John Isaacs, now 78 years old. Sir Isaac stayed in the background but was actively guiding the defence, providing legal advice to Mulvany and regular reports to his daughters.¹⁵⁷



Isaacs' maintenance litigation. *Melbourne Truth* coverage of Isaacs' maintenance litigation. 1942.

Courtesy State Library of Victoria.

¹⁵³ NAA: B160, 131/41. Transcript of examination of Frances Edna Isaacs, dated 16 September 1942.

¹⁵⁴ Victorian Supreme Court File 501 of 1943. Affidavit of Edna Frances Isaacs, sworn 28 April 1942.

¹⁵⁵ *Truth*, 23 May 1942, 18.

¹⁵⁶ *Truth*, 23 May 1942, 17.

¹⁵⁷ NLA, M 2755, 1/615, Isaacs to Marjorie, 19 May 1942. At this time Sir Isaac was also active with his public opposition to what he described as “Extreme Zionism” and the calls for a Jewish homeland in Palestine. See further, Zelman Cowen, *Isaac Isaacs*, 1967, 228–235.

The maintenance hearing was a torrid affair. Davis needed to show that Isaacs had “deserted” and left her “without means of support”.¹⁵⁸ She took a broad-brush approach to this and canvassed how she had been persuaded to enter the marriage by promises that “if you marry me ... you will have everything I have”¹⁵⁹ and why the marriage had later turned sour. She aggressively examined Joseph Davis from Gillotts and accused him of turning her husband against her. He in turn referred to the “hundreds of letters” Davis had written to his firm about the case. On more than one occasion magistrate Hill warned Davis that, “[a]ny more of your nonsense or hysterical outbursts and I’ll send you out to Pentridge for a few days”.¹⁶⁰ For the defence, Mulvany argued that it was Davis who had “deserted” and, in any event, her extravagance had spent all the money there was. The issue of the whereabouts of the proceeds from the 1940 sale of 1 Goodall Street was not canvassed, the magistrate being content to find that the property belonged to Sir Isaac.¹⁶¹ Matters reached a crescendo when Mulvany started his cross-examination of Davis. She was coy about her age and denied slandering her husband or Sir Isaac. However, matters boiled over when Mulvany attacked her character by introducing the “Westbury Affair” and quizzed her on her relationship with the “German” Edward Kuehn.¹⁶² Davis fainted. Sir Isaac had a different view:

She wound up the day with a “faint”, after two or three glasses of water, when pressed by Mr Mulvany on certain awkward matters. That is the sort of refuge she seeks when in difficulty. That was her excuse when bowled out for deserting, and when Judge Foster was going to send her to gaol, and again yesterday. I should not be surprised if she did not turn up on Thursday.

Davis did not turn up for the last day and the magistrate dismissed the case.¹⁶³ Although the magistrate awarded costs, Sir Isaac was dismissive about his brother’s chances of recovery: “The costs are as safe as a snowball in hell”.¹⁶⁴ There was a further flurry later that year when Davis unsuccessfully tried to appeal the decision and that kept Sir Isaac “hard at work”. In his words, “she is in truth, a “sister-in-LAW””.¹⁶⁵

However, there was yet another battle looming.

¹⁵⁸ Section 4(a) of the *Maintenance Act 1928* (Vic). See also Litherland, J, *The Law Relating to Maintenance of Wives and Children: Who are Deserted or Left Without Means of Support in Australia and New Zealand*, 1949, 14-16.

¹⁵⁹ “COURT TOLD OF ELDERLY HUSBAND’S PROPOSAL”, *Truth*, 23 May 1942, 18.

¹⁶⁰ “GAOL THREAT TO MRS ISAACS: Heated Clash in Maintenance Case”, *Truth*, 23 May 1942, 17.

¹⁶¹ “MRS ISAACS TERMED ‘A WICKED WOMAN’: P.M. Rejects Claim For Maintenance”, *Truth*, 23 June 1942, 8.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ NLA, M 2755, 1/619, Isaacs to Marjorie, 12 June 1942.

¹⁶⁵ NLA, M 2755, 1/632, Isaacs to Marjorie, 2 September 1942.

The battle for probate

In August 1944 John Isaacs died. He was 81.¹⁶⁶ He had never recovered from the anxiety of the marriage breakdown and had left the conduct of the ensuing litigation to his older brother, Sir Isaac. Upon learning of his death Davis placed notices in the papers, as “his loving wife”, saying “her beloved husband” would be “sadly missed”.¹⁶⁷ A grieving Sir Isaac was incensed, particularly as:

The next day she showed her true colours. She sent an insulting and threatening letter to Greta (Jack’s maid) and Mrs Girton (in whose house he lived) demanding a Camphor box & threatening “legal authorities”. She had a stiff letter in return.¹⁶⁸

By November Sir Isaac was aware that Davis was “preparing to have another shot at me the nature of which I do not yet know. I suppose she is savage that he has made a will making me sole beneficiary and executor though he had nothing to leave”.¹⁶⁹ He was determined to resist at all costs. In the event, it was Sir Isaac who provided the forum by applying to prove the will for probate. He had seen it as a pre-emptive move to deny the widow’s doing so.¹⁷⁰ It was a strategic mistake. In fact, the probate litigation between Davis and Sir Isaac consumed them both and would span two years and multiple courts, fading only after Sir Isaac’s death in 1948.

When Sir Isaac lodged probate documents in March 1945 the total value of his brother’s personal estate was shown as £33.13s.0d. Real estate was “Nil”.¹⁷¹ Davis had earlier lodged a handwritten caveat but only after convincing the Registrar that the lodgment of a caveat was not “issuing proceedings” and thus did not require “leave”.¹⁷² For the next five months the parties “duelled by affidavit”. The many affidavits filed by Davis recite at length the story of her musical career, the marriage, its decline and the reasons for it. They shift from handwritten to typed and show a remarkable grasp of legal language and concepts. As in the “removalist’s case” they suggest the presence of some background legal help. A good example are her “Particulars of Objection” that list nine grounds, including “undue influence” by Sir Isaac and Joseph Davis; want of testamentary capacity of John Isaacs from 1938; undervaluation of the estate; non conformity with the *Wills Act* and false and untrue representations

¹⁶⁶ “Deaths”, *Argus*, 24 August 1944, 2.

¹⁶⁷ “Deaths”, *Argus*, 28 August 1944, 10.

¹⁶⁸ NLA, M 2755, 1/781, Isaacs to Marjorie, 27 August 1944.

¹⁶⁹ NLA, M 2755, 1/781, Isaacs to Marjorie, 27 August 1944.

¹⁷⁰ NLA, M 2755, 1/801-802, Isaacs to Marjorie, 12 December 1944.

¹⁷¹ PROV, VPRS 28/P3 Unit 4195. Inventory dated 22 March 1945. Ironically, it disclosed that the main items of value were two safes valued at £7.7s.0d.

¹⁷² PROV, VPRS 28/P3 Unit 4195. Caveat dated 2 February 1945 and Note of Registrar dated 26 March 1945.

to John Isaacs that Davis was of bad character and thus not entitled to any benefaction.¹⁷³

In reply, the affidavits of Sir Isaac are brief and to the point. Presumably designed to attack Davis' character, he simply raised her vexatious litigant and undischarged bankrupt status. Then, at the hearing in August 1945,¹⁷⁴ through Sir Isaac's counsel, Coppel KC, and Mulvany, Davis' character was again put in issue with the Westbury matter being raised with evidence from Mrs Gertrude Westbury and 1932 letters from Kuehn to Davis tendered.¹⁷⁵ In addition, Dr Watters, a Goodall Street neighbour and general practitioner, gave evidence that John Isaacs "did not at any time exhibit any symptoms of insanity" and was "fully capable of making a will".¹⁷⁶ It was enough for Martin J. On 7 August 1944 His Honour granted probate to Sir Isaac.¹⁷⁷

It was not enough for Davis. She immediately appealed to the Full Court, only to be eventually dismissed with costs two years later in March 1946.¹⁷⁸ She then appealed to the High Court.¹⁷⁹ While that was pending, Sir Isaac learnt that Davis had again applied to be discharged from bankruptcy and, as a legal costs creditor, he resolved to oppose it. He told his daughter, "I am not going to let her get away with it if I can help it after all she has done".¹⁸⁰ He mounted a comprehensive objection, referring to continued frivolous and vexatious litigation by Davis and her failure to account for assets.¹⁸¹ In response, Davis filed a lengthy and florid handwritten affidavit referring to conspiracy by Sir Isaac and the other creditors,¹⁸² only to see large slabs struck out under the rules of court as "scandalous" by Clyde J on 27 September 1946 on the application of Mr Mulvany.¹⁸³ They too were now regular participants in the proceedings.¹⁸⁴ Sir Isaac's objection was adjourned until April 1947, when it was dismissed and Davis discharged, although the discharge was suspended

¹⁷³ PROV, VPRS 28/P3, Unit 4195. Particulars of Objection dated 5 May 1945 and Amended Particulars dated 5 May 1945.

¹⁷⁴ There was a false start in May 1945 when the assigned judge, Gavan Duffy J, disqualified himself on the basis of perceived bias in favour of Sir Isaac who had a "long association with my father". Sir Charles Gavan Duffy had been a colleague (and Chief Justice) on the High Court. See NLA, M 2755, 1/842, Isaacs to Marjorie, 15 May 1945.

¹⁷⁵ PROV, VPRS 28/P3, Unit 4195. Order dated 7 August 1944 of Martin J: First Schedule: List of Propounders Witnesses and Second Schedule: Propounders Exhibits.

¹⁷⁶ PROV, VPRS 28/P3, Unit 4195. Affidavit of George Graham Watters, sworn 7 May 1945.

¹⁷⁷ PROV, VPRS 28/P3, Unit 4195. Order dated 7 August 1944 of Martin J.

¹⁷⁸ PROV, VPRS 28/P3, Unit 4195. Order of Full Court dated 8 March 1946.

¹⁷⁹ NAA: A10074, 1946/9. The appeal lapsed for want of prosecution.

¹⁸⁰ NLA, M 2755, 1/952, Isaacs to Marjorie, 29 August 1946.

¹⁸¹ NAA: B160, 131/41. Notice of Objection to Discharge by Creditor, dated 17 September 1946.

¹⁸² NAA: B160, 131/41. Affidavit of Edna Frances Isaacs, sworn 10 September 1946.

¹⁸³ NAA: B160, 131/41. Order of Clyde J dated 27 September 1946.

¹⁸⁴ Another participant, Joseph Davis, had died in April 1947. Sir Isaac was "shocked". He "had known him for over fifty years". See NLA, M 2755, 1/1017, Isaacs to Marjorie, 13 April 1947.

until 30 August 1947.¹⁸⁵ Even this victory dissatisfied Davis and she appealed the suspension to the High Court.¹⁸⁶

In the meantime, an uncompromising Sir Isaac had opened up another battlefield. He had launched his own bankruptcy proceedings against “That Woman” based on non-payment of £54.6s.10d legal costs.¹⁸⁷ Despite her vigorous objections about “proceedings instituted vexatiously”,¹⁸⁸ Davis was bankrupted a second time on 25 September 1946. Again the judge was Clyne J. Counsel for Sir Isaac was again Mulvany.¹⁸⁹ Once more, Davis appealed to the High Court only to see the appeal dismissed in October 1947.¹⁹⁰

Dissatisfied, on 2 February 1948 Davis filed a further High Court appeal, raising a claim of bias against Clyne J.¹⁹¹ She had already filed an affidavit in support. Not only was Clyne J “affected by his inordinate respect for Sir Isaac Isaacs” but he also had a “personal relationship outside the Bankruptcy Court with Mr Mulvany”. In support of the latter point Davis attached as “Exhibit A1” a recent photo from the *Argus* showing Mulvany with Clyne J over the caption “YORICK CLUB AT HOME: Pictured at Nine Darling Street in cheerful mood. (Left to right): Mr and Mrs J Mulvany, Mrs Clyne, and Mr Justice Clyne choose a quiet corner for a chat”.¹⁹²

Sir Isaac did not have time to respond. Nine days later he died quietly in his sleep, aged 92.¹⁹³ With the passing of her principal combatant, the Isaacs litigation finished, indicating that Sir Isaac was a major force in maintaining the litigation. Davis would not bother to seek a discharge from this bankruptcy until 1960.¹⁹⁴

It was now time for other things.

Peace and a new beginning

After nearly a decade of legal warfare with Sir Isaac, Davis must have been exhausted. Whatever the amount of mysterious support in the background, her output of affidavits and correspondence with court officials in the period was extraordinary. It would have taken considerable time and energy. As the

¹⁸⁵ NAA: B160, 131/41. Order of Clyne J dated 22 April 1947.

¹⁸⁶ NAA: A 10074, 1946/44. The appeal was redundant by the time the matter was heard in the court. See Order of Full Court 13 October 1947.

¹⁸⁷ NAA: B160, 16/46. Creditor’s Petition, dated 11 September 1946.

¹⁸⁸ NAA: B160, 16/46. Notice of Intention to Oppose Petition, dated 20 September 1946.

¹⁸⁹ NAA: B160, 16/46. Order of Clyne J dated 25 September 1946.

¹⁹⁰ NAA: A 10074, 1946/44.

¹⁹¹ NAA: A10074, 1947/28. Appeal Notice, dated 2 February 1948.

¹⁹² NAA: B160, 16/46. Affidavit of Edna Francis Isaacs, sworn 12 December 1947.

¹⁹³ Zelman Cowen, *Isaac Isaacs*, 1967, 257. The press were generous in their tributes, the High Court less so, with a three-paragraph homage of Chief Justice Latham being described as “brief to the point of perfunctoriness”. See John Barry, “From Yackandandah to Yarralumla: the Enigma of Isaac Isaacs”, (1967) XV1 *Meanjin*, 451 and also High Court of Australia, Canberra, Full Court Minute Book, Volume 10, 11 February 1948.

¹⁹⁴ NAA: B160, 16/46.

documents make clear, during this period she lived at 4 Vale Street, St Kilda, which was then a single-fronted brick villa owned by her mother. Rebecca (Davis) Frieze lived next door at number 2 and appears to have been the major support and source of income.¹⁹⁵

Now in her 40s, Davis set about rebuilding her life. She had started composing again and in 1945 had sent *The Duke of Gloucester March* to Canberra to welcome “an old friend”, the new Governor-General. His Chief of Staff had replied thanking her, saying “His Royal Highness hopes to have the pleasure of meeting you during his forthcoming visit to Melbourne”.¹⁹⁶ Clearly, he was unaware of the litigation with a former Governor-General.

Davis’ next big engagement came in February 1954. She married Geza (Fred) Laszloffy at the Catholic Sacred Heart Church in St Kilda. He was an unskilled “Hungarian/Rumanian émigré”¹⁹⁷ who, at 24, was her junior by 23 years. How, when and where they met is unknown but it is clear that she cared for him.¹⁹⁸ Years later she confided to her theatrical agent that she liked younger men and that it was a mistake “to get involved with an older man”.¹⁹⁹



Laszloffy wedding photo.

Edna marries Geza Laszloffy in St Kilda.

Courtesy Elsa Davis Collection.

The couple settled at Vale Street and, with Laszloffy providing the income from factory work,²⁰⁰ Davis embarked upon an active period of musical composition that generated significant publicity. She revelled in being the centre of attention and her method was to link her music to events in contemporary life. The years 1956–1958 were particularly active. In December 1956 she sent for copyright registration a book of songs comprising *Australia is my Home; A day of Harmony and Honeymoon days*.²⁰¹ In 1957 she

¹⁹⁵ The only paid employment Davis appears to have had in this period was some sewing and hat making she did for Myer Emporium. It was the subject of a vigorous cross-examination by Sir Isaac’s counsel JF Mulvany during a 1947 bankruptcy hearing. See NAA: B160, 131/41. Transcript of proceedings, dated 22 April 1947.

¹⁹⁶ PROV, VPRS 28/P3 Unit 4195. See paragraph 17, Affidavit of Edna Frances Isaacs, dated 8 May 1945. See also NAA: A1336, 41107 for March.

¹⁹⁷ NAA: A12091, 12144. The IRO Resettlement Medical Examination Form dated 10 January 1950 lists him as a healthy unskilled labourer.

¹⁹⁸ In the post-war years St Kilda was an area settled by large groups of immigrants. It is likely that they met in the local area. See further, Anne Longmire, *St Kilda: the show goes on*, 1989, 165 ff.

¹⁹⁹ Interview with Mary Murphy (theatrical agent) by the author, 19 May 2005.

²⁰⁰ Interview with Alan and Barbara Leary, 23 January 2006.

²⁰¹ NAA: A1336, 57103.

followed with a book of waltz songs including *Half past two in the morning* and *I'm Forgiving you*²⁰² and that same year she teamed with Laszloffy on the words to a new national anthem, *God Bless Australia*.²⁰³ A copy of the anthem was promptly sent to the Queen Mother in London.²⁰⁴ Presumably in order to harness this activity, the couple also established a business grandly called the "World Wide Australian Cultural Centre". It aimed to produce plays, operettas, musical comedies, dramas, ballet and cultural exchanges with the Soviet Union.²⁰⁵ There is no record of its ever being anything other than a business name. Davis also returned to radio with her xylophone and played the compositions on 3KZ's "Community Singing" programme.²⁰⁶ However, this activity was restrained compared to the events of the following year.

In February 1958 Davis returned to the vice-regal circle when her composition the *Queen Elizabeth March* was played at Government House (Melbourne) and Davis herself was presented to the Queen Mother.²⁰⁷ This was followed in October with an international success. Impressed by the success of the Russians in the space race, the couple had composed *Under the Sputnik With You*. It paid tribute to the Russians' successful launch in 1957 of two unmanned satellites, the second with a dog as passenger.²⁰⁸ One verse read:

Travelling round the world in 90 minutes,
All the world looks up towards the sky,
To see a lovely gleam, Once it was a dream,
A shining satellite up in the sky,
Holding hands the lovers gazing up there,
Kissing by the night, and by the day,
Satellite love, comes from above,
It takes the lovers many miles away.²⁰⁹

No doubt alert to a cold war propaganda opportunity in Australia, given the passions aroused by the recent Petrov affair,²¹⁰ the Russian Ministry of Culture promptly accepted the composition for publication. A congratulatory letter

²⁰² NAA: A1336, 55033.

²⁰³ NAA: A1336, 57739.

²⁰⁴ 3DB News Bulletin, dated 16 November 1957, in the Elsa Davis Collection.

²⁰⁵ Victorian Corporate Affairs Office, "Registration of a Firm consisting of individuals only", dated 12 November 1957.

²⁰⁶ "PICTORIAL ROUND-UP", Listener *In-TV*, 14-20 December 1957, 14.

²⁰⁷ "Under a sputnik..... COUPLE SELL SONG TO RUSSIANS", *Herald*, 11 October 1958.

²⁰⁸ Sputnik 1 was launched into orbit of the earth on 4 October 1957. Sputnik 2 (with dog) was launched 3 November 1957.

²⁰⁹ NAA: A1336, 58093. See also "Under a sputnik.....COUPLE SELL SONG TO RUSSIANS", *Herald*, 11 October 1958.

²¹⁰ In April 1954, Vladimir Petrov, a Colonel in the Soviet intelligence service, defected in Sydney. A fortnight later his wife, Edvokia, also defected. It led to a severing of diplomatic relations between the USSR and Australia that would not be restored until 1959. It was the very height of the cold war. See further, Robert Manne, *The Petrov Affair*, 1987.

'Under a satellite sputnik...'

COUPLE SELL SONG TO RUSSIANS

Him THE WORDS

"My song will hypnotise Mr Khrushchev, and will bring peace to the world" beamed Australian composer Mrs Geza Laszloffy, happily.

Her husband hit a cymbal with a thimble.

They were celebrating the success of "Underneath a Satellite With You" — he wrote the words, she composed the music.

And the Russians, she says, will not doubt her for the song.

A LETTER to Russia has hit the charts. The Laszloffys are a well-known musical couple. Mrs Geza Laszloffy, 34, is a pianist and composer. Her husband, 30, is a lyricist. They met in 1949 and married in 1950. They have two children, a son and a daughter.

The Laszloffys are a well-known musical couple. Mrs Geza Laszloffy, 34, is a pianist and composer. Her husband, 30, is a lyricist. They met in 1949 and married in 1950. They have two children, a son and a daughter.

HER — music

THE LETTER from Russia.

Attention— PLASTIC MANUFACTURERS

Gym girls step out

WATKINS, SCOTT & CO.
16 SPRING STREET, SYDNEY.

Feting the Russians.

Herald coverage of the Laszloffy musical composition celebrating the flight of the Russian sputnik. 1958.

Courtesy State Library of Victoria.

from President Krushchev followed.²¹¹ Davis shone in the resultant publicity. "Reds Like Aust. Satellite song"²¹² and "Their song's best seller in Russia..."²¹³ were two of the headlines. Always the self-marketer Davis was (now) "a descendant of Johann Strauss" and expected "the song to make the hit parades when several Australian versions are recorded towards the end of the year".²¹⁴ It would also lead to a close association with Russian performers, in particular those from the Moscow Circus.²¹⁵ As the couple's interest in things Russian grew, it was matched by an interest in them by the then new Australian Security Intelligence Organisation (ASIO).²¹⁶ The combination of a Governor-General's

²¹¹ "Reds Like Aust. Satellite song", *Daily Telegraph*, 10 October 1958.

²¹² *Daily Telegraph*, 10 October 1958.

²¹³ *Herald*, 29 April 1959, 3.

²¹⁴ "Reds Like Aust. Satellite song", *Daily Telegraph*, 10 October 1958.

²¹⁵ Photographs and Moscow Circus programmes in the Elsa Davis Collection.

²¹⁶ Established 1949.

²¹⁷ NAA: A6119, 4204, International Bookshop Report 23 June 1968. Also monitored at this time for his purchase of the *Yugoslav Review* was Mr RA Jolly of Monash University. Jolly would later become Treasurer of Victoria (1982–1990).

surveillance. The memo of the supervising agent on the file concluded, “I really can’t see much point in taking this seriously and recommend NFA”.²¹⁸

For their part Laszloffy and Davis had appearances booked elsewhere.

Back to court: the case of the leaking gas heater

In September 1961 Geza Laszloffy made his first appearance on the Victorian Supreme Court stage. In a case that ran over four days he claimed £68,000 damages from the Myer Emporium Ltd, Metters KFB Pty Ltd and the Gas and Fuel Corporation. The action followed “an explosion” in March 1957 at Vale Street of a gas bath heater made by Metters and sold by Myers. Representing himself, self-styled as an “engineer” and “composer”, and with his limited English, Laszloffy claimed the heater was defective and the gas connections faulty. As a result he had suffered gas poisoning and his cultural and literary activities had been interfered with. “The inspiration does not come as it used to”, he said.²¹⁹ Had it not been for the incident, Laszloffy would have earned £41,000 from his compositional work in the next five years, he claimed.²²⁰

The claims were met with huge scepticism by the defendants. They argued that the heater did not leak and there was no evidence that it was faulty.²²¹ There was no medical evidence that the plaintiff had suffered injury although a hospital psychiatrist, in what was an ominous portent for the future, said Laszloffy suffered from epilepsy.²²² The defence also poured scorn on his composing claims. His works, *The Pineapple Cha Cha* (honouring the tour of Princess Alexandra) and the song *You are my Red Red Rose* (for Maurice Chevalier’s Australian tour), did not impress them.²²³ The presiding judge, Dean J, noted that Laszloffy had admitted he had not earned any money from his compositions in the five years before the accident.²²⁴ However, it was the appearance of Davis that attracted the most interest. In cross-examination she admitted that she was formerly Mrs Isaacs who was declared a vexatious litigant 20 years earlier in 1941. She went on to say that it was she who prepared the original statement of claim. It had been a document of 139 paragraphs and, in a procedural application in the Practice Court, it had been struck out by O’Bryan J before a new statement of claim was filed.²²⁵

²¹⁸ NAA: A6119, 4204, handwritten advice, 13 November 1974.

²¹⁹ “Composer’s £68,000 Claim Over Heater ‘Explosions’”, *The Age*, 7 September 1961.

²²⁰ Supreme Court of Victoria File M 4693 of 1963. See paragraph 3 Affidavit of Graham John Frederick Dethridge, sworn 22 July 1963 and “Composer Tells Court He Wrote Lyrics in Honour of Royalty”, *The Age*, 5 September 1961, 7; “Composer’s £68,000 Claim Over Heater ‘Explosions’”, *The Age*, 7 September 1961.

²²¹ “‘HEATER WASN’T DEFECTIVE’ – £68,000 CLAIM”, *Herald*, 5 September 1961.

²²² “Doctor’s evidence on ‘gas symptoms’”, *Herald*, 7 September 1961, 18.

²²³ “Composer Tells Court he Wrote Lyrics in Honour of Royalty”, *The Age*, 5 September 1961, 7.

²²⁴ “Composer’s £68,000 Claim Over Heater ‘Explosions’”, *The Age*, 7 September 1961.

²²⁵ “WIFE IN £68,000 CASE VEXATIOUS”, *The Sun*, 6 September 1961, 19. Bar legend suggests that it was most likely Richard (Dick) McGarvie (Victorian Governor 1992–

Justice Dean had heard enough and, on 7 September, dismissed the claim without calling defence evidence. The plaintiff's case was "artificial, unreal, imaginative and untrue". Laszloffy and Davis were "living in a world of fantasy and imagination". The resulting newspaper headlines were predictable: "Composer Fails in 'Startling' Claim for £68,000"²²⁶ and "He claimed £68,000: BATH HEATER SUIT FAILS".²²⁷ Laszloffy immediately appealed.²²⁸

Over the next two years Laszloffy issued a further nine writs. They had in common the "leaking gas heater" story, the original defendants and, increasingly, the lawyers who represented the defendants, in particular ST Frost QC, WB & O McCutcheon, Malleson Stewart and Co and Moule Hamilton and Derham.²²⁹ In August 1963 this group was joined by the State of Victoria, the Attorney-General, the County Court bailiff and the entire Board of the Gas and Fuel Corporation.²³⁰ Similarly, the causes of action, though criticised as "vague, disordered and of a highly vexatious nature"²³¹ canvassed repetitive themes of negligence, breach of contract and breach of statutory duty, escalating into allegations of malicious conspiracy and defamation.²³² All but one writ were struck out or lapsed. The one case that came to hearing was dismissed.²³³

In August 1963 Attorney-General Rylah moved that Laszloffy be declared a vexatious litigant. He relied on affidavits of court officials and of Graham Dethridge, a solicitor for one of the perennial defendants. Dethridge was in no doubt about the driving force in the Laszloffy litigation. After referring to the vexatious status of Davis, he said:

I have formed the opinion that Mrs Laszloffy is the motivating force in all these proceedings, and that she is merely using her husband as a figurehead to continue her abuse of the process of this Court.²³⁴

The hand of Davis can be seen in the two handwritten answering affidavits. Both in Davis' handwriting, the affidavit for Laszloffy simply rejected the Attorney-General's case and alleged a conspiracy by the lawyers to make

1997) who was briefed to oppose the first statement of claim. Having recently been appointed a QC, he was surprised that someone of his seniority had been briefed on what appeared to be a procedural application. He apparently returned from the Master's hearing exhausted. Interview with Jeremy Ruskin QC (counsel for *The Age* in later Davis litigation), 12 April 2005.

²²⁶ *The Age*, 8 September 1961, 13.

²²⁷ *Herald*, 7 September 1961.

²²⁸ Although appeal notices were served on the defendants it was never pursued. See Supreme Court of Victoria File M 4693 of 1963, paragraph 3 Affidavit of Graham John Frederick Dethridge, sworn 22 July 1963. Further references to this affidavit will commence with the short form "Dethridge".

²²⁹ Dethridge, n 229, paragraph 3.

²³⁰ Supreme Court of Victoria File M 4693 of 1963, paragraph 2 Affidavit of Percival Stanley Malbon, 22 August 1963.

²³¹ Dethridge, n 229, paragraph 13.

²³² Dethridge, n 229, paragraph 9.

²³³ Dethridge, n 229, paragraph 7.

²³⁴ Dethridge, n 229, paragraph 12.

money;²³⁵ that for Davis was altogether different. Over 80 paragraphs and 32 pages it canvassed the couple's musical careers, the facts of the "gas heater case", correspondence with court officials and a detailed explanation of why the Isaacs litigation was not vexatious. The affidavit finished with an attached copy of a 1959 letter to Davis from the then federal Treasurer, Harold Holt. He acknowledged receiving a recording of *Australia is My Home* and is interested to learn "it is receiving a good reception".²³⁶

Justice Sholl was not impressed. On 6 September 1963, almost two years to the day since the end of the original "gas heater" case, he declared Geza Laszloffy a vexatious litigant.²³⁷ Laszloffy was the fourth Victorian and fifth Australian so declared, but made his own piece of history as one half of the first married couple to have that status. This declaration, like the earlier ones, was not mentioned in the law reports. Although Laszloffy immediately appealed, his appeal was struck out two weeks later.²³⁸ Laszloffy did not move the fight to the High Court. The defendants, perhaps mindful of the Wridgway Bros error two decades earlier, did not pursue their costs through bankruptcy proceedings. For Laszloffy, it was the end of his career as a litigant.

Life goes on: a new career and a cult following

In 1966 Davis and her husband moved home. Her mother had given her 4 Vale Street, St Kilda. She promptly sold it to finance a move to another single-fronted brick villa at nearby 8 Hartbury Avenue, Elwood. This followed her lack of success in persuading the Local Government Minister, Rupert Hamer, to rezone the Vale Street area "light commercial".²³⁹ However, this contact did bring her to the attention of Hamer for later dealings.

From Elwood, Davis continued her established correspondence with crowned heads of Europe and political leaders of the world. Typically, her letters included copies of her compositions. The Secretariat of the Vatican

²³⁵ Supreme Court of Victoria File M 4693 of 1963, paragraph 1(b) Affidavit of Geza Laszloffy, sworn 2 September 1963.

²³⁶ Supreme Court of Victoria File M 4693 of 1963, Affidavit of Edna Laszloffy, sworn 2 September 1963.

²³⁷ Order of Sholl J dated 6 September 1963. See also "Engineer Declared Vexatious Litigant", *The Age*, 7 September 1963, 3 and "JUDGE CALLS LEAKING GAS CASE 'FRIVOLOUS'", *Melbourne Truth*, 2 November 1963, 9.

²³⁸ Supreme Court of Victoria File M 4693 of 1963, Order of Herring CJ dated 19 September 1963.

²³⁹ Interview with Alan and Barbara Leary, 23 January 2006. It was the intention of Rebecca (Davis) Frieze to give two of her daughters a property each in Vale Street, St Kilda. Edna was unsuccessful in her efforts to persuade her mother that sister Olga did not need a property as she had married well. When her mother died Olga inherited her mothers' property. No sooner had Davis sold her Vale Street property, having failed in having it rezoned, the area was rezoned and the property demolished. A two-storey office block now stands on the site. (Sir) Rupert Hamer was Minister for Local Government (1964–1971) in the Bolte Government. He was Premier of Victoria from 1972 to 1981.

responded saying that the “Sovereign Pontiff” conveyed “to the donor His warm appreciation of the sentiments of deferential homage which prompted this presentation”.²⁴⁰ The Private Secretary to the Queen was “commanded by The Queen to thank Mrs Edna Laszloffy for her good wishes for Christmas and the New Year”.²⁴¹ Prime Minister Menzies replied, on being knighted: “In my public life I have become so accustomed to controversy that it has given me uncommon pleasure to receive so many expressions of generous appreciation and warm friendliness. I thank you as does my wife”.²⁴² The Official Secretary to the Governor-General replied, congratulating Davis on her award by the USSR of the Lenin Commemoration Medal²⁴³ and the Chairman of the Queensland Sugar Board responded through his General Manager that “[y]our letter has been read with interest and Sir Alan joins us in thanking you for your remarks regarding sales of Australian raw sugar to Russia”.²⁴⁴ Even Laszloffy occasionally corresponded. In 1976 he wrote to High Court Justice Lionel Murphy on the subject of handwriting. Justice Murphy replied:

In an era when human skills are being discarded in favour of machine production, it is pleasing to know that one of our fellow citizens takes pride, and a well deserved pride, in writing by hand which was of course once the indispensable mark of a man of letters. Thank you for writing to me.²⁴⁵

For Davis, this correspondence was more than a considerable pastime. It represented proof of her status in the world as a composer/entertainer and of her extensive friendship network. She carried albums and copies in her bags wherever she went. Her home was crammed with scrapbooks and videos.²⁴⁶

Davis and Laszloffy also pursued their association with the eastern bloc, with Davis dedicating songs to the 90th anniversary of the birth of Bulgarian communist leader Georgi Dimitrov and to Bulgaria. Both were published and performed on the order of the Bulgarian Government.²⁴⁷ Davis and Laszloffy even toyed with emigrating to Russia but it came to nothing.²⁴⁸ Closer to home, they had other problems. Laszloffy’s mental health had declined and he spent increasing periods in psychiatric care.²⁴⁹ Davis continued to care for him,

²⁴⁰ Vatican Secretariat to Laszloffy, 7 December 1965. The Pope accepted her composition *The Peace Prayer Song*. See further, “The Pope accepts a Melbourne gift of Song”, *Herald*, undated, in the Elsa Davis Collection.

²⁴¹ Buckingham Palace to Laszloffy, 3 January 1972, in the Elsa Davis Collection.

²⁴² Menzies to Laszloffy, 14 April 1963, in the Elsa Davis Collection.

²⁴³ Tyrell to Laszloffy, 16 November 1970, in the Elsa Davis Collection.

²⁴⁴ General Manager CSR to Laszloffy, 25 February 1972, in the Elsa Davis Collection.

²⁴⁵ Murphy to Geza Laszloffy, 13 April 1976, in the Elsa Davis Collection.

²⁴⁶ Interviews with Mary Murphy 19 May 2005; Alan and Barbara Leary, 23 January 2006 and Paul Cox, 13 February 2006.

²⁴⁷ Marinov (Secretary of Bulgarian Composers) to Laszloffy, 16 October 1972, in the Elsa Davis Collection.

²⁴⁸ Crean (Minister for Immigration) to Geza Laszloffy, 2 January 1975, in the Elsa Davis Collection.

²⁴⁹ Letter from Queen Victoria Medical Centre to Admitting Officer, 26 July 1976, in the Elsa Davis Collection.

despite periods of volatility, but he would move increasingly to the background as her performance career bloomed once more.

In the early 1970s the Melbourne musical scene had started to explode as the rising tide of “baby boomers” reached adulthood and looked for entertainment. The development of live entertainment at pubs and restaurants followed. The vaudeville act of Davis that had worked so well in the silent movie theatres of the 1920s was naturally suited. Even though in her 60s, she quickly developed her “act”, gathered some zany outfits and obtained a theatrical agent. Her agent recalls:

Kids loved her. She was half entertainer and half sending herself up. She sang her own songs and could make them up quickly. People having birthdays and other celebratory parties would get her to sing a song for them. Part of her routine was to do tricks like bouncing a ball and dancing pirouettes, all without missing a beat at the piano.²⁵⁰

She performed regularly at the Harbourside Pub in Port Melbourne, the Victoria in Albert Park and the Barbeque Inn Cafe in Brighton Road, St Kilda. She also had a regular booking at the Shangri-La, a Chinese restaurant in Chinatown.²⁵¹ Publicity followed the appearances²⁵² and, before long, the then flourishing variety television shows discovered her. Davis’ obvious musical aptitude on piano and xylophone, her amusing act and non-threatening “grandmother” persona combined to make her a popular, even outlandish, regular guest on programmes such as “The Mike Walsh Show” (TCN 9), “The Don Lane Show” (GTV9) and “Good Morning Melbourne” (ATV0).²⁵³ She developed a minor cult following.

Elsa on TV with Don Lane.

TV personality Don Lane chats to Elsa “on air” about her international correspondence.

Circa 1978.

Courtesy Elsa Davis Collection.



²⁵⁰ Interview with Mary Murphy, 19 May 2005.

²⁵¹ *Ibid.*

²⁵² See, for example, Michael Morris, “Edna and Geza – Our space age composers”, *Nation Review*, 30 October 1972 and “Singer dogged by good luck”, *The Age*, 16 March 1977.

²⁵³ Davis taped her own radio and television performances. Copies are contained in the Elsa Davis Collection.

Nor did Davis forget her composing. Not only was she was working on an operetta celebrating the work of Dr Bradfield, the designer of the Sydney Harbour Bridge²⁵⁴ but, in 1979, she also had a particular triumph with the *Mighty Westgate Bridge*, written for the opening of that major arterial link in Melbourne. The tune was played at the opening of the Westgate Bridge by the RAAF Band and Davis was a special guest of Premier Hamer on the day. This also brought her generous television coverage, with Willessee at Channel Seven devoting two segments to her.²⁵⁵

But, despite these successes, Davis had not forgotten her other theatre, the law court.

The case of the dog catcher

In 1977 Davis found herself once more before the St Kilda court. This time it was as a defendant in a local by-laws prosecution for letting her German Pointer dog, “Captain”, wander at large. A dog lover, Davis was not one to let such a matter go unchallenged. She represented herself but was convicted and fined \$10. Incensed, she immediately appealed to the County Court and gathered publicity as she went. She told her audience on “The Mike Walsh Show” that, at the original hearing, although she “had all the law cases” she had lost. It was because the court “and the Town Hall are as thick as thieves”. Showing

flashes of both her determination and experience with Sir Isaac, she said, “I am going to appeal to the other courts. It will go as far as the High Court”.²⁵⁶ She told *The Age* that “she had been wronged and says she will go to jail rather than pay the fine”. “It’s not the money it’s the principle.”²⁵⁷

The appeal came before Judge McNab in the County Court in October 1977. Alive to the theatre of it all, Davis had borrowed a black



Appeal in “Dog Case”.

The Age coverage of the successful appeal on behalf of “Captain” the dog. 1977.

Courtesy State Library of Victoria.

²⁵⁴ See transcript of “Mike Walsh Show” (Channel Nine), 18 March 1982, in the Elsa Davis Collection. There is no evidence that the operetta was ever completed.

²⁵⁵ Copies are contained in the Elsa Davis Collection. Also see accompanying DVD.

²⁵⁶ Show aired on TCN9 (Sydney) in October 1977. See tape in the Elsa Davis Collection.

²⁵⁷ “I’d go to jail for dog: woman”, *The Age*, 22 July 1977.

robe from Crawford Productions so as to be appropriately attired.²⁵⁸ Given her courtroom and performing experience she was not in the least intimidated by the occasion and outrageously and irrelevantly cross-examined the prosecuting council officer on his private life.²⁵⁹ Struggling to control his laughter, Judge McNab confirmed the conviction but halved the fine to \$5. For Davis, this was a victory. Outside the court she told the waiting media that the judge was “quite a nice chappy”. Ominously, implying she still had a taste for court performances, she went on to say, “I gave them a good run for their money”.²⁶⁰

I am not eccentric!

As the 1980s progressed so did Davis’ new cabaret career. She continued to appear as Elsa Davis on national television and radio and even had a cameo part written for her in a 1986 Paul Cox film, *Cactus*.²⁶¹ She received regular newspaper publicity. The *Herald* gave her full coverage in a profile entitled “Bright lights still gleam for Elsa”, where she mused on doing a season in Las Vegas.²⁶² She also continued to insert herself into public affairs. She changed her name to “Dame Edna Every Age”²⁶³ to mimic the comic creation of Barry Humphries and then to Elsa “Phar Lap” Davis to celebrate a new film on the champion racehorse.²⁶⁴ Meanwhile, *The Age* reported on her latest compositions: *Ode to Bill* written on the birth of Prince William,²⁶⁵ *The 12th Commonwealth Games March*²⁶⁶ and *Flo’s Pumpkin Scones*, the last being dedicated to the wife of the then Premier of Queensland.²⁶⁷ *The Age* also reported that Davis was 56 years old, a slippage of some 19 years.²⁶⁸

In all of this Davis was playing a part. She was the lovable, talented entertainer who loved being the centre of attention. However, friends conceded that she was hard to get close to and was coy about her age and background, particularly the Isaacs litigation. When cornered in conversation she would turn her head to the side, use a “girly” voice and side-step the issue. Nonetheless, her friends loved her “fire” and her originality.²⁶⁹

It was this same originality that was the catalyst for her next and last big court case. For some time the live theatre and cabaret critic for *The Age*, Peter

²⁵⁸ Interview with Mary Murphy, 19 May 2005.

²⁵⁹ *Ibid.*

²⁶⁰ “Judge halves fine over ‘lovely dog’”, *The Age*, 7 October 1977.

²⁶¹ Interview with Paul Cox, 13 February 2006.

²⁶² Dorothy Goodwin, *Herald*, 11 October 1983, 25.

²⁶³ Victorian Corporate Affairs Office, “Certificate of Registration of Business Name”, 16 June 1981, in the Elsa Davis Collection.

²⁶⁴ Victorian Corporate Affairs Office, “Certificate of Registration of Business Name”, 28 October 1982, in the Elsa Davis Collection.

²⁶⁵ “Ode to Bill”, *The Age*, 30 June 1982.

²⁶⁶ *The Age*, 1 October 1982.

²⁶⁷ Sir Joh Bjelke-Petersen was Premier of Queensland from 1968 to 1987.

²⁶⁸ *The Age*, 1 October 1982.

²⁶⁹ Interviews with Mary Murphy, 19 May 2005; and Paul Cox, 13 February 2006.

Weiniger, had enjoyed the Davis performances. In a review in October 1980 he said of her:

Sharing the bill in what is one of the most adventurous shows staged at the Flying Trapeze since the heyday of radical cabaret is Melbourne's ageless eccentric Elsa Davis. Surely one of our most enduring institutions, Davis with her ditties honouring the Royal Family and the Liberal Party, has been acknowledged for her excellence from Buckingham Palace to Spring Street.

Seated at her piano, dressed in dazzling sequins, she enthralls her audience with renditions of "Waltzing Matilda" as Beethoven and Mendelssohn would have composed our national song.

The undoubted highlight of the show is an operatic number Davis performs assisted by Ringbarkus. It captures all the madcap zeal of the Marx Brothers in "Night at the Opera".²⁷⁰

Three years later Weiniger said of her:

Rounding off the evening is the indestructible Elsa Davis, composer of such epics as "Ode to Phar Lap". Miss Davis once played honky-tonk piano accompanied by a singing dog. Here she performs solo and it is a tribute to her artistry that the absence of the canine is hardly noticeable.²⁷¹

In 1984 Davis acted on these reviews. She believed she had been defamed by the use of the words "ageless eccentric" and "indestructible". She applied before Crockett J in the Supreme Court for leave to sue *The Age* for defamation. She told the judge that the articles were "out to ruin her reputation as a singer and a composer".²⁷² She was not flattered at being described as an eccentric. Quoting from *Roget's Thesaurus*, she referred to alternative meanings of "freak, crankpot, crotchety, quirky, dotty, kinky, screwy, non-conformist, strange duck".²⁷³ Justice Crockett granted the application.²⁷⁴ In 40 years Davis had sought leave twice and had been successful on both occasions. Banner headlines followed the decision: "WALSH STAR SUES: \$1MIL LIBEL WRIT".²⁷⁵

The case did not get to trial until 1988, just as Davis approached her 81st birthday.

Previously, Jeremy Ruskin, counsel for *The Age*, had cautioned his instructing solicitor Tony Smith to prepare for trial, "as litigants like Davis never settle".²⁷⁶ Tony Smith would have known that, as he had been a key

²⁷⁰ *The Age*, 30 October 1980.

²⁷¹ Peter Weiniger, "Sharp, varied young comic", *The Age*, 2 March 1983.

²⁷² "Court gives Elsa Davis leave to sue 'The Age'", *The Age*, 11 December 1984.

²⁷³ *Ibid.*

²⁷⁴ Pamela Pinto, "Entertainer seeks permission to sue", *The Age*, 8 December 1984.

²⁷⁵ *Truth*, December 1984, in the Elsa Davis Collection.

²⁷⁶ Interview with Jeremy Ruskin (counsel for *The Age*), 12 April 2005.

participant in the litigation that saw Constance Bienvenu declared a vexatious litigant 16 years earlier.²⁷⁷

At the trial before O'Bryan J, a jury of six and a packed gallery, Davis appeared for herself "dressed in a striking blue floral dress and matching sandals". She denied that she was an eccentric and suggested that the word "put a blot and a stigma on a person".²⁷⁸ To prove her musical prowess she played tapes of her music, including the *Westgate Bridge March*. She also denied she played the "honky-tonk" as she usually played on a Steinway or a Yamaha. Further, she had not sung with a dog: "Dogs don't sing. They bark". When asked how old she was, she replied, "gentlemen don't ask ladies their age".²⁷⁹

Pivotal to the defence case was the denial by Davis that she had ever sung with a dog. To counter this, Ruskin played a video of the 2000th edition of "The Mike Walsh Show" with Davis at the piano and the Channel Nine dog, "Wombat", howling beside her.²⁸⁰ The court was reduced to hysterics. It took the jury 37 minutes to decide that Davis had not been defamed.²⁸¹ Outside the court, Davis told the waiting media that Ruskin had put up "a very good fight" and that the judge had been "wonderful". She went on to say "she had received a lot of good publicity from the case and said she would be well supported in her appeal to the High Court".²⁸² It was not to be. Davis died 11 months later in October 1989, before the appeal was heard. As if to have the last word over Sir Isaac, she was cremated, following a service led by Rabbi John Levi, under the name Edna Isaacs.²⁸³ She was 82. Reporting her passing, Brian Naylor on the Channel Seven television news described her performance in *The Age* case as "the best of her life".²⁸⁴

Geza Laszloffy died in 2002.²⁸⁵

²⁷⁷ Simon Smith, "Constance May Bienvenu: Animal Welfare Activist to Vexatious Litigant", (2007) 11 *Legal History*, 31, 54. See also Chapter Eight.

²⁷⁸ "Elsa the lion-hearted", *Sun*, 25 November 1988.

²⁷⁹ *Ibid.*

²⁸⁰ The use of the VCR in court was one of the first times that the technology had been used before O'Bryan J. His Honour had expected a film projector. He was so interested in the technology that he came down from the bench to view it more closely. Interview with Jeremy Ruskin, 12 April 2005. See also, "Libel suit ignores free speech, court told", *The Age*, 26 November 1988.

²⁸¹ "Elsa Davis Loses case against newspaper", *Herald*, 28 November 1988, 1 and "Entertainer not defamed: court", *The Age*, 29 November 1988.

²⁸² "Entertainer not defamed: court", *The Age*, 29 November 1988.

²⁸³ See [http://www.necropolis.com.au/search/\(qhmo3gy3ohh3p5bt4eehnd45\)/Detail.aspx](http://www.necropolis.com.au/search/(qhmo3gy3ohh3p5bt4eehnd45)/Detail.aspx) (19 May 2005). During the 1980s she had received an age pension in the name "Edna F Isaacs". Correspondence located in the Elsa Davis Collection.

²⁸⁴ "Channel Seven News", 7 October 1989.

²⁸⁵ Laszloffy continued to live on at 8 Hartbury Street, Elwood, after the death of Davis. As his mental and physical health declined he came under the care of the Victorian Public Trustee. During this period the various papers, audiotapes and videotapes belonging to Davis were moved to her sister's family for safekeeping. Interview with Alan and Barbara Leary, 23 January 2006.

Conclusion

Of all the threads that run through the life of Davis, the one that resonates strongest is that of entertainer. In court appearances that spanned 50 years she could be said to have played the role of litigant, as she defined it, according to the circumstances of the time. Talented, theatrical, energetic and single-minded, she was a natural performer and thrived “on stage”. She was also a flirt, vain, selfish, unreasonable and loose with the truth. Certainly, as times changed and as she was increasingly able to wrap herself in the cloak of the “cheeky grandmother”, the performances mellowed. In the early cases (“Westbury”, “Isaacs”, “Hullabaloo” and “Laszloffy”), the result was an important driver but, in the later cases (“the dog catcher” and “*The Age*”) it was almost as if the performance was the thing and the result incidental. In “Westbury” she was the naïve pianoforte teacher/artiste and in “Isaacs” and “Hullabaloo” the wronged wife combating the combined forces of the legal establishment. In “the dog catcher” she was the citizen taking on the officious City Hall and in “*The Age* case” she was fighting for the artistic integrity of the performer. Only in “Laszloffy” is her role possibly of a more Machiavellian nature.

Although the Isaacs litigation defined Davis as a vexatious litigant, the evidence suggests that what started out as a genuine grievance in “the ring case” only escalated when Davis refused to yield to the superior resources and legal networks of Sir Isaac. It was never Sir Isaac’s grievance. It appears that John Isaacs’s failing health gave effective carriage of the litigation to Sir Isaac and that his rigid Victorian-era moral code appears to have made him unable to contemplate negotiating a commercial settlement at an early stage. This point is emphasised by the way Sir Isaac quietly obtained title, then sold and absorbed the proceeds of the major matrimonial asset, the Goodall Street property. Had he been open to a compromise, the litigation that followed may never have occurred. Certainly, Wridgway Bros made that decision and saw their involvement cease. Sir Isaac’s inflexibility was what kept the litigation going. Interestingly, his involvement in the litigation was mentioned only



Davis loses defamation case against *The Age*.

Davis leaves court after losing her last court case. *The Herald*. 1988.

Courtesy State Library of Victoria.

briefly by his biographer (Sir) Zelman Cowen, who simply noted that Sir Isaac “was deeply involved and expressed himself vehemently and with anger”.²⁸⁶ Another eminent commentator, John Barry, was more forthright. He wrote:

His family loyalties were strong to the point of irrationality and his partisanship in the litigation arising out of his brother’s marriage was enthusiastic and undignified.

And:

It was saddening to see a man of Isaac’s eminence in law and public life behaving with a venom and lack of reason that would have been deplorable even in a vexatious litigant.²⁸⁷

The intensity of the Isaacs litigation also drew in other participants in ways that do not reflect well on their professional abilities to remain impartial and fair. For example, the advice of Gorman KC to move the major matrimonial asset, 1 Goodall Street, out of the name of the husband into the name of Sir Isaac may have been legally permissible but was ethically suspect. For his part, Foster J, though provoked, overreacted in sentencing Davis, in her absence, to gaol for contempt. Further, Clyne J and Mulvany (counsel) should have excused themselves from continuing roles in the proceedings. Their continued participation over a decade reflects poorly on them and the system and raises perceptions of bias. Similarly, Attorney-General Bailey initiated the vexatious application after only 18 months and nine unsuccessful superior court proceedings. Compared to other vexatious applications this sits very much at the lower threshold and suggests that the political consideration of protecting the distinguished Sir Isaac was a key factor in hastening the vexatious application.²⁸⁸ The fact that the decision (and the decision regarding Laszloffy) was not reported in the law reports, despite its rarity, also suggests a legal establishment anxious to minimise embarrassment to a distinguished member. All these examples indicate how the litigant-in-person, particularly one as determined as Davis, challenges the forms, procedures and professional advocates of the legal system and how sometimes, under stress, they fail.

The Davis cases also tell us that the vexatious litigant sanction is far from absolute in its effectiveness. It may ban the litigant from issuing new proceedings unless they obtain prior leave, but it does not stop them defending or operating in other jurisdictions, as the Isaacs bankruptcy cases in the Federal and High Courts and “the dog catcher” case show. In addition, the Laszloffy case is a reminder that it is always possible for the litigant to pull the strings

²⁸⁶ Zelman Cowen, *Isaac Isaacs*, 1967, 221.

²⁸⁷ Barry, J, “From Yackandandah to Yarralumla: the Enigma of Isaac Isaacs”, (1967) XV1 *Meanjin*, 449.

²⁸⁸ Rupert Millane (1930) had issued over 200 unsuccessful proceedings before vexatious litigant proceedings were taken against him. The volume of his litigation sits at the upper threshold of “habitual and persistent”. See Chapter Four.

through someone else. Indeed, the continuing vexatious status of Davis would be arguable were it not for the Laszloffy case. After the Isaacs litigation, unlike other vexatious litigants, she did not single-mindedly persist with repetitive litigation seeking to redress the initial (Isaacs) grievance. Indeed, “the dog catcher” and “*The Age*” cases can be fairly described as unrelated, reasonable and “one-offs”.

So was Davis a querulent in terms of the Mullens and Lester definition? Her age and determination fit the profile, although as with Barlow (Chapter Five) her gender places her in the unusual category. Undoubtedly, Davis’ documentation exhibited the typical characteristics in both form and content. It was voluminous, contained irrelevant attachments and made generous use of underlinings and capitalisation. It was also rambling and characterised by repetition and rhetorical statements. However, there are departures from the profile. Davis was clearly able to form relationships and function quite effectively in the wider community. She could also draw a line in her litigation. The Isaacs litigation that defined her as a vexatious litigant persisted only because of the equal determination of Sir Isaac. Accordingly, I would suggest that the querulent behaviour of Davis is at the lower end of the spectrum. Even if it had been diagnosed as such at the time, it is unlikely to have translated into a multidisciplinary approach that she would have accepted.

Whatever one’s view about Davis the litigant, it is clear that she was a talented performer. One can only wonder whether, had she not been distracted for a decade by the struggle with Sir Isaac, her performing career might have continued on to greater, even international heights? In her later years her larger than life persona added colour to the legal system and the live music scene and she can, despite her exception to the term, be truly described as an eccentric. In the words of one her closest friends, film-maker Paul Cox: “She was a remarkable character. A giant amongst Melbourne’s most original artists”.²⁸⁹

²⁸⁹ Interview, 13 February 2006.



CHAPTER SEVEN

Goldsmith Collins

Footballer, fencer, maverick litigator

Unquestionably, Rupert Frederick Millane (1887–1969), the subject of Chapter Four, was the pioneer of the Australian “vexatious bar”. It was his extraordinary flood of unsuccessful litigation in the 1920s, mainly against the Melbourne and Heidelberg Councils, that led to the vexatious litigant sanction being enacted in 1928 in Victoria. But if Millane was the leader, then his associate (for a time), Goldsmith “Goldie” Collins (1901–1982), was his natural successor.¹ Indeed, as Francis QC has noted:

The ‘fifties, the era of Dixon and Fullagar, is often regarded by Victorians as the golden age of the High Court. It was, even more certainly, the golden age of the great vexatious litigants — Millane and Collins.²

Early life and football

The origin of the Collins family is somewhat obscure. What is known has been drawn from official records and the determined research efforts of football historians. Considerable attempts by me to locate and engage with direct descendants failed, as did earlier attempts by football historians. Most likely this reflects the rawness that still attaches to the sensational nature of the litigation and the subsequent breakdown of family relationships.

Born in 1901, in the Melbourne suburb of Malvern, Collins was the third of five children of John and Selina (Curtis) Collins. At the time his father was a dairyman.³ Soon thereafter the family moved to 588 Nicholson Street, Carlton, where Collins attended Lee Street Primary School.⁴ However, it was in Australian Rules football that the Collins family rose to prominence, with

¹ Charles Francis QC penned the description of Millane as the “leader of the vexatious bar” in a 1982 obituary he wrote for Collins. See further, Charles Francis, “Valete Goldie”, *Victorian Bar News*, Winter Edition, 1982, 20.

² *Ibid*, 21.

³ See further, Victoria, Births, Deaths and Marriages, Victoria registered death 17817/1982.

⁴ See <http://www.unimelb.edu.au/infoserv/lee/htm/slates.htm> (7 August 2007).

three of the four sons playing at the highest level. An older brother, Harold, played for Fitzroy in the period 1912 to 1915 but his career was interrupted by service in the Great War. Harold was killed in action late in 1918.⁵ The youngest brother, Norman, played 92 games with Fitzroy, Carlton and Hawthorn in the period 1924 to 1933.⁶ Tragically, Norman took his own life in August 1933.⁷ The loss of two brothers in such tragic circumstances must have had some impact on the mental health and subsequent behaviour of Goldsmith Collins.

However, on the football field Goldsmith Collins shone, winning high honours. He debuted for Fitzroy in 1922 as a “burly” ruckman and was a force in that team’s 1922 premiership win. That year Melbourne journalists recognised him as the best player of the year and awarded him the prestigious title “Champion of the Colony”⁸ — a measure of the impact he made. The following season brought further success with selection in the Victorian State team and the award of his club’s “best and fairest” trophy. Then in the 1923 Grand Final Essendon defeated Fitzroy. Collins was well held and “took a tremendous battering and was awarded eight free kicks”.⁹ One legal commentator would later suggest that the head injuries Collins suffered in that and subsequent matches partly explained the aggressive and confused behaviour he exhibited in his litigation.¹⁰

Certainly, the following year, Collins’ aggressive on-field behaviour saw him in conflict, perhaps for the first time, with the law. He was suspended for a total of 10 matches because of two separate incidents



Goldsmith Collins.

Goldsmith Collins aged 21 in Victorian Football Team jersey. 1922.

Courtesy Australian Football League..

⁵ Harold Collins DCM was killed in action in France on 10 August 1918. See further, Jim Main and David Allen, *Fallen: the ultimate heroes: footballers who never returned from the war*, 2002, 37-38.

⁶ Main and Allen, n 5, 38.

⁷ Public Record Office of Victoria, VPRS 24/P0, Unit 1249, Coroner’s Inquisition, 29 August 1933. Further reference to material from this archival source will be in the short form “PROV”.

⁸ This award was presented annually between 1858 and 1945 based on the votes of leading football journalists. The Brownlow Medal that was established in 1924 gradually overtook its pre-eminent position. See further at http://en.wikipedia.org/wiki/Champion_of_the_Colony (10 August 2007) and Chris Donald, *Fitzroy: For the love of the Jumper*, 2002, 78-79.

⁹ Chris Donald, *Fitzroy: For the love of the Jumper*, 2002, 79.

¹⁰ Interview with Charles Francis, 17 March 2005.

and, as a result, he missed the entire 1925 season. Upon his return in 1926 Collins was again involved in a violent on-field incident and was suspended for a further eight games. Over the next two years he played only seven more games and retired at the end of the 1928 season aged 27, having played a total of 64 games.¹¹ His public persona thereafter was commonly introduced by the words “ex-footballer”.¹²

With his playing days behind him, Collins appears to have concentrated on building a successful electroplating,¹³ used car and second-hand metal business in Carlton and later Northcote. Although he does not appear to have completed a formal course he often described himself as “Engineer”. By 1936 he was sufficiently established to buy outright a double-fronted house at 29 Andrew Street, Northcote¹⁴ and to get married. He was 35 and his bride, Beryl Ada Storey, 22.¹⁵ Later that year they would celebrate the arrival of the first of four children, a son.¹⁶ For the next 10 years life for Collins appears to have been a comfortable mix of business, membership of the Fitzroy Football Club Committee,¹⁷ socialising with mates from football days¹⁸ and life with a young family. However, Collins’ life would soon start to disintegrate.

“When is a fence not a fence?” — and the birth of a grievance

In 1947, aged 46, Collins had leased a narrow, vacant block of land at 404 High Street, Northcote, on which to store used vehicles. Opposite a local cinema, the block of land was bordered by a laneway and went through to the street

¹¹ Chris Donald, *Fitzroy: For the love of the Jumper*, 2002, 79.

¹² See, for example “Move against ex-footballer”, *Herald*, 20 March 1953 and “Ex-Footballer’s Tackles Require Judge’s Permit”, *Truth*, 4 April 1953, 4.

¹³ In the late 1930s Collins ran the electroplating business from a large galvanised shed at the rear of his parents’ property at 588 Nicholson Street, Carlton. He employed six men, a number of whom were ex-footballers. The business made sports trophies, silver trays etc. Telephone interview with Jack Campbell (apprenticed to Collins 1934–39), 1 October 2007.

¹⁴ See Victoria, Department of Sustainability and Environment, Certificate of Title Volume 5100 Folio 934. The transfer was registered on 10 June 1936 and shows Collins bought the property without need for a mortgage. His occupation was electroplater.

¹⁵ Possibly he met her at O’Shea’s Dancing School in Swanston Street, Melbourne. It was at the Saturday night classes in 1934 that he met Jack Campbell to whom he later offered a job as an apprentice in his electroplating business. Campbell had the distinct impression that Collins was “looking for a wife”. Campbell, n 13.

¹⁶ Victoria, Birth, Deaths and Marriages, Victoria registered death 17817/1982. The certificate lists the names of the children as John, Janice, Harold and Irene.

¹⁷ Donald, n 11, 79.

¹⁸ Wal Reid was a Fitzroy team mate. He provided Collins with financial advice. His daughter recalls Collins as a mild-mannered man who was “clever”. He came regularly to see her father. Interview with Val (Reid) Brooks, 20 September 2006.

behind.¹⁹ The collection of old cars and trucks that rapidly built up on the site was an irritation to other local businesses²⁰ but it was Collins' own fencing of the site that brought him into major conflict with the Northcote City Council (NCC). Relations between the NCC and Collins had started to deteriorate in July 1947 after complaints that Collins was storing business materials at his home, 29 Andrew Street. It had brought a visit from the local Health Inspector, followed by a written rebuke from the long-serving and influential Town Clerk, John Thomson.²¹ By November 1947 Thomson had become aware that Collins had fenced the High Street property without obtaining a permit. In a helpful tone he wrote:

I have to inform you that under the Uniform building regulations, which are now in operation, you should have obtained a permit before proceeding with the erection of the fence.

It is desired that you will submit a detailed specification to the Building Surveyor, and if he is satisfied with the specification a permit will be issued.²²

Collins responded, claiming that he had only erected gates and that an inspector had informed him that a permit was not needed for gates.²³ In reply, Thomson declined to comment on the inspector's statement and noted that in any event "it certainly does not cover the iron fence you have erected on the lane".²⁴ He went on to quote part of the 1945 Victorian *Uniform Building Regulations*:

No fence on or within 10 feet of any street alignment (Street includes a lane) shall be constructed except in accordance with a plan and specification submitted to and approved by the Surveyor.²⁵

Collins was given seven days to comply or face legal action.²⁶

By March 1948 Collins had not complied. Instead, he had written an omnibus response to Thomson, requesting a concrete crossing outside 29 Andrew Street, complaining about road conditions for trucks in Northcote and asserting that a councillor had agreed that a permit was not necessary. Thomson sent a full but firm letter in reply and, in a spirit of conciliation, concluded: "If you would

¹⁹ The site, owned by Johnson and McMillan Pty Ltd, was rented to Collins through a local real estate firm FW Stott and Son. According to a staff member of the time, Collins only ever paid one rental payment for use of the land and was eventually evicted. See interview with Jack Parks, 6 April 2005.

²⁰ PROV, VPRS 3202/P0, Unit 65, Town Clerk to Collins, 12 March 1948. This was the start of a direct correspondence with Collins that would last until 1951 and number 31 letters. Further reference to letters from this source will be in the short form "NCC Letters".

²¹ NCC Letters, n 24, Town Clerk to Collins, 2 July 1947. Thomson was a long time NCC employee, being first employed in 1906. He died in 1956. See further, Andrew Lemon, *The Northcote Side of the River*, 1983, 255.

²² NCC Letters, n 20, Town Clerk to Collins, 12 November 1947.

²³ NCC Letters, n 20, Town Clerk to Collins, 13 November 1948. This letter appears to have been misdated. The correct date would appear to be 13 December 1947.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

care to see me I will be in the office on Monday morning and will be glad to discuss all your difficulties with you".²⁷ Collins did not so care and, later that month, the NCC authorised the Building Surveyor to prosecute him for erecting a fence without a permit.²⁸ The precise legal basis for the prosecution was somewhat confused and became a major grievance for Collins. In fact, the 1945 implementation of State-wide *Uniform Building Regulations* (UBRs) had overtaken many of the provisions of earlier local by-laws upon which the NCC relied, particularly By-law 34 as amended by By-law 72.²⁹ Collins would argue that these were invalid, having been superseded by the UBRs.³⁰ This sowed the seeds of a grievance that would later be characterised by one appeal judge as "genuine".³¹

The prosecution reached the Northcote Petty Sessions Court on 4 May 1948. Francis Lonie prosecuted. His firm, Maddock, Lonie and Chisholm (Maddocks), local government specialists, were the NCC's solicitors. Council Engineer Alan Hill and Building Inspector Alexander McKinnon gave evidence that the fence was not only constructed without a permit, but part of it was of corrugated iron and second-hand timber and was "jerry built".³² All these parties found themselves embroiled in the subsequent litigation.

Collins conducted his own defence. Not only had he used new timber, "he had not constructed a fence at all, but gates, which swung open to allow for trucks to be driven out". He told the court that the entire frontage was made of gates.³³ The court did not agree. It was a fence and it did not have a permit. Collins was fined £5 and £3.10s.6d costs.³⁴ The local paper introduced its story on the case with the lines "When is a fence not a fence? 'When it is a gate,' said Goldsmith Collins".³⁵

²⁷ NCC Letters, n 20, Town Clerk to Collins, 12 March 1948.

²⁸ Darebin City Council, 'Minutes of Northcote City Council', 22 March 1948, 51. Located with Darebin City Council at Preston. Further reference to these minutes will be in the short form "NCC Minutes".

²⁹ NCC Letters, n 20, Town Clerk to Collins, 10 August 1950. See also NCC Minutes, n 28, 6 June 1949, 354.

³⁰ Supreme Court of Victoria, file M2072, paragraph 3, Affidavit of Goldsmith Collins, sworn 20 March 1953. Further reference to material from this file will be in the short form "Supreme Court file".

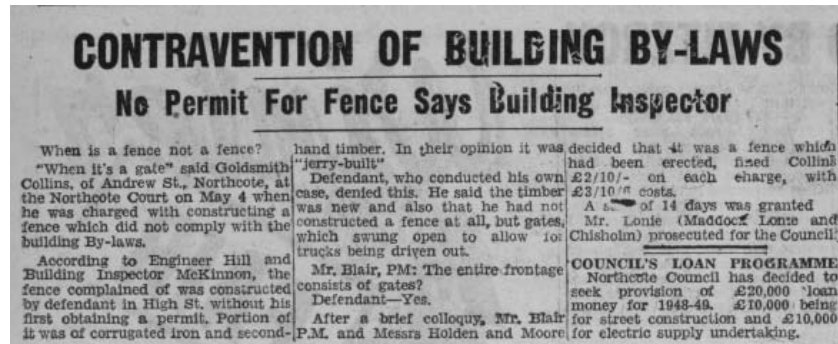
³¹ *R v Collins* [1954] VLR 46. See comments of Sholl J at 58. See also Graham Fricke, "The Injustice Collectors", (1978) 58 *ALJ*, 316.

³² "CONTRAVENTION OF BUILDING BY-LAWS", *The Leader*, 12 May 1948, 14.

³³ *Ibid.* Collins argued that each gate was independently affixed in front of each car and was thus not a fence. See further, "DAMAGES ACTION FAILS", *The Leader*, 21 June 1950, 16.

³⁴ "DAMAGES ACTION FAILS", *The Leader*, 21 June 1950, 16.

³⁵ *Ibid.* The case would later be used by author Frank Hardy as the basis for the central character in a book. See further, Frank Hardy, *Warrant of Distress by Oscar Oswald*, 1983, 6–7.



The fence dispute.

Local newspaper coverage of the "fence dispute". 1948

"Northcote Leader".

Courtesy State Library of Victoria..

Collins did not accept the decision and had it reviewed in the Supreme Court. Subsequent interventions suggest that a young barrister, Murray McInerney,³⁶ represented him and that another barrister, John Norris,³⁷ appeared for the other side. Although McInerney does not appear to have played an active role thereafter, Collins came to see Norris as an arch enemy. In any event, it was probably the last time Collins was represented. The case came before Fullagar J on 21 July 1948 but was dismissed.³⁸ An aggrieved Collins promptly mailed his own notice of appeal to the Melbourne Registry of the High Court, foreshadowing an appeal, a practice that he would follow for the next 25 years.³⁹ He also posted a copy to the NCC, although for some reason he did not pursue the appeal.⁴⁰ In the meantime, he sought to have the NCC withdraw the enforcement of the fine but was unsuccessful. Thomson replied to the request, saying that "was not within the Council's authority" and suggested

³⁶ Although McInerney does not appear to have played an active part in the Collins litigation hereafter, for Collins he remained "one of the few gentlemen I have met in my hectic course in the law". See further Supreme Court File, n 30, paragraph 3 Affidavit of Goldsmith Collins, sworn 20 March 1953. Murray Vincent McInerney (1911–1988) was a Supreme Court judge 1965–1983. He was knighted in 1977.

³⁷ Supreme Court File, n 30, paragraph 3 Affidavit of Goldsmith Collins, sworn 20 March 1953. John Norris (1903–1990) served on the Supreme Court 1968–1975. He was knighted in 1981. His daughter Rosemary Balmford also served on the Supreme Court 1996–2003.

³⁸ The decision was unreported but is referred to in a memorandum of the then Principal Registrar of the High Court. See further, High Court of Australia, Canberra, File 80/0452, Memorandum of Principal Registrar Hardman, paragraph 1, dated 13 May 1952. Further reference to this source will be in the short form "High Court file".

³⁹ Commonly, Collins would push his papers across the Registry counter with the filing fee and promptly leave. Interview with Frank Jones (High Court Registrar 1980–1995) 26 February 2005.

⁴⁰ High Court file, n 38, paragraph 1, dated 13 May 1952. See also NCC Letters, n 20, Town Clerk to Collins, 4 August 1948.

Collins have McInerney contact the police.⁴¹ For the next year things were quiet but, by June 1949, the continued presence of the fence had become too much for the NCC. On 6 June 1949 they ordered its demolition.⁴²

The demolition a few days later caught the interest of the local community and the local paper recorded the event:

Residents are speculating on the story “behind the fence”. Last Thursday morning a fence around a vacant High Street block on which there were a number of old cars etc, was removed by a council gang. Parked nearby was a truck covered with placards and slogans. The workmen, after demolishing the fence, loaded it onto a lorry and drove off. The placard truck was seen around the streets for some time. On Friday morning, the fence was back around the allotment. It seems likely that there will be some legal reverberations over the matter.⁴³

Reverberations there were. Once more the NCC directed a prosecution, again based on “No 34 of the City of Northcote as amended by By-Law 72”.⁴⁴ When the prosecution reached the Northcote court in July 1949 it was a re-run of the issues argued 12 months earlier and with the same players. Francis Lonie prosecuted, saying that the NCC took a serious view of the matter as they considered Collins to be “defying them”.⁴⁵ Building Inspector McKinnon again told the court of a “weird contraption” made partly of rusty iron wired to vehicles and partly of wired netting, with the High Street frontage consisting of folding concertinaed steel. It was “dilapidated and dangerous, and an eyesore”.⁴⁶ City Engineer Hill gave evidence that the fence did not comply with the NCC’s regulations, it did not have a permit and Collins had constructed the fence without first submitting plans. Collins, again representing himself, said he had not erected a fence; it was “a gate, or series of gates”.⁴⁷ The court thought otherwise and again convicted and fined Collins £30 and £3.6s costs. Once more, and ominously, Collins wrote to Thomson indicating he would take action to “restrain” the NCC.⁴⁸ He did, commencing three Supreme Court actions. The first sought a further review of the convictions and the second an order that the NCC allow him to fence his property and otherwise not interfere in his business. These actions did not come before the Supreme Court until June 1950.⁴⁹ The third, a damages action, would lapse in 1951.⁵⁰

⁴¹ NCC Letters, n 24, Town Clerk to Collins, 20 May 1948.

⁴² NCC Minutes, n 28, 6 June 1949, 354. The fence was demolished on 9 June, 1949. See further, NCC Letters, n 24, Town Clerk to Maddock, Lonie and Chisholm, 31 July 1950.

⁴³ “Story of a Fence”, *The Leader*, 15 June 1949, 13.

⁴⁴ NCC Minutes, n 28, 20 June 1949, 365.

⁴⁵ “Fence was an Eye-sore”, *The Leader*, 3 August 1949, 3.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* See also NCC Letters, n 20, Town Clerk to Collins, 27 July 1949.

⁴⁹ High Court file, n 38, Hardman Memorandum, paragraph 2.

⁵⁰ Supreme Court file, n 30, paragraph 6 Affidavit of Francis Hay Lonie, sworn March 1953.

The descent into litigation

By 1950 Collins' life had become complicated. Under eviction pressure at 404 High Street for non-payment of rent,⁵¹ he was also in trouble with the NCC on two new fronts. First, he had flagged his intention to carry out his own electrical works at 18 Walker Street, Northcote, a property he had recently purchased abutting the Merri Creek. He required the NCC, as the relevant electrical authority, to connect the premises. They hesitated, as this was a condemned property under section 10 of the *Slum Reclamation and Housing Act 1938* (Vic).⁵² Collins not only rejected the invitation of Thomson to come and discuss it, he also irrelevantly complained about the use of the NCC bulldozer for carrying a piano from the Town Hall.⁵³ More significantly, he had erected another fence, this time at Walker Street and Thomson wrote requesting an explanation as to "why you should not be prosecuted for carrying out the work without a permit and contrary to the regulations".⁵⁴ Collins wrote two letters in response and accused Thomson of libelling him in his letters.⁵⁵ On 19 June 1950 the NCC resolved to bring another prosecution.⁵⁶

Collins was also busy in court. On 8 June 1950 Herring CJ in the Supreme Court had dismissed, with costs, Collins' further attempt to review his convictions, particularly his infringement of By-law 72. An application in the Full High Court for special leave to appeal that decision, made later that day, was also dismissed. However, Kitto and McTiernan JJ did rule that a fresh application could be made if Collins was "advised by counsel that there were other grounds open in addition to whether the structure was a fence".⁵⁷ The following week, on 15 June 1950, back in the Supreme Court, Dean J dismissed Collins' earlier applications for orders compelling the NCC "to permit him to erect fences and gates" and an injunction restraining the "Council from interfering with his business".⁵⁸ To Dean J these applications were "frivolous and an abuse of the processes of the court". Again, costs were awarded against Collins.⁵⁹

⁵¹ The landlords, Arthur Adamson and Co, would obtain a formal possession order in June 1951 but Collins would appeal it through to the High Court. See High Court file, n 38, Hardman Memorandum. See also NCC Letters, n 20, Town Clerk to Collins, 4 August 1948.

⁵² NCC Letters, n 20, Town Clerk to Collins, 14 April 1950. In 1958 the Housing Commission would eventually take over the site and build low-income housing (flats). See further NCC Letters, n 20, Town Clerk to Maddock, Lonie and Chisholm, 14 July 1950 and Victoria, Department of Sustainability and Environment, Certificate of Title Volume 1619 Folio 716.

⁵³ NCC Letters, n 20, Town Clerk to Collins, 20 and 26 April 1950.

⁵⁴ NCC Letters, n 20, Town Clerk to Collins, 18 May 1950.

⁵⁵ NCC Letters, n 20, Town Clerk to Collins, 26 May 1950.

⁵⁶ NCC Minutes, n 28, 19 June 1950, 590.

⁵⁷ High Court file, n 38, Hardman Memorandum, paragraph 3.

⁵⁸ "DAMAGES ACTION FAILS", *The Leader*, 21 June 1950, 16.

⁵⁹ *Ibid.*

Collins now went further on the attack and commenced multiple proceedings against the NCC, its officers and legal representatives. It is probable that by this time he had linked up with Rupert Millane and was receiving tactical advice from him. In this period they were regularly seen together in and around the Supreme Court. Millane was the courteous one, often with a flower in his lapel, while Collins, head down and carrying a suitcase bulging with papers, wore a full-length dustcoat and radiated hostility.⁶⁰ And the legal *modus operandi* of Millane is evident in the Collins litigation. Millane repeatedly turned prosecutions by council officers back on them by taking them to court. He also became fixated on a particular legal point as if it were a “silver bullet”. Notably, in Millane’s case it was that the *Carriage Act 1915* (Vic) had not been repealed by the passage of the *Omnibus Act 1924* (Vic). Both these approaches are evident in the Collins litigation from this point onwards.

On 3 July 1950 the NCC was advised that Collins had issued further Supreme Court proceedings against it and Maddocks, claiming £10,000 damages for “alleged malicious and fraudulent proceedings” relating to the prosecutions for breaches of the building regulations.⁶¹ Later that month Maddocks applied in the Practice Court for an order that the action be stayed as “frivolous, vexatious and an abuse of the court”.⁶² When the applications came before Barry J he quickly showed his impatience with Collins, further entrenching Collins’ sense of grievance:

His Honor: I am not interested in what you have done at the court of petty sessions. This endorsement on your writ is sheer rubbish. You are merely bringing trouble on yourself and no good to anyone the way you are going on. On the endorsement you have a lot of gibberish.

Collins: I resent that your Honor.

His Honor: Look, you will be dealt with in a minute. You are making yourself a vexatious litigant and you have been shown great consideration by the Judges.

Collins: You said that before your Honor.

Mr Justice Barry then sent for the sheriff, who sat in the court until the proceedings concluded.⁶³

The judge then proceeded to stay the action as not disclosing a cause of action, with costs against Collins.⁶⁴

⁶⁰ Interviews with Barney Cooney, 25 February 2005; Gordon Spence, 9 March 2005; Philip Opas, 16 and 21 March 2005; Charles Francis, 17 March 2005; and Edward Woodward, 1 February 2006. See also Francis, n 3, 20.

⁶¹ NCC Minutes, n 32, 3 July 1950, 603.

⁶² “Judge Tells Litigant He is Vexatious”, *The Age*, 19 July 1950, 4.

⁶³ *Ibid.*

⁶⁴ “Writ Dismissed as Being Frivolous”, *The Leader*, 2 August 1950.

A week later Collins identified a new opportunity. He realised that the solicitors for the NCC had failed to file a formal notice of appearance⁶⁵ and promptly applied to Barry J to have him set aside his earlier decision and then to enter a default judgment against the NCC for half the claim, £5000. His Honour would have none of it. He allowed the NCC to enter an appearance and then confirmed his earlier order. He told Collins that he might end in the Bankruptcy Court if he persisted in litigation without consulting a solicitor.⁶⁶ In reply, Collins told Barry J that he was a man of “independent means” and, anyway, a leading firm of solicitors “had told him he needed no legal assistance”.⁶⁷ This is in contrast to Rupert Millane, who was not averse to obtaining representation when he could either afford or obtain it.⁶⁸

In addition, on 12 July 1950, Collins had called on Thomson and served him with a local court information.⁶⁹ Two days later he returned and served three more summonses.⁷⁰ One summons related to Collins’ view that the NCC (and Engineer Hill) had, as the supplier, failed in their statutory duty to supply electricity to Walker Street. Another alleged that the High Street “fence” prosecutions were invalid. The remaining summons claimed a breach of statutory duty by the NCC in failing to supply Collins with copies of By-laws 34 and 72.⁷¹ Supply of the by-laws was a problem for the NCC as they were out of print. This followed the passage of the UBRs that had overtaken most, but not all, of their provisions. All through August 1950 Collins embarked on an aggressive letter-writing exchange with Thomson, insisting on being supplied with a copy of By-law 72.⁷² In response, the NCC arranged a reprint but also foreshadowed a consolidation of the by-laws.⁷³ When the summonses came to court in September 1950 three were dismissed but the NCC was found to have breached its statutory duty to provide a copy of By-law 34 (as amended by By-law 72). Even then the court dismissed that breach as a “triviality”. It would be the only case that Collins would “win” of the 15 he brought in this period in the Northcote court.⁷⁴

⁶⁵ At the time Gordon (later Judge) Spence was an articled clerk with Maddock Lonie and Chisholm. When the writ was served he was sent to file the formal notices of appearance. In error he filed two for Maddocks and none for NCC. Francis Lonie identified the error. Interview with Gordon Spence, 9 March 2005.

⁶⁶ “Footballer litigant told of bankruptcy danger”, *The Sun*, 25 July 1950, 23.

⁶⁷ *Ibid.*

⁶⁸ For example, see *Millane v Shire of Heidelberg* [1936] VLR 8.

⁶⁹ NCC Letters, n 20, Town Clerk to Maddock, Lonie and Chisholm, 12 July 1950. In the Magistrates’ Court an “Information” was the normal method of instituting criminal proceedings in that jurisdiction. Commonly, informations were issued on oath.

⁷⁰ NCC Letters, n 20, Town Clerk to Maddock, Lonie and Chisholm, 14 July 1950.

⁷¹ *Ibid.*

⁷² In the period 8 August 1950 to 12 September 1950 he wrote 12 letters.

⁷³ NCC Letters, n 20, Town Clerk to Collins, 10 August and 6 September 1950.

⁷⁴ NCC Minutes, n 28, 13 March 1951, 294. See also, “Ex-Footballer’s Legal Tackles Require Judge’s Permit”, *Truth*, 4 April 1953, 4.

However, Collins was not finished. He took the dismissals on review to the Supreme Court, only to have them again dismissed in March 1951.⁷⁵ While they were pending he complained to Thomson about uncovered rubbish at the local tip,⁷⁶ issued four more local court summonses against NCC employees Hill and McKinnon for alleged offences⁷⁷ and issued three more writs against Maddocks and barristers such as Philip Opas, who had appeared on behalf of the NCC. All would lapse or be struck out in 1951.⁷⁸

For its part, the NCC was also busy. Almost fearlessly, given what had occurred to date, they had informed Collins that his keeping of 12 to 14 used cars at the Walker Street premises was in breach of By-law 90 (which prohibited the operation of a business in a residential area).⁷⁹ More significantly, the NCC accepted Francis Lonie's advice that all the Collins papers be submitted to the Law Department "with a view of obtaining an order to prevent Mr Collins continuing his actions".⁸⁰ They had in mind an application by the Attorney-General to the Supreme Court under section 33 of the *Supreme Court Act 1928* (Vic) to have Collins declared a vexatious litigant. This would ban him from issuing new legal proceedings without obtaining prior judicial permission. Justice Barry had first raised this prospect publicly in 1950. It would take a further two years before the State Attorney-General would act. In the meantime, Collins was busy on other legal fronts.

Jungle law in Victoria

By June 1951 Collins was giving less attention to his business and it declined as he became consumed by litigation. The volume and range of his output across the Northcote Petty Sessions, Supreme and High Courts was extraordinary, as evidenced by the large number of rough, self-typed foolscap size affidavits, notices of motion and various appeal documents contained in the files of those courts. For a self-taught litigant, his take-up of legal jargon and procedures, albeit defective, was impressive. Again, it appears likely that Millane was a tutor and both men used the Supreme Court Library extensively in search of legal precedents to support their cases. Millane placed great store on English legislation that had survived in Victoria after the passage of the *Imperial Acts Application Act 1922* (Vic), while Collins favoured the *Magna Carta*.⁸¹ Unlike the courteous Millane, Collins was a rude, even hostile, library user, so

⁷⁵ The decision was not reported in the law reports. See further, "Ex-Footballer's Legal Tackles Require Judge's Permit", *Truth*, 4 April 1953, 4.

⁷⁶ NCC Letters, n 20, Town Clerk to Collins, 15 August 1950.

⁷⁷ NCC Minutes, n 28, 13 March 1951, 294.

⁷⁸ Supreme Court file, n 30, paragraphs 8 and 9 Affidavit of Francis Hay Lonie, sworn March 1953. Interviews with Philip Opas, 16 and 21 March 2005.

⁷⁹ NCC Letters, n 20, Town Clerk to Collins, 6 September 1950.

⁸⁰ NCC Minutes, n 28, 13 March 1951, at 294 and 12 April 1951, at 301.

⁸¹ For example, see High Court file, n 38, paragraph 3 Affidavit of Goldsmith Collins, sworn 12 December 1951.

much so that on 1 October 1951 the Library Committee (made up mainly of Supreme Court judges) banned self-represented litigants from using the library facilities. The new rule made it clear that if litigants needed books for use in court, then “they may apply to the Library staff who will send into court for them”.⁸² Though it was still possible for Collins to roam round the corridors of the court, seeking assistance from court officials, judges’ associates and sympathetic barristers, it was the start of a further grievance. Collins also tried the patience of the small establishment of Supreme Court judges.⁸³ Some were more patient than others, as a former associate to Herring CJ recalled:

The Chief Justice listened at length to Collins’ hopeless argument and, as we came out of court, I asked him why he’d been so patient. He said, “I think it’s very important that everyone who comes to the courts should go away feeling that they’ve had a fair hearing, and that applies even to Goldy Collins”.⁸⁴

However, by December 1951 the patience of the Supreme Court had started to run out. The catalyst was the filing of an affidavit by Collins expressing dissatisfaction at the recent dismissal by Dean J in the Practice Court of a number of his applications.⁸⁵ Over seven paragraphs Collins vented his frustration with the court. He had no doubt “that British Justice and Magna Charta were almost forgotten and a lost cause in this Court as far as I and other litigants in person were concerned”.⁸⁶ Further, it was his considered opinion that “the judges of this court have shown deliberate undisguised biased hostility and prejudice against me as a litigant in person”.⁸⁷ Collins went on to conclude with passion:

That by reason of the above and many more serious actions by judges to be fully set out in my book on my experiences in litigation Jungle Law in Victoria including numerous unwarranted and unsustainable untrue personal attacks on me, I have for some time now abandoned almost all hope of being properly heard and of getting fearless and impartial justice in the Court and verily

⁸² *Collins v The Supreme Court Library Committee* [1953] VLR 161, 166. See also “Claim on Judge Rejected”, *Herald*, 13 October 1952. There is no record of the ban having ever been rescinded.

⁸³ At that period statute limited the number of judges to nine. In 1952–1953 they were: Herring CJ, Lowe J, Gavan Duffy J, Martin J, O’Byrne J, Barry J, Dean J, Sholl J and Smith J. There were two acting appointments while permanent judges were on leave. They were Coppel AJ and Hudson AJ.

⁸⁴ Herring was Chief Justice 1944–1964. See further, Edward Woodward, *One Brief Interval*, 2005, 39. Interview with [Sir] Edward Woodward, 1 February 2006. See also Robert Coleman, *Above Renown: Biography of Sir Henry Winneke*, 1988, 240–241.

⁸⁵ High Court file, n 38, Affidavit of William Harkness McLorinan, sworn 22 January 1952.

⁸⁶ High Court file, n 38, paragraph 3 Affidavit of Goldsmith Collins, sworn 12 December 1951.

⁸⁷ High Court file, n 38, paragraph 4 Affidavit of Goldsmith Collins, sworn 12 December 1951.

believe that in a number of cases the behaviour and methods of conducting the proceedings by some of the said Judges amounts to nothing less than a biased judicial condonation of perjury, fraud, and actual felonies on the part of the Council of the City of Northcote, its officers Thomson, Hill, McKinnon and Solicitor F.H. Lonie of Maddock Lonie and Chisholm and I verily believe one leading Barrister.⁸⁸

It was too much for the court. Collins was reflecting “on the integrity propriety and impartiality of the Justices” and lowering “the authority of this Honourable Court”.⁸⁹ Specifically, he was “scandalising” the court.⁹⁰ In January 1952, under instructions from Crown Solicitor Frank Menzies, “Mr Nelson of Counsel for His Majesty the King” obtained an order *nisi* from Coppel AJ that Collins show cause why he should not stand committed for contempt.⁹¹ However, before the matter returned to the court, Collins lodged a notice of appeal⁹² with the High Court, forcing Solicitor-General Menzies to seek dismissal of the appeal as incompetent.⁹³ This caused a delay⁹⁴ and, when the contempt proceedings came before Herring CJ, Collins escaped gaol, receiving instead a formal conviction and costs order.⁹⁵

It was now the turn of the High Court to respond to the activity of Collins.

A High Court first — and Collins responds

In the 1950s the Principal Registry of the High Court was in Little Bourke Street, Melbourne, immediately adjacent to the Supreme Court. Installation of electronic security was still half a century away and it was possible to enter and leave the Supreme Court through its many side doors. Accordingly, for self-represented litigants, such as Millane and Collins, it was a simple matter to stroll out of the Supreme Court and into the front door of the High Court to

⁸⁸ High Court file, n 38, paragraph 6 Affidavit of Goldsmith Collins, sworn 12 December 1951. There is no record of Collins ever having completed or published *Jungle Law in Victoria*.

⁸⁹ High Court File, n 38, paragraph 2 Affidavit of Albert George Booth, sworn 5 May 1952.

⁹⁰ Historically, the little known offence of contempt of court by scandalising is the way the judiciary dealt with publications that they believed undermined public confidence in the administration of justice. In recent years the “offence” has been subject to academic and practitioner critique as being inconsistent with a system of open justice and principles of freedom of speech. See Henry Burmester, “Scandalising the Judges”, (1985) 15 *Melb UL Rev*, 313 and Oyiela Litaba, “Does the ‘Offence’ of Contempt by Scandalising the Court have a valid place in the law of Modern Day Australia?”, (2003) *Deakin Law Review*, 113. See also *Gallagher v Durack* (1983) 152 CLR 238.

⁹¹ High Court file n 38, *The Queen v Collins*, Order of Coppel AJ dated 24 January 1952.

⁹² High Court file, n 38, *The Queen v Collins*, Notice of Appeal dated 11 February 1952.

⁹³ High Court file, n 38, *The Queen v Collins*, Notice of Motion dated 5 May 1952.

⁹⁴ The appeal was struck out with costs on 2 June 1952. See further, High Court of Australia, Canberra, Full Court Minute Book, Volume 11.

⁹⁵ *R v Collins* [1954] VLR 46, 56 and “Four Months’ gaol for contempt”, *Herald*, 20 October 1953.

file papers or make an *ex parte* oral application. This was particularly so on a Friday, “Motions Day”.⁹⁶ For his part, Collins had been filing applications and affidavits with the High Court Registry since 1948, although his only (unsuccessful) court hearing had been in that year. However, Principal Registrar James Hardman⁹⁷ had watched with increasing concern the growing frequency of Collins’ filings. Between October 1951 and April 1952 he had filed 10 separate appeal applications. Closely typed and increasingly strident, all applications had stalled because Collins had failed to lodge supporting documentation such as appeal books.⁹⁸ However, in two cases his opponents brought their matters before the court. One was Solicitor-General Menzies’ application to strike out the appeal against the order of Coppel AJ as incompetent and the other was an application on behalf of Arthur Adamson Pty Ltd to strike out an appeal “for want of prosecution”. Adamson’s case related to its attempts to repossess land in Northcote on which Collins had parked a truck.⁹⁹ Conveniently, Hardman listed both matters before the court on the same day in June 1952. Collins lost both and they were dismissed with costs.¹⁰⁰

Then Hardman acted. He was aware that the *High Court Rules* had been specifically amended in 1943 to give the court power to ban litigants bringing unsuccessful proceedings “frequently and without any reasonable ground”. Once an order was made, a litigant needed judicial leave before instituting new proceedings. Significantly, the rule gave the Principal Registrar standing to initiate the proceedings.¹⁰¹ Although it had never been used, Hardman had been preparing to activate it. This is evidenced by a full memorandum on Collins that Hardman prepared in May 1952, headed “In the Matter of a Proposed Application by the Principal Registrar of the High Court Under Order XLIVA of the Rules of Court”. So, on 13 June 1952, 11 days after the Full Court had dismissed the two appeals, Mr RL Gilbert of counsel moved an application to

⁹⁶ See Regulation 41.10. The High Court Principal Registry moved to Canberra in 1980. Interview with Frank Jones (High Court Registrar 1980–1995), 24 February 2005. The ability to make *ex parte* oral applications for special leave was restricted in 2004 with changes to the *High Court Rules*. This saw applications from litigants-in-person (mainly immigration matters) being considered “on the papers” from 1 January 2005.

⁹⁷ Principal Registrar 1943–1957.

⁹⁸ High Court file, n 38, Hardman Memorandum.

⁹⁹ *Ibid.*

¹⁰⁰ High Court of Australia, Canberra, Full Court Minute Book, Volume 11, 2 June 1952.

¹⁰¹ Order 44A inserted 9 March 1943. The relevant rule is now Regulation 6.06. The insertion of the original rule was prompted by a series of writs issued by a group of Tasmanians in 1942 against Latham CJ, McTiernan and Starke JJ. The group believed, among other things, that there should be reform of the monetary system and that war loans were unnecessary. Their activities also led to a special wartime Board of Enquiry. Despite the introduction of the provision vexatious litigant proceedings were not brought against any members of the group. See further, Frank Jones and James Popple, “Vexatious Litigants” in Tony Blackshield *et al*, *The Oxford Companion to the High Court*, 2002, 698–699; and see also “Vexatious Litigation”, (1943) 17 *ALJ*, 9.

declare Collins a vexatious litigant. A newspaper report of the time indicates the unusual nature of the hearing:

Collins came to the bar Table to conduct his case and placed a suitcase on a chair. He refused to move the suitcase when Mr Justice Williams asked him to put it on the floor. When ordered to move it he left the court but reappeared in the public benches and said he would take notes. Mr Justice Williams said that if he did not wish to conduct his case at the Bar Table, he could leave the court. Collins replied that he was exercising his right as a private citizen to be in court. He left when Mr Justice Williams warned: "If you proceed in this way I will have you arrested for contempt of court. Now don't be foolish".¹⁰²

Nonetheless, Williams J was convinced and, on 13 June 1952, Goldsmith Collins became the fourth Australian to be declared a vexatious litigant and the first by the High Court.¹⁰³ He was 51 years old. The basis of the order, although it did not make the law reports despite its legal significance, was three dismissed actions and nine incomplete actions since 1948.¹⁰⁴ Numerically, when compared to the prolific and unsuccessful litigation of Millane, it was very much at the low end. In practical terms, in the High Court jurisdiction, because of his failure to complete and file documentation Collins had been of minimal inconvenience to defendants and the court. Most likely, the declaration reflected both an improperly close relationship between the State and federal court registries and a measure of hastiness on the part of High Court officials to pre-empt a future "Collins problem".

However, it was not the end of Collins' involvement with the High Court. Within days he was back at the Registry, seeking to file further appeal documents, particularly in the Adamson matter. He had formed a view, backed by recent *obiter* of Gavan Duffy J in the Supreme Court, that an appeal was not "proceedings".¹⁰⁵ Nonetheless, based on the order of Williams J, Deputy Registrar Doherty refused to accept the documents. As a result Collins left the papers and the filing fee on the counter and went away.¹⁰⁶ This became a common "filing" practice of Collins over the next 20 years.¹⁰⁷ In the meantime, his dissatisfaction mounted at the way he had been treated.

¹⁰² "Ex-Fitzroy player ordered from court", *Sun*, 14 June 1952, 11 and "MADE ATTACKS ON JUDGES", *Herald*, 13 June 1952.

¹⁰³ High Court file, n 38, Order of Williams J dated 13 June 1952. Later that year, on 20 October 1953, leave to appeal was refused by Dixon CJ, McTiernan and Fullagar JJ in *Principal Registrar of the High Court v Collins* (1955-54) 88 CLR 658. An irony here is that the original Order 44A had been inserted when Sir John Latham was Chief Justice. After he retired in 1952 he sold parts of his private law library. An "enthusiastic Fitzroy supporter", he "knocked down" a considerable part of it to Goldie Collins for a reasonable price. See further, Francis, n 1, 21.

¹⁰⁴ "Ex-Fitzroy player ordered from court", *Sun*, 14 June 1952.

¹⁰⁵ High Court file, n 38, unreported judgment of Gavan Duffy J in *Arthur Adamson Pty Ltd v Collins*, 18 June 1952 and Memorandum of Doherty, "Collins v Arthur Adamson", 19 June 1952.

¹⁰⁶ *Ibid.*

¹⁰⁷ Interview with Frank Jones (High Court Registrar 1980-1995), 24 February 2005.

By October 1952 Collins' displeasure had converted into action. He sent a handwritten and rambling letter of complaint to Dixon CJ, referring to the "vicious action of Hardman against me" and observing that his treatment was because "you think my name is Millane who has been treated so badly in his litigation".¹⁰⁸ Chief Justice Dixon did not reply. However, it was the Supreme Court writ Collins had issued earlier in that month, attacking the initiation of the High Court vexatious declaration proceedings, that brought a swift response from the High Court. The writ named as defendants all the principal participants in Collins' declaration, namely Hardman, Gilbert, Commonwealth Crown Solicitor Bell and Mr Justice Williams. The endorsement on the writ claimed £50,000 damages for "conspiracy, trespass and fraud".¹⁰⁹ The resulting contempt proceedings brought by the Commonwealth Attorney-General saw Taylor J describe the allegations in the writ as "truly scandalous and an unwarranted attack on the integrity, propriety and impartiality" of the High Court. Justice Taylor sentenced Collins, in his absence, to one month's gaol for contempt.¹¹⁰ He also ordered that the warrant of committal lie in the Principal Registry until 10.30am the next morning.¹¹¹ Presumably, this was to satisfy natural justice principles and allow Collins the opportunity to respond. The next morning Collins apologised unreservedly and undertook to discontinue the Supreme Court proceedings. Justice Taylor was satisfied that Collins had purged his contempt and stayed his earlier order, although His Honour reserved liberty to the Attorney-General to apply for reinstatement of the committal warrant should Collins not comply with his undertakings.¹¹² Collins had narrowly escaped gaol again.

The library grievance gathers momentum

The 1951 decision by the Supreme Court Library Committee to ban litigants-in-person clearly targeted Collins.¹¹³ It made it difficult for him to prepare

¹⁰⁸ High Court file, n 38, Collins to Dixon, dated 21 October 1952.

¹⁰⁹ "APOLOGY ON ALLEGATIONS IN WRIT", *Herald*, 30 November 1952.

¹¹⁰ *Ibid.*

¹¹¹ High Court file, n 38, Order of Taylor J dated 29 October 1952. The decision was not reported and there is no surviving transcript.

¹¹² High Court file, n 38, Order of Taylor J dated 30 October 1952. The file also contains copies of correspondence between the Principal Registrar and the Crown Solicitor's Office that makes it clear that Collins never formally discontinued the Supreme Court action (No 2001 of 1952). The Attorney-General appears not to have pursued enforcement of the warrant of committal.

¹¹³ Collins was not the first vexatious litigant to fall into dispute with library authorities. In England the persistent and unsuccessful litigation of Alexander Chaffers led to the enactment of the first vexatious litigant sanction in the world, the *Vexatious Actions Act 1896* (UK). His litigation against the Trustees of the British Museum, relating to his use of the reading room, was cited as one of the prompts for the legislation. See further, Michael Taggart, "Alexander Chaffers and the genesis of the Vexatious Actions Act 1896" (2004) 63 *Cambridge Law Journal* 656.

his cases and became a further source of grievance. His response in August 1952 had been to issue a writ against the committee in general and its judicial chairman, Sir Charles Lowe.¹¹⁴ Collins alleged a fraudulent conspiracy between certain members of the Library Committee to exclude him and claimed a right to admission and use of the library.¹¹⁵ Both the depth of his feeling against Sir Charles and his growing comfort with legal jargon is evident in Collins' language claiming conspiracy:

To purport and pretend to pass a resolution in breach of the statutory powers to exclude plaintiff particularly from the said Library and in further pursuance of the said conspiracy the said Sir Charles Lowe procured and induced and directed the said Librarian, the said Mr Coghill, to wrongfully and arbitrarily, on the authority of the said resolution, without notice on or about 30/7/51 in full view of the persons therein, order plaintiff to forthwith and immediately leave the said Library and further inform plaintiff that plaintiff thereafter, by reason of the said resolution, would have no further access to or use of the said Library and the contents thereof at the time when the plaintiff was preparing for the hearing of his action No. 745 of 2/8/51.¹¹⁶

Similarly, Collins' claim of a right of access also displayed a level of comfort with legal concepts and the influence of Millane. One paragraph in his writ suggests that the right was:

- a) An elementary and constitutional right being public property.
- b) An absolute right being provided for litigation and litigants and the administration of justice.
- c) A right by custom.
- d) An implied right.
- e) A right by licence with an interest.
- f) A right by licence.
- g) The elementary right of natural justice and impartiality.¹¹⁷

Sir Charles Lowe, no doubt uncomfortable with the presence of an action impugning the fairness of the court's officers, moved quickly to have it struck out as "frivolous, vexatious and an abuse of the process of the court".¹¹⁸ The application came before fellow judge Gavan Duffy J on 28 August 1952 and, although Gavan Duffy J himself was a member of the Library Committee, no question of ostensible or actual bias appears to have arisen. However, His Honour did reserve his judgment until October 1952, when he provided a comprehensive review of the history of the Supreme Court Library and the source of its power to exclude. Justice Gavan Duffy then referred to

¹¹⁴ *Collins v The Supreme Court Library Committee* [1953] VLR 161.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, 161, 166-167.

¹¹⁷ *Ibid.*, 161, 162.

¹¹⁸ *Ibid.*, 161.

“the extravagant and absurd nature of this pleading and the confused and misconceived claims therein”. Exercising the court’s inherent jurisdiction¹¹⁹ His Honour then “forever stayed” the action.¹²⁰ Collins did not accept the decision and continued to assert a right to use the library until 1953, when he shifted his major research efforts to the legal section of the State Library. There he would meet other self-represented litigants and provide assistance. One, Constance Bienvenu, became the second person to be declared a vexatious litigant in the High Court, in 1972.¹²¹ Meanwhile, Collins was about to become a defendant again.

Victoria acts, that “felon” Norris and a declaration

Since early 1951 the solicitors for the NCC had been pressing the Victorian Attorney-General to seek an order declaring Collins a vexatious litigant. Despite the involvement of the local member and former Premier Jack Cain MLA, the response had been that the “Council’s application is receiving attention”.¹²² However, in early 1953, despite the failure of his action against the Library Committee, Collins returned to the Supreme Court Library. This triggered action. The statement that Librarian Eustace Coghill prepared for the Library Committee about the incident captured the moment:

[A]t about 10am, Goldsmith Collins came into the Library, entered my room, and said to me “Are you a public servant?” I said — “That is a question of definition. I am not appointed or paid by the government, but I try to serve the public.” He then entered into a discussion of the Privy Council case (whose name he could not recall) on the effect of a court sitting behind a door marked “Private”, and suggested that it applied in Victoria because the Library door is marked “Private”. We agreed as to the validity of Court Orders made in the conference room, but differed as to the last point. He then said — “I have considered my position. I have a right to use this building. It is provided for the public. I will not leave until put out by the police.”¹²³

Later that day two policemen ejected Collins after the sheriff declined to assist in the absence of a formal court order.¹²⁴ Coghill immediately consulted the Crown Solicitor for advice and, the next day, reported his discussions to the

¹¹⁹ *Cox v Journeaux (No 2)* (1935) 52 CLR 713.

¹²⁰ *Collins v The Supreme Court Library Committee* [1953] VLR 161, 167. See also, “Claim on judge rejected”, *Herald*, 17 October 1952.

¹²¹ See further at Chapter Eight; and Simon Smith, “Constance May Bienvenu: Animal Welfare Activist to Vexatious Litigant”, (2007) 11 *Legal History*, 31, 56-57.

¹²² NCC Minutes, n 28, 15 October 1951, 382. John “Jack” Cain was a Member of the Legislative Assembly 1917–1957 and Premier on three occasions: 1943; 1945–1947 and 1952–1955.

¹²³ Supreme Court of Victoria, Librarian’s File on Goldsmith Collins, Statement of EH Coghill, 10 March 1953. The Supreme Court Library also holds the diary of Eustace Coghill but it adds no further information.

¹²⁴ *Ibid.*

Acting Chief Justice, Sir Charles Lowe. It had been suggested that His Honour should formally request that Attorney-General Slater take action.¹²⁵ Two days later the Library Committee met and, with eight of the nine permanent judges in attendance, endorsed that course of action.¹²⁶

Events then proceeded swiftly. The following week a barrister all too familiar to Collins, John Norris QC, with John Young,¹²⁷ urged Hudson AJ to declare Collins a vexatious litigant under section 33 of the *Supreme Court Act 1928* (Vic).¹²⁸ Acting Justice Hudson was the only judge who had not sat on the Library Committee or on a Collins matter and was presumably viewed as unbiased. Relying principally on affidavits of Prothonotary McFarlane¹²⁹ and the Clerk of the Northcote Petty Sessions,¹³⁰ Norris outlined the facts. Collins had launched 31 actions in the Supreme Court since 1948. They had resulted in 71 hearings. Collins was successful in only one. In addition, he had issued nine writs that had not come before the court. Defendants had included High Court judges, Supreme Court judges, the Attorney-General, the Principal Registrar of the High Court, the NCC, lawyers, newspapers and public servants. Further, in the Northcote Petty Sessions Collins had commenced 15 prosecutions and had been successful in only one. Defendants had principally been the participants in the “fence case”.

Ever combative, by the time the application came before Hudson AJ, Collins had issued seven further writs. They included a claim for £10,000 damages from the publishers of *Truth* newspaper for publishing “malicious libels”; £10,000 from Sir Charles Lowe “for intimidation assault and battery unlawful arrest of the Plaintiff in the Supreme Court Library on the tenth day of March 1953” and £100,000 from the Attorney-General, Crown Solicitor and the Library Committee for conspiracy and “Ku Klux Klan tactics”.¹³¹ But this was mild provocation compared to what happened during the rest of the case:

When Collins appeared in the Practice Court he asked for an adjournment saying that he was “dopey” from drugs he took to fit him to contest the action. He walked to the back of the court and flung himself on a seat as though he had

¹²⁵ Supreme Court of Victoria, Librarian’s File on Goldsmith Collins, Coghill to Lowe, 11 March 1953. Coincidentally, the Attorney-General was again William Slater. In that role in 1927 he had introduced the original *Vexatious Actions Bill* designed to curb the litigation of Rupert Millane. It eventually became section 33 of the *Supreme Court Act 1928* (Vic).

¹²⁶ Supreme Court of Victoria, Minutes of Supreme Court Library Committee, 13 March 1953. The Chief Justice, Sir Edmund Herring, was on leave at this time.

¹²⁷ Young was Chief Justice 1974–1991. He was knighted in 1975.

¹²⁸ Supreme Court file, n 30, Notice of Motion dated 16 March 1953, returnable 19 March 1953.

¹²⁹ Supreme Court file, n 30, Affidavits of Rupert Duncan McFarlane, sworn 13 and 18 March 1953.

¹³⁰ Supreme Court file, n 30, Affidavit of Kevin Aloysius McDonald, sworn 12 March 1953.

¹³¹ Supreme Court file, n 30, Affidavit of Rupert Duncan McFarlane, sworn 20 March 1953. See also, “Move against ex-footballer”, *Herald*, 20 March 1953.

collapsed. Mr Justice Hudson adjourned the case until Monday. Collins then rolled onto the floor. The court crier went for a doctor, but when he came back Collins had disappeared. Court officials and reporters searched for Collins and found him in half an hour later in a small tower in the south west corner of the building. He left the building unattended.¹³²

When the application resumed on the Monday Collins persistently interjected. He was not impressed that his former “opponent”, Norris, was now appearing for the Attorney-General and repeatedly called him a “felon”. Collins also foreshadowed the issuing of an information against Hudson AJ for “occasioning grievous bodily harm” and claimed he was biased and incompetent to deal with the case. The response of Norris indicated an awareness that Collins had mental health issues. Norris said, “[t]his man should be confined either in a mental asylum or Her Majesty’s gaol”.¹³³ However, Hudson AJ had heard enough and, on 27 March 1953, Collins, aged 52, became the third Victorian to be declared a vexatious litigant by the Supreme Court. As a result, he also became the first to be declared in two jurisdictions. Although the law reports did not publish the decision, despite its rarity, the newspapers did and with predictable headlines: “Ex-Ruckman barred from legal action”,¹³⁴ “Ex-Ruckman in historic court ructions”,¹³⁵ and “Ex-Footballer’s Legal Tackles Require Judge’s Permit”.¹³⁶ However, the matter still had some distance to go.



Ex-Footballer banned.

Melbourne Truth
coverage of Collins’
second vexatious litigant
declaration. 1953.

Courtesy State Library of
Victoria..



¹³² “Court flurry when man disappears”, *Sun*, 21 March 1953, 5. There is some confusion over when and how Collins left the court. Another account suggests that he went to sleep on a bench in one of the courts only to awaken shortly before midnight. Only with some difficulty did he extract himself from the locked court buildings. See further, Charles Francis, “Valet Goldie”, *Victorian Bar News*, Winter Edition, 1982, 21.

¹³³ ““Lock up this man’, QC urges”, *Herald*, 23 March 1953, 3 and ““EX-FOOTBALLER SHOULD BE LOCKED UP” – QC”, *Sun*, 24 March 1953, 7.

¹³⁴ *Argus*, 28 March 1953.

Publication, more contempt ... and gaol

During the course of the hearing Collins had produced three affidavits that he delivered either in open court or, through the court attendant, to the judge's associate. Although never read aloud, the affidavits offended Hudson AJ. At the end of the application His Honour had referred them to the Attorney-General for consideration.¹³⁷ Two weeks later the Attorney-General successfully applied for an order *nisi* that Collins show cause why he should not be dealt with for contempt. The Attorney-General's counsel argued that two of the affidavits contained matter likely and calculated to lower the authority of the court and reflect on the judge's integrity and impartiality.¹³⁸

When read together, the affidavits also show the increasing frustration of Collins with the legal system, his view that a conspiracy existed and his descent into "litigant rage". Their form and substance are also what Mullen and Lester regard as typical of the court documentation of a querulent.¹³⁹ Collins' first affidavit was double-spaced and relatively respectful. It focused on the "conduct of Mr J.G. Norris" in opposing him since 1948 and stated that Collins had observed Norris "speaking in an exuberant manner to a tall fair man whom I understand to be the press reporter for the Herald and the said reporter was taking notes on a writing pad". The affidavit went on to canvass the "fence case" and the library dispute before giving an indication of the mental turmoil in Collins' life. He wrote, "I have been to [sic] ill to properly concentrate on my work and to do ordinary which should have been done weeks ago".¹⁴⁰ However, it was the other two affidavits that raised the ire of the court and led to further contempt proceedings. One was sworn on 23 March and was passed, but not read aloud, to Hudson AJ during that day's proceedings. Closely typed, rambling and with liberal use of capitals and epithets over two foolscap pages, this affidavit reflects Collins' growing rage. The heading indicated the nature of its contents:

¹³⁵ *Truth*, 28 March 1953, 21.

¹³⁶ *Truth*, 4 April 1953, 4.

¹³⁷ "Ex-Footballer's Legal Tackles Require Judge's Permit", *Truth*, 4 April 1953, 4.

¹³⁸ *R v Collins* [1954] VLR 46 and "Contempt order on ex-Fitzroy star", *Sun*, 11 April 1953, 5.

¹³⁹ Referred to in Paul Mullen and Grant Lester, "Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour", (2006) 24 *Behavioural Sciences and the Law* 333, 336.

¹⁴⁰ Supreme Court file, n 33, Affidavit of Goldsmith Collins, sworn 20 March 1953.

IN THE SUPREME COURT
OF VICTORIA

IN THE MATTER OF G. COLLINS

THE PENTRIDGE OFFICERS OUTSIDE THE COURT AND

IN THE MATTER OF THE FAKED APPLICATION BY THE
CROWN LAW DEPARTMENT AND J.G.NORRIS AND ONE
YOUNG WITHOUT THE KNOWLEDGE OF THE ATTORNEY
GENERAL AND WITHOUT ANY AUTHORISATION
WHATEVER WITHOUT JURISDICTION

I Goldsmith Collins of 29 Andrew St N’cote make oath and say:¹⁴¹

The body of the affidavit canvassed, in a confused way, the litigation over the “fence case” and noted:

The illustrious Crown law Department can only get a felon Mr. Norris to make the application on the affidavit of another felon and the ordernisi [sic] referred to are generally about the failure to carry out the statutory duties of the Uniform Building regulations by the admitted felons Hill McKinnon and Thomson all of whom have knowingly put off to me knowing that they were wholly or partially invalid fraudulent bylaws and TEN informations (from memory) were dismissed in my enforced absence by Mr O’Connor S. M. at Northcote one day until I stated one day “IT IS MY CONSIDERED OPINION THAT YOU ARE ACTING IN COLLUSION WITH MR LONIE TO AVOID NORTHCOTE OFFICERS FROM BEING CONVICTED. HE DID NOT DENY IT.”¹⁴²

Similarly, the third affidavit, sworn on 27 March, was in the same format as the second and was even more strident. Passed to the judge, through his associate, it canvassed similar territory. It concluded with Collins’ view of the proceedings:

I have been up practically all night composing this material despite my medical certificate and do not intend to further endanger my health or liberty by attending court to be made a further “AUNT SALLY” for THE DELIGHTFUL MR JUSTICE HUDSON and the FELON NORRIS and the GESTAPO awaiting the order to DEAL WITH ME and the criminal press who are now more vitally concerned that I be prevented from taking action against them AND NOTHING CAN STOP ME MOVING THAT THEY BE ATTACHED FOR CONTEMPT OF COURT IN RESPECT OF THIS MATTER AND ALL MY ACTIONS IN THIS COURT (16 NOT 40) none of which have yet been tried or properly heard.¹⁴³

¹⁴¹ Supreme Court file, n 30, Affidavit of Goldsmith Collins, sworn 23 March 1953. As noted in Millane (Chapter Four), the reference to the “faked application” picks up on the unusual nature of the original passage of section 33 of the *Supreme Court Act 1928*, which has fuelled the conspiracy theories of more than one vexatious litigant.

¹⁴² *Ibid.*

¹⁴³ Supreme Court file, n 30, Affidavit of Goldsmith Collins, sworn 27 March 1953.

The contempt hearing ran for five days before Sholl J.¹⁴⁴ Collins was not represented. Although the full background facts have been omitted from the law report, Sholl J concluded that there had been contempt but only after dealing at length with establishing that there had been “publication” of the affidavits even though they had not been read aloud in court.¹⁴⁵ In his judgment Sholl J went on to suggest that there was some underlying medical explanation. He relied on a medical certificate of a Dr [Ian] Wilson who appears to have been a general practitioner attending Collins. The certificate, quoted in a Collins affidavit, apparently said:

I have been attending Mr G. Collins of 29 Andrew Street Northcote for some. [Sic] he is suffering from insomnia and nervous strain and in my opinion he is unfit for any court proceedings or to attend court for the next six or eight weeks.¹⁴⁶

His Honour said of Collins: “... having observed him over a long period in the Courts, I regard him as a man with some sort of a persecution complex”¹⁴⁷ and that:

... Collins’ resentment at those [Northcote Petty Sessions] decisions lies at the root of all his subsequent offensive and eccentric behaviour in the courts. He also has a habit of imagining all kinds of slights which are not intended, and is prone to impute the worst motives to those who are opposed to him or have to adjudicate upon his cases. I take into account also the medical evidence of Dr Wilson, to which I have already referred, as to his nervous state, and also I take into account the circumstances of excitement and haste, principally self-induced, under which apparently he prepared the affidavits of the 23rd and 27th March.¹⁴⁸

And further:

He has in the past been treated with very great indulgence, because he has obviously been a litigant endeavouring to conduct his own cases under what I believe to be a genuine sense of injustice inflicted upon him in the original convictions of 1948 and 1949. It is apparent that he is a self-indulgent type of individual who seeks to justify his own failures by attributing them not to his own faults, but to the alleged wicked conspiracies and malice of other persons. He referred before me to his having been previously an athlete. If he was such,

¹⁴⁴ The start of the contempt case was adjourned for a week as the Crown had difficulty in finding Collins to serve him with the papers. At one stage thought to be living at Kangaroo Ground near Eltham, he was not located there. See further, “Crown had trouble in finding ‘Goldie’ Collins”, *Sun*, 22 March 1952.

¹⁴⁵ *R v Collins* [1954] VLR 46, 52. A full copy of the judgment or a transcript could not be located.

¹⁴⁶ Supreme Court file, n 30, Affidavit of Goldsmith Collins, sworn 27 March 1953.

¹⁴⁷ *R v Collins* [1954] VLR 46, 58. At that period the expression “persecution complex” was understood by psychiatry to relate to the mental illness, paranoia. See further, Michael Gelder, Dennis Gath and Richard Mayou, *Oxford Textbook of Psychiatry*, second ed, 1989, 341-343.

¹⁴⁸ *R v Collins* [1954] VLR 46, 57-58.

he has apparently lost the habit of accepting in good spirit decisions against him. In my opinion he will continue the behaviour of which the Crown complains unless he is on this occasion given a sharp lesson.¹⁴⁹

On 17 July 1953 Sholl J sentenced Collins “to be imprisoned in Her Majesties gaol at Pentridge for one month”. The order was stayed for a month while Collins considered an appeal to the High Court.¹⁵⁰

More gaol

Collins’ family life had now begun to disintegrate. As fines and costs mounted, so had police attendances at 29 Andrew Street to enforce them.¹⁵¹ One commentator noted the circumstances around one, possibly apocryphal, incident:

On another occasion when the police arrived at his home one night to obtain Council fines, he instructed his wife to “stop them”. Whilst Mrs Collins, Horatio-like and armed with a broom, held the bridge, Goldie went out the back door and over the fence.¹⁵²

In early August 1953, as gaol loomed, Collins returned to the Supreme Court Library but refused to leave when requested. A frustrated Coghill brought the matter immediately before the Library Committee, this time including Hudson AJ. Somewhat indignantly, the committee resolved that a letter be written to the Attorney-General seeking assistance and emphasising that “the duty of regulating the Library falls on the Committee, and it is necessary that it should be supported in its decisions”.¹⁵³ Before the Attorney-General could respond to this mild rebuke, Collins was taken into custody but only after a struggle. In that incident he struck Detective Wilby, the arresting officer, told him the arrest was “unlawful” and the Supreme Court warrant of commitment “was not worth the paper it was written on”.¹⁵⁴ Even before Collins was released, the Crown had commenced further contempt proceedings based on Collins’ “interference with the administration of Justice”.¹⁵⁵

¹⁴⁹ *Ibid*, 46, 58.

¹⁵⁰ *Ibid*, 46, 59. Special leave to appeal was refused on 22 October 1953 in *Collins v The Queen* (1954–55) 91 CLR 656. See also, “Ex-football star gets month’s gaol: contempt”, *Sun*, 18 July 1953, 10.

¹⁵¹ One creditor was Arthur Adamson Pty Ltd, which had evicted him from some land in Northcote. Trying to enforce their costs order, they lodged a writ of *feri facias* against the title of 29 Andrew Street in 1954. It did not result in the sale of the property. See further, Department of Sustainability and Environment, Certificate of Title Volume 5100 Folio 934.

¹⁵² Francis, n 1, 20.

¹⁵³ Supreme Court of Victoria, Minutes of Supreme Court Library Committee, 4 August 1953 and Librarian’s File on Goldsmith Collins, Coghill to Attorney-General, 5 August 1953.

¹⁵⁴ “Collins in court on Sept. 21”, *Herald*, 8 September 1953, 11.

¹⁵⁵ *Ibid*.

When the case came before Dean J on 21 September it continued to embroil others and test the patience of the court. Collins, now free,¹⁵⁶ did not appear. Instead, he sent a message to McNerney to tell him of the proceedings. This led to a robust exchange between McNerney and Dean J:

Mr Justice Dean: Do you now appear for him?

Mr McNerney: I have not had time to receive instructions.

Either you appear for him or you do not — If you will take note, sir...

No, I will not take note.

After further exchanges in which Mr McNerney persisted in his attempts to be heard, Mr Justice Dean said:

“You have no right to be here. You are offending against the rules of the Bar. I will not hear you further.”

NOT PERSONAL

When Mr McNerney protested at the charge that he was offending against the Bar, Mr Justice Dean replied:

“I did not mean to be offensive to you personally.”

Mr McNerney then left the court.¹⁵⁷

Justice Dean then sentenced Collins, in his absence, to a further four months’ gaol for contempt.¹⁵⁸ There is no record of any future intercession by McNerney.

What happened next was almost predictable. When the police went to Collins’ home to execute the imprisonment warrant there was a further altercation. He kicked and resisted and was taken to Pentridge Prison where, surprisingly, given the preceding circumstances, there is no indication of any mental health assessment having taken place.

When the resulting contempt proceedings came before Martin J in April 1954, Collins immediately harangued him. He said he had been “knocked about by the warders at Pentridge since last Friday”.¹⁵⁹ He further alleged that the warders seized his two suitcases of papers relating to the case. As a result, he had to write his case notes on “sanitary paper with a burnt match”.¹⁶⁰ From there, the hearing deteriorated. Every time Martin J sought to say something Collins interjected in a raised voice, leading the judge to observe, “[e]very time

¹⁵⁶ 1953 *Victoria Police Gazette*, 356. He was released on 23 September 1953. It appears likely that this was a separate sentence to the one imposed by Sholl J on 17 July 1953 that had been stayed for one month. Most likely it related to unpaid fines.

¹⁵⁷ “Four months gaol for contempt”, *Herald*, 20 October 1953.

¹⁵⁸ *Ibid.*

¹⁵⁹ The case was not reported and there is no available transcript. See further, “Judge ill as man talks him down”, *Sun*, 14 April 1954, 12.

¹⁶⁰ *Ibid.*

you open your mouth you commit a contempt of court. You are the rudest man who has ever appeared before this court".¹⁶¹

After a few more exchanges Martin J suddenly collapsed and had to be helped from the court. Chief Justice Herring took over the hearing to adjourn it. As Collins was handcuffed and bundled from the court his wife, Beryl Collins, said, "[t]he man's not well. He should not be here". Collins replied, as if to prove the point, "[t]he man's not well".¹⁶² Collins was released from gaol the next month¹⁶³ and the contempt proceedings adjourned *sine die* when he gave an undertaking to keep away from the Supreme Court building.¹⁶⁴

By 1955 the combination of deteriorating mental health and absences in gaol had resulted in Collins' business deteriorating further and he was unable to pay the rent for his Robbs Parade, Northcote, junk yard.¹⁶⁵ He was evicted. That was no easy task, as the evening paper reported:

By noon, six workmen had stacked six wrecked cars, a donkey engine, half a dozen car and truck engines and hundreds of tyres on the footpath. They used the loader, a crane and a truck for the job.¹⁶⁶

In 1956 Collins was again in trouble with the law, this time for negligent driving. He was fined £20 and his licence cancelled at the Carlton Petty Sessions.¹⁶⁷ However, by March 1958, he was active across a number of jurisdictions and in a matter that represented a significant change of direction. His focus had moved from his own grievances to those of another, namely William John O'Meally. O'Meally, a convicted murderer, was awaiting a flogging sentence, coincidentally ordered by (now) Hudson J, for having escaped from custody.¹⁶⁸ Possibly identifying with a fellow "Hudson victim", Collins sought to intervene on O'Meally's behalf. However, his attempt to issue a Supreme Court writ in the name of O'Meally against Hudson J and others, alleging a conspiracy to inflict grievous bodily harm on O'Meally, was

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* Justice Martin was seen by a doctor and, after resting, went home.

¹⁶³ 1954 *Victoria Police Gazette*, 356. He was released on 24 May 1954.

¹⁶⁴ "EX-FOOTBALL STAR GETS 18 MONTHS", *Sun*, 22 April 1958, 11.

¹⁶⁵ Robbs Parade is located behind and across the road from the original yard at 404 High Street, Northcote.

¹⁶⁶ "Goldie Collins evicted", *Herald*, 19 September 1955. The following month an almost identical scenario was repeated with Rupert Millane (the subject of Chapter Four) when he was evicted from his Brighton tenancy. His property was also filled with used motor cars and old machinery.

¹⁶⁷ 1956 *Victoria Police Gazette*, 157. Later that year, after he failed to pay the fine and costs, a "show cause" summons was issued and served in 1957 but it too appears to have lapsed. See further, 1956 *Victoria Police Gazette*, 237 and 1957 *Victoria Police Gazette*, 111.

¹⁶⁸ O'Meally had been convicted in 1952 of the murder of Constable George Howell. His death sentence had been commuted to life imprisonment. In 1957 he escaped from prison only to be recaptured. Justice Hudson sentenced him to a further 10 years gaol and ordered 12 strokes of the "cat". He is the last person to have been flogged in Victoria. An appeal to the High Court was unsuccessful. See *O'Meally v R* (1958) 98 CLR 13. See also, William O'Meally, *The Man They Couldn't Break*, 1979.

unsuccessful. Similarly, his efforts to issue *mandamus* proceedings next door in the High Court to compel the Prothonotary to issue the writ also failed when Principal Registrar Doherty refused to accept the documents. Doherty knew Collins as a declared vexatious litigant.¹⁶⁹

Collins then proceeded to Sydney by car to make similar applications. This led to a flurry of written exchanges between the Melbourne High Court Registry and the New South Wales Supreme Court that enclosed copies of documents left in Melbourne by Collins “on the Bench in No 1 Court”.¹⁷⁰ In Sydney Collins actually issued a writ out of the Supreme Court, a jurisdiction where he had not been declared vexatious.¹⁷¹ The New South Wales writ named as defendants, Herring CJ of Victoria, the Attorney-General, the Solicitor-General and judges of the High Court. Collins then proceeded to post copies to the various defendants. Earlier, he had sent a similar one to “Mr A.F. Lewis Private Secretary to the Chief Secretary and Attorney-General, Mr. Rylah”.¹⁷²

The Victorian Government was not amused. It immediately commenced more contempt proceedings. In its view Collins had not only breached his 1954 undertaking not to enter the Supreme Court but had committed a further contempt by serving a “bogus” writ on Lewis.¹⁷³ When the matter came before the court on 21 April 1958 Collins did not appear. Nonetheless, Pape J was in no mood for leniency. His Honour said, “I can see no prospect of leniency having any effect other than to make Collins think it is easy to flout the authority of this court”.¹⁷⁴

Justice Pape then sentenced Collins to 18 months’ gaol on the two charges.¹⁷⁵ Meanwhile, the proceedings in the New South Wales Supreme Court were quietly extinguished over the course of the next few months. In Victoria lawyers for the Commonwealth advised Doherty that Sydney counsel had been briefed “to advise of the best procedure to be followed to have the writ struck out with the least embarrassment to all concerned”.¹⁷⁶

¹⁶⁹ High Court file n 38, Doherty to District Registrar (Sydney), 19 April 1958.

¹⁷⁰ *Ibid.* See further, “Ex-footballer gets gaol for contempt”, *Herald*, 21 April 1958, 1.

¹⁷¹ In fact, the New South Wales Supreme Court did not obtain the statutory vexatious litigant sanction until 1970. See *Supreme Court Act 1970* (NSW), section 84.

¹⁷² High Court file, n 38, Order of O’Byrne J dated 31 March 1958; “Ex-footballer gets gaol for contempt”, *Herald*, 21 April 1958, 1 and “EX-FOOTBALL STAR GETS 18 MONTHS”, *Sun*, 22 April 1958, 11.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ High Court file, n 38, Renfrey (A/Secretary, Commonwealth Attorney-General’s Department) to Doherty, 6 November 1958.

A legal maverick in the Bankruptcy Court

By April 1959 Collins, released from gaol, his financial affairs crumbling¹⁷⁷ and his marriage over,¹⁷⁸ was living in Sydney. With his fascination for things legal undiminished by his periods of imprisonment, he had continued to help, *pro bono*, other litigants.

Styling himself as a “Bankruptcy Agent” and “Legal Technician”, his next clients were brothers, Thomas Clement Murray and John Charles Murray, who had been declared bankrupt in 1956 after the collapse of their butchers’ business.¹⁷⁹ Collins met them in the Sydney Bankruptcy Court in April 1959 as they awaited oral examination. Collins had approached the brothers and said, “[t]here is a matter for conspiracy going on here and I will take your case up”.¹⁸⁰ Being unrepresented, the brothers agreed and in April 1959 Collins tried unsuccessfully to issue a High Court writ for damages on behalf of John Murray. The defendants were bankruptcy judge Clyne J, Attorney-General Sir Garfield Barwick and the Commonwealth of Australia. Grounds, although confused, included “Slander, Injurious falsehoods, Fraud and Intimidation”.¹⁸¹ Then, on 25 May 1959, Collins lodged two notices of appeal on the brothers’ behalf in the High Court. Although Registrar Gamble again took the view that the papers were an abuse on their face and declined to accept them, Collins had already left his office and regarded them as issued.¹⁸² Two days later the papers surfaced in the Bankruptcy Court when Mr Robert (Bob) Ellicott,¹⁸³ counsel for the Official Receiver, told Clyne J that “strange things have been happening” and that there were “curious documents” in circulation.¹⁸⁴ Ellicott then referred to a document prepared by Collins on behalf of the Murrays that combined elements of a writ, an affidavit and a notice of motion. Closely typed, with various headings such as “In the matter of the manifest and notorious

¹⁷⁷ In 1956 a major creditor was the Commissioner of Land Tax. He lodged charges against two properties held by Collins. One was against 588 Nicholson Street, Carlton, that Collins acquired from his parents in 1953. See Victoria, Department of Sustainability and Environment, Certificate of Title Volume 3468 Folio 525. The other was the Walker Street property in Northcote. See Victoria, Department of Sustainability and Environment, Certificate of Title Volume 1619 Folio 716. The Housing Commission eventually cleared both properties as slum redevelopment (for low-income housing).

¹⁷⁸ Supreme Court of Victoria, *Collins v Collins* Divorce File 1806 of 1962, Divorce Petition of Beryl Ada Collins, sworn 20 November 1962.

¹⁷⁹ NAA: SP448, 1. File 100 of 1956, Report of Official Receiver, 21 May 1956. Further reference to material from this source will use the short form “Murray File”.

¹⁸⁰ Murray File, n 179, Evidence of John Charles Murray, Transcript of Proceedings before Clyne J dated 4 August 1959.

¹⁸¹ High Court file, n 38, Gamble to Chief Justice, 13 April 1959. Chief Justice Dixon directed under Order 58 Rule 4(3) that the document not be issued, being “on its face” an abuse of process and a vexatious proceeding.

¹⁸² High Court file, n 38, Gamble to Principal Registrar, 26 May 1959.

¹⁸³ Ellicott would later serve as Commonwealth Attorney-General in the Fraser Government 1975–1977.

¹⁸⁴ Murray File, n 179, Transcript of Proceedings before Clyne J, 27 May 1959.

felonious GESTAPO intimidation by Judiciary & Crown”,¹⁸⁵ the document listed 23 wide ranging grounds of appeal. Early paragraphs gave the flavour and clearly drew on Collins’ “fence case” experience:

2. That the Bankruptcy Rules are not available for purchase at the Commonwealth Office Sydney

3. That the purported “Court” is not an open or any Court according to law & persons interested are intimidated from entering the building and the “Court” therein by “Dixons” Commonwealth Police therein and there is nothing to indicate that a court is being held there for Public

4. That the bankruptcy Act the “Court” & jurisdiction thereof are in issue F.E.Kemp Appeal 329/56.

5. That Sect 76 of Bank Act is ultra vires Plmt & void and is otherwise invalid and inapplicable¹⁸⁶

Justice Clyde indicated that he had seen Collins’ “handiwork” before, but appeared more bemused than concerned.¹⁸⁷ His Honour should have been concerned, as Collins was at that moment paying 50 guineas of his own money to a solicitor, George Kenyon, to brief counsel.¹⁸⁸ Two days later WG (Bill) Kloster of counsel successfully applied to Clyde J for a stay of the Murray imprisonment warrant for contempt issued two days earlier, on the basis that there was an appeal lodged in the High Court.¹⁸⁹ Justice Clyde does not appear to have made the connection with the Collins paperwork. It took just over a week for the Official Receiver to confirm that the “appeal” filed by Collins had no validity and a further three weeks before the matter came back before Clyde J.¹⁹⁰ His Honour was not amused. He ordered that the warrant of committal for John Murray take effect “forthwith”. “I think he is the victim of his own folly. He has been misled by this man Collins and has been his dupe.”¹⁹¹ Justice Clyde sentenced Collins, in his absence, to six months in Long Bay Gaol. “His offensive comments about this court and his motion to the High Court constitute an abuse of the process of this court intended to mislead the court and to bring it into disrepute and contempt.”¹⁹² Kenyon and Kloster did not escape censure either:

I think the Solicitor who gave these instructions failed in his duty. He was guilty of improper conduct, and a lack of fair appreciation of his duty. I do not altogether absolve Counsel from a charge of neglect. Had he seen the Notice of

¹⁸⁵ Murray File, n 179, Annexure “A” referred to in report of McCombie, 26 May 1959.

¹⁸⁶ *Ibid.*

¹⁸⁷ Murray File, n 179, Transcript of Proceedings before Clyde J, 27 May 1959.

¹⁸⁸ Murray File, n 179, Transcript of Proceedings before Clyde J, 26 June 1959.

¹⁸⁹ Murray File, n 179, Transcript of Proceedings before Clyde J, 29 May 1959.

¹⁹⁰ Murray File, n 179, Transcript of Proceedings before Clyde J, 26 June 1959 and High Court file, n 42, Gamble to Principal Registrar, 29 June 1959.

¹⁹¹ Murray File, n 179, Transcript of Proceedings before Clyde J, 26 June 1959

¹⁹² *Ibid.*

Appeal he should have realised that he was playing with fire in making such an application as this on behalf of a man such as Collins.¹⁹³

In comparison to the penalty given to Collins, this was a light response given that it was only Kenyon's and Kloster's participation in events that had led to the adjournment. Neither practitioner appears to have faced disciplinary proceedings as a result of their involvement.¹⁹⁴ Predictably, the case prompted a few headlines in the next morning's papers: "Contempt of Court: Judge orders jail for man with complex"¹⁹⁵ and "Man Gaoled for Contempt".¹⁹⁶

Despite the events before Clyne J, the Murrays continued to show faith in Collins, much to their disadvantage. Collins also continued to involve himself in the case by sending letters and self-typed court applications and affidavits. However, the High Court and Bankruptcy Registries were now on their guard and the documents had no impact beyond their being a nuisance. By the early 1960s Collins had dropped out of the case.¹⁹⁷ There is no record that he was ever gaoled in New South Wales as a result of Clyne J's order.¹⁹⁸

A run for Parliament, trouble at home and friends fall out

In 1961, having had no success in the legal arena, Collins briefly flirted with the prospect of being a federal Parliamentarian. He stood in the 1961 election as an independent candidate in the seat of Kooyong, then held by the Prime Minister, Mr Robert Menzies. Collins' candidacy was predictably described in the press as "Ex-Footballer v. Menzies".¹⁹⁹ Possibly, he had been encouraged to run by his colleague Rupert Millane, who had stood for the Senate in 1943. Like Millane, Collins lost, receiving only 192 votes.²⁰⁰ The Menzies Government was narrowly returned.

By the end of 1962 Beryl Collins had seen enough from her 25 years of marriage to Collins. Her only regular source of income was as a domestic help and she had become alarmed at Collins' attempts to raise money by trying to mortgage the family home at 29 Andrew Street. With three of her four children now adults, Beryl petitioned for divorce on the ground of three years'

¹⁹³ *Ibid.*

¹⁹⁴ Subsequently, the professional careers of George Kenyon and Bill Kloster changed direction. In 1962, after 10 years as a barrister, Kloster left the Bar at his own request and was admitted to practise as a solicitor. See (1962) 35 *ALJ*, 412. In 1965 Kenyon was struck off for trust account irregularities. See *Ex parte Law Society of NSW: Re Kenyon* [1970] 3 *NSWLR* 343.

¹⁹⁵ *Daily Telegraph*, 27 June 1959.

¹⁹⁶ *Sydney Morning Herald*, 27 June 1959, 10.

¹⁹⁷ John Murray would not be discharged from gaol until September 1959. He was discharged from bankruptcy in 1970. See generally NAA: SP448, 1, File 100 of 1956.

¹⁹⁸ Caroline Ritchie (NSW Department of Corrective Services) to author, 13 April 2007.

¹⁹⁹ *Sun*, 15 November 1961, 13.

²⁰⁰ "Kooyong", *Sun*, 10 December 1961, 18. The unsuccessful ALP candidate was Dr Moses (Moss) Henry Cass, who later became the federal member for Maribyrnong 1969–1983.

continuous desertion. She had not cohabited with Collins since March 1958, when he last went to gaol.²⁰¹ After a delay caused by difficulty in locating Collins, the divorce was granted in November 1963. Beryl Collins was awarded 29 Andrew Street, valued at £3500, and £1 per week maintenance. Collins was to keep the Walker Street property, notionally valued at £3175, and 90 acres at Kangaroo Ground valued at £2000.²⁰² It was one piece of litigation in which he took no active part and filed no papers.

In 1963 events continued to move against Collins, now aged 62. First, the Housing Commission of Victoria moved to compulsorily acquire 18 Walker Street for a low-income housing development.²⁰³ Then, Rupert Millane, his mentor for over a decade, appeared to turn against him when he named Collins as a defendant in some confused High Court writs. This reflected how closely Millane and Collins monitored each other's activities. The writs also joined the Housing Commission as a co-defendant and, among a number of rambling particulars of demand, sought "ORDERS for Peaceful Possession and or Re-possession" of 18 Walker Street.²⁰⁴ The plaintiff was Highway Motors, a flashback to the company name used by Millane in the 1920s when engaged in his litigious "bus wars" with the MCC that had contributed to his own declaration as a vexatious litigant. For Millane to be able to link all these themes together, albeit disjointedly, shows a close association with Collins. It may even possibly have been some bizarre legal manoeuvre designed to help Collins keep the Walker Street property. But, most likely, it was an indicator of Millane's physical and mental decline, as he was then aged 76. That the writs were not taken seriously by the High Court is indicated by the fact that they were simply added to a pile of unissued Millane material even though he had never been declared a vexatious litigant by the High Court. In any event, whatever friendship existed with Collins was near the end. Millane died in 1969.²⁰⁵

Helping in the High Court

As the 1970s arrived Collins was a familiar figure moving round barristers' chambers, sitting in court and suggesting legal strategies to lawyers who would listen and to those who wouldn't.²⁰⁶ Almost always wearing a dustcoat

²⁰¹ Supreme Court of Victoria, Divorce File *Collins v Collins*, File 1806 of 1962, Petition of Beryl Ada Collins, sworn 20 November 1962.

²⁰² *Ibid.* Beryl Collins sold the property in 1974.

²⁰³ Victoria, Department of Sustainability and Environment, Certificate of Title Volume 1619 Folio 716.

²⁰⁴ For example, see High Court file, n 38, Writ dated 20 December 1963.

²⁰⁵ *Ibid.*

²⁰⁶ Interviews with Frank Jones, 24 February 2005; Barney Cooney, 25 February 2005; Gordon Spence, 9 March 2005; Philip Opas, 21 March 2005; Charles Francis, 20 April 2005; and John Young, 29 April 2005.

and carrying a suitcase of legal papers, Collins no longer sought to issue proceedings in his own name but was content actively assisting other self-represented litigants. He appears to have lived for some of the time at his Kangaroo Ground property and used Box 1353-L at the Melbourne GPO as his principal contact point. One person he assisted in 1970 was Constance May Bienvenu. Collins befriended her in the legal book section of the Public Library of Victoria and advised that he had an expert knowledge of constitutional law, having purchased the law books of former High Court Chief Justice and Fitzroy supporter, Sir John Latham. He introduced himself as “Mr G. Collins (alias Mr George)” and offered to help Bienvenu draw up legal documents.²⁰⁷

Bienvenu was an animal welfare activist who had been engaged in a struggle for reform of the conservative Royal Society for the Prevention of Cruelty to Animals (RSPCA) (Victoria) since the late 1950s. She had become consumed by litigation after Starke J somewhat harshly awarded costs against her in a 1968 Supreme Court case.²⁰⁸ In 1970 she was running a number of actions in the High Court as a litigant-in-person, having been declared a vexatious litigant in Victoria in 1969.²⁰⁹ Her compassion for the animal welfare cause and sense of legal grievance made her a willing recipient of Collins’ offer of assistance. He made numerous visits to her Malvern home and spent “long periods explaining legal matters to my husband and myself and in drawing up legal documents”.²¹⁰ Bienvenu then issued the documents.

One indicator of Collins’ involvement was the Bienvenu writ issued by Frank Jones, then Deputy Registrar of the Principal Registry, on the direction of Barwick CJ, naming Jones and the Principal Registrar, Neil Gamble as defendants. The cause of action was that Gamble and Jones had conspired to deny Bienvenu her constitutional rights by refusing to supply her free of charge with a copy of the *Constitution*. Although dismissed by the Full Court, the action was modelled on Collins’ 1950 “success” against the NCC when it had failed in its statutory duty to supply him with a copy of By-law 72.²¹¹

For the next few months Collins actively inserted himself into Bienvenu’s litigation. There is an abrupt shift in the language used in the documents

²⁰⁷ NAA: A10074, 1970/8, paragraph 4 Affidavit of Constance May Bienvenu, sworn 13 May 1970.

²⁰⁸ The 1967 decision of Starke J accepted the submission of Bienvenu’s lawyers that the RSPCA had been without valid by-laws since 1895. As a result there were no office bearers or contributors, including Bienvenu. Therefore she had no *locus standi* to bring the action. Further, she was estopped from succeeding as having relied on the by-laws in earlier proceedings, she could not now seek advantage by saying they did not exist. He then awarded costs against her. See generally *Bienvenu v Royal Society for Protection of Animals* [1967] VR 665.

²⁰⁹ For further background, see Chapter Eight; and Simon Smith, “Constance May Bienvenu: Animal Welfare Activist to Vexatious Litigant”, (2007) 11 *Legal History* 31.

²¹⁰ NAA: A10074, 1970/8, paragraph 6 Affidavit of Constance May Bienvenu, sworn 13 May 1970.

²¹¹ Interview with Phil Opas, 21 March 2005. See also Tony Blackshield *et al*, *The Oxford Companion to the High Court of Australia*, 2001, 698-699 and NAA: A10075, 1970/3.

Bienvenu filed that is entirely consistent with Collins' style of closely typed documentation liberally strewn with emphases and epithets bordering on invective. The sudden change to "scurrilous and intemperate language" was even noticed by the judiciary.²¹² For example, the heading of a notice filed in Bienvenu's bankruptcy proceedings initiated by the RSPCA was worded:

<u>IN THE FEDERAL</u> <u>COURT OF</u> <u>BANKRUPTCY</u>	<u>BANKRUPTCY DISTRICT OF THE STATE</u> <u>OF VICTORIA</u> <u>BOGUS No. "945" 1968</u> <u>IN THE MATTER OF THE MANIFEST</u> <u>CRIMINALITY FRAUDULENT</u> <u>MALPRACTICE INFLICTED ON</u> <u>ME, CONSTANCE MAY BIENVENU,</u> <u>PARTICULARLY RE THE</u> <u>TREACHEROUSLY FRAUDULENT</u> <u>BOGUS "BANKRUPTCY NOTICE" AND</u> <u>ALL OTHER NECESSARILY CORRUPT</u> <u>ENSUING MALICIOUS ATROCITY ACTS</u> <u>THERON THERAFTER</u>
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RE: BOGUS NONENTITY "ROYAL SOCIETY FOR THE
PREVENTION OF CRUELTY TO ANIMALS' AND THE
MANIFESTLY FICTITIOUS NONENTITY "OFFICE
BEARERS" FRAUDULENTLY PURPORTING MALICIOUSLY
SCURRIOUSLY CRIMINALLY LIBEL AND TO DEFAME ME AND
TREACHEROUSLY INJURE ME IN THE SAID "BANKRUPTCY
NOTICE"

N O T I C E

TAKE VERY PARTICULAR NOTICE that I am now fully satisfied
 after.....²¹³

However, "Mr George" was suddenly gone and not to be found. Attempts to adjourn cases in which he was involved failed.²¹⁴ Eventually, desperate telegrams to Collins' GPO box generated a response. Bienvenu told the court in an affidavit, "I have received two abusive and threatening letters from this

²¹² NAA: A10117, 1970/22, *Hutchison v Bienvenu*, See comments of Walsh J in Reasons for Judgment, 19 October 1971.

²¹³ NAA: B160/0, 327/1969 Part 2, Notice dated 10 March 1970

²¹⁴ NAA: A10074, 1970/8, Affidavit of Constance May Bienvenu, sworn 13 May 1970.

person and am now of the view that he may be mentally unbalanced".²¹⁵ Rather surprisingly, it appears that Bienvenu never made the connection that Collins was a declared vexatious litigant.²¹⁶ In a perverse irony, in 1972 Bienvenu was also declared a vexatious litigant by the High Court.²¹⁷ She joined Collins in an exclusive club of litigants declared in two jurisdictions.

More help, a local council, fences and a sad end

While helping Bienvenu, Collins was also helping Eduards and Melita Vizibulis, two immigrants from Latvia. They were resisting attempts by the rapidly urbanising City of Ringwood to compulsorily acquire their modest farm for a municipal golf course. Having survived the excesses of Nazism and then Communism, the couple was not easily cowed by a local council.²¹⁸ Most probably Collins learnt of their fight from newspaper reports.²¹⁹ He would have identified with a legal struggle involving a local council. In any event, Collins' assistance appears to have been limited to drafting up an avalanche of writs and summonses for the couple and posting them to the Supreme Court. In a neat turn of the circle he addressed the documents to Murray McNerney, now a judge of that court. At the court, in a reflection of a more relaxed approach to Collins' activities, the documents were quietly placed in a manila file kept by Prothonotary Malbon and never actioned.²²⁰

Nonetheless, the documents reflect both Collins' continuing obsessions and his declining mental health. Closely typed, with hardly any spare space up and down the margins, they combine nonsensical legal jargon with unabashed rage. In one summons, against the Mayor and councillors of Ringwood, the police, a bulldozer driver, the Attorney-General, the Prothonotary and others, Collins alleged, in a stream of invective:

The said defendants on the seventh day of December 1970 and before and after up to "bulldozer" 18.12.70 feloniously at Ringwood (and other places) in Victoria did treacherously/ and maliciously conspire to put off Melita Vizibulis and her family a bogus forged title to her property herein and a forged bogus "warrant" (forged by D.B. Johnston stamp of the Sheriff 29.5.70) with intent to make a breach of the peace thereon

²¹⁵ NAA: A10074, 1970/8, paragraph 7 Affidavit of Constance May Bienvenu, sworn 13 May 1970.

²¹⁶ Interviews with Nance Simonds (sister of Constance Bienvenu), 4 May and 28 July 2006.

²¹⁷ NAA: A10117, 1970/22, *Hutchison v Bienvenu*, Reasons for Judgement, 19 October 1971. See also "No more actions, judge rules", *Herald*, 19 October 1971.

²¹⁸ Interview with Richard Carter (President, Ringwood Historical Society), 30 April 2007.

²¹⁹ For example, see "Bid to resolve row over land", *Sun*, 8 October 1971.

²²⁰ Supreme Court of Victoria, "Goldie Collins" file.

and to maliciously assault personally and by paranoid megalomaniacal gestapo threats...²²¹

His writ against a similar group of defendants claimed:

For Eduards Vizbulis \$200,000,000, Mrs Melita Vizbulis \$200,000,000 and for Miss Zaiga Vizbulis \$100,000 multi aggravated (9.12.70) cumulative punitive vindictive [sic] disciplinary damages against the defendants and each of them for 'Murderous judge and co (Bentham) judas conspiracy whilst acting in treacherous judasical [sic] concert as joint tort feasers with a murderous common design and with a potential (natural) murderous paranoid megalomaniacal outrageous demonical sadistic intent....²²²

Then, at the end, the writ politely says:

Take Notice that plaintiffs require pleadings.²²³

Although Eduards and Melita Vizbulis eventually conceded the inevitable and moved away, they maintained their practical resistance well into 1971. After one incident the Town Clerk wrote to them in a manner eerily reminiscent of the NCC Clerk's letters to Collins in 1948 that had set him on his litigious path. The letter said:

Council officers have today reported that Mrs Vizbulis interfered with survey pegs being placed by them also mentioning fencing the land at the rear on which to put your cattle.

The Council will not let you do this. By law, it is now Council property and any fencing you erect without council authority will be demolished.

The land has been ploughed and if cattle enter, it will have to be ploughed again. This will cost money and as well as action being taken for trespass, action will be taken against you to recover damages.²²⁴

Collins may have been aware of the irony. Certainly he knew of the letter, as his handwriting is all over the copy in the Supreme Court file.²²⁵ However, it was his last known legal foray. Although he was seen once around this time leaving documents on the counter of the High Court Registry and quickly exiting, he was not seen in the courts again.²²⁶ In 1982, an invalid and a diabetic, he was living in a caravan behind his son Harold's farmhouse in Panton Hill. In May

²²¹ Supreme Court of Victoria, "Goldie Collins" file, Summons headed "Cattle Battle down on the farm", 23 December 1970.

²²² Supreme Court of Victoria, "Goldie Collins" file, Supreme Court Writ dated 10 December 1970.

²²³ *Ibid.*

²²⁴ Supreme Court of Victoria, "Goldie Collins" file, Webster (Town Clerk) to Mr and Mrs Vizbulis, 11 June 1971.

²²⁵ *Ibid.*

²²⁶ Interview with Frank Jones 24 February 2005. Collins did continue to post material. In 1974 he sent the High Court a heavily annotated telegram form addressed to Prime Minister Gough Whitlam. It contained a jumble of allegations about conspiracy and

of that year he died, tragically, when the caravan caught fire. The coroner's inquest could not determine the cause. It was the last court case involving Collins and a sad end. He was 81 years old.²²⁷

Conclusion

Central to the Collins story is his inability to resolve his "fence" dispute with the NCC. Indeed, it was the NCC's subsequent resort to the legal system to enforce its position that set in train the extraordinary flood of litigation that ran for the next two decades. Town Clerk Thomson made early attempts to personally mediate a solution but he had no access to alternate dispute resolution mechanisms (such as trained mediators or the Neighbourhood Justice Centre (Victoria)) that exist in modern times.²²⁸ Once the matter moved to the lawyers it rapidly escalated into an adversarial theatre, positions hardened and the capacity for compromise disappeared. A revealing insight is the concession by lawyer Francis Lonie, in a 1949 prosecution, that the NCC's approach had hardened because Collins was "defying them".²²⁹ Had the NCC been open to negotiating a compromise then, possibly, things may have been different. Certainly Sholl J hinted as much when he suggested in *R v Collins* that the original grievance had been "genuine".²³⁰

In one sense it is not surprising that there is potential for local government to fall into dispute with its residents. It is, after all, the level of government that intersects most often with daily life — whether it is over home renovations, rubbish collections, school crossings or parking controls. The potential for dispute is significant. That is what makes it all the more surprising that in the early 21st century, (although not so much back in the 1950s) local government has not fully embraced alternate dispute resolution mechanisms and still relies on the formal legal system to resolve disputes. Were local government to adopt, for example, explicit service standards backed by penalties for failure and in-house ombudsmen with the power to intervene and settle disputes earlier, then it seems clear that standards would rise and dispute levels fall. This is the recognised experience in sectors such as banking and insurance where such initiatives are now standard.

Once Collins' dispute entered the legal arena the focus changed. It became about the form of the documentation, time limits, case law and the skills and courtesies of professional advocacy that, for the initiated, make the system work.

breaches of the *Crimes Act*. It was quietly filed in a Collins file. See further, High Court file, n 38.

²²⁷ PROV, VPRS 24/P1, Item 418. See also, "Exit Goldie, Fighter", *The Age*, 1 May 1982; and Francis, n 3, 20.

²²⁸ See <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Neighbourhood+Justice/> (19 March 2008).

²²⁹ "Fence was an Eye-sore", *The Leader*, 3 August 1949, 3.

²³⁰ [1954] VLR 46, 58.

A maverick like Collins, whose loud and aggressive persona and free-wheeling use of legal jargon cut across those accepted norms, created difficulties for court officials, counsel and judges. As the Collins dispute spectacularly turned back in on itself, as indicated by his 1952 litigation over access to the Supreme Court Library, the judges themselves became the focus. It was inevitable that, in the 1950s when the court was small, it would be difficult for the judges to keep a distance between their own sense of grievance and their judicial responsibilities. They were too sensitive to the provocative nature of Collins' documentation. Given that most of the affidavits were not read in open court, Collins' activities only received the oxygen of publicity because the court itself felt scandalised and pursued contempt proceedings. It was these contempt proceedings, usually conducted in Collins' absence, that generated the greatest press coverage and thus allowed the court to argue that his activities were undermining public confidence in the administration of justice. The larger and more robust modern courts are likely to be more tolerant of a Collins.

For its part, the High Court's declaration of Collins reflects both an improperly close relationship between the State and federal court registries and a measure of hastiness on the part of court officials to pre-empt a future "Collins problem". As noted earlier, when compared to the prolific and unsuccessful litigation of Millane, that of Collins was very much at the low end and, in that jurisdiction to that point, had been of minimal inconvenience to defendants and the court.

Similarly, in the 1959 Murray bankruptcy proceedings, Clyne J clearly stepped over the mark when he sentenced Collins *in absentia* to six months' gaol for contempt. By not giving Collins the opportunity to know that he had been charged, convicted and sentenced Clyne J erred, as had Foster J in 1940 when sentencing Elsa (Isaacs) Davis.²³¹ This judicial lapse in judgment was never tested as it appears that Collins was never arrested. The difference in approach to an erring litigant-in-person and to practitioners is marked when one considers the relatively light sanctions directed at the two professionals (Kloster of counsel and solicitor Kenyon) involved in misleading the court.

For all these courts the Collins case demonstrates that two key legal sanctions available to deal with an aggressive and persistent vexatious litigant, namely gaol for "scandalising" contempt and the vexatious litigant provision, are of limited effectiveness. They both failed. Gaol clearly did not embarrass, intimidate or deter Collins. He was always comfortable appearing in the public arena, possibly a legacy of his time as a famous footballer. He simply continued to pursue his legal activities although, as the Murray and Bienvenu cases illustrate, he developed a degree of guile, making sure documentation

²³¹ *The King v Foster ex parte Isaacs* [1941] VLR 77.

was lodged in their names. It is a further limitation of the sanction, as it then was, that the courts did not readily identify this was happening.²³²

For his part, although articulated in a confused manner, Collins had a point in his objections to the “justice” he was receiving. For example, it is hard to argue confidently that the appointment of Hudson AJ as the judge in charge of the vexatious litigant hearing was truly one at arm’s length from the subject matter. That said, at that time there was no alternative, as even had it been contemplated, the then rigid structure of judicial appointments did not allow for the use of an interstate judge.

All of this misses the essential point that there was clearly an underlying medical explanation for Collins’ behaviour. In terms of the Mullen and Lester definition of querulousness, Collins would appear to be at the hard edge with his behaviour most likely reflecting an abnormality of mental function. His behaviour fits the querulent definition almost classically. He is in the age range, had a sound education and more than fair work history. His ability to maintain relationships also crumbled as his litigation took hold. The form and content of his legal documentation is typical in format and substance. It was voluminous, used multiple methods of emphasis and increasingly displayed incoherent marginalia. It regularly quoted the *Magna Carta* in support and used threats, ingratiating statements and ultimatums with a repeated misuse of legal and technical terms. However, in the 1950s the legal system did not easily identify the challenge by Collins to its authority as having a medical explanation. This is despite the frustrated cry of Norris in the 1953 case that “[t]his man should be confined either in a mental asylum or Her Majesty’s gaol”²³³ or the anguished court cry of his wife, Beryl Collins, in 1954, that “[t]he man’s not well”.²³⁴ The inability of the legal system then, as now, to identify and address directly such an underlying cause is a further limitation of the sanction. In the end it was court officials who showed the most insight into the management of Collins’ increasingly disjointed litigation attempts. They simply filed them away.

²³² In 2005 a move by the States towards a model uniform vexatious litigant sanction enabled the sanction to apply to a person “acting in concert” with a vexatious litigant. See section 6(1)(b) of the *Vexatious Proceedings Act 2005* (Qld).

²³³ “‘Lock up this man’ QC urges”, *Herald*, 23 March 1953, 3.

²³⁴ “Judge ill as man talks him down”, *Sun*, 14 April, 1954, 12.

CHAPTER EIGHT

Constance May Bienvenu **Animal welfare activist**

Constance May Bienvenu (1912–1995) was a passionate animal welfare activist. In the 1960s she led a reform group that challenged for control of a conservative Royal Society for the Prevention of Cruelty to Animals of Victoria (RSPCA). Though unsuccessful, those legal challenges had significant consequences. First, in 1968 the Victorian Parliament was forced to pass retrospective validating legislation to remove legal uncertainty about the structure and operations of the RSPCA back to 1895. This included some democratic reforms. Secondly, having been excluded from active involvement and membership in the RSPCA, Bienvenu and her supporters set about recasting the Victorian animal welfare landscape by establishing a new “hands-on” organisation, the Australian Animal Protection Society. Finally, Bienvenu’s litigious battles in the Victorian Supreme Court and the High Court resulted in both courts declaring her a vexatious litigant. She was only the seventh Australian (and fourth woman) in 40 years so declared. She was also the first woman declared vexatious in the High Court and the second person to achieve the double declaration. A decade after her declaration she prompted further legislative reform, this time to the vexatious sanction itself, when she challenged its “draconic” life sentence character.

Animal protection in Melbourne in the early 20th century

In seeking to understand the determination, even obsession, of Bienvenu about her cause it is important to understand the forces that established and sustained the early animal protection movement. Historically, the Australian movement had its roots in the cause espoused by the English social reformers of the 19th century. In 1822 Richard Martin MP, assisted by anti-slavery advocate William Wilberforce MP, had steered through the English Parliament the first legislation to protect farm animals.¹ Two years later, in 1824, they and the

¹ *Cruel Treatment of Cattle Act 1822* (UK).

Reverend Arthur Broome were instrumental in forming a charity to promote and enforce the law. This was the Society for the Prevention of Cruelty to Animals (SPCA).² Nearly 50 years later the movement reached the Australian colonies when, in 1871 in Melbourne, the Victorian Society for the Prevention of Cruelty to Animals (VSPCA) was established.³

The view of Jennifer MacCulloch is that in the 19th century the cause of animal protection operated as an umbrella under which a number of social processes such as education and health reform, religion, law, philanthropy and the role of women were accommodated. The language used reflected those motivations, with an emphasis on compassion, love and kindness. Supporters were mainly conservative, middle class urban men and women with an interest in social reform. However, they were not extreme in their views and the use of the term “cruelty” was selective. Meat was eaten, furs were worn and animals were generally viewed as being for the benefit of humans. The theme was the amelioration of systemic animal cruelty rather than total abolition. The latter would be a focus of the animal rights movement that emerged toward the end of the 20th century.⁴

By the 20th century the dynamics of the animal protection movement had altered. This reflected the changing place of animals in the workplace. As society industrialised, the role of the working animal changed and thus its exposure to cruelty was reduced. The car and the bus took over from the horse as transport and the tractor replaced the horse-drawn plough. There was a shift in focus towards pets and domestic animals and a greater emphasis on animal welfare. As the cause lost its appeal for men, its consequent feminisation began. Women began to play leading, even dominant, roles in running and funding the movement.⁵

In the post-World War Two Melbourne of the 1950s (as in other cities) animal protection had become something supported by government but was effectively under-policed. There was support through legislation but it was of more value as a symbol of good faith than as an active response to a pressing political issue.⁶ Responsibility for delivering services and promoting the cause

² It obtained the Royal warrant in 1840. See further, Antony Brown, *Who Cares for Animals*, 1974, 12–21 and Barbara Pertzel, *For All Creatures: A History of the RSPCA Victoria*, 2006, 3.

³ Pertzel, n 2, 5. All references to the RSPCA in this chapter will be to the one based in the State of Victoria, unless otherwise indicated.

⁴ See generally, Jennifer MacCulloch, “Creatures of culture: the protection and preservation movement in Sydney 1880–1930” (unpublished Doctor of Philosophy thesis, Library, University of Sydney, 1993).

⁵ In her comprehensive study of the Sydney-based New South Wales RSPCA MacCulloch provides an extensive gender analysis of the reasons for and impact of the feminisation of the movement. See further, MacCulloch, n 4, Chapter 2. See also, Lyle Munro, “Caring about Blood, Flesh, and Pain: Women’s standing in the Animal Protection Movement”, (2001) 9 *Society & Animals*, 43.

⁶ MacCulloch, n 4, 3.

was instead shared between three main Melbourne-based charities: the Lost Dogs Home (fully established in 1910)⁷; the Animal Welfare League (AWL; fully established in 1927) that ran the Lort Smith Animal Hospital (fully established in 1936)⁸ and the renamed Royal Society for the Prevention of Cruelty to Animals (RSPCA)⁹. While these charities shared the workload, the determined nature of the personalities involved (such as Mrs Louisa Lort Smith and Dame Mabel Brookes),¹⁰ meant they found it difficult to cooperate. Sources of disagreement, even dispute, were the responsibility for an after-hours service, methods of animal transport and slaughter and styles of lobbying on anti-cruelty issues.¹¹

The RSPCA saw itself as the senior animal protection agency and the one most recognised by government. It was the one with vice-regal patronage. There was a conservative, even self-congratulatory, confidence in its performance. In theory, it had the wider remit, with a focus beyond domestic animals and a role to initiate prosecutions for cruelty. In reality, it was a modest operation. There was a two-person ambulance service and a three-person inspectorate that investigated instances of alleged cruelty and put down maltreated, neglected and ill animals. There was also a small fulltime secretariat that handled both administrative matters and a modest schools educational programme.¹² As an organisation it eschewed overt campaigning for reform, preferring quiet lobbying. Not for the RSPCA were the “fanatical” public meetings convened by the Anti-Cruelty Committee of the AWL.¹³

RSPCA governance was through an honorary committee. Determinedly male, with a cap on women members set at six,¹⁴ the committee was drawn from religious, professional, police and retired military classes.¹⁵ It met monthly to

⁷ See <http://www.dogshome.com/aboutus> (25 January 2007).

⁸ See generally, Felicity Jack, *The Kindness of Strangers: a History of the Lort Smith Animal Hospital*, 2003.

⁹ Since 1871 there have been three major name changes for the Victorian Society. The second change to “Victorian Society for the Prevention of Animals” (VSPA) occurred circa 1913. In 1955 the grant of a Royal warrant saw a further change to the “Royal Society for the Prevention of Cruelty to Animals” (RSPCA). See further, Pertzel, n 2, 35 and 97.

¹⁰ Lort Smith was an influential figure with both the AWL and the RSPCA although she fell out with the latter. See further, Heather Ronald, “Lort Smith, Louisa Eleanor (1875–1956)”, 15 *ADB*, 2000, 125; Jack, n 8, 13–14; Pertzel, n 3, 99. Brookes was a formidable charity worker and President of the AWL. See Jack, n 8, 12; J Poynter, “Brookes, Dame Mabel Balcombe (1890–1975)”, 13 *ADB*, 1993, 265–267.

¹¹ Pertzel, n 2 Chapters 15–17.

¹² Pertzel, n 2, Chapter 15.

¹³ Pertzel, n 2, 103.

¹⁴ By-law 4 of the 1943 edition of RSPCA By-Laws reads, among other things: “All members of the general committee shall be contributing members and not more than six of them may be women.” RSPCA (Vic), Burwood.

¹⁵ For example, in 1963–1964 the 14 members of the General Committee included the Dean of Melbourne, two Generals, one policeman, two veterinarians, one architect, one doctor and one lawyer. There were two women members. See Annual Report RSPCA (1963–64), 1, RSPCA (Vic), Burwood East.

review finances and set policy but left administration and implementation to the fulltime Secretary, the formidable Miss Victoria Ethelberta Carter (1900–1991).¹⁶ The variable RSPCA membership of a few hundred to a thousand was more in the nature of silent financial support. Kept at a distance from any hands-on engagement, the members received for their subscriptions regular newsletters and an invitation to the annual general meeting (AGM) with tea and scones.

This was the animal welfare landscape that Constance Bienvenu encountered when invited by a friend to attend her first RSPCA AGM in 1959. That meeting shocked her:

I went along with interest but was very much surprised that none of the officers of the Society placed any concrete plans before the members (NOTE: The Annual General Meeting is the ONLY general meeting held in a year). I was conscious of the animals in the circuses, in rodeos, in stock transports, in scientific research, in traps crying out silently for human voices to speak out for them. Some people tried to speak but they were silenced. However, after the “officers” of the Society had made congratulatory remarks to each other, tea and scones were served. I could only think that this was wasted time and that instead of politely enjoying the refreshments, the time would have been more profitably spent on seeking ways to combat existing cruelties, as the members would not be together again for another twelve months.¹⁷

At the meeting Bienvenu had tried to speak on the topics of banning live bird trap shooting and improved cooperation between “sister” societies but had received a non-committal response. For her, the experience was a catalyst for reform activism. For Victoria Carter, it was a dark omen. Henceforth, Carter’s approach would be to “repel all boarders”.¹⁸

Bienvenu and the RSPCA: early encounters

As an urban child born in 1912, Constance May Bienvenu (formerly Wilmott), encountered the usual array of domestic animals of the time: cats, dogs, rabbits and other pets. One of three children, she grew up in South Melbourne where her father managed some horse stables for a shipping company. She would later say that her interest in animal welfare was first kindled “when, as a girl of seven she startled a wagon owner with her vehement protests over his treatment of a horse”.¹⁹ Her passion grew from then.

¹⁶ She was appointed to the salaried staff in 1944. Awarded an MBE in 1966, she retired in 1975. See Pertzel, n 2, 136–137.

¹⁷ Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu, RSPCA (Vic), Burwood East. Unless otherwise stated, this file and other RSPCA (Vic) files referred to are located at the RSPCA’s Burwood East premises.

¹⁸ Bienvenu to Kennedy, 15 August, 1960, By-Laws (Continued) File 2.

¹⁹ D Dark, “Look out! The animals are in revolt”, *Truth*, 31 August 1963.



Constance May Bienvenu.

Connie Bienvenu. 1967.

The Age.

Courtesy State Library of Victoria.

To the immediate family, Bienvenu's early adulthood was unremarkable and showed no indication of her later activism. She was employed in sales and secretarial positions with the Myer Emporium and, in 1937, married self-taught engineer Albert (Ben) Henry Bienvenu. In 1943 the couple started a small general engineering works in South Melbourne. It was named Wellcome Products, a play on their French-based surname. Having no children, the Bienvenus devoted themselves to the business. One of the major items they made and distributed to local councils throughout Australia, in those pre-microchip times, was registration tags for animals, especially dogs.²⁰ Constance Bienvenu's other interest was animal welfare.

During the 1950s, she had assumed formal positions in the animal welfare world when she became Honorary Secretary to the Committee for World Animal Week (Victorian Division) and the Combined Animal Welfare Organisations of Victoria.²¹ The major activity of World Animal Week was the promotion of "education in kindness to animals" through a publicity week in October each year. This involved the distribution to schools of self-printed leaflets and posters featuring Australian fauna and iconic images, such as "Simpson and his Donkey".²² For over 20 years Bienvenu ran this from the South Melbourne business and appears to have been its main force and provider of funds.

The Combined Animal Welfare Organisations of Victoria (CAWO) was a loose umbrella group of 11 animal welfare associations formed in this period to campaign on anti-cruelty issues.²³ A key advocate, and friend and supporter of Bienvenu, was the Reverend LL Elliott, the chairman of the Anti-Cruelty Committee of the AWL.²⁴ Predictably, the conservative RSPCA had declined to associate with the CAWO.²⁵

²⁰ This description of the Bienvenu family background is drawn from interviews with Graeme Bienvenu, 2 and 12 March, 2006 and Nance Simonds, 4 May and 28 July 2006. See also NAA: B160, 327/1969 Parts 1 and 2, Affidavit of Albert Henry Bienvenu, sworn 29 April, 1970.

²¹ Bienvenu to Kennedy, 15 August 1960, Miscellaneous Documents — Bienvenu Literature and Bienvenu to Secretary, 18 October 1962, By-Laws (Continued) File 2.

²² Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu. Examples of the posters are located in NAA: A10074, 1970/6. See also interview with Jim Hagekyriakou, 1 March 2007.

²³ Dark, n 19.

²⁴ Jack, n 8, 212.

²⁵ Pertz, n 2, 106.

Not long after the 1959 RSPCA AGM, Bienvenu had her first conflict with Carter, by now the public face of the RSPCA.²⁶ Significantly, the conflict was over posters, educational initiatives that both women organised. For a number of years Carter had organised the RSPCA poster competition for school children.²⁷ In December 1959 she learnt that Bienvenu had retained children's posters sent to her in error. As a result, the posters missed being considered for the annual prize and had caused the RSPCA, and Carter in particular, embarrassment.²⁸

Thereafter the momentum of Bienvenu's correspondence and general engagement with the RSPCA grew steadily.²⁹ Although it would be four years before she launched her first legal proceedings, she showed increasing frustration with the RSPCA and they with her. At no stage did they seek to bring Bienvenu "into the tent". Instead, her focus, and that of her supporters, increasingly turned to reform of the RSPCA. An early 1960 skirmish was over Bienvenu's request to Carter, just before the AGM, for information on voting procedures. She was promptly rebuffed. Writing on CAWO letterhead, Bienvenu complained immediately to the RSPCA President:

A polite request was made by the writer today by telephone to the R.S.P.C.A. in which nomination forms for your committee were asked for if available, and if not available, the date which nominations close. Miss Carter who answered the telephone, said that nominations were closed. On asking the date on which they closed, Miss Carter on the grounds that I was not a member, refused to tell me. It seems rather odd that such a matter is kept secret.³⁰

The President sent two letters in reply. The first outlined membership and electoral procedures but made it clear that the RSPCA controlled who could come to the AGM and who could speak.³¹ The second was undoubtedly ghosted by Carter and locked the committee squarely behind her. It advised that the committee:

Expressed its genuine regret at the clash of personalities between you and Miss Carter — particularly as you are both unselfishly devoted to a common cause

²⁶ Pertzel, n 2, 112.

²⁷ Despite her enthusiastic support for it since 1945, the poster competition was not a major success having regard to the effort expended. See Pertzel, n 2, 112.

²⁸ Committee Minutes of the RSPCA 1, 21 December 1959, 320, RSPCA (Vic), Burwood. Unless otherwise stated, further reference to the RSPCA's Minutes and their location will be in the short form "CMRSPCA". See also Pertzel, n 2, 121.

²⁹ In February 1960 she complained to the RSPCA about the treatment of animals at Ashton's circus. See CMRSPCA 1, 15 February 1960, 324. In 1962 she complained about RSPCA endorsement of chariot races at the Royal Agricultural Show being "not in keeping with efforts to promote kindness to animals". See Bienvenu to Secretary, By-Laws (Continued) File 2, 8 October 1962.

³⁰ Bienvenu to Kennedy, 15 August 1960, Miscellaneous Documents — Bienvenu Literature.

³¹ Kennedy to Bienvenu, 23 August 1960, Miscellaneous Documents — Bienvenu Literature.

— it strongly affirmed its complete confidence in our Secretary's fidelity to the Society's objects, her work as our Secretary, and her zeal to promote the interests of animals.³²

RSPCA reform pressure mounts: the "revolution" cometh!

Voices of dissent next erupted after the 1962 AGM when the President closed the meeting without allowing questions. "There is no question time on the agenda" and "[w]hen you become a member of this Society you are bound by its rules" were his blunt responses to two members who had wanted to discuss the ill-treatment of poddy calves in Gippsland. They felt "gagged".³³ Carter's unsympathetic follow-up action was to seek advice from the RSPCA's solicitor, Roy Schilling, on how the committee could expel troublesome members. Schilling advised that there was no specific power in the by-laws and it would be necessary to follow the common law rules relating to natural justice.³⁴

By 1963 a letter and leaflet campaign to reform the RSPCA had gained momentum and spilt over into the public arena.³⁵ Bienvenu, by this time a paid-up member of the RSPCA,³⁶ personalised the campaign when she was quoted in the *Herald* as saying, "Carter should be censured severely for condoning use of animals in experimental laboratories" and that the RSPCA was "wealthy but won't use its money".³⁷ Public notices appeared in the press that announced the formation of a six-person "RSPCA Reform Committee". Led by Bienvenu, this committee called upon RSPCA members to support a "MORE ACTIVE POLICY" and to vote for them at the forthcoming AGM.³⁸ Bienvenu's passion shone through when she was quoted saying:

An animal revolution is in progress throughout the world. It will be the same type of revolution, which put an end to child labour last century only this time it will be the animals which will benefit.³⁹

Beneath the rhetoric Bienvenu outlined proposals for a 24-hour veterinary service; more money for direct animal welfare; small clinics placed strategically throughout Victoria (attended by voluntary veterinarians) and greater public

³² See Carter to Kennedy, 24 September 1960, enclosing draft letter and Kennedy to Bienvenu, 14 October 1960, Miscellaneous Documents — Bienvenu Literature. See also Pertzel, n 2, 121.

³³ "RSPCA meeting gagging charge", *Sun*, 31 August 1962, 13.

³⁴ Roy Schilling & Co to Carter, 19 November 1962, By-Laws (Continued) File 2.

³⁵ See, for example, L Cranfield, Letter to the Editor, "Treatment of Animals", *The Age*, 27 July 1963, 2.

³⁶ She joined with her husband. See further, Annual Report RSPCA (1962–63), 23. See also, Pertzel, n 2, 121 and "Woman's bid to join RSPCA rejected", *The Age*, 2 July 1968, 3.

³⁷ CMRSPCA 1, 17 June 1963, 423, RSPCA (Vic), Burwood and Pertzel, n 2, 121–122.

³⁸ *Herald*, 21 August 1963. See also, "Group challenge to reorganise R.S.P.C.A.", *The Age*, 22 August 1963, 8.

³⁹ Dark, n 19.

education. The RSPCA committee immediately countered with a notice saying that the group was “self appointed and has no recognition by nor status under the Society”.⁴⁰ It also distributed a three-page circular letter to members, mounting a vigorous defence of its position. It made clear its view, although somewhat defensively, about whose support was superior:

The Society is proud to enjoy the confidence of the Government of Victoria, Victoria Police, the Graziers Association, the Fisheries and Wildlife Department, the Departments of Health and Agriculture, the Victorian Dairy Farmers Association, Meat and Allied Trades Federation and many of the Shires and Councils in Victoria.⁴¹

The 1963 AGM was a public relations disaster for the RSPCA. “Critics heckle R.S.P.C.A. Chief”,⁴² “RSPCA chief heckled”,⁴³ and “Look Out! The Animals are in revolt”⁴⁴ were just some of the headlines over the next few days. However, the scenes at the meeting had confirmed Carter’s resolve to “rid ourselves of such people as members” and she set about ensuring that proposed new by-laws included similar exclusion powers as existed in the English RSPCA rules.⁴⁵ The RSPCA committee still failed to understand the depth of feeling against them and focused instead on “fully examining the possibility of action being taken re the recent attack made upon the Society by certain members” and considered that “it was important to ascertain who constituted the group ‘Combined Animal Welfare Organisations’”.⁴⁶ The committee made no moves to review their policy direction.

The AGM was also a failure for Bienvenu and the Reform Committee. Although a fairly close contest,⁴⁷ not one of their candidates was elected. Bienvenu believed the election to be unfair, even unethical, as ballot papers had been marked to indicate retiring committee members, presumably to their advantage.⁴⁸ To support her view she had requested a copy of the RSPCA’s list of contributing members as marked off by the returning officer on election day. It was refused.⁴⁹ The RSPCA had won that round.

⁴⁰ *Herald*, 21 August 1963.

⁴¹ By-Laws (Continued) File 2.

⁴² *The Age*, 27 August 1963.

⁴³ *Sun*, 27 August 1963.

⁴⁴ Dark, n 19.

⁴⁵ Carter to Schilling, 2 September 1963, By-Laws (Continued) File 2. In responding to Carter’s letter about the Australian developments, the Chief Secretary of the RSPCA (UK) expressed sympathy and advised that “practically all that you mention in your letter had its exact parallel in similar unhappy proceedings at our own Extraordinary and Annual General Meetings in 1961”. See Hall to Carter, 9 November 1963, By-Laws (Continued) File 2.

⁴⁶ CMRSPCA 1, 17 September 1963, 431.

⁴⁷ The Reform Committee received 216 votes and the RSPCA candidates 350. See Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu.

⁴⁸ Dark, n 19.

⁴⁹ CMRSPCA 1, 17 September 1963, 431. See also, Ettelson to Carter, 5 September 1963, By-Laws (Continued) File 2.

A second challenge: the legal system intervenes

Undeterred by this setback, Bienvenu had then thrown herself into campaigning before a further reform attempt at the 1964 AGM. Through the press she called for better conditions and supervision of long-haul cattle trucks;⁵⁰ reproved the RSPCA for approving “Buckjumping” rodeos at the Royal Show⁵¹ and criticised as “disgusting” the fact that Victoria was 10 years behind a New South Wales ban on live hare coursing.⁵² Bienvenu also continued to tackle the RSPCA head on. She wrote to complain about the failure of the RSPCA to respond promptly to a call to attend an injured dog;⁵³ their failure to invite her as an RSPCA member to the annual Children’s Poster Exhibition, “no doubt an oversight by the Secretary”,⁵⁴ and was persistent in seeking copies of the RSPCA’s unpublished balance sheets for 1960/1961 to 1962/1963.⁵⁵

The continuation of the reform campaign became public news again in June 1964 when Bienvenu wrote to the *Herald* foreshadowing that the RSPCA Reform Committee would again nominate for positions at the next AGM and that “it would require that the ballot be conducted in a fair and unbiased way, and that the reform committee be given their rights under the rules of the society”.⁵⁶ Lady Gwenda Manifold,⁵⁷ a doyen of the establishment, immediately rebuked her: “surely Mrs Bienvenu might better assist the aim of the society with helpful support (through fundraising), than with uncalled-for criticism”.⁵⁸ Not to be silenced so easily, Bienvenu responded, referring to the pre-marked ballots at the 1963 election and noting the fact that for some years there had not been a full committee, asking, “[w]hy there is such urgency being displayed by some members to divert the normal process of change in committee membership by fair election?”.⁵⁹ Ominously for the RSPCA, this was confirmation that Bienvenu had become a student of the RSPCA by-laws.

This time the Reform Committee ran a fuller campaign and distributed a 13-page information booklet. It claimed credit for improved financial reporting

⁵⁰ “Here’s an answer to animal cruelty”, *Herald*, 21 February 1964, 52.

⁵¹ “Buckjumping at Royal Show”, *The Age*, 5 August 1964, 2. See also, “The Cruelty behind Rodeos”, *The Age*, 7 August 1964, 2.

⁵² “Victoria’s lag on coursing ‘Disgusting’”, *Herald*, 19 August 1964, 18.

⁵³ Bienvenu to Ettelson, 15 March 1964, By-Laws (Continued) File 2. See also, CMRSPCA 1, 13 April 1964, 450.

⁵⁴ Bienvenu to RSPCA Committee, 12 May 1964, By-Laws (Continued) File 2.

⁵⁵ Bienvenu to President, 8 June 1964, By-Laws (Continued) File 2. Responding to the criticism, in 1964 they were published in the annual report in line “with the modern trend in publishing accounts”. See Annual Report RSPCA, (1963–1964), 29.

⁵⁶ “RSPCA ballot”, *Herald*, 18 June 1964, 4.

⁵⁷ Formerly Grimwade, she was the wife of Sir Chester Manifold, grazier and racing administrator. See Andrew Lemon, “Manifold, Sir Thomas Chester (1897–1979)”, 15 *ADB*, 2000, 296–297.

⁵⁸ “RSPCA ballot”, *Herald*, 25 June 1964, 4.

⁵⁹ *Ibid.*

by the RSPCA, analysed past annual reports, and provided profiles of its 10 candidates, Bienvenu and the Reverend LL Elliott included. There were also detailed plans on how they would proceed if elected, including holding more general meetings for “open discussion and formulation of policy”, more prosecutions for cruelty, and the promise that funds would be “released immediately for an all out war on cruelty”.⁶⁰

To ensure the widest circulation of the manifesto among the membership, Bienvenu requested a list of RSPCA subscribers.⁶¹ She was advised that she could view it at the AGM,⁶² effectively giving the incumbent committee full and sole prior access to the membership in the forthcoming contest. By this time Bienvenu’s study of the by-laws had revealed that Carter was wrong in advertising seven vacancies rather than 12 and was improperly curtailing the hours the poll was to be open. From her experience of the 1963 elections Bienvenu also held reservations about the integrity of the ballot papers. These facts suggested an unfair, even undemocratic, election and she sought legal advice from Gillott, Moir and Ahern, Solicitors. After checking with her husband that Bienvenu was a person of means and could pay their bill, on 25 August 1964, just seven days before the AGM, the solicitors wrote to Carter saying:

Unless the Society is prepared to cancel the present proposed poll and conduct one in accordance with the requirements of the Hospital and Charities Act and the Society’s By-Laws, our instructions are to apply to the Supreme Court for an injunction to restrain [sic] the proposed poll next Monday.⁶³

Defiantly, Carter wrote back that same day: “The Society denies the validity of your client’s contention and will resist the proceedings threatened”. She advised that Roy Schilling & Co had been authorised to accept service.⁶⁴ The decision to defend appears to have been made without reference to the committee.⁶⁵

Three days later Sholl J granted Bienvenu, as an RSPCA member, an interlocutory injunction stopping the election of the General Committee until the RSPCA complied with the procedures under the *Hospital and Charities Act 1958* (Vic). His Honour was dissatisfied with some of the by-laws and said it “was a matter of importance that the Committee should be validly elected”.⁶⁶

⁶⁰ “To members of the RSPCA: The Case for the Reform Committee”, Miscellaneous Documents — Bienvenu Literature.

⁶¹ Bienvenu to Secretary RSPCA, 27 July 1964, By-Laws (Continued) File 2.

⁶² CMRSPCA 2, 10 August 1964, 462.

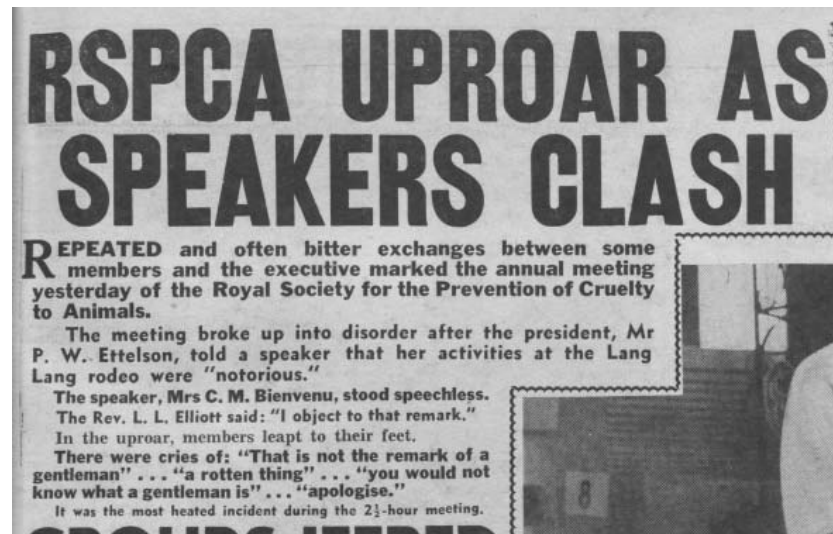
⁶³ Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu. See also, By-Laws (Continued) File 2.

⁶⁴ Carter to Gillot Moir & Ahern, 25 August 1964, By-Laws (Continued) File 2.

⁶⁵ An examination of the committee minutes makes no reference to any discussion or ratification of the decision.

⁶⁶ “RSPCA ballot stopped”, *Sun*, 29 August 1962, 9. See also, PROV, VPRS 6345/P0, Unit 310, paragraph 2, submission from Roy Schilling & Co to Chief Secretary of Victoria, 23 May 1967.

Against this troubled background the RSPCA proceeded with the scheduled AGM on 31 August 1964. Once more, it was a public relations disaster with two and a half hours of heated arguments, interjections and continual heckling. Only limited business was transacted, mainly the release of the annual report and the election of office-bearers. Newspaper reports the next day referred to “Snaps, Snarls, Growls Provide Theme for R.S.P.C.A Talk”,⁶⁷ and “RSPCA Uproar as Speakers Clash”.⁶⁸



RSPCA uproar. *Sun* newspaper report of fiery RSPCA Annual General Meeting. 1964.

Courtesy State Library of Victoria..

On 12 October 1964, having satisfied the necessary electoral rules, the AGM reconvened to finalise the election of the General Committee. Again, it was a disappointment for Bienvenu and the Reform Committee. They were comprehensively defeated by 600 votes to 289 for all 12 committee positions.⁶⁹ However, issues relating to the work of the RSPCA were not discussed, the President ruling that the RSPCA was still before the court and they “would have to be brought up again at the next annual meeting or at a general meeting”.⁷⁰ Round two to the RSPCA committee.

⁶⁷ *The Age*, 1 September 1964, 3.

⁶⁸ *Sun*, 1 September 1964, 3.

⁶⁹ “All returned in R.S.P.C.A”, *The Age*, 13 October 1964.

⁷⁰ “All quiet again RSPCA: Committee returned”, *Sun*, 13 October 1964, 18.

1965: a new battleground and new legal proceedings

In 1965 the battleground became the by-laws. For different reasons Bienvenu and the committee each had an interest in them. Even before Sholl J's comments had created legal uncertainty the committee had commenced a rewrite of the 1943 by-laws to among other things, include a power to expel troublesome members.⁷¹ For Bienvenu, the focus was on securing rules that ensured a fair electoral process. For her that was the road to wider RSPCA reform. To bring that about she gathered signatures from 20 subscribers and petitioned Carter on 30 March 1965 for a special general meeting (SGM). Its purpose would be to adopt by-laws that mandated election processes as set out by the *Hospitals and Charities Act 1958*. On 1 April, the irony of the date no doubt not lost on her, Carter totally rejected the request, stating that Bienvenu had "misinterpreted" the by-laws upon which she relied. However, Carter did indicate that a complete re-draft had been prepared by Roy Schilling and would shortly come before a SGM for confirmation.⁷² At the same time Carter again sought urgent legal advice, this time from Schilling's partner Alan Missen,⁷³ on how to expel Bienvenu. In providing his advice Missen's comments indicated a certain partisanship: "We feel that this expulsion should have been contemplated long before this".⁷⁴ But the committee thought differently, deciding that it was "inexpedient to take action at this time".⁷⁵

The disclosure that there was a new set of by-laws in the pipeline alarmed Bienvenu. She saw that voting on the by-laws would take place before the next AGM and would most likely pre-empt her efforts at democratic reform and entrench unfair electoral processes. In particular, her examination of the proposed by-laws showed that names, but not addresses, of subscribers would be available only through the new public register. To Bienvenu this:

placed unfair and unwarranted power into the hands of the existing Committee to post out any policy they wish to state, or any belittling propaganda about those who criticised the administration. This is a totalitarian method.⁷⁶

In addition, the proposed by-laws gave the committee power to make "any regulation they liked, good or bad, regarding the conduct of elections".

⁷¹ In 1964, the RSPCA's solicitor, Roy Schilling, was authorised to prepare a new constitution on the understanding that appropriate fees would be charged. See CMRSPCA 1, 13 April 1964, 17 September 1963, 450.

⁷² Carter to Bienvenu, 1 April 1965, By-Laws (Continued) File 2.

⁷³ From this point Missen takes a key role in providing legal advice to the RSPCA. In 1974 he entered federal Parliament as a Liberal Senator for Victoria. See further, Anton Hermann, *Alan Missen: Liberal Pilgrim: A Biography*, 1993.

⁷⁴ Schilling & Co to President, 7 April 1965, By-Laws (Continued) File 2.

⁷⁵ CMRSPCA 2, 22 April 1965, 483.

⁷⁶ Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu.

Bienvenu felt the committee was “BULLDOZING” through the 43 altered by-laws. They had to be stopped.⁷⁷

With the SGM set for 25 May 1965, Bienvenu again consulted Gillott, Moir and Ahern. Despite a warning letter, the RSPCA declined to postpone the meeting and, on 24 May 1965, *new* interlocutory proceedings (No 1720 of 1965) came before the Supreme Court. Relying on the 1943 by-laws, Bienvenu’s counsel, Mr Otto Strauss, challenged the legitimacy of the confirmation and electoral process and sought an injunction. However, Winneke CJ,⁷⁸ unlike Sholl J in the 1964 proceedings, saw no irregularities in the electoral process being followed and declined to grant the injunction. Accordingly, the meeting proceeded and the new by-laws were confirmed, despite “continuous interruptions” by Bienvenu and the Reverend Elliott.⁷⁹

It would later become significant that the court dealt with two matters that morning. Apparently, without objection, Winneke CJ had earlier dismissed the dormant 1964 proceedings (No 3256 of 1964) for want of prosecution. Although present at the back of the court, Bienvenu would later claim she had not been consulted on that step and indeed, at that stage, did not know that there had been two legal proceedings on foot. In her view as a layperson, the 1965 hearing was simply a further part of the 1964 proceedings. This event would loom large in her later claims of professional negligence and conspiracy among lawyers.⁸⁰

A few days later, with no injunction granted and the second proceedings now adjourned and awaiting a trial date, Bienvenu made a conciliatory gesture to the RSPCA. Through her lawyers she offered, first, to withdraw “on the basis that each party pay its own costs in both actions”. Missen, for the RSPCA, rejected this immediately.⁸¹ As an alternative, it was suggested that the matter be allowed to proceed with the RSPCA agreeing not to seek any further order for costs. Gillotts suggested that this reflected the RSPCA’s expressed view that “it now feels essential that it should have the court’s ruling on the validity of the bylaws”.⁸² This too was rejected upon advice of the RSPCA’s counsel, Voumard QC and his junior Ivor Greenwood. Voumard advised that the RSPCA should assume the by-laws to be valid and “should not proceed to explore the

⁷⁷ Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu.

⁷⁸ Michael Winneke, the son of the Chief Justice, was by now a partner in the law firm acting for Bienvenu. In due course Bienvenu would see this familial link as part of a wider conspiracy by the legal profession.

⁷⁹ The result (including postal votes) was 612 in favour, 64 against. See Annual Report RSPCA, (1964–1965), 3 and Pertz, n 2, 124.

⁸⁰ This description of events is drawn from Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu, and PROV, VPRS 6345/P0, Unit 310, paragraphs 2 and 3, submission from Roy Schilling & Co to Chief Secretary of Victoria, 23 May 1967.

⁸¹ See Gillott, Moir and Ahern to Roy Schilling & Co, 28 May 1965, By-Laws (Continued) File 2 and CMRSPCA 2, 15 June 1965, 488.

⁸² Gillott, Moir and Ahern to Roy Schilling & Co, 28 May 1965, By-Laws (Continued) File 2.

position at law”.⁸³ The assumption apparently was that a pressured Bienvenu would concede and the problem would go away.

The RSPCA’s having chosen to reject possible compromise, President Beattie also sought to ensure there was solidarity among the committee members. At their meeting on 15 June 1965 they spent considerable time discussing why committee member Mr N Allen had recently declined to second formally the confirmation motion for the new by-laws. The committee knew that Allen had an association with Bienvenu through her World Animal Week poster programme.⁸⁴ After pressing Allen on whether he had any ongoing concerns, the President closed the discussion but not before pointedly noting “that it was very important for all members of the committee to be in agreement on this matter”.⁸⁵

After her peace offer had been rebuffed Bienvenu set about researching with new urgency the origins and validity of the by-laws. Through the rest of 1965 and into 1966 she spent enormous amounts of time researching in the La Trobe Library,⁸⁶ making enquiries of the Attorney-General,⁸⁷ the Minister for Health⁸⁸ and even the Governor.⁸⁹ This caused exchanges of correspondence between Government departments about the “breakaway group” and saw tension develop between the RSPCA and the Hospital and Charities Commission (HCC), the ostensible supervising authority.⁹⁰ By then it was becoming clear that when the RSPCA first incorporated as a charity in 1895 (on the advice of then committeeman and honorary counsel, the Hon Alfred Deakin), the provisions of the *Hospitals and Charities Act 1890* (Vic) required that by-laws be confirmed and then published in the *Government Gazette*. Bienvenu could find no gazettal and nor could the RSPCA.⁹¹ What did that mean?

By May 1966, with another AGM looming, Bienvenu had become concerned that the case had not been heard and went to see her solicitor at Gillotts, Mr AE O’Connor. She was surprised to learn that he was in Canada on leave and Mr AF (Tony) Smith was now acting for her. For the first time Bienvenu learned there had been two legal actions issued, but Smith was unclear as to why the 1964 action had been dismissed. Though “far from happy” Bienvenu “believed that what she was doing was right” and, now armed with what she

⁸³ CMRSPCA 2, 28 June 1965, 492.

⁸⁴ Bienvenu to RSPCA, 12 May 1964, By-Laws (Continued) File 2.

⁸⁵ CMRSPCA 2, 15 June 1965, 488.

⁸⁶ Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu.

⁸⁷ PROV, VPRS 6345/P0, Unit 310, 26 May 1966.

⁸⁸ *Ibid*, 3 June 1966.

⁸⁹ *Ibid*, 7 September 1966.

⁹⁰ As early as 1947 there had been doubt that the RSPCA came under the supervising remit of the then Charities Commission. An opinion provided by the then Crown Solicitor, Frank Menzies, concluded that they did. See PROV, VPRS 6345/P0, Unit 310, Menzies to Secretary, Department of Health, 18 July 1947.

⁹¹ PROV, VPRS 6345/P0, Unit 310, Carter to Secretary, Hospital and Charities Commission, 20 July 1966.

clearly saw as a silver bullet, namely the non-gazettal of the original by-laws, she insisted on amendments to the statement of claim to incorporate the point.⁹²

In response, the RSPCA made two major points in their formal defence. They raised an estoppel argument. How could Bienvenu now say there were no valid rules when she had relied on them in the 1964 litigation? Secondly, if there were no valid rules then she could not be a member and thus had no *locus standi* in the action.⁹³ By adopting such a defensive position the RSPCA was closing off any discussion on reform of its electoral processes. At the same time, their determination to see off Bienvenu and her supporters made it clear that they and, presumably, their legal advisers did not fully consider the wider legal implications for the RSPCA if their line of defence were actually to succeed.

With pleadings closed the matter moved slowly towards a hearing, but not before yet another fiery AGM. For two and half hours the meeting debated a series of motions put forward by Bienvenu and supporters. They canvassed the suffering of brumbies, a call for an intensive educational campaign on the spaying of female dogs, refusal of membership to “horse slaughterers” and a ban on the excessive flogging of racehorses. At times the meeting bubbled over and Bienvenu was accused of making “stupid suggestions” to which she replied evenly, “I would have hoped that the gentlemen in this meeting would have been able to control themselves to the extent of not making such remarks about ladies present”.⁹⁴ However, it was progress of sorts. Only four years earlier the AGM had been closed down without allowing any questions at all.

Shortly afterwards, on 16 September 1966, the case came on for hearing. It was a false start. It had been listed before Oliver Gillard J who “laughingly declined to hear the matter because he stated that he had been connected with the RSPCA some years prior”.⁹⁵ In fact, His Honour had been a member of the committee and joint architect of the 1943 by-laws.⁹⁶ Bienvenu bore the cost of this adjournment, adding to her growing disenchantment with lawyers. The case would not be heard that year.

A legal bombshell: the RSPCA in a “tangle” and legislative reform

Bienvenu’s long awaited “day in court” came on 2 February 1967 but not before an unsettled start. At the last moment her chosen counsel, Ashkanasy QC, had

⁹² Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu.

⁹³ PROV, VPRS 6345/P0, Unit 310, paragraphs 2 and 3, submission from Roy Schilling & Co to Chief Secretary of Victoria, 23 May 1967.

⁹⁴ Transcript of 95th Annual General Meeting, held 31 August 1966, By-Laws (Continued) File 2.

⁹⁵ Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu.

⁹⁶ Pertzel, n 2, 204 and CMVPSA 6, 21 August 1943.

dropped out and was replaced by the unknown (to her) Richard Searby.⁹⁷ For three days Searby and Otto Strauss argued the case before Starke J, taking evidence from Bienvenu and her supporters such as Muriel Danilov, Allan Green and Bienvenu's sister Nance Simonds. More supporters sat in the public gallery. For the RSPCA, Aickin QC and Haddon Storey⁹⁸ relied on Carter and former President and co-author of the 1943 by-laws, Phillip Ettelson.⁹⁹

On 9 March 1967 Starke J dropped his bombshell. His Honour accepted that the RSPCA had been without valid by-laws since 1895. Bienvenu had been right! However, as a result, there were no office-bearers or contributors, including her. Therefore Bienvenu had no *locus standi* to bring the action. Further, she was estopped from succeeding as, having relied on the by-laws in the 1964 proceedings, she could not now seek advantage by saying they did not exist. Justice Starke said, "I cannot conceive of a clearer case of blowing hot and cold".¹⁰⁰ Having accepted the narrow legal points, His Honour went on to say, "[t]here are various other matters argued before me but in view of the conclusions I have reached it is unnecessary to determine them"¹⁰¹ and thus dismissed Bienvenu's attempts to reform the RSPCA's electoral processes through the courts. As if to rub salt into the wounds, Starke J awarded costs against her.¹⁰² This would subsequently be a major point of grievance for Bienvenu.

The next day the decision was front-page news. "Invalid since 1895. Judge decides RSPCA has no legal basis",¹⁰³ "Court Ruling has RSPCA in a Tangle"¹⁰⁴ and "Does the RSPCA exist?"¹⁰⁵ read the headlines. It was a cartoonist's delight with both WEG and Jeff making the most of the opportunity.¹⁰⁶ Both parties explained their positions through the press: "RSPCA goes on with job"¹⁰⁷ and "RSPCA is still 'operating' — Secretary",¹⁰⁸ explained Carter; "Tangles with RSPCA cost \$3000",¹⁰⁹ said Bienvenu.

Sensing an opportunity, the Reform Committee moved to fill the void created by the ruling. With Bienvenu and the Reverend LL Elliott at the fore they petitioned the HCC to reconstitute the 1895 "Victorian Society for the

⁹⁷ Interview with Richard Searby, Melbourne, 13 February 2007.

⁹⁸ Storey would later serve as Victorian Attorney-General in a Liberal Government in the period 1978–1982.

⁹⁹ Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu.

¹⁰⁰ *Bienvenu v Royal Society for Protection of Animals* [1967] VLR 656, 664.

¹⁰¹ *Ibid.*, 665.

¹⁰² *Ibid.*

¹⁰³ *The Age*, 10 February 1967, 1.

¹⁰⁴ *Herald*, 9 March 1967, 1.

¹⁰⁵ *The Australian*, 10 March 1967.

¹⁰⁶ See for example, "Jeff and the RSPCA Tangle", *Sun*, 10 March 1967, 27 and "Weg's Day", *Herald*, 10 March 1967.

¹⁰⁷ *The Age*, 13 March 1967.

¹⁰⁸ *Herald*, 11 March 1967.

¹⁰⁹ *The Age*, 10 March 1967.



Courtesy State Library of Victoria.

Prevention of Cruelty to Animals” by accepting them as the valid body. To garner support they distributed a letter commencing, “Dear fellow member of the legally non-existent RSPCA (Victoria)” and outlining that the eventual aim of the reform was to “unlock a portion of the amount of money at present held (over \$400,000) for immediate aid to animals”.¹¹⁰ The President of the RSPCA (NSW) was quoted in support:

Your ‘Bombshell’ as outlined in the press relative to the Victorian RSPCA, will bring some headaches to many people and it is hoped bring about some much needed reforms — congratulations on your courage and sincerity.¹¹¹

To head this off and ensure the RSPCA was seen as the legitimate body, Carter successfully sought support from established friends.¹¹² Responding directly to the State Government, the Graziers Association of Victoria counselled that “it would be an ill-service to animals and to the livestock industry if control of the RSPCA should pass into more emotional and less responsible hands”.¹¹³ Murray Byrne MLC was concerned that a “bogus body can, in circulars, attempt to misrepresent an organisation which, despite some legal friction, has carried out the work of a respected and honourable body”,¹¹⁴ and the Lost Dogs Home considered “that the work of animal protection in Victoria would suffer if the status of the RSPCA should be altered”.¹¹⁵ Missen also lobbied heavily for the RSPCA, noting that:

Its elected committee (whether technically elected, irregularly or otherwise) is composed of well known citizens of the highest repute, who are actuated by no other than philanthropic motives.¹¹⁶

He urged rejection of the petition.

In this heated environment the petition went nowhere as the HCC elected to await the opinion of the Crown Solicitor.¹¹⁷ However, there was little doubt where the sympathies of some in government lay, with Chief Secretary Rylah opining:

With regard to the Interim Reform Committee this would seem to have little standing as far as I know and there seems little doubt that it is inspired by

¹¹⁰ PROV, VPRS 6345/P0, Unit 310, Bienvenu to Secretary, HCC, 21 March 1967 and Elliott to Dear Fellow Member, April 1967. See also, “RSPCA row see-saws by mail”, *Herald*, 18 April 1967 and “Clash over RSPCA reform move”, *Herald*, 24 June 1967.

¹¹¹ PROV, VPRS 6345/P0, Unit 310, Carberry to Bienvenu, 13 March 1967.

¹¹² For a summary of sources of support, see Annual Report RSPCA (1967), 2–3.

¹¹³ PROV, VPRS 6345/P0, Unit 310, Secretary to Rylah, 12 May 1967.

¹¹⁴ *Ibid*, Byrne to Rylah, 4 May 1967.

¹¹⁵ *Ibid*, Sallman to Rylah, 12 May 1967.

¹¹⁶ *Ibid*, Schilling & Co to Commissioner of HCC, 14 June 1967.

¹¹⁷ *Ibid*, McLellan to Dickie, 19 June 1967. In May 1968 the Minister for Health formally decided against recommending acceptance of the petition. See PROV, VPRS 6345/P0, Unit 310, Rogan to Lindell, 30 May 1968.

interests which have been carrying out a private war against the Government as well as the RSPCA for some time.¹¹⁸

For the RSPCA, the solution lay with the State Government. This followed the advice of Aikin QC that they could not appeal as they had won! He noted that the court had not ruled on the merits of the Bienvenu dispute and recommended an approach to the Government for a legislative solution.¹¹⁹ Consequently, in May 1967, Missen forwarded a 10-page submission to the Government outlining the views of the RSPCA.¹²⁰

Three months later Bienvenu made her own lengthy submission direct to Premier Bolte and other Ministers. Showing the wordy style that would characterise her later legal documentation, it ran for eight pages with numerous underlinings for emphasis. In five appendices she outlined the main complaints against the RSPCA and the evidence supporting them. They were:

- A. Failure to extend field of activities despite huge increase of both human and animal population.
- B. Failure to conduct fair and democratic elections.
- C. Lack of educational literature in the humane treatment & proper care of animals.
- D. Failure to implement resolutions carried at Annual General Meetings and unfulfilled promises of action.
- E. Failure to prosecute in cases where an action would have every chance of success.¹²¹

On the other side, as part of her ongoing lobbying, Carter gave wide circulation to the specially produced 96th Annual Report (1966/1967). Her covering letter to subscribers explained the “technical breach” of 1895, the expectation of remedial legislation and rather provocatively referred to:

the war of attrition which has been so sedulously carried on by a handful of people styling themselves “Reform Committee” over the past six years. The distraction and waste of time and money involved has been widely deplored.¹²²

Carter’s covering letter to Parliamentarians was more circumspect. It referred simply to the “interesting contents” of the frontispiece and the hope that the report would be “helpful” when considering the forthcoming legislative measures designed to “regularise” the 1895 technical “omission”.¹²³

¹¹⁸ PROV, VPRS 6345/P0, Unit 310, Rylah to Byrne, 5 May 1967.

¹¹⁹ Aikin Opinion, 14 March 1967, located as attachment at CMRSPCA 2, 10 April 1967, 543.

¹²⁰ PROV, VPRS 6345/P0, Unit 310, submission from Roy Schilling & Co to Chief Secretary of Victoria, 23 May 1967. See also “Making RSPCA ‘Legal’”, *Sun*, 4 April 1968 and “Govt. acts to make the RSPCA legal”, *The Age*, 4 April 1968.

¹²¹ PROV, VPRS 6345/P0, Unit 310, Bienvenu to Bolte, 25 August 1967.

¹²² Carter to Dear Sir/Madam, 31 August 1967, By-Laws (Continued) File 2.

¹²³ Carter to Dear Sir, 14 September 1967, By-Laws (Continued) File 2.

Bienvenu took immediate objection to the annual report, particularly the inclusion of a letter that referred to the Reform Committee “robbing the RSPCA”. To her that was libellous and she sought its withdrawal and an apology. Through Gillotts she indicated she was considering “further proceedings”.¹²⁴ Carter did not apologise and Bienvenu did not sue. However, neither did this signal an end to hostilities. It was a phoney peace.

In November 1967 Attorney-General Reid agreed to a legislative fix. He suggested a separate Act of Parliament that would retrospectively validate the RSPCA back to 1895. It need not come under the supervision of the HCC. The Act would include a set of by-laws, most likely the 1965 ones, but should not include the contentious provisions for inspection of membership lists and postal voting. The Parliamentary draftsman would be available to confer with the RSPCA and “any groups interested”.¹²⁵ The RSPCA took immediate objection to the exclusion of postal voting provisions that would disenfranchise many of the membership and make the RSPCA vulnerable to “any unscrupulous or irresponsible group to sign up sufficient members and pack a meeting to obtain a small majority”.¹²⁶ Reid was less concerned. Noting that Bienvenu and her supporters had taken successful legal action and that there was a genuine difference of opinion over elections, it was “most undesirable for Parliament to resolve internal disputes in societies such as the RSPCA”. Reid suggested that any further discussions should be held with the Parliamentary draftsman.¹²⁷

By March 1968 discussions between the parties had advanced, although sticking points remained. One was the by-law amendment procedure. The RSPCA was concerned about takeover. Unless agreement was reached on their preference for a tight procedure, the RSPCA proposed to send a deputation to the Chief Secretary and Premier.¹²⁸ Missen was already showing his skill as a political brinksman. Eventually, in April 1968, Reid introduced the validating Bill.¹²⁹ He acknowledged the incorporation of a number of Bienvenu’s representations, including the right for members to inspect the full members’ register.¹³⁰ Other Parliamentarians also recognised the reforming role played by Bienvenu and others to make the RSPCA “a more active and effective organisation”.¹³¹ Although persistent, she was “not a vexatious litigant”.¹³² In hindsight, these were ironic words.

¹²⁴ Gillott, Moir & Winneke to Carter, 3 October 1967, By-Laws (Continued) File 2.

¹²⁵ Reid to Roy Schilling & Co, 3 November 1967, Attorney-General (GO Reid MLA) re By-Laws File.

¹²⁶ Roy Schilling & Co to Reid, 9 November 1967, Attorney-General (GO Reid MLA) re By-Laws File.

¹²⁷ Reid to Roy Schilling & Co, 16 November 1967, Attorney-General (GO Reid MLA) re By-Laws File.

¹²⁸ Roy Schilling & Co to Reid, 19 March 1968, located in Minute Book RSPCA 2.

¹²⁹ See “Making RSPCA Legal”, *Sum.*, 4 April 1968 and “Govt. acts to make RSPCA legal”, *The Age*, 4 April 1968.

¹³⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 3 April 1968, 4039.

¹³¹ *Ibid*, 30 April 1968, 4511

¹³² *Ibid*, 30 April 1968, 4510.

On 11 May 1968 the Bill passed the Legislative Council.¹³³ The RSPCA was lawful again.

The RSPCA cleanses the membership

New By-law 6 had been a “sleeper” during the Parliamentary debate. It gave the RSPCA committee power to reject, refuse to renew or cancel any membership upon being satisfied:

6(a)(i) that the person concerned has made or caused to be made or published false, unfair, extravagant, fraudulent, derogatory or harmful statements concerning the Society or its activities or its General Committee, Office Bearers or Staff in the performance of their duties.

Under paragraph 6(c), an aggrieved member could “request” the committee to appoint an arbitrator from the Law Institute or the Victorian Bar but no legal representation was to be allowed. Costs could be awarded. Importantly, it gave the power to control appeals to the committee.¹³⁴

The committee wasted no time invoking the by-law. Another AGM was approaching and they were concerned to avert takeover by any reform group. At lunchtime on 28 June 1968 they “unanimously” rejected the membership applications of Bienvenu and her husband. They relied on the presentation of a report from Missen. Bienvenu and her husband were not invited to attend nor ever told the factual basis of the rejection.¹³⁵ Roy Schilling’s 1962 advice on the rules of natural justice in such matters was overlooked.

Over the next few weeks the committee rejected a further 18 applications, including those of Bet Hardy, Muriel Danilov, Nance Simonds, Allan Green and Joan Richmond.¹³⁶ The approach of the RSPCA quickly spilled into the public arena¹³⁷ and brought Carter a rebuke from Reid:

Some severe public criticism may be made to the effect that the Society has been somewhat oppressive in rejecting the applications of Mrs Bienvenu and other members in her position. I bring this matter to your notice at this stage since I understand that the annual meeting of the Society takes place on Friday next and you may wish to take the opportunity of reconsidering the decision of your committee.¹³⁸

After the 1968 AGM, which “took place in a spirit of harmony”, Carter responded to Reid, defending the decisions and noting firmly that the “Society

¹³³ *Ibid*, 1 May 1968, 4598. See also *Royal Society for the Prevention of Cruelty to Animals Act 1968* (Vic).

¹³⁴ See Schedule to *Royal Society for the Prevention of Cruelty to Animals Act 1968* (Vic).

¹³⁵ CMRSPCA, 28 June 1968, 578.

¹³⁶ See undated list on RSPCA letterhead in By-Laws (Continued) File 2.

¹³⁷ “Woman’s bid to join RSPCA rejected”, *The Age*, 2 July 1968, 3 and “Refusing entry to RSPCA”, *The Age*, 5 July 1968, 5.

¹³⁸ Reid to Carter, 28 August 1968, By-Laws (Continued) File 2.

is confident that it can amply justify the action taken”.¹³⁹ Reid replied almost angrily, saying that he did not feel able to answer the suggestions that Bienvenu and her supporters had been “shabbily” treated. He advised Carter that unless the applications were reconsidered, “I will be submitting legislation to Parliament to establish their rights to membership of the Society”.¹⁴⁰ The RSPCA responded, saying it was “shocked” and would view such a step as “the grossest form of interference with the internal management of this society”.¹⁴¹ Then, in December, Carter defiantly advised that the committee had “unanimously” decided not to reconsider the applications or submit them to arbitration.¹⁴² Reid took no further action. The RSPCA had stared him down. It was also the end of the Reform Committee’s attempts to change the RSPCA. Bienvenu’s campaign would now move to a different arena.

Enter Mr X

During the struggle over membership, the RSPCA had moved further on the offensive and had started to pursue Bienvenu for payment of the \$3308.11 court costs. Rather surprisingly, Gillotts appear not to have advised Bienvenu to appeal the costs order. Instead, they accepted the traditional view that “costs follow the event” and only tried to minimise the amount by reviewing the Taxing Master’s order. Understandably, Bienvenu did not appreciate the distinction between these two review paths and was shocked when Gowans J, at the urging of RSPCA barrister Haddon Storey, dismissed her appeal. His Honour ruled:

Whether or not it was within power, or a proper exercise of discretion, to order the plaintiff to pay costs for which the defendant was not liable was not raised before the learned trial judge, and was not a matter the Taxing Master could consider or which can be debated on a review of his taxation. It is now a matter for appeal alone.¹⁴³

In Bienvenu’s eyes, this was another technical decision, not fairness, and understandably compounded her growing lack of confidence in her lawyers. Her disappointment is clear from entries in a surviving diary from that time:

It seems so strange to me that whilst I have only fought for the general good of the Society & its members, justice in the matter fails to reach me every time.¹⁴⁴

¹³⁹ Carter to Reid, 9 September 1968, By-Laws (Continued) File 2.

¹⁴⁰ Reid to Carter, 24 October 1968, By-Laws (Continued) File 2.

¹⁴¹ Carter to Reid, 12 November 1968, By-Laws (Continued) File 2.

¹⁴² Carter to Reid, 10 December 1968, By-Laws (Continued) File 2.

¹⁴³ NAA: A10074, 1969/10, Exhibit B, Mr Justice Gowan’s Judgment, 23 July 1968. See also, “Battle over RSPCA fees”, *The Age*, 20 July 1968, 20 and “Pay costs says Judge. \$6000 Goes To Prove Her Point”, *Herald*, 23 July 1968, 3.

¹⁴⁴ Diary entry for 23 July 1968 in Collins Mid-Year Diary 1968–1969, in the possession (2006) of Mrs N Simonds (sister of Bienvenu), Melbourne, Victoria. Unless otherwise stated all further references to diary entries will be to this diary.

And:

Today my heart is heavy. Have all my efforts over the past nine years gone for nought? Why is it that, if one is truthful, honourable & works for the good of other creatures or other human beings, with no thought of gain for oneself, the odds seems stacked against one?¹⁴⁵

Then, as publicity raged around this latest case, including a call for a public inquiry into the RSPCA,¹⁴⁶ an offer of help came from an unexpected source. On 29 July 1968 Bienvenu took a telephone call from a man who would be the inspiration for her legal activities for the next two years. In her words:

Anonymous man with legal knowledge and who loves dogs has spent some hours talking to me on the telephone endeavouring to try and find some point of legal weakness in RSPCA case to help me. He has given me some very sound advice, but the long telephone conversation tires me (2 hours this morning and 2½ hours this afternoon).¹⁴⁷

For the next year at least, when the diary entries finish, Bienvenu received 83 calls and spent hundreds of hours taking advice and dictated instruction from this anonymous man whom she variously described as “Mr X”, “Councillor” [sic] and “Adviser”. He encouraged her to study law by buying books on contract, torts and the *Supreme Court Rules*.¹⁴⁸ He also advised of her right to inspect Supreme Court files and to obtain the Gillotts file. After reading court files at the Prothonotary’s office, Bienvenu noted, “I have read through them and gather the impression that I have not been represented by my Solicitors as well as I could”.¹⁴⁹ Her examination of the Gillotts file confirmed this impression: “I am afraid any belief or confidence I had in Solicitors is fading”.¹⁵⁰ This, together with her recent discovery that RSPCA President Beattie had been struck off the Solicitors’ Roll in New Zealand in 1932 for professional negligence, further lowered her opinion of lawyers and the standing of people opposed to her at the RSPCA.¹⁵¹

Spurred on by Mr X, Bienvenu’s view hardened that Gillotts had gone beyond tardiness in the conduct of the litigation. They had been negligent. Not only had they failed to protect her interests, but they had also been too close to, even conspired with, the other lawyers. Her discovery of a letter before action to Schillings from her solicitor AE O’Connor confirmed that view. Sent immediately before the 1965 proceedings it said: “We are giving you this prior notice in case it is of some assistance to you in any action you may wish to

¹⁴⁵ Diary entry for 25 July 1968.

¹⁴⁶ “Seeks public inquiry into RSPCA”, *The Age*, 24 July 1968; “Case ‘took cash for animals’”, *Herald*, 25 July 1968 and “RSPCA legal wrangle unnecessary”, *The Age*, 26 July 1968, 3.

¹⁴⁷ Diary entry for 29 July 1968.

¹⁴⁸ For example, diary entry for 24 January 1969.

¹⁴⁹ Diary entry for 30 July 1968.

¹⁵⁰ Diary entry for 6 August 1968.

¹⁵¹ Diary entry for 15 July 1968.

take regarding this matter”. Bienvenu’s not unreasonable interpretation was that this was the green light for Schillings to have the 1964 matter struck out without her knowledge, thus causing her to lose before Starke J.¹⁵²

On Mr X’s advice Bienvenu dismissed her lawyers¹⁵³ and, on 27 September 1968, issued her own Supreme Court writ (3572 of 1968) against Winneke, Smith and Gillotts claiming \$32,000 damages under causes of action described as “actionable wrongs and breaches of contract”. Over the next 14 months she issued a further seven writs together with supporting affidavits and other documentation. Winneke, Smith and Gillotts were regularly named defendants but, as the conspiracy argument took hold, the list of defendants widened, peaking at 32 in one writ in November 1969. The defendants included broadcasters, judges and senior lawyers such as Keith Aickin, Norman Banks, WA Beattie, Victoria Carter, AE O’Connor, Phillip Ettelson, Alan Missen, Basil Murray, the RSPCA, Roy Schilling, Richard Searby, Haddon Storey, Otto Strauss, and Sir Henry Winneke. Although Bienvenu continued to argue that the court should review the decision of Starke J, the causes of action also broadened and escalated in their stridency. They included “intimidation, conspiracy and infamous conduct”, “obtaining judgement by fraud”, “infamous professional conduct and defamation” and “malicious publication of false and defamatory statements”. All the proceedings, save the first where a default judgment was set aside and then dismissed, were either struck out as hopeless, groundless, vexatious, an abuse of the process of the court or just lapsed. Costs were always awarded against Bienvenu.¹⁵⁴

Running in tandem with this litigation was the bankruptcy action started by the RSPCA.¹⁵⁵ Although a formal bankruptcy order was made in August 1969, the RSPCA never recovered any costs from Bienvenu. Instead, the proceedings provided Bienvenu with opportunities and federal forums, mainly the High Court (still located in Melbourne), to challenge previous judgments and restate her case. It unleashed a torrent of letters to officials and judges, applications, cross-applications, and appeals, most with lengthy supporting affidavits sworn by Bienvenu. A consistent theme was that the order for costs was not effective because Starke J found that there were no members or properly appointed officers of the RSPCA capable of collecting the costs. Thus, Bienvenu argued, a bankruptcy could not be founded upon it and nor did the validating RSPCA Act make good that defect.¹⁵⁶

¹⁵² Gillott Moir & Ahern to Roy Schilling & Co, 19 May 1965, referred to in Bienvenu to Richardson, January 1971, Miscellaneous 2 Bienvenu.

¹⁵³ Diary entry for 29 August 1968.

¹⁵⁴ PROV, VPRS 12024/P3, Unit 2, see Affidavit of John Joseph Andrew Sharkey, sworn 4 December 1969.

¹⁵⁵ Bienvenu had been told that this was in train when her husband took a warning telephone call from a sympathiser who worked as a secretary in the office of Roy Schilling & Co. Interview with Jim Hagekyriakou (trustee of Bienvenu Foundation), 1 March 2007.

¹⁵⁶ NAA: A10074, 1970/22, Reasons for Judgement of Full Court, *Hutchison v Bienvenu*, 19 October 1971.

Named defendants were mainly connected to the RSPCA, most of the cases being appeals from the bankruptcy proceedings. Increasingly, they included the suite of defendants named in the Supreme Court, High Court Registrars and politicians such as Attorney-General Tom Hughes, as the cases made their way on appeal. Here again the documentation was dictated mostly by Mr X and typed by Bienvenu, often into the early hours of the morning.¹⁵⁷ She then filed personally at the court registries where she met varying assistance from the counter staff. For example, “[o]ne of the clerks, one who takes the money and stamps the documents is a perfect pig of a man”.¹⁵⁸

Bienvenu appeared for herself in proceedings. In her diary she recalled a particular appearance in March 1969 when Gibbs J heard her challenges to both the bankruptcy notice and the creditor’s petition:

B Day (Bankruptcy Court)

Today was one to be remembered. Although I felt I would be unable to carry out my part up till the time I was seated at the Bar table in the Bankruptcy Court (I had been rather overawed by all the wigs and gowns of the barristers in the proceeding cases). Suddenly, I felt different somehow that inner peace reached me. And I was able to go on. Eileen Allen, Muriel Danilov, Betty Hardy, Nance and Sylvia Simonds & Ben were in court to support me.

I was very happy when each one said I had carried out my task very well. The decision was reserved. Mr Justice Gibbs was very nice to me & I feel like he is fair judge. Mr Storey Barrister (my opposition) was in wig and gown. But I had a pretty lipstick pink suit and my hair done nicely & I felt assured in my appearance.¹⁵⁹

By August 1971 Bienvenu had issued 14 applications in the High Court. All were unsuccessful, with the court refusing to review the decision of Starke J.¹⁶⁰ Throughout, although she appeared never to have discovered his identity,¹⁶¹ she retained confidence in Mr X. “He is an interesting man.”¹⁶² “He is a most brilliant man. Amazing memory and extremely well read.”¹⁶³ But Bienvenu doubted herself:

Very depressed today. Should I go on with legal battle. Am I a (fool) for accepting advice from someone whose name and address I do not know? Can I possibly win when all seems stacked against me?¹⁶⁴

¹⁵⁷ For example, “Adviser telephoned. Dictated another affidavit. I was typing same until 2am”. See diary entry for 19 March 1969.

¹⁵⁸ Diary entry for 10 April 1969.

¹⁵⁹ Diary entry for 19 March 1969.

¹⁶⁰ NAA: A10074, 1970/22, Reasons for Judgment of Full Court, *Hutchison v Bienvenu*, 19 October 1971.

¹⁶¹ Interviews with Nance Simonds, 4 May and 28 July 2006.

¹⁶² Diary entry for 18 December 1968.

¹⁶³ Diary entry for 18 February 1969.

¹⁶⁴ Diary entry for 21 May 1969.

In the end it is her friends who provide the support. She noted in her diary:

What should I do? I am not a stupid or vexatious person, I only seek justice. Bet Hardy is absolutely wonderful. She is doing everything in the world to help.¹⁶⁵

While the legal activity dominated her waking hours, Bienvenu sought to lead as normal a life as possible. Her campaigning and family life simply merged with her affidavit-typing and filing of documents. One day she issued a Supreme Court writ and the next day she went to see Dame Janet Baker sing: "It was really wonderful".¹⁶⁶ On another day she had a Taxing Master's appointment and then a meeting with Senator Mulvihill over presentation of a petition opposing the export of kangaroo meat.¹⁶⁷ She also continued to write protest letters to the papers,¹⁶⁸ baked and creamed 24 sponges in a day for a fundraiser¹⁶⁹ and found time to celebrate her birthday. "Ben and I had dinner at the RACV and went to see 'Bedazzled'. Very poor show. But nice day generally."¹⁷⁰

However, Bienvenu's opponents had had enough of the legal battles. They moved to close her down.

Enough's enough! Two declarations, "Ned Kelly" and history is made

In December 1969 the Victorian Government moved to invoke section 33 of the *Supreme Court Act 1958* against Bienvenu¹⁷¹ and have the Supreme Court declare her a vexatious litigant. It was with some irony that the task fell to Attorney-General Reid, who had provided support to Bienvenu in the Parliamentary debates over the RSPCA legislation.

However, for Bienvenu this was another suspect legal manoeuvre. Her research for the case discovered that the original 1927 *Supreme Court (Vexatious Actions) Bill* had been withdrawn by the Attorney-General of the time and had never been presented again. How then could it be law? In her responding affidavit she made her view clear. The section had:

been illegally and fraudulently inserted in and printed as part of the Supreme Court Acts from time to time by various printers while the said printers were employed by the Government of the State of Victoria.

Then, in uncharacteristic prose (suggestive of a change of adviser) she wrote:

¹⁶⁵ Diary entry for 22 May 1969.

¹⁶⁶ Diary entries for 27 and 28 September 1968.

¹⁶⁷ Diary entry for 1 October 1968.

¹⁶⁸ "Ban those Rodeos", *Herald*, 7 March 1969, 4.

¹⁶⁹ Diary entry for 23 October 1968.

¹⁷⁰ Diary entry for 9 May 1969.

¹⁷¹ PROV, VPRS 12024/P3, Unit 2, File M7029 of the Supreme Court of Victoria.

That the said section 33 is a fraudulent political device and gimmick of the obnoxious Establishment for the unlawful suppression of persons who refuse to be cravenly subservient to the Establishment.¹⁷²

Bienvenu had a point. As discussed in the story of Millane (Chapter Four), there was something unusual, but not illegal, about the passage of the section. In 1928, in the hurry to enact the provision, the Bill had not been reintroduced. The Parliament had simply adopted in full the 1896 English equivalent as part of the 1928 consolidation of current and outdated laws. This was an arcane point of legislative drafting that would both bewilder and fuel the conspiracy theories of more than one vexatious litigant.

On 12 December 1969, in her absence, Gillard J declared Bienvenu vexatious. She was the fifth Victorian declared a vexatious litigant since 1930. Unfortunately for the Government, loose drafting of the order required a further court hearing in February 1970 to insert the word “such” in the appropriate spot. This gave Bienvenu the opportunity to object to Gillard J’s involvement on the basis of bias. She had recalled that his previous RSPCA involvement had seen him stand down from hearing the 1965 litigation. Justice Gillard was not as sensitive to perceptions this time and did not agree. This added further fuel to the conspiracy fire.¹⁷³

Bienvenu’s appeal to the High Court was dismissed on 25 February 1970.¹⁷⁴ As with other vexatious litigant cases, despite the rare nature of the decisions they did not find their way into the law reports.

By this time most of Bienvenu’s litigation had progressed to the federal jurisdictions of the Bankruptcy Court or the High Court. Around February 1970 she started receiving advice from a second “Adviser”. He had approached her in the legal book section of the Public Library of Victoria and offered to “help me draw up legal documents”. An “expert” in constitutional law, this adviser had purchased the law library of the former High Court Chief Justice, Sir John Latham. Identified only as “Mr G Collins (alias Mr George)”,¹⁷⁵ my research makes it clear that this was Goldsmith Collins (the subject of Chapter Seven), former Fitzroy champion footballer of the 1920s whose own legal battles had seen him declared as the first vexatious litigant in the High Court in 1952¹⁷⁶ and the third by the Victorian Supreme Court in 1953.¹⁷⁷ Legal legend confirms

¹⁷² PROV, VPRS 12024/P3, Unit 2. See Affidavit of Constance May Bienvenu, sworn 11 December 1969.

¹⁷³ PROV, VPRS 12024/P3, Unit 2. See Affidavit of Constance May Bienvenu, sworn 16 February 1970.

¹⁷⁴ Full Court Minute Book, Volume 14, High Court of Australia, Canberra. See also, NAA: A 10074, 1969/44.

¹⁷⁵ NAA: A10074, 1970/8, Affidavit of Constance May Bienvenu, sworn 13 May 1970.

¹⁷⁶ High Court File 80/0452. High Court, Canberra. The full circumstances are discussed in Chapter Seven.

¹⁷⁷ Supreme Court of Victoria, File M 2073, Melbourne Victoria.

that Sir John Latham, an enthusiastic Fitzroy supporter, did in fact sell Collins his law library “at a very modest price”.¹⁷⁸ The difference in writing styles suggests that it was unlikely that Collins was also “Mr X”.

As noted in Chapter Seven, an indicator of Collins’ involvement was the *Bienvenu* writ issued by Frank Jones, then Deputy Registrar of the Principal Registry, on the direction of Barwick CJ, naming Jones and the Principal Registrar, Neil Gamble, as defendants. The cause of action was that Gamble and Jones had conspired to deny *Bienvenu* her constitutional rights by refusing to supply her free of charge with a copy of the *Constitution*. Although dismissed by the Full Court this action was modelled on the only successful court action Collins achieved when he successfully sued the NCC. In the early 1950s a magistrate had held that the NCC had failed in their statutory duty to supply him with a copy of their by-laws.¹⁷⁹

Then, suddenly, “Mr George” is gone and not to be found. Attempts to adjourn cases while *Bienvenu* looked for him were unsuccessful.¹⁸⁰ It appears that *Bienvenu* never realised that Collins was also a declared vexatious litigant.¹⁸¹

By October 1970 a frustrated RSPCA was urging Missen to petition the Commonwealth Parliament to have *Bienvenu* declared vexatious in the High Court. Responding to Carter, Missen explained that a petition would be neither appropriate nor wise as such requests are essentially political. He advised that his friend Ivor Greenwood (and RSPCA junior counsel in the 1964 litigation), now a Senator, was pressing the Attorney-General for action. He urged that committee members lobby “influential members” to pressure the Attorney-General.¹⁸² Showing the extent of his own conservative network, Missen lobbied his local member and future Parliamentary colleague, Andrew Peacock MHR.¹⁸³

In February 1971 Commonwealth Crown Solicitor Hutchison finally applied to have *Bienvenu* declared vexatious under Order 63 Rule 6 of the *High Court Rules*. To demonstrate that she had been “unreasonably instituting vexatious proceedings” he referred to her having taken 14 unsuccessful actions in the High Court in the past two years.

The matter was not heard until October 1971, by which time, in another neat shift of positions, Greenwood had become Commonwealth Attorney-General. Although *Bienvenu* made a preliminary application to have the application struck out for “unwarranted delay” and also challenged the validity of Order 63, she made no reference to perceived conflict or bias of the chief

¹⁷⁸ Charles Francis, “Valete Goldie”, *Victorian Bar News*, Winter Edition, 1982, 20.

¹⁷⁹ Interview with Phil Opas, 21 March 2005. See also, Tony Blackshield *et al*, *The Oxford Companion to the High Court of Australia*, 2001, 698–699 and NAA: A10075, 1970/3.

¹⁸⁰ NAA: A10074, 1970/8, Affidavit of Constance May *Bienvenu*, sworn 13 May 1970.

¹⁸¹ Interviews with Nance Simonds, 4 May and 28 July 2006.

¹⁸² Roy Schilling & Co to Carter, 12 October 1970, Miscellaneous 2 *Bienvenu*.

¹⁸³ Missen to Peacock, 26 October 1970, Miscellaneous 2 *Bienvenu*.

law officer having regard to his previous involvement in the RSPCA case or his friendship with Missen. Chief Justice Barwick dismissed the application. His Honour said the “rule is made in pursuance of the rule making power of the court which is ample to sustain it and not in conflict with any constitutional or statutory provision. In my opinion the rule is valid”.¹⁸⁴

The case finally came before Walsh J a few days later. Material filed in Bienvenu’s defence reviewed the history of the RSPCA litigation and drew on Australian history to explain her position:

[The] Commonwealth of Australia seeks to gag me by placing legal restrictions and legal obstacles in my way and barring me from free access to the Courts by branding me a vexatious litigant and thus making me an outlaw like Ned Kelly.¹⁸⁵

On 19 October 1971 Bienvenu made history of sorts when she became the first woman declared vexatious by the High Court.¹⁸⁶ Ironically, she joined Goldsmith Collins as only the second Australian (then) to have been declared vexatious by two superior courts.

The cause continues — activist to the end

Even as the litigation cycle drew to a close, the minds of Bienvenu and her supporters had turned to another way of advancing the animal welfare cause. If the RSPCA could not accommodate them, then they would establish their own society. Bienvenu had taken tentative steps in May 1969 when she had registered the words “Animal Protection” as a business



The High Court rules!.

Bienvenu becomes the second person declared a vexatious litigant by the High Court. *The Herald*. 1971.

Courtesy State Library of Victoria.

¹⁸⁴ NAA: A10117, 1970/22, *Bienvenu v Hutchison*, Transcript of Full Court, 5 October 1971. This view was confirmed in 1992 by Toohey J in a case involving Alan Skyring, the third person declared a vexatious litigant in the High Court. See further, *Jones v Skyring* [1992] 66 ALJR 810, 814.

¹⁸⁵ NAA: A10117, 1970/22, *Hutchison v Bienvenu*, Affidavit of Constance May Bienvenu, sworn 7 October 1971.

¹⁸⁶ NAA: A10117, 1970/22, *Hutchison v Bienvenu*, Reasons for Judgment, 19 October 1971. See also, “No more actions, judge rules”, *Herald*, 19 October 1971.

name and, at the suggestion of her “Adviser”, publicly advertised “Free advice and assistance on animal welfare and cruelty complaints”.¹⁸⁷ In April 1970 Carter was alerted to this development by a “deep throat”, who asked to remain anonymous. The informant advised Carter that a group calling themselves the “Animal Protection Society” was setting up a company and, although her name would not appear as one of the original subscribers, Bienvenu was the convenor. The informant suggested that “one of the reasons for the adoption of this name is a long term plan to subvert public support for the RSPCA”.¹⁸⁸

Missen immediately objected to the Official Receiver, suggesting that Bienvenu, as a bankrupt, should not be “using funds for this purpose”.¹⁸⁹ It was of no effect. In October 1971 Bet Hardy convened the first meeting of the Australian Animal Protection Society (AAPS) at the Malvern library and became its pioneering President. Active supporters (and fellow excluded RSPCA members) were Muriel Danilov, Joan Richmond, Bienvenu and her sister, Nance Simonds. For many years after Bienvenu and her sister would be the nucleus of the Malvern auxiliary, which ran a fundraising shop that also served as early committee rooms.¹⁹⁰

Over the next 30 years the growth of the AAPS represented a significant recasting of the animal welfare landscape in Victoria. It developed a network of auxiliaries throughout Melbourne, provided accessible shelter for unwanted animals and cost-effective veterinary services. It participated in animal welfare policy-making and provided a “welcome mat” for volunteers wanting to be actively involved in the care of animals.¹⁹¹ The RSPCA’s loss was animal welfare’s gain.

It was not only in Victoria that Bienvenu’s influence was felt. In 1964 in South Australia a kindred spirit, Joy Richardson, had established the very successful Animal Welfare League and directly attributed its success to the inspiration and support provided by Bienvenu. Writing an open letter of support in 1970, Richardson explained that in 1959 she had written for help after being rebuffed by the local RSPCA:

I can never forget her spontaneous response — Not by vicious word or thought, of which I have her incapable, but she carted to me, free of any charge, her wonderful Animal Kindness and Educational leaflets.¹⁹²

¹⁸⁷ Diary entries for 1 May and 25 May 1969. See also, “Public Notice”, *Sun*, 24 May 1969, 51.

¹⁸⁸ Penanaid to Carter, 8 April 1970, Bienvenu to Kennedy, 15 August, 1960, By-Laws (Continued) File.

¹⁸⁹ Schilling & Co to Official Receiver in Bankruptcy, 22 April 1970, By-Laws (Continued) File.

¹⁹⁰ Sue Thompson, *Twenty-five years of Animal Protection: A History of the Australian Animal Protection Society*, 1997, 2–6 and also, interviews with Nance Simonds, 4 May and 28 July 2006.

¹⁹¹ “Presidents Report”, *AAPS Newsletter*, Keysborough, Spring 2006, 2–4.

¹⁹² Richardson to Victorian Parliamentarians, October 1970, Miscellaneous 2 Bienvenu. See also at: <http://www.animalwelfare.com.au/AboutUs/History/tabid/55/Default.aspx>

The wheel was turning also for Carter and the RSPCA. After a decade of dealing with the challenge of the Reform Committee there was belated recognition within the RSPCA that change was needed. Key to this was the arrival on the committee in 1969 of future President Hugh Wirth and the retirement of Carter. Her “unhappy but necessary departure” occurred at the end of 1975.¹⁹³ Thereafter the RSPCA set a proactive course. The committee regenerated with younger progressive members, restructured governance into active committees, rebuilt funding, membership and public relations and, perhaps most significantly, initiated the Kindred Societies Liaison Committee “to bring together the proliferation of satellite animal welfare groups launched in Victoria during the RSPCA’s Carter era”.¹⁹⁴ Years later, long-time RSPCA President Hugh Wirth would say that Bienvenu had been “more right than wrong” and had been a catalyst for change.¹⁹⁵

After 1971 Bienvenu’s life was quieter. She returned to work at Wellcome Products, her activism limited to caring for animals left at her front door,¹⁹⁶ writing letters of protest to the papers¹⁹⁷ and voluntary work with the AAPS. In 1977 she was discharged from bankruptcy without having paid the RSPCA anything, her husband having successfully established equity in her real estate.¹⁹⁸ However, in 1982 she returned to court for one last tilt, seeking to have the 1969 vexatious order of Gillard J set aside or revoked. Bienvenu argued that he had erred in not assigning counsel to her, as required by section 33(2) of the *Supreme Court Act 1958*. Justice Crockett gave the argument short shrift. Bienvenu should have asked for counsel at the time and, in any event, it was an appeal point and out of time! An unintended consequence was that Bienvenu’s case did create new law, with Crockett J finding that the court had an inherent power to bring such orders to an end, if appropriate. In his view Parliament would not have intended it to be so “draconic” as to be an effective life sentence. Nonetheless, Crockett J declined to make a revocation order, although His Honour did indicate that if the application were in the proper form, then it would be considered.¹⁹⁹ But Bienvenu took it no further. Then, in

(2 March 2007). Interestingly, the official history of the South Australian RSPCA makes only a passing reference to the Animal Welfare League and no mention of Joy Richardson. See further, Budd, WB, *Hear the other side: A History of the Royal Society for the Prevention of Cruelty to Animals in South Australia 1875–1988*, 1988.

¹⁹³ Pertzel, n 2, 137. Ironically, after she was ousted as Secretary, Carter would make life difficult for Wirth. In his words: “She would come to the annual meetings, sit in the front row wearing her tam’ o’shanter and criticise me”. See Lawrence Money, “The vet with bark and bite”, (2007) 75 *ROYAL AUTO*, 46.

¹⁹⁴ Pertzel, n 2, Chapter 24.

¹⁹⁵ Interview with Hugh Wirth, 19 January 2006.

¹⁹⁶ Interviews with Nance Simonds, 4 May and 28 July 2006.

¹⁹⁷ See, for example, “They’re not sportsmen”, *Herald*, 7 December 1971 and “Roo ignorance”, *The Age*, 7 May 1984.

¹⁹⁸ NAA: B160/0, 327/1969 Part 2.

¹⁹⁹ *Bienvenu v Attorney General for Victoria* [1982] VR 563.

what could be called the “Bienvenu amendment”, Parliament gave statutory recognition to the revocation option in 1986.²⁰⁰

Bienvenu died in Melbourne in 1995, aged 83, and was cremated. She was survived by her supportive husband Ben and sister Nance. A short obituary in the AAPS newsletter said:

This lady was a great friend to the Society and indeed to all animal welfare. Her fight for justice and fair play years ago in animal welfare is well known to many and she will be greatly missed.²⁰¹

Ben died in 2000 and through his estate established the Albert and Constance Bienvenu Foundation for charitable purposes. It was a condition of his will that no donations be made to the RSPCA.²⁰²

Conclusion

In the 40 years since Constance Bienvenu first did battle with the RSPCA it is now common ground that she was ahead of her time. Her vision for an active and interventionist animal welfare system is now recognised. Not least of all, her fight gave rise to a more democratic, accountable and active RSPCA. It is also clear that Bienvenu was not alone in the struggle, either in Victoria or interstate. However, it was her determination that drove the campaign for over a decade when others, less determined, would have wilted.²⁰³ In Victoria Carter MBE Bienvenu came up against a woman who was equally determined that her conservative vision for animal welfare was the correct one. It is clear that they did not like each other. Had Carter and the RSPCA committee been less defensive then perhaps Bienvenu’s recourse to litigation might have been avoided, some reform achieved and a proliferation of splinter groups minimised.

However, it was the inability of the legal system to provide solutions to help advance Bienvenu’s reform agenda that saw the litigation veer off in its own direction, sweeping others up in its unintended consequences. In retrospect, both Bienvenu and the RSPCA were not well served by their lawyers. Bienvenu’s lawyers were too loose in their conduct of the case, while the lawyers for the RSPCA became personally involved to the point of where their professional judgment was clouded. Even Gillard J, who declared Bienvenu a vexatious litigant, apparently saw no continuing bias on his own part, although he had previously disqualified himself from earlier litigation on that basis. But it was the 1967 judgment of Starke J, focusing as it did on narrow legal points and not the underlying dispute, that was the catalyst for Bienvenu’s break from

²⁰⁰ Victoria, *Parliamentary Debates*, Legislative Council, 5 December 1986, 1659. See also, *Supreme Court Act 1986* (Vic), section 21(5).

²⁰¹ “President’s Message”, *AAPS Newsletter*, Keysborough, September 1995, 3.

²⁰² Interview with Jim Hagekyriakou, 1 March 2007.

²⁰³ Interview with Hugh Wirth, 19 January 2006.

her lawyers. Justice Starke's judgment was exacerbated by his rather harsh exercise of discretion to award full costs against Bienvenu. Had he not done that, then a major focus of continuing grievance would have been eliminated.

Not surprisingly, the combination of Bienvenu's passion for her cause together with her disappointment with the legal profession made her easy prey for a "good Samaritan" in the form of the mysterious "Mr X". The extraordinary thing is that there were two such "Advisers" at play at different times and that at no time did the court or others involved appear to recognise that there was an invisible hand guiding the litigation. This reflects the difficulty the adversarial legal system has, unlike the European inquisitorial system, in actively enquiring into disputes. Rather, it relies on procedures, form and professional advocacy to get to the core of a dispute. That Bienvenu was, in effect, a conduit (albeit a willing one) for transporting the litigation ideas of others makes it difficult to suggest that she was a querulent as defined by Mullen and Lester (Chapter Two).²⁰⁴ Her life apart from her animal welfare activity and litigation was entirely normal.

One of the great ironies is that Bienvenu kept returning to the court looking for that elusive "justice" after being rebuffed time and again. This almost blind faith is, of course, what distinguishes the vexatious from the ordinary litigant. The positive aspect of this is best summed up in the words of George Bernard Shaw:

The reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man.²⁰⁵

²⁰⁴ See discussion in Chapter Two; and also Paul Mullen and Grant Lester, "Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour", (2006) 24 *Behavioural Sciences and the Law* 333, 336.

²⁰⁵ "Man and Superman", 1903; *Oxford Dictionary of Quotations*, 1992, 637:32.



CHAPTER NINE

Dieter Soegemeier Don Quixote at law

Dieter Soegemeier (1933–2005) was, from all accounts, a large and likeable man. Over six feet tall, with blond hair, he was also a self-taught student of Australian law and a loyal subject of the Queen. In 1980 he found a place in legal history when he became the ninth Australian and the second Queenslander to be declared a vexatious litigant.

Born in Germany, Soegemeier emigrated to Australia after World War Two in quest of a new life. However, his various business enterprises were unsuccessful, as was his subsequent litigation against the leaders of the land. The pioneer of the first “sex shop” on the Gold Coast in the 1970s, Soegemeier was also the prime mover in the establishment of the “Australian Personal Freedom Party”. It was his determined but unsuccessful efforts, on behalf of this party, to enforce the financial disclosure provisions of the *Commonwealth Electoral Act 1918* (Cth) that saw him declare himself as “De-Jure Attorney-General” of the “De-Jure Commonwealth of Australia”. In that role, Soegemeier’s continued litigation and issue of voluminous summonses, complaints and petitions against Messrs Whitlam, Kerr, Bjelke-Petersen, Small and others were the catalyst for the passage of the *Vexatious Litigants Act 1981* (Qld).

Soegemeier was not taken seriously by the legal system because of the procedural deficiencies in his attempted litigation and the confused, even overblown, nature of its presentation. However, in 1979 Don Chipp’s then new Australian Democrats Party¹ mounted a similar legal challenge to the electoral laws, albeit with professional advocacy and in the appropriate forum. Their success led to the 1980 repeal of the federal electoral laws that Soegemeier had challenged for nearly a decade.² Ironically, Soegemeier was declared vexatious by the Queensland Supreme Court that same year.

¹ The Australian Democrats became a third force in Australian party politics in 1977. Their first leader was Don Chipp. In the 1977 election they had two Senators elected: Don Chipp (Victoria) and Colin Mason (NSW).

² *Commonwealth Electoral Amendment Act 1980* (Cth).

Soegemeier's story brings into focus the difficulties self-taught litigants-in-person have in raising issues of democratic compliance and reform through a legal system that is reluctant to go behind legal form and is reliant on professional advocates representing recognised groups to shape legal argument.

A New Australian and some early business ventures

Dieter Soegemeier was born in Berlin in 1933 to Gustav and Ema Soegemeier.³ Little is known of his early life. What is known has been drawn largely from newspapers and public records, such as immigration and court files, that have recently been opened for public access. Despite my attempts, it has not been possible to engage directly with Soegemeier's peers or descendants to paint a fuller picture. This most likely reflects the relatively contemporary nature of the events and the rawness that may still attach for those closely connected. That said, Soegemeier, in common with many other Europeans of the post-war period, elected to make a fresh start in Australia. In March 1952 he arrived in Melbourne aboard the *MS Anna Salen*. Then aged 19, single and a baker by trade, he had emigrated under a "special projects" scheme that saw him bonded to the Victorian Railways for one year as an engineman.⁴ In 1953, as soon as his time was up, Soegemeier moved to Brisbane in Queensland to a job as a pastry cook.⁵



Dieter Soegemeier.

Dieter Soegemeier
aged 19. 1952.

Courtesy National Archives of
Australia.

After 12 months as a pastry cook Soegemeier next turned his hand to floor covering as an employee of Roofix. He was with them for 18 months before being injured in a serious accident. Sometime in 1955, after being hospitalised for six months, Soegemeier returned to his trade as a baker and started a cake shop in the Brisbane suburb of Tarragindi. Although the business was successful, his heart was apparently not in it and he sold the business after about 18 months.⁶ Around this time he met his future wife, Sigrid Emi Wodarz.

³ National Archives of Australia; J25, 1965/12556, Form RA, 1 April 1952. All further references to material drawn from this source will commence with the short form "NAA".

⁴ NAA: J25, 1965/12556, Form RA, 1 April 1952.

⁵ NAA: BP89/1, 79/1963, Notes of Public Examination of Dieter Gustav Soegemeier, Bankrupt, 9 August 1963, 2. Further reference to this document will be in the short form "Public Examination".

⁶ *Ibid.*

Born in Wisbuerg, Germany, in 1931 Sigrid too had emigrated, arriving in Sydney in 1955. In 1956 she had moved to Queensland and in July 1958 she and Soegemeier married at the registry office in Brisbane.⁷ The couple had three sons in quick succession.⁸ Then, in 1959, Soegemeier became a naturalised citizen and proudly swore an oath of allegiance to the Queen.⁹ In just over a decade he would be in more direct contact with her.

In 1957 the modest profit from the cake shop business had provided a small stake in a new business, this time floor covering under the partnership name “Meier Flooring”. For a short time the business prospered, particularly in 1960, when Soegemeier secured a large contract to lay 13,000 square yards of flooring for the Myer shopping centre being constructed in Cooparoo, a new Brisbane suburb.¹⁰ However, this overstretched his resources and a poor choice of new partner, followed by the tragic death of an employee in a workplace fire at Cooparoo in 1960, together with the 1961 credit squeeze, resulted in the collapse of the business.¹¹ Soegemeier struggled on for the next few years but sales of business and personal chattels and the abandonment of property purchases¹² could not save the business and in 1963 a creditor, the Commonwealth Deputy Commissioner of Taxation, petitioned for his bankruptcy. He was declared bankrupt, for the first time, on 28 May 1963 by the Supreme Court of Queensland, exercising federal jurisdiction.¹³ It was Soegemeier’s first appearance in that court, but not his last. He was 30 years old. The following year his wife Sigrid, a partner in the failed business, was also bankrupted.¹⁴

New businesses, the “First Gold Coast Sex Shop” and the beginning of a legal career

By the middle of the 1960s Soegemeier had recovered his business confidence. In 1965 he had been discharged from bankruptcy¹⁵ and, in 1966, proposed establishing a non-profit association dedicated to buying consumer goods in bulk and then selling to members at discounted prices. Called the “Consumer Club Australia Pty Ltd”, this association proposed to unite “housewives

⁷ NAA: J25, 1965/12556, Application for Naturalisation or Registration: Interview Report, 28 September 1965.

⁸ Dieter (1960); Ralph (1961) and Danny (1962).

⁹ NAA: J25, 1965/12556, Nulty (Commonwealth Migration Officer) to Soegemeier, 22 January 1959.

¹⁰ Public Examination, n 5, 5.

¹¹ Public Examination, n 5, 5. See also, “He told reason for loss”, *Courier Mail*, 8 August 1963.

¹² Public Examination, n 5, 9–16.

¹³ NAA: BP89/1, 79/1963, Sequestration Order, 28 May 1963.

¹⁴ Sigrid Soegemeier was bankrupted on the Petition of Colin Edward Sealy (Trading as Silicone Services) on 5 May 1964. See further NAA: BP89/3, 56/1964.

¹⁵ NAA: BP89/1, 79/1963, Order of Discharge, 11 January 1965.

and consumers of Australia” as members upon payment of a once-only \$10 membership fee.¹⁶ Although Soegemeier does not appear to have developed this association beyond a concept, he had picked up on an emerging market dynamic as evidenced by the then new Australian Consumers’ Association and the members’ magazine *Choice*.¹⁷ Significantly, Soegemeier’s proposal demonstrated a new self-confidence and an interest in the language of the law. He submitted a document entitled “Proposed Statute for Consumer Club Australia Pty. Ltd.” to the Commonwealth Registrar of Copyrights for registration as a “Literary Work”.¹⁸ A more modest and practical approach would have been just to incorporate the organisation.

By 1969 Soegemeier was a half-partner in a new business, SEW Enterprises, that made fibreglass products for Mt Isa Mines. This business was sufficiently successful to enable Soegemeier to purchase in that town a home for his young family. The house was sold for a small profit a few years later.¹⁹ Before then Soegemeier expanded into the music business, importing and selling audiocassettes. Within a short time it had shops in Mt Isa, Brisbane and Surfers Paradise. In 1971, in order to finance further expansion, Soegemeier solicited investments by establishing Video and Musicassette Bar Franchise syndicates. Investors were boldly promised return of capital and a 20 per cent profit. But these businesses failed quickly and were liquidated by 1972, leaving some disgruntled investors, one of whom would pursue recovery from Germany.²⁰

Soegemeier, his wife and three sons next relocated to Surfers Paradise. There, Soegemeier opened the “Sex Supershop”, a mail order business operating from premises at Central Arcade and later the Blue Arcade, Surfers Paradise. Trading under the names of the Eros Centre and later Lola’s Boutique²¹ it was the “Gold Coast’s first sex shop”.²² It sold adult books, photographs and slide images. Inevitably, this business conflicted with the conservative obscenity laws of the time. During 1972 the shop was raided on an almost weekly basis.²³ In particular, the sale of four 35mm slides “depicting nude males and females in various poses”²⁴ to a plainclothes policeman on 8 August 1972 brought charges of selling obscene publications and the seizure of four cartons of books and

¹⁶ NAA: A1336, 68283, Proposed Statute for Consumer Club Australia Pty Ltd.

¹⁷ The Australian Consumers’ Association (now known as Choice) was formed in Sydney in 1959. See further, Robin Brown and Jane Panetta, “A View of the Australian Consumer Movement from the Middle of the Web”, in Simon Smith (Ed), *In the Consumer Interest: A selected history of consumer affairs in Australia 1945–2000*, 2000, 9–28.

¹⁸ NAA: A1336, 68283.

¹⁹ NAA: BP810/1, 67/1975, Report of Official Receiver, 28 August 1975.

²⁰ *Ibid.*

²¹ *Ibid.*

²² “THEIR MARK: D FOR DEMOCRACY”, *Gold Coast Bulletin*, 31 October 1972, 16.

²³ NAA: BP810/1, 67/1975, Transcript of Public Examination, 29 August 1975, 9.

²⁴ “COURT TOLD OF SEX SHOP SLIDES SALE”, *Gold Coast Bulletin*, 13 October 1972, 2.

sex aids. This seizure finished the business.²⁵ At the time Soegemeier refused to make a formal statement to the police as “he was forming his own political party to preserve civil rights”.²⁶ In view of what occurred over the rest of the decade, that was an ominous statement.

When the matter came before the Southport Magistrates’ Court in December 1972 Soegemeier boldly defended himself. He conceded that he knew the nature of the slides but “they were nothing to what could be bought in Europe”. Then, showing an emerging appreciation of constitutional law, Soegemeier claimed immunity. He argued that the slides had been bought outside Queensland and were therefore exempt under the interstate free trade provisions of section 92 of the Australian *Constitution*.²⁷ After a vigorous cross-examination of the police officers, Soegemeier then turned his attack on the bench when he handed up “a document purporting to charge the magistrate with 33 offences”.²⁸ Magistrate Rutherford ignored the document and, “out of charity”, declined to charge Soegemeier with contempt.²⁹ Undeterred, Soegemeier went on to accuse the magistrate of appearing to take no notice of his defence. He was curious about the court’s methods of justice. He said:

It does appear that evidence submitted by me and the police has not even been looked at by you. Yet you will pass sentence on this charge. It seems odd to me, and I am sure to the public, how that can be classified as justice.

And further:

I will appeal mainly on the laws of the Commonwealth, which can only be heard in the High Court as it concerns our constitution and its power to make void any state law.³⁰

The hearing ended when the magistrate reserved his decision so that he could examine the exhibits over the Christmas/New year recess! In early 1973 the magistrate imposed a \$60 fine for possession of four obscene slides and ordered 350 books, slides, sex aids and other property be destroyed.³¹ Showing growing comfort with the steps in the legal hierarchy, Soegemeier immediately appealed to the District Court. The case came before McCracken J in September 1973. Soegemeier’s audacious basis of appeal was a claim that the “Sex Shop” had Prime Ministerial approval following an apparent earlier

²⁵ NAA: BP810/1, 67/1975, Transcript of Public Examination, 29 August 1975, 10.

²⁶ “COURT TOLD OF SEX SHOP SLIDES SALE”, *Gold Coast Bulletin*, 13 October 1972, 2.

²⁷ *Ibid.*

²⁸ “DECISION RESERVED IN SEX SHOP CHARGE”, *Gold Coast Bulletin*, 14 December 1972, 2.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ “PM’s approval”, *Sydney Morning Herald*, 4 September 1973, 2.

visit by soon-to-be-Prime Minister Whitlam, his wife, daughter and various State Parliamentarians.³² Appearing in person, Soegemeier told the court that:

Not one of them collapsed, or was shocked, when they viewed every item on display. In fact they had laughed their “heads off”. On top of this, Mr Whitlam informed me that he would see that more freedom would be available to us when his party got into power.³³

Although the final decision in this case is not known, it is unlikely to have been in Soegemeier’s favour. However, the proceedings had already affected his business. His shop had closed and he had commenced work as the full-time leader of a new political party.³⁴ But his interest in the law would continue.

A new political party emerges

In 1972 political change was in the Australian air. At the election of 2 December 1972 the Australian Labor Party, led by Gough Whitlam QC, came to power under the theme “It’s Time”.³⁵ Their success was fuelled by community dissatisfaction over involvement in the Vietnam War and an emerging voting demographic of informed and radicalised “baby boomers”. It brought to an end to 23 years of conservative federal governments. This environment also engaged the attention of a newly politicised Soegemeier. Sparked by his clashes with authorities over the enforcement of obscenity laws during 1972 and prompted by customers, on 1 July 1972 he had formed the Australian Personal Freedom Party (APFP).³⁶ In October 1972 he announced that he would be its candidate for the Gold Coast federal seat of McPherson.³⁷

The exact origins and depth of support for the APFP is unclear. Its newsletter, the *Keyhole News*, appears not to have gone beyond a first edition, despite a titillating (for its time) content of personal advertisements, cartoons and political manifesto.³⁸ Newspaper reports from the period that quoted Soegemeier suggested APFP support of “2000 Gold Coast Residents”³⁹ to a party of “500 members”.⁴⁰ Later events suggest that the APFP was really a vehicle for Soegemeier alone to advance his gathering interest in federal democratic institutions. In particular, he had formed a view, not without foundation, that candidates were not complying with section 145 of the *Commonwealth*

³² *Ibid.*

³³ *Ibid.*

³⁴ NAA: BP810/1, 67/1975, Transcript of Public Examination, 29 August 1975, 10.

³⁵ For an insider’s account of the rise to power of the Whitlam Government and its tumultuous years in office, see Graham Freudenberg, *A Certain Grandeur*, 1977.

³⁶ NAA: BP810/1, 67/1975, Transcript of Public Examination, 29 August 1975, 10.

³⁷ “SOEGEMEIER MAY SUE OVER POLL COSTS”, *Gold Coast Bulletin*, 27 October 1972, 6.

³⁸ NAA: A2880, 18/7/2656, *Keyhole News*, Vol 1 No 1.

³⁹ *Gold Coast Bulletin*, n 37.

⁴⁰ “Move to cancel Federal election”, *Gold Coast Bulletin*, 17 November 1972, 3.

Electoral Act 1918, which required lower house candidates to limit their campaign expenditure to \$500.⁴¹ As a result, Soegemeier believed they were invalidly elected and every law subsequently passed and every appointment made was invalid. “SOEGEMEIER MAY SUE OVER POLL COSTS” was the newspaper headline that greeted his announcement of candidature and intention to drive compliance with the law. Soegemeier was reported as saying: “This excessive spending of amounts over and above that allowed under the Electoral Act is exerting undue influence on the public”.⁴² And further:

“My party — the Australian Personal Freedom Party — considers that unfair advantage is being taken over candidates who are less financial,” Mr Soegemeier said.

He said, that to date, no defeated politician or party had instituted proceedings against successful candidates known to have overspent in an election campaign.⁴³



Soegemeier poll challenge.

Gold Coast Bulletin coverage of early Soegemeier challenge to electoral laws. 1972.

Courtesy State Library of Victoria.

The paper went on to report that the APFP would challenge in the High Court any attempt to change the law and, if necessary, “his party would be

⁴¹ This campaign funding control had its genesis in the *Commonwealth Electoral Act 1902*. It derived from 19th century English legislation designed to deal with the bribery and corruption then existing in English elections. In Australia the limit for lower house candidates was raised to \$500 in 1966. This and other provisions were repealed in 1980. For further historical analysis, see Deborah Cass and Sonia Burrows, “Commonwealth Regulation of Campaign Finance — Public Funding, Disclosure and Expenditure Limits”, (2000) *Sydney Law Review*, 476.

⁴² *Gold Coast Bulletin*, 27 October 1972, 6.

⁴³ *Ibid.*

prepared to petition the Queen”.⁴⁴ Four days later the APFP was reported as calling upon voters to mark the reverse side of their ballot papers with a capital “D”: “This is to remind past, present and future politicians that Australians want democracy and not dictatorship”.⁴⁵ In November Soegemeier lifted the rhetoric further when, on behalf of the APFP, he called for the federal election to be cancelled. He also announced his withdrawal as a candidate, saying:

The party was taking this stand because political parties were spending so much on their campaigns that it was unfair to candidates on a tighter budget. “The law states how much can be spent and candidates of all people, should obey it,” he said. “It is a national disgrace that this abuse is being allowed.”⁴⁶

Nonetheless, the 1972 election proceeded and Eric Robinson (Liberal) won McPherson. However, for Soegemeier and the APFP the struggle for “legitimate” democracy had only just begun.

Let the challenges begin

Following the declaration of the federal poll, candidates had eight weeks in which to file with the Commonwealth Electoral Officer a declaration that they had complied with their \$500 limit.⁴⁷ Aware that there was poor compliance,⁴⁸ Soegemeier bided his time and, in June 1973 on behalf of the APFP, he complained straight to the top. He sent a three-page telegram to the “QUEEN IN COUNCIL CARE BUCKINGHAM PALACE”.⁴⁹ It said:

DEAR MAJESTY THIS IS AN APPEAL OF ALL THE LOYAL MEMBERS OF THIS POLITICAL PARTY HAVING IN MIND A PURPOSE TO INVESTIGATE THE LEGALITY OF OUR PRESENT FEDERAL PARLIAMENT. BEFORE THE LAST FEDERAL ELECTIONS WERE HELD WE INFORMED YOUR GOVERNORS IN EACH STATE THAT WE FELT MOST OF THE CANDIDATES FOR THIS FEDERAL ELECTION WERE AND DID DISQUALIFY THEMSELVES EVEN BEFORE THE ELECTION DATE DUE TO NON OBSERVANCE OF THE LAWS RELATING TO ALL ELECTIONS.⁵⁰

⁴⁴ *Ibid.*

⁴⁵ “THEIR MARK: D FOR DEMOCRACY”, *Gold Coast Bulletin*, 31 October 1972, 16.

⁴⁶ “Move to cancel Federal election”, *Gold Coast Bulletin*, 17 November 1972, 3.

⁴⁷ *Commonwealth Electoral Act 1918–1973*, section 151(1).

⁴⁸ By the 1970s the section was anachronistic, as it did not recognise the role of the modern political party in conducting electoral campaigns on behalf of individual members. Rather than risk perjury for filing false returns, few members filed and none were prosecuted. For example, following the 1969 election most lawyer members of the Gorton Cabinet declined to lodge a return. See further speech of Dr Klugman (Prospect), Australia, *Parliamentary Debates*, House of Representatives, 21 May 1980, 3012.

⁴⁹ NAA: A2880, 18/7/2656, Telegram, Members of the APFP Dieter Soegemeier to Queen, 25 June 1973.

⁵⁰ *Ibid.*

The telegram went on to allege a conspiracy of inaction by politicians and public servants in failing to ensure compliance, expressing the view that:

APPARENTLY THESE SUBJECTS OF YOURS CANNOT COMMITT [sic] CRIMES FOR ALL WE KNOW EVEN TREASON WITHOUT ANY PROCEEDINGS BEING TAKEN AGAINST THEM. WE ARE DISGUSTED BY SUCH PEVERSION [sic] OF JUSTICE AND ALTHOUGH SHOCKED BY THE FLAGRANT AND RUTHLESS DISREGARD FOR THE LAW BY THESE SUPPOSEDLY HONEST AND UPSTANDING POLITICIANS WHOM KNOWINGLY COMMITTED THESE ACTS OF CRIMINAL FALSEHOOD USING UNLAWFUL AUTHORITY AND ILLEGAL UNCONSTITUTIONAL METHODS WITHOUT LAWFUL AUTHORITY OR EXCUSE.⁵¹

Concluding that “WE MAY NOT HAVE HAD A LEGALLY ELECTED GOVERNMENT STATE OR FEDERAL SINCE FEDERATION”, the telegram also said:

WE DO THERFORE [sic] FEEL THAT YOU SHOULD APPOINT A PUBLIC INVESTIGATION INTO ALL THESE MATTERS AS THEY ARE VITAL IMPORTANCE

WE THANK GRACIOUSLY AND REMAIN YOUR LOYAL AND FAITHFUL SUBJECTS

ON BEHALF OF ALL THE MEMBERS OF THIS POLITICAL PARTY BY DIETER SOEGEMEIER.⁵²

A week later Soegemeier sent the Queen another telegram from the APFP, outlining suggested criminal charges⁵³ and, a further two weeks on, another telegram advised Her Majesty that action had been taken. In his capacity as President of the APFP Soegemeier had sworn a complaint in the Southport Magistrates’ Court against Eric Robinson for “HAVING CONSPIRED WITH OTHER AND DIVERSE OTHERS OTHER PERSONS UNKNOWN OR HAVING COMMITTED CRIMINAL OFFENCES WITHOUT AUTHORITY OR EXCUSE OR PERMISSION”.⁵⁴ This was the first of over 50 originating summonses that Soegemeier would issue out of the Southport and Brisbane Magistrates’ Courts over the next three years.⁵⁵

Behind the scenes, in its own measured way, the Palace had kept the Australian Governor-General’s office informed of developments. In late July 1973 David Smith, the Official Secretary to Governor-General Hasluck, advised Soegemeier that the Queen had received his first telegram and his “intention

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ NAA: A2880, 18/7/2656, Telegram, Members of the APFP Dieter Soegemeier to Queen, 29 June 1973.

⁵⁴ NAA: A2880, 18/7/2656, Telegram, Members of the APFP Dieter Soegemeier to Queen, 18 July 1973.

⁵⁵ Queensland, 283 *Parliamentary Debates*, Legislative Assembly, 28 April 1981, 918.

to take certain legal action has been noted”.⁵⁶ Possibly taking that response as encouragement, in August 1973 Soegemeier advised the Governor-General by telegram that he had issued more summonses at the Southport Magistrates’ Court, in his capacity as APFP President. This time Soegemeier named 35 members of the House of Representatives, including Prime Minister Whitlam, Postmaster-General Bowen, Paul Keating, Eric Robinson, Dr Klugman, Country Party leader Doug Anthony, a magistrate and some local solicitors.⁵⁷ His telegram advised that he had charged that the defendants:

ILLEGALLY WITHOUT EXCUSE PERMISSION AUTHORITY
OR OTHER AND WITHOUT MANDATE IN THE FEDERAL
PARLIAMENT FOR COMMITTING A PERJURY B CONSPIRACY
C DECEIT D NON LODGMENT OF STATUTORY DECLARATION
E SEDITIOUS ENTERPRISES⁵⁸

In response, the Governor-General “noted” the information and let the legal procedure take its course.⁵⁹

When the cases came before the Southport Magistrates’ Court on 10 September 1973 only two defendants appeared, a Government solicitor and a local solicitor. “National government chores” were too important to be interrupted for Ministers to attend, suggested the *Gold Coast Bulletin*.⁶⁰ Mr Cook SM dismissed the summonses as being “nonsensical”.⁶¹ In response to submissions from Soegemeier that there was a government illegally in power



Whitlam freed!

A Soegemeier summons against prime minister Whitlam dismissed by Magistrate.

Gold Coast Bulletin. 1973.

Courtesy State Library of Victoria..

and that injustice was “roaming wild in Australia”, the magistrate said he did not want to listen to any “political ramblings”.⁶² He noted that many of the summonses had not been served on the defendants and told Soegemeier that he had failed to heed advice on how to frame complaints.⁶³ No doubt this advice included the accepted view that charges of alleged breaches of the

⁵⁶ NAA: A2880, 18/7/2656, Smith to Soegemeier, 23 July 1973.

⁵⁷ For examples of the summonses, see Queensland Supreme Court file, OS 65 of 1980, Affidavit of Donald Robert William Hair, sworn 11 February 1980, Exhibit “G”.

⁵⁸ NAA: A2880, 18/7/2656, Soegemeier to Governor-General in Council, 21 August 1973.

⁵⁹ NAA: A2880, 18/7/2656, Smith to Soegemeier, 23 August 1973.

⁶⁰ “WHITLAM PM ‘FREED’ BY SM”, *Gold Coast Bulletin*, 11 September 1973, 1.

⁶¹ *Ibid.*

⁶² “WHITLAM PM ‘FREED’ BY SM”, *Gold Coast Bulletin*, 11 September 1973, 2.

⁶³ *Ibid.*

Commonwealth Electoral Act 1918 must be by formal petition⁶⁴ and are the exclusive jurisdiction of the High Court (or, by reference, the relevant State Supreme Court) sitting as a Court of Disputed Returns.⁶⁵ The magistrate also criticised the Justice of the Peace who had signed the summonses. It appeared that he had not brought “any judicial mind to bear”.⁶⁶ For Soegemeier, this was a mere temporary setback. His summonses had been defeated on procedural technicalities only; his substantive claim of electoral irregularity had not been defeated. Over the next decade Soegemeier determinedly, but unsuccessfully, prosecuted that cause with occasional side litigation.⁶⁷

Telephone bills

In late 1973 Soegemeier once more found himself a defendant. He had been sued by the Commonwealth on behalf of the Postmaster-General (PMG)⁶⁸ for non-payment of a telephone bill.⁶⁹ His defence was that the APFP, not he, had taken responsibility for the eventually disconnected telephone line. However, the proceedings provided the opportunity for Soegemeier to display what a student of the law he had become. In a lengthy document that combined elements of a notice for discovery, a request for further and better particulars, an answering affidavit and a formal defence, he also objected to the Southport Magistrates’ Court’s having jurisdiction in the matter. Soegemeier argued that only the High Court could hear such matters.⁷⁰ He challenged the very authority of the PMG to authorise the litigation as successive electoral breaches made the Government, and thus their appointed civil servants, illegal. The PMG’s action was also an assault on political freedom. Soegemeier said:

... the Rights of any Political Body to a Phone Service even if its Members file Criminal Charges against certain Illegal Members of the Federal Parliament and in particular the Postmaster General. After the action was filed for Criminal Charges against the beforesaid Postmaster he by Order, ordered the cutting of the Defendants Political Party Telephone Service on the before mentioned Excuse without Authority nor by permission of any of its Party Members. Indeed he then alledged [sic] and now this Action against the leader of the said Political Party is an Infringement of his Rights and also a cross [sic] insult to the Members of the Political Party whom [sic] cannot Condone such

⁶⁴ *Commonwealth Electoral Act 1918–1973* (Cth), section 185.

⁶⁵ *Commonwealth Electoral Act 1918–1973* (Cth), section 184.

⁶⁶ “WHITLAM PM ‘FREED’ BY SM”, *Gold Coast Bulletin*, 11 September 1973, 2.

⁶⁷ One other piece of litigation in 1974 was a Supreme Court writ (1912 of 1973) against the *Gold Coast Bulletin* seeking damages for defamation and misrepresentation. Issued in November 1973, it was struck out in March 1974 on procedural grounds. See Queensland Supreme Court file, 0S 65 of 1980, Affidavit of Donald Robert William Hair, sworn 11 February 1980, Exhibit ‘B’.

⁶⁸ The PMG was disaggregated in 1975 into Telecom Australia and Australia Post. Telecom changed its name to Telstra in 1995.

⁶⁹ NAA: A2880, 18/7/2656, Hutchison (Crown Solicitor) to Smith, 21 February 1974.

⁷⁰ NAA: A2880, 18/7/2656, Affidavit of Dieter Soegemeier, January 1974.

misconduct by any of the Before said Persons. Nor should such degradation of Political Freedom be Possible under any Law now in force anywhere within the Commonwealth of Nations and indeed most defiantly [sic] not within the Commonwealth of Australia.⁷¹

Soegemeier's earlier litigation experience had also alerted him to pre-emptive procedures that his opponent might use to have his claims dismissed. He required:

... specific proof from any of you what is in fact is vexatious and frivolous. Is it not according stupid and silly, and if it is such whom has given any Judge or Politician to determine on his own say so that such is the case, in any matter indeed if I am not mistaken and of use will use this excuse to fill in the answers I require within this Discovery of Information. Many of you can get out of very tricky questions by pertaining that these any of my questions are stupid and silly.⁷²

To overcome evidentiary problems Soegemeier insisted that the Queen's representative countersign the proofs requested from the PMG. Accordingly, he forwarded a copy of the document to the Governor-General. After advice from the Crown Solicitor the document was simply added to the growing pile of correspondence.⁷³ Again, although the eventual result of this case is not known, it is unlikely to have been in Soegemeier's favour. However, the litigation did demonstrate the strategic error of making Soegemeier a party to litigation and thus providing him with a forum to advance what had become a major obsession — not that he needed assistance in finding a legal platform.

Paradise City and the High Court

As Soegemeier litigated in the Southport court, his family faced eviction from their home at 18 Allawah Street, Isle of Capri.⁷⁴ The family had moved there in April 1972, no doubt attracted in part by the extravagant promotions of the larger than life businessman, Bruce Small⁷⁵ for his then new canal-based land development on the Gold Coast known as "Paradise City". An extract from a publicity brochure of the time captures the flavour:

The dream was this — to transform the pristine beauty of pastureland into a modern city free from the noise and bustle of a city, its maddening traffic snarls, its crowds and smoke-stacks. A city that would offer its citizens every appurtenance of civilisation but which would retain the natural beauties in which the land abounded. A city for leisure and a full enjoyment of life. A city

⁷¹ NAA: A2880, 18/7/2656, Affidavit of Dieter Soegemeier, January 1974, 3.

⁷² NAA: A2880, 18/7/2656, Affidavit of Dieter Soegemeier, January 1974, 13.

⁷³ NAA: A2880, 18/7/2656, Hutchison to Smith, 21 February 1974.

⁷⁴ Queensland Government, Department of Natural Resources and Water, Certificate of Title, Volume 4381 Folio 127.

⁷⁵ Bruce Small retired to the Gold Coast in 1958, having made a fortune in Melbourne through his Malvern Star bicycle empire. He then embarked on a new career as a colourful, albeit

of gardens, of society and solitude. A “paradise” city....Venice-like, it would arise from the water.⁷⁶

The development represented the Australian dream to immigrants like Soegemeier. More pragmatically, it offered the prospect of good business opportunities for a would-be entrepreneur. However, it was an ill-advised purchase that required two mortgages and, by 1973, the Soegemeiers had negative equity and a creditor threatening to sell them up.⁷⁷ They sought release. Accordingly, on 14 July 1973, they sold the property at a loss to Bruce and Lois Coop for \$36,000. They completed a standard form contract but left the section relating to a deposit blank. Within two months of signing the contract, the Soegemeiers had reconsidered and sought to rescind by sending a personal letter to the Coops that said: “We withdraw from the Sale of our House at the above address due to circumstances beyond our control”.⁷⁸

What happened next became typical of Soegemeier’s determined but confused approach to litigation. He focused on a particular point, in this case the silence in the contract on the payment of a deposit, to the exclusion of other points and matters of procedure. Although the written contract had been silent on the payment of a deposit, Soegemeier argued that payment of a deposit was part of the contract and refused to complete the sale. The Coops then sued in the Queensland Supreme Court for specific performance of the contract. Soegemeier represented himself through a series of hearings.⁷⁹ On 17 December 1973 Hanger CJ ordered specific performance of the sale contract.⁸⁰ Soegemeier refused to accept the decision and displayed extraordinary confidence and a growing comfort with legal language and form when he appealed to the High Court. His notice of appeal contained 13 detailed grounds of appeal overlaid with allegations of conspiracy. The following paragraph, numbered 4h, is typical:

upon the defence and counter claim depositions we the appellants alledged [sic] fraud and swindel [sic] carried out by the respondents with the help of their Solicitor and to dismis [sic] same as frivolous and vexatious without due regard

controversial, Gold Coast developer and local council and State politician. He was Mayor of the Gold Coast (1967–1973; 1976–1978) and member of the Legislative Assembly for Surfers Paradise 1974–1977. He was knighted in 1974. See further, Robert Longhurst, “SMALL, Sir ANDREW BRUCE (1895–1980)”, 16 *ADB*, 2000, 264.

⁷⁶ Michael Jones, *A Sunny Place for Shady People*, 1986, 31.

⁷⁷ Queensland Government, Department of Natural Resources and Water, Certificate of Title, Volume 4381 Folio 127. Writ of *Fieri Facias* lodged 7 February 1974.

⁷⁸ The summary of facts is drawn from NAA; 12918, 14/1974, *Soegemeier and Anor v Coop and Anor*, unreported Reasons for Judgment of Barwick CJ.

⁷⁹ While this was going on Soegemeier had launched a cross claim in the Supreme Court against the Coops and their solicitor. In October 1973 he claimed damages for “aggravated assault with intent to hinder or prevent Plaintiffs from working, buying or selling or otherwise deal with certain property”. It was treated as a counterclaim and eventually dismissed. See Queensland Supreme Court file, OS 65 of 1980, Affidavit of Donald Robert William Hair, sworn 11 February 1980, Exhibit “B”.

⁸⁰ *Ibid.*

to Orders 18a, 3, 4, 5, 6, and 7 where under Order 22 we specifically pleaded that Not at any time did the respondents perform as they were obliged to do by the Specific agreement made in writing and by verbal agreement between the appellants and the Respondent and also their Solicitor.⁸¹

The 23-paragraph supporting affidavit canvassed similar ground.⁸²

The High Court was not persuaded and, after hearing from Soegemeier in person, Barwick CJ dismissed the appeal with costs on 14 July 1974.⁸³ With the Isle of Capri house lost, that was the end of the Coop matter, but it was not the last that the High Court or Bruce Small would hear of Soegemeier.

The 1974 federal election

1974 was a tumultuous year in Australian politics. An obstructionist Senate, the “Gair Affair”, the start of the “Loans Affair” and the controversial journey of Lionel Murphy from the Senate to the High Court bench were just a few of the year’s events. In the midst of all this, in an effort to seize the initiative, Prime Minister Whitlam obtained a double dissolution of Parliament and called a federal election for 18 May 1974.⁸⁴ To these events Soegemeier made his own distinct contribution.

On 27 May 1974, just over a week after the Whitlam Government was narrowly returned to power, Soegemeier issued a summons against Whitlam for “falsifying of records” — namely, Whitlam’s failure to file a declaration of expenses as the successful candidate for Werriwa (New South Wales) in the 1972 election.⁸⁵ The summons was returnable at the Brisbane Magistrates’ Court on 10 June 1974, where it was struck out.⁸⁶ Undeterred, Soegemeier, in his capacity as leader of the APFP, telegraphed the “Governor-General in Council” in Canberra and in an almost chiding manner advised:

WE WISH HEREBY TO INFORM YOU AGAIN AS WE DID IN 1972–73 TO MAKE 100 PERCENT CERTAIN THAT THE PERSONS WHO ARE PRESENTED TO YOU FOR SWEARING IN INTO A PARLIAMENTARY OFFICE ARE IN FACT LEGALLY AND LAWFULLY SO ENTITLED TO BE SWORN IN.⁸⁷

⁸¹ NAA; 12918, 14/1974, *Soegemeier and Anor v Coop and Anor*, Notice of Appeal, 22 March 1974.

⁸² NAA; 12918, 14/1974, *Soegemeier and Anor v Coop and Anor*, Affidavit of D Soegemeier, sworn 22 March 1974.

⁸³ NAA; 12918, 14/1974, *Soegemeier and Anor v Coop and Anor*, Unreported Reasons for Judgment of Barwick CJ.

⁸⁴ For an insider’s account of all these events, see Graham Freudenberg, *A Certain Grandeur*, 1977.

⁸⁵ Queensland Supreme Court file, OS 65 of 1980, Affidavit of Donald Robert William Hair, sworn 11 February 1980, Exhibit “C”.

⁸⁶ Queensland Supreme Court file, OS 65 of 1980, paragraph 12 Affidavit of Donald Robert William Hair, sworn 11 February 1980.

⁸⁷ NAA: A2880, 18/7/2656, Soegemeier to Governor-General in Council, 12 June 1974.

Governor-General Sir John Kerr⁸⁸ did not respond. A month later His Excellency received a follow-up telegram:

IT APPEARS TO US THAT YOU DO AND DID NOT ABIDE BY THE LAWS OF AUSTRALIA AND ENGLAND AND WE HAVE NOW INFORMED HER MAJESTY THE QUEEN OF AUSTRALIA AND THE UNITED KINGDOM THAT WE INTEND TO LAY VARIOUS CRIMINAL CHARGES AGAINST YOU FOR THESES [sic] OFFENCES NOT ONLY IN AUSTRALIA BUT ALSO IN THE UK.⁸⁹

True to his word, a month later Soegemeier, still in his capacity as the leader of the APFP, filed an affidavit at the Sydney Registry of the High Court, seeking a writ of prohibition against Sir John Kerr and the Chief Electoral Officer, Mr Ley. A document that shows a remarkable grasp of legal terminology and concepts, no doubt informed by Soegemeier's parallel High Court Coop litigation, it combined elements of a subpoena *duces tecum*, notice of discovery and a request for further and better particulars. It also sought to restrain the defendants:

- A. From further accepting and declaring as members any of the 1974 elected members of both houses of the Commonwealth of Australia Parliaments.
- B. From accepting and declaring as legal and lawful made law, Act, Bill or other instrument however arising which originates from either of the Houses of the Commonwealth Parliament, any of its committees and other Governmental departments or other however arising being contained or supervised by members where not legally and lawfully Elected into such public office.
- C. Any other persons which the Court shall seem met [sic]⁹⁰

There is no record that the action went beyond the filing stage. But this action did introduce another electoral concern that became an additional theme for Soegemeier in later litigation: "What evidence is in his [the Chief Electoral Officer's] possession which proves beyond doubt that the Parliament in the Year 1918 had the power to alter the voting system to a preferential rather than one vote one value system".⁹¹ This question reflected Soegemeier's view that the preferential system illegally allowed a vote to be counted more than once. However, for the moment, the attention of Soegemeier and the APFP was diverted to the 1974 State election.

⁸⁸ Sir Paul Hasluck retired in February 1974.

⁸⁹ NAA: A2880, 18/7/2656, Soegemeier to Governor-General in Council, 9 July 1974.

⁹⁰ NAA: 10273, 132/1974, Affidavit of Dieter Soegemeier, sworn 23 August 1974.

⁹¹ NAA: 10273, 132/1974, paragraph 11g Affidavit of Dieter Soegemeier, sworn 23 August 1974.

The 1974 Queensland State election

Queensland held a State election on 7 December 1974. Soegemeier mistakenly believed that the *Elections Act 1915* (Qld) mirrored the requirements of the federal legislation and required candidates to report that they had not breached campaign-spending limits within a prescribed time. As with the federal level, Soegemeier assumed rampant non-compliance. In fact, in Queensland, rules controlling electoral expenditure had never existed.⁹² Nonetheless, before the election Soegemeier sought vice-regal intervention and attempted to telephone Governor-General Kerr at his residence, Yarralumla, to advise that there had been no “legal and lawfully conducted election” in Queensland since 1915. He also wanted to advise that the APFP intended to “issue out of the Supreme Court of Queensland a writ for prohibition” restraining the issue of electoral writs.⁹³ The message was taken by Constable First Class Clanchy, who noted Soegemeier’s view that Premier Bjelke-Petersen had never been at “any time material” an elected member and therefore had “no power to call for the issue of writs for holding any election”.⁹⁴ As with the earlier federal election, the legal challenge did not progress, the election proceeded and the Bjelke-Petersen Government was returned.

Soegemeier was not deterred. He had gained valuable procedural knowledge from his earlier electoral litigation and, in February 1975, he filed a petition in the Brisbane Supreme Court challenging the election of (now) Sir Bruce Small for the electorate of Surfers Paradise.⁹⁵ Soegemeier served the petition on 17 people, including Small and William Knox (the Queensland Attorney-General and Minister for Justice). His broad themes of objection were that the *Elections Act 1915* (Qld) was invalid, the election of 7 December was not held by a first-past-the-post system as required by law and the Surfers Paradise electorate was a “jerry-mander”.⁹⁶ Knox moved quickly to have the petition struck out on the grounds that, among other things, it was an abuse of the process of the court, disclosed no reasonable or probable cause of action and/or was vexatious and oppressive.⁹⁷ After a short delay on procedural grounds Dunn J, sitting as an election tribunal, dismissed the petition as an abuse of process on 28 February 1975. His Honour took the strict legal view that he had no power to deal with the core complaint. He held:

Mr Soegemeier by his petition purports to complain of an “undue election” but, properly understood, that is not the complaint he makes. His complaint is that

⁹² Commonwealth of Australia, 118 *Parliamentary Debates*, House of Representatives, 15 May 1980, 2849.

⁹³ NAA: A2880, 18/7/2656, Soegemeier telephone message taken by Clanchy, 7.15pm 25 November 1974.

⁹⁴ *Ibid.*

⁹⁵ *Re Surfers Paradise Election Petition: Soegemeier v Small* [1975] QdR 114.

⁹⁶ *Ibid.*, 119.

⁹⁷ *Ibid.*, 114.

the state of the law is such that if it is obeyed there can be no valid election. The Elections Tribunal has no power to deal with this his real complaint, and it is nothing to the point that another Court in proceedings of another kind might deal with it. His fundamental error has led him to abuse the procedure of the Elections Tribunal: seriously to abuse it, because of the serious complaints and charges which he makes against many people in the course of elaborating upon his principal complaint.⁹⁸

A few weeks later Soegemeier filed documents in the Supreme Court seeking to appeal the decision to the Queen in Council, the House of Lords and the House of Commons.⁹⁹ As with his earlier High Court filings, there is no record that the appeals progressed any further. However, he was not finished in the High Court.

Bankrupt again, the High Court and political rumblings

Since 1971 Soegemeier had been consumed by his litigation. The number of applications, the volume of his court documentation and the research they would have required would have left him little time for other activities, such as running a business. By 1974 an investor in the failed Musicassette business, Josef Kaspeitzer, petitioned for Soegemeier's bankruptcy from Germany.¹⁰⁰ Despite Soegemeier's in-person efforts, on 3 April 1975 Wanstall SPJ of the Queensland Supreme Court, exercising federal jurisdiction, bankrupted him for a second time.¹⁰¹

Soegemeier's response later that month was to deliver papers to the High Court Registry in Brisbane. While notionally supporting a bankruptcy appeal, a five-page affidavit lodged in Soegemeier's capacity as leader of the APFP launched an attack on the illegality of every "Governor, Parliamentarian, Senator, Judge or public servant" due to electoral fraud. For this reason, "Mr" Wanstall was not a judge.¹⁰² Warming to the theme the affidavit also asserted:

THAT THE JUDGES OF THIS COURT, KNOWINGLY ALLOWED PREVIOUS PARLIAMENTS AND THE PRESENTONES [sic] TO PERVERT THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA AND THE STATES AND TO THERBY [sic] CONDONE THE PREVENTION OF JUSTICE AND RIGHTS OF THE SUBJECTS OF THE QUEEN HOWEVER ARISING. NAMELY THAT THEY ALLOWED THAT PARLIAMENT CHANGE THE ELECTORAL LAWS, FROM A FIRST PAST THE POST TO PREFERENTIAL VOTING SYSTEM CONTRARY TO THE CONSTITUTION. THAT THEY ALLOWED JERRYMANDERING [sic] OF THE ELECTORAL DISTRICTS, THAT THEY ALLOWED THE ELECTORAL OFFICERS NOT TO PROSECUTE CANDIDATES

⁹⁸ *Ibid*, 120.

⁹⁹ *Ibid*.

¹⁰⁰ NAA: BP810/1, 67/1975.

¹⁰¹ NAA: BP810/1, 67/1975.

¹⁰² NAA: A12918, 21/1975, Affidavit of Dieter Soegemeier, sworn 26 April 1975.

STANDING FOR PUBLIC OFFICE WHOM BY CRIMINAL INTEND [sic]
BROKE THE ELECTION LAWS HOWEVER ARISING.¹⁰³

Not surprisingly, Deputy Registrar McMahon was uncertain whether to accept the documents and sought advice from the Principal Registrar in Sydney.¹⁰⁴ However, before McMahon received a reply he was left a further set of the material together with a new document headed “Indictment”. This latter document laid out 16 varied conspiracy charges against 11 named defendants, including the Governor of Queensland, Gough Whitlam, Sir John Kerr, Johannes Bjelke Petersen, Lionel Murphy and Malcolm Fraser. Indicating increased activism, it was signed by “Dieter Soegemeier THE PROCETUTOR [sic] IN PERSON ON BEHALF OF HER MAJESTY THE QUEEN OF AUSTRALIA AND THE COMMONWEALTH AND ENGLAND”.¹⁰⁵ The charge that most showed Soegemeier’s frustration was number seven:

That they knowingly conspired from the 1.1.1972 to 8.5.1975 in the Commonwealth of Australia and with diverse others without Authority and Power wilfully obstructed and resisted the Procecuter [sic] DIETER SOEGEMEIER in the execution of his rights to have a fair and just hearing of the various criminal charges any of them layed [sic] before any Australian Court.¹⁰⁶

Once more McMahon sought guidance from Sydney and this time the direction relayed from Barwick CJ was for “no process to be issued at the instance of Mr Soegemeier in this connection without the leave of a Justice”.¹⁰⁷ When the application for special leave to appeal came before Gibbs J on 4 June 1975, events had reached a new stage. Frustrated at his lack of legal success and convinced that years of electoral non-compliance had totally eroded the legitimacy of the Government and its officers, in May 1975 Soegemeier had declared the new “De-Jure” Commonwealth of Australia and declared himself “De-Jure” Attorney-General.¹⁰⁸ Appearing in person, he also sought leave to file a new document entitled “Declaration of INDIPENDENCE” [sic].¹⁰⁹ Soegemeier’s purpose in making the request was to ensure “it would be on hand in this court at any future date”. Obliging, Gibbs J agreed to the request

¹⁰³ NAA: A12918, 21/1975, paragraph 15 Affidavit of Dieter Soegemeier, sworn 26 April 1975.

¹⁰⁴ NAA: A12918, 21/1975, McMahon to Principal Registrar, 29 April 1975.

¹⁰⁵ NAA: A12918, 21/1975, Indictment, 5 May 1975.

¹⁰⁶ NAA: A12918, 21/1975, Indictment, 5 May 1975, Charge Seven.

¹⁰⁷ NAA: A12918, 21/1975, Foley to District Registrar (Mc Mahon), 16 May 1975. Chief Justice Barwick would have exercised a specific power in the Rules of Court. Order LVII Rule 3 had been introduced in 1943 at the same time that the court gained the power to declare a litigant vexatious. This prohibited the litigant issuing further proceedings without prior judicial leave. See Anon, “Vexatious Litigation”, (1943) 17 *Australian Law Journal*, 9.

¹⁰⁸ NAA: A12918, 21/1975, Transcript of Proceedings, 4 June 1975, 2–3.

¹⁰⁹ NAA: A12918, 21/1975, Memorandum Foley to Gibbs J, circa 28 May 1975.

to let the document lie on the court file¹¹⁰ but then proceeded to dismiss the special leave application. His Honour said:

I want to make it plain to you that I cannot give leave to appeal from the sequestration order for the purpose of enabling you to establish that the Australian Parliament is not validly sitting and the Australian judges are not validly appointed, and the reason I cannot do that is because I think such a contention is obviously wrong and cannot possibly succeed because it is obviously wrong.¹¹¹

Or so His Honour thought.

A “De-Jure Coup”

Soegemeier established the “De-Jure” Australian Government on 23 May 1975.¹¹² Possibly, this was influenced by the publicity surrounding another maverick, “Prince Leonard”, and his secession from Western Australia to form the Principality of Hutt River Province.¹¹³ Almost certainly, the catalyst was Soegemeier’s firm conviction that successive Australian Parliaments had been invalidly elected and that, as a consequence, their laws and judicial appointments were illegal.

Soegemeier’s new Governor-General was Jack Martyn and his key Ministers included James Ford (Public Service), Franz Koesler (Postmaster-General) and himself (Attorney-General, Trade and Industry).¹¹⁴ The new Government also created a series of home-printed documents, replete with Australian crest, with headings in bold italics such as “De-Jure Commonwealth of Australia Gazette. Extraordinary”.¹¹⁵ These documents led to a series of bizarre events — specifically, the use of “De-Jure” Government requisition forms to purchase items. One such was later described to the Queensland Parliament in the following terms:

The story is this: Dieter Soegemeier, dressed in stubby shorts, with a seven year old child in hand, went to Byron Byrt Ford at Mt Gravatt with a bundle of these requisition forms. He spoke to one salesman and subsequently, to another. After claiming that he was an undercover agent for the Attorney-General’s Department of Australia he gave them a requisition form which, on

¹¹⁰ NAA: A12918, 21/1975, Transcript of Proceedings, 4 June 1975, 2.

¹¹¹ NAA: A12918, 21/1975, Transcript of Proceedings, 4 June 1975, 9.

¹¹² NAA: A12918, 39/1975, paragraph 6 Affidavit of Dieter Soegemeier, sworn 19 November 1975.

¹¹³ Leonard Casley founded the “independent” Principality of Hutt River on 21 April 1970. It followed a long-running dispute over wheat quotas with the Western Australian Government. Casely gave himself the title “His Royal Highness Prince Leonard”. Since that time the principality has enjoyed continuing publicity and has become a tourist destination. See further at: http://en.wikipedia.org/wiki/Hutt_River_Province_Principality (3 November 2007).

¹¹⁴ Queensland, *Parliamentary Debates*, Legislative Assembly. 5 May 1981, 919.

¹¹⁵ Queensland, *Parliamentary Debates*, Legislative Assembly. 5 May 1981, 918.

close examination shows “De Jure Commonwealth of Australia”. It has the verisimilitude of a Commonwealth document. He got a Ford Falcon station wagon of the colour he wanted, with the accessories he wanted, with the invoice sent through to the Department in Brisbane.¹¹⁶

Soegemeier was promptly prosecuted for uttering forged documents. He defended himself by issuing a torrent of witness summonses to Premier Bjelke-Petersen, the Attorney-General, the Treasurer, the Chief Justice, the prosecuting police and a number of others.¹¹⁷ Again, the theme was to insist on their appearance in court to show that they were invalidly elected and appointed and that therefore the process through which Soegemeier was being prosecuted was unlawful. Seeking to pre-empt the prosecution, Soegemeier also filed documents in the High Court in his capacity as “De-Jure Attorney-General”, seeking a writ of prohibition against the police informants. That went nowhere, most likely because of the earlier ruling of Barwick CJ that prior judicial leave must be obtained. However, the documents did show an awareness of the constitutional niceties of the period following the recent dismissal of the Whitlam Government. They named, as a party, “Mr Greenwood caretaker Attorney-General C of A”.¹¹⁸ But that particular document was restrained when compared to the “Warrant of Arrest” Soegemeier issued on 22 December 1975, naming most members of the caretaker Fraser Government, the Governor-General, State Governors and various Chief Justices. That “Warrant” alleged that the defendants knowingly conspired in:

THE OVERTHROW OF THE

- a. Commonwealth of Australia Constitution Act of 1901 reconstituted on the 23.5.1975
- b. The De-jure Queen of Australia by any illegal and unlawful act
- c. Of all letter patent, statutes, acts, regulations, orders or any other
- d. Of any other matters [sic] however and wherever arising under all and any laws of the United Kingdom and Australia from 1275 to 1975.¹¹⁹

It went on to allege illegal seizure of documents of the “De-Jure Government” and to claim general immunity from prosecution. It was duly struck out.¹²⁰

When the criminal charges came before Cormack J in the Brisbane District Court on 26 July 1979, unusually, Soegemeier was represented. Although a gaol sentence was avoided, he was placed on a five-year good behaviour bond when he agreed not to “prosecute, institute or continue, or assist in any legal proceedings in your own name or otherwise, without written application

¹¹⁶ *Ibid.*

¹¹⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 5 May 1981, 919.

¹¹⁸ NAA: A12918, 39/1975, Affidavit of Dieter Soegemeier, sworn 19 November 1975.

¹¹⁹ Queensland Supreme Court file, OS 65 of 1980, Affidavit of Donald Robert William Hair, sworn 11 February 1980, Exhibit “E”.

¹²⁰ *Ibid.*, paragraph 12.

first made to the relevant court”.¹²¹ Soegemeier also agreed that he would not “publicly assert to be a Minister of any government or holder of any office under a government, or to do any overt act in pursuance of a claim to be a member of a government, or any holder of an office of government”.¹²²

The “peace” appears to have lasted for three years. Although it is not known what triggered new litigation, in late 1979 things again came to a head when Soegemeier sought leave to issue against the Brisbane Magistrates’ Court itself, and against a plaintiff and his solicitor in an action in that court.¹²³ When unsuccessful, Soegemeier immediately reissued against the same parties but also joined the Acting Crown Solicitor.¹²⁴ When this also failed, he issued witness summonses, naming the Chief Justice, the Governor and various electoral officers. But by now Soegemeier had become more than an irritation to the State senior law officers charged with defending the litigation.¹²⁵ They moved to close his litigation down.

Queensland acts

The Queensland Supreme Court had amended its rules in 1943 in order to have power to be able to restrict the activities of vexatious litigants.¹²⁶ This reflected the traditional view that the inherent jurisdiction was insufficient foundation for such a power.¹²⁷ The new Order 60A gave the court the power to ban litigants who had brought unsuccessful proceedings “frequently and without any reasonable ground”. Once an order was made, a litigant needed judicial leave before instituting new proceedings. Unlike in Victoria¹²⁸ and in Western Australia,¹²⁹ no single litigant had acted as the catalyst for the change. Rather, it appears that it was inserted simply as a “housekeeping” measure, following the insertion of a similar rule in the *High Court Rules* that same year when

¹²¹ *Ibid*, paragraph 10.

¹²² *Ibid*.

¹²³ Queensland, 283 *Parliamentary Debates*, Legislative Assembly, 28 April 1981, 921.

¹²⁴ *Ibid*.

¹²⁵ Queensland Supreme Court file, OS 65 of 1980, Affidavit of Donald Robert William Hair, sworn 11 February 1980, Exhibit “A”.

¹²⁶ Order 60A was published in the *Queensland Government Gazette* on 9 October 1943, 1248–9.

¹²⁷ Simon Smith, “Vexatious Litigants and their Judicial Control: the Victorian Experience”, (1989) 15 *Mon LR*, 48 at 49.

¹²⁸ The litigation of Rupert Frederick Millane was the catalyst for the insertion of section 33 in the *Supreme Court Act 1928* (Vic). See further, Chapter Four and Grant Lester and Simon Smith, “Inventor, Entrepreneur, Rascal, Crank or Querulent: Australia’s Vexatious Litigant Sanction 75 Years On”, (2006) 13 *Psychiatry, Psychology and Law Journal*, 1.

¹²⁹ The litigation of Ellen Barlow was the catalyst for the *Vexatious Proceedings Restriction Act 1930* (WA). See further, Chapter Five and Simon Smith, “Ellen Cecilia Barlow (1869–1951): Western Australia’s pioneering Vexatious Litigant”, (2007) 14 *Murdoch University E Law*, 69.

that court had experienced troublesome litigants.¹³⁰ Since 1943 the Queensland Supreme Court had exercised the power only once.¹³¹

The action to have Soegemeier declared a vexatious litigant was brought by Denis Galligan, the Crown Solicitor, in February 1980.¹³² The immediate impetus was the barrage of summonses that Soegemeier had issued against senior political and judicial figures. When the matter came before Campbell J in early 1980, His Honour held that the five unsuccessful matters Soegemeier had initiated in the Supreme Court “are sufficient to justify the making of this order”.¹³³ The 20-page answering affidavit filed by Soegemeier, in his capacity as leader of the APFP, was not enough, despite his argument in it that he had appeared under protest, rejected the jurisdiction and authority of the court and foreshadowed an appeal to the Privy Council in London.¹³⁴ To the court, the matter appeared to be at an end. On 19 February 1980 Dieter Soegemeier, aged 47, became Australia’s ninth vexatious litigant and Queensland’s second.

However, there were some loose ends.

Queensland acts again

In his judgment Campbell J had hinted at a gap in the reach of Order 60A. It soon became apparent what that gap was when Soegemeier continued to issue warrants and subpoenas to witnesses out of the Magistrates’ Court and the authorities appeared powerless to stop them. They took the position that the Supreme Court Order 60A did not extend to inferior court proceedings, unlike in the other States where the legislative provision covered proceedings in *any* court.¹³⁵ Whether or not Soegemeier was aware of this legal point, he had continued to issue streams of witness summonses and related complaints against a widening group of defendants. A particular trigger was the prosecution of a son for driving an unregistered car. This soon embroiled a magistrate, police, the constitutional law expert Professor Daryl Lumb and Government Ministers such as Russell Hinze. Again, a theme of Soegemeier was the attempted “overthrow of the Constitution of the De-Jure Commonwealth of

¹³⁰ Order 44A was inserted in 9 March 1943. The relevant rule is now Regulation 6.06. For the background to the insertion of the original rule, see Chapter Seven, footnote 101.

¹³¹ Margaret Lillian Rockwell was declared a vexatious litigant by Hart J on 19 January 1966. See further, Queensland Supreme Court file, OS 8 of 1966.

¹³² Queensland Supreme Court file, OS 65 of 1980.

¹³³ Queensland Supreme Court file, OS 65 of 1980, Transcript 19 February 1980.

¹³⁴ Queensland Supreme Court file, OS 65 of 1980, Affidavit of Dieter Soegemeier, sworn 19 February 1980. He also appears to have telegraphed the Queen, drawing her attention to the “absolute treason” outlined in *Hansard* of 5 May 1981 and imploring her to forbid the Queensland Governor from assenting to any laws as a result. See Queensland Supreme Court file, OS 705 of 1983, Affidavit of Roy Patrick Sammon, sworn 14 September 1983, Appendix “D”, Soegemeier to Her Majesty Queen in Council, 16 June 1981.

¹³⁵ For example, see *Supreme Court Act 1928* (Vic), section 33.

Australia and to keep permanently removed from the Head of that government Her Majesty the Queen”.¹³⁶

By early 1981 the patience of the Crown Law Office had again run out and the Queensland Government moved to close the gap by legislation. On 28 April 1981 Attorney-General Doumany introduced the *Vexatious Litigants Bill*.¹³⁷ It met only token resistance from the member for Lytton, Mr Burns, who (similarly to Maurice Blackburn in the Victorian Parliament 54 years earlier)¹³⁸ mused: “Really, do we introduce laws that reduce the civil liberties of people to use the courts of this land because of one man?”.¹³⁹ Burns also thought that a simpler solution would be for the Supreme Court to amend its rules.¹⁴⁰ In any event, the legislation passed its Third Reading into law on 5 May 1981.¹⁴¹ Ironically, Soegemeier was never declared vexatious under the provisions of that legislation which he had provoked. But he remained declared as a vexatious litigant under the *Supreme Court Rules*. Nonetheless, Soegemeier’s influence would still be felt through others.

Helping a friend

Sometime around the middle of 1980 Robert William Franklin Van Haeff, a chef, came under the influence of Soegemeier. For the next three years litigation, clearly drafted and managed by Soegemeier, was initiated in Van Haeff’s name. It may be that, like other declared litigants before him,¹⁴² Soegemeier saw this as a way around his status as a vexatious litigant. In any event, until October 1983, when Van Haeff was also declared vexatious, there was a further stream of litigation that promoted the cause of the “De-Jure Commonwealth of Australia”.¹⁴³

The initial association between the two men started in June 1980 when Soegemeier assisted with a conditional appearance in the Holland Park Magistrates’ Court where Van Haeff was a defendant in a motor vehicle property damage action.¹⁴⁴ When he lost that case, Van Haeff issued a complaint on the authority of the “De-Jure Attorney-General”, against all the parties in the case. The complaint alleged, among other things, that the defendants “conspired

¹³⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 5 May 1981, 921.

¹³⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 5 May 1981, 921.

¹³⁸ Victoria, 173 *Parliamentary Debates*, Legislative Assembly, 15 September 1927, 1361 ff. Tom Burns (1931–2007) was Deputy Premier in the Goss Labor Government in Queensland in the period 1989–1995.

¹³⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 5 May 1981, 922.

¹⁴⁰ *Ibid.*

¹⁴¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 5 May 1981, 928.

¹⁴² Rupert Millane (Victoria, 1930) and Goldsmith Collins (Victoria, 1952) both employed this strategy in order to continue litigating. See further, Chapters Four and Seven.

¹⁴³ Queensland Supreme Court file, OS 65 of 1980, OS 705 of 1983, Affidavit of Roy Patrick Sammon, sworn 14 September 1983.

¹⁴⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 5 May 1981, 921.

to remove from Our Lady the Queen her title, honour and good name of the Commonwealth of Australia and manifested their intentions by certain overt acts therein".¹⁴⁵ The complaint was dismissed.¹⁴⁶ A similar fate befell proceedings in a further three cases in the Magistrates' Court and three in the Supreme Court where the causes of action similarly challenged the jurisdiction of the courts, officials and judges.¹⁴⁷ Attempts by Soegemeier in 1982 to intervene in Van Haeff's bankruptcy hearing in the federal jurisdiction also failed. There, Fitzgerald J made a "partial vexatious order" when he specifically banned both men from making or serving any further applications in that case without prior leave.¹⁴⁸

In October 1983, when Crown Solicitor Mackenzie moved to have Van Haeff declared a vexatious litigant, he was in no doubt that the driving force was Soegemeier. The affidavit material upon which Mackenzie relied specifically mentioned that fact and exhibited various documents produced by Soegemeier and the "De-Jure Commonwealth of Australia".¹⁴⁹ Mackenzie's cause was assisted by lengthy and rambling answering affidavits filed by both Van Haeff and "De-Jure Attorney-General Soegemeier". Both the affidavits rejected the jurisdiction of the court and its officers and relied on the protection of the "De-Jure Commonwealth of Australia Procedure of Courts of Law Act 1975" and the "De-Jure Commonwealth of Australia Alibi Act 1975".¹⁵⁰ Soegemeier and Van Haeff were unsuccessful. On 12 October 1983 Carter J declared Van Haeff a vexatious litigant. He was the 13th Australian so declared and the third in Queensland.¹⁵¹

A last legal hurrah

For over a decade Soegemeier had unsuccessfully challenged the legitimacy of elections and Parliamentarians through the courts. He had even formed an alternative *de jure* government. Then, in 1984, he moved his campaign to another level and stood as a Queensland Senate candidate in the 1984 federal

¹⁴⁵ *Ibid.*

¹⁴⁶ Queensland Supreme Court file, OS 65 of 1980, OS 705 of 1983, Affidavit of Roy Patrick Sammon, sworn 14 September 1983, Appendix "A".

¹⁴⁷ *Ibid.*

¹⁴⁸ Queensland Supreme Court file, OS 65 of 1980, OS 705 of 1983, Affidavit of Roy Patrick Sammon, sworn 14 September 1983, Order of Fitzgerald J, 11 June 1982.

¹⁴⁹ Queensland Supreme Court file, OS 65 of 1980, OS 705 of 1983, Affidavit of Roy Patrick Sammon, sworn 14 September 1983.

¹⁵⁰ Queensland Supreme Court file, OS 65 of 1980, OS 705 of 1983, Affidavits of Robert William Franklin van Haeff, sworn 22 September 1983 and The Attorney-General De-Jure Commonwealth of Australia The Right Honourable Dieter Soegemeier, sworn 26 September 1983.

¹⁵¹ Queensland Supreme Court file, OS 65 of 1980, OS 705 of 1983, Order of Carter J, 12 October 1983.

election.¹⁵² In a field of 27, including Cheryl Kernot and Michael Macklin from the Australian Democrats and Ron Boswell from the National Party, Soegemeier was unsuccessful. Only 39 Queenslanders voted for him.¹⁵³ Not surprisingly, he was dissatisfied with the result and, showing a procedural knowledge honed over the years, he lodged a petition in the High Court challenging the election of Michael Macklin.¹⁵⁴ This was also a jurisdiction from which Soegemeier had not been banned.

In March 1985 the challenge came before Gibbs CJ in the High Court, sitting as a Court of Disputed Returns. Although not mentioned in the report, Gibbs CJ indicated no concern about perceptions of bias on his part (given His Honour's 1975 dealings with Soegemeier). Chief Justice Gibbs proceeded to hear Dr Macklin's application to have the petition struck out as not complying with the strict requirements of the *Commonwealth Electoral Act 1918*. Appearing in person, Soegemeier argued the two themes that he had refined over the years — namely, that there was no valid Parliament and that the preferential voting system was unconstitutional as it gave people more than one vote.¹⁵⁵ Chief Justice Gibbs had no hesitation in striking out the petition as vexatious. On the first argument His Honour said:

I think it would follow from what he is saying that, similarly, there would be no valid judiciary. It is enough to state the argument to show that it is in truth, a vexatious argument. It is one that is irrational and could not possibly be accepted.¹⁵⁶

On the second argument Gibbs CJ said that Soegemeier had misconstrued what sections 8 and 30 of the *Constitution* said about electors voting only once. Preferential voting was valid and the court had only recently confirmed this.¹⁵⁷

This was Soegemeier's last known excursion into the legal arena, although his name would live on as legal precedent in the arena of electoral petitions.¹⁵⁸ After a long decline in health due to Alzheimer's disease he died in Brisbane on 2 October 2005. Survived by his wife, three sons and their families, he was 72 years old.¹⁵⁹

¹⁵² Earlier vexatious litigants had also unsuccessfully stood for Parliament: Rupert Millane for the Senate (1943) and Goldsmith Collins for the House of Representatives (1961). See further, Chapters Four and Seven.

¹⁵³ "Federal election results", *Courier Mail*, 14 December 1984, 10.

¹⁵⁴ *Soegemeier v Macklin and Others* (1985) 58 ALR 768.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* See also *Mc Kenzie v Commonwealth of Australia* (1984) 57 ALR 747.

¹⁵⁸ For example, see *Re Surfers Paradise Election Petition: Soegemeier v Small* [1975] QdR 114 and *Soegemeier v Macklin and Others* (1985) 58 ALR 768.

¹⁵⁹ *Courier Mail*, 4 October 2005, 20.

Conclusion

In many respects Soegemeier was a man ahead of his time. The original impetus for his political engagement and litigation was his objection to the strict enforcement of the obscenity law of the time. Thirty years later, the law in that area has significantly liberalised, even in Surfers Paradise. However, it is in the area of electoral funding that the greatest irony exists. Soegemeier was right when he argued that many federal Parliamentarians either ignored or breached their obligations to contain their spending and to report formally on it. That this non-compliance was an open secret at the time is well documented. As both sides of politics ignored the rules, no prosecutions had ever been brought by public electoral officials.¹⁶⁰ But that all changed in the late 1970s when a new “third force” in Australian politics, Don Chipp’s Australian Democrats, started to “keep the bastards honest”.¹⁶¹

The Democrats focused on campaign spending and enforcing electoral laws. In 1979 they were successful in challenging the election of seven candidates for breaches of Tasmanian electoral laws, resulting in the elections being set aside and a fresh election held.¹⁶² Chipp then proposed to make it a national campaign. “Challenge on poll spending threatened by Democrats”, read one headline.¹⁶³ As another federal election loomed, the response of the Fraser Government in 1980 was simply to repeal the provision or “deregulate” the issue of electoral financing while reform of the area was further considered.¹⁶⁴ That same year Soegemeier was declared a vexatious litigant. Neither the Queensland Supreme Court nor Soegemeier appear to have made the connection. Even though the irony may have been lost on Soegemeier, it is doubtful that he would have seen it as full vindication. The repeal of the provision did nothing to address the campaign funding imbalances among candidates or endorse his argument that appointments of officials under the former law were void.

So why were Soegemeier’s litigious protestations about electoral breaches ignored and those of the Australian Democrats successful? The evidence suggests that the difference was, as with other vexatious litigants, really in Soegemeier’s inability to articulate his complaint in the correct form and

¹⁶⁰ Colin Hughes, “The Case of the Arrested Pendulum”, in Howard Penniman, *The Australian National Elections of 1977*, 1979, 327–330; Deborah Cass and Sonia Burrows, “Commonwealth Regulation of Campaign Finance — Public Funding, Disclosure and Expenditure Limits”, (2000) 22 *Sydney Law Review*, 477 at 492 and Denny Meadows, “Open election funding or hide and seek?”, (1988) 13 *Legal Service Bulletin*, 65.

¹⁶¹ This was the very effective campaign slogan of the Australian Democrats in the 1980 federal election.

¹⁶² Colin Hughes, “A Close-Run Thing”, in Howard Penniman, *Australia at the Polls, 1980*, 236–238.

¹⁶³ *Sydney Morning Herald*, 22 September 1979, 3.

¹⁶⁴ *Ibid.* See also, *Commonwealth Electoral Amendment Act 1980* and Commonwealth of Australia, 118 *Parliamentary Debates*, House of Representatives, 15 May 1980, 2848 ff.

forum and with sufficient gravitas. The salaciousness of the early Southport “Sex Shop” case and the claims about support from the Whitlam family did nothing to establish his credibility as a litigant. Nor did his subsequent direct engagement with Buckingham Palace, Yarralumla, the high volume issue of witness and other local court summonses or the activities on behalf of the “De-Jure Commonwealth of Australia”. Soegemeier was simply dismissed as a troublesome crank. In contrast, the challenge from the Australian Democrats came from an organisation with a nationally credible profile, in the right forum with the correct documentation and with professional advocacy. This simply emphasises the challenge the litigant-in-person has in litigating in a legal system that relies heavily on the adversarial approach, rules and procedures and that is reluctant or unable to delve too deeply into the causes of the presenting case.

There can be no doubting the genuineness of Soegemeier’s campaigning. His ability to research the law and use its terminology was impressive, particularly for someone for whom English was a second language. It is also clear that he became increasingly frustrated with his lack of legal success and that the litigation became an obsession with him. As with other declared vexatious litigants, such as Millane and Collins, it is difficult to understand why he maintained such confidence in the legal system after it rejected him so often. But that lack of success seems only to have fuelled the obsession that consumed his working life. One explanation for what may have inspired Soegemeier lies in the extraordinary, even tumultuous, political events of the period and the activities of other mavericks such as “Prince Leonard”.

There is, of course, a medical dimension to the Soegemeier story. His litigious activity fits the querulent profile described by Mullen and Lester¹⁶⁵ (discussed in Chapter Two). Soegemeier persisted with a grievance in a manner that was seriously damaging to his economic, social and personal interest as well as disruptive to the courts. His profile also fits the typical one of male, middle-aged with a sound secondary education and fair work history. Similarly, the form of Soegemeier’s documentation showed multiple methods of emphasis, especially capitalisation, while the content became repetitive and made repeated misuse of legal and technical terms.¹⁶⁶ However, as Lester and others have noted, the danger of too readily applying such medical labels is to deprive such individuals of legitimate rights or prerogatives, however poorly advanced.¹⁶⁷ Soegemeier’s story demonstrates the truth of this observation most vividly. Soegemeier may have pursued his litigation obsessively but, at its core, it was legitimate.

¹⁶⁵ Paul Mullen and Grant Lester, “Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour”, (2006) 24 *Behavioural Sciences and the Law* 333 at 336.

¹⁶⁶ *Ibid.*

¹⁶⁷ See, in particular, Robert Goldstein, “Litigious Paranoics and the Legal System: The Role of the Forensic Psychiatrist”, (1987) 32 *Journal of Forensic Science* 1009, 1014.

The courts showed remarkable tolerance in not using the contempt power or imprisonment as a deterrent. Instead, they relied on pre-emptive dismissal of cases and the award of costs as sanctions. As the stories of other vexatious litigants have shown, these sanctions are ineffective against persistent and impecunious self-litigants. When eventually the Government did resort to the vexatious sanction, it too was ineffective. Soegemeier simply issued in the federal jurisdiction, where the order did not apply, worked through Van Haeff and focused on litigation in the inferior courts. Interestingly, even the 1981 introduction of the legislative provision to formalise application of the vexatious sanction in the lower courts seemed less directed at Soegemeier than at the “many justices of the peace who do not understand their work and believe that they have to witness anything which is flourished in their faces”.¹⁶⁸ As an indication of the perennial nature of the challenge, 30 years later the activity of other litigants saw Queensland leading the nation in developing model vexatious litigant legislation designed to address a perceived rising tide of persistent litigants.¹⁶⁹

Eventually the storm that was Soegemeier passed. He simply aged away from active involvement. Historically, he can properly be described as a modern day legal Don Quixote campaigning for democratic reform, convinced that he was right and society wrong. Our democratic society is stronger for such a citizen’s vigilance over, and fascination for, the proper functioning of the electoral system. One can only ponder whether events may have taken a different course had Soegemeier’s early 1970s’ electoral challenge been successful. In any event Soegemeier, like another Queenslander, Mr Percy Neal, was entitled to be a quixotic agitator.

¹⁶⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 5 May 1981, 920.

¹⁶⁹ *Vexatious Proceedings Act 2006* (Qld).

CHAPTER TEN

Conclusion

Introduction: the big picture

Although the data are sparse, the publicly expressed views of the judiciary and administrators suggest that there is a realignment occurring in Australia in the way parties present themselves before the nation's superior courts. There is a rise in the number of litigants-in-person and an expansion in the types of courts in which they appear.¹ As recently as the 1970s and 1980s litigants-in-person were confined mostly to courts of summary jurisdiction, and legal representation was the norm in the superior courts. That is no longer the case, with an increased number of litigants-in-person now also appearing before the superior courts. It seems likely that this is a permanent shift.

If there is to be effective reform, then there will need to be a fuller recognition by the judiciary, court administrations and governments that representation in the superior courts is not necessarily the natural order. For a judiciary traditionally drawn from barristers, this is a particular challenge as their professional experience may have conditioned them to see their role as that of "passive arbiter",² rather than the "helpful intervener", and to expect cases to be always conducted with the assistance of professional advocates. As Professor Webb has expressed it:

... it needs to be borne in mind that the primary function of the court system is to resolve disputes between citizens without them having to resort to force.

In a sense courts are the original alternative method of dispute resolution. Advocates exist for one reason – to assist litigants in resolving those disputes.

¹ See Geoffrey Davies, "The Reality of Civil Justice Reform: Why we must abandon the essential elements of our system", (2003) 12 *JJA* 155, 158 and the comment of Justice Guest of the Family Court upon his retirement. See further, Kate Legge, "Justice of the Peace", *Weekend Australian*, 13 May 2008, 2 and

² Richard Moorhead, "A Challenge for Judgecraft", (2006) 156 *New Law Journal* 742 and Richard Moorhead, "The Passive Arbiter: Litigants in person and the Challenge to Neutrality", (2007) 16 *Social and Legal Studies* 405, 415. See also Richard Zorza, "The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties appear Pro Se: Causes, solutions, recommendations, and Implications", (2004) 17 *Geo J Legal Ethics* 423.

Litigants are practically and logically necessary for disputes to be settled: advocates are not.³

That the shift will continue is clear when regard is had to the explanations commonly given for the increase in litigants-in-person. There is unlikely to be a decrease in lawyers' fees, substantial increases in the availability of legal aid or a "re-mystification" of the law. Conversely, "access to justice" can be expected to continue to be a powerful political policy front, particularly in the human rights arena. Of course, it is possible for governments to change policy direction and to effect change through substantive law reform. In particular, reform in the Commonwealth areas of immigration and family law could decrease the numbers of litigants-in-person in the Federal Court, the High Court and the Family Court.⁴ For example, the softening of the mandatory detention policy in immigration law and a review of parental responsibility law could see marked reductions.

However, the increased appearance of litigants-in-person in the superior courts has not occurred overnight. A decade ago Professor Stephen Parker in his report, *Courts and the Public*,⁵ recognised the challenge that the growth in litigants-in-person presented to the administration of justice. He called for courts to, among other things, develop "Self-represented Litigant Plans" and to collect data. Professor Dewar and his colleagues built on that work when they produced their *Litigants in Person in the Family Court of Australia*.⁶

But it appears that the courts and governments have been slow to act on those various recommendations and that the challenge of litigants in person has continued to build. The difficulty of the challenge for reform is compounded because of the continued lack of data about the numbers and nature of litigants-in-person. It is a case of "what you do not measure, you cannot reform". As a result, it appears that current responses of the judiciary and government to the case management pressures of increased numbers of litigants-in-person are very much driven by perception, if not anecdote. That this has occurred can perhaps be explained by the persistence and even outrageousness of vexatious litigants as a group that gives them a prominence in the judicial mind way beyond their numbers. This has led to a focus on reform of the vexatious litigant sanction that is out of proportion to the actual numbers of vexatious litigants. As such, the nature of the challenge of litigants-in-person has been misconceived and therefore the nature and effectiveness of the solution is also misconceived. As

³ Duncan Webb, "The right not to have a lawyer", (2007) 16 *JJA* 165, 168.

⁴ An early example is the *Child Support (Assessment) Act 1989* (Cth) that removed child maintenance cases from the court system by making assessment of child maintenance an administrative matter supervised by the Child Support Agency and the Australian Taxation Office.

⁵ Stephen Parker, *Courts and the Public*, AIJA, 1998, 107.

⁶ John Dewar, Barry Smith and Cate Banks, *Litigants in Person in the Family Court of Australia*, A Report to the Family Court of Australia, Research Report No 20, Family Court of Australia, 2000, 1.

I have argued, the vexatious litigant sanction was always only a “last resort” legal solution to a more complicated challenge. It did not work in 1930 and it is unlikely that the 2005 modernisation, if and when adopted nationwide, will be fully effective either.

Even if reform of the sanction is effective in dealing with vexatious litigants, courts will still face the increasing burden of litigants-in-person. In Professor Webb’s view, “[w]hile it may be true that self-represented litigants do not fit into the system perfectly, this may be due to the poor design of the system rather than the lack of ability, understanding or good faith of the litigants”.⁷ It is clear that redesign of the system to meet this challenge is very much an early work in progress.

The vexatious litigant numbers

In the 79-year history of the vexatious litigant sanction in Australia there have been only 49 people (42 men and seven women) declared as vexatious litigants in 10 of the 11 Australian superior court jurisdictions. Only four people have been declared in more than one court and, of them, only Alan Skyring has declarations across three courts. This is hardly evidence of a major problem within the court system sufficient to explain the current reform interest of the judiciary, court administrators and governments. Indeed, at the federal level, the High Court and the Federal Court have each made only two orders while the Supreme Courts of Tasmania, the Australian Capital Territory and the Northern Territory have made none. For the latter group, this most likely reflects the modest size of their jurisdictions and the fact that they saw no need to adopt the sanction until recently. Only in the States of Victoria and Queensland has the number of declarations reached double figures. Victoria has accumulated 15 vexatious litigants over 79 years (an average of one declaration every 5.2 years). However, Queensland has recorded 13 declarations since 1980. In comparison to Victoria, this is a relatively fast rate of one every two years. There is no immediately visible explanation, systemic or otherwise, for the relative surge of declarations in Queensland.

Of course, the “elephant in the room” is the large number of people declared as vexatious litigants in the Family Court (195 in the period 1976–2006).⁸ As has been noted a number of times, this figure alone is remarkable and indicates that there are special challenges with litigants-in-person in this jurisdiction that would benefit from specific research. But it would be unfortunate if the experience of persistent litigants-in-person in the Family Court were to be allowed to indiscriminately drive legislative change to the vexatious litigant

⁷ Duncan Webb, “The right not to have a lawyer”, (2007) 16 *JJA* 165, 166.

⁸ Diana Bryant, *Self Represented and Vexatious Litigants in the Family Court of Australia*, Access to Justice Conference, Monash University, Prato, Italy 2006.

sanction in other jurisdictions. This is because different dynamics appear to exist in the Family Court compared to other courts.

An imperfect sanction

The introduction of the vexatious litigant sanction to Australia (specifically, Victoria) in 1928 was born out of frustration. It was a specific solution crafted, as it was in England, for a specific problem. That problem was Rupert Millane. It was the extraordinary volume of his litigation in the 1920s against local government and political figures that persuaded the Victorian Government to adopt in full the *Vexatious Actions Act 1896* (UK). That the sanction was not fully effective against Millane or subsequent litigants is clear from the case studies. To varying degrees all remained active litigants after their declarations. Millane, in particular, as befits his status as the “leader of the vexatious bar”,⁹ was still active in the courts nearly 40 years after his declaration and assisting other persistent litigants, such as Goldsmith Collins.

The case studies show three major weaknesses with the (then) sanction. Two are technical legal limitations (and are largely addressed by the modernisation process) and the third goes to the nature of the adversarial system itself. First, the order only applies to the litigant and has no authority in other jurisdictions. After their declarations Millane and all the litigants discussed in the case studies in this book moved their litigious efforts (in varying degrees) to either Commonwealth or interstate courts. Commonly, the intensity of their litigious efforts lessened, reflecting a natural tiring of passion. This is supported by the fact that only four litigants have sustained the intensity of their campaigns to the point of being declared a vexatious litigant in a second jurisdiction.

Secondly, it was still possible for a vexatious litigant to continue litigating using the name of another willing participant. Millane had the compliant assistance of his brother Gilbert. Barlow occasionally had the assistance of her children. Collins directly advised Bienvenu, thereby contributing to her declaration, and Davis did the same for her second husband, Laszloffy. In Queensland, Soegemeier litigated through Van Haeff until he too was declared vexatious. Only Bienvenu appears to have never litigated through others. She stopped litigating when finally declared by the High Court.

An important point here is that the sanction (even after modernisation) only bars litigants from *issuing new proceedings* without leave. Naturally, and appropriately, it does not prevent them from *defending* proceedings. A number of the case studies (for example, Barlow, Davis and Bienvenu) demonstrate that litigation was unnecessarily sustained post-declaration when aggrieved opponents initiated proceedings to recover costs orders through bankruptcy and other enforcement mechanisms. In the cases of Bienvenu and Davis, recovery

⁹ Francis QC penned the description of Millane as the “leader of the vexatious bar” in a 1982 obituary he wrote for Collins. See Charles Francis, “Valete Goldie”, *Victorian Bar News*, Winter Edition, 1982, 20.

was obsessively pursued by Victoria Carter and Sir Isaac Isaacs respectively, even when it was clear that the vexatious litigants were without funds. When they were challenged the litigants quite naturally defended themselves and the litigation cycle renewed. In particular, the extraordinary decision by Sir Isaac Isaacs to bankrupt Elsa Davis a second time in order to (unsuccessfully) recover £54.6s.10d legal costs provides a stark example of an obsessive and vindictive continuation of litigation.

Thirdly, the sanction is a formal legal solution to deal with a challenge that is largely extra-legal in nature. It comes at the end of a process that has failed to divert, conclude or give satisfaction to the litigant. If the legal system along the way has failed to stop the persistent litigant who has shown little regard for procedures and form, then it was always optimistic to hope that a new law would do so. This raises a number of related points. It reflects the incompatibility of the vexatious litigant with the adversarial system. The very nature of that system (in the superior courts at least) is the reliance on professional advocates to present and articulate a litigant's cause according to accepted legal principles and in a form and language familiar to the court. Once before the court there is limited capacity for a judge to adopt an informal style to investigate underlying causes and passions. It is a system that is not suitable for every case. This is not to unduly criticise the legal system, but to observe that for many people (and vexatious litigants in particular) there is an unshakeable faith in the ability of the legal system to always deliver "justice". This is an unreal expectation. In reality, as with any human system, there are limits. Sometimes the system fails.

Sadly, it has long been accepted that "law" does not necessarily equate to "justice". As the case studies make clear, the causes and passions that vexatious litigants are seeking to articulate before the court do not easily lend themselves to resolution or satisfaction through the legal system and, in some cases, never would. For Millane, there was his intractable belief that his way was the only way to license omnibuses or build prototype fireproof houses. His was a creative genius that was not to be thwarted. On the other hand, Davis, in a torrid matrimonial dispute, found herself caught up in a vortex of unsympathetic matrimonial law and harsh wartime conditions with a judiciary overawed by the involvement of the distinguished Sir Isaac Isaacs. In Bienvenu's case, her cause of greater "hands on" animal welfare was presented to the court as a dispute over the proper proclamation of RSPCA rules and Starke J refused to make the broader inquiry. Soegemier's efforts to ensure compliance with electoral funding laws were steadfastly ignored by the courts because of his confused presentation and advocacy.

Further, the very existence of the sanction reflects the frustration and tolerance threshold of the legal system in dealing with persistent litigation and its wish to bring it to an end. The participants in the system looked to the sanction as the solution. Not surprisingly, the tolerance thresholds of practitioners and

the judiciary were related to the level of provocation they faced. Millane, for example, was never gaoled for contempt — a reflection no doubt of his widely acknowledged courteous and pleasant demeanour. With him it was possible for practitioners and the judiciary to remain calm and even occasionally to display a sense of humour. Barlow, Davis and Collins, on the other hand, all pushed the boundaries of tolerance and practitioners and the judiciary reacted, sometimes unprofessionally.¹⁰ However, it was Collins, with his unpredictable and violent outbursts, that best demonstrates the inadequacy of the vexatious litigant and other court-based sanctions. He simply continued to haunt the courts.

The case studies also demonstrate the difficulty the legal system has with taking a multidisciplinary approach to dispute resolution. The focus of the civil court is primarily on applying legal principle based on admissible evidence. With the benefit of hindsight, it seems clear that all the litigants were somewhere along the path of querulence as defined by Mullen and Lester.¹¹ Recognition of that condition as a driver of the persistent litigious behaviour may have enabled an earlier diversion (if indeed such alternate dispute resolution mechanism had been formally in place at the time). The possible exception here is Collins who, as the court recognised, was at the extreme end and appears to have exhibited an abnormality of mental function. However, recognition of an underlying driver is one thing. Having the legal tools to apply is another and, in the period covered by the case studies, alternative disposal methods were beyond the remit of the courts. Nor did court registrars have the pre-emptive powers to refuse to accept documents that all State courts now enjoy in one form or another. Had these existed in earlier times it is possible that some of the litigants may have discontinued their litigation or, at least, made the registry office their focus (which would have been, admittedly, a partial solution only).

Finally, where the sanction does partially assist is the way in which it *does* shift the focus of the litigant-in-person from beleaguered defendants toward the courts and their registry staff (because of the litigant's need to seek leave before issuing new proceedings). All the litigants canvassed in the case studies were well known to registry staff. But this simply redirects litigants toward registry staff who then bear the brunt of any continuing litigious activity, albeit usually out of public view.

Modernising the sanction

Despite the data indicating that vexatious litigants are small in number and only an occasional problem for most superior courts, the momentum to modernise the sanction has been building for almost a decade. It was the 1999 report

¹⁰ See, for example, the overruling of the decision of Foster J to gaoil Mrs Isaacs (Davis) in *The King v Foster ex parte Isaacs* [1941] VLR 77.

¹¹ Paul Mullen and Grant Lester, "Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour", (2006) 24 *Behavioural Sciences and the Law* 333.

of the Western Australian Law Reform Commission that first articulated the perceived failures of existing legislation and called for that State's legislation to be renamed the *Malicious Proceedings Act*.¹² Significantly, that report did not fully explain the basis for describing some persistent litigants-in-person as being motivated by "malice". This is unfortunate, as the use of such a descriptor sets a tone for legislators and feeds the already existing systemic bias against litigants-in-person. And the existence of "malice" as a litigation motivator is something not supported by the case studies. For example, Millane, Bienvenu and Soegemeier were all creative, genuine, even compassionate people, driven by events to litigate and determined to succeed. They all displayed a marked *absence* of malice.

The issues the Western Australian report did identify, largely picked up in the reforms contained in the Queensland *Vexatious Proceedings Act 2005*, all focus on making it easier for vexatious litigant orders to be sought and obtained. The report studiously avoids the issues of the nature of vexatious litigants and vexatious litigation, whether the sanction is effective anyway and the possibility of invoking a multi-disciplinary solution. By failing to be precise in defining what "vexatious" means, there continues to be large discretion vested in the judge. This simply fosters inconsistency and frustration. These "reforms" are very much legal reforms by and for lawyers. There is no reason to think they will be any more effective than the 1930 model.

In fact, as discussed in Chapter Three, the impact of many of the reforms may well be *counterproductive*. For example, by introducing new definitions of what constitutes "vexatious proceedings" and by allowing orders to be sought by people with "sufficient interest" and against people "acting in concert", a whole new area of jurisprudence and evidentiary challenge is introduced. At the same time, by placing the court at the centre of controlling who may apply for a vexatious litigant order, there is the real possibility of perceived bias should the court or its officers too readily assume the role of initiating vexatious litigant applications. This may move the court too far toward an unsatisfactory dual role of prosecutor and judge. On this point, Professor Taggart may prove to be right in his concern (in his discussion of the developments in *Bhamjee v Forsdick*¹³) about the wisdom of eroding the (UK) law officers' "monopoly" over the initiation of the sanction.

Perhaps the most concerning thing about the modernisation trend is the formalisation and prescriptive tightening of procedures surrounding leave applications. Given that this is intended as a largely administrative procedure, it vests much power with non-judicial registrars. Not only are the requirements onerous, but they also lack transparency to the point of being unfair, particularly

¹² Western Australia Law Reform Commission, *Civil and Criminal Justice System*, Report 92, 1999, 165.

¹³ Michael Taggart, "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896", (2004) 63 *Cam LJ* 656, 681.

for litigants-in-person. The power of court registrars to refuse to accept documents and the inevitable trend (as in the High Court for special leave applications) for applications to be dealt with in private is of particular concern. If this is to be the trend, then there needs to be much greater transparency and accountability in that process to ensure fairness and the maintenance of public confidence.

Most States and the Commonwealth have not yet enacted the provisions of the Queensland model legislation. The modernisation is therefore still very much a work in progress. There is potential for the two Victorian reviews to influence further changes. Of particular interest is the recommendation of the VLRC for the appointment of a Special Master to help guide difficult cases through the system.¹⁴ This would break new ground and may be the closest that our legal system can get to injecting a less formal dynamic into the case management procedure in order to ensure the parties are on an equal footing in presenting their cases.¹⁵ It would provide a valuable focus at a senior level, enabling earlier diversion, intervention and management of more difficult litigant-in-person cases. In particular, such early intervention may prevent the build-up of the sense of unfairness that so often drives the actions of a vexatious litigant. Again, the case studies provide guidance on when, where and how the legal system can fall into error and can therefore be on its guard to prevent the mistakes of the past. For example, inquisitorial intervention in *Bienvenu* and *Soegemeier* may have got to the substance of the complaints earlier and may not have been distracted by deficiencies in the standing of the parties or the inadequacies in the form of the presenting documentation.

Interestingly, the Law Reform Committee of the Victorian Parliament did not take up the suggestion of the VLRC to examine the possibility of incorporating a medical path as part of the sanction.¹⁶ It would have broken new ground if it could have been constructed in such a way as to promote the participation of the litigant and the court. Further research is necessary on any such proposal, but *Collins*' case study provides insight into how the court allowed itself to get caught up in the provocations of a troubled litigant and how the matter escalated into arguably inappropriate contempt proceedings when a medical path may have been more appropriate.

¹⁴ See Recommendations 110, Victorian Law Reform Commission, *Civil Justice Review: Report 14*, 40-41. See further at: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe72602960b930/VLRC%20Civil%20Justice%20Review%20-%20Report.pdf> (29 May 2008).

¹⁵ For a further discussion on possible approaches, see Richard Zorza, "The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties appear Pro Se: Causes, solutions, recommendations, and Implications", (2004) 17 *Geo J Legal Ethics* 423.

¹⁶ Victorian Law Reform Commission, *Civil Justice Review: Report 14*, paragraph 1.3.10, 601. See further at the website referred to in footnote 14.

Finally, what is missing from the emerging public discourse on the modernisation of the sanction is a wider discussion on who accesses the courts and why. For example, it is surprising that following the “scandalous” use of court resources in *Seven Network Limited v News Limited*¹⁷ there has been no concerted judicial or political response about the need for supervision of the use of the courts by corporations for strategic or collateral purposes. Surely there must be a point when the community, through the courts, is able to say to such litigants “enough is enough”? There is an obvious disconnect here, when viewed against the attention focused on the litigant-in-person, for it seems probable that the court resources tied up in that one corporate case were more than were used for the combined number of vexatious litigant cases in Victoria and Queensland in the period 1930 to 2008.¹⁸ As Soegemeier’s case study demonstrates, part of the explanation may be the capacity of corporations to engage skilled counsel and other resources to construct legal arguments in a format and a style that is less confronting to the court when compared with the inexperienced litigant-in-person. If misuse of court resources is truly a major catalyst for reform, then this is something that public interest lawyers may well pursue in order to ensure the courts are accessible.

Conclusion — mavericks all!

It is common ground that vexatious litigants can be annoying, unreasonable, troublesome, frivolous, persistent, costly and wasteful of scarce court resources. However, a central theme of this book has been that a close examination of the lives and litigation of some declared vexatious litigants allows for a less one-dimensional view. Clearly, all the litigants discussed in the case studies were intelligent, sometimes even brilliant, people. To varying degrees they knew that, and their efforts at self-promotion were very much part of their personas. Rupert Millane, the inventor and entrepreneur, vigorously promoted his ideas and inventions, seeking patents and copyright protection for them. Similarly, Davis was aware of her talent as a composer and performer and regularly claimed copyright for her scores and distributed copies to crowned heads and political leaders of the world. Even Soegemeier sought copyright protection in the 1960s for his proposal for a “Consumer Club Australia Pty Ltd”.

These litigants were also accustomed to being centre-stage. Unfazed by the legal or political processes, they appeared to relish the limelight generated by their participation. Millane wrote to newspapers, appeared before inquiries,

¹⁷ *Seven Network Limited v News Limited* [2007] FCA 1062, 1064.

¹⁸ In 2007 the cost of legal resources devoted to the Julian Knight litigation was estimated by one source at \$6.2M. Used as a conservative benchmark against the cost of the Channel Seven litigation, that is the equivalent of 32.2 separate vexatious litigants. That is more than the total number of vexatious litigant declarations made by the Victorian and Queensland Supreme Courts in the period 1930–2007. See further, “Pests cost \$6.2m”, *Herald Sun*, 11 September 2007, 4.

self-published on his various projects and stood for the Senate. Collins also appeared comfortable with notorious celebrity, having been a famous larrikin Australian Rules footballer. He too sought a Parliamentary seat when he challenged Prime Minister Menzies in the 1961 election. For his part, Soegemeier was regularly reported in the local press, published briefly his own newsletter, the *Keyhole News*, and stood for the Senate in 1984. However, it was Davis who shone brightest in the theatre of the courtroom. Once the torrid Isaacs litigation was behind her she genuinely appeared to have fun with her subsequent legal battles as, for the most part, did her opponents and the judiciary. The best example was her litigation against *The Age*.

As has been argued, all these people were determined litigants. In different ways a number can also be seen as activists, ideas people, non-conformists, even dissenters promoting reform and/or themselves through the legal system. Most often this was deliberate, but the results were not always intended. There was always an impact on the defendants, the courts and, usually, an impact on the wider community. For example, Millane's campaigns related to his role in the pioneering of the Melbourne omnibus system and his attempt to promote a radical fireproof house. His legal tenacity saw the omnibus licensing regime tightened through two Acts of Parliament as well as the introduction of the vexatious litigant sanction into Australia. Similarly, the determination of Barlow to litigate her marital dispute in the face of unsympathetic matrimonial law saw Western Australia also adopt the vexatious litigant sanction. Davis too took on unsympathetic matrimonial law and the power imbalance inherent in her dispute with Sir Isaac Isaacs, testing the tolerances of the system to the limit. Interestingly, family law continues to be an arena of vexatious litigant dispute, raising the question, as yet untested, whether it is an arena where the law lags behind contemporary community standards and thus exacerbates disputes, so fuelling otherwise unnecessary legal disputation. However, with Davis, it was her subsequent "eccentric" court appearances played out before the national media that deflated the occasional pomposity of the legal system and, indeed, enabled it to demonstrate publicly a sense of reasonableness and humour.

On the political front, Bienvenu and Soegemeier stand out as social reformers ahead of their time. Of all the case studies they demonstrate the challenges that activism, reform movements and self-representation present to a legal system too often more comfortable with arcane procedures, legal form and professional advocacy than the substance of a reform struggle. Without the determination of Bienvenu there would not have been the statutory restructure and democratisation of the RSPCA (Vic) and the establishment of the Australian Animal Protection Society. Both recast the animal welfare scene in Victoria. Similarly, Soegemeier was also a grass roots reformer. Politicised by his prosecutions for obscenity offences in the 1970s he was the prime mover in the establishment of the Australian Personal Freedom Party. This in

turn led to his campaign to reform the unenforced financial disclosure laws of the *Commonwealth Electoral Act 1918* (Cth). Although his reform campaign was unsuccessful, and led to his declaration and the subsequent enactment of the *Vexatious Litigants Act 1981* (Qld), a democratic society is better for such a citizen's vigilance and participation.

Finally, each of the subjects of these six case studies can be said to fall within the broader definition of a "maverick", being a "bohemian, dissenter, extremist, malcontent, non-conformist, radical".¹⁹ Few, if any, of the litigants, their ideas or talent won full acceptance in their time. Most often their litigation activities were at a cost to them and their families. However, in the longer term a democratic society is richer for such active participation, despite the obvious annoyances, frustrations, costs and even distress evident in the short term. As George Bernard Shaw opined, a community needs unreasonable people to persist with demands for change if a society is to progress. Importantly, in a civil society the legal system is a major mechanism through which the community may advance demands for change, even if those demands are poorly articulated, conceived or provocatively presented. It is important that access be enabled and not easily denied. Unfortunately, the ability to determine the upper level of unreasonableness of those demands is not an exact science. The reasonableness of the demand may not be immediately evident and mistakes will be made. That may go beyond mere inconvenience and cause distress and expense. However, in order for the judiciary to demonstrate fairness and objectivity, and for public confidence in the accessibility of justice to be maintained, that may be the cost that a mature and democratic society has to bear. Australia needs its maverick litigants. That is what history teaches us.

¹⁹ See *Thesaurus.com Roget's New Millennium Thesaurus*, first ed (v 1.3.1), Lexico Publishing Group, LLC: <http://thesaurus.reference.com/serach?q=maverick&x=46&y+15> (August 29 2006).



APPENDIX A

Australian vexatious litigants register (1930–2009)

*Indicates not reported in law reports.

No	Date Declared	Name	File No	Judge	Court	State	A/G
1 ¹	5.9.1930	MILLANE, Rupert Frederick (1887–1969)	4360	Mann CJ McArthur J MacFarlan J	Supreme	VIC	Slater
2 ²	26.5.1931*	BARLOW, Ellen Cecilia (1868–1951)	A21/1931	Northmore ACJ	Supreme	WA	Davy
3 ³	21.7.1941*	ISAACS, Edna Frances (1907–1989)	501	MacFarlan J	Supreme	VIC	Bailey
4 ⁴	13.6.1952*	COLLINS, Goldsmith (1902–1982)	1952/25	Williams J	High	VIC	Spicer
5 ⁵	6.9.1963*	LASZLOFFY, Geza (1931–2002)	M4693	Sholl J	Supreme	VIC	Rylah

¹ *In re Millane*, [1930] VLR 381.

² Appeal to High Court dismissed 13 September 1934 by Rich J (1934/10) Refer NAA 8345102. In 1937 she sought leave to issue against North Fremantle Municipality. Leave refused by Draper J. See *Barlow v North Fremantle Municipality* (1937) 39 WALR 89.

³ Married Geza LAZSLOFFY (1931–2001) in February 1954. He was declared vexatious in Victoria in *Attorney-General v Laszloffy* (Unreported, Supreme Court of Victoria, Sholl J, 6 September 1963).

⁴ Later declared vexatious in Victoria in *Attorney-General v Collins* (Unreported, Supreme Court of Victoria, Hudson AJ, 27 March 1953).

⁵ Married Edna DAVIS (formerly ISAACS) in February 1954. The Victorian Supreme Court previously declared her vexatious on 21 July 1941. This was the first husband and wife so declared.

No	Date Declared	Name	File No	Judge	Court	State	A/G
6 ⁶	19.1.1966*	ROCKWELL, Margaret Lillian (? – 2001)	OS 8/1966	Hart J	Supreme	QLD	Dela- mothe
7 ⁷	12.12.1969*	BIENVENU, Constance May (1912–1995)	M7029	Gillard J	Supreme	VIC	Reid
8	5.9.1977*	COUSINS, William (1904–1982)	M12263	Starke J	Supreme	VIC	Storey
9	19.2.1980*	SOEGEMEIER, Dieter (1933–2005)	OS 65/ 80	Campbell J	Supreme	QLD	Lickiss
10	9.12.1980*	DESMOND, Paul (b. circa 1933)	2397/80	Wickham J	Supreme	WA	Medcalf
11	17.3.1981*	BEN HEMICI, Abdul Madjil	M14544	Starke J	Supreme	VIC	Storey
12	17.7.1981*	GALLO, Kathleen	M15122	Gray J	Supreme	VIC	Storey
13	12.10.1983*	VAN HAEFF, Robert William Franklin	OS 705/ 83	Carter J	Supreme	QLD	Harper
14 ⁸	8.5.1986	SOLOMON, Eddie	4954/ 86	Young J	Supreme	NSW	Sheahan
15 ⁹	21.7.1987*	FRITZ, Leslie Harold	OS 418/ 97	Moynihan J	Supreme	QLD	Clauson
16 ¹⁰	21.7.1987*	FRITZ, Dennis Melvin	OS 418/ 97	Moynihan J	Supreme	QLD	Clauson

⁶ Order made pursuant to Order 60A r 1. Rule inserted 9 October 1943 and deleted 2 July 1983 following passage of *Vexatious Litigants Act 1981* (Qld).

⁷ Became the second person to be declared vexatious by the High Court in *Hutchison v Bienvenu* (Unreported, High Court of Australia, Walsh J, 19 August 1971).

⁸ *Attorney-General of NSW v Solomon* (1987) 8 NSWLR 667.

⁹ Father of Dennis Fritz.

¹⁰ Vexatious order revoked by Williams J on 27 October 2000.

No	Date Declared	Name	File No	Judge	Court	State	A/G
17 ¹¹	13.6.1990*	SPAUTZ, Michael Edward	14464/1989	McInerney J	Supreme	NSW	Dowd
18 ¹²	27.8.1992	SKYRING, Alan George	S92/005	Toohey J	High	CTH	Lavarch
19 ¹³	27.8.1992	CUSACK, Patrick Leo	S92/006	Toohey J	High	CTH	Lavarch
20 ¹⁴	19.11.1992	WEST, Raymond Stanley	16208/90	Newman J	Supreme	NSW	Dowd
21 ¹⁵	5.3.1996	CAMERON, Donald James	APL 112/95	Fitzgerald P Pincus JA Mackenzie J	Supreme	QLD	Foley
22	20.2.1997*	BURKE, Philip Damian	SCGRG 95/1240	Perry J	Supreme	SA	Griffin
23 ¹⁶	16.7.1998*	LINDSEY, David James	7476/1997	Kellam J	Supreme	VIC	Wade
24 ¹⁷	23.2.1999*	KAY, Ian	6562/1998	Eames J	Supreme	VIC	Wade
25 ¹⁸	16.12.1999*	ABBOTT, John Murray	S10813/99		Supreme	QLD	Foley

¹¹ See also subsequent proceedings as in *Attorney-General (NSW) v Spautz* [2001] NSWSC 66.

¹² See *Attorney General (Cth) v Skyring* (1992) 66 ALJR 810. Also in Queensland in *Attorney-General v Skyring* (Unreported, Supreme Court of Queensland, White J, 5 May 1995) and by Sackville J in Federal Court on 6 July 1999. See *Ramsey v Skyring* [1999] FCA 907.

¹³ *Jones v Cusack* (1992) 66 ALJR 815.

¹⁴ See also “Vexatious litigant took on too many lawsuits”, SMH, 20 November, 1992, 6.

¹⁵ *Re Cameron* [1996] 2 Qd. R. 218.

¹⁶ Leave to issue under *Transport Accident Act* 1988 (Vic) granted 25 March 2002 by McDonald J in *Lindsey v Attorney-General (Vic)* [2002] VSC 96. Leave also given in *Phillip Morris v AG Vic & Lindsey* [2006] VSCA 21.

¹⁷ Previously declared by Family Court of Australia in 1996. Details restricted. See also *AG for Victoria v Kay* [2006] VSC 9 and [2006] VSC 11 regarding application of *Grepe v Loam* order.

¹⁸ *Attorney-General (WA) v Keating* [2000] WASC 93. Leave refused by Hasluck J in *Attorney-General (WA) v Keating* [2000] WASC 276.

No	Date Declared	Name	File No	Judge	Court	State	A/G
26 ¹⁹	19.4.2000	KEATING, Oisin Geoffrey	CIV 2181/1999	Anderson J	Supreme	WA	Foss
27	22.5.2000*	GARGAN, Peter Alexander	S1888/00	Holmes J	Supreme	QLD	Foley
28	10.5.2001*	SLATER, Merrilee Margaret	A81/2000	Madgwick J	Federal	ACT	Williams
29 ¹⁹	9.8.2001	HORVATH, Gabor	7832/2000	Ashley J	Supreme	Vic	Hulls
30	16.10.2001*	SARGENT, John Gary	S6670/01	Mullins J	Supreme	QLD	Welford
31 ²⁰	2.8.2002	HUNTER, Lindsay	CIV 1655/2002	Hasluck J	Supreme	WA	McGinty
32	15.11.2002*	JAMBRECINA, Drago	10820 & 20019/2002	Levine J	Supreme	NSW	Debus
33	4.12.2002*	TAIT, William Peter	S5757/02	Wilson J	Supreme	QLD	Welford
34	5.3.2003*	TSEKOURAS, Con	001039/03	Palmer J	Supreme	NSW	Debus
35 ²¹	16.4.2003	GUNTER, Richard Stephen	S11734/02	Holmes J	Supreme	QLD	Welford
36 ²²	12.9.2003	HEINRICH, Stephen Glenn	SCCIV 02 822	Debelle J	Supreme	SA	Atkinson

¹⁹ *Attorney-General (Vic) v Horvath (Senior)* [2001] VSC 269. Also “partially vexated” with mother Agota Horvath in Federal Court by Weinberg J on 27 April 1999 in *Commonwealth Bank of Australia v Horvath* [1999] FCA 504.

²⁰ *Attorney-General v Hunter* [2002] WASC 189.

²¹ *Lohe v Gunter* [2003] QSC 150.

²² *Attorney-General (SA) v Heinrich* [2003] SASC 322. Leave to appeal refused 23 December 2003.

No	Date Declared	Name	File No	Judge	Court	State	A/G
37	10.12.2003	BHATTACHARYA Pranay Kumar	10904/ 03	Whealey J	Supreme	NSW	Debus
38	5.2.2004*	KANAK, Dominic Wy	013056/ 03	O’Keefe J	Supreme	NSW	Debus
39	27.2.2004*	BIRD, Geoffrey James	S7790/ 03	McMurdo J	Supreme	QLD	Welford
40 ²³	27.8.2004	WESTON, Michael	7711/01	Whelan J	Supreme	VIC	Hulls
41	30.9.2004*	BETTS, Craig Andrew	13264/03	Hoeben J	Supreme	NSW	Debus
42 ²⁴	19.10.2004	KNIGHT, Julian	9420/03	Smith J	Supreme	VIC	Hulls
43 ²⁵	23.12.2004	SHAW, Brian William	CIV 2264/ 2004	Braddock SC	Supreme	WA	McGinty
44 ²⁶	25.2.2005	BAR–MORDECAI, Michael Jacob	10622/ 04	Patten AJ	Supreme	NSW	Debus
45 ²⁷	16.9.2005	MICHAEL, Shawky Shafeek	CIV 1374/ 2003	Le Miere J	Supreme	WA	McGinty
46 ²⁸	11.11.2005	PIEPKORN, Henriette	SCCIV– 05-459	Layton J	Supreme	SA	Atkinson
47 ²⁹	13.4.2007	MANSUKHANI, Dayal Hassaram	BS4770/ 06	Mackenzie J	Supreme	QLD	Shine

²³ *Attorney-General (Vic) v Weston* [2004] VSC 314.

²⁴ *Attorney-General of Victoria v Knight* [2004] VSC 407.

²⁵ *Attorney-General (WA) v Shaw* [2004] WASC 280. Later declared vexatious in Victoria on 17 May 2007 by Hansen J. See *Attorney-General (Vic) v Shaw* [2007] VSC 148.

²⁶ *Attorney-General (NSW) v Bar-Mordecai* [2005] NSWSC 142.

²⁷ *Attorney-General (WA) v Michael* [2005] WASC 203.

²⁸ *Attorney-General (SA) v Piepkorn* [2005] SASC 420.

²⁹ *Attorney-General (Qld) v Mansukhani* [2007] QSC 69.

No	Date Declared	Name	File No	Judge	Court	State	A/G
48 ³⁰	2.5.2008	MORAN, John Gerard	10356/ 2006	Curtain J	Supreme	Vic	Hulls
49 ³¹	30.1.2009	GARRETT; Andrew	SSCIV- 96-2244	Layton J	Supreme	SA	Atkinson

³⁰ *Attorney-General (Vic) v Moran* [2008] VSC 159.

³¹ *Garret & Anor v Mildara Blass & Ors:Attorney-General for the State of South Australia v Garret* [2009] SASC 19.

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