VICTORIAN BAR NEWS

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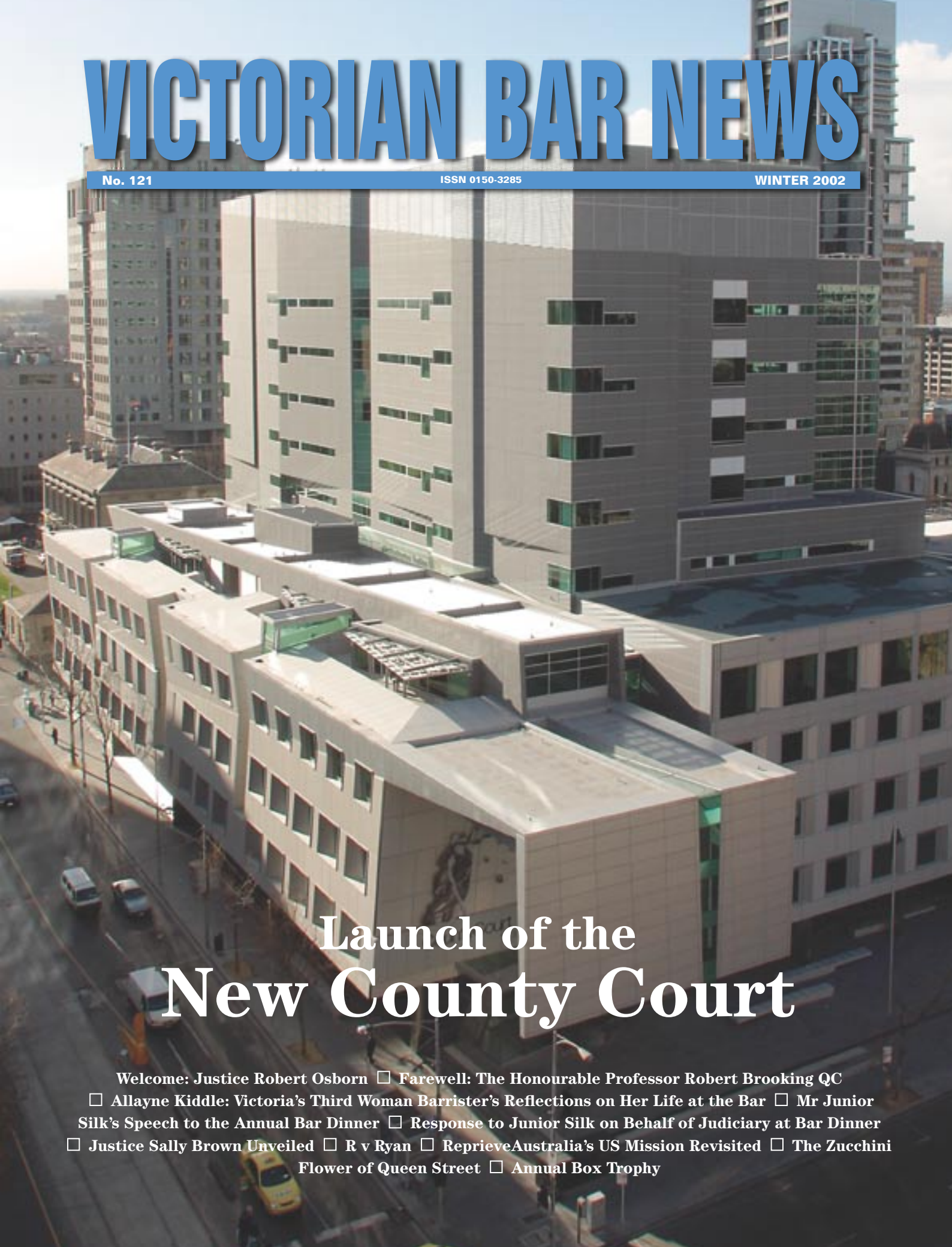

Launch of the New County Court

Welcome: Justice Robert Osborn ☐ Farewell: The Honourable Professor Robert Brooking QC ☐ Allayne Kiddle: Victoria's Third Woman Barrister's Reflections on Her Life at the Bar ☐ Mr Junior Silk's Speech to the Annual Bar Dinner ☐ Response to Junior Silk on Behalf of Judiciary at Bar Dinner ☐ Justice Sally Brown Unveiled ☐ R v Ryan ☐ ReprieveAustralia's US Mission Revisited ☐ The Zucchini Flower of Queen Street ☐ Annual Box Trophy

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No. 121 WINTER 2002

Contents

Cover: The new County Court building — the new face of justice. The launch ceremony addresses follow at pages 21–30.

Welcome: Justice Robert Osborn

Farewell: The Honourable Professor Robert Brooking QC

Allayne Kiddle

Mr Junior Silk's Speech to the Annual Bar Dinner

Justice Sally Brown Unveiled

Annual Box Trophy

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A New County Court and New Insurance Premiums

THE new County Court building was officially opened on 31 May 2002. After the official opening by the Premier in the morning, there followed a ceremonial sitting of the Court in the afternoon and a reception in the Grand Hall. The opening of the new Court is the culmination of many years of hard work by Chief Judge Waldron together with his supporting committee headed by Judge Michael Strong.

As the Chief Judge pointed out in his address to the ceremonial sitting, the original Court built in 1969 did not meet the demands of the Court from its very opening. The Court was too small, the lifts too few and the design public and lawyer unfriendly. Over the years the building on the corner of William and Lonsdale Streets had to be augmented by other temporary premises. Those who practise in the County Court will not have fond memories of the temporary premises in the old Corporate Affairs building in Little Bourke Street. Aptly named "whiplash valley" these temporary premises were even more inhospitable than the 1969 building. There followed the move to 565 Lonsdale for the civil Courts. This building housed both the offices of the DPP and civil, jury and Workcover Courts. Again, the design left much to be desired. Thronging about the dull corridors of this Court, whilst attempting to "get on", was never one of the most exhilarating experiences in life for barristers, solicitors and clients.

Early opinions of the new Courts are glowing. Certainly the judges are happy with their new chambers. Although there are some minor quibbles about toilet facilities. The entrance and the Great Hall together with the ceremonial Court are excellent additions. The Court has been designed with an eye to security, with the judges' chambers being protected from the public.

The Court has grown from humble beginnings to now boast fifty-five sitting judges. Perusing the assembled judiciary at the ceremonial opening provided quite a spectacle in purple. Those barristers lucky enough to be invited held a competition to see who could claim to know

the most judges by their first names. Results of the competition have been suppressed.

The photographs and speeches in this edition of *Bar News* testify to what is hoped to be a great improvement in the functioning of the Court. It is to be hoped that with a move to new premises there will be an improvement in the listing of cases in the Court. Despite many efforts to improve listings, the general consensus of barristers is that it is still very difficult to get a civil or criminal case on.

The sight of a reserve civil Court crowded with enough barristers to fill fourteen reserve cases should be avoided. Criminal barristers complain that even with the new manner of listings, having set much time aside to prepare a long criminal case, often that case is adjourned or is unable to be reached.

The task of moving the Court was a mammoth one. Hundreds of boxes of files together with much of the paraphernalia and belongings of judges and staff alike needed to be moved across from one corner of Lonsdale Street to the other. It is obvious that the move and the relocation program was a difficult one as it was necessary to close the Court down for two weeks. It certainly gave many barristers a tax break especially coupled together with conference breaks in April and the four-week July vacation.

PROFESSIONAL INDEMNITY INSURANCE

The withdrawal of Suncorp Metway from the provision of professional indemnity insurance to barristers caused quite a kerfuffle. Initially Suncorp Metway decided that it was not in the company's commercial interest to continue professional indemnity insurance. This caused a great problem as it appeared that no other insurance company really wanted to take up the slack. Then Suncorp Metway had a change of heart and decided to re-enter the market. At first this all appeared too late. Only one insurance company was approved by the Legal Practice Board to provide professional indemnity insurance. This gave Affinity Risk Partners a monopoly of the market.

Much shock and horror was caused when that company's application form was delivered to barristers. To begin with Parliament had to extend the period for insurance because of the difficulties in getting insurance companies to provide cover. When that cover was to be provided, many were surprised at the enormous increase in premiums which were linked to income, together with the fact

that the insurance pool was to be limited to $15 million with a maximum insurance of $1.5 million before top-up cover was needed as extra cost.

Luckily, after strong representations by certain members of the Bar, the Legal Practice Board had a rethink. Suncorp Metway was allowed back to compete with Risk Affinity Partners. Many who were already insured with Suncorp Metway were happy with this arrangement. Affinity Risk Partners then withdrew its facility from the market; leaving those who insured with the new company in a strange situation.

However, the question remains as to why there has been such a hefty rise in premiums, in some cases being two to four times the size of last year's premium. Is the rise in professional indemnity premiums linked to the overall rise in insurance premiums caused by the public liability insurance disaster? According to certain federal government ministers, greedy lawyers were responsible for the increase in this area of insurance by making scurrilous and unfair claims. Therefore indirectly have the greedy lawyers caused their own premiums to increase? Or have the increases been caused by greedy insurance companies using these reasons as a pretext?

It was interesting to see the views of Channel 9's television program "60 Minutes". Initially that magnificently fair program blamed greedy lawyers for the increase in premiums. Their commentators trotted out their usual array of clichés attacking the legal profession and then bleated on about public liability and medical claims being abolished or severely capped.

Then there appeared to be a change of heart. A recent program had a rethink and interviewed some of the lawyers to put the other side of things. Perhaps it was the insurance industry through its own mismanagement in the HIH and FAI disasters that have brought this situation about. It is clear that the statistics do not support the claims of the insurance companies that increased claims and pay-outs are the cause of increased premiums. The commentators then got stuck into representatives of the insurance companies. It was pointed out that many insurance companies profits have increased dramatically even in the light of 11 September and the collapse of HIH.

But what is the rationale behind linking premiums to the size of a barrister's income? Those earning larger incomes pay larger premiums. But are these people the bad risks? It could be argued that those who earn larger incomes are more skilled and competent and should not be penalised. An argument is put that the premiums should be based on past claims history rather than income. Whatever the merits of the argument it appears that the present system of a sliding scale is here to stay.

BAR DINNER

The Bar dinner was an excellent occasion this year. However, there is a general rethink going on about its format. Numbers fell again this year. Mr Junior Silk John Langmead SC, whose speech is included in this issue, was asked not to follow the usual format of referring to each guest in his speech. Instead he was asked to speak about a learned legal topic. Luckily John saw the error of this approach and gave a witty speech *not* upon a learned legal topic. Perhaps our Bar could follow the example of Sydney which recently staged its centenary Bar dinner with a 900 person turn up. The Sydney Bar does not depend upon Mr Junior Silk as the main speaker but chooses a person who is well known for after dinner speech skills. In the future our Bar could allow Mr Junior Silk to make a speech which is not necessarily the entertainment of the evening. Whatever the case it is imperative that the speeches at the Bar dinner remain to be seen as entertainment or else the numbers will continue to drop.

WE WERE WRONG

Sometimes it is difficult to decipher photographs, especially when not viewing the original. The Editors apologise for some misnomers in the last edition. At page 45 we made an understandable mistake when we confused the President of the Court with Justice P.D. Phillips of the Court of Appeal. The photograph appearing on that page should refer to President Winneke rather than Justice Phillips. Further, at page 61 of the prior edition we mistakenly stated that Peter Rattray was presenting the Neil McPhee perpetual trophy for yachting. As the photograph on that page testifies the trophy was actually presented by Melanie Sloss. We apologise for such errors.

The Editors

Laws of Negligence — Where to Now?

IN 1988, in a trial lasting some eight months, Daryl Williams QC appeared on behalf of Messrs Peter Heyes and Tim Barrow in the Supreme Court of Western Australia. Both men had contracted mesothelioma as a consequence of exposure to asbestos at the notorious Wittenoom Mine. Peter Heyes was to die before the completion of the trial. Tim Barrow died within two months of the judgment.

Justice David Ashley (then Ashley QC), who appeared with Williams QC for the plaintiffs, later described this trial as the most difficult he had appeared in. Two previous cases taken on behalf of Wittenoom workers had failed in the Western Australian Supreme Court. Every point was disputed. The comprehensive submissions on behalf of the plaintiffs covered content of duty of care, foreseeability, causation — every element of the tort of negligence.

Justice Rowland, in a 223-page judgment, found for the plaintiffs. The analysis and details of the judgment, including the examination of the development of the law of negligence, remains a valuable exposition.

Now Williams as Federal Attorney-General is part of a government that has selected a New South Wales based panel of so-called "eminent persons" to review the laws of negligence. The terms of reference are such that one can readily assume that the basis of the submissions relied upon by Williams in 1988 concerning negligence, and accepted by Justice Rowland, will be decimated, along with High Court authority painstakingly developed since 1988.

The panel is to:

> . . . enquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury or death including: the formulation of duties and standards of care, causation, the foreseeability of harm, the remoteness of risk, contributory negligence, and allowing individuals to assume risk.

As if all this were not enough, the reference also includes professional negligence, including specifically medical negligence; the exemption or limitation of liability of eligible not-for-profit organisations from negligence clams, the interaction of the Trade Practices Act, and proposed amendments thereto; the imposition of a three-year limitation period, with protections for minors and the disabled; quantum of damages; limitation of the liability of public authorities; and proposals to replace joint and several liability with proportionate liability in relation to personal injury and death.

No doubt the Federal Attorney and the Minister for Revenue, who announced the panel and terms of reference, have great confidence in those appointed to the panel who, in the space of less than three months, must re-write what the common law courts have developed in Australia over a century.

One of the four "eminent persons" is a Mr McIntosh, the Mayor of Bathurst, NSW. His qualifications for eminence in relation to the mammoth task have not been disclosed. Qualities of an open mind and impartial approach would not form part of his curriculum vitae. Councillor McIntosh was reported (*Financial Review*, 3/7/02) as putting much of the blame for the so-called public liability crisis with the legal profession:

> There is extraordinary opposition in a covert way, from the legal profession because we are talking about money . . . They are denying the legal profession should bear any responsibility. The majority of people out there in lawnmower land regard that as complete nonsense.

How can the profession or the community be expected to accept recommendations of a panel when its members express such prejudiced and illogical views?

Another member of the panel is NSW surgeon, Don Sheldon. He is referred to in the *Financial Review* as:

> . . . an outspoken member of stricken insurer United Medical Protection [who] favours limiting liability, capping damages, reducing the statute of limitations, and putting in place a more narrow definition of negligence.

Unfortunately the terms of reference do not require any investigation of the insurance practices of the NSW-based UMP. For years UMP has been the subject of criticism over the prudential management of its fund. Its collapse is a disaster, but not the fault of lawyers. Australian taxpayers apparently are to bear the UMP burden. It is relevant to note that a Victorian fund responsible for insuring Victorian doctors recently increased premiums, not because of any increase in litigation or damages but because of the state of the insurance market after 11 September 2001 and problems with reinsurance.

Mr Sheldon would appreciate the mandatory direction of the terms of reference that the panel:

> . . . must develop and evaluate options for a requirement that the standard of care in professional negligence matters

> (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission.

One may well ask why "enquire" at all?

The medical profession has never accepted, and has consistently misrepresented, the High Court decision in *Rogers* v *Whitaker* (1992) 175 CLR 479. The ratio is hardly alarming. In deciding the appropriate duty of care, professional opinion in medical practice will be influential and often decisive. But it is not determinative, particularly on the issue of whether the patient has been given relevant information, because what accords with practices of the profession may not conform with the standard of reasonable care demanded by the law. The Commonwealth's terms of reference seemingly demand a return to the opinions of "medical men" and the *Bolam* principle.

Justice D. Ipp is to chair the panel. He is now an acting judge of the New South Wales Court of Appeal. The magnitude of the task set by the terms of reference that have predetermined the basis for changing the laws of negligence, the reporting date of less than three months, and the public statements of fellow panel members, apparently cause no embarrassment for the acting judge. The public assurance of Ipp, J concerning consulting "as widely as possible" is hardly convincing when, in the same breath, he can state the predetermined outcome:

> It's very apparent from the first paragraph [of the terms of reference] what the government has in mind.

Why bother with submissions?

Not for Justice Ipp the cautions recommended by former High Court Chief Justice Mason (*Financial Review*, 30/5/02). Sir Anthony urged governments:

> . . . to think more carefully about proposed changes to the legal system that he described as a dangerous, knee jerk reaction.

Sir Anthony referred to the risk of rushing to adopt solutions that would introduce greater uncertainty into the law of negligence. When one appreciates that by the terms of reference, the "eminent persons" must also look into joint and several liability, proportionate liability, and voluntary assumption of risk, the task, the time and the lack of expertise are the cause of grave concern.

The premise justifying the existence of the panel has never been properly enquired into, let alone established. The preamble to the terms of reference states:

> The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another . . .

In other words, litigation and the law of negligence are responsible for the sudden and massive increase in insurance premiums. The premise has never been substantiated. Insurers, through the Insurance Council of Australia, still refuse to validate claims as to the role of litigation in premium rises by "opening the books".

The fourth member of the panel, Professor Cane, has written extensively in academic texts on the theory of the law of negligence. How he will cope with the task set by the federal government is difficult to comprehend. In a case note in the *Law Quarterly Review* [Vol 115, January 1999] on the High Court decision in *Chappel* v *Hart* he stated:

> The legitimacy of the common law does not rest on the way the judges who make it are chosen, nor on political ideas of accountability and responsibility, but on the strength of the reasoning by which common law rules are supported.

The common law has that legitimacy in Australia. Now Cane must participate in this peremptory attack on the framework, concepts and principles of the law of negligence contained in the terms of reference.

The Victorian Bar along with the Law Council of Australia, over the course of 2002, has clearly demonstrated that litigation cannot be blamed for premium explosion. The so-called "reform of common law" is no solution.

The legal profession is concerned with the hardship caused by extraordinary premium increases. The Bar remains committed to a constructive and reasonable dialogue on all these issues. The Bar will work with every other legal professional body in the Law Council to prepare full and detailed submissions to this enquiry. However, the terms of reference for the review, the composition of the panel, and the predetermined result, leave little prospect for dialogue that is reasonable, much less constructive.

This three-month enquiry is a travesty of process. It is merely part of a federal government strategy in the ongoing media circus which, per usual, puts polls and votes ahead of leadership and rights.

Jack Rush QC
Acting Chairman

Autumn Session Reforms

THE Bracks Government has continued to deliver on its promises to restore the justice system, and indeed democracy, from the shackles of the Kennett years. Initiatives such as the construction of the new County Court, the creation of Koori and Drug Courts, the measured review into street prostitution in St Kilda, and the introduction of the Crimes (Workplace Deaths and Serious Injuries) Bill, demonstrate our continued commitment to creating a fair, accessible and understandable justice system for all.

Such reform can only be achieved by broad consultation, and I continue to welcome and encourage the valuable input of the legal profession. Broad consultation undoubtedly involves both favourable and critical responses from various sectors of the public. But searching for a balance of community expectations provides the necessary impetus for effective and relevant reform.

For me and many others of the legal profession the opening of the County Court in May was a momentous occasion on the judicial calendar. It was both a proud and honourable day for all involved and I encourage all those who have not yet done so to wander through the magnificent new building.

The building itself symbolises in many ways the important role of the justice system to the people of Victoria. It encourages courts to be viewed by the community as modern and accessible. This is a critical objective of the Bracks Government and is absolutely essential if we are to maintain public confidence in the judicial system.

The construction of the County Court is but part of a major commitment to restore access to modern and efficient court infrastructure throughout Victoria, stripped away by the Kennett Government. Indeed I am pleased to say that we are currently constructing new courts at La Trobe Valley, Mildura and Warrnambool.

By providing modern courts, the Government is seeking to ensure access to justice for all Victorians. The Government is also keen for all courts to take full advantage, as the new County Court does, of the new opportunities technology offers. Some of these opportunities will also flow from the Criminal Justice Enhancement Project which will provide a more efficient technology system for access to an electronic document management system.

Beyond new buildings and greater technology, I remain dedicated to making the justice system more responsive to the needs of Aboriginal people in order to address the discrimination and disadvantage experienced by indigenous Victorians.

Currently Aboriginal people are 11 times are more likely to be imprisoned than non-Aboriginal people, and the Koori Court will seek to tackle such disproportionate figures by providing a forum where the Aboriginal community has input into the sentencing process through an Aboriginal elder/respected person and an Aboriginal justice worker.

Input by the offender's community is both a more appropriate and more effective method of decision making than traditional judicial decision making. Indeed the courts and the community must recognise that present sentencing practices are doing little to reduce the rate of offending and that more creative uses of the sentencing process are needed to enable indigenous communities to exercise greater ownership and control over sentencing outcomes.

Furthering the Government's determination to explore new ways of seeing justice done, I opened Victoria's first drug court in May. My column in last season's *Bar News* detailed this exciting and modern initiative to reduce drug dependency and its destructive effects in our community.

It demonstrates the State Government's strong commitment to be tough on crime while identifying and responding to the causes of crime in our society. As a government, we recognise that traditional sentencing approaches are simply not working to break the cycle of drug use and offending, and we are keen to tackle drug problems up-front.

It may be tempting to appeal to community concerns of drug-related crime by advocating harsh punishment and mandatory sentencing. However, it is my view that mandatory sentencing, in whatever guise, breaches the separation of powers, judicial discretion and denies absolutely the ability of courts to treat the causes of crime. Unlike the Opposition, this Government accepts the challenge to balance the need between punishment and deterrence on the one hand and on the other, a system which is fair and offers hope for rehabilitation and integration back into the community.

Another area where the State Government has been prepared to take up the challenge for reform is the issue of street prostitution in St Kilda. The previous Government put this issue into the 'too hard' basket, despite numerous calls for action from the Port Phillip Council, local residents, and welfare agencies.

In establishing the Street Prostitution Advisory Group, I asked that it develop a package of workable measures to address the issue of street prostitution in the City of Port Phillip.

The State Government's commitment to developing law reform in consultation with the community is amply demonstrated by this Group's work and I am delighted that their efforts have produced a very workable local solution for a local problem.

The Group's final report accepts that street prostitution cannot be eradicated

and adopts harm minimisation and increased community safety as its priorities. It sets a comprehensive package of measures to effectively manage street sex work in St Kilda and minimise the harm caused to street sex workers, residents, traders and other community members.

The Opposition again demonstrated their zero understanding on critical social issues by advocating zero tolerance for street workers. Indeed Denis Napthine's "solution" of having police lock up street workers and the naming and blaming publicly of clients appears to me to be a throwback to the days when sinners were publicly stoned.

Somewhat ironically though, the Opposition is not prepared to lock up corporate criminals nor even charge those companies and individuals responsible for causing deaths and serious injuries in the workplace.

The Crimes (Workplace Deaths and Serious Injuries) Bill is targeted specifically at those rogue employers who do not care about workplace health and safety and are grossly negligent in the workplace. It addresses behaviour that is so reprehensible that any Victorian, including the Liberal and National Party members, should be appalled to see it go unpunished.

While the Bill successfully passed through Parliament's Legislative Assembly, it has since been blocked in the Legislative Council with the Liberal and National Parties indicating that they are prepared to go soft on crime in the workplace.

In the various stages of review, consultation, legislation and implementation, I seek your ongoing assistance and I welcome any of your suggestions for ensuring access to justice for all Victorians.

Unlike the Opposition, this Government does not intend to stand by while further workplace deaths and serious injuries occur, and we remain committed to implementing our promise for all Victorians to enjoy a safe workplace. The legislation was developed after an extensive consultation process and it reflects community expectations. I am determined to continue the fight for the right of every Victorian to head to work and return home safely that night.

More generally, I remain dedicated to reforming and improving the justice system throughout the State. In the various stages of review, consultation, legislation and implementation, I seek your ongoing assistance and I welcome any of your suggestions for ensuring access to justice for all Victorians.

Rob Hulls MP
Attorney-General

Victorian Bar News Supplement:

Amendment to the Rules of Conduct

THE *Victorian Bar News* is the official publication of the Victorian Bar and is used to inform members of the Bar and other practitioners regulated by the Victorian Bar RPA of professional practice matters. From time-to-time it may be necessary to issue a supplement to *Bar News* in order to comply with the notification requirements of the *Legal Practice Act 1996* (Vic). On 30 May 2002, *Victorian Bar News* Supplement 07/2002 was issued to advise regulated practitioners of the Bar of a change to the Rules of Conduct (practice rules) of the Victorian Bar to take effect on 1 July 2002. Details of the changes follow.

CHANGES TO THE PRACTICE RULES

Recently the Bar Council made a number of amendments to the Practice Rules. These will all take effect from 1 July 2002.

Mediators

For some time there has been concern expressed as to the extent, if at all, that the Rules apply to mediators. After seeking advice, it was determined that the appropriate course was to specify those Rules which do not apply to a barrister when acting as a mediator. Further, it was also thought appropriate to require a mediator to disclose any interest he or she may have in the mediation. Similarly, the amendments make it clear that a mediator is required to maintain confidentiality concerning the mediation.

Media Rules

The Media Rules have been under review for quite some time. The existing Media Rules had caused some problems both for the Ethics Committee and counsel. Draft Rules were prepared and circulated by the Australian Bar Association. The new Rules are based on the Rules as settled by the Australian Bar Association. In essence, they provide limitations with respect to publication of material concerning current or potential proceedings. The term "current proceedings" is already defined in Rule 9. The amendment introduces a definition of "potential proceeding" and that definition is published together with the amending Rules. In effect, the purpose behind the new provisions is to prevent counsel seeking to use the media, in any way, to advance, directly or indirectly, the cause of his or her client.

Disclosure Rule

The current Rule provides that a "disclosable event" includes a conviction or finding an offence is proved against the barrister "where the maximum penalty . . . is a term of imprisonment of more than 12 months . . ." The amendment alters those words to a "maximum penalty . . . is a term of imprisonment of 12 months or more." This is a significant alteration.

Conditional Fee Agreement

The *Legal Practice Act 1996* provides for additional costs agreements: s.97. Counsel have for quite some time been briefed on such a basis. Accordingly, it was thought appropriate to include in the Rules provisions concerning conditional fee agreements.

AMENDMENTS TO THE PRACTICE RULES OF THE VICTORIAN BAR EFFECTIVE 1 JULY 2002

Interpretations

(1) Insert definitions of "Potential Proceeding" and "Confidential Fee Agreement" to Part I — Preliminary, Interpretation, Rule 9(f) —

"Potential proceeding" means proceedings which have not been commenced but where there is information which has been publicised that such process is imminent or where there is a very real likelihood that process will be instigated.

"Conditional Fee Agreement" means an agreement whereby a brief is accepted on the basis that the barrister will not be paid any fee unless the client succeeds to an extent set forth in the agreement being an agreement that conforms with the requirements of the *Legal Practice Act 1996* relating to conditional fee agreements.

Rules of Conduct re Mediators

(1) Insert Rule 5A to "Part 1 — Preliminary, Application of Rules"

"5A. The following rules do not apply to a barrister when acting as a mediator:
(a) Rules 10-73;
(b) Rules 84-112;
(c) Rules 126-192."

(2) Insert Rules 198 and 199 as Part XI — Rules Regulating Barristers as Mediators:

"198. A mediator must disclose to all parties to the mediation any interest or association, personal, professional or commercial, which he or she has or may have in or with:
(a) the outcome of the dispute the subject of the mediation; or
(b) the parties to the mediation.

199. A mediator has the same obligations of confidentiality, with respect to communications made in the course of a mediation, as he or she would have if such communications had been made by a client to him or her as a barrister."

Media Rules

(1) Repeal Rules 58 to 61 (both inclusive) and in lieu insert new Rules 58 and 59

"58. (a) A barrister must not publish or take any step towards the publication of

any material concerning any current or potential proceeding which:

(i) is inaccurate;

(ii) discloses any confidential information;

(iii) appears to or does express the opinion of the barrister on the merits of the current or potential proceeding or on any issue arising in the proceeding, other than in the course of genuine educational or academic discussion on matters of law.

(b) Subject to sub-rule (a) and any court rule or order to the contrary a barrister may publish or assist the publishing of material concerning a current proceeding by supplying only:

(i) copies of pleadings or court documents in their current form, which have been filed and which have been served in accordance with the court's requirements;

(ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;

(iii) copies of transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court;

(iv) copies of exhibits admitted in open court and without restriction on access;

(v) answers to unsolicited questions concerning the current proceeding and the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court and the client's intentions as to any further steps in the case;

provided that where the barrister is engaged in the current proceeding, the barrister does so only with the consent of the client first obtained."

(2) Amend Rule 59.

"59. A barrister will not have breached Rule 58 simply by advising the client about whom there has been published a report relating to the case, and who has sought the barrister's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication."

Disclosure Rule

(1) Amend Rule 197(a) (iv) by replacing the words "more than 12 months" with the words "12 months or more".

Conditional Fee Agreements

(1) In Rule 98 insert at the start of sub-para (b): "subject to para (d)".

(2) In Rule 98 insert:

"(d) the provisions of rule 200 relating to Conditional Fee Agreements applies"

(3) By the addition of Part XII "Conditional Fee Agreements"

(4) By the addition of rule 200:

"A barrister may return a brief accepted under a conditional fee agreement if:

(a) the barrister and instructing solicitor, if any, consider on reasonable grounds that the client has unreasonably rejected a reasonable offer of compromise contrary to the barrister's advice;

(b) the client has refused to pay the barrister a reasonable fee for all work done or to be done after the client's rejection of the offer;

(c) the client was informed before the barrister accepted the brief of the effect of this rule; and

(d) the barrister has the firm view that the client has no reasonable prospect of success or of achieving a better result than the offer.

(5) By the addition of rule 201:

"Nothing in this Part entitles the barrister to enter into a Conditional Fee Agreement in criminal proceedings or proceedings under the *Family Law Act 1975*."

Professional Indemnity Insurance for Former Barristers

SUNCORP Metway Insurance Limited has advised that it will consider offering professional indemnity insurance for the period to 30 June 2003 to barristers who ceased practice prior to 1 July 2002. The following conditions apply:

- A premium will be charged. The quantum of the premium will depend on the limit of indemnity sought and the insurer's assessment of the risk;
- The insurer reserves the right to decline or limit cover or to impose a premium loading and/or higher excess if the proposer has an unsatisfactory claims or disciplinary history. The insurer may also impose a loading for certain areas of practice; and
- The cover is limited to facts or circumstances that give rise to a cause of action that occurred on or after 1 July 1996, subject, of course, to the policy terms and conditions.

A proposal form and a copy of the wording of the insurance policy can be obtained from the Bar Council office, 12th floor, Owen Dixon Chambers East, 205 William Street, Melbourne 3000, or by telephoning the office on 9225 7111.

Suncorp Metway Insurance Limited can be contacted through its agent, Business Insurance Group, by phone on (07) 3362 2768 or fax (07) 3362 2885.

Bigger War Games

The Editors

Dear Sirs

IN the course of his interesting observations (in his letter of 12 February 2002) Mr Greenwood SC says that a major problem with current litigation is the appalling failure of some solicitors to bring any proper critical legal judgment to bear on the instructions they are given. There has apparently been a "dumbing down" of one branch of the profession over the past twenty years as some solicitors have become preoccupied with business.

For the purpose of this discussion, and only for that purpose, I will accept the suggestion that solicitors have been subject to a generational slide (that other branches of the profession have presumably been immune to), but, even so, the question remains — are trial lawyers responsible for the proper running of trials? By trial lawyers, I mean the Bench and the Bar.

Under our constitutional dispensation, State or Federal, the judges are responsible for the proper running of the courts (or, at least, such courts as government allows them). Can you imagine telling a Chapter III justice — say, Sir William Deane — that it is not the judiciary, but the parliament or the executive, that is responsible for the due exercise of judicial power and the administration of justice?

Apart from the constitutional imperative, members of the Bench have by the creation of their own rules of court assumed responsibility for the way trials are prepared and conducted. They have now expressly accepted managerial responsibility for the way in which their lists or dockets are managed. Justices of superior courts do not say that they are impotent to deal with the professional forces interfering with the due administration of the law. Who would have dared to say to Mr Justice Crockett that things had got so bad with the standards of local solicitors that it would be hopeless for His Honour to try to get on top of his Geelong list for that month? For that matter, how would you like to turn up in front of any Magistrate and say that the court would not be able to get under way on time because your solicitor was late back from lunch? It is the job of the judges to keep order in their courts and they could not, and would not, cop out by claiming some lawyers have got dumber.

As a matter of law, members of the Bar are responsible for the conduct of the trial in which they are briefed. As a matter of the rules of court, counsel have responsibility for the pleadings they sign. As a matter of practice, their retainer in the proceedings means that they assume responsibility for the conduct of the proceeding from beginning to end, including — and this is part of the problem — witness statements, and even issues relating to discovery and court books. The only justification for procedures before the trial is to improve the procedure of the trial, and in matters of substance counsel assume responsibility for most if not all those procedures.

It is therefore difficult to lay too much responsibility on solicitors for the way that the trial lawyers run trials. In truth, it is hard to sustain the notion that a court cannot rise any higher than the solicitors who instruct in it. But if Mr Greenwood is saying that budgetary pressures on some solicitors are adversely affecting the way they approach litigation, I agree with him. The big firms have economic imperatives that are awful and inexorable. The problem is that the judges are playing into their hands by giving them bigger war games to play with, and bill for. That is the big change, as I see it, over the last twenty years.

I should add that I am speaking only of Melbourne, and that the little experience that I have had, on either side of the profession, with practice in Sydney suggests that it is different — deeply and insolubly different — up there.

Yours sincerely

Geoffrey Gibson

Supreme Court

Justice Robert Osborn

JUSTICE Robert Osborn was welcomed to the Supreme Court by a large gathering of practitioners, family and friends on 15 May 2002.

The Chairman observed that His Honour shares with Lord Nelson the dubious distinction of being the son of a parson. This in fact was the excuse proffered by Robert to a succession of loyal but baffled secretaries as the reason for his totally illegible handwriting. It appears that in his formative years Robert was moved through a succession of parishes in country Victoria, necessitating a change of school on each occasion and the consequent loss of consistent attention to the three Rs that might otherwise have produced a fine scripted hand.

Robert's religious inheritance nowadays manifests itself in the spirit rather than the teachings and practices of the church. He is a communicant with nature, and is never more at one with himself than when trekking the foothills of the Himalayas, or the Andes, or his own beloved Australian bush. Robert's peak in Darien is a rock in the Great Dividing Range overlooking the Alps towards Mount Baw Baw, where on occasions he has been known to munch on a heavy north eastern Victorian red.

His Honour's early education was at the Rural School at the University of Melbourne, a school for the children of resident academics who included among their number His Honour's father, the Reverend Doctor Eric Osborn, the distinguished theologian and stalwart of Queen's College. Robert attended classes with the singer and film star Olivia Newton-John, whose talents inspired His Honour to nothing more than a spirited rendition of "Good Old Collingwood Forever" on the rare occasions that have justified that irritating tune.

After the succession of schools previously referred to His Honour ended up at Wesley College, from which he matriculated with honours in Greek and Roman History and Latin. From there he went into residence at Queen's College, and graduated from the University of Melbourne with honours degrees in both Arts and Law, later completing a Masters of Laws Degree. He won the Goethe Prize and the Wilson Prize as the top graduate in German. His language skills served him well on later occasions, such as the IBA Conference in Melbourne some years ago when he was called on to assist with the entertainment of guests from Vienna whose propensity for partying lead to severe depredations upon their host's cellar.

After serving articles with Oswald Burt & Co His Honour signed the Bar Roll in 1975. He read with Graeme Crossley, now Judge Crossley of the County Court, under whose tutelage he mastered a system of quality assessment by means of animal stamps, the highest accolade being the elephant stamp. This system was administered to a succession of readers, Michael Hennessy, Christopher Smale, Arnold Dix, Trevor Cohen and Christopher Townshend, and thereafter to a number of juniors.

His Honour developed an early practice in personal injury cases. In his first jury trial he represented the employer defendant. Counsel for the plaintiff, known for his robust advocacy, introduced the *dramatis personae* of the case to the jury by describing counsel for the employer as "that rather studious looking young man at the other end of the Bar table".

Robert took silk in 1994 by which time he had developed a specialist practice in planning and environmental law, local government law, and valuation and rating cases. At the time of his appointment His Honour was one of the leaders of the Bar in these areas. He also represented the Murray Darling Basin Commission in the long running claim by the Yorta Yorta Aboriginal group for declarations under the Native Title Act over the waters of the Murray and Goulburn Rivers and the Crown lands of the river valleys, mastering in the course of the case complex questions of water law. In this task His Honour was initially assisted as junior counsel by Justice Warren until her appointment to the Supreme Court. Briefs for the MDBC are now understandably much in demand.

His Honour did much pro bono work for the Environmental Defenders Office ranging from defending the rugged eastern coastline of Phillip Island to protecting rare (if little known) species like the Mable Gully Daisy Bush and the Kilsyth Spider Orchid. His Honour also represented the Kew Cottage Parents Association during the coronial inquest into the tragic fire at Kew Cottages that claimed the lives of nine disabled residents.

His Honour has been supported throughout his career by his wife Jane, who is a professional planner and a member of VCAT, and the two apples of his eyes, his daughters Sophie and Genevieve. His Honour will bring to the Supreme Court qualities of learning, patience and common sense. His Honour is to be congratulated on attaining the ultimate elephant stamp.

The Honourable Professor Robert Brooking QC

IT is sometimes said of men that none is irreplaceable. And, in the sense in which that is true, it is as true of judges as it is of other men. When a judge reaches the age of retirement and steps down, other judges follow to do the work he did. The Honourable Mr Justice Brooking is a case in point. On 7 March 2002 he reached the age of 72 years and stood down after 25 years of continuous judicial service. Now, other judges have followed to do the work he used to do.

It is also sometimes said of some men that their achievements stand out from others. Paradoxically, however, that tends to be said less often of judges than it does of other men. The qualities of their peers and the hierarchy in which judges operate make the exercise of comparison difficult. It is only the most exceptional judges whose achievements stand out from the rest. Mr Justice Brooking is again a case in point. His achievements stand out, for he has been one of the most exceptional judges of the Supreme Court of Victoria.

At the time of the Justice Brooking's retirement, much was said in farewell speeches and in other places about his judicial career. Rightly, those who spoke on the subject were unanimous in their praise. Frequently, the detail was different, but in each case the substance was the same. Whatever the abilities of the judges who follow, and it is to be assumed that they will be significant, few are likely to match in total or eclipse in many respects the contribution of Justice Brooking to the work of the Court.

It is not practical in a note such as this to record all that can or should be said about the work of such a judge. To begin with, it is not possible to gather together in a limited space reference to all or even a significant number of His Honour's important decisions. It is also difficult adequately to convey the profound effect which the man has had on those with whom he worked and over whom he presided. Some of it can be gleaned from the law reports in which his judgments are recorded. Some of it is evident in the various curial and administrative structures he helped shape or to which he otherwise added. But so much of it was also in the way in which he conducted his Court or otherwise applied himself to whatever task was at hand that a proper appreciation of this judge's work will remain confined to those who witnessed at least something of it at first hand.

It may be noted that Justice Brooking was appointed to the Court on 22 February 1977 at the relatively early age of 46 years and that by the time of his appointment he had achieved pre-eminence in diverse areas of practice, including landlord and tenant law, vendor and purchaser law, building contracts, trustees and executors, equity, common law, commercial law and occasionally crime. He was renowned for his scholarship and capacity for hard work, and his force of personality and strength of persuasion as an advocate were widely admired and respected. There is no doubt that his appointment left a significant gap in the ranks of the inner Bar.

It is also worthwhile to recall that the Court to which His Honour was appointed was then a Court comprised of great judges and thus that the expectation of those who appointed him was that he would be one of them. It was a Court preceding by years the advent of divisions and the creation of the Court of Appeal. Therefore, those who were appointed to it were expected and able to judge all manner of matters at first instance and on appeal at a level of competence which was not always replicated in later years. Justice Brooking fitted the mould admirably. He had proved himself just as competent in common law juries as he had in equity, and the criminal jurisdiction held nothing in store of which he would not prove master. He took up his role as a judge of the Court with all of the ability and enthusiasm for the task that one would expect to flow from such a background.

Moreover, once on the Court Justice Brooking's capacity for work was sensational, and it never varied throughout the 25 years of judicial service that followed. Whether at first instance or on appeal, the approach was always the same. An apparent degree of preparation which could only be the consequence of many hours of work, the direction of the trial or debate in a way which reflected a thorough understanding of the issues and, rapidly, the production of a judgment which more often than not bound skill and hard work together in a seamless solution to the problem.

Many at the Bar have experienced first hand the effects of that approach. Sometimes indeed it was so forceful as to seem that the result of a case would be the same regardless of any efforts which could have been made to persuade. But to reach that conclusion would be a mistake. No doubt it is a fine line that divides predisposition from prejudgment. But it is one that this judge is most unlikely ever to have crossed. His allegiance to the institutions of the common law would have rendered such a crossing anathema. If a barrister's efforts did not produce a result different to the judge's predisposition, it was likely

to be because the predisposition was correct or at least because the efforts were inadequate.

For most barristers, however, and on most occasions, it was a treat to appear before this judge. With him, the assumption that the Court had read the material was a reality; not just a line in a mission statement. With him, the presumption that the judge knows all the law closely approximated to reality. One knew that he knew what he was doing and in turn that allowed one to get on with the job at hand in a way which is not always the case in other places. It was not necessary to say things more than once because whatever was said was comprehended and considered, even if it were not always accepted.

That is not to say that Justice Brooking was without critics. On the contrary, he was as capable as any judge of producing occasional forceful criticism from those who appeared before him and from those with whom he served. But the bulk of that criticism was transient and any of it which ever mattered tended to come from those who most admired him and then only concerning matters about which people of ability may legitimately, even if emotionally, sometimes disagree.

Justice Brooking's contribution to the work of the Court was not confined to the realm of judging. He was a tireless worker and leader of judicial committees. His abilities as an administrator were significant. He served upon and at various times led the Rules Committee and the Library Committee, and he was active on the Court's Executive. He managed the Commercial List at a time of great volume and challenge and, until the establishment of the Court of Appeal in 1995, he led the Appeal Division. In the days when the volume of business in the Practice Court was still vast, he was among the most accomplished judges in the management of its workload. When a judge was required to manage a Court project, he was naturally regarded as among the first to be chosen. And in all of this, he maintained a standard of bearing and courtesy that invariably reflected favourably on the high standing and reputation of the Court.

It is, however, Justice Brooking's abilities as a judge — his ability to judge — that most mark out the contribution which he made to the Court.

Justice Brooking will be remembered as a great judge, with a great ability to judge, because he is an exceptional lawyer. He knows the law like few others, and thus he judged according to law like few others. The extent of his legal knowledge is vast. It was not exceeded by any of his peers and it is of a level to which most present day judicial appointees could only hope to aspire. It was the horsepower that drove the unflagging engine of his decision making from the beginning to the end of his judicial career in all jurisdictions, at first instance and on appeals. And it is a mark of its extent and excellence that in the course of his 25 years judicial service Justice Brooking delivered close to a thousand judgments of which a record remains, ranging in subject matter across every facet of the law, and many still stand as authoritative precedents.

One early example, in the field of company law, in *Re Haughton & Co* [1978] VR 233, is remarkable not only for its quality, but also as evidence of His Honour's ability to achieve in a day or two in the Supreme Court the sorts of results which today are not always matched in other courts even after several months of case management, piles of paper, days of debate and months of reservation of decision. Contrastingly, in the law relating to the sale of land, in *Nund* v *McWaters* [1982] VR 575, Justice Brooking as the junior judge of the Full Court produced in the space of just over 10 pages a comprehensive and comprehensible synthesis of an array of difficult legal conceptions which had to that point defied complete exposition. In the criminal law, Justice Brooking as a member of the Court of Criminal Appeal and later of the Court of Appeal delivered more than 300 judgments containing incisive expositions of legal principle. For a recent, powerful example, see *R* v *Franklin* (2001) 3 VR 9, especially at [66]. In equity, Justice Brooking time and again demonstrated a level of competence which far surpasses the merely memorable: see, but only for example, *Pioneer Concrete Services Ltd* v *Galli* [1985] VR 675; *Costa & Duppe Properties Pty Ltd* v *Duppe* [1986] VR 90; *Moffett* v *Dillon* [1999] 2 VR 480; *Swanston Mortgage Pty Ltd* v *Trepan* [1994] 1 VR 672; *Flinn* v *Flinn* [1999] 3 VR 712; and *Spincode Pty Ltd* v *Look Software* [2001] VSCA 248.

Justice Brooking will also be remembered as a great judge of the Court because of his ability and unashamed inclination to apply the high technique of judicial method in ways calculated "to meet the demands which changing conceptions of justice and convenience make".[1] The results are to be seen in any number of his decisions, beginning in the earliest years of his judicial career.

One of the early reported examples is *Re Clark's Refrigerated Transport Pty Ltd (In Liq)* [1982] VR 989, where the question was whether an all moneys mortgage given to A to secure advances made by A should be taken to secure other debts assigned by B to A, and the decision was that it did not. The result accords with commonsense, and thus with what one may hope would be the outcome. But it is the technique of judicial method employed to achieve the result that makes the case remarkable. It begins with an assessment of the matter by reference to mainstream notions of decency and commonsense. That is followed by a rigorous analysis of the problem according to legal principle. Finally, there is produced a result which seemingly as a matter of course is made to accord not only with decency and commonsense but also to legal precepts. In later years, the same technique or something close to it appears in many of His Honour's decisions. The analysis employed in *Spincode*, above at [41] to [59] is but one recent example.

A third and closely related reason why Justice Brooking will be remembered as one of the great judges of the Court is that he was the sort of judge who saw the value of institutions in the protections which they afford to all members of society, regardless of their place in society, rather than the privilege which institutions sometimes create for the few; and he shaped his judgments accordingly. His Honour's judgment in *Magistrates' Court of Victoria at Heidelberg* v *Robinson* (2000) 2 VR 233 is an inspirational example of the worth that he placed upon institutions. His observations in *Shelmerdine* v *Ringen Pty Ltd* [1993] 1 VR 315 at p. 321 might be thought to provide an example of his intolerance of their excesses.

As much as anything, however, Justice Brooking will be remembered as one of the great judges of the Court because of his work as a founding member of the Victorian Court of Appeal. In the seven years in which he sat on that Court the volume and quality of his judicial writing was in aggregate unmatched by any other member of the Court. Sometimes whimsical, sometimes censorious and sometimes sagacious, it was always disciplined and dedicated to the rigorous application of authoritative precedent. It was also frequently polemical, in ways that extended the law to limits beyond which only the High Court could take it. Then, when the occasion demanded, it was constrained by the sort of conservatism necessary to arrest a trend advancing too far or too fast. In each case that came before him, he wrote for the benefit of the parties. In the

totality of the cases that came before him, he left much for the benefit of posterity.

In the result he contributed fundamentally to the establishment of the Victorian Court of Appeal as the leader of its type in this country.

In the year in which the Honourable Mr Justice Brooking was appointed, it was said of another great judge that it was impossible to overestimate the contribution which he had made to the work of the Court.[2] Of Justice Brooking it must now be said that the same is undoubtedly true.

NOTES:

1. "Concerning Judicial Method", in *Jesting Pilate* 152 at p. 165.
2. [1977] VR at p. ix, per Young CJ.

The Commercial Bar Association paid tribute to Justice Brooking at a dinner held on 18 April 2002

After the introduction for the evening by David Denton SC, President of the Commercial Bar Association, John Digby QC was invited to propose a toast to the life and times of Robert Brooking to the 120 members of the Bar and Bench attending the dinner.
The words of that text are reproduced below.

THE arrangement of this dinner, only the third such event since the establishment of the Commercial Bar Association in 1994, and our special guest's recent retirement, are no coincidence. The Commercial Bar Association has arranged this evening's soiree as an opportunity to acknowledge the enormous contribution and significance of Robert Brooking to the Victorian Supreme Court. We were delighted when His Honour, as he then was, agreed to be the focus of tonight's event.

It is widely appreciated that the attributes which guaranteed our Honoured Guest success at the highest level in his careers at the Bar, and on the Bench, included remarkable intellect, an extraordinary capacity for work, and in the result, a profound depth of legal scholarship.

In a little while, I wish to return to some facts which appear to exemplify the legal, and judicial colossus our Honoured Guest has come to represent. However, I would like to commence our brief journey starting at the second of the seven ages of this man, drawing on Shakespeare's definition of those ages in "As you like it".

The first of Shakespeare's seven ages of man is infancy and nothing is known of the infant Brooking.

The second stage is youth.

Brooking the youth is said to have exhibited signs of sweet sensitivity, romance and artistic revelry.

The earliest recorded example of these attributes was recently mentioned by Douglas Graham QC at our Honoured Guest's farewell, and although some may be familiar with the relevant vignette, it is so precious, and revealing as to require re-telling.

Robert Brooking was transported to these shores, together with his parents and brother, in the late 1930s. Apparently, the dye, which ultimately set in a relatively stern and most dignified forensic bearing and countenance, had not been caste back then, and an impartial onlooker could have been forgiven for predicting that the subject lad looked forward to a career in the Arts.

Young Brooking's smiling face once adorned the front page of *The Age* taken with a 15-year-old female Ukranian chess prodigy with whom he was competing.

The basis for this insight occurred during young Master Brooking's voyage to Australia. As circumstance would have it, on board the good ship *Monterey* was Madame Gertrude Bodenweisser's Ballet Group from Vienna. As part of the P & O celebration on the crossing of the equator, instead of, or perhaps as a supplement to, the traditional dunking of the children by King Neptune, the Bodenweisser Ballet Group performed a ballet which enlisted the more attractive youngsters on board as performers.

I appreciate that the image which I am about to ask you to conjure up is extremely difficult to visualise, with the subject, some 63 years older, and sitting before you. But imagine Robert Brooking, a sweet little blond-haired boy wearing a gorgeous leotard of green crêpe paper, and delicately dancing the role of a seahorse with the Bodenweisser Ballet.

Many of you will be speculating as to what emotional and psychological damage such an experience might have inflicted. For my part, I expect that as a result of these events, our guest made a decision, there and then, some 60 plus years ago, to ensure that he pursued a vocation in later life which did not compromise his dignity, but nevertheless, allowed him to masquerade in costume.

The third of the ages of man identified by Shakespeare in "As You Like It" is the adolescent.

As to Brooking the young man, in the years before the burden of practice, there is very little insightful information by which to plot what appears to be the disappearance of the artistic, the romantic and the more sensitive aspects of his personality, although smatterings of information do exist.

It appears that at school, and later University, our subject was still something of an actor, with a penchant for romantic roles. However, regretfully, the detail has been judicially suppressed over the years, and only snippets survive. Such a morsel is our Honoured Guest's famed role as Henry Lawson in the Wesley College school play, and his participation in a radio series conducted by one Hedley Bryant, debating the case for popular, as against classical, music.

Other information which I have come

by, in relation to this period of Brooking's life, is clearly not correct, for example, the suggestion that as a school boy at Wesley College, Brooking had ready access to a large store and variety of cigarettes (through some family business), and was known to distribute them to fellow students for profit. None of us could accept that this rumour would stand up to scrutiny.

R. Hugh Foxcroft QC; Chris Connor; John Digby QC (gave speech at function); and MC on the night and organiser David Denton SC.

John Bingeman QC, The Hon. Robert Brooking QC and Patrick Tehan QC.

In relation to the young man at university, again only scant information is available. There is talk of some frivolity, and occasional visits to Naughton Hotel in Parkville, but, nothing specific enough to stick.

It would, however, be remiss not to record that during this period our Honoured Guest's well known enthusiasm for chess developed into a passion.

In retrospect, one can readily see the attraction of the game to young Brooking. The rules were rigid, and well understood (at least by him), the essence of the game had to do with logic and tactics, and the opportunity to intellectually overpower another was limitless.

What is probably not so well known is that the Melbourne Chess Club, of which our Honoured Guest was President for a record 13 years, is an institution older than the State of Victoria, and that young Brooking's smiling face once adorned the front page of *The Age* taken with a 15-year-old female Ukranian chess prodigy with whom he was competing.

Consistent with his uncompromising diligence for work, our Honoured Guest attempted to prevent his incessant desire to play chess from distracting him from other obligations. This end was largely achieved by engaging in chess games by correspondence. Chess boards littered his home, and some of these games took up to two years to complete. Occasionally, passion got the better of him, and it was not unknown for Brooking to arise early enough on the weekends to demolish an opponent or two at the Melbourne Chess Club, before returning to legal studies or preparations.

The Hon. Robert Brooking QC, Mrs Joan Brooking and Craig Porter.

Shakespeare's fourth age, of lover and soldier will be combined in our case study. Further, adaptation to modern times requires barrister to be read for soldier. Barrister fits closely enough.

The 2002 edition of *Who's Who* tells us that our Honoured Guest married in 1955, and the Commercial Bar Association is delighted that Mrs Joan Brooking is also our guest tonight.

I have little to place before you on domestic matters, but can say that all enquiries confirm our Honoured Guest as a devoted father of his two sons and daughter, and have also established it as abundantly clear that Joan has, throughout her husband's remarkable career, been a stalwart wife and partner.

As to the barrister, in 1954 our Honoured Guest signed the Roll of Counsel, and took silk some 15 years later. Brooking the barrister practised in many fields. Briefs were happily received in areas as diverse as crime and defamation, as well as equity and commercial matters.

Not uncommonly, Brooking the barrister accepted personal injuries briefs for the Victorian Railways. Folklore has it that many an opponent, in that jurisdiction, left for Court with papers underarm, optimistic about the prospect of early settlement and lunch, only to return to chambers shocked, exhausted and defeated, having unexpectedly come up against Brooking's well-prepared determination to run the case, in all its detail, or settle only on extremely advantageous terms to his client.

Similar stories abound in relation to our Honoured Guest's commercial practice. For instance, not long before appointment to the Supreme Court, Brooking QC was briefed in a case in the area which, perhaps, he most loved and enjoyed. This was a building and engineering case in Tasmania, for Baulderstone Hornibrook. As I understand it, the issues involved the design, construction and performance of a woodchipping and pulping plant. The chipping and pulping operations were at Triabunna on the east coast of Tasmania, and ultimately the engagement lasted for months.

Brooking QC toiled in Tasmania, away from hearth and home, Monday to Friday. The case was made even more difficult because, at the time, the Hobart Bridge was down, senior counsel being ferried to and from the battlefield by helicopter.

Apparently, Brooking QC, at the height of his powers, was not just a formidable, but by now, a terrifying opponent. Picture if you will at frequent on site

views, a brooding 6ft 2" of statuesque senior counsel, topped off by another four to six inches of white hard hat, and on other occasions Brooking QC, entering the Supreme Court in Hobart, in black on black silk, like a former day Darth Vader.

At the end of the case, Brooking having pulped his opponents, his client gave him the white hard hat with Baulderstone Hornibrook logo, and threw in an engineer's magnifying glass designed to assist in reading drawings. Counsel was also given a woodchip caste in a perspex block, for good measure.

Apparently after appointment to the Victorian Supreme Court our guest was occasionally sighted in his imposing home study at Maling Road, Canterbury, nostalgically sporting the white hard hat, with magnifying glass in hand, scrutinising submissions, and in more recent years the judgments of his brother Nathan.

Notwithstanding Robert Brooking QC's extremely busy and intense practice as counsel, somehow he found time to write, or contribute to, a large number of legal textbooks, including one with his former master Kevin Anderson, as he then was, concerning landlord and tenant law in Victoria. Again in the early 70s in conjunction with Alex Chernov QC, as he then was, Brooking wrote the new edition of *Tenancy Law in Victoria*, and in about the mid 1970s produced a text in the building and engineering area still known as *Brooking on Building Contracts*, which every serious construction lawyer has read cover to cover. This publication is in its third edition. Other works included a work in conjunction with Justice Percy Joske entitled *Insurance Law in Australia and New Zealand in the mid 70s*. There are probably others, as well as numerous learned articles.

Our Honoured Guest's appointment to the Bench coincides nicely with Shakespeare's fifth age: "And then the justice . . . good capon lined . . ., with eyes severe, full of wise saws and modern instances."

Robert Brooking was appointed as a judge of the Supreme Court of Victoria on 22 February 1977, and served the Court and the community with conspicuous distinction for more than 25 years, a fact that distinguishes the judge as the longest serving member of a Supreme Court in Australia. Our Honoured Guest was also one of the original members of the Victorian Court of Appeal, established in mid 1995.

It is well recognised that our Honoured Guest's superhuman industry and profound knowledge of the law enabled him to perform, I say with respect, as a top, if not a super, judge. The reports of our Supreme Court from 1977 are peppered with a disproportionate number of excellent judgments produced by Justice Brooking.

There is no doubt, in any quarter, that the contribution made by Justice Brooking to the Court, the jurisprudence, and thereby directly to the community, has been enormous.

There is also, no doubt that the judgments which were produced in the last 25 years have increasingly manifested that theatrical element of our Honoured Guest's personality, which was so discernible in his youth. Apparently, this is in keeping with a trend in the latter Shakespeare "ages", to return to type.

Of the many examples of entertaining passages in Justice Brooking's judgments, I proffer only the following:

> In *FAI Traders Insurance Company Ltd* v *Savoy Plaza Pty Ltd* His Honour stated:
> The lease of the Savoy Tavern in Spencer Street suffers from the corpulence which seems to afflict all hotel leases. It runs for some 60 pages. When we open it, the lease exudes the faintly musty smell we have come to associate with leases of hotels. Cesspools and distemper, graining and varnishing, are preserved in its covenants as reminders of a bygone age.

> And in *Mountain Cattlemen's Association of Victoria Inc*. v. *Barron* His Honour described a meeting of the Omeo Branch of the Mountain Cattlemen's Association of Victoria Inc., as follows:
> The get-together was to last for the weekend, and there were to be horse events, together with whip cracking, dog high jumps, the tug-of-war, a ladies' saucepan throwing competition, and other entertainments.

A question I expect in the minds of all acquainted with our Honoured Guest is: "How did he achieve all this, these extraordinary feats, year after year, and over such a very long period of time?" I have come to the last anecdote which I think provides the answers.

During much of his practice our Honoured Guest found it convenient, and effective, to lengthen the normal working day to ensure that his preparations were complete.

It was his habit to leave his home in Canterbury each morning, in time to catch the first train to the city which left Canterbury station at 5.18 a.m.

The journey was a solitary and conspicuous one, because the virtuous barrister was the only person on the 5.18 a.m. who did not have a Gladstone bag, and who was dressed in collar and tie. Apparently, his fellow travellers treated him with grave suspicion, and one can only imagine the anticipation every morning, in his preferred carriage, as the train approached Canterbury Station, where inevitably one towering and solemn gentleman would board with a briefcase.

This journey had our Honourable Guest arriving at chambers well before 6.00 a.m. These odd hours in chambers created their own difficulties. In the early days of his untimely arrival, a lady from the cleaning staff noticed lights on behind the closed doors of Brooking's chambers. At this dark and inhospitable hour, she suspected an intruder and alerted the security staff. Their enquiries revealed nothing more sinister than a remarkably zealous practitioner, but I am told that after this incident the same cleaning lady was in the habit of making the young barrister a cup of tea on his arrival at chambers.

The real point of my story is, however, not apparent until I add, that every morning before Brooking closed the front door, at Mailing Road, for the 5.18 a.m. train, Joan Brooking had arisen in sufficient time to cook him breakfast before his departure.

The answer to the question I posed is, I suggest, that behind the super performance of the special guest this evening, and enabling it, has been the super support of a remarkable wife and partner.

Happily, for our Honoured Guest, the sixth and seventh of Shakespearian ages lie far ahead.

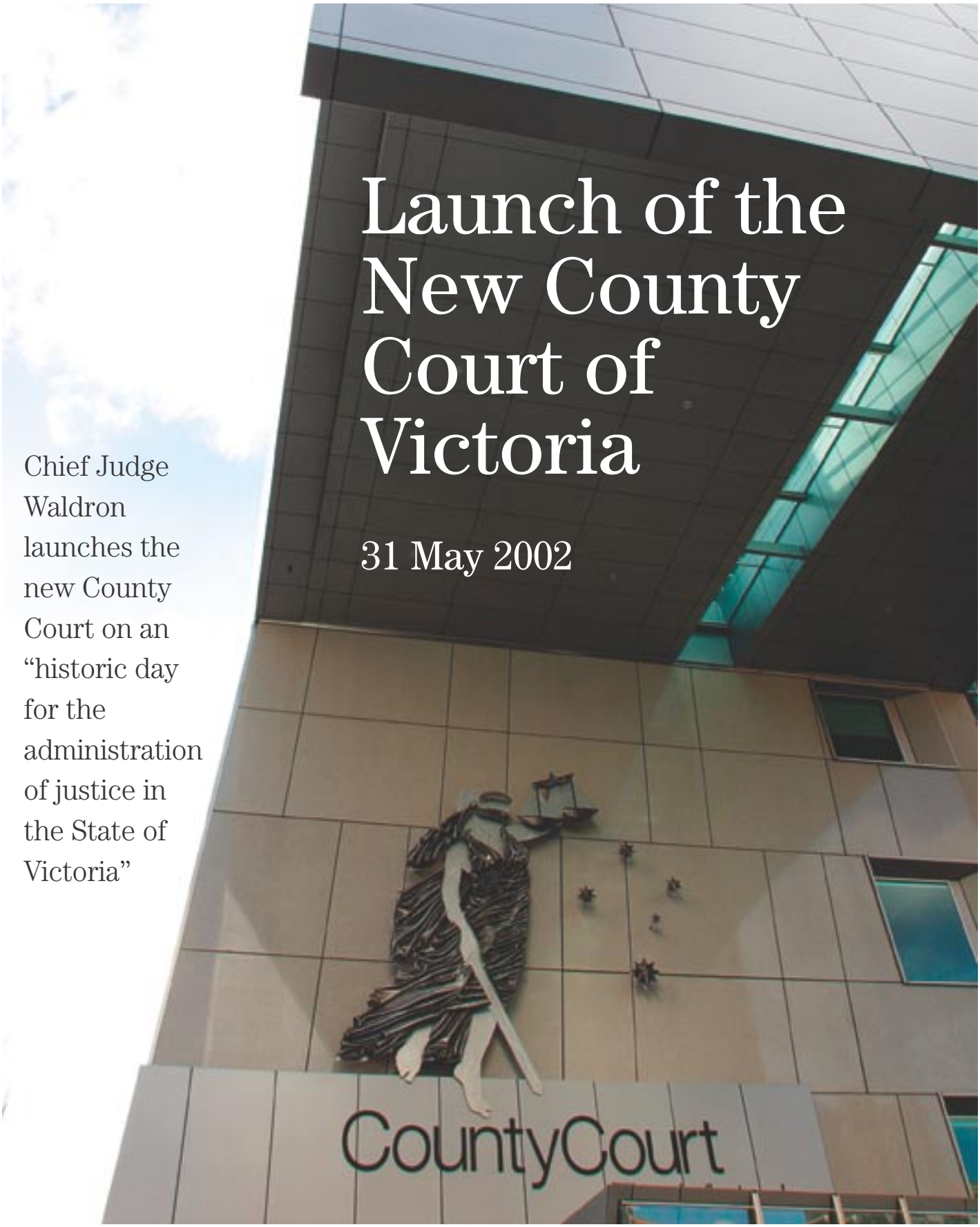
We wish our special guest well in his retirement and, in his new role as Professor Brooking, Director of Judicial Studies at the Victoria University Sir Zelman Cowen Centre for Continuing Legal Education.

I ask that you all rise and join me in a toast to our special guest, the Honourable Robert Brooking QC.

Launch of the New County Court of Victoria

31 May 2002

Chief Judge Waldron launches the new County Court on an "historic day for the administration of justice in the State of Victoria"



"The judges and all members of the County Court accept, w the truly splendid attributes of this great edifice to telling ef

Image by David Caird, courtesy of the Herald Sun *newspaper*

Mr Premier the Honourable Steve Bracks, Mr Attorney the Honourable Rob Hulls, Joy Murphy Wandin, Aboriginal Elder of the Wurundjeri people, Your Honours, distinguished guests, ladies and gentlemen.

This is indeed an historic day for the administration of justice in the State of Victoria.

The construction of this truly magnificent building — magnificent architecturally and functionally — will enable the County Court of Victoria, the principal trial Court of Victoria, to carry out its responsibilities to the full. Thus, bearing in mind the vital place which the County Court occupies in the Courts' hierarchy, the due functioning of the administration of justice will be palpably enhanced — to the benefit of all Victorians.

Speaking for the judges of the County Court, may I say that we are mightily enthused by the prospect of henceforth having the opportunity to carry out our judicial function to the optimum in such an excellent environment. Speaking for the Court in its entirety, both the physical attributes of this building, and also the sophisticated and comprehensive IT and other types of technological support which are provided in it, will likewise enable all Court officers to operate with full efficiency.

The judges and all members of Court staff are very much in the Government's debt for having shown such foresight and will, in first approving and then undertaking this novel but most creative project, namely having the building built, owned, and serviced by the private sector, with the Government leasing the building for occupancy and use by the County Court.

The partnership thus created between building owner on the one hand, and the Government and the County Court on the other, has had a very strong and effective existence already during the construction period, and will, I am confident, continue to be an effective and productive relationship in the future.

This new Court complex ushers in, I believe, a new era for the administration of justice in this State. The judges and all members of the County Court accept, with both humility and not a little pride, the role of putting the truly splendid attributes of this great edifice to telling effect.

Chief Judge Glenn Waldron

GOVERNOR John Landy; Mr Attorney the Honourable Rob Hulls; Mr Robert Redlich QC, Chairman of the Victorian Bar Council; Mr David Faram, President of the Law Institute of Victoria; Your Honours; distinguished guests; ladies and gentlemen.

The opening of this splendid new Court complex, which, by happy coincidence, takes place only 5½ months before the sesquicentenary anniversary date of the establishment of the County Court in November 1852, represents an historic moment in the administration of justice in the State of Victoria. That being so, the judges of the County Court have deemed it appropriate to conduct this sitting, both to ceremoniously mark that opening, and also to recognise and express our thanks to a number of persons whose endeavours have, over a lengthy period of time, combined to achieve the commissioning, the construction and finally the completion of this outstanding public building.

Although to do that will take a little time, we believe that both for the present and the future it is most appropriate that such recognition be made and recorded.

However, before embarking on that exercise, may we say that we are singularly honoured by the presence here today of Governor John Landy and Mrs

Judges at the opening of the new County Court

ith both humility and not a little pride, the role of putting fect."

Landy; the Chief Justice of Victoria, the Honourable Justice John Harber Phillips; the President of the Court of Appeal, the Honourable Mr Justice Winneke; the Chief Justice of the Federal Court of Australia, the Honourable Chief Justice Black; and Sir Daryl Dawson, former Justice of the High Court. Additionally, we welcome with pleasure Chief Magistrate Ian Gray; Federal Magistrate Maurice Phipps, representing Chief Federal Magistrate Bryant; Mr James Syme, Victorian Government Solicitor; Chief Judges Blanch, Hammond, Wolfe and Worthington, respectively Chief Judge of the District Court of New South Wales, Western Australia, Queensland and South Australia; along with a number of their interstate judicial colleagues. We note with pleasure the presence at the Bar table of Mr Coghlan QC, State Director of Public Prosecutions; Mr Morgan-Payler QC, Chief Crown Counsel; Mr Punshon QC, Chairman of the Victorian Criminal Bar Association; Mr Cain, Executive Director of the Law Institute; along with members of the Executives of both the Victorian Bar Council and the Law Institute of Victoria. We also welcome Mr Pedley, Commonwealth Deputy Director of Public Prosecutions.

We also most warmly welcome a number of reserve judges not presently serving, and many former County Court judges.

Although it is unfortunate that this splendid ceremonial court, spacious though it is, could not accommodate all those whom we would have wished to be in it, we have endeavoured, with the help of video technology, to be as inclusive as we could be concerning the County Court community and the profession generally.

Thus we record with pleasure that in an early demonstration of the powerful technology with which the Court is supported in this, its superlative new home, these proceedings are being simultaneously viewed by means of video-link at five locations within the building, as well as at the Ballarat, Bendigo, Geelong, Hamilton, Mildura, Morwell, Sale, Shepparton, Wangaratta, Warrnambool and Wodonga circuit courts.

Amongst those who are viewing these proceedings by way of video-link within the building, we warmly welcome spouses of serving judges, reserve judges, retired judges, widows of deceased judges, and spouses of interstate judges, along with many members of the County Court staff, judicial and otherwise, and members of the legal profession. We trust that country practitioners and their staff, along with County Court circuit staff, are viewing the proceedings in those various circuit locations.

To all those well-wishers both within and beyond the Court who are thus viewing these proceedings, we thank them for so doing and bid them a warm welcome.

This Court building is, of course, very much the focal point of the Court's functioning. Nevertheless, as is demonstrated today, with the aid of modern technology the Court is now ever-more "Victoria-wide" in its operation. Therefore, if we may coin a theatrical allusion, we are, to our great satisfaction, "playing" to the whole of the County Court community and to the practitioners, metropolitan and country, who avail themselves of our services.

So again, to *all*, near and far, we bid a warm welcome.

As long ago as July 1985 a spatial audit of the former County Court building demonstrated that its capacity was a staggering 79 per cent less than was required. Since that time, a succession of initiatives were either investigated or undertaken with the aim of relieving that inadequacy of the Court's accommodation. A number of proposals for the relocation of the Court were entertained, the more significant of which were, first, to establish a central criminal court on the site now occupied by the Melbourne Magistrates' Court; next,

complex. *(Image by David Caird, courtesy of the* Herald Sun *newspaper)*

to refurbish the Melbourne Metropolitan Board of Works building in Spencer Street to wholly accommodate the Court; and, finally, to establish a new Court building on the Royal Mint site. None came to fruition.

In the interim, additional courts were established in the former County Court building; judges' chambers were established in three floors of Owen Dixon Chambers West and linked to the County Court building; temporary civil courts were established first at 471 Little Bourke Street; then at 565 Lonsdale Street; and finally and additionally at 436 Lonsdale Street.

Thus, in varying degrees, the Court has operated for the past 16 years in fragmented, constricted, and far from adequate accommodation. It has been to the great credit of the judges and all County Court staff that the best was made of that less than satisfactory situation.

Throughout that time, the "impossible dream" of finally coming to a modern, large, well-equipped building continued to be cherished by the optimists amongst us. And may I say that the indefatigable efforts of Judge John Hassett over all those years, from 1985 onwards, gave a semblance of attainability to that dream, or, as some might have described it, that rash hope.

Over recent years the Court has had a role to play in the planning and construction of the new Geelong, Ballarat and Wodonga Court complexes, and the additional Criminal Court at Bendigo. Judge Michael Strong has represented the Court in those endeavours.

Thus, when, in 1999, the former Kennett Government set the processes in motion for the construction of this Court complex, it was both natural and obvious that Judges Hassett and Strong should play a pivotal role on behalf of the Court in that initiative, albeit that a number of other judges have assisted in it.

As we believe is now generally understood, the basis of this proposal was for the building to be built and owned by the private sector, and, when operational, serviced by the building owner, with the State of Victoria being the lessee on behalf of the County Court. It was a novel and, in the eyes of some, a somewhat adventurous basis on which to achieve the provision of a new Court building.

The Kennett Government in general, and the previous Attorney-General, the Honourable Jan Wade, in particular, are to be commended for their pursuit of that initiative until, when close to the point of final approval, there was a change of Government.

Very shortly thereafter, acting with more than commendable speed and decisiveness, the Bracks Government endorsed the initiative, and thus, approximately 2½ years later, the dream has become reality. The judges, indeed all at the County Court, along with the Victorian community at large, are very much in the debt of the Bracks Government in general, and the present Attorney, the Honourable Rob Hulls, in particular, for endorsing, undertaking and achieving this noble enterprise.

It is perhaps potentially invidious to recognise particular persons, when, with a venture as large as this, so many, many people have played important roles in its achievement. Nevertheless, as has already been said, both for the present and the future we believe that it is most fit and proper that such recognition be made.

Thus, in varying degrees, the Court has operated for the past 16 years in fragmented, constricted, and far from adequate accommodation. It has been to the great credit of the judges and all County Court staff that the best was made of that less than satisfactory situation.

As already stated, Judges Hassett and Strong — the "building" or "design" judges, as they have been described — deserve particular mention. Their most effective and dedicated commitment to detail in this vast undertaking has been extraordinary — and extraordinarily effective. Judge David Jones has played a likewise invaluable role in overseeing both the extension of the video linkages, which, prior to the move to this Court, had made the County Court a leader in that regard, and also the establishment of a sophisticated integrated intelligent civil and criminal Case and List Management IT System ("CLMS", as it is known), which likewise, when completed, will give the Court a leadership role in that area. In that regard, Ms Ann Crouch and her team, who have adapted the American SCT CLMS system to the Court's needs, also deserve special commendation.

Most of the others within the Court who have contributed so conscientiously and diligently must, by reason of time constraints, remain "unsung heroes". I trust that they will pardon me in not naming them.

Beyond the Court, we at the Court wish to recognise, with our sincere thanks and gratitude, the sterling work done first by the initial project director, Mr Tony Wilson, and, following his unfortunate illness, by Mr Tim Cave, who, as project director, with the aid of his dedicated staff, has driven the project on behalf of the Government to such a successful and timely conclusion. We are likewise most grateful to Mr Jim Cox, who has overseen the construction of the building for The Liberty Group (TLG), the building owners; to Mr Jim Berry, the project manager for Multiplex, that highly efficient very much "master" builder of the complex, which has delivered it on time, within budget, and with the avoidance of any serious accident; and to Mr Glenn Hay, who, throughout the course of the project, first ably assisted the project directors, and more latterly has been an essential participant for TLG, and henceforth will represent the building owner in the operation of the building.

Additionally, we thank and commend the many building workers and tradesmen whose skill and dedication has produced this excellent edifice.

Special recognition is to be made of Ms Judith Watson, indigenous artist, who designed the extensive zinc mural in the ground-floor foyer which Joy Murphy Wandin, an Aboriginal elder of the Wurundjeri people, has named "Ngarrn-Gi" (meaning "to know"), and Ms Anne Virgo and her colleagues at the Australian Print Workshop who turned that design into reality; Mr Colin Lanceley, the celebrated artist, who designed the moulded coloured-glass artwork entitled "Quality of Mercy" which hangs in the Great Hall; and finally Mr William Eicholtz, who designed and created the aluminium cast sculpture of "Lady of Justice" which, along with the depiction of the Southern Cross, is positioned on the southern exterior wall of the building beneath the canopy. Those works of art, separately and together, provide a splendid enhancement to the building. They significantly contribute to it being a truly marvellous public building. At one and the same time they both soften it and materially add dignity to it.

Finally, our unalloyed congratulations,

thanks and praise go to the architects: initially and primarily Mr Bob Sinclair, whose genius produced this architectural gem; Mr Daryl Jackson and others of his staff, who complemented Bob Sinclair's endeavours; and finally Mr Cameron Lyon, who was responsible for courtroom design.

Returning then to our primary theme, it should not be overlooked that the concomitant challenge to the creation of the building itself has been, of course, to successfully move the Court from its previous many inadequate locations into these splendid new premises. Such an enterprise has been of gargantuan proportions, and has required extraordinarily detailed pre-planning and subsequent execution.

In that regard, all of us at the County Court are very much in the debt of the joint efforts of Ms Jennifer Troy of Multiplex and Ms Karol Hill of the County Court, who in turn have been so ably supported by Mr Steve Malaiman, County Court engineer, Mr Ian Edwards, Court librarian, and the many members of staff — judicial, registry, and administrative — who, as co-ordinators, have ensured that the meticulously planned transition has become a happily successful reality.

Additionally it should be understood that the move to this Court building has had much wider implications over and beyond the actual physical move.

Over the past few years, well appreciating the need to take full advantage of this new environment with its sophisticated technology, IT and otherwise, the Court has heavily concentrated on improving its administrative processes, both judicial and quasi-judicial.

First, very significant, and, I must say, successful judicial procedural reforms have been adopted by the Court, as evidenced both by the Civil Initiative and also by the criminal pre-trial procedures under both the *Crimes (Criminal Trials) Act 1999* and the accompanying additional measures fashioned by the Court. Then, on the endorsement of the Council of Judges, the Court has gone on to approve most significant reforms both to the constitution of the Registry and to judicial support structures, along with the adoption of the previously-mentioned sophisticated, comprehensive and intelligent computerised Case and List Management System which, when fully operational, will cater for and support all jurisdictions of the Court.

It may be that in 20 years' time at the expiration of the lease of this building, knowing the speed at which technology — particularly computerised technology — evolves, our successors will look at our present pride in, and satisfaction with, the advanced state of our technological support in this building with tolerant amusement. Nevertheless, at this time, that support, when completed in its entirety, will literally make this Court a world leader in Court support technology. That being so, the establishment of CLMS has entailed much construction work, much pre-planning, and much training of all Court staff who will, in the performance of their duties, operate it.

Although, as has been observed, those changes, those reforms, are not yet fully in place, all County Court staff, judicial, registry and administrative, have had to bear, and, much to their credit, have willingly borne, significant workloads additional to their normal duties in order to achieve these goals.

Judges at the opening of the new County Court complex.
(Image by David Caird, courtesy of the Herald Sun *newspaper)*

The judges are most grateful to all of them. In particular, in that regard, the judges note with gratitude the decisive role which jointly and severally has been performed by Mr James Hartnett, the Court's Chief Executive Officer, and Mr Findlay McRae, the Registrar of the County Court.

In conclusion, and by way of summation, we believe that it is appropriate to repeat the remarks which I made this morning, when the building was officially opened by the Honourable the Premier. They were as follows:

"The construction of this truly magnificent building — magnificent architecturally and functionally — will enable the County Court of Victoria, the principal trial Court of Victoria, to carry out its responsibilities to the full. Thus, bearing in mind the vital place which the County Court occupies in the Courts' hierarchy, the due functioning of the Administration of Justice will be palpably enhanced — to the benefit of all Victorians.

"Speaking for the judges of the County Court, may I say that we are mightily enthused by the prospect of henceforth having the opportunity to carry out our judicial function to the optimum in such an excellent environment. Speaking for the Court in its entirety, both the physical attributes of this building, and also the sophisticated and comprehensive IT and other types of technological support which are provided in it, will likewise enable all Court officers to operate with full efficiency.

"The judges and all members of Court staff are very much in the Government's debt for having shown such foresight and will, in first approving and then undertaking this novel but most creative project, namely having the building built, owned, and serviced by the private sector, with the Government leasing the building for occupancy and use by the County Court.

"The partnership thus created between building owner on the one hand, and the Government and the County Court on the other, has had a very strong and effective existence already during the construction period, and will, I am confident, continue to be an effective and productive relationship in the future.

"This new Court complex ushers in, I believe, a new era for the administration of justice in this State. The judges and all members of the County Court accept, with both humility and not a little pride, the role of putting the truly splendid attributes of this great edifice to telling effect."

"The Victorian Bar is honoured to participate with the Court magnificent court building which coincides with the Court's

Robert Redlich QC, Chairman of the Victorian Bar Council

MAY it please the Court. The Victorian Bar is honoured to participate with the Court and so many of the Court's distinguished guests in this ceremonial sitting to mark the opening of this magnificent court building which coincides with the Court's 150th anniversary.

Within Victoria's judicial system this Court has traditionally borne a heavy workload of cases. Early records show that in 1901 the six judges of the County Court presided over 572 trials. By mid-century the nine judges of this Court heard 1576 trials, and by the end of the last century the judges sitting in Melbourne alone heard 2900 trials — an average, over the last century, of 100 trials per annum per judge.

This Court has provided access to justice for Victorians for over one and a half centuries in most important areas of disputation between its citizens. The civil jurisdiction of the Court has increased from $50 at the time of the Court's inception to the present unlimited jurisdiction in personal injuries, and $200,000 in other civil suits.

The predecessor of this Court in its civil jurisdiction was known as the Court of Requests. That Court had no building of its own. Mr Redmond Barry of counsel, as he then was before his appointment to the Supreme Court, was Commissioner of that court. The absence of any adequate place to conduct a hearing was reflected in the headline of January 1842: "Mr Barry in the Watchhouse". For three days court had been held in the cells of the Eastern Hill Watchhouse. Ned Kelly was to later wish that Sir Redmond had remained there.

The first judges of the County Court held joint appointments as judges of the County Court and chairmen of the Court of General Sessions in its criminal jurisdiction. For over a century from 1852, the Court sat as regional Courts of Civil Jurisdiction. For example, in 1864, the six judges of the County Court sat in 64 places out of Melbourne. It was not until 1957 that the regional County Courts became the single County Court of Victoria.

Robert Redlich QC

The first County Court building in Melbourne was described as a "dirty, dusty, uninhabited-looking house". Entry was through a narrow, dingy hall which was papered-over, above shoulder-line height, by Causes Lists, Notices of Sale under Decrees of the Court, and Schedules of General Rules with daily interpolations.

The court was small. The body of the court was the full width of the house, which was only 16 feet, and only 5 feet long. A rough and ready railing marked off the further 12 feet of length for the Bar table and up to the Bench. There was no ventilation and, as a visitor said of it, "I had not the patience to remain many minutes in this rancid, vapour bath."

The location of that place has long been forgotten. But compare the lofty, well-lit and airy entrance hall to this magnificent building, with its many courts, a roof garden for public use, and an "al fresco" terrace outside the judges' common room. The entrance hall is three storeys high in parts, and is flooded with natural light. Likewise, the public areas outside the courtrooms are pleasing to the eye, often with windows or skylights giving natural light.

It is a building designed for the people it serves, having highly functional courtrooms with state-of-the-art technology, and befitting the critically important role performed by the judges of this Court.

One of the Bar's greatest members, Sir Robert Menzies, records that he looked upon his times in this Court as his most enjoyable at the Bar, and he did not have a workplace such as this.

The first known location of the County Court was on the present RMIT site, until the County Court shared the Law Courts building, now the present Supreme Court building. The Lonsdale Street side of the Law Courts was the Supreme Court; and the Little Bourke Street side, the County Court.

In a case argued on the Little Bourke Street side of the building, counsel for the defendant had the effrontery to want to pursue a point of law. The presiding County Court Judge, one Judge Billy Williams, said, "If you want to argue law, you go over on the other side of the court house. The man over there is paid more than I am."

Effective 1969, General Sessions was abolished and its jurisdiction was given to the County Court, so that from then on the County Court exercised both civil and criminal jurisdiction.

The first County Court building in Melbourne was described as a "dirty, dusty, uninhabited-looking house". Entry was through a narrow, dingy hall which was papered-over, above shoulder-line height, by Causes Lists, Notices of Sale under Decrees of the Court, and Schedules of General Rules with daily interpolations.

and in this ceremonial sitting to mark the opening of this 150th anniversary."

The old County Court building across the road was opened on Friday 30 May 1969, 33 years ago almost to the day. There were then 21 judges. Now there are 55 judges, and 10 reserve judges. There was simply not enough room in the old County Court building, to say nothing of the lifts, which were commonly relied upon by counsel to explain their late arrival in court.

On this sesquicentenary of the Court's formation we should also remember that the Court has long been a court for the people, presided over by judges of diverse experience and background.

The first County Court judge and Chairman of General Sessions, Judge Robert Williams Pohlman, was a squatter, but apparently not suited to bush life. When tending his flock, His Honour took Blackstone's Commentaries with him, and would become so engrossed in his reading he would forget about his sheep. Judge Casey, who served the Court from 1884 until 1900, had worked as a gaol warder in America and as a clerk on a Mississippi steamboat.

Modern-day illustrations of the Court's breadth of experience are also illuminating. The former Chairman, Judge Leo Dethridge, was an estate agent before studying law. Judge Fagan worked as a barber, distinguishing himself in 1956 as the outstanding apprentice of the year in hairdressing. Judge Crossley, after completing articles, went to London, where he delivered caviar, smoked salmon and kangaroo tail soup to establishments such as Harrods. Judge Francis Lewis, after serving his articles, returned to London and taught in the East End for two years. Judge Ross and Judge Higgins both left school early, and completed matriculation at night school. Judge Ross worked as a slaughterman and labourer. Judge Higgins worked at the Singer Sewing Machine Company. Judge Gordon Lewis not only practised as a solicitor, but was film critic for the ABC, reviewing some 800 films before his appointment.

The judges of this Court have served Australia both in peace and in war. Five judges served in the armed services during World War I. In World War II, the majority of the Court served in branches of the armed forces. His Honour Judge Vickery was highly decorated and was awarded a wartime military MBE. After the war His Honour rose to the rank of Major General, being known in the military as "The Judge" and in the legal profession as "The General". Present members of this Court continue to serve in the armed services.

Whatever affectionate name it acquires, this magnificent court house will stand as a monument to the Court's service to the people of Victoria since 1852 and will provide a powerful symbol of the strength and independence of the judiciary.

The appointment in 1986 of Judge Jones from the ranks of solicitors was the first of 11 solicitors appointed to this Court. By their presence they have immeasurably enriched this Court. Judge Lynette Shiftan was the first woman judge appointed in 1985. And, in 1996, the first woman appointed to the Supreme Court, Justice Rosemary Balmford, was elevated from this Court. Fifteen of the current 55 County Court judges are women. This Court is appropriately representative of the community it serves. Since the time of Justice Barber's elevation in 1965, there have been a further eight County Court judges elevated to the Supreme Court.

Judges of this Court have authored leading texts in almost every branch of legal practice, including Judge Vickery (motor and traffic law), later edited by Judge Ostrowski; Judge O'Driscoll (licensing law); Judge Rendit (workers compensation); Judge Fricke (trusts and compulsory acquisition); Judge Hassett (indictable offences); Judge Neesham (County Court practice); Judge Jenkins (VCAT Domestic Building Legislation Service); and Judge Mullaly (*The Victorian Trial Manual* and *The Victorian Sentencing Manual*). Judge Hewitt has written two books of biographies of County Court judges, from which I have drawn in preparing these remarks. It is, of course, impossible to make reference to the many great judges who have served in this Court.

The question is naturally asked: how are judges of such an inspiring and prestigious court house to be addressed? They have been accorded a variety of titles over time. Sir Redmond Barry, when he was acting governor of the colony, thought that the judges of this Court should not be addressed as "Your Honour". He asked Judge Wrixon, who had been the second judge to be appointed to this Court, how he was addressed.

Barry's enquiry was on a large sheet of foolscap with a large seal. Judge Wrixon's response was on an even larger sheet, with an even larger seal. "I am sometimes addressed as 'Your Worship', sometimes 'Your Lordship', and I can recall one occasion where I was addressed as 'Your Reverence'", to which His Honour Judge Hewitt could add from his experience, "Your Majesty".

No title matches the following self-proclamation by Judge Gaunt, who served on this Court late last century. He was sent to restore order after European miners had attacked a party of Chinese at the Buckland River diggings. His Honour's proclamation, issued in Chinese characters, concluded: "W.H. Gaunt, Your Protector. Tremble and obey".

The Victorian Bar congratulates the Government, the Challenger Group, and the Court on the timely completion of this superb court house. The strong, clean lines of this beautifully proportioned building reflect a Court with vision and purpose, and say much about its Chief Judge's leadership and the collegial atmosphere fostered by His Honour Judge Waldron.

I have been prevailed upon by a number of Your Honour's colleagues to pay special tribute to Your Honour's role in the initiation and completion of this massive project. Your Honour has passionately and resolutely worked through every conceivable disappointment to see this wonderful new court complex come to fruition. Other members of the Court, both judges and staff, have worked on the project and designs — a reflection of Your Honour's inclusive style of leadership. In particular, Judges Strong, Jones and Hassett were leaders in the design of this inspirational environment.

The new court could be called "Palazzo Populi" on account of the care taken in the design to make it a pleasant environment for the people it serves. Equally aptly might it be called "Palazzo Waldron" in recognition of Your Honour's inspiring leadership of the entire project. Whatever affectionate name it acquires, this magnificent court house will stand as a monument to the Court's service to the people of Victoria since 1852 and will provide a powerful symbol of the strength and independence of the judiciary. Above all, the complex creates a warm, light and spacious environment within which judges, staff, and members of the profession can work with enthusiasm to provide access to justice for all Victorians. May it please the Court.

"This new County Court building is a magnificent example of the potential for the court to embrace a modern and progressive approach to the administration of justice."

Attorney-General Rob Hulls MP

TODAY is indeed a historic day for the County Court of Victoria. This new County Court building is symbolic in many ways of the important role of the justice system and the judiciary to the people of Victoria.

In a democratic society, the justice system performs the dual role of providing an avenue to establish and enforce rights, while at the same time determining the rules of social order.

This is a balance which carries great responsibility and for which members of the judiciary are rightly held in high esteem.

It is a reality that today's Australian courts face a number of challenges.

First among those challenges is the intense scrutiny of the courts and individual judicial officers by the media, politicians or the public at large.

We should, of course, all start from the basis that the courts are public fora in that their role is to administer the justice system for the good of every individual who appears before them. The courts are, therefore, open and accountable to every member of our community.

Our system of democracy places great, and justifiable, weight on the doctrine of the separation of powers. This doctrine provides that the judiciary is, as an arm of Government, independent, and, let me repeat that, independent, of the legislature and the executive.

Rob Hulls MP

It is by reason of this independence that the judiciary can make decisions, which can deeply affect people's lives, without political interference.

It is a natural consequence then that courts do not, in turn, enter into the political fray. Quite rightly, judicial officers cannot publicly defend themselves against criticism which may be levelled against them.

I hold very strongly to the view that it is the role of the Chief Legal Officer of any State, Territory or the Commonwealth to defend the judiciary against attack.

The abdication of that role leads to the diminution of public confidence in the courts and is a dereliction of duty.

As important is the preservation of judicial discretion.

This week is Reconciliation Week and it is a timely reminder of the findings of the Royal Commission into Aboriginal Deaths in Custody.

Two years ago, the death of a young Aboriginal man in custody brought the Northern Territory regime of mandatory sentencing into the centre of national and international condemnation.

At that time, Federal and State politicians, regardless of political persuasion, decried that discriminatory practice.

Mandatory sentencing, in whatever guise, breaches the separation of powers, judicial discretion and denies absolutely the ability of courts to treat the causes of crime.

Courts also face the perception in some quarters that they do not move with the times. Courts are often portrayed as staid, formal environments, shrouded in the trappings of tradition.

In Victoria, this could not be further from the truth.

The Victorian judiciary supports lifelong learning for judicial officers and has warmly welcomed the establishment of the Judicial College of Victoria to deliver ongoing professional development, training and education.

The Victorian judiciary is also working

hand-in-hand with this Government in the development of a 10-year strategic direction plan for all of the courts. The Courts Strategic Directions Project will bring courts together to better plan and manage for the future. This will include better ways of using resources, information technology and new business, operational and administrative reforms.

As a result, the Courts will also be better able to adopt the cultural changes which are emerging in justice systems throughout the world. These include the increased use of alternative dispute resolution, technology and the new concepts of therapeutic jurisprudence and restorative justice.

But when you really pare it back to basics, the court system is about people dealing with people, and this is the most crucial interaction of all.

For this reason, the courts and community are best served when judicial officers are possessed of the highest merit, integrity and ability.

I am absolutely committed to ensuring that the judiciary is representative of the broader community, particularly in the area of gender and ethnic diversity.

Victoria can be rightly proud and is well served by each and every one of its judicial officers.

This new County Court building is a magnificent example of the potential for the court to embrace a modern and progressive approach to the administration of justice.

Designed and built in partnership with the judiciary and the private sector, this state-of-the-art facility, with its state-of-the-art technology, will provide 21st century state-of-the-art access to justice.

The County Court of Victoria has a very proud, 150-year history of fairness, impartiality and independence in the delivery of just outcomes for the people of Victoria.

To Chief Judge Glenn Waldron, the judges of the Court and the staff of the Court: thank you for your hard work in the development of this magnificent court building.

Thank you also, on behalf of the people of Victoria, for your commitment and unswerving service to the cause of justice in Victoria

"This is a wonderful building that will rightfully take pride of place in Melbourne's legal precinct and set a new standard for courts throughout Australia."

David Faram, President of the Law Institute of Victoria

MAY it please the Court.

I am very pleased and honoured to represent the solicitors of this state and to participate in this ceremonial sitting to mark the opening of this new building.

At the outset I would like to formally retract the comments that I made about this building at a speech of welcome I gave last year for one of Your Honour's new judges. Adopting the words of others sometimes comes at a price — something Your Honour has not let me forget on any occasion that we have met since then. For the record may I say that I think this is a wonderful building that will rightfully take pride of place in Melbourne's legal precinct and set a new standard for courts throughout Australia.

Your Honour has indicated that the move has "gone brilliantly". Of the 10,000 boxes moved, only four or five have gone astray. The phones are working and staff are responding to emails.

We congratulate you on the smoothness of the transition period — though not far, nonetheless of herculean proportions.

The County Court of Victoria has had a fascinating history. It was created by statute in 1852, shortly after Victoria became a colony.

David Faram.
(Photo courtesy of the Law Institute of Victoria)

Before separation, its functions were exercised by the Court of Requests, which was presided over by a commissioner.

One of the first commissioners was Sir Redmond Barry, the founder of the University of Melbourne and the public library, who later served with great distinction on the bench of the Supreme Court of Victoria.

In 1852, the jurisdiction of the County Court was limited to $50 unless the parties agreed in writing to the court dealing with a higher amount.

Your Honour will undoubtably be pleased by the fact that the near-complete picture gallery of County Court judges has taken up residence in the new building.

The gallery provides a fascinating potted legal history of Melbourne.

The honour board of judges, which now hangs on the wall of judges' chambers, shows the gradual growth of the Court from a single judge in 1852; to six judges in the early 1900s; to eleven judges by the 1950s; to 22 judges in 1969 when the old County Court building was opened; to 55 judges today.

The photographs include Judge Michael Francis Macoboy who was held up by a highwayman. The judge was immortalised in the song "The Wild Colonial Boy" part of which runs: "He held the Beechworth mail coach up, and robbed Judge Macoboy,

who trembled and gave up his gold to the wild colonial boy."

There are photos of Judge James Langton Clarke, the father of Marcus Clarke, author of *For the Term of His Natural Life*; and Judge Samuel Henry Bindon, whose son Henry, appearing in his first Supreme Court trial, unsuccessfully defended Ned Kelly. This was not a good case for the defence, and Kelly was, of course, convicted and hanged.

The trial was presided over by Sir Redmond Barry who had previously sentenced Kelly's mother to three years for assaulting a policeman. She was reported to have said then that if her son had been before the court, he would have made an example of him.

I am reliably informed, Your Honour, that the portrait of Judge James Forrest came from a *Herald* photograph taken outside a racing tribunal hearing.

It wasn't the first time that a judge of the Court was photographed partaking in a sporting activity.

Another photograph shows Judge Alexander Donaldson Ellis marking his golf card.

The first of the Winneke family of judges was Judge Henry Christian Winneke, father of Sir Henry Winneke, a former Chief Justice and grandfather of His Honour, Justice John Winneke.

Judge Quinlan had come from Ireland, originally to work at the goldfields at Dunolly, and later completed his law course at the University of Melbourne.

He also founded a weekly newspaper, and stood twice, unsuccessfully, for parliament. As a judge, he wrote a County Court practice book, believed to be the first in Victoria.

The colour photographs that now have a new home reflect the modern Court, including Judge Lynne Schiftan, the first woman appointed as a judge to a Victorian court.

Three portraits are still missing but Your Honour is ever hopeful of whittling down the number of judges missing in action.

But even the renewed vigor created by the move into a new building might make it difficult to find a portrait of Judge Joseph Henry Dunne, who was born in Dublin, and appointed in 1872.

The judge was known for his fondness for the drink and died suddenly in Fitzroy.

Your Honour would appreciate that a great deal has been said about the old Court, mostly in relation to the slowness of the lifts.

When the former building with its 19 courtrooms was opened in 1969, those responsible believed it was insufficient to meet the needs to the year 2000.

In fact, a survey carried out in 1985 established that the bulding could then only provide two-thirds of what was required.

As Your Honour rightly observed, the old building was hopefully the last great example of "deciduous" or "autumnal" architecture in this State.

The main defects were the lack of sufficient courtrooms and nearly all the jury rooms, which were only 15 square metres in size, were unnecessarily cramped for 12 men and women to spend long periods of deliberation.

Windows are a feature of the new jury rooms in the court but the question must be asked — how do we expect juries to make a decision when they can bask in rays of sunlight?

Judge John Barnett made some interesting observations in a recent edition of the *Law Institute Journal*. His Honour said that in the early years of the Court, video evidence was given by a television with a video player brought into the courtroom and placed where a jury could see it. Audio was provided by way of a cheap portable tape recorder.

As we can see of those standing outside this Court today watching these proceedings on television, the technology here is state-of-the-art.

One of the most striking figures in the new Court is the giant cast-aluminium sculture of Lady Justice, her eyes blindfolded, her robes flowing and scales in motion.

On the Supreme Court, she is seated, and not blindfolded; here, she is standing, and she is blindfolded.

We are reliably informed that it was pointed out to Your Honour recently that the scales of the new Lady Justice were not evenly balanced. It was an observation that was not well received by Your Honour.

Stretching back to the beginning of recorded history, there have been gods whose province was justice. It is a fact that both the Greeks and the ancient Egyptians have chosen to personify this god as a woman.

The idea of a goddess representing Justice originated with the mythical Greek figure Themis.

The daughter of Uranus (heaven) and Gaea (earth), Themis is depicted in homeric poems as the personification of the order of things established by law, custom and equity. She is not a decision-maker, but rather she maintains the order of society and oversees the conservation of tradition.

By the eighteenth and early nineteenth century, a blindfolded statue appears to have been the common representation of justice throughout Europe. In the United States, the concept of blind justice became popular as a reflection that the courts would judge all equally without prejudice.

It is understood that Your Honour is not exactly misty-eyed at the thought of leaving behind the nooks and crannies of the old building.

In a recent article published on the front page of *The Age*, Your Honour described the process of moving into a new court building as a little like childbirth.

Your Honour was quoted as saying: "Maybe in time you forget the troubles and there will be nostalgic memories, but in the immediate future there is a happy comparison between what was and what will be."

As Your Honour rightly observed, the old building was hopefully the last great example of "deciduous" or "autumnal" architecture in this State. Its fate remains unclear but as has been suggested in the media, perhaps it will be converted into apartments. After all, it offers all the benefits of a good location and a view of Lady Justice.

Those responsible for this great building are to be congratulated and Your Honour's long-term commitment to this project must be acknowledged.

The Law Institute is honored to participate in the opening of the new County Court. May it take pride of place in the proud legal history of this State.

May it please the Court.

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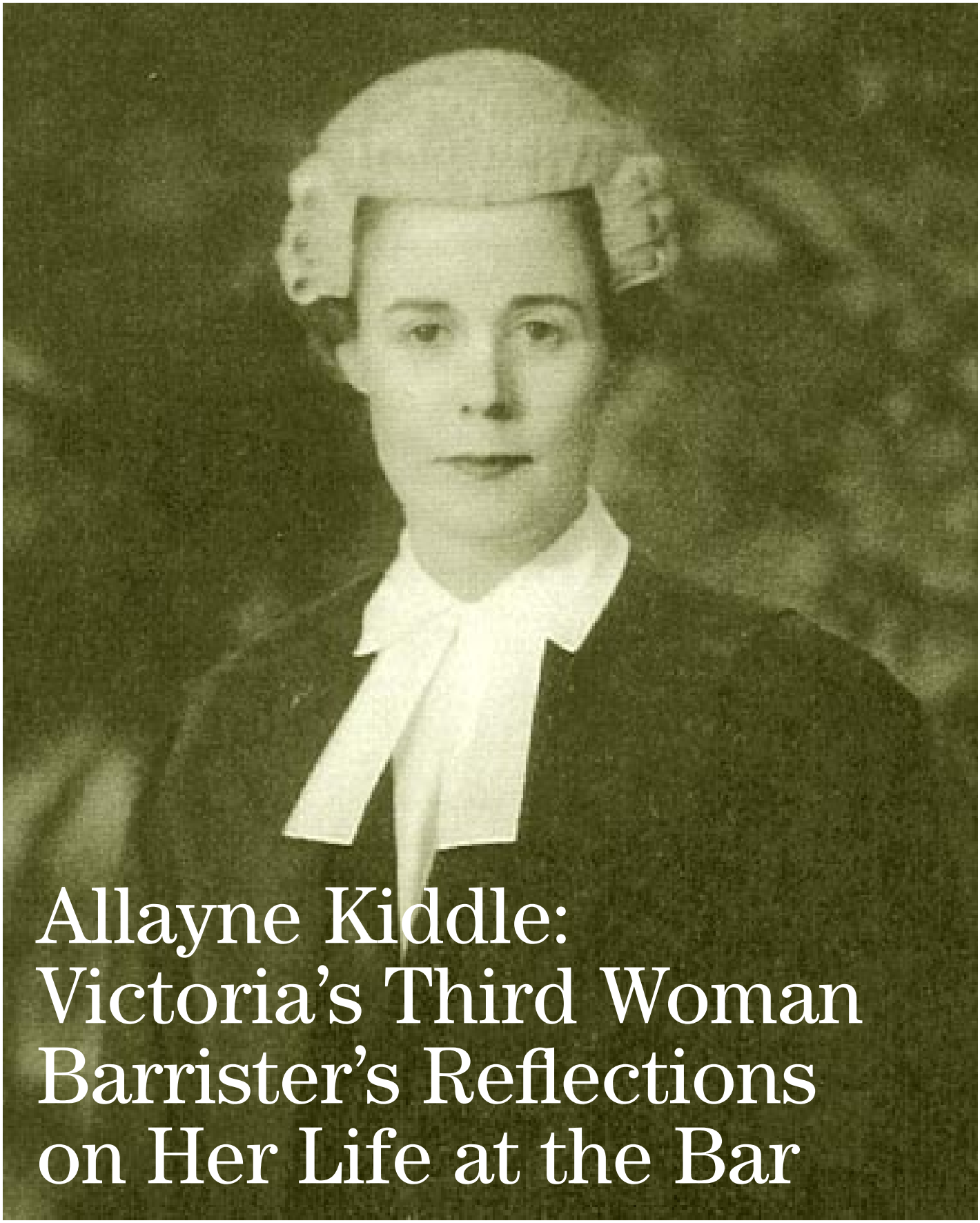


Allayne Kiddle: Victoria's Third Woman Barrister's Reflections on Her Life at the Bar

A Most Peculiar Child is the title which Allayne Kiddle, the third woman to sign the Victorian Bar Roll, gave to her autobiography of which she said:

> This narrative is not intended to be an historical record. Nor does it pretend to resemble the actual events to which it refers. For, although we speak of recollecting the past, all we really remember is our perception of former happenings at the time of their recall. Once we censor those moments by deleting them from our memory, or transforming them in such a way that they no longer bear any relationship to past events we embark, whether we realise it or not, on the writing of fiction.

Kiddle, as she preferred to be known, was born in Sydney and educated at the University of Sydney and at Kings College Law School in London. She then sat for the Bar finals and joined the English Bar.
In 1959 she was admitted in Victoria and signed the Roll of Counsel. At the time, because she came from the English Bar, most of us assumed that she was English.

What follows are extracts of her reminiscences of the Victorian Bar, from *A Most Peculiar Child*.

I applied for admission to the Victorian Supreme Court as a barrister and a solicitor of that Court. On the due date I appeared before the board of examiners and was told that they were still awaiting certain particulars in relation to my application from England. I must reappear before them next February.

While I was still waiting to see the board of examiners I met a fellow aspirant for admission. His name, I learnt, was Ivor Misso. Misso was from the Ceylon Bar, and a member of the Middle Temple. He, like me, was deferred to reapplying in February. Still it was nice to know someone whom I would know when my admittance finally took place.

The big day finally arrived for seeing the board of examiners again and this time I was issued with a certificate from them that enabled me to apply to the Supreme Court on the next admission day.

I was fortunate in obtaining the services of Mr Eugene Gorman QC to move my admission in Court. He had as his junior Mr Hazledon Ball ("Hasy"). Gorman had known Mr Wilbur Ham KC, Geoffrey's uncle, very well. When the ceremony was over I was a barrister and colicitor of the Supreme Court of Victoria.

Gorman invited Geoffrey, Ball and me to lunch with him at Menzies. In the meantime he said I must run upstairs and quickly sign the Supreme Court Roll. It was on that he said and not my Bar Roll seniority, that I would gain my Court seniority. He advised me to sign the Bar Roll as quickly as possible.

I had succeeded in obtaining Mr William Kaye, as he then was, as my master and Mr Dever as my clerk. Kaye had a large running down practice. He did some cases outside that but the bulk of his practice was in the former field. I also applied to sign the Bar Roll when that time came. It surprised me that I should be required to read again but that was the rule that applied at the time. All persons who signed the Bar Roll must read with a junior barrister for six months.

Although in theory the Bar had been founded on the English Bar and although the Victorian Bar wore English wigs and robes, not only was the law slightly different, but also everything else ran differently from, yet somehow the same as, the UK. It was as though the two were concentric circles, but the circles were made from different material.

I had forgotten that at the English Bar the practising Bar in England consisted for the most part of Englishmen and women. In Victoria, it consisted of some men who were English in descent, some who were Scots, some who were Jewish and many more who were of Irish descent, the latter if not a largest group were certainly the most vocal.

Of women barristers there was only one, Mrs Joan Rosanove. Joan had been at the Bar practising exclusively as a barrister for ten years when I appeared. Before that time she had been a solicitor and practised chiefly in the field of divorce. Having been admitted as a barrister and solicitor of the Court and not having signed the Bar Roll she had been able to go into Court in wig and gown. Whereas, in Victoria, those who wished practise solely as barristers, gave up their right to practice as solicitors for as long as their name remained on the Bar Roll. I believe Joan was admitted to practise in the Supreme Court in 1919, so she had a great deal of experience as a divorce barrister, if not at the Bar, certainly as a solicitor, when she signed the Bar Roll in 1948.

I liked Mrs Rosanove very much, but I did not want to read with her, for two reasons. I did not want the women to be separate part of the Bar from the men and also I was not a divorce practitioner. Although as a common law barrister matrimonial matters fell within the ambit of common law, I did not want to specialise in that field as Mrs Rosanove had done.

By and large being at the Victorian Bar was a lonely experience in the days when I was doing my reading. I did not go to court with my master as I had done in London; during conferences, although I remained in the room with my master when these were taking place, not only did I not speak, but also there was very little discussion with my master when his clients had left. For the most part my work consisted of writing opinions for my master, statements of claim and other matters relevant thereto. I spent endless hours sitting and listening to applications in the Practice Court, with a copy of the Annual Practice before me, so that I could follow what was taking place.

Thanks to my master I was briefed on several occasions. These were mostly at outlandish suburban Magistrates' courts. I shall always remember the first brief I had in Melbourne. I believe it was at the North Melbourne Magistrates' Court. The matter consisted of an application in chambers. I arrived at the court in plenty of time. I remember the clerk appeared very surprised that I arrived so early. He asked me to wait outside on the verandah.

The courthouse was just an ordinary weatherboard house sitting on the side of a hill with a verandah running along the front. As I sat and waited for the magistrate, I looked across the road towards an open paddock. A motley mob of sheep was grazing in it. As I watched I thought to myself, the High Court was nothing like this. While I was thus dreaming the clerk

I had succeeded in obtaining Mr William Kaye, as he then was, as my master and Mr Dever as my clerk. Kaye had a large running down practice.

emerged from inside the courthouse and told me that the magistrate would now see me. I followed him into a large room, in which there was a kitchen-like table, with a man sitting at one end, swinging back on his chair. There were several other men lounging around on different chairs. I thought I was in some sort of ante room where I must wait until the magistrate could see me. But no! A voice suddenly emerged from the man swinging on the back of his chair. He asked me when I was going to begin my application. I was so surprised to learn that this was the magistrate that I almost forgot why I had come to this outlandish place. I succeeded in what I had to do and departed. It was certainly different from London!

At another time, at yet another Magistrates' Court, I was offered a lift back to chambers by the barrister I was opposing. He said he must call into his home first to collect a few things. I asked him if he had a telephone and he said yes he did. He was curious as to why I wanted to use his phone.

"I must telephone my clerk," I said, "and tell him the results of the case and that I am returning with you to chambers."

"Do you always do that?" he questioned.

"Oh yes," I said. "Don't you?"

"No" he said, "I shall tell him when I see him."

I rang my clerk who, from his response to my message, was just as mystified by my call as my learned colleague. This was the first thing we had to do in London so that our clerk could notify us if there were any important messages that we should attend to straight away. Life was certainly different down under. I was learning fast how things were done the Aussie way.

When I was first interviewed by Mr Kaye he said, "My name's Bill", and then asked me what my name was. The clerk on the other hand, called me "Snooks" or anything else he fancied at the time. So that took care of what we called each other. I thought this all very peculiar. My colleagues at the Bar, I am sure, thought I was very peculiar as well.

Apart from Misso and a chap called Brussey from England, I knew no one. Brussey had been a solicitor in England and when he came to Victoria, after a short time in a solicitor's office, he decided he would come to the Bar. Very early in the piece, while I was still reading, there was to be a large cocktail party at Menzies, given by the Bar, for two American judges. Brussey asked me if I was going and when I said I was, he very kindly offered to escort me. He called for me at Bill's chambers and as we were walking out of Selbourne he was called by another chap for a quick word. He came back very amused and I asked him what was so amusing. He then informed me that the person who had called him was the Chairman of the Bar who had told him that he couldn't take his wife to this particular function. Brussey explained to the chap that I was not his wife but a member of the Bar.

The meeting opened with the usual, "Gentlemen". My presence at the function was completely ignored. At the party I met a very nice man who informed me he was

Of women barristers there was only one, Mrs Joan Rosanove. Joan had been at the Bar practising exclusively as a barrister for ten years when I appeared. Before that time she had been a solicitor and practised chiefly in the field of divorce.

a judge and that he was going to England within the next couple of days. He had to see someone there in chambers.

"The sister of this chap lives next door to me and I promised her that I would look her brother up. Perhaps you know him?" he asked. "Well there are many sets of chambers in London," I said, "I really only know the men in my own set. Who is the barrister whom you have to see?" I asked.

"I cannot recall," he said. Nor could he remember whose chambers he was in, or where he had to go. It was all written down at home! In spite of this lack of communication on chambers in London, we enjoyed a long chat on other matters. I discovered he was a judge on the Workers Compensation Board. He said he would tell me who his friend was when he returned. His name was Judge Dethridge.

Before he returned, however, another, to me, strange event occurred at the Bar. There was a notice on the notice board that Garfield Barwick was going to speak at a club in the city and any members of the Bar wishing to attend were to notify such and such a barrister. I notified this gentleman that I intended to go. I thought that was all I had to do. I was called to Stuart Collie's chambers and told very politely that I could not go.

"But why?" I said, "I am a member of the Bar and the meeting is for members of the Bar."

"Nevertheless," he said, "you cannot go. You may go as a representative of the *Winkle Weekly*, or the *Jiving Journal*, but you cannot go as a member of the Bar."

"That is monstrous nonsense," I replied. "I have no intention of going as something I am not, when there is no reason why I cannot go as a member of the Bar."

He then said "I believe the reason is that it has something to do with Barwick's language."

"He is supposed to be one of the best speakers in Australia," I replied. I deliberately misunderstood what he was trying to convey, so that he would come out with the truth. "Ah," he intoned, "I, aha . . . intended to say his language is not all that it might be."

"You mean he swears," I suggested. "Well, something like that," he answered.

"And because of that I am to be treated like a nineteenth century woman, even though I am a member of the Bar?"

"Well you can tell the Bar Council I intend to go. I am not some delicate swooning type to be protected by the Bar. In fact I find the whole thing amusing."

"Well, if you insist, then go."

"I most certainly will," I said.

I did go and I enjoyed hearing Barwick speak. His speech was exemplary. I really believe that it is possible that the club may have objected to having a woman on the premises because the place where Barwick was supposed to speak was later changed.

The news quickly filtered around the Bar that I intended to go to the Bar dinner. This caused a goodly amount of gossip at the Bar.

"You don't really mean to say you are going to the Bar dinner, Kiddle?"

"I most certainly am. It is the Bar dinner is it not and I am a member of the Bar?"

"Y-e-s but".

"There are no buts about it. I shall see you there."

In the end there were two women present at the dinner. Mrs Rosanove, when she heard I was going said that she would call and pick me up. I thought it very nice of her to come with me. In those days we sat at dinner in order of seniority; we were, therefore, unable to sit together. Joan didn't come again after the first time. I thought that a pity; these men really did need teaching a lesson or two. I even took a cigar that night when one was offered to

me, but did not smoke it, I took it home and gave it to Geoffrey instead.

By this time I had ended my pupillage. Normally I should have left my master and gone in to my own chambers. However, there was a shortage of chambers at Selbourne. I stayed with Kaye until the Bar had found alternative accommodation for me in other premises.

When I did move, I moved into a suite of four rooms in a building, more or less opposite Selbourne, in Chancery Lane. There was already one barrister ensconced. The other two rooms were empty. The chap who was in residence was a nice fellow. His name was Garrick Gray. We didn't see a great deal of each other. Shortly we were joined by two others, Berkeley and Nash. They shared a room. Later we were all joined by a fourth man, who would begin most of the trials he was in with four or five preliminary points (Garth Buckner). In its own way our group of five people resembled a small set of chambers in London, but we had no clerk with us and had no direct telephone line to him. Most of the barristers had their own secretaries. To cap everything else we were cut off from a direct line telephone to our clerks, whom we physically had to walk to see.

I decided that I would like to change my clerk from Dever to Foley, and with that in mind I asked Misso, who was on Foley's list, to ask Mr Foley to call and see me. Foley came but Foley could do nothing because he said, "It wouldn't be etiquette."

Very soon, most of us in those chambers had very little work. We had experienced one Bar meeting in which it was decided that we should have more clerks. We had also been invited to say how many of us would be prepared to change clerks if this became a reality. There were no clerks present, but clearly the clerks heard the names of those barristers that were changing clerks if this happened. Three of us in our little set decided to change and from then until the time we did so, we received very little work from our present clerks. We were obviously on a freeze list.

I spent a great deal of time trudging up and down Little Collins Street, determined that no clerk was going to put me out of business. Instead I arranged with Stott's for full-time tuition (mornings only) in typing, on the clear understanding that if for any reason I couldn't come, then that was that. After lunch I practised in chambers on my own typewriter. I did pleadings and papers for friends. In this fashion I proceeded very well with my typing. I also learnt how to do Australian pleadings. In the summer vacation I went to Stotts each afternoon and studied speed writing. I was well equipped for the change over by the time we moved into Owen Dixon Chambers.

As for the public house on the corner next door, we should buy it, as we might want to expand at sometime. It was decided that the Bar could not possibly run a hotel and so the County Court ultimately bought the corner block and later the building went shooting skyward, demolishing as it did so a wonderful view that I had from my window before the building was erected.

The change was a great deal more humorous and more complicated than we thought. There were those that said there were not sufficient lifts for the building. It would never do to have the baker coming in the front door as he did with the name Dixon on top of his baker's cart. Then there were those who wanted rooms on the first and second floors because it wouldn't be so far to walk up or down if the lifts failed. We were too far from our clerks; we should have a clerk on each floor like they did at Wentworth Chambers in Sydney. In fact it seemed there was very little that was correct about the building.

We only went to nine storeys, and the top floor was the barristers' common room and dining room. We did not have a Bar dinner there, but we did have smaller dinners from time to time and we honoured Sir Charles Lowe at a dinner, for presiding on the Bench for such a long period of time. Subsequently, he retired from the Bench. At the time of his retirement in 1964 he was 84. When we moved into Owen Dixon Chambers we were all most curious to see the other barristers' rooms. My chambers were called Kiddle's boudoir, because I had curtains on my windows.

Trouble soon loomed. It seems that the architects and builders and the wise men in charge of operations at the Bar had all failed to ask, or failed to remember, that barristers are not like people in business firms, all coming to work at the same hour and going at the same hour. We were like will-o'-the-wisps. We came and went as we pleased. There was only one master key for the front door and this was securely locked. In front of that was a huge grill. No one could get in or out without disturbing the caretaker, Mr Brown. Pandemonium ran riot. Things must be fixed and quickly. Failing that something dire would happen. No one was exactly sure what would happen, but it was dreadful, diabolic almost. To make matters worse when one did get in the lift, one was probably struggling with the loaves of bread trying to get to the 9th floor. Never was there so much wailing and gnashing of teeth. In time it was found we all did get in and out of Owen Dixon chambers. The problem of the bread was solved. At last it was time to consider the opening of the building.

In the meantime I received a most delightful note from Judge Dethridge, the man who had to meet a barrister in London and couldn't remember his name. He did find his instructions and did find his way to chambers. He not only found the man he was searching for, but also he found his friend was a member of my old chambers. All the members of my old chambers wanted to know about, once they heard he was from the Melbourne Bar, was their friend, Kiddle. The barrister he was looking for was my very dear friend, Roger Davies.

In his note the judge said he was guilty of having said he knew me, when he really could not claim such a privilege. Could he meet me for lunch one day to rectify the situation?

The two of us met shortly after and we had a most delightful lunch and he was able to pass onto me all sorts of news about all my friends in my former chambers. It was so good to have first-hand news of them. None of them ever wrote. He told me that they were all obviously fond of me, and wished me well here in Australia.

And so, back to the opening of the building. I did not expect to do anything for the opening at all, except attend with the rest of the crowd. In that happy frame of mind I floated along for a short time. Then one day the axe fell. I was invited to see a man whom I called "Mr Pickwick", in his rooms. His name was Sir Reginald Smithers. He had another barrister with him whom he introduced as O'Driscoll. The two of them looked at me and

I arranged with Stott's for full-time tuition (mornings only) in typing . . . After lunch I practised in chambers on my own typewriter . . . In the summer vacation I went to Stotts each afternoon and studied speed writing.

Smithers said, "Kiddle, we would like you to do the flowers for the opening."

"Oh no," I said, "I am very sorry, I couldn't possibly do what you want. I can't arrange flowers at all."

"Of course, you can," he said again. "All women can arrange flowers. My wife does them excellently, but unfortunately she is overseas at the moment."

"What your wife can do and what I can do are two totally different things," I replied. "I really am hopeless at arranging flowers. Can't you ask the secretaries to do the flowers?" I urged

"No. We definitely want you to be responsible for the flowers."

"O'Driscoll will see that everyone at the Bar will bring vases to your room, with their names on the base. He will also organise the flowers. That way it will really be a Bar function."

I left for my home that night quite disturbed about the entire matter. I cannot really arrange flowers, although I certainly know when flowers are well done and when they are not. When I arrived home I told Geoffrey what had happened that day.

"Can you imagine how awful they will be if I do them?" I moaned. That little outburst was no good at all.

"I have never known you do anything badly, Vicky. So you just have to set your mind to it and get cracking."

I was doomed to be the laughing stock of the Bar. That I was determined not to be, so I had a wonderful idea. If I cannot do it myself, then I must organise a group of people, not from the Bar, whom I will supervise and I know can do them well.

I can't tell you how I felt during the next few weeks when a motley collection of vases arrived in my chambers. Then as the day grew closer, a miscellaneous collection of flowers arrived. There was really nothing wrong with the flowers but people brought what was in their gardens with no idea what vases they were going into. O'Driscoll came to our home and took lilac from our tree. He gave the tree such a good prune while he was about it, that for sometime I really thought he had killed it.

My crew of willing helpers and I worked until very late the night before the opening and in the end the result wasn't too bad at all. We sprayed the blossom with hair spray and put aspirin in the water and then we stood off and looked at our work again. A touch here and a touch there and it was as near perfection as any collection of assorted flowers and vases could be. I thanked my friends and went home to bed and to sleep.

Some of Ms Kiddle's contemporaries at the

Hartog Berkeley (1960).

William Kay (1960).

Ivan Franich and Barry Beach (1960).

The great day dawned. Mrs Rosanove, as the most senior woman barrister, was asked to make the presentation to the guest of honour. My friends who had scarcely noticed me in Selbourne Chambers now thought that "Their Kiddle" should have been the one chosen. It had taken a long time, but I had finally won most of them over.

Each year at that time, there was an art show, called the Myrniong, which was held at the Athenaeum Gallery. The artists, for the most part, were either Doctors or barristers. Invitations were sent to each member of the Bar. We all tried to attend if we were not otherwise engaged. They were pleasant affairs and we mingled with both the artists and ourselves.

Prior to the opening at one of these events, I was standing next to a man whom I found very entertaining and exceedingly handsome. I had no idea who he was. Included in the art, in addition to those along more classical lines, there were a number of very modern paintings. I pointed to one of the modern ones and asked him what he thought about it. He was non-committal in his reply. Then I asked him if he had contributed any work to the exhibition to which he said, yes, as an invitational exhibitor. Further questioning elicited the information that the painting I questioned him about was his exhibit. It was not for

Bar, as she captured them with her camera

John Phillips and Jack Lazarus (1959).

Gerry Nash (1960).

sale. I had no idea of purchasing it as my home was not one that could be described as modern and I had absolutely nowhere to put it. Sometime after that we parted, but not before he told me his name. He was a judge, he said, in the County Court. His name was Judge Gamble.

That was not the end of the painting. About a month later when I was sitting in chambers and working on a brief, the Chairman of the Bar came to my chambers and said, that His Honour Judge Gamble would be delighted to make me a gift of his painting, however, I must collect it from the gallery.

Painting, I thought. I was completely at a loss. I had forgotten about Myrniong. Then I remembered. Oh, what would I do with it? Then I looked around my chambers and thought well it could go in here, all the other furniture is modern. There is a place above my brief cupboard where it would probably look very nice.

First it was necessary to have it framed. The painting had not been done on canvas. It appeared to have been painted on to three-ply wood. It had no frame at all. It was, I was later to learn, an example of dribble painting. When framed it looked much better.

Shortly after that, His Honour died. Two of his fellow judges from the County Court came to my room on their way to the common room, and said, "May we look at Freddie's painting please, Kiddle?" Then each in turn, pulled out their handkerchiefs and wept profusely into them, muttering as they did so, "Poor Freddie, poor Freddie." Then they left.

It had quite a contrary effect on my clients. They would walk in, sit down and then, as clients do, look around at all the "books"; when they saw the painting they would look extremely startled. At least it took their minds off their problems.

Hazledon Ball, apart from the fact that he was the same Hasy who had appeared as junior counsel for me at my admission, I had also met subsequently in Gibby's coffee lounge in the pre Owen Dixon Days. In these early morning discussions I learnt, over a period of time, that he had always wanted to be an artist. His father, so he told me, said to him when he left school, "Here is one hundred pounds. Do anything you wish for the next twelve months. I am not going to pay university fees for you in that time. If at the end of twelve months you still wish to be an artist, fair enough. If, on the other hand you want to go to the university and train for a career, then I shall pay for that." For the next twelve months he took off as an ordinary able seaman on a steamer and had the time of his life. At the end of the year he returned to his father and said, "I would like to go to the university to do law."

He did law and he was a very good lawyer, but he still painted in his spare time. Each year at the Bar cocktail party they had in those days an art show in Selbourne, in which all the work was done by members of the Bar. Over our many cups of coffee Hasy tried to encourage me in submitting some work towards the art show.

"But Hasy," I replied, "I am no artist. I cannot paint, or draw."

"Rubbish," said Hasy, "anyone can paint that puts their mind to it."

So I tried and took these works of art into Hasy and said, "There, are you satisfied? I really can't paint."

Much to my surprise he said, "We must really have these in the show."

"Are you mad?" I retorted. "They are dreadful, you know it, I know it and Geoffrey knows it."

"Not at all," he replied, "they are very good."

He then took the couple of paintings and ultimately they were submitted as part of our annual art exhibition.

Geoffrey and I were at the cocktail party and we had a great deal of fun watching the people suddenly come upon

these "great works" of mine. At first they didn't know what to make of them, then they wondered who had done them. Then finally they commenced discussing them, there was no sense in anything they were saying. But they believed it, or thought they did. I do not think I have ever had such an amusing time. Nor did I submit any work in the future. Geoffrey and I had a good laugh about the entire evening. I saw Hasy many years later. Again it was at a Bar cocktail party. He had a wonderful set of paintings along one wall of the Owen Dixon Chambers common room. He died shortly after the party.

However, I shall never forget him. He was a kind man and a gentleman.

The barristers were not surprised now, if I came to the Bar dinner; they would say to me before the event, "Coming to the Bar dinner Kiddle?" and I would reply, "Wouldn't miss it for quids."

Master Collie was there and still worried. He came to me at the Bar dinner and said, "Allayne, would you please tell me what you are wearing, my wife likes to know. Last year I told her you looked very nice and your dress was made from crêpe de chine. She told me I was silly and said, "Crêpe de chine is only worn under dresses."

So I told him that this year I was wearing a long black figure-fitting dinner gown in guipure lace and that the year before I had been in a dress made from pale yellow chiffon. He carefully wrote all that I said down.

The members of the Bar were much more friendly towards me in Owen Dixon Chambers than they were at Selbourne. I think it was Owen Dixon Chambers that brought about this change. We were all on different floors which meant that we rubbed shoulders with each other in the lifts and we had a common room. Many of us met there for morning tea and coffee, we also had lunch there. So we were not as isolated from each other as we had been at Selbourne Chambers.

Also, I believe that the real change came about for me in the common room at Owen Dixon Chambers. I was sitting there, one afternoon, having a cup of coffee. I was sitting at the same table as the men, but not of them. They were discussing the cricket. I was at the time mentally lost in a case of my own, which was causing me some difficulty. Suddenly one of them said, "You must be pleased with the results Kiddle?"

"The results. What results? And why should I be pleased?"

"Why? Because England is winning the Test that's why." "Oh," I said, "but I'm not English. I am an Australian."

"I thought you came from the Pommy Bar."

"Well, yes I do. But that doesn't make me English. I just happened to study law there."

"Oh," they said. "Well don't worry, we will soon teach you how to conduct a cross-examination here. English barristers have no idea how to cross-examine."

"Really, I'm surprised to hear that," I replied, "since they invented the system."

I have an idea that after that discussion the word trickled around the Bar that I was an Australian. In any event, my luck with the men at the Bar changed from then on.

A short time later at a dinner given to Barwick by the Victorian Bar to honour his appointment as Chief Justice of the High Court of Australia, the Chairman of the Victorian Bar again said "Gentlemen" when addressing the members of the Bar. I was there and admittedly I could not see why the Chairman could not say "members of the Bar". However, I did not bother to say anything. After the dinner, before the speeches were given, it seems that one of the barristers present complained to the chairman about his lapse of normal good manners.

When we all reassembled for the speeches the Chairman rose to his feet. Before introducing the next speaker, he said that a complaint had been made to him that I had been ignored in the address. He apologised for overlooking my presence. The next speaker he introduced was His Honour Mr Justice Barry, who commenced his address to Barwick, after the formal announcements, with Members of the Bar. Then Barwick rose to respond. He followed Mr Justice Barry's normal spiel, and followed it with "Gentlemen" pause, at which there was a gasp, "and My Fair Lady." For the latter salutation he received a round of applause. I suppose today the feminists would object to that by saying it was prejudiced and he was trying to put me down. He happened to be a most charming man and I didn't mind at all. He then followed that by saying "I know all the best Chief Justices of the High Court come from Victoria." (He was from the New South Wales Bar.) There was an audible gasp from the audience, when he said that. All in all the evening was a great success. I couldn't wait to rush home and tell Geoffrey all about it.

I was approached by one of the secretaries and asked if I would help to get them a room for resting in when they did not feel well, or for changing their clothes, if they were going somewhere after work, etc. A common room for the secretarial staff was what they required. Such a thing sounded reasonable to me and I said I would use my best endeavours to see that they obtained what they wanted.

It was not at all simple to the Bar Council. They raised objection after objection. This was not an ordinary office building I was told. Each barrister was self-employed. Furthermore each barrister employed his own secretary. The Bar Council did not have to supply such a room to the secretaries. The Bar was not the Shell Oil Company.

I pleaded with them for some weeks; they finally said I could have a room for the secretaries provided the secretaries themselves furnished the room.

I informed the secretaries of this success and the Bar Council ruling, and they were as delighted as they were agreeable to the ruling. We then had a number of meetings in my chambers setting up a committee etc. and furnishing the room. I was taken to see it once it was finished. I remember the committee gave me a very nice silver filigree brooch to thank me for my efforts. It was not necessary, but I certainly appreciated them thanking me the way that they did. I understand that today the room no longer exists. It was still flourishing when I left the Bar. I can only wonder why it disappeared. It was, I thought at the time and I still do now, a necessity.

All in all, I was much happier at the Bar by this time than I had been when I first went there. I still found life at the Bar very lonely compared with life at the English Bar. As for the men of the Victorian Bar, however, I found them a "good bunch of guys". Those whom I approached for help all gave it freely. Some members of the Bar were exceptionally good to me. They will know who they are. I value their friendship to me as much today as I did at the time.

There has been much talk in recent years of prejudice against the women. I can only say that I did not find either the Benchers or the members of the Bar prejudiced. In fact I found them the very reverse. If the solicitors were prejudiced, I do not know. I did not find them so. But then I do not look for prejudice and I do not find it. If they had been, I would not have blamed them, because, by and large, they had no women when I went to the Bar, except Joan Rosanove, and she had a very specialised practice. It is quite clear that she herself did not suffer from

prejudice insofar as matrimonial matters were concerned. Having had nothing but men to brief, in all other matters, for years and years, I would say they were just slow to change over to the fact that they now had a choice.

In 1966 my daughter Anne was married. I was very run down myself with the constant drain on my health caused by Geoffrey's frequent illnesses, and Anne with her late teenage traumas. I knew that if I didn't do something and do it soon, I would become very ill. Geoffrey agreed with me that I should return to London where I could do a Master of Laws. He would follow me later, when I had found a flat and settled down to life in London.

My college was again the LSE. Geoffrey joined me in London later. His health was now much worse and he had retired from the estate agency business that he had gone into after selling Steam Plains. Geoffrey arrived in London some six months after I left Australia.

I found academic law a little strange after life at the Bar. However, I had too much to do to worry about the differences for long. It was a two-year course. If we were University of London law graduates with an Honours degree at LLB standard, we could try and attempt to do it one year. That was my aim.

I found a small flat in Knightsbridge, which was admirable for my purposes until Geoffrey arrived. The block had a gem of a housekeeper who serviced all the flats. Apart from its size it would have been ideal for the two of us. When Geoffrey arrived in London, it so happened that a very small flat became vacant on the top floor. We rented that for my study, and lived in the lower flat on the ground floor.

Before Geoffrey arrived, I was awakened by a sharp ring on the telephone one morning. I was surprised because it was about two or three a.m. It was Geoffrey telephoning from Melbourne to tell me that Mr Opas, one of our silks at the Victorian Bar, with whom I had appeared as his junior, twice or three times before, wanted to know if I would appear with him in an action to appeal for a hearing before the Privy Council at the Privy Council in the Queen and Ryan. I can remember saying to Geoffrey, "Who is Ryan?" He then refreshed my memory about Ryan and I said, "I don't know. First I am doing this degree, second I am flat out doing it, third I am on the non-practising list, and fourth I cannot do any other work unless I have the permission of my College." Geoffrey should have been at the Bar himself because he argued most persuasively in Phil's favour.

"Oh well," I finally said, "since it is a question of the liberty of the subject, tell Opas to find out if it is okay for me to appear with him, or do I have to transfer back to the practising list? If the latter you had better attend to that for me. I cannot appear as a member of the English Bar because I am not in chambers here. In the meantime I shall seek permission from my College. I cannot do anything until tomorrow morning."

There has been much talk in recent years of prejudice against the women. I can only say that I did not find either the Benchers or the members of the Bar prejudiced. In fact I found them the very reverse.

I was beginning to wake up now, and trying hard to remember what I could about Ryan. I couldn't remember a great deal except that he together with another fellow had broken out of Pentridge gaol and had finally been recaptured. I obtained permission from the University to accept the brief and within the week I had received a letter from Opas that it was okay for me to appear with him. Instructions from his solicitor quickly followed.

I was expecting Opas to arrive in London on a Monday and he changed his plans, without informing me, to escape the press in Melbourne. While I was working on my views of the Ryan case on the Saturday, before the date of his arrival, Opas telephoned me from London to say that he had arrived. I mention this to scotch the rumours that I raced out to the airport to meet him and flung my arms around him. A TV film was shown of me supposedly doing this. I am not in the habit of flinging my arms around anyone in public, let alone a silk, whom I scarcely knew.

The day of the application for the appeal arrived. Although overcast it was warm. I decided to catch a taxi to the Privy Council where I was to meet Opas. On the way to the front door I grabbed a letter, which I thought was for me on the hall stand. This I read in the taxi. I didn't understand what I was reading, I looked again at the front of the air letter, and saw that I had opened by mistake a letter addressed to Geoffrey, who was en route by ship to London at this time.

By now we had reached the Privy Council and I put it away to attend to at a later moment. I had been instructed by Opas to obtain certain law reports for him from the Privy Council library. None of them was there. I was in quite a flap about this, until I saw Opas, and explained to him.

"Oh," he said, "the usher has taken them into court for me."

Mr B.L. Murray, the Solicitor-General, for Victoria was appearing for the prosecution. He was already in the robing room with his junior when I arrived. I said good morning to them both.

Later my clerk arrived. I was very pleased to see Donald. I handed him my brief, and in due course he followed me into the Privy Council Chamber and placed my brief on the table.

It is a very strange feeling appearing before this particular tribunal. It is not a court but the judicial appeals committee of the Privy Council. There were five judges sitting on this application for leave to appeal to the Privy Council. Sitting there and looking at them, I was reminded of Bowen J's dissertation, that a man's indigestion, in an action, was as much a question of fact as any other. I couldn't help wondering whether these gentlemen had come up from the country that morning or, was London their normal home? I particularly mused as to the condition of their indigestion. What did they know about our judges, particularly those being quoted in the Ryan trial? Had it been an English trial they would have known all the judges. Known the good from the not so good, etc.

I had been told by Opas that although it was only a petition for leave to appeal sometimes their lordships decided that they would hear the appeal at the same time. Prior to the proceedings commencing their Lordships sent a message that they would not be doing so on this occasion. I thought that a somewhat ominous statement.

There are several accounts of what Opas said other than the press reports. Those wanting to learn what the arguments were could do no better than to read the account written by Opas himself, in his autobiography *Throw Away My Wig.* Another book that fully covers the Ryan trial and the petition for leave to appeal is Patrick Tennison's *Defence Counsel.*

Verbatim

Stranger Than . . .

Supreme Court of Western Australia

18 January 2001
El Ansary v *El Raghy and Ors*
Coram: Templeman J
M. Zilko SC for Plaintiff
R.E.Birmingham QC and L. Tsaknis for Defendant

Witness being cross-examined about whether a debt was payable by the company.
Zilko SC: Do you know anything about it?
Witness: I certainly do.
Zilko SC: Are you able to say that in June 1996 that debt need not be paid if Pharaoh did not have the means to pay it?
Witness: It's a strange question but I think the answer's going to be no, but I'm not quite sure. It might be yes. Can I have it again?
Zilko SC: All right. That is a strange answer.
Witness: If you ask a strange question, you will get a strange answer.

Dig That Video

County Court

21 June 2002
Coram: Judge G.D. Lewis
Buttigieg v *Eldridge Glen Pty Ltd*
V.W.A. Dalton QC and Waugh for Plaintiff
Gillies QC and Noonan for Defendant.

Plaintiff being cross-examined by Gillies.
Gillies: What other things have you done in the garden apart from the possibility of sweeping on the one occasion, pulling out the weed on one occasion?
Witness: Nothing since — my husband usually does the gardening and the mowing of the lawns.
Gillies: Yes. I'm sure he does usually but I'm asking about what you've done?
Witness: None — Well it's all I can afford doing.
Gillies: No digging at all?
Witness: Yes, there was one occasion. Just in case it's on video, I bought a couple of little plants, a little thing and I just did a couple of turns and put some little plants in the soil. It was about half a dozen or so.
His Honour: What do you mean when you say 'just in case it's on video'? That gives me the impression you think you should own up to that one because it might have been seen?
Witness: No. It's just something I said. I shouldn't have said it, I'm sorry.

The Eye of the Beholder

Melbourne Magistrates' Court

5 March 2002
Coram: Mr. R. Crisp M.
Police v *Austin Gilday*
Marc Sargent for the Police
Martin Amad for the Defendant

Martin Amad was cross-examining a male eyewitness to an armed robbery. The witness had earlier deposed to having a good memory and good eyesight. In summing up the witness's position, the following exchange took place.
Amad: So you've got a good memory?
Witness: Yes.
Amad: And you've got great eyes?
Witness: Thank you.
His Worship: He might well have added "sweetheart".

Subtle Duress

18 March 2002
Hesse v *3AW*

Dr Pannam: If Your Honour has the first volume of the Appeal Book, it appears at p. 45.
His Honour: We haven't got to that yet, we'll get to the Appeal Book later.
Dr Pannam: I'm sorry, the Court Book.
His Honour: Always gives a judge a degree of assurance when the opening of the appeal is being talked about.

The Good Life

The following is an extract from an amended notice of appeal filed by a litigant in person seeking to appeal to the Court of Appeal from a decision of Judge Dove:

The trial judge erred, acted with bias and malice toward the plaintiff Weston by failing to disclose his obsession with the food and wines of the Rutherglen district, which led him to reside in a community that had made the false heinous allegations, that the plaintiff Weston had deliberately attempted to kill his own son during the trial and disqualify himself from hearing the trial.

The Junior Silk making his address.

Mr Junior Silk's Speech to the Annual Bar Dinner

Held at the Plaza Ballroom on Saturday 1 June 2002

John Langmead

MR Chairman, Your Honours, distinguished guests and members of the Bar.

It is my privilege to propose a toast to the newly appointed members of the judiciary. But I have a few comments and observations to make first.

The Junior Silk speech is of course a considerable responsibility, and there are many pitfalls as I consider the numerous sensitivities, taboos, special interest groups and protocols. The time allotted to me is probably not sufficient to accurately target each one of them.

Anyone invited to speak at a Bar Dinner should probably take advice in relation to such matters, from senior and appropriately qualified people. The obvious choice of advisors was Paul Elliott QC and Simon Wilson QC who are of course widely known and respected for their wisdom and good judgment in such matters.

However, I didn't contact them. I must take complete responsibility for this speech. But in doing so I remind potential plaintiffs and habitual complainers of the recently expanded defence of qualified privilege, the possible application of an innovative reading of *Giannarelli*, and if those are not sufficient deterrent, my uninsured status in relation to this brief (indeed, possibly as we speak, in relation to any brief).

I would like to record that you have tonight been denied the pleasure of hearing from the most junior barrister to be appointed silk last year. That title belongs to Julie Dodds-Streeton SC who came to the Bar in the same year as I did, but some six months later. I understand that Julie supports the calculation of juniority for this purpose based curiously on date of admission to practice rather than the date of signing the Bar Roll.

But given that I was born in the same year that Charles Francis QC came to the Bar, I am of course grateful for any title, however temporary, which includes the word "Junior".

In making this speech I also have the support of Geoff McArthur SC who by

reason of his date of admission to practice would have been making this speech had I not been available. McArthur has been most solicitous as to my health over the past few months, a concern I suspect will evaporate after tonight.

You are all well aware of the basic premise of the Junior Silk Speech which is that you are to be entertained by watching the spectacle of the Junior Silk flirting with self-destruction with the various methods placed at his disposal for that purpose.

I have discovered in recent months that robust encouragement in this perilous venture comes readily and entirely unsolicited from a variety of sources, some of whom are present tonight.

However, tonight is the occasion of a significant change to the traditional format of this speech. Indeed, there have been a number of such changes over the years.

Originally the toast was given by the most junior member of the Bar, not the most junior silk. However, a series of indiscretions and an epidemic of umbrage saw that tradition abandoned, and in the early 1970s, the task fell to the Junior Silk.

The traditional implement placed at the disposal of the Junior Silk was a brief to recklessly and irreverently lampoon the recently appointed members of the judiciary.

But the Bar Council recently resolved to remove from the Junior Silk this traditional weapon of self-destruction. The newly appointed judges have been granted immunity, and in writing as I understand it. I have been directed by the Bar Council to toast them but not to roast them.

Given their number, even if I had allocated only two or three minutes to each judge, it is no doubt a relief to all present that the interruption between your main course and coffee will now be considerably shorter. Indeed, that was a further directive of the Bar Council, to keep the speech short — about 15 minutes.

A further factor I have had to consider is the considerable volume of unsolicited requests from fellow barristers that after a Bar dinner at 9 p.m. on a Saturday night, a dissertation on anything too serious is to be avoided like a Friday afternoon mention at Bairnsdale.

So what could have triggered this abandonment of long tradition as to the content of this speech? Did Judge Smallwood, known for his loathing of publicity, fear that I might let the cat out of the bag about his soon to be released video, "A Day in the Life of Judge Smallwood"?

Maurice Phipps FM, Maia Carroll, Erin Gardner, Carrie Rome-Sievers, Elspeth Strong and Richard McGarvie.

Graeme Hicks, David Curtain QC who addressed the dinner (briefly) as president of the ABA and Duncan Reynolds.

Did Justice Pagone fear that I would reveal his closely guarded secret that during the period he was at the Bar, there was in fact one committee upon which he did not serve? His secret was always safe with me.

Was it the fact that appointments like Justice Habersberger represent such infertile ground for satire and startling revelation? My researches in this direction simply revealed that His Honour has apparently spent his life making only good friends and leaving only good impressions.

Was Judge Hicks concerned that I would reveal that his love for animals found opportunity for spontaneous and generous expression in his provision of

financial and moral support for a disadvantaged and homeless horse. This support is revealed as all the more generous when you learn that the horse was not much of a pet, it didn't tolerate children much at all, and had never done anything so useful as pulling a milk cart, rounding up cattle or even serving as a pony club hack. In fact, the only endearing quality of this beneficiary of the philanthropy of Judge Hicks and five other caring souls was its habit of winning virtually every race it ever entered to the tune, some say, of over $700,000. Of course those not familiar with the horse racing game will think this was a great windfall to the syndicate, but those in the know understand what inroads into such gross winnings hay and fresh water twice daily can make.

Save for such observations in passing, my researches about the recently appointed members of the judiciary will forever remain in draft form.

But the Bar Council, having removed the traditional subject matter from me, has placed at my disposal an alternative weapon with possibly greater potential for self-destruction. The Bar Council suggested that I might consider addressing you on "The Administration of Justice". I had a quick browse on the internet, entering in the search engine "find all sites containing the words "The Administration of Justice" within 100 words of the phrases "most entertaining" and "that was a good night". The result was "your search did not match any documents". It was at this point that I became suspicious of the Bar Council's suggestion.

The suggested topic was a weapon of self-destruction which gave me no chance at all to even take any others with me. It was a sword upon which I could fall in a solitary and final way before you. Despite the entertainment value of that spectacle and tantalised though you may have been by the prospect, I formally decline the invitation to address you on the administration of justice.

His Honour rapidly back-pedalled, explaining how Latin plays only a very minor role in the law, and that plain English has taken over. But to no avail. The three phrases were then read to him:
Res ipsa loquitur
Res judicata
Ray's Tent City

Chief Justice The Hon. J. Phillips and Elspeth Strong.

Of course I am not precluded from talking about judges who are not new. Some years ago a Supreme Court judge who has since retired was interviewed on a radio show which was an experiment in bringing to the public entertaining facets of the law, including the regular segment "Beak of the Week". His Honour was told (apparently without notice) that he was to be tested on his knowledge of Latin maxims. He was asked to listen to three phrases, and to pick the odd one out. As many of us would have done, His Honour rapidly back-pedalled, explaining how Latin plays only a very minor role in the law, and that plain English has taken over. But to no avail. The three phrases were then read to him:

Res ipsa loquitur
Res judicata
Ray's Tent City

There was a brief silence. His Honour, obviously flustered at this persistence in the face of his contra-indication, tersely answered that he could *not* pick the odd one out, stating as his reason that it had been a long time since he had studied Latin.

But just as certain language usages in the law go out of fashion, others emerge. The evolving concept of "document retention" is a very recent development and illustrates well that technical legal terms are quite dynamic. A client was providing me with instructions recently (and I have his permission to mention this), and when I inquired as to the whereabouts of a significant number of documents which were once in his possession, but appeared no longer to be so, he said: "Well I haven't got a document retention policy."

At first I thought he was stating the obvious and recognising my point, but then I realised that here was a pristine example of the emergence of new legal terminology. He was telling me he hadn't destroyed the documents.

Traditionally of course we have simply accused each other of *not having* a shred of evidence. But recent developments in the law relating to document retention policies have made clear that there are circumstances in which the *possession* of a shred or shreds of evidence can be forensically significant. Commentators have suggested that a document retention policy which results in the possession of sufficient quantities of shreds of evidence can lead to shorter trials. It has also been noted that it can lead to more of them.

Shawn Ginsberg, Yusef Zaman, Mark Campbell and Liz Gaynor.

Frank Dyett, Barry Dove and Adrian Smithers.

Peter Couzens, Charles Gunst QC and Paul Elliott QC.

Graeme Hicks, Greg Garde and Graeme Crossley.

Romauld Andrew, Elizabeth Brophy and Simon Steward.

Rowena Orr, Matthew Bromley, Jacqueline Robertson, Paul Vout and Lisa Sarmons.

Peter Pascone, Richard McGarvie and Graeme Hellyer.

Danielle Hunter-Smith, Ed Larkin and Chris Clough.

Dennis Baker and Geoff Herbert.

Michael Dowling, Judy Benson and Judge Frank Walsh.

Jane Dixon, Maya Rozner and Rachel Doyle.

John Simpson, Ross Mankivell and Ron Meldrum QC.

Gavin Tellefson, Clair Quin, Richard Niall, Katherine Bourke and Tony Cavanough QC.

Bill Baarini, Allana Goldsworthy, Roland Anthony, Helen Rofe, Glen Pauline, Lisa Hannan and Samantha Cipriano.

David Neal, Tony Neal and Garrie Moloney.

Robert Redlich QC addressing the Bar Dinner.

Judge Lewitan, Judge Wood, Mark Dean SC and Michael Rozenes QC.

Robert Redlich QC, Caroline Burnside and Attorney-General the Hon. Rob Hulls.

One can only hope that the inventors of such euphemistic phrases as "document retention policy" will not abandon their mission of redefining legal concepts and processes with that solitary effort.

I recall my first experience of a "negative rate of climb" as a barrister, when early in my career I was making an application to a master of the Supreme Court which involved examining the relationship between confidential information and the discovery process.

For example, the sentencing process is ripe for their attention. Those daunting and discouraging words, "I sentence you to 25 years . . ." can be replaced by something a little more encouraging along these lines:

> You have been found guilty of a heinous crime, but I am pleased to announce that you have been selected to participate in the "Prisoner Release Program". In your case the date for your participation is the year 2027.

The process of disguising the unpalatable in euphemistic terms has for years been employed by manufacturers of light twin-engine aircraft. Immediately after takeoff, if one engine fails it is desirable that the aircraft maintain a positive rate of climb on the remaining engine. Many light twin-engine aircraft will *only* do this when the landing gear is retracted, flaps are retracted and so on. Should one engine fail *before* these steps can be taken, some manufacturers have gone into print stating that the aircraft will experience a "negative rate of climb".

The optimistic phraseology of the manufacturer is to be admired, but if you are an occupant of an aircraft experiencing a negative rate of climb shortly after takeoff, it is to be admired for only a very short time.

Anna Whitney is presented with a gift in recognition of her long service to the Bar from Chairman of the Bar Council Robert Redlich QC.

Federal Magistrates Maurice Phipps and McInness with Gina Reyntjes.

The crowd reacts to the Junior Silk's address.

I recall my first experience of a "negative rate of climb" as a barrister, when early in my career I was making an application to a master of the Supreme Court which involved examining the relationship between confidential information and the discovery process. After presenting my laboriously prepared and carefully crafted submissions, I resumed my seat. It felt like that enjoyable moment during a takeoff when the aircraft first leaves the ground and starts to fly. All is going well, and the flight appears to have sound prospects of success.

The master having listening patiently and without any interruption whatsoever thanked me and without pausing turned to my opponent and his junior and said: "I won't need to hear from you Mr Harper. The application is dismissed with costs."

I didn't even have time to get the Mayday call out.

That I have been prevented tonight from talking about the newly appointed judges in anything but glowing terms, does not of course preclude me

from mentioning members of the Bar Council.

The present Chairman many years ago was junior to a senior silk, who was on his feet waxing lyrical and educating the Bench on the finer points of law. He authoritatively asserted a legal proposition and cited an authority supporting it. The authority cited had not been discussed with his junior. The silk was immediately met with a short response from the Bench, "But hasn't that been overruled by the High Court?"

Without missing a beat he responded, "Thank you, Your Honour. I should have known better than to rely on my junior for this point."

I had a similar experience early in my time at the Bar, when I was being led. I was doing my best to hand up useful notes in a style later glorified by Denis De Nuto in "The Castle". Each note or comment would be ignored or rejected by my leader. I persisted, and on handing up a carefully worded question to my leader for his consideration to put to the witness under cross-examination, he stopped proceedings, gave an apologetic eyes-skyward look to the Bench, impatiently read the note for a moment or two, and then screwed the piece of paper up and threw it on the table in front of me. As he did so he gave an unnecessarily protracted dismissive gesture with his hand, appearing most annoyed at this needless interruption . . . then proceeded to ask the exact question I had proffered using the exact words I had suggested.

It is of note that the number of silks typically appointed each year, and indeed the number of judges appointed each year, is more than double the original size of the Victorian Bar.

The new silks will of course refrain from any such behaviour.

The life of the Bar in general, and the achievements of the Bar Council in particular have for many years now been chronicled in the pages of the *Bar News*. These archives present a useful benchmark of progress we have made. In Volume No. 4 of the *Victorian Bar News*, the September 1972 edition, there was a solitary letter to the editor on page 4. The relevant portions read:

> Dear Sir,
>
> The Bar Council should negotiate cheaper professional negligence insurance for barristers. At present the cost of insurance is prohibitive.

The writer would never have hoped or dreamed that the Bar Council would diligently pursue his request for 30 years.

It is of note that the number of silks typically appointed each year, and indeed the number of judges appointed each year, is more than double the original size of the Victorian Bar.

The Victorian Bar had its origins on 12 April 1841 when the apparently irascible Justice Willas in the newly opened Supreme Court admitted six barristers in the region known as the Port Phillip District of NSW. One of these was the Honourable James Murray, an Englishman with a fondness for conducting expeditions to wild and unexplored regions. I am informed that regrettably he was eaten by cannibals in Borneo on his last such expedition (an occasion some have tastelessly referred to as the first Bar dinner). That left a total of five barristers at the Bar, and this number did not increase until 1851. Apparently it was a golden era.

In 1900 the Bar boasted 63 members. By 1968 it had only increased to 367. Today there are 1420 practising members.

But whilst competition at the Bar may be a little more intense in 2002, the Victorian Bar remains an independent, robust and vital institution.

A feature of the new judicial appointments is that while they come from a variety of backgrounds and while they bring a variety of life experience to their new role, without exception they have substantial relevant legal experience. Plainly, such qualifications can be obtained in a variety of contexts.

Each of the members of the judiciary appointed during the past 12 months is to be heartily congratulated.

That the newly appointed judges have been let off the hook this evening is possibly a matter of some relief to them — the level of relief being in direct proportion to the richness of the tapestry of their various lives.

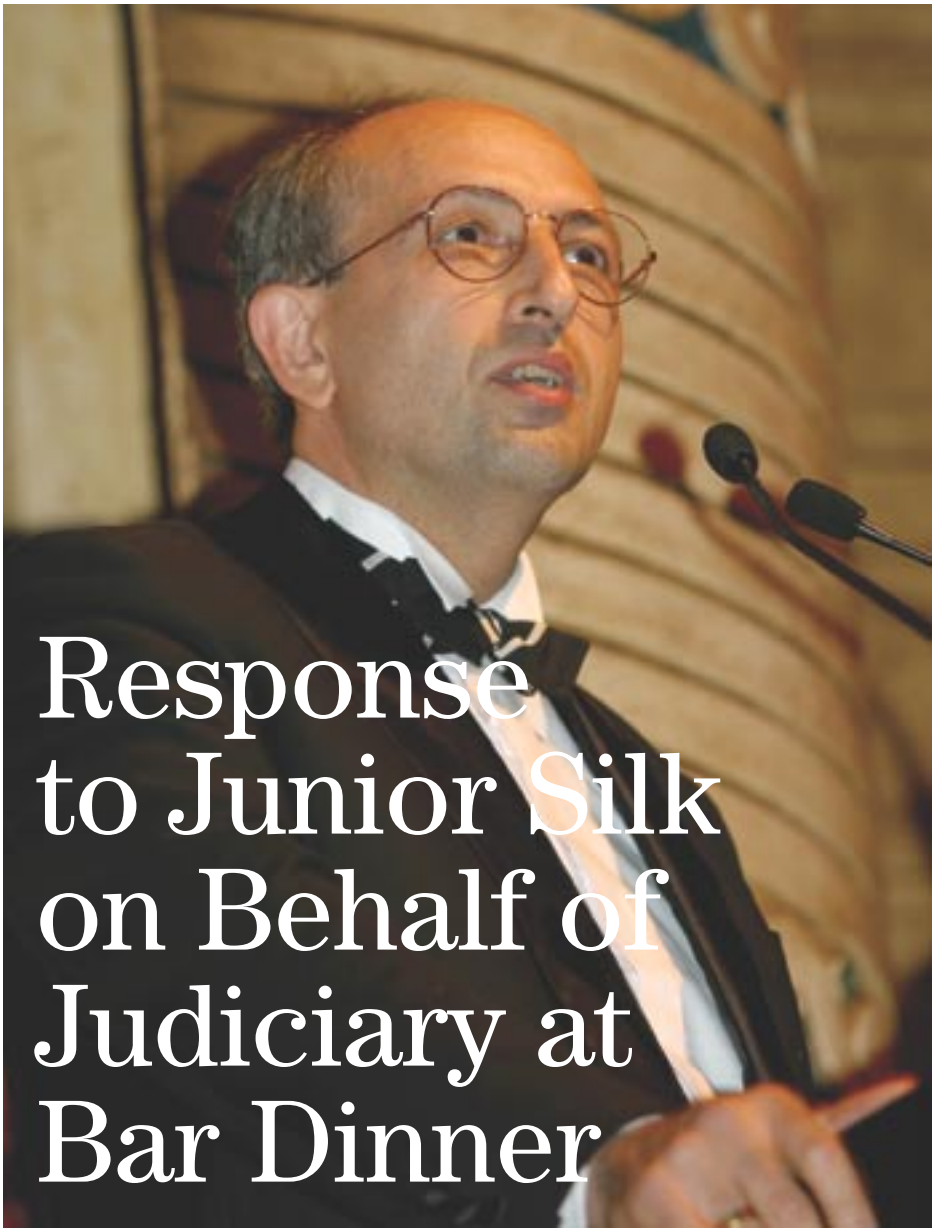
So having shown restraint in that regard as requested, I must now accommodate the other request that this speech be short.

I trust that those who placed bets on the length of this speech at 20 minutes or less, no doubt on long odds, enjoy their winnings.

And so I move to the real reason I am on my feet tonight, which is to toast our honoured guests on their fine achievements.

Without further ado ladies and gentlemen, I invite you to be upstanding to toast our Honoured Guests.

To our Honoured Guests.



Response to Junior Silk on Behalf of Judiciary at Bar Dinner

Justice Tony Pagone replies to the Junior Silk's address on behalf of the honoured guests.

MR Chairman, Junior Silk, distinguished guests, Your Honours, members of the Bar and anyone else who may care to listen.

It is my daunting task now to respond to the junior silk on behalf of the honoured guests. The task is daunting for a number of reasons. One is my own uninteresting disposition which was once likened to a footnote in a pension plan. Another reason is that my remarks in response had to be prepared before having heard what John Langmead had to say. It is customary for a response to express some thanks to the speaker, but my remarks had to be prepared before knowing whether he might have said anything that I could feel thankful for. This is not an idle concern. It is said that after one of these events, Sir Frank Gavin Duffy's response to the speaker was to say:

> I am not acquainted with Mr Junior, but I sincerely hope that he will never appear in my court.

Thoughts along these lines were encouraged by my own recollection of the memorable speech by Robert Redlich QC as the junior silk in 1985: my first Bar dinner.

I cannot actually recall agreeing to speak at all tonight, but I did receive a letter from Robert Redlich saying:

> I am delighted that you have agreed to respond to the toast this year by John Langmead SC. I know that preparing yet another speech adds to your already significant workload, but I am confident that your speech will make this a memorable night.

I skip over the dubious note of concern about my workload.

The speeches at these dinners have sometimes made them truly memorable. One appears to have been the speech by Merralls QC in 1975. He decided not to speak about the honoured guests but proceeded to give his impression of wines: "Six bottles uncorked for sampling: one looked at before the others new." The thought that Langmead SC might liken the honoured guests tonight with some part of the menu produced its own anxiety. Would any of us be described as:

> Equable, individual, well-balanced . . . makes good drinking now, and has just a suggestion of fullness in the middle palate to indicate that it will develop further subtleties of flavour when it settles in its new cellars after ten years in government bondage.

But what if we were not likened to the wine? Just imagine if each were selected for description as if we were the meal to be eaten. And why stop at that? Perhaps I might conjure in Langmead's mind a variety of pizza sprinkled with hot chillies; another could be a winsome capricciosa; a third a meatless vegetarian; and so on. How should I respond with thanks if that occurred?

Amongst my concerns for this response is that I speak on behalf of others for whom I have no authority to be thankful. I thought last week, therefore, that I should consult with those honoured guests who (a) were located physically close to me and (b) might have an interest in my not failing to show up tonight in case this task might fall upon them.

My first request for help was to ask Justice Habersberger — a seasoned public speaker. He said,"Gee, it's hard." There was then a pause and a change of expression on His Honour's face consistent with a variety of possibilities, including deep thought. Eventually His Honour said:

> I remember one Bar dinner meeting, Jack Starke in the loo after the speech, and Jack

Justice Winneke and Justice Osborn.

Paul Lawrie, Gina Reyntjes and Christopher Hanson.

was going on with: "Bloody commercial lawyers, hopeless speech, they don't know a f.... thing."

With these helpful comments I was reminded that both Justice Habersberger and I are in the Commercial Division of the Court and that, therefore, I might do better seeking guidance elsewhere.

From Justice Habersberger I turned to my brother Flatman — not one readily thought of as an equity whisperer. Indeed, he was very helpful. It seems that his former position has given him access to interesting aspects of the lives of many here tonight. Unfortunately, he has since withdrawn permission for me to use any of the information he had seemed so keen to give me at first, and has threatened to sue me if I do. It seems that he has received certain advice about the limits of the freedom of political communication as it may apply to judicial officers, and may have offered to write some key passages of any subsequent decision. I next tried Justice Osborn, or rather, attempted to do so, but my calls were to no avail. Perhaps he thought I was calling to put this task where it should be, namely on him.

I know that I am all that stands between you and your beds and, therefore, I shall be brief. I am sure that I do speak on behalf of us all when I thank the Bar for having us here tonight as your guests. The honour to Sir Edward Woodward reflects well on all of us, and his own work is a model for us all to follow. For those of us on one or other Bench, we are grateful to the support of the Bar and to the public gesture on this occasion. The occasion of this dinner has led me to reflect upon the origins of dinners like these which, in turn, caused me to look up that rich source of anthropological treasures, *The Golden Bough* by Sir George Fraser. You may be interested to know that the sharing of meals by hostile parties is an ancient custom based upon what Sir George called "The Principles of Sympathetic Magic".[1] It seems that amongst some primitive tribes there is a fear that magical evil that can be done to others through food, including the leftovers of a meal. The principle seems to be that a real connection continues to exist between the food which a person has in his or her stomach and the refuse which remains uneaten.[2] Some primitive tribes feared that by injuring the refuse you could also simultaneously cause injury to the eater. Fraser reports that an ancient Indian way of injuring an enemy was to offer a meal of rice, and afterwards to throw the remains of the rice into a fish pond. The enemy's fate was sealed if the fish swam up in large numbers to devour the grains. I have often been tempted to throw a bowl of rice into a fish pond, and other places for that matter, but never realised its possibilities! In antiquity, it seems, the Romans would immediately break the shells of eggs and snails which had been eaten in order to prevent enemies from making magic with them.[3] The practice, however, was plainly not enough to protect the empire itself from its decline and subsequent collapse.

In any event, the same superstitious fear, it seems, is the ancient cause of us being here tonight. The fear of the use of leftovers is said by Fraser to be the cause of the sanitary habit of destroying leftovers (and thereby avoiding disease), as well as the cause of the practice of "strengthening the moral bonds of hospitality, honour, and good faith" among those who have the fear.[4] The theory seems to be that "no one who intends to harm a man by working magic on the refuse of his food would himself partake of that food", because the harm caused to the refuse would affect all who had eaten from the same source. It is this idea "which in primitive society lends sanctity to the bond produced by eating together; by participation in the same food two men give, as it were, hostages for their good behaviour; each guarantees the other that he will devise no mischief against him, . . ."[5]

What more appropriate task could we be engaging in tonight as lawyers than one of sharing our meal together in harmony and goodwill. Lawyers are intensely rivalous and our constant task is to find fault with one another's work. We compete with each other at every level of work, and we make it our life's vocation to find fault with each other's arguments, submissions, opinions, trial decisions, first level appellate decisions, and so on. Those of us who were recently appointed may still feel some residual curiosity about how the announcement of our own appointment was greeted in lifts by you, our peers, and our most immediate public. For us it was not that long ago when we too stood in a lift with our friends and exchanged views about the then last announced appointment to a Bench. For us, being asked to be your guests tonight is something for which we are pleased.

NOTES:

1. G. Fraser, *The Golden Bough, Taboo* Part II, p. 130.
2. Fraser, at 126.
3. Fraser, at 129.
4. Fraser, at 130.
5. Fraser, at 130.

R v Ryan

THE hanging of Ronald Ryan polarised Victoria and focussed national attention on the issue of capital punishment.

For anyone 50 years or older the broad outline of the case is still familiar. Ronald Ryan and Peter Walker, both small-time criminals, broke out of Pentridge Gaol in December 1965. During the escape, Warder George Hodson was killed. It was widely believed that Ryan had fired the fatal shot, with an M1 carbine he had taken in the course of the break-out.

A huge manhunt began. Ryan and Walker were recaptured in Sydney and arrived back in Pentridge 19 days after their escape. Whilst at large they had held up a branch of the ANZ Bank, and Walker had shot a man dead in an execution-style killing in a toilet block.

The trial before Starke J began on 15 March 1966. Tony Murray SG QC, with Geoff Byrne, prosecuted. Ryan was defended by Phil Opas QC and Brian Bourke; Jack Lazarus appeared for Walker.

The trial turned largely on whether the fatal shot had been fired by Ryan or by Prison Warder Paterson. Eleven eyewitnesses said that they had heard only one shot fired. They said that they saw Ryan fire the shot. When interviewed immediately after the shooting, Paterson had said he heard no shot other than the one he fired himself. However, in his second statement, a few weeks later, he said he did hear a shot before he fired. He repeated this at the inquest and at the trial.

Paterson gave evidence that he had taken aim at Ryan and had taken first pressure on the trigger when, as he said, a woman walked into his sights and he fired into the air to avoid hitting her. Ryan's counsel had already satisfied themselves that the M1 carbine had no first pressure on the trigger; and no witness had heard more than a single shot.

Nevertheless, Paterson gave evidence at the trial that he had heard another shot before he fired. His various statements show significant differences in several important respects, and bring to mind the changing evidence of Constable McIntyre at Ned Kelly's trial.

Ryan gave evidence. He swore that he did not fire at Hodson. He denied firing a shot at all. He denied the so-called confessions said to have been made by him.

But the jury convicted him of murder and, after coming back to ask a question about acting in concert, convicted Walker of manslaughter.

Mr Justice Starke pronounced the death sentence. It must have been a hard moment for him: he had been a lifelong opponent of capital punishment.

Then followed an intense political struggle in which the prize was Ryan's life. Many present and former members of the Victorian Bar distinguished themselves in the struggle to save Ryan from the gallows: Opas QC and Brian Bourke appealed to the Court of Criminal Appeal and then unsuccessfully sought leave to appeal to the High Court. Later, Opas QC and Allayne Kiddle appeared in the Privy Council on Ryan's application for leave to appeal. Ralph Freadman, and his then junior solicitor Paul Guest, came across new evidence and worked furiously to get it before Starke J just hours before Ryan was due to be executed. This resulted in a last minute stay of execution

Meanwhile, the anti-hanging committee, led by Barry Jones, had enlisted the help of church leaders and the Labor Party in an attempt to pressure the Government to commute Ryan's sentence. The committee included Maurice Ashkenasy QC, Zelman Cowen and Richard McGarvie QC.

The Government had commuted every death sentence passed since 1951 when Jean Lee, Norman Andrews and Robert Clayton had been executed for the murder of Pop Kent. The Cabinet was not unified on whether Ryan should hang. At least four Cabinet members strongly opposed capital punishment. But the Premier, Henry Bolte, wanted to hang Ryan in order to reassert his leadership: just a few years earlier he had been prevented from hanging Peter Tait in the dramatic circumstances recorded at 108 CLR 620.

The press was largely against Bolte. *The Age*, *The Herald* and *The Sun* all ran strong campaigns against executing Ryan. Bolte went so far as to put pressure on the chairman of David Syme Limited to have its editorial line softened. To their great credit, Ranald McDonald and Graham Perkin resisted the pressure. Sir Frank Packer was more obliging: he recalled and pulped the issue of the *Bulletin* due to be published on 31 January 1967. This drastic step was taken because of a cartoon by Les Tanner and an editorial on capital punishment. Packer also interfered at GTV-9: he forced the last minute withdrawal of a widely publicised BBC documentary on capital punishment.

Ultimately the struggle to save Ronald Ryan was to no avail. Through all of the legal and political skirmishing, Ryan remained stoical. At the final hour he admitted having fired his carbine, but denied intending to kill Hodson. He remained calm while the sheriff who read the death warrant faltered and broke down.

Bruce Dawe wrote a fine poem about the execution ("A Victorian hangman tells his love"):

> . . . the journalists are ready with the flash-
> bulbs of their eyes
> raised to the simple altar, the doctor
> twitches like a stethoscope
> — you have been given a clean bill of
> health, like any
> modern bride.
>
> With this spring of mine
> from the trap, hitting the door lever, you
> will go forth
> into a new life which I, alas, am not yet fit
> to share.
> Be assured, you will sink into the generous
> pool of public feeling
> as gently as a leaf — accept your role,
> feel chosen . . .

Four minutes after the hangman (faceless, anonymous for the shame of it) pulled the lever, Ryan's heart stopped beating. With that last heartbeat, capital punishment ended in Australia. It was abolished progressively in each of the States over the next 17 years, but no-one was executed during that time.

Ryan's conviction, we now know, was right; his death was wrong. But the controversy sparked by his sentence and execution brought an end to capital punishment in Australia. His life and death were a tragedy in miniature but he achieved a far greater good than he had ever intended or dreamed of.

Julian Burnside

Justice Sally Brown Unveiled

Rob Hulls unveils the portrait.

ON 11 June 2002 the Attorney-General, the Honourable Rob Hulls MP, unveiled a portrait of Her Honour Justice Sally Brown. Her portrait is the first portrait of a woman commissioned by the Victorian Bar and the Women Barristers' Association to hang with the numerous portraits of notable lawyers displayed in the main corridors of barristers' chambers. It is the first portrait of a woman in the series — "Women and the Law".

Late last year the Bar Council agreed to support an initiative of the Women Barristers' Association to establish a series of images which would, through art, acknowledge the achievements of women in the law. The series does this by recognising both a woman's excellence in her field and her contribution to the advancement of the interests of women in the law. Through the display of images of women the series seeks to enhance the visibility of women as members of the legal profession, to affirm their status in the law and, in the case of the Victorian Bar and the Women Barristers' Association, to provide us with an opportunity to honour the many women who have been and are contributors to the law.

Amongst her many achievements Her Honour has the distinction of being the first woman to lead a Victorian court. This she did as Chief Magistrate from 1990 before her elevation to the Family Court of Australia in 1993. Justice Brown is also acknowledged for her strong commitment to establishing gender and cross-cultural awareness in the law, her commitment to equality of opportunity for women and the personal and professional support she has given to other women pursuing careers in the law.

The artist, Josephine Kuperholz, printed the images used on the two glass panels by adapting a 19th century non-silver photographic process, the Gum Bichromate process. In the past this process has been applied to paper surfaces and, according to the artist, her adaptation of the process and its application to glass is unique. The colour and translucency of the work was achieved by adding layers of water-colour pigments mixed with light-sensitive chemicals.

Rob Hulls, Justice Brown, the artist Josephine Kuperholz, chair of the Women Barristers' Association Frances Millane and Chairman of the Bar Council Robert Redlich QC.

Justice Brown and the artist Josephine Kuperholz.

A committee consisting of representatives from the Bar Council, the Women Barristers' Association and the Equality Before the Law Committee will recommend future candidates for the series.

Frances Millane
Convenor,
Women Barristers' Association

ReprieveAustralia's US Mission Revisited

Recent decisions in the United States banning the execution of the mentally retarded and prohibiting a judge alone to determine the fate of a defendant found guilty of a capital crime means that many lives may be spared. Many applaud the decision, including *ReprieveAustralia*.

Some readers will recall the launching of the organization by His Honour Justice Michael Kirby on 17 May 2001 followed by the address given by Mr Clive Stafford Smith, Director of the Louisiana Crisis Assistance Centre. (See Spring 2001 edition pp. 34–42.)

Ashley Halphen recently returned from the United States, having worked with Mr Stafford Smith in New Orleans. The issues that confronted him and the first-hand observations he made are detailed in the articles below.

Lethal Lawyers deals with the standard of legal representation in the Southern death penalty belt. *Union Confidence Justice* followed by *Angola*, crystallize Ashley's first observations of court proceedings and death row respectively. *Choosing Death* discusses the ethical obligations facing a lawyer when a client wishes to plead guilty or abandon appeal rights. The final article, *The Gift of Time*, reflects on the often emotionally intense nature of death penalty work.

Lethal Lawyers

In the United States, one need go no further than the South to find some of the most notorious examples of incompetent legal representation. Tragically, it is in circumstances where clients' lives are at stake.

George McFarland was sentenced to death in Houston in August 1992 for killing Kenneth Kwan, a convenience store owner. The *Houston Chronicle* described what happened as McFarland stood on trial for his life:

Seated beside his client . . . defence attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the . . . robbery killing of grocer Kenneth Kwan.

When state District judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

"It's boring," the 72 year old, longtime Houston lawyer explained . . .

HISTORICALLY

CAPITAL punishment arrived on North American shores with the very first British colonists. In 1608 the colonists carried out their first hanging.

By 1835, laws were enacted to bring the hangman behind a wall or fence or within the prison yard.

William Kemmler, an illiterate who confessed to the axe murder killing of his lover in an alcohol sodden rage was the first person in the US to be executed by electricity on 6 August 1890.

Following the publication of Beccaria's classic essay *On Crime and Punishment*, public sentiment continued to swing between abolition and retention of the death penalty.

During the 1930s and 1940s executions reached their highest levels, most likely as a consequence of public anxiety over the crime wave generated by the Great Depression (1929–1940) and Prohibition (1916–1932).

In Nevada in 1923, lethal gas was first authorized as a humane improvement on both hanging and the electric chair.

There was a complete cessation of executions from 1968 to 1976 while the constitutionality of the death penalty was being tested in the courts. The judicial moratorium on execution ended in 1977 when Gary Gilmore was executed by firing squad in Utah.

In 1972 the Supreme Court decided the case of *Furman* v *Georgia* and by a 5–4 margin found the death penalty as then

practised, rife with discrimination, making it an unconstitutionally cruel and arbitrary punishment.

After just four years, the Supreme Court in *Gregg* v *Georgia* changed course in a 7–2 decision, finding that the punishment of death does not invariably violate the constitution. The case heralded the introduction of a two-stage or bifurcated trial that involved a guilt phase and penalty phase. The new rules were supposedly designed to prevent arbitrary justice and discrimination by requiring courts at the sentencing phase to consider aggravating and mitigating factors.

The expiration of the moratorium in 1976 marked the beginning of a new death penalty era by the introduction of execution by lethal injection, first used in Texas in 1982.

THE STATISTICS

Over the course of the twentieth century more than 7000 men and woman have been lawfully executed. There are more than 3700 people on death row. Since the reinstatement of capital punishment in 1976, approximately 749 people have been executed, of those 66 were executed in 2001.

There are currently 38 States in America that regard the death penalty as a lawful criminal sanction. As such, their standing in the western world is unique.

Since 1973, approximately 98 people have been exonerated and released from death row. This amounts to a complete exoneration for about every seven executions or an average of 3.9 individuals being freed each year.

Seven-hundred-and-sixty-one years of lives have been lost on death row!

Wrongful convictions can be explained by the failings in the adversarial system — corrupt law enforcement, prosecutorial misconduct, judicial bias and racism. This article however, focuses on counsel's ineffectiveness as a contributing factor.

THE PROMISE

The Sixth Amendment of the United States Constitution provides that in all criminal prosecutions, the accused shall . . . have the right of counsel . . . The famous trial of the Scottsboro boys where Clarence Durrow defended nine African-Americans accused of raping two white women gave the Sixth Amendment practical utility. The case established that any person facing capital punishment, too poor to afford an attorney, has the right to have an attorney assigned to him.

It was foreshadowed that every person charged with a crime would be capably defended no matter what his/her economic circumstance, without resentment at any unfair burden arising but proudly and to the best of a lawyer's ability.

More than 60 years since the Scottsboro case, what was hoped remains unrealized. The situation has variously been described as a "crisis" and "scandal". Justice Sandra Day O'Connor of the Supreme Court says the problem is one troubling feature of a capital punishment system that may well be allowing some innocent defendants to be executed.

In fact studies reveal that as many as two out of three appealed death sentences are set aside because of errors by defence lawyers at trial or because of prosecutorial misconduct. George McFarland's case was not, however, set aside on review. Astonishingly, in February 1996 the Texas Court of Appeals by a 7–2 margin agreed that sleeping John Benn was no reason to reopen McFarland's conviction or reconsider his death sentence.

Ashley Halphen

ANECDOTAL SUPPORT

There are a number of illustrations that lend themselves to the notion that truth is often far stranger than fiction.

After years in which she and her children were abused by her adulterous husband, a woman in Talladega County, Alabama, arranged to have him killed. The woman was ultimately sentenced to death. Her court-appointed lawyer was so drunk that the trial had to be delayed for a day after he was held in contempt and sentenced to jail. The next morning, he and his client were both produced from jail, the trial resumed, and the death penalty was imposed a few days later.

In another case, defence counsel cross-examined a witness whose direct testimony counsel missed because he was parking his car.

John Young was represented at his capital trial by an attorney who was dependent on amphetamines and distracted from his law practice because of a number of personal problems. The lawyer as a result was inadequately prepared and his performance inept. A few weeks after trial, Young met his lawyer at the prison yards after pleading guilty to both State and Federal drug charges.

A Georgian lawyer conceded his client's guilt and arguing for a life sentence at the guilt phase, had not even read the State's death penalty statute nor realized that a capital trial was bifurcated into separate determinations of guilt and punishment.

A court-appointed lawyer, when asked by the trial judge to name criminal law decisions from any court with which he was familiar, could only name two, one of which was not a criminal case.

During a penalty phase a court-appointed lawyer said about his client to the jury, "you have got a little ole nigger man over there that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer . . ."

Another court-appointed lawyer, a sole practitioner who had never tried a capital case, was struggling with financial problems and a divorce and being paid at a rate of about $20.00 an hour. Under the stress of it all his closing argument amassed a total of 255 words.

James Brewer was sentenced to death in circumstances where his attorney spent a couple of hours preparing the sentencing phase. He waived the opportunity to make an opening argument and presented neither character evidence nor evidence of his client's severe mental illness.

One attorney told a jury that his client, "can't live with that beast from within any longer", and that a death sentence might be, "the gift of life".

An article in the Tennessee Bar Journal revealed that some attorneys are spending 20 hours or less preparing for a death penalty trial. This results in representation like that afforded Keith Messiah. Messiah was convicted of capital murder in a one-day trial in Louisiana. His attorney then merely stipulated to his client's age at the time of the offence and rested his case. The entire penalty phase took 20 minutes.

One study found that one-fourth

of those under sentence of death in Kentucky were represented at trial by attorneys who since have been disbarred or resigned to avoid disbarment.

Defence counsel's failure to present evidence available at the time of trial has preceded the imposition of numerous death sentences.

The failure of defence counsel to present critical information helps to account for the death sentence imposed on Jerome Holloway who has an IQ of 49 and intellectual capacity of a seven year old and William Smith who has an IQ of 65. It also helps explain why Donald Thomas, a schizophrenic, was sentenced to death. In each case the jury knew nothing of the defendant's respective impairments because lawyers failed to present a scintilla of evidence of those conditions.

When a lawyer in El Paso, paid only $11.84 per hour, failed to present an available alibi witness, the Fifth Circuit Appeals Court remarked that the justice system only got what it paid for.

A Tennessee appellate court cited 17 cases in which attorneys offered no mitigation evidence whatsoever during the penalty phase of the trial.

Are more able attorneys on appeal able to somehow rescue the situation? Where counsel at first instant fails to preserve an issue by an objection made to the court, opportunity on appeal to argue the point is lost. Increasingly, strict procedural doctrines developed by the Supreme Court since 1977 means that failure to preserve an issue will bar review of that issue. This leads to the entirely unsatisfactory situation that innocence is not generally reviewed.

Lionell Herrera of Texas had accumulated considerable exculpatory evidence that was not available at trial but was unable to persuade the Supreme Court to reconsider his case. Justice Scalia joined by Justice Thomas took the view that, "there is no basis in text, tradition, or even contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered information brought forward after conviction."

Where counsel at first instant fails to preserve an issue by an objection made to the court, opportunity on appeal to argue the point is lost. This leads to the entirely unsatisfactory situation that innocence is not generally reviewed.

It has been noted that courts sometimes review and decide capital cases on the basis of appellate briefs that would be rejected in a first-year legal writing course at law school.

The Georgia Supreme Court affirmed the death sentence after receiving a brief that contained only five pages of argument and was filed only in response to threat of sanctions against the lawyer.

In many instances, it's not just a question of inadequate lawyers: there simply are no lawyers available, especially for appeals.

In 1995, half of California's death row inmates awaiting their first appeals had no lawyers. In Pennsylvania, with the exception of a handful, none of the 190 inmates on death row at the time had representation after the direct appeal stage.

THE REASONS

The reasons belying the poor quality of representation in capital cases are readily identifiable.

In many jurisdictions, judges simply appoint members of the Bar in private practice to defend indigent accused. These lawyers may not want the case, may receive little or no compensation for handling them, may lack any interest in criminal law and may not have the skill to defend those accused. As a result, individuals are often represented by inexperienced lawyers who view their responsibilities as unwanted burdens, have no inclination to help their clients and no incentive to develop criminal trial skills.

Some jurisdictions employ a contract system in which a county contracts with an attorney in private practice to handle all of the indigent cases for a specified amount. Often contracts are awarded to the lawyer or group of lawyers who bids the lowest. The lawyer is still free to generate other income through private practice. Any money spent on investigation or experts comes out of the amount the lawyer receives. These programs are well known for the lack of expenditure in these areas.

A third system is the public defender system. Some of these offices employ remarkably dedicated attorneys whose jobs are nonetheless made almost impossible by overwhelming caseloads and low funding. These programs have never been properly funded in many jurisdictions. The remuneration is so minimal that few accomplished lawyers can be enticed to capital cases. Those who do take a capital case rarely have the time to defend it properly. As a result individuals are represented by lawyers who lack experience, expertise and resources. Offices preoccupied with capital defence work must get used to the high burn-out rate which results in more experienced attorneys being replaced by young, inexperienced lawyers who are even less able to deal with the overwhelming workloads.

The situation has further deteriorated in recent years because of the increased complexity in the law and termination in 1995 of federal moneys for local death penalty centres that previously provided local firms with capital expertise and investigative assistance.

Less than one-quarter of the 38 death penalty States have set any standards for competency of counsel and in those few States, the standards were set only recently. In most States, any person who passes a Bar examination, even if that attorney has never represented a client in any type of case, may represent a client in a death penalty case.

Many State court judges, instead of correcting the situation, foster it by intentionally appointing inexperienced and incapable lawyers to defend capital cases. Judges have appointed to capital cases lawyers who have never tried a case before. For instance, a newly admitted member of the Georgia Bar was surprised to be appointed to handle the appeal of a capital case on her fifth day of practice in Colombus, Georgia.

The system almost invariably leads to many inexperienced and ill-prepared lawyers available or appointed to handle capital cases. At the Terrell Unit in Livingston, Texas, inmates and death penalty lawyers refer sardonically to a place they call the Mock Wing. This metaphorical prison enclave has housed at least a dozen death row inmates, who shared the same lawyer, Ronald G. Mock.

Like so many lawyers, Mr Mock has been accused of inadequate factual investigation and an inability to keep abreast of complex and ever-changing legal principles and doctrines.

STANDARDS OF COMPETENCY

This sorry state of affairs is tolerated in part because the Supreme Court has said the purpose of the Sixth Amendment's guarantee of counsel is not to improve the quality of legal representation.

The court in *Strickland* v *Washington*

adopted a standard that is highly deferential to the performance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show that the attorney's representation fell below an objective standard of reasonableness and also establish a reasonable probability that counsel's errors affected the outcome.

It appears that rather mediocre assistance passes muster under the Strickland standard. Often what are clearly mistakes and errors in judgement are characterized as strategy and thus beyond review. A defence lawyer in one Texas case failed to produce any evidence in mitigation at the penalty phase of the trial and his entire closing argument regarding sentencing was: "You are an extremely intelligent jury. You've got the man's life in your hands. You can take it or not. That's all I have to say." The Fifth Circuit characterized counsel's non-argument as a dramatic ploy and found the attorney's performance satisfied Strickland.

The same ineptitude is tolerated on appeal. The brief on direct appeal to the Alabama Supreme Court in the case of Larry Gene Heath, executed on March 20, 1992, consisted of only one page of argument and cited only one case.

In essence the minimal standard for attorney competence employed in death penalty cases offers little protection to an indigent defendant. The test has been described as the "mirror test" — you put a mirror under the court-appointed lawyer's nose, and if the mirror clouds up, then the lawyer is considered adequate counsel!

VOLUNTEER SUPPORT

The best hope for those facing the death penalty is that capable lawyers volunteer to take capital cases and provide proper representation regardless of whether they are paid adequately or at all.

As a Justice of the Supreme Court, once a supporter of the death penalty but now an ardent opponent noted, "It is tempting to pretend that those on death row share a fate that is in no way connected to our own, that our treatment of them sounds echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined . . . The way in which we choose those who will die reveals the depth of moral commitment among the living."

People are able to help, by contacting *ReprieveAustralia*, a non-profit organisation established in Melbourne, Australia, with the aim of supporting the provision of effective legal representation and humanitarian assistance to indigent defendants facing the death penalty. As a key part of its program *ReprieveAustralia* has established a volunteer internship program, allowing Australians to donate three months or more of their time as volunteers in death penalty law offices representing impoverished accused.

Ashley Halphen

Ashley recently worked for an organization based in New Orleans, where attorneys act for indigent defendants either charged with a capital offence or on death row pending appeal.

For further information write to contact@reprieve.org.au

Union Confidence Justice

SOME sat at the Bar table. Others whispered almost mischievously by the bench with the judge. Prisoners sat doggedly in "the box". One amongst them sat upright and alert. He is on death row.

Section H of the 24th District in Jefferson Parish is the judge's court. There is even a portrait of him on the wall.

All persons present in court were white except the prisoners and their families. The latter scattered across the body of the court.

The bright orange overalls captured my immediate attention. Then I noticed the handcuffs. The shackles became apparent only when the bailiff removed the prisoners. They were chained to one another.

Silence was broken by the chatter at the Bench. I reminded myself that proceedings were conducted in open court.

Cases were called in rapid succession whilst informal exchanges criss-crossed the room.

My gaze settled on the only individual who might some day know the precise time and location of his own death. His handcuffs were different, perhaps for added security but also symptomatic of his unique status.

His father sat with immense dignity and read over the motions that might save his son's life, or at least prolong his death. When introduced, I was greeted with a forced smile. I understood.

A name was called. A man automatically stood. The prosecutor asked to revoke the man's probation then continued chewing mercilessly on his gum. The man said his attorney was outside. The hearing continued anyway.

Shortly after that the public defender requested a continuance on behalf of her client who had been charged with murder. She stressed that no police report was yet forthcoming. Her client had been wearing his orange overalls almost four months. I awaited the court's expression of dissatisfaction. There was none.

In another case a man was reprimanded for failing to attend by the scheduled time. He was handcuffed and placed in "the box". Having fallen asleep as well clearly inflamed the Judge.

Finally the case that begged my attendance was called. The man with the different handcuffs rose to his feet and shuffled to the Bar table where he took a seat.

In December 1996, at just 16 years of age, he had been indicted for capital murder following the fatal shooting of a 45-year-old man and his 70-year-old mother. In April 1996 the jury returned a verdict of guilty. At the penalty phase he was sentenced to death. The Louisiana Supreme Court on direct appeal reversed both conviction and sentence. The case was remanded for a new trial.

The motions before the court sought a recusal of the Judge and the quashing of the indictment because of the discrimination in the selection of grand jury forepersons and because of the improper exclusion of jurors from the grand jury process.

In all, over the preceding three weeks, six people had worked around the clock preparing these motions. We all sat restlessly in our seats.

The motion to recuse was denied for reasons not stipulated and without resort

to oral argument. The hearing was over within moments.

His Honour left the Bench. Tension dissipated. The guard with a chin too big for his face escorted our client away. "Thank y'all for your hard work", was all he had time to say as he passed.

As I left the courtroom I read the three words inscribed on the emblem resting between the United States and Louisiana flags . . . "Union Confidence Justice".

I drew a wry smile.

Angola

THE arch at the entrance reads, LOUISIANA STATE PENITENTIARY, or otherwise known as Angola. With 3461 prisoners serving life sentences, almost 100 prisoners on death row and 1800 staff, Angola is the largest prison in the United States. Formerly a plantation, slaves were sent from an African country also known as Angola. Says one prisoner, "the only difference between now and 1860 is the year." Not a dramatic thought as one observes guards patrolling on horseback with shotguns in hand, overseeing chain gangs working the land.

On the immediate right of the entrance, through cyclone fences and swirls of barbed wire, I saw a two-tiered building that the world knows as death row. Once my identification was verified and the pat down complete, I found myself walking without escort through immaculately kept grounds towards the building.

Steel bars in a variety of permutations filled my eyeshot. My attention focused on the oppressively clean passageways. Washed and re-washed, polished and re-polished, I could eat from the floor without hesitation whilst peering at my reflection on the tiled walls.

There were six different secured points that I passed before reaching my ultimate destination. I was briefly introduced to my first client, Q.K. We sat facing each other in a cubicle the size of a telephone box that was partitioned by a wire mesh type material. I knew that he had been convicted of the murder of a child.

Where does one begin a conversation in such a predicament with so many taboo topics to avoid? The initial moments passed of their own accord. I soon found Q.K. to be intelligent, articulate and highly opinionated. Conversation ranged from genealogy to turtle soup. I became so absorbed I did not realize that his wrists were chained to his waist!

Before appeal avenues finally exhaust, prisoners can spend in excess of ten years on death row. I learnt that death row inmates spend 23 hours of each day locked in their cells. They are allowed 1 hour in exercise that is spent alone in a caged yard. Breakfast is at 5 a.m., lunch is at 10:30 a.m. and supper is at 3 p.m. Visits are not commonplace — not for want of care but for want of money.

Imagine your life without human touch. Without laughter. Where each day is the mirror image of the day before. Imagine your life without the moon or the stars. Imagine your life without dreams. Imagine the only sounds being rattling chains and slamming steel doors. Imagine being watched each time you use the toilet...

I had all the stereotypical preconceptions of death row as projected by the media. That was so until I met my second client, G.A. He is 30-something. He forgets exactly how old. He thinks it has been eight years since he last took his liberty for granted.

In 1995 a jury sentenced him to death for first degree murder. The district attorney's case was that two people were gunned down outside a highway bank in a well planned ambush. Only one of the women survived. The other left children to fend for themselves.

My purpose was to simply introduce myself as the person who would be working on his appeal. Once the formalities were exhausted, G.A. chatted about his love of music. We listed a number of mutual favorites then we sang them. Whether it was singing punctuated by laughter or laughter punctuated by singing I can't be sure. The medley eventually broken by his revelation that he hadn't "heard laughter in a long time".

On my way home I remembered these words together with those of another inmate on death row who said, "We're supposed to be vicious and cruel but this (death row) goes beyond anything anyone could do."

My overwhelming feeling was one of shame. Shame that I expected to be confronted by inarticulate, lifeless and feared characters who had been shadowed and defeated by both the physical and psychological brutality of their environment. As such I completely overlooked the formidable strength of the human spirit that can indeed rise above the bleak futility of an existence.

It is this spirit that monopolizes my memories.

Choosing Death

"I was just a young 'un when I got raped by Daddy."

She threw her arms up in utter exasperation. Only one reached into the air, the other remained chained to the table.

She was raised on a remote property in the deep South, in circumstances of extreme poverty. There was neither electricity nor running water. "In winter, it was so cold, we would pee in the bed to keep ourselves warm some." Summer was as equally merciless. In the oppressive heat, her parents left the children for a time, "me, I was so thirsty, I sucked my sister's li'l ole lip."

Her physical integrity was again violated as a teenager. She was beaten by her husband on their wedding night when he discovered she was not a virgin.

Summers came and winters passed and the marriage continued with abuse and violence. Finally, almost 20 years later, she mustered the courage and left him.

Tragically, this history is not uncommon for many of the woman on death row.

Since the death of the man who had stalked and harassed her when she refused his approaches, she had been in custody 14 years, eight of those on death row. "I feel safe in here and I sleep better than I ever did on the streets," she says without hesitation.

Of the 3717 people on death row in

the United States, there are 54 woman (1.45 per cent of the death row population). The first woman executed in the US was in 1632. There are 561 documented instances of the execution of female offenders. These 561 executions constitute less than 3 per cent of all confirmed executions in the US since 1608.

Though 14 years henceforth, there was a retrial approaching. This explained my attendance at the local county jail. During discussions, my client expressed the desire to abandon all her prevailing legal rights. "Let it be God's will," she explained without reservation.

To comply with her request was potentially tantamount to judicial suicide!

Consider that when an individual is on death row, one of the most traumatic feelings is the sense of powerlessness — the uncertainty as to the precise time when the execution is scheduled. Laborious appeals prolong the agony of uncertainty.

Consider also the conditions on death row; inmates are isolated in minuscule cells, their lifestyles marked by immobility and lack of stimulation, there is a general indifference to basic human needs, there are few visits and no comforts. There is nothing to do but ponder fate.

To end the suffering associated with being on death row, to put an end to a family's grief or to salvage a measure of grace and dignity a defendant may elect for execution.

Capital defendants often express a desire to concede to the State at some point during the criminal proceedings. Of the 302 inmates executed between 1973 and 1995, 37 (or 12 per cent) gave up their appeals.

The case law on the right to waive representation or appeal is well settled. A defendant may do so if the choice is made knowingly, voluntarily and intelligently. Once these criterion are met, the Supreme Court has made it clear that it will not stand in the way of an individual who chooses to expedite their own execution.

What are the obligations on the lawyer in these circumstances? Where a defendant wants to plead guilty to a capital offence, offer no mitigatory evidence or waive all appeals, should the lawyer adhere to instructions?

Considerations differ depending on the stage reached in litigation. A defendant must have a bifurcated trial, including guilt and penalty phases. The guilt phase considers the merits of the case, while the penalty phase considers evidence relevant to sentencing.

At the pre-trial stage, negotiations between the district attorney and defence lawyer might save the client's life. Where a client wants to plead guilty at this stage, the ethical guidelines allow the attorney to still enter negotiations. The authority to make decisions is left exclusively with the client. The lawyer's role at this point is primarily one of informing the client of all options. The decision to accept a plea thus rests entirely with the client.

If the client completely rejects all plea bargains and elects to go to trial, there is no conflict for the lawyer. If the client, however, rejects even a trial, ethical guidelines allow for intervention by the lawyer where there are reasonable grounds for doubting the client's competency due to any physical or mental condition.

When an individual is on death row, one of the most traumatic feelings is the sense of powerlessness — the uncertainty as to the precise time when the execution is scheduled. Laborious appeals prolong the agony of uncertainty.

During the penalty phase, the jury, which is the same body that convicted the defendant in the guilt phase, hears mitigating and aggravating evidence. The only possible outcomes are a sentence of life in prison (without parole) or death. Issues arise where a defendant does not want to present any mitigating evidence during this phase.

The consideration of mitigating factors is constitutionally required by the Eighth Amendment. Thus a lawyer has a legal basis for exceeding the duty owed to the client who does not wish to present to the court any mitigatory evidence.

Acting contrary to a client's instructions will, however, violate ethical requirements. Such concern is evaded by the appointment of independent counsel, thereby allowing for mitigating evidence to be placed on the record. This is essential for a carefully balanced penalty determination.

The third phase is the appellate process. There are three levels within this process. The first stage is the automatic, direct appeal where argument is heard as to whether there has been any errors made on the face of the record. The second stage involves a post conviction hearing where new evidence is introduced. Finally, after State appeal courts have been exhausted, challenges can be made in the federal jurisdiction.

Should a defendant decide to abandon the appeal process, it would not be improper for a lawyer to encourage the client to take another course of conduct.

In certain instances it may be prudent for a lawyer to pursue a declaration of incompetency, mental retardation or insanity. A "next friend" motion is the mechanism that allows the lawyer to seek the appointment of a guardian or take other protective action with respect to a client when the lawyer reasonably believes that the client cannot adequately give effect to his or her own best interests. Where the declaration sought is ultimately made, the likelihood of execution becomes more remote so long as the condition prevails.

Where the declaration is not made and the lawyer believes that the course of action chosen by the client is immoral or otherwise repugnant, the lawyer does have the option to withdraw. However, a lawyer who continues through the appeal process, contrary to instruction, is not without at least some ethical foundation. The issues that come into play here focus on the state's overall interest to preserve life, avoid cruel and unusual punishment and prevent the possibility of suicide.

The lawyer has both a legal and ethical backbone to intervene where a client has surrendered further legal challenge. Moreover, courts have the power to limit a defendant's desire to expedite proceedings unless the defendant can demonstrate the requisite competency to establish that the choice has been made knowingly, voluntarily and intelligently.

Where a competent defendant does choose death, the lawyer's option is limited to withdrawing from the case as considerations of human dignity and the right to self-determination take precedence.

The woman on death row, left chained to a table when expressing her judicial surrender, ultimately recanted her stated intention. Whether she is sentenced to death or released remains unknown.

The Gift of Time

FIGURES taken between 1989 and 1993 indicate guns are used in approximately seven out of every ten homicides — handguns being the weapon of choice since they can be easily concealed.

In 1998, a security guard was shot with one such handgun. A small amount of money was obtained. The victim was on the phone to his wife at the time. She heard four distinctive pops before the phone dropped.

A number of men were arrested including a teenager.

The courthouse was the most impressive structure in this particular rural county. It was surrounded by only broken, makeshift abodes, barely standing yet allowing some protection for many from the elements.

The judge in courtroom 1 busied herself with the daily list, rife with misdemeanors — the sort of mischief that got you into trouble at the time but later looked upon it without regret.

A relatively young man sat shackled and handcuffed with a social worker, stoically by his side. His competency hearing was the final matter called for the day. Was he able to properly instruct his legal representatives in relation to the charge of first degree murder of a security guard?

A number of experts gave detailed and technical evidence. Even the judge failed to understand a number of the responses.

After careful consideration of the evidence, the judge found the defendant incompetent to stand trial. The case was continued for 12 months.

I don't know whether the defendant had understood what went on, I don't know whether he understood why he was at court, I don't even know whether he knew where he was. But one thing was certain, tomorrow he would not be spending his 21st birthday on death row.

I took a right turn off Interstate 10, then a left turn on Highway 61. There were a series of tight turns that I carefully negotiated before reaching my ultimate destination. In just 30 minutes I had travelled from the vibrance of the French Quarter to a weary and depleted town, divorced from the promises of the American Dream.

An oil refinery was the epicentre of numerous trailers and project houses scattered in the surrounding area. I was somehow reminded of a plantation, only glossed over by the import of industrialization.

As my car came to a halt, I was greeted by the menacing looks of a number of local youths. When they saw a co-tenant smile at me with familiarity, they quickly lost interest.

I had come to pick up the young man's family and transport them to the secured forensic unit to celebrate his 21st birthday. With no public transport available and with little money to spare, they had not seen him since his arrest, four years ago.

A hint of their general isolation first surfaced as we drove through the capital. My passengers sat silently, fixated by their surroundings. The capital was only 30 miles into the drive and I wondered if they had ever been there before. I did not seek to absolve my curiosity.

A number of experts gave detailed and technical evidence. Even the Judge failed to understand a number of the responses. After careful consideration of the evidence, the judge found the defendant incompetent to stand trial. The case was continued for 12 months.

En route to the hospital conversation was strained. Whatever came to mind seemed so trivial in comparison to the subject of their anticipation. The radio countered the silence until our arrival.

We met Earl, a security officer at the front gate. His chin hung like a necklace and his belly battled to stay above his waistline. He moved with effort. Over the course of our induction, I noticed a compelling mix of stress and excitement overwhelm him. It became apparent that he was slowly losing control — his sedentary existence not accustomed to this level of activity. A query regarding a birthday cake instantly brought on a steady flow of perspiration. He advised that only commercially sealed products were permitted.

I politely listened while Earl went on to detail the infinite threats to security resulting from a breach of this rule. The others strategically took his soliloquy as an opportunity to hurry off and embrace their moment. I finally left Earl in mid sentence to purchase a rule compliant birthday cake.

Miraculously, the cake was able to withstand the veracity of Earl's inspection. Another officer was especially dispatched to deliver the cake. He was but 20, too young to drink in bars, but old enough to supervise troubled adults suffering serious mental illness.

Five people plus a soft drink vending machine cluttered floor space a queen-sized mattress could cover. The waiting room in the unit had never experienced the occasion of a 21st birthday party.

Conversation was caged: there were four uniformed guards in a window-fronted office immediately across the hallway, peering curiously into the room. The request for a knife to cut the cake brought the staring to an abrupt halt.

There were no streamers, balloons, candles or birthday songs. Just five people solemnly eating cake. I left the room.

I was met a short time later by the family. They carried the remainder of the cake — a remnant of an afternoon that had quickly transformed into a memory.

Outside, under a big, old oak tree, I was only able to muster forced smiles for the family portrait that I promised I would forward to the brother, sister and child they had left behind.

Doublespeak

Outside the realm of high art, language is intended to convey meaning. Ideally, it should do so accurately. Some writers and speakers betray these ideals, and use language as a sham to mask an intellectual void; or worse, as a stalking horse for quite different ideas they dare not acknowledge.

The world is awash with examples of the first sort — empty rhetoric dressed up in the finery of Rococo elegance, or vacuous new-Age gush, or the yawning post-modern fashion of abstraction piled on abstraction — all devoid of real content. These are the empty calories, the fast food of modern discourse. They are the staple of cheap magazines, talk-back radio and art criticism.

More interesting is the second sort: speech which serves to disguise the thing described. Depending on circumstances, it may be called tact, or diplomacy or doublespeak or lying. The proper description depends on the speaker's purpose.

Tact sets out to avoid giving offence. It suppresses or disguises an unhappy truth to spare the feelings of another. It is a down-payment on future favour. It is falsehood in the service of kindness. When tact is lifted from the personal to the national scale, it is called diplomacy.

Euphemism does not directly suppress the truth, but disguises it by substituting gentle words for harsher ones. Its success is limited in the long-term because the euphemism is readily identified with the underlying idea and takes on the colour of that idea. This process is readily seen in the progression of euphemisms regarding universal bodily functions, for example: water closet — WC — lavatory — toilet — loo — the Ladies/Gents room — restroom, etc.

The intention of euphemism is benign, if somewhat fey. Its excesses of delicacy inspired Dr Bowdler to strip Shakespeare of any questionable content. Bowdler's Shakespeare was published in 1818 — before the Victorian age, let it be noted — and was probably influenced by the attitudes which spawned Mrs Grundy. In Morton's play *Speed the Plough* (1798), Mrs Grundy was the neighbour whose narrow and rigid views about propriety were a tyranny for her neighbours.

Tact is kind; diplomacy is useful; euphemism is harmless and sometimes entertaining. By contrast, doublespeak is dishonest and dangerous.

In his closing address at Nuremberg, US prosecutor Robert Jackson said:

> Nor is the lie direct the only means of falsehood. They [the Defendants] all speak with a Nazi double talk with which to deceive the unwary. In the Nazi dictionary of sardonic euphemisms "final solution" of the Jewish problem was a phrase which meant extermination; "special treatment" of prisoners of war meant killing; "protective custody" meant concentration camp; "duty labor" meant slave labor; and an order to "take a firm attitude" or "take positive measures" meant to act with unrestrained savagery.

The war in Vietnam produced such doublespeak expressions as:

> Collateral damage (killing innocent civilians)
> Removal with extreme prejudice (assassination)
> Energetic disassembly (nuclear explosion)
> Limited duration protective reaction air strikes (bombing villages in Vietnam)
> Incontinent ordnance (bombs which hit schools and hospitals by mistake)
> Active defence (invasion).

When Jimmy Carter's attempt to rescue American hostages in Iran — a catastrophic strategic blunder — he described it as "an incomplete success". When Soviet tanks invaded Prague in 1968, the manoeuvre was described as "fraternal internationalist assistance to the Czechoslovak people".

Doublespeak uses language to smuggle uncomfortable ideas into comfortable minds. The Nazi regime were masters at it. The Howard Government is an enthusiastic apprentice.

The victims of protective reaction air strikes, or incontinent ordnance, or active defence, or fraternal internationalist assistance often flee for safety. A small number of them arrive in Australia asking for help. They commit no offence under Australian or international law by arriving here, without invitation and without papers, in order to seek protection. Nonetheless the Australian Government refers to them as "illegals". This piece of doublespeak is not just for tabloid consumption: it is official. When the Human Rights and Equal Opportunity Commission held an inquiry into children in detention in Australia, the Department of Immigration and Multicultural and Indigenous Affairs made a submission. That submission was stored on the Department's website. The full web address of the submission showed that it was held in a sub-directory called "illegals".

Like all doublespeak, "illegals" is used for a purpose: these people are immediately locked up without trial. No doubt it seems less offensive to lock up "illegals" than to lock up innocent, traumatised human beings.

They are also disparaged as "queue jumpers": a neat device which falsely suggests two things. First that there is a queue, and second that it is in some way appropriate to stand in line when your life is at risk.

When the "illegals/queue jumpers" arrive, they are "detained" in "Immigration Reception and Processing Centres". This description is false in every detail. They are locked up without trial, for an indefinite period — typically months or years — in desert camps which are as remote from civilisation as it is possible to be. They are held behind razor wire, they are addressed not by name but by number, and they slowly sink into hopelessness and despair.

When the new prison for asylum seekers at Port Augusta is completed it will have, in addition to the usual layers of razor wire, an electrified fence. But in the doublespeak of the Department of Immigration, these are officially called "energised fences". Wait for the energised cattle prods.

When a "detainee" (doublespeak for prisoner) is removed from a detention centre for deportation, the process is generally done in the dead of night and may involve forcibly tranquillising the person; it is generally done by a squad of ACM guards in costumes reminiscent of Darth Vader. This alarming procedure is sanitized as "an extraction".

In the desert camps, dormitories are regularly checked during the night: at 8.00 p.m., midnight and 4.00 a.m., by shining a torch in the face of each detainee and demanding to see their identification. This is a "security check". It also fits within one of the standard definitions of torture.

If detainees are driven to the desperate extreme of suicide or self-harm, Minister

Ruddock disparages this as "inappropriate behaviour" designed to "manipulate the Government". By that doublespeak, the victim becomes the offender.

On the last sitting day in June, the Parliament passed the Migration Legislation Amendment (Procedural Fairness) Bill 2002. The title is one of the most audacious pieces of doublespeak ever to blight the pages of Hansard. The measures affect the ability of courts to review decisions of the Refugee Review Tribunal. The Tribunal does not afford a right of legal representation, its members are short-term appointees, its decision-making processes are often unfathomable except by reference to government policy. Its proceedings are frequently not fair, nor are they calculated to be. The requirements of natural justice have been driven out by repeated amendment. The Procedural Fairness Bill reduces to vanishing point the scope for judicial review of Tribunal decisions. The Migration Act now practically guarantees procedural unfairness in decisions which have life and death consequences.

The truth of our treatment of refugees is deeply shocking. Innocent people are locked up in dreadful conditions and for an indefinite period; they are deprived of sleep and isolated from the outside world; they are forcibly removed as circumstances require. They live behind razor wire and (soon) electric fences. Their powerful will to live is gradually eroded until — all hope lost — they are driven to self-harm. The truth is uncomfortable for the major political parties: they conceal it in doublespeak in the hope that it will be alright.

See how we have emulated pre-war Germany, in both action and language.

In Nazi Germany (before the concentration camps became death camps) "undesirables" were "placed in protective custody" or "resettled". In Australia "illegals" are held in "Immigration Reception and Processing Centres" behind "energised fences", receiving regular "security checks" and occasional "extractions". Their "inappropriate behaviours" are not allowed to "manipulate public policy".

In 1946, George Orwell wrote *Politics and Language*, in which he exposed the deceits and devices of doublespeak. He might have thought that it would lose its power once its workings were revealed. But he would be disappointed. Language is as powerful now as in 1933: it can hide shocking truth, it can deceive a nation, it can hand electoral victory to the morally bankrupt.

Julian Burnside

Asylum Seekers Detained Too Long

THE detention of asylum seekers can only be justified for a defined purpose and a defined period according to Tony Abbott, President of the Law Council of Australia.

Mr Abbott was commenting in the wake of concerns expressed by a United Nations working group, currently investigating Australia's detention centres. He said, "Whilst the Law Council accepts that the Government has a responsibility to protect the people of Australia within its borders, detention without trial should only be necessary for a limited period to carry out appropriate checks on health, identity and security."

"Once these checks are satisfactorily completed, asylum seekers should be released into the community with reporting requirements imposed to provide ongoing monitoring by officials. Australia's acceptance of the 'International Covenant on Civil and Political Rights' endorses the rights of everyone in this country to be free of arbitrary arrest or detention."

Mr Abbott stressed, "There is great concern within the community that apart from broader issues of humanitarian concern, and the economic efficiency of the policy, the Government is in breach of its own law. The Government has a long-standing protective duty to all children in Australia, whether in detention or not — the rights of children should be of paramount concern."

"The Law Council has welcomed the Government's review of some aspects of their policy on mandatory detention but doesn't believe they have gone far enough to meet the concerns that we've expressed on a number of occasions," Mr Abbott concluded.

Law Council Supports Federal Court's Integrity

THE Law Council of Australia has full confidence in the integrity of the Federal Court of Australia to approach its task of interpreting legislation and upholding the law. The Court has been the subject of comment over migration appeals by asylum seekers. The appeals involve important questions about the meaning and constitutional validity of migration laws. These questions clearly fall within the Federal Court's jurisdiction.

Protecting the judicial process is of paramount importance to the Law Council and the Australian public. External pressures should not be exerted on any court of law, nor should the public be concerned about our court system being compromised in reaching its decisions.

The Law Council anticipates assurance from the Government that the integrity of the Court will be respected and public confidence in the Court will be reinforced.

Caterina's Cucina: The Zucchini Flower of Queen Street

SHOULD the male or female zucchini flower be stuffed? This was the subject of conversation I had with Caterina at her subterranean Italian restaurant in Queen Street. The traditional culinary creed decrees that only male flowers should be stuffed — the female should be left as plants which are deprived of their underdeveloped fruits, continue to flower for several months most profusely, each producing a great number of young gourds, which gathered in that state, are exceedingly tender and delicately flavoured: (See *Vilmorin-Andrieux* 1883, English Edition p. 183).

Incidentally the vegetable is more correctly called a zucchini, rather than a courgette as it was the Italians who introduced them to France. They only entered Anglo-Saxon culinary at a late stage mainly through the writings of Elizabeth David in the 1950s. The English adopted the French courgette.

Enough of such historical matters and back to food. Caterina had announced that stuffed zucchini flowers were on the menu (they are now out of season) and that the chef Rita Macali had indeed stuffed the female variety with a delicious and traditional concotion of mozarella and anchovies. Male or female they were delicious!

If you lunch at Caterinas much of the menu will be in the spoken form. Either Caterina or her young and talented off-sider Tanya will recite a very long list of specials which can range from soups such as stracciatella consisting of chicken, breadcrumbs and beaten egg — the penicillin of the Italian Mamma — a very thick cauliflower soup topped with blue cheese tortellini, many varied pastas, such as pigeon stuffed ravioli in a rich pigeon jus, two or three different risotto, some with Italian sausage, other vegetarian, fish in simple and not so simple form such as snapper fillets on a bed of stewed capsicums, tomatoes, zucchini

and potato, a large crumbed pork cutlet with velvety mash, or winter stews of veal, lamb or shanks. All served with a different mix of vegetables for each dish which is a pleasant change from the new fangled "add on" of extra chips, dull rocket salad, or spinach.

Some at my table (not hard to guess) complained that they could not retain so much information at once — it all sounded so good it was difficult to choose. It was suggested that there should be the ubiquitous blackboard. I disagree. To hear such a list recited without notes is a theatrical experience which whets the appetite and causes discussion of food — and wine to match.

There is a menu which in itself is long and contains the more traditional — such as spaghetti marinara, steaks, veal scaloppini and desserts. For those with waning eyes, and considering the subdued lighting of the place, perhaps both food and wine menus could be printed in bolder type.

Caterina's has been operating successfully for a number of years — it should have been reviewed earlier — but for those who have not attended it provides excellent fare, service and ambience. It is a basement restaurant in Queen Street between Little Bourke and Lonsdale Streets. It was formerly the Horse and Hounds, and some of the old English pub fittings remain.

It has been rather begrudgingly reviewed by the *Age Good Food Guide* because it normally contains "suits" "in a club like atmosphere". Therefore as *The Age* doesn't like it much, it should appeal to the majority of the Bar and Bench. It seems that the latest food writing fad is that restaurants must be "cutting edge" places, full of concrete, stainless steel, noise, and suitless dot.com internet types on mobiles accompanied by anorexic females wearing dull jeans and brownish colours which were "in" in the early 60s. Food must be "Pacific Rim", or "East meets West", or "Anglo-Morrocan" which means it must be stacked up, with the spiced mash (now very, very much in) on the bottom, with the drizzled eggplant next, some kind of protein, and much rocket, with perhaps little pieces of fried some or other adorning this twin tower of gastronomy. Noise and supercilious service must accompany this experience.

But this is not Caterina's, although you can have the mash underneath if you want. The tables are well spaced with linen and the atmosphere subdued and yes perhaps clubish in an Italian sort of way.

There is a large bar which is well frequented from the late afternoon (late lunches) to early night (regular after work drinkers). Indeed famous members of the Family Law Bar can be viewed regularly at the bar, extolling thoughts on most things.

At my most recent lunch the assembled throng (including a judge) all agreed that their lunches were excellent. A few strayed into the dessert menu where the "semi-freddo", semi-frozen Italian ice-cream was excellent. Also a cheese platter is available.

The wine list is wide ranging. Good Italian food often brings a craving for good Italian wine. Excellent advice is always on hand. A Pieropa Soave Veneto '99 and a Castello di Farneltella Chianti '99 went well with the assortment of pigeon, fish and pork.

It is good to see Italian food that is both rich and different. Many new Italian restaurants claim they have moved away from the "Lygon Street formula" of tasteless watery tomato sauces, and veal parmigiana. They return to traditional pot foods of regional Italy. Unfortunately this often means "peasant" food in the form of pasta scattered with breadcrumbs and pesto and no more, dull one-dimensional stews, and bland fish and meat. Indeed — sacrilegious as it may sound, I have not had a really good meal in Rome which equals the food of Melbourne Italian restaurants such as Caterina's. Purists would say that our Italian food is created to suit our Australian tastes and that simple is better. I disagree.

As for prices — they are not cheap but not expensive. You could just have a pasta and a glass of wine — on the other hand you could . . .

CATERINA'S CUCINA and BAR
Chef: Rita Macali
221 Queen Street, Melbourne
Open for lunch Monday to Friday
Bar open until eightish
Available for private functions and dinner by arrangement
Telephone: 9679 8488
Prices —
Entrees: $12–$18
Mains: $22–$26
Dessert: $9.50–$11.50

Paul Elliott QC

Annual Box Trophy

ON 8 December 2001 the annual J.B. Box Trophy was played between the Bar/Bench and the Solicitors at the Royal Melbourne Tennis Courts at Richmond. J.B. Box had been a County Court Judge and a devotee of Royal Tennis. Justice Murray Kellam donated the Cup. Regrettably, save for one occasion, the trophy has been won by the solicitors. Last year proved no exception. However, some amongst their ranks have seen the light of day and are coming to the Bar, which may bring the trophy back.

A fine lunch was had after the trophy, with much wine drunk whilst the finer points of the game were discussed. The results were:

Murray Kellam *d* Stewart McNabb	6-4
Alan Kirsner *d* Howard Mason	6-2
Jason Pennell *d* John Dixon	6-4
Tony Melville *d* John Kaufman	6-4
David Stagg *d* Carrie Rome-Sievers	6-2
John Lewisohn *d* John Dixon	6-2
H. Mason/M. Kellam *d* S. McNabb/A. Kirsner	6-2
D. Stagg/A. Melville *d* J. Pennell/C. Rome-Sievers	6-2
S. McNabb/A. Kirsner *d* J. Kaufman/M. Kellam	6-4
J. Dixon/A. Melville *d* J. Lewisohn/C. Rome-Sievers	6-3

Murray Kellam congratulates Alan Kirsner.

John Dixon, David Stagg, Tony Melville, Stewart McNabb, Alan Kirsner, John Lewisohn, Carrie Rome-Sievers, John Kaufman, Jason Pennell and Murray Kellam.

Principles of Contract Law

by Peter Heffey, Jeannie Paterson and Andrew Robertson
Law Book Company 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 viewpoint.

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 standpoint.

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

Equity and Trusts in Australia and New Zealand (2nd edn)

by G.E. Dal Pont and D.R.C. Chalmers
Law Book Company
pp. 1–xxiv; 1–1046

THIS book was first published in 1996 and the second edition is very much welcomed. There is always a difficulty in reviewing the second edition, as the reviewer may tend to concentrate on the changes in that edition rather than to consider the broad sweep of the book. Equitable relief, in its various forms, has become increasingly important in providing a remedy where the legislature has yet to catch up with economic and social changes.

The authors have organised the chapters into various parts which readily assist the reader in being able to isolate the particular problem, without the necessity to search through an index. To give an example, under Part 4 the heading is "Unfair Outcomes". Within that part the authors discuss part performance, relief against forfeiture and penalty clauses, subrogation contribution and marshalling, and deceased's estates.

Whilst much has been written in relation to the fiduciary relations, the authors discuss this difficult problem with precision and clarity. As may be expected a director's duties to the company and to the shareholder are discussed as well as the solicitor's duty to his or her client and a partner's fiduciary duty towards the other partner. What is of particular interest in the discussion is that the authors provide an analysis of the fiduciary duties that stem from joint ventures and the scope of that duty. Similarly, the authors discuss the problems in relation to subrogation and in particular those that arise out of the debtor creditor relationship.

In a separate section, the nature of the trust is well discussed. The nature and use of a unit trust is discussed at some length. The unit trust employed in a commercial context has become a trading vehicle and presents difficulties in terminating that trust as opposed to a small proprietary limited company in the nature of partnerships. The authors include, amongst other matters, a table of comparison between the trust companies and partnerships which is very helpful.

In all the book is extremely helpful and a welcome addition to a practitioner's library. For those who are practising in this difficult field, the book provides a ready reference to a number of sources.

John V. Kaufman

Understanding Company Law (10th edn)

by Phillip Lipton and Abe Herzberg
Law Book Company, 2001

THE authors inform us that this edition of *Understanding Company Law* represents what they hope to be an innovative approach to teaching and learning company law. It is part of a "mixed media package" which integrates the text with on-line sources.

As one may expect, the book deals with the usual topics that one may expect to be discussed in such a book. However, the style and format of the book is accessible to the reader and is concise in the points that are made.

To take an example, Chapter 5 deals with the company's relations with outsiders. At the commencement of the chapter, the contents of the chapter, together with page references, are set out in tabular form. This enables the reader to go to the particular section without the necessity of trawling through the index to the book. The authors have compiled, in bullet form, a list the key points. A useful tool, which they employed, is to highlight those points in grey. Similarly, important quotations from the authorities which appear in the chapter are so highlighted. When dealing with the statutory assumptions which are set out in section 129 of the Corporations Law, the authors construct a table which sets out each element together with subsection references. In a separate table they set out the exceptions to the assumptions. At the end of the chapter, a bibliography appears which sets out the relevant text in relation to that chapter. This is extremely helpful as it provides a selectivity, which is absent from a general bibliography.

Each of the chapters are dealt with in a similar fashion. The language that is employed by the authors is clear and economical. It sets the reader on path which

opens the way for more detailed research, if that is required.

Whilst this book has been designed for use by students, it does provide a ready commencement point for the more experienced practitioner. It is a very useful book.

John V. Kaufman

Alternative Dispute Resolution

By T. Sourdin
Lawbook Company, 2002
pp. i–xiii, 1–295
ISBN 0 455 21820 X

THIS book is one of a number now existing on the topic of ADR and mediation in particular. In his foreword to the book, Sir Laurence Street says that the "ADR evolution has progressed in recent decades to the point where the letters 'ADR' have acquired a generic significance". Those letters, he considers, have masked the important distinction between deciding and resolving disputes. He says, "Judges do not resolve disputes coming before their courts; they decide disputes or adjudicate on them."

The purpose of the book is described in the preface as "to introduce concepts and skills and to map issues that are occurring within the ADR area". Chapters 1 and 2 of the book deal respectively with "Conflict and Dispute Resolution" and "Processes and Practice". Chapter 3 deals with "Skills" such as so-called "foundation skills" of neutrality and impartiality and listening. Chapter 4 deals with "System Objectives". Chapter 5 deals with "Court-based ADR". I found this chapter to be far too generalized: there was only passing reference, without more, to the fact that "the Victorian Civil and Administrative Tribunal makes use of mediation and conferencing processes". Chapter 6 deals with "Multi-option Civil Justice" which refers to multi-door systems in the one place of dealing with disputes involving adjudication and ADR processes. Chapter 7 deals with "ADR Outside the Litigation System", while Chapter 8 deals with "System Design Issues" which relates to such things as mediation standards. Chapter 9 deals with the interesting topic of "ADR and Terminology", while Chapter 10 deals with "Future Trends". Appendices A to F have helpful inclusions such as the NSW Law Society Mediation and Evaluation Information Kit and Dispute Resolution Clauses.

This book is a useful addition to the works already existing in this developing area. It has, however, two annoying features: it lacks tables of cases and statutes (so that you cannot find out where in the text some particular case or statutory provision is referred to); and it has an undue emphasis on the law in New South Wales (and this automatically limits the value of the book in other jurisdictions). Those aside, the book is a valuable resource for anyone wanting a practical guide on topics in the area.

Damien J. Cremean

Family Provision in Australia (2nd edn)

by J.K. de Groot and B.W. Nickel
Butterworths, 2001
pp. i–xxxviii, 1–249,
Appendices 251–379, Index 381–390

THE second edition of *Family Provision in Australia* comes nearly a decade after the first edition. In that time there has been a continuing stream of important judicial decisions relevant to "testator's family maintenance" and legislative reforms including in Victoria the important changes to Part IV of the *Administration & Probate Act 1958* introduced by the *Wills Act 1997*. "Testator's Family Maintenance" in Victoria has now been replaced by much broader category of persons who may have a claim on a deceased's estate subject to the considerations now set out particularly in s. 91 (4)(e) to (p) of the Administration & Probate Act.

Family Provision in Australia is designed for use by practitioners. To this end it contains relevant family provision legislation in each state (Appendix III) together with forms and precedents and a useful "checklist", also on a State by State basis. The forms and precedents found in the Appendix are supplemented by Chapter 10 where there is discussion of relevant procedural matters in each State. No doubt as a reflection of the diversity of legislation, practice and procedure there are contributing editors for each State other than the home State of the authors.

This State by State approach to legislation and practice ensures that this work is not just a general text but provides specific guidance to relevant law for practitioners in each jurisdiction.

The authors have thoughtfully prepared a number of tables which enable comparison over time and between different jurisdictions (and legislative regimes) of cases dealing with considerations as diverse as the family farm, widows (including separated and de factos), children (including infants, unmarried/married daughters and adult sons) and large estates. Care of course must be taken in referring to these tables as clearly the law and community attitudes vary over the years and between jurisdictions, and of course each case must be considered on its specific merits against the background of the applicable State legislation. Nevertheless the tables provide an interesting background against which the merits of various claimants may be considered.

Family Provision in Australia is an excellent text and practical resource. While succession law and practice may not be as fashionable as takeovers, as sexy as "sports law" or as exotic as "e-law" it nevertheless remains an important and technical area of practice for many practitioners. *Family Provision in Australia* is commended to those practitioners.

P.W. Lithgow

Butterworths Tutorial Series: Equity and Trusts

by P. Radan, C. Stewart and A. Lynch
Butterworths, 2001
pp. i–xlii; 1–427; Index 429–450

THIS book unfolds as a tempting invitation to readers to discover the mysteries and intricacies of equity and trusts. This book adopts the same problem solving approach that is used for all the titles in the *Butterworths Tutorial Series*. The equity chapters cover discrete topics, arranged in much the same way, as one would expect to find the development of topics in an equity course synopsis or student reading guide. The collection of abstract equitable rights and remedies covered in Chapters 1–16 take on a more concrete form in the trusts component, which occupies the remaining eight chapters. Like the equity chapters, the titles of these chapters also resemble a typical student reading guide for the study of trusts.

Each chapter is prefaced with a concise coverage of the law that includes facts and excerpts from relevant authorities. Some basic material for tutorial discussion, which takes the form of tutorial problems and suggested solutions, or

simply questions that test one's level of understanding follows this. For readers wanting more than the concise statement of the law, a list of references and further reading is collected at the end of each chapter.

The book is a well-written and well-organised text designed to engage, educate and encourage a student of equity and trusts who must learn to identify and apply some often fascinating and idiosyncratic principles. In fact, any reader wanting a clear and comprehensive work that includes reference to significant authorities would find the book a useful supplement to their "equity and trusts" bookshelf. Where relevant, statutory references are made to all Australian jurisdictions.

Chapter 1 appropriately traces the development of the equitable jurisdiction and the principles of equity. The historical backdrop, essential to understanding equitable concepts and principles, is continued in Chapter 2, with a review of the relationship of law and equity and the judicature system. Subsequent chapters deal with basic aspects of equity and trusts that one expects to find in a standard text. The extent and depth of analysis tends to vary according to the contemporary relevance of the issue under discussion.

The fact that a considerable proportion of the book is devoted to equitable remedies acknowledges the diversity of equitable applications. Equity's mixture of remedies based on flexible concepts of social justice, equality and discretion is juxtaposed to the common law's predictability and non-discriminatory nature. The authors deserve praise for balancing critical analysis with the need to provide a succinct package of basic and up-to-date information. They contrast different remedies and link related concepts. They have not avoided appropriate coverage of contentious issues such as the application of s.134 of the *Property Law Act 1958* to equitable interests or the priority rules for competing equitable interests after *Moffet* v *Dillon* [1999] 2 VR 480.

The book is inexpensive and provides the reader with a basic book on equity and trusts which is current, compact and comprehensive.

Joycey Tooher

Justice in Tribunals

By J.R.S. Forbes
Federation Press, 2002
pp. i–xlviii, 1–299, Index 301–318

JUSTICE in Tribunals is a revised and rewritten version of *Disciplinary Tribunals* which appeared in two editions in 1990 and 1996. Consequently, *Justice in Tribunals* is effectively the third edition of the earlier work, albeit with an extended scope and incorporating much of the new and ongoing developments in administrative law.

The text deals briefly with statutory tribunals. The main focus of the work is on domestic or private tribunals. Of course many tribunals are hybrid in nature, often arising in a private context but within a statutory regime. Examples of hybrid tribunals are in areas such as unions, universities, political parties and sporting bodies.

The two principal aspects of natural justice — the hearing rule and the rule against bias are extensively discussed and analysed. There is particular emphasis on all the nuances relevant in applying administrative law principles to the many and varied forms of private tribunals outside the regular court hierarchy. The focus of the work is operating the disciplinary or "enforcement" aspect of these tribunals' jurisdiction, however, many of the principles are of general applicability to tribunals whether public or private.

Aspects of natural justice such as the right to be heard, have notice of the allegations, to counsel, to be provided reasons and to an appeal are all extensively discussed, as are all aspects of the rule against bias.

The remedies potentially available to an aggrieved party such as prerogative writs, injunctions and declarations, damages and statutory appeals and judicial review are also fully dealt with in a discrete chapter. Of course private tribunals may not generally fall within the Administrative Decisions (Judicial Review) Act or similar State legislation, nevertheless the courts have adapted and applied the common law to make many private tribunals amenable to judicial review.

There is a separate chapter in relation to administrative law requirements reluctant to enquiries such as Royal Commissions and Commissions of Enquiry.

Justice in Tribunals provides a thoughtful and comprehensive analysis of the intertwining of common law and statutory developments in this burgeoning field. There can be no doubt that more and more traditionally private or domestic tribunals are subject to challenge and review. The law requires many such tribunals to act fairly and to be seen to act fairly, however, the scope of operation and content of these requirements is still evolving. Increasingly the courts provide those affected by decisions of private tribunals with an avenue for review, and consequently there is developing a substantial body of administrative law principles applicable to such tribunals. *Justice in Tribunals* provides a significant guide into the development and application of these principles. The author is to be commended on this new text which follows on and develops the excellent early work of *Disciplinary Tribunals*. The book provides clear guidance in the rapidly developing area of the law applicable particularly to domestic tribunals, their practice and procedure.

P.W. Lithgow

Conference Update

2–3 September 2002: Melbourne. Current Issues in Regulation Enforcement and Compliance. Australian Institute of Criminology. Contact Conference CoOrdinators. Tel: (02) 6292 9000. Fax: (02) 6292 9002. E-mail: confco@austarmetro.com.au.

12–13 September 2002: Sydney. Crime Prevention. Contact Conference CoOrdinators. 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–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: Melboume. 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)38753563. Fax: (07)3875 6634. E-mail:S.Lockwood-Lee@mailbox.gu.edu.au.

20–22 October 2002: Sydney. IBA's 2002 Conference presented by ALIA. Contact Conference Secretariat. Tel: (02) 9241 1478. Fax: (02) 9251 3552. E-mail: tech just@icmsaust.com.au.

20–25 October 2002: Durbin, South Africa. Third AIJA Technology for Justice Conference. Contact International Bar Association. Tel: +44(0) 20 7629 1206. Fax: +44(0) 20 7409 0456.

26–31 October 2002: Melbourne. XVI World Congress 2002 presented by International Association of Youth and Family Judges and Magistrates. Contact The Meeting Planners. Tel: (03) 9417 0888. Fax: (03) 9417 0899. E-mail: ltrevenar@meetingplanners.com.au

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