VICTORIAN BAR NEWS

No. 122 ISSN 0150-3285 SPRING 2002

New Practitioners Admitted by the First Women's Full Court of the Supreme Court

Welcome: Justice Nettle, Justice Dodds-Streeton ☐ Obituary: Justice Faltman ☐ The 2002/2003 Victorian Bar Council ☐ Recent Changes to Tax Laws Affecting Barristers ☐ Communism Embraces Capitalism: Reflections on Chinese Law ☐ Horses for Courses ☐ Terror Nullius ☐ CLE Launch at the Essoign Club ☐ Victorian Bar on the Conference Trail ☐ Kiddle Revisited ☐ Music in Court ☐ Prosecuting in the South Pacific ☐ Morality is Lawyers' First Responsibility ☐ Unveiling of Portrait of the Hon. William Crockett AO, QC ☐ The Tom Fantl Art Exhibition

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Cover:
At page 17, Victorian Bar News *publishes a welcome to Her Honour Justice Dodds-Streeton, following her appointment to the Victorian Supreme Court bench on 31 July 2002.*
Her appointment enabled a Full Court of women justices comprising Justices Balmford, presiding (centre); Warren (left); and Dodds-Streeton (right), to preside at the admission ceremony for new practitioners on 5 August.

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for the year 2002/2003
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On War and Peace and Renovations

ALL THE WAY WITH LBJ

BY this time this issue goes to press, it may be that we have a US-led invasion of Iraq.

Not to invade Iraq, apparently, is to allow terrorism to go unchecked and to allow Saddam Hussein to continue with the development of weapons of mass destruction. It is a "necessary pre-emptive strike".

What is proposed is possibly analogous to invading Germany when Hitler, in defiance of the treaty of Versailles commenced building up Germany's naval strength. However, when we note Mr Chaney's comment that the Americans will go into Iraq as "liberators not conquerors" the analogy may more clearly be drawn with the German invasion of Czechoslovakia to protect the interests of the Sudeten Germans.

One must but question the legitimacy of any attack on Iraq not sanctioned by the United Nations.

So far as we are aware no Iraqi has been shown to have been involved in the events of September the 11th — or, as we used to write it in this country, 11th September. Osama Bin Laden is not an Iraqi and none of those who are shown to have been involved in the attack on the United States are Iraqis.

What happened in New York on 11 September was horrifying. But what happened on that day (although more unexpected) was not as horrifying as the fire bombing of Dresden during World War II. Nor did it change the world as did the events of 17 July 1945 when the United States Air Force dropped a nuclear bomb on Hiroshima.

The reaction to the destruction of the Twin Towers has already led to a greater number of civilian deaths in Afghanistan than the number who were killed in the Twin Towers.

The ideology was clear. We were fighting to stop the implementation of the domino theory and the spread of the communist empire. Today it is generally recognised that our involvement in that war was unjustified.

We went "All the way with LBJ" in Vietnam. We were wrong. And we know we were wrong. We should not make the same mistake again.

RENOVATION OF ODCE

On a more domestic and immediate point, the renovation of Owen Dixon East is generating a considerable amount of unhappiness. The source of the unhappiness lies in the fact that many people do not want the upgrade (or the extent of the upgrade) which is being carried out.

Tenants of ODCE are required to vacate their rooms while the upgrade takes place and, unless "permanently displaced" will then move back to their old rooms. BCL is providing alternative accommodation during the period of "vacating". But to move all one's books and — if one is lucky enough to have them — all one's briefs and then to unpack them for a relatively short period of time is extremely disruptive. It is even more disruptive to leave the books packed and try to practise effectively out of a suitcase.

When the inhabitants of ODCE return to their rooms they will find that many of the fittings have been stripped. They will either have to settle for new shelving provided or will need to replace the old bookcases. More significantly rents will have increased for an upgrade of premises which, it appears, most of those living in ODCE do not really want.

There is also a concern among many: (a) that the cost of the upgrade is disproportionate to the benefit to be derived by the Bar or to any increase in the value of the building to BCL; and (b) since there is no depreciation reserve or building reserve to be called upon that the liability incurred as a result of the upgrade will need to be met — and ultimately that means that it will be met out of the pockets of members of the Bar. And the question many ask is "Is it worth it?"

NEGLIGENCE IN THE 21ST CENTURY

When Lord Atkin, faced with a putative snail in a bottle, coined his definition of the duty of care which each of us owes to his or her neighbour, he did not realise that he was creating a serious problem for the insurance industry.

Of course, Lord Atkin was not concerned with insurance. He was concerned with the "good old days" when tort law acted both as a deterrent and as a provider of compensation. There has been much change since 1932. Three matters

are highly relevant to the present problem:

1. The development of medical science. This has enabled the medical profession to save the lives of many people who would even 50 years ago have died very shortly after the relevant injury was suffered. The cost of the equipment used to maintain these lives is also high.
2. A significant increase in wages and salaries, even in terms of the cost of living and related to an increase in the quality of life which the average person expects.
3. A growing tendency to equate a mistake or an error of judgment with negligence.

We seem to have lost touch with the test of the man on the Clapham Omnibus, and with the concepts of "reasonable" behaviour and "reasonable" care. We have now, perhaps, come to think in terms of some "absolute" duty of care.

A TIME OF CHANGE

It is a time of change in the Supreme Court with many new faces appearing and many old and familiar faces departing. Since the last issue of *Bar News* went to press we have seen the departure of Justice McDonald into well-earned retirement, and of Justice Pagone who has departed the Bench which he graced for such a short time to assist what the late Peter Clyne used to refer to as the "fiscal fiend". Tragically we have also lost Justice Flatman who was accorded such a very short time to demonstrate his judicial skills. His death is a loss to the Bench and to the profession.

There are three new faces on the County Court bench: Judge Bourke, Judge Coish and Judge Gaynor. We welcome the appointment of all three. We regret that due to a breakdown in logistics their formal welcomes do not appear in this issue. But they will be published in the summer issue.

The Editors

New Bar Council, New Essoign Club

BAR COUNCIL ELECTIONS

BAR Council elections were held in September, and I record my thanks to the previous Bar Council for its work over the past year. In particular, I thank the retiring Bar Council members: Brind Zichy-Woinarski QC, James Delany, Justin O'Bryan, Katherine Bourke, Paul Duggan, James Gorton and Peter Clarke who made an important contribution to the work of the Bar Council. I congratulate the newly elected members: Michael Rozenes QC, Michael Crennan S.C., Michelle Quigley, Fiona McLeod, Anne Duggan, Debra Coombs and Kim Knights. It is particularly pleasing that our members have elected women to the Bar Council in each category, seven in all.

CHANGES TO THE BAR CONSTITUTION

A number of amendments to the Bar Constitution were passed at the Annual General Meeting in September. In particular, the Statement of Purposes was amended to include the promotion of the proper administration of justice, including making recommendations with respect to legislation, law reform, rules of court, and the business and procedure of courts, and to comment publicly for that purpose.

Other amendments to the Constitution provide for Public Defenders to be able to remain on the Practising List, in the same way as Crown Prosecutors, and clarify Bar Council election rules to require eligibility on the part of both those who nominate candidates, and the candidates, at the date of closing nominations; and to cover the situation of candidates who withdraw, cease to be eligible, or die before the election.

VICTORIAN BAR COMMENTARIES ON PROPOSED LEGISLATION

Increasingly, the Bar is consulted by government, and by the opposition, on proposed legislation, and by courts, and by various law reform commissions. Recent submissions have been on Federal judicial remuneration; on child representative guidelines, and on expert evidence, in

the Family Court; on law reform proposals to extend property and maintenance liability to a variety of "close personal relationships"; on a review of Australia's commercial arbitration legislation; and on a range of proposed amendments to Victorian legislation. Many of the Bills commented on have been in criminal law, and the Criminal Bar Association and its members continue to do outstanding work in this respect.

LAW COUNCIL OF AUSTRALIA AND PROTECTION FOR THE INDEPENDENT BARS

The Constitution of the LCA has been amended to provide for a tiered voting system so that constituent bodies with less than 1000 members have one vote, those with 1000 or more members have two votes, and those with 6250 or more members have three votes. This is to reflect not only membership numbers, but the levels of financial contribution, which is on a per capita basis.

The interest of the independent Bars in matters directly related to litigation, advocacy or the judiciary is protected by the qualification to the tiered voting provision that, in relation to these matters, each constituent body has only one vote. This qualification was proposed by the Victorian Bar, and passed unanimously.

Following the election at the Annual General meeting in September, Mr Ron Heinrich of the Law Society of New South Wales is President, Mr Bob Gotterson QC of the Queensland Bar is President-Elect, Mr Stephen Southwood QC of the Law Society of the Northern Territory is Treasurer, and Messrs John North of the Law Society of New South Wales and Tim Bugg of the Law Society of Tasmania are Executive Members.

RECEPTION FOR NEW APPOINTMENTS TO THE JUDICIARY

The first annual reception for new appointments to the judiciary will be held in the Essoign Club on Wednesday 30 October 2002 from 5 p.m. to 7 p.m. We shall be recognising this year Justices Habersberger, Osborn, Nettle and Dodds-Streeton of the Victorian Supreme Court; Judges Nicholson, Hicks, Smallwood, Cohen, Sexton, Hogan, Lawson, Gullaci, Bourke, Gaynor and Coish of the County Court; Justice Young of the Family Court of Australia; and Federal Magistrates Michael Connolly and John Walters. All members of the Bar and judiciary are encouraged to attend.

VICTORIAN LEGAL AID

The Legal Aid Task Force of the Bar and Law Institute continues to work on the crisis in legal aid funding. There have been no increases in the Legal Aid fee scales for criminal matters in the Magistrates' Court since 1993. Since then, the Consumer Price Index has gone up 22 per cent, Supreme Court fee scales have gone up 26 per cent, Victorian Public Service salaries have gone up 28 per cent, police salaries have gone up 35 per cent, and parliamentary salaries and allowances have risen significantly. The 1997 Price Waterhouse Urwick Review of Barristers' Fees Scales in Victorian Legal Aid Criminal Matters commissioned by the Bar Council reported that the real incomes of criminal law

barristers doing legal aid work were lower than they had been in 1984. A recent survey by Victorian Legal Aid reported that 27 per cent of solicitors working in the Magistrates' Court jurisdiction now decline to accept legal aid work. Not only are significant numbers of Victorians being denied legal aid, but increasingly those to whom it is granted are being represented by less experienced members of the profession.

The public meeting on the steps of the Melbourne Magistrates' Court on 25 July 2002 was organised by the Legal Aid Task Force and sponsored by the Bar Council, the Criminal Bar Association, the Law Institute, Liberty Victoria, the Federation of Community Legal Centres and the Criminal Justice Coalition. That meeting was well attended, particularly by more senior members of the Bar. Jack Rush QC addressed the meeting as Acting Chairman of the Bar, as did Law Institute President David Faram, and Liberty Victoria President Chris Maxwell QC.

In August, not long after the Melbourne Magistrates' Court public meeting, Attorney-General Rob Hulls announced what he described as an additional $7.63 million in legal aid funding. The actual increase was about $1.1 million because the allocation was from the Public Purpose Fund administered by the Legal Practice Board; there is a grant from that fund every year; and the previous year's grant had been $6.55 million. The Public Purpose Fund is derived from the interest on solicitors' trust accounts. Obviously, any increase in funding is welcome. However, in the context of total Victorian Legal Aid funding of approximately $77 million per annum, the $1.1 million increase is minimal. More significantly, the Public Purpose Fund allocation is a one-off allocation which could increase of decrease next year, depending on other demands on the Fund. It is not recurrent funding.

The State Labor government criticises the federal Liberal government for its funding cuts and restrictions. It is true that, in 1997, the federal government ruled that federal legal aid funds could be used only on federal law matters. However, the real issue is not the earmarking of particular funding, but overall underfunding. The federal contribution to Victoria Legal Aid has not increased since 1998. State funding overall has increased, but by only about $1.9 million since the Bracks government took office in 1999 — an increase that is less than would be required to cover the rate of inflation in that time. The State government must now accept full and direct responsibility for all access to justice issues for Victorians.

The Legal Aid Task Force continues to approach the government, the opposition and independent members of the legislature on the matter of legal aid. It is now in the process of organising another set of public meetings to take place outside Magistrates' Courts in Melbourne, Shepparton, Bendigo, Moe, Ballarat, and Geelong — all at 11 a.m. on Monday 14 October. The focus of the July public meeting was on Criminal Law legal aid funding. The focus of these October public meetings will be on legal aid funding for family law and domestic violence matters.

The public meeting on the steps of the Melbourne Magistrates' Court on 25 July 2002 was organised by the Legal Aid Task Force and sponsored by the Bar Council, the Criminal Bar Association, the Law Institute, Liberty Victoria, the Federation of Community Legal Centres and the Criminal Justice Coalition.

THE BAR LEGAL ASSISTANCE SCHEME AND LAWAID

The Bar Council agreed in August to increase reimbursement to the Public Interest Law Clearing House for its administration of the Bar's Legal Assistance Scheme for the 2002–03 year to $82,817. With other costs in relation to signs, a printer and a referral database, this brings the total cost of the scheme to $91,717 — more than double the $41,517 for the previous year. Last year, the Legal Practice Board reimbursed the Bar for 75 per cent of what the Bar paid PILCH. The Board has not yet responded to the Bar's application for reimbursement for the coming year.

The Bar Council also agreed in August to continue to fund an office for the secretariat of LawAid, the Bar Council and Law Institute trust to provide litigation assistance to people unable to afford the cost of access to justice in civil proceedings.

PROFESSIONAL INDEMNITY INSURANCE

The Bar Council remains of the view that the best solution would be for the Bar to join the scheme under the *Legal Practice Act 1996* operated by the Legal Practitioners' Liability Committee ("LPLC"), which insures all practising and former solicitors in Victoria. This would provide certainty, stability and continuity in the provision of quality insurance from year to year; affordable premiums; the opportunity to benefit directly from good claims history over time; run-off cover of all former barristers, including retired persons and judges, at no charge to them; in co-operation with the Bar Council, the maintenance of a comprehensive database of claims, and the active promotion of risk management strategies.

For the Bar to join the LPLC scheme, there needs to be an amendment of the Legal Practice Act to make it compulsory for barristers to insure with the LPLC. Although the Attorney-General supported, and continues to support, the Bar proposal, it was not possible to bring the matter before Parliament in time for the present year. In August, the Bar Council resolved once again to approach the government seeking the needed amendment of the Legal Practice Act, and that has been done, and is being vigorously pursued.

The Bar Council continues to monitor the situation of those members affected by the collapse of HIH, and has written to all members of the Bar apprising them of the situation, and seeking their support in assisting those members defending claims for which HIH was the responsible insurer, either by offering their services as a barrister or mediator, or by making a financial contribution. The identity of those members defending such claims is, of course, being kept confidential, but they have been contacted, and assured of the Bar Council's concern and support. Volunteers for the Victorian Bar support scheme to assist members affected have been very encouraging.

PUBLIC LIABILITY INSURANCE AND REVIEW OF THE LAW OF NEGLIGENCE

In the last *Bar News*, the Acting Chairman, Jack Rush, expressed concern about the federal government panel to review the laws of negligence: its terms of reference, the composition of the panel, and the predetermined result. He described the three-month enquiry as "a travesty of process". The Law Council

of Australia engaged legal academics to assist in the preparation of submissions on behalf of all member Australian legal professional bodies. The Panel's reports have now been made, and all State governments are under pressure to be part of this national initiative. The Victorian government has expressed its scepticism over unsupported insurance industry claims of runaway liability, and I issued a press release expressing the Bar's concern about political knee-jerk reaction by those pressing for so-called Tort "reform", and commended the Victorian government for its restrained and measured stance. The Bar is in the process of evaluating and commenting on the policies of the Victorian government and opposition, and on draft Victorian legislation made available very recently.

PROFESSIONAL STANDARDS AND DISCIPLINE: REVIEW OF THE LEGAL PRACTICE ACT

The Bar continues to resist the pressures to diminish, if not eliminate, the role of the practising profession in the maintenance of its own professional standards and the disciplinary process. The situations of the Bar and the Law Institute are not entirely identical because of the different nature of a barrister's practice from practice as a solicitor, and the different structures and systems of self regulation and discipline. However, both branches of the profession share the underlying principle of the importance of being involved in our own professional regulation, and the Bar is working closely with the Law Institute in doing everything to maintain government support of our continuing roles in professional standards and discipline.

CONTINUING LEGAL EDUCATION

The Bar's program of Continuing Legal Education was launched by the Honourable Michael Black, Chief Justice of the Federal Court, at a reception in the Essoign Club at the end of July, and will be in place to commence with the current intake in the Bar Readers' Course.

HISTORY OF THE BAR

The Bar Council has resolved to begin work on the compilation of an oral history of the Victorian Bar by having volunteers interview senior and retired members to record their recollections. It is proposed to type up transcripts of such interviews, and to collect memorabilia and photographs.

SCULPTURE FOR OWEN DIXON CHAMBERS EAST

In September, the Bar Council received the report of the sub-committee formed to consider the acquisition of artwork for the renovated foyer of Owen Dixon Chambers East, and accepted the unanimous recommendation of that sub-committee and its artistic consultants to commission a sculpture from Paul Selwood. The sculpture has been commissioned by the Bar Council on behalf of the silks at the Bar, approximately ninety of whom have committed to contribute $1000 each towards the sculpture. It is expected that the sculpture will be completed in three to four months' time, and be installed in February 2002, with an unveiling ceremony to follow.

ESSOIGN CLUB

The most exciting aspect of the redevelopment of Owen Dixon Chambers is surely the new Essoign Club. Its prime position on the first floor, with easy and convenient access, natural light, and a view of the Supreme Court, will make it attractive to every member of the Bar, and our guests. Whether for the contemporary mix of Asian and European dishes in the bistro-style dining room, or pannini, sandwich wraps and sushi in the more up-beat café lounge, or just for tea or coffee, this will be a very affordable, lively and welcoming place to be. It will be open from early morning, throughout the day, and into the early evening, and a special feature will be a selection of appetising "fast-track" meals and snacks.

The Essoign Club Development Committee and the Bar Council continue to work on the myriad of details in connection with the club's relocation to the first floor, including amendment of the current liquor licence, and different options for membership and management of the club.

Robert Redlich
Chairman

Proposed Law Reform in Sentencing

RECENT research conducted by the Victorian Department of Justice indicates that there is a need for ongoing public education to increase the community's understanding and knowledge of legal and court systems, including sentencing practices. This research is consistent with overseas findings. It requires governments to think carefully about how they will respond to the community when, in particular, sentencing issues are raised.

In New South Wales the response, in the past month, has been to canvass the introduction of standard minimum sentencing. Under this model, around 20 indictable offences will attract a standard sentence. Judges may increase or reduce this sentence with reference to aggravating and mitigating factors and relevant common law rules. They must also set out their reasons for departing from the standard minimum sentence.

Such an approach is of great concern. In essence, standard minimum sentencing is a form of mandatory sentencing. It interferes with both judicial discretion and the separation of powers between the parliament and the judiciary. Sentencing is the role of courts and judges, not politicians. Government interference with judicial discretion undermines the proper functioning of the law and the status of the judiciary in a way that may ultimately affect the quality of candidates for judicial positions.

In rejecting mandatory sentencing the Victorian Government proposes to introduce a number of sentencing reforms in the Spring session of Parliament. These have arisen, in part, from the review of sentencing laws conducted by Professor Arie Freiberg in 2001/2002. Professor Freiberg considered the ways in which community input could form part of the sentencing process. It is proposed that a Sentencing Advisory Council be established to foster ongoing and informed community participation in the sentencing process and to provide support to the judiciary in the complex task of sentencing. The Council's members would include members of the legal profession, representatives of victims groups, academics and members of the broader community. The role of the Council will be to contribute to research and community understanding in the field of sentencing.

The development of guideline judgments is also proposed. The policy basis of this initiative is to balance the broad discretion of the judiciary with the desirability of consistency in sentencing. Guideline judgments have been handed down in the United Kingdom since the early 1970s and, in 1988, the New South Wales Court of Criminal Appeal adopted a practice of delivering guideline judgments.

The proposed legislation will empower the Victorian Court of Appeal to give guideline judgments. The Court may be assisted by both the Director of Public Prosecutions and Victoria Legal Aid. The Court of Appeal, on its own motion, or parties to a proceeding may seek the development of a guideline judgment.

As I have previously emphasised, it is essential to recruit the best and brightest to sit on our benches. But the best and brightest know that if their discretion becomes fettered, and their independence compromised, they will not choose to take judicial office.

Rob Hulls
Attorney-General

Legal Practice Act 1996

As required by section 201 of the Legal Practice Act 1996*, the Victorian Bar RPA gives notice that the Legal Practice Board has made the Determination set out below.*

DETERMINATION OF CONTRIBUTIONS TO FIDELITY FUND FOR THE PERIOD 1 JULY 2002 TO 30 JUNE 2003

THE Legal Practice Board, acting under Division 1 of Part 7 of the *Legal Practice Act 1996,* has determined that the classes of persons required to pay a contribution under Division 1 of Part 7, and the contribution payable by members of each class, for the period 1 July 2002 to 30 June 2003 are as set out in the following table. Approved clerks, Interstate Practitioners and Foreign Practitioners must pay any contribution to the Legal Practice Board by 30 April 2002 (see s. 202(4)). All other persons will pay any required contribution to the Victorian Lawyers RPA Ltd at the time of applying for or varying their practising certificate.

CLASS OF PERSONS

Contribution

Authorised to receive trust money

1. An approved clerk or the holder of a practising certificate that authorises the receipt of trust money (other than an incorporated practitioner) who received, or was a partner or employee of a firm, or a director or employee of an incorporated practitioner that received trust money *exceeding* $500,000 in total during the year ending on 31 October 2001. **$200**

2. An approved clerk or the holder of a practising certificate that authorises the receipt of trust money (other than an incorporated practitioner) who received, or was a partner or employee of a firm, or a director or employee of an incorporated practitioner that received trust money *not exceeding* $500,000 in total during the year ending on 31 October 2001. **$100**

Interstate and Foreign Practitioner

3. An interstate practitioner or a foreign practitioner (not includmg a body corporate) who has established a practice in Victoria within the meaning of section 3A of the Act and received, or was a partner or employee of a firm or a director or employee of an incorporated practitioner that received trust money in Victoria, exceeding $500,000 in total during the year ending on 31 October 2001. **$200**

Contribution

4. An interstate practitioner or a foreign practitioner (not including a body corporate) who has established a practice in Victoria within the meaning of section 3A of the Act and received, or was a partner or employee of a firm or a director or employee of an incorporated practitioner that received trust money in Victoria, not exceeding $500,000 in total during the year ending on 31 October 2001. **$100**

Employee practising certificate and not authorised to receive trust money

5. The holder of a practising certificate that authorises the person to engage in legal practice as an employee but holds a practising certificate that does not authorise the receipt of trust money and who is employed by a legal practitioner or firm that is authorised to receive trust money. **$50**

Practitioners not in the above classes

6. Corporate practitioners, sole practitioners not authorised to receive trust money, employee practitioners employed by a legal practitioner or firm not authorized to receive trust money and employees of community legal centres are not required to make a contribution. **NIL**

A person who applies for a practising certificate after 31 July 2002, or where a variation to the conditions of a practising certificate requires a person to pay a contribution, then a pro rata contribution will be required and may be ascertained by contacting Victorian Lawyers RPA Ltd or the Legal Practice Board.

Legal Profession Tribunal: Publication of Orders

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

1) Name of practitioner: Matthew Stirling ("the legal practitioner")
2) Tribunal Findings and the Nature of the Offence
   a) Findings
      The Tribunal found the legal practitioner guilty of unsatisfactory conduct as defined by paragraph (b) of the definition of "unsatisfactory conduct" in section 137 of the Act in that his conduct:
      i) contravened Rules 74 (a) and (b) of the Rules of Practice of the Victorian Bar; and
      ii) contravened Rule 3 of the Rules of Practice of the Victorian Bar.
   b) Nature of the Offence
      The legal practitioner failed:
      i) to respond to the requirement of the Ethics Committee of the Victorian Bar Incorporated for information relating to the practitioner's conduct and failed to reply to letters from the Ethics Committee of the Victorian Bar Incorporated when asked to do so; and
      ii) to act with diligence in the service of a client and failed to attend to the work required with reasonable promptness.
3) The Orders of the Tribunal were as follows:
   a) in respect of the first charge, the legal practitioner was ordered to pay a fine of $500.00 to the Legal Practice Board by 30 August 2002;
   b) in respect of the second charge, the legal practitioner was ordered to pay a fine of $1,000.00 to the Legal Practice Board by 30 August 2002; and
   c) the legal practitioner was ordered to pay to the Victorian Bar Incorporated its costs of the proceedings, fixed by the Tribunal at $2,076.00, by 30 August 2002.
4) As at the date of publication no notice of appeal against the orders of the Tribunal has been lodged. The time for service of such notice has expired.

Opas on Ryan

Dear Gerry,

MY attention has been drawn to an article by Julian Burnside on Ronald Ryan.

As I vehemently disagree with his assertion that Ryan was guilty, I have written a response which you may be able to publish in *Bar News*. I believe I am in a better position than anyone else to discuss the case as most of those involved are now gathered unto their fathers. I am probably clinging to life with a somewhat slippery grip so I seek to make a last plea for someone who did not deserve to die.

If it is too long to print, at least do me a favour and make it available in the Bar Library for anyone who might want to do some research into capital punishment.

Regards

Phil Opas

The article by Phil Opas is not too long to print. We are delighted to print it, not only because of its content but also because we are fed up with having to say "We Were Wrong". It is much more satisfying to say "Julian Burnside was wrong".

The Editors

THE INNOCENCE OF RONALD RYAN

Julian Burnside's article asserts that the verdict of guilty was correct but the sentence was inappropriate. As most of the principal actors in this drama are now dead, and in the natural order of things I must soon join them, please allow me to put another view as my last attempt to put the record straight.

I will go to my grave firmly of the opinion that Ronald Ryan did not commit murder. I refuse to believe that at any time he told anyone that he did. When all hope of a reprieve had gone and he had decided that he might as well declare his guilt (if that was the fact) there are two people whom I believe he would have told and they were Father Brosnan and me. Father Brosnan and I have formed a lifelong friendship since the hanging, and Father has told me that Ryan never made any admission of guilt to him.

Father Brosnan did not hear his final confession which enabled Ryan to die in a state of grace.

Ryan always vehemently denied to me that he fired the shot that killed the warder, Hodson. The last time I saw him was the day before I left for London to seek leave to appeal from the Privy Council. I told him frankly that I did not expect to succeed on mere questions of law, although I was heartened by the action of Sir John Barry who had rung me a few days before to tell me that he had presided at a hearing of the Court of Appeal which had come to a decision diametrically opposed to that reached by the three justices who had heard Ryan's appeal. He told me his decision might help me and asked me to see his associate and obtain a copy of the unanimous decision, hot off the typewriter.

One of the legal points decided against Ryan turned on the time when the felony of escaping from prison ended. The trial judge, Justice Starke, followed an old New South Wales case which held that the felony of escaping continued right up to recapture — in Ryan's case nineteen days later. Therefore if the shooting took place outside the gaol (which it did) the Crown did not have to prove intent and the felony murder rule applied. Therefore manslaughter was not a possible verdict and the judge refused to leave it to the jury.

My contention, and that of Jack Lazarus for Walker, was that the escape was complete when the two prisoners escaped from the prison and were outside the control and custody of those in charge. Therefore the felony/murder rule did not apply because the murder was not in the course of the felony of escape, and intent was an essential ingredient of the charge which had to be proved beyond reasonable doubt by the prosecution. Thus manslaughter had to be considered by the jury even though the defence was that Ryan had never fired a shot.

Justice Barry in a different case agreed with our contention and refused to follow the case relied on by Justice Starke. We therefore had at the appellate level six justices evenly divided on whether the felony/murder rule applied in the circumstances of Ryan and Walker.

I informed Ryan that I would do my utmost to stress before the Privy Council the serious difference of opinion between six senior justices of this State, and that this was a worthy case to require their adjudication. Nevertheless I told him that I would probably fail as the Privy Council rarely intervened in criminal matters. I said that we were largely playing for time to create a groundswell of public opinion that would prevent the government from carrying out its declared intention of executing him.

Ryan replied, "We've all got to go some time, but I don't want to go this way for something I didn't do." Then he smiled and added, "You know, mate, we're playing time on. If you don't kick a goal soon, we're going to lose this match." We shook hands and that is the last time I saw him.

One of the last things Ryan did was to write me a letter that I never received. Perhaps it may turn up at Sotheby's some day. He showed it to Father Brosnan, and I am indebted to him for informing me of the contents. It expressed deep gratitude for the efforts I had made on his behalf, and went on to ask that I attend the hanging as he wanted to look on the face of a friend as his last vision on earth.

I did not attend the hanging.

Apart from any question of Ryan admitting guilt, I am of opinion that not only did he not fire a shot, but that he could not have fired the shot that killed the warder. I rely on facts that could neither lie nor be mistaken. The bullet that killed Hodson was never recovered. It passed right through the body. It was never proven that the M1 carbine held by Ryan ever fired a shot while in his possession.

During the war I served for nearly six years on active service in the RAAF and was proficient in weaponry, although that did not include the M1 carbine which was not then used by our forces. My instructor, Allan Douglas, the Public Solicitor, served with the AIF and ended the war as a lieutenant colonel also proficient in weaponry. At the time of the trial I was an active reservist in the RAAF and I arranged for Douglas and me to spend about three hours at the butts at Laverton under instruction from a senior armaments officer. Between us we fired about six hundred rounds from an M1 carbine. We observed and measured muzzle velocity, penetrability, range and general characteristics of the weapon using the same smokeless cartridges that according to the evidence were loaded in the magazine of the weapon which Ryan took from the tower at Pentridge. I believe that by the time of the trial I knew more about the M1 carbine than did the ballistics expert called by the prosecution. In fairness to him, he knew a lot more about a large variety of weapons but Douglas and I were concentrated on one only.

We confirmed that unlike the Lee Enfield .303 rifle familiar to infantrymen which had two distinct pressures, the M1 carbine was fired immediately by a comparatively light pressure on the trigger and continued firing until the finger was removed. It had no recoil so that it did not jerk back the shoulder of the firer. As

smokeless cartridges were used, no smoke was emitted from the barrel. Therefore witnesses who spoke of seeing Ryan's shoulder jerk back and seeing smoke from the barrel were drawing on imagination.

The evidence was unchallenged that when Ryan took the carbine it was loaded with eight rounds. Seven were positively accounted for. If the eighth could also be accounted for then Ryan could not have killed Hodson.

The vital witness on this aspect was the warder in the tower at Pentridge from which Ryan seized the carbine. He was Helmut Lange. In the witness box he described how Ryan's first action was to activate the bolt on the carbine but according to Lange he did this while the safety catch was on. The result had to be, as he agreed, to eject a live cartridge. Lange said that he did not find that cartridge, but that did not affect the position that every cartridge in the magazine had been accounted for without Ryan firing a shot.

The evidence that the carbine had fired a shot was most unsatisfactory and inconclusive. While on the run for nineteen days, Ryan and Walker drove a car to Sydney by an indirect route that took them via the Riverina and Hay during a hot summer period with no rain. The carbine was in the boot of the car. The ballistics expert examined the carbine when it was retrieved and gave evidence that it appeared to him that it had not been cleaned since it was last fired. Under cross-examination he said that he did not take any sample from the barrel to test for residue from gunpowder or cordite. He agreed that it was inevitable that the barrel would be dusty while being carried through a drought stricken rural area. The most he could say was that the barrel appeared dirty but he could not say what caused the dirt. He could not say that the weapon had been in fact fired since it was last cleaned.

A few years after Ryan was hanged I received a phone call from a man with a strong German accent. I cannot be more precise about the date as I did not note it. He refused to give his name but he said that Helmut Lange had been a friend of his. Lange came from East Prussia and they were both members of the Austrian Club in Brunswick Street, Fitzroy, where they often met for a drink and a chat in their native language. He said Lange told him that he had been on duty in the tower when Ryan seized the weapon from the rack. The first thing that Ryan did was to work the bolt on the carbine. Ryan did not seem to know much about the gun because the safety catch was on and this resulted in bullets (plural) being thrown out on the floor.

Lange picked up the bullets (plural) and later on made a written report which he handed to his superior. At that time an inquiry was being conducted in the prison to see whether any warders had helped the prisoners to escape. About two weeks later while Ryan and Walker were still being hunted, Lange was called before his superior and asked to make another report omitting all reference to finding any bullet. Lange refused at first but he was threatened with being charged with conspiring with the prisoners to help the escape. Because he wanted to keep his job he made another report as asked.

After the hanging Lange became very worried about the false evidence he had given. In 1969 he was informed that he had been awarded a commendation for bravery for his actions during the escape and he was ordered to go to Government House to receive the award. He believed this was a pay-back for giving false evidence and he refused to go. Eventually he was presented with the award at Pentridge by the Governor of the Gaol.

On 12 April 1969 while on duty in the tower at Pentridge he committed suicide by shooting himself.

I took no action on this phone call and I have no means to verify the statements. I suggested to the caller that he convey this information to the police. For some reason he was clearly afraid of the police and hung up. However, this only confirmed what I have always believed, namely that Lange lied in the witness box. The ejection of the round made it impossible for Ryan to have committed murder.

Confirmation is further obtained from what I contend is evidence that cannot lie. Before the trial I attended three autopsies and borrowed a skeleton from the Anatomy School at Melbourne University to understand fully the course that the bullet took through the body of the deceased. I obtained from the pathologist under cross-examination that he measured meticulously the diameter of the wounds of entry and exit. They were identical, showing without question that the bullet had not been deflected in its path. Had there been any deviation the wound of exit would have been larger than the wound of entry, as bits of bone and other material would have enlarged the wound of exit.

In the result there was no contest that the bullet entered between the first and second rib on the right side and came out between the second and third rib on the left side, one inch lower than it went in. As they were both standing on level ground, it was impossible for Ryan being 5 foot 8 inches high to shoot in a downward trajectory to cause the wounds on Hodson (6 foot 1 inch).

I was at pains to get from every eye witness who gave evidence that when shot Hodson was running upright so as to present his full height as a target. Murray commented to the jury that Hodson might well have been bending over. The evidence was all one way. Hodson was running upright as one would expect from a heavily built man who had just had Christmas dinner and was keeping his eyes on the man he was pursuing.

All independent eye witnesses deposed to hearing only one shot. A warder, Paterson, a very excitable Scot, gave evidence that at the relevant time he came out of the main gate at Pentridge armed with an identical M1 carbine to that taken by Ryan. He stood on top of the low stone wall surrounding the garden in front of the gaol and took aim at Ryan. He took a first pressure on the carbine (which as stated above would instantly fire it) but saw a woman in the way so he pulled the gun up and taking a second pressure fired harmlessly into the air.

Taking aim at Ryan he would only have to miss him by about half a degree and he would hit Hodson in the very way that in fact he was struck. By standing on the low wall he would have the necessary height to fire in a downward trajectory.

Paterson had made three conflicting statements. In the first he said he heard only one shot. In the other two he said he heard two shots. If he did, he was the only witness who heard them. From memory I think there were fourteen, not eleven, in a position to see and hear what took place. If Ryan had fired a shot, somebody other than Paterson should have heard it. I wouldn't have hanged a dog on Paterson's evidence.

Ryan was the unfortunate victim of the Premier's determination to have a hanging. After the appeal to the High Court was dismissed, a petition to the Privy Council seeking leave to appeal was filed. That was the signal for the Premier to set a date for execution before that petition could be heard. I drew a statement of claim in a writ seeking an injunction to restrain the hanging until the final outcome of the Privy Council petition.

I failed both before the judge of first instance, Menhennitt J. and the Full Court to obtain the injunction on the ground of lack of jurisdiction. Nevertheless the Full Court said that it was unthinkable that a

man should be executed before he had exhausted his ultimate right of appeal.

Reluctantly the Premier deferred the execution. He then directed the Public Solicitor to withdraw my brief as the government was not going to fund the petition. I consulted the Ethics Committee of the Bar Council to seek approval to make a public appeal for a solicitor prepared to brief me as I was prepared to pay my travel and other expenses and appear without fee. The Committee said that this would be touting for business and was unethical. I argued that a man's life was at stake and I could not see how I would be touting when no payment was involved.

I defied the ruling and on radio sought an instructor. As one might expect I was inundated with offers. I accepted the first application, being from an old friend Ralph Freadman. Two Labor party stalwarts Val Doube and Barry Jones (who was then completing articles with Norris Coates and Hearle) headed an Anti Hanging Committee and offered me a return fare to London but could not fund my junior, Brian Bourke. I accepted the offer and as luck would have it, Alleyne Kiddle was in London completing a Master's degree and she agreed to take a junior brief at a fee of two-thirds of nothing.

As readers would know, theoretically an appeal to the Privy Council is a vestigial remnant of an appeal to the sovereign in person. The Council gives an opinion always ending with "and we shall so humbly advise Her Majesty". The actual decision is simply a few lines published in the Government Gazette announcing that the appeal has been allowed or dismissed.

Theoretically it is possible but extremely unlikely that Her Majesty may give a decision contrary to the advice of the Judicial Committee. Sir Henry Bolte took no chance of that occurring. Ryan was hanged on 3 February 1967. The decision of Her Majesty in Council to refuse leave to appeal was gazetted on 10 February.

My involvement did not end there. I was called on to show cause before the Bar Council why I should not be struck off the Roll for flouting the direction of the Ethics Committee. I decided to ignore the proceeding and make no answer. I was ultimately persuaded by many colleagues that I had to fight and allow my choice from many volunteers to represent me. I agreed reluctantly but only on condition that personally I would take no part.

Dick McGarvie with Ivor Greenwood as his junior appeared for me. The job of prosecuting me fell to the junior silk who happened to be Ninian Stephen. He was a friend of mine, and I hope he still is. I was present in body but not in mind. What happened is a blank except that at the end I was unanimously acquitted. The Chairman Louis Voumard remarked, "What the Bar needs is more Phil Opases not one less."

I have no regrets about my conduct. I don't think I would act differently in the same circumstances today. I will always be troubled by the feeling that Ryan should have been acquitted and that I must have been inadequate for the task of defending him. At least so long as capital punishment is kept off the statute books, no member of the Bar will have to visit the occupant of the condemned cell and discuss with him or her the chance of living or dying. It is a heavy burden when in the last analysis it may all depend on you.

Philip Opas

Supreme Court

Justice Nettle

ON 23 July 2002, Geoffrey Arthur Ackeroyd Nettle QC was sworn in as a judge of the Supreme Court of Victoria. At the age of 52, His Honour will commence his judicial life in the Common Law Division of the Trial Division. His appointment has been received with widespread acclaim by barristers, solicitors and (discretion requiring containment) State and Commonwealth judges, demotically expressed as "fantastic". To the discerning eye his acceptance of judicial office was, like so much of what he did, an act of leadership, for it disavows the supposition that in modern times judicial office holds little appeal to the highest quality barrister.

At a welcome given by the profession in a very congested Banco Court on 30 July 2002, a conventional recital was given of His Honour's personal qualities, educational achievements and professional ascension. It is in deference to His Honour's astonishing modesty, inspirational to those with whom he shared chambers, that such matters will not be rehearsed here, at least, not in detail. Nor is it proposed to enter upon any account in detail of his work at the Bar or his cases. But as a study of a model barrister, part of his life at the Bar and some professional attributes are well worth exposing.

His Honour signed the Bar Roll in November 1982, reading initially with Mr Hartley Hansen (now Justice Hansen of the Supreme Court) and later with Mr Ken Hayne (now Justice Hayne AC of the High Court of Australia), relinquishing all the lucrative benefits that would no doubt have visited him as a young and energetic partner at Messrs Mallesons, solicitors. The crossing of that rubicon bespeaks the mind of someone who had decided to respond to a calling and dedicate himself as a barrister. Now that His Honour has crossed William Street, it may well be seen symbolically in the same way.

As a junior, he was a prodigious worker, having not just the mental fortitude but the zeal and physical capacity. The rapidity with which he was able to perform demanding paperwork led to an expansion of that part of his practice, yet he had a very active appearance practice in commercial cases and was involved in many significant cases. One of the most prominent and arduous was the *Bank of Melbourne* case in 1991, a trial in the Supreme Court before O'Bryan J in which he appeared with Mr Ken Hayne QC (as he then was). He shone brightly as a junior amidst the multitude of counsellors. In 1992 His Honour took silk, necessarily early. He delivered a memorable speech as Mr Junior Silk at the 1993 Bar Dinner an honour which, with characteristic modesty, he said he was "barely worthy" — see *Victorian Bar News*, No. 85 at p. 47.

As a silk, his practice flourished. His paperwork practice did not greatly recede, as his opinions and pleadings became more valued. He remained a highly sought-after trial lawyer for his thorough preparation, court demeanour and natural aptitude as a spirited cross-examiner which, at the slightest hint of mendacity in a witness, became bracing and usually devastating. It was not egotistical, but always designed in accordance with the rationale of the adversary system to get to the truth of the matter. Therefore, he was a feared but admired opponent.

A considerable part of his practice was in the appeal courts in which he was a penetrating advocate, and unafraid to engage the Bench in the dialectical process. One special field of knowledge was revenue law. He was a part-time member of the Taxation List – Administrative Division of the Victorian Civil and Administrative Tribunal. But by no means did he confine himself or specialise in that field. His core practice remained commercial law but he also practised in constitutional and administrative law, trade practices law, corporations law, property law and common law. He deeply believed in the common law.

Over recent years he appeared more frequently in the High Court of Australia where he was regarded as one of the best. Not much more need be said about his acquired reputation, discretion, integrity and his abilities than to point to the fact that he was chosen by the affected judges and masters as leading counsel in their High Court challenge to the Commonwealth superannuation surcharge on judicial pensions.

In Sir Owen Dixon's paper on professional conduct to be found in *Jesting Pilate*, it is said that a barrister's first ethical duty is to gain knowledge of the law. For Geoffrey Nettle, barrister, that was certainly imbibed as a solemn duty; but it also seemed a fascination. But that was not his only demonstration of exemplary ethical conduct. He was always benignant to his juniors, and in court treated fellow barristers very well and with as much collegiate goodwill as his usually highly combative cases would permit. He had, and demonstrated, deeply held views about a barrister's duty to the court. He maintained the traditions of the Bar. He always remained objective and independent.

Like a true barrister, there were no barriers to access. Whilst his reputation quite rightly attracted many well-heeled clients via the mega firms around Australia, it must be said — and said emphatically — he gave no less priority to the briefs of sole and not-so-conspicuous practitioners. The same visceral generosity was available to his colleagues in need of help. He would readily and cheerfully assist his colleagues with legal problems or the formation of forensic judgments

in the presentation of a case, frequently gave practical assistance, and always gave correct references to the many decided cases stored in his memory. He had three readers who, although expecting it or wishing it, must no doubt be feeling his departure to the Bench, namely: Robert Hay, Pamela Tate and Michelle Gordon.

His Honour's punishing work ethic and dedication to his demanding practice has left all but a few with any knowledge about his personal life. Perhaps there will be another time and place for expounding on this. But presently it is appropriate to say he is married to Wendy, a practising architect, and they have three children: Virginia, Jonathon and Julia. He has a younger brother Graeme who is a solicitor in Canberra, and an older sister Janice who is a Deacon in the Anglican Church in New South Wales. His mother and his father (who was a renowned public administrator) live in Canberra. His Honour's interests are vintage and modern cars and anything automotive, music, movies, long-distance running, rugby union and, of late, sailing his Jubilee from the Sorrento Sailing Club

The Supreme Court is over 100 years old with a tradition of conscientious discharge of its duties. It is fitting His Honour was appointed to that place. We may now confer on His Honour a memorable compliment he paid to a senior colleague in his speech as Mr Junior Silk and describe him as a great barrister, a great leader and a great lawyer, but above all he is a gentleman in whose company it is always a pleasure to be. It is unlikely that in convening a court he will undergo any transformation and become any different. The Bar congratulates Geoffrey Nettle and his family. It wishes him good health. It wishes him a fulfilling and — as Chief Justice Sir John Young used to intone sonorously at every admissions ceremony — "above all an honourable career".

Justice Dodds-Streeton

FOR a large part of her adult life Julie Dodds-Streeton would undoubtedly have scoffed at the suggestion that her career would culminate in her appointment as a Supreme Court Judge. Educated at University High, Julie initially studied law/arts at the University of Melbourne but then abandoned law in pursuit of the study of history. She was the outstanding history student of her year and became a member of the history faculty at the University of Melbourne. She taught English history of the Tudor and Stuart periods.

Julie did eventually complete her law degree and she undertook articles in 1981 at the firm then known as Paveys (a firm which has since been the subject of a number of mergers culminating in the firm Corrs Chambers Westgarth). She was articled to Delcho Bobeff. It is no reflection on Del or on the firm Paveys, for whom Julie always maintained a high regard, to say that Julie was unhappy in her first contacts with the commercial applications of the law. She missed the academic life.

Julie returned to academia, this time in law. She taught at La Trobe University and in the law faculty at the University of Melbourne for a number of years. In the mid-80s she began reading at the Bar with Joe Santamaria. Julie read under special provisions applying to academics which permitted them to complete their reading period in instalments over the summer vacations. Julie's occasional occupation of Joe's chambers appeared to be almost perpetual. Joe maintains he never got a scrap of work done while Julie was there.

Julie has a knowledge of the law and a capacity for finding and distilling the relevant principles which is quite extraordinary. She quickly became a junior very much in demand in the most difficult of commercial cases. She was perhaps first "discovered" by McPhee but others quickly learnt of her skills. For a time she attempted to be both a barrister and a lecturer to undergraduates but, as many had found before her, she was eventually forced to choose between the two.

Notwithstanding the short time that she had spent at the Bar, once she became a full-time barrister she played a prominent role as junior counsel in much of the major litigation which arose out of the economic setbacks of the late 80s and early 90s. She developed a particular interest in corporate insolvency, and with Professor Ford and another member of counsel she taught corporate insolvency in the Masters program at the University of Melbourne for a number of years. In more recent times Julie advised State governments (of both persuasions) and argued complex matters of corporations law both at first instance and on appeal as junior counsel without a leader.

Julie took silk in 2001 and was immediately engaged as one of the senior counsel assisting the HIH Royal Commission. Appearance at that commission has since preoccupied her. Readers of the financial press would be aware that Julie was given the task of undertaking what was probably the most difficult cross-examination of the entire inquiry.

It can be said without doubt that Julie was one of the most diligent and learned commercial practitioners at the Bar. Julie was also an excellent advocate. The depth and breadth of her knowledge shone through every argument she advanced.

Perhaps one of her greatest strengths is her knowledge of, and interest in, matters outside the law. Since she left her career as a historian she has studied and published in the field of Egyptology and has written on Roman law and the place of women in Roman society. She is widely travelled and particularly loves the Middle East. She is a modern "Renaissance woman".

Julie is one of a number of former academics who have been outstanding successes at the Bar. There is little reason to doubt that she will make a similar success of this new aspect of her career.

Supreme Court

Justice Flatman

Eulogy delivered by the Chief Justice of Victoria the Hon. John Harber Phillips, AC, at a special sitting of the Supreme Court of Victoria held as a mark of respect to the late Justice Flatman

YOUR Honours, distinguished leaders of the profession, ladies and gentlemen. We meet this afternoon in both sorrow and pride that I may pay a tribute on behalf of this Court to the memory of our colleague Justice Geoffrey Raymond Flatman.

In doing so, I speak to his family, to whom he was so devoted; I speak to our profession, which held him in such esteem and I speak to the Victorian community, to whom he rendered much distinguished service.

I should acknowledge that with us today are His Honour Justice Hayne of the High Court; His Honour Chief Justice Black of the Federal Court, His Honour Chief Judge Waldron of the County Court; the Chairman of the Bar, a representative of the Law Institute, the Director of Public Prosecutions and the Chief Crown Prosecutor. Others have asked me to convey that performance of their duties or other sufficient reasons, prevent their attendance. They are, Justice of Appeal Charles, the Attorney-General (Mr Hulls), and the Chief Executive Officer of the Law Institute, Mr John Cain Jnr. There are, of course, a number of other persons who would greatly wish to be present, but are prevented by circumstances outside their control.

Geoffrey Raymond Flatman was born on 7 July 1944 at Mortlake where his father was a Bank Manager. He attended primary school in Mortlake, and received his later schooling at Merbein Higher Elementary School and Mildura High School — changes brought about by his father's various appointments. He was at Wesley College during the years 1961 and 62. There he excelled in sport particularly tennis and football. He was a member of Wesley teams which won successive APS football premierships and, indeed, was a member of the combined APS team in 1962.

He lived at Queen's College at Melbourne University studying for his degrees in Arts and Law of which he graduated in 1969. After serving articles and being admitted to practice, he signed the Bar Roll in March 1971. He read in the chambers of Mr Michael Black now Chief Justice Black.

His Honour speedily developed an extensive practice in the criminal law and appeared, most often very successfully, in a number of significant cases in that jurisdiction. Ever conscious of his duty to the profession as well as to his clients, he took no fewer than eight readers. They were, Howard Friedman, Sandy Elliott, Carmen Osborne, Sarah Thomas, Nick Poynder, Mark Gamble, Claire Quin and Anita Kwong. To them, as they will attest, he imparted in generous measure, not only his technical skills and exemplary ethical standards, but also his intellectual approach to the law. I shall later return to this matter.

On 8 July 1994, His Honour was appointed Chief Crown Prosecutor of Victoria a most important appointment in that it committed to his stewardship the day to day management of the Crown Prosecutors of Victoria.

Upon the resignation of the then Director of Public Prosecutions, Bernard Bongiorno, QC (now His Honour Justice Bongiorno), Geoffrey Flatman was the recipient, in February 1995, of the even greater responsibility that goes with that high office. It is sufficient to say that in troubled times he speedily made it clear to the public that he was completely independent of government and that his office would be conducted accordingly.

That was but the first of his many achievements in his new appointment.

He was instrumental in the appointment in July 1995 of four additional Senior Crown Prosecutors and, shortly thereafter, six additional Crown Prosecutors. Their numbers had dwindled in previous years to a total of eight.

In September of that year he was the prime mover in the establishment of the Witness Assistance Service. While this service, to which he committed a social worker and two solicitors, was essentially aimed to assist prosecution witnesses, it had a very considerable victims of crime orientation. It has since grown, with marked success, to involve three social workers.

Again in 1995, he supervised the taking over by his office of all committal proceedings — some 215 of which were taken over in that year. The number has grown to average figures of over 1000 in succeeding years. This was a very significant reform in the criminal Justice system.

Other matters which warrant mention today include His Honour's initiatives in the installation of modern computer equipment in his office, advocacy training for some 60 of his staff and his supervision of the now well known VATE tapes which enable the evidence of young people to be received in the courts on video film.

Many people in the profession who have spoken to me have remarked on the "openness" which characterised His Honour's performance as Director. He was open to receive and speak to a wide range of people — victims of crime, members of service clubs and other community groups. He gave, with a very personal touch, great encouragement to the young solicitors in his office. He ensured that women counsel were treated equally in the provision of briefs to prosecute and indeed, five women were appointed to office as Crown Prosecutors during his directorship.

I said I would return to His Honour's intellectual approach to the law. He thought deeply about significant matters and then wrote about them with authority and clarity of expression. Aspects of articles for the *Criminal Law Journal* and the *Australian Law Journal* of which he was co-author, have been referred to with approval by every member of the High Court on several occasions.

Geoffrey Flatman was not simply a good Director of Public Prosecutions — he was a great one.

His success as Director made his appointment as a Judge of this Court almost inevitable. Sadly, he was to hold judicial office for a short time, and his illness was with him throughout it. yet the high quality of his work remained intact. Indeed, a juror, writing in the *Age* newspaper about her experiences, was full of praise for his conduct of a complex murder trial. In spite of his pain and discomfort, his courage never wavered. He kept working until it was impossible for him to continue. He was extraordinarily brave.

By long established tradition, occasions such as this are not those to speak of personal matters or personal grief. That has already been done in full measure at His Honour's truly memorable funeral service, conducted by Father James who we are honoured to have with us this afternoon. But I am sure you would want me to express to His Honour's wife Margaret, sons Sam and Tom and other family members our deepest sympathy. We hope they will draw some solace from this occasion, conveying as it does the high esteem in which he was held by our profession.

And so, after a life of much endeavour and distinction, Justice Geoffrey Raymond Flatman is now at rest — amid the wind song and the bird song of the Eltham hills — an area of which he was exceedingly fond.

I will close with the words of the poet Catullus, written over 2000 years ago, in order to mark an equally sad occasion.

"Atque in perpetuum, frater, ave atque vale."

"And so, for ever, brother, hail and farewell."

(Reg. Lib. A 1596, fo. 672.)

MYLAND *v.* WELDEN. 15 Feb. 1596.

FORASMUCH as it now appeared to this Court, by a report made by the now Lord Keeper, (being then Master of the Rolls), upon consideration had of the plaintiff's replication, according to an order of the 7th of May anno 37th Reginae, *that the said replication doth amount to six score sheets of paper*, and yet all the matter thereof which is pertinent might have been well contrived in sixteen sheets of paper, wherefore the plaintiff was appointed to be examined to find out who drew the same replication, and by whose advice it was done, to the end that the offender might, for example sake, not only be punished, but also be fined to Her Majesty for that offence; and that the defendant might have his charges sustained thereby; the execution of which order was, by a later order made by the late Lord Keeper the 26th of June, Anno 37th Reginae, suspended, without any express cause shewed thereof in that order, and was never since called upon until the matter came to be heard, on Tuesday last, before the now Lord Keeper; at which time some mention was again made of the same application; and for that it now appeared to his Lordship, by the confession of Richard Mylward, alias Alexander, the plaintiff's son, that he the said Richard himself, did both draw, devise, and engross the same replication; and because his Lordship is of opinion that an abuse is not in any sort to be tolerated, proceeding of a malicious purpose to increase the defendant's charge, and being fraught with much impertinent matter not fit for this Court; it is therefore ordered, that the Warden of the Fleet shall take the said Richard Mylward, alias Alexander, into his custody, and shall bring him into Westminster Hall, on Saturday next, about ten of the clock in the forenoon, and then and there shall cut a hole in the *myddest* of the same engrossed replication (which is delivered unto him for that purpose), and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders, with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the Courts are sitting, and shall shew him at the bar of every of the three Courts within the Hall, and shall then take him back again to the Fleet, and keep him prisoner, until he shall have paid 10*l.* to Her Majesty for a fine, and 20 nobles to the defendant, for his costs in respect of the aforesaid abuse, which fine and costs are now adjudged and imposed upon by this court, for the abuse aforesaid. (1)

Source: Cecil Munro, Acta Cancellariae 692 (London, 1847)

The 2002/2003 Victorian Bar

Seated (left to right):
Kate McMillan S.C.
Anthony Howard QC
Michael Crennan S.C.
Robin Brett QC
(Junior Vice-Chairman)
Mark Dreyfus QC
Robert Redlich QC
(Chairman)
Fiona McLeod
Jack Rush QC
(Senior Vice-Chairman)
Michelle Quigley
(Assistant Honorary Treasurer)
Ross Ray QC
Philip Dunn QC

Back Row (left to right):
Michael Rozenes QC
Kim Knights
Anne Duggan
Debra Coombs
Michael Shand QC
(Honorary Treasurer)
Michael Gronow
Richard McGarvie
Jeanette Richards
David Neal

Results of Bar Council Elections for 2002/2003

AT the Declaration of the Poll following the Bar Council election on 4 September, 2002, the following candidates, in order of seniority, were declared elected:

CATEGORY A: Eleven counsel who are Queen's Counsel, Senior Counsel, or counsel of not less than 15 years standing:

Robert Frank REDLICH QC
Michael ROZENES QC
Anthony John HOWARD QC
John Timothy RUSH QC
Philip Alistair DUNN QC
William Ross RAY QC
Robin Alfred BRETT QC
Michael Warner SHAND QC
Mark Alfred DREYFUS QC
Cathryn (Kate) Faye McMILLAN S.C.
Michael Joseph CRENNAN S.C.

CATEGORY B: Six counsel who are not of Queen's Counsel or Senior Counsel and are of not more than 15 nor less than six years standing:

Michelle Lesley QUIGLEY
Richard Wallace McGARVIE
Jeanette (Jenny) Elizabeth RICHARDS
Fiona Margaret McLEOD
Peter Julian RIORDAN
David John NEAL

CATEGORY C: Election of four counsel who are not of Queen's Counsel or Senior Counsel and are of less than six years standing:

Anne Elizabeth DUGGAN
Michael Geoffrey Rees GRONOW
Debra Judith COOMBS
Kim Joy KNIGHTS

The following office bearers have been appointed:

Chairman:
Robert Redlich QC
Senior Vice-chairman:
Jack Rush QC
Junior Vice-chairman:
Robin Brett QC
Honorary Treasurer:
Michael Shand QC
Assistant Honorary Treasurer:
Michelle Quigley
Honorary Secretary:
Richard Attiwill
Assistant Honorary Secretary:
Sharon Moore

Recent Changes to Tax Laws Affecting Barristers

By Michael Flynn

The purpose of this article is to outline recent amendments to taxation laws that affect barristers. Some of these amendments will restrict the ability to claim tax deductions, while other amendments may present opportunities to claim additional deductions. I discuss the amendments under three headings: "Prepayments", "Simplified Tax System", and "Non-Commercial Losses".
All references to legislation are to the *Income Tax Assessment Act 1997* (Cth) unless otherwise indicated.

Michael Flynn

PREPAID EXPENSES

BARRISTERS return their income on a cash received basis but, as I will explain in a moment, prior to the current year of income they have been entitled to claim their expenses as deductions under a hybrid cash/accruals method. Under section 8-1 taxpayers are entitled to claim as deductions all losses and outgoings incurred in a year of income in gaining or producing assessable income (except to the extent to which they are of a capital, private or domestic nature). An outgoing is "incurred" when a taxpayer is "definitively committed" to paying the outgoing (see *FCT* v *James Flood Pty Ltd* [1953] 88 CLR 492) or there is a "presently existing liability" (*Nilsen Develop-ment Laboratories Pty Ltd* v *FCT* [1981] 144 CLR616). Consequently, barristers have been entitled to claim deductions for:

(a) services or goods supplied prior to year end provided the cost has been quantified, as, for example, by the issuing of an invoice; and
(b) expenses paid prior to the end of the year for services to which the barrister is committed but which have not yet been provided (such as insurance premiums or the cost of a professional membership).

When I refer to prepaid expenses I am referring to the second category of expense. Such expenses are incurred for the purposes of section 8-1 because by paying them the barrister establishes a definite commitment to the outgoing.

The accounting treatment of prepaid expenses is different. Under full accruals accounting only the proportion of the prepaid expense that relates to services or supplies provided would be treated as an expense. So, for example, an insurance premium paid on 1 June for a policy for the subsequent 12 months would be treated for accounting purposes as having been incurred as to one-twelfth in the financial year in which it was paid.

The ability to prepay expenses near to 30 June in relation to services to be provided over a future period has long been a feature of tax avoidance arrangements. In 1988 a rule was introduced to restrict the benefits that can be obtained by prepaying expenses. Under this rule, if the payment related to services that were to be provided over a period of more than 13 months the deduction was claimable in the income years in which the services were to be provided on a pro rata basis (that is, the tax treatment was aligned with the accounting recognition of the expense).

With effect from 21 September 1999, in response to recommendations of the Review of Business Taxation chaired by John Ralph ("the Ralph Report"), the prepayment rules were amended so that most medium and large business taxpayers who prepaid expenditure for services that would not be wholly performed within the same income year would only be entitled to claim deductions on a pro rata basis (subject to some transitional rules). Those rules did not apply to individuals carrying on a small business, but this exclusion terminated on 1 July 2001.

As from 1 July 2001 all taxpayers, including individuals, are required to apportion prepaid expenses over the period during which the services will be provided unless:

- the taxpayer has elected to be an STS taxpayer (see below);

- the taxpayer is an individual and the relevant expenditure is not incurred in carrying on a business (e.g. a taxpayer who prepays interest for 12 months in relation to a loan used to acquire an investment asset); or
- the obligation to pay the relevant expenditure arose under an agreement entered into before 21 September 1999 which the taxpayer could not unilaterally escape.

As a consequence of the above rule, barristers who prepaid expenses prior to 30 June 2002 will be required to apportion the deduction for the expenses to the years in which the services or goods will be supplied. For example, if a barrister paid $2000 for a subscription to a loose-leaf service on 31 December 2001, only $1000 would be deductible in the year ended 30 June 2002, the deduction for the remaining $1000 being deferred to the year ended 30 June 2003. This result may be avoided if a barrister elects to be an "STS taxpayer" (see below).

"Excluded expenditure" is not subject to any of the above rules and therefore continues to be deductible when paid. "Excluded expenditure" is defined as expenditure less than $1000, expenditure required to be incurred by law or expenditure incurred under a contract of service.

In addition to the above rules there is an anti-avoidance rule applicable to certain prepaid expenditure incurred after 11 November 1999 under "tax shelter" type arrangements, such as afforestation schemes. This rule applies where, among other things, there is more than one participant in the arrangement or the manager or promoter of the arrangement manages or promotes similar arrangements to other taxpayers and the taxpayer does not have day-to-day control over the operation of the arrangement. This rule is not really relevant to barristers' practices but it might be relevant to those barristers who have participated in year-end tax schemes.

SIMPLIFIED TAX SYSTEM

The "simplified tax system" (STS) was also a product of the Ralph Report, the purpose of which was to reduce small business costs directly associated with the tax system. For income years ending 30 June 2002 and later, taxpayers whose income and assets do not exceed certain limits can use the STS. A taxpayer enters the STS by electing to be an STS taxpayer in their income tax return. The consequences of making the election are that:

- the taxpayer is subject to cash accounting rules;
- the depreciation rules are varied to allow an immediate tax deduction for assets costing less that $1000;
- other depreciating assets having effective lives less than 25 years are depreciated at an accelerated rate of 30 per cent;
- simplified accounting for private use of depreciating assets applies;
- the taxpayer is permitted to ignore the difference between the opening and closing values of trading stock (up to $5000); and
- prepayments are deductible when paid if they relate to "things" that will be completed within 12 months.

When it was introduced, many accountants and lawyers practising in income tax criticised the STS as being irrelevant to most small business taxpayers. The negative reaction suggests that very few taxpayers are likely to opt for the STS. But in my view it offers a number of attractions to barristers. I will therefore deal in more detail with three aspects of the STS: (a) eligibility, (b) prepayments and (c) depreciation.

(a) Eligibility

A taxpayer is eligible to be an STS taxpayer if he or she carries on a business in that year and has an "STS average turnover" of less than $1,000,000 for that year. "STS average turnover" is normally the sum of the taxpayer's "STS group turnovers" for any three of the previous four years divided by three. This formula is adjusted if the taxpayer did not carry on business in each of the previous four years: see section 328-370. In broad terms, "STS group turnovers" are the turnovers of the barrister and certain other persons and entities that are grouped with the barrister for this purpose. Barristers who control companies or trusts that carry on significant business activities will need to read the eligibility rules very closely. Barristers whose practices turn over more than $1 million will not be eligible.

(b) Depreciable assets

One of the main advantages of electing to be an STS taxpayer is that the cost of a depreciable asset (such as a computer, or an item of furniture) is deductible outright in the income year in which the taxpayer first starts to use it or installs it ready for use, provided the barrister started to hold the asset when the barrister was an STS taxpayer and the asset is a "low cost" asset: section 328-180(1). A depreciating asset is a "low cost asset" if its cost as at the end of the income year in which the barrister starts to use it or installs it ready for use for a taxable purpose is less than $1000: section 40-425

One issue that arises in relation to calculating the cost of an asset is whether, if two or more barristers jointly acquire an asset, the cost is determined by reference to the amount that each one has paid or whether it is the total of the amounts they have all paid. For example, if two barristers share in the cost of a couch, is the relevant cost the $1900 the couch costs or is it $950, which each has contributed?

Section 40-35 of the *Income Tax Assessment Act 1997* provides that Division 328 (which contains the STS provisions) applies to a depreciating asset that two or more taxpayers own jointly as if the taxpayer's interest in the underlying asset were itself the underlying asset. Under sections 140–180 and 140–185 the cost of an asset is, in most cases, effectively the amount the taxpayer pays for the asset or the liability incurred to acquire the asset. Accordingly, if two or more barristers acquire an asset and each barrister's interest in the asset costs less than $1000, the barrister should be entitled to claim a tax deduction outright for the cost of that asset under the STS system.

Assets costing more than $1000 are also the subject of special rules. Depreciating assets within the STS depreciation regime that are held by a taxpayer when the taxpayer enters the STS (other than "low cost assets") are automatically allocated to two "pools" at the start of the first year in which the STS applies. The intended advantage of a "pool" is to simplify depreciation calculations by allowing the individual to treat all assets added to the pool as if they were a single asset. The two pools are a "general STS pool" for assets having effective lives of less than 25 years and a "long-life STS pool" for assets having effective lives of 25 years or more. But the taxpayer can choose to exclude a long-life asset from the long-life pool if the taxpayer started to use the asset before 1 July 2001. The pool depreciation rate is 30 per cent for the general STS pool and 5 per cent for the long-life STS pool.

The following kinds of assets are excluded from the rules outlined above (including the outright deduction rule): a building (subject to certain exceptions); horticultural plants; an asset that is let or is intended to be let predominantly on a depreciating asset lease (including a building); and software.

Prepaid expenses

The second major advantage in electing to be an STS taxpayer is that prepaid expenses are fully deductible in the year in which they are paid, provided:

(a) the "eligible service period" for the expenditure is 12 months or less (that is, the item or service for which the payment is made is supplied within 12 months); and
(b) the 12-month period ends no later than the last day of the income year following the year in which the payment was made.

Where a prepayment does not meet both the 12-month rule and the next-year rule then no immediate deduction is available. The STS taxpayer will need to apportion the deduction over the period that the service is to be provided.

The main disadvantage to a barrister of electing to be an STS taxpayer is that expenses will only be deductible when paid. This might result in some expenses invoiced at year-end but not paid being treated as non-deductible. This should not be a significant disadvantage for most barristers, as most barristers would be ensuring that their invoices are paid prior to year-end so as to qualify for refunds of GST input tax credits, although in the year ended 30 June 2002 it would prevent barristers from claiming their professional indemnity insurance premiums (since these would not have been paid until July this year).

It should be noted that opting for the STS will be the only avenue for a business taxpayer to claim a prepaid expense in the year in which it is paid for years of income beginning 1 July 2001.

There are a number of STS rules that I have not mentioned here. The main reason for mentioning the STS system is simply to alert barristers that it is available and that it might offer some advantages. If you are interested in electing to become an STS taxpayer I recommend that you talk to your accountant about it or if you prepare your own tax return that you consult the CCH Master Tax Guide or the ATP Australian Tax Handbook. The Commissioner has also published material on his website: see http://www.taxreform.ato.gov.au/content.asp?doc=/content/19925.htm&placement=TR/B T/ ST S&from=TR/BT

NON-COMMERICAL LOSSES

One hundred years ago barristers would have worn the label "non-commercial" as a badge of honour. In Australia today the Taxation Office considers that to practise as a barrister is to carry on a business and an "uncommercial" approach to business is accounted an abuse of the tax system.

New anti-avoidance measures contained in Division 35 of the Act are designed to prevent individuals from offsetting losses from "non-commercial" business activities against other assessable income in the year the losses incurred. Rather than disallowing expenses on a permanent basis, the effect of the rules is that the loss is deferred and may be offset in a later year against profits from the same activity. These restrictions commenced in the year ended 30 June 2001.

The rules in Division 35 only apply to "non-commercial" losses. A loss is regarded as "non-commercial" if it arises from a business activity in any year in which the activity satisfies at least one of the following tests:

(a) Assessable income test — assessable income from the activity for the income year is at least $20,000 (or would reasonably be estimated to be at least $20,000 if the activity were to be carried on for the whole year);
(b) Profits tests — the activity has made a profit in at least three of the past five income years including the current year;
(c) Real property test — the total value of real property used on a continuing basis in carrying on the activity is at least $500,000 (not relevant to barristers unless they own expensive chambers);
(d) Other assets test — the total value of other assets (except cars, motor cycles and similar vehicles) used on a continuing basis in carrying on the activity is at least $100,000 (not likely to be relevant to barristers unless they have expensive art work or furniture or an expensive library).

The rules in Division 35 do not apply to losses from a primary production or professional arts business where assessable income for the year from other sources is less than $40,000. Also the Commissioner has a discretion not to apply the rules in Division 35 if it would be unreasonable to apply them because of special circumstances or because the nature of the business activity is such that there is a lead time between the activity commencing and the production of assessable income and the activity is objectively expected to make a profit or pass one of the commerciality tests within a commercially viable period.

The application of Division 35 might have surprising (and unintended?) consequences. Consider the situation of a barrister who commences practice in May or June (which would be the situation for readers commencing in March). Such a barrister might have no income at all in his or her first financial year of practice but would incur expenses in practising as a barrister. How are such barristers treated under the new rules?

They may be able to argue that a reasonable estimate of what would have been their income if they had carried on the business activity throughout the year is more than $20,000. If their actual income for the following year exceeds that amount it should be strong evidence in support of the deductibility of the loss in their start-up year.

Alternatively, they might be able to rely upon the Commissioner exercising his discretion in section 35-55 on the ground that there is an objective expectation based on evidence from independent sources that within a period that is commercially viable for the industry concerned the activity will satisfy the income test. The Commissioner has stated that the expectation that a person's business will pass one of the tests or make a profit within a period that is commercially viable should be based on evidence from an independent source (provided that an appropriate source exists). Is there objective evidence of the period within which a barrister's practice can be expected to become commercially viable? I recall seeing a survey several years ago that reported on income levels of barristers of different levels of seniority, but I do not recall the source of the survey.

Barristers who fail to satisfy either of these conditions will not be able to offset their deductions in connection with their business of practising as a barrister against any other income they might have incurred earlier in the year (such as salary from their former employment).

The non-commercial loss rules might also need to be addressed by barristers whose incomes are low, perhaps because they practise part-time or perhaps temporarily, because of illness or because they have taken time off to care for a child. In any of these circumstances, the non-commercial loss rules might present an obstacle to claiming losses from their practice as a barrister against other sources of income.

Communism Embraces Capitalism: Reflections on Chinese Law

Peter Vickery QC

Peter Vickery QC, having recently returned from a journey to China, files the following report on legal developments in that country. The report includes some comments from Dr Clifford Pannam QC, a keen observer of the modern Chinese legal system over the last 40 years.

WITH Starbucks and McDonalds springing up next door to ancient Taoist temples, regiments of western icons the likes of Cartier, Bvlgari, Gucci and Versace offering the finest baubles the yuan can buy, and the pervasive face of CNN available in five-star hotels at the flick of a remote control, it's enough to make Mao Zedong role over in his mausoleum.

For a visitor to the major cities of China today, one is confronted with images of effervescent economic activity driven by a high-spirited people brimming with confidence, vitality and entrepreneurial spirit. As if to herald the awakening of the next world economic powerhouse, construction cranes dominate the skylines of Shanghai, far surpassing the scene Melbourne grew accustomed to during the heady days of the eighties.

Within the short span of 20 years the ideological driving force of China has undergone a radical shift. It has moved from one structured wholly on principles of Maoist/Marxist theory towards a consumer society, conspicuous with the

Nanking Road, Shanghai — everything the yuan can buy.

Starbucks, with Taoist temple in situ.

A scene from Tiananmen Square — "only the tourists buy these little red books these days".

Grand Theatre, Nanking Road, Shanghai — foreign investors have a minority interest.

trappings of capitalism. Laurence Brahm, a leading commentator on modern China, described his observations of the celebrations in Tiananmen Square on 1 October 1999 to mark the 50th anniversary of the People's Republic of China: "By tradition, the portrait of SunYat-sen faces Mao Zedong's own portrait over Tiananmen gate, eye-to-eye across the square every 1 October. The wording on the signs, however, can change depending on the political wind. I looked for changes. 'Congratulating the People's Republic of China on the 50th Anniversary of Its Establishment', read one sign. 'Carry High the Banner of Deng Xiaoping's Great Theory Leading Us into the New Century', read the other, clearly and unequivocally stating to Chinese people that the next century for China will be driven by pragmatism."

With a view to advancing Deng's new economic order, the Chinese have recognised the need for fundamental reform of the country's legal system. As Jiang Zemin, State Chairman of China has pointed out: "Ruling the country in accordance with the law is the objective requirement of the market economy, it is the important symbol of civilization and progress of society, it is an important guarantee for long-term rule and stability of the country."

Prior to the current developments, the Chinese system of governance may be described as essentially "administrative".

The economic miracles of the major cities are not to be found all over China.

The Chinese Communist Party (CCP) was able to draw upon precedents in place for over 4000 years, including the structure of the more recent imperial bureaucracies of the Ming and Qing dynasties. In 1949, Mao Zedong inherited a system under which rule of the state was sourced from political power in which executive and judicial functions were fused. This approach to governance diverged sharply from Western traditions. If Western Europe can lay claim to the invention of "rule of law", then the Chinese may equally lay claim to the invention of "bureaucracy".

However, within significant elements of the polity of China today, there is a growing recognition of the need to reconstruct the legal system from one in which the concept of *ren zhi* (rule by men) is predominant, to a system in which the concept of *fa zhi* (rule by law) is the guiding feature. As Xiao Yang, the Chief Justice, People's Supreme Court of the People's Republic of China, has recently put it: "Today, China has finally stepped onto the correct track of socialism ruled by law, in writing a new chapter in the construction of a modern legal system."

In mid-1966 Mao Zedong launched the Great Proletarian Cultural Revolution. Over the next decade, as the contagion spread at the hands of the "Red Guard" armed with Mao's *Little Red Book*, literally millions of people were imprisoned and otherwise reviled for hitherto hidden "bourgeois tendencies", while tens of thousands were executed.

The Cultural Revolution was destructive of the fledgling legal system of the modern era, which had seen its begin-

A hint of yesteryear.

Within the short span of 20 years the ideological driving force of China has undergone a radical shift. It has moved from one structured wholly on principles of Maoist/ Marxist theory towards a consumer society, conspicuous with the trappings of capitalism.

nings in the 1950s. Xiao Yang, the Chief Justice, describes events in the following terms: "During the later part of the 1960s, the 'ten year turmoil' (Cultural Revolution) began and legal system construction broke down altogether. At that time, the legislative departments of our government had no function at all and the number of drafted laws was very few. Judicial departments were destroyed, judicial workers suffered persecution, citizen rights were no longer protected and a great deal of injustice, framing and unjust cases emerged. The construction of China's socialist legal system underwent a great calamity."

The starting point for the modern epoch of legal reform occurred in 1978, marked by the Third Session of the 11th Congress of the Communist Party of China. Faced with a legal system in ruins, a resolution was passed to ensure that a new legislative program would be given the highest priority for the National People's Congress (NPC), China's highest legislative body, and its Standing Committee. The preamble to the resolution set the agenda: "There are laws to be complied with and they must be complied with, enforcement of the law must be strict and the people violating the law must be penalized." In 1979, the NPC then adopted a number of important laws, regarded as fundamental to the new legal order. The Organization Law and Electoral Laws — drafted to establish the national legislative, administrative and judicial bodies; "The Criminal Law and Criminal Procedural Law" — which were drafted to penalise defined crimes, protection of individual rights and guaranteeing the litigation rights of citizens; and "The China-Foreign Equity Joint Venture Law" — drafted to open up China's doors to foreign trade and encourage foreign investment.

In September 1979, The Central Committee of the Chinese Communist Party issued an "Instruction Regarding Resolutely Guaranteeing the Full Implementation of the Criminal Law and Criminal Procedural Law". Xiao Yang, the Chief Justice, has provided the following explanation of the "Instruction": "This 'Instruction' clearly reflects the spirit that the ruling party — the Communist Party of China — respects the concept of law and the legal system. The 'Instruction' requires that all the party and government leaders at different levels, regardless of their position and authority, shall not and are now forbidden to over-rule written law with verbal orders. They must respect the law and the authority of the judicial departments."

The Constitution also saw development. The first Constitution of 1954 had been abandoned during the "Ten Years of Turmoil". In 1975 a new constitution was born. Although it contained provisions establishing the obligations of the citizen, it was silent on rights. This was recognised by the Third Session of the 11th Congress in 1978, which also gave top priority to constitutional reform. A new constitution was promulgated in December 1982, following two years of deliberation and four months of nationwide public discussion. The 1982 Constitution is afforded supreme legal authority, providing that all political parties, state organs, social organizations and citizens must comply with its terms. Detailed provisions provide for the basic rights of citizens, including economic, social and cultural rights.

Another notable development in modern Chinese law has been the growth of administrative law. Again drawing upon the observations of the Chief Justice: "The exercise of power requires supervision, and the exercise of administrative power makes no exception." A number of measures have been introduced with the object of bringing the exercise of administrative power within the rule of law. An early example of this structure at work is provided by the "China-Foreign Equity Joint Venture Enterprise Income Tax Law", which came into force in 1980. This law provides that if a foreign joint venture enterprise disagrees with a tax department decision on a taxation matter, it may bring a proceeding in the People's Court. This was the first example of the Chinese legal system providing a legal remedy, enforceable in a court of law, against a decision of the bureaucracy.

Reflecting the process of transition from a planned economy to a "commodity economy" much has been achieved in an intense program of legal reform dealing with practically all aspects of commercial law. The 1980s saw the NPC and its Standing Committee proceeding at rapid pace with an impressive

program. Foundation commercial laws such as the "General Principles of Civil Law", "Enterprise Bankruptcy Law", "Economic Contract Law Involving Foreign Interests", "Foreign Investment Enterprise Law", and "Patent Law" were all promulgated in quick succession.

An undoubted impetus to these developments has been the recent acceptance of China as a member of the World Trade Organization (WTO) and the astute positioning of the Chinese economic and legal system to achieve this momentous outcome. The Protocol on the Accession of the People's Republic of China to the WTO came into force on 11 December, 2001. By adopting the Protocol, China has undertaken to effect a great number of economic and legal reforms in order to comply with the core agreements of the WTO.

There are a staggering number of recent examples of the new breed of "WTO inspired" legislation. Some major structural milestones introduced during 2001 include: "The Provisional Regulations Concerning Investment Inside China by Foreign Investment Enterprises"; "The Several Opinions Concerning Further Encouraging Foreign Investment in Non-Oil-and-Gas Mineral Resource Exploration and Mining"; and the landmark decision concerning amendment of the "Law of the People's Republic of China on Equity Joint Ventures". The decision amends China's main law governing equity joint ventures. A principal reason for amending the foreign investment laws was to eliminate perceived inconsistencies with WTO rules in the run-up to joining the WTO.

Measures for the protection of intellectual property have received considerable attention. Recent examples include: "The Regulations on Protection of the Layout-Designs of Integrated Circuits"; another example is provided by "The Detailed Implementing Rules for the Law of the People's Republic of China on Patents"; yet a further example is "The Decision of the Standing Committee of the National People's Congress on Amendment of the 'Copyright Law of the People's Republic of China'", 2001 which makes numerous changes to China's Copyright Law; then followed "The Measures for Registration of Copyright in Computer Software".

The controlling hand of the CCP and its highly influential military arm, the People's Liberation Army, however, is never far away. This influence is reflected most obviously in the arena of the mass media, as illustrated by the following recent legislation: "The Provisional Regulations on Foreign-Invested Movie Theatres" were promulgated on 25 October, 2000. In Chinese-foreign equity joint venture movie theatres, the Chinese Joint Venture Party's investment share in the registered capital may not be less than 51 per cent, and it must hold the principal rights of operation; "The Measures for Administration of the Import of Audio and Video Products" issued 17 April, 2002, which set out a system under which approval must be obtained from the Ministry of Culture for the import of audio and video products; and finally reference is made to "The Provisional Regulations for the Administration of Internet Publishing" promulgated on 27 June, 2002. They define "internet publishing" as the on-line transmission acts by internet information service providers of posting on the internet, or sending to user terminals through the internet, after selection and editing, works created by themselves or others for browsing, reading, use or downloading by the public. Approval must be obtained for the conduct of internet publishing activities.

A striking example of the application of direct governmental regulation of the internet emerged recently. Under the banner "Internet news sites face tough new rule", the South China Morning Post reported on 15 July that: "Beijing yesterday unveiled a new regulation that will tighten control over publishing of news on the internet. Operators of news portals will be required to exercise stringent control over their content. For example, 'major items' will have to be submitted to the Press and Publications Administration 'for reference.' . . . these 'major items' refer to news reports which may 'jeopardise national security [and] affect 'social stability.' It also clamps down on 'content which poison's young people's minds', it stipulates that public apologies and 'corrections' be published over incorrect reports 'to neutralise the [bad] influence', and it specifically forbids news portals from promoting cults and superstitions."

Are there plans to privatise the people's Liberation Army?

The controlling hand of the CCP and its highly influential military arm, the People's Liberation Army, however, is never far away. This influence is reflected most obviously in the arena of the mass media, as illustrated by the following recent legislation:

The path ahead for the Chinese legal system is by no means likely to be smooth and much remains to be done. The Chief Justice, Xiao Yang, has identified two critical problems for the legal system in China. The first he describes as follows: "Strict observance of the law by citizens and social organizations is an important part of law enforcement. The prior condition for observance of law is that citizens must possess an understanding of modern legal concepts and possess a determined spirit to observe the law. In the past, China lacked the tradition of a legal system for a long time, and the concepts of legal consciousness and legal system among citizens fell into relative apathy. Especially, citizens lack the spirit to observe the law and they do not possess the consciousness of unifying their rights and liabilities, which are required by modern legal con-

sciousness. The habit of respecting the law and observing law has not been completely formed. This is the major obstacle for China in implementing its legal system." This "consciousness", observes the Chief Justice, must also permeate the administrative arms of government.

The second matter requiring urgent attention arises from rapid growth in the operation of the courts in the Chinese legal system. Xiao Yang notes: "Since the 20 years of reform and openness began, the types and numbers of cases treated by the Chinese courts have increased constantly. From 1979 to 1999, the Chinese courts at different levels have handled about 50 million various first trial cases which were involved in criminal, civil, economic and administrative matters. The average rate of growth for these cases was 13 per cent. The intensification of judicial functions has become one important aspect of building a socialist country run by law." It is not, however, the apparently gargantuan issues of case management which are of immediate concern to the Chief Justice, who undoubtedly presides over the most complex and extensive curial system in the world. The most pressing issue arises from an entirely different quarter. As he frankly observes: "Along with the intensification of the judiciary function, the phenomenon of corruption has surfaced in the judicial system. A series of problems such as perverting justice for bribes, perverting justice for private affairs, perverting justice for relations have caused general concern throughout the whole society. The demands of the people for judicial fairness, efficiency, honesty and cleanliness have become ever more urgent."

To these matters must be added the counsel of Cliff Pannam who observes that one should not be hypnotised by the apparent legal reforms. "Form and substance in China have always been two very different things. This distinction is nothing new. It permeates Chinese history from the earliest recorded times. There is a lot on paper but much is poorly implemented in practice. Constitutional rights and a fair Criminal Code are all very well, but remember not only the Fa Lun Gong but also the fact that the acquittal rate in Chinese criminal courts is about 1 per cent, if that. In China the trial is the end of the road of justice for the accused, not the beginning. People have always had extensive "rights" under Chinese law. The problem has been how to enforce them. It still is. As to the new and good-looking Intellectual Property laws, the fact is that in China in general, and in Beijing and Shanghai in particular, international patents and copyrights are massively breached with little attempt to enforce the law. The largest market for such goods in Beijing is conducted openly in the embassy district!"

Constitutional rights and a fair Criminal Code are all very well, but remember not only the Fa Lun Gong but also the fact that the acquittal rate in Chinese criminal courts is about 1 per cent, if that. In China the trial is the end of the road of justice for the accused, not the beginning.

Cliff Pannam further cautions that one should not for one moment assume that the economic "miracles" of Beijing/Tianjin, Shanghai and Xiamen — and possibly Guangzhou — are to be found all over China. "The reverse is true. China is a huge country with not only a vast population but a population that predominantly still lives and works in provincial and agricultural areas. In those areas though these are changes they are of a different dimension. The economic boom is not to be seen in these areas or if it is, the scale is very much smaller . . . Further one should not assume that China is a homogenous country. It is rent with great geopolitical differences. The Tibetans and the Uygur peoples of Xinjiang, to name but a few of many minorities, have not shared in the economic boom. Indeed in many parts of China there is to be found considerable revolt and tension about the diversion of local economic wealth to the central government."

As for democracy in China, Xiao Yang, the Chief Justice, notes: "In terms of our political system, there is a marked difference between China and western countries. Western countries adopt the principle of separating power through a system of checks and balances. China provides the People's Congress System with separation of power under the leadership of the Communist Party of China." This exposes a structural conundrum of the new China — how can vibrant capitalism operate effectively in the absence of a developed democracy in the western style?

Although something approaching democracy operating within the precepts of a western model may ultimately arrive, there is no guarantee that this will ever be achieved, and there are serious questions as to whether indeed this should be the ultimate goal. Professor Donald Lewis of the Department of Law, University of Hong Kong, ventures as to the future: "What can perhaps be said about the coming century is that China will arrive at a Chinese destination — which will be different yet similar — to where the West is today. We may expect a form of governance, to be sure, but it will be 'governance with Chinese characteristics'. China should be encouraged to travel its own road, its own way, for in the journey the Chinese may uncover something new and different, and of enduring benefit to us all."

Towards the end of our trip, our delightful tour guide appointed by the Chinese International Tourist Company (CITC) (her grandfather was a General in the old days with Mao Zedong) was amused as I thumbed the pages of a *Little Red Book* on offer in a Beijing stall. "Are there plans to privatise the People's Liberation Army?" I quipped. "I'll check," she said, as she pretended to reach for her new model mobile phone. "By the way, only tourists buy those little red books these days," she laughed.

Horses for Courses

Warlords as Peacemakers: Are Trial Lawyers Bad for ADR?

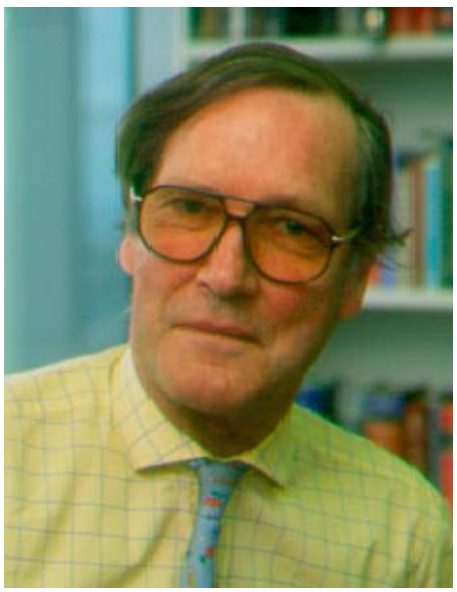
By Geoffrey Gibson

People looking for an alternative to litigation want to avoid litigation. Trial lawyers — barristers or solicitors — are trained to fight; their clients pay them handsomely to do just that. They need recognised skills and strengths to succeed in a congested marketplace. The training of trial lawyers affects their participation in arbitration and mediation. By and large they have ignored the first and are now embracing the second, but does their training and disposition fit them for mediation? Just as it is said that if you want a lawyer to conduct trials you should appoint a trial lawyer as the judge, so the question needs to be asked whether a trial lawyer is the appropriate person to be appointed if a trial is the last thing you want.

INTRODUCTION

IF you want an alternative to medicine, you do not want medicine. You want something else. If you go to a herbalist, you are not looking for brain surgery or Prozac. Perhaps you do not trust medicine, or perhaps you believe it has failed, but whatever else you want, you do not want medicine. In our world, you would be quitting western medicine for something else. Someone giving you western medicine would therefore be acting against your wishes. If doctors were involved, they would be suspected of succumbing to an intellectual bias induced by their professional training or, worse, of being corrupted by a fear of a loss of professional fees if the patient was lost to the medical profession and left with the alternative.

It is the same with alternative dispute resolution. People who seek it do so because they want to avoid litigation. Many find themselves involved in mediation because the courts have ordered it, but once they get there they will at least try this alternative to litigation. They may not trust litigation, or they may believe it has failed them, or is likely to fail them. Whatever may be their reason, they do not want litigation, at least while they are seeking to work through the alternative. Someone giving them litigation would be acting against them. If lawyers were involved, they would be suspected of succumbing to an intellectual bias induced by their professional training, or, worse, of being corrupted by a fear of loss of professional fees if the client was lost to the legal system.



Geoffrey Gibson

Litigation lawyers — barristers or solicitors — are trained to litigate. That is, to fight. Most of them have little training in mediation or arbitration. They spend four years at university in learning the law, with twelve months of articles, or the like, and possibly three months or thereabouts in a readers' course if they have gone to the Bar. They might do a tax deductible course for one sunny weekend in mediation, or something similar for arbitration. Their training is overwhelmingly in litigation — the kind of dispute resolution that many want to avoid. There are not, after all, many litigants who like litigation and those in charge of litigation, the judges, routinely order the parties to avoid litigation if they can by undergoing mediation.

The question then is whether or not litigation lawyers are the right people for the job of ADR. That question is more acute if looked at from the point of view of the financial interests of the lawyers. If ADR may be bad for the lawyers, the lawyers may be bad for ADR. Just how does the mind-set of lawyers affect the way they go about ADR? It is not the obvious case that if you need a dentist, you do not want a vet, but rather — if you want to broker a peace treaty, is it a good idea to send in the commandoes?

MEDIATION AND ARBITRATION

The two main modes of ADR currently used in Australia are mediation and arbitration. The two are different. Mediation involves a negotiation process that may or may not lead to an agreement that determines the dispute. Arbitration involves a decision making process that must resolve the dispute. In mediation the parties negotiate with someone else there. In arbitration, the parties bring their own judge. One involves off-the-record without prejudice negotiations. The other involves, commonly, evidence and argument, but given in private, unlike a court.

Both processes depend on agreement.

There has to be an agreement to get arbitration off the ground, but once that agreement is reached, the contract and the law relating to the conduct of arbitration will enable the arbitration to be conducted independently of any further agreement.

Mediation can only resolve the dispute if the parties reach agreement. If the mediation is not entered into voluntarily but by order of the court, it can only succeed if the parties agree to participate — they will not be in contempt of court if they turn up at the mediation, tick the roll and leave. They may be open to criticism, but the courts are still chary of ordering people to negotiate. The parties do after all have what might be called, for want of a better term, a constitutional right — it is at least a *Magna Carta* right — to have their disputes resolved by their courts, and have them resolved decently.

It is obvious that the mind-set of a litigation lawyer may have a different effect on the ADR process depending on whether the ADR is mediation or arbitration. One involves an attempt to reach agreement between the parties. The other involves the forensic determination of issues. At first blush it might be thought that the arbitration processes were more likely to attract the kind of forensic skills learnt by a litigation lawyer in preparation for litigation, while the same skills may have little to offer for the process of guided negotiation. Is this so?

THE PROCESS OF LITIGATION

Litigation is a forensic contest that derives from trial by ordeal and trial by battle. Each side usually has a lawyer. The lawyer for each side presents the case. The trial is in public. Witnesses are examined, and cross-examined, and arguments are presented. The aim is to get through the evidence and argument in a continuing sitting and then give judgment. The judge rules on procedural issues and then weighs the case as presented. The party who wins the case is the one whose case the judge has found to be the better.

Legal historians (Pollock and Maitland *The History of English Law*, 1899, CUP, Volume 2, 598, 670–1) compare the function of the judge in the old days to a cricket umpire. The judges sit in court not to discover the truth, but so that they may answer the question, "How's that?" The analogy of a tennis referee is just as appropriate. That official sits there above the protagonists, calls the shots in or out, adds up the score, and says who is the winner — not who is the best, but who has scored the most points on the day.

This process of the common law, developed in England over the course of a millennium, is said to be adversarial. That is true enough as it goes. But insofar as it is said to represent a distinction from the inquisitorial, it is now misleading.

The issue more relevant to our time is — is the adversarial position customarily adopted by trial lawyers consistent with the conciliatory position required to make ADR work? Is it simply "negative" against "positive"?

The English Chancery employed inquisitorial procedures like the subpoena and discovery. They now have been abused in our procedure so that major commercial cases can now take on the air of a Royal Commission. The current trend towards judge-controlled lists, and varying procedural mixes for different kinds of cases, also makes the current process more inquisitorial. The distinction is no longer worth talking about. The issue more relevant to our time is — is the adversarial position customarily adopted by trial lawyers consistent with the conciliatory position required to make ADR work? Is it simply "negative" against "positive"?

THE MIND OF THE TRIAL LAWYER

Litigation — whether you call it adversarial or inquisitorial — involves a contest. The parties are opposed to each other. Otherwise they would not be in court. Each party wants to win. It is the duty of their lawyers to try to get them over the line. The parties and their lawyers are contestants. As Sir Owen Dixon remarked, "the object of the parties is always victory, not absolute truth" (*Jesting Pilate*, Law Book Co, 1965, 131).

Lawyers involved in trying to win these contests are likely to develop some characteristics, whether you are talking about solicitors who practise litigation, or the paradigm litigation lawyer, the trial lawyer, being either barrister or solicitor. What are the characteristics that define the trial lawyer? What are you likely to notice about them?

Combativeness. Conscientious objectors are excused, at least in civilised societies, from fighting wars. There is not much point in sending people out to fight if they will not. People regularly engaged in combat naturally become combative. If you have to go into combat yourself, you want someone to represent you who knows what to do — and who is not frightened, or at least no more frightened than is necessary. Trial lawyers have to face hostility in various ways. They may have to face a hostile judge. There is law on how to deal with a hostile witness. Very few trial lawyers would blush at the suggestion that their job in respect of a hostile witness may be to destroy the witness. "Destroying" people — hostile or not, witnesses or not — is not something to be entered into lightly or ill-advisedly. This tendency to hostility is one of the reasons why some young lawyers instinctively react against practice in litigation. (Women are yet to get into this combat zone as much as men: a reluctance to put women in the front line is not found only in the armed forces.) The trial lawyers acquire a warrior status that sets them apart. And why should it not? It is completely uplifting and honourable to be the only thing standing between someone and the powers that be or want to be. There is nothing else in the profession to match it.

Gamesmanship. The analogy between war and games seems to come easy to Anglo-Saxons, especially since someone said the Battle of Waterloo was won on the playing fields of Eton. There is a conscious exercise of skill against the interests of the other side, or the lawyer for the other side. You are trying to put the other side in hazard. This leads to a sporting, blokey attitude to the proceedings. It is in part a demonstration of the urge to win, in part the need to hide from what might be the high seriousness of the occasion, and in part the need to hide your own nerves. This sporting attitude, these exercises in gamesmanship, can be very unsettling for people who have not experienced it face to face before, and who had hoped that their destiny might be in the hands of people whose serious intent and high office may have shown themselves more beneficently.

Advocacy. Because of the manic digression of large cases into trench warfare, into wars of attrition that exhaust the parties, while at the same time satisfying the lawyers, we are breeding a generation of trial lawyers who hardly ever fight a trial. We are certainly breeding a group that do not know how it is simply to run

trials day after day on the footing that you get something that looks like a statement of what a witness might say, put them in the witness box and proceed. But this falling off in trial turnover should not obscure the fact that the primary function of a trial lawyer is to persuade. It is to represent the case by persuading the judge or jury or tribunal to adopt the evidence of the witnesses and the submissions in support of those witnesses. Whether you regard advocacy as high technique or an art form, its final command is beyond teaching. As the professional coach said in *Chariots of Fire*, "you cannot put in what God left out". The successful application of the techniques in cross-examination, or before a judge, or before a jury, or in the High Court of Australia, is what gives counsel their biggest charge.

It also gives their clients a charge. Most lawyers would subscribe to the old proposition that out of a hundred cases, ninety decide themselves, three are won on good advocacy, while seven are lost on bad advocacy. But most litigants would not accept that view. They want to regard their counsel as their champion, and they have very high ideas of what their counsel, and only their counsel, can do for them, sometimes bad ideas which are often left uncorrected until it is too late. While counsel might sometimes apply the techniques of advocacy to try to persuade their client, or a witness, or the other side, the full panoply is left for the court. Whether those techniques of persuasion can be applied in pursuit of agreement in private is another matter. There is no doubt that successful advocates, like successful actors or singers, can develop a public *amour propre* that thrives on public acceptance, which in turn depends on public performance. It is what Osric may have called a "very liberal conceit" (*Hamlet*, 5, ii, 117). Again like the case of actors and singers, you may see a felt need and a felt capacity to manipulate. If advocacy as such is a tool to be deployed in settlement discussions, it will be a different kind of advocacy to that deployed before the High Court of Australia or a jury in a murder trial.

Learning. The trial lawyer has to have specialised knowledge of the rules of procedure, including those relating to the trial. Some people, for their sins, make a living out of pleadings and discovery and arguments about them. Some barristers make their living out of paper work and nothing else — they act as de facto as solicitors. The lawyer is frequently called on to display this knowledge in the course of exchanges. Some trial lawyers find it harder to resist displaying their learning, or their advocacy, than lawyers whose practice does not involve a celebrated extraversion.

Snobbery. All this can lead to a degree of intellectual snobbery, as you see with some surgeons. There is a funny rollover in intellectual snobbery in our profession. The big firms at the big end of town look down on litigation with something like contempt. Litigation lawyers have to live with the suggestion that somehow or other they are not real lawyers. They are tolerated, just. They are plainly inferior. At the other end of town, at the Bar, they believe they are the only real lawyers, and the top of the pile. Most of them look on all solicitors as being inferior. But as between the kinds of litigation lawyers, there is little doubt that the Bar claims the high ground. Its members show a tendency to posture, like some football supporters. "We are the champions."

Independence. There is no doubt a level of independence at the Bar that is rarely seen, if understood, in other parts of the profession. It is vital. It is one reason why the "independent" Bar must and will go on. This leads to a professional approach or standing that on a good day is robust, on a bad day is brash, and on a worse day shows the nauseating arrogance of a schoolyard bully. But the fact that some get crazed by their own success, or corrupted by their own power, should not obscure the obvious need for trained specialised and independent lawyers at something like the Bar. It is becoming daily more important as big firms are bought off from acting against big corporations and big government.

Snappishness. There is in some trial lawyers a snappishness bred from their practice. Trial lawyers are there to fight trials. If the other side do not want to behave in a reasonable way and look like they are not serious about getting a settlement, the best thing to do is to get on with it and go to court. You will meet some lawyers who after one round of negotiations will start walking off to court, and not just as an exercise in dramatics. If the other side do not want to play ball sensibly (however that is judged), then counsel can get on with what they are trained and paid to do. We will see you in court and you, Sportsman, are cruising for a bruising. This attitude would not serve well in negotiations in the Middle East. You do not always see that capacity to keep a dialogue going that industrial advocates and peace brokers have. You do not always see that determination to get a deal that business may require.

Theory of Relativity. Trial lawyers understand, from hard experience, that there are no absolutes, and no certainties. Litigation is a lottery. You simply cannot assess the odds. People who think they can are deluding themselves. Your client might have all of the credibility in the world and all of the circumstantial evidence that one could find, and still go down for reasons that were simply not seen. The judge might just get it wrong — whatever that means. For this reason trial lawyers know that they have to suspend belief. They do not believe anything or anyone. It is not their job. Their job is to persuade someone that their case is just that much more acceptable than the case of the other side. All this leads to is a form of scepticism that is healthy, and which is in tune with the empirical tradition in our Anglo-Saxon philosophy. Unhappy experiences in litigation — bad accidents — may lead to seasoned scars that may temper aggression and provide a healthy antidote to the insouciance of the mercenary. Trial lawyers are best placed to have a full understanding of the effects of the decision "to open the purple testament of bleeding war" (*Richard II*, 3.3.9–3).

Insecurity. This part of the personality of a trial lawyer derives as much from the time spent out of court as the time spent in court. Barristers will tell you that none of them knows where their next brief may come from. This is obviously true in a philosophical sense. Most barristers believe it to be true in every sense. That is why they are afraid to knock a brief back and that is why, therefore, their practice gets into a shambles and they let people down. There is also the insecurity that derives from not knowing what the result may be. There is nothing quite like the tension of waiting for and receiving the verdict of a jury. This leads to a certain wannishness on the part of seasoned counsel. One senior silk said many years ago that barristers are like cats: when they are born they have so many lives in their belly, and each fight they have is one less fight they have left. There is no doubt most barristers feel this kind of wear and tear. That is why the government still gets some affirmative answers to offers of a position on the Bench.

These generalisations have no scientific backing or standing. Unleashing the measurers on trial lawyers could be entertaining, if useless, but there is enough anecdotal support for this kind of analysis

to make it worthwhile in assessing how litigation lawyers in general, and trial lawyers in particular, might approach ADR.

The issue is clear in the mediation of commercial disputes. Business depends on agreement. Litigation depends on disagreement. People in business live to make deals. Litigation lawyers live to fight. The prevailing caste of mind is therefore likely to be radically different. Barristers who after years of practice come to practise at a corporate firm notice an immediate difference, putting to one side any partnership commitments they may have entered into. What they find is that they are working with lawyers whose main object is to secure a deal for their client. They are there to make things, rather than break things. The idea is to get the deal done on the best terms possible. There may be serious arguments on the way through, but the object remains the same. The opposing parties have the same objective — an agreement.

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The commercial approach, and indeed the forensic equipment, are radically different to those of a litigation lawyer. If you look at the characteristics of a trial lawyer set out above, you might conclude that only the last two — the theory of relativity and insecurity — might assist in the mediation process while the others — combativeness, gamesmanship, advocacy, learning, snobbery, independence and snappishness — might be unhelpful to that process, and might derail an arbitration from the process that the parties wanted.

In looking at how the training or disposition of trial lawyers may affect their contribution to ADR it is fundamental that the parties want to avoid it. In arbitration they have rejected litigation. In mediation they are trying to avoid litigation. They are therefore rejecting a process from which trial lawyers make their living. You might therefore expect friction.

ARBITRATION

The most obvious way in which the background of trial lawyers affects their position on arbitration is that that most of them either pretend it does not exist or do not want to know about it. There used to be good reasons to avoid commercial arbitration. The law was obscure and encouraged intervention by judges and obstruction by a party with money. It was difficult to find arbitrators of appropriate standing in the profession. Why should you pay an arbitrator when you get a judge for nothing? All those things have changed. The law now very firmly encourages judges to stay out of the process. You can get arbitrators of a very high standing; if you take the view, fairly or otherwise, that there has been a decline in the standing of certain courts, then you may also take the view that you may be confident of finding a lawyer as arbitrator of a standing at least as high as that on offer in the courts. You now have to pay for your day in court, and your judge, and at a substantial rate. The effect of the difference in the costs of an arbitrator and a judge has largely gone out the window.

The problems that business has with litigation need no further cataloguing. In arbitration, they can set their own pace. If they want to they can assure themselves of a decision in weeks, or less. The hearing will be in private. There may not have to be hearing at all. They can ban discovery. They can ban appeals. The CEO does not have to worry about being called names or made a fool of in public. The shareholders need not worry about the impact on the value of the shares of some allegations being made public. They do not have to worry about the Deputy Commissioner of Taxation or the ACCC getting involved. They can forego a transcript if they have not foregone a hearing. They can almost certainly count on paying less to their lawyers. They can know in advance who their "judge" will be — they can never do this in the court. The decision of their dispute might be given by a distinguished silk or a commercial partner of a large firm of standing in the business community. The decision may or may not be a monument to jurisprudence, depending on the predilection of its author, but you can be confident that those who are paying for it will not want that. They just want a decision, which they will get.

Given all of these advantages, and they are huge, it is to put it at its lowest sad that commercial lawyers do not spend more time at least discussing arbitration as an option to commercial litigation. The problem here for trial lawyers is not so much that they are biased against arbitration because it will reduce the level of fees they can charge for a given dispute — which will most often be the case — the problem is that they have not been brought up to consider commercial arbitration as an option to litigation.

The result of this general communal ignorance and antipathy is that arbitration is not widely used in commercial disputes, but tends to be invoked in specific areas. Historically, the principal of these has been building cases. The problem here is that trial lawyers simply bring in all of their attitudes and all of their procedural learning with the result that they are having a trial process by a different name and expressly denying to the parties what the parties promised each other, namely, a form of resolution that would not involve the procedures of litigation. You get pleadings, directions, discovery, the rules of evidence, transcripts, court books — the lot. The issue was described by Rogers, CJ (Commercial) in *Imperial Leatherware Co. Pty Ltd* v *Macri Marcellino Pty Ltd* (1991) 22 NSWLR 653 at 661 (after referring to Mustill & Boyd *The Law and Practice of Commercial Arbitration in England*, 2nd Edition, 1989) for the observation that "pleadings are not the ideal way of isolating the essential issues in dispute":

> I would venture to suggest that one reason why parties submit to arbitration is so that they should avoid "pre-trial pleadings, discovery and other procedures of the Court". This is so whether the arbitration is long and complex, or short and simple. The heart of the arbitral procedure lies in its ability to provide speedier determination of the real issues. Those aims, to a large extent, are made impossible of achievement if the procedures of a Court are mimicked. Nor is there anything in the requirement to provide natural justice which requires adoption of the pleadings and procedures of Courts. What is required is that the parties enjoy the benefits of natural justice consistently with the requirements of arbitrators for dispensing with technicalities, with discovery, and doing away with interrogatories. The proper requirement that each party have full notice of the case to be made by the other and a full opportunity to prepare and to answer that case does not

require pre-trial pleadings, discovery and other procedures of the Court.

Clients are frequently told that the dispute is their dispute. The problem is that it can be hijacked by the lawyers either in arbitration or in mediation. What happens involves a form of corruption of the procedure. You can see a similar process in some statutory tribunals. They start off with the best will in the world to be informal and to keep out legal niceties, but the lawyers start to creep in and a process of mutual preening takes place. Before long, you can feel people wanting to bow at the tribunal, and some do. People who have spent years doing this kind of thing commence addressing the tribunal "If the tribunal pleases". No matter how hard the tribunal members try, this has a satisfying effect on their ego. They may not be so unlike real judges after all. The takeover process is more manifest when, as commonly happens, the lawyers involved form a club so that the adherence to proper ritual is appropriately enforced. Before long you have got to a stage where you do not have a court and you do not have the tribunal that the Parliament intended to set up, but you do have something that the members and the lawyers feel comfortable about. Just how the punters feel is not often studied.

This process is not entirely the fault of the lawyers. There are areas where people do want their lawyers to go into bat for them, and to go for it in a lawyerly way. Parliaments of all political colours over many years have tried to get lawyers out of jurisdictions, or reduce their role, but they have to confront not only the machinations of the lawyers, but the wish of people to have some sort of protection not just against the other side, but against the machinery of government — including the judges.

MEDIATION

When it comes to mediation, trial lawyers should perhaps be on firmer ground than they may be with arbitration. After all, most cases do settle and lawyers get plenty of practice at it. Indeed, in some jurisdictions it is said that the settlement rate is so high that that is all the lawyers are capable of — a good fight would kill them.

The paradigm trial lawyer in Australia is the barrister. Barristers are generally very good at settling cases between themselves. They are candid, to the point, and accept the value of settlement. But when the occasion is structured so that there is an audience, even an audience of just the client, the mediator and the other side, then even though the audience is in private, some may start behaving a little like they do in court. They may take technical points. They may refer to the pleadings. They may make a speech. They may even posture. Rather than sounding like a commercial lawyer who is there to conclude a deal with the other side, they may sound like a litigation lawyer who is there to assert a case against the other side. "Priests pray for enemies, but princes kill" (2 *Henry VI*, 5.2.6). You can see a trial lawyer sometimes commence a mediation with what looks like an instinctive urge to score a king hit as soon as the ball is bounced. The commitment to learning can degenerate into an uncomely arrogance. Combativeness may drive the parties apart when the idea is to bring them together. Gamesmanship can become mere point scoring and you do not often attract someone to your position by slapping them in the face. Snappishness can turn into a sclerotic tendency to pull the pin, which from a commercial perspective might involve a form of suicide. You can sometimes sense business people thinking that lawyers at a mediation who are unduly argumentative or ostentatious do not seem to have contact with the world of business. They are not committed to doing a deal. It is interesting to see how a lot of these problems have started to rub off since mediation became sanctioned, and trial lawyers have come to accept it, but they can still be seen in some lawyers, barristers or solicitors, whose practice consists mainly of fighting cases in court.

When it comes to mediation, trial lawyers should perhaps be on firmer ground than they may be with arbitration. After all, most cases do settle and lawyers get plenty of practice at it.

These problems can be worse if the mediator shows the same warlike tendencies and claims rank to back them up. There are some former judges who still behave as if they were judges and seek to impose their will. Some silks seem intent on developing a similar reputation for firmness that others find just demeaning. Perhaps the problem is merely generational, but it will be as well when we are rid of it.

Not surprisingly, therefore, the weapons of war may not always be helpful in making the peace.

CONCLUSIONS

Some trial lawyers may not be as good at settling cases as others. It bears repeating that most cases settle. We train our lawyers primarily, if not exclusively, in one form of dispute resolution, the civil trial. This, it also bears repeating, involves a fight. Of course people have a right to have their disputes settled, and the peace preserved, by Her Majesty's judges. But we ought to do more to educate our lawyers about the settlement process. It is the right of people to go to law, but the problems of that course are notorious. Why should we therefore treat the right as being one of first recourse rather than last resort? Why should we not teach civil procedure in the law schools mediation first, arbitration second, and litigation third?

There is no doubt that in the last ten years or so the attitude of litigation lawyers in general, and trial lawyers in particular, has become more sophisticated in its reception of mediation, but the lack of education in the proper approach to it is still sometimes apparent. The failure to respect arbitration either by giving it a go or by reducing it to a mockery of a court form shows a bad lack of sophistication in commercial lawyers generally. The business community finds serious fault in the way the courts resolve commercial disputes. The profession is not doing all it should to provide and promote the alternative.

Attitudes will change. They may also change on the role of lawyers as mediators or arbitrators. Judges say that the only people who are qualified to hear and determine civil trials are those brought up as trial lawyers — which means, for the most part in Australia, barristers. There is a compelling, even inexorable, logic to this proposition. But does it have a converse? If the parties agree to avoid a civil trial by going to arbitration or mediation, may it not be the case that the worst person they could get as mediator or arbitrator is someone whose whole training has been as a trial lawyer?

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Terror Nullius

Ragu Appudurai

AMENDMENTS to the Migration Regulations excising several Australian islands from the "migration zone" were disallowed by the Senate on 19 June 2002. The Government introduced the *Migration Legislation Amendment (Further Border Protection Measures) Bill 2002* on 20 June 2002 to give effect to the excision previously contained in the disallowed regulations.

The Bill (which comprises four clauses and a schedule), if enacted, will add the following islands to the places included in the definition of "excised offshore place" in the *Migration Act 1958*:

- the Coral Sea Islands Territory;
- all islands that form part of Queensland and are north of latitude 12 south;
- all islands that form part of Western Australia and are north of latitude 23 south; and
- all islands that form part of the Northern Territory and are north of latitude 16 south.

The Bill provides that the excision of these islands is to have retrospective effect from 2pm on 19 June 2002.

The Explanatory Memorandum to the Bill (at para 4) very helpfully explains that the Bill is being introduced ". . . in response to indications that people smugglers are changing the focus of their operations to target islands closer to the Australian mainland. In combating these new threats it is necessary to extend the bar on visa applications by persons who arrive without lawful authority at these offshore islands." No doubt as those "operations" move further south, islands further south will be progressively added to the definition of excised offshore place.

Some "do-gooders", including lawyers, have suggested that such a course would not achieve the Government's intended outcome as the High Court would continue to have jurisdiction to issue certain constitutional writs upon the application of an asylum seeker.

A simplistic, yet disingenuous, solution — meeting both the core criteria of political expediency — is available. Instead of the piecemeal approach of excising land from the "migration zone", the *War Against Terrorism (Terra Nullius) Bill 2002*, when passed, will facilitate comprehensive border protection while maintaining Australia's international commitments including those under the Refugees Convention.

Ragu Appudurai

The *Terra Nullius* Bill will have two clauses only:

- a provision for a "buffer zone" of 5 km inland from the low water mark on all Australian land to be declared *terra nullius*; and
- a provision making clear (for the benefit of recalcitrant judges) that the buffer zone is beyond the jurisdiction of the Australian judicial system.

The Explanatory Memorandum accompanying the *Terra Nullius* Bill will likewise have two paragraphs in the following terms:

.• "Clause 1 provides that the buffer zone is *not* Australia, so bugger off and even if we wanted to help you (which we sincerely do), we can't"; and
- "Clause 2 provides, for the assistance of judges who still have difficulty with both parts of "NO", that they do not have jurisdiction."

The advantages of this approach are numerous and include that:

- no judge, however adventurous or recalcitrant, even when fully-robed would venture into an area in which the atmosphere is devoid of jurisdiction;
- Australia will not be in breach of its obligations under the Refugees Convention in refusing to process any asylum application, as no such obligation will arise if an applicant has not arrived in Australia;
- the Australian Defence Force will be able legitimately to repel queue jumpers, terrorists and other undesirables back out to sea, in carrying out their border protection role in "hot pursuit" mode within the buffer zone;
- there will be budget savings of hundreds of millions of dollars given that there will no longer be a need for detention centres, refugee tribunals, defence by the Minister of court proceedings, or the "Pacific solution";
- there will be created a captive economic powerhouse on our doorstep (by definition, 5 km outside the reach of the Maritime Union of Australia) benefiting from the lack of any regulation of business activities; and
- given that the bulk of the electorate which really matters lives within 5 km of the low water mark, the implied promise to overturn *Mabo* and *Wik* to protect their backyards from native title claims will be achieved. Another core promise kept!

There will, of course, be some disadvantages including that:

- the over-populated countries to our north will see an opportunity to invade the buffer zone as a prelude to an invasion of Australia. While such an occurrence must be contemplated, a simple dare of "Dub'ya or nothin'" should see that any such intended invasion does not eventuate;
- the residents, and businesses, in the buffer zone will not have to pay taxes, rates or other duties;
- paedophile clergy, colourful racing identities and other business luminaries are likely to "migrate" to the buffer zone to avoid prosecution (given that

there can be no extradition treaty); and

- the buffer zone in the Australian Antarctic Territory cannot be meaningfully defended.

Surely, such disadvantages are a small price to pay in order to win the war against terrorism?

In any event, the grateful residents and businesses (protected from native title claims and exempted from workplace/health and safety regulation) will no doubt be prepared to keep paying to the revenue as if they were still residents of Australia.

If that fails, an appropriate increase in the Medicare co-payment and the minimum payment for PBS medicines will more than compensate for the shortfall. Such a move will affect only the "bludgers" and other malingerers given that they typically reside outside the buffer zone.

More importantly, the passage of the Bill will better enable us "to decide who comes to our country and the circumstances in which they come".

Terra nullius worked a treat from 1788 until 1992, before a majority of the High Court decided to fix something that certainly was not broken. Surely, its time has come — again!

The *Terra Nullius* Bill will, of course, not achieve any reduction in people-smuggling. The Governement's approach is likewise destined for failure.

Assuming that all people-smugglers are motivated by profit only and care nothing for their "clients", legislatively moving an outlying Australian island from the "migration zone" is not going to deter them. They are not concerned with the success or otherwise of any of their clients' asylum claims. Desperate persons seeking access to a safe haven will believe anything, so long as it is laced with a trace of hope, in circumstances in which choice, reliable information and the time within which to make such decisions are severely limited.

As limited a choice as that which confronts the Australian electorate at election after election. Our experience tells us that our politicians often make promises during the auction atmosphere of an election campaign which they either know they cannot keep or do not intend to keep (e.g. "L-A-W law" and "never ever" re the GST). Yet we keep electing one or other group of the same suspects at election after election. And the victor then claims to have a "mandate".

Implementation of policy, of the kind which underlies the excision of islands from the "migration zone", simply reinforces the position in which I found myself during the last election campaign. To paraphrase the Gerry Rafferty song, I found myself flanked by:

> clowns to the Left of me
> jokers to the Right . . .

I suspect that many voters, including those to whom border protection was the primary criterion, now find themselves in just that position. Worse, those minor party politicians "stuck in the middle" with us simply offer no hope.

The bi-partisan sanction in September 2001 for the grant to the Minister of power to prescribe certain parts of Australia as excised offshore places, apparently now the subject of a Labor re-think, underscores that position.

I do not advocate an open-slather approach to asylum seekers; only that the obligations to which our political leaders committed us to when they signed the Refugees Convention (and ratified it, by inclusion of reference to it in the *Migration Act 1958*) are honoured.

I do not deny that people smuggling is a problem. But is denying those persons who may be genuine refugees, whether or not they arrive on boats operated by people-smugglers, the opportunity to have their claims tested the only way to go?

If indeed the Bill has been introduced in the knowledge that it would not produce the desired outcome of deterring people-smugglers, the actions of the Government stand on no higher ground than that occupied by the people-smugglers.

We stand steadfast against capital punishment primarily because we refuse to accept that any innocent person should be put to death (whether or not we agree on such a fate for the guilty). The rejection of an asylum claim untested is tantamount, in some circumstances, to a sentence of capital punishment without a trial, let alone a fair trial.

Oppression which manifests itself as persecution for one, or other, of the Convention reasons begins from the one common source — breach of trust by those entrusted with power by the people. Piece-meal avoidance of obligations under the Convention amounts to a breach of trust of a kind similar to that of the oppressive regimes from which asylum seekers flee. Any apparent difference is as to scope and reach only.

Successive Labor and Coalition Governments have progressively either watered-down or reneged from honouring such obligations.

If Governments are permitted (pursuant to some claimed mandate) to progressively dilute the rights of "foreigners" in this way, and most of us it would appear are comforted by the idea that the restriction of rights applies only to "them", how much longer before such restrictions are applied to some of "us" — even if only first applied to those outside the "buffer zone"?

The intent of the Bill is to deny an asylum-seeker landing on any of the excised islands an opportunity to apply for a protection visa, thereby avoiding our obligation under the Convention to consider such a claim. Yet the Explanatory Memorandum explains that the ". . . Commonwealth will continue to ensure that, while unauthorised arrivals at excised offshore places cannot apply for visas, appropriate arrangements will ensure that Australia continues to fulfil its obligations under the United Nations Convention relating to the Status of Refugees and under other relevant international instruments [para 7]."

These "appropriate arrangements" are nowhere specified but the "Pacific solution" rings a bell.

Clowns to the Left, jokers to the Right . . . *terra nullius* to the rescue!

The Judicial Function Analysed

County Court (WorkCover Jurisdiction) Geelong

15 August 2002
Holt v *Kleyn Plant Hire Pty Ltd*
Coram: Judge G.D. Lewis
M. Waugh for Plaintiff
N. Ross for Defendant

Ross (cross-examining plaintiff)**:** I put it to you that you are capable of light work, perhaps holding a "go slow" sign on a road making gang.
Judge: Now I must say that's a job that's always appealed to me, holding up a "stop", "slow" or "go" sign.
Ross: But more or less, isn't that what your Honour does now?

CLE Launch at the Essoign Club

Wednesday 31 July 2002

THANK you Mister Chairman.

On behalf of the CLE committee, I am pleased to introduce the Honourable Chief Justice Black to launch the CLE program.

Before I call upon the Chief Justice to speak, I should say a few words about the program. First, I should thank the CLE committee which has worked diligently in establishing the CLE program. In particular I must thank Barbara Walsh, whose longstanding commitment to the Bar Readers' course provides the foundation of legal education at the Bar. I also must thank the Bar Council, for supporting what I believe is an important initiative at the Bar. It is also important to thank Matthew Groves. He has continued his support and involvement in this program after leaving the Bar administration and joining Monash University.

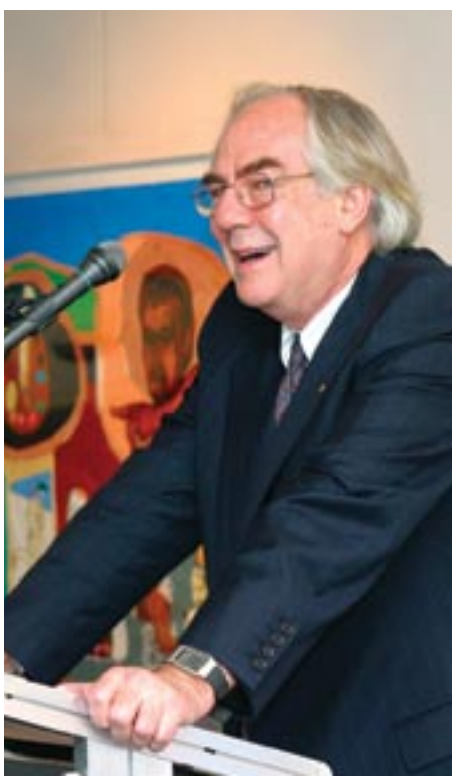
When a CLE program was first proposed many asked whether we needed one. My response is — of course we do. Barristers need to constantly review and revise their knowledge, just as any other profession must. Many barristers feel that they gain all the CLE they need by remaining at the cutting edge of their practice. Well that may be true, but every practitioner can gain benefits from the thoughts and views of others. CLE provides a forum in which practitioners can listen and exchange their views. This is one of the most important features of the CLE program. It is easy to get a barrister to talk, but a lot harder to get one to listen. Listening and learning in court is quite different to CLE. The difference is that CLE provides a reflective environment in which practitioners can consider and exchange ideas without the pressing demands of their responsibilities to the client and the court.

We must remember that CLE does not simply provide an environment in which barristers can learn, it is one in which they can also teach. The passing of knowledge and experience from senior barristers to more junior barristers lies at the heart of the Bar itself. From this view,

Kim Knights, Anita Kwong, Donna Bakos and Martin Bartfeld QC.

Stephen McLeish, Caroline Kirton and Caroline Kenny.

Ross Ray QC, Chief Justice Black, Robert Redlich QC and David Faram.



Chief Justice Black launches CLE.

Ian Hill QC, Martin Grinberg and Duncan Allen.

Justice Brooking, David Faram (President of The Law Institute) and Fiona Hanlon of Victoria University.

David Bremner, Mei-Leng Hodi and Inna Chibalova.

Robert Redlich QC addresses the function.

Ross Ray QC, Chairman of the CLE Committee, addresses the function.

a CLE program represents a logical extension of what already occurs at the Bar. The Victorian Bar has always taken pride in the high standard of the Readers' course . . . But the education of our members does not finish with the Readers' course.

The various Bar associations provide excellent seminars on important areas of practice. The Bar has also long supported the open-door policy, under which any member of the Bar, usually junior ones, may seek the advice or assistance of a more senior practitioner. In one sense CLE provides a formal means by which these informal practices of the Bar may be harnessed and shared with a larger audience at the Bar.

It is important that the Bar's CLE program is as flexible as possible. We believe we have achieved that.

- We ensure the sessions are immediately relevant to practitioners at the Bar by calling upon the commitment of the various Bar associations to provide a minimum number of sessions relevant to their members. This commitment will provide on average in excess of one session per fortnight.
- All members of counsel are welcome to attend these sessions. They are at this time, however, compulsory for the most recent readers' group and all groups thereafter. It is expected that the program will become compulsory for all barristers in the near future.
- While we hope to provide a wide range of relevant topics for practitioners it is our view that advocacy and ethics are to be mandatory components of the course.
- It is expected that barristers will require 10 points a year which may be gained in a number of ways. But as a rough guide one point equals one hour of CLE.
- Members of counsel may also gain their CLE points by attending other accredited institutions, such as:
  - all Federal Government accepted Australian university law schools;
  - the Sir Leo Cussin Institute;
  - the Law Institute of Victoria;
  - the Australian Advocacy Institute, etc.
- To gain accreditation, a seminar or course must be relevant to a practitioner's needs in professional development and the practice of law. It must contain a significant intellectual or practical content.
- Members of counsel may also gain their CLE points by teaching at the Bar and at other accredited institutions.
- Each barrister will be required to certify the completion of CLE points which will then enable them to obtain a Victorian Bar practising certificate. In special circumstances compliance may be waived or deferred at the discretion of the committee.
- For these reasons, we think that the CLE program will be embraced by the Bar as a useful and ultimately essential part of practice.

It is particularly appropriate that Chief Justice Black of the Federal Court should launch this program. Justice Black has a longstanding commitment to education at the Bar. For many years he was involved in the management of the Victorian Bar Readers' course and was its first chairman, so he draws from experience at both the Bar and now on the Bench.

The Chief Justice has maintained his involvement in legal education during his term in judicial office. It is fair to say that under his leadership the Federal Court has led the way in the adoption of new practices and technologies to assist all users of the court, not simply practitioners.

The Chief Justice also speaks from a position of particular judicial experience. The Federal Court has always paid great attention to the Federal nature of its jurisdiction. Chief Justice Black presides over, and is acquainted with, the differing Bars of Australia in a way that provides him with a unique insight into the legal profession. But today, I understand that he is going to enlighten us a little about the judicial perspective on the importance of continued education.

Ladies and gentlemen: the Honourable Chief Justice Black.

Victorian Bar on the Conference Trail

Inaugural World Conference of Barristers and Advocates

Royal Museum, Edinburgh, 27–29 June 2002

Mark Robins

". . . as long as but a hundred of us remain alive, never will we on any conditions be brought under English rule. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom —for that alone, which no honest man gives up but with life itself."

The Edinburgh Declaration

THE above words form part of the famous "Declaration of Arbroath". That declaration was written by the Lords of Scotland to Pope John in 1320 AD at the height of Robert the Bruce's wars to liberate Scotland. I saw this extract proudly displayed in a pub along the Royal Mile in Edinburgh whilst I was attending the Inaugural World Conference of Barristers and Advocates last June. At the time I was struck by the very strong, if somewhat strange, juxtaposition between this quote and the overriding theme of the Conference. But I am getting ahead of myself.

The Conference was jointly hosted by the Australian Bar Association and the Faculty of Advocates of Scotland. Fittingly, the joint chairmen of the Conference were Glenn Martin SC and Colin Campbell QC, the respective heads of these two Bars, and they handled their task most ably. Over 160 judges, barristers and advocates from Australia, Scotland, Ireland, England, Northern Ireland, New Zealand, South Africa, Bermuda, Hong Kong and Zimbabwe attended the three days of the Conference. I am pleased to add that the Victorian contingent was particularly numerous and representative of our own Bar.

Mark Robins

No less fittingly, the principal proceedings of the Conference were held in the Laigh Hall, Parliament House, Edinburgh. In that very hall, Cromwell's roundheads stabled their horses during their occupation of Scotland during the 1650s. Whilst this beautiful room still reeks with history, fortunately a great deal of house keeping has taken place there since the mid-seventeenth century! The building in question is of course the old Scottish Parliament, which has long been home to the Faculty of Advocates. A newer, and infinitely less charming, structure is being erected further down the Royal Mile towards Holyrood Palace to house the new Scottish Parliament.

At the outset I stress that it would be an arid exercise to venture to recite the full details of the generosity and hospitality of the Conference's Scottish hosts. The heartfelt Scottish welcome which all who attended received will remain with us for many years to come, as will the image of David Curtain QC doing a more than passable Highland Fling at the closing dinner!

The business of the Conference started with the keynote address of Mary Robinson, the former President of Ireland and the present United Nations Commissioner for Human Rights. Mrs Robinson's address focused on the role of advocates and Bar Associations in protecting and preserving human rights. She spoke with passion about several of the all too many places in this world where human rights abuses proliferate and of

the absolute necessity for those involved in the Law to do all they can to seek to assist people in such circumstances. In closing, Mrs Robinson challenged each of the Conference attendees to consider what they could do, both individually and collectively, in respect of such human rights abuses.

Whilst I found Mrs Robinson's address to be extremely thought provoking and of genuinely great interest, at the time I somewhat sceptically felt that it was perhaps a bit idealistic and far too generalized. After all, what could I as a lone antipodean barrister realistically achieve in such a context? For that matter, human rights abuses are something that one really does not expect to encounter in contemporary Australia, or any other Commonwealth country for that matter, are they? I naïvely reflected that such are the stuff of dusty British history, Henry VIII, Oliver Cromwell, Butcher Cumberland, etc. Little did I then appreciate precisely how well Mary Robinson had set the scene for the next speaker and how many oaks would spring from the acorns which she had so skillfully sewn amongst us.

The next speaker was the Honourable Anthony Gubbay SC, the former Chief Justice of Zimbabwe. Anthony Gubbay presented as a modest, slight, softly spoken and rather gentle man, not at all of the stuff that a Hollywood producer would cast for a heroic role. Nevertheless, he is an individual of truly heroic proportions. In his own quietly determined and unphlegmatic way he held all of the Conference delegates spellbound during the all too brief 20 minutes in which he spoke of his experiences as Chief Justice of a country where the executive flouted the rule of law at every turn, where lawyers, judges and litigants were regularly harassed and threatened and where an unscrupulous government simply ignored any judgment or ruling contrary to its interests or its convenience. Regrettably, as he told us, those problems have continued since his retirement. But as Anthony Gubbay explained, the judges, the barristers and the solicitors of Zimbabwe continued, and for the most part continue, to do their job as well as they could despite the very real personal risks which they faced, of which incarceration was probably the least.

The major points touched upon by Anthony Gubbay included the arbitrary change of Zimbabwe's constitution and its Declaration of Rights to suit the needs from time to time of Mugabe's ruling party and the parliament dominated by it. He told the Conference delegates of Mugabe's use, or rather misuse, of Presidential Pardons to sanction the torture, kidnapping and even murder of farmers and other opponents of the Zimbabwe government. He expanded upon the Mugabe regime's refusal to investigate or acknowledge abuses by its military, which abuses included the unlawful arrest of journalists. He recounted how since about 1999 Mugabe has increasingly employed his so-called "war veterans" in an attempt to cow the Courts and to crush opposition, most publicly by the overt occupation of hitherto white-owned farms, culminating in a brief invasion of the very Courts themselves. Finally Anthony Gubbay spoke briefly about the difficulties presented to the judiciary and Bar in seeking to uphold the law in a country where, as in Zimbabwe, the governing power has professed that it will not recognise rulings of the Court (as Mugabe himself stated to his ruling party on 14 December, 2000).

At the foot of the cliff below Edinburgh Castle.

I simply could not do justice to Anthony Gubbay or to his address without being able to present his speech in its entirety. For my own part, he made me see some of our Bar's fundamental ethical rules, such as the cab rank principle, the obligation to prosecute a client's case without either fear or favour, and above all the vital importance of the preservation of our role as independent advocates, in a fresh and vigorous light. By the loud ovation which Anthony Gubbay so rightly received at the end of his address, I do not believe that I was alone in that regard.

It would be unfair to try to summarise the addresses of all of the speakers who followed the Honourable Anthony Gubbay SC. Indeed, they all faced the proverbially dreadful theatrical dilemma of following a very hard act indeed. Accordingly I will only briefly refer to a sample of some of the later speakers, with one significant exception.

Alan Leong SC, Chairman of the Hong Kong Bar spoke of the delicate balance faced by barristers in the former crown colony and of the difficulties and challenges posed by China's so-called 'One Country, Two Systems'. Ironically enough, one Scottish barrister sitting near to me quipped that the Scottish had faced that problem since 1709! One might, however, reflect on which rule was potentially harsher, that of the Mandarins of Westminster or that of the more authentic version?

On the final day of the Conference, the Honourable Lord Reed, Senator of the College of Justice of Scotland, thoughtfully addressed the question of the independent Bar and the State. His Lordship was in turn followed by two other speakers before another unassuming Titan from Zimbabwe took the floor to speak on the question of the independent Bar and human rights, Adrian de Bourbon SC, Chairman of the Zimbabwe Bar.

Whilst Adrian de Bourbon was physically more imposing than Anthony Gubbay, like the former Chief Justice, his address was delivered forcefully but softly and without hyperbole or spleen. Somehow the lack of overt emotion in his address made it all the more powerful. He added to Anthony Gubbay's account of the plague of human rights abuses which has beset Zimbabwe under the unenlightened tyranny of President Mugabe, particularly since the nascent emergence of a viable opposition at about the time of the elections in 2000.

Adrian de Bourbon praised the example set by Anthony Gubbay and the other judges whose appointments predated the

Over 160 judges, barristers and advocates from Australia, Scotland, Ireland, England, Northern Ireland, New Zealand, South Africa, Bermuda, Hong Kong and Zimbabwe attended the three days of the Conference. I am pleased to add that the Victorian contingent was particularly numerous and representative of our own Bar.

worst excesses of Robert Mugabe's regime but, with implicit regret, he went on to inform the delegates of the deleterious effect of some of Mugabe's more recent appointees upon the independence and integrity of the judiciary of Zimbabwe. Indeed, since 2001, not only has Anthony Gubbay been forced to resign, but five other judges have been similarly pressured into withdrawing from office. This has left Zimbabwe with a Court dominated by Mugabe appointees such that Adrian de Bourbon was compelled to concede that with only a few exceptions, Zimbabwe could no longer be regarded as having a truly independent judiciary.

The catalogue of blatant abuses by the Mugabe Government which Adrian de Bourbon spoke of was sobering. These included the statutory reintroduction of penal laws for so-called "false reporting" by the media after the Courts had found such laws to be unconstitutional, the retrospective change of land laws for the clear purpose of defeating litigation then presently on foot on behalf of the Commercial Farmers' Association, the arbitrary arrest without due process of lawyers or other critics of the government and even a threat by the Government to legislate against the Law Society of Zimbabwe in order to stifle its outspoken criticism.

Adrian de Bourbon noted that the independent Zimbabwe Bar consists of only 19 barristers. It is a *de facto* bar which, much like the Victorian Bar in the 1890s, has survived the Government's attempts to fuse the profession. Whilst as a Bar they are apparently well supported by the Law Society of Zimbabwe, one can only imagine the immense courage and character which can bind so small a Bar of 19 members together and to keep it going in the face of such overwhelming adversity. Like Anthony Gubbay's speech, that of Adrian de Bourbon needs to be set out in full to be truly appreciated. When he finished after a little more than half an hour, Adrian de Bourbon received a thunderous standing ovation.

The task that faced those who followed Adrian de Bourbon was no easier than that for those who followed Anthony Gubbay. If anything, it was worse! The current Attorney General of England and Wales, the Right Honourable Lord Goldsmith, gave a splendid address on the true role of Attorney General and its importance in preserving and protecting the independence of both Bar and judiciary. It was a speech that would be well referred to His Lordship's contemporaries throughout our own Commonwealth.

David Curtain QC of our Bar and Roy Martin QC of the Faculty of Advocates then gave two excellent speeches on the respective drives by the competition authorities of Australia and the United Kingdom to reform our independent Bars. It seems that in both of our countries the same philosophically driven arguments of alleged restrictive trade practices are pursued by the competition authorities against the independent Bars, despite the lack of objective evidence to support such arguments and usually in the face of

Pre-dinner entertainment on the evening of the Gala Dinner, Royal Museum of Scotland.

clearly contrary evidence refuting them! Sadly the misplaced zeal of the competition authorities of Australia and Scotland appear to mirror one another, but more fortunately so far the voice of reason has prevailed in both countries, if only just. My own conclusion was that perhaps if these bodies were themselves in competition with competing competition authorities then, and only then, they might either produce fresher and more convincing reasons for reform of the independent Bars or even conclude that this constant attack on the independent Bars is simply misconceived?

As the Conference drew to a close on its final day, and all delegates were looking forward to the much anticipated dinner to be held that evening in the new Scottish National Museum, a proposed resolution was put to the delegates. This proposed resolution was framed after consultation amongst the various chairmen of the Bars present. That resolution was as follows:

EDINBURGH DECLARATION

This conference resolves:

1. That the independence of courts is essential to the functioning of democracies, and that the independence of the legal profession in turn is essential to the independence of the courts.
2. That the referral bars, the organised bodies of the profession of barristers and advocates, have a vital role to play in defending the independence of the courts and in ensuring access by the public to them.
3. That the participating bars commit themselves to supporting, and always being open to them, legal practitioners in all countries where their capacity to practice and organise themselves freely and independently is under threat.
4. That this conference expresses its complete support for:
   — the Bar Council and Law Society of Zimbabwe in their assertion of independence and in their commitment to the restoration of the rule of law in Zimbabwe;
   — the Hong Kong Bar in its principled espousal of the rule of law.
5. That the participating bars shall take practical steps to coordinate and advance the work of bars around the world for the protection of human rights and for the enhancement of pro bono legal services for the poor and the vulnerable.
6. That the participating bars shall also continue to work to defend the independence of the profession of barrister and advocate.

I am proud to say that this resolution was unanimously adopted by acclaim. Mary Robinson's mighty oak had sunk deep roots indeed.

I will long recall the calm and determined valour of Anthony Gubbay and Adrian de Bourbon. It was completely humbling to hear their recounted experiences and to observe their ability to struggle on ethically and with dignity as members of a legal system, so close to our own, but one which is beset by the worst possible executive abuse. The fact that those gentlemen shortly after the Conference were to return to Zimbabwe simply underscored their true calibre as human beings and as lawyers.

And so as I read the words of the Declaration of Arbroath in that pub in Edinburgh, in my conception they flowed into and merged with the words of this far more recent Edinburgh Declaration. If the enemy now no longer be a foreign oppressor, but a domestic one, then the barrister's duty to oppose injustice and to uphold the rule of law is no less real than the task which faced the Bruce and his followers in 1320, nor, for that matter, are the stakes any less high.

Decline of Cab-Rank Rule Discussed

By R.A. Lawson

FOR one who had never been to Scotland, notwithstanding his Scottish ancestry, the inaugural World Conference of Barristers and Advocates, in Edinburgh, was just too tempting.

How different from Melbourne Edinburgh is. Compact, cool, austere, modern, medieval, and crammed with architecture and history. No wide streets, no football, no trams and few trees, but a beautiful city. It has had its share of notables: Hume, Boswell, Adam Smith, Burns and Scott. And along with the Irish, when the Scots speak, they leave one close to tears.

It has been said before that, compared with the rest of the UK, they do things a little bit differently in Scotland. It is not forgotten that, in 1587, Queen Elizabeth I of England condemned Mary Queen of Scots to death. An independent mood persists. The Scots have their own currency albeit that their pound is fully equivalent to the English with each being accepted throughout the UK. The Scots have their own Crown Jewels which were saved from Oliver Cromwell and are proudly noted as being of much greater antiquity than those sparklers housed south of the border in the Tower of London. Browsing in a department store, my companion even saw a Monopoly game with Parklane and Mayfair replaced by Balmoral and St Andrews. Then, of course, there is Scottish Law whose differences I shall not even attempt to outline. Suffice to say that, as I recall, *Donoghue* v *Stevenson* began life as a Scottish trial with the House of Lords ultimately remarking that, for the purposes of the appeal before it, the law of Scotland and the law of England were the same. I should say something about the Conference. It attracted 400 people drawn from the independent referral Bars of Scotland, England, Ireland, Northern Ireland, South Africa, Zimbabwe, Hong Kong, New Zealand and Australia. Our host was the Faculty of Advocates (the Scottish Bar) and what magnificent hospitality was offered. The Opening Reception was, for me, the highlight — staged as it was in the Great Hall of Edinburgh Castle. The Castle is, to say the least, impressive, and has been there for 900 years. Even my companion conceded that it overpowered the ancient and stunning Shinto Castle in Osaka.

Gala Dinner at the Royal Museum of Scotland: (back row) Peter Almond QC, Andrea Gabriel (South Africa); Jan Logan (Queensland); two Faculty of Advocates members, Hoosen Gani (South Africa); (middle row) Richard Lawson, John Logan SC (Queensland); unknown Australian; (front) Victoria Broughton.

As for the Conference lectures, I only wish to make a couple of points. No doubt, the full text of most of what was said is on a website somewhere.

The first point is about the cab-rank rule. This was the subject of a discussion

Victoria Broughton, Arthur Adams QC and Richard Lawson.

chaired by a Scottish silk, Neil Brailsford. In my view, what emerged from the discussion was that, by degrees, the rule has become optional if not meaningless. In practice, it is easy to find ways to refuse a brief. One way is by fees. If one finds a case or a client unattractive or distasteful, one simply quotes (perhaps unconsciously) an artificially high fee knowing that it is out of the client's reach.

Another and more insidious way is by specialization. Most of the other participating Bars at the Conference, as with ours, appear to have become wheels within wheels within wheels. "That is not quite my area of practice" is something that can be said about any number of briefs one is minded to refuse.

So the notion that a member of the public may brief any barrister they like (provided a proper fee is offered) is largely illusory.

The main exceptions to this are those areas of practice which have become politically fashionable. Because they are politically fashionable, they attract public money to fund them — one way or another. The subsidized client is happy to "pay" the brief fees that are charged and the barrister is happy to take on the case. If the case is "not quite my area of practice", then it very soon will be.

The other point about the Conference lectures is to remark on an address given on the final day by Adrian de Bourbon SC. He chairs the Zimbabwe Bar which has only a 20-year history and which has less than 30 members. With a cool factual delivery Mr de Bourbon recounted a litany of state intimidation and arbitrary arrest of members of the Zimbabwe Bar and their families — which has emerged under the Mugabe regime in the last 18 months. It seems that the new Mugabe-appointed judges are, to be most charitable, incompetent and have no understanding of what an independent Bar is or does. Mr de Bourbon's speech was at once chilling and rivetting. When he finished, he received a standing ovation.

So back to Melbourne for us via France and Italy. It is certainly worthwhile attending an international conference at least once. It broadens the mind even if the travel does not.

Magnificent Men on their Cycling Machines

AN extraordinary case is going on in the High Court at the moment. Lawyers can find no precedent for the case of *Murphy* v *Flying Nun Motors*, which will make legal history as the first case in which bicyclist sues the owners of an aeroplane after a traffic accident. What happened was that . . . but perhaps an extract from recent proceedings will explain things.

Counsel: Your name is . . .?
Plaintiff: Murphy.
Counsel: What is your first name?
Plaintiff: Murphy has always been my name. I never had another previously.
Counsel: No, what are your forenames?
Plaintiff: Only two. Edward Murphy.
Counsel: Thank you Mr Murphy. Now will you describe the events of the morning of June the 19th last year?
Murphy: All of them?
Counsel: Only the events that are relative to this case.
Murphy: Oh, right. Well, that morning I was in the garden.
Counsel: What were you doing in the garden? Gardening? Sunbathing?
Murphy: No. I was bicycling.
Counsel: Really? Do you often bicycle in your garden?
Murphy: When I say I was bicycling, that isn't strictly accurate. In fact I was on an exercise machine. Normally I do half an hour a day.
Counsel: You prefer going on the machine to getting on a bike and going out on the roads?
Murphy: Oh God, yes. The traffic fumes are awful on the road, and it's far too dangerous out there. What would be the point of getting fit and healthy only to be run over? A fit dead body is just as dead as a flabby dead body.
Counsel: So you didn't do your exercise indoors as normal on this one day?
Murphy: No, I thought that as it was a lovely sunny day I'd pull the machine into the garden and do my cycling there.
Counsel: Right. So we have a picture of you in the garden, pedalling away and going nowhere, your mind a blank . . .
Murphy: My mind was not a blank. I was listening to an audio tape. It was a James Bond story.
Counsel: Right. So you are on your exercise bike, listening to a James Bond story. What happened next?
Murphy: Well, along the A road passing my house there was a succession of what looked like fairground vans — you know with lots of gaily painted girders and signs saying "GHOST TRAIN" and dodgems. Then suddenly there is the most almighty crash, and this thing comes through the hedge towards me.
Counsel: What thing?
Murphy: An aeroplane.
Counsel: What kind of aeroplane?
Murphy: Well, not strictly an aeroplane, but one of those things that flies round on the end of one of those great twirly things that you get on and they make you sick as a dog, so I never go on them. It had come off a lorry.
Counsel: Were you terrified to see an aeroplane coming towards you?
Murphy: Yes and no. Yes, it was certainly unexpected. No, because what was happening to James Bond in the story I was listening to was a lot more hairy than what was happening to me, so in a sense I was keyed up for it. Maybe because of that I had the instinctive reaction to hurl myself off the machine before the plane hit it.
Counsel: Was the machine damaged?
Murphy: Damaged? It was demolished! I would probably have been killed. As it was, I had a bad ankle injury.
Counsel: From being hit by the plane?
Murphy: No. I fell awkwardly.
Judge: Mr Rossiter?
Counsel: Yes, my Lord.
Judge: I have been listening attentively, because that is what I am paid to do, and as far as I can tell, we have a case in which an unmanned aeroplane that cannot fly is said to have demolished a vehicle which is incapable of moving. Have I got it straight?
Counsel: Yes, my Lord.
Judge: And all this took place on private property where, as you know, traffic laws and highway code do not apply?
Counsel: Yes, my Lord.
Judge: I only hope you know what you're doing. What have you got lined up for us next?
Counsel: I propose to call the only witness to the incident, a Mr Arthur Whitlow, who was in the next door garden.
Judge: May I ask what he was doing?
Counsel: He was on a rowing machine.
Judge: Oh good. Carry on!

The case continues, though not in this column.

Miles Kington

Australian Bar Association Conference

Maison du Barreau, Isle de Cité, Paris, 7–10 July 2002

This conference was different from other years. It began with a Red Mass. The Mass was notable because it was held in the stained glass beauty of the Chapelle de St Michel in the Palais de Justice. But also notable because two Protestants trained at a certain bluestone establishment were entrusted with taking up the collection from the assembled and partly wigged and robed congregation. Judge Graham Hicks and one of the editors of this publication were chosen by ABA President David Curtain QC (looking resplendent in his silks) to "take up the plate". Many could only conjecture as to his reasons.

What then unfolded from this auspicious beginning was undoubtedly one of the best conferences organised by the Australian Bar Association.

Eiffel Tower

MOST attendees agreed that the content and standard of the papers were excellent. The conference was based at the Paris Bar's headquarters, Maison du Barreau situated on the Isle de Cité, the island which houses not only the beautiful French Courts of the Palais de Justice, but Notre Dame itself. Perhaps it was these surroundings coupled with the warm summer haze of Paris that made the speakers so listenable.

Paris passes by the reception.

At the dinner: Rodney Garrett QC, Mark Robins and Diana Garrett.

Chris Small and Warren Swain.

Up the long Plaza.

On board La Paquebot.

The conference engine room.

A cosmopolitan feeling pervaded throughout the Conference. Perhaps it was the timetable which allowed registrants afternoons to explain to accompanying persons and sundry Parisians the nuances of human rights, the media's treatment of judges, and the tension between the executive and the judiciary.

Having experienced the facilities that the Paris Bar enjoys it is understandable that some attempt is being made to upgrade Owen Dixon Chambers East, short of demolition. The erection of a faux Notre Dame towering over the rusty roof of 205 William Street would inspire more to marvel at the words of Chairman Redlich, or scheduling Bar Council meetings in a cosy Brasserie in the Club d'Essoign with a saucy show to follow.

The international flavour was highlighted by the attendance of the Chairman of the Bar of England and Wales David Bean QC who spoke on human rights. There certainly did not appear to be any of the old tensions between France and Britain when the conference was addressed by our French hosts. The session on 9 July was highlighted by Jose Rosell discussing whether code and common law counsels are coming closer together, Louis-Bernard Buchman speaking on the French legal system and Yves de Mahenge on the future of the separate systems.

Of the local content Justice Michael McHugh's paper on the relationships and tensions between the executive and the judiciary was both thought provoking and hard hitting.

This large art deco hotel is famous not only for its ambience but the fact that it was the headquarters of the Nazis during World War II.

But enough of the serious side. Registrants needed to relax and network after the intellectual rigours of the day.

The opening reception took place on water for a change. In the spirit of the great transatlantic liners, *La Paquebot*, a large and imposing vessel was the scene for the conference reception — and what a reception it was. Fine food and wine and a basking afternoon were the perfect ingredients to de-stuffify such usually stuffy occasions. Many felt sorry for George Beaumont and his wife, who missed the boat despite a last ditch run at the gang plank.

One of the main conference hotels was the Lutetia situated on the Left Bank. This large art deco hotel is famous not only for its ambience but the fact that it was the headquarters of the Nazis during World War II. Some said that it was entirely suitable as a venue for Australian judges and barristers. Many notable members of

Robert Redlich QC, John Middleton QC, Roy Martin QC and Justice Ken Hayne.

The on-board reception.

the High Court thoroughly enjoyed their stay, although Jim Kennan S.C. made it clear to the media that he did not stay at the hotel nor indeed had not set foot in the place.

An excellent cocktail party was held for registrants to meet members of the French Bar, although to many Victorians their most lasting experience of foreigners was to attempt to converse with Queenslanders. It is said some of the French attorneys present were able to interpret. Having experienced the price of une coupe de champagne in the conference hotels (around $25–30), many conferencees made the most of the excellent Taittinger champagne at the conference functions. Indeed the French staff were bemused at such Antipodean consumption.

The Conference Dinner was held at Le Pavillon Dauphine located at the edge of the bois de Boulogne. This meant that those attending were "bussed" from the hotels resplendent in "Cravate Noise". Indeed many barristers had a lot of baggage to carry to the conference what with packing full wig and gown, tuxedos (although the vast majority wore black rather than white which was the correct etiquette for Summer), and long luxurious flowing, designer gowns and accompanying baubles.

The dinner and its setting were superb, although Rodney Garrett QC was overheard commenting to Christopher Smale that he much preferred Leonda as a venue.

Glittering chandeliers, huge expanses of mirror, and Louis XVI furnishings in garden surrounds ensured enjoyment. An array of waiters served foie gras, salt-fed lamb, cheeses, and fine pastries. However, Judge Frank Walsh loves his lamb the Australian way and sent his back for it to be "properly cooked", it duly returned recooked with a hefty side serving of diced carrot and white sauce.

The assembled throng were entertained by a piano accordion band, *une chanteuse*, and the words of Glenn Martin S.C., Conference Chairman and ABA President David Curtain QC. Glenn, inspired by the surrounds, was witty — David had to thank our French hosts. It is rumoured that Jack Forrest QC spent many hours prior to the dinner "working on" David's French pronunciations. Perhaps the Jesuits were not great teachers of French, as David is still working on his *grâves*. Judge Warren Fagan, *francophile extraordinaire* has vowed to take David under his wing and tune his accent at the Alliance Français.

After much dancing and talking, the buses finally took their cargo to various hotels, where some were later seen attending other establishments such as the Havanita Cafe and Le Baby Doll.

Such a seamless conference owes much to its organisers. The hard work was performed by Glenn Martin S.C., David Curtain QC, ABA Secretary Dan O'Connor, and Anna Whitney of the Victorian Bar. The travel and accommodation were excellently handled by Ruth Carlton of World Travel.

An Editor

Verbatim

Gender and Health

Master Bruce, hearing a submission from a solicitor on 5 September 2002 that the interlocutory steps could not be agreed to due to the (male) "defendant's health being in a delicate condition".

Master Bruce: Now I don't know what being in a "delicate condition" means. There was a time when in a "delicate condition" meant something in relation to women, but I doubt that applies to your client.

The Age was Wrong

There was also, obviously, the reference in *The Age* on 5 September 2002 to the opening of the "Esso" case:

I am sure the editors were mortified to see the learned Judge referred to as Justice Bill Dullard.

Nouveau Testament

Mr Justice Byrne, hearing a case about testamentary capacity.

Witness: I spoke French with him.
Judge: I didn't know speaking French was a requirement for testamentary capacity.

Loggerheads

Australian Industrial Relations Commission

14 January 2001
Commissioner Tolley
Stephen Rex Dundon v *Simon Engineering Australia Pty Limited*
Application under section 170CE of the Act for relief re termination of employment.
P. Holding for Applicant
C. Milne with T.T. Turnbull for Respondent

The Commissioner: If he wants to learn to behave himself and not dance in here as if he is in a bar at Moe or somewhere, you can go and talk to him.
Holding: Commissioner, Mr McClay is — I have tried to advise him that he is under subpoena and that he is required to comply with the subpoena. Things happened quite fast when you came into the room and I am not at all certain exactly what did transpire. He is convinced that you called him a dickhead, sir, and . . .
The Commissioner: I didn't call him a dickhead. I said "if people want to behave like dickheads". We will leave it at that, and what transpired between me and . . .
Holding: . . . he feels that you have called him a dickhead and he feels that an apology from you would be appropriate.
The Commissioner: Mr Holding, you can tell that gentleman you have just spoken to that I am not intimidated by people staring at me.
McClay: Don't ever call me a dickhead again.
The Commissioner: I didn't call you a dickhead, and don't talk to me like that and don't point at me like that.
McClay: Well, you were pointing at me.
The Commissioner: I wasn't pointing at you and . . .
McClay: You called me a dickhead.

Reading Difficulty

County Court

8 September 2002
Judge Higgins
Attard v *Frewstall Pty Ltd*
R. Gordon QC and D. McIvor for Plaintiff
Boyes QC and Zydower for defendant
Doctor being re-examined by D. McIvor

Judge: What do your notes say, Mr McIvor?
McIvor: I can't read my writing, Your Honour.
Zydower: And you're not even a doctor.
Doctor: I object to that, Your Honour.
Judge: Objection overruled.

Silence from the Bench!

High Court of Australia Melbourne Office of the Registry

Allan Robert Knight, Applicant
Randall John Bell and Peter Clifford Falconer, Respondent
Outline of Oral Submissions:
Before I start I wish to make it clear to the Court that I would like to use the 20 minutes allocated to me, without any undue interference from the Bench. If the Court wishes to ask me any questions, you are quite welcome to write them down and ask me at the end of my allocated time.

Concerning Masonic disclosures from the sitting members of the Bench, I will work on the assumption that members of this Bench may have made secret Masonic oaths. This assumption must exist until any sitting member states otherwise.

Perfect Inquest

Coram: Wall M., Coroner
Priest QC and Hinchey for Vic Roads

Coroner: what do you think needs to happen now, Mr Wall, in relation to improvements?
Hinchey: Your Worship, improvements in relation to what?
Coroner: Generally.
Hinchey: To the world?
Coroner: It may be a broad question that Mr Wall can choose to answer in a way he sees fit. I don't want to narrow his focus at all in relation to any question.
Hinchey: I still ask Your Honour to direct him at least to a sub-category within the scope of the inquest because just the word "improvements" doesn't really direct his mind to the particular area.
Coroner: I'm sure Mr Wall is bright enough to work out where we're going.
Hinchey: Well, I'm not, Your Worship.

"Sounds Like Viagra"

28 August 2002
N. Rajcinovski v *Non Ferral Pty Ltd*
R. Webster for Plaintiff
Kirkham and Batten for Defendant

Kirkham: Mr Rajcinovski, we have a print-out of the moneys that have been paid in respect of medical and similar expenses on your behalf by VWA. Do you understand what I'm talking about?
Rajcinovski: (*Inaudible response*).
Kirkham: it appears that in relation to pharmacy bills between 29 May 2000 and 21 April 2002 you've had 78 visits to the pharmacy and $16,900 in total was paid on

Continued on page 56

New Practitioners Admitted by the First Women's Full Court of the Supreme Court

5 August 2002

It's not every day that women judges turn up as cover girls, but such a day occurred in August when a Full Court of the Supreme Court was composed of three women, for an admissions ceremony.

Justice Warren, Justice Balmford (presiding) and Justice Dodds-Streeton.

THE appointment of Justice Julie Dodds-Streeton in late July provided the Chief Justice, Justice John Harber Phillips, with his first opportunity for an all-woman Full Bench, only the second time this has occurred in Australia.

It was also excellent timing that it occurred in the year the Supreme Court celebrated its 150th anniversary.

Presiding was Justice Rosemary Balmford, a Supreme Court judge since 1996, and a County Court judge before then for three years, following her father, Sir John Norris, who was also a judge, first of the County Court, and later of the Supreme Court. She sat with Justice Marilyn Warren (appointed in 1998) and Justice Dodds-Streeton, who was welcomed in the same courtroom only five days earlier.

Justice Balmford said: "The three of us were delighted at the Chief Justice's decision to list an all-female Full Court for the admission ceremonies in August. We were in complete agreement that nothing would be said at the ceremonies about the constitution of the Court, but we were all very much aware of the significance of the occasion."

Justice Warren, who heads the Supreme Court's commercial list — the first woman to do so in an Australian court — regarded the sitting as a significant start for the court and for women in the profession.

"It has taken 150 years, but it is pleasing to have been on the first all-woman Full Court in this court," she said.

"When I was admitted in 1975 there were no women judges on the Supreme Court, so this is a milestone in the recognition of women in the legal profession," Justice Warren told *Bar News*. "I have waited a long time for this."

All three judges are looking forward to the first all-woman Bench on the Court of Appeal.

"We still have a long way to go," Justice Warren said. "When I preside over directions hearings on Fridays I still look out at a sea of people in suits, almost all of them worn by men. Women have been briefed to appear before me in only two trials in the last four years.

"But this sitting, even though it is a ceremonial sitting, is a powerful symbol to women, especially those now entering the profession. Women are now making their mark at the most senior levels of the profession, and this special sitting was a symbol of that."

Justice Dodds-Streeton said she was honored to take part in the historic sitting.

"It is symbolically important and also, I hope, presages a transition from an exclusively male culture in the courtroom," she said.

"That in itself may reduce one impediment to women's greater participation in the full spectrum of legal professional life.

"The current representation of women on the Bench and at senior levels in the profession still falls far short of what might be expected, given the number of women graduates for some years.

"While there may be no easy answers, it is important to keep questioning why this should be so."

The Chief Justice told *Bar News*: "In the midst of what has been a historic year, an opportunity to create a further piece of history was too good to miss.

"Our professional leaders are currently concerned about the departure of many young lawyers from our ranks. A considerable proportion of these are young women.

"The appearance of role models for these, to whom they can relate is, I think, very important. Hence our special Full Court."

Remarks by Justice Balmford, as Presiding Judge

THE Court being satisfied, with respect to each applicant, that the necessary requirements for admission to practise have been completed, in the case of each applicant an order for your admission will be made, to take effect on your signing the roll.

The first admissions to practise in what is now the State of Victoria took place before this Court was established. On 12 April 1841, in a court house at the corner of Bourke and King Streets, Mr Justice Willis of the Supreme Court of New South Wales admitted five barristers to practise in the Supreme Court of New South Wales for the district of Port Phillip. And on 8 May 1841, fourteen attorneys were admitted in the same way.

The Colony of Victoria was separated from New South Wales on 1 July 1851, and the Supreme Court of Victoria was established by legislation which came into effect on 6 January 1852, since when admission to practise has been a matter for this Court. The first sitting of the Court was held on 10 February 1852, and thus earlier this year the Court celebrated its 150th anniversary.

The building we are now in was opened in February 1884, and we can assume that all, or almost all, admissions to practise in Victoria since that date have been performed in this building, normally here, in the Banco Court. So you are following in what is for this country a long tradition.

When you sign the roll, and the order for your admission takes effect, you will be, by virtue of the *Legal Practice Act 1996*, barristers, solicitors and officers of the Supreme Court of Victoria, owing duties to the Court as well as to your clients.

It used to be said here to newly admitted members of the profession: "The profession to which we have admitted you is an ancient and an honourable one." And so it is. Human beings are fallible; but the profession aims high, and for the most part succeeds. By admitting you to practise, we have entrusted the future of the legal profession of Victoria to your hands, and you bear a heavy responsibility. It is for each one of you to play your part in maintaining the profession's standards of honesty, integrity, fairness and concern for the public interest in the maintenance of a just society.

The world these days is often critical of lawyers, and you will have heard and read much of that criticism. There is, of course, validity in some of the criticism; but much of it is ill-informed, or consists in jumping on easily accessible bandwagons. Perhaps you are finding that you do not enjoy what you are doing now, that you do not find it very valuable to anyone else or very satisfying to yourself. That may pass as you gain experience and confidence. If not, you can change what you do and still be making use of your training in law.

Despite what you may have heard, be reassured that the world needs lawyers. And individuals need lawyers. There are many ways in which lawyers are needed.

James Boswell as you all know, wrote the Life of that great literary figure Dr Samuel Johnson. Boswell writes that, in 1765, when he was 56 years old, Johnson had thoughts of studying law. He was a very devout man, and he composed a prayer, in which he asked God to enable him "to attain such knowledge as may qualify me to direct the doubtful, and instruct the ignorant; to prevent wrongs and terminate contentions".

To direct the doubtful and instruct the ignorant; to prevent wrongs and terminate contentions. It is not a bad summary of much of what a lawyer does.

The doubtful client who is proposing to make a will, anxious to achieve a particular purpose and hesitating between different courses of action, unaware of their legal implications - perhaps wanting, for what seems good reason, to leave more to one child than to another, but wondering about that second child's ability to make a successful challenge to the will.

The ignorant client planning to set up a manufacturing business, who knows everything about how to make the proposed product, but knows nothing about corporate structures, the problems of buying or leasing premises, or the intricacies of planning law.

The client who has been charged with a crime and asks you to undertake the defence.

The client who is enmeshed in litigation and seeks to fight it out to a finish when it could better be terminated by a settlement.

All of these, and many, many more, are people who need the help which a lawyer's skill and experience can give them.

The gratitude of the individual human being whose problem you have solved is a very satisfying reward — sometimes one feels the gratitude is out of all proportion to the effort involved — what is so easy for you is so important to the client. Never forget that often what may well be a small matter for you is at the time the most important thing in the world for the client. Treat your clients with the care and consideration which you hope and expect to receive yourself when you seek the help of another profession.

Be courteous and considerate in your dealings with other lawyers. If lawyers cannot deal with each other in a civilised manner, we might as well leave it to the clients to fight their own battles — because in that situation we will do it no better than they.

Different kinds of clients need different kinds of skill and experience. You will find, somewhere in the world for which your qualification has fitted you, whether or not in the actual practice of the law, work which will enable you to use your skill and training and to enjoy the satisfaction which comes from a job well done. And whether or not you are in practice, you are still a member of the profession, with all that that entails.

Community organisations need lawyers. You may well find that you join some organisation because you are interested in, or committed to, what it does, and find that it needs a lawyer, whether in a voluntary or a paid capacity.

Governments need lawyers, both for strictly legal work and for policy advice. The executive can only act in accordance with the law — normally a valid authorising statute. Lawyers are needed both to

draft those statutes and to ensure that the executive operates within the powers which those statutes confer.

The whole community needs lawyers, if we are to retain the rights and the freedoms which we enjoy in this, the luckiest country. Sir Gerard Brennan, speaking at Bond University in 1998, as Chief Justice of the High Court, said:

Our Constitution, rooted in the common law, does not need to express the proposition that the nation is under the rule of law and that the Courts are the organ of government responsible ultimately for the enforcing of the rule of law. That is the Constitution's fundamental postulate, inherent in its text.

The courts, with that responsibility upon them, cannot function without the legal profession; those who prepare cases for trial, those who present them to the courts, and those who are the judges and magistrates who constitute the courts, who have sworn to do justice according to law.

The criminal courts are concerned to deal with those who are thought to have infringed the law, while ensuring that no-one loses their liberty otherwise than in accordance with the law: the civil courts are concerned to resolve disputes in accordance with law; the High Court is concerned with these same matters, but also with ensuring that the exercise of legislative and executive power conforms with the Constitution and the laws made under it. All of those courts need lawyers. Which means that they need you.

On behalf of all the Judges of the Court, we welcome you to the legal profession of Victoria, and we trust that you will, as we have done, find satisfaction and enjoyment in your membership of the profession. We wish you all good fortune.

Annual Report of the Alternative Dispute Resolution Committee

THE nature of the work of the Committee in the first part of this year has been affected by circularisation of the business rather than by meetings. For the second half of the calendar year 2002 the Chairman is hopeful of organizing a review of mediation in the various Court jurisdictions in which it is practised.

In late 2001 the Bar Council sought the Committee's views on the appropriateness of the then existing Rules of Conduct. The point of issue was whether any of the Rules applied to barristers when acting as mediators. Various drafts and comments were circulated by the Chairman to committee members and members of the Bar Council and Ethics Committee and their responses collated. For the large part the Committee's view was that minimum regulation should be effected and ultimately that found favour with the Bar Council which passed new Rules 5A,198 and 199.

The Bar's Executive Director David Bremner oversaw the running of the Mediation Centre which continues to enjoy a satisfactory but less than optimal level of occupation. Bookings returned to the levels of 1999/2000 year after a fall in the year 2000/2001. Currently bookings are running at a rate of 1.25 per working day, and a level of 1.3 is the break-even point. The Committee again exhorts all counsel to maximise the use of the Mediation Centre which, in addition to its traditional functions of conducting mediations and arbitrations, is also available for hire for conferences; the rooms vary in size from large to rooms suitable for small conferences.

The Bar is indebted to Tania Giannakenas who for many years has worked as the receptionist and booking officer with an exemplary degree of keenness. We wish her well in her motherhood role.

The Bar's Mediation Centre is efficiently run by Helen Henry, Pauline Hannan, Kay Kelly and Robyn Cran, and the Chairman extends his special thanks to them. A special thanks also to David Bremner who, in addition to his usual efficient efforts, has prepared a detailed procedure document for the staff.

The Chairman also thanks the Committee members for their willing contributions.

W. J. Martin

Women Lawyers Achievement Awards

AWARD PURPOSE

THE Women Barristers' Association and the Victorian Women Lawyers (in conjunction with the Attorney-General's Department) have established the Women Lawyers Achievement Awards for 2003 to recognise and celebrate the accomplishments of women lawyers. This Award honours outstanding women lawyers who have achieved professional excellence within their area of speciality and have actively paved the way to success for other women lawyers.

The award will be presented to three women lawyers who excel in a variety of professional settings and who personify excellence on either the State or local level. The nomination form contains the detailed Award criteria.

NOMINATION FORMS

Must be received on or before 28 February 2003 by the Victorian Women Lawyers Achievement Awards Committee. The Committee will select recipients in March 2003. The Awards will be presented at a dinner in Melbourne in May 2003. To obtain a nomination form, please call Suzanne Jukic at the Law Institute on 9607 9390 or visit the VWL website at www.vwl.asn.au

VICTORIAN WOMEN LAWYERS ACHIEVEMENT AWARDS COMMITTEE

The five-member Committee comprises representatives from the Judiciary, the Women Barristers' Association, the Victorian Women Lawyers, the Victorian Division of the Australian Corporate Lawyers' Association and academia.

Kiddle Revisited

IN the introductory words printed in relation to the extract from "A Most Peculiar Child" in the winter issue of *Bar News* we made a number of errors:

1. Allayne Kiddle was not the third woman to sign the Roll of Counsel. She was the second.
2. We attributed her education to the University of Sydney. This was erroneous.
   (a) She completed two years of Medicine at the University of Melbourne before her career was interrupted by marriage.
   (b) Subsequently, after a stint as a dancer, including a contract with the BBC, she enrolled at London School of Economics and graduated with LLB (Hons) in 1956.
   (c) She read for the English Bar and was admitted to the Middle Temple.
   (d) She signed the Victorian Bar Roll in 1958.
   (e) In the late 1960s she returned to London School of Economics to complete an LLM.
3. We omitted to include some photos of Melbourne barristers taken by Kiddie in 1960.

Eric Hewitt (1960)

Peter Brusey (1960)

Jeff Sher (1960)

Phil Opas (1960)

Kevin Foley (1960)

S.E.K. Hulme (1960)

Reggie Smithers (1960)

Music in Court

Peter Luff, horn player; Margaret Schindler, lyr

ON 7 August 2002 the Great Hall of the Commonwealth Law Courts provided an unusual venue for a concert by the Southern Cross Soloists.

Slightly more than 100 people heard Margaret Schindler, Tania Frazer, Paul Dean, Leesa Dean, Peter Luff and Kevin Power perform works by Mozart, Haydn, Moussorgsky and more modern items from Jerome Kearn, Flanders and Swan, Dominic Argento and Paul Stanhope. For our money the outstanding performance was Peter Luff's arrangement of Moussorgsky's "Pictures at an Exhibition".

The Great Hall, surprisingly, proved an ideal venue. The acoustics were good, the ambience was friendly and the music first class. The wine and nibbles which followed were also of excellent quality. Many of the guests were intrigued by the Federal Court etchings on the glasses.

The evening established beyond question:

(a) that the Federal Court, although a creature of statute, has all the versa-

The program.

ic soprano and Paul Dean, director and clarinettist.

Foreground: Margaret Schindler and Peter Luff. Second row: Leesa Dean, Paul Dean and Tina Frazer. Back: Kevin Power.

tility of a common law court;

(b) that good music and fine wine are proper accompaniments to the administration of justice;

(c) that public places and spaces can, and should be, adapted to varying uses;

(d) that sweet music and soft wine can ease the pressure at the end of a hard day.

We congratulate Chief Justice Black on the initiative.

Paul Dean on clarinet.

Chief Justice Black

Prosecuting in the South Pacific

By Miranda Forsyth

BLACK woollen robes and bar jackets are definitely not designed for the tropical climate, but the Chief Justice of Vanuatu insists that they be worn in court. Luckily he tends to turn a blind eye to the fact that, underneath the robes, lawyers are often either in thongs or sandals. These formal and informal aspects of the legal dress requirement symbolize many of the tensions that exist in the Vanuatu legal system. I have spent a year in Vanuatu working in the Public Prosecutor's Office as part of AusAid's Youth Ambassador scheme. During the year I have come face to face with the difficulties and incongruities of trying to apply a legal system based on a Western model to a society that is, in many respects, pre-industrial and based on a Chiefly system of governance.

Vanuatu, a Y-shaped series of 80 islands, was jointly ruled by the French and the British until it achieved independence in 1980. The arrangement for joint government was called a "condominium" and involved two sets of everything — two police forces, two prisons, two law courts and so on. After independence the Ni-Vanuatu (as citizens of Vanuatu are called) adopted a legal system based largely on the British model, with a few ambiguous references to customary law and the powers of chiefs in the statutes and constitution. The English common law, as it was prior to independence, still continues to be binding, along with any common law generated by the Vanuatu courts.

During the year I have come face to face with the difficulties and incongruities of trying to apply a legal system based on a Western model to a society that is, in many respects, pre-industrial and based on a Chiefly system of governance.

Vanuatu was traditionally governed by a complex system of chiefs. The chiefs were responsible for adjudicating disputes and determining punishment by applying "kastom" laws. There are enormous variations in the kastom laws applying on different islands, and even different communities. However, the punishment nearly always involved payment of a fine in the form of a pig, woven mats, kava and food such as taro and yams. Sometimes the fine was paid to the victim's family and sometimes to the Chief.

There are unresolved tensions regarding the role that chiefs continue to play in the criminal justice system in Vanuatu. Legally, judges and magistrates are only required to take into account any "kastom" settlement when determining the magnitude of sentence. However, in reality the power of the chiefs is much more pervasive. I came across a number of cases where victims had gone to the Chief to ask him to resolve a dispute before going to the police. On some occasions the Chief had decided the case was too big for him and he handed it over to the police. On other occasions the Chief told the defendant that if he did not pay the fine then the case would be handed over to the police. Sometimes even after the fine was paid the victims went to the police, leading to the defendant and his/her family being dealt with by two systems and feeling

A courthouse at Malekula.

The courthouse interior.

an understandable sense of resentment about that fact.

There are enormous advantages of using the kastom system over the formal system. Kastom settlements involve the whole community. Once it has been possible to "cleanim face", everything is able to be forgotten and people move on with their lives. This is especially important where people live in very small communities and nearly everyone is related to everyone else. One of the major problems with kastom is that it does not recognize the rights of women in the same way as the formal system. In the case of a rape, often what is being compensated is not the violation of the woman but the transgression of various kastom laws regarding sexual intercourse between married and/or related people. The women's groups I have spoken with are unanimous in viewing the formal legal system as offering them more support than the traditional systems.

Perhaps the best example of the difficulties of using a Western legal system in the cultural context of Vanuatu is the "black magic" case. Section 151 of the Vanuatu Penal Code states: "No person shall practice witchcraft or sorcery with intent to cause harm or detriment to any other person." When I first read that provision I was certain that no charges would ever be brought under it — how is it possible to prove that someone has practised witchcraft "beyond reasonable doubt"?

However, late last year a Supreme Court judge handed down the first judgment to consider a charge of witchcraft. The prosecution case was that seven men who were members of a black magic cult had raped and then killed their victim through the use of witchcraft practices. The prosecution stated in its closing submissions: "[t]his case is about magic. It is not white man's magic but black magic having its deep roots on Ambrym and slowly spreading to other parts of Vanuatu. It is a sacred cult and a satanic practice."

The trial judge accepted the prosecution case and found all the defendants guilty of rape and witchcraft, one guilty of intentional homicide and the other defendants guilty of complicity to intentional homicide. His Honour stated: "[w]e are dealing here with spiritual powers of darkness. The mastermind behind these activities is Satan who the Bible refers to as the father of lies." He continued: "[i]n this case we see the clear evidence of the ritual that becomes a covenant initiating a person into the covenant with the mastermind . . . I take judicial notice of the evidence to imply that a covenant relationship was entered into . . ." Unfortunately, His Honour did not engage in any analysis of what is required to prove a charge of witchcraft. After convicting the defendants His Honour discharged them without sentence, taking into account the fact that they had already spent more than 12 months in jail. The appeal against conviction and sentence will be heard by the Court of Appeal in October.

This case demonstrates another very important regulating force in Vanuatu: organized religion. It is omnipresent; for example, on a small island of 300 inhabitants there may be up to seven different churches. Although Western religion is often merged with kastom stories in an apparently seamless manner, its influence necessarily lessens the power and authority of chiefs. People now have another source of authority — the pastor/priest — and there may be many different ones in the same village, leading to fragmentation of the society and the traditional hierarchy.

Overall I found that the Vanuatu legal system is in a state of flux and development. It is clear that the superimposition of a Western legal system in such an enormously different cultural context is problematic. It is equally clear that kastom laws are not capable, in their present state, of meeting the needs of regulating the country as a whole, in particular, urbanized Ni-Vanuatu. The challenge for the future is to find a way to fuse the two systems to meet the unique needs of Vanuatu.

Morality is Lawyers' First Responsibility

LEGAL morality. Is that contradiction in terms? Not according to Judge Jones of the County Court of Victoria in his speech to nearly 100 legal professionals on 28 May. Judge Jones was addressing the second Melbourne Catholic Lawyers' Association (MCLA) breakfast for 2002.

The morning had started early with St Augustine's Church on Bourke Street packed with hardy souls who had braved the morning cold and fog for 7.00 am Mass. With the day started on the right note the congregation moved next door to the Royal Melbourne Hotel for a delicious breakfast and to hear the Judge's speech.

The breakfast Mass attendees were drawn from a wide cross-section of the legal community and varied age, employment and interests. But on this morning they were united in their desire to hear an eminent Judge speak on the influence that morality, specifically Catholic morality, should have on a life of a lawyer.

Judge Jones' basic argument was both challenging and inspiring. Central to it was the notion that we are all bound to do what is right, even when it hurts.

Judge Jones was able to speak with the benefit of his years of legal experience in commenting on the obligations of a lawyer asked by a client to do something that is wrong. The lawyer, said the judge, is bound by Catholic faith and by any decent notion of morality to do what is right. He did not deny that there might be a cost to pay for adopting this attitude. Standing by a principle might cost a lawyer a client and he or she may be ridiculed by colleagues. Nevertheless, the Judge stated, the obligation to do what is right remains.

Judge Jones also tackled a more subtle tendency — not limited to the legal profession — to lose perspective in the midst of busy life. Lawyers, he stated, are often tempted to place so much emphasis on a case before them that they neglect other responsibilities and aspects of their lives. There are many possible reasons for this including ambition, pressure from employers or clients, and a professional pride that loses sight of what really is important. While every lawyer should always strive for professional excellence, said the Judge, each needs to evaluate constantly whether he or she has retained the correct balance.

Judge Jones' speech carried on the high standard set by Paul Coghlan QC, who addressed the first MCLA breakfast for 2002 in February.

The MCLA continues to enjoy enormous support from a wide section of be legal profession, including the judiciary, barristers, solicitors, students, and other legal professionals. It aims to strengthen the faith of those involved, to help offer a Catholic voice on social issues and to create a network of like-minded professionals.

For further information on the MCLA, contact Chris Andrews at catoliclawyers@excite.com

Verbatim

Continued from page 47

your behalf which works out at $248 per visit to the pharmacy.

Interpreter: 78 times . . .

His Honour: 78 visits divided into $16,900 gives us what figure?

Kirkham: $248 per visit, Your Honour.

Witness: (*through an interpreter*) Since you've got those figures you should have also what it was used for. I can't remember everything.

His Honour: It sounds like Viagra or something like that.

Robin Brett QC, Justice Allan McDonald and Justice Bill Crockett.

Unveiling of Portrait of the Hon. William Crockett AO, QC

ON Thursday 27 June 2002, a function was held to unveil the portrait of the Honourable William Crockett. Mr Justice Crockett, his wife Anne, their four children and spouses and their six grandchildren attended the function, which was held in the Forsyth Room in Owen Dixon Chambers East.

Due to indifferent health in recent years, Mr Justice Crockett has been unable to venture out to social gatherings so the Bar was delighted that His Honour was able to attend the unveiling. Also among the guests were the three former associates of His Honour — Ms Kerri Judd, Ms Sophie Robinson and Ms Leora Miller — and the artist, Mrs Barbara August and her husband, Mr John August.

The junior vice chairman of the Victorian Bar, Mr Robin Brett QC, briefly welcomed the gathering and asked Mr Justice Crockett's former reader, Justice Allan McDonald, to speak to the gathering. Justice McDonald referred to the long and distinguished career of His Honour. He was admitted to practice in February 1948. He signed the Bar Roll in the same month. He graduated as Bachelor of Laws in 1945 and shortly afterwards as a Master of Laws which followed the award of the Supreme Court Judges' Award. He took silk in 1962 and was appointed to the Supreme Court in 1969. He was appointed AO in 1983. He served the Supreme Court with distinction until his retirement in 1996. In addition, Mr Justice Crockett was awarded honorary Doctorates of Laws from both Melbourne University and Monash University.

Mr Justice Crockett did not escape the evening without his former reader telling the audience some lively (and affectionate) tales of their times together at the Bar and on the Bench. Mr Justice Crockett and Justice McDonald then together unveiled the portrait.

Mrs August also did not escape without a contribution to the occasion as she was asked (without warning) to tell the gathering of the circumstances of the portrait coming into existence. She told the gathering that her husband met with Mr Justice Crockett in 1992 at the races and her husband suggested to Mr Justice Crockett that his wife paint his portrait. His Honour agreed and hence the portrait was painted.

The portrait of Mr Justice Crockett has now been hung on the ground floor of Owen Dixon Chambers West outside the entrance to Clerk M and Clerk B.

The Tom Fantl Art Exhibition

Ray Gibson,Julie Baker-Smith, Tim Ryan and Ian McDonald.

EXHIBITION

ON 13 June the Tom Fantl Exhibition opened at the Essoign Club featuring his recent works.

Tom was born in Prague and raised in Australia. A major feature of his work is his connection to these two cultures. His rediscovery of Prague as a place of origin has posed many significant questions for this artist, resulting in focused exploration of Czech literature and culture.

Fantl about his work: "My work is about my experiences and roots. Life is made of endless fragments, some fleeting, some dominant. Sometimes these fragments enter our lives totally unattached and inexplicable. Often they meld and weld into links, which make up the mainframe of the stuff of our life's sojourn. The fragments model us — our myths, our roots, our fantasies and our explorations . . . When my works leave the studio and are put on view, it is an invitation to you to take your own journey through my fragments. You may enjoy or reject them. That is your journey."

THE OPENING

In spite of the onslaught of the school holidays, the Opening was well attended by a crowd of about 80. We saw members of the Bar, the Bench and invited guests mainly from the Melbourne arts scene, having a great time as well as enjoying Jane's delicious "finger food" and, and of course, wine from the Club's extensive wine cellar.

All art exhibition openings at the Club are joyful opportunities to exchange views on other than our latest win/loss in court and to interact with, shall I say, "normal" people.

A tip for the art minded barrister with taste: Tom's works features some motifs from the Old Bailey in London, fit for any barrister's chambers.

HOW DOES IT WORK?

I also take this opportunity to emphasise that whether a member of the Club or not, all barristers are welcome to attend and an invitation is sent to all members of the Bench, the Bar and their guests. If in the second category, why not do a little bit of touting and invite an instructing solicitor?

Many people ask me what the "rules" are about exhibiting at the Club. Well, none really, suffice to say that prospective "exhibitionist" should at least have had a couple of public exhibitions in the past. All works are for sale, with 13 per cent of proceeds going to the Club. If an agent for the artist is involved in the arrangement, The Club's "cut" comes off the agent's commission, not the artist's.

I hope to see all my colleagues with guests at the next opening.

Ian and Elizabeth Munro with the artist, Tom Fantl, after having purchased one of his works.

The Forgotten Memoirs of John Knox — A Year in the Life of a Supreme Court Clerk in FDR's Washington

Edited by Dennis J. Hutchinson and David J. Garrow
The University of Chicago Press 2002

JAMES C. McReynolds was a Justice of the US Supreme Court from 1914 to 1941. Along with Justices Van Devanter, Butler and Sutherland he made up the notorious old "Four Horsemen of the Apocalypse" who, with the support of Justice Roberts, acted to frustrate President Roosevelt's New Deal legislation. Once President Roosevelt announced his infamous "Court-Packing" proposal, (under which one new judge would be appointed for every serving judge aged over seventy), Justice Roberts switched sides, leaving McReynolds and his obstructionist colleagues in a minority and the institutions of the Presidency and the Court seriously damaged.

McReynolds was "a doyen of [Washington] society". He was also rude, a racist and an anti-Semite. He had "unspeakable manners" and was "sarcastic, peremptory and antagonistic". By the end of his time with the judge, Knox concluded (with just cause) that he was "stingy" and "the most contemptible and mediocre old man I ever came in contact with. His selfishness and vindictiveness [were] unbelievable." Knox was not alone in his views. McReynolds' standing among his peers was such that when he died, in 1946 aged 85, no former or current justice of the Court attended his funeral. On the other hand, when Harry Parker, his long-serving and devoted assistant (or "darky" as McReynolds' publicly referred to him) died, six justices attended to mourn his death.

By the mid-1930s, mainly at Professor Frankfurter's urging, Supreme Court judges had begun to hire promising young Harvard Law School graduates to assist them and the role of judge's clerk soon evolved into what it is today. John Knox worked for a year as McReynolds' private secretary/law clerk in the October 1936 term of the Court. He was not one of Frankfurter's protégés. He got the job by writing to Van Devanter, a man whom he had met once and with whom he commenced a "pen-pal" relationship. Knox was a graduate of Northwestern University Law School and had completed an LLM at the Harvard Law School before he started what he later came to regard as his life-defining year with McReynolds. He spent his time reviewing petitions for certiorari, attending to the judge's social requirements (including mastering the now lost art of the calling card) and trying to ensure that he did not incur his employer's wrath.

Knox emerges from this memoir, which he wrote mainly in the 1960s, as a curiously insecure man who foisted himself on leading judges, including, in particular, Justices Van Devanter, Holmes, Cardozo and Brandeis, in the belief that his association with them would advance his career in some way or another. Quite what the judges derived from their meetings with Knox, the pedestrian details of which he describes in minute detail in the memoir, or indeed what Knox derived from them (other than the delight of meeting his judicial heroes) is not at all clear.

Until 1935 all the judges of the United States Supreme Court worked from home. The Court sat in the old Senate chamber. By the time Knox commenced his year with McReynolds, the new court building had been completed. The judges were reluctant to break with tradition, however, and only Chief Justice Hughes and Justice Roberts moved to the new building. Knox therefore worked with McReynolds in his apartment. McReynolds required that he rent an apartment in the same building. Knox spent much of his year living in something approaching terror of his cantankerous, moody and petty boss. Knox chronicles these events in considerable and, at times, touching detail. He does not write particularly well but manages nevertheless to convey a powerful picture of his years' work with the judge, and the judge's devoted messenger (Harry Parker) and housekeeper (Mrs Mary Diggs).

Knox learned quickly that McReynolds was no Holmes, Brandeis or Cardozo. He was shocked that McReynolds dashed off his judicial opinions in the matter of an hour or two (by dictating them to Knox) and that large parts of the opinions were pieced together from quotes from other cases. In many cases, especially when McReynolds no longer commanded a majority, he dissented without giving reasons.

Knox knew that his memoir revealed much about himself because an old classmate told him so, writing: "I suppose you realize that your account leaves you as naked as it does McReynolds." It is doubtful, though, whether Knox anticipated that the work would be published together with the editors' contributions which, one suspects, tells us more about the author than he ever intended his memoir to disclose.

Despite his promising start, Knox's legal career was undistinguished, to say the least. Tragically, Knox came to regard the end of his clerkship with McReynolds as the beginning of the downfall of his life. When McReynolds learned that Knox had been, as he saw it, working on government time studying for the Bar when McReynolds was away and there was nothing else for Knox to do, the judge insisted that he stop and not sit the examination. Knox refused, so McReynolds fired him, 13 days short of his full term. He sat the Bar and failed it. He sat the exam two more times, and failed on each attempt. On his fourth try he passed, but it was too late. The law firm Cravath had already fired him for failing the Bar the second time and he ended up working most of his life as an insurance adjuster. The editors explain that Knox's life ended very sadly. He was penniless for much of his professional life, unmarried and, as he wrote in a separate diary, was constantly visited by the "dragon of loneliness". As he grew old vultures of one sort or another descended upon and removed most of his prize collection of judicial mementos. He died in 1997 aged ninety.

Provided one accords Knox a degree of patience — something which he deserves — the book, in the end, provides a poignant and interesting vignette of days that are, thankfully, long gone.

David J. O'Callaghan

Banking Law in Australia (4th edn)

By A.l. Tyree
Lexisnexis Butterworths 2002
pp i–xliii, 1–555; Bibliography with Glossary 557–564; Index 565–572.

BANKING Law in Australia, first published in 1990, is now in its fourth edition. The book has established itself as a standard text in this area of law in Australia. It is a clear and concise guide to the principles of banking law in Australia.

The text covers the fundamental areas of banking law. The "banker and customer relationship" (Parts II and IV) includes specific treatment of special customers such as unincorporated associations,

executors/administrators and minors amongst others, together with further separate discussion of the duties of the bank and customer to each other and to third persons.

Traditional bank facilities and services such as the provision and operation of a current account (Part III), cheques and negotiable instruments (Part V and VIII) and bank lending and securities (Part IX) are given extensive treatment. The discussion of securities includes issues such as securities over real property, chattels, choses in action, the banker's lien and guarantees. Part VI, on payments, includes discussion of "e-commerce" type banking services.

Part VII deals with consumer protection and includes discussion of the Code of Banking Practice, the role and function of the Banking Industry Ombudsman, the electronic fund transfer system and credit cards. Other aspects of banking law such as documentary credits, *Financial Transactions Reports Act 1988* obligations, and discussion of the Financial System Inquiry Final Report (better known as the Wallis Report) can be found in this text.

The fourth edition of *Banking Law in Australia* continues the excellent reputation of this work as a leading text on banking law in Australia. *Banking Law in Australia* is sure to be of use to legal practitioners, bankers, business people and students who need to have access to an up to date and authoritative guide to banking law in the Australian context.

P.W. Lithgow

Pizer's Annotated VCAT Act

By Jason Pizer

IN Victoria, *Williams* is undoubtedly the leading text with annotations to the Supreme Court and County Court rules.

This text is the first attempt to provide commentary for the VCAT Act and Rules. Whilst the VCAT is relatively young, the breadth of commentary cannot be as extensive as the commentary in *Williams*.

The short introductory chapter titled "Overview of the VCAT Act" is a very useful summary. Included is information about the historical background to VCAT, extracts from the parliamentary debates, contact details for each list and a full list of the members of the Tribunal. This chapter also details VCAT's jurisdiction and powers.

The remainder of the text is devoted to the VCAT Act, the transitional provisions and the VCAT Rules, with annotations. The annotations provided by the learned author reflect the fact that the Tribunal has only been in existence since 1 July 1998, and there are only very few decisions at the time of the publication. Therefore, many similar earlier decisions of the AAT and the courts in relation to the AAT are relied on.

As with Miller's text on the Trade Practices Act, I look forward to many further editions of the work as the case law expands.

W.G. Stark

Annotated *Safety Rehabilitation and Compensation Act 1998* (5th edn)

THE fifth edition of the *Annotated Safety Rehabilitation and Compensation Act 1998* has now been released current to 1 July 2002. For practitioners in the field of Commonwealth compensation, this updated edition, which maintains the format of earlier editions, will be much appreciated. The authors have continued to maintain their high standard and clarity. All the major legislative changes that have occurred since the last edition are dealt with, and the substantial case law which has emerged over recent years is referred to and commented on. The extent of this extra material is highlighted by the length of the book, which is over 100 pages longer than its predecessor. The important decision of *Lees* v *ComCare,* with respect to the AAT's jurisdiction, is discussed. A number of the recent authorities as to the interpretation to be given to s.24 of the Act with respect to permanent impairment are also dealt with by the authors.

Compensation for seamen is effectively dealt with in this book as the *Seafarer's Rehabilitation and Compensation Act 1992* largely follows the ComCare legislation. Compensation for members of the Defence Force are, subject to the amendments made by the *Military Compensation Act 1994*, also covered by this legislation. An understanding of this book will provide any lawyer with the capacity to advise clients as to their entitlements and obligations if they have suffered injury in their employment.

For anyone interested in or working in this particular jurisdiction, this edition is a fine example of just how useful a thorough and comprehensive Annotated Act can be. The authors are to be commended for the concise but informative and coherent observations as to the judicial trends emerging with respect to this piece of legislation.

Ian Fehring

Civil Procedure: Commentary and Materials (2nd edn)

By S. Colbran, G. Reinhardt, P. Spender, S. Jackson and R. Douglas
Butterworths, 2002
Pp i–xcx; 1–1042; Index 1043–1072

CHRISTOPHER Columbus Langdell is reputed to have assembled the first casebook in around 1880 during his historic pedagogical overhaul as Dean of Harvard Law School. He introduced a contracts casebook in conjunction with his visionary and controversial casebook teaching method and the Socratic teaching method. Australian law students will probably find a casebook amongst the prescribed texts in the majority of courses taught in law schools today. The casebook not only serves the students with a portable library but serves as teaching tool in some courses.

As a portable library, the modern casebook must compete with the obvious advantages of extensive and up to date web-based resources and the inherent dynamism of law. Critics have always warned against the dangers of course casebooks removing the need for students to research library resources for themselves.

As a teaching and learning resource, it has been criticised for implanting contexts and concepts that might dwarf those vocational skills which extensive research and use of primary sources develops and strengthens. The better student will be the student who acquires the skill of identifying and ordering an issue by relevance and importance; who synthesises materials from diverse resources; who recognizes the merits of an argument; or who can make a reasoned choice between competing solutions or arguments. Some might argue that

reliance on a casebook leaves such skills underdeveloped.

Having said all this, the authors of the casebook under review must be given credit for their organizational structure and commentary. There are clear signs of scholarly voices echoing through the casebook. In addition, thought-provoking commentary that deserves recognition provides insights and reflection for the student.

However, the utility of a casebook for members of the Bar is quite limited. A barrister requires access to updated materials, and the search for the esoteric points will often require a close reading of unedited case and statute law. It is difficult to recommend any casebook as an invaluable addition to a barrister's bookshelf. Casebooks are bulky items that usually outdate fairly rapidly. However, this casebook refers to all Australian jurisdictions and provides practitioners involved in civil litigation with a national guide to Rules of Court. This makes it a useful book and furthermore it could also be a starting point to supplement a textbook, a loose-leaf subscription, a CD Rom database or any of the myriad of web-based information systems and search engines.

Joycey Tooher

Insolvency: Personal and Corporate Law and Practice (4th edn)

By Andrew Keay and Michael Murray
The Law Book Company

REGRETTABLY, bankruptcy and insolvency have become increasingly important part of Australia's corporate life. This book, with admirable precision, leads the reader through the labyrinth of personal bankruptcy and insolvency law as it exists in Australia today. The law is always changing to meet commercial and society's needs.

The book is divided into three parts: the first is an introduction; the second is concerned with personal insolvency and is further divided into bankruptcy and non bankruptcy arrangements; and a third part which is again divided into liquidation and non liquidation arrangements. The book includes a very generous table of cases and a comprehensive table of legislation. The index is well presented. In the body of the text the authors employ the useful tool of bullet points as well as marginal lining of the important cases which clearly sets out the salient facts and what was held by the Court. This enables the reader to go to the principal authority on point.

The introduction section provides a useful discussion as to the development of insolvency law and the meaning of "insolvency". Changes to the bankruptcy legislation are distinctly highlighted in bullet points, the subject matter of which is discussed further on in the book.

An example can be given of the way the authors deal with the subject matter in their discussion of the various ways a bankruptcy notice may be resisted (Chapter 3). They highlight and discuss an application to set aside the judgment, an application to set aside the bankruptcy notice, the validity of the bankruptcy notice, the effect of an overstatement of the amount claimed, and the effect of a counterclaim or set off cross demand. The authors similarly deal with resisting a petition for bankruptcy highlighting and expanding technical flaws, insolvency as a defence and the power or willingness of a court to go behind the judgment.

In separate chapters the authors discuss the impact of the bankruptcy on a person's property, which includes the doctrine of relation back, the administration of the estate, which also includes investigations, the power of the trustee to obtain a search warrant, the right of access to premises, and access to books of account of associated entity and offshore information notices under section 81A of the Act.

In Chapter 8 they discuss Part 10 arrangements which enable the discharge of debts without bankruptcy. The book contains a useful table comparing deeds of assignment, deeds of arrangement and compositions.

As may be expected the authors (Chapter 11) discuss the procedure and differences in relation to a voluntary or compulsory winding up. Again, in bullet point form, the broad grounds for winding up are listed, together with the relevant sections for ease of reference. They deal with the difficulties of the statutory demand and the essential requirements that have to be complied with in resisting such a demand, particularly in relation to disputed indebtedness. As the authors remind us, a court is not expected to finally determine the rights and obligations of the parties. Once a matter comes to applying for a winding up order, the authors set out the procedure and discuss the law in relation to disputing the debt.

Further on in the book, the authors deal with the difficult problem of receivership and the effect it has on a company. The powers of the liabilities and duties of a receiver are of considerable importance to the secured and unsecured creditors, as is the effect of the appointment of a receiver upon the company of its officers. In Chapter 20 the relationship between receivers and liquidators is analysed, as well as the powers remaining in the receiver, who is then precluded from carrying on the company's business.

This is a very comprehensive book and is very useful to practitioners. It clearly shows the path through which one must travel when advising or enforcing the rights of a creditor or debtor, in circumstances when the debtor is faced with bankruptcy of insolvency.

John V. Kaufman

Corporations Law in Australia (2nd edn)

By Roman Tomasic, Stephen Bottomley and Rob McQueen
Federation Press, 2002
pp. i–lxii, 1–875, Index 877–893

THE preface to this substantial volume indicates that its purpose is to "present a text that introduces undergraduate law students to Australian corporate law in a way that is informed by theory and policy".

Having been provided with this text by the publishers some time ago for the purpose of this review, I can say that not only would it appear to be useful for undergraduate students but it is also very useful for practitioners. In particular the section on members' rights and remedies came in handy in a recent oppression case providing guidance on several relevant topics. It took me weeks to obtain a return of the text from my leader in that case who found the book extremely useful in several other of his corporations matters.

The text is extremely readable with an extensive table of contents and a useful index. Case law references are up to date and accurate. If one's practice does not extend to spending thousands of dollars on extensive looseleaf works or on-line publications, this text can be recommended as an up to date reference to the Corporations Act. The text has a full coverage of "extrinsic material" which seems to be available in abundance in relation to the Corporations Act and its predecessors. Practice notes and policy statements are included as well

as references to journal articles and of course the ever-increasing case law in the corporations area. This is a useful general text and has a handy encyclopaedic coverage of this wide area of the law. I recommend it for practitioners as a quick and ready reference to link subject matter to legislation and case law.

S.R. Horgan

Douglas & Jones' Administrative Law (4th edn)

By Roger Douglas
Published by the Federation Press 2002
Pp i–lii, 1–804, Table of Sources 805–822, Index 823–828

DOUGLAS & Jones' Administrative Law is now in its fourth edition. The work is essentially a selection of materials relevant to the study and understanding of administrative law with a strongly Australian perspective.

As the authors make clear in their preface (which is both interesting and idiosyncratic), administrative law is a burgeoning field with ongoing legislative and judicial developments. This evolution has in some areas made irrelevant the "old" administrative law. Administrative law has become a body of rules in flux, in which themes can be identified but their content or context not necessarily stated with any certainty. Indeed, the extracted materials "reflect the degree to which the doctrine of precedent has been eroded . . . cases now seem better treated as materials which provide guidance as to how Courts are likely to behave than authorative sources. Recent cases therefore are likely to be more helpful in cases of pensionable age." Reflecting the tenor of these remarks, Australian cases (and materials) predominate in the text, many of recent origin and the highest authority.

Generally, time-honoured themes of administrative law — the rule against bias and the hearing requirement — are amply illustrated in all their manifestations by the extracted materials. Aspects such as *Wednesbury* unreasonableness (now a statutory ground of review by virtue of s. 5(2)(g) and 6(2)(g) of the Administrative Decisions (Judicial Review) Act) and the common law right to procedural fairness, which has found a full exposition and enlivenment by the High Court in *Kioa* v *Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, are thoroughly demonstrated in the modern Australian context.

Extracts from recent cases of significance incorporated into the fourth edition include *Project Blue Sky Inc.* v *ABA* (1998) 194 CLR 355; (mandatory v directory statutory requirements); *Enfeld City Corp* v *Development Assessment Commission* (2000) 199 CLR 135 (grounds for review, remedies); *Refugee Review Tribunal: Ex Carte Gala* (2000) 204 CLR 82 (prohibition/discretion); and *Minister for Immigration and Ethnic Affairs* v *Guo* (1997) 191 CLR 559 (remedies/declaratory orders).

Indeed the current administrative law "preoccupation" with immigration matters is highlighted by one of the recent extracts added to this edition in *Ruddock* v *Vadarlis* [2001] FCA 1329 (the *Tampa* case).

It is perhaps unfortunate that the debate about the limits of judicial versus administrative power does not receive wider treatment. This issue was considered in *Brandy* v *HREOC* (1995) 183 CLR 245 and more recently in the context of the public debate regarding the role of the courts in immigration matters.

Clearly administrative law is a significant and important aspect of modern Australian society. No doubt there will continue to be a conflict between governments' (the executive) desire to act and make decisions, establish rules and implement policy while the judicial arm of government is relied upon to recognise, protect and enliven rights under the rule of law. The overlap and interplay between the judicial and administrative arms of government will continue to be a fruitful source for development of administrative law both by legislation and judicial decision.

Douglas & Jones' Administrative Law provides a significant entree for the student into this complex and growing body of law. In addition, the work provides ready access for practitioners to cases and materials that exemplify the current application of the central themes of administrative law. This fourth edition is sure to be a useful acquisition for practitioners involved in administrative law, particularly Federal administrative law.

P.W. Lithgow

Conference Update

27–31 October 2002: Sydney. 75th Anniversary Congress of the Union Internationale des Avocats. Contact www.uianet.org.

27 February–1 March 2003: Coffs Harbour. Superannuation 2003. Contact Dianne Rooney. Tel. 0602 311. Fax. 9670 3242. email: dirooney@leocussen.vic.edu.au.

20–25 October 2002: Durban, South Africa. International Bar Association Conference. Contact Bar's Administration Office or IBA website, www.ibanet.org.

13–17 April 2003: Melbourne. 13th Commonwealth Law Conference. contact: www.mcigroup.com/commonwealthlaw2003.htm.

29 June–5 July 2003: Bali. 9th Biennial Conference, Criminal Lawyers Association of Northern Territory. Tel: 08 8981 1875. Fax: 08 8941 1639.

17–18 January 2003: Kuala Lumpur. Commonwealth Medico-Legal Conference. Contact Tel: +03 4041 1375. Fax: +03 4043 4444. E-mail: mma@tm.net.my

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