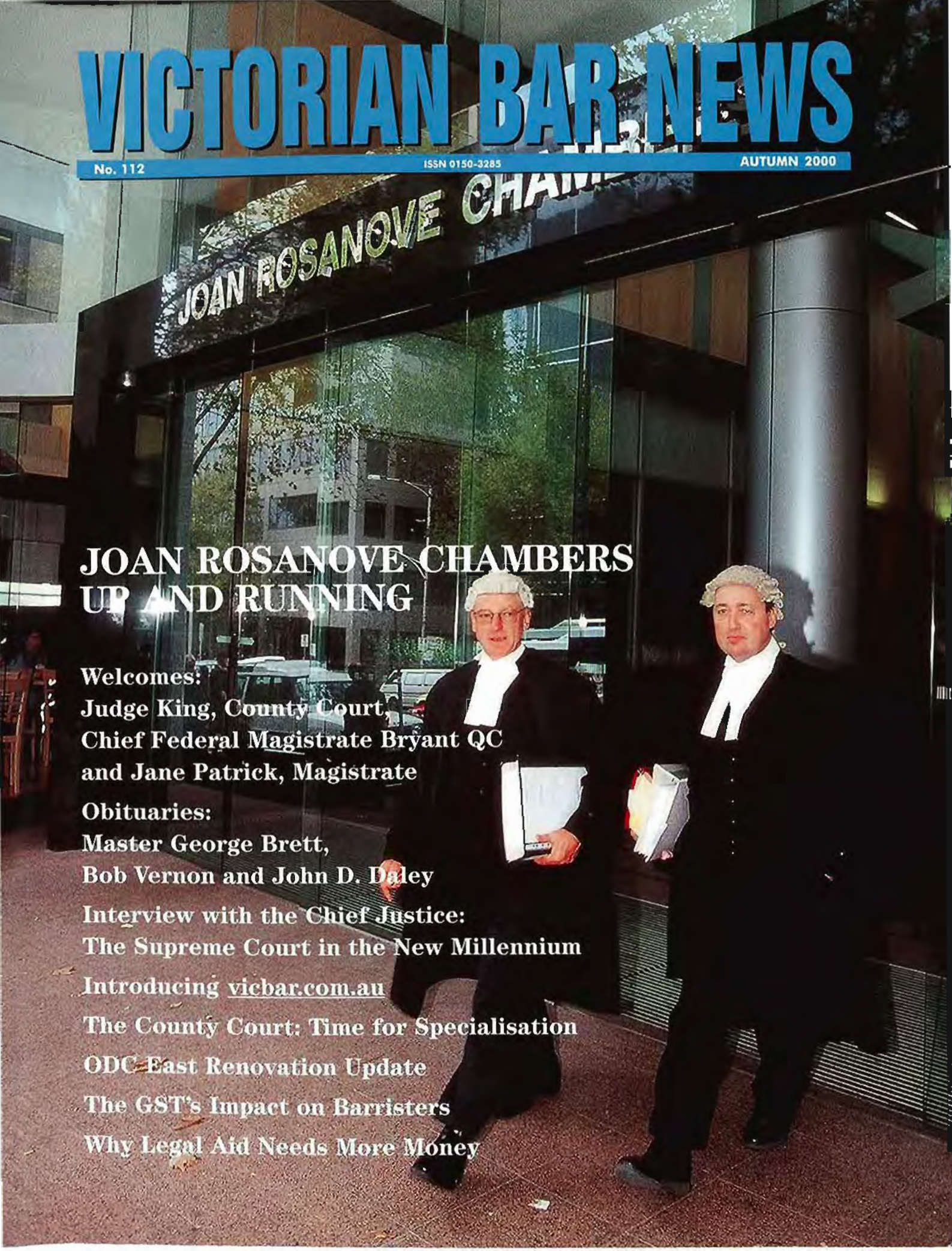
VICTORIAN BAR NEWS

No. 112 ISSN 0150-3285 AUTUMN 2000



JOAN ROSANOVE CHAMBERS UP AND RUNNING

Welcomes:
Judge King, County Court,
Chief Federal Magistrate Bryant QC
and Jane Patrick, Magistrate

Obituaries:
Master George Brett,
Bob Vernon and John D. Daley

Interview with the Chief Justice:
The Supreme Court in the New Millennium

Introducing vicbar.com.au

The County Court: Time for Specialisation

ODC East Renovation Update

The GST's Impact on Barristers

Why Legal Aid Needs More Money

VICTORIAN BAR NEWS

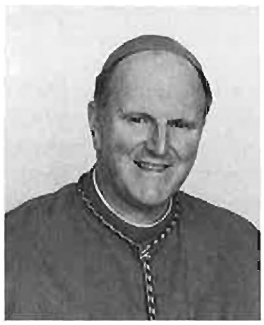
No. 112 AUTUMN 2000

Contents

Cover:
His Excellency the Governor of Victoria, Sir James Gobbo, to open the BCL's "new millennium" Joan Rosanove Chambers, previewed at pages 24–26 of this issue.

Welcome: Judge King

Welcome: Chief Federal Magistrate Diana Bryant QC



Homily preached by Bishop Denis Hart

Women Lawyers: Justice Catherine Branson speaks

Biggibilla, Australian Aboriginal artist

The County Court: Time for Specialisation

Sport: Bar's 1st & 2nd XIs cricketers v. LIV; and Bar hockey

VICTORIAN BAR COUNCIL
for the year 1999/2000
*Executive Committee

Clerks:

A *Derham QC, D.M.B. *(Chairman)*
R *Redlich QC, R.F. *(Senior Vice-Chairman)*
H *Rush QC, J.T. *(Junior Vice-Chairman)*
S Murdoch QC, P.B.
B *Kaye QC, S.W.
B Curtain QC, D.E.
F Dunn QC, P.A.
B *Ray QC, W.R.
W *Brett QC, R.A. *(Honorary Treasurer)*
A *Pagone QC, G.T.
G Santamaria P.D.
P Allen D.L.
H McGarvie R.W.
D Dixon Ms. J.
A Richards Ms. J.E.
D *McLeod Ms F.M. *(Assistant Honorary Treasurer)*
D Riordan P.J.
G Hinchey Ms S.L.
B McKenzie B.R.
F Walsh M.J.
D Gronow M.G.R.
A Moloney G.J. *(Honorary Secretary)*
R Burchell Ms S.E. *(Assistant Honorary Secretary)*
D Attiwill R.H.M. *(Acting Assistant Honorary Secretary)*

Ethics Committee

A Wright QC, H.McM. *(Chairman)*
D Lyons QC, J.F.
A Pagone QC, G.T.
H Young QC, P.C.
B Hill QC, I.D.
G Lacava P.G.
B McMillan Ms C.F.
B Maidment R.J.H.
F Hartnett Ms N.H. *(Assistant Secretary)*
A Delany C.J.
B Grigoriou Ms G. *(Secretary)*
D McLeod Ms F.M.
B Connor Mrs F.J.S.
D Riordan P.J.
F Burnside Ms C.M.

Chairmen of Standing Committees of the Bar Council

Applications Review Committee
R Redlich QC, R.F.

Bar Constitution Committee
G Colbran QC, M.J.

Child Care Facilities Committee
D McLeod Ms F.M.

Conciliators for Sexual Harassment and Vilification
A Habersberger QC, D.J.

Counsel Committee
B Kaye QC, S.W.

Equality Before the Law Committee
D Lewitan QC, Ms R.A.

Ethics Committee
A Wright QC, H.McM.

Human Rights Committee
D Fajgenbaum QC, J.I.

Legal Education Committee
B Ray QC, W.R.
- *Readers' Course Sub-Committee*
B Ray QC, W.R.
- *CLE Sub-Committee*
S Santamaria QC, J.G.

Litigation Procedure Review Committees
- *Commercial Law*
A Derham QC, D.M.B.
- *Common Law*
B Curtain QC, D.E.
- *Criminal Law*
M Richter QC, R.
- *Family Law*
R Redlich QC, R.F.

Past Practising Chairmen's Committee
D Francis QC, C.H.

Professional Indemnity Insurance Committee
H Rush QC, J.T.

Strategic and Planning Committee
G Crennan QC, Mrs S.M.

Victorian Bar Dispute Resolution Committee
S Martin QC, W.J.

VICTORIAN BAR NEWS

Editors
Gerard Nash QC and Paul Elliott QC

Editorial Board
David Bennett QC
Julian Burnside QC
Graeme Thompson

Editorial Consultant
David Wilken

Editorial Committee
John Kaufman QC, Peter Lithgow (Book Reviews)
Richard Brear (Assistant to the Editors)
Carolyn Sparke and Bill Gillies
David Johns (Photography)

Published by The Victorian Bar Inc.
Owen Dixon Chambers,
205 William Street, Melbourne 3000.
Registration No. A 0034304 S

Printed by: Impact Printing
69–79 Fallon Street,
Brunswick Vic. 3056

This publication may be cited as (2000) 112 Vic B.N.

Advertising
Publications Management Pty Ltd
38 Essex Road, Surrey Hills,
Victoria 3127
Telephone: (03) 9888 5977
Facsimile: (03) 9888 5919
E-mail: wilken@bigpond.com

Some Positive Steps Towards the Rule of Law

WORKCARE AND COMMON LAW RIGHTS

IT seems that steps are now in train to revive, at least in part, the common law rights of injured workers. This will inevitably produce work for the Bar not only in litigating those rights but also in interpreting, or arguing over the interpretation of, the words of the amending legislation.

We welcome any expansion of the work available to members of the Bar. On the other hand, any work which becomes available must be paid for. There is a cost, in one form or another, to the community. We understand that WorkCover premiums are to rise to meet that cost.

This cost and the putative benefit to the Bar are, however, irrelevant to the main issue. It has been, and is, entirely anomalous that the owner of factory premises may be liable in negligence to a trespasser, or to a casual stranger who comes to the door to solicit subscriptions for the Blue Light Disco, but that there is no such liability to the worker, who is, after all, on the premises not only at the invitation of the owner but (one assumes) for the benefit of the owner. No system of statutory compensation justifies the abolition of the worker's right to sue for negligence unless the tort of negligence is to be abolished right across the board. It has never been suggested we do that.

WORKCARE LEGISLATION IS BENEVOLENT

Until the common law revival takes place, we have a compensation scheme which derives from the Germany of Bismark and which was originally (but no longer) an addition to, not a substitute for, common law rights. That legislation in its current "narrow and meagre" ambit is intended to ensure that the injured worker receives some compensation. It is legislation which, according to all principles of statutory interpretation, not to mention humanity, should be interpreted benevolently.

The courts which determine the rights of an injured worker need to be conscious of the history of the legislation, of its purpose and of its effect. To interpret or apply the provisions of the Accident Compensation Act by resort to semantic quibbles, which may be appropriate when dealing with the Income Tax Assessment Act, is not only unfortunate; it is unjust. There is no legitimate role for a scholarly and clinical analysis of the fine print, pursued in ignorance, or disregard of the purpose and substance of the legislation. Those who preside in Workcare cases should at all times be conscious of the fact that the life of the law is not [mere] logic but experience.

INDEPENDENCE OF THE DPP

The legislature has re-affirmed in a very positive way the independence of the Director of Public Prosecutions. The amendments to the Constitution Act introduced by the *Public Prosecutions (Amendment) Act* 1999 have entrenched the powers of the Director of Public Prosecutions, so far as is possible and in a way equivalent to the entrenchment given to the powers of the Supreme Court.

The same Act has abolished s.46 of the Public Prosecutions Act 1994, which inhibited the power of persons other than the Attorney-General to apply to a court for punishment of a person for a contempt of court.

LEGAL AID

These are all positive steps towards a State governed by the rule of law. However, legal aid funding (as indicated elsewhere in this issue) remains inadequate, despite the increase in Commonwealth funding.

The decision of the Court of Appeal in *Phung* v. *R* would seem to require judges presiding over criminal trials of indigent accused, in all but exceptional circumstances, to order that Victoria Legal Aid provide legal representation for the accused. This necessarily places a greater demand on legal aid resources than has previously existed. At the same time it makes clear that the role of a trial judge when considering an application

under s.360A of the Crimes Act is directed towards the ensuring of a fair trial not the protection of the VLA coffers.

INQUISITORIAL JUSTICE

This would seem to be a major step forward in ensuring a fair trial according to law. However, the "efficiency" measures introduced with the amendment of Schedule 5 to the Magistrates' Court Act and the introduction by the *Crimes (Criminal Trials) Act* 1999 of pre-trial admissions and summaries in the criminal trial process (all canvassed in the Spring 1999 issue) appear to be heading in the opposite direction.

If we are to move to a system of inquisitorial justice (and we do not advocate such a course) it should be done openly. The introduction of "pleadings" in criminal trials, the gross inhibitions on making a simple uncomplicated plea of "not guilty", the pressures placed on the accused and his advisors to relieve the Crown in part (and sometimes in large part) of the burden of proof, and the reduction of the committal proceedings (save where the defendant can justify cross-examination) to a mere magisterial vetting of the prosecution brief do not savour of the common law. Certainly, they reduce and undermine the rights of the accused as they have been known since the abolition of the Star Chamber.

It is little consolation to know that Victoria is behind the other Australian States and many overseas countries in the move to put efficiency ahead of justice. When the efficiency of the system prevails over the rights of the individual, even in the criminal sphere, then anarchy has its attraction.

MANDATORY SENTENCING

The issue of mandatory sentencing raises a major conflict between the rights of the person and the efficient protection of property rights.

To give the court of trial no discretion in relation to sentence and to fix that sentence without reference to the gravity of the offence appears to be contrary to common law principle and to internationally accepted concepts of justice.

At common law a court, when exercising its sentencing discretion, may properly have regard to the protection of the community. But it may not impose a sentence not related to the gravity of the crime.

A sentence of imprisonment may not, according to common law principles, be increased beyond that which is proportionate to the crime of which the accused has been convicted.

"[I]It is now firmly established that our common law does not sanction preventive detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender. The extent of a sentence of imprisonment which would violate the principle of proportionality can scarcely be justified on the ground that it is necessary to protect society from crime which is serious but non-violent": *Chester* v. *R* (1988) 165 CLR 611 per Mason CJ, Brennan, Deane, Toohey and Gaudron JJ at 618.

Until the common law revival takes place, we have a compensation scheme which derives from the Germany of Bismark and which was originally (but no longer) an addition to, not a substitute for, common law rights.

This is precisely what happens with mandatory sentencing of the type now in force in Western Australia and the Northern Territory.

Under international law the provisions of Article 14 of the *Covenant on Civil and Political Rights*, to which Australia is a signatory, appear to conflict with these mandatory sentencing regimes.

> All persons shall be equal before the courts and 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 . . .: Article 14.1.
>
> In the case of juvenile persons. The procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation: Article 14.4.
>
> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law: Article 14.5.

Where the legislature requires the imposition of a mandatory sentence based on the antecedents of the offender, not the gravity of the offence:

(a) the accused would appear to be deprived of the equality promised by Article 14.1;
(b) juvenile offenders would seem to be deprived of the protection given by Article 14.4; and
(c) the assumption in Article 14.5, that a sentence may be reviewed and reduced by a higher tribunal so as to be appropriate to the offence committed, cannot operate.

Mandatory sentencing accords neither with the principles of the common law nor with Australia's international treaty obligations.

The editors note with concern, and some amazement, that the Commonwealth Attorney-General, who was himself a practising lawyer for some considerable time, considers it "inappropriate" for members of the judiciary to comment on legislation of this kind.

It is unfortunate that the Attorney-General, as chief law officer of the Commonwealth, has seen fit not to support the judicial condemnation of mandatory sentencing but has chosen to challenge the right of members of the judiciary to comment on legislation which (as the attorney-general must know) undermines common law rights and infringes Australia's international treaty obligations.

Who better to comment on the administration of justice than those fixed with the task of administering it?

WE WERE WRONG

The summer issue of *Bar News* was a bad one for the editors. We accepted at face value the "loose translation" relating to the award conferred on Bernie Borngiorno. For that we have received a justifiable rebuff from Paris.

We also erred (with Justice Kirby) in making an assumption, by reason of Justice Kearney's long-standing connection with PNG, that he had led Ron Castan in the claim for native land rights mentioned by Kirby J, in his tribute to Ron Castan. However, it was John Kearney, then a member of this Bar, who was Ron's leader in that case.

We apologise for both errors. They are canvassed by Pat Donovan and John Kearney in the correspondence section.

THE EDITORS

A Rosette By Any Other Name . . .

THERE are now 1363 practising counsel at the Victorian Bar, including 170 Queen's Counsel. The Attorney-General, the Hon. Rob Hulls MLA, has announced that no more Queen's Counsel will be appointed — only Senior Counsel. The proposal, as it is presently understood, is that there will only be a change of name. There are some who might think that the exercise of the prerogative of the Crown is not so easily altered. But the important question from the point of view of the Bar is not how the proposed change is made, but whether the change will impact on the importance and value of the office of Senior Counsel. In other words, does it matter that there is a change in the title? Plainly the title matters very much to some. But, in my view, what really matters is the functional distinction between senior and junior counsel, and that the office of senior counsel continues to be "useful" and to be a mark of professional eminence. It is in fact useful to the court and the administration of justice, useful to solicitors, clients and the public. The usefulness of the office will not be affected by a change in its title, at least in the longer term. Moreover, the proposed change (as I understand it) will not attempt to be retrospective nor change the method of appointment. Senior Counsel will continue to be appointed by the Governor-in-Council, on the advice of the Attorney-General who, in turn, acts upon the recommendation of the Chief Justice of the Supreme Court. That is due recognition of the importance of the office.

RETIREMENT OF DAVID CURTAIN AS CHAIRMAN

At the Bar Council meeting on Thursday 2 March 2000, David Curtain retired as Chairman of the Bar Council. He served the Bar as Chairman for 18 months. During his chairmanship the Bar Council has operated smoothly and harmoniously. Under his chairmanship, the day-to-day problems of the administration of the Bar have been handled efficiently and with good humour. On behalf of all the Bar I thank David for his dedicated service as

Chairman, and, before that, as Vice-Chairman, Treasurer and member of the Bar Council.

JUDGE KING

On 1 March 2000 the Attorney-General announced the appointment of Her Honour Judge King to the Bench of the County Court. One of David Curtain's last official functions was to welcome Judge King to the Bench. There is an article in this *Bar News* about Betty King, so I will not say more than, on behalf of the Bar, I congratulate and extend my best wishes to her. It is also appropriate to recognise that in making this appointment the Attorney-General continues the approach announced at the time of the elevation of Judge Kent — of appointing persons with appropriate litigation experience.

GST AND THE BAR

The introduction of the Goods and Services Tax will add another burden to all our practices. The Bar has done a great deal of work, in conjunction with the clerks, on the impact of the GST on barristers' practices. For example, application was made to the Commissioner of Taxation on behalf of all members of the Bar for permission for members to account for GST on a cash basis, rather than an accruals or earnings basis. The ATO issued a ruling late last year. The effect of the ruling is that if a member accounts for income tax on a cash basis, he or she may account for GST on the same basis. A copy of the ruling was published in full in the Bar's publication *In Brief* and copies are available from the Bar offices. The Bar Council thanks John DeWijn and Jennifer Batrouney for their assistance in obtaining the ruling.

Arthur Andersen have been retained to advise on the impact of the GST on barristers and clerks. David Bremner, the Executive Director of the Bar, has coordinated the efforts of the Bar and the clerks to gather information and assess the impact of a GST on barristers' practices. There is an article in this edition of the *Bar News*. I thank David Brenner for producing that. In addition there will be a booklet produced bringing together the elements of the GST of greatest concern to barristers.

THE BAR BALL

The Bar Council has decided that the centenary of Federation and the new millennium deserve celebration. A ball is to be held at the Royal Exhibition Building in October 2000. The ball will be open to all members of the Bar and their "partners", judges and judicial officers (whether or not they are members of the Bar), clerks and their staff and the staff of the Bar and BCL. The ball is going to be a little unconventional, and promises to be great fun. For junior members it will be subsidised. All I am prepared to say at present is: don't expect to be stuck in a chair for very long.

NED KELLY TRIAL

The Bar will perform a re-enactment and "retrial" of Ned Kelly during law week, in May this year. The Chief Justice, Justice Phillips, has kindly given permission for the performances to be held in the Banco Court. The production is being directed by Nicholas Harrington, and is expected to run over two nights (19 and 20 May) with the option of a Saturday matinee. The production will be staged in two

parts, the first being a theatrical re-enactment of the original trial, the second being a retrial. For the retrial, two senior members of counsel will be briefed to appear to prosecute and defend Kelly. The briefs will include copies of the original depositions and statements from 1880. The audience will be the jury.

BARRISTERS' CHAMBERS

Many of you will have already seen the new Joan Rosanove Chambers. They will be opened by His Excellency Sir James Gobbo on 14 April 2000. In this edition of the Bar News there is an article about the chambers.

INTERNET CONNECTION

One of the features of Joan Rosanove Chambers, a feature which BCL is progressively offering throughout its chambers, is a direct connection to the internet. This enables 24-hour continuous access. The effect is that e-mail comes to you, rather than you dialling in to your Internet Service Provider to collect it. Once connected, it costs $25 per month. Everyone connected agrees that it is a superb system. E-mail addresses are also now available. E-mail addresses are "name@vicbar.com.au". In general, the direct internet connection and e-mail addresses are available to members of the Bar, their secretaries, readers and clerks (as well as to BCL and the Bar Council staff). It will be available incrementally. It is presently available in Joan Rosanove Chambers and Owen Dixon Chambers West in accordance with notices which have been circulated. A large group in Latham Chambers have also been connected as a result of the initiative and energy of Michael Wheelahan. It will be available in Owen Dixon Chambers East. Until the renovation of that building, however, the service will depend on surface cabling. More information about the service is provided in an article in this edition of *Bar News*.

BAR HOME PAGE

Those of you who use the internet will find the home page of the Victorian Bar at *www.vicbar.com.au*. It has been completely redone since it was first established through the skill and dedication of David Levin QC. Linked with it is the home page of BCL. That page is still under construction.

BAR TELEPHONE SYSTEM

In 1998 BCL upgraded the PABX telephone system provided to its tenants and to associated chambers. In the result, the PABX has now available virtual ISDN (Integrated Services Digital Network) lines and all extensions to the PABX are now accessible through the prefix 9225.

RENOVATION OF ODCE GROUND FLOOR

The ground floor of Owen Dixon Chambers East is to be renovated. The renovations are expected to commence in late May or early June this year. The works are anticipated to take three months only. During the period of the renovations the clerks on the ground floor of Owen Dixon Chambers East will be relocated. There is more information about the renovations later in this edition.

PRO BONO SCHEMES

On behalf of the Bar Council, I thank all those members of the Bar who have given their time to represent litigants in need of assistance. In particular, I thank those members of the Bar who have participated in the Bar's Pro Bono scheme, the Bushfire scheme and those who have assisted with the East Timor evidence project.

NEW BAR READERS

Finally, I wish to extend a warm welcome to the new Bar readers, including three from Papua New Guinea and one from Vanuatu, who commenced the Bar Readers' Course on 1 March 2000.

Mark Derham
Chairman

Autumn Se Reforms

THE recently commenced autumn session of State Parliament sees the introduction of a number of significant legislative reforms for the Bracks Government — including the introduction of the Juries Bill, the Administration and Probate (Dust Diseases) Bill, the Whistleblowers Protection Bill and amendments to the Equal Opportunity Act

Firstly, the introduction of the Juries Bill reaffirms juries as the cornerstone of our legal system. The Bill deals specifically with the issue of jury vetting — and was drafted partly in response to the decision of the High Court last year in *Katsuno* v. *the Queen*. The Court held that the provision, by police to the prosecution, of material relating to the criminal histories of potential jurors is unlawful. The Bill also expands the range of potential jurors and clarifies who is disqualified from sitting on juries.

It is my view that people should only be excluded from jury service on the basis of clear legislative criteria. For this reason, jury vetting by the prosecution should not be permitted and will be abolished in favour of a disqualification regime significantly more rigorous than that in the current Juries Act.

The Bill provides a lifetime disqualification for anyone who is sentenced to three years or more in prison. It provides a ten-year disqualification for persons who have been sentenced to a period of imprisonment of between three months and three years. In addition, the Bill provides for a period of five or two years disqualification for persons charged with serious offences, depending on the sentence received. Those on remand and undischarged bankrupts will also be disqualified.

This scale of disqualification strikes an appropriate balance between concern about convicted criminals sitting on juries, and the right of people who have served sentences being again able to participate in an important civic right and obligation.

Further to my commitment to provide access to justice and the enshrinement

ssion Legislative

of equality of opportunity, I propose to introduce amendments to the *Equal Opportunity Act* 1995. The Act will be extended to include breast-feeding as a protected attribute, i.e. mothers cannot be discriminated against because they are breast-feeding in public.

I also propose to introduce amendments prohibiting discrimination on the basis of a person's sexual orientation. The term "sexual orientation" will include heterosexuality, homosexuality and bisexuality. The Bill will clarify that "homosexuality" includes being a lesbian. The prohibition of discrimination against people on the basis of their gender identity will apply to people who assume the characteristics of the other sex, or who seek to live as a member of the opposite sex. It will also apply to people of indeterminate gender who seek to live as a particular sex. These amendments provide real avenues of redress for people who experience significant levels of discrimination in everyday life.

A badly needed reform in Victoria is contained in the Administration and Probate (Dust Diseases) Bill. This Bill will provide for the survival of actions for pain or suffering, bodily or mental harm and curtailment of expectation of life, upon the death of a plaintiff. Currently claims for these types of damages lapse when the plaintiff dies. This was highlighted in the recent case of Kerry Ann Halleur, who died only the day after settling her asbestos case with the Commonwealth. This Bill will allow a plaintiff's estate to continue these claims. The Administration and Probate Act currently provides an opportunity for windfall gains for defendants if they don't settle before the death of a plaintiff. The survival of such actions will ensure that plaintiffs and their families are not disadvantaged by delay on the part of defendants. This is a terrific boost for plaintiffs through reform of an archaic law.

The Whistleblowers Protection Bill will protect people who disclose information about improper conduct or activities of public officers. Protection will be available to persons who make a "public interest disclosure", defined to mean a disclosure which shows, or tends to show, a public officer is engaging, or proposes to engage, in "improper conduct" e.g. corrupt conduct or substantial mismanagement of public resources. Substantial protections will be offered to those persons who make a public interest disclosure, including protection from civil and criminal liability, as well as immunity from any alleged breach of confidentiality and protection from reprisals, including the right to bring proceedings for damages and to seek injunctive relief. This legislation is ground-breaking for Victoria — the model is unique and far-reaching. The draft legislation is available on the Department of Justice website and I encourage the profession to participate in making submissions.

I have taken active steps to improve access to justice in rural areas, particularly in improving the conditions of court facilities. I have just announced that the Government will be providing $8.9 million for a new Mildura court complex and will be purchasing a site for a new court complex in Warrnambool.

I remain committed to ensuring access to justice for all Victorians and growing the whole of the State, both through legislative change and the identification of areas where reform is needed. In respect of both, I welcome ongoing contribution by the profession and look forward to future consultation.

Rob Hulls
Attorney-General

Legal Profession Tribunal — Publication of Orders

UNDER section 166 of the *Legal Practice Act* 1996 ("the Act"), the Victorian Bar Incorporated, as a Recognised Professional Association, is required to provide the following information in relation to orders made by the Legal Profession Tribunal ("the Tribunal") on 15 February 2000 against one of its regulated practitioners, Alan Swanwick.

1. Name of practitioner: Alan Swanwick ("the practitioner")
2. Tribunal Findings and the Nature of the Offence
   The practitioner pleaded guilty to two charges, namely that:
   (a) He was guilty of unsatisfactory conduct in that he contravened section 227 of the Act in a manner not amounting to misconduct by failing between 1 July 1999 and 1 January 2000 to maintain professional indemnity insurance whilst engaged in legal practice.
   (b) He was guilty of unsatisfactory conduct in that he contravened rule 74(b) of the Practice Rules of the Victorian Bar Incorporated in a manner not amounting to misconduct by not replying to a letter dated 1 October 1999 from the Ethics Committee of the Victorian Bar by 18 October 1999 when asked to do so.

   A charge that whilst engaged in legal practice the practitioner was guilty of misconduct within the meaning of section 137 of the Act by failing between 1 July 1999 and 1 January 2000 to maintain professional indemnity insurance whilst engaged in legal practice was withdrawn by the Victorian Bar Incorporated.
3. The orders of the Tribunal were as follows:
   (a) On Charge (a), the practitioner is to pay a fine of $300 to the Legal Practice Board.
   (b) On Charge (b), the practitioner is reprimanded.
   (c) The practitioner is to pay the Victorian Bar's costs of these proceedings, fixed at $1250.
4. As at the date of publication, no notice of appeal against the orders of the Tribunal has been lodged. The time for service of such notice under the Act has expired.

Professional Indemnity Insurance for Barristers

FOLLOWING a recent amendment to the *Legal Practice Act* 1996 ("the Act"), barristers will be required to renew their professional indemnity insurance prior to 31 May in future years commencing with the year 2000. In past years, barristers have been required to renew their professional indemnity insurance by 30 June.

Section 59(5) of the Savings, Transitional and Other Provisions of the Act states that "a current practitioner who is a regulated practitioner of the Bar must, on or before 31 May 2000, give the Bar satisfactory evidence, in a form approved by the Board, that the practitioner has professional indemnity insurance as required by this Act in respect of the period from and including 1 July 2000 to 30 June 2001."

The Bar will notify the professional indemnity insurers who service the Bar of the fact that barristers must renew insurance by 31 May 2000. This will enable the insurers to issue renewal notices and offers of insurance in sufficient time for barristers to consider their positions. The manner in which barristers will inform the Victorian Bar of the renewal of insurance will be advised in due course.

Judge King

THE warmth of the welcome of Her Honour Judge King to the County Court testifies to the universal approval which greeted her appointment.

Such were the numbers of her family, members of the judiciary, counsel, solicitors as well as representatives from the State and Federal Directors of Public Prosecutions and Government attending that certain prominent senior counsel and judges could only find seats in the dock; others attended in the corridor outside. Mr David Curtain QC, representing the Bar Council, and Ms Tina Miller, President-elect of the Law Institute, spoke in glowing terms of Her Honour's progress from a student at University High on to law school at Melbourne University through her years at the Bar to the Bench (thereby becoming the first graduate of University High School to be elevated).

Her Honour was to celebrate two milestones in her life this coming August — her 50th birthday and 25 years at the Bar. She will now have to channel all her energy into her 50th birthday party, a task that she will not find difficult. Almost 25 years ago Her Honour agreed to read with John Kaufman QC believing him to be a criminal advocate and he believing Her Honour to be an aspiring commercial lawyer. Although he didn't realise it at the time he was correct — it only took Her Honour 22 years to prove it. After only three weeks they decided Her Honour's interests lay with crime (his did not) and, in what proved to be truly masterful advice, he suggested that she observe a few trials. Ramon Lopez came into her life. Ramon recognised her potential immediately. One day, after just five months at the Bar, he asked her to wait outside court where, soon afterwards, she was approached by a Mr Ro from the Public Solicitor's Office and immediately offered a brief. When she asked why, he said that Mr Lopez would not accept his brief unless she was also briefed to act for one of the defendants. Ramon's foresight and instructions were immediately rewarded — she was one of the eighteen counsel in the trial, and, being one of the most junior, she was amongst the last to cross-examine the informant. Her first question was simply "why did you hit my client?" to which he replied "I didn't mean to, it just happened". Her Honour had several more questions but was prevailed upon by seventeen other counsel, acting in instant accord, to sit down and not take the matter any further. Indeed she so impressed one of the solicitors present, James Ruddle, now Assistant Victorian Government Solicitor, that he married her.

Her Honour Judge Betty King

Times and attitudes have changed since those early days when female counsel were rare. Early in her career her Honour was appearing in the County Court at Colac for a person charged with theft of petrol. The all-male rural jury was not impressed that Her Honour, who was heavily pregnant, referred to herself as Miss King until they spotted the rings on Her Honour's left hand. The accused was ultimately found not guilty. In those days it was not unknown for jurors to

fraternise with those associated with the proceedings after a case and it transpired that a major influence on their decision was that the victim, the petrol station owner, was himself a rogue because whenever there was a shortage of petrol he would put his prices up.

Her Honour's late stage of pregnancy also attracted the attention of the local press. After the acquittal, the local newspaper reported both the verdict and the birth of her daughter, Elizabeth (now a fifth-year law-science student herself), the following day with the headline "Verdict Just Beats Stork".

Some years later, in the early 1980s, Her Honour was appointed one of the first female crown prosecutors — and later became the first prosecutor for the Commonwealth.

Her thoroughness and balance made her formidable but fair. This was demonstrated in her prosecution of two accused — represented by Ramon Lopez and Remy Van de Wiel, both of whom had chambers on the same floor of Owen Dixon Chambers as Her Honour. Each morning they would all go to court, and after a short time Remy Van de Wiel's client asked if he could carry Her Honour's bag for her.

In 1992, with her close friend and fellow pioneer at the Bar, Lillian Leider, her Honour took silk. In 1994, in another first for her gender, she was appointed one of the three members of the National Crime Authority; her Honour was said to occasionally call herself "the member without a member". Here Her Honour spent nearly three years crisscrossing the country conducting various investigations. This was a position that not only recognised Her Honour's prosecution skills but her absolute integrity and the trust placed in her.

Her return to the Bar from the NCA in 1996 marked a significant expansion of her practice. Whilst still conducting criminal trials, Her Honour also advised and represented many bodies including the Medical Board (where, after a number of significant wins, she came to be known as "Saint Betty of the Medical Board"), the Victorian Government Solicitor especially in running test cases to determine the parameters of legislation such as the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997, and also as counsel assisting the Victorian Casino and Gaming Authority.

More recently, and perhaps in fulfilments John Kaufman's judgment 20 or so years earlier, Her Honour has developed a practice in the arcane world of taxation and administrative law, to which she has brought new insights. In a recent case in the Federal Court, when asked how her client would answer a particular interrogatory, she replied her client would never answer an interrogatory against his interest. Whilst the judge pointed out that this was the very purpose of interrogatories, he did concede that interrogatories were generally useless and then engaged Her Honour in the intricacies of conducting a criminal trial for contempt in a civil context (an issue which made the tax legislation in question seem almost rational).

As a barrister Her Honour has fought for her clients and for the Bar, an institution that to her is second only to her family. Those qualities of generosity and honesty, independence and balance which she inherited from her parents, Marie and Roy, found real form in the conduct of her practice, and the promotion of the Bar (and in particular the Criminal Bar where she served on the executive). She has always given barristers encouragement and assistance. Hers was a door that was never shut no matter how busy she was. She always had time to help others either individually or by participating in the Leo Cussen Institute courses and in the Bar Readers Course over many years.

As David Curtain QC so eloquently stated at Her Honour's Welcome:

> Your Honour's appointment to the County Court is one for which the Bar and the community can be proud.
>
> Your Honour's existence as an outstanding criminal advocate at the Bar, together with Your Honour's generous and caring nature equip Your Honour well for life as a judge.

On behalf of the Victorian Bar, we welcome you to the County Court Bench and wish you a long and fulfilling career.

Hard to Please

THE sun doth caste Justitia's breast
upon my room.
I'll move to West to avoid the gloom.

Anon

Chief Federal Magistrate Diana Bryant QC

IT was a well-kept secret but no-one was surprised when the Federal Attorney-General announced the appointment of Diana Bryant QC as Chief Federal Magistrate. The Federal Government's decision to establish a new court is the first time that a lower level Commonwealth court has been created in Australia. There will be six magistrates based in New South Wales and the Australian Capital Territory, four in Victoria, three in Queensland, one in Tasmania based in Launceston and one in South Australia. The Northern Territory will be covered by a circuit magistrate operating out of Townsville. Western Australia already has magistrates under the State Family Court system. The Federal Magistrate Service will provide a cheaper, simpler and faster method of dealing with less complex family law matters and civil matters arising under federal law. It will help ease the pressure on the Family Court and reduce waiting lists. It will also allow the judges of the Federal and the Family Courts to concentrate on more complex matters.

Chief Federal Magistrate Diana Bryant QC

As the first Chief Magistrate, Diana Bryant is a popular appointment. Born on 13 October 1947 in Western Australia and educated at Firbank Grammar School in Melbourne she completed her Bachelor of Laws at Melbourne University graduating in 1969. In 1999 she completed her Master of Laws degree at Monash University. She was articled to Gordon Duxbury at Darvall & Hambleton, Solicitors, and admitted to practice in Victoria in 1970. Thereafter she spent 18 months living in London working as a litigation clerk with a firm of solicitors before returning to work with Darvall & Hambleton, Solicitors.

In 1977 Diana was admitted as a barrister and solicitor in Western Australia. She commenced work as a solicitor advocate with Lavan & Walsh and took responsibility in the firm for family law. The Family Court of Western Australia had only just commenced operation. Most of the experienced practitioners had been appointed. Diana's talents were soon in high demand. She became friends with Peter Dowding, later to become Premier of Western Australia. Within a short time she became a partner of the firm which as it expanded merged with Phillips Fox & Masel giving Diana the opportunity to apply her family law skills beyond the State boundaries of Western Australia.

As the practice of family law around Australia became a speciality, it caused the establishment of family law practitioner associations. In 1985 Diana Bryant was the founding member and President of the Western Australian Family Law Practitioners Association. In this role she was involved in preparing submissions to the Family Court and the West Australian and Federal Governments on a variety of family law issues. It is fair to say that since 1977 she has been involved at some level or another in making representations in the legal framing and implementation of virtually all major family law issues. One of the most enduring and satisfying areas in which she was involved was the committee chaired by the Honourable John Fogarty which advised the Government on the model for the child support scheme. Diana Bryant was the only practising lawyer on the

committee. She was instrumental in all aspects in the preparation of the child support legislation and its implementation. In her other waking hours while in Western Australia she was a member of the Barristers' Board (the Disciplinary Board for the profession), elected a member of the Law Society of Western Australia and a founding member and Secretary of the Women Lawyers of Western Australia. She was appointed to the boards of the Perth Royal Hospital and Australian Airlines. It has been said that her appointment to the latter entity was an entirely appropriate one for a family lawyer who has an appetite for travel! In these organisations she learned how large organisations work and found that like most things, there is always a place, as the Honourable Guest has been known to say, for "the highest authority of all, common sense".

In 1990 she left Western Australia to relocate to Melbourne. There is little doubt had she remained in Western Australia she would have been destined for high places. The Victorian Bar was very fortunate she made the decision to come to this State. She read with Michael Watt now the Honourable Justice Watt of the Family Court. There was a rising star next to her name from the very first day she started appearing as a barrister in family law cases in Victoria. The Family Law Reports include many "landmark" decisions in which she has appeared as counsel. They include *Deputy Commissioner of Taxation and Speanjich* (1988) FLC 91-974; *Schwarzkopff and Schwarkopff* (1992) FLC 92-303; *Re K* (1994) FLC 92-461; *Smith and Smith* (1994) FLC 92-488 and the High Court decision in *AIF* v. *AMS* (1999) FLC 92-852 in which she successfully argued important constitutional issues as they effect family law.

In November 1997 Diana was appointed one of Her Majesty's Counsel. She has served on the Victoria Bar Council. She has been a member of the Ethics Committee, Vice Chairman of the Family Law Bar Association and on the Executive of the Family Law Section of the Law Council and assistant Editor of Australian Family Lawyer.

The community is fortunate that Diana Bryant has chosen to accept the position as the first Chief Federal Magistrate. She has seen the development of family law from its inception. Her contributions as a solicitor, advocate, barrister and law reformer have been significant. The secret of her success has been her constancy to purpose. She has the intellect and determination to make the Federal Magistrates' Court a success and to fill the niche in the operation of the legal system for which it is intended. She has the full support of the profession and the courts as she sets sail on this new voyage of her life. The Bar warmly congratulates her and wishes her well.

The profession will formally welcome Diana Bryant in June of this year when the Federal Magistrates' Court commences sitting.

Jane Patrick, Magistrate

WE welcome the appointment of Jane Patrick, a member of the Bar, as a Magistrate. She was educated at Firbank and then graduated from the University of Melbourne in 1973 in Law. She did not go into practice but studied for a Diploma of Education at the then State College of Victoria, and taught for two years.

She then left the workforce when she first had her children. She returned to Melbourne University and completed her Master of Laws by coursework. As a mark of her breadth of experience, whilst completing her Master's, she tutored in constitutional and administrative law, torts and criminal law. After being awarded her Master's, she was then articled to the firm Burdon-Smith & Associates, who practice in West Melbourne.

After she was admitted to practice, she worked with the Commonwealth Director of Public Prosecutions for three years and then went to the Equal Opportunity Commission as a Legal Officer for a further three years.

She came to the Bar in 1995, reading with Ray Lopez. Her principal area of practice was in equal opportunity law. She also appeared in employment cases and in crime. One of her most memorable experiences was her appointment as a conciliator to the Bar for complaints of sexual harassment and vilification. Her co-conciliator was the late Ron Castan. During her time at the Bar she has been an active member and supporter of the Women's Barristers Association.

She has three children by her first marriage and now three stepchildren. Her interests have always been in reading, the theatre and music. She adds as an additional interest "attempting to keep fit".

The Bar warmly welcomes Jane Patrick to her appointment and it is gratifying to see a person with such rounded experience being appointed to the Bench.

D'Oneur v. d'Honneur

25, avenue Bosquet,
75007 PARIS

The Editors

Dear Sirs,

AS usual, I have read the latest number of *Bar News* with interest and pleasure. Down to seeing the name of the son of an old friend in the list of new QCs (Jeremy Gobbo) which accounts, I assume, for the somewhat unusual opening of the Chief Justice's address acknowledging "the presence of His Excellency the Governor and Lady Gobbo".

However, I write on another minor issue. As part of the award conferred on Mr Bongiorno QC, there appears (p.54) a "loose translation by a secretary at Co.As.It." of Foreign Orders. It says "In France they receive La Legion D'Oneur". Well, it may be loose, but it is not English, Italian or French. Having been named recently by the President as a Chevalier of the Legion d'Honneur (and my Australian nationality is mentioned in the decree) I felt I had to protest. Perhaps it could be corrected in the next issue.

Yours sincerely

P. Donovan

A Gentle Giant

The Editors

RON Castan QC AM was a long-time friend and professional confrere at the Melbourne Bar and the International Commission of Jurists. We shared a mutual interest in basic human rights. May I endorse the tribute by Alan Goldberg, Ron Merkel and Jack Fajgenbaum published in the *Australian* newspaper of 27 October 1999.

Ron Castan and I appeared together in 1971 for the Kamkuman and Butibum peoples of the Bumbu and Bussu River coastal region in New Guinea. The natives claimed land rights — native title — compensation in relation to the airport and city of Lae at the mouth of the Markham River delta.

It was a major land rights case heard by the Supreme Court of Papua New Guinea by way of trial, as distinct from appeal from the Land Commission. The trial judge was Justice Kelly of the Supreme Court of Papua New Guinea.

Counsel for the administration was Trevor Morling QC who subsequently conducted the final enquiry and report on the Azaria Chamberlain–Uluru–Ayers Rock–dingo case.

Ron Castan was accompanied to Lae by his wife Nellie and their young children. They were loved, provided with native foods and baby-sitters and were well looked after by the native villagers. My wife Alison and I stayed in Lae near the Court which sat in the Masonic Building.

The trial went back in history to the days of German Chancellor Bismark, Kaiser Wilhelm and the Great War. Australia claimed title to the land as successors to the Germans by right of conquest in 1914. The big question was, did the Germans acquire valid title and if so how? Was it by purchase from the native occupiers — albeit for trinkets, blankets or axes — albeit more than was paid to the Indians for Manhattan? Or was it by occupation of *terra nullius*? Australia was hooked on the horns of a dilemma.

The native claims to compensation succeeded thanks primarily to Ron Castan.

Ron's scholarship, modesty, compassion and commitment to the Kamkuman and Butibum community was inspiring.

Ron Castan played a major role in the trial. He was respected and loved by all of our native clients. It was a real life lawyer — family — tribal experience for us all. Lae led Ron Castan's later crusades for land rights and native title for Aboriginal people in Australia leading to *Mabo*, *Wik*, and the Native Title Act.

Ron was a gentle giant among lawyers. His untimely death is mourned as a deep loss to his family and the law and to the whole spectrum of the Australian community.

John F. Kearney QC

Master George Brett

George Brett, long-term serving Master of the Supreme Court, died on 1 February 2000. The following eulogy was delivered at his funeral service.

By His Honour Leo Lazarus held at Ormond College Chapel, Saturday 5 February 2000, at 10.00 a.m.

GEORGE Strafford Brett was born on 17 September 1916. He came from Williamstown and went to Williamstown High School before going on to Scotch College.

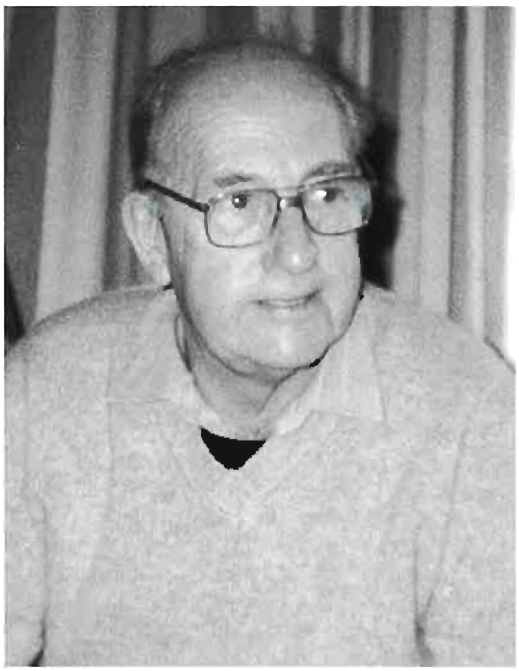
He graduated in Arts at Melbourne University, occupied himself as a lay preacher and then, after lengthy and arduous war service of which he seldom spoke, completed the law course, again at this University.

In those days, he was a handsome man and physically an even more imposing, not to say portly, figure than he became, and remained, after subjection to a rigorous diet. At University, I would not have dared approach so formidable a figure and so it was only after he had served articles with Chick Lander and signed the roll of counsel that we really encountered each other. He went to the Bar in January 1950 and read with the late Alan Mann, later Sir Alan Mann, Chief Justice of Papua New Guinea.

George and I first met in the robing room at the Supreme Court. George approached me partly robed and, with a deference inherited, I feel sure, from his very courteous father, said "Excuse me, sir, but could you tell me how you fix this wretched thing?" With the advantage of my long experience of some two or three months at the Bar, I was able to help him adjust his Bib. There followed fifty years of friendship broken only early on Tuesday last.

The real centre of George's many-sided life was always the family: that from which he sprang; the one he founded with Barbara No. 1; and the one he acquired along with Barbara No. 2. For them all George had a very deep affection. They meant everything to him. In a real sense they were his life. But I must stick to my brief and leave this area to the safe hands of the Rev. Gribben. I shall confine myself largely to George as barrister and as friend.

George was in his element at the Bar. He was a good lawyer, but his forte was as an advocate in the days before jury advocacy became confined to the criminal courts. He was a staunch fighter, but



George Brett

he did not leave his great good sense and his humanity behind when he went to court. He was always ready to attempt compromise if it could be achieved without damage to his client's interests. On matters between husband and wife, if reconciliation was in any way open, George would pursue it with vigour. The Bar was — doubtless it is still — a great place for "characters". George Brett was indeed one of them, and as colourful as any I remember.

Despite his courteous upbringing, George could often be heard addressing more or less outrageous remarks to one or other of his colleagues. Somehow or other, offensive as he might sound, he avoided giving offence, and no one was ever really hurt. In the end it was the humour which won through.

He was a resourceful, witty and successful barrister.

His was a busy practice, but somehow he found time to accept lectureships in law in a diversity of bodies including Monash University and to tutor in law in this very place, Ormond College.

It was a full and varied career in the law, crowned in 1967 by his appointment as a Master of the Supreme Court where he remained until his retirement in 1988.

He was a much-respected, well-liked Master. Unfailingly courteous but always serious, he exercised a firm control of proceedings. He was scrupulously fair and impartial, perhaps too impartial at times. I don't recall ever winning a case before him.

But there were many things in George's life other than the law.

He was a keen sportsman. He had a good eye, a sharp ball-sense and considerable all-round natural ability.

He was a keen golfer and played a good game of tennis. He enjoyed his trips to the country fly-fishing. But his greatest and most enduring sporting interest was as a yachtsman. His *Gwen* was superseded by that fine craft, *The Shalomar*. Family and friends derived countless hours of pleasure with George sailing the seas off Blairgowrie Yacht Squadron. George was generous in acknowledging my own service as an occasional crew member. "Well, sport", he was moved to say, "You are not entirely useless. You are good for ballast."

He was a keen competitor — a euphemistic way of saying he detested being beaten. I remember once on holidays when Barbara No. 1 had the temerity to beat him at quoits. George congratulated her, if somewhat coolly, I thought, and to outward appearances took his defeat gracefully enough. But he spent much of the ensuing fortnight practising and

practising until he could put all quoits on the post virtually at will.

In the early fifties, at George's suggestion, he and I went to see a demonstration of oil painting by the late and great Ernest Buckmaster. He painted one of his typical mighty river canvases, and that in something under one and a half hours. That was enough. It looked deceptively simple and George became a dedicated oil painter. George was gifted with real artistic talent and went on to paint for the greater part of his lifetime.

He was a foundation member of the Myrniong Art Group, so named after the dairy whose horse and milk cart collided with the late Kevin Anderson's car. It was an enthusiastic band of amateurs, mostly barristers, who had the presumption to hire the Athenaeum Art Gallery for their annual exhibition.

George had a natural gift as a conversationalist. We used to go bush on occasional painting excursions. Typically we would land up as evening fell at some bush pub or other. Soon George would be quietly chatting with anyone in sight who looked at all interesting. By the time I was ready for dinner and had found out the way to the dining room, George would know the basic history of the district and have a fair run-down of many local identities. He did not interrogate people. At least he did not appear to do so. He would just quietly yarn to them, encourage them a bit, and listen.

It is not easy to form a true picture of the larger-than-life person that George was.

Many knew or thought they knew him as an extroverted, somewhat rascally, humorous, even ribald falstaffian or rumpolian sort of character.

I may be permitted one little story of a personal nature from our life at the Bar.

On one occasion, I was in the midst of a case in the Collingwood Magistrate's Court when the Clerk of Courts came in and spoke to the Magistrate who in turn told me I was wanted on the phone, and urgently enough to warrant interrupting the case.

I was excused by the Magistrate and, naturally apprehensive, I went to the phone. It was George: "Hey, sport, how much longer are you going to be? If we don't get down to the MCG pretty soon, the West Indies will be all out!"

But he was not always the hearty bluff individual he so often appeared. Underneath lay a reserved, contemplative, wise man, one vitally interested in those around him, but for himself an essentially private person who kept himself and his life and affairs very much to himself.

No one who knew George would doubt that he had a strong and deep philosophy of life, whatever may have been its well springs; an intensely moral man who well knew right from wrong and who regarded the rules as there to be fairly strictly adhered to.

Certainly he was a fascinating mix.

One might have been excused for asking — "Will the real George Brett please stand up?".

Stand up indeed he did: an original and one of the finest, wisest, funniest, most lovable, most loyal and deep down, most compassionate of men.

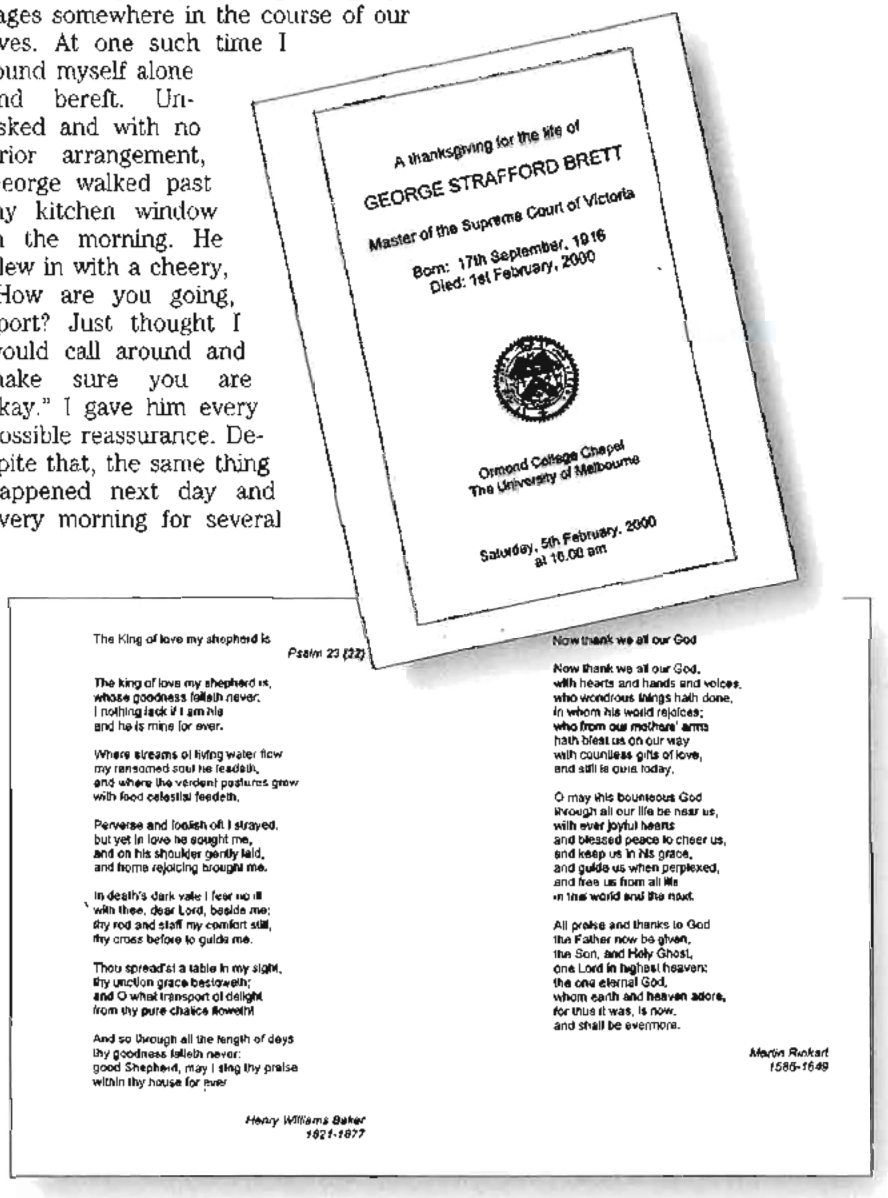
We nearly all go through rough passages somewhere in the course of our lives. At one such time I found myself alone and bereft. Unasked and with no prior arrangement, George walked past my kitchen window in the morning. He blew in with a cheery, "How are you going, sport? Just thought I would call around and make sure you are okay." I gave him every possible reassurance. Despite that, the same thing happened next day and every morning for several days after that, until finally he came to believe my assurances. And we did not live next door to one another. The round trip would have taken him the best part of an hour. He had a gift for friendship. He is an unforgettable, irreplaceable friend.

Those are a few of my recollections. Each of you will have your own.

I would just say what probably each of us would say — "I was greatly honoured. I was his friend".

A complex man he was, but all in all it is fitting to say of George, as of Brutus:

His life was gentle, and the elements
So mix'd in him that Nature might
stand up
And say to all the world, "This was a
man!".



A thanksgiving for the life of

GEORGE STRAFFORD BRETT

Master of the Supreme Court of Victoria

Born: 17th September, 1916
Died: 1st February, 2000

Ormond College Chapel
The University of Melbourne

Saturday, 5th February, 2000
at 10.00 am

The King of love my shepherd is

Psalm 23 (22)

The king of love my shepherd is,
whose goodness faileth never;
I nothing lack if I am his
and he is mine for ever.

Where streams of living water flow
my ransomed soul he leadeth,
and where the verdant pastures grow
with food celestial feedeth.

Perverse and foolish oft I strayed,
but yet in love he sought me,
and on his shoulder gently laid,
and home rejoicing brought me.

In death's dark vale I fear no ill
with thee, dear Lord, beside me;
thy rod and staff my comfort still,
thy cross before to guide me.

Thou spread'st a table in my sight,
thy unction grace bestoweth;
and O what transport of delight
from thy pure chalice floweth!

And so through all the length of days
thy goodness faileth never:
good Shepherd, may I sing thy praise
within thy house for ever.

Henry Williams Baker
1821-1877

Now thank we all our God

Now thank we all our God,
with hearts and hands and voices,
who wondrous things hath done,
in whom his world rejoices;
who from our mothers' arms
hath blest us on our way
with countless gifts of love,
and still is ours today.

O may this bounteous God
through all our life be near us,
with ever joyful hearts
and blessed peace to cheer us,
and keep us in his grace,
and guide us when perplexed,
and free us from all ills
in this world and the next.

All praise and thanks to God
the Father now be given,
the Son, and Holy Ghost,
one Lord in highest heaven:
the one eternal God,
whom earth and heaven adore,
for this it was, is now,
and shall be evermore.

Martin Rinkart
1586-1649

Bob Vernon

THE Bar, and particularly the Criminal Bar, is saddened by the death of Bob Vernon.

The enigmatic, mysterious, private and unique Bob Vernon would be amused at the thought of my writing his obituary.

He would be amused that someone he knew as a prosecutor (see *R* v *Smith, Ashford & Schevella* — circa 1989) would be the one to remind the Bar, in summary, about the quality of the man and his ability as an advocate. I hope he would be gratified to know that same prosecutor maintained an admiration for his skills and power as an advocate and, like most others, retained the memory of the long leather coat.

Bob Vernon seems to have always been there and since he had been there since 1960 that is not surprising. Now, regrettably, he is gone. A common exchange between members of the Criminal Bar agrees there are fewer characters now than in earlier years. "Character" in this sense means someone who made a mark on our profession by force of his or her unique character and power as an advocate. Bob Vernon was a character. Andrew Kirkham QC described Vernon's chambers as ". . . a broom cupboard on the fifth floor of Owen Dixon Chambers regularly visited by a cavalcade of painters and dockers". The young Kirkham (one of Vernon's two readers) was jammed in a corner.

Some years ago, Felicity Hampel QC apparently suggested to some students or young readers that they would benefit by watching a capable advocate making a good plea. Reluctantly (because barristers are not usually inherently entertaining) they accepted the advice. They found themselves watching Vernon and they were apparently quite spellbound by what they saw. Jack Cullity once warned Brian Bourke: "Never imitate another barrister". As Brian observed, Bob Vernon never imitated anyone.

On the occasions I saw him in action, from the Crown end of the Bar table, it was impossible to ignore the passion he developed for his cause. The surgical approach to criminal trials of the 1990s, necessary as it no doubt is, deprives us of some of the great conflicts. Bob Vernon was in many great conflicts and, years ago, his presence in such cases was comforting to the young Phil Dunn or slightly older Brian Bourke. Bob could be relied on to fight and fight hard: murder trials, corruption enquiries, armed robbery trials — including the famous MSS trials and the murder trial known as "The Battle of Hastings" with Vernon's famous cricketing final address. Delivering the fifth and last defence address to the jury, Daryl Wraith said something to him as he rose to commence. He turned to the jury and said, "Last man in to bat and even your mates are telling you to hurry up". The Bar table in the fourth court then became the pitch — the defence was batting — the Crown was bowling. The Crown prosecutor was the demonic fast bowler, "in he comes to bowl — no scientific evidence linking the accused to the murder — No ball! — in he comes again — no fingerprints on the weapon — 4 runs!" and so it went —— to an acquittal.

He appeared for the accused in one particular murder trial before Mr Justice Starke. When the trial was over, the judge wrote him a brief note. The note recorded Starke's view that Vernon's final address in that case was the best Starke had seen since the legendary Eugene Gorman.

Bob Vernon and the Crimes (Criminal Trials) Act would have been incompatible. Trying (in a caring sharing way!) to establish what the real issues in the case were before I opened in *Smith & Ors*, Bob told me "Open at your peril — I will spoke your wheel every inch of the way". And he did, on behalf of a client he referred to throughout as the "the boy from Brunswick".

Most criminal advocates recall great final addresses they have heard (as opposed to all the great ones they like to think they delivered themselves). The first 20 minutes or so of his final address in that case, on why the jury should regard their jury service as a privilege rather than a duty, was spectacular. It was the Bob Vernon style that grabbed the attention of the listener and forced even the reluctant to listen because that style was compelling, entertaining and demanded to be noticed and thought about. When the case was over he returned to Queensland where he spent so much of his time. He sent John Champion and me (having named us "Jaws 1" and "Jaws 2") a photograph of himself aboard a handsome yacht known as *The Good Ship Not Guilty* cruising the coast.

Bob Vernon certainly fell into the "character" category — but character with content. He was the consummate advocate. He had exactly the turn of phrase and style to "carry it off" and so often did. Yet he was without pomposity. In the midst of a coffee table exchange between counsel about their great forensic triumphs Bob whispered that somewhere in the car park under Owen Dixon Chambers there is a barrister who has never won a case. This poor barrister, he said, sat in a disused storeroom with a naked bulb burning and, now, no briefs on his table. He was on the losing side of every one of those cases so triumphantly featured in the self-serving stories — everyone at the Bar had defeated him. That barrister could *never* drink coffee on the 13th floor of Owen Dixon Chambers.

Philip Dunn QC describes the Bob Vernon he knew and we would recognise:

> He was a mysterious and enigmatic figure. He was robust looking with dark black hair and a pencil-thin moustache. He was very fond of long leather overcoats and he was always very neat in his appearance. He had a reputation as a ferocious cross-examiner and had an incredible gift of giving a passionate and moving final address.

In Paris on his first overseas trip with George Hampel QC (as he then was), interviewing witnesses for a forgery case, Bob was admiring the uniform of the gendarmes, particularly the cloaks they wore. Bob loved uniforms but "they'd still verbal you", he told Hampel. In order to record the moment, the uniform and the international trend of police verbals, Vernon asked Hampel to take a photograph of him speaking in broken English and French to the officers. Hampel did so. The photo was later framed and given a title "Verballed"! It was on that trip that the insular lifestyle of being a barrister in Melbourne struck them both. As they sat

admiring the ambience, the people and the internationalism of Paris, not one Parisian, they concluded, would know who the most recent appointment to the Victorian County Court was!

Vernon loved anything military. He had a fascination with the Battle of Waterloo. Living as he did in the gatekeeper's cottage at Ripponlea, he used to go possum shooting with Oliver Frost, the gardener at Ripponlea, with a military precision that would put professional soldiers to shame. He was obsessive about his other interests. His interest in China meant he had to consume the works of, and about, Mao Tse Tung. When he took up tennis it was not one racket but three with similar multiples of all the other ancillary equipment.

Bob Vernon was admitted to practice on 2 December 1957. He signed the Bar Roll on 29 February 1960. He transferred to the interstate list on 1 December 1996 and practised in Queensland until 23 March 1997 when he left the Bar. His readers were Andrew Kirkham QC and Kerry Milte.

Those who admire style, passion, colour, courage and commitment in criminal advocates will miss Bob Vernon.

Lex Lasry QC

John D. Daly

THE Bar notes the passing of John Daly who signed the Bar Roll on 13 February 1969 and was number 864 on the Roll of Counsel. He read in the chambers of Nettlefold QC. His practice was largely criminal law. He was in the Victorian Police Force before coming to the Bar. John was married to Fay Daly, barrister, also deceased. At the time of death John was on the retired division of the Roll. He served in the Royal Navy from 1942–46. He went to live in Ireland following the death of his wife but returned to Australia and thereafter lived in Wonthaggi, Gippsland. He died on 22 February 2000.

The Supreme Court in the New Millennium

Changes are taking place in the Supreme Court of Victoria. Physical changes include the creation of the new Court 13 with advanced computer technology reported in our Summer 1999 issue. Management changes include the creation of three Divisions of the Court, the Commercial & Equity Division, the Common Law Division and the Criminal Division. In this interview Paul Elliott QC discusses these changes with the Chief Justice His Honour John Harber Philips AC and his views on the future of the Court in the year 2000.

UNLIKE in other State Courts, civil business in the Supreme Court has increased. The Productivity Commission conducted a survey of the business of the superior State Courts. In Victoria it reported an increase of over 10% in civil listings. Criminal business has grown by 25%, unfortunately reflecting an increase in homicides in Victoria from 1997.

The Commission found that the Court was the most efficient State Supreme Court in Australia.

Paul Elliott QC interviews Chief Justice Phillips.

Elliott: *The refurbishments of Courts 13 and 10 represent a revolution in court technology and computer use. How did the changes come about?*
Chief Justice: It's very much part of our ethos at the Supreme Court to preserve traditions which we think are worthwhile at the same time combining them with advances in technology. Prior to the installation of the system in the 13th Court, the Supreme Court had historically been involved in bits and pieces of civil litigation where computer use was involved. During a number of lengthy trials — the Estate Mortgage case and the litigation concerning the solicitor Max Green — members of the profession saw the potential for a broader use of technology. The different judges who presided over those trials said to the profession: you construct a modern model of computer use. That's how those trials were structured. Those models assisted in the overall scheme.
Elliott: *Was a committee set up with those particular judges; how was it done?*
Chief Justice: Well no, it was really driven by the larger body, the council of the judges including those judges who had experience in those cases being Smith, Byrne and Hansen JJ. All were well versed in computers, and their knowledge was of great assistance in setting up the technology in the 13th Court.
Elliott: *When did the Court open?*
Chief Justice: The Court was officially opened on 11 October last year and is presently operational. A lengthy civil trial will be commencing in March 2000.
Elliott: *What about the 10th Court?*
Chief Justice: The 10th Court, which is the Practice Court, is operational at present. Nearly all the courts are wired up to use the technology in the courts. Now that the Court has acquired the old High Court building, that will also be upgraded in this respect.
Elliott: *When it is said that the courts have electronic assistance what does this mean?*
Chief Justice: Complete multimedia arrangements which essentially mean real time transcript, the capacity to video any aspect of the courtroom proceedings, imaging for the documents. In particular technology to enable juries and others in the Court to have a close-up view of what's happening in the witness box. Each member of the jury can have their own console in the witness box.

We've also purchased a very large screen which sits on the opposite wall in the Court. The screens can be split into sections. I've seen in our new cyber court book, which is installed in the 13th Court, that you can have a piece of pleadings in one of the top quarters, run-

ning transcript coming continuously in one of the bottom quarters, and reference to the previous day's transcript as well.

Elliott: *The 13th Court is the largest of the courts. Will it be reserved for big cases only?*

Chief Justice: Well yes, what is interesting is that there is room for up to 30 plus counsel at the Bar tables.

Elliott: *How did you decide which was the best system to be installed in the courts?*

Chief Justice: The Court has entered into a relationship contractually with a small Victorian company called Ringtail Solutions. The judges involved in previous massive litigation together with the staff of the Court have combined with Ringtail Solutions to create a laboratory for future development of the cyber court book. It is important to note that for a comparatively small outlay the Court has been able to take on this collaboration, which is the first of a technical nature sponsored by a court.

Elliott: *What are the plans for the development of the old High Court building, which has recently been taken over by the Supreme Court?*

Chief Justice: It provides three excellent historic courtrooms, and also a very large meeting room which was the original High Court library. It contains a number of administrative areas of some size. There are 11 judges' chambers. We are contemplating erecting a bridge over the laneway between the two courts. There have been discussions for part of the Court to be used for international arbitrations and there have been discussions with the Institute of Arbitrators over this matter. Of course the bridge between the two buildings would be in the nature of an arch and would have to be approved by Historic Buildings.

Elliott: *Apart from these physical changes to the courts there has been a profound change in the management of cases?*

Chief Justice: Yes, years ago the judges were expected to be all rounders. However, with specialisation, especially in crime, it seemed preferable that the business of the Court be divided into three divisions. The three divisions are Commercial and Equity, Common Law and Criminal. Judges have been allocated to those divisions and commenced this year. Principal judges appointed are McDonald J., principal Judge of the Commercial and Equity Division, Vincent J. principal Judge of the Criminal Division and Ashley J. principal Judge of the Common Law Division.

Overall our experience from the massive exercises we conducted through the Spring and Autumn offensives showed the value of judges working in teams, although that was for a limited period.

I'd like to stress that divisions in the Court is not something that has been pressed upon us. The Productivity Commission undertook a survey of the State Courts. The figures arising from the report showed that the trial division of this Court is the most efficient Supreme Court in Australia. So we're not coming to it as a last resort. We're saying all right, things are going well, but we can do better.

Elliott: *And so we're more productive than New South Wales?*

Chief Justice: Yes, we are more productive than any Supreme Court but in fairness to New South Wales they have an awful lot more work than Victoria.

Elliott: *What's the present number of judges in the Supreme Court?*

Chief Justice: Essentially 30.

Elliott: *Are there any plans for that to be increased or is to going to stay the same?*

Chief Justice: Well I would hope that we could persuade the government that at some time in the near future some new judges could be appointed.

Elliott: *Are there sufficient facilities in the courts to cope with new appointments?*

Chief Justice: Yes, well that has been our problem over the last few years. We've had no room for judges chambers and we've always been three courts short on the trial division. This has necessitated several long trials being housed in King Street. These problems have now been solved by the acquisition of the High Court building.

Elliott: *Along with the creation of the Divisions, are the judges going to adopt the docket type system, as the Federal Court has done, where the judge handles the case from its listing to trial?*

Chief Justice: Of course all our specialist lists and our criminal lists are in a docket form to some extent. However, the answer is no. We believe that the Federal Court judges have some sixty cases each and the docket system appears to be working well in that Court. However, on our calculations if we were to go the same way it would be that each judge would have something over 100 cases. Enquiries with American judges, who do nothing else but the one variety of work, have shown that it would be an impossible workload for these cases to be divided up in this way.

Elliott: *If we look over the last five years, do the statistics show an improvement in, for instance, getting a common law jury action on for trial?*

Chief Justice: If you start with our printed list the answer is yes. That certainly has decreased in size, The breakthrough was the creation of the Litigation Support Group under Mr Justice Teague. He made sure that every case in the Court was put on computer. This removed what could be described as the black hole of the printed list which never seemed to decrease. Now that we've ascertained where the cases are we are able to get a handle on things. It turned out that many of the cases that were still there had been settled and the Court had not been notified.

I believe the effect of the Litigation Support Group is mirrored in the Productivity Commission Report which compared the various jurisdictions.

Elliott: *In relation to criminal listings, has there been a marked improvement there?*

Chief Justice: Unfortunately homicides in Victoria have increased by something like 25% which has increased the business in the Court. However the Court is looking at taking on other matters apart from murder. In particular the Court will be hearing large fraud criminal matters. Our norm is that we give a trial date to the accused within six months of committal. That is not always achieved but they are told of a trial date within six months.

Elliott: *As to the outside structure of the building, a lot of work has gone on over the years; is it still continuing?*

Chief Justice: Yes. We've just let out a contract for the roof in the building which will include reslating and aluminium walk-ways to avoid further damage to the roof.

Elliott: *Has the cleaning to the outside walls been finished?*

Chief Justice: Yes.

Elliott: *How long did that take?*

Chief Justice: Italian stonemasons were brought out to do the work. Many of them have married Australian girls and have had children and the children reached University by the time their fathers have finished the work on the stone.

The Divisions of the Supreme Court

THE Chief Justice has allocated the following Judges the Divisions referred to below for an initial period of three years from 15 January 2000.

COMMERCIAL AND EQUITY

McDonald, J. Hansen, J.
Byrne, J. Mandic, J.
Harper, J. Warren, J.

COMMON LAW DIVISION

Beach, J. Eames, J.
Smith, J. Balmford, J.
Ashley, J. Gillard, J.
Hedigan, J. Kellam, J.

CRIMINAL DIVISION

Hampel, J. Cummins, J.
Vincent, J Coldrey, J.
Teague, J.

The principal Judges are McDonald, J, Commercial and Equity, Vincent, J, Criminal Law, Ashley, J, Common Law.

The allocation of work will be as follows.

COMMERCIAL AND EQUITY DIVISION

1. Proceedings brought in the:
   (a) Admiralty List
   (b) Building Cases List
   (c) Commercial List
   (d) Intellectual Property List
   (e) Taxation List.
2. Corporations matters.
3. Wills, probate and deceased estate matters.
4. Trust matters.
5. Charities Act matters.
6. Commercial Arbitration Act matters.
7. Other matters arising principally out of ordinary commercial transactions and including:
   - the construction of commercial, shipping or transport documents
   - the export or import of merchandise
   - the carriage of goods for the purpose of trade and commerce
     — insurance
     — banking
     — finance
     — commercial agency
     — commercial chattel leases
     — priority of securities
     — claims by financial institutions for debt or enforcement of securities.

COMMON LAW DIVISION

1. Proceedings brought in the:
   (a) Major Torts List
   (b) Valuation, Compensation and Planning List
2. Any other proceeding founded in tort, or concurrently in tort and in breach of contract and/or upon statutory breach; and matters ancillary thereto (for example, disputes as to liability of insurers to indemnify or to make contribution).
3. Contract matters not falling within the Commercial and Equity Division and miscellaneous matters (for example, claims by individuals to enforce securities, claims in debt, partnership disputes, professional disciplinary matters).
4. Industrial and employment law matters.
5. Land law matters.
6. Property disputes between de facto partners.
7. Matters under Part V of the Crimes (Mental Impairment and Unfitness to be Tried) Act other than those relevant to the trial of an accused person.
8. Administrative law proceedings (including proceedings brought under Order 56 of Chapter 1 of the Rules; and proceedings brought under the Administrative Law Act).
9. Appeals from orders of the Magistrates' Court.
10. Appeals to the Trial Division from decisions of the Victorian Civil and Administrative Tribunal.
11. Appeals to the Trial Division from decisions of other inferior tribunals.
12. Appeals from orders of the County Court Master.

CRIMINAL DIVISION

1. Criminal trials.
2. Interlocutory applications, including:
   - Determination whether the trial should be heard in this Court or the County Court
   - Pegasus hearings
   - Applications to sever the presentment or for an order for separate trials
   - Arraignments.

PRACTICE COURT

The jurisdiction of the Practice Court will remain as it is at present.

Elliott: *What about funding from the government. Do the repairs and renovations come from a separate fund?*

Chief Justice: Yes, that's independent of the Court's operating budget. I must say that successive governments have been very good about renovations. It has been realised that this is the only historic complex in Australia that functions independently as a Supreme Court.

Elliott: *The other States have moved to high rise housing?*

Chief Justice: Well yes, most of them. Adelaide still has an original part preserved but it has a separate more modern building. This is the last functioning unit. What is interesting is that there is room in the old High Court building for the easy creation of a 4th Court.

Elliott: *Well just generally where do you see the Court going in the future?*

Chief Justice: I would like to see the Court established as the premier Court in Australia in both procedure and technology. Along with the increase of the use of technology the other important aspect in our court system is the use of alternative dispute resolution procedures. This is now an affirmed process.

Elliott: *As for the cost of justice, how do you see it in the future?*

Chief Justice: I believe that there's got to be an increase in Legal Aid, particularly in civil cases. We have one end of the spectrum with two massive corporations locked in a dispute, and at the other end individuals who are unable to afford legal representation. I have been looking at events in the UK carefully where there has been developments of community legal centres. The question of legal aid in general will be looked at at a Legal Aid Conference some time next year. It can only be hoped that there is an increase aid to individuals to enable them to access three Divisions of this Court.

Owen Dixon Chambers East Renovation Update

By Maurice Phipps QC

The first stage of renovation of Owen Dixon Chambers East, basement and ground floor, is planned to commence in June this year. The construction period is estimated at three months.

THE major part of the work is to convert the vacant area on the north side of the building (next to the County Court) into a new entrance, lobby and reception area and to close off the existing entrance from the street, so that there is then a lift lobby separate from the entrance. From the reception area separate doors and corridors will lead to Owen Dixon Chambers East and Owen Dixon Chambers West.

The whole floor is to be brought to current standards. There will be properly graded ramps from William Street and between East and West. Any hazardous materials will be removed and there will be a new ceiling, lights, airconditioning and fire sprinklers throughout. Some work will be done which will be used for the rest of the building once renovation is completed. The main examples are a new electrical switchboard, fire pump room and pumps (all in the basement), fire control panel and some of the air-conditioning equipment.

Agreement has been reached with the Commonwealth Bank to relocate temporarily to the north side of the ground floor (the former State Bank) while the necessary work is carried out in its premises. The bank intends to re-fit, and the lease between the bank and Barristers' Chambers Limited is to be renewed for a further term.

Arrangements are being made for accommodation for clerks Foley, Dever and Hyland, while the work is done. In the clerks' area the work is at ceiling height and above so the fitout is not being altered, although one will take the opportunity to do some alterations.

A timber tunnel will be constructed so that access to the Owen Dixon Chambers East lifts and through the ground floor to Owen Dixon Chambers West will be maintained. Obviously there will be some inconvenience.

Maurice Phipps QC

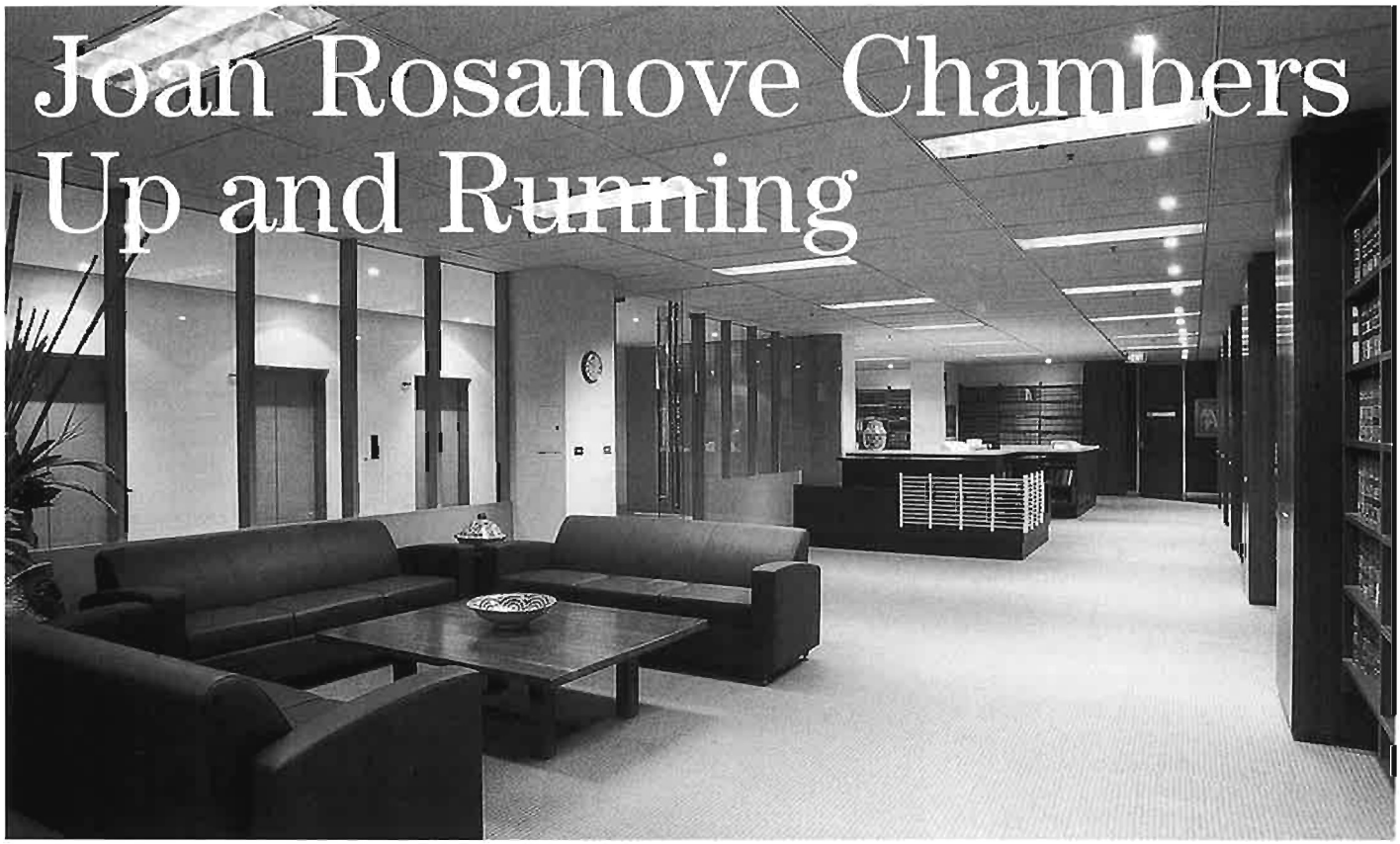
Current planning is for work on the rest of the building, floors 1–13, to commence in about two years time. Advice to BCL is that it can be done two floors at a time, which makes the task of providing accommodation for the tenants from each floor as the work is done manageable. The time at which the work is done will depend on finances. BCL's plan is to pay off the company's existing debt and then re-finance to carry out the balance of the renovations.

The planned work includes rebuilding the lifts including equipping them with modern electronic controls and so improving the service. It is hoped this can be done soon after the ground floor is finished, although a decision has not yet been made.

The design for the whole building has been completed. One aspect of interest is the heating and cooling designed by the services engineer. Chambers and reception areas will have individual fan coil units. Fresh air ventilation for each unit will come through ducts in corridor ceilings, so that each chamber and each area will be separately ventilated as well as separately heated or cooled. Card operated locks on doors can be linked to the fan coil unit and the lights, so that when a door is unlocked, lights and airconditioning will turn on and when the door is locked they will turn off. For those who forget to lock doors, a detector can be fitted which will turn off lights and the fan coil unit after a predetermined time with no movement. Heating and cooling will be provided by multiple units on the roof automatically controlled so that only the number needed to meet the load at any given time are operating. Given that most barristers hope to spend their days in court rather than in chambers, the energy saved in not heating or cooling empty rooms will be enormous. It will save money and is a very green solution, and there is another benefit. The issue of after hours airconditioning, often a problem in some of our leased buildings, becomes irrelevant. The system can operate automatically all the time, so it will switch on and off as needed, for one room, for the whole building or anything in between.

By the end of the year the ground floor of Owen Dixon Chambers East will be transformed. It will literally look like new, and the plan envisaged at the time West was built of having a single entrance, lobby and reception on William Street for both Owen Dixon Chambers buildings will have been brought about.

Joan Rosanove Chambers Up and Running



Fifth floor entry and common area; subtle finishes, materials and details combined to present a visually exciting sense of arrival.

Joan Rosanove Chambers is now up and running, with four of the six floors fully occupied by tenants of BCL. The sixth floor is due for handover to BCL in April next year and BCL has an option to take over the first floor from 1 November 2002.
The chambers are due to be officially opened by His Excellency the Governor of Victoria Sir James Gobbo, on 14 April 2000. In naming the chambers after Joan Rosanove QC, BCL intended that the building should recognise a pioneering woman of the Victorian Bar and be an enduring recognition that men and women live and work within the buildings that house our college.

The position of Joan Rosanove, opposite Owen Dixon West, makes it easy for tenants to keep in contact with barristers in Owen Dixon and Isaacs. The chambers have been very well reviewed by tenants and visitors. Each floor comfortably accommodates about 12–15 chambers, and the position of the lifts creates an open common area with chambers around the perimeter of

Library within fifth floor common area further enhances the visual excitement.

two walls. Tenants who drive in are able to park in the car park contiguous to the rear of the building, on the same level as their chambers.

As was the case when Owen Dixon West was opened and more recently Douglas Menzies Chambers, BCL invited group applications for Joan Rosanove Chambers. The opening of new chambers enables BCL to meet demand for group organised chambers. Naturally, over time the composition of the original groups will change. BCL's Chambers Allocation Policy applies to Joan Rosanove Chambers as it does to all other BCL chambers.

Paul Anastassiou

Fourth floor entry and common area; vistas of clearly defined forms and spaces present an efficient and dynamic corporate image.

Full height bookcases provide texture and interest within fourth floor common area.

Chambers which may be fitted to suit the needs of individual barristers.

Small chambers making efficient use of space may also meet the needs of many barristers.

First Woman to Sign the Roll of Counsel in Victoria

Joan Rosanove was the first woman to sign the Roll of Counsel in Victoria. She did so on 10 September 1923. Her number on the Roll was 207.
She was, for whatever reason, unable to obtain chambers in Selbourne Chambers and she rented a backroom office in another (dilapidated) building in Chancery Lane.

For two years she persisted as a barrister but she received few briefs. In *Australian Women of Achievement*, Susanna DeVries says "Male solicitors flatly refused to send her work. They rationalised their prejudices by claiming clients did not want 'women to defend them'".

Joan Rosanove.

ON 23 April 1925 she decided to leave the Bar and at her request her name was removed from the Roll of Counsel. Accordingly to DeVries, when Phillip Jacobs, who was then on the point of departing to spend a year in England, heard that she was going to leave the Bar, he offered her the temporary use of his room in Selbourne "to get the fellows used to having a woman there". But a protest meeting was called and the directors of Selbourne Chambers told Phillip Jacobs that if he allowed Mrs Rosanove to use his room, they would have no option but to cancel his lease.

Joan left the Bar and set up practice as an "amalgam" from home.

Her practice as an amalgam blossomed. Initially her work appears to have been mainly in the criminal courts. She specialised in defending women and twice appeared for women accused of murder.

Gradually she developed a very significant divorce practice. At one stage she was handling one-eighth of the divorce list.

During Word War II Joan practised from rooms in Chancery House and her practice became even busier with the absence of many male barristers overseas. She resigned the Roll on 7 October 1949 (Roll No. 428) and ultimately moved into chambers in Selbourne.

It is not generally known that it was she who initiated the *habeas corpus* proceedings on behalf of Egon Kisch which resulted in the Commonwealth authorities administering the notorious dictation test in Gaelic: see *R. v. Carter; Ex parte Kisch* (1934) 52 CLR 221.

She applied for silk in 1954 which would have made her Australia's first ever female Queen's Counsel. Her application was unsuccessful. Sir Edmund Herring wrote: "I have very reluctantly come to the conclusion that it would be wrong for me to grant your application. I am very sorry to have to disappoint you but personal considerations cannot be allowed to weigh with me in the exercise of such an important function as the granting of silk."

An enquiry from the then Premier John Cain (Snr) as to why she had been passed over drew the reply that her practice was "too specialised".

It would seem that only prejudice prevented her from being the first woman silk in Australia. Roma Mitchell was appointed Australia's first female Queen's Counsel in 1962. At the time of her appointment Roma Mitchell was younger than Joan Rosanove and less senior in the law.

In those days there was a practice under which barristers applying for silk would send a note to anyone senior to them stating their intention to apply, the purpose being to ensure that the more senior barrister could also apply and thereby retain his (or her) relative seniority. Joan continued for many years to apply for silk whenever she received such a note.

In 1964 Sir Edmund Herring retired as Chief Justice and Sir Henry Winneke was appointed. On 16 November 1965 Joan Rosanove was appointed the first woman silk in Victoria.

Joan transferred to the non-practising list on 9 September 1969. On 8 December 1971 her name was removed from the Roll of Counsel at her own request, She died of "a fatal heart attack while talking animatedly to an admiring audience" on 8 April 1974.

Internet and E-mail: vicbar.com.au

Fast internet access, and e-mail using the address vicbar.com.au, the internet domain name owned by the Victorian Bar Incorporated, is now being offered in the Victorian Bar's Chambers.

AT the time of writing 168 barristers are either connected or about to be connected. The connection to the internet is by cable and is permanent — there are no modems or telephone lines and no time limits — and the speed is fast. E-mail is received almost immediately it is sent provided the computer is switched on and the e-mail software appropriately configured. E-mail address is [name]@vicbar.com.au.

Connections so far are in Owen Dixon Chambers West, Joan Rosanove Chambers and Latham Chambers. The Victorian Bar/Barristers' Chambers Limited Communications Committee has established a cost of $300 for connection in Owen Dixon Chambers West and Joan Rosanove Chambers, a monthly fee of $25 for internet access plus $25 per year for e-mail, the aim being cost recovery and no more. The connection to Latham Chambers is via the BCL PABX microwave link, the cost being higher because of the need for additional equipment.

The system is being expanded gradually so that any problems which occur are easier to find. There were some glitches with the first connections, but since then the work has gone smoothly. The system can be expanded to buildings with a microwave link to Owen Dixon Chambers East. Cabling will be installed in Owen Dixon Chambers East as part of the renovations and it may be possible to provide temporary cabling in the meantime, cost of course being a major consideration given the limited time it will be in use.

As each floor is connected there must be cabling to each room, cabling to the PABX room in the basement of Owen Dixon Chambers East and various pieces of equipment added. The initial fixing of the $300 required some estimation, but costs to date show that the estimation was about right.

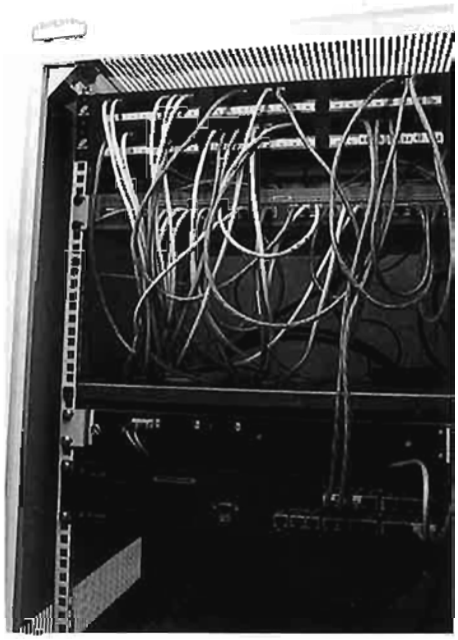
The connection is with Optus which hosts the domain name and provides the e-mail boxes. Optus has one customer — Barristers' Chambers Limited. The agreement is for a monthly fee (dependent upon the size or capacity of the connection) and 18 cents per megabyte downloaded. In addition, there was a once-only establishment fee of $6000.

A uniform fee per month is being charged because, given the normal pattern of barrister use, a system to bill for individual use is not worth the cost. Again, a degree of estimation had to be used, but use to date shows that $25 per month is about right. Given the standard of service the charge is modest and there is not the additional cost of a separate telephone line.

For the non-technically minded, all you need to know is that the service is fast, permanent and reliable. There is not the frustration of having to dial up via a modem and perhaps get an engaged signal and there are no time limits on connection.

For the technically minded, the following is a brief description (from a non-technical person). In ODCW and Joan Rosanove Chambers, each floor has a patch panel and hub. Each computer is connected to the hub by category 5 cable (100 mbps up to a distance of 100 metres). Each hub is then connected to a switch on the first floor in ODCW and the fifth floor in Joan Rosanove Chambers. Again, connection is by category 5 cable. These switches are then connected to another switch in the PABX room in the basement of Owen Dixon Chambers East. From Owen Dixon Chambers West connection is by category 5 cable and from Joan Rosanove Chambers by fibre optic cable in a conduit under Lonsdale Street.

Connection from Latham Chambers to Owen Dixon Chambers East is through ISDN lines and the PABX microwave link via a router in Latham Chambers and another, in the PABX room. The speed of this link is 128 kbps. The microwave link has sufficient capacity to enable the Latham Chambers connection to be duplicated as more connections are made.



Joan Rosanove Chambers switch and hub, providing speedy internet access.

The Owen Dixon Chambers East switch is then connected to a router which connects the signal to the Optus frame relay and fibre optic cable. The connection with Optus is 1064 kbps. The speed of the connection will be increased as traffic requires. In the PABX room is a server for management of the system. Security from outside interference is provided by a firewall in the router.

The system is a local area network so that with appropriate software and suitable security, groups of computers can be linked together. For instance, secretary and barrister or group of barristers can be linked, or a group of barristers can combine to use a single printer.

The system has been designed by Michael Feramez of Radcom Consultants Pty Ltd. He has been reporting to and advising the combined Victorian Bar/Barristers' Chambers Limited Communica-

tions Committee: Mark Derham QC, David Levin QC, Maurice Phipps QC, David Bremner, Executive Director of the Victorian Bar, and Geoff Bartlett, Secretary, Barristers' Chambers Limited. It has taken some time. The difficulty has been to devise at reasonable cost a system to be used by individuals which could be started with a small number and then expanded. Commercial providers have proposed complete systems for the Bar, but at prohibitive expense in both initial cost and operating fees. Michael Feramez and the committee are very pleased that what has been developed is a high quality internet service available at modest cost to the individual user.

. . . what has been developed is a high quality internet service available at modest cost to the individual user.

Barristers' Chambers Limited provides the service to the plug on the wall. Computers then need an ethernet card and configuration. The card costs about $80 and installation and configuration about $40 each if several are done at the same time. To maintain the integrity of the system (such as security of passwords), configuration can only be done by a technician approved for that purpose. Details are contained in the Victorian Bar/Barristers' Chambers Limited internet policy.

Currently the service is only available to those directly connected by cable. E-mail can be collected from anywhere using a separate e-mail address but you have to remember your password as well as your address. It is hoped that shortly BCL will have its own e-mail server equipped so that e-mail can be collected on any computer with modem connection to the telephone service. You will still have to remember your password unless it is your own computer with the password stored in it. Connection to the internet service from outside Chambers is under consideration by the committee.

The Victorian Bar web site is www.vicbar.com.au. Don't forget the .au, otherwise you will find yourself at the web site of the Victoria Bar Association, Victoria, BC, Canada and so will your e-mail.

Maurice Phipps QC

Article

The County Court: Time for Specialisation

By Tony Radford

THE PRECEDENTS

THE judicial system in Victoria has in the last decade seen welcome changes in mechanisms to increase the level of expertise available from the Bench in the judicial process.

Thus it has seen the establishment of the Court of Appeal in 1994, and 1999 has seen the establishment of separate divisions of the Supreme Court (Crime, Common Law, Commercial Law).

Appointments to the Supreme Court have, (with two exceptions), come from the ranks of either Senior Counsel or the County Court Bench.

ASPECTS AND IMPLICATIONS OF TRIALS IN THE COUNTY COURT

The author contends that it is time for the State to recognise and deal with important facts and aspects of the County Court system.

Firstly, that Court is the principal Court in the State for criminal trials: 70–80 per cent of Court time is in criminal matters and 70–80 per cent of judges sit in criminal matters.

Secondly, appeals against conviction and sentence at trial, from that Court are almost, automatic.

Thirdly, many criminal trials are re-trials following (successful) Court of Appeal decisions. Fourthly, the Court of Appeal is a constant "overseer" of all criminal trials. Particularly with the advent of the institution of the Court of Appeal, far more is now printed (including the Victorian Law Reports) about the evidence, procedure and the law in criminal matters, than was hitherto the case.

It is an understatement to say that what is now far better exposed — in print alone — is that the criminal law is highly complex.

It is trite to say that it is clearly a field for specialists.

Fifthly, the County Court has a civil jurisdiction in many areas, including areas where jurisdiction is unlimited.

Sixthly, in the civil area, there is an unacceptable delay in obtaining trial dates because of an unmet need for more courts than are available.

Seventhly, there are problems in a system that demands specialist skills, particularly in criminal law, a demand that is not always met in practice. This has repercussions for the County Court as a whole, given its role in criminal trials.

Eighthly, an "apprenticeship" in Chambers and Appeals is often the introduction to judicial experience for new appointees to that Court, before sitting in trials.

For some the "apprenticeship" may well be the first experience in criminal law. For a few, prior experience in trial matters is also a wholly new experience.

This is appalling and creates undue pressures for the profession apart from

that on the new appointee. It is not just the problem of finding the "patter" of the jurisdiction.

THE PROBLEM WILL NOT GO AWAY

The problems with the current system do not lie in recent events but in a failure to acknowledge the implications of the above aspects of the County Court system.

Criminal trial work, particularly, has become far more specialised and demanding.

A perusal of the Victorian Law Reports and unreported judgments, over the past five years alone, reveals the demanding roles placed upon the Bench and the profession (both on the DPP and defence counsel) in the proper conduct of criminal trials.

Failure by counsel to take points of significance or points sufficiently earlier in a trial may be undetected at trial.

Failure by the Bench to make rulings, with or without a submission by counsel, can give rise to later complications.

There is no other court hierarchy in the State where in one area — crime — an appeal against conviction or sentence is almost automatic.

However, this State continues, by default and without good reason, to suffer a system that does not attract or receive the most skilled practitioners.

Further, it does not, therefore, allow the most skilled practitioners, particularly in criminal law, to specialise in it. Skilled practitioners in civil law should specialise in that area on the Bench.

SYSTEMIC PROBLEMS IN CONTINUING THIS SYSTEM

The immense disadvantages that flow from the continuation of the problem are:

(a) Longer trials occur than should be necessary.
(b) Detectable errors in direction occur in the course of proceedings.
(c) Longer delays occur in Court of Appeal hearings — as more appeals are listed for hearing.
(d) Longer judgments are provided than should be needed if proper attention was paid to the adoption of best practice, in the appointment of the Bench.
(e) Re-trials occur with monotonous regularity.
(f) Greater uncertainty is caused for clients and their advisers and counsel.
(g) There are greater costs to the community — in longer trials, appeal hearings and re-trials — by providing courts and in the provision of legal practitioners both for the State and for Defence through Legal Aid and through private funding.

THE SOLUTION

1. I advocate the setting up of the County Court into a Criminal Division and a Civil Division. This should be formalised by legislation.
2. I recommend that the Bench of the Criminal Division comprise only those of prior knowledge and practice as counsel in the criminal trial area or those who, without experience as counsel, have established credibility as sound trial judges on the Bench.
3. I recommend also that appointments to be made to the Civil Division be of persons of recognised competence as trial lawyers or judges in this area.
4. In each case I recommend that the legislation provide that any appointment to a particular division, be made with the approval of the Chief Judge. This mechanism could cover both appointments from the Bar and the other division of the Court. Also, a *permanent* or a *temporary* transfer of a member from one division to another, should require (published) direction by the Chief Judge of that Court, so as to marry specialist skills, with efficiencies.
5. I recommend, further and separately, that the salary of the County Court Bench be increased to a level more commensurate with the greater levels of responsibility now exercised by members of the Court.
6. I recommend that this structure be set up now and not merely await the advent of a new building.

Addendum: This is a submission by an independent member of the Bar. It is being provoked by none and is not seen or authorized by the Bar Council.

Construction Law Courses

MELBOURNE University Faculty of Law has experienced an enthusiastic response to its recently introduced Graduate Program in Construction Law which commenced in February 2000. Enrolments have been in approximately equal numbers from legal and construction graduates. The courses are offered nationally and are being conducted on an intensive basis in Melbourne with initial enrolments including a number from New South Wales.

The program includes a Graduate Diploma in Construction Law and a Masters degree in Construction Law. Non examinable briefing subjects, Introduction to Law and Introduction to Construction apply to both courses. There are two common compulsory subjects, Construction Contracts and Construction Claims with additional subjects from a range of options, two for the Diploma Course and four for the Masters degree. Each subject is dealt with in an intensive five day series of tutorials with assessment by an examination or a dissertation.

The course subject advisers include, amongst many well known practitioners John Sharkey, Geoff Masel, Doug Jones and John Digby QC, along with senior members of the construction professions.

The Co-Directors of Studies for the program are Ian Bailey of the New South Wales and Victorian Bar and Paula Gerber formerly of Maddock Lonie & Chisholm in Melbourne who is a graduate of Kings College London.

Further information about these Courses may be obtained from the Graduate Studies Office, Faculty of Law, University of Melbourne, telephone (03) 9344 6190 and by email at graduate@law.unimelb.edu.au

GST: A Summary of its Impact on Barristers at the Victorian Bar

By David J L Bremner, Executive Director

This paper provides a summary of the impact of the GST on a barrister's practice. The paper outlines the preparations that a barrister should make for the GST and explains some of the terms with which barristers will need to become familiar.

As part of its tax reform package, the Federal Government will implement a goods and services tax (GST) commencing 1 July 2000. At the same time, a number of other taxes will be removed either on 1 July 2000 or progressively over future years.

Under the new tax system, enterprises will be required to pay GST at the rate of 10% of the value of any "taxable supply". As an offset to this payment, enterprises will be allowed to claim back the GST paid on business inputs. The theory of this indirect tax system is that the final cost of the tax is borne by the end consumer.

An important difference between GST and the major tax it replaces — the wholesale sales tax — is that GST is not automatically added to the price but is instead assumed to be included in the price. Thus when remitting GST to the Australian Taxation Office (ATO), 1/11th of the price is paid as GST irrespective of whether or not the enterprise has been able to increase its prices sufficiently to offset the net cost to it of the new tax system.

The GST will impact on barristers and the key to dealing with the requirements of the new tax system is to be thoroughly prepared.

Being prepared does not mean waiting until 1 June 2000 and then thinking about the GST — if you do this, it will cost you! As an example, GST applies to contracts which commence prior to 1 July 2000 but which extend beyond that date e.g. annual subscriptions to publications. Barristers may thus already be paying GST on such contracts.

An essential element in preparing for the GST is to establish a recording system which enables the tracking of the GST included in purchases and the filing of the special tax invoices that must be provided by enterprises who charge GST and which are required in order to claim a refund of the GST paid on business inputs. A system as simple as writing the amount of GST paid in red ink on the cheque butt and filing a copy of the tax invoice in a separate folder will assist in providing the information needed when a refund of the GST (the input tax credit) is claimed at the end of the September 2000 quarter.

One matter which the Bar is in the process of researching is the manner in which GST paid or received during 1999/2000 should be treated in tax returns for 1999/2000. We have been told that in October 1999 the Federal Government intended to legislate to exclude GST received or paid in 1999/2000 from tax returns for 1999/2000. However, as recently as 1 March 2000 the ATO telephone helpline has not been able to confirm how GST should be treated in 1999/2000 tax returns. A formal approach has been made to the ATO for clarification and the response will be advised through *In Brief*.

REGISTRATION

An enterprise, which includes a barrister's practice, cannot charge GST to clients or claim a refund of GST paid on business inputs unless it registers for GST. If an enterprise's current or projected annual turnover exceeds $50,000, registration is required. If an enterprise's turnover is less than $50,000, it may register in order to claim a refund of the GST paid on business inputs.

Special provisions apply to the registration of service companies including provisions to group entities so that transactions within the group can be ignored for GST purposes. Barristers who may be affected by these provisions should obtain specific advice from their tax advisors.

The registration process involves two steps — obtain an Australian Business Number (ABN) and register for GST with the ATO. Registration must be completed by 31 May 2000 or, following that date, within twenty one days of the obligation to register arising. If an enterprise does not register and at some time in the future the enterprise's income exceeds the turnover threshold, the Tax Commissioner may determine the date from which the enterprise should have been registered. The enterprise would then be liable for GST on all taxable supplies made from that date even though the enterprise may not have collected GST from the clients to whom the supplies were made

Registrants will receive a voucher entitling them to a refund of $200 on the cost of certain goods and services relating to the implementation of the GST.

The ATO will send a registration kit to each person or business that has submitted a business tax return in the past. The Bar Council Administration office has obtained a supply of registration kits for barristers who have recently joined the Bar and therefore may not have submitted a business tax return last year. The kits have been distributed through the Clerks.

When registering, a barrister must decide the basis on which the GST will be accounted for. If the barrister's turnover is less that $1 million, either receipts (cash) or accrual accounting may be used. If turnover exceeds $1 million, accrual accounting must be used unless the Tax Commissioner's permission is obtained to use receipts accounting. The Victorian Bar Council has obtained the Commissioner's permission for its members to use the receipts method irrespective of the level of their turnover provided they currently use receipts accounting for taxation purposes. The full text of the Commissioner's decision was published in *In Brief* on 8 February 2000 and is also available from the Bar Council Administration office.

A barrister registering for GST must also select a reporting period for the purposes of remitting the GST to the ATO. Barristers will generally account for GST on a quarterly basis with the first period ending on 30 September 2000. The return (Business Activity Statement) must be lodged within twenty one days of the end of the period.

TERMS

Taxable Supplies

A registered enterprise must pay GST on all taxable supplies it makes. Except to the extent that a supply is "GST-free" or "Input Taxed", for a barrister, a taxable supply will be made if the barrister is registered or is required to be registered for GST and provides on or after 1 July 2000 a professional service for a fee. Where a supply includes elements of taxable supply and GST-free or input taxed supply, then the value of the taxable supply is the proportion that the taxable supply is of the total supply.

In order to avoid having to pay the GST out of his/her own pocket, a barrister should allow for GST in the fee rendered on the fee slip provided that the fee agreement with the client (which may be the solicitor or a lay client) allows for the charging of the higher fee.

GST-FREE SUPPLIES

If a supply is GST-free, no GST is included in the price of the supply and no GST is paid by the supplier on that supply. If the supplier is a registered enterprise, it can still claim input tax credits on the business inputs it purchases. Examples of GST-free supplies are exports, hospital and medical care, and domestic air travel by non-residents.

INPUT TAXED SUPPLIES

If a supply is input taxed, the supplier does not include GST in the price and the supplier is not entitled to input tax credits on business inputs. Examples of input taxed supplies are financial supplies such as fees for using or obtaining a cheque account, and residential rents.

Barristers may therefore not be able to claim input tax credits on all business inputs because many financial services consumed by barristers will be input taxed. Examples of input taxed services are fees for using or obtaining a cheque account, loan or advance, superannuation contributions, life insurance premiums and credit charges under a hire purchase agreement if the credit charge is separately identified.

Input tax credits will be available on certain financial services e.g. lease finance, professional indemnity insurance, and income and general insurance.

INPUT TAX CREDITS

Provided a supply is not GST-free or input taxed, an enterprise can claim a refund from the ATO of the GST it pays when purchasing a business input (a creditable acquisition). The refund is called an input tax credit and is obtained by deducting the input tax credit from the GST payable by the enterprise on the taxable supplies it makes.

Business inputs include the purchase of business equipment. As a result, a registered enterprise will be able to include in its GST return a claim for the refund of the GST included in the cost of the business equipment it purchases as well as the GST included in the cost of other business inputs.

TAX INVOICES

To be entitled to claim an input tax credit for a creditable acquisition, an enterprise registered for GST must possess a tax invoice at the time the amount is claimed in the Business Activity Statement prepared at the end of the GST period. However, if the value of the taxable supply is less than $50 (i.e. the tax-exclusive price), a tax invoice is not needed although some form of documentation should be obtained in order to support the claim for the input tax credit. Barristers will therefore require tax invoices or other documentation for their business purchases, and their GST-registered clients will require tax invoices from the barrister.

The content of a tax invoice varies depending on the value of the purchase and whether any of the items on the invoice are GST-free or input taxed. According to a draft ruling issued by the ATO, in order to cover all situations, a tax invoice must contain the following elements:

- the Australian Business Number (ABN) and name of the issuing enterprise;
- the words "tax invoice" stated prominently;
- the date of issue;
- the name and the address or ABN of the recipient;
- a brief description of each thing supplied including the quantity or the extent of the services supplied including an indication of which are taxable
- the amount, excluding GST, payable for the supply;
- the amount of GST payable;

At the Victorian Bar, fee invoices are issued by the Barrister's Clerk. The Clerks will be reviewing their accounting systems in order to produce suitable tax invoices.

Special provisions apply to taxable supplies that are made for a period or on a progressive basis for consideration paid on a progressive or periodic basis. An example is a lease agreement for a piece of equipment which shows a price of $1000 per month. A single document (e.g. the lease agreement) can be the tax invoice for each monthly payment provided it contains the elements required in a tax invoice. If the periodic payment changes in the future (e.g. because the amount has been adjusted for the Consumer Price Index), a new tax invoice showing the adjusted payment must be obtained in order to justify input tax credits for the new payments.

A tax invoice must be issued by the supplier within 28 days of a request by the recipient of the supply.

A barrister will need to be certain as to who is to pay the barrister's fee in order that the tax invoice is made out to the correct recipient and shows the rel-

evant invoicing details for the recipient. If the client is responsible for the barrister's fee, the barrister's tax invoice must show the client's details even though the invoice may be sent to the briefing solicitor and be paid from funds lodged in the solicitor's trust account by the client. If the briefing solicitor is responsible for the barrister's fee, the barrister's tax invoice should be made out to the solicitor.

INCREASING FEES FOR THE GST

An important issue is the extent to which a barrister should adjust his/her fees to allow for the net cost of the new tax system.

The Federal Government has given extensive powers to the Australian Competition and Consumer Commission (ACCC) to monitor price movements in the first two years of the new tax system in order to eliminate price exploitation. An enterprise that engages in price exploitation can be fined up to $10 million if it is a corporation or $500,000 if it is an individual. The government has taken this action to ensure that only the net cost of the new tax regime flows through to consumers. Barristers and other enterprises must therefore ensure that any adjustments in prices reflect the net value of:

- the additional GST to be paid on taxable supplies;
- the savings resulting from lower business input costs due to the reduction or elimination of various taxes and government charges; and
- the additional cost of complying with the new tax system.

The ACCC's website (www.accc.gov.au) provides guidance on price exploitation issues. The ACCC's concern is with changes in prices, not the actual level of the price. The ACCC has issued guidelines on price exploitation and a key element of those guidelines is the net dollar margin test. In summary, an enterprise should adjust the costs of its business inputs to reflect cost savings from the new tax system and then increase its prices for the GST by only the amount required to ensure that the dollar profit margin is the same as before.

The Bar has engaged a major accounting firm to provide advice as to how barristers should calculate the extent to which they can adjust fees to recover the net cost of the new tax system. This advice should be available in late March 2000.

The GST a barrister includes in a professional fee can be claimed as an input tax credit by the client if the client is an enterprise registered for GST and if the barrister's fee is a business input to the enterprise. Clients who are private individuals, such as in criminal, family law or personal injury cases will not be able to claim the GST as an input tax credit.

The Bar Council will be seeking advice from fee-setting bodies such as the Courts and Legal Aid Victoria as to the adjustments they will be making to their fees to allow for the GST. The Bar will be advised of the outcome of these discussions.

GST TREATMENT OF DISBURSEMENTS

Barristers sometimes incur expenses which clients agree to reimburse. The expense may be a creditable acquisition (e.g. a domestic airfare) or GST-free (e.g. an international airfare). In the case of creditable acquisitions, the barrister will claim the input tax credit on the acquisition and then charge the same GST-inclusive cost to the client. The barrister will thus obtain an input tax credit on the purchase and will pay the GST received from the client to the ATO.

In the case of a GST-free supply, such as an international airfare, it is anticipated that the recovery of the airfare by the barrister will be viewed as being part of the legal service provided to the client and therefore the barrister should add 10% GST to the airfare in order to recover the GST from the client. The GST recovered on the airfare would later be paid to the ATO by the barrister.

The treatment of disbursements is being clarified and will be the subject of further comment.

GST RETURNS (BUSINESS ACTIVITY STATEMENTS)

The GST return will be submitted on a new form known as the "Business Activity Statement" (BAS). The BAS must be lodged with the ATO within twenty-one days of the end of each tax period. Barristers will normally have a quarterly tax period although an election can be made to account for GST on a monthly basis.

The BAS will show the total sales/receipts of the enterprise and the GST payable on the taxable supplies, the business-related purchases for the period and the input tax credits claimed, and any adjustments to prior period returns. A BAS must be lodged for each tax period even if it is a nil return, i.e. there is no GST to pay and no input tax credits to be claimed. In order to be accurate, the BAS must be prepared by someone who is aware of all receipts and expenditure relating to the enterprises's operations. Barristers should now decide on who will prepare their returns in order that the necessary recording and filing arrangements can be put in place prior to 1 July 2000.

Most barristers will account for GST on a receipts (cash) basis. It will therefore be necessary to examine each receipt and determine the amount that relates to services rendered on or after 1 July 2000 and on which GST must be paid. If a payment is received on or after 1 July 2000 for a service performed prior to that date, no GST is payable by the barrister on that receipt. If a payment is received on or after 1 July 2000 which is paying a mixture of pre and post 1 July services, the amount received for the post 1 July services must be calculated and GST paid on it.

RECEIPT OR ACCRUAL ACCOUNTING FOR GST

The Bar Council has received permission from the ATO for its members to account for GST on a receipts (cash) basis if that is the basis the barrister now uses for accounting for income tax. The full text of the ATO's letter can be obtained from the Bar Council office.

TRANSITIONAL ARRANGEMENTS

GST can only be charged on supplies made on or after 1 July 2000. If a supply is made over a period of time which commences prior to 1 July 2000 and finishes on or after that date, GST can only be charged on the value of the supply relating to the period after 30 June. As an example, if a barrister provides a service which commences prior to 1 July 2000 and finishes on or after that date, the barrister has two options:

- Separately account for and price the pre 1 July service based on file notes etc., or
- Apportion the total cost of the service over the full period of the service.

In both cases, GST is only charged on that value of the service which relates to the period after 30 June. The amounts charged in relation to the two periods (i.e. pre 1 July and post 30 June) must be separately identified on the tax invoice and the GST relating to the post 30 June service must be clearly identified.

It is anticipated that Clerks will make the necessary arrangements with their lists for the billing of pre and post GST services.

SHARED SERVICES

Some barristers have formed groups to share the cost of certain business inputs, e.g. they share the cost of a secretary, a photocopier, a fax machine or a library. Normally, one barrister accepts responsibility for co-ordinating the service and makes the necessary payments from a pool of money to which each member of the group contributes. The co-ordinating barrister effectively acts as the agent for each barrister in the group. In the case of equipment such as a photocopier, barristers may contribute to the pool of money on a cost per copy basis.

It is likely that so long as the "agent" barrister holds an appropriate tax invoice for the business input, each member of the group is entitled to claim that member's proportion of any input tax credit resulting from the purchase. It is also likely that the periodic contributions to the pool of operating funds will not be accounted for as a receipt to the agent on which the agent must pay GST. As no tax invoice is issued, the contributors would not get an input tax credit for their contributions.

Complications may occur if the group sells a portion of the service to barristers outside the group, e.g. casual users of a photocopier are charged for any copies they take. This may result in the need to issue tax invoices to the casual users and to declare the provision of the supply in a BAS. A leading accounting firm has been asked to give advice on the GST treatment of shared services and members of the Bar will be advised of the outcome in the near future.

FURTHER INFORMATION

As mentioned above, a leading accounting firm has been asked to provide advice on the following issues:

- the manner in which the adjustment to barristers' fees should be calculated in order to provide for the 10% GST and the reduction in the cost of business inputs because of the withdrawal of wholesale sales tax and other indirect taxes;
- the GST implications for barristers who share business input services;
- the manner in which GST should be accounted for in disbursements charged by barristers;
- the implications for barristers of the PAYG tax system.

Once the advice has been finalised, further information will be distributed to the Bar.

The Clerks are each reviewing their operations in order to implement the appropriate procedures and systems to enable them to provide their clerking services in a manner appropriate to the new tax regime.

OTHER TAX CHANGES — THE PAY-AS-YOU-GO (PAYG) TAX SYSTEM

The PAYG tax system will replace the provisional tax system as from 1 July 2000 and will also consolidate arrangements for withholding tax and group tax. Under the PAYG system, barristers will pay quarterly income tax instalments based on their business income for that quarter with the payments due within twenty one days after the end of the quarter. The first quarter ends 30 September 2000.

The income tax instalment to be paid will be calculated by multiplying the actual business income for the period by the instalment rate. The business income will be the normal gross taxable income

excluding capital gains. The instalment rate will be calculated by the ATO based on the taxpayer's latest assessed income tax return. The instalment rate is therefore equivalent to what the tax paid on the last assessed return was as a percentage of the taxable business income on that return. In certain circumstances, the taxpayer can request a variation in the instalment rate but a penalty can apply if the variation results in an underpayment of tax.

A feature of the PAYG tax system is that the amount of tax payable will change each quarter in line with variations in the level of business income. Due to the fact that barristers account for tax on a receipts (cash) basis, the amount of tax to be paid will thus vary with the level of receipts for the quarter thus enabling easier cashflow management.

BAR COUNCIL ACTIVITIES

The Bar Council has taken the following initiatives in relation to GST:

- In March 1999, the Bar Council conducted a seminar for members of the Bar at which the implications of the new tax system were explained.
- The Executive Director of the Bar is representing the Bar Council in working with the Clerks as they prepare for the GST.
- In conjunction with other members of the Australian Bar Association, the Victorian Bar has made a joint submission to the GST Start-up Office requesting funding for the distribution of specific information for barristers on the effects on their practices of the GST. The submission has been accepted and the details of the funding are presently being finalised. It is anticipated that the information booklet will be distributed in April 2000.
- The Bar will request the various government agencies who brief barristers to adjust their fees for the net cost to barristers of the new tax system.
- The Bar Council has obtained the approval of the Commissioner of Taxation for its members to account for GST on a receipts basis if that is the basis they currently use for accounting for income tax.
- The Bar Council will continue to keep barristers up-to-date on GST issues.

WHAT SHOULD YOU BE DOING NOW?

Barristers should be making the following preparations for the new tax system:

- Develop a system of recording details of GST now being paid in order that an input tax credit can be claimed later.
- Register to pay GST and to obtain an Australian Business Number. Registration must be made by 31 May 2000 but, due to processing delays, should not be left until the last moment.
- Determine who is best placed to prepare the quarterly Business Activity Statement. This person is most likely to be the barrister or the barrister's current accounting/taxation advisor.
- Consider whether current fee agreements contain provisions which enable the barrister to pass on to clients the net cost of the GST should the provision of the service extend beyond 30 June 2000.
- Monitor the Bar's publications for further advice.
- Monitor information coming from the Clerks as to the arrangements they will be making for the GST.

DISCLAIMER

The information contained in this article is of a general nature and is not meant to constitute professional advice. Barristers requiring professional advice should contact their usual advisors.

Why Legal Aid Needs More Money

Proper treatment, not just Band Aids are needed to rescue Legal Aid Victoria

The following is a submission sent to the Attorney-General by Tony Radford

SYNOPSIS

The Problem

UNREPRESENTED persons and under-funded litigants, particularly those appearing before trial courts in the State continue to create problems for the judicial system in Victoria.

A Financial Answer

Ongoing problems in the scope of the funding available in State Legal Aid matters may be attacked effectively by the adoption of a new statutory scheme funded by new sources of revenue. Funds do exist for this purpose.

Benefits

1. Reduction of numbers of adjournments seeking clarification of funding entitlements.
2. Reduction of uncertainty over entitlements.
3. Reduction of burdens on courts, post *Dietrich* including the judge being judge and advocate, fewer appeals, appeal points and Crimes Act s.360A applications founded on *Dietrich* arguments.
4. Savings of time and costs at trial and on appeal.
5. Better quality of legal outcomes.
6. Greater numbers of persons to be assisted.

A SCHEME FOR MORE STATE LEGAL AID

The scheme comprises several elements, which are as follows:

1. *A levy*
   A levy should be imposed on the Victorian public in order to raise funds specifically for legal aid for State matters, principally to be used for members of the Victorian public.
   If large enough it might be in lieu of all other State funding for Legal Aid.
2. *The mechanism*
   Stamps Act or Motor Vehicle Act or Gambling Act or Franchise Revenue
   The proposal is that the levy be levied in fact either:
   (a) as an "add-on" — analogous to Commonwealth Medicare payments of the past (and shortly to be reintroduced to certain persons) — to charges or fees made under one or other of the above legislative areas; or
   (b) as an appropriation (merely) on the funds collected under one Act or the other.

   Revenue derived from gambling acts, stamp duty and motor vehicle taxes contribute some of the highest items of revenue to the State budget sector. Revenue now in grants since the High Court ruled the State franchise fees invalid is also significant.
   It is the view of the author that legislation could be drawn directed to any one of those areas to achieve an efficient and effective levy system.
   The preferences would lie in legislation affecting the gambling area, Stamps Act, motor vehicle taxes and franchise grant revenue, in that order.
   Changes would have to be made consequentially to the Legal Aid Act.
3. *An annual charge*
   An appropriate (monetary) figure could be allocated annually.
   This could be a figure which is a percentage of the funds budgeted to be derived from revenue received in one or other of the areas referred to.
   In all cases in recent years returns have been higher than budgeted.
   It is recommended that the legislation *expressly* incorporate a percentage of the revenue in one or other of the areas, so that one is not stuck with a particular figure in Year X and have that total figure (merely) repeated in each of the years thereafter.
4. *Name*
   I propose that the funds that come from the new source, be called "LEGAL AID FUND" or "LEGICARE".
5. *An evaluation of the sources*
   A snapshot of aspects of State finances
   In the past three to four years State taxes have contributed around 50 per cent of total revenue.
   The last total estimated receipts (grants and revenue) for 1998/99 are $20,571 million, state tax receipts $8676 million.
   The budgeted figures for 1999/2000 are $19,489 million cf. $8691 million respectively. The years 1996/97, 1997/98 and 1998/99 showing comparative figures (total revenue/taxation revenue) were respectively, $16,155 million cf. $8256 million; $16,254 million cf. $8643 million and $19,655 million cf. $8935 million.

Heads of Main Revenue Items ($ in '000s)

	1996/1997	*1997/1998*	*1998/1999*	*1999/2000*
Gambling	1049	1237	1338	1423
Stamp duty	1015	1028	1326	1254
Motor vehicle legislation	713	822	870	883
Safety net revenue (formerly franchise fees until end 1997/8)	1470	1242	1306	1344
Payroll tax	2123	2189	2192	2231
Land tax	407	427	380	387
Taxes on insurance	334	342	352	365
Regulatory fees and fines	175	179	250	246

Revenue derived from gambling, stamp duty and motor vehicle legislation and some other areas, as reflected in the budgets of the past three years and of the current year, can be briefly stated (see table).

Thus gambling revenues are predicted to yield $1423 million, stamp duty $1254 million, motor vehicle registration $883 million and Commonwealth franchise grants ("safety net revenue") $1344 million in the 1999/2000 tax year.

With the exception of payroll tax some of the other heads of revenue although substantial, are not nearly as significant.

Payroll tax is the most significant contributor to taxation revenue.

However, it is of a singular nature as it is levied only on employers and would be a lower priority by most Governments, now, as a target for either "add-on" charges or as the ultimate source of funds, in any event.

It is expected that gambling revenue is likely to continue its upward surge in the State and not merely because the number of EGMs approaches the current ceiling of 27,000 machines, but because of factors referred to in the "Financial Report for the State of Victoria 1998–99" released by the Bracks government in November 1999. This report claims that the increasing revenue of EGMs was principally due to more intensive use of machines, the introduction of bill-accepting machines, the retirement of less popular machines and the extension of operating hours by a number of a venues. The trend is expected to continue.

Revenue from motor vehicle taxes increases have not been as significant as for gambling taxes. An increase as an add-on to motor charges might be thought to be more likely to upset the motoring public where in addition there is now a fixed charge ($140) for registration for vehicles under three tonnes.

6. *Preferred legislation*
Amending legislation to the Gambling Act or the Stamps Act, or new legislation to draw on safety net revenues to provide for the charge to be out of the revenue collected, is likely to be regarded as more politically acceptable, than any other mechanism.

The driving *raison d'être* for the choice of revenue resource is the need to provide a sufficient fund, beyond the size of current State funding, to bring about a greater spread of financial assistance to those deserving of legal aid assistance. That in turn could significantly bring about the benefits referred to in the author's synopsis.

7. *The financial gain for Legal Aid particularly in allocations to private practitioners*
The actual revenue which could be raised can be illustrated by the figures below.

These may be contrasted with recent payments by the LAC and the Board e.g. 1995/96 $51.8 million; 1996/97 $44.8 million; 1997/98 $32.6 million.

(i) Levy as imposed on matters charged under the Gambling Act legislation.
Total revenue estimated 1999/2000 — $1427 million
Levy of 10% = $142.70 million

(ii) Levy as imposed on matters charged under the Stamps Act 1958 (As Amended) legislation.
Total revenue estimated 1999/2000 — $1254 million.
Levy of 10% = $125.4 million

(iii) Levy as imposed on road transport registration and third party charges and fees.
Total revenue motor vehicle taxes (including stamp duty) estimated 1999/2000 — $884 million.
Levy of 10% = $88.4 million

(iv) Levy as imposed as an add-on in the payroll tax legislation area.
Total revenue estimated 1999/2000 — $2.231 million.
Levy of 10% = $223 million

(v) Expenditure to "case related" professional payments by the LAC and the Board from 1995/1996 onwards has been as follows:
1995/1996 — $51.8 million
1996/1997 — $44.5 million
1997/1998 — $32.6 million
1998/1999 — N/A

Comments:

(a) If a levy was imposed (and revenue collected) in the above ways, they would achieve effective use of revenue from taxpayers and as a small percentage only of the total consolidated receipts.

According to the current financial documents (referred to above) the total revenue collected for 1998/99 was $26,405 million.

Ten per cent of gambling revenues would constitute only 0.53 per cent of total consolidated receipts.

Ten per cent levy in the stamps duty area yield is only 0.47 per cent of total consolidated receipts.

The 10 per cent levy from total revenue from motor vehicle legislation tax, is 0.33 per cent of total consolidated receipts.

Ten per cent of total payroll revenue would constitute 0.84 per cent of total consolidated receipts.

(b) Other facts, mainly relating to the nature of VLA funds and the nature of applications granted are provided in the notes annexed to the submission.

8. *The holding of funds*
I propose that the legislative scheme provide that the whole of the monies annually be diverted, from the time of the imposition and collection of the levy, to an independent Legal Aid Board.

It is considered that the current administrative structure of Victoria Legal Aid is adequate for this purpose.

9. *The reasons for these new proposals*
The reasons for the adoption of the proposed scheme are in short:

- Reduction of numbers of adjournments seeking clarification of funding entitlements.
- Reduction of uncertainty over legal aid entitlements.
- Reduction of burdens on Courts, post *Dietrich* (including the judge being judge and advocate, fewer appeals, appeal points and Crimes Act s.360A applications founded on *Dietrich* arguments).
- Savings of time and costs at trial and on appeal, and fewer trials.
- Potential to avoid longer hearings where there is no legal representation.
- Greater certainty in the short, medium and longer term.
- Increase in numbers of persons granted assistance.
- Potential to end the inevitable federal feuding over responsibility for legal aid funding in respect of matters arising under Commonwealth laws especially of family law matters.

10. *Other benefits — economic and political*

These include:

- Avoidence of any allegation of political bias.
- Attaining an appropriate level of acceptance in the community.
- Maintaining employment at current levels, both within the VLA and in areas of practice by independent practitioners (including representation and advice work).
- According to economic theory, $1 spent on staff, rental, equipment, library etc. returns $5.
- Going hand in hand with reforms in trial processes including in the civil area greater acceptance and adoption of mediation procedures.

11. *Other reforms of the legal system*

It is necessary for legal reform and for improvements and efficiencies to occur across the legal system.

There are many current initiatives, in these areas, some of the most significant of which have been instituted by the courts themselves.

The court system continues to remain attractive for resolution of legal disputes for many thousands of people. So it should be.

It does reflect a great deal of confidence in the underlying legal system.

This is not to say that improvements cannot occur.

Mediation is appropriate in the civil area whilst "plea bargaining" is accepted in the criminal area.

12. *Conclusion*

The early intervention of properly qualified and funded legal representatives in the judicial process (including VLA staff) generally, can often achieve a speedier and more efficient result: this would bring greater satisfaction to clients also. Problems arising from *Dietrich* also must be overcome. Current funding arrangements are not inclusive. The system remains bedevilled by the problems outlined in the synopsis. The adoption of the current scheme could lead to the better running of the State.

ADDENDUM

1. The author has no pecuniary interest in VLA work.
2. The views, the text and the inspiration for the article are the author's own. The text was vetted by none.

It is a copy of a letter made by him as Counsel at the Victorian Bar, to the Treasurer of Victoria, The Honourable Steve Bracks, in late November 1999.

ANNEXURE TO SUBMISSION

Notes:

1. The figures concerning State finances are drawn from the following papers:
   - 1999/2000 Victorian Government Budget Papers Nos 1, 2 and 3 and Budget Overview.
   - 1998/1999 Victorian Government Budget Papers Nos 1, 2 and 3, Budget Overview, "A Guide to the Budget Papers", "Improving Budget Information", "Managing the Full Cost of Government Service Provision", "Introducing Conventional Financial Statements and Financial Report for the State of Victoria" presented to the Parliament of Victoria, 10 November 1999 by the Honourable Steve Bracks MLA, Treasurer and the Honourable J Brumby MA, Minister for Finance, Assistant Treasurer and ordered to be printed November 1999.
   - 1997/1998 Victorian Government Budget Papers Nos 1, 2 and 3.
   - 1996/1997 Victorian Government Budget Papers Nos 1, 2 and 3.
2. The facts and figures concerning Victoria Legal Aid are drawn from the VLA Annual Reports 1995/1996, 1996/1997 and 1997/1998.

   At the time of writing the 1998/1999 Annual Report had not been published.
3. The following facts and figures are relevant to the overall position of legal aid in Victoria:

   (i) With the (notified) termination by the Commonwealth Attorney-General of Commonwealth/State legal aid agreements, on 30 June 1997, Commonwealth grants to the VLA are solely to be expended on Commonwealth matters post 1 July 1997.

   As from 1 July 1998 VLA placed (unexpected) surpluses of Commonwealth aid previously granted to it, into reserves for accrued matters concerning Commonwealth aid. (This has been done with the consent of the Commonwealth; such aid and any further Commonwealth legal aid funds, cannot be spent on State matters.

   (ii) Roughly two-thirds of all legal aid work is handled by private practitioners, the balance in house.

   A summary of cases handled from 1993/1994 (save for the most recent year pending publication of an Annual Report) is thus:

	1993/ 1994	*1994/ 1995*	*1995/ 1996*	*1996/ 1997*	*1997/ 1998*	*1998/ 1999*
Private Practitioners	24,141	28,146	27,815	23,414	21,328	N/A
Direct Assistance	9,424	10,948	10,466	8,865	10,486	N/A
Total	33,665	39,094	38,361	32,279	31,814	N/A

   (iii) A summary of picture of VLA total revenue, cf. total expenditure 1993/1994 to 1997/1998 is thus:

Dollars in '000's	*1993/ 1994*	*1994/ 1995*	*1995/ 1996*	*1996/ 1997*	*1997/ 1998*	*1998/ 1999*
Revenue	86,539	79,337	82,798	79,096	70,729	N/A
Expenditure	70,976	80,041	84,631	75,800	66,727	N/A
Surplus/Deficit	9,663	(704)	(1,833)	3,296	4,002	N/A

   (iv) Gross expenditure by VLA on legal aid on the five years to the end of 1995/1996 was $181M.

   (v) The incidence of the use of Crimes Act (Vic) s.360A to seek orders to compel VLA to offer legal assistance has been, in 1997/98, 37 applications, 23 orders. It is regarded as a useful safety valve. It is not a panacea, however.

   (vi) In 1997–98 a little over 70% of legally assisted clients were on social service benefits. The balance of assisted clients derived no income at all.

   (vii) In the five years to March 1996, 70% of VLA case-related professional payments were spent on the 20% most expensive cases. In 1997/1998 the figure was 61% spent on 20% of the most expensive cases.

A POSTSCRIPT

A reply to this submission (concerning State sources of funding) was received in early February from the State Attorney-General.

Coincidentally it arrived on the eve of the announcement from Canberra of the grant by the Commonwealth to the States of $63 M for legal aid funding to the States.

The Attorney's reply firstly drew attention to the need for the restoration of the Commonwealth commitment to the provision of legal aid on a co-operative basis as a matter of the highest priority. The reply suggested that the proposal to impose a levy did not address the more pressing issue of the current level of Commonwealth legal aid funding.

The Attorney put secondly that the levy suggested on stamp duty and gambling would be selective and may not be "equitable, progressive and conducive to economic growth."

The writer has forwarded a lengthy reply to the Attorney drawing attention to the fact that the mechanism of the levy was but one device suggested, that sources do exist particularly in those derived from electronic gaming machines (EGMs) (where State budgets have been greatly exceeded) (further references are provided) further, that employment exists also in the legal sector both private and public, further that the Government itself does not see increases in WorkCover premiums as a burden upon the economy and (thus) that the writer's thesis stands.

Identifying the Truly Good and Making It Truly Common

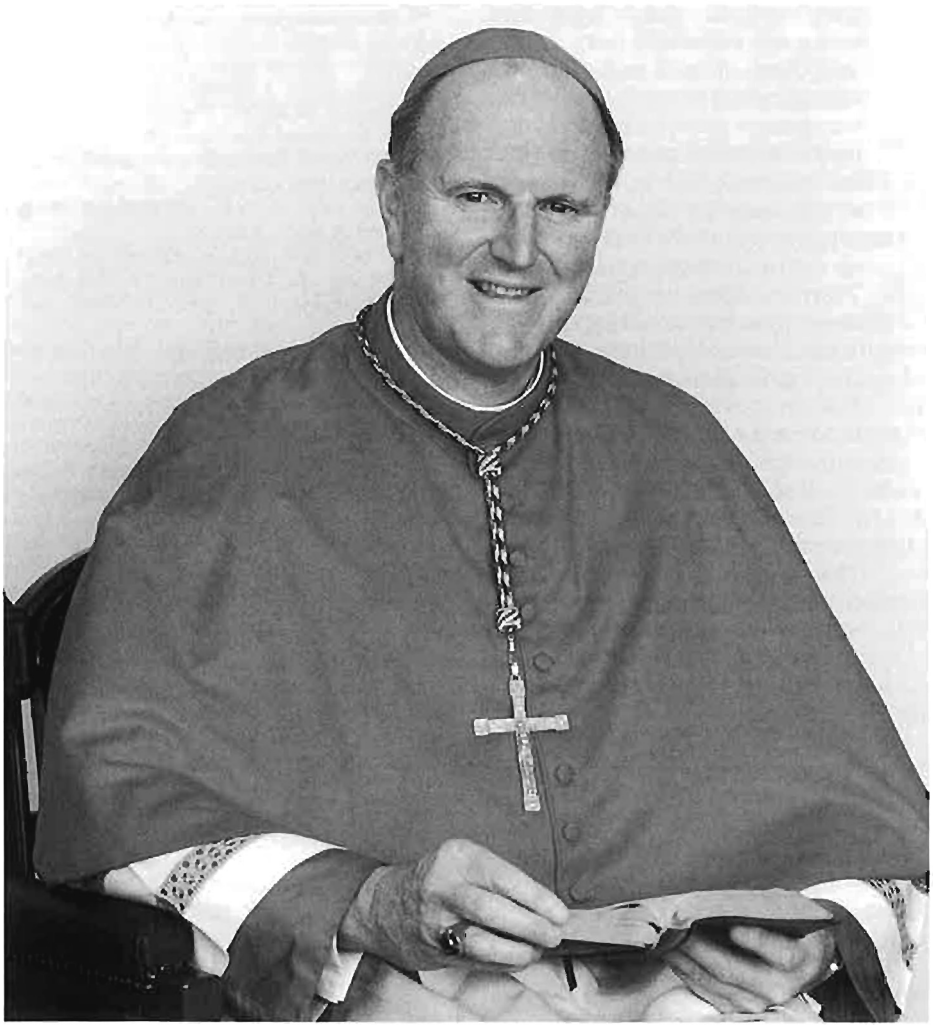
Homily Preached by Bishop Denis Hart, Annual Red Mass, St Patrick's Cathedral, Melbourne 31 January 2000

Dear Friends,

AS we offer Mass to seek the guidance of the Holy Spirit upon the practice of the law, let us reflect on the service which we give.

It's a truism, of course, that law exists to serve the common good. What's not so clear is what is meant by "the common good". Christians, at their best, are great defenders of human rights, basic liberties and equality — ideas the Christian Church gave to the world — but we have to ensure the values we uphold are the right ones and not just a reflection of our own wishes or current fads and fashions. So how do we work out complex notions like the common good? At a time when lawyers are under increasing pressure to commoditise their services — putting stress on the concept of legal service as has been previously understood — how do we go about identifying what is truly good for our community? The answer was provided by St Thomas Aquinas— who invented our concept of the common good — and has recently been confirmed by Pope John Paul: by faith and by reason.

The Pope chose to celebrate the 20th anniversary of his pontificate with an encyclical on faith and reason. Having tackled in the past such subjects as communism and capitalism, employment and workers' rights, the defence of human life and third world poverty, the Pope now moves to the most important topic of all — appealing to Catholics to use their intelligence in matters of faith and morality. Sadly, young people are often advised that morality and faith are simply a matter of having good feelings, feeling "at one" with oneself, doing what comes naturally and so on. In the face of this anti-intellectualism the Pope replies that nothing except hard, cold truth can satisfy something as noble as the human spirit: a big heart and good will are not enough. Morality is not acting out of kind feelings, for these can mislead: there is a solemn duty on professionals serving the community to train themselves in mature reflection on public affairs and wariness of easy and popular options.



Bishop Denis Hart

Of course, the Pope does not counsel that we should use intelligence as an alternative to faith. The position of the Catholic Church has always been that reason without faith tends towards unrestrained self-interest, current fashions and private satisfactions — just as faith without reason tends towards superstition, emotional self-indulgence and private intuitions. Reason and faith are inseparable. We believe that human reason is wounded and weakened by original sin: part of the meaning of the 'Fall of man' is that we cannot rely on our own intelligence for all the answers but must humbly turn to the Scriptures and the tradition of Church teaching from the early Fathers to the recent Magisterium.

Critics sometimes describe this as "giving up on" our intelligence; in fact, it is just the reverse. We turn to our faith because it gives intelligent answers which intelligence by itself could not provide; we do not abandon intelligence when we pay attention to God's voice we extend its scope.

You might ask: but is it not possible to leave faith for Sunday Mass and private life and just get on with our everyday work? Some try to do this: we all know people who are at the pinnacle of their particular profession but who on the level of faith development are like children. Very senior public figures in politics, science, art, business etc. may never read a theological book, take a course, or think about the religious implications of their lives. The result is that their religious development can remain stunted, at the Santa Claus level, even as their professional responsibilities and honours increase. These people tend eventually to abandon what has remained for them a childish religion: it has not kept up with developments in other areas of their lives, so it is immature and embarrassing. They then call themselves "agnostic" or "atheist" and fill the void with one of the other counterfeit truths available on the marketplace of lifestyles on offer in contemporary Australia. This is an absolute tragedy when it occurs — for the individual and for the Church. The Pope hopes that in the Church of the new millennium professional Catholics will work at faith development and build an adult faith which will grow as they grow and so feed all areas of their lives.

When confronted with a notion like the common good, the Church recommends that we first think deeply about what is truly good and how it can be made truly common.

Of course, this idea of marrying intelligence to faith is not new. From its beginnings Christianity was never a fundamentalist, closed-minded cult but a public religion offering rational accounts of creation, salvation and morality — accounts which can hold their own against all other theories and traditions. Catholic professionals should take advantage of the full riches of the Church: after all, the clear and rational account of human life she promotes is at the basis of much of our law, politics and general ethics.

So when confronted with a notion like the common good, the Church recommends that we first think deeply about what is truly good and how it can be made truly common, available to all; then, once we have thought for ourselves and perhaps consulted expert writers in philosophy, jurisprudence, politics and so on, we should ask: "and what does the faith hold about the common good?" What view of law and human happiness is revealed in the Scriptures, especially in the Gospels. What has the Church traditionally taught here? What recent Church documents have appeared in this area? And finally there is prayer, in particular prayer for guidance from the Holy Spirit. The traditional gifts of the Spirit include wisdom, counsel, understanding and knowledge as well as courage, piety and fear of the Lord. Thus the Holy Spirit uplifts and supports the mind, as well as strengthening the character. It is these gifts of clear mind and righteous character which will keep Christian professionals committed to the service of their brothers and sisters amidst the demands of their daily work.

Conference Update

1–6 April 2000: Hong Kong. Section on Energy and Resources Law Conference. Contact IBA.

10–14 April 2000: Nicosia, Cyprus. International Law Conference. Contact: Options Congresses Ltd: Tel: 3572 31 8688, Fax: 3572 31 8680.

22–28 April 2000: Venice, Italy. Pacific Legal Conference. Contact: Rosana Farfaglia: Tel: (07) 3236 2601, Fax: (07) 3358 4196.

28 April–2 May 2000: Vancouver. Tenth Annual Meeting of the Inter-Pacific Bar Association. Contact: Inter-Pacific Association 2000, British Columbia: Tel: 604 681 5226, Fax: 604 681 2503.

30 April–4 May 2000: Vancouver. Inter-Pacific Bar Association Annual Conference. Contact: Jim Fitzsimmons: Tel: (02) 9353 4199, Fax: (02) 9251 7832.

11–12 May 2000: Potts Points, Sydney. Third National Gambling Conference. Contact: Conference Co-ordinators: Tel: (02) 6292 9000, Fax: (02) 6292 9002.

25 June-1 July 2000: Juneau, Alaska. Legal Conference for Australian practitioners in association with the Alaska Bar. Contact Margot Curich: Tel: 1800 633 131, Fax: (02) 4232 4962, E-mail: margot@curich.com.au, Website: www.uncon-conv.com.

July 2000: New York. Australian Bar Association Conference. Contact: Dan O'Connor, Australian Bar: Tel: (07) 3236 2477, Fax: (07) 3236 1180.

14–16 July 2000: Darwin. Eighteenth Australian Institute of Judicial Administration Annual Conference. Contact; Complete Conferences: Tel: (08) 8985 1909, Fax: (08) 8948 3566.

1999 Women Barristers' Association Annual Dinner

On 2 December 1999 the Women Barristers' Association held a well-attended and very successful annual dinner. The newly appointed Attorney-General, The Hon. Rob Hulls MLA, spoke briefly, declaring that he and his Government are committed to ensuring that women have greater representation in judicial appointments at all levels. He said that the Government would seek to achieve this objective by providing women with better access to government-generated work and by encouraging more women barristers to apply for silk and for judicial positions.

The dinner guests were then welcomed by WBA's Convenor, Ms. Pamela Tate, and addressed by the guest speaker, The Honourable Justice Catherine Branson. An edited text of the welcome speech and the full text of her Honour's speech are set out following.

Welcome Speech by the Convenor, Ms Pamela Tate

YOUR Honours, Attorney-General, Shadow Attorney-General, honoured guests, colleagues and friends — on behalf of the Women Barristers' Association of the Victorian Bar, welcome to our annual dinner for 1999.

The focus of the efforts of WBA over the last year has been the implementation of the recommendations in the report, *Equality of Opportunity for Women at the Victorian Bar*. There are two particular objectives which WBA has pursued.

The first objective is to eliminate gender-bias in briefing practices — one of the many concrete and positive ways in which we are seeking to achieve this is by assisting the Bar Council to establish an internet-based directory of women barristers.

The second objective is to increase the representation of women at the central level of decision-making within the Bar — we want the Bar as an institution to include women as part of the mainstream — not to leave women barristers, in the words of our guest speaker, "running on the edge".

The directory is a measure which carries the support of the solicitor side of the profession. When asked why women do not get briefed for appearance work in proportion to their numbers at the Bar or briefed in non-traditional areas, the solicitors respond in two ways — either they say that they do not know any women who practise in their area or, just as importantly, they do not know enough about the women to assess their suitability. Some solicitors also concede that, when they brief a barrister for the first time, while they hope the barrister will be good they are also concerned that the barrister will be at least "safe". Some of them admit that briefing a woman is seen as carrying with it a greater risk, a greater concern that she will not be a "safe" choice.

The report suggested that while solicitors may be willing to brief a man on the basis of a small amount of information (where he did his articles and whom he read with) they require much greater assurance in the case of a woman to overcome this greater sense of risk. Especially in areas of the law in which women have not traditionally practised, solicitors require special assurance about a woman before they brief her because they, or their clients, make stereotypical assumptions about the unwillingness or incapacity of women to cross-examine or to run trials before a jury.

Ultimately, of course, the assurance the solicitors need can only be met by demonstrated performance. But the need to obtain greater assurance before briefing a woman stands as a barrier to equality of opportunity.

The establishment of the directory is one, albeit small, way in which the extensive information the solicitors tell us they need can be provided. The directory will contain not only the usual contact details and nominated areas of practice but a more substantial description of the woman's proven fields of practice including cases in which the woman has appeared, whom she has worked with, her relevant history before the Bar, and those areas of law in which she would like to practise but has not yet done so. The aim is to provide a reliable and informative directory for solicitors — one which gives them the equivalent information they more readily obtain in other ways about male barristers. It is intended that the directory will be launched jointly by the Bar Council and the Law Institute in about March or April 2000.

WBA has also made efforts towards the second objective — that of increas-

ing the representation of women in decision-making roles at the Bar. While two women have now been appointed to Barristers' Chambers Limited, no woman was returned in the recent elections to the senior category of Bar Council. Only one woman has ever been elected to the senior category of the Bar Council in the history of the Victorian Bar despite the fact that over the years almost all of the leading women counsel at the Bar have stood for election in that category. In those circumstances it is reasonable to infer that there may be a perception within the community of barristers at large, that, in general, women are not suitable for leadership positions. If that prejudice does exist then it may be necessary for WBA to promote the introduction of special measures for women, or targets, as part of the voting process for Bar Council — to ensure that women are properly represented — and their interests respected and reflected in the institution.

The report showed that it was a fallacy to assume that equality of opportunity would be brought about as an inevitable consequence of the lapse of time. It concluded that it would be wrong to believe that as time wore on more women would arrive at the Bar in greater numbers and be seamlessly assimilated into its ways until women no longer formed a minority.

What the report indicated was that a real problem lay in the form of participation currently experienced by women at the Bar. It suggested that the experience of women at the Bar was, in general terms, quite different from the form of participation enjoyed by male barristers. Women were briefed to appear principally in very short matters — half a day to a day being not uncommon; they were not regularly briefed to appear in trials, especially common law or criminal jury trials, and in order to argue an appeal they had to have considerably more seniority than their male opponents.

The report also suggested that there was much greater social inclusion for men at the Bar — and junior male barristers had in general a greater sense of

Directory of Women Barristers

Pamela Tate, Convenor, Women Barristers' Association

THE principal focus of Women Barristers' Association ("WBA") over the last twelve months has been the implementation of the recommendations made in the report, *Equality of Opportunity for Women at the Victorian Bar*. A critical recommendation of that report was the establishment of a directory of women barristers. The Bar Council has agreed to fund an internet-based directory of women barristers. The Internet has been chosen because it allows for easy up-dating of information and because links can be made to the website for the Victorian Bar and to each of the clerks' respective websites.

The report concluded that solicitors lack information about women who are at the Bar and that this is one of the reasons why women tend not to be briefed for appearance work (especially jury trial work) in proportion to their numbers at the Bar. This conclusion has been confirmed by observations made by solicitors either that they do not know any women in their area of practice or they do not know enough about their suitability and experience to brief them. Unfortunately, briefing women is seen as carrying a "risk" factor and solicitors are unwilling to accept that risk unless it is overcome by demonstrated performance. By comparison, solicitors say they are willing to brief men on the basis of information provided by traditional male networks or by reason of the recommendation of a more senior male barrister. The directory is aimed at remedying this problem.

The information to be provided by those women who choose to participate in the directory will include not only the usual contact details and areas of practice but a more substantial description of the woman's proven areas of practice and cases in which the woman has appeared. This information will be sharply distinguished from the "wish-list" areas in which an individual woman may seek to practise. The aim is to provide a directory upon which solicitors can rely as giving them the equivalent information they readily obtain in other ways about male barristers.

The directory has the support of the Law Institute of Victoria and will be launched by the Bar Council jointly with the Law Institute. A letter commending the directory has been sent by the Chairman of the Bar Council, David Curtain QC, to all women at the Victorian Bar together with a questionnaire. WBA hopes that a high degree of participation in the directory, at all levels of seniority, will make it a useful and comprehensive resource.

BAR COUNCIL ELECTIONS

Earlier this year WBA promoted the election of women to the Bar Council and was able to congratulate four women on their electoral success. Unfortunately, no woman was elected to the Senior Category of Bar Council despite three women standing who clearly deserved support. Only one woman has ever been elected to the Senior Category in the history of the Victorian Bar. Women continue to be unrepresented at the highest levels of decision making at the Victorian Bar.

COURT PRACTICE

WBA has also secured the endorsement of the Bar Council in principle for two proposals relating to court practice. The first proposal is that court hours not be extended beyond 4:15 p.m. without sufficient warning and an opportunity given to counsel to rearrange his or her childcare commitments. The second proposal is that when barristers are addressed at the Bar table as a group they be referred to by the gender-neutral expression "counsel". This would remove the awkwardness for a judge of saying "gentleman and lady" when there is only one woman at the Bar table or inappropriately using "gentlemen" to cover all barristers, male and female. Of course, if addressed individually a barrister would still be referred to by his or her proper name.

identification with the institution and a greater sense of belonging.

The report concluded that unless there are changes to the *form of participation* women experience at the Bar — both in terms of changes to briefing practices and changes to the role women play in the institution — the number of women at the Bar will not reach the critical mass necessary for women no longer to form a minority. Time alone — without a change in the form of participation experienced by women in the profession — will not lead to genuine equality of opportunity. It is an aim of WBA to take steps which will have positive, real and permanent effects upon the experience of women at the Bar.

Women Lawyers — or Lawyers Who Are Women? The Honourable Justice Catherine Branson

IN September 1997 when Justice Mary Gaudron spoke at the launch of Australian Women Lawyers (AWL) she said that she saw the association as the beginning of a new era for women and for women lawyers — "an era in which people realise that equality, equal rights and equality of opportunity are complex ideas, difficult to implement and achievable only by the sustained efforts of those committed to those ideals."

It is wonderful to be able to open my address tonight by acknowledging that in the two years since Her Honour spoke the sustained efforts of some of those of whom Her Honour spoke have resulted in some notable achievements.

(a) The jurisdiction to which we feel most close, New Zealand, now has a Chief Justice who is a woman. Incidentally it is also country which only last weekend held a national election in which each of the major parties was led by a woman. With a change of government a Prime Minister who was a woman was succeeded by a Prime Minister who was a woman.

(b) It has recently been announced that Madame Justice Beverley McLaughlin will become Chief Justice of Canada early next year when the present Chief Justice retires. It is noteworthy that a third of the nine judges of the Supreme Court of Canada are women. Two of the Provincial Courts of Appeal in Canada (those of Alberta and British Columbia) are comprised of a (slim) majority of women if supernumeraries are ignored. The number of federally appointed judges in Canada who are women is close to 33% if supernumeraries are disregarded. In Canada the Federal Government appoints not only the judges of the Supreme Court, the Federal Court and the Tax Court of Canada, but also the

Justice Catherine Branson

judges of the Superior Courts of the Provinces.

I recently spent a few days with the Superior Court of Justice of Ontario in Toronto. It was heartening to be shown figures that demonstrate that although the overall gender distribution for judges of that Court in the Toronto region is 26% female and 74% male, the gender distribution of the most recent 20 appointments is 45% female and 55% male. Incidentally, the figures also show some interesting age and gender statistics. The data for the 20 most recent appointments reveal that the average male judge was 53.6 years of age on appointment whereas the average age on appointment of a female judge was 46.8 years of age. However, the average age of the 20 most senior judges at the date that they were appointed was 46 years of age. That is, at least in that court, it is not that women are being appointed at an unusually young age. Rather the men appointed between 1995 and 1999 were on average 13 years older than the (almost exclusively male) judges who were appointed between 1966 and 1990. It would be an interesting exercise to work out the reason for this.

(c) Many of you will know that as of last week New South Wales has a President of the Bar Association who is a woman (Ruth McColl SC) and a President of the Law Society who is a woman (Margaret Hole). Lindy Powell QC has just completed her term as President of the Law Society of SA (a body which represents solicitors and barristers). The President-Elect of the Law Council of Australia is Anne Trimmer of Deacons, Graham and James, Canberra.

(d) Justice Mahler Pearlman, Chief Judge of the Land and Environment Court of New South Wales is no longer the only female head of jurisdiction in this country. Justice Margaret McMurdo is President of the Queensland Court of Appeal, Judge Patsy Wolfe is Chief Judge of the District Court of Queensland, Patricia Staunton is Chief Magistrate of NSW and Diane Fingleton is Chief Magistrate of Queensland.

(e) The number of women silks continues to increase, albeit only slowly.

(f) Many of you will know that I am midway through a two-year term as President of the Australian Institute of Judicial Administration.

Those of us whose nostalgia is the 60s may fairly, I think, hum the Dylan refrains "the times they are a-changing".

But as Justice Gaudron has reminded us — we should not be lured into complacency. It is easy to let the achievements of a small number of high profile women distract attention from structural disadvantage affecting the majority of women. It is plain that such problems remain. They are revealed, for example, by the small numbers of female applicants for silk in this State and elsewhere in Australia.

So accepting that we are starting to see signs of improvement, what are the crucial issues now facing an organisation such as yours? May I say first, that I hope that you will continue to be a source of information and advice to the Federal Court and to other courts. The Chief Justice and the other judges of the Federal Court value your input into our endeavours to promote equality within the Court, not only for litigants but also for practitioners and indeed our own staff. But more generally, which issues deserve pursuing? I do not presume to be able to offer a comprehensive list of things that might be deserving of your attention — but I will mention a few things that it seems to me might be well worth pursuing.

Properly understood, feminist issues are issues of broad and enduring social importance. Their pursuit does not mark us out as something less than full lawyers, that is, a subgroup comprised of women lawyers.

Each of them in a way picks up Justice Gaudron's message at the launch of AWL — "Go to it — go be yourselves". Her Honour was by that message touching on a similar issue to that which I touched upon when I delivered the 1995 Mitchell Oration. At the time I said:

> There is no genuine equal opportunity in allowing women to enter traditionally male institutions – but only on the basis that the values of such establishments, and the way they are run, are to remain unchanged. The freedom to be an honorary man or alternatively an outsider, is a freedom that few women aspire to.

The topics that I would like to say a little about tonight are:

(a) practicing law and having a life as well

(b) the way in which merit in the law is assessed

(c) the structures of governance of legal organisations.

Before I turn to the topics individually, it is worth noting that none of them touches on an issue of exclusive interest to women — although for cultural and other reasons they may, in a practical sense, influence women's achievements more than men's achievements. It was, I think, at the launch of the valuable report commissioned by the Victorian Bar Council *Equality of Opportunity for Women at the Victorian Bar* that Katherine Walters described women as the caged canaries of the workforce: if things are bad in the workplace they will leave it first.

There is, of course, nothing new in women pushing for changes that ultimately prove to benefit men, as well as women. It is, it seems to me, one of the abiding strengths of feminism that, as it has freed women from the constraints of laws and social conventions that stereotyped them and limited their opportunities, it has provided men with a similar freedom to challenge traditional thinking.

That is, to touch on the theme of this address, women should not be concerned that they are adopting what is sometimes described as the "ghetto" approach by pursuing feminist issues. Properly understood, feminist issues are issues of broad and enduring social importance. Their pursuit does not mark us out as something less than full lawyers, that is, a subgroup comprised of women lawyers; they are issues that many thoughtful lawyers, including those of us who happen to be women, see as important not only for ourselves but for our profession and our increasingly diverse society.

PRACTISING LAW AND HAVING A LIFE AS WELL

The NSW Law Society is to be applauded in having recently taken action to emphasise the need for lawyers to "get a life". Curiously, whilst there is increasing community recognition of the desirability of judges having a life, in the sense of

actively participating in the activities of the community which we serve, surprisingly little has been said about the need for lawyers to do the same. If one cannot judge well a cause which one doesn't understand, it might be thought to follow that one will not advocate well a cause one doesn't understand.

The problem seems to be the conflict, or at least the perceived conflict, between sensible lifestyles and financial success. Whilst the making by the partners of legal firms and the big name barristers of large sums of money is not necessarily a bad thing, the increasing trend towards making the lives of young legal practitioners lives of almost total commitment to the workplace, and the generation of billable hours is, it seems to me, a bad thing. How is time to be found by these young legal practitioners for family and other personal relationships, for culture, for travel, for social service, for physical exercise — in short for the development of healthy, well-balanced lives?

More than that, why would anyone think that young legal practitioners, isolated in this way from the community that they are ultimately asked to serve, will know and understand the values and aspirations of the many segments of that diverse society.

The issue also has an ethical dimension. Chief Justice Gleeson in an address to the NSW Women Lawyers recently issued a reminder that lawyers have important ethical obligations derived from the role that they play in the administration of justice. His Honour said:

> These obligations, in a variety of ways, are supposed to temper their selfish pursuit of economic success. Current developments in relation to professional behaviour, discipline and organisation, driven to a large extent by the demands of competition policy, present some challenges to this theory.

It might, I think, fairly be said that ever-increasing pressures of a materialistic kind are adding to the ethical challenges facing the legal profession. Challenges such as not encouraging unnecessary or merely tactical litigation, not running up unwarranted billable hours and not charging the client in a way which generates profit from inefficiency or inexperience. The decision of the NSW Court of Appeal in *Law Society of NSW* v. *Foreman* (1994) 34 NSWLR 408 at 435–8 makes most interesting reading in this regard.

The problems and challenges that I have just mentioned do not, of course, impact only on lawyers who happen to be women. They impact on all lawyers — and particularly young lawyers. But we know that disproportionately it is women who feel the conflict between personal and professional demands, women who assume principal responsibility for domestic matters, women who will first leave an antagonistic workplace — even though in the long run it may be disadvantageous to their careers to do so.

It seems to me that it will be to the advantage of virtually everyone if women within the legal profession were to take a lead in challenging the increasing and excessive commercialisation of our profession. Increasing recognition of the importance of maintaining the law as a liberal profession and not a mere business, and the concomitant desirability of lawyers having a life outside the law, all, of course, assist lawyers who are women. But as the Chief Justice of Australia has reminded us, such recognition also has a more general social value.

. . . it is particularly remarkable that whilst women now dominate Law School's prize lists, their legal capacities are apparently not being commensurately recognised by law firms.

THE ASSESSMENT OF MERIT IN THE LAW

I have on another occasion, in a talk which I think a number of you will have read, addressed the issue of the assessment of merit for judicial appointment. The real problem with the assessment of merit in the law is not, it seems to me, one of how you measure merit but rather one of how you define it; that is, of working out what it is that you really want to assess.

Tonight I would like to say a little about the assessment of merit in the practising profession. It is a topic which is closely connected with the trend to commercialise the legal profession. Although I will talk about merit assessment in firms of solicitors, as that is the area where I think that the problem can be seen most starkly, there are, no doubt, parallel problems at the Bar.

It is striking how little correlation there appears to be between the Universities' assessments of the respective merits of law students, and the assessments made of the merits of the same individuals as legal practitioners a few years later. This is the case for both men and women but it is particularly remarkable that whilst women now dominate Law School's prize lists, their legal capacities are apparently not being commensurately recognised by law firms.

It seems to be widely accepted these days that to achieve senior partner status in a law firm of any size one needs high-level marketing skills — but not necessarily high-level professional skills. One needs to be willing, as the saying goes, to "put one's liver on the line for the firm". I do not want to suggest that marketing a legal firm is not important — in the modern world it is probably crucial. But ought it to be the only, or even the principal, measure of a lawyer's value to his or her firm? What about the capacity to deliver in a professional way the services that clients require from legal firms? This might well be thought to suggest that value should be being placed not only on intellectual capacity (although value should surely be placed on intellectual capacity) but also, amongst other things, on diversity of experience, on thoughtfulness and on the capacity to empathise with clients. Ought not a first-rate legal firm seek to achieve a mix of skills amongst its most senior members so that, whilst some may achieve greatness through a capacity to market the firm, others may achieve equal status through their capacity to service the needs of clients once they have been attracted to the firm?

Again this is not a purely women's issue. It is an issue of profound significance to the law generally. But while the decision making among the major clients of legal firms continues to be dominated by men, and while lawyers who are women, disproportionately to lawyers who are men, carry responsibilities which make it unrealistic for them to "put their livers on the line", women as a group will not compete equally with men as marketers of legal services. It is, it seems to me, a legitimate and valuable issue for women to pursue.

GOVERNANCE OF LEGAL ORGANISATIONS

This is, I know, an issue of immediate concern to this group.

Women are increasingly assuming leadership roles in legal organisations

but the numbers overall are still not high. Also my impression is that a significant number of these women are either single or, if they are not, they do not have school age or younger children.

As President of the AIJA, I have recently had occasion to consider the structure of governance of that organisation and, because I wanted to consider options for change, other legal organisations. What that consideration revealed was that those who aspire to leadership roles in legal organisations require a high degree of staying power. Within the AIJA as its governance is presently structured, it is unrealistic to aspire to be President unless you are willing to devote at least eight years to service on the AIJA Council. For an umbrella organisation like the Law Council of Australia, the position is probably worse. To achieve a leadership position in that body you need first to climb the leadership ladder of a constituent body such as a State Law Society or Bar Council (and this, of itself, may take a good number of years) and then move to a junior position on the Executive of the Law Council before you can commence the climb to President. Many lawyers with much to contribute to legal organisations, a fair proportion of whom will be women, simply cannot devote that much time to a commitment outside their day jobs. They will be responsibly seeking to maintain a life!

I expect the Board of Management of the AIJA to recommend a change to the rules of the Institute which will have the effect of allowing a person to assume leadership of the Institute without necessarily devoting nearly a decade to the work of the organisation. It would, I think, be very desirable for other legal organisations to give consideration to whether their governance structures do not make it unnecessarily difficult for many lawyers, including a good number of women lawyers, to aspire to leadership positions within those organisations.

CLOSE

In closing I wish to return to Justice Gaudron's address to the Australian Women Lawyers. She welcomed the formation of AWL as an acknowledgment by women lawyers of their difference and their right to be so. She saw it further as an implicit demand that the legal profession take stock of itself and the practices which have resulted in the under-representation of women in important areas of legal practice and the judiciary — not because women should have a larger share of the spoils of legal practice, but because they have the potential to improve the law and the administration of justice.

I agree with everything that her Honour said in this regard. Few would now debate that the capacity of the law to ensure equal justice to all has been enhanced by the increasing involvement of women in its teaching, its practice and its administration. Experience shows, it seems to me, that, generally speaking, this is best achieved not by establishing special rules for women lawyers but by questioning in a more general way practices and organisational rules which tend to discourage diversity of all kinds by giving unwarranted legitimacy in the law to a particular style of person, a particular choice of lifestyle and a particular attitude to professionalism.

Lawyers who happen to be women, I suggest, may well be the lawyers who can provide leadership in the profession by raising these questions — and hopefully in helping in the identification of the right answers.

Debt Collection 403

The following strategems are offered to my brothers and sisters in these hard economic times. They have a 100% strike rate and are less "messy" than litigating against solicitors. I am not troubled about litigating against solicitors. My problem is I feel the lay public should be required to pay to enjoy the spectacle of one lawyer suing another. Such enjoyable entertainment should be handsomely rewarding to the author of the amusement — the counsel forced to sue for fees owing. Another potential difficulty is the comparison of the litigious barrister with the domestic canine which attacks livestock. On the basis that such dogs develop a taste for blood they are "put down" lest they freely indulge their newly acquired taste. While the idea of the reduced competition flowing from the "putting down" of barristers has some appeal it is not a practice I wish to promote.

1. What sort of dumb solicitor purports to pay fees with a trust account cheque that is subsequently dishonoured?

   This was quite some time ago (during my reading period) and my pupil-master deserves the credit for advising me how to deal with this one. Using a script devised by him I telephoned the solicitor and purported to give him some advice on suing his bank. The gist of the conversation was that as defendants go, banks have bottomless pockets and the dishonour of a cheque is a representation to the effect that the drawer has insufficient funds to meet the demand upon presentation. The representation also carries with it the dishonesty of the drawer in passing such a cheque knowing full well that it will be dishonoured. Such a representation by a bank is, if untrue, actionable in the ordinary course of events. The purpose of my telephone call was to draw to his attention the very damaging nature of such a representation regarding a solicitor's trust account. The damages awarded would be beyond the ordinary course of events because of the possible inference that the drawer was playing hard and fast with moneys not belonging to him. In order to inflate his damages it was essential to aggravate the injury suffered. What better way than to suffer a thorough audit by the professional standards people from the Law Institute? In my spirit of sympathetic assistance I volunteered to be the one who dobbed him in to the Law Institute to ensure that he suffered the aggravating injury necessary to mulct his bank of enormous damages. In my co-operative helpfulness I even offered to be a witness in the court case to tell the sympathetic jury of the low regard in which drawers of dishonoured trust account cheques are held by me and other members of my profession. Strangely enough, the prospect of receiving a large windfall from his bank did not seem to excite him at all. Not so strangely, my clerk reported to me that the cheque was honoured upon its presentation the following day.
2. I am not sure that I deserve the credit for this one given that the opportunity was provided by an evasive solicitor seeking to run a variation on the tattered and threadbare "cheque's in the mail" routine. The background is evident from the content of the letter following:

Brien Briefless
c/- Clerk "X"
205 William Street,
MELBOURNE 3000
DX 17372
September 9, 1999

Messrs k'foops, fforde, & Co
Mount Thomass
DX 17373

Attention: Mr fforde

Dear Sir,

RE: Magillicuddy *ats* Brickhouse — *4 September 1997 (your ref.: ff:abc 456)*

It is now more than two years that this fee (of $4500) has been outstanding. I am informed by my clerk that upon enquiry by him of your firm he was informed that $1000 of this outstanding fee had been paid. I hold your firm responsible for falsely misinforming my clerk that any moneys in respect of this outstanding fee had been paid or had been received by me.

I am sure that as a practising legal professional you will appreciate the defamatory nature of any suggestion that I have received professional fees without accounting to my clerk for such fees. As a practising legal professional you will further appreciate that the misinformation relates directly to my profession of a practising barrister and as a consequence is actionable *per se* without proof of special damage. Further, such misinformation may well carry with it the connotation that I have also failed to account to the Deputy Commissioner of Taxation for the receipt of such fees.

At this stage I am prepared to forgo an apology and compensation for injury to my reputation provided the outstanding fee is paid in full on or before October 15, 1999. I also require you to inform my clerk that the previous communication (to the effect that $1000 of the outstanding fee had been paid) was erroneous and any imputation that I have received fees for which I have failed to account to my clerk is not founded upon fact.

Sincerely,

Brien Briefless

Commercial Bar Association Cocktail Party and Art Exhibition

At the Melbourne Fine Art Gallery, 25 October 1999

ON the evening of 25 October 1999 the Commercial Bar Association hosted a cocktail party at the Melbourne Fine Art Gallery at which the principal guest speaker was Professor Allan Fels of the Australian Competition and Consumer Commission. The function was well attended by over 80 members of the Commercial Bar. The Association also invited judges and masters constituting the Commercial and Equity Division of the Supreme Court. The evening was an outstanding success on a number of fronts. The venue chosen was apposite given the closeness to the Spring Racing

Professor Alan Fels speaking at the Commercial Bar Association cocktail party and art exhibition.

Alexandra Richards QC, Caroline Kirton, Samantha Marks, David Shavin QC and Jenny Richards.

John Dixon, Master Evans and Joseph Tsalanidis.

David Denton RFD thanks Professor Alan Fels, Chairman of the ACCC for his speech.

Graham Smith, Danielle Galvin, Rachelle Lewitan QC and Peter Willis.

Carnival and the Melbourne Cup. The drawings and paintings on display were all of an equine nature and were brilliant in colour and a spectacle to view.

An unexpected highlight of the evening was the introduction of our guest speaker by Dr John Emmerson QC. Indeed, the general consensus of those attending the function, after the introduction, was that perhaps Dr Emmerson QC should be called upon more frequently at Bar functions to deliver a dry and yet a poignant introduction containing both wit and comment.

Professor Fels provided a general overview of the activities of the ACCC and lightly noted that as far as his own investigations had determined that there was indeed competition amongst barristers at the Victorian Bar and at the New South Wales Bar. (It always seems to this commentator that the general public itself does not level criticism at the Bar of a lack of competition but a few persons with less than well informed positions tend to make the suggestion.) In any event leaving aside these observation those attending the function welcomed the input of Professor Fels.

The function was also addressed by Mr Justice McDonald, the nominated Principal Judge of the Commercial and Equity Division. McDonald J addressed the perceived changes and the framework that the Commercial and Equity Division judges and masters hope to put in place from January 2000.

With the conclusion of the formal part of the evening members of the Commercial Bar continued for some time to enjoy the artwork, camaraderie and fine wine and food provided by the Commercial Bar Association.

The function was notable for another reason, that being that the cross-section of members of the Bar attending the meeting appeared to be truly representative of all levels of the Bar. It gave a great opportunity for senior members and junior members to meet and introduce themselves to each other. This is one of the main reasons for the existence of the Commercial Bar Association.

The Commercial Bar Association has otherwise undertaken to continue to provide to the Victorian Bar continuing Commercial Legal Eduction of a first rate quality. On this occasion the evening was a tremendous success thanks to the work of Jenny Richards and Andrew Kirby.

David Denton
Senior Vice-President

Verbatim

Making a Date

County Court, Melbourne

9 December 1999
Coram: Judge Lewis
Sala for the plaintiff
WorkCover Mentions and Directions Hearings

Following an earlier discussion about the origin of names.
Sala: I would like a date fixed for hearing, Your Honour.
His Honour: Mr Sala, is your name of Italian origin?
Sala: Your Honour, I am as far from Italian as the Straits of Messina. I am Sicilian.
His Honour: Heavens! Is there any particular time of day you'd like your case heard?

Plus La Même Chose

Federal Court of Australia

25 January 2000

The internet Federal Court list indicates that, so far as some former members of the Bar are concerned, old habits die hard.

Court 8C: Justice Beaumont, Justice Merkel, Justice Finkelstein
10.30 am (Mention)
Australian Competition & Consumer Commission v. *Boral Limited (ACN 000 051 696) & Anor* V625/99

Court 8C: Justice Finkelstein
10.30 am (Hearing, Interlocutory)
Moonlighting International Pty Ltd (ACN 087 724 614) & Anor v. *International Lighting Pty Ltd (ACN 089 432 842) & Ors*

An Experienced Driver

Supreme Court of Victoria

20 December 1999
Staywale Pty Ltd v. *Rinieri Pty Ltd*
Coram: Beach J
Berglund QC for Plaintiff
Shatin QC and M. Robbins for Defendant

Berglund: My learned friend has put horse before the cart.
Robbins *(sotto voce)*: Any better suggestions?

Research Encouraged

Supreme Court of Victoria

28 July 1999
Jeffrey v. *Honig*
Coram: Hedigan J
Uren QC and Donald for Plaintiff
Nash QC and Lombardi for Defendant

His Honour: You virtually said yesterday that that part of the case was weak.
Nash: In relation to the past. Since then, Your Honour, I have had the advantage of reading some law.
His Honour: It's always helpful to do that, I think.

People *v.* Leopold and Loeb

Julian Burnside

IN 1924, the depravities of the 20th century had not yet desensitized the world to random killings. Even a tough city like Chicago was horrified at the crime committed by Nathan Leopold and Richard Loeb.

"Babe" Leopold was the son of a rich Chicago family. His father was vice-president of Sears Roebuck. He was the youngest ever honours student at the University of Chicago. Aged 19, he was a gifted linguist and a noted ornithologist.

Dickie Loeb was 18. He had graduated from the University of Michigan at 17, the youngest graduate of that university. His family was among the richest in Chicago. He and Babe Leopold had been friends for years, as had their families.

Both were convinced of their own intellectual superiority; both considered themselves set apart by their gifts. They both believed that they were Nietzsche's Supermen, unrestrained by the moral strictures which bound ordinary mortals. They had engaged in all manner of petty criminal activity, but they wanted to commit the perfect crime. They were lovers, with a relationship in which Babe Leopold adopted the role of Loeb's slave.

The crime they fastened on was a kidnapping murder. They planned every detail meticulously. Each owned his own car, but for obvious reasons they decided to hire a car. In order to be able to hire a car, they opened a bank account in the name of "Morton B Ballard", and hired a hotel room in that name. They used the bank-book and hotel receipt as proof of identity at the car-hire firm. They bought for cash all the equipment they thought might be needed. They devised an ingenious method of collecting the ransom, which was virtually foolproof.

On 21 May 1924, they collected the rented Willys-Knight motor car, and drove to Harvard Preparatory school, which both had attended as children. They spoke to Bobbie Franks, who was Dickie Loeb's young cousin. They told him they wanted his advice about choosing a tennis racquet, so he got in the car with them.

Whilst Babe Leopold drove the car along a suburban street, Dickie Loeb beat Bobbie Franks to death with a chisel. They drove around until dusk, then took the body to some vacant swampy land south of Chicago. They stopped on the way to get some sandwiches.

When they got to the swamp, they stripped the body, and poured acid on it to make identification harder. They put the body in a culvert and drove home for dinner with their families.

Babe Leopold rang Bobbie Franks' father and announced himself as George Johnson. He said Bobbie Franks had been kidnapped, but would be returned unharmed if the ransom was paid. A ransom demand had been posted, which gave the first of a sequence of instructions.

Next morning, Jacob Franks was waiting beside the phone, as instructed. The phone rang: it was "George Johnson" with instructions to get in a cab which had been called. Jacob Franks was about to leave when the police rang: Bobbie Franks' body had been discovered by a group of railway workmen who used the swamp as a shortcut to the nearby railway yards.

Leopold and Loeb discovered the same fact soon after: newspaper placards said "Unidentified Boy Found in Swamp". They returned the rented car, and disposed of the chisel and the typewriter which they had used to type the ransom note. They were quite relaxed, because there was no reason to think anyone would connect them with the crime.

They did not learn for another few days that police had found a vital clue beside the culvert: a pair of glasses made to an unusual prescription. Nine days later, enquiries showed that only three pairs of glasses had been made in Chicago to that prescription. One for a man who was in Europe at the time; one for an elderly lady, and one for Babe Leopold.

Leopold and Loeb were questioned. Initial denials turned into mutual accusations and ultimately confessions. Both were charged with kidnapping and murder.

****

Although the Scopes "Monkey" trial was not to take place until the following year, Clarence Darrow was already America's best known advocate. He was the great defender of the underdog, the champion of great causes. The boys' families begged Darrow to take the defence. He demurred: they had confessed their crime, they were sane in the eyes of the law; what could he do? The families asked him to do one thing only: save them from the gallows. For an agreed fee of $100,000 Darrow agreed to take the case.

Across America and around the world, the public and the press were in uproar at the thought of two young, intelligent and privileged boys committing such an appalling crime. The overwhelming call was to see the boys hanged.

The families of Leopold and Loeb reneged on their fee agreement with Clarence Darrow. He finally received less than half the agreed amount, shortly before he died.

Darrow delicately started a rumour that he was going to plead the two not guilty by reason of insanity. The trial, before Judge Robert Caverly, began on 21 July (just eight weeks after the murder). 3000 spectators jostled for one of the 300 seats in the courtroom. Leopold and Loeb entered the court, looking composed and relaxed. They seemed pleased to be the centre of attention.

Darrow announced that he was changing the plea to Guilty, and said he wished to call psychiatric evidence to show diminished responsibility. This meant that the sentence would be decided by the judge: under the criminal procedure in Illinois at the time, where a jury found a defendant guilty of murder, the jury would fix the sentence. Psychiatric evidence was called by Darrow and by the State. The District Attorney accused Darrow of defending the boys only for money, and insisted that a death sentence was the only appropriate result.

Finally Darrow rose to make his plea. He spoke, without a note, for three days. Every word of his plea was reprinted in the press. He used the case to develop the arguments against capital punishment generally. It is a justly famous speech, which has been republished several times. When he sat down, the court was completely silent for several minutes. The judge was openly weeping.

Judge Caverly adjourned until 10 September, when Leopold and Loeb were each sentenced to life in prison for murder, and 99 years for kidnapping.

****

After 12 years in prison, Dickie Loeb was stabbed to death by another prisoner, James Day. Day was charged with murder. His defence was that Loeb had made a homosexual advance, and that he was defending himself. With more wit than taste, a journalist wrote: "Richard Loeb, despite his erudition, today ended his sentence with a proposition."

Whilst in prison, Babe Leopold reformed the education system in the prison; he studied radiology and psychiatry, and he published a book *Life Plus Ninety-Nine Years*.

In 1958, Babe Leopold was released on probation. He spent the rest of his life in Puerto Rico, where he lectured in mathematics at the university, worked as an x-ray technician and continued his study of ornithology. He died in 1971.

****

The families of Leopold and Loeb reneged on their fee agreement with Clarence Darrow. He finally received less than half the agreed amount, shortly before he died.

Monash University Law Faculty Seeks Property Law Placements

THE aim of the placements is to enhance the student's vocational and skill development and to enable them to experience workforce learning. The project team is excited by this opportunity to promote practical interaction between law students and members of the profession and to foster the relationship between the Monash Law Faculty and the profession.

The project team has written to a number of members of the profession, both solicitors and barristers, who practise in the area of Property Law, seeking their involvement by placing students as described. The response from the profession has been very positive.

Members of the Bar who have not yet returned their response forms are encouraged to do so as soon as possible to assist with planning of placements. The project's Professional Affiliation Co-ordinator, Ms Elspeth McNeil, is happy to provide information or answer queries about the program: 9905 5319 or elspeth.mcneil@law.monash.edu.au.

Spring Racing Carnival Art Exhibition

Artist Fred Collar at the Essoign Club

FRED Collar has exhibited consistently and successfully in Melbourne's inner city galleries, and private and regional galleries throughout Victoria since 1978. His works are placed in private collections in Italy, Germany, Malaysia and recently Palm Springs, California and throughout Australia.

Paintings depicting athletes in motion were of dominant interest to Fred Collar since the early 1980s. The combination of expressive movement of the figure with a painterly technique led to a large series of "sports paintings". Combining his enthusiasm for horse racing and ancient history as a synthesis of horse images with mythology of the Trojan wars led to the "Trojan Horse Series". The Essoign Club exhibiting Fred Collar's horse racing series during the horse racing carnival was very timely. The opening evening was well attended and several of Collar's works now adorn the walls in barristers' chambers.

The committee of the Essoign club wants to remind the members that they are most welcome to invite friends and instructing solicitors to the opening nights.

Gunilla Hedberg

Garth Grisbrook and Patrick Tehan QC.

Barbara Walsh and Christine Rafferty.

Gunilla Hedberg, Katherine Bourke, artist Fred Collar and Sara Hinchey.

Beastly Words

THE lexicography of animals is rich and fascinating. I have elsewhere written about the various collective expressions used with reference to groups of animals (a murder of crows, a skein of geese, etc.). These words are more or less well known, and have a surprisingly long history. They are properly referred to as terms of *venery*. Despite its appearance, venery has nothing to do with the planet of love. It comes from the Latin *venari* — to hunt.

Because venery is the practice or sport of hunting, it is no surprise that *venison* was (originally) any animal normally hunted for meat, or the meat of any animal so caught. So, Thoreau in 1884 referred to a hare as a venison; and in 1852, a haunch of kangaroo meat was described as venison without any sense of irony. Hunting is now considered a sport by those who practice it, and deer are much prized by hunters. Hunters express their admiration for the deer by trying to kill it, so most venison nowadays is deer, and the word has narrowed its meaning accordingly.

The young of many species of animals have names which are radically different from the predictable diminutive. Ogden Nash famously wrote:

> Whales have calves,
> Cats have kittens,
> Bears have cubs,
> Bats have bittens,
> Swans have cygnets,
> Seals have puppies,
> But guppies just have little
> guppies.

The only surprise in his list is *bitten*, which is made up. The list could be supplemented with *heifer*, *poddy*, *fawn*, *foal*, and *joey*. But how many people would immediately remember that a *leveret* is a young hare; or that a baby hog is a *grice* (if still sucking) or a *shoat* (if weaned)? *Pup* is familiar as referring to young dogs and seals, but equally it refers to a young rat or a baby dragon.

While *cygnet* and *gosling* and *squab* are familiar enough, much less so are *eyas* (young hawk) and *poult* (young turkey or domestic chicken). Stranger still are some of the words for young fish of various breeds: young cod are *codling* or *sprag* or *scrod*; baby eels are *elver*; young salmon can also be *sprag*, but in addition they are (in chronological sequence) *parr*, then *smolt* then *grisle*, and at all relevant times, *alevin*. To complete the picture, the spawn of oysters and other bivalves is called *spat*, but this can also be used in reference to bees' eggs — doubtless a frequent source of confusion.

Everyone knows what *bovine*, *feline* and *canine* mean. Less familiar are the adjectives associated with some other animals: *dasypodid* (pertaining to armadillos); *vespertilian* (bats); *vituline* (calves); *pithecoid* and *simian* (monkeys) and *pongid* (gorillas and orang-utans).

The albatross holds an honoured place in the folklore of the sea. It produced grief and guilt for the sailor who shot one and lived to tell the tale to the wedding guests in Coleridge's Rime of the Ancient Mariner:

> And the good south wind still blew
> behind,
> But no sweet bird did follow,
> Nor any day for food or play
> Came to the mariners' hallo!
> —
> And I had done a hellish thing,
> And it would work 'em woe:
> For all averred, I had killed the bird
> That made the breeze to blow.
> Ah wretch! said they, the bird to
> slay,
> That made the breeze to blow!

The Rime of the Ancient Mariner was written in 1798. Less than 100 years earlier, William Dampier had written of a bird called the *algatross*, and not long before that, sailors called it the *alcatras*. That was at a time when English sailors rarely saw them. They had the word from Dutch and Portuguese sailors who, as it happens, were talking about a different bird altogether.

The albatross is a petrel, a member of the order *Diomedea*, which is seen in the southern oceans, and so was beyond the range of most English sailors before the 17th century. The *alcatras* is what we now know as the pelican (genus *Pelecanus*). The pelican's original Portuguese name — *al-catras* — is the scoop or bucket (*catras*) on a water-wheel. It comes originally from the Arab water lifting device *al quadus*. The Arabs name the pelican by a related metaphor: *al sagga*: the water-carrier.

The notorious US prison in San Francisco Bay was named after the island on which it stands. The island was named by a Spanish Lieutenant, Juan Manuel de Ayala, who explored it in 1755; and named it *Isla de los Alcatraces*, after the large pelican population there.

Thomas Hobbes popularized Leviathan in his book of the same name, published in 1651. In chapter 28 he said:

> Hitherto I have set forth the nature of man, whose pride and other passions have compelled him to submit himself to government; together with the great power of his governor, whom I compared to LEVIATHAN, taking that comparison out of the two last verses of the one-and-fortieth of Job; where God, having set forth the great power of Leviathan, calleth him king of the proud. "There is nothing," saith he, "on earth to be compared with him. He is made so as not to be afraid."

There is great conjecture about what this beast was, on which Hobbes' metaphor was built. The Leviathan is mentioned four times in the King James version of the *Bible*. The references in

Job 41:1, in Psalms 74:14, in Psalms 104:26 are consistent with Leviathan being a whale.

All references to the Leviathan give the sense that this was a huge beast. The reference in Psalms 104 suggests a whale. Milton, in *Paradise Lost* (vii, 412) calls it the "hugest of living creatures" — which the whale is. Herman Melville, at the start of *Moby Dick*, takes pains to claim the credit for whales as the Leviathan: but his agenda was clear. Anatole France was equally confident: in *Penguin Island* (1908) he says:

> And Leviathan passed by hurling a column of water up to the clouds.

However in Isaiah 27:1 the following appears:

> In that day the Lord with his sore and great and strong sword shall punish leviathan the piercing serpent, even leviathan that crooked serpent; and he shall slay the dragon that [is] in the sea.

Johnson was apparently aware of the uncertainty and defined Leviathan as:

> A water animal mentioned in the book of Job. By some imagined the crocodile, but in poetry generally taken for the whale.

Only a poet could confuse the whale with a serpent, or with a reptile of any sort. The passage from Isaiah cannot be referring to a whale: the reference to "a crooked serpent" and "that dragon . . . in the sea" suggests a crocodile, or a else wholly mythical creature.

The possibility that Leviathan is a creature of imagination gains support from Babylonian literature, which records a battle between the god Marduk and the multi-headed serpent-dragon Tiamat. This story prefigures St George and the dragon. A parallel story in Canaanite writing has Baal fighting Leviathan at Ugarit in Northern Syria: a story more consistent with Leviathan being a huge crocodile, or a dragon.

A creature which is, by definition, imaginary is the *chimera*. Its name comes from the Greek for he-goat. It is a fire-breathing monster with a lion's head, a goat's body, and a serpent's tail. Other accounts rearrange the body-parts, which is legitimate and painless in imaginary beasts. *Chimera* now is used almost exclusively to refer to a "wild fancy or unfounded conception".

Since Hobbes dressed Leviathan in the raiment of government and Freud lured dragons to the analyst's couch, such beasts have faded from popular imagination. They are all *chimeras* now. The platypus should be *chimerical*: its oddities are nicely captured by Ogden Nash:

> I like the duck-billed platypus
> Because it is anomalous
> I like the way it raises its family —
> Partly birdly, partly mammaly
> I like its independent attitude:
> Let no-one call it a duck-billed
> platitude.

Julian Burnside

Near-Death Experience

"I was in a state of shock," said Ellen Reasonover. "I was terrified."

In December 1983 a jury in St Louis deadlocked over whether to impose the death sentence on Ms Reasonover, who had been convicted of murdering a gas station attendant. It is believed the vote was 11 to 1 in favour of the death penalty. A unanimous vote was required for a death sentence to be imposed, so Ms Reasonover's life was spared by a frighteningly thin margin.

It's a good thing because we now learn that she wasn't guilty. And that's the biggest problem with the death penalty. Sometimes you get the wrong person. One more vote and Ellen Reasonover would have been shoved unfairly and ignominiously into eternity.

Instead she was sentenced to 50 years in prison without parole, and she served more than 16 grim years of that sentence before a Federal judge ruled this month that she had been improperly convicted and ordered her released.

I talked to Ms Reasonover last week. She was struggling with some of the technological marvels of the last few years. "I never heard of call-waiting," she said. "And I had to learn what a cell phone is and a pager."

She was 24 and the mother of a 2-year-old girl when she was arrested. She's 41 now and her daughter is 18.

"I didn't think I would be convicted," Ms Reasonover said. "I thought that when I finally got to trial I was going to explain to the judge that I was innocent, just tell him everything that had happened, and then he was going to let me go home."

Ms Reasonover was convicted of murdering James Buckley, a 6-foot-8inch gas station employee who was severely beaten and shot seven times with a rifle. Ms Reasonover became a suspect when, after viewing a television report about the murder, she voluntarily contacted the police to offer information that she thought might be helpful. She said she had stopped by the gas station to get some change to use at a nearby laundromat.

As her latest lawyer, Cheryl Pilate, put it: "There was nothing to tie Ellen to this. She came forward originally as a good citizen to report a suspicious character she'd seen at the gas station, and the next thing she knew they had turned her into their suspect."

The case against Ms Reasonover was based almost entirely on the testimony of two jailhouse snitches she encountered after she was arrested. The snitches, Rose Jolliff and Mary Ellen Lyner, were both heroin junkies with long arrest records. They hit the criminal justice jackpot by testifying that Ms Reasonover had told them in a jail cell that she had committed the crime. Jolliff got cash and Lyner, who admitted she was "looking for a deal," was spared a lengthy term in the state penitentiary.

"When I first went to prison I was depressed," said Ms Reasonover. "I cried a lot and I couldn't sleep. Then I got a job working at night, cleaning the bathrooms, sweeping and mopping the floors, pulling the trash. So that was a little better."

She said guards constantly propositioned her for sex and when she refused sometimes beat her. Fellow inmates taunted her.

She read whatever she could get her hands on and wrote endless letters pro-

claiming her innocence to people she felt might help — the Pope, Nelson Mandela, Presidents Reagan, Bush and Clinton and their wives. "I even thought about writing to Chelsea," she said.

Years passed. She contacted the Centurion Ministries, an organization in Princeton, NJ, that seeks justice for the innocent, and they eventually took up her cause.

In a decision handed down three weeks ago, US District Judge Jean Hamilton ruled that the case brought against Ms. Reasonover was "fundamentally unfair". Two conversations that were secretly recorded by the police and that were favourable to Ms Reasonover's defence were withheld by the prosecution. They came to light at a Federal Court hearing just two months ago.

Had those conversations been disclosed, Judge Hamilton said, the jury "would have been entitled to find" that Ms Reasonover was "a credible witness whose testimony was corroborated" by the tapes.

Ms Reasonover, who is black, said she understands that the lone holdout against the death sentence was a white woman. "I always wondered who that white lady was that didn't vote to put me to death," she said. "I'd like to meet her so I can thank her."

Bob Herbert *In America*

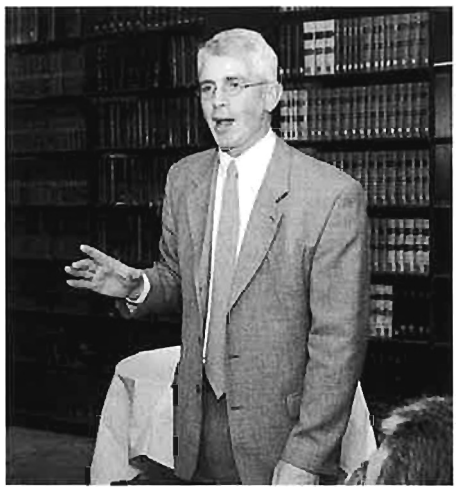
Readers' 10th Anniversary Dinner

Held on 30 November 1999, at the Neil Forysth Room

IF my memory serves me correctly, the evening of 30 November 1989 was a typical hot and sultry Melbourne evening. That night 45 Readers signed the Bar Roll. Emma Williamson was the first called and signed on at number 2393. James Kewley was the last call for the evening at number 2437. For those interested, the last Bar Roll number allocated in December 1999 was 3353.

Ten years later our Call met for dinner to celebrate and reflect on our first decade at the Bar. At best estimate, 29 remain in active practice at the Bar. Of those who have left, some have returned to life on the other side of the Bar table, some practice interstate, others have found the combination of parenthood and the Bar too difficult to juggle. Two of our Call, Murray Carn and Steve Winter, tragically, have passed away.

Once we were young.



Tony Rodbard-Bean addresses the gathering.

The Neil Forysth Room provides a perfect venue for such gatherings. Small and intimate with an impressive array of law reports lining the walls, the same also soundproofs the room to prevent the escape of egregious slander. Whilst the weather this time on was a constant, many things had changed. Foremost the ability to wine and dine at a price far in excess of the amounts many of us earnt (more so were paid) from our first briefs so long ago.

When our readers group first met it was soon apparent who were the "shouters" and who were the "whisperers". Friendly battle lines were drawn. Ten years later, it was pleasing to see the rivalries formed earlier on stand the test of time, the shouters and the whisperers quickly forming their own tables so that good-natured slanging could continue afresh. I am afraid to say, as with many an event with barristers present, no semblance of order was maintained over the night.

As the evening wore on most of the gathering rose to their feet to say a few words. Suffice to say some speeches are best left unreported! James Kewley, the most junior of our call, attempted a moving salute to the camaraderie of the Bar. Serious sledging put a quick stop to such emotional nonsense. How much better was the speech when the maker resorted to a personal commentary on the adversarial skills of his peers.

The highlight of the evening was a replaying of a video taken ten years earlier of the traditional post dinner Readers Review. What an edifying experience it is to see one's self captured in time. Thank heavens for qualified privilege and thick-skinned pupil masters.

For some the night ended relatively early, for others the night ended in the wee hours at an establishment on the southern side of the river. Hopefully, some of us will still be around to celebrate another decade at the Bar. That was the pledge; I suspect it will be kept.

ARB

Pen City Winner

Rohan Hamilton wins Pen City's Pelikan M800 pen competition in the Summer issue

A barrister is cosseted, steeped in, controlled and ruled by judicial pronouncements and statutes from the past. Precedent decided hundreds of years ago in circumstances alien to the present is treated as holy writ. Tomes like the Magna Carta are revered, their status enhanced the more for most not knowing its origins let alone meaning.

Melburnians as a people were thought to have been particularly tradition conscious, reserving special veneration for the obscure, the inexplicable and especially the incomprehensible.

Could this explain why, in late in the 21st century, following accelerated and exponential growth in artificial intelligence, DNA cloning and general dumbing-up of the world's scientists, human beings departed toxic planet Earth in Suzuki star ships and Melbourne chose for its time capsule the Supreme and Federal court buildings. And what if any significance can be given to the philosophy behind design and technological improvements to these courts, circa 1999.

The thrice yearly e-journal of the University of Wollongong grandly titled *Journal of Social Change & Critical Inquiry* (JOSCC) may hold the answer. Its November 1999 issue references an article in the *Australian Financial Review* that states "The Victorian Supreme Court will on Monday launch a world-first computer system for managing trials. The Cyber Court Book comprises an intranet-based electronic filing cabinet of the court case and a presentation shell that integrates other electronic services and applications for access by a browser interface". Apart from informing the reader that Chief Justice JH Phillips will launch the technology in Courtroom 13, the article remains impressively incomprehensible.

On the Commonwealth Law Courts Building JOSCC quotes design architect Hassell. Hassell defends the genre of modernism inherent in the court's design holding it is unfairly placed between "mid-century (20th) and downtown corporate" and designs which are "clean, minimal, light, reductive, with a surface gloss often attempting to mimic Zen tranquillity". He states: "Caught between these narrow binaries, modernism as genre is left to oscillate in irrelevance as an exhausted paradigm from a lost age or a sparse interlude bathed in chic meditation."

Rohan Hamilton, right, tries out his new Pen City pen after receiving it from John DiBlasi.

If this description was not sufficiently bewildering to Melburnians of the 20th and 21st centuries the utility of the tracery words printed onto the glazed portions of the facade is impressively baffling. Describing the phenomenon Hassell states: "When sunlight strikes the city, and as one walks within the building close to the perimeter, the shadows of the words that form Chapter Three of the Constitution fall across one's body."

Perhaps final comment should be left to The Hon. MEJ Black AC, Chief Justice of the Federal Court of Australia. JOSCC quotes the Chief Justice as stating that the vision for the Federal Court building was "to create a court building that had a symbolism reflecting the importance of the law but also reflecting the accessibility of the law. We wanted to create a courthouse that reflected the place of law in a free society. The Courthouse had to be functionally efficient, but it also had to have an ambience reflecting an openness and friendliness of use."

Such ideals, when Melbourne was rife with economic rationalism, corporate downsizing, job out-sourcing, youth suicide, street begging and kerosene bathing of the elderly, were not only incongruous with the times and thus appealing, to Melburnians, but reflected Melbourne and the law at its finest and its two most prominent legal citadels, worthy reminders of that long lost city.

Law Men & Women: Biggibilla, Australian Aboriginal Artist

Visitors to the Essoign Club during December and January had the opportunity to explore the art of Biggibilla, an Aboriginal sculptor, carver and painter. The exhibitition opened on Thursday 2 December 1999.

BIGGIBILLA'S artworks feature zoomorphic line work and are derived from *sand engravings* unlike the more familiar dotted style that predominates the artwork of the Central Desert and are based on *sand paintings*.

The songs and stories come from north-western New South Wales and have been passed down to Biggibilla by his uncle — his mother's brother and his spiritual father. The songs were passed down to his spiritual father by his uncle and so on, throughout Time (Mahabala). Gumnaroi culture is matrilineal and in this tradition, the brother is the custodian of the songs for and on behalf of his sister.

Biggibilla, which means Echidna in Gummaroi language, is the initiated totem-holder whose "job description", to use a contemporary analogy, is custodian or caretaker of daytime, fauna and flora for his language group — a Law man.

As the custodian, all Biggibilla's paintings are songs passed down from ancestors in an unbroken lineage; a sacred, oral transmission of culture and belonging. Exoteric songs acknowledge individual languages, culture and territory association whereas esoteric songs are limited to rites of passage (initiations) and no songman should ever sing another totem's songs as this would be breaking the Law.

The songlines are also the story and the map of an area of land, water or astrological belonging and is sung into existence via the visual representation, which in this exhibition is acrylic on linen. Every colour, totem, sacred instrument, sand engraving (map/song) and related information has relevance. Associated to each song is a vocabulary of 3000 words or more depending on the age and development of the initiate and tells of totemic family responsibilities to

Biggibilla at his studio. The painting has been acquired by the Russian Space Museum and depicts the Mir space station passing through Biggibilla's land.

fauna and flora within each particular map. This system ensured environmental and spiritual harmony within the microcosm and macrocosm and began at the age of five with the first song. To interpret Aboriginal art is highly complex and a challenge for the uninitiated. However, once a little knowledge is shared and an insight gained, the layers can be peeled away to reveal an intelligent and structured way of life based on a strict adherence to the Law. A life in which all things were equal and the responsibility to community produced an harmonious existence and intuitive understanding of the totality of Nature and its Laws. Aboriginal art depicts a way of life that has existed since creation time, when ancestral beings travelled across Australia, moulding the land, forming rivers, billabongs, establishing Law and rituals and groups of people related through language and dialect.

The artwork of Biggibilla carries on this tradition and this particular exhibition focuses on the "Law Men and Women" whose responsibility was to ensure this harmony was upheld and that any person who chose to defy the ancestors would pay the price

The Biggibilla painted Porsche Carrera 911. Biggibilla at the official "handover" to Porsche CEO Dr Wendelin Wiedeking at Porsche's new Melbourne headquarters. The painted Carrera 911 has been acquired for the Porsche Museum, Stuttgart, Germany.

Judge Frank Walsh and his wife, Mary and Gunilla Hedberg. The painting has been donated to the club by Biggibilla.

Michael Colbran QC; Wendy Taylor, Executive Director of Court Network; Professor Concetta Benn, President of Court Network; Graham Peters; Clarice Breese and Ian Davidson. The artist will donate 20% of proceeds of sales to Court Network.

— these decisions were made by a group of elders, not an individual. These men and women are depicted in the paintings by the totemic icon which carries this responsibility.

As mentioned earlier, the paintings feature zoomorphic lines which are based on *sand engravings*. These sand engravings are carved out of the sand and are the map/song, similar to a labyrinth. The sand engraving/labyrinth took four initiated men approximately ten days to prepare and engrave the Bora site which was the place to initiate language group responsibilities.

In Biggibilla's paintings, these engravings are transported to the canvas and are overlaid with sacred totems, icons and instruments and shows divisions and markings which are symbols of association to family, totem, skin group and territory responsibilities. Each one of his paintings is a spiritual vibration sung to life in multidimensional form. This is often referred to as the Dreaming and according to Biggibilla those who live in the Dreaming must know their initiated song. Biggibilla's paintings are direct links to this Dreaming and his ancestral past.

Biggibilla has exhibited around the world including Japan, Hong Kong, Switzerland, Germany, Venice, Slovenia, Florida, Santa Fe, Sicily and of course Australia. His artworks have been acquired by the Australian Museum in Sydney; the Australian National Museum in Canberra; Australia's Embassy in the Hague; the Japanese National Gallery in Osaka; the University of Melbourne's Howard Florey Institute; the Ludwig Museum in Cologne, Germany; the Queensland University of Technology; Ca Pesaro, the Museum of Modern Art in Venice; Castle Bled and the Australian Consulate in Slovenia; the Australian Embassy, Angola; the Art Centre, St Petersburg, Florida, USA; the Russian Space Agency Museum, Russia; the Menzies Foundation, Melbourne; and the Porsche Museum, Stuttgart, Germany.

His paintings and carvings are also held in many private and commercial collections.

The title of this particular exhibition "Law Men and Women" was very appropriate for the Essoign Club and its members and surely intrigued and stimulated many of the contemporary Law Men and Women visiting the club in December and January

Ooboon

Bar's Cricketers Win Holy Grail

1st XI *v.* Law Institute Victoria

AFTER enduring sustained defeats at the hands of the Law Institute for most of the last decade, the Bar now holds the cricketing lawyer's Holy Grail (a.k.a. the Sir Henry Winneke Trophy) for only the sixth time since its inception in 1965. Before that year the memory of the present cricketers runneth not.

The 1st XI triumphed for the first time since 1992, when the match was also played at Cordner Oval, Fawkner Park. This, of course, is no mere coincidence since all the available evidence now clearly establishes that the solicitors cannot handle a cricket pitch unless it compares favourably with the "road" at the Albert Ground.

The exhilarating win on 20 December 1999 fulfilled the dream of the impatiently awaiting captain, Chris Connor, to lead a winning Bar side against the Law Institute and enable him to join the small band of his successful predecessors in Barry Dove, Daryl Wraith and Bill Gillard.

Although the pitch looked as if it might have little bounce and not "come on" to the batsmen, the opposing and macho (read foolish) skippers decided that the playing arena should be the entire oval and to ignore the marked inner boundary.

Batting first, as is de rigueur, the solicitors stumbled early on in their innings and struggled to 7 for 42 in the 25th over, before a late rally allowed them to finish with a competitive, but attainable, 9 for 93 at the compulsory closure.

The Bar's team was considerably strengthened by the addition of Tony Klotz and Justin Hannebery as our first and second change bowlers, ideally complementing the opening "dynamic duo" of Rowan Skinner and Tony Phillips. Between them these four players collectively bowled 32 of the 40 overs, capturing 6 wickets for 65 with 7 maidens.

The bowlers were aided and abetted by crisp fielding, including two runouts and some sharp catching.

When the Bar's turn came to bat, our players found just as much devil in the two-paced wicket, and after scrambling to 8 for 54, dark despair began to well up in the batsmen who had been dismissed cheaply. Another loss seemed imminent. At this stage only David Neal, Joe Forrest and Justin Hannebery had made double figures. Fortunately, there was no sense of *déjà vu* for Mordy Bromberg who in partnership with Shane Lethlean took the score to 9 for 78, tantalisingly close to the solicitors' tally, but still perhaps considered out of reach when our number 11 Tony Phillips sauntered to the crease. With typical insouciance Tony helped Mordy fashion a match-winning last-wicket partnership which gave us victory with 2.2 overs to spare. Annus mirabilis.

The Man of the Match was undoubtedly Mordy Bromberg whose inspiring unbeaten 39 runs was a solo batting performance made in front of his cheering children. The highlight of his innings was the hard hit boundaries which were exquisitely placed on an oval that has a playing area equivalent to the MCG.

The selectors' policy in looking to youth (of a sort) had been thoroughly proved correct. As a result, the Sir Henry Winneke Trophy is on permanent view in the display cabinet of the Bar Library on the 13th Floor of Owen Dixon Chambers East.

Scores: Victorian Bar 9/94 (Bromberg 39 n.o.) d. Law Institute 9/93 (Skinner 2/15, Klotz 2/17)

Front row: Neville Kenyon, Tony Klotz, Chris Connor, Mordy Bromberg (wearing the cup's lid), and Joe Forrest.
Back row: Lachlan Wraith, David Neal, Tony Phillips, Shane Lethlean, Rowan Skinner, Justin Hannebery.

Bar Bowled Over Opposite Trauma Centre

2nd XI *v.* Law Institute Victoria

THE BATTLE

Act 1, Scene 1

THE day dawned — the forecast mild, no rain, 20 degrees.

The wicket was the new turf ground in Fawkner Park opposite the Alfred Hospital Trauma Centre, replacing the MPV site in Swan Street.

The team 12 picked — with nine fresh faces. Ten persons arrived.

The toss — wrong call. However, the Bar was invited to choose to bat or bowl. The team's sole answer was "Bowl" and they did, in agreed terms of 40 overs, retired at 40.

Scene 2

The trusty arms of Jonathan Davis and Dino Currao flayed in circular (or semi-circular) motion at each end, with steadying effect on watchful, competent but lethal looking openers.

Based on last year's belting, fielders were thus, set well back — nearer the boundary in some cases. Hopes were high also to avoid last year's record nine dropped catches.

The first catch was taken at 1/29; the second wicket, at 2/93, was bowled. The last wicket fell at 225 all out, the first 10 wicket haul the Bar 2nd XI has achieved. Amongst those wickets were some ex-District 1sts and 2nds players. Nine catches were taken in all by the Bar!

Of the nine catches, two were gems, one one-handed by Philip Simpson, the other like a back pocket ruckman — from Chris Winneke — and both overhead, way in the deep. The others were not straightforward either.

Apart from the catches, the fielding otherwise, was exemplary, including the performance of Michael Sasse behind the stumps. Four bowlers took two wickets each.

Of the LIV batsmen, two retired, only to return — an odd construction of a literal rule — one getting 59 and the other 50 n.o.

Act 2

This was lunch courtesy of the Bird and Bottle, comprising a healthy salad with rolls, fresh fruit and iced drinks. Although it was sunny, it was pleasant enough to relax on the boundary. The grounds in the Park, generally, were in mint condition, close cut and pleasant under foot.

Sir Henry Winneke Trophy and the Grafter's Goblet.

The break enabled all to fully appreciate the charm of Fawkner Park with its spaciousness, lines of Elms and diagonal pathways and the absence of traffic.

Act 3

The Bar took up a challenge. The scoring was careful but not carefree, early on.

After 40 or so runs (with none out), the clock was running down after one of the openers retired with cramp. Prior to this Chris Maxwell, the other opener, was scoring singles without a more agile running partner. (Maxwell later complained of having to run at all.)

Then attempts were made to lift the rate of scoring but with mixed success. Shortly, the introduction of an orthodox left arm spinner (the current captain of Northcote 2nd XI), caused some small problems. A slight slump occurred, arrested briefly by some good endeavour and lusty hitting. Michael Sasse and Chris Winneke contributed with some good shots.

Nick Frenkel held up one end during the chaos at the other as the Bar lost seven for 45. On the return of the early retiree to the wicket at the fall of the ninth wicket, Frenkel then blossomed, to later finish with a graceful 28 n.o. Whilst the captain returning to the crease finished with 40, the side was out for 129. It was less than 100 runs short of its target.

THE AFTERMATH AND DIAGNOSIS

It was a pleasant day. The weather was superb. The umpiring was impeccable. There was some blazing batting against the Bar, which held its head and the leather. There were some useful innings by the Bar. A further real quick and some experienced (practising) batsmen, who could provide some middle order stability, would be useful additions — providing they can catch as well as the 1999/2000 side. Congratulations go to the LIV. The LIV were gracious and also, highly complimentary of the Bar's fielding. The cup was at the ground again and on view all day, providing the right incentive. The catches were grand. The bats need oiling.

****

As a postscript, the rule of retiring at 40 runs and no return may be enforced.

Further, as the 1st XI on its win, claims the Holy Grail ("the H.M. Winneke Trophy"), quo vadis the 2nd XI Trophy The Grafter's Goblet?

Tony Radford

Gifted Youthful Players Wanted

MANY will recall the apocryphal Pravda announcement of the car race between Kruschev and Kennedy under the banner headline "Kruschev finishes second in major international car race. Kennedy won from last."

A headline of roughly this sort seems wholly appropriate in announcing the results of the annual game between our team and the Law Institute side. Unfortunately, however, such duplicity would be rendered shortlived by the fact that the Law Institute Journal will apparently shortly carry a more complete and truthful version of events.

Endeavours to solicit new players were partly successful in that Tim Luxton emerged as a Bar player of relative youthfulness, but hopes that Nick Tweedie would provide a star recruit from Western Australia were sabotaged by an untimely visit of a girlfriend's mother (always an event to be paid due homage).

In the event, Stephen Sharpley got his first run in goal, following Lynch's gracious abdication, and proceeded to win the J.R. Rupert Balfe trophy for best player on ground.

Given that the Solicitors had taken steps to ensure a full report in the Law Institute Journal, they had recruited avidly and produced a young and skilful team.

Accordingly, it was with some surprise that the Bar found itself on top in the first quarter of an hour or 20 minutes of the game, and could easily have been a couple of goals up. Thereafter, however, age played its part. The Solicitors proceeded to score two short corner goals to be 2-Nil up at half time, and thoughts of disaster were plainly in the minds of all the Bar team as we moved, gasping, to the sideline.

In fact the game proceeded to go fairly well in the second half and although the solicitors managed to score two more goals, being thwarted on numerous occasions by Sharpley's brilliance, the Bar team pulled back a late, and as it happened outstanding, goal by Wood.

His Honour Judge Campbell had very kindly agreed to attend to hand over the cup and the Rupert Balfe trophy, and did so in his own inimitable and fluent style. His surmise that the Bar team was losing on purpose as a touting exercise was wholly refuted by the evident superiority of the Solicitors' team.

Absentees this year included Coldrey and Goldberg, both of whom had judicial commitments, and Trish Riddell and Lachlan Wraith. All would have been well used had they been able to attend.

Other than that, it was a matter of the usual suspects, all of whom did their best in trojan if unavailing style, namely, Brear, Burke, Burchardt, Collinson, Dreyfus, R. Gordon, Luxton, Niall, Sexton, S. Sharpley, A. Tinney, M. Tinney and S. Wood. Tony Melville exercised the inalienable right of all barristers and solicitors who are in fact solicitors to have a run with us under s.1 of the Old Pals Act (Vic) 2000, as we were short when the game started.

The hunt for new and youthful players continues. Please pass any rumours of lurking and gifted hockey players on to the writer.

Philip Burchardt

Sharpley (with Rupert Balfe trophy) Campbell J (with Law Institute acquaintance) and Venn (Captain of the LIV team.).

The LIV team — spruce and generally youthful.

The Bar team — not spruce — not youthful.

Retail Tenancies Reform

A Guide to Contemporary Issues in Property Law: No. 2

General Editor: Dr Clyde Croft, Leo Cussen Institute, 1999 pp. i–xviii, 1–251 including Indexes by Subject, by Cases and Awards, and by Statutes and Regulations

THIS book is a collection of the subsequently revised and edited papers given at two conferences in 1998 on the *Retail Tenancies Reform Act* 1998 (the Act), which repealed and replaced the *Retail Tenancies Act* 1986 (the 1986 Act). One was held at Leo Cussen Institute (comprising chapters 1–6 in this collection), and the other at the Law Institute of Victoria (chapters 7–11). Their purpose was to explain the new Act and to provide practitioners with an overview of its operation, especially in light of the fact that the new *Victorian Civil and Administrative Tribunal Act* 1998 came into force at the same time as the Act (1 July 1998). VCAT thus acquired jurisdiction to hear and determine matters in its Retail Tenancies List which had previously fallen to the Retail Tenancies Tribunal.

The fact that there were papers delivered at two separate forums on the same broad topic at different times presents something of a problem with the structure of the material in this collection, as a reading of the contents listing below demonstrates. Most subjects are dealt with twice, but are not physically placed sequentially in the compilation; nor has there been any editorial attempt to integrate like topics. However, this slight nuisance factor aside, there is some conceptual division between the two groupings of chapters, which might amount to a justification of the presentation in this way. The first six chapters deal with more substantive matters, including:

- overview, background and operation of the Act, including its legislative history
- analysis of what types of leases the Act applies to
- comparison of the 1986 and the new Act
- potential legal problems
- discussion of the most significant changes — renewal of leases, assignment, works, compensation, rent review, disclosure, dispute resolution, outgoings and legal costs.

Chapters 7–11, on the other hand, deal with the more practical aspects of the drafting of leases and the associated documents which are required for compliance with the new legislation.

I attended the Leo Cussen seminar and recall a robust and vigorous exchange among practitioners present as to precisely what various elements of the new Act meant. There was no general agreement, either among speakers or participants, as to the interpretation of various provisions of the Act, around the time of its enactment. There appeared to be consensus on only one point: that the newly enacted legislation was bound to require further and significant amendment, sooner rather than later. These amendments have not come to pass, to date. And in the current political uncertainty, it cannot be said with any assurance when retail tenancy amendment will have any priority in a government's legislative agenda.

Here are some of the problems identified in the new legislation:

1. The meaning of the new rent review provisions: section 12 (covered in chapters 3 and 9);
2. Whether or not a lease is subject to the provisions of the Act. Section 4(2) potentially broadens the scope of the Act over the 1986 Act by seeming to provide that if an option to renew is exercised post commencement (1 July 1998) a lease which did not fall under the 1986 Act may fall under the new Act;
3. The "floor area" exception in the definition of retail premises: section 3(1);
4. The nature and status of a lease which has been assigned.

Some of the most significant features of the Act were agreed to be:

1. The new disclosure requirements (covered in chapters 2 and 8). The onus falls mainly on landlords, consistently with the consumer orientation of the legislation. The landlord's disclosure statement must set out information such as rent, detailed outgoings, and promotional and marketing expenses, and be given to the tenant at least seven days prior to entering the lease, along with a copy of the lease and the retail tenancies information booklet. [Additional information is to be provided to shopping centre tenants.] The tenant, in response, is obliged to provide the landlord with a business plan.
2. Specific disclosure requirements — for example, outgoings and costs — are dealt with in chapter 4 of the materials. Chapter 8 provides helpful advice on drafting of disclosure documents both from a landlord's and a tenant's perspective.
3. Landlords' liability under section 19 for legal and other expenses in relation to the *preparation* of the lease. It is possible that "preparation" may be given a wide interpretation, thus capturing a great deal of the disclosure documentation, with significant financial consequences for the landlord.

   Chapter 10 provides some drafting hints and techniques which may modify the potential effects of the cost recovery provisions.
4. The consequences of failing to comply with disclosure document requirements is serious. Chapter 8 gives suggestions for ways of minimising liability, and there is a sample disclosure statement annexed to the chapter.
5. The new role of VCAT, and its increased jurisdiction in the area of retail tenancy disputes, extending to misrepresentation claims, rectification claims, and those based on estoppel, is explained in Chapter 6.

Clearly, retail tenancy is and will continue to be a dynamic area of the law. This collection serves as a helpful status report on the Act, at the time of its enactment, and serves as a timely life raft thrown on the seas of confusion to help the floundering practitioner. What will be of immense assistance now, to practitioners, is a body of interpretation and decision-making from VCAT. Watch this space.

Contents:

1. Application of the Act, by Dr Clyde Croft
2. Disclosure Requirements, by Michael Redfern
3. Rent Review, by Maurice Phipps QC
4. Outgoings and Costs, by Derry Davine
5. Works and Compensation, by Peter Lowenstern
6. Dispute Resolution, by George Golvan QC
7. An Outline of the New Act, by Michael Redfern
8. Disclosure Documents, by Michael Redfern
9. Rent Review Provisions, by Dr Clyde Croft
10. Drafting Aspects of Outgoings and Legal Costs, by Derry Davine
11. Due Diligence and Defensive Strategies, by Campbell Paine

Appendices: Comparative Tables — 1986

Act and new Act provisions; LIV sample lease for a commercial property.

Judy Benson

Commercial Leases

A Guide to Contemporary Issues in Property Law: No. 3

General Editor: Dr Clyde Croft, Leo Cussen Institute, 1999
pp. i–xvi, 1–194 including Indexes by Subject, by Cases and Awards, and by Statutes and Regulations

IN March 1999, Leo Cussen Institute offered a half-day seminar on the topic of commercial leases. This is an edited collection of the papers presented at that seminar. Leo Cussen Institute is of course well known for the excellence of its continuing legal education program, and the practical orientation of its seminars, workshops and presentation. This offering is certainly another of the publications in that vein. It is helpful to read this title with No. 2 in the series, on retail tenancies, where the law has changed significantly, and where there is some potential overlap of concerns.

Six chapters, or topics, are covered, each by a different contributor, as follows.

Chapter 1 — The Trade Practices Act and Leases, by Dr Clyde Croft

The effect of both the *Trade Practices Act* 1974 (Cth) and the *Fair Trading Act* 1985 (Vic) on commercial leases is explored, with particular emphasis on misleading and deceptive conduct (generally, and specifically as to leases), and unconscionable conduct, both as it currently stands as section 51 AC, and how the provision may be broadened and extended if certain recommendations are accepted. The Part IV Restrictive Trade Practices provisions as they apply to commercial leases, and in particular shopping centres, are also covered. Reference is made to the guidelines published by the ACCC in 1997, and there is discussion of how these are useful for interpreting how the ACCC might view the application of the Act to commercial leases.

Chapter 2 — Leasehold Inquiries and Disclosures, by Michael Redfern

The need for inquiries to be made in relation to commercial leases generally, and the consequences of not inquiring properly, are outlined. Practical lists of sample inquiries are provided, including those that go to matters of title as well as the quality of the leased premises. The discussion encompasses not only leases but also agreements for lease, assignments, sub-leases, surrenders, renewal of leases, guarantees, mortgage of leases (including mortgagee consents) and variations of leases.

Chapter 3 — The Building Component of a Commercial Lease, by John Permewan

This chapter discusses the issues faced by a solicitor in preparing commercial lease documentation including plant and equipment and taking into account its operation and state, so as to reflect and conform to the bargain being struck. It is necessary to identify and isolate what part of the leasing process involves the actual building. Useful checklists are provided of the factors to take into account to ensure all elements of the commercial lease are covered.

Chapter 4 — Leases and Professional Negligence, by Cameron Macaulay

Solicitors' duties over lease transactions are considered in the overall context of a review of the authorities on the nature and extent of a duty of care and to whom it is owed. A case study approach is used to illustrate the common pitfalls in leasing transactions, and constructive suggestions are offered to prevent and minimise the potential for claims.

Chapter 5 — The Impact of GST on Lease Arrangements, by Derry Davine

After introducing and outlining the basic terminology, the application of the GST to commercial leases is considered in detail, step by step. There is mention of the transitional provisions, and responsibility for payment. An appendix of specimen clauses is included.

Chapter 6 — Resolution of Leasing Disputes, by George Golvan QC

Using a case study technique, a structured approach to the resolution of leasing disputes is proposed and outlined, separate checklists are provided (one for a landlord, one for a tenant) to assist practitioners to understand the steps to be considered in achieving successful resolution of a dispute.

For practitioners in the field of commercial leases, this publication presents an up-to-date survey of the main issues, concerns and pitfalls, as well as the law. It includes very practical information affecting all aspects of commercial leasing, including the entering into the lease, the difficulties that may arise during its term, and the termination of the lease. Practitioners in this field will probably not mind spending $80 on such a resource, however, that said, my copy fell apart at the spine in the course of reading the work for the preparation of this review. A small point, but if the production values of the title matched the contents, the book might even make it onto the legal bestseller list.

Judy Benson

Sentencing: State and Federal Law in Victoria (2nd edn)

By Richard Fox and Arie Freiberg
Oxford University Press, 1999
pp. i–cl. 1–1166

THE first edition of this text, published in 1985, has proved to be an outstanding success. It has had an enormous influence on the development of sentencing principles, not only within Victoria, but throughout the whole of Australia. It has been relied on as an authoritative guide to sentencing at all jurisdictional levels including the High Court of Australia.

Given the success of the first edition, the publication of this second edition has been eagerly awaited by the judiciary and by Victorian legal practitioners. I am in no doubt that this second edition will prove to be as successful and invaluable as the first edition.

The work contains a detailed legal analysis of sentencing principles. It also contains a comprehensive discussion of the policy considerations applicable to sentencing.

It contains valuable practical information on procedure, such as procedure at the sentencing hearing; the role of counsel for the prosecution and counsel for the defence at the sentencing hearing; and the way in which the factual basis for sentencing is determined.

Each of the available sanctions, both custodial and non-custodial, are given detailed coverage. There is specific attention given to sanctions applicable to certain types of offenders, such as mentally ill offenders and juveniles.

There is an extremely useful chapter dealing with sentences for specific offences. This chapter includes valuable practical material relating to statistical patterns and sentencing ranges for particular offences. The text and tables in this chapter are also supplemented by two computer disks which contain a

wealth of important material. The first disk contains case summaries of the Victorian Court of Appeal between 1994 and 1997. The second disk contains sentence outcomes of the Victorian Court of Appeal between 1986 and 1997. These disks were compiled to provide fuller statistical and descriptive material so as to assist judges, magistrates, legal practitioners, correctional officials and researchers.

The final chapter in this book examines the appellate process and includes material on appeals in indictable matters, appeals in summary matters, prerogative relief and other remedies.

Since the first edition of this work, sentencing law in Victoria has undergone significant change and development. This second text reflects a detailed and comprehensive understanding of all legislative and case law development. For example, detailed consideration is given to:

- the sentencing regime applicable to serious sexual, violent, drug and arson offenders;
- issues relating to young offenders;
- the introduction of victim impact statements;
- the introduction of the combined custody and treatment order.

This is a book written by two of Australia's most talented experts in criminal law, criminology and sentencing. It is a mandatory purchase for every criminal law practitioner and every person involved or interested in the Australian criminal justice system

Kerri Judd

McPherson, Law of Company Liquidation (4th edn.)

By Keay
Law Book Company 1999
pp. cv + 743, paperback $135

A new edition of this standard text is most welcome. It remains the leading Australian book on its subject, and is indispensable to those who practise in the area. There is nowhere else one can go for such a comprehensive and well-written guide to the Australian law of company liquidation and related areas. The previous editions of this book were rightly well respected. From what I can see, the fourth edition is a worthy successor.

Professor Keay has substantially rewritten a number of areas of the text, to cope with legislative changes and other alterations in the law. The result is a focused and up to date guide. Everything one would expect to find in the book is there, if one knows where to look. I found the index easy to use (though readers less familiar with the area might be assisted by more topic headings and cross-referencing between them).

The book has chapters on various aspects of winding up and applications to wind up companies. There are also sections on provisional liquidation, the commencement, effects and administrative organs of liquidation, the role and functions of the liquidator, creditors and contributories, and available assets and their distribution. In addition, the text deals with investigations and associated procedures, termination of windings up and private international law issues.

The propositions in the text are supported with extensive reference to the Corporations Law, to relevant Australian and (to an appropriately lesser extent) overseas case law. Particularly impressive is the wealth of reference to recent and topical Australian decisions. For much research, the book will be both a starting and a finishing place. Indeed, often one will need to go nowhere else.

About the only gripe I have with the book is the setting out. Due no doubt to the bulk of the text, it has been considered necessary to print it fairly closely. In addition, the chapter headings are written down the side of each page rather than at the top. The combined effect of those two things is to make the text difficult to read, since the text being in small print requires close attention, and the eye is distracted by the sideways writing down the edge of the page.

It is all enough to give the reader a headache. With a subject as complicated and technical as this one, most readers can get that even without poor setting out of the text. It would have been more user friendly to have more space in the text, and to have the chapter titles at the top of each page, even if that resulted in more pages having to be printed.

I would nevertheless heartily recommend the book to barristers and other practising in the insolvency field. The text is well-written and authoritative, and (apart from the setting out) is accessible. Considering how complex the subject can be, the pronouncements made about it by this work are clear and easy to understand. For a book about insolvency, those are rare and laudable qualities.

Michael Gronow

Professional Practice Management

By P.J.L. King
LBC Information Services, 1995
pp. i–xvi, 1–496
including Bibliography and Index

THIS book was written to provide advice to a variety of Australian professionals — be they solicitors, accountants, engineers or architects — on how to manage a modern, possibly "mega" practice resulting from the amalgamations of the 1990s into the new millennium. The author is well placed to offer some significant insights into the subject, having been at various times a partner then managing partner at one of the largest law firms in Sydney, a councillor of the Law Society of NSW, a consultant for Quality in Law Inc., and most recently, an academic.

The author postulates the premise that all professionals essentially face the same difficulties, which he analyses in an extended biological, life-progressing metaphor. First, there is the "conception" of the firm, the nucleus of an idea and the germination of some aspirations which should be tested against some hard-nosed realities. Do I really want to do this, and am I suited to the life, or am I drifting into it because it seems like a good idea at the time? If the answers here appear to be positive, the next phase — "gestation" — kicks in. These are the essential elements, the DNA if you like, which have to be sorted out from the beginning: the development of a mission and goals, and the patterning of a corporate culture; structures; capital; infrastructure systems; governance; hiring of people; purchase of equipment; and acquisition of outside help.

Next follows "growth", making it all work and come together. Elements here include managing the firm, its people and its clients; marketing; risk management; quality assurance; ethics; managing money and profitability; strategic planning. Finally, there is the "maturity" phase, whether to go up or out. This deals with whether and how to expand; realising the future and change; survival and challenges; knowing when to go or move on, growing upwards or outwards.

In any size firm, whether small or

large, one inherent difficulty within professional practice always appears to be how to manage groups of "talented, and sometimes unruly, individuals". This is no easy feat at the best of times, but harder in a climate of vigorous competition for clients and market share, poaching of staff and clients, and the cut and thrust of professional life as it is generally perceived to be and often is. There is also highlighted the inherent tension between, on the one hand, efficiency and business-like practices — typified by the "tyranny of the timesheet" — and on the other hand, the crucial ethical and service aspects of the profession which also serve to distinguish firm from firm. The conclusion is inescapable that the need for increased efficiency and effectiveness must be balanced by maintaining high standards of ethics and professional service or the practice will suffer adverse and perhaps irreversible consequences.

This book offers sound and comprehensive guidance to professionals in the pursuit of their calling, and includes many helpful models based on Australian experience, complete with charts, diagrams, summaries, draft documents and checklists.

What application does this book have to barristers, those sole practitioners — not firm-based — who are "talented, and sometimes unruly, individuals"? Plenty. Chapter 13, for example, covers "Managing Yourself". Who more than a barrister should be mindful of looking after number one, as the book puts it, so that the show can go on? Issues covered include health, finances, domestic life and time management/allocation. Sensible and practical pointers are given, which are too often ignored or overlooked, usually by those most in need of taking heed of the advice who continue to ignore the signs at their peril or until it is too late. Second, chapter 18 covers the topic of clients, and what barrister is not intensely interested in his or her clients? Under this head, matters are discussed such as whom do you want as clients (and how do you get them); client relationships, meeting client expectations, dealing with dissatisfaction, recognising and dealing with conflicts. These and other topics of serene reflection — the direction of one's practice, strategies to shape the practice — require time out and the occasional dipping into the ideas contained in this book.

A future edition would benefit from an update on the greater use and role of information technology in the managing of the modern professional practice, but as it is, it would be a handy reference to any professional practice library.

Judy Benson

Judicial Reasoning and the Doctrine of Precedent in Australia

By Alastair MacAdam and John Pike
Butterworths, 1998
pp. i–viii, Table of Cases ix–xxii, Table of Legislation xxiii–xxvi, 1–394 including Index

WHAT immediately strikes you about this book is the cover, which is dominated and enlivened by one of Geoff Pryor's arresting cartoons. A robed and wigged male barrister, wearing in addition to traditional garb, a hot pink "Spice Girls" T-shirt, purple sunglasses and a gold earring, is standing in a cavalier attitude with his left hand on his hip and his right arm as though resting on a lectern. But no ordinary lectern, this one is constituted by an elderly and very grumpy appellate judge, most aggrieved at being leant upon as he looks through ancient cases (one volume is visible of *English Law Reports* circa 1906) through his magnifying glass. The demeanour of the judge looking over the spectacles perched precariously on the end of his nose says, as if to the barrister above him: "You must be joking to put that argument!"

The illustration is an aptly chosen and telling metaphor for the central thesis of this book: the tension between the judiciary's overwhelming predilection for following the doctrine of precedent, and the Bar's vigorous attempts to persuade judges to see things differently and to adopt a variety of other approaches in their decision-making and reasoning based on deduction, induction, analogy, consistency with principle, and policy considerations.

But this is no mere textbook about the theory of judicial reasoning. It does not attempt a systematic explanation of the phenomenon of judicial reasoning as a "grand theory". Rather, it is a "theory" in the Greek sense of the word (*theoros*, meaning "spectator"), a series of observations, using examples, to tease out the process by which judicial reasoning proceeds to its conclusion. While the influence of advocacy and the techniques of legal problem solving are mentioned, they are not the focus of enquiry here. The text is essentially a description and an explanation of the processes at work in judicial legal reasoning. The substantive part of the volume is taken up with an analysis of various cases in which precedents were either followed or made, cases drawn substantially from the common law and from equity, and covering the spectrum from contract (*Carlill* v. *Carbolic Smoke Ball Co.*), tort (*Donohue* v. *Stevenson*), and the then emergent doctrine of unconscionability (*Baumgartner* v. *Baumgart-ner*), concluding with a discussion of the "activism" of the Australian High Court in *Mabo*.

This is essentially a resource for students (although as the law is stated to be as at the end of 1996 its usefulness is not in its currency), inviting them to think and see reasoning in two different ways at the same time, and to see and appreciate how values and other factors come into play in the process. For practitioners, the scope and treatment of the topic is a reminder (if one is needed) that the law changes, that there is a continuum of trends and indicators which constitute abundant pointers to future change, and that the law is also a system of applied ethics, where principles of fairness and equality can never be divorced from the other ideas in the equation.

Contents:

Part A Introduction to the Concepts

1. Introduction
2. Fixed or changing law: two sides of the debate, and the two sides of the coin
3. Understanding precedents: of facts, decisions, ratios and dicta

Part B The Following of Precedent

4. The doctrine of precedent — context, overview and terminology
5. The general principle and some complications
6. The Privy Council
7. "Persuasive" decisions
8. Previous decisions of the same court
9. Majority decisions and equally divided courts
10. Practical distinctions between ratio and obiter
11. The doctrine of precedent — a concluding perspective

Part C The Making of Precedent

12. Making new precedents: leeways of choice
13. Deduction: certainty and the appearance of certainty
14. Similarity and difference: distinguish-

ing precedents and extending them by analogy
15. Explaining precedents (or re-interpreting them?)
16. Principles in the law: the pursuit of coherence and the derivation of law from mutuality
17. "Policy" arguments: evaluating consequences
18. Grand theory raises its head: policy and values or something else?
19. Extra-legal (and some "internal") values in judge-made law
20. Values of dominance and strictness.

Judy Benson

Australian Federal Constitutional Law

By George Winterton, H.P. Lee, Arthur Glass and James A. Thomson
LBC information Services, 1999
pp. i–xviii, Table of Cases xix–xxxviii, Table of Statutes xxxix–xlviii, 1–967 including Appendices, Bibliography and Index

THIS ample tome is primarily intended to be a student casebook covering the materials taught at university undergraduate level constitutional law courses. However, in its case notes and commentaries, and with the addition of comprehensive bibliographies, its scope would also be of appeal to lawyers and judges (as a first port of call) and to legal researchers. There are ten main topics covered, as follows:

1. Australian Constitutionalism (federalism, separation of powers doctrine, the rule of law, representative and responsible government, judicial review)
2. Inconsistency
3. Commerce and corporations
4. External affairs and defence
5. Commonwealth financial powers
6. Freedom of interstate commerce
7. Excise duties
8. Rights and freedoms
9. Inter-governmental immunities
10. Constitutional interpretation.

An analysis of the Table of Cases reveals the inclusion of all the seminal ones (remembered from university lecture days), as well as cases from more recent times exploring implied rights in the Constitution (*Lange*, for example). Surprisingly there are only three cases mentioned which have been reported in the last two years, and these are merely mentioned rather than being extracted and discussed at length. They are: *Commonwealth* v. *WMC* (1998) 72 ALJR 280, *Gould* v. *Brown* (1998) 72 ALJR 375, and *Kartinyeri* v. *Commonwealth* (1998) 72 ALJR 722. Not surprisingly perhaps, the first two of these fall within the compass of the rights and freedoms chapter, an area of recently perceived judicial activism by the High Court, and the last one falls under constitutional interpretation. The first case is mentioned in the context of whether, if an entitlement is provided by statute, would a subsequent extinguishment of the entitlement by parliament amount to an "acquisition" within the terms of section 51(xxxi) of the Constitution. The second case is mentioned in the context of the Constitution envisaging and providing for Commonwealth-State co-operation, and the third in support of the development of a theme espoused by Kirby J in *Newcrest Mining (WA) Ltd* v. *Commonwealth* (1997) 190 CLR 573, 657, that it can be presumed the Constitution is not intended to violate fundamental human rights.

Of considerable interest and appeal is the inclusion of two appendices relating to the justices of the High Court. The first provides a table indicating lines of succession, that is, what justice was appointed on the death or retirement of which previous justice. It is a fascinating read, viewed in this format. For example, since the establishment of the High Court, Justice Gaudron is only the fourth judge in a line stretching back to Rich J (1913–50), followed by Kitto J (1950–70), and then Gibbs J, later CJ (1970–87). Is there irony in the fact that Justice Callinan is in a line of descent including Murphy J (1975–86), Toohey J occupying the intervening period (1987–1998)? Other connections in this fascinating table give pause for thought . . . but they are worth a browse for yourself. The second appendix lists all justices (current and previous) of the High Court, with details of their dates of birth and death, period in office, age on appointment and retirement, government at time of appointment, prior judicial experience, state of residence, and an "other comments" column which lists whether the appointment had had prior experience for example in politics, also a most interesting survey, viewed in this format.

Perhaps the most valuable part of this volume is the Bibliography, which at 48 pages is a formidable and comprehensive compilation of resources. The references are grouped not only under chapter headings, but there is a separate section including general references to casebooks, constitutional annotations, historical background, publications on the founding era, modern scholarship, the High Court, books on and by various justices, constitutional reform proposals, and more. There is even a website address, obligatory these days.

The topics in the casebook are examined in considerable depth. The purpose is to provide some insight into judicial reasoning, and to promote greater awareness of the way courts deal with constitutional principle. The text notes the political contexts in which some decisions were made, but otherwise eschews ideological perspectives.

This book would be and should be a useful starting point for any constitutional enquiry within its scope.

Judy Benson