Australian Society of Indexers
NEWSLETTER
GPO Box 1251, Melbourne Vic 3001
Volume 20, Number 5, June 1996   ISSN 0314-3767

Contact for Membership
$40 Melb, Syd, ACT; $30 rest of Australia; $35 Overseas
Phone/Fax: (03) 9571-6341
email: mindexer@interconnect.com.au
Webmaster: aussil@zeta.org.au

Branch News
Progress on Formation of New AusSI Branches
by Ian Odgers, Secretary, National/Vic. Branch
We are pleased to announce that two new AusSI Branches are planned to be formed in the near future, namely in South Australia and Queensland. As shown in the current membership listings published in this issue, both states have attained the minimum number of members (10) for branch formation. South Australia currently has 11 members and Queensland 12.

In addition, Western Australia now has eight members, only two short of reaching the minimum number. Members in Perth are encouraged to recruit further members, possibly through their editor/publisher contacts, with a view to forming a branch there also. Forming these branches, even where the numbers are small, will provide members with a sense of focus, where like-minded individuals can get together and discuss topics of mutual interest.

South Australia
A meeting will be held on 13 June in Adelaide to officially form the South Australian Branch of AusSI. All members in SA have been contacted, and hopefully as many as possible will attend, as a quorum of six is needed. Further information can be obtained from Susan Rintoul, ph. (08) 235 1535.

Queensland
AusSI members Helen Penridge and Leslie Bryant in Brisbane are currently planning the formation of a Branch in Queensland. Further details will be announced shortly. [See their phone nos. inside - Ed.]

ACT Committee for 1996/97
President Geraldine Triffitt
Secretary Shirley Campbell
Treasurer Laurelle Tunks
Committee Lynn Parkas, Robert Hyslop, Jean Jensen, Susan MacDougall, Robert Withycombe

Meetings and Training:
Victoria
Monday, 24 June, 6 p.m., La Trobe Lib., Melbourne
History of the Book (HOBA) seminar: ‘Newspapers’
Convenor: Liz Morrison (Monash University)
Venue: State Library of Victoria in the La Trobe Library (entrance off La Trobe Street to the La Trobe Roadshow Theatre), Staff seminar room, 4th floor
Contact: Patricia Holt, Ph: (03) 9905 5240 (w)
email: Patricia.Holt@arts.monash.edu.au

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Letters to the Editor
I noticed in the April 1996 issue of the Australian Society of Indexers Newsletter a mention of a thesaurus of 19th century Australian terminology. (p.4) I wish to find out what progress has been made with this project and obtain the address of the person(s) who are working on this thesaurus. I hope you can help me with this request - thanks.

Roger Swanson, Roger.Swanson@natlib.govt.nz
Reference & Research Services, Alexander Turnbull Library, National Library of New Zealand, 7 May 1996

Reply from Editor is on page 8

Editorial
Greetings! Thank you to those who complimented me on the new style of the Newsletter! The annual membership directory has replaced an article from Janet Hine delaying it yet again. (Sorry Janet!) Photos for the last two conferences were not ready in time for publication but will be ready for July. In the July issue I will be printing Glenda Browne’s article ‘Abstracting from the Robertson Conference. I have put it up already on the Web site, with remaining articles being added later. I have added links to cross references in Glenda’s article which makes for interesting reading. The coupon on the back of each issue is meant for recruiting new members, not for renewals! My apologies to the members who thought they had to pay again! : ) Please spread the word...
That’s all for this month. See you next month.
Dwight Walker, Editor and Webmaster

Australian Society of Indexers Newsletter, Volume 20 No. 5, June 1996
**NSW Branch**

Ms Jean Bailey,
PO Box 11, Woodford 2778
jeanbailey@library.usyd.edu.au

Ms Gabriella Brie,
PO Box 288, Kempsey 2440
(065)62 6656(w) (065) 66 8319(h)

Reg Ms. Glenda Brown,
PO Box 307, Blaxland 2774
jonathan@magna.com.au

Ms Cecilia Clarke,
10 St Giles Ave, Greenwich 2065
(02) 436 1947 (w & h)

Mr Graham L. Clayton,
40 Kurrajong Cres Blacktown 2148

Reg Ms. Caroline Colton,
1/70 Mount St, Coogee 2034

Mr Phil Cotton,
2 Megalong Street, Katoomba 2780

Reg Mr. Garry Cousins,
2/27 Whatmore St, Waverton 2060
(02) 99551525 (w & h)

Mrs. Barbara Crighton,
29 Turner Avenue,
Baulkham Hills 2153

Ms Madeleine Davis,
PO Box 6021, Shoppingworld,
North Sydney 2059
(02)438 5354 (w)(02)439 7028 (h)

Ms. Lorraine Doyle,
15 Nirimba Ave, Nth Epping 2121
(02)99366229(w) (02) 876 4218(h)

Ms P. Findlay,
Puddingburn Publishing Services
P/L, 4 Victoria St, Greenwich 2065
(02) 436 6026 (w)

Mrs Marjorie Flood,
3 Coventry Cres., Nth Epping 2121

Ms Liz Goodman,
26A Sunryndale Pl, Bayview 2104

Ms. Eugenia Greig,
18 Therry Street, Drummoyne 2047

Reg Ms. Diane Harriman,
10 Headland Rd,
North Curl Curl 2099
(02) 9905 8521 (w & h)

Mrs Meredith Healey,
112 West St, Crows Nest 2065

Ms Tina Hendrikson,
5/57 Shirley Rd,
Wollstonecraft 2065

Miss Janet Hine,
31 Fairfax Road, Mosman 2088

Mr. William Hood,
36 Nursery Street, Hornsby 2077
W.Hood@usw.edu.au

Ms Susan Jackson,
13 Rosesdale St, Dulwich Hill 2203

Reg Mr Jonathan Jermy,
PO Box 307, Blaxland 2774
jonathan@magno.com.au

Ms. Pamela Johnson,
17 Radiata Ave, Baulkham Hills
2153 (02) 639 9435 (h) (ph & fax)

Mobile 019 393 086

Reg Ms. Pamela Johnstone,
32 Claines Cres,
Wentworth Falls 2782
(02)99587699(w) (047)57 3045 (h)

Mrs Caroline Jones,
Braxus Press, PO Box 618,
St Ives 2075

Ms Carolyn Kearney,
66/5 Hutchinson St,
Surry Hills 2010
ekearney@library.usyd.edu.au

Mrs Hai Choo Khoo,
11 Erica Close, Dubbo 2830

Ms Kate Lyons-Dawson,
10 Rosemont St,
West Wollongong 2500

Ms. Anna Beth McCormack,
218 Cowper Street, Goulburn 2580
(048)230438(w)(048)281131(h,f,fx)

Reg Dr. Trevor Matthews,
164 Windsor St., Paddington 2021
(02) 351 2102(w) (02) 363 3341(h)
tmathew@extro.ucl.oz.au

Dr John Merrick,
PO Box 490, Artarmon 2064

Mr Mark Micallef,
PO Box N694, Gosvenor Pl 2000

Ms Ann Parry,
4 Godfrey Road, Artarmon 2064

Ms Megan Pitt,
108 Hill Street, Quirindi 2343

Mrs Ann C. Prestney,
322 Catherine Field Road,
Catherine Field 2171

Reg Ms Juliet Richers,
National Centre in HIV Social Research,
School of Biological Sciences,
Macquarie University 2109
(02)8508606 (w) (02) 810 9590 (h)
richters@bunyip.bhs.mq.edu.au

Ms Christine Roberts,
2/80 Cremorne Rd,
Cremorne Point 2090
x0000495x@acsusun.acsu.unsw.edu.au

Ms Jeanne Rudd,
102 Bridge Road, Glebe 2037

Reg Miss Jo Rudd,
6/109 Wyuna Ave, Harbord 2096

Reg Mr. Kingsley Siebel,
11/22 Frederick St, Hornsby 2077
(02)7473149(w),(02)4764378(fax)

Ms. Janet Sorby,
12 Paul Street, Balmain East 2041

Reg Mr. Neil Towart,
84 Hat Hill Road, Blackheath 2785
(068)643260(M, W, Th)
Fax (068)643220 (047)87 6637(h)
N.Towart@laborgar.org

Reg Ms. Mary Turner,
5/3 Trafalgar Pl, Mansfield 2122

Ms Liz Vincent,
PO Box 111, Pienon 2571

“Reg” denotes Registered Indexer
Send corrections to the Secretary

Reg Mr. Alan Walker,
10 Rockwall Cres, Potts Pt 2011
(02)6830174(w,h)(02)3585593(fax)

Reg Mr. Dwight Whitby,
2/1 Nelson Street, Randwick 2031
(02) 4937950 (w) (02) 398 6726(h,f)
(02)4387329 (fax)
dwight@zip.com.au

Reg Mrs. Deirdre Ward,
47 Wakeford Rd, Strathfield 2135
MalWard@world.net.au

Mrs Jane Whisker,
RMB 3300C.Wisemans Ferry Rd,
Somerby 2250

Mr Eric Whitby,
6 Cypress Street, Leeton 2705
(069) 53 2612 (h)

Reg Mr. Michael Wyatt,
Keyword Editorial Services, 22
Kendall Street, Surry Hill 2010
(w & h)(02)3317764 (w) fax
(02) 331 7785 (02) 332 1414 (h)
keyboard@oxemail.com.au

Reg Mr. Elmar Zalouns,
1/21 Station Street, Thiiroull 2515

Ms. Michele Ziegler,
35 Janmail Cres., Jannali 2226

**Victorian Branch**

Mr Trevor Absalom,
5/60 Blessington St, St Kilda 3182

Mr John D. Adams,
17 / 115 Torbay St, Macleod 3085

Mr James Anderson,
12 Washington St, Toorak 3141
(03) 9827 4874 (w & h)

Reg Ms Kerry Biram,
PO Box 2301, Richmond St 3121
kbiram@penguin.com.au

Reg Mr Russell Brooks,
19 Cowper Street, Brighton 3186
(03) 9596 1585 (w & h)

Mrs Andrea Burke,
18 Winter St, Malvern 3144

Manager, Acquisitions, CSIRO,
314 Albert St, E Melbourne 3002

Ms Janie Carrington,
141 Cecil St, Williamstown 3016

Ms. Dorachai,
9/25 Illawarra Rd, Hawthorn 3122

Mrs. Betty Cooper,
1 Halifax Court, Ashburton 3147

Reg Mrs Dominique Davis,
29 Lansell Cres, Camberwell 3124

Reg Ms. Hazel Dittebrandt,
1/53 Mount Eliza Way,
Mt Eliza 3930 (03) 9787 9060 (h)

Mr Ivar Dorum,
40 Hawthorn Gve, Hawthorn 3122

Ms Christine Durbridge,
38 Allister St, Nth. Fitzroy 3068
(03) 9481 3500 (w & h)
email: cjdl@melbpc.org.au

Mr. Alan Eddy,
24 Normandy Terrace,
Mt. Martha 3934
“Reg” denotes Registered Indexer
Send corrections to the Secretary

Ms Carol Ellison,
21 Greenwood St, Burwood 3125
Ms Margaret Findlay,
3A Goodall St, Hawthorn 3122
findlay@acer.edu.au
Mrs Joyce Gillespie,
‘Black Cameron’,
Smith Gully 3760
(03) 9710 1270, (03) 9654 8527
Ms Rowena Gipps,
PO Box 289, Shoreham 3916
Ms Joanne R. Grant,
PO Box 58, Tallangatta 3700
fileworks@albury.net.au

Reg Mrs. Kathleen Gray,
‘Old Oak’, Franklinds Rd,
Harcourt 3453
(054) 74 2556 (w & h)
kggray@hendigo.net.au

Reg Miss Jean Hagger,
31 Maylands Ave,
North Balwyn 3104
Reg Mrs Kathleen Harper,
11 Clarence Street, Brunswick East
3057, (03)3938 3664 (w & h)
Reg Mrs. K.A. Herbstroet,
see Mrs Kerry Biram

Mrs Heather Hillman,
2 Manuka Drive,
Warrnambool 3280
(055)57 8264 (w) (055) 62 5084(h)
hhillman@vch.a.edu.au
Reg Mrs. Patricia Holt,
PO Box 172, Clifton Hill 3068
(03)99055240(w) (03)98527375(h)
Patricia.Holt@arts.monash.edu.au
Mrs Florence Hu,
25 Sackville Street, Kew 3101
Reg Mrs Anne Irons,
43 Fortuna Ave, Nth Balwyn 3104
Reg Mr. George Levick,
1/51 Jackson St, St Kilda 3182
(03) 9534 4843 (bus.)
Reg Mrs. Susan Liepa,
5 Wellwood Square,
Wheels Hill 3150
susan.liepa@acslink.aone.net.au

Mr Brett Lockwood,
8/141 Clarke St, Northcote 3070
socbel@lure.latrobe.edu.au

Mrs. Mary Long,
3/190 Cotham Road, Kew 3101
Miss P. Longley,
Serials Librarian, LaTrobe University,
Periodicals Department,
Bundoora 3083
Reg Miss Josephine McGovern,
3/30 Foote Street, Brighton 3186
Mr. Michael McMahon,
5 Porter Street, Hampton 3188
mikmak@werple.mira.net.au

Mrs Julie McMaster,
44 Rosethay Ave, E. Malvern 3145
mindexer@interconnect.com.au

Reg Mr. Max McMaster,
44 Rosethay Ave, E. Malvern 3145
(03) 9571 6341 (w & h)
mindexer@interconnect.com.au

Reg Mrs. Kirsty McRobert,
11 Eltham Street, Flemington 3031
kmcrobert@slv.vic.gov.au
Mr. J. Martinvale,
c/o Oakleigh Public Library,
148 Drummond St, Oakleigh 3166

Mrs. Win Mills,
2/57 Gloucester Ave, Berwick 3806
Ms Halina Nowicka,
154 Corio St, Geelong 3220

Mr Ian Ogders,
9 Finch Street, Altona 3018
(03) 9398 4988 (w & h)
igo@interconnect.com.au

Mrs. Bronwen Parsons,
11 Bayview Pde, Nth Geelong 3215
Browwn_Parsons@dse.vic.gov.au
Ms. Ann Philpott,
1/6 Scheele St, Surrey Hills 3127
(03) 98300494 (w & h) (ph & fax)
Reg Mrs. Dorothy Prescott,
44 Lucas St, East Brighton 3187
(03) 95925156 (w & h)

Reg Mrs. Margery Price,
10 Maleela Avenue, Balwyn 3103
(03) 9817 4417 (h)

Ms. Jennifer Pritchard,
11 Riversdale Rd, Hawthorn 3122
Reg Mr. Michael Ramsden,
104 Lakeview Drive, Lilydale 3140
(03) 9735 4235 (h)

Ms. Hilary Ranger,
3/98 Grosvenor St, St Kilda 3183
Reg Mrs. Jenny Restarick,
208 Kooyong Rd,
North Caulfield 3161
(03)95422247(w) (03)9528 2539(h)
library@forprod.csiro.au
Ms Susan Sandford,
15 Edmund St, Clifton Hill 3068
susans@victnet.net.au
Mrs. Cheryl Schuler,
1 Geel Street, Bentleigh 3204
cherryl@mit.edu.au

Reg Mr. John E. Simkin,
148 Stawell Street, Richmond 3121
(03) 9429 8817 (w & h)

Ms Gloria Simos,
18 Church Street, Parkville 3052
gsimos@melbpc.org.au

Mrs. Lynn Stead,
Lot 3, Martins Road,
Barnawdown 3557
(015)04 0349(w) (054) 32 2356 (h)

Reg Ms.Bettina Stevenson,
5/6 Mackie Court, Kew 3101

Reg Mr Steve Sunter,
14 Coolahab Drive, Eltham 3095
(03)95185943(w) (03)94393734 (h)
steve.sunter@cis.csiro.au
www.cis.csiro.au/index

Reg Mrs. Geraldine Suter,
41 Lochian St, Nth Melbourne 3051
Reg Ms. Ann Taylor,
P.O. Box 51, Beaconsfield 3807
Mr. Philip Taylor,
3 New Street, Dimboola 3414
pstaylor@netconnect.com.au

Mr Thomas Vadi,
2 Verne Crt, Templestowe 3106
Reg Mrs Venn,
43 Edmond St, Parkdale 3195
regv@library.lib.rmit.edu.au

Mr Simon M. Watt,
347 Myers St, East Geelong 3219
simonw@ne.com.au
Ms Sandra Whittom,
32 Havelock St, St Kilda 3182

Reg Mrs. Vera Wicks,
3/43 Robinson Rd, Hawthorn 3122
Ms Gek S. Wong,
PO Box 163, Ormond 3204
Ms Claire Wood,
3/150 Helen Street, Morwell 3840

Mrs G Woodlatch,
32A Balfour Ave, Heathmont 3135
Ms. Amy Young,
3 Rae Street, Hawthorn 3122

ACT Region Branch

Reg Mrs. Edyth Binkowski,
G.P.O. Box 1724, Canberra 2601
(06)249 2912(w) (06) 281 2484 (h)
Ms Shirley Campbell,
Senior Librarian, Radford College,
College Street, Bruce 2617
(06)234 2225(w) (06) 285 1006 (h)
Shirley.Campbell@radford.act.edu.au

Reg Ms Patricia Clarke,
14 Charmside Street, Deakin 2600
Reg Dr. William Coppell,
22 Streeeleck Crescent,
Narrabundah 2064
(06)295 0899(w) (06) 295 8546 (h)
Ms Barbara Dickens,
PO Box 4475, Kingston 2604
Miss M. Doolan,
P.O. Box 482, Woden 2606
Ms Barbara M. Edwards, (Also called Barbara Malpass)
PO Box 28, Charnwood 2615

Ms Lynn Farkas,
GPO Box 1870, Canberra 2601
jgillpie@pgu.org.au
Ms Karyn Gladwish,
Lionel Murphy Library, Attorney
General’s Department, Barton 2600

Reg Mrs Angela Grant,
137 Shackleton Cire, Mawson 2607
(06)274 0254(w) (06) 286 2363 (h)
angelag@actcrime.oz.au

Ms Kerry Grimmond,
25 Burt Cres, Calwell 2905
KerryNorm@man.com

Ms Sandra Henderson,
5 Shackell Place, Wannassa 2903
s.henderson@nla.gov.au
Members Directory as at 1 June 1996

“Reg” denotes Registered Indexer
Send corrections to the Secretary

Reg Mr. Barry Howarth,
28 Aronson Cres., Gilmore 2905
(06)249 4665(w) (06) 292 4473 (h)
bhl301@coombs.anu.edu.au

Reg Mrs. Olga Howell,
130 Bandjalang Cr., Aranda 2614
(06) 251 3237 (W & h)

Reg Mr Robert Hyslop ISO,
33 Hampton Cir., Yarralumla 2600
(06) 281 1866 (h)

Reg Ms Joan D. Jensen,
PO Box 247, Erindale 2903
(06)249 2996(w) (06) 292 5856 (h)
Joan.Jensen@library.anu.edu.au

Ms Valerie Johnson,
11 Rapanca St, Rivett 2611

Reg Ms. Hilary Kent,
RMB 250, Creekwood Road via Bungendore 2621
(06)2492615 (w) (06) 236 9317 (h)
Hilary.Kent@au.anu.edu.au

Mrs Susan MacDougall,
2 Wirraway Crescent, Scullin 2614
(06)2012645 (w) (06) 254 1108 (h)
100236.2357@compuserve.com

Ms. Margaret McGeehan,
9 Alroy Circuit, Hawker 2614

Mrs Amalia MacIntyre,
140 Kingsford Smith Drive,
Melba 2615

Mr H. MacLean,
47 Stonehaven Cres., Deakin 2600

Reg Mr Craig Malot,
PO Box 278 Curtis 2605
(06) 281 3188 (h)
cmalot@pug.org.au

Mrs J. Merrell,
17 Brookman St, Torrens 2607

Ms R. Missingham,
7 Samson Place, Kambah 2902
R.Missingham@iw.eve.csiro.au

National Library of Australia,
(Preliminary Processing),
Canberra 2600

Ms Ann Peat,
98 Limestone Ave, Ainslie 2602

Mrs. Pam Ray,
67 Hopetoun Circuit,
Yarralumla 2600

Mrs S. N. Ridley,
RMB 245, Gundaroo Rd,
Gareays Gap 2621

Mrs. Geraldine Triffitt,
P.O. Box 53, Mawson 2607
(06)246 1177(w) (06) 231 4977 (h)
grt@aiatsis.gov.au

Mrs Laurelle Tunks,
11 Philips Place, Latham 2615
(06)254 3875(h) (06) 234 1139 (w)
rotunks@netinfo.com.au

Ms Susan White,
56 Mountain Circuit, Callwell 2905

Mrs. E. Whitton,
24 Somerville Street, Spence 2615

Ms Penelope Whitten,
49 Williams St, Watson 2602

Ms Janet Wilson,
34 Aruba St, Aranda 2614
wilsonj@par18.aph.gov.au (numerals one eight)

Ms TesWooldridge,
39 Rutledge St, Queenbeyan 2620

Queensland

Mrs Margaret (Leslie) Bryant,
79 Cheltenham Street, Alderley 4051
(07)3352 6869(w,h)
(07)3356 7171(fax)

Reg Ms. Jean Darmall,
17 Kepler St, Wulguru 4811
jean.darmall@juu.edu.au

Mr David Embury,
164 Victoria Park Rd,
Kalgoorlie 4059

Mr Roger Hawcroft,
PO Box 4201 Ashmore 4214
hawcroft@qldnet.com.au

Ms Elizabeth Lees,
PO Box 24, Bridgewater 5155
(08) 388 5718 (h) [moving to WA]

Mrs. Anne Letchford,
12 Keith Road, Blackwood 5051

Reg Mr Angus Trumble,
Assoc. Curator of European Art,
Art Gallery of South Australia,
North Terrace, Adelaide 5000
polybuis@ozemail.com.au

Western Australia

Ms Julie Balfand,
Lot 503 Rosedale Rd,
Chidlow 6656

Mrs. Anne Batt,
30 Colombo St, Victoria Park 6100
(09)346 2917(w) (09) 364 6943 (h)
abat@library.uwa.edu.au

Ms June Caunt,
5 Walma Place, Coogee 6166

Mr Roger Frey,
PO Box 1150, Fremantle 6160
(08)904488 (mobile:w)
(09)4814056 (h)
context@dialix.oz.au

Ms Judi Jagger,
50 Marriamup St, Cannington 6107

Reg Miss Nicolek J. Knappe,
PO Box 386, Cottesloe 6011
(09)2227379(w)(09)3051958(h,fax)

Mr Douglas Ramsey,
7 Claunele Rd, Armadale 6112

Tasmania

Reg Mrs. Clodagh Jones,
238 Nelson Rd, Mt Nelson 7007
(002) 25 3848 (h)
[from Aug 96: (03) 9625 3848]

Northern Territory

Ms Amy Ferguson,
Librarian, Central Land Council,
PO Box 3321, Alice Springs 0871

Ms. Lyn Johnson,
P.O. Box 1302, Alice Springs 0871
lyn.johnсон@nt.gov.au

Ms Marita Thompson,
PO Box 8438, Alice Springs 0871

New Zealand

Mrs. Susan Brookes,
71A Palmerston Road, Birkenhead,
Auckland 10, NZ

Dr Simon J Cauchi,
13 Riverview Tce, Hamilton, NZ
(+64-7-854 9229 (w & h)
cauchi@wave.co.nz

Australian Society of Indexers Newsletter, Volume 20 No. 5, June 1996
Members Directory

Ms Karen Collins,
Brooker's, PO Box 43,
Wellington, NZ
Ms Kathleen Napier,
22 Fuller Grove, Lower Hutt, NZ
k.napier@irl.cri.nz

Other Countries
Mr. D. Mercer,
Foreign Language Department,
Kunming University of Science and Technology, Kunming, People's Republic of China 650093

ASI Officers and
Denver Conference News
by Elinor Lindheimer,
Immediate Past President of ASI

American Society of Indexers
Officers 1996-97:
President: Ann Blum
Annblum@aol.com
Vice President/President-Elect: Alexandra Nickerson
Alexandrex@aol.com
Secretary: Barbara Cohen
becohen@prairienet.org
Treasurer: Frances Lennie
IRCINDEX@aol.com
Immediate Past President:
Elinor Lindheimer elinor@mcn.org
Board Members
Maria Coughlin
mariac@indexing.com
Elspeth Pope ludgeatw.com
Marilyn Rowland
Mrowland@aol.com
Charlotte Skuster
cskuster@library.lib.binghamton.edu
Sandi Schroeder
sanindex@aol.com
Enid Zafran eafran@bna.com

(Finally, ALL board members are on email!!!!!!)

I greatly enjoyed spending time
with Josephine McGovern in
Denver, and also meeting Mac
McMaster and family in Bristol!

The Denver meeting was a great
success—212 attendees, second only
to the 25th anniversary meeting in
Alexandria, Virginia that Nancy
Mulvany put on. Workshops
(making your own web page—ie.,
"Weaving Your Own Small Web"
by Jan Wright and Kari Bero; and
"The Structure of Book Indexes"
by Bella Hass Weinberg OR Ann

Hall's introduction to indexing and
and Anne Leach's marketing
workshop) were excellent.
Roundtables were packed and
informative. Saturday conference
was varied and informative. The
keynote speaker was Linda
Milliman, manager of the 40,000-
square-foot Tattered Cover Book-
store in Denver, where we'd had
our reception the evening before
(and ASI members bought a LOT
of books, you can be sure!). We
learned a lot, a surprising amount
of it relevant to us as freelancers,
about customer service and em-
ployee relations. Other speakers
were on scholarly indexing,
childrens' book indexing, gene-
alogical indexing, medical indexing,
technical indexing, using indexing
skills in a grants research project,
using the World Wide Web, and
ergonomics without spending
money on equipment (VERY
welcome!)!!

Denver Conference
Publications
Available from:
ASI Publications Sales Office,
PO Box 48267,
Seattle, WA 98148-0267, USA
Voice: +(206)241-9196
Fax: +(206)727-6430
e-mail: asi@well.com

Society of Indexers
(uk)
TRAINING IN INDEXING
Open-learning course for indexing
books, periodicals, images
and other information media.
Write to:
the Training Administrator,
Society of Indexers, 38
Rochester Road, London
NW1 9JJ, England, UK

CINDEX Tip No. 13
Making files for typesetters #1

It is usually necessary these
days to give a publisher an
index on disk as well as in hard
copy. Making these files is
quite straightforward, although
you have a lot of flexibility in
the types of files you can make.
All of these procedures make
separate files which you can
then copy onto floppy for your
publisher; none of them affect
the original index in the
slightest.

In the next three columns I will
look at making plain text files,
making files for proprietary
word processors (WordPerfect,
Word, etc), and making files
with generic coding, like ANSI
or University of Chicago Press
coding.

Plain text files
To make a plain vanilla text file
with no coding for italics,
boldface, etc type PRINT/FILE.
This will bring up the
Typesetting menu. Make the
following settings:

• In File type type dottext
• Insert tags? to N
• Use layout width? to N, so
you don't produce a file with
lines which wrap
• Use layout spacing? to Y,
so that formatting like blank
lines between alphabetical
groups is preserved

Use format indents? to Y, so
that the indentations for
subheadings are preserved

Now press <Enter>. CINDEX
will write the new file, giving it
the same name as the index,
but with a .TXT suffix. You can
copy the file to a floppy with
this command (where XYZ is
the name of the index):

!COPY XYZ.TXT A:

If you have a tip for other
CINDEX users, or a problem,
write to the Newsletter or
contact Garry Cousins
Phone/fax (02) 9955 1525

Australian Society of Indexers Newsletter, Volume 20 No. 5, June 1996
Introduction
1. Glenda Browne raised some important matters in her article ‘Professional Liability of Indexers’ (Jan/Feb 1996 Newsletter). I have since seen two (government and semi-government respectively) contracts containing unusual and disturbing obligations for the performance of contracts for [indexing] services. There is much that is common to both (which are called Standard Contracts). Where it is necessary to distinguish between them I use A for the government, and B for the semi-government contract. My comments are not to be taken as being legal advice.

Glenda’s article
2. The Internet story about the two Robert Maxwells has insufficient detail and lacks credibility, unless some form of injury or loss was caused. If there was negligence on the part of the indexer, then prima facie only the publisher had a right against the indexer. The New York Times story has still less detail.

3. The formation of a company cannot escape the conditions or liabilities of a contract; in fact, the obligations in a corporate contract may be viewed more seriously by the courts than personal agreements. For example, an individual indexer’s claim against duress or unconscionability in contract, by a more powerful or dominant party, may receive a more sympathetic hearing.

Contract generally
4. An indexing contract (or agreement) is usually between a publisher (offeror) and an indexer (contractor). Such a contract need not necessarily be in writing though some offerors require it. [In the discussion that follows I use the terms ‘offeror’ and ‘contractor’ where the context calls for it or for brevity].

5. A contract may be terminated upon the conditions of performance being satisfied, but there may be situations under which termination can be postponed. For example, defects in the performance may surface later, such as in a building, architectural or research contract. Generally, it may be said that an indexing contract terminates upon acceptance for payment by the publisher. Both contracts sighted stipulate a 30 day period for payment after ‘acceptance’, by the offeror. Both impose certain unreasonable obligations which are to continue for ever, and which could cost the indexer several times more than the amount paid for the index.

Statutory limitations set a period of 6 years after which no action can be taken for breach of contract; in the case of negligence the period is 6 years after the loss is suffered.

Reasonable conditions for performance
6. In both contracts the offerors stipulate fairly regular obligations for the performance of the ‘contract services’, such as a high standard of professional efficiency and competence; expedition; specified formats (requiring the use of particular thesaurus for keywords, or the use of a style manual). They also require delivery in a particular form (on disk and hard copy), and both require confidentiality and completion within a stated time.

Special conditions in these government contracts
7. Additional obligations are imposed by both contracts. Some of these seem much less reasonable, and require careful examination:

(a) that consideration for the contract (i.e. the benefit or payment) will be made within 30 days, but subject to ‘acceptance’ by the offeror of the ‘contract services’;

(b) exclusive vesting of intellectual property rights (i.e. copyright in the index) in the offeror: see 9 below.

(c) each requires indemnification of the offeror against any liability or claim in respect of infringement of intellectual property by the indexer. Different words are used to express this as being in the ‘course of or incidental’ to the ‘performance of the contract services’ (A), or the ‘development or production of documents’ (B). Whilst B requires only a ‘warranty’, A calls for proof of an indemnity insurance to ‘survive the expiration or termination of the contract. These clauses are expressed as being mandatory.

(d) offeror B requires the contractor to ‘maintain during the period of the contract’ (3 months) public liability insurance for ‘the premises at which the consultancy services are performed’. (Contract A was for ‘contract services of 2 years’)

(e) both offerors (using different language) require the contractor to indemnify the offeror at all times against any liability, claim, demand or suit etc. brought against them. Offeror A required this indemnity if the loss or
liability was 'reasonably incurred or suffered' where it is 'caused by any wilful, unlawful or negligent act or omission of the contractor... in connection with this contract'. B required this indemnity 'arising out of or as a result of the performance of the contract services'.

(f) offeror A not only required the indemnities to "survive the expiration or termination of the contract", but also "so long as any obligations remain in connection with this contract". A also wanted the indexer to "effect and maintain indemnity insurance in the joint names of the contractor and the offeror" for "an amount of not less than 5 million dollars". This is also a mandatory clause.

Comment on special conditions
8. The demands noted at 7(a) and (b) seem reasonable, but certain considerations arise from these obligations which may tend to favour one party against the other. If payment is subject to the 'acceptance of the contract services' it is reasonable to argue that by such acceptance the contract services have pr\'ima facie been properly performed: (see 9 below). However, there may be the remote possibility of some presently unknown claim arising from the negligence of the indexer.

My note at 7(c) in respect of infringement of copyright of 'documents' has probably never arisen before. In the very nature of an index, if the same index is done by 7 different persons, it is an original construction every time. A does not provide information, it only points to information in the document being indexed. It is unfortunate that this 'standard' form contract which may be used for other services, such as consultancy or research services, should be used for indexing. 'Documents', is defined to include 'written text, reports, sketches, plans, maps, drawings, designs and photographs' any one of which is hardly a component of an index. (This condition seems quite unnecessary and inappropriate.) The offerors have not recognised the completely different nature of indexing services. There is no objection to the principle of the obligation so it can safely be ignored, if not protested. However, it seems most unreasonable for A to call for the indemnity to continue for ever and a day: see 8(ii) below.

As for 7(d) the offeror is attempting to preserve its own data which are placed in the hands of the indexer: (see footnote 1). Any person who is running any type of business may have a library, computer equipment, software, account books etc. which are insured against loss, so this is a reasonable obligation which indexers must include in calculating a level of fees for an index.

The clause noted at 7(e) is of an entirely different nature. Once again the 'standard form' of contract is inappropriate for indexing services. Ultimately it may be that the only possible cause for any liability is a 'negligent act or omission' arising out of the performance of, or 'in connection with' the contract. The burden of proof will be on the offeror, first, that there was negligence and secondly, that the claim arose out of that negligence. Mere error may be of no legal effect.

The clause noted at 7(f) is pernicious, and could well be contested if the contract is entered into by an individual (as opposed to a corporation).

The onus of proof of negligence or other act or omission which caused the loss or injury is on the party making the allegation. Defences (which cost money) may be as follows:

(i) that the responsibility for the contract services is at an end on 'acceptance' by the offeror, and that satisfaction of performance is demonstrated by payment. On the other hand, if the indemnity is considered to be a separate contract, any claim will still have to be based on performance.

(ii) that no liability can run for ever and a day. It is contracting for an impossibility like 'the sun will not rise on a [particular] day in the next year';

(iii) that the condition is imposed by a powerful and dominant party [government] against an individual; this inequality in the relationship of the parties may make the consent of the indexer to the contract not a voluntary consent. If so the contract might be declared void or this clause severed.

(iv) that the obligation to maintain for all time a 5 million dollar indemnity insurance for professional liability (which could cost about $2500 p.a.) is not commensurate with the benefit arising under the contract. It would seem that the consideration (even if it may be as high as $5,000) is given with one hand and taken away, many times over, with the other. Such a contract may be unconscionable, particularly if entered into by an individual. It is likely that these conditions may be severable (offeror A does provide for severability of a clause that may be void or unenforceable), or the entire contract may be void.

Copyright
9. Unlike authors, the indexing profession has not received sufficient recognition to claim copyright in the creation of an index, but this must change at least to the extent of a moral right - a subject which has been under consideration by a special government inquiry. It has become almost customary to vest copyright in an index in the publisher. Vesting transfers ownership of property and all rights and interests. Is it not reasonable to suggest that the publisher (who has satisfied himself of the standard of performance before 'acceptance' and payment) also assumes the burden (defects if any) of a future claim? Can the publisher invest itself
Legal Issues

with the advantages and divest itself of the disadvantages? Should there be a right of further claim against the indexer? I am advised that general policy requires indemnity of the copyright holder.

Conclusion

10. A publisher may legitimately require indemnification against a breach of copyright or other intellectual property right by the contractor, but to require a heavy toll of indemnity (with no relief in sight) is not so reasonable. The term of professional indemnity insurance in contract A seems an unacceptable condition.

It must be emphasised that once entered into it will be more difficult to avoid the consequences of a contract, particularly if the indexer enters it as a corporation. At least some written dissent (if not protest) may be made that the contract is unreasonable in particular clauses and that the form of contract is not appropriate for indexing services. If there is insistence from the offeror, this protest may be pleaded, if it comes to the crunch - as did Macaulay.

If there is a strong consensus among members of our Society not to enter into such contracts there is likely to be a change of attitude by similar offerors. Can this be achieved? Will there be a trumpet call from those who refuse to sign such contracts?

Footnotes:

1. I am informed by a competent Insurer that public liability is a form of insurance against physical injury or damage. If for example the indexer is using 'documents' (or a disk) provided by the offeror, the insurance covers damage to these documents, but as they are considered to be 'goods in custody' the premium is additional for this class.

2. "Inequality of bargaining power may be applied to a service agreement by the application of public policy for the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable to be in unreasonable restraint of trade. Such a case was Schroeder Music Publishing v Macaulay [1974] 1 WLR 1308, where the music company publishers used their superior bargaining position to obtain the exclusive services of Macaulay (an unknown song writer) for a period of at least five years and obtained an assignment of copyright of Macaulay's music works under an agreement that gave the publisher the right to terminate the agreement on giving one months notice but contained no obligation to publish Macaulay's works: Lord Diplock (House of Lords) found that the agreement was unconscionable." (Extracted from Butterworths' Halsburys Laws of Australia, by Prof. John Carter)

3. The insurer consulted advised that professional liability insurance is calculated on the income of the person over a year. Normally a $5 m. insurance will not be covered by an insurer without seeking re-insurance, which of course means a higher premium. Collective Society cover is a possibility, but this is hardly practicable.

Letters to the Editor (cont. from page 1)

See Rachel Jakimow, Administrative Support to the Working Group, DNC Office, National Library of Australia CANBERRA ACT 2600 Tel: +61-6 262 1522.
Fax: +61-6 273 1133 E-mail: r.jakimow@nla.gov.au.

John Simkin’s letter, of 7 March 1996, about the HOBA (History of the Book in Australia) project, has stimulated my interest in the history of indexing in Australia. I’m undertaking a higher degree and am wondering if this should be my thesis topic for next year, or would it be too excruciatingly boring to sustain? John Simkin might care to know about Michael Harrington’s chapter on the indexing of Commonwealth govt information in his book, The Guide to Government Publications in Australia, AGPS Press, AGPS, Canberra, 1990 (if he hasn’t already read it). Liz Morrison, of the History of the Book (HOBA) project, advises that Liz Lee, who is on secondment from the Barr Smith Library, has been working on particular aspects of indexing history in Australia and has collected quite a bit of information.

Patricia Holt, Patricia.Holt@arts.monash.edu.au, 15/5/96

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AUSTRALIAN SOCIETY OF INDEXERS
NATIONAL/VICTORIAN BRANCH
GPO Box 1251
Melbourne Vic. 3001
Phone: (03) 9571 6341
Email: minfxer@interconnect.com.au

World Wide Web URL:
Webmaster Email: aussi@zeta.org.au

President: John Simkin (03) 9429 8817
Vice Pres: Max McMaster (03) 9571 6341
Secretary: Ian Odgers (03) 9398 4988
Email: igo@interconnect.com.au
Minutes Secretary: Sandra Whitbourn

Treasurer: Joyce Gillespie (03) 9654 8527 or Phone/Fax: (03) 9710 1270

Editor: Dwight Walker
2/1 Nelson Street, Randwick NSW 2031
Phone: (02) 398 6726, Fax: (02) 438 3729

Committee Members:
Margaret Findlay, George Levick
Josephine McGovern, Ann Philpott
Michael Ramsden

NSW BRANCH
PO Box R598, Royal Exchange NSW 2000
Email: dwight@zip.com.au

President: Kingsley Siebel (02) 477 3149
Fax: (02) 476 4378
Secretary: Madeleine Davis
Phone: (02) 438 5354
Treasurer: Pamela Johnstone
Phone: (047) 57 3045

Committee Members:
Caroline Colton, Garry Cousins
Lorraine Doyle, Neale Towart
Caroline Jones, Alan Walker
Dwight Walker, Michael Wyatt

ACT REGION BRANCH
GPO Box 2069, Canberra ACT 2601

President: Geraldine Triffitt (06) 246 1177
Fax: (06) 249 7310, Email: gtt@aiatsis.gov.au
Secretary: Shirley Campbell (06) 234 2225
Fax: (06) 234 2237
Email: Shirley.Campbell@Radford.act.edu.au
Treasurer: Laurelle Tunks (06) 234 1139
rodtunks@netinfo.com.au

Committee Members:
Robert Hyslop, Joan Jensen, Lynn Farkas,
Susan MacDougall, Robert Withcombe

Indexing Rates

The 1996 recommended rate for freelance back-of-book indexers has been kept at $35.00 per hour in line with rates for freelance editors. Although the Society recommends this rate, individual indexers are at liberty to charge above or below this rate as they deem appropriate.

Database indexing rates are more variable, and are usually charged on a per record basis, so rates will vary depending on the complexity of the indexing required.