VICTORIAN BAR NEWS

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Judge Frank Walsh: 'A Reasonable Entertainer' Stars at Bar Dinner

Welcomes: Justice [illegible], Justice Whelan Justice Hollingworth and Federal Magistrate Bennett ☐ Farewells: Chief Justice Nicholson AO, RFD and Judge Neesham ☐ Obituary: John (Jack) Anthony Strahan QC ☐ Ms Junior Silk Takes Poetic Licence to Bless the 2004 Bar Dinner ☐ 'A Reasonable Entertainer' Hits the Spot with the Frank Walsh Vic All Stars ☐ Elegance, Erudition, Enchantment and Elan ☐ Third Party Appeals Against Works Approvals: A Personal Journey ☐ The Bar library: All Dressed Up With Somewhere To Be ☐ Children's Court of Victoria Website ☐ Rights and Values ☐ Slang II ☐ Wine Report ☐ You Say 'Q.C.', I Say 'QC', You Say 'S.C.', I Say 'SC', Let's Call the Whole Thing Off! ☐ Criminal Bar Dinner ☐ Oh, Say Can You Sue?

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Is Practising at the Bar More Difficult Today ?

TALES of doom and gloom abound at the Victorian Bar, but is there any substance to these tales? Is it more difficult to practise as a barrister today than in the past?

There are not many cases being listed in the County and Supreme Courts. Mediation has ruined litigation. There are no large commercial cases needing the talents of dozens of barristers. There are no Royal Commissions. Those practising criminal law have seen a real decline in the fees paid to them. The amount of common law proceedings have been decimated by the statutory requirements to prove serious injury and the recent restrictions placed on medical negligence and the like. The law is becoming more technical and difficult to understand. The costs involved and the time spent on administration have increased. Both Federal and State Governments are always thinking up new ways to limit representation. These are just some of the complaints that can be heard in the corridors of the courts and Owen Dixon Chambers.

But those who practised back in the days of Selborne Chambers will tell you that there was no work around then. Young barristers had to wait many years before they could be paid in guineas. The naked light bulbs and linoleum of chambers did not provide an instant living. Things were just as difficult.

Some believe that things were better in the seventies and the eighties. The workers compensation jurisdiction was at its peak, as were barristorial visits to the Flower Drum. There were no pre-trial conferences, compulsory mediations or round-table chit chat before a case got to court. Those practising in common law could command a whole list. Whiplash cases and small industrial injuries were plentiful. There were plenty of Royal Commissions into failed banks and the like providing work for the commercial Bar. Alan Bond was in full flight together with the rest of the white shoe brigade which provided vast amounts of work

to barristers. Then the excesses of the eighties ceased.

The effects of the Accident Compensation Act and the Transport Accident Act decimated the ranks of the common law Bar. Those cases not deemed to involve serious injuries all disappeared. The Kennett Government in 1997 even went so far as to abolish the right to common law litigation for injured workers. Even though the present government reinstated these rights there are technical restrictions on the right to sue which have been made even more restrictive for injuries occurring after 1999.

The days when junior barristers used to have a number of briefs in the Magistrates Court seem to be a thing of the past. No longer does a junior barrister regularly go to the Magistrates Court with a crash and bash, Family Court access dispute, a criminal plea or a landlord and tenant dispute.

In days past it was considered to be a good thing to be a generalist — a person who could practise in a number of areas of law. With the increasingly technical nature of many areas of law, and the specialist nature of practice in particular courts and tribunals, it is becoming difficult *not* to be a specialist. Indeed the recently appointed Mr Justice Kaye seems to be one of the last of those who could practise in crime, common law and commercial matters.

The increase in specialisation is to the detriment of the junior members of the Bar, particularly in an ability to practise advocacy. Many junior barristers complain that they do not get the opportunity to go to court and exercise these skills but are locked away in their chambers hard at work on their computers.

There appears to be much more administration and time wasted on regulation. GST has brought with it the ogre of the BAS, much form filling and the regular need to pay tax rather than a one-off hit at the end of the year. Certainly GST has not brought a direct benefit to barristers. With the new professional boards there is more need to fill in forms to become registered "as a practitioner".

A search of the list of civil cases in the County Court will show that there is not much there and certainly there is not a great deal going on in the Supreme Court. Many complain that even when a case is listed in the Supreme Court it is often difficult to obtain a judge when the case is first listed. The County Court

civil list used to contain many contract claims, testator family maintenance and building cases. Nowadays the majority of cases seen in these lists are serious injury applications and common law industrial and transport proceedings. Even these have dwindled with the changes to the Accident Compensation Act which makes the obtaining of a serious injury certificate in order to initiate proceedings even harder.

Comparisons are often made between the Supreme Court and the Federal Court. It is said that the Federal Court is more efficient with its docket system of listings. It is "customer friendly" and accommodates the needs of clients and practitioners more readily. However, in defence of the Supreme Court it is argued that it has three times the work of the Federal Court and that a docket system is not practical in these circumstances. But both the Supreme and County Courts are looking seriously at these problems of listings and delay in both their criminal and civil jurisdictions.

Family law seems to have an increased share of customers, however, there are threats that a tribunal will be set up from which lawyers will be excluded. This is a further concern in other areas of practice. Those practising in immigration law are continually under the threat that their clients' right to representation will be taken away. The State Government took away workers' rights to common law in 1997 and, of course, acts and legislation have been brought in restricting the rights of plaintiffs in medical negligence and other professional negligence areas. Much of this is at the behest of insurance companies.

There is concern among many of the members of the commercial Bar. They point to the need for some extremely large takeovers or other types of fight. There is a concern that many of the large cases are being heard in Sydney rather than Melbourne. Many large commercial disputes are being settled by solicitors without the involvement of barristers past the initial pleading stage.

The cost of being a barrister has risen. The Bar subscriptions themselves have skyrocketed. Senior Counsel now pay over $3,500.00 to be a member of the Victorian Bar. Many say that the only tangible thing that a barrister gets from these fees is the *Bar News*.

There is a shortage of chambers at the moment. Further, many of those going back into the renovated Owen Dixon East claim that the rise in rent is unnecessarily high. Those enduring the rents in Owen Dixon West say that their rents are unreasonably inflated to offset the renovations and the costs in maintaining Barristers' Chambers.

The cost of insurance has increased dramatically along with the time spent in filling out the paperwork in order to obtain compulsory professional insurance. The latest premiums have been increased by something in the order of 10 per cent in contemplation of the possibility of the High Court overturning the principles of *Giannarelli* which protect barristers from being sued in negligence for what they say and do in court. If the *Giannarelli* principle is not overturned by the present proceedings before the High Court, can barristers expect a decrease in premiums? A most unlikely prospect.

And what of fees themselves? Does the average barrister today earn as much as she/he would have 20 years ago? Certainly those who practice criminal law would say "no". The constraints placed on fees by Legal Aid and the fees paid for prosecution have seen a real decline in the fees paid in this jurisdiction. Although the media is very keen to point to the high fees achievable by a small section of the Bar in the commercial marketplace, the reality is that the average barrister is not earning as much and perhaps is even earning less than before. As in society the gap between rich and poor is increasing.

Despite the apparent difficulties the numbers at the Bar are increasing. The Readers' course has been reduced to two months to accommodate up to 100 people possibly coming to the Bar this year and three intakes amounting to up to 150 next year. Junior barristers must pay for this privilege. Can the Bar cope with such increased numbers? Only time will tell.

But are these just the same complaints that have been going around for many years? Is it just a question of age? There is always a tendency to look at the past through rose-coloured glasses. Some would say that increased competition is good for society as well as for the Bar itself. Perhaps it's just because it is the end of the financial year and that having to write out many cheques to obtain a few tax deductions causes the barristorial mind to wander, ruminate, become anxious and depressed, and then go on — again.

The Editors

A Transition Year Ahead for the Bar

THE SUPREME COURT SHORT VACATION

I hope that those members of the Bar who were able to take a break during the recent Supreme Court short vacation had an enjoyable and refreshing time.

THE ABA CONFERENCE

I was fortunate enough to be able to attend the Australian Bar Association Conference in Florence. It was very informative and interesting, with papers on a number of diverse topics.

The location of the conference overseas has been questioned in public comments, with the implication being that conferences should not be held outside Australia. Such criticism is uninformed. Certainly the location in Florence made the conference attractive for a number of Australian barristers. There were over 400 registrants, and it is difficult to see why that should be regarded as a bad thing. The location of the conference also facilitated the inclusion by the ABA of a number of speakers who were advocates and academics from Italy, France, the United Kingdom and the Republic of Ireland. These speakers, coming as they did from legal systems that are different from ours, made fresh points about a number of important topics. There was a very interesting session, for example, on expert witnesses. It was also valuable to be able to speak informally to these practitioners and academics from other systems of law at the conference's social events. I took the opportunity to speak to Stephen Irwin QC, the chairman of the English Bar, both at the conference and afterwards, about several matters of common interest, including the training of advocates and the appointment of silk.

SENIOR COUNSEL

A new protocol for the appointment of Senior Counsel in Victoria is being developed. As previously noted in this column, the Victorian Attorney-General announced some time ago that the State

Government would not be involved in future appointments of Senior Counsel, and this means that the system must change.

A small sub-committee of the Bar Council is presently discussing a proposed protocol with the courts, who are of course fundamental to the process. I hope and expect that it will be possible to make a general announcement in the near future.

It is important to understand that the EOBP is not an "affirmative action" policy. It does not require the briefing of women in any particular matters. It does not require women to be preferred to men. It is more properly characterised as a "consideration" policy, concerned only with equality of opportunity.

EQUALITY BEFORE THE LAW

One matter that has occupied much time in the Bar Council is equality of opportunity for women barristers. It also seems to be of great interest to the press. The Victorian Bar played a prominent role in securing the adoption of an Equal Opportunity Briefing Policy ("EOBP") by the Law Council of Australia. That is now our own policy, and has been widely accepted and adopted. The Law Institute has supported this initiative, and we have now begun a program of meetings and seminars with law firms, briefing agencies and our own barristers' clerks. There will be a Bar CLE seminar on the EOBP on 26 August 2004.

It is important to understand that the EOBP is not an "affirmative action" policy. It does not require the briefing of women in any particular matters. It does not require women to be preferred to men. It is more properly characterised as a "consideration" policy, concerned only with equality of opportunity — to ensure that consideration is given to whether there are any qualified women available for a brief. Assuming there are, it does not require one of them to be briefed. The professional obligation is always to brief the best available barrister, regardless of gender. This is clearly and explicitly stated in the explanatory notes circulated with the EOBP:

> The EOBP is not an affirmative action or quota policy. It advocates, as part of the briefing process, that reasonable endeavours be made to identify and genuinely consider appropriate women barristers as suitable for briefing in a particular case and for a particular client. However, at the end of the day, the overriding duty remains on a legal practitioner to brief, or counsel and barristers' clerk to recommend, the best available barrister for the particular case — whether that counsel be male or female.

RECENT AND CURRENT PROJECTS

Acting Judges

The Victorian Attorney-General has raised once again a proposal to appoint Acting Judges. I set out the Bar's position in some detail in this column of the Spring 2003 edition of the *Victorian Bar News*. We are working to formulate a constructive response to the Department of Justice Discussion Paper.

Crime, Corruption and Commissions

In Law Week, the Criminal Bar Association sponsored a public lecture by the Honourable Sir Edward Woodward on the problems of crime and corruption in Victoria, and in June it co-sponsored with the Monash University Law School, the Monash Department of Justice and Criminology, the Law Institute and the Fitzroy Legal Service, a public seminar: "Crime, Corruption and Commissions: Future Directions for Victoria's Criminal Justice System". Lex Lasry QC was one of the presenters at the seminar.

There is a consensus that the Ombudsman's Office is, in general, not the appropriate body to be investigating crime and corruption in Victoria. This is not in any way to criticise the current Ombudsman, who appears to be conducting the investigation of the recent spate of gangland killings with vigour and determination. A committee has been established to prepare a concrete proposal for a more permanent process to be put to Government, if possible, before the Spring session of Parliament, beginning at the end of August.

BLAAAM withdrawn for revision

On 23 July 2004, very shortly before this edition of *Bar News* went to print, the House of Representatives Standing Committee on Legal and Constitutional Affairs tabled in Parliament the report on its Inquiry into the exposure draft of the *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004* — aptly called, in the Law Council Insolvency & Reconstruction Committee submission to the House of Representatives Committee, "BLAAAM". On the same day, the Commonwealth Attorney-General announced that the Government had decided to withdraw and revise the draft Bill.

BLAAAM would have set aside the philosophy of the present provisions dealing with transfers to defeat creditors, namely that there must be a connection between the transfer and the debtor's solvency at the time of the transfer. It would have allowed the trustee in bankruptcy to take control of property that had been transferred many years before the bankruptcy, when there was no hint or expectation of insolvency. Transactions which society has always held to be acceptable in arranging a family's affairs for the reasonable protection of the family would be subject to being set aside retrospectively on the basis that the purpose of the transaction was deemed to be "tainted". It would have placed the burden on the bankrupt and the recipient of the property to prove that the transfer was not made for such a purpose.

The Victorian Bar took a lead in criticising the claimed "consultation" process and made a substantial and detailed individual submission on the initial proposals which were later embodied in BLAAAM. The Law Council had carriage of submissions on BLAAAM, and members of the Victorian Bar contributed to that effort through the Law Council Insolvency and Reconstruction Committee and the Family Law Section. It is very pleasing to see that this severely flawed idea is to be re-thought.

It has been an honour and pleasure for me to serve as Chairman. Before I took up the position last September, I was well aware that it would require a lot of time and effort — I had seen how much my predecessors had put in. Even so, it took on a whole new dimension when viewed from the inside.

Other projects

Many members of the Bar participated in the conferences and consultations leading up to the issue of the Victorian Justice Statement, attended the Commonwealth Attorney-General's meeting with interested parties concerning his defamation law proposals, and have contributed to Law Council submissions in relation to the proposal to establish a Families Tribunal (a serious issue on which, thankfully, it was announced just before this edition of *Bar News* went to press, the Government intends not to proceed), human rights, alternative dispute resolution, Crown copyright, and the Commonwealth Attorney-General's civil justice strategy initiative. We have commented on or made submissions on Limitation of Actions Act proposals, anti-money laundering reforms, unfair contract terms, civil aviation discrimination amendments, the Migration Amendment (Judicial Review) Bill (jointly with PILCH), a review of Victorian perpetuities legislation and a review of Building Contracts Security of Payments legislation.

MEETINGS WITH ATTORNEYS-GENERAL AND SHADOW ATTORNEYS

Members from the Bar Council have met informally with the State and Commonwealth Attorneys-General and Shadow Attorneys-General from time to time to discuss current issues, such as the proposed reform of double jeopardy laws, BLAAAM, the proposed Families Tribunal, Judges' superannuation, legal aid, and the Hicks and Habib situations and trials.

BAR COUNCIL ELECTIONS

By the time you read this column, you will have received the notices for this year's Bar Council elections. The Bar is fortunate that so many of its members are willing to be nominated. Participation in the election process is good, and those elected have served willingly and with dedication. I'm confident that this year's election process will continue that tradition. For the first time in many years, I will not be taking part in it.

It has been an honour and pleasure for me to serve as Chairman. Before I took up the position last September, I was well aware that it would require a lot of time and effort — I had seen how much my predecessors had put in. Even so, it took on a whole new dimension when viewed from the inside. There is a large and constant stream of correspondence, and a liberal sprinkling of communications from individual barristers with questions, comments and suggestions. There is also of course the occasional complaint and the even more occasional word of praise.

These things have all contributed to a year that has been extraordinarily stimulating and, on the whole, highly enjoyable. One factor that has contributed greatly to my enjoyment of the task, and indeed the ability to perform it at all, is the assistance that has been provided by an enormously wide range of people.

First, there are the members of the Bar Council itself. We meet fortnightly in full session, and all members are involved in several Bar committees or associations as well. The level of debate is high, and matters that come before the Bar Council receive full consideration. We may not always get it right, but I think we go about our decision-making in the proper manner. As Chairman, I have often been asked to comment on matters publicly, sometimes before the Bar Council has had a chance to consider them. When necessary, I have done so; but in fact most of the issues have related to matters that have already been considered by the Bar Council in some way.

Then there are the quite remarkable number of members of this Bar who serve on committees of the Bar, in the various subject area Bar Associations, and as Bar appointees on boards and committees of external bodies such as the Courts, Government, Legal Aid, the Law Council of Australia, the Australian Bar Association, the Universities and the Leo Cussen Institute. Without them the Bar simply could not function properly.

In addition, there are many barristers whom the Bar Council calls upon for assistance with specific matters. I cannot think of any occasion on which any member of the Bar has declined to work on a submission to Government, the Courts or the various law reform agencies in his or her area of expertise, often on a very short time line, and often involving hours, even days, of concentrated work, and sometimes an appearance to put oral submissions. This work is difficult and important, and the members of the Bar who lend their assistance contribute enormously to the public good, and entirely from their own generosity of spirit.

The Ethics Committee is a striking example of a constant commitment, in most cases for a number of years. The Committee meets fortnightly, and for each meeting there is a substantial body of materials (usually two lever arch files) requiring careful reading and consideration. Members of the Ethics Committee are also constantly available and called on for consultation in person or by telephone, and give immediate advice as needed on call.

Another striking example of the work, and quality of work, by members of the Bar (none of whom were, as it happened, members of the Bar Council at the time) is the recent establishment of the Bar Compulsory Continuing Legal Education Program. In little more than three months, Justice Nettle and his Continuing Legal Education Committee created a superlative program. They began work in September 2003. The program was ready for launch in December 2003, and hit the ground running in February 2004.

The subject area Bar Associations and their members have held a large number of Bar CLE seminars, workshops and the like. Chambers lifts and notice boards are constantly bedecked with a rainbow of coloured notices advertising CLE sessions. The sessions have been of high quality and have been very well attended.

PACIFIC CONNECTION

In the Summer 2003 edition of *Bar News*, I wrote in this column about the advocacy workshops the Bar has been conducting in Papua New Guinea for the last 14 years. In particular, I detailed the four workshops that had taken place over the previous 12 months. In September and October this year, we shall once again be conducting workshops in Papua New Guinea and, for the first time, a workshop in the Solomon Islands, where Nathan Moshinsky QC is now Solicitor-General.

The Solomon Islands workshop in September is part of the AusAID Law & Justice Section's Institutional Strengthening Program. There will be two streams, one for Clerks of Courts and another for Magistrates and legal officers of the Attorney-General's Department, the Office of Public Prosecutions and the Public Solicitor. The Solomon Islands Chief Justice and the Registrar of its High Court will also be participating in the program. Justice Eames will lead the team supported, of course, by Barbara Walsh. Bar members instructing will be Jack Rush QC, David Parsons S.C., Fiona McLeod S.C. and James Mighell.

In October, we shall be sending a double team to Papua New Guinea, and running two workshops concurrently, one at the Legal Training Institute, and the other for Government lawyers and the Ombudsman's Commission. Director of Public Prosecutions, Paul Coghlan QC will lead the double team supported by Barbara Walsh. Justice Coldrey hopes to come, and the rest of the team will be Jeanette Morrish QC, Duncan Allen, Geoffrey Steward, Martin Grinberg, Ronald Gipp and Julie Condon.

BAR ADMINISTRATION AND THE RETIREMENT OF EXECUTIVE DIRECTOR DAVID BREMNER

The work of Bar members is supported by the Executive Director and the staff of the Bar Administration. David Bremner has been our Executive Director since April 1997. He announced his intention to retire at the end of June this year, but generously agreed to continue until our new Executive Director, Christine Harvey, is able to begin.

David will be greatly missed. His work has been exemplary. His keen intelligence and analytical skills, his unflappable calm, his encyclopaedic memory, his sensitivity to nuance and detail, and his tireless and selfless industry have served the Bar well. In Bar Council deliberations, he is not intrusive; but in responding to questions, or in very occasionally volunteering information, he is brief, balanced and to the point. On the Law Council Committee of constituent body administrators, he has effectively represented the Victorian Bar and served the wider profession.

David brought a new level of professionalism to Bar administration and Bar finances (which he manages with the able assistance of Mal De Silva), particularly in the introduction of forward financial planning. He also provided valuable insights and support to the Chairman and Board of Barristers Chambers Limited in returning BCL to a sound financial footing.

Recent projects in which he has distinguished himself include the Bar's

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engagement in the Victorian Government process of revising the Legal Practice Act, and in Law Council work on a National Practice initiative. His work with Michael Shand QC and the Professional Indemnity Insurance Committee has been invaluable.

Looking at what one could describe as departments under David's leadership, Anna Whitney is a department unto herself. She excelled herself once again in the organization of this year's Bar Dinner, reported on in this edition of *Bar News*. Her organisational skills are extraordinary, and an essential support to the work of the Chairman and Bar Council. Anna's work is unobtrusive and always efficient. She is a vital support to the Chairman.

Barbara Walsh continues to administer the Bar's Legal Education activities effectively and gracefully. She is primarily responsible for the very substantial task of administering Compulsory Continuing Legal Education, a task she has taken on without blinking. She has for years been a prime mover in our activities in the Pacific nations, and in September, she will have a week in the Solomon Islands organising the Bar's advocacy workshop, referred to above. In October, she will be in Papua New Guinea, supporting the two concurrent workshops for the Legal Training Institute and for Government lawyers and the Ombudsman's Commission. Barbara is ably supported by Liz Rhodes and Deborah Morris.

Debbie Jones and Cath Mukhtar are vital to the efficient operation of the Ethics Committee, receiving and investigating complaints and putting together materials for consideration by the Committee. They have the difficult task of dealing not only with persons who make complaints against barristers, but with the barristers against whom those complaints are made.

Ross Nankivell works on enquiries from Government, from opposition parties, and from various law reform agencies for the review of existing legislation, proposed legislation and proposals for change. He works closely with members of the Bar in their specialist areas of practice, with the Criminal Bar Association, which does a massive amount of work in this area, and with the Law Council of Australia. He also gathers information for, and drafts, speeches for the Chairman. I am frequently complimented on a speech I have made at a welcome or farewell, or on the quality of a Bar submission on some topic or other. These compliments are gratifying but embarrassing, as they really ought to be directed to Ross.

Alison Adams has, for many years, been the Bar archivist on a part-time basis, and continues to bring order out of chaos. She can be relied upon to find practically anything, given reasonable notice — a particularly notable achievement since, for well over a year now, so many materials have been in off-site storage.

The team is completed by our secretarial and administrative staff: Rosa Globan, Michele Woolnough and Gabrielle Incigneri. Daphne Ioannidis, for very many years our full-time receptionist, provides part-time support in the monumental task of copying and organising of materials for the Ethics Committee.

NEW EXECUTIVE DIRECTOR

We are very fortunate to have attracted Christine Harvey to be the next Executive Director of the Victorian Bar. Christine has practised in the Australian Capital Territory, and sat as a Special Magistrate. She has been CEO of the Australian Capital Territory Law Society, and Deputy Secretary General of the Law Council of Australia. Most recently she has been the CEO of the Royal Australian Institute of Architects. I had some limited contact with Christine in the past when she was at the Law Council, and Ross Ray, who has been on the Law Council for a number of years, had much more. One thing that I shall regret about finishing my term of office is that I will not have the opportunity to work with Christine. She is extremely able, and will bring a wealth of experience to the position.

We are very fortunate to have attracted Christine Harvey to be the next Executive Director of the Victorian Bar.

BAR ADMINISTRATION BACK IN OWEN DIXON EAST

The Bar Administration has moved back from Douglas Menzies Chambers to Owen Dixon Chambers East, now on the fifth floor. This is a great relief to all.

Robin Brett QC
Chairman

Justice Statement: 'Affirms the Rule of Law as Integral to a Properly Functioning Democracy'

JUSTICE STATEMENT

IN the last edition I wrote of the pending release of the Justice Statement, a groundbreaking analysis of the Attorney-General's portfolio and a vision for our legal system as it matures. On 27 May I was proud to present the Statement to Parliament and the wider community but, despite being the product of enormous hard work by my Department and legal sector stakeholders, the presentation of the Statement was not a culmination but instead an inception. The Justice Statement signals openly the terrain which Justice will explore in the short and long term. In doing so it makes clear that, if we are to fulfil the promise of our legal system and shape one that is co-operative, flexible and compassionate, we must start from a recognition that the law is there not to be alienating and remote, but for the protection and benefit of the community — building the law's authority on lucidity and inclusion, rather than mystification.

Never before has Victorian law had such clarity of direction under an emphatic statement of our belief in a system that reveres the rule of law and recognises equality, fairness, accessibility and effectiveness as essential to the operation of any truly democratic society. It is an exhilarating road ahead and I know that members of the Bar will be excited by the initiatives within the Statement.

CRIMINAL LAW REFORM

However, there are a number of reforms which I suspect which will be of particular interest, the first being our intention to conduct wholesale reform of the *Crimes Act 1958*, the *Evidence Act 1958 and Bail Act 1977* by 2007. We want to return

consistency and certainty to the criminal law; ensure that bail is not denied to those entitled to it; and bring evidence laws into line with model rules. We also intend to reform jurisdictional thresholds to ensure that matters are always heard in the lowest appropriate jurisdiction; and streamline criminal procedure, maintaining the committal process but making it more effective and introducing a sentence indication process to encourage guilty pleas to be made early. We will, of course, continue to implement recommendations from the Sentencing Review 2002, such as providing courts with greater discretion where defendants breach the conditions of a suspended sentence; community based orders more specifically targeted at rehabilitation; and investigating express statutory discounts for guilty pleas. Finally, to complement reforms in the criminal jurisdiction we will modernise the Coroner's Act to enable it to keep pace with technological developments and continue to contribute to accident prevention.

CIVIL REFORM

As indicated in the March edition of this journal, the Justice Statement also heralds an overhaul of the civil system. In addition to increasing the Magistrates' Court's civil jurisdiction to $100,000 and a range of other measures, the Statement announces a Gateways to Justice Project which will:

- identify the range and requirements of existing dispute resolution services;
- understand and define the types of disputes that occur, both current and emerging;
- develop an approach to dealing with different types of disputes;
- identify service providers, and who can best be a gateway to their services;
- allow matters to move between different stages of resolution procedure; and
- provide feedback and information about dispute patterns.

The Project will also examine the potential of the "multi-door courthouse", a court that acts as a doorway to a range of resolution services from which disputants can choose. Further, we will give Magistrates the power to order mediation between litigants and investigate pre-litigation protocols that require parties to have made a genuine attempt to resolve the dispute before resorting to litigation. Any such policy must obviously be sufficiently flexible to ensure that only appropriate cases are subject to the requirement and that access to the courts is not unfairly denied.

MODERN AND FLEXIBLE COURTS

Obviously no reform of the legal system can take place without the support of the courts, nor without courts that continue to evolve with community expectations. The Bracks Government wants Victoria's courts to be genuinely accessible to every member of the community, and essential ingredients in this accessibility are the adequate dissemination of information and the provision of accessible facilities. The Justice Statement therefore signals plans to help courts improve the integration of IT between jurisdictions and accessibility for those with mobility, visual or audio impairments, or with English as a second language. The Statement also calls for greater liaison between jurisdictions, improved co-ordination with agencies, and the expansion of staff skills. Governance arrangements and a transparent budget process that have the confidence of both the courts and Government are also critical, and we will work with the courts over the next twelve months to progress reform in these areas.

Significantly, the Government believes in creating material unity and intends to house every jurisdiction in a combined legal precinct. As part of this, we will be embarking upon a Master Plan for the development of Melbourne's CBD that will leave a tangible legacy for the future. Further, the Government will explore the potential for a single, one-stop registry to create greater clarity, consistency and access to all Victoria's courts.

The Statement is about securing the confidence of the community in the law's mechanisms.

ADDRESSING DISADVANTAGE

We will also build on the valuable work of existing problem-solving jurisdictions, such as the Drug Court, the Sex Worker List, and the proposed Family Violence Division of the Magistrates' Court, and extend the Koori Court to Mildura and Gippsland. Additionally, we are developing a Children's Koori Court as this Government knows that marginalisation contributes to people's alienation from the law, driving them into a cycle of crime. I was particularly pleased to announce, therefore, that the Children's Court's jurisdiction will be increased to include children aged 17 years, halting the steady march of these children into the adult system and instead steering them towards the greatest chance of rehabilitation in the juvenile justice system, and their best opportunity to avoid the cycle of crime.

Further to all this, we will continue to support the needs of victims of crime, assisting their recovery from violent offences, improving their experience in the court system and examining potential for a Victims' Charter. We will improve the provision of legal information, advice and assistance in civil matters to ensure they are more accessible to disadvantaged groups; and modernise the Equal Opportunity Act, extending its focus from individual complaints towards a systemic focus which encourages proactive compliance, such as industry codes of practice, accreditation and model-employer schemes.

RIGHTS AND RESPONSIBILITIES

All of these reforms will improve day to day legal practice in Victoria. One iconic element of the Justice Statement, however, could lead to a fundamental improvement in Victoria's self-confidence as a community. Human rights and their associated responsibilities are those essential to any truly democratic society, a statement of our common humanity. Australia, however, is currently unable to make this statement with any veracity. While, along with other members of the international community, we have ratified and therefore agreed to uphold the major human rights instruments, we are persistently failing, at a national level, to give these instruments life.

It is time to return human rights to centre stage and recognise that they are the international extension of the 'fair go', that simple concept that Australians have historically embraced but grappled with less successfully in reality. We need to put the 'fair go' back on the agenda, to have a conversation about its place in Australian society, talking openly about rights, their associated responsibilities, what they are and how they might be realised, who is missing out, and how they should be promoted and protected.

The Justice Statement will foster this discussion and for many, its potential destination may be a formal instrument, such as a Charter of Rights and Responsibilities or a Citizens' Charter. Australia is, after all, one of the last developed nations not to have a rights instrument to mediate the relationship between the state and its citizens. However, others argue that it is not possible to enshrine the spectrum of rights and responsibilities and that judicial interpretation offers greater flexibility and an opportunity to evolve with community expectations. It is a difficult balance to strike. Whatever the result, it is essential that we have the discussion. Through the Justice Statement process, and through thoughtful leadership, we can explore the merits of the various models and, together, unearth the most appropriate direction for Victoria.

CONCLUSION

The Justice Statement is an indication of our fundamental belief in the importance, and the vulnerability, of the law. At every turn it affirms the rule of law as integral to a properly functioning democracy, acknowledging that we cannot talk about the recourse that the law offers us without acknowledging the defence that we must offer the law. The Statement is about cementing this defence, securing the confidence of the community in the law's mechanisms and exciting their imagination in its potential. I hope it evokes a similar response in every member of the Bar.

Rob Hulls
Attorney-General

EOBP 'Morally Wrong'

Robin Brett
Chairman
The Victorian Bar

Re Equal Opportunity Briefing Policy ["EOBP"]

Dear Brett,

IN response to the Bar Council's general invitation of 11 May 2004 signed by you to comment on the EOBP I have written the following critique. I submit it with considerable reluctance. However, if we are to pursue a course to a brave new world in which discrimination is not only approved by the law but enjoined by the Bar, then such a move should be opposed.

The proposals contained in the EOBP constitute institutionalised discrimination against male barristers. This is so both from the viewpoint of the objective sought to be achieved (proportionality of outcome) and the measures to be used to achieve it (preference). Institutionalised discrimination is morally wrong. It would not cease to be so if we were to append a favourable adjective to it such as "positive" or substitute a less jarring description such as "affirmative action". Nor does it alter the position to suggest that such discrimination will have an overall ultimately beneficial effect on society in general or the legal profession in particular. Even if it were so, which on the evidence must be at best doubtful, the end cannot morally justify the means. Likewise to suggest that there presently exists an ingrained or cultural discrimination against female barristers, which on the evidence again is far from being obviously so, does not alter this fundamental flaw. It is trite but true that two wrongs do not make a right

That it is morally wrong is enough to condemn the EOBP. There are, however, a number of other specific reasons why it is flawed and should not be pursued, some of which I propose briefly to touch upon.

The nature of the EOBP is of such significance as to require a constitutional basis. Constitutions do not normally countenance discrimination between members. I venture to suggest that such proposals as contained in the EOBP are contrary to the constitution of the Victorian Bar as presently formulated and that the EOBP is *ultra vires* at least without the approval of a general meeting.

If the Bar is to have a briefing policy (and it is not suggested that it should) then it should be that the best person available for the job should be briefed whether male or female ("a best available policy"). There is no logical basis (at least without considerable further evidence) to believe that a policy designed to ensure an equal proportion of briefs be received ("an equal proportion policy") could ever be applied consistently with a best available policy.

If the Bar believes (as I do) that it should deal equally with all members, regardless of whether male or female, then it should not begin by so dividing its membership, with separate provisions for each group. Needless to say it is divisive. And separate but equal is long discredited. It is also destructive of morale overall; one group will feel cheated and the other subject to by unspoken thought that it is not really up to it, regardless of how well its individual members succeed.

The *Equal Opportunity Act 1995* proscribes discrimination on the basis inter alia of sex. Lawyers need not be reminded of its potential. Equal applicability to all members of its provisions and regulations is the only equality that the Bar can properly aspire to. In that regard the name of the policy misrepresents its contents. The original recommendations may have emanated from the Equality of Opportunity Working Group but the objective of the EOBP is not equality of opportunity (much less equality of treatment) but rather equality of outcome. Equality of outcome is inconsistent with equality of treatment. It is not a legal goal but a political one. Political considerations are the concern of the legislature, not the Bar.

It is appropriate to reiterate that whilst specific objections such as the above are important, the basic reason that the EOBP should not be adopted is that it is morally wrong.

Yours faithfully,

David Sharp

Chairman's Reply

Mr David Sharp

Dear David,

THANK you for your letter of 27 May 2004, and I apologize for not replying to it sooner.

I appreciate receiving comments about Bar Council policies, and try to take them into account whenever possible. However, I have to disagree with you about the Equal Opportunity Briefing Policy.

The EOBP is not a discriminatory policy. It does not provide for "affirmative action". It does not state that female barristers should be preferred to male barristers. It requires proper consideration to be given to female barristers, and it asks solicitors not to reject female barristers on the basis of illogical and unproved assumptions about the relative merits of males and females.

It is true that in one sense the Bar Council could be seen to be giving special treatment to female barristers by drawing attention to the need to give them proper consideration. However, by drawing attention to the circumstances of female barristers, the Bar Council is not in fact favouring them; it is merely attempting to remedy the position of disadvantage that they have held for so many years.

Yours sincerely,

Robin Brett QC

Recollections on a Case

The Editors

Re: Jack Strahan

Dear Editors,

I noted your attendance at Jack's wonderful funeral at Trinity College Chapel recently.

You may recall that during his excellent and succinct eulogy to his late father, Anthony Strahan mentioned a conversation with Jack — apparently not long prior to his death — concerning the (unnamed) barrister, in respect of whom Jack wrote a letter concerning an alleged conflict raised by the former Chief Justice, Young, during the course of his judgment in a civil appeal.

That barrister was me. The case was *Nangus and Ors* v *Donovan and Ors* [1989] VR 184.

The fact that Anthony mentioned it, and that Jack had mentioned it to Anthony at that particular time, perhaps indicate the significance that Jack attached to it, as did 1.

In that regard, I enclose for your information:

(a) the letter Jack wrote to the Editor, *Victorian Bar News* (Winter Edition 1989); and
(b) the (short) judgment of Young CJ in which he mentioned me by name.

SUPREME COURT OF VICTORIA
11–31 May 1988
Coram: Young CJ, Kaye and Southwell JJ
A.G. Southwell for Appellants
M.W. Shand for Respondents

Young CJ: I have had the advantage of reading the joint judgment to be delivered

by Kaye and Southwell JJ. I agree in the conclusions which their Honours have reached and I do so substantially for the reasons they have expressed. I wish however to add a few words of my own upon one aspect of the case.

Mr Southall appeared for both respondents and began his argument with the contention that the learned Judge had assessed the damages incorrectly in that he had not reduced them on account of the fact that there had been changes of ownership interests amongst the lessors. The contention was that a lessor was not entitled to damages for loss of rent in respect of the period after he ceased to be the owner of the premises. In this contention both Mr Southall's clients have the same interest.

Mr Southall's second argument however was that the guarantor was not liable under the guarantee for any damages arising from the breach of the lessee's obligations under the lease. If this argument succeeded the whole of the burden of the damages payable would be thrown on the first appellant. A clear conflict of interest arose.

Mr Southall assured us that his instructions were that both of his clients, who were represented by the same solicitors, agreed to the course he was pursuing notwithstanding the apparent conflict and upon that assurance we allowed the argument to proceed, reserving the question whether any difficulty would arise in disposing of the appeal.

In view of the conclusions at which we have arrived, no difficulty does arise in our disposing of the appeal. It should not however be assumed that the Court would, on another occasion, allow a similar course to be followed.

I do not attach the judgments of Kaye and Southwell JJ: they — perhaps significantly — did not address the particular issue. One might infer that they did not do so because they did not apply the same analysis as did the Chief Justice. I should add that Young himself only mentioned it *en passent* during my submissions, without appearing to place much emphasis on the point at all. Hence, my complete surprise upon the publication of the judgment in the Victorian Reports.

I should add that, as I have a fairly thick skin, I did not give the matter a great deal of serious consideration nor was I particularly upset, after the initial surprise. Further I took considerable consolation from the fact that neither of the Chief Justice's (in my opinion, more learned) colleagues saw fit themselves to raise the issue in their judgment.

When he wrote that letter, I had met Jack once or twice and had (unfortunately) never been his junior: in other words, he had no reason to do it, other than propriety and scholarship. Some time subsequently I did get to know him better, particularly through a mutual friendship with Peter Heerey and thereafter socialising with Jack and his wife Diana. It was a true mark of the man: a great member of the Bar and, more importantly, a fine person.

Yours faithfully,

Anthony Southall

Counsel's Conflict of Interest: Finding Questioned

The Editors

Gentlemen,

AN injustice may have been done to counsel in the case of *Nangus Pty Ltd* v *Charles Donovan Pty Ltd* [1989] VR 184, who was said to have appeared before the Full Court in circumstances involving a "clear conflict of interest".

The plaintiff lessor had obtained judgment jointly against two defendants. One was the lessee. The other was the guarantor of the lessee's liabilities. Both defendants appealed and were represented by the same counsel. The appeal involved two points. The first point sought to reduce the quantum of the judgment. By the second point, the defendant guarantor argued that the guarantee did not cover the particular liability.

Young CJ delivered a separate judgment agreeing with the other members of the court in dismissing the appeal, but devoted primarily to the question of conflict of interest of counsel (a matter not dealt with by the other members of the court). The Chief Justice, having stated that both appellants had the same interest on the quantum point, went on to say this (at p.185):

> Mr Southall's second argument however was that the guarantor was not liable under the guarantee for any damages arising from the breach of the lessee's obligations under the lease. If this argument succeeded the whole of the burden of the damage payable would be thrown on the first appellant. A clear conflict of interest arose.

But the position would appear to be that the defendant lessee was ultimately liable to the plaintiff lessor for the whole amount. To the extent (if any) that the lessor recovered from the guarantor under the guarantee, the lessee simply owed the amount to the guarantor and not to the lessor.

Put another way, the lessee could have had no legitimate expectation that the guarantor would share any of the burden of his (the lessee's) liability to the lessor. To the extent that the guarantor escaped liability, that was a matter of concern only for the lessor.

An argument by a guarantor denying liability is an argument with the creditor; it does not affect the liability of the principal debtor. Clearly, issues may arise between the guarantor and principal debtor, and caution is needed on the question of conflict. There may be relevant facts undisclosed in the report. But, on the face of it, it is, with respect, difficult to see why the argument on behalf of both defendants as to quantum could not without conflict or embarrassment be coupled with the argument on behalf of the defendant guarantor denying liability.

The finding of "clear conflict" is one of some gravity and reflects adversely upon counsel's judgment. It is respectfully submitted that it is a finding not justified in the particular circumstances of this case.

Yours sincerely,

J.A. Strahan

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 practitioner.

Name of practitioner: Paul S. Reynolds ('the practitioner')

1. Tribunal Findings and the Nature of the Offence
   (a) Findings
   Charge 1: 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 Victorian Bar Rule 176.
   Charge 2: The Full Tribunal found the practitioner guilty of misconduct at common law and statutory misconduct as defined in section 137(a)(1) of the Act in that he contravened Victorian Bar Rule 4.
   (b) Nature of the Offence
   Charge 1: The practitioner in contravention of Rule 176 commenced work on a direct access matter before the standard terms of engagement approved by the Victorian Bar Council for direct matters was executed by the practitioner and the Complainant.
   Charge 2: The practitioner wilfully or recklessly engaged in conduct which:
   (i) was discreditable to a barrister contrary to Rule 4(a);
   (ii) was likely to bring the legal profession into disrepute contrary to Rule 4(c).
2. The Orders of the Full Tribunal made on 30 March 2004 were as follows:
   (a) In relation to charge 1 the practitioner is reprimanded.
   (b) In relation to charge 2
   (i) the practitioner is reprimanded;
   (ii) the practitioner's practising certificate be suspended until 1 October 2004;
   (iii) the legal practitioner to pay the Bar its costs of and incidental to this matter in the sum of $13,000. There will be a stay of nine months for the payment of the costs;
   (iv) Exhibit A remain on the file Tribunal file.
3. As at the date of publication no notice of appeal against the orders of the Tribunal has been lodged. The time for service of such notice has expired.

Misleading and Irregular Briefing Practice

THE Ethics Committee has become aware of a misleading and irregular briefing practice by a particular firm of solicitors.

In the case in question, the barrister received a brief from a firm of solicitors with a backsheet stating that it was a brief to advise in conference and to appear as counsel in an appeal. On the front of the backsheet was stamped the word "draft". In addition, the backsheet did not include the name of the solicitors or the address and other usual details of the solicitors.

Shortly after the delivery of the brief and "draft backsheet" the solicitors held a conference with the barrister and had a number of conversations with the barrister about the matter. Six days after the initial conference, the barrister received a letter from the solicitors which referred to the conference, advised the barrister that the solicitors wished to "confirm" that the client had briefed the barrister directly and advised the barrister that the firm of solicitors were not "currently your instructing solicitors". The letter then advised the barrister that the firm was "constrained from briefing you until [the client] provides us with money in trust equal to your agreed fees. Accordingly, we consider [the client] is directly responsible for your fees."

The letter then requested the barrister to confirm that the barrister had been directly briefed pursuant to the Direct Access Rules of the Practice Rules of the Victorian Bar. The letter proceeded: "If you have been so briefed, we wish to clarify our role (if any) in preparing

for the hearing. If you have not been so briefed, we consider that it is necessary to regularise the brief and wish to discuss this" in conference with the barrister and the client.

Such a practice, in the view of the Ethics Committee is misleading and irregular for the following reasons:

(a) It shows a fundamental misunderstanding by the solicitors of the Direct Access Rules. The Direct Access Rules are directed towards the circumstance where there is a lay client and no intervention by a solicitor.

(b) It also shows a fundamental misunderstanding by the solicitors of what the contract is between solicitors and a barrister. In the case in question, the Ethics Committee would regard the delivery of the brief for the initial work undertaken by the barrister as the retainer. By delivering the letter after the brief was delivered the solicitors were attempting to vary the arrangement unilaterally and, in particular, to abrogate any responsibility for the payment of the barrister's fees.

Counsel should be aware of such a practice and need to be astute to notice any such endorsements or irregularities on the backsheet. In the event that counsel becomes aware of such a practice, counsel should regularize the position with the solicitors in question and bring such an occurrence to the attention of the Ethics Committee.

4 June 2004

Bulletin 2 of 2004

Court of Appeal

Justice Nettle

THE Honourable Justice Nettle was appointed to the Court of Appeal as of 25 May 2004.

Like Mr Justice Callaway of the Court of Appeal, Justice Nettle was a partner at Mallesons before coming to the Bar in 1982. He took silk in 1992. His Honour served as a part-time member of the Victorian Civil and Administrative Tribunal and its predecessor tribunal from 1989 until his appointment to the Supreme Court on 23 July 2002.

At the Bar, His Honour practised in a wide range of jurisdictions and areas of law. He was known for his industry, thoroughness and speed, and for his cheerful readiness to assist others in their work, both fellow counsel and solicitors who often called for informal advice.

At his welcome to the Supreme Court, Justice Nettle said he was looking forward to an even greater breadth of work on the Bench. In his two years in the Trial Division, His Honour has sat in a broad range of the Court's diverse jurisdiction. He has been an excellent trial judge, and delivers judgments promptly.

In September 2003 Justice Nettle accepted Chairmanship of the Bar Continuing Legal Education Committee, charged with the formidable tasks of creating and then implementing the Bar Compulsory Continuing Legal Education Program. In a little over three months, that Committee produced a substantial and practical program of high excellence and uncompromising intellectual rigour. The Bar records its gratitude to Justice Nettle and his Committee, and wishes His Honour well on the Court of Appeal, confident that the Court and the law will be well served.

Supreme Court

Justice Whelan

ON behalf of the Victorian Bar I extend warmest congratulations upon Your Honour's appointment as a judge of this Honourable Court.

As everybody in the court no doubt knows, you "coodabeen" a champion footballer. And as all the lawyers in court know, there is little doubt that you are "gunnabe" a champion judge. Your appointment will add strength to the already highly impressive commercial division of the Court.

Your Honour was educated at Xavier College and at Newman College within the University of Melbourne, graduating Bachelor of Arts and Bachelor of Laws with honours.

You were active in student politics, and were a delegate to the National Union of Students. You have the distinction of having been informed on to ASIO by a fellow student, who later went on to bigger and better things as a member of the Federal Parliament. You also displayed vocal talent as the lead singer in a rock and roll band. I never had the good fortune to hear the band myself, but one can probably obtain an idea of the general nature of the band from their name, "The Man-sized Saladas". The lead guitarist in the group was Geoff Richardson, a fellow Coodabeen champion.

Your Honour served articles with Peter Bobeff of the firm of Paveys (now Corrs Chambers Westgarth). You are remembered as a stand-out articled clerk — this in the context of a firm which prides itself on selecting and attracting the most promising graduates for articles.

You were admitted to practise in 1978, and remained with Paveys for another three years as a solicitor.

Paveys represented the Business Council of Australia, which was concerned about moves to introduce class actions in Victoria. Consumer advocates were pressing for immediate adoption of the United States rules. Paveys' submission to the Government was based on your meticulous and thorough research and analysis of the United States experience. It played no small part in Victoria taking more time and coming up with better rules for class actions.

During your time at Paveys, Your Honour worked as a volunteer at a legal aid centre in the Richmond housing estate.

Your Honour's greater temperamental suitability for the Bar was evident at the annual cricket match between Paveys and one of its major clients, Carlton and United Breweries. You took a spectacular and difficult, but somewhat tactless, catch on the boundary to dismiss for a duck a director of CUB, who prided himself on his batsmanship.

Your Honour came to the Bar to commence reading in September 1981. You read with Leslie Ross (now Judge Ross of the County Court). Your Honour was one of a group of 24 readers, who have so far produced one Magistrate, three County Court judges, one Federal Court judge and now one Supreme Court judge.

You served a fairly typical apprenticeship at the Bar, accepting pretty much any brief that was offered in just about any area of law where you learnt some of the realities of litigation. In a "crash and bash" in the Magistrates Court, for example, you learnt that logic and legal argument are not much use against the testimony of the independent witness who states firmly and clearly that he saw your client enter the intersection on a stale red light. You learnt how to draft affidavits on behalf of a defendant opposing an application for summary judgment, based on the most typical defence in such cases, which you named the "I'm an idiot" defence, otherwise known as the "yes I signed the guarantee but I never realised I might have to pay" defence.

Your Honour appeared in criminal cases as well. In one of them you learnt about the realities of criminal defence from your opponent, George Slim. You were prosecuting in a fraud case. After the jury had retired to consider its verdict you said to Slim, "Oh, I forgot to mention my best argument to the jury that the police wouldn't have charged him if he wasn't guilty!" Slim replied, with resignation, "Don't worry, they know that already."

Your Honour was always much in demand, and quickly built a substantial practice. You progressed rapidly from the Magistrates Court, through the County Court to the Supreme and Federal Courts, where you have appeared extensively for many years.

You had four readers: Adrian Ryan, Annette Rubinstein, Jonathan Davis and Jacqueline Horan.

Although you had four readers, you never had a reader's desk. You had the lower cupboards taken out of part of the standard Owen Dixon Chambers West bookshelf to make leg room, and your readers used the top as their desk — a novel strategy that ensured they did not spread themselves and disturb the neatness of your chambers. Some barristers might have attempted the carpentry work themselves, but not you. "The first rule of modern householding is 'don't do it yourself'," you have said. "Get the man in."

Left to your own devices, you favour casual attire. You, and Peter Almond and Peter Lithgow were to take your shared secretary, Mrs Helen Miller (who is in court today), for a pre-Christmas lunch.

Your Honour had finished work a few days early, and came to the restaurant from home. It was a very good Chinese restaurant. Everyone else was in business attire. You were in shorts, T-shirt and thongs. The management wouldn't let you in. Almond eventually persuaded them, on

the basis that you were hidden from view. The others formed a ring around you to shepherd you in, and you had to sit in a dim corner.

The Coodabeen Champions have been going for 24 years, and have consumed a substantial part of your spare time. You have said of this interest, "You're only young once, but anyone can be immature".

The Coodabeens have done shows live in every State and Territory, and in provincial centres. In one memorable show at Shepparton, you were tastefully attired in a polyester safari suit, and wearing a considerable quantity of body jewellery. You came on stage with a Crown Lager and cigarette. In your Coodabeen persona, you shouted, "Alright, who here hates the f'ing Eagles?" A nun in the front row fainted.

On the Channel 7 football marathon, you appeared in a spa with two bikini-clad girls from page three of a Sunday newspaper.

Your Honour has always kept a balance between work, family and football. Although you participated in Coodabeen interstate appearances, you always took what your children called "the stress box" — an oversized brief case — of work. While the other Coodabeens lounged around the pool like rock stars, you worked.

Nineteen-ninety-five was quite a year. The Coodabeens performed in the pre-match program at the Grand Final and, at the end of the year, you were appointed one of Her Majesty's Counsel.

As a silk, Your Honour maintained your very strong appearance practice. You had an inventive and engaging style of advocacy. You may also be the first counsel to introduce dance as part of your technique of advocacy in the course of argument in the Supreme Court.

Your opponent had been rather undecided as to whether a particular clause was in or out of the contract. Summing up, you said it was a bit like the hokey-pokey:

> You put the clause 4 in
> You put the clause 4 out
> You put the clause 4 in
> And you shake it all about —

… complete with hand movements and pirouette.

There are so many stories that feature your sense of humour and lack of pretension that it would be easy to run out of time to mention the distinction that Your Honour has earned as a lawyer. But you are held in high regard, and taken very seriously indeed, as a barrister. You have also been exemplary in the discharge of your duty to the Court, never putting a submission without a proper basis, and never failing to inform the Court of authorities that might be against you, and always dealing with your opponents with absolute honesty and frankness.

From the late 1980s your practice focussed more and more on commercial law, particularly insolvency. You have been at the forefront of the development of the law of voluntary administration, and Your Honour's name will be found in the reports of many of the leading cases.

In the mid-1990s, you were Senior Counsel representing the liquidator of the Pyramid group of building societies and companies — until HIH, the largest corporate liquidation Australia had seen.

A little later Your Honour was in a case concerning the Dimarelos group of companies. There was an application in this Court by the administrator of one of the companies for some unusual orders, the effect of which would have been to treat all the companies in the group as one. No-one with any commercial interest in the matter actually opposed the application but, as the orders were unusual, it was thought necessary by the administrator to have a contradictor to put the opposing case to the court. You were briefed (with Justice Dodds-Streeton as your junior) to fill this role. The one thing Your Honour was not supposed to do was win. However, you took the brief very seriously, and presented superbly researched submissions and got into the spirit of the fight. Your Honour first characterised the application as "novel", then "unprecedented", then "radical". Finally, it became "unique in the common law world" and "something that only a very brave judge would order". Despite very able argument in support of the application, and to the dismay of the administrator, it failed.

Shortly afterward Your Honour and Justice Dodds-Streeton were paid the ultimate compliment and briefed by the administrator to find a way to achieve, in practice, the pooling you had thwarted in the Supreme Court. You brought an application in the Federal Court, which was different in nature but achieved the same practical outcome. You asked for a declaration, alternatively directions. I was in that case for a creditor who would have preferred a declaration. Justice Finkelstein pointed out that there was no legal controversy to justify making a declaration, but said that the same thing could be achieved with a direction. You responded immediately: "Your Honour, I understand. It's a deal. We'll take a direction."

Most recently, Your Honour represented the administrator of the Ansett group of companies. In those cases, you argued for, and succeeded in making, new law in relation to many aspects of the voluntary administration procedure under part 5.3A of the Corporations Act. In those cases the Court, at your urging, effectively directed and guided the administration, rather than leaving it to the various groups of creditors to fight it out between themselves.

Your Honour has presented papers at a number of conferences, including a paper on the landmark Ansett administration cases with Justice Dodds-Streeton at the University of Sydney.

From 1993 to 1995, and again from 1998 to 2000, you were a visiting fellow at the University of Melbourne. With Justice Dodds-Streeton and Professor Harold Ford, you taught in the Master of Laws program in corporate insolvency.

Your Honour's late father, Des Whelan, practised at this Bar for over 24 years, over 10 of those years as one of Her Majesty's Counsel. He was the first person appointed Chief Judge of the County Court, and led that court through a period of dramatic increase in the court's business until his untimely death in 1981.

Your Honour's mother, Carmel Whelan, is here today. She is a great social activist, and has done much to establish hospice care on the Mornington Peninsula.

Despite the demands of your practice and your diverse interests, you have a close and happy family. Your wife Clare is a lawyer and social worker, who worked for many years in the community law sector and is now with the Department of Justice. A glimpse of the nature of your relationship may be gathered from an exchange that took place on the Coodabeens' radio show one Saturday morning. You were asked by fellow Coodabeen, Ian Cover, whether you'd been to the St Kilda match the night before. You replied guardedly that your social diarist had committed you to a dinner party that night, but had said, "I'll leave it up to you whether you come. You decide." Cover wasn't fooled: "So how was the dinner?"

Your Honour has two daughters, Alexandra and Madeleine, and a son, Hugh, who are all here today. You recently participated in a five-day bicycle ride with Madeleine. Madeleine was pleased that you were able to go with her, but a lot less pleased at what she regarded as your highly un-trendy cycling clothes. You are

a neighbour of the Chief Justice, another well-known cyclist, and the question that has occurred to some is whether you and the Chief Justice might jointly invest in a tandem.

The Bar is delighted at Your Honour's appointment, and looks forward confidently to appearing in a court which may be expected to be conducted with intelligence and a high degree of legal learning. The Bar also expects your court to be characterised by courtesy and good humour, although the Bar also knows that you have too much respect for the law, and too good an appreciation of the importance of legal proceedings for the parties, to become what W.S. Gilbert called that "*nisi prius nuisance*", the judicial humorist. Above all, the Bar, and the community, can expect to see in Your Honour's court those two vital ingredients of justice: common sense and a degree of compassion.

On behalf of the Victorian Bar, I wish you long, distinguished and satisfying service as a judge of this Honourable Court.

May it please the Court.

Supreme Court

Justice Hollingworth

ON behalf of the Victorian Bar it gives me particular pleasure to extend warmest congratulations upon Your Honour's appointment as a Judge of this Honourable Court.

Your Honour has been a conscientious and courageous advocate, and maintained the old tradition of a broad practice appearing in both commercial and common law litigation. You have been a member of the Legal Profession Tribunal, and of the Patent and Trademark Attorneys Disciplinary Tribunal, and the Bar welcomes your appointment to this Honourable Court.

You were born in England at York in 1961. The family came to Australia in the late sixties.

Your secondary schooling was at Canberra Girls Grammar School, and at Geelong Grammar School. You were one of the first women at Geelong Grammar, where you engaged in an extraordinary variety of extra-curricular activities, including debating, the school play, the chapel choir, and an array of sporting activities.

The family moved to Perth, so you studied law at the University of Western Australia. You chaired the student council and were vice-president of the Law Students Society. You were a member of the University Board of Discipline. You rowed and played water polo for the university and you were president of the Undergraduate Guild of Sports. You were a member of the Combined Australian Universities Water Polo Team, and also rowed for the State of Western Australia. Your Honour organised the law school

mooting competition.

During your final year of law school, you also worked part-time as a law clerk with Stephen Jaques Stone James.

Along with student organisations, sport and a part-time job, you obviously did find a little time to study — graduating first in your class, and winning the Parsons Memorial Prize in Law for the most outstanding law student, combined with leadership. You graduated Bachelor of Jurisprudence (with Honours) in 1983, and Bachelor of Laws (with Honours) in 1984.

Your Honour wasted little time after final law exams, commencing articles in December 1983 with Mr Martin Bennett of Stephen Jaques Stone James.

You were elected Rhodes Scholar for Western Australia, and interrupted your articles to go to Oxford. You were the first Australian woman lawyer to be elected a Rhodes Scholar.

Former judges of this Court with whom Your Honour shares the distinction of a Rhodes Scholarship are Chief Justice Sir Edmund Herring and Justices Sir Reginald Sholl, Sir James Gobbo, and Kenneth Hayne (now, of course, a member of the High Court).

At Oxford, you rowed in the university women's crew in the Oxford/Cambridge boat race, defeating Cambridge, and also, a fortnight later, winning Head of the River at Reading. You also represented Oxford in water polo.

Your Honour was resident in St Edmund Hall, the sole survivor of the mediaeval Halls that provided accommodation and tuition to undergraduates in the 13th Century, before the Colleges began to do so. "Teddy Hall", as it is affectionately known, was full of rugby players, a very "blokey" place. You not only survived in that environment, you were the first woman to play in the Hall's water polo team.

Your Honour's tutor, Mr Adrian Briggs, has observed that tutorials and seminars were not conducted on the river, or in the swimming pool, but that they did rather resemble small islands in the vast ocean of your activities.

Your Honour graduated Bachelor of Civil Law from Oxford in 1986, and returned to Perth to complete your articles. Mr Bennett had left the firm, so you completed articles with Mr Peter Martino.

You were admitted to practise in Western Australia on 2 April 1987.

Your Honour did general litigation work, including appearances as counsel in Supreme and Federal Court Chambers, as junior counsel in Supreme and Federal Court trials and appeals, and as counsel in local and district court trials.

In April 1988, you transferred to the Melbourne office of the firm, which had become Mallesons Stephen Jaques. You were admitted to practise in Victoria on 1 August 1988.

A little over a year after coming to Melbourne, in July 1989, you were appointed a Senior Associate at Mallesons Stephen Jaques.

As a solicitor at Mallesons Stephen Jaques, Your Honour did commercial litigation, torts, trade practices and securities work.

One of your major cases was an Alan Bond company securities case, in which Mallesons acted for the National Australia Bank. I appeared in that case for another party. Your client had settled with the Bond company, but had not entirely extricated itself from the proceedings, and you were instructing Jeffrey Sher QC. Allan Myers QC represented the Bond company.

At one point Sher was cross-examining a Bond witness. Sher hit on a nerve and, without the benefit of anaesthetic, was drilling deeper. The opposing instructor passed you a note with a message from Allan Myers: "Tell Sher that if he doesn't stop this line of cross-examination, the settlement is off."

Your Honour thought for a second or two — there was something in the order of $1 billion at stake — then sent back a short reply that demonstrated that you had a hitherto unknown familiarity with the art of taxidermy, and the cross-examination continued.

You may not be aware of this, but the story got around, and a number of solicitors decided that someone who was prepared to put such a formidable advocate as Myers in his place like that would do well for her clients.

Your Honour came to the Bar in September 1991, and read with — me. For that reason, this is, for me, a very special welcome address.

As many here know, in the Bar Reader's course, there is a segment where the Victoria Police demonstrate how a breathalyser works. A reader is asked to volunteer to have a few drinks over lunch, and then submit to breath analysis. You selflessly undertook this onerous task, with, as usual, enthusiasm and 100 per cent commitment. History does not record the actual reading, but it's said that you were, in this, as in other areas of endeavour, a high achiever.

Your Honour signed the Bar Roll on 28 November 1991.

Mentors sometimes find their readers' activities distracting, but you were always very considerate. I regret to say that I was not, and I recall that at one stage early in your reading, I was engaged in a case that required me, and therefore, I'm afraid, you, to listen to hours and hours of taped telephone conversations between an investor and stockbroker. There was not a word of complaint.

I also recall one occasion during your reading, when we found ourselves opposed to one another. The Chinese Wall within my chambers took the form of one or other of us leaving the room when a phone call came in about the case. My recollection is that the situation was resolved when we did eventually agree on consent orders.

After signing the Bar Roll, Your Honour very quickly established a practice in a broad range of commercial and common law litigation, principally in this Court and the Federal Court.

Your Honour had one reader, Victoria Lambropoulos. You were, however, a mentor and support to many others, including Caron Beaton-Wells, who was junior counsel with you and Meagher QC in the "Stolen Generation" case.

Your Honour had a strong sense of the community of the Bar. Indeed, at one point, your chambers took on some of the attributes of a commune. You took into your chambers two young counsel, both new mothers, and a male barrister who was unable to find suitable chambers. Conferences were scheduled around baby feeding times. More conventionally, you also organised get-togethers of those with chambers on the 16th floor of Owen Dixon West.

In 1995, Your Honour was selected for a Vincent Fairfax Ethics in Leadership Award. Competition for places is fierce and nationwide. Leaders and future leaders in a wide range of disciplines, not only law, are guided through a rigorous program of exploration of social and ethical issues.

As part of the Fairfax Fellowship program, you participated in a cross-cultural awareness course conducted by Rosemary Tipiloura at Nungalinya College in Darwin. You then went to Central Australia, the Tanami Desert, to a gold mine. You and two other Fairfax Fellows lived in a "donga", or "de-mountable" tin hut. It was 45 degrees outside, 51 degrees in the mine, and even hotter in the donga. In that heat, the three of you drank approximately 27 litres of water a day. You mixed with the miners, and visited a number of Aboriginal Communities.

Your Honour's major Ethics Award project was on child prostitution in Thailand, and you worked on the project in that country for some weeks, and attended an ethics conference in Penang. You have taken graduate courses in Bioethics.

In your practice at the Bar, you qualified as a mediator on 15 May 1997. Your Honour took silk on 17 December 2002.

You served on the Bar Council for two years, 1994–96. You were a vocal supporter of finding appropriate and affordable chambers for junior members of the Bar, the renovation of Four Courts (now Douglas Menzies) Chambers, and the establishment of Isaacs Chambers. You were never afraid to turn the heat on senior members of the council, and then to enjoy their company after the meeting.

Your Honour served on the Academic and CLE Steering Committee for four years, 1992–96; and on the Counsel Committee and Litigation Procedures Committee in 1994–95. You were the Bar appointee to the board of the Public Interest Law Clearing House, and are now one of the Bar appointees on the law faculty of the University of Melbourne. For four years, 1996–2000, you served on the Commonwealth Attorney-General's Evidence Act Committee.

Your Honour is a Senior Fellow of the Faculty of Law at Melbourne, and has taught Civil Procedure, Advocacy and Dispute Management. Professor Cheryl Saunders, the Director of the Juris Doctor program, says how she values your consultation and counsel. Your teaching is a huge success, and your courses are in high demand. Your Honour has also presented numerous papers and programs at the Leo Cussen Institute, in the Bar CLE program, at conferences, and at Victoria University.

Every year, since coming to the Bar, you have taken 10–12 weeks holiday, and travelled abroad extensively. You are an adventurous and intrepid traveller. You've been described as "a sampler of all the world has to offer". You've trekked the Himalayas; toured the Scottish moors; lived it up in Las Vegas, California and New York; and explored the depths of Kenya, Zimbabwe and Zanzibar.

At home, you are a generous host, an excellent cook, and an artist in the creation of large-scale floral arrangements.

Your Honour's chambers, for many years on the 16th floor of Owen Dixon Chambers West, were scarcely "a room with a view": they looked out on the brown brick wall of the old Telstra building. Finally, earlier this year, you moved to a corner room with a splendid view — overlooking the Supreme Court Library dome on one side, and looking out towards the docks on the other. In one way your move across the road has been a retrograde step: your chambers in the Court overlook an air conditioning unit and light well on one side, and the laneway to the old High Court building on the other.

Otherwise, however, Your Honour's appointment is very much a step forward. It adds significantly to a distinguished Court, bringing to it a first-rate legal mind and a substantial body of experience, not only of the law, but of many aspects of life. Your youth and enthusiasm will add to the already growing sense of vitality in the Court.

On behalf of the Victorian Bar, I wish Your Honour a long, distinguished and satisfying service as a Judge of this Honourable Court.

May it please the Court.

Federal Magistrates Court

Federal Magistrate Bennett

ON behalf of the Victorian Bar I extend warmest congratulations to Your Honour upon your appointment to this Court.

Your Honour brings to this Court a background in banking, financial and commercial litigation as a solicitor, and particular expertise in specialised areas of family law. With the Honourable Justice Joseph Kay of the Family Court, you are the undisputed authority on the Hague Convention on the *Civil Aspects of International Child Abduction* and the *Family Law (Child Abduction Convention) Regulations*. Under the Hague Convention, under international treaties relating to overseas maintenance, and in the law in relation to the assessment of child support, your clear exposition and arguments have contributed significantly to the development of the law.

Your Honour was born in South Australia, and educated in Victoria and Queensland. You began your education at the Methodist Ladies College in Melbourne, continued at the Maroochydore Primary School in Queensland, and at Clayfield College, Queensland. You began your law course at the University of Queensland, and soon transferred to the University of Melbourne.

Through university, you worked as a waiter at The Latin restaurant, long a favourite with members of the Bar. It's said that you were an outstanding waiter.

Your Honour served articles with Mr Richard Earl of the firm of Minter Ellison, then Ellison, Hewison & Whitehead. You worked principally with Mr Earl in banking, financial and commercial litigation.

Your Honour was admitted to practise on 2 April 1984 and remained with Ellisons until 1986.

Ellisons rotated their articled clerks through all aspects of the firm's practice. However, the firm did not practise in family law. Another partner with whom you had worked, the late Mr Tom Hanrahan, suggested you go to Snyder & Fulford, to whom Ellisons referred all its family law matters, for a few months, to gain experience in that field. Ms Susan Snyder and Ms Lolita Fulford had constituted the family law department of Ellisons, but had left some years earlier to establish their own firm.

You found family law satisfying and did not return to Ellisons.

You hit the ground running in family law, almost immediately beginning appearances in the Family Court two, three and four times a week.

Your Honour signed the Bar Roll on 24 November 1988, and read with Rex Wild QC, now the Northern Territory Director of Public Prosecutions.

Mr Wild recalls that, having appeared in the Family Court as a solicitor for some years, Your Honour already knew much of what he worked on with other readers. You required no instruction by way of what is now called "assertiveness training".

Wild is prone to the use of Latin maxims and quotations in written work. Without comment, you discreetly corrected occasional slips on his part. At the conclusion of your reading, you gave your former Master the authoritative *Lewis & Short Latin Dictionary* — the point of which gift was not lost on him. You will be glad to know that he continues conscientiously to refer to it.

At the Bar, Your Honour was immediately very busy, practising in family law, crime and civil litigation. Within about eighteen months, you concentrated solely on family law.

You are renowned for your thorough and meticulous preparation of every case. Your Honour's appointment has been universally acclaimed. The Bar, in preparing for this occasion, spoke to a number of Family Court judges. The immediate response from each was identical — dismay that they would no longer have the pleasure of your appearing in their Court. Judges knew that, if you were appearing, every aspect of the case would have been carefully scrutinised, and every relevant authority considered.

Solicitors also appreciated your thoroughness. However, their appreciation was mixed with some chagrin because, no matter how carefully they thought

they had prepared the case, you would invariably find more that needed to be done. You were, however, studiously careful never to embarrass your instructor in front of the client. You were generous with praise and never criticised the preparation.

Your Honour's anticipation of an opponent's likely moves was remarkable. In one case, you appeared for the wife. The husband had represented himself right up to the trial, and then he briefed silk. Despite numerous notices, the husband had failed to produce a video tape relevant to the issue of child contact. You were cross-examining the husband. "Mr X, we have to have the tape." "I'm afraid it's at home." "Well, perhaps your partner could go and get the tape." "No, she came in with me, and doesn't have her car here." "Perhaps she could borrow your car." [with contempt] "She couldn't drive my Maserati!" "Well Mr X, I have a cab charge here in my hand, paid for by your wife." You got the video.

Your Honour appeared regularly for a number of Commonwealth and State officers and agencies, including the Deputy Commissioner of Taxation, the Child Support Registrar, the Child Support Agency, and the Government Central Authority under the Hague Convention. The Commonwealth Attorney-General's Department is the Central Authority for Australia, and has delegated its powers and responsibilities to authorities in each State — in Victoria, to the Department of Human Resources.

Your Honour has conducted in-house training for the Department of Human Resources on its responsibilities under the Hague Convention. You have also represented applicants, recently obtaining the return of an abducted child from New Zealand under the Convention.

The Child Support Agency selects cases as vehicles to obtain a ruling on complex and problematic aspects of the Child Support (Assessment) Act. You were briefed to advise and appear in those cases — invariably without a leader, and often against Senior Counsel.

Your Honour has long been the junior of choice of Martin Bartfeld QC, who is Deputy Chairman of the Family Law Section of the Law Council of Australia. He says he'll now really have to work for a living, without you to prepare everything. You gave your former Master, Rex Wild, the Latin dictionary. Mr Bartfeld is waiting to see what equivalent reference you may give him to compensate for your departure.

You recently represented the Child Support Registrar in a contempt application against him by a disappointed litigant, named Lamb. The Registrar is a Mr Mutton, so the case was Lamb against Mutton.

Your Honour is regularly invited to deliver papers at Continuing Legal Education seminars. During the last twelve months, you have done so at the Leo Cussen Institute, for the Law Institute, for Lexis Nexis, and in the Bar CLE program, on superannuation issues, the Hague Convention, expert evidence, child support, and the new Family Law Rules.

You have also prepared the responses of the Bar and of the Law Council of Australia to various discussion papers and proposals in family law, in particular in relation to expert evidence and the new Family Law Rules. You will be sadly missed at the Bar.

You will also be missed in chambers. For years, you have baked cakes for each member of your chambers, on their birthday. The cakes are cunningly procured by asking you for the recipe. Your Honour has been unwilling to divulge the secret. Instead, a beautiful culinary masterpiece appears in due course.

Your Honour's late father was a pilot in World War II, and was awarded the Distinguished Flying Cross. He was known as "Bomber Bennett". Your husband, Dennis Easton, is a Principal Legal Officer with the Commonwealth Director of Prosecutions. Your son, Nicholas, is nine years of age, and your daughter Amelia is four.

You have excelled as a barrister, and looked after your family. Commonly, it is said of male appointments to the Bench on these occasions, that they were in chambers at 6 or 7 a.m. You were not infrequently in at 3 a.m. You have a remarkable ability to get by on little or no sleep, and still be able to work effectively.

As a barrister, you were not only thorough and meticulous, but a lateral thinker and problem solver. As a person, you are known for your decency, common sense and extraordinary generosity of spirit. The Court, and all who come here, will benefit from your remarkable gifts.

Your Honour has a characteristic of raising one eyebrow in quizzical surprise. I'm told that your four-year-old daughter already has this mannerism perfectly. It is a signal that those who will appear before Your Honour would be prudent to watch for.

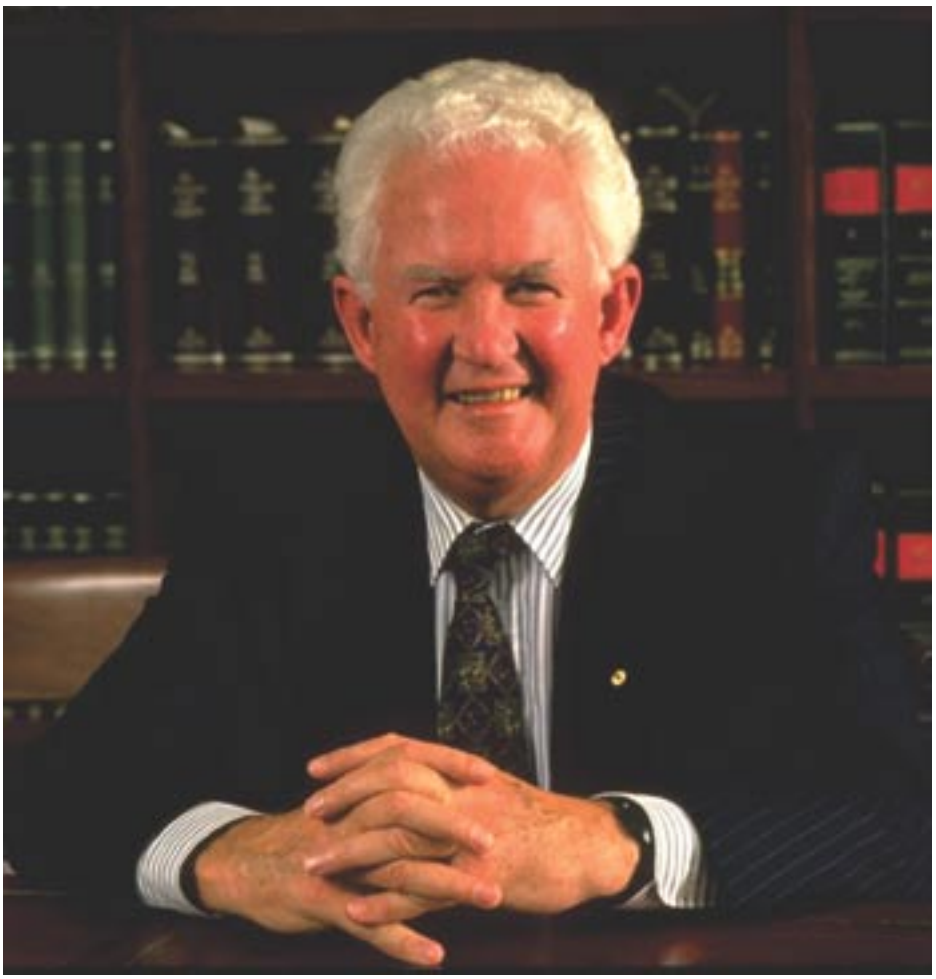
It is testament to the high regard in which you are held, and to enduring friendships and associations, that Mr Earl with whom you served articles, is in Court today, as is also Ms Susan Snyder. Mr Wild is in Darwin and Ms Lolita Fulford is on vacation in Florence. She is, however, represented by her son and daughter.

The Bar wishes Your Honour a long and satisfying service as a Judicial Officer of the Commonwealth.

May it please the Court.

Family Court

Chief Justice Nicholson AO, RFD



IT is a particular pleasure for me, on behalf of the Victorian Bar, to pay tribute today to Your Honour's high achievements and service. Your Honour is a member of the Victorian Bar, and I know that you have special pride in that membership.

You grew up on your parents' copra plantation, "Kokibagu", close to the coast, in the Rigo district of Papua. From the age of seven, you were a boarder at Scotch College in Melbourne. You took the old DC 3 "milk run" (from Moresby to Cairns, Brisbane, Sydney and Melbourne) back and forth between home and school. In World War II, you and your mother were evacuated to Australia. Your father remained behind and acted as a guide to Australian and American armed forces.

In due course, Your Honour joined the Royal Australian Air Force as a reserve officer, with the Melbourne University Squadron. As we have heard, you rose to the rank of Air Vice Marshall. You were Judge Advocate General and served not only in Australia, but in Malaysia and in Vietnam. In 1985, Your Honour was awarded the Reserve Forces Decoration. In 1992, you received the great honour of being made an Officer of the Order of Australia "for distinguished service of a high degree to Australia".

While still at school, in an early demonstration of your passion for justice, and courage in standing up for others less able to defend themselves, Your Honour and three others brought to the notice of the headmaster an abuse of power by the house captain, consisting of excessive use of corporal punishment on the younger boys. The result of this exercise of moral courage was, however, that you were all thrown out of the small private studies that matriculation students were privileged to occupy.

Nevertheless, you failed to learn from that early lesson and have, all your life, continued to speak out forthrightly and fearlessly against injustice, and for the needs of others and in latter times for the needs of this Court. This forthrightness has not always won universal favour.

You were a resident student at Ormond College within the University of Melbourne, and had Sir Daryl Dawson as a tutor.

Your Honour is a loyal and good friend and this is reciprocated. Sir Daryl went to some pains to return to Melbourne from the United States in time to attend your welcome to this Court, and to be the one to administer the oath of office to Your Honour as Chief Justice of this Court and a Judge of the Federal Court.

Stories of you at the Victorian Bar are legion and legendary. One that has not, I believe, previously been told concerns workers' compensation. Although Your Honour had a broad practice, you specialised in town planning, local government and administrative law, and certainly not workers' compensation. Your clerk, Percy Dever, was never one to let a brief go out of his list, and on one occasion he sold you as a specialist in workers' compensation. After a long night's preparation, you rose to the task. Next day, you conducted the pre-hearing conference in your chambers with the client with your usual confidence and urbanity. Then you took the client to the Board for the hearing. Unfortunately you took him to Sleigh House on the corner of Bourke and Queen Streets, although some years earlier the Workers' Compensation Board had moved to Marland House. Your cover as a workers' compensation specialist was blown.

Your Honour is an extremely hard worker and a voracious speed reader. You fit more into each day than anyone would believe possible. You have been seen reading *The Age* newspaper while under the shower — holding it at arm's length out of the water — so as not to waste time.

Lest it be thought that you are a workaholic, I should also say that there were two notable lunch groups at the Bar when you were in practice. Each gave the other a nickname: "The Red Faces Club" and "The Tall Girls Club" (all of whom were, of course, men!). With Chief Justice Michael Black and Master Michael Dowling, Your Honour was a "red face".

Before appointment to this Court, Your Honour served for over five years as a judge of the Victorian Supreme Court. Aged 44 at the time of appointment, you were the youngest judge in Victoria. Notable decisions include *Gasbourne Pty Ltd* (a complex bottom-of-the-harbour corporations winding-up decision) and your courageous dissent in the Full Court decision in the contempt proceedings against radio broadcaster Derryn Hinch.

Your Honour has been an outstanding judge, chief justice and administrator. You have also been an intellectual leader in the jurisprudence of family law. The interaction of international human rights and family law has been a theme of major importance in papers, addresses and judgments.

The legal system in which Your Honour was educated in the late 1950s, and which you first practised in the 1960s, treated most international law as irrelevant. You saw the importance of the universal features of international human rights law, and their application to the development of Australian family law. In this, Justice Michael Kirby has described Your Honour as "prescient" and an intellectual leader.

The University of Melbourne Law School is honouring you with a public valedictory address which will be delivered by Justice Kirby.

The University of Melbourne has also appointed Your Honour to be a professorial fellow in the Department of Criminology with the title and dignity of "Professor".

Your Honour has also been a very kind and thoughtful Chief Justice, encouraging and nurturing the development of new judges to the Court and empowering them to develop new ideas and projects and broaden their horizons.

You know and care about the Court staff as well as the judges — taking a personal interest in them and their lives, knowing and asking about, for example, a sick child. The long service and loyalty of your personal staff is testament to this.

On behalf of the Victorian Bar, I wish Your Honour a long, satisfying and happy retirement.

May it please the Court.

County Court

Judge Neesham

I appear on behalf of the Victorian Bar to recognise Your Honour's service to this Court for the best part of 20 years.

Your Honour has seen, and been part of, remarkable growth in the Court, and in its jurisdiction and standing. In 1985, there were some 40 judges. Now, including sitting reserve judges, there are some 60 judges. In 1985, the Court's jurisdiction was limited to $100,000 in personal injuries actions and $50,000 in other matters. Now, the Court's jurisdiction in personal injuries is unlimited, and, in other matters, is $200,000. Its criminal jurisdiction, except for treason and murder, is concurrent with that of the Supreme Court.

We have Sir Leslie Pepiat and John Rodd to thank for your move from London to Melbourne. Sir Leslie was then senior partner of Freshfields, solicitors. He had visited Sydney, and spoke highly to Your Honour of the opportunities in Australia. John Rodd, then senior partner of Arthur Robinson & Co (now Allens Arthur Robinson) interviewed you in London, and persuaded you to come to Melbourne.

Your Honour succeeded Peter Brusey as the cultured Englishman at Arthur Robinson & Co. Brusey had come from London to Melbourne in 1957, and been a solicitor at Arthur Robinson & Co for two years before coming to the Bar.

After a year, you came to the Victorian Bar and read with Ivor Greenwood.

Through your Master, you acquired roots and connections in the Victorian profession. Greenwood had read with Sir George Pape, who became a Supreme Court judge. Your Honour was Greenwood's first reader. Judges Duckett and Campbell of this Court also read with Greenwood, as did Larkins QC and Shatin QC.

You carried on the tradition of readers who went on to distinguish themselves. Rees-Jones left the Bar, but Bongiorno was appointed to the Supreme Court and Michael Colbran took silk.

Few at the Bar have seen the playful side of your character. Mr Justice Jenkinson, then Jenkinson QC, had chambers near Your Honour's. Jenkinson was known for his sweet tooth. His secretary was making tea for him, and you said, "Why not make a really good job of it?" and emptied the sugar bowl into Jenkinson's cup. You stirred it well, and told the secretary to take it in. "He has so much sugar in his tea, he won't even

notice." Your Honour was right. Jenkinson kept working and drank the tea without comment.

Speaking of refreshments, Sir Garfield Barwick, when you appeared before him in Chambers, offered coffee and biscuits — hospitable, but perhaps also playful — creating an unforseen forensic challenge for counsel, balancing a cup of coffee and putting your argument between mouthsful of biscuit.

As a Crown Prosecutor, you were impeccably fair, and everyone who appeared against Your Honour for the accused would agree. This is, if I may be pardoned for using the Australian vernacular, one "hell-of-a" compliment, and the more notable by reason of its source — a member of counsel who is not always complimentary about others. He is in court today, in silent support of what he has said, Colin Lovitt QC.

A certain notorious paedophile had taken to representing himself. He did so, even in his appeal before the Full Court of the Supreme Court. On a charge of obtaining money by deception, the Crown had failed to lead any evidence that the appellant's youth camp was not, as he had claimed, subsidised by the government. The appellant had not raised this. Fairly, Your Honour, as prosecutor, drew it to the attention of the Court, and the conviction was set aside.

Interestingly, Lovitt recalls that you were the first barrister he saw in full rig when, as an articled clerk, he instructed Your Honour in a civil case — a formidable and curious coupling of widely different personal styles, one might say.

In another case as a prosecutor, you were addressing the jury. In one burst, without pause, hesitation or breath, Your Honour said: "Members of the jury, don't you think, if there were a skerrick of truth in the accused's story, he would have called his wife? My God! What have I said?"

You were regarded by His Honour Judge Hart as having thrown a googly in a case in which you pleaded a lost modern grant, sending him scurrying to Voumard. Judge Hart is also here today.

As Deputy Ombudsman to Sir John Dillon, with Sir John, Your Honour broke new ground in Victoria. There was little precedent in a common law country. In 1961, New Zealand had been the first country outside Scandinavia to have an ombudsman. Western Australia, South Australia and Victoria followed suit in the early 70s. In his report reviewing the first 25 years of the Victorian Ombudsman, the recently retired third Ombudsman, Dr Barry Perry, said this: "I should emphasise that the foundations laid in the early years by Sir John Dillon and his Deputy, Tom Neesham, remain today. I believe that the work done by these two has been of fundamental importance to this Office. The direction which they set for the Office, the policies they enunciated and the practices they introduced, in essence, remain today. I think, perhaps, that the best test of quality is that of time, and the direction, policies and practices [they] set have certainly stood the test of time."

Your Honour was Acting Ombudsman between the retirement of Sir John Dillon and the appointment of his successor.

The late Sir John Dillon had high praise for Your Honour. He relied heavily on you in matters of the jurisdiction and practice, and has described you as the best investigator he knew, with a fierce sense of fair play, independent and absolutely incorruptible. Sir John attended Your Honour's welcome to this Court.

Shortly after Your Honour's return to the Bar in 1981, you established a set of chambers, of which you were regarded as the head. Justice Guest of the Family Court, Berglund QC, Lacava S.C. and Graeme Clarke S.C. were members of your set.

Your Honour was prosecuting a rape case in which there had been two mistrials. You were brought in to make a certainty the third time. The accused had given evidence each time, and you demolished him in cross-examination. Shamelessly, Guest asked the jury what they would expect in such a David and Goliath contest — an accused, barely literate in his own language, cross-examined by a six-foot-four, blue-eyed, former British Officer, with a gold pen. Your strengths counted against you, and the jury acquitted.

Your Honour was Judge Hassett's choice to succeed him as Secretary of the Criminal Bar Association. You were also Chairman of the Bar Public Relations Committee.

You are a good sportsman. In the British Army, you represented your Corps in the Pentathlon: running, swimming, fencing, shooting and riding. At the Bar, you used regularly to captain the team that played Dr Pannam's eleven. You are a keen yachtsman, and have sailed the Greek Islands and Adriatic, as well as the Gippsland Lakes, the Whitsunday Passage and Westernport. There are many stories of your ability to get out of tight situations at sea, on one occasion, diving in to recover a runaway oar when a north wind was blowing your dinghy out to sea.

Your Honour has a 400 acre Angus cattle farm on French Island. Cattle are spooked by koalas. Koalas not infrequently wander across paddocks, driving the cattle into a frenzy. In their panic, the cattle charge the koala. You once intervened to save a koala from being trampled. The koala, probably stoned on eucalyptus leaves, would not be coaxed. It simply ambled on, smiling benignly. You took off your belt and, using that as a lead, walked the koala to safety — the six-foot-four judge towering over the stoned, smiling koala.

The Solicitor-General has spoken of Your Honour's cases as a judge, and I understand that Mr Dale will also. You have been described as a stalwart of the Court, one upon whom successive Chief Judges have always been able to rely to take a sticky case.

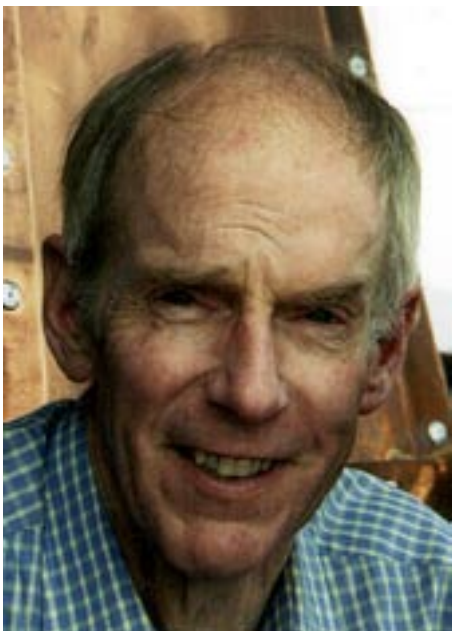
Your Honour engenders loyalty and respect in your personal staff. You have had only two associates and two tipstaffs in nearly 20 years. The team has been mostly former military: you are a former Captain, your present associate, Mr Sullivan, is a retired Lieutenant Colonel and has served with Your Honour for 12 years. Your tipstaffs have been retired army and airforce sergeants. Significantly, your first tipstaff, Mr Jock Clark, who served you for 10 years has come up from Inverloch to attend today's farewell.

I understand that it's expected that Your Honour will be appointed a reserve judge, and that, after a short vacation, you will return to the Court in that capacity. On behalf of the Victorian Bar, I wish Your Honour, a long, satisfying and happy retirement.

May it please the Court.

John (Jack) Anthony Strahan QC

Eulogy by Jack Fajgenbaum QC



ON Thursday 20 May 2004 a funeral service was held at Trinity College Chapel, University of Melbourne. Jack Fajgenbaum QC delivered the following eulogy.

John Anthony Strahan was taken from us far too early. He had so much more to give — not only to his family and his friends, but also to his profession. All who knew him will remember him as the most courteous and civilised of men, the perfect gentleman who displayed great concern for others and none for himself.

He epitomised all that a barrister ought to be. He had great learning, wisdom and judgment and a profound sense of justice and fairness. He was fearless, he was incisive, he was in control of his cases: there was no need for extravagance. Judges in all jurisdictions trusted him and knew that they could rely on him. Solicitors, from the largest at the big end of town to the smallest in the bush, trusted him, as did their clients. His opponents regarded him as formidable, his juniors as the ideal leader. His colleagues naturally turned to him for advice and support which were always readily and generously given. They regarded him as a barrister's barrister.

Jack disarmed us all with his dry and incisive wit, a wit which was utterly devoid of malice. It was often mischievous. He never had an unkind word to say of anyone. Although he was a reluctant performer, he was the wittiest and funniest and for that reason one of the best and, for those who heard him, the most celebrated of speech makers. He could reduce his audience to paroxysms of laughter and to envy of his remarkable skill.

Jack was a natural leader. At Caulfield Grammar he was captain of the school. Here at Trinity College, where he was a resident student throughout his University days, he became senior student. His scholarship is evidenced by his graduation as one of the top students who completed the honours degree in law in 1961.

Jack was admitted to practice on 1 April 1963. He came to the Bar in June 1966 and read with Daryl Dawson, one of the most distinguished of mentors. He took silk in 1985. When called upon to do his duty, he did it, and so between 1991 and 1994 he was a member of the Board of Examiners.

Loved and admired by all who knew him, Jack remained unaffected. He was extraordinarily modest. It was not a false modesty and there was no need for it. From time to time the Bar affectionately honours its senior members who have contributed to its life by designating them as "living legends". Living legends are anointed with a roasting. Jack, when asked to allow himself to be so honoured, refused — protesting that he did not qualify and that perhaps he might one day be flushed out as a notable hermit. Recently, the silks at the Bar were asked to contribute $1000 each for the commissioning of the sculpture which now stands in the foyer of Owen Dixon Chambers East. Jack unhesitatingly made his contribution but he insisted that he not be publicly acknowledged. A plaque listing the names of the contributors will appear shortly beside the sculpture. All the contributors save one will be named. One will appear described as "anonymous".

Notwithstanding his civility, his courtesy, his modesty, Jack had an inner strength of steel and a well disguised, but strongly competitive, and also playful, spirit. It was apparent on the sporting field. He played golf wearing clothing that appeared to have been bought at an op-shop, including a terry towelling hat. He claimed that the clubs were his father's, others thought them his grandfather's His opponents generally had the latest gear — fashionable clothing and the latest and the best of clubs. Jack looked indifferent, but he generally won.

Similarly, on the tennis court he played with an old fashioned narrow-faced wooden racquet of the kind Adrian Quist had used. This was deceptive. Again he generally won. The same inner strength and well disguised strong competitive spirit were well employed in his profession, often to the disadvantage of the unknowing with whom he was required to cross swords.

In more recent years, Jack had developed a practice as a mediator. He was acknowledged as one of the best. He immediately commanded the confidence and respect of the litigants and their lawyers. The litigants immediately recognised his wisdom, integrity and judgment. The lawyers admired his persistent and constructive efforts to bring the litigants to a just compromise. He continued to strive for, and often achieved, constructive solutions when others may have abandoned the task because the mediation was apparently futile.

Jack had a perfect judicial temperament. He would have been an excellent judge. The community has suffered because he did not become one.

This crowded, overflowing chapel is testament to the affection in which Jack was held by all who knew him and also of their felt need to support and comfort you, Diana, Anthony and Lucinda, in your grief. We mourn with you. May we all be blessed by our memory of Jack. And Jack, may you rest forever amongst the righteous.

Ms Junior Silk Takes Poetic Licence to Bless the 2004 Bar Dinner

In a radical departure from the format and tradition of junior silk speeches at Bar dinners past, this year Dr Hanscomb S.C. devised a novel and literary tribute to the honoured guests.

MR Chairman, as you say, I am a mathematician by training. Mathematicians are not famous for humour, and I am no exception. So, ladies and gentlemen, as a naturally unfunny person, I thought that instead of anecdotes, I might propose a toast to our honoured guests by way of:

BLESSINGS
(Any movement you may feel will be A.A.Milne, turning in his grave.)
Barrister kneels at the foot of the bed,
Droops on her little hands
Over-stressed head.
Hush, hush,
Whisper who dares,
The junior silk is saying her prayers.

God bless the Attorney,
I'm sure that's right,
He's the reason I'm here tonight.
He gave me a blessing,
I'm now called S.C.
But I'd rather he were here than me.
He tried to gazump me
With two recent announcements,
But my bacon was saved
By the Chairman's pronouncement.

God bless Chief Warren,
Our new CJ.
Deserved and worthy,
Despite the delay.
Counsel teased us all
With a ring-in from Sydney,
But she's a judge of Victorian kidney.

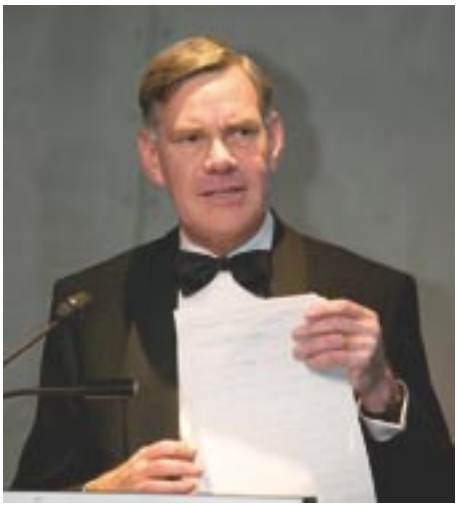
Junior Silk Kristine Hanscombe S.C. toasts the honoured guests.

She went in to bat
For all of the judges,
To get them more money
So they wouldn't bear grudges.
And it worked quite a treat;
The government's purses
Opened wider for them
Than for the nurses.

For Robert Brooking AO I pray,
You only know what he does now all day.
That mighty and inventive brain,
Once plotting away on the 5:18 train.
After years of hard labour at trial and appeal,
A life of retirement seems quite unreal.
He too thanks the Chief
As I should mention,
A rise for them all
Puts up his pension.
After arduous service, with much to go,

Justice Hayne listens to Justice Whelan's response.

Ian Harrison QC, President of the Australian Bar Association, makes the toast.



Robin Brett QC, Chairman of the Bar Council, delivers his welcome address.

The Commonwealth gonged him with AO.
But I hope that he doesn't feel he's been slighted,
In earlier times he would have been knighted…

Enough of appeal courts
Who criticise all.
Whose judgments are huge,
But whose case load is small.
Lord, please don't forget those who run trials.
(And thanks for the backlog of cases for miles.)

Thanks for the appointment
Of Justice Steve Kaye,
As earnest a judge
As you meet these days.
A talented man of experience galore,
From commercial to property and common law.
He padded about all day in his socks,
But now he can wear an ermine-trimmed frock.
His sartorial quirks
Have caused some mirth,
But I'm sure its not true that he elbowed the players
When the guernsey he wore in the blue and white layers.

God bless Justice Whelan,
Who talks more than he plays.
He's fond of recalling his Coodabeen days.
It was green on the "G"
Where he pranced,
Lithe and free.
But he's given it up,

Chief Justice Warren.

And it's been quite a wrench.
Lord, what people give up when they go to the Bench.
In Fitzroy he's famous
For doing it proud:
The mansion he lives in
Dwarfs all around.
(There's another whole house
In just part of its grounds.)

God bless our Solicitor, Pamela Tate,
Who's done rather well, like most women of late.
Her rise to the top has been just stellar,
And has shown our Solicitor
Need not be a fella.
It was only last year she was junior silk.
Now she stands above all of us, and of our ilk.

God bless Judge Frank Walsh,
(Our All-Star performer
And expert crowd warmer).
He's been awarded
The Australia Medal,
For service recorded
To law and community.
Sounds very fine,

Glenn Martin S.C., President of the Bar Association of Queensland.

Judge Lewitan AM listens to the toast.

Justice Whelan gives the response on behalf of the honoured guests.

Chief Judge Rozenes.

But it's really deserved,
He's father of nine.

God bless Rachelle L
At this special time.
(Lewitan's such a difficult rhyme.)
She has been honoured to a high order
"For service to women" the citation records her.
The WBA is now vigorous and strong.
It stands up against things it thinks wrong.

God bless Geoffrey Chettle,
The bald-headed bikie.
He'll need some new leathers,
Black and purple, by crikey.
He defended them all.
Now he's poacher turned keeper
He'll send them all down,
Just like the Grim Reaper.
Lord, bless all the crims
Who now live in fear,
For Geoff knows the tricks: the nolle, voir dire.
He's tried them all — some win and some fail.
But that's why we have fast appeal bail.

God bless Judge Millane,
Who might form a committee
Of judges upset
By my little ditty.
Her experience there is unutterably vast,
So I'd better move on to the end, very fast.
She worked for the Bar for ages, dear Lord,
And the County Court is her earthly reward.
A keen player of netball
As we have been told,
In another court now
To the rules she must hold.

God bless all the Feds
I humbly implore you.
(Though Commonwealth Judges
Are the type to ignore You).

God bless Susan Crennan,
Not here now with us.
She's made the wise choice
To avoid all this fuss.
As an advocate up on her feet she was fearless,
As a Judge without wig she'll be equally peerless.
For she can tell dicta from rat. decidendi
But still live a lifestyle very Kew,
And yet trendy.
Our Sue is a Legend,
Officially so,
(There's a cute secret handshake
For those in the know.)

God bless our Victoria,
Known also as Bennett.

(A Federal appointment
I can't rhyme it with Kennett.)
She's well known as an expert
On the Hague Convention.
So delinquent parents
Should pay her attention.
She kept her high heels
In her old Master's cupboard,
Which flummoxed his wife
When they were discovered.

God bless our Moshinsky,
Who's not here tonight.
He's back in the Solomons
Fighting good fights.
Our Nathan most bravely
Has heeded the call,
Of those who need order
And law, above all.
With his Panama hat
And a pair of red bathers,
Essential equipment
For legal lifesavers.

Barrister kneels at the foot of the bed,
Droops on her little hands
Agnostic head.
Hush, hush,
She sags with relief.
Her only prayer now
For a real paying brief.

Then an unseen reminder
Prompts gently behind her:
"Is there anyone else you've forgotten
to mark?"
Yes, now I remember, God bless my
Clerk.

Junior silk up at the front of the hall,
Holds up her glass,
And raises the call:
Charge all your glasses
And be standing up tall,
Our honoured guests toasting,
One and all.

The crowd applauds.

'A Reasonable Ente
the Judge Frank Wa

In his autobiography Judge Frank Walsh reflects on music and his recent performance at the Victorian Bar dinner.

THIS chapter on music is happily not yet complete. This segment is written on 4 June 2004. I am now 73 years of age and some delightful events have occurred since the earlier portion of this chapter was written.

The "Frank Walsh Sextet" continued to perform on an ad hoc basis at the Essoign Club. There were four such performances. One of our presentations was attended by Robin Brett QC, the chairman of the Victorian Bar Council. He was apparently quite impressed. He approached me early in 2004 and requested that my group perform at the annual Bar Dinner. This is a status function in my profession and is attended by judges of all jurisdictions and practising barristers. I attended my first Bar Dinner in 1958.

The request of the chairman of the Bar Council was a breathtaking request. How would I, Francis Walsh, who had had only a few lessons on the saxophone, perform for nearly 400 people at a status function? My reputation was again on the line, but on this occasion it was as a musician and entertainer. I must confess that I gave agonised consideration to the proposal. But I had gathered around me a fine group of young talented musicians. I had a lovely E-flat alto saxophone, which had been manufactured by the Conn company in USA in 1929, and it had been beautifully restored. My good friend, David O'Brien, who had joined with me in organising the group, had

Judge Frank Walsh and Chief Justice Warren.

convinced me that I could sing a good song. In addition, Robin Brett unearthed

rtainer' Hits the Spot with lsh Vic Bar All Stars

Judge Frank Walsh, the Vic Bar Allstars with Miss Sarah Fregon entertain the dinner.

a lovely vocalist, Sarah Fregon, a young attractive barrister who was prepared to join the group. I consulted other members of the group. I took a deep breath, and accepted the challenge. We would perform at the Bar Dinner.

Intensive preparations began. The group was billed as "The Judge Frank Walsh Vic Bar All Stars with Miss Sarah Fregon". The advance accolades were of such nature as to call for an inspired performance. We all worked assiduously towards a convincing performance. We were given prime time at the dinner, comprising 15 minutes between the entrée and the main course, to set the atmosphere for the evening.

During the afternoon we attended the Zinc Ballroom at Federation Square for a sound check of the amplification. Nothing was left to chance.

The presentation itself is now history. During my lifetime there have been only a handful of magic moments. This was one of them.

We were able to establish an atmosphere of fun and audience participation. We were given a standing ovation. It was unforgettable.

The Bar Dinner of 2004 was not my swansong. I have a great deal of living yet to do. But it was a wonderful experience to join with a group of talented young people and entertain my peers in a manner which, as I have been assured, was scintillating. It is not without significance that each member of the group communicated with me and thanked me for the opportunity to be involved.

From my own perspective I have always wished to demonstrate to my peers that I am a reasonable entertainer. The response of the Bar was beyond my wildest dreams.

Elegance, Erudition, Enchantment and Elan

This year the venue of the Bar Dinner — held on Saturday 29 May 2004 — was once again Zinc at Federation Square. It was attended by 326 members of the Bar and Bench, many of whom had heard of the success of the previous year's dinner and wanted a repeat of that experience. They would not have been disappointed one jot.

GUESTS were warmly welcomed and greeted at the door by Bar Chairman Robin Brett QC and Senior Vice-Chairman Ross Ray QC. All smiles and graciousness. A good start. Loud camaraderie fuelled by the ebb and flow of the cocktail hour followed hard upon. Even better.

As an extremely welcome distraction to the minimalism of the culinary experience on offer later, this year entertainment was provided, and the talent the Bench and Bar has produced astonished everyone.

The "Frank Walsh All Stars with Miss Sarah Fregon" comprised band-leader Judge Frank Walsh (alto saxophone and vocals) resplendent and completely in the role in a dazzling cream jacket; barristers David O'Brien (double bass); Andrew Fraatz (tenor saxophone); Michael Turner (guitar); and Sarah Fregon (vocals); with co-opted members Patrick Gracey (drums) and Matthew Ferguson (piano/keyboards). They warmed up the gathering between entrée and main course with a bracket of jazz favourites including rousing renditions of Summertime, Night and Day, Don't Get Around Much Any More (dedicated to those who used to appear before Judge Walsh in the County Court but who now spend time at Her Majesty's pleasure!), Georgia on My Mind, and The Lady is a Tramp. Unfortunately for those spellbound by the music in general and the singing of Sarah and the Judge in particular, the etiquette of the concert hall did not find favour in some quarters, and there was a nattering of voices where silent appreciation would have been more in order. The appreciation at the conclusion of the bracket was, however, thunderous and included a well-deserved standing ovation. The performance brought a bolt of much needed élan to the otherwise predictable formality of Bar dinners past and was a thorough hit. What will it be next year — The Victorian Bar Idol?

The Junior Silks' speech — reproduced elsewhere in this issue — has to go down in the annals of Bar history as the first speech honouring the invited guests composed entirely in verse (with apologies to AA Milne). But not only that.

Justice Dodds-Streeton; Rod Randall; Chris Dale, President of the Law Institute of Victoria; and Andrew McIntosh MP.

Richard Tracey QC, David Beach S.C., Ross Nankivell and Craig Halfpenny.

Jenny Richards, Mark Derham QC and Mark Robins.

Julie Davis, Glen Pauline, Richard Boaden, Simon Gannon, Stewart McNab and Richard Phillips.

Warren Swain, Jim Shaw and Lawrence Maher.

The Chairman in rising to respond to the standing ovation (another one) which followed the junior silk's tour de force, responded thus:

"What can you say to a speech all in rhyme?

A marvellous effort and funny at the same time.

We're now going to have a very brief pause

But first let's give Kris another round of applause."

As if the previous stellar performances were somehow insufficient (whereas in truth the gathering was probably excessed-out in erudition and élan at this point), Justice Simon Whelan rose to respond to the toast to the honoured guests and on their behalf. Professing an unpreparedness that fooled no-one (due, he said, to the Chief Justice levying her charges to heroic feats of extended service permissive of no frivolity) Justice Whelan then produced a blue manila folder which he said was the Chief Justice's file on judicial humour. He proceeded to read from the file, ostensibly as a warning to those who attempt humour from the Bench. In doing so he peppered his examples from transcripts of proceedings before the High Court in special leave applications where the Bench quipped with each other in irreverent and jocular tones. The lesson as a parable on the folly of so doing was lost, I suspect, because the reading (perfect delivery, all in the timing) brought the house down and proved further — if indeed it be necessary to do so — that truth is indeed stranger than fiction. Justice Whelan then expanded on his theme, classifying humour by type and category and recipient, and demonstrated why the Coodabeens' loss was comprehensively the Bench's gain.

And so the elegance of the evening wore on, and but for the odd broken chair and spilled wine might have been a perfect, even enchanted evening.

J.B.

Richard Lawson, Ray Northrop and Richard Brear.

Stephen Moloney, Michael Gronow, Georgina Costello and Tim McEvoy.

Albert Monichino, Mark Moshinsky, Iain Jones and Ted Woodward.

Bob Gotterson QC, President of the Law Council; Judge Chettle; Lesley Fleming M and Maurice Phipps FM.

Judge Wilmoth, Caroline Kirton, Louise Donohoe and Jennifer Batrouney S.C.

Richard Greenfield, Liza Pawderly and My Anh Tran.

Ken McGowan, Barbara Cotterell M and Ross Maxted.

Marguerita Desmond, Patrick Tehan QC and Bill Stuart.

Third Party Appeals Against Works Approvals: A Personal Journey

Justice Stuart Morris, President, Victorian Civil and Administrative Tribunal

A paper delivered to a seminar hosted by the Victorian Planning and Environmental Law Association and the National Environmental Law Association, in association with Mallesons Stephen Jaques, at Level 28, Rialto Towers, 525 Collins Street, Melbourne on 20 April 2004. As the issues canvassed in this paper may be the subject of proceedings before the author, any opinions expressed in the paper must necessarily be regarded as tentative.

IT was on 29 June 1976, just a few days after I was permitted to accept briefs as a young barrister at the Victorian Bar, that Mr Justice Oliver Gillard handed down his decision in *Protean (Holdings) Limited* v *Environment Protection Authoriy*. Although this case did not directly consider the scope of third party appeals, it was significant in the development of environmental law in Victoria. If nothing else, it established a judicial tone. The case the court was required to consider involved the nature of the powers available to the Environment Protection Authority under the *Environment Protection Act 1970* ("the Act"). I think it can be said that Mr Justice Gillard had not come across an Act which gave a statutory authority such broad, sweeping powers.

Justice Stuart Morris

He commented that the Act had two objectives: to provide for a licensing system whereby the discharge, emission or deposit of waste may be permitted; and to impose certain prohibitions and limitations on the enjoyment of rights of a personal and proprietary character where it might be thought that the exercise of such rights would be hurtful to the physical well-being of the community in general. He said the Act contained "a number of novel and somewhat extraordinary features". But in saying this His Honour was merely warming up. After setting out the nature of the powers contained in and under the Act, His Honour said:

> Although it may be readily conceded that the purposes and objects of this Act are praiseworthy, the means adopted to achieve them seem to be quite authoritarian, if not draconian in character. The penalties are harsh. Because of these features, I am of opinion that the legislature must be taken to have intended that although the statutory provisions of this Act might appear to confer powers upon the subordinate bodies, which would enable them to invade or erode the existing rights and privileges of the individual, either of a personal or proprietary character, such provisions if at all ambiguous should be strictly construed in favour of the subject.

I suspect judicial attitudes to property rights may have softened since 1976, but it remains true that the Act, and instruments made under the Act, can significantly impinge upon personal or property rights. It also remains true that there is at least a potential for the Act to operate in an arbitrary manner. This is highlighted by the High Court decision in *Phosphate Co-operative of Australia* v *Environment Protection Authority* where Aickin J described the startling width of the definition of "waste" in the Act. He commented that:

> The definition is so wide that to smoke, or perhaps even to breathe, would appear to be to emit matter into the environment so as to cause an alteration in the immediately surrounding portion of the environment. To water one's garden or to drive a car would equally be to discharge waste as defined and would require a licence from the authority.

Although my personal journey with environmental appeals does not start with the *Protean Holdings* case, my first Supreme Court appearance was in front of Mr Justice Gillard. I was acting for a landlord who was seeking to prevent the extension of a lease in circumstances where the tenant claimed to have exercised an option to renew. Essentially the

landlord claimed that the tenant had no right to exercise the option because it had not complied with various covenants in the lease, including covenants in relation to the use of the premises. The premises consisted of a motel in Wellington Street, St Kilda. It is said that, at least at one stage in its history, it was the biggest illegal brothel in Melbourne. Unfortunately my case floundered when my opponent alerted the court to a provision in the Property Law Act that the right to exercise an option was not dependent upon complying with all covenants, but only covenants in respect of the payment of rent. At this point I amended my case, somewhat desperately, and pointed out that the tenant had been paying $1,666 per month in rent whereas the lease provided that the rental required was $1,666.66. Sir Oliver Gillard was somewhat taken back by the amended claim, but said little more. Next morning he delivered judgment, in my client's favour, stating that the *de minimis non curat lex* rule did not apply to the payment of rent. His Honour cited a mountain of authority, none of which I had brought to his attention, in support of this proposition. When I asked for costs, he smiled at me kindly and said "not on this occasion, Mr Morris".

A few years later I took on a brief to act for the Australian Conservation Foundation in a proceeding before the Environment Protection Appeals Board in which the ACF sought to appeal a decision of the EPA in relation to the provision of mixing zones adjacent to the Shell refinery in Corio Bay. I spent the weekend studying the Act and mixing zones. But at the commencement of the hearing, on 6 October 1980, my opponents, represented by Warren Fagan QC and H. McM. Wright of counsel, ambushed me with the submission that the ACF was not "a person aggrieved" and did not have any right to bring the proceeding. Displaying greater confidence than may have been appropriate, I declared that I was ready to meet the submission and carefully explained why it should not be upheld. But the then chairman of the board, Mr Russell Barton, did not agree. Russell Barton was a studious lawyer, who ran a tight but fair hearing. In the mould of his generation he was socially aware but conservative in disposition. As it turned out, over the next twenty years he played a crucial role in the development of the law concerning third party environmental appeals. In the *Shell* case he held that the ACF was not capable of being a person aggrieved and threw its case out. Some years later the Full Court of the Supreme Court of Victoria reversed this decision.

The decision of the Full Court in the ACF case revolved around the words "person aggrieved". The court held that, in their context, these words should be interpreted broadly and included a body such as the ACF, particularly as the ACF had objected to a preliminary determination by the authority to grant a licence. The ACF case was obviously important to the future of third party appeals; as a standard strategy for those opposed to third party appeal rights is to question the standing of the appellant.

A couple of years later, in *McCubbin* v *Environment Protection Authority*, the decision of the Full Court in the ACF case was put to the test in the context of an appeal by members of the community against the issue of a licence to discharge wastes to land at Dutson Downs in Gippsland. Mr H. McM. Wright of counsel appeared for the licence applicant and, once again, contested the competency of the appeals. But the Planning Appeals Board rejected this argument, holding that the liberal interpretation given by the Full Court to the expression "person aggrieved" meant that a wide range of persons had an interest in the matter. Mr Wright also argued that the grounds upon which appellant objectors could rely were limited. The board did not need to rule upon the validity of the various grounds of appeal because ultimately it directed the issue of a licence. However, it did observe that there must be some causal connection between the consequence or effect complained of and the proposed discharge, emission or deposit of waste. It added:

> The board also considers that in order for a ground of appeal to be valid, it need not be phrased in the precise terms of section 33B(2)(a) or (b). A ground of appeal is valid if the matters raised are in fact based upon either (a) or (b).
>
> The board also agrees with Mr Wright's submission that the suitability of another site for the disposal of the wastes is not a valid ground; nor is the suitability of alternative methods of disposal of the wastes.

His Honour cited a mountain of authority, none of which I had brought to his attention, in support of this proposition. When I asked for costs, he smiled at me kindly and said "not on this occasion, Mr Morris".

When the Environment Protection Act was passed in 1970 there was provision for appeals, but not by third parties. This was quickly changed. In 1972 third party appeals were introduced, with the relevant Minister, Mr Borthwick, commenting as follows:

> When the principal Act was drafted there was an unintentional but serious omission in the appeal procedure. The way the Act now stands the only person who has the right to appeal on the issue or non-issue of a licence for the discharge of any waste, or, the conditions attaching to any licence, is the licence applicant or the licensee, as the case may be. It is now realised that it may be possible for the rights of many third parties to be seriously affected by the issue of a licence or the conditions of a licence, and it is therefore essential that at these parties should have an avenue through which their views may be made known. An example would be that the authority might decide to issue a licence for a discharge into a stream which a downstream water user or a downstream waste discharger might consider to be detrimental to his interests. He should have the right of appeal and the amendments provide for an orderly process of hearing these appeals.

The appeal process that was initially introduced actually involved an appeal to the EPA in respect of its own decision; but a person who was aggrieved by the determination of the authority could then appeal to the Environment Protection Appeal Board. The right of a third party to appeal against a decision of the EPA was expressed to be on certain grounds. These grounds are fundamentally the same as the grounds which are in the current Act.

In 1984 the Act was amended and the provision which gave third parties a right of review was modified. This amending Act introduced section 33B, which remains the operative provision. It is useful if I set it out in some detail.

Section 33B(l)(a) provided that if the authority issues a works approval a person aggrieved by the decision may apply to the tribunal for review of the decision.

Section 33B(2) then provides:

… an application for review under sub-section (1)(a) is to be based on either or both of the following grounds —

(a) that if the works are completed in accordance with the works approval, the use of the works will result in a discharge, emission or deposit of waste which will unreasonably and adversely affect the interests, whether wholly or partly of that person;

(b) that if the works are completed in accordance with the works approval, the use of the works will result in a discharge, emission or deposit of waste which —

(i) will be inconsistent with State environment protection policy established for the area in which the discharge, emission or deposit will occur: or

(ii) where there is no State environment protection policy established for that area, would cause pollution.

The meaning of the words used in section 33B(2) is obviously critical in determining the scope of any third party right of appeal.

The next step of significance in the development of this branch of the law occurred in 1986, at a time when I was seeking to reform municipal boundaries in Victoria. So I must rely upon the written report and my knowledge of the two principal players. The case is known as *McKinlay* v *Environment Protection Authority* and the two principal players were Russell Barton and Michael Wright. I have already spoken of Mr Barton. Mr Wright has been an outstanding barrister in the planning and environment field over many years. Defining a strategy has always been a central focus. This case would have been no exception. The case concerned a proposal by the Shire of Flinders to establish a garbage tip at the intersection of Browns Road and Truemans Road in Rye. Various objectors sought to have the tribunal review the decision by the SPA to grant a works approval. Mr Wright, who appeared on behalf of the Shire of Flinders, submitted that it was not open to the third party appellants to challenge the validity of the works approval. He also contended that the right of an objector in pursuing an appeal against a works approval was quite limited by reason of section 33B(2) of the Act. Mr Wright focused upon section 33B(2) and, in his canny way, stressed four points:

1. That the discharge, etc. must be under the provisions of the works approval or licence, that is, in conformity with the same. While a discharge not in accordance with the works approval may amount to the commission of an offence under the Act, that is not a matter which can be relied on by an objector under s. 33B(2).
2. That the discharge, etc. must be one which "will", not "may", unreasonably and adversely affect the interests whether wholly or partly of that person.
3. That there must be a causal connection between the consequence or effect complained of and the discharge of waste under the provisions of the works approval.
4. That, likewise, under (b) there must be a causal link between the discharge under the provisions of the works approval and the pollution caused.

The tribunal, led by Mr Barton, adopted these points and applied them in limiting, and ultimately dismissing, the appeal. It is of significance that in this case the Tribunal held that an objector could only complain about a discharge of waste that was in conformity with the applicable works approval or licence. The works approval in that case contained the usual condition that "no discharge of leachate shall occur beyond the boundaries of the site". The real concern of the appellant objectors was that leachate would escape from the site and detrimentally affect the groundwater. But on the basis of the submissions made by Mr Wright, the tribunal held that this was not a matter properly before it on two separate bases, namely:

1. That the board is entitled to assume that conditions in either a planning permit or a works approval will be met by the applicant.
2. That in relation to the works approval any discharge of leachate to groundwater would not be a matter arising "under the provisions of the works approval".

The principles adopted by the Planning Appeals Board in *McKinlay* have been repeatedly followed ever since. During that time there have been numerous third party appeals in relation to works approvals, often by environmental groups and sometimes by commercial opponents. For example in *Carrington* v *Minister for Planning and Environment* the EPA had granted works approval for a quarry hole in Newport to be used for a putrescible landfill. The tribunal held that for the appeal to succeed the discharge of waste from the premises must arise under the particular works approval the subject of the appeal. It stressed that the test was whether the discharge will (as distinct from may) unreasonably and adversely affect the interests of the appellant. It held that for an appeal to succeed, the appellant must show that the discharge of waste authorised under the works approval would have an adverse consequence; it was not sufficient to demonstrate that there would be a deposit of waste which would exceed the levels permitted by the works approval.

Similar decisions were made by the tribunal in *McCubbin* v *Environment Protection Authority* and *City of Sunshine* v *Minister for Planning*.

The 1980s was the era of a series of appeals by community activists in the western suburbs, led by Alan Finch and John Kirby. Virtually all the appeals by Mr Finch and Mr Kirby failed, but they were never without their excitement.

The 1980s was the era of a series of appeals by community activists in the western suburbs, led by Alan Finch and John Kirby. Virtually all the appeals by Mr Finch and Mr Kirby failed, but they were never without their excitement. I am told the police were called on one occasion. And I remember the time when Mr Finch was behaving in a manner that led part-time member, Laurie Penttila, to look at me and say *sotto voce*, "what is the section that says you can throw people out". In the case of *Esmore and Finch* v *EPA* tribunal member Dr P.H.N. Opas commented:

> Mr Finch showed scant regard for the proceedings and left on three occasions during the course of the hearing returning after short intervals and was not interested enough to await the determination which was delivered in the presence of those parties who saw fit to remain. The written submission which Mr Finch made commenced by accusing the solicitors for the applicant as initiating invalid proceedings because the signature to the letter of the 9th August 1988 was forged. That allegation is wildly

irresponsible and has no substance in fact. A statement of this sort which is so exaggerated and actually accuses reputable solicitors of a criminal act is something like what Oscar Wilde described as the thirteenth chime of a crazy clock which casts doubt on all prior utterances. In this instance the utterances are subsequent.

The next case worth mentioning is *58th Colro Pty Ltd.* v *Environment Protection Authority.* This involved a proposal to build a rendering plant in conjunction with an export abattoir in Pakenham. At the time the rendering industry was held in relatively few hands and there was often a suspicion that objections to new entrants, although cast in worthy environmental terms, had somewhat different motivation. Originally I had the brief for *58th Cairo Pty Ltd* and, in February 1989, drafted a series of technical objections to the works approval which had been issued. I was unavailable for the hearing, and Mr Roger Gillard QC and Mr T.S. Falkiner of counsel represented the appellant objector. Mr Gillard carefully articulated the points I had devised, but the tribunal, chaired by Mr Barton, carefully rejected each one. Mr Gillard added an argument of his own, but even this did not succeed: the tribunal commenting "we do not think that the argument is tenable". Once again the tribunal adopted the reasoning in McKinlay and after considering the evidence, rejected the objector's appeal.

The *58th Colroy* case is just one of many strange cases that I was involved in concerning the rendering industry. For example, I well remember the time when I was briefed by a high powered corporate solicitor to act for an elderly woman on an aged pension who lived near to a proposed plant in Maribyrnong. At the first conference, the solicitor said:

> It doesn't matter how long the case takes. Whatever experts you need, we will obtain. In this case we will spare no expense.

But, strange as that experience was, nothing compares with *Staffbelt Pty Ltd* v *Environment Protection Authority and Kampala Holdings Pty Ltd.* Kamulla Holdings Pty Ltd wished to re-establish an abattoir at Old Hume Highway, Seymour, and, as part of this proposal, wished to establish a rendering plant. My client, Staffbelt Pty Ltd, was the owner of a rural residential allotment adjacent to the abattoir site. It had recently purchased the allotment for about $65,000. It had even obtained a planning permit to build a house on the lot. Naturally, being an adjoining landowner, it was a "person aggrieved" who could lodge an appeal pursuant to section 33B of the Act.

As so often happens in these cases the works approval which had been issued was subject to conditions to the effect that no objectionable odours should be discharged off the site. Moreover there was a draft licence for the operation of the proposed rendering plant to similar effect. I recall the proposed operator was, once again, represented by Mr H.McM. Wright of counsel and the hearing was before a tribunal chaired by Mr Russell Barton. It was hardly surprising that heavy reliance was placed upon the tests articulated in the *McKinlay* case in order to defeat my case. As matters transpired, notwithstanding the arguments I advanced, the tribunal adhered to the principles it had established. It said:

> Given the ambit of the third party appeal, …, the Tribunal is of the view that it cannot consider the likelihood of unlicensed discharges or their impact or the likelihood and consequences of discharges that would be in breach of the works approval. Nor can it consider whether the standards set by the works approval are likely to be achieved by the licensee, or whether the licensee would be tempted to operate outside the licence.
>
> As is not unknown in the case of appeals under section 33B of the Environment Protection pact the appellant seemed to conduct its case on the assumption that there would be a breach of the works approval or licence conditions. This is not a permissible approach.

I suppose in hindsight it was ambitious to have thought that the tribunal would have departed from the previous line of authority which had been established. But I must say that I was out-manoeuvred in this case. There had been a thirteenth chime of a crazy clock which cast doubt on all my submissions.

It is inappropriate to complain about the decision; and, in any event, I would no longer encourage complaints about tribunal decisions! But it is at least an open question whether the tribunal satisfactorily dealt with some of the arguments that had been advanced. For example, I put the following arguments concerning the nature of the appeal:

3.1 It is conceded that the tribunal should generally proceed upon the assumption that the approved works will be completed in accordance with the works approval. The word *generally* is used because there may be instances where the nature of the approved works makes it inherently improbable that the works will be completed in accordance with the works approval; in which case it would be illogical to expect the tribunal to proceed on such a false basis.

3.2 The tribunal is required to make an assessment of the use of the works. This means an assessment must be made of the probable use of the works, that is, the manner in which the works will be used on the balance of probabilities. (Compare section 20C of the Act.)

3.3 The contention by the respondent that the tribunal must proceed on the assumption that the use of the works will be in accordance with the provisions of the draft licence cannot be sustained.

- — The draft licence is a draft, not a final licence.
- — The terms of a licence can be changed from time to time.
- — The licence conditions may, or may not, be observed. This will depend upon the nature of the condition, the ease with which the condition can be satisfied and the suitability of the works to satisfy the condition.

3.4 In the present context, it is ludicrous to suggest that the inclusion of a condition in a draft licence to the effect that no objectionable odours shall be discharged off the site therefore means that the use of the works will not discharge objectionable odours. This would make a mockery of the right of third parties to appeal against the issue of a works approval.

I suppose in hindsight it was ambitious to have thought that the tribunal would have departed from the previous line of authority which had been established.

But I must say that I was out-manoeuvred in this case. There had been a thirteenth chime of a crazy clock which cast doubt on all my submissions. Let me explain.

My opponent repeatedly alleged that Staffbelt Pty Ltd was controlled by a large family company that dominated the rendering industry in Victoria. On every occasion this was raised, I made no admissions. Indeed I had no instructions on the matter. I recall that the directors of the company were men of straw employed by the large family company in question; but there was no other information which identified the underlying owners of Staffbelt Pty Ltd. My opponents then obtained a subpoena, to be served on a director of the family company which controlled a substantial portion of the rendering industry in Victoria. The process server was unable to effect service, but swore an affidavit to the following effect:

> I attended at the residence of the director, knocked on the door, which was answered by a young man. He told me he was the director's son and that his father was not home as he was out walking the dog. I returned a few minutes later and, on this occasion, spoke to a middle-aged woman. She told me she was the director's wife. When I asked if the director was available to accept service, she told me he was interstate.

Upon this being read to the tribunal Mr Wright commented: "The dog obviously needed a lot of exercise."

A few days later the summons was served, but the director, represented by separate solicitors, was excused from attendance owing to the sudden onset of a severe back complaint.

The *Staffbelt* case illustrates the aphorism so favoured by Mr C.J. Canavan QC: if it is a choice between having the law on one's side and having the high moral ground, give me the latter any day!

The case of *Adams* v *Environment Protection Authority and Rosedale Leather Holdings Limited*, also heard in 1995, was one in which the high moral ground was keenly sought. I acted on behalf of a group of residents who were concerned about the establishment of a leather factory near their homes in Rosedale. Mr Canavan acted on behalf of a large national company who had obtained strong support from the Kennett Government to establish its tannery. Noise and odour were the big issues. Mr Canavan sought to undermine my position by highlighting the funding of my client's case, which appeared to have some assistance from a rival tanning business. Ultimately he succeeded in persuading the tribunal to reject the third party appeals, although there seemed to be real questions as to whether the decision contained errors of law. My clients lodged an appeal with the Full Court of the Supreme Court of Victoria.

However, this was thwarted when, in an extraordinary intervention, the planning scheme was changed by ministerial fiat so as to make the proposed tannery an as of right use.

In 1997 the tribunal heard *Richmond Action Coalition on Freeways* v *Environment Protection Authority* in which third party objectors appealed under section 33B of the Act against the issue of a works approval for a ventilation system for the Burnley Tunnel. I appeared for the builder of the tunnel. I was told, in polite terms, that the name of the appellant had been chosen without me in mind: the acronym was RACOF. The case for the builder of the tunnel was largely presented through expert witnesses, but I did advance arguments, based upon the *McKinlay* principles, designed to minimise the scope of the appeals. However, the tribunal was spared from any detailed analysis of legal issues because it generally agreed with the technical evidence led on behalf of the builder of the tunnel.

Upon the coming into operation of the *Victorian Civil and Administrative Tribunal Act 1998* section 33B was subtly changed by substituting the words "whose interests are affected" for the words "who is aggrieved". The effect of this change was considered by the tribunal in *Brambles Australia Limited* v *Environment Protection Authority*. The tribunal took the view that the approach adopted by the Full Court in the *ACF* case continued to be applicable and that the expression should be given a wide interpretation.

Upon the coming into operation of the *Victorian Civil and Administrative Tribunal Act 1998* section 33B was subtly changed by substituting the words "whose interests are affected" for the words "who is aggrieved".

Before departing from this review, I should mention some recent cases.

In *Clean Ocean Foundation Inc* v *Environment Protection Authority* the tribunal accepted a submission I had made on behalf of Melbourne Water and dismissed the appeal by the Clean Ocean Foundation under section 75(1) of the VCAT Act as misconceived and lacking in substance. However, Balmford J overturned this decision, essentially because she found that the appellant may have an arguable case which should be allowed to be resolved at a full hearing. I understand that, owing to changes in the applicable policy, this case is unlikely to proceed any further.

In early 2003 the tribunal decided an appeal by various environmental groups against the extension of a prescribed waste landfill at Lyndhurst: see *Residents Against Toxic Waste in the South East* v *Environment Protection Authority and Sita Australia Pty Ltd*. I represented the landfill operator, Sita Australia Pty Ltd. In this case, it was not RACOF; rather my opponent was RATWISE.

The decision in the RATWISE case is relatively short, but represents an advance in thinking about section 33B of the Act. First, the tribunal was required to consider whether environmental groups with no direct connection with the landfill in question could rely upon section 33B(2)(a) of the Act. One group, the Western Region Environment Centre Inc, claimed that there would be a discharge of waste that would adversely affect the interests of the people of Lyndhurst in the south-east suburbs. The tribunal held that the reference to "that person" in paragraph (a) was a reference back to the appellant; and that the landfill would not adversely affect the interests of the western suburbs group.

In relation to section 33B(2)(b)(i) of the Act, which is concerned with inconsistencies with policy, the tribunal accepted the submission that the words "will result" and "will be inconsistent" require the tribunal to be satisfied on the balance of probabilities that the completed works will be used in a manner which will be inconsistent with the policy.

In relation to the assumptions the tribunal should make, it said:

> We also consider that in determining what consequences will flow from the use of the authorised works, we should assume that the works will be carried out in accordance with the approval and that the use

made of them will be in accordance with the licence issued pursuant to s.20 by the Authority. Indeed, it would not be lawful for Sita to use the works at all without such a licence. In assessing the nature and extent of the use we must have regard to the following:

(a) The terms of the Licence as it currently stands;
(b) The power of the Authority under the Act to vary the terms of the Licence from time to time;
(c) The amendments that we are told the Authority proposes to make to the Licence.

The most recent case that I am aware of was last month when the tribunal decided *Department of Defence* v *Mitchell Shire Council*. In that case the solicitor for the EPA quoted from *Staffbelt*, which in turn quoted *58th Colro*, and which in turn quoted *McKinlay*. The tribunal then concluded:

Thus he argued and we agree, that the tribunal must be satisfied that:

- Any impact suffered is because works are performed in accordance with the works approval.
- Compliance with the works approval will result in noncompliance with the State Environment Protection Policy.
- The tribunal must be satisfied that non-compliance with State Environment Protection Policy is the cause of the discharge of waste occurring under the provisions of the works approval/licence and such impacts must be unreasonable.

It does not appear that the tribunal was referred to the RATWISE case.

I now wish to make some concluding comments.

It is, perhaps, surprising that section 33B of the Act has not been subject of a detailed decision by the Supreme Court of Victoria. There are various questions which might be thought to deserve further consideration.

Let me take a typical third party appeal in which an objector seeks to review a decision by the EPA to issue a works approval. The permissible ground of appeal would appear to require the assumption that the approved works will be completed in accordance with the works approval. Presumably this includes the completion of the works in accordance with the conditions of the works approval. Section l9B(7) of the Act provides that the authority shall, not later than four months after receiving an application for a works approval, either refuse to issue the works approval or issue a works approval subject to such conditions as the authority considers appropriate. This might be thought to beg the question as to whether conditions can be imposed in relation to the use of the works. However, section 21 of the Act certainly authorises certain types of conditions on a works approval which relate to the use of works and the use of premises. Whatever the answer to these matters, a question would appear to remain as to whether or not compliance with conditions on a works approval, which relate to the use of the works "once they are completed", is to be assumed on a third party appeal. Has the *Sita* decision taken this matter beyond *McKinlay*?

It is not always appreciated that State environment protection policy is a species of delegated legislation. Although described as "policy", in some circumstances it may establish rules which must be followed.

Another issue that warrants consideration is the use of the word "will" in the context of a third party needing to demonstrate that the discharge of waste "will" unreasonably affect their interests. The traditional view is that in proceedings before an administrative tribunal the onus of proof is upon a party asserting a particular proposition. Thus it would be the burden of the third party appellant to show that a discharge of waste "will" unreasonably affect its interests. But it is also the case that matters generally need only be proved on the balance of probabilities. Sometimes in civil proceedings a higher standard is required and questions may need to be resolved as to whether a higher standard applies in this case. Once again, has the *Sita* decision taken this matter beyond *McKinlay*?

A further question that may arise in some cases is whether or not a State environment protection policy has been "established for the area in which the discharge, emission or deposit will occur". The alternative ground, namely that the discharge would cause pollution, is clearly unavailable if a State environment protection policy has been established for the relevant area. In one sense, there are State environment protection policies which have been established for the whole of Victoria. It is possible that section 33B(2)(b)(ii) should be interpreted as if it read "where there is no relevant State environment protection policy established for that area". For example, it would be odd if the existence of a State environment protection policy in relation to the air environment, which applied throughout the whole State, rendered section 33B(2)(b)(ii) irrelevant in a case concerned with the discharge of liquid waste to a creek. On the other hand, if a policy clearly dealt with a particular part of the environment there is obviously no scope to argue that section 33B(2)(b)(ii) is available because the policy does not contain some provision that the third party appellant regards as desirable.

It is not always appreciated that State environment protection policy is a species of delegated legislation. Although described as "policy", in some circumstances it may establish rules which must be followed. This emphasises the care which must be taken in the drafting of such policy. It is desirable that the document be clear and concise; and that provisions designed to be guidelines, rather than requirements, are clearly indicated as such.

Today I have looked back, and related my personal journey, over 25 years, in relation to third party appeals against works approvals. From origin to destination, I have been privileged to be closely connected with the development of the law. From the destination I fondly look back; and consider the ideas and personalities of the likes of Russell Barton and Michael Wright. But destinations also allow one to look forward. But that is another journey. And the story of that journey must wait for another time.

The Bar Library: All Dressed Up With Somewhere To Be

Judy Benson

As part of the Owen Dixon East refurbishments, the Bar Council has consolidated its library acquisitions into a new purpose-built space.

ONE of the most significant benefits of the renovations on the first floor of Owen Dixon East — apart from the obvious benefit of the Essoign Club — is that, for the first time, the three libraries of the Bar — the Griffith, the Forsyth and the Herring (the latter previously located on the first floor of Douglas Menzies chambers) — have been amalgamated into one super library, the Griffith Library. Yet in another sense, the library has come full circle, returning to a location which predated its move to the 13th floor of ODE. While renovations were in progress, the collections — comprising in excess of 10,000 volumes — were sent to storage for three months. But the collection is back in place, and the amalgamation has enabled duplications to be identified and sold, the proceeds going towards further possible acquisitions for the library.

The new library is a significant improvement on its previous manifestations. It affords a peaceful and quiet location for research and reading away from clients, solicitors and telephones. It is accessible to all barristers 24 hours a day, is well set out and has the benefit of ample natural lighting during the day. Fortunately the library sustains no direct sunlight, being protected by the height of Owen Dixon West. In spite of the fitting out of about 550 metres of shelving in the new library, it will be apparent that shortage of book space is likely to become a significant problem in the not too distant future, by reason of the library shelf metres expended each year by adding on to the collection of Reports to which the library already has a commitment. About one new vertical shelf each year is needed just to maintain the current reports. So extra shelving is urgently needed just to keep pace with annual expansion and acquisition.

It would be fair to say that the Library is principally a Reports library, lacking the resources in time and staff to maintain loose-leaf collections. (However, it does have the Australian Halsbury series which is loose-leaf and maintained by one of the library assistants.) Its holdings of Australian reports include the CLR, ALR, FCR, FamR, ABC, ATR, CAR and AAR, and all the State and Territory Reports. Specialist series include ACrimR, ACLR, ASCR, LGERA, IPR, MVR, ATortsR, AInsCas and some AIndR.

Overseas reports include the United Kingdom Authorised Reports, English Reports, Revised Reports, WLR, AllER, RPC, Lloyds R, TaxCas, CrimAppR, Coxs Cases, and IR; the NZLR; US Supreme Court Reports. While the acquisition of United States State Reports and the Dominion Law Reports from Canada were currently under consideration, the decision not to continue purchasing the US Supreme Court Reports could be made following the Supreme Court Library's decision to display its collection of these Reports just across the road from ODCE. The Library is also considering expanding its holdings of Australian Reports, e.g. the CCH insurance Reports, CCH Torts Reports, the Western Australian Reports, Family Law Reports, and Administrative Law Decisions, and a series of Industrial Relations cases. If there is a significant and necessary series of Australian law

reports that members consider the library lacks and should acquire, the Librarian will consider recommending purchase to the Bar Council.

To round out the collection there are a number of Australian and NZ university and other reviews and a selection of text-books.

At present the "staff" consists of all honorary members, the Librarian Gordon Ritter QC, and part-time library assistants Richard Brear and volunteer Joyce Masman.

Over the years the Library has benefited by significant donations from deceased estates of judges and Bar members. Donations of books and materials which are not duplications of current holdings are gratefully received. Although there is currently no CD or on-line resources these are under active consideration, as is the upgrading of the photocopier.

The facilities of the Library are commended to members who will appreciate not only its all-hours access but also its peace and quiet ambience and the fact that the Essoign Club is only steps away for a coffee break. In addition, the Library serves as a refreshments venue following continuing legal education seminars on occasions when the Essoign is pre-booked for another function.

A final, gentle reminder. Not only is it not permitted to remove books from the library it is a breach of the Bar's rules of ethics. Remember Murphy: it is the volume you need and want that somehow always appears to have gone missing …

Children's Court of Victoria Website

On 14 May 2003 the Attorney-General, the Honourable Rob Hulls MLA officially launched the Court's website. A prominent feature of it is a 100,000 word essay by Magistrate Peter Power. Judy Benson, co-editor of *Bar News* interviews His Worship and Janet Matthew, the Court's liaison officer, and explores the origin, purpose and composition of this unique resource for practitioners.

The Children's Court home page at www.childrenscourt.vic.gov.au

Judy Benson How did the idea for the website come about?

Janet Matthew The idea for the website came about because the Department of Justice was expanding the online information it was providing to the public in accordance with government-wide policy, and so of course the Children's Court was keen to be part of that, and early on in the project I asked Mr Power if he'd like to put together a few pages for professionals and students.

Peter Power I thought you said a few hundred pages!

JM And it grew from there.

JB So, having been asked to do "a few pages" what did you envisage was your real task and how did you set about conceptualising what you were going to do?

PP I decided that I'd generate some headings and I generated about ten or so headings, some of which were general, some of which were related to the Family Division, and some of which were related to the Criminal Division.

JB Then, having decided on that, how did you flesh them out? How did you resource the text writing — from your own collection of materials or how far afield did you go?

PP Quite far afield. I suppose the generation of the headings to some extent came from a Powerpoint presentation I worked on to present to various school groups, interest groups, professional groups. I've got a number of variations on that but there's an underlying core theme and I used that as the working document and then expanded on that. Partly I used the Act, partly all of the unreported decisions that I could lay hands on, many of which had been assembled some years ago by an Information Officer for the Children's Court, who had assembled it in volumes that she had put together for the use of the Courts, for Magistrates and Court staff. They weren't collected anywhere in the public domain. And partly it was based on things that I had read and I also made reference to Nash, I also used Nash for ideas.

JB The Editors are delighted to hear that.

PP And I went to a librarian at the Melbourne Magistrates Court. Any of the Magistrates who are interested are provided with all of the unreported decisions in the Supreme Court, the Court of Appeal and the High Court, not that there is a great deal of relevance for us in the High Court materials, but there are a number of cases over the last three or four years which have been relevant to aspects of the operation of the Children's Court, so I went through all of those unreported decisions since late 2000, and pulled out any cases that I thought might be relevant to some aspect of the Children's Court work, and then with those materials at hand, that enabled me to draw up a number of sub-headings for the ten or so chapter headings that I had, and then sub-sub-headings for those sub-headings. And I just sat in Chambers — I get into Chambers fairly early in the morning — and I would come in every day and spend an hour or an hour and a half filling the materials in under the various headings.

JB You said you developed some of the headings taking your Powerpoint presentation around various groups. Did you get any useful or interesting feedback from those groups that helped you develop the ideas?

PP Not specifically. We got a lot of positive feedback from the groups, but it's positive feedback in the form of approval rather than positive feedback in terms of "well perhaps we would have been interested in having you say something about x or y". It hasn't been instructive in the sense of enabling me to really expand areas in one area rather than another. I think that perhaps one of the main reasons for the positive feedback is probably that people are surprised that a lecture about the law has jokes and things in it. They're surprised because it's unexpected.

JB How long did it take you to write the resource section?

PP The initial drafts were published on 14 May last year and I suppose I had been working on it for the better part of the year. I probably could have done it more quickly but we had some technical delays, and there wasn't a great deal of pressure on me to have the research materials completed on a deadline because of other blow-outs in the time that had occurred for technical reasons. It was spread over more like a year but probably the bulk of the work was done in about three months. I think I had it ready in about April 2003. We went to air in May.

JB You were in fact a sitting Magistrate, contemporaneous with the writing, weren't you? You weren't given leave for twelve months to go and write the essay, you were doing everything you usually do.

PP Yes, that's true, I was. It assists with things I do as well, and it's related to things I do, so I didn't feel it was an imposition. It actually took me about two or three months to get going on it, to break the ice, but once I broke the ice it was never difficult after that, it was never emotionally difficult, never a case of "I've got to do this, I don't want to be here doing this, I'd rather be doing something else". For the first couple of months it was like that but once I broke the ice it wasn't at all.

JB Would it be fair to say that your target audience for this material was other practitioners?

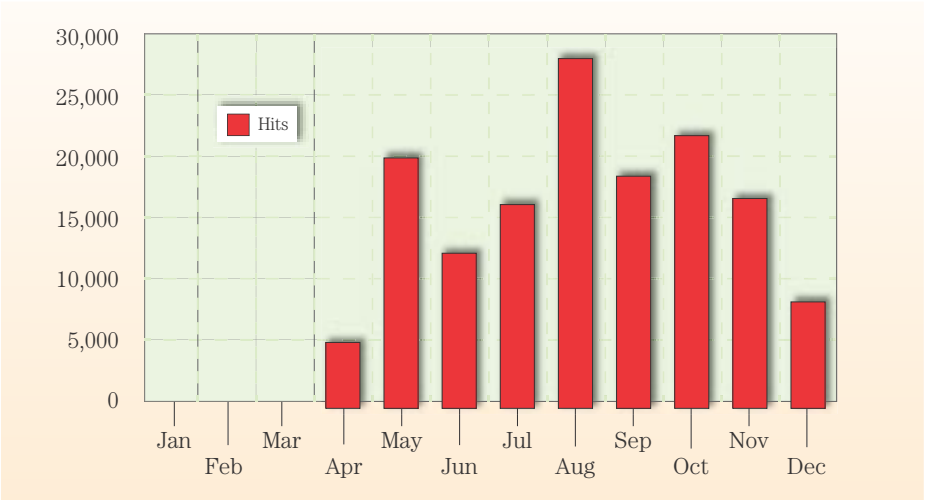
PP Yes, absolutely.

JB Do you know of any other Court websites in Victoria, in Australia, or indeed anywhere in the world, that has this sort of resource for practitioners?

PP I don't.

JB I don't know of any either and I've got most of the websites bookmarked on my computer. I don't know of anything remotely comparable to this that would assist practitioners with an overview of the law in so many areas connected with the one Court. Would you regard it as a reasonably groundbreaking effort for a Court to offer this sort of service to practitioners and the public?

PP Yes, possibly, but interestingly enough we did the same thing, albeit not in the medium of the times, with the Crimes Compensation (VOCAT) manual as it was, which was assembled in 1995. In 1991 the Crimes Compensation Tribunal was transferred to the Magistrates Court at fairly short notice, and I was given, I think by Darcy Dugan, about two weeks off ordinary Court duties to make a summary of all of the cases that I could find in relation to victims of crimes compensation, I assembled that into a handbook and put in a table of standard awards as well as the cases and a summary of the Act and so on, and we distributed that to all of the Magistrates. It wasn't in the public domain. Then when Alan McDonald was appointed Coordinating Magistrate in probably '93 or '94, Alan had the idea of expanding that work and publishing it, and we did. I did three cases, Alan did most of the other chapters and [Magistrate] Peter Lauritsen did the chapter that related to the loss of earnings, and we published it and sold it to the public at $30. In other words we were making it available, everything we could think of that was relevant to crimes compensation, we made available to the public. No doubt if the internet had been as viable a tool as it is now we would have gone that way, but we did it in hard copy, and it was reasonably well received, I would have to say, but I think that the skill involved in that and the learning involved in that was useful background when I was putting this material together.



Hits on Children's Court website 2003.
Source: *Department of Justice.*

Recently I have added sections in relation to sentencing and mental illness, sentencing for manslaughter, sentencing for drug trafficking, where comments have been made by the Court of Appeal or the Supreme Court, usually the Court of Appeal.

JB Internet access wasn't all that common back in the mid 90s?

PP Probably more to the point from my perspective is that my colleagues were not as computer literate as a group in 1995 as they are in 2003–2004, so I would have not been confident of publishing something on the internet and getting it available for use by my colleagues. I wouldn't have felt as comfortable about this in '95 as I do in 2003–2004.

JB Apart from the essay which you've had enormous input into, what other aspects of the Children's Court website are interesting, and did you make contributions to those?

PP The research materials were my only contribution.

JB Are there are some statistics available which show the number of downloads

that have been made of various areas of the Children's Court website?

JM I've compiled a list of the number of times the material has actually been downloaded and printed off, it would be fair to say that judging by those figures there's a fair degree of interest in the material. [See chart on page 43.] It would appear that it peaked, if the chart is correct, at around just under 30,000 hits.

PP I hope so, I didn't really have any feedback. I've had a few people say that they've been pleased and I know a few people who have downloaded it, but whether there were 10 or 10,000 I really had no feel for.

JB And of course the number of people who visit the site and look at it and read it without downloading has gone to many thousands.

PP Yes, it has, since the launch last year.

JB What is involved in keeping the website up to date? What's the commitment in time and energy in keeping it running along?

PP What I've generally been doing is just working through unreported cases as they come out and putting them into existing areas. If I get something that is new which I think is of interest, I sometimes create a new sub-section. For instance, fairly recently I have added sections in relation to sentencing and mental illness, sentencing for manslaughter, sentencing for drug trafficking, where comments have been made by the Court of Appeal or the Supreme Court, usually the Court of Appeal, which I think are relevant to the sentencing of juveniles.

JB I had reason to access the website myself recently and I noted that there was an expert report by a psychologist extracted on attachment and bonding.

PP Yes, that's right, that's something also that was updated. What had happened was that Sharn Rolf, who is well known I think as a child psychologist with speciality in bonding and attachment, had written what I thought was an absolutely excellent report in a case that came across my desk, so I guess it's just the luck of the draw. In about January of 2003, I emailed her and asked her could I have permission to publish it on the internet list with some information that identified parties removed and she wrote back and kindly said yes, which I was pleased about.

JB Do you see that it may be a fertile area for development, the critical literature, if I can put it that way?

PP Yes, I do. Later in the year, probably in November, I got another report. It's I suppose almost a case by case thing unfortunately, but I had a case involving another report, which Sharn Rolf had written, which was even more detailed. She had clearly developed her thinking on the literature, summarising the literature, and I asked her again, could I replace what I'd already put on with this new material and again she said yes, so all of the material in section 4.12 dealing with the relationship between attachment and the child's emotional well-being came about in that way, just simply as a result of a report that by chance I'd read. After that, I created a section on the website to collect together some of the large number of papers that have come across my desk in the last couple of years so that there is somewhere where people can read through and see if there is anything that they are interested in, such as suggestibility of child witnesses or social adversities in childhood and adult psychopathology. I suppose it's a fairly random collection, but a collection of papers that I've put together, or have across my desk over a period of time, and in both the family and the criminal areas, so I intend to keep on updating that as I get new materials.

JB The website is cross-referenced, or linked I think is the correct word, to the Family Court website.

PP Yes, that's right. Very early on in the process, before I really seriously started, Janet obtained a copy of the Family Court website for me, and it played a reasonably significant part in my thinking about the structuring of the website. Ultimately there wasn't as much common material as I'd thought. The Family Court gave us permission to use whatever we wanted from their website … I have used some things and I've acknowledged it but their website certainly provided me with a lot of ideas about structure.

JB Is there anything you'd like to add about your experience of preparing this opus for the website?

PP There's just one thing that I'd like to say: what we're talking about is research materials on the Children's Court website, but particularly in the areas of the materials that relate to the Criminal Division there is a lot of material that is relevant to adult defendants, sometimes young adult defendants, sometimes not. For instance, there's a chapter on custody and bail and most of the bail cases relating to exceptional circumstance and showing cause, unacceptable risk; they are really a summary of the bail legislation and were equally relevant to adults as well as to children. I probably should say that a lot of the material in that section I am indebted to Jelena Popovic for because with her consent I borrowed from material that she prepared for the use of Magistrates. In relation to sentencing there's a large section on young adults and children sentenced under the Sentencing Act which contained cases that are relevant to sentencing of people by Magistrates Courts, things like double jeopardy and parity and effective mental illness and sentencing for various types of offences which are relevant to adults as well as children. So I guess what I'm saying is that it does go a little bit beyond just a collection of Children's Court materials.

JB In fact there is a substantial overlap that crosses over with some of the jurisdiction of the Magistrates Court, isn't there?

PP There is.

JB So practitioners in those areas would find the content useful.

PP Some of the content useful, yes. Perhaps one other thing that doesn't exist at the moment that Janet and I have discussed, but I think it's probably a question of getting an amendment to the Children and Young Persons Act first — I would like us to have a collection of our own decisions of the Children's Court in the same way as the New South Wales Children's Court publishes very broadly its decisions. At the moment each of the Magistrates keeps in their own folders in their own Chambers their own decisions and a copy is put on the relevant files, but there isn't a collection that's easily accessible to the public. We would like to have that but we do run into problems with Section 26 of the Act, the Children and Young Person's Act. If we could get an amendment to that we'd be interested in publishing our judgments. It's a bit labour intensive though because the New South Wales experience is that they change the names a lot, and putting decisions into a form in which you could remove identifying material, material identifying any of the children or the parents or the witnesses, would be actually quite a big job.

JB It has a number of potential uses, but if you can tell your clients there's been a decision already in a very similar fact situation it's invaluable.

PP Yes, that's right.

JB The website address is **www.childrenscourt.vic.gov.au**, so everone can bookmark that and go into the website. There's no substitution for that is there?

Rights and Values

Catholic Lawyers Association Dinner Melbourne, 18 June 2004

Chief Justice Murray Gleeson

Guest speaker, the Honorable Chief Justice Gleeson AC, of the High Court.

My remarks to you this evening will take the form of a Case Note. The case is not a decision of the High Court, or any other Australian Court, and the point at issue is not one that is likely to arise for judicial decision in Australia. The lines of argument involved, however, reflect developments of a kind which affect modern legal thinking in Australia and in all mature legal systems.

THE case is *Odièvre* v *France*, a decision of the European Court of Human Rights, given on 13 February 2003. Seventeen members of the Court sat, and the decision was by a majority of ten to seven.

The case arose out of a challenge to a French law on the ground that it was inconsistent with the European Convention on Human Rights.

The French law under challenge permits the mother of a child put up for adoption to elect to preserve her anonymity, thus making it impossible for the child, in the future, to discover the mother's identity. (There appears to be a requirement, in an appropriate case, to supply certain information that may be essential for health purposes, but that was irrelevant.) The French law, in that respect, while not unique, is unusual in Europe. It reflects custom in France dating back at least to the seventeenth century. St Vincent de Paul introduced a practice by which churches or hospitals were equipped with a device, placed on an exterior wall, known as a "tour". A mother could place an infant in the "tour", and ring a bell. The device would be rotated so that the infant was brought within the building, and the mother would remain unknown. In some countries, in Europe and elsewhere, "baby boxes" are used for a similar purpose. The original object was to discourage abortion, and infanticide. In modern circumstances, a right to legal anonymity also enables a mother to obtain medical treatment, and assistance during childbirth, without there being a need to create a record of her identity.

The European Convention on Human Rights asserts a right to life, and a right to privacy. The French Government maintained that its law was in aid of both of those rights: the mother's right to privacy, and the child's right to life. The Convention also asserts a right to respect for family life. The challenge to the French law involved a contention that to deprive a child of the knowledge of the identity of his or her natural mother offended that right, and prevented the complete personal development and fulfilment of a child.

It is no part of my purpose to express a preference for the reasoning of either the majority or the minority. My purpose is to indicate, by reference to the decision, the kinds of issues that may be at stake in human rights jurisprudence, with which all courts in the early 21st century are becoming increasingly familiar.

There are two notable features of commonly accepted civil and political rights: first, rights are rarely absolute;

Rolly Briglia; Damian and Joanne Clarke; Elizabeth Briglia and the Honourable Justice Teague.

Judge Frank Shelton.

secondly, some rights may conflict with other rights. In countries which apply the death penalty, even the right to life is not absolute. Leaving the right to life to one side, however, almost all rights are qualified to the extent that they may, in certain circumstances, yield to some overriding necessity. Whether rights are declared in a Convention, a Constitution, or an Act of Parliament, most modern instruments contain some qualification by reference to the need for reasonable regulation of conduct in a democratic society. Furthermore, rights may be inconsistent. The most obvious examples of both of these propositions are the right to privacy and the right of free speech. Neither right is absolute, and one person's interest in privacy is very likely to collide with another person's interest in free speech. Reconciling these potentially conflicting interests is one of the challenges facing contemporary law in Australia, the United Kingdom, and all modern societies. Some vocal advocates of the right of free speech are taciturn about the right of privacy.

To return to *Odièvre*, the majority in the European Court took the view that the mother's interest in retaining her privacy was not merely for her personal benefit. The object of discouraging abortion and infanticide, and of facilitating medical assistance during childbirth, was also in aid of the right to life. At the least, it was said, the French Parliament could take the view, consistently with France's Convention obligations, that these rights should prevail over the rights or interests of the child in knowing his or her family origins. The minority judges took the view that the French law, to be consistent with the Convention, should have established some procedure to enable the conflicting interests to be weighed, on a case-by-case basis, having regard to individual circumstances. (Interestingly, they said that, in order to be fair, such a procedure should be adversarial. Those were all judges with a civil law background. The adversarial system gets better press in Europe than Australians are sometimes led to believe.)

Courts are often required to "balance" competing interests. The scales of justice are a powerful image in the law. Discretionary decisions by courts commonly involve weighing the benefits and detriments of a potential outcome. But this is usually done on the assumption that the interests or considerations to be weighed are in some way reasonably commensurate. A set of scales can tell you that an ounce of silver has the same weight as an ounce of sand. The scales cannot tell you whether an ounce of silver is more valuable than an ounce of sand; you need some other standard of measurement for that purpose.

If two rights, neither of which is absolute, conflict, and a court is required to decide, by a process of "balancing", which is to prevail, and to what extent, what is the intellectual process by which that task is to be accomplished? Since it is of the essence of judicial decision-making that reasons are given for a decision, so that the parties and the public may know that the procedure is rational, the intellectual process has to be able to survive scrutiny. To say, in a particular case, or generally, that one right or interest outweighs another right or interest is to announce a result. What information does it convey as to the process of reasoning by which that result is reached? How can the result be contested? If it is wrong, how can it be shown to be wrong? How is such a conclusion either verifiable or falsifiable? If it is neither verifiable nor falsifiable, what is its claim to be regarded as a process of

Father Glen Tattersall, Ann Shelton, Geraldine and Geoffrey Horgan S.C.

Daniel Hickman, Eliza Meehan and Jack Tracey.

reasoning? Is it not simply an expression of choice, or an exercise of power? Is it a judicial, or a legislative, function that is being performed?

Many contemporary Australian lawyers, although well aware of the issues thrown up by modern human rights jurisprudence, have forgotten that we have our own history of attempting to resolve such issues in relation to a constitutional provision, that, for a large part of the 20th century, was given a rights-based interpretation. That rights-based interpretation was later abandoned by the High Court, apparently with general approval, but it persists in one respect. Section 92 of the Constitution provides that trade, commerce and intercourse between the States shall be absolutely free. The guaranteed freedom of intercourse is still regarded as creating individual or human rights. But they are not absolute. A prisoner in a Victorian jail cannot complain that his constitutional right to travel to South Australia is being infringed. Although freedom of movement between States is declared to be absolute, it is subject to reasonable and necessary regulation. Freedom does not mean licence. In the days when freedom of trade and commerce was regarded as a constitutionally guaranteed individual right, the High Court had to reconcile that "absolute" freedom with lawful restrictions of various kinds. How did it relate to schemes regulating the marketing of primary products? How did it relate to a requirement that users of heavy vehicles pay a road tax to meet the cost of road maintenance and repair? One thing was clear: "absolutely free" was not to be taken literally. As Oliver Wendell Holmes Jnr said about another freedom, whatever freedom of speech means, it does not mean that a man can go into a crowded theatre and call out "fire" for his own amusement.

When rights conflict, a decision as to which is to prevail, and to what extent, can only be justified rationally by reference to some value external to the "balancing" process. Of course, it may not have to be justified rationally. If an exercise of legislative power is involved, an outcome may be justified democratically, by weight of numbers operating through the political process. The decision may be an exercise of power rather than judgment. A judicial decision, on the other hand, must be justified by a process of reasoning.

To describe something as a "right" may itself require justification. It is a commonplace feature of political and legal debate that advocates of various interests seek to characterise those interests as rights, thereby staking a claim for weight or recognition that may be contestable. By calling an interest a right, you may trump another interest. If there is a contest, then, again, it can only be resolved rationally (as distinct from resolution by power or weight of numbers) by reference to some value.

Professor Anderson, a famous teacher of philosophy at Sydney University, used to amuse himself with the paradox that two people can only have a sensible argument if they are already largely in agreement. In a multicultural, multi-value, society, this is an important point. A Catholic can have an argument about transsubstantiation with an Anglican; but not with an atheist. Christians who have a common understanding of Holy Orders sometimes argue amongst themselves about the ordination of women as priests. How could they have such an argument with someone who does not believe in religion or in priesthood? For such a person, the starting point of the entire discussion is nonsense. To someone who does not believe in the concept of priesthood, the question is whether women should be permitted to engage in social work. There can be no rational argument about that. Argument depends upon shared values. And a judgment can only explain a judicial choice between competing interests if it justifies the choice by reference to values that are shared by the reader of the judgment.

In the past, religion provided many of the common values by reference to which conflicts of rights or interest were resolved. In the future, what will take its place? Our law still reflects many Christian values. If and when these are challenged, how is the challenge resolved?

Weighing or balancing competing interests or considerations is a familiar part of the process of judgment. We all do it, in a variety of ways, on a daily basis. Courts do it all the time. The work of courts, however, is different from most everyday tasks of judgment in one respect. If I have to decide for myself whether I will give priority to one commitment over another, for example, I may only have to explain and justify that decision to myself. If I have to justify it to someone else, I may need to resort to some value that I share with the person to whom I am trying to justify my decision. Giving more weight to one consideration than to another can only be justified by either an express or an implied appeal to some standard external to the decision-maker. A judgment that says: "These are the considerations in favour of course A; those are the considerations in favour of course B; I will take course B" does not explain or justify the decision. It gives no reason for preferring B to A. That is the essential difference between the legislative and the judicial process.

The development of human rights jurisprudence, as the case of *Odièvre* v *France* illustrates, forces judges to weigh conflicting interests by reference to values. Sometimes judges will start with some external instrument, such as a Constitution, or a Bill of Rights, that identifies certain kinds of interest as rights. If that is so, they are provided with at least one value to begin with. They may still have to decide how to weigh it against another right. Sometimes they may have to decide for themselves whether an interest is to be regarded as a right.

We live in a pluralist society. By definition, that means that there is competition, not only when it comes to applying values, but also in identifying values. Everybody is aware that our society is rights-conscious. A rights-conscious society must also be values-conscious. If it is not, then we have no way of identifying those interests that are rights, or of resolving conflicts between them. Rights cannot work without values.

Perhaps an important part of the work of your new Association will be to participate in the developments that will inevitably take place concerning these issues. I congratulate all those whose initiative created this Association, and wish you well.

Slang II

What constitutes slang is difficult to identify precisely. The word *slang* is not recognised by Johnson (1755) — except as the preterite of the verb *sling* (*sling-slang-slung*, on the same pattern as *ring-rang-rung*): "David slang a stone and smote the Philistine". Nathaniel Bailey (1721) does not mention the word at all. The earliest quotation supplied by OED dates to 1756, and it does not offer an etymology for the word.

The OED rather loftily defines *slang* as "the special vocabulary used by any set of persons of a low or disreputable character; language of a low or vulgar type". It gives a later meaning as "the special vocabulary or phraseology of a particular calling or profession". That later definition has *slang* indistinguishable from jargon.

Eric Partridge, in his *Dictionary of Slang and Unconventional English*, gives a fair working idea of slang's boundaries. He distinguishes as follows: slang and cant — colloquialisms — solecisms and catachreses — catchphrases — nicknames — vulgarisms. This nice subdivision is probably the best guide to the nature of slang.

Carl Sandburg captured the spirit of slang when he said "slang is a language that rolls up its sleeves, spits on its hands and goes to work". By contrast, G.K. Chesterton wrote "All slang is metaphor, and all metaphor is poetry". Not many would equate slang with poetry, even obliquely.

However defined, slang is an informal register — one that makes its own rules, but steers clear of open vulgarity. Because it is home-made, jury-rigged language, it tends to be blunt, honest and unfinished.

Slang develops as capriciously as language in more formal registers, but the whole process is accelerated. Slang words emerge when circumstances are right; they change form or meaning quickly as their use spreads; and they flourish or they disappear — sometimes within a generation or two. Time and circumstances dictate what slang words are coined; chance and fashion dictate which words survive.

The following slang words all emerged at about the same time (1900–1920, but especially during the First World War). Some are so familiar as to have passed into more formal registers; others are completely forgotten, except among war veterans or their families:

welter ("to make a welter of it" — to go to extremes, take excessive trouble)
bonzer — extremely good
boshter, *bosker* — bonzer
dinkum (adjective) — genuine
dinkum (noun) — work, especially hard work
beetle about — to move about rapidly
blotto, *blithered*, *inked*, *oiled*, *molo*, *perked* — drunk
kip (noun) — sleep; also, a brothel
kip (verb) — to lodge or sleep; to play truant
kipsey — a house or home
offsider — assistant.

It is surprising to learn that *welter* and *offsider* were originally — and recently — slang words. Likewise, it is curious that the noun form of *dinkum* has virtually disappeared, and that the only meaning of *kip* which currently survives is sleep in a neutral sense.

Bouncer is no longer regarded as slang: the *Macquarie Dictionary* (3rd Edition, 1997) defines it without comment, as does the *New Oxford Dictionary of English* (1998). But it was treated as slang as recently as 1989 (2nd Edition *Oxford English Dictionary*) and likewise was recorded as slang by Eric Partridge (1951) and by *Downing Digger Dialects* (1919). It has an entry in Francis Grose's *Dictionary of the Vulgar Tongue* (1811).

This recent respectability of *bouncer* is a strange thing, because its current meaning is both colloquial and recent.

From the early 19th Century, *bouncer* had two meanings: a large, swaggering or boastful person; a great lie or deception.

In those senses it is treated as slang until recent times. The original meaning of *bouncer* is noted in Johnson (1755) and in the 1902 edition of *Webster*.

Bouncer is now fairly specific: a person employed by a nightclub or similar establishment to exclude patrons who may drink too little, and to expel those who have drunk too much. The original bouncer was a swaggering bully. Social Darwinism ensured that such people were physically strong (others had the tendency knocked out of them). The physical characteristics of swaggering bullies were thought useful at nightclubs, and the meaning shifted to suit the new reality. The current sense emerged in Australia and the US at about the time of the First World War. The English slang equivalent is *chucker out*.

Other bits of World War I slang which have survived and flourished include:

cobber — friend
furphy — false or exaggerated story
banger — sausage
buzz off — go away
nut it out — think a problem through to its conclusion
put the acid on (someone) — to ask someone for a loan: the ultimate test of genuine friendship. From the acid test by which the genuineness of gold is tested, as gold is unaffected by nitric acid.

Some World War I slang has disappeared, simply because modern circumstances no longer need such expressions:

Anzac button — nail used in place of a trouser button; nowadays we replace the trousers, that being cheaper than repairs
Anzac stew — an urn of hot water and one bacon rind; made famous by Lieutenant General Birdwood ('Birdie'), the Anzac Commander at Gallipoli
Anzac wafer — a very hard biscuit
Anzac soup — water in a shell-hole polluted by a corpse.

Other slang expressions from the same time and circumstances have also disappeared, although they remain perfectly serviceable:

chivoo — a party or celebration (from the French chez vous — at your place)
catsow — the price of a beer — twopence (from the French quatre sous)
jildy — quickly (on the jildy — in a hurry) from Hindi

kangaroo feathers — a furphy; an impossible thing

kennel-up — stop talking

macnoon — mad or dippy (from the colloquial Egyptian Arabic magnoon — mad).

The exigencies of trench warfare made it likely that an expression would emerge to describe the ground between your own trenches and the enemy's: *no man's land*. It is an expression in common use today, with a weaker meaning for weaker circumstances.

No man's land has a much longer history than its current use suggests. From the 9th Century to about the 18th Century, *no man* (or *noman*) was a common synonym for *no-one* or *nobody*. In recorded use from the early 14th Century, *no man's land* simply meant land belonging to nobody. For centuries, *no man's land* was unoccupied and benign (at best) or wasteland, dark with foreboding (at worst). However, in a country that was relatively densely populated, unowned land was likely to have some fundamental defect. For that reason, perhaps, the expression *no man's land* acquired a negative connotation. The OED gives a quotation (in Latin) from 1326 which has the unfortunate Arnold taken to *nonesmanneslond* outside London, where he was beheaded. But in 1881, Thomas Hughes (author of *Tom Brown's School Days*) writes of a "small plot of nomans land in the woods".

In WW I, *no man's land* was the stretch of disputed ground for which a terrible price was paid. Paradoxically, the price paid would render the real estate worthless, except to Generals. In this modern world of more remote, impersonal killing techniques, no man's land has reverted to its earlier sense.

Julian Burnside QC

Conference

16–22 September 2004: Florence, Italy, Pan Europe Asia Legal Conference. Contact: Rosana Farfaglia, Tel: (07) 3236 2601 Fax: (07) 3210 1555 or (07) 3251 0061, PO Box 843, New Farm, Qld 4005, E-mail: boccabella@qldbar.asn.au

Wine Report in Association with the Essoign

By Andrew Bristow

Houghton Pemberton Chardonay 2002

THE 2002 Houghton Pemberton Chardonnay is an exciting wine from Western Australia with little oak that allows other more interesting and exciting characteristics to be displayed. This wine won the Best Chardonnay, Best Table wine and Best at Show at the Sheraton Wine Awards in Western Australia this year.

BRL Hardy has produced this wine, which is pale straw in colour with a green hue.

The bouquet is an unusual blend of citrus, grapefruit and lime with a faint hint of tropical fruits. This is more apparent after it has been allowed to breath for half an hour or so.

The palate shows a full flavour of grapefruit and melon which is enhanced by an underlying sweet nougat flavour. The French oak is discernible, but not apparent. The back palate shows a creamy texture.

The wine coul take cellaring f five years. The con plex nature of th Chardonnay woul complement summer lunchtime dining. It is available from the Essoign Club at $32.50 a bottle ($27.00 takeaway).

I would rate this wine as a junior criminal barrister, exciting, nervous and theatrical.

You Say 'Q.C.', I Say 'QC', You Say 'S.C.', I say 'SC'. Let's Call the Whole Thing Off!

Glenn McGowan

EVER since the appointment of silks in Victoria was changed from Queen's Counsel to Senior Counsel, the inconsistent use by the Victorian Bar of their respective acronyms has bugged me. It will be seen that the Victorian Bar abbreviates them as "QC" and "S.C.".

Why the difference? I didn't much care which style was used, but why differentiate between them? Why not be consistent?

I decided to investigate to see if there was a legitimate reason.

My research was of four types:

(a) comparative use;
(b) dictionary/publication use;
(c) scholarly use;
(d) I asked Anna Whitney for an explanation.

I do not pretend to have been exhaustive in any of them.

Comparative use is instructive. There are few Bars which have both ranks. As far as I can tell, Australia is the only place with jurisdictions "in transition" and thus having both ranks at once. Ireland, Canada, New Zealand, South Africa, Scotland and England (and Wales) all have only one style of rank. Of all those, only the Canadian Supreme Court uses full stops. The others do not. However, some English silks have also taken silk in republican Ireland (eg. Michael Fysh QC, SC, now of the Patents County Court) and consistent use is there observed. (I note in passing that this multiple post nominal use is considered only justified when a different country is involved, and frowned upon as inappropriate where merely another state or dominion within the one nation is involved, as in Australia. Thus, one could justify e.g. "SC, QC" if a recently appointed Australian silk also took silk in New Zealand, but not otherwise).

In Australia the various Bars (e.g. on their websites) all act consistently except Victoria. The various Courts (in their judgments and websites) also act consistently. The various publications and law reports all act consistently. In fact, the only entities I could find which do not act consistently were the Victorian Bar, Who's Who and the Law Council of Australia, each of which use as each other do (as aforesaid). Yet the other national legal body, the ABA, acts consistently. The accompanying table sets out the results of these enquiries.

Is there a possible reason for *Who's Who*, the Victorian Bar and the LCA using the acronyms inconsistently? The next step was dictionary use. Here again, use was consistent. However, the post nominals for senior counsel only appear in some legal dictionaries. And the habits of abbreviation generally do not seem principled. The OED gives a long series of acronyms for each letter, giving many examples of use both with and without periods (e.g. SC, structural change; S.C., s.c. self contained, QF., q.f., quick firing; Q.C., Queen's Counsel; QS, Quartermaster-Sergeant; etc.). The possessive apostrophe in "Queen's Counsel" seems to make no difference.

For me, the most persuasive point is the way court decisions are reported. The use in the various law reports is unwaveringly consistent. All use "QC" and "SC", except QdR and some English reports (which use periods, but still do so consistently). The leading authorised reports (CLR, VR, NSWLR and authorised in UK) all use "QC" and "SC".

As far as I can tell, Australia is the only place with jurisdictions "in transition" and thus having both ranks at once.

Glenn McGowan

Scholarly writing is a little more illuminating. Stephen Murray-Smith (Right Words, *A Guide to English Usage in Australia*, Viking 1987) observes:

> We are used to indicating words that are normally abbreviated in writing by placing a full stop after the abbreviation, thus:
>
> The baboons, hyenas etc. then boarded Noahs Ark. The St. Kilda tram leaves from Swanston Street.
>
> The motion was passed nem. con., after a lot of discussion.
>
> There is now an increase in tendency to omit the full stop when an abbreviation ends with the same letter as the full word

does. Thus such words as Saint, Doctor, Street and Road are abbreviated as St, Dr, St, and Rd, without any stops.

Other abbreviations retain the full stop; Rev. for Reverend, for instance, and Cres. for Crescent.

It should also be noted that in one or two cases it is becoming more common to drop the full stop in any case. Thus per cent., short for per centum, is now very often written or printed simply as per cent, and the word ibid., used in scholarly publications (meaning in the same place, an abbreviation of ibidem) is now frequently printed as ibid, without a full stop after it.

Such simplifications are to be welcomed.

Fowlers Modern English Usage (3rd ed 1998 OUP) observes that the use of a full stop in abbreviations and contractions now requires some modification from more traditional rules. A distinction between abbreviations and contractions (abbreviation taking the first letter of each of a series of multi words and a contraction being e.g. Dr. for Doctor) is useful but has been eroded in the 20th century by a widespread tendency to abandon the use of full stops altogether for both types. *As long as consistency is maintained,* either is acceptable unless ambiguity would arise by omission of the full stop. Fowler goes on to note the distinction between abbreviations and acronyms. Acronyms are the first letter of multi words only where they can be pronounceable as a word. Thus BBC is not an acronym but an abbreviation. NATO is an acronym. However, where the acronym might be confused with another regularly used word (e.g. WHO) it will normally be expressed with full stops after each letter. A subset of abbreviations is initialisms which are not pronounceable as words (e.g. FBI and VCR). Fowler does note that many abbreviations start off life with full stops between their letters and only gradually attain the status and shape of ordinary words or expressions without full stops between their letters as they have become more familiar.

The Penguin Working Words (An Australian Guide to Modern English Usage 1993) also notes that abbreviations are usually followed by a full stop. Those made up of a group of initial capitals have traditionally had a full stop after each capital. Today however it is thought the trend is towards lighter punctuation and the stops are usually dropped. Examples given include N.S.W., now commonly NSW.

Colorado University at Boulder Style Guide says the general trend is away from using periods in abbreviations, unless confusion might result. This might be important in the present context. It could be argued that until "S.C." is better known and accepted, period use is called for. However, where its use is constantly proximate to "QC", one would have to wonder what would be the cause of more confu-

My research was of four types:

(a) comparative use;
(b) dictionary/publication use;
(c) scholarly use;
(d) I asked Anna Whitney for an explanation.

	Q.C.	QC	S.C.	SC
Victorian Bar		x	x	
Law Council of Australia		x	x	
Who's Who		x	x	
NSW Bar		x		x
Qld Bar		x		x
Tas Bar		x		
WA Bar		x		x
NT Bar		x		
South African Bar				x
Scottish Bar		x		
Australian Bar Association		x		x
Irish Bar				x
UK Bar		x		
Hong Kong Bar			x	
International Bar Association		x		x
High Court of Australia		x		
Canadian Supreme Court	x			
Oxford English Dictionary (2nd)	x			
Osborne's Legal Dictionary (6nd)	x			
Australian Legal Dictionary (Marantelli)	x			
Butterworths Australian Legal Dictionary		x		x
Macquarie Dictionary		x		
Black's Law Dictionary (16th)	x			
International Who's Who of Patent Lawyers		x		x
Patent Law Experts		x		
Who's Who Legal 2002		x		x

	Q.C.	QC	S.C.	SC
Aust. Bar Review (Butterworths)		x		x
CLR (LBC)		x		x
FCR (LBC)		x		x
ALR (Butterworths)		x		x
ALJR (LBC)		x		x
VR (Butterworths)		x		x
NSWLR (LBC)		x		x
QdR	x		x	
SASR (LBC)		x		x
WAR (LBC)		x		x
IPR (Butterworths)		x		x
ACSR (Butterworths)		x		x
ALD (Butterworths)		x		x
VAR (LBC)		x		x
AAR (LBC)		x		x
Aust. Torts Reports (CCH)		x		x
ACLC (CCH)		x		x
AIPC (CCH)		x		x
ATPR (CCH)		x		x
AustLII		x		x
LGERA (LBC)		x		x
Authorised Reports UK (e.g. AC)		x		x
WLR	x		x	
All ER (Butterworths)	x			
Lloyds Reports	x			
Property Planning and Compensation Reports (Sweet & Maxwell)	x			

sion! Consistent use. it might be thought, would cause the least confusion.

The highly regarded *Chicago Manual of Style* first distinguishes between abbreviations, acronyms, initialisms and contractions. QC and SC are both initialisms which is a subset of abbreviations. That style manual prefers no periods but recognises the use of periods as "traditional".

According to *The Business Writer's Handbook* an acronym is an abbreviation that is formed by combining the first letter or letters of several words and is pronounced as words and written without periods. An initialism is an abbreviation that is formed by combining the initial letter of each word in a multi word term and is pronounced as separate letters and generally periods should not be used when they are uppercase.

This would be consistent with the age old habit of writing "QC" without periods (as even the Victorian Bar, *Who's Who* and LCA do). All the more reason to consistently adopt"SC" without periods.

Finally, Anna Whitney, in response to an enquiry, informed me that the Bar policy is based on a wish to distinguish from the military award for valour, the Star of Courage (conventionally abbreviated "SC"). However, as far as anyone is aware, no-one at the Bar is the holder of such an award. This consideration might explain the use in *Who's Who* (because some entries hold the Star of Courage which was an entry in the form "SC" long before barristers started adopting the appellation in Australia), but nothing more. And this consideration has not persuaded the *Law Reporter* publishers or other Bar associations, even in Australia. Indeed, our current Governor-General, himself a military man (Major-General), uses "SC" in official correspondence, e.g. appointing senior counsel to government posts!

As to whether periods should be used, modern trends are towards their removal. See e.g. *Commonwealth Style Manual* (69 ed 2002) p.158.

As with all abbreviations, context is everything. One should not use any abbreviation in circumstances which tend to confuse or mislead. The point here is that inconsistent use, far from successfully distinguishing from a bravery award, tends only to confuse, especially when its use is almost always going to be in a legal context where "QC" is likely also to appear.

Therefore, it seems appropriate to recommend that the Victorian Bar commence using "SC".

Verbatim

Leisure of the Court

Federal Magistrates' Court

29 April 2004
Coram: Registrar Connard
Bankruptcy applications — Bornstein seeking a two-week adjournment on behalf of the respondent debtor.

Bornstein: Will you be sitting in a fortnight's time, Registrar?
Registrar Connard: Yes I will — but in a café in Florence.

Criminal Openings

High Court of Australia

22 April 2004
Coram: Gleeson CJ, McHugh J, Gummow J, Kirby J, Hayne J, Callinan J and Heydon J
John David Rich and Mark Alan Silbermann, Appellants
Australian Securities and Investments Commission, Respondent

Callinan J: Mr Walker, some modern criminal proceedings now make provision for all sorts of participation by the accused.
Mr Walker: There is a fairly long-established statutory requirement in relation to alibi notices, which is a species of the genus, I suppose, criminal pleading.
Gleeson CJ: Somebody got the idea in New South Wales a few years ago of giving defence counsel of criminal trials an opportunity to open to the jury, an opportunity that was very rarely taken advantage of.
Mr Walker: Yes.
Hayne J: They are now obliged to in Victoria and they are now obliged to state their defence at the start of the trial and that has ...
Gleeson CJ: You cannot say, "I was rather hoping that the principal Crown witness would get sick".
Hayne J: No, at least not overtly.
Callinan J: If ever there is a misnomer it is to call what happens in New South Wales in a criminal case an opening.
Gleeson CJ: That is a very bitter comment.

Catholic Punishment

High Court of Australia

22 April 2004
Coram: Gleeson CJ, McHugh J, Gummow J, Kirby J, Hayne J, Callinan J and Heydon J
John David Rich and Mark Alan Silbermann, Appellants
Australian Securities and Investments Commission, Respondent

Gleeson CJ: The penal laws — to which reference has already been made in connection with Lord Hardwicke — included, for example, provisions that Catholics could not become lawyers. That was a penalty. Edmund Burke was a member of the Church of Ireland because his father, who had been a Catholic, had to become a member of the Church of Ireland in order to be admitted as a lawyer. They were called "penal laws".
Mr Macfarlan: There were a lot of people in those days, Your Honours, who thought Catholics should be punished in different ways.
Gummow J: They were a security risk.
Kirby J: Well, that is the point. They were not regarded as loyal to the Crown, and many of them were loyal to the Crown.
Gummow J: You had to be alert, and not alarmed ...
Hayne J: Here are the fridge magnets.

Accused as Witness?

Coram: Judge Sexton
R. Webster for Crown
Unrepresented Accused
R v *Emmanuel Alexandridis*

Her Honour: Will you be giving evidence yourself on this investigation? You don't have to answer that now, but just so that I know when I tell the jury what is going to be happening.
Accused: What do you mean by will I be giving evidence; will I be giving sworn evidence?
Her Honour: Yes, that is the only way that you can ...
Accused: ... examine myself.
Her Honour: You can get into the witness box and tell the jury what you want to tell

them about your response to the investigation, response to the doctor's evidence. Mr Webster will be able to cross-examine you if you get into the witness box.
Accused: Can I cross-examine myself after the prosecution has cross-examined me.
Her Honour: I am not sure what you mean by cross-examine in that sense. You can …
Accused: I am in the dock, I swear on my Bibles, right, and then what I do is, that the prosecution asks what he wants to ask me and then Manny is going to ask Mr Alexandridis — Manny is another name for Emmanuel, right — Manny is going to ask Mr Alexandridis — that is an example; do you understand what I am trying to say to you?
Her Honour: That is not the usual way to go about it. The usual way is a person who is giving evidence and representing themselves simply just makes the statement as if it was the answer without asking the question.
Accused: Yes, but he gets to say what he wants to say, but I don't get to ask Manny my questions.
Her Honour: No, well, you can just put the question into the answer. Anyway, we will wait and see how we get to that point.
Accused: Yes, have a think about it.
Her Honour: Well, I know the way that I would be doing it, but you are representing yourself so it is up to you, subject to what I say is done. But, in any event, you are not proposing to call any other medical witnesses, that is the main thing I wanted to know. Yes, you can be seated again, thanks.
Accused: Well, there is one person I would like to call.

Nothing Personal

High Court of Australia

20 April 2004
Coram: Gleeson CJ, McHugh J, Gummow J, Kirby J, Hayne J, Callinan J and Heydon J
Ryan D'Orta-Ekenaike v *Victorian Legal Aid and Ian Denis McIvor*

Gleeson CJ: Now, in this New Zealand case, they concluded: "There is an overwhelming case for retaining the immunity in relation to criminal and family law litigation." I presume your submission is that that is wrong?
Mr Moshinsky: That is so.
Gleeson CJ: What has happened to this decision? Has it gone on appeal?
Mr Moshinsky: It has gone on appeal, but there has not been a result from the Court of Appeal yet.
Gleeson CJ: Has the appeal been heard?
Mr Moshinsky: I believe so, in March.
Gleeson CJ: Do not take that personally, Mr Moshinsky.
Mr Moshinsky: Having come from Honiara, I am very used to it. Two other points are made by Justice Laurenson. One is that there has been an increase in legal aid, and that means an increase in the number of litigants. As a result, there has been an increase in the expectation that the law will provide a remedy for every wrong.

Last Word

Supreme Court of Victoria

10 October 2002
IF Asia Pacific Pty Ltd v *Galbally*
Coram: Dodds-Streeton J
Berkeley with Shaw for Plaintiff
Schlicht for Defendants

Her Honour: Mr Berkeley, what do you say that you have to establish in order to — in relation to the restraint of trade terms?
Mr Berkeley: Can I come to that, can I just finish what I want to say about this confidentiality business?
Her Honour: Yes.
Mr Berkeley: That's all I want to say.

Water Politics

Puntoriero and Another v *Water Administration Municipal Corporation* 5141/1998 (13 April 1999).

Mr Jackson: … in the first place, it suggests, Your Honour, that part of the Respondent's activities, is not likely to be the subject of special privileges or disabilities, because the reference to "in a commercial manner" rather suggests that it is to be carried on in a manner akin to the way in which generally similar transactions would be carried on …
Kirby J: ... that makes a bold political assumption that privatisation is performed in an intellectually rigorous and consistent manner. Sometimes there are expressions of this kind which are token political slogans …
Mr Jackson: … of course, Your Honour.
Kirby J: And which may have some legal effect but nonetheless, section 19 remains to which effect must be given.

Law Enforcement in New Zealand

Justin Lee
46 David Ave
Manurewa
Auckland

27th January 2004

New Zealand Police
Infringement Bureau
PO Box 9147
Wellington

Good morning,

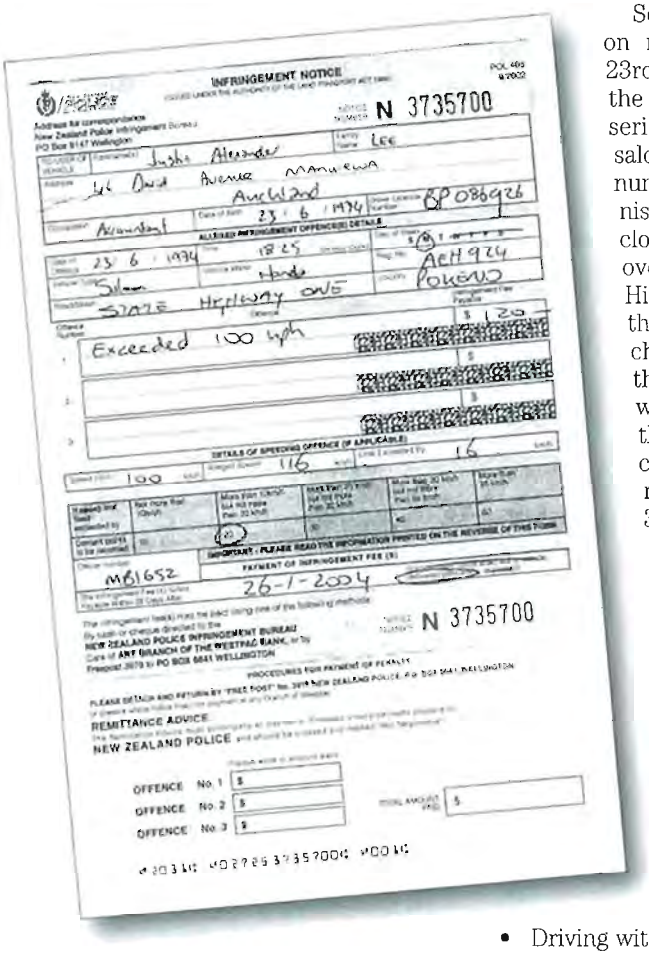
INFRINGEMENT NOTICE N3735700

Yesterday, I was presented with the above infringement notice (copy attached for your records) while returning home from the Parachute music festival at Mystery Creek near Hamilton over the long Auckland Anniversary weekend. I had a most excellent weekend, but that is not why I'm writing to you at this time. Unfortunately, there are a couple of irregularities with the infringement notice that are causing me some consternation and hopefully you can clear them up or, preferably, forget about the whole thing entirely.

Firstly, the "date of offence" is listed as the 23rd of June 1974 with the time being at or around half past six in the evening. This is of grave concern because I was not issued a driver's licence until sometime in 1990 and I have no desire to be charged with driving while not legally licensed. I do not have a clear recollection of very much at all before I was three and a half years old, so I rang Mum to see if she remembered what I was doing that day, she said that — coincidentally — I was born on that day!!

Mum mentioned that I was born at around five o'clock in the evening on that day in Porirua, which is not far from Wellington. She also said Porirua was a bustling suburb of young, low-income earning people who were trying to get ahead. Back in the 70s, people were coming to terms with oil shocks, high-inflation and wage freezes, but that's not important right now.

For me to have travelled from Porirua to the foot of the Bombay Hills just out of Auckland by six thirty, I would had to have crawled into the first car in the hospital parking lot and headed for Auckland at around 1,000 km/h. For this reason, it is entirely possible that the constable who clocked me back in 1974 was holding his


INFRINGEMENT NOTICE

N 3735700

Justin Alexander Lee

46 David Avenue Manurewa Auckland

Hyundai 23/6/1974 BP086926

23/6/1974 1825 Honda AEH924

Silver STATE HIGHWAY ONE POKENO

Exceeded 100 kph $120

100 116 16

M81652 26-1-2004

N 3735700

NEW ZEALAND POLICE INFRINGEMENT BUREAU

REMITTANCE ADVICE

NEW ZEALAND POLICE

OFFENCE No. 1 $

OFFENCE No. 2 $

OFFENCE No. 3 $

laser equipment upside down and instead of doing 116 km/h as per the infringement notice, it is more likely that I was doing 911 km/h.

This is where it starts getting really strange. The car that I must have crawled into had the same license plate as the one I have now — AEH924 (according to the infringement notice). However, my car is a dark grey Nissan Bluebird SSS, with dual cup holders, 1800cc of grunt, air-conditioning and electric windows. You will notice that a time travel option is not included on this model, so that rules out any "Back to the Future" issues and the car I was driving back then could not have been the one I drive today.

This is clarified by the infringement notice which states that the vehicle was a Honda saloon. How this relates to my Nissan Bluebird, I cannot fathom. I can only hypothesise that, back in 1974, the first range of proto-type Hondas had an automated number plate changing mechanism (like on the A-Team) which were used to avoid parking tickets and facilitate safer getaways from burglaries, armed hold-ups and the like.

So to recap, it appears that on my birthday on June the 23rd 1974, I crawled out of the maternity ward, hijacked a seriously high powered Honda saloon with an automated number plate changing mechanism, drove to Auckland at close to Mach II was pulled over approaching the Bombay Hills and unwittingly changed the automated number plate changing mechanism to show the same number as a car I would come to own almost thirty years later!! (The chance of selecting the same number plate is a mere I in 308,915,776 — so quite conceivable.)

I am currently residing at the address listed at the top of this letter. I expect you will want to apprehend me fairly shortly now that we've established that I may have committed the following offences:

- Grand theft auto (I probably stole the Honda as my parents drove a white Ford Cortina at that stage).
- Driving without a licence.
- Driving at ludicrous speed using a motor vehicle.
- Evading the law using an automated number plate changing mechanism.

If you could provide a clearer indication as to why the "date of offence" is the same as my birthday, and why the vehicle make and type bears no resemblance to the number plate listed on the infringement notice, it would be appreciated. Mind you, I wouldn't be too disappointed if we agreed to let this one go. I could really use the $120 dollars as I'm lowering my Nissan, installing an excessively noisy waste-gate and boring it out for better performance in the street drags down Te Irirangi drive and around Weymouth.

Thank you for considering my submission, I look forward to hearing from you.

Regards,

Justin Lee
Encl. Copy of infringement notice N3735700

Criminal B

Thursday 24 June 2004 at Matteo's North Fitzroy

Mark Dean S.C.

I have a friend who writes for *Gourmet Traveller*. He is always just about to go somewhere exotic at the company's expense. And on my frequent long haul flights for work to places such as Burnie and Mildura I often read Deborah Ross' restaurant reviews in *The Spectator*. So when Paul Elliott rang on the day of the CBA Dinner to ask me if I would write a review of the event I jumped at the chance. A new career immediately presented itself. One of endless entrees, mains and desserts in warm, French-speaking locales. With this in mind I dragged myself away from Fox League Teams and headed to the judiciary's HQ — North Fitzroy and the famous Matteo's.

Of course, a good scribe needs a note book and so, fortunately, shortly after I arrived Nicola Gobbo seconded a waiters pad for me.

The first thing I noticed was the young crowd — apart from Pat Casey. There was about 60, "30 something" criminal lawyers in attendance. It's true the usual

Guest speaker Magistrate Reg Marron.

ar Dinner

Guest speaker Judge Michael Bourke.

Robin Brett QC, Chairman of the Bar Council.

Lex Lasry QC, chairman of the Criminal Bar Association.

Marc Sargent and Michael Cahill.

Greg Lyon and Michael Croucher.

Yildana Hardjadibrata, Benjamin Lindner and Arthur Adams QC.

Jim Kennan QC, Julie Davis, Mark Dean S.C.,and Shivani Pillai..

David Ross QC, Duncan Allen and Shane Thomas.

complement of magistrates, County Court judges and aging silks were there too but the crowd did seem young — or maybe it was just me. Before dinner I decided to check the fashion stakes. Judge Punshon was decked out in a suave skivvy which he described as "my birthday jumper". Judge Bourke had a jumper on too but that came as no surprise. Jim Kennan had gone for the casual look (it was smart casual) and David Ross, in a tribute to "Singing in the Rain", sported a pair of two-tone

Danielle Huntersmith, and Caroline Burnside.

brogues. Needless to say, to name but a few, Carolyn Burnside, Shivani Pillai and Jane Dixon were all looking very smart casual indeed.

And so to dinner. Matteo's is highly regarded for its fine dining, and rightly so. I had the pumpkin gnocchi tossed with "osso bucco style veal", the twice-cooked duck leg and "aiguillette" of duck breast. A good cabernet was in ample supply at our table. Dessert was a bit of a treat I have to admit — chocolate and frangipane flan and a fairly solid serving spoonful of tiramisu. Everyone enjoyed the excellent food.

CBA dinners are, however, not really about fashion and food. It's the speeches that we all go for and this year was no exception. Lex Lasry was MC and a very good one too. No doubt the result of his years as a Royal Commissioner. To warm up the young crowd Reg Marron M came on after entree. He regaled us with tales from the depths of the magistracy. At one point he described bumping into rather stern magistrates in the hallways behind the courts and getting a terrible fright. It sounded a bit like Harry Potter but he reassured us that "the scary magistrates" are really very nice. Reg was followed by Judge Bourke whose poignant self-deprecating gags got a lot of laughs. He told us how judges are very sensitive when it comes to criticism of their directions to juries. He was particularly defensive of his *Kilby* direction (*Kilby* v *R* (1973) 129 CLR 460) and said that he thought it stood up very well. The speech was completed with a richly deserved tribute to Judge Kelly; a great teacher to us all.

We were all very honoured to share the evening with the Chief Justice and her partner, and as they departed into the North Fitzroy air they looked to have had good night out. I think everyone else did too.

Oh, Say Can You Sue?

America, once called the land of opportunity, has now become the land of opportunism. Nowhere is this more evident than in its litigiousness, a disease of pandemic proportions. Look at the paper coffee cup issued by McDonalds. It carries an inscription: "WARNING: CONTENTS HOT." Goodness me! Really? I'm so surprised!

Graham Fricke QC

THAT fatuous warning dates back to the case of the lady who drove her vehicle through the car lane at McDonalds, ordered a coffee, then placed it in her lap and drove off. The coffee spilled over her thighs, scalding her. Treating the golden arches as the golden pot at the end of the rainbow, she sued, and an American jury awarded her a million dollars. The amount was cut down on appeal, but the fast food outlet inserted the inscription in the vain hope of avoiding future litigation.

The duty to warn is frequently invoked by plaintiffs' attorneys. As a result, lawyers for manufacturers and public utilities advise their clients to warn about all possible risks, however obvious the danger. Travel on a Muni bus in San Francisco, and a recorded voice offers the caution, "Please hold on!" A written notice explains helpfully that sudden stops are sometimes necessary. The phantom voice also counsels you about the importance of watching your purse on crowded buses, the need to exit from the rear door and to vacate front seats for seniors and the disabled. Other notices warn you that the exit doors open inwards.

None of this should surprise, in a land where litigants commonly sue liquor manufacturers for ruining their livers by furnishing the wherewithal for 40 years of heavy drinking, and sue innkeepers for selling liquor to motorists who later injure them. But never underestimate the ingenuity of United States citizens.

Early this year American opportunism was on full display at McCovey Cove, a small bay alongside the SBC baseball park where it was hoped that the local hero Barry Bonds of the Giants would equal the career record number of home runs, 660, established by his godfather, Willie Mays. A man called Larry Ellison and his son were each paddling their kayaks in the cove as they listened to the game on radio. Bizarrely, Larry wore an Arnold Schwarzenegger mask. When Bonds hit the ball out of the park and into the waters of McCovey Cove, Larry paddled furiously, then dived into the waters and retrieved the famous ball.

Ellison then consulted with his son, and they decided, quite uncharacteristically for Americans, not to keep the ball, but to return it to their hero Bonds. They did not lose out entirely, for Bonds and Mays, who had been present to witness his godson's triumph, made a public presentation of tickets for further games and baseball bats inscribed with their signatures. Ellison had become a minor celebrity, which was fitting, for he has the same name as a well-known multi-millionaire. (The kayaking Ellison says that this is handy. It means that people return his calls.)

The plot thickened a day or two later, when Bonds hit another home run, which meant that he had exceeded his godfather's record. Ellison was again out there in his kayak in McCovey's Cove, not this time wearing his water-logged Arnie mask. But on this occasion there were a lot more kayaks. When the record-breaking ball sailed into the water, Ellison was again the first to reach it. But a group of kayakers, like a frenzy of predatory feeding sharks, descended on the scene and tried to wrest the ball from Ellison. In the flurry of battle, Ellison's cell phone was destroyed by

SBC baseball park.

Kayakers on McCovey Cove.

salt water. But he held on to the magic ball. This time he kept it.

What had made the 661st ball so attractive was the local knowledge of a similar incident in 2001. Bonds had hit his 73rd home run for the season, achieving a record annual tally. The ball had on that occasion gone into the crowd, where two gentlemen wrestled for the distinguished ball. One of them managed to retain the ball in the scuffle, but the other claimed that he had caught it first. What do you do in that situation? Why, you sue, of course.

Attempts were made by judges in pretrial conferences to persuade the litigants to resolve their differences. But one of them was a dogged fighter who refused to settle. In the end the trial judge ordered them to sell the ball, and to split the proceeds. The ball was auctioned, and sold for US$450,000. Not bad money, you say, for attending a baseball game and catching a ball in a scuffle. The trouble was, legal fees had to be taken into account. The judge ordered that the proceeds be paid into a trust account, pending the determination of the appropriate legal expenses. The parties had achieved a pyrrhic victory. But it's an ill wind that does the lawyers no good.

The Law Of Misleading or Deceptive Conduct (2nd edn)

By Colin Lockhart
Lexus Nexus Butterworths 2003
Pp. i–lviii, 1–396, Index 397–407

THE 2nd Edition of *The Law of Misleading or Deceptive Conduct* comes some five years after the publication of the first edition.

Although there has been a statutory cause of action for over 25 years in relation to misleading or deceptive conduct, the law continues to be developed both by court decisions and statute. Recent statutory developments include s.12DA of the *ASIC Act 2001* (a prohibition of misleading conduct in relation to financial services), the extension of limitation times and the creation of the Federal Magistrates Court invested with jurisdiction in this area.

The Federal Court Reports and on-line FCA/FCAFC citation also bear witness to the ongoing importance and development of this area of the law by the courts. The High Court continues to have reason to concern itself with issues relevant to s.52 as recent cases such as *Marks* v *GIO Australia* (1999) 196 CLR 494 (damages), *Henville* v *Walker* (2001) 206 CLR 459 (causation), *I & L Securities* v *HTW Valuers* [2002] HCA 4 (ss.82 & 87) and *Burke* v *LFOT* [2002] HCA 17 (contribution) demonstrate.

The Law of Misleading or Deceptive Conduct provides extensive discussion and analysis of all aspects of the law relating to statutory misrepresentation claims. The particular discussion of misrepresentations in the context of express statements being promises, predictions and statements of opinion, and non-disclosure or misleading conduct by silence is often of relevance in practice.

Similarly, the discussion of remedies including damages, injunctions (interlocutory and final) and other orders is excellent. From a practical point of view, the text canvasses matters such as limitation periods, amendments to pleadings, relevant jurisdiction and s.75B (person aiding or abetting contravention) and s.51A (onus of proof — future matters) of the Trade Practices Act which enhance to the practical utility of this work.

Section 52 and the statutory cause of action for misrepresentation has become an important aspect of commercial law. *The Law of Misleading or Deceptive Conduct* is an excellent authority combin-

ing both scholarly legal analysis, comprehensive footnotes and a wide coverage of all relevant aspects of this important area of the law. This book is to be commended to all those interested in the scope and operation of s.52 and like statutory causes of action. **P.W. Lithgow**

Principles of Remedies (2nd edn)

Covell and Lipton
Lexis Nexis, Butterworths, 2003
Pp. xlvi plus 298 pages, including index (paperback)

AS every barrister knows, having legal rights is one thing, but being able to do something effective to enforce them is quite another. Remedies are accordingly a crucial part of litigation. Knowing what remedies are available, and choosing the right ones, are critical in advising any client. This work is a useful handbook covering a broad range of remedies, and provides a good starting point (if not necessarily everything one will need to know) in order to make those decisions.

The book commences with the standard common law remedy of damages. There are separate treatments for tort and contract, which is appropriate due to the often different considerations involved. There follows a part concerning restitution. Due perhaps to space limitations, this is more a summary than a general treatment. It refers to most of the main cases, and discusses the main principles, but a person wanting a comprehensive treatment of the subject would have to consult a work like Mason and Carter *Law of Restitution in Australia*, or Goff and Jones, *Law of Restitution.*

A significantly longer third part deals with the remedies available in equity. It includes rescission, account of profits, specific performance, injunctions, equitable compensation and damages, rectification, declarations and delivery up. Notwithstanding that this is the longest part of the book, in some cases the treatment lacks depth. For example, in account of profits, one would like to see a greater discussion of the considerable difficulties of obtaining effective accounts of profits in practice. Again, however, it might be said that the work is only intended to be a general overview, and that people wanting a more comprehensive coverage should consult a specialist book. There is a good discussion of injunctions and equitable compensation. In each case the distinction is preserved between the "exclusive" jurisdiction of equity and the "auxiliary" jurisdiction, and the dreaded "fusion" fallacy is avoided.

A final part of the book deals with statutory remedies, which is limited to the *Contracts Review Act 1980* (NSW) and the *Trade Practices Act 1974* (Cth). Remedies under State Accident Compensation legislation are no doubt regarded as being beyond the scope of the book. Unfortunately for practitioners south of the Murray, the Contracts Review Act does not apply, and the section on the Trade Practices Act is too short to be more than a general overview.

Throughout, the book is written in a clear and easy to understand style. There are copious references to and quotations from judgments, which makes the work more useful to practitioners. I would recommend it is a good general introductory work on its subject. **Michael Gronow**

The Society Murders: The True Story of the Wales-King Murders

By Hilary Bonney
Allen & Unwin, 2003
Pp. 1–243, Appendix, Endnotes, Acknowledgments and Photographic Credits

OVER 2002 and 2003, Melbourne media and public interest focused intensely on murders perpetrated not by any underworld drug lord but by a Caulfield Grammar school educated, former South Yarra hairdresser; murders carried out not in Carlton or Brunswick in broad daylight but after evening dinner in the front yard of a leafy residence in Burke Road, Glen Iris.

There is no need for suspense in this account. We all know at the outset who dun it. The act itself occurs in Chapter 1, the spareness of the telling and the economy of detail adding a palpable chill to the unspeakable but utterly premeditated acts. The following 21 chapters and Epilogue attempt to unravel the who and the why and the what of the murders and subsequent trial. Included in the cast list is a *dramatis personae* which could only be described in sociological terms as dysfunctional.

The author, a Victorian barrister, has — not unexpectedly in a profession renowned for its wordsmiths — a turn of phrase that is at the same time memorable, majestic, pleasing, and yet restrained. Some examples: "Matthew had a lifetime of lists running through his head" (p. 3); "Prue thought that her little brother was strange. He crucified flies when he was four and impaled eels when he was eight."(p. 36) In the unfolding of the myriad details, in the scrutiny of the extended family and its background, throughout the piece-by-piece police investigation and the subsequent Supreme Court trial, the author encapsulates something of the epic proportions of a Greek tragedy. Indeed, there is more of the Oedipal complex in the wings than meets the eye at first glance, together with a touch of the Shakespearean Lear in the way the gods appear to deal with the players for their sport. In her choice of an almost chronology-style of telling, the author shows how truths and insights emerge naturally and often relentlessly from the way things are ordered and structured.

In a read that was hard to put down (and, in fact, completed at one sitting, such did the writing compel the reader to go on to find out "what next") the author teases us by saving the best till last. It is tempting to give the last word in the Epilogue to Chris Maxwell QC, whose article in *The Age* a week after Matthew and Maritza's arrest asked "By what right does a newspaper assume the role of investigator and prosecutor?" These words have proved prophetic, in that the media appear persistently to be impervious to any improvement in behaviour in their rush to publish the sensational story rather than permit the administration of justice to unravel in its own way in its own time. (Recall their conduct in the matter of the nightclub bouncer who is unlikely in the short term to get any trial much less a fair one.)

For me, the author serves up the most delicious ironies in the juxtapositions she makes and the images she paints on Matthew's sentencing day. There is the grieving family, which nevertheless has the collective presence of mind to hire a public relations consultant who on cue hands out a prepared typewritten statement setting out the family's frustrations and anger that the full facts have not been uncovered at trial. There is a simultaneous demand for a full public coronial inquest while at the same time the request that privacy be absolutely respected in the hope that they could move forward with peace and dignity. The contradictions and inconsistencies are emblematic of many of the themes threaded through the sad and sorry tale.

This is such a good book with all the compelling human ingredients — in the "true crime"/real life genre — that you could be forgiven for wondering what the appeal could be in fiction. **Judy Benson**