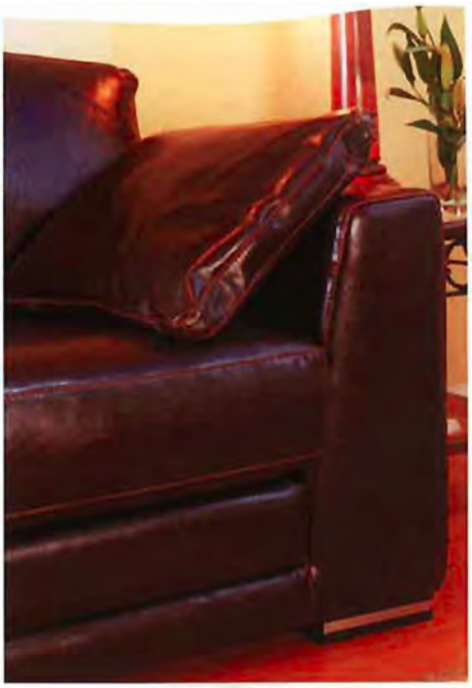
VICTORIAN BAR NEWS

No. 120 ISSN 0150-3285 AUTUMN 2002

TEN NEW SILKS WELCOMED BY HIGH COURT IN CANBERRA

Welcome: Judge Hogan ☐ Obituary: Richard Kelsham Fullagar ☐ Supreme Court's 150th Anniversary Sitting ☐ 25th Anniversary of the Federal Court ☐ Legal Response by Australia to the War Against Terrorism ☐ Expert Evidence ☐ Opening of the Legal Year ☐ The Exquisite Hour ☐ Magistrate's Plaque ☐ Fading Distinctions ☐ Voluntas Launches 'Network of Commitment' ☐ Criminal Bar Association News ☐ The Remembrance



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Life in the 21st Century

PRESUMED INNOCENT

RECENTLY one of the editors was present in court when a person charged with drug offences appealed to the Supreme Court from the refusal of a magistrate to grant him bail.

Under the provisions of the Bail Act, the judge could not grant him bail unless satisfied that there were "exceptional circumstances". He held, quite properly on the authorities, that the fact that the accused (presumed as a matter of law to be innocent until proven guilty) would probably spend 18 months in custody before his trial commenced did not constitute exceptional circumstances.

In the case of a person ultimately acquitted, 18 months in custody is a harsh penalty for the offence of being charged.

WELCOME TO AUSTRALIA

"Boat people" arriving in Australia are locked in a "detention centre" for periods exceeding two years (or perhaps removed to a Pacific island against their will) while their claims to refugee status are examined.

If, perhaps after the lapse of years, the application for refugee status succeeds, the refugee is released into the community. If, however, the application is rejected, this does not necessarily mean that they are returned home. Quite often the countries from which they have fled are not prepared to take them back.

We have yet to look squarely at the problem of indefinite detention of people who come unbidden to our shores or who are picked up by our naval vessels at sea. The imposition of a sentence of indefinite detention for the crime of arriving unasked in Australia appears to clash quite seriously with our (presumed) belief in the rights of the individual and the rule of law.

THE WAR ON TERRORISM AND THE RULE OF LAW

Non-Afghans fighting with the Afghan forces against the American invasion of Afghanistan have been apprehended by the Americans and taken to an American base on the island of Cuba. There, it seems, they are kept in cages without access to legal advice. They are stated not to be prisoners of war and, therefore, not entitled to the benefits of the Geneva convention.

The basis upon which they are not to be categorised as prisoners of war is somewhat unclear. There is no suggestion that they have committed any offences against international law or against the law of Afghanistan.

A few weeks ago a representative of the English government spoke of the need to enforce sanctions against Iraq because it was developing "weapons of mass destruction". He did not advert to the weapons of mass destruction in the form of nuclear armaments held by Pakistan, India, China, various member states of the former USSR and of course the USA. He did point out, however, of the Iraqi government (or people, it was not clear) that they are "not like us".

We have yet to look squarely at the problem of indefinite detention of people who come unbidden to our shores or who are picked up by our naval vessels at sea.

The Vice-President of the United States has stressed that the USA will take the steps necessary to counteract terrorism which "threatens the United States or its allies". He has also asserted that the US will act to prevent actions, wherever they occur, which threaten US interests. His popularity at home seems to be booming.

It seems only a short time ago that an Austrian "gentleman", who was then the leader of the German State, was applauded at home when he went into Czechoslovakia to protect the interests of the Sudeten Germans and when he sought Lebensraum in the east in the interests of the German people.

On another, historical note, the only clear distinction we can see between the demands which Austria made on Serbia in 1914 (and the aftermath of those demands) and the demands which the US made on Afghanistan (and their aftermath) lies in the fact that the United States of America is more powerful than was Austria.

The people who live in Afghanistan, Iraq or even in North Korea — "the axis of evil" — are human beings. They are not "different from us" in any relevant sense. They do not "hate freedom". But they may not see eye to eye with us on many matters.

Palestinian bombs are going off in Israel killing innocent people, and Israel

is engaged in a series of reprisal raids in which more innocent people are being killed. The US has not commenced any military operations against Israel or the Palestinians. These acts of terrorism do not, it seems, threaten "the US or its allies".

ANTI-TERRORIST LEGISLATION

The war against terrorism has resulted in the enactment of legislation in various countries, including Australia, which is directed to making life more difficult for terrorists and to ensuring that any potential terrorist action is nipped in the bud. Such legislation also, unfortunately, impacts adversely on the freedom of our society and the rights of the individual generally.

PARLIAMENTARY PRIVILEGE

We condemn the scurrilous and irresponsible attacks made, under cover of privilege, against Justice Kirby, whom we (in common with most lawyers throughout Australia) regard as a man of the highest integrity.

We are appalled that a member of the legislature is able, under cover of parliamentary privilege, and otherwise than in a debate relating to a motion to remove from office, to make allegations against a member of the judiciary which he is not prepared to make other than under cover of that privilege.

Privilege is necessary for the functioning of Parliament but it should not extend to protect a man pursuing what appears to be a personal vendetta or the product of a personal phobia.

Newspapers which hunted for the scurrilous about public figures used to be described as the "gutter press". They at least were not immune from the laws of defamation. It is to be hoped that we are not entering into the age of the "gutter Senate".

THE RIGHTS OF OTHERS? WHAT ARE THEY?

At a domestic level and at an international level concern for the rights of others and respect for the rule of law seems to be falling into desuetude.

OPEN COURT

At a more mundane level, ceremonial sittings of the Supreme Court are no longer held in open court. They are "by invitation only" affairs.

We congratulate the Court on its longevity and join (in spirit) in the celebration of 150 years of the Supreme Court of Victoria. We appreciate that there was a need to reserve seats for various dignitaries. But to exclude the profession as a whole from participation was an unfortunate break with tradition.

Most members of the Bench come from the Bar and all come from one or other branch of the profession. The Bar has always felt that when a barrister goes onto the Bench he or she still in truth remains a member of the Bar — he or she merely moves to another part of the list.

There should always be scope to allow crowding at the doorways even at the expense of the dignity of the occasion.

END OF AN ERA

Justice Brooking retired from the Court of Appeal on March after years on the Supreme Court. Since the establishment of the Court of Appeal he has been the dominant figure on that Court. His departure represents the end of an era. He will be sadly missed. A farewell to Justice Brooking will appear in the winter issue of the journal.

The Editors

2002 Legal Year: Some Significant Celebrations

AS is the tradition, the opening of the new legal year was celebrated by members of the judiciary, the Bar and the legal profession by attendance at religious services. On 4 February services were held at St Paul's Cathedral and St Patrick's Cathedral in the city and the Melbourne Hebrew Congregation in South Yarra and the St Eustathios Cathedral in South Melbourne. The theme for the services was "religion and the rule of law in these troubled times".

The 2002 legal year has already proven to be a year of significant celebration for two of our Courts. On 7 February I was delighted to attend the national ceremonial sitting of the Full Court of the Federal Court of Australia on the occasion of the 25th anniversary of the Court's first sitting in Sydney on 7 February 1977. At that first sitting Sir Nigel Bowen swore in all but one of the 18 other members of the newly established Court. The ceremonial sitting was attended by former justices of the Court, including five judges who sat as the foundation members of the Court 25 years ago, as well as many members of the judiciary of State and Commonwealth courts and tribunals and many other distinguished guests. Chief Justice Black presided over the ceremonial sitting in Sydney and was linked by a video-conferencing network to sittings in all States and Territories (except the Northern Territory) — even Western Australia despite a 6.00 am starting time. From Melbourne, the Victorian Bar commended the Court for its contribution to the development of national laws, its innovative and progressive approach to the administration of justice and the focus which it has leant to the equality of opportunity.

On 11 February the Supreme Court of Victoria celebrated its own major milestone — its 150th anniversary. The Victorian Bar participated at the Court's ceremonial sitting attended by distinguished guests including former Chief Justice Young, former Governors General Sir Ninian Stephen and Sir Zelman Cowan, former Governors, the Honourable Sir James Gobbo and Richard McGarvie, Premier Bracks, members of the judiciary, the legal profession and guests who joined in celebrating its many achievements since its inception.

(The address by the Chairman on behalf of the Victorian Bar is reported fully in this edition.)

The Victorian Bar's response to the report of the Review of the Legal Practice Act 1996 was submitted to the Attorney-General in December 2001. The response addresses a number of major recommendations made in the report which are of serious concern to the Victorian Bar and which it believes ought to be addressed if a new regulatory model is to be an appropriate one for the legal profession.

FAREWELL TO JUSTICE BROOKING

By the time this first edition of the *Bar News* for 2002 is published the Supreme Court will have farewelled Justice Brooking from its Bench. His Honour has made an outstanding contribution to the law and legal profession, the Supreme Court and to the wider community since his appointment in 1977. His Honour has been a member of our Bar for 47 years and the Bar looks forward to a continued association and wishes him well in his retirement.

LEGAL PRACTICE ACT REVIEW

The Victorian Bar's response to the report of the Review of the *Legal Practice Act 1996* was submitted to the Attorney-General in December 2001. The response addresses a number of major recommendations made in the report which are of serious concern to the Victorian Bar and which it believes ought to be addressed if a new regulatory model is to be an appropriate one for the legal profession. Some of the views expressed by the Bar in the response were that:

- the Chairperson of the Board should be a serving or retired Supreme Court judge rather than a non-lawyer;
- the Legal Service Commissioner should be an experienced legal practitioner;
- the nominees of the Bar Council and the Law Institute should be automatic appointments to the Board rather than be appointed from a list of nominees provided to the Attorney-General;
- a conduct complaint against a practitioner should be investigated at first instance by practitioner's professional association with a reserve power by the Commissioner to review the investigation after its completion;
- the disciplinary body of each professional association should retain their present summary power to deal with a practitioner for "unsatisfactory conduct" with a power by the Commissioner to review that process;
- each professional association should issue and monitor practising certificates with a power reserved to the Commissioner to direct that a

practising certificate not be issued or that an existing certificate be cancelled or suspended.

In the response the Victorian Bar proposes that once the Attorney-General has determined the structure and functions of the new regulatory body a working party be established including representatives from each branch of the profession to provide assistance in addressing the detail of how the new regulator will function.

Members may wish to read a copy of the Bar's response, which is available on the Bar website.

SUNCORP METWAY — BARRISTERS' PROFESSIONAL INDEMNITY INSURANCE

On 28 February 2002 the Bar was advised that as of 1 July 2002, Suncorp Metway will no longer provide professional indemnity insurance to barristers or for that matter any other professionals. Suncorp's decision resulted from a review of its portfolio of products which concluded that it was not in the company's commercial interest to continue professional indemnity insurance. The Chairman of the Victorian Bar's Professional Indemnity Insurance Committee, Michael Shand QC, and the Bar's Executive Director, David Bremner, have, as representatives of the Victorian Bar, formed a sub-committee with representatives of the Queensland Bar Association to obtain an alternative insurer. Suncorp Metway has indicated its willingness to assist the Bars to obtain professional indemnity insurance cover from another insurer and has already met with the sub-committee. A range of alternatives will be considered, and it is anticipated that something may be in place next month. What is clear, however, is that whatever alternative cover is arranged there will be a significant cost increase on our premiums for 2002/2003.

PUBLIC LIABILITY INSURANCE

Insurance is not only a matter of current concern for our members but also for the general public. On 4 March 2002 I published the following press release in relation to public indemnity insurance:

> The Chairman of the Victorian Bar Council, Mr Robert Redlich QC, today called for a comprehensive investigation of the reasons for the escalation in public liability insurance premiums. Unless the cause of the current problem is properly identified any response runs the risk of missing the point and could disadvantage the public and the insurance industry. The issue affects all the States and Territories and requires co-ordination at the Commonwealth level and the participation of all the significant stakeholders.
>
> The Victorian Bar Council believes that recent statements, particularly by the Federal Minister for Small Business, Mr Hockey, to the effect that there has been a litigation blow-out or that the current problems with public liability insurance are attributable to lawyers are not sustainable. At present the debate is being fuelled by broad generalisations which provide no sound basis for legislative action for establishing yet another compensation scheme which would remove existing rights and would not provide the injured with full compensation. The availability of public liability insurance at reasonable premium rates is a matter for significant community concern, and the Victorian Bar will give whatever assistance it can in any process to identify the circumstances that have given rise to the problem and the range of solutions that best meet it.
>
> Speaking in response to suggestions that the common law right to sue for personal injury be removed, that a monetary threshold be introduced below which an injured person would not have a right to sue, that there be a cap on liability, or that those suffering a personal injury due to the fault of another should not be able to request lawyers to represent them on a "no-win, no-fee" basis, Mr Redlich said: "Ultimately what is being currently suggested is the taking away of the rights of ordinary people under the law to recover compensation for wrongs done to them. This is a very serious step. Both the Federal and State governments have a duty to the community not to take such a far-reaching step without first having thoroughly investigated and identified the nature of the problem and the most effective means of addressing it. In order to do this, it must find out the facts so that it can see whether suggested solutions address the true causes of the problem.

OWEN DIXON EAST RENOVATIONS

The Bar Council and Barristers Chambers Limited some time ago resolved to undertake renovations to Owen Dixon Chambers East. A decision will shortly be made in relation to the precise nature of the renovations and design. Whilst there is no alternative but to renovate, Barristers Chambers Limited and the Bar Council will do all they can to minimize the cost to members whilst trying to provide accommodation and facilities which will best meet the needs of the Bar over the next 30 years.

AUSTRALIAN BAR ASSOCIATION MODEL RULES

The Bar Council is currently considering the Australian Bar Association draft set of model rules which will be largely identical to our present rules. These rules, subject to local variations, will be adopted and operate nationally.

LAW WEEK 2002

The Bar Council has accepted a recommendation by the Victorian Bar Theatre Company Steering Committee that the company stage a theatrical tour of the Supreme Court precinct in May 2002. The theatrical tour is the Bar's contribution to Law Week 2002. The Chief Justice has asked the Theatre Company to develop further the proposal so that it can be placed before the Judges of the Court for approval.

The tour will consist of a theatrical/historical tour of some of the courts, the library and cells. There will be an original musical component as well as trial re-enactments. As with the highly successful retrial of Ned Kelly staged during Law Week in May 200, the cast and production crew will consist of some professional actors and members of the Bar. Nicholas Harrington will be the director and writer for the production and Sara Hinchey will be the producer. It is planned that the tour will take place twice each evening from Monday to Saturday with approximately 45-50 people being accommodated in each tour. The tours will be marketed to the Bar and the general public. The number of tickets will necessarily be limited by the maximum number of people who can participate in each tour.

NEW BAR READERS

Finally, I wish to extend a warm welcome to the new Bar readers, and in particular our overseas participants (four from Papua New Guinea and one from Indonesia), who commenced the Bar Readers' Course on 4 March 2002.

Robert Redlich QC
Chairman

Victoria's New Drug Court

DRUGS and drug-related crime pose a significant challenge for the criminal justice system. The Government recognises that traditional sentencing approaches are not adequately equipped to manage the complex and intensive needs of drug-dependent offenders.

The Victorian Drug Court adopts a fundamentally new and "therapeutic" approach to sentencing drug-dependent offenders. This approach represents a shift away from focussing purely on the criminal conduct of an offender, to addressing offenders' needs and the underlying causes of their offending, such as drug dependency, homelessness and unemployment, in a holistic way.

In developing our Drug Court, we have been fortunate to learn from the experiences of other jurisdictions, such as New South Wales and Queensland, where Drug Courts have already been established. The Victorian model combines the most successful features of other Drug Courts to address the specific needs of our community.

The Government will establish the Drug Court on a trial basis for a period of three years, commencing at Dandenong Magistrates' Court in May 2002.

The *Sentencing (Amendment) Act 2002*, recently passed by the Victorian Parliament, provides the broad framework for the Drug Court pilot. The Act establishes the Drug Court as a new Division of the Magistrates' Court.

The Chief Magistrate will assign Magistrates to sit in the Drug Court Division on an ongoing basis. Magistrates assigned to the Drug Court will receive training to develop and enhance their understanding of the nature of drug and alcohol dependency, treatment options, and offender motivation.

One of the key features of the Drug Court is that the Drug Court Magistrate will have responsibility for the ongoing supervision of offenders placed on the Drug Court program. With the assistance of a multidisciplinary Drug Court team (including a clinician, case manager, police prosecutor and defence lawyer), the Magistrate will monitor offenders' progress on the Drug Court program, encourage compliance with conditions and respond to non-compliance. Based on the experience of Drug Courts both in Australia and overseas, ongoing, active judicial supervision is designed to retain offenders on the Drug Court program and reduce their offending.

The Drug Court will require Magistrates, lawyers, police, correctional authorities, treatment providers and government departments to adopt a collaborative approach in managing Drug Court participants.

The Drug Court will target a very specific group of offenders whose needs are currently not being met — those drug or alcohol dependent offenders sentenced in the Magistrates' Court, whose dependency contributed to their offending, and who would otherwise face an immediate term of imprisonment for the offences with which they have been charged.

The Drug Court recognises that recovery from drug dependency does not occur overnight. To expect an offender with a severe drug problem to abstain from drug use immediately once placed on a sentencing order is unrealistic. Lapse and relapse into drug use are highly likely.

Potential Drug Court participants will undergo a detailed and comprehensive assessment by members of the Drug Court team to determine suitability for the program. This assessment will play an important role in determining whether a drug-dependent individual is sufficiently motivated to address that dependency and the problems associated with it.

Offenders accepted into the program will be placed on a new sentencing order known as the Drug Treatment Order or DTO. The DTO is a sentence of imprisonment positioned between the combined custody and treatment order and the intensive correction in the sentencing hierarchy.

Individuals who are assessed as suitable for the Drug Court program will be eligible for a DTO if they plead guilty to offences within the jurisdiction of the Magistrates' Court, with the exception of sexual offences and offences involving the infliction of actual bodily harm.

The DTO is a custodial order with two parts. The custodial part of the DTO is the term of imprisonment of up to two years to which the offender would have been sentenced had he or she not received a DTO. The custodial part is imposed on the offender at the outset but suspended until it is activated by the Drug Court in the event of non-compliance with conditions or cancellation of the order.

The treatment and supervision part lasts for up to two years and consists of conditions designed to address an offender's drug or alcohol dependency (such as submitting to drug treatment and drug testing). Drug Court participants will be required to appear in Court on a regular basis, to enable the Drug Court to monitor the progress of each participant on the program.

The Drug Court recognises that recovery from drug dependency does not occur overnight. To expect an offender with a

severe drug problem to abstain from drug use immediately once placed on a sentencing order is unrealistic. Lapse and relapse into drug use are highly likely.

The Act establishes a unique regime of variation, "rewards" and "sanctions" to enable the Drug Court to respond to compliance and non-compliance by an offender with the conditions of the DTO. For example, if an offender failed to appear in Court when required, the Drug Court could vary the DTO to increase the frequency of drug testing. For more serious non-compliance, the Drug Court could sanction the offender by activating the custodial part of the DTO, and ordering the offender to serve a period of up to seven days in prison.

Conversely, the Drug Court will have the power to "reward" an offender for compliance with the conditions of the DTO, for example, by decreasing the frequency of drug testing or decreasing the frequency of an offender's court appearances. The ultimate reward in the Drug Court will be the cancellation of the DTO for successful completion of the program.

The Drug Court pilot will be evaluated to determine whether it has been effective in reducing drug dependency and related crime, and has ultimately made a difference. If the evaluation is successful, the Drug Court could be extended to further locations throughout Victoria.

I am extremely grateful for the Criminal Bar Association's input into and support for the legislation. I am also pleased that the legislation has received the support of the Opposition.

The Drug Court is only one element of the Government's overall strategy to address Victoria's drug problem. Clearly as a community we must continue to find new ways to tackle the issue.

I have no illusions about the challenges that lie ahead in making the Drug Court a success. We have selected a challenging group of offenders with highly complex needs. We are also acutely aware of the need to ensure that the Drug Court is properly resourced, and have committed funds for drug treatment programs and housing for Drug Court participants. Despite these challenges, with the necessary leadership from all agencies involved, I have no doubt that the Drug Court will make a significant difference to the Victorian community.

Rob Hulls MP
Attorney-General

Attack on Bench and Bar 'Misplaced'

The Editors

Dear Sirs,

I must deplore the title and tone of Mr Gibson's article entitled "Judicial Overservicing: Bringing Home the Bacon" which you published in the last *Bar News*. Although Mr Gibson, a partner at the firm Blake Dawson Waldron, recognises the seriousness of making an allegation of overservicing about a solicitor, he has been quick to make such an allegation about the judiciary.

Many of Mr Gibson's observations about costs incurred unnecessarily in some litigation are correct. But his attack on the Bench and the Bar is quite misplaced. Curiously, he overlooks entirely the importance and role of solicitors in the conduct of litigation.

Putting the matter bluntly, Mr Gibson's article fails to expose the obvious source of the problem that judges, barristers and clients are so commonly encountering today — the appalling failure of *some* (emphasis added) solicitors to bring any proper critical legal judgment to bear on the instructions they are given.

Mr Gibson's astonishment that some judges may require a matter to come back for 10 or more directions hearings merely begs the question, "Why is the judge doing that?" Almost always the answer is because the parties have not properly done what was required of them to prepare the matter for hearing. That failure is not the judge's fault.

The "problems" identified by Mr Gibson — pleadings, discovery, witness statements, court books and directions hearings — are not problems if the tasks are competently performed. The real "problem" is that these tasks are not being carried out properly by the people who are principally responsible for such things.

Well-designed, well-drawn pleadings do crystallize issues of fact. Poor pleadings do not. Fundamental to an effective pleading is the need to have discerned the issues to be litigated and the relief required. Mr Gibson paradoxically comments:

> Experience of forensic contests does suggest that the real issue only emerges well into the trial and the process is not then assisted by pleadings.

Why is that? A lack of proper preparation? Might I suggest that any failure of pleadings to reveal the real issue(s) is not a failure of the procedure but rather of the drafters or those who have provided inadequate instructions?

In relation to discovery, whilst I agree that the "train of enquiry" test is too broad, it does not mean that discovery is of no value. The great problem with discovery at the moment is the way in which it is conducted with parties exercising no critical judgment about the relevance of documents to issues. Instead clients are instructed to provide documents that might relate in some way to the case and then those documents are mindlessly catalogued and reproduced many times over.

Witness statements properly drawn by ethical lawyers who know the rules of evidence can be excellent. If they are poorly done, they are worse than useless. Similarly court books. The vast majority of cases turn on a few documents but they are too often swamped by irrelevant and often illegible documents because of an extraordinary lack of care and consideration in the preparation of such books.

Mr Gibson rhetorically asks, "But when did we acquire the need to have the judges direct the lawyers on how they should present their case?" The sane answer of course is "when the lawyers failed regulary to do it properly themselves". It would be good if we could proceed upon the basis that trials are prepared by members of a learned profession, who are trained for that purpose, but that is often just not the case. The shift that we have seen over the past twenty years, with some solicitors regarding their occupation only as a business, means there has been a "dumbing down" so that some who are charged with preparing cases have no idea how to run a trial.

Mr Gibson's criticism about unnecessary use of counsel is another reflection of the same malaise. He is right in saying that counsel are sometimes briefed by solicitors to attend to matters which the solicitors ought be perfectly capable of attending to themselves. But it is hardly fair to criticise barristers for attending when so instructed. Why do solicitors instruct them to attend? Sometimes for added protection but often because the solicitors have no relevant expertise.

I agree with Mr Gibson's conclusion that it is time to shift some of the responsibility back to those whose profession it is to carry it. Members of the Bar do not wish to be "paper hangers, scriptwriters or barrow boys" but who is going to do the work that desperately needs to be done if solicitors will not accept that responsibility?

Yours sincerely,

P.H. Greenwood S.C.

Tour de force!

The Editor

Dear Gerry

I'M writing to congratulate you on the summer *Bar News* — a tour de force!

So detailed and so interesting that I read it and reread it over more than a month. It is magnificent.

I trust you'll stay as editor till we both retire.

Best wishes
Dr Harry Imber

County Court

Judge Hogan

FRANCIS Elizabeth Hogan has been appointed a judge of the County Court and was warmly welcomed by the profession on 5 October 2001.

Her Honour was born into a family of six children and grew up in Canberra. She completed her schooling at St Clare's College with distinction. She then became a student at the Australian National University where she graduated with a Bachelor of Arts in 1976 and a Bachelor of Laws in 1978.

The reformist zeal of the Whitlam government, the Aboriginal Tent Embassy, the Governor-General's dismissal of the government in 1975 and like matters made these heady times in which to be a university student in Canberra. Her Honour was one of the many law students who marched to Parliament House after Sir John Kerr had acted on 11 November 1975. She also waitressed in the parliamentary dining room on a part-time basis. In this facet of Her Honour's education, she glimpsed both good and bad performances by prominent and colourful public figures of the day.

Both as a student and later in her life, Her Honour had a distinguished career as a debater. In inter-varsity debating for ANU, she first met Ron Meldrum QC, Molly Missen and other long-term friends.

Her Honour left Canberra and moved to Melbourne, where she knew nobody, other than her university sweetheart and later husband, Michael Waugh. She did articles with the firm of Anderson, Rice and Nichols and was admitted to practice in 1979. After practising for a short time in Warrnambool, she signed the Bar Roll in September 1981.

Her Honour was fortunate to read with Kevin Mahony, now the Senior Master of the Supreme Court. Kevin took Her Honour on "sight unseen". As a master, he gave service above and beyond the call of duty, including on one occasion conducting one of his pupil's conferences personally and in the absence of his pupil. Her Honour had overlooked the conference, going straight home after a long day in Court.

In her early days at the Bar, Her honour became a member of an informal bushwalking group that included Chief Justice Nicholson of the Family Court and Ron Meldrum QC. On one walk, Her Honour went rapidly from near the back of the group to the front of it, as she ran down a steep slope, out of control and unable to stop. Fortunately, the only injury that was suffered was to Her Honour's beautiful white woollen jumper. The front if the jumper was covered in mud. This was a product of the position in which Her Honour finally came to a standstill.

Her Honour's practice was initially broad, involving the full gamut of Magistrates' Court work. In her early days of practice, she made a number of trips to Central Australia, where she did locum work both for the Central Australian Aboriginal Legal Aid Service and for the Central Land Council. In doing so, Her Honour continued the long tradition of members of this Bar representing Aboriginal people from the Northern Territory in both criminal law and land rights work. In "bush" courts, Her Honour would routinely represent dozens of Aboriginal people in the course of a single day and not uncommonly did so in harsh physical conditions and with the difficulties of communication that are inherent in the work. Conditions in Alice Springs may have been better, although it was not for nothing that the house where Her Honour commonly stayed was known as "Hepatitis House".

Her Honour soon came to appear regularly in higher jurisdictions, namely the Workers' Compensation Board, the County Court and the Supreme Court. Along the way, her practice became more specialised, initially in general personal injuries and, in more recent times, in medical negligence work.

The hallmarks of Her Honour's work as a barrister were diligence and care with which she prepared her briefs, her skilful jury advocacy, her very efficient cross-examinations, particularly of medical experts, and her level of commitment to those for whom she acted. As Ms Tina Millar observed at the welcome, Her Honour became the leading female personal injuries barrister in the State.

In the latter part of Her Honour's career at the Bar, she undertook a substantial amount of mediation work, particularly in the medical negligence field. Many of these were difficult cases. Many barristers could learn from the manner in which Her Honour went about this form of work. Mediations were not viewed as easy briefs. They were meticulously prepared, as if the trial was about to commence. Good results were achieved, often because Her Honour was better prepared than her opponents.

Her Honour has always enjoyed a wide range of interests outside the law. First among these is her husband, Michael, and her children, Laurence and Timothy. Her Honour is also very attentive to her mother, brothers, sisters and friends. She is actively involved in her local parish, St Anne's in Kew, where her two sons attend school. As a member of the parish's Social Justice Committee, Her Honour recently organised a series of lectures which examined the inter-relationship between the teachings of the Church and matters of social justice. Her Honour also finds time to attend the theatre, the opera and monthly meetings of her bookclub (of which she has been a member for 20 years).

Her Honour brings to the County Court a breadth of experience in the law and in life, a capacity for hard work, an innate sense of fairness and a good sense of humour. As Robert Redlich QC observed at the welcome, Her Honour's appointment has been greeted with universal acclaim as one that will clearly enhance the status of the Court.

The Bar wishes Her Honour well for a long and satisfying judicial career.

Richard Kelsham Fullagar: 1926–2001

The following is an extract from the eulogy delivered by Phillips J.A. on 23 November 2001

RICHARD Kelsham Fullagar is of course a name to conjure with, a name made famous in the law, in its own right. Born on 14 July 1926, the second of five sons of Wilfred and Marion Fullagar, he was given the name Kelsham. Apparently, in 1565 when an ancestor named "Fullagard" married Agnes Kelsham, a daughter of the lord of the manor of Headcorn in Kent, it was made a condition of that marriage that the first-born male child should always bear the name of Kelsham. Like a cautious equity lawyer, Wilfred Kelsham Fullagar gave the name to all five of his sons and I think one may safely say that from his very birth Dick became a traditionalist.

Young Richard attended Geelong College and began his law course at the University of Melbourne in 1944. Having completed his first year with distinction, he interrupted his studies to enlist in the Navy, serving as a sub-lieutenant. In 1946, he returned to University and early in 1949, after the final Honours examination, he graduated as a Master of Laws. Having served his articles with Mr E.A. Cook of Russell, Kennedy and Cook, he was admitted to practice on 3 October 1949 and a month later he went to the Bar. Signing the Roll of Counsel on 4 November, the young Fullagar commenced his pupillage in the chambers of H.A. Winneke, later Chief Justice and Governor of the State. When the then Mr Winneke took silk soon afterwards, he completed his reading in the chambers of Mr. G.A. Pape, who specialised in industrial property and maritime law.

On 30 June 1953 Dick married June Harris, a country girl from Cobram, who was to be his mainstay and support for the rest of his life and whom, quite simply, he adored. Having grown up in his father's household, in an atmosphere of success, he had already, in the years before his marriage established himself at the Bar. An early practice in equity and property law soon gave way, in volume at least, to his abiding joy and particular specialty, industrial property. He had an extensive practice not only in Victoria but also in Tasmania, and later in NSW. He took silk on 26 May 1964 and was regularly seen in the High Court, often in constitutional cases. In one patent case, litigation which was commonly demanding for its technical complexity, Chief Justice Barwick, with whom (I think it is fair to say) Dick had little in common, complained in the course of the argument: "But Mr Fullagar it is only words, words, words", to which counsel promptly replied: "Pending advances in telepathy, Your Honour, I communicate only in words". As a hard-working barrister he never spared himself, or indeed his juniors, to ensure that his client's case was presented at the highest level that meticulous preparation and thoughtful presentation could achieve. He was a perfectionist, and like all of that ilk, he worried to get things just right. Yet, demanding though his practice was, in 1974 he was Vice Chairman of the Bar Council, he was a director of the Equity Trustees Co. Ltd. and, for long a member of the Medico Legal Society, he became its President in 1975.

On 29 January 1975 Richard Kelsham Fullagar QC was appointed to the Supreme Court, to the very Bench which his father had graced from 1945 until 1950 when he became a Justice of the High Court of Australia, an office retained by Sir Wilfred until his untimely death in 1961. Like the father, the son soon adapted to the varied work of the Supreme Court, sitting in all of its jurisdictions, including those with which he was altogether unfamiliar. His first case was a murder trial and one can imagine his concern. But he need not have worried; for Dick did all his work well. He grew to have a wide knowledge of the law and he had a sound instinct for its direction; he had great intellectual depth and capacity; he was acute and perceptive, and his analytical powers were considerable. He soon gained a reputation for well-crafted judgments, displaying logical thought, clarity of expression, a concern for precision, and, like his father, a grasp of fundamental principle. His were judgments that were sound and, if concise, that was due no doubt to the comment made years before, by his pupil-master, on the young Fullagar's first attempt at an opinion: "You've got the right answer m'boy, but you don't have to write *Gone with the Wind*!"

For 19 years Dick sat on the Supreme Court. He exercised his authority conscientiously, indeed at times with courage. In one case, in 1986, he made what was probably then an unprecedented order for the forfeiture and sale of 60 million dollars worth of shares in North Broken Hill which had been acquired by another. As he became more senior he sat more and more on appeals, presiding in due course over a Bench of three. As with all his judicial work, he did it with courtesy, with kindness and sometimes with humour, but humour never at the expense of the dignity of his court. On the Bench, his was in many ways the very model of judicial temperament.

On 11 February 1994 Mr Justice Fullagar retired from full-time judicial work to become a reserve judge, only to resign from the Court altogether some two months later, on 9 May, upon his appointment as chairman of the solicitors' disciplinary body, the Solicitors' Board. In 1997 he became the chairman of the Board's successor, the Legal Profession Tribunal, when the legislation was completely re-cast. Technically, this was a part-time job, but nothing that Fullagar ever did was part-time and he brought to this the same dedication and conscientious thoroughness which marked his work as a judge, sparing himself no more now than formerly. He gained the ungrudging respect of those who sat with him and of those who had to come before him. His judgment remained sound and, as before, he never shirked his duty, however much aware this compassionate man must have been at times of the shattered professional lives with which he was dealing.

Richard Fullagar was a man of learning. He was also a devoted family man.

Devoted to his wife, he was a loyal and loving husband. He was devoted, too, to his three children of whom he was intensely proud, Jenny, Richard and Sally, and with the arrival of grandchildren that love and affection was extended to embrace them all.

Richard Fullagar was a man of principle. He was intense and passionate about everything he did, whether on the golf course or on the Bench, and his greatest passion next after his family was his belief in the Rule of Law. He pronounced this creed when he was welcomed by the profession to the Supreme Court Bench:

> I deeply believe in the common law, and I deeply believe in the rule of law. A judge is not in our country elected by the people, nor is he directly removable at their will. . . . The law which can be altered at will by those who are elected by the people, and are responsible to them, must stand above the judge, and therefore the oath of the judge is to do equal justice between the strong and the weak according to law, that is to say, according to that law which the people's representatives in Parliament can and do make and unmake."

That belief never dimmed. In his judicial work, once he had analysed the problem to his satisfaction — which was never at an early stage in the argument — he could be stubborn in insisting upon what he saw to be the proper solution. What was right in the law and what was right in the wider sense were never compromised.

In one word, Dick Fullagar was a good person. Straightforward and direct, he had integrity of purpose; he was a man of honour. He would do nothing that might tarnish his own honour or that of his family, or call into question the standing of the court of which he was for so long a distinguished member.

Verbatim

The Inapt Metaphor

Supreme Court of Victoria

Harney v *Transport Accident Commission*
Coram: Eames J and a jury of six
Meldrum QC with Tobin for Plaintiff
Curtain QC with Middleton for Defendant

Curtain QC *(cross-examining medical witness)*: And you gave him Viagra not knowing that it would be any use for nerve dysfunction at all?
Witness: That's right.
Curtain QC: Was it a sort of suck it and see approach?
Witness: Well.

A Matter of Perception

County Court at Melbourne

30 November 2001
Coram: Her Honour Judge Hogan
Rattray QC and Ingram for the Plaintiff
Wheelahan for Second Defendant
Gillies QC and Solomon for Third Defendant
Ruskin QC and Masel for Fourth Defendant

Upon coming onto the Bench at the commencement of the case Her Honour said: "This looks like the painting of the last supper — and I see Mr Gillies that you are in the middle."

The Hunt for Stability

County Court

Wakeling v *Sky Dive Corrowa Pty Ltd*
Coram: Judge Fagan and a jury of six
Nash QC and G. Burns for Plaintiff R. Middleton for Defendant

Mr Middleton *(cross-examining plaintiff)*: Then the next segment that you are instructed about, was that stability?
Plaintiff: Yes.
His Honour: What do you mean by stability, stability of what?
Mr Middleton: You tell His Honour what was the stability component of the course as you remember it?
Plaintiff: I can't remember at this present time, Your Honour.
His Honour: Well, maybe because it's his question. Mr Middleton can tell us what he meant by the question.
Mr Middleton: I might if I knew what it meant myself, Your Honour, but I'll get instructions about it.

Mitigation in Vanuatu

Public Prosecutor of the Republic of Vanuatu v *Amos John Pakoa*
Coram: Murrum AJ, Supreme Court of the Republic of Vanuatu
Miranda Forsythe prosecuting (an Australian Youth Ambassador in her very first trial — a double murder. Daughter of the late Neil Forsythe QC. Miranda will be reading in September 2002)
Hilara Toa for the Accused

The following questioning occurred in the context of a doctor giving evidence about the mental capacity of the accused during a murder trial.
Doctor: . . . and so I found that the accused is suffering from depression.
Judge: Doctor, isn't it possible that the accused's depression was caused by the fact that he had just killed his wife and children?

In the context of the Defence providing mitigating factors in relation to the sentencing in the same case:
Toa: . . . and another factor to take into consideration, My Lord, is that since the accused has been remanded in custody he has not once tried to escape from prison.

VicBar Internet

THE Victorian Bar internet access system continues to grow in popularity. There are now over 660 users of the internet access system. It is comparatively cheap, usually very fast and is supported by a Network Administrator. Visit the Vicbar Network website at:
"http://network.vicbar.com.au/"
Please contact Ian Green on extension 6664 or by e-mail: network@vicbar.com.au for further information.

On Monday 4 February 2002, 10 of the 16 new Victorian Senior Counsel appointed on 27 November 2001 went to Canberra to be welcomed by the High Court and attend the Australian Bar Association's Silks Dinner in the Court's Great Hall that evening. Julie Dodds-Streeton and David Collins report on the day, and the text of the speech to the dinner given by the High Court's the Honourable Justice Ian Callinen follows.

Ten New Silks Welcomed by High Court in Canberra

Report by Julie Dodds-Streeton and David Collins

Throughout their long history, bar dinners have not been reliably pleasant occasions. From mediaeval times, the obligation to eat communal dinners with legal colleagues was an incident of vocational training imposed by the Inns of Court on aspirants and practitioners who were there "not so much to make the Law their study, much less to live by the profession (having large patrimonies of their own) but to form their manners and preserve them from the contagion of vice."

Fortescue, *De Laudibus*

THE New Silks' Dinner for new Senior Counsel from all Australian States and Territories, which took place in the High Court at Canberra on 4 February this year, was not compulsory, and probably included some barristers without large "patrimonies of their own". The journey to Canberra involves long distances for participants from some States and a degree of disruption for almost everyone. It is testimony to the reputation of the event that so many silks, their partners, families and friends and ABA members attended the ceremony and dinner this year.

Some Sydney silks travelled to Canberra by car. Although a long drive, it proved by far the more reliable mode of transport this year as at least two participants missed the ceremony due to flight delays caused by torrential rain in Sydney.

The occasion commenced with a short ceremony in Court Room 1 of the High Court. The Commonwealth Solicitor General and the President or Chairman of the Bar Association of each State or Territory announced the new silks attending, in order of precedence. As each new silk was announced they stood and bowed to the Court. It was a relief that it was a non-speaking part, which spared the risk of exposure even a single sentence might have presented. All the new silks stood and bowed with all the skill and experience which had justified their appointment. Gleeson CJ then addressed the new silks and their families.

The ceremony was followed by a reception hosted by the Chief Justice and justices of the High Court at which judges, new silks, ABA members, family and friends mingled in a relaxed atmosphere. The reception provided the opportunity to meet the judges and interstate practitioners and to make the acquaintance of some hitherto unknown new silks from Victoria. Justice Gaudron then provided a warm welcome with drinks for the four female new silks and their families. It was a friendly occasion, which Her Honour's guests much appreciated.

The dinner took place in the Great Hall of the High Court, attended by over 300 people.

Guests were entertained by succinct and witty addresses from David Curtain QC (the incoming ABA president) and Griffiths S.C. of the New South Wales Bar (the Junior Silk), Ruth McColl S.C., outgoing president of the ABA, also spoke well. Justice Callinan proposed the toast to the new silks and in a witty speech (published below) pointed out the many parallels between the anxieties and egos of advocate and thespian. We and our partners were seated with Richard Manly S.C. and partner, Robert Redlich QC, David Bremner and Kirby J and his partner. It was a friendly, lively and convivial dinner. The conversation never flagged and it never centred on law. Enquiries to other Victorian new silks confirm that they and their partners also enjoyed the evening and considered attendance well worth the effort.

New Silks Dinner Speech at the High Court

The Honourable Justice Ian Callinan

YOUR Honours, Queens and Senior Counsel, ladies and gentlemen.

My first task tonight is to congratulate you on your appointment to silk. It distinguishes each of you as an eminent member of an ancient and important profession. In this country there is a tendency to discredit any kind of public distinction as an incitement to unacceptable elitism. To do that is to prefer mediocrity, and to discourage industry, excellence and aspiration. You should be proud that your professional peers and the chief justices who have participated in the process of your appointment have singled you out as leaders of your profession. The primary meaning of the word "elite", as the choice, or flower of a group, the best — in your case — in learning, advocacy and ethics, remains.

That completes my first task. My second is, I regret to say, a pedagogical one, in short, to give you a few tips. And I propose to do that by reference to your sister profession, from which much is still to be learned, stage and screen.

I start with prima donnas, and by that, I don't just mean great divas. Although some do succumb to temptation, the best silks will resist any inclination in that direction. Don't for example, treat a court as Dame Nellie Melba is reputed to have treated an unrefined audience, by singing them, as she said, trash. You have to remember that you are cabs on the rank and obliged to accept any part offered to you. You do not enjoy the luxury Dame Edith Evans had in rejecting the role of Lady Macbeth, on the grounds that she could never bring herself to play the part of anyone who had such curious notions of hospitality.

The next piece of advice I offer relates to an advocate's vocabulary. All of, "As your Honour pleases", "I am indebted to your Honour", "Your Honour puts it most felicitously", "Your Honour is ahead of me", "I wish I had put it as clearly as your Honour has", and, "May I adopt that as my submission", are valuable and much appreciated expressions. But they lack the variety, the originality and the richness of the vocabulary of the world of the theatre which was discussed in this exchange between an interviewer and a seasoned critic:[1]

Q. Now, then, when great ladies of the stage are in a cast —
A. They are never in a cast. They grace a cast.
Q. I beg your pardon. When they grace a cast, how do they act?
A. With emotional intensity, consummate artisty, and true awareness. They are superb as . . . They are magnificent in the role of . . . It is good to have them back.

Let me pause there. Why has not some enterprising counsel greeted the High Court on its procession into the courtroom with this? "It's good to have your Honours back. You grace the judiciary." But I have digressed. The interview continues:

Q. And how are their performances etched?
A. Finely. They have the ring.
Q. What ring?
A. The ring of authority. They bring new understanding to the role of Shakespeare's immortal heroine. They make the part come alive.
Q. I see. Now the author writes a play —
A. Sir, the mot juste continues to elude you. Playwrights do not write plays. They fashion them.
Q. How?
A. With due respect for the eternal verities.

Q. How else?
A. With deft strokes, scalpel wit, loving care, penetrating insight, and masterly craftsmanship.
Q. Why?
A. So that the distinguished director may direct the plays with authority and imagination.
Q. What kind of plays are there?
A. Oh, their number is legion. There are dramas of frustration and dramas of extramarital love, or the eternal triangle. There are plays which are penetrating studies and plays that are valuable human documents. There are pageants, which ought to be glittering, if possible. Tragedies should, of course, be stark, and melodramas lurid, and spectacles, to be de rigueur, should be lavish, colourful or handsome But lampoons must be merry, farces must be rollicking, and comedies must be either of ancient vintage or sophisticated.
Q. What does the playwright do in a sophisticated comedy?
A. He pokes fun at our foibles. He dissects our tribal mores.
Q. Using what kind of vein?
A. A rich vein of satire.
Q. The task of the playwright sounds onerous.
A. Oh, you have no idea of the angles he must consider. He must, for instance, make sure his play has compelling moments. He must take care that it is well knit and fast-moving, and that it is brilliant in conception, builds up to an exciting climax, and ends on a happy note. Then, there is the character insight.
Q. What about that?
A. Well, he must provide plenty of it, along with a scope.
Q. Must have a scope, too, eh?
A. Yes, preferably wide.

Let me say something now about the set. There's not much more that can be done there. But after all, a courtroom is a pretty good set upon which to work. It's superior to many that professional actors have on occasions to use. And, even on circuit, unlike a theatre company on tour, it does not have to be bumped in the night before the case. The acoustics are usually good, and the lighting reasonable. The exits are clearly marked and are unlikely to lead to any confusion. Its general shape and the places for its props do not change. You're unlikely, therefore, to be accident prone on it. There is a recorded incident of an actor playing a scene of a railway station. The part required him to walk along the platform. Unfortunately he miscalculated and fell off the side of the stage. His embarrassment was compounded by the next line written for his opposite number who had just alighted from the train, "I thought you must have had an accident."

An analogy can be drawn between briefing solicitors and actors' agents. We have all known solicitors who have assured us that they will definitely brief us. Statements such as, "The senior Bar is very weak these days", "I'm glad you got silk", "You can count on me to brief you" are well known. Assurances of that kind are about as reliable as actors' agents' promises to get the part. One actor said this of his agent: "The most wanted criminal in Britain and the USA knew exactly how to elude his pursuers: he didn't bother about plastic surgery or false passports he just joined an actor's agency and was never heard of again."

Silks need to keep in mind that we have an adversary system and be careful to remember which side they are on. You don't want to excite the sort of question that Sir John Gielgud kept on anxiously asking as he watched Spencer Tracy play Dr Jekyll and Mr Hyde, "Which one is he playing now?"

One thing that you are usually spared, which actors sometimes have to suffer, is public gallery participation. Some of you

may have heard the story about Robert Newton playing Richard III. Following a day of heavy drinking he and a fellow player arrived at the theatre only just in time to dress and go on stage. About half way through his heavily slurred first speech Newton was interrupted by an outraged voice from the audience shouting "You're drunk!" Newton stopped, swayed downstage, and shouted across the footlights: "You think I'm drunk? Wait till you see the Archbishop of Canterbury!"

Samuel Beckett's *Waiting for Godot* provoked his first London audience. When the two tramps were in the middle of their philosophising, a man in the audience stood up and yelled, "Why don't they get some work?" Instantly another member of the audience jumped up and shouted "They haven't got the time!"

Reference to coming and going downstage or upstage provides another timely reminder. Resist temptation, don't ever upstage the judge. A good example of what not to do is this. In a case in Brisbane a senior counsel was arguing that an invoice which bore the words, "final account", which the wholesaler recipient paid, and used for the calculation of its retail charges, raised an estoppel against an attempted subsequent re-adjustment of the wholesale price upwards by the supplier. The judge, who had an unjustified reputation for financial prudence, found the submission unattractive. He pointed out that he often received from Telecom, as it then was, and other government agencies, second, and even third reminders, each stating "First and Final Account". Counsel inadvisably made the fatal response: "I wouldn't know about that Your Honour. I always pay an account as soon as I receive it."

Costumes are of course important. The heroic star of a western is fully entitled to insist on his white hat, just as a leading lady of stage or screen is entitled to her designer dress cut on the bias. By the same token, you silks would do well to maintain your distinctive silk gown, and, of course, at all costs, the full bottomed wig. After all, you are the star, although you need to be wary about judges, who, like the well known character actor Wilfred Hyde White as Colonel Pickering in *My Fair Lady*, is capable of stealing the show from under your eyes.

Never forget, judges, like the stars, one way or another, have the last word. A young actor in a repertory company was elated when he was given the role of defence counsel in a play in which the veteran was to play the judge, because the judge had no lines at all in his only scene. On the first night, after that scene, the young actor came off in tears. The stage manager asked what was wrong. The young actor answered, "The swine drank the ink from the inkwell during my main speech."

A good analogy may be drawn between the way in which you treat your junior and the way in which an experienced star treats his or her stage inferiors. Again much can be learned from the conventions of the stage. Once a stage manager by mistake caused the telephone on stage to ring at an inappropriate moment. The leading woman picked up the receiver, simulated listening for a moment, and then handed it to the other, lesser woman, on stage saying: "It's for you darling."

Another helpful example is provided by a failure of the leading lady to take her cue. She failed to join the star and a smaller part player on stage when she should have. The silence lengthened. In desperation the young actor tried to fill the vacuum by saying to the star "I really think we must thrash this matter out!" The experienced actor folded his arms and said, "What an excellent idea. You begin!"

In the same way, when the judge asks an inconvenient question you may be able to deflect it by saying, "My junior assured me he had covered that in our written outline", or, "I'm assured by my junior that that case has not been referred to in any reported decisions in the last 20 years".

It's always better to stick to the script, to use the actual words of the judges of the past than to seek to improve on them. Embellishments rarely work, as Anthony Burgess on tour in India discovered, when he watched a film version of *Hamlet* in Hindi and formed the view that a grave digger's dancer and ten songs for Ophelia, did little to enhance the original. Noel Coward's advice to young actors applies equally to the Bar: "Learn your lines — speak up — and don't fall over the furniture."

Lengthy submissions tend to be as ineffective as long plays. Writing of a play by Eugene O'Neill the critic Humbert Wolfe said "The theatre was packed, though a few may have died in the 49th act".

Solicitors, as well as having a role akin to that of agents have important roles as critics and connoisseurs of performances. This can give rise to tensions between briefer and the briefed. In the theatre the actors, set, and light designers, stage manager and even the prop mover think they could have written the play better than the playwright. Solicitors are often of the same mind about the advocate's efforts. It would not be a good career move, however, to be as publicly outspoken about your instructing solicitor as the playwright John Osborne was in 1966 about theatre critics when he said that they ". . . should be regularly exposed, like corrupt constabularies or faulty sewerage systems".

An ambitious young silk should also avoid making another observation of the kind which was made by John Osborne, that playwrights have much the same view about critics as lamp posts have about dogs.

One critical decision you'll have to make is whether you want to avoid, or embrace, typecasting. Holding yourself ready for the right case on a point of arcane law may turn out to be as futile as Dolly Parton holding out for Rigoletto. If your forte is in comedy, or torts, even if you'd like to branch out into something more fitting to your talents, think twice before doing so. Everyone in the business likes instant brand recognition. If you have no track record of dancing backwards in high heels don't expect to be cast with Fred Astaire.

At the moment I have no further advice to offer you. As you progress in your careers you will, however, come to learn, and indeed even develop, some further tricks of the trade. The more generous of you will pass these on, as I have to you tonight, to your successors as you move up the professional ladder.

The first of these dinners was held on 6 February 1989. It was an early initiative to give the Bar a more unified and national aspect. It has undoubtedly served that purpose well. The ceremony this afternoon, and this dinner, held as they are in the High Court, have another, a Federal significance. It is that although most of you are appointed silk in your own States and Territories, under the various protocols of those places, you come here to the Court to notify it of your admissions, thereby underlining that the Court is not only a Federal Constitutional Court, but is also the final court of appeal for the States.

I wish all of you successful and fulfilling careers as leaders of your profession.[2]

Notes:

1. Frank Sullivan, an imaginary interview.
2. A number of the anecdotes repeated in this speech are collected, some with, and some without attributions in *The Book of Theatre Quotes* compiled by Gordon Snell (Angus & Robertson, 1982).

Introducing the New Silks for 2001

Prepared by Graeme Thompson and Judy Benson

IT has been said only superficial people think appearances are unimportant.* And so the addition of S.C. after one's name is not there just for appearances.

Traditionally the *Bar News* has asked a few background questions to each of the new silks, but the information provided hardly tells us anything about the personality and character of the new Senior Counsel. At first we thought about a new set of draft questions which were as follows:

1. What does it feel like to reach your dream?
2. Will you seek further legal appointments in the years to come?
3. Do you feel your family and friends have made enough fuss since you became a silk?
4. What do you think are your special qualities that caused you to become a silk?
5. Were there any surprises for you in the people who:
   (i) took silk;
   (ii) did not become silk?
6. How many previous applications for silk have you made and what did it feel like to be refused?
7. What would have been your reaction if you didn't become a silk this time?

The Editors were disappointed that few of the appointees responded. Those responses we did receive we decided not to publish! And so after requesting information from each of them we give you this profile of how they see themselves. You will note some see themselves with brevity, others — well they take a big picture of themselves!

* Attributed to Oscar Wilde

GEORGE McGRATH

Signed Bar Roll 1 March 1968.

Areas of practice: transport accident and workplace personal injuries, medical negligence, occupiers' liability.

Readers: Damien Cosgriff, Michael Bourke, Larry Dent, Melanie Young, Christopher Nettlefold.

Career highlights: Surviving serial legislative assaults on my principal areas of practice.

Hopes and aspirations: to continue to survive and to get some help doing it.

HERMAN BORENSTEIN

Admitted to practice in 1970; signed Bar Roll 1987.

Areas of practice: accredited mediator, constitutional and administrative law, equal opportunity, industrial employment law.

Before coming to the Bar, Herman spent 14 years as a senior litigation partner in a major Melbourne law firm.

Since coming to the Bar in 1986 Herman has established himself as a senior barrister in the areas of employment/industrial law and in equal opportunity/discrimination law. His experience in these areas has included administrative and constitutional law.

Industrial Law — counsel for the successful parties in leading cases such as *Gerrard* v *Mayne Nickless* (s.127A — unfair contracts), *Moore* v *Australian Airlines* (industrial dispute) and *MUA* v *Patricks* (conspiracy).

Equal Opportunity Law — counsel for the successful applicants in the leading cases of *Waters* v *PTC* (the scratch ticket case) decided by the High Court, *Sinnapan* v *State of Victoria* (the Northland school case) and the *State of Victoria* v *Bacon* (intellectually disabled students) decided by the Court of Appeal.

COLIN HILLMAN

Signed Bar Roll 8 October 1973

Reader: John Smallwood (now His Honour Judge Smallwood).

Areas of practice: criminal law — almost exclusively for the prosecution prior to appointment as a Senior Crown Prosecutor in July 1995 and thereafter in accordance with that appointment.

Reaction to appointment: delighted.

DAVID PARSONS

Born 9 July 1950. Schooled variously at Bairnsdale West, Ringwood, Manly, Epping (NSW) and Melbourne.

Graduated from Melbourne University in 1974 (hons — 3rd class low) and thence to Alice Springs to work with the Central Australian Legal Aid Service. I had previously worked in (as opposed to starting) the Fitzroy Legal Service on a voluntary basis.

I worked with the legal aid service for three years before going overseas for a number of years. On my return I was employed by the Aboriginal Legal Service in Darwin. I worked there for a couple of years before being called to the Darwin Bar. Once again, as in Alice Springs I had the great pleasure of working with a number of barristers from the Melbourne Bar. They, for the most part, unlike myself, have gone on to much greater things. As far as the work in Darwin is concerned it can best be described as the sort of thing that if I had the time to describe to you and you were a right-minded person you would say at the end of the description — "I would have paid to do that" and I would agree.

I returned to Melbourne to join the September 1982 intake and then read with Robert Richter after Peter Faris asked him if it would be alright.

I read in the chambers that came to be known as Suite 27A in Aickin and I have never left save for the six years, on and off, that I spent in Perth prosecuting a longish trial.

Apart from those years (1990–6) I have travelled through most of the States of Australia representing Aboriginal people in their desire to have their lands restored to them. When I am not doing that I am in Melbourne involved in primarily a criminal practice. As long as my family don't mind (too much) I would like to continue what I am doing for as long as I can sit comfortably on the ground taking instructions without my legs getting pins and needles too badly.

Thank you for the opportunity of not answering those inane questions.

LESLIE GLICK

Admitted to practice 1974; signed the Bar Roll in 1974.

Read with: Jack Fajgenbaum QC.

Readers: Samantha Marks, Mark Robbins, Fiona McLeod, James Nixon, Aileen Ryan, Professor Francis Trindade, Anthony Young and Michael Gurvich,.

Areas of practice: commercial litigation and trade practices. I have a keen interest in the pro bono scheme especially for community environmental groups.

Graduated from Melbourne University with LLB (Hons) 1971, with first class honours and Supreme Court Prize. Completed LLM (Dist) at London University in 1973, majoring in legal history. I have been influenced by my good friend Ross Robson QC (a noted Roman history scholar) to resume my interest in medieval studies which I pursued whilst at London University as a part of medieval history. So my hope is to one day soon shout myself some long service leave, to travel to Georgetown University in Washington to take some courses in medieval cultural subjects. I am contemplating going in first semester 2003. My other interest is the Battle for Stalingrad as part of Russian studies. I am planning on visiting Volgagrad (nee Stalingrad) in September of 2002.

PETER ROSE

Admitted to practice in 1976; signed Bar Roll in 1977.

Readers: Eddie Power, John Ribbards, Anthea MacTiernan, Michael Bright, Dennis Baker, Roger Douglas.

Areas of practice: aviation law, personal injuries and insurance and administrative law.

Hobbies: Car racing — MG histories and MG racing, motor bike riding — (Triumph ST), flying, fly fishing, scuba diving.

Peter has been an active contributor to the pro bono schemes especially in the areas of migration and refugee law.

BRIAN WALTERS

Came to Bar 1982. Read with Barton Stott. Now at Flagstaff Chambers, a great set of chambers with fine sense of community. Co-founder, *Wild* magazine. On committee, Free Speech Victoria and Liberty Victoria. Wide practice, including administrative, criminal and commercial law.

Prominent cases:

- acted for Senator Bob Brown when he was accused of obstructing lawful forest operations in East Gippsland. The operations were held not to be lawful. State Parliament passed retrospective legislation to legalise all logging in East Gippsland;
- acted for Konrads Kalejs (and against Carlos Cabal) in relation to extradition proceedings;
- acted for the NCA when John Elliott attempted to prevent charges being laid.

I like my work to be creative and inspiring. A career at the Bar is, for me, part of a larger commitment to the Earth and the community.

DAVID COLLINS

Completed articles with Don Cooper of Weigall & Crowther, then went to the country to practice with Milo Davine & Co in Warragul for a year, to provide an opportunity to pursue an interest in competitive horse riding. Spent a year travelling before returning to Melbourne where I worked as a solicitor for a few years with Purvis & Purvis and then Pavey Whiting & Byrne before coming to the Bar.

Areas of practice: In early years a "crash and bash" specialist, then in workers' compensation and personal injuries before developing a commercial practice in which I have specialised for the last 12 years.

Career highlights: I have been fortunate to be briefed in a series of large and high profile pieces of litigation including the Bank of Melbourne case, the litigation between Gina Rinehart and her interests against Rose Porteous and *Lange* v *Australian Broadcasting Corporation.*

Hopes and aspirations for the year ahead: to establish practice as a silk, to do my work well and enjoy it, and to maintain a balance of work, family and other interests.

JULIE DODDS-STREETON

BA (Hons) LLB (Hons) (Melb) MA (Mon)

Previous positions: Tutor Dept of History, University of Melbourne, Senior Lecturer, Law School, University of Melbourne.

I am currently Counsel Assisting, HIH Royal Commission.

I began my working life teaching Tudor and Stuart history at the University of Melbourne. I completed my law degree as an older student and for ten years lectured in Company, Insolvency, Equity, Property and Intellectual Property at the Law School, University of Melbourne.

I had not originally intended to practise, but for a teacher of commercial law, particularly company law, it was a logical step to read for the Bar to gain practical experience and a chance to apply the theory. I read over successive annual academic vacations with Joseph Santamaria QC, who bore my long-term tenancy of his chambers graciously.

At the Bar, I have specialised in Company Law, Insolvency, Equity and Property. I have acted in large corporate collapses, including Pyramid, Regal Occidental, Brashs, Goldberg/Linter and Ansett. I enjoy the drama and intellectual interest, and autonomy of work at the Bar.

I applied for silk for the unremarkable but compelling reason that it suddenly seemed time to do it. My principal non-professional interests are art, literature and history — extending now to Egyptology, archaeology and Middle Eastern travel.

I also derive great pleasure from entertaining family and friends and spending time in my house and garden in the Dandenong Ranges.

DAVID H. DENTON RFD

Admitted to practice in 1981; signed Bar Roll 1987.

For any established barrister the appointment as silk is a true measure of one's ability, by application of an objective standard. In this regard the appointment is truly professionally satisfying.

The many letters I have received since taking silk aptly described the real feeling upon opening the Chief Justice's letter — "euphoric terror"!

My appointment to silk was preceded by total support from my parents and family who I publicly acknowledge.

Through very great sacrifice and hard work my parents gave me the opportunity to attend Xavier College. I remember it fondly and have had

at various times up to 10 classmates at our Bar (including Dick Manly S.C., Geoff McArthur S.C. and Norman O'Bryan S.C.).

After leaving Xavier, I attended the Royal Military College, Duntroon, and then onto Monash University where I completed my Arts and Law degrees in three years (and subsequently my LLM).

When I first came to the Bar I split my reading period — half with a criminal barrister (Brind Zichy-Woinarski) — to learn evidence and cross-examination; and, half with a commercial barrister (Peter McCurdy) — to learn the finer points of pleading.

In my time at the Bar I have been influenced by four people in particular. My father-in-law, His Honour Judge Geoffrey Byrne — for his fairness and example. Jack Strahan QC — for his precision and patient exposition of the law. David Bennett QC — for his court-room presence and engaging general knowledge. Finally, the great J.D. Phillips QC (now of the Court of Appeal). J.D. Phillips QC ruled the 6th Floor of Owen Dixon Chambers East. I was indeed fortunate to have chambers on his floor. He has the sharpest mind and knowledge of the law and helped me understand the importance of thorough preparation of each case.

All in all it is my belief that being a barrister is the most wonderful life and lifestyle of all occupations, professions or callings. I now look forward to being a member of the inner Bar and to its challenges and opportunities.

RICHARD MAIDMENT
No information provided.

RICHARD MANLY
I am the eldest of eight children (six boys and two girls). I completed schooling in 1974 at Xavier College together with David Denton S.C. and Geoff McArthur S.C. In 1975 I commenced an Arts degree at Melbourne University. In 1977 I attended James Cook University in Townsville and completed my Arts degree. I also completed Criminal Law and Legal Process. Thereafter I returned to Melbourne University and completed my Law degree. I hold the degrees of Bachelor of Arts, (History) (1981), Bachelor of Laws (1981) and Master of Laws (1987) all from Melbourne University.

I am married to Angie, a caterer, and have three children (Sarah: Law/Arts at Monash University, Daniel: Year 11 at Xavier College and Lucy: Year 7 at MLC).

I was articled to Mr Frank Shelton (now Judge Shelton, County Court) at Ellison Hewison & Whitehead in 1981.

I read in the chambers of Mr Peter Murdoch QC in 1983.

During 1982–84 I was a part-time lecturer in the Faculty of Architecture and Building at RMIT. I was a legal member of the Building Appeals Board between 1994 and 2000.

During 1985 I was a resident tutor in law at St Hilda's College, Melbourne University and a non-resident tutor in 1986.

In 1993 and 1994 I was President of the Old Xaverians Association.

I am admitted to practice in all States and Territories. I was also admitted to the Honourable Society of Kings Inns, Dublin, and conferred with the Degree of Barrister-at-Law in 1993 together with John Digby QC, Peter Golombek, David Galbally QC, Ben Lindner and Judge Julie Nicholson.

My career at the Bar has predominantly been in the area of building, construction and engineering litigation in the courts, before arbitrators and special referees. Over the years it has been my great pleasure to have been junior to John Digby QC, John Larkins QC, Maurice Phipps QC, George Golvan QC, Peter Vickery QC, Bill Martin QC, David Levin QC, Hugh Foxcroft QC, John Dwyer QC, David Curtain QC, Alan Myers QC and Peter Hayes QC together with now Justice Goldberg, Justice Byrne, Justice Hanson, Judge Wood and Judge Anderson.

I have had four Readers. They are Andrew Kincaid, John Tuck, Romauld Andrew and Bernard Carr.

I am the Bar's representative on the Users Groups to the Supreme and County Court Building Cases Lists.

I have been a member of the Building Dispute Practitioners Society and the Institute of Arbitrators and Mediators Australia, Victorian Chapter for many years.

Prior to my appointment as a silk I spent the preceding 18 months preparing for and appearing in an arbitration as junior to Peter O'Callaghan QC together with David McAndrew.

Over the last few years I have appeared in construction litigation regarding the City Link project, the old Beaurepair swimming pool, the Burnley Tunnel and the Arts Centre Spire. With all the cranes on the city skyline I hope to be busy as a silk and involved in many interesting and varied construction disputes.

MARK DEAN
Admitted to practice 1982; signed Bar Roll in 1983
Read with: Judge John Barnett
Readers: Clem Newton-Brown; Andrew Barnett
Principal areas of practise: commercial crime; occupational health and safety; environmental law.

DAVID BEACH
No information provided.

GEOFFREY MCARTHUR
Monash Uni 1975–79.
Associate to Mr Justice McGarvie 1980–1.
Articles: Arthur Robinson & Co 1982
Bar: 1983–2002
Read with Habersberger
Readers: Wallace
Age 44
Married with two daughters

HAROLD (JOHN) LANGMEAD
My previous pursuits: jackaroo, teacher, full-time musician (including a year with Mulga Bill's Bicycle Band), and commercial pilot (charter pilot and flying instructor).

Graduated in law from Melbourne University in 1986.

Articles at Phillips Fox 1987.

Admitted to practice in Victoria on 7 April 1988.

Read with Gordon Ritter QC and Ross Macaw QC.

Signed the Bar Roll 26 May 1988.

Admitted to practice in all Australian States and Territories.

Specialist in aviation law — national practice in this field. General commercial practice including building disputes, property law, insurance law, equity, contractual disputes, contempt cases, public law, inquests, administrative law and mediations.

Interests beyond the law: family, reading, flying light single-engine and multi-engine aircraft, hang gliding, flying gliders, surfing (long board), swimming, playing a Martin 000-28H guitar, relaxing in Apollo Bay.

Supreme Court's 150th Anniversary Sitting

A ceremonial sitting of the Supreme Court of Victoria was held on Monday 11 February 2002, in the 12th Court. It was an historic occasion to mark 150 years of the continuous work of the Court.

Court Ceremony

The Chief Justice John Harber Phillips

DISTINGUISHED guests and friends. Today we mark 150 years of performance of this Court's core function, its *raison d'être*, the administration of justice in accordance with law. A function simply stated but attended, these days, with all the detail of universal case management, specialist lists, application of the latest electronic and other technology and referral to court-connected mediation and arbitration.

The members of the Court accept the view of the Chief Justice of Australia that judicial officers hold their privileges and authority on trust, the terms of that trust being expressed in the oath of office, to perform our duties to the best of our knowledge and ability "without fear, favour or affection".

Following on the appointment of the first three judges in 1852 more than 100 other appointments to the Court have followed. I am afraid we current judges just cannot compete with the versatility of some of our forebears. When George Coppin's new Olympic Theatre opened in Exhibition Street in 1855, the orchestra struck up a prologue for which the words were written by — none other than Chief Justice a'Beckett. Sir William Stawell, who was Chief Justice for many years from 1857, won the Grand National steeplechase at Flemington — riding his own horse. The horse was called Master of the Rolls.

I am pleased to report that with the recent acquisition of the old High Court building and the construction of Court 15 — almost entirely by our own staff — the Court now has, for the first time in many years, a sufficient number of courtrooms within this complex. All the members of the Court and staff now have satisfactory accommodation and there is scope for further development. This will be neces-

Judges and speakers — front row: Justice Bemard Teague, Justice Frank Vincent, Justice Peter Buchanan, Justice Frank Callaway, Mr Justice John D. Phillips, Justice Robert Brooking, President of the Court of Appeal Mr Justice John Winneke, Chief Justice John Harber Phillips, former Chief Justice Sir John Young (dark suit), Mr Justice William Orimiston, Justice Stephen Charles, Mr Justice John Batt, Justice Alex Chernov, Mr Justice Barry Beach.

The Chief Justice John Harber Phillips

sary because the volume and complexity of our work is steadily increasing. In the year ending in June 2001 the court took in some 4800 matters.

In addition to the performance of our judicial duties, we are also custodians; custodians of a group of elegant heritage buildings and of the many priceless historical objects that are contained in them.

We have in the library the workbooks of Sir Redmond Barry compiled when he was a barrister. Remarkably, Barry's arguments in the defence of an Aboriginal man charged with a wounding were akin to those successfully advanced to the High Court, a century and a half later, by the late Ron Castan QC. In the case of *Mabo* v *Queensland*, Barry argued that the Court had no jurisdiction, in that the doctrine of *terra nullius*, based on an erroneous notion of an indigenous populace lacking a settled law, had no application in Victoria, the Aboriginal peoples' system of laws not having been supplanted.

Our library also contains the transcripts of four of the trials of the Eureka Stockade miners. In all, 13 miners were tried for high treason. All were acquitted. The conduct of the prosecution case against them was not assisted by the circumstance that the principal prosecution witness, an ex-soldier known as "Old Waterloo" was as deaf as a post. I shall quote a portion of an examination of him by the Solicitor-General:

> Question by Solicitor-General: "What is your full name?"
> Answer: "Yes, that is the prisoner"
> Question: "What is your full name, Sir?"
> Answer: "No, I don't have a pension, you see I'm a little deaf."

We have in the library the workbooks of Sir Redmond Barry compiled when he was a barrister. Remarkably, Barry's arguments in the defence of an Aboriginal man charged with a wounding were akin to those successfully advanced to the High Court, a century and a half later, by the late Ron Castan QC.

The Court has some notable historical associations. The same firm of solicitors, originally Arthur Robinson and Co, and now Allens Arthur Robinson, has provided the secretary and the secretariat for our Council of Legal Education on an honorary basis for nearly 100 years. The present secretary, Mr Colin Galbraith, is here as a guest this afternoon.

This Court has had two homes and we are in the second of them, which dates from 1884. The first was situated on the corner of Russell and LaTrobe Streets and was opened, with much ceremony, in 1843. A prominent clergyman, the Reverend Thompson, who was present, called upon the Almighty to ensure that no perjury was ever committed in the Court's witness box. I am afraid, however, an examination of the court records of convictions sustained in the subsequent

Back row: Justice Tony Pagone, Justice David Habersberger, Justice Marilyn Warren, Justice Bill Gillard, Justice Philip Mandie, Justice Geoff Eames, Justice David Byrne, Mr Justice David Ashley, Justice Allan McDonald, Justice Philip Cummins, Justice Tim Smith, Justice John Coldrey, Justice David Harper, Justice Hartley Hansen, Justice Rosemary Balmford, Justice Murray Kellam, Justice Bemard Bongiorno, Justice Geoff Flatman.

years reveals that this supplication was spectacularly unsuccessful.

An important part of this Court's ethos consists of preserving fine things from the past while embracing the very latest in technology. I would believe that Court 13, with its decoration evoking the glories of Ancient Greece, is both the most beautiful courtroom in Australia and the most advanced technologically. It is open for your inspection after this ceremony.

The efforts of the members of the Court would be fruitless were it not for our staff. My association with the Court now goes back some 45 years and I can affirm that for all that time the work of the staff here has not only been characterised by diligent performance, but also by a universal respect and affection for this Court and all that it stands for. I particularly commend this afternoon Messrs Niemer, Murray, Campbell, Chapman, Lane, Smout, De Bruyn, Sabangan, Watson and Hoffman, who were responsible for the preparation of this courtroom for this occasion.

Professor Murphy, thank you for your attendance this afternoon. Your presence serves to remind us that for many centuries before the establishment of courts such as this, the Aboriginal people created and enforced their own laws. Mr Premier I thank you also. You represent here both the legislature and the executive government, which, together with this Court, constitute the three organs of State provided by our constitution and which are the cornerstones of our democracy. Mr Redlich and Mr Corcoran, thank you. You represent a learned and independent profession of, if I may say so, outstanding quality. Without its constant, skilled assistance, the effective operation of this Court would not be possible.

I am pleased to report that with the recent acquisition of the old High Court building and the construction of Court 15 — almost entirely by our own staff — the Court now has, for the first time in many years, a sufficient number of courtrooms within this complex.

I would also like to acknowledge the presence on the Bench of my predecessor Sir John Young, who served as Chief Justice from 1974 to 1991. Sir John's presence emphasises the element of continuity in the Court's corporate strength and its capacity to give to us the benefit of the wisdom and experience of the past.

Distinguished guests, you honour us by your presence. Rest assured, this Court will continue to uphold the rule of law and faithfully serve the community you represent.

Adjourn the court *sine die.*

May It Please the Court

Robert Redlich QC, Chairman Victorian Bar Council

THE 150th anniversary of the founding of this great Court is an occasion for special celebration.

The Victorian Bar is honoured to be able to share such an occasion with the Court and so many of its distinguished guests.

A sound democratic society is founded upon the supremacy of the rule of law and the confidence of its citizens in the institutions which uphold it. Victoria's turbulent childhood called for a strong well-respected court to guide it.

This great institution has played a significant and continuous role in enabling Victoria to realize its destiny.

The Court has through one and a half centuries had the confidence of Victoria and has administered justice fairly maintaining individual rights and freedom.

That Victoria has been relatively free of constitutional controversy despite the fact that the Constitution Act of Victoria has never embodied the doctrine of separation of powers as contained in the Commonwealth Constitution is in measure due to the esteem in which this Court is held by the executive and legislative arms of government.

Upon the establishment of this Court its judges were appointed by Her Majesty in England and held office during her pleasure.

It was not until the next century that recognition was given to the fact that such a provision was quite out of harmony with modern conditions as no such provision was applicable to either judges of the Commonwealth, or to judges of the High Court in England.

Robert Redlich QC.

Initially justice in Port Philip was not without controversy.

Justice Willis, appointed by Her Majesty, was briefly the resident judge in Port Philip having been removed from the Supreme Court of Upper Canada, came to Sydney and was banished to Port Philip because of his difficult disposition, bringing with him his personal baggage but also 43½ tons of luggage.

He was the source of much controversy in the colony, culminating in the discovery that he was making secret payments to the only newspaper in Melbourne that gave him favourable press.

While the Victorian Bar cannot guarantee favourable press for judges of this court we will continue to ensure, with the support of the Law Institute of Victoria and the Attorney-General, that public discussion in relation to decisions of this Court are fair and measured.

Despite the legacy of Justice Willis,

Steve Bracks, Robert Redlich QC and John Corcoran.

distinguished jurists such as Sir William a'Beckett and Sir Redmond Barry were appointed and the Court quickly established a fine reputation within the community.

As the Premier has observed, from its earliest sittings, this Court was renowned for discharging its judicial duties with a sense of fairness and a knowledge of the law that gained the respect of all.

An account by Sir Archibald Michie QC of his visit to Mr Justice Beckett shortly before he was appointed Chief Justice is a vivid reminder of the difficulties under which members of the Supreme Court then laboured.

Having been informed that Sir William was at St Kilda, Michie trudged off. He soon found himself at St Kilda in pretty thick bush and reached St Kilda, which seemed to him to consist of only one house, the now Royal Hotel, on the shore.

He found Sir William, who with the utmost seriousness and good faith endeavored to persuade him that he was spending a few days at what he called "a watering place". Michie in his writings later confessed:

> I hoped successfully, to disguise my consciousness that I was in about the dismal and most desolate hole a civilized and social being could be buried alive in.

Nine years later he identified this spot as covered by Alma, Sebastapol and Inkerman Roads.

In the 2001 annual report of this Court

Professor Murphy presents ceremonial leaves on behalf of the Aboriginal community.

the judges acknowledge the true source of judicial office.

It is the will of the people of Victoria that is the foundation for the Court's judicial authority.

The Court strives to ensure that the reasonable expectations of Victoria's citizens are met by fair and just systems and procedures.

This Court stands as a monument to the fact that the fundamental values and objectives articulated by the present Bench have, throughout the history of this Court, remained of paramount importance.

It is impossible at such a time to give individual recognition to the work performed by the many jurists of excellence who have graced this Bench and whose judgments have enhanced the great stature of this Court.

The Victorian Bar is delighted to see so many of this Court's former members and distinguished jurists present to celebrate this special occasion including the court's previous Chief Justice The Honourable Sir John Young.

The rights and duties of a Justice of the Supreme Court have not altered over 150 years but the daily responsibilities of a justice have changed.

The volume and complexity of work which comes before this Court has increased, as has the responsibility imposed upon each justice to ensure that the work of the Court is conducted expeditiously and efficiently.

Justices sit on many committees and the Victorian Bar is pursuing arrangements which would see an even greater involvement of judicial officers on the Bar's committees.

Despite the demands of judicial office the judges of this Court have always offered their time to participate in the development and administration of the law, many distinguished members of the Court assisting in the important work of the Chief Justice's law reform committee.

Another herculean task performed by the judges of this Court was the development of an entirely new set of court rules in 1986.

The Bar and the community at large remain grateful that this Court remains so receptive and responsive to the views of all those affected by its deliberatious.

In the year 2000 the trial division of the court was divided into three specific divisions, commercial and equity, common law and criminal.

A study conducted by the productivity commission of civil and criminal jurisdictions of Superior State and Federal Courts throughout Australia reflected very favorably on this Court, demonstrating that this Court disposes of its workload with great efficiency.

The dedication of judges, masters and staff must be commended.

The Court has also remained abreast of developments in society.

It recently introduced a comprehensive practice direction, to encourage the use of technology in applications.

It was also the first Supreme Court in Australia to arrange publication of all of its decisions on the Internet, so that decisions could be easily obtained and used without cost by the public.

The legal profession in Victoria commenced 11 years before the establishment of the Victorian Supreme Court when it was still the Supreme Court of New South Wales for the district of Port Philip.

In 1841, four barristers and 14 solicitors were admitted to practice, they having previously been admitted to practice in the United Kingdom.

In the very first pages of the *Victorian Law Times* the Colonial Bar is described as little more than a collection of legal adventurers gathered together from all quarters of the globe:

> Who are prone to acknowledge no law but their own will and to resent every attempt to prescribe rules of conduct for their guidance as an outrage on the rights and liberties of free men.

Thus it was proposed by the editors of the *Law Times* that an Inn of Court should be established to consolidate the members of the Bar into a guild or fraternity to establish a censorship over the whole body.

These fears proved unfounded largely because of the high standards which were imposed upon the profession by this Court.

Although the Bar was not to form a council for half a century, the vigilance, impartiality and high standards of this court had a salutary effect on the legal profession from its infancy.

The very first case reported in the *Victorian Law Times* reports was an action against a lawyer for professional incompetence.

The lawyer was required to prepare an affidavit of bail designed to prevent the defendant ship captain from leaving the colony.

The affidavit was set aside because of numerous errors. Soon after, the captain sailed away.

The plaintiff sued his lawyer for the large sum of 176 pounds. The lawyer in the best traditions tried to have it dismissed on technical grounds.

He failed before Justice Williams at first instance and then on appeal.

There are other recorded accounts of how the Court in its earliest days dealt with legal practitioners.

They were left in no doubt as to the professional standards expected of them by this Court.

Former Governors-General and past and present members of the judiciary.

The very first case reported in the *Victorian Law Times* reports was an action against a lawyer for professional incompetence.

The judicial oath or its equivalent has been required of judges in this Court since its inception.

Decision could not be made without fear or favour unless judges were independent of all parties including the executive government.

This Court has throughout its history provided a shining example to the common law world of an independent judicary.

The unwavering impartiality and independence of this Court was exemplified by Chief Justice Sir William Stawell in the case of Mount and Morris, two young gentlemen, though of good and high social connection and to the law but whom the Chief Justice firmly dealt with as criminals who were convicted of a cruel outrage upon a number of Victoria's indigenous community.

In 1888 the full bench of this Court decided *Toy* v *Musgrove*, a decision as topical today as it was then.

It involved an application from a Chinese citizen who was attempting to enter the colony of Victoria.

At that time immigration, particularly from Asia and the South Pacific, had been the subject of very heated public debate.

The government sought to prevent Mr Toy from entering by exercise of prerogative power.

On application to the Full Court, Mr Toy challenged the government's power to do so.

In those times, a legal challenge to the exercise of a prerogative power was almost unthinkable.

But a majority of the Full Court found in Mr Toy's favour. This remarkable case for its time explains the limitations of the power of the executive, and provides one of the first judicial explanations of the concept of "responsible government" in the common law world, although it was the subject of marked disagreement within the Court.

This beautiful court house, constructed almost a century and a quarter ago and occupying a full hectare of a city block, is a constant reminder of the influence of the early Irish members of this Court.

It is no coincidence that the domed library which we all so admire bears a strong resemblance to the main hall in the Central Court of Dublin.

The interior of these courts are marvelously finished and in recent years have been painstakingly restored although, as the author Michael Challinger observes, the courts share one other attribute, the highly set judicial benches and lofty ceilings result in acoustics which are uniformly poor.

This may explain Melbourne's unconventional statue of justice in which the

blindfold has been removed perhaps to ensure that court proceedings could at least be observed.

Although much work has been required over the last 60 years on the Court's exterior the work of the Court flourished.

The decisions of this Court commanding the highest respect throughout Australia and in the common law world.

Both legal practitioners and academics are immensely proud of the quality of judgments produced by this Court.

An examination of the earliest cases of this Court reflects that this Court's judges were anxious to ensure that the law should as far as possible be settled, a difficult undertaking given that many cases depended on circumstances purely colonial and required the application of principles for which there was no precedent and to which no fixed rule could apply.

It was recognised that it was as indispensable in the colony as elsewhere that there be a uniformity of ruling of judges and that there be a record of the decisions of this Court.

This was a particular challenge as it was not believed that in the early years of this court 100 copies of the Court's judgments would have been sold and the prospects of remuneration for reporters and publishers appeared very uncertain.

Nevertheless the law reporters of the times determined to undertake this task and report on cases decided in every branch of the law submitted to the Supreme Court for decision.

They expressed a hope that after some generations had passed away and Victoria had fulfilled her destinies and taken her rank amongst the nations of the world, lawyers might look back upon the work of the Court with great respect.

The Victorian Bar is delighted to be able to do so in a public way and in the presence of so many who have contributed to the work of this great institution.

Victorians may look upon the achievements of this Court since its inception with great pride.

The Victorian Bar congratulates the Court on this special occasion and looks forward to the continuation of its special relationship with the Court which has both served to advance the administration of justice and ensure the maintenance of the highest professional standards.

If the Court pleases.

Speech of the President of the Law Institute of Victoria

John Corcoran

MAY it please the Court.

Distinguished guests and friends of this Court.

It is with a sense of great honour that I represent the Law Institute of Victoria and the solicitors of this State at this important ceremony.

We believe that the 150th anniversary of the formation of the Court is an occasion for celebration and congratulation.

The first Chief Justice, Justice a'Beckett, had been a member of the Bench of the Supreme Court in NSW and had the role of resident judge serving in Melbourne. It was, therefore, entirely natural and appropriate that he should be the first Chief Justice upon the creation of the Court. Before conducting our research for this important occasion we had not realised some of the extraordinary characteristics of the first Chief Justice. He led an exemplary life and he saw it as incumbent on him to exhort his fellow colonists to do likewise. As a consequence, he developed a reputation for being puritanical. And, if I might say so, I am sure that the example which he has set has been followed scrupulously ever since.

He gave particular leadership, no doubt to the Court but also generally, on the subject of temperance. After he was appointed as Chief Justice he once said that he looked forward to the day "when legislation will ever effectually banish from the colony the curse of intemperance with which it is so dreadfully afflicted".

In 1852 Chief Justice a'Beckett expressed his opinion that "not only the prisons, but the hospitals and lunatic asylums owed the larger proportion of their inmates to the vice of drunkenness", and he could not but view with regret the increase in the number of public houses. For his part, he wished there was "not a single public house throughout the town". History records that his audience responded with loud cheers. This causes me to pause to inquire whether you, Chief Justice, have ever contemplated making such a speech and whether you have contemplated what the reaction might be?

The history books do not mention anything about the relationship between Justice a'Beckett and the first President of the Law Institute, David Ogilvy. Mr Ogilvy, who was born in Scotland and emigrated

John Corcoran

to Melbourne in 1839, where he set up law offices in Queen St, owned 10 acres of land on the Yarra River. He used the land to grow grapes and hired a Frenchman to turn those grapes into wine. Apparently, the auctioneers W.M. Tennant & Company claimed that Mr Ogilvy's "red hermitage was celebrated". Though I doubt Justice a'Beckett would have been one of those celebrating.

Strangely, for a judge of this honourable Court, it appears that the Chief Justice could also be somewhat short in temper. On 30 January 1852 a group of newly appointed magistrates attended the Court to be sworn into office, but unfortunately their commissions were not in the Court. The Chief Justice therefore declared abruptly that without the commission's being available for him to inspect he couldn't administer the oaths and the proceedings were abandoned.

The other issue upon which the first Chief Justice had strong views was that of the gold rush. The first criminal sitting of the Supreme Court involved a criminal list which was longer than anything which had been experienced prior to the creation of the separate colony, and the Chief Justice took it upon himself to deliver to the jury an address in which he declared that the quest for gold had introduced to Victoria a change which "seemed to destroy all the

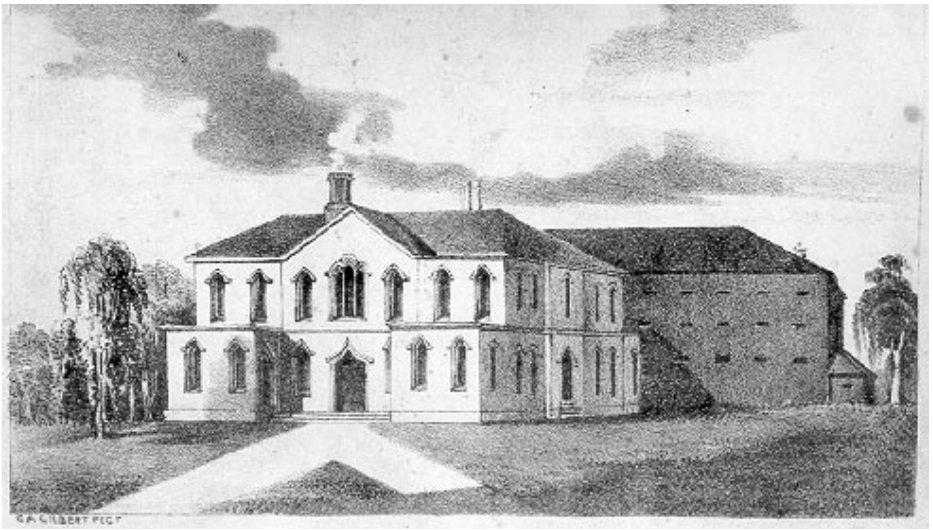
promise of its primal dawn". He was, in particular, concerned about men leaving their urban settlements to pursue their fortunes on the goldfield.

This may have been the first occasion upon which the comments of a justice of this Court attracted unflattering comment in the press. It is recorded that *The Argus*, for example, in considering the Chief Justice's remarks about the gold rush commented that "the more deeply we pondered it, the more dissatisfied we felt both with the sentiments it contains and with the manner of expressing them".

The newspapers did not mince words at that time and when we sometimes wonder today about editorials or newspaper comments, we should remember that in 1852 *The Argus* described the Chief Justice's address to the jury as "very like that of a boyish aspirant to literary fame or a junior member of a sporting club". Not letting up, the Editor described his address to the jury as "meaningless bombast" and concluded with the withering statement that "we believe that we owe his presence (in this colony) less to any natural predilection to the employment, than to the seductions of 1500 pounds a year". So, even then, judicial salaries were under attack.

I should add that lawyers fared little better when it came to the ramblings of a malcontent media. In 1842, the *Port Phillip Gazette* reported on the economic depression that racked the city and in particular the future for lawyers during those troubled times. The portrait is not a flattering one. It reads: "As for lawyers, they will certainly continue feeding on the community until all fail when they will prey upon each other. Well, perhaps this is as good a way as any of getting rid of them." Thankfully the relationship between the media and the legal profession has improved — slightly.

Before leaving Chief Justice a'Beckett, I must also mention that the first attempt to create a circuit was not without difficulty. On 19 February 1852 the Chief Justice travelled to Geelong to open the first circuit sittings of the new Supreme Court and made what was described as "a sort of triumphal entry into Geelong". After giving the citizens of that city a further homily as to the evils of gold, the first prisoner was placed in the dock for trial before it was then realised that the indictment could not be read because there had been a failure to have promulgated the necessary proclamation by the Governor authorising the establishment of the Court.



The Court House and prison. Melbourne, Port Philip, NSW.

I would now like to mention some issues which the Institute feels are of contemporary importance. Victoria prides (or should pride) itself on the fact that its court system works extremely economically. The Productivity Commission Report as to Government Services (2002) provides a great deal of information for those who have an interest in this subject. As examples, Victoria's expenditure on the court system of $124 million is less than fifty per cent of the expenditure in NSW. It is only $2 million more than in QLD (with its much smaller population). I am sure, Mr Premier, that these figures are good news for you. A reason for the very good result in Victoria is that a higher proportion of costs incurred are recouped by the revenue earnt by the courts themselves.

The other absolutely dramatic statistic which one derives from the Productivity Commission Report relates to the speed with which civil matters are finalised.

If the measure of efficiency can be determined merely by reference to the number of cases which have been finalised within a certain period, then our Supreme Court is amazingly efficient. Seventy-eight per cent of civil matters are resolved within six months of being issued as opposed to a national average of fifty-five per cent. The Victorian percentage is the highest, comfortably, amongst all State and Federal superior courts within the nation. Taking a slightly longer time period, our Supreme Court also disposes of more matters than any of the other superior courts within twelve months of issuing — eighty-four per cent as opposed to a national average of sixty-five per cent.

The other relatively serious matter which I wish to mention relates to the standing of the court.

We believe that Victorians treat it as "a given" that the judges of this court behave in an exemplary manner in the performance of their duties. I can report that a couple of years ago a group of senior lawyers were musing over problems which have developed in superior courts elsewhere. None amongst those present could remember the slightest hint of impropriety on the part of any member of our Supreme Court. Of course, this is an entirely different issue from criticism of a particular judge's sentencing in a criminal matter or even a critical comment in the financial press following a judgment in a complex civil action. These comments are to be anticipated even if not, hopefully, in the terms used by the ill-fated *Argus* in its commentary upon the efforts of our first Chief Justice.

But it is not an insignificant matter to reflect upon the fact that in the 150 years of its history there has been not the merest whiff of scandal. The lawyers in this State take pride in the fact that they are officers of a court which enjoys this standing. Such standing is of course a reflection of the calibre of the members of this Court both now and in the past. Several members of this Court have moved on to the High Court, including perhaps Australia's greatest jurist, Sir Owen Dixon, who became Chief Justice of the High Court. Also the influence of the judgments of this Court in other jurisdictions in the common law world is quite remarkable.

Although, as I have said, the first attempt at a circuit sitting was a conspicuous failure, thereafter this Court has established an excellent circuit

network throughout Victoria. The Institute believes that this has been of the utmost importance and that indeed it continues to be so.

We cannot go too far in expressing a hope that the volume of circuit work will increase — at a recent opening of the legal year in Ballarat the Mayor of that city when addressing the Court commented that he was delighted at the news that the number of criminal cases in Ballarat had risen to the point where an additional circuit was justified. It was an occasion for high fives all around — a sentiment which didn't appear to be shared by the local police superintendent! But the Institute has noted with great satisfaction the efforts of this Court including of course the Court of Appeal to take its business to the people in country Victoria. By doing so (no doubt at considerable personal inconvenience) the judges have helped to maintain the awareness of the Court for country Victorians.

I should say one further thing about the relationship between the Institute and the Court. In recent years, some controversy has arisen as to publicity affecting courts, particularly criticism of certain judgments often in the context of sentencing in criminal cases. The Institute believes that it is important that balance should be achieved in these areas. On so many occasions when a judgment is criticised, once we have examined it we find that there are matters which have not been drawn to the public's attention and that the criticism is quite unfair. It will continue to be the role of the Institute, whenever we are able to do so, to try to restore that balance and to use our resources to try to ensure a balanced debate. I should add also that the Law Institute, which will shortly record its 143rd anniversary, has had a long and happy association with this court for almost all of its 150 years and looks forward to that association continuing well into the future.

Your Honours, at a time like this one would like to mention numerous other matters but time does not permit this. I conclude by reaffirming how proud are the solicitors of this State to be associated with this Court which is, for most of us, the court in which we were first admitted to practise and took our oath.

We congratulate the Court upon this important anniversary and upon its continued maintenance of standards of the highest quality.

May it please the Court.

Chief Justice Phillips Addressed Historic Public Viewing of Supreme Court

Saturday 16 February 2002

Chief Justice Phillips addressed members of the public, the first to do so in the Court's history.

Chief Justice John Harber Phillips.

Chief Justice Phillips addressing a group in the Banco Court.

Andrew Watson of Court Network speaking to a group in the Supreme Court Library.

25th Anniversary of the Federal Court

A national ceremonial sitting of the Court was held on Thursday 7 February 2002 to mark the 25th anniversary of the first sitting of the Federal Court, which took place in Sydney on 7 February 1977.

The ceremonial sitting in Melbourne was part of a national sitting, held simultaneously in Sydney, Melbourne, Brisbane, Adelaide, Perth and Canberra and linked by a video conference network.

The sitting in Melbourne was held in Court One, Level 8, Commonwealth Law Courts, 305 William Street, Melbourne at 9.30 am.

Chief Justice Reviews First 25 Years

By the Honourable Michael Black AC, Chief Justice of the Federal Court of Australia

THANK you all for your generous comments about the Court. We all appreciate them very much.

I take this to be an occasion to acknowledge and thank those who have contributed so much to the first 25 years of our Court.

I must begin, of course, with the work of the first Chief Justice and the other original judges, and those other judges — also lawyers of great distinction — who joined them soon afterwards. Those early years were years of immense importance to a new court facing, in the minds of some, an uncertain future.

The work of the first Chief Justice and the other judges laid the foundations of the Court upon which we now have the great privilege to serve.

The example they set of intellectual excellence, independence, fairness, innovation and also courtesy still guide us today. May I say, again, how greatly honoured and delighted we are that so many of the founding and former judges are with us today.

When the Court first sat, the collection of federal statutes that conferred jurisdiction upon it was seen as rather a mixed bag. The unifying factor was, of course, that they were federal statutes and the task of the Court was to exercise the judicial power of the Commonwealth in the judicial resolution of federal matters brought before it.

Looking back now, it is plain that the

Note: This is an edited version of the Chief Justice's speech.

early decisions of the Court were not only of fundamental importance in establishing its reputation, but also in contributing to the development of federal law. Many of those areas of law were new, but they can now be seen as forming essential strands in the fabric of Australia's law.

The jurisprudence that the Court has developed from the time of its foundation is now to be found in some 23,000 judgments that the Court has in its archives, a proportion of more than 70,000 cases that have been brought before it for determination. Of recent years, following amendments to the Judiciary Act, the Court has become a court of general jurisdiction in civil matters arising under federal law.

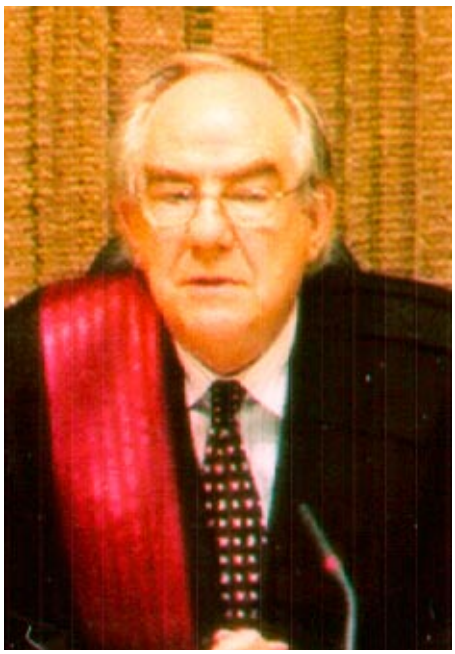
The importance and growth of the Court's work, and the growth in its areas of jurisdiction, is illustrated by the fact that our authorised Reports — the Federal Court Reports — now comprise 109 volumes and that, at the present rate of decision making, the 23,000 judgments presently in the archives will have doubled in number in approximately nine years. This, and the many procedural reforms and other innovations that have accompanied it, have been built upon the foundations laid by the former Chief Justice and the former judges to whom we pay tribute today.

Before moving from the work of the judges to other matters, I want to pay my own tribute to the work of the present members of the Court. I simply want to say that it has always been, and is, an immense privilege and pleasure to work with such outstandingly talented, hard-working and congenial colleagues. There is indeed a rare spirit within our Court. I thank them all for their work in the Court and in its administration.

Whilst the reputation of a court must rest fundamentally upon the excellence of its judicial work and the jurisprudence that it develops, it also rests, in the public mind, upon the work of its staff at all levels.

In a self-administered court such as ours, the role of the Registrar is of special importance, requiring, as it does, a rare combination of skills. The Court has been exceptionally well served by its Registrars. There have been only three and I have had the privilege of working with two of them — Mr Jim Howard, now deceased, and Mr Warwick Soden. The Court is particularly grateful to Mr Soden who has served the Court as its Registrar and Chief Executive Officer since 1995 and with whom I and the other judges work closely and well in the collegiate management of our Court. The District Registrars and other senior officers of the Court also deserve our special thanks.

But it is important to remember that the reputation of the Court, in the sense that I am now using it, rests not only on the Registrar and the senior officers, or upon the valued members of the judges' personal staff; it rests upon the work of all members of its staff. I am particularly grateful to all our staff at all levels, for their dedication to the work of the Court and for the helpful and courteous way in which they go about their duties.



The Honourable Michael Black AC, Chief Justice of the Federal Court of Australia

I think it is a tribute to the first Chief Judge and to the first judges that a culture of courtesy to all has, in my own experience as counsel and then as Chief Justice, existed in this Court as something to be valued from the Court's very beginnings 25 years ago.

From time to time the Court is placed under unusual pressures, and at those times I have had occasion to say that we are proud of our staff. Today is another day in which I would like to say that.

The relationship between a Court and the Executive Government has several facets, not all free from difficulty. But as Chief Justice, I have been fortunate in having had a very constructive and appropriate relationship with three Attorneys-General — I can speak only of my time. The support that the Court has received has included strong support for the construction of Court buildings to replace the shared and rented accommodation in which the Court, in most cities, began its life. That support, which has been greatly appreciated; it has richly served the public interest in the provision of court buildings that enhance access to justice and public confidence in its administration.

It is also important that I acknowledge the assistance received from successive Secretaries to, and officers of, the Attorney-General's own Department.

Byrne J, Balmford J, Sir Zelman Cowen and Sir Ninian Stephen.

The public and the profession.

Looking back now, it is plain that the early decisions of the Court were not only of fundamental importance in establishing its reputation, but also in contributing to the development of federal law.

The very important contribution that has been made to the work of the Court by members of the profession must also be acknowledged. We are all grateful to the Presidents of the bar associations and law societies for their generous words and, for our part, I want to acknowledge the great

assistance that the Court has received over the years from their members. We have been very well served in that regard. The importance to the administration of justice of a learned and independent legal profession, such as we have in Australia, should never be underestimated.

Finally, I want to say something about the Australian judiciary, of which the Federal Court is a part. Looking back now over 25 years, we can see that there has developed between the Courts more than just co-operation — and there certainly is that — but also a sense that we are members of an Australian judiciary and that there is a strong bond of friendship between us. Many developments over recent years, including the growth of the Federal Court — but certainly not confined to that — enable us now to speak of an Australian judiciary. This is a judiciary of judges sharing common traditions and working together in the one federal nation in the same great work of administering impartial justice according to law. Happily, though, distinctive developments and traditions of the component parts remain. But this is within a framework, today, of unity and co-operation.

There are many examples of this in which the Federal Court has had the privilege to take a part. They range from the work of the Council of Chief Justices of Australia and New Zealand and the various harmonisation projects that it has successfully promoted, to the annual conference of Supreme and Federal Court judges, to judicial involvement in the affairs of the Australian Institute of Judicial Administration and now, very significantly, to judicial involvement in the establishment of the National Judicial College of Australia under the foundation chairmanship of Chief Justice Doyle. It is surely illustrates the unity of the Australian judiciary that other judges have joined us today in such large numbers all around Australia. And this, despite the inconvenience of the hour in some places and the pressures of work everywhere that face us in our daily role as judges.

It has been suggested that the creation of the Federal Court might be a step on the road to the establishment of a national system of courts. If this would mean one divisionalised court, it is not a view that I share. That would be a mistake. My own view is that the present system, as it has developed over recent years, provides a structure with a good balance between the requirements of efficiency and the distinct elements of our federation. It gives proper recognition to the fact that we are indeed a federal Commonwealth. It has the advantage of being a system in which individual courts work harmoniously and co-operatively together.

And so I conclude by thanking all our judicial colleagues for attending and by thanking each and every one of you for honouring us by your presence to mark the 25th anniversary of the establishment of the Federal Court of Australia. I thank the speakers for their generous comments. I thank you all for your support, and for the assistance the Court has received over the past 25 years, the commitment we share with you in the great ideals of justice according to law.

The Court will now adjourn.

Development of the Federal Court over 25 years

Address to the Federal Court of Australia's 25th Anniversary Sitting by the Attorney-General, The Honourable Daryl Williams QC, MP.

Court 21A, Law Courts Building, Queens Square, Sydney.

MAY it please the Court in all its manifestations across the continent.

It is a pleasure to address the 25th anniversary sitting of the Federal Court of Australia on behalf of the Commonwealth Government.

May I begin by acknowledging the immense contribution the Court has made to the rule and application of Commonwealth law in the last quarter of a century. The Federal Court's achievements are many, and after 25 exemplary years there is certainly a great deal in the Court's history to celebrate.

The Court has distinguished itself as a superior court of the Commonwealth. Indeed it has developed a well deserved reputation throughout the common law world as a world class civil court.

OVERVIEW

Since Federation there has been a considerable expansion in the size and importance of the federal judicial system. This expansion has been a response to the increasing complexity of Australia's federal system. And it has been a response to the expanded role of the Commonwealth in the nation's life.

A major revamping of the federal justice system came with the establishment of the Family Court of Australia in 1976 and the establishment of this Court in 1977.

There were two main reasons for establishing the Court.

The first was to take over some of the workload of the High Court in matters arising under Commonwealth or Territory laws. The second was to provide a federal forum to deal with special areas of federal law.

The Court's jurisdiction now covers almost all civil matters arising under Commonwealth legislation. The Court also has a substantial and diverse appellate jurisdiction.

JUDGES

In the period since its establishment, the Governor-General has appointed a total of 94 judges to the Court.

A number of members of this Court have gone on to hold higher office, attesting to the outstanding scholarship and ability of its judges. Despite the Court's relatively short history, five of its judges have subsequently held appointment as Justices of the High Court. His Honour Justice Brennan was elevated to Chief Justice of Australia.

Another former judge of the Court, Sir William Deane, was to hold the office of Governor-General of the Common-wealth.

QUALITY OF APPOINTMENTS

Australia has been well served by the quality of its federal judiciary. Successive governments have appointed members of the Bench on merit.

However, while the quality of our judiciary is exemplary, it is important to

The Attorney-General, The Honourable Daryl Williams QC, MP.

recognise that its present composition does not reflect the diversity of Australian society. To an extent this reflects the lack of diversity amongst those practising at the Bar, especially at a senior level.

It is of particular concern that there are few women who practise in areas of Federal Court jurisdiction. However, it is pleasing that the number of women in the judiciary is increasing. Of the 56 judges and magistrates appointed to federal courts simce March 1996, 16 have been women. This is nearly 30 per cent of all new appointments. It may be possible in the near future to make further inroads, particularly in relation to the Federal Court, without compromising on the quality of appointments to the Bench.

ROLE OF THE JUDICIARY

Members of the judiciary are key players in upholding the rule of law.

An independent judiciary is the cornerstone of our system of government.

The courts have to maintain and enhance public confidence in the judiciary by the quality of their work. Judges must remain impartial arbiters and avoid activities incompatible with their exercise of federal jurisdiction.

The Federal Court is meeting those standards.

GROWTH IN FEDERAL JURISDICTION/ LITIGATION

As well as distinguishing themselves through their intellectual vigour, the members of the Court have a reputation for hard work and dedication. The Court is a busy one.

In the Court's first year, it could exercise jurisdiction under 11 Acts and 442 applications were filed.[1]

By the end of 1990 when Sir Nigel Bowen retired, this workload had grown to the Court exercising jurisdiction under 90 Acts, with 2016 applications being filed.[2]

The Court is now given original jurisdiction by over 150 Commonwealth Acts, and in the last financial year 5385 applications were filed.[3]

This increasing workload brings with it the challenge of ensuring that the delivery of justice continues to be timely, efficient and cost-effective.

INTERPRETATION OF COMMONWEALTH LEGISLATION

It is appropriate that this Court be the premier court for the interpretation of Commonwealth legislation.

In this regard, it is not intended that the Court supersede the Supreme Courts.

The role of the Supreme Courts is well-defined.

There are, of course, areas of overlapping jurisdiction. However, this overlap avoids jurisdictional disputes and facilitates the delivery of justice to court users.

IMPACT OF THE FEDERAL MAGISTRATES SERVICE

The establishment of the Federal Magistrates Service is likely to have a significant and enduring impact on the Federal Court.

As the Court is aware, the Service has been established to deal with a range of less complex federal disputes that would otherwise go to this Court or to the Family Court.

The Service shares jurisdiction with the Court in administrative law, bankruptcy, human rights and trade practices under a range of Commonwealth provisions. The Government is considering other areas of suitable concurrent jurisdiction for the Federal Magistrates Service where they involve matters of low complexity.

Although it is expected the Federal Magistrates Service will reduce the burden of less complex cases on this Court, the considerable pressures on the Court and the nature of cases coming before it remain a concern.

MIGRATION CASES

The increasing number of migration cases before the Court has taken up a significant portion of the Court's resources.[4]

This is of particular concern when so many of the applications lack merit. Indeed, I note that in 2000–2001 only 5 per cent of migration applications[5] were upheld by the Court at first instance. A significant number of cases, 31 per cent,[6] were withdrawn by the applicants before the final hearing, considerable resources of the Court having already been expended.

The Migration Act jurisdiction presents a significant challenge for Federal Courts and for the Government.

The Court is aware that the Parliament has legislated to implement a new judicial review scheme for refugee applications.[7] This legislation is intended to lessen the burden on the courts by reducing the number of cases going to the courts.

I expect that we will all hear more about the operation of this scheme in the coming year and we will watch its impact on the Court's workload with interest.

Justice Finkelstein and Justice Merkel.

NATIVE TITLE WORKLOAD

Another significant impact on the workload of the Court has been in the area of native title.

I am conscious that this has been a challenge for the Court.

Many native title cases do not fit the traditional mould of court litigation. The number of parties alone increases the complexity of much native title litigation.

Slowly but steadily the case law on native title is increasing, as is the number of native title determinations.

Last financial year 21 native title determinations were made, bringing to 32 the number of native title determinations made since 1993. It is pleasing to note that a substantial proportion of these determinations were made by consent.[8] The Commonwealth appreciates, nevertheless, that consent determinations involve significant work by both the Court and the National Native Title Tribunal in assisting the parties to reach agreement.

The Government acknowledges the professional and committed way in which the Court has managed its native title workload.

RECENT FEDERAL COURT INNOVATIONS

Coping with this significant and increasing workload has required the Court to adopt a flexible and innovative approach to delivering services to the Australian community.

To ensure operational efficiency and public accessibility, the Court has adopted a number of innovative initiatives which have distinguished the Court as a world leader.

The Court's individual docket system and the Court's e-Court strategy are two initiatives which have drawn accolades from litigants, the profession and lawmakers in Australia and overseas.

These are initiatives of which the Court is justifiably proud.

In this respect, specific mention should be made of the Court's role as leader in the haute couture of judicial attire. The Commonwealth is confident that the Court will continue to act as a leader in both court innovation and judicial fashion.

CONCLUSION

At the first sitting of the Court 25 years ago, then Attorney-General the Honourable Bob Ellicott QC predicted that the Court would evolve to play "a significant role in the development of the judiciary and the law in Australia".[9]

This prediction has been realised very quickly.

Everyone who has been associated with the establishment and work of the Court is entitled to feel proud of its many achievements.

Sir Nigel Bowen admirably steered the Court through its first 13 years. Under the leadership of Your Honour the Chief Justice, the Court continues to flourish and grow in stature as a world-class superior court.

The next challenge is to ensure that the next 25 years are as noteworthy, and as distinguished, as the last 25 have been. The Government looks forward to working with the Court to achieve that goal.

May it please the Court.

NOTES:

1. *Federal Court of Australia Annual Report 1977–78.*
2. *Federal Court of Australia Annual Report 1989–90.*
3. *Federal Court of Australia Annual Report 2000–2001.*
4. The number of migration applications to the Court increased from 418 in 1996–97 to 1121 in the last financial year, *Federal Court of Australia Annual Report 2000–2001*, p. 43.
5. *Litigation Involving Migration Decisions*, Fact Sheet, Department of Immigration and Multicultural Affairs, www.immi.gov.au/facts/09litigation.htm.
6. See above fact sheet.
7. *Migration Legislation Amendment (Judicial Review) Act 2001.*
8. *Federal Court of Australia Annual Report 2000–2001*, p. 47.
9. Address of Welcome by the Attorney-General, Mr R.J. Ellicot QC, 7 February 1977 at the swearing in of the judges of the Federal Court of Australia.

Success of Individual Docket System Reflects Confidence in Court

Address to the Federal Court of Australia's 25th Anniversary Sitting by the President of the Law Council of Australia, Tony Abbott.

THE Law Council of Australia is very pleased to join in the celebration of this Court's first 25 years.

It is surprising to note that there were doubts in 1977 about the extent of federal jurisdiction and the necessity for this Court. There can now be no doubt of the significant breadth of the jurisdiction this Court exercises. One need only flip through the 109 volumes of the Federal Court reports to gain an appreciation of the reach of the work of this Court into the lives of Australian people and businesses. Of course, the expansion of the Court's jurisdiction has also been assisted by the increasing influence of federal legislation and government action seen over the past 25 years.

While it is obvious that the amount of federal jurisdiction has increased, there is also no doubt of the importance of the jurisdiction. The Court's decisions on the application of Section 52 of the Trade Practices Act shape a significant part of Australia's commercial life. The Court's decisions in the areas of native title, migration and industrial relations are often seen at the forefront of highly contentious public debate.

In the jurisdiction that this Court exercises, it is accordingly of vital importance that the jurisdiction be exercised with distinction and in a manner which commands the respect of those who appear before the Court and are affected by its decisions.

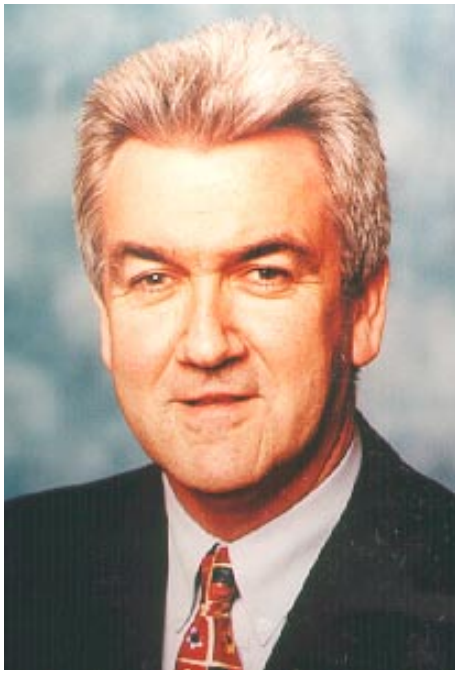
That the Court enjoys the confidence of its users was recently demonstrated in the course of the Australian Law Reform Commission's work which led to their report number 89 "Managing Justice, A Review of the Federal Civil Justice System". The Commission's report recorded the "consistent high praise about the quality judging and effective management of the Federal Court" in consultations and submissions to the Commission.

These comments were of course made in the context of the primary focus of the Commission's work, which was an examination of delay and cost in federal litigation. However, as to the quality of justice dispensed, the Law Council also notes that members of the Commission, in reviewing reaction to their report, have commented that the Federal Court is regarded as a world class court. The Law Council interprets this as praise of the highest order and associates itself with it.

One of the principal features of this Court, which commanded a great deal of the attention of the Australian Law Reform Commission, was the Court's individual docket system. The success of the individual docket system illustrates, in the Law Council's view, two important features which have distinguished this Court in the last 25 years.

First, the system was introduced in consultation with and cooperation with the legal profession, in recognition of the principle that reforms and changes to practices are more likely to work effectively if they are shaped with the cooperation of those whom they affect. The preparedness of the judges of this Court to consult with and listen to the legal profession on procedural reform has been something which the legal profession has particularly appreciated. That preparedness continues. The individual docket system is undergoing a review at present to which the Law Council is contributing. Representatives of the Law Council serve on the Court's Practice Committee, chaired by Justice Von Doussa.

The second feature which the success of the individual docket system in this Court demonstrates, in the Law Council's view, is the very high respect and confidence which the legal profession has in the Court. Simply, the system would not work so well without that respect and confidence. It has been remarked about other places where a system of managerial judging has been introduced that a principal reason for that system not working is the systemic non-compliance with the orders and directions of the managerial judge. Such non-compliance is attributed by commentators to insufficient respect for that judge. By contrast, in this Court it may be observed that on the whole, and with just exceptions, the rate of compliance with directions is very high.



President of the Law Council of Australia, Tony Abbott

The respect and confidence which the legal profession has in the quality of appointments to this Court is in part attributable to the involvement of the legal profession in the process of appointment of its judges. The Law Council wishes to acknowledge its appreciation of the depth of consultation about appointments which the current and previous attorneys have had with the legal profession. The public can be assured that every effort is undertaken to identify the best candidates for appointment.

A prominent feature of the Australian Law Reform Commission's inquiry into the federal civil justice system was delay in litigation, because delay often increases costs. Sometimes delay can produce injustice. In this context, the legal profession is grateful for the efforts which the judges of this Court and its officials have at all times taken to make themselves available quickly in urgent situations. A recent remarkable example was the application in the nature of *habeas corpus* issued out of the Melbourne registry in respect of occupants of the *MV Tampa*. One of the many noteworthy features of that litigation was the extreme dispatch with which a case involving very complex legal issues, and of great importance to the parties, was disposed of within the shortest possible times. A trial, mediation and appeal to the full Federal Court were all accomplished, and judgments given, within 19 days of issue of proceedings. That this was able to be done reflects the commitment to public service and justice of both the judges and the officials of this Court.

It has been a theme of these brief remarks that this Court has the confidence of the legal profession. The Law Council has supported and will continue to support the Court and its independence. It will continue as far as possible to defend the Court against unfair and dangerous attacks. Every court, including this Court, must expect criticism from both legal and other commentators, but some types of comment and criticism have a tendency to undermine the public and political confidence which is ultimately necessary for the independent existence of those courts. Not all criticism can be met, but some must. In particular, the Law Council rejects any assertion that any section of this Court has any political or social bias. The Law Council has complete confidence that this Court has done, and will continue to do, justice according to law.

The Law Council congratulates the present and former judges, registrars and staff of this Court on its first 25 years of outstanding public service.

Representatives of State benches and the profession at the ceremonial sitting.

Legal Responses by Australia to the War Against Terrorism

Dr James Renwick[1]

INTRODUCTION

THE term "terrorism" is not new. It was apparently first used in relation to "The Reign of Terror" of the French revolutionaries of 1793–94. But the current war against terrorism is something new: a war where in some ways the main enemy is an idea. Defeating it has been compared with trying to destroy a hydra-headed monster. There is force in the analogy.

It will be recalled that killing the hydra, a monster with nine heads, one of which was immortal, was the second labour of Hercules. It was a great challenge even for the mythical hero. First he tried to cut off its heads, but he found that for each decapitation another two heads grew. So, with the assistance of his nephew he tried another strategy, with greater success. He strangled the necks of the beast one by one, lighting a fire to keep the other heads at bay. Finally, Hercules dipped his arrows in the hyrda's deadly blood — so enhancing the weapons at his command. But in the end, the poison on these arrows was used to poison him and bring his life to a close.

A myth? Certainly, but perhaps an instructive allegory: terrorism is a difficult concept to defeat, requiring new strategies if we are not to make the problems worse, and we need to ensure we do not poison our institutions or our way of life in the process.

THE UNITED NATIONS RESPONSE

Soon after the terrible events of 11 September 2001 in Washington and New York the United States' President said:

> We will direct every resource at our command — every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war — to the disruption and to the defeat of the global terror network.

Mr Bush's words were no exaggeration. Leaving aside the substantial military response by the coalition of nations, which is most evident in operations affecting Afghanistan, there have been very substantial activities by governments in the war against terrorism.

The international centrepiece of this strategy is UN Security Council resolution 1373, adopted unanimously by that Council under chapter 7 of the Charter of the United Nations, on 28 September 2001. The theme of the resolution was:

- preventing and suppressing the financing of terrorist acts; and
- denying safe havens to terrorists.

The resolution imposed a binding obligation on all States to this end and also required States to review and strengthen

- border security operations;
- banking practices;
- customs and immigration procedures;
- law enforcement and intelligence cooperation; and
- arms transfer controls.

The resolution also required that each state report to the Security Council on the steps it had taken, and what follows is largely taken from the reports provided to it by the United States of America, the United Kingdom, and Australia. It is fair to say that the responses are a powerful reminder of what nations states can do when they consider that their existence, and the way of life of their citizens, is threatened.

THE UNITED STATES' RESPONSE

Turning first to the United States response, the steps taken include the following:

1. Mr Bush issued Executive Order 13224 on 23 September 2001. This froze the assets of various foreign individuals, groups and entities linked to terrorist acts or supporters of terrorism — and that list has been steadily added to.
2. The US Congress enacted the evocatively named USA Patriot Act which strengthened the national government's ability to exclude supporters of terrorism or to deport them, and expanded the powers of US law enforcement bodies to investigate and prosecute persons engaging in terrorist acts.
3. The US signed and expects soon to ratify the UN conventions on "The Suppression of Financing of Terrorism and the Suppression of Terrorist Bombing".
4. The US has moved to share operational information with other countries and to encourage them to do the same, with a view to suppressing terrorism and its financing.

THE UNITED KINGDOM APPROACH

This approach has been fully supported by both Australia and the United Kingdom.

Furthermore the UK has enacted the *Anti Terrorism, Crime and Security Act 2001*, a very wide ranging statute which, for example:

(a) provides a regime for freezing terrorist assets and arranging for their forfeiture;
(b) increases the ability of governments to share information between departments, and with other countries;
(c) proscribes dealing with the ingredients of weapons of mass destruction;
(d) gives increased powers to police to fingerprint, search, examine and photograph terrorist suspects;
(e) allows for detention of suspected international terrorists, and deportation in specified cases.

THE AUSTRALIAN RESPONSE

Turning to Australia, the position is hardly less dramatic. The detail may be found in the report by Australia to the UN Security Council.[2] I will only mention the key points.

The documents bring to prominence a little known statute called the *Charter of the United Nations Act 1945 (Cth),* which, relying on the external affairs power, permits regulations to be made to give effect to decisions of the Security Council under Chapter VII in so far as those decisions require Australia to apply measures not involving the use of armed force: see s.6. By operation of s.9 of the Act (and, in relation to States, by operation of s.109 of the Constitution) such regulations prevail over inconsistent Commonwealth Acts and State and Territory laws. By s.10, later Acts are not to be interpreted as overriding the regulations.

Regulations have been passed under this Act, notably the *Charter of the United Nations (Anti Terrorism Measures) Regulations 2001*, and the *Charter of the United Nations (Sanctions Afghanistan) Regulation 2001*. The former freezes specified assets (generally those identified by Mr Bush in his Executive Order), the latter regulation imposes a sanctions regime on Afghanistan by restricting the supply of arms, or the use of Australian aircraft and ships to, or in relation to Afghanistan, and prohibiting dealing with Taliban or Bin Ladin assets. The Attorney-General is able to seek injunctions to prevent current or proposed breaches of the regulations. These regulations are only the beginning, however, of the response by Australia.

There are a number of Acts, which are perhaps not so well known generally, which provide a formidable array of powers for the government to deal with terrorism. They include banking powers e.g. the *Financial Transactions Report Act 1988* but also, for example, s.7 of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, about which so much has been written in relation to David Hicks, currently a guest of the US marines. Thus, s.6 of the latter Act creates offences arising out of incursions into foreign States with the intention of engaging in hostile activities,[3] and sub-sections 7(1)(e) and (f) create offences where a person:

(e) gives money or goods to, or performs services for, any other person or any body or association of persons with the intention of supporting or promoting the commission of an offence against section 6; [or]

(f) receives or solicits money or goods, or the performance of services, with the intention of supporting or promoting the commission of an offence against section 6.

There are many Commonwealth statutes which already deal with terrorist activities e.g.

- The *Crimes (Aviation) Act 1991*;
- The *Crimes (Ships and Fixed Platforms) Act 1992*;
- *The Nuclear Non-Proliferation (Safeguards) Act 1987*;
- The *Crimes (Hostages) Act 1989*;
- The *Crimes (Internationally Protected Persons) Act 1976*;
- The *Crimes (Biological Weapons) Act 1976*;
- The *Chemical Weapons (Prohibition) Act 1994* and, of course;
- provisions in the *Crimes Act 1914* dealing with offences such as treason,[4] treachery,[5] sabotage,[6] sedition and espionage; and
- provisions in the *Criminal Code Act 1995* dealing with causing, or threaten-

Law Council Warning

HICKS REACTION A WARNING ON COUNTER-TERRORISM LAWS

THE David Hicks case must not become an excuse to enact counter-terrorism laws which override fundamental protections and individual rights, according to the Law Council of Australia.

Law Council President, Tony Abbott, said that there was a danger that measures designed to protect Australian democracy from terrorism might damage the very rights and freedoms which make up the democracy.

His comments follow the announcement by the Federal Attorney-General that ASIO would be granted expanded powers and that persons might be detained without charge and without legal representation in order only to seek information about terrorism.

"The Law Council recognises the Government needs to protect Australia's security interests, but in doing so, it must remain mindful of the rights of individual Australians to fair treatment by police and security agencies."

The Hicks case demonstrates how easy it is to create an atmosphere of hysteria when the facts are barely known. The Law Council understands Mr Hicks has not been interviewed by Australian authorities, yet he is already being labelled as a "traitor" with some outlandish media comment canvassing the restoration of the death penalty.

"The Council believes the Government should allow any proposed laws to be fully debated by Parliament and be subjected to the close scrutiny of a Parliamentary committee. The Government must demonstrate that the proposed new measures are reasonably necessary to assist in the defence of Australia from terrorism. There must be limits and safeguards on counter-terrorism measures," said Mr Abbott.

"For its part, the Law Council will examine the laws to ensure that basic protections are provided such as:

- the right to be fully informed of the charges or information being sought from a detained person;
- appropriate testing of the reasonableness of the belief held by ASIO or other agencies of the knowledge a person may have of terrorist activity prior to any strict time limits on periods of detention;
- strict time limits on periods of detention without charge;
- entitlement to legal representation of detained persons;
- protection from prosecution from self-incriminating information supplied under powers of coercion; and
- adequate monitoring of the exercise of the new powers, and review of the new legislation within two years."

"Of course, the Government must act to protect life and property from terrorist acts, but there exists already ample power to do this in the police, ASIO and other security agencies. Additions to these powers should be made only when compelling reasons can be advanced, and the extraordinary powers are balanced against safeguards to prevent abuse."

"The Law Council will constructively participate in this debate so that both the interests of Government and the citizen are protected," Mr Abbott concluded.

ing to cause harm, to Commonwealth Public Officials.

Notwithstanding that wide array of criminal proscriptions, the Commonwealth Government has announced that it will seek to amend the Criminal Code Act at the first sitting of the new Parliament to create an offence of "terrorism", which is apparently to be defined as either:

- an act or omission constituting an offence under the UN or other international counter-terrorism instruments; or
- an act committed for a political, religious or ideological purpose which is designed to intimidate the public with regard to its security, and intended to cause serious damage to persons, property or infrastructure.

It has been suggested that such offences are unnecessary, or too wide and vague. It will therefore be interesting to see the precise formulation of such offences.

There is considerable material in the Australian report to the Security Council dealing with:

- border control;
- ensuring that the refugee convention is not used by terrorists; and also
- explaining the assistance which can be provided in terrorist investigations and prosecutions under the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987*.

Paragraph 18 of the response contains what many regard as the most controversial response by the government to the war against terrorism, namely the proposal that a federal magistrate or a senior legal member of the Administrative Appeals Tribunal could issue a warrant on the application of the Director General of Security (the Head of Australian Security Intelligence Organization (ASIO)), with the concurrence of the Attorney-General, to hold an individual incommunicado for up to 48 hours without legal representation, and give power to ASIO to question such persons, when they have or may have information about terrorism, even if they are not themselves involved in the activity.

No doubt such a provision — and its safeguards — will be given the closest scrutiny when introduced into Parliament. If enacted it would mark a significant change in the role of ASIO.

The capacity of Australia to detect and prevent terrorism, and whether the National Crime Authority and indeed ASIO ought to be reorganised to this end, is the subject of another review announced by the government, and currently under way.

Some national security legislative activity pre-dated 11 September 2001: — for example, the *Intelligence Services Act 2000* — had passed through Parliament just prior to then, and the Defence (Aid to Civil Authorities) legislation had been enacted the previous year. The latter Act dealt with call out of the Defence Force at the request of the States or the self-governing territories for protection against domestic violence (so fleshing out the mechanism contained in s.119 of the Constitution), call out of the Defence Force by the Commonwealth to protect its own interests, and the powers and immunities given to members of the Defence Force when called out in each case, and in dealing with terrorist incidents: see generally my article, "Military Aid to the Civil Power", *Bar News*, *Journal of the NSW Bar Association* Summer 2000/2001 pp. 13–16.

The Intelligence Services Act essentially:

- puts the Australian Secret Intelligence Service (ASIS) on a statutory footing for the first time;
- sets out the functions of ASIS and the Defence Signals Directorate (DSD);
- provides immunities for officers of both organisations in respect of the proper conduct of their functions;
- provides rules to protect the privacy of Australian citizens;
- creates a parliamentary joint committee for ASIS and ASIO which will examine expenditure upon, and administration of each agency;
- protects the identify of ASIS staff and agents in the same manner as ASIO officers; and
- extends the oversight of each agency by the Inspector General of Intelligence and Security; see my article, "The *Intelligence Services Act 2001*" in *Bar News*, the *Journal of the NSW Bar Association*, Summer 2001/2002 pp. 10–13.

In conclusion, I suggest that national security law — which is really the topic of this note — is no longer either an obscure backwater, or the occasion for wry jokes. It is in fact a challenging area of law, in part because its sources are disparate. As I have written elsewhere:

> National security is located at a point where law, politics, international relations, defence, and on occasion individual freedoms intersect, and where, therefore, difficult and sometimes controversial legal and policy choices must be made by parliaments, judges and policy makers.
> [Bar News Summer] 2001/2001 p. 10.

In conclusion, I return to the image of the hydra, and the question, how do we destroy terrorism without risking poisoning what is precious to us and our way of life. Justice Kirby of the High Court of Australia may provide the general benchmark against which we can judge our country's response in this regard. He recently wrote:

> The countries that have done best against terrorism are those that have kept their cool, retained a sense of proportion, questioned and addressed the causes, and adhered steadfastly to constitutionalism.

NOTES:

1. Barrister, Sydney. james.renwick@12thfloor.com.au. The author currently holds an appointment as Counsel Assisting the Royal Commission into the Building and Construction Industry, and as a Lieutenant-Commander in the Royal Australian Naval Reserve. The views expressed are his own.
2. http://www.un.org/Docs/sc/committees/1373/
3. 6(1) states:
   A person shall not:
   (a) enter a foreign State with intent to engage in a hostile activity in that foreign State; or
   (b) engage in a hostile activity in a foreign State.
   ...
   For the purposes of subsection (1), engaging in a hostile activity in a foreign State consists of doing an act with the intention of achieving any one or more of the following objectives (whether or not such an objective is achieved):
   (a) the overthrow by force or violence of the government of the foreign State or of a part of the foreign State;
   (aa) engaging in armed hostilities in the foreign State;
   (b) causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;
   (c) causing the death of, or bodily injury to, a person who:
   (i) is the head of state of the foreign State; or
   (ii) holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or
   (d) unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State . . .

(6) Nothing in this section applies to an act done by a person in the course of and as part of the person's service in any capacity in or with:
(a) the armed forces of the government of a foreign State; or
(b) any other armed force in respect of which a declaration by the Minister under subsection 9(2) is in force.

4. *Crimes Act 1914* — Sect 24 entitled "Treason", relevantly states:
(I) A person who:
...
(c) levies war, or does any act preparatory to levying war, against the Commonwealth;
(d) assists by any means whatever, with intent to assist, an enemy:
(i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
(ii) specified by proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth;
(e) instigates a foreigner to make an armed invasion of the Commonwealth or any Territory not forming part of the Commonwealth; or
(f) forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act;
shall be guilty of an indictable offence, called treason, . . .
(2) A person who:
(a) receives or assists another person who is, to his knowledge, guilty of treason in order to enable him to escape punishment; or
(b) knowing that a person intends to commit treason, does not give information thereof with all reasonable despatch to a constable or use other reasonable endeavours to prevent the commission of the offence;
shall be guilty of an indictable offence.
(3) On the trial of a person charged with treason on the ground that he formed an intention to do an act referred to in paragraph (I)(a), (b), (c), (d) or (e) and manifested that intention by an overt act, evidence of the overt act shall not be admitted unless the overt act was alleged in the indictment.

5. Sect 24aa, of the Crimes Act entitled "Treachery", states:
(1) A person shall not:
(a) do any act or thing with intent:
(i) to overthrow the Constitution of the Commonwealth by revolution or sabotage; or
(ii) to overthrow by force or violence the established government of the Commonwealth, of a State or of a proclaimed country; or
SECT 24AB of the Crimes Act entitled "Sabotage" states:
(1) In this section:
"act of sabotage" means the destruction, damage or impairment, with the intention of prejudicing the safety or defence of the Commonwealth, of any article:

7. Law Council Of Australia; 32nd Australian Legal Convention Canberra, 11 October 2001; "Australian Law — After 11 September 2001"; http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_after11sep01.htm

Expert Evidence

Paul Elliott QC interviews Professor George Hampel

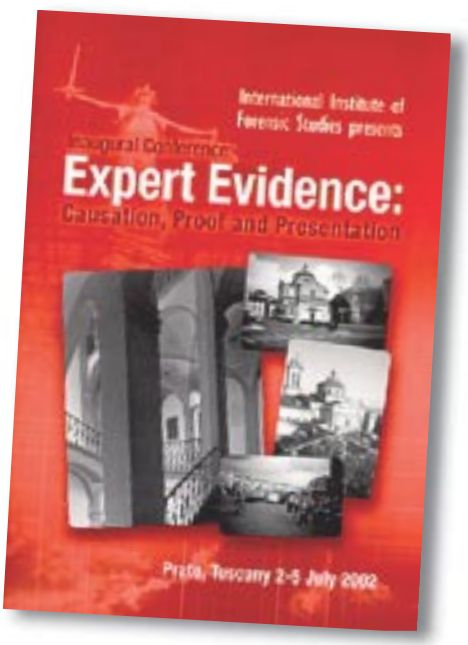
The following is an interview between *Bar News* Editor, Paul Elliott QC and Professor George Hampel concerning the establishment of the International Institute of Forensic Studies and its conference on expert evidence: "Causation, Proof and Presentation" to be conducted in Tuscany in July 2002. Professor Hampel outlines how the International Institute of Forensic Studies at Monash University came to be established and the need for a re-evaluation of the role of expert evidence in court. The establishment of the Institute and the need for further training for both lawyers and experts was instigated by two reports published in 1999 under the auspices of the Australian Institute of Judicial Administration: Australian Judicial Perspectives on Expert Evidence and Empirical Study and Australian Magistrates' Perspectives on Expert Evidence: An Empirical Study.

Professor Hampel emphasises the need for barristers to re-evaluate the manner in which they present expert evidence and their relationship with experts from other disciplines.

Paul Elliott: How did the International Institute of Forensic Studies come to be set up?

George Hampel: Well, the issue of forensic and expert evidence has always been a difficult one, both for the courts and for practitioners and for those who give the evidence. There are a lot of issues about the best way of doing it, but, in the last few years there have been two surveys done; one of the Australian judiciary and the other of the Australian magistracy with unexpectedly good responses. The results of these surveys have been analysed in two reports by Dr Ian Freckelton, Dr Prasuno Reddy and Hugh Selby. The findings include the lack of objectivity by experts; the lack of understanding by experts in the forensic process of the tension between the professions; very strongly the lack of ability by experts to communicate with judges and juries, to prepare relevant reports and generally to conduct themselves well in examination and cross-examination. There was considerable concern about the performance by lawyers who deal with experts, and they related mainly to areas such as difficulty because of lack of preparation, and also skills of examination and cross-examination. And so a number of remedies were offered by those who were interviewed, but one of the most important ones was training, both for advocates and for experts. The report says:

> The answers to the survey of Judges disclosed a significant recognition of the need for both experts and advocates to perform better so that the burden upon lay jurors is eased. This took the form of overwhelming support for training for expert witnesses to communicate their views better and to fulfill their roles as forensic witnesses more professionally as well as lawyers to discharge their roles as examiners and cross-examiners more effectively.
>
> (*Australian Judicial Perspectives on Expert Evidence: An Empirical Study*).



Now the same views were expressed by the magistrates and many judges who were concerned about the way this happens with judges and not only with jurors.

Elliott: Who did the studies and who initiated doing the studies that have led to the establishment of the Institute?

Hampel: These were initiated by the Australian Institute of Judicial Administration, and the surveys were prepared and conducted under the guidance of Dr Ian Freckelton a member of our Bar, Dr Prasuno Reddy and Hugh Selby. Of course Freckelton and Selby are the well known authors of the main work on expert evidence.

Elliott: Was the survey done with the aim to set up an institute or was this an idea that only came after the results came in?

Hampel: The survey was not done with any connection with the Institute, in fact it was well before the Institute was set up. But it was certainly one of the catalysts for the establishment of the Institute.

Elliott: So what is the objective of the International Institute of Forensic Studies?

Hampel: The Institute looked at the fact that there was no cohesive training provided for lawyers and experts. There were some training programs here and there; but there was nothing cohesive and nothing that would build on the total field, both for lawyers and experts: We looked at what is described as "the immediate challenge ahead" in one of these reports. It's an immediate challenge for the experts and advocates alike to be persuaded that they can improve their performance, and therefore their marketability, by acquiring more skills and experience in dealing with areas outside the judicial compass of the law. I mean that's the sort of general objec-

tive of the Institute which looks at both research and training. So the research arm, to look at what actually happens in various areas of this kind and then to train both experts and lawyers to improve their performances.

Elliott: When was the Institute set up and under whose guidance and which University is it attached to?

Hampel: Well, when I left the Bench and went to Monash, I became aware that Monash University had various courses in various faculties which touched on this forensic process. It occurred to me that an Institute such as this which could operate both nationally and internationally could bring all that together. The Monash Law Faculty set up this Institute under my chairmanship. Ian Freckelton is my two IC and there are two other members of it, Professor Bernadette McSherry, who is in charge of the research arm of the Institute, and a senior lecturer, Jonathan Cluff, who assists me with the educational side of it. And so, the Institute has started its work. We have already done a number of workshops for forensic scientists and chartered accountants.

Elliott: When did it start?

Hampel: In the year 2001 with Justice Kirby as its patron.

Elliott: What courses are being offered?

Hampel: We are at the moment about to finish devising a Graduate Certificate in Forensic Studies for Chartered Accountants. It's going to be a full-year course with a qualification, which will start later this year. And we hope ultimately to devise courses that will be open for both lawyers and other experts in these areas and will provide graduate qualifications. But the important event is the first, the Inaugural Expert Evidence Conference.

Elliott: Now, the Inaugural Conference on expert evidence is taking place in Prato, Tuscany from 2 to 5 July 2002. What is its aim and how will it operate?

Hampel: Monash has a permanent campus in Prato which is an old town just outside of Florence about 15 minutes by train, and it is hosting this conference. The aim of the conference is to explore the fields of causation, proof and presentation skills by experts and incidentally by advocates. So the conference begins with a demonstration workshop in the form of a short trial which will be examined and where some of the issues of presentation particularly will be considered. The conference will consist of some papers from an array of international speakers, a considerable number from Australia, but interestingly in a number of disciplines so that the expert evidence issues are not seen as part of any one discipline but across disciplines. The keynote speaker is a professor of law and a judge of the Court of Appeal in Amsterdam and he is a man very much involved in education and development. There are other international speakers from Canada, from Australia — from New South Wales and Victoria — judges and magistrates, a professor of surgery and a barrister speaking of such issues as causation as viewed by science and medicine as distinct from the approach to it by lawyers and courts, and there are a number of other interesting sessions. There is the usual program attached to the conference and pre and post conference tours.

Elliott: Where do you think barristers would gain an advantage by going to the conference?

There is now a change in the ethical position of the experts in the sense that they are invariably required to dedicate their effort to first the interest of the court and not the parties that they represent.

Hampel: My impression is that barristers, unless they are particularly exposed to a lot of work with experts, really don't think beyond the sort of basic approach to leading of evidence and cross-examination and don't have the opportunity of broadening their perspective across other disciplines. The aim of the conference is just to broaden the thinking and to encourage an interest in further development consistent with the views that have been expressed in these reports that really we all need to, everyone needs to, broaden our perspectives. I think it's significant that at the moment there are great changes taking place in this area, for example, the procedures in England have changed significantly in the way that the courts treat expert evidence. Our Federal Court in Australia has devised a whole new series of programs and methods of dealing with expert evidence. That will eventually, I think, infiltrate into the other courts. There are great issues being reconsidered about the impartiality of evidence, and the court-appointed experts. There is now a change in the ethical position of the experts in the sense that they are invariably required to dedicate their effort to first the interest of the court and not the parties that they represent. In New South Wales there are some new rules about expert evidence that are being promulgated and I think that will happen in Victoria very soon. So there are lots of developments, lots of focus in this area and many barristers simply use the traditional methods that we've all used for a long time and don't think beyond it sufficiently. That's where I think some awareness will come from this conference and similar conferences and training.

Elliott: So the aim is to assist in presentation of forensic material at the trial?

Hampel: Yes, well as far as all professions are concerned, to enhance their skills to start with, apart from their thinking about it. And also there are lots of assumptions made which are not based on any real research, real data, and so part of the attempt here at this conference and of the Institute is to research these areas, to get some proper basis on which conclusions about experts and about expert evidence can be made.

Elliott: There has been a change in New South Wales in relation to experts. Can you just briefly explain what that is?

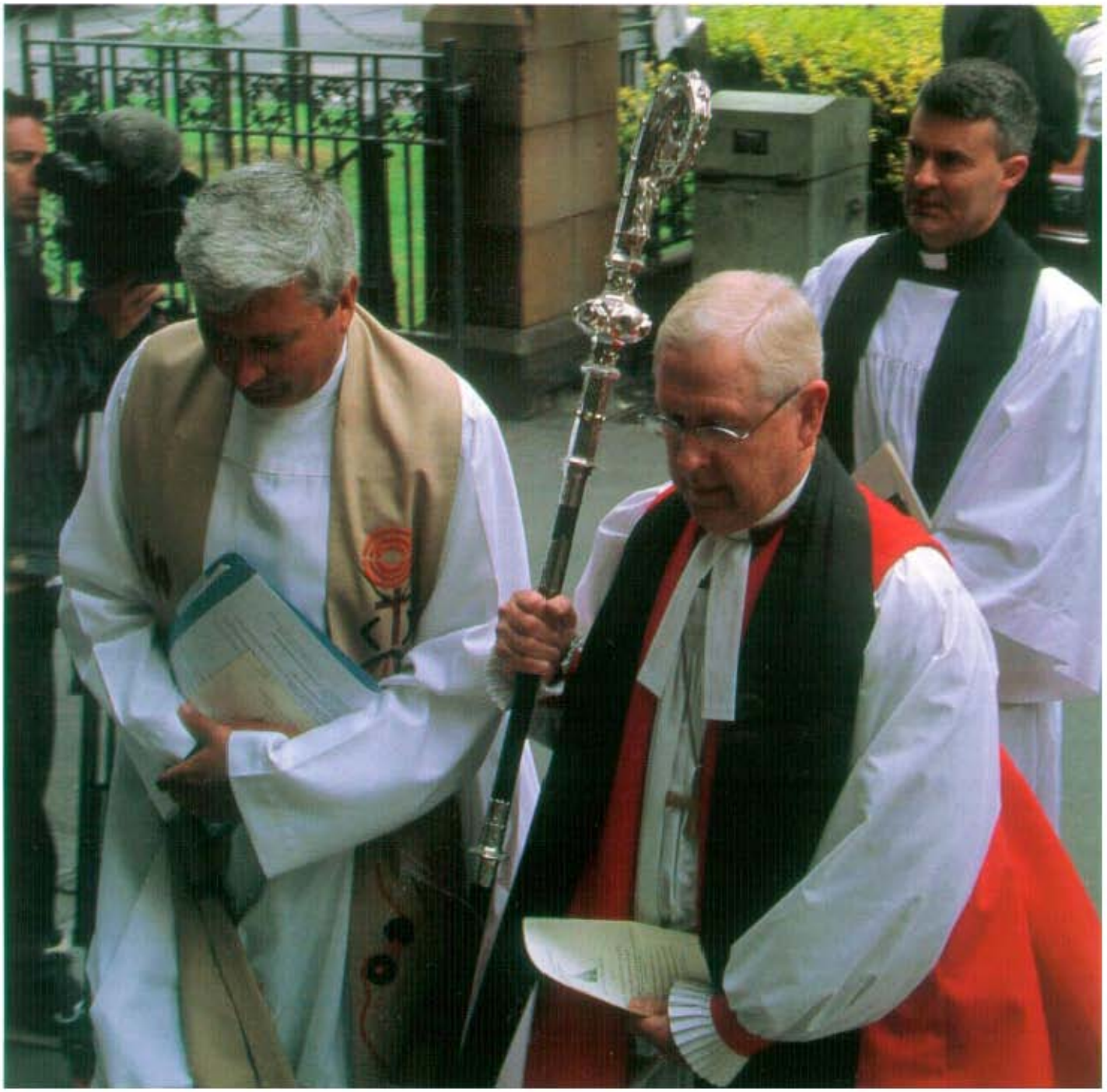
Hampel: Yes, a whole set of quite complex rules which require experts to exchange reports to confer with each other, to declare that they have attempted to resolve the issues, to identify issues for the Court, and ultimately to declare that their first obligation will be to the Court.

I've always found that there is a fair bit of tension between the professions and people who give evidence in court and the legal profession. And I think a lot of it is due to the fact that the expert witnesses from the other professions don't really appreciate and understand and accept their role. Therefore, there is always this tension which in my experience goes once lawyers try and understand where the expert is coming from and their position. Even more importantly, the experts appreciate the system and the way it's based and the way it works so that when they choose to become part of it they understand it sufficiently to be better as experts in court and in reports. So I think that exchange between experts and lawyers is a terribly important part of reducing that unnecessary tension.

Opening of the Legal Year

Monday 4 February 2002

St Paul's Cathedral



Father Frank Brennan SJ, AO and The Archbishop of Melbourne.

Master Katherine Kings; Justice Balmford and Miss Rowena Armstrong, Lady Canon, St Pauls.

Justice Phillips, Justice Hayne and Chief Justice Black of the Federal Court.

Judges of the County Court at St Pauls.

Religion and the Rule of Law in These Troubled Times

Opening Service for the Law Year 2002

St Paul's Cathedral, Melbourne, 5 February 2002

Fr Frank Brennan S.J., AO

Isaiah 43:16–21, Psalm 119: 57–64, Matthew 5:21–26

The congregation.

IT is a fine tradition that we gather to pray at the commencement of the law year. But public manifestations of faith and religious convictions are becoming more difficult for many Australians, I have just returned from 18 months work in East Timor where public prayer and acknowledged dependence on God is commonplace in the midst of such suffering and loss. I well remember the mass in the Dili Cathedral in thanksgiving for the work of INTERFET. Bishop Belo was presiding. At the end of the mass, Major General Cosgrove spoke. He recalled his first visit to the cathedral three months earlier when he was so moved by the singing that he realised two things: first, the people of East Timor had not abandoned their God despite everything that had happened; second, God had not abandoned the people of East Timor. As he spoke, I was certain that despite the presence of the usual media scrum, not one word of this speech would be reported back in Australia. It was unimaginable that an Australian soldier would give such a speech in Australia. If he were an American general, we would expect it. Here in Australia, the public silence about things spiritual does not mean that spirituality is not present animating and inspiring the moral actors of our society including lawmakers (whether they be politicians or judges) and legal practitioners. Practised both in the art of distinguishing law, policy, and morality, and in the discipline of separating our roles from our personal dispositions, we are delighted to join the psalmist this morning in praying together and publicly: "Though the cords of the wicked ensnare me, I do not forget thy law . . . I am a companion of all who fear thee, of those who keep thy precepts." (Ps. 119:61,64) Let us reflect on religion and the rule of law in these troubled times.

The Archbishop of Melbourne greets the Governor-General John Landy.

When admitted as a barrister and solicitor of the Supreme Court of Victoria in 1978, my affidavit stated that l was resident at Campion College, Kew. I mused at the time that Edmund Campion

St Patrick's Cathedral

Judge White, Rose O'Loughlin, Judge Bowman and David Martin at St Patricks.

— hung, drawn and quartered at Tyburn on 1 December 1581, 18 months after his return to England when he had presented to the Dover port authorities as a jewellery merchant — would have marvelled at how things had changed. Before Campion had fled to the continent seeking ordination as a Catholic priest, he had been ordained a deacon in the Established Church and had even given the speech of welcome at Oxford when Queen Elizabeth had visited in 1566. I can only presume that he would join with all of us in taking delight that a Jesuit now be invited to preach in the Anglican cathedral for the opening of the law year. We lawyers of diverse religious traditions and none need to concede that Campion had no reason to think well of the legal system which had wrongly convicted him of conspiracy against the life of the Queen. His dying declaration was, "If you esteem my religion treason, then I am guilty; as for other treason I never committed any. God is my judge." Though no lawyer now would defend the legal processes applied by the State to the person of Campion and his ilk, we could still debate the politics and high policy of the time that placed the sovereignty of the state and the popular will of the people (or at least the populist sentiment of the majority or the personal preferences of the powerful) above the rights and dignity of the one who happened to be different, the "Other" in their midst.

Nowadays, I have cause to step into chambers or a legal office only a few times a year. The response to the usual greeting, "How are you?" is inevitably, "Busy, very busy. Yes I am well." Lawyers are the only people I know who start any description of their professional and personal life with a universal declaration of "busyness". It is usually a sign of how all-embracing one's profession is in one's life. Sometimes we know it can also be a polite and nervous acknowledgment of the uncertainty and risk of practising a profession which is the clients' last resort in difficult economic times, and of the confidential demands of a profession dedicated to resolving conflicts which cannot be the content of

Representatives of the County Court.

Deputy President VCPT John Billings, Michael Corrigan and Dominic Lennon.

Arriving at St Patricks.

Justice Teague, Paul Coghlan and Geoffrey Horran.

John Corcoran and Justice Teague.

superficial social discourse. No matter what the initial disposition of our clients or the availability of public funds, we ought to have a professional commitment to treating litigation as a last resort, urging our clients "first be reconciled to your brother . . . Make friends quickly with your accuser, while you are going with him to court, lest your accuser hand you over to the judge". (Mt. 5:25)

As lawyers, we are privileged to be able to view any conflict from all sides. As reconcilers, we seek justice, truth, mercy and love. Jesus' articulation of the new law which we have heard in this morning's gospel from the Sermon on the Mount is an impossible prescription but an appealing ideal. Whichever side of the Bench we are on, whichever side of the Bar table, we have all been angry with one of our peers at some time, and we have definitely expleted, "You fool" if not in open court, then when we return to the camaraderie of chambers. This morning we gather in this cathedral, and like the Jews in the Matthean Christian community who still came to the temple to bring their gifts to the altar, we must pause and remember not those against whom we have a grievance, gripe or grudge but those who have a grievance, gripe or grudge against us. To commence this law year with a pure heart and an open mind we should attempt to be reconciled to the one who feels wronged by us. This is a big ask. It is so much more than the old law and the established norms of social discourse and propriety. It is the new law of Jesus put before us so that we might truly bring reconciliation where there has been none and to make things new. "So if you are offering your gift at the altar, and there remember that your brother has something against you, leave your gift there before the altar and go; first be reconciled to your brother, and then come and offer your gift." (Mt. 5:23–24)

As lawyers in a democratic society espousing a commitment to the rule of law, we have a role not only as personal reconcilers but as the architects of a legal system which can bring reconciliation and justice to all those who are subject to the jurisdiction. Members of our profession must be heard in the public forum when political conflicts relate to the liberty, dignity and rights of the person against the power of the State. To raise one's voice is not necessarily to seek membership of the chattering classes or of any other elite. Difference of opinion from commentators who read the public mood can assist society's ultimate quest for reconciliation and justice for all persons. Action such as Mr Eric Vadarlis's litigation in defence of the Tampa rescuees was as the Federal Court so rightly said a matter of high public importance, raising questions concerning the liberty of persons who were unable to take action on their own behalf to determine their rights. It was not as the State proposed an attempted, unwarranted interference with the executive power central to Australia's sovereignty as a nation. There are times when lawyers inspired by the law of the Old and New Testaments are called to put themselves on the line publicly even in the midst of political controversy.

As lawyers in a democratic society espousing a commitment to the rule of law, we have a role not only as personal reconcilers but as the architects of a legal system which can bring reconciliation and justice to all those who are subject to the jurisdiction.

The consoling and optimistic Deutero-Isaiah directs his words to the Chosen People in exile. They are to be liberated by Cyrus, a foreign king. In their isolated detention in Babylon, a foreign place, they constantly hark back for the consolation of the Exodus when Yahweh made a path for them through the waters and then drowned their enemies in the sea. But they are chastised: "Remember not the former things, nor consider the things of old. Behold I am doing a new thing, now it springs forth, do you not perceive it? I will make a way in the wilderness and rivers in the desert." (Isaiah 43:19)

Having recently returned to Australia, I happened to be in the Woomera Detention Centre last week when the government's Immigration Detention Advisory Group visited and met with hunger strikers. They were the first persons wearing the government mantle who were perceived to be listening and understanding after months of silence, absence, delay, and public abuse of these people as criminals during an emotive election campaign. They acknowledged that the majority of Hazara inmates fear persecution back home no matter who is in government. These asylum seekers want fair, quick and transparent determinations because they are confident that any fair-minded person would accept that they are refugees. There was I contemplating the words chosen for today's service in this splendid cathedral in the heart of Melbourne: "I give water in the wilderness and rivers in the desert, to give drink to my chosen people". (Isaiah 43:20)

I am amongst a minority of Australians who presently believe that a blanket detention policy and the Pacific solution are morally reprehensible as well as being impractical in the long term. I live in a democracy where that is not the prevailing public opinion nor the moral assessment of our lawmakers. Given that detention is an integral component of the government's present border protection policy, it is essential that the time delays, uncertainties, and psychological trauma exacerbated by the events of September 11 and the federal election now be put behind us as quickly as possible. Because of those events, every inmate in Woomera (including the bona fide refugees) will have spent an additional five months in detention — five months of despairing isolation which drove people to sew their lips so that they might be heard. They are now to be heard. Surely it is time for government and the community to respond with a renewed commitment to a determination process which is "fair, just, economical, informal and quick". Now that the election is over, surely it is time for government and all major political parties to concede that asylum seekers are not criminals and that their detention should not be any more dehumanising, isolating or remote than the detention imposed upon convicted criminals.

It will not be too long before protracted detention of children in the heated isolation of Woomera will be seen to be a moral obscenity, especially when some of them have fathers living here in Melbourne, happy to resume their parenting responsibility. If the media were allowed inside the one-kilometre fence to show ordinary Australians the sight of women with little children behind razor wire in the middle of the desert, many Australians would surmise that there must be a better way. In helping the community set its moral compass, we lawyers should continue to draw attention to the jurisprudence of other countries which are not so susceptible to our Australian isolation and hysteria on these matters. The UK Court of Appeal last October had to consider the lawfulness of detention of Kurdish asylum seekers for more than ten days while their

St Paul's Cathedral

St Patrick's Cathedral

Melbourne Hebrew Congregation

St Eustathios Cathedral

applications were processed. The Court of Appeal noted the UK government's policy decision "that, in the absence of special circumstances, it is not reasonable to detain an asylum seeker for longer than about a week, but that a short period of detention can be justified where this will enable speedy determination of his or her application for leave to enter." Though conceding that "the vast majority of those seeking asylum are aliens who are not in a position to make good their entitlement to be treated as refugees", the Court of Appeal went on to state its unanimously held belief "that most right-thinking people would find it objectionable that such persons should be detained for a period of any significant length of time while their applications are considered, unless there is risk of their absconding or committing other misbehaviour." Let's pray for those lawyers keeping watch at Woomera, Curtin and Port Hedland.

Praying for God's help and guidance at the commencement of this law year, may the Australian legal profession be able to assist us in the resolution of conflicts which cloud Isaiah's vision of water for those in the wilderness and rivers in the desert.

Praying for God's help and guidance at the commencement of this law year, may the Australian legal profession be able to assist us in the resolution of conflicts which cloud Isaiah's vision of water for those in the wilderness and rivers in the desert. May we be the professional exemplars, leaving our gift here at the altar and daily acting in the hope that before we return to this place next year we might be able to be reconciled to our brother or sister, making friends with our accusers (Mt. 5:25). What will distinguish us in this year of professional service is not the achievement but the hope which informs our efforts to provide a service to the nation -- justice and reconciliation for all, without fear or favour, whether they be one of us or "the other" in whom we see reflected something of ourselves and of God. "The earth, O Lord, is full of thy steadfast love; teach us thy statutes." (Ps. 119:64)

Melbourne Hebrew Congregation

The Synogogue.

St Eustathios Cathedral

The Chief Justice at St Eustathios.

The Exquisite Hour

A vision of a Superior Court in Australia in the year 2025

The Chief Justice John Harber Phillips' welcome to the Supreme and Federal Court judges' conference held in Melbourne in January 2002.

IN his remarkable poem *L'Heure Exquise* Paul Verlaine writes of those rare magical evenings when the radiance of the setting sun is picked up and continued by that of the rising moon. It is the period of this beautiful transference of light that he describes as "the exquisite hour".

The exquisite hour cannot occur without a combination of a clear, lengthy and bright sunset and an early rising full moon. As you would expect, this combination does not happen very often. Indeed, some uncharitable people would say that, in Melbourne, it cannot even be contemplated. Well, I am pleased to inform you that the combination did occur here earlier this month and an "exquisite hour" resulted.

As Verlaine has explained, extraordinary things can happen during "the exquisite hour". People long separated come together in spirit, perceptions through the senses are greatly refined and, importantly for this paper, accurate visions of the future may be obtained.

I have to tell you that during this recent "exquisite hour" I obtained what I believe to be an accurate vision of a superior court in Australia in the year 2025. I would like to share that vision with you this morning. Please come with me now while we visit the court.

THE JUDGES

Somewhat more than 50 per cent of the judges are women. For reasons that will shortly appear, all the judges are fluent in a language other than English — usually European or Asian. Many are fluent in several languages. At any given time several of the judges are serving on courts in other jurisdictions, both in Australia and overseas. These judges are replaced here by judges from those other jurisdictions on an exchange basis. Another judge sits on the international criminal court, American reservations about that body having been modified in the aftermath of the terrible events of 11 September 2001.

All the judges are members of the International Association of Judges. In the first decade of this century many more common law countries came to be involved in this association. Australia's role in the association is now significant. Formerly, Australia was merely a member of the oceanian regional group. Now a separate Australian section exists and operates. The secretariat of the association, now located in New Zealand, circulates an enormous amount of useful information to the member countries.

THE COURT'S RELATIONSHIP WITH THE COMMUNITY

For many years now the judges of the court have devoted much attention to their relationship with the community. In this connection they have seen their involvement with schools as a very significant element. Indeed, it was at the suggestion of the judges that two-year "community justice" courses were established in all schools for all students. These courses teach legal principles and court organisation and practice. Mediation, arbitration and negotiation of disputes are fully covered in them. The judges also sponsored the development of materials to enable "justice systems" to operate within the schools. These materials have included scenarios which can be developed by the students generally (not just the legal studies students), so that they can devise and conduct their own model criminal, civil and mediation proceedings. Each judge of the court visits at least two schools each year, usually in conjunction with one of the school "justice system" exercises. The Chief Justice gives an annual prize for the best "justice system" exercise conducted.

OPEN DAYS

Each year the Chief Justice conducts two "open days" in the court's largest courtroom. Groups of the public are invited to the "open days" by advertisements placed in the media. They attend at the court where they are addressed by the Chief Justice. They are given a report on the structure and operations of the court and provision is made for a question and answer session.

For the community generally the court also maintains its own information desk at its main entrance. This is linked with similar information centres in all of the public libraries.

COURT VISITORS

As the judges move through the community they make it a practice to invite people they meet to attend at sessions of the court as court visitors. This process produces each year visits by some hundreds of citizens — a good cross-section of the community. After their visits they are invited to express their views about the way the court works, and these views are collated so as to provide independent feedback on the court's operations.

THE COURT'S OPERATIONS

On the civil side, a plaintiff is generally required to provide to the court a "notice before action", to be served on the prospective defendant and an insurer if appropriate. Pursuant to court rules, sufficient detail must be included in the notice to enable a prospective defendant to reasonably assess the claim. The defendant must send a response to the notice within a 60-day time frame.

No formal proceedings can be commenced in the court unless the dispute involved has been first referred to court annexed mediation or some other alternative dispute resolution method. However, one of the panel of judges known as "entry judges" can, for good reason, direct otherwise.

A practice court operates for matters requiring urgent attention.

Case flow management is conducted by individual judges and other court officers upon the principles of a minimum of directions hearings, early identification of a trial date and an assured place for mediation as an action progresses.

Interaction between the profession, the public and the court is accomplished by electronic means. The court's registry is open on a 24 hour basis for both civil and criminal matters.

Proceedings admitted by the entry judges are routinely initiated by electronic filing. All processing and extraction of key data elements for the court's database being achieved automatically. Filed documents are stored in an electronic case file accessible round the clock via the Internet.

As the proceedings continue the electronic file enlarges with additional documents, digital photographs and video segments together with a variety of other multimedia information.

Interlocutory judgments and rulings are posted electronically.

Video conferencing and on-line hearings are routine and very effective for both trial proceedings, callovers and directions hearings.

Transcript has been replaced by a digitised electronic record of proceedings. This includes video recording of evidence. Speech recognition technology makes the record text searchable and access to the record is instantaneous.

In all these things Australian courts have been greatly assisted by advice from the Australian Society of Computers and the Law which has expanded nationally from its victorian origins.

THE COURT'S LANGUAGE

Some of you present may just recall that shortly after the turn of the century the Australian Council of Chief Justices and the AIJA established a high level committee to examine the computer language called "XML" — "extensible markup language", for use in the courts.

This was an extension of the language of the internet — which provided a method of defining the structure and content of electronic documents. In litigation, information from documents is used over and over again, and legal XML allowed this information to be reviewed and analysed by separating structure and content from presentation. Accordingly, the same XML source document could be written once and displayed in a variety of ways on a computer monitor.

This court of the year 2025 uses fourth generation XML, but its essential benefits remain much the same, viz, information can be marked or tagged throughout a document with the tags identifying the information contained within them.

LAW REFORM

The judges of the court constantly obtain the very latest information about law reform, world-wide, in both its substantive law and procedural aspects. This has come about because the Commonwealth Association of Law Reform Agencies, which came into being at an international conference hosted by Australian and New Zealand agencies in Darwin in June 2002, expanded to the International Association of Law Reform Agencies in the succeeding years. The agencies of more than 100 countries are now members.

RELATIONSHIPS WITH OTHER COURTS

The court has had, for some time now, formal relationships with other courts outside Australia — a Court of Appeal and Assize in France and a Court of Appeal in Asia. These relationships involve exchanges of information, conferences and judicial visits.

DATA COLLECTION AND FUTURE PLANNING

Since the year 2010 there has been a central Australian agency for the collection of data relevant to the operations of courts. The court is a subscriber to this agency. The data collected relates to four aspects of the justice system — litigation filing patterns, disposition patterns, judicial and support staff numbers and public perceptions of the operation of the justice system. Following a sustained effort by the Australian judiciary during the first decade of this century, governments generally have agreed to fund courts on a four-year cycle basis and this court is no exception. The Chief Justice heads a future directions committee which seeks to identify "justice indicators" to assist in planning.

COURTROOMS AND JURY ROOMS

Following on the interest generated by their very successful seminar at the University of Canberra in 2002, there occurred widespread appreciation of the skills and learning of Professor Eugene Clark and his Courtroom 21 (Australia) team. Australian judges were not surprised to learn that the design and furnishing of many of this country's courts and jury rooms — particularly the older ones — were sadly lacking in provision for effective communication and comfortable working environments.

Much needed to be done to improve the physical, social and technological environment for all courtroom users.

In the years following the 2002 seminar, the Courtroom 21 (Australia) team undertook, on invitation, assessment of many courtrooms and jury rooms, suggesting modification as necessary.

This court of 2025 underwent just such a process.

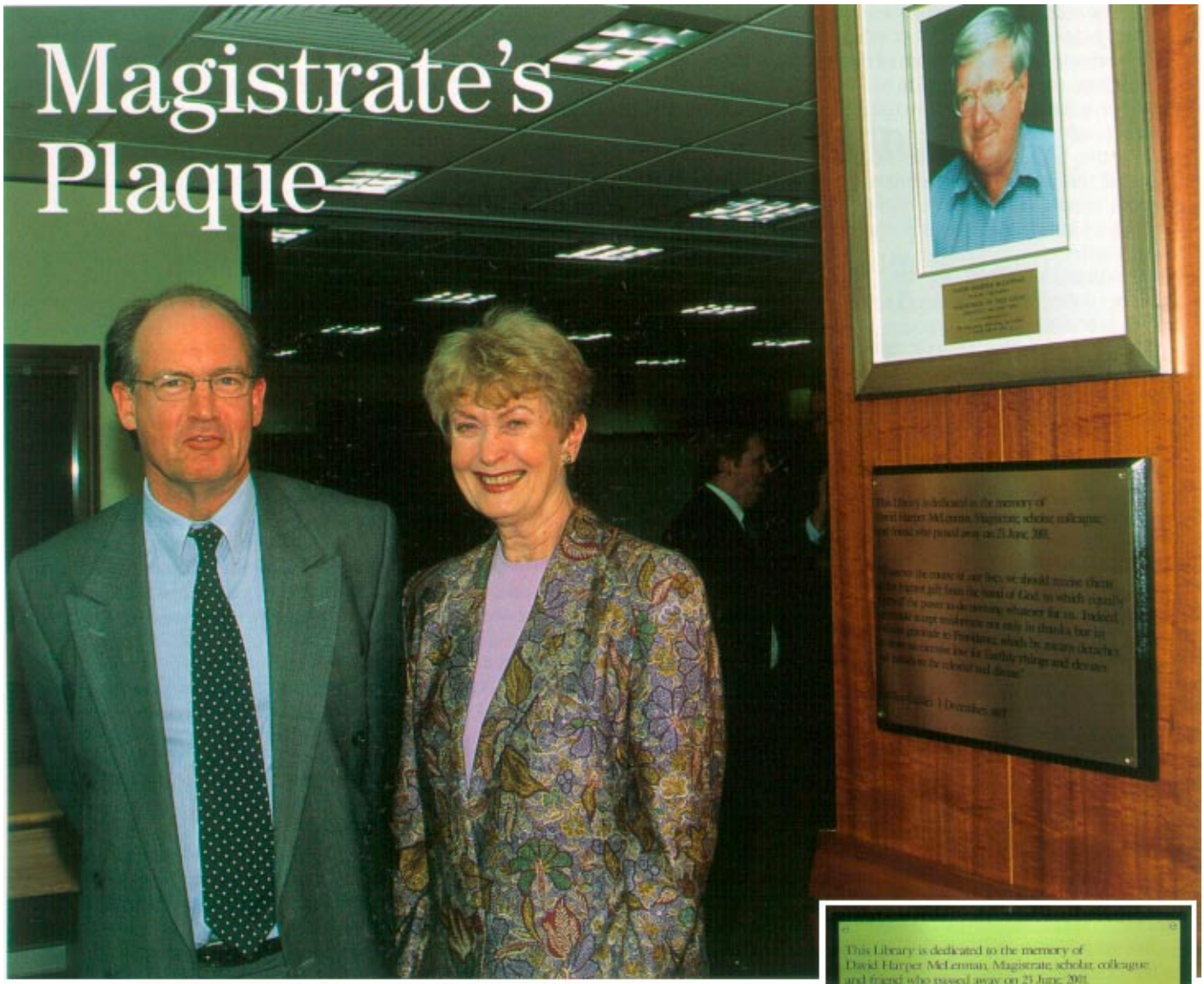
Improvements in technology soon overcame ostensible problems in the design and construction of historic courtrooms.

In a related development, a number of studies of jurors and their work soon eventuated. Technology also overcame difficulties attached to the provision of the court transcript to jurors.

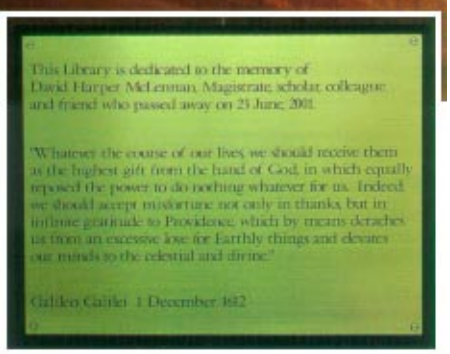
Indeed, the nature of jury service became a significant part of school curricula and its privileged place as a vitally important part of a citizen's duties came to be more keenly appreciated as attacks on democracy were beaten off internationally.

Well, ladies and gentlemen, like all splendid things, the "exquisite hour" came all too quickly to an end. Dark clouds scudded towards the moon and my last glimpse into the void of 2025 was that of the smiling face of that very distinguished Australian and recently appointed patron of the International Assocation of Law Reform Agencies — the former High Court Judge, the Honourable Michael Kirby, 85 years of age and still going strong.

Magistrate's Plaque



Chief Magistrate Gray and Joan McLennan, widow of David, with the plaque and photograph of David.



Plaque inscription.

DAVID McLennan signed the Roll of Counsel on 25 June 1964. He discovered computers while most of us were dictating to secretaries using manual typewriters. He was way ahead of his time. When he was appointed to the Magistrates' Court, he took his expertise with him and played a major role in the establishment of the computerisation of the Magistrates' Court and in the development of its library.

David died on 23 June 2001. On 14 December 2001 the contribution of this quiet, scholarly and much loved man made to the operation of the Magistrates' Court (and particularly to the content of its library) and to the administration of justice in this state, was recognised at a ceremony in which the Magistrates' Library in the Melbourne Magistrates' Court was dedicated to his memory.

David McLennan's family: wife Joan with children Sarah, Andrew and Alex, seated is his mother Ellen. His other daughter Isobel was absent.

The ceremony naming the David McLennan library was attended by David's family (shown in photo), by all available Magistrates at the Melbourne Magistrates' Court and by members of the court staff.

Fading Distinctions

THE English language has developed haphazardly. Drawing on diverse sources, it has spawned as rich a vocabulary as any known language. The chaos Johnson found, and tried to tidy up, includes many words which have sprung from the same source whose meanings are related but different. For example, *frail* and *fragile* both come from the Latin *fragilis*. They are not synonyms for each other, even though they share the same central idea. "A frail old man bought a fragile old vase" sounds right. Reverse the adjectives and the resulting sentence would sound distinctly odd. Similarly, we have many words which sound similar but come from different roots and have different, albeit similar, meanings.

Generally, the distinctions between these approximate twins are useful. English has thousands of them; they account in part for its richness and subtlety. Unfortunately, some of these useful distinctions are being rubbed away by careless handling. As the process continues, the language loses a little of its power and subtlety.

Precious (to lawyers at least) is the distinction between *disinterested* and *uninterested*. A person is *uninterested* in a thing if it holds no interest for them; if they prefer to give their attention to other things. So, I am interested in music and sculpture, but I am uninterested in golf and stamp-collecting. To be *disinterested*, however, is to have no stake in the subject matter. Judges must be disinterested in cases they decide, but they should be interested in them. Increasingly, the two words are used interchangeably. In its report into the the Cash for Comment affair, the Australian Broadcasting Authority discussed the idea that listeners would naturally assume that radio commentators had no financial stake in the matters on which they shared their views. They set out in full the dictionary definition of *disinterested* — presumably because they thought the word would not be readily understood. An important distinction is being lost.

Another casualty of the process is the distinction between *incredible* and *incredulous*. *Incredible* is the condition of not being believable. *Incredulous* is the state of mind that does not believe something. Mr Howard has recently asserted that he was unaware that reports of asylum seekers throwing their children overboard at sea were untrue. That assertion is incredible; many people are incredulous that he persists with it. What is incredible often induces incredulity; the fact that the two things often go hand in hand probably explains the confusion. Facts are *incredible* (not believable); people are *incredulous* (not believing).

The battle to save *reticent* from a takeover by *reluctant* is probably lost. A person who is reluctant is unwilling, struggles against a thing, resists it. By contrast, a peson who is reticent is reserved, silent, disinclined to speak. *Reluctant* comes from *re* + *luctare*: to struggle. *Reticent* comes from *re* + *tacere*: to be silent.

Another two words often confused for each other are *interpolate* and *interrupt*. Interrupt comes from the Latin *rumpere*, to break. With the prefix it has the obvious meaning *break in upon*, or *break off*. *Interpolate* is more subtle, and extends beyond mere interruption. Originally, it meant to polish up, from *polire* (to polish); from which we also get *polite* and *policy*. It soon came to signify altering a book by adding material, especially by adding spurious material. So it was from the mid-17th century. to the late 19th century. But from the late 18th century mathematicians had been using it in a more neutral sense. Mathmeticians use it to signify the completion of a series of numbers by the introduction of numbers in the unfilled intermediate positions by calculation from those numbers already known. The gravitational pull of the scientific use slowly influenced the lay use, so in ordinary speech it came to mean any words, comment or observation inserted in the middle of another. It has lost its pejorative connotation, although it may still involve an interruption which is ill-mannered by reason of bad timing.

Another fading distinction — a battle almost certainly lost — is the distinction between *surprise* and *astonish*. Surprise comes from *sur* + *prehendere*: literally *over* + *take hold of*. Originally, to overpower the mind or will; then to attack suddenly, or to capture by force; then to come on unexpectedly, to take unawares; then to affect with the emotion of being taken unawares, which approximates its current principal meaning. *Astonish* is cognate with stun, but its intensity has gradually diminished: originally it meant to stun, paralyse or deaden; then to stun mentally, then to dismay, then to shock. The *Coverdale Bible* (1535) has "Be astonished (o ye heauens), be afrayde, and abashed at soch a thinge" (Jeremiah II:12); the King James version (1611) has "The people were astonished at his doctrine" (Matthew vii:28). The distinction between *surprise* and *astonish*, at least as lexicographers would have it, is best captured in a story (no doubt apocryphal) about the great lexicographer and pedagogue Noah Webster. It is said that his wife found him embracing their maid. She said "Noah, I am surprised". He replied: "No. You are astonished, it is we who are surprised".

Astonish may have lost some of its original force, but it is still a strong word. The language needs a word for a similar emotion at a lower pitch. *Surprise* does the job. The distinction remains only in the story about Webster, and he died in 1843. In 1844 Macaulay had written "Weymouth had a natural eloquence, which sometimes astonished those who knew how little he owed to study". This deftly ambiguous insult suggests that the distinction had all but disappeared by the time Webster had died.

Confusion between *dysfunctional* and *non-functional* probably comes from the attraction (irresistable to some writers) of new and important-sounding words. *Dysfunctional* crawled out of the swamp of social science jargon. Its apparent meaning seemed obvious enough and it quickly became a desirable substitute for the dowdy, familiar *non-functional*. *Non-functional* simply means not able to function; broken; unserviceable. Dysfunctional

means functioning badly, functioning in a manner abnormal, or not intended. The distinction is real and useful and should be preserved, if only to spare us a replacement neologism from the social scientists.

The same tendency of some writers to prefer the important-sounding word where it is available probably explains the recent vogue of *epicentre*. When writers wish to place a thing more emphatically at the centre of events, they often refer to it as being "at the epicentre". This is plainly wrong, and means quite the opposite of what is intended. The *epicentre* is not some mysteriously intensified form of centrality. On the contrary, the epicentre is *never* at the centre of a thing. The word comes from seismology, where it is used to identify the point on the earth's surface immediately above the centre of a seismic event. By definition, the epicentre is above the true centre: often many miles above it. The Greek prefix *epi-* means *upon*, and is used in many technical words which, because of their obscurity, have avoided the careless treatment received by *epicentre*.

Julian Burnside

Isaacs Chambers

MEMBERS of the Bar will be aware that the lease for the space currently occupied by Isaacs Chambers in 555 Lonsdale Street was not formally renewed in early 2002 by BCL. Members of the Bar, and tenants of Isaacs Chambers in particular, were informed of this decision prior to Easter 2002.

Further negotiations have been undertaken by BCL with the landlord, and the position has been reached where BCL has agreed to take the ground floor, and levels 8 and 9 for a further two years commencing 1 July 2002 and with further options at the end of that period. Level 11 will not be leased by BCL after 30 June 2002.

BCL confirms that existing tenants of Isaacs Chambers will have priority in taking up the offer of chambers on levels 2, 3 and 4 in Owen Dixon Chambers West, which will become available in June 2002. This priority will only apply to tenants who elect to move from Isaacs to Owen Dixon Chambers West by 30 June 2002.

Individual and group applications will be accepted from existing tenants of Isaacs Chambers interested in moving to Owen Dixon Chambers West.

Owen Dixon Chambers East Refurbishment

WORK is continuing on finalising the plans and specifications to enable the tender process to proceed in relation to the refurbishment of Owen Dixon Chambers East.

It is clear that no substantial work or relocation of tenants will be necessary prior to 30 June 2002, although it is hoped that refurbishment of the lifts will commence by that date.

It is still envisaged that work will commence on the substantial renovation of Owen Dixon Chambers East during the second half of 2002.

BCL is committed to keeping members of the Bar and other interested parties fully appraised of all developments in relation to the refurbishment of Owen Dixon Chambers East.

Mark Herron, Attorney-General Rob Hulls, Chief Justice Phillips and Margaret Camilleri.

Voluntas Launches 'Network of Commitment'

On 7 February 2002 the Victoria Law Foundation released its report, "Future of Pro Bono in Victoria", the result of a series of roundtable discussions staged mid last year.

THE launch was held at Victoria Legal Aid where the Report was officially launched by the Attorney-General the Honourable Rob Hulls MP at Victoria Legal Aid, with additional speeches given by Chief Justice Phillips AC, President of the Foundation, and its Executive Director, Mark Herron. The occasion attracted a large crowd including distinguished members of the State and federal judiciary, both arms of the practising profession and a goodly number of people from beyond the legal sector.

Commenting on the size and diversity of the gathering the Attorney-General said:

> It's fantastic to see such a significant turnout for today's launch. Welcome to you all as representatives of the community sector, the government sector, the private profession and the judiciary. Your presence here is a mark of the importance with which Victoria's legal profession views the provision of pro bono services to the public. It is also an indication that, as a broad church, Victoria's legal profession is open to working together on an ongoing basis to improve the delivery of those services.

Federal Magistrate Maurice Phipps, Justice Byrne and Carmen Randazzo from Victoria Legal Aid.

BACKGROUND

Voluntas (Victorian Pro Bono Secretariat) is a project of the Victoria Law Foundation now entering its fifth year. In May and June of 2001 Voluntas held a series of three roundtable discussions focusing on pro bono legal services in Victoria. Forty representatives from the legal and community sectors were brought together to discuss critical issues concerning pro bono and to identify strategies for its future development. Participants included representatives from the courts, Victorian Bar, Victoria Legal Aid, the Law Institute's Legal Assistance Scheme and Law Aid, Public Interest Law Clearing

House (PILCH), La Trobe and Monash universities, community legal centres, and other community organisations including Court Network.

As well as bringing people together, the roundtable series was intended to search for suitable strategic responses to the problems the participants would identify and thereby help shape future directions for pro bono in Victoria. In turn this would be used to define and align the forward agenda for Voluntas.

TOPICS DISCUSSED

The Relationship between Legal Aid, Pro Bono and Legal Services

The purpose of the first roundtable was to examine how changes in legal aid have affected the provision of pro bono services in Victoria and the broader relationship between these two spheres of activity.

Papers included an historical perspective on legal aid funding and the relationship between legal aid and pro bono, as well as current issues for legal aid. Other papers presented the views of community legal centres, barristers, and solicitors in both small and large firms. Discussion centred on how the rise of pro bono activity is linked to the decline in legal aid and what response the profession should make to that decline.

Participants felt strongly that legal aid and pro bono must be recognised as separate activities. At the same time they acknowledged the continuing uncertainty as to where legal aid ends and pro bono begins.

Access to Pro Bono Services

The second roundtable looked at how clients gain access to pro bono services and how this could be improved from the client perspective. With over 50 organisations offering some level of pro bono assistance, all with their own eligibility criteria, the sector is characterised by a profusion of entry points. Referrals to pro bono legal services come from a variety of organisations, some providing legal services and some not.

The proliferation of pro bono services and diversity in the types of assistance available are beyond the reach of many who work within the legal sector; to the community sector it is confused and confusing.

Working Together — Building a Framework for Pro Bono

The third roundtable took up these issues, focusing where collaboration in the sector has worked and where there seems to be confusion, competition and conflict.

There is a broad network of people and organisations performing pro bono work in Victoria, and in the legal profession more generally there is a lot of energy, goodwill and enthusiasm for pro bono. The vitality of pro bono in Victoria is exemplified by the participation in clearing houses such as PILCH, the Bar Legal Assistance Scheme, the Law Institute Legal Assistance Scheme and the myriad community-based pro bono services plus the co-ordinating and policy centre in Voluntas.

As ever though, good intentions are not sufficient. Although there is some level of consultation and collaboration there are also many disparate activities being undertaken without much knowledge of or connection with what is being done elsewhere and often nearby. There is uncertainty about the capacity of different pro bono providers and this adversely affects the pro bono providers, community and referral agencies, and the public. In addition, in a climate of shrinking legal aid and funding cutbacks, there is potential for conflict, competition and "territorial" behaviour among pro bono providers.

As might be expected, many different issues were raised during each of the roundtables.

On further analysis, however, it became clear that there were several salient issues or themes identified by participants and these were:

1. Pro bono is not a substitute for legal aid. Government responsibility to adequately fund legal aid services is not diminished by the pro bono activity of lawyers, nor do these pro bono activities have the capacity to meet the shortfall in legal aid funding.
2. A fundamental principle underlying both pro bono and legal aid work is that citizens should have access to justice.
3. Client needs are not always matched by the services available.
4. Both clients and pro bono providers would benefit from an improved level of co-ordination and organisation, provided this can be done without undue formalisation or regulation. Any organisation of pro bono needs to recognise that it is a voluntary activity, involving choice, discretion and flexibility.
5. Pro bono clients are entitled to high quality services.
6. Pro bono is a worthwhile and important activity that benefits the lawyers involved as well as the clients. It needs to be promoted more widely in the profession through university law schools and by the involvement of senior practitioners.

Action Plan

Voluntas has developed an action plan that identifies which issues it can actively seek to address and outlines a communication plan that would encourage and promote further sectoral collaboration. In all, twenty-five actions have been identified and these have been categorised as follows:

- coordination/access
- policy/research
- promotion
- resource development

Working groups will be formed to deal with each of these areas.

Communication Plan

Through Voluntas the Foundation is committed to a process that both encourages broader participation and draws on expertise from members of the legal and community sectors in planning and decision making about pro bono. The consultation plan is aimed at facilitating more effective communication on pro bono, at a number of levels, including within the legal sector, and between legal and community organisations, the National Pro Bono Resource Centre and the State Government.

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Justice Teague and Judge Lewitan.

John Corcoran and Patrick Tehan QC.

Criminal Bar Association News

November 2001 Dinner

The Criminal Bar Association Annual Dinner was held on the 29 November 2001 at Fortuna Village Restaurant, with 164 attending. As is invariably the way with CBA dinners, a late rush on tickets filled the restaurant to overflowing, making the night a resounding success. Thanks go to Nicola Gobbo for her organisational efforts, Colin Lovitt QC for his inimitable hosting, and His Honour Judge John Smallwood, for entertaining the crowd as guest speaker.

A selection of photographs from the evening is included below.

Judge Smallwood addresses the throng.

SUBMISSIONS

The Association has been active in making the following submissions;

- The Association provided a submission on proposed State Government legislation as to the use of alcohol ignition locks in drink-drive cases. Legislation is currently before parliament.
- Phillip Priest QC prepared a submission on the issues surrounding the on-line dissemination of criminal history. The issue came to a head last year when a murder trial before then Justice Hampel was adjourned due to the potential access the jury had to the accused's prior convictions, which had been posted on the internet.
- Peaceful Assemblies Bill: Roy Punshon S.C. and Richard Bourke met with representatives from Justice to discuss Association concerns about the Bill. This was followed by a Round Table discussion, held on 13 December 2001 chaired by the Minister for Police and Emergency Services, Mr Andre Haermeyer, and attended by a large group of interested parties including the Chief Commisioner of Police, the Trades Hall Council, Legal Aid, the Law Institute and VCCL. The CBA was again represented by Roy and Richard. The legislation is currently under further consideration and will be reviewed later in the year. The Association has been clear that the definition of the right to peaceful assembly should accord with international covenants.
- Nicola Gobbo and Remy van de Weil QC prepared the Association's submission on the Proceeds of Crime Bill 2001 (Cth). The Bill in its current form unfortunately does not take into account the concerns raised by the Association, but members will be kept informed as to its progress.
- Jeanette Morrish QC and Nicola Gobbo are in the process of preparing a submission to the Victorian Law Reform Commission on its Sexual Offences Discussion paper. To date, no legislation evolving from the discussion paper is before Parliament.
- Stephen Sherriffs appeared on behalf of the Association before the Parliamentary Committee inquiring into the powers of entry, search, seizure and questioning by authorised officers. The Association's position has emphasised the need for transparency, common rights and duties including the need for seized materials to be taken before court in accordance with the Crimes Act provisions. Lesley Taylor has provided further written submissions to the Committee.
- Michelle Hodgson prepared the Association submission to the Draft Recommendation Paper on the current Bail Act position for accused who fail to appear in court in response to bail. The Association supports the amendment of legislation to remove the "reverse onus" situation that currently means

Dyson Hore-Lacey S.C. and David Parsons S.C..

Roy Punshon S.C., Damian Sheales and Michael Rozenes QC.

Judge Betty King, Nicola Gobbo, Con Kilias and Patrick Tehan QC.

Colin Lovitt QC quizzically orates.

Richard Bourke and Michelle Williams.

John Carmody and Michael Bourke.

that an accused who fails to appear in answer to bail is held in custody unless he or she can establish that the non-attendance at court was through no fault or negligence on their part. This imposes a higher standard of proof for bail than exists for the proving of the charge per se, and the Association supports the abolition of that provision.

CRIMINAL LAW NATIONAL LIAISON COUNCIL OF AUSTRALIA

Michael Rozenes QC will replace Brett Walker S.C. and become co-chair of the council with Tim Game S.C. of the Sydney Bar. Michael will also be the Association's delegate to the International Criminal Court conference. The conference will be held to discuss the creation of an International Criminal Bar.

MAGISTRATES' COURT

The Association has a number of issues to deal with as to current practices in this jurisdiction, and to this end Association Chair Roy Punshon S.C. has met with Her Worship Lisa Hannan, now the Magistrate in charge of the Criminal list, to discuss the concerns raised by members. These include the current listing practices for criminal fixtures.

The move toward the electronic service of briefs is also a subject for discussion. The practice is already being adopted by the homicide squad and will undoubtedly expand. The court and practitioners need to establish appropriate guidelines to deal with this.

APPEAL COSTS ACT CERTIFICATES

The Association has liaised closely with the courts and the Justice Department since the Court of Appeal decision in *R* v *Hall* changed the prerequisites for the application for a certificate pursuant to the act. Whilst ultimately it is expected that the issue can be resolved through a legislative amendment in the Autumn session, the County Court has issued a practice direction to deal with the situation in the interim. A link to the practice note is available through the Association website.

SEMINARS

The next Association seminar will be on the Criminal Trials Act on Tuesday 12 March 2002. It is hoped that ongoing issues surrounding the operation of the Act can be aired by the membership.

Her Worship Jelena Popovic will present a seminar on 16 April 2002. Topics for discussion to include the access to and range of parallel services, pre-sentence detention calculations, prior convictions, the CREDIT and Diversion programs.

WEBSITE

The Association website is located at www.crimbarvic.org.au . Links to all Court lists, major legal sites and associations are provided, along with up to date news and events from the Criminal Bar Association. Please feel free to provide feedback as to how the site can be improved.

Voluntas Launches 'Network of Commitment'

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Policy Council

The Action Plan also contemplates the establishment of a policy council to discuss broader policy issues and develop statements that would assist in directing future pro bono development within the State. Membership of the Council would be drawn from key community and legal sector organisations.

The Foundation encourages anyone interested in pro bono services and activities to obtain a copy of the report. Copies of "Network of Commitment Future of Pro Bono in Victoria — report from the round table series" are available in hard copy by phoning Victoria Law Foundation on 9602 2877 or may be downloaded from the Victoria Law Foundation website at www.victorialaw.org.au.

Margaret Camilleri
Project Manager
Voluntas — Pro Bono Secretariat

The Remembrance of Defamations Past

A short essay by Barry Dickins

IT was the happy and unhappy year of Our Lord 1986 I first experienced the sting and satire of defamation as I turned up at my old ruin in Arthurton Road in Northcote, and there awaiting my fear was a large and rather beautiful writ in our rusty emphysemic tin letterbox. I thought they were delivered by hand?

In it I read of an impending physical appearance at the Magistrates Court by me due to a comment attributed to myself upon the Doug Aiton Program on ABC Radio that apparently defamed the writer and prize winner Gerald Murnane. I gasped.

A few months prior to this mysterious missive lobbed in my care I was the guest of Doug Aiton on his highly-rating (in Northcote) drive-time program, and he had attacked me on the subject of bias in funding towards Australian writers.

All I wanted to do was speak of my new comedy.

It came as a considerable surprise to read and to learn that a smart-arsed remark on a radio show could metamorphose into a legal appearance in the courts. But there it was, or were, because two writs there certainly were in existence. I had said under pressure that there was no cronyism in Literature Board awards and it was not the case that the same famous writers copped big prizes each time they were handed out.

Doug Aiton said, "But you look at Gerald Murnane. He has won two Literature Board Senior Fellowships this year. Wouldn't you say, as a critic of our arts scene, as one who has been neglected yet again that there is in fact genuine bias in these sorts of prizes, and it's an old mates' network?"

I declined to answer. I said, "Listen. If I feel like persecution then I go and see the Police." He said that was just a smart thing to say. I then said it's a case of who you sleep with. That was judged defamatory for some mysterious reason all its own. Our legal defence was just. But the whole thing was tragic.

Not long after this fevered reading at my front gate I received an emotional telephone call from Malcolm Long, who was then pretty much head of the ABC. He told me to speak personally to Murnane, who lives in Coburg, you're from Reservoir anyway, he said, and try to stave off all this defamatory crisis because it will just about bankrupt Dear Old Aunty.

I did. I rang Gerald Murnane from a public telephone booth in Brighton Road, where I was drinking with an intellectual out of work Garbo whose shout it was. I jolly well had to get the sweetness out of me to do this call because the whole thing seemed risingly ridiculous, as all tragedy is.

He said he had been told not to converse with me over the blower and would see me in court. The next thing I knew I had to front the ABC's depressed and therefore depressing legal eagle, who accused me of being a trouble-making egomaniac.

Curiously this strange man showed me a clutch of newspaper entertainment black and white ten by eights of me conversing with a greyhound or an elephant

or Bert Newton and asked me why I did idiotic photos for the enlightenment of our public. I said I was a fool.

"Upon that pronouncement there can be no doubt," said he. He then asked me why I posed for the media in all kinds of foolish ways. Again I said I was a public clown; not a bad job the way the world is.

After being roundly insulted I left without so much as a stone-cold Bonox.

The magistrate found for Murnane and a small fortune went Murnane and his representative's way.

The defence of jest wasn't worth a cracker.

Not meaning what one says is diabolical in the media. Meaning it means bugger-all, it seems.

In 1990 I turned up at court, this time to learn why it was that I likened in print a Brunswick Street Nightclub proprietor to Frank Thring's dog.

The Troubador Café bunged on an atrocious evening's entertainment and in my weekly column for *The Melbourne Times* I said many silly things, not the least of which was the above idiotic remark.

I didn't mean what I said. Next stop: court on another defamation charge that copycatted the infamous one in Sydney where *The Sydney Morning Herald* was successfully sued over a remark filed by restaurant critic Leo Schofield that a certain lobster had last been seen haring down Darlinghurst Road, in its considerable haste, to elude custom at the Blue Angel Café.

The court case went on for two whole days in the mint-new Magistrates' Court in Lonsdale Street, and the whole thing proved exhausting for the owners of *The Melbourne Times*, who speedily discovered a pay-out of $300,000 or more was likely in the event of me getting done.

To make matters worse the brand-new fighting forepaws of the roo on the Commonwealth Crest above the magistrate — they collapsed immediately we were told to "All rise". It seemed a bad omen.

Frank Thring, then still animate, sent by cab a photo of his cat, saying in the note he didn't have a dog. The cat's likeness was duly tendered in the most grimness outside the crypt for all satirists in Melbourne.

In the event the rival legal team settled and Kevin Childs wrote satirically of the case in *The Age* and widely mocked it in his spot with Ramona Koval on the ABC. The settlement was over $20,000.

Was I supposed not to joke in print ever again? *The Melbourne Times*' owner Glen Rohan said it was a victory for their paper; but I felt terrible and odd. I thought we could take a joke in Australia?

I still joke in life and print and on the stage. I haven't lost a drop of confidence and sometimes I wonder why it is me who gets punished, when all around I see just how cruel — without being satiric — a lot of writing is in print and in the media.

I go to the Press Council over complaints to do with my published observations as others go buying socks and sandals.

Everything has sort of cooled down somewhat today, and I suppose it could be rather a while until I am in court again, although I have to say to you I miss it. I have always liked telling the truth and court seems to me the ideal venue in which to continue this ancient but ignored practice.

When people scream at me in the street these days — "I'll see you in court, Dickins!"

You know what I reply, do you?

I always say I look forward to it, and I do because honesty isn't worth a zac outside it.

Ian Crisp is presented with the Neil McPhee Perpetual Trophy by Peter Rattray, Michael Laurence (Suncorp Metway) and James Mighell.

Squadron Sailing Day

THE annual Wigs & Gowns Squadron Sailing Day was held on the waters of Hobson's Bay on 20 December, 2001 in perfect conditions. About a dozen yachts participated in the short race sponsored for the first time by Suncorp Metway and conducted by the Royal Yacht Club of Victoria. The handicap committee did the best they could with what could only be described as an eclectic mix of sailing craft.

The eccentricities of sailors at the Victorian Bar was highlighted by the following. Peter Crofts arrived in his Herreshoff 12 launched on the day; John Digby, Peter Golombek and others arrived in a 45ft chartered Benetaeu providing a standard of luxury that they were accustomed to but that WAGS had not seen before; Peter Clarke arrived in his 42ft Huon Pine Motor Sailor *Renaissance*; lan Crisp sailed an International Etchells Class; Ross Macaw sailed his motor sailor *Marie Louise*; James Mighell sailed the historic 26ft Couta Boat *Pearl*; Martin Grinberg skippered an Endeavour and Garry Moore sailed an Elliott 7.5.

Albinito *motoring into dock. Barbara Walsh (skipper), Martin Grinberg, Ron Gipp, Liz Rhodes, Deborah Morris and Linda Dillon.*

Peter Golombek, Josh Wilson, David McAndrew, John Digby, Belinda Martin, Natasha Marginis, Mark Laurence and Anthony Schlicht.

Marie Louise *crew members Ann DePettri (RYCV photographer), and Janine Wylde.*

Octavia *tying up. Peter Crofts, Denis Meehan and Cary Hipkins. (Peter and Cary built the boat).*

Pearle, *a Couta boat with crew. James Mighell, Judge Crossley, Mark Laurence (Suncorp Metway), Ian McDonald, Peter Rattray, Dennis Horne, Alan Middleton and Dick Travers.*

Peter Rattray and Peter Crofts.

Renaissance *crew walking along jetty. Peter Clarke, Richard Allen and Tim Hunt.*

Ian Crisp sailed a well-judged race picking up the shifts in the final 100 metres to come out the eventual winner of the Neil McPhee Perpetual Trophy from James Mighell. Peter Crofts won the Thorsen Trophy. A barbecue was enjoyed by about 70 skippers and crew, all of whom managed to make it safely back to their respective clubs, but some only just!

Thanks to Suncorp Metway who sponsored the day and look forward to their continued support in the future.

James Mighell

Hat Trick of Wins for Bar Cricketers

THE Bar's 1st XI cricketers, adorned by their sponsor's "neo-baggy green" caps, secured their third win in a row by beating the Law Institute by sixteen runs in their annual match for possession of The Sir Henry Winneke Trophy. The game was played in perfect cricket weather on 17 December 2001 at the Junction Oval.

Man of the match was Matthew Parnell who reprised his best on ground performance for the Bar against Mallesons Stephen Jacques last March.

The team was Chris Connor, Justin Castelan, Mordy Bromberg, Mark Greenshields, John Gordon, Chris Maxwell, David Neal, Matthew Parnell, Justin Serong, Suresh Senathirajh, Craig Stevens and Lachlan Wraith.

Having won the toss, the Bar batted but quickly lost two wickets before attractive batting from Justin Castelan (24) and Matthew Parnell (36) took the score into the 70s. More wickets then fell until Stevens, Connor and Wraith hit out to help the Bar reach 8 for 130 at the compulsory closure.

In the field the Bar performed heroically with Justin Serong's pace putting pressure on the openers, whilst his athletic fielding was responsible for two early run outs. At the other end Lachlan Wraith bowled an amazing spell with only three runs taken from his first six overs. The tightness of the attack was continued by the change of bowlers, and after that Chris Maxwell impressed with his coolness when called on to bowl at a crucial stage. Mordy Bromberg continued to catch and stump every opportunity given to him behind the wicket. Craig Stevens (2 for 21), bowling in tandem with Matthew Parnell, then restricted the solicitors to 6 for 114. The winning margin on this occasion was the largest of the three wins. During the after-match celebrations Mark Laurence was gratefully thanked for arranging the team's sponsorship by Suncorp Metway.

From largest to smallest: The Sir Henry Winneke Trophy, The Phil Opas Trophy and The Singapore Cricket Club shield

Combined Team Beats Singapore Cricket Club

ON 15 January 2002, a combined Bar and Law Institute team defeated the touring Singapore Cricket Club in a match played at the Brighton Beach Oval. Scores: Combined Side 6 for 139 (Geoff Chancellor 42 n.o., Tony Klotz 38) defeated Singapore CC 103 (Justin Hannebery 3 for 20, Tony Klotz 3 for 27, Gerard Doulton 2 stumpings). Man of the match: Tony Klotz.

An Excellent Year

THIS year's *Bar News* article is a positive pleasure to write. Instead of finding new phraseology to describe defeat, my only difficulty this year is to express myself in terms which are appropriately enthusiastic about our excellent results, and combining these with appropriate modesty so as not to inflame our colleagues north of the Murray.

NEW SOUTH WALES BAR: 2:
VICTORIAN BAR: 2

Following our 6–2 defeat of the New South Wales Bar team last year in Victoria (celebrated as I had thought with restraint, and an affection for our New South Wales colleagues, in the pages of *Bar News*), we returned the fixture by going to Sydney this year.

On Saturday 13 October 2001 the doughty 12, as it turned out to be, of the Victorian Bar team assembled at the Olympics Sports Centre in Homebush to exercise our modest talents on the ground where the last Olympic final was played.

We discovered opponents who, on a typically sultry Sydney day, had the advantage of 15 or 16 players, thus enabling numerous interchanges. The game was played to a surprisingly high standard given the age and fitness of the competitors.

We managed to give away a soft short corner goal early on, but rallied and equalised when Michael Tinney blasted through the goalkeeper (at this stage, Ireland, QC). We pressed on and, considerably aided by our new star recruit, Richard Clancy, who has only recently defected from the solicitors and come to the Bar, we were able to score another goal through Robinson who tapped in opportunistically following another goal mouth scramble. We finished the half strongly and were 2–1 up at the break.

The New South Wales team brought on Katzmann S.C., to replace Ireland, and it was her proud boast after the game that no goals were scored against her team while she was on the field.

Katzmann was quite correct of course, and played very well, but was significantly assisted, and ourselves disadvantaged, by the fact that Michael Tinney severely tore a leg muscle in the early minutes of the second half, thus meaning that we had no interchanges and lost our most potent striker.

Notwithstanding this, we held out well and with Wood and Clancy controlling much of the midfield, and Luxton performing prodigies of running, we held on till fairly close to the end when the New South Wales team scored another scrappy goal following poor defending off a short corner.

Throughout the game Sharpley played extremely well in goal, and it is fair to say that everybody who was on the field contributed effectively. We missed Meryl Sexton who was unable to come because of illness at the last moment.

In what is clearly going to become a tradition, the two sides repaired that

Before: the doughty 11 — Robinson was late!

After: everyone happy (the bar was open).

evening to the Little Snail Restaurant near Sydney University at which an exceptionally convivial evening naturally followed. Katzmann's speech (she is a member of the New South Wales Bar Council as well as being an extremely competent goalkeeper) made it very plain that my thought that the article in last year's *Bar News* was restrained was wildly misconceived. My remarks about the collective age, weight and speed of the New South Wales team had plainly touched quite a number of exceptionally raw nerves. We were roundly (if affectionately) criticised for having a ring-in (Ross Gordon, barristers' clerk), no women in our team (Meryl Sexton was not able to come and Riddell is on parental leave) and a reader (Clancy). I refrained from pointing out in reply that when they played last year the New South Wales team had a ring-in (who umpired this year's game and robbed us of a goal at the last few minutes) and that they also had another ring-in this year (a serving officer in the Australian Defence Force). The New South Wales team nominated Clancy and Dreyfus, deservedly, as our best players.

As noted in last year's article, the New South Wales team were excellent opponents on the field and extremely good company off it. The fixture will be repeated again in Melbourne next year, and it is strongly hoped will subsist on an ongoing basis. It is only fair to say in conclusion that although each team (as is so common) thought that they had the better of the play, my own view is that a draw was a very fair result. We look forward to seeing them again.

MAJOR TRIUMPH — FIRST DEFEAT OF LAW INSTITUTE TEAM SINCE 1996

Buoyed by the return of Sexton, and the addition of Collinson and Niall, we approached our game with the Law Institute team with less foreboding than in previous years.

On Thursday 25 October 2001 we forgathered at the State Hockey Centre in Royal Park and proceeded to achieve a victory as uncommon as it was satisfactory.

With Michael Tinney still unfit, we played his brother Andrew at centre forward (a task for which he was not slow to volunteer) and with Clancy in even better form than in the previous game, we dominated the early play.

We were able to score a first goal through Clancy who picked up a ball following a scramble and flicked it cleverly into the net. This goal divided the teams at half time.

In the second half, with Wood and Clancy again excellent, well assisted by Robinson, Luxton, Andrew Tinney, Collinson and an exceptionally mobile Lynch, we actually managed to increase our lead. Robinson crossed to Clancy who scored with a rasping shot from the left inside position.

That goal gave us the security we needed and, despite interchanging numerous players, we were always in control. The Law Institute team scored a late goal and the score finished 2–1.

The umpires who selected the awards commented upon the standard of the play which was better than they had anticipated. Whether this was because the standard was superior or because their expectations were low, they were kind enough to refrain from saying. The].R. Rupert Balfe Trophy was awarded, and very properly, to Clancy who is a tremendous acquisition for us, and if we can ever get Tweedie back from the wilds of South America we should have a team that remains competitive for several years yet.

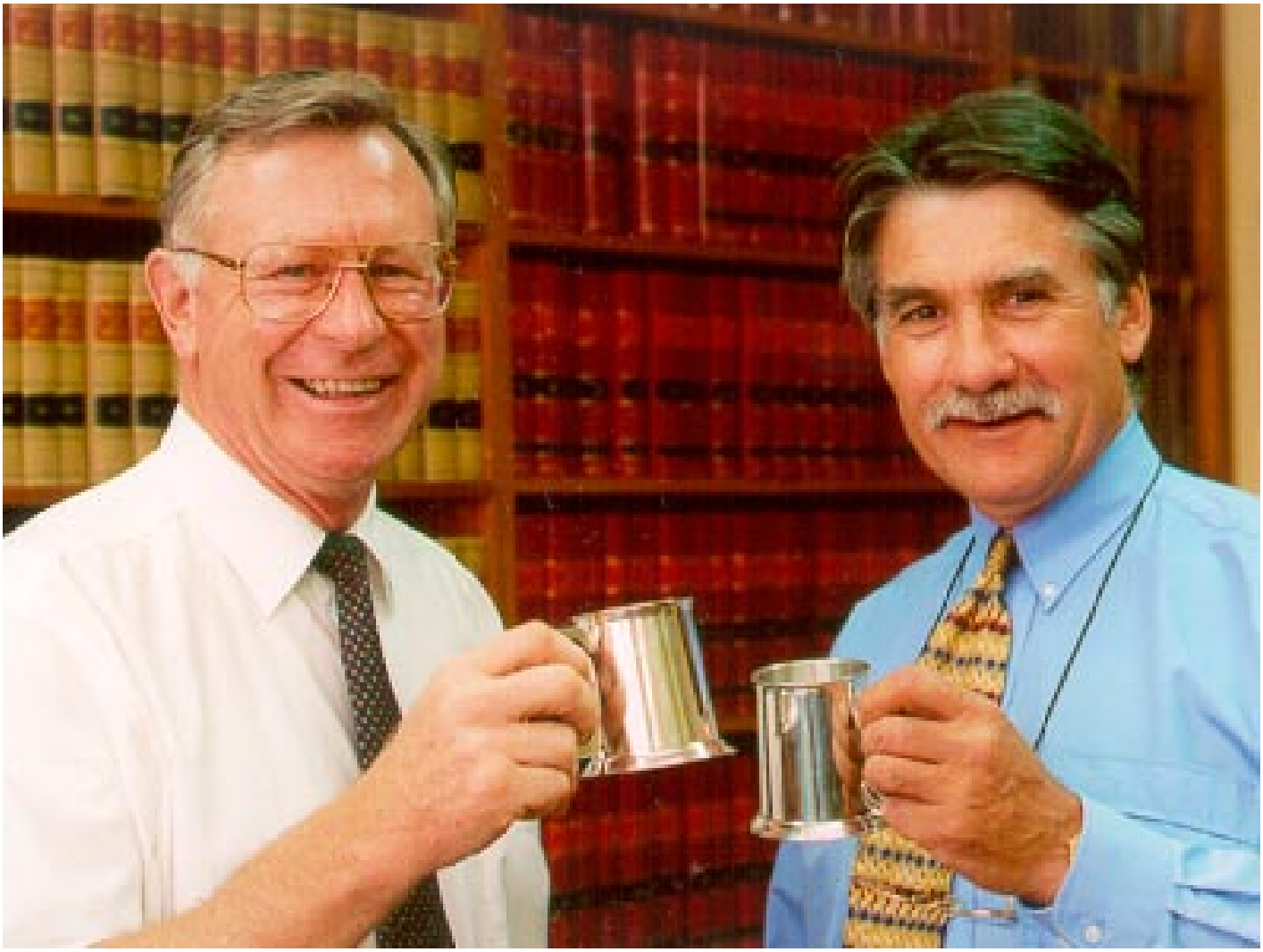
Thereafter, the teams repaired, as traditionally, to Naughtons and, as might be expected, the conversation largely turned upon the endeavours by the Bar team to remember the circumstances in which we had last actually won the Scales of Justice Cup. Research showed this to have been in 1996, and the previous victory was some considerable number of years before that.

With at least one more recruit posited for next year, the future for the Bar hockey team in 2002 is at this stage looking extremely rosy. It may yet be my pleasant task to write an article in which refinement, restraint and gloating are nicely matched in the event that we were to actually win both our fixtures in the one year.

Those who played in Sydney were Brear, Burchardt, Clancy, Dreyfus, Gordon, Luxton, Lynch, Robinson, Sharpley, Andrew Tinney, Michael Tinney and Wood.

All of those played again against the Law Institute team apart from Michael Tinney who was injured, but we were augmented by Sexton, Collinson and Niall, whose presence on the back line was keenly felt.

Philip Burchardt



Robert Miller and Brian Keon-Cohen QC with their golf trophies.

Bench and Bar Winners at Kingston Heath

ON 18 December 2001, at the Kingston Heath Golf Club, the Bench and Bar team regained the Sir Edmund Herring Trophy. In perfect weather conditions a small field convincingly defeated the Law Institute team. Exceptional scoring was the order of the day. The top score for the Bench and Bar team and indeed the top score for the day was attained by Robert Miller and Bryan Keon-Cohen, with a score of +8. They were closely followed by recently retired County Court Judge Chester Keon-Cohen and well known solicitor, Peter Druce, who had been co-opted to the Bench and Bar Team with a score of +7.

The Bench and Bar Team was generously sponsored by Business Insurance Group Australia Pty Ltd and Suncorp Metway Limited. Each Bench and Bar player received a Suncorp Metway Golf Umbrella, Corporate Satchel bag and six premium golf balls. Further umbrellas, satchels and golf balls were awarded to prize winners. In addition, the Bench and Bar team's bar bill for the entire day was paid for by Suncorp Metway. Mark Laurence represented the sponsors at the Golf day and played with Gavan Rice.

The Bench and Bar team will endeavour to retain the trophy for 2002 at Kingston Heath on 17 December 2002.

Gavan Rice

Minister of the Crown: Vernon Wilcox

Published by V.F. and J.R. Wilcox
pp. 1–227
Paperback, $25.00

THIS privately published "personal story of life, politics and people" contains cameos from history reaching back to the days before World War II as seen from the point of view of a former Attorney-General of the State of Victoria.

Vernon Wilcox held the Seat of Camberwell for twenty years. He initiated the building of the underground rail loop and, as Attorney-General, it was he who gave his fiat to authorise D.O.G.S. to challenge state aid to non-govemment schools.

The dual role of the Attorney-General is illustrated by Vernon Wilcox giving his fiat to enable a challenge to be mounted, even though the Cabinet was t opposed to that challenge.

In these reminiscences, written with a simplicity and economy of style which make extremely easy reading, he gives the reader an insight into pre-war Melbourne and into life as a Cabinet Minister under Henry Bolte.

Geoffrey Blainey says in the foreword: "This book is quietly revealing about Bolte and his skill as a leader". It is equally revealing of the operations of the Liberal Party Cabinet during the years that Vernon Wilcox was a member of the Ministry. Although Sir Henry Bolte opposed the appointment of Vernon Wilcox to the Cabinet, once he was a member of the Cabinet Bolte supported him.

It is not a book to sit down and read in one session. It is a book to dip into on a sunny afternoon. It will make very good holiday reading.

Copies can be obtained from the Law Institute Bookshop.

Gerard Nash

Mediation: Skills and Techniques

By Laurence Boulle
Butterworths 2001
pp. i–xiv, 1–295,
Appendices 297–323, Index 325–331

NEGOTIATION (of which mediation is but one form) is like Australian Rules Football. Both are activities for "players". Both happen in the present and evolve during the "game". Football has a number of rules, patterns of play and requires certain specific skills. It is not something that can be learned or truly appreciated without actual play. Similarly, negotiation has a number of rules, and specific styles can be identified and classified, yet it is not a subject that can be truly understood without actual participation.

Just as a coach contributes to a football player's skills, a written text on mediation and by implication, negotiation, does have a useful part to play in improving the understanding and performance of negotiators and mediators.

Just as one cannot truly appreciate the lightning quick reflexes involved in executing a perfect hand pass from underneath a pack, nor the vision that enables some players to always find a team mate in a better position nor the debilitating effect of the crunching tackle or goal scored close to siren time in the game of football, neither should one overlook in the "game" of negotiation the careful reframing of issues by a mediator or the strategic intervention and response to a sudden change of tack in negotiation. What is the appropriate response to an apparently inflexible approach to mediation or, conversely, an unexpected concession during negotiation?

For the "non-player" the book provides the format, structure and insight into aspects of mediation and negotiation. Of more importance for the "player" the book enables insight and appreciation to be gained of familiar tactics, techniques and approaches frequently encountered in real life situations. By appreciating and understanding the tactics, explanation can be given to certain patterns of behaviour and alternative and different strategies can be implemented. For the "player" this insight extends and reinvigorates alternatives in the mediation and negotiation process.

The chapters on "assisting the communication process", "facilitating the negotiations" and "encouraging settlement" are useful for all involved in negotiated bargaining (Chapters 6–8). Similarly the chapters on "avoiding traps" (for mediators) and "special issues in mediation" provide a useful overview and exploration of many of the familiar skills and techniques in mediation (Chapters 9 and 10). By identifying these issues, alternative strategies are more readily identified and familiar tactics are better understood.

Of great practical use are the appendices, which provide model documents, particularly mediation agreements.

Just as the football player develops skills and appreciation of aspects of the game from the study and analysis of football, so do mediators and negotiators who seek technical explanations of the process and practice of mediation. This work can be usefully accessed by the "spectator", and of more significance it will enable the "players" in mediation and negotiation who are interested in further developing and honing their skill to gain a significant insight into particular aspects of the mediation and negotiation process. Good skills acquired through practice and study enable the "players" in football and negotiation to maximise their contribution to the game and outcome. Professor Boulle is to be commended for his useful and practical work *Mediation: Skills and Techniques*. For "players" and "spectators" it provides insight in a most useful and practical way.

P.W. Lithgow

Moran v *Moran*

by Murray Waldren
Harper Collins Publishers 2001
pp. i–xiv, 1–336. Paperback

IRVING Younger exhorted us on video at the Bar Readers Course that you could not call yourself a trial attorney until you had done 25 trials and if you hadn't done any trials you should read biographies of the famous trial attorneys. His particular favourite, I recall, was Max D. Steuer.

Kristina Moran, daughter-in-law of Doug Moran one of Australia's wealthiest men sued Doug, Greta and Peter Moran for the tort of intentional infliction of emotional distress, alleging that their actions had caused the suicide of their son and brother and her husband Brendan Moran. The trial before a jury in the Supreme Court of NSW in Sydney on 3 February 2000 and ultimately settled on day 37.

This is not quite a biography of famous trial attorney, but the biography of a famous Sydney trial that settled, written by a journalist assigned to cover the trial. It is a laboured love with some interesting insights, especially into the jury process, and maddeningly brief treatment of what must have been very interesting legal issues. For example, the author gives no real analysis as to why the case may have settled despite Richard Ackland's perceptive assertions. (See "The letter which demolished the Moran defence" *Sydney Morning Herald* 31 March 2000.)

Look out for tidbits of information that I don't recall from the Bar Readers

Course, for example, the use of the word "gallimaufry", as in "nothing more than a gallimaufry of tittletattle, an ill-assorted ragout of gossip and scandal" (my dictionary defines it as a dish made up by hashing up odds and ends of food; a ragout or a promiscuous assemblage of persons) by defendants Senior Counsel before a jury to describe the plaintiffs case, Junior Counsel ostentatiously using a stopwatch to time the answers of a witness, with the Judge suggesting the time taken could be read into the record, commencing cross-examination of one of the principal defendants by asking her to identify her public relations consultant in the body of court, as well as asking a witness which one of two statements she had previously made was false and the response Senior Counsel gave to a witness who asked him a question "(it's) probably easier if I ask the questions".

Perhaps written for a wider audience in mind, it will probably fill many legal stockings this festive season and it is worth a read on the beach.

Land Law (4th edn)

by Peter Butt
Law Book Co. (Thomson Legal & Regulatory Ltd)
pp. i–cxli, 1–895. Paperback

PETER Butt is a prolific author of books concerned mostly with New South Wales property and conveyancing law. This volume is the fourth edition of his general text on land law.

The preface acknowledges the relevance of the work particularly to New South Wales but also notes that it will be relevant in other jurisdictions given the similarity of property legislation throughout Australia. After considering several chapters in the book I suggest that it has definite relevance in Victoria. In particular, there are some substantial chapters dealing with general topics such as the nature and type of interests in land (tenures, estates, uses, trusts and equitable interests, fee simple, fee tail, life estate, remainders and executory interests and settlements). Other chapters deal in depth with easements, covenants, mortgages and priorities. There is an extensive and interesting chapter dealing with Torrens Title which relates directly to the registration system applicable in Victoria.

A new chapter in this edition deals extensively with native title. There is an extensive and detailed review of all native title decisions running from *Mabo* v *Queensland* (No. 2) (1992) 175 CLR 1 through State and Federal decisions to the present date.

Most of the statutory references relate to New South Wales Acts, as would be anticipated in such a text. Notwithstanding, the book provides a valuable exposition of the wide and varied area of land law. The book is extremely well indexed and there is extensive footnoting of authorities from all jurisdictions.

This is a wonderful omnibus text that takes into account not just those conveyancing and leasing issues but all relevant interests in land (including trusts and estates). It will be of great assistance to any practitioner involved in property and associated areas. Given the depth of coverage in respect of areas of general application it is a useful acquisition for Victorian practitioners.

S.R. Horgan

Statutory Interpretation in Australia (5th edn)

by D.C. Pearce and R.S. Geddes
Butterworths
pp. i– xlv, 1–303, Index 305–314

THE legitimacy of a legal argument will often rest on the construction of a statute, and much of the practitioner's work will involve vexing questions of statutory interpretation. The practitioner will look for a black letter analysis, which focuses on Australian law, and which offers very clear and concise practical guidance on what our courts say and do when they interpret statutes. The 5th edition of Pearce and Geddes continues to merit the reputation of earlier editions as the standard work on statutory interpretation in Australia. As with the last edition, the authors alert the reader that it is not their purpose to explore abstract theoretical perspectives and modern philosophical controversies that inform modern statutory interpretation jurisprudence (see para 2.1). Perhaps there is a danger that a work that largely expounds the grammatical cannons and logical justifications our judges have applied in the interpretation of statutes does not automatically escape the theatre of political controversy. This approach may of itself be a statement of adherence to a positivist theory of law.

The work remains a relatively slim volume and is easy to use. Short, numbered paragraphs are well signposted with self-explanatory headings. The intellectual clarity that matches these valuable features is also supported by an index, which, on the whole, tends to be comprehensive. There has been some re-organisation of material within existing chapters. This 5th edition updates judicial developments to 1 June 2001, with a substantial proportion of new references. A number of existing entries have been rewritten to reflect changing judicial responses, and the authors, in a spirit of true scholarship, confirm or review the commentary that appeared in the 4th edition. The authors themselves refer to a number of significant changes in their preface to the 5th edition.

First, the heading and the discussion relating to judicial bodies modifying the text of legislation has changed. The heading "[r]eading words into legislation"(para 2.16) is now changed to "[i]mplying words into legislation" (para 2.27), sounding a cautionary note as to whether judicial modification of a statute is a legitimate interpretative tool. The text has been expanded to explain how the process of implying words into a statute can be a legitimate use of the purposive approach (paras 2.28 –2.37).

Second, the title of chapter 11, entitled "Mandatory and Directory Provisions" in the 4th edition, has been changed to "Obligatory and Discretionary Provisions" in the 5th edition, and the chapter itself has been "recast" to take account of the decision of the High Court in *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355. An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. The Court's view was that the description of provisions as mandatory or directory provides no test for determining the consequences of non-compliance with the provisions. The Court acknowledged that a provision that prescribes the satisfaction of a condition as a prerequisite to the availability of a power has traditionally been described as mandatory because noncompliance is attended with invalidity. However, in the Court's view, the consequences of non-compliance depend on whether there was a legislative intention to invalidate any act that failed to comply with the condition. The legislative intention is ascertained by reference to the language, the subject matter and the objects of the statute and the consequences for the parties of holding void every act done in breach of the condition. The

consequences of non-compliance need to be determined before a provision can be described as mandatory or directory.

Third, a new chapter dealing with commonly used drafting conventions and expressions has been added. The authors have extracted the existing material on drafting conventions from the Introduction in the 4th edition and reproduced this material in a new Chapter 12. The chapter has been enlarged by a discussion of some drafting expressions used in legislation. It has been said that practitioners often have difficulty understanding the language of legislation. While language can never be an exact science there is a range of conventions, words and phrases that parliamentary drafters have used with some frequency and which judges have subsequently considered. Such conventions include the conjunctive "and" and the disjunctive "or" and cautionary expressions such as "notwithstanding" or "subject to". The drafting expressions covered in the book include expressions indicating a connection between one subject and another, such as "in respect of" and "having regard to". The chapter also provides further helpful guidance in the meaning of temporal expressions that indicate the time within which some action must be taken or when certain consequences arise.

The changes in the 5th edition justify the outlay of what is really a small investment for a huge return. It is an excellent book that will enhance the library of every practitioner. It will provide the busy practitioner with the basic and essential framework needed to engage in the mysteries attending the interpretation of statutes.

Joycey Tooher

Companies and Securities Law, Materials (3rd edn)

by Redmond
Law Book Company
pp. xlvi–919
Paperback

THIS is yet another student case book about company law. It is better written than most. It sites the subject well in its historical background in partnership and then the early development of company law. The book goes on to deal with the formation of the company, and consequences of corporate personality.

It then has a chapter about directors and managers and their roles. There is a further chapter (curiously, situated later in the book) about the duties and liabilities of directors and officers. There is also a chapter about general meetings, one about shareholders' remedies and one about corporate finance. At the end, there is a chapter about the structure and regulation of security markets and one containing case studies said to relate to the "Evolution of Corporate Firms".

Notwithstanding that I found its organisation a little hard to follow at times, the book seemed to me to contain most of the materials which an undergraduate student of company law would require. Some of the references appear a little out of date. While many of the cases and articles referred to are Australian or English "classics", a lot of water has flown under the corporate bridge in the last 20 years or so. One would have at least in some instances preferred to see more emphasis on recent cases and secondary materials.

Similarly, a reconsideration of the structure of the book may be in order. For example, the treatment of directors and officers and their duties and liabilities could be together, rather than separated by a chapter about General Meetings. And the statutory regime for dealing with corporate insolvency, liquidation and their consequences is surely now of sufficient complexity to need more thorough and prominent treatment in a separate chapter. After a year of Ansett, One-Tel and even Enron, these are areas of company law that touch many people's lives.

Michael Gronow

Principles of Contract Law

by Peter Heffey, Jeannie Paterson and Andrew Robertson
Published by Law Book Co. 2002
pp. i–xlv, 1–632, Index 633–655

PRINCIPLES of Contract Law has been written as a text for students studying contract law as part of a law degree. To that end it is not a general text on "business law" nor is it a "student primer" providing a general coverage and gloss on contract law. It is a substantial text dealing with the principles of contract law both from a theoretical (doctrinal) and substantive view point.

Busy practitioners will no doubt be intrigued by the perspectives on the theoretical underpinnings of contract law — classical, economic and feminist, to name but a few (see generally Chapter 1). On the other hand, areas where there is development and change such as an implied duty of good faith, the current and future status of *Yerkey* v *Jones* (1940) 63 CLR 649 in light of *Garcia* v *National Australia Bank Ltd* (1998) 194 CLR 395, estoppel and the quantification of damages (including issues such as *Hungerfords* damages and penalties v genuine pre-estimates of damages) are subject to clear, concise and useful analysis and commentary from both a practical and theoretical stand point.

There are also extremely useful chapters dealing with construing the terms of a contract which includes significant discussion in relation to the construction of both express terms (including exclusion clauses) and the recognition of implied terms.

This work (unusually perhaps for a legal text) is written in an extremely clear and readable style. The text itself is uncluttered and footnotes are relevant and concise, confined to the bottom of the page and do not contain the massed information and argument "overload" often found in the footnotes. The user friendly layout ensures the text is accessible, it is appropriately footnoted and broken down within each chapter under relevant headings. The text, with its theoretical underpinnings may not be a concise resource, but if this be a shortcoming it is more than made up for by the stimulating perspectives and the clear and comprehensive prose. For any practitioner looking for a substantial work providing insight and guidance in contract law, *Principles of Contract Law* lives up to its name and provides an excellent resource.

P.W. Lithgow

Native Title Corporations a Legal and Anthropological Analysis

Mantziaris and Martin
Federation Press and National Native Title Tribunal, 2000
pp. xxxiv + 366 pages including index
Hardback

THIS is (so far as I know) the only comprehensive textbook dealing with, and devoted to, native title corporations. Given their increasing numbers and importance, it is a gap which needed to be filled.

As a mere lawyer, I was initially a little concerned about reviewing a book that claimed to be an anthropological as well as a legal analysis. Nevertheless, given the nature of native title corporations and the context in which they operate, the anthropological aspect of the book could well be a necessary one. As the High Court has pointed out in *Fejo* v *NT* (1998) 195 CLR 96 at 128, native title results from "an intersection of traditional laws and customs with the common law" (Neate J. in his forward to the book).

The book is separated into three parts. The first concerns the character of the native title. It includes chapters defining and explaining the concept of native title and how its content is determined and described. This means that the book covers more than simply native title corporations, which is appropriate, since it is impossible properly to understand the corporations without also understanding native title itself.

A second part deals with the legal framework for native title management in Australia. It reviews the relevant legislation and the policy behind it as well as the characteristics and functions of native title corporations. It also contains chapters on the trust or agency relationship in which native title corporations find themselves, and the operation and governance of the corporations themselves. A third part deals with the "design process" for native title institutions. As the book explains, that process is yet to be completed.

Because the area is such a new one, many of the relevant principles are not yet fully developed. The authors have therefore often provided suggestions about the way in which principles will operate which are close to speculative. They nevertheless seem to me to have avoided the temptation in a book of this nature to become vague. Where there needs to be speculation, it appears to me to be intelligent speculation.

Overall, I found the book a useful and indeed essential compilation of the legal and other materials one needs to have to hand in dealing with a native title corporation. As native title corporations become a more important part of the native title process and of our legal system, I think that the importance of such a book will increase, both as an adjunct to native title law, and also to property and corporations law. The present work represents an excellent start in the area.

Michael Gronow

Conference Update

6–7 June 2002: Melbourne. Fifth AIJA Tribunals Conference. Contact AIJA Secretariat. Tel: (03) 9347 6600. Fax: (03) 93472980. E-mail: c.Crawford@unimelb.edu.au.

12–14 June 2002: Alice Springs. Future Directions: Courts and Indigenous Cultural Awareness National Conference 2002. Contact AIJA Secretariat. Tel: (03) 9347 6600. Fax: (03) 9347 2980. E-mail: k.Jarrett@unimelb.edu.au.

27–29 June 2002: Edinburgh. Inaugural World Conference of Barristers and Advocates. Tel: (07) 3236 2477. Fax: (07) 3236 1180. E-mail: mail@austbar.asn.au.

30 June 2002–6 July 2002: Lake Como Italy. The Fourth Europe/Asia Legal Conference. Contact Lorenzo Boccabella. Tel: (07) 3236 2601. Fax: (07)3210 1555. E-mail: Boccabella@qldbar.asn.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.

7–10 July 2002: Paris. Australian Bar Association Conference. Tel: (07) 3236 2477. Fax: (07) 3236 1180. E-mail: mail@austbar.asn.au.

12–14 July 2002: Brisbane. Access to Justice — The Way Forward.

12–13 September 2002: Sydney. Crime Prevention. Contact Conference Co-Ordinators. Tel: (02) 6292 9000. Fax: (02) 6292 9002. E-mail: confco@austarmetro.com.au.

13–14 September 2002: Brisbane. Second AIJA Magistrates' Conference. Contact AIJA Secretariat.

28 September 2002–5 October 2002: Heron Island. Sixth Pacific Rim Legal Conference. Contact Lorenzo Boccabella. Tel: (07) 3236 2601. Fax: (07)3210 1555. E-mail: Boccabella@qldbar.asn.au.

30 September–1 October 2002: Melbourne. Role of Schools in Crime Prevention. Contact Conference Co-Ordinators. Tel: (02) 6292 9000. Fax: (02) 6292 9002. E-mail: confco@austarmetro.com.au.

4–7 October 2002: Brisbane. Biennial Conference 2002: Reconstructing "The Public Interest" in a Globalising World: Business, the Professions and the Public Sector. Contact. Susan Lockwood-Lee. Tel: (07) 3875 3563. Fax: (07) 3875 6634. E-mail: S.Lockwood-Lee@mailbox.gu.edu.au.

20–22 October 2002: Sydney. The AIJ's Third Technology for Justice Conference. Contact Conference Secretariat. Tel: (02) 92411478. Fax: (02) 92513552. E-mail techjust@icmsaust.com.au.