VICTORIAN BAR NEWS

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MAJOR GENERAL GREG GARDE AM, RFD, QC

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Political Correctness and the Victorian Bar

IN the past most barristers were considered to be advocates. People whose job was to argue cases in the courts. Professionals who followed the cab rank rule, who would vigorously argue a case, regardless of its merits, and regardless of their personal opinions of the client and the moral worth of the client's case.

By this process of advocacy barristers became used to exchanging conflicting views with fellow barristers and judges. Advocacy is the art of putting forward a case with precision and vigour but without emotion. Therefore to those in the court, exchanges between barristers could be seen to be quite robust, especially when addressing a jury. Robust comments were made concerning the manner in which the opponent's case had been argued and presented. Proper points of advocacy were taken. After these exchanges clients and those not involved were often surprised when they heard gales of laughter coming out from the robing room, from the very two barristers who had been at each other's throats a few minutes earlier.

Of course robust advocates were not the sole component of the Bar. There were those who excelled in submissions to Courts of Appeal and whose opinions were extremely learned. The naked light bulbs and brown linoleum of Selborne Chambers provided a monk-like environment for those who had a true love of the law.

Things are a bit different nowadays. A new breed of barrister has arisen. THE TIP TAP VARIETY. This new breed is permanently fixed to a screen. Most of their time is spent in their chambers tip tapping away at a laptop primed and overflowing with megabytes galore. On the odd occasions that they go to court they do not go alone. There is normally a posse headed by an experienced male Queen's Counsel, followed by a gaggle of these folk with numerous gelled, power dressed, and bespectacled young solicitors bringing up the rear, pushing trolleys of folders resplendent with top-end-of-the-town firm names.

Once inside the courtroom there is no question of rising onto one's hind legs. It's tip, tap, tip all the way. Head down, into the screen, tipping and tapping to one's heart's content. A request to take a subpoena is met with horror. Requesting an adjournment is a "no can do". These things do not involve tip tapping and are verboten.

Political correctness is the terminator of all humour. Most jest can be analysed, in the cold light of day, to be offensive, sexist, racist or ageist. It offends the prevailing ideology of political correctness. And so this new breed of the politically correct is having a profound influence on the Victorian Bar.

And so this breed can continue rising to the top without ever asking a question in anger. It is a world of further, further, further, further and better particulars. Fifth amended cross claims of the sixteenth respondent and endless reviewing of transcript. Occasionally there is a great need to photocopy authorities.

This new class has no concept of the traditions of the Victorian Bar. Those who practise in the criminal law are considered insane. After all, most get paid a pittance by that funny outfit called Legal Aid and have to, God forbid, represent criminals sometimes. The common law is regarded as a minor vulgar sideshow of broken bones and funny Acts. As for Family Law — is that really law at all? I mean you'd have to be mad to earn a living by actually cross-examining witnesses.

This new breed has no time for joviality. Life is a very serious business. Self-promotion is an overwhelming preoccupation of every waking hour. Hand in hand with this lack of humour is an all consuming love affair with political correctness.

Political correctness is the terminator of all humour. Most satire or jest can be analysed, in the cold light of day, to be offensive, sexist, racist or ageist. It offends the prevailing ideology of political correctness. And so this new breed of the politically correct is having a profound influence on the Victorian Bar.

There is a fear of open discussion. Many of the Bar do not participate in Bar activities because of fear of saying the wrong

thing, or simply because most things are so correct and boring.

Recently the tip tap class showed its power. The Victorian Bar Council at the urging of these folk passed a motion enforcing censorship and toeing the political correctness party line.

The problem was some proposed entertainment at the 2001 Victorian Bar Dinner. For many years the Bar Dinner had become rather a dull affair. Attendances were dropping. Many people said they would not attend because of the prescribed format of the evening, whereby sometimes dozens of guests had to be mentioned in a speech by the current Junior Silk. Naturally there were variations in quality depending on the after dinner oratorial skills of the speakers. So the idea was hatched to make the evening a little more fun. The venue was moved from Leonda to the Plaza Ballroom. The Chairman of the Bar approached two Queens Counsel to provide some humorous entertainment and it was decided that a brass band could appear as a surprise musical event to brighten things up somewhat. The idea was for a little bit of humour and satire to be injected around the formal speeches. Nothing particularly extraordinary.

Both the Queens Counsel, who agreed to provide the entertainment, had written and produced successful Bar shows over a long period of time beginning with the Victorian Bar Review in 1984. Some ideas had been tossed about but no script written.

However, alarm soon swept through the politically correct members of the Victorian Bar! One of the Queen's Counsel had mooted a few ideas about what he proposed to say. Alarm, Alarm! The tip tap class went into action. E-mails flooded into the Chairman of the Bar Council. The entertainment was deemed to be sexist and would set the Bar back twenty years. If it proceeded there were threats of walk-outs at the dinner. Certain types of barristers were to vilified. It was all going to be a dreadful sexist romp. This was despite the fact that not a word of script had been written.

And so the Bar Council was lobbied at a meeting before the Bar Dinner. A motion was passed that a censorship committee should be set up. This would consist of a Queen's Counsel, a middle ranged barrister and a very, very junior barrister. They in their wisdom would vet a proposed script to make sure that it was not sexist. The proposed Queens' Counsel could not be trusted, even though invited to perform by the chairman.

Therefore the fundamental principles of the law were followed. The Queens' Counsel were convicted without trial, without full particulars, upon no written evidence. The concepts of freedom of expression, and the traditions of the Bar went out the door. Vague allegations from anonymous persons were enough for our governing body.

Of course requiring speakers at the Bar Dinner to have their proposed scripts censored was totally intolerable. Naturally that was the end of the entertainment part of the evening. The conditions were rejected and no performance took place. The tip tap class had prevailed.

Many people did not attend the Bar Dinner in protest at these restrictions. The attendance was one of the lowest in years. The highlight of the night was an excellent speech by Judge Bowman. Although there were murmurings that his speech was a little bit too "blokie", as he used the analogy of a cricket team.

Censorship of this nature goes against the fundamentals of the Victorian Bar. There must be some trust and faith in people to perform at a function in a non sexist or offensive manner.

In future years will all speakers have to submit the draft of their speeches to this committee? Such behaviour only causes the Bar to move away from any collegiate spirit that it once had. But perhaps the term "collegiate spirit" is not acceptable?

And what does the future hold? A Bar Dinner attended by fifty or so persons all tip tapping away while a computer screen mouths platitudes about the honoured guests — but oh so correct platitudes, oh so correct . . .

THE EDITORS

On Reviews, Discussions, Issues, Fees, and Rules

REVIEW OF THE LEGAL PRACTICE ACT

THE "Reviewers" appointed by the Attorney-General of Victoria in June 2000 to review the key features of the *Legal Practice Act 1996* recently issued a Discussion Paper. Last year they put out an Issues Paper. All of the main institutions involved in the regulation of the legal profession had made submissions in response to the Issues Paper. The Discussion Paper provided a synopsis of the submissions and details of the responses made on certain issues. The comments and suggestions appear to have been as diverse as the range of commentators themselves. While the ultimate direction of the review has not been determined, the Discussion Paper noted wide agreement on several issues. There was general agreement that the current regulatory structure is unnecessarily complex and expensive. In particular, the legislative device of registered professional associations (RPAs) was universally criticised as a complex legislative experiment that had not succeeded.

In response to the Issues Paper, both the Bar and the Law Institute submitted that professional regulation could only be successful if the profession, through its main representative organisations, remained strongly involved in the regulatory process. The Bar argued that the profession was well placed to provide cost-effective and responsive regulation, subject to appropriate independent review by external bodies. Other submissions advocated the complete removal, or significant lessening, of the continued involvement of the professional associations in the regulatory process.

The response of the Bar to the Discussion Paper suggested that the continued involvement of the profession in the regulatory process was essential to maintaining high professional standards. The Bar and the Law Institute were criticised by some commentators as self-interested, or unable to recognise an apparent conflict between their "trade union" and

regulatory roles. The Bar suggested that if professional standards are to be both accepted and applied within a professional group, they must be drawn from principles determined by reference to the knowledge and experience of that group. The best means of determining what is, or is not, appropriate professional conduct, or what may constitute misconduct, is to draw from the standards of members of the profession by reference to their own knowledge and experience.

The submission of the Bar also drew attention to the particular role of the legal profession. It is relevant to note that when legal practitioners are admitted to practise law, they are admitted to such practise within a certain State or Territory. The inherent supervisory jurisdiction retained by a Supreme Court over practitioners within its jurisdiction imposes direct professional obligations on practitioners, particularly barristers. Members of the Bar who are involved in the conduct of proceedings commenced in a Court are subject to a professional duty to that Court. Most of our professional obligations are ultimately explicable by the continuing duty owed to the Court and through it to the administration of justice.

The operation of the Bar's Ethics Committee complements the wider duty owed to the Court. The Committee is comprised of practitioners who are experienced in, and subject to, the same duties as members who seek their advice. Accordingly, members of the Committee are able to provide informed advice upon request, or to determine formal complaints, by standards that are informed by direct practical experience. The Committee operates by reference to the same ultimate goals as the Courts. When viewed from this perspective, the work of the Committee enhances the integrity and independence of the Courts because it ensures that the general duties owed to the Court are maintained in the everyday problems of practice with which the Courts cannot, practically, be concerned. At the same time the experience of members of the Ethics Committee enables the Committee and the Bar Council to remain attuned to the state of the profession and, therefore, able to develop and maintain rules of conduct that reflect the needs of the profession, the public and the Courts.

The submission of the Bar also highlighted the point that there is a low number of complaints against barristers in absolute terms, and also, proportionately, when compared with complaints against solicitors. The Discussion Paper, and the earlier Issues Paper, stressed the apparent problems arising from the current operation of the regulatory system. In the view of the Bar Council, the continued low level of complaints against barristers provides clear support for the view that the current arrangements for the professional regulation of barristers by the Ethics Committee, subject to the scrutiny of the Legal Ombudsman, is generally working well. There was compelling statistical evidence in support of this aspect of the submission. It is my view that the low level of complaints against barristers is due to the effective operation of the Ethics Committee, particularly the great ease with which members may seek prompt and authoritative advice. The other reason

is the commitment of members of the Bar to the rules of conduct and the principles upon which they rest.

RECOVERING BARRISTERS' COSTS FROM SOLICITORS: *DIMOS' CASE*

All practitioners should be aware of the recent case of *Dimos* v *Hanos & Egan* [2001] VSC 173 (29 May 2001). The decision of Gillard J provides useful guidance on the circumstances in which a barrister might be able to recover his or her fees from a solicitor, and also the effect of several relevant provisions of the Legal Practice Act.

The facts of the case were as follows. A solicitor (Dimos) operated a small legal practice. Egan worked at the firm as an employee solicitor. On several occasions Egan briefed counsel, Hanos, to appear for various clients of the firm. Hanos was not paid for his services. He subsequently sought to recover his outstanding fees in the Magistrates' Court. Dimos lodged a defence that alleged that he was not responsible for the outstanding fees because there was no fee agreement as required by s.96 of the Act. Dimos joined Egan as a third party, alleging that Egan had been instructed that he could not engage counsel for any client of the firm unless sufficient monies were held in trust. Dimos alleged that if liability for the outstanding fees occurred by reason of Egan acting contrary Dimos' instructions as his employer, Dimos could recover those monies from Egan.

The Magistrate found for the barrister and made three main findings. First, the relevant provisions of the Act were not helpful in identifying the parties to a contract for a barrister's services. Secondly, where a solicitor engaged a barrister, as a general rule, there is a contract between the solicitor and the barrister. The facts of this case did not displace this general rule. Thirdly, any requirement or instruction made by Hanos to Egan was not a term of Egan's contract of employment. Accordingly, the third party proceeding was dismissed.

Hanos appealed to the Supreme Court under s.109(3) of the *Magistrates' Court Act 1989*. Master Wheeler stated the three questions for determination. The first question, which was considered in detail, was as follows: if a solicitor engages a barrister to perform work on behalf of the solicitor's client, is there a contract to perform that work between the solicitor and the barrister, or between the barrister and the client?

Gillard J noted that the common law rule, under which barristers' fees were a matter of honour and not recoverable in the Court, was altered by the *Legal Profession Practice Act 1891*. That Act enabled barristers to sue both instructing solicitors and clients for unpaid fees. Subsequent cases established that the Act was regarded as having created a contract between barristers and solicitors and barristers and clients. His Honour concluded that this law, as amended and remade in subsequent Acts, remained in force until the passing of the *Legal Practice Act 1996*.

Much attention was given to ss93 and 96 of that Act. Gillard J noted that ss93 and 96 establish that, contrary to common law, a barrister may sue to recover unpaid fees but, importantly, the sections do not establish any form of statutory contract. Accordingly, the identity of the parties to a contract for legal services depends on the circumstances of each case. His Honour rejected the proposition that the Act placed a solicitor in the position of an agent for his or her client as a disclosed principal.

Gillard J observed that the parties to a contract for legal services were free to negotiate the contract as they wished, subject only to the particular limitations within the Act (practitioners should recall that any agreement that contravenes the Act is void: s.102(1)). His Honour suggested it would be unwise for a barrister to perform work on the basis of a contract with the client, under which the client alone bore responsibility for the barrister's fees, but acknowledged that the solicitor could negotiate such a contract on behalf of a client.

If each case depends on its facts, and the parties are free to negotiate as they choose, subject to the restrictions of the Act, it may be difficult to decide how any case should be determined. Gillard J suggested that the normal arrangements between barristers and solicitors would give rise to a contract between the two. He stated:

> In the normal course of events, a client who retains the services of a solicitor engages the solicitor to provide professional services for him. In providing those services, the solicitor may advise the client that it is necessary to brief a barrister to provide specialist services. For example, it may be necessary to retain a barrister to appear in court. Retention of a barrister is, in part, satisfaction of the provision of legal services by the solicitor. In the absence of any contrary evidence, the retention of the barrister would result in a contract between the barrister and the solicitor. [100]

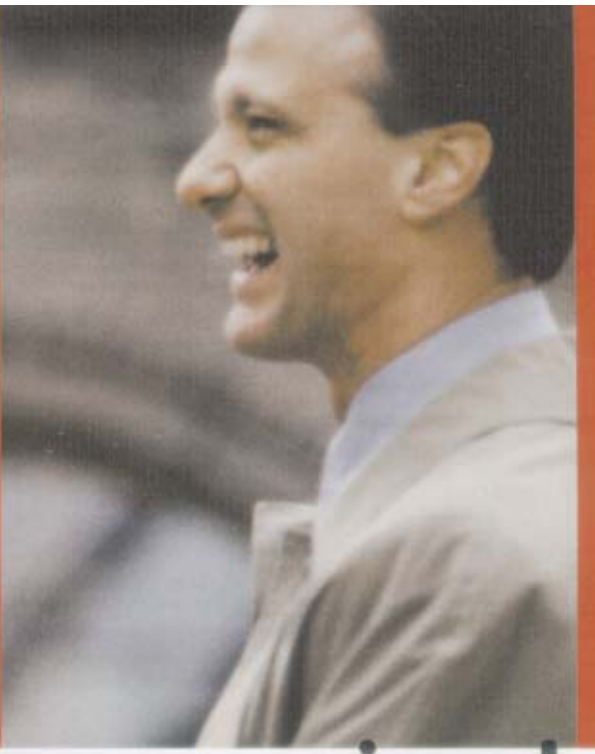
The application of this reasoning to the claims in issue was instructive. In one case the barrister was retained through delivery of a brief with a back sheet. There was nothing on the back sheet, which was endorsed with the name and address of the instructing solicitor, suggesting that the retainer was between the barrister and the client, nor was there any evidence of any discussion between the barrister and the instructor to that effect. Nor was there any evidence that the client expressly authorised the solicitor to brief the barrister and to bring into existence any contract between the barrister and the client. Gillard J held that on facts overall the conclusion was "overwhelming" that the contract was between the barrister and solicitor. Other dealings revealed a similar lack of evidence to suggest an intention to establish anything other than a contract arising from the normal commercial dealings between counsel and his instructing solicitor.

Gillard J did not determine the remaining questions stated by the Master, essentially because they raised questions that were wider or different from the issues before the Magistrate.

PROPOSED CHANGES TO RULES OF CONDUCT

The Bar Council is currently considering two changes to the rules of conduct. First, the rules of conduct concerning barristers' dealings with the media are being examined with a view to providing clearer guidance in this difficult area. Secondly, draft rules of conduct concerning barristers acting as mediators are being developed for discussion. The growth of mediation in recent years has led to an increase in the number of barristers acting as mediators. The current Rules are not, in the main, apt to the role of a barrister acting as a mediator. When the draft Rules are in a more developed state, I anticipate that they will be exposed for general comment.

Mark Derham
Chairman



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Attorney-General's Job "Exceeding Expectations"

I am often asked whether becoming Attorney-General for the State of Victoria has proved as satisfying as I had anticipated. The answer is always that it continues to exceed my expectations.

As Attorney-General, I am in a unique position to encourage the provision of access to justice to all Victorians, through the reduction of discrimination, and through ensuring that our legal system is more available and relevant to all members of the community.

This commitment can be exercised in a number of ways. The last parliamentary session saw the passage of the *Statute Law Amendment (Relationships) Act*, a piece of legislation of which I am particularly proud, and which eliminates discrimination against same-sex couples through the amendment of 43 other Acts.

I was delighted to celebrate the proclamation of 24 of these amendments with members of the gay, lesbian and transgender community on the eve of the 32nd anniversary of the Stonewall riots on 28 June. Gay, lesbian and transgender Victorians have campaigned tirelessly for the recognition of their relationships, and I felt privileged to be able to provide a mechanism for this to occur, in what I consider to be a simple reflection of a genuinely democratic society.

Of course, this commitment to access to justice has also been demonstrated through our determination to maintain the independence and viability of Community Legal Centres and our legal aid system.

Recently I announced an additional $1.05 million for State-funded CLCs. This increased funding includes a $500,000 injection in capital, and brings CLCs back from the brink of the crisis in which they were left under the previous State Government.

The infamous IAG Review of CLCs, implemented by the previous State Government and the Commonwealth Government, has come to a conclusion with no calls for the closure of any CLCs, and in fact with an endorsement of existing CLCs by the Federal Attorney-General.

The Bracks Government came to office with a commitment that no CLC would be forced to close or amalgamate, and I am

particularly pleased that our firm stand on this issue, sometimes in the face of fairly virulent pressure, has been vindicated and that the independent future of CLCs has been assured.

Many of you will also be aware that, after almost two years of struggle, Victoria will now be $4 million better off under a three-year legal aid agreement, allowing more access to accumulated funds and increasing the overall pool of funds for VLA.

Sometimes, however, a commitment to access to justice can be demonstrated through simple policy initiatives. The Victorian Bar, and in particular the Women Barristers Association, have done much to improve the briefing practices of the private profession since the release of the report on Equal Opportunity at the Victorian Bar.

However, the Government must take the lead on this issue. As well as briefing practitioners directly, the Government contracts out approximately $40 million worth of work each year to Victorian law firms. Firms vying for a piece of this pie will now have to demonstrate three things — that they are a model litigant; that they have a commitment to pro bono work; and that they have a demonstrable commitment to the briefing of women barristers and to the equitable distribution of work to women within firms.

Coupled with the Government's commitment to progressive briefing practices for work done within Government, it is my hope that these simple initiatives will ensure not only that more women receive legal work, but that they also receive a better quality of work.

It is stating the obvious to say that there are plenty of women at the Bar with the skills and confidence to tackle high profile cases. However, too often, the ability of these women is not highlighted or is hidden behind male senior counsel. We all know the talent is there. The challenge now is to make sure it is used.

You will all be aware of my commitment to making Victoria's Bench reflect the diversity of its community. Since coming to office I have been able to improve the proportion of women on the Victorian Bench substantially. However, we still have a long way to go, and part of the challenge is ensuring that the work of women at the Bar, and in the private profession, is visible and duly acknowledged. It is all too easy for those in senior positions to perpetuate the status quo by appointing people that mirror their own particular paths to success. This process is usually unconscious, and it takes a deliberate effort to look beyond the usual suspects and outside the customary career paths.

Despite every politician's love of a good story, I want to reach the stage where senior female appointments in the legal profession are no longer news but are par for the course. I would like to reach the stage where the terms "women barristers", or "women lawyers" become obsolete — where practitioners are not identified by the fact that they do not choose grey pinstripe, but by their demonstrated skills and capacity.

So I conclude where I started. The position of Attorney-General is exciting and invigorating and can be used as an agent for change. Whether it be change in legislation to end discrimination, a change in funding to improve access to justice, or a change in culture to promote women within the profession, the job continues to exceed my expectations.

Rob Hulls
Attorney-General

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Legal Profession Tribunal: Publication of Orders

UNDER section 166 of the *Legal Practice Act 1996*, the Victorian Bar Inc., as a Recognised Professional Association, is required to provide the following information in relation to orders made by the Legal Profession Tribunal ("the Tribunal") against two of its regulated practitioners.

First Matter

(1) Name of practitioner: Trevor J. McLean ("the practitioner")

(2) Tribunal Findings and the Nature of the Offence

(a) Findings

The Tribunal found the practitioner guilty of misconduct at common law, and guilty of misconduct by reckless breach of Rules 4(a) and 4(c) of the Bar Rules (in effect from 2 February 1998), in that the practitioner engaged in conduct which was discreditable to a barrister and was likely to diminish public confidence in the profession and likely to bring the profession into disrepute.

(b) Nature of Offence

The practitioner swore at, threatened and assaulted another member of Counsel when they were waiting in Court to appear in a directions hearing in the Corporations List.

(3) The orders of the Tribunal were as follows:

(a) The practitioner shall on or before 19 April 2001 pay to the Legal Practice Board a fine of $2000.

(b) The practitioner shall pay to the Legal Ombudsman her costs of and incidental to the hearing in the sum and by the instalments (if any) agreed between the practitioner and the Legal Ombudsman and in default of agreement in a sum to be assessed by a Registrar.

(c) This order shall not take effect until 11 April 2001 so that any time fixed for appealing from this order shall not start to run until that date.

(4) As at the date of publication no notice of appeal against the orders of the Tribunal has been lodged, the time for service of such notice having expired.

Second Matter

(1) Name of practitioner: David Munro ("the practitioner")

(2) Tribunal Findings and the Nature of the Offence

(a) Findings

The Tribunal's finding was that the practitioner admitted that he was guilty of unsatisfactory conduct as defined by paragraph (b) of the definition of "unsatisfactory conduct" in section 137 of the *Legal Practice Act 1996* in that he contravened rule 74(b) of the Rules of Conduct of the Victorian Bar Incorporated by failing to reply to correspondence from its Ethics Committee within the time allowed.

(b) Nature of Offence

The practitioner failed to reply to correspondence from the Ethics Committee of the Victorian Bar within the time allowed.

(3) The orders of the Tribunal were as follows:

(a) The practitioner is to pay a fine of $500 to the Legal Practice Board by 8 June 2001.

(b) The practitioner is to pay to The Victorian Bar Incorporated by 8 June 2001 its costs of these proceedings, agreed at $1573.

(4) As at the date of publication no notice of appeal against the orders of the Tribunal has been lodged. The time for service of such notice having expired.

Federal Magistrates Court Rules

THE Federal Magistrates Court (FMC) has released its rules, which will take effect from Monday, 30 July, 2001.

The FMC consulted widely with the legal industry about the rules and received many submissions. Chief Federal Magistrate Diana Bryant said the FMC was grateful for the submissions, and a number of changes were made following suggestions from the profession.

She said the FMC was mindful of the unique opportunity offered to it of starting afresh and creating new rules consistent with its objectives. It is the intention of the FMC that its proceedings should be accessible, streamlined and less formal, and the rules will play a vital role in achieving this aim.

The FMC will apply the rules of court flexibly and with the objective of simplifying procedure to the greatest possible extent.

This article highlights some of the key

differences between the FMC rules and the rules of the Federal and Family Courts.

For a full copy of the rules and the explanatory memorandum, see the website at *www.fms.gov.au.*

FORMS

- The FMC has eight prescribed forms: application, response, reply, notice of address for service, notice of discontinuance, subpoena, notice to admit facts or documents, and notice for review. While not prescribed, there is an approved information sheet and affidavit.
- Forms for divorce and bankruptcy are the same as those prescribed by the Family Law Rules and Federal Court Rules.
- There are two basic forms common to all proceedings (other than divorce and bankruptcy). These are an application and response.
- In addition, an information sheet is required in family law and human rights matters when applications for final orders are sought.
- An application and response must be supported by an affidavit. There is no pro forma affidavit but the website will provide examples of particular types of applications. An affidavit is to be filed with an application or response, whether seeking final, interim or procedural orders, unless the evidence relied on is in affidavits already filed in pending proceedings.
- Substantial compliance is sufficient, and the court will accept a document if it is in a form used for a similar purpose in the Family Court or Federal Court.
- In certain family law proceedings, a financial statement is required (Form 17 of the Family Law Rules will suffice) or an affidavit of financial circumstances. The filing of a response or reply must generally be within 14 days of service. This differs from the Family Law Rule (08r16) which requires a response to an application to be filed at least seven days before the date fixed for the case conference or directions hearing.

CONDUCT OF PROCEEDINGS

The *Federal Magistrates Act 1999* has the objective of reducing the complexity of court proceedings. To this end, there are significant differences between procedure rules of the Family Court or the Federal Court and those operating in the FMC.

- The court aims to reduce the number of court appearances to a minimum. In most cases, the only appearance will be on the first court date and, if the matter has not resolved earlier, the final hearing.
- The Federal Magistrates Act provides that discovery and interrogatories will not be used in the FMC unless the court requires them. Orders for discovery or interrogatories will be made on the first court date when the timetable for preparing the proceedings for a final hearing will be established.
- The Federal Magistrates Court aims to hear all cases within six months of filing.
- The court operates a docket system in which there is control by the federal magistrate of the conduct of proceedings between the first court date and the resolution of the proceedings by judgement or otherwise.

Procedure in Family Law matters

- In children's matters pre first court date counselling will be ordered by the registry. Orders for conciliation and property matters will be made at the first court date.
- The FMC has made contractual arrangements with community-based providers of primary dispute resolution services, and some proceedings may be referred to a community-based provider for mediation.

Proceedings in Bankruptcy matters

- The FMC rules repeat the bankruptcy rules of the Federal Court. For proceedings in other general federal law matters, the FMC rules repeat, with minor modification, the rules of the Federal Court in relation to Administrative Appeals Tribunal appeals, Administrative Decisions (Judicial Review) matters, Trade Practices Act matters and applications in which unlawful discrimination is alleged.
- There are no pleadings in the Federal Magistrates Court unless the court specifically orders that proceedings be conducted by pleadings.

COSTS

- The FMC rules do not apply to solicitor–client costs. Solicitor–client costs are governed by the relevant State or Territory law.
- The FMC rules provide an events-based cost regime for party–party costs. The court may, alternatively, refer a bill of costs for taxation under the relevant provisions of the Family Law Rules or Federal Court Rules. However, the applicant must exceed the amount that would be provided under the event-based cost regime by at least 20 per cent before he or she will be awarded costs of the taxation.
- Costs may be awarded against a lawyer if costs have been incurred as a result of delay or misconduct.
- Existing cost rules in relation to divorce and bankruptcy have been repeated in the FMC rules.
- The scale of events-based costs is different in the general federal law and family law jurisdictions. The differences reflect the variations in the amount of work that it is estimated the practitioners will be required to do to prepare a matter for hearing.

SUBPOENA RULES

Family Law

- There is a prescribed form in the FMC rules which is similar to the form prescribed in the Family Law rules.
- The FMC rules limit the issue of subpoenas to not more than five in a proceeding (without leave) but enable a subpoena to be issued at any time in the proceedings.
- The FMC rules also provide that a subpoena must not be served less than seven days before attendance or production.

General Federal Law

The Federal Court must give leave to issue any subpoena. This will not be the case in the FMC.

Service Rules

The key difference in family law is that the FMC rules provide that a change of address of service must be filed within seven days. There is no time limit in the Family Court rules.

In general federal law matters, the service rules are broadly similar to those applying in the Federal Court, although rather less prescriptive. In bankruptcy proceedings, they are the same. The FMC may adopt additional rules for electronic filing in the future, depending on developments in the Federal and Family Courts.

Missing General

The Editors

Dear Sirs

General officers at the Victorian Bar

MAY I suggest the name of Sir James Whiteside McCay as an addition to your list (Autumn 2001, p. 5) of general officers at the Victorian Bar?

Details of Sir James's career are set out in (1986) 10 *Australian Dictionary of Biography* 224–7 (copy enclosed). It does not actually say there that he was a member of the Bar, but you will have your own means of checking that. I am relying on my copy of *The Law List of Australia and New Zealand 1926*, which at p. 143 lists him as having been admitted to the Bar on 8 October 1925. Next to him is listed his daughter Miss B.W. McCay ('Bixie'), admitted ahead of him on 10 June 1925. She subsequently married [Sir] George Reid, Attorney-General of Victoria 1967–73.

The entry in the *ADB* does not make clear the rank(s) held by Sir James between his appointment as temporary major-general in November 1915 and his retirement as honorary lieutenant-general in 1926. I enclose a copy of p. 200 of H.W. Allen, *The University of Melbourne Record of Active Service . . . in the European War, 1914–18*, evidently published in 1926. This suggests that he was a substantive major-general by 1916 and states that he held that rank in the CMF from January 1920.

It is interesting to note that McCay won the Supreme Court Prize for 1894 and that he was Minister for Defence in 1904–05.

Yours sincerely

Peter Balmford

It appears that Sir James McCay was an unfortunate omission from the list of barristers who have held the rank of Major General. His career was an interesting one but its military aspect occupied a period of his life when he was a member of the "other branch" of the profession. He signed the Roll of Counsel in 1925 some five years before his death at the age of 66. The extract from the University of Melbourne, *Melbourne Record of Active Service in the European War 1914–18* is set out below.

The Editors

McCAY, JAMES WHITESIDE. 1881

S.C.; Ormond; M.A., LL.M.; 1877 S.S. Exhibition; 1881 Classical Exhibition at Matric., and divided Exhibition in Maths.; Exhibition in Classics 1st year Arts, and in 2nd year Arts (divided); 1893 1st class and Exhibition 1st year Law; 1895 first class, Final Scholarship, and Supreme Court Prize; called to the bar; 1895 M.L.A. for Castlemaine, re-elected 1897; 1899 Minister of Customs and Education; 1901–6 M.H.R. Corinella, Vic.; 1904–5 Minister of State for Defence; 1886 Lieut. Vic. Infantry; 1896 Major; 1900–7 Lieut.-Col. commanding btn.; 1907–13 Colonel commanding Aust. Intelligence Corps, C.M.F.; awarded V.D. 1907; 4th–11th August 1914 Chief Censor for Australia.

15.8.14 Colonel, commanding 2nd Inf. Bde. Egypt, Anzac landing, 25.4.15; battle of Krithia 8.5.15; wounded and to hospital at Alexandria; returned to Gallipoli 8.6.15; Brig.-General July 1915; disabled 11.7.15, invalided home, and reached Australia 11.11.15; 28.11.15 Temp. Major-General, Inspector-General A.I.F. Australia; 22.2.16 re-embarked as Major-General commanding 5th Div.; Egypt and France (Armentieres, Fromelles, Somme); 16.12.16 invalided to England; 1.5.17 to 10.3.19 G.O.C., A.I.F. Training Depots in U.K.; 1915 C.B., Commandeur Legion d'Honneur; 1918 K.C.M.G.; 1919 K.B.E.; Despatches 12.6.15 and 26.8.15 (Gallipoli), 1.7.16 (Egypt), 13.11.16 (France), 12.2.18 (England). Demob. 19.8.19; Major-General C.M.F. January 1920.

West Meets East

The Editor

Dear Sir

WHILST entering Owen Dixon Chambers from William Street today I recalled your editorial comment in the Autumn 2001 edition of the *Victorian Bar News* re "Owen Dixon Chambers East" seemingly to have been turned into a quiet backwater and the mainstream of traffic "hurries along from the William Street entrance en route to Owen Dixon Chambers West".

It is true that upon entering the building all one sees is the sign up ahead "Owen Dixon Chambers West". Poor old "East's" signage, being along the way and on the side, is not clearly seen until one in adjacent to it.

It appears to me that the problem could be substantially solved by the not overly expensive exercise of angling the "Owen Dixon Chambers East" sign out about 40 degrees so that both "East" and "West" could be equally seen by persons as they enter the main doors of the building.

I trust that you will pass this excellent idea along to the appropriate authorities,

Yours faithfully

Paul E. Bennett

Ian Gray, Chief Magistrate

THE community of Victoria is fortunate to have Ian Gray appointed as its Chief Magistrate. After completing an Arts/Law degree at Monash University he was admitted to practice in 1975. He first worked at the firm of Schilling, Missen and Impey, and then as a community lawyer at the Nunawading Legal Service and a solicitor for the Victorian Aboriginal Legal Service.

In 1982 His Worship came to the Bar and practised mainly in criminal defence work. He developed a reputation as a careful and skilful advocate with a strong awareness of the needs of his clients.

Ian Gray, Chief Magistrate

In 1987 His Worship left the Victorian Bar and went to work with indigenous Australians in the Northern Territory. He became the principal legal advisor to the Northern Land Council in Darwin. While holding that position he acted for the Land Council in a number of diverse areas such as advising on contractual matters, issues of access to its lands for commercial purposes, and negotiating with mining companies that were seeking to conduct exploration and mining work on land controlled by the Council. He was also involved in litigation concerning all aspects of land claims. His work involved appearances in a range of forums including the Supreme Court of the Northern Territory, the Federal Court and the High Court. His work with the Land Council set a benchmark in an area that is well known to be complex and difficult.

In 1990, in recognition of his professional standing, he was appointed a Magistrate of the Northern Territory and then in 1992 the Chief Magistrate of the Northern Territory. During this time he instituted many reforms to the operation of the Court. He supported the development of alternative dispute resolution within the court, and also a reorganization of case management systems. As Chief Magistrate his work was characterized by effective and consultative leadership. He earned great respect within the legal profession and the wider community. As a judicial officer he was a strong defender of the integrity and independence of the Court and the individual during what were sometimes difficult times.

In 1998 His Worship returned to the Victorian Bar and reestablished his practice largely in native title law, occupational health and safety, personal injuries, administration and industrial law and as a mediator. Perhaps one of His Worship's most notable cases as a mediator was his role as co-mediator in the resolution of the first stage of the long running inter-indigenous land dispute in the Halls Creek area on behalf of the Department of Aboriginal Affairs of Western Australia.

In June last year His Worship assumed the position as head of the Land and Property Unit of the United Nations Transitional Administration in East Timor. The Land and Property Unit was charged with the difficult task of restoring the land registration system of East Timor, and resolving the large number of land disputes existing in the new nation.

The Magistrates Court is one of the most important Courts in the State of Victoria. It is often the first and only point of contact between the public and the justice system. Accordingly the experiences and impressions people have of it will determine their views of the justice system as a whole. There are almost 100 magistrates in Victoria. They are assisted by many hundreds of Court staff. The great size of the Court reflects a jurisdiction that extends to every aspect of society. Over 100,000 criminal cases are initiated in the Court each year. It also exercises a large and varied civil jurisdiction in family law matters and all forms of civil claims. To administer such a complex system with its large case load it requires a Chief Magistrate who has a wide experience of human nature, a vision as to the needs of the community and a quality and depth of legal experience. These are all attributes that Ian Gray brings to the office of Chief Magistrate.

The Victorian Bar warmly welcomes his appointment.

Mr Justice Tadgell

THE Honourable Robert Clive Tadgell resigned his commission as a Judge of Appeal of the Supreme Court at the end of May, almost five years before it was due to expire. He was a member of the Supreme Court from 4 March 1980 until the establishment of the Court of Appeal on 7 June 1995 when he was appointed as a Judge of Appeal. He was one of three of the original Judges of Appeal who had graduated in law with honours from the University of Melbourne in 1958, having completed the course the previous year. After graduation he spent a year as Associate to Mr Justice Sholl, of the Supreme Court, and he was later articled to Sir James Forrest at the firm of Hedderwick, Fookes & Alston. He was admitted to practise in March 1960 and came to the Bar at once, reading in the chambers of J. McI. Young. He joined two other of Young's pupils, Robert Todd and Richard Searby, as an assistant in the compilation of Wallace & Young's Australian Company Law and Practice, which became the standard annotation to the Companies Acts until they were superseded by national laws. He soon established a substantial practice in company law. When Young took silk in 1961 he was regarded by many solicitors as one of his natural successors for junior work in that field. He had early success in litigation concerning the promotion of vending machine companies.

The Honourable Robert Clive Tadgell

He took silk in November 1974. The highlight of his career as senior counsel perhaps was not in court but in conducting a board of inquiry into the affairs of the Sunshine Council. He conducted a difficult inquiry with such equanimity and skill that it was no surprise that he was offered appointment to the Supreme Court at the age of 46.

As a judge he was conscious of the dignity of the Court as an essential attribute of the rule of law. No litigant should have left his court without the belief that his cause had been fairly heard. As was customary at the time he sat in all jurisdictions, and he was one of the original members of the Court of Appeal who had presided over both criminal and civil trials by jury. His judgments were notable for their clarity of expression, and he looked for that quality in others, especially those charged with the drafting of statutes and subordinate legislation. Another characteristic of his judgments, vigour, was perhaps derived from one of the two idols of his youth, the great commercial lawyer Lord Macnaghten (the other, F.E. Smith, being more notable for the bite of his oral expression).

It is not surprising that Mr Justice Tadgell's most enduring contributions to the law as a judge should be in his own field of the law of corporations. His judgment in the National Safety Council case (*Commonwealth Bank of Australia* v *Friedrich*) did much to establish the standards of duty required of non-executive directors of trading companies; and his judgment for the Appeal Division in the Pyramid Building Society case (*Victoria* v *Hodgson*) underlay the High Court's reasons for dismissing an appeal in that case. His judgments in criminal appeals were regarded by trial judges as disclosing familiarity with the trial process and understanding of legal principles and providing guidance in their difficult work.

His seniority often led to his presiding over hearings of the Court of Appeal. He did so with courtesy and good humour. In a Court which works under pressure not to deny justice by delay, he has not been averse to the demands of judgment-writing. This sense of responsibility may have contributed to his decision to resign while still capable of bearing the burden.

Beyond the Court Mr Justice Tadgell has contributed to the affairs of many organizations both public and private. While of the Bar he was one of its nominees on the Faculty of Law at the University of Melbourne. He was a member of the Council of Monash University from 1981 until 1995, and since 1998 he has been a member of the governing body of Trinity College of which he was a resident student in 1956 and 1957 and was appointed a Fellow in 1993. He was also President

of the Medico-Legal Society of Victoria in 1990 and 1991. But it is with the affairs of the Anglican Church that he has been particularly associated. He was appointed Chancellor of the Diocese of Melbourne in 1981 and Deputy President of the Appellate Tribunal of the Anglican Church of Australia in that year, becoming President in 1995. Since 1998 he has been a Lay Canon of St Paul's Cathedral, a position once held by one of his predecessors on the bench, Sir Oliver Gillard. As a member of the Appellate Tribunal he sat in the hearing of cases involving the validity of canons (church legislation) for the ordination of women as deacons and priests. He was a member of the majority, upholding validity, in each case.

From September he will indulge his interests in language, the church and the law as an Honorary Scholar of Oriel College, Oxford, where he will study ecclesiastical and legal usage of the English language in the late Tudor and early Stuart period. The Scottish connection is apt, for he has developed an affinity over the years with his wife's home country. When he was welcomed as a judge in 1980 he spoke with gratitude of those who had been his teachers at the University of Melbourne. The Dean of the Faculty at the time was Professor Cowen and so it is appropriate that he will be joining High Table at the College of which Sir Zelman was subsequently Provost.

When farewelled from the Bench by the barristers' and solicitors' professions on 30 May, Mr Justice Tadgell spoke warmly of his colleagues in the Court of Appeal and especially of the contribution to its success of the President. He spoke, with perhaps less warmth but more heat, of changes in the tax treatment of judicial pensions which had affected those appointed to the bench in recent years and of what he considered to be the failure of the federal Attorney-General to dampen bureaucratic enthusiasm for the imposition of the new tax regime.

He leaves the Court with the affectionate regards of those who appeared before him there.

Judge Kent

This appreciation of "Bob Kent" was written as a "farewell", only weeks before his sudden and tragic death on 15 July 2001. It is unfortunate that because his return to the Bar was so short, we did not have time to savour the "inestimable gain" of which Geoff Steward writes. His caring and contributing personality will be sorely missed.

The Editors

JUDGE Kent's resignation from the County Court last month saddened many. His appointment had been heralded. Perhaps more importantly was the, justice, intellect, common sense and compassion he exercised during his all too brief tenure.

The Bar is richer for the return of one of its most able, courageous and decent members. It is unfortunate in the extreme, however, that the judiciary is very much the poorer for his departure.

During His Honour's 18 months on the Bench he sat in the civil and criminal jurisdictions both on circuit and in Melbourne. The feedback from practitioners, litigants and even some accused was that the man presiding over their hearing was a person of rare qualities. It was a wonderful experience to appear before Judge Kent, he played no favourites and treated everyone with respect and dignity. Anyone whose matter was presided over by Judge Kent knew that they had received the fairest of hearings.

Brian Cash was the first advocate to appear in a criminal trial before His Honour. He estimated to His Honour that the trial's duration would be about four days. It lasted closer to four weeks. Acutely aware of both societal and courtroom "political correctness," and being a devotee of it, Brian knew that the days of referring to female witnesses as "darling", were long gone. So as not to be rebuked by His Honour, he was mindful to address the foreman of the jury in the appropriate gender terminology of the times. "Madam forelady", was his assiduous and continual form of address. His Honour dealt with the inaccurate estimate of the trial's duration and form of address to the foreman with patience and good humour. Alas, the male foreman was none too pleased!

Judge Kent

His Honour endured some excruciatingly difficult times in his last couple of months on the Bench. Those critical of him for reasons of sanctimony, cowardice, disloyalty, ignorance, or self-interest, be it political or professional, were very much in the minority. Those who wrote to him or for him, gave evidence on his behalf, or implored him to remain on the Bench, came from every conceivable echelon of the judiciary, profession and community at large.

The cross-section of support was indicative of the man. His Honour was, is, and shall remain very grateful to those innumerable supporters. His resignation was motivated by concern for the best interests of the court of which he was a member.

It is expected by all those who know him that the excellence of his advocacy shall again be seen in the highest jurisdictions in the land. One envisages that "Bradman-like" passing on of information to soon resound around the corridors of chambers. Instead of, "he's in", it will be, "Bob's doing a murder trial". Readers and practitioners generally will learn so much more from seeing Kent on his feet than by reading every chapter of "Halsbury" tenfold.

The circumstances of His Honour's return to the Bar are less than ideal. He will remain unaltered as the man and advocate that he is. However, those close to him merely hope that for the first time in his professional life his prodigious talent is at least balanced by a modicum of caring about himself to the same extent as he has endlessly cared for others.

The judiciary's abject loss is the Bar's inestimable gain. We wish him the very good fortune he richly deserves.

Geoffrey Steward

Life and Times: Hubert Theodore (Freddie) Frederico — Lawyer

15 July 1904–6 February 2001

John Tidey

HE was a distinguished County Court judge and a familiar face at the Melbourne Savage Club.

It might have been the Australian penchant for levelling that resulted in Hubert Theodore Frederico being known universally as Freddie on all but formal occasions. A more likely explanation is the great affection with which he was regarded by friends and colleagues during his long life.

Born in Melbourne when the Commonwealth of Australia was in its infancy, Freddie died in Melbourne, in his 97th year. As his friend and eulogist Sir Daryl Dawson put it: "To go back along that life is to engage a considerable part of our history in this city, this State and this country."

Much loved himself, Freddie was in turn devoted to his family, his religion, his friends, the law, his farm, his books and the Melbourne Savage Club. Long before the habit became fashionable again, he was a connoisseur of cigars.

Freddie was educated at Xavier College and enjoyed an association for the rest of his life with the school and the Jesuit order. In 1925 he began his law degree, and his record suggests sporting rather than academic priorities. A resident at Newman College, he took a serious interest in rowing, and in 1927 was appointed the first Newman captain of boats.

Freddie was admitted to the Bar in 1930, his admission being moved by Norman (later Sir Norman) O'Bryan and the legendary Gratton Gunson. In 1930 he married Marjorie Sherlock. Freddie had met his future wife while he was still at school, and their marriage was a long and happy one, lasting until Marjorie died in 1981.

Hubert Frederico QC (Photo courtesy John Tidey)

Sir Daryl Dawson recalled that, as a barrister, Freddie had a self-deprecatory approach: "allowing his opponent to pirouette before the jury placing all his talents on display. Then Freddie, with that incisiveness which was always there when needed, would deal a mortal blow which the jury, particularly a country jury, never failed to appreciate."

Freddie's particular interests in reading were history and biography. It was a matter of great pride to him that his beloved room in Selbourne Chambers had previously been occupied by Alfred Deakin, L.B. Cussen, Sir Robert Menzies and Sir Henry Winneke.

He took silk in 1955, and in 1962 was appointed to the County Court, retiring in 1976. Sir Daryl remembered that "on the Bench His Honour Judge Frederico was a kind man and if there was a hint of abruptness, it was always tempered by that dry, even at times sardonic, wit, for which many of us remember him most".

Freddie was community-oriented. He became president of the Old Xavierians' Association, Newman College Old Boys and the Melbourne University Boat Club. He was national president of the Knights of the Southern Cross, active in the St Vincent de Paul Society and commodore of the Point Leo Boat Club.

Probably the greatest of Freddie's interests outside the law and his family was the Melbourne Savage Club. Indeed, as its president in the mid-1970s, he is credited with bringing the club through a difficult period and ensuring that it became once again a vigorous, stimulating and entertaining place. Here it was that he could be found — invariably with a Cuban cigar in hand — until just two weeks before his death.

To a younger generation of cigar smokers at the Savage, Freddie was something of an inspiration. It is said that he smoked his first cigar at the age of 10 and that his mother used to "smuggle" some of his father's supplies to her son at school and later at Newman College.

Freddie is survived by three daughters, two sons, six grandchildren and six great-grandchildren.

His great devotion to his family was repaid in his later years when, as he often acknowledged, his children's devotion to him meant he was able to live a comfortable and happy life to the very end.

John Tidey is a Melbourne journalist and drew on Sir Daryl Dawson's eulogy and information supplied by the Frederico family for this obituary, which first appeared in The Age.

Major General Greg Garde AM, RFD, QC

CMDR Paul Willee RFD, QC

In the Supreme Court's Banco Court, on Friday 18 May 2001, a large contingent of Victorian practitioners, most of whom were or had been members of the Defence Force Reserves, recognised the promotion of yet another member of our Bar to high rank in the Armed Forces.

ON 10 March 2001 Greg Garde QC became a Major General and was appointed Chief of Reserves of the Australian Defence Force (ADF). There is no more senior position available to a reservist, in the ADF. The attached photographs show Greg receiving his Marmaluke Sword — the badge of Office of General rank, from Chief of Army-General Cosgrove; while his justifiably proud and devoted PA Chris (also his spouse) looks on. It was typical of General Garde's generous approach to his military colleagues that he turned the occasion into a celebration of the total military reserve force, rather than of his own high achievement. Even so, the remarks of Chief Justice John Phillips who conducted the ceremony (which is fast becoming a custom) invested proceedings with the requisite degree of recognition for General Garde's attainments. His Honour has a remarkable talent for bringing about a sense of occasion reflecting his understanding and approbation of the fusion of two such apparently incongruent professions as those of the law and of arms, in a meaningful and satisfying way.

After acknowledging the presence of the Deputy Chief of the Defence force, General Mueller and his wife Gweny Mueller, the Chief Justice went on to make due acknowledgment of other members of the Victorian legal profession who have attained General rank. This is not the place to repeat all of the fascinating detail to which we were treated but some interesting tidbits bear mention. Of our first Major-General, one Harold Edward Elliott, His Honour remarked that he "did what he thought right regardless of the consequences. Before the Battle of Fromelles, where his Brigade suffered dreadful casualties, he vehemently protested to his superiors at the hopelessness of the task given it. He ordered the arrest of a British officer found looting wine. He refused to accept incompetents posted to his Brigade. . . . Elliott also wrote reports highly critical

Major-General Greg Garde QC, receiving his Marmaluke Sword from Chief of Army General Cosgrove.

of senior commanders when he thought they were warranted." In the current climate of a heightened interest in the fate of the monarchy in this country, his reference to the next officer Sir Edmund Herring's remark as a devoted monarchist was fairly telling. The Chief Justice said of him that "Such was his attachment to the Crown that when the late Ted Laurie, who was a communist (but a rather benign one) applied to be appointed Queen's Counsel in 1961, Sir Edmund refused to recommend him and allegedly said, 'You know, Laurie, the thing I can't forgive you communists is that you murdered a relative of The Queen', which was, perhaps, taking things back a rather long way." He also mentioned the distinguished careers of "Norman Alfred Vickery, . . . who died in 1998 after a brave struggle with protracted illness, Kevin George Cooke and

Major General Greg Garde and Chief of Army-General Cosgrove.

Greg Garde is responsible for the strategic development of the Reserves and he is the leader of some 30,000 Reservists. His extraordinary achievement comes after 30 years of commissioned service, and we draw great pleasure in congratulating him on that service, his promotion and appointment.

Major-General Kevin Murray, who signed our Bar Roll as an Interstate member in 1964 . . ." before inviting Major General Garde to speak.

Like so many quiet and unassuming people, Gregory Howard Garde AM, RFD, QC has a reputation built on an enormous bulwark of hard work and application to detail. Electronic database searching makes it easier these days to winkle out the wealth of cases in which he has appeared in the higher courts. None of these would necessarily excite the interest of the public at large, but they demonstrate a facility with his legal profession belied by the time he must have spent in military service — and none of that comfortably as a legal officer. From early days as a student Greg showed great promise, reflected in exhibitions in Equity, Advanced Constitutional Law and Conflict of Laws. His other discipline was mathematics for which he won the Dixon Scholarship in Applied Mathematics Part 1. He left University with honours degrees in both Arts and Law and later completed a Master of Laws. He joined the Victorian Bar in 1974 reading with Mr E. W. Gillard, now Justice Gillard. He was appointed Queen's Counsel in 1989. Major-General Greg Garde enlisted in the Melbourne University Regiment in 1967 as a first-year law student and rose through the ranks to Corporal. He was commissioned in 1970 and posted to Monash University Regiment. His service soon included a period of full-time duty with the 2nd Battalion, Pacific Island Regiment. In 1978, Garde, then a Major, successively commanded the Sunshine and Footscray Rifle Companies of the 1st Battalion, Royal Victoria Regiment. He won the Blamey Award on the military operations course for promotion to Lieutenant Colonel conducted at Land Warfare Centre, Canungra, in 1981, and returned to Monash University Regiment as its Commanding Officer from 1982 to 1984. From 1984 to 1986 Greg commanded 4th/19th Prince of Wales Light Horse Regiment. Both Sir John Young (during 1978–1998) and Sir John Norris (during 1964–1972) served as Honorary Colonels of this Regiment.

General Garde told us how seriously Sir John Young took that duty. He described an occasion when he was appearing for a very anxious respondent during a particularly turgid afternoon session in the Full Court. Sir John wrote a note. After tapping the bench in front of him in the time-honoured fashion he passed it to his associate, who passed it to the tipstaff, who passed it to Greg's instructing solicitor, who passed it to Greg. By this time the attention of everybody present was firmly focussed on him. Greg read the note and scribbled a reply before passing it back to Sir John, through the same chain of receipt. The Chief Justice carefully unfolded and read it before nodding sagely to Greg. By this time the client was convinced that the case was in the bag. Actually, the original note simply said: "How is the regiment?" to which Greg had replied: "Sir, the regiment is in very good shape".

In 1986 he was awarded the Reserve Forces Decoration. In 1987, Greg Garde was promoted to the rank of Colonel serving as the Chief Instructor Reserve Command and Staff College. He was promoted to Brigadier in 1990 and appointed the Commander of the Third Training Group. He was appointed the Commander of the 4th Brigade in 1992. The 4th Brigade is located in Victoria and consists of two infantry battalions, one armoured regiment, an artillery regiment, as well as medical and logistic elements. Greg was then appointed the Assistant Commander of Land Command based in Sydney. In this capacity, he was responsible for NORFORCE, 51, Far North Queensland Regiment and the Pilbara Regiment. In 1996 he was made a Member of the Order of Australia for service to the Army Reserve. From 1998 he was appointed the Director, General Reserves and a member of the Chief of Army's Senior Advisory Group. His responsibilities had now become very considerable and included budget review, a review of the Defence Act and advice on future military development. Major General Garde is the principal architect and author of the two defence bills. These bills overhaul the *Defence Act 1903* (Cth) amongst other things constituting each of the services of the Australian Defence Force (the Navy, Army and the Air Force) as consisting as Permanent and Reserve components, empowering Government to call out Reserves for peacekeeping duties and for the provision of humanitarian aid and disaster relief, providing protection to the civilian interests of Reservists, and supporting employers of Reservists.

Greg Garde is responsible for the strategic development of the Reserves and he is the leader of some 30,000 Reservists. His extraordinary achievement comes after 30 years of commissioned service, and we draw great pleasure in congratulating him on that service, his promotion and appointment.

Speech for Ceremony for Major-General Garde

GENERAL Mueller and Mrs Gweny Mueller, other distinguished guests, friends and colleagues from the services and the law. We meet here this afternoon to do honour to our respected colleague Greg Garde QC upon his promotion to the rank of Major-General. May I say how pleased I am to provide this beautiful court room for this auspicious occasion. It is also, of course, a place of history. As we are currently celebrating the Centenary of Federation we should recall that Alfred Deakin, who was admitted to legal practice at the old Supreme Court in La Trobe Street in 1877, often appeared here as counsel. Not only was Deakin a fine lawyer and one of our founding fathers, but, to the best of my knowledge, he is the only Australian Prime Minister to have received a summons for riding his bicycle on the footpath. To this room on 2 May 1917 Robert Gordon Menzies also came to be admitted; Owen Dixon had preceded him on 1 March 1910. Indeed, this room was the home of the High Court during the first twenty years of its existence.

It is proper on this occasion, and on behalf of all present, that I make due acknowledgment, not only of Greg, but also of other members of the Victorian legal profession who have attained General rank, and of the valued contributions they have made to the Army of our country.

The first of these is Harold Edward Elliott, the Supreme Court Prize winner of 1905. When admitted he practised as a solicitor in Melbourne. But, even before the completion of his law course, Elliott had served in the Victorian contingent at the Boer War where he was awarded the Distinguished Conduct Medal. On his return to legal studies at the University of Melbourne, he kept up his interest in the militia, rising to the rank of Lieutenant-Colonel in 1913. On the outbreak of war he was appointed to command the 7th Battalion and was progressively promoted to Brigadier-General and Commander of the 15th Brigade. Elliott was wounded on the day of the Gallipoli landing and again in France, but remained on duty. He was awarded the Distinguished Service Order and the French Croix de Guerre, and mentioned in despatches several times. His men, who affectionately reconciled his outstanding qualities of leadership with his very bad temper, christened him "Pompey", a nickname of which he was not enamoured. Idolised by his troops, Elliott was not, however, popular with his superiors and various injustices were visited on him. After Lone Pine he received no decoration, although his name headed the list of recommendations. He saw officers of less ability promoted over his head and no knighthood, or promotion to Major-General, came his way during the war years.

Elliott did what he thought right regardless of the consequences. Before the Battle of Fromelles, where his Brigade suffered dreadful casualties, he vehemently protested to his superiors at the hopelessness of the task given it. He ordered the arrest of a British officer found looting wine. He refused to accept incompetents posted to his Brigade. I confess I am not sure whether I should mention this next matter in the presence of such distinguished company, but Elliott also wrote reports highly critical of senior commanders when he thought they were warranted.

After the war Elliott returned to the militia and was promoted to Major-General in August 1927. Harold "Pompey" Elliott, a remarkable lawyer/soldier.

Chief Justice Phillips congratulates Greg Garde QC on his promotion.

It is proper on this occasion, and on behalf of all present, that I make due acknowledgment, not only of Greg, but also of other members of the Victorian legal profession who have attained General rank, and of the valued contributions they have made to the Army of our country.

Edmund Francis Herring served with the Royal Field Artillery during the First World War in France and Macedonia and was awarded the Distinguished Service Order and the Military Cross. He signed the Roll of Counsel of the Victorian Bar in June 1921 and was appointed Queen's Counsel in 1936. He combined legal practice with an interest in the militia and then served in the 2nd AIF from 1939 to 1944 when he was appointed from the wilds of New Guinea, Chief Justice of Victoria. Variously, he commanded 6th Australian Division and 1 and 2 Australian Corps. For his service he was awarded the

Greek Military Cross in 1941 and knighted two years later. He departed the Army with the Rank of Lieutenant-General. He remained Chief Justice until 1964 over which period the Court expanded from six to 14 judges. He was a devoted monarchist. Such was his attachment to the Crown that when the late Ted Laurie, who was a communist (but a rather benign one) applied to be appointed Queen's Counsel in 1961, Sir Edmund refused to recommend him and allegedly said, "You know, Laurie, the thing I can't forgive you communists is that you murdered a relative of The Queen", which was, perhaps, taking things back a rather long way.

Norman Alfred Vickery, then a recently commissioned militia Lieutenant, enlisted at the outbreak of World War II. His active service number was a very low one, NX130. His initial service was in the 2/1st Australian Field Regiment in the Middle East. In January 1941 he so distinguished himself during the battle of Bardia that he was awarded the Military Cross. His conduct amounted to a very successful bluff in which he convinced a substantial enemy force that his Bren gun carrier with its complement of four men was the forerunner of an Australian divisional attack. In fact it was simply a lone vehicle conducting a patrol. He was promoted to Captain later that year and saw service in the Middle East, Ceylon, New Guinea, Borneo and the Philippines. Appointment to Field rank followed in 1942. At the end of hostilities he was awarded the MBE for his services in the South West Pacific area. In the post war years he commanded the Melbourne University Regiment and I had the honour to serve under him. Subsequent commands included the 31st Medium Regiment, Royal Australian Artillery, and the 3rd Infantry Division which followed his appointment as Major-General. He was a member of the Military Board for the Citizen Military Forces from 1966 till 1970. General Vickery graduated in law at Melbourne University in 1950 and later read in the Chambers of Mr Reginald Smithers. His practice became wide ranging and included many substantial criminal cases. He was the distinguished author of Vickery's *Motor and Traffic Law*. At the age of 44 he was appointed a judge of the County Court where he served until his retirement in 1985. His judicial work included terms at the Police Service Board and the Workers' Compensation Board. General Vickery died in 1998 after a brave struggle with protracted illness.

Kevin George Cooke was admitted to legal practice in 1953 and practised in Melbourne as a solicitor, becoming senior partner at the firm of Cooke and Cousin from 1975 to 1986. He enlisted in the Citizen Military Forces in 1950 and was commissioned. By 1965 he had risen to the rank of Lieutenant Colonel and was Commanding Officer of the 1st Battalion, Royal Victorian Regiment. A number of senior appointments followed, including Chief Instructing Officer of the Cadet Training Unit, Chief of Staff of 3 Division, Commander 1st Support Group and Brigade Commander 3rd Training Group.

Major-General Greg Garde enlisted in the Melbourne University Regiment in 1967. He was then a first-year law student. He was commissioned in 1970 and posted to Monash University Regiment. His service soon included a period of full-time duty with the 2nd Battalion, Pacific Island Regiment.

In 1980 he was promoted to Major-General and Assistant Commander of Logistic Command. From 1981 to 1985 he commanded the 3rd Division and was Chief of the Army Reserve from 1985 to 1988.

In 1985 he was appointed an Officer of the Order of Australia for his lengthy and distinguished contribution to our Citizen Army. He now lives in retirement in Queensland where he has the evocative address of Admiralty Drive, Paradise Waters.

I intend no disrespect to another lawyer Major-General, if I mention him but shortly. He is Major-General Kevin Murray, who signed our Bar Roll as an interstate member in 1964, but maintained chambers in Sydney where he was an outstanding advocate in criminal matters and a Queen's Counsel. Our Bar has no record of him practising in Victoria.

Major-General Greg Garde enlisted in the Melbourne University Regiment in 1967. He was then a first-year law student. He was commissioned in 1970 and posted to Monash University Regiment. His service soon included a period of full-time duty with the 2nd Battalion, Pacific Island Regiment. He joined the Victorian Bar in 1974 reading with Mr E. W. Gillard, now Justice Gillard. He was appointed Queen's Counsel in 1989. By 1978 he had attained Field rank and Company Command in the 1st Battalion Royal Victoria Regiment. From 1982 to 1984 he was Commanding Officer Monash University Regiment and from 1984 to 1986 Commanding Officer 4th/19th Prince of Wales Light Horse Regiment. Promotion to Colonel followed in 1987 and the Command of the 4th Brigade in 1992. In 1996 he was made a Member of the Order of Australia for service to the Army Reserve. From 1998 he was appointed the Director, General Reserves and a member of the Chief of Army's Senior Advisory Group. His responsibilities had now become very considerable and included budget review, a review of the Defence Act and advice on future military development. General Garde was promoted to Major-General by the Chief of Army on 10 March last. He is appointed Chief of Reserves of the Australian Defence Force and Head of Reserve Policy. He is responsible for the strategic development of the Reserves and he is the leader of some 30,000 Reservists. His achievement comes after 30 years of commissioned service.

On behalf of all present, Greg, I congratulate you. Your profession of the law is very, very proud of you, as it is of Air Commodore Kirkham who is present this evening and for whom a similar ceremony was held last year. May I also offer, Greg, our best wishes to your wife, Chris, and to your children and family members who are here on this occasion. Their presence adds greatly to our enjoyment of this ceremony as, I am sure, it adds to yours. I now invite

Madam Junior Silk's Bar Dinner Speech

Presented at the 2001 Bar Dinner held at the Plaza Ballroom on Saturday 2 June 2001.

Madam Junior Silk Jennifer Batrouney.

MR Chairman, distinguished guests, ladies and gentlemen, my task this evening is to say a few things about our 14 honoured guests.

They are an eclectic bunch and, as far as I am able to determine, their only commonality is that they are members, or former members, of our great Bar.

However, both **Gareth Evans** and **Les Kaufman** read with **Justice Don Ryan**, who is with us tonight. While this no doubt fills Justice Ryan with a certain amount of pride, it also does somewhat date him. In fact, Justice Ryan turns 60 tomorrow and we wish him many happy returns!

The **Honourable Justice Bongiorno** has been appointed to the Supreme Court.

He has had more welcomes than Nellie Melba had farewells and, in the course of those, his numerous achievements and good work have been well and truly catalogued. I will not repeat them again tonight.

Suffice to say that he has served the Bar and the community well. He has worked particularly hard for the Italian community. In his own words, he has spent a lot of time *on* Italian affairs although he hasn't been lucky enough to *have* one yet!

The young Bongiorno worked on the railways in Geelong during his University holidays. He was a goods trucker second class — that's goods *tr*ucker. He worked the night shift and happily misconsigned truck loads of superphosphate all over the countryside. Those that were meant for Terang ended up in Kerang and those destined for Yarroweyah ended up in Yarrawonga. This was all in a night's work and didn't seem to cause the railways any concern.

But he crossed the line when he was caught playing a transmitter radio on government property. He was charged and summonsed to appear before the Railways Disciplinary Tribunal in Melbourne. As a card-carrying member of the Australian Railways Union, on the day of the hearing he was entitled to a day off with full pay, a free ticket to Melbourne, and a free meal in the railway canteen.

Not bad for a young chap — an all expenses paid adventure! The downside was that he was convicted and fined 10 shillings.

Bonge might forgive but he has not forgotten. In his Chambers at the Supreme Court sitting proudly centre stage of his mantelpiece is — yes, you guessed it — a transistor radio! And just in case any one was thinking of charging him with the same offence, he has strategically placed (right next to that radio) the Sicilian of the Year award — presented to him by "The Family" in recognition of their Godfather – Bernie Bongiorno.

Your other family welcomes you most warmly to the Bench.

Her Honour Judge Coate has been appointed the inaugural President of the Children's Court and a judge of the County Court.

Prior to her appointment, she worked tirelessly for the community on many committees and boards. I am told that her career has been characterised by a determination to help others and by a very real sense of justice. In her current position, she is in her element. However, she has not always chosen her vocation so well.

When she was young girl, Her Honour showed some promise as a swimmer, but despite this, she was determined to be a ballerina. She dutifully pliéd and pirouetted through her classes until it was time for the end of year ballet concert. Her proud mother sat through the concert and afterwards was heard to say, "That was lovely dear — would you like to learn swimming?"

Her Honour is well suited to her position as President of the Children's Court, given that she commenced her working life as a primary school teacher. In that capacity she learned a few tricks that could serve her well in the courtroom.

When everyone is talking at once she could yell: "Hands on heads!"

She could declare: "No-one is leaving the room until I find out the truth." And she could say: "I'll have that note you are passing around."

We welcome M'am to the Bench.

His Honour Judge Bowman has been appointed to the County Court.

He had previously been appointed a judge of the Accident Compensation Tribunal but returned to the Bar after the dissolution of that Tribunal in December 1992. His first words upon entering his court were: "As I was saying before I was so rudely interrupted . . ."

I am told by my common law colleagues that Bowman is a lovely chap. Now that's hardly surprising, given that he is a product of the inimitable Latham Chambers (as am I). But Latham Chambers are a bit of a backwater so far as chambers are concerned. There is none of the hurly burly of the Owen Dixon, the glitz of Aickin or the sexy fit outs of Rosanove.

In Latham, we have been deemed unfit to receive the lift notices that are constantly being defaced by some idiot in Owen Dixon. We make up for this neglect by littering the notice boards in Latham with our own missives:

"Who's nicked my copy of 1999 VRs?";

"Car for sale cheap — won in a raffle"

Riveting stuff . . . But one notice in particular caught my eye last month "Judge Bowman's desk for sale . . ."

Now, this is a far more interesting notice than one might at first think. Being a good little junior silk, I attended Judge Bowman's welcome. **Mark Derham** told the assembled throng about his Honour's reputation for ducking and weaving so as to avoid starting difficult cases. While on circuit in Ballarat this strategy involved hiding out in the ladies' toilet. But when his colleagues woke up to this tactic, he was forced to employ the more sophisticated and extreme measure of hiding in the ladies toilet in *another* building!

Now his desk is up for sale!

Does this mean, friends, that Bowman has no need of a desk? Has he taken up chambers in the ladies toilet of the County Court? Will his judgments be carefully written on her Majesty's best Sorbent? I think we'll just have to sit on that one for a while. We welcome Judge Bowman to the Bench!

Maurice Phipps FM.

Justice Bongiorno.

Her Honour Judge Lewitan has been appointed to the County Court.

Her Honour started her career at Corrs, where she was made an associate partner in 1975. When she came to the Bar, she read with the late great Ron Castan and Peter Jordan. She was the first woman elected to the Bar Council and the inaugural convenor of the Women Barristers' Association. She has been an inspiration for many young women at the Bar.

However, her skills with women are counterbalanced by a complete incompetence when it comes to animals. A few years ago Her Honour decided that it might be nice to have a Labrador puppy. Now, the thing about Labrador puppies is that they are completely mad. And Her Honour's puppy, Bogart, was no exception.

He was completely uncontrollable. He would chew everything in sight, rush about all over the place and generally cause mayhem and destruction wherever he went. Bogart was sentenced to a three-month course of obedience classes. And so, every Sunday morning, Her Honour would drag Bogart off to school, so that he could learn to be a good canine citizen. Week after week Bogart learnt . . . nothing.

At the end of the three months her Honour was duly presented with a certificate attesting to the fact that *she* had successfully completed the obedience course. No mention of Bogart! While that certificate was proudly kept and cherished, Bogart was shipped off to Her Honour's mother — where he instantly became a model companion and, I'm told, a more valued member of the family than Her Honour was.

Her Honour will no doubt be a very valued member of the County Court and we welcome her to the Bench.

Master Michael Dowling QC has been appointed a Master of the Supreme Court.

Michael has been a fixture in Owen Dixon East since 1961. He was prised out of his room in 1965 when a further four floors were added to the East but he immediately returned and ensconced himself in the 10th floor for a further 35 years. Some lesser lights joined him over the years:

Sir Ninian Stephen, Woodsy Lloyd, Neil McPhee, Hartog Berkeley, Jack Winneke, Stewart Campbell, Tim Wood, Jack Keenan, and Arthur Adams, to name a few.

It was Adams who recently coined the phrase "10th Florians" — no doubt they

Mark Derham QC, Chairman of the Bar, addressing the Bar Dinner.

Ruth McCall addressing the Bar Dinner.

will soon create their own flag and national anthem.

Michael was declared to be a legend of the Bar in 1998. No doubt this was, in part, because he was the heart and soul of the 10th Floor social club. The club opened for business at 6 o'clock every night for 38 years. There would always be someone around to listen to your tale of victory and to confirm or deny the latest rumour circulating around chambers.

All jokes aside, I am reliably informed that Michael Dowling has one of the finest legal minds the Victorian Bar has ever been graced with, and that over the last 40 years he has been inexhaustibly kind and generous in sharing that knowledge with his colleagues.

It is said that when the on-line legal research database AUSTLII was created, they simply downloaded it from Dowling's mind. Now, he himself has been downloaded from the lofty heights of the 10th Floor to his new position "over the road".

We wish him well.

His Worship Ian Gray has been appointed Victoria's Chief Magistrate.

His Worship is a native of the Victorian Bar but he moved to Darwin to work with the Northern Land Council in 1987. He subsequently worked as a magistrate and then Chief Magistrate in the Northern Territory until he returned to the Victorian Bar in 1997. After a stint with the United Nations in East Timor he was appointed our Chief Magistrate.

Ian has done so much good work for the community that what was left of his *hair* has been replaced by a *halo*. Why is it then, that — back in 1987 — he was deported to Darwin?

Well, my friends, it's because when he was at the Bar, he fatally annoyed the Melbourne Establishment. You may remember that, some time ago, the Melbourne Club was attacked by a pack of Trotskyites.

These alleged people stormed the entrance, rushed in without so much as signing the guest book and then proceeded to rampage about in total disregard of the dress code!

Not only did Gray *not* rush up to the other end of Collins Street and lay down his life for the Club as any chap worth his salt would — he defended these hooligans!

Being a forgiving bunch, the chaps could have overlooked this sort of seditious behavior by Gray. But when, after a six-week trial he got these blaggards off . . . scot-free! This . . . THIS, the chaps could not forget.

Off to Darwin he went!

The Victorian Bar, at least, is pleased that you are back.

The Honourable Brian Lacy has been appointed a Senior Deputy President of the Industrial Relations Commission.

He was part of the Industrial Relations lair in the 9th Floor of Latham Chambers, which included his brother Les Kaufman in concert with Douglas, Spicer and Parry. It is said that His Honour was trying to establish an appellant practice at the Bar by appealing against every unfavourable decision handed down to his hapless clients. This gamble paid off and His Honour became the leader of the unfair dismissal Bar in Victoria.

We are very lucky to have His Honour here with us tonight. By that, I mean that we are lucky that he found his way here at all. His Honour is not very good at reading maps. As part of his army training in preparation for service in Vietnam, His Honour was required to do "jungle training". Thus,

he was sent off into the Queensland hinterland with a map and a compass and told to find his way from point A to point B. Days later a search party was sent out to find him. Find him they did, and off he went to Vietnam, despite failing this most basic of training.

Things didn't improve. While in Vietnam, His Honour was in the Intellig-ence Corps. One night, the aerials utilised at his post were subjected to an enemy rocket attack. The deafening sirens went off and all his colleagues fled into the weapons pit. It was only then that it was discovered that His Honour was not there — he had slept soundly through the whole shebang!

No doubt these skills will equip His Honour well for life on the bench and we welcome him there.

The Honourable Les Kaufman has also been appointed a Senior Deputy President of the Industrial Relations Commission.

His Honour started out his legal career as associate to Sir Richard Kirby and has maintained a close friendship with him

Chief Justice Barry Connell.

Justice Don Ryan.

for over 30 years. He also had a superb working relationship with Ian Douglas QC and together they were a formidable team. In the early '90s he undoubtedly had the best High Court practice of any junior in Australia.

He was a pillar of society, a man to be reckoned with.

Which makes it all the more remarkable that one morning, on his way up to the Commission he walked across Bourke Street *allegedly* against the lights and was nabbed for jay walking!

Jay walking!

Well, that simply would not do. Kaufman was *not* going to pay the fine — he would fight these trumped up charges, all the way to the High Court if necessary. So off he went to the Melbourne Magistrates Court. He was ably represented by his now Brother, Brian Lacy. Under astute cross examination by Lacy, the policeman had to admit, that no — he did not actually have his eye on BOTH his Honour *and* where his feet were *at* the same time!

The charges were thrown out and His Honour was free to roam the streets once more. We welcome His Honour, and his feet, to the Commission!

The Honourable Gareth Evans QC was awarded an AO in the General Division of the Australia Day Honours List for services to the Australian Parliament.

Gareth won the Supreme Court Prize in 1966, lectured in law at the University of Melbourne for five years and came to the Bar in 1977. He was a member of Parliament for 21 years and a minister for 13 of those. He is a Labor Party legend.

But he was a *legendette* well before his parliamentary days.

I am told that Gareth used to stride, Christ-like, around the University in his capacity as President of the Student Union. The only difference was that, in those days, he was known as Garry. But "Garry" had to go. "Garry Garry" does not have the same *je ne sais quoi* as does "Gareth Gareth"!

At the end of his political career Gareth Gareth has staved off his "relevance deprivation syndrome" by taking up a position as the President of the International Crisis Group — a sort of a cross between a veteran lethal weapon and a raiders of the lost junket.

Lets hope that, in *this* position Gareth loses not his quick wit and silver tongue. These talents were trotted out recently in Hong Kong where Gareth mentioned that he had heard that China's paramount leader, Deng Xiaoping, liked to eat four puppies a day.

Although one is tempted to think that these sorts of gaffes are the reason that Gareth didn't ever get the top job, he himself denies this. He recently said to *The Age*:

> If I'd really, really wanted to make that last rung on the ladder years ago, I would have changed my whole political style and become much more of a schmoozer rather than someone who was obsessed with trying to get things right . . . I think that would

Mark Derham QC, Chairman of the Bar, and Attorney-General Rob Hulls.

have required a personality transplant to have pulled it off.

Well, he's pulled off an AO without the need for a personality transplant and for that we congratulate him.

Greg Garde QC has been promoted from the position of Brigadier to that of Major-General and has been appointed Assistant Chief of the Defence Force (Reserves).

Now, for those of you who are not military types, this is fairly impressive. It is the highest position available to a reserve officer within the Australian Defence Force. In this capacity he heads an office staff of six in Melbourne, 11 in Canberra and is in command of 30,000 reservists in Australia.

I have to admit, I was terrified at the prospect of approaching such a formidable figure. The fact that he was born on April fool's day and that every single person I consulted assured me that he was a thoroughly nice bloke did not quell my fear. I wimped out and rang him instead. This was the recorded message on his phone:

> Thank you for calling the Defence Force Reserves. I'm sorry, but all of our units are out at the moment, or are otherwise engaged. Please leave a message and as soon as we have finished flouncing around at the endless Centenary of Federation do's, we will return your call.
>
> Please speak after the tone, or if you require more options, please make your selection from the following numbers.
>
> If your crisis is small, and close to the sea, press 1 for the Royal Australian Navy Reserves.
>
> If your concern is distant, with a tropical climate and five star hotels, please press hash for the Royal Australian Air Force Reserves. Please note that this service is not available after 1630 hours, or at weekends.
>
> If your enquiry is *not* urgent, please press 2 for the State Emergency Service.
>
> If you are in real, hot trouble, please press 3, and your call will be directed to Sandline International.
>
> If your enquiry concerns a situation which can be resolved by a posse of armoured vehicles, lots of flag waving and a really good marching band, please write, well in advance, to Greg Garde, AM RFD, QC, Chief of Everything, Canberra.

Greg Garde, the Victorian Bar salutes you.

The Honourable Murray McInnis has been appointed a Federal Magistrate.

His Honour had a broad practice at the Bar covering family, criminal and administrative law. He was often briefed by the AGS in Comcare matters. One of these Comcare cases involved a public servant who was making a stress claim — things at the department were so stressful that he had to take time off as he was not able to work.

Hound dog McInnis had discovered that the public servant had been running a massage business on the side. He was seeking to prove this by an examination of the expenses the public servant had claimed in his tax return. One of these expenses was for employing a locum masseuse on the odd day that the public servant actually went to work in the department.

During the course of cross-examination on his tax returns, the hapless public servant cried out in desperation that he had not understated his income. "Hang on a minute," McInnis said — "I haven't *got* to your income yet — that's next!"

At which time the public servant promptly dropped dead of a heart attack. Unfazed, McInnis immediately called on his next witness — who happened to be a cardiologist!

We trust Your Honour will always be this well prepared on the bench!

The Honourable Norah Hartnett has been appointed a Federal Magistrate.

Her Honour has worked in private practice and as a corporate counsel. In her spare time she has completed a Masters of Law and an MBA. During her 10 years at the Bar, she served on the ethics committee, the equality before the law committee and the alternative dispute resolution committee.

If she was tempted to think that her life had become a little boring and predictable, this all changed when she took up her appointment. Her first six weeks on the Bench were full of thrills and spills. Her Honour was hearing a marital matter that involved a husband who was a debt collector bikie from Ballarat. He looked tough and the proceedings were not improving his thunderous demeanor.

While Her Honour was delivering her judgment he put his leather jacket on, filled up two glasses of water at the Bar table, picked one up and threw it over his wife, smashed the second glass on the Bar table and attempted to stab his wife in the stomach with the broken glass.

All this activity finally roused the security door-mice into action. They ran into the court and jumped on the bikie. The wife's counsel, David Whitchurch, gallantly assumed a statue-like composure. The court transcriber fled out the door never to be seen again and Her Honour was escorted, shaken but not stirred, out of the court.

We wish Your Honour many long and peaceful years on the Bench.

The Honourable Maurice Phipps has been appointed a Federal Magistrate.

His Honour has previously been a faithful servant of the Bar, having served on the Bar Council and as Chairman of List A. He also endured seven years as a director of BCL (now — that was one mirror you shouldn't have broken!).

His Honour was prepared for his position on the Bench by years of gentle nurturing by Allan Myers QC in the course of endless BCL meetings. Myers would

say: "I'm not interested in what you *think* Maurice, I just need to know if you are for or against the proposal."

This training has served him well.

In the first week on the job, Maurice was overturned by the Full Court for a denial of natural justice! Not content with that, the litigant in question has lodged an application to the High Court claiming that the rehearing should be before any court in the land *other than* the Federal Magistrates Court.

We welcome His Honour to the bench and look forward to the next installment.

The Honourable Barry Connell has been appointed Chief Justice of the Supreme Court of Nauru.

His Honour is a well respected, if a touch elusive, member of the Victorian Bar. He taught Stephen Charles as a schoolboy at Geelong Grammar, he tutored the Solicitor-General in political science at Trinity College and was a winning doubles bowls player with Jim Merralls. Now *that* is a mean pedigree!

He describes himself as "something of an international wanderer" and is described by others as "one who always combined the respectability of the Bar with forays out into foreign affairs of one sort or another". In his capacity as the Scarlet Pimpernel of the Bar, his adventures have taken him to many remote and exotic places — Lesotho in Southern Africa, the International Court of Justice in the Hague and Monash University.

He presides over a court which is unique: it being the only *non* Australian court from which an appeal lies to the High Court of Australia — a device which the leaders of our Bar describe as "legally imaginative".

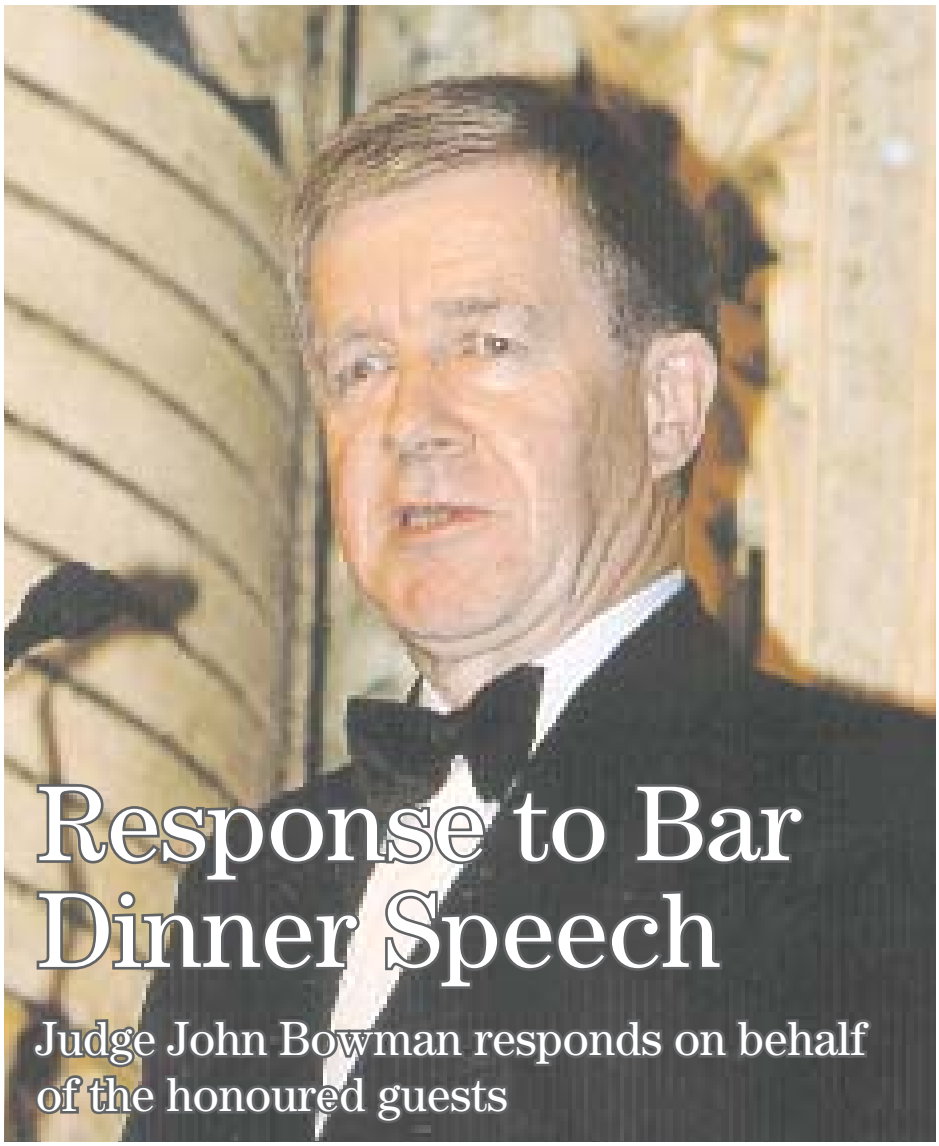
And yea, though Your Honour walks through the valleys of phosphate, we are proud that you still call the Victorian Bar home!

I said earlier that our honoured guests did not have much in common. On reflection, I realised that I was wrong. Each and every one of them has given back to the community. Each of them has given hours of their own time for the welfare of others. This generosity permeates throughout the whole of the Victorian Bar, whether it be helping out a colleague, service to the community, or service to the Bar itself.

It is this spirit of giving that is the hallmark of our great Bar.

Ladies and Gentlemen, will you please charge your glasses and be upstanding for the toast to our Honoured guests.

Our honoured guests.



Response to Bar Dinner Speech

Judge John Bowman responds on behalf of the honoured guests

DISTINGUISHED guests, ladies and gentlemen.

It's not easy responding on behalf of such a diverse group. This is hardly a class action. Unless, given that we took these jobs, it's for faulty brain implants.

For a while I was completely bereft of inspiration, particularly as I had mislaid my rib-tickling, knee-slapping speech about the County Court rules in relation to bonds in replevin of cattle. But then, surprisingly, I had an idea — a landmark event in itself. This idea sprang fully formed into my mind as I sat labouring at a judgment, after a modest chinese meal which had been accompanied by the merest drop of white wine.

What provoked this idea, apart from the tea-smoked duck and the sauvignon blanc, was a football discussion which took place as I gave my undivided attention to the judgment. The honoured guests could constitute a team. I could respond on behalf of the diverse guests in one fell swoop if I could group them as a sporting team.

I should say by way of factual background — that's judgespeak. I've learnt some already — that in my early Bar days, more consent adjournments ago than I care to remember, Kevin Mahoney, George McGrath and I had neighbouring cells on the eighth floor of Owen Dixon, and we spent a great deal of our productive time composing football teams out of names of solicitors firms. This was in the era of the famous TV show when Lou Richards, Jack Dyer and Bob Davis would read out the league teams, and some firms of solicitors sounded just like lines from those teams. So, as Kevin, George and I toiled away industriously, writing birthday cards

On Parade at the Plaza

Steven Tudor, Elizabeth Brophy, Romould Andrew and Richard Thompson.

Peter Nugent, Rachel Doyle and David Forbes.

Caroline Burnside, Attorney-General Rob Hulls, Murray McInnes FM, and Lesley Fleming M.

Justice Linda Dessau, Judge Elisabeth Curtain and Justice Sally Brown.

Peter Nicholas, Sarah Fregon and Brad Newton.

David Starvaggi, Simon Lee and Chris Sievers.

Justice Murray Kellam, Sue Winneke, David Habersberger QC and Fiona Connor.

Clarke Grainger, Aileen Ryan and Jeremy Twigg.

Jane Gabelich, Gina Reyntjes and Jason Pennell.

Arthur Adams QC, Michael McDonald and John Richards.

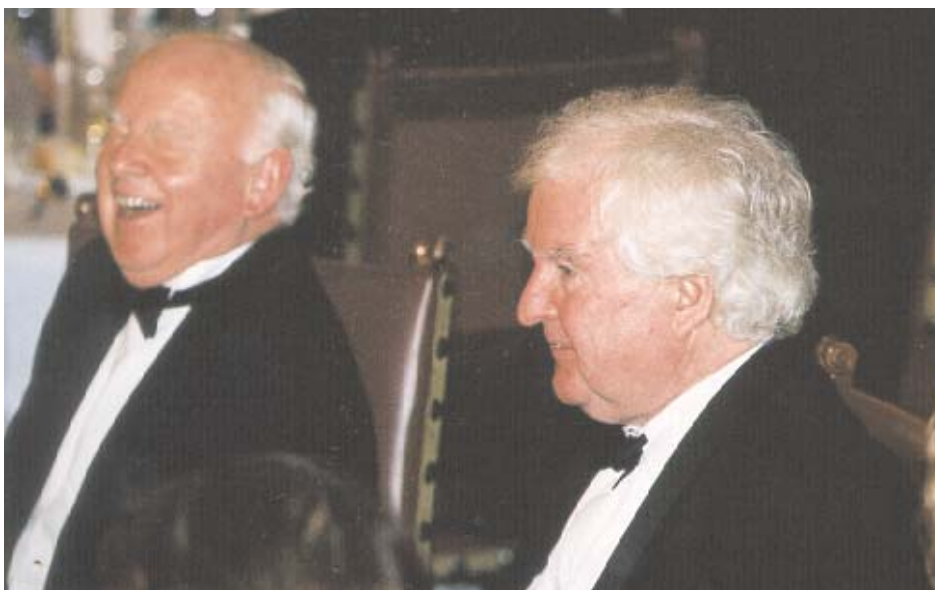
At the Bar Dinner.

Murray McInnes (Federal Magistrate), Erin Gardner, Elspeth Strong and Richard McGarvie.

for paperwork briefs, one of us might suddenly call out "the forward line is Dugdale, Dimmick and Stephens" — a distinctly North Melbourne sounding line. Or "the centre is Warming, Hayes, and Goulopolos", which had a Carlton ring to it. And, at a time when Geelong had B. and I. Nankervis, and Collingwood had W. and M. Richardson. There was only one choice for the reserves — "the 19 and 20 men are Corr and Corr".

I have gone on with this drivel so as to explain that, lurking in my past, has been this hobby of converting lawyers' names into sporting teams. But, were the names of the honoured guests sufficiently suggestive of sporting prowess so as to enable this team response?

Because there were originally eleven and the name at the top of the list was the Honourable Justice Bongiorno, I must admit my first thought was of soccer. Bongiorno. The name simply conjures up visions of Mediterranean footballing idolatory. One can almost hear the BBC commentataor summarising after a world cup semi-final — "the highlight was when the great Italian striker Bongiorno, slammed the ball past the hapless Scottish goal-



At right, Master Michael Dowling QC.

keeper, Kennett. And then Bongiorno did a handstand, showing off his navel to the ladies in the adoring crowd". Marvellous. But the rest of the names didn't have much of a soccer feel. Possibly Kaufman. One of those grim defenders that hacks forwards' ankles out from under them. Not that Les would do that. He's a lovely man. This whole exercise is about the names, not their owners, although if I occasionally merge the names, their roles, and their real personalities, that's entirely acciden-

tal. Anyway, the names didn't suggest a soccer team.

Then it struck me. A cricket team. And, when the number expanded to fourteen, a touring squad. Some of the names literally scream out "cricket". Others are more difficult. So I will respond on behalf of the honoured guests touring cricket squad.

And so to the players. Just look at these names. From Nauru, Barry Connell. Has to be a tropical fast bowler. Mich-ael Holding, Mal-colm Mar-shall, An-dy Rob-erts, Char-lie Griff-iths, Bar-ry Con-nell. Barry Connell, express fast bowler, getting that extra lift out of the Nauru track when the ball hits the guano. Connell, the scourge of batsmen, causing more than bird droppings to be left on the pitch.

The wicketkeeper picks himself — who else but G.Evans? It was said that the great English keeper, Godfrey Evans, could talk opposing batsmen into the turf. A novice compared with our Gareth. After all, he's just given one of the Alfred Deakin lectures. He's a constitutional expert. Imagine batsmen trying to concentrate with Gareth squatting behind them, babbling at them about free intercourse between the States. I mean, they'd be familiar with the concept, but the terminology would slay them.

And what a wonderful name is Brian Lacy. Obviously an English slow bowler. Lacy. Somewhere between Lock and Laker. Brian Lacy, tweaking the ball through the mist from the gasometer end, turning it a mile on the doctored pitch, beating the bat, and the commentator saying, "Oh, that was an unfair dismissal".

And whilst we're on the English, the name Maurice Phipps suggests to me an English opening batsman. Phipps. Upright and unflinching. Ultimately to be "Sir Maurice Phipps". Driving the bowlers to despair. Indeed, giving them the pip. Which is almost what his name woud be. If only the "h" were silent. Like the "p" in mixed bathing.

But who's to open the batting with the redoubtable Phipps. I think Norah Hartnett. I think that's a Springbok name. A South African star with the bat. Kepler Wessels. Norah Hartnett. Dare one say it, Norah Hartnett, Hanse Cronje. And she's a fed. Ideally placed to take calls from Indian bookmakers. But I can tell the Bar that the honoured guests are also honourable guests. We're not into case fixing. We don't give away legal information or knowledge for money. In fact, I can assure you that we have absolutely no knowledge, so there.

Where was I? Who's next? Murray McInnis. McInnis. Sounds like a dour, middle order, Scottish batsman. Pugnacious, tenacious, and hard to remove. A Scot, but with a surprisingly large number of Irish fans. Because they think his name is actually "marry my guiness". Which they'd like to do. In fact his name is derived from the way ancient Scottish bowlers used appeal to umpires - "Mcout or Mcinn is he?" And Mcinn he certainly is.

Rachel Lewitan is not a name that immediately suggests cricket. Until you analyse it. And call her Rach or Rachey. Then its apparent that we have a medium -to- fast bowler. Terry Ald-er-man, Rachey Lew-i-tan. Rach Lew-i-tan, Carl Rack-er-mann. And if our touring squad visits Hong Kong, as touring teams often do, who could be a better guide than Lewi tan. Indeed, continuing our game of putting the empharsis on the wrong syllable, for Flower Drum fans, Lew i tan, Gil bert lau. Not just a deceptively quick bowler, Rachey is a truly cosmopolitan addition to our squad.

Jennifer Coate might also seem a difficult cricketing name, but run title and name together and what do you get? Erronna jennicoate. Clearly a Sri Lankan spinner. Perhaps a distant relative of that famous Indian property steward whose name has gone down into joke lore, Mahatma Coate. In addition, as a slow bowler, her name is a commentator's dream. Those deliveries smashed back for six could be descibed as over coate. Those bashed between her ankles as under coate. And a sharply turning pitch should — suit coate. I might say that , had Jennifer been with us at the Accident Compensation Tribunal in 1992, she too would have been cut down from a coate — to a Bar jacket.

Major General Gregory Garde. Well, here's our skipper. Has to be at least captain of this outfit. But what cricketing image comes from the name? Garde! Easy! Something you shove down your trousers. Not that I'm saying Greg would be happy about that. Although he does have a military background. I see him as one of those fearless right-on-top-of-the-bat fieldsmen for the sharp, short catches. Garde, in very close, in case of rising balls. From the pace attack of course.

We might as well immediately deal with the vice-captaincy, because, if the experts are to be believed, skipper Garde's popularity waxes and wanes, and also he's not always available. Because the commentators are sometimes saying the players are on guard, but other times the players are completely off guard. And frequently they are taking guard, but I'm not sure where. So if the troops are turbulent, there's one ideal experienced man ready to take charge. Chief Magistrate Ian Gray. Not only does the name, Ian Gray, suggest solid batting, reliability and stability, but he's been filling this take-over role since Adams was a boy.

Kaufman is an unusual cricketing name. At first I was tempted to group him with Garde of trousers fame. Why? Cough-man. Cough-man. Sounds like a West Indian doctor's instruction at a hernia examination. But cricket-wise? Perhaps the Christian name "Les" provides the clue. A batsman. There's been Les Favell and Les Stillman. And the famous French openers, the painfully slow Les Cargo, and the doleful and peculiarly double named, Les Miserab Les. And the amnesiac, Les we forget. It is a Christian name associated with batting greatness, although I appreciate that it may not be politically correct to say that cricket has had some famous Les's.

Now what about where we started, the famous Bongiorno. I see him as one of those flamboyant, temperamental, flowing-locked, glaring fast bowlers. The Roman showman. But Bongiorno, in cricket, is a name of pure malice. Lightning fast, erratic, and nearly decapitating the enemy. And when he gets one on the pitch, spread-eagling the stumps, giving the departing batsman the two-finger salute, and growling "arriverderci".

Suddenly, when the squad is assembled, there's a last-minute addition. Master Dowling. Master Dowling. We're just about to board the jumbo, and we get someone from the under twelves. And wasn't one M. Dowling the captain of New Zealand? Just what we need. A kiwi in short pants. I'm afraid I see Master Dowling's role as the mascot. Or, in the team photo, sitting on the ground in front, with legs crossed and holding the blackboard.

On reviewing the squad, I detected a deficiency. Powerful bowling, great keeper, even a mascot. But the batting! No pizzazz. Solid, reliable, courageous. But no batting brilliance. Then I remembered there was one more name. I hope you realise that the name "Bowman" is just three letters away from — Bradman! Nothing more need be said.

So, Jenny Batrouney, Mark Derham, members of the Bar, here is your honoured guests touring squad, ready to play throughout the common law world. We are heading off to spark statutory scrutiny; burn brightly at bars and in banco; fan the flame of forensic furore; and, hopefully, bring home the ashes.

Thank you very much!

Verbatim

Degrees of Relevance

Toomey v *Scolard's Concrete*
14th day of hearing
Coram: Eames J
Saccardo (with Curtain QC) for 8th Defendant

Cross-examining a movement analyst Mr Meikle.
His Honour: So you are putting a proposition to the witness that the person is leaning against the rail, absent any other forces at all?
Mr Saccardo: Yes.
His Honour: Is it more or less likely that he'll go over the rail?
Mr Saccardo: Is it, I am asking in which category is the fall very unlikely, very likely, or somewhere in between.
His Honour: I would like to know whether it is very irrelevant, extremely irrelevant or just barely irrelevant; how is it relevant to me, if that's the proposition that you're asking the witness to comment on?

Not For Solicitors

Michael Crennan noticed a sign on the Bar Table in the Supreme Court of New South Wales last year. He copied the wording verbatim:
"Please note that carafes and water are supplied for the Bar Table only, and not for solicitors or the general public. Of course, use your discretion if someone has a persistent cough or has to take a tablet, etc. There are bubblers located on each floor so please direct the public and solicitors to them.
Senior Court Officer"

Lighten Up Order

United States District Court for the District of Columbia

Citizens Coal Council, et al., Plaintiffs v *Bruce Babbitt*, Secretary of the Interior, Defendant and *National Mining Association*, Intervenor-Defendant

The recent heated exchange between plaintiffs and intervenor on the subject of whether or not NMA should have filed a statement of material facts pursuant to Rule 56.1 or not, whether the court has granted plaintiffs' motion for leave to file supplemental authority or not, whether the Court's own previous order is "authority" or not, etc., betrays a startling lack of sense of humour, or sense of proportion, or both, especially since it appears to be agreed that the facts relevant to this case are all in the administrative record. It is this 21st day of May, 2001, ORDERED that NMA's rule 56.1 statement is *not* "rejected", that it will remain of record, and that it may remain as "context" NMA's arguments. And it is FURTHER ORDERED that the parties lighten up.

Windmills of the Mind

Federal Court of Australia

1 May 2001
Timar v *The Minister for Justice and Customs*
Coram: Marshall J
Mr John Kaufman QC with Mr G. Thomas for Applicant
Mr G. Livermore for the Respondent.

His Honour: This is your submission to the effect that the decision was so unreasonable that no minister would have decided it that way.
Mr Kaufman: Yes, Your Honour, if I can take you through those. I have noted . . .
His Honour: I have to warn you that the last time I upheld a submission of that kind I was kicked to death by a Full Court in Betkhoshabeh.
Mr Kaufman: Your Honour, be brave. I shall protect you . . .

Silken Bondage

Industrial Relations Commission of New South Wales

Coram: Justice Boland
Gough and Gilmour v *Caterpillar* (Day 14)
Houghton QC (with Hall QC and M. Connock for the respondents) cross-examining:

Houghton: I am going to ask you a general question, and no doubt everyone at the Bar Table knows about this concept, but I think my learned junior thinks it's some form of sexual bondage, but what is this concept "golden handcuffs", Mr Robinson? (Later)
Connock: Our junior silk, Mr. Houghton, has released me from the golden handcuffs of which he speaks and has allowed me to address on this matter.

Wobbly Case

In the United States District Court for the District of Maryland

Kevin Potter v *Marguerite Potter*, *et al.*, Civil Action No. MJG-00-63

As presented in the voluminous papers filed by the parties, this case has been portrayed as a great shaggy beast requiring titanic effort to subdue. Yet, using the approach familiar to those on the great sheep stations of Victoria, Queensland and New South Wales, one can shear away the hysteria, exaggeration and hyperbole. What is then left is no more than a huge mound of fur scattered around a scrawny, and very ordinary, little creature whimpering and peering forlornly as it is led, on wobbly legs, out of the shed.

The Court has before it:

1. Nationwide's and Christine Parks' Motion to Dismiss and/or for Summary Judgment and Motion for Sanctions Against Kevin Potter [Paper 28];
2. Nationwide's Motion for Summary Judgment, and for Sanctions against Mr & Mrs Harry Potter on Nationwide's Cross-Claim [Paper 29];

Jack Cullity

Based on a speech given at the Criminal Bar dinner on 30 November 2000

Professor George Hampel QC

JESSAMINE Avenue runs off Dandenong Road, Windsor. As a law student I lived nearby and often cut through Jessamine Avenue. I did not realise then how much three men who lived within a few metres of each other in that unassuming suburban street would mould my professional life and help to give the practice of criminal law the respectability it deserved.

The first of them was Ray Dunn. He was an outstanding solicitor advocate with a large criminal practice who, unlike Frank Galbally, limited his appearances to the magistrates' courts. He was also a colourful teacher of criminal procedure at Melbourne University for many years.

When at the end of my law course I saw David Derham and told him that I wanted to go to the Bar, he rang Ray Dunn and arranged articles for me in five minutes. That is how easy it was in those days although I had an advantage because I was a volunteer in the moots which Ray Dunn organised for the Justices of the Peace.

But this is not a talk about Ray Dunn although I owe him much. When I finally went to the Bar Ray gave me my first brief but then said, "You're not learning at the expense of my clients, I'll see how you get on."

Then there was Trevor Rapke who lived on the corner of Dandenong Road. He was a senior well-regarded barrister with a good general civil practice and a room above the cellars at Selborne Chambers. Trevor was well known for his command of the English language, his forceful advocacy and his regular afternoon catnaps in his chambers. We briefed Trevor in civil cases and I got to know him well. When articles were nearly over I arranged to read with Trevor but he took silk on me. I think he realised that he had disappointed me and so I found myself with a junior brief to him in a negligence case against The Royal Melbourne Hospital. But Trevor had a mischievous streak. On the morning of the trial he sent me off to the library to do some research. Just before lunch, armed with lots of authorities, I went to the courtroom where the trial was to take place. I found that it was closed. "Sorry," said Trevor later "I didn't tell you that we had settled but I thought that the research would be good for you anyway." When Trevor Rapke was appointed to the County Court Bench he become known as one of those good judges who gave reasonable doubt a real meaning. I always had a good run in his court. I think he felt that I would have been a lot better had I been his reader. But Trevor is also not the person I want to speak about this evening.

Jack Cullity

The third man of Jessamine Avenue whose influence was most profound was Jack Cullity. Black Jack as he was known. Ray Dunn who briefed him constantly had talked about him as the ultimate advocate. So did all his contemporaries.

Jack Cullity was born in 1893 and died in 1975. After his father's death Eugene Cullity wrote to his sister:

> We were literally overwhelmed by tributes to Dad from all sections of the community. He was often referred to in legal circles as a legend in his own lifetime, and he was known, admired and respected by the legal profession throughout Australia. He led and dominated an era of particularly strong criminal advocates in this state in his heyday. He had the universal respect of every judge, an almost impossible task for any advocate to achieve, and they envied his ability. The police admired and feared him. Many policemen have told me they will never forget being cross-examined by him, they often referred to his fairness and the fight he put up for his clients. The same was, and still frequently is, mentioned by tutors in law schools and police academies. But he always remained a very humble man.

An obituary in the *Victorian Bar News* in 1975 read:

> The death of John Michael Cullity was remarked on widely in the legal profession as marking the end of an era. Jack Cullity was a legend in his own time. The central feature of his life was his service to the people and his outstanding integrity as a human being.
>
> No matter what was said against his client Cullity would always find good in him. The daily press spoke of his greatness as a trial advocate. They were correct. He was an advocate in the old tradition, a master tactician capable of dominating any court and commanding the course of the trial. He knew his law, he knew human beings, he knew life. He spoke the language of the common people and had a profound contempt for anything in the way of pretension.
>
> Every barrister could learn much from a study of Jack Cullity. He had been very close to Leo Cussen to whom he attributed much of the success he himself had. He said that if the proper points could not be made to a jury or judge or in cross-examination in 20 to 30 minutes they were probably not worth making. To hear a trial conducted by him was a lesson. It is sometimes thought that Jack Cullity confined himself to the criminal courts. In fact, he practised widely in many jurisdictions and had a mastery of general legal problems. One of the outstanding characters of the Bar and of Australia has left us. His work enriched the Bar and life. It will not be forgotten.

In the centenary edition of the *Victorian News* the tribute to Jack Cullity as a great advocate said:

> Cullity was probably the ablest cross-examiner this Bar has seen.

The writer added:

> I personally never saw Cullity do a bad cross-examination, and I don't think anyone else did. I can confidently add that I have never seen a better cross-examiner or a better trial advocate.

As the tradition has now developed at these dinners of speaking about great characters and advocates of the past I suppose I could stop here as no greater praise can be given to any advocate. But I want to reflect briefly on some of my own fortunate experiences of Jack Cullity, and although he was described as an advocate in the old tradition I see him also as the ultimate modern advocate.

I first saw Jack Cullity in Equity Chambers in a conference with one of our clients. He had the poor man standing in the corner being subjected to an aggressive bullying cross-examination. I was agog because even in those days I realised that that could not have been a good cross-examination. But I soon realised that Jack was putting the client through what he may experience at the hands of some of the bad prosecutors of the day.

The many cross-examinations I saw him do were immaculate. He could be firm but quiet, never flustered, always relaxed and composed. Most noticeable was his brevity. There was the famous one question cross-examination of a pathologist, Dr Bowden. It was a case in which there was a difference of opinion between the doctors who treated a man who was still alive for a wound and a pathologist who expressed an opinion as a consultant. Jack asked the pathologist pensively "Dr Bowden, it must be about 20 years ago that you last saw a live patient." "Yes" said the witness, and Jack sat down slowly, allowing the answer to resound in the courtroom before anyone spoke.

He had a special ability to capture the moment and create the right atmosphere. Juries loved him. The first time I instructed Jack Cullity he told me that I wasn't much use as I just sat there and took no notes. That was true because I was mesmerised. I sensed that I was seeing something different and special without really appreciating how and why it was so good.

One morning towards the end of a significant trial just before addresses, I lost him. He wasn't in chambers and I couldn't find him anywhere. It was about half an hour before the court started as I passed our courtroom.

The door was open but the court was still in darkness. I saw Jack sitting at the Bar table calmly looking ahead as if in a trance. I wondered what he was doing but at the time gave it not much thought. I have since realised that he was probably meditating. That is the only conclusion that can be drawn from his amazing calm and composure when the proceedings started.

In the presence of the jury, Jack Cullity never spoke to the prosecutor. He took the view that would give the wrong impression and would be inconsistent with the contest that was going on. Comments and exchanges between Counsel at the Bar table were his pet hate. Sledging and bickering he thought was indicative of a loss of control and confidence. He calmly waited for his turn and when his turn came he was deadly.

Jack never joked or laughed in court and did not respond to those who did, whether it was his opponent or the judge. He looked at the jury in a way that made it clear that what he was doing was too important to be made light of. It always surprised me that one of the favourite sports of this gentle sensitive man was boxing.

Jack Cullity had a quiet whimsical sense of humour. He had a calm gentle face with that little smile which can be seen in his photographs. I have some copies, which I will pass around so you may have an image of the man who was so highly regarded. I don't know who the man with him is. I don't think he is a client but he may be a very satisfied instructing solicitor.

When I knew Jack he travelled once a year but only to one place which he explored thoroughly. I recall his stories about his visit to the courts in China and his horror at the practice of the prosecutor having the last say on sentence.

The last thing I want to describe is a traumatic experience of my own. Early in my career I did, as did others, County Court appeals for the Crown. Typically, there were half a dozen briefs which one would get the night before. Most of them were not complicated and they were then, as they are now, re-hearings. My opponents were usually counsel of about my own vintage, sometimes more experienced. You can imagine my horror when one day, halfway through the morning just before the next appeal was called, in walked Jack Starke QC. Many of you here probably recall Sir John Starke either as a barrister or as a judge. Starke was one of the leaders of the Common Law Bar, a tough, abrupt, aggressive, larger than life advocate. You can imagine how I felt. But then what happened was even worse. I think you can guess. Behind Starke walked his junior, my idol, Black Jack Cullity. The case was a charge against a local Frankston chemist of dangerous driving. It was, I thought, an overwhelming case of very bad driving. However, when those two finished with the judge, with the witnesses and with me, the driving was not dangerous at all. It was a great lesson. I don't think I remember much about the proceedings themselves because I suspect I have repressed the trauma that I experienced. I remember, however, something very important. It was Cullity who was given the job by Starke of cross-examining the main witness. That says a lot about Cullity but also about John Starke.

Cullity practised for a few years after I started before he became ill. I used to go and watch him in court whenever I could and sometimes consulted him. Sometimes I went to see him on a pretext just to hear him talk about the case. I am sure he sensed that I admired him and was always receptive and helpful.

I described Jack Cullity earlier as the ultimate modern advocate. Many of Cullity's contemporaries, even the good ones, were much more verbose and took a lot longer to do that which Cullity did so efficiently. Good advocacy today demands great focus and brevity. Jack Cullity understood even then that those were the qualities of a good advocate.

I see Cullity as the beginning of the change in the attitude by the rest of the profession towards criminal practice. Those of us who followed, who had seen and were influenced by Jack Cullity, realised the need for the pursuit of excellence. This was the way the practice of criminal law would gain respectability. My only regret is that in those early years I didn't understand enough about advocacy to be able to learn more from Jack Cullity. As I have thought about advocacy over the years I have always used Jack Cullity as my point of reference.

The tradition of speaking about great advocates of the past is I think important because it gives us inspiration, goals and role models.

I have, since those days, slowed down respectfully and pensively as I pass Jessamine Ave.

Mediation Centre Function

Patronage by firms of solicitors and mediators is crucial to the continuing of success and operation of Victorian Bar's Mediation Centre at Level 3, 180 William Street.

Bill Martin QC speaking at Mediation Centre Function.

IN May 2001 the Alternative Dispute Resolution Committee held a drinks function to acknowledge those firms and mediators who have supported the Centre and contributed to its success to date.

(The occasion was notable for the absence of Kirby J as guest speaker but, presumably in anticipation, the CJ left — another commitment — before he realised that Kirby J was not speaking).

The Bar needs to be as innovative as possible in the mediation area, and the Centre has been a practical exhibition of its progressive thinking. As far as it is known the Bar's facility is the only mediation centre run by a professionally organised Bar. It is important to remember that its viability depends on recommendations for its use on every possible occasion by our members. You are urged to bear this in mind. To promote the Centre excellent graphic brochures are available from the 12th Floor Administration which show the layout and facilities. You are encouraged to send them to solicitors and to parties.

Gerald Lewis and Julie Nicholson are sincerely thanked for organising the function with unsurpassed catering. Many thanks are also extended to the Bar staff, David Bremner, Wendy McPhee and Tania Giannakenas for coping with the invitations and the usual numbers chaos.

The Centre's main feature is of course its staff, Helen Henry, Pauline Hannan, Robyn Cran and Kay Kelly, who with aplomb have dealt with every situation and have done so over the 1500 mediations which have occurred since the Centre opened.

Bill Martin QC

Gavin Francis, John Lewisohn and Geoff Gronow.

David Levin QC, Julie Nicholson and Justice Kellam.

Chief Justice Phillips and Bill Martin QC.

Chief Federal Magistrate Diana Bryant and Gerald Lewis.

A Practical Way to Early Resolution of the Head of State Issue

Richard McGarvie previews the Conference to be hosted by the Corowa Shire Council on 1 and 2 December 2001, as the endpiece of the federation year. The conference aims to perform the same function as the Corowa Conference of 1893, which recommended the process that was followed to resolve the issue of whether Australia should federate.

OUR strong and stable federal democracy is a priceless community asset which belongs to the people. So does the responsibility for keeping it strong and ensuring that whenever it is adapted to fit changing circumstances, this is done in a way that preserves or improves it.

IS EARLY RESOLUTION NECESSARY?

A Newspoll in September 1999 showed 95 per cent agreeing that the head of state should be an Australian, 88 per cent strongly agreeing. In the referendum two months later only 45 per cent voted for the package offered and no State gave majority support. This indicates that over 40 per cent of voters were not satisfied they were offered an acceptable package and voted "no" despite their desire for an Australian head of state. A later study shows 89 per cent agreeing an Australian should be head of state, 70 per cent agreeing strongly.

This shows a latent instability in our constitutional system. Constant wrangling over basic features of the constitution has a destabilising effect in a federal democracy. That has been the experience of the long-running series of constitutional disputes in Canada since the late 1970s. It would not be responsible for the Australian people to leave the body politic unhealthy, with a constitutional running sore where about 90 per cent do not identify with a central feature close to national sentiment.

WHAT IS THE ISSUE?

The issue is whether we have reached the stage of history where we should cast off the legacy of colonial times, which gave us a head of state in a foreign country on the other side of the world, and finally attain entire constitutional autonomy.

Since 1788 we have moved so far in that direction that only a slim residue of constitutional dependence on Britain remains. For years the operative or de facto heads of state, the Governor-General, Governors and Administrator of the Northern Territory, have performed virtually all the head of state responsibilities for the Australian federation. They operate as advised by their Australian ministers and are entirely free of any control by the Queen. Our only remaining constitutional dependence is that whoever is monarch of the United Kingdom is monarch of Australia and the formal head of state of the Commonwealth and each state and territory. The only constitutional function the Queen now performs is the fairly mechanical and infrequent one of complying with the binding convention to appoint or dismiss the Governor-General, state Governors or Administrator of the Northern Territory as advised by the Prime Minister, State Premier or Chief Minister.

The issue which faces us is whether we have reached the stage where the whole federation should separate from the monarchy.

While that would be a relatively small change, it is a difficult one. The quality of our federal democracy has endured mainly because the law of its constitutions, and the operating constitutional system developed on that, between them leave powerholders no real option but to exercise their powers consistently with the continuation of democracy and its safeguards. They have that effect because they combine to provide incentives and disincentives and to bind powerholders to act in that way. Particularly important are the constitutional conventions which are made binding on powerholders by the way the constitutional system actually works and the non-legal penalties it imposes for their breach.

The main difficulty in moving to complete constitutional autonomy is to ensure that a model which replaces the monarchy would not reduce the incentives and disincentives provided by the operation of the constitutional system and would not lead it to work in a way that would weaken or destroy the binding power of those conventions. Avoiding these unintended consequences depends very little on a knowledge of law but on a knowledge of humans and their behaviour within organisations, particularly when influenced by the impulsive attractions of obtaining or retaining power.

WHAT IS NEEDED FOR EFFECTIVE RESOLUTION?

The experience of resolving the issue of whether Australia should become a federation, and of the 1999 referendum, show what will and what will not resolve the

head of state issue. It must be resolved in a constitutional way which makes full use of the resources of people, parliaments and governments in working out the proposal ultimately put to referendum.

The issue will be resolved only by a referendum vote upon a proposal that can genuinely be presented so as to catch the public imagination and vision, and where people can vote free of partisan political impulse and secure in the knowledge that whichever way the vote goes our democracy and federation will be safe for future generations.

In practice the issue will be resolved only in two events: if a referendum passes; or if a sound and acceptable proposal for change is strongly put and voters reject it because of a genuine preference against making the change at the present stage. Both those events depend on there being a sound and acceptable proposal.

The effective resolution of the issue is retarded by loose thinking. Regarding or describing the issue in the vague terms of whether Australia becomes a republic is an instance of this. The word "republic" distracts attention from the realities and rouses conflicting responses based on emotion. Use of the word has led many to concentrate on copying the constitutional structures of very different overseas republics rather than on how best to maintain the strengths of the federal democracy that has been evolved to suit Australia's history, tradition and culture. In some, the word evokes utopian ecstasy which convinces them that if we become a republic our trade will automatically increase and all our problems become easier to solve. In others it has the opposite effect. Within living memory we have seen republics which produce good democracy, such as the United States and Ireland. But we have also seen the republics that produced the tyrannies of Hitler, Stalin, Mao Tse Tung, Idi Amin, Pinochet and Robert Mugabe. This predisposes people, particularly those who or whose families came to this country to escape the tyrannies of such republics, to regard all republics with repugnance. It is better to use tight and objective words which do not distort clear thinking and which convey what is actually proposed. Since the 1999 referendum the issue is increasingly being described as the "head of state issue" and it is recognised that the real question is whether the Australian federation finally separates from the monarchy and attains the constitutional self-sufficiency of a nation state.

DIDN'T THE 1999 REFERENDUM RESOLVE THE ISSUE?

The package rejected at the 1999 referendum lacked a number of the attributes which are essential if a referendum vote is to resolve the issue. I refer only to some of them.

The referendum was confined to the Commonwealth unit of the federation. People could not vote secure in the knowledge that whichever way the vote went our federation would have been safe for future generations.

The package was not developed in the constitutional way, in which the resources of people, parliaments and governments are fully utilised in working out the proposal put to referendum. In reality, the people, parliaments and governments had very little involvement in putting the package together. Instead we sought to resolve the issue in a privatised way. The main influence on the form it took was a private organisation, the Australian Republican Movement. The main critic of the package was another private organisation, Australians for Constitutional Monarchy.

The process by which the package was determined was not one which led people to vote free of partisan political impulse. The process was designed and operated so as to suit the purposes of the government of the day. John Button has observed that Paul Keating woke up republican sentiment in 1993 and understood its symbolic power. "He held it in his hand like the Welcome Stranger gold nugget. Then he dropped it in the murky waters of acrimonious partisan politics." What he did was to brand the model as the one endorsed and promoted by his party. To brand it that way and use it in extracting political advantage from his party's opponents was to brand it a referendum reject. To negate the political advantage over the Coalition that Keating and his party were deriving, John Howard undertook to hold a convention and put to referendum a model with clear support, and the 1999 referendum was the result.

Resolution of the issue became to a large extent politically partisan. This showed in the Newspoll of voting intention taken a week before the referendum. It indicated 53 per cent of ALP voters voting "yes" but 63 per cent of coalition voters voting "no".

Although it was put together as we approached the centenary of federation, paradoxically the designers and promoters of the referendum package hardly looked at and never seriously considered a resolution of the issue for the whole federation. The referendum was confined to the Commonwealth unit of the federation. People could not vote secure in the knowledge that whichever way the vote went our federation would have been safe for future generations. The destabilising effect if the referendum had succeeded with one or two States strongly dissenting would have been considerable. The majority in the dissenting States would have been forced into a system of government for the Commonwealth in which they lacked confidence. Although theoretically possible for them to remain monarchies, circumstance and ridicule would have forced the dissenting States to become republics at State level. This would have produced a destabilising factor in the federation, unequalled since Western Australia voted in 1933 almost two to one to secede from the federation.

The referendum package could not be presented so as to catch the imagination and vision of Australians. A referendum to separate the whole federation from the monarchy could be presented as completing the long sweep of evolution from being totally dependent on Britain in 1788 to becoming finally totally self-sufficient. That was not open to the advocates of change in 1999. If the referendum had succeeded, most of the federation — all of the States — would still have been monarchies. The advocates had to content themselves with extolling the virtues of novel fittings and fixtures in the package.

WHAT IS THE AIM OF THE COROWA PEOPLE'S CONFERENCE 2001?

The Conference to be hosted by the Corowa Shire Council on 1 and 2 December 2001 as the endpiece of the federation year, aims to perform the same function as the Corowa Conference of 1893. It recommended the process that was followed to restart the stalled move to resolve the issue whether Australia should federate and to progress it to resolution.

This year's Conference will confine itself to recommending a process for early resolution of the head of state issue. It will not consider whether the Australian federal-

tion should separate from the monarchy nor the merits of models to replace the monarchy in that event. It will consider a process that will empower the people to decide those questions in an informed, fair and effective way.

It will have the advantages of the lessons that come from the experiences of federation and the 1999 referendum.

WHY IS IT A PEOPLE'S CONFERENCE?

It is designed to enable the Conference members to make recommendations in exercise of their responsibility to ensure that if Australia separates from the monarchy, it is done in a way which preserves or improves the strength of our federal democracy. The influence of the people is essential if the stalled move to resolve the head of state issue is to be restarted.

The reality at present is that the main political parties share a strong interest in retarding resolution of the issue. They all had their fingers badly burnt in the referendum and naturally do not wish to repeat the experience. Apart from enduring the strains of permitted disagreement between party members, the Prime Minister, who favoured a "no" vote, carried only 65 per cent of the Liberal Party's most recent electoral constituency that way. The Nationals opposed the package but a number of senior members broke rank and supported it, and the party carried only 80 per cent of its constituency to a "no" vote. Labor supported a "yes" vote but carried only 57 per cent of its most recent electoral constituency that way.

The Coalition is treating the issue as having disappeared with the referendum. Labor's approach is first a plebiscite on whether we desire an Australian head of state, then another plebiscite on the preferred model and ultimately a referendum on whether to change the constitution. That seems only the start, as it does not appear to encompass resolving the issue for the States. If that process eventually resolved the issue, it would take many many years.

Fortunately many within all parties see that the national interest demands an early resolution of the issue.

About half the Corowa Conference will be self selecting. They will be members of the public who respond to advertised invitations to register. Up to a quarter are automatically invited because they have constitutional experience from holding office related to government. They include current and former Prime Ministers, Premiers and Leaders of the Opposition; former operative heads of state; current Australian presidents of the main political parties, leaders of parliamentary parties, independent members of parliament, presiding officers of the parliaments and councillors holding office in the main local government organisation in Australia. The other members will be people of all views who have experience or knowledge relevant to recommending a process for consideration of a constitutional change. They include people holding the various positions held on the head of state issue and those with experience in business, unions or other organisations.

Any Australian wishing to attend may write to The Mayor, Corowa Shire Council, at PO Box 77, Corowa NSW 2646, asking to be placed on the Reserve List, and giving postal and e-mail addresses and phone and fax numbers. Selections for individual invitations are made from that list and those not invited will receive notification of when and where the advertised invitations will appear. That will give them every opportunity of registering in that way.

An innovative feature of the Conference, likely to set the pattern for consideration of constitutional change in the electronic age, is that the debate on the process the Conference should recommend is already well under way. It is open to every Australian, whether attending the conference or not. More than six months before the Conference, the Conference website *www.corowaconference.com.au* started displaying drafts of the detailed process which the Conference will consider with a view to recommending that or a varied or substituted process. The website has papers on the process and invites any Australian to e-mail their comments or alternative proposals on the process, to the Mayor, Corowa Shire Council, at *discussion@corowaconference.com.au* for display on the website.

CAN THE CONFERENCE WORK IN A NON-PARTISAN WAY?

For a Conference to recommend the best process for resolving the head of state issue, Australians expect the membership to include people of all viewpoints, and that each will vote according to what they individually think best for our community and future generations. Every Australian, whatever their political preference and whatever their position on the head of state issue, shares an identical interest in identifying and following the best process. It is not an occasion for partisan voting on the dictates of a party, group or faction.

The response from all community sectors has been magnificent. A crucial lead was given by the early agreement of Australian presidents of political parties, Shane Stone (Liberal), Greg Sword (Labor) and Michael Macklin (Democrats) to attend the Conference. Showing similar leadership, Greg Barns, Australian Republican Movement Chairman, and David Flint, National Convenor of Australians for Constitutional Monarchy, are attending. So is ACTU President, Sharan Burrow, and business leader, Stella Axarlis. Former Governors, Michael Jeffrey (WA) and Gordon Samuels (NSW), former Chief Justice, Sir Gerard Brennan, and former High Court Justice, Sir Daryl Dawson, will be there. Seldom, if ever, has a Conference been convened which combines in a national task members of the public and community leaders of all viewpoints. Seldom has there been such a prospect of non-partisan approach to the recommendation of process.

Every Australian, whatever their political preference and whatever their position on the head of state issue, shares an identical interest in identifying and following the best process. It is not an occasion for partisan voting on the dictates of a party, group or faction.

HOW DID THE CONFERENCE ORIGINATE?

John Lahey asked me to launch his book, *Faces of Federation: An Illustrated History.* On reading it I saw how much the experience of federation confirmed the practicality of the process advanced by a Working Group at the 1998 Constitutional Convention and in my book, *Democracy*, to resolve the head of state issue for the whole federation. I said so in my launch speech. Sir Zelman Cowen read the speech and, in his notable lecture to the St James Ethics Centre in Melbourne on 31 October 2000, urged Australia to follow that process, which he saw as combining "political realism with expert advice". Jack Hammond QC read the speech and the lecture and came up with the idea of Corowa again taking the initiative. He put it to the Mayor, Cr Gary Poidevin, who responded "Sure it can be done". Jack Hammond and

I presented a paper and spoke at Corowa. Two days later, on 19 December 2000, the Corowa Shire Council decided to host the Conference. Sir Zelman Cowen is its patron and will give the opening address.

WHAT PROCESS WILL THE CONFERENCE CONSIDER?

The Conference will consider recommending the process endorsed by Sir Zelman Cowen and set out in some detail on its website. Although its recommendations could be for that or a varied or substituted process, it is useful to outline it as an example of how an early resolution of the head of state issue could be achieved for the whole federation.

The plan to be considered proposes that the Conference appoint a high level and non-partisan drafting committee to prepare legislation to establish all-party committees within each of the parliaments. First, the State and Territory committees would each investigate, listen to their community and report on two questions: (1) Which head of state model would best preserve or improve our democracy if it replaced the monarchy? (2) Which method of deciding the head of state issue would place least strain upon our federation? Then the all-party committee in the federal Parliament, with a representative from each State and Territory committee, would give a report on those questions and appended to it the State and Territory reports. That report would go to the proposed coordinating authority, the Council of Australian Governments (CoAG) and be widely publicised on the internet and elsewhere.

All-party parliamentary committees have a good record in Australia for their reports on questions where the political parties have no conflicts of interest. Much of our best legislation comes from them. The proposed process would start with investigation and reports by committees within the parliament closest to the people of a State or Territory. This will come immediately to people's attention and begin to provide the information they need to make their decisions. The capacity of the process to provide the people with information and expert advice from a variety of sources is one of its great strengths.

It is proposed that on the second question, the parliamentary committees consider the following method of deciding the issue without strain on the federation.

With the community informed by the work and reports of the parliamentary committees and media discussion of it, there would be a plebiscite in which the people would express their preference between the models supported by either the majority or a minority in the report of the federal parliamentary committee. The people of each unit of the federation, the Commonwealth and each State and Territory, would choose the model they would prefer for their unit if it separated from the monarchy. Each Australian voter would mark a ballot paper showing their preference of model for the Commonwealth and another showing their preference for their State or Territory. There is no constitutional necessity for each unit to have the same type of model, although that is the most likely outcome. The traditions, culture and operating systems of government within each unit are essentially the same as within each other unit, and it is difficult to see why a model considered best for one unit would not also be considered best for the others. The plebiscite could be held with the federal election to be held not later than 2004.

If supported by the overall majority of voters and a majority in every state, and if every state parliament requested it under the Australia Acts, the whole federation would separate from the monarchy at the same time, with each unit converting to the model it chose in the plebiscite. Otherwise there would be no change.

Finally, all Australian electors would vote in the one referendum on the one question of whether the whole federation — all its units — separate from the monarchy. That method would enable the change to be made with political and constitutional legitimacy and without strain on the federation.

No unit would separate from the monarchy and substitute a self-sufficient model for it, unless the majority of the unit's voters had voted for that. All powers of constitutional change would be relied on, particularly the new powers created by the Australia Acts in 1986. If supported by the overall majority of voters and a majority in every State, and if every State parliament requested it under the Australia Acts, the whole federation would separate from the monarchy at the same time, with each unit converting to the model it chose in the plebiscite. Otherwise there would be no change. Either way the issue would be resolved, at least for this stage of history. The referendum could be held in about 2005.

The potential of Australia Act powers for resolving the issue for the whole federation was perceived at an early stage by South Australian Solicitor-General, Brad Selway QC. That appears from the South Australian Constitutional Advisory Council report, *South Australia and Proposals for an Australian Republic*, (Peter Howell, Chairman), Adelaide, 1996. My book, *Democracy*, pp. 255–63, outlines constitutional mechanisms relying on those new powers.

Every successful referendum after 1910 has been carried with the support of an overall majority of voters and a majority in every State. The proposed process does not require a level of support for constitutional change that is significantly higher than that usually attained. If a majority of a State's voters vote for the change, in political reality, the State parliament would have no option but to make the necessary request.

ARE THERE VALID OBJECTIONS TO THE PROPOSED PROCESS?

It is said that December 2001 is far too early to start making decisions on recommended process and much more time should be left for discussions before that is done. Whatever satisfactions come from sessions of endless talk that lead only to more talk and never to decisions or action, the need for Australians to move from theory and face up to taking practical steps must outweigh the temptations of serial postponement. Discussions have gone on since 1993, and if the propounders of an alternative process cannot put it on the Conference website in as much detail as the one displayed since last May, and thus expose it to public scrutiny well before the Conference, it must have little substance.

It is not only the deepening constitutional running sore mentioned earlier, that should impart a sense of some urgency. We now have an opportunity we have not had for years and which may not last for long. At present no political party is identifying itself with a particular model and promoting it. The fact that they are licking their referendum wounds is a great plus. This atypical situation gives the best

chance ever of resolving the issue free of partisan political impulses. We should not squander it through inertia.

Then it is said that instead of the first step of the recommended process being inquiries and reports by parliamentary committees, the process should go first to a constitutional convention which is all or mainly elected. The precedent of the 1897–98 Constitutional Convention is relied on. That seems to overlook the realities. Although politicians were about as unpopular then as they are today, voters knew who best understands how the constitutional system actually works, and all but one member of the Convention were parliamentarians. The Convention was, in effect, a large committee of parliamentarians.

The elections for that Convention were held about thirteen years before the modern party system asserted itself in Australia. Today, if members of parliament stood for election to a constitutional convention on the head of state issue, the parties would seek political product differentiation by sponsoring different models and processes. Political partisanship would mar the second attempt to resolve the issue. As the election for the 1998 Constitutional Convention showed, if parliamentarians were barred from standing, electors would tend to elect people they had heard of. Usually this would elect celebrities who have little understanding of the working of the constitutional system rather than those who had that understanding but lacked the public recognition of celebrities.

It is also said that instead of the process starting with parliamentary committees or an elected convention, the first step should be a plebiscite on whether we desire an Australian head of state.

That has two obvious weaknesses. First, however ready some 90 per cent of the people are to reveal to an opinion poll their desire for an Australian head of state, many of them would be reluctant to express themselves in that way in a public plebiscite. Constitutional caution would predispose against giving what many would regard as a blank cheque. They would regard a "yes" vote as politically committing Australia to dispense with the monarchy and would desire that no such commitment be given until they were satisfied that the substituted system would be safe for the democracy and federation of future generations.

Celebrating Federation and Networking Constitutional Law

The Australian Association of Constitutional Law is to hold a major national conference in Perth on 21, 22 and 23 September 2001. The conference is entitled "A Celebration of Federation — The Australian Constitution in Retrospect and Prospect". The first event of the conference, following a Vice-Regal reception on Friday, 21 September, will be a public oration to be delivered by Sir Anthony Mason, former Chief Justice of the High Court of Australia and the inaugural President of the Association.

Justice Robert French

THE conference will be officially opened by the Federal Attorney-General, the Honourable Daryl Williams AM QC MP, on Saturday, 22 September, and has attracted a range of high calibre speakers and commentators. They will cover topics ranging from the historical context of the formation of the Constitution to its interaction with contemporary issues such as globalisation, international human rights norms and science and technology. Prospects for its adaptation and change and comparisons with other constitutions internationally will also be discussed.

Speakers and commentators include Professors Geoffrey Bolton, Larissa Behrendt, Greg Craven, Geoffrey Lindell, Cheryl Saunders, Jeremy Weber, George Williams, John White and Leslie Zines. Prominent counsel speaking at the conference are the Commonwealth Solicitor-General David Bennett QC, the South Australia Solicitor-General Brad Selway QC, David Jackson QC of the Sydney Bar, and Robert Orr QC of the Attorney-General's Department.

On Saturday evening, 22 September, there will be a conference dinner at Parliament House in Perth which will be addressed by the Premier of Western Australia, the Honourable Dr Geoff Gallop MP.

The conference is being staged by the Australian Association of Constitutional Law in conjunction with the Constitutional Centre of Western Australia, which provides the venue for most of the conference events. Conference enquiries may be directed to the Constitutional Centre on 08 9222 6922. The registration fee is $250 for members and $275 for non-members.

This conference is the first major national conference organised by the Association, which is a comparatively new body. It is an independent, not-for-profit organisation whose objectives include the development and promotion of the discipline of constitutional law in Australia. It seeks to support teaching, research and the practice of constitutional law, and to provide a forum for the exchange of knowledge and information between practitioners, academics and other interested persons. Those who are eligible to be members of the Association include

Second, even if the result of such a plebiscite showed a majority desire to separate from the monarchy, we would have placed ourselves in the position where our declaration of no confidence in a central feature of our constitution would be likely to resonate for years. It would continue to restate our position until we did the hard stuff necessary to resolve the issue through a referendum vote with the essential qualities mentioned earlier. We would be most unwise to place ourselves in that constitutional no-man's land for many vital years.

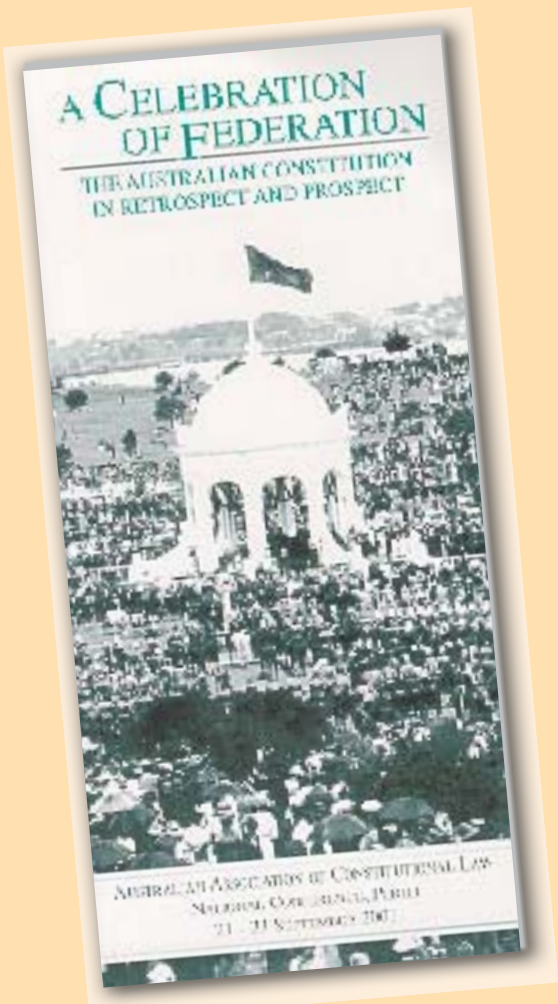
No doubt, in the pre-Conference debate upon the Conference website and at the Conference itself, the cases for and against the recommended process starting with parliamentary committees, an elected convention or a plebiscite on whether we desire an Australian head of state will be put strongly. Other processes with other initial steps are likely to join the contest. The Conference decision on that contest will be very important.

WHAT EFFECT COULD THE CONFERENCE HAVE?

As with the first Corowa Conference, the effect of the recommendations of this year's Corowa Conference will depend on the persuasive authority they carry with people, parliaments and governments. The Conference has the potential to initiate an orderly exercise of the people power which underlies our democracy. It could bring the weight of public opinion upon parliaments and governments to take the action necessary for early resolution of the head of state issue, despite the hesitancy of political parties to do so. If it does, it will not only have provided a significant endpiece for the year of celebrating federation. Corowa will again have served its nation well.

SOURCES

The information relied on in this article is to be found in my papers on the www.corowaconference.com.au or *www.chilli.net.au/~mcgarvie* websites or in my book, *Democracy: Choosing Australia's republic*, Melbourne University Press, 1999. That book is also entirely on the *www.mup.unimelb.edu/democracy/index.html* website.



academics in constitutional law and related disciplines, judges, legal practitioners and government legal officers.

The Chief Justice of the High Court, the Honourable Murray Gleeson, is patron of the Association. Its inaugural President was Sir Anthony Mason. The Association presently has 167 members.

The Governing Council comprises:

President:
Justice Robert French, Federal Court of Australia.

Vice-President:
Professor Cheryl Saunders, Centre for Comparative Constitutional Studies, University of Melbourne.

Treasurer:
Mr Brian Opeskin, Commissioner, Australian Law Reform Commission.

Secretary:
Professor Geoffrey Lindell, Faculty of Law, University of Melbourne.

Council Members:
David Jackson QC, Barrister, Sydney.
Dr Melissa Perry, Barrister, Adelaide.
Dr John Williams, Senior Lecturer, Law School, University of Adelaide.
Professor George Winterton, Anthony Mason Professor, Faculty of Law, University of Sydney.
Brad Selway QC S-G, Solicitor-General for South Australia.

Constitutional law impacts on many areas of practice in Australia and a greater sensitivity to and awareness of constitutional issues will be of benefit to practitioners across a variety of fields. It intersects with politics, history and political science in a way that makes it a fascinating intellectual as well as practical discipline. All practitioners are encouraged to join the Association and to help in the development of its activities and profile in each of the States and Territories of Australia.

In addition to the national conference planned for September, the Association proposes to conduct State-based colloquia on the Australia Law Reform Commission's Report in relation to alterations to the Judiciary Act. Other small informal seminars will be organised through local membership. The Association also acts as a network for information about visiting scholars, whether from overseas or visiting from one State to another in Australia, so that all members can have the maximum opportunity for participating in ongoing discourse about our fundamental law.

Those who are interested in joining the Association should direct enquiries to: Stacey Watts: Telephone: 03 8344 0801; E-mail: staceyw@unimelb.edu.au Judy Sulcs: Telephone: 08 9268 7164; E-mail: pa.frenchj@fedcourt.gov.au

ASIC Chairman Reviews HIH Collapse in Corporate Governance Address

More than 40 members of the combined Commercial Bar and Corporate Lawyers Associations attended a Seminar on 16 May, 2001 to hear David Knott, Chairman of the Australian Securities and Investment Commission, address them on issues arising from the collapse of the HIH Insurance Group.

David Knott

THE collapse of HIH is now clearly identified as one of the largest and most significant financial failures in Australia's history. It is understandable in such circumstances that the public demand for answers and accountability is vocal and pressing.

The Australian Securities and Investments Commission now has the task of investigating this collapse to determine whether any person or persons should be brought to account for offences under the Corporations Law.

On behalf of the Commission I want to assure the Australian public that our investigation will be conducted without regard to any vested interest; that we will devote whatever financial and investigative resources are required to complete this task within the shortest possible time; that we will explore all remedial avenues available to us under the law, whether they be criminal, civil or administrative in nature; and that we will do this with a sense of priority commensurate with the enormity of this collapse.

As you would know, we embarked upon this task in February. On 27 February this year, ASIC commenced an investigation of HIH Insurance and sought the suspension of trading in its shares because we believed that the market was inadequately informed about the company's financial position. We made it clear to HIH that we would not allow them to recommence trading until their financial position was made known to the market. HIH went into provisional liquidation on 15 March without seeking to re-list.

Since that time, we have initiated an investigation strategy that clearly differentiates between prospective criminal and civil avenues of enquiry. We are well advanced in assembling a specialist team of investigators, drawing on both internal resources and external experts. These include specialist actuarial, auditing, claims management and insolvency skills.

While the size and composition of the investigating team will remain confidential, it promises to be the biggest ever assembled by ASIC.

We have also retained a team of senior and junior counsel in Australia, and are in the process of retaining additional counsel in the UK and USA on issues concerning the provisional liquidation. We have retained Ferrier Hodgson to provide us with specialist insolvency advice.

Norman O'Bryan SC, David Denton and David Knott.

We are consulting with the Commonwealth Director of Public Prosecutions to ensure maximum coordination of our resources.

I also want to acknowledge the strong support we have received from the Commonwealth Government which has approved a special line of funding to help underwrite this investigation.

Since this investigation commenced, we have begun the process of seizing and reviewing relevant documents, and have carried out preliminary examinations of some persons considered likely to assist our enquiries. For reasons of security I will not elaborate further on our planning or intentions.

However, I do need to counsel patience and to emphasise the risks that calls for early accountability carry for ultimate justice. It is imperative that the work of ASIC and the DPP be carried out with full regard to the requirements of law and the accepted standards of our judicial system. The public desire for quick answers must be balanced against potential prejudice to the ultimate accountability of responsible parties, which must rank as our foremost objective. In matters of such weight, there are simply no shortcuts and this will be a long and complex investigation.

We have noted recent calls for a Royal Commission or Judicial Enquiry. It is not appropriate for ASIC to express a view of such possibilities. However, if any such enquiry is commissioned it will be important to take account of the work of ASIC and the DPP so that the legal accountability for any unlawful conduct is not compromised or delayed.

In the meantime, it is critical that ASIC's investigations be conducted in confidence and with proper regard to the rights of third parties to due process and natural justice. For these reasons ASIC will not comment after today on the progress of our investigations, other than to comment on significant developments in the public interest from time to time.

At the conclusion of this speech Mr Knott addressed the subject matter of the advised seminar and took questions from those in attendance on HIH and Dot Coms and gave candid and full answers to each of the questions. So much so that all in attendance took away from the evening an understanding that corporate regulation under David Knott as Chairman of ASIC was indeed in good hands.

Angela Edwards, Mahlab Recruitment; Anthony Loschiavo, Isis Communications; and Giles Hunt, Chubb Insurance.

Monika Maedler, Phillip Morris; Angela Clelland, Mahlab Recruitment; Gina Faba, CSIRO.

Albert Monichino; Madelaine Denton, Focus Capital Group; and Richard Short.

After the Change Over

Paul Elliott QC interviewed Mr Justice Peter Nguyen of the High Court of Hong Kong on his recent visit to Melbourne.
His comments on the judicial system, language, appeals, the future of Australian lawyers and Australian wines in Hong Kong are recorded below.

Elliott: Can you briefly explain how the courts work in Hong Kong and, now that Hong Kong is part of China, how the courts and appeals operate between China and Hong Kong?
Nguyen J: The judicial system, pursuant to the joint declaration between the United Kingdom and Peoples' Republic of China has not changed at all since the hand over. The courts are conducted in exactly the same way as they were before the hand over. But as a matter of practice, more Cantonese is used in the courts. In the Magistrates Court, where the majority of our Magistrates are now Cantonese speaking local people, about 80 per cent of the cases are conducted in Cantonese. In the District Court, which is the court one level above the Magistrates Court, there is an even mix of non-Chinese and Chinese judges, about 50 per cent of the cases are conducted in Cantonese. In the High Court where I sit with a jury on criminal trials, only about 10 per cent of the cases are conducted in Cantonese. The rest of the criminal cases are still conducted in English. In the Court of Appeal, if an appeal is from a trial held in Cantonese then the appeal will be heard in Cantonese by three Cantonese-speaking judges of the Court of Appeal. In the Court of final appeal the majority of the cases are still conducted in English except where the applicant is acting in person, and if he's Cantonese speaking, then as far as possible the Chief Justice will convene a panel of Cantonese-speaking judges and the proceedings would be held in Cantonese.

But otherwise everything is done in English.
Elliott: Does this mean that the serious criminals are English-speaking people?
Nguyen J: No, there is full interpretation of the proceedings as there was before the hand over so that anything said in English is translated back to the accused in Cantonese, and anything he says in Cantonese is translated into English.
Elliott: Do you speak Cantonese?
Nguyen J: I do. And I've conducted Magisterial appeals in Cantonese where the original trial before the Magistrate was in Cantonese. Consequently the transcript I get from the trial is in Chinese so I have to read that in Chinese and I conduct the proceedings in Cantonese and write my judgment in Chinese.
Elliott: You sit in the High Court. Is that the equivalent to the Supreme Court here? The Supreme Court of Victoria used to have an appeal division and a trial division. Now we have a separate Court of Appeal. How does it work in Hong Kong?
Nguyen J: The basic law stipulates that the High Court of the Special Administrative region of Hong Kong should be the name for what used to be the Supreme Court, and our High Court now comprises the Court of Appeal and the Court of First Instance, which is the Court that I sit in. In the old days it would have been called the High Court.
Elliott: You said there was another court of appeal. What is the Court of Final Appeal how does that fit into the judiciary?
Nguyen J: Our Court of Final Appeal is the replacement for the Privy Council of London because before the hand over we used to go to the Privy Council for our final appeals. We've stopped doing that since the hand over, and the Court of Final Appeal is our replacement.
Elliott: So all appeals terminate with the Court of Final Appeal in Hong Kong?
Nguyen J: With each appeal there will be four Hong Kong permanent judges, the Chief Justice and three permanent Hong Kong judges, but there is always a fifth Judge who is invited by the Chief Justice to sit on a particular appeal and who is selected from a panel of non-permanent judges. I forget now how many people there are in the list of non-permanent judges, but at any one time we would have two from England, two from New Zealand and two from Australia. The present judges from Australia who are non-permanent judges from the Court of Final Appeal are Sir Anthony Mason and Sir Gerard Brennan.
Elliott: Since the amalgamation in 1997, is there any appeal or any way of going to China or China coming in over the heads of the courts in Hong Kong?
Nguyen J: There is no co-operation as such between the courts of Hong Kong and the courts in China simply because they have a different legal system from us and the joint declaration doesn't provide for such co-operation or collaboration. The only provision in the basic law which allows for going to Beijing is that the Court of Final Appeal, if it is so minded, can refer particular provision of the basic law to the preparatory committee of the

National Peoples' Congress for interpretation. So far that hasn't happened yet, but on one occasion in 1999 the Secretary for Administrative Justice, acting for the government of the Special region of Hong Kong, referred particular provision in the basic law to the NPC for interpretation, which the NPC did interpret. The result of that was that the interpretation of the NPC in effect reversed the whole of the judgment of the Court of Final Appeal.

Elliott: And in what circumstances can an individual appeal?

Nguyen J: It has to be referred either by the government or by the Court of Final Appeal itself. There is no provision in the basic law for an individual to ask the National Peoples' Congress to interpret a particular provision.

Elliott: Have you found that there are lawyers coming in from China to learn about the legal system in Hong Kong and vice versa, and do you think that there will be a trend that those people will be appointed to the Bench from outside Hong Kong?

Nguyen J: We've had lawyers from the PRC come into Hong Kong to work, either as para-legals in solicitors' firms or as para-legals in the Department of Justice. But we haven't had any lawyers from the PRC come into the judiciary. We've had Hong Kong lawyers being admitted to practice as lawyers in the PRC and recently they have opened the doors to Hong Kong lawyers to enable them to not only practice but to start firms within China, so some Hong Kong lawyers have done that. Insofar as PRC lawyers coming to Hong Kong is concerned, there has only been a trickle of lawyers coming to Hong Kong to try and learn about our system.

Elliott: There was a tradition in Australia, in Melbourne, of people going and prosecuting. Is this still going on and are there any Australian barristers left practising in Hong Kong?

Nguyen J: I'm afraid the practice of recruiting from overseas has stopped for both the Department of Justice and for the judiciary. Not so much because of the hand over but probably because of the hand over knowledge of Chinese has now become a requirement for people coming to Hong Kong to work. Consequently since the hand over we haven't recruited anyone from overseas to either the Department of Justice or the judiciary but the lawyers and the judges who were judges and lawyers who worked in Hong Kong before hand over have not been asked to leave and they are still working in Hong Kong. So the answer to your question is yes, there are still Australian lawyers working as judges and prosecutors in Hong Kong. But these are people who were recruited before the hand over.

Elliott: And their future is not under threat?

Nguyen J: No, their future is not under threat at all. They will be allowed to stay until their retirement days. Insofar as promotional prospects are concerned, that hasn't been affected either because in the Department of Justice now, of the five law officers working under the Secretary for Justice, only one is local Chinese and the other four are still expat lawyers.

Elliott: Do you think that English will be eventually phased out as a language or do they still teach English in the schools and promote it?

Nguyen J: English will continue to be used, I think, in Hong Kong because it is an international language and Hong Kong, if it wishes to remain an international city, will have to continue to use English. Insofar as the law is concerned, I think English will continue to be used for a long, long time because all our precedents in the common law are judgments which were written in English, and even if one tries to translate all the thousands of judgments the meaning might be lost after the translations.

Elliott: Judge Duckett on our County Court was the former Deputy Director of Public Prosecutions. Did you work with him in Hong Kong?

Nguyen J: His Honour Judge Duckett was a Deputy Director of Public Prosecutions in Hong Kong. He worked with me after I was appointed the DPP in July 1994 but it wasn't for a long while because shortly, I believe some time in 1995, he was appointed to the County Court Bench here in Victoria. He was greatly admired in the years when he worked in Hong Kong, both as prosecutor and also in his days as acting Solicitor-General, and he was respected by both the Bench and the Bar.

Elliott: Were you appointed Director of Public Prosecutions by Governor Patten?

Nguyen J: Yes, I was one of the two local law officers who were appointed by the Attorney-General in the days when Governor Patten was the Governor of Hong Kong. Governor Patten was very keen that at least some of the law officers should be local people, and it was as a result of that that I think I and the then Solicitor-General, who was also a local barrister, were appointed to be law officers.

Elliott: You actually come from a Vietnamese background. Has that caused any problems?

Nguyen J: I'm actually Vietnamese–Chinese and our family had been in Vietnam for many generations. But I was brought up in Hong Kong so for all intents and purposes I am a Hong Kong person.

Elliott: For those people visiting Hong Kong, what do you think is the best Chinese restaurant?

Nguyen J: My favourite restaurant for Cantonese food is the Sun Tong Lok Shark Fin restaurant in Causeway Bay which, as the name implies, is a restaurant which specialises in shark fin. I would highly recommend that restaurant to anyone visiting Hong Kong, not only for the shark fin but for all its other Cantonese dishes

Elliott: Those of us who have visited Hong Kong have found that Australian wine is very scarce and hasn't broken the market, and indeed a bottle of Jacobs Creek last time I was there was about $60 or $70 a bottle. It's probably gone up since then. Why is it that Australian wines are not widely accepted?

Nguyen J: Australian wines have now become very popular in Hong Kong because a lot of people found perhaps with some justification that the French wines were costing far too much. And Australian wines are now accepted as a wine very much worth drinking. Australian wines are getting some competition now from Chilean and South African wines, but speaking for myself I would always have a bottle from Australia.

Elliott: So if you went to a hotel or a restaurant there would be Australian wine on the menu.

Nguyen J: Oh yes, absolutely. Most of the popular vintages from Australia would be available in Hong Kong and, as I said earlier, the price for an Australian bottle would be far less than a bottle from France and also because of the quality a lot of Hong Kong people are now drinking Australian wines.

Elliott: I understand that you had lunch with Mr Justice Vincent in Hong Kong and discussed some new programs and seminars at Victorian University of which of course he is the Chancellor. Can you give us some details about what the plans are?

Nguyen J: Mr Justice Vincent was appointed Chancellor of Victoria University in January 2001 and he and the Vice Chancellor were in Hong Kong in March to attend a series of graduation ceremonies held in Hong Kong by the Victoria University. The Victoria University will be starting a School of Law and in conjunc-

tion with the University of Cambridge will be conducting a course on judicial studies.

The course for judicial studies will be conducted at the Victoria University's new premises, which they originally acquired from the State Government, which are in the old record office in Queen Street, Melbourne. These premises are being refurbished and will be ready some time next year. The course on judicial education will be conducted by the University of Cambridge in conjunction with the Victoria University.

They will be holding their first seminar to promote that course in September 2001.

Elliott: As a judge, what are your views about going to judge school to learn how to be a judge?

Nguyen J: I haven't been a judge for too long, so speaking personally I would welcome attending courses and lectures to be held as part of judicial studies here in Melbourne by the Victorian University. We in Hong Kong do have a judicial studies board, but what we do in Hong Kong is mainly to have seminars on Saturday mornings or invite visiting eminent judges or lawyers to give us talks. But we haven't got a course on continuing judicial education such as Victoria University has in mind.

Elliott: In the present in Australia there has been some criticism of the judiciary of gender bias. Has this subject been raised in Hong Kong because some people in our present day society think that judges must be trained in this subject?

Nguyen J: I don't think in our common law system there has always been the system of training judges to be judges, and the system that we've known in the common law world is always that judges are appointed from the Bar. In Hong Kong certainly these days, there is wide-spread practice of appointing judges from the private Bar and the idea is that judges should be people who are experienced at the Bar and should be able to utilise their knowledge of the law as a result of their years of practice at the Bar to hopefully become good judges.

Elliott: How many female judges are there in Hong Kong?

Nguyen J: We have four lady judges out of 25. In the District Court the proportion is about the same.

Elliott: And are there any females in the Court of Appeal?

Nguyen J: I believe there is one.

Elliott: Thankyou very much Judge for your time, and I hope to see you when you return on one of your visits.

Actual Hypothetical

David Bennett QC took a walk on Thursday 7 June 2001 across William Street to catch the vibes in an unusual meeting of minds at the Sixth Court of the Supreme Court. This is his report.

***Bar News* Editor:** (on the telephone) There is a case on before Hedigan with Geoffrey Robertson in it. You know, the silk in UK who does those "hypotheticals". Can you write something on it?
***Bar News* reporter:** This is the one against Jeff Sher?
***BN* Editor:** Sher is for Joe Gutnick. Robertson is for Dow Jones. The defendant Dow Jones is trying to get Gutnick's defamation claim against it transferred to New Jersey.
***BN* reporter thinks:** *Only last week, they were only trying to remove Gutnick as President of Melbourne Football Club. This week, somebody is actually trying to go the whole hog and give him a "New Jersey".*
***BN* reporter:** (Looking at pile of paper and hungry PC screen waiting to be fed). "I haven't got time."
***BN* Editor:** It's just after three. Just go over for an hour until stumps and then tell us what you see?
***BN* reporter thinks:** (Reaching for Court notebook) *I will be leaving this job at the end of the month. This will be their last request. I'll give it a go.*
***BN* Editor:** I believe Robertson called Hedigan, "Your Lordship", and Hedigan said, "Is that a promotion?".
***BN* reporter:** That story has been done to death. It was around the Bar in an hour.
***BN* Editor:** It's in the Sixth Court; that funny court upstairs. It's packed — standing room only.
***BN* reporter:** Who? Barristers?
***BN* Editor:** Reporters mostly.

Across at the Supreme Court, *Bar News* reporter makes his way up the 1950s terrazzo stairs to the 1950s Sixth Court.

Bar News reporter remembers the 1960s pre-Family Law Act days when this was the Divorce Court, run with an iron hand, by Barry J. (also a "Jack", like Hedigan J).

The Sixth Court did not generate much excitement in its divorce emanation. The high peak would have been the faintest frisson when a well-known petitioner lodged a Discretion Statement confessing to not having played an absolutely straight bat.

Geoffrey Robertson QC

Jeffrey Sher QC

Today it was different. On the landing, posted outside the court to direct the traffic, was not one tipstaff, but two. They were surprisingly helpful to *BN* reporter given that there were at least five or six people also gathered around the courtroom door.

Opening the green baize door, eager to see live The Man from Hypothetical, the international barrister and television genius who Dow Jones flew across the world to take Joe Gutnick out — in every sense of the phrase.

The striking first impression was of a truly 747 look about the courtroom. The green, high-backed, material-covered individual seats (replacing the original elegant 1950s blonde wood benches) looked for all the world like rows of seats across a Boeing jumbo. Their occupants were sitting, facing forward, with ranging degrees of absorption, just as on take-off. Every seat was full. Only the absence of seatbelts and the spectators standing at the back contradicted the airline image.

There was another evocative symbol that jet age law was in town. By the left wall, on the Robertson team side, there was an enormous, very shiny, smoothly rounded aluminium container. It was like a spacecraft with a handle. The four big rollers at its base easily could have served as launch pads. Barristers commonly have papers in trundle bags, usually covered in modest black fabric, but, although now used for papers, the spacecraft could have begun life containing circus equipment.

At the front of the passengers in their aircraft seats was, in effect, their pilot. Leaning firmly on the bar table lectern, creating a high-hunched back topped by thick grey hair, was Geoffrey Robertson QC. He was well over on Sher's side of the table, in fact, right beside him. Robertson's familiar and distinctive basso tones were caressing to the ear as he addressed Hedigan J.

A quick look at the judge to get a sense of how he was taking things.

No special occasion here — that was obvious. Hedigan J's usual unimpressionable manner was unchanged. He sat in the same seat as had Barry J and obviously had the same control over proceedings. The baton had passed. Jack Barry. Jack Hedigan . . . the memory of the former somewhat dimmed these days. A longer look at Robertson QC. There still was not much visible to describe except his back. Fitted on his leaning frame was a black lightweight suit jacket that may have been, and certainly shrieked, "smooth silk". In West End style, its deep vents reached half way up the leanish back. A half moon outline of a singlet top up near the suit's collar was the price of padding up to allow summer fabric to meet Melbourne's winter. Curiously, the left shoulder of the jacket was corded, crisp and firm, while the right shoulder was battered and uneven, its padding sagging down the arm. This looked like the work of too many heavy shoulder bags on and off aircraft.

Robertson's junior sat well away on Robertson's left. The visual contrast was remarkable. The junior's shining dark hair was tied-back and reached as far down his back as Robertson's vents reached up his. The light glinted on a tortoiseshell hair clasp at the back of the junior's head, and brought out the mottling on his tortoiseshell spectacle frames. The junior's suit stretched tight, very tight, across his bulky frame. No West End fit or shape there.

Sher sat quietly, hardly moving as Robertson intoned beside him.

BN reporter was reminded of his memory of Sher. Sher was sitting at a tiny desk beside the fireplace in Voumard QCs Selbourne Chambers room. Then, Sher looked like a young blackbird ready to snatch a worm. Today, he looked as though he had eaten the worm, had developed a taste and was ready for more.

What was it that Robertson kept saying?

Robertson was dropping the name of a case that he said was "dispositive". It was "dispositive" of this, "dispositive" of that . . . "dispositive" of everything, it seemed. Was it "dispositive", or was it "suppositive"? It seemed that this case may be a sort of juridical snake oil brought to town to be flogged for its general good effects?

Opposite Sher at the bar table sat Hugh Northam, the Clayton Utz solicitor for Gutnick. Almost throughout, Northam was, silently and unshakeably, reading. For all the impact that Robertson's submissions were visibly making on him, Northam could have been reading in a garden summer house as, among nearby flowers, a bee hummed.

Behind Sher sat Joe Gutnick. The first thing to notice was that, for these proceedings, Gutnick had changed his yashmak scull cap. For last week's case about the control of Melbourne Football Club, Gutnick famously wore a yashmak striped in the Melbourne's red and blue colours. Today, the cap was black velvet.

Beside Gutnick, and virtually on top of the opposing Clayton Utz files, languorously lay Robertson's black overcoat. It was open to display a drossy gold lining that made a diagonal gold stripe against the black outer.

Not the Tigers! Robertson couldn't be trailing his coat in this way to seduce Gutnick into a New Jersey with them!

Stretched out along the back of the seat of his companion beside him was Gutnick's arm. It emerged from his suit, hairy and shirt-free, and displayed, on a gold bracelet, an expensively thin gold watch. Gutnick checked around the courtroom occasionally in a friendly, unconcerned way. He seemed quite untouched by the grave things being previewed for him by Robertson QC. Never did Gutnick lose the mien of a host who was giving (and paying for) a party and happy to see that so many guests had come along to enjoy it with him.

The Court day was at an end. Robertson QC's submissions continued. Hedigan J remarked on the time. There was a discussion about finishing. Robertson, it seemed, had made it known that he had to jet out at the earliest. The judge enquired whether there was agreement as to admissions that could shorten proceedings. Robertson said that agreement was "close".

"Not close enough!" Sher QC interjected. He was hungry for worms.

The Court was closed. The judge left. Robertson seemed tired (no surprise) and made communication arrangements with Sher to try to negotiate the gap.

BN reporter watched, intrigued, as Robertson's junior taxied the spacecraft over to the bar table to be re-fuelled.

BN reporter left to telephone the *Bar News* Editor's desk.

***BN* Editor:** Did you get in okay?

***BN* reporter:** There were people standing around the walls.

***BN* Editor:** Did you get anything?

***BN* reporter:** Not much to see, really.

***BN* Editor:** [Silence]

***BN* reporter:** I'll email you something in the morning.

Lawyer in a Accident

A very successful lawyer parked his brand-new Lexus in front of his office, ready to show it off to his colleagues. As he got out, a truck passed too close and completely tore off the door on the driver's side. The lawyer immediately grabbed his cell phone, dialled 000, and within minutes a policeman pulled up.

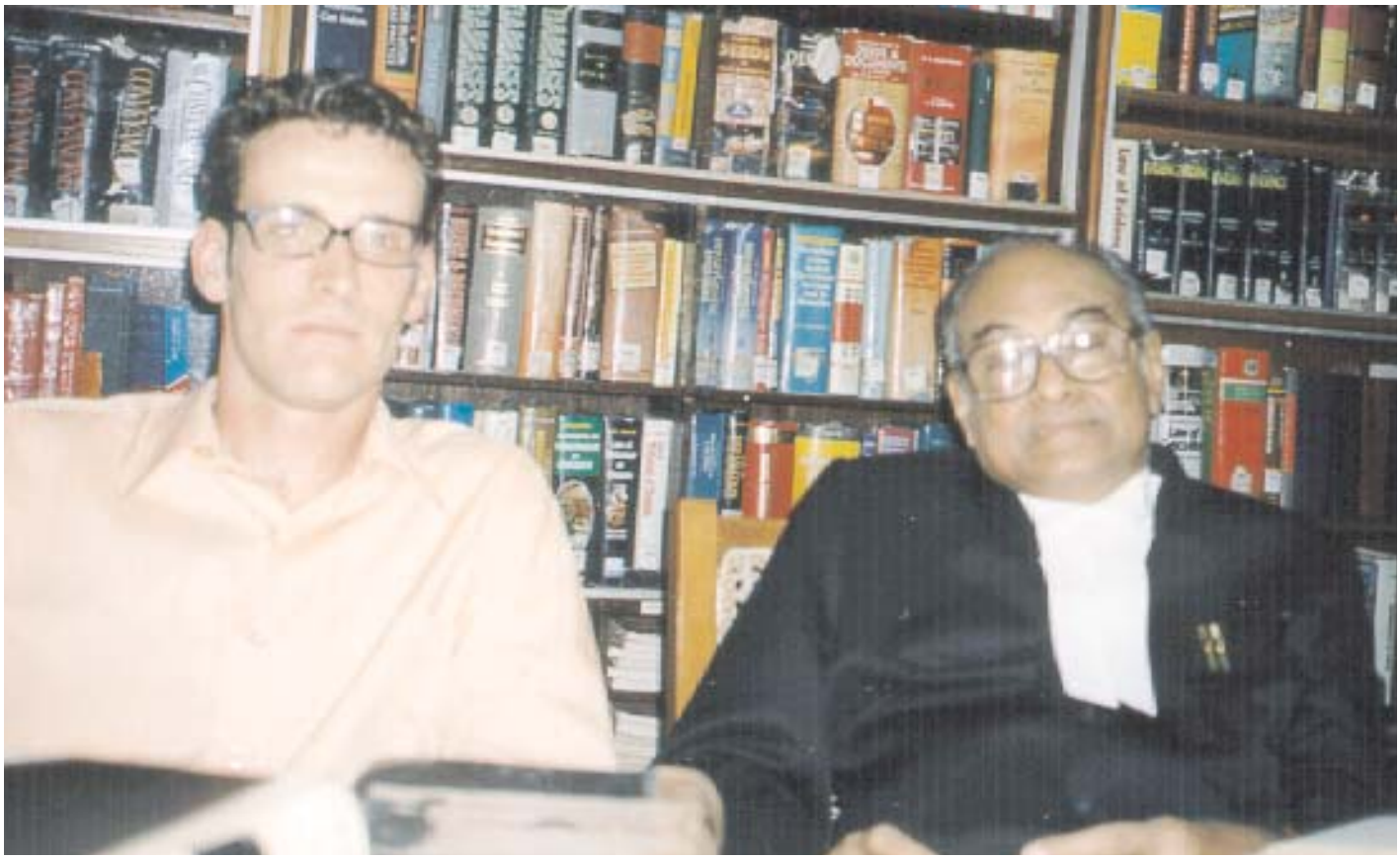
Before the officer had a chance to ask any questions, the lawyer started screaming hysterically. His Lexus, which he had just picked up the day before, was now completely ruined and would never be the same, no matter what the body shop did to it.

When the lawyer finally wound down from his ranting and raving, the officer shook his head in disgust and disbelief. "I can't believe how materialistic you lawyers are," he said. "You are so focused on your possessions that you didn't notice anything else."

"How can you say such a thing?" asked the lawyer.

The cop replied "Don't you know that your right arm is missing from the elbow down? It must have been torn off when the truck hit you."

"My God!" screamed the lawyer. "Where's my Rolex?"



Jim Shaw with Mr G. Masilamani in the library of the Madras Bar Association.

Indian Summer Holiday to Chennai Courts and Bar

CHENNAI, formerly known as Madras, is the capital of the State of Tamil Nadu and the fourth largest city in India. Home of the world's largest film production industry, scene of the second only tied test match, world headquarters of the Theosophical Society and one-time residence of the apostle Doubting Thomas, the city is also the site of what is believed to be the second largest functioning judicial building on earth.

The Madras High Court, the superior court of record in the State, was built in 1892 of red brick in the Indo-Saracenic style. Set in expansive, shady grounds the complex contains 30 courtrooms of the High Court, barristers' chambers, the law school of the University of Madras, the offices and libraries of the rival Madras Bar Association and High Court Advocates' Association, and the inferior Court of Civil Claims.

Arriving unannounced at the Madras Bar Association, I am welcomed by a deferential librarian and introduced to Mr G. Masilamani, Senior Counsel. In a library crammed with counsel working feverishly during lunch hour, he explained to me various aspects of the Indian legal system.

English cases are no longer cited, as Indian common law is now so "voluminous". He notes proudly that this is not so in Australia. The Supreme Court of India (the equivalent of the High Court of Australia) hears and decides 35,000 cases each year! Juries were abolished in 1976. Cross-examination generally lasts about 15 minutes and in a criminal trial, from committal to sentence, "a man's whole fate is decided in one week". This in a land where it can take an hour to purchase a train ticket. Despite such economies, the newspapers are filled daily with articles and letters to the editor bemoaning the enormous backlog of cases.

All documents are typed on antediluvian typewriters. The absence of word processors and a reliance on carbon paper

Barristers' chambers, Madras High Court.

Barristers at the Madras High Court.

Typists outside barristers' chambers, Madras High Court.

in place of photocopiers reduces prolixity and frees the system from avalanches of discovered documents. Paradoxically, when you buy aspirin from a chemist shop or pick up your dry cleaning a receipt is drawn up in triplicate.

All this typing has to be done by someone, and even on Sundays a bevy of middle-aged women sit on the verandah outside barristers' chambers pounding the heavy keys. The chambers are, in short, modest. Indeed, the unrenovated Owen Dixon East and the old Four Courts are palatial by comparison.

Court dress is similar to our own. Wigs are not worn, perhaps as a concession to the stifling heat of this sub-equatorial metropolis. Counsel are robed in all courts, even those of summary jurisdiction. White trousers appear to be *de rigueur*, useful if you have to attend cricket training straight after work. Given India's reputation as a strongly patriarchal society, there are a surprisingly large number of female barristers. They wear gown and jabot (no bar jacket) over brightly coloured silk saris.

The twelfth court is one of the more ornate with its wood panelling and stained-glass window. Slow-moving ceiling fans fail to disturb the dust caught in the shafts of sunlight entering through the coloured panes. Upon entering court, one bows with the hands pressed together in a prayer-like attitude. Today the court is hearing "petitions", something akin to applications or Practice Court business in Victoria. Counsel are crowded around a semi-circular bar table upon which sit piles of bundled documents several feet in height.

Proceedings are in Tamil, with the occasional smattering of English. While matters appear to be conducted in an orderly fashion, counsel are not afraid to shout menacingly at the tiny, withered judge. The language barrier prevents me from ascertaining whether this bellowing constitutes effective advocacy or merely alienates the Bench and ruins one's case. In India people shout at each other incessantly, to express affection, hostility, joy, or sorrow, or simply for no reason at all. I suppose there is no reason why a courtroom should be immune from this custom.

Some days later, on the dilapidated local bus from Chennai to the small sea-side town of Mamallapuram, a man sits next to me reading. He is dressed in the habitual garb of the Indian urban working classes: dhoti, long-sleeved collared shirt, thongs. And what is he reading? *The Contract Labour (Regulation and Abolition) Act 1970*. As Mr Masilamani wisely said — "You must have it all at your fingertips."

Speakers Outnumber the Delegates at the International Law Congress in Nicosia

Between 10 and 14 April 2000 the Cyprus Bar Association played host to the International Law Congress in Nicosia, Cyprus, sponsored by bodies such as the International Bar Association.

A.T. Artemi reports

CYPRUS is an island located in the Mediterranean sea at the crossroads between Europe, Asia, Africa and the Middle East. Although the University of Cyprus does not offer law or medicine, there is still an overabundance of lawyers in Cyprus. It boasts a large fused legal profession of over-qualified lawyers who were compelled to go to the expense of studying law abroad, predominantly in the United Kingdom and Greece. As a result, the competition amongst lawyers in Cyprus is fierce and they are often underpaid. Both common law (probably as a result of the British occupation) and modern civil law (being as a result of its Greek connection) is practised in Cyprus.

The Congress was unique in many respects, particularly in terms of those present. There were more speakers than delegates, fewer delegates than conference organisers (which probably accounts for the large registration fee of up to $US 1836, larger for the Australian delegates who attended when the $A was barely worth half of the $US) and fewer Scandinavians than you would normally find there in July, being European midsummer.

Catching a taxi from the airport to the Congress in Nicosia (LeEkosia) in April is not dissimilar from driving a buggy through a large golf course — suprisingly the island is green and lush and the taxi driver tends to drive anywhere but on the road. One hand is holding the latest mobile phone and the other is busy lighting the next cigarette.

The Congress offered a wide variety of commercial topics through nine sessions running concurrently each day. These included:

a) "Litigation Arbitration and Alternative Dispute Resolution" — Chair: Professor Karl Mackie, Centre for Dispute Resolution (CEDR), UK.
b) "Business, Banking and International Financial Services" — Chair: J.William Rowley QC, Chair, Section on Business Law, (IBA).
c) "Environment, Tourism and Leisure".
d) "Ethics and Human Rights" — Chair: Dr Uwe Kargel, President of the Berlin Bar and Vice-President of the Federation of German Bars, Germany.
e) "European Union" — Chair: The Hon. Janos Kranidiotis, Alternate Minister of Foreign Affairs, Greece.
f) "Law Administration and Law Practice Management" — Chair: The Hon. A. Markides, Attorney-General of the Republic of Cyprus.
g) "IT and Telecommunications" — Chair: Elizabeth Wall, Group Director of Legal and Regulatory Affairs, Cable and Wireless PLC, UK.
h) "Biomedical and Pharmaceutical" — Chair: Sotiris Fellios, President, Council of the Bars and Law Societies of the European Community, (CCBE).
i) "Intellectual Property" — Chair: Susan Flook, Chair, European Corporate Counsel Association.

Kevin Zervos (Hong Kong); female (unknown, Cyprus); Mr Koshis, Minister for Justice of Cyprus; Artemis Artemi and Ruta Olmane (Latvia).

The Congress was attended by speakers and delegates from all parts of the globe including Canada, Hong Kong, Latvia, Africa, Greece, the United Kingdom, Bulgaria, Sweden, Switzerland and Monaco. The large proportion of Eastern block countries attending was important for Cyprus which has recently been invited to join the European Union.

Cyprus.

Julie Owen (Canada); Christina Varnavides (Cyprus); Vaso Rousounides (Cyprus); Lucy Owen (Canada) and Ruta Olmane (Latvia).

By far the most attended session was that of Human Rights. And why shouldn't it have been? For Nicosia is possibly the only remaining divided capital in the world, with the Turkish occupation of the northern part of Cyprus, having been a fact of Cypriot life since the summer of 1974. Occupation which has retained the longest United Nations peacekeeping forces on the "green line" and still without a peaceful resolution in sight. The Turkish occupation of northern Cyprus is not recognised as its own sovereign State by any country in the world other than Turkey itself.

A retired lawlord from Scotland also discussed the Pinochet trial. There were also troubling and topical issues such as cloning of human beings where two Italian professors in favour of cloning invited some very thorny questions. Genetic engineering will no doubt attract litigation in one form or another.

I found one of the more entertaining sessions to be the Litigation, Arbitration and Alternative Dispute Resolution session where at one stage I wasn't sure whether the dispute between an American attorney and a German lawyer mediated by an English Supreme Court Justice was part of a workshop or an actual dispute that arose during the course of the session. Fortunately costs were not in issue.

The Congress was a success on both the professional and social side, although the social aspect made a bigger impression. It was a delight to see the Minister for Justice of Cyprus dancing Zembekika with delegates. The Cypriot hosts were warm and proactive, taking every opportunity to make the delegates feel welcome, often hosting cocktail functions at their offices and even organising gratuitous transportation to the next function, often a Greek "night" with the entertainer performing his usual routine of placing 30 drinking glasses on his head while dancing.

Personally, my highlight was the casual and impromptu visit to a genuine Greek restaurant with one of the hosts, a dingy dark taverna located metres from the green line with tables and chairs dating back to the year dot. Each table had a tambourine, and patrons were free to sing and dance on, or under, the tables while the two-piece band played traditional Greek songs. The cuisine was simple — mezethes, appetisers — pickled octopus, dips, calamari, saganaki (fried sheep's cheese), olives and a small bottle of ouzo, to begin with. Naturally the owner of the taverna insisted we stay on to watch a free display of plate breaking (not deliberate I might add) and to hear his theory that Jimmy Hendrix was inspired by the bouzouki to learn guitar.

Cyprus is very much its own culture. Miss Universe hosted in Nicosia by the Americans in May 2000, Wooden Spoon at last year's Eurovision singing contest and the International Legal Congress where any Canadian can attend in April and still arrive home all tanned. Perhaps solariums sell well in Cyprus after all.

All's Well That Ends *-al*

LOTS of English words end *-al*. Words of this form generally fall into one of three groups:

1. There are nouns which become adjectives by adding the adjectival suffix *-al*; this is very common. Some of this first group become nouns again without changing their form.
2. There are verbs which become nouns by adding the noun suffix *–al*. There are about a dozen common examples of this pattern. Some of these are subsequently pressed into service as adjectives without change of form.
3. Then there are words whose form suggests that they follow one or other pattern, but which turn out to be spurious imitators.

The adjectival suffix *–al* generally means *of the kind of,* or *pertaining to.* It reflects the Latin suffix with the same meaning *-al*, *-alem*. Added to many nouns, it creates a convenient adjective for the associated noun, as for example: *navy — naval*, *norm — normal*; *vestige — vestigial*; *tide — tidal*, etc. There are hundreds of examples of this from *abdominal* to *zonal*. Woody Allen famously lampooned this pattern in his Eggs Benedict sketch, in which he complains of a pain "in the chestal area".

A few of the adjectives formed this way become nouns again, without further change of form. Sometimes, the fact that the adjective was originally formed from a corresponding noun is obscure or forgotten. Examples of this progression from noun to adjective to noun again are: *commercial*, *confessional*, *periodical*, *journal*, *paralegal*, *terminal*, etc. *Aboriginal* is often enough used in place of *aborigine* to be recognised as a noun, although purists continue to protest; likewise *oriental* and *continental* for residents of the orient or continental Europe, although these are now disparaged as pejorative. Other, less obvious, examples are *chemical*, and somewhat differently *pedal. Chemic* was another name for an alchemist, but seems to have faded from relevance before even the alchemists themselves. *Pedal* comes from Latin *ped*: foot. *Pedal* was originally an adjective, but is only used as an adjective in the special case of the *pedal pipes* of a pipe organ. They are the pipes activated not from the keyboard — the manuals — but by depressing levers with the feet.

There is a small group of nouns which end *-al* and which result from a parallel use of the suffix. In all its glorious chaos, English can accommodate the use of the suffix not only to convert a noun into an adjective, but also for the quite different task of converting a verb into a noun.There are about a dozen words in ordinary use which follow this pattern. It is uncommon, but easily recognised: *commit — committal*, *dismiss — dismissal*; likewise *arrival*, *approval*, *recital*, *rehearsal*, *survival*, *trial* and (less obviously) *reprisal* from the archaic meaning of *reprise*: to retake property by force. Fowler (1926) disparages the lazy use of this device to create new nouns where there is an available alternative. His list of bastard nouns formed this way includes *accusal*, *beheadal*, *revisal* and *refutal*. It is difficult to lament their early demise. But his list also includes *appraisal*, which is now indispensible to the antiques and real estate trades. The Gowers edition of Fowler (1968) raises the white flag by dropping *appraisal* from the list of words to be avoided.

Then come the impostors. *Bridal* and *burial* seem to fit the first and second patterns respectively, but their origins are quite different. *Bridal* was originally *bride-ale*: quite literally the ale drunk at the feast for a newly married bride. It was a noun, not an adjective. Its meaning gradually broadened to embrace the festivities associated with a wedding, and then (as the pattern of the Latin suffix became stronger) it was taken for an adjective. It is not used as a noun any more, although Scott and Tennyson used it as a noun, for archaic effect.

Burial is an Anglo-Saxon word (originally spelt *biriel*, *beryel*, *buriel*, etc.). It originally meant a burying place, grave or tomb and later came to mean the act of burying. It appears to be, but is not, formed on the verb *bury* with the noun suffix. It serves both as a noun — the act or service of interment — and almost as an adjective, in combinations such as burial chamber, burial feast, burial procession.

To these curios can be added; *arsenal* (originally — and tortuously — from the Arabic *dar al cina ah*: place of the making); *canal* (reflecting the Latin *canal -em*); *capital* (from the Latin diminutive of head *capitulum*); *metal*, from Latin *metallum*: a mine; and *pedestal*, from the Italian *pie di stallo*: the foot of a stall or shed.

Another example is *admiral* which could, by its form, seem to be related to the verb *admire*. For a short time in the 17th century it was in fact used as meaning *admirable*. However, in its normal, naval meaning it derives from the Arabic *amir al ma*: commander of the sea. The *amir* from which it comes means a commander, and is the same word as *emir*, from which the United Arab Emirates get their name. *Emir* is also a title of honour borne by descendants of Mahommed.

* * * * * * *

As *bridal* is something of a linguistic imposter, so *bridegroom* conveys a false idea of its true origins. A *groom* is a person who tends to animals, especially horses, by currying and feeding them. It comes from the Anglo-Saxon *grome*, a boy or attendant. The original *bridegroom* was the Anglo-Saxon *brydguma*, that is a *bride man*. It gradually shifted its form to *brydgome* and from there the influence of *grome* (attendant) caused a change of form without a concomitant change of meaning. He does not groom the bride: in fact the Anglo-Saxon tradition forbids him to see her on the wedding day until the wedding ceremony begins and all the grooming has finished.

Another expression which suggests grooming is *curry favour*. The currycomb is used to groom a horse. The original expression in French was *estriller fauvel* meaning to curry a fauvel. A *fauvel* was a horse of brownish or reddish yellow. But more than that, it was a specific horse in a 12th century French story: a horse which represented fraud and deceit. In the context of the story, the warning not to curry fauvel was advice to avoid wasting care and effort on a deceiver. When the expression came to England, *fauvel* was misunderstood for *favour* and it was so used by 1500. It is probably for this reason that *currying favour* has a pejorative tinge, although it now speaks poorly of the groom and not the horse. As adopted and varied in English, it makes no literal

sense at all, but we understand it because we deem it to mean what it once meant in French.

The Spanish were not seeking to curry favour when they coined the word *flamenco*. The word, which now stands for a proud element of Spanish cultural tradition, was once a disparaging term for natives of Flanders. Those whom we call Flemings the Spanish called *vlamingo* and then *flamenco.*

The Spanish also have the word *batador*: a person who administers a beating, or the instrument used for the purpose. It reflects the pattern of *matador*, *picador* etc. It is useful for the Spaniards, no doubt, but also left a small mark in English. The Spanish *batador* came into English and became *battledore*: a paddle-shaped instrument once used for beating garments during the wash, or flattening them as they pass through the mangle; also the flat-ended instrument for placing loaves in an oven, or taking them out again, and a paddle for a canoe. (Despite the similarity of sound, *paddle* owes nothing to *battledore*).

The game we now call *shuttlecock* was called *battledore and shuttlecock* until the end of the 19th century. The *shuttlecock* (or *shuttlecork*) was the piece of cork or other light material with a crown of feathers; the *battledores* were the bats used to hit it across the net. In Pickwick Papers, Sam Weller says: "Battledore and shuttlecock's a very good game, vhen you an't the shuttlecock and two lawyers the battledores, in which case it gets too excitin' to be pleasant."

The name of the game has changed, but Weller's sentiment is undimmed in application. Dickens probably did not intend it as a compliment to barristers. He did not like lawyers much, although his son Henry was called to the Bar three years after Dickens died, and later became a leading counsel and was knighted. If coincidence can be permitted to overtake irrelevance, it happens that Sir Henry Dickens once tried a case in front of Hawkins J in which his first witness was a gentleman called Mr Pickwick!

Julian Burnside QC

Eminence Grise

The man behind John Elliott?

John O'Bryan believes he has discovered the secret of John Elliott's commercial success.

The Stefan Kiszko Case

Julian Burnside QC

THE headnote in *R* v *McKenzie* [1993] 1 WLR 453 reads:

> Where the prosecution case depends wholly on confessions, the defendant suffers from a significant degree of mental handicap and the confessions are unconvincing to a point where a jury properly directed could not properly convict on them, the judge should take the initiative at any stage of the case in the interests of justice and withdraw the case from the jury.

One of the cases cited in argument, but not referred to in the judgment, is *R* v *Kiszko* (unreported) 18 February 1992, CA.

Stefan Kiszko was convicted of murder 25 years ago — on 21 July 1976. The victim was 11-year-old Lesley Molseed. She had been stabbed to death on the Yorkshire moors. The killer had ejaculated on her underclothes.

Kiszko spent the next 16 years in prison. He was released in February 1992 after the decision of the Court of Appeal. He had collapsed mentally and physically.

Stefan Kiszko was innocent. Lesley Molseed's real killer has never been prosecuted.

* * * * * *

Stefan Kiszko was the son of a German mother and a Ukrainian father who had fled to England after the second world war. They were hard-working ordinary folk who lived in Rochdale in the north country and were proud of their son when he got a job in the tax-collector's office: he was the first in the family to wear a suit and tie to work.

Stefan was a large child-man: although apparently of average intelligence, he was grossly immature because of hypogonadism — his testes were completely undeveloped. This condition was not diagnosed until he was 23. As a student, he had been the butt of schoolyard jokes; when he began work as a clerk, he became the butt of office jokes. He had no friends, and no social life beyond his parents and his aunt Alfreda. Then his father died, and he had only his mother and aunt — but he wanted nothing more. He was a lumbering, good-natured child in a man's body.

Lesley Molseed was a small, frail 11 year old. She lived in Rochdale with her mother and stepfather. On 5 October 1975, she agreed to go down to the shop to get some bread. Her body was found three days later, on the moors nearby. She had been stabbed 12 times. Her clothing was undisturbed, but the killer had ejaculated on her underwear.

An enormous police investigation began when the body was found. The police took statements from over 6000 people, including girls in the Rochdale area who had seen a man indecently exposing himself during the weeks immediately before Lesley Molseed was killed; and people who had seen vehicles in the parking area near the place on the moors where the body was found.

Two girls identified Kiszko as the man who had exposed himself to them. Police quickly formed the view that Kiszko fitted the profile of the person likely to have killed Lesley Molseed. They pursued evidence which might incriminate him, and ignored leads which would have taken their enquiries in other directions.

The police questioned Kiszko closely. They were convinced he was the murderer, and they seized on inconsistencies between his various accounts of the relevant days as further demonstration of his guilt. They paid no attention to his gross social backwardness; they did not tell him of his right to have a solicitor present; when he asked if he could have his mother present when he was questioned, they refused; they did not caution him until well after they had decided he was the prime suspect.

Kiszko made a confession, which he retracted shortly afterwards. He explained that he had confessed because the police had assured him he could go home to his mother if he told them what had happened.

* * * * * *

The trial began on 7 July 1976. Kiszko was defended by David Waddington QC and Philip Clegg. The prosecutor was Peter Taylor QC (later Taylor LCJ) with Matthew Caswell.

The defence made three significant mistakes:

First, they did not seek an adjournment when the Crown delivered thousands of pages of additional unused material on the first morning of the trial. Among the additional material was a statement by a taxi driver who admitted being the person who had (inadvertently) exposed himself in front of the two girls: it was the incident which had initially attracted police attention to Kiszko; it was an incident to which he had confessed in his statement to police. It gave the clearest grounds for suspecting the reliability of Kiszko's confession.

Second, instead of seeking to exclude the confession on a *voir dire*, they sought to impeach its voluntariness and veracity in the course of the trial itself. This meant not only that the jury saw the confession, but also that they heard all of Kiszko's pitiable frailties and shortcomings as a human being.

Third, and most difficult to understand, they ran inconsistent defences. Kiszko had recently been put on a course of hormone treatment to deal with the consequences of his immature testes. The scientific evidence was that this could cause uncharacteristic changes of mood, although even here the defence put forward an exaggerated version of the likely effects. So the defence involved a denial that Kiszko committed the murder, coupled with a defence of diminished responsibility: "If he did it, it was because of the hormone treatment which turned him into a sex monster." It is hard to imagine how any jury could exclude the effect of the second defence from their consideration of the first. In any event, Kiszko's endocrinologist would have said (if called) that the effect of the hormone treatment was only to exaggerate existing personality traits, and that the effect of the hormones on Kiszko would certainly not have caused him to commit a crime so grotesquely at odds with his normal personality.

Kiszko appears not to have been consulted about the second line of defence. From first to last (apart from the retracted confession) Kiszko insisted that he had never met Lesley Molseed, and did not kill her.

He was convicted and sentenced to life imprisonment.

* * * * * *

For a person convicted of sexually molesting and killing a child, life in gaol is hard. Kiszko was frequently beaten by other prisoners, and eventually retreated into a world of private delusion, in which he was the victim of an immense plot to incarcerate an innocent tax-office employee in order to test the effects of incarceration. He ultimately came to believe that even his mother was party to this elaborate conspiracy.

Meanwhile Kiszko's mother was the only person who clung tenaciously to a belief in his innocence. She pleaded his case to anyone who would listen. She was steadfast in her certainty that Stefan was innocent. As her entreaties became more desperate and forlorn, so her audience became less receptive. But eventually, in 1987, Campbell Malone agreed to take a look at the case. He consulted Philip Clegg (who had been Waddington's junior at the trial). Clegg expressed his own doubts about the confession and the conviction. After lengthy investigations, they prepared a petition to the Home Secretary. The draft was finally ready on 26 October 1989. On the same day, by the most remarkable coincidence, a new Home Secretary was announced: David Waddington QC MP. Despite (or perhaps because of) Waddington's exquisitely delicate position in the matter, more than a year passed before a police investigation into the conduct of the original trial was begun.

Detective Superintendent Trevor Wilkinson was assigned to the job. After a great deal of painstaking work, Wilkinson's team of investigators discovered four vital things:

First, that the additional unused material disclosed to the defence on the first day of the trial included crucial evidence, but the late disclosure had made it impossible for the defence team to pursue the ramifications of that evidence; the evidence, if pursued, would have cast doubt on the reliability of the confession.

Second, the matter of the two girls who identified Kiszko as the person who had exposed himself to them. Their statements had been read to the Court; they were not cross-examined. During the investigation in 1990, the girls (by then they were mature women) admitted that they had made up the story: they had simply seen the taxi driver urinating behind a bush.

Third, that the pathologist who examined Lesley Molseed's clothing had found sperm in the semen stains on the underwear. This fact had not been disclosed to the defence or the Court.

Fourth, that the police had taken a sample of Kiszko's semen at the time of the investigation: it contained no sperm at all. This fact had not been disclosed to the defence or the Court.

It therefore became apparent that the evidence led against Kiszko had been flawed and partial, and that vital evidence had been withheld from the Court and from the defence.

These investigations culminated in an application which was heard by the Court of Appeal on 17 and 18 February 1992. At the conclusion of the argument, the appeal was allowed. Lane LCJ said:

> It has been shown that this man cannot produce sperm. This man cannot have been the person responsible for ejaculating over the girl's knickers and skirt, and consequently cannot have been the murderer.

On the same day, Peter Taylor QC was appointed Lord Chief Justice.

* * * * * *

Kiszko was released immediately. He needed nine months rehabilitation before he could go home to his mother. He received 500,000 pounds in compensation for his 16 years in prison. However his physical and mental health had been destroyed. He died eighteen months later, aged 41. The date of his death was 23 December 1992: exactly 18 years after his arrest. His mother died six months later.

The Court of Appeal decision by which Kiszko was released is not reported. So far as the legal system is concerned, the life it destroyed is nothing but a footnote in *R* v *McKenzie*.

Conference Update

20–21 July 2001: Melbourne. AIJA Magistrates Conference. Contact AIJA website at www.aija.org.au.

2–3 August 2001: Townsville. Contact Australian Institute of Criminology, e-mail: Julie.Dixon@aic.gov.au. Tel: (02) 62 609 229.

9 August 2001: Centre for Law in the Digital Economy (CLiDE) Inaugural Lecture and Afternoon Symposium. Inaugural Lecture: Winners and Losers: the Internet Changes Everything or Nothing? Free. 6–8pm. Speaker: Professor Michael Froomkin, School of Law, University of Miami. Respondent: Mr John Rimmer, Chief Executive Officer, National Office for the Information Economy (NOIE)

Afternoon Symposium. $99 (including GST) 3pm–5.15 pm "Virtual Finance andActual Rules: Regulating Online Firms and Financial Portals" Professor Caroline Bradley, School of Law, University of Miami. "Electronic Banking and Payments Regulation" Mr Mark Sneddon, Partner, e-Commerce, Information Technology and Privacy Team, Clayton Utz, Melbourne. "Scams, Lies and Information: Investment Advice and the Online Investor" Professor Dimity Kingsford Smith, CLiDE, Monash Law.

For further information: www.law.monash.edu.au/clide

12–19 August 2001: Thredbo, NSW. The Australasian Legal Conference.

16–19 September 2001: Vancouver. Australian Rules and Probate Conference 2001. Contact Patricia Palman. Tel: 9602 3111. e-mail: lpd@leocussen.vic.edu.au.

20–26 September 2001: Rome, Italy, Pan Europe Asia Legal Conference.

21–23 September 2001: Hobart, 19th AIJA Annual Conference. Contact AIJA website.

4–8 October 2001: Christchurch. Law/Asia and New Zealand Law Society Conference 2001. Contact Conference Innovators. Tel: 64 3379 0390. e-mail: info@conference.co.nz.

8–9 October 2001: Best Practice in Corrections for Indigenous Prisoners. Contact. Julie Dixon. Tel: (02) 6260 9229. 11–14 October 2001: Canberra, 32nd Australian Legal Convention of the Law Council of Australia. Contact Susan Burns. Tel: (02) 62473788. e-mail: susan.burns@lawcouncil.asn.au.

25–26 October 2001: Brisbane. Police and Partnerships in a Multi-Cultural Australia: Achievements and Challenges. Presented by the Australian Institute of Criminology. Contact Julie Dixon. Tel: (02) 6260 9229. e-mail: Julie.Dixon@aic.gov.au.

2–5 July 2002: Prato, Tuscany. International Institute of Forensic Studies inaugural conference on Expert Evidence: causation, proof and presentation. Contact: Jenny Crofts Consulting on (03) 9429 2140.

Exhibition of Paintings

The Australian Outback by Robert Fisher

SOME weeks ago, on the one night, Robert Fisher was to be found in two bars at the same time, some 2000 kilometres apart, "as the crow flies".

Figuratively true that is, on the ceiling of the bar in the William Creek pub, and on the walls near the bar in the Essoign Club.

Worldly wise at 16, Rob and a mate boarded the "Ghan", aiming to ride an uncle's camels outback across the desert, from the Alice.

Floods stranded the Ghan at the William Creek train stop, where the mates' cash soon ran dry at poker play.

And there were no camels at the Alice, there was no uncle at the Alice, — but there was a pub or two, if you got a job, to get a bob or two.

During the tough and tumble run of years that followed, Robert's mind revisited the vast dry, red landscapes, that explosively grew green in a thundering big wet, lightning-lit, where the next night's moon loomed larger than the star-specked space about it.

One day Robert would return to William Creek, ancient base for the Afghans brought to labour on this remote Australian rail track.

One day he would show the way he saw the limitless space and richness of place, in this outback.

Four years ago, Robert Fisher found a modern way to survey the timeless land.

From an airstrip close by the venerable pub, Wrightsair flies Robert high above Lake Eyre's surrounds, aerially adventuring directly — "as the crow flies" — to Mount Isa, Broken Hill, Leigh Creek, Birdsville, Port Pirrie, Port Augusta, Roxby Downs, with some-time touch-downs to swim in a cooling creek, like the Cooper, and the Diamantina.

Lake Eyre is the central outback "sink" for Australia's northern river system, nature's rugged patterns causing the lake to be salt-pan dry for some thirty years past, Robert chancing to see last year's monsoonal floods filling it to seventy percent — since evaporated.

Millennia ago, flooding seas, stormy deluge, volcanic thrusts, tearing winds and searing sun, have left a twisted, torn and worn terrain in Australia's outback crust.

Kerry and Michael Willis of Kallista with the artist Robert Fisher at the Essoign Club exhibition.

Vast areas are combed by gigantic runnels or gutters that over countless time have conducted the run of northern flood waters towards the Lake Eyre sink, deposited silts forming the runnel walls, maps showing these fluted plains as "channel country".

Enspirited by this striking scenario, seeing it in all its seasons, Robert Fisher returns to his studios at Melbourne and at William Creek, and commits his measure of the moment to canvas.

The dynamic rhythyms, sweeps, swirls and colours of the land, in the wet, in the dry, sun-shone and moon-lit, inspire Robert Fisher's powerful paintings, they tell us of this artist's particular, personal and passionate response to the shaping forces of nature.

Fisher's works are fast gaining international acclaim. This month in London Marita Hayes-Brown shows Roberts' "as the crow flies" series at the Australian high commission at Australia House, "depicting the many moods of the Australian outback".

Don Hendry Fulton

Judge Michael McInerney, Judge Timothy Wood, artist Robert Fisher and Don Fulton.

Michelle Williams and Denis Connell.

Criminal Law Investigation and Procedure Victoria

Edited by Ian Freckelton
LBC (now Lawbook Co.)
Information Services, 2000
Three volumes, loose-leaf

CRIMINAL Law Investigation and Procedure Victoria is a three-volume loose-leaf service consisting of legislation, commentary and legal analysis. It covers both indictable and summary offences and it contains a detailed analysis of investigative powers, trial procedures and post trial matters. The service is edited by Dr Ian Freckelton, who is supported by 15 talented authors, all of whom have a very high level of expertise both in criminal law and its practical application in Victoria.

The first volume commences with an analysis of the general principles of criminal law. It then sets out the Victorian Crimes Act, followed by narrative chapters on homicide, violence offences, sex offences, dishonesty offences, property offences, public order offences and offences against justice. The first volume concludes with annotations to the Drugs, Poisons and Controlled Substances Act and to the Occupational, Health and Safety Act.

The second volume contains extensive material on the investigative process, in particular arrest, questioning, identification (both traditional and scientific), search and seizure and electronic surveillance. The second volume also covers the pre-trial procedure, the trial procedure and post-trial issues.

The pre-trial issues covered are bail, committal proceedings and *nolle prosequis*. The trial issues covered are presentment arraignment and pleas, mental impairment and unfitness to be tried, mental health and intellectual disability, general trial issues, juries, trial on indictment and the Evidence Act. Post-trial issues covered are sentencing and appeals.

The second volume is completed by chapters on confiscation of assets, coronial investigations and victims of crime assistance.

The third volume deals with summary offences. It supersedes *Paul's Summary Offences*. This volume contains an overview of summary trials followed by annotated legislation in respect of summary offences, vagrancy, unlawful assemblies, crimes family violence, control of weapons, firearms, road safety, domestic (feral and nuisance) animals, prevention of cruelty to animals, fisheries, classification (publications, films and computer games) and lotteries, gaming and betting.

The Commonwealth Crimes Act and the Children and Young Persons Act will be included in the service in the near future.

This service will be an extremely useful tool for all levels of practitioners of criminal law and associated areas of law. It is a service to which its authors and editors have committed to updating on a regular basis. It includes almost all Victorian legislation (both Acts and Regulations) relevant to criminal law, and it provides the most current and comprehensive coverage of criminal law, investigation and procedure in Victoria today.

Kerri Judd

Historic Court Houses of Victoria

Michael Challinger
Palisade Press
pp. 1–231

AS the title to the book suggests, this book is written about the Court Houses of Victoria. Michael Challinger has travelled throughout Victoria and has photographed and written about the various Court Houses, large and small, throughout the State. This is not a book of photographs, but is a well-researched account of those Court Houses which first administered justice in the colony and then later in the State. Together with the bank and the town hall or shire offices, these were a major public building in any small community. Regrettably, a lot of those Court

Houses have been closed, but the buildings have remained and are now being used for other public purposes.

Some three years ago, the author tells us, he was driving through Minyip, which is found to the north-east of Horsham. He was interested in finding the old timber Court house that had been built there in 1886. Unfortunately it had been demolished and, as he has written, "so was lost a small part of Victoria's history — and a large part of Minyip". The idea for the book sprang from that visit.

For those of us who are acquainted with the old courts of Petty Sessions and later Magistrates' Courts, reading the book is like a trip down memory lane. An example is the old Kilmore Court House. As with every example, a photograph of the old bluestone building appears. The author tells us its address, where it was built, who was known to be the architect and the cost of construction. In each entry Michael Challinger provides a history of the Court House and an anecdote of some event that occurred. With respect to the Kilmore Court House, he recounts in November 1905 it was the scene of the so called "Kilmore flogging case". I will not spoil the story so you will need to buy the book to find all about that celebrated incident. There are similar examples from the 158 Court Houses he has visited.

The author has included a map of Victoria showing the Court Houses that he has visited. In particular he has included detailed maps of the central goldfields where much court business was done in the early days of the colony. He has also listed the heritage classification of each of the Court Houses at the back of the book, and includes details of the sources on which he has relied, including extensive end notes.

This a thoroughly enjoyable book, well written and indexed, bound and presented. It will have an attraction to a wide range of people, not only for those who are concerned with the law, but also for those who are interested in the historical development of Victoria and its towns.

John Kaufman

Business Law in Australia (10th edn)

By R. B. Vermeesch and K. E. Lindgren

PROFESSOR Vermeesch and (presently Justice) Lindgren first published *Business Law in Australia* in 1971. In keeping with earlier editions, the tenth edition is still very much intended as a general guide to business law from a student or lay perspective. It nonetheless provides a comprehensive review of a wide range of commercial law subjects suitable for a practitioner in general practice.

The format and layout of the book is simple and easy to understand; the liberal use of case references invites an exploration of relevant legal principles, which underlies its value as an adjunct to formal classes and lectures. The writing style is direct, and students of gender neutrality will note the use of the female pronoun employed in even-numbered chapters.

Perhaps not only as a reflection of its subject matter but also of the immense changes in increasingly specialized areas of commercial law the tenth edition runs to 31 chapters. The learned authors are now assisted by 12 contributors.

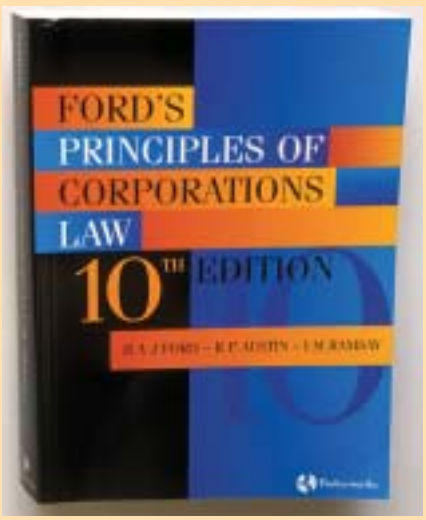
Despite the book's student or lay focus its use to practitioners lies in its successful marshalling of a wide range of specialised areas within a single volume. The previous editions of this book enjoyed a well

Ford's Principles of Corporations Law (10th edn)

By H.A.J Ford, R.P. Austin and I.M. Ramsay
Butterworths 2001
pp. i–ix, Table of Cases xi–lxic Table of Statutes lxv–xciii, xciv–cvii, 1–1363, Index 1365–98

At first glance the tenth edition of *Ford's Principles of Corporations Law*, appears smaller and slimmer than its predecessors. Somewhat anxiously I ventured into the text to find out whether desperate editors had achieved a miracle of slimming and downsizing by wholesale excising and remodelling this classic text. Fortunately this has not happened and the real explanation for the slimmer text is finer paper (there are over 300 additional pages in the tenth edition compared with the seventh edition) and what appears to be slightly closer typesetting.

This book (in line with the author's



modest ambition for the first edition) is a text for students of law and commerce. Although there has been since the seventh edition a loose-leaf version of *Ford's Principles of Corporations Law*, the book version remains the pre-eminent resource for lawyers, accountants, government and business throughout Australia.

The tenth edition incorporates changes arising from the enactment of the *Corporate Law Economic Reform Program Act 1999* in the areas of company directors' and officers' obligations; accounting standards; the introduction of a statutory derivative action (cf. the rule in *Foss* v *Harbottle*); amendments to the takeover and compulsory acquisition provisions; and changes to company's ability to raise funds by the issuing and sale of securities.

While the Corporations Law provides the framework and text that regulates corporate entities, it is this work (together with the loose-leaf version) that provides insight and understanding. The text is accessible and authoritative. It provides explanation and analysis whilst also enabling the reader to translate technical insight into practical applications.

This work while slimmer retains all of the substance, style and scholarship that has made it an indisputable legal classic for students and practitioners alike.

P.W. Lithgow

deserved reputation as a standard text in business law; the tenth edition maintains and enhances that reputation.

Neil Rattray

Retail Tenancies (3rd edn)

By Dr Clyde Croft SC
Leo Cussen Institute

Dr Clyde Croft SC's excellent work on retail tenancies has expanded from the slim volumes constituting the first and second edition (and 1995 supplement) into an excellent loose-leaf service published by the Leo Cussen Institute.

This work deals comprehensively with the *Retail Tenancies Act 1986* and the *Retail Tenancies Reform Act 1998*. To aid the work's practical utility there is the inclusion of LIV standard form leases in use since 1986 and the full text of the 1986 and 1998 Acts, together with the relevant regulations. In addition, the work also deals with relevant trade practices legislation (including the *Fair Trading Act 1985*) and dispute resolution focusing on VCAT practice and procedure.

As the author notes in his preface to the 3rd edition there is and continues to be developments in terms of case law, arbitration awards and legislative changes which impact directly on the landlords and tenants operating under the retail tenancies regime.

While it is generally intended that the loose-leaf format will enable updating to take place at appropriate intervals, it is significant that the table of VCAT retail tenancies decisions (found at Part G) can be updated without charge via the Leo Cussen Institute website.

The Index contains a table of cases and table of legislation together with a comprehensive subject index that enable ease of reference to those using this text.

Despite its somewhat daunting size (which is perhaps inevitably the result of the technical and complex nature of the retail tenancies legislative regime) the work is available at a very moderate cost. Further, *Retail Tenancies* ought be considered an indispensable resource and reference for those involved in advising and implementing retail tenancy arrangements.

Dr Croft is to be commended on his scholarship and comprehensive coverage of this difficult area of the law. This work is sure to find a niche on the bookshelves of all those whose practice is touched by the requirements of retail tenancy legislation.

P.W. Lithgow

Criminal Laws

Materials and Commentary on Criminal Law and Process in New South Wales (3rd edn)

Brown, Farrier, Neal and Weisbrot
The Federation Press 2001

IN the first edition of this book in 1984 the authors decided upon a novel approach for the presentation of material that would challenge assumptions, stress contemporary issues, emphasise relationships within the New South Wales criminal law system and provide provocative commentary.

This latest edition continues this approach with the result that practitioners have a text of both reference for the structure of the judicial system and the various elements of criminal offences..

The authors use Chapter 1 to address various themes including general concepts and principles. This chapter sets the tone for the rest of the work and thus should be read with interest.

Chapters 2 and 3 deal with apprehension of crime and the criminal process.

Chapters 4–11 address specific crimes and the elements thereof, whilst Chapter 12 attempts the difficult task of explaining the background to sentencing and penalty. The authors avoid discussion of innovative sentencing options and this disappoints given the contribution they could be expected to make.

The end result is a work that any practitioner in the criminal law field can gainfully read, and this is facilitated by the use of Commonwealth and other State legislation and case law. No doubt a number of the propositions can be challenged but overall it is an excellent reference written in a stimulating fashion.

John L. Bushby

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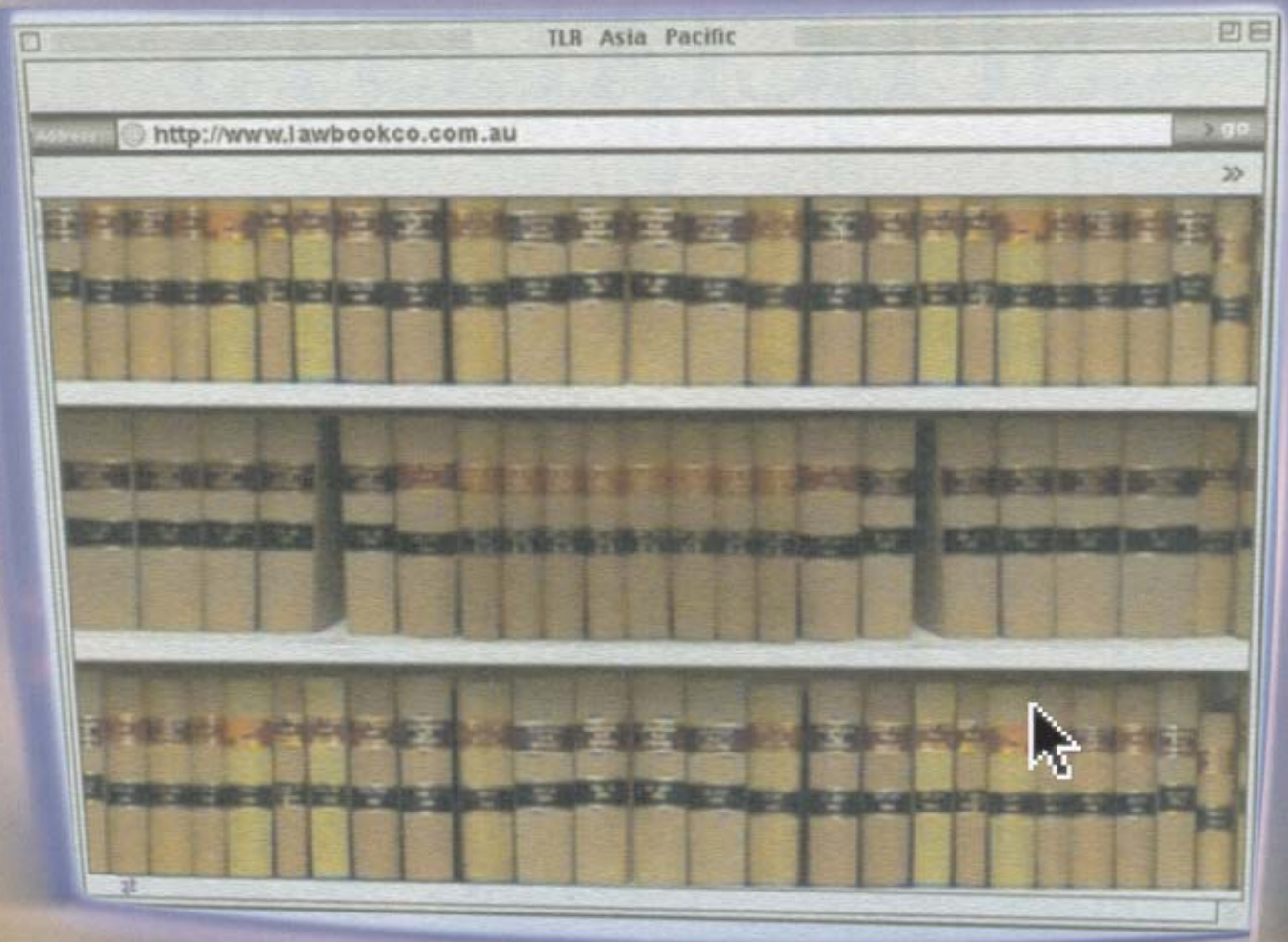

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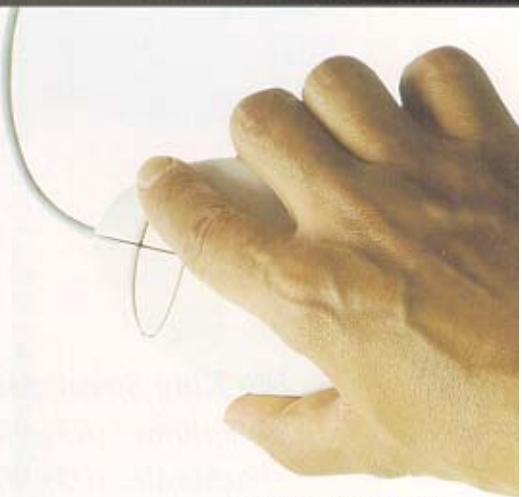

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