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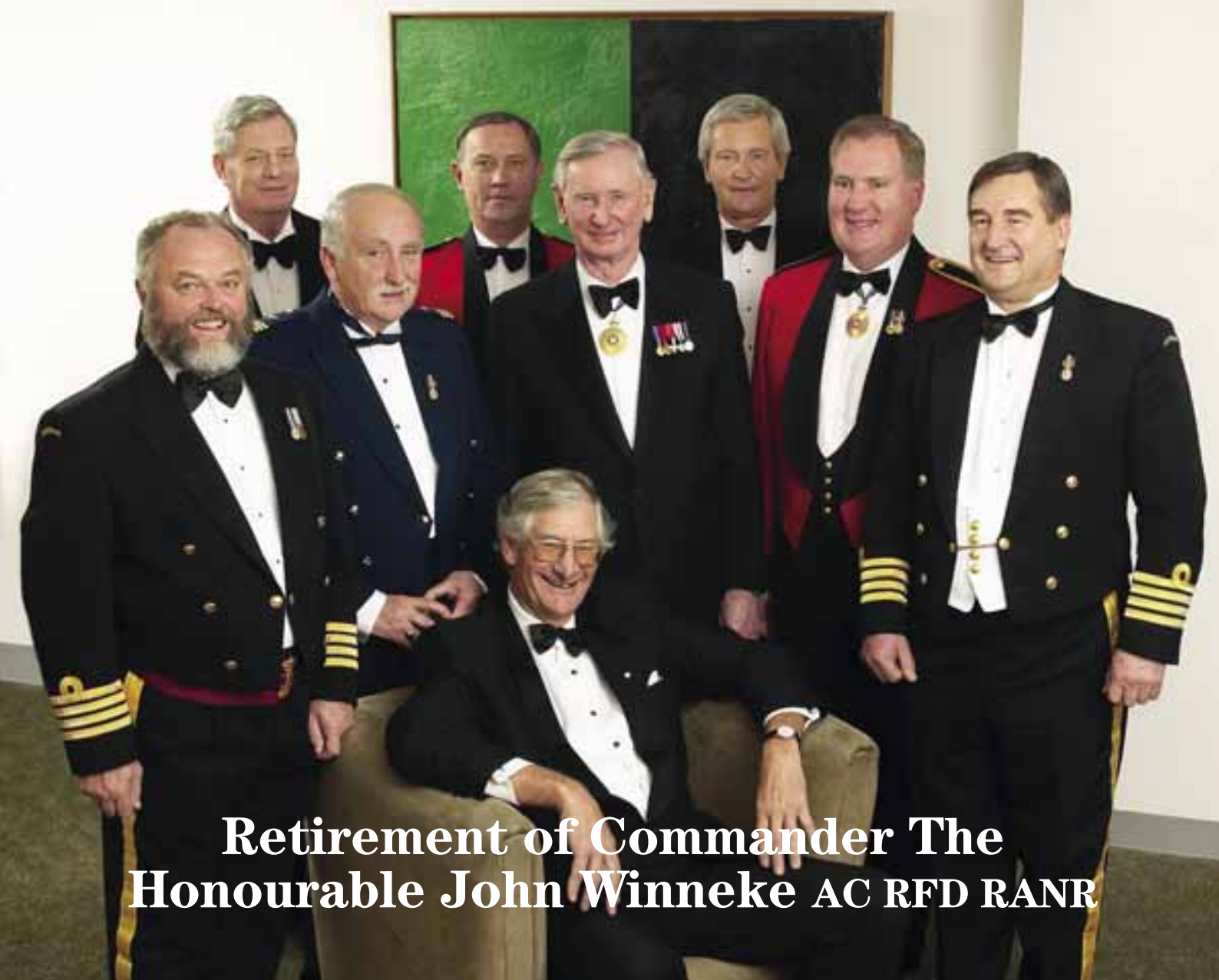

Retirement of Commander The Honourable John Winneke AC RFD RANR

Legal Profession Act 2004 ☐ Disclosure Requirements and Cost Agreements Under the *Legal Profession Act 2004* ☐ Farewell Anna Whitney ☐ Obituaries: James Anthony Logan, Carl Price and Brian Thomson QC ☐ Junior Silk's Bar Dinner Speech ☐ Reply on Behalf of the Honoured Guests to the Speech of Mr Junior Silk ☐ The Thin End of the Wedge ☐ Opening of the Refurbished Owen Dixon Chambers East ☐ The Revolution of 1952 — Or the Origins of ODC ☐ Of Stuff and Silk ☐ Peter Rosenberg Congratulates the Prince on His Marriage ☐ The Ways of a Jury ☐ Bar Legal Assistance Committee ☐ A Much Speaking Judge is like an Ill-tuned Cymbal ☐ March 1985 Readers' Group 20th Anniversary Dinner ☐ Aboriginal Law Students Mentoring Committee ☐ Court Network's 25th Anniversary ☐ Au Revoir, Hartog ☐ Modern Future for Victoria's Historic Legal Precinct ☐ Preparation for Mediation: Playing the Devil's Advocate ☐ Is It 'Cos I Is Black (Or Is It 'Cos I Is Well Fit For It)?

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Au Revoir, Hartog

Bar Legal Assistance Committee

Cover: The Royal Australian Navy Reserve Legal Panel Dinner in recognition of the retirement as President of the Court of Appeal of Commander The Honourable Justice John S. Winneke AO RFD RANR (seated).
Standing (L to R): Captain His Honour Judge Tim Wood RFD QC RANR, His Honour Judge Michael Kelly QC, Wing Commander His Honour Judge David Morrow RFD, Colonel Richard Tracey RFD QC, Sir Daryl Dawson AC KBE CB, Captain Warwick D.K. Teasdale OAM RFD ADC RANR, Major General Greg Garde AO RFD and Captain Paul A. Willee RFD QC RANR.
(Reviewed on pages 28–31).

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Life Imitating Art

ONE hundred and thirty years ago the only opera devoted entirely to an episode of legal life opened (to wild acclaim) in London. Gilbert and Sullivan, whose long, lucrative and entrepreneurial partnership began with this beguiling collaboration, originally created the one act "Trial by Jury" as a postlude, but in more recent times it has assumed a life of its own and concluded a similarly successful run as part of Opera Australia's Melbourne season in June. What was conservatively described as a "dramatic cantata" encompassing "witty plot, characterisations and lyrics" in 1875 has been transformed by modern production values and direction into a delicious satire on the process of the law and its seeming interdependence with the media.

The whole action takes place in a British courtroom (the Court of Exchequer) and centres on a breach of promise case. The 12 gentlemen of the jury have each come prepared for a degree of tedium in the proceeding — which becomes evident when for example they are being addressed by the defendant and they each produce their tabloid newspapers and read them en masse. Counterbalanced on the other side of the court, the ladies of the press are represented by 12 women. Irrespective of who is speaking or what is happening, they are variously engaged in taking any number of flash photographs in court, sending SMS messages, making or receiving calls on their mobile phones, chatting up the defendant (or the plaintiff's junior counsel); talking to each other, wandering around the Court, taking notes and passing them around.

The defendant arrives in Court dressed in a fluorescent purple suit and sunglasses and has the hairdo and nonchalant attitude captured frequently on our television evening news bulletins. His entrance and the obvious relish over being the centre of attention is only exceeded by the arrival of the plaintiff, complete with La Dolce Vita attire and carrying a miniature puppy. The press frenzy and attention is taken up and reinforced by the jury, the court ushers and everyone else, and general mayhem ensures.

While the jury is being sworn in, the court is a hive of activity. People come and go, conversations continue, even the judge is engaged in making newspaper cut outs on the bench. The learned judge, who after his arrival in court proceeds to robe and tell everyone how he came to assume his position, looks as though he has already had a tot too many of port. Later, a plastic bag of (empty) bottles falls out from under the bench. Around half way through the proceeding the learned judge is asleep, spreadeagled out on the bench.

That sufficient numbers of practitioners should be so ignorant of what to do in what order, and be unfamiliar with what etiquette requires would normally be cause for concern. No need to worry, though. All those articled clerks appearing at Directions Hearings will no doubt be well instructed.

The alluring plaintiff does not rely on her barrister to work his magic in words. She works the courtroom herself, darting into the jury box to cajole the jurors or teasing the court staff, titillating them all with her antics of posture and excessive emotion. As the proceeding wends its way to its hilarious and improbable denouement, we enter into the mêlée with laughter because belief is suspended. We are carried away not just by the music and the comedy-laden lyrics, but by how wildly impossible is this depiction of the workings of the law and the courts and because we just know that such goings on are unknown in real life. Lawyers and the public really know how to behave, this was all just a romp, high jinks, a send up, a farce.

Or was it?

The following observations perhaps fall short of a complete G & S treatment (though they are, admittedly, replete with possibilities).

1. Prominently displayed in large type on the Bar Table in the County Court Directions Hearing court are the following signs: "PRACTITIONERS PLEASE NOTE. When your matter is called the Plaintiff should address the Judge first. When your matter is finished please stay at the Bar Table

until the next practitioner is at the Bar Table."

That sufficient numbers of practitioners should be so ignorant of what to do in what order, and be unfamiliar with what etiquette requires would normally be cause for concern. No need to worry, though. All those articled clerks appearing at Directions Hearings will no doubt be well instructed by their superiors and in any case they now have the benefit of the helpful sign on the Bar Table for their edification.

2. On the website of the Australian Industrial Relations Commission, there is a very helpful guide prepared by the Commission to assist those preparing for hearings (especially the self-represented). Under the heading "More tips on court procedure" the following advice in point form is given: "Do not speak when a witness is taking an oath or an affirmation. Do not interrupt the other party or the Commission member when they are speaking. Do not eat or chew while in court."

   One does wonder what those dreadfully uncivilized self-represented persons must be thinking (or have been caught doing, over and over) if such advice has to be rendered into writing. No legal practitioner, certainly no member of counsel, would ever have need of such prescriptions.
3. Recently over the names of the Chairman of the Victorian Bar Council and the Chairman of the Essoign Club, a circular notice was sent out to all members of the Bar reminding them that "The Essoign Club is a private members' club. In the past few months there has been a high rate of non-members in the club either coming in on their own after being referred by a member or being left in the club after a member has left. All Essoign Club members should be aware and adhere to the following guidelines to ensure the 'privacy' of the Essoign is maintained." Members of the Essoign were then urged to be aware of and adhere to various guidelines including the necessity for members to sign in non-members. In particular "Club by-laws prohibit members from entertaining current litigants or clients currently appearing before the courts in The Essoign Club".

Now wouldn't Gilbert and Sullivan have had a little fun with that (tra la).

The Editors

Grumpiness or Satire?

The Editors

Dear Editors

While horrified to be accused of grumpiness by the *Victorian Bar News* (The Grumpy Old *Australian* newspaper, Autumn 2005), I am delighted to accept the invitation, or even the demand, to explain the difference between a guild and a trade union.

Today, the legal profession echoes the pre-capitalist and closed-shop guilds of artisans and craftsman which controlled the market for their services or manufactured wares. In this sense, the judiciary, barristers and solicitors are all part of a legal guild. Protected by legislative fiat, it controls its own market, in large part by being the licensed agents of the state with responsibility for running the public monopoly of the administration of justice. The profession retains many of the cultural and social trappings of a pre-capitalist guild, including a sense of answering to a higher calling, intricate internal rules of courtesy and aggrieved solidarity in the face of outside criticism. The royal colleges of medical specialists are another modern-day guild phenomenon.

Big law firms are a modern adaptation that adopts a partnership model to more efficiently service the demands of its business clients, while retaining close working contact with the monopoly guild.

The question here is this. How can the public can be confident that the profession which controls the administration of justice is vigorously rewarding best practice and curbing poor performance in a way that continually improves the delivery of justice? Vigorous media coverage is one way of providing the public scrutiny required to maintain public confidence in the administration of justice.

The journalists' collective is in a far different position. The industrial revolution produced capitalists, who accumulated capital in the means of production, in the process becoming a more productive form of economic organisation than the guilds. As the guilds lost market share, artisans and craftsman who once would have been members of a guild found themselves being employed by capitalists. Typically, they formed trade unions to represent their members' interests in dealings with their employers.

Hence, the journalists' collective is a trade union, not a guild. As an editor and manager, I have not been a member of the journalists' union for a decade and clearly sit on the other side of the fence. Members of the journalists' trade union enjoy little or no legislative control over their market. In turn, their employers operate in an intensely competitive market. If journalists don't perform, they won't be rewarded by their employer. If a newspaper doesn't perform, it will lose readers. If it attracts more readers, it will be able to employ more and better-paid journalists. In the Adam Smith sense, the market provides both disciplines and rewards to promote productivity in the interests of both shareholders and the public. In today's democratic capitalism, the working journalists may also be mini-capitalists by virtue of their superannuation investments in the share market.

And, rather than grumpiness, surely the Victorian Bar Association editors mean satire. What could be better than to reveal to taxpayers and readers a ruddy High Court judge wearing a panama hat as he wanders around the delightful street markets of Florence after a session at the leisurely Australian Bar Association conference? Vigorous media scrutiny of such escapades allows taxpayers, including those barristers who pay tax, to at least know what they are paying for.

Sincerely

Michael Stutchbury
Editor
The Australian

Grants of Silk "Archaic and Inappropriate"

Ross Ray QC
Chairman
Victorian Bar Council

Dear Ross,

I write regarding the practice of the grant of silk to pre-eminent counsel in Victoria. I write to the Bar Council as I understand that the Chief Justice undertook that task last year at the request of the Council. My concern is that the practice is an archaic and inappropriate one, inconsistent with modern principles and legislation. It ignores the need for competition and is not in the interests of the consumer. I appreciate that my concern will be labelled "sour grapes". In my defence, I have long been of the view and, as a result, did not apply for silk for many years.

My following comments question the validity of "any justification" for the system and, if it is to be retained, "the sufficiency" of the process.

I note that the system has long enjoyed currency in Australia and is supported by judges and barristers alike. It has recently been substantially reviewed but maintained in England. It was abolished by Quebec in 1976, by Ontario in 1955 and by the Canadian Government in 1993. New Zealand is in the process of its abolition. However, the practice remains in many common law countries but is not replicated in non-common law jurisdictions, nor in other professions.

JUSTIFICATION

In considering the justification for the process, it has to be borne in mind that we are dealing with a long-entrenched tradition to which many in the profession are greatly attached. The origins of the process relate back to the 17th century when lawyers were retained by the monarch to act in matters of State. Of course, this justification has long passed and is no longer relevant. As a result, there is now only a vestigial connection between the present system and its origins.

Justification for the present system is often said to lie in its recognition of the expertise of advocates. It is said that, as a result, clients are able to identify and retain counsel with appropriate expert skills. It has also been said that "silks" provide leadership, integrity and courage. One might think that these attributes will exist irrespective of the imprimatur of the Court. By the time of appointment, successful applicants have already obtained that degree of expertise and, as a result, the necessary high reputation. Solicitors will be aware of their capacity. Their promotion is unnecessary.

The system offends modern precepts of fair competition. An award not only recognises talent but also ensures better and more remunerative work. As such, It distorts the market. The elevation of counsel to the rank of silk immediately provides a considerable advantage over competitors. Of itself, the elevation provides new silks with the advantage of more significant cases. The Chief Justice has observed that appointment "ought mark a change in your practice such that you assume the more difficult and complex cases". This all follows from the fact that silks are labelled by the Court as outstanding.

A considerable increase in fees is brought about by the process. Senior counsel are expected, upon appointment, to levy fees well in excess of those commonly rendered. That increase occurs overnight. There is no corresponding benefit to the consumer. Upon appointment, silks are put under intense pressure not only to increase fees but also to appear with a junior, considerably inflating total fees.

Appearance with a junior is a universal practice reinforced by intense pressure to conform. This two counsel practice might be seen as a natural consequence following upon the increase in the complexity of matters undertaken. In practice, this is by no means universally so. Obviously, much work does require two counsel. However, many silks appear in matters which could not be said to justify two counsel. Some are mundane or minor matters. I will not detail the nature of these matters but they are well known. The cost of employing two counsel, where inappropriate, falls on the consumer.

PROCEDURAL FAIRNESS

A total lack of transparency has been a feature of awards of silk for a long time. This is despite the fact that it constitutes a significant achievement for any counsel. It determines the careers of not only those who succeed but also those who fail.

In Victoria, the application is made in about August. The application is not acknowledged. The results are simply published through the medium of a clerk's e-mail in December. No explanation is given for a lack of success. No advice is given regarding any enquiries made or other steps taken. No advice is given regarding the results of enquiries. There is no provision for an appeal.

No criteria for selection have been promulgated in Victoria. No details have been promulgated regarding the standard of excellence required. We are not told whether the standard of advocacy is the sole determinant of an award or whether other matters are relevant. For instance, we are not told whether the only criterion is that of advocacy or whether matters such as excellence in mediation or the compilation of outstanding legal works are relevant.

By way of contrast, in the United Kingdom, there is total transparency. The criteria for an award are published. Reference must be made during the process to referees nominated. As part of the process, an interview is carried out. After the promulgation of selections, unsuccessful applicants receive a further interview regarding the shortcomings of their applications. Exceptional service to the legal profession is a common criterion in many jurisdictions. An appeal process has been instituted.

The appropriateness of the use of a quota should be considered. One obtains the impression from the limited number of silks appointed in 2004 that a quota was imposed. However, the question arises whether the only prerequisite is meeting the prescribed standards, rather than also fitting within a quota. It is instructive that, in England, a quota for the selection of silks is regarded as inappropriate and inconsistent with the nature of the process. Silk is awarded to all those who satisfy the criteria. There is no limit upon the number and no quantitative factors applied.

CONCLUSION

By definition, the process must be an unreliable one. Once one deals with the careers of counsel, it is inevitable that injustices will arise.

My comments are made in the knowledge that the traditions, as historical features, are attractive to most barristers and judges.

I write this letter in the hope it might excite some consideration. I have forwarded a letter in the same form to the Chief Justice.

Yours faithfully,

John A. Riordan
cc Council members

Mr John Riordan

Dear John

I refer to your letter of 7 February 2005. You have obviously given deep consideration to the matters you raise, and they deserve a serious reply.

The first part of your letter questions the existence of the institution of Senior Counsel. As you probably know, the Bar Council spent much time last year considering an appropriate method for appointing Senior Counsel, as the Attorney-General had indicated that he would no longer take any part in it. In the course of this consideration, the question of whether the institution should be retained at all was raised.

It is fair to say that little time was spent on this question, because, as you point out in your letter, the institution is strongly supported by the profession as a whole, including the judiciary. In England, the decision to retain it was made after an

extensive inquiry and very detailed consideration. I believe it is also supported by the general community; there is very little evidence one way or the other, but perhaps the strongest evidence of public support is the absence of any significant call for abolition from the media, even in the "lawyer-bashing" or "barrister-bashing" stories that are unfortunately all too common. With this strong general support, the Bar Council did not feel the need to justify the institution.

However, some of the points you make in the "justification" section of your letter are true. Senior Counsel are no longer retained by the monarch; indeed, they have not been for some centuries in England and never in Victoria. It may well be the case that leaders of the profession would emerge even if the institution were abolished. But these things, I think, do not constitute reasons for abolition.

I disagree with your statement that the system is anti-competitive, and I think that the prevailing view is that it is not. I do not agree that appointment ensures better and more remunerative work; I suspect it may do the exact opposite. The practice of briefing two counsel discourages the briefing of as many Senior Counsel as it encourages; probably more. The two counsel rule has of course been abolished, and certainly in criminal work, advice work and non-trial commercial work, Senior Counsel frequently appear without juniors. As for fees, the gap between the fees charged by newly appointed Senior Counsel and senior junior counsel is not great, even comparing counsel in similar areas of practice. If one compares counsel practising in different jurisdictions, some senior juniors charge more — often substantially more — than some silks.

You strongly criticize the method of appointment. I disagree with your criticisms.

You first mention the method by which appointments are announced. I do not see that this is very important; but the successful and unsuccessful applicants are notified by letters from the Chief Justice, and there are the formal ceremonies with which you are familiar. No more is necessary.

You say that no criteria for selection are published and no reasons are given for the decisions that are made. I do not think you are right in saying that no criteria are published. The Chief Justice's notice in September last year describes in its opening section the qualities that are required of a successful applicant. It is true that those qualities are not measurable on any numerical scale; but this does, not mean that they are not real or not recognizable. As for the absence of reasons, it is difficult to see what reasons could be given other than that particular applicants were, and others were not, considered to display the necessary qualities to the appropriate degree.

You mention a quota. I do not believe there is a quota.

You do not refer to the consultation that takes place before appointments are made. I believe that this is one of the great strengths of the system. The Chief Justice consults not only other Justices of the Supreme Court and the Court of Appeal, but also the Judges of all other relevant courts, the leaders of the professional associations and other persons she considers appropriate. This ensures that although the decision is ultimately the Chief Justice's alone, she makes it with the knowledge of the profession and the judiciary as a whole.

I realize that views may differ about these matters, but I hope that this letter answers some of your concerns. Your letter and this response (in draft) were noted by the Bar Council as its meeting on 3 March 2005.

Yours sincerely

W. Ross Ray QC
Chairman

Ross Ray QC
Chairman

Dear Ross,

THANK you for your letter of 15 March 2005. However, I find it disappointing. It demonstrates that the abolition of a conservative historical decoration such as the appointment of silk cannot be effected from within. The tenor of your comments makes it clear that only outside intervention can bring about a real review of the institution.

It seems that the issue is essentially an emotional one — intellectual rigour is replaced by assertion. Let me deal with some of the matters you have raised:

1. It appears that the Council was so confident of the worth of the institution that it devoted little time to the question last year. This is unfortunate as other jurisdictions have given the issue exhaustive consideration. You call in aid the results of the English enquiry. However, an awareness of the extent of that debate is not demonstrated.
2. Whatever enquiry was carried out by the Council last year was clearly inadequate. It appears to have been made by a committee of barristers, presumably committed to the institution. There does not appear to have been any outside enquiry. It is not clear to me that even the Bar was consulted. As you refer to the English approach, it should be appreciated that an extremely broad range of opinion was sought in that enquiry. Any enquiry here could hardly be entitled to bear that description in face of the scrupulous enquiry undertaken there. It was carried out over a lengthy period. Relevant Government departments were consulted. They provided comprehensive reports. Solicitor bodies and the full range of professional institutions were involved. Community legal services, the Trades Hall and the Confederation of British Industry were consulted. Community opinion was canvassed. The view of the Consumer Association was obtained. Many hundreds of submissions were received.
3. One result of the English enquiry was that a good deal of dissent was identified. The Office of Fair Trading opposed the maintenance of silk. One of its concerns was that the system did not identify areas of specialisation. In New Zealand, the decision has been made to abolish silk. You mention none of these matters. It does make sense that the Council was unable to identify critical comment if none of these enquiries were made.
4. One remarkable assertion in your letter is that you believe that the process is "supported by the general community". In saying that, you rely upon the absence of critical media comment. Your conclusion is said to be reinforced by the fact that this silence exists in a media which is critical of lawyers and engages in "barrister-bashing" stories. As a result, the Council "did not feel the need to justify the institution". It is difficult to believe that this view could be held. That community and media opinion should be the touchstone for the determination of the appropriateness of Court and Bar practices is remarkable. There is nothing more sure than that the media, if scratched, would be critical not only of silk but also of the Bar in general. It is an illusion to claim support from

that area. However, if the Bar Council places such stock on media comment, I imagine that critical comment could easily be arranged.

5. You disagree with me that the system is anti-competitive. You say that your view is the "prevailing view". Whose prevailing view? Is it the prevailing view of the ACCC? You disagree that the system leads to increased fees. You disagree that the appointment of senior counsel leads to a benefit to them in terms of their work and in terms of fees rendered. The arguments mounted in favour of these conclusions can only be described as surprising. The submissions of the Department of Constitutional Affairs to the English enquiry acknowledged that the institution, of itself, enhances the earning power and competitive position of silks.
6. You go on to assert that fees charged by senior counsel are not much greater than those of junior counsel. All barristers, taxing masters and solicitors know that senior counsel charge considerably higher fees. The reference to some juniors charging more than senior counsel in another jurisdiction does not assist.
7. You contend that an appointment does not ensure better and more complex work. Rather, you claim, it may result in the depressing prospect of lesser and reduced remunerative work. You are in conflict with the Chief Justice on this point. In her welcome to the successful candidates last year, she made it clear that they could expect to be engaged in more difficult and complex litigation by reason of the appointment. It is inherent in that proposition that the work would be more remunerative.
8. You contend that the two counsel practice does not result in higher fees to clients generally. That is a remarkable proposition. The two counsel rule was abolished as anti-competitive. You state that senior counsel do not appear with junior counsel in limited areas. That is so. However, in trial work, senior counsel invariably appear with junior counsel. When they are first appointed, they are enjoined by Judges and senior practitioners not to appear alone to maintain tradition.
9. You do not mention the word "transparency" in your letter. It was a particularly significant part of my letter. You disagree with my criticism of the process. I criticised a system where nothing is known of the process of selection from the time of application until the time of appointment. That is a critical matter which received a great deal of consideration in England. It was considered that the selection process should be open and wholly transparent.
10. You say that there are criteria for selection set out. I am wholly unaware of the requirements for appointment. Does it include an outstanding advice practice? Does it include outstanding work for the profession? Does it include the learned writing of the law? Does it include an excellent mediation practice? In England, the criteria, which you consider intuitive, are spelt out in detail.
11. You say you do not believe there is a quota. On what basis do you not believe there is a quota? When the number of barristers appointed is more than halved by a newly incumbent Chief Justice, what does that mean? Does it mean that unsuitable candidates had been appointed before? Does it mean that there are now fewer suitable candidates? As a matter of common sense, it is clear that the present Chief Justice applied a more rigorous standard, which in many ways must be thought desirable. However, does that mean that there were only I1 candidates who met the criteria? On your statement, it must be so. Clearly, there are many people who met the standard, meaning a quota was applied.
12. I note your comments regarding consultation. I have no doubt that the Chief Justice laboured mightily to achieve appropriate results. However, it might be said to be an impossible task for one person. It was said to be so in England.

    It must clearly be so. One person could not possibly make the necessary enquiries, even having regard to the resort to the various Judges referred to. What is more, obviously Judges are not the only reference. Consideration should be given to a selection panel with lay members, as in England.
13. You have not addressed the question of the treatment of failed candidates, except to assert that no treatment is necessary. In England, it is accepted that a detailed feedback should be provided to unsuccessful candidates. They are allowed an appeal. You are particularly sanguine regarding their situation.

Your letter has achieved its task. It is clear to me that internal debate cannot change an historical and conservative feature of the Bar, whatever the merits. It is apparent to me that only external pressure from a body such as the ACCC or media pressure can change the situation. I have no heart for any of these. I have the greatest affection for the Bar where I have spent my working life. I do not intend to take the matter any further. The only further steps I will take is to provide the correspondence to the *Bar News* for publication if the Editors see fit. I do not seek any response to this letter.

Yours faithfully

John A. Riordan

cc: The Honourable Justice Marilyn Warren, Chief Justice
The Honourable R. Hulls, Attorney-General
The Honourable Justice Michael Black, Chief Justice, Federal Court
The Honourable Judge Rozenes, Chief Judge, County Court
Chief Magistrate Ian Gray, Magistrates' Court
Victoria Strong, President, Law Institute
The Editors, *Bar News.*

A Matter of Taste?

Dear Editors

IT is with much reluctance that I enter the fray re the disputed usage wherein the editors altered the prose in Master Patkin's article ("Standing corrected", Autumn 2005 *Bar News* 10). My reluctance is borne of the observations over many years that those purporting to lay down the correct grammar in a public forum invariably commit a more horrendous boo-boo than that they are seeking to correct. Thus, while I have disclosed my identity to you I would prefer to remain anonymous should you decide to publish this letter.

Patkin fille is to be commended for her patrial loyalty. However, the texts cited by her do not support her conclusion as asserted. They merely describe the problem and the editors could equally claim their position to be supported by the same texts. May I refer your readers to Fowler's (*Modern English Usage*, third edition 1996 by the late Robert Burchfield). I do not suggest this to be the only authority or even to be the most authoritative of many. However, it is a highly persuasive guide.

Under the heading "Agreement" Fowler suggests that British English equally accepts either a singular or plural verb for collective nouns. [Is "variety of problems" a collective noun?] For American English Fowler tends to support the editors with the caveat that some collective nouns (especially those of the type "a + noun + of + plural noun") optionally govern a plural verb [Sub-head 5, "Collective nouns"]. As an aside perhaps Burnside could be commissioned by the editors to address the issue of whether American English will ultimately prevail over British English.

Under sub-heading 9, "Attraction" the problem is as described by both sides. We must determine which is the subject: "problems" [per the Patkins] or "a variety of problems" [per the editors]. This usage is consistent with the separate heading "Collective noun". Although sub-heading 4 of that entry leans towards the patkinesque: [w]hen a collective noun is followed by of + a plural noun or pronoun, the choice between a singular and a plural verb remains open, but in practice a plural verb is somewhat more common.

May I suggest the principle enunciated under sub-heading 2 of "Collective noun" where reference is made to whether the collective noun may be thought of as a unit. Thus a fleet of identical helicopters flying in formation would attract a singular verb while a fleet made up of a wide variety of different helicopters (differing in colours, shapes, configurations, and purpose) and buzzing about in all different directions may require a plural verb. This suggestion favours Master Patkin's construction so long as there are indeed a number of different distinct problems.

What may we conclude? That correct usage is a fiendish problem? That neither the Patkins nor the editors are in error and it is really only a matter of taste or choice in the utilization of one of two equally correct solutions? If that be the case then perhaps the Master's prose should have been left undisturbed and without interference even though another writer (or editor) would have opted for the alternative usage. On the other hand, the editors are the current custodians of the "house style" for the *Bar News* and may alter the contributions of their correspondents to conform to that style. Consider, for example, the problem posed by a hypothetical article in the same issue written by a specialist in, say, the drafting of wills. That author chooses the construction "There is a variety of problems …". Surely the editors are entitled (or required) to impose some consistency between the disparate styles?

The equivocal conclusion offered here reminds one of the client seeking to engage a one-armed lawyer because he was fed up with his legal advice being couched in terms of "on the other hand".

What would the editors make of "a variety of problems present themselves …"? Would they alter it to read "a variety of problems presents itself …"?

Yours etc.,

Anonymous

Giving Way to the Right

Dear Editors,

RUTH Trytell's letter ("Standing Corrected", Autumn 2005 issue, page 10) surprises me at three levels: that a person who professes to be a school teacher is capable of displaying such ignorance of grammar; that, to redress her ignorance, she could not find a more authoritative answer than those provided by "a US book entitled *English Made Simple*" and "the Reader's Digest book entitled *How to Write and Speak Better*" (one is tempted to ask — better than whom?); and that the learned editors consider that the question discussed in her letter is sufficiently contentious to warrant "further comment".

Had Ruth Trytell commenced her research in the obvious place, with *Fowler's Modern English Usage* — and if she had had the good fortune to have access to either the first or the second edition, rather than the execrable third — she would have encountered a complete answer to her problem under the entry "number" and the sub-heading "Red herrings":

> Some writers are as easily drawn off the scent as young hounds. They start with a singular subject; before they reach the verb, a plural noun attached to an *of* or some other similar distraction happens to cross, and off they go in the plural; or vice versa. This is a matter of carelessness or inexperience only, and needs no discussion; but it is so common as to call for a few illustrations: ... The results of the recognition of this truth is ... / *The foundation of politics are in the letter only.* / ...

Even with no better guidance than that afforded by *English Made Simple* and *How to Write and Speak Better*, Ruth Trytell was still able to identify the right principle (that singular verbs go with singular subjects, and plural verbs go with plural subjects) and to ask herself the right question (what is the subject that goes with the verb). Yet she still managed to get the wrong answer — much like the administrative decision-maker whose decision is immune from judicial review, because the correct test was applied and the correct question was asked, even though the wrong answer was reached.

I had the good fortune to receive my primary education at a one-teacher school where the syllabus included "parsing" — a quaintly old-fashioned word which is probably meaningless to anyone (even school teachers) of Ruth Trytell's generation. Sadly, in order to determine a verb's subject, one needs to know how to parse a sentence.

In the sentence "There is/are a variety of schools in Melbourne", the subject is clearly the singular noun "variety". It is perfectly elementary that the subject cannot be the plural noun "schools", because "schools" forms part of an adverbial phrase — "of schools" — and an adverbial phrase cannot be the subject of a verb. So the correct verb has to be the singular "is" rather than the plural "are".

Of course, like most rules of grammar and syntax, this rule must sometimes give way to what "sounds" right. It may be strictly correct to say "A number of people is present", but even the most extreme pedant would not speak or write that way.

Alternatively, had Ruth Trytell chosen to consult the third edition of *Fowler*, edited by the New Zealander R.W. Burchfield, she would have found that, on this point (as most other points), what was once the touchstone of grammatical perfection now offers virtually unlimited licence to speak and write as one fancies. Everything is now permitted, including split infinitives; sentences beginning with prepositions; the use of a comparative adjective where a superlative adjective is appropriate (and vice versa); the use of gender-neutral plural pronouns, instead of gender-specific singular pronouns, to stand in place of a singular noun; the mixing of transitive and intransitive verbs; the use of comparative nouns (like "quality" and "value") as if they were absolutes; the use of the subjunctive mood where the indicative mood is called for; even the abandonment of the possessive apostrophe prior to a gerund.

Presumably, Ruth Trytell is one of the ever-diminishing group of school teachers who is (note the singular verb for the singular noun, "group") convinced that

there must be a single "correct" way to speak and write, and that everything else is therefore incorrect — after all, the purpose of her letter is to determine which of two alternatives is correct, rather than to contend that both are permissible. If there can only be one "correct" answer, it must be the answer reached by the learned editors.

Still, it is not easy being right. Every time that I type the sentence "A variety of schools is available in Melbourne", the inbuilt "grammar checker" which Mr. Gates helpfully supplies with Microsoft Word insists that "is" should be "are". Who am I to argue with the world's richest man or the world's biggest software company ?

Yours faithfully,

Anthony J.H. Morris QC

Word® v Fowler

Dear Editors

THE matter regarding the grammatical correctness of the phrase "There is a variety of problems…" is solved quite simply by reference to the classic text *The King's English* (1908) by H.W. Fowler, particularly Chapter 2 — Syntax — Number.

The word "[t]here" functions as a pronoun in apposition to the noun "variety". The copula (in this case, "is") should always agree with the subject, not the complement, but in this case the number signified by the subject ("[t]here") is determined by the complement ("variety"). The word "variety" is a singular collective noun.

The words "of problems" merely form an adjectival phrase qualifying the word "variety". That is, they describe what sort of variety is being discussed. In this case, the fact that the word "problems" is also a noun is irrelevant to the question of agreement in number.

Fowler gives several examples of sentences exhibiting incorrect agreement in number, including the following analogous example:

> "I failed to pass in the small *amount* of *classics* which *are* still held to be necessary"

Accordingly, the phrase "There are a variety of problems…" is incorrect.

P.S. I note that my spellchecker in Word disagrees with Fowler and me (not I)!

Sincerely

Simon Matters

Plural the Better Syntax

The Editors,

Dear Sirs and Madam,

THE question of collective nouns and the verb which follows them is a difficult one to resolve. I agreed with the grammatical decision enshrined in the published text of Patkin's article, namely, that "variety" in the phrase "a variety of" is a singular collective noun which requires a singular verb. Patkin's letter taking issue with the Editors (*BN* Summer 2004) was followed by one from his daughter, Ruth Trytell (*BN* Autumn 2005). Further

enquiries lead me to alter my original view.

Surely, I thought, OED would have the definitive answer. However, under "variety" OED has a specific subheading

"d. With a plural verb."

Under this subheading it includes quotations from Lady Montagu (1718), Jeremy Bentham (1780) and Alison (1849–50) each using a verb in the plural after "a variety of" …, specifically "prospects", "nations" and "false attacks".

The inclusion of the entry under this subheading, with no warning that it is ancient or otherwise suspect, strongly suggests that the usage is, at the least, permitted.

In *The Guide to Grammar and Writing* sponsored by the Capital Community College Foundation of Hartford, Connecticut, the authors note on the subject of collective nouns words "which are singular when we think of them as groups and plural when we think of the individuals acting within the whole". They provide a number of examples: *audience*, *band*, *class*, *committee*, *crowd*, *dozen*, *family*, *flock*, *group*, *heap*, *herd*, *jury*, *kind*, *lot*, [the] *number*, *public*, *staff* and *team*.

In the discussion explaining the concept they state:

> Thus, if we're talking about eggs, we could say "A dozen *is* probably not enough." But if we're talking partying with our friends, we could say, "A dozen *are* coming over this afternoon." The jury *delivers its* verdict. [But] The jury came in and took their seats. We could say the Tokyo String Quartet *is* one of the best string ensembles in the world, but we could say the Beatles *were* some of the most famous singers in history. Generally, band names and musical groups take singular or plural verbs depending on the form of their names: "The Mamas and the Papas *were* one of the best groups of the 70s" and "Metallica *is* my favorite band."

Similarly, in *The American Heritage® Book of English Usage: A Practical and Authoritative Guide to Contemporary English*, on the topic of collective nouns, the authors write:

> Some nouns, like *committee*, *clergy*, *enemy*, *group*, *family*, and *team*, refer to a group but are singular in form. These nouns are called "collective nouns". In American usage, a collective noun takes a singular verb when it refers to the collection considered as a whole, as in *The family was united on this question* or *The enemy is suing for peace*. It takes a plural verb when it refers to the members of the group considered as individuals, as in *My family are always fighting among themselves* or *The enemy were showing up in groups of three or four to turn in their weapons.* In British usage, collective nouns are more often treated as plurals: *The government have not announced a new policy. The team are playing in the test matches next week.*

But what of British rather than North American texts? In an article on the topic on the British Council website,[1] the author regards the above explanation as indicative of American usage. It approves the usage described in Swan's *Practical English Usage*,[2] to the effect that "… in British English, singular words like family, team, government, which refer to groups of people, can be used with either singular or plural verbs and pronouns". Perhaps "variety" is a further example of such usage, notwithstanding that it does not necessarily refer to a group of people?

Cambridge University Press appears, at first sight, to support the Editors of BN. In The Cambridge Grammar of the English Language the authors write:

> The number of differences in grammar between different varieties of Standard English is very small indeed relative to the full range of syntactic constructions and morphological word-forms.[3]

Surely tacit support for the view that the singular verb should follow the singular collective noun "number".

So what of Fowler, arguably the definitive syntactic primer? In *Fowler's Modern English Usage*[4] under the entry "number", the author deals with several issues. Under the issue of nouns of multitude the author states:

> When the word "number" is itself the subject it is a safe rule to treat it as singular when it has a definite article and as plural when it has an indefinite. *The number of people present was large, but a large number of people were present.* In *Before the conclave begins in a fortnight's time a number of details has to be settled* singular is clearly wrong; it is the details that have to be settled not a number; *a number of details* is a composite subject equivalent to *numerous details*. This use of a *number of* in the sense of more than one is idiosyncratic, but the almost absurd vagueness of the expression if interpreted literally makes careful writers prefer an adjective such as *some*, *several*, *many*, *numerous*; this has the advantage too leaving no doubt that the verb must be plural.

In the Patkin text a *variety of problems* is a composite subject with an indefinite article akin to *various problems*, in which case, had the text read "… *a variety of problems has to be resolved by the Court*" Fowler's would apparently contend that singular is clearly wrong. Whether the plurality of the verb is affected by the fact that the verb precedes the composite subject is a further moot point on which Fowler has some interesting views. However, having considered the matter at some length I now regard the plural as the better syntax, although I concede that either usage as permissible.

Yours sincerely,

David Levin

Notes

1. http://www.learnenglish.org.uk/grammar/archive/collective_nouns.html
2. New Edition, Oxford University Press, 1997.
3. *The Cambridge Grammar of the English Language*, Huddleston & Pullum, Cambridge University Press 2002.
4. 2nd Edition, Oxford, 1965.

Rendering Unto Caesar

THE financial year having recently drawn to a close, it is that time of the year again in which we must each render unto Caesar, in the person of the Deputy Commissioner, that which is Caesar's.

Over the last couple of months, there has been some newspaper publicity about the failure of some barristers, solicitors, judges and magistrates to lodge their tax returns on time. National figures attributed to the Australian Taxation Office ("the ATO") indicate that, in 2003, 239 barristers, 2352 solicitors and 26 judges or magistrates, failed to lodge a tax return on time.

The Law Council of Australia has established a specialist working group to report on the development and monitoring of strategies to assist legal practitioners in meeting their taxation obligations. I chair that working group.

Solicitors, even those who practise as sole practitioners rather than in firms, are better, I think, at accepting that the conduct of their profession involves the running of a small business. Barristers, most of whom have clerks to attend to a large part of the "small business" aspect of their practice, are often less focussed on, and less systematic about, their business, and for that matter personal, business and taxation responsibilities.

We are concerned that a small number of Victorian barristers are amongst those who have not lodged annual returns perhaps for more than one year, and are amongst those who have significant levels of outstanding tax debts.

In *D'Orta Ekenaike* v *Victoria Legal Aid* [2005] HCA 12 at paragraph [107] (10 March 2005), Justice McHugh identified failure to file tax returns and to pay taxes as relevant matters in considering whether an advocate is a fit and proper person to practise before the courts:

> [A]dvocates who neglect to file income tax returns or pay taxes may be struck off the role of practitioners. Such failures may indicate that a person is not a fit and proper person to discharge the duties owed by an advocate to the court and to lay clients. There can be few other professions, if any, where such failures bring a professional career to an end.

We are concerned that a small number of Victorian barristers are amongst those who have not lodged annual returns perhaps for more than one year, and are amongst those who have significant levels of outstanding tax debts.

Accordingly, these matters must be of concern to the Bar as the Recognised Professional Association charged under section 38 of the *Legal Practice Act 1996* with the responsibility of suspending the practising certificate of a regulated practitioner if that practitioner, in its opinion, is unfit to engage in legal practice.

Rule 197(a)(i) of the Bar Practice Rules (Rules of Conduct) requires disclosure of a sequestration order against a barrister, or the filing of a debtor's petition by a barrister. It is in the context of bankruptcy in which there have been significant tax debts that barristers in other jurisdictions have been struck off.

Rule 197(a)(iv) requires disclosure of a conviction, or finding that an offence has been proved, where the maximum penalty is a term of imprisonment for 12 months or more. This would include an offence of failing to comply with an order under section 8G(1) of the *Taxation Administration Act 1953* (Cth) that a person comply with a requirement made under or pursuant to a tax law.

Both these discloseable events are, however, well down the track of non-compliance beyond the failure to file a return on time and what might be described as an initial failure to pay tax.

Significantly, the new *Legal Profession Act 2004*, now scheduled to come into operation on 1 October 2005, singles out tax offences as capable per se of constituting unsatisfactory professional conduct or professional misconduct, section 4.4.4(b)(ii). "Tax offence" is widely defined in section 1.2.1 to mean any offence under the *Taxation Administration Act 1953* (Cth), and so will cover even comparatively minor offences, such as failure to comply with a notice under section 8C, punishable only by a fine. Moreover, the general definition of "unsatisfactory professional conduct", the lesser degree of disciplinary offence, is limited to "conduct occurring in connection with the practice of law", section 4.4.2, and it is only the higher degree of disciplinary offence, "professional misconduct", that, at least in the general definition, extends to conduct outside the practice of law, section 4.4.3.

This legislative provision reflects an expectation on the part of the community that members of the legal profession have a particular responsibility to comply with the law, and that a failure to do so reflects on that person's fitness to practise law, even if that failure is in the lawyer's private capacity and in no way connected to his or her practice.

Consistent with these provisions in the new Legal Profession Act, the Bar will need to amend Rule 197 to include proof of any offence under the Taxation Administration Act as a discloseable event.

Representatives of the ATO have met with the Bar Council and stressed that, as with any other member of the community, or group, the first aim of the ATO is education to inform members of the profession about their particular obligations as barristers, and to encourage and facilitate compliance. Once the ATO has initiated court proceedings to enforce compliance, those proceedings must take their course, and options are limited.

Accordingly, it is important that any Victorian barristers who are in arrears, or their accountants, contact the ATO without delay so that, hopefully, the contact will be made before the initiation of enforcement proceedings, while it is still possible to come to terms about a reasonable schedule for late filing and reasonable arrangements for payment of outstanding amounts. Compliance action is taken as a matter of routine. It is inevitable, although the timing is fortuitous.

The Bar Council has introduced sessions on barristers' tax obligations into the Readers' Course and into the Bar Compulsory Continuing Legal Education program. The ATO is assisting with these, and conducted a session on tax compliance by barristers in the Readers' Course on 11 May 2005. This will now be a regular component of that course.

It is important that any Victorian barristers who are in arrears, or their accountants, contact the ATO without delay so that, hopefully, the contact will be made before the initiation of enforcement proceedings, while it is still possible to come to terms about a reasonable schedule for late filing and reasonable arrangements for payment of outstanding amounts.

Also that day, the ATO conducted a Continuing Legal Education seminar, "Barrister's Obligation in Relation to GST Income Tax Record Keeping Tax Compliance". That CLE seminar was at a fairly basic level. The next CLE seminar, which will be some time during the next Readers' Course beginning in September, will be more advanced.

I and our Chief Executive Officer, Christine Harvey, have met with the Clerks to discuss ways in which the Bar and the Clerks may be able to assist and support members in difficulty. Obviously, any contact with me or any member of the Bar Council, with Christine Harvey, or with your clerk will be kept in confidence. But members in difficulty need to contact one of us. We can help, but we can't contact you because we don't know who you are. You may do your own tax. You may have your own accountant. If you do not, we can give you the names of a number of accountants for your consideration who have advised other barristers and are familiar with the particular issues relevant to tax obligations in a barrister's practice. If you are in arrears, I urge you to seek assistance, and to do so without delay.

This is my last Chairman's Cupboard. I thank you for the privilege of serving on the Bar Council over the years and, in particular, this year as Chairman. I shall continue to serve as a Director and member of the Executive of the Law Council of Australia and am, as some of you may know, Treasurer of the LCA this year.

Ross Ray QC
Chairman

Bringing the Crimes Act into the 21st Century

I'M pleased to inform readers that work is underway on the most significant criminal law reform project in 50 years. In my view, the criminal law is the cornerstone of any justice system — a measure of our capacity for integrity and compassion. When an individual's liberty is at stake it is essential that our criminal law functions fairly, effectively and consistently, and therefore one of the major projects in the sweeping agenda set by last year's Justice Statement included the reform and replacement of the legislative framework that surrounds the criminal law.

As readers will be aware, the Government has commissioned references from the Victorian Law Reform Commission concerning the *Evidence Act 1958* and the *Bail Act 1977*, while a specialised unit within the Department of Justice has started work on an overhaul of the *Crimes Act 1958*. This unit is examining the entirety of this Act, as well as provisions in the *Summary Offences Act 1966*, Part 5 of the *Drugs, Poisons and Controlled Substances Act 1981*, the *Crimes (Criminal Trials Act) 1999* and some common law principles, rules and offences.

The project will focus on rationalisation of and consistency between provisions. More than 1,500 changes have been made over the last 47 years to a piece of legislation that is now crying out for a comprehensive overhaul. Every provision will also be studied from a drafting perspective and, where necessary, provisions will be re-drafted in contemporary and accessible language. This is critical, as the Act was last consolidated in 1958, although the history of some provisions dates further, with offences such as treason and piracy being drawn from centuries-old laws. The average Victorian — dare I suggest, even the average practitioner not conversant in olde English — is unlikely to be comfortable getting their tongue around terms

such as "estreat" and "rasure". It is therefore time to bring the language, as well as the policy, into the 21st century.

While the primary purpose of the Department's work is to consolidate and clarify the existing law, rather than redefine or codify principles, some aspects of the Crimes Act will be nevertheless the subject of substantive policy reform. Proposed areas are homicide (including defences), committal proceedings, indictable offences triable summarily, geographical jurisdiction, and theft, fraud and related offences.

Some aspects of the Crimes Act will be nevertheless the subject of substantive policy reform. Proposed areas are homicide (including defences), committal proceedings, indictable offences triable summarily, geographical jurisdiction, and theft, fraud and related offences.

Make no mistake, this is a major project. It will benefit both the profession and the community by rectifying areas of the criminal law which have long been confusing, anachronistic and inconsistent. It will, of course, mean a significant amount of change for those working in the criminal jurisdiction and the contribution of those practitioners to the project will be invaluable, as it is an opportunity for the profession to help shape the framework of the criminal law.

An advisory group of senior personnel working in the criminal justice system has been convened to provide advice on the reforms. The group includes senior representatives from the courts, the DPP and the OPP, the Victorian Bar Council, the Criminal Bar Association, the Law Institute, Victoria Legal Aid and Victoria Police. In addition, working parties are likely to be used to gather information and ideas from others working in the jurisdiction.

All recommendations will of course be developed in accordance with fundamental principles of the criminal justice system, i.e., laws creating offences must be consistent, transparent, fair and certain; the defendant must be presumed to be innocent, the prosecution must prove the offence beyond reasonable doubt and punishment must be fair.

Powers must also be justified in the public interest following consideration of the nature of the harm sought to be dealt with and its effects on individuals and the community; the degree of intrusion on citizens' rights involved in the exercise of the power; and ensuring that those who are granted powers must be accountable for the exercise of those powers.

The three elements of the legislation which shape the tripartite project are "investigation powers", "offences" and "criminal procedure". "Procedure" is the first cab off the rank and this sub-project will work on:

- Rationalisation and clarification of provisions, as well as identification of opportunities to improve archaic procedures and practices;
- Identification of ways to improve the committal process. The number of contested committal hearings has increased in recent years. This project will seek to identify whether improvements can be made to the current system to increase efficiency without prejudicing the rights of the accused. Abolishing committals is not being considered.
- Consideration of whether more indictable offences should be made triable summarily to ensure the lowest most appropriate jurisdiction is used for hearings.
- Ways to improve trial procedure. The average length of hearings has increased in recent years. Several attempts have been made to improve case management techniques through the *Crimes (Criminal Trials) Acts of 1993* and *1999*, and the County Court has been making significant administrative changes over the last two to three years.
- Appeals to the Court of Appeal: Seeking to identify whether any improvements can be made to the current procedures.

An advisory group of senior personnel working in the criminal justice system has been convened to provide advice on the reforms. The group includes senior representatives from the courts, the DPP and the OPP, the Victorian Bar Council, the Criminal Bar Association, the Law Institute, Victoria Legal Aid and Victoria Police.

I encourage all readers to engage with the overhaul of the Crimes Act, as well as with the broader reform of the criminal legislative framework. Those interested can contact the relevant unit within my Department on cljs@justice.vic.gov.au. I hope you will be as excited by the possibilities ahead as I am.

Rob Hulls MP
Attorney-General

Legal Profession Act 2004

Fran O'Brien S.C. explains how the new *Legal Profession Act 2004* impacts upon barristers.

ALL members of the Bar should be aware of the new *Legal Profession Act 2004* (the Act) which is now set to be proclaimed in October 2005.

Specifically, chapter 4 of that Act provides for a new system of complaints and discipline for members of the profession.

THE LEGAL SERVICES COMMISSIONER

The Act creates the "Legal Services Commissioner". This is the "one stop shopping" regime which is said to avoid "confusion" on the part of consumers as to how to complain. Under the current system, complaints could be made to the Bar, the Law Institute or the Legal Ombudsman. The new regime is contrary to current approaches to so-called "consumer interests" which would prescribe more choice not less: see page 2 of the second reading speech dated 16 November 2004.

The Legal Services Commissioner is charged under the Act with responsibility for administering and in part enforcing the scheme of civil complaints and discipline. The scheme is structured much as complaints of discrimination under the *Equal Opportunity Act 1995*. Broadly, any civil and/or discipline complaint must be lodged with the Commissioner. The Commissioner has certain powers to deal with complaints both civil and disciplinary.

The Legal Services Commissioner is also the CEO of the Legal Practice Board. The Legal Practice Board's responsibilities remain essentially the same as under the *Legal Profession Practice Act 1996*. Part 5 of the Act provides for the additional responsibility of external administration of practices and inspection and supervision of trust accounts.

However, the civil and discipline complaints system is wholly the responsibility of the Legal Services Commissioner. The Legal Ombudsman is abolished. The staff of the legal ombudsman will by operation of law become the employees of the Legal Services Commissioner.

Fran O'Brien S.C.

CIVIL COMPLAINTS

A civil complaint is defined widely to include:

1. A legal costs dispute to $25,000.00. This was formerly $15,000 and excluded family law costs. This exception does not appear to have been preserved.
2. Any "pecuniary loss" suffered as a result of an act or omission of a practitioner. This was formerly $15,000 excluding wills and probate matters. This exception does not appear to have been preserved.
3. Any other "genuine dispute" between a client and a provider of legal services; and
4. The "conduct" of a provider of legal services.

The breadth and depth of this definition raises very significant concerns for the profession.

It is difficult to see why the administration of justice should concern itself with matters of "conduct" by a legal services provider.

"Conduct" which falls short of the definition of discipline, that is, the level of competence, diligence, fitness and/or proprietary to engage in legal practice is surely a matter for professional associations.

Sexist, racist etc. behaviour in the delivery of services is adequately provided for in the *Equal Opportunity Act 1995* and applies to all service providers. The singling out of one profession to enforce conduct by this method lacks cogency.

This scheme provides a statutory charter for the mad, the bad and the vexatious. It risks being a very significant administrative burden on barristers in particular as sole practitioners.

Of course costs do not follow the event in a civil complaint. Costs are payable where the Tribunal finds in a discipline complaint, unsatisfactory conduct or professional misconduct unless exceptional circumstances exist, otherwise costs are discretionary in discipline matters. S109 of the VCAT Act applies to civil complaints and do not follow the event.

The complainant is the party to a civil complaint notified to the VCAT. The Legal Services Commissioner is the prosecuting party to a disciplinary complaint before the VCAT.

The Commissioner does have the power to summarily dismiss any complaint. However, the structure of the Act requires the Commissioner to notify the practitioner of the complaint. The practical effect of this will be that the practitioner will have to request the commissioner to exercise these powers of summary dismissal.

Additionally the Commissioner has to give written reasons to the complainant if a complaint is dismissed. No such obligation exists if there is refusal to exercise the power.

Given the nature of the summary dismissal power, review pursuant to Order 56 of the Supreme Court Rules and potentially the *Administrative Law Act 1978* would be open.

Should the commissioner exercise the summary dismissal powers, unlike the *Equal Opportunity Act 1995* the complainant cannot nevertheless require that the complaint be referred to VCAT for hearing.

If the Commissioner does not dismiss the complaint the Commissioner must attempt to resolve any civil complaint and "may take any action" considered necessary to assist the parties to reach an agreement. This includes requiring the parties to attend mediation, requiring supply of documents or information. This has the potential for a heavy administrative burden upon barristers. The mediation provisions in Division 3 largely follow the usual format.

However, in relation to mediation, there is a provision that the mediator "must prepare a written record of the agreement, signed by the parties and the mediator and give a copy to the Commissioner". The agreement is the document by which the enforcement of the agreement in the Magistrates' Court is affected. The section is drafted in such a way that it suggests this is the only method by which agreement could be reached and appears to exclude agreement on terms or by a signed release.

The Commissioner is also charged with assisting complainants to formulate their complaints. My experience at the Equal Opportunity Commission over many years is that the necessary level of expertise to do this in discrimination matters is often lacking at the Equal Opportunity Commission. The global nature of complaints that often characterise complaints against the legal profession make the likelihood of such expertise being available at the Legal Services Commission even less likely. The kind of assistance both the Law Institute and the Ethics Committee of the Bar gave to complainants for this purpose is now completely lost (potentially) by this new system. The handful of complaints the Legal Ombudsman made to the Legal Profession Tribunal since its inception could well indicate the complexity of the skill and experience necessary to delineate a well-founded complaint.

Once the complaint has been made and the legal practitioner has been notified, neither the complainant or the legal practitioner can commence proceedings in relation to the subject matter of the complaint until the complaint is dismissed, determined and any appeal rights are exhausted.

THE ORDERS OF THE VCAT IN CIVIL COMPLAINTS

The jurisdiction of VCAT (matters will be heard in the "Legal Practice List") in a civil complaint only arises if the complaint lodged with the Commissioner is notified by the Commissioner to VCAT as "unlikely" or "unable" to be resolved or "not suitable" for resolution by the Commissioner. The transitional provisions in Chapter 8 provides for the former members of the Legal Profession Tribunal to become members of VCAT. Page 4 of the Second Reading speech refers to matters being heard in the Legal Practice list of VCAT.

Should the civil complaint be referred to VCAT for hearing with the necessary notice from the Commissioner the Tribunal may make:

1. "compensation" orders up to the value of $25,000.00;
2. an order in relation to a legal costs dispute without limit;
3. an order that legal costs be waived or repaid;
4. an order that the legal service provider provide services free of charge, or any other order as the Tribunal "sees fit".

The differences in the jurisdiction between what may be lodged with the Commissioner as a civil complaint and that which VCAT may order presents some difficulties.

The Commissioner has a limit in dealing with complaints as to legal costs up to $25,000.00. There is no limit on what the VCAT may order in relation to such a dispute.

The jurisdiction of the Tribunal only arises where "the complaint" notified to it by the Commissioner has not been resolved or dismissed.

It is difficult to see how the Tribunal could use this wider power. Should the Tribunal do so, it could potentially deal with matters not within "the Complaint" that had been before the Commissioner. Hence its jurisdiction would be in doubt. Whether the Tribunal is bound by the "complaint" or can deal with issues "arising from the matter" is an issue of some controversy in the Discrimination List. Respondents are rightly concerned to know the complaint against them and to use the opportunity to deal with all matters under the (effectively compulsory) mediation provisions.

Further, the very policy purpose of this structure — to require (in a practical sense) parties to mediate their disputes — means there could often be little reason to settle for sums larger than the Tribunal could in fact order.

The Commissioner may receive and attempt to resolve "pecuniary loss" claims without limit. But the Tribunal may order "compensation" not exceeding $25,000.00. This appears to mean a complainant may have to abandon the part of a civil dispute compensation claim over $25,000 at VCAT despite lodging such a claim with the Legal Services Commissioner.

Under the current system an award of a "pecuniary loss" up to $15,000 was payable where loss occurred as a result of a dispute between the legal practitioner and the client. "Compensation" up to $15,000 was payable where a disciplinary complaint led to financial loss.

Presumably this distinction between "pecuniary loss" and "compensation" has been made to allow the Tribunal to award loss arising from the complaint about legal work performed and any "conduct" complained of. Thus it appears the total of the amount able to be ordered for either or both types of civil complaint is $25,000.

However, if two separate complaints were brought, one about the pecuniary loss and a second about the "conduct" two awards could be made up to $25,000 each. Nevertheless the Commissioner could receive and endeavour to mediate a resolution of a civil (not a costs complaint) complaint worth millions.

Additionally the Tribunal may order the delivering up of documents, the provision of specified legal services and the repayment of costs without limit.

DISCIPLINE COMPLAINTS

"Discipline" is defined by two familiar concepts.

First, unsatisfactory professional conduct: This is defined as including conduct occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner.

Second, professional misconduct includes:

1. Conduct which involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; or
2. Conduct whether occurring in connection with the practice of law or not that would justify a finding that the practitioner is not a fit or proper person to engage in legal practice.

Sections 4.4.4, 5 and 6 define what is capable of constituting unsatisfactory professional conduct or professional mis-

conduct. It specifically defines what is unsatisfactory professional conduct and professional misconduct without limiting the general definition.

The Commissioner is required to investigate any disciplinary complaint lodged with it.

It is not necessary for a complaint to have been made for an investigation to be conducted by the Legal Services Commissioner.

The Commissioner may refer a complaint to a prescribed investigatory body. This is where the Ethics Committee of the Bar and the Law Institute could continue to be involved in the investigation of disciplinary complaints. This is not a delegation of the power to investigate. It is merely a referral and the "prescribed body" makes a recommendation only.

The mere fact that a reference has been made to such a body does not prevent the Commissioner from further investigating the complaint after the report has been received from the investigating body.

The Commissioner may summarily dismiss a disciplinary complaint but must give written reason to the complainant.

The powers of the Commissioner and the prescribed investigatory body are as you would expect. They can require a full written explanation and any other information or documents.

Once the investigation is completed, the Commissioner may apply to the Tribunal for the relevant orders if there is a "reasonable likelihood that the Tribunal would find a practitioner guilty of professional misconduct". This is the test currently in use for the reference of complaints to the Legal Profession Tribunal. As the Commissioner must apply to the Tribunal for the relevant orders, the Commissioner's role is that of prosecutor in discipline matters and is akin to the DDP in criminal trials.

Clearly such decision-making on the part of the Commissioner requires considerable skill, expertise, experience and resources.

In the case of unsatisfactory professional conduct, in addition, the Commissioner may, with the consent of the practitioner, reprimand or caution the practitioner, and/or require the payment of compensation as a condition of not making an application to the Tribunal, or take no further action. This is in line with current practice.

Nevertheless, written notice must be given to the complainant of the decision of the Commissioner if the decision of the Commissioner is to take no further action. The Commissioner must "dismiss the discipline complaint".

THE POWERS OF THE TRIBUNAL ON A DISCIPLINE COMPLAINT HEARING

These are set out in ss.4.4.17, 18 and 19 and are extensive, including the usual removal from the Supreme Court Roll, Interstate Roll, fines, conditional practice, reprimands and any other orders the Tribunal thinks fit.

The Tribunal has all of the powers under the *Victorian Civil & Administrative Tribunal Act 1998* which includes injunctions, inter injunctions, declarations, further orders and the imposition of conditions on orders and orders for costs. Section 75 of the VCAT Act includes summary power of dismissal at any time during the course of the hearing.

Under the current Legal Practice Act the small civil claims mechanism worked efficiently. Disciplinary matters appear to have been dealt with fairly and impartially. The structure gave all parties an appeal mechanism with the unpurchaseable expertise and experience of a former Supreme or County Court Judge. This hearing structure was in line with all other professional regulation where the statutorily enacted and professionally constituted boards hear complaints at first instance with appeal rights to VCAT. This two-tier arrangement is abolished under the new Act.

PUBLICATION OF DISCIPLINARY ACTION

A register of disciplinary action is to be set up. This is to be kept by the Legal Practice Board. The Act provides that the register only applies in relation to disciplinary action taken after the commencement of the section, but details relating to earlier disciplinary action may be included in the register. The register must be made available to the public on the Board's internet site and the Board may publicise the disciplinary action in any other way it sees fit.

These powers of publication are limited only by prohibition against publication until the expiry of all rights and where disciplinary action has been taken against an infirm person.

These are consistent with the broader objects of the Act and the rights vested in the Commissioner to enter into protocols with corresponding authorities in other States to publicise the discipline register, to conduct investigations of complaints and to share information with the corresponding interstate authorities.

Disclosure Requirements and Cost Agreements Under the *Legal Profession Act 2004*

Elizabeth Harris reports on the statutory changes to barristers' disclosure requirements and cost agreements under the new legal regime.

THE *Legal Profession Act 2004* ("the Act") is expected to commence operation on 1 October 2005. It will automatically come into effect on 1 January 2006, if not proclaimed prior to that date. The Act establishes a new regulatory system for the legal profession and comes into being as part of the move towards a national profession. New South Wales and Queensland have passed equivalent Acts.

This article concentrates on the provisions relating to the disclosure requirements under the Act which are likely to have an immediate impact on day to day practice. It does not cover all aspects of the Act.

The Act will affect legal practice on a day to day basis in the following areas:

- The ongoing disclosure requirements.
- Review of bills pursuant to cost agreements.
- Requirements re notices on bills.
- Changes to recovery time limits and procedures.

SUMMARY OF CHANGES: WHAT COUNSEL SHOULD BE DOING NOW

The principal matters counsel should be attending to prior to the commencement of the Act are:

- Update the present section 86 letters to comply with the Disclosure requirements in Division 3 of Part 3.
- If counsel are briefed in jurisdictions where a scale applies, consider whether a cost agreement is required.

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- Review the cost agreement(s) to ensure it is enforceable, and covers matters such as the ability to charge interest and increase rates.
- Review engagement procedures to ensure disclosure requirements are met, and any cost agreement is enforceable.
- Review practice management procedures to ensure continuing disclosure obligations are met, including updates of estimates, and changes to hourly and daily rates.
- Establish procedures to document decisions to waive disclosure requirements if appropriate.
- If fees are marked on the basis of time spent, consider how time is recorded to ensure maximum recoverability of costs should fees be challenged.

DISCLOSURE REQUIREMENTS

As a preliminary matter, it is important to note two common misconceptions regarding disclosure. The first misconception is that a disclosure statement can, but often does not, constitute a cost agreement. For a number of reasons, it is far preferable that the disclosure statement be quite separate to the cost agreement:

- The disclosure statement has to notify the client of the right of the client to negotiate a cost agreement. Query how this provision sits with the disclosure statement itself constituting the agreement.
- It is preferable that some matters required in the disclosure statement (e.g. cost estimates) are not contractually enforceable against the practitioner as part of the cost agreement.
- The terms of a disclosure statement of itself are not generally sufficient to establish a proper basis on which to charge other than scale fees.
- A cost agreement can be set aside on the grounds that it is not fair, reasonable or just. An inaccurate disclosure (e.g. cost estimates) could found such a ground.
- The client may have rights under the

Trade Practices Act 1974 in relation to inaccurate matters in the disclosure statement, and it is preferable that these are not available to the client in relation to a dispute about the terms of the cost agreement.

The second misconception relates to the exceptions to disclosure requirements.

S.3.4.19 provides three bases on which legal costs are recoverable:

1. Pursuant to a cost agreement.
2. Pursuant to the relevant scale or practitioner remuneration order ("PRO").
3. If neither 1 nor 2 applies, on the fair and reasonable value of the costs, taking into account such matters as disclosures made, skill, labour and responsibility, complexity, novelty and difficulty of the matter, and the quality of the work.

The fact that the disclosure exception provisions apply does not exclude the requirement for a cost agreement, if the practitioner wishes to charge on any basis other than that provided by the Act (e.g. scale or PRO or reasonable charge). If a practitioner proposes to charge on any other basis, the practitioner MUST have a cost agreement with the client. This is relevant to both counsel and solicitors.

In particular, where counsel is briefed in jurisdictions where a scale of fees for counsel applies, fees will only be recoverable pursuant to the scale, unless a cost agreement is in place. The obvious jurisdictions in this regard are the Magistrates' Court, the County Court the Family Court and the Federal Magistrates' Court. There may also be certain Tribunal matters where a scale will apply to counsel's fees. Further, in the Federal Court, the Court publishes a recommended scale of counsel's fees, which, although not strictly part of the Rules, would be a point of reference for the "reasonableness" of fees marked in that jurisdiction.

DISCLOSURE REQUIREMENTS

For counsel, there are different disclosure requirements depending on whether the retainer is with a solicitor, with the solicitor as agent for the client, or with the client directly. Therefore, as a starting point, the basis of the retainer must be ascertained.

Counsel retained by another law practice (i.e. a solicitor)

Where counsel is retained by a solicitor, on behalf of a client, the disclosure requirements are detailed in s.3.4.10.

A law practice engaged by another law practice, (typically counsel engaged by a solicitor), must disclose the following matters to enable disclosure by the first law practice to the client:

- Basis of calculation of costs and whether/which scale applies.
- Estimate of —
  Total costs OR
  Range of costs and explanation of variables.
- Billing intervals.

Where counsel is retained by another law practice, s.3.4.9 specifically provides that counsel is not required to make disclosure to the client and limits the matters which must be disclosed to the law practice to those set out above.

Settlement of litigious matters

Prior to settlement in litigious matters, unless counsel is aware that the solicitor has already advised the client of same, counsel must disclose the following to the client (not the other law practice) (s.3.4.13):

- Reasonable estimate of costs payable (including costs payable to another party).
- Reasonable estimate of costs to be received from another party (i.e. party/party costs recoverable).

Uplift fees and conditional cost agreements

Where an uplift fee is to be charged, the practitioner must make the following disclosure to the client in writing before the cost agreement is entered into (s.3.4.14):

- The law practice's usual fees.
- The uplift fee as a percentage of usual fees
- The reasons why the uplift fee is warranted.

The provision appears to apply irrespective of whether the cost agreement is between counsel and solicitor or counsel and client.

Ongoing obligation (s.3.4.16)

This section imposes an ongoing obligation to advise the client as soon as the practitioner becomes aware of a substantial change to a matter disclosed.

There is doubt as to whether the ongoing obligations apply to law practices engaged by another law practice (i.e. counsel/agent). A law practice engaged by another law practice must make disclosure to the first law practice to enable them to make disclosure to the client. However, s.3.4.16 provides that:

> a law practice must notify the client of any substantial changes to anything included in a disclosure under this Division …

Arguably, this requires counsel to make disclosure of any change to the original disclosure statement to the client, rather than to the solicitor to whom the original disclosure was made. If this is the case, then the non-disclosure consequences of s.3.4.17 will apply to counsel given that this section operates when a law practice fails to disclose a matter to the client. No reference is made in this section to failure to disclose to another law practice.

It would seem to be against the spirit of the legislation if there is no obligation on counsel to advise the solicitor of matters required for the solicitor to meet his or her continuing obligation to the client to update the estimate of costs.

Consequences of failure to disclose

The consequences of non-disclosure depend on the nature of the non-disclosure.

If the failure is to provide the relevant information to another law practice pursuant to s.3.4.10, the consequences are:

- Failure to disclose is a matter to be taken into account by VCAT on an application to set aside a cost agreement (s.3.4.32).
- Failure to comply with the disclosure provisions can constitute unsatisfactory professional conduct or misconduct (s.3.4.17(4)).
- The practitioner must pay the costs of a review (taxation) of costs (s.3.4.45).
- Disclosures made, or the failure to make disclosures required are factors which the Taxing Master can take account of in a review of solicitor/client costs (s.3.4.44(b)).

As has been noted, there are certain disclosures which must be made to the client, rather than to another law practice, even if counsel is retained by the law practice on behalf of the client. Failure to make disclosure to a client attracts the following additional consequences (s.3.4.17):

- The client does not have to pay the costs until they have been reviewed (taxed).
- The client may apply to set aside a cost agreement.
- The practitioner cannot maintain a recovery proceeding unless the costs have been reviewed.

EXEMPTIONS FROM DISCLOSURE (S.3.4.12)

Generally, the disclosure provisions retain the exemptions in the *Legal Practice*

Act 1996. The changes to categories of exempted clients/matters are:

- Accountancy practices and trustees are no longer included in exempted clients.
- Matters where the legal costs will be calculated or have been agreed as part of tender process are now exempted.
- Pro bono matters are now exempted.

The most substantial change is where the client has received one or more disclosure statements in the previous 12 months. Now, a positive decision must be made by a principal of a law practice that no further disclosure is required. Such decision must be made on reasonable grounds and documented on the file. If no reasonable grounds can be established, the principal may be found guilty of unsatisfactory professional conduct or misconduct. Further, the non-disclosure consequences would apply.

PROGRESS REPORTS (S.3.4.18)

A client may request written reports on both the progress of the matter and the costs incurred to date, or incurred since the last bill. A practitioner must provide such a report and can charge for preparation of a report as to progress but not for a report on costs.

A second law practice (counsel/agent) does not have to provide a progress report on the request of the client but does have to provide information to the first law practice to enable it to comply with the client's request.

COST AGREEMENTS

Division 5 of Part 3.4 of the *Legal Profession Act 2004* governs Cost Agreements.

In the absence of an enforceable cost agreement, a law practice is only entitled to charge in accordance with the relevant scale or Practitioners Remuneration Order or, if these are not applicable, at a fair and reasonable value for services provided (s.3.4.19). A potentially difficult aspect is that a cost agreement can only be made with a "client" or other law practice.

Part 3.4 of the Act (of which Division 5 if part), defines "the client" as "a person to or for whom legal services are provided, and includes a prospective client". However, it is not uncommon for a practitioner to be retained by a person other than the person to or for whom the legal services are provided. For example, a parent may engage a practitioner on behalf of a child, and clearly agree to be responsible for payment of costs. Arguably, the cost agreement cannot be made with the parent, but must be made with the child. An even more common example is where an insurance company instructs a practitioner. In this instance it is arguable that the "client" is the insured, not the insurer.

Requirements of a cost agreement (s.3.4.26)

- Must be in writing or evidenced in writing.
- May consist of a written offer which is capable of acceptance by conduct If it is a written offer it must also state:
  - that it is an offer;
  - that it can be accepted in writing or by conduct;
  - what type of conduct constitutes acceptance (typically this will be continuing to provide instructions, and/or payment of accounts rendered).

It is important to note that a conditional cost agreement must be accepted in writing.

- Cannot exclude the review provisions of the Act.
- May be between:
  - a law practice and a client;
  - a client and a second law practice;
  - a law practice and another law practice.

A cost agreement is enforceable like any other contract (s.3.4.30(1)). Cost agreements which contravene Division 5 are void, the consequence being that costs are only recoverable under scale, PRO or on the fair and reasonable basis, and the practitioner must repay the excess of any fees paid.

Contingency fees continue to be prohibited, and a practice entering into a contingency agreement is prevented from recovering any costs for services rendered and must repay any monies received for costs (s.3.4.31(5)).

Conditional cost agreements

There are further specific provisions regarding conditional cost agreements (s.3.4.27):

- Cannot relate to Criminal or Family Law matters.
- Must specify what constitutes "success".
- May provide that disbursements are payable in any event.
- Must be in clear plain language.
- Must be signed by the client. This provision is not applicable to conditional agreements between law practices.
- Must advise the client of his or her right to seek independent legal advice before signing the agreement. This provision is not applicable to conditional agreements between law practices.
- Must have a cooling-off period of at least five clear business days. Termination of the agreement by the client within this time must be in writing.

  This provision is not applicable to conditional agreements between law practices.

Uplift fees

A conditional cost agreement may provide for uplift fees, being a premium on both fees and paid disbursements.

Where an uplift fee is to be charged, the practitioner must make the following disclosure before the cost agreement is entered into (s.3.4.14):

- The law practice's usual fees.
- The uplift fee as a percentage of usual fees.
- The reasons why the uplift fee is warranted.

The further specific requirements relating to uplift fees are:

- The proposed uplift must be expressed as a percentage of legal costs (and paid disbursements) and must be identified separately.
- In litigious matters, the percentage must not exceed 25 per cent. By implication, there is no maximum uplift in non-litigious matters, which gives scope for alternative billing arrangements in commercial transactions.
- The law practice must have a reasonable belief in the likely successful outcome of the matter.

Review of fees under a costs agreement

The new Act allows bills which are rendered pursuant to cost agreements to be reviewed by the Taxing Master. As part of the review, the Taxing Master will consider the terms of the cost agreement, (although it is interesting to note that a costs agreement is only one of the criteria to be considered on a review of costs (s.3.4.44)). Previously, bills pursuant to a costs agreement were not subject to review, and there is little Victorian law relating to cost agreements. However, there is a large body of law from other jurisdictions, and the overriding principle is that the practitioner has a fiduciary duty to a client, therefore care must be taken both as to the terms of a cost agreement, and the circumstances in which it is entered into. An agreement cannot seek to oust the review provisions (s.3.4.36(5)).

Application to set aside an agreement

A cost agreement can be set aside, if it is not fair, just or reasonable (s.3.4.42). The concept of a cost agreement being "just" is not one previously encompassed in Australia by either common law, or legislation. The *Oxford English Dictionary* defines "just" as "morally right and fair" — which creates a potential minefield for practitioners entering into cost agreements. Is a practitioner obligated to investigate the personal circumstances of the client to ensure the agreement is "just"? By whose moral standards is an agreement judged to be "just"?

"Fairness" has been held to relate to the circumstances in which an agreement is entered into. "Reasonableness" relates to the terms of the agreement itself.

The application to set aside can only be made by the client, which is inconsistent with the possibility of an agreement being made between two law practices. Whilst it is accepted that a law practice entering into an agreement with a second law practice is far more knowledgeable and capable of negotiating a proper agreement than a client, there is no capacity to set aside the agreement even if there was fraud or misrepresentation on the part of the second law practice.

Application to set aside is made to VCAT.

In considering whether an agreement is fair, just or reasonable, the Tribunal may take into account such matters as fraud or misrepresentation by the law practice at the time the agreement was entered into, a finding of unsatisfactory professional conduct or misconduct, and failure to make proper disclosure.

If an agreement is set aside, the Tribunal may make an order regarding payment of the legal costs, applying the relevant scale or PRO, or otherwise determining the fair and reasonable legal costs, in the latter instance, taking various matters into account.

Elizabeth Harris LLB is Director of Harris Costing Pty Ltd

New Living Will Form

I, _____, being of sound mind and body, do not wish to be kept alive indefinitely by artificial means. Under no circumstances should my fate be put in the hands of pecker wood politicians who couldn't pass ninth grade biology if their lives depended on it.

If a reasonable amount of time passes and I fail to sit up and ask for a cold beer, it should be presumed that I won't ever get better.

When such a determination is reached, I hereby instruct my spouse, children and attending physicians to pull the plug, reel in the tubes and call it a day.

Under no circumstances shall the members of the Legislature enact a special law to keep me on life support machinery. It is my wish that these boneheads mind their own damn business, and pay attention instead to the health, education and future of the millions of Americans who aren't in a permanent coma.

Under no circumstances shall any politicians butt into this case. I don't care how many fundamentalist votes they're trying to scrounge for their run for the presidency in 2006, it is my wish that they play politics with someone else's life and leave me die in peace. I couldn't care less if a hundred religious zealots send e-mails to legislators in which they pretend to care about me. I don't know these people, and I certainly haven't authorised them to preach and crusade on my behalf. They should mind their own business, too.

If any of my family goes against my wishes and turns my case into a political cause, I hereby promise to come back from the grave and make his or her existence a living hell.

_____ Date: _____

Witness: _____ Date: _____

Witness: _____ Date: _____

Farewell Anna Whitney

Those of us who have been at the Bar for many, many years remember the days when Dorothy Brennan played mother to the Bar Council.

In those days, there was very little administrative or clerical support for the Bar Council. Effectively, she was "it".

EXPANSION began nearly a quarter of a century ago and it was at that time that Anna Whitney joined the Bar administration, initially as a receptionist/personal assistant to Dorothy. Anna's resignation, which took effect on 4 June this year, has triggered memories of that time which are perhaps artificially "rose coloured". But it was a time (at least in retrospect) to which the words of Andrew Marvell seem to apply:

> When all the world is young, lad,
> And all the trees are green
> And every horse a winner, lad,
> And every lass a queen.

Over the years Anna took responsibility for running the Readers' Course, for the Ethics Committee, for organising and minuting Bar Council meetings. As Executive Officer of the Bar, she effectively ran the Bar administration. She knew how all the committees worked, the membership of the committees and the best way to get matters to and through those committees. As an administrator hers was a "hands on" role. She knew what was happening, what had happened and what was likely to happen in the relatively uncomplex world of the then Bar administration. The relatively unstructured Bar administration then seemed much more user-friendly. This was partly a product of size, but it was also a product of Anna Whitney.

Anna Whitney.

When one recalls those earlier years of the Bar administration, one is led to remember the words spoken of the pilots of the Battle of Britain "Never in the history of man have so many owed so much to so few". In the context of the closed world of the Bar, this may in some ways be an overstatement; but the substance of the sentiment is clearly applicable. A shining star among the few was Anna Whitney.

Anna had a phenomenal memory which embraced all aspects of the Bar's history over the 23 years that she served the Bar. Her departure leaves a major gap, not only in the Bar's corporate memory, but in the hearts of those of us who came to equate Anna with the Bar as a functioning entity.

We will miss you, Anna.

James Anthony Logan

JIM Logan was my friend.

I met him about three weeks after he, and his family, disembarked from the *MV Streathaird*. He applied for the post of junior clerk with Leslie N Allan Pty Ltd, an insurance broker in Collins Street where I was working. He got the job because he told the then manager that he had a college education. The manager failed to note that the institution named, although bearing a name similar to a well-known Victorian institution, was actually located near Liverpool.

Over the next three years our friendship developed. I met his parents and, much to the disgust of his father but to Jim's delight, we set about destroying a bottle of Irish whiskey, which his father had been saving for a much grander occasion. Thus began a long-lasting hard-drinking relationship.

After I commenced studying law full-time, Jim remained in the insurance industry, ultimately working for the Bankers and Traders Insurance Company Ltd in Geelong where he met, and married, Eunice. They had two children, Ben and Eva, with both of whom I am still on speaking terms.

After Geelong Jim became an employee of AFCO Financial Services Ltd, a company which he later described to me in no uncertain and non-endearing terms. He spent a number of years working for them in Newcastle and then returned to Melbourne.

We re-established our relationship. Jim, uncertain of what to do asked me for help. I offered him articles at Ellison, Hewison and Whitehead if he were to commence legal studies at the new law course at RMIT. He accepted and for four years, he was my articled clerk. It was often a question of who led whom astray. Upon finishing in 1979 he applied to be a reader with the Victorian Bar and later signed the Bar Roll, becoming a barrister on the Dever's list.

He enjoyed life as a barrister and fully participated in all the pastimes available in the 1980s, horticultural percussion being one of them. He also established a long-lasting friendship with Peter Berman and Ken Liversidge. Many and long were the lunchtimes spent with them, especially at the Bank Place Cricket Club.

When I wished to come to the Bar, I could not think of another person with whom to read but Jim. I spent nine happy months in his chambers learning the rudiments of life at the Victorian Bar and the enjoyment of the Essoign Club.

In his later private life, he was not so successful. After his divorce from Eunice and the break-up of his family, he met, and married, Liz Hilton. Between the two of them, they arranged many parties, dinners and other functions at the houses they occupied over a period. The parties at Ivanhoe were particularly splendid and memorable, not the least because of the many things which could be observed in the almost mirror-like windows of that house. Fine food and good wine were par for the course. Jim generally finished entertaining his guests singing Irish songs.

When compensation work dried up at the Bar, Jim decided on a change of life and applied for the position as associate to his Honour F. Davies J. Jim liked VCAT and its personnel. Together with now Judge Jenkins and Dr Damian Cremean, they wrote and edited the ANSTAT publication *Victorian Administrative Tribunal Laws and Procedure*. After ceasing to be Davies J's associate he set-up practice as solicitor specialising in VCAT work. At first, he was successful in this endeavour, but later regretted having lost the intimacy of the Bar. Towards the end of his life, he was taking steps to return to the Bar. Alas, death intervened.

There are many tales which I could tell about Jim, but this is not the place for that. I want to remember him as the jovial, bon-vivant Irish boy he was when I first met him.

Vale Jim, in *paradisum perducat te angelis.*

Carl Price

CARL Price died suddenly on 3 November 2003. He was born on 13 April 1950 and educated by the Jesuits at St Patrick's East Melbourne, now demolished, then at Melbourne University where he graduated with a Bachelor of Laws. This degree was obtained, and his stay at university lengthened, as he worked as a truck driver, in advertising and commenced his life long passion of theatre, film work and stand up comedy.

After Articles at Dunn Ting & Byrne he was admitted to practice to the Supreme Court of Victoria on 3 April 1978. He signed the Bar Roll on 8 June 1978, Bar Roll No 1407. Graciously he allowed Christopher Johnson (no, after you I insist) Bar Roll No 1406 to come to the Bar immediately before him. He read with Bernard Bongiorno as His Honour then was, with whom he was a diligent pupil and learnt the mysteries of common law trials.

Carl's practice was originally in the Magistrates' Court jurisdiction and he was a leader of the Bar that practiced in motor vehicle collisions whose heyday came to an end in the mid 1990s. A capable and well regarded opponent, his adept cross-examination and theatrical style meant that he was regularly briefed in motor vehicle matters, and was never short of work. Carl often included his stand-up shtick in his court appearances. On one occasion at Heidelberg Court, he was appearing before his good friend, His Worship Mr Goldberg. It was 12.20 pm. His Worship requested some guidance and asked Carl if he had any cases to support his bold submission. Carl said: "I actually have the leading case on my desk in chambers. What I suggest is that you adjourn the court now and I will drive to the city, pick up the case, have lunch and return here. You could resume at about 2.30 pm." His Worship said: "Last time I looked, it was the co-ordinator who fixed the court's sitting times, not members of counsel." "Ah, your Worship", said Carl, "I'm only tap-dancing here!" On another occasion, Carl was attempting to seek costs on a higher scale than he was apparently entitled to. The Magistrate said: "Why should you get costs on the next scale? You get costs pursuant to the amount of the claim." "Usually, yes, your Worship. In this case, however, my client has a claim for interest, which, if successful, would take him to the next scale. I therefore have a claim 'in futuro'." "Mr Price, it sounds to me like a claim 'in bullshitto' to me."

Admittedly he did not expect a witness to agree with him during cross-examination that he "probably didn't know" the noise of two cars colliding as he had said in examination-in-chief but said he had been a panel beater for 30 years.

At the same time Carl combined his passion for theatre and film work with his career at the Bar. Many Australian movies or TV series of the last 30 years or so will often have a walk-on role with Carl Price in it. He had small roles in films as diverse as the Hollywood blockbuster "Wild Geese 2" and Australian art house films such as "With Love To The Person Next To Me", and "Chopper", which starred Eric Bana, and in the TV Series "Janus". As David Brown he appeared as a standup comic in the TV series "The Small Room".

In the last 10 years he had established a broad genera! practice in insurance work, chamber work and general property damage claims. Unfortunately, he had suffered from degeneration of his eyesight which caused him constant pain and left him with irreversible visual impairment. That he managed to keep a practice with the acute pain that he suffered is a tribute to his determination.

Although outwardly Carl could seem severe, he had many warm friendships with the very many people he knew at the Bar, especially his colleagues in Equity Chambers, and he had many genuine lasting friends who appreciated his wicked and subversive sense of humour. Upon being asked "How are you?" he would inevitably reply "All the better for seeing you, comrade". A drinks gathering to celebrate his life in Equity Chambers was over flowing with solicitors, Bench and Bar and reminiscences, many of which cannot be repeated here. As one of the speakers said their lives were all the better for knowing him. Divorced, with no children, our sympathy goes to Carl's family.

Brian Thomson QC

BRIAN Keith Canale Thomson was born in Melbourne on 20 September 1923 and died on 21 February 2005, aged 81. For over 50 years he was a practising member of the Victorian Bar.

He was educated at St Patrick's College, East Melbourne and on leaving school became a Clerk of Courts. During World War II he served in the army and on being demobilised did a law course at Melbourne University under the Commonwealth Reconstruction Training Scheme. He was admitted to practice in 1948 and signed the Bar Roll shortly afterwards.

Brian read with Jack O'Driscoll in Equity chambers. After completing reading he stayed in Equity and shared a clerk (Dave Calnin), with such well-known names as Eugene Gorman, Rob Monahan, Charles Sweeney, Jack Cullity, Tom Doyle, John Minogue, Murray McInerney, Lou Voumard and Jack O'Driscoll, to name just a few. They were only "in Equity" geographically as many were leaders of the Bar in all jurisdictions. Their favourite watering hole was the Beaufort Hotel on the corner of Queen Street and Little Bourke Street in the far-off days of "6 o'clock closing".

Brian and his contemporary Jim Gorman became good friends and both later excelled, particularly in the personal injuries jurisdiction. Jim Gorman leading Brian Thomson was a powerful combination indeed.

When the Bar built Owen Dixon Chambers in 1960 Brian and Jim moved there, although their clerk did not, and they were largely instrumental in persuading Jack Hyland to leave the State Insurance Office, where he worked, and become their new clerk. And history shows how sensible they were to do so.

Although best known as a common lawyer Brian not infrequently practised in other areas, including serious criminal cases, commercial and administrative cases, licensing cases, property and probate cases.

He frequently appeared in the Full Court and often in the High Court. And he appears as counsel in a number of reported cases.

He liked circuit work and had a big following of solicitors in country Victoria. He also appeared in Sydney and Wentworth in NSW, the Northern Territory and in New Guinea in the 1980s. He once told me he was about to cross-examine the Prime Minister of New Guinea.

One day in 1983 Jim Taylor, a Myrtleford solicitor, sent Brian a brief to advise whether a survivor of the 1964 disaster, when *HMAS Melbourne* collided with and sank *HMAS Voyager*, could bring an action against the Commonwealth for damages for his injuries. He was a member of the *Voyager* crew and had nearly died in the collision and had suffered what appeared to be an extreme psychological reaction resulting in him ceasing employment and retreating to a life as a hermit in the remote north east of Victoria. There were many difficulties, not the least being the Statute of Limitations. Brian recommended writing to the Commonwealth Government requesting that it waive the Statute of Limitations in the circumstances. This the Commonwealth did, due to the acknowledged absence of prejudice. The assessment of damages in that case attracted considerable publicity, and it emerged that many other survivors of the tragedy were living broken lives with little support. Brian took on their cases also, and when the Government of the day reneged on its previous promises that all similar survivors would be justly compensated, Brian was outraged. He fought the case all the way to the High Court, where his intuitive sense of "That can't be right" was vindicated. There were further court battles until eventually the Commonwealth conceded that all survivors of the sunken vessel were entitled to have their claims assessed and paid without any further stress.

Outside the law Brian had many interests. He enjoyed his golf and tennis. He was a member of the Kooyong Lawn Tennis Club and the Royal Melbourne Golf Club. He helped set up the annual tennis match between the Bench and the Bar and the Law Institute for the J. O'Driscoll Trophy. He was a country delegate for the Victorian Tennis Association and in the DOXA Foundation for underprivileged children. He was President of the Celtic Club for 19 years between 1968 and 1987. He acquired a small farm on Flinders Island where he liked to visit and relax and play the Collins Street Farmer.

He was a devoted husband and family man. On 4 July 1953 he married his wife Betty, who was secretary to Jack O'Driscoll and with whom Brian had read. She has been ever a great support for him. They celebrated their golden wedding Anniversary in 2003. They had seven children and 13 grandchildren. Their son, Chris, is at the Victorian Bar.

Brian had an innate sense of justice. He was a champion of the underdog and tenaciously fought many difficult plaintiff's cases. When he perceived an injustice without an apparent remedy, his intuition told him there must be a way, and often, when he looked, he found one.

Ave atque vale Brian.

The Royal Australian Navy Reserve Legal Panel Dinner in recognition of the retirement as President of the Court of Appeal of Commander The Honourable Justice John S Winneke AO RFD RANR.

Retiremen
Honourabl
RANR

Captain Teasdale OAM RFD ADC and members of the reserve legal panel of the Royal Australian Navy, together with officers of the Army and Royal Australian Air Force, farewelled Commander Winneke at the Essoign Club on 16 June 2005. On this occasion the Essoign Club assumed the status of a naval wardroom (or mess to our Army and Air Force colleagues). Thus, Queen Victoria's direction that when the loyal toast is proposed in a wardroom, the diners were to remain seated applied for the evening.

GUESTS included Major General Garde AO RFD QC, Group Captain Di Bates, Colonel Garry Hevey, Colonel Richard Tracey RFD QC, Wing Commander His Honour Judge Morrow RFD, Wing Commander Frank Healey, Lieutenant Commander The Honourable Sir Daryl Dawson AC KBE CB, Lieutenant Her Honour Judge Lewitan AM, His Honour Judge Kelly (a press gang member of the RAN legal reserve) and Mr Michael Winneke (a former sailor and current Associate to His Honour).

Captain His Honour Judge Tim Wood RFD proposed the toast to Commander Winneke and noted it was appropriate that the function was held on a Thursday evening because the traditional Navy

t of Commander The
e John Winneke AC RFD

Colonel Gary Hevey RFD, Captain Warwick D. K. Teasdale OAM RFD ADC RANR and Colonel Richard Tracey RFD QC.

Captain His Honour Judge Tim Wood RFD QC RANR.

toast for that evening was "a bloody war and quick promotion". Captain Wood observed that the guest of honour had indeed enjoyed a quick promotion, rising from the rank of sailor, wearing bellbottom trousers, to the rank of Commander. Thus, Commander Winneke, Captain Wood observed, was a graduate of the lower deck and, as such, "a special duties officer" (a term given to such a promotee). Such a person's qualifications for promotion were those of outstanding naval service and "officer-like qualities". Naval records, regrettably, do not reveal in what measure of abundance Commander Winneke possessed either or both of these qualities.

His Honour's elevation was in part due to the efforts of Sir Daryl Dawson, then Lieutenant Dawson, Royal Australian Navy Volunteer Reserve. Sir Daryl was briefed, together with the then Mr Winneke, in the Westgate Bridge Inquiry. Sir Daryl let it slip that he was shortly to depart for Singapore to preside as Judge Advocate at a court martial to which His Honour replied, "I'd love to be part of that". Subsequently Lieutenant Dawson presented his recruit to a naval selection board comprised of Captain Robertson, Director of Naval Legal Services, and His Honour Judge Trevor Rapke, then Judge Advocate General of the Royal Australian Navy. Captain Robertson enquired of His Honour as to whether he had any naval experience, which met an affirmative response, whereupon Captain Robertson said that he would look into His Honour's file in Canberra. His Honour said "Not to bother", presumably knowing full well that if the inquiry was made, the seeds of the imminent commission, carefully sewn by Sir Daryl for His Honour, would not germinate. Judge Rapke thereupon usurped the powers of the Chief of Naval Staff and the Governor-General by offering His Honour a commission instantly with the words "Welcome aboard, Winneke".

His Honour's father, Sir Henry Winneke, served with distinction in World War II and rose to the rank of Group Captain as Director General Personal Services. He suggested to his sons, Michael and Jack, that they undergo national service in the Navy, rather than the Air Force. Whether Sir Henry's reasons for doing so were out of beneficence to the senior service or protection of the junior service, one does not know.

Accordingly, Able Seaman Winneke reported to HMAS Lonsdale in Port Melbourne as a sailor and fell under the command of Lieutenant Commander Denis Cordner, the Commanding Officer of Reserves. At that time, Denis Cordner was a distinguished ruckman with the Melbourne Football Club. His Honour was later to become a distinguished ruckman with the Hawthorn Football Club and, indeed, as such became a commando, notably one of "Kennedy's commandos".

The Commanding Officer of HMAS Lonsdale at that time was Lieutenant Commander Gordon Henry, who later

Chris and Major General Greg Garde AO RFD, Sir Daryl Dawson AC KBE CB, His Honour Judge Michael Kelly QC, Lady Dawson and Mrs Margaret Wood.

Christine Lawton, Wing Commander Frank Healy, Commander Jim Unkles RAN, Lieutenant Commander Lou Vatsousios RANR, Toula and Captain Nick Dragoljlovic .

Kate Hart-Smith, Lieutenant Tim de Uray RANR and Lieutenant Arthur Athanasiou RANR.

Lisa Lewis and Lieutenant Richard Udovenya RANR.

became an Associate to Monahan and Anderson JJ. It transpires that Lieutenant Commander Henry's daughter had no offer to escort her to the Sailors' and Officers' Ball at HMAS Lonsdale. Lieutenant Commander Henry implored Able Seaman Winneke to alleviate his daughter's distress and, for that matter, his own by inviting her to the Ball as his partner. His Honour declined on the pretext that Lieutenant Commander Cordner had imposed upon him such onerous duties that evening that he could not do so. Unbeknown to Lieutenant Commander Henry, those activities included the decoration of the hall. Able Seaman Winneke, with his colleague, Able Seaman "Basher" Hill (also a member of Kennedy's commandos), resolved to fill the balloons, which were to be suspended by the white ensign above the dance floor with H_2O rather than CO_2. When the evening was to close, the ensign was to be released, thus drenching the participants. Clearly, the prospect of taking a drenched daughter home to meet daddy in such a state was a circumstance which His Honour thought was one best avoided.

His Honour's advocacy in Naval Courts Martial was exemplified in two trials. Firstly, that of Lieutenant Scott, who was

Alice Willee, Commander Gerald Purcell RANR and Claire Purcell.

Lieutenant Peter Billings, Kate Morrow, Lieutenant Her Honour Judge Lewitan AM QC RANR, and Wing Commander His Honour Judge David Morrow RFD.

Melinda and Captain Warwick D. K. Teasdale OAM RFD ADC RANR, Lieutenant Commander Bill Weston RANR and Robyn Weston.

serving as a patrol boat captain in Papua New Guinea. At the end of an exercise, Lieutenant Scott was running late for a cocktail party which was to be hosted by a distinguished planter. Scott broke the golden rule for navigating officers because he cut the corner and ran across a reef, rather than proceed along the channel. He was charged with hazarding his ship. Sir Daryl Dawson, by this time Lieutenant Dawson, was the Judge Advocate, and His Honour, then Lieutenant Winneke, appeared for Scott. Scott was found guilty and reprimanded. This was a penalty which caused some comment in the wardrooms of the Navy, as it was thought to be exceedingly lenient. Not so felt the then Lieutenant Winneke, as he explained to the Court that it was a greater offence to be absent without leave at a cocktail party, and whatever measures one took to avoid that circumstance were minor. With this in mind, the Court sentenced Scott to be reprimanded. Scott rose to greater things some months later when he was appointed a Member of the British Empire, a recognition of honour greater than that of a verdict of honourable acquittal at court martial.

A second example of His Honour's advocacy was his appearance for Lieutenant Fayle (not Fail), one-time Commander of the submarine *HMAS Otway*. During exercises off the east coast of Australia, Fayle, whose vessel was then submerged, gave the order "take it down 30 fathoms". Unbeknown to Fayle, there was only 10 fathoms of water between the submarine and the seabed at the time of the order. Known to Fayle was the fact that the Admiral's deputy was on-board and sleeping in one of the for'ard cabins of the submarine. The vessel struck the seabed, waking the Commodore abruptly. Fayle, like Scott, was charged with hazarding his ship. The no-case submission made by His Honour to Lieutenant Commander Dawson, the Judge Advocate, was upheld on the grounds that these things do happen from time to time and do not necessarily involve negligence.

Captain Wood acknowledged the deep debt of gratitude which the Navy owes to His Honour. For a period in excess of 25 years His Honour appeared at courts martial, as Prosecutor or Defence Counsel or Judge Advocate. He was appointed a Defence Force Magistrate and officiated in those proceedings for many years. His Honour held an appointment as a Reviewing Officer under the Defence Force Discipline Act, which called upon him to review proceedings before Defence Force Magistrates and before courts martial and, in doing so, to advise whether the conviction ought to be upheld or quashed and the sentence affirmed, modified or quashed.

It was the verdict of His Honour's brother and sister officers that notwithstanding early misdemeanours committed whilst a member of the lower deck, that nevertheless he was entitled to an honourable discharge and His Honour was entrusted to the care and supervision of his wife, Sue. In doing so, Captain Wood noted the naval service which she had provided in supporting her husband.

Junior Silk's Bar Dinner Speech

Presented by James Elliott S.C. at the 2005 Bar Dinner held at Zinc, at Federation Square, on 4 June 2005

MR Chairman, honoured guests, other distinguished guests, and my colleagues. I am delighted this evening to honour the newly appointed members of the judiciary, together with those who have received official honours for their outstanding contribution to the community … well sort of.

Once it had dawned upon me that I had been given the dubious distinction of being the junior silk this year (last year's junior silk described it to me as a "poisoned chalice"), I decided it was appropriate to seek advice from our present Chairman, Ross Ray, on exactly what role it was that I was to perform tonight.

Some of you may recall that the junior silk for 2002 informed those at the Bar Dinner that he had been directed by the Bar Council to toast the honoured guests rather than roast them. This was said to be a change in position of the role to be played out by the junior silk at the annual Bar Dinner.

So I spoke to Ross Ray and sought to confirm that my role was to toast, rather than roast. In his usual decisive manner, Ross informed me that he wouldn't say that it was one or the other. He thought it should be somewhere in between and basically he would leave it to my better judgment.

Being far wiser than to take the treacherous course of relying on my own judgment, I decided that I would turn to senior members of the judiciary for some guidance. As the first person listed on the list of honoured guests was his Honour Justice Winneke, I thought it appropriate to speak to members of his Court.

I duly did so and raised my uncertainty as to how I was to pitch this speech. For reasons that will become apparent, the judges I spoke to shall remain nameless. In raising the issue I also stated to their Honours that Justice Winneke had been bestowed with accolades at almost every

Junior Silk, James Elliott S.C.

turn of his life and I thought it would be extremely difficult to say anything different or original about him.

Much to my surprise, in response one of the judges said: "Just rubbish him."

The other member of the Court of Appeal present did not dissent from this view. Accordingly, I decided that the situation must have been one of those where two appeal judges constituted the Court of Appeal, and that until the High Court said otherwise I had the authority to stand before you all tonight with considerable licence.

JUSTICE JOHN SPENCE WINNEKE AC RFD

Armed with such authority, I set about making enquiries as to how I might be able to belittle the President in some form or another. As part of my investigation, I spoke to a former member of the Court of Appeal. I was informed by that person that he regarded Justice Winneke as the greatest leader of men that he had ever come across.

I was unsure whether the word "men" in that statement was the use of a somewhat outdated term to refer to both men and women, or alternatively whether the speaker was choosing his words very carefully in light of the fact that

Justice Elizabeth Hollingworth.

the one woman on the Bench of the Court of Appeal in the 10 years under his Honour's presidency only lasted 12 months before leaving the Court. I thought it prudent not to ask any further questions.

Perhaps his Honour's style of leadership can be best demonstrated by recounting an event that occurred within the Chambers of the Court of Appeal.

Sometime ago, at the start of a working day, the Associate to Justice Winneke, who happens to be his brother Michael, passed by one of the more senior members of the Court and greeted his Honour with: "Good morning, Bob."

This judge was somewhat taken aback by such informality. Shortly thereafter he arranged to meet with the President to discuss the matter. Having had the relevant circumstances brought to his attention, Justice Winneke responded without hesitation. Allowing me to modify somewhat the conspicuous departure from the Queen's language, Justice Winneke simply said: "Well, it is your f…ing name, isn't it?"

Justice Winneke AC RFD.

Sue Winneke.

Apparently, that was end of the matter.

Another indication of leadership is how one responds in a crisis. There is no greater crisis to deal with than a life-threatening situation.

I wish to take you all back to the late 1980s when his Honour was leading Justice Kaye, who was then a junior at our Bar, in a case being conducted in Darwin.

Justice Winneke knew the Registrar of the Court in Darwin well. When the Registrar learnt that "Jack" was in town for the weekend he asked Justice Winneke on a fishing expedition in the Arafura Sea.

The Registrar of the Court was promising a big weekend. His Honour mentioned the fact that he had a junior with him and asked whether he could come along. The Registrar was reluctant. His intentions for the weekend were clear. There was to be a lot of drinking and everyone was to partake. Given these concerns the Registrar asked Justice Winneke if Justice Kaye could drink. Again, without hesitation Justice Winneke replied: "Stephen Kaye is the drinking champion of the south."

In order to get to this remote fishing spot it was necessary to fly on a small plane. The plane was piloted by the wife of a friend of the Registrar. Upon arriving at the tarmac Justices Winneke and Kaye were greeted by the Registrar who was carrying a gigantic esky that was stacked full of beer. It was with some considerable difficulty that the Registrar and Justice Kaye managed to fit the esky on the plane. The Registrar and Justice Kaye got in the back of the plane, with Justice Winneke sitting alongside the pilot.

Something concerned Justice Kaye about the pilot. She was wearing what might be described as coke bottle glasses. Justice Kaye describes them as the thickest glasses he had ever seen. Concerns were heightened when the pilot looked at the dashboard and asked Justice Winneke whether the number on the dial was a 6 or a 9. In response Justice Winneke went slightly pale and responded, "It's actually a 4."

Undaunted, the intrepid adventurers remained in the plane. The small plane seemed to take an endless period of time to take off from the runway, given that the rear of the plane was weighed down heavily by the esky. A sense of relief was felt when the plane finally got off the ground until, at about 100 feet, Justice Winneke's door suddenly flew wide open.

Cool in a crisis Justice Winneke immediately reached for the door and desperately tried to hold it shut. The Registrar of the Court yelled out to Justice Kaye: "Hold onto the esky." Again leaving expletives to one side, Justice Winneke's response was to tell Justice Kaye to forget about the esky and to hold onto him. Apparently Justice Kaye wasn't concerned about the weekend's supplies or Justice Winneke and simply held on for his own dear life.

Notwithstanding this near catastrophe, Justice Winneke insisted that the fishing

trip proceed, which it duly did with the copious supplies being consumed, apparently without much of a contribution from Justice Kaye.

Returning to matters more closely at hand, the Court of Appeal has now been in existence for just shy of 10 years. For most litigants, the Court is now the highest appellate court available, and has already become an integral part of our justice system. Naturally, the first decade of the existence of this Court has provided the foundation stone upon which it will be built for many years to come. This State has been greatly privileged to have, in my personal view, such an outstanding leader and fundamentally decent person as the first President of the Court of Appeal. That this is so is reflected by the fact that his Honour recently received the highest of all Queen's birthday awards.

THE HONOURABLE KENNETH HENRY MARKS AM QC

The next honoured guest gives me the opportunity to demonstrate how times have changed.

The Honourable Ken Marks is to celebrate his 80th birthday in September this year and has achieved more than most would ever dream of. Due recognition for these achievements was given when his Honour was recently awarded an AM.

But I wish to turn the clock back to his Honour's time in the Commercial List. Justice Marks was largely responsible for setting up the List, over which he was its first presiding judge.

In those days his Honour seemed to take great delight in extracting from counsel a basis for throwing the matter out of the list.

- If the trial was to last longer than 10 days;
- If the matter couldn't be ready for trial in six weeks;
- If the issue was not truly a commercial matter;
- If a party had failed to comply with an order of the Court (sometimes even by the barest of margins).

Out it would be thrown with great alacrity.

For your Honour's information, today's Commercial List is a much more "touchy feely" world. It seems the sensitive new age world of the Federal Court has meant that if the Supreme Court wants any business it has to accommodate all sorts of behaviour your Honour would have found intolerable.

I say bring back "the good old days". At least in those days a solicitor or a client knew that when you said it had to be done, it really had to be done!

HIS HONOUR JUDGE EUGENE JOHN CULLITY AM

His Honour Judge Cullity retired on 6 March 2002 after nearly a quarter of a century of service on the Bench. His Honour also received an AM in the 2004 Queen's Birthday Honours. That award no doubt has some connection with the outstanding contribution his Honour made as a Judge of the County Court, but surely also relates to the many other aspects of his Honour's career and public life.

However, a great source of pride and achievement has been derived from his long and happy marriage, accompanied by plentiful progeny.

As his Honour has learnt in the past, the number of children one has can attract comment. The Junior Silk from 1983, Michael Kelly, known to us younger members of the Bar as Judge Kelly of the County Court as he later became, was so impressed by the proliferation of the name Cullity that he suggested that name may well be linked in future with the introduction of rabbits into Australia.

Again, on the occasion of his Honour's farewell the then Chairman of the Bar, David Curtain QC, recorded that his Honour had seven children, spanning an age difference of 17 years. On the same occasion, Ms Provis, on behalf of the Law Institute of Victoria, suggested his Honour had eight children, rather than seven.

Rather cryptically, in response, his Honour stated: "I think I will leave you to decide who is more accurate in relation to the number of children who have had to be supported."

Given the events of early this year, I thought it appropriate to avoid a Tony Abbott-type saga by stating for the record that his Honour has eight children. It also gives me the pleasure of being able to point out in front of such a large gathering that David Curtain was wrong.

On the topic of children, another one of our honoured guests tonight, Judge Hampel, learnt during the Readers' Course in March 1990 that my wife had just given birth to our fourth child in the space of four-and-a half years. Her Honour confronted me with this piece of information and exclaimed: "You big brute." One shudders to think what her Honour would call Judge Cullity.

THE HONOURABLE JUSTICE ELIZABETH HOLLINGWORTH

In many ways the mother country, as it was once called, has contributed to the law in Victoria as we know it. In a less conventional sense, Justice Hollingworth represents yet a further contribution that England has made to our judicial system in Victoria. Although born a Pom, her Honour now has spent the best part of her life living in Australia and is embraced with much pride in both Western Australia and Victoria.

The appointment of Justice Hollingworth gives me the opportunity to address an issue of discrimination which has been ongoing for some time. I know this is not the forum for political statements, but something must be said.

It has not been since 1979, when Justice Alec "Ginger" Southwell was appointed, that a redhead has been appointed to the Supreme Court. Finally with the appointment of her Honour, we have hopefully seen an end to the discrimination against redheads.

I can hear some of you say Justice Whelan was a redhead. You are right he was a redhead. But at the time of his appointment what little hair he still had was well and truly grey — well, there might be a bit of red there.

In all seriousness, Justice Hollingworth has had a unique preparation for her time on the Bench. Not only has she lived in Canberra, Perth and Melbourne, but she has also travelled the world extensively. This is in part due to the fact that she was the first Australian woman lawyer to be elected a Rhodes Scholar. I understand it is also because her Honour enjoyed taking 12 weeks vacation every year to travel to various parts of the world. One can only hope the travel bug doesn't bite too fiercely now that her Honour's holidays are more confined.

THE HONOURABLE JUSTICE KEVIN BELL

His Honour Justice Bell has brought to the Supreme Court a diverse range of skills and experiences from his dynamic career to date. Indeed, I suggest that his Honour may have a special role to perform at the Court from which his brothers and sisters will greatly benefit.

As a conscientious member of our community, his Honour was instrumental in establishing in Footscray an organisation known as "Poverty Law Practice". This organisation was founded to assist less financial members of the community who needed legal assistance, but were unable to meet the rigorous criteria of Legal Aid. His Honour was able for a number of years to assist those of lesser

means in dealing with the issues that confronted them.

As we all know, there are always some Judges crying poor. Perhaps his Honour can use his skills to help our Judges cope with being on a guaranteed six-figure salary. I didn't think that would get much of a laugh.

His Honour also has an interest in wine and wine making. As was noted at his Honour's welcome, when asked by a journalist about these activities, his Honour stated: "The highs are moments when I am working in the vineyard where I have an epiphanous connection."

The only epiphany that his Honour might look forward to on the Bench will be the realisation of his own divinity. In my experience at the Bar, after a relatively short time on the Bench, this manifestation is almost universal amongst superior court Judges.

Graham Fricke QC and Adrian Smithers QC, formerly judges of the County Court and Family Court.

THE HONOURABLE JUSTICE KIM WILLIAM SPENCER HARGRAVE

In relation to the next honoured guest, Justice Hargrave, I want to say as little about him as possible. This is not out of any sense of self-preservation, but rather a desire for revenge.

His Honour was considered by most at the Commercial Bar as the leading commercial junior immediately before he took silk in 1995. However, his reputation amongst his peers took a pounding at the Bar Dinner for that year. His Honour delivered the junior silk speech for the inordinate length of 42 minutes.

Some may think with my lineage that I would be intent on trying to break records. But you will all be relieved to know I have no intention of standing here for three-quarters of an hour. The bad news is that Justice Hargrave will be responding on behalf of the honoured guests.

So you may all wish to adopt the practice prevalent in the sporting world at the moment and take your "No-Doz" caffeine tablets before his Honour gets to his feet.

HIS HONOUR JUDGE WILLIAM MORGAN-PAYLER

The first of the County Court Judges we are to honour tonight is Judge Morgan-Payler. His Honour is the former Chief Crown Prosecutor for the State of Victoria. However, before taking this appointment his practice had been predominantly defence work. Accordingly his Honour brings a great deal of experience from both sides of the criminal justice system.

That is not all his Honour brings by way of experience to the Court. For better or for worse, his Honour shared a flat with Dyson Hore-Lacy in Darwin back in the 1970s. The flat was located in Bougainvillea Street, which soon became known as Bougainvillea Chambers because of its august occupiers. In a city still suffering from the effects of Cyclone Tracey, both his Honour and Hore-Lacy scratched out a living in Darwin, but this period was not without its moments.

On one occasion his Honour was enjoying a cold beer with Hore-Lacy at a bar known as the Hot and Cold Bar. There were quite a few people in the bar. Without warning someone stormed in and discharged a firearm. Both his Honour and Hore-Lacy had no desire to make heroes of themselves. They dived for cover.

One would expect someone of his Honour's background to have acute forensic skills and be able to give a detailed account of the events that unfolded before him. Nothing could be further from the truth.

When the smoke settled his Honour raised his head only to find that the Bar was completely empty. When asked later what he could say he had witnessed, his Honour meekly proffered that all he saw was a row of thongs where all the other drinkers had once been.

Returning to matters curial, undoubtedly the highlight of his Honour's career was in a murder case where the accused had chosen to represent himself and his Honour was prosecuting for the Crown.

In his final address, the accused stated that he only wanted two things. Having identified the first of them, the accused continued. "The other thing I had need of was a prosecution barrister with no brains at all, and hereto once again the OPP has come to the fore and generously supplied the solution."

Notwithstanding the accus-ed's rather dim view of his Honour, he was duly convicted.

His Honour is currently President of the Victorian Fly Fishing Association and we trust that his appointment will not interfere with the more important things in life.

HER HONOUR JUDGE SANDRA DAVIS

From time to time one comes across a person whose capacity and achievements are overwhelming to the extent that it makes you feel quite inadequate. Prior to preparing for tonight, I knew very little about our next Honoured guest, Judge Davis. This is in part explained, no doubt, by my own ignorance. But it is also explained by the fact that, like Judge Morgan-Payler, her Honour chose not to have a formal welcome upon her appointment.

I understand that her Honour took this course because she considered such a public parading of her past would be a source of embarrassment and discomfort. I hasten to add that this is not because her Honour has anything to hide. But regrettably for her Honour, there is no escaping tonight.

In the limited time I have to speak about each of the honoured guests, it is not possible to touch on much of what they have achieved. This is particularly the case with Judge Davis whose list of achievements appears to be endless. Having done a bit of research I decided not to focus on the fact she was school captain, had various honours and masters degrees from various universities, nor her skills in languages including French, Italian, Hebrew, Russian, Arabic, Japanese and Spanish.

It seemed to me that the obvious choice for the focus of tonight ought to be the fact that her Honour read with one of our other honoured guests, Judge Hampel. It follows from the fact that I am talking about Judge Davis before Judge Hampel, that Judge Davis was audacious enough to accept an appointment to the County Court before her former mentor. The more timid of those amongst us may not have been willing to take such a step. Perhaps her Honour's courage was fortified by the fact that she also happens to be an expert in the martial arts.

An article in the *Bar News* published shortly after her appointment described her Honour as "a modern renaissance woman". To the extent that the law might still be said to be in the Middle Ages, her Honour is abundantly qualified to bring it into the 21st century.

HER HONOUR JUDGE FELICITY HAMPEL

Her Honour Judge Hampel needs no introduction. Her personal publicist has no doubt already taken care of that.

Her Honour has chosen a career in the law, but this was not always her intention. No doubt her Honour will be a model judge, but as a 15-year-old she was intent on becoming a model. So sure was she that this was her vocation in life that she had photos professionally taken and assembled in a portfolio, which she showed to her friends with much enthusiasm.

We are all very grateful she chose the law as her career. As, I am sure, is Elle Macpherson.

Having made this choice of career she signed the Bar Roll in 1980. Early in her time at the Bar she accepted a brief as junior to George Hampel QC (as he then was).

As we all know they were married four years later, and remain happily so.

Only a few weeks ago I was travelling to Sydney and bumped into Professor Hampel (as he now is). We boarded the plane together, so the flight attendant rearranged the seating so we sat together.

I happened to mention to Professor Hampel that I would be speaking about her Honour at the Bar Dinner and asked him if he had anything that might be of particular interest. After listening to George for over 20 minutes, I did not have the heart to tell him that I could only speak for two or three minutes. Needless to say, he was full of praise for her Honour. Anyone who attended her welcome, and listened to the recounting of her many achievements, would know his praise is fully justified.

THE HONOURABLE CHIEF JUSTICE DIANA BRYANT

The last occasion upon which our next guest was honoured at our Bar Dinner was in June 2000 when she had been appointed the first Chief Magistrate of the Federal Magistrates' Court. I now have the pleasure of congratulating Chief Justice Bryant on her appointment as Chief Justice of the Family Court.

Her Honour is in a rare position. She has been the boss of one Court and now finds herself the boss of another Court. This has given me the unique opportunity to canvass some of her former colleagues on her Honour's performance in the Federal Magistrates' Court for the purpose of advising her Honour on how she might improve in her new role.

If I may be so bold, I have some tips for her Honour based on the feedback I have received.

The first tip I have is for her Honour to change her nocturnal habits. Apparently as Chief Magistrate her Honour was notorious for sending emails in the wee hours of the morning, sometimes as late as 2.00 am. If her Honour could refrain from sending the emails until first thing the following morning then the other members of the Court would not have to feel guilty about sleeping at night time.

The next tip is that as Chief of the Court, you do not have to win at everything. My sources tell me that at social tennis matches against fellow Magistrates, her Honour often played with gritted teeth. Indeed her Honour took these games against her colleagues so seriously that one time she was heard to say, whilst serving for a set: "This is more pressure than a Newcastle Duty List."

Her Honour also fancies herself as a singer and enjoys standing around a piano with her colleagues singing songs from famous musicals. It has been suggested to me that her Honour should ensure that those partaking are primed with more of her Honour's beloved Margaret River reds before her Honour's vocal cords are called into action.

My enquiries have also confirmed what was already well known about her Honour, namely her unwavering dedication and commitment to the job at hand.

MAJOR GENERAL GREGORY HOWARD GARDE AO RFD QC

The last of the honoured guests is Greg Garde QC. Anyone who knows Greg knows that he is a very measured person, and not easily excited. Indeed, the level of excitement that Greg experienced about being one of the honoured guests tonight is reflected in the fact that he decided not to come.

As no doubt most of you would be aware, Greg Garde became a Major General in March 2001, the highest position available to a reservist in the Australian Defence Force. If he were here, no doubt he would like us all to stand to attention in his honour. Accordingly I invite you all to be upstanding, but, in so doing, toast all our honoured guests.

To our Honoured Guests.

The Vic Bar Allstars entertained.

Editors' Note

This speech is an edited version of the speech delivered at the Bar Dinner held on 4 June 2005 by the Junior Silk, James Elliott S.C. In the course of his speech, Mr Elliott made certain other comments about one of the honoured guests, Her Honour Judge Felicity Hampel.

In a letter dated 6 June 2005, Mr Elliott S.C. advised Her Honour that there was no intent on his part to cause professional or personal harm to Her Honour. He gave an unqualified public apology to Her Honour, which was accepted unreservedly by Her Honour.

In a letter dated 6 June 2005, the Chairman of the Bar Council, Ross Ray QC, apologised to Her Honour for some of the comments made by James Elliott and for the offence they caused. The Chairman apologised to Her Honour as an invited honoured guest and expressed his personal regret that the night became one of distress for her, rather than one of celebration.

Reply on Behalf of the Honoured Guests to the Speech of Mr Junior Silk

by Justice Kim Hargrave

MR Chairman, members of the Bar, other honoured guests.

James. … more than half the time. Less than half the guests!

However, I cannot say that "Time Is On My Side", so I will move on.

Popular music is a vital part of our everyday lives. It expresses, in accessible language, and with the help of catchy tunes, the way we live our lives.

Some of us associate popular music with particular events, for example, the song we couldn't get out of our head during some memorable time.

But our favourite songs do not come burdened with associations. Nick Hornby is a popular writer who may not be known to all of you. He is obsessed with popular music (and also soccer). His writings are littered with references to popular music and the effect that it has on our lives. He has written that a favourite song is one you love enough to accompany you throughout the different stages of your life — good, bad and ordinary. Any specific memory is rubbed away by use. The love of the song induces a narcotic need to hear it again.

Popular music is a great leveller. It brings all manner of people together — much the same as barracking in the outer at a football match.

What's all this got to do with a reply on behalf of the honoured guests? You might well ask! Well, nothing really, except that, as a bunch, we are as diverse as a top 40 from any time over the past 40 years.

We are a mix of, on the one hand, oldies, or classics, who have travelled "The Long And Winding Road", "Yesterday's

Justice Hargrave gave the response on behalf of the honoured guests.

Justice Dyson Heydon, Tim McEvoy and David Bailey.

Lydia Kuda, Paul Vout, Ian Hardingham QC and Stewart McNab.

Brian Lacy, Michael Roberts and Fiona Connor.

John Noonan QC, Phil Corbett, James Elliott S.C. and Sharon Keeling.

Michelle Quigley S.C. and Samantha Marks.

Simon Pitt and Penny Nescovcin.

The Honourable Alistair Nicholson AO, Judge Frank Dyett and Justice Linda Dessau.

Tony Cavanough QC, Julian Burnside QC and James Barber.

Heroes" if you like. On the other hand, we are "The Young Ones" — new talent who might be rising stars or might be one-hit wonders. So that's as good a reason as any to link us. Oh, and I know "It's Only Rock And Roll (But I Like It)".

When Ross Ray rang and asked me to give this speech, he told me to be quick, uncontroversial and to try and be mildly amusing if I could. In other words "Try And Keep The Customer Satisfied". The way he said it, he didn't sound very confident at any level.

Keeping this particular customer satisfied is a hard gig. I know, I tried with obviously little success for 42 minutes in 1996. So, here goes.

I fully recognise that the Bar, being such a diverse group of people, will contain a fair section of you who are already sitting there saying to yourselves "I Can't Get No Satisfaction" from this. To those of you I say "You Can't Always Get What You Want" — although "Wouldn't It Be Nice" if you could!

By now you will have gathered that song titles are the order of this speech. Hopefully those I have chosen will say something about each of us honoured guests.

Most of the songs I will mention come from the 1960s and 1970s. As Bob Seeger memorably sang "Today's music ain't got the same soul, (I like that) old time rock and roll".

ME

I'll get myself out of the way first. When Ross Ray telephoned me, I went "A Whiter Shade Of Pale". "Don't Let Me Be Misunderstood", it was an honour, and not a poisoned chalice, to be asked. However, having given the junior silk speech nine years ago, I would have hoped to avoid the burden of the junior judge speech.

So, as the "New Kid In Town" what are my aspirations for judicial life. First, to avoid the "Lonely Days" of judicial life. I will try to maintain my friendships at the Bar and not retreat to my chambers feeling "Alone Again, Naturally".

Second, I will seek "Help". There is plenty of it on offer I am pleased to say — from the Chief Justice down through my fellow judges, the associates and tipstaves. I look forward to getting by "With A Little Help From My Friends". I am sure that together "We Can Work It Out".

HER HONOUR JUDGE FELICITY HAMPEL

We all know of Felicity Hampel's extraordinary breadth of achievements and of her enormous contributions to the Bar, particularly the Readers' Course. It cannot be said that Felicity Hampel is "As Shy As A Violet". More a combination of "Uptown Girl", "Dedicated Follower of Fashion" and "Hard-Headed Woman". Together with her husband George, Felicity has toured the world on teaching junkets singing syrupy duets such as "The Two Of Us" and "Islands In The Stream". As a solo performer, Felicity prefers "Love Me Do" and "These Boots Are Made For Walking" and, about George, the broken record of how he is "The Wind Beneath My Wings".

Although Felicity is now a judge, and will of course reduce her public profile accordingly, I am sure that Felicity will "Not Fade Away".

THE HONOURABLE MR JUSTICE JOHN WINNEKE

Unfortunately for the whole community, there is one honoured guest who is about to fade away. Indeed, I suspect he has reached the stage where he is "Running On Empty" and hums to himself "I Want To Break Free", "Release Me" and "Hit The Road, Jack". Together with his brother Michael they sing in unison "We Gotta Get Out Of This Place".

Yes it's true, "Another One Bites The Dust", our President Jack Winneke is to retire in a matter of weeks.

James Elliott has spoken eloquently about Jack's leadership qualities. These are no doubt due, in part, to the fact that he is the "Fortunate Son" of that great "Father and Son" team of Henry and Jack.

Just as importantly, Jack learned leadership on the sporting field. His description of the philosophical legacy of the Hawthorn coach John Kennedy has been often quoted. Jack said about Kennedy: "He gave us an understanding of the position one really ought to take in life. You have to realise all the time that you are only a cog in the wheel, you don't happen to be the wheel. That every person in the team was playing for something quite larger than himself."

So, very soon now, Jack, you can cease being a cog in that large wheel known as the Court of Appeal. You have well and truly earned the right to sit and look from afar "Watching The Wheels" turn round and round.

THE HONOURABLE KENNETH MARKS

Ken Marks has been watching the wheels for some time. He was farewelled as a judge of the Supreme Court in January 1994. In his heyday, however, Ken was a formidable barrister and, in particular, a great cross-examiner. On the day he was appointed a judge of the Supreme Court, the number one hit was Rod Stewart's "I Don't Want To Talk About It" on the A-side and "The First Cut Is The Deepest" on the B-side.

Both song titles are apposite to describe the way in which Ken would approach a witness who was reluctant to disclose the truth. He would cut him or her up into little pieces, beginning with his first question.

THE HONOURABLE EUGENE CULLITY

Like Jack Winneke, Eugene Cullity is the "Fortunate Son" of a great "Father and Son" team. He is also a mad keen surfer. As with all things in life, Eugene carried this passion through to the pinnacle of success, becoming the President of the Torquay Lifesavers Club. So what has that well-known "Beach Boy" been doing since he retired in 2000? No doubt he has been getting around on a "Surfin' Safari" and having "Fun Fun Fun" with his many offspring and grandchildren. We can well imagine this vital man standing on the beach, still dripping wet from an exhilarating surf, enthusiastically exhorting his tired grandchildren to get back in the water with him and "Do It Again".

THE HONOURABLE JUSTICE KEVIN BELL

Kevin Bell is partial to a "Bottle Of Wine". Not "Cheap Wine". He grows expensive pinot noir at his Mornington Peninsula vineyard. Most critics say he grows it very well.

Kevin's passion for Aboriginal rights and culture is well known. I can well imagine him working in the vineyard with his i-pod listening to songs such as Goanna's "Solid Rock", Midnight Oil's "Beds Are Burning" and Yothu Yindi's "Treaty". Good luck to anyone who is briefed for a defendant in a land rights claim listed before Kevin!

THE HONOURABLE JUSTICE ELIZABETH HOLLINGWORTH

Liz Hollingworth is the only honoured guest born in the 60s. She is the first judge appointed to the Supreme Court born in that decade. In respect of her appointment it can truly be said that "The Times They Are A Changing".

Liz is an intrepid traveller. This must have started from an early stage, because she was born in England, educated in Canberra and Geelong, and went to university in Perth and England.

Table 25 was singled out for special mention by Ross Ray QC. Occupants were Gordon Spence QC, Adrian Smithers QC, Leo Lazarus QC, Xavier Connor QC, Geoffrey Colman QC, Justice Ryan, Graham Fricke QC, William Kaye AO QC, Norman O'Bryan QC and Glenn Waldron AO QC.

Each year brings a new "Magical Mystery Tour" to an exotic destination. Liz can't wait for the next holiday to be "Up, Up And Away" and experience delights such as "Viva Las Vegas" and many a "Hotel California".

Many of her travels involve walking. Liz has been known to "Walk On" despite harsh conditions in the Himalayas and "Walk Away", or even "Run Through The Jungle", when confronted with the wildlife in Kenya and Zimbabwe. She has been seen "Walking On Sunshine" in all manner of places, including Zanzibar; and taking a "Walk On The Wild Side" in New York.

It is not just holidays which cause Liz to flee chambers as soon as she can. On Mondays she laments "I Don't Like Mondays" and by Wednesday it's all "Friday On My Mind". Of course, she has a study at her Daylesford retreat which is in constant use over weekends.

THE HONOURABLE CHIEF JUSTICE DIANA BRYANT

Like Liz Hollingworth, Diana Bryant spent a great deal of time in Perth. During this time, Diana developed the habits of a workaholic, a resulting reputation for always being late and became a West Coast Eagles fan.

Diana, as a Chief Justice, there is now no need to continue to "Take It To The Limit" and "Live Life In The Fast Lane".

Ross Ray QC Chairman of the Victorian Bar Council.

Instead, as any good Eagles fan should do, "Take It Easy" and delegate wherever you can. If you do this, you will achieve, "In The Long Run", that "Peaceful Easy Feeling" of knowing you will be on time, "Time After Time".

HIS HONOUR JUDGE WILLIAM MORGAN-PAYLER

We have heard of Bill Morgan-Payler's passion for fly fishing. As with many of us, our hobby or passion dictates our holiday destinations. In Bill's case, this means finding an appropriate body of water full of trout.

When Bill had young children, it was off to "Indian Lake" with the little ones.

Now that young children are not an issue, Bill can be more adventurous. He can be seen searching "River Deep And Mountain High" for "The River Of Dreams" full of big fat trout. Success is not always guaranteed. On "These Days" Bill hums "Cry Me A River" (full of trout please) as he gazes into the camp-fire pondering the one that got away.

HER HONOUR JUDGE SANDRA DAVIS

We have heard of the extraordinary multilingual skills of Sandra Davis. No doubt this influences her taste in music. One can well imagine Sandra's i-pod containing an eclectic mix of multilingual songs, or songs about the places where the languages she speaks are spoken. A walk or jog around the block might be accompanied by an international smorgasbord such as "Cherchez La Femme", "Quando, Quando, Quando", "By The Rivers of Babylon", "Back in the USSR", "Rock The Kasbah", "Turning Japanese" and "La Bamba".

MAJOR GENERAL GREGORY GARDE

James Elliott has said that Greg Garde is a very measured man who is not easily excited. Having been opposed to Greg, I agree. Instead of being "Born To Be Wild", Greg was born to be mild.

Anyway, "Congratulations" Greg on another gong. You said you were "Sorry" and didn't come to hear what James or I had to say about you. So, it's the "Sounds Of Silence" for you, and from me.

The Thin End of the Wedge

Alexandra Richards QC, Chair, Equality Before the Law Committee comments on the lack of appropriate behaviour at the Bar.

EVENTS transpiring at the Annual Bar Dinner held on 4 June 2005 cause me considerable concern that sexist criticism of female members of the Bar by male members remains a significant adverse cultural hurdle that the Bar has yet to overcome. It is unfortunate that the leadership of the Victorian Bar Council over the past seven years seems to have failed to redress this issue as noted by Marcus Priest in the *Australian Financial Review* on 10 June 2005.

The "Equality of Opportunity For Women at the Victorian Bar Report" by Rosemary Hunter and Helen McKelvie, which was commissioned and published by the Victorian Bar Council and launched in 1998, devotes a chapter (Chapter 3) to the subject of "Bar Culture and Organization".

The Report, itself, is instructive and sadly, in many respects, still highly relevant. On the topic of sexual criticism the authors, amongst many other things, had this to say:

> 3.3.7 While it seems that much of the sexist criticism of women takes place outside their presence, the fact that some of it is said to their faces, and that it happens at all, creates an atmosphere that is unwelcoming to female barristers.
>
> 3.3.9 As noted earlier, attitudes and behaviours of barristers are unregulated by easily enforceable rules or guidelines. The Bar Rules do contain a provision that arguably applies to sexist criticism of female barristers and judges:
>
> "A barrister shall not publish, orally or in writing or otherwise, an opinion of the professional characteristics of fellow barristers or any of them in a way or in such circumstances as to impugn the dignity and high standing of the profession."
>
> The sexist criticism described in the interviews clearly denigrates the professional credentials of those it is directed at, and as the Rule suggests, is damaging to the general image of the Bar. However, this form of criticism is obviously viewed as acceptable by at least a proportion of the Bar. …

Alexandra Richards QC.

Thus, the authors recommended:

Recommendation 2:

- That the Bar Council consider ways that Rule 11.1, to prevent sexist criticism of female members from undermining their professional credentials and thereby damaging the image of the Bar;
- That the Bar Council and senior members of the Bar take a leadership role in actively discouraging sexist criticism of female members, when it occurs within their earshot, and generally by their words and actions.

Rereading the 1998 Report also caused me to revisit a speech I prepared as then President of Australian Women Lawyers partly in response to the findings and recommendations contained in the 1998 Report. This is reproduced below. The

sentiments expressed in it appear as pressing and relevant now as they did seven years ago.

Despite the growth in the numbers of women entering the legal profession for some years now, it is clear (and the Victorian Bar Equality of Opportunity report and other studies confirm) that the matrix of discriminatory barriers which form part of the professional culture makes it difficult for women to participate fully in the work, aspirations, rewards and responsibilities of the legal profession. Whereas it was once commonly thought that it was all a matter of time it is clear that that view is wrong. The so-called "trickle-up" effect is not working.

At the launch of Australian Women Lawyers on 19 September 1997, Justice Mary Gaudron, in answering the question she posed "Why a women lawyers' association?" said:

> It is, I think, a tribute to the women's movement, generally, and to the growing understanding that equality is a complex issue that membership of a women lawyers' association, or even participation in the activities of those associations, is now regarded as professionally acceptable. It was not always so. Regrettably, it is not universally so even now.
>
> Certainly, 30 years ago in New South Wales, many of the women then entering practice rejected membership of the Women Lawyers' Association saying, "I'm a lawyer not a woman lawyer and I have no intention of being identified as such." It was an attitude born of the belief that I then shared, namely, that once the doors were open, women would prove that they were every bit as good, and certainly no different from, their male counterparts. Therein was an insidious untruth, the effects of which are with us still. The truth is that, in some respects, we are the same but in others we are different. And when we admit that difference, when we assert our right to be different, we are going to be significantly better lawyers. Moreover, the legal profession is going to be a better profession and the interests of justice are going to be much better served.

In her speech delivered to NSW Women Lawyers' Association on 15 October 1997, Justice Catherine Branson of the Federal Court, having referred to the complex forms in which discrimination may come and the degree of societal change that would be required before women and men would be equal participants in public life said:

> I have a fear, however, that a significant problem does arise because, as women in our profession, we are made to feel that we are outsiders — not of the mainstream. Those few women who do achieve prominence in the law provide no real challenge to this notion — we are easily categorised as exceptions; we do not exist in sufficient numbers to challenge stereotypes.
>
> There are, of course, other problems. Justice Gaudron, in the passage from her recent speech from which I have quoted, identified some of them. Others, I expect flow from what has been described as sex-based stereotyping of traits. That is, that men are generally perceived as naturally possessing the competency cluster of traits — strength, toughness, assertion, responsibility, authoritativeness, credibility, whilst women are seen as naturally possessing the nurturing cluster — caring, vulnerability, passivity, indecisiveness. That is, men are assumed to be credible and competent, (i.e. likely to make good lawyers) until they demonstrated otherwise; women are seen as lacking in assertiveness and credibility, (i.e. unlikely to make good lawyers) until they demonstrate otherwise. Thus, even when women remain in the profession, there is a tendency for them to be easily siphoned off into supportive, back-room roles whilst their male colleagues are encouraged into more prominent roles.

Thus also found the Victorian Bar Equality of Opportunity Report. I commend that Report to all who have not read it as it does not only hold relevance for the Victorian Bar. Any lawyer who reads it will immediately identify those traditional traits and practices identified in it as posing the most significant hurdles for women as being endemic throughout the whole of the legal profession and which are, in the main, lauded by it. For all practical purposes women are outsiders, not of the mainstream, and experience feelings of isolation and consequent lack of self-esteem.

That is not to say, however, that my reading of the Report caused me to respond with outrage. Indeed, there are few references in the Report to overt acts of discrimination. Rather, it is the matrix of numerous and subtle ways which operate at the various interlocking planes of life at the Bar which come together to form a seemingly major hurdle for women in practice: those planes are the clerking system, one's peers, Bar culture and traditions, solicitors' briefing practices, rules of seniority, attitudes towards parenting responsibilities, courtroom experiences both from the Bench and one's opponents. My reaction to the Report was one of great sadness: for those women who do not manage or are not lucky enough to find a supportive enclave it would be difficult to imagine longevity in their chosen career.

One particular aspect of Bar culture identified in the Report is the high level of sexist criticism, jokes and comments which occurs in conversations between male barristers. The Report noted of a study by Kanter that "tokens, highly visible because of their low numbers", were persecuted for "flaunting success", and that there was an active backlash against those who were seen to "advance too fast" within an organization. Also noted is the observation of the sociologist, Cynthia Cockburn, that an undercurrent of male resentment towards women may prevail with some men feeling "damaged by the equality movement and the influx of women". A further but related aspect identified in the Report was the higher level of scrutiny experienced by women from their peers, members of the judiciary and the legal profession generally (again, associated with increased visibility amongst the male-dominated population).

A Chief Justice of the Supreme Court of Victoria wrote:

> A model woman according to a very prevalent conception of the character is little better than an amiable idiot; and any woman who evinces strength of mind and vigour of intellect becomes an object of derision and a butt for the feeble sarcasm of the mentally destitute of the other sex.

One wonders what that Chief Justice meant by "mentally destitute"? Is that an apt description of some if not many male barristers? I find it somewhat of a conundrum, for if the description is not correct, what motivates intelligent men to engage in such conduct?

Some of you are no doubt wondering who that Chief Justice of Victoria might be? The answer is Chief Justice George Higinbotham prior to his appointment to the Supreme Court and writing in the *Argus* in 1858 — more than 140 years ago. I just hope not too many people still subscribe to the trickle-up theory.

Hillary Clinton, in her capacity as Chair of the Commission on Women in the Profession commissioned by the American Bar Association, reported to that Association in June of 1988. I quote selected extracts:

> ... the Commission found ... that although the profession has made room for women at an entry level, certain attitudinal and structural barriers exist which subtly limit women's opportunities for advancement.
>
> Attitudinal barriers subject women to pressures which lead to discomfort and often rejection in the workplace. An example of the attitudinal barrier is the recurring testimony that women enter the legal arena and are faced with negative presumptions: women must prove their competence, while men must prove their incompetence. Excessive scrutiny of women was a theme heard over and over again. The Commission also found that barriers exist in the very structure of the profession which has not been altered to reflect the emergence of women as members of the profession or the basic changes in society that have occurred in the past 20 years.
>
> The Commission is concerned that some men apparently continue to have problems separating the image of women as romantic possibilities from the reality of women as professionals. These men say they don't trust themselves working with young, attractive women or claim their wives don't approve ...
>
> Witnesses also report biased treatment within law firms and corporate counsel offices. Recurring testimony was received on the topic of mentoring — women's difficulty in establishing mentoring relationships with senior male attorneys. A shortage of mentors is particularly acute for minority women who rarely have any role models and face additional sources of discrimination from other lawyers. Some senior male attorneys' discomfort in establishing mentor relationships with women may be due to fear of sexual overtones or unfamiliarity with working with women.
>
> Some women also report being frozen out of firm discussions and professional socialization. The exclusion may stem from discomfort or uncertainty about how to engage in camaraderie with a woman, but acquiescing in this behaviour only perpetuates the unfamiliarity and discomfort. Women lawyers are often not included when colleagues go out for lunch or drinks after work where business is going to be discussed. Male colleagues may conduct work discussions or professional meetings in settings that are likely to exclude women, such as clubs that do not accept women as members. These settings often provide the starting point for development of business contacts, professional trust and collegiality.
>
> One subtle but significant form of bias women experience concerns the greater degree of scrutiny given to their work and their work styles. Many women who testified before the Commission reported that they still have to work harder, do better and make fewer mistakes in order to receive even the same degree of professional respect received by men of average skill, competence and diligence.
>
> Today, the structures and attitudes of the legal profession — developed in an era that no longer is representative of American society — pose great problems for women lawyers. These cultural norms are not often thought about by the group that has defined and most often fits them, but for women lawyers, these norms represent the subtle attitudinal and structural barriers encountered on a daily basis discussed throughout this report. They are the problems that have no name, yet most men do not even understand the description of them as problems, but rather perceive them as the inevitable and necessary norms of the profession to which all members must adapt.

One may perhaps understand why a male lawyer may feel uncomfortable accompanying a female practitioner to lunch. At a recent gathering I attended with eight women barristers present, all recounted having at one time or another occupied a particular set of chambers where their male neighbours routinely lunched together but never thought to include or invite that woman barrister who would be the only barrister left in the relevant area of chambers. Issues such as sexual overtones and innuendos one would have thought have little bearing in a crowd. One may ask why such an exclusionary practice?

On behalf of Australian Women Lawyers I attended the Australian Women's Round Table discussions in Canberra recently where 52 peak women's bodies were represented. No male was present but for a brief session in which the Treasurer visited to promote the GST. It occurred to me at that conference that women spend a not insignificant amount of time effectively preaching to the converted, namely, other women.

But who are in a better position to speak out against the attitudinal and structural barriers to which I have referred tonight than men? First, men are able to penetrate those traditional male bastions wherever occurring. Second, it is a natural and well recognised strategem to employ the use of an independent speaker to a cause where the listeners are themselves being subjected to potential criticism. Thirdly, men are more accustomed (unfortunately) to hearing and listening to the voice of the "authoritative" male. Male mentors hold much sway with their male pupils who tend to emulate their mentor's conduct. Well respected men similarly hold much sway with their male peers. And finally, men presently occupy the most powerful positions within our legal community and are able to influence accordingly.

I am also conscious that the men present tonight are in varying degrees "converts" (if I might use that word) already, as is evidenced by your presence. In saying that, I do not disregard the efforts that I know certain of you, in particular, have made to redress the imbalance and I thank you for that. I do ask of you tonight that you continue to champion the women's cause within the legal profession.

One may ask why? The legal profession is an extremely competitive arena. Men are presently well placed within it. Why should they make room for or do anything to relinquish that position? The reasons are simple. There is mounting evidence that disaffection with the legal profession and exodus from it is not peculiar to women. Both the accounting and the legal professions are noticing that men too are rejecting the private profession for corporate and other sectors of the marketplace. But perhaps more importantly, to hold relevance, respect and integrity there are increasing demands upon the legal profession to reflect community values and expectations of it. As Justice Mary Gaudron said, to allow for the difference between men and women lawyers will make the legal profession a better profession and the interests of justice are going to be much better served. Similarly, the ABA Commission found that:

> If the profession is to retain and attract competent, well-rounded people — people who are interested in being more than 24-hour-a-day workaholics and people who derive personal and professional growth from outside contacts — it is important that the American Bar Association, as the voice of the legal community, take a good hard look at where the profession is headed. One witness noted that the issue here is simply the survival and sanity of the legal profession.

For a start, I invite the men here tonight to take up the gauntlet. Australian Women Lawyers will assist you in any way we can.

I conclude with the words of Alfred Lord Tennyson: "The woman's cause is man's; they rise or sink together."

Opening of the Refurbished Owen Dixon Chambers East

Some nostalgic remarks by SEK Hulme QC, on Wednesday 4 May 2005

FORTY-FOUR YEARS ON

JUST on 44 years ago, on 16 October 1961, this building was opened by a man who had at an early age attained fame as a member of this Bar, before gaining greater fame as Prime Minister of this country. At the time he opened this building Mr (as he still was) RG Menzies QC had been Prime Minister for just on 12 years. He would serve for just over another four years before announcing, one January morning, right out of the blue, his own immediate retirement. The time was entirely of his own choosing, something I think not true of the retirement of any other Prime Minister this country has had. Nor does it seem likely to be true of any Prime Minister in the near future. Some old friends got together and put up the money to buy him a house, for there was little superannuation for parliamentarians at that time, and Menzies had an old-fashioned belief that a Prime Minister ought not to leave the Lodge with more money than he entered it. Times have changed. At his retirement in 1966, it was 27 years since, at the age of 44, he had first become Prime Minister, and 34 years since his engagement in private practice as a barrister had largely ended, in 1932, when he was aged 37.

Menzies had more to do that day than declare the new building open. He had also to unveil the portrait by Mr A.D. Colquhoun, which today hangs in the approaches to Owen Dixon Chambers West, of the great judge for whom the building is named. The connection between Menzies and Dixon was of long-standing. When he went to the Bar in May 1918, Menzies read with Dixon, at that time the leading figure of Melbourne's junior Bar. (Hayden Starke was technically a junior, having for some years refused to take silk because to do so might advantage him at the expense of other barristers serving in World War I. But he was the recognised head of the Victorian Bar, and was hardly thought of as a junior.) Throughout the 1920s Menzies and Dixon appeared together and against each other. Throughout the 1930s Menzies regularly appeared before Dixon in the High Court. In the course of all this Menzies had formed a vast admiration for Dixon's luminous intellect. When Dame Pattie Menzies famously said to him, "Bob, you must remember that Owen Dixon is not God", his reply was instant: "No, my dear. But only just." In 1952, as Prime Minister, he had appointed Dixon to be Chief Justice of the High Court, thereby putting forever out of reach what many who knew him best thought had been his own ultimate ambition.

I want to say something today of these two famous figures, and something of a third and less famous figure whose name is to be remembered with honour among barristers.

R.G. MENZIES AT THE BAR

The Australian zest for politics as a blood sport should not be allowed to blind us, as members of the Victorian Bar, to Menzies'[1] quite extraordinary career as one of us.

In March 1920, in his second year at the Bar, Menzies appeared on his own in the High Court, for the *Federated Engine-Drivers and Firemen's Association of Australasia*.[2] I hope I may be permitted to note the framed certificate, much prized by my grandfather and now hanging on a wall of my home, recording his membership of that union from 1886 until his retirement in 1929. How Menzies came to get the brief I am not aware. Young men (there were no young women) did not get High Court briefs on their own in those days. The later Dr E.G. Coppel QC , who was to develop a very large practice and was twice an acting judge of the Supreme Court of Victoria — a story for another day — told me once that he had been at the Bar for ten years before he ran a Supreme Court trial on his own. And there was Menzies in the High Court on his own in his second year, not consenting or anything formal of that sort, but appearing for the claimant in a very serious case. His instructing solicitor was H.H. Hoare, of whom I have found nothing save the description "discerning".[3] The

Opening of Owen Dixon East refurbishments.

SEK Hulme QC officially opening the refurbished Owen Dixon East.

young Menzies was opposed by the doyen of the constitutional law Bar, Sir Edward Mitchell KC, with him the very senior junior John Latham, later to be Chief Justice of the High Court. Dixon appeared for the Commonwealth, intervening. At the end of the day no one had been entirely successful, but Menzies had won more of the disputed points than anyone else.

In July of the same year Menzies appeared on his own in another case before the High Court, sitting in Sydney this time. Again the solicitor was the discerning H.H. Hoare, this time acting for a different union. It was just over two years since Menzies had begun to read. The case concerned an attempt by the Commonwealth to increase the range of its control over industrial conditions. Not everything changes. The union supported the increase of Commonwealth power. Some things do change. It is said that Menzies appeared on his own because more senior counsel had advised that the case was hopeless. And certainly a long line of High Court and Privy Council authority stood in his way. He was opposed by a bevy of silk and experience, Sir Edward Mitchell KC and Latham, and the Sydney silk Flannery KC leading the young Evatt. Present on the court was Mr Justice Starke, who had gone to the High Court still a junior: a fierce and irascible man of most powerful presence, a man of whom Sir Owen Dixon said that "(He had) a forensic force as formidable as I have seen".[4]

It is of course always of assistance to counsel to have some indication of how the court is thinking. At the same time, most young barristers would find it of not much assistance to put a proposition and have Hayden Starke indicate fairly clearly the way he was thinking by the thunderous interjection "That proposition is nonsense." Pretty powerful stuff to dish up to a young man who had been at the Bar for two years. But Menzies was no ordinary young man. He had — as the world was to discover — a massive confidence and personal presence of his own. He seemed not at all put out — might even have trailed his coat for such an intervention, with a reply ready for it. For strong legend tells us that the reply came instantly: "Yes, your Honour, the proposition is nonsense." The admission did not betoken surrender. Far from it. Menzies continued straight on: "It is nonsense that I am compelled to speak, by the decisions of this court. If the court will give me permission to attack those decisions, I shall cease to speak nonsense." Whatever precisely he said, the court allowed him to mount his attack.

The case ended on 2 August 1920. On 31 August the Court announced its decision. By a majority of 5 to 1, Menzies had won. The earlier cases had been overruled or distinguished out of existence or ignored. Provisions in the Constitution giving powers to the Commonwealth were to be interpreted according to their terms, without any implication that there were certain undefined reserved areas in which State power was to prevail. Menzies had won the *Engineers Case*,[5] the greatest constitutional case Australia has had, and now as then one of the fundaments on which has rested the steady growth

of Commonwealth power at the expense of the States. After two years at the Bar, Menzies was never a struggling junior again. In addition to his constitutional work he instantly developed a wide junior practice. In 1922 Latham and Dixon took silk, and in his fourth year at the Bar Menzies became first choice in Melbourne as junior in constitutional cases in Melbourne. His general practice became enormous. In 1925 Latham disappeared into full-time politics, and in 1929 Dixon went to the High Court. Menzies promptly took silk and overnight became Melbourne's top constitutional Queen's Counsel, with the aging Sir Edward Mitchell edged increasingly to one side. He was 34. As a silk, he kept his wider practice effortlessly.

Menzies had already, in 1928, found time to become a member of Victoria's Legislative Council and an Honorary Minister. His private practice continued. In 1932 he became Deputy Premier, Attorney-General, and Minister for Railways. Thereafter, though he did from time to time do some work in private practice, his private practice was largely at an end; largely ended in 1932, when he was 37, and had been at the Bar for a total of 14 years. In 1934 he was Acting Premier for some months. Not much time for private practice there. And still less time from September 1934, when he entered Federal politics as member for Kooyong, and at the age of 39 became Commonwealth Attorney-General and Minister for Industry immediately upon his arrival in Canberra. For the rest of the 1930s and early 1940s his court work was limited to appearances for the Commonwealth in the High Court and the Privy Council. In the years of opposition from 1941 to 1949, between his two Prime Ministerships, he did some occasional private work, though his responsibilities as Leader of the Opposition prevented his doing much. I remember his appearing for a jockey in a racing appeal about 1946. Asked by a journalist why he was appearing for the jockey, he said simply "I could do with the money." After becoming Prime Minister again in 1949, he appeared in court only once more: in Melbourne, in 1964, appearing as Prime Minister, unrobed, to speak in the High Court at the retirement ceremony for Sir Owen Dixon.[6]

Some of you — not many, I am afraid, for the years pass — may remember old Mr Gubbins, of the old firm of Snowden Neave and Demaine. In my year as an articled clerk he lectured at Melbourne (there was no other) University, in Professional Conduct. As a younger man, old Mr Gubbins (as we knew him) had briefed Mr Menzies regularly. Whenever he wished to illustrate the proper relationship between solicitor and barrister, he used an example involving Mr Menzies. To the end of his days, whenever the firm had a brief suitable for Mr Menzies, the brief was prepared and taken by Mr Gubbins to Jim Foley, Menzies' clerk, to offer it first to Mr Menzies. Only after Foley had confirmed that Mr Menzies' responsibilities in Canberra regrettably prevented his accepting it, would Mr Gubbins inscribe the name of some other barrister, and hand the brief to Foley.

Menzies loved the Bar. Even after he became Prime Minister he retained his chambers in Selborne Chambers, the principal home of the Bar from 1882 until the building of Owen Dixon Chambers. Large chambers they were, at the Chancery Lane (Little Collins Street) entrance to the building. Because of his very special position as Prime Minister Menzies was, highly unusually, given permission by the Bar Council to sub-let them. The first time I met the now Sir John Young, formerly Chief Justice of the Supreme Court of Victoria, was when I went to sign the Roll of Counsel prior to going off to Oxford in 1953. I found him in Menzies' chambers, of which he was the current sub-lessee. When on my return I first met the now Sir Ninian Stephen, later Justice of the High Court and Governor-General, I found him in Menzies' chambers, he having succeeded to the sub-lease when John Young got chambers of his own.

It may please or at least amuse an increasingly prevalent sector of the Bar to note that the first female to come to the Bar and actually proceed to read, Miss Beatrix McCay (later Lady Reid, wife of Victoria's Attorney-General Sir George Reid) read with the young Mr RG Menzies.

SIR OWEN DIXON

Sir Owen Dixon's career was more largely confined to the law, though with significant forays into other realms. In the early years of World War II, while still a judge of the High Court, he had a directing role in relation to the Australian wool and shipping and insurance industries, all done in out of court hours. In 1942, after Pearl Harbour, he took leave from the court and accepted Prime Minister John Curtin's request to represent Australia in Washington, as Minister Plenipotentionary in that critical period. He had numerous contacts in Washington, and Australia's voice there was probably more powerful than at any time before or since.

It has been found not altogether easy to reconcile all these non-judicial activities with views expressed by Dixon from time to time as to the desirable limits on non-judicial activities of Justices of the High Court. In later years his always acute and at times tortured conscience led Dixon to say at a conference discussing extra-judicial activity by judges, where his activities were being used as examples of what must be seen as proper because they had been done by Dixon, "I should not like it to be thought that I necessarily approve of all that I did at that time." War produces unusual and stark situations, and can demand responses not appropriate in other conditions. Later he acted as Mediator for the United Nations in an attempt to resolve the impasse between India and Pakistan, over Kashmir. He failed — but he and his effort are remembered with honour in both countries. I note that the attempt currently being made to at least ameliorate the dispute is proceeding along the lines that Dixon indicated as containing the greatest hope of success.

Important though all these things were, it is as lawyer and judge that Dixon is remembered. As barrister, he attained in the 1920s a position of unrivalled authority at not just the Victorian but the Australian Bar. Menzies' summing-up may suffice:

Dixon was a Justice of the High Court from 1929 until his appointment as Chief Justice in 1952. As to that appointment, let it suffice to record the cable received from Justice Felix Frankfurter of the Supreme Court of the United States, saying simply, "Law is enhanced." He remained Chief Justice until his retirement in April 1964. Throughout that long period he was recognised in Australia and throughout the common law world as a judge without peer.

> Those who are of a newer generation will, I think, never quite understand the absolute dominance that your Honour exercised at the Bar. Even at the Bar you were not only a point of reference, but also a voice of authority. To appear with you was a liberal education; to appear against you was calculated to reduce any normal human being like me to the depths of despair. I have always said — and with due apologies, Sir, I repeat it — that in my time at the Bar you were the greatest legal advocate I saw either here or abroad.[7]

Dixon was a Justice of the High Court from 1929 until his appointment as Chief Justice in 1952. As to that appointment, let it suffice to record the cable received from Justice Felix Frankfurter of the Supreme Court of the United States, saying simply, "Law is enhanced." He remained Chief Justice until his retirement in April 1964. Throughout that long period he was recognised in Australia and throughout the common law world as a judge without peer. He was honoured by Oxford, by Harvard, by Yale, and by many other universities. He was awarded the Order of Merit, the only person ever so honoured for services only to the law. He could seem like someone from an earlier era: and then deliver a judgment that showed him very much someone of this era too.

More than any person I have seen, Dixon became in his later years a man apart. He had been there so long, and with such distinction, that other men, even the very grand and important, deferred to him automatically, as if he were an honoured friend of their father. In a paper I once wrote on him, I noted that in Dixon's later years a very few persons — Menzies, his fellow High Court judges, ex officio as it were, one or two others like his contemporaries Sir Edmund Herring and Sir Charles Lowe — called him Dixon, while to the rest of humanity he was "Sir Owen". I said that his wife Alice Brooksbank, whom he married in 1920, was at that time perhaps the only person in the world who called him Owen. Sir John Young, who had been his Associate, added a gloss for the care of which I have always been grateful: "I think there was also a cousin in Wales."[8]

Although — sadly — Dixon was never on comfortable terms with Sir Garfield Barwick, the pre-eminent High Court advocate in the later part of Dixon's era as a judge, and his successor as Chief Justice, it was Barwick who best summed up the entire achievement:

> In the case of other judges, appointment to the High Court of Australia brings lustre to their name. In the case of Owen Dixon, appointment to the High Court of Australia shed his lustre on the Court.

It all sounds stifling. In fact Dixon was the opposite. To the young especially he was greatly kind, in his court and outside it. Laughter, including his own explosive laugh — not a cackle, not a giggle, but with elements of both, and certainly high-pitched — followed him everywhere, in his court and outside it. Truly he was a man for the ages.

It has been interesting to notice, in the forty years since Dixon retired, certain later High Court judges and judges from other courts (almost all Sydney-based, as if looking south and unable to believe that anything good could come out of Israel) explaining matters along lines that "Yes he was of course very good for his era. We all recognise that. But nowadays we know much more about judging, and we have a wider range, so our wisdom and discernment exceeds what was possible in his time." All very self-satisfying no doubt, though the reader may be reminded of the sardonic remark made to the High Court by one of its early prominent advocates, Sir Julian Salomons: "It shows the advantage that a living mouse has over a dead lion." For next one sees later judges again leaping over the soon-forgotten successors, to look back and see Dixon's views on this or that, and Dixon's manner of dealing with such matters. One may I think feel a certain confidence that when another Dixon does come along we will know because others, not the new Dixon himself, will assume the role of John the Baptist and tell us so. I have not to date heard anyone making such an announcement about anyone else.

THE VISION AND THE SHIFT

The whole idea of shifting from Selborne Chambers and building a new home for the Bar was a visionary one. Instrumental in carrying it through were, giving them their later titles, Sir James Tait, Sir Reginald Smithers, Sir Murray McInerney, and Sir Oliver Gillard (Can it true that he left a son called Eugene, as the Press keeps telling me?). The continued thanks of the Bar are due to these and others, for their courage in embracing the vision, and their fortitude and strength in triumphantly realising the vision through scepticism and difficulties. It is pleasing to remember that most of them had some reward, in having opportunities to make long speeches about it and — as those who attended the ceremonies for the opening of Owen Dixon Chambers in 1961 and the opening of the four-floor extension in 1964 will remember — making the most of those opportunities.

The cost of the land and building of Owen Dixon Chambers had been estimated at $925,000. The cost turned out at $787,466.[9] For another $120,000 they could have installed air-conditioning, but the extra cost was seen as perhaps a bridge too far. In the end far more money was spent by tenants installing air-conditioning room by room, and producing a sadly pock-marked building. There were at the time of opening nine floors (plus the car-parking basement). Initially some three floors were let out to tenants including the Department of Justice and, somewhat daringly for barristers, the head office of Vogue Australia. Some six floors were available for barristers; 194 rooms in all, of which 190 were let at the time of moving in. Tenants were coming both from Selborne Chambers and from outposts which the Bar had leased and was now giving up, in Saxon House and Eagle Star Chambers. Lest anyone think that four empty rooms made the financial position perilous, the Report of Directors noted the directors' expectation "that these will be taken as new men start practice".

New as the building was, things were not to be too luxurious. Throughout the building the corridors and lobbies were finished in floor tiles. Not until — if I remember the timing correctly — the opening of the four further floors built in 1964 was it realised that carpeting them was much more comfortable, added to the appearance of the place, and would pay for itself in lower cleaning and maintenance costs.

The shift took place in late June and early July 1961. The main operation was handled by Wilsons the Carriers, from Malvern. That business was owned by Ian Wilson, who later attained a dubious fame as President of Richmond Football Club when that club was winning some premierships around the early 1970s: and when the club was beaten so magnificently by Carlton in the Grand Final in 1972. Octa, as the world called him, more than once told me of the great amusement his men had had in seeing the furniture being shifted. His men were accustomed to shifting company head offices, and it is well-known that the people who inhabit company head offices are accustomed to the company providing them with new furniture when they shift into new premises. If anything is shifted, it is only

the exceptionally good. Some new tenants of Owen Dixon Chambers did indeed buy new furniture, but that was not the general way of the Bar. Most barristers thought shifting into a new building quite radical enough, without adding the extra dangers of new furniture. So off to the new Owen Dixon Chambers went tired old desks and chairs and carpets whose condition showed that they had rendered such long and faithful service in Selborne Chambers (perhaps even in its predecessor the old Temple Court) as to merit their passing to peaceful retirement rather than to further use. But for that release they had to wait a few years longer.

I was at the time concerned in the affairs of the Melbourne art gallery and design group and art school and office furniture manufacturer, all trading as Gallery A, run by Max Hutchinson. Max was a person of considerable personality and force: he would later sell Jackson Pollock's *Blue Poles*, for what was considered a sum so enormous as to be a political issue, to his former Gallery A employee Jimmy Mollison (a connection the commentators never got onto) as head of the newly established National Gallery of Australia, in Canberra. Max convinced me to let Gallery A organise my room, on the 6th floor. Thereafter plaintive bleats like "But Max, no barrister has ever had a white carpet" were totally unavailing. So there, amid a world of old furniture of about 1900 and earlier, was one room with everything new, from the white carpet to the abstract Janet Dawson on the wall to the Gallery A desk and bookshelves and side cupboards, all of which Gallery A furniture is now subject to honourable intention to be passed in due course to the National Gallery of Victoria as part of its collection of Australian furniture. After the opening ceremony people asked to visit the room and look at it. The then arbiter of taste in Australia, the *Women's Weekly*, even published a small article and a tasteful picture in colour.

A QUIETER MORE RETIRING MAN

So far I have spoken mainly of the high and the mighty. I want next to recall something of a quieter more retiring man.

It is well known that their individual right to control their own individual lives makes organising barristers rather like herding cats. Given that Barristers' Chambers Ltd had at the relevant time no staff of its own, and given the propensity of barristers to defend the rights of people, including themselves, it may be accounted remarkable that the whole allocation of rooms took place so peacefully. That this was so was due to one man. Indeed for several years that one man handled all the administrative matters of BCL, in the midst of carrying on a highly successful practice.

Those whose activities in their profession include reading the law reports will see in the 1950s and 1960s the frequent name R.L. Gilbert, mainly in cases to do with constitutional law and revenue law (stamp duty, death duties, land tax, income tax) though in other areas also from time to time. In 1950 and 1951 one of his tasks was preparing what became the 1952 Rules of Court of the High Court, which survived in use until last year.

Bob Gilbert had been equal dux of Melbourne Grammar School (they call it Head at the Grammar School, but they mean Dux) in 1929 and 1930. He won the Latin exhibition at Matriculation. At the University he resided in Trinity College, where he continued his school friendship with the later war correspondent and author Chester Wilmot. Reading Arts and Law, he won first class honours in Classics and the Exhibitions in Constitutional Law and Jurisprudence. In World War II he served in the AIF, reaching the rank of Captain before being part of the doomed force sent to a hopeless task in Greece and then on to Crete, where he was captured. He then spent four years in German prison camps.

Gilbert returned to Australia physically healthy, but certain aspects of his four years incarceration had produced demons deep inside. At the Bar he practised very much in his own style. Almost certainly as a result of the war, he refused to take any position where he would be required to exercise authority over others. He would not employ a secretary – or even use a communal typist, which most barristers were beginning to do. Every document he sent out went out in his own somewhat idiosyncratic handwriting. And many documents there were, for he was a highly competent barrister, with a very large practice. Ludicrously well qualified by ability and practice to take silk, he refused to apply, and was perfectly happy to be led by people who knew much less about the field than he did, and were not as clever. He refused to consider judicial appointment.

In his heyday as a barrister Bob normally did not drink at all. Then very occasionally — perhaps in the Bar's drinking hole at the bar in Menzies Hotel on the last day of the year — he would almost deliberately drink until he became very very drunk indeed. He was the nicest of drunks — indeed drunk or sober it seemed impossible to annoy Bob Gilbert. These very rare occasions would normally conclude with his refusing all aid to get home, and returning unsteadily to his own chambers and quietly passing out; no doubt waking at some time or other during the night and getting a taxi home.

From the formation of BCL in 1959, Bob Gilbert acted as Company Secretary, handling in the midst of a very large practice, without a secretary, the entire administration of the company. In the early part of 1961, there was added to all this the handling of all applications from those intending to go to Owen Dixon Chambers. He recorded the details in his own handwriting, on his own little notes, with his own little charts, and worked out the allocations which would give as many people as possible precisely what they had sought, or as close to it as could be achieved. He did it all on his own. When crunch time came, to the best of my belief the whole allocation passed without complaint, as indeed did his entire handling of all the company's administrative matters. It was a remarkable achievement, and it got the new building off to a very comfortable start.

Late in his career, in 1978, Gilbert accepted appointment as the sole member of the Victorian Taxation Board of Review, deciding in a peaceful and quiet manner disputes in a field that was so much his own. He held this position until 1985. In his last years alcohol played a larger part in his life than before, and his life went somewhat awry. Yes, indeed there were demons inside this very nice man. His death in 1988 concluded a life of the greatest promise, impaired by the hazards of war, but lived with grace and dignity throughout. He was a true servant of the Bar.

THE FORMAL OPENING

Mr Chairman, it has long been the ambition of the Victorian Bar, and a most honourable ambition, that no person shall be prevented from coming to the Bar by being unable to produce, whether owned or borrowed, a capital sum to buy chambers. That is only possible if the Bar can continue to play a part in the provision of chambers for persons wishing to lease. I am aware of obstacles which in recent years have been placed in the way of ensuring this. This is not an occasion for pursuing that matter, even if I were so minded. I say only this, that if the Bar is to fulfil its hoped-for role in this regard, it must offer

adequate and satisfying chambers. The Bar will not, I hope, reach the full commercial stage of in-built goldfish tank and the column that does not quite reach the ceiling. But a certain standard of comfort and convenience and communication services is required. This building, its creators' pride of 1961, was no longer delivering it. It was getting tired. It needed revitalisation. It has received it in full measure, and all who have planned and worked in the project are greatly to be congratulated. They deserve the thanks of the whole Bar. I express the gratitude of all, I hope, to those past and present who have served you in relation to this building.

I record my deep gratitude at the invitation to perform the role I have today. With great pleasure I declare open the refurbished version of the original Owen Dixon Chambers, latterly called Owen Dixon Chambers East. And if as I have been informed this little cord is the right one to pull, I will now further reveal the plaque commemorating this very pleasant occasion.

Notes

1. There is no satisfactory answer to the problem of where to put the possessive apostrophe on the name Menzies. It is a singular name, and a zealot might insist on Menzies's, as with St James's. In my view the case is one where the ugliness of the triple z . . s . . s justifies putting the apostrophe after the "s" of the name, just as is done for the same reason with Jesus. A good revivalist churchman, Menzies would I am sure have appreciated the example.

   It has been pointed out to me that in Scotland, where Menzies is pronounced Mingiss, this triple ugliness would not arise and the apostrophe would on normal rules have its own "s", as in Menzies's. (Mingisses). The curious result is that in this instance good English grammar seems to depend on whether one is talking to a Scotsman or an Australian.
2. *Federated Engine-Drivers and Firemen's Association of Australia* v *Adelaide Chemical and Fertilizer Co Ltd* (1920) 28 CLR 1.
3. Dean *A Multitude of Counsellors* (1968) at p. 195.
4. Obituary following the death of Sir Hayden Starke, delivered in the High Court on 16 May 1958, and published in 97 CLR at p. v.
5. *The Amalgamated Society of Engineers* v *The Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
6. See 110 CLR at p. v.
7. 110 CLR at p. vi.
8. I have since been informed that I was wrong, anyway. There remained one or two old school-friends who called him Owen, and two or three English lawyers including Lord Pearce. Felix Frankfurter sometimes addressed him as Judge, sometimes as Owen Dixon. But especially in the Australian context, the thrust of my remark remains. Certainly I never "heard" anyone address him as Owen.
9. See Report of Directors of Barristers Chambers Ltd dated 9 November 1961, presented to the second annual general meeting of the company held on 24 November 1961.

The Revolution of 1952 — Or the Origins of ODC

By Old Anonymous

IN 1947 the Committee of Counsel, as it was then known, said in its Annual Statement that it:

> has had continually before it the problem of accommodation for members of the Bar.

In 1948 it said that it:

> has been gravely concerned at difficulties Counsel have experienced in obtaining accommodation.

In 1949 it said that it:

> has been continuously concerned at the shortage of accommodation for Counsel.

In 1950 it said that:

> the question of accommodation for members of the Bar has been continuously under the consideration of the Committee.

In 1951 there was no mention of accommodation in the Annual Report. In fact in those five years when the number of counsel was increasing substantially as returned servicemen came back to or qualified for the Bar the Committee failed to find accommodation for a single barrister. For the roomless counsel this meant that they had to roam Selborne Chambers reading briefs and conducting conferences on seats along its long corridor. At times they would get to use other counsel's chambers when the incumbents were in Court or away on circuit. Clerks would allow the roomless to use their phone and lucky readers might be allowed to overstay their reading periods, but most literally had nowhere to put a phone let alone a table and chair.

By the time that elections were to be held in 1952 matters had come to a boiling point and the young men of the Bar (unfortunately there was then only one woman at the Bar) took matters into their own hands. They were satisfied that the Committee had no genuine intention in the foreseeable future of doing anything about accommodation. They held meetings, consulted senior men who were sympathetic to their cause and ran a ticket

Owen Dixon Chambers East before refurbishment.

for the Bar elections. Despite tutt-tutting from some ultra conservatives who said it wasn't cricket, old boy, the ticket was completely successful. The reigning Chairman and Vice-Chairman were thrown out, as well as others, and there was a transfusion of new blood in the persons of Ashkanasy QC, Smithers QC, Norris QC, Mclnerney, Collie and Connor.

The result was startling. The new Committee formed an Accommodation SubCommittee consisting of Ashkanasy QC, Smithers QC, Anderson and Connor. A company styled Counsel's Chambers Ltd. was formed to control any accommodation obtained. Initially some limited space was found and occupied in Saxon House in Little Collins Street near Selborne Chambers. This space grew over the following years and more and more barristers found accommodation there, albeit accommodation shared by two or three to a room. Building construction had virtually ceased during the war years. In the post-war period accommodation in the city was extremely scarce, and regulations made it very difficult to obtain possession of leased premises from existing tenants. Counsel's Chambers Ltd obtained a concurrent lease of the 5th floor of the Eagle Star Building at 473 Bourke Street and took proceedings for possession of the various rooms there. Over time 22 such rooms were made available. By the end of 1954, in excess of fifty Counsel had been found accommodation.

By the time of the Annual Report of 1954–55 the Committee of Counsel had changed its name. It was now the Victorian Bar Council, the same members being again re-elected. Despite its considerable measure of success, the Council did not rest on it laurels.

It reported:

> The steady increase in accommodation available during the year has just about kept pace with increased demand. The accommodation position for the Bar generally, however, is still quite unsatisfactory. Practically all rooms in Saxon House are being shared; in three rooms there are three Counsel. So long, therefore, as Counsel desirous of separate rooms are forced to share Chambers it cannot be said that the accommodation problem for the Bar has been solved, and we can claim no more than to have overcome the most acute aspects of the matter.

In 1956–57, through the good offices of Eugene Gorman QC, Barristers' Chambers Limited secured a lease of considerable space on the fourth floor of Equity Chambers, providing accommodation for 14 barristers, and some additional accommodation was obtained on other floors of Saxon House.

But about this time the notion of "a future home for the Bar" first came under serious consideration, and during 1957 and the early part of 1958 architects were engaged, sketch plans drawn up and the financial aspects of the proposed building were investigated. On the 30 May 1958 a special general meeting of the Bar was held at which the details of this planning were placed before the general membership of the Bar. A hundred and fifty attended and the Acting Chairman, Gillard QC, presented a report covering the probable cost of a suitable building and the extent to which finance could be obtained. An overwhelming majority of the members present expressed approval of the principle that the Bar should be housed in one building.

An incident occurred towards the end of the meeting. A young member of counsel, who shall remain nameless, spoke and said, *inter alia*, that although it did not matter to him because he had independent means he could see it might be of benefit to others who did not. He referred to this more than once. Shortly after, when the Chairman was trying to close the meeting, Brusey (later Brusey QC), newly at the Bar, sought to ask a question. Gillard QC, somewhat testily, "Oh, all right, what is it?" "Through you, Mr Chairman, I should like to ask the last speaker a question — could he lend me a fiver?"

The report for 1958–59 predicted that the new building would be ready for occupation in about two years' time.

In the next year, 1959–60, the Annual Report of the Bar Council contained the following:

> On 30 May 1958 a general meeting of the Bar resolved that an effort should be made to provide a single home for the members of the Bar. This resolution was re-affirmed at a meeting held on 16 October 1959. In accordance with the policy thus laid down, the Council has proceeded to form a company known as Barristers' Chambers Limited and it is a matter of satisfaction and pride that those members of the Bar who promised support to the scheme for a new building have supplied the necessary initial capital for this Company. The thanks of all

members of the Bar are extended to R.L. Gilbert Esq., for his work as Hon. Secretary in the formation of the Company. The Company has purchased a site in William Street and negotiations are proceeding at present between the Company, its financiers and a construction company for the erection of a building on the site. It may be anticipated that within a month contracts will be executed providing for the erection of suitable chambers according to the requirements of the members of the Bar.

The Council, in choosing a. title for the new building, wished to pay a tribute to the Right Hon. Sir Owen Dixon PC, GCMG, Chief Justice of the High Court of Australia, who has for many years, both as Barrister and Judge, taken a keen interest in the Association. Sir Owen has graciously consented to the building being named "Owen Dixon Chambers".

The following extracts from the Annual report of the Bar Council for the following year 1960–61 describe the bringing down of the curtain for most of the Bar's tenancies and the ringing up of the curtain on the arrival of Owen Dixon Chambers:

Amongst the counsel who had either been in the corridor of Selborne Chambers or who had been tenants of Bar companies, there were, in embryo, a Governor-General, a Governor of Victoria, three High Court Judges, a Chief Justice of Victoria, a Chief Justice of Papua New Guinea, two Judges of the Federal Court of Australia, nine Judges of the Supreme Court of Victoria, two Judges of the Supreme Court of the Australian Capital Territory, seven Judges of the County Court of Victoria, three Chairmen of the Bar Council, and a Federal Attorney-General.

A full report on the activities of Barristers Chambers Ltd was made by the Chairman of Directors, J.B. Tait Esq. QC, to the first annual meeting on 11 November 1960. His report to shareholders may be summarised by stating that the Company has been successfully floated and obtained the necessary finance to erect a building as outlined in earlier circulars to members, that a building contract was executed in June 1960 and that demolition of the old building and erection of the new building commenced on 4 July 1960, and the project is proceeding satisfactorily as a visual inspection will reveal.

The directors of the company, who are nominated by the Bar Council (which is the only ordinary shareholder) have made arrangements for the letting of the lettable space to outside interests.

At this stage indications are that tenants will be able to occupy the new chambers on 30 June, 1961 ... Arrangements are being made for the official opening of Owen Dixon Chambers probably on or about 17 October 1961.

As at the closure of the Bar's temporary tenancies on the move to Owen Dixon Chambers, it may be observed that amongst the counsel who had either been in the corridor of Selborne Chambers or who had been tenants of Bar companies, there were, in embryo, a Governor-General, a Governor of Victoria, three High Court Judges, a Chief Justice of Victoria, a Chief Justice of Papua New Guinea, two Judges of the Federal Court of Australia, nine Judges of the Supreme Court of Victoria, two Judges of the Supreme Court of the Australian Capital Territory, seven Judges of the County Court of Victoria, three Chairmen of the Bar Council, and a Federal Attorney-General.

In the following year 1961–62 the Annual Report shows Owen Dixon Chambers well on the way.

Occupation of Owen Dixon Chambers took place progressively during July 1961. The building was formally opened on 16 October 1961 by the Right Hon. The Prime Minister Mr R.G. Menzies CH, QC, MNR. Those in attendance included the Right Hon. Sir Owen Dixon GCMG, the Premier of Victoria, the Chief Justice of Victoria, the Commonwealth and State Attorneys-General, the Commonwealth and State Solicitor- General, and a wide representation of the judiciary of all jurisdictions, of the Bars of New South Wales and Queensland, of the Law Institute of Victoria, and of other professions and organisations. The Council has preserved a transcript of the proceedings of the Opening Ceremony and the addresses of the Prime Minister and the Chief Justice have been published in the *Law Institute Journal* for November 1961.

In the Common Room on the 9th floor there is a library area containing the law reports and other references previously located in Saxon House and Eagle Star Chambers, a dining room, a lounge area and a kiosk where sandwiches and incidentals may be purchased.

(Originally the 9th floor was the top floor of the now Owen Dixon Chambers East. Four further floors were added in 1964).

Very few of the Counsel who took part in these events are still with us and at this stage with the complete refurbishment of Owen Dixon Chambers (now called Owen Dixon East in deference to its younger and bigger brother West) it is thought it might do no harm to remind barristers of today of how it came to be built and of how much is owed to the young revolutionaries of 1952 and to the Bar Councils of the decade to 1961. Whilst the trigger for the coup was the issue of accommodation, those years saw a major change with the Bar accepting a general responsibility to facilitate as far as possible practice at the Bar and to play a more prominent role in society. This was reflected, for example, in the setting up of the Bar Superannuation Fund and the control exercised over the clerking system and in the representation of the Bar on an increasingly large number of bodies whose activities affected the practice of the law. More specifically as to accommodation the Bar Council developed the policy that it should be suitable, centralised and at reasonable rental on a monthly basis. It also instituted the system whereby the rental of newcomers was subsidised through increased rentals for more established members. These initiatives were directed towards ensuring that no heavy initial financial investment or commitment was required of those wishing to come to the Bar. It can fairly be claimed that these measures have played a significant part in ensuring that over the last forty or more years the Bar has been continually renewed by the influx of young men and women of great talent and aspiration drawn from all levels of society. Foundations such as these have helped sustain the independence of the Bar and therefore the value of the service it provides to the community.

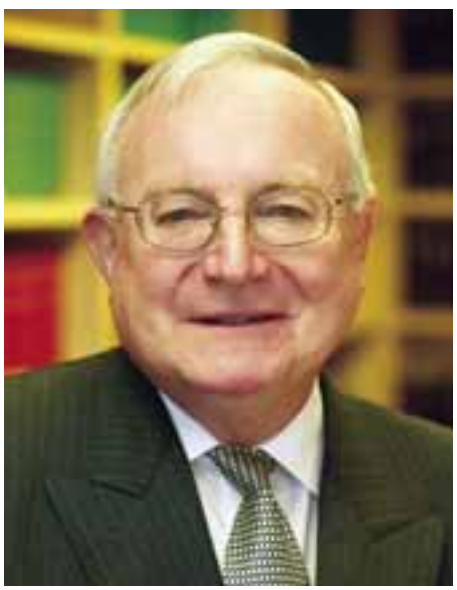
The question may now well be asked — what if there had been no revolution in 1952?

Of Stuff and Silk

A paper delivered by Dr C.L. Pannam QC, as part of the Bar Readers' course on 9 May 2005.

I joined the Bar in 1967. At that time the divide was between silks and stuff gownsmen ("men" rather than "persons" and then regarded politically correct). Today there are silks and juniors, the word "stuff" not now much in vogue; probably because the gowns are now made in China from polyester and not from "stuff", whatever fabric that might have been. I suspect it was cotton. Silks, I hasten to add, have suffered the same fate. Recently when listening to an opponent's argument I was fiddling with my newly acquired silk gown from Ludlows (the old one having frayed away) when I came upon a tag: "Made in China"! Is nothing sacred in this rush to globalisation?

In 1967 the number of Victorian counsel practising at the Bar was 396. There were 39 Queen's Counsel of whom only one was female, Mrs Rosanove QC. She had a largely matrimonial practice. There were 357 members of the junior bar of whom only two were female — Miss Kingston and Miss Opas, who again at that time had largely matrimonial practices. Today there are 1569 Victorian practising counsel. Of the 215 Queen's or Senior Counsel 17 are female; and, of the 1354 junior counsel 279 are female. I take leave to think that most women at the Bar, if not all, now have wide-ranging practices which extend far beyond matrimonial disputation. These simple statistics show a dramatic change in the gender balance of the Bar. The change in the ratio of junior to senior counsel is not as dramatic but still is significant — 1 to 10 in 1967; now a little over 1 to 7.



Dr C.L. Pannam QC.

The rules and conventions which governed the relations between the junior and senior Bar were very, very, different in 1967 to those that now apply. To begin with there was the "two counsel rule". A silk could not appear alone; junior counsel had to be jointly briefed. Then again there was the infamous "two-thirds" rule. When briefed with a silk, junior counsel automatically charged two-thirds of the leader's fees. These rules operated until comparatively recent times.

Members of the senior Bar can now appear alone, if that is considered to be appropriate; and, if junior counsel are briefed with them then they make their own individually negotiated fee arrangements. This underscores the point that the retainer of junior counsel is not now a required luxury but their involvement in appropriate cases with senior counsel is the product of a decision that their services are required for the proper conduct of the particular case.

I vividly remember my first junior brief — as no doubt you will. It was in 1968. I was briefed to appear as junior to a then formidable leader of the Bar, Dr Godfrey Elias Coppell QC. It was a sales tax case involving the sales tax payable on locally manufactured gold wedding rings under a Commonwealth Act, which I now can only vaguely recall. I fancy it was the Sales Tax (Exemptions and Classifications) Act in force at the time.

The fashion in those days was to only use surnames. I introduced myself as Cliff Pannam and extended my hand to shake his. He did not take it. I shall never forget his frosty reply: "Pannam, members of the Bar do not shake hands in Term time"! I did not then, and do not know now, to what tradition he was referring. Why on earth would members of the Bar only shake hands out of Term time? At all events he followed it up with: "And why you have been briefed as my junior I do not know as I assume you know nothing about Sales Tax. Anyhow if you have read my Opinion on the point to be argued what else can you possibly contribute?" I attempted to express some views I had formed on the point in issue which were quite contrary to his. These were dismissed with an airy wave of the hand accompanied by a look of disdain modified only by accompanying pity. At some stage he added, "Of course, I will announce your appearance with me as Mr Pannam because your doctorate after all is only from an American university."

I think I am safe in saying to you that when you are briefed together with a silk each of you will not have to endure such an experience. Things have much changed in the subsequent 37 or so years since then. Today I take leave to think we are not at all a bad lot at the senior Bar. Although I must add, in respect to his memory, that in later years Dr Coppell and I became if not friends then joined by several common interests and together involved in many interesting cases. He had one of the finest legal minds I have ever encountered. I remember him with considerable affection despite that first meeting.

Enough of this. You are not so much interested in the past as in having drawn to your attention what awaits you when the junior briefs start to come rolling in, as I hope for your sake they do. I also hope that I can be of some assistance in advising you as to how to best handle the tasks required of you by such briefs.

LEGAL RELATIONSHIP

Let me first deal with the legal rather than professional relationship between the senior and junior Bar. It seems to be clear that no duty of care arises as between junior and senior counsel for the purpose of professional negligence allegations made

by the one against the other. The legal duty of care that they both are obliged to fulfil is to the duty owed to their client; and, not to one another. See: *O'Doherty* v *Birrell* (Court of Appeal) [2001] 3 VR 147 especially at 166. The corollary is that is no necessary defence to a claim of professional negligence by a client against junior counsel that he or she relied upon the views of senior counsel in relation to the matter which is the subject of complaint; and, for that matter, vice versa. See: *Yates Property Corporation* v *Boland* (1998) 85 FCR 84 (a Full Federal Court) at 111–112; not dealt with by the High Court on appeal, (1999) 167 ALR 575. A possible contrary view expressed by O'Keefe J in *A.G. of NSW* v. *Spautz* [2001] NSWSC 66 is, with respect, incorrect.

The general principles to which I have just referred are of course subject to modification by the terms of the contractual retainer of either or both senior and junior counsel. For example, a junior may be retained on terms that some aspects of the client's case are to be his or her sole responsibility because of a particular expertise in the field; or, the sole responsibility of senior counsel. The terms of the retainer in question always provide the basis for the existence of duties to the client which arise out of that retainer. See: *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145 at 194, applied in *Astley* v *Australia Pty Ltd* (1991) 197 CLR 1 at 22 and 50.

Before turning from the legal principles which govern the relationship between junior and senior counsel I would like to draw your attention to a passage in the Reasons of a Full Federal Court (Drummond, Sundberg and Finkelstein JJ.) in *Yates* op. cit. at 111. The Court was dealing with an argument advanced on behalf of junior counsel in a professional negligence case that he was under no duty to give advice as to what valuers should deal with in their expert reports to be used in a compulsory acquisition of land case because that was the responsibility of senior counsel. The members of the Court, each of whom had extensive practices as silks, said:

> If we may say so, this is a remarkable assertion, and one that shows a complete misunderstanding of the role of junior counsel. In our courts most cases are conducted by junior counsel. But when the case is a difficult or complex one or where it involves a substantial sum of money, the client or the solicitor will form the view that it requires the attention of two counsel and then leading counsel is retained. That does not mean that the role of junior counsel is diminished. On the contrary, as anyone who has practised as leading counsel will know, senior counsel places great reliance on junior counsel for all aspects of the preparation of the case for trial.

PROFESSIONAL RELATIONSHIP

Life at the Bar can sometimes be a very lonely experience. We are individually briefed to consider questions put to us for advice; the general tactics to be employed by the client in the attempted resolution of disputes; the determination of how a client's case is to be conducted on the pleadings; during the interlocutory stages; at trial on appeal; and, so on and on. We do not enjoy the Judge's luxury, in most cases, of being able to consider the final version of carefully prepared arguments advanced on behalf of all parties. Instead we are a part of that process. As advocates we have to anticipate possible legal and factual attacks which may be made upon the client's case and to evaluate those attacks as well as the strength of the client's case.

After having practised as a silk for almost 30 years now I take leave to think that I can make the following statement in the knowledge that it is correct: there is no more satisfying experience and rewarding professional experience that junior and senior counsel can enjoy than working and arguing and making decisions together for the purpose of presenting and advancing a client's cause.

After having practised as a silk for almost 30 years now I take leave to think that I can make the following statement in the knowledge that it is correct: there is no more satisfying experience and rewarding professional experience that junior and senior counsel can enjoy than working and arguing and making decisions together for the purpose of presenting and advancing a client's cause. The otherwise loneliness of the professional task becomes a shared experience with the opportunity of being able to bounce ideas off one another; to have arguments and tactics mutually evaluated; and to share from possibly (and hopefully) different perspectives how an advice should be formulated, pleadings structured, or a case conducted.

In my opinion the relationship between junior and senior counsel only works as well as it should if four essential conditions are met.

(a) First, a junior brief is not regarded as something of a free ride involving agreeing to or going along with everything senior counsel says and does.
(b) Second, and the consequence of the first condition is that junior counsel must give independent detailed consideration to each matter which arises in connection with the carrying out of the joint retainer.
(c) Third, senior counsel must give careful consideration to whatever contrary or other views junior counsel might put forward and not expect that his or her views will inevitably prevail.
(d) Fourth, when senior and junior counsel have determined upon a course to be followed in relation to any matter then, subject to expressing other views to one another for the purpose of changing that course, they each owe to one another a professional obligation of loyalty and mutual support in progressing that course.

To put the essential underpinning of these conditions differently can I refer you to the marvellous lines given to Sir Thomas More, who was a considerable lawyer in his own right, by Robert Bolt is his play *A Man For All Seasons* which if you have not you should all read. In the relevant part just substitute a silk for God — as all silks probably think they are — and substitute junior counsel as Man.

> God made the angels to show him splendour — as he made animals for innocence and plants for their simplicity. But Man he made to serve him wittily, in the tangle of his mind!

I particularly like that concept. Juniors exist to serve silks wittily in the tangle of their minds; and tangled their minds frequently are! And in that service wit is always appreciated.

I now want to deal with some specific matters which may be of assistance to you in getting on well with your leaders.

DRAFTING PLEADINGS

Prolixity in a pleading is to be eschewed. Before commencing the preparation of a draft pleading which is to be settled by senior counsel an essential exercise is to first draw up a plan or outline which sets out the essential elements of either the causes of action in question, or the available defences. Then it is necessary to identify the necessary factual allegations which are required to make good the causes of action or defences. When that plan or outline is in place the drafting exercise can be commenced but not before. If you go to the classic books containing standard form precedents (Bullen and Leake, Atkin etc.) you will be amazed by their brevity. The golden rule is enshrined in Order 13.02 of the Rules of Court.

> (1) Every pleading shall:
>
> (a) contain in a summary form a statement of all of the material facts upon which the party relies, but not the evidence by which those facts are to be proved …

Indeed the whole of the rest of the provisions of Order 13 should be carefully considered in relation to what is required to be contained in a conforming pleading.

In recent years, sadly enough, my experience has been that many members of the junior Bar seem to be drifting into the habit of ignoring the requirements of Order 13, with the result that draft pleadings put before me for settling are far too lengthy. It should be remembered that as long ago as 1596 a barrister suffered an ignominious fate in relation to his preparation of a prolix Replication. You will find the story told in *Mylward* v *Weldon* (1596) 1 Spencer's Equitable Jurisdiction (1846) at 376. Richard Mylward, the son of a plaintiff, had drawn a pleading of "… six score sheets of paper, and yet all the matters thereof which is pertinent may have been well contained in sixteen sheets of paper". The Court was so outraged that Richard Mylward was committed to the Fleet Prison and the Warden of the Prison was ordered to take him to Westminster Hall at 10 a.m. the following Saturday. The order continued by directing the Warden to:

> … then and there shall cut a hole in the midst of the same engrossed Replication, which is delivered unto him for that purpose, and put the said Richard's head through the same hole, and so let the Replication hang about his shoulders with the written side outward, and then, the same so hanging shall lead the said Richard's barehead and barefaced round about Westminster Hall, whilst the Courts are sitting and shall show him at the Bar of the three Courts within the Hall …

It would be fun to try to redraw this Order to attempt to make it conform to present conditions in our Court!

My experience has been that many members of the junior Bar seem to be drifting into the habit of ignoring the requirements of Order 13, with the result that draft pleadings put before me for settling are far too lengthy. It should be remembered that as long ago as 1596 a barrister suffered an ignominious fate in relation to his preparation of a prolix Replication.

JOINT WRITTEN ADVICE OR ADVICE IN CONFERENCE

If you are briefed with a silk to provide such advice then it is essential that you do at least these three things. First, read and consider in detail the instructions from your instructing solicitor and all of the documents contained in your brief. Second, research and consider the relevant statutory provisions, the relevant legal principles, and relevant authorities relating to them. Third, contact your leader in order to ascertain how he or she may be assisted; in particular enquire as to whether a preliminary meeting between you both to generally discuss the matter might be a useful exercise — it usually will be.

My essential point is this. Never be passive in the sense of waiting for the guidance or direction of your leader. That may come. It may not. You must digest the brief, research the law, and then, and only then, ask your leader as to how you may be of assistance. Of course in most cases you will be asked to produce a draft joint advice, or a memorandum relating to the issues to be discussed in conference. But do not wait to be asked. Be pro-active. Anticipate.

Let me make this point. In most cases a good junior should know more about the case for advice than senior counsel before the first meeting between you both. This is not at all a counsel of perfection. My point is that the relationship between senior and junior counsel works well if the junior has worked up the case before first contacting senior counsel to discuss, or to jointly confer with instructing solicitors, clients, witnesses, etc.

A junior brief is not, and should never be regarded as, an easy brief. At the end of the day senior counsel may conduct a case as he or she may see fit, or to settle a pleading or a joint advice on the basis which may be very different to your drafts. That is the prerogative of the senior Bar. But however that may be, senior counsel's views should be informed, even challenged, but always assisted by the preliminary work of junior counsel.

MARKING UP AUTHORITIES

Effective advocacy these days rarely involves the reading of long passages from cases or texts or other relevant academic literature. It is usually only necessary to present the Court with short concise passages to support the submissions being advanced. Senior counsel always find it of considerable assistance for junior counsel to provide a clearly marked up copy of the report which highlights the relevant passages. This prevents those seemingly endless pauses and consequent embarrassment whilst attempts are made to locate the passages to be read.

CASE SEARCHES

Another useful exercise which is of considerable assistance to senior counsel is to carry out a case base search of the principal authorities which are to be used to support the submissions. By this I do not mean the carrying out of the task in such a way that such a volume of paper is produced that our forests are still further denuded. The exercise is certainly not to ascertain and regurgitate every subsequent citation of the authorities in question. It is instead to ascertain whether their status has been diminished or enhanced by subsequent developments, and whether or not they may have been the subject of academic comment. In this context can I offer a warning? These searches usually throw up a large number of unreported cases. The computer is a wonderful aid but it is a literal beast. Arguments should not be swamped with copious citations of subsequent authorities where the case that provides a sound

foundation for a legal submission is simply referred to for that very same purpose. It is only when the subsequent authority adds something to the analysis that it may be useful to cite it.

In passing it is interesting to observe how technological developments impact on the traditions and usages of the Bar. In my early days at the Bar there were things known as "purple gutsers". These were unreported decisions printed on flimsy paper in a purple typeface. They were only ever produced in an attempt to destroy an opponent's argument. However, the ethical rule was clear. If you wanted to rely upon such a "purple gutser" you were required to provide your opponent with a copy well prior to the argument where it may have been relevant. Not now. We all have access to the computer-generated citations of seemingly all of the relevant unreported cases on a particular point. In my experience no opponent of mine in recent years has provided me with a copy of an unreported case upon which reliance is placed.

ASSISTANCE DURING ARGUMENT

Here the role of junior counsel is crucial. There is nothing more helpful for senior counsel than to have the benefit of a junior's correction of an error in a submission being put to the Court; a comment as to how a question from the Bench might be better answered; the drawing attention to an oversight in the presentation of the argument; and various other interventions.

However, let me make a fundamental point — these contributions should be made unobtrusively either by whispered comment, or, more helpfully on most occasions, by the passing of a legible note, stress legible! Of course in order to provide this assistance a complete familiarity with the case is required as well as close attention being paid to the argument as it unfolds. Gown tugging and loudly spoken interventions are to be avoided.

A few years ago I had a junior appearing with me in a Federal Court proceeding who was constantly tugging at my gown and offering comments upon the shortcomings of my argument in a loud voice. I leaned across the Bar table and asked my instructing solicitor to relieve him of his brief and remove him from the courtroom, which she did. Still he is one of a kind, and, for all of that, we are friends.

OUTLINES OF ARGUMENT

Modes and styles of advocacy have much changed over the years. When I was a first and second year law student I would regularly come down from the University to the Supreme Court (usually Court no. 3 which is a magical if tragic place) to hear Frank Galbally address juries in, usually but not always, murder cases. Let me tell you he was quite over-the-top marvellous. Frank continued here in Victoria the tradition of the great leaders of the English and Irish Bar — Erskine, Curran, Marshall Hall, F.E. Smith and Sir Patrick Hastings. It is interesting to note that he never joined the Bar but acted as an advocate as a solicitor as was his right.

Let me give an example from John Philpot Curran in a case which involved whether the common law recognized that there could be property in a slave.

> No matter in what language his doom may have been pronounced; no matter what complexion incompatible with English freedom an African or Indian sun may have burnt upon him; no matter in what disastrous battle his liberty may have been cloven down; no matter with what solemnities he may have been devoted upon the altar of slavery, the first moment he touches the soil of Britain, the altar and the God sink together in the dust; his soul walks abroad in his own majesty; his body swells beyond the measure of the chains that burst from round him, and he stands redeemed, regenerated, and disenthralled by the irresistible genius of universal emancipation.

Absolutely marvellous, but you would be laughed out of Court if you attempted it today! Not even Phillip Dunn QC would dare, although he might! However, I urge you to read the old addresses. They are the rich stuff — in quite another scene — of our common law tradition. They might have nothing whatsoever to do with the way in which cases are conducted now, but they evidence the golden linking thread between them and us — the client's case must be put forcefully and effectively to the very best of our abilities but, of course, having regard to the standards and styles of the times.

Over the last few years it has become increasingly common for parties to provide the Court in advance of argument with written Outlines of the arguments which will be put on behalf of the parties. It has come to be required by the Rules of Appellate Courts. But it is far more widespread. I can tell you that, with very few exceptions, over the last three years I have not appeared in a case where an Outline of Argument has not been provided to the Court or Tribunal hearing the matter. As Justice Hayne of the High Court said in a recent paper:

> … it seems inevitable that written argument will play a more prominent part in proceedings of any kind in every court.

Let me focus upon the role of junior counsel in drafting such Outlines. In essaying this task you should keep the following matters in mind.

(a) In general an Outline should be just that; it is not a substitute for oral argument. What it does is to provide in advance the outline of the way in which an oral argument is to be structured. Outlines assist advocacy. They are not substitutes for it.
(b) Relevant legal principles should be stated succinctly with the leading authorities referred to, and, if relevant, the particular passages relied on identified. In addition helpful references to other authorities that are not to be specifically referred to can be collated.
(c) In an appropriate case the Outline can be used to collect together the detail of the evidence upon which the Court is being asked to make particular findings of fact. This saves a lot of time in oral argument.
(d) It is sometimes helpful to summarise the common ground between the parties. This too may save a lot of time in argument.
(e) If an Outline is to be accompanied with a folder of authorities then, if possible, only provide copies of the headnotes and the relevant part of the Reasons for Judgment. Remember the client is paying for the photocopying. Of course sometimes it is necessary to reproduce the entire case; but in most cases it is not.

CROSS-EXAMINATION

Senior counsel are always greatly assisted if junior counsel prepare notes outlining points or approaches to be used in the cross-examination of witnesses. A list of the matters which must be put to avoid the dreaded rule in *Brown* v *Dunn* is essential, but other suggested lines of questioning are helpful — e.g. points going to credit, probability, inconsistency, and so on.

It is also necessary for junior counsel to closely follow the cross-examination of senior counsel so that further points may be suggested or omissions made good.

RED BAGS

I am, and confess at once, an unashamed traditionalist — even though I shake hands with fellow counsel in Term time — when it comes to observing the old customs operating as between the senior and the junior Bar. As a junior you may acquire a blue bag in which to carry your wig, gown, jackets, etc. But you have no right at all to acquire a red bag for that purpose. The gift of a red bag (with your initials stitched on it) lays only in the grant of a silk. It is a gift made to a junior in circumstances where, in the silks view, the junior has rendered splendid professional service to him or her in a particular case or matter. It is a wonderful tradition, and if you are the recipient of a red bag, you should be immensely proud. I fear, however, that it is a tradition that has tended to be overlooked in recent years.

GENERAL

In your professional careers you will be briefed to appear with various silks who each will have different characteristics and styles. I did toy with the idea of attempting a classification of the types of silks you might be briefed to appear with. Although I found the exercise very amusing indeed I quickly gave it up for fear of provoking outrage from my colleagues at the senior Bar. The point is, however, an important one. You must try to adapt yourself to the way the particular leader you are briefed with approaches the task in hand. We are all different. It is only by moulding your assistance to your particular leader's needs that you will work well together as a team.

The essence of what I want to say to you comes down to this: when you are briefed with a silk it is as much your case as his or hers. You become joint partners in some one or other of the various tasks of providing advice to the client; formulating relevant pleadings; agreeing strategies to be employed to advance the client's case; and in putting the client's case forcefully and effectively whether in Court or in other conflict resolution processes. It is a team effort. It should involve both the silk and the junior making appropriate contributions to the matters in hand. That is, after all, what the client is paying for. Let me make this clear — a silk who leaves a junior out of the process is just as much in breach of his or her professional obligation to the client as is the junior who does not effectively involve him or herself in the process. There is a mutual obligation owed by both to the client and to no one else to properly and effectively conduct the client's case.

The gift of a red bag (with your initials stitched on it) lays only in the grant of a silk. It is a gift made to a junior in circumstances where, in the silks view, the junior has rendered splendid professional service to him or her in a particular case or matter. It is a wonderful tradition.

This obligation applies as much to a pleading summons as it does to an appeal to the High Court. From both counsel's point of view there never should be such a thing as an unimportant or uninteresting case. Every case or pleading, or advice or application, or anything else related to the conduct of each case, is of critical importance to the client. Our shared task when briefed together as senior and junior counsel is to put our mutual client's case, whatever it may be, clearly and to the best of our shared abilities. That is what the adversarial system demands of us, and that is why in my view it is the most effective system for arriving at a just result.

For my part I find that there is nothing more interesting and challenging than to work up a case in common with junior counsel, especially with a junior who has particular views about the matter in hand whatever they might be. It is then that the client is best served by having both senior and junior counsel. Juniors whose sole contribution is to rubber stamp senior counsel's views without any independent examination should just return the brief. They are of little or no use. A reasoned agreement with senior counsel's views is a very different matter.

Let me conclude by repeating something that I said earlier — junior briefs are not, and should never be regarded as, easy briefs. They are not, if the retainer is properly executed. Furthermore, in my view, there is no better educational process for honing your own skills as a barrister than to work closely with, and to be able to observe how a leader who has had considerable experience in the adversarial process goes about, his or her task whatever it might be.

Peter Rosenberg Congratulates the Prince on His Marriage

14 February 2005

H.R.H. Prince Charles
St. James's Palace
London, Great Britain SW1A 1Bs

Dear Prince Charles,

Re: Congratulations on your Wedding Announcement & Renewal of Request for a "Royal Teapot"

Firstly, congratulations on the announcement of your wedding to Camilla. I wish you both peace and every happiness for the future.

Secondly, you may recall that I wrote to you some time ago seekling your assistance in securing a "royal companion" for my commemorative tea cup and saucer as previous approaches to Buckingham Palace had proved to be inconclusive.

I appreciate that you have to consider weightier matters of state to generally occupy your time, and therefore may not immediately recall the minutia of my odyssey. I am therefore enclosing copies of the correspondence both with Buckingham Palace (eventnally published in the *Victorian Bar News*) and the subsequent correspondence with your own Mrs Claudia Holloway (also enclosed).

As you will be returning to Australia shortly before your marriage ceremony, I have been prompted to again make contact with you. Would you be able to send your staff on one further mission to secure the much desired item for me? If you were able to bring the teapot with you when you visit, perhaps we could share a cup of tea together (or possibly something somewhat stronger).

I look forward to your reply,

Peter Rosenberg

15 February 2005

H.R.H. Prince Charles
St. James's Palace
London, Great Britain SW1A 1BA

Dear Prince Charles,

Re: Request for a Royal Teapot

Further to my letter I wrote yesterday, I have just read in today's *Age* newspaper that you will in fact tour Australia between 28 February and 5 March 2005.

It would appear therefore that there is only a very finite period to gird your servants into action to track down the required item. I have every confidence that they will be up to the task.

I remain hopeful of a satisfactory outcome to your searches.

Yours sincerely,

Peter Rosenberg

9 March, 2005

Clarence House
London SW1A 1BA
From: The Private Secretary to
HRH The Prince of Wales

Dear Mr Rosenberg,

The Prince of Wales has asked me to thank you very much indeed for your kind congratulations on his forthcoming marriage, and to send you His Royal Highness' very best wishes.

Your letter has, I am afraid, only reached me today and as you will know His Royal Highness has already left Australia after a very enjoyable visit.

I am afraid that teapots and, indeed, cups and saucers are not really my area, but I can say that being a small Household we have very few teapots at Clarence House, all of which are needed, as far as I am aware, for daily use.

Your sincerely,

Sir Michael Peat

16 March, 2005
Sir Michael Peat,
Private Secretary to
HRH The Prince of Wales,
Clarence House,
London SW1A 1BA

Dear Sir Michael,

Thank you for your letter of 9 March. I read with concern about the chronic crockery shortages at Clarence House. It seems only appropriate that I gift His Royal Highness a teapot with an Australian motif to redress the problem. However, it will take time to locate one that is suitable. Regrettably, it may not be available for delivery until after the wedding on the 8 April.

Exploratio continuanda est!

Peter Rosenberg

24 March, 2005

Clarence House
London SW1A 1BA
From: The Private Secretary to
HRH The Prince of Wales

Dear Mr Rosenberg

The Australian teapot's arrival is eagerly awaited. With many thanks for the kind thought.

Yours sincerely,

Sir Michael Peat

Idle Rubbish

Julian Burnside QC

IT is notorious that English lacks words for some useful concepts, but has words for utterly obscure concepts. So, for example, English has had to import words such as *savoir faire*, *déjà vu*, *décolletage*, *faux pas*, *outré, de trop*, and *l'esprit d'escalier* because we lacked available English words for the same idea. Equally, we have words for some very odd things:

apopetalous: having distinctly separate petals.

capes: grains of corn to which the husk continues to adhere after threshing.

spetch: a piece or strip of undressed leather, a trimming of hide, used in making glue or size.

wennish: of the nature of a wen.

turdiform: having the form or appearance of a thrush.

But for many ideas English provides copiously. Words around the concept of being idle are provided in abundance: approximately 500 English words have idleness at the core of their meaning. So, words which suggest idleness of character include: *bumble*, *do-nothing*, *dor*, *drone*, *fainéant*, *gongoozler*, *loon*, *lubber*, *lurdan*, *lusk*, *picktooth*, *quisby*, *ragabash*, *rake*, *shack*, *sloth*, *slouch*, *sluggard*, *toot*, *trombenik*, *vagrant* and *wastrel*.

Some of these are obvious, but others deserve a closer look. A *bumble* is a blunderer or idler, also known as a *batie bum*. A *gongoozler* is originally "an idler who stares at length at activity on a canal; hence more widely, a person who stares protractedly at anything". A highly specialised word indeed, its first recorded use is in that well-known organ *Bradshaw's Canals & Navigable Rivers of England & Wales*. In an attempt at survival its meaning broadened, but the word remains obscure.

A *lubber* is "a big, clumsy, stupid fellow; esp. one who lives in idleness; a lout" and it became specialised as a sneering term used by sailors as meaning "a clumsy seaman; an unseamanlike fellow" especially in the well-known compound expression *land-lubber*.

The OED2 defines *lurdan* as "a general term of opprobrium, reproach, or abuse, implying either dullness and incapacity, or idleness and rascality; a sluggard, vagabond, 'loafer'". Its sound fits it well to the task and it has been around since the 14th century, so it is surprising that it is now so little heard. Similarly, a *lusk* is "an idle or lazy fellow; a sluggard". Cotgrave described someone as "…sottish, blockish … luske-like". It could not be mistaken for a friendly observation. Like *lurdan*, it dates back many centuries, but even as the number of people increases to whom it could be fairly applied, it has fallen out of use.

Just as idleness of conduct or manner is well-served by English vocabulary, so is idleness of speech. Words denoting idle talk include *babble*, *balderdash*, *bibble-babble*, *bourd*, *braggadocio*, *cackling*, *clatter*, *claver*, *fiddle-faddle*, *flim-flam*, *gossip*, *jangle*, *jaunder*, *labrish*, *palaver*, *prattle*, *prittle-prattle*, *tattle*, *tittle-tattle*, *trattle*, *trittle-trattle, truff*, *twattle*, *yap* and *yatter*.

Most of these are self-explanatory; some are obviously archaic. *Jaunder* is simply idle talk. *Claver* is "idle garrulous talk, to little purpose". There is a Scottish saying: 'Muckle claver and little corn,' (*muckle* = much) referring to eloquent preaching which uses many words but has little substance. The pun is on *claver*, *clover*. A *truff* is "an idle tale or jest". It is a 15th century word, which seems to have disappeared in the 17th century.

Twattle (also *twaddle*, and in this form commoner in Australian English) is idle talk or chatter; and just as we now have the expression *chatter-box*, in the 18th century there was *twattle-basket*.

Yatter is onomatapoeic and self-evident, but not often heard although it is still in use. It is originally a Scottish dialectical word. OED2 gives a quotation from (of all places) the *Brisbane Sunday Mail*: "No one in the Brisbane Valley any longer believes the tourist yatter given out by Government … circles." The quotation dates from May 1978, when the Premier was the late lamented Sir Joh Bjelke-Petersen. Given Sir Joh's narrative style, and his famous reference to press conferences as "feeding the chooks", *yatter* seems to be an apt word in the context.

Just as we have many more words for idle talk than we can conveniently use, so we are richly endowed with words whose central idea is rubbish. In Tom Stoppard's *Artist Descending a Staircase*, a choleric old modernist painter offers a terse appraisal of his colleague's latest work, which comprises a layered sound recording made in an empty room. This provokes the following exchange:

DONNER: I think it is rubbish.

BEAUCHAMP: Oh. You mean a sort of tonal debris, as it were?

DONNER: No. Rubbish, general rubbish. In the sense of being worthless, without value, rot, nonsense. Rubbish in fact.

BEAUCHAMP: Ah. The detritus of audible existence, a sort of refuse heap of sound …

DONNER: I mean rubbish. I'm sorry, Beauchamp, but you must come to terms with the fact that our paths have diverged. I very much enjoyed my years in that child's garden of easy victories known as the avant-garde, but I am now engaged in the infinitely more difficult task of painting what the eye actually sees.

Donner could also have described Beauchamp's work as *bilge*, *bosh*, *bull*, *bullshit*, *crap*, *dung*, *flim-flam*, *horse*, *horseshit*, *jazz*, *moody*, *nonsense*, *nut*, *punk*, *ruck*, *skittle*, *skunk*, *slag*, *slop*, *slush*, *straw*, *stuff*, *toffee*, *tosh*, *toy*, *trash*, *trumper* or *eyewash*.

The OED2 notes nearly 400 words whose central meaning is *rubbish*. *Tosh* is not much heard these days. It was invented in the late 19th century and was much heard in cricketing circles. It is an interesting word, because it has a number of other meanings apart from that which cricket conferred on it. It is a bath or footpan; it is also those items of value which may be retrieved from sewers and drains. As a contraction of *tosheroon* it means two shillings, or money generally (compare Australian slang *dosh*); it can also be used as a neutral, informal mode of address, equivalent to *guv'* or *squire*. Strangely, when *tosh* is used as an adjective it takes on an entirely new set of meanings: neat, tidy, trim, comfortable, agreeable, familiar.

Bilge is a very satisfactory word: short, luscious and stinking, it expresses its meaning well. Its primary meaning is the bottom of a ship's hull, or the filth which collects there. It is very often used in its metaphorical sense of rubbish or rot. Much less obvious is its use as a verb, meaning to stave in the hull of a ship, causing it to spring a leak. So Admiral Anson wrote in his account of his epic, four-year voyage around the world: "She struck on a sunken rock, and soon after bilged." And this use as a verb may also be metaphorical. In 1870 Lowell wrote: "On which an heroic life … may bilge and go to pieces."

Bilge is interesting in another way. In the 625,000 words in the English language, only 11 end with the letters *-lge*. Three are well-known and obvious: *bulge*, *divulge* and *indulge*. The rest are very strange and rare:

bolge: the gulfs of the eighth circle of the inferno (also *malebolge*. Dante did not think well of it).

effulge: to shine forth brilliantly (hence the coded proverb "all that shines with effulgence is not ipso facto aurous").

emulge: To drain (secretory organs) of their contents.

evulge: to disseminate among the people; to make commonly known, hence to divulge (*e-* + *vulgare*).

milge: to dig round about.

promulge: to promulgate (also *provulge*, and probably a corruption of it).

thulge: to be patient.

volge: the common crowd; the mob. (The mob is a contraction of *mobile vulgaris*: literally "the common people in motion".)

While *bilge* is a good word, my favourite word for expressing succinct condemnation is *bullshit*. It has the merit of being terse, expressive and naughty enough to shock without being beyond the pale. It can be heard on ABC television, which is a fair substitute for a linguistic gold standard. It is at risk of becoming polite, however, which would strip away much of its force. There was recently published a book titled *On Bullshit* by Harry G. Frankfurt (Princeton University Press, 2005). Frankfurt is a philosopher, so his take on this vital subject is useful but not obvious. He discusses the difference between bullshit and lying by reference to an anecdote about Wittgenstein: he distinguishes between a "…statement … grounded neither in a belief that it is true, nor, as a lie must be, in a belief that it is not true". And that sounds very much like bullshit, but not rubbish.

The Ways of a Jury

The following decision in Buckley, which was the third trial to take place in the colony of Van Diemen's Land in 1824, and the second murder trial, illustrates the various attempts to get the jury to return a proper verdict.

Daniel Aghion

R v *BUCKLEY*

Supreme Court of Van Diemen's Land
Pedder CJ,
31 May 1824
Source: Hobart Town Gazette*,*
4 June 1824

MONDAY, May 31. At an early hour this morning, His Honour the Chief Justice ascended the tribunal; immediately after which, James Buckley was arraigned for the murder of Solomon Booth. It will generally be remembered that our report of the Coroner's Inquest in this case elucidated all the circumstances, and therefore now we shall not detail them. But we may say that throughout our experience of Courts we never heard a prosecution more dispassionately or more ably conducted than this was, by the Attorney-General; that the trial, which lasted until evening, elicited from His Honour the Chief Justice as admirable a charge as ever was addressed to a Jury; and that the whole proceedings were equally honourable to law, humanity, and justice.

After recapitulating the evidence with much care, and pronouncing a commentary on its most important bearings, the learned Judge said, the first question to be decided was, had the wounds and bruises described on the deceased occasioned death? if so, had they been inflicted by the prisoner? and then, even supposing the affirmative, had any equivalent provocation been given him to either justify or extenuate them?

It was for the Jury to weigh, in the scales of impartiality, all that had been proved — it was for them to render a due proportion of regard to every circumstance — and if then, after solemnly matured deliberation, one doubt should exist — one conscientious doubt of the prisoner's guilt, it would be their imperative and sacred duty to acquit him.

The indictment charged murder, which malice distinguished from manslaughter; but our law contemplated two kinds of malice, that which was premeditated, and that which was impliable from the weapons used in a quarrel.

He therefore who struck his fellow creature with such a weapon as must in probability destroy life was construed to bear malice; and if death resulted he would be a murderer. With respect also to intoxication, which in some instances was pleaded as an excuse for crime, His Honour argued with much feeling, and said, the being who would drink an empoisoned beverage, until reason tottered from her throne, and mercy left his bosom, and who should then commit a crime of blood, appeared no less culpable in the eyes of law, and was no less amenable to violated justice, than if at the time he was sober. The Jury then retired, and on their return, delivered the following verdict — Guilty, but not with premeditated malice.

This of course could not be recorded; for, as the Chief Justice stated, murder and malice were inseparable, and therefore such a verdict nullified itself.

The Jury again left the box, with some suitable instructions from the Court as to the manner of an especial verdict, and again found the prisoner — Guilty, but not with malice. A third time, with renewed directions as to the form of verdicts, the Jury withdrew; and, after remaining absent a considerable time, found him — "Guilty of manslaughter".[1]

1. Buckley was sentenced to transportation for life: *Hobart Town Gazette*, 6 August 1824.

Bar Legal Assistance Committee

Legal Aid Lawyers' Function at Essoign

Ross McCaw QC, Chairman of the Bar Legal Assistance Committee.

ON 11 May 2005 the Victorian Bar hosted a function at the Essoign Club to honour the contribution made by barristers to the Victorian Bar and the Public Interest Law Clearing House (PILCH) Legal Assistance Schemes and other pro bono work.

Over 100 members of the Bar who have accepted briefs over the past year to advise and appear without fee for members of the community who would not otherwise have access to legal representation, attended the reception. Also present were members of the judiciary, court staff and members of PILCH who are actively involved in the Victorian Bar Legal Assistance Scheme (VBLAS).

Ms Kate McMillan S.C., Senior Vice-Chairman of the Victorian Bar Council, welcomed and thanked all present on behalf of the Victorian Bar and confirmed the Bar's ongoing support for the work of the VBLAS and PILCH. Kate McMillan acknowledged the history of commitment to pro bono and access to justice by the Victorian Bar and the establishment of the strong relationship with PILCH to create the one-stop shop for pro bono legal services in Victoria.

Mr Ross Macaw QC, Chairman of the Legal Assistance Committee, also extended warm congratulations and expressed appreciation to barristers who had participated in pro bono work on behalf of the Legal Assistance Committee and VBLAS.

Ross noted that over the past year, over 200 barristers have undertaken pro bono work through VBLAS and PILCH across all areas of law and all jurisdictions. Their work has included areas of practice, including those that are not traditionally considered pro bono practice areas such as corporate and commercial matters, property and planning cases, and appearing in the High Court and in the Coroner's Court.

Further, Ross Macaw QC pointed out that in addition to those who have been called on to undertake work, in fact more than a quarter of the members of the Victorian Bar have volunteered to participate in VBLAS. Of the new barristers who have signed the Bar Roll in the past year, well over half of them have signed up to participate and a great number have already contributed, often by accepting briefs to appear for community legal centres before

Tony Howard QC, Alexandra Richards QC, John Emerson AO and Susannah Sage-Jacobson.

Ross Nankivell, Barbara Phelan, Maurice Phipps FM and Jamie Wood, District Registrar of the Federal Court.

Paula O'Brien, Jane Fricke, Susannah Sage-Jacobson, Sam Ure, Kristen Hilton, Emma Hunt, Bernadette Segrave and Teresa Cianciosi.

suburban Magistrates Courts. In the past year 26 silk have accepted briefs from VBLAS or PILCH, often in the process also mentoring a junior barrister acting in the case.

On behalf of the Legal Assistance Committee, VBLAS and PILCH, Ross

Bernadette Segrave, Nick Troy and Jane Fricke.

Macaw QC also thanked outgoing Chairman of the Legal Assistance Committee Anthony Howard QC who retired from the position after three years of service this year. Tony Howard provided great leadership and energy to VBLAS during his time with the Committee and was instrumental in providing for the substantial expansion of the capacity of VBLAS in 2004. The Function is intended to continue as an annual event to recognize and reward the pro bono practice of members of the Victorian Bar. For any enquiries or information concerning pro bono activities or opportunities, please do not hesitate to contact VBLAS staff Susannah Sage Jacobson, Jane Fricke or Bernadette Segrave on 9225 6692.

A Much Speaking Judge is Like an Ill-tuned Cymbal

Further support for judicial restraint in ex curia public speaking

CONSERVATIVE US Supreme Court Associate Justice Antonin Scalia is renowned for his intellectual combativeness — Margaret Talbot likens his public speeches to a rock concert and his verbal pyrotechnics as the "jurisprudential equivalent of smashing a guitar onstage". (See "Supreme confidence: the jurisprudence of Justice Antonin Scalia", 81(6) *New Yorker* 39 (28 March, 2005) — the caricature accompanying the article is captioned "Scalia's certainty runs so deep that he views detractors with mild amusement", http://www.newamerica.net/templets/Documents/print.cfm?pg=article&DocID=2291&Prt=Yes viewed 21 May, 2005.)

Every year he hires at least one liberal clerk to give him somebody to spar with, and the anti-death penalty campaigner Sister Helen Prejean recalls in her recent book, *The Death of Innocents*, that she approached Scalia once in the New Orleans Airport to advise him that she was intending to attack his views in print. His response — "I'll be coming right back at you," he said, jabbing his fist in the air. (ibid pp. 41–2).

Thus it is no surprise that he has been prepared to take on all comers in spirited question and answer sessions after his public speeches. He revels in the cut and thrust of argument with his critics and opponents.

At a question and answer session before a recent NYU Law School award honouring the justice on 12 April, 2005 the robustness got a little out of hand. After hearing Scalia's response to his question concerning the recent gay rights case, *Lawrence* v *Texas*, 539 US 558 (2003), in which Scalia had dissented, gay NYU law student Eric Berndt further enquired of the justice whether he sodomized his wife. (For completeness we note that Mrs Maureen Scalia was also in attendance.) The justice responded that the question was unworthy of an answer and Berndt's microphone was turned off.

Thinking out loud we wonder whether (a) the justice is reconsidering his delight in vigorous public debate, and (b) young Berndt is reconsidering his choice of a legal career (he is unrepentant, see http://www.perspectives.com/forums/forum6/37895.html viewed 24 May, 2005).

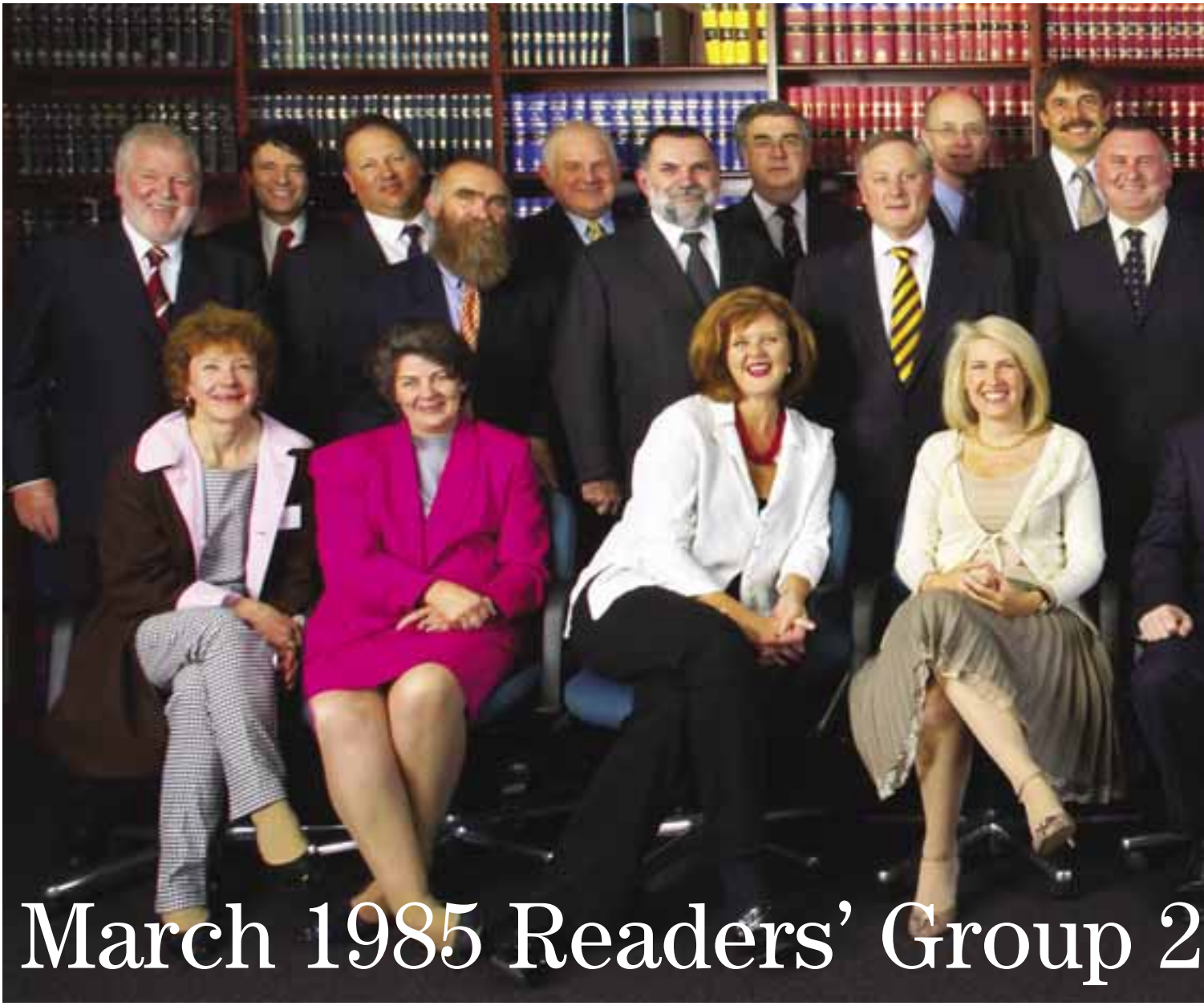
You know, reading through the news reports again, we wonder whether this piece should be headed: "Making sure your legal career is properly kick started by bringing yourself to the attention of the big cheeses of the profession".

(The incident was reported in the campus newspaper, the *Washington Square News*, 14 April, 2005, see http://www.nyunews.com/news/campus/9405.html and http://www.thenation.com/doc.mhtml?I=20050502&s=berndt viewed 24 April, 2005.)

Briefless

A Contest

RECENTLY some silks' robes were found in a rubbish tin on one of the higher, more rarified floors of ODCW. They looked to be in good condition. Readers are asked, in 200 words, to provide an explanation for that occurrence.



March 1985 Readers' Group 2

Wednesday 18 May 2005 at the Essoign Club

SOUNDING wiser and looking not that much older, 29 of the 35 members of the March 1985 Readers Group gathered at the Essoign Club on Wednesday 18 May 2005 to celebrate the twentieth anniversary of each of them signing the Bar Roll. Three of the six absentees are current members of the Bar who were detained on work in Fiji, Sale and Tasmania.

Of the 35 who signed the Bar Roll in May 1985, one has become the Chief Justice of the Supreme Court of Victoria, another has become a Justice of the Supreme Court of Victoria, three have become Judges of the County Court of Victoria, three are in practice as senior counsel, two have become Crown Prosecutors, one is the Shadow State Attorney-General and nine have left the Bar. (However, four of this latter group continue to be involved in legal practice). The remaining members of that intake are still in active practice at the Bar.

Two came from some distance to attend the dinner: Chris Priestley from America, where he runs a successful computer software business, and Liz Harbour, from Darwin, where she works as a senior solicitor in the Family Law Division of the Legal Aid Commission.

The event was organised by a group led by Judge Meryl Sexton and Goldie Freedman.

The ceremonial duties on the night fell to Trevor McLean who performed them with aplomb.

It was a splendid occasion and it was made all the more memorable by a luminous after-dinner speech given by the self-styled "brilliant" Neville Bird. He spoke as if he were at the

0th Anniversary Dinner

Front row (seated) Julie Sutherland, Margot Brenton, Judge Gaynor, Goldie Freedman, Brendan Kissane, Judge Sexton, Jeanette Morrish QC, Chief Justice Warren and Liz Harbour.
Back Row (standing) Neville Bird, David Robertson, Geoff Bloch, David McKenzie, John Murphy, Nunzio Lucarelli QC, Kim Baker, Andrew Mclntosh MP, Mark Settle, Joe Ferwerda, Justice Bell, Darryl Burnett, Kieran Gilligan, Trevor McLean, Peter Byrne, Shane Kennedy, Judge Smallwood, Joe Sala, Gary Sturgess and Chris Priestley.

30th reunion of the group and regaled all with a retrospective of the 20th anniversary dinner and of the developments that will have taken place in the lives of the group's members since that dinner.

Chief Justice Bird penned the speech from his chambers overlooking Lake Burley Griffin. Apparently his chambers will be next to those of the future eminent jurist, Justice Shane Kennedy — a soon to be reformed sybarite who will then be slim and living on a diet of exercise, bland food, mineral water and high powered vitamins supplied to him by Goldie Freedman.

Judges Gaynor-Smallwood will still be in the news and, on advice from their media consultant, they will have hyphenated their names and one will have become the President of Collingwood.

But he assured us that some things will not change: Giuseppe ("Joe") Sala will still be the last person to register for the 30th anniversary dinner and he will do so well after acceptances close with an advance payment in cash.

Dinners of this kind are an excellent opportunity for members of an intake — including those who have left the Bar to pursue other careers or interests — to look nostalgically at the years that have passed since the "salad days" of the Readers' Course and to look forward to what the next phase of life may bring — in or out of the legal profession.

Aboriginal Law Students Mentoring Committee

A social function held on 10 June 2005

THE Bar has again hosted Aboriginal law students at an informal reception in the Neil McPhee room.

The purpose of the evening was to create an opportunity for networks to be built between barristers, indigenous law students, indigenous lawyers and representatives of university law schools which are attended by indigenous students.

Melbourne's universities have over 30 Aboriginal law students, a number of whom participate in the Bar's mentoring program.

The Bar scheme is available to all those students who wish to apply for a mentor but sometimes some extra encouragement is needed for an application to be made, and functions such as the one held encourage students to join the mentoring program. Thus one of the main purposes of the event was to provide that encouragement and to attempt to break down the mystique of the Bar as an institution.

The greatest number of participants in the Victorian Bar Mentoring Scheme so far have come from Deakin University which has at its Geelong campus the Institute of Legal Education, offering legal education to Aboriginal students from all over Australia.

Geographical issues have created somewhat of a challenge for students and mentors in the past, but the increasing accessibility of email has helped overcome some of the limitations of distance.

Justice Sally Brown and Paula King.

Michael Shand QC and Daniel Briggs.

In addition to students, the function was attended by members of the judiciary (Justices Kaye and Bongiorno of the Supreme Court, Justices Gray and Merkel of the Federal Court, Justice Browne of the Family Court and Chief Magistrate Gray), as well mentors and members of the Aboriginal legal community. Representatives of Melbourne, Monash and Deakin Universities attended, including Miranda Stewart and Sid Fry, co-ordinators of Aboriginal studies programs at Melbourne and Deakin Univerisities respectively, who have been strong supporters of the mentoring program.

Colin Golvan S.C.

Although the event was designed to be a fairly informal occasion some low-key

Louise Anderson, Ron Davis, Findlai McRae and Justice Ron Merkel.

Hans Bokelund.

speeches were made. Colin Golvan S.C. welcomed the participants and promoted the benefits of the scheme. Hans Bokelund, an Aboriginal lawyer, who has recently commenced in practice, spoke on behalf of the indigenous students and lawyers and gave an eloquent vote of confidence to his experience of mentoring and the benefits for students and mentors alike.

It has been over 20 years since the Bar last had an Aboriginal member. The mentoring scheme means to redress this anomaly.

Simone Bingham, Peggy Swindle, Justice Peter Gray and Frank Guivarra.

Ann Collins and Louise Kyle.

The Essoign Wine Report

By Andrew N. Bristow

Jenke Vineyard's Barossa Shiraz 2000

THE ancestors of the winemaker Kim Jenke fled Germany as religious refugees and settled in the Barossa Valley in 1854. Kim is the sixth generation of his winemaking family and is the winemaker of the Jenke Vineyard's Barossa Shiraz 2000.

2000 was a dry season in the Barossa Valley, which created good sugar levels with great intensity in the flavour and fruit. The wine was barrel fermented in new and two-year-old American oak barriques where it matured for two years prior to bottling.

The wine has a bouquet of plum and summer berries.

The wine colour is a beautiful deep ruby.

The wine is dry, complex and with full fruit. The wine is astringent on the front palette but exploding on the back palette with great intensity of the fruits that is almost overpowering. This wine has the finesse and balance to be confidently cellared for 10 to 12 years. It is available from The Essoign Club at $28.00 a bottle ($23.80 takeaway).

I would rate this wine as junior constitutional barrister, complex and full of him or herself and able to continue on for a long time.

Verbatim

To Robe or Not to Robe

Federal Court of Australia

6 April 2005
Australian Competition and Consumer Commission v *Leahy Petroleum Pty Ltd and Others*
Corum: Goldberg J
Ms E. Strong (instructed by the Australian Government Solicitor) appeared on behalf of the applicant

His Honour: I think I have been discourteous to you. I didn't realise you had robed. I would have robed if I had known you had robed. I apologise.
Ms Strong: I've been feeling the opposite, your Honour. I assumed, given that it was actually the final orders being made in the matter, that it would be a pearls and tiara affair.
His Honour: It is, with long gloves as well. But unfortunately I, due to a miscommunication before I came in, I didn't think anyone was robed. So my robes are on the other side of the door.
Ms Strong: I did consider taking mine off at the Bar table but then I thought that might be a bridge too far.
His Honour: Thank you very much for that.
Ms Strong: If your Honour pleases.
His Honour: Adjourn the court.

Judge Thy Self

The Australian Industrial Relations Commission

3 March 2005
Metropolitan Fire and Emergency Services Board v *United Firefighters' Union Of Australia*
Corum: Commissioner Grainger
Mr Langmead for the Union
The application is for the Commissioner to disqualify himself from further hearing the matter on account of (alleged) apprehension of bias

Mr Langmead: If I may briefly recap: the thrust of that submission is that the Commission is now in a position of you, sir, having provided a sworn affidavit as to factual matters upon which ... the application we have filed in admitted form is based. The Union has in response filed four affidavits which differ in those deponents' recollection of the events. The resolution ...
The Commissioner: And I found it very helpful.
Mr Langmead: The resolution of those differences between the deponents, including yourself, sir, becomes a matter of some difficulty, in dealing with it, a great difficulty in our submission. In that it requires that you form a view about, with respect, your own sworn evidence, and the sworn evidence of the other four deponents. That seems to us to put the Commission in a position of such great difficulty that almost inevitably of itself must create an ... appearance of bias in that the Commissioner is about to pronounce on his own evidence and the other deponents and make a judgment as to — in some way as to which one is correct.
The Commissioner: ... There are some facts in dispute between the four UFU members' witness statements and my own witness statements. I don't hesitate to look at those witness statements and my own witness statement with complete dispassion, and don't hesitate to draw a conclusion as to whether any of those witness statements is a better reflection of what actually occurred in any particular detail, than what I recollected ... But I can only say, no, I have no hesitation in viewing it with complete dispassion and detachment, in order to reach a conclusion.
Mr Langmead: Normally the way in which conflicts of evidence are resolved is, of course, to make the deponents of affidavits available for cross-examination ... which ... in our submission requires the Commissioner making yourself available for cross-examination. Then that brings about that very extremely difficult, almost impossible situation, as to how that could possibly be done.
The Commissioner: I am very happy for you to question me from where you are and from where I am, Mr Langmead.
Mr Langmead: I think the difficulty is, sir, that — it is the traverse from the sworn evidence to unsworn evidence. Clearly I cannot see, with respect, how you can give sworn evidence because you can't administer the oath.
The Commissioner: No, my commitment is to the oath, and the fact that I am under oath at all times in any event.
Mr Langmead: We would ask you to proceed in the manner in which you originally indicated, sir, which is to give sworn evidence and be available for cross-examination.
The Commissioner: I am happy to swear an oath, but I am under oath, I am under my oath of office and I don't consider it necessary, but it is up to you, Mr Langmead. If you would like me to swear the oath on the *Bible* I am happy to do so.

Gareth Grainger sworn
[Cross-examination]

Mr Grainger: Subsequently you are recanting the remainder [of your previous statement] and substituting what you have just said?
The Commissioner: Yes ... That's the best deduction I can place on it, considering all of the material before me.
Mr Langmead: I think you can direct yourself to leave the box, sir?
The Commissioner: I will excuse myself and resume my hearing of the matter.

The witness withdrew.

Mr Langmead: The customary practice is to invite the witness to leave the Court.
The Commissioner: Well, I shall remain as the presiding Commissioner...

Cognitive Problems

County Court

13 December 2002
Corum: Hanlon J
Mohammed Feroz Ali v *Luke O'Brien and Transport Accident Commission*
Mohammed Feroz Ali v *Electom Pty Ltd and Victorian Workcover Authority*
Mr B.M. Griffin, with Mr I.D. McDonald (instructed by Herbert Geer and Rundle) appeared on behalf of the Defendants

His Honour: This was going to be a comment. I can feel it coming.
Mr Griffin: I think I can feel it coming too, Your Honour.
His Honour: What is Dr Miach's specialty?
Mr Griffin: She's a neuropsychologist.
His Honour: At p.5 of her report I have

noted with some interest the cognitive problems which she was referring to. She could have been talking about me.

Mr Griffin: I don't know how to respond to that, Your Honour.

His Honour: Perhaps you'd better not.

Mr Griffin: I'll just note it. I think that's the safest way. … He describes his concentration as "completely gone". He can no longer follow a television program or a lecture, finding that his mind drifts off. His memory is so unreliable that he is constantly forgetting or leaving behind valuable items like his wallet or sunglasses.

Recently he lost his valuable sunglasses, leaving them somewhere but being unable to recall where. He frequently leaves his wallet behind in taxis, and it has been returned to him on many occasions. At home he is constantly misplacing things, and he becomes very frustrated and distressed by his poor short-term memory. He has not driven since the accident because of his reduced concentration. He is fearful he would hit someone or have an accident since he cannot concentrate for any length of time.

He also reported slurring of speech which has improved considerably over the two years, five months since the accident. He still has mild slurring of speech at times.

Continued on page 72

Court Network's 25th Anniversary

EVERY day in 24 courts across the state, Court Network volunteers help victims, witnesses, respondents and distressed families. These volunteers — a team of over 300 — are fondly called "Networkers" by court staff. Judges most familiar with their work will often not start a hearing until they know a Networker is on hand to assist with the human aspect of rulings or court process. Networkers are referred difficult cases by the Witness Assistance Program, the police or the OPP.

Last year, more than 72,000 Victorians were assisted by Court Network. It also provides assistance to the public through a 1800 number and an information and education service at the Supreme Court. The service is also operating an outreach project at the Children's Court, funded by the Telstra Foundation.

Some heads of court have commented that if they hear nothing about Court Network, things must be going well! Court staff recognise Networkers for their diligence and hard work, their discernment and their ability to minimize the human toll of hearings and sentencing.

The Victorian community is fortunate to have the services of Networkers, which is made possible by financial support from the Departments of Justice and Human Services, The Federal Attorney-General's Department, the Telstra and Buckland Foundations, the Victorian Law Institute and private donor's contributions.

In June 2005 the Court Network celebrates it's 25th anniversary. Substantial funding from The Helen MacPherson Smith Trust and the Buckland Foundation will allow the Network to complete the state-wide coverage of the courts that was envisaged when the service started in the Prahran Court a quarter of a century ago. Prahran Court is no more, but the Network has expanded to cover all of Victoria.

This is what some of the users of Court Network have to say about its work:

> A very big thank you to everyone at Court Network for your kind assistance during the very long trial at the Supreme Court in relation to the murder of my brother Keith. You made the trial so much easier to bear.
>
> *Name withheld*

> Having to recount my story at court was more traumatising than the actual crime. I will not forget your support, you got me through it, thank you.
>
> *Name withheld, Sexual Abuse Victim*

> Over the years, I have seen Court Network become part of the fabric of the court system but never lose sight of its purpose — helping people who come to the court in a compassionate, caring, non-judgmental way. As a Crown Prosecutor I have seen Network staff assist the bereaved relatives of the deceased in murder trials, support victims in countless rape trials as well as the families of people sent to prison. I frankly do not think the system could survive without their wonderful work.
>
> *Ray Gibson, Crown Prosecutor*

> Court Network has provided invaluable assistance to unrepresented parties who have appeared before me in the civil and criminal jurisdictions. They have also been able to perform an important role in supporting witnesses and family members in criminal trials. During the year I have heard numerous cases of culpable driving and have had the benefit of court networkers providing a much-needed buffer between the accused and relatives of the deceased victim. I am sure that other Judges have had similar help.
>
> At all times, I have found the court networkers to be professional and discreet. At all times, they have provided a valuable service to this Court.
>
> *Judge Rachelle Lewitan QC, AM*

As the Network marks and celebrates its 25th anniversary, you might consider participating in this milestone by becoming a Friend of the Network.

Contact 9603 7420 for more information or go to www.courtnetwork.com.au

Au Revoir, Hartog

On 19 May 2005 between 80 and 100 members of the Bar gathered in the Essoign Club to farewell one of the most colourful figures in the Bar's recent history, Hartog Berkeley, who retired after almost 46 years at the Bar. The dinner was hosted by the members of the 16th Floor of Owen Dixon Chambers West, Hartog's "neighbours".

HARTOG'S wife, Margaret, who was present at the dinner, aptly remarked many years ago that "in order to be a member of the Bar, you really have to be a little eccentric".

It is hard to say to what extent her assessment of the Bar was coloured by her assessment of her husband. Hartog had the gift of being a non-conformist, if not an eccentric.

It is not necessary in these pages to canvass the highlights of his successful career, which included service as Solicitor-General for the State of Victoria under the Cain Government. It is perhaps more apt to draw attention to his capacity to catch the attention of the court: by referring, for example, in one High Court case to the concentric circles of power exercised by the State and the Commonwealth which give rise to the "doughnut theory of constitutional law"; or to his description of one of the plaintiffs in the ASIS case (*A* v *Hayden*) as "the Cockatoo", and when the expression was queried by Brennan J, said: "Yes, your Honour. He was the nit keeper".

One story told at the dinner illustrates much of what makes up Hartog.

Hartog was in a stream of traffic in Collins Street, when the driver in front of him stalled at an intersection. The driver behind Hartog started to sound his horn. Hartog got out of his car, walked back to the horn blower, opened the door and said: "Excuse me. You seem to be having a problem. Can I be of any assistance?"

In an age when conformity appears to be the fashion, we who remain will miss you, Hartog.

Mark Derham QC, Phillip Bing, Hartog and Justice Stephen Charles.

Hartog and President John Winneke.

Brendan Murphy QC, Kate McMillan S.C., Judge Campbell and Tony Howard QC.

(Right) The Berkeley family and Justice Susan Crennan on the left.

Homage to Hartog: An Ode

How shall we praise this Hartog?
Let us count the ways:
We love thee first for cheek
Delivered meek and mild
To judges.
All innocence, you bat your eyes
Affect surprise,
And let them have it.

Then next, for penetrating wit,
That's just a little bit
Risque.
(Sometimes the things you say
Can redden leather cheeks
Of us, who've seen it all).

And third we love your mind,
Of such a limpid kind not
Often met.
A joy to watch its turns and twists
As rapiers slip right past
The Other Side.

But lastly, Hartog dear,
We love you most
Because you're kind.
However great the mind,
It's warmth that draws us near.
Your heart so large and generous,
Your willing help
To all that ask
Is really *sui generis*.

We're sad that you're to go —
(It's been a splendid show)
Enjoy the peace, by the fireside doze.

… But now and then, remember us,
Still chasing the Clapham omnibus.

Kristine Hanscombe S.C.

Modern Future for Victoria's Historic Legal Precinct

VICTORIA'S iconic, heritage-listed Supreme Court is set to continue serving the community into the future with Attorney-General, Rob Hulls, recently unveiling a blueprint for the redevelopment of the court and wider Melbourne legal precinct.

"As an architectural and cultural icon, the Supreme Court is instantly recognisable to many Victorians as the physical representation of our legal system," Mr Hulls said at the unveiling.

"To meet the needs of a modern justice system, this magnificent 121-year-old building requires a major overhaul.

"Today we have taken the first step in this process by developing a blueprint that provides a plan to guide future decisions regarding the building and its environment.

"Existing facilities of the court need updating and additional works are necessary to ensure the building is better integrated with its more recent neighbours," he said.

Mr Hulls said Melbourne's centralised legal precinct — on the intersection of William and Lonsdale streets — is unique in Australia with the Magistrates', County and Supreme Courts all situated opposite each other.

"To preserve this precinct the Bracks Government has made an initial investment of $2.5 million to implement the blueprint, known as the Melbourne Legal Precinct Master Plan.

"This masterplan was first identified in last year's Justice Statement which outlined a long-term strategic approach to future reform of Victoria's justice system.

"This high priority of the masterplan is to consolidate and enhance the role of the legal precinct, improve court administration and to optimise the delivery of court services," he said.

The Melbourne Legal Precinct Masterplan includes proposals such as:

- A new single, entrance off Lonsdale Street with airport style security screening;
- A dedicated criminal division of the Supreme Court in a new building at the rear of the historic court;
- Consolidating the Supreme Court and Court of Appeal in the one building;
- Improved public access to and around the Supreme Court, particularly for people with disabilities;
- Introduction of state-of-the-art technology in line with contemporary court design standards;
- Improved holding facilities and protection for persons in custody.

Preparing for Mediation: Playing the Devil's Advocate

Julian Ireland

THE adversarial nature of our legal system conjures up notions of beating the other side, winning with smart points and assertions of "I'm right you're wrong — I'll see you in court". Litigants usually have friends and relatives who sympathetically agree they have a good case. They employ legal advisors who, on the instructions they receive, bolster this view. Further, the history of perceived abuse or unfairness of most litigants, both plaintiffs and defendants, is magnified and reinforced by the strategies of the authors of the various court pleadings.

In the pleadings there is an underlying contradictory "push-pull" attitude between disclosure and non-disclosure, which competent lawyers use to advance their client's claim. It is no wonder that in the mediation room parties look with scepticism when the mediator urges them to step into the other side's shoes and view the dispute from the opponent's point of view. Some people can't do it, some people sham it. They are just not prepared for the quantum change that they are being asked to perform. Yet a successful mediator with a result that sticks usually requires that change to occur.

There are useful paradigms that can be utilised prior to mediation hearings to ease the shock of parties becoming attuned to the appreciation that there is a contrary argument to their set position.

A good mediator will acknowledge the difficulties in their opening statement and will indicate that the private sessions will assist the parties to come to an understanding. However, there are useful paradigms that can be utilised prior to mediation hearings to ease the shock of parties becoming attuned to the appreciation that there is a contrary argument to their set position. These are steps that can be put in place to assist the parties to assess the strengths and weaknesses of their own case and their opponents beforehand.

Julian Ireland

As practitioners, one of the most sensitive exercises to be undertaken is to alert the client to the weakness of their case and still retain their confidence. Mediators cannot rely on lawyers to do this and they have to take the advisor and the client through the possible weaknesses.

In proper preparation for a successful mediation, it is helpful and possibly significantly reduces the length of the mediation if the clients:

- write (for their own use) a concise case outline of the strengths and weaknesses of their own case, and then;
- put themselves in the shoes of the other side and write out what they think are that side's strengths and weaknesses;
- undertake the same exercise with experts' opinions;
- quantify their losses and the other side's;
- write a list of priorities and possible concessions;
- write a list of legitimate expectations and responsibilities of both sides' cases that could apply to the problem to be solved.

These aims may well overlap but it will hopefully achieve the purpose of the client appreciating that there are two sides to the debate. It is my experience that parties who have prepared in this fashion save time in mediation and can be more forthcoming in identifying underlying causes of the dispute and do not baulk at the concept of compromise and "cutting a deal".

On the other hand, lack of preparation can lead to a whole gaggle of issues and concerns being raised (often expressed with emotionally charged rhetoric) that take time and expense to neutralise, and sometimes notwithstanding the best efforts of the mediator the parties' positions cannot be changed.

In summary, a proforma given to the parties to fill in and consider beforehand is the first step in a successful mediation.

Is It 'Cos I Is Black (Or Is It 'Cos I Is Well Fit For It)?

Ragunath Appudurai

MALCOLM Garner had just called-in at his clerk's office when he noticed his clerk motioning excitedly to him. Malcolm hadn't, in his 13 years at the Bar, ever seen his clerk so animated.

He handed Malcolm a note and, whispered, "It's a 'call' from the Attorney. Well done!"

Malcolm opened the note. It simply read, "Please phone the Attorney." It could, of course, mean only one thing — an appointment to the Bench.

After all, hadn't the Attorney made it clear that he was determined to be "Chief Law Officer of a State in which the diversity of its population is reflected in those making decisions that affect it"?[1]

Reverting to his native Brixton vernacular, Malcolm muttered to himself, "Is it 'cos I is black, or is it 'cos I is well fit for it?"

Apart from the Attorney's proud record of appointments along a roughly 50–50 gender split,[2] it couldn't, thought Malcolm, be properly said that in other respects such appointments had truly reflected the diversity otherwise found in the community. Was he to be at the vanguard of the next phase? Could it be that the deficit in gays/lesbians, Asians, Balkans, Muslims, South Americans, cross-dressers, state school alumni and leather freaks will finally be addressed? He'd been keenly aware that women from minority groups hadn't exactly featured in the appointments to date.

While in the lift, Malcolm recalled the many times he had seen announcements of judicial appointments alongside the odd death notice. He, however, couldn't but wonder whether the notion of a representative judiciary was just rhetoric. Would the next step be an announcement by the Health Minister that she would actively pursue the achievement of a truly representative medical and specialist staff at public hospitals?

Malcolm could see the significance of the appointment of a black judge but was, nonetheless, still troubled by whether he was indeed "well fit for it".

He'd, of course, experienced both positive and negative effects of the inescapable fact that he was black. He had once, believing the spiel at the Readers' Course about the mysterious cloak of anonymity afforded by the wearing of a wig, failed in his attempt to camouflage himself in a sticky situation. Malcolm, of course, had failed to read the fine print disclaimer on the wig — Conditions apply.

He'd been called a "black nigger" by a misguided teenager and had had to take the trouble to patiently explain to the unfortunate boy the inefficacy of redundancy. A Russo-German neo-Nazi acquaintance at university had once described Malcolm as a good bloke but, with admirable candour, added "but, yer black!" He'd been refused service but had never been asked to leave premises provided he was accompanied by other acceptable patrons.

On the positive side, he'd never had a client walk into his chambers for the first time and show any concern. Even the "One Nation" sympathisers he once represented were kind enough to tell him that they would not be seeking his deportation; they promised to have a word with Pauline.

Malcolm was routinely thrown the new ball and asked to bat first-drop in cricket matches. His captains soon realised that the perfectly reasonable assumption, "He's black, therefore he must be athletic" didn't always hold true.

Malcolm was still troubled.

He wasn't silk. He wasn't even rayon. While he considered himself a more than competent barrister and prided himself in not having "carried the bags" as often as others who'd been appointed senior counsel, he didn't consider that he could satisfy the minimum standard which, he believed, was required for appointment as senior counsel. After all, he could not be confident that he would be able to command a practice based solely upon cases which required the involvement of a senior and junior counsel.

He was aware that the Bar Rules had been relaxed but had there also been some accompanying edict requiring that the fundamentals which underpin the quality of the Bar, and the legal system, also be jettisoned over time?

In any event, he was of the view that his independence as a barrister would be compromised by an application to the head of the Judiciary, asking that the Chief Justice recommend to the Executive his appointment as senior counsel. The not uncommon scenario of repeat applications without success did not assist in this regard. The change introduced in 2004 did not alter this view.

The central thesis of a recent article in the *Bar News* that Australians "had become a mean and niggardly people, each of whom is preoccupied with 'me'", thought Malcolm, could just as well have been a reference to the Bar.[3]

The business of being a barrister had, after all, moved a long way away from the thinking of Hayden Starke who "dominated the Bar as a junior, and became the first junior to be appointed a judge of the High Court."[4] Starke, it is said, refused to take silk (as he then could have) "because other barristers senior to him were away at the War."[4] The man, of course, simply failed to appreciate the marketing opportunity.

Regrettably, the relaxation of the Bar Rules had in recent times resulted in the practice in some (if not all) jurisdictions of senior counsel appearing on a regular basis without a junior or appearing with an instructing solicitor as the junior.

Cashing-in on the relaxation of the Bar Rules at the expense of the Junior Bar; a manifestation of admirable commercial savvy or just base, self-interest (with just a dash of early on-set memory loss)?

Malcolm reached for the phone but hesitated.

He wondered whether he was being offered an appointment because of his

ground-breaking work as the inaugural Convener of the Black Barristers' Association (BBA) and in his role as the BBA representative on the executive of the Australian Black Barristers' Association (ABBA). Immediate Past-Chairmen of the Bar had, until recently, been elevated to the Supreme Court as a matter of course. Could it be that the BBA was being embraced by the mainstream?

After all, hadn't the BBA assisted many minority groups, including several members of the Bar from otherwise privileged backgrounds, come to terms with their lack of progress? Hadn't he successfully orchestrated the election of BBA-sympathisers on to the Bar Council? The networks were starting to deliver. Malcolm, momentarily, congratulated himself.

But, he knew better. The BBA's agitation on behalf of the many disenfranchised members of the Bar must, he thought, have surely resulted in his file being marked "Never to be appointed".

The BBA had been condemned as "un-Victorian" for its stand on many issues. The BBA discussion paper, "What's wrong with an all-female High Court if appointed entirely on merit but drawn exclusively from NSW?", would not have helped.

For a moment, he entertained the idea that his name had been mentioned in despatches by well-meaning friends but that wasn't likely. The BBA's strong opposition to the Coalition/Labor bi-partisan approach to the *Tampa* and other refugee issues must, surely, have made the rounds? Should he accept? Was he under an obligation to accept?

The call had indeed come.

Was he obliged to stand up and be counted for his gender, his race and for the good of the BBA, just because others apparently considered that he was suitably qualified? Did he not have an obligation to himself and the legal system to carry-out a brutally honest assessment of his suitability for the appointment against the standards which he believed should apply?

Maybe not.

The Parliament had seen fit recently to reduce the minimum qualification for appointment to the County Court to five years post-admission.[5] A new regime covering the appointment of acting judges and magistrates is upon us.[6] On one view, a kind of "try before you buy" scheme, in contrast to the current "fly now, pay later" approach.

Was there then an over-riding duty to accept, lest there be no one else of his ethno-cultural background suitably qualified for appointment? After all, the offer represented recognition (at last!) of the existence of diversity not otherwise limited to gender differences.

The burden weighed heavily upon Malcolm. But he could not bring himself to be party to what he thought was change by the numbers for the sake of change. He wasn't about to become a tick on someone else's checklist.

After all, the BBA's motto was "Keep it real". He had to decline the appointment.

"Oh, Mr Garner! This is the Attorney's Senior Private Secretary," the voice on the other end said. "Would you be prepared to represent the Attorney at the celebration of Bob Marley's 16 birthday next week?"

"A black man's work is indeed never done," reflected Malcolm, as he dusted-off his dress Rasta-dread "tea cosie" in preparation for the big event.

But he couldn't allow himself to even temporarily rest on that crutch. Grandma Garner's oftrepeated mantra, "Bad dancer, blame de floor", was prominent in his psyche.

There was no option but to continue to "Keep it real".

Notes

1. *Bar News* edition No. 118, p. 11: "Address to the Women Barristers' Association Dinner", 23 August 2001. A position repeated in the Attorney's speech at the welcome extended to Chief Justice Warren in 2003 — *Bar News*, Edition 127, p13: "It seems obvious to me that the diversity of a population should be reflected in those who adjudicate over it."
2. *Bar News* edition No. 118, p. 11: "While equality of opportunity is not just about numbers of judicial appointments, I'm proud of the fact that 13 out of 22 judicial appointments have been women." Media Release, Attorney-General, 2 December 2003: "The Bracks Government has made 53 judicial appointments since 1999 — 26 of those appointments were female and 27 male." That balance has been maintained in subsequent appointments.
3. *Bar News*, edition No. 131, p. 25: "The Twilight of Liberal Democracy?"
4. *Bar News*, Edition No. 124, p. 28: "Characters of Bench and Bar".
5. *Courts legislation (Judicial Appointments) Act 2004* — with effect from 2 June 2004, the qualification for appointment to the County Court was reduced to the minimum of five years post-admission then already prescribed (since 2003) with respect to the appointment of judges of the Supreme Court.
6. *Courts Legislation (Judicial Appointments and Other Amendments) Act 2005* — relevant parts in force from 1 May 2005.

Verbatim *continued from page 67*

Judicial Abandonment?

Supreme Court of Victoria

9 November 2004
Victorian WorkCover Authority v *Commonwealth of Australia*
Coram: Kaye J
D. Beach S.C. with W. Wheelham for Plaintiff
Griffith QC with McLeish for Defendant

Dr Griffith QC: Your Honour, we seem to have reduced six days to 60 minutes.
His Honour: I think it might take a little longer. I am reminded of Mr Balfe who once said, "it's a short point but it might take a bit of time for me to get there", I don't know about you gentlemen.
Dr Griffith QC: Your Honour, I think we have the advantage here that each party on its exchange of submissions, Your Honour, seems to have frankly gone to the points and expressed them and Your Honour has made it clear that Your Honour has also advanced through them prior to coming on to the bench which has facilitated progress ...

[About one hour later]
Dr Griffith QC: Your Honour, there has been a common attempt, I think by the parties, I accept that my learned friends — may, the same as I particularly ask Your Honour to, identify exactly what is the issue and what seems to be the rather thin, we can't say signpost because we are out at sea, aren't we, but whatever, Your Honour, the buoys or whatever — Your Honour there is a story that President Reagan's speechwriter left him once, he didn't like him very much so he gave him the last speech and one of those that flash up on an idiot board, Your Honour, and the President got to the bottom of the second page saying "now I tell you people of America my views on this issue" and the next page flashes up, "now, you're on your own your (sic) bastard".
His Honour: Three minutes ago I had the same thought.
Dr Griffith QC: I have never called a Judge that, Your Honour, and I never will ...

Ford's Principles of Corporations Law (12th edn)

R.P. Austin and I.M. Ramsay
LexisNexis Butterworths, 2005
Pp. v–x, Table of Cases xi–li, Table of Statutes liii–lxxxi, References and Abbreviations lxxxiii–lxxxviii, 1–1374, Index 1375–1418

WHAT can be said about *Ford's Principles of Corporations Law* that hasn't been said before? Since the publication of its first edition in 1974, this well regarded and widely referenced text has earned its place on the bookshelves of thousands of Australian commercial lawyers.

This twelfth edition of the work has been issued in response to further changes to the legislative framework governing corporations, most notably the latest instalment of the CLERP legislation, the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (C'th). Most of that legislation commenced on 1 July 2004. Its subject matter includes meeting procedures, auditing, reporting and disclosure. It also provides for proportionate civil liability for misleading and deceptive conduct. The authors have also taken the opportunity to revisit the commentary about the Takeovers Panel.

Like its predecessors, the twelfth edition deals with all facets of corporations law — from the theoretical basis of the corporate entity, through the nature, function and origins of companies, corporate governance and liability, corporate finance and restructuring to external administration.

The authors specifically state that the bound volume of the work is directed towards undergraduate and postgraduate students of company law. They refer practitioners to the larger two-volume looseleaf version of the text. Helpfully, the two versions use consistent paragraph numbering, with the looseleaf containing many further paragraphs interspersed between those reproduced in the bound volume. Some paragraphs of the looseleaf service are "reduced and simplified" in the bound volume. Further, there are topics (such as managed investment schemes) which have simply not found their way into the bound volume of the text. Those who find the bound volume light on detail in any particular area would be well served checking the looseleaf version before having recourse to alternative secondary sources. Having said all that, the authors are perhaps too dismissive of the practical utility of the bound volume, which remains a portable, accessible and eminently useful tool for practitioners.

Stewart Maiden

Discrimination Law and Practice (2nd edn)

By Chris Ronalds and Rachel Pepper
Federation Press, 2004

THE preface of this book describes discrimination law as an exciting and continual evolving area of law. This is undoubtedly correct.[1]

This is a good little book. It gives a good overview of how discrimination law works. It is fairly comprehensive in delineating, (in a set of appendices) the relationships within which discrimination can be unlawful, the grounds of unlawful discrimination and the exceptions across the country.

There are pithy summaries of some of the more important of the High Court's decisions. *Purvis* v *New South Wales* [2003] HCA 62 (11 November 2003), which even for the initiated is a decision of some complexity, is neatly summarised.

The difficulty about this book is its audience. If it is directed to the intelligent human resources adviser, the appendices lack comprehensiveness; for example, prior convictions are not dealt with. This is area about which employers often need ready information. If on the other had the book is directed to legal practitioners, this book must be treated with caution in some important technical areas.

For example, there is a reference on page 42 to whether the identified act of unlawful discrimination needs to be the only reason, a substantial or dominant reason or just a reason. The book asserts this issue to have been resolved by the incorporation in all laws of the general proposition that the discriminatory reason need be just one of the reasons for the act. This is not the case in Victoria. Section 6 of the *Equal Opportunity Act Victoria 1995* specifically provides that the unlawful reason must be the dominant reason for the discrimination.[2]

The book also asserts that the victimisation provisions of the *Sex Discrimination Act 1984* (C'th) are similar to all State Acts. Whilst this is strictly true, the book makes no reference to the *Disability Discrimination Act 1992* (C'th) which does not make victimisation unlawful. The victimisation cause of action in s.96 of the *Equal Opportunity Act (Vic) 1995* has been an important part of the armoury of the well advised complainant.[3] The Anti Discrimination Tribunal of Victoria has been zealous protecting complainants from victimisation. In a disability discrimination/victimisation case the decision as to what jurisdiction a complainant might lodge a claim can become a matter of considerable importance.[4]

In the critical area of discrimination on the ground of family responsibilities the discussion in Chapter 4 lacks a critical edge. Some decisions of the Federal Magistrates' Court lack solid jurisprudential credibility. For example, *Song* v *ANZ Game Technology Pty Ltd* (2002) FMCA 31 cannot be justified on the basis of "a purposive and expansive construction of provisions as to 'dismissal'". The decision lacks credibility in substance and because of the way the question was approached in that case. The use of references to "unfair" discrimination indicated a fundamental misunderstanding of the nature of what is intended by discrimination Acts. The provisions as to discrimination on the ground of family responsibilities under the Federal *Sex Discrimination Act 1984* specifically limit the detriment to "dismissal". This is unlike the other grounds of discrimination where only "detriment" of some kind needs to be proved. There is also, in the federal cases,[5] a ready resort to the ground of sex as an alternative to resolving the limitations in the "family responsibilities ground".

Fundamental questions of statutory interpretation are at issue in this approach but they appear not to have concerned the decision makers in these cases.

There are many decisions made by (now) leading members of the Federal Court, when sitting as the Human Rights and Equal Opportunity Enquiry Commissioners dealing with these issues, which comprehensively and cogently address many matters that would appear from this book to have only recently been considered or decided in the Federal Magistrates' Court. Indirect discrimination is a complex and sometimes difficult area. The summary in this book is helpful. But for a thorough understanding of indirect discrimination, Rosemary Hunter's books *Indirect Discrimination*, also a publication of the Federation Press, is undoubtedly the serious practitioner's handbook in this area, even though it is now quite old.

The Federal *Age Discrimination Act 2004* is not covered in this book because it came after its publication.

So whilst I recommend this book for its case summaries, as a technical guide it is to be treated with some caution.

Notes:

1. The enactment of the *Equal Opportunity Act Victoria 1995* significantly increased the grounds upon which discrimination is unlawful. Further amendments in 1997 extended these grounds. Victoria accordingly has one of the most comprehensive Discrimination Acts in the country.
2. See also the recently enacted *Age Discrimination Act 2004* (C'th).
3. See *McKenna* v *The State of Victoria* [1998] VADT 38 (8 December 1997) where the complainant in that case did not prove any of the sexual harassment allegations made by her. She was nevertheless awarded a substantial sum ($100,000) for the victimisation, in the words of the judgment "for treatment of disciplinary kind "unheard of in Victoria Police", which she underwent as a result of making her complaint of sexual harassment.
4. Other considerations are also relevant here. Costs follow the event under the Commonwealth Acts. This is not the case under the Victorian *Equal Opportunity Act 1995*. All the Commonweath Acts require the identified act of discrimination to be the reason for the discrimination . Under the Victorian Act the Complainant must prove the reason was the dominant reason.
5. See for example *Thomson* v *Orica* [2002] FCA 938.

Frances O'Brien S.C.

Butterworths Annotated Trade Practices Act 1974 (2005 Edn)

Ray Steinwall
LexisNexis Butterworths, 2005
Pp. vii–xiii, Table of Cases xiv–l, Pending Legislation li–lxiv, Comparative tables 1–10, 1–1074, Index 1075–1121

IN a recent speech to the Second Biennial Conference on the Law of Obligations at the University of Melbourne, the Honourable Justice Hayne commented on the ubiquitous action for misleading and deceptive conduct under the *Trade Practices Act 1974* (C'th) (the "TPA"). His Honour said: "No court proceeding is now thought to be respectable unless one or other party alleges contravention of the Trade Practices Act and I await with interest the day when a charge of homicide is met by a plea of misleading or deceptive conduct." His Honour's comment is both amusing and helpful: it diverts attention from my frustrating inability to say very much at all by way of review of a volume of annotated legislation.

This is one of two available annotations of the TPA. The book is well structured. The annotations are easily distinguished from the text of the legislation by font size, although the book does not adopt the more obvious shaded background utilised by its only competitor for that purpose. Where extensive, annotations are grouped according to headings. References to relevant cases are plentiful, and the text is assisted by a comprehensive table of cases.

One of the great advantages of annotated legislation is the provision of an index which enables the hurried reader to quickly link together sections of legislation which might not immediately appear related. This volume is no exception.

Pleaders will be assisted by a table comparing the provisions of the TPA to its Fair Trading Act counterparts in the States and Territories.

In addition to its annotations to the TPA, the book provides a reproduction of other primary and secondary materials useful to those who practice in the various legal areas touched upon by that very broad statute. It reproduces the *Trade Practices Regulations 1974* (C'th), Inter-Governmental Agreements, The Australian Competition and Consumer Commission's *Merger Guidelines, the Competition Policy Reform (New South Wales) Act 1995* (NSW), the *Trade Practices (Industry Codes — Franchising) Regulations 1998* (C'th), the *Australian Energy Market Act 2004* (C'th) and the *Australian Energy Market Commission Establishment Act 2004* (SA). Shaded page tabs on the sides of the pages assist the reader to navigate quickly between different parts of the book, although the Act itself appears under a single tab, rendering the page tabs of little use to those who do not need to refer to the more esoteric content.

For the most part, this work duplicates the material in the Trade Practices volume of Butterworths' *Practice and Procedure High Court and Federal Court of Australia*. At somewhere under a tenth the price of that looseleaf service, practitioners not in need of frequent updates or the other three volumes of that work are well advised to consider this bound alternative.

Conference Update

29 June–2 July 2005: Dublin. The Australian Bar/Irish Bar Joint Conference. Contact Dan O'Connor. Tel: (07) 3238 5100. Fax: (07) 3235 11801. Email: mail@austbar.asn.au.

2 July–9 July 2005: Bali. Tenth Biennial Conference of the Criminal Lawyers Association of the Northern Territory. Contact Lyn Wild. Tel: (08) 8981 1875. Fax: (08) 8941 1639. Email: info@thebestevents.com.au.

3 July–9 July 2005: Amalfi Coast. Europe Asia Medico-Legal Conference. Contact Rosana Farfaglia. Tel: (07) 3236 2601. Fax: (07) 3210 1555. Email: conference@qldbar.asn.au.

4 August–9 August 2005: Chicago, Illinois. 127th Annual Meeting of the American Bar Association. Contact ABA International Liaison Office. Tel: 1-312-988-5107. Fax: 1-312-988-6178. Email: sullivankash@staff.abanet.org.

31 August–4 September 2005: Fez: Union Internationale Des Avocats 29th Annual Congress. Contact website www.uianet.org.

15 September–22 September 2005: Rome. Pan Europe Asia Medico-Legal Conference. Contact Rosana Farfaglia. Tel: (07) 3236 2601. Fax: (07) 3210 1555. Email: conference@qldbar.asn.au.

7–9 October 2005: Museum of New Zealand, Te Papa Tongarewa, Wellington, New Zealand. 23rd AIJA Annual Conference. Contact New Zealand Law Society. Tel: 64 4 472 7837. Fax: 64 4 915 1286. Email: cle@lawyers.org.nz.

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