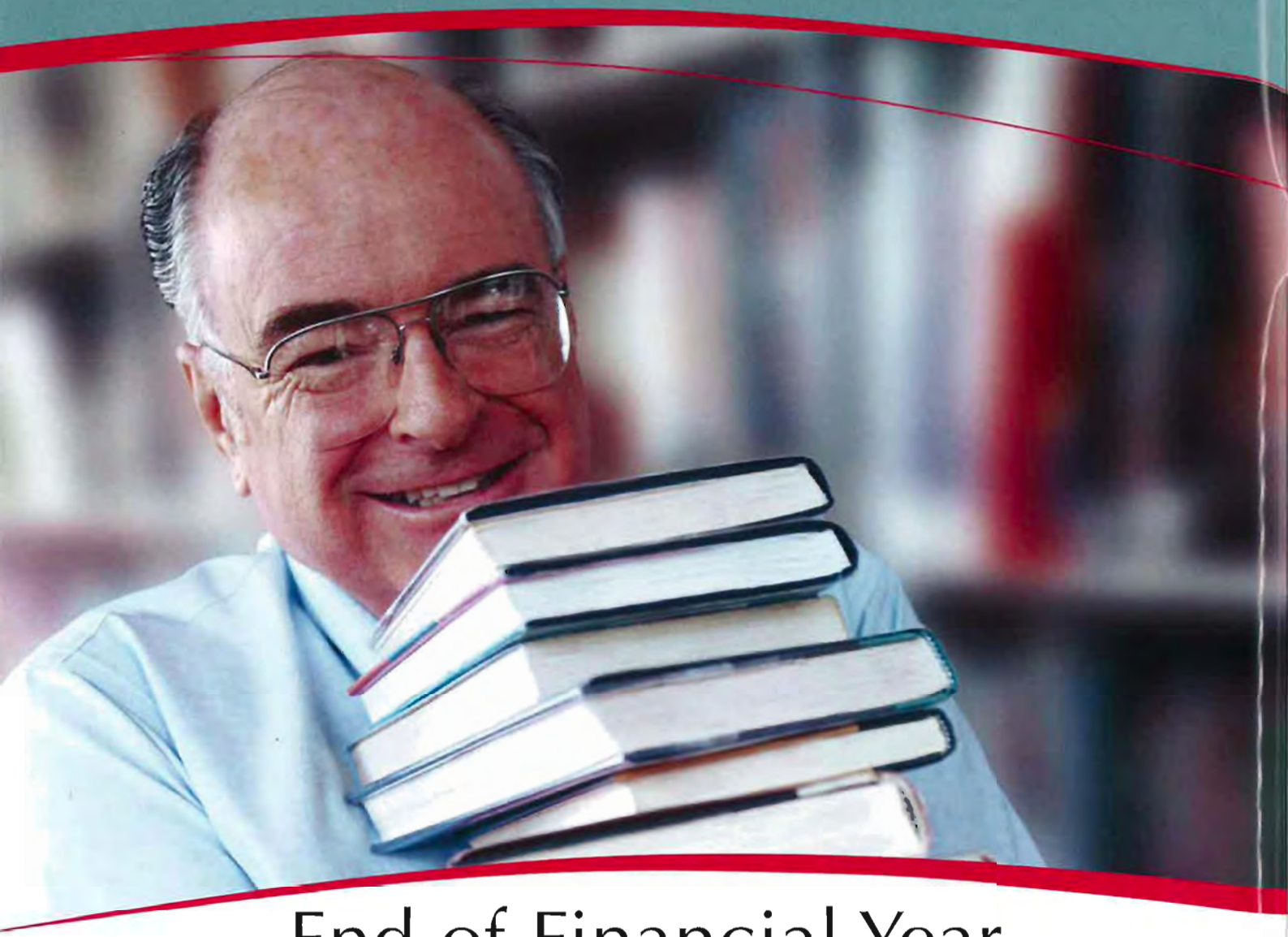
VICTORIAN BAR NEWS

No. 128 ISSN 0159-3285 AUTUMN 2004

Unveiling of Tapa Cloth

Welcomes: Justice Susan Crennan and Justice Stephen Kaye ☐ Obituaries: Allayne Kiddle and Leslie George Crisp ☐ Independence and the Bar ☐ Bush Lawyers ☐ Exchange Chambers ☐ Bar Reception for Pro Bono Practitioners and Farewell to Samantha Burchell ☐ Services for the Opening of the Legal Year ☐ Major Michael Mori, David Hicks' US Military Lawyer, Visits Melbourne ☐ Justice Gaudron Opens Gaudron Chambers in Republic Tower ☐ The Balance of Improbabilities ☐ The Victorian Bar's Children's Christmas Party ☐ The New Silks — and Their Way to the Top ☐ High Court Welcomes Victorian New Silks ☐ Launch of Compulsory Legal Education Program ☐ Solomon Islands' New Solicitor-General Farewelled ☐ A New Supreme Court Building? I Think Not. ☐ Ten Years of the Women Barristers Association ☐ New Wine Column in Association with the Essoign ☐ Sport: Golf, Tennis and Yachting

LexisNexis™



End of Financial Year
Book Sale

Visit www.lexisnexis.com.au/booksale to take advantage of discounted purchase prices on selected LexisNexis book titles, saving you up to 25%, until 30 June 2004.
Don't miss out on these great offers!

Contact Us
Customer Relations

Phone:	1800 100 161 (Lines are open 8.00am-8.00pm EST Mon-Fri)
Email:	customer.relations@lexisnexis.com.au
Fax:	1800 800 122
Web:	www.lexisnexis.com.au

VICTORIAN BAR NEWS

No. 128 AUTUMN 2004

Contents

Cover: New readers from the Pacific region were welcomed by Chairman Brett on 1 March, who unveiled the Tapa Cloth donated by reader Jennifer La'au — see story page 32.

Welcome: Sue Crennan QC

Welcome: Stephen William Kaye

Obituary: Allayne Kiddle

David Hicks' US Military Lawyer Visits Melbourne

Services for the Opening of the Legal Year

The Opening of Gaudron Chambers by Justice Gaudron in The Republic Tower

The Victorian Bar's Children's Christmas Party

New Silks Welcomed to High Court in Canberra

Ten Years of the Women Barristers Association

Bar Sport:

Golf

Tennis

Yachting

VICTORIAN BAR COUNCIL
for the year 2003/2004
*Executive Committee

Clerks:

W *Brett QC, R.A. *(Chairman)*
B *Ray QC, W.R. *(Senior Vice-Chairman)*
B *McMillan S.C., Ms C.F. *(Junior Vice-Chairman)*
D Fajgenbaum QC, J.I.
G *Howard QC, A.J.
F *Dunn QC, P.A.
A *Shand QC, M.W. *(Honorary Treasurer)*
F Dreyfus QC, M.A.
G Crennan S.C., M.J.
D Beach S.C., D.F.R.
F *Quigley S.C., Ms M.L. *(Assistant Honorary Treasurer)*
D Riordan S.C., P.J.
D McLeod S.C., Ms F.M.
D Jones, I.R.
W Neal D.J.
R Doyle, Ms R.M.
D Duggan, Ms A.E.
D *Gronow, M.G.R.
B Coombs, Ms D.J.
L Hannebery, P.J.
D Connor, P.X.
D Moore Ms S.E. *(Honorary Secretary)*
G Anderson, Ms K.J.D. *(Assistant Honorary Secretary)*

Ethics Committee

B McMillan S.C., Ms C.F. *(Chair)*
H Merralls AM, QC, J.D.
S Willee QC, P.A.
S Lally QC, W.F.
P Bartfeld QC, M.
F Gobbo QC, J.H.
F Dreyfus QC, M.A.
G Lacava S.C., P.G.
H Lewis S.C., G.A.
A Macaulay S.C., C.C.
M Clelland S.C., N.J.
G Gordon S.C., Ms M.M.
R Batten, J.L.
L Lane, D.J.
F Shiff, Ms P.L.

Chairs of Standing Committees of the Bar Council

Aboriginal Law Students Mentoring Committee
G Golvan S.C., C.D.

Applications Review Committee
G Howard QC, A.J.

Charitable and Sporting Donations Committee
D Riordan S.C., P.J.

Conciliators for Sexual Harassment and Vilification
B Curtain QC, D.E.

Counsel Committee
G Crennan S.C., M.J.

Equality Before the Law Committee
A Richards QC, Ms A.

Ethics Committee
B McMillan S.C., Ms C.F.

Human Rights Committee
D Fajgenbaum QC, J.I.

Legal Assistance Committee
G Howard QC, A. J.

Legal Education and Training Committee
B Ray QC, W.R.

Continuing Legal Education Committee
— Nettle, The Honourable Justice

Accreditation and Dispensation Sub-Committee
B Young QC, N.J.

Readers' Course Sub-Committee
G Santamaria S.C., P.D.

New Barristers' Standing Committee
R Doyle, Ms R.M.

Past Practising Chairmen's Committee
G Berkeley QC, H.C.

Professional Indemnity Insurance Committee
A Shand QC, M.W.

Professional Standards Education Committee
S Willee QC, P.A.

Victorian Bar Dispute Resolution Committee
S Martin QC, W.J.

Victorian Bar Theatre Company Steering Committee
H Wilson QC, S.K.

VICTORIAN BAR NEWS

Editors
Gerard Nash QC, Paul Elliott QC and Judy Benson

Editorial Board
Julian Burnside QC
Jack Rush QC
Graeme Thompson

Editorial Consultant
David Wilken

Editorial Committee
John Kaufman QC, Olyvia Nikou S.C., William F. Gillies, Carolyn Sparke, Georgina Schoff, Paul Duggan, Peter A. Clarke, Nicola Gobbo, Victoria Lambropoulos, Richard Brear and Peter Lithgow (Book Reviews)

David Johns (Photography)

Published by The Victorian Bar Inc.
Owen Dixon Chambers,
205 William Street, Melbourne 3000.

Registration No. A 0034304 S

Printed by: Impact Printing
69–79 Fallon Street,
Brunswick Vic. 3056

This publication may be cited as (2004) 128 Vic B.N.

Advertising
Publications Management Pty Ltd
38 Essex Road, Surrey Hills,
Victoria 3127
Telephone: (03) 9888 5977
Facsimile: (03) 9888 5919
E-mail: wilken@bigpond.com

The New Despotism

WHATEVER the merits or demerits of the invasion of Iraq by the "coalition of the willing", and irrespective of the cause of the events of 11 September 2001, it is clear that we are now faced with a major worldwide terrorist problem.

In a sense, the die has now been cast, whether on 11 September or earlier, or even later. The reaction of the west, and especially the apparent irrelevancy of the invasion of Iraq, has given a boost to Islamic extremists. Whatever the causes of that problem, there is a danger that in reacting to it and in an attempt to protect our "freedom", we will in fact sacrifice our freedom.

It is 75 years since Lord Hewart published his criticism of unbridled bureaucracy entitled *The New Despotism*. It is over 50 years since Lord Shawcross in his closing address at Nuremberg said of the situation where a nation abandoned any pretext at observance of the rule of law:

> When the state, either because as here its leaders have lusted for power and place, or under some specious pretext that the end may justify the means, affronts these things, they may for a time become obscured and submerged. But they are imminent and ultimately they will assert themselves more strongly still, the imminence more manifest. And so, after this ordeal to which mankind has been submitted, mankind itself — struggling now to re-establish in all the countries of the world the common simple things — liberty, love, understanding — comes to this court and cries, 'these are the laws — let them prevail'.

Detention without trial has been fashionable under a number of regimes: the France of Louis XVI, pre- and post-revolutionary Russia; Argentina and Uruguay under the Juntas; Nazi Germany to name but a few. More recently the French in Algeria and the British in Northern Ireland have used detention without trial as a method of fighting against those considered to be terrorists.

Our concern is with the erosion (at a national and international level) of the rule of law in the name of "freedom" and "national security".

The common law principles relating to bail and the statements in Magna Carta and in the Bill of Rights appear to enshrine the principle "nulla poena sine lege", the presumption of innocence and the principle of equality before the law. Therefore, one would expect that the legal profession, acting in a responsible and orthodox fashion, would speak out against special anti-terrorist legislation.

One of the most important roles of the lawyer is to act as an independent buffer between the power of government and the rights of the individual. Therefore, one would assume that provisions for detention without trial and limitations on access to legal assistance would have the legal community up in arms. One would certainly expect the Australian Law Reform Commission to be expressing concern at the ambit of the "anti-terrorist" legislation introduced in this country since the events of 11 September 2001.

Our concern is with the erosion (at a national and international level) of the rule of law in the name of "freedom" and "national security".

The Australian Law Reform Commission has recently released a discussion paper. But it does not appear to be one that it is concerned to curb the powers of the executive or the excesses of the bureaucracy. It is a paper concerned with "national security". In that paper it is made clear that the principle of open and fair justice has to be balanced against the national security of the state.

It may well be that the price of "freedom" is the abolition of the rule of law. But, if that be the case, what is this "freedom" we seek to protect?

Once one starts to water down the rule of law as stated in the Bill of Rights and Magna Carta, and as since developed by the courts, freedom atrophies.

The state must defend itself from terrorists but once the rule of law ceases to be sacrosanct then clearly those "who hate freedom" (whoever they may be) have won.

When there is a special set of rules governing the trial of certain criminals, and justice for any individual is required to take second place to the needs of the nation state, we no longer have a liberal

democracy merely (if we are lucky) a choice at the polling booth as to who shall be our master.

MOVING ADMISSIONS BY NUMBER

It is perhaps an inevitable price of "progress" that there is no longer room — or time — for the gracious things in life. The sing-a-long around the piano was replaced by the cluster around the radio, by the gawping at television, and now by the solitary person huddled over the computer "talking" to people he or she has never met.

In the last 50 years university graduation ceremonies have become more and more impersonal as the need to "process" more and more graduates diminishes the time available for, and the value attributed to, the individual.

Some of us still remember that at the end of years of study and a year of articles, or perhaps in some cases after five years of articles, the time came when we could actually join the legal profession. It was an important moment in our lives and in the lives of our parents, spouses or others who had assisted or borne with us during the years preceding admission. It was an important day and one fitting for pomp and ceremony to reflect our sense of achievement.

The numbers have grown since we were admitted to practice. That, of itself, has watered down the importance of "the day".

It appears that a proposal was put forward which would have had the effect of removing the last vestiges of recognition of the individual from the admission ceremony. That proposal, as we understand it, has now been scrapped or at least adjourned. At the same time the mouthing of the magic formula "I move that [Alvin Purple Bloggs] be admitted to practice as a barrister and solicitor of this Honourable Court. I so move on the certificate of the Board of Examiners" has been abandoned in favour of a shorter formula: "I so move" which, while shortening the proceeding, detracts in no way from the importance of the individual in the ceremony.

We welcome the initiative, which we believe came from the Bar Council and which has resulted in the saving of the ceremony.

JUDICIAL INDEPENDENCE

We have devoted a considerable amount of space in previous issues of *Bar News* to the question of judicial independence. We stress that judicial independence requires not only that there be no interference with the executive (or the legislature) with the judicial process, but it also requires an inability of the executive to put pressure of any kind, whether direct or indirect, upon members of the judiciary.

It was for this reason that an independent tribunal was established to determine judicial salaries.

The refusal of the Victorian Government to implement the latest determination of that tribunal creates an unfortunate situation. It means that the executive intends itself to determine what remuneration is appropriate for members of the judiciary. As a matter of principle this undermines judicial independence.

There is no difference in kind between refusing to implement a determination for an increase in judicial salaries and a decision to reduce judicial salaries.

Once it is accepted that judicial salaries may be determined by the executive, the executive has the power to" punish" a recalcitrant judiciary or to "reward" a compliant judiciary. The fact that members of the judiciary may have sufficient courage and integrity to ignore the capacity of the executive to control their remuneration and, if it so wishes, to do so on the basis of "performance", which theoretically could be measured by the number of decisions which implement the policy of the executive is irrelevant. The very existence of such a power undermines the independence of the judiciary.

The issue is not how much Victorian judges and magistrates should be paid. Rather the question is: who should determine this?

The clear answer is that it should not be the executive. The only fetter on executive power is the power exercised by the judicial arm of government. That power must be exercised free from all actual or potential interference, direct or indirect.

The refusal of the state government to implement the determination of the judicial remuneration tribunal is a potentially serious interference with judicial independence.

BURIED TREASURE

The Editors note with some concern that a member of the Editorial Board and a regular contributor, Julian Burnside, has been named a "national treasure". Since no one has yet realised the significance of the editors and each of them, we can only assume that we remain "buried treasures". Like Lassiter's Reef we lie here (X marks the spot) waiting to be uncovered.

The Editors

Judges' Remuneration

THE Victorian Government has acted very wrongly in its announced intention, made public over the Easter public holiday weekend, to reject the salary determination of the Judicial Remuneration Tribunal. It is to be hoped that the Government will reconsider this decision, and that members of Parliament will not vote in support of the proposed rejection.

Victorian Supreme Court judges now have the lowest salaries of all Australian State or Territory Supreme Court judges. The carefully considered determination of the independent Judicial Remuneration Tribunal would have moved Victorian Supreme Court salaries towards parity with the Federal Court and with their States and Territories counterparts. The only reason given in the public disclosure of the Premier's announced intention to reject that determination is that it is "out of step with community expectations".

The Premier was quoted as saying, "We're not saying that Victoria's judiciary don't deserve a pay rise, but a salary increase of that size was far beyond community expectations of a fair and reasonable wage increase." It was also reported that: "The Government is considering linking future judicial pay rises directly to movements in federal judicial salaries." There is an obvious contradiction in the latter statement, in that the Judicial Remuneration Tribunal determination moved in exactly that direction, but is, apparently, to be rejected.

Of course the Government and the Parliament have a role in the final decision in relation to judicial salaries. There is, however, a delicate balance to be struck between the three constitutionally separate branches of government, the Executive, the Legislature and the Judiciary.

> Equality before the law requires the impartial administration of justice … Impartiality requires a judiciary which is independent of both Parliament and the executive arm of government. This separation of powers is a precondition of the liberty of individual citizens … In our democratic tradition, judicial independence has been secured by two important conventions. The first is by providing judges with security of tenure … The second is by providing judges with security of remuneration.

These are not my words. They are from the Second Reading speech on the *Judicial Remuneration Tribunal (Amendment) Bill 2001* by the Attorney-General, Rob Hulls, only a little over two years ago.

Security of remuneration includes the principle that the salaries of serving judges may not be reduced. This is explicit in section 72(iii) of the Commonwealth Constitution, and implicit in relation to State judges. It also includes periodical review to ensure that the remuneration "is and continues from time to time to be sufficient and that it is properly protected from reduction and erosion": Sir Anthony Mason, *Consultancy Report: System for the Determination of Judicial Remuneration* (February 2003) paras 3.3 and 3.26. "Direct reduction of judicial remuneration is an obvious violation of judicial independence. An indirect reduction is also a violation of judicial independence": Ibid at para 3.4.

The carefully considered determination of the independent Judicial Remuneration Tribunal would have moved Victorian Supreme Court salaries towards parity with the Federal Court and with their States and Territories counterparts.

In order to ensure a fair determination and safeguard judicial independence, every Australian jurisdiction has a process for review of judicial salaries, allowances and leave that is independent of government. The Commonwealth Remuneration Tribunal makes determinations for Members of Parliament, Ministers, senior public servants, other public office holders and federal judges: *Remuneration Tribunal Act 1973* (Cth) s.7. The Territories follow federal judicial salaries. Tasmania has an arithmetical formula based on South Australian and Western Australian judicial salaries, with an annual calculation by the Auditor-General and automatic adjustment at the beginning of each financial year. Every other State has an independent tribunal. The New South Wales Tribunal was established in 1975. It was not until twenty years later, in 1995, that Victoria established its Judicial Remuneration Tribunal, and initially that tribunal had power only to make recommendations, not determinations.

It was a matter of notoriety that the Victorian Tribunal recommendations "were often overridden by the Government, leading to controversy": Sir Anthony Mason, *Consultancy Report: System for the Determination of Judicial Remuneration* (February 2003) at para 4.47. In 2000, in response to a report of the Victorian Tribunal that described the system as "most unsatisfactory", the Bracks Government

commissioned an extensive review by Mr Frank Honan, former Chairman of the Public Service Board, and now one the three members of the reconstituted Tribunal. That report concluded that the Victorian Tribunal was the least independent of any in Australia.

In introducing what became the *Victorian Judicial Remuneration Tribunal (Amendment) Act 2002*, the Bracks Government emphasised the connection between the independence of the Tribunal and that of the judiciary: "[T]he Honan report found that the [Tribunal] lacked an appropriate level of independence and that this had the consequence — and this is very important — of impacting on the judicial independence of Victorian judicial officers."

The Bracks Government said there had been a greater non-acceptance of recommendations on judicial salaries by previous Victorian governments than in any other Australian jurisdiction. It described the process of the previous Liberal Government in rejecting Tribunal recommendations as "nothing short of scandalous". "The overall purpose [of the amendments] is to ensure that Victoria has an independent judiciary, unfettered by political interference." "[I]n its new structure, the [Judicial Review Tribunal] will be more independent. We need an independent structure determining judicial salaries, allowances and leave entitlements for judges."

Significantly, the 2002 amendments vested in the Tribunal responsibility and power to assess and take into account "factors relevant to Victoria, including (i) current public sector wages policy; (ii) Victoria's economic circumstances; (iii) the capacity of the State to meet a proposed increase in judicial salaries, allowances or conditions of service; (iv) any other relevant local factors": section 12(1A)(h), *Judicial Remuneration Tribunal Act 1995*. The amendments also require the Tribunal to take into account "the importance of the judicial function to the community; the need to maintain the judiciary's standing in the community; the need to attract and retain suitably qualified candidates to judicial office; [and] movements in judicial remuneration levels in other Australian jurisdictions": section 12(1A)(a)–(d). Previously, the Act had not laid down any criteria, providing simply that the Tribunal was to "inform itself in such manner as it thinks fit; and may receive written or oral statements" and to "report … on the question whether any [and if so what] adjustments are desirable": sections 12(1)(a) & (b), 11(1) and 13(2).

The Bracks Government's submissions to the Tribunal included the assertion that the Victorian economy had slowed, although the then most recent (December 2003) Victorian Economic News indicated that economic growth in Victoria was expected to increase.

The Bracks Government's submissions to the Tribunal included the assertion that the Victorian economy had slowed, although the then most recent (December 2003) *Victorian Economic News* indicated that economic growth in Victoria was expected to increase from 2.8 per cent in 2002–03 to 3.25 per cent in 2003–04: *Judicial Remuneration Tribunal Report No. 2* of 2003, paras 52 and 54. The Tribunal noted that, apart from the general assertion that a slowed economy would "impede the State's capacity to continue to deliver high quality court services to Victoria", the Government did not address the issue of the State's capacity to meet the claimed increases in judicial salaries: Ibid at para 54. The Tribunal found that the Government's desire to limit judges, salaries for consistency with its 3 per cent public sector wages policy did not take into account specific factors relevant to judicial office: Ibid at para 58.

Most significantly, the Tribunal found that "the New South Wales and federal jurisdictions are comparable to Victoria in terms of jurisdiction, nature and complexity of cases and workload" (para 45), and that Victorian judicial officers were performing similar duties and at a comparable standard to their counterparts in other jurisdictions (para 57). The Tribunal found that the Government had failed to present any argument why Victorian judicial officers should be paid less than their counterparts: para 57.

When the Tribunal wrote its report, it did not have the most recent adjustments in Queensland and Tasmania. The Queensland determination was tabled in Parliament on 6 April 2004. The Tasmanian adjustment that will take effect 1 July is calculable as a matter of arithmetic.

Every Australian jurisdiction except Victoria has implemented, or is implementing (the Queensland Tribunal has indicated parity over four rather than three years), parity with the federal

jurisdiction following the exhaustive review by the Commonwealth Remuneration Tribunal in November 2002. The present Victorian Supreme Court judge's salary of $227,100 is now, and unless increased will continue to be, the lowest in the whole of Australia by about $30,000. It will be $37,449 less than the salary of a Tasmanian Supreme Court judge, and about $31,000 less than the salary of a New South Wales Supreme Court judge or a Federal Court judge.

Repeatedly the Government has voiced its commitment to getting "the best and brightest legal minds on [Victorian] judicial benches". In 2003, the section 75B of the Constitution Act 1975 was amended to permit appointment an interstate practitioner or judge not admitted in Victoria as a judge of the Victorian Supreme Court. The Government called throughout Australia for expressions of interest in appointment as Chief Justice of the Victorian Supreme Court.

The Bracks Government has now appointed the heads of all three Victorian Courts and of VCAT, Chief Justice Marilyn Warren, Chief Judge Michael Rozenes, Chief Magistrate Ian Gray and VCAT President Justice Stuart Morris. All are regarded as first class appointments. At Chief Justice Warren's welcome, the Attorney-General referred to the legislative broadening of qualifications, and to the advertising. He observed that Chief Justice Warren was the first Chief Justice "to be appointed from an unprecedentedly wide pool of candidates".

Victoria cannot expect to continue to attract or retain "the best and brightest legal minds" on the lowest Supreme Court judicial salaries in the whole of Australia. Chief Justice Warren said in her public statement on this issue that the message she has from her "listening tour" is that the community wants the Supreme Court to be the best in the country, and she asks, "How can I achieve that when the government acts in this way?" The other heads of courts and VCAT supported the Chief Justice's statement.

The Government's intention to reject the Tribunal recommendation was made public in the *Herald Sun* on Saturday 10 April 2004, during the Easter public holiday long weekend. I spoke to ABC News Radio, and my comments were included in the ABC radio news bulletins that morning. I gave an interview to ABC Television News, and part of that interview was included in the television news on Saturday evening. I issued a media release on Tuesday April 13. I have made comments to numerous reporters. With Law Institute of Victoria President, Chris Dale, I have sought an appointment with the Premier to discuss the matter, and Chris Dale and I have written joint letters to the Premier and to each member of Parliament.

Victoria cannot expect to continue to attract or retain "the best and brightest legal minds" on the lowest Supreme Court judicial salaries in the whole of Australia.

Chief Justice Warren has described the hard work of Supreme Court judges: "around 60 hours per week, some even 70 hours or more, and on weekends and holidays". *The Age* quoted a senior Supreme Court judge as saying, "I start at 7 a.m., go home at 7:30 p.m. and do another three hours at night. At weekends, I'm lucky to get three-quarters of a day off. It is terrible for the family. At the same time, there is tremendous satisfaction in the job. It's a very privileged position."

The Government's vague ("out of step with community expectations") and contradictory ("The Government is considering linking future judicial pay rises directly to movements in federal judicial salaries") statements so far made public do not justify the announced intention to reject the well informed and carefully reasoned determination of the Judicial Remuneration Tribunal. The Premier is apparently to meet with the heads of courts and VCAT. It is to be hoped that meeting will be productive, and that the Government will reconsider its position. If not, individual Members of Parliament should take responsibility for scrutinising the basis for any resolution to disallow the Tribunal determination.

BAR DINNER

On a more cheerful note, this year's Bar Dinner will be held at Zinc in Federation Square on Saturday 29 May. Last year's dinner was a huge success. This year's dinner promises to be as good, or even better. Dr Kristine Hanscombe S.C. is Junior Silk. Justice Simon Whelan is the after dinner speaker. The Frank Walsh Vicbar All-Stars will play and Sarah Fregon will sing. Speeches will be brilliant, but short. I encourage members to come, and to book early. Last year's dinner was a sellout.

Robin Brett QC
Chairman

Justice Statement a "Groundbreaking Analysis of the Attorney-General's Entire Portfolio"

FOR those of us who work every day in and amongst the law, the principles on which it is based seem self-evident. For those who practice in a specific area, from criminal to discrimination law, its virtues and shortcomings are obvious. Across the spectrum of the legal system, we discuss the successes and the challenges that we perceive before us on a daily basis. Yet absent from this field is a place for these discussions to converge — an opportunity for us to examine the breadth of the legal system, its impact on the lives of all Victorians, and to articulate what it is that we value about the law and why. Nowhere has there been, until now, a site at which we can appraise the need for reform or improvement with the benefit of detailed context and collaborative insight.

That is why the Justice Statement is an exciting, and fairly radical, exercise. To be released in the coming months, the Justice Statement is a groundbreaking analysis of the Attorney-General's entire portfolio. It involves a vision for our justice system that goes beyond our time in office and focuses on the greater benefit of the community rather than on political point scoring. It is the most comprehensive analysis ever undertaken of the way our system operates, and the first time that every stakeholder within my portfolio has been brought together to evaluate the forces that will affect them in the coming decades and identify ways to make their services meaningful to every Victorian. In short, the Justice Statement is about taking a holistic approach to

every thing we do, harnessing creativity and flexibility, and ensuring that the law is capable of delivering justice to the most marginalised sectors of the community.

Importantly, the Justice Statement recognises that justice should be reflected in people's daily lives and interactions, that it has something to say about every facet of Government and of life in Victoria. The Statement recognises that justice intersects with economics, infrastructure, the environment, education and community services; and that it impacts on the opportunities that Victorians confront, and on their confidence to embrace such opportunities and to avoid the traps of alienation, disadvantage and self-doubt.

The Statement will be guided by the themes of "Modernising Justice" and "Protecting Rights and Addressing Disadvantage"

Just as crucially, the Justice Statement is grounded in a declaration of the value of the rule of law, and constructed on the basis of four values which the Government believes are fundamental to a properly functioning democratic society: equality and the role of an independent judiciary in protecting this equality; fairness; accessibility and effectiveness.

With this background and these values in mind, the Statement will be guided by the themes of "Modernising Justice" and "Protecting Rights and Addressing Disadvantage" to consider possibilities for modernising criminal law and procedure, civil disputes, the Courts and the Legal Profession; and for protecting human rights; addressing the causes of over-representation of disadvantaged groups in the criminal justice system; improving responses to victims of crime and improving legal information, advice and assistance.

Detailed consideration of subjects of such complexity and depth will obviously serve as a platform for the announcement of numerous proposals, which I do not wish to pre-empt here. Equally importantly, however, I hope that the Statement prompts unprecedented discussion across Government, the

profession and the courts, and within the wider community, about the kind of legal system we want for Victoria in the 21st century.

As just one of many examples, an area that I believe is ripe for discussion and scrutiny is the area of civil disputes and, within it, the subject of appropriate, or alternative, dispute resolution. All societies need to find effective ways for resolving disputes between their members. While these disputes may be private, Governments still play an important role in establishing the means by which these disputes can be resolved in order that the rule of law may be effective and justice be achieved.

It is my belief that the starting point for the resolution of any civil dispute should be the lowest possible level of intervention.

As readers of this journal have learned to their mutual benefit, the traditional method of dispute resolution has been adversarial and highly dependent on legal advocacy to navigate the law's complexities. While this method is most appropriate for more complex matters, it is my belief that the starting point for the resolution of any civil dispute should be the lowest possible level of intervention.

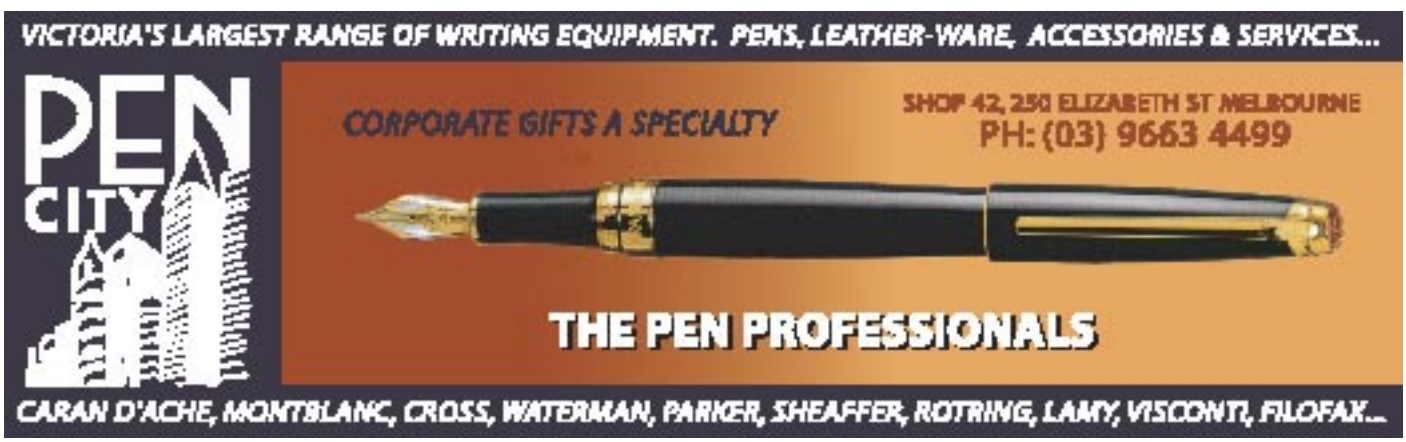
This is my belief because of the enormous value I see in minimising the costs of disputes, in providing more efficient resolution and in ensuring that non-adversarial processes and remedies are available and adaptable to the needs and particular vulnerabilities of the disputants. Perhaps most importantly, this is my belief because I am convinced that the law can only benefit where parties feel they have participated in the decisions that will ultimately affect them.

More and more people share this belief, and the use of ADR has grown exponentially across the State and around the country over the last 25 years or so. However, this growth has not been accompanied by a systematic or planned development, or even by a consistency on the part of those who facilitate or assist in these resolution processes. Consequently, methods currently used range from neighbourhood processes designed to minimise formality; through private and court-based mediation to fully fledged commercial arbitration proceedings. Some providers belong to professional associations, while others engage in ADR as part of other professional activity, a breadth which makes it impossible to quantify the level of demand for these types of services.

We need to have a discussion within the Victorian community about what we want from dispute resolution and how best to cement and improve the myriad methods available. Consequently the Justice Statement will undertake to promote this discussion, in order that appropriate dispute resolution methods are made more accountable, accessible and effective for every Victorian.

This is just one path among many down which my portfolio will head over the coming years and, as with the many other undertakings in the Justice Statement, I am convinced it will be a fruitful one. The Justice Statement is unique, providing every member of the community with a map and signalling openly the terrain which Justice will explore in the short and the long term future. In doing so, the Statement urges the participation of all those who feel passionate about the protections and the possibilities of the law. I encourage all of you to take the time to read the Statement and reflect, and I look forward to numerous lively discussions in the years ahead.

Rob Hulls
Attorney-General



Legal Practice Act 1996

Determination of Contributions to Fidelity Fund for the Period 1 July 2004 to 30 June 2005

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 and the contribution payable by members of each class, for the period 1 July 2004 to 30 June 2005, are as set out below. Approved Clerks, Interstate and Foreign practitioners must pay any contribution to the Legal Practice Board by 30 June 2004. All other practitioners must pay any required contribution to the Law Institute of Victoria by 30 April 2004.

Fidelity Fund Contribution Rates 2004/2005

Class of Persons	*Contribution*
AUTHORISED TO RECEIVE TRUST MONEY	
1. An approved clerk or the holder of a practising certificate that authorizes 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 2003.	$210
2. An approved clerk or the holder of a practising certificate that authorizes 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 (i.e. $0–$500,000) in total during the year ending on 31 October 2003.	$105
INTERSTATE AND FOREIGN PRACTITIONER	
3. 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, exceeding $500,000 in total during the year ending on 31 October 2003.	$210
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 (i.e. $0–$500,000) in total during the year ending on 31 October 2003.	$105
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 authorized to receive trust money.	$50
EXEMPT PRACTITIONERS	
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 at community legal centres are not required to make a contribution.	NIL

Legal Profession Tribunal — Publication of Orders

UNDER section 166 of the *Legal Practice Act 1996*, ('the Act') the Victorian Bar Inc ('the Bar'), 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 practitioners:

Name of practitioner: James Jackson Isles ('the practitioner')

1. Tribunal Findings and the Nature of the Offence
   (a) Findings
   The Full Tribunal found the practitioner guilty of:
      (i) Charge 1 — misconduct as defined by paragraph (a)(i) of the definition of 'misconduct' in section 137 of the Act by wilful contravention of rule 188 of the Bar's Rules of Conduct in that the practitioner received cash from various clients on account of fees which did not pass through the hands of his clerk.
      (ii) Charge 2 — unsatisfactory conduct as defined by paragraph (b) of the definition of 'unsatisfactory conduct' in section 137 (b) of the Act in that the practitioner contravened rule 176 of the Bar's Rules of Conduct by commencing work on a direct access brief before both the practitioner and his client had executed standard terms of engagement approved by the Victorian Bar Council and completed that work without such terms ever having been executed.
      (iii) Charge 3 — misconduct as defined by paragraph (a)(i) of the definition of 'misconduct' in section 137 of the Act by wilful contravention of rule 177 of the Bar's Rules of Conduct in that the practitioner failed to pay fees for direct access work into a trust account established pursuant to the Act in circumstances where he had not forwarded a memorandum of fees to the client.
      (iv) Charge 4 — unsatisfactory conduct as defined by paragraph (ab) of the definition of 'unsatisfactory conduct' in section 137 of the Act in that in disregard of an instruction from the principal of a firm of solicitors the practitioner persistently accepted briefs from that firm without delivery of a backsheet.
   (b) Nature of the Offence
      (i) Charge 1 — in wilful or reckless contravention of rule 188 of the Bar's Rules of Conduct the practitioner received from various clients amounts on account of fees which did not pass through the hands of his clerk.
      (ii) Charge 2 — in wilful or reckless contravention of rule 176 of the Bar's Rules of Conduct the practitioner commenced work on a direct access brief before both the practitioner and his client had executed standard terms of engagement approved by the Victorian Bar Council and completed that work without such terms ever having been executed.
      (iii) Charge 3 — in wilful or reckless contravention of rule 177 of the Bar's Rules of Conduct the practitioner failed to pay certain fees for direct access work into a trust account established pursuant to the Act in circumstances where he had not forwarded a memorandum of fees to the client.
      (iv) Charge 4 — the practitioner persistently accepted briefs from or on behalf of the complainant firm of solicitors without delivery of a backsheet in wilful or reckless disregard of an instruction or direction from its principal that he accepts briefs from the firm only upon delivery of a backsheet.
   The practitioner pleaded guilty to the charges.
2. The Orders of the Full Tribunal made on 15 October 2003 were as follows:
      (i) In relation to Charge 1 the practitioner is reprimanded and fined the sum of $5,000.00 payable to the Legal Practice Board by 14 December 2003.
      (ii) In relation to Charges 2, 3 and 4 the practitioner is reprimanded.
      (iii) The practitioner is to pay the Bar's costs of and incidental to these proceedings to be assessed by the Registrar or Deputy Registrar of the Tribunal in failure of agreement.
3. As at the date of publication no notice of appeal against the Orders of the Full Tribunal has been lodged. The time for service of such notice has expired.

Name of practitioner: Damian Peter Sheales ('the practitioner')

1. Tribunal Findings and the Nature of the Offence
   (a) Findings
   The Full Tribunal found the practitioner guilty of:
      (i) Charge 1.1 (i) — unsatisfactory conduct as defined in paragraph (b) of the definition of 'unsatisfactory conduct' in section 137 of the Act in that in breach of rule 106 of the Bar's Rules of Conduct he failed to inform his instructing solicitor there was a real possibility he would be unable to appear in Court to conduct the case.
      (ii) Charge 1.1 (ii) — misconduct as defined by paragraph (a)(i) of the definition of 'misconduct' in section 137 of the Act by reckless contravention of rule 108 of the Bar's Rules of Conduct in that

he handed over his brief to another counsel to conduct the case without the knowledge or consent of the instructing solicitor.

(iii) Charge 2.1 (d) — misconduct at common law in that he requested his clerk to send tax invoices to his instructing solicitor claiming a fee for appearances he had not made.

(iv) Charge 3.2 (a) — misconduct at common law in that he received from his instructing solicitor a fee on the basis of a false representation he had appeared in Court when he had not appeared.

(v) Charge 4.1 — misconduct as defined by paragraph (a)(i) of the definition of 'misconduct' in section 137 of the Act by reckless contravention of rule 108 of the Bar's Rules of Conduct in that he handed over his brief to another counsel without the knowledge or consent of the instructing solicitor.

(vi) Charge 4.3 (a) — unsatisfactory conduct as defined by paragraph (ab) of the definition of 'unsatisfactory conduct' in section 137 of the Act in that having undertaken to pay another counsel's fees agreed upon he failed to do so.

(vii) Charge 4.3 (b) — misconduct at common law in that he was paid fees by the instructing solicitor on the basis that he had appeared in Court when he had not appeared.

(viii) Charge 5.1 — unsatisfactory conduct as defined in paragraph (ab) of the definition of 'unsatisfactory conduct' in section 137 of the Act in that he failed to comply with the instructing solicitor's reasonable requests for information concerning the progress of his work in relation to the brief.

(ix) Charge 8.1 (a), (b), (c) and (d) — misconduct at common law in that knowing the case was listed in Court in Sydney on 30 November 2001 he —

1. did not travel to Sydney;
2. did not appear for the client;
3. handed the brief to appear to another counsel;
4. agreed upon a fee to be paid by the practitioner to the other counsel.

(x) Charge 10 — unsatisfactory conduct as defined in paragraph (b) of the definition of 'unsatisfactory conduct' in section 137 of the Act in that he contravened rule 74 (b) of the Bar's Rules of Conduct by failing to reply to correspondence from the Ethics Committee within the time limited.

(b) Nature of the Offences

(i) Charge 1.1 — the practitioner is guilty of:

(a) misconduct within the meaning of paragraph (a)(i) of the definition of 'misconduct' in section 137 of the Act; or

(b) unsatisfactory conduct within the meaning of paragraph (b) of the definition of 'unsatisfactory conduct' in section 137 of the Act;

in that he, having been briefed by the complainant to appear for the client on each occasion that the proceeding was mentioned in Court ('the brief'):

(i) wilfully or recklessly in breach of rule 106 of the Bar's Rules of Conduct failed to advise the complainant that he had reasonable grounds to believe that there was a real possibility that he would be unable to attend when the proceeding was mentioned before the Court on 20 September 2001;

(ii) further or in the alternative, wilfully or recklessly in breach of rule 108 of the Bar's Rules of Conduct handed the brief to another counsel without the knowledge or consent of the complainant.

(ii) Charge 2.1 — the practitioner is guilty of misconduct at common law within the meaning of paragraph (a) of the definition of 'misconduct' in section 137 of the Act in that the conduct alleged is such that a practitioner of good repute and competency would regard it as disgraceful or dishonourable in that he requested the clerk to send a tax invoice to the complainant which represented to the complainant that the practitioner had appeared for the client on 20 September 2001 and that he was entitled to claim a fee in the sum of $2,200.00 including GST for that appearance when in fact he had no such entitlement.

(iii) Charge 3.2 — the practitioner is guilty of misconduct at common law within the meaning of paragraph (a) of the definition of 'misconduct' in section 137 of the Act in that the conduct alleged is such that a practitioner of good repute and competency would regard it as disgraceful or dishonourable in that the practitioner received from the complainant the sum of $2,200.00 on the basis of the false representation that he had appeared for the client on 20 September 2001.

(iv) Charge 4.1 — the practitioner is guilty of:

(a) misconduct within the meaning of paragraph (a)(i) of the definition of 'misconduct' in section 137 of the Act; or

(b) unsatisfactory conduct within the meaning of paragraph (b) of the definition of 'unsatisfactory conduct' in section 137 of the Act;

in that he, having been briefed by the complainant to appear for the client on each occasion that the committal proceeding was before the Court wilfully or recklessly in breach of rule 108 of the Bar's Rules of Conduct handed the brief to another counsel for the purpose of appearing on behalf of the client when the proceeding was mentioned before the Court on 30 November 2001 without the knowledge or consent of the complainant.

(v) Charge 4.3 — the practitioner is guilty of misconduct at common law within the meaning of paragraph (a) of the definition of 'misconduct' in section 137 of the Act in that he:

(a) having undertaken to pay to the other counsel the amounts agreed, failed to do so within a reasonable time or at all;

(b) had been paid amounts by the complainant on the basis that he had appeared personally on 20 September 2001, and was later paid a further amount of $2,200.00 on the basis that he had appeared for the client before the Court on 30 November 2001.

(ix) Charge 5.1 — the practitioner is guilty of:
(a) misconduct within the meaning of paragraph (a) of the definition of 'misconduct' in section 137 of the Act; or (b) unsatisfactory conduct within the meaning of paragraph (b) of the definition of 'unsatisfactory conduct' in section 137 of the Act:
in that he failed in breach of section 92 of the Act to comply with the reasonable requests of the complainant to provide to the complainant information concerning the progress of work in relation to the brief.

(x) Charge 8.1 — the practitioner is guilty of misconduct at common law within the meaning of paragraph (a) of the definition of 'misconduct' in section 137 of the Act, in that the conduct alleged is such that a practitioner of good repute and competency would regard it was disgraceful or dishonourable in that:
(a) he had not travelled to Sydney on 30 November 2001 for the purpose of fulfilling his obligations to the client in relation to the brief;
(b) he had not appeared before the Court on behalf of the client on 30 November 2001;
(c) he had handed the brief to another counsel for the purpose of making the appearance;
(d) he had agreed with the other counsel upon a fee to be paid to the other counsel by him.

(xi) Charge 10.1 — the practitioner is guilty of:
(a) misconduct within the meaning of paragraph (a)(i) of the definition of 'misconduct' in section 137 of the Act; or
(b) alternatively, of unsatisfactory conduct within the meaning of paragraph (a) of the definition of 'unsatisfactory conduct' in section 137 of the Act:
in that he wilfully or recklessly contravened rule 47(b) of the Bar's Rules of Conduct by failing to respond to correspondence from the Ethics Committee.

2. The Orders of the Full Tribunal made on 10 December 2003 were as follows:
(i) Charge 1.1 (i) — the practitioner is reprimanded.
(ii) Charge 1.1 (ii) — the practitioner is reprimanded.
(iii) Charge 2.1 (d) — the practitioner is reprimanded and his practising certificate is suspended for a period of three (3) months.
(iv) Charge 3.2 (a) — the practitioner is reprimanded and his practising certificate is suspended for a period of three (3) months.
(v) Charge 4.1 — the practitioner is reprimanded and his practising certificate is suspended for a period of three (3) months.
(vi) Charge 4.3 (a) — the practitioner is reprimanded.
(vii) Charge 4.3 (b) — the practitioner is reprimanded and his practising certificate is suspended for a period of three (3) months.
(viii) Charge 5.1 — the practitioner is reprimanded.
(ix) Charge 8.1 (a), (b), (c) and (d) — the practitioner is reprimanded and his practising certificate is suspended for a period of three (3) months.
(x) Charge 10 — the practitioner is reprimanded.
(xi) The practitioner is ordered to pay to the Bar its costs of and incidental to the hearing fixed by the Full Tribunal in the sum of $68,000.00.
3. As at the date of publication no notice of appeal against the Orders of the Full Tribunal has been lodged. The time for service of such notice has expired.

Name of practitioner: Julian Rohan Hamilton
('the practitioner')

1. Tribunal Findings and the Nature of the Offence
(a) Findings
The Full Tribunal found the practitioner guilty of unsatisfactory conduct as defined by paragraph (b) of the definition of 'unsatisfactory conduct' in section 137 (b) of the Act in that he contravened rule 4 of the Bar's Rules of Conduct.
(b) Nature of the Offence
The practitioner contravened rule 4 of the Bar's Rules of Conduct by communicating with the person charged at the Victorian Civil and Administrative Tribunal with hearing and determining a case during the course of the proceedings.
2. The Orders of the Full Tribunal made on 18 December 2003 were as follows:
(i) The appeal by the practitioner against the decision of the Deputy Registrar of the Tribunal of 25 July 2003 is allowed.
(ii) The Orders of the Deputy Registrar of 25 July 2003 are set aside.
(iii) The practitioner is reprimanded.
(iv) The practitioner is to undertake a course of counselling and education on the subject of the ethics of barristers including the expression of those ethics in the current Rules of Conduct of the Bar. The course is to be as directed by the Chairman for the time being of the Continuing Legal Education Committee of the Victorian Bar Council ('the Chairman') or his authorised deputy. If required to do so by the Victorian Bar Council, the Chairman or his authorised deputy is to report to the Victorian Bar Council on the nature of the course of counselling and education required and whether or not the practitioner has satisfied those requirements.
(v) The practitioner is to pay to the Bar its costs of and incidental to the proceedings before the Deputy Registrar and the Full Tribunal fixed by the Full Tribunal in the sum of $3,500.00.
(vi) Stay of 90 days for payment of the costs.
3. As at the date of publication no notice of appeal against the Orders of the Full Tribunal has been lodged. The time for service of such notice has expired.

Federal Court

Justice Susan Crennan

The first women to be appointed as Chairman of the Victorian Bar Council, Susan Crennan, was on 3 February 2004, sworn in as a member of the Federal Court of Australia. We set out below the speech of Welcome given on behalf of the Victorian Bar by the Chairman of the Bar Council, Robin Brett QC.

MAY it please the Court. It's a particular honour and pleasure for me to welcome Your Honour Justice Crennan on behalf of the Victorian Bar and of the Australian Bar Association and to extend warmest congratulations upon Your Honour's appointment as a judge of this Court. The President of the ABA, Mr Ian Harrison, is in court in Sydney this morning and has asked me to convey his regrets at not being able to be here, and his personal best wishes and congratulations.

It was in the first week of February 1979, 25 years ago to be exact, that Your Honour signed the New South Wales Bar Roll. Your Honour's master was Dr David Bennett. The very first day of Your Honour's reading was a fairly standard Sydney Friday morning in the equity jurisdiction for Dr Bennett. He was due to appear in fifteen matters before five different judges sitting simultaneously. Dr Bennett gave Your Honour six of these mentions to do alone in five courts. This assignment, daunting already, was no doubt made even more daunting by the fact that Your Honour had only ever been inside a courtroom once at that stage, having begun reading immediately after the completion of Your Honour's law degree.

A year later in March 1980, Your Honour signed the Victorian Bar Roll, having completed your reading. In Melbourne, Your Honour had a further short period of reading with Fred Davey, now Judge Davey of the County Court. Your Honour practised extensively in intellectual property law. However, Your Honour also developed a wide general practice which included everything from prosecuting white collar crime — the Pyramid Building Society directors — to constitutional law, administrative law, arbitrations, mediations, construction and engineering law, extradition and appeals, including criminal appeals, as well as all aspects of commercial law.

As a junior, Your Honour continued the practice of juggling multiple appearances that had commenced so spectacularly on your first day. Indeed, Your Honour was one of a number of very busy juniors who engaged in this sport and consequently sometimes have found themselves jammed and unable to appear with their leaders.

Your Honour was once embarrassed by having cases in Sydney and Melbourne on the same day; one with the then Chairman of the Victorian Bar, now Justice Chernov; the other with the then President of the Sydney Bar, now Justice Gyles, both of whom are present in Court today. Melbourne yielded to Sydney and Justice Chernov appeared alone and was very understanding.

Alan Goldberg QC, as His Honour Justice Goldberg then was, who also frequently led Your Honour, was so impressed by the ability of his juniors to accept multiple briefs that he instituted an occasional award with the title of "Invisible Nominal Junior". There were often a number of contenders but Your Honour — and I have to say Justice Finkelstein — were usually the winners.

Your Honour had two readers — Colin Golvan S.C. and John Billings, who is now Deputy President of VCAT. Your Honour took silk in 1989, a very early appointment that reflected Your Honour's rapid rise to leadership at the Bar. Counsel who have appeared as juniors with Your Honour speak of Your Honour's extraordinary organisation and thoroughness and how much they learned working closely with Your Honour. They speak also of Your Honour's generosity in praising their work to the instructing solicitors.

Your Honour has argued a number of constitutional cases, both as junior and silk since taking silk. Your Honour was, for example, in the landmark section 92 case of *Cole* v *Whitfield*, led by the Victorian Solicitor-General Hartog Berkeley QC and Brian Shaw QC. Your Honour has had complex cases concerning the privatisation of infrastructure, such as the arbitration in *Varnsdorf* v *Fletcher, and Murraylink* which Your Honour did last year.

Your Honour has had a number of important appeals, most recently *Tahche*, in which Your Honour represented the Victorian Director of Public Prosecutions in the Court of Appeal and in the High Court. In denying special leave the High Court accepted Your Honour's submissions that standards of fairness by the Crown are not directly enforceable by the accused or anyone else by prerogative writ, judicial order or action for damages — a matter of some significance to barristers who prosecute for the Crown.

Although Your Honour has been a leader in cases relating to scientific processes, Your Honour has never claimed a high degree of practical technological skill. During the *Varnsdorf* arbitration, for example, which concerned some gas-fired turbine electricity generators, Your Honour was on a view of one of the engines in company with engineers from the United States. Your Honour managed, inadvertently, to lean against

the emergency stop button, shutting down the entire plant. The major issue in that case was Your Honour's client's claim of interruptions in the availability of the plant. The weekly availability report for that particular engine recorded "plant stopped by QC".

In 1993, Your Honour was the first woman elected Chairman of the Victorian Bar. Your Honour was a courageous and effective leader in very difficult times. Under Your Honour's leadership, the Bar Council introduced significant reforms, including the introduction of limited direct access and co-advocacy. Those reforms were not without considerable controversy. Perhaps most notably, Your Honour led the way in constructively addressing the serious issues of access to justice by establishing a scheme for pro bono legal assistance in civil cases. The Law Institute supported and joined the Bar in the project and the government supplied seed capital.

In 1994, Your Honour became the first woman President of the Australian Bar Association. Your Honour has been described as a vigorous President who fostered national discussion on public interest pro bono work. At the Bar, in addition to service on the Bar Council and committees, most recently on Justice Nettle's continuing legal education committee, Your Honour has served as a senior mentor and taught equity regularly in the Readers' course.

Outside the Bar, Your Honour is a member of the Council of the University of Melbourne, Chairman of the Independent Compensation Panel of the Archdiocese of Melbourne, and a member of the advisory board for the Graduate Program in Intellectual Property at the Melbourne Law School. For a number of years, Your Honour was a member of the Royal Women's Hospital Ethics Committee, and the Board of the Australian Book Review.

Your Honour's husband Michael is a senior counsel at the Victorian Bar. Your son Daniel is also at the Bar. One daughter, Brigid, is an historian and writer. Your other daughter, Kathleen, is studying arts and law at the University of Melbourne. Your Honour's children are in Court today, as is the senior of two grandchildren. Your Honour's mother and your five brothers and sisters are also here to celebrate Your Honour's appointment. Your Honour's father, sadly, died some years ago, but not before he had seen Your Honour well established.

David Bennett once described Your Honour as not at all a frivolous young person. Although those who have attended Your Honour's St Patrick's Day parties and been greeted at the door by Your Honour beating a bodhran, which is an Irish drum, might initially think otherwise. A moment's reflection on the breadth and depth of Your Honour's achievements shows that Bennett was quite correct.

The Victorian Bar and all of the independent Bars of Australia wish Your Honour a long, distinguished and satisfying service as a judge of this Court. May it please the Court.

Supreme Court

Justice Stephen Kaye

THE appointment of Stephen Kaye QC as a judge of the Supreme Court on 16 December 2003 was a great loss to the Bar and a huge gain to the Bench of the Court.

His Honour was one of the few generalists practising at the Bar, and won the respect of the Bench, the Bar and the solicitors of Victoria. He is the second Kaye J to grace the Bench of the Supreme Court and, it is hoped, not the last.

Stephen Kaye was born in Victoria on 13 December 1951, the son of William Kaye, of counsel (as he then was) and Henrietta Kaye, neé Ellinson).

He attended Scotch College, Melbourne, matriculating in 1968 and was awarded the prize for Dux of the School, achieving four first class honours, a special distinction in Latin and a distinction for General Excellance.

But it was not all plain sailing. As a junior school boy at Scotch College,

bravado got the better of young Stephen. In the days when a fountain pen was a necessary part of early education, and perhaps to show his bravery in the face of disbelief, he up-ended a bottle of Swan blue ink — in his mouth. Some old friends knew him as "Kaye, the blue-tongued lizard".

He proceeded to Monash University where he undertook a combined course in arts and law. He graduated Bachelor of Arts in 1972 and Bachelor of Laws (with First Class Honours) in 1974, sharing the Supreme Court Prize. During his law course he won the prizes for the top student in the law of contract, administrative law, property law and constitutional law.

As a student at Monash University, he was known for his modesty, indeed humility, and excellence. When asked how he went in an exam, he would always say "I'm hopeful I'll pass, with a bit of luck", but inevitably he came through with a fine result, in many instances topping the subject.

He was articled to Mr G.E. (Eric) Permezel of Blake & Riggall and was admitted to practice in April 1975. He continued to work as a solicitor at Blakes for another year after admission, signing the Bar Roll on 26 February 1976.

He read with John Winneke QC (now Winneke P of the Court of Appeal). He had various chambers beginning with the salubrious Hooker chambers, with other struggling but now eminent barristers, such as Burnside QC, and finally moving into a room on the 5th floor of ODCW when that building opened in 1986. He had seven readers, Philip Marzella,

Richard McGarvie, Gary Cazalet, Maree Kennedy, Warren Mosley, Boyd Cohen and Kerri Judd. They all testify to his Honour's industry, generosity and sound advice.

At the Bar, his work took him to all fields, although predominantly in the civil area. In his typically modest way, he described his practice as a general practice in civil law, personal injury (including medical negligence), commercial law, defamation and criminal law.

In truth Stephen Kaye specialized in many areas. His skill in the area of defamation was profound. His ability to deal with difficult questions in many areas was remarkable, from wills to property law, personal injury to professional negligence, insolvency to insurance, administrative law to general contract, crime to family law. Given time to prepare, there is nothing he could not, indeed did not, turn his hand to. His preparation was a legend. Every case was given his absolute commitment.

As a junior he appeared in some notable trials, including the case of the Silver Gun Rapist (let your imagination fill in the detail) as junior to Phillip Dunne QC, the Toxic Shock case[1] as junior to John Winneke QC, the *Waverly Transit* case[2] as junior to John Winneke QC (again and many more times as well) and the *Ken Morgan Toyota* case as junior to Bill Gillard QC[3]. He also appeared in the infamous and long running *Occidental and Regal Insurance* case before O'Bryan J.

He took silk in 1991 saying, at the time "I need a challenge and a new gown", typical of his modesty and self-deprecating wit.

After taking silk, he appeared in many long and particularly difficult trials. He acted for the auditors in the Estate Mortgage litigation before Smith J, in a hugely successful defence in the *Transport Industry Insurance Co* v *Masel*, before Eames J[4] and for the CFA in the Inquest into the Linton fires. He appeared in many reported cases in widely different fields of law, including *Koorootang Nominees Pty Ltd* v *ANZ Banking Group Ltd*[5] (trusts); *Registrar of Titles* v *Fairless*[6] (Torrens system); *Linsley* v *Petrie*[7] (estoppel-insurance); *Lew* v *Herald & Weekly Times Ltd*[8] (defamation), and so the list goes on.

He is a keen supporter of the Hawthorn Football Club and played footy himself for many years for the Old Trinity Football Club. How he came to play for that club remains a dark secret. He was an aggressive and competitive sportsman, but always with a sense of fun and fairness. He went in hard, indeed so hard that he injured himself in many ways.

He is a great family man and a loyal friend. He met his wife Karen following a severe break of his leg brought about by his ferocious approach to amateur football, playing for the Old Trinity Football Club. The break was very severe and he was laid up in the Royal Melbourne Hospital. Karen was working at the Royal Melbourne Hospital and by pure chance was with a cousin of Stephen's at the time of a visit. That was the spark that lit a wonderful marriage. It also ended his football career. Not before time. There is hardly a body part that he didn't injure: back, arms, legs, head, nose, and all bits between.

Stephen and Karen have four children, Roslyn (third year Law Arts at Melbourne), Michelle (first year physiotherapy at Melbourne), Natalie (year 10 at MLC) and Michael (year 8 at Scotch).

He was elected to the Bar Council in 1996 and served until 2000. He was Chairman of the Aboriginal Law Students Mentoring Committee from 1999 until his appointment, a cause that he championed whilst a member of the Bar Council. That Bar Committee works with Justice Eames' Indigenous Law Students Mentoring Committee, and with the Indigenous Lawyers and Law Students Association (in the establishment of which the Bar Council provided considerable assistance). Some 29 students have entered the Bar Mentoring Program over the years since its establishment. He was Bar's representative on the Civil Litigation Committee of the Supreme Court from 1995 until 2003; and served as a Director of the Melbourne Bar Pty Ltd.

Stephen has always given generously of his time, skill and knowledge in the service of fellow practitioners, particularly members of our Bar. Indeed he was and is devoted to this institution and has given it his unswerving loyalty. He has always believed in serving and promoting our collegiate spirit. The "open door policy" had real meaning for him. Many junior and not so junior barristers would appear unannounced at his door for counsel and assistance. Mostly he would give them time there and then. If he couldn't immediately assist, he would always remember to give the inquirer a call when he was free to do so.

He represented many fellow barristers before the Ethics Committee and the Tribunal. After one such effort a "stack" of cases of wine appeared in the middle of his chambers as a tribute to his advocacy.

Stephen was a member of List B, and was a tower of strength through the final illness of Barry Stone, both to Barry and his wife. He was a member of the List Committee for a number of years and a great supporter of Michael Green as the new clerk, providing loyal and dedicated assistance in his new role.

He is a dedicated walker. Most mornings he can be seen vigorously exercising around his home patch in Kew. At lunchtime he is always available as a companion in a turn around the Flagstaff Gardens. He even jolts those football knees in regular jogging.

No person is without faults. But it is hard to fault Kaye J. There is the annoying habit of leaving the pantry door open, or the light on; of opening the windows in the middle of winter (fresh air never hurt anyone!) of wearing those Australian icons — the rubber thongs — on any occasion, summer or winter; and discarding his shoes at the first opportunity and padding around chambers or home in his socks.

The Bar welcomes his appointment.

NOTES

1. *Thompson* v *Johnson & Johnson Pty Ltd*, Murphy J., 29 June 1989 (unreported).
2. *Waverly Transit Pty Ltd* v *Metropolitan Transit Authority* (1988) 16 ALD 253 (O'Bryan J, 2 June 1988); On appeal: [1991] 1 VR 181.
3. *Ken Morgan Motors Pty Ltd* v *Toyota Motor Corp Australia Ltd,* Ashley J 6 November 1992 (Unreported); On appeal: [1994] 2 VR 106.
4. [1998] VSC 114.
5. [1998] 3 VR 16.
6. [1997] 1 VR 404.
7. [1998] 1VR 427.
8. [1999] 1 VR 313.

Allayne Kiddle

MARCELLE Allayne Kiddle ("Allayne") was a remarkable woman who packed into her 84 years a breadth of experience that few of us manage to achieve. She signed the Roll of Counsel in 1959. She transferred to the non-practising list in 1966. She died on 29 December last year.

In 2002 she published privately a book of reminiscences, which she entitled *A Most Peculiar Child*. If a biography of Allayne Kiddle were to be published it would properly be entitled "A Most Remarkable Life".

A Most Peculiar Child captures in vignettes pictures of a time which is now long gone. Speaking of her early childhood spent in Sydney she says:

> When I was very young, hansom cabs competed with taxis, trams and buses for passengers. Even then they were an obsolete method of transport, nevertheless, I was fascinated by the top hatted coachmen, sitting in a high seat on the top of the cab, controlling their snorting horses with a long whip. As a special treat I was occasionally allowed to ride in one of these amazing conveyances.

In about 1930 she became a boarder a Fensham Girls' School in the southern highlands of New South Wales. She describes her life at Fensham in about 1930 as follows:

> The Head Mistress believed not only in nurturing our spiritual needs and artistic talents, but also in upholding the *mens sana in corporsano* dictum. In furtherance of this we slept on open verandahs with only canvass blinds to shelter us from the blast of winter winds and rain. We rose at 6.00 a.m. and after stripping our beds and throwing the bed clothes onto the verandah railing, we hurried to the bathroom where we showered in icy cold water. Three nights a week we indulged in a hot bath.

Subsequently, when her parents moved to Melbourne, she enrolled at St Catherines and, on matriculation in 1939, she enrolled as a medical student at Melbourne University.

She had studied dancing and had become a most accomplished tap dancer. Apparently, she danced at the Tivoli while she was studying as a medical student.

In late 1940 she abandoned her medical course and her dancing at the Tivoli to marry Geoffrey Kiddle. His family owned a sheep station near Tumburumba and another near Deniliquin. In 1940 those places were much more remote than they are today and she spent much time at the station near Tumburumba and endeavouring to keep up with her husband and his father on horseback.

During the war her husband served in the army and she acted as a ARP warden in Melbourne suburbia.

In London in the early 1950s she was pursuing a dancing career, and had a contract as a solo dancer with BBC Television. On medical advice she gave up dancing. It was then that she decided to enrol for a law degree at the London School of Economics. She graduated with Honours from LSE and joined the Middle Temple in 1956. She returned to Melbourne and signed the Roll of Counsel in 1959.

It was at this stage that I first met her. The name "Marcelle" was never used and "Allayne" seldom. In the English tradition — and in the old tradition of the Victorian Bar — she expected to be called "Kiddle".

I came to know her well when in about mid-1960 an overflow of young barristers from Selbourne Chambers found themselves housed in Condon's Building. In a warren of tiny rooms in a narrow-fronted building, half of which was taken up with a printer's business, were Garth Buckner, Peter Furness, Garrick Gray, Hartog Berkeley, Allayne Kiddle and I.

Her style appeared at first sight to be arrogant. She was very positive and unafraid to say: "That's not the way it was done in the Temple", or at the Law Courts. Most of us originally thought she was English. In many ways she had become such. It was clear that she enjoyed her time at the Temple and at first found it hard to adjust to the more pragmatic environment of the Victorian Bar. When one came to know her one realised that the apparent arrogance was not arrogance but merely a directness that stemmed from a complete lack of self-consciousness. She was never afraid to ask a question, never afraid to reveal her own ignorance, never afraid to take a contrary view if she believed in it, all of this without any real consciousness of self. She seemed to have no concern as to whether she was making a good impression or a bad impression. She was just not concerned with impressing in any way at all.

As has been noted previously in *Bar News* she was the third woman (it seems) to sign the Roll of Counsel and to practise at the Victorian Bar.

As a woman at the Bar she did not expect to be treated in any special way. But she did expect to be treated as an equal. In her book of reminiscences she says:

> There has been much talk in recent years of prejudice against the women. I can only say that I did not find either the Benchers or the members of the Bar prejudiced. In fact I found them the very reverse. If the solicitors were prejudiced, I do not know. I did not find them so. But then I do not look for prejudice and I do not find it. If they had been, I would not have blamed them, because, by and large, they had no women when I went to the Bar, except Joan Rosanove, and she had a very specialised practice. It is quite clear that she herself did not suffer from prejudice insofar as matrimonial matters were concerned. Having had nothing but men to brief, in all other matters, for years and years, I would say they were just slow to change over to the fact that they now had a choice.

When the Bar Dinner for 1960 came around she said to Hartog Berkeley and me that she wanted to attend the Bar Dinner and asked could she go with us. We agreed. Prior to that time no woman

had attended a Bar Dinner. Subsequently, Allayne spoke to Joan Rosanove and they came to the Bar Dinner together. Berkeley and I were unnecessary. Joan Rosanove did not attend any subsequent Bar Dinners. Allayne Kiddle continued to attend.

She was not only a pioneer woman in the law and a superb dancer. She was also an excellent photographer. Photography was something to which her father introduced her when she was a young child. In the 1970s she was made a Fellow of the Royal Photographic Society of London.

She retired from the practising list in 1966. But that was not the end of her intellectual activity. In 1994 at the age of 75 she completed a Bachelor of Arts Degree, and in 1997 she obtained a graduate Diploma in Writing from Swinburne University. Whether her writing owes anything to that Diploma is hard to tell. It is, however, undoubted that she writes with perception and touch. Speaking of the "ice man" of her childhood she says:

> Nothing, however, in our small lives compared with the chase on a hot day down the street to catch him with his cart, as he travelled from house to house delivering blocks of ice.
>
> His van contained very large blocks of ice that required chipping into smaller blocks before they could be carried indoors. To do so he placed a sugar bag on his shoulder and a block of ice on the bag. If a spell of very hot weather was anticipated he would be asked to place an extra block or two in the copper.
>
> What pleasure it gave us to see him breaking the ice with his ice pick. Then, when the slivers of ice came sailing in our direction, to try to catch them. How we licked and sucked those pieces … An icy pole (developed much later) licked sedately within the confines of one's own garden was very different from those chips of ice which we garnered from the ice man.

She was also a wise woman, not necessarily in her personal relations but in her understanding of the world about her.

> Although we speak of recollecting the past, all we really remember is our perception of former happenings at the time of their recall. Once we censor those moments by deleting them from our memory, or transforming them in such a way that they no longer bear any relationship to past events we embark, whether we realise it or not, on the writing of fiction. Memory, unlike fiction, has no story or plot. It consists of no more than a series of incidents recalled haphazardly.

It was a remarkable life, a pioneering life; the world is poorer for her passing. As Warren CJ wrote after reading *A Most Remarkable Child*:

> It was fascinating to read about such a full and richly life. Even more so, as a woman in the law Mrs Kiddle achieved an enormous amount. Along with Joan Rosanove QC and Molly Kingston she blazed the path that paved a way, much easier for women like me.
>
> G.N.

Leslie George Crisp

GEORGE Crisp was born at Charters Towers in North Queensland on 25 October 1919. He was the eldest of five children, and his father was a railway fettler; his extended family were graziers and miners around Charters Towers and Ravenswood.

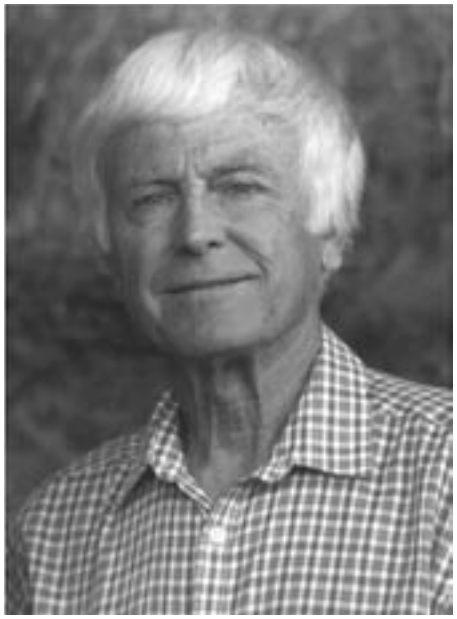
George's family were "battlers", but at least his father had work. His brothers and sister recalled nothing but a happy and productive childhood. His father's work took him to Cloncurry, so George spent his early school years with paternal grandparents at Charters Towers. He remembered them fondly, and later joined his family at Cardwell and Hinchinbrook Island on their return from "out West", where he continued his schooling at Cardwell State School from 1929. Part of the attraction of Hinchinbrook at the time was its orchards.

Cardwell/Hinchinbrook seems to have provided a positive, nurturing environment. George recalled it as a stimulating, liberating place and tme, where people travelled by goat and rail cart, where prowess in sports and athletics was valued over possessions, and where school was actually a positive influence, so much so that after leaving Cardwell he remained friends with his old headmaster. An old studio photograph of George shows him as a young boy in his Sunday best, without shoes. No money for shoes, but no need, and yet the money for a photograph was found. That milieu produced five charming and dignified people who went on to lead balanced and contented lives. They never needed, nor could justify, laments about the bad old days, or a rough trot.

George and family moved to Townsville for his final schooling, where he continued to form positive relationships and furthered his sporting interests in tennis, cricket, rugby and rowing. Via school and the fellowship of the West End Methodist Church, as well as the aptly named and nearby Magnetic Island, George met and wooed the love of his life, Alice (Lally) Kennedy. They later honeymooned on Magnetic Island.

George had to leave Townsville High School after Intermediate, to help his family. He left behind an impression best summed up in the comments (kept by his mother) by his French teacher on an essay: "Mon Cher Georges. Je vous felicite". He rejected the offer of an apprenticeship in fitting and turning with the railways (won over hundreds of applicants), toyed with the idea of teaching, but opted for the Townsville office of the Public Trustee.

War intervened and George enlisted in



the RAAF, trained as a narrigator/bomb aimer and found his way to 459 Squadron near Tobruk, at Marsa Matruh, by way of a battered tramp steamer from Panama to West Africa, then by air via Timbuktu. His first experience of travel stimulated an appetite for it from then on.

His war service was distinguished, involving anti-submarine sweeps, convoy escorts and night-time nuisance bombing of airfields at Athens and on Crete and Cos, the latter all carried out in "coastal white" "camouflage". on 16 June 1943 George and company were called upon to rendezvous with naval vessels to sweep for the *U-97*, a very successful U-boat which had that morning sunk a cargo vessel. The *U-97* was the first U-boat through the straits of Gibraltar, was the vessel under discussion when the Enigma Code was broken, and was the inspiration for the book and film *Das Boot*.

The rendezvous was missed, a lone search was undertaken and the sub was found. Kapitanleutnant Trox, to the dismay of his crew, had surfaced to inform *La Spezia* of a few recent successes. George and his pilot realised that although they had depth charges, what was required was a risky low level attack for a direct "dry" hit. That would involve Newton's first law of motion, and it did, but although the aircraft was later written off, they remained to facilitate rescue efforts and drop the dinghy.

George returned to Townsville in 1945 to marriage and the Public Curator's office. He and Lally had a house built and produced three boys. Between 1948 and 1951 George completed the Queensland Solicitors' Board examinations, largely by reading Blackstone under a tree at home. He then re-enlisted in the RAAF in 1952, and via a series of postings found himself in Melbourne in 1955, having another house built in Beaumaris, the last house.

His career with the RAAF as a Legal Officer and Judge Advocate was long, unblemished and interesting. He travelled a lot, more so because he preferred Beaumaris to Canberra, the choice of domicile being a limitation on his final rank, which was a small matter to George. He retired from the RAAF in the early 1970s having by then completed a Diploma of Criminology and a course in Italian. Then it was off with Lally to the Alfa factory in Milan to pick up a new Alfa Spyder for a long tour of Europe and parts of North Africa. On his return, when he signed the Bar Roll, George and the Alfa were a common and distinctive sight on Beach Road. He read with Alistair Nicholson.

George spent a good deal of his time at the Bar as a member of the Small Claims and Residential Tenancies Tribunals where his courtesy, patience, experience and dignity were assets. No doubt they were also tried, but George couldn't have enjoyed it more. It is a pity that those in a position to decide such things perceived such qualities to be abundant, and George "returned" to the Bar, without rancour or regrets, because he enjoyed that too, but it was not the same.

Nonetheless, George and Lally were freed to pursue golf, tennis, skiing, travel (a Winnebago across North America, the Flinders Ranges, camping at Bright, trips back to Queensland) and the inevitable (once unthinkable) bowls, although George did continue to ski well into his later seventies, something he started at Mt Etna in 1943. George was also able to continue a favourite lunch engagement, the Ceylon Tea Rooms with his sons.

After moving to Beaumaris, George felt that the typical Beaumaris lifestyle was as good as it gets, and he and Lally remained absolutely and obviously in love, much to the amusement of others. In a way, George found and fashioned a lifestyle which mimicked his early years. He accorded his family enormous respect and independence, exposed them to sport (particularly sailing) the outdoors and encouragement in studies. As in the case of most people in Beaumaris, there was much exposure to water, and probably far too much to sun. Unlike Cardwell, shoes were affordable, but still very optional.

George has been described as a true gentleman, and in every sense he was. It was a privilege to travel life's path with such a wonderful man. His companionship is greatly missed.

Independence and the Bar

A paper delivered to members of the Victorian Bar at a seminar on professional ethics.

Part of the Compulsory Continuing Legal Educaton Program of the Victorian Bar held at Owen Dixon Chambers, Tuesday 16 February 2004

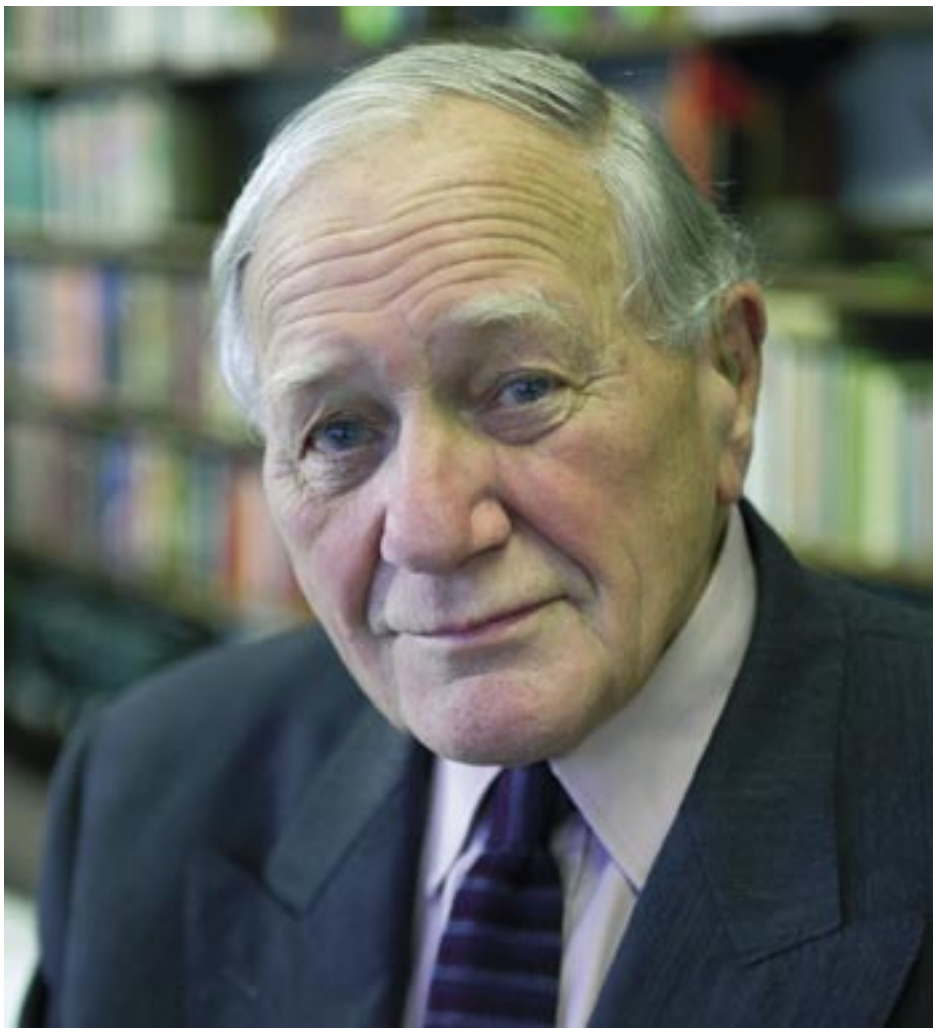
By S.E.K. Hulme AM QC

MY text consists of some remarks made by Australia's greatest judge, Sir Owen Dixon, on the occasion of his swearing in as Chief Justice of the High Court of Australia, sitting in Sydney on 21 April 1952.[1] Let me say, once and for all, that Dixon did not treat such occasions as excuses for loose thinking and patronising courtesies. When he spoke on such occasions, he spoke publicly, his words were considered, and he meant every word he said.

The series of remarks begins:

> I think it is hardly useful to refer to the past except to explain the present. But my work at the Bar covered a period when I was younger and when perhaps according to the ordinary nature of man he derives greater pleasure and excitement from his activities.

I read that passage to remind you all, the more senior as well as the more junior, that the practice of the law will probably never bring you more enjoyment than it is doing right now. This is it, what you have now, day by day. The toil, the long hours, the struggle to build a practice, the struggle to pay the taxes when you do so, the loss sometimes of valuable parts of family life: but justifying them all, the challenge, the contest, the camaraderie, the periodic taste of success, the feeling, occasional but to be treasured, that this case finished the way it did because it was you who was there that day, not anyone else. These satisfactions belong to the barrister, not the judge. Dixon was a barrister for nineteen years, and a judge for thirty-four. He always spoke of his years at the Bar more fondly than his years on the Bench. Take heed. Appreciate the fun and enjoyment now, while you pursue one of the most satisfying ways of making a living that this world offers. It is to what is happening now that in later years you will look back with nostalgic memory. Ask any judge.



S.E.K. Hulme AM QC.

> The activities at the Bar are greater than those on the Bench, and the responsibilities are no less.

By and large, you will work harder, at a wider range of professional tasks,

before and during and after the case, than the judge is asked to do, and will bear throughout the same responsibility to get things right as does the judge. I would apply to counsel some remarks Dixon made as to solicitors:

> I would like to say that from long experience on the Bench and a not much shorter experience at the Bar there is no more important contribution to the doing of justice than the elucidation of the facts and the ascertainment of what the case is really about, which is done before it comes to counsel's hands.

I would say that in most cases the most productive stage of these processes is not in fact before the case comes to counsel's hands, but while the case is in counsel's hands. How often have you not found that you cannot handle the case satisfactorily without first dismantling the brief and re-assembling the papers in a different order, most often simply but strictly chronological, and in the process becoming perhaps the first living person to develop a coherent picture of the particular little group of facts. Even more is the delineation of the issues arising from those facts the task of counsel. This work is hard, and it can be tedious. But until you have achieved it, you are likely to beat the air, impressively perhaps, but without doing your client much lasting good.

> The Bar has traditionally been, over the centuries, one of the four original learned professions.

You will notice that Dixon says four, not three as is often but wrongly said by the ignorant, who in fact present different groups of three out of the four. The four original learned professions were the church, the army, medicine, and the law. There is another ancient profession, older perhaps than any of them. But persons who write books do not regard that profession as learned.

Dixon turns to the curious, the anomalous, the almost contradictory position that the Bar occupies in the administration of justice. The starting-point is straightforward.

> The Bar occupied that position in tradition because it formed part of the use and service of the Crown in the administration of justice.

The government of any livable country must provide a mechanism for dealing without violence with disputes between citizens, and with disputes between government and citizen. In the system Australia has inherited and adopted, the court system provided by government includes the Bar. To that extent the Bar is part of the total system of justice which government provides and for which government has a responsibility.

Then comes the curiosity, the anomaly, the near-contradiction. In the central passage of this part of his address, Dixon continues:

> But because it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the Bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence, and owing allegiance to none.

By and large, you will work harder, at a wider range of professional tasks, before and during and after the case, than the judge is asked to do, and will bear throughout the same responsibility to get things right as does the judge.

It is because of this role that the barrister cannot let himself be controlled in the conduct of his work by the government or by anyone else, save as regards compliance with known rules and codes of ethics applicable to him.

You will see the paradox. It is the duty of the government to provide the system. The system includes the Bar. But for the system to work, the government cannot control, save in that limited disciplinary sense, what the barrister does. The system the government is bound to provide includes an entity the ordinary activities of the members of which it cannot, consistently with that system, control. Putting the client aside for a moment, the barrister has duties to the court, to the public, and to the Bar of which he is part. But while he behaves himself within the rules, no one — not the government, nay, not even the Bar Council itself — can control how he goes about the performance of his work. He needs no authority to ask a question. He needs no authority to refrain from asking it. It is left to him. It must be left to him. And he cannot avoid responsibility for the decision he makes.

It may not have occurred to you that this far-reaching independence is something not demanded of any of the other three learned professions.

The doctor will of course remain at all times subject to his Hippocratic oath, but he may properly work for a hospital, or a corporation.

The clergyman retains something of his own conscience, less or more according to the church for which he clerges. But he works for an organisation, and obeys it.

The soldier belongs to an organization, and obeys it.

Nor of course does anything like this independence exist outside the four learned professions, in the corporate world, or indeed anywhere in the world of business.

> They go whither they are sent. They toil at what they are directed.

By contrast, of the barrister this independence is required. Alongside his duties to the court and the public and the Bar, he has of course his great duty to his client. But even to him, the barrister does not surrender his independence. What he sells to his client are his services. He does not sell himself. And he sells his services, not the control of them.

To make all this possible, the barrister must have no allegiances. Subject to the usual exceptions, the barrister is available to all. The pressures on him in these respects will be many, the temptations at times strong. If the Bar is to remain healthy, with barristers "really" available to all, these he must resist. So: The mere fact that you have acted for someone does not give rise to a right or obligation to refuse to act against him.

Retainer rules must be understood, and enforced. A general retainer does "not" bind counsel not to appear against the giver of the retainer. It compels him, if offered a brief against the giver, to notify the giver and inquire whether the giver wishes to brief him in the matter. If the giver does, then counsel must act for him. If the giver does not, counsel is free to accept the brief against him.

Delivery of a special retainer entitles

counsel to be briefed in the matter concerned, if it proceeds toward court. Not many years ago I received a special retainer from an interstate company with which I had had no previous connection. I heard no more until I read in the paper that the matter was already in court. After making a few inquiries, I wrote to the Melbourne firm which had handled the retainer on an agency basis for an interstate firm, and told them I was suspicious that special retainers had been delivered to the few counsel in Australia experienced in the particular field, not with the intention of briefing them at all, but to make them unavailable to the other side. Inquiries by an initially rather hurt Melbourne firm showed that this was pretty clearly the case The excuse offered from interstate was an intention to brief in the event that the matter spread interstate. Even if the unlikely story were true, that was not a proper use of a special retainer.

Attempts of regular customers to inhibit your activities improperly must be resisted. The fact that at cost to itself a bank has helped to educate you in understanding (non-secret) matters, such as how customer accounts work, does not entitle it to require that you not act against it when later requested to do so.

In great cases, great corporations will tend to push you to carry out your work as a loyal member of "its" corporate team, not as the spearhead of the independent legal team acting for the corporation. The increasing use of word-processors and electronic analysis of transcript are making pressures of this kind increasingly strong. Act for them with pleasure, and hopefully reward, but treat them with care and circumspection.

In general, all attempts of outsiders — even of clients — to instruct you how to act, must be resisted.

This independence has its price.

You may find that you envy people elsewhere their big pay packets, the big comfortable office which awaits them, their apparent security, their right to work, the relatively painless way the tax they must pay is administered out of their pay packets week by week.

Whereas you?

You have no right to work. No one choosing to make his living providing services has the right to require that society be so organised that people want his services. All you have is the right to offer your services, and the right to hope that sooner or later someone will ask you to supply them. If you are a taxi, as you are often assured you are, remember that a taxi-driver has no right to require that people shall not choose to walk home, or catch a bus, or even another taxi: no right, even, to require that no one build a light railway out to Tullamarine Airport, though real taxi-drivers often forget that.

Then you will have the right to wait to be paid for the services you rendered.

And if you do begin to get ahead, you will face those iniquities of provisional tax which await the self-employed person when at last he begins to have a rising income.

And if you get further ahead, you will gradually become overworked, at the cost of your family life. To quote Dixon again, socially this time rather than on a formal occasion:

> A successful barrister's wife has a very good life. She has all the advantages of being a widow, without having had to pay death duties.

People with domestic arrangements of kinds not envisaged by the great judge may adapt the thought to their own circumstances.

But the compensations are great. You will have the honour and solace of knowing that your independence is a necessary part of the whole system of justice underlying peaceful life in this country. And as you go through your professional life you will realise, never more vividly than when you bump against its absence, the enormous privilege you have in your independence. Your freedom to come and go as you list. Your freedom to pursue this kind of work rather than that kind. Your freedom to decide for yourself whether you wish to go to a conference, or take some other kind of holiday. Your freedom to barrack for an unfashionable football tearn. Your freedom to have a bet, or not to have a bet. Above all your mental freedom, your freedom to express the opinion you think right, your freedom to put the argument you think proper, your freedom, short of misconduct, from being responsible to any man. Even your freedom to lie awake half the night, cross-examining the witness due in the witness-box tomorrow.

And assured that the greatest of Australian judges has given you his considered verdict:

> Counsel, who brings his learning, ability, character and firmness of mind 0to the conduct of his causes and maintains the very high standard of honour and independence of English advocacy, in my opinion makes a greater contribution to justice than the judge himself.

Have the words printed, and put them where you can see them when you feel low. Show them to your family, who may not realise how important you are. When you have a reader, show them to him, and lead him the way he should go.

Note too the corollary: note another of Dixon's dicta, that the first and prime ethical duty of a barrister, the basal duty underlying all others, is to make every effort of which he is capable, to handle every case, large or small, important or unimportant, newsworthy or dull, as well as he is capable of handling it. If you do not do that, you betray not only your client, but the court, the Bar, your independence, and yourself.

For remember: your client will usually be able to appeal against the follies of an incompetent judge. He will usually not be able to appeal against the follies of his incompetent counsel.

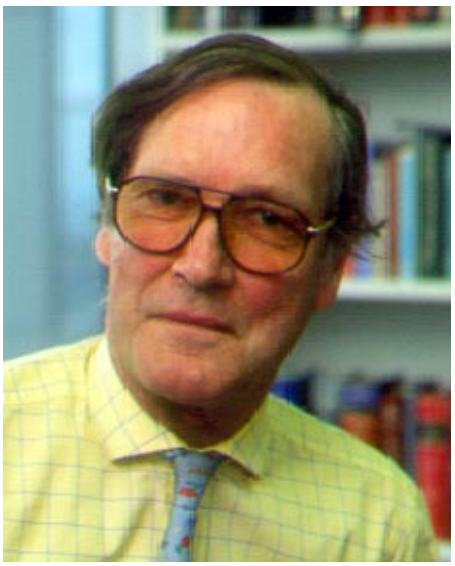
Notes

1. Recorded in (1952) 85 CLR at pp. xi ff.
2. I explained to my audience that I cannot bring myself to say *he/she* etc. all the time, and still less an ungrammatical *they*; and that I prefer to speak and write the English language as it has been spoken and written for centuries. No one seemed to mind. What I say applies equally to counsel of all sexes though only one sex at a time.

Bush Lawyers

Geoffrey Gibson

Bush lawyers are like flies. They are a pest. We generally use the term to refer to people who are not qualified in the law, or much else. They have some knowledge but nowhere near enough to warrant a ticket to be able to charge for it; they are dead keen, which makes the first problem worse; and they do not know when to shut up. We also have known them from time to time within the profession, both sides of it — it would be a bad mistake to suggest that exclusive practice at the Bar gives some form of immunity from the disease.



Geoffrey Gibson

AIMS

BUSH lawyers coalesce in different pockets. At one time you could find them in certain Courts of Petty Sessions, generally in the outer suburbs or the bush. At another time you could find them before specialist tribunals which encouraged closed shops and discouraged legal analysis except for the esoteric lore applied by the tribunal (which the uninitiated could never understand) or the even more esoteric law that you invoked to get them before a real judge when you wanted to throw your weight around and remind them of who the real lawyers were (your becoming an honorary member for that purpose). Garth Buckner QC was a paradigm in the area of town planning at the Victorian Bar. The late R.C. (Bob) Taylor held something like a fiefdom at Frankston. A definitive if sad case was the industrial area. You can also see a little of it from time to time in some aspects of crime or personal injuries where some lawyers may appear on one side only in a narrowly specialised area.

If as a professional lawyer you have not been exposed to a bush lawyer before, you might feel like the Christian travellers during the Dark Ages on first being exposed to the glory of Islamic art of the Marinids at Fez or of the Fatimites at Cairo when hesitantly their mystic appetites sought, it is reported, "under the appearance of fancy and caprice the reality of a secret logic and a mathematical coherence".[1] But your search will be unrequited.

I want to look at some of the incidents of what turns a trained lawyer into a bush lawyer, and see the consequences of that evolution, and then see if the result is that such a lawyer breaks all of the rules of advocacy. On the principle that it is easier to teach people how to avoid bad advocacy than how to practise good advocacy — you cannot put in what God has left out, said the professional coach in *Chariots of Fire* — the exercise may be instructive.

INCIDENTS

There is frequently a constitutional background, either in the charter of the relevant tribunal or, in the case of the industrial area, the Australian Constitution, which focuses some minds on issues of form and power from the very start. Because of the nature of our Constitution, artificiality crept into the creation of industrial disputes for the purpose of invoking the Commonwealth power, and it appears that the issue of whether anything is within power arises in just about everything they do. It is the sort of argument you get on some boards of companies or the committee of a charity or academic institutions where people who have nothing else to do wonder about the extent to which the constituent documents of the body empower certain kinds of action. There must be something in our nature that promotes gratification in being able to say that a proposed course of action is beyond power and therefore unlawful. It is the kind of argument that does encourage people to be judges and the fact that it is in their own cause does not discourage most of them.

It is part of this problem that people who see themselves as operating in a specialist area under narrowly confined constraints do not also see themselves as acting subject to the general law, or at least they forget what it is like to practise under the general law, and their vision becomes blinkered as a result. What you get is the kind of formalism that fascinates small minds and puts off everyone else; it is the sort of thing that brings the law into contempt; it is the product not of learning, but of the absence of learning. What you also get is a communal celebration of lore, and the safety — indeed, the superiority — of knowing that you know more than the uninitiated. But lore is not law, and what you are getting is at best shallow. It reminds you of that unkind remark someone — Carlyle? — passed about the French: so full of vehemence, so free of depth.

Frequently advocates are appearing before people who have no legal training or insufficient legal training. This was the case in the old days with magistrates, although it is not now. Then, too, you could also find yourself in front of the justices. But the same problem can be there with the AIRC Commissioners. It is also there in front of many tribunals. Many of the members of those tribunals may have some legal training; they may

have a ticket; they may even have practised for seven years; but many of them have not had enough experience in running proceedings in the nature of a trial to be able to preside over one sensibly enough to make it work. We do not ask GPs to conduct brain surgery; we should not ask solicitors who are GPs and who have not been specially trained and have experience for the task to act in the position of judges.

But this does not trouble most of the people appointed to these positions. A safe club-like atmosphere develops with the lawyers who appear there — you scratch my back and I will scratch yours. Fractious outsiders are dismissed as smart alecs. (It is like a juristic apartheid.) The lawyers behave like lawyers, at least on the surface, even though the parliament will have gone out of its way to say that the tribunal should conduct itself informally. The tribunal does not mind — it can be pleasing to behave like someone who is a judge and so behave when responding to what appears to be an eloquent address that sounds as if it must be the product of some learning. Advocates who confine themselves to these sorts of tribunals become perceptibly loose in their demeanour when they have to do something in a real court. The cross condescension is not likely to cut much mustard there. It is like rain being the great leveller for football teams and F1 motor cars.

In some areas, the lawyers are ideologically split and therefore typed. They therefore appear to be more identified with their side and to that extent less independent. I gather this can be a problem at the moment in certain personal injury areas where the tightly controlled purse strings of the defendants discourage counsel from flirting with the other side. There has been a deep ideological split in Australia in the industrial area for generations: it is very hard there to practise on both sides. Some little time ago there was a disquieting suggestion that the Crown in Victoria in revenue cases would not be briefing people who had accepted a brief to appear against it, but I gather that there is now no foundation for this suggestion. That is just as well, for a variety of reasons. In tax cases the court or tribunal is entitled to look for the highest degree of independence from counsel for the Crown, and is also entitled to get guidance from counsel who have the requisite level of experience and practice on both sides in order to be able properly to understand and explain the legal and commercial issues at stake. The law is usually incomprehensible and the onus on counsel correspondingly higher. It is necessary for counsel to have independence and expertise and it is desirable that counsel be seen to have independence and expertise. It is worse than useless for the Crown to serve up someone whose main function is to spout the party line. (It is a different problem, but I might say that one of the reasons the NCA got into trouble with some white collar crime is that its representatives did not know what they were talking about — there was no one from corporate law or the big end of town to say what happens in the world outside.)

The relevant contests may not be one on one, but are more likely to be one against a team, or even one represented by lawyers who act for very many others in the same capacity against a team. One example is of a worker complaining of unfair dismissal, either before the AIRC or in court. The contest is in substance likely to be a contest between the union and the solicitors acting for the union and the employer's solicitors acting for the employer. In that case, the result is likely to be more like a war than a game, and a war which can be seen from both sides as part of a class war — and that label does, I think, adequately describe the relevance of this kind of posturing for Australia in 2003. This mind-set can lead to murderous assaults on language in the name of ideology that call to mind the memorials to border guards they used to have on the east side of the Berlin wall — "treacherously murdered by fascist gangsters".[2] Experience in forensic contests suggests that when sensibility goes out the window, sense goes out soon afterwards.

Sometimes the advocates have to put on a show for those of the team who have turned up on the day, even to the extent of counsel for the Crown in some Commonwealth tax cases having to do something for the morale of the plethora of dark-suited, glum-faced civil servants sitting behind them. This can lead to even less impartiality, and to grandstanding and chest-beating that is for everyone else a waste of time and which looks like it must be plain boring even for the perpetrator. Some of these advocates just do not understand that their job is to persuade the person in front of them, not to appeal to the people behind them.

There has been a deep ideological split in Australia in the industrial area for generations: it is very hard there to practise on both sides.

We are all familiar with the felt need to give the punters a return on their money — to give them their day in court and to allow them to think that the ratbag on the other side has finally got the shirt-front they have been asking for since birth — but cheer-leading and flag-waving should be reserved for arenas designed to cope with them. Bonaparte expected to be cheered by his men, but not Wellington — he dismissed cheering as "coming dangerously close to an expression of opinion".[3] (The duke won, or, at least, Bonaparte lost.) Not the least of the difficulties occasioned by this form of communal role playing is that if the judge blows the whistle, or, better, hands out an occasional shirt-front, to bring the game into line, the assembled cheer squad glares plaintively and caustically because, they are saying, the judge is so obviously loaded against them. Their champion has personalised the contest. Some of these champions and their entourage are not beyond intimidating the tribunal, or at least the other side or their witnesses.

In a number of these areas the action before the court or tribunal may in substance be just a show — not a sham, but a show — while the real action takes place elsewhere, in forums for negotiations where there are no barriers to the language employed or the threats uttered, or in the columns of the newspapers whose accounts may or may not have a substantial resemblance to the truth, whatever that is. There may be an air, generally unacknowledged, of artificiality or unreality in the forensic process. You sometimes walk into a court and see the cavalry disporting themselves and you wonder where the real action is taking place. This, too, takes the edge off the need for precision or concision – why work up a sweat trying to be short and sweet when none of it matters anyhow?

This used to be the case with the football players' football cases in the eighties. They would be argued by reference to issues of freedom of trade and other high notions. The real parties could not care less about any of that — they were only interested in who was trying to get what player and at what price. That, everyone knew, would be determined only by the market, in some grubby, tribal, smoke-filled room, and not by the court. The

only interest in the court proceedings was how much of a premium their costs would put on the transfer fee. A lot of litigation is commenced to take negotiation to another stage — it may be just negotiation by another name. There are, after all, very few people who have the means or the drive to commence a legal process with no other purpose than to seek a favourable judgment.

The menu therefore includes:

1. a determination to put form over substance and the pursuit of lore;
2. a communal lowering of standards;
3. partisan identification;
4. membership of a team engaged in similar battles (as part of a war) and the consequent failure of individual responsibility;
5. paid for table-thumping;
6. and actual or apparent immateriality or irrelevance.

To this should be added

7. sense-numbing and mind-narrowing specialisation.

This sort of thing may be okay in our salad days when we are green in judgment, but the trouble is that, unlike Cleopatra, these advocates cloy the appetites they feed.

METHOD

The style of the bush lawyer may be described as rhetorical, or florid — like that of a bucolic Rotarian toastmaster. It looks like this kind of advocacy requires this kind of prose — it may be long on soul, but it is short on both brevity and wit. It is certainly long. The clarity of a submission is frequently in inverse proportion to its length (and to the length of its main words). Purveyors of waffle raise doubts about their brains. They might bear in mind the 1921 departmental report on teaching English cited by Sir Ernest Gowers: "What a man cannot state, he does not perfectly know, and conversely, the inability to put his thoughts into words sets a boundary to his thoughts."[4] (The author of that remark had almost certainly not yet heard of Wittgenstein, but the two may have had something in common.) Sometimes the wordiness is such that it is hard to discern a syllogism, and this can be unsettling for those judges who still believe that the logic of a case should be exposed.

The style of the bush lawyer may be described as rhetorical, or florid — like that of a bucolic Rotarian toastmaster.

The method is characterised by repetition. Anything said less than five times is not to be taken seriously. In particular, if there is a key phrase — something profound and satisfying like "industrial harmony", or "amenity of the neighbourhood" — it must be hammered until it takes off with the force of its own tomtoms, like "Ein Volk, Ein Reich", to choose an uncomely example of a useless slogan. (How many slogans are useful?) People who are put off products that engage in repetitive advertising are not good targets for this kind of advocacy. You get the feeling that the idea is not so much to persuade you as to wear you down.

There is more sincerity, actual as well as apparent, I think. This is partly the product of the commitment to the team, and to showing the flag, but mainly the product of the ideological split and consequent lack of objectivity or, as some would say, professionalism. But this sincerity is often off-set by a level of deference that borders on the obsequious.

There is a propensity to take technical or formal points that more refined jurisdictions would dismiss out of hand and which more mature lawyers would professionally decline to put up with. This used to be the case with .05 cases and some areas of town planning and still appears to bedevil some aspects of the industrial process. For some, no point is too thin, and no ground too shallow, to run an argument. It is like confirmed punters watching two flies climb up a wall — they cannot help themselves. These advocates have no idea of the dangers of mere cleverness. Judgment is not among their blessings. Good technique may be necessary for an artist, but it is very far from being sufficient. It is the lack of judgment in these people that really hits you between the eyes and puts the wind up you.

These advocates like to have a script and to stick to it. They are put off easily and they are careful to stay on cue with their own programme. Because these advocates are attuned to their own script, and to what I might call the vibes of their own side (with apologies to *The Castle*), and because many of them are more concerned about their own performance and their own face than anything else, they forget that their first job is to persuade the people they must first get to know and understand. This is, you would think, elementary to the role of any advocate.

We should not blame the people before whom bush lawyers may be accustomed to appear. Putting entirely to one side the hugely vital part played by the jury, there must be a place for tribunals made up of people who are not lawyers — why are we shy of calling them lay people? Are we so conscious of status symbols? — but almost by definition, there is no place for such tribunal members who become bent on playing lawyers. This represents not just a contradiction in terms, but a confusion of purposes.

Lawyers are commonly engaged in seducing lay tribunal members with some of the folderol of the courts. You see it with commercial arbitrators and specialist assessors all the time. When this happens, the parties do not get the result they have agreed on in their contract or that their parliament has prescribed in its statute. It is also dangerous. If you are lying on the table waiting for the knife in that warm, drowsy state, and someone looms up out of the mist with a mask and a scalpel, and you say that you expect that they do this all the time, and the answer is no, but

they have nearly finished reading *Gray's Anatomy* and they feel that they are the full bottle, your rational self would want to hope that this was the purest of hallucinations.

So, the elements of style of the bush lawyer include:

1. colour (or floweriness);
2. repetition (bang-bang-bang-bang-bang);
3. heart-on-sleeve;
4. casuistry (yes, with apologies to those products of learning carried down from the medieval schoolmen, casuistry); and
5. a tramlined adherence to the route of march. In short, not just the absence but the denial of professionalism.

CONSEQUENCES

Lawyers are now chary of describing themselves as learned in the law. They should not be. The standing of a profession does, I think, entitle it to withstand the annihilating urge of the equalising drive to mediocrity. Learning in the law is a valid and politically acceptable mark of distinction from, say, encyclopaedia salesmen or politicians. Forget where we are on popularity ratings, the punters are entitled to have their legal interests represented by thoroughbreds rather than show ponies. The advocates we admire are those who wear their learning lightly, not twirled like a scarlet-lined cape for a big night out at *Turandot*. That learning culminates on the Bench in a muffled query from Tom Smith or an apologetic murmur of Richard Newton or a soft, simple, but possibly terminal hypothesis put by Sir William Deane.

The addiction of bush lawyers to repetition goes hand in hand with their addiction to slogans or catchphrases. The best that can be said is that these addictions represent an absence of thought. Parroting is no substitute for analysis and exposition — it is a weak camouflage for their absence; repetition is no substitute for persuasion — it commonly puts people off. You should start — you should at least start — by assuming that the person being addressed is up to their job. They should get the point, and until they show otherwise, they should be trusted to get the point the first time. Every repetition is a separate insult, a further blow to the case being put. If you can find a garage attendant and say you want $20 worth of super, and then say it again twice, you might get more than a funny look in response. These advocates might derive from the last of the Habsburgs — who were said to be always desperate, but never serious.[5]

The issue of sincerity is important. Bush lawyers are big on sincerity (as are mob orators and lay preachers). This makes them a hit with people who think that sincerity is the one thing lawyers surely lack. It is thought that barristers are obliged to indulge in pretence — since even the "guilty" have a right to counsel — and pretence is the opposite of sincerity. This is a misconception. Barristers are not paid to be sincere — indeed, they are expressly forbidden to give personal endorsements to their clients or the case of their clients. Sincerity is the reverse of objectivity, and is likely to be the enemy of professionalism.

If advocates are trained not to have any personal belief in the causes they press, the issue of sincerity does not arise. It makes no more sense to inquire if counsel is being sincere in making a submission than to inquire if a surgeon is being sincere in making a diagnosis or recommending surgery. We do not ask doctors whether they sincerely wish to treat us. A surgeon may curl up her lip if told that the patient on the table is a 40-a-day Marlboro man, but she will not if she is acting professionally let any ideological aversion stand between her and the execution of her oath.

Barristers do not have to like or believe their clients; indeed, they are forbidden to reject clients just because they cannot bring themselves to like or believe them. In truth, barristers who believe or like their clients too much can be a pest, to their clients and to themselves. Once you understand that advocacy in court is not a function or reflection of the personal belief, let alone the ideological conviction, of the advocate, you understand that sincerity has nothing to do with it. Advocates have an obligation of candour, but that is very far from being an obligation of sincerity. Sincerity is about meaning what you say; candour is about saying what you mean.

Once you understand that advocacy in court is not a function or reflection of the personal belief, let alone the ideological conviction, of the advocate, you understand that sincerity has nothing to do with it.

The quality of sincerity is often linked to the quality of enthusiasm. Bush lawyers are enthusiastic. "Enthusiasm" has had a mixed history in religious circles. It has not been smiled on in juristic circles. An English judge, Lord Devlin, reminded us that enthusiasm means taking sides and cannot therefore be a judicial virtue. "But enthusiasm is rarely consistent with impartiality and never with the appearance of it."[6] Since the Bench and the Bar are part of the one professional continuum, advocates who see themselves as lawyers by profession should bear this stricture in mind. The counsel we most admire are those who are at home with the process of the court and help to make it work; they are part of the furniture, like the Bench and the Bar table.

The attachment to form, and the addiction to argument for the sake of it, are defining elements for bush lawyers, and their most annoying qualities. In their need to start something over anything, they resemble compulsive gamblers; they would rather have a fight than a feed. In their capacity to find grounds for division and discord, where rational lawyers see none, they resemble the paranoid. They seem repelled by the centre and attracted to the edges. Advocates who go straight to the periphery annoy those, on the Bench or at the Bar, who like to find and stick to the point.

The determination to pursue every possible line of argument is in truth a repudiation of the very idea of professional judgment. The failure of professional nerve is probably the principal cause of the failure of our system as we speak. It is also likely to lead at any given time to the breach of what many regard as the first rule of advocacy — you put your best point first and you do not spoil it with a dud point. You should not debase your own currency. A school of advocacy should give people experience in listening to arguments. You will soon learn how unsettling it is for a judge who is just gaining confidence and respect for counsel to lose both when a sound and sensible proposition is followed by one which is suspect but which is presented with the same apparent force and confidence. The judges go quickly from seeing through a glass darkly to seeing face to face, and they do not like what they see. Small arguments may be the prerogative of small minds — there may be the problem of a big name in a small town — but they do lose friends and they do not win cases.

Following the script is a similar problem that involves a breach of a fundamental rule. Advocates are there to persuade the court, not to justify or protect themselves. Two things are required — the communication of an argument and the ability to engage in a dialogue to support, clarify or defend it. Good judges need this assistance; bad judges do not seek it; disastrous judges do not understand the process. If you have a ticket, and you are not illiterate, and you are not out of your depth, the first part should not be too hard; it is the second that calls for art, just as finishing in golf or painting may call for touch. This is not something that it is easy to teach.

Advocates are there to persuade the court, not to justify or protect themselves. Two things are required — the communication of an argument and the ability to engage in a dialogue to support, clarify or defend it.

But you only show ignorance if you remain locked on the tramlines of your own singular path and heedless of the directions of the traffic cop. It is like the other problem — look Mum, no hands – when a stationary lamp-post is looming up. Counsel who decline to engage directly in the required dialogue with either the Bench or the Bar engage in a form of desertion.

MORAL

Flies buzz all around you, they create an awful racket, they get in your face, and, unless dealt with, they go forth and multiply. They have done nothing for the rest of us in the meantime. The style of the bush lawyer may have for some the old world charm of a rustic drunk, but real lawyers who behave like bush lawyers demean their profession. Bush lawyers may have their uses — like someone saying something at a wake when no one else can think of anything warm to say about the departed — but their uses are limited. Professionals may not be as colourful, but their uses are not so limited. A dispassionate surgeon might get on your nerves in some ways, but a passionate one is likely to find much worse ways to get on your nerves, and other things as well. When you get into big trouble, either in medicine or in the law, you want someone to look after you whom you can trust, someone who is not just trained and paid to look after you, but who is called for that purpose. You do not want someone whose own vanity is more important than your prospects or who cares more about their standing or their future or your politics or your sexual preference. You want someone who is willing and able to do the best job. You do not need an amateur, you need a professional. Real lawyers are privileged to be called to answer that need; most of them forget just how privileged they are; but the rest should be left to the Mortein — preferably from the old style delivery system — front-end round-barrel, rear end pump action, scatter-gun spread, full bore.

NOTES

1. *The Birth of the Middle Ages*, H.St.L.B. Moss, Clarendon Press, 1935, 184.
2. *The Ghosts of Berlin*, Ladd, UCP, 1997, 201.
3. *Napoleon*, Paul Johnson, Weidenfeld and Nicolson, 2002, 55.
4. *The Complete Plain Words*, HMSO, 1973, 3.
5. *Wittgenstein's Vienna*, Janik & Toulman, Elephant Paperback, 1996, 241.
6. *The Judge*, Devlin, OUP 1981, 5, 17.

Exchange

MEMBERS of the Bar will have become accustomed to receiving, in relatively recent times and throughout 2003, letters, memoranda and notices from Barristers Chambers Ltd advising of an absolute shortage of chambers available for rental as a result of the renovations being undertaken in Owen Dixon East. Barristers have been exhorted to share chambers and have been offered inducements to do so. The rules about remaining with mentors after a reading period have been relaxed. However, it has been obvious that, overall, the availability of space has been at an absolute premium.*

It is in these circumstances that a new entrant has emerged — as if in answer to a prayer — offering space in premises on the 16th floor — the penthouse — of 530 Little Collins Street. It is sited a stone's throw from VCAT in one direction and the Legal Profession Tribunal in the other, but is a bit of a hike to the Court precinct proper. Having attended the launch as the sun was setting, the views are indeed panoramic over the Docklands and back to the CBD.

Exchange Chambers, developed by the Asian Pacific Building Corporation and located on the top floor of the Exchange Towers Building, was launched on 5 February 2004 and offers the prospect of chambers with a difference. While barristers are accustomed to looking at an existing room to decide if it is suitable, Exchange Chambers is at present only a floor plan over which various configurations of space can be finalized or purpose built, subject to demand, individual requirements and necessity. The floor at the launch was marked out with tape to show how various chambers and reception areas could be utilized — comprising up to 34 rooms with islands for secretarial and reception services. This plan has since been revised

*However, as at 10 March, BCL advise that 102 rooms will be generated over 2004 as follows: 16 on Level 6 of Joan Rosanove Chambers (April); 11 on Level 2 of Douglas Menzies Chambers (September) and 75 in Owen Dixon East (November).

Chambers

A typical room in Exchange Chambers, complete with office furnishings.

Spectacular views from Exchange Chambers.

to a configuration of 24 rooms However, if a group of barristers wished to design the space differently from the current plan there is the capacity to develop a scheme to suit that purpose, because the internal walls, fixtures and fittings are still "on the drawing board" and there are opportunities to customize the suites as required. Each room will, according to the prospectus, be sound protected.

Another feature which distinguishes Exchange Chambers is that these chambers may be purchased — outright by owner-occupiers, or as an investment for lease — or tenanted, providing a range of options not generally available to barristers. The starting price for purchase of chambers on strata title is $175,500.00.

The concept, however, incorporates some features which will be available to all tenants and occupiers no matter what configuration the chambers ultimately take. For example, mediation rooms, conference rooms and video-conferencing facilities are all available on site; telecommunications and IT hub cabling enable state of the art equipment to be utilized to ensure that all occupants will have access to high-speed internet connection; a reception service is available. A legal library is under consideration. Facilities such as secretarial assistance, word processing, photocopying, and para-legal work (filing documents at court) is available on a user pays basis. There is even an expression of interest from a Clerk in having an office on site.

Tenants in addition will also have complimentary access to the building's gymnasium, sauna and change rooms.

It could be worth considering and is certainly worth an inspection, especially if the need for chambers is urgent or there is no ready or timely alternative.

Judy Benson

Robin Brett welcomes new Readers and unveils Tapa Cloth.

Unveiling of Tapa Cloth

Donated by Pacific Island Reader Jennifer La'au during the Welcome to New Readers function at Owen Dixon West on 1 March 2004

ON Monday 1 March 2004 at a reception to mark the commencement of the March 2004 Bar Readers' Course, Chairman Robin Brett QC unveiled the Tapa Cloth presented to the Bar by Vanuatu lawyer Jennifer La'au in gratitude for the Bar's commitment to the Advocacy training of lawyers in the South Pacific region. Ms La'au attended and successfully completed the Readers' Course four years ago, in March 2000. She now practises with the well established firm of Ridgway Blake Lawyers in Port Vila, Vanuatu.

Eleven lawyers from Vanuatu have participated in the Readers' Course since 1992 including, in the recently completed March 2004 course, Carol Singh and Lent Tevi — pictured at the reception standing in front of the Tapa Cloth with the Chairman and the two other South Pacific Readers, Nirrie Eliakim and Jacinta Murray from Papua New Guinea. In 1995, the Bar conducted a week-long Civil Litigation Advocacy workshop in Vanuatu.

Four days before the 1 March 2004 reception, tropical cyclone Ivy hit Vanuatu, with gusts at more than 200 kilometres per hour. We were concerned for the people there, and glad that Carol Singh and Lent Tevi were able to be in Melbourne for the reception and for the Readers' Course.

The Bar provides places in the

Readers' Course to lawyers of the South Pacific without charge. We have done that since 1987. We've had at least one person every year since then. On average, we have five South Pacific lawyers each year — a total of eighty-one people over the last seventeen years. They have come from Papua New Guinea, Vanuatu, Indonesia and the Solomon Islands. The South Pacific Readers have included a number of women.

New Readers from the Pacific region Lent Tevi,Carol Singh,Jacinta Murray and Nexrie Eliakim with Robin Brett.

In addition to having lawyers from the South Pacific in our Readers' Course here, we conduct full-time, week-long advocacy skills workshops in Papua New Guinea. We have also conducted a civil litigation advocacy workshop in Vanuatu. These workshops began in 1990. The enthusiasm and commitment of the late Bob Kent QC were the foundation and drive of these workshops from 1990 until his untimely death in 2001.

The Bar began teaching in the Papua New Guinea pre-admission course at the Legal Training Institute. We still do that, and now also conduct workshops for prosecutors, public defenders, the Attorney-General's department, the Ombudsman's Commission, the Judiciary, and teacher training.

In the twelve months or so from the end of October 2002 to last November, the Bar went to Papua New Guinea four times. Most recently, Justice Harper headed a team that taught a course on the Papua New Guinea Leadership Code for the Ombudsman's Commission and specialist public prosecutors. Government lawyers from Fiji and Vanuatu also attended that course.

In the fourteen years that the Bar has been teaching these courses, twenty-one members of the Bench and Bar have taught in Papua New Guinea and Vanuatu: Justices Vincent, Coldrey, Harper and Eames; Judge Crossley and Magistrate Lesley Fleming; DPP Paul Coghlan QC and Chief Prosecutor Bill Morgan-Payler QC; the late Bob Kent QC, Ross Ray QC, Chris Canavan QC, Rowan Downing QC, and Michael Tovey QC; Andrew McIntosh (now shadow Attorney-General), Geoffrey Steward, Frank Gucciardo, Martin Grinberg, Robert Taylor, Paul Lawrie, Julie Condon and Ronald Gipp.

From the very beginning, Barbara Walsh has organised everything, and she holds the record with twelve trips to Papua New Guinea and one to Vanuatu.

The Papua New Guinea Ombudsman's Commission presented the Bar with a fine portrait of a tribal warrior. That hangs in the Neil McPhee room, along with a number of carvings, masks and story boards presented over the years. The Bar values its connections with the South Pacific and the many kind remembrances presented to us, to which have now been added Jennifer La'au's Tapa Cloth.

The making of Tapa Cloth is a long and ancient tradition in the South Pacific — in Melanesia, from New Guinea to Vanuatu, in Fiji, and on most of the high islands of Polynesia from Hawaii to Tahiti, the Marquesas, Tonga, Samoa, Niue, the Cook Islands and New Zealand. Tapa Cloth is hand-made from the beaten bark of the Paper Mulberry tree. It is painted with dyes made from berries, roots, leaves and bark, and burnt tree resin. It is left to dry in the sun.

A former art director of University of the South Pacific has likened the designs to the mysteries of elven paintings in Celtic lore — patterns of white, black and brown "tumbling and rolling, a playful pattern of light and dark, like that of a child's toy … The patterns give life, like the old mysteries of elven paintings in Celtic lore. From them one feels the richness of a life full of purpose. The rhythm of an inner felt music, to move to in a functional dance that carries one through the magic of each dawning day. … The tapa cloth, the real tapa, is one that holds the patterns of life, showing the heart the path that leads back to the dawn of time where the patterns of the ancients began." Tapa Cloth plays an integral role in weddings, funerals, and chiefly and royal ceremonies. Our Tapa Cloth is from the Kingdom of Tonga.

The Tapa Cloth has been magnificently framed and hangs in the foyer of Owen Dixon Chambers West. The delicate cloth is 3.20 by 2.35 metres. Bar Executive Officer Anna Whitney was responsible for investigating what needed to be done for its preservation and appropriate display, and for organising all that. Eva Gaitatzis of Fine Arts Interiors advised, managed and co-ordinated the preparation of the delicate cloth for framing, and its framing and hanging. Abigail Hart did the textile conservation work. Louise Bradley did the conservation quality framing. We thank them for their excellent work.

If you have not already done so, we encourage you to come and view the Tapa Cloth. Hanging opposite the Tapa Cloth are the two Images of Women in the Law portraits: a contemporary photographic study of Justice Sally Brown by artist Josephine Kuperholz, and the more traditional photographic portrait of the five women who have been appointed to the Victorian Supreme Court by artist Murray Yann. They also are worth looking at. All are in the foyer of Owen Dixon Chambers West.

Bar Reception for Pro Bono Practitioners and Farewell to Samantha Burchell

Edited speech given by Anthony Howard QC, Chairman, Legal Assistance Committee, at a reception held at The Essoign on Wednesday 3 March 2004, to acknowledge the pro bono contribution of members of the Bar and to farewell Samantha Burchell on her retirement as co-executive director of PILCH.

Anthony Howard QC.

LADIES and gentlemen, on behalf of the Bar's Legal Assistance Committee, I welcome you to this reception to acknowledge and thank counsel who have in the past 18 months undertaken pro bono work on behalf of the Legal Assistance Scheme, PILCH, the Federal Court Order 80 and the Federal Magistracy Part 12 schemes and those who have performed other pro bono work which is not part of a formal scheme. This is the first such reception hosted by the Bar. We are also here to farewell Samantha Burchell who is retiring as co-executive director of PILCH, but more about her shortly.

The Legal Assistance Scheme has been operated by PILCH since July 2000. It costs the Bar about $84,000 per year of which approximately $63,000 is reimbursed by the Legal Practice Board. Accordingly, our thanks must go to the Board for its significant contribution.

In June 2003, Susannah Sage was appointed as the part-time solicitor/manager of the Bar's scheme. She is supervised by the PILCH co-executive directors, Emma Hunt and Paula O'Brien. On your behalf I want to extend our deepest gratitude to this team for the excellent work which they do for the Bar.

A broad range of cases are dealt with by the scheme. Currently, a substantial amount of work is done for asylum seekers, refugees and in the migration law area generally. Last year the Bar conducted a number of seminars to train up young practitioners in this field and also established a mentoring program so that experienced counsel would be available to assist juniors in their work. Since 2002 the Asylum Seekers Sub-committee has worked actively in this area and liaised closely with a number of refugee agencies. The scheme also provides significant assistance to prisoners and persons with intellectual disabilities or mental illness. There are two special features of the operation of the scheme that I want to mention:

- First, the "one-stop shop" facility whereby the PILCH scheme is conducted alongside the Legal Assistance Scheme, the Law Institute's scheme and the Homeless Persons Clinic. This is an Australian first pro bono model which provides consistency, efficiency and economic administration.
- Secondly, most fruitful relationships have been established with the courts at both state and federal level. Barristers are often called on by the courts to assist in urgent and difficult circumstances. I want to particularly acknowledge the presence here tonight of the leaders of the courts along with registrars and administrators. They include Chief Justice Marilyn Warren of the Supreme Court, Chief Justice Michael Black of the Federal Court and Chief Judge Michael Rozenes of the County Court.

Presently about 400 barristers volunteer their time and expertise to the various schemes. This represents a very pleasing 27 per cent of the Practising List of approximately 1,500 barristers. Every barrister is encouraged to volunteer his or her services. The Bar's enthusiasm to help underprivileged persons is not new — this has always been a part of the Bar's existence. A short story well illustrates the point.

I'm sure you all know the beautiful seaside resort of Lorne. I can remember as a young boy sitting on the steps of the well-known Cumberland resort eating Rainbow Chocs (the best ice-creams from Colac). Next door to the Cumberland was a beautiful old courthouse. Sadly, it is now no longer. In the early 1960s a group of running down barristers went on circuit to Geelong for the week. As happens, within two days they had settled all their cases. Someone suggested they spend the rest of the week at Lorne. They went down that afternoon and had a big-slap up dinner that night. The next morning they decided they would all pay a visit the courthouse. And so it was that shortly before 10.00 am, three silks and four juniors walked into the Lorne Magistrates Court. An unfortunate defendant had been charged with being drunk and disorderly. He was sitting in

the back of the court, slumped over in the corner, looking the worse for wear. He was unrepresented. The senior silk was seen to speak quietly to a local solicitor. The deal was struck. When the matter was called on for hearing, three silks and four juniors strode forward and took their places at the (rather small) Bar table. Much to the amazement of the local prosecuting sergeant, the senior silk announced his appearance with his six juniors — "If Your Worship pleases, I appear with my learned friends Mr Silk, Mr Silk, Mr Junior, Mr Junior, Mr Junior AND Mr Junior on behalf of the defendant AND the plea is 'not guilty'". The defendant looked confused. Shell-shocked, the sergeant asked for the matter to be stood down. The Magistrate did more and adjourned the court. Shortly thereafter, the prosecutor was seen to enter the Magistrate's chambers. He reappeared a little while later and the matter was called back on. Again, the seven barristers took their places at the Bar table. The sergeant stood up and announced: "We won't be leading any evidence in this matter, if Your Worship pleases". "Yes" said the Magistrate "the charge is dismissed". This was pro bono in action!

That sort of commitment on the part of lawyers is, as I say, nothing new. In more recent times, it was confirmed in some startling figures provided by the former Commonwealth Attorney-General, Daryl Williams QC, at the National Pro Bono Conference held in Sydney in August 2002. At this time, the Attorney estimated that in 2001–2002 throughout Australia, solicitors performed 1.7 million hours and barristers 489,000 hours of pro bono work. That is 2.189 million hours which equates, at a conservative $200 per hour, with something in the vicinity of $437 million worth of free legal advice in one year alone! To me, admirable as they are, these figures suggest that governments at both state and federal levels are failing in their duty to provide adequate legal aid to the Australian community. This situation is not improving. Between 2000 and 2003, the Legal Assistance Scheme has seen a very significant increase in the amount of work it has been called upon to perform. For example, in 2000–2001, there were 147 enquiries and 50 referrals. By 2002–2003 the enquiries had almost doubled, at 289, and there had been a 40 per cent increase with 70 referrals.

Each of you has played an important role in a vital community service performed by the Bar, one of which we all can and should feel justly proud. Keep up your involvement. The Legal Assistance

Victorian Bar Legal Assistance Scheme Case Summaries

MR Guy Gilbert of counsel accepted a referral to advise an asylum seeker concerning judicial review of a decision to refuse him a protection visa before the Federal Magistrate. In preparing the case counsel was assisted by Mr Stephen Meade from Middletons Lawyers as pro bono solicitor. The case was referred to the VBLAS by Victoria Legal Aid who were unable to act but were concerned that the client receive assistance given his major psychiatric illness and inability to understand English. Mr Meade visited the client to receive instructions at the Thomas Embling Hospital with the help of an interpreter. While final instructions were to withdraw from the court proceedings both counsel and Middletons remained on the record to assist the client in his application to the Minister for Immigration Multicultural and Indigenous Affairs and to challenge the costs order sought by the Australian Government Solicitor.

MR Jason Harkess of counsel appeared in Broadmeadows Magistrates' Court for a client referred to VBLAS from Coburg Brunswick Community Legal Centre. While the VBLAS does not routinely accept petty criminal matters, this client faced a number of assault charges and was refused Legal Aid due to a conflict. The client was recognized as unable to adequately represent himself given his youth, drug and anger issues. The notable efforts of counsel resulted in the client being given a Community Based Order without conviction. In substantially similar circumstances Mr Sergio Petrovich of counsel agreed to appear in Heidelberg Magistrates' Court for a client charged with three charges of unlawful assault, intentionally causing injury and recklessly causing injury. Counsel's successful negotiation resulted in all indictable offences being withdrawn and the client facing only the unlawful assault charge. Counsel put mitigating circumstances before the Magistrate and the client received a $300 fine without conviction.

MR Richard Harris of counsel undertook to advise and represent a VBLAS client suffering mental illness, referred from the Consumer Law Centre Victoria (CLCV). The client had deposited much of her belongings with a storage company at a time when she was seeking hospital admission for treatment. Some months later the client sought to recover the goods without success. She repeatedly sought to gain a copy of the storage agreement as well as offering a financial settlement for the return of her belongings. The storage company would not respond. Counsel, with CLCV instructing brought proceedings for recovery of goods or damages. While recovery was not possible, Counsel secured an Order for $5,000 in damages.

MS Caron Beaton-Wells and Mr Justin Serong of counsel worked together with pro bono instructor Mr Henrik Lassen partner at Herbert Geer and Rundle to achieve an outstanding and rare success on behalf of an asylum seeker detained at Port Hedland WA before the Full Federal Court. Counsel appeared before his Honour Justice Carr by video link between Melbourne and Perth. The case involved the review of a decision to refuse a protection visa by a delegate of the Minister, affirmed by the Refugee Review Tribunal (RRT) and appealed unsuccessfully to a Federal Magistrate. Extensive and complex submissions were made by Counsel to the Federal Court and as a result His Honour remitted the matter to the RRT and awarded costs in favour of the client. The client was subsequently referred to Migration Agent Mr Kon Karapanagiotidis at the Asylum Seekers Resource Centre for the preparation and representation at his second RRT hearing.

Samantha Burchell being presented with her farewell gift by the Honourable Chief Justice Warren.

Committee and the Bar Council thank you and all those who stand ready to perform pro bono work.

It is now my pleasure, on behalf of the Bar, to farewell Samantha Burchell who is retiring after working for 4½ years as the co-executive director of PILCH. Sam's background is impressive. She first completed her articles and then worked as a solicitor at Wisewoulds. In 1991–1992 Sam worked as an Associate to Justice Heerey in the Federal Court. In 1993 she came to the Bar and remained until 1999. She practised in general civil law, family and criminal law. Sam was the Assistant Honorary Secretary of the Bar from 1996 to 1999, a member of the Legal Assistance Committee from 2000 to the present, a member of the Women Barristers Association from 1996 to 1999 and a member of the New Barristers Committee from 1993 to 1995.

In 1999 the Bar Council granted Samantha special leave from the Bar so that she could take up her position at PILCH where she has shared the position of co-executive director with Emma Hunt and later Paula O'Brien until February this year. Sam's arrival at PILCH in 1999 came at a pivotal time in its development. She set about consolidating all of its activities, and the organisation and its work flourished. Sam was instrumental in driving the agreement with the Bar for the establishment of the current Legal Assistance Scheme. Under her guidance, PILCH established its financial independence. Of special note, Sam worked to secure the legal department of the National Australia Bank as the first corporate member of PILCH, and set up the "one-stop shop" model I have already mentioned — both Australian firsts.

Whilst at PILCH, Sam has been involved in a number of major public interest cases including the *Tampa* case, which was heard in the Federal and High Courts in 2001, and more recently in the VCAT application by three adolescent girls wanting to play football in a mixed competition. The matter concerned an important human rights issue and there were mutterings around the PILCH office of — "its more than a game". It may not be politically correct, but the VCAT case was affectionately known at PILCH as the "footy chicks' case".

Sam has been described by a number of her co-workers as "hard working, meticulous and a creative thinker — a pleasure to work with". I can say from my own experience, having worked with Sam now for the past three years, that this is very accurate description of her and her work ethic. She is a dedicated and professional public interest lawyer who has made both a contribution and a commitment to this important community service. Those of you who had bacon and eggs this morning will know the difference between contribution and commitment. You will know that in the case of your breakfast the chicken made a contribution, but the pig made a commitment!

Other than having written extensively and delivered conference papers on pro

bono, Samantha's other professional achievements of special note are:

- accredited mediator since 1997
- member of the National Pro Bono Resource Centre Steering Committee 2001–2002 and Board 2002–2003
- member of the Federal Attorney-General's Pro Bono task force 2000–2001
- member of the Advisory Council, Victorian Law Reform Commission 2003 to the present.

It is clear that Sam's interests and achievements are conspicuous and wide ranging. She is a valued and respected practitioner in the pro bono field and will be greatly missed by her colleagues and clients.

What of Sam's future? She is not immediately returning to the Bar. Facing "pro bono burnout", she proposes to take a deep breath and have a rest! She will have more time to spend with her husband, Albert Monicino, who is a successful commercial barrister, and her two delightful children. She is not only moving house next week but at the same time restoring an old bluestone church near Daylesford. So, she has plenty to do.

I couldn't help noticing in today's *Age*, in the shipping news, of the arrival and departure of the *Victorian Reliance*. This seemed to be an apt metaphor for tonight's occasion. Sam's departure, whilst disappointing for her many friends and colleagues, is not quite as serious as that faced by Socrates who, on his involuntary retirement from life, said: "Calm yourselves and try to be brave." Sam, on your voluntary retirement, the Bar thanks you for a job well done.

I will now call on the Chief Justice who will, on behalf of the Bar, present a gift to Samantha.

[Chief Justice Warren then presented Samantha with a gift on behalf of the Bar and Samantha made some remarks by way of reply.]

Reply by Samantha Burchell to Tony Howard QC at Victorian Bar Legal Assistance Scheme Function

CHIEF Justices and colleagues:

When I received the invitation to this evening's function I felt entirely overwhelmed. Although I very much appreciate such a generous farewell gesture, I do not feel worthy. The role I had at PILCH for the last 4½ years has been a privilege and a pleasure. I had the rare opportunity to work in an organisation where I was passionate about its underlying objectives, in particular that of access to justice for all. I have been involved in a change of the culture and manifestation of pro bono work in the law. I have had some unique professional experiences. And I have worked with some amazingly gifted, creative and generous lawyers. It is these people that are truly deserving of acknowledgement and thanks.

On the occasion of his swearing in as Chief Justice of the High Court in 1952, Sir Owen Dixon said: "… it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak …"

That duty is given true meaning in the context of pro bono work. Every day barristers, like many lawyers, represent people who are vulnerable, disadvantaged and otherwise voiceless. They do so without any expectation of fee or even acknowledgement or thanks. With their particular skills in advocacy they provide such clients with access to a system, which is largely adversarial in quality, and which would otherwise be inaccessible.

Sir Owen Dixon went on to say: "… the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence, and owing allegiance to none."

It is this quality of independence that makes barristers' contribution to pro bono work so valuable. There are occasions that come to mind where the fearless independence of counsel working pro bono has been striking. The *Tampa* case is a notable example. But there are many other occasions considerably more unremarkable where barristers, unfettered by ties or conflicts, have made an enormous contribution. In this context the work of so many members of the Bar to assist asylum seekers, particularly those held in immigration detention in remote parts of Australia, is particularly deserving of praise.

At this point I would like to personally and on behalf of PILCH convey some heartfelt thank yous.

Over a number of years the Scheme and PILCH have enjoyed the support (financial and otherwise) of the Bar Council. I would like to particularly acknowledge two former chairmen, David Curtain QC and Mark Derham QC, who made the leap of faith and supported the PILCH initiative of bringing the major pro bono schemes in Victoria together in a way that is now the envy of many other states in Australia and overseas.

I would also like to acknowledge the generous financial support of the Legal Practice Board which in recent years has given a substantial amount of funding to the Bar to provide for the administration of the Scheme.

For organisations to come together in a way that the Bar and PILCH have requires the motivation, commitment and efforts of individuals. In this context I would like to thank Garrie Moloney who as Honorary Secretary of the Bar Council made an enormous personal contribution to the formation of the scheme by running it on a voluntary basis from 1996 to 2000. I'd also like to express gratitude to David Bremner, the Executive Director of the Bar, who with his calm and wise ways has often gone beyond what would normally be expected to simply make things work. And I would like to especially acknowledge Tony Howard QC whose energetic leadership helps to motivate, guide and maintain the commitment of all involved.

Finally, I would like to thank each and every member of the Bar who has expressed willingness to participate and has given of their time, skill and expertise. It has been a pleasure to work together.

As for me personally, I have embarked on a bit of sabbatical. According to Chief Justice Warren's well known assessment of the five ages of women, I am smack bang between the "energetic and ambitious" phase of my life on the one hand, and the "cool, calculating and driven phase" on the other. That being the case I think I need to pause and take stock.

Services for the Opening of the Legal Year

St Paul's Cathedral

The Reverend Doctor Dorothy Lee, Professor of New Testament Studies, The Uniting Faculty of Theology.

Deuteronomy 6: 4–13, Mark 12: 28–34

IN the four Gospels, there are a good many stories about lawyers, not all of them favourable. Indeed, to be perfectly frank, the majority are probably rather negative. Today's reading from the Gospel of Mark, however, is a shining exception: A scribe — that is, an expert in matters of law — approaches Jesus in what seems at first a hostile manner and with a trick question in his hand, and ends up being bowled over by Jesus' answer. At this stage in the Gospel, we're expecting yet another confronation between Jesus and the authorities in Jerusalem. But in fact that isn't the case. The story ends up being one of those rare moments in the Gospel of Mark where the sun breaks through the clouds. Jesus and a lawyer find themselves in perfect agreement.

Now the Bible itself has a lot to say on the subject of law. You may have heard people saying that the God of the Old Testament is a god of law, while the God of the New Testament is a god of love and grace. But nothing could be further from the truth! Our two readings, from Deuteronomy and from Mark, both cohere perfectly: their message is identical. The God of the Bible is a god both law and love, a god of justice and mercy, in both testaments, a god who demands the very highest ethical standards but who shows also the deepest levels of mercy. Law and grace in the Bible are not mutually exclusive. You can't take your pick and side with one or the other — not unless you want to walk away from the position on these matters that God himself takes.

So, what is it about our readings today that might help us understand this vital nexus between law and love, between justice and grace?

In the first place, the tricky question the lawyer asks Jesus is a question fundamentally about where the centre lies. "Which commandment is the first of all?" What, in other words, is the centre of the law? What's the most important thing about the law? It's a vital question and a question much disputed in the Jewish world of Jesus' day. And Jesus chooses to answer it at face value. He's a good Jew. He answers the question by going straight to the very heart of the Old Testament. And he outlines what the law, with all its fumbling and its qualifications and its omissions and its wordiness, what the law at its best, at its heart, is really trying to achieve.

And that's pretty important stuff. We need, as society to be asking ourselves this same question: What is the centre of law? What is its heart? What is it really on about? Because one thing that characterises us humans is our truly appalling memory, no matter how efficient or well-organised we think we are. We keep forgetting what our lives, what our professional institutions are really on about. Our lives are so frantically busy that we rarely have time to centre ourselves; to ask ourselves what our profession, institution, what our contribution to society, is truly about.

And so today for the start of the legal year, the Gospel challenges us to ask this central question: what is the heart of the law for us, and what are our professional lives really on about in light of that? The answer demands an extraordinary truthfulness from us — about ourselves and about the world we live in — a depth of insight and wisdom. The irony is that to have these qualities goes right against our culture which is often so obsessed with superficial image and success, that it's very hard for us to even find the centre, let alone stay there long enough

Justices Batt, Phillips and Ormiston.

The Reverend Doctor Dorothy Lee.

to have a conversation. "What is the first commandment?" Where does the heart of the law lie — for me, for you? And what difference does that make to the way we live our professional lives?

Secondly, the whole weight of the law, in Jesus' answer to the scribe, turns on the issue of love. Love, in Jesus' view and in the view of the Old Testament, stands at the very centre of the law. Now at first glance you may think that's

Judges' Associates.

absurd, that law and love are opposites; the one hard and uncompromising, the other soft and rather wet. But that's certainly not the biblical view. For a start, love isn't soppy and sentimental. Love doesn't mean sweeping nasty things under the carpet. Love isn't about making things seem good when they're really bad. It's not about letting innocent people be walked over by those who are unscrupulous and manipulating. "Love," says St Paul, in one of the most exquisite passages of the New Testament, "bears all things, believes all things, hopes all things, endures all things." That's a pretty tough kind of love. It's the sort of love that enables us to face the very worst about our world, about ourselves. It demands integrity of us, but equally honesty when we fail. It's the kind of love that may from time to time lose heart but never gives up entirely: not on any one, not on our

Justice Balmford.

Judges Harbison, Wood, Duckett and Neesham.

Justice Robert Osborn.

Entering the Cathedral, Justices Ormiston and Hayne.

Group of Judges with Canon Anne Wentzel, Dr Dorothy Lee and Reverend David Richardson.

Justice Hansen.

Justice Nettle with Judge Wood.

Victoria Strong, reading the Second Lesson.

Justices Chernov, Ormiston and Hansen.

Archbishop Peter Watson.

Judge Nixon.

society and its institutions, including the law, not on ourselves.

And love isn't just about the individual: it has a social and political dimension — it's concerned also about social justice. It's prepared to make the hard, self-sacrificing decisions that will prevent our society becoming more and more torn apart between the haves and the have-nots, between the comfortable insiders and the desperate strangers who come knocking on our doors. Of course, law can't manufacture love, not even in the Bible, but it can point us in the right direction; it can ensure, as much as possible, that the innocent are guarded, the vulnerable protected, the rights of the destitute maintained. In the Bible, the law is particularly concerned for the needy, the disabled, the poor, the uneducated, the outsiders. If the law can't create love, it can certainly help to safeguard it, to be the banks of the river, as it were, giving structure and direction. Love and the law go hand-in-hand; they're allies and ultimately friends.

Thirdly, and finally, the answer Jesus gives the scribe holds together the vertical and the horizontal. "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind, and with all your strength," says Jesus, quoting our Deuteronomy passage. And, then, because Jesus isn't going to be confined by just one question, he adds: "The second is this, 'You shall love your neighbour as yourself'. There is no other commandment greater than these." Not one commandment then but two. Not one dimension to love but two; not just a horizon encircling the earth but also the sky above us, reaching up and up.

And so we're called, on the one hand, to love one another — to love the other who is our neighbour. Luke's Gospel tells us — in another conversation with a lawyer — that our neighbour isn't just the person next door but also the stranger we meet in the street, the one whose totally alien to us in every possible way, even our enemy. Jesus tells us that this "neighbour" has as much right to our love and goodness, our social justice and integrity, our compassion and sense of fairness, as the people who are like us, the people we feel at home with. Uncompromising love of the other, regardless of who and what that other is, stands at the very centre of the law.

But there's more to it than that. Like Jews and Muslims, Christians believe that the God dimension is just as important as the neighbour dimension. Indeed, in Bible, the God aspect comes first. Love of God is a call against idolatry, against putting anything or anyone in the place of God. If we want to use language that's less religious, we could say we need to have a sense of transcendence, an awareness of mystery that is beyond us and yet among us. That sense of mystery is what helps us to give other people the respect and dignity they deserve as human beings. It's what enables us to treat the earth with respect instead of abuse. You don't have to be a card-carrying Christian to recognse that there is this other aspect to life — this sense of spirituality — that is present in all that's good and beautiful and worthy in our lives and institutions. Without it, we descend into our natural egotism and self-centredness.

So whether we name God or not, God is present as the mystery at the heart of things, a mystery that embraces every aspect of our lives. And that means that, whether we're speaking about our society and the way it's run, or talking about institutions like the law, or discussing our relationships to one other, we're not just speaking of ourselves. There's another reference point, another dimension that intersects with everything we say and do. And that dimension is more worthy of our love and our reverence and our best efforts than anything else in all the world. In that spirit, with that attitude, we are indeed, like the scribe, "not far from the kingdom of God".

St Patrick's Cathedral

RED MASS

THE Red Mass for the legal profession upon the occasion of the opening of the legal year was celebrated by the Most Reverend Denis Hart DD, Archbishop of Melbourne at St Patrick's Cathedral, East Melbourne on 2 February 2004.

The annual Mass was attended by the Governor Mr John Landy, the Attorney-General for the State of Victoria, Mr Rob Hulls and many judges, magistrates and other members of the legal profession who sought God's blessing for the work of the legal profession in the year ahead.

The homily delivered by the Archbishop discussed the Judeo-Christian tradition of God as the ultimate lawgiver and supreme judge and the Catholic Church's faith in the growth of a body of international law based upon "universal principles" of justice and human rights and the development of institutions to administer it. In this context and with respect to international relations His Grace quoted the Pope who has said that the law favours peace and that we must prefer the force of law to the law of force.

His Grace observed that those in the legal profession "are called to serve … in the search for justice, in respect for truth, in the promotion of equity, in the right ordering of society, in the punishment of crime and the healing of the wounded by it, in the protection of the rights of all, especially the weak" and reminded us that we are often the guardians of liberty and human dignity and that as such we should not lose sight of how our children might inherit a better world.

The President of the Law Institute, Mr Chris Dale, and the Senior Vice-Chairman of the Victorian Bar, Mr Ross Ray QC, read the lessons.

A full transcript of the homily delivered by his Grace is published below.

My dear Friends,

Forty days after his birth, the parents of Jesus took him to the Temple in Jerusalem "observing what stands written in the law of the Lord". It is this event, by

Governor John Landy and Mrs Landy arrive at St Patrick's.

L.I.V President Chris Dale giving a reading.

Chris Dale speaking with the Most Reverend Denis Hart D.D. Archbishop of Melbourne.

Robert Ray QC Senior Vice-Chairman of the Victorian Bar giving a reading.

Procession entering St Patrick's Cathedral.

Most Reverend Denis Hart D.D. Archbishop of Melbourne.

Justice Vincent and Sir James Gobbo after the service.

Governor and Mrs Landy and Attorney-General Rob Hulls after the service.

Most Reverend Denis Hart D.D.

a happy coincidence, which we celebrate today on the feast of the Presentation of the Lord, as we gather once more for the traditional Red Mass at the start of the legal year.

In the Judeo-Christian tradition God is the ultimate lawgiver and supreme judge. His creation is ordered by laws which reflect the divine wisdom: their intricacy and complexity are an ever-present reminder of the awesome nature of the creativity of God.

In the human realm, the law was considered the greatest of God's gifts to his people Israel, a law given to Moses and also written in the human heart.

We Christians treasure above all the "new commandment" of love of God and love of neighbour which the Lord Jesus taught in word and deed.

The Catholic Church, of course, has its own body of law, and over many centuries has been a strong voice for the philosophical tradition of natural law, a law established by reason, universal in its precepts and binding in its authority, because it is rooted in the dignity of the human person, and ultimately in the wisdom of our Creator. The Church continues to insist that the natural law must be the foundation for the building of any human community. It enshrines the common principles that can bind us all into one human family which transcends our differences. It expresses the dignity of each person and his or her fundamental rights and duties. It provides a necessary basis for civil law, with which it has an essential connection [cf. *Catechism* 1956–1959].

Pope John Paul II and his recent predecessors have spoken with great insistence and determination about the importance of the natural law, and have done so with special urgency in the field of international relations. In fact, the growth of a body of international law based on universal principles of justice and human rights, and the development of institutions to administer it, is one of the great signs of hope in modern times.

The world community increasingly wishes to have laws which do not merely preserve international stability, or which see peace merely as the absence of war, but rather to have international agreements which strive to address the root causes of violence and injustice, of preventable disease and famine, of inequality and exploitation, of damage to the environment, of disrespect for human life and human dignity.

We must demand of our leaders honesty in public life and public policy. As the Pope has said recently, law favours peace, and we must prefer the force of law to the law of force [*Message for World Day of Peace*, 01.01.04, n. 5].

In fact, Jesus spoke rather rarely about the law on its own. For him law has a constant companion, for he usually spoke of "the law and the prophets". When his parents took him to the temple in fulfilment of the law, they found a prophet waiting for him there. Her name was Anna. When she saw Jesus, "she praised God, and spoke of the child to all who hoped for the deliverance of Jerusalem" [Lk 2.38]. When he was transfigured on Mount Tabor, he was seen with Moses, representing the law, and Elijah, representing the prophets.

You know better than any of us what law is and how it works, but what of prophecy, the biblical companion of the law? Prophecy is linked to contemplation. The prophet, because he knows how to listen to the voice of God, sees into the heart of things. The prophet does not scorn the law, but he demands that law serve the cause of justice, that it vindicate the rights of the weak and the poor, that it insist on truth and integrity, that it strive to heal what is broken, and that, however imperfectly, it represent for us some vision of what we hope our society might be, and of how we ourselves should act towards one another.

Moses is not Elijah; a lawyer and a prophet are not the same. Your work is constrained by all kinds of limitations, and rightly so. You are occupied principally with what our society considers the boundaries of acceptable behaviour and the transgression of them.

But you are also the custodians of a long tradition of reflection on the horizons that beckon us and the social ideals which inspire us; you are often the guardians of our liberty and our human dignity. This requires a kind of contemplation: it takes us to the heart of things. Sometimes, especially when we forget what our ancestors learned, or when we lose sight of how our children might inherit a better world, or when we do not consider the law that the Creator has written in his world and in our hearts, you may need to find a way to speak to us with the prophet's voice.

It is customary at this Red Mass to invoke the inspiration and help of the Holy Spirit on our work in the year ahead. I would like to do so in the words of Stephen Langton, Archbishop of Canterbury, at the beginning of the 13th century. Cardinal Langton was an energetic and creative ecclesiastical legislator, whose influence on church law was considerable. He was influential in the framing of Magna Carta, at great cost to himself. He was also the author of the famous poem *Veni Sancte Spiritus*, which we use as the sequence at Pentecost. The longings, which it expresses, are our own as we commence our work once more in the service of our community:

Come, Holy Spirit,
and send out a ray
of your heavenly light.
Come, father of the poor;
come, giver of gifts;
come, light of our hearts.

Come, best of comforters,
sweet guest of our soul:
sweet refreshment,
rest in our toil,
cool in the heat,
relief to our pain.

O most blessed light,
fill the deepest hearts
of those who believe in you.
Without your divine power
we have nothing in us,
nothing that is not wounded.

Wash what is unclean,
water what is parched,
heal what is wounded;
bend what is stiff,
warm what is cold,
guide what has gone astray.

Give your seven holy gifts
to your faithful ones
who trust in you.
Give virtue its reward,
give us salvation at the end,
give us the joy which lasts forever.

Amen.

Melbourne Hebrew Congregation

THIS year's Jewish opening of the legal year was at Melbourne Hebrew Congregation in St Kilda Road.

Rabbi David Rubinfeld gave a sermon in which he discussed a reading from the Ethics of The Fathers and the Scriptures.

In that reading Rabban Shimon ben Gamliel said that the world exists upon three things — truth, judgment and peace.

Justice is a fundamental upon which the world endures; the judge who renders a correct judgment is a partner of God in creation, he said.

The congregation was also addressed by synagogue president Mr Leonard Yaffe.

He welcomed the attendees and noted the presence of members of the Bench and a representative of the State Government.

Mr Yaffe observed that it was not a gallery the likes of which many of the congregations' parents or grandparents would ever have witnessed in their countries of birth.

The service closed with a particularly rousing rendition of the hymn Adon Olam delivered by Rabbi Rubinfeld to the up tempo tune of Waltzing Matilda.

Alex Lewenberg, Justice Linda Dessau, Rabbi David Rubinfield and Chief Judge Rozenes.

Katy Barnett, Deborah Mandie, Justice Mandie, Mrs Marilyn Mandie and Evelyn Danos.

Larissa Halonkin, Justice Kellam and Margot Maylan.

Sharon Burchill, Larissa Halonkin, Justice Habersberger and Emily Howie.

Martin Ravech QC and Judge Rachelle Lewitan A.M.

Buddhist Temple

TWO thousand and four was the second year that a Buddhist Ceremony was held to mark the opening of the Legal Year. The ceremony once again took place at the Fo Guang Yuan (Buddha's Light) Temple in Queen Street, Melbourne.

The organisers of the ceremony were keen to ensure that it reflected the different schools of Buddhism active in Australia. In this task they were ably assisted by the Buddhist Council of Victoria who arranged for the attendance of various ordained members of the Buddhist community from both the Theravadan and Mahayana traditions. Approximately 40 participants, including a number of members of the Bar, distinguished guests Justice David Byrne of the Supreme Court and representatives from the judiciary of the County Court were officially welcomed by the Reverend J Kai and the nuns of the Temple. After a Dharma talk by the Venerable Santindriya of the North Victorian Buddhist Association, David Andrews, solicitor and partner at Holding Redlich, spoke on behalf of the legal profession about the relationship between the law and Buddhism. The Venerable Thich Phuoc Tan of the Quang Minh Temple in Braybrook led a meditation before participants were given the opportunity to make an offering of light to the Buddha "as an expression of generosity, a symbol of non attachment and an accumulation of merit and wisdom". The formal part of the ceremony was closed with a transfer of merit by the Venerables Ananda and Thich Phuoc Tu of the Buddhist Society of Victoria.

David Andrews, solicitor, Holding Redlich, speaking on behalf of the legal profession at the Buddhist ceremony.

Making an offering of light to the Buddha.

Participants listen to a lecture delivered on behalf of the Fo Guang Yuan Temple.

Thanks are extended to those who attended and supported the event; the Buddhist Council of Victoria, especially Brian Ashen and Michael Wells; the hosts at the Fo Guang Yuan Temple; and solicitors Angela Perry, Lian Liu, Andrew Linton and Tom Rowen, who were indefatigable in their organisational efforts.

Oscar Roos

Major Michael Mori, David Hicks' US Military Lawyer, Visits Melbourne

Sara Hinchey

ON 11 March, 2004, Marine Major Michael Mori was interviewed by Kerry O'Brien on the *7.30 Report*. Amongst other things, Major Mori spoke frankly about the process which his client, David Hicks, presently faces and the fundamental flaws in the system presently proposed by the US Government for trying those being held at Guantanamo Bay.

That interview sowed the seed of an idea, and the following day, I successfully contacted Major Mori while I was visiting Adelaide.

Much to my delight, upon hearing of the Victorian Bar's interest in and position on the issue, Major Mori agreed to meet with members in order to obtain their views on the plight facing Mr Hicks in the US.

So it came to be that on 17 March, 2004, despite only one day's notice, literally hundreds of barristers squeezed themselves into the Neil McPhee room at 1.15pm to hear this most impressive and articulate man speak, inter alia, about his experience so far, his concerns about the system and, of course, his concern for the plight of his client. Many who wanted to hear Major Mori speak had to be turned away because of a lack of space. It was, truly, an unprecedented show of solidarity amongst lawyers, and a riveting and lively hour of discussion.

Major Mori has promised to keep the Bar informed about the progress of the case against his client and may well return to Australia later this year to gather more evidence in support of the case. We wish him well in his endeavours and commend the extraordinary stance he has taken against the system imposed upon detainees at Guantanamo Bay. His outspoken support of his client's position and the courage he has displayed in defending the rule of law against ignorance and fear, is inspirational.

Sara Hinchey.

Major Michael Mori.

Barristers squeeze into the Neil McPhee room.

Justice Gaudron officially opens the chambers, with occupiers Richard Maidment, Stephen Whybrow and James Glisson.

Justice Gaudron Opens Gaudron Chambers in Republic Tower

GAUDRON Chambers was launched by Her Honour on 5 March 2004. It is a small set of chambers in the Republic Tower, 299 Queen Street. The chambers are on Level 22 and have magnificent facilities, including spectacular views over the courts, parks, Docklands and the bay. Each of the rooms has a full-width balcony. There is a large conference room/library and access to a well-equipped gym and 25-metre pool.

There are two categories of membership:

- Room with shared use of conference room. As mentioned the room has a balcony, spectacular views. It has full-length windows and sliding door. Full access to gym and pool. I have one room left for sub-let until approximately September 2004, when Richard Maidment is moving in. The rent is $1,500.00 per month.

Also, there is an option to sub-let a secure designated car park until September for an extra $330.00 per month.

Jeanette Morrish QC speaking to the gathering.

- The second type of membership is a "license" arrangement. This is designed for low usage members of chambers who do not require their own room, but want access to the conference room on a booking basis, want a place to hang their robes, have mail delivered and have a set of chambers with which to identify. This arrangement has been working very well for one local barrister and three interstate counsel. No access to gym or pool in this category. The fee is $275.00 per month.

No long-term contract required for either situation, rent paid monthly in advance, on a month to month basis.

Anyone interested can call Jeanette Morrish on 9670 0500 or 0416 087268.

The Balance of Improbabilities

By Richard A. Lawson

SOME time ago I was press ganged into a meeting that had fallen short of a quorum. Those there were grateful: I listened, voted and did my best to be polite. My reward was to be added to a committee that the meeting was appointing. And, ever since, I have been a member of this committee. Something to add to one's CV, as they say.

The committee's work is not very taxing. Its main task is to examine other people's CVs, being ones which from time to time, it receives from would-be barristers. Over the years I have read several hundred of these documents. All this reading is better described as having been an education rather than a chore. It may be that I have become an expert in CV analysis (assuming CV analysis to be a recognised field of expertise). "CV analysis experience" being itself something to add to one's CV.

The fascination with these little autobiographies is enduring. They can be long, short, smug, selective, modest, heart-felt, optimistic, informative, mis-leading and/or ridiculous — and many other things besides. But I am happy to say that I have only ever read one that was demonstrably untrue.

The helpful point is to understand that a CV, of all the adjectives just mentioned, is almost always selective. It seems that most people, when sitting down to the task of writing their CV (or adding to it as they say), do not have Lord Atkin's phrase in *Donoghue* v *Stevenson* in mind, namely, "… when I am directing my mind to the acts or omissions which are called in question". In short, the good bits go in and the bad bits stay out.

I have formed the tentative view that many of us have a couple of extra CVs inside us straining to get out. These other two versions are more selective but just as true as the official version relied upon. One of these extra versions is improbably good and the other improbably bad. Indeed, I could imagine myself writing a CV that, on one view, would see me short-listed for an Australia Day honour. But I could also imagine myself writing a CV that would probably see me locked up. Generally speaking, the CVs one gets to read are pitched at one to two steps below the "improbably good" level which is, of course, many steps above the "improbably bad".

The author at his improbably good holiday house.

The one that I have read that was demonstrably untrue ran to 17 pages. The length of a CV, by the way, is a matter that warrants its own consideration. Here I admit to prejudice and/or discrimination — mistrusting as I do anything much longer than four pages. Even the start of a CV is something calling for careful study. Some start at Year 12, some at admission to practice. By contrast, applicants may begin by noting their batting average from their time in the under nines. But I digress. Let me return to the deluxe 17 pager.

The thing that was noteworthy about these particular 17 pages, unlike many efforts of a similar length, was that I didn't start nodding off half way through reading it. The applicant, so he said, was in his late forties, happily married with four adolescent children. At least he had age as a point in mitigation. Unlike a 23 year old, this man had four decades of achievements to catalogue. Nevertheless. the more one read the more one started thinking "unprobably good".

The crunch came at pages 11 to 13. This was a list of 43 professional committees with which the applicant claimed to be, or to have been, linked. His wife, I thought, was to be likened to Mrs James Cook left to her Yorkshire stone cottage while her husband-navigator was off exploring for years at a stretch

The 43 professional committees were divided into three groups by the applicant. He was or had been an active member of 15. He was or had been a "normal" member of 14 more. And he was "passively connected" with another 14. And then I saw it. My close reading disclosed that for five years he had been simultaneously an active and a passive member of the same committee.

I grinned. One might even say I was smug. Too much time spent in my youth looking for non-existent flaws in postage stamps had paid off — finally. I became "active" myself at our own committee's next meeting. Something to add to one's CV.

Verbatim

Gardening Duties

County Court of Victoria

21 June 2002
Coram: Judge G.D. Lewis
Buttigieg v *Eldridge Glen Pty Ltd and Victorian Workcover Authority*
Dalton QC and Waugh for the Plaintiff being cross-examined by Gillies

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

Expressing Judicial Dissatisfaction

Most of us have experienced the situation in which the court calls into question the form of our pleadings or the logic of our submissions. Few, however, have been subjected to the sort of criticism which District Judge Kent in the United States District Court at Galveston expressed in *Bradshaw* v *United Marine Corporation Inc.* In granting the defendant's application for summary judgment on 27 June 2001 His Honour said:

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact — complete with hats, handshakes and cryptic words — to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.

Some Are More Equal Than Others

Federal Court of Australia

17 June 2001
Coram: Heerey J
Welcome Read-Time SA v *Catuity-Inc*
J. McL. Emmerson QC and A.J. Ryan for Applicant
D.K. Catterns QC for Respondents
(Discussion about form of orders made in High Court case)

Dr Emmerson: There's liberty to apply as to the mode of assessment. There's a certificate of contested validity and there's an order dealing with the costs that had occurred up to that stage.
His Honour: Sorry, have I missed something? Was there an injunction at all?
Dr Emmerson: There's a declaration of infringement.
His Honour: There doesn't seem to be any injunction.
Dr Emmerson: There doesn't seem to be an injunction, no, Your Honour.
His Honour: Perhaps counsel just forgot to ask for it.
Dr Emmerson: I think if one looks to see the counsel involved — K.R. Handley QC, with him J.J. Garnsey and Mr Fleisch of the London Bar …
His Honour: I withdraw that suggestion then, Dr Emmerson.

Tough

Federal Court of Australia

Melbourne 15 June 2000
Coram: Finkelstein J.
Telstra Corporation Ltd v *Desktop Marketing Systems Pty Ltd & Anor*
Emmerson QC and A. Ryan for Applicant
Shavin QC and G. McGowan for Respondent
At the close of an eight-day trial in a difficult and complex copyright case, and before reserving judgment:

Mr Shavin: This is clearly designed to be a test case and if there was guidance given by Your Honour to the participants in the marketplace it may minimise the necessity for a large number of these cases to go one after the other. If Your Honour pleases.
His Honour: Thank you. Thank you all very much. I thought constitutional cases were tough, but no longer. I will adjourn sine die.

Father Christmas (Paul Elliott QC) handing out the presents.

The Victorian Bar's Children's Christmas Party

WHAT do Twister the Clown and Milo the Magician have in common? Both stole Santa's sleigh. Or more correctly commandeered Santa's cart at the Children's' Christmas party in the Botanical Gardens.

The story goes this way … Once upon a time the good barristers had children. They mothered or fathered babies whether they could afford it or not — because they had been taught that having lots of kiddies and big families was the right thing to do.

And so there were lots of bean bags and deep breathing — no matter whether the naughty solicitors were paying outstanding accounts or not. And it came to pass that Father Christmas noticed the good barristers. For years and years he summoned them to a beautiful rotunda in the leafy environs of the Royal Botanical Gardens [soon to be renamed the Senior Peoples Open Environment for Passive Recreation] — SPOEPR.

There the children frollicked whilst the grown ups lingered on merino rugs with a chilled picnic goblet of fresh orange juice.

But things change. Progress is inevitable. Times must move on. So Santa's sleigh was judged to be too slow for modern day deliveries. Simple wooden toys, candy sticks and hoops were replaced with game boxes, DVDs, computers and gender-free international dolls. Santa was on a tight schedule. Every six minutes had to be charged to a client

And so it was decided that Santa had to be transported from the garden gates to the beautiful rotunda in a golf cart. Faster and less cruel to reindeer. And so in early years, a dear old lady, a friend of the gardens, would drive Santa to the children where simple gifts and lollies were distributed amongst laughter. But recently youth has taken over. Young keen people in uniforms who don't believe in Santa now drive the cart.

It came to pass that these modern youth fell under the spell of Twister the Clown and Milo the Magician. In modern days a Christmas party with Santa is not enough. Children at parties need to be entertained by clowns and magicians to fill their TV-infested minds. Some years ago while Santa performed, Twister

Ellena Kouris.

Alfred Kouris.

Ed Remer and son William.

Father Christmas.

Tony Burns and Deborah Morris with Georgia Burns, Sarah Burns and Cassie Stefanovich.

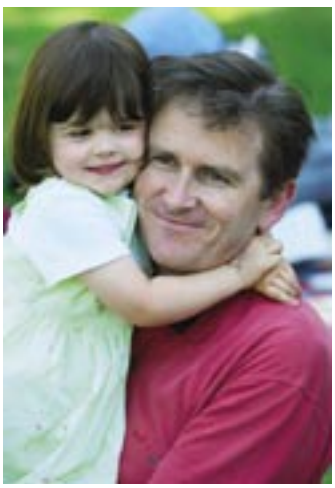
Santas cart being helped along by Mitchell Schomburgk and Nick Elliott.

Santa Claus with Christian and Miranda Gronow.

Vicki, Ellena, Alfred and Paul Kouris.

Katrin and Carena with twins Kester and Markus.

Robbie McIntosh and Francesca Halse.



Prudence and Andrew Halse.

Santa arrives.

Patrick Campbell.

Milo the magician with lunch.

Daniela Klempfner with Hugo (left), Carl and baby Hugo.

Who hasn't got a present?

disappeared with the car, leaving Santa to trudge kilometres back to the gates in 40 degree heat.

This was never to be repeated. But just like the promises of politicians it all came to nought last year. Santa, after handing out refrigerators, fee books and good cheer to the hordes of barristorial youngsters, found himself stranded. Milo had fled with the young woman and the cart.

It was a long hot walk back. But Santa met many interesting folk on that trek. Excited Taiwanese tourists who snapped at him assiduously. Dutiful Japanese who bowed and offered him tea. An incredulous Norwegian blonde who couldn't believe that Santa ever left the North Pole, let alone ventured out into 30 degree heat — she assured him that she was going to show their photo together to everyone back home to prove it.

But the Bar has now moved swiftly to deal with these problems and others.

Because the number of children at the Bar has grown and in line with current policy, an association has been formed to deal with the issues of Christmas. The association has been called The Christmas Bar Association, or CBA. The CBA decided that a permanent Santa suit should be purchased to save hire costs. However, great debate arose as to the nature of the costume and its symbolism. Many said that Santa's wig should be abolished. It was an outdated symbol of an unwanted colonial past.

Some wanted it to be made clear to children that Christmas was not usual for all, and that the name of the "gift giver" be changed from Santa Claus (S.C.) to Queer Claus (Q.C.) but this motion was lost narrowly. Some Catholics wanted Father Xmas (F.X. or F.C.) but this nomer was seen to have religious overtones. In the end it has been decided that the gift giver known as Santa Clause (S.C.) be dressed in multi-coloured overalls with a woollen beanie. Advertisements for the job will be inserted in the legal pages in a gender-free manner.

It was a long hot walk back. But Santa met many interesting folk on that trek.

The photographs on these pages testify to the success of the party as shown by the joy and fun on the faces of the children. Michael Gronow and his hard-working secretary Lisa Utting are to be thanked for all the hard work they put in in organising the event. Santa's costume can be inspected in Michael's chambers by appointment.

Santa Claus QC

The New Silks — and Their W

Name:
Cameron Clyde MACAULAY
Date of Signing Bar Roll:
24 November 1983
Areas of Practice:
Commercial Law, Trade Practices, Insurance, Professional Negligence, Corporations, Property, Retail Tenancy, Trusts, Superannuation, Telecommunications.
Readers:
Karen Streckfuss, Stanley Isaiah and Dean Guidolin.
Reaction on Appointment:
Elated and honoured.
Reason for Applying:
I felt it was time to do so.

Name:
Timothy James GINNANE
Date of Signing Bar Roll:
11 October 1979 (Read with Alex Chernov)
Areas of Practice:
Administrative Law, Employment/ Industrial Law, Trade Practices, Commercial Law.
Readers:
R. Taranto, N. Batten, D. Lane, B. Lacy, Bruce Shaw, S. Wood, J. Maclean, C. Fairfield (Split with N. Green QC) and Jonathan Forbes.
Reaction on Appointment:
Grateful to many people.
Reason for Applying:
New challenges.

Name:
Mordecai (Mordy) BROMBERG
Date of Signing Bar Roll:
June 1988
Areas of Practice:
Primarily Employment and Industrial Law but also Administrative and Trade Practices Law.
Readers:
Steven J. Moore, Peter C. Rozen, James D. Gray and Malcolm Harding.
Reaction on Appointment:
Delighted.
Reason for Applying:
Like the feel of silk!

Name:
Elspeth Anne STRONG
Date of Signing Bar Roll:
25 May 1989
Areas of Practice:
Intellectual Property, Trade Practices, General Commercial and Mediation
Readers:
None.
Reaction on Appointment:
Delighted and honoured.
Reasons for Applying:
After 14 years at the Bar I considered it was time the nature of my practice had been that I had worked with (or been opposed to) silks from fairly early on. Some of these had taken appointments and one whom I admired greatly had died. The judge to whom I had been associate also died this year. Applying seemed to offer me the chance to do more of two things I enjoyed — working up court matters with the assistance of a team and acting as a mediator in superior court proceedings.

Name:
John NOONAN
Date of Signing Bar Roll:
1984
Areas of Practice:
Common Law.
Readers:
Andrew Clements, Anna Bogan and Sasha Manova.
Reaction on Appointment:
Delighted.
Reason for Applying:
Time to accept a new challenge.

Name:
Debbie MORTIMER
Date of Signing Bar Roll:
25 May 1989
Areas of Practice:
Administrative and Public Law, Anti-Discrimination.
Readers:
Juliet Forsyth, Lisa Sarmas and Lisa De Ferrari Georgie Costello.
Reaction on Appointment:
Thrilled.
Reason for Applying:
New challenges.

Name:
James William Sturrock PETERS
Date of Signing Bar Roll:
26 November 1987
Areas of Practice:
Commercial.
Readers:
Matt Walsh, Peter A.P. Clarke, Andrew Hamlyn-Harris, Edward Heerey, Peter Fary, Daniel Crennan and Andrew Broadfoot.
Reaction on Appointment:
Honoured.
Reason for Applying:
New challenges.

Name:
Kristine HANSCOMBE
Date of Signing Bar Roll:
27 November 1989
Areas of Practice:
Commercial, Administrative, Equity.
Readers:
Judith Bornstein, Andrew P. Dickenson, Jenny Firkin, Richard Antill and Arushan Pillay.
Reaction on Appointment:
Delighted.

Name:
James Lloyd PARRISH
Date of Signing Bar Roll:
1 September 1978
Areas of Practice:
Accident Compensation/Common Law.

ay to the Top

Readers:
Chris Colman.
Reaction on Appointment:
Thrilled.
Reason for Applying:
Professional satisfaction.

Name:
Tony NEAL
Date of Signing Bar Roll:
8 December 1977
Areas of Practice:
Construction Law, Commercial Law, Native Title.
Readers:
None.
Reaction on Appointment:
Relief.
Reason for Applying:
After many years in practice I thought I'd got the hang of it.

Name:
Peter Julian RIORDAN
Date of Signing Bar Roll:
26 November 1992
Areas of Practice:
Commercial Disputes.
Readers:
Matthew Bromley, Andrew Fraatz and Justin Lewis.
Reaction on Appointment:
I thought it was nice of them to give a country boy a go.
Reason for Applying:
I hoped I would get respect. Wrong again.

Name:
Carmen Maria-Francesca RANDAZZO
Date of Signing Bar Roll:
30 May 1991
6 December 2002 (Public Defender)
Areas of Practice:
Criminal Law, Crimes (Mental Impairment).
Readers:
None.
Reaction on Appointment:
Humbled, elated and proud.
Reason for Applying:
I was encouraged by others who felt I was ready. I felt I was ready. Out of a sense of responsibility and duty to myself, my family and other barristers. I recognised the benefits to VLA clients in having access to Senior Counsel.

Name:
Jim DELANY
Date of Signing Bar Roll:
23 May 1985
Areas of Practice:
Commercial, Valuation, Insolvency.
Readers:
Alan Kornhauser, Matthew Carey, Caron Beaton-Wells, Dinusha Joseph, Justin Castelan, Tomo Boston, James Barber, Peter Crofts, David Pumpa and Marita Foley.
Reaction on Appointment:
Pleased.
Reason for Applying:
It's time.

Name:
Graham THOMAS
Date of Signing Bar Roll:
September 1976
Areas of Practice:
Crime.
Readers:
Hannebery, Vinga, A. Lavery, Saunders, Albert, Lovitt, Maguire and Hoobin.
Reaction on Appointment:
Pleased.
Reason for Applying:
Hope to have a little more time for preparation and reflection.

Name:
Fiona McLEOD
Date Of Signing Bar Roll:
28 November, 1991
Areas of Practice:
Commercial, Administrative, Common Law.
Readers:
Julianne Jaques, Michelle Wallace and Simon Rubenstein.
Reaction on Appointment:
Thrilled, honoured.
Reason for Applying:
New challenges.

Name:
John Ross CHAMPION
Date of Signing Bar Roll:
13 October 1977
Areas of Practice:
Criminal Law.
Readers:
Gregory Lyon, Daniel Dwyer, Michael Cahill, Dianne New and Jamie Singh.
Reaction on Appointment:
Very, very pleased.
Reason for Applying:
Life is too short not to have tried.

Name:
Neil CLELLAND
Date of Signing Bar Roll:
29 May 1986
Areas of Practice:
Commercial Crime, General Crime, Administrative Law, Tribunals.
Readers:
Holding, Gobbo, Tyrrell and Hallowes.
Reaction on Appointment:
Delayed.
Reason for Applying:
I was pretty sure I wouldn't be appointed otherwise.

Name:
Graeme S. CLARKE
Date of Signing Bar Roll:
22 November 1984
Areas of Practice:
Intellectual Property/ Commercial
Readers:
Margaret Ryan, Jonathan Evans, Jane Gabelich and Ian Horak.
Reaction on Appointment:
Honoured.
Reason for Applying:
To have a go.

High Court Welcomes Victorian New Silks

Victorian new silks assemble in front of the High Court.

Female new silks form a group.

The High Court welcome.

Launch of Compulsory Legal Education Program

The Honourable Justice Nettle, Chair, Victorian Bar Compulsory Continuing Legal Education Committee.

MR Chairman, your Honours, ladies and gentlemen. One might be forgiven for thinking that the last thing many of you would wish to hear at this hour of the day at this time of the year are observations by me about continuing legal education at the Victorian Bar. Thus, I will be brief.

Self-evidently continuing legal education is something that is vital to the maintenance and advancement of the already high standards of the Victorian Bar. If I may say so, therefore, the Bar Council is to be congratulated upon its decision to establish and conduct this program.

The content of the program has been determined by a legal education sub-committee comprising a group of the Bar's leaders, and each of them has brought to the task a wealth of experience based upon their practice and their previous involvement in continuing legal education at the Bar.

Broadly speaking the aim has been to take the best of the programs previously developed by the specialist Bar associations for their respective memberships, to augment them where considered desirable, and to draw them together into a coordinated Victorian Bar program directed to the current professional needs of all practising barristers. It is, however, envisaged and I have little doubt that the program will develop over time with increasing experience and changing circumstances, and that the specialist Bar associations and their members will continue to play a leading role in bringing forward new ideas and the development of new programs as part of that development. It is after all a program devised by the Bar for the members of the Bar, and it is they who have the greatest interest in ensuring the program's success.

Usually there is little profit in comparisons, which are largely a matter of subjective perception. But it is natural and I think to be desired that we in Victona should aspire to lead in whatever we do. The program has therefore been developed having regard to what is already on offer in other States, in New Zealand and in the United Kingdom, based upon a detailed survey undertaken for the Bar by Mr Ross Ray QC. It will of course be for others to judge, but it is our hope that the Victorian Bar Continuing Legal Education Program will be regarded as the leading program of its type.

May I on your behalf thank the members of the continuing legal education sub-committee who have laboured long and hard to produce this program for you, and commend it to you as unquestionably worthy of your enthusiasm and support.

Robin Brett QC, Chair, Victorian Bar Council.

Murray McInnis FM, Jeanette Morrish QC and Martin Bartfeld QC.

Barbara Walsh, Robin Brett QC, the Honourable Justice Nettle and Michelle Gordon S.C.

Paul Lacava S.C. and the Honourable Justice Gillard

Solomon Islands' New Solicitor-General Farewelled

Nathan Moshinsky was late last year appointed as Solicitor-General of the Solomon Islands. He faces a major task in assisting to re-establish law and order following the recent revolt. But he says that he is enjoying the lifestyle and the challenge. Some of his colleagues threw a farewell party for him, and below is the text of the speech given by Kurt Esser at that party.

THOSE who are here, all friends and colleagues of Nathan, would not have been surprised to hear of Nathan's appointment as Solicitor-General to the Solomon Islands. For a person who swims as often and much as Nathan, it's probably the best place on earth to be a Solicitor-General!

Close observers of Nathan will have noticed recently an important change in Nathan's wardrobe, which may have alerted them to a sudden change in circumstances.

He was leading me in a case recently and I went to his chambers early one morning. There he was on his computer wearing that black cap, looking for all the world like something out of a Polish stetl. When I asked him, "Why the cap, Nathan?" he said, shivering, "Because I'm so cold".

Nathan Moshinsky.

By the end of that day, he was proudly walking around the lobby of Owen Dixon wearing a Panama hat, looking like some wealthy planter out of a Joseph Conrad novel.

In the meantime, of course, it was confirmed that he would be flown to Honiara, and in anticipation of the trip, he bought the Panama! So why not wear it home?

Already, Nathan has made a quick visit to Honiara and has sampled, personally, what professional life might be expected to be like as S.G. in a struggling, not to say impoverished, Third World country.

We in Owen Dixon Chambers East or West, don't know how lucky we are. Most of the time our telephones work, most of the time we have a continuing and uninterrupted electricity supply and usually our attendance in chambers is not summarily cut short by a tropical cyclone. Mostly our secretaries can speak English and usually they know much more about computers and the Internet than we do.

I can tell you from experience, having tried to speak to Nathan in Honiara, the telephonist isn't quite up to the standard of Ellen in Glenn Meldrum's office.

If we went to the Solomon Islands, we'd all be in for a very rude shock. Nathan tells me that professional life in his new place of work isn't full of nubile bikini-clad lagoon-swimmers and perfectly mixed, chilled cocktails served by a waiter in the fading afternoon as you look over the water, through palm trees, into the setting sun.

As we all know, Nathan is entering something more like a war zone than a tropical paradise. One cannot assume, even now, that the rule of law actually applies, throughout the Islands.

I have often wondered, as a relatively forgotten son in a Jewish family — that boasts a father who was a doctor, and an orthopaedic surgeon in this generation — how a lawyer can be hero in law, in something like the same way doctors are often portrayed as heroes.

I always thought the most heroic thing a lawyer could do was to deliver an interesting lecture on the rule against perpetuities.

Now Nathan has shown us another way. What he is doing is truly heroic and I'm sure even he will have his mettle tested ... although I must say, I couldn't think of anyone more suited to the office than Nathan.

Can you imagine the job description?

What's needed is someone who is an impeccable lawyer, with a vast range of both personal and professional experience across lots of diverse areas of the law especially in criminal law, administrative law, commercial law, constitutional law, and a smattering of human rights law wouldn't go astray.

Then you'd need someone with lots of courage, lots of insight, lots of application and lots of patience, who would never become irritated or frustrated, even in very trying circumstances, and someone who would easily mix into a totally different culture, and in fact, someone who would actually enjoy the new cultural experience.

Above all you'd need the common touch, a sense of humour, plus judgment and integrity that are beyond question.

As you all know Nathan was born in China, of Jewish parents escaping Soviet Russia after the Revolution. He was educated in Melbourne and went to Melbourne University to study law and arts.

Nathan has had an extraordinarily wide practice. Even now he is happy to appear in any tribunal, do a murder for either side, try a civil case before a jury, apply for special leave from the High Court, which he did as recently as last Friday, do a complicated trade practices case, or appear in a nasty, difficult, financial bust-up in the Family Court. For a while Nathan worked as a prosecutor in Hong Kong.

He is an all rounder, the likes of which we very rarely see at the Bar these days. I'm sure Nathan's period away will create a huge gap in the upper end of Glenn Meldrum's List.

As we all know Nathan is a very serious practitioner of yoga and meditation. Painting is Nathan's great love and consuming passion. He needs it as a counter-balance to a hectic and demanding life as a silk. As a painter he is both gifted and highly productive. He's also a great swimmer.

Nathan is a great traveller and mixer, urbane, but thoroughly at home in the bush and on foreign soil.

It really is as if the whole of Nathan's life has been chartered to equip him as being a superbly well qualified Solicitor-General for the Solomon Islands, as she reaches an extremely important phase in her formative development as a nation.

In a week we have seen Arnie elected to high office in California, that nice man Mr Ruddock appointed as our Federal Attorney, and that sympathetic and charming lady Amanda Vanstone appointed as Minister for Immigration, what a relief we have an incumbent who fits his office!

Nathan, you'll be missed by your colleagues and friends. We look forward to your return to chambers whenever that might be. To you and to Ann we wish you good luck. We know you both have the fortitude to meet this new and daring challenge.

You've done us proud already, you'll do us proud again. We wish you and Ann every good fortune.

I'd like to finish by observing an ancient Chinese, Jewish, Buddhist, Hindu, forensic ritual, lost in the mists of time, but recently adopted by peoples in the South Seas ... and have Judge Sue Cohen, of the County Court, present you both with a lai.

A toast to Nathan and Ann.

Shifting Sands

IT is a cause for wonder that we manage to communicate more or less successfully, so many are the changes in the meaning of words over time. The shift of meaning causes problems for lawyers as they struggle to draw sensible or convenient meaning from statutes or contracts. The difficulty increases in proportion to the age of the document to be construed.

Luckily for our daily conversation, the shift of meaning usually takes decades or centuries, although newly minted words often go through an early period of instability.

Documents written before the start of the 19th century are likely to present familiar words whose context will make the astute reader pause to wonder what the writer truly meant. For example, in *Henry VI* Part 1 Shakespeare has York address Joan of Arc ("la Pucelle") as *miscreant*. Whilst he may have disagreed with her views or her conduct, *miscreant* in its modern sense (OED2: *depraved, villainous, base*) seems not to be what York intended.

Similarly, but less clearly, Lear's exchange with Kent:

> Kent: Now by Apollo, King,
> Thou swearst thy gods in vain.
> Lear: O vassal! Miscreant!

The original sense is *false believer*. In times when religious belief was more important than it is now, it was natural that the word acquired the strong pejorative sense given it by Johnson: *a vile wretch*. The original meaning dates from the early 14th century and was current until the mid 19th century. The current meaning emerged at the end of the 16th Century. Thus, both senses were current when Shakespeare wrote. It seems clear that he intended York's comment in the original sense. Lear's comment is made in response to a comment about religious belief, but it may be that he was so vexed by daughters and circumstances that he intended the modern meaning and a blunt insult.

I have discussed elsewhere the slow decline of *tawdry*, which once signified necklaces sold at the fair at Ely Cathedral where St Audrey lived and died. *St Audrey-Lace* was fine and pure, but eventually cheapened to *tawdry lace*. *Tinsel* has followed the same path. Now meaning cheap and showy (unfairly attached to Sydney, which Melburnians refer to as Tinsel-Town) it once had something of the divine spark. It comes into English from old French *estincelle* which in turn traces back to Latin *scintillare* — to sparkle or glitter. From the same root we have *scintilla* — a spark ("not a scintilla of evidence") and *scintillating* ("brilliantly and excitingly clever, especially in conversation").

This last definition, which is the current popular sense of *scintillating* comes from the *New Oxford Dictionary of English* (1998). It has no equivalent in the *Oxford English Dictionary* (2nd ed, 1989). A similar sense is recognised by the *Chambers Dictionary* (1993), the *American Heritage Dictionary* (2000) and the *Macquarie Dictionary* (2nd ed, 1991, 3rd ed, 1997). The *Random House Dictionary* (2nd ed, 1987) also recognises this sense, as does the *Webster's Encyclopaedic Dictionary* of the same year.

It would be misleading to say this gap in the OED2 is baffling — at least, it would have been until the mid-17th Century. Originally, *baffle* had nothing to do with confusion or puzzlement. It referred to the treatment of a knight who had dishonoured his chivalrous obligations: he was (in person, or in effigy) hung up by the heels, his escutcheon was defaced and his spear broken; he (or his effigy) was then subjected to the abuse and humiliations of the crowd. The person subjected to these indignities was said to have been *baffled*, and a *baffle* was a disgrace or an affront. By the time of *Bailey's Dictionary* (10th ed, 1742) and Johnson (1755) the only sense recognised was the modern one. Presumably this was for either of two reasons: the age of chivalry had passed, and its usages had lost their relevance; or knights of the realm had so improved their behaviour as to make their public disgrace no longer relevant.

Perhaps the knights exercised their influence at court to change the system.

In those days however, *influence* had a somewhat different meaning: it was the ethereal liquid which was thought to flow from the stars and so affect the character and destiny of men and the behaviour of "sub-lunary things" generally. In short, *influence* was the force which underpins the pseudo-science of astrology. Strictly, mortal men could not exercise influence, but were subject to it. Modern times have reversed that — we seek to influence others and deny the theories of the astrologers.

Early medicine thought disease could be caused by these forces from the stars. The Italian for *influence* is *influenza*. When an epidemic of one disease or another swept the country, it was referred to as an *influenza di febbro scarlatina*, or an *influenza di catarro*, and so on.

In 1743, an epidemic spread across Italy and then the rest of Europe. A report in the *London Magazine* referred to "News from Rome of a contagious Distemper raging there, called the *Influenza*". The name stuck, and became specific to the particular viral infection whose symptoms are well known. Later epidemics occurred in 1762, 1782, 1787, 1803, 1833, 1837, 1847 and a particularly bad one in 1889. The worst recorded epidemic of influenza was in 1918, in which 30 million people died.

Note that in the *London Magazine*, the catarrh-like disease was referred to as a *Distemper* — a word which then signified any "deranged or disordered condition of the body or mind". Its primary sense now is the specific catarrh-like disease of dogs (and, according to the *Macquarie Dictionary*, horses).

Originally, a distemper was thought to result from a disordered state of the humours. The *humours* were the four fluids of the body: blood, phlegm, choler and black choler. *Choler* is bile. *Melos* is Greek for black, so black bile is *melancholy*. Thus the human tempers associated with the four humours were *sanguine*, *phlegmatic*, *choleric* (or *bilious*), and *melancholy*.

Each of these words is familiar, but they are not now used as diagnostic tools. Only *sanguine* presents linguistic problems: because of its connexion with blood, it has oddly ambiguous meanings. As a humour, people in whom it predominates are thought to have "a ruddy complexion and a courageous, hopeful, and amorous disposition". However, it also means "causing or delighting in bloodshed, bloody-minded". Thus, unless the context resolves the ambiguity, describing a person as sanguine may not improve their humour.

Although the primary current sense of *humour* concerns mirth or amusement (its adjective *humorous* has only that sense), the earlier sense is called on when we speak of ill-humour or bad humour.

And so the process goes — words shed old meanings and take on new ones, and it happens slowly enough that we can keep pace with the fashion (*fashion*: originally the action or process of making something, a sense retained in the verb — *to fashion* a thing). Our language is built on shifting sands.

Paradoxically, the current sense of the word *sand* has been stable since the 9th Century.

Julian Burnside

A New Sup I Think No

By David H. Denton S.C.

RECENTLY there has been some suggestion in *The Age* that the magnificent Victorian era Supreme Court Building in the centre of Melbourne's legal precinct should be replaced. Such a suggestion does not find favour with many of those who regularly identify that place as their workplace: Melbourne's barristers. The informed criticisms that have been made by Chris Dale, President of the Law Institute, are directed at the age of the place and perceived difficulties with computer facilities, security and acoustics. For many of us sometimes we are probably grateful not to be able to hear our learned friends at all!

However, Chris Dale's criticisms should not be ignored. Indeed, many other observations may also be made. It is just that I disagree with the need for a new building.

There is no doubt that the Supreme Court building is in need of careful refurbishment and additional space. The building opened in 1884 to then accommodate the Supreme Court, the County Court, the Courts of General Sessions and the Court of Insolvency. Each of these Courts, in one way or another, has now been placed in their own gleaming modern building in Melbourne's legal precinct. However, the Court is still where it has been for the last 120 years and is in need of special attention.

Each year the building is open during Law Week for a closer viewing by members of the public. What they observe on their tour is that no two courtrooms are the same. They see that some courtrooms are simply beautiful. Others they see are simple. To get between courts they walk along bluestone flagged corridors reminiscent of a penal institution rather than a palace of justice. They wander into the magnificent setting of the Supreme Court Library under the dome styled on the Four Courts in Dublin but see the way the library has been forced to eat

reme Court Building?
t.

into areas to accommodate all manner of legal books. They do not see the judges' chambers and those of their staff members. If they did they would note these areas are entirely inadequate and yet they would understand they could not really be much improved upon within the context of the present building structure.

What the public will realise is that the Court is really the same as any old Victorian building. It needs sympathetic renovation and additions. That is, like any place requiring renovation on limited ground space — it needs to go up. The aesthetics of the exterior stone work will need to be replicated by the addition of two further floors. For my part I can see no difficulty whatsoever in a sympathetic two floor addition all round the perimeter of the Court to provide new Court rooms and much needed new judicial chambers, not only for the judges but for their associates and for the support staff of the Court. In my view there is also a pressing need to actually bring the Masters of the Supreme Court back within the Court's physical environment.

David Denton S.C.

Whilst considering other useful building works for the Court I suggest that the entire bluestone cobbled courtyard which surrounds the isthmus-like structure of the Library Dome be enclosed within an atrium. Perhaps this could be done in the style of the glass pyramid of the Louvre. As the Court has no hall or reception area whatsoever an atrium would provide an area for the benefit of ceremonial and public occasions. Further floors would also allow for the reinstatement of the ground and first floor of the Library to its uncluttered original state.

Whilst drawing up my wish-list further consideration could be given to adding further floors above what is the Old High Court building site. This site has become the seat of the Commercial Courts of the State but there is a need for it to be physically joined to the main Supreme Court Building for the sake of security and utility.

If the suggested works are undertaken it is likely that the Court will be able to continue dispensing justice from the same venue for another 120 years. Quite frankly, I don't know of anyone that really wants to build a new Supreme Court building. The building means so much to every lawyer in this State. It is the place we get admitted to practice as barristers and solicitors in the solemnity of the Banco Court; we obtain urgent injunctions in the Practice Court; we appear for our clients in the many court-rooms; we welcome and farewell our colleagues as judges; and, we attend the library looking like generations before us, for that elusive one case authority that can add hope to our client's case.

As this building is a living and integral part of the Government of this State it has always been only a matter of time before the building would be required to undergo some serious building additions. The fact that it has lasted more or less untouched for 120 years is a testament to those who designed the building with such great foresight as to its position and function within our judicial system.

Let's hope the Attorney-General's working party charged with preparing a master plan for the building's future takes public submissions and is emboldened to do what is right for the Old Supremo and Victoria.

Ten Years of the Women Barristers Association

Supreme Court Library

By Samantha Marks, Convenor

ON 11 November 1993, the Women Barristers Association met for the first time. Its purposes were, and remain: to provide a professional and social network for women barristers; to promote awareness, discussion and resolution of issues which particularly affect women; to identify, highlight and eradicate discrimination against women in law and the legal system; and to advance equality for women at the Bar and the legal profession generally.

On 11 November 2003 the WBA was ten years old. Much has been achieved in that time in pursuit of its goals, by the many barristers who have served on its committee over time and the many members of the Bar, the judiciary and the government who have supported those goals.

In 1998 the Victorian Bar Council commissioned the report "Equality of Opportunity for Women at the Victorian Bar". That report led to a number of positive changes at the Bar, including the creation of the Women Barristers' Directory which now provides a useful reference point for those seeking to brief female barristers, and for information about the WBA generally. The Victorian Bar has now adopted a Model Briefing Policy for the briefing of counsel at the Victorian Bar, and the Law Council of Australia has agreed to adopt a model equitable briefing policy, the terms of which are being finalised. The policies highlight the desirability of all barristers being selected for their skills and competency, regardless of gender.

In the ten years that WBA has been in existence, there has been a significant increase in the number of women being appointed to the judiciary and to the ranks of senior counsel, and Victoria has seen the appointment of its first female Attorney-General, Solicitor-General and Chief Justice of the Supreme Court. The

Chair of the WBA Fiona McLeod with the guest speaker Justice Sally Brown.

Film maker Sarah McLeod receives flowers from her sister Fiona after the showing of their film "Raising The Bar".

Victorian Bar has introduced the parental leave policy, which makes it possible for barristers taking parental leave to pay reduced rent for six months — a supportive and encouraging policy which has assisted in the retention of female barristers in particular. An increased awareness of the presence of women at the Bar table, and the submissions of the WBA, have led to courts adopting a policy of referring to those at the Bar Table as "counsel" rather than "gentlemen". WBA hosted a session entitled "Women and the Law" at the 2003 Commonwealth Law Conference; presided over various CLE seminars; has been involved in the commissioning and hanging of portraits

Samantha Marks, Fiona McLeod S.C., Judge Frances Millane, Jeanette Richards, Judge Susan Cohen, Felicity Hampel QC, Helen Symon S.C., Fran O'Brien S.C., Judge Rachelle Lewitan (absent Pamela Tate S.C.).

Guests at the anniversary function applauding after the showing of the film.

in Owen Dixon Chambers of former and current female justices; hosted many social events for women at the Bar and their supporters; provided encouragement to female law students at Melbourne and Monash Universities; and made submissions on appropriate matters to the Bar Council, the Law Council of Australia and government.

At the ten-year anniversary celebrations of the WBA, which took place prior to Christmas last year, the historic first screening of the WBA film "Raising the Bar" occurred. The film provides an overview of the history of women at the Victorian Bar. It includes historic footage of the life of the first female barristers of the Victorian Bar, and interviews with many current judges and silks, and of a junior barrister being the representative face and voice of the future. As Fiona McLeod S.C. said in introducing the film, it is "part documentary and part theatre, and its aim is to record and reflect in some small way the views of a generation". The showing of the film created a buzz of excitement, and it is already in demand by various community groups. Justice Sally Brown spoke at the celebratory dinner which then took place at the Essoign, being both informative and amusing with a speech touching on issues of equality and gender bias.

New Wine Column in Association with the Essoign

By Andrew Bristow

Bowen Estate Coonawarra Shiraz 2001

THE 2001 Bowen Estate Coonawarra Shiraz is rated as the best ever by wine critic Jeremy Oliver. Winemakers, Doug Bowen and his daughter Emma have produced a concentrated but silky Coonawarra Shiraz. This wine has a small nose at first and the concentrated fruit becomes more obvious after decanting. It has a deep crimson colour. The wine is peppery and balanced. It is high in alcohol at 13.5 per cent. The fruit is yet to fully develop and it is expected that it will be at its peak drinking in about five years' time. This wine is available at the Essoign Club for $35 a bottle ($30 takeaway). I would rate the 2001 Bowen Estate Shiraz as a "Junior Silk", good quality now but with a number of good years ahead of it.

Bench and Bar Golf Day

THE Annual Golf Day between the Bench & Bar and the Law Institute of Victoria took place at Kingston Heath Golf Club on Tuesday, 23 December 2003. The Bench & Bar team regained the Sir Edmund Herring Trophy. The Bench & Bar team comprised 22 members. The aggregate score of +9 defeated the Law Institute who had an aggregate of +7.

The leading score for the Bench & Bar team was produced by Con Salpic, partnered by Stuart Garanziotis (the son of Manny Garanziotis S.C.). The next best score was returned by John Richards S.C. and Rob Shepherd.

The weather was fine and the course was in excellent condition for the event. We will return to Kingston Heath in December this year to defend the trophy.

The Bar wins. Gavan Rice holds the trophy.

Cottrill M, on the 15th.

Jim Lally bunker on 16th hole.

Rod Smith lines up his 40ft put on the 16th, it did not even touch the sides.

Winners: Con Salpic and Stuart Garanziotis.

Timothy Tobin watches his putt on the 16th green. Watching are Patrick Dalton, Greg Carr and Gordon Elkington.

Searching the rough for his ball, John Pilley on the 17th.

Judge Keon-Cohen on the 17th, a little excited about his putt.

Bob Quayle out of a bunker on 16th hole.

Michael Bishop lends a helping hand to his playing partner.

George Spiliotis, John Richards S.C., James Mangopoulos and Robert Shepherd resting at the 15th.

Gavin Rice at the 17th. How about that — it's in?

On the 17th green, Gerard Hyland. It just missed!

On the 17th, J. O'Callagnan gets the ball airborne and then watches it's flight.

Judge Hart concentrating on his putt, watched by Judge Keon-Cohen.

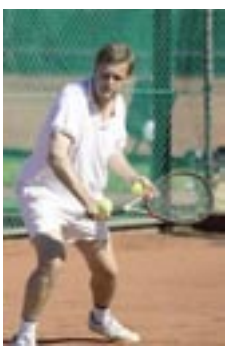
Bar Graciously Surrenders Trophies

Ray Gibson (Bar)

Peter Boyle (solicitor)

David McSteen (Bar)

Elspeth Strong (Bar)



Howard Mason (Bar)

"IT is my sad and painful duty to announce that the trophies for winning the overall tennis day and for the best performed pair have both been won by the Law Institute." Thus the news was conveyed to the assembled players enjoying glorious sunshine on the balcony of the Kooyong stadium on Tuesday 23 December, 2003. Unfortunately, the J.X. O'Driscoll trophy for the winning team on the day, in this annual contest between the Bench and Bar against the Law Institute, and the Flatman-Smith trophy for the best performed pair, both of which had stood so proudly in the Victorian Bar Council chambers for the preceding twelve months, were surrendered to the Institute on what was, apart from the results, an otherwise extremely enjoyable day.

The members of the Institute team, no doubt smarting from their previous year's loss and whipped into better form by their demanding captain, Peter Maybury, thoroughly outclassed the Bar team. Our erstwhile and gallant captain who led us to victory the previous year, Tom Danos, was absent in another jurisdiction, and the team evidently missed his leadership.

In the B section Fennessy, despite the handicap of a most unworthy and incompetent partner, managed to strike some blows for the dignity of the Bar, and McSteen and Ray Gibson performed very strongly to win three of their four sets. Elspeth Strong S.C., leading her enthusiastic junior Howard Mason, promised much but failed to deliver, whilst Rattray Q.C. and His Honour Ryan J. had some success, albeit less than the occasion demanded. Redd and Fraatz were lent to the Institute in order to even up numbers from where they provided valuable support to the Bench and Bar, through their games being counted in our favour.

Unfortunately, in the A section we did not make much headway. Senathirajah and Harrington were very competitive but unable to clinch a set. Pauline and Bigmore were in there fighting, and our stars from last year and the inaugural winners of the Flatman-Smith trophy for the best performed pair, Rob Williams and Daryl Brown, were competitive in their first set but fell away afterwards.

In short, the Institute won by 17 sets to 8. Wardle and Maybury for the Institute were clearly the best performed pair this year, conceding no sets and only four games in total.

Despite the disappointment of the result, the tennis was very competitive and extremely enjoyable, and the

Continued on page 70

Wigs & Gowns

Ross Macaw QC's motor sailor Marie Louise IV *hard on the wind on the waters of Port Phillip.*

THE 2003 Wigs & Gowns Regatta was held on the waters of Port Phillip on 22 December 2003. With gale force winds forecast and a stiff 25 to 30 knot south westerly from early in the morning, the usual large fleet size was somewhat depleted.

The 2003 Wigs & Gowns Regatta was the first year a change in format has been introduced to allow for a "cruise in company" rather than a race, however, the weather conditions, including the odd shower, meant that many crews elected to remain on shore at the Royal Yacht Club of Victoria enjoying pre-lunch festivities.

Ross Macaw QC won the Neil McPhee QC Memorial Trophy in his motor sailor *Marie Louise IV* and John Digby QC won the Thorsen Perpetual Trophy in his 45ft sloop *Capriccio*. Whilst the weather conditions were far from ideal, they did not dampen the spirits of those that attended. Next year is hoped to be bigger and better again.

Peter Rattray QC, Ross Macaw QC, Melanie Sloss SC and James Mighell at the trophy presentation.

The finale to yet another fantastic day was the return trip from Hobsons Bay to St Kilda aboard *Capriccio* where Digby's hospitality both pre and post berthing was enjoyed by all present.

Next year is hoped to be bigger and better again.

Peter Rattray QC and
James Mighell

Brooking On Building Contracts (4th edn)

By D.J. Cremean, B.A. Shnookal and M.H. Whitten
Lexus Nexis Butterworths 2004
Pp. i–l, 1–378, Further References 379–380, Index 381–390

BROOKING on Building Contracts was first published in 1974. Thirty years later the book is in its fourth edition. The work, although having a Victorian focus, is sufficiently detailed and scholarly to be relevant to building law across all Australian jurisdictions and includes extensive reference to Australian, New Zealand and English court decisions and relevant legislation in all States.

The work is aimed at a wider audience than just lawyers and is useful for all those concerned with building contracts including owners, builders and contractors, arbitrators and legal practitioners generally.

The contractual basis of the building contract is extensively dealt with, and commentary on the central aspects of contract law is illustrated generally by reference to decided building cases. Further, there is extensive discussion on the interpretation of contractual documents including the operation of the *contra proferentum* rule, parole evidence rule and the issue of whether reference may be had to surrounding circumstances including prior negotiations and subsequent conduct in interpreting a contract. There is a separate chapter on implied terms specifically dealing with the implication of terms such as those regarding workmanship, materials, best endeavours, time and permits.

There are specific chapters dealing with tenders and subcontracts.

Having discussed the contractual aspects, subsequent chapters deal with topics including time for completion, rise and fall clauses, payment, approvals and certificates. The often litigious aspects of building works arising from variations and defects are also dealt with in discrete chapters.

Finally, a miscellany of chapters consider other aspects of building law including building disputes and the potential liability of particular persons involved in building works such as builders, local authorities, architects and the engineers.

This excellent work is both authoritative and accessible — it will provide guidance to those experienced in the nuances of building law as well as providing a practical and accessible source of information for non-lawyers. The extensive footnotes and further reference section enable the reader to further explore the case law and legislative underpinnings, and access other materials that provide further analysis and commentary in relation to the law of building contracts. This work is to be commended to all those who have an interest or need to understand building contracts in the Australian context.

P.W. Lithgow

Principles of Australian Public Law

By David Clark
Lexis Nexus Butterworths 2003
Pp. i–xlviii, 1–297, Bibliography 298–322, Index 323–334

PRINCIPLES of Australian Public Law is part history, part politics, part legal philosophy, part constitutional law and part administrative law amongst its many characterizations. It focuses on both Federal and State aspects of public law.

Politicians and commentators (and lawyers) often talk knowingly about "responsible government", "legislative power", the "executive" and "human rights". Lawyers more frequently bandy terms such as "judicial independence", "judicial review", "separation of powers" and the "rule of law". The great pleasure of *Principles of Australian Public Law* is that such doctrines and catchphrases are discussed and analysed, from an historic and legal perspective in an Australian context.

Human rights forms a discrete chapter and includes discussion of theoretical and practical aspects of a Bill of Rights that provides the reader with a satisfying overview of the history, current law and possible future direction of this debate in Australia.

Although *Principles of Australian Public Law* looks and reads like a legal text, it is in fact an invaluable resource for those involved in or interested in politics and government. The work is scholarly in its legal analysis and informative as to the history and background of many of the central doctrines of Australian public life such as the powers of the executive, legislature and the judiciary.

Principles of Australian Public Law has much to commend itself not only to lawyers, but also for commentators and analysts of political life, and students of Australian history and politics.

P.W. Lithgow

Law of Costs

By G.E. Dal Pont
Lexis Nexis Butterworths, 2003
pp. i–cxxxii (Table of Contents, Preface, Abbreviations, Table of Cases and Table of Statutes) 1–1037 (including index).

IN his preface, the author states that the focus of this book is "on the law pertaining to costs in Australia". Indeed, *Law of Costs* is a cross-jurisdictional, comprehensive compilation of the law of costs in Australia and it deals with all applicable statutes, rules of court and relevant cases. It does not purport to be a match for other voluminous, multi-jurisdictional loose-leaf services which include scales of costs, forms and the like. As a single volume text, this work is virtually without peer.

At page I of the prologue, the author illustrates the centrality and importance of the law of costs in the following way:

> No other area of law can lay claim to so expansive a pervasiveness to a lawyer's practice. The issue of costs is ... central to the existence of a legal profession, in the past, at present and into the future. The reason for this is that costs are the lifeblood of the legal profession, crucial to the livelihood of the majority of lawyers. Orders for costs are, moreover, an effective way of encouraging settlements, discouraging inappropriate behaviour by litigants, and for controlling standards in the profession.

In the following 29 succinct chapters, Dal Pont places the law of costs in Australia in context by making reference to the comparable statutes, cases and rules in our common law contemporaries, the United Kingdom, Canada and New Zealand. Whilst the text has an overt focus on the modern law of costs, context is also achieved by reference, where appropriate, to the history and development of the law of costs.

The text is divided into seven parts as follows:

Part I — Costs between solicitor and own client
Part 11— Costs between party and party
Part 111 — Quantification of party and party costs
Part IV — Costs in appeals
Part V — Non-party costs orders
Part Vl — Costs in criminal cases
Part VII — Securing costs entitlements

Within these parts, the text is divided into chapters containing plain English accounts of all areas of the law of costs, providing statements of "general rules"

and any deviations there from (where possible, on a State by State basis).

Law of Costs will either have the answer to your query or put you on the right path to the answer. It brings together a sometimes mystifying area of the law that is in a constant state of flux. The book is extensively referenced and provides an important centre-point from which a line of inquiry can be taken. If you are a solicitor or a barrister practising in any Australian jurisdiction, G.E. Dal Pont's *Law of Costs* must be in your library.

Kate McMullan S.C.
and Simon Pitt

Pollution Law in Australia

By Zada Lipman and Gerry Bates
Lexis Nexis Butterworths, 2002
Pp. i–xxiii, 1–448, soft cover

THE authors of *Pollution Law in Australia* inform us that it constitutes the first comprehensive work on pollution law and policy in Australia. There are seven contributors to the book who tackle topics as diverse as the legislation governing the manufacture and disposal of hazardous substances, the apportionment of liability for land contamination, waste disposal and management strategies, and the methods for dealing with the impact on the Australian marine environment of pollution caused by ships and from land-based sources.

This work provides an interesting and useful overview of both current and historical approaches to pollution control in the Australian legal landscape. The discussion commences with a consideration of the more modern approaches to environmental management. Modern pollution control legislation seeks to unite regulatory mechanisms with economic incentives in an attempt to move away from an exclusive focus on pollution control towards the pursuit of environmental protection and improvements.

This initial overview is followed by a detailed analysis of the use of economic instruments, civil remedies and criminal offences in the environmental law field. The imposition of statutory criminal liability for corporations and personal liability for directors and managers is also dealt with in some detail. It is interesting to note from Zada Lipman's discussion of criminal offences and enforcement in Chapter Four that Victoria was the first State to integrate land, air and water pollution controls into a single statute, which led the way to a similar approach in all other States.

In an era where we are told that each Australian generates an average of one tonne of waste per annum, this comprehensive commentary on legal responsibility and liability in the area of pollution law is welcomed. *Pollution Law in Australia* seeks to provide a useful tool for regulatory authorities, corporate officers, legal practitioners, students and all who are interested in and concerned about the effects of pollution on our unique Australian environment. It is successful in achieving this goal.

S.R. Horgan

Crime

By David Ross QC
Law Book Company 2002
pp. v–lxxiv, 1–1045,
Table of Cases 1047–1164,
Table of Statutes 1165–1214

THIS book is a comprehensive and detailed reference to more than 300 terms relevant to the practise of criminal law. It is arranged alphabetically by term, with major subheadings set out as separate numbered paragraphs and helpfully identified in the table of contents.

The book covers topics at the black letter heart of the criminal law, as well as explaining concepts surrounding its practise. For example, it addresses terms such as "aid and abet", "grievous bodily harm", "nolle prosequi" and "possession", evidentiary rules like corroboration, credit and the rule in *Browne* v *Dunn* (1893) 6 R 67, and ancillary issues such as counsel (ranging from duties and responsibilities through to liability in negligence and the need to robe) and the correct pronunciation of certain words. The scope of the book is at times astounding but occasionally obscure: for example, it includes a description of the steps via which DNA profiling is carried out, and almost three pages are devoted to a questionably relevant entry on "jazz".

Where appropriate, headings contain references to statutory provisions in each Australian jurisdiction. The author makes prolific reference to case law and frequently quotes both trial and appellate judgments to assist the interpretation and application of the principles which he addresses.

The work is engagingly written and peppered with witticisms, making it a pleasure to read.

The combination of a comprehensive table of contents and the alphabetical order in which the book's headings appear would render an index to this book of less than usual utility. Indeed, an index would add to the book's already voluminous size and repeat to a large extent the 69-page table of contents. However, the absence of an index denies be reader the ability to find references to a particular topic within other topics and otherwise to cross-reference terms. The result may be that an important principle is lost to a reader due to their lack of knowledge as to its precise nomenclature: for example, what proportion of non-criminal practitioners would know to look for the heading "Anunga rules" when dealing with the difficulties faced by an Aboriginal defendant without a full grasp of the English language? References to other topics which appear within the content of a heading go some way toward rectifying that problem.

That minor problem aside the work is a hardy reference for criminal practitioners. For those who only stray occasionally into criminal practice, it is an indispensable tool which explains fundamental concepts in plain language and provides comprehensive references to primary materials from which submissions can be drawn.

Stewart Maiden

Proof and the Preparation of Trials

By Andrew Palmer
Law Book Company 2003
pp. vii–xii, Table of Contents
xiii–xviii, List of Figures xix–xx,
1–164, Notes 165–180, Bibliography
181–186, Index 187–194

THIS is a book about how best to construct a case, and then organise evidence so as to prove that case in court. The publisher states that the book "fills the gap between evidence texts focusing on the law of evidence and ... advocacy texts focusing on the techniques of trial preparation". The book purports to be the first such text in Australia. Its author is a member of this Bar and a senior lecturer at the University of Melbourne.

The book provides a useful toolkit for the advocate to use when thinking about his or her case. Chapters are logically organised in the order in which they will be used in the preparation of a case: Part A deals with preliminaries to case prepa-

ration, including the preparation and use of chronologies, and investigation. The author expounds and propounds the use of adbuction ("the imaginative process of developing working theories of the case"), retroduction ("the identification of tests which can be used to confirm or disprove those theories") and investigation (performing those tests) to formulate and investigate potential theories of one's case. Part B deals with the development and proof of a case theory. Part C explains the final preparations involved in organising a case considering questions of admissibility, arranging the order of evidence, and preparing the various stages of address and examination.

The core of the book is Palmer's explanation of how to create a case theory and present the proof of that theory in a way which demonstrates its strengths and weaknesses. That model can then be used to order the presentation of evidence and structure the arguments to be presented in court. Palmer describes a process of determining what evidence is needed to address the factual propositions on which the case turns. He explains the different ways in which individual pieces of evidence can relate to one another and to the facts that an advocate must prove, and provides a diagrammatical means by which those relationships can be represented.

Palmer's analysis of facts, evidence, argument and the relationship between the three is based on scholarly works identified throughout the text and in a bibliography. For the most part, he draws on that well of scholarship without falling into it. Select parts of the text suffer from the description and citation of sources included in the body of the text. In a practical work such as this, those details would be more appropriately included in the notes section at the rear of the book.

Liberal use of diagrams and examples (the latter frequently drawn from the work of Arthur Conan Doyle) assists the reader to understand and digest the text. The author also provides textual and diagrammatical analyses which illustrate his methods on a website, www.evidence.com.au. While that method of presentation is a convenient way of removing voluminous illustrative matter from the text of the book, readers must worry that the website will prove less enduring than the book itself.

This is an excellent, practical book for advocates and scholars of practical advocacy. Undoubtedly there are infinite ways to prepare a case for trial. Palmer does not set out to analyse or critique any selection of them. Rather, he explains a number of useful techniques that a practitioner can adopt in his or her own way, and comfortably use in practice. Disorganised advocates will benefit from a literal application of many of the techniques described in the book, and those who already have a structured approach to preparation might find a gem or two which will augment their existing practice.

Stewart Maiden

Admiralty Jurisdiction Law and Practice in Australia and New Zealand (2nd edn)

By Professor Damian J. Cremean
Federation Press 2003
Pp. i–xxxii; 1–302 (including index)

IT is six years since the first edition of this work by Professor Cremean. Like the first edition, this edition is a compendious analysis of Admiralty Jurisdiction based around the *Admiralty Act 1988* (Commonwealth) and the *Admiralty Rules 1999* (Commonwealth) and the corresponding New Zealand legislation.

The concept of proceedings in *rem* and the apparent complexity of the various types of maritime claims can be confusing for persons not familiar with this area of the law.

Professor Cremean's text carefully, clearly and authoritatively deals with the complexity of Admiralty law and the peculiarities of its practice and procedure (for example the peculiarities of arrest, bail and caveats against arrest in respect of vessels and that wonderful procedure for admissions enabled by the "preliminary acts").

In circumstances where shipping is the primary vehicle for international commerce it is not surprising that a substantial part of the text deals with jurisdictional issues.

As with the first edition of Professor Cremean's work this edition is an extremely handy practice volume including the full text of the legislation and the rules and the author's commentary. Some useful precedents are also provided by the author. The case law cited by the author has been updated and provides both a representative and comprehensive analysis of the application of the Act.

All commercial lawyers at some stage or another deal with shipping or admiralty. This is a readable and authoritative text.

S.R. Horan

Annotated Insurance Contracts Act (4th edn)

By Peter Mann and Candace Lewis
Law Book Company 2003
pp. ix–xxx, 1–452, Index 453–465

THE scope of this work is not completely disclosed by its title: it is actually an annotation of several related Commonwealth acts and statutory instruments: the *Insurance Contracts Act 1984*, the *Insurance (Agents and Brokers) Act 1984*, the *Insurance Contract Regulations 1985*, the *Insurance (Agents and Brokers) Regulations, and the Insurance (Agents and Brokers) Decision-making Principles No 1 of 1994*. It also contains the text of the *General Insurance Code of Practice* and the *General Insurance Brokers' Code of Practice*, bereft of annotation.

While the Agents and Brokers legislation was repealed by the *Financial Services Reform Act 2001* (FSRA) regime, it is subject to a two-year transitional period and thus remains in the book. The work has been updated to include reference to the changes achieved by the FSRA. The preface assures readers that Agents and Brokers legislation will not survive into the book's next incarnation. Presumably it will be replaced by the appropriate provisions of the Corporations Act and any other relevant legislation.

Each annotated section is accompanied by annotations which include its legislative history. Usefully, the commencement date of any amendments is also indicated where necessary. Important concepts are defined by reference to precedent and by cross-reference to other sections where relevant. Significant space is devoted to a detailed analysis of important decisions. Obviously, major changes in the new book include a discussion of cases decided in the two years since the previous edition, including *FAI General Insurance Co. Ltd* v *Australian Hospital Care Pty Ltd* (2001) 204 CLR 641, *Moltoni Corporation Pty Ltd* v *QBE Insurance Ltd* (2001) 205 CLR 149 and *Gibbs Holdings Pty Ltd* v *Mercantile Mutual Insurance (Australia) Ltd* [2002] 1 Qd R 17 (to name but a few). While comprehen-

sive, the text is not overly verbose.

The Insurance Contracts Act is not a complete statement of the law relating to insurance contracts in Australia. The common law relating to insurance has developed over hundreds of years and involves complicated topics including subrogation, contribution and *uberrimae fidei* (utmost good faith). Where the legislation touches on those concepts, the annotations would be improved by reference to textbooks or seminal articles which fully describe the operation of those important parts of the law. Those changes would make the book more useful to all members of its intended audience. In particular, the additions would be appreciated by professionals and students who may not have the passing familiarity with the concepts that experienced insurance practitioners will.

Like earlier editions, the book is a handy and accessible reference. This up-to-date edition deserves a place in the library of anyone whose work involves insurance.

S.J. Maiden

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

By Andrew Keay and Michael Murray
Law Book Company 2002
Pp. v–lix, 1–540, Bibliography 541–552, Index 553–573

Insolvency Law and Policy

By John Duns
Oxford University Press 2002
Pp. v–lx, 1–512, Index 513–523

THE number, size and infamy of recent corporate collapses have generated some remarkable phenomena: reporting of the details of insolvency administrations outside the business pages, letters to the editor about employee entitlements and the interaction between business and politics, and perhaps less predictably, celebrity accountants! Possibly a further result of the recent outbreak of large-scale insolvency has been a flurry of books about and surrounding the topic. Several new textbooks, and new editions of old books, have been released in the last two years, along with general non-fiction works concerning the collapse of Ansett, One.Tel and HIH. This trend seems set to continue, with at least one further such book to be released in the wake of the HIH Royal Commission.

This review compares two general Australian insolvency textbooks published last year. Andrew Keay has written three prior editions of *Insolvency: Personal and Corporate Law and Practice*, and has been joined by Michael Murray in penning this fourth edition. Keay is a prolific author in the field of insolvency. He has written books on various topics concerning Australian insolvency law, and his work is frequently published in local and international law journals. Michael Murray is the general editor of the Australian Insolvency Bulletin, and has written extensively on insolvency outside that publication. *Insolvency Law and Policy* is John Duns' first book on insolvency law. He has published numerous articles in the area, and has also written books on trade practices and consumer protection.

Keay and Murray have arranged their book in three parts. The first is a general introduction to insolvency. Part two deals with bankruptcy, and part three covers corporate insolvency. Each of the latter parts is divided into similarly structured chapters beginning with the initiation of the relevant insolvency process, then dealing with its effects, the administration of assets in insolvency and the termination of the insolvency process. A separate section in each part deals with "non-terminal" administrations — Part X arrangements and debt agreements in bankruptcy, and schemes of arrangement, receivership, voluntary administration and deeds of company arrangement in a corporate context. The discussion of bankruptcy prior to corporate insolvency creates a logical progression given the latter's continuing reliance on concepts of bankruptcy law. The chapter structure, along with its comprehensive index and reasonable internal referencing, make navigating Keay and Murray's book a pleasure.

Duns covers much the same ground, and in a similar order. He discusses insolvency policy, courts and administration and the concept of insolvency before embarking on a tour of the typical insolvency "life cycle". However, Duns groups corporate and personal insolvency together for the purpose of discussing the mechanics of their operation, allowing him to helpfully compare and contrast the two regimes in the course of his narrative. The final chapters of his book deal with cross-border insolvency, deceased estates, and concurrent bankruptcies and offences, before finishing with a brief chapter entitled "Reform and Conclusions". Many of the issues canvassed in those chapters are not covered in detail by Keay and Murray, and they are interesting and useful additions which contribute to Duns' rounded discussion of the law. However, the index to Duns' book is far less thorough. The book also lacks the helpful bibliography provided by Keay and Murray, which guides the reader to works that provide more detailed or specialised commentary than can be crammed into a general textbook.

Both books stand out from the raft of books on general insolvency law, but for different reasons. *Insolvency Law and Policy* is an academic text more suitable for readers interested in the underpinning concepts and history of insolvency. It discusses interesting issues confronting legislators and judges in some detail. In parts of the book (for example, the chapter on the concept of insolvency) this is useful for students and practitioners alike, because a detailed grasp of the legal meaning of insolvency and the means of proving it is crucial in practice. However, the detailed dissection of theory takes away from the practical use of the book in some parts. In contrast, *Insolvency: Personal and Corporate Law and Practice* is a more rounded, more easily accessible guide to the practical aspects of insolvency. Its authors provide practical advice and insights which are largely absent from Duns' book. For example, they offer advice as to the courts' likely approach to applications to set aside statutory demands and bankruptcy notices, and explain when consent orders are commonly agreed to on hearing creditors' petitions. That practical instruction, along with the book's comprehensive index and logical structure justifies the inclusion of *Insolvency: Personal and Corporate Law and Practice* as the set text for the Insolvency Practitioners' Association of Australia's Insolvency Education Program.

Regardless of the significant differences between the two books, students and practitioners will benefit from the presence of either book in their library. Each is sufficiently broad to provide a thorough understanding of the basic concepts of insolvency law, while containing enough detail and sufficient reference to other works to guide those who need further specifics.

Stewart Maiden

Intellectual Property: Text and Essential Cases

By R. Reynolds and N.P. Stoianoff
Federation Press 2003
Pp i–xl, 1–545, Index 54–552

Intellectual Property: Text and Essential Cases is a comprehensive work that provides ready access to the law of intellectual property in an Australian context. The authors have targeted this text for students, nevertheless the work provides a useful overview of the law of intellectual property for practitioners and others interested in intellectual property law.

The usefulness to practitioners of text books devoted to cases and materials is questionable — too often they are a series of selected extracts supplemented by questions, but lacking a coherent commentary or analysis. Clearly such texts are primarily teaching resources, and their value for practitioners is limited.

This work, *Intellectual Property: Text and Essential Cases*, does not suffer from the pitfalls of many text and materials case books. There is substantial outline of the law, together with relevant, comprehensive commentary setting out the general principles in each area of intellectual property law. As an adjunct to the commentary there are extracts from significant cases that represent or highlight salient features of the particular area of intellectual property law under discussion. Thankfully the extracts are found at each chapter end, which enables the text to be read complete, with reference to the extracts if desired. The work has a strong Australian orientation with many of the extracted cases being recent Federal Court decisions.

There are specific chapters devoted to copyright, patents, designs, trademarks, confidential information and the protection of business reputation. The "new" intellectual property rights in relation to plant breeders' rights and circuit layouts also are dealt within discrete chapters. It is interesting to note that although the *Circuit Layouts Act 1989* and *Plant Breeders' Rights Act 1994* have been enacted for a number of years, there are no cases the authors deemed of such significance that extracts were incorporated into this text. Other areas of "new" intellectual property such as DNA advances and the impact of computer technology receive only cursory commentary.

Readers of *Intellectual Property: Text and Essential Cases* will find the text clear and concise. By incorporating extracts of salient cases at chapter's end it is possible for the reader to gain a clear insight into the law of intellectual property in Australia. This text is commended to those interested in intellectual property, whether they be students, practitioners or others who have a particular interest in intellectual property law.

P.W. Lithgow

Conference Update

1 May 2004: Melbourne. 8th Annual Family Law Intensive. Contact Anita Kwong. Tel: 9602 3111. Fax: 9670 3242.
2 May 2004: Seoul, Korea. 14th Annual Meeting of the Inter-Pacific Bar Association. Contact Convention Team, Han Jin Travel Service Co. Ltd. Tel: 82 2 726 5556. Fax: 82 2 778 2514. E-mail: IPBA@2004seoul.com.
8–14 August 2004: Perisher Blue, NSW. Australian Medico-Legal Conference. Contact Rosanna Farfaglia. Tel: (07) 3236 2601. Fax: (07) 3210 1555. E-mail: conference@qldbar.asn.au.
9–15 August 2004: Valle Nevado, Chile. Employment Law and Business Immigration Conference. Contact Dennis Campbell. Fax: 43662 835171, E-mail: cils@cils.org.
24–28 August 2004: Naples. Association Internationale des Jeunes Avocats 42nd Congress. Contact Association International des Jeunes Avocats. Tel: 322 347 3334. Fax: 322 347 5522. E-mail: office@aija.org.
29 August – 2 September 2004: Geneva. YIA Congress. Contact. Union Internationale des Avocats. Tel: 331 4488 5566. Fax: 331 4488 5577. E-mail: uiacentre@wanadoo.fr.
12 September 2004: Beijing. 17th International Congress of Penal Law. Contact Mr Liang Yi. Tel: 8610 6618 2218. E-mail: website@chinalawsociety.com.
16 September 2004: Florence, Italy. Pan Europe Asia Medico-Legal Conference. Contact Rosanna Farfaglia. Tel: (07) 3236 2601. Fax: (07) 3210 1555. E-mail: conference@qldbar.asn.au.

Bar Graciously Surrenders Trophies

Continued from page 64
occasion was once more voted a resounding success. The timing of the match being during the afternoon again seemed to work well, with convivialities on the clubhouse verandah continuing into the early evening. The Bench and Bar has this year returned to being competitive but lacking the fire power to combat the big guns of the Institute. Maybe there are a few pennant players reading this who might be interested in participating in the next match to be held during the week prior to Christmas this coming year.

Chris Thomson