VICTORIAN BAR NEWS

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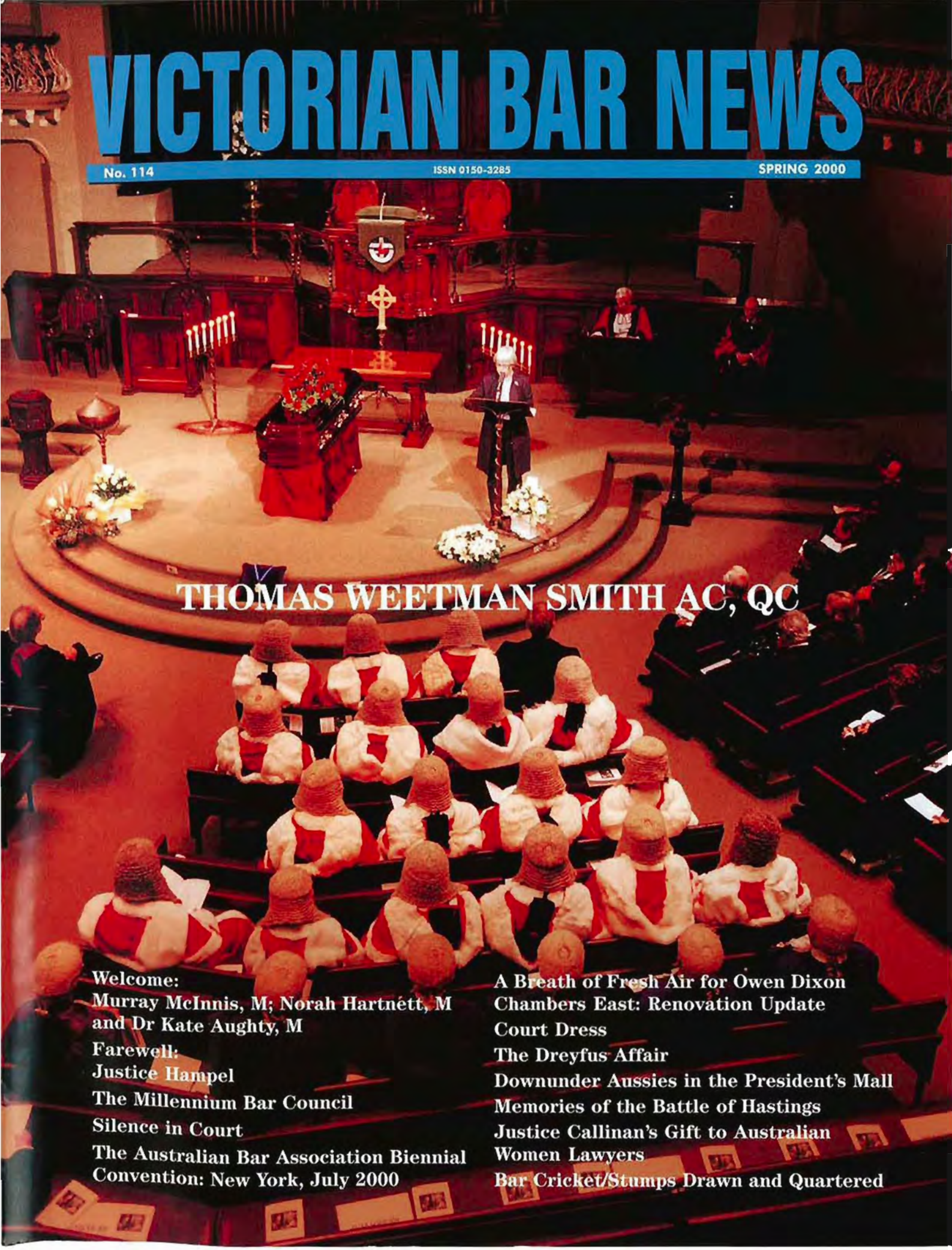

THOMAS WEETMAN SMITH AC, QC

VICTORIAN BAR NEWS

No. 114 SPRING 2000

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The Administration of Justice

WE have commented before on the sheer impossibility of measuring "justice" in terms related to economic efficiency. We accept that the community cannot put unlimited resources into the administration of the legal system, but the fundamental rights of the individual should not be sacrificed to bureaucratic efficiency.

The courts, of course, have adopted what is known as "case management" in an attempt to increase the efficiency of the legal system, to ensure that cases get to trial promptly and that resources are not wasted through lack of preparation or unnecessary amendments and adjournments.

The purpose of case management, however, is the delivery of justice, not the processing of cases. A trial judge who has five cases listed before him and "clears his list" in the morning may congratulate himself that five pending cases have now been determined. The statistics from the point of judicial administration will be "good". The results from the point of view of the individual litigant may be anything from "excellent" to "disastrous". The question is not how many cases have been determined but whether in the cases which have been determined justice has been done according to law.

It is unfortunate that the phrase "administration of justice" has become so fashionable.

The courts do need to be administered, and procedures which involve an *unnecessary* waste of time or money should be avoided. But the courts are in the business of *delivery of justice* not *administration of justice.*

SENTENCING

If a man is convicted of a serious offence, gaoled and subsequently released, the community is properly concerned should that man commit further serious crimes. But recent media witch-hunts would seem to indicate that the newspapers in this State believe that there is only one purpose of sentencing and that is to prevent future crime. If that is the only purpose, then re-introduction of the death penalty is long overdue.

Fortunately the judiciary in this State still adhere to the assumption that a person should be punished only in respect of the wrongdoing of which he has been convicted, not in respect of the wrong which he may do in the future. Equally fortunately, since the decision in *Kable* v *DPP*, it would seem that it is beyond the power of the legislature to require the courts to imprison people, soley because they represent a *potential* threat.

Perhaps one of the hardest tasks which faces any member of the judiciary is that of determining the appropriate sentence for a particular crime committed by a particular individual. Those who choose to comment adversely on particular sentencing decisions (usually without knowing the full facts before the trial judge) are on the whole people who have never had to exercise the frightening power to send another person to prison.

It would be of more value to the community and of more assistance to the judiciary if the energies devoted to criticising particular sentences were directed to a campaign to ensure that those who are sentenced to a term in prison have some chance of rehabilitation; that the individual prisoner cannot be assaulted, raped or murdered. A successful campaign for safer prisons might make the task of the sentencing judge much easier.

Such a campaign would probably not be popular. We should not "pamper criminals".

It probably would not sell newspapers. Certainly we would not advise the editors of any of our daily papers as to how best to sell a newspaper. Our judges are as well qualified to advise on how to increase circulation as are journalists to advise on sentencing. Most of them, however, would not have the necessary chutzpah. Perhaps the journos should stick to their last, as the lawyers do to theirs.

Some issues for journalists to campaign on:

1. Abolition of the motor car, which is more lethal than any serial killer.
2. Abolition of coal-fired generating stations in Australia, the prime cause of our greenhouse gas emissions.
3. Compensation to be paid by the organisers of the Sydney Olympics to all Australians whose lives have been disrupted by excessive daylight saving, excessive media hype and general disruption organised by or on behalf of that Sydney cabal.
4. Abolition of the IOC and re-establishment of the Olympics as a contest between individual athletes rather than between national sporting corporations and the professional athletes employed, or sponsored, by them.

(But we do admit our professionals did us proud!).

BY-PASSING THE BAR

According to *Business Review Weekly* of 8 September 2000:

> Complex corporate disputes solved in six weeks? Lawyers trying to stop their clients going to court? Most of Australia's large law firms getting together to offer alternative dispute resolution? No, it is not a prank. It is a new arbitration and mediation service called MustSolve. The service brings together 23 of Melbourne's senior commercial litigators from 11 firms . . . AustSolve, which took two years to establish, will act as a referral service to its various members, most of whom have been practising alternative dispute resolution (ADR) for many years. The cost of the service ranges from about $2000 to $4000 a day. Although it will offer several types of ADR, including mediation, its emphasis is on arbitration.

So the big firms are going to have their own mediation centre! A move such as this has become almost essential, when one looks at the high cost of litigation. If the proposal goes ahead and is successful, it will reduce the inflow of work to the law.

The high cost of litigation stems not only from the fees charged by barristers, by court recording services and by expert witnesses. It also stems from the capacity of the litigant with large pockets to ensure that the number of interlocutory steps which occur between the issue of proceedings and the trial are many and costly.

A RETHINK ON COSTS?

We have suggested, some years ago, that statement of claim and defence should be verified on affidavit, that (as is now largely the case) interrogatories should not be as of right, and discovery should be limited. We would now add to that suggestion a proposal that litigants who unsuccessfully take unnecessary (as opposed to untenable) interlocutory objections should pay costs on an indemnity basis and, in the case of a plaintiff, should have the action stayed until the costs have been paid.

In the interests of expediency, efficiency and justice the rule that costs be ordered on a party and party basis, save in exceptional circumstances, should in any case be revisited.

In a society in which even prisons have been privatised, where the provision of essential services is in the hands of large corporations "competing" with each other, it is anomalous that the successful defendant should bear any part of the costs he or she has incurred in defending the plaintiff's claim. Equally if the plaintiff is justified in bringing his or her suit (and by corollary the defendant is not justified in defending it) the plaintiff should be indemnified for his or her costs.

PRESIDENT OF THE CHILDREN'S COURT

We welcome the appointment of Her Honour Judge Judith Coate as President of the Children's Court of Victoria. A formal welcome (omitted from this issue for logistical reasons) will appear in the Summer issue of *Victorian Bar News*.

THE EDITORS

To Speak Or Not To Speak, That Is The Question

"EVEN a fool, when he holdeth his peace, is counted wise; and he that shutteth his lips is esteemed a man of understanding."[1]

This is not, surely, what Lord Kilmuir had in mind when, in a letter to the Director General of the BBC written in 1955 he said:

> But the overriding consideration . . . is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the actual performance of his judicial duties, must necessarily bring him within the focus of criticism . . .

Hearsay has it that some judges have developed real dissatisfaction with the content of their judicial office because of the isolation they feel from their professional peers and the community.

The notion that judges should maintain an extra judicial silence on matters of public interest or controversy has come under sustained attack in Australia over the last 20 years or so. In his speech at the New South Wales Bench and Bar Dinner, the Honourable Justice Keith Mason gave the *Kilmuir Rules* both barrels.[2]

Sir Anthony Mason has observed that judges are not renowned for their sense of public relations and that judicial reticence has much to commend it. ". . . it preserves the neutrality of the Judge, it shields him or her from controversy and it deters the more loquacious members of the judiciary from exposing their colleagues to controversy."[3]

Attorneys General in Australia have almost all ceased to perform their age-old function as protectors of the judiciary. Whilst the various bars around Australia can and do step in to defend judges when appropriate, it must now fall to the Chief Justices of our Courts to speak out on matters affecting the interests of the judiciary. Few would dispute that Chief Justices could, and perhaps should, comment on matters that directly affect the role of the judiciary, such as proposals affecting the remuneration or tenure of judges, or complaints about the administrative practices of courts. But even these examples which are directly related to the working of the judiciary, as opposed to controversial matters such as individual decisions, present uncertain terrain for judicial comment. It may be appropriate for a Chief Justice to respond to general, and perhaps inaccurate, comments about court practices, but these issues may inevitably lead to related and more sensitive issues such as funding for courts and legal aid. How far, or how strongly, may a judge properly comment on such issues before he or she is met with the repeated barb that the judge is "out of touch" with the restrictions facing other parts of society?

It is worth noting that, while the Honourable Justice Keith Mason noted the widening exceptions to the *Kilmuir Rules*, His Honour acknowledged the continued diversity of opinion on this and other issues among judges. His Honour suggested that "no-one's independence comes by way of permission from the Government or societal majorities . . . independence relies not on a judge's silence out of court but on ensuring that he or she decides cases fairly, according to law . . ."[4] As debate about the nature and extent of judicial utterances continues, no doubt informed by pronouncements from judges and other commentators, contributions that remain so mindful of the overriding function of independence can only be valued.

COMPETITION AND THE LEGAL PROFESSION

On 14 August 2000 the National Competition Council issued a press release "Public Interest or Self-Interest" addressing restrictive practices in professions. The NCC directed its attention to those practices which it felt "*unnecessarily* restrict the number of professionals". Examples of such "anti-competitive" practices included academic qualifications as a requirement for entry into a profession (with apologies to those who worked so hard to achieve that requirement), restrictions on the use of professional titles such as "'barrister" or "architect" to appropriately qualified persons and inconsistencies between State regulatory regimes. The examples provided in the NCC press release concerning the legal profession included restrictions on advertising and conveyancing, both of which were described as having occurred "until recently".

This salvo was disappointingly lacking in detail or any apparent awareness of recent changes made by the legal profession, particularly by the *Legal Practice Act* 1996 and the Victorian Bar's Rules of Conduct, introduced in 1998. Many aspects of that Act, such as the provisions concerning the status of interstate practitioners and the wide jurisdiction of the Legal Ombudsman to examine matters relating to competition, read like a wish list of the NCC.

The NCC also cautioned against "allowing lawyers (or any profession) to make their own rules". While this pronouncement ignores the ability of the Legal Ombudsman to investigate the constitution or rules of an RPA, it also contrasts starkly with the Hilmer Report which suggested that the "application of

competitive conduct rules would not undermine the self-regulation of the professions".[5] There will always be debate and disagreement about the appropriate level of autonomy in any professional regulatory regime. No profession can or should remain entirely unregulated. At the same time, any effective form of professional regulation must be well informed and reflect the proper standards of the profession in question.

Ill-informed criticisms of the legal profession are not wholly unlike those facing the judiciary. They are easy to make and difficult to dispel. Unlike the judiciary, however, the profession must expect to provide its own defence without assistance (though it might not be unreasonable for Attorneys-General to highlight the more important legislative changes affecting the profession). Fortunately the President of the NSW Bar, Ruth McColl SC, issued a well reasoned reply to the NCC which dispelled many inaccuracies in the statement of the NCC and also highlighted some important recent changes in the profession.[6] Proponents of competition policy and deregulation frequently highlight the need for a vigilant commitment to those ideals. There is an equal need to remind those affected by the profession, whether customer or critic, or both, of our achievements.

In addressing criticisms of the judiciary or the legal profession perhaps members of the profession should be increasingly mindful that, despite the clear separation between the two, there is a continuum in much of the criticisms aimed at one or the other. This is not because some of today's lawyers may become some of tomorrow's judges, but because many criticisms directed at one part of the legal system have the potential to impact on another. The increased role of the profession in responding to unfair and erroneous comments on the judiciary, therefore, represents a proper development in the protection of our system of justice. Sensible and well reasoned extra-judicial pronouncements, made by judges who choose to make such statements, can present a similarly proper development of the law.

Mark Derham QC
Chairman

NOTES

1. Proverbs, 17:28
2. *Bar News*, the journal of the New South Wales Bar Association, Spring 2000, p.18.
3. Mason, Sir Anthony "Some Problems Old and New" (1990), 24 (2) *University of British Columbia Law Review* 345 at 352.
4. See n.3 at 20.
5. *National Competition Policy* (1993) at 137.
6. *Bar News*, the journal of the New South Wales Bar Association, Spring 2000, p. 3.

Native Title Policy: Achieving Sustainable Outcomes Through Mediation

ONE of the most significant achievements of the Bracks Government in its first year is the recent announcement of the development and launch of its native title policy. This policy leads Australia in demonstrating the commitment to achieving outcomes for Indigenous Victorians in a concrete and sustainable way.

The Government entered the election, a year ago, with a strong commitment to achieving reconciliation with Indigenous Victorians, which included the support of the rights of Aboriginal people to native title over Crown land.

I, as Attorney-General, have carriage of Victoria's compliance with the Native Title Act. The Native Title Unit, within the Department of Justice, performs the role of co-ordinating native title issues within Victoria.

The recently released Native Title Policy is a critical step in recognising land rights and achieving reconciliation with Indigenous Victorians. This policy is a Victorian solution to native title in Victoria. Each State has to tailor its response to native title claims in line with the history of the State, its land use patterns, land management systems and the aspirations of its Indigenous population.

The policy represents an historic shift in the approach to dealing with Indigenous issues and native title in the State. It rests on the central premise that native title claims can be resolved by negotiation. To achieve this, the policy provides that the recognition of native title can be an outcome of a mediated settlement.

This approach is in stark contrast to that of the Kennett Government, which operated on the basis that native title issues were to be litigated. That approach proved expensive, overly legalistic and to date, has provided no positive outcomes for any party.

The Bracks Government's native title policy states that there will be a co-ordinated "whole of Government" approach to native title in Victoria. This will ensure consistent compliance with the Native Title Act by all Government agencies. By this method, there can be predictability, certainty and consistency in dealing with native title claims.

A mediation approach can provide beneficial outcomes for all parties concerned.

The policy also provides for processes whereby the Government and other parties can respond efficiently and effectively to native title issues. This will mean that native title claims can be addressed in a way which meets the needs of all parties concerned.

The native title policy is the basis for creating a framework from which agreements will flow to resolve native title issues. Mediation is currently taking place in relation to one major claim, and other claims are likely to enter mediation later this year.

The central premise in the policy, that of achieving sustainable outcomes through mediation, is applicable to many issues which arise pursuant to the Native Title Act. Sales of Crown land, for example, can raise native title issues, even where no claim has been made in relation to the land. A mediation approach can, in such circumstances, provide beneficial outcomes for all parties concerned.

The Native Title Act also provides for Indigenous Land Use Agreements (ILUA) in which there is no recognition of native title, but there may be recognition, in other ways, of the significance of a piece of land for the local Indigenous people. Victoria has already entered into one such ground-breaking ILUA, at Birchip in north-eastern Victoria. That agreement allows for the expansion and relocation of police and health services in Birchip, on Crown land, which had been subject to a native title claim. The land is then intended for use by a local Health Service. By agreement, the significance of that land to the Indigenous claimants would be recognised in a formal way.

This type of co-operation between Indigenous Victorians, local stakeholders and Government is the blueprint for the resolution of native title matters in a timely, cost-efficient and sustainable way. It is the beginning of a new era for native title in Victoria.

Rob Hulls
Attorney-General

Whoever You Are, Forget It

ON 8 September this year, counsel in Owen Dixon East received from one of the "large" firms a facsimile addressed "To whom it may concern". The body of the fax read:

Dear Sir/Madam

Please disregard facsimile sent in error re Higgs.

Collection Agency Proposed

Dear Editors

The editorial in the Winter Edition of the *Bar News* has prompted much discussion, especially among those of us practitioners engaged in the common law and compensation areas, as to what might be done to alleviate the perpetual problem of securing timely payment of counsel's fees. The introduction of the *Legal Practice Act* 1996 might have been expected to lead to some more formal arrangements between counsel and their instructing solicitors or clients so that timely payment of fees became the norm rather than the exception. As the authors point out in the recent editorial, the Legal Practice Act allows for the payment of interest on unpaid fees although this appears to be rarely used in practice. The editorial states somewhat whimsically:

> If there was a uniform insistence on payment of interest then this might change things.

I think it would be fair comment to say that the majority of barristers would not be particularly concerned if the generalised delays in the payment of fees was due simply to the pressure of work faced by solicitors or some acknowledged inefficiencies in their office procedure. On the other hand, where the delays in payment are due to a conscious decision made either by large organisations or in some cases perhaps by individual firms of solicitors then the Bar as a whole needs to seriously question whether barristers should continue the time-honoured practice of acting as unpaid bankers in litigation.

Individually barristers are no doubt reluctant to take a decision to impose interest charges on outstanding accounts, as such a practice would clearly be unpopular with solicitors and clients and would no doubt raise a reasonable expectation that an individual barrister's practice might be affected by taking such a step. Similarly, an individual barrister's clerk would no doubt express similar reservations. The clerks basically see themselves as having a dual role — firstly to establish a good relationship with solicitors who regularly brief members of their List and secondly, to adopt the less popular persona of the fee collector. Clearly there is no great relish taken by a clerk who is asked perhaps by an individual barrister to vigorously pursue outstanding fees from a firm who regularly supports that barrister's List.

I am strongly of the view that the Bar as a whole cannot afford to allow the amount of fees owed to individuals to simply float around in the ether for many months or perhaps even years whilst attracting no interest. Individual barristers have their own financial commitments as increasingly immediate demands for payment are being made in all spheres of our daily lives. In my view a possible solution to this recurring problem would be the establishment of an agency within the framework of the Bar and independent of clerks and individual barristers. This agency would be given the responsibility of ensuring the collection of fees either in accordance with the individual fee agreements or generally in accordance with the provisions of the Legal Practice Act. Provided this collection agency was given broad support by individual barristers and clerks, I believe many of the recurring and unexplained delays in payment would simply disappear.

In recent years it has become increasingly evident that businesses generally are heavily reliant upon expert financial advice in the management of their particular organisation's cash flows. If a large firm of solicitors or even an insurance company is faced with competing demands for payment, one of which attracts no interest if left unpaid for a period of time, then it is only common sense and sound financial practice to give first preference to paying the account on which interest is accruing. No doubt many experienced practitioners at this Bar are well aware of solicitors who are regular payers but perhaps tend to pay 90 or 120 days in arrears. Some insurers or other large organisations similarly seem to take many months or even more than a year to process accounts for Counsels' fees where there would seem to be no obvious impediment to prompt payment.

All sorts of hypothetical calculations can be made as to the amount by which the Victorian Bar as a whole underwrites its own costs by allowing the payment of fees to extend for many months or even years without any interest being charged. In past times one would often hear the comment that fees owed were simply a form of superannuation or a novel way of minimising income tax liability (i.e. by minimising income). Such practices no doubt developed in times when doctors made home visits and stayed for a cup of tea, dentists sent quarterly handwritten accounts and schools did not impose interest charges on overdue school fees. Unfortunately we no longer live in that safe and happy environment. We are all in the business of trying to provide a competent and professional service in a world that has become increasingly concerned with bottom lines and financial efficiency. If the problem is ignored, as it has been for many years, it will no doubt fester and grow until the demand for fees ultimately detracts from the ability of barristers to concentrate on providing the best level of professional service of which they are capable, and new barristers are discouraged from entering or continuing in our profession.

As far as the practicalities of establishing a collection agency are concerned I see no real difficulty. If my proposal or similar one has sufficient support from members of the Bar then it could be debated at a general meeting at the Bar in accordance with our Rules. Alternatively, it is always open to some individual to simply establish a collection agency and offer such a service either to individual barristers or groups of clerks. My personal preference would be for the Bar as a whole to vote to establish a collection agency within its own framework rather than to deal with some outside agency which would be less likely to have such widespread support or usage from individual clerks or members of counsel.

Yours faithfully,

Robert Dyer

Resolution Ignores Ballot

Dear Sir,

In the 22 August 2000 edition of *In Brief* the Bar Council's resolution of 17 August on wigs and court dress are set out.

How can the Bar Council come to the resolutions they have in view of the most recent ballot of its members on this issue? The result of that ballot showed emphatic and unconditional support for the wearing of wigs and court dress. This ballot has been quite properly referred to by the Chairman of the Bar Council when speaking to the press about the Bar's views on this issue. Why are the results not also reflected in the resolutions that have been passed?

Yours faithfully

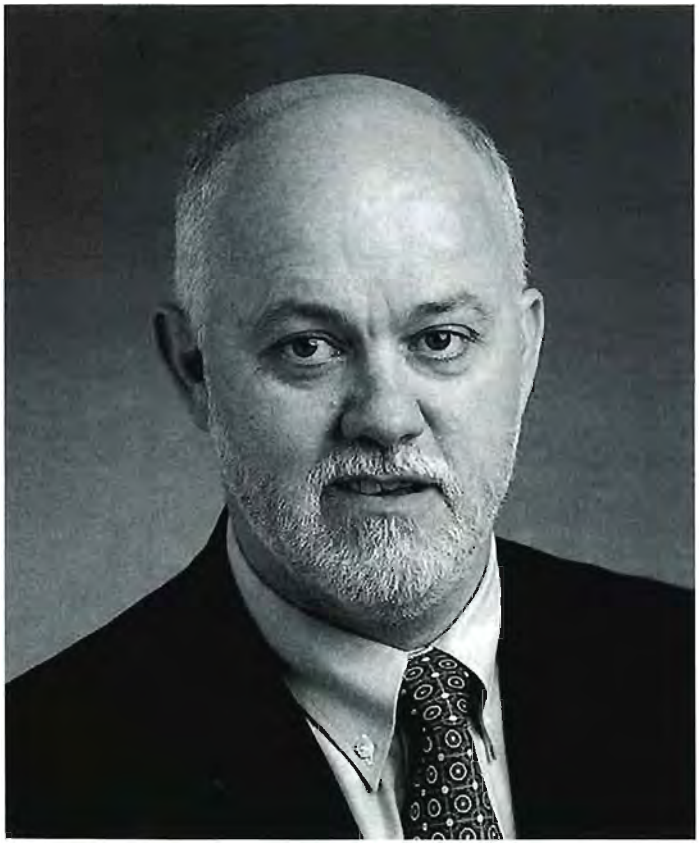
Douglas M. Salek QC

Murray McInnis, M and Norah Hartnett, M

ON 14 June 2000 the Attorney-General the Honourable Daryl Williams announced the appointment of Murray McInnis and Norah Hartnett, both members of the Victorian Bar, as Magistrates of the Federal Court. Murray McInnis has been a member of the Victorian Bar since 1980. He read with Paul Guest QC now the Honourable Justice Guest of the Family Court. He has experience in a wide range of jurisdictions including family law, criminal law, administrative law and civil litigation.

Norah Hartnett has been a member of the Victorian Bar since 1984. As well as being in full-time practice as a barrister she has been a full-time mother to her three children. Her experience as a barrister has largely been in the Family Court where she has enjoyed a reputation as a skilled practitioner.

The Victorian Bar warmly congratulates Mr McInnis and Ms Hartnett on their appointment.



Murray McInnis, M

Norah Hartnett, M

Dr Kate Auty, M

WE welcome the appointment of Dr Kate Auty, a member of the Bar, as a magistrate. Kate was appointed in December 1999, and has exchanged a full and varied life in practice for an even fuller life on the Bench.

Kate's primary school education at the Ord River Research Station School near Wyndham, WA, and at Brisbane and Darwin, no doubt exposed her to social, cultural and environmental issues at an early age, shaping her future interests and directions. After graduating as BA (Hons)/LLB and completing her articles, Kate worked at the Aboriginal Legal Service from 1981 to 1984, and was involved in extensive consolation with Victorian Aboriginal community groups and co-operatives, and in initiatives which led to the establishment of the first official Police/Aboriginal Liaison Committee.

After a period with the Victorian Legal Aid Commission, Kate became a partner in a private practice (the firm of Auty & Popovic) with clientele mostly being non-English speaking or Victorian Aboriginal. During this period, she also provided practical legal training for Leo Cussen Institute graduates. Later, Kate graduated as a Master of Environmental Science, then successfully completed a doctoral thesis entitled "Silence(s) and resistant (dis)quiet in the shadow of the legal system; Race-ing jurisprudence by reference to the Western Australian Courts of Native Affairs 1936–1954".

From 1988 until 1991, Kate was involved with the Royal Commission into Aboriginal Deaths in Custody, being the solicitor in charge of the Victorian and Tasmanian offices (Commissioner — Hal Wootten) engaged in the co-ordination and preparation of cases and in the identification and analysis of underlying issues. With her background and experience, she was alert to the difficulties faced by indigenous people in a potentially alienating environment and appreciative of the need for cultural sensitivities to be respected throughout the whole process. Because of her finely honed skills in case management, her understanding of cultural issues and her acute appreciation of the legal issues, Kate was appointed to the Western Australian office (Commissioner — Patrick Dodson) on the recommendation of Senior Counsel Assisting the Royal Commission.

Kate Auty, M

Kate has also lectured/tutored at university level, notably as lecturer and project officer teaching a post-graduate certificate course in environmental and heritage interpretation to Koorie cultural offices. She has worked as a consultant to the Mirimbiak Aboriginal Nations Corporation, and has published extensively. As well, Kate has delivered papers at various conferences, including the keynote address at the Law and Literature Association of Australia Conference this year.

Since her appointment to the Bench, Kate has been seconded to the advisory group to the Expert Drug Committee chaired by Professor David Penington; was invited to join other colleagues from the Magistrates', County and Supreme Courts on the Judicial Officers Aboriginal Cultural Awareness Committee; and *Continued on page 15.*

Justice Hampel

ON 31 August 2000, George Hampel retired from the Supreme Court. He had been appointed in 1983, and leaves the Bench to take up the inaugural chair of Advocacy and Trial Practice at Monash University.

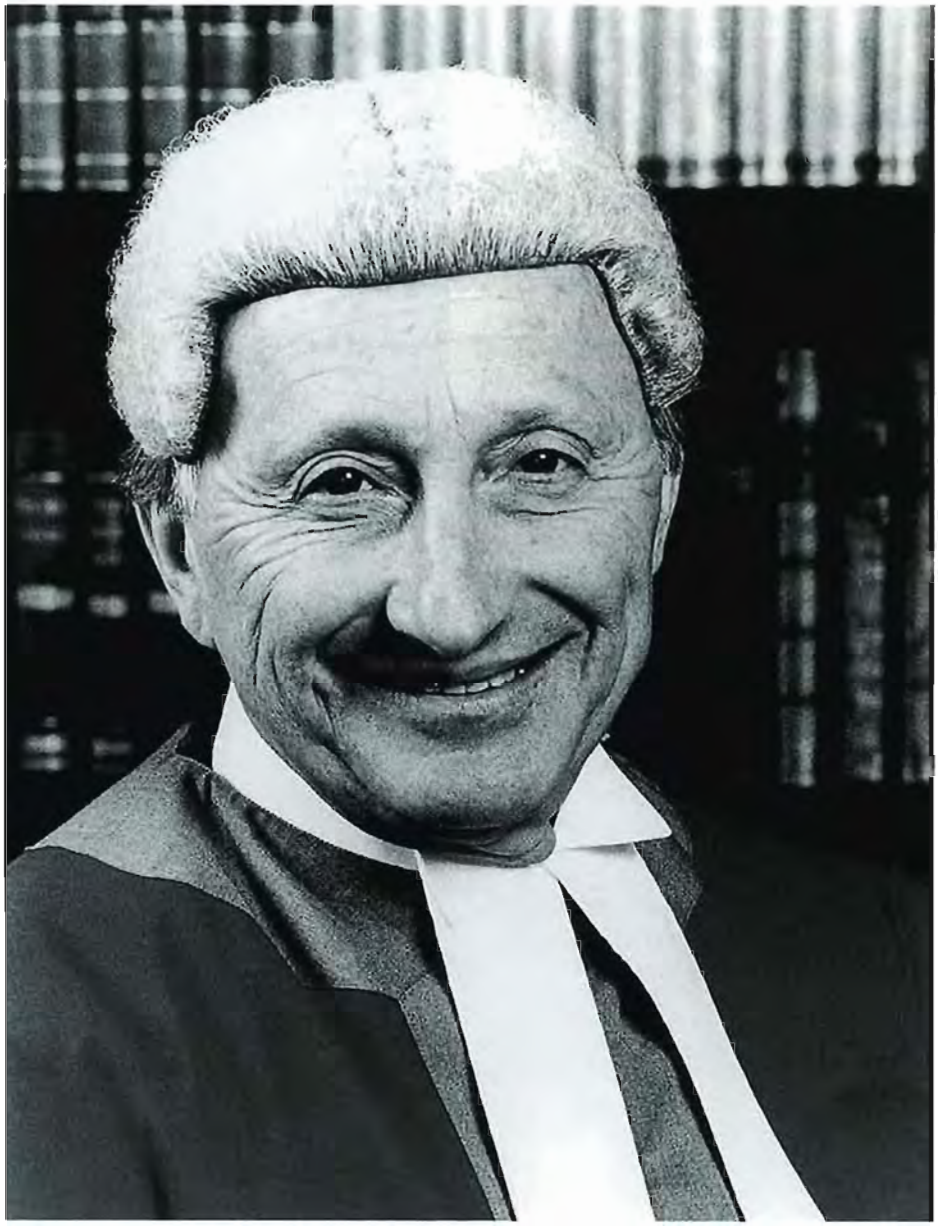
By any standard, his career has been remarkable. Born in Warsaw in 1933, he retreated across Poland and into Russia with his family, ahead of the advancing German army. He went to schools in various towns in Russia and, after the war ended, in Paris. He arrived in Australia aged 14, with serviceable Russian and French, but no English. To some, this might have represented an impossible barrier to a career as a criminal advocate, the more so given the narrow, WASP-ish climate in Australia in the 1950s.

But George Hampel has a profound belief in the equality of people, and allows himself to be included in the generalization. He has that sense of self which Alan Bennett spoke of when he said: "The real solvent of class distinction is a proper measure of self-esteem: a kind of unselfconsciousness. Some people are at ease with themselves, so the world is at ease with them." The world is at ease with George Hampel.

Undaunted by the fact that he started behind the field, he matriculated and went to Melbourne University to study law. After articles with Ray Dunn, he went to the Bar and very soon was briefed in cases which were, on his own assessment, beyond his ability. They must have been quite difficult cases, because he is a natural advocate. He quickly established a substantial criminal practice.

George Hampel was the first person to be appointed to the Supreme Court from a principally criminal practice. His appointment marked a belated recognition of the quality and importance of our criminal bar. As a judge, he sat mainly in criminal trials and criminal appeals. Both as counsel and as a judge, his notable cases included some of Australia's most sensational criminal cases.

His Honour always found sentencing difficult. His natural compassion for victims of crime ran in tandem with compassion for the accused, and an enduring belief in the possibility of redemption.



Justice Hampel

His faith in human nature, as manifested in sentencing decisions and bail applications, meant that "Go Home George" was a sobriquet, not a suggestion.

Above all, George Hampel was concerned to see that justice was done. Among the many letters he received on his retirement was a letter of genuine well-wishing from Julian Knight, who had been sentenced by Hampel J for the Hoddle Street shootings. An unlikely person to think favourably of Hampel J, but nevertheless a satisfied customer.

More recently, Hampel J attracted attention world-wide recently when he discharged a jury because of adverse material about the accused which had been posted on a website called CrimeNet. An American publication wrote:

CrimeNet is in hot water because one of the criminal dossiers it gleaned from rap sheets and media reports not only happened to be about a man facing a retrial for murder in Melbourne, Australia, it also caught the eye of Justice George Hampel, the judge presiding over that very same retrial. Hampel found CrimeNet's dossier, which included details of the defendant's aborted first trial and two previous convictions, so prejudicial that he aborted the trial for a second time and slammed the site for not getting its facts right. Then the proverbial really hit the fan.

And (appropriately) the Polish newspaper *Rzeczpospolita* wrote:

Australijski Internet żyje sprawą serwisu CrimeNet i jego konfliktu z antypodzkim wymiarem sprawiedliwości. Zaczęło się od tego, że sędzia **George Hampel** z sądu najwyższego stanu Victoria postanowił zrezygnować z udziału w procesie o zabójstwo.

George Hampel has at least two defining characteristics: natural style, and a gift for teaching. These characteristics come together on the snowfields. He is supremely elegant skier, and for years he taught skiing in the French ski-school at Mount Buller. I spent a day skiing with him in 1989. It was soon obvious (it took about 20 seconds) that my skiing skills were rudimentary. The jaunt turned into an all-day lesson. It is easy to see why his teaching is so effective. He treats the student as an equal; he makes the easy assumption that you will master the skill, if only you are given a chance: and he shows you the skill and gives you the chance; and then he somehow makes you want to do it better, to please him. This trick is not noticeable at the time: all you know is that you try all sorts of insane things, and he beams with approval, and you are managing things which seemed beyond your reach.

He brings the same skill to teaching advocacy. As he tells the story, he was troubled by the fact that barristers used to learn their advocacy skills at the expense of their clients. It is a legitimate concern. As the medical profession say: no-one should be allowed to take out an appendix until they have taken out 25.

He learned the skills of advocacy teaching from the National Institute of Trial Advocacy in the US. He adapted their teaching model, and became an enthusiastic convert to the idea that advocacy skills can be taught. It is hard now to appreciate what heresy this was in the early 1970s. The orthodoxy then was that you either had the gift, or you did not. The high-priests of this creed were those who had the gift.

The Readers course began in 1979, with the Hampel method of advocacy training at its heart. Of the 1200 or so barristers in active practice in Victoria, about 900 have attended the Readers course. Not to have attended the Readers course is a mark of antiquity. The Bar is justly proud of the Readers course; it has been adopted as the model for similar courses in NSW, Queensland, England and Scotland.

In 1992, Hampel was invited to London by the Benchers of Gray's Inn, to show the English Bar how to teach advocacy skills. To hear colonials expound a heresy was clearly distasteful for some members of the English Bar. Their initial hostility was obvious. In the introductory session, as George explained the teaching method and the need for advocacy skills to be improved, he brought his audience around. By the end of the third day, the English Bar had embraced the Hampel method enthusiastically. It was a remarkable piece of advocacy! Since that time, he has been invited to teach advocacy skills, and teaching techniques, in Singapore, Malaysia, China, Scotland and in every State and Territory in Australia.

It is fitting that Hampel J is retiring to take the inaugural chair of Advocacy and Trial Practice at Monash University. It is the culmination of a long and dedicated career in the law, in which advocacy as a principal tool of justice has featured so prominently. We bid Mr Justice Hampel farewell with sorrow; we congratulate Professor Hampel with pride; and we thank George Hampel with affection.

Julian Burnside

Dr Kate Auty, M

Continued from page 13.

was involved in organising Aboriginal participation at the reconciliating sitting of the Melbourne Magistrates' Court in July 2000, held during NAIDOC week and during Reconciliation Week 2000.

Kate's intelligence, compassion, warmth, commitment, enthusiasm and vitality are wonderful attributes which will stand her in good stead in the many challenges that will face her in her role as magistrate. We congratulate her and wish her well.

Kathryn Rees

Thomas Weetman Smith, AC, QC

28 September 1901–16 June 2000

Chief Judge Glen Waldron: Reflections on Tom Smith, the Barrister and the Judge

THE young Tom Smith, after graduating Master of Laws and Master of Arts from the University of Melbourne and having served the compulsory one year of articles, went straight to the Bar in 1926. He first read with Charles Lowe; then, when Lowe was elevated to the Supreme Court Bench he went on to read with Wilfred Fullagar. He did, indeed, keep impeccable company from the start.

As I shall observe later, the 1930s were grim years at the Bar, with the Great Depression biting very hard indeed. Even the great Tom Smith found the going hard in those Depression years. However, by the time World War II arrived he had survived them. Thereafter, save for the years 1942 to 1945 when he was in the War Cabinet Secretariat, first as a junior and from 1948 as silk, he enjoyed an increasingly busy and successful practice principally in the fields of commercial law, industrial law, constitutional law and equity. Along with many other leading constitutional lawyers, he was, of course, in the great Banking Case of the late 1940s. Nevertheless, he had a number of briefs which he thoroughly enjoyed, along with the great Jack Cullity, in what might be described as mixed fact and law cases. Theirs was a lethal combination, Cullity obtaining the requisite concessions in cross-examination to support Smith's brilliant submissions on the law.

Professor Robin Sharwood will give you the detail of Tom Smith's quite huge and most influential contribution to both legal education and law reform, dating from 1933 concerning legal education.

That detail will demonstrate that he was a man who, independent of his judicial service, did great public service to the Victorian community. When one reflects on the breadth and excellence of his public service, in legal education, as law reformer and as a great judge, the impression may be given that he was a man of unswerving rectitude and overly sober habits. I can assure you that having read Tom Smith's memoirs of his pre-war years at the Bar, the impression is false. He was a close friend of Len Stretton and Freddie Gamble (both later County Court judges). He joined them in many of their legendary high jinks, including being the front-seat passenger in Gamble's Rolls-Royce on the famous (infamous?) occasion when he, Gamble, drove it up the Parliament House steps.

Tom Smith enjoyed life to the full. Indeed throughout his years on the Bench it was his virtually invariable practice to have a few beers on his way home at the Windsor Hotel, discreetly away from the "legal precinct". I understand that the meetings of the Chief Justice's Law Reform Committee closed promptly in order to maintain that practice.

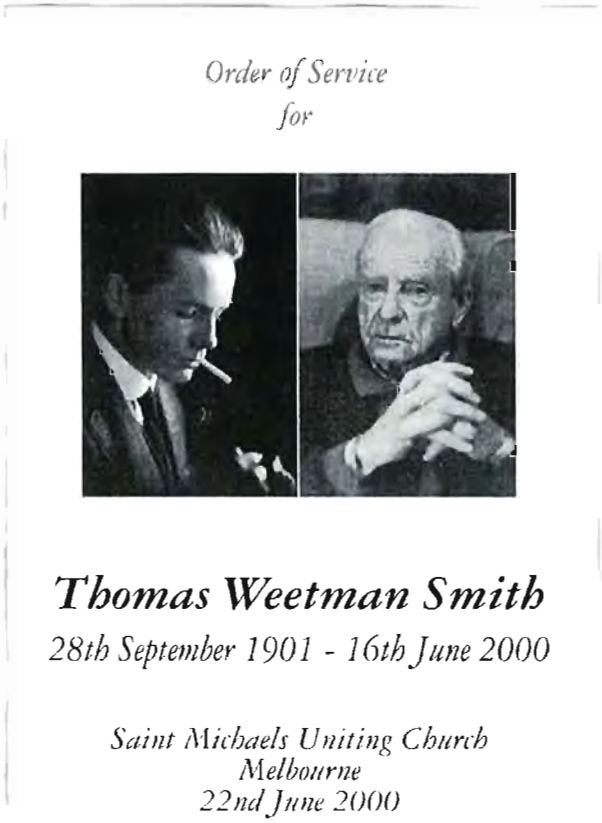
I come now to his years as a judge.

T.W. Smith KC took his seat on the Supreme Court Bench in February 1950. Thereafter, until September 1973 when he reached the then compulsory retirement age of 72 years (an absurdity for one of his attainments) he served for some twenty-three-and-a-half years as a judge in the most exemplary manner.

It is fair to say that he was the complete judge; the "par excellence" judge; undoubtedly the outstanding judge of his generation.

From my perspective, first as a very junior barrister through to the time I took silk, the Victorian Supreme Court Bench was an outstanding one. All of the judges knew their law. Indeed, I have always thought that with all of them, having been put to and survived the very gruelling test of the Depression years, with only the most talented able to survive at the Bar with comparatively sparse briefs, they certainly had the time to learn the law in a complete manner — and learn it they did.

In 1973, Mr Justice Smith was conferred the degree of Doctor of Laws at the University of Melbourne.



Although, as I say, the calibre of the Victorian Supreme Court Bench was so high, Tom Smith very clearly stood out above the others.

How was that so? His of course was a vaulting intellect, a highly desirable capacity but, least happily for some of us, not a condition precedent to the holding of judicial office. However, additionally he possessed all of the necessary judicial attributes, to the highest degree.

His industry was gargantuan. For many years I appeared before him throughout his annual month's circuit at Geelong. Remembering his many extra-curricular responsibilities, it may be that he saw the month at Geelong as a mildly restful respite. His loyal and good friend "'Mac" Gibson, his devoted associate for most of his judicial tenure, organised and orchestrated the list for him. The result was, in truth, that during each of those circuits he virtually did not stop. He heard undefended divorces and Practice Court matters before and after the normal sitting hours — sometimes at lunchtime as well. As proof of this point, I tell this true story. On one occasion at Geelong, Martin Ravech asked his tipstaff Harry O'Shannessy who was the greatest judge he had seen. Without hesitation, Harry instantly replied "Sir Charles Lowe". "Not your judge?" was Martin's incredulous query. "No," said Harry, "with Sir Charles it was always: One o'clock, stop. Quarter past four, stop."

As I say Tom Smith never stopped. Additionally, he prepared his jury charges in civil personal injury actions with meticulous but necessarily time-consuming care, interweaving from the transcript the lay evidence with the expert evidence on both the liability and damages issues into a most comprehensive and compelling tapestry, thus, very frequently I must say, putting paid to the attempted plausible submissions advanced by a certain defence counsel.

At Geelong over those years I had the great privilege of learning advocacy skills from the masterly Ted Laurie and the requisite judicial attributes from the great Tom Smith. It was a most fulfilling, albeit not infrequently, humbling apprenticeship.

He was a superb lawyer. His knowledge of the law was encyclopaedic. Further, as a judge he became a great criminal law judge at first instance and on appeal in addition to his mastery of the civil jurisdictions. Many of the accepted criminal directions to juries come

Chief Judge Glen Waldron.

either from his directions or his judgments on appeal. Indeed, as will be observed by Professor Sharwood, in his retirement he was most influential in the reform of the criminal law. It is not surprising that when application was made to the High Court in *Tait's* case for a stay of execution, Chief Justice Sir Owen Dixon readily granted it on Mr Justice Smith's dissenting judgment in the Court of Criminal Appeal.

One can only assume that he was not elevated to the High Court simply because of his wish to remain at home with his family rather than adopt the then peripatetic lifestyle, generally by aeroplane, of a High Court judge. Indeed, although he was a truly humble man, so consummate a lawyer and judge was he that he genuinely never expected that any exceptions would be taken to his jury charges. If one were not lightningly quick, he would be out the judge's door behind the Bench before the exception could be taken.

It may be that it was his widely accepted pre-eminence in his ability to charge a jury in proper manner that allowed him to make the following comments at the conclusion of a certain civil jury action without them being subjected to appellate scrutiny. The case was *Tremain* v *Lilley and another*, an action for damages by a plaintiff concerning severe brain damage suffered by him in a motor car collision. At the conclusion of his charge in this large, long and emotionally laiden action the judge said words to this effect: "Members of the jury, when you return to your various walks of life after verdict, if persons come to know that you were on this jury, those persons, not fully informed as are you, may criticise you for the size of your verdict. In that context, I simply say to you: 'Be bold and do your duty'. You may now retire and consider your verdict."

I can assure you the jury heeded the judicial direction and returned what was then a record verdict!

He was disciplined. Each time I speak to the Bar Readers I instance his self-restraint. His modus operandi never varied. It was only after examination in chief, cross-examination and re-examination had concluded that he would ask any question that was required in order to cure some ambiguity. Devastating those questions generally were.

He had complete control of his court. And he did it so easily. Of course, respect for him was universal. Nevertheless, all he ever did — ever had to do was simply to say, raising his hand, "Stop". Whether it was witness or counsel, they stopped!

He was a man of quiet good humour who very much possessed the "common touch". Not I might say with any diminution of the necessary judicial "gravitas". Indeed, from the outset of his judicial career he very determinedly resolved not to play the role of the judicial comic.

He was a man of high principle and of the utmost integrity. It was the fact that this great judge, alone of the long-serving judges of his time, was not knighted whilst in office because he believed that a serving judge should receive no preferment from the Executive lest it "affect" or give the perception of affecting his judicial objectivity and independence. Most appropriately in his time of retirement in 1990 he was appointed a Companion of the Order of Australia.

He was wise, he was erudite, he was consummately fair. The loser in his court was always the party who deserved to lose. Nevertheless, all went from his court knowing they had received the fairest and most thorough of hearings.

Finally, and most importantly, *he was a man of compassion*, with a most finely honed sense of justice. I had a profound respect for the individual. He was a true egalitarian. In today's parlance one might say that he had a most well developed social conscience. I suspect that it was this that caused him to more readily and willingly sit in the civil jury jurisdiction than some of his fellow judges who,

it seemed, thought it was somewhat beneath their dignity. Nevertheless, maybe he did not gain unalloyed joy from the experience. On an occasion when he was sitting in civil juries in the London Assurance building in which were then located four temporary Supreme Court civil jury courts, I well remember him in the crowded lift saying to the then young Darryl Dawson: "And what brings you to Sodom and Gomorrah this morning, Dawson?"

But returning to my theme, no judge has exercised judicial discretion in a more consummate manner.

When we reflect on the greatness of this quite outstanding judge, this marvellous, universally well respected and very much loved man, you can understand, I am sure, what a great honour the Smith family have done me in asking me to speak this morning. I trust that I have not been found too wanting in that task, for the Honourable Mr Justice Thomas Weetman Smith was indeed a judicial paragon.

Professor Robin Sharwood, AM: Tom Smith's Contribution to Legal Education and Law Reform

TOM Smith's stature and achievements as a barrister and as a judge were so outstanding as to constitute a major career in themselves. What more could be expected of any person? For us ordinary mortals, comparatively little, I suspect; but Thomas Weetman Smith was no ordinary mortal. His gifts, and his energies, which sustained him into old age, also enabled him to make notable contributions in the fields of legal education and law reform.

Given his devotion to scholarship, apparent from his student days, his willingness to play a significant and creative role in Victoria's system of legal education is perhaps not surprising — although how he found the time to pursue this role so energetically and for so long must be a matter for wonderment.

As a junior barrister, he became a so-called "independent lecturer" at the Law School of the University of Melbourne. That was in 1933, and it is said that it was on the strength of the stipend attached to that position (minimal though it must have been) that he decided he could afford to marry! From 1933 to 1941 he lectured in a subject called Law of Contract and Personal Property, and from 1941 to 1946 in the reordered subject of Contract. He was by all accounts a clear and authoritative lecturer, indeed legendary in those respects, and when I (for example) went up to the Law School at the end of the 1940s Tom Smith's lecture notes were still circulating surreptitiously amongst the favoured few.

Tom Smith returned to the field of legal education, in a rather different fashion, in the early 1960s, in response to what amounted to a serious crisis. In 1961, the Melbourne Faculty of Law, with the greatest reluctance, imposed a quota on admissions to the Law School, its hand forced by an overwhelming demand for places and totally inadequate resources to meet that demand. As it was not possible to establish immediately a law school at the still relatively new Monash University, the Council of Legal Education decided to create a facility for the teaching of the existing Articled Clerks' Course, to be housed at RMIT. Chief Justice Herring gave Tom Smith the task of creating that facility, as Chairman of the Council's Legal Education Committee, and the Committee undertook the heroic task of setting up the facility in effect, a mini-law school — in just six weeks, so that students could enrol for the academic year 1962. This is not the place to examine in detail the history of what came to be called (not altogether accurately) "the RMIT course", but it lasted until 1978, and for most of that period (until 1973) Tom Smith was its chairman. This was never for him a nominal position. With his Associate "Mac" Gibson as his right-hand man, and lecturers of high quality from the profession, Tom Smith was the course's active director, and took a personal interest in the welfare of its students, doing all he could, for example, to assist them to find articles. One student — the only female student of that first year — recalls the Judge stopping to talk to her: "I nervously fidgeted with my pearl necklace which promptly broke and pearls scattered everywhere. His Honour knelt down to help me pick them up . . . "a lovely man", she says today, remembering the incident with some embarrassment![1]

Given his devotion to scholarship, apparent from his student days, his willingness to play a significant and creative role in Victoria's system of legal education is perhaps not surprising — although how he found the time to pursue this role so energetically and for so long must be a matter for wonderment.

When Monash University set up an Advisory Committee in 1963 to plan for its own law school, Tom Smith became a member and then in due course, and for a number of years, a member of the new Monash Faculty of Law and Faculty Board.

Very fittingly, all three of the Melbourne tertiary institutions with which Tom Smith had been so closely associated were to honour him — the Universities of Melbourne and of Monash conferred upon him Honorary Doctorates of Law, and the RMIT made him a Fellow, only the second in its history (the first was Lord Casey).

Tom Smith also had a passionate commitment to law reform.

While still on the Bench, he was Chairman of the Chief Justice's Law Reform Committee from 1962 until 1973. That Committee was at the time the only standing law reform agency in the State, and, under Tom Smith's chairmanship, and with the co-operation of other

judges, barristers, solicitors and law teachers, but with very limited resources, it did sterling work.

When the Judge retired from the Bench in 1973, at the age of 72, it might have been expected that he would be content to rest on his not-inconsiderable laurels. But no-one who knew him actually expected anything of the sort, and in that year, 1973, he was appointed Victoria's first Law Reform Commissioner, a position he held until 1977. This was when I myself first began to work closely with him, and to form a warm regard and affection for him as mentor and friend, because the Law Reform Commissioner shared a suite of offices with the Victoria Law Foundation, of which I was the first director. As a member of the Foundation himself, Tom Smith played a very important part in its initial development. The funds he urged the Foundation to invest, which came to be known as "the Smith Reserve", literally enabled the Foundation to survive the twin disasters of a run on the Solicitors' Guarantee Fund and unheralded and damaging government changes to its statutory funding formula. When asked to nominate a motto for the Foundation, Tom Smith suggested "put not your trust in Princes".

As Law Reform Commissioner, with a small staff and a select advisory council, Tom Smith produced six reports and he later calculated their implementation at "about eighty per cent".[2] Professor Louis Waller, long a close colleague, singles out three reports as particularly notable:[3] the first report, that on the Law of Murder, which was ground-breaking but not acted upon in detail, although it did pave the way for the abolition of capital punishment, an outcome of which Tom Smith was especially proud;[4] the report on the Law of Rape, which was speedily implemented; and the report on Spouse Witnesses, whose recommendations were again enacted.

Tom Smith retired for the second time in 1977, but his work for law reform was by no means over. In that year, Haddon Storey, as Attorney-General, asked Professor Waller to convene a criminal law working group to consider certain reforms to the criminal law. Its members were Louis Waller, Tom Smith, Paul Mullaly (then Crown Counsel) and Robin Brett (of Parliamentary Counsel), and it worked until 1984 when Tom Smith (be it remembered) turned 83. For almost all its life, the group met at Tom Smith's home in Malvern — largely, Louis Waller assures me, because Molly Smith produced "brilliant afternoon teas". "Completely under-awed" (to quote Louis Waller again), Molly christened them "the Gang of Four".[5]

All Tom Smith's law reform work, extending over so many years, was characterised by erudition, balance, wisdom and a strong sense of justice — or, as some have put it, an instinct for detecting injustice.

Tom Smith revelled in the work of this group, which ran rather like a high-powered seminar. He once, in an interview, identified the criminal law as the most important branch of law for society.

"It's the area", he said "in which the law makes its contribution to keeping the community viable, keeping it a society in which people can live reasonably happy and independent lives. So long as the people have faith in the criminal law system as their protector, and it functions with reasonable fairness, I think you have good odds on having a community that is worth living in."[6]

"The Gang of Four" produced reports on three topics: on criminal damage, on the basic classification of crimes and on the so-called "preliminary crimes" of conspiracy, incitement and attempt. Its recommendations were substantially enacted by successive governments.

All Tom Smith's law reform work, extending over so many years, was characterised by erudition, balance, wisdom and a strong sense of justice — or, as some have put it, an instinct for detecting injustice.

In summing up the enormous debt we owe him, we can, I suggest, adopt those words of his which I quoted a few moments ago: it is not least because of the untiring efforts of Thomas Weetman Smith that we here in Victoria have "a community that is worth living in". And for that precious legacy we give him our thanks.

NOTES:

1. Margaret Purcell, in a personal communication to Anne Mancini, 21 June 2000.
2. Interview published in *Law Institute Journal*, August 1983, p. 816.
3. Personal communication, 21 June 2000.
4. Interview published in *Law Institute Journal*, August 1983, p. 816.
5. Personal communication, 21 June 2000.
6. *Law Institute Journal*, July 1983, p. 658.

Audley Gillespie-Jones ("Gill")

AUDLEY Sinclair Gillespie-Jones (after his school days known to many as "Gill") was born on 1 July 1914 at Swan Hill. He died at Canberra on 7 May 2000, aged 85 years. He was educated at Melbourne Grammar School. In his final year at school in 1933 he played in the first eleven cricket team, was captain of athletics and was vice-captain of the first eighteen football team. At Melbourne University he was awarded a triple blue in athletics, cricket and Australian Rules football. In 1934 he kicked 106 goals in 16 matches for University Blacks. (In the same year he kicked 15 goals in one match against Adelaide University.) He lost his blue for football for playing in the professional league although he always played as an amateur. In 1935 he joined the Melbourne Football Club but injuries limited his opportunities.

He then travelled through China in the time of the warlords, and left Vladivostok just before it became a closed port. With his great friend Alan La Fontaine (the future Melbourne captain), he went to the United States where he won the return fare by winning a fight in a boxing tent. It was with La Fontaine that he swam the Yarra at Prince's Bridge in his dinner suit for a bet after a ball. In 1937 he trained with Carlton, but then joined the Fitzroy Football Club. In his first year he played as a forward under Hayden Bunton. In 1939 he had his best year, polling well in the Brownlow count. Enlistment in air force and then the army thereafter severely limited his appearances, but he continued to play football for Fitzroy during the war and played his last match in 1946. "Gill" served the Fitzroy Football Club as a recruiting officer and committee man. He became a life member of the club.

He was serving in New Guinea when Fitzroy won its last premiership in 1944, but he played when the club had five Brownlow medallists. He served behind the lines as a commando in the islands and in New Guinea and Timor. He once spent 26 hours in the water waiting for a submarine off Ambon and thereafter confidently asserted that sharks were not attracted by fear. He finished the Second World War as aide-de-camp to General Murray who was Allied commander of Norforce based in Darwin.

Audley Gillespie-Jones

After 1946 he coached the University Blacks to two premierships. He obtained a Bachelor of Laws degree from the University of Melbourne. He completed his articles with the great Alan Benjamin at E. L. Vale and Benjamin, and in 1948 read with Ben Dunn, later to be a Justice of the Supreme Court of Victoria. Gill practised in all jurisdictions, both trial and appellate, and was never a stranger to controversy (see *R* v *Chairman of General Sessions ex parte Atterby* [1959] V.R. 800). He did 68 murder trials, all but a handful in the days of the noose and the triangle. He had three heart scares after three losses. He was the last barrister at the Victorian Bar to be poisoned by criminals so that he would not appear in court. He was one of the few lawyers to appear for a prime minister, a High Court judge and a cabinet minister in the same case (*Sankey* v *Whitlam* (1978) 142 CLR 1). He declined judicial appointment, practised in Queensland, and then Canberra where he became President of the ACT Bar Association. He abhorred pompous judges and greedy lawyers.

Gill was one of life's enthusiasts. In the 1950s living in Melbourne he joined with others in being an early member of the Vintage Car Club. He owned three pre-war Rolls-Royce cars. He was part owner of a hotel at Mathoura, New South Wales. He played cricket for Melbourne University and the Melbourne Cricket Club. He stood for preselection. He wrote a number of successful books. His friend, Connor J, was once quoted as saying that it was difficult to tell a funny legal story without breaching his copyright. He was a passenger on a Qantas major air crash in Mauritius. He lived for short periods in Tonga and Malta. He was a friend of many migrants and often gave advice to refugees and asylum seekers. He was awarded an Order of Australia medal for his services to the law and the community in 1991.

He was a very good friend. When times were hard, when fair weather friends had departed, "Gill" was steadfast in his support. He valued friendships more than fees. He was gregarious, generous, good company and frequently quick to see a joke in almost any situation. He was considerate towards others and had great courage. His counsel was often sought and valued by persons in and out of the legal profession.

Throughout his life and up to about the age of 80 he ran and later walked kilometres daily. In his later years he suffered severe injuries by running into obstacles and falling down manholes. He had very little sight from the 1960s and for the last 30 years of his life he was blind.

He married Margaret, a doctor, who was the daughter of Professor Inglis, the Professor of Pathology at Sydney University. He then married Lola, the former wife of Reg Grundy. He is survived by four children and two sisters.

S. Gillespie-Jones

Ian Geoffrey Sutherland QC

IAN is survived by Tina and their children James, Thomas and Amelia. He was educated at Hailebury College where he was an outstanding middle distance runner. Tina's brother Peter, who was head prefect at the time, described the young Ian Sutherland as a headstrong, rebellious, pain-in-the-neck. On one famous occasion a notorious school master, whose practice was to kick unwanted school bags away from the common area, more than met his match when Ian filled a school bag full of bricks.

Ian enrolled at Monash University in 1967 and in 1971 graduated with degrees in law and jurisprudence. In his first year he worked at a railway station stall on the 5.00 am shift to help pay his way. At the end of the first year he earned a Commonwealth scholarship and never looked back. Although an enthusiastic participator in the ratbaggery of university days, Ian conscientiously attended all lectures and tutorials and took impeccable, complete and legible handwritten notes which were in great demand by those of us less organised or conscientious.

Ian loved speed. He rode a motor bike. He was a practical joker, spending lots of time hosing or being hosed or pelting or being pelted with lemons or other throwable objects, often after the victim was well and truly tucked up in bed. The wild child, the bikey, the practical jokester, became the ultimate family man and a model of responsibility as he progressively became Honorary Secretary of the Bar Council, Queens Counsel, Chairman of the Firbank Foundation, a member of the Legal Practice Board, a member of the Brighton Grammar School Council and recently President of the Brighton Grammar School Council.

Ian enjoyed the intellectual side of the Bar and the company of many of his colleagues, although he shied away from some of its more confrontationalist aspects. He enjoyed the simple things of life, be it his weekly Saturday visit to the Pantry in Brighton, watching his children play sport, or working on his exaggerated shed at Mansfield, affectionately known by the locals as the Merrijig Mahal. Ian gave a lot to, and got a lot out of his time with, Firbank and Brighton Grammar, where he was much appreciated.

Ian and Tina knew each other from local Brighton days. They were a fun, attractive couple. Between them they had the craziest laughs in the business. Tina was spunky and zany, and Ian fun with that amazingly infectious laugh. They were each other's soul mate. Ian the controller, Tina untamable. They had a healthy independence. Ian would lay down the law and Tina would do what she wanted. When Ian got sick Tina's life was turned upside down. Ian use to laugh and say that the only way he could get Tina out of their large family home Winmalee was to have her registered as an easement.

No matter what his family did to irritate him, his unconditional love for them remained. He was an attentive godfather to my daughter, Sarah. Ian was very loyal. He stuck with me through thick and thin. I was usually thick, he was usually thin. He withstood my various bouts of irrational behaviour without condemnation. He was a true friend. Ian had a lot of love to give and gave it in his own unique way. Who can forget all of those Legal Studies and English assignments that Ian helped draft for James and Thomas? He was really cross when he, I mean Thomas, only got a B for a Legal Studies assignment. He devoted himself to their schools.

Ian also loved his dogs. He had two red setters, Megsy and Shevaun. Megsy lived to about 14 and was as devoted to Ian as Ian was to her. The first red setter having been such a success, in contrast to our bad experience from the same litter who was totally scatty and looked to escape at every turn, Ian replaced Megsy with Shevauny who was like the road runner, constantly breaking out from wherever she was. All you would see was a red flash. Finally it was Cassie and Tessa, his two border collies, again absolutely devoted to Ian, for whom Merrijig was Nirvana.

Some look around for sexual distraction from middle age. Ian's mid-life crises were lived through a stream of toys; two Porsches, a Harley Davidson motor bike, a super fast speed boat and his two farms.

Ian generously took on many community responsibilities. He was wise, fair and honest and a leader. It was not at all surprising that he was offered a position on the County Court. It would not have been surprising if in time he was offered a Supreme Court appointment. Ian had the attributes of a good judge; intelligent, fair, relatively few prejudices and stubborn and determined when necessary.

Ian had a successful legal career. He was one of Her Majesty's Counsel. He read with Tim, now Justice Smith. He had seven readers. He battled through the philosophical biases of the Industrial Court in the matter of *Sutton* and successfully overcame the acidity of the High Court to bring home a famous victory. He was making a name for himself in the burgeoning area of Industrial Law. He was one of the counsel assisting the Tricontinental Royal Commission. He was often commended for his reliability, conscientiousness and quiet intelligence.

Ian had a great sense of humour, even in adversity. Undoubtedly he would want people to laugh rather than dwell on the sadness of his last years. Early this year he said he would like to go with me to the football, adding "I'm sure there'd be plenty of plasma available at the MCG." He always had a joke to tell. Usually politically incorrect or extremely daggy, and often heard at the long table in Dominos. As was typical of the man his sense of humour was not destructive of other people.

The multiple myeloma that Ian suffered from caused a period of prolonged illness, particularly from when it was diagnosed in October 1998. Ian went about all of the unpleasant treatments that his dedicated medical team recommended, including a stemcell transplant during which he was taken to within an inch of death before being revived by some fresh stemcells, with stoicism and positive thinking. Not once did Ian complain, or ask for sympathy. He openly discussed his condition and joked about it. Ian and Tina and friends, Peter and Jo Kennedy, visited us at Airey's Inlet and saw in 2000. Ian was still weak, but seemingly improving. He blossomed in the sea air and in the company of close friends. He went for walks, told jokes, was wonderful

company and was so happy. He used to come into chambers, wearing a cap to hide his embarrassment at his hair loss, but was otherwise totally open and natural. He often went down to the coffee club table where he felt at home. He was brave and uncomplaining.

Ian had a large assortment of friends and admirers who turned up in numbers at his funeral. He was as at home with the fencer at Merrijig as he was with a judge or a headmaster. As one of Ian's neighbour's and friend said, people clustered around Ian because of his infectious nature, wonderful wit and integrity. Ian was not aloof.

Ian died too young. He will be sorely missed. Ian lives on through the indelible impression he left on so many.

Peter Hayes QC

Godfrey Cullen

GODFREY would expect to be written about in satirical terms. That is the way he was. He was my eleventh reader and came to the Bar in 1988. He was the first and only reader for whom I had to appear before the Bar elders to explain why he should not be thrown out of the Bar Readers Course. He was a brilliant man. He started off studying medicine but hated the sight of blood and left after a year. After his disastrous second divorce and unsuccessful appeal to the High Court in the celebrated case of *Cullen* v *Cullen*, he took up law as a mature age student. At Melbourne University he would sit in the front of the lecture class and heckle and often intimidate his teachers. He received a double first class honours degree in law and arts. He also remained a director of a data processing business where he learned a thing or ten about key strokes. He was also a director of a business which searched out litigation opportunities where he learned about champerty and maintenance and rough justice.

Godfrey did not mind rolling the dice. He was three times married. He was often broke and more often wealthy. He said that money did not matter to him, but then nor did it seem to matter if he did not pay. He had a laissez-faire view of life and could laugh at himself. He seemed to like fighting with people and was good at it.

Godfrey seemed to be attached to his mobile phone. He would rarely be seen other than in animated conversation on his mobile phone, usually with a script taken from the little bird in the Peanuts comic strip abusing Snoopy with lots of exclamation marks. Godfrey was very inclusive in his telephone conversations. Anyone on his side of chambers would be able to share in the vocabulary expansion delights of Godfrey's telephone calls. He left an indelible impression on the 10th floor of ODCW.

Godfrey was very loyal to a narrow band of people who he truly accepted. He fought ferociously for his clients and had a profound knowledge of the law. He loved his three children passionately. He had a great interest in Jewish causes and was a donor to many causes.

Godfrey was like the Eveready battery. He only "gave up" when he fell victim to an ultimately fatal brain tumor. This tumor had been growing for some time and was probably a major contributor to a lot of his more irascible behaviour.

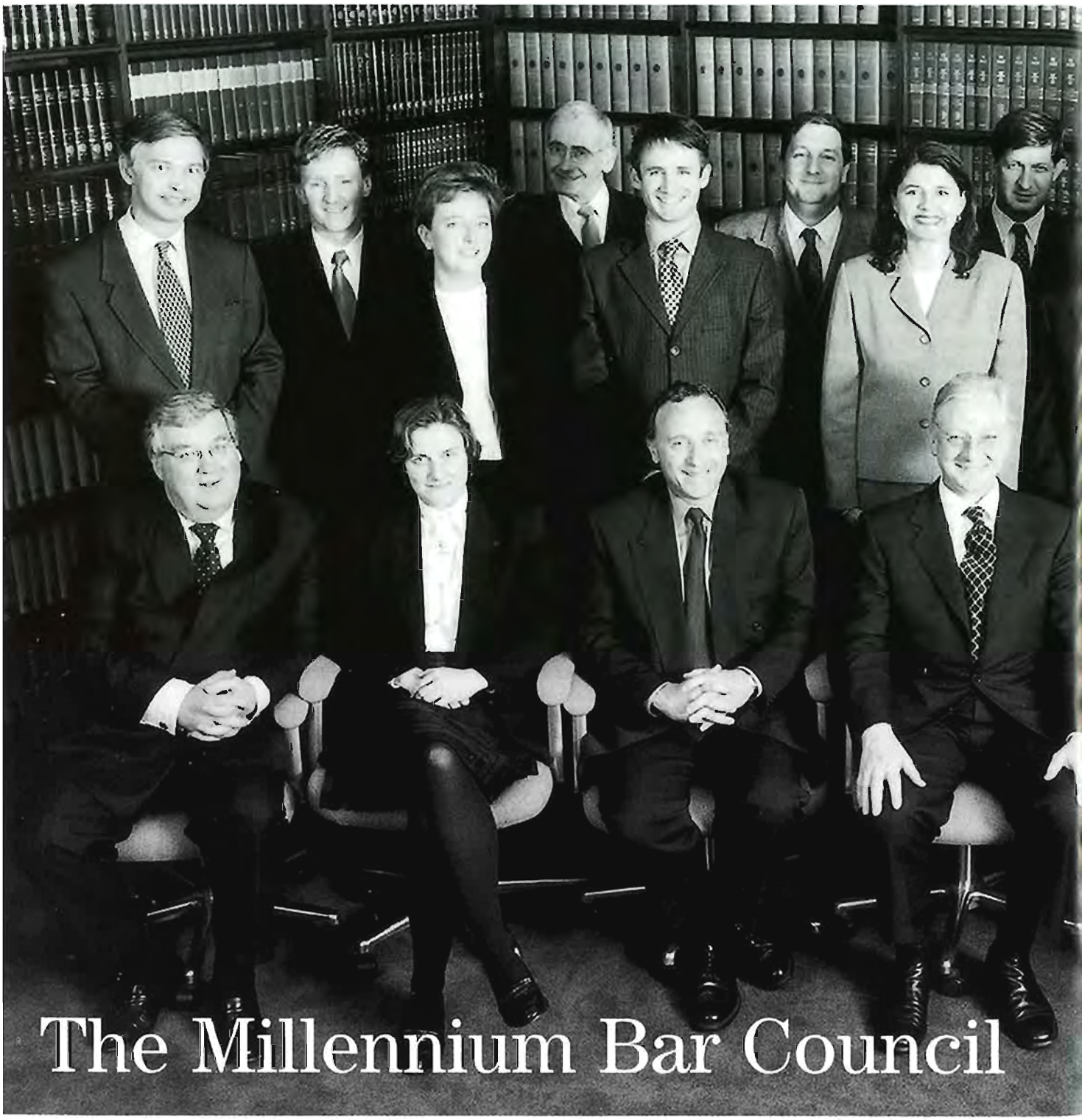
Peter Hayes QC

Strange Old World

"WE find that District Judge H. Lon Harper failed to act in a dignified manner throughout this case," declared the Texas State Commission on Judicial Conduct, after reviewing his handling of a recent capital murder trial. "Not only did he encourage court officials to read newspapers and magazines during the proceedings, and distribute business cards for his private insurance scheme to all witnesses, but he also spent much of the trial repairing two Colt Model 1873 revolvers, a sight which must surely have unnerved the defendant. In general, we find that Judge Harper has failed to maintain appropriate levels of attention to facts during court proceedings."

Despite this finding, and a recent evaluation poll from the Houston Bar Association which voted him the worst judge in Texas, Judge Harper remained defiant: "All I can say about that complaint is that sometimes people who can't walk and chew gum at the same time don't believe that other people can. All judges carry guns. I suppose, I should just have kept mine under my robes, instead of on my desk with a screwdriver. Anyway, the trial lasted four days, only I spent two of them repairing my guns. The rest of the time I just read newspapers. I like the British tabloids best. They have fascinating stories."

(*Austin Herald*, 13/7/00. Spotter: Adrian Porter)



The Millennium Bar Council

Seated Front Row (left to right):

Philip Dunn QC

Kate McMillan

Robert Redlich QC
(Senior Vice-Chairman)

Mark Derham QC
(Chairman)

Jack Rush QC
(Junior Vice-Chairman)

Ross Ray QC

Standing at Rear (left to right):

Michael Shand QC

Peter Nugent

Sara Hinchey

David Ross QC

James Gorton

Michael Gronow

Katherine Bourke

William Houghton QC

Richard McGarvie
(Assistant Honorary Treasurer)

Richard Attiwill
(Honorary Secretary)
David Neal
Garrie Moloney
Sharon Moore
(Assistant Honorary Secretary)

Absent:
Robin Brett QC
(Honorary Treasurer)
Tony Pagone QC
Jeanette Richards
Peter Riordan

ON 13 September 2000 the Bar elected a new council. There were births, deaths and many smiles, particularly from Derham QC who rose with friends as our Chairman and sat down without an enemy. The Council has lost one of its longstanding comrades in arms, David Curtain QC, who has taken the Bar through many troubled waters and to whom we owe a great debt for his dedication, eloquence and many media appearances on our behalf. The Bar is also indebted to Fiona McLeod for her many contributions across all areas of Bar Council activities. Stephen Kaye QC's contribution will be missed as he has made thoughtful, fair-minded and at times strident contributions to the work of the Council.

So what of the future as we go into the millennium? To adapt the words of Walter Lippman, "The Bar is an irreversible institution and for that reason its future can never be a repetition of the past".

To maintain the Bar as a vibrant institution we must all support the work of the Bar Council and its elected members.

Graeme P. Thompson

Silence in Court

By David Bennett QC

"The recent spectacle of members of the stolen generations being subjected to hostile cross-examination during the Gunner-Cubillo case was a disgrace to any civilised government."

Sir Ronald Wilson QC, submission to Senate Inquiry into the Stolen Generation, 4 September 2000, as reported, *The Age*, 5 September 2000.

REMINISCENT of the poem, there was "movement at the station" at the far end of the first floor vestibule of the Supreme Court at Darwin. At the mid-morning break one could sense that something had ruffled the usual calm of the groups that gathered outside the courtroom there. It was as though the breeze stirring the palm tops outside had penetrated the vestibule.

In that courtroom O'Loughlin J was hearing the Federal Court claims against the Commonwealth by Mrs Lorna Cubillo and Mr Peter Gunner. Claiming to be members of a "stolen generation", they sought damages for wrongful imprisonment and breaches of duty. In 1948 and 1956, when aged eight and seven respectively, Mrs Cubillo and Mr Gunner had been placed in missionary hostels and remained there, attending local State schools, until their mid to late teens.

Also as in the poem, the word got around the courthouse that there had been a furore in court earlier that morning.

On the previous afternoon, in evidence in chief, the applicant, Mr Peter Gunner, had identified from a photograph the missionary he alleged to have been a childhood physical and sexual tormentor at the hostel. The evening television news and the morning press showed the identified missionary's face from the photograph, describing him as the alleged molester.

On the next morning, the morning I noticed stirring outside the court, Mr Gunner, still in evidence in chief, informed the court that he had identified the wrong man in his evidence of the previous day. The man he had identified in the photograph was innocent. The molester was somebody else.

Struck by the apparent absence of remedy for the wrongly identified man, it seemed that it might be interesting, if there was a break in my own case, to drop in to see, for the first time, what was going on at the other end of the vestibule in the Cubillo-Gunner courtroom.

During the time I was in the courtroom, the manner of cross-examination of Mr Gunner, far from being "hostile" and a "disgrace to civilised government", could hardly have been more benign consistently with asking any questions at all.

A day or so later a chance arose. As I walked along the vestibule towards the courtroom, I did not realise that I was about to witness "a spectacle" that Sir Ronald Wilson would describe to a Senate Inquiry as "a disgrace to any civilised government".

My impression as a result of my visit was different from Sir Ronald's. This is what I saw and heard.

Cross-examination of Mr Gunner had begun. Elizabeth Hollingworth, a junior counsel for the Commonwealth, was on her feet, beside her was a Bar table stand on which her notebook lay open. Mr Gunner was seated at a witness table. The white shirts (no coats in the Darwin fashion) of O'Loughlin J and the male counsel gleamed under the courtroom lights.

As I took my seat, Elizabeth Hollingworth asked a question of Mr. Gunner and then wrote in her notebook. It was a very Darwin question; it had an end as open as a hungry crocodile's jaw.

As though he was not aware that a question had been asked, Mr Gunner, head inclined, continued to gaze down at the table ahead of him. Elizabeth Hollingworth waited quietly, looking at the witness. The silence went on too long to expect that something had not gone amiss. I looked around the court. The judge, the other counsel, and the spectators — all sat waiting but without sign of surprise. Time seemed to have stopped.

It is hard to say precisely how long it was before an answer came. The court waited for at least one minute, but more probably for closer to two minutes, before Mr Gunner gave his short answer.

Showing no sign of impatience, Elizabeth Hollingworth enunciated another open-ended question and wrote again in her notebook.

Again, the people in the courtroom sat motionless for a similar period of time until Mr Gunner gave his next short answer.

I suspected that when Elizabeth Hollingworth wrote in her book, it was to record the question, in case by the time the answer came, she had forgotten its precise terms.

On that occasion, I sat in the courtroom for twenty minutes or so. The tempo and form of the questions and answers did not change. Another spectator told me that this had been the pattern throughout the cross-examination to date. When counsel had raised the length of time an answer had taken, the judge had decided not to interfere.

During the time I was in the courtroom, the manner of cross-examination of Mr Gunner, far from being "hostile" and a "disgrace to civilised government", could hardly have been more benign consistent with asking any questions at all.

I cannot speak of what happened in other parts of the case but my impression was that the Commonwealth counsel was taking pains to avoid leaving room for criticism of the type made by Sir Ronald. The reasons for judgment, which reflect the trial judge's sensitivity and his expressed sympathy for the applicants, contain no hint of criticism of conduct of the defendant's counsel.

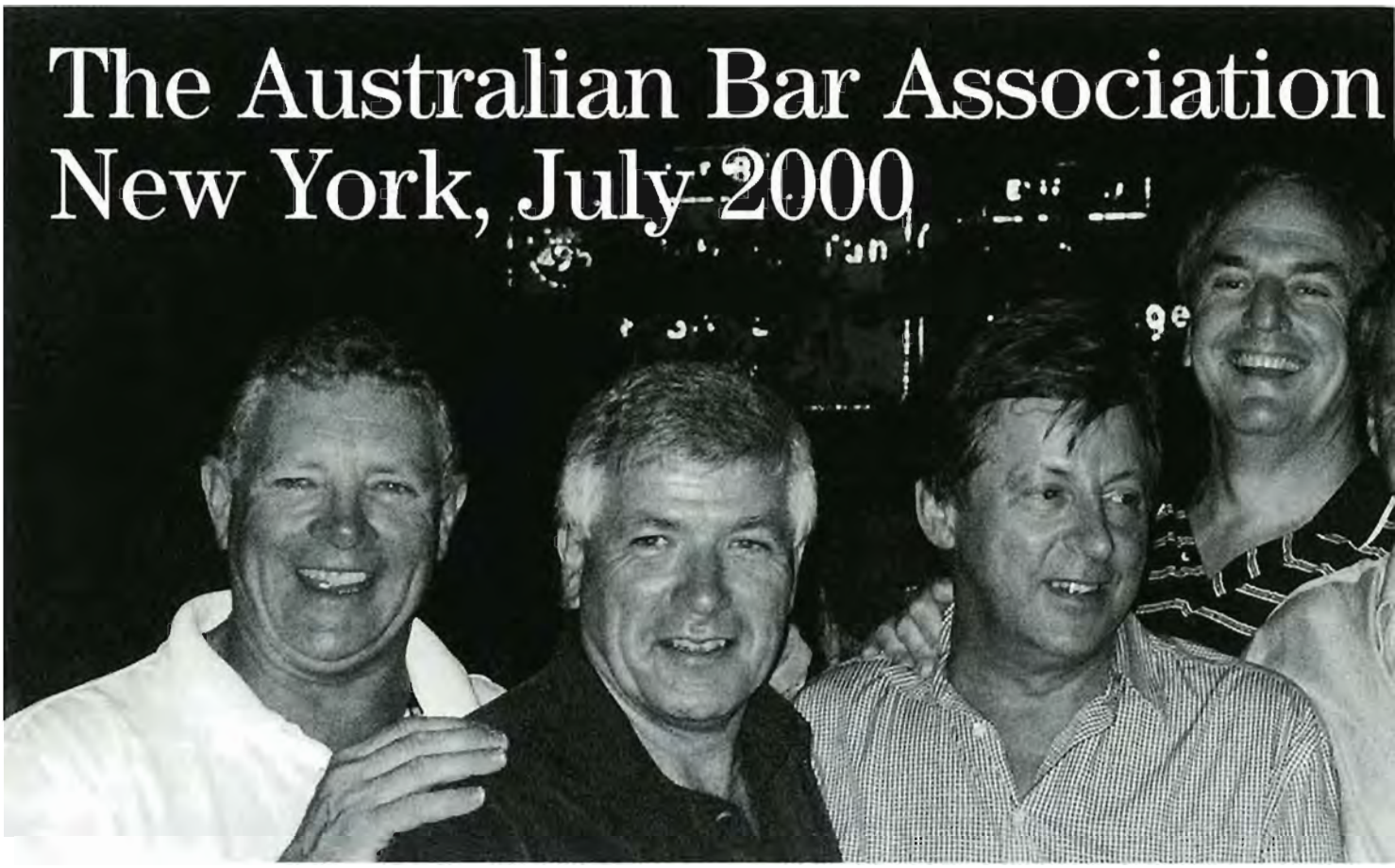
There are two other comments to be made in the light of Sir Ronald's criticism of counsel's cross-examination.

Sir Ronald Wilson's submission to the Senate enquiry referred to "the spectacle" of the conduct he criticised. Sir Ronald was not a spectator in the courtroom when I was there during Mr Gunner's cross-examination. If he visited the court at all in that eight days or so that I was around the Supreme Court building at Darwin, I did not see him or hear of it.

The reasons for judgment . . . contain no hint of criticism of conduct of the defendant's counsel.

Reports of the Senate enquiry do not disclose whether it was aware of some material circumstances. First, the applicants' cases included allegations of violent cruelty and sexual molestation, occurring decades before the trial. The allegations, made late, were against persons who were not parties. One alleged perpetrator gave evidence — and was cross-examined. Secondly, in his reasons for judgment, O'Loughlin J expressed reservations about the credibility of parts of the evidence of each of the applicants. He concluded that, on one issue, Mrs Cubillo deliberately attempted to mislead the court.

The Australian Bar Association New York, July 2000



Malcolm Titshall QC, Judge Michael McInerney, Ross Gillies QC, Tim Tobin, David Martin and David Curtain QC.

THE Big Apple called those peripatetic souls who had labored hard right to the end of GST life as we knew it.

Some 250 delegates and speakers, as well as a similar number of accompanying persons, flocked to New York to participate in the Australian Bar Association's Biennial Conference. We were all apprehensive about the weakness of the Australian dollar . . . in hindsight it's lucky we went when we did.

The conference took place at the historic Plaza Hotel ideally situated on Fifth Avenue amongst the most expensive shops on earth, so that any spare funds not mopped up by airfares, accommodation and victuals could be uploaded at Emporio Armani, Bergdorff Goodman, Saks, etc.

The Chief Justice of the High Court, the Honourable Murray Gleeson, opened proceedings, along with Judge Joseph Bellacosa, of the New York State Court of Appeals. The latter introduced us to some of the wit of Yogi Berra, the famous baseball player, who apparently mangled the English language as badly as Jack Dyer. The line "It ain't over 'till it's over" was his, as was "It was impossible to get a conversation going, everybody was talking so much".

This was certainly true at the cocktail party which followed, in the Terrace Room at the Plaza. There we were able to drink good Australian wine, thanks to Rob Hill-Smith at Yalumba, and discuss where our luggage had left us on the way over. Unexpected but welcome guests were former chanteuse pianist Lana Cantrell, now practising as an attorney in New York, and John Dyett, nephew of his Honour Judge Frank Dyett.

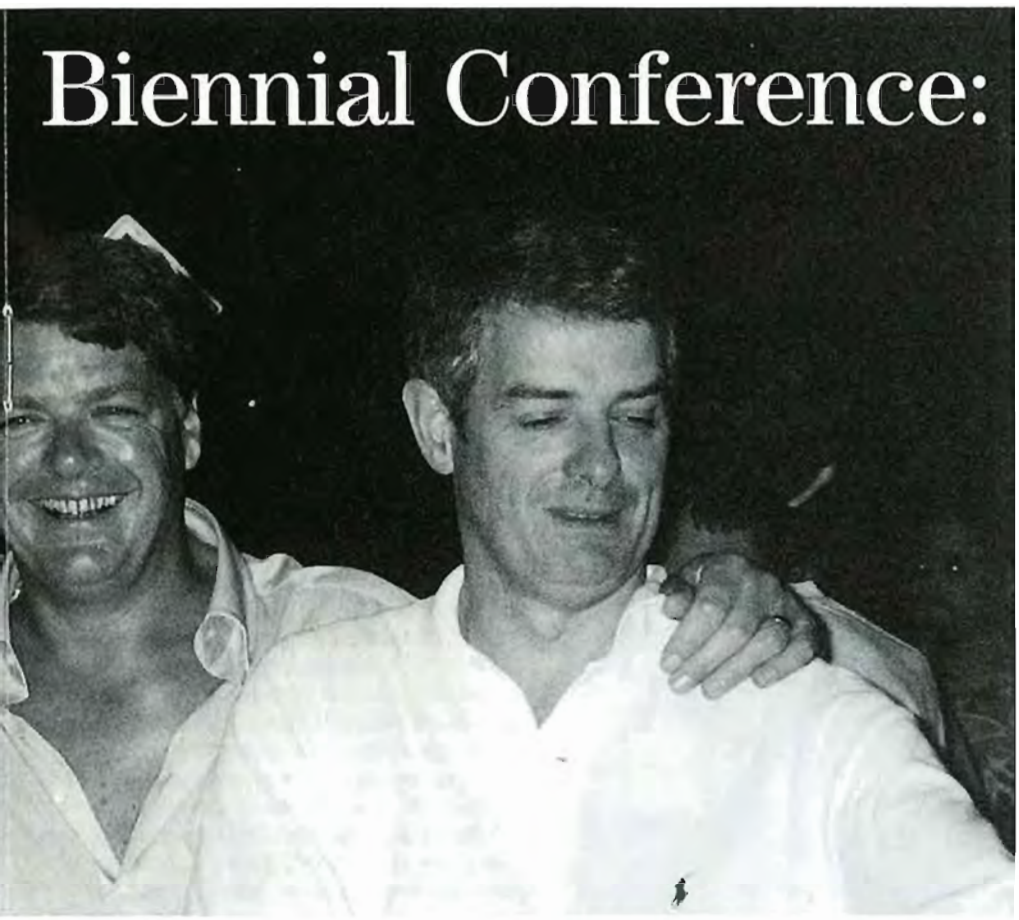
Drinks led inevitably to dinner, and the concierges were kept busy recommending restaurants which could provide reasonable food yet did not cost an amount equivalent to the national debt.

The sessions were all excellent, and the American Bar Association did itself proud in assisting with organising

Graeme Hicks, Paul Elliott QC and Maureen Hicks.

Joanne Titshall, Sally Tobin and Roslyn McInerney with husbands.

Biennial Conference:



John Bingeman QC, Graeme and Maureen Hicks on tee at 18th at Pebble Beach Golf Course, in quiet preparation for New York conference.

speakers of relevance and interest to the Australian delegates. Highlights included a session on Public Trust and Confidence, the Patenting of Processes and its Abuses, and an assessment of the so-called excess in tort litigation in the USA, always a good topic for debate.

Professor Maureen Mancuso delivered a rivetting paper on the Starr Inquiry into the actions of the President and sounded a salutary warning for investigation authorised by government with one subject and apparently unlimited budget.

The last session featured a bright but hard-hitting speech by Johnothan Hirst QC of the Bar of England and Wales. The subject matter was "The profession at the cross roads", but the speaker let fly with both barrels on those who have sought to beset the independence of the English Bar.

Following the last session, a number of delegates visited a community court in Red Hook, an underprivileged area of New York where local community is determined to assist young offenders in avoiding a life of crime. The work load of the resident trial judge, who has sat every day since the court opened, was amazing.

We also visited the Federal Court, to marvel at the high-tech equipment available. The general consensus was that the courts in Australia are ahead of the United States in using technology in the courts, and indeed the United States Federal Court is using the services of people who have provided systems to our courts.

The social life of some of the delegates was stunning to behold. Many took the opportunity to visit Broadway and one can still hear Simon Wilson humming tunes from "Kiss Me Kate". At the closing dinner we were treated to big band music, Broadway actors and actresses singing and performing, and Rachel Doyle and Brent Hutchinson showing just why they are barristers, not professional dancers. The stage was eventually wrested back from these two interlopers, and the musical entertainment allowed to continue to compete with the babble of hundreds of lawyers at dinner.

The conference was a huge success, offering high quality accommodation at a reasonable price, excellent speakers and an air of conviviality throughout. Those who attended enjoyed it, and those who did not attend would be wise to mark July 2002 in their diaries for the next conference in Paris.

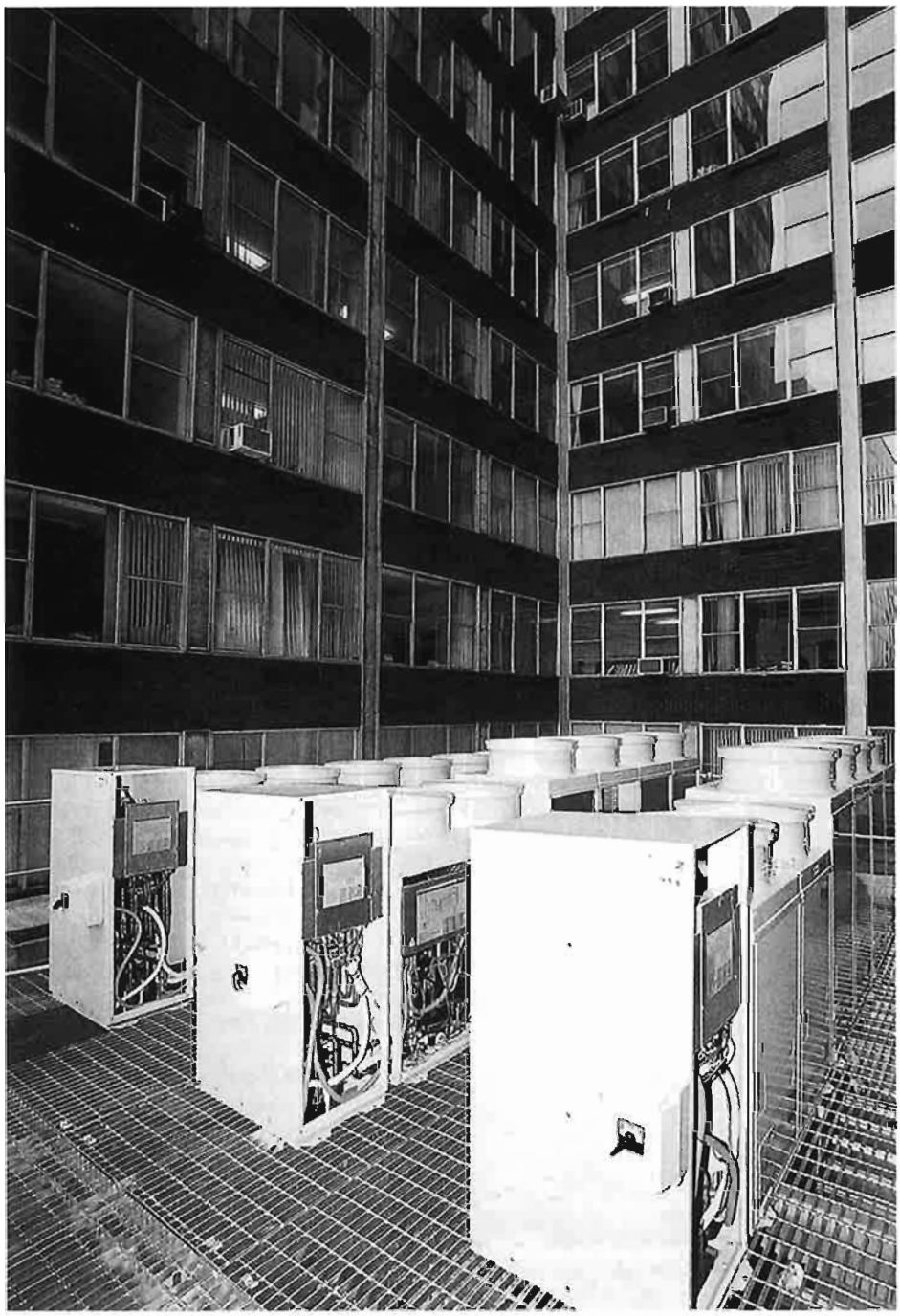
David Curtain

Brendan Murphy QC.

John Bingeman QC (in disguise).

A Breath of Fresh Air for Owen Dixon Chambers East: Renovation Update

By Maurice Phipps QC



BY the time of publication, the renovation of the ground floor of Owen Dixon Chambers East will be well into its second phase.

Barristers' clerks, Foley's List and Hyland's List, moved in in early September, the Commonwealth Bank in late September and Dever's List in mid October. All of these premises had asbestos removed and have new ceilings, lights, fire protection and airconditioning. The Commonwealth Bank and Dever have completely refitted their premises.

The remaining work is removal of asbestos from the area temporarily occupied by the Commonwealth Bank and the conversion of that area into the new entrance for Owen Dixon Chambers. There have been some delays, but not so serious that it should affect the planned

Left and below: New air conditioning units.

Tiles being laid in Devers List offices.

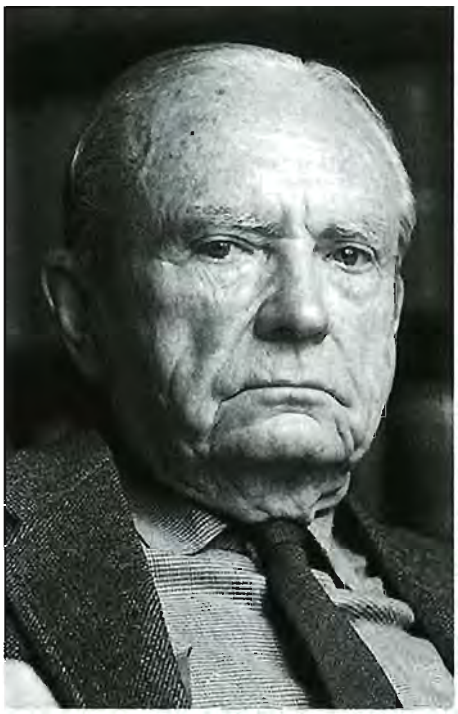
completion date of just prior to Christmas.

The work has had to be done in an operating building, and the ground floor tenants had to be accommodated so that they could keep operating while the work was done. These relocation activities have been done successfully. The mediation centre was closed for three weeks from about a week before the commencement of the September Readers' Course and the time at which Foleys was able to move back to its premises. Dever's List relocation was some weeks more than anticipated, so that temporary meeting facilities had to be continued for that period. Given the complexity of what was involved, there was potential for much greater disruption.

Carpenters working on the new wheelchair access ramp in the main foyer.

Court Dress

Excerpt from a conversation with the Honourable T.W. Smith QC by David Wilken, editor, *Law Institute Journal*, July 1983.



Tom Smith, AC, QC.

LIJ: Is it necessary for judges to be wigged and robed?
Mr Smith: I'm in favour of preserving those traditional trappings. My feeling is that it promotes more efficient conduct of business between the judge and the Bar. It formalises the whole situation so that people are under strong pressure to behave well — with courtesy to each other — and to keep to the point. I think also that it makes the job of telling deliberate lies in the witness box much more difficult.

I think that practically all persons who go in the witness box are a little intimidated because it seems to be such an exposed position. They are commonly under very strong pressure to make out the best case they can for the side that they are called by. They are under very strong pressure to stretch things, or to tell deliberate lies. Nothing, of course, is going to prevent witnesses from having biases, or on occasion telling deliberate lies, but I think that an extremely formal atmosphere and a judge who is an imposing figure, because of his strange garb, tends to put a brake on that.

There is another important aspect, and that is that in all contested litigation, somebody has to lose. If the authority that announces to a man that he is a loser is a figure made majestic or impressive by distance and strange costume, and he is elevated up on the Bench wearing the wig, I think that it is easier for the defeated party to bear a disappointment. If the bad news is delivered to him by someone who is sitting across the table from him on the same level as himself, an unimpressive fellow who keeps pulling his left ear with his thumb and is obviously having difficulty in making up his mind, that person is to all appearances merely his own equal.

I think that, from what I can hear on the grapevine, it's been found in the Family Court that the absence of solemnity there is making it very difficult for losing parties to put up with losing. It is an area where feelings are really roused in matters such as custody and family property and things of that kind. It's in the interests of justice that the judge should appear to be in a higher and more impressive situation than the people to whom he is laying down the law. I think that this is quite important for acceptance by litigants of the decision that's given; in the same way as a jury trial makes people more reluctant to complain. A man does not get much attention if he says "Those twelve men have decided my case all wrongly. They said I lied" or "They said I was guilty!". But, if he is saying about the judge "I've had a good look at him and he is no more impressive than I am and he's gone completely around the bend about this thing", he will be listened to.

LIJ: Can I ask for your reaction to the alternative argument that witnesses might not give the best account of themselves because they are over-awed or uncomfortable?
Mr Smith: I don't agree. I think that the witness who finds the atmosphere intimidating and may feel that he has not been fluent enough, or expressive enough, will very commonly have been a very effective witness, because his difficulties will have been apparent. The fact that he is trying to do his best will be apparent, and the tribunal, whether it is a judge or a jury, will be inclined to be sympathetic with him. Their main concern is whether he is a rogue and a liar or whether he is trying to tell the truth.

The Dreyfus Affair

THE French Revolution started in 1789. The changes it worked were not fully accomplished until 1906. Only then did France finally determine that it preferred democracy to autocratic rule; that it preferred the rights of the individual over the rights of the State; that it accepted the separation of Church and State. The catalyst for this final phase of the French Revolution was the Dreyfus Affair.

Alfred Dreyfus was a Captain in the French Army. He was pompous, snobbish, unfriendly and (unforgivably) he was Jewish. A powerful undercurrent of anti-Semitism ran through French society in the 19th Century, and especially in the army and the Church. Although Jews were formally tolerated, the attitude to them was set by the Catholic Church which was openly anti-Semitic.

By 1894, Dreyfus had a reputation for hard work and stiff manners. He was devoted to the army and to his family.

In September 1894, Madame Bastian retrieved a piece of paper from a waste-paper basket in the German Embassy. Madame Bastian was a cleaner and a sometime informer for the Statistical Section (military intelligence). The note suggested that there was a spy in the French Army. She gave the note to her contact, Major Henry, who had previously received a note from the same source referring to "the scoundrel D". Major Henry's Minister for War, General Mercier, urged Henry to find the traitor before the matter became a public scandal.

In late September 1894, another document came to light. It listed a number of military matters which the writer would soon provide to the (German) addressee. This document was the famous *bordereau* which would shake France to its foundations.

A quiet witch-hunt began. On 15 October 1894, Dreyfus was called to the Ministry of War. Major Du Paty — a bizarre, melodramatic fop — asked Dreyfus to take some dictation. He explained that he had injured his hand. The text he dictated was loaded with phrases from the *bordereau*. Dreyfus' handwriting was nothing like that of the *bordereau*. Nevertheless, Du Paty arrested Dreyfus on a charge of treason because (as he later explained) Dreyfus' hand had trembled whilst he was writing.

The Ministry of War cast about for other evidence of Dreyfus' guilt. Unfortunately, news of his arrest was published in *La Libre Parole* on 1 November. That anti-Semitic newspaper sealed Dreyfus' fate, because the army was now compelled to make good its case against Dreyfus if it was to avoid public humiliation. Major Du Paty recruited a self-styled handwriting expert — one Bertillon — who declared that Dreyfus was the author of the *bordereau*.

Bertillon's evidence at Dreyfus' court martial was little short of bizarre. The reason the writing in the *bordereau* did not look like Dreyfus' writing, he said, was that Dreyfus had trained himself to imitate the writing of others! Observers reported to the Minister, General Mercier, that the trial was not going well. It seemed certain that Dreyfus would be acquitted. Mercier's political instincts told him that more was needed if he was to avoid serious political embarrassment. Major Henry and Major Du Paty realised that if Mercier was in trouble their careers were threatened. So they put together a file of documents — mostly forgeries —and gave the file secretly to the judges. Du Paty hinted darkly to the judges that the national interest was vitally threatened by these documents.

And so it was that counsel for Dreyfus summed up only on the matter of the *bordereau*, and did not realise that the judges had access to a dossier of apparently damning evidence.

Dreyfus was convicted of treason and sentenced to life in exile on Devil's Island. He was effectively in solitary confinement: his guards were his only human company, and they were forbidden to speak to him. There he remained for years, oppressed by the tropical heat and the injustice of his circumstances. For years his wife and his brother tried to enlist help. For years they met blank resistance.

* * * * * * *

Help came from an unlikely quarter. The head of the statistical section was replaced by Lieutenant Colonel Picquart. Picquart had attended the court martial and had reported to General Mercier. He had been convinced of Dreyfus' guilt because of what Major Henry had told him. He was now Major Henry's commanding officer. In March 1896, Picquart received an intercepted message from the German Military Attaché addressed to a French Army officer, Major Count Ferdinand Walsin-Esterhazy. Picquart wondered what business Esterhazy could possibly have with the German Military Attaché.

Not long after, in August 1896, Esterhazy applied for a post on the general staff. When Picquart saw Esterhazy's letter he recognised it as the handwriting of the *bordereau*. He retrieved the dossier which, as he knew, had been shown secretly to the judges of the court martial. He immediately recognised that most of the documents in it were forgeries or were loaded with unattributed hearsay. When he told the Minister of War that it was clear that the wrong person had been convicted he was told plainly: the Dreyfus case is closed. When he protested that Dreyfus was innocent, he was told that that was irrelevant. When he said he could not go to his grave with such a terrible secret, he was sent on a series of lengthy missions first to the Eastern Front and then to increasingly dangerous parts of Africa. It was a long time before Picquart realised that he was in exile.

But truth was not so easily suppressed. Soon Esterhazy's involvement became known. An inquiry into his guilt was actively subverted by Major Henry, whose prime concern now was self-preservation. Henry kept Esterhazy informed of all developments and advised him how to respond. He made sure that the question of Dreyfus' guilt was separated from the question of Esterhazy's guilt. Experts were found who would say that Dreyfus had learned to forge Esterhazy's handwriting.

Esterhazy was court-martialled but was ultimately acquitted, and his acquittal was greeted with cries of "*Vive* Esterhazy, down with the Jews".

Emile Zola, offended and disturbed by

the affair, wrote an open letter to the President of the Republic. He sent a copy to the newspaper *L'Aurore*. In the letter, he levelled a series of blunt accusations at General Mercier, the judges of Dreyfus' court martial, the judges of Esterhazy's court martial and other named officers in the French Army. The accusations were plain and powerful:

I accuse General Mercier of having made himself an accomplice in one of the greatest crimes of history . . .

I accuse General Billot (Mercier's successor as Minister of War) of having in his hands decisive proof of the innocence of Dreyfus and of having concealed them . . .

I accuse the (Dreyfus) court martial of having violated all human rights in condemning a prisoner on testimony kept secret from him . . .

"*J'accuse*" identified the field of battle: protect the army, or uphold individual rights; the dominance of the Republic or the dominance of the Church; Christianity versus "the Jewish conspiracy". It provoked anti-Semitic rioting throughout France. But it also provoked a growing concern about Dreyfus' trial, which ultimately led to a re-trial.

Together with George Clemenceau, Zola forced France to face the fraud which had been worked in Dreyfus' court martial. For his troubles, Zola was charged with criminal libel. During the trial, the Generals swore confidently that Dreyfus was guilty, and asserted that the security of France was at stake. The press published the names and addresses of the jurors in the case, and reiterated the Generals' message. Not surprisingly, in these circumstances, Zola was convicted.

In August 1897, the crucial document — part of the secret dossier on which all the Generals had based their confident evidence of Dreyfus' guilt — was shown to be a forgery. Major Henry, in his passion to convict Dreyfus, had glued together the pieces of this damning document. That in itself was not uncommon, in a trade where documents were garnered from wastepaper baskets. But the watermark of the different fragments of the document were inconsistent. When confronted with this fact, Major Henry confessed that he had forged the document. He was arrested and committed suicide in prison. Esterhazy fled to England.

Zola, Clemenceau and Picquart were the true heroes of the Dreyfus affair. They all suffered terribly for the roles they played. Dreyfus never showed either concern or gratitude for them.

Eventually, Dreyfus was brought back from Devil's Island. In August 1899 he was tried again for treason. The prosecution evidence — specifically that of General Mercier and various army officers — was laced with vague allegations that Dreyfus (being Jewish) was unreliable. At the end of the trial, most observers thought an acquittal was a foregone conclusion. But the judges held, five to two, that Dreyfus was guilty of treason "with extenuating circumstances". What this meant was far from clear, but what it signified was that Dreyfus could expect a presidential pardon. He received his pardon on 19 September 1899.

The Prime Minister of France, Waldeck-Rousseau, embarked on a series of reforms designed to reduce the political power of the army and the Church. He granted an amnesty to all principal actors. Dreyfus refused an amnesty for himself, because he wished to continue trying to clear the stain from his name.

Waldeck-Rousseau's reforms dealt with the root cause of the Dreyfus affair, and France regained the respect of democratic nations. In 1905, the separation of Church and State was effected by statute. In 1906, an appeal court quashed Dreyfus' second conviction, and Dreyfus and Picquart were reinstated in the army. Zola was already dead; Clemenceau become Prime Minister of France in 1917.

* * * * * * *

Zola, Clemenceau and Picquart were the true heroes of the Dreyfus affair. They all suffered terribly for the roles they played. Dreyfus never showed either concern or gratitude for them. He was the only direct participant who understood nothing of the significance of the affair which bears his name.

Julian Burnside

Wigs

1. The wearing of wigs can be traced to the earliest recorded times. The ancient Egyptians shaved their heads and wore wigs to protect themselves from the sun. The Assyrians, Phoenicians, Greeks and Romans all used official hairpieces.
2. According to the website, Wig Outlet, wig wearers should be careful not to expose their wig to heat greater than 160 degrees (such as when opening an oven door); brush their wig when wet; or use a curling iron or blowdryer on it.
3. The toupee worn by Sean Connery in the James Bond movie, *Never Say Die*, cost Warner Bros $US52,000 ($87,186). The company decided that a full head of hair was necessary for Connery's portrayal of Bond. Wigs made from human hair are more expensive than synthetic wigs, with prices ranging from $295 to $2000. Synthetic wigs usually cost between $30 and $275.
4. Wigs are found on famous heads, including Elton John's, Gary Glitter's and Cheryl Kernot's. In the movie, *Pulp Fiction*, Samuel L. Jackson's character, Jules, was originally meant to have a giant afro. There wasn't a wig available on the day filming began, so Jackson's own hair was curled. Russell Crowe wore a wig in *The Outsider*.
5. In 1999, Chief Justice Slack of the Federal Court announced that wigs should no longer be worn in court. In the High Court, barristers still wear wigs, but judges do not. Judges and barristers of the Family and State Supreme Courts, however, do wear wigs. The cost of these wigs ranges from $1500 to $3000.

Jacqui Haslem

Reprinted from *The Age*, 14/4/00

Verbatim

Big Wheel

13 April 2000
Summary: M00000895605
Drive With Terry Laidler
3LO (Melbourne)
Compere: Terry Laidler

Discusses new figures indicating the increasing number of legitimate phone taps being used throughout Victoria; the degree of unauthorised intercepts being used by police and other detection agencies; calls for a committee to be established to look at whether phone tapping is justified in individual cases.

Interviewees: Remy Van Der Wheel QC, member of the Victorian Bar.

Rabbit Trap

6 May 1999
Crimmins v *Stevedoring Industry Finance Committee*
Coram: The Full High Court
T.E.F. Hughes QC, J Rush QC, J. Forrest QC and R. Doyle for the appellant

Mr Hughes: . . . anyone who has used phostoxin to trap rabbits knows that unless the trapper is very careful to keep himself out of the way of the fumes he can be made very silly, temporarily, and sometimes more than temporarily.
Gleeson CJ: That is something that occurs to me as a possible explanation of many things.
Mr Hughes: I can speak with personal experience of phostoxin. Maybe I am silly.
Gleeson CJ: No, quite plainly it never happened to you, Mr Hughes.

Pregnant Pause

High Court of Australia

Sydney, 26 May 2000
Vichlenkova v *Minister for Immigration and Multicultural Affairs*
Coram: Gaudron J, McHugh J, Kirby J

Mr Johnson: Your Honours, with respect to the medical certificate, it does not actually say that she is suffering from any medical condition which makes her unfit to appear.

Gaudron J: That may be so, but one knows nonetheless, does one not, that not everyone can continue unfazed throughout an entire pregnancy?
McHugh J: Not everybody is as tough as Justice Gaudron. I once appeared against her at the Bar in the High Court and she was eight and a half months pregnant.

Singing Lesson

County Court Appeal

27 June 2000
Coram: Judge Walsh
Priest QC for the appellant
Appellant appealing against sentence for firearms offences.

Mr Priest: Your Honour, my client is a devotee of the American wild west. He has five cowboy hats, 10 sets of spurs, six pairs of cowboy boots, etc.
His Honour: Does he yodel?
Mr Priest: Pardon me a moment, Your Honour, while I obtain some instructions!

Computer-speak

7 September 2000 (eighth day)
VWA v *Stawell Gold Mines & Ors*
Coram: Judge McInerney
M. O'Loghlen QC and W. Clarke Grainger for plaintiff
R.P. Gorton QC and R. Smith for defendant
W. Houghton QC and J. Parrish for first third party
J. Bell for second third party
M. O'Loghlen QC and W. Clarke Grainger for fourth party
Gorton QC cross-examining Ms Amirthalingam, a technical consultant employed by a computer company concerning the accuracy or otherwise of computer records.

Mr Gorton: I am saying that what the computer says is not always in accordance with reality?
Witness: You have to put that in writing.

Downunder Aussies in the President's Mall

By David Bennett QC

ON this hot Sunday afternoon, 25 June 2000, in the Washington Mall near the Korean War Memorial, President Clinton seemed in no hurry to be anywhere else as he moved and stopped, talking to people in the crowd and shaking hands. From several feet away, the overwhelming impression of the President was of his complete ease.

We were among crowding Korean War veterans and their families who were straining out hands toward to the President, each hoping that he might choose theirs to shake, giving that definite look in the eye as he did so.

The President was taller than he appears on television and in press photographs. His skin was shining and reddened in the broiling late afternoon sun. His near-black suit and blue and scarlet striped tie contrasted with the shorts and light shirts of the crowd.

The President accepted a cap offered to him by a veteran near us. Ecstatic, the veteran turned, his Korean War medals flopping on his chest, shouting to people behind: "The President took my cap! The President took my cap!"

"Australia, Australia", we called from behind. The President looked up, reached over and took my wife's hand. He caught her eye and said something we missed hearing.

Chelsea Clinton followed along after her father. She said that she was visiting Australia for the Olympics and "couldn't wait" to come.

So this is America, land of opportunity. We had been in Washington DC for only two days.

On that afternoon, more than seven thousand people had come to the Mall for a ceremony to mark the 50th anniversary of the commencement of the Korean War. The celebration marked the end of a long period during which it seemed that persons who served in Korea had been overlooked. Korean War veterans, the survivors of 38,000 dead Americans who fought with them, had come, many with their families, from all parts of the United States.

Family members of the dead were there, often bearing a photograph or memento of the parent or sibling that they were representing. A youngish man sat in front of me. Beside his chair was a framed montage of photographs and memorabilia of a young fighter pilot, apparently his father, killed in action. I watched his back, unshaded in the near-century heat, as his perspiration soaked his suit coat. He remained silently fixed on the proceedings ahead, never removing the coat.

On the stage, facing the afternoon sun, was an official party including President Clinton, Secretary for Defence Cohen, Senator John Glenn (a Korean War ace before becoming famous as an astronaut) and the South Korean Ambassador. They made memorable speeches recalling, each from different perspective, the events of the war and the human sacrifices it entailed.

The President recalled the misjudgment of the communist world of that time. It did not expect that a Norman Rockwell America, just settling down after World War II, would have the spine for another war in a country as remote as Korea. He recalled President Truman's determination that, having given so much to defeat Nazism, America would not allow the results of its achievement to be stolen by communism. He recalled conclusively identified by American research teams still working in Korea and Hawaii to locate and identify the bodies of American servicemen and women missing in the Korean conflict.

At the Secretary's request, the families of those soldiers stood. They were soon lost from sight as the crowd stood to honour them and their lost sons.

After the speeches came the moment when Connie Stevens sang, "God Bless

America", just as she had in Korea during the fighting. As the patriotic words came, the crowd stood, absorbed by their emotions, silently watching her face on a giant television screen. On the stage, seated behind Connie Stevens, the President dabbed his eyes.

With the sun lowering in the sky behind the dome of the Capitol, soldiers bearing standards and flags paraded at the front of the stage as the military band played. Korean War fighting planes flew overhead. The official party moved off for the President to place a wreath at the Korean War Memorial.

I took a photograph of a veteran called Mike who was wearing an Australian soldier's slouch hat. It turned out that he was American. He received the hat during the Korean War from an Australian soldier who had become a friend. The friend still lives in Melbourne. Mike gave his name: "Do you know him?" I wished that I did. Mike pointed to the gleaming badge on the turned- up brim of his hat: "Real brass, you know. Not like the plastic they use now." I told him that I knew what polishing those brass badges was like from my time in National Service.

The ceremony was over but large numbers remained. Soldiers continued to hand out bottled water, as they had all afternoon. It seemed that few wanted to leave this Mall where the intensity of emotion and national pride of the past two hours had been created. It was the President's salute to the unity of feeling that, after laying the wreath, he came with his daughter to greet the waiting crowd. His personal recognition of those participating in the occasion completed the day.

the contributions made by the other nations, including Australia.

In his speech, Secretary Cohen movingly recognised the families of two dead soldiers. Until only a few days before the ceremony the soldiers had been treated officially as "Missing in Action". Now, however, their remains had been

Not far away, the black vehicles of the President's motorcade, motorcycles at its front, drew away towards the nearby White House. At the motorcade's tail there was a black van, also gleaming, with a mounted video camera on its roof. An operator pointed the camera around as they proceeded. There was a grimness about the need for this, a return to reality, that jarred with the feeling of the afternoon.

We waved towards the darkened windows of the President's limousine . Then, we too, sharing memories, slowly made our way across the grass of the Mall towards home.

Memories of the Battle of Hastings

Justice Peter Heerey

LEX Lasry's fine obituary on Bob Vernon in *Bar News* Autumn 2000 touched on the Battle of Hastings. In 1972 a murder trial arose out of a death at the Westernport town of that name. A ruling in the case is reported as *R* v. *Webster* [1974] VR 457.

It was my one and only murder trial. Coming down in the lift on the first day I was seized with an almost overpowering desire to be going to County Court Chambers instead. Fortunately at the defence end of the Bar table I was in the company of far more experienced criminal counsel. As well as Bob Vernon, there were Daryl Wraith and Phil Cummins.

The accused were bricklayers. After finishing work on a job near Frankston they all set off in their van for the Hastings area where they lived. All that is except Bob Vernon's client, of whom more anon.

Not far out of Frankston the bricklayers' van encountered a Ford Customline full of youths looking for trouble, or at least excitement. The Customline got in front of the van and started to speed up and slow down erratically. At one of these speed changes the van just failed to stop in time, causing a minor collision. The youths piled out of the Customline and, armed with some wooden surveyor's stakes which happened to be at the side of the road, they belted the windows of the van. One broke, sending chards of glass over the occupants with resulting lacerations.

The van took off with the Customline in hot pursuit, swerving and roaring over the Peninsula backroads to Hastings.

The van reached Hastings and the very cul-de-sac where some of the bricklayers lived. Both vehicles skidded to a halt. The doors of the Customline burst open and out rushed the youths, still wielding their surveyor's stakes. The bricklayers grabbed the only weapons available, their spirit levels — straight sharp-edged metal bars about a metre long. In the mêlée that ensued one of the youths was hit with a spirit level and killed almost instantly.

Bob Vernon's client, although a workmate of the others, had gone home independently. He came on the scene at Hastings quite by chance. At an early stage of the fight one of the bricklayers had got the worse of it and was slumped against a telegraph pole with his spirit level at his side. Bob's client saw what was going on, picked up the spirit level and weighed in. It was never clearly established who struck the fatal blow, but he was the most likely candidate.

Bob of course faced the forensic difficulty that most of the circumstances which added up to a strong self-defence case for the rest — the collision near Frankston, the broken glass, the pursuit — were not available to his client. But in a way which defied strict logic, and probably law as well, he somehow managed to sweep his client into the sympathetic ambience of the general defence case.

The trial judge, Mr Justice Menhennit, was well aware of this and there were some terse encounters along the way. Not that this fazed Bob in the slightest. While the rest of us scribbled away in our notebooks, he gazed around the courtroom with a benign expression, occasionally penning caricatures of the judge and other trial participants in the margin of a tattered copy of the depositions.

As well as the extended cricket metaphor referred to by Lex Lasry, another highlight of Bob's final address was his treatment of the issue of excessive force. The prosecutor, the redoubtable John "Wingy" Moloney, had argued that a bricklayer's spirit level was a lethal weapon, out of all proportion to a feeble wooden surveyor's stake. Bob dealt with that argument something along these lines. Pointing to the swing doors at the entrance to the Fourth Court he said to the jury:

Look at those doors! A madman armed with a stake bursts through them. He rages up to the Bar table. Down goes Vernon. Down goes Heerey. Down goes Cummins. Down goes Wraith. Down goes Moloney. Up to the Bench. He's about to attack his Honour himself. [At this stage my gaze was riveted on my notebook.] His Honour reaches under his robe, pulls out a gun and shoots the madman. Would you convict his Honour?

So the jury acquitted all accused, and after not a very long retirement, as I recall.

A personal postscript. Somewhat unusually for murder charges in those days the accused were granted bail. So shortly before the trial I arranged a view at Hastings with my client, a very nice man called Chicken. An unlikely surname for a man accused of murder. To make it a bit of a family outing my wife and our two-year-old son came along. At one stage of the visit I was inspecting something or other. Sally came up and asked where Edward was. "He's OK," I said, "Mr Chicken is looking after him," The prospect of her toddler in the care of an alleged murderer somehow did not seem to assuage her. Anyway, as already mentioned, Mr Chicken was rightly acquitted. Edward survived quite unscathed and signed the Bar Roll with the most recent intake.

Beak Rules Fluffy Horse is a Bird

THE case of *Regina* v *Ojibway* in Canada involved a man charged with violating the Small Birds Act by shooting a horse with a broken leg. The point at issue was whether a horse was a bird or not. The defendant used a feather down pillow for a saddle and the law defined a bird as a "two-legged animal with feathers." Ojibway's lawyer argued "that the iron shoes found on the animal decisively disqualify it from being a bird." However, the judge snorted at this. "How an animal dresses is of no concern to this court," he said. The judge ruled that a horse covered with feathers is technically a bird by definition of the Act — despite having four legs. And the defendant was found guilty of violating the Small Birds Act.

Justice Callinan's Gift to Australian Women Lawyers

On 26 May 2000, the Board of Australian Women Lawyers welcomed members and guests to a presentation by Justice Ian Callinan of gifts kindly donated by His Honour. Distinguished guests included Justice Ken Hayne, Victorian Chief Justice John Harber Phillips, VCAT President Justice Murray Kellam, Chief Judge Glenn Waldron and Federal Chief Magistrate Diana Bryant.

THE presentation held in the Supreme Court Library included the unveiling by Justice Callinan of a portrait of Mademoiselle Jeanne Chauvin, the first woman admitted to the French Bar. Also presented was a collection of early 19th century books, *Women in All Ages and All Countries.*

Justice Callinan informed the gathering that he had come across the portrait in a New York art catalogue and immediately thought it appropriate as a gift for AWL. Quoting from Virginia Woolf, His Honour said "women need a room of their own and money of their own."

Mademoiselle Chauvin received her doctorate in law in 1892 and applied for admission to the Bar. Despite her plea that she had spent 10 years of her youth and considerable money to qualify her for a profession she loved, she was informed that to admit her would be "contrary to the progress of civilization". The feminist Maria Deraismes was sarcastic about this decision: she wondered aloud if judges were afraid of being seduced by women lawyers, or whether they feared that one might give birth in court. It took years of effort (1900) and the personal intervention of statesmen such as Viviani and Poincaré before the legal profession was declared open to women on the same terms as men. A few weeks later Mlle Chauvin was admitted to practice. In 1925 she received the French Legion of Honour.[1]

It would seem that our own Victorian judiciary was somewhat more advanced than the French judiciary for some 40 years earlier (in 1858) former Victorian Supreme Court Chief Justice George Higginbotham wrote in the *Argus:*

Alexandra Richards QC, President Australian Women Lawyers, and Justice Ian Callinan with a painting he donated to AWL of Mllé Jeanne Chauvin.

> A model woman according to a very prevalent conception of the character is little better than an amiable idiot; and any woman who evinces strength of mind and vigour of intellect becomes an object of derision and a butt for the feeble sarcasm of the mentally destitute of the other sex.

Alexandra Richards, QC thanked Justice Callinan for his thoughtful donation quoting the words of AWL's patron, Justice Mary Gaudron, at the launch of AWL in 1997:

> I believe that having acknowledged and asserted difference, women lawyers can, with the assistance of feminist legal theorists, question the assumptions in the law and in the administration of the law that work injustice, either because they proceed by reference to differences which do not exist or because they ignore those that do. And having become sensitive to those matters, it will not be long before there is a realisation of the need to be sensitive of the different experiences and circumstances of others, to articulate those differences when necessary, to question the assumptions of the law as it affects them. In short, to be sensitive to the needs of justice.

The portrait's permanent location is to be announced at a later date.

1. Priscilla Robertson, *An Experience of Women: Pattern and Change in Nineteenth-Century Europe*, Templeton Press, 1982, pp 335–6.

Drinking Words

WHEN any vegetable mash containing sugar is warmed and exposed to yeast, the yeast converts the sugar into two other chemicals: carbon dioxide and alcohol. The carbon dioxide did not cause much excitement, but the alcohol was received enthusiastically. The discovery of alcohol predates the discovery of writing in most societies. This is no small achievement, since the taste of the resulting brew depended on the original ingredients of the mash, and the treatment of the resulting product. But the effects of the alcohol were predictable and (if history is any guide) widely appreciated. Thus Noel Coward wrote of Uncle Harry:

> the natives treated him kindly,
> and invited him to dine,
> on yams and clams and human hams and
> vintage coconut wine,
> the taste of which was filthy, but the
> after-effects divine . . .

By the time of the Babylonian civilization, alcohol was sufficiently popular that laws regulating its sale and use had been enacted. The Code of Hammurabi (about 1770 BC) included laws regulating drinking houses.

Alcohol has been used for social, religious and medicinal purposes for a long time. Its significance in many societies is obvious. It is no surprise, then, that our language is littered with words about drinks.

As I have commented in an earlier article, *alcohol* has an unlikely etymological history: for centuries, Arab women used powdered antimony to colour their eyelids. The powder was called *al kohl*, and was produced by sublimation: the process of vaporising a compound solid then condensing the vapour to precipitate the desired powder. Many substances can be produced by sublimation, but when Western alchemists discovered the process of sublimation, they used an anglicised form of the Arab *al kohl* to describe the result: hence, *alcohol of sulphur*, for sulphur powder produced by sublimation, *alcohol martis*, for reduced iron. By extension, *alcohol* came to mean the essence of a thing, or the product of sublimation or distillation. During the 18th century, it came to refer principally to rectified spirits produced by distillation.

When you buy spirits today, they are generally marked according to their strength in *degrees proof*. The US measure is simple: *proof spirit* is 50% alcohol by volume. One half of one percent equals one degree proof. So, vodka rated as 110 degrees proof, is 55% alcohol by volume, according to the US system.

In England (and Australia), things are less simple. Traditionally, when enough water was added to pure alcohol that the mixture when added to gunpowder would just permit gunpowder to ignite, the mixture was reckoned as proof spirit. This inconvenient measure was eventually defined by statute in 1818, in *Act 58 Geo. III*, c. 28 thus:

> To denote as Proof Spirit that which, at the Temperature of Fifty-one Degrees by Fahrenheit's Thermometer, weighs exactly Twelve Thirteenth Parts of an equal Measure of Distilled Water.

Any given volume of alcohol weighs less than the like volume of water. Alcohol diluted with water gradually approaches the weight of a similar volume of water. When enough water has been added to pure alcohol that the mixture weighs 12/13ths as much as a similar volume of water, the mixture is *proof spirit*. This must all be measured at 51 degrees Farenheit. Not quite self-evident, but precise. It equates to 48.24% by weight or 57.06% by volume. As the quantity of alcohol varies from that measure, so the liquid is over-proof or under-proof.

In the Federalist Papers (No 12, 1788), Alexander Hamilton wrote:

> The single article of *ardent spirits*, under federal regulation, might be made to furnish a considerable revenue.

Ardent spirits has an archaic sound to it, even if the sentiment is immediately familiar to tax-payers. *Ardent* comes from Latin *ardere* "to burn". *Ardent spirits* are so called for their fiery taste: in a different idiom, *firewater*.

It comes as a surprise to learn that *balderdash* and *barmy* both referred to the drink before they referred to the drinker. *Balderdash* originally means a mixture of drinks, one of them alcoholic and the others added to reduce its alcoholic strength. Originally, it was beer with buttermilk added, then it was extended to any mix of alcohol and other drinks. The central idea is an alcoholic drink mixed and weakened with anything else; then by transference it came to apply to muddled thought and befuddled speech. Until about 1820, it could also be used as a verb. So, paradoxically, the less the drink had been *balderdashed*, the more likely it was that the drinker would speak *balderdash*.

A person who takes too much ardent spirits and talks balderdash, might be thought *barmy*. *Barm* is the froth which is produced by the action of yeast in the fermenting liquor. It is Old English, and is recorded as early as the 10th century. By extension, it soon came to mean the foaming head on beer when poured, and by the 17th century it was also applied to "froth-headed people" in compounds such as *barm-fly*, *barm-pot*, etc. In parallel, *barmy* was applied originally to the fermenting drink, and later to those who had drunk it.

At the start of Act II scene 1 of *Othello*, appears the line:

> For do but stand upon the foaming shore . . .

In the early folio and quarto editions, this appears as . . . *upon the banning shore* . . . It seems clear from the context that *banning* was a wrong transcription of *barming*, which catches accurately the effect of foam cast on the beach, which in German is called *meerschaum*. Shakespeare used a parallel allusion elsewhere, when Macbeth says to the three witches: . . . *though the* yesty waves *confound and swallow navigation up* . . . Until the mid-19th century, *yest* was an alternative spelling for *yeast*.

In its original yeasty sense, or its figurative dopey sense, *barmy* should not be confused with *balmy*. *Balm* is defined by OED as:

> An aromatic substance, consisting of resin mixed with volatile oils, exuding naturally from various trees of the genus *Balsamodendron*, and much prized for its fragrance and medicinal properties.

This aromatic or restorative oil is etymologically identical with *balsam*.

However, there are many other aromatic compounds called *balm*, in particular various members of the mint family.

Balmy (especially in reference to weather) is a natural figurative extension, carrying a sense of soothing restoration. It is very different from the frothy light-headed *barmy*.

Balderdash is a mixed drink, and so is *punch*. There is a small etymological debate about the source of this. The better view is that it derives from the Hindi word *panch* (cf Persian *panj*) which means five. In compounds it is seen as *panchamrit* (a mixture of five substances), *panchbhodra* (a sauce with five ingredients) and *panchgavya* (the five products of a cow). *Punjab* derives from the same root, and means *five rivers*. The original recipe for punch had five ingredients.

The OED objects that *punch* was originally pronounced *poonch*, whereas *panch* could never be so pronounced. In support of this objection, OED cites Dr Johnson's pronunciation of the word. Fryer, who travelled the East Indies in the 1670s, speaks of *that enervating Liquor called Paunch (which is Indostan for Five)*. Although Johnson's first edition is silent on the etymology, his 4th edition quotes Fryer for the meaning, and lists the five original ingredients of punch. He seemed untroubled by the shift in pronunciation.

OED suggests tentatively that *punch* is a contraction of *puncheon*. Call me old-fashioned, but I am with Fryer and Johnson.

An *Old-fashioned* is a cocktail comprising whisky, bitters and sugar. It seems that 200 years ago a drink made of similar ingredients was simply called *Cock tail*. In 1806, a New York magazine writer said:

> *Cock tail*, then, is a stimulating liquor, composed of spirits of any kind, sugar, water, and bitters.

In *Martin Chuzzlewit*, Dickens writes:

> He could . . . drink more rum-toddy, mint-julep, gin-sling, and *cocktail*, than any private gentleman of his acquaintance.

These references point unmistakably to *cocktail* being the name of a particular drink, rather than the generic label it is today. Some writers suggest that the original *cocktail* was served with the feather from a cock's tail added as the garnish which now distinguishes the generic cocktail from serious drinks. The OED gives the ingredients for *cocktail* as *spirit mixed with a small quantity of bitters, some sugar, etc.* Hence an *Old-fashioned* is simply the original *Cocktail*.

The commonest generic words for all alcoholic drinks are *booze* and *grog*. *Booze* as noun and verb, dates from the 14th century, and is variously spelled *bous*, *bouse*, *bowse* and *boose*.

Grog derives from the grogram coat of the unloved Admiral Vernon. (*Grogram* is a coarse fabric of silk, mohair and wool, from the French *gros-grain*). Admiral Vernon ordered that rations of rum provided to sailors should be diluted with water. He was referred to as "Old Grog", and his wilfully weakened liquor came to be called *grog*. It was in recorded use by the time Captain Cook discovered Australia, where grog quickly became the currency and then the culture.

Julian Burnside

Robert Holcombe

Lynne Freedman

ROBERT Holcombe has been painting for over three decades and in that time has gained national and international recognition and is represented in many corporate and private collections throughout the world.

His painting titled "Cry of the Wilderness" (Man's Rape of the Landscape) was one of 12 winners in the largest painting competition ever held. The "Our World in the Year 2000" Millennium Painting Competition attracted 22,500 entries from 51 countries. This painting is now part of the United Nations Millennium Art Exhibition held in New York in July 2000.

Robert's abstracted landscapes are a statement of the beauty and harshness yet fragility, of this untamed land, expressed through strong, thick and thin lines dissecting, submerging and reappearing amongst varying textures and colours. He manipulates the work surface by means of rubbing, scratching, wiping, scrubbing, allowing the paint to run and glazing, making a rich tapestry of design.

Using multiple perspectives he challenges the viewer to question and rethink the way they see the landscape.

The result is work that explores the essence of the surface, framework and underlay of landscape rather than dealing with specifics. For the viewer this will mean many more metaphoric possibilities to consider.

Robert's work can be viewed on "face value" — purely for its colours, patterns, harmonies, contrasts and design or as an exaggeration and distortion for statement of the actual landscape, be it close-up, distant, aerial or from under the surface (x-ray). The paintings can be also looked on by the environmentalist; the black lines representing the landscape's skeleton while the fragile "skin" is being eroded away by man until there are only shadows and ghosts remaining, hence titles such as "Shadow Country Ghost Gum".

Robert considers his works to be earthy and primal with a strong environmental statement.

The art/exhibition shows at the Essoign Club are now in their fourth year in the present format. The reviews have been mainly positive and the members of the club seem to appreciate that the art on the club walls is changing about every six weeks, with an opening night for members with guests. It is the club committee's ambition that the exhibitions will contribute to the enjoyable and relaxed atmosphere we have at the club.

As members of the club might be aware, the art is for sale with 12% of the proceeds going to the club. Sales varies from almost 100% sales to none at all. This might be due to the greater appreciation of a particular artist's work or simply that some of us are busy chasing unpaid brief fees.

The reviews over the years have mainly been positive, or at least the artworks have fuelled debate and discussions between the patrons of the club. It was not without satisfaction that the club noted an article about a recent exhibition in one of the trendy local magazines. Whatever the reviews are, the club gets contemporary art adorning the walls for the enjoyment of its members.

Robert Holcombe's exhibition opened on 26 June 2000 with about 80 members and guests in attendance enjoying a chat with the artist, his works and the "happy hour" with nibbles.

Left to right: Judge and Mary Walsh and artist Robert Halcombe.

Judith Trimble and Vincent Ruta at the Robert Halcombe exhibition.

The Perfect Witness

THERE died recently Captain Harry Locke AFC, many years ago the subject of a memorable moment in a courtroom.

A Trans-Australia Airlines Viscount aircraft, fully laden with passengers, had dived into Botany Bay shortly after take-off from Sydney Airport, on a night of most violent storms. All on board were killed. A judicial inquiry was ordered, and the judge designated to hold it was Sir John Spicer, Chief Judge of the Commonwealth Industrial Court (later merged into the Federal Court). Spicer was a former Attorney-General, and a member of the Victorian Bar. Something of an inquiry specialist, he had earlier carried out the inquiry into the crash of a Fokker Friendship into the harbour at Mackay, Queensland, for no reason that was ever discovered. Subsequently he inquired into the accident in which the aircraft carrier *HMAS Melbourne* ran down and sank the destroyer *HMAS Voyager*.

Burly John Spicer was a good and a kindly man. One characteristic was very obvious. He was deeply conscious of having been prevented by health from serving in World War II, and throughout his life he showed the utmost respect for those who had. It was an attitude which was to lead him astray in the *Voyager* inquiry, where his utter unwillingness to make a critical finding as to a deceased naval officer led, very sadly, to injustice for the living.

But that lay ahead. This inquiry was into the crash of this Viscount into Botany Bay. An obvious question was whether the stormy weather had been a factor (as it almost certainly was).

A few minutes before the fatal take-off, another Viscount had taken off from Sydney. Its pilot was a short wiry pugnacious man called Locke. Captain Harry Locke AFC. Locke had a very distinguished record in World War II, flying successively and Lancaster bombers.

So here was Captain Locke, to give evidence as to conditions that night. After being sworn, Locke was asked to state his experience. He gave it briefly. So many hours flying with the RAAF, so many hours flying with TAA. He had often flown in bad weather. He had been flying that night. He paused to await the first question.

Unexpectedly it came from the judge, seeming to speak somewhat brusquely and even accusingly. "You haven't told us everything, have you Captain?"

"I think I've said everything relevant Sir."

"You haven't told us that you were twice decorated by His Majesty for conspicuous gallantry, have you Captain," said the judge.

Two voices responded. One was Harry Locke's

"Didn't think that had anything to do with this matter, Sir."

The other voice came from the Bar Table. It came from the great advocate John Starke. Rather more loudly perhaps than even he intended, there rang through the courtroom some sage advice for his brother lawyers crowding the Bar Table.

"Cross-examine him if you fucking well dare."

Spicer smiled. No one cross-examined.

Pen City Winner

John Birrell wins Pen City's Pelikan M800 pen competition in the Winter issue

DECONSTRUCTION OF THE SUPREME COURT

"WHOLLY in keeping with our postmodernist approach to the administration of justice," the Attorney-General told *Bar News* today, when opening the new, purpose-built Commercial Court at Bandywallop. "It's designed to meet the specific needs of the business community of this State and epitomises the transparency which we've demanded of them for some time," he said.

During a tour of inspection the Attorney highlighted the new Court's features. The substitution of the Eureka flag as the State's emblem in place of "the sad old monarchist thing" was a sign of "our progressive policies", he told *Bar News*. He described the technological facilities available on the bench as "world class" and "no more than they deserve really, having regard to their salaries and superannuation entitlements". The Court's location had been chosen, he said, for its proximity to its potential users and practitioners ("not much further by train than the Supreme Court at Frankston") and "to pander . . . er, to meet our commitment to regionalism".

When asked by *Bar News* to comment on the relatively small attendance at the opening, the Attorney replied that this was not of his concern, for "no-one seems to use the Commercial List much any more".

Stumps Drawn and Quartered

ON 10 August 2000 our Third Cricket Dinner was held at the Essoign Club and enjoyed a capacity attendance. The artistic arrangements and organisational burden once again fell squarely on Tony Radford's shoulders and were carried out with his unique aplomb. In addition he performed his Master of Ceremony duties in characteristic style.

The night was simply a celebration of what is great about being involved in cricket — as player, spectator, official, commentator, parent, etc. Damien Maguire spoke with feeling of the spirit of playing for the Victorian Bar in the annual fixtures against the solicitors and other traditional rivals. He recounted the pleasures of previous matches, including matches against the naval men from *HMAS Cerberus*.

We were privileged to have two very special guests. Principal guest speaker was Tim Lane who with characteristic modesty described his experiences as a sportscaster all over the world. His views on the game seemed both eminently sensible as well as illuminating. His reminiscences of the legendary John Arlott, Alan McGilvray and Charles Fortune as they toiled away at the microphone were very amusing. His own stature in the field of cricket commentary needs no explanation from me and continues to grow. Unlike much that comes from the media these days, it was a refreshingly, straightforward view of the game of cricket over the last three or so decades.

The second guest is equally legendary. What schoolboy cricket and footy coach has produced a Test cricketer as well as a Brownlow medallist, leaving aside at least three AFL senior coaches, numerous AFL/VFL senior captains, premiership players and innumerable big "V" State reps? That person is the very unassuming Ray Carroll — coach of Assumption College 1st XVIII for the past 33 years, and the 1st XI for 26 years. He spoke all too briefly but we were very grateful for his making the trip down from Kilmore to be with us. What man has made a greater contribution to our two major games in this State and about whom so little is ever said?

As those people involved in organising sporting functions and noteworthy speakers these days would know it is rare indeed to have such distinguished guests give up their time for no fee other than a hearty meal and the good company of other cricketers.

As well as displaying an extensive range of subtle posters and memorabilia Tony Radford selected a Bar cricket team of the century as follows:

W.H. Moule (c)	Ian Gray
Sir Leo Cussen (vc)	D. Wraith
Sir Edmund Herring	C. Connor
Alec Southwell	G. Chancellor
Peter Coldham	A. Phillips
E.W. Gillard	R. Skinner (12th man)

We enjoyed of course the not too frequent presentation of the Winneke Trophy to the Bar. Mark Derham QC, our Chairman, following Chris Connor's team defeating the solicitors in December 1999, gratefully accepted the prize.

It was a great night to just enjoy cricket and a capacity it has "to just make people feel good".

Thanks to all who made the night possible with its fine meal and, judging by the audience participation, adequate liquid refreshments.

John A. Jordan

Conference Update

27 August – 3 September 2000: Perisher Blue, NSW, Australia. The Australasian Medico–Legal Conference.

17–23 September 2000: Rome, Italy. Pan-Europe Asia Legal Conference. (Escape the Olympics!)

2–9 December 2000: Heron Island (Great Barrier Reef, Australia). Pacific Rim Medico-Legal Conference.

9–15 January 2001 (and 2002): Cortina D'Ampezzo, Italy. Europe Pacific Legal Conference.

21–27 April 2001: Venice, Italy. Pan-Europe Pacific Legal Conference.

29 April – 5 May 2001: Statford-Upon-Avon, England. Britain Pacific Legal Conference.

30 June – 6 July 2001: Dublin, Ireland. Celtic Pacific Legal Conference.

8–14 July 2001: Positano/Praiano, Amalfi Coast, Italy. Europe Asia Legal Conference.

December 2001: New York, USA. USA Pacific Legal Conference.

23–29 June 2002: Lake Como, Italy. Europe Asia Legal Conference.

7–13 July 2002: Jerusalem, Israel. North South Legal Conference.

Trade Mark Law in Australia

By Brian Elkington, Michael Hall and David Kell
Butterworths 2000
i–x, Table of Cases xi–xv, Table of Statutes xvii–xxiv, Comparative Table of Sections xxv–xxxi, 1–369 including Index

THE new *Trade Marks Act* 1995 came into force on 1 January 1996, replacing a piece of legislation which had been in force for 40 years. The new Act brought a number of significant changes to the law and practice. Since the passage of the new Act, both Court and Trade Marks Office decisions have underscored the importance of the changes made to the legislation, as judges and administrators have, variously, either revisited previous decisions and adapted or endorsed them as current law, or discarded them where necessary or desirable. This is the first book (not counting loose-leaf services) based on the new legislation incorporating these updated decisions.

This book does for trade marks what Millers' does for trade practices — that is, provide a useful, reasonably detailed and annotated commentary to all provisions of the Act and Regulations. While there is inevitably a difference of opinion as to how comprehensive the commentary to each section of the Act should be, what is certain is that, as with trade marks, the length and volume of the commentary is bound to increase (as Millers' has done in recent editions) as the number of decisions on the new Act multiply. In the opinion of Justice K E Lindgren of the Federal Court of Australia, who has written the foreword, all major cases on trade marks to 1 December 1999 have been mentioned in this text, in particular, those relating to the key sections of the Act (sections 41, 43, 44 and 60). That is no mean recommendation.

The annotations include some significant material that arose under equivalent or related provisions of the previous Act, but the authors' emphasis is, naturally, on the changes brought about by the new Act — the tests for registrability; changed aspects of registry practice, grounds and procedures for opposition to and removal of trade mark registrations; and the concept of trade mark infringement.

The particular features of this book of interest and relevance to practitioners are:

- The full text of both the Act and Regulations is set out. The annotated commentary to each section then follows immediately under that section in smaller type.
- There is included a comparative table setting out the provisions of the 1955 Act alongside the relevant 1995 Act equivalent.
- Appendix 1 "Certification Trade Marks — Role of the ACCC" details what the interface is between the Registrar of Trade Marks and the ACCC. It effectively reproduces (with the permission of the ACCC) its current brochure on the subject.
- Appendix 2 "Australian Customs Notice No 96/01" details the Australian Customs Service practice on seizure of infringing goods.
- There is mention of and comparison with international provisions and decisions where relevant.
- Cross-references to other parts of the Act and Regulations and to other publications are provided.
- The style of the book, including running heads, makes it easy to find the sought-after section or passage.
- The index is well compiled and set out, and is sufficiently detailed.
- Legislative background/history to each section is given.

For a practical day-to-day guide to trade mark law, this is a most useful compilation for both practitioners and students. Highly recommended.

Judy Benson

Health Law in Australia and New Zealand — Commentary and Materials

By Peter J M MacFarlane
Federation Press 2000
i–ix, Table of Cases x–xii, Table of Statutes xiii–xviii, 1–318 including Index

THIS is the third edition of a work which first appeared in 1993.

The book is designed primarily for a range of health care, health administration, nursing and medico-legal professionals who need to be familiar with the legal principles relevant to their professional areas but who have no prior knowledge of or training in law. In one volume the author has collected together the materials on Australian and New Zealand case law and statute for this group, materials which are necessarily selective in terms both of topics chosen and the depth and coverage of the extracts. The focus, however, is on those facets of case law and statute which regulate the relationship between the health care provider and the patient/client.

The third edition adds a section on professionalism, ethics, and complaints — and also material from New Zealand — and the text has been updated and revised throughout. The collection does not resile from tackling difficult but relevant issues to the health professions — suicide, euthanasia, removal from life support systems, blood transfusions, adverse reactions to drugs, to name a few.

There are questions and exercises to stimulate student discussion at the end of each chapter which are representative of the types of situations which arise in day-to-day practice.

While the book is aimed mainly at students of health law, practitioners would find it a useful compilation of the main topics in the field.

Contents:

1. An introduction to the legal system
2. The regulation of health care
3. The corporate nature of health care
4. Consent to treatment
5. Negligence
6. Records and confidentiality
7. The impact of the criminal law
8. Organ and tissue transplantation
9. Provisions relating to drugs and poisons
10. Professionalism, ethics and complaints.

Judy Benson

Health Care, Crime and Regulatory Control

Edited by Russel G Smith
Hawkins Press, 1998
i–vii, Contributors viii–xii, Table of Cases xiii–xiv, Table of Legislation xv, 1–216 including Index

THIS is a collection of 16 essays based on the papers delivered at a conference on the book's title conducted by the Australian Institute of Criminology in Melbourne in July 1997. Contributors

include distinguished representatives from academic life, public service, medical boards, nursing, health services commissions, lawyers, conciliators and doctors. There are two papers written by current members of the Victorian Bar, Ian Freckelton and David Neal.

Medicine, crime and criminology have long been inextricably linked. The focal point of this collection (and the conference from which it derived) is the extent to which the criminal courts should be involved in regulating the conduct of health care providers, if indeed at all. So the starting point is, what is the current state of play and to what extent does the criminal justice system have a role in regulating health care practice. From this central theme, other key and related topics emerge: how does a court's role intersect with or run parallel to other regulatory mechanisms, for example, registration and licensing authorities, complaint handling procedures, disciplinary bodies, professional associations and ethical rules?

The papers in the compilation discuss and detail various approaches taken to the regulation of health care practice, then practical examples are provided as to how the system works in relation to specific types of conduct — sexual misconduct, fraud, unlawful killing. The point is made that not only should "the punishment fit the crime", but that the appropriateness of a particular response should be very carefully analysed and weighed, so as to impact effectively on professional communities in health care. Complainants may consider that punishment such as imprisonment satisfies their sense of retributive justice. But would such a penalty invariably be the best way of ensuring that like conduct is not repeated, and that others are dissuaded from engaging in similar deviances in the future? What sanctions have real potential to change positively peoples' behaviour for the better?

The general editor points to some broad rules of thumb to emerge from these considerations, analyses which some legal practitioners may in part find engagingly controversial:

- Conciliation is a process best deployed to settle misunderstandings between health care providers and users. It is less effective where deterrence-based sanctions are required. The process should be conducted openly and with representatives of the practitioner's professional colleagues present.
- Civil action is the best recourse where a health care user has suffered some pecuniary loss which can be quantified in dollar terms. Exemplary damages awards should not be imposed where other regulatory approaches are available for dealing with the same offence. Where awards for damages are paid for by a practitioner's insurance or indemnity fund, it may be appropriate for the practitioner to bear some of the financial burden, for example, by a reduction of the no-claim bonus.
- Disciplinary proceedings should be used where standards of professional conduct have been breached and where restrictions should be imposed on a practitioner's registration. Striking off and suspension should be sanctions restricted to instances of very serious conduct, repeat offending or failure to comply with previous directions. Clearly, the practitioner's ongoing conduct in these circumstances should be closely monitored by a regulatory authority.
- Criminal action should be restricted to cases where criminal law has been breached and where other regulatory responses are inadequate. The health profession is governed — as most professions are — by a set of ethical principles and rules which reflect what is and is not acceptable conduct in the opinion of its peers. The guidance given to practitioners, though, is not always sufficiently clear and precise as to where in a particular instance the line should be drawn between what is and is not permissible. Perhaps — these papers suggest — more work needs to be done in this area because the ultimate sanctions — suspension and striking off — are used relatively rarely and in dealing with very small numbers of practitioners in the overall pool.

The question of how to deal with practitioners against whom deterrence-based sanctions have been used is also discussed. The suggestion is put forward that regulatory bodies should consider the method of — "reintegrative shaming" to ensure practitioners are not isolated and scapegoated by their experience. The overriding concern is not merely to ensure that the particular individual does not reoffend or breach ethical rules again, but to ensure that he or she will refrain from doing so again when resuming practice.

There are many interesting contributions in this collection. It is clear from a quick scan of the contents listing below that, two years on from this conference, many topics are still of abiding, contemporary and current relevance and will be on the agenda for some time to come. Well worth a look.

Contents:

1. An Introduction, by Russell G Smith
2. Rational Choice Regulation: Two Strategies, by Phillip Pettit
3. The Criminalisation "Solution" to Medical Misconduct, by Ian Freckelton
4. Disciplinary Regulation, by Andrew Dix
5. Conciliation, by Beth Wilson, Keith Jackson and Teresa Punshon
6. National Influences on the Regulation of Professional Conduct, by Jan Fletcher
7. The Review of Traditional Chinese Medicine in Victoria, by Anne-Louise Carlton
8. The Alternative and Complementary Health Care Practitioner's Perspective, by Andries M Kleynhans
9. The Problem of Reporting Sexual Misconduct by Colleagues and Patients, by Merrilyn Walton
10. The Criminalisation of Post-Therapeutic Relationships in Psychiatry and Psychotherapy, by Carolyn Quadrio
11. Criminal Negligence in Health Care, by David Neal and Russell G Smith
12. Euthanasia, by Danuta Mendelson
13. The Transmission of Life-Threatening Infections: A New Regulatory Strategy, by Simon Bronitt
14. Fraud Control in the Health Insurance Commission: A Multi-Faceted Approach, by Peter Brandt
15. The Regulation of Telemedicine, by Russell G Smith
16. Controlling Genetic Research, by Louis Waller.

Judy Benson

Victorian Administrative Law

Edited by Emilios Kyrou and Jason Pizer 1999

VICTORIA, above all other States, has been at the forefront of administrative law reform. Victoria was the first State to establish an Administrative Appeals Tribunal, the first to codify and simplify judicial review proceedings and remedies, the first to introduce freedom of information legislation and second (after South Australia) to establish the

office of Ombudsman. It is, therefore, hardly surprising that Victoria, in 1985, became the first State to have the benefit of an annotated loose-leaf service covering all aspects of the State's administrative law. That work was Kyrou's *Victorian Administrative Law*.

The work has expanded considerably since its inception as decisions relating to the "new administrative law" came to be made by courts and tribunals. It was relaunched in 1999 with a new editor (Peter Pizer). Emilios Kyrou continues his association with the service as consulting editor. The occasion for the relaunch was the establishment of the Victorian Civil & Administrative Tribunal. That tribunal incorporated the former Administrative Appeals Tribunal and was given additional merits review jurisdiction over administrative decision-making in areas as diverse as motor car trading, prostitution and guardianship. VCAT also exercises extensive original jurisdiction over matters such as discrimination, domestic building and retail tenancies. Such jurisdiction had previously been exercised, in the main, by a range of ad hoc tribunals.

In its revised form *Victorian Administrative Law* retains its extensive commentary on the Freedom of Information Act, the Ombudsman Act and the Administrative Tribunal Act. It adds detailed treatment of the Victorian Civil and Administrative Tribunal Act, the VCAT rules, the VCAT practice notes and tables which set out VCAT's jurisdiction. Its commentary extends to VCAT practice and procedure, and the work contains a select bibliography on VCAT-related matters and a comprehensive index. Importantly, it provides commentary on all of the procedural aspects of VCAT's multiple jurisdictions and of appeals to the trial division of the Supreme Court and Court of Appeal from decisions of VCAT.

Victorian Administrative Law has established itself as the premier work on all aspects of Victoria's administrative law system. Indeed it has been described by Deputy President Macnamara (of the former Administrative Appeals Tribunal and, presently, VCAT) as "the Bible" in this area. It is unsurpassed in its scope and detail. It continues to provide the most comprehensive coverage of Victorian administrative law which is available to practitioners. Its high standards have been maintained under the new editorial regime.

Richard R.S. Tracey

Emergency Law — Rights, Liabilities and Duties of Emergency Workers and Volunteers

By Michael Eburn
Federation Press 1999
i–xix including List of Abbreviations, Table of Cases, Table of Statutes, 1–204 including Appendix of Liability Exclusion Clauses and Index

As the subtitle makes clear, this book canvasses the particular legal liabilities of those people who provide rescue, first aid and emergency services, whether as paid professional officers acting in the course of their duty, members of volunteer organisations, or persons at large among the general public acting as good Samaritans. Anyone who comes to help another "to save life, or to prevent or mitigate the injurious consequences"[1] of an emergency falls within the categories covered, ranging from those who perform daring helicopter rescues over cliffs and forests, to those rendering first aid at school football matches or in the shopping mall.

The author is well placed to put this material together and to cover the scope he does. An academic lawyer and teacher with research interests in the field of health law, the author and various other members of his family have had long involvement with emergency services (ambulance, fire brigade, State emergency services). He has therefore had long-term and direct and immediate exposure to the real and pressing problems and concerns encountered generally by doctors, nurses, and emergency workers in crisis situations, about their legal responsibilities and rights. The insights offered here are therefore the more valuable, arising as they do not only from a theoretical perspective but also from first-hand experience.

This is also a legal rarity — a "good news" book. Its central message brings comfort and welcome relief to rescue workers and the public-spirited individuals for whom this book was written and to whom it is targeted. Their worries can be put to rest because the law is fundamentally sympathetic to rescuers, even without specific "good Samaritan" (exclusion) clauses in operation. The law is inclined, on public interest grounds, to extend proper leniency, mitigation and understanding to those prepared to come forward to help others in emergencies or at times of sudden crisis. The law is not, however, prepared to extend the same qualities to those who may be the cause of the disasters in the first place (for example, pyromaniacs and arsonists). They can expect to feel the full vigour of the law's response when they are brought to justice.

The practical nature of this manual is its strength. Its thrust is twofold: it sets out the legal rights and obligations that arise in providing emergency care to those in danger, the sick and injured (including sick and injured rescuers) and the consequences of damage to property by rescuers; it then deals with avenues available for compensation for injuries occurring in the course of efforts to assist others.

The whole exposition is written in a clear and matter-of-fact style, befitting the subject matter, and assumes no prior knowledge of the law, and so is more useful as a lawyers' starting point than as a complete reference. It would be an invaluable addition to the resources of laypersons and their lead organisations. Of particular usefulness is the coverage of specific State by State provisions of State Emergency Service/disaster legislation (Chapters 8 and 9); ambulance legislation (Chapter 3) and firefighting (Chapter 7), a summary of the various liability exclusion clauses contained in legislation (Chapter 11 and appendix), and the succinct section on treatment without consent and withholding treatment (Chapter 4).

Although there is not a detailed coverage of the common law, this text is well worth a place on the bookshelf of any practitioner in the field of medical negligence, personal injury or tort law. The law is stated as at July 1998.

Contents

1. Definition adopted in *Chester* v *Waverley Corporation* (1939) 62 CLR 1 at 37 per Evatt J.

Part 3 — Fire Fighting and Rescue Services
7. Fire fighting
8. Other emergency services
9. Emergency co-ordination and disaster response
10. Liability of emergency services
11. Exclusion clauses

Part 4 — Other Matters Affecting Emergency Services
12. Driving emergency vehicles
13. Compensation for rescuers
14. Conclusion

Appendix: Liability Exclusion Clauses
Index

Judy Benson

Agency Law

By Simon Fisher
Butterworths 2000
pp. i–xii; Table of Cases xiii–xxiv; Table of Statutes xxvii–xxxii; xxxiii–xxxv; 1–259; Index 261–280.

AGENCY Law is a contemporary Australian-focused text explaining and analysing the fundamental principles of the law of principal and agent.

This work covers all the essential elements of the principal and agent relationship, such as the establishment of the relationship, (Chapter 6), the obligations that arise between the principal and agent (Chapter 7 & 8), relationships with third parties (Chapters 9 & 10) and termination of the principal agent relationship (Chapter 11).

Specialist agency relationships such as real estate and insurance are dealt with in a discrete chapter (Chapter 12) along with other such unique agency relationships as receivers, powers of attorney, commission agents and lawyers. This book does not aim to be exhaustive in relation to these specialised examples of agency, nevertheless the discussion of the special types of agency is usefully set against the full exposition of the fundamental principles of agency law.

Although the work is inevitably specialist in nature, the principles of agency law impact upon a vast variety of everyday transactions and relationships.

Inevitably, some of these transactions and relationships will be examined and analysed in the light of the law of principal and agent. This work will add significantly to the ease with which the law can be found and applied. *Agency Law* provides a contemporary Australian analysis while drawing from the long common law tradition and development of agency law. This work is commended to those who seek guidance and understanding of the principles of agency law in modern commercial life.

P.W. Lithgow

Australian Constitutional Law: Materials and Commentary (6th edn)

By Hanks and Cass
Butterworths 1999
pp. lviii plus 973 pages, including index
Paperback

THIS is the sixth edition of Australia's best known and longest lasting student case book on constitutional law. The book will be particularly familiar to those who studied at Monash University, but will be recognisable to most other lawyers as well. The selection of materials is slightly more orthodox (and perhaps closer to what one would expect to see in an undergraduate student text) than in some of its competitors, such as Blackshield and Williams. This book includes a comprehensive selection from overseas cases and articles, though there is quite understandably a strong emphasis on Australian materials throughout. There are extensive extracts and references to nearly every important High Court constitutional decision, and to a large range of other materials.

An introductory chapter is entitled "What is Australian Constitutional Law?". That is followed by a chapter written by a guest author (Ms Jennifer Stuckey) called "Indigenous People and Constitutional Law". This is apparently a new chapter for this edition of the book. It deals with native title, and a number of other issues concerning indigenous people in Australia. There are also chapters about treaty making and the "external affairs power, Parliament and legislative procedures, limits to legislative power, the Executive, the legal relationships in Federalism and the distribution of fiscal powers in Australian Federalism. The book concludes with chapters about the Commonwealth "trade and commerce" and "corporations" powers and freedom of interstate trade, and constitutional protection of express and implied rights in Australia. The emphasis throughout is on federal rather than State constitutional law. Nevertheless, there are specific treatments of the position of the States in the chapters about Parliament, legislative procedures and power and the Executive.

As well as more specifically "legal" topics, the text deals with some matters that might be regarded as partly political in nature. In particular, there is a treatment of the constitutional aspects of dismissal of governments. Most of the crucial documents concerning the dismissal of the Whitlam Government in 1975 are either reprinted or referred to. The authors unashamedly cast Sir John Kerr as the villain, and make their opinions plain: he acted in a "devious" and inappropriate way. There is, of course, some support for that in the documents reproduced. Nevertheless, the authors' view that "there is nothing in the Australian experience to support the proposition . . . that the Commonwealth ministry is responsible to . . . the Senate . . ." is a little dubious in the light of sections 1 and 57 of our Constitution (the effect of which is that to become law, legislation must be passed by both the Senate and the House of Representatives).

The dismissal of the Whitlam Government is of course a remarkable event in our constitutional history, and thoroughly deserves the space dedicated to it. The treatment of the even more remarkable dismissal of the Lang Government in New South Wales (which occurred in 1932, not 1935) is by contrast very brief. To anyone but a die-hard Whitlamite, the constitutional issues raised by that dismissal, and the legality of Sir Philip Game's actions, are even more contentious and open to question.

There is some limited reference to material from places other than Australia and the United Kingdom. A few US cases are referred to (particularly relating to the "corporations" power). So is some Canadian constitutional law, though that is mainly in the context of references to it in Australian High Court decisions. It might be interesting and stimulating for students to have more exposure to the ways in which the kinds of problems — particularly those raised by a Federal system — are dealt with in other countries. The Canadian Constitution for example, has often thrown up problems similar to those faced in Australian constitutional law, but given different solutions. On the other hand, it might be said that at nearly 1000 pages, this book is long enough already. The authors may

consider it hard enough to fit in all of the materials which are relevant to a study of only the Australian experience.

Overall, this is a comprehensive and readable student guide to Australian constitutional law. One might of course disagree with a number of the authors' opinions. To their credit, the authors generally make it plain when they are taking a stance, and at least acknowledge that there are arguments to the contrary of their own view (even if those are not always stated as forcibly as the arguments in support!).

Michael Gronow

Securities over Personal Property

Ed. Wappett & Allan
Butterworths 1999
pp. xxxiv plus 446 pages, including index
Paperback

THIS book fills a useful gap. It provides an up-to-date treatment of an important area of personal property law. Apart from the monumental (and rightly revered) Palmer on *Bailment,* detailed and authoritative treatments of Australian personal property law are few and far between.

This book is written by a number of authors, who seem to have in common a connection with the well-known law firm Mallesons Stephen Jacques. Having different authors often leads to a loss of uniformity of style and setting out. Here, however, most of the chapters in the book have been written with the participation of at least one of the editors, and guidelines for setting out and structure appear to have been followed for each chapter. The result is a consistency which makes the content of the book easier to absorb.

The book contains an introductory chapter called "What is a Security?", followed by an overview of the Australian legislation relating to securities. As the author of the chapter about the legislation says, there is a lot of it, and it is complex. Following are chapters dealing with conflict of laws issues in personal property securities, priorities and enforcement. After that, there are chapters on security interests in intellectual property (a growing area, both in practical and theoretical terms), and "dematerialised" and "immobilised" securities. The next group of chapters deals with security in financing, (including receivables and asset sales, financing), security for trade finance, security for equipment financing and security for consumer financing. That is followed by a chapter on inventory finance. A final chapter deals with the personal property securities registers in Australia and how those registers are administered.

The book is written as a statement of the current law in Australia. Nevertheless, there is reference to a wide range of international authority and academic opinion, especially on those areas of security law which are not the subject of clear decided Australian cases. Particularly in the chapter about securities over intellectual property, there is copious reference to United States authorities (where IP security seems to be even more of a buzz area than it is here).

Overall, the book contains a comprehensive and useful treatment of the different aspects of its subject. It will be of particular interest to commercial lawyers who practice in insolvency, banking and finance or consumer law. As a greater proportion of the nation's wealth moves from real property to personal property items (such as company shares and intellectual property), the enforceability of personal property securities can only increase in importance.

Michael Gronow

Native Title in Australia

By Bartlett
Butterworths 2000
pp. liii + 585 pages, including index
Paperback

THIS could well become the definitive textbook in its area. It contains the most comprehensive and authoritative statement of the law (as opposed to merely a discussion of social policy or economic implications) of native title in Australia that I have yet come across. That is not to say that this book does not also discuss the social, historical and economic aspects of the subject. Indeed, it could not cover it properly without doing so.

The author is (many would say justifiably) critical of the approach of successive Australian Commonwealth Governments to the issue. He is particularly critical of the current one. Nevertheless, he does not let his sense of outrage and social activism over-ride the aim of setting out a usable explication of this important area of our law.

The book rightly begins with an historical discussion of the development of native title law in Australia. There are also appropriate references to the historical development of native title claims and law in other common law countries, including the United States, Canada, New Zealand, Papua New Guinea and former British colonies in Africa. The work then focuses on the two *Mabo* decisions and the responses to them, the *Wik Peoples'* decision and the Federal Government's Ten-Point Plan in response to it.

The first part of the book deals with the historical, legal and political background to native title. The second part deals with the nature of native title, and it contains chapters about how native title is established and proved, the making of a claim under the *Native Title Act* 1993 (Cth) and the kinds of rights which are conferred on successful claimants for native title. Part 3 concerns extinguishment and validation of native title. It divides the period during which the native title may have been extinguished into firstly from white settlement in 1788 up until 1975 (when the Commonwealth Racial Discrimination Act was enacted) and secondly in the period 1975 to 1996. It also deals with deemed extinguishment of native title in the entire period from white settlement until 1996.

Part 4 covers future dealings in native title land including the "future act" process, the right to negotiate and agreements, settlements and compensation. Part S deals with the relationship between resource development and traditional pursuits on land covered by native title. It includes sections on minerals and petroleum, water, hunting, fishing and gathering. Part 6 deals with the institutions and jurisdictions concerned with native title, such as the National Native Title Tribunal and the Federal Court, and representative bodies. It also has a chapter covering the State and Territory jurisdictions in connection with native title. A final part contains a comparative treatment of the position in Australia with that in North America. This is a useful complement to the brief outline of those topics in the introductory section, and provides interesting examples of alternative ways of dealing with the same problem.

The book appears already to have been extensively cited and favourably reviewed elsewhere. As well as setting out the applicable statutes, it contains a thorough and authoritative treatment of

the Australian authorities. It also has a comprehensive reference to foreign authorities, particularly those in Canada and the United States (where native title and native title claims appear to be most developed). Lawyers working in the area would be wise to have access to a copy.

Michael Gronow

Controversies in Health Law

Edited by Ian Freckelton and Kerry Petersen
Federation Press, 1999
pp. i–x, Table of Cases xi–xiii, Table of Statutes, xiv–xvii, Introduction xviii–xxix, 1–354 including Appendix on human tissue legislation, Bibliography, Index

THE idea for putting together this collection of 18 essays, prepared by 19 distinguished contributors, emanated from the first intensive three-day residential course in health law held in 1998 in Melbourne. The papers there presented were subsequently expanded, revised, grouped and supplemented to form this volume. The compilation's stated aims are to stimulate and promote constructive debate and analysis about the issues and dilemmas that will preoccupy health law practitioners and professionals into the year 2000 and beyond, for example, the impact of revolutionary technologies, and ethical issues to do with rights to dignity, privacy, autonomy, benevolence and humanity. The whole work is an endeavour to enlarge the appreciation of health care practitioners about the law, and of lawyers to the practice and principles of health are.

So what are the particular controversies exposed for dissection in this collection?

- sterilisation and special medical procedures on children and young people
- criminal abortion laws
- withdrawal of life support and criminal prosecution
- the end of life legal framework
- competency to consent to treatment
- doctors as witnesses
- malpractice actions against health care providers
- the "ritual" of confidentiality
- medical records
- health disputes and alternative dispute resolution
- continuing legal education for doctors
- human genetics
- regulation and legislation on assisted reproductive technology
- introduction to ethics and moral frameworks
- resource allocation in health care management
- future directives
- organ donation and transplantation.

A number of particular themes emerge in this collection: first, the all-too-frequent disjunction between practice and theory, reality and myth. There is considerable discussion on areas of medical practice which are regulated (in principle) by the law, but are in fact (almost) entirely unaffected by legal strictures, for example, the prevalence of abortions, and frequently practised euthanasia, both of most uncertain legal status.

The second theme is the extent to which legal rules can and do provide effective regulation of clinical decision-making and procedures. Can legal rules command the respect and compliance of the medical profession and the community generally, both here and internationally? The practices which are mentioned and discussed in this context are infertility technologies, cloning, surrogate arrangements, eugenics, and sale of body parts from overseas donors for transplantation into patients in Australia.

Third, there is a discussion of the various approaches of the courts in common law countries to human rights and patient rights, for example, in relation to termination of pregnancy and patient-assisted suicide. In this context there is also an analysis of the efficacy and ultimately the desirability of the litigation process, with particular reference to recent High Court cases on medical malpractice and accountability in treatment and diagnosis.

The unravelling of the intertwined issues embedded in the various controversies is not intended to come up with "answers" to the dilemmas, but to highlight the interconnectedness not only of many of the topics discussed, but also of the complex relationships between law and practice.

The topicality and relevance of this searching collection two years on from its conception is indisputable. As the community struggles to come to terms with, or even debate, for example, human genome mapping, and the access of homosexual couples (or singles) to IVF treatment and procedures, the law, ethical considerations, and the question as to what benefits/applications/consequences may accrue from this research and knowledge of what science and medicine can do, limp along behind. This collection as a whole argues that this need not be so, and would not be so if a lively and informed ethical debate put such matters in the forefront of public discourse. These essays go a long way to fulfilling part of this function, and should occupy an important niche in the literature.

The essays are well researched, well presented, and provocative if sometimes disturbing reading. They are supported by extensive end-note references with a wealth of additional material. The bibliography alone — a real gold mine — has nearly 20 pages of minutely typeset listings of further resources, although this wonderful excess of scholarly zeal does not extend to the embarrassingly meagre, even perfunctory, index of only three pages.

The astute editors have kept in mind the everyday conundrums of legal practitioners and medical and health care professionals, as well as students, administrators, policy makers and legislators. There is indeed something for everyone in this diverse and valuable collection which no up-to-date library should be without.

Judy Benson

Butterworths Statutes: Property and Conveyancing Law Victoria (2nd edn)

Edited by Tooher
Butterworths 1999
pp. xii + 370 pages
Paperback

THIS is a new edition of a collection of Victorian statutes relevant to property and conveyancing law. It is primarily aimed at students. There are extracts from a total of 28 different statutes. The *Transfer of Land Act* 1958 is reproduced in its entirety. Only selected portions of the other statutes are reproduced. Substantial portions of the Property Law Act, Native Title Act, Residential Tenancies Act and Sale of Land Act are included.

The book would only be of use to a practitioner wanting a quick overview of the area. Due to the annoying habit

which obscure provisions of statutes have of governing particular cases before practitioners, no-one could safely use this book for detailed research. On the other hand, it would be an economical way for a student studying property law at any tertiary institution to obtain nearly all of the statutory provisions he or she would have to be familiar with, conveniently arranged under one cover.

Michael Gronow

Understanding Company Law (9th edn)

By Lipton and Herzberg
Law Book Company 2000
pp. x + 690 pages, including Index)
Paperback

THIS is a classic Australian student text on company law. Over the years it has become both popular and famous due to its clear and accessible explanations of the important concepts in the area. It has achieved this by a shrewd identification of what are the central points and concepts one needs to understand to have a basic grasp of company law.

There is also a concentration on the provisions of the *Corporations Law* and related statutes. Cases are only referred to where they genuinely add something to the law. As practitioners know (but law teachers seem not to) most real problems in the area tend to turn on the legislation.

The ninth Edition is updated to take into account the amendments made to the Corporations Law by the *Corporations Law Economic Reform Program Act* 1999 (Cth). As the preface points out, that legislation effected changes in five important areas, namely directors' duties, members' remedies, corporate fundraising, take overs and corporate accounting standards. The relevant chapters of this book have been largely rewritten.

The plain, no-nonsense approach of this work (which commences with the title) means that it can clarify when more detailed books confuse. The book does not purport to be as detailed, comprehensive or authoritative as standard practitioner texts such as Ford. Nevertheless, its clarity and conciseness make it a useful starting point even for practitioners. As for students, one imagines they will go on using it for some time to come.

Michael Gronow

Media Law — Commentary and Materials (1st edn)

By Sally Walker
LBC Information Services, 2000
pp. i–x, Table of Cases xi–xliv, Table of Statutes xlv–lxv, 1–1075 including Index

SALLY Walker is the Hearn Professor of Law at Melbourne University and taught me Media Law in 1995. In those days, students were periodically issued with what became vast piles of photocopied materials, for a fee (the cumulative fee was considerable). I still have about a half-metre high collection of media law cases and case extracts, pieces of legislation, journal and newspaper articles, policy and discussion papers, law reform reports and other documents and clippings. But now no student or legal practitioner need look much further than this book as it has just about everything on the subject of media law in one convenient collection.

Two principal developments stimulated the field of media law over the past decade, necessitating the creation of a first edition of this work rather than a simple revisiting or rewriting of the author's previous book on *The Law of Journalism* (LBC 1989). The first was the significant *legal* impacts on media law arising from the High Court's recognition of an implied freedom of political communication in *Nationwide News v Wills* in 1992; the High Court's development of the concept in *Theophanous* v *Herald & Weekly Times* and *Stephens* v *West Australian Newspapers* in 1994; and the Court's further refinement in *Lange* v *ABC* in 1997. Although the book deals with these cases extensively and in detail in the introductory chapter, the principles and their application have actual or potential relevance to many other laws and ideas which affect or inform what may or may not be published. The cases are therefore seminal ones which permeate much of the rest of the book.

The second, practical, change is the impact of *technological* developments. In 1990 "media" meant radio, television and newspapers. Computer bulletin boards, chat rooms and on-line information systems are now widespread facts of working and daily life readily available to everyone with a home or office computer. The Internet has provided the capacity not only to transmit information to a potentially worldwide audience on demand, but enables every person to create and disseminate their own material or compilations. The brave new world, however, creates minefields for the unwary. How far does freedom of communication regarding government or political matters extend? Do laws applying to print and broadcasting apply to the new forms of media? Should electronic communications be regulated, and, if so, how far and by whom in an international context of computer networks?

The ferment in the field of media law and the emerging issues and problems just hinted at mean that an understanding of the legal rules which affect what may be published, and the way information may be obtained and distributed, is no longer confined to journalists. Media (and their related) organisations, and the lawyers and advisers they employ, need to keep abreast of key developments. To this end, this book includes useful comparative materials from other countries to analyse approaches and strategies tried or adopted elsewhere.

The book contains, as well as its comprehensive contents, extended lists of further reading, detailed footnotes, questions and notes, and a well prepared and set out index. Though I wish I had had this book in 1995 when studying media law, having it now means that I can personally attest to the truth of the proposition that all things come to those who wait.

Contents: The Media and Freedom of Speech — Material Injuring Reputation, Trade or Business, Defamation and Related Actions — Criminal Defamation — False, Misleading or Deceptive Material, Injurious Falsehood and Consumer Protection and Fair Trading — Court Reporting — Contempt of Court — Reporting Political Events — Reporting Parliament — Contempt of Parliament — Security and Defence Material — Offensive, Obscene, Violent or Blasphemous Material, Classification Legislation and Hate Material — Privacy and Intellectual Property Law Restrictions — Copyright, Passing off and Breach of Confidence — Special Rules Applying to Broadcasters or the Print Media — The Regulation of Broadcasting — The Australian Press Council.

Judy Benson

Crime

David Ross QC
Law Book Company
One vol. looseleaf with regular updates. Also on disc.

THE availability of an immense number of books and looseleaf services, with their attendant costs, presents a continuing need for discriminating selection by today's legal practitioner. Occasionally, however, a work stands apart as immediately indispensable for its scope of subject matter and lucidity of format.

Such a work is the current looseleaf service, *Crime*, written and maintained by David Ross QC and published by the Law Book Company.

Crime is effectively an A–Z of the Criminal Law — and then some. The title may be easily stated but the topic immediately presents a subject of such enormous scope and diversity that any attempt to encompass it in a single volume must seem ambitious. The author has not shirked the challenge, and "screwing courage to the sticking place" has succeeded in producing a work comprehensive in subject matter, erudite, and with occasional sparkles of delicious whimsy.

Beyond being a mere case citator for particular topics, *Crime* provides the reader with the advantage of having short excerpts from carefully selected decisions from which principle may be readily perceived together with references for further enquiry such as books, legislation and articles. Perhaps its great value apart from the depth of research and breadth of subject matter is the skill with which the author is able to condense the issues and guide the reader through the particular topic.

Its scope is far reaching. As well as the expected topics such as Causation, Insanity, Bail and Conspiracy, there is the more esoteric; Procedendo, Allocutus, Venire de novo, Dog and even Jazz! Syndromes are included, hence Klinefelter's, Accommodation and Battered Woman, as are important judicial directions commonly known by name of accused, such as McKinney, Kilby, Black and Prasad.

Two additional features are an excellent subject index together with separate case index to all authorities (including authorised citations) and an Appendix on "Preparation of a Defence Case" and table of "Reports and their Abbreviations".

This is not an academic work but it would be a mistake to consider it lacked scholarship. Its immediate apparent simplicity is deceptive. Issues and principles are readily understood for their directness and felicitous choice of example. *Crime* is fundamentally and unapologetically a practitioner's handbook. Well over 1000 pages are included, covering over 300 separate topics relevant to the criminal law.

With over 30 years as a barrister specialising in criminal law at both trial and appellate level, the author is well qualified to present such a work: its style reflects qualities of compression and succinctness no doubt acquired through years of deliberative advocacy.

This is an extremely useful book either for preparation of a case in chambers or at the Bar table. To the practitioner unfamiliar with the Criminal Law it is essential; to the specialist it is indispensable.

Howard Mason

The Drama of the Courtroom

By Kathy Laster with Krista Breckweg and John King
The Federation Press 2000

WE all have our favourite courtroom films, whether they be "Anatomy of a Murder" (1959) directed by Otto Preminger, "Witness for the Prosecution" (1957) directed by Billy Wilder or the many other films with courtroom scenes.

The courtroom film is not a recognised form of film genre. Courtroom scenes could be in a romance, western or even a screwball comedy. There are, therefore, few, if any, critical reviews of courtroom films as such.

This book, however, is primarily intended for law teachers who are looking for courtroom scenes to assist in their classes.

The book briefly explains how courtroom scenes can be used to teach law. Essentially, however, the book is a reference work: a filmography. It is divided into two parts: a subject index followed by the synopses of the films reviewed, subdivided by jurisdiction. The jurisdictions being the United States, the United Kingdom, Australia and other countries. Within each jurisdiction, the films are divided into criminal and civil. The index is of legal issues only. The synopses are an analysis from a law perspective, identifying what legal principles are addressed at what point in the film. For many films, the filmography gives the time at which particular legal principles are addressed. Each film analysis contains a head note, similar to a law report, identifying the legal issues addressed.

There is, however, no analysis from a cinematic perspective. Thus, a film such as "To Kill a Mockingbird" (1962) is not differentiated from the TV series "Perry Mason". The authors do not pretend otherwise. This is regrettable, as invariably people who watch a film have a view about its merits. Film dictionaries, such as *Leonard Maltin's TV Movies* and *Video Guide*, indicate the author's opinion of the quality of film using a star system. Such an assessment would have been useful in this book.

To test the completeness of the filmography, a comparison was made to the films referred to under "Courtroom Scenes" in *The Filmgoers Companion* by Leslie Halliwell, Macgibbon & Kee, London, 1967. Of the first 10 films listed by Halliwell dealing with British courts, only three appear in the *Drama of the Courtroom.*

The book, however, achieves its desired aim of identifying and recording the legal principles addressed in the 190 films dealt with.

The book will be useful to law teachers who wish to use cinema as a means of teaching. It will also be of interest to lawyers who enjoy cinema. They will be surprised to learn that many of the films which so captivated them on the screen also contain constructive information to their profession.

R. McK. Robson

Remedies, Commentary and Materials (3rd edn)

Tilbury, Noone and Kercher
Law Book Company 2000
pp. lvii+839 pages (paperback)

THIS is a case book about remedies. Notwithstanding that it is obviously aimed at law students, I found it interesting and I think many practitioners may find it useful. That is because it covers the area comprehensively, selects its materials well and often examines them intelligently and critically. The material is arranged (as much as possible) by reference to the different kinds of remedies, rather than just the areas of law to which they apply.

After an introductory chapter about the general nature of remedies, there is a treatment of what are called "self-help remedies" in tort and contract. Those include in tort the ability to abate nuisances, remove trespassers, recover goods and defend oneself. In contract, they include things like penalty clauses and other contractual provisions creating remedies for the innocent contracting party.

The book then deals with compensation in general, including damages for various common law and equitable "wrongs". It contains a useful and up-to-date treatment of concurrent liability in contract and tort, including the High Court's recent decision in *Astley* v *Austrust Limited* ((1999) 197 CLR 1). A chapter on restitution including proprietary relief and the relationship between restitutionary and compensatory awards follows. The book concludes with chapters about exemplary and aggravated damages and what are called "coercive" forms of relief, such as injunctions, and lastly enforcement of remedies, both at an interlocutory stage and after judgment.

While somebody preparing either an opinion or a submission to a court would naturally wish to look at the relevant cases in full, this is a useful place to get an overview and a start. As I have said above, many of the editors' comments stimulate thought. I suggest that the book is worthy of attention.

Michael Gronow

Cross on Evidence (6th Aust. edn)

By J.D. Heydon
Butterworths, 2000
pp. cxxxix+1279 pages, including index (hardcover)

THE new Australian edition of *Cross on Evidence* seems if anything even better than the last. It remains the only entirely comprehensive and completely authoritative Australian evidence text for practitioners (and in particular practising barristers). That is not to disparage other Australian evidence texts; it simply reflects that their aims are not necessarily as ambitious as those of this book.

It is apparent that large portions of the text have been rewritten. According to the preface, that was with the commendable aim of shortening and clarifying them. Given the confusing (and often contradictory) nature of many recent Australian evidence decisions, clarity and brevity are sorely needed. One can only applaud the current author's courage and assiduity in taking on the task, and trying to create order from apparent chaos.

Among other things, there is now available substantial case law on at least some aspects of the operation of the new uniform evidence legislation, particularly in the area of client (or "legal professional") privilege. Notwithstanding the despair expressed in the preface, the author sets out and expounds both the statutory provisions and the case law interpreting them in a lucid fashion. While it may be that the uniform evidence legislation has not made evidence law as clear as it could have, it is still a substantial improvement on many areas of the common law. One can only wonder why, five years after the introduction of the legislation in New South Wales and by the Commonwealth, we are still waiting for it in Victoria. When our State Government has finished abolishing wigs and QCs, perhaps it will interest itself in some real law reform.

The scheme of the book is similar to that of previous editions. An introductory chapter deals with the development and range of law of evidence, the best evidence rule and basic concepts such as relevance, admissibility and weight of evidence, as well as aspects of the uniform evidence legislation. Chapter 2 deals with judicial notice and formal admissions. Chapter 3 deals with estoppel by record, including the rule in *Hollington* v *Hewthorn* ([1943] KB 587 (CA)) and legislative reform of it. The following chapters deal with the burden of proof, presumptions, the degrees of proof and the differing functions of judge and jury as tribunals of fact and law. Then come chapters about the competence and compellability of witnesses and corroboration.

After that, Chapter 9 deals with examination in chief, cross examination and re-examination as well as rebuttal evidence. Character and credibility, similar fact evidence and evidence by accused people are then treated. The following chapters deal with privilege, exclusion of evidence on public policy grounds, and opinion evidence. There are several chapters dealing with the rule against hearsay, the common law and statutory exceptions to it and (in a separate chapter) the doctrine of res gestae. The book concludes with chapters on documentary evidence and proof of frequently recurring matters.

One virtue of maintaining this scheme is that it leads to an arrangement of the text in a way that makes it easy for practitioners to find quickly the area they want. That is not necessarily a feature of evidence textbooks which are arranged by reference more to theoretical than practical principles. The frequent use of sub-headings (and the comprehensive setting out of them in the table of contents) means that one often does not even have to consult the index in order to find the passage relevant to one's problem. Given the unexpected way in which evidence issues often arise, and the speed with which they must be resolved (especially in court), that can only add to the book's usefulness.

In short, the new edition of this book maintains it as the leader in its field. It is both the first and the last place a practitioner should go when researching or seeking to resolve an evidence issue. We can only hope that the present author's recent elevation to the New South Wales Court of Appeal will not prevent him being involved in future editions.

Michael Gronow

Thieves Court Disaster

NEW Zealand's *Southland Times* has reported a trial in which Justice Morris of the Auckland High Court berated a pair of guilty robbers for incompetence.

"What is the modern world coming to when a gang of thieves arrive at the place they are going to rob in a taxi?" the judge wondered. "I despair for the future of our country when a group of louts like you lack the intelligence to take even basic precautions to avoid detection."

Their crime was to steal five protective helmets and 400 puncture repair kits from a Mt Eden bicycle shop. "Why couldn't you steal a car beforehand, like everybody else?" Justice Morris demanded. "You are imbeciles. I hereby sentence you both to five years' imprisonment."

The Australian, 22 July 2000