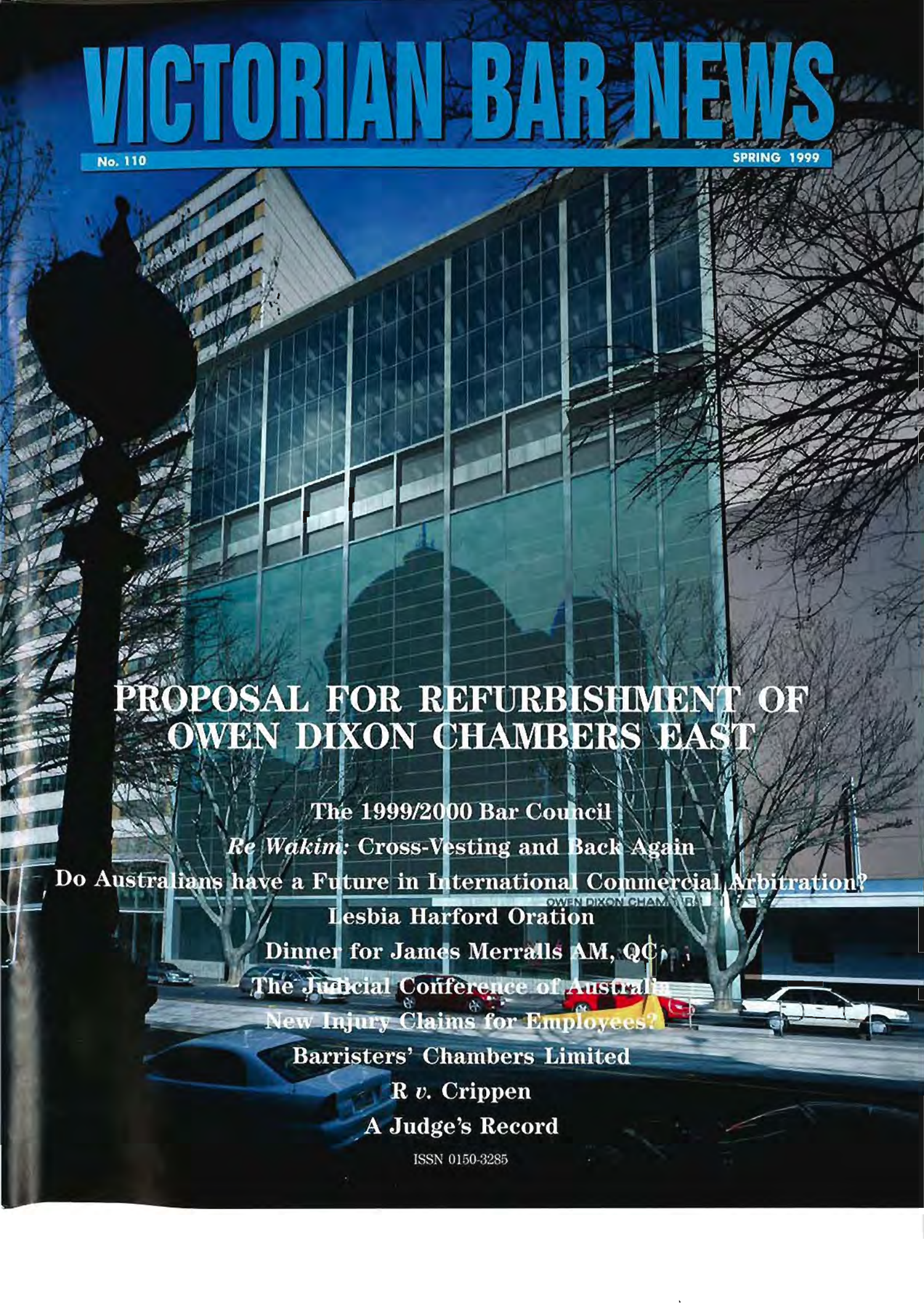
VICTORIAN BAR NEWS

No. 110 SPRING 1999



PROPOSAL FOR REFURBISHMENT OF OWEN DIXON CHAMBERS EAST

The 1999/2000 Bar Council

Re Wakim: Cross-Vesting and Back Again

Do Australians have a Future in International Commercial Arbitration?

Lesbia Harford Oration

Dinner for James Merralls AM, QC

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New Injury Claims for Employees?

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A Judge's Record

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for the year 1999/2000
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Advertising
Publications Management Pty Ltd
38 Essex Road, Surrey Hills,
Victoria 3127
Telephone: (03) 9888 5977
Facsimile: (03) 9888 5919
E-mail: wilken@bigpond.com

Privatisation and Governmental Responsibility

SOME 50 years ago government took responsibility for the provision of what were seen as "essential services". These services did not necessarily run at a profit but they were subsidised out of taxes. The economists tell us that government provision of essential services is necessarily inefficient: "Private enterprise can do it better and/or cheaper." Perhaps more importantly, government has discovered that if private enterprise provides a service, then there is no basis for complaint when the "user pays" principle is applied.

There are some of us who (perhaps living in the past) believe that deregulation and competition and the pursuit of profit does not necessarily provide the best system of justice, the best system of public transport or the best prison system.

PRIVATE PRISONS

The principle of user pays which seems to extend into every aspect of what used to be described as public utilities, has not yet extended to our prisons. We do, however, now have "private prisons" which, no doubt, are required to operate at a profit.

At an instinctive level — perhaps due to undisciplined reading as children — we feel that the incarceration of human beings is not a matter appropriate to be let out to public tender.

This is not to suggest that private prisons are necessarily badly run, that the people incarcerated in them are more subject to violence than those in State prisons or that they are less well fed or more harshly disciplined. Our concern is with something more fundamental. Is it permissible to trade in human misery? Is it proper to make a profit out of the incarceration of human beings?

We accept that the State has an important role to play in protecting society from antisocial acts and that this, of necessity, involves the imprisonment of certain individuals. Clearly, when all else fails, imprisonment of offenders is necessary.

We also know that people are brutalised in prison, both sexually and generally. For some reason the powers-that-be have found it unnecessary to spend the money required to ensure that this does not happen. It is difficult to accept that in a civilised society such a state of things can be countenanced.

Politicians who are on a law and order kick can talk about "clamping down on crime" and the uninformed can object to the "pampering of criminals". One wonders how they would feel if their sons or daughters were about to be sentenced or even how they would feel if they found themselves in the position of a judge sentencing a young man or young woman, who knows that there is really no alternative to imprisonment available and who knows at the same time what is likely to happen to the young man or woman standing in the dock if sent to prison.

It is, of course, one thing for the State to say that the money is not available to provide a safe environment for the inmates of our prisons. It is quite a different thing for private enterprise to say this.

In the legal profession we are told that we cannot place ourselves in a position where our self-interest conflicts with our duty to the court or to the client. Should those who manage our prisons be placed in a position where their duty to the inmates is in conflict with their duty to their shareholders?

One of the bases for privatisation is this wonderful myth that competition is good. Perhaps it is, where the customers can really vote with their feet and move to the provider who gives the more efficient or more satisfying service. The extent to which any of us can do this in relation to our individual supply of gas, water, electricity or public transport is highly doubtful. In the case of the offender imprisoned in a private prison, his capacity to choose an alternative service provider is totally non-existent.

Orphans who were committed to privately run orphanages in the 19th century were, as Dickens has pointed out quite dramatically, at the mercy of management. The convicts who were indentured out to the early settlers were in the same position. They had no choice but to stay and endure — if endurance or suffering were required.

So far as government is concerned, there may be competition between the various prison providers — competition

as to the price at which they will provide a particular service to the government. So far as the prisoners are concerned, there would appear (and we admit that we are not economists) to be a direct relationship between the price charged and the service (i.e. food, shelter and protection) which can be provided to the prisoner. In other words, both in order to obtain the government contract in the first place and in order to satisfy the shareholders' need for a profit margin, a successful private prison needs to "run lean".

It does not necessarily follow that a private prison will provide worse conditions than a government-run prison. It may provide better conditions for the inmates. There is, however, a clear conflict between the duty to the shareholders, (a) to obtain the contract and (b) to make a profit, and the duty to the community to ensure that people who are imprisoned suffer nothing more than imprisonment.

If profits are being generated by prison systems which do not provide adequate protection for the inmates then we are trading in human misery. It is not sufficient that the private prisons are "as good as" government-run prisons. If their existence is to be justified in any way at all, it can only be on the basis that a person imprisoned in a private prison is at no greater risk of physical violence than he would be if he were not imprisoned.

COMPETITION AND PROFESSIONAL RESPONSIBILITY

The Australian Law Reform Commission has now recommended that, as a condition of being permitted to practise, providers of legal services be required to do a certain percentage of work on a pro bono basis (if we may be permitted to bastardise the original Latin and to give it its somewhat different modern meaning).

At the same time Professor Fels tells us that we are in the "legal industry". We should not have restrictive rules, even if they are designed to ensure that we give our clients (customers) the best service that can reasonably be provided.

When will our political masters and the bureaucrats (and the do-gooders) make up their minds as to what they want of the legal profession?

Both of these proposals have to be seen against the proposed New South Wales legislation permitting law firms to incorporate, share profits with other professionals and raise outside capital, and which will it seems, permit law firms to float on the Australian Stock Exchange. According to the *Financial Review* "the laws will make NSW a world leader in shaking off the 17th century business structures of the legal profession".

From what our betters tell us, we can conclude (a) it is a good thing to provide free service; (b) it is a good thing to engage in competition; (c) deregulation is a good thing; (d) privatisation of essential services is a good thing; (e) Legal Aid should be privatised; (f) the legal profession should provide legal aid for free.

When will our political masters and the bureaucrats (and the do-gooders) make up their minds as to what they want of the legal profession? Most of us would prefer to remain a profession, serving our clients and, in many cases, doing it at an uneconomic rate or at no charge, just because we are professionals. In the present brave new world, where "efficient competition" is the motto of the month and shedding of governmental responsibility the policy of the decade, one has to ask why the legal profession (industry) should provide free services to anyone. Isn't this absolutely contrary to the user pays principle?

LAW AND ORDER

It is not only in the privatisation of prisons that our criminal justice system appears to be departing from what most of us would regard as the norm. We now have legislation in Victoria designed to ensure that the right of an accused to trial by jury should be inhibited by a system of "pleading".

It is true that jury trials become extremely lengthy. It is also true that such trials cost public (and sometimes private) money. It may also be the case that the new system will shorten the actual trial. Whether it will actually save money is a different question.

Traditionally the only issue which a jury was required to decide was whether, on the whole of the evidence, they were satisfied beyond reasonable doubt that the accused was guilty. There was a presumption of innocence and the whole burden was cast upon the Crown. Perhaps, however, that also is an obsolete 17th century concept.

The guilt or innocence of an accused should not be determined in the speediest possible way or even in the most efficient way. It should be determined in the most just way *having regard to the fundamental principles of the common law* — which some of our legislators and some of our administrators seem to have forgotten.

The Editors

Federal Litigation Reform

AFTER a flurry earlier this year of State Government litigation reform, once again the federal judicial system is in the limelight: the aftermath of the decision of the High Court in *Re Wakim; ex parte McNally* concerning the exercise by federal courts of State jurisdiction; the recent proposal for a Federal Magistrates Court; and the release by the Australian Law Reform Commission (ALRC) of a discussion paper entitled *Review of the Federal Civil Justice System.*

The Bar Council has been active in publicly addressing the issues which these federal matters have presented, both through our involvement in the Law Council of Australia, and also directly. In my view it is vital that, as far as possible, the Bar Council accept invitations to have direct input on federal litigation reform. The depth of expertise at our Bar, the breadth of our practical experience and the relative speed with which we are able to present both formal and informal responses to law reform initiatives are increasingly valued by governments and other law reform bodies.

RE WAKIM

First, we have been urging the State Government to present Parliament with a Bill which would deem a judgment of the Federal Court or Family Court which is "ineffective" under the principles of *Re Wakim* to be a valid judgment of the Victorian Supreme Court. Such legislation has already been passed in other States, including NSW and South Australia. Although doubts have been raised in some quarters as to the constitutional validity of such legislation — presenting the possibility that it may constitute executive "interference" with the exercise by federal or State courts of Chapter III judicial powers — we have put a detailed submission to Government that these speculative doubts are not strong and do not, at a practical level, remove the need for validating legislation. I am grateful to Mark Derham QC for preparing the Bar's submission.

FEDERAL MAGISTRACY

Secondly, we recently accepted an invitation of the Senate Legal and Constitutional Legislation Committee to present written and oral submissions regarding the Federal Magistrates Bill 1999. This Bill would, if enacted, create a Federal Magistrates Court (or "Federal Magistrates Service") which would have a jurisdiction which is substantially concurrent with that of the Family Court and the Federal Court.

The Bar Council supports, in principle, the creation of a new federal court to relieve the now intolerable burden on the existing federal court structure. However, at a hearing of the Senate Committee we supported the Law Council's view that the Bill, if enacted, would have an unacceptably damaging effect on the existing system and the Family Court in particular. It appears from statements of the Attorney-General that a substantial amount of the funding for the new court would be deducted from the Family Court's budget. It also appears from an analysis of the Bill that the new court would not supplement but rather *compete* with the Family Court. In our view this competition would have the effect of making federal litigation more confusing, complex, and expensive.

Moreover, the text of the Bill reveals a number of other problems: the Bill would, for example, allow unregulated non-lawyers to represent parties in the new court, and would relieve federal magistrates (exercising the judicial power of the Commonwealth) from the obligation to give substantive reasons for decision. I am grateful to Mark Derham QC, Diana Bryant QC, Garrie Moloney and Jonathan Morrow for their work in this regard, and I hope that our submissions are carefully considered. There may be a need for a new lower federal court, but we need the *right* court.

ALRC

Thirdly, the Bar has been involved in detailed discussions with the ALRC in relation to the final stage of its review of the federal litigation system. The review – which began its life some time ago as an amorphous "adversarial system" review – is due to be completed with final recommendations later this year. I am pleased to say that the recently published ALRC discussion paper, in contrast to some of the earlier ALRC publications in relation to the adversarial system, strikes me as a very intelligent and carefully researched document. Many of the proposals will, I believe, command the support of the Bar Council.

In particular, the discussion paper acknowledges the critical importance of legal representation in our federal courts, and it holds up the Federal Court's docket system as a model to be followed in federal tribunals and the Family Court. Members of our Bar who met with Commissioner Dr Kathryn Cronin and ALRC staff for informal discussions were generally supportive of the bulk of the ALRC recommendations, and found the paper useful and informative. I am very grateful to our members who gave their time to attend meetings: Tony Cavanough QC and Richard Tracey QC (administrative review); Robert Redlich QC, Noel Ackman QC, Clarinda Molyneux QC, Jeremy St John, Norah Hartnett, Michael Connolly, Joseph Melilli, and Lachlan Wraith (family law); and Mark Derham QC, Robin Brett QC, Paul Santamaria, Bruce Caine, Melanie Sloss, Richard McGarvie, and Richard Attiwill (federal civil litigation).

NEW BAR COUNCIL

Finally, I would like to congratulate those of our members who were elected to the Bar Council, and convey my

gratitude to the outgoing members, who gave so much of their time and expertise: Robert Richter QC ably represented the Bar at several parliamentary hearings in relation to criminal law reform; Maurice Phipps QC provided an invaluable link between the Bar Council and BCL; for several years David Beach has assisted the Bar Council to intervene in common law reform issues, and has served as Assistant Treasurer; Carolyn Burnside has energetically assisted the Bar in advocating legal aid reform. I would also like to thank in particular David Neal who as a member of Bar Council since 1996 has allowed the Bar to remain at the very forefront of criminal law, civil liberties and legal aid debates. The challenge for the new Bar Council will be to maintain this momentum.

David Curtain
Chairman

Graham Fricke's Response

The Editors

Dear Sir

MY article in the Autumn issue of the *Bar News* provoked responses from your senior editor and from my erstwhile opponent in the Solomon Islands. The latter was a clever piece which studiously neglected to contest the accuracy of my account of what took place in the court in early 1998. Both responses defend the practice of ad hoc or case-by-case admissions of foreign practitioners. Their examples involve non sequiturs.

I accept the fact that New Zealand and British practitioners needed to pass examinations in, for example, constitutional law in order to practice in Victoria. But when they had done so, they were admitted once and for all. They did not need to repeat the exercise each time they wanted to practise in this jurisdiction.

What possible purpose can be achieved, other than the protection of the preserve of local practitioners, by requiring the outsider to undertake the burdensome paperwork each time he or she wants to appear? To take up Mr Radcliffe's example, I do agree that if he were to walk into a Victorian court, whether fully robed or not, without having been admitted, he would be lucky to escape being committed for contempt. But if he had taken the trouble to become admitted in Victoria, I would not expect him to have to repeat the exercise each time he sought an audience in this jurisdiction.

Yours faithfully

Graham Fricke

Practising Certificate Applications for 2000/2001

ON 11 May 1999, the *Legal Practice Act* 1996 was amended to:

- alter the period of the practising certificate year from a calendar year to a financial year;
- introduce a system of surcharges for late applications for a practising certificate by current practising certificate holders;
- alter the timing of the lodgment of proof of professional indemnity insurance when current practitioners apply for a new practising certificate; and
- change the manner in which practitioners nominate for inclusion on the roll for the purposes of electing the practitioner members of the Legal Practice Board.

Special transitional arrangements have been made to effect the change to a financial year certificate. The change will occur through an eighteen-month practising certificate valid from 1 January 2000 to 30 June 2001. The following schedule summarises the critical dates for applications for practising certificates for 2000/2001 by practitioners who, at 31 October 1999, hold a practising certificate valid for 1999.

All or part of the surcharge which applies to applications lodged in November or December 1999 may be refunded in special circumstances. The surcharge system only applies to current practitioners, i.e. those who on 31 October 1999 hold a practising certificate issued by the Victorian Bar RPA for 1999. New practitioners who apply for a practising certificate for 2000/2001 after 31 October will not pay the surcharge.

If a practitioner who held a practising certificate at the end of the previous practising certificate year (in this case, at 31 December 1999) applies for a new certificate within the first three months of the new practising certificate year, a surcharge of 200 per cent of the prescribed fee for the practising certificate will apply. The surcharge can be avoided if the practitioner provides with the application a statutory declaration to the effect that he/she has not practised since the end of the previous practising certificate year, intended at the end of the previous practising certificate year not to practice for at least the first three months of the new practising certificate year, and provides reasons why that intention has now changed.

SUMMARY OF CRITICAL DATES

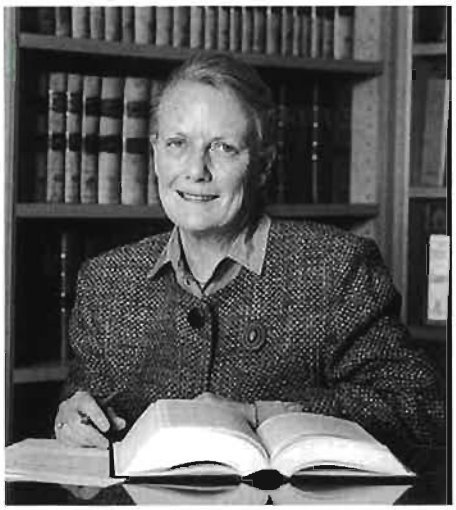
The Victorian Bar RPA will issue applications for practising certificates for 2000/2001 to current practitioners by:	Late September 1999
Current practitioners must apply for a practising certificate for 2000/2001 and pay the relevant fee of $320 (inclusive of $20 GST) by:	31 October 1999
Normally, applicants would be required to provide proof of professional indemnity insurance for the period January to June 2000 by 30 November 1999. However, as the holders of practising certificates issued by the Bar and valid for 1999 have already provided proof of insurance to 30 June 2000, no further action will be required.	No action required in 1999
A surcharge of 25 per cent of the practising certificate fee will apply if an application by a current practitioner is made in:	November 1999
A surcharge of 50 per cent of the practising certificate fee will apply if an application by a current practitioner is made in:	December 1999
A surcharge of 200 per cent of the practising certificate fee will apply if an application by a current practitioner is made during:	1 January 2000 to 31 March 2000
Practising certificates for 2000/2001 for those who apply by 31 October will be forwarded to applicants in:	Mid November 1999

Courts and the Future

AN address by Justice Michael Kirby of the High Court to last year's colloquium of the *Judicial Conference of Australia* was entitled "The Future of Courts — Do they Have One?". Not surprisingly, perhaps, His Honour concluded that courts do indeed have a future but will need to conduct their operations very differently from the past, especially as modern computer technology is fully deployed in the court system. I thought I would use this column to make some observations about the courts and the future, with particular emphasis on civil justice. It is in the civil area where some major questions are beginning to emerge about the future role of the courts. This is largely because of continuing concerns about the cost of civil proceedings, the time taken to deal with cases and the general complexity of the procedural system. Alternative means of private dispute resolution are continuing to emerge and unless the court system can improve its performance its future health and strength may be in jeopardy.

I agree with Justice Kirby that the courts do have a future and it is very important that they do so, for the reasons mentioned by former Chief Justice of the High Court, Sir Anthony Mason, in his paper to the 1999 AIJA annual conference. In discussing the role of the courts and the continuing growth of alternative methods of dispute resolution, Sir Anthony observed:

> Quite apart from a lack of evidence to suggest that court adjudication will be eliminated or overwhelmed by ADR, there are several considerations which indicate that court adjudication will survive, even if it be not as dominant a mode of dispute resolution as it has been. First, there is the constitutional dimension . . . The Australian Constitution entrenches the exercise of judicial power. Court adjudication is also an integral element in the constitutional framework of State government.
>
> Secondly, it is difficult to conceive in a modern democratic society that such a society can survive without a strong integrated system of public court adjudication. The existence of such a system lies at the core of the separation of powers. Although it is possible



that criminal and public law adjudication could provide the basis of such a system, a more wide-ranging system of court adjudication is not only desirable but necessary for maintaining the rule of law. Court adjudication in civil cases is essential for the regulation of acts and transactions, in particular for the protection of commercial transactions and economic activity. The vitality of commercial life depends upon judicial enforcement of contractual rights and obligations.

EXPANDING DISPUTE RESOLUTION OPTIONS

These considerations are very important but so is the need for courts to examine their role in society and especially the range and standard of services provided to the community. Absolutely central to this is the dispute resolution role and the maintenance and development of community respect and support in this regard. It is important that the courts consider carefully the prospects for increasing the range of dispute resolution options. The courts are clearly aware that despite improvements in recent years through such means as caseflow management and ADR there is still substantial concern about the cost, delay and complexity of traditional adjudication. In this context, it is likely that alternatives to the formal adjudication process will continue to emerge and in fact to compete with the courts for the business of dispute resolution. It is also likely that litigants will increasingly seek choices between courts within which to resolve their difficulties.

VCAT (The Victorian Civil and Administrative Tribunal) will continue to develop as an alternative to the courts. In this context the results of recent research in the United Kingdom should be noted. This showed that litigants tend to prefer quicker, cheaper and more informal methods of dispute resolution to the traditional, adversarial approach. The results of this research and other similar studies elsewhere pose a real challenge for the courts of the future. This challenge is to broaden the range of dispute resolution options and to make the system cheaper and quicker than it is at present without compromising the important role which the courts perform in maintaining the rule of law.

CHANGES IN JURISDICTION AND STRUCTURE

As part of the general improvement process, especially if the traditional adjudication role of the courts is to survive, the pace of reform of process and procedure must accelerate, preferably under the leadership of the judiciary. But beyond procedural reform we must also contemplate broader structural and strategic approaches in areas where the executive and legislative arms of government may have a role. For example, it may be timely for a thorough "first principles" examination of the jurisdiction of the various courts to ensure that we have got things right in that regard. Court jurisdictions tend to evolve a bit like "topsy" and it may be that a detailed examination is required to ensure that in Victoria we have the best possible arrangements for allocating cases to the most appropriate bodies. Such an examination might well consider the issue of overlapping jurisdictions to provide litigants with a choice of venue for resolution of their disputes. Such an examination could also go beyond jurisdictional issues to consider how civil proceedings are conducted in the courts, especially in the light of emerging evidence that litigants, including individuals and businesses, are looking for quick, cheap, informal and conclusive resolution of their differences.

It might also be appropriate to consider whether Victoria really needs two higher level trial courts. The jurisdictions of the Supreme and County Courts are now very similar and it could be time for a feasibility study into the possibility of merging the two bodies. A merger would have the potential to provide a much more streamlined, simpler, more flexible and more accessible higher court system for Victoria. It could well offer substantial administrative and cost benefits. Any such study would need to include an assessment of the legal, administrative and cost benefit aspects. Independent of such a study, consideration could well be given to whether the civil jurisdiction of the Magistrates' Court should be further increased. This would be on the basis that the Court is more accessible to litigants from a cost and delay standpoint than the higher courts.

COURTS TO TAKE THE LEAD

While these are all matters for consideration by the executive and legislative branches of government most of the potential for civil justice reform clearly lies in the hands of the courts themselves, particularly the judiciary. Ensuring the future of the civil operations of our courts will require an increasing emphasis on effective management of all aspects of their affairs. Courts are increasingly seen as organisations requiring modern approaches and techniques of management. As part of this, the future will require an even stronger judicial role than in recent times and this will need to be supported by the legal profession, both barristers and solicitors. Litigation will need to be approached in project management terms, and existing caseflow management systems will need to be further developed and refined. There is a strong view among litigation lawyers, many judges and experienced litigants themselves that the "individual docketing" system of caseflow management currently being practised in the Federal Court should be adopted by the Supreme and County Courts. This enables individual attention to be given to each piece of litigation by the relevant judge to whom the case is assigned at the time of issuing proceedings, and improves its overall management. There are strong suggestions that "docketing" improves the quality of judicial life because it involves much greater control of the processing of cases by individual judges. It is also calculated to improve trial management for the cases that get that far in the system.

ADMINISTRATIVE IMPROVEMENTS

As well as further developments in caseflow management, the idea of having a single registry for Victorian courts is now being discussed in various quarters. The major advances in computer technology make this a perfectly feasible development. Proponents of a single registry claim that it would assist parties and their lawyers to select the dispute resolution forum best suited to their needs, be it a court or a tribunal, arbitration, mediation or other possibilities. State of the art technology would be used extensively to facilitate communication between the registry, the courts and the litigants. A modern call centre could be established to provide litigants with quick, accurate information on progress with their cases.

More generally, the rapid fall in the cost of storage technology and data capture techniques, such as scanning and video production, will very likely revolutionise court procedures. The massive capacity of CD-ROMS and the low cost of scanning documents is likely to result in the adoption of the American practice of discovery by delivery of documents. Lawyers will not need to trawl expensively through endless amounts of paper to isolate issues; they will simply search electronically. The test of direct relevance will be the norm in the courts and the so-called Peruvian Guano approach will be reserved for only the most complex cases. Proving electronic documents and the acceptance of digital signatures as a matter of course will bring radical change to the operation of the courts. In addition, video will allow trials to run continuously or in stages at the managerial discretion of the trial judge. Expert witnesses can give real time evidence by video link to the court from their place of work. Courts can allow the recording of testimony of crucial witnesses before a trial. Use of these procedures will increase.

Bringing about improvements will require strong and sustained leadership on the part of the judiciary. Judicial officers will not be able to do it on their own and will rely heavily on the legal profession and their court administrators to assist. Like the judiciary, lawyers and court administrators will need to improve their own project management skills. This may require specific training from relevant experts.

UNIFORM AND SIMPLIFIED RULES

To assist in this whole process, uniform and simplified rules are desirable. This would require the courts to get together and produce a set of uniform rules, as was recently achieved in Queensland. It may well be desirable to involve non-lawyers in this process. For example, the involvement of management experts and business processing people could assist enormously and it could be useful to include some consumer representatives as well. In addition to uniform rules, these initiatives could result in the development of a series of litigation protocols, as is now occurring in the United Kingdom, to assist in the practical operation of the litigation system. As part of this process, all the various rules and procedures will need to be investigated to see if they are appropriate for modern conditions and for the dispute resolution requirements of the future. All of these things are extremely important because of the increasing pressure from the community for better operation of the court system. It is notable that many of Australia's courts are now developing court performance measures that include time standards for caseflow management and protocols on the time for delivery of reserved judgments. These are useful developments.

THE COST OF LITIGATION

As far as the cost of civil dispute resolution in the courts is concerned it seems that at present we are not making much headway. One of the major innovations adopted recently in the United Kingdom as a result of Lord Woolf's report is a system of fixed costs in lower level cases. This may well be something worth investigating in Victoria and, notwithstanding the difficulties of dealing with longer and more complex cases, it might well be considered for higher level cases as well. The present system of scale costs and many litigation lawyers continuing to operate on a "time charging" basis is unsatisfactory and not meeting community expectations of the court system. Different approaches are required, and if courts and lawyers are not able to sort it out government action may be required.

JUDICIAL APPOINTMENTS AND JUDICIAL EDUCATION

The civil justice system of the future will require special attention to be given to the criteria and process for appointment of judicial officers. High level legal skills and experience will continue to be important but a broadening of the range of dispute resolution options and the increasing need for the whole system to be led and effectively managed by the judiciary will demand that more emphasis be given to people with diverse legal backgrounds and demonstrated managerial capacity.

At present there is discussion throughout Australia about possible changes in the methods of appointing judicial officers. In this context I note with interest that a new system has very recently been introduced in New Zealand involving advertisement, expressions of interest and the maintenance of a confidential register. It also involves interviews, required at District Court level, optional for the High Court but not used for Court of Appeal appointments. It may well be that changes along these or similar lines will occur in Victoria at some stage in the future.

The judiciary of the future will certainly require access to a variety of educational programs to assist them in their important and complex work. There should be orientation programs for new appointees and a comprehensive range of continuing education courses on key topics of relevance and interest to judicial officers. I am of course aware of the important national programs conducted by the AIJA, but in my view something more comprehensive is required which has particular relevance to Victoria and is accessible to all judges, magistrates and tribunal members who wish to use it.

I note that the Judicial Conference of Australia and the AIJA are having discussions about the possible establishment of a national judicial college. This idea was first mooted some years ago when the former Federal Labor Government did some preliminary work on feasibility issues. I am not aware of the results of those investigations but a national organisation may well be the best way to proceed provided it is an exercise in genuine co-operation between the Commonwealth and the States and Territories, is led by the judiciary and caters adequately for the "local content" aspect which would be important for the specific circumstances of each jurisdiction.

The end result of these changes and many others which could be contemplated would be a system that is cheaper, quicker and simpler and satisfies community need for a more accessible civil justice system. While preserving the important, traditional role of the courts in adjudicating civil disputes, we should pay much greater attention to the development of a system that treats litigants, practitioners and other court users more like the best of the service industries in the economy. As part of a project management approach to litigation, especially assisted by modern computer technology and the latest management practices, the courts should be able to provide litigants and other users with a much more effective service than in the past and thus preserve and enhance their important position in the overall scheme of democratic government.

Jan Wade
Attorney-General

Legal Practice Act 1996

Determination of Contributions to Fidelity Fund for the Period 1 January 2000 to 30 June 2001

THE Legal Practice Board, acting under Division 1 of Part 7 of the *Legal Practice Act* 1996 has determined that the classes of persons required to pay a contribution under Division 1 of Part 7, and the contribution payable by members of each class, for the period 1 January 2000 to 30 June 2001 are as set out in the following table. Approved clerks, interstate Practitioners and Foreign Practitioners must pay any contribution to the Legal Practice Board by 31 October 1999 (see S. 202(4)). All other persons will pay any required contribution to the Victorian Lawyers RPA Ltd at the time of applying for or varying their practising certificate. **Persons who do not fall within these classes are not required to make a contribution.**

CLASS OF PERSONS

Contribution

Authorised to receive trust moneys and no nominee mortgage practice

1. An approved clerk or the holder of a practising certificate that authorises the receipt of trust money (other than an incorporated practitioner) who:
   (a) received, or was a partner or employee of a firm, or a director or employee of an incorporated practitioner that received trust money exceeding $500,000 in total during the year ending on 31 March 1999; **and**
   (b) did not receive at any time during the year ending on 31 March 1996 money from a client to be lent on the security of a nominee mortgage. **$600**

Authorised to receive trust moneys and a nominee mortgage practice

2. The holder of a practising certificate that authorises the receipt of trust money (other than an incorporated practitioner) who at any time during the year ending on 31 March 1996 received, or was a partner or employee of a firm, or a director or employee of an incorporated practitioner that received money from a client to be lent on the security of a nominee mortgage. **$900**

Interstate and Foreign Practitioner

3. An interstate practitioner or a foreign practitioner (not including a body corporate) who:
   (a) has established a practice in Victoria within the meaning of section 3A of the Act; and
   (b) received, or was a partner or employee of a firm, or a director or employee of an incorporated practitioner that received trust money in Victoria, exceeding $500,000 in total during the year ending on 31 March 1999. **$300**

Employee practising certificate and not authorised to receive trust money

4. The holder of a practising certificate that authorises the person to engage in legal practice as an employee or as a corporate practitioner who:
   (a) holds a practising certificate that does not authorise the receipt of trust money; and
   (b) is employed by a legal practitioner or firm that is authorised to receive trust money. **$150**

Employee of community legal centre

5. If an employee of a community legal centre falls within one of the categories set out above (but not otherwise), he or she shall only be required to pay $100: (see S. 201(1))

Where an applicant for a practising certificate or for a variation of a condition of a practising certificate the holding or variation of which, or an applicant for registration as a foreign practitioner, or an interstate practitioner notifies the Board they have engaged in legal practice in Victoria, the granting or notification of which would make them a member of any of the classes set out above, makes their application or gives their notification after **31 January 2000**, the contribution payable by the person shall be calculated in accordance with the following formula: $[((n/18) x C) – P] where this gives a figure greater than 0. **n** is the number of whole months remaining up to and including June 2001 after the date of the application or notification; **c** is the contribution payable by members of the relevant class and **p** is the amount (if any) already paid under this determination as at the date of the application or notification.

Sexual Harassment and Vilification

The Conciliators for Sexual Harassment and Vilification have reported that they received no inquiries or formal complaints during 1998/1999. The conciliators note that this may be due to there being no concerns or because those affected are not aware of the availability of the conciliators. To this end, from time to time the Bar intends to publicise the arrangements it has for dealing with these matters.

The Victorian Bar's Rules of Conduct contain provisions which provide that sexual harassment or vilification in any professional context may be held to be professional misconduct or unsatisfactory conduct.

A person allegedly harassed or vilified may lodge a complaint with a conciliator who will provide advice or, if requested, conciliate the matter. The conciliators appointed by the Bar Council are Ron Castan AM QC, David Habersberger QC, Jane Patrick and Debra Mortimer.

The Rules relating to sexual harassment and vilification are set out below.

PART IX – CODE OF CONDUCT

Sexual Harassment

194. (a) A barrister shall not, in any professional context, engage in sexual harassment.
   (b) For the purposes of sub-rule 194(a) a barrister sexually harasses another person if:
      (i) the barrister makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to that person; or

(ii) engages in other unwelcome conduct of a sexual nature in relation to that person;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that that person would be offended, humiliated or intimidated.

"Conduct of a Sexual Nature" includes making a statement of a sexual nature to the person allegedly harassed or in the presence of that person, whether the statement is made orally or in writing.

Vilification

195. A barrister shall not, in any professional context, engage in conduct which is calculated to disparage, vilify or insult another person ("the person allegedly vilified") on the basis of that person's sex, sexual preference, race, colour, descent, national or ethnic origin or religion.

Procedure

196. (a) The person allegedly harassed or vilified may lodge a complaint in writing alleging a breach of Rule 194(a) or Rule 195 with any one of the persons appointed from time to time by the Bar Council as a Conciliator for Complaints of Harassment ("Bar Conciliator");

(b) A Bar Conciliator who receives such a complaint shall treat the complaint and any response as confidential but may do any one or more of the following:

(i) provide the person allegedly harassed or vilified with counselling and advice;

(ii) inform the barrister concerned of the complaint;

(iii) provide that barrister with an opportunity to respond to the complaint;

(iv) provide that barrister with an opportunity to be counselled or advised in respect of the complaint;

(v) arrange for the complaint to be conciliated by that Bar Conciliator acting alone or together with any other Bar Conciliator.

The steps referred to in subparagraphs (i), (ii), (iii) and (iv) shall only be taken with the consent of the person allegedly harassed or vilified. The step referred to in subparagraph (v) shall only be taken with the consent of both parties.

(c) Nothing in these Rules shall prevent the person allegedly harassed or vilified from lodging a complaint alleging a breach of Rule 194(a) or Rule 195 or of Section 137 of the *Legal Practice Act* 1996 with the Ethics Committee or the Chairman of the Bar Council.

Martin Shannon QC

Peter Galbally

WITH the death of Martin Shannon QC on 27 August, the Bar has lost a warrior, and one from the Praetorian Guard at that. His advocacy blended compassion with steel. His work bound wounds but butchered hypocrisy.

Shannon's family were, and still are, farmers in the Lancefield district. He maintained that such an upbringing was worth a fistful of degrees. He graduated from Melbourne University in 1958 and did articles with Tom Burke in Malvern. He signed the Bar Roll in 1962 and within a few years had built up an extensive practice principally in the criminal field. As time went on he was sought for prosecution work, particularly on circuit.

Martin Shannon QC

It was during this time that he had occasion to prosecute a publican at Bairnsdale, one Doodles Duffy, for driving under the influence. After a hard fought trial the jury were sent out in the late afternoon and Martin and his instructor embarked upon an expedition to secure the necessary restoratives to accommodate their needs for the evening bearing in mind the strictures of 6 o'clock closing. Doodles was duly acquitted and discharged. Martin as prosecutor was required to remain for some time to tidy up the balance of Crown business. He ultimately left the Court and repaired to his prosecutorial sanctuary only to be met by the rousing cheers of Doodles and the jury who were making very short work of the Shannon carefully husbanded restoratives. With the practised nose of a publican bloodhound, Doodles had no difficulty sniffing out the ambrosian qualities of Victoria Bitter even within Her Majesty's Courthouse at Bairnsdale.

In the legal sense Shannon's spiritual home was Gippsland. In his early days as prosecutor he saw the potential for civil work. He was instrumental in bringing Tony Stewart, Peter Ryan (now MLA) and later Klaus Mueller to the firm of Warren, Graham & Murphy which subsequently opened offices throughout Gippsland and became the powerhouse of litigation in the region.

During the seventies and eighties, the variety and substance of civil litigation probably eclipsed any other region in the State. Tony Stewart recently described how his firm alone had briefed Shannon in some 27 Supreme Court actions for hearing at one circuit, and all were disposed of one way or another and this number was not unusual. The work included motor car accidents, Bass Strait oil rig litigation, Loy Yang and Yallourn industrial accidents, timber mill accidents as well as environmental law issues involving the Gippsland Lakes and Bass Strait. Over this time Shannon was able to dispense considerable largesse to the likes of Costigan QC, Nicholson QC, Hart QC, Villeneuve-Smith QC and Gillard QC, all of whom supped well at the table.

Through all this Shannon was the true professional. I saw him during this time on numerous occasions not knowing at 10 a.m. or later in the day which of six cases he may have to start. Indeed a number might start in the course of the day. He was always immaculately prepared and ready to fight. His idea of negotiation was to state how much he wanted and just stick to it.

Shannon took silk in 1985. He continued to practise in the personal injuries jurisdiction for some time but soon his talents were sought by the Commonwealth in big prosecutions. Some instances being: sales tax — Murphy; income tax — a prominent member of the Victorian Bar; conspiracy to defraud and tax — Grollo.

I suspect these were the least enjoyable years of Shannon's career but he did the work with towering strength and without bitterness or rancour. But, as he said to me recently, he missed the daily banter and interchange with his fellow barristers and practitioners.

He was a man of considerable physical strength. He played football with South Melbourne. His athletic prowess was formidable. As time went on he developed a passion for quality firearms and hunting. I cherish a vivid memory of him heading out for a spot of pig shooting out back of Broken Hill. The scene was outside the Mildura Court House. The circuit was finished: the chauffeur opening a door on the largest white stretch limo to grace regional Victoria, Shannon disappearing into the vast recesses of this craft loaded with more artillery and firepower than you would need to storm Fort Knox. All that was required was the ride of the Valkyries and a beachhead.

Martin will be sadly missed by Marj, his best friend and devoted wife of over 35 years, and by his five children and one grandchild and, not the least, by those in the profession for whom he was a cherished confidante.

Farewell to a formidable foe and a loyal friend.

Arthur Webb QC

I.C.F. Spry

ARTHUR Clifton Pelham Webb was born 31 January 1920 and was educated at Guildford Grammar School, in Western Australia. He came to Victoria, and completed a law course at Melbourne University. He was admitted to practise in 1947 and signed the Roll of Counsel of the Victorian Bar in 1949.

Meanwhile the Second World War had made demands on many Australians. Arthur Webb joined the Royal Australian Naval Volunteer Reserve in 1941, and served as a lieutenant until 1945. For much of this period he was seconded to the Royal Navy, and served on *H.M.S. Highlander*, which carried out convoy duty in the difficult and dangerous environment of the North Atlantic.

When he commenced at the Victorian Bar he read with Mr Oliver Gillard, and in 1954 he was appointed as the legal member of a Commonwealth Taxation Board of Review, in which position he remained until 1963. As a member of the Board he gave careful and honest decisions — honesty was one of his pre-eminent characteristics — over a wide range of taxation matters. His reasoning was always instructive, and more rewarding than that of Supreme and Federal Court judges with an insufficient grasp of the principles of taxation law.

After he left the Taxation Board of Review he developed a notable practice in the field of revenue law, and became a Queen's Counsel in December 1966. For many years he practised as the leading income tax specialist at the Victorian Bar, and was consulted in particular by many large commercial enterprises. Subsequently he also acquired an extensive knowledge of mining law. In view of his areas of specialisation, his practice was largely of an advisory nature. However, when he did appear in the High Court or some other jurisdiction, he spoke frankly and in his open and engaging manner, and it was a pleasure to listen to him.

During his years of practice as a silk there were marked changes in the High Court in the construction of revenue statutes. The decisions of the Barwick

Arthur Clifton Pelham Webb QC

Court were, with some exceptions, correct as a matter of law, but they demonstrated serious deficiencies in the drafting of the relevant legislation, and the matter was not assisted by that Chief Justice's difficult personality. Then, subsequently, the High Court became increasingly subject to political correctness, and many of its decisions became less intellectually respectable. Arthur Webb viewed these tergiversations with some disappointment. He believed that the law should be applied honestly, and was well aware of the difficulties that are faced by the commercial community especially when judges adopt a legislative role and reliance cannot be placed on the statute book. He found it increasingly difficult to respect decisions of the High Court which, not only in taxation matters but more generally, betrayed a readiness of judges to set their own views and prejudices above the law.

Outside the law, Arthur found much enjoyment in sailing, and was a member of the Royal Brighton Yacht Club and the Royal Yacht Club of Victoria, as well as of the Royal Sydney Yacht Squadron and the Cruising Yacht Club of Australia. Boats were a life-long interest for him, and he took much pleasure in acquiring older boats and restoring them for use in cruising and in racing. He particularly enjoyed deep-sea sailing, and participated on many occasions in such activities as the Queenscliff-to-Devonport race.

I came to know Arthur very well over the years, and I regarded him with great affection. He was open and generous in his views, and a most pleasant companion. His nature was honourable, and he was without any meanness of character. He was one of a generation who had risked their lives for their country in undergoing much hardship and danger, and accordingly had a solidity of purpose and a strength of principle that is perhaps lacking in the generation that has followed.

In 1949 Arthur married Eleanor Ham, their four children being Robin, Marcus, Duncan and Justin, all of whom survive him. He always spoke with great pride and affection of his family. He died on 27 June 1999, and is greatly missed by his family and friends.

The 1999/2000 Bar Council

Seated Front Row (left to right):

Ross Ray QC
(Honorary Treasurer)
Mark Derham QC
(Senior Vice-Chairman)
David Curtain QC
(Chairman)
Robert Redlich QC
(Junior Vice-Chairman)

Standing Second Row (left to right):

Jane Dixon
Peter Murdoch QC
Sara Hinchey
Jeanette Richards
Richard McGarvie

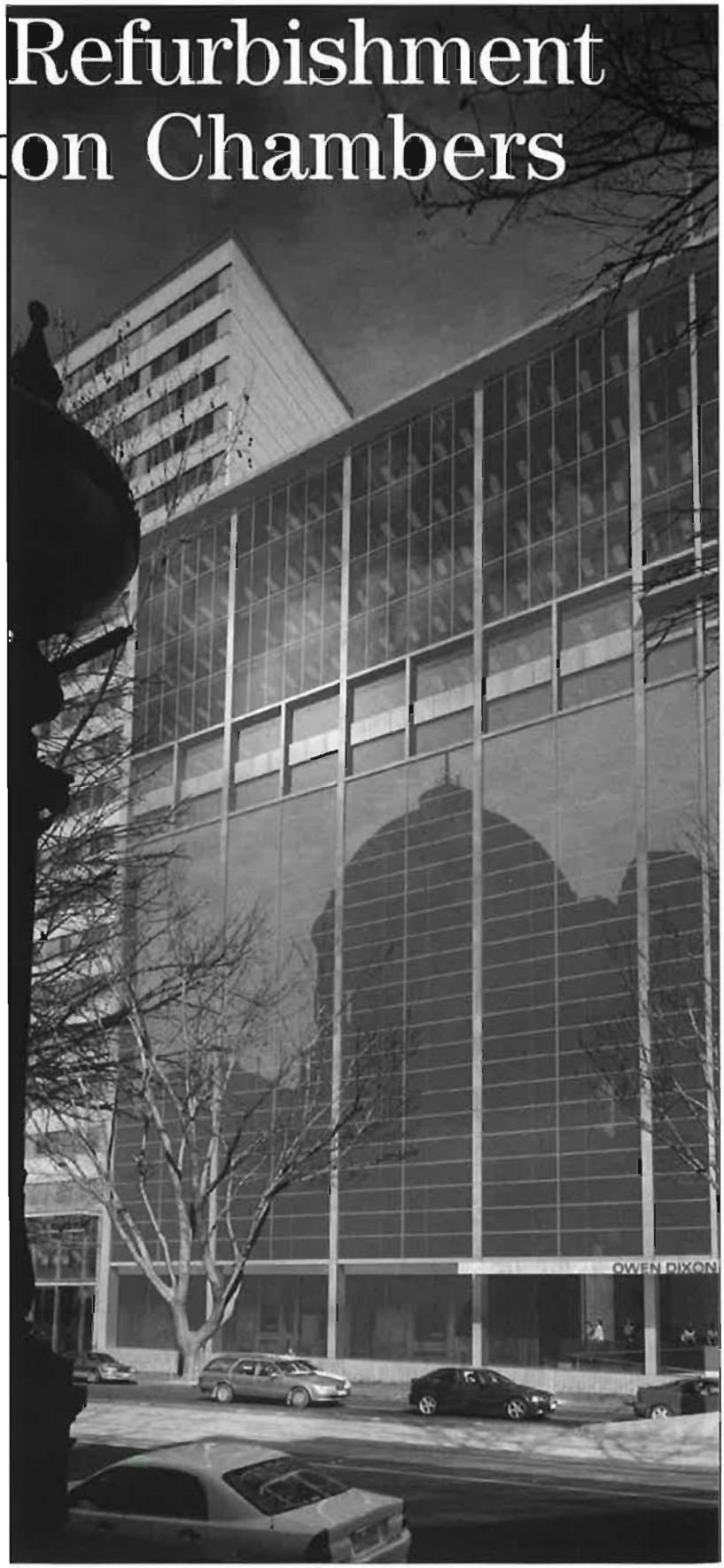
Standing at Rear (left to right):

Duncan Allen
Matthew Walsh
Richard Attiwill
(Acting Assistant Honorary Secretary)
Philip Dunn QC
Tony Pagone QC
Peter Riordan
Michael Gronow
Stephen Kaye QC
Garrie Moloney
(Honorary Secretary)
Bruce McKenzie
Robin Brett QC
Fiona McLeod
(Assistant Honorary Treasurer)

Absent:

Jack Rush QC
Paul Santamaria
Samantha Burchell
(Assistant Honorary Secretary)

Proposal for Refurbishment of Owen Dixon Chambers East



The Directors of Barristers' Chambers Limited have spent much time and effort in considering and preparing for the expected future accommodation needs of barristers. To this end, the Directors have considered various options including having new chambers built for BCL, various leasing options and the refurbishment of Owen Dixon Chambers' East.

The Board came to the conclusion that a comprehensive refurbishment of Owen Dixon Chambers' East is the best course to follow. The Directors have commissioned architects to prepare detailed plans for the proposed refurbishment of Owen Dixon Chambers' East.

At this stage, Directors of BCL have only committed BCL to the renovation of the ground floor of Owen Dixon Chambers East which will involve a new entrance to Owen Dixon Chambers. The further renovation of Owen Dixon Chambers East is dependent upon BCL's ability to fund the refurbishment and acceptance by BCL of proposed plans that will provide significant improvement in the standard of accommodation being offered by BCL.

Current plans, including alternatives, are on display in the office of BCL, 1st Floor, Douglas Menzies Chambers. Members of the Bar are invited to inspect these plans and make any appropriate comments.

The Board has asked its architects, Spowers, to present a report to the Bar on its proposal. An edited version of the proposal is set out opposite.

R. McK. Robson
Chairman, BCL

FOCUS ON EFFICIENCY AND VALUE

MOST property owners must inevitably face the reality of building wear and tear. Since the first condition report of the premises at 205 William Street undertaken in April 1997, Barristers Chambers Ltd has grappled with alternative accommodation options, refurbishment versus demolition and the ubiquitous financial considerations of these choices.

Following an audit of 205 William Street conducted by well-known architectural firm Spowers, BCL Board members were given a clearer understanding of options, based on the condition of the existing structure. They were not only forced into making a final decision on the fate of the building, but the audit served to highlight the positives in relation to the value of the property — the most relevant being the prime CBD location of the site — particularly because of its proximity to the legal precinct. The historical significance of Owen Dixon Chambers within the legal fraternity; and the fact that refurbishment is the less expensive alternative to relocation or rebuilding were also critical factors.

Having confirmed that refurbishment was a genuine option, Spowers set to the task of creating a design which had to meet the three main criteria: tailoring accommodation to the particular requirements of Barristers' Chambers; complying with current building regulations; and meeting all occupational health and safety obligations.

A PLANNED APPROACH

In providing the most appropriate upgrade for the tenants of 205 William Street, Spowers is concentrating on designing commercial accommodation which offers those tenants a functional and pleasant working environment. Limitations which routinely challenge refurbishment projects of this type include the need to comply with all

Opposite page: proposed facade.
Top left: present facade of Owen Dixon Chambers East.
Top right: proposed common area, floors 2–13.
Middle right: proposed Essoign Club.
Bottom: proposed entrance, ground floor.

relevant regulations, codes and/or Acts which have been introduced since the original property was built. It is almost 40 years the building was constructed and some of the issues which were not even considered in the 1950s are now given attention as a matter of course.

Spowers has divided the project into the following four manageable stages:

- *Public Areas and Building Entry*

  "The power of first impressions"; "the importance of making an entrance" — call it what you will — a building's entry statement speaks volumes about the organisation within. Of equal importance is the link into West, which is considered by Spowers to be an integral part of the overall design and effect. Both are to receive a great deal of attention throughout the program stages. Ground floor construction is scheduled to commence in March 2000 in full consultation with the Commonwealth Bank which occupies the southern ground floor area of the building.

  Public areas in general, and amenities such as toilets in particular, typically illustrate the challenge of keeping up with the changes in building regulations. Toilets for the disabled; general building access for the disabled and lift car interiors are the most obvious of these.

- *Visual appearance of the building, including treatment to the facade*

  The facade facing William Street will receive treatment to create a new curtain-type effect.

  The proposed facade as featured on the cover of *Bar News* aims to re-establish Owen Dixon Chambers as a building of local significance. One of the aims of the proposal is to provide a visual impact allowing the building to regain its prominence as a premier building, draw attention to the entrance and with the glazing reflecting the image of the Supreme Court building.

- *Standard of accommodation*

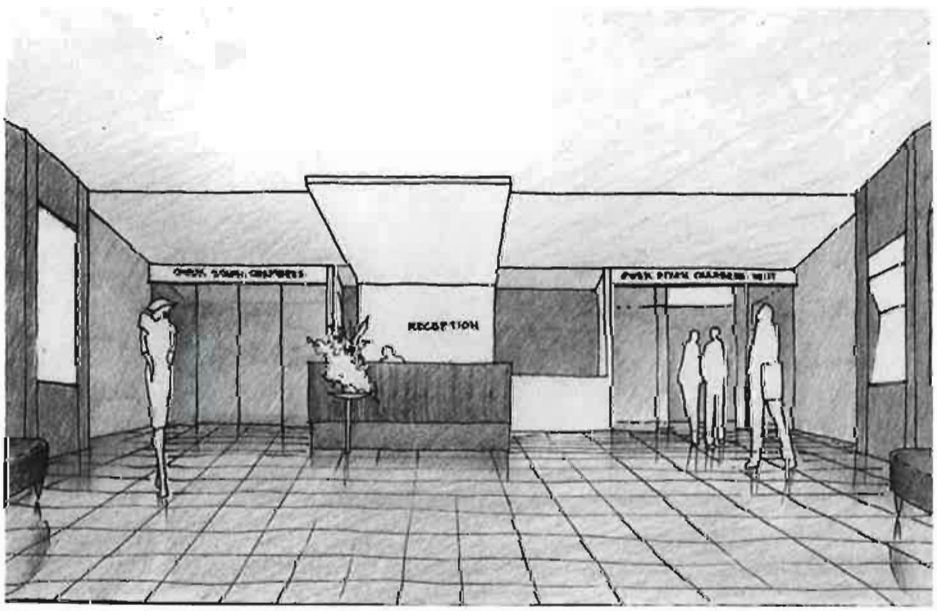
  All floors are to be refurbished to give chambers and office accommodation an all-new fresh appearance. A range of sizes of chambers together with new public and common areas is designed to create an improved work for barristers, staff and clients.

- *Building Services*

  Issues under the broad heading of Building Services are similar to those earlier described as "compliance" matters. Building regulations, fire safety and essential service requirements are now far more stringent than they were when the original property was built. As a result, a great deal of attention will be given to the services which occur behind-the-scenes. The mechanical system which provides the correct degree of smoke control, stair pressurisation, toilet and car parking exhaust and the all-important air-conditioning comfort level will be upgraded. Electrical services such as switchboards, light fittings and general power together with cabling for the age of electronic communication will receive a high level of attention — as will sprinklers, hydrants, hose reels, extinguishers and all safety matters related to fire regulations.

Spowers has drawn together a team of creative and driven individuals with the knowledge and experience to isolate and define problems and transform them into design solutions. This practical approach has earned Spowers a reputation for giving clients a total service package in workability, safety, security, environment and corporate image.

Spowers looks forward to continuing its work with the Victorian Bar in developing this exciting project.



Drawing of ground floor entrance from William Street.

Re Wakim: Cross-Vesting and Back Again

Nunzio Lucarelli

For over 10 years federal courts relied on the legislative cross-vesting scheme to freely exercise jurisdiction over non-federal matters, whether or not those matters were connected with a federal matter. On 17 June 1999 a majority of the High Court of Australia ("HCA") in *Re Wakim; Ex parte McNally and Anor* (1999) 73 ALJR 839 ("the *Wakim* case"), held that federal courts could not exercise jurisdiction over a non-federal matter unless that matter was sufficiently connected to a federal matter. That decision significantly affects: judgments and orders made by the federal courts which involve non-federal matters; present proceedings in the federal courts; and the future exercise by federal courts of jurisdiction over non-federal matters.

This article briefly surveys the four separate appeals that constitute the *Wakim* case and which were heard concurrently by the HCA, identifies the practical effect of the four appeals, and sets out the salient features of remedial legislation.

THE CROSS-VESTING SCHEMES

THE legislative cross-vesting scheme commenced in 1988. Its basis was cooperative legislation passed by the Commonwealth and each of the States. The short title of each Act was the *Jurisdiction of Courts (Cross-vesting) Act* 1987. The purpose of these Acts was to establish "a system of cross-vesting jurisdiction between [federal, state and territory] courts, without detracting from the existing jurisdiction of any court." This cooperative legislative scheme has been referred to as the general cross-vesting scheme.

In 1989 and 1990 the Commonwealth and each of the States passed cooperative legislation providing specifically for cross-vesting of jurisdiction under the Corporations Law. This may be conveniently referred to as the corporations cross-vesting scheme.

At issue in the *Wakim* case was that part of the general cross-vesting scheme and the corporations cross-vesting scheme (collectively "the cross-vesting scheme") that purported to vest State judicial power on federal courts. An additional cross-vesting issue in the *Wakim* case was whether the federal courts may exercise jurisdiction conferred on them in respect of matters arising under the Corporations Law of the Australia Capital Territory ("ACT").

A SUMMARY OF THE KEY CONSTITUTIONAL ISSUES

Two constitutional issues arose for determination in the *Wakim* case. First, whether s.9(2) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) and s.56(2) of the *Corporations Act* 1989 (Cth) validly conferred State jurisdiction on federal courts. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ (Kirby J dissenting) held that those provisions were unconstitutional and therefore invalid. As a result of that invalidity, the cross-vesting scheme is circumscribed so that federal courts do not have jurisdiction to hear and determine State law matters unless they are sufficiently connected with a federal matter. The majority also held, in effect, that where federal courts had heard and determined non-federal matters in reliance on the cross-vesting scheme, they had acted without jurisdiction ("acting without jurisdiction").

The second constitutional issue was as follows: whether s.51(1) of the *Corporations Act* 1989 (Cth) validly conferred jurisdiction on the Federal Court of Australia ("FCA") with respect to civil matters arising under the Corporations Law of the ACT. The HCA held that the conferral of jurisdiction on the FCA to deal with civil matters arising under the Corporations Law of the ACT was valid.

The *Wakim* case comprised four separate appeals. They are: *Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall* (collectively "the *McNally* and *Darvall* cases"); *Re Brown; Ex parte Amann and Gould* ("the *Re Brown* case); and *Spinks* v. *Prentice* ("the *Spinks* case"). It is convenient to discuss the *McNally* and *Darvall* cases, the *Re Brown* case and the *Spinks* case separately.

THE *MCNALLY* AND *DARVALL* CASES

The facts

In July 1985 Mr Wakim obtained judgment against Mr Nader for personal injuries he sustained whilst employed by a partnership business conducted by Mr and Mrs Nader ("the Nader partnership"). Later in 1985 Mr Nader became a bankrupt. The official trustee ("the OT") was appointed trustee of Mr Nader's bankrupt estate. In June 1987, the OT commenced proceedings against Mrs Nader seeking dissolution of the Nader partnership and the taking of accounts ("the partnership proceedings"). The OT's solicitors were Lobban McNally and Harney ("the solicitors"). Later in 1987, the solicitors retained Mr Darvall QC to provide advice in connection with the partnership proceedings. In March 1990

the partnership proceeding was compromised.

In July 1993 Mr Wakim commenced proceedings against the OT in the FCA. He alleged that the OT was negligent and guilty of breach of duty in not continuing the partnership proceeding against Mrs Nader. The claim against the OT for breach of duty was made under ss176, 178 and 179 of the Bankruptcy Act. Later Mr Wakim commenced two further proceedings in the FCA. One was against the solicitors; another was against Mr Darvall. The proceedings against the solicitors alleged negligence in failing to advise the OT of its rights against Mrs Nader. The proceeding against Mr Darvall made a similar claim to that made against the solicitors.

The relief sought

The solicitors and Mr Darvall sought writs of prohibition to prevent the FCA from hearing and determining the proceedings by Mr Wakim against them. That relief was sought on the basis that s.4(1) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (NSW) and s.9(2) of the *Commonwealth Cross-Vesting Act* were invalid. As stated above, a majority of the HCA held that s.9(2) of the *Commonwealth Cross-Vesting Act* was invalid.

The claims in negligence against the solicitors and Mr Darvall were non-federal matters. The solicitors and Mr Darvall argued that, as the FCA could not exercise jurisdiction in respect of those matters, orders for prohibition ought be made to prevent the FCA from further dealing with the proceedings against them. The majority (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne JJ; Callinan J dissenting) refused prohibition.

Reasons for denying relief

Gummow and Hayne JJ (Gleeson CJ and Gaudron J agreeing)

Gummow and Hayne JJ proceeded on the basis that the solicitors and Mr Darvall could only obtain prohibition if the claims against them in negligence did not fall within the "accrued" jurisdiction of the FCA. As to that matter the majority held as follows. The jurisdiction of federal courts is not restricted to the determination of the federal claims or causes of action in the proceeding. It extends beyond the determination of federal claims to the justiciable controversy between the parties of which the federal claim or cause of action forms a part.

Their Honours held that the proceedings against the solicitors and Mr Darvall did fall within the accrued jurisdiction. The reasoning of their Honours as to this issue may be conveniently considered in two parts. First, as to the approach to be taken for the purposes of determining whether a State claim is part of the accrued jurisdiction of a federal court. Secondly, as to the application of that test to the facts of the *McNally* and *Darvall* cases.

As to the approach to be taken in determining whether a State claim or non-federal claim falls within the accrued jurisdiction of a federal court, the majority (as well as McHugh and Callinan JJ) relied on authorities on this issue that applied before the introduction of the general cross-vesting scheme. The primary authorities relied on included: *Fencott and Ors* v. *Muller and Anor* (1983) 152 CLR 570; *Philip Morris Inc and Anor* v. *Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Stack* v. *Coast Securities (No. 9) Pty Ltd* (1983) 154 CLR 261. According to the majority in the *Wakim* case, the central task for the court is the identification of the justiciable controversy. In civil proceedings this is done by reference to the pleadings (if any) and the factual basis of each claim. In that respect, the factors that the court ought have regard to include:

(a) what the parties have done;
(b) the relationship between or among the parties;
(c) the laws which attach rights or liabilities to the conduct and relationship of the parties;
(d) whether the different claims arise out of the same substratum of facts;
(e) whether the different claims are so related that the determination of one is essential to the determination of the other.

On the facts Gummow and Hayne JJ held that there was one justiciable controversy. As to that issue their Honours' reasoning may be summarised as follows:

(a) the three proceedings could have been joined in one;
(b) the three proceedings arose out of the one set of events;
(c) significantly, the damage that Mr Wakim claimed in each of the three proceedings was the amount he would have recovered in the bankruptcy had the partnership proceeding against Mrs Nader been prosecuted differently.

Their Honours rejected an argument that there can never be accrued jurisdiction if a party, against whom no federal claim is made, is added to a proceeding.

McHugh J

Stated briefly, McHugh J held that: federal courts have accrued jurisdiction to resolve issues that depend on State law or the common law; and that the accrued

jurisdiction depends on there being a single controversy. His Honour identified several factors that suggested that there was not a single controversy in the *McNally* and *Darvall* cases. The several factors were:

(a) that the pleadings suggested that much of the factual material admissible against the solicitors and Mr Darvall was not relevant to the claim against the OT;
(b) that the OT had not cross-claimed and had not alleged in the defence that it had relied on the solicitors or Mr Darvall in taking the steps that gave rise to the claim against it.

Despite having identified these factors, his Honour refused relief for two reasons. First, the damage claimed in each of the three proceedings was identical. Secondly, there was insufficient material before the Court to determine the matter at that time. His Honour held that, upon a full examination of the facts at a later time, prohibition might be ordered.

Callinan J

Callinan J held that on the facts of the case there was not one justiciable controversy. The factors that his Honour took into account in reaching that conclusion included:

(a) the absence of any attempt to join any party as a third party;
(b) the different nature of the claims made by Mr Wakim in the three proceedings;
(c) the entirely non-federal nature of the claims against the solicitors and Mr Darvall.

His Honour also held that a federal court only has accrued jurisdiction where a federal claim is actually made in the proceeding. As to this issue, his Honour implicitly differs from the approach taken by Gummow and Hayne JJ.

THE *RE BROWN* CASE

The facts

On 30 November 1992 the FCA ordered that Amann Aviation Pty Ltd ("Amann Aviation") (incorporated in NSW) be wound up ("the winding up order") (apparently under the New South Wales Corporations Law). Mr Brown was appointed as the liquidator. On 7 July 1995 the FCA ordered ("the examination order") that Messrs Amann and Gould be summonsed to attend for examination ("summons for examination") before the FCA about the examinable affairs of Amann Aviation. The examinations ("the relevant examinations") were conducted.

Relief sought by Amann and Gould in the HCA

On the basis that s.56(1) of the *Corporations Act* 1989 (Cth) was invalid, Messrs Amann and Gould sought the following relief in the HCA:

(a) certiorari to quash the:
  (i) winding up order;
  (ii) examination order;
(b) prohibition to preclude any further:
  (i) steps in the winding up;
  (ii) examination of Amann and Gould;
(c) orders that tapes, transcripts and other records of the relevant examinations be destroyed ("the delivery up and destruction orders").

The applications for prerogative relief by Messrs Amann and Gould were made out of time. As a result, questions as to whether the HCA ought grant extensions of time arose. In addition, Mr Gould had, in earlier litigation, challenged the validity of the corporations cross-vesting scheme on constitutional grounds. Mr Gould failed in that challenge. The appeal to the HCA in that matter is reported as *Gould and Ors* v. *Brown* (1998) 193 CLR 346. Due to that earlier litigation, issues arose as to whether Messrs Amann and Gould ought be precluded from making the applications for prerogative relief and as to whether time ought be extended for the making of the application for certiorari. It is convenient to first discuss the granting or refusing of relief by the HCA and then to briefly identify the issues as to preclusion and extension of time in connection with the applications for certiorari.

Results of the relief sought by Amann and Gould

In order to discuss the result of the relief sought it is necessary to refer to the winding up order, the examination order and the delivery up and destruction orders in turn.

Winding up order

The majority (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; Kirby J dissenting) granted prohibition to prevent the further enforcement of the winding up order in the FCA. Stated simply, the majority held that prohibition ought be granted because the FCA did not have jurisdiction to hear and determine matters arising under State corporation laws.

Certiorari to quash the winding up order was refused by Gummow and Hayne JJ (Gleeson CJ and Gaudron J agreeing) for the following reasons. First, the winding up order had been made over six years earlier. Secondly, the liquidator had performed certain tasks pursuant to his appointment and incurred expenses in the winding up. Thirdly — significantly — third parties may have acquired rights that would be affected if the winding up order was quashed. Fourthly, it had not been shown that third party rights would not be adversely affected if the winding up order was quashed.

McHugh J held that although the winding up order had been made without jurisdiction, certiorari ought be refused for the following reasons. First, more than six years had elapsed since the winding up order was made. Secondly, the liquidator had incurred expenses in the winding up and may have incurred significant liabilities on behalf of the company for which he would be responsible if the winding up order was a nullity. Thirdly, on the state of the evidence, it was not known whether innocent third parties had acquired rights or incurred liabilities as a result of the winding up order.

The approach of Callinan J was that, for the reasons expressed by Gummow and Hayne JJ, it was not appropriate to declare that the FCA had no jurisdiction to make the winding up order. His Honour held that, in the exercise of the Court's discretion, the declaration ought not be made principally because of the likely supervening rights of third parties.

Examination order

Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ held that certiorari ought be granted to quash the examination order. That relief was granted on Mr Amann's application. For that purpose he was granted an extension of time.

The application for prohibition in connection with the examination order was refused by Gummow and Hayne JJ (Gleeson CJ and Gaudron J agreeing) on the basis that the relevant examinations had been concluded. Therefore, there was no need for prohibition. (McHugh J did not deal with the application for prohibition in connection with the examination order.) Dissenting on this issue, Callinan J held that prohibition ought go to prohibit further steps being taken in

connection with the examination. His Honour held that Messrs Amann and Gould were yet to sign the transcript of their examinations; therefore the relevant examinations were not concluded and prohibition ought be granted.

Delivery up and destruction orders

The delivery up and destruction orders were refused. Messrs Amann and Gould argued that there could in no circumstances be legitimate use of the material obtained as a result of the examination. In dealing with that argument Gummow and Hayne JJ (Gleeson CJ and Gaudron J agreeing) held, in effect, that: the answer to that argument depended on what use was involved for that material and the circumstances of that use; and it was neither possible nor desirable to give a general answer to that question. McHugh and Callinan JJ did not deal with the application in relation to the delivery up and destruction orders.

Issues as to preclusion and extension of time as to certiorari

As Mr Gould had challenged the constitutional validity of the corporations cross-vesting scheme in earlier litigation, the liquidator argued that the doctrines of res judicata and issue estoppel applied to preclude Mr Gould from obtaining the relief sought. It was argued that Mr Amann ought also be precluded because, although he was not a party to the earlier proceeding, he had stood by and had taken benefit from the earlier litigation. Stated simply, the majority (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) held that the doctrines of res judicata and issue estoppel did not apply. As to Mr Gould, those doctrines did not apply because no final orders had been made in the FCA in the earlier proceedings. As to Mr Amann, it was held to be decisive that he had not been a party to the earlier proceeding. The argument that he had stood by and taken the benefit of the earlier proceeding was rejected.

The majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ; Callinan J dissenting) refused to extend time for Mr Gould to apply for certiorari. Principally that was because of the earlier litigation by him. (According to the majority on this issue, as Mr Amann was not a party to the earlier litigation, these considerations did not apply to his application for certiorari.) There were other reasons for refusing an extension of time for Mr Gould's application for certiorari. For example, an extension of time for certiorari to quash the winding up order was refused because the grant of the relief would affect third party rights.

The *Wakim* case and the remedial legislation is likely to give rise to a plethora of litigation.

SPINKS CASE

The facts

White Constructions ACT Pty Ltd ("White P/L") was ordered to be wound up by the FCA under the Corporations Law of the ACT. On 26 June 1998 the FCA ordered that various persons including Spinks and the other applicants (collectively "Spinks") be summonsed to attend for examination before the FCA in regard to the examinable affairs of White P/L.

Spinks applied to Branson J to set aside the summonses for examination on the basis that the FCA had no jurisdiction. Branson J dismissed the application. The Full Court of the FCA granted leave to appeal those orders and dismissed the appeal. Spinks applied for special leave to appeal to the HCA in respect of the orders of the Full Court. The HCA granted special leave to appeal and dealt with the appeal instanter. As stated above, the HCA per curiam held that the FCA had jurisdiction to make the orders for examination because s.51(1) of the Corporations Law of the ACT was a constitutionally valid conferral of jurisdiction on the FCA in respect of civil corporation matters under the Corporations Law of the ACT.

A SUMMARY OF THE PRACTICAL EFFECT OF *WAKIM*

Some of the practical effects of the *Wakim* case are as follows:

(a) judgments or orders made by federal courts acting without jurisdiction are voidable (subject to the operation of remedial legislation referred to below); and
(b) present proceedings in which a federal court is acting without jurisdiction:
  (i) would, upon application, result in a grant of prohibition to prevent the federal court from continuing to hear and determine the proceeding; or
  (ii) may result in a federal court in its inherent power staying or dismissing the proceeding;
  (iii) may be transferred by the federal court to a State court having jurisdiction to hear and determine the proceeding;
(c) future proceedings in which a federal court would be acting without jurisdiction may be dealt with in the same way as present proceedings;
(d) the precedents for determining whether a State law claim falls within the accrued jurisdiction of a federal court as applied before the cross-vesting scheme came into operation, continue to apply subject to what was said about them in the *Wakim* case;
(e) the FCA has had and continues to have jurisdiction to hear and determine civil matters under the Corporations Law of the ACT.

REMEDIAL LEGISLATION

With the exception of Victoria, all States have either passed or introduced legislation to deal with judgments or orders made by federal courts acting without jurisdiction. That legislation may be conveniently referred to as the Federal Courts (State Jurisdiction) Act. The New South Wales Act was assented to on 6 July 1999. The Victorian Government has indicated that it will pass the Victorian Model Bill for a Federal Courts (State jurisdiction) Act ("the proposed Victorian Act"). It is in substantially similar terms to the New South Wales Act.

The purpose of the proposed Victorian Act is stated as follows:

> The purpose of this Act is to provide that certain decisions of the Federal Court of Australia or the Family Court of Australia have effect as decisions of the Supreme Court and to make other provision relating to certain matters relating to the jurisdiction of those courts.

Simply stated, the remedial legislation provides that judgments or orders made by a federal court acting without jurisdiction are judgments or orders of the Supreme Court of the State. Further, judgments or orders of the Full Court of the FCA or the Appeal Division of the Family Court of Australia are judgments or orders of the Court of Appeal.

Among other things, the remedial legislation also provides for the transfer of

present federal court proceedings (in which the federal court would be acting without jurisdiction) to State courts.

POTENTIAL DIFFICULTIES

The *Wakim* case and the remedial legislation is likely to give rise to a plethora of litigation. Some of the potential difficulties might include:

(a) it is the intent of the remedial legislation that judgments or orders of federal courts acting without jurisdiction (defined in effect as ineffective judgments or orders) are to be judgments or orders of State Supreme Courts. Reasons for judgments or orders are generally regarded as separate from the judgments or orders to which they relate (see *Driclad Pty Ltd* v. *FC of T* (1968) 121 CLR 45 at 64 per Barwick CJ and Kitto J). Will the reasons for the ineffective judgments or orders "travel" with the ineffective judgment or orders to become reasons of the Supreme Court?

(b) if the reasons for the ineffective judgment or orders do not "travel", what is the basis for an appeal to the State Court of Appeal in connection with the ineffective judgment or orders?

(c) if the reasons for the ineffective judgment or orders do "travel", what status, as a matter of precedent, do the reasons of the federal court have? For example, if the reasons for an ineffective judgment or order differ from the reasons of a state court on the same issue, which of the reasons are to be followed?

(d) what is the status of provisions such as ss35 to 38 of the *Corporations (Victoria) Act* 1990? (See *Pancontinental Mining Ltd and ors* v. *Burns and ors* (1994) 124 ALR 471 especially at 478–80)

(e) if a party in a federal court proceeding has accrued "rights" pursuant to the rules of a federal court (not by virtue of a judgment or orders) which would not have accrued to that party under the rules of the Supreme Court of Victoria, what becomes of those "rights"? For example, Order 18 Rule (3) of the Rules of the FCA provides, in effect, that a properly endorsed list of documents served by one party on another will result in the admission of the authenticity of the documents by the party on whom the list is served. That is not the case under the Rules of the Supreme Court of Victoria.

CONCLUSION

The *Wakim* case compels a revisiting of the judicial precedents as to the accrued jurisdiction of the federal courts that prevailed before the cross-vesting scheme came into effect in 1988. The remedial legislation is intended to overcome the lacuna created by the *Wakim* case. Whether that legislation goes far enough remains to be seen.

Do Australians Have a Future in International Commercial Arbitration?

The Hon Justice Michael Kirby AC CMG

An address at the opening on 27 July 1999 of the Dispute Resolution Centre, Melbourne, sponsored by the Australian Centre for International Commercial Arbitration and the Institute of Arbitrators & Mediators Australia.

THE Institute of Arbitrators & Mediators Australia, which was established in 1975, has its headquarters in Melbourne. In a reversal of the great federal experiment, it moved its headquarters from Canberra (which it presumably found a trifle quiet for the taste of its members) to Melbourne. But it has strong chapters in Sydney, Melbourne and elsewhere. It displays its national character by the way in which it has engaged universities throughout Australia in the provision of training for arbitrators and mediators: an essential aspect of its functions.

The Australian Centre for International Commercial Arbitration was established in 1985, started as initiative of the Institute. Its purpose is to encourage the use of arbitration as an appropriate and desirable means for the resolution of disputes having an international and commercial character. Along with other initiatives launched in Australia, its subplot has been, from the start, to attract international commercial arbitration to this country. That business has so far largely eluded Australia. It continues to flow to Paris, New York and London and, in our region, to Singapore and Hong Kong. The opening of a permanent national dispute resolution centre in Melbourne is a bright omen for Australia.

The growth of the economies of the countries in Australia's geographic region, the participation of multinational corporations throughout the region and the vast flows of international capital, necessarily produce a proportion of cases where disputes arise. Where this happens those involved in such disputes must make the hard decision that is well known to every lawyer. The disputants must decide to abandon the claim if the amount at stake is not worth pursuing and if bluff and bluster get them nowhere; to take the matter to a court of law within the jurisdiction, if that course is open to them and justifiable in the circumstances; or to submit the matter to independent arbitration, by an expert acceptable to the parties, proceeding in private, pursuant to pre-arranged arbitral agreement or to post-dispute concurrence if that is the quickest, cheapest and most satisfactory way to a resolution.

THE FACILITIES OFFERED BY THE CENTRE

There are several reasons why the opening of the new Dispute Resolution Centre in Melbourne is an important event:

- the premises offer a venue for a system of dispute resolution alternative to the courts and a place in which, by agreement of the parties, arbitration can be conducted efficiently and economically;
- they provide facilities in which large-scale and often complex commercial disputes can be investigated and resolved more quickly and economically than the formal court system can usually offer;
- they offer a resource close to the heart of a major legal centre of Australia where skilled lawyers of ability, integrity and experience offer their services to help the parties and arbitrators to cut through the detail of a dispute, sometimes horrendously complex, and to arrive at an award which will finally put the dispute to rest;
- they support the very important drive to sell offshore legal services in which Australia has significant advantages; and
- they can help to build up the effort of Australia to present to the world and to its region, its advantages as a significant Pacific financial centre.

Recent news reports in Australia have emphasised the way in which retired judges in Victoria of great experience are now heavily engaged in arbitrations, national and international. In New South Wales, retired judges have also been engaged in international arbitrations. Recently, the Federal Attorney-General, Mr Daryl Williams QC, led an important delegation to China. As a result, China may be opening its borders to licences for more Australian legal firms and utilising more Australians as arbitrators in international commercial disputes concerning Chinese interests.[1] This is a very promising development for the future of this Centre and of its facilities in Melbourne. The media has also carried news of the indefatigable Sir Laurence Street who recently conducted four mediations in Bangkok, Thailand.[2] When I telephoned Sir Laurence to tell him of the opening of the Melbourne fa-

The Hon. Justice Michael Kirby AC CMG

cilities, I found that he was in Malta and not for a holiday. He also sent the message that all Australians should get behind this initiative and, for once, rise above the parochialism that bemuses foreigners, depresses Australians and damages our national effort in a most competitive overseas market, such as that of international commercial arbitration.

THE OBSTACLES TO BE OVERCOME

It is necessary to explain frankly why Australia and its various arbitration and mediation services have not been flooded with clients using the undoubted talents of the Australian legal profession and experienced mediators and arbitrators to help resolve commercial disputes that arise internationally, especially in the Asia–Pacific region. There are several reasons. Unless Australians know them, and address them, they will not be able to remove such of the impediments as are susceptible to our influence. These include the following:

- Australia is not yet a traditional place, nor are Australians traditional players, for international commercial arbitration. Large businesses and the legal firms which advise them are fairly conservative in such decisions. They tend to feel more comfortable in sticking to the place, the institutions and the facilities that have an established track record: in Paris, London, New York, and to some extent in Singapore and Hong Kong. Once the resistance is overcome and quality services are provided, things will change But lawyers everywhere, and not a few businesses, are creatures of habit and precedent. Australia's international mediators and arbitrators have to break this mould.
- Australia is, geographically, still a long way from everywhere else. True it is that Melbourne is closer, as the plane flies, to Singapore and Bangkok than it is Sydney. But not by much. It still takes effectively most of a working day to fly the long distance to Australia from the south-Asian mainland. Physical distance is, of course, becoming less important. This Centre needs to seize the opportunities presented by contemporary technology. According to one knowledgeable commentator, changes in information technology herald substantive changes in society equivalent to the invention of printing by Gutenburg in the 15th century which paved the way for the Reformation and the growth of the modern industrial economy. According to this view, "the present electronic revolution, which makes instant world-wide communication a reality, is gradually erasing the relevance of national boundaries, distinctions and separations".[3] This revolution will have large implications for international commercial arbitration. The Centre in Melbourne will need to stay ahead of the field. Last week, in Sydney, I launched the AustLII National Law Collection which brings legal data to Australia and the world, free of charge. In two years this service has expanded to a million hits a week. International commercial arbitration will embrace the same electronic communication. The High Court of Australia has been a pioneer in the use of this technology. The judges have found that advocates are significantly briefer when speaking to the Court in disembodied electronic form than when they appear before the judges in the flesh. Perhaps the obstacle of distance, which probably still represents a psychological barrier against the use of Australia as an international centre for international commercial arbitration, will eventually be overcome by increased use of video and other electronic links. Technologically, there is virtually no difference between linking

Darwin and Canberra and linking Kuala Lumpur or Manila to Melbourne. But a psychological bridge must be crossed. Australians should be addressing the ways in which we can make this easier and more attractive. It may sometimes be necessary for Mohammed to go to the mountain as I would note, without blasphemy, that Sir Lawrence Street and Dr Michael Pryles have done by conducting their hearings in Bangkok and elsewhere. If the parties or their lawyers will not, or cannot, come to Australia, Australian mediators and arbitrators should be foremost (as I believe they are) in packing their bags and going where the business is.

- A further obstacle is this. In so far as courts are concerned, I believe that Australia's courts rightly enjoy a high reputation in the region for integrity, complete independence of government and of vested interests and parochialism, high skill in the accurate resolution of complex commercial disputes; devotion to mastering extremely demanding and complex facts and law, and an ever-increasing appreciation of the needs of parties and their advisers for efficiency, fast-tracking of urgent matters and effective case management. These are the merits of the independent courts of Australia. Everyone knows them. Yet, by definition, international commercial arbitration generally wants to steer clear of the courts. Australia thus loses an important advantage which it offers over most other countries of the world (and many of the region) whose courts are lacking in independence, expertise and efficiency. Yet, as many former Australian judges with long experience in the courts now offer themselves for international commercial arbitration and lawyers become available who are trained in, and accustomed to, the honest and professional legal culture of Australia, we can make the point that Australia has skills in arbitration and mediation which redound to the benefit of the parties if they entrust international commercial arbitration to Australians.
- One problem derives from our history in the field of commercial arbitration, at least until recently. All too often in the past[4] Australian lawyers, and sometimes Australian judges (sometimes perhaps I myself) have approached commercial arbitration as if it were just another court case but one conducted at a disadvantage before a non-judge in a hired room where all the facilities have to be paid for. The approach, of course, need not be that of total withdrawal of the courts from commercial arbitration. Courts can sometimes play a supportive role.[5] Yet, in Australia, until lately, we did not always embrace wholeheartedly the different techniques needed for mediation and arbitration. Those techniques do not always come easily to people trained in the combative atmosphere of adversary trials before Australian courts. That is why the educative work of the Institute and of the Centre are so important. Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology. To earn and retain international commercial arbitration, Australian arbitrators and the Australian legal profession will have to show that they have these qualities as saleable virtues, without losing their priceless reputation for honesty, neutrality and professionalism.
- It is essential to maintain consistently high standards of competence and expertise in the performance of international arbitrations. Serious problems arise when the nature of the issues of an international commercial arbitration change, rendering irrelevant, or much less relevant, the expertise of the arbitrators originally chosen. One of the main complaints of clients about international arbitrations, according to an expert, concerns the incapacity to correct plainly erroneous fact-finding or clear legal mistakes; the delivery of "unpredictable awards" on the basis that arbitrators may try to render "equitable" awards ("cut the baby in half") rather than apply the law or established practice; the absence of established precedents that allow for accurate predictability; and the fact that arbitration can itself become protracted and even more expensive than ordinary court proceedings.[6] These and other perceived difficulties have caused knowledgeable commentators to call for the creation of an International Arbitral Court of Appeal, at least for some of the largest international disputes.[7] The complexity of international arbitration and the need for a pool of varying expertise, as well as for flexibility and a measure of self-sacrifice, call for special measures of cooperation in a country like Australia. This is particularly so because of its relatively small population and its still limited hands-on experience in the wide range of commercial disputes that can arise.
- There is a final consideration which Australians cannot ignore. Most Australians still wear a European face. Most have not been brought up in the Confucian, Islamic or Buddhist philosophies of most people in the nations to the north whose commercial disputes represent our most natural international market in this field. There was a time when the appearance of a European face might have been an advantage in dispute resolution. In some parts of the world that may still be true. But in the sophisticated commercial and financial markets of Asia, the days of the colonial decision-maker have long passed. In part, this consideration will be diminished in time by ethnic, cultural and social changes which reinforce attitudinal developments that have already occurred. However, travelling in countries of our region, getting to know and appreciate their ways and respecting their customs, is an important preparation which Australia's arbitrators and mediators must be willing to accept if they hope to break into this market. In the expansion of Australian law firms throughout the region, there is much evidence of a willingness on the part of increasing numbers of young lawyers to embrace these challenges. I recently met a number of them in Hanoi, Vietnam. These people will themselves earn respect and appreciation. They will come, in time, to pay their part as lawyers in international arbitrations and as mediators and arbitrators in others. We should not forget that, within Asia, there are many strong cultural, religious and ethnic differences and even antagonisms which may make the use of a complete outsider of skill and efficiency positively attractive to the disputants and those advising them. Furthermore, we must never underestimate the enormous head-start which the English language gives Australians in a world where English dominates most international commercial and legal dealings. We can learn from the very successful sale of

Australia's educational services in the region. The potential for that export is virtually limitless.

AUSTRALIA'S COMPARATIVE ADVANTAGES

Australia's markets for international commercial arbitration are not limited to Asia and the Pacific. But that region seems likely to be the place to which most of our exports of such services will go. To maximise the attractiveness of the Dispute Resolution Centre in Melbourne and of other Australian bodies interested in international commercial arbitration, there are many preconditions. By its law and practice, Australia offers several advantages which Australians should make known as often as they can. These include:

Australia's markets for international commercial arbitration are not limited to Asia and the Pacific. But that region seems likely to be the place to which most of our exports of such services will go.

- the freedom which the parties enjoy to determine the method and degree of formality in which their arbitration will be conducted;
- their freedom to be represented by lawyers and other professionals of their choice, regardless of nationality;
- their freedom to have an award expressed in a relevant currency, not necessarily Australian;
- the general freedom to enjoy a very high measure of confidentiality in the conduct and outcome of the arbitration;
- the restraint generally observed by Australian courts against undue interference in arbitrations, particularly of a commercial character and between international parties;
- the lack of nationalistic and parochial approaches to such arbitrations and the adherence of Australia to the New York Convention and its enactment of the UNICTRAL Model Law on International Commercial Arbitration in Part III of the *International Arbitration Act* 1974 (Cth);
- the highly competitive fees charged by members of the Australian legal profession, especially when compared with the cost structures for English senior counsel, New York attorneys and even some lawyers in Hong Kong and Singapore;
- and, not least, the work of the Institute of Arbitrators & Mediators Australia and of the Australian Centre for International Commercial Arbitration in the ongoing training of personnel for involvement in international commercial arbitration.

Australia's economy, although resilient and growing strongly, is still small compared to the economies of many of its neighbours. This means that Australians may not be seen as frequently on the international commercial arbitration circuit as arbitrators from countries with big economies and with countless disputes and repeat players. We need prominent lawyers and others to take the lead; to demonstrate an international outlook; and to manifest their expertise and efficiency. Sir Laurence Street, Dr Michael Pryles and a host of others have accepted those obligations. It sounds a glamorous life. Often it means prolonged periods away from home with little but work to occupy one's time. Yet, if more Australian lawyers accept these obligations there is, I believe, a huge market for legal services which Australia can tap. It requires patience and persistence. But such virtues will be rewarded. They will bring much work to the new Centre in Melbourne.

OPENING THE CENTRE

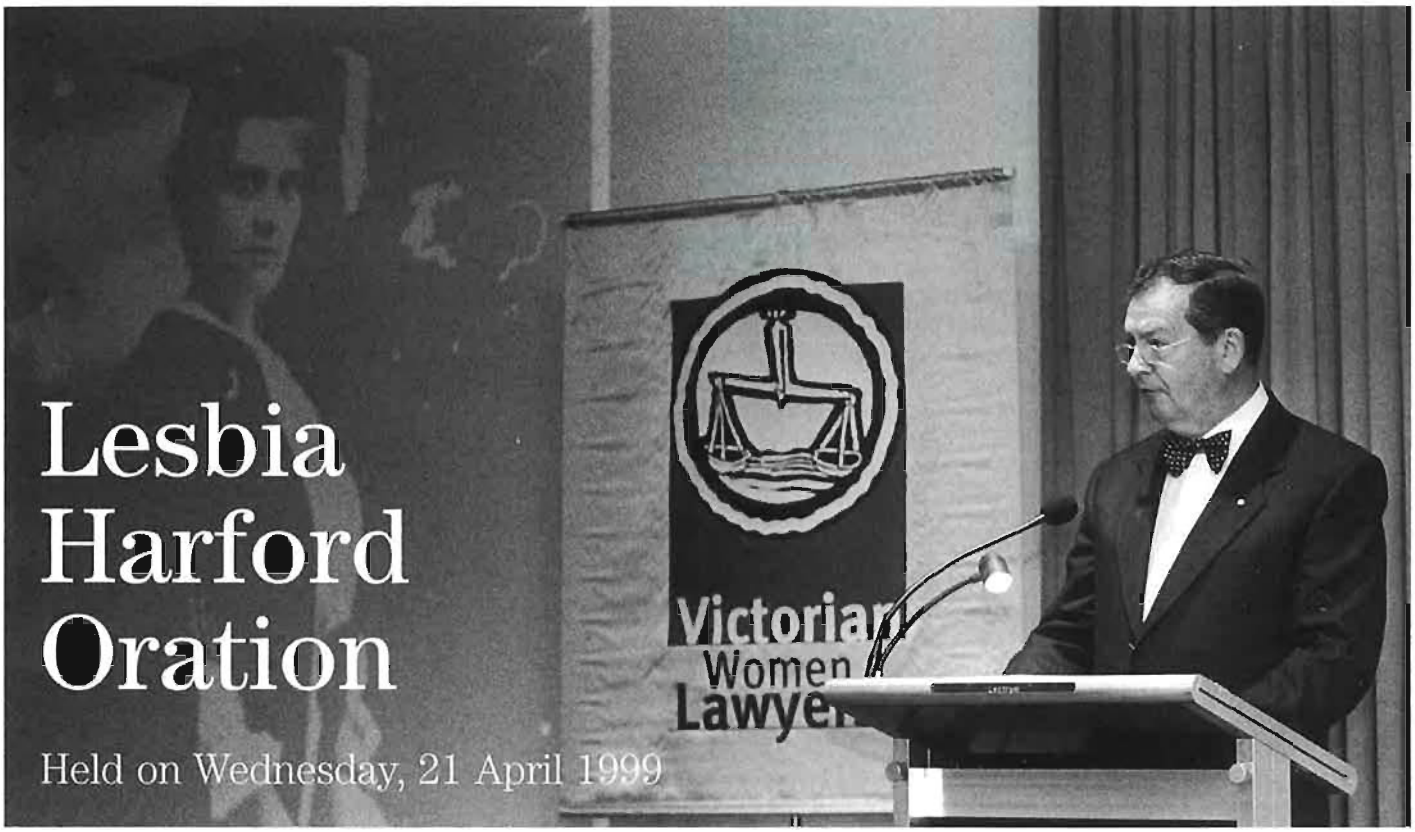
The opening of this Dispute Resolution Centre is therefore an important initiative for Melbourne, Victoria and Australia. Personally, I am glad that it has not been called the Australian Dispute Resolution Centre. In the business to which it aspires, nationalism and parochialism are probably impediments to success, not advantages. The boast of a postcode Australia 3000 is not what a client with an international commercial dispute, or its lawyers, in Phnom Penh, Hanoi or Calcutta necessarily wish to hear. In the age of the Internet, of the Human Genome Project and of the global economy, Australian lawyers and others must adjust their mindset. They must see the world through completely different eyes. Before too long I expect that this Dispute Resolution Centre in Melbourne will open offices in Bangkok, Kuala Lumpur and other cities in Asia and perhaps further afield. It will be necessary to take some risks, spend some money and secure seeding investments that will reap large rewards in the future, just as was earlier done in the sale of educational services. This is an international Dispute Resolution Centre which happens to be based in Melbourne, engaging mostly Australian talent.

The establishment of this new Centre is a step in the right direction. It is brave and bold and worthy of the spirits who conceived it. I trust that it will enjoy the fruits of much disputation and bring efficient and just resolution to those who are in conflict who come to its doors, physically or electronically. In doing so, the Centre will bring rewards to lawyers and others in Australia. But the rewards will go far beyond the fees that are earned. Their work will bring respect to Australia and enhance Australia's ever-increasing involvement in the international trade in legal and arbitral services, especially in the Asia–Pacific region. Here is a good illustration of thinking globally and regionally; but acting locally.

If Australians can maximise their advantages, address their disadvantages and break the current mould, I expect that there will be a very large market for international commercial arbitration services. And if there is, the Dispute Resolution Centre in Melbourne will become a major regional centre for international commercial arbitration.

NOTES:

1. A. Burrell, "Williams confident China visit will benefit law firms", *Australian Financial Review*, 23 July 1999, 27.
2. B. Smith, "Australian mediators now in heavyweight division", *Australian Financial Review*, 16 July 1999, 28.
3. J. Werner, "Introduction to the 7th General Global Arbitration Forum" in [1999] *Journal of International Arbitration* 57 at 61.
4. An illustration of the turning tide is *Ferris* v. *Plaister* (1994) 34 NSWLR 474. It has been suggested that Commonwealth of *Australia* v. *Cockatoo Dockyard Pty Ltd* (1995) 35 NSWLR 704 was a retrograde step. But it had special features and involved an Australian government party raising public law considerations specific to Australia.
5. P. Bernardini, "Arbitral Justice, Courts and Legislation", in International Court of Arbitration *Bulletin*, Special Supp 1999, 13 at 19.
6. M.C. Boeglin [1999] *Journal of International Arbitration*, 62.
7. H. Holtzmann and S. Schwebel cited J Werner in [1999] *Journal of International Arbitration* 57 at 60.



By the Hon. John Phillips, Chief Justice of Victoria, delivering the inaugural Lesbia Harford Oration on Wednesday 21 April 1999, presented by Victorian Women Lawyers in conjunction with the Victorian Law Foundation.

DISTINGUISHED guests and respected colleagues. It is an honour to deliver the first Lesbia Harford Oration on behalf of the Victoria Law Foundation and Victorian Women Lawyers. Let me say a little about the Foundation. Many people subscribe to the maxim "big is beautiful". But sometimes "small" is beautiful too, and the Foundation is a case in point. It has a full-time staff of only six, one of them seconded to the Victorian Courts as Courts Information Officer. The rest of us on the Foundation, effectively eight in number, are part-time volunteers. I am very proud of our record of work done for the advancement of women lawyers in this State. In 1994–96 the Foundation conducted a project entitled "Facing the Future — Gender Employment and Best Practice Issues for Lawyers". A study of gender issues in law firms, the project comprised a job satisfaction survey and an effective practices guide. When completed, it included proposals to maximise job satisfaction for female lawyers. The Foundation has also funded a revised edition of a booklet produced by Victorian Women Lawyers, "Working Together in the 90s — A Guide for Legal Firms". More of that later. Other funds were made available for the study of equality for women members of the Bar recently commissioned by the Bar Council and for a researcher to review national research about women lawyers — research about what studies have been undertaken and what actions have been carried out as a result of those studies. For women in the community as a whole, the Foundation funded the Federation of Community Legal Services production of a further edition of a manual about intervention orders and has supplied more funding for an extensive study of the operation of the *Crimes (Family Violence) Act* 1987 conducted by Dr Rosemary Wearing of La Trobe University.

Victorian Women Lawyers and Victorian women generally can be assured the Foundation will continue its efforts on their behalf.

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Now to the history of Victorian Women Lawyers. It is well worth the telling.

In July, 1993, I received a letter jointly signed by David Denby, then President of the Law Institute, and Deanne Weir, then Chair of the Young Lawyers section. David and Deanne asked me to chair a seminar to be held in the following November on behalf of the Young Lawyers section. The title of the proposed seminar was "Women in the Legal Profession". The aim of the seminar was to identify issues regarding female practitioners and possible means of utilising the great potential which women presented to the profession and the community. I agreed to chair the seminar and shortly thereafter embarked on a series of planning meetings at the Institute. As I recall there were usually six or eight of us present. The minutes of an early meeting read:

The Chief Justice expressed enthusiasm for using the Seminar to produce a Women Lawyers Association. However, the meeting felt that there was more benefit in prompting

a working party structure to examine the issues and gauge the real need for such an organisation.

As usual, my colleagues were right, and I was wrong, as later events shall show.

In due course the seminar was held. I shall always regard it as one of the most significant occasions during my life in the law. The large meeting room in the Law Institute basement was filled to overflowing, with people standing around the walls. The Attorney-General attended and spoke, as did a number of distinguished women practitioners. Others constituted a discussion panel. Towards the end of the seminar, reflecting the mood of those present, I invited someone to make history by proposing a Women Lawyers working party. This was done and the meeting resolved that the working party be established. At the end of the evening I thanked a number of women and it is proper, I think, that I again mention their names: Carol Bartlett, Rebecca Borden, Genevieve Overell, Jane Patrick, Kriss Will, Annemaree Lanteri, Sue Mountford, Linda Dessau, now Justice Dessau, Ada Moshinsky QC and particularly Hilary Heggie and Deanne Weir. Unfortunately, Deanne is unable to be with us this evening.

The working party lost no time in getting to work. Operating under the auspices of the Young Lawyers section and assisted by other women's groups, it set up a number of project groups or committees which looked at flexible work practices, sexual harassment, child care and other issues. The Child Care Committee put a series of articles in the Law Institute Journal. The Flexible Work Practices and Sexual Harassment Committees combined to produce an excellent booklet, "Working Together in the 90s — How to do it Better", and distributed it to all legal firms. Another committee collected and collated materials and information about women's roles in our profession. One of the women's groups that assisted was the Women Barristers' Association which was formed on 12 November 1993. I was very pleased to provide a venue for them at the Royal Mint building. This Association has since moved from strength to strength and we are grateful to them for their support for this Oration. I should also acknowledge the support of the Australian Women Lawyers and, in particular, that of their leader, Alexandra Richards QC.

We continued our planning meetings at the Law Institute and the notion of an Association of Victorian Women Lawyers was developed. A steering committee met on a fortnightly basis.

Victorian Women Lawyers was launched on 29 August 1996 at the Law Institute of Victoria. Once again, the level of attendance was inspirational. Eve Mahlab A.O. was the keynote speaker.

From this beginning Victorian Women Lawyers has grown so that it now has over 450 full and associate members, both male and female, solicitors and members of the Bar, academics and students. It has seven committees involving over 50 people. It has obtained significant sponsorship. A brief survey of 1998 will show the quantity and quality of its work. In that year the Networking Committee organised four seminars and four social occasions providing a wide variety of educational and recreational events. For the Communications Committee, the year saw the launch of a video entitled *Willpower*, which celebrated the achievements of five prominent Victorian women lawyers and provided valuable information and motivation. So, too, the magazine *Portia* continued in publication growing to 20 pages, and the development of a Victorian Women Lawyers website was undertaken. The Work Practices Committee published the flexible work practices and policies guide "Living and Working Together — Looking to the Future" which was launched at the Law Institute by the Attorney-General. All members and Victorian law firms were provided with a copy. The Justice Committee assisted the Women's Trust in relation to the treatment of female police officers and made media statements on issues relevant to women which received significant exposure. Assistance was given to the Yorta Yorta tribe when it was found they needed legal representation in London. The Mature Age Practitioners Sub-Committee launched an employment register for the information of members.

Three projects stand out in that year. In September a revised flexible work practices booklet, "Living and Working Together", was published. This was followed by a child care guide produced in conjunction with Community Child Care Association of Victoria and then there was the "Taking up the Challenge" project, which was designed to address issues such as dissatisfaction with work practices among lawyers and to explore the link between that dissatisfaction and productivity. Involved in this are gender and age-related issues.

VICTORIAN WOMEN LAWYERS

This oration is named after Lesbia Harford. That she chose after graduation to work at professions other than the law, and that death claimed her just as she finished her long-delayed articles of clerkship, does not make her any the less one of us. She is one of our people of whom we should be justly proud, for she was indeed law graduate, poet and fighter for peace and justice, as the advertisements for this Oration declare.

Her story begins in Brighton in 1891 when she was born into a family which lived in very comfortable circumstances. Her father, Edmond Keogh, was a successful financial agent. But these circumstances only survived until Lesbia was 11. In 1900 her father was declared bankrupt. He took to drink and departed for Western Australia where he worked as a boundary rider on the rabbit-proof fence. He made some irregular visits to the family in later years but never played a significant part in Lesbia's life. When she came to write poetry she wrote the following poem:

FATHERLESS

I have gone free
Of manly excellence
And hold their wisdom
More than half pretence.

For since no male
Has ruled me or has fed,
I think my own thoughts
In my woman's head.

It fell to her mother, Helen Keogh, to earn a living and look after Lesbia, her brothers Edmond and Gerald and her sister Estelle. She was a woman of remarkable spirit and endurance, and with some family help and their own ability to secure scholarships she saw Edmond qualify in medicine, Lesbia in law and Estelle in nursing.

As we shall see, Lesbia's life was one of very considerable achievements. They were attained in spite of constant ill health for she was born with a congenital heart problem which prevented efficient oxidation of her blood. No surgical procedure was then available to alleviate it. And so, physical exertion was forever a problem for her.

Her secondary schooling took place at a series of convents: "Clifton", a Brigidine Convent at Glen Iris; and the

Loreto Convent, "Mary's Mount", at Ballarat, from which she matriculated in 1909.

In 1912 she enrolled in law at the University of Melbourne, graduating in 1916. Like our friend, the now late Lord Denning, she failed equity at her first attempt. Among those graduating with her was an up and coming young fellow from Jeparit, one Robert Gordon Menzies, who would become both a King's Counsel and a Minister of the Crown before his 35th birthday.

Lesbia Harford had other ideas. She was already a committed socialist. It is likely that her childhood experiences had played a significant part in this development. Instead of undertaking articles of clerkship in the usual way, she went to work in clothing factories and domestic service. The long hours and arduous work took their toll, but she persisted. According to some accounts, she joined the radical International Workers of the World movement. After two years she moved to Sydney to offer support to members of that movement who had been imprisoned under the Unlawful Associations Act for membership of an illegal organisation. In November, 1920, she married a struggling Redfern artist with a long name. Patrick John O'Flaghartie Fingal Harford. Unfortunately, he had an even longer thirst and after a reasonably

In 1912 she enrolled in law at the University of Melbourne, graduating in 1916. Like our friend, the now late Lord Denning, she failed equity at her first attempt.

happy beginning, the marriage deteriorated and was dissolved after a few years. Opinions about Patrick Harford differ. Lesbia's brother Edmond quite liked him, but others regarded him as a drunkard with violent tendencies towards her. It must be that Lesbia loved him for she would not have otherwise made the commitment. His position in the world of art is also uncertain, although Lesley Lamb, writing Lesbia's entry in the dictionary of Australian Biography, refers to him as "a founder of the post-impressionist movement in Melbourne". Apparently he worked in the same studio as William Frater.

Lesbia Harford had two other intense loving relationships in her all too short life. The first began in 1912 and lasted until her death. This was with Katie Lush who was a philosophy tutor at Ormond College. Katie was a tall woman with striking titian hair and a superb intellect. She was, apparently, an outstanding teacher of logic. Their friendship was long lasting and was celebrated, in its early years, by more of Lesbia's verse. Here is a poem of 1912:

This year I have seen autumn with
new eyes,
Glimpsed hitherto undreamt of
mysteries
In the slow ripening of the town-bred
trees;
Horse-chestnut lifting wide hands to
the skies;
And silver beech turned gold now
winter's near;
And elm, whose leaves like little suns
appear

Scattering light — all, all have made
me wise
And writ me lectures in earth's
loveliness,
Whether they laugh through the grey
morning mist,
Or by the loving sun at noon are
kissed
Or seek at night the high-swung
lamp's caress.
Does autumn such a novel splendour
wear
Simply because my love has yellow
hair?"

The second relationship was with a Guido Baracchi, the son of the Government Astronomer and whom she drew into left wing-circles. Baracchi had been left a considerable inheritance and was able to live off his income from investments. He enrolled in law at Melbourne in 1914 and became Lesbia's lover in 1916. Their relationship was to lead him to Pentridge Prison after his conviction in 1918, under wartime regulations, for making statements opposing conscription. He was fined in default imprisonment but Lesbia insisted he "do the time". He carried out her wishes although their relationship was then over and he had married somebody else.

Lesbia started writing poetry about 1910. Only a handful of her poems were published during her lifetime, but in 1941 a selection of them was published by Melbourne University Press, edited by Nettie Palmer. The several exercise books in which the poems were written were kept for many years by various people contemplating publication. This finally occurred in 1985. Drusilla Modjeska and Marjorie Pizer were editors. The form of a number of the poems has occasioned the distinguished poet and critic Gary Catalano to conclude that they had been put aside for further polishing. Another explanation for the form may be that they were written to be sung rather than spoken, because it is known that Lesbia frequently did sing them, composing her own music for the purpose. Sadly, this has all been apparently lost. The standard of the poems is uneven but Douglas Stewart, the poetry editor of Angus and Robertson, has written, "Of course, there's no doubt about the quality of the best of them".

In her poems, in a strong clear voice, she speaks of women's lives — the restrictions and attitudes which beset them; the loves and the pains; the striving for independence. One of her best efforts is:

A PRAYER TO SAINT ROSA

When I am so worn out I cannot sleep
And yet I know I have to work next
day
Or lose my job, I sometimes have
recourse
To one long dead, who listens when I
pray.

I ask Saint Rose of Lima for the sleep
She went without, three hundred
years ago
When, lying on thorns and heaps of
broken sherd,
She talked with God and made a
heaven so.

Then speedily that most
compassionate Saint
Comes with her gift of deep oblivious
hours,
Treasured for centuries in nocturnal
space
And heavy with the scent of Lima's
flowers.

For many years after her death it was known that Lesbia Harford had written a novel during the 1920s. But, had the manuscript survived? It was clear enough from letters she had written that all her efforts to have it published ended in failure, not surprisingly, for in the climate of the day a novel critical of the injustice and harsh internment inflicted on foreign nationals in Australia during the First World War was unattractive to publishers. Eventually, the manuscript was discovered in some files of the Commonwealth Literary Fund in the Australian Archives. I will quote a paragraph to show Lesbia's ability with prose. She is describing an aspect of Sydney.

At the first cross-street, the road widened and took a slight turn. Suddenly, beyond them, below them, a long way off, showed a blackness. That was the water. To their right, the cross-street also led down to the tree-covered cliffs overhanging the harbour. On the horizon the sky seemed lighter. The outlines of North Head and South Head were visible against it. Suddenly, on the ridge behind Manly, appeared a white line. The ocean waters beyond the Heads began to glow. The line of white, of light, broadened, curved. The moon was rising over the harbour. It was a huge, unshapely moon, so low down in the sky. Very bright. Like silver. Too early in the year for a yellow moon. But the silver moon was as potent to transfigure as a golden moon would be. Slowly it filled with light the dark bowl of the harbour.

With the failure of her marriage, Lesbia Harford took up some part-time university tutoring and this may have led to her decision, in 1926, to finally take up articles of clerkship. This she did in Melbourne with a young solicitor, Paul Nunan, himself admitted in 1920. His office was at 440 Chancery Lane. She had no sooner completed the year when she fell gravely ill. Pneumonia developed and she died at St Vincent's Hospital on 5 July 1927. Her mother had no doubt that the extra strain of work and study in articles had been too great.

Even after his marriage to another woman, Guido Baracchi followed her to Sydney and they continued to meet. The attachment must still have been strong and is reflected in another poem:

Old memories waken old desires
Infallibly. While we're alive
With eye or ear or sense at all,
Sometimes, must love revive.

But we'll not think, when some
stray gust
Resumes the flicker of desire,
That fuel of circumstance could make
A furnace or our fire.

The past is gone. We must believe
It has no power to change our lives.
Yet still our constant hearts rejoice
Because the past survives.

I cannot resist a comparison with a poem called "Return" by the great Constantinos Cavafy.

Return often and take me,
beloved sensation, return and take
me —
when the memory of the body
awakens,
and old desire again runs through
the blood;
when the lips and the skin remember,
and the hands feel as if they touch
again.

Return often and take me at night,
when the lips and the skin
remember . . .

Lesbia's work, I think, fares pretty well in the comparison.

It is known that Lesbia sang her poems to Baracchi on journeys to and from work. The picture of this vital young woman singing to a handsome Italian revolutionary on the Manly ferry may well be the most evocative that springs from her remarkable life.

* * * * * * *

I shall now do what I hope others giving this oration in future years will also do.

That is, I will address an aspect of the law which is of particular interest to women. In doing so, I will be referring from time to time to the proceedings leading to the recent conviction of Mrs Marjorie Heather Osland for the murder of her husband, which conviction was subsequently upheld in the Court of Appeal and the High Court. In doing so, I want to make it clear that I do not in any way question the correctness of the decisions in those appellate courts. Nor do I express any personal views about Mrs Osland's case.

While it will be necessary for me to refer to aspects of the evidence and the judgments in Mrs Osland's case, what I essentially will talk about is future cases which, one can confidently conclude, will have features that are in a number of ways similar to that of Mrs Osland. In particular, they will involve evidence that a person charged with a crime of violence committed on a spouse or partner was a person living in a battered or abusive relationship of dependency. Why do I think there will be such cases? Because in 1997–98 Victorian Magistrates made 11,573 final intervention orders under the provisions of the *Crimes (Family Violence) Act* 1987 — 11,573. The story does not end there because the court also dealt in the same year with 3822 offences constituting breaches of those orders.

In speaking to you this evening, I will be using the expression "battered women" from time to time because it appears in the judgments in Mrs Osland's case and it is otherwise convenient for my purposes. In doing so I acknowledge the force of Justice Kirby's caution, included in his judgment in that case, that the law should avoid categories expressed in sex-specific terms. I also acknowledge, with respect, the correctness of his observation that there is no inherent reason why a battering relationship should be confined to women as victims.

Some aspects of Mrs Osland's trial provide a setting for proposals which I will later make. I stress that I intend that they do no more than that. I take some of the evidence involved as it appears in the judgment of the Court of Appeal.

At the trial of Mrs Osland the defence raised the defences of self-defence and provocation.

Self-defence

There was undisputed evidence that Mrs Osland and her son dug a hole (and the jury could find it was a grave) some hours before her husband met his death during the evening of 30 July 1991.

There was undisputed evidence that the deceased met his death while asleep in his bed — that sleep being induced by drugs covertly administered to him by Mrs Osland. He was killed by her son (who was ultimately acquitted of any offence) wielding an iron bar. The digging of the grave was described by the Court of Appeal as an insuperable hurdle to self-defence. No doubt the drugging also presented a hurdle.

Provocation

In the case of Mrs Osland, although there was undisputed evidence of grave physical and psychological abuse of her and her children by her husband for a number of years, the prosecution contended that evidence obtained by telephone intercepts suggested that the husband and she may have been living independent lives for some years before the night of the killing. There was evidence that on 28 July the husband had yelled at her and pushed her ordering her to get some metal joints for a bed. She did not suggest any particular incident occurred thereafter immediately before the killing which triggered it off. She said in her evidence, however, that she lived in constant fear that he would kill her and her son who had also suffered constant abuse. She never asserted that at the time of the killing of the husband she had lost control.

The Court of Appeal said that the drugging of the deceased presented an insuperable hurdle in the way of a defence of provocation.

It is now necessary to turn to aspects of the judgments given in the Osland case in the High Court for they reveal, in a helpful way, the current state of knowledge concerning what was referred to in the proceedings as the "battered wife syndrome". In Mrs Osland's trial, a forensic psychologist, Dr Kenneth Byrne, was called for the defence and gave a deal of evidence without objection. Justices Gaudron and Gummow, observing that it must now be accepted that the battered wife syndrome is a proper matter for expert evidence, noted:

> Some matters which, according to Dr Byrne's evidence, are characteristic of battered women, but not necessarily present in all cases:
>
> 1. they are ashamed, fear telling others of their predicament and keep it secret,
> 2. they tend to relive their experiences and, if frightened or intimidated, their thinking may be cloudy and unfocussed,
> 3. they have an increased arousal and become acutely aware of any signal of danger from their partner,
> 4. they may stay in an abusive relationship because they believe that, if they leave, the other person will find them or take revenge on other members of the family,
> 5. in severe cases, they may live with the belief that one day they will be killed by the other person.

The same judges acknowledged that the ordinary person was unlikely to be aware of some of these matters including the heightened arousal and awareness of danger and that such matters, if appropriately raised in evidence, may be relevant to considerations of both self-defence and provocation.

Justice Kirby noted that there is now a substantial amount of legal literature in Australia and overseas relating to the battered woman syndrome. He also noted that some controversy attached to the syndrome and that there was a need in proceedings where it was said to be relevant for reliable evidence touching it. His Honour said, "There is considerable agreement that expert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert." Justice Kirby thought that in a given case where an abusive relationship was established by evidence, that evidence may help a jury "to under-

stand, as self-defensive, conduct which on one view occurred where there was no actual attack on the accused under way but rather a genuinely apprehended threat of imminent danger sufficient to warrant conduct of a nature of a pre-emptive strike". Justice Kirby also expressed the view that the greatest relevance of evidence "about the general dynamics of abusive relationships" will usually concern what has been termed "traumatic bonding" (an expression acknowledged by the Judge) and which may occur in them. As I understand it, traumatic bonding produces some, perhaps all, of the characteristics of battered women noted by Justices Gaudron and Gummow. The value of expert evidence in this context has also been acknowledged in the Supreme Court of Canada.

In this summary of the knowledge about characteristics of many battered women, it is also helpful to refer to the case of *Chhay*, decided by the Court of Criminal Appeal of New South Wales in 1994. In that case Chief Justice Gleeson cited a passage from an article "Battered Women and Provocation" by D. Nicholson and R. Sanghvi, which appeared in [1993] *Crim LR* 728 at 730.

> According to research and many cases themselves, battered women tend not to react with instant violence to taunts or violence as men tend to do. For one thing, they learn that this is likely to lead to a bigger beating. Instead, they typically respond by suffering a "slow-burn" of fear, despair and anger which eventually erupts into the killing of their batterer, usually when he is asleep, drunk or otherwise indisposed.

Chief Justice Gleeson then added:

> It is not necessary to accept the full effect of words such as "typically" and "usually" in that passage, or to construct a stereotype of a battered woman to appreciate the force of the underlying point.

It is of interest that my colleague, Justice Frank Vincent, who has much experience in the criminal law, came to hold a similar view many years ago when still practising as a barrister.

What needs to be done for the other cases that I envisage will occur? Cases where there is satisfactory evidence that an accused person has been living in a battered or abusive relationship of dependency and of it resulting for them in traumatic bonding, heightened arousal or awareness of danger and other characteristics noted by the High Court Justices. Cases of that sort where self-defence and/or provocation are real issues. Cases where expert evidence might resolve in favour of an accused the puzzlement of the ordinary person as to why a woman would continue in such a debilitating relationship.

To answer this question one needs to note, as I have done, the current state of knowledge concerning the effect on some women of their involvement in abusive relationships of dependency and to also note the current state of the law touching self-defence and provocation.

In the High Court in Mrs Osland's case, Justice Kirby did not accept that statements made in the Supreme Court of Canada should be read as endorsing "an entirely new and discrete defence to a charge of culpable homicide arising from proof of the presence of BWS or an analogous abusive relationship". Justice Callinan said, "The submission for the appellant that this Court should adopt a new and separate defence of battered woman syndrome goes too far for the laws of this country." What I propose, and it is a proposal for Victoria, is some change of focus in the existing common law touching self-defence and provocation, together with some statutory amendment of the law as to the latter.

In the case of Zecevic, decided in 1987, the High Court explained that with respect to self-defence the question to be asked was whether the accused person believed on reasonable grounds that it was necessary in self-defence to do what he did, but that in cases of homicide some elaboration was required — for a person who kills, intending death or serious bodily harm, can scarcely believe on reasonable grounds that it was necessary to do that in self-defence unless he perceives a threat which calls for such a response and that a threat would not ordinarily do so unless it caused a reasonable apprehension in the killer of death or serious bodily harm. As both distinguished judicial and academic writers have pointed out, legal history shows that the defences of self-defence and provocation came forth and developed from male perceptions and experience. Included in that development, so far as self-defence is concerned, are the notions of immediacy of response and proportionality in relation to the conduct of accused persons.

In recent times the law relating to self-defence has been adumbrated in terms relevant to the situation of the sort of women I have been referring to. Indeed, in Mrs Osland's case, citing *Zecevic*, Justice Kirby pointed out that the High Court had explained "that issues of self-defence were to be approached in a practical manner and without undue nicety, giving proper weight to the predicament of the accused". Thus, the law now operates so that the jury looks to what the particular accused could have regarded, in her particular circumstances, as force that was reasonably necessary.

In the general run of cases involving charges of murder and where self-defence is an issue, attention is properly directed to the last attack or threat by the deceased to the accused person prior to the killing. Or, indeed, the absence of such an attack or threat. As a consequence judges direct juries as to issues such as the possibility of retreat or taking avoiding action by an accused in such a situation and the proportionality between the threat or attack and the accused's response.

In such cases where there is satisfactory evidence that the accused was involved with the deceased in a battering or abusive relationship of dependency, in my opinion, the focus of the judge's directions ought to change. The last attack or threat should be dealt with as simply a component of the sum total of conduct directed against the accused by the deceased so that the accused is regarded as defending herself against the cumulation, the sum total, of the deceased's violence and abuse. Such directions are consistent with our present state of knowledge of the effects of a battering or abusive relationship of dependency.

This approach should, in my view, be accompanied by appropriate jury warnings delivered with the authority of the Judge. The Crimes Act of the Victorian Parliament now includes some jury warnings to be delivered in cases of rape and other sexual attacks. One of them requires a judge in appropriate circumstances to "inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it". In the present context a warning "that there may be good reasons why a woman remains in a battering or abusive relationship or hesitates to complain about it" may well be apposite. Other warnings are not difficult to devise.

As with self-defence, so should the directions of the Judge change focus when provocation is an issue. In my opinion, juries should be directed that a last provocative incident is simply to be

regarded as a component of the woman's experience and that it is the sum total of the deceased's provocative conduct to which the focus of the jurors' attention should be turned. Such directions would complement the legislative change I shall later propose. In saying this, I acknowledge that judges do direct juries along the lines of a last act other than of a trivial nature being "the last straw".

It is sufficient for present purposes to note that with respect to the law concerning provocation, it is beyond dispute that the common law in this State has, as its centre, the notion of a killing during a sudden and temporary loss of control in the accused person resulting from the provocative conduct of the deceased.

In 1980, the New South Wales parliamentary taskforce on domestic violence submitted a report and as a result amendments were made to the New South Wales Crimes Act by the *Crimes (Homicide) Amendment Act* 1982. Those amendments provided that the conduct of the deceased which induced the loss of self-control in the person accused need not have occurred immediately before the act or omission causing death, nor need the act or omission causing death be done or omitted suddenly. In other words, these amendments removed the need for an immediate response and for the conduct causing death to be proportionate to the provocation. If the killing occurred while the accused person lacked self-control, provocation was available as a defence although the response was delayed. The requirement of immediacy of response was abandoned. These amendments also allow the provocation to be assessed having regard to previous provocative conduct. In my opinion, consideration should be given to similar provisions being enacted by the Victorian Parliament.

In my opinion, juries should be directed that a last provocative incident is simply to be regarded as a component of the woman's experience and that it is the sum total of the deceased's provocative conduct to which the focus of the jurors' attention should be turned.

I know of no substantial criticism of the operation of these amendments which have now been in place for more than 16 years. The Court of Criminal Appeal of New South Wales had occasion to consider them in the case of Chhay (supra). In that case the Court held that provocation should have been left to the jury at trial even though there had been, on the evidence, a delay of several hours between the deceased's last provocative act and when he was killed as he slept by his wife, there being ample evidence that he had repeatedly abused and battered her. The main judgment was given by the present Chief Justice of Australia who has, if I may be permitted, frequently given the lead in matters touching the criminal law. After describing the development of the law touching provocation and noting the concept of sudden masculine response to it, His Honour remarked:

> To extend the metaphor, the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.

In making these suggestions I am not unmindful of other important considerations. I again turn to Justice Kirby and his judgment which included the following passages: "No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse." ". . . There is no legal carte blanche, including for people in abusive relationships, to engage in premeditated homicide."

Let us work towards the law reflecting fully a body of scientific knowledge and learning which has been compiled for our assistance.

"My Learned Brethren, the Arrogant Czarists . . ."

THE United States Supreme Court is no place for faint hearts. Debate is vigorous, as it should be, and the judges do not pull their punches. But to a lawyer accustomed to the polite language of Australian and English judges, the dissenting opinion of Scalia J in a recent case seems unusually blunt and hard-hitting. The case is of current interest because of its discussion of what is now called judicial activism, particularly in relation to "implied rights" in the Constitution.

The case was *Planned Parenthood of Southeastern Pennsylvania, et al.* v. *Casey et al.* 505 US 883 (1992). By a 5:4 majority, the court struck down parts of a Pennsylvania statute which regulated abortion in that State.

In a blistering dissent Scalia J accused the majority of:

- succumbing to the "temptation" towards "systematically eliminating checks upon its own power";
- adopting "outrageous arguments";
- supporting their decision "not [by] reasoned judgment" but by "personal predilection";
- adopting a principle of "undue burden" [of State regulation of abortion] which "has no principled or coherent legal basis" and which is a "jurisprudence of confusion";
- seeking "to maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily";
- establishing an "Imperial Judiciary" with a "Nietzschean vision of us unelected life-tenured judges leading a Volk who will be 'tested by following' and whose very 'belief in themselves' is mystically bound up in their 'understanding' of a Court that 'speak[s] before all others for their constitutional ideals'";
- "almost czarist arrogance".

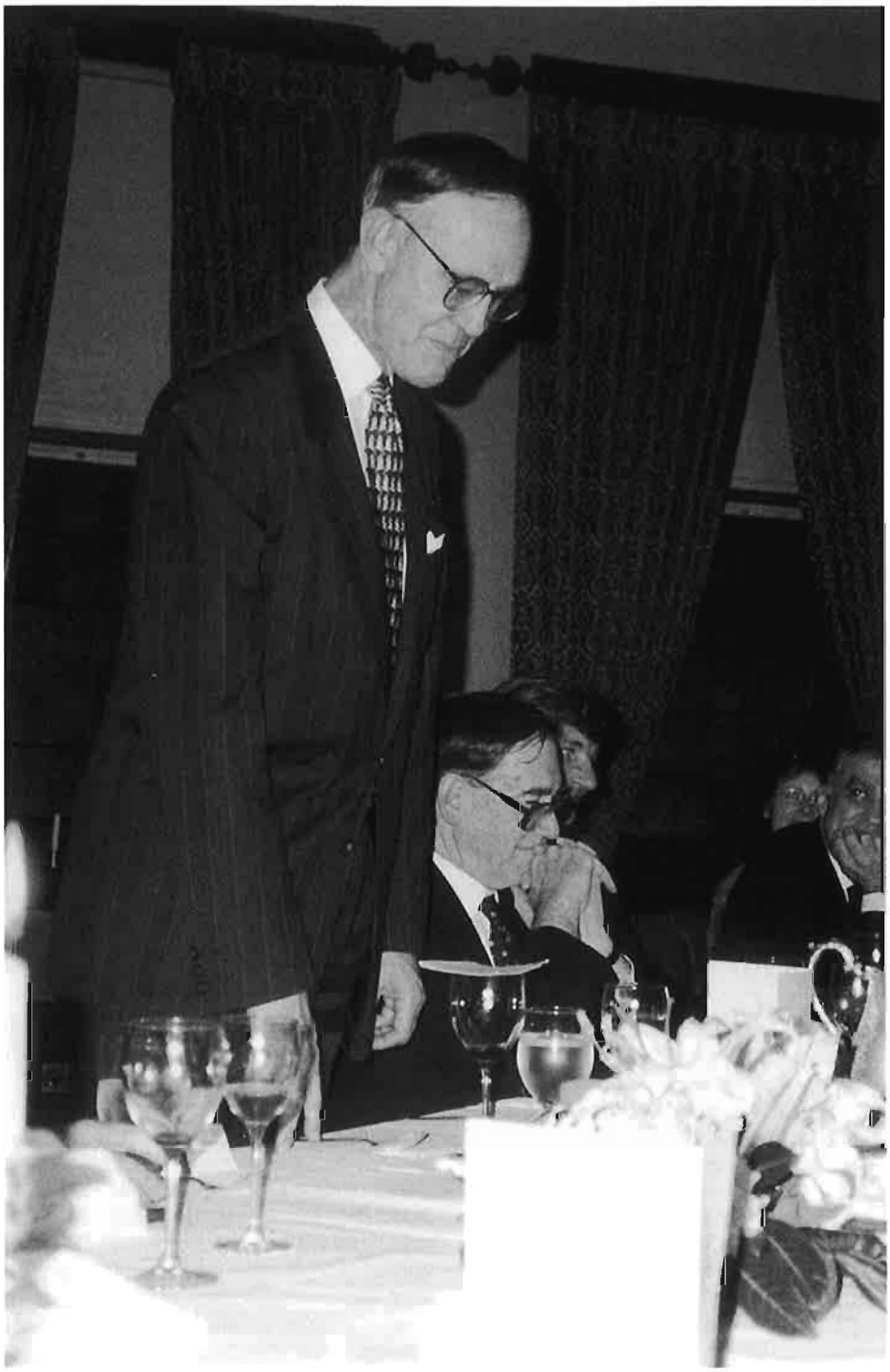
To some extent, the heat in the opinion reflects the heat in the abortion debate itself. However, the opinion is also a passionate argument against taking judicial activism too far. What lessons are there in this for the Australian courts?

Charles Scerri

James Merralls AM, QC

Graeme Clarke

A dinner was held in honour of James Merralls AM, QC at the Australia Club on Friday 12 February 1999. Justice Sundberg made the following speech.



WE are here this evening because Jim Merralls has been honoured for his services to law reporting — in particular for his work as editor of the Commonwealth Law Reports.

Many of us are or have been reporters for those reports, either while Jim was himself a reporter or while he has been editor.

Three who are here, but were never reporters, have written the judgements that others have reported.

The balance of those present, if they have been doing their jobs properly, will have read what those three have written and the others have reported.

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Jim became editor in May 1969, and at his invitation I became a reporter later that year. I remained one of his reporters for the next 25 years. That's why I have been asked to say something tonight.

Things were not well with the reports when Jim was appointed.

There was a large backlog of unreported decisions, some of them handed down years before.

Jim's "present" from the Law Book Company on taking over was a number of tea chests containing judgements and transcripts of augment for more than 100 cases.

On top of these 100-odd were others that had been in the hands of reporters, unreported, for far too long.

Jim's first and daunting task was to get rid of the backlog. This took a long time, but was achieved by the appointment of new and enthusiastic reporters and the pensioning off of old non-performing ones.

It took more than 10 years to achieve an acceptable six months turnover between judgement in a case and publication in the Reports.

Six months may itself seem long — but the CLRs are authorised reports.

Left, James Merralls AM, QC

The reporter's draft goes to the judges. They or their associates sometimes comment on the headnote, pick up errors or raise matters for clarification. That takes time, and it is not entirely within the publisher's control.

In most cases the argument has to be reported, which is not a feature of unauthorised reports or indeed of many authorised ones. Reporting an argument is not a simple task. Many cases that survive the special leave ordeal involve experienced counsel, and their refined arguments must be faithfully reported in precis or shorthand form. In some cases the reporting of the argument is more difficult, because it is not entirely clear what it is. One has to be inventive, to express in intelligible form the point that counsel seems to be trying to make.

So the reporting of the argument takes time, obtaining the approval of the judges takes time, and six months is generally regarded as about the best that can be managed.

That was one of Jim's most important achievements as editor — making reports more "current".

He was also insistent upon a useful but not overburdened headnote — in most cases the facts, the decision and the propositions of law for which the case is authority.

In this task a new reporter could use Jim's own headnotes as models, and there were others with respectable initials subjoined, such as JDP, RCT and BMD.

But the "education" of new reporters is mainly the result of trial and error. The edited copies of my early attempts bore more of the elegant Merralls script than of my own typescript.

Thus one came to learn the style he favoured and the structures he liked.

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A good editor has to keep the troops happy. The reporters are part-timers, and being brittle and opinionated barristers could be put off-side by heavy-handed editorial treatment.

Justice Sundberg

(Left to right) standing: James Merralls AM, QC; Mr Justice Hayne; Justice Sundberg.
Sitting: C.M. Caleo (partly obscured); Mr Justice Ormiston; Mr Justice Debelle (S. Ct of S.A.); John Karkar QC and Melanie Sloss.

But Jim was very good in that respect — a particularly severely edited document was often preceded by a friendly phone call warning that it was coming, and a few words to soften the blow.

I spent 25 years being corrected, and Jim and I still speak to each other — that's because the editing was done in a sensitive manner, and because we saw ourselves as members of a team rowing together as fast and as accurately as we could — though some may chuckle at the thought of Merralls and Sundberg together in a rowing boat.

****

The CLRs are generally regarded as a model for other series. In his foreword to vol. 180 of the Reports, Sir Anthony Mason referred to the "very high standard" that has come to be expected of the reports as a result of Jim's "tireless dedication".

Volume 180 was Jim's idea — to collect together cases that had not in their day been thought worth reporting, but which had subsequently attained reportable status.

The volume was well-received, and in Sir Anthony's witty foreword he disavowed the notion that as editor of the CLRs Jim has been merely a collector of "other men's flowers" who has provided nothing of his own but "the string to bind them".

****

And so one can understand why the powers that be, have made Jim a Member of the Order of Australia.

Jim, the assemblage here attests to the respect in which you are held, and

James Merralls AM,QC; Jack Fagenbaum QC; Jack Strahan QC; and Ross Robson QC

the great pleasure your friends have in your receipt of the award.

Melanie and gentlemen — please be upstanding as I propose a toast to Jim Merralls — may he remain editor of the Commonwealth Law Reports until at least the year 2009, by which time he will have beaten Sir Frederick Pollock's almost 40-year record as editor of The Law Reports.

Photographs courtesy of Justice Kirby

The Judicial Conference of Australia

The Chairman, Hon. Mr Justice B.H. McPherson CBE, BA (Natal), BA, LL B (Cambridge), PhD (Qld)

In April this year, the Victorian Attorney-General wrote to the Judicial Conference of Australia putting forward proposals in relation to judicial appointment and training. This letter was also released to the press and published widely by the media.

With the blessing of the chairman of the Judicial Conference of Australia, we publish below the reply which he sent to Mrs Wade, with the authority of the Judicial Conference of Australia.

The Hon Jan Wade MLA
Attorney-General
Department of Justice
Level 1, 55 St Andrew's Place
East Melbourne Vic 3002

Dear Attorney-General

JUDICIAL APPOINTMENTS AND EDUCATION

"I refer to your letter dated 30 April 1999, addressed to Professor Parker as secretary of the Judicial Conference of Australia, which has been considered at some length at recent meetings of the Governing Council of the Conference. In the light of those discussions, Council members have authorised me to respond on their behalf in the following terms.

The letter under reply contains a series of proposals or ideas for what are described as changes in existing methods of selection, training and tenure for prospective appointees to judicial office in Australia. With all of these suggestions, some of which lack detail, it would be impossible to deal in a communication like this; and the Council's response is therefore specifically confined to what are considered to be the most controversial of the major issues raised by your letter.

CANDIDATES FOR JUDICIAL APPOINTMENT

We note that you do not question the standard of the Australian judiciary as it is now. Indeed, the stated purpose of your proposals is to "ensure that the quality of judicial appointments to all Australian courts is maintained". You do, however, express concerns about two matters. One is that the judiciary is not sufficiently representative of the community as a whole; the other is that it fails to draw for its membership on the full range of available legal talent. These two concerns are, on their face, essentially in conflict.

In the past, community participation in the judiciary was maintained through the use of representative juries in both civil and criminal cases. Juries decide the facts and, as one would expect, judges determine the law to be applied. Historically, the retreat from this form of community representation in civil and, even to some extent, in criminal matters has been promoted by executive government and not by the judiciary. Short of reversing that trend, if a truly representative bench has now become a genuine concern of government, the only legitimate means of achieving it is by popular election of judges irrespective of individual legal ability. Having regard to experience with that system in the United States, it seems unlikely that you would be prepared to recommend that it be adopted in Victoria.

On the contrary, your proposals plainly assume that legal ability must remain the essential criterion for appointment to judicial office in the future. Specific mention is, however, made of what is said to be the untapped pool of legal expertise said to exist in the ranks of solicitors, legal academics, and government and corporate sector lawyers. We challenge your assumption that judicial appointments have not been or are not being made to Australian courts from among those in the first three categories. Indeed, in the majority of Australian jurisdictions, in which the legal profession is not subdivided, appointments of solicitors are not only inevitable, but are regularly taking place, and this is also happening, for example, in the Family Court and in courts in New South Wales and Victoria.

The same is also true of "legal academics", of which in Queensland Dr Kevin Ryan and I are instances, as are former Professors Sackville, Lindgren and Finn in the Federal Court, Professors Austin, Goldring and Phegen in New South Wales, and Professor Nygh, Justice Finn and others in the Family Court. Mackenzie J in Queensland is an example of a judge appointed to the Supreme Court from a senior position in government, as are Mason P. (NSW), Parker J. (WA), and the most recent appointment to the Supreme Court of Western Australia, McKechnie J. This brief survey is, of course, by no means exhaustive. The position in Victoria is, of course, known to you. There are at least six County Court judges and two or more Supreme Court judges who were solicitors before their appointment. The same is true generally of magistrates in all jurisdictions in Australia.

The real problem in making appointments of the kind you propose, especially those from government offices and the corporate sector, is to assess their legal competence and suitability in advance of appointment. Publicly demonstrated legal ability in court has so far been the accepted criterion, and most if not all of those who have been mentioned here by name have first distinguished themselves in that way. If that

criterion is now to be abandoned without being replaced by some publicly identifiable alternative standard, it has a real potential to foster a substantial growth in arbitrary executive power and political or personal favouritism in the process of judicial appointment or at least the appearance of it. It is not without significance that, in order to identify a judge drawn from the corporate sector, you find the need to go to Singapore for your example. If, in doing justice according to law, efficiency was the sole consideration, there would no doubt be other examples of that kind much closer to home.

SHORT-TERM APPOINTMENTS

Your concession that lawyers appointed from outside the practising profession "will usually have far less litigation experience" acknowledges that practical experience in the day-to-day working of a system is a prerequisite for appointment to positions of authority within it, as indeed it is for most other callings. Your proposals claim to rectify this deficit in the candidates you have in mind by trying to identify some form of "relevant substitute experience". The precise nature of the substitute is not fully explained; but one solution you advance is the making of probationary part-time or limited term appointments to the judiciary.

To appointments of that kind there are, as you are aware, well-founded objections based on the pressing need for separation of executive and judicial functions in order to maintain public confidence in the independence and impartiality of the judiciary. The objections are identified and fully recognised in the Declaration of the Principles on Judicial Independence adopted by all of the Australian Chief Justices in 1997 consequent upon the Beijing Statement in 1995, to which Australia and many other nations are signatories. Although you profess to speak of the whole of Australia, there are constitutional guarantees in New South Wales and the Commonwealth which make it impossible to adopt your proposal without prior approval at a referendum of the people. If in other jurisdictions the intention now is to disregard principles of judicial independence established in England some 300 years ago and adopted here on the advent of responsible government, then the Judicial Conference of Australia is firmly opposed to the change you are suggesting.

Inevitably, of course, we will be assured that this is far from being your intention. It is nevertheless likely to be the direct, even if unintended, effect of your proposals for part-time and short-term judicial appointments. Widespread perceptions of the potential for successive governments of differing political colours to use the power of making, or failing to renew, appointments of that kind will be the inevitable result, with corresponding loss of public confidence in the impartiality of the judiciary, to say nothing of the difficulties inherent in a practitioner retaining for substantial periods an interest in his or her practice, which of its very nature competes with others in the field who will be appearing before him or her. The dangers of such a course are amply illustrated by evidence from the United States and are now emerging in reported decisions in England.

JUDICIAL EDUCATION

The notion that formal classes on how to be a judge are capable of providing "relevant substitute experience" for someone who lacks prior court experience is, with respect, misconceived. The difference in any field of human activity between learning from teaching and learning from experience in practice is plain to everyone who has had the benefit of being trained in both ways. Your own proposals on the subject fail to address what you say is, under the present system, the problem of a new judge "being sworn in and having to immediately preside over a trial next day". We are not aware that such problems exist at present but can well understand that they would arise if the new judge had little or no previous experience in court. The difficulty will, however, not be overcome by making the appointment of such persons probationary in the first instance. Part-time and short-term appointments will multiply the number of thoroughly inexperienced judges before whom parties will, as you claim they do now, have to appear, to the detriment of their interests as litigants. There is, we think, merit in allowing fresh appointees, even those who are well qualified practitioners, a limited period of adjustment during which they can sit with experienced judges to observe from the bench, without actively participating in, the judicial process in action, especially in those areas of which they may not have had extensive personal experience. Such a practice is already being followed in courts in New South Wales, Victoria and the Capital Territory. The real obstacle to its adoption generally lies in the recurrent failure of government to make timely appointments in sufficient numbers to cope with the existing workload, and in persistent pressure on courts constantly to make full use of all available judicial resources. At the root of the difficulty is an unwillingness to spend public money on judicial administration, which returns so few immediate political rewards to governments in power.

The suggestion of trying out the continental European system of training up "promising" judicial officers is open to many of the objections already mentioned. Not the least of them is the very considerable expense of conducting a program of educating (and paying) such candidates while they are being trained, in contrast to the present system in force throughout the English-speaking world by which future judicial officers acquire experience of court work by practising it at their own expense. The contrast in approach between the two systems may be one reason why it requires about four times as many judges per head of population in France (and slightly more in Germany) to administer the judicial systems in those countries than it does in Australia. If any such proposal is being seriously considered for introduction here, it should, in the interests of public candour, be preceded by an impartial economic impact study.

JUDICIAL APPOINTMENTS

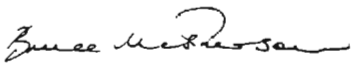
Finally, we wish to advert to the process by which judicial appointments are currently being made in Australia. At present they are subject to the absolute and uncontrolled prerogative of the executive exercisable by the Attorney-General sometimes even without adequate reference to Cabinet colleagues. Consultation with leaders of the profession may take place; but, as often as not, some Attorneys-General do not consider the advice received in that way as relevant, and increasingly it is being treated as a formality that is ignored in practice. There is growing evidence that the power of making judicial appointments is coming to be regarded by governments in power as a form of patronage and a source of influence that can be used to serve their short-term political interests.

The whole process of making judicial appointments ought to be scrutinised and reviewed to ensure that it is less secretive or, as some would have it, more "transparent". In this, as in other areas, governments must be accountable for

the way in which their powers are exercised. One suggestion, which the Conference neither indorses or disavows at present, is that the power of appointment should be transferred to, or at least shared with, a properly constituted and non-political Judicial Appointments Board. We would regard some such reform as the minimum condition that ought, in the public interest, to be satisfied before proposals of the kind put forward in your letter are considered. Are you prepared to join with the Judicial Conference of Australia in working out an acceptable procedure for the selection of candidates for the judiciary that will maintain public and professional confidence in the continued independence and impartiality of those appointed to this high and important office of state?

I should be happy to discuss with you details of proposals for the best method of achieving this objective."

Yours faithfully,



Hon Mr Justice B.H. McPherson CBE
BA (Natal); BA; LL B (Cambridge);
Ph D (Qld)
Chairman

Verbatim

Chur-lish Court

16 August 1999
Coram: Mandie J.
A-G & Ors v. *Church of St. John Greek Orthodox Church & Ors*
For the plaintiffs: Dr Pannam QC and Mr Glacken
For the defendants: Mr Nugent
[Pannam QC spent the afternoon citing 19th century cases mostly involving the Church of Scotland and the Free Church of Scotland]

At 4.15 pm:
Tipstaff: This Honourable Chur . . . er . . . Court stands adjourned to half-past ten o'clock tomorrow morning. God save the Queen."

Goaless Lockett

Geelong County Court

22 April 1999
R v. *Gregory John Brazel*
The prosecutor, Andrew Moore was examining in chief a prosecution witness.

Accused: Your Honour
His Honour: Yes?
Accused: I don't want to keep getting to my feet, but the learned prosecutor is leading better than Tony Lockett at the moment. I would ask him not to do so.
Mr Moore: Not kicking too many goals.

Keeping it Simple

Federal Court of Australia

Coram: O'Loughlin J
Cubillo & Gunner v. *Commonwealth of Australia*
J.T. Rush QC with M.A. Dreyfus and M. Richards for the Applicants
D.R. Meagher QC with E.J. Hollingworth and C. Beaton-Wells for the Respondent

26 August 1999, sitting at Tennant Creek, Northern Territory

Meagher QC cross-examining witness, through a Warumungu interpreter.
Meagher: Now, was she concerned for your welfare?
Witness: Sorry?
Dreyfus: That question may need simplifying, your Honour.
Interpreter: Yes, sorry. Can you put that question in a simple way so I can translate it?
Meagher: Was the missus concerned about your welfare?
Dreyfus: That's not exactly a simple way, your Honour.
Interpreter: No, that's not . . .
Dreyfus: It's still using the same verb and the same object of the sentence, your Honour.
Meagher: Can I have the interpretation changed?
Dreyfus: The interpreter's asked for the question to be simplified, your Honour, and it wasn't simplified.
His Honour: That is so Mr Meagher.

1 September 1999, sitting at Alice Springs, Northern Territory

Meagher QC cross-examining witness.
Meagher: Do you see the first paragraph there, that you were camping near the racecourse, your father had been asked that you be admitted to St Mary's and there was some suggestion that you were approaching a stage where your mother could no longer exercise control over you. You were camping near the racecourse, weren't you?
Witness: Yes.
Meagher: Do you agree your father made the request that is said there?
Witness: I didn't know of anything.

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Meagher: And that he was prepared to maintain you at St Mary's. Would that be right?
Witness: I think so.
Meagher: That you had no permanent home?
Witness: No.
Meagher: And that you were living after the manner of Aboriginals?
Witness: Well, we were Aboriginals.

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Meagher QC cross-examining witness.
Meagher: Was it during a weekday or on a weekend?
Witness: I don't know.

Meagher: You don't know whether it was on a weekday or on a weekend?
Witness: I don't know, probably a weekday.
Meagher: Summertime or wintertime?
Witness: I don't know.
Meagher: During the wet or during the dry?
His Honour: The dry or the drier.

Hard of Hearing

24 June 1999
Powercor v. *Pacific Power*

Mr Delany: What circumstances were they? Well, first of all, the difficulty with the schedule in the fax of 28 May, which would have been physically impossible for us to do anyway, so that was one reason. And the second reason I was getting conflicting signals about what Pacific Power should be doing in the market.
His Honour: I don't really want to see anybody tomorrow, Mr Delany, but if you have to, you have to at some stage.
Mr Delany: I do not wish to come either, Your Honour.
His Honour: This case will resume income Monday. Adjourn the court until 10 o'clock tomorrow morning.

At this stage the further hearing of the matter was adjourned until 10.30 am, 28 June 1999.

Only Sipping

Coram: Harper J — Jury
R. v. *Georgiadis*
Crown: Hillman
Defence: A.R. Lewis
Verdict: not guilty

Lewis: Did you give evidence at the committal hearing in this matter in January of this year.
Wright: Yes, I did.
Lewis: Did you say (Your Honour this is p.6, line 10), when asked: "What time do you say you started drinking on this day?" Did you reply "Nine o'clock." Next question: "In the morning?" Answer: "Yes."?
Wright: Yes, Yes. I did say that but not drinking, like I was sipping my beers. So that would have been, what, three, four, up to the extent of start drinking.
Lewis: So you were drinking but you were only sipping, is that what you say?
Wright: Yes, I can — yes.
Lewis: From nine o'clock in the morning?
Wright: Yes.
Lewis: By 12.30 had you had a dozen cans?
Wright: Yes.
Lewis: Still sipping?
Wright: Yes, I am.
Lewis: Then in the afternoon you had more to drink as well?
Wright: Yes, I did.
Lewis: How many did you have in the afternoon?
Wright: I'd say another dozen, on top of what I've had.
Lewis: You've had two dozen cans during that day?
Wright: Yes.
Lewis: At least?
Wright: That's 24 as a carton, yes, Your Honour — no, sorry.
Lewis: Twenty-four is a slab in this case isn't it?
Wright: Yes, yes.
Lewis: Are they just the ones you can remember?
Wright: If I had more I don't remember.

New Injury Claims for Employees?

Anton Lindeman

Legal Practitioners are properly attuned to the potential for seeking and obtaining new avenues of compensation for clients and, perhaps, most justifiably, in the context of workplace-related injuries where common law relief is being rapidly eroded. Whether amendments made to the *Sentencing Act* 1991, whereby compensation for "pain and suffering" may be sought, extends to employees (or their dependants) who are injured in the workplace, against employers and/or others found guilty or convicted of occupational safety offences, is problematic. This article explores some of the issues that are relevant to Sentencing Act compensation claims.

THE LEGISLATION

BY an amendment to the Sentencing Act, introduced by s.74(1) of the *Victims of Crime Assistance Act* 1996, and operative from 1 July 1997, the scope of s.86 compensations orders was extended to include claims for "pain and suffering". The relevant post amendment s.86 reads:

(1) If a court finds a person guilty of, or convicts a person of, an offence it may, on the application of a person suffering loss or destruction of, or damage to, property or *pain and suffering* as a result of the offence, order the offender to pay any compensation for the loss, destruction or damage (not exceeding the value of the property lost, destroyed or damaged) *or for the pain and suffering* that the court thinks fit.

(5) An order under sub-section (1):

(a) may be made on an application made as soon as practicable (*and, in the case of an application for compensation for pain and suffering, no later than six months*) after the offender is found guilty, or convicted, of the offence; and . . ." (Amendments are in italics)

The context in which this new entitlement was established, suggests several hurdles may stand in the way of any injured worker/dependent applicant, seeking a compensation order. I will examine some of the potential impediments under the following headings:

(a) Whether the specific nature of the *Accident Compensation Act* 1985 and related legislation establish an exclusive code or scheme, for the compensation of employment related injuries, thereby excluding by implication other general legislation providing for similar relief.

(b) Whether occupational safety law breaches are "offences" as contemplated by the Sentencing Act amendment which extended relief to cover "pain and suffering".

(c) Other limitations for granting compensation, the discretionary nature of those orders.

EXCLUSIVITY OF ACCIDENT COMPENSATION ENTITLEMENTS

There is little doubt that Parliament has evinced the intention to remove common law relief for workplace injuries and, rather, has opted for management of any such claims through the processes established under the umbrella of the workers compensation legislation. See, for example, s.134A of the *Accident Compensation Act* 1985.

The right to the relief, established under s.86 of the Sentencing Act, is founded on the notion of offenders compensating victims who have suffered as a consequence of their crimes. The prohibition on "recovery of damages of any kind", by workers (and their dependants) for "compensation in respect of an injury arising out of or in the course of, or due to the nature of, employment on or after 12 November 1997" (as provided by s.134A *Accident Compensation Act* 1985), appears wide and may be held to cover s.86 applications, notwithstanding the social purposes that gave birth to the establishment of this new entitlement.

Although breaches by employers of their general duty obligations under the *Occupational Health and Safety Act* 1985 ("OH&S Act") are, by force of s.47(3), indictable offences, in the wider context of employers' industrial safety obligations, which are broadly accepted as being regulatory in nature, it is doubtful whether the label of "offender", in the traditional criminal law sense, is appropriate. This issue is discussed further below.

In addition to the express limitation (if any) discussed above, there are prospects for excluding injured workers from this new Sentencing Act entitlement through other limitations imposed by principles of interpretation, whereby a statutory "code or scheme", for example, for worker's compensation, is held to cover the field and thereby exclude any capacity for other forms of relief. These principles are founded on notions of implied repeal, through the maxim of interpretation *generalia specialibus non derogant* and cases which have identified the existence of statutory codes whereby certain special statutory provisions operate to the exclusion of other more general provisions. See *Jones* v. *Bodanski* (1986) 11 NSWLR 667 and, as confirmed on appeal, at (1987) 11 NSWLR 677.

NATURE OF OFFENCE

The nature and character of OH&S Act breaches has been considered, inter alia, in the *Director of Public Prosecutions* v. *Ancon Travel Towers Pty Ltd* unreported decision of 16 December 1998, by Judge Mullaly. His Honour emphasised prevention and the role of the enforcement provisions in securing prevention and thereby distinguished this

sentencing process from other offences in which sentencing is responsive. Mullaly J, inter alia, pointing out:

"In assessing penalty it is necessary to have regard to the nature of the breach rather than the consequences of that breach. Offences under the Acts are not defined in terms of consequential injury or death, but rather in terms of a failure to fulfil a positive duty under the Act . . ." See also *WorkCover Authority of NSW* v. *Waugh* [1995] NSWIRC 14 and cases discussed therein and *Corrado* v. *Gebhardt & Anor* [1999] VSC 35 (23 February 1999) at paragraph 34.

It is submitted that the emphasis in OH&S Act offences on the duty to protect workers, rather than the consequences of an accident, makes it difficult to reconcile the notion of a worker injured in a workplace accident (absent criminal intent) with the concept of a "victim" under the Sentencing Act.

Further, s.28 of the OH&S Act, inter alia., provides:

Nothing in this Part shall be construed as:

(a) conferring a right of action in any civil proceedings in respect of any contravention whether, by act or omission, of any provision of this Part.

It is arguable that s.86 of the Sentencing Act establishes civil rights to compensation, in the sense in which that term is used in s.28 of the OH&S Act. Section 87A of the Sentencing Act provides some support in that direction, i.e., ". . . *an order under section 86(1) must be taken to be a judgment debt due by the offender to the person . . .*".

It follows that s.28 of the OH&S either precludes the existence of an entitlement to compensation under s.86 of the Sentencing Act, arising through employers who are found to have breached their general duty obligations to provide safe work environments, because s.86 of the Sentencing Act establishes civil entitlements, or it supports other arguments based on statutory construction, for denying such entitlements.

Other indicators pointing to fundamental differences between OH&S Act offences on the one hand and crimes of violence on the other, i.e., offences which involve what are generally understood to be victims of crime, include the following:

- The pain and suffering amendment was introduced into s.86 of the Sentencing Act by the *Victims of Crime Assistance Act* 1996, i.e., legislation which broadly speaking amounted to a scheme for assisting victims of crime.
- Crimes of violence invariably involve the perpetrator breaking the law in circumstances where there are no competing duties on either the victims or any other third parties. Industrial safety law breaches are arguably different in this regard given that there could, in any particular case, be a number of competing or complementary duties that reside alongside those of the employer, namely;
  (a) the OH&S Act imposes duties: in s.24 on designers, manufacturers and suppliers, etc.; in s.22 on self-employed persons, etc.; and, in s.25 on employees (who must take "reasonable care" for, inter alia, their own safety and co-operate with their employers in relations to the employers' safety obligations);
  (b) the fundamental right of employees to refuse to undertake work that is considered to be dangerous, including the right to negotiate safety improvements. See s.26 and s.33 of the OH&S Act;
  (c) the recognition of employees being liable at common law for contributory negligence. See, for example, *Kulczycki* v. *Metalex Pty Ltd* [1995] 2 V.R. 377 at 381;
  (d) the *Accident Compensation Act* 1985 along with the OH&S Act are part of a package of employment-related Acts which passed through Parliament together. The *Accident Compensation Act* 1985 establishes a scheme for, inter alia, compensation and rehabilitation of injured workers and any compensation recovered, under s.86 of the Sentencing Act, may need to be refunded to the *Accident Compensation Act* 1985 insurer, either through the operation of that Act or the principle of double or dual insurance. See s.138 and *Jansen* v. *Thornton and Another* [1996] ACTSC 62 (14 June 1996).

The differences between breaches of the OH&S Act and crimes involving victims, as such, call into question whether injured workers or their dependants could fall within the class of people intended to receive the benefits of s.86 of the Sentencing Act compensation orders, either as a matter of parliamentary intention or on the basis of the interpretation of the Sentencing Act, against the background of the OH&S Act and related legislation, regulations and codes.

The *Victims of Crime Assistance Act* 1996 limits entitlements to "primary victims" (ss7 and 8); "secondary victims" (ss9 and 10), "related victims" (ss11 and 12) and, taking into account the stated purpose of this Act and various "means" definitions of such terms as "act of violence", "criminal act" and "relevant offence", may operate collectively to exclude workers and their dependants from the class of persons intended to receive Sentencing Act compensation, assuming these definitions are accepted as being relevant to a determination of the intended scope of s.86 Sentencing Act entitlements.

It is arguably both justified and necessary to look at the whole of the *Victims of Crime Assistance Act* 1996, for the purposes of interpreting, inter alia, the meanings of words like "offence" and "pain and suffering", contained in s.86(1) of the Sentencing Act. This follows not only because the pain and suffering entitlement was introduced by the *Victims of Crime Assistance Act* 1996 but also because the latter Act amended and added other provisions to the Sentencing Act, including s.87A, whereby the State can recover from a defendant payments made to victims under the *Victims of Crime Assistance Act* 1996, albeit concurrent with s.86(1) claims and, in such cases, the latter have priority (s.87A(8)).

In the Second Reading speech on 31 October 1996, in the Assembly, the Attorney-General Mrs Wade, inter alia, said with respect to the purposes of the *Victims of Crime Assistance Bill*, at p.1024 of Hansard:

Recovery from the offender

The bill will allow a criminal court to make a compensation order for pain and suffering where an offender is found guilty. This order does not form part of the sentence.

The State will be given the right to pursue the offenders or other relevant parties at common law for civil damages if victims agree to assign their rights. Victims will receive any moneys recovered which exceeds the assistance they receive under this bill.

This could include compensation received by way of pain and suffering recovered through the civil procedure . . .

As the Victorian Community Council Against Violence has said, an integrated model of assistance to victims of crime will identify and provide the specific services suitable for a specific need. It will include processes and procedures which will monitor and assist

victims towards complete rehabilitation and healing. This scheme is such a model.

The parliamentary debates remove any doubt about there being an interrelationship between the *Victims of Crime Assistance Act* 1996 and Sentencing Act, i.e., that they combine to create one scheme. The stated purposes of "rehabilitation and healing", referred to by the Attorney-General, militates against an interpretation of s.86 of the Sentencing Act as establishing an additional system of compensation, for injured workers, i.e., over and above the system provided for in the *Accident Compensation Act* 1985 being for compensation, rehabilitation and early return to work where appropriate.

OTHER LIMITATION FOR GRANTING COMPENSATION AND DISCRETIONARY NATURE OF ORDERS

There is a mandatory injunction placed on courts by s.86(8) of the Sentencing Act to:

> . . . not exercise the powers conferred by this section unless in the opinion of the court the relevant facts sufficiently appear from evidence given at the hearing of the charge or from the available documents, together with admissions made by or on behalf of any person in connection with the proposed exercise of the powers.

It is considered unlikely the Authority would seek to gather evidence to bring or support applications for compensation under s.86 of the Sentencing Act. Further, in order to deal fully with a s.86 application, the court would need to hear all the relevant evidence in order to determine issues such as contribution by other parties including, potentially, by the injured employee applicant. Statistically, the vast majority of occupational safety prosecutions are resolved by way of a guilty plea with merely a prosecution summary being admitted, by consent, as the factual basis for the determination of penalty.

There is the prospect of defendants seeking to join other parties and/or their insurers to contribute to any order for compensation. In this regard employers should be encouraged to review their insurance cover generally to determine the ability to obtain cover and/or extend any existing insurance cover to include s.86 Sentencing Act compensation orders (these entitlements are supported by s.86(9A) whereby a defendant is entitled to "a reasonable opportunity to be heard on the application".

The words "available documents" (as defined in s.86(9) of the Sentencing Act) also point to the courts declining to hear these applications where all documents falling within the class of "available documents" have not been provided by the applicant. Related problems such as the admissibility of documentary evidence and/or the sufficiency thereof, to establish what will be necessary to justify the making of a compensation order, would also loom large in cases where a worker seeks to present his or her own application for compensation.

The above matters are but some of the difficulties which could trigger what is a mandatory proviso, contained in s.86(8) of the Sentencing Act, obliging courts to decline to deal with the compensation applications.

CONCLUSIONS

The OH&S Act establishes a collective response to manage and achieve safe workplaces. Duties are imposed on employers and employees as well as third parties who, for example, design or manufacture plant used in the workplace. This approach, together with a scheme for no fault compensation and rehabilitation for injured workers, etc., where the "system" fails to deliver workplace safety plus the fact parliament could have simply included injured workers and/or their dependants as beneficiaries for compensation orders under the Sentencing Act, had this been intended, all militate against the existence of these entitlements in the employment arena.

Apart from a literal reading of this new s.86 Sentencing Act compensation entitlement, without regard to its history or statutory context, there is little to commend an interpretation which supports injured workers (or their dependants) being entitled to the benefits of such compensation orders. There appear to be a number of statutory interpretation arguments which could be called in aid to read down the Sentencing Act amendment. Alternatively, the *Accident Compensation Act* 1985 (as amended) arguably operates, as an exclusive scheme, to deny injured workers, etc., this form of relief. However, pending clarification of these issues either by parliament and/or the courts, legal practitioners should consider advising employer clients to address the adequacy of their insurance cover, to deal with the potential risks that a s.86 Sentencing Act compensation order could impose on their business.

"The Best Virginia Creeper in Melbourne"

On 24 August 1999 the Minister of Planning and Local Government, the Hon. Robert Maclennan, took possession on behalf of the State of Victoria of the original home of the High Court at Chancery Lane, now Little Bourke Street.

We print below the speech made by the Hon. John Phillips, Chief Justice of Victoria on that occasion.

MINISTER Maclennan, Attorney-General, Chief Justice Black, Your Honours and Mr Harmsworth, other honoured guests, ladies and gentlemen.

On behalf of the court, minister, I thank you most sincerely for your decision to offer to purchase this building. If I may say so, it is a far-sighted decision, a timely decision, it is a decision which will have great benefit for our court and the advancement of justice.

The recent report of the Productivity Commission showed that, for the period 1997/98, the Supreme Court of Victoria was the most efficient supreme court in Australia in its disposal of trials.

Not many people would know that this result was achieved despite a shortage of courtrooms in the main court complex and with a number of judges in unsatisfactory accommodation.

When this building is acquired, it will give us just what we need, three splendid historic courtrooms, 11 judges' chambers, and large areas that can be used for administration purposes.

I should add that it will also give us just about the best Virginia creeper in Melbourne, a privet hedge and these two plane trees. It is important to have trees near courts. They are tranquil objects and they help to calm down the barristers.

We are honoured to have with us the Attorney-General and I acknowledge and thank her for her support for this project.

Also present as my guest is Chief Justice Black. I thank him for, in effect, minding this building for us for the last nine years. I say that because I think we all know that he set his heart and mind on new Federal Courts for Melbourne from the time he became Chief Justice of the Federal Court. And he kept it until the beautiful building opposite the Flagstaff Gardens was built. He has been kind enough to mark this occasion by giving us a lovely old print of this area, dating from the 1880s, which Mr Peters is now holding up.

Chief Justice John Phillips and the Hon. Robert Maclennan at the Supreme Court

I also offer thanks to two other gentlemen, Mr Bruce McLean, our Chief Executive officer, and Mr Russell Maunder from Minister MacLellan's office, who have been most helpful in this matter.

Ladies and gentlemen, the acquisition of this building will mark a significant new era for our court. It will comfortably take us into the next millennium. Under the constitution of Victoria, the Supreme Court is created equal to but independent of the executive and legislative organs of our State.

It has been that way for nearly 150 years. May it ever remain so.

Barristers' Chambers Limited: A Management Who's Who

THE current Directors of Barristers' Chambers Limited (pictured right) are Ross Robson QC (Chairman), Maurice Phipps QC (Deputy Chairman), Mark Derham QC, David Levin QC, Michael Colbran QC, Paul Anastassiou, Julie Dodds-Streeton, Peter Lithgow and Caroline Kenny.

In October 1998 Mr Allan Myers QC (the then Chairman) retired as a Director and Chairman of BCL. Since Allan retired there have been several board changes.

Mrs Kathy Williams was appointed a Director in 1998 and resigned in April 1999 upon her appointment to the County Court Bench. Although a director for only a relatively short period time, she made a significant contribution to BCL.

Mr Andrew McIntosh also resigned as a Director upon his preselection to stand as a candidate for the Liberal Party in Kew. Andrew has been a Director of BCL since 1994 and over the years has made a significant and ongoing contribution. Countless hours have been spent by Andrew in dealing with members of the Bar in relation to resolving some of the myriad issues of concern to the tenants of BCL.

Less well known is the contribution made by Andrew behind closed doors. As the Chairman noted on 7 September 1999, at a dinner to mark Andrew's retirement as a director, he joined the board at a time of financial crisis for BCL where directors needed to regularly seek the advice of accountants as to the viability of BCL. The Chairman praised Andrew's loyal and courageous support and steadfast calm through difficult times.

Ms Julie Dodds-Streeton became a director in mid-1999. Julie came to the Bar in 1988 after several years as a lecturer at the University of Melbourne. Julie brings a wealth of experience and legal expertise in company law to the Board.

Mr Peter Lithgow and Mrs Caroline Kenny were appointed directors to BCL in August 1999. Caroline came to the Bar in 1988 after previous experience in Melbourne and New York, and practises principally in the areas of company and commercial law. Peter came to the Bar in 1985 and has a general commercial practice.

Douglas Menzies Chambers board. (Left to right): Caroline Kenny; Michael Colbran QC; Maurice Phipps QC; Mark Derham QC; David Levin QC; Ross Robson QC, Chairman; Peter Lithgow; Julie Dodds-Streeton. Absent: Paul Anastassiou.

Members of the Bar are reminded that should they wish to raise matters relevant to BCL they may contact Mr Geoff Bartlett, the Company Secretary, or attend at the BCL office located on the first floor of Douglas Menzies Chambers. In addition, members of the Bar may contact any of the directors should they wish to raise particular matters of concern.

R *v.* Crippen

Julian Burnside

IN 1900, as the sun set on Empire and the world was adjusting to a new century, Hawley Harvey Crippen arrived in London with his wife, Cora. They were both American citizens: he a native of Michigan; she the daughter of a Russian/Polish father and a German mother.

Cora Crippen had been christened Kunigunde Mackamotzki, but when Crippen met her in New York in 1893 she was going by the name Cora Turner. They married, and lived in various places in the United States according to the success of Crippen's attempts to find work in his field of training, medicine. Cora had a pleasant but light voice and aspired to grand opera. These aspirations were nurtured with lessons and funded by Crippen, but met no success. Over the next ten years, she lowered her sights progressively, from grand opera, to operetta, to music halls. So modest was her talent that she eagerly took the opportunity to sing in a minor music hall during a strike of regular musicians: but even then, when the musical public were starved of their accustomed entertainment, the audience had no appetite for her and she was hissed off the stage. Her professional life consisted mainly of poorly paid appearances at smoking nights and minor music halls.

Despite the evidence of her own failure, Cora clung to dreams of talent and success, buoyed no doubt by a healthy self-opinion. She affected the stage-name Belle Elmore, frequented cafes and restaurants where musicians were to be met, became a valued member of the Music Hall Ladies Guild and amassed a collection of dazzling and flamboyant dresses which would have been more useful had her career been more successful. Her life was part fantasy, part pretence.

Crippen was a quiet, unassuming man. He worked as a representative of Munyons, selling homoeopathic cures, and had an interest in a business which sold a patent remedy for ear complaints. By 1907, the Crippens were living a settled life at 39 Hilldrop Crescent, London. Their circle of friends bordered on the bohemian life of London's musical world. The fires of romance had dwindled to smouldering ashes — neither warm enough for comfort, nor cold enough to dispose of. Belle Elmore was accustomed to receiving presents from gentlemen friends, and claimed to have had an affair with an American music hall artist, Bruce Miller.

When Crippen met Ethel Le Neve in 1907, she was able to offer him the comfort and friendship which had long since deserted his life. Although his relationship with Le Neve became increasingly open, life at Hilldrop Crescent remained apparently tranquil. The Crippens had each, it seems, adjusted to changed circumstances.

On 2 February, Crippen sent a note to the Music Hall Ladies Guild offering Mrs Crippen's resignation. He signed it on her behalf.

On the evening of 31 January 1910 the Crippens entertained their friends, Clara and Paul Martinetti, at dinner. Mrs Martinetti's evidence later was that all seemed entirely normal: she saw no sign of agitation or hostility in her hosts. After that night, no person saw Belle Elmore again. On 2 February, Crippen sent a note to the Music Hall Ladies Guild offering Mrs Crippen's resignation. He signed it on her behalf. The note explained that Belle Elmore had gone to America at short notice, in connection with a business in which Crippen had an interest.

On 2 February, Crippen pawned some of Belle Elmore's jewellery for £80, and on 9 February, he pawned a brooch and some rings for £115. On 20 February, he attended the Benevolent Fund ball with Ethel Le Neve. When asked about his wife, he explained that she was still in America. Soon enough, Mrs Crippen's continued absence called for further explanation. On 24 March, he sent a telegram to Mr and Mrs Martinetti, announcing that his wife had died in California of pulmonary pneumonia. On 26 March, an obituary notice was published in *Era*, a newspaper much read by those interested in music.

Belle Elmore's friends had loved her, and they were distressed by the suddenness of her death. They had not been much surprised that Crippen took Ethel Le Neve to the Benevolent Fund ball; but they were incensed to recall that she had been wearing some of their friend's jewellery. They wondered how Belle had disposed of her estate; they imagined that she might have left some of her dresses and jewellery to them; they speculated on whether Dr Crippen would honour his late wife's wishes in this regard; they speculated more widely than this; and they went to Scotland Yard on 30 June 1910.

Walter Dew, Chief Inspector of New Scotland Yard, went to speak to Crippen. Crippen quickly admitted that the story about his wife's disappearance had been false. In fact, he explained, they had had a row after the Martinettis left dinner on 31 January, and Mrs Crippen had announced her intention to leave him. She had another man who wanted her. She had left the following day, and Crippen had not seen her again. She had asked him to cover up the scandal with their friends as best he could, and so he had invented the story of her trip to America, and her untimely demise.

Crippen showed Inspector Dew about the house, and together they composed an advertisement which asked Belle Elmore to contact Crippen or the police.

Inspector Dew was probably satisfied with this. Crippen's demeanour was relaxed and helpful. However, when Dew tried to contact Crippen on 9 July, he found that Crippen had left in a hurry, and that he had sent a letter to his business partner saying that he was leaving "to avoid trouble". More than any other fact, Crippen's flight brought him undone.

Inspector Dew went to 39 Hilldrop Crescent on 12 July and searched it thoroughly. He found nothing; but Crippen's sudden departure had excited his interest, so he returned on 13

July. That day, whilst searching the cellar, he noticed that several bricks in the floor were slightly loose. He removed the bricks and dug down a few inches before he discovered a mass of flesh. On later analysis, it emerged that he had uncovered a human torso from which all bones and sex organs had been removed. One portion of skin bore a scar which witnesses later identified as the same as a scar on Belle Elmore's abdomen. In addition, fragments of cloth found with the remains were identified as coming from articles of clothing owned by Belle Elmore. Chemical analysis of the remains showed the presence of hydrobromide of hyoscine, an alkaloid which is now better known as scopolamine. It is used in minute quantities as an anti-spasmodic. The evidence showed that Crippen had bought 5 grains of hyoscine on 19 January, and he could not account for any of it.

In the meantime, Crippen and Ethel Le Neve had travelled to Antwerp, where they bought new clothing and boarded *The Montrose* bound for Quebec. Le Neve was dressed as a boy, and the two embarked as Mr and Master Robinson.

By this time, the hue and cry had been raised, and warrants had been issued for the arrest of Crippen and Le Neve. The captain of *The Montrose* had read the story, and became suspicious of the father and son who were travelling under the name of Robinson. He observed them carefully for several days, and was ultimately convinced that they were Crippen and Le Neve. Using the newly installed Marconi apparatus, Captain Kendall sent a wireless message by Morse code to the English authorities, detailing his observations and conclusions. Inspector Dew and Sergeant Mitchell boarded the *SS Laurentic* in Liverpool, and intercepted *The Montrose* off Pointe-au-Père in the St Lawrence River on 31 July.

It was the first time in history that criminal suspects had been apprehended by use of the Marconi system of wireless transmission.

Crippen and Le Neve were extradited to England. Crippen's trial for murder began at the Old Bailey on 18 October 1910, before Lord Alverstone CJ. The prosecution was led by the formidable Mr Richard Muir, with Mr Travers Humphreys and Mr Ingleby Oddie; Crippen was defended by Mr A.A. Tobin KC with Mr Huntly Jenkins and Mr Roome.

Muir's first four questions in cross-examination of Crippen were deadly.

On the early morning of 1 February you were left alone in your house with your wife? — Yes.

It was the first time in history that criminal suspects had been apprehended by use of the Marconi system of wireless transmission.

She was alive? — She was.

And well? — She was.

Do you know of any person in the world who has seen her alive since? — I do not.

The evidence against Crippen was strong. Why he killed his wife remains a mystery — he always maintained his innocence, so we have no explanation either during or after the trial. The circumstances, notably his sudden disappearance in disguise, told heavily against him. The jury retired at 2.15 on 21 October. They returned 27 minutes later with a verdict of guilty.

Ethel Le Neve was tried as an accessory after the fact of murder. Her trial was held on 25 October. She was defended by Mr F.E. Smith KC MP and Mr Barrington Ward. She was acquitted.

On 20 November 1910, a statement by Dr Crippen was published in the *Daily Mail*. In it, Crippen tells eloquently and poignantly of his love for Ethel Le Neve. It is the dignified statement of one facing eternity, whose only thoughts are for his one true love.

The warders who attended Crippen's final days and hours spoke of him as a kind and decent person. His crime stands in stark contrast with the rest of his life and personality.

Crippen was hanged at Pentonville gaol on 23 November 1910.

Of Judicial Demeanour

No jest from the best?

An edict of late,
Should not stop one to relate,
The effects of a trial,
Carried on without smile.

A case on appeal,
Might be run without zeal.
Yet appellant's good joke,
Could assist, to evoke
A tailored reply.
Not a slap in the eye.

Easement case heard at trial,
Wholly absent a smile,
The events (so) enthralling,
One felt it appalling.
And yet injuncted the humour,
To quell the odd rumour,
That the Judge had no feel,
For the right rule to heal?

For to miss the wisecrack
Independent, on track,
To lighten the mood
Whilst coralling the brood,
Would amount to unnatural,
Sight of things cultural.
Sets parties at ease
With a deft touch, like a breeze.

One turns to the books,
To see if one's looks,
Or manner, so bland,
Could be out of touch, in this land.

No common law rule,
Will assist the odd fool,
Who would seize on a quip,
And appeal, the said "slip".

So let's forget mooted edict,
And forever will predict,
That judicial good humour,
Inspires confidence, not rumour.

From a Member of the Victorian Bar on the occasion of the publication of an article concerning judicial demeanour and attempted humour in The Age, *Monday, 17 August 1998.*

She — He — They

Julian Burnside

"If a person makes a contract for provision of services, ***he she or it*** *must register that contract with the office of . . ."*

"If a person makes a contract for provision of services, ***they*** *must register that contract with the office of . . ."*

Which is to be preferred?

THE latest and most troublesome shibboleth in the English language is the use of the indeterminate third-person singular pronoun: a singular third-person pronoun equally applicable to masculine, feminine or neuter subjects. Since feminist writers drew our attention to the fact that the English language has deeply ingrained male-biased conventions, those of us with a conscience have tried to find a way of compensating for our lack of a pronoun which applies equally to male or female referents. For centuries statutes were an obvious example of the problem:

If a person does such-and-such, he is guilty of an offence.

To avoid the obvious difficulties, a reference to the male was defined as including the female. A new drafting style, which has recently been adopted in most jurisdictions, is to say *he or she*; *him or her*; *his or hers* wherever there is a reference to the third person singular. Presumably, companies are thereby attributed masculine or feminine gender.

This is increasingly used in other fields of discourse; even (occasionally) barristers speaking in court will use this new, inclusive expression. Cutting-edge practitioners of modern English are consciously using *she or he* in the same circumstances, on the footing that *he or she* still contains the residue of male bias.

This is all very commendable, and it has achieved some small measure of success, but it is ugly and cumbersome. It is the only pronoun with more than one syllable — only an enthusiast could use the new construction without a sidelong glance at its aesthetic effect:

Consider for example Keats' *Four Seasons Fill the Measure of the Year*; the alterations are in italics:

Four seasons fill the measure of the year;
There are four seasons in the mind of *man or woman*:
He or she has *his or her* lusty Spring, when fancy clear
Takes in all beauty with an easy span:
He or she has *his or her* Summer, when luxuriously
Spring's honey'd cud of youthful thought *he or she* loves
To ruminate, and by such dreaming high
Is nearest unto heaven: quiet coves
His or her soul has in its Autumn, when *his or her* wings
He or she furleth close; contented so to look
On mists in idleness — to let fair things
Pass by unheeded as a threshold brook.
He or she has *his or her* Winter too of pale misfeature,
Or else *he or she* would forego *his or her* mortal nature.
It doesn't really work, does it.

Other solutions to the problem have been advanced from time to time: *s/he*, which was urged in the early days of the new consciousness. It was visually effective, but unpronounceable. Other offerings include *tey*, *co*, *per* and *E*. None of these has so far caught on.

The alternative to these worthy but unsuccessful constructions is to use the gender-neutral plurals: *they*, *them*, *their*. These indeterminate pronouns are a useful and aesthetically acceptable solution to a real problem. The purists complain that the plural pronoun cannot — simply cannot — be used with reference to a singular noun. This complaint, however, founders on three points:

- English displays idiosyncrasies in many matters, so disagreement of number is not, of itself, impermissibly odd;
- plurals in English are fraught with exceptions and anomalies in any event; and
- the language needs a gender-neutral third-person singular pronoun, and pressing the plural into service on aesthetic grounds has a long and distinguished history.

The first proposition needs no proof.

The second is dealt with briefly in my last article.

The third is more interesting, because the purists castigate the indeterminate pronoun as a grammatically unacceptable modernism. In fact, it has been used for centuries by the best writers in the English language. In each of the following examples, grammatical convention requires a singular pronoun:

1464: *Rolls of Parliament:* "Inheritements, of which any of the seid persones . . . was seised by *theym self*, or joyntly with other." (V. 513/2)

1470: Caxton: "Each of *them* should make *themself* ready";

1594: Shakespeare: "There's not a man I meet but doth salute me,
As if I were *their* well-acquainted friend." (*Comedy of Errors*, Act IV Scene 3)

1598: Shakespeare: "God send every one *their* heart's desire." (*Much Ado About Nothing*, Act 3 sc. iv)

1611: *The Bible* (authorised version): "Let nothing be done through strife or vainglory; but in lowliness of mind let each esteem other better than *them*selves." (Philippians 2:3)

1749: Fielding: "Every Body fell a laughing, as how could *they* help it." (*Tom Jones* viii. xi)

1759: Chesterfield: "If a person is born of a . . . gloomy temper . . . *they* cannot help it." (*Letters IV.* cccIv. 170)

1813: Jane Austen: "I always delight in overthrowing those kind of

schemes, and cheating a person of *their* premeditated contempt." (*Pride and Prejudice*)

1817: Jane Austen: "She did not blame Lady Russell, she did not blame herself for having been guided by her; but she felt that were any young person, in similar circumstances, to apply to her for counsel, *they* would never receive any of such certain immediate wretchedness, such uncertain future good." (*Persuasion*)

1858: Bagehot: "Nobody fancies for a moment that *they* are reading about anything beyond the pale of ordinary propriety." (*Literary Studies II.* 206)

1866: Ruskin: "Now, nobody does anything well that *they* cannot help doing." (*Crown of Wild Olives* §38)

Parallel examples for *them*, and *their* abound, from the 15th to the 19th centuries.

Recently, the example of great writers has offered an elegant solution to the problem identified by the feminists. But the purists reacted with vehement opposition. Why?

It is a legacy of the great push to regularize English. In the 18th century, grammar was the new growth industry. A quick look at a good dictionary reveals that most technical expressions in grammar date from the 18th century. Grammarians had appointed themselves to establish a system of rules for the English language. This they did by analogy with Latin, regardless of the differences between the two languages. They decreed, for example, that an English infinitive could not be split, because a Latin infinitive could not be split. This mindless decree overlooks the fact that in Latin, unlike English, the infinitive is a single word, so of course it could not be split.

They decreed that a preposition could not be placed at the end of a sentence, because Latin construction did not permit terminal prepositions. This completely ignores the existence, in the mongrel English, of phrasal verbs, such as *put up with*, *run away*, *sleep over*, etc., where the function of the prepositions has no direct equivalent in Latin. Churchill famously parodied this pedantic dictate, saying that "A terminal preposition is something up with which I will not put".

In the same way, the grammarians insisted that the pronoun should be singular if it corresponded to a singular noun. As a principle, this cannot be criticized. However, grammatical irregularity alone need not result in automatic banishment. If it were otherwise, a large part of the language would disappear. The case for many irregularities in English is no more than an acknowledgement of historical fact: that is how it is.

In the matter of plurals, English excels itself in its wilful disregard of rules. But the case for the indeterminate pronoun is strong: it has a long history, it avoids the need to specify sex where to do so may be impossible, meaningless or offensive, and it does this without damaging the aesthetic balance of the sentence. If a purist cannot embrace this usage, they should at least tolerate it.

If anyone wants to use the indeterminate pronoun, I will support them.

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Incidentally, I have been cautious in this artcle about the word *gender*. *Gender* is a word which is undergoing significant change as part of the feminist awareness of bias in language. *Gender* and *sex* are not synonyms. They should not be used interchangeably .

Sex distinguishes between male and female: it is a characteristic distinction seen in most organic beings.

Gender is primarily a grammatical construct: it distinguishes between the two (or in many languages three) grammatical "kinds", *masculine*, *feminine* and *neuter*. Although these kinds generally agree with the corresponding distinctions of sex, this is not always so. In many languages which retain distinctions of gender there are anomalous cases where sex and gender do not correspond. In English, animals (and babies) are often referred to as *it* (neuter), even though their sex may be known; ships and cars are generally treated as feminine, although they plainly have no sex.

The modern use of *gender* as meaning *sex* can be dated to the early 1960s, and the beginnings of modern feminism. It was originally a euphemism for *sex*. Like most euphemisms, it serves to protect the susceptible. But euphemisms blunt meaning, and weaken useful distinctions.

Sex and *gender* are not the same. It is better to distinguish them than to confuse them.

Some Old Scribblings

NOTES discovered and transcribed from inside the drawers of the old court reporters' desk at the Bendigo Magistrates Court.

Saturday, 9 October '97 — Kate Tulty the flower of Dowling Street sent up for three months for keeping a brothel and for receiving stolen money. She was intimately acquainted with the press and the legal profession — especially the latter. The aristocrats of Dowling Street were charged in a body with various offences and the hearing of the case lasted from 10.05 a.m. to 4 p.m. Charlie P. expresses sincere regret regarding Kate's sad fate. But he is determined to keep up his courage until the three months have expired.

J.B. Hon. recorder.

The house in Dowling Street is now closed until further developments.

2 April '03 — W. Tonkin of the *Independent* appeared charged with cycling without lights. Defendant said lamp had just gone out, but bench smiled incredulously and fined him 2/6. Fine paid by C.E. Manager of *Independent*.

Monday, 8 November — Kit Connell was charged by Const. Burke with calling him "an Irish Bastard". Burke, Mullin and H.G. Bishop gave evidence for the prosecution and Gerald Mealey was mentioned as a "mysterious Government officer". The evidence given was, on one side, a tissue of falsehoods and from our knowledge of H.G.B. we are induced to think the police evidence was decidedly crooked. Kit was fined 10/-.

Monday, 29 November — Bookmaking prosecutions. Seven fined 20 pounds each. Court sat from 10 a.m. to 7 p.m. and there were then two cases to be dealt with. One of 10 defendants was discharged.

A Judge's Record

Former judge Tony Graham releases his first album "The Rocker and the Jazzer"

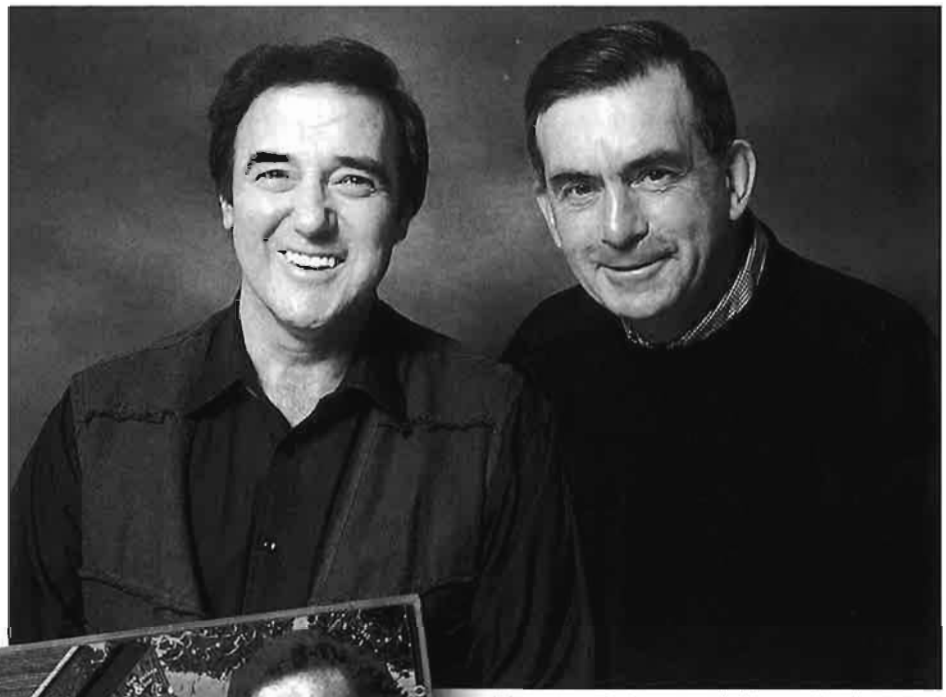
THIS is undoubtedly a first. A former Family Court judge who has come back to practice at the Bar has now released a country CD entitled "The Rocker and the Jazzer". The twelve songs on the CD were co-authored by Tony Graham with his friend, and the performer of the songs, Malcolm Arthur. Can it be that ten years on the Family Court causes a judge to seek solace in writing country music?

The CD, "The Rocker and the Jazzer", was launched at a function at Akvavit Restaurant at Southbank where many of the songs were performed. At the launch Tony happily announced that a distributor has been found to sell the product.

Before Tony Graham became a lawyer, he was one of the promoters of the highly successful jazz club Esquire. He later returned to school and studied law while organising dances. He met Malcolm Arthur when Malcolm was engaged as a guest artist at the Esquire They did not meet again for 30 years until their wives met on the golf course. In 1998 they began writing songs which culminated in the release of the CD. Malcolm Arthur in the 1950s had been the idol of the crowds as one of Melbourne's first real local rock and roll stars. He worked with the likes of Johnny O'Keefe, Bobbie and Laurie and Col Joy and the Joy Boys.

The album is a culmination of folk, country and rock. The pair have written about 30 songs but narrowed the project down to 12. Their favourite song is "Nashville Music City, Tennessee" which was written in a pizza break in a writing session at Tony's house.

The CD was recorded in Melbourne at Woodstock Studios by Joe Camilleri who produced the album. The musicians are James Black (ex Mondo Rock), Ed Bates (Moonee Valley Drifters), Wayne Duncan and Gary Young (former Daddy Cool rhythm section) and Barry Roy (The Henchman). The album is said to traverse a variety of musical tastes from country through rock and roll, jazz and folk music.



Malcolm Arthur and Tony Graham QC.

Unfortunately Tony has denied that it was years on the Family Court that inspired the record.

The CD is available at Basement Discs 9654 1110 and Deep South 9523 7060 or by mail order from P.O. Box 148, Cheltenham 3192.

Pen City Competition — Too Hard for Some

Obviously our last competition was far too hard. Nobody seems to know anything about the "Equitable Doctrine of Murder". Very unfortunate as the great prize of a very expensive Pelikan pen has not been won.

This competition is much simpler.

In twenty-five words (25) or less (or even a little bit more) describe the proposed new Owen Dixon Chambers East pictured on this page.

Only one Pelikan pen will be awarded!

We look forward to tasteful and humorous thoughts.

In twenty-five words (25) or less (or even a little bit more) describe the above digitally generated image of our proposed new Owen Dixon Chambers East.

Entries to Gerry Nash QC, c/- Clerk S, Owen Dixon Chambers East by 15 November 1999.

No member of the Editorial Board or Committee of *Victorian Bar News* and no relative of a Committee or Board member is eligible for the prize.

Finance and Security Law Cases and Materials

by Sheelagh McCracken and Dianne Everett
Butterworths 1998
pp. i–xxxvi, 1–590, Index 591–600

FINANCE and security work is a large part of legal practice. Everything from the standard home mortgage through to the most complex offshore financing, currency swaps, hedging and the like is finance or security related. Less obviously a security interest may be created, for instance, by a possessory lien claimed by a local tradesman or be derived from a "Romalpa" clause.

Consequently, finance and security law is not a discrete doctrine, and those practising in finance and security law need to have an understanding of how principles and practices from contract, property, equity and trusts and Corporations Law, and statute and common law interrelate to affect finance transactions.

Finance and Security Law Cases and Materials provides an excellent introduction and overview of how the different bodies of law are relevant to finance and security transactions.

The work is broken up into two parts, with the first dealing with the creation of the contractual financial relationship and including a chapter highlighting the impact of insolvency on financial obligations.

The second part deals with particular forms of financial transactions, with the emphasis on secured transactions. To this end there are chapters that deal specifically with security by title, i.e. mortgages, hire purchase and finance agreements, and "Romalpa" clauses (Chapter 6), contractual securities such as equitable charges, set-offs, possessory securities such as liens and pledges (Chapter 7) and a chapter dealing with particular types of securities such as the statutory mortgage of land and other securities over interests in real property, chattels, shares, negotiable instruments, intellectual property and insurance policies, for instance (Chapter 9).

Although case books are rarely the first choice of practising lawyers as reference works, this text is sure to be of use to lawyers, bankers and financiers. It provides in a comprehensive and comprehensible way access to many of the strands of law an understanding of which is necessary in relation to finance and security transactions. The authors are to be commended for their choice of cases as they have thoughtfully woven together cases drawn from all Australian jurisdictions and the United Kingdom, including both "older" cases and appropriate contemporary cases. In addition the cases have had headings inserted and where necessary appropriate commentary added to the text of the case. This book is sure to be of interest to many practitioners as well as being invaluable to students interested in finance and security law.

Peter Lithgow

Discrimination Law and Practice

by Chris Reynolds
Federation Press, 1998
pp. i–viii, Table of Cases ix–xv, Table of Statutes xvi–xviii, 1–225, Appendices 227–41, Index 242–5
Soft cover

THIS is an indispensable handbook for practitioners in the fields of discrimination and employment law. Although the focus of the text is on Commonwealth-enacted discrimination legislation — the *Racial Discrimination Act* 1975, the *Sex Discrimination Act* 1984, the *Affirmative Action Act* 1986, the *Human Rights and Equal Opportunity Act* 1986, and the *Equal Opportunity Act* 1987 — the author cross-references her analysis throughout to corresponding State legislative regimes, pointing out divergences, departures and idiosyncrasies where appropriate. There are included at the end of the book four very useful appendices which provide comparative tables outlining where (by section and sub-section) in all Federal and State legislation particular topics are dealt with and can be found (or not, as the case may be). This is a very practical and valuable tool for deciding, in some instances, the Act and the jurisdiction of most application to the problem at hand.

The best feature of the book, though, is its overall organisation. Topic by topic the author examines the law clearly and concisely, and then systematically and methodically demonstrates the way it operates by reference to numerous practical examples, leading decided and unreported cases, and current usage.

As in the best approaches to legal problem-solving, the subject of jurisdiction is tackled first (at pages 8–11), particularly choice of jurisdiction. The decisions to be made and the consequences which flow from the choice of State versus Commonwealth law can be and often are crucial and determinative of any future prospects. There follows a handy summary of the grounds and attributes of discrimination: how they are defined, contentious issues which have arisen as to meaning and application, and the various types of complaints actually made within the scope of the definitions.

The author then deals with the direct/indirect discrimination dichotomy and the relationship between the two, now generally regarded as "mutually exclusive". Of particular interest and value under direct discrimination is the discussion of the meaning given to words and phrases such as "characteristic", "favourable treatment", "by reason of", "on the ground of", "on the basis of", "because", and "circumstances . . . same or are not materially different". Under indirect discrimination the author deals with the eight major cases which address the indirect discrimination provisions, isolating the particular difficulties those complaints encounter in meeting the statutory criteria. (Circumstances and situations left open for future determination are tantalisingly suggested.) In all cases the author cites Federal and High Court or Equal Opportunity Commission authority to support the propositions outlined. All these points can, and usefully may, be applied to the corresponding provisions of the Victorian Equal Opportunity Act and therefore are relevant and apposite to practitioners appearing in the Anti-Discrimination List of the Victorian Civil and Administrative Tribunal.

A significant portion of the book deals with discrimination in employment and industrial law, and the intersection of the two fields, in some detail. But other areas of discrimination are also covered: in education; in accommodation and tenancy situations; the provision of goods and services; by clubs; in sport; and in superannuation, to name a few.

The broad-ranging survey also covers offences, activities such as victimisation, incitement, liability, defences, and complaints taken as a result of the display of "inappropriate" advertisements. There is also treatment of exceptions and exemptions to the legislation, the complaints, handling processes such as conciliation

and confidentiality, and how enquiries and proceedings are conducted.

The author's style and approach is so engaging and very readable that it would be churlish to mention the odd typographical error and verbless sentences scattered throughout the text. The content just draws you in and, like a good novel, I found myself wanting to read on just to find out "what next". Literally and metaphorically this is not only a sexy subject, but a field in which, by all accounts, practitioners will be increasingly and fruitfully engaged in the future. As I could find no comparable titles on discrimination listed in either of the major legal publishers' catalogues, this essential guide should do very well. Highly recommended.

Contents:

1. Background and Current Position
2. Grounds or Attributes of Discrimination
3. Definitions of Discrimination
4. Employment Discrimination
5. Harassment and Vilification
6. Education Discrimination
7. Other Areas of Discrimination
8. Victimisation
9. Other Unlawful Acts and Offences
10. Liability and Defences
11. General Exemptions
12. Complaint Handling Processes
13. Enquiry Proceedings
14. Equal Opportunity and Affirmative Action
15. Industrial Laws

Appendices:

A Grounds of Unlawful Discrimination
B Areas of Unlawful Discrimination
C Exceptions to Coverage
D Conciliation and Inquiry Powers
E Contact Points

Judy Benson

Restitution — A New Perspective

by Joachim Dietrich
Federation Press, 1998
pp. i–viii, Table of Cases ix–xv, Table of Legislation xvi, 1–248, Bibliography 249–52, Index 253–6
Hardcover

THE central argument of this book is to challenge critically — and ultimately to reject — the generally accepted orthodoxy of unjust enrichment as the underlying, unifying and key explanatory principle of restitution (a term which includes its predecessor quasi-contract). The author postulates that the very concept of unjust enrichment is capable neither of fulfilling the role asked of it, nor even of being an appropriate analytical tool to deal with the whole subject of restitution, or, indeed, even a part of it. He goes further, asserting that the phrase unjust enrichment has imposed a "straitjacket" on all analysis of restitution, despite the "visceral appeal" to our innate sense of justice that the term often invokes. As such, the book is unashamedly controversial and polemical, not to mention novel — factors which undoubtedly derive from its origin as a PhD thesis submitted at the ANU.

The author puts forward the theory that all restitution cases can be categorized not by unjust enrichment but into four identifiable classes as follows:

1. Fault-based, conduct-based liability (where liability is imposed)
2. Parties sharing common interests
3. Justifiable sacrifice
4. Innocent recipients.

In the author's hypothesis, it is more appropriate to focus on the common causative elements within each of these four classes or categories, rather than focus on the remedial responses which follow from what he calls "trigger events" which give rise to liability. He argues that the process of reasoning backwards from remedy can and does have the consequence of falsely uniting unlike cases, in which liability is triggered in fact by very different causative events. The argument pleads for a radical rethinking of unjust enrichment and for alternative methods of organizing the subject matter of restitution.

Whatever view one ultimately takes about the theory, the inherent value of this offering is not, in my view, in its novelty or controversy, but in its careful and systematic analysis of the Australian judiciary's thus far restrained and cautious approach to the whole area of unjust enrichment. While it is acknowledged that courts are slowly recognizing and utilizing a range of legal concepts and causes of action encompassed within restitution, in Australia it is by no means persuasive — yet. There is the suggestion that the Australian cautiousness has more inherent capacity to recognize the diversity of causative elements to restitution than the way in which the English origins of the theory as espoused by Lord Goff and Peter Birks has developed. The author maintains that the English developments are inappropriate to our law and have the tendency to stifle a more broad-based analysis of restitution, because generalisations are of little value in explaining past decisions.

The author has called upon and received the comments and input of some formidable judicial and academic authority — Justice Gummow of the High Court and Justice Finn of the Federal Court, and Professors Nicholas Seddon, P. Beatson and R. Sutton.

The book will appeal to those common law and property practitioners who operate in the rarefied realm of restitution subject matter who are looking for some innovative ammunition and arguments for their next special leave application before the Federal or High Courts. For the rest of us, or indeed for any brave soul prepared to venture however tentatively into what Levin J called "the restitution thicket", we may never be heard of again!

Contents:

Part I

1. Venturing into the Restitution Thicket
2. A Brief History of Restitution
3. The Meaning of Unjust Enrichment
4. The Failure of Unjust Enrichment

Part II

5. A New Perspective on Restitution
6. Fault-Based Liability: Breach of Contract-Like or Tort-Like Duties
7. Common Interests: The Consequences of Unprovided for Contingencies
8. Justifiable Sacrifice: Allocating the Costs of Justifiable Conduct
9. Innocent Recipients of Money and Services
10. Restitution — The Future

Judy Benson

Australian Corporations Legislation

Butterworths 1999
pp. 1914 + 472 + 87, paperback

THIS remains a handy one-volume collection of Australian corporations legislation. It contains all the legislation you will need to appear in court in a corporations matter, or for most research and paperwork. Apart from the Corporations Law itself, it includes the ASIC Act, the text of the Corporations Acts, and all relevant regulations made pursuant to those Acts. It also has copies of the *Corporate Law Economic Reform Program Bill* 1998 (which was

pending at the time of publication), and the explanatory memorandum to that Bill.

Generally speaking, the legislation is well set out and easy to use. Each chapter of the Corporations Law is prefaced with an outline of the effect of the legislation. I think it would be a better use of the space to have a really comprehensive and easy-to-use index. For example, there are no entries in the index for "voidable transactions", "unfair preferences", "preferences" or "insolvent transactions". How a person so unfamiliar with the Law would find the actual provisions relating to those things without index entries for them I do not know. It must nevertheless be said that the indexes to most rival publications are little better.

This collection does not, for reasons of space, include things like the various rules of court applicable to corporations matters. They are the kind of thing most barristers would have in other publications anyway. The only other useful thing which this book does not have is an explanation of the High Court's recent decision in Re Wakim; Ex parte McNally (1999) 73 *ALJR* 839. I suppose we will have to have to work that one out for ourselves!

Michael Gronow

The Varieties of Restitution

by I.M. Jackman
The Federation Press
pp. i–xxvi, 1–186 (including index)

IN the forward written by the Honourable Justice Gummow, His Honour writes:

The author tackles questions of doctrinal and practicable importance which have set the discussion of restitution for unjust enrichment for the last century.

Goff and Jones' first edition on the law of restitution was published in 1996. Mr Jackman's book on the same topic has the advantage of considering the relevant Australian authorities. Whilst the book does discuss the doctrinal basis of the various facets of restitution, it is a book of practical importance for the practising lawyer.

There are nine chapters in all. Those chapters consider the concept of restitution with respect of mistaken payments, duress, undue influence and unconscionable bargains; payments made on a total failure of consideration; voluntary and non-voluntary provision of benefits in kind; restitution for wrongs; proprietary claims and proprietary remedies and defences.

Of particular interest is a section on anticipated contracts, which highlights the difficulties for those that perform work in anticipation that a contract shall be made. This work may have been performed at the pretender stage or pursuant to a "letters of intent". The other party may retain the benefit of the work if the contract fails to come into effect. Mr Jackman discusses the circumstances by which the hapless person who has performed the work may recover for the benefit the other party has received.

In his chapter on restitution for wrongs, the author examines the circumstances in which a person will be liable for a pecuniary remedy for conduct that has not caused the other actual harm. That may arise when a plaintiff seeks disgorge benefit that was acquired by a defendant through the latter's wrongful act. An example has been given of a trespasser who has benefited by using a track across the plaintiffs land even though it has not reduced the value of the land. Mr Jackman discusses the right to bring an action for restitutionary rather than compensatory damages, coupled (if necessary) with the alternative remedy of an account of profits. For example, damages for detinue might be assessed according to a reasonable hiring charge for the period of the unlawful detention. That has nothing to do with whether the plaintiff would have used the property during that period or would have hired it out. Similarly in the case of fiduciaries, a person who stands in a fiduciary position cannot profit from that position. Equity will require an account of any profits that have been made.

The concluding chapter to this book concerns two of the defences that are available to a restitutionary claim. Mr Jackman discusses the defence of change of position and reference is made to the David Securities case.

Likewise, Mr Jackman discusses the defence of illegality; namely, that the plaintiff needs to prove the illegal nature of a particular transaction in order to establish his or her cause of action. The book clearly explores the juristic basis of restitutionary claims and enables the reader to attain a better understanding of the remedies that are available.

John V. Kaufman

Rethinking Human Rights

Edited by Brian Galligan and Charles Sampsord
Law, Ethics and Public Affairs Series
The Federation Press, 1997
pp. i–xxvii including Table of Cases and Table of Statutes, 1–260 including References and Index

AS a topic of public debate, the question of whether Australia should have a Bill of Rights comes and goes, as fashion does, depending on the emergence of anything particularly controversial, outrageous or novel on the political scene or in judgments of the High Court. The para-constitutional preoccupations at present are those surrounding the powers and conventions of the head of state, the move to a republic (about which a referendum is to be held in November 1999), and the re-wording of the preamble to the Constitution. They are not the focus of this offering.

In 1994, the Australian Research Council provided a grant to the National Institute for Law, Ethics and Public Affairs to hold a workshop on "Constitutional Theory and Practice for Australia's Second Century". This workshop was held in December 1995; and the papers collected into this volume are essentially the products of the workshop, but refined by further deliberation and reflection subsequent to their initial delivery. In focussing on human rights for the 21st century, two particular issues were addressed during the workshop:

1. the kinds of human rights norms appropriate for the next century; and
2. the most effective means of protecting and enhancing those rights and the desirability of doing so.

In their introduction to the volume, the editors note a quickening of public interest in the Constitution as the centenary of federation approaches in 2001. Human rights is thus considered in part of an overall context asking the question: how appropriate is the Constitution as an instrument of governance for the future? Human rights as a subject of enquiry has loomed large in the twentieth century; systematic denials of human rights on the one hand, and inspired attempts at articulation and protection of those rights on the other have been parallel features of its development. Where (if indeed anywhere) should human rights fit into the Australian Constitution in the future?

The editors mull over one of Professor Galligan's own favourite themes: whether Australia should enact a Bill of Rights based on the Canadian or US models. We are now very familiar with the background facts — how the founding fathers of federation were well aware of the US Constitution, and were influenced by it in some measure, but in the end decided that British democratic institutions and practices would provide an adequate safeguard of rights; how the Constitution made parliament and the courts arbiters of account; and how the confidence of history has been largely misplaced since the rise of disciplined political parties has led to the result that the executive effectively controls the parliament, not vice-versa. It is a fact of modern political life and government practice that policy decisions are largely (and increasingly) taken in the executive and fall outside parliamentary scrutiny.

In the broader world picture, human rights activists could point to parliamentary protection of rights in most liberal democracies by the middle of the twentieth century. Since the formation of the United Nations, international treaties, concomitant domestic legislation and the impact of US Supreme Court decisions have increased both the awareness and realisation of rights in many countries — but not so as to prevent abuses and disasters on the scale of Cambodia, Rwanda, Bosnia and now Kosovo. If human rights are making significant inroads, the progress is largely moral; often it appears only to be "on the agenda" in some quarters.

But Australia's own record is so patchy, there can be no room for any regional complacency. Citizens have rights to health, education and social security. Our migrants have only limited access to these. The treatment of indigenous peoples continues to be a national shame. The White Australia Policy existed and applied within living memory. Aborigines could not vote in federal elections until 1962, were not counted in the official Census figures till 1967, and were denied basic human rights, and social and economic benefits until (relatively) recently. That they were also subject to oppressive regulatory practices under the guise of "protectionism", one of the most notorious consequences of which was detailed in the Stolen Generations enquiry conducted by HREOC, has only recently come to light. Only in 1992 did the High Court in *Mabo* reject the doctrine of *terra nullius* and recognise the prior

existence of indigenous law. Australia is at this moment far from repairing the human rights debacle of its treatment of indigenous peoples — not that a US-style Bill of Rights would necessarily have made much difference.

The editors identify a third generation of rights claims emerging on the verge of the twenty-first century. The "first generation" of rights — protected by, for example, the US Bill of Rights — are civil, political or negative rights, involving protection from the harmful excesses of the State. The "second generation" might be called economic, social, cultural or positive rights, requiring specific action for their realisation. The third category are perhaps "systemic" or "solidarity" rights — to peace, development, a decent environment. Group rights for indigenous peoples and ethnic minorities in their demands for self-determination would also be included in this domain.

This collection of papers is both controversial and challenging, and, on a number of levels, thought-provoking. If there were a Human Rights Report Card it might well read: "Must try harder next term". Rights talk may now be universal and encompassing, but as Hilary Charlesworth points out, debates about rights rarely touch on sex and gender, and so avoid dealing with items in the too-hard basket. She believes that "prevailing understandings of human rights are gendered and privilege particular male life patterns" offering little to women. The problem lies not so much in the conceptualisation of rights, but in the failure of their application in areas that affect women.

Anne Bayefsky's paper details major problems with the UN's role in human rights protection. (Wouldn't she have relished a case study on the recent Kosovo exercise!) She points to disagreement on principles, lack of practical implementation, and bias in application standards. Poor monitoring, poor reporting of infringements, "rampant" bias in some UN bodies . . . hardly a litany of success to celebrate the near 50-year-old organisation, but even in its organisational failures, there are a number of practical suggestions for improving the UN's role to be learned.

In Australia, the debate about whether human rights should be constitutionally entrenched or not has not progressed for over two decades at least. One side argues for a range of human rights protections, including rights to work and participate in workplace decisions; the opposition is sceptical of any tendency to judicial activism and of the role of courts and judges generally. It is largely a sterile debate, because as history shows there will be no fruitful progress on any Bill of Rights initiatives in Australia without bi-partisan political support, an approach which has been spectacularly and consistently absent. Round argues that unless human rights are grounded in rights respecting culture, they will be largely empty prescriptions anyway.

In the final section of essays there is an interesting discussion by Jim Harris on whether self-ownership is a human right, and the related question of who owns body parts that are of commercial value. He concludes that there is a human right to exclusive control over one's own body, but that human bodies and their parts are outside the domain of property.

Fascinating as this diverse collection of papers is, one is left with the impression that all the profound thought and incessant talking about rights has not led to a great deal of action or even a constructive intention to act. Certainly the results of human rights theory in Australian law is better elucidated in Federation Press's 1998 offering *Human Rights in Australian Law: Principles Practice and Potential.* This collection is a slice of the human rights discourse captured at a point in time. It gives an overview and perspective; dip into it to reflect on the panorama and contemplate the scope of the subject and some of its tensions and idiosyncrasies. When ready to consider the application of human rights to Australian law, in the here and now, read on.

Contents:

Judy Benson

Human Rights in Australian Law: Principles, Practice and Potential

Edited by David Kinley
The Federation Press, 1998
pp. i–xvi, Table of Cases xvii–xxiii, Table of Legislation xxiv–xxxiii, 1–366 including Index

THIS book was published both to mark and to celebrate the 50-year period since the 1948 United Nations Universal Declaration of Human Rights, and to take stock of human rights developments and their impact on the law over this time. It takes the form of a collection of 15 essays by 25 distinguished national (and one international) contributors, arranged in three Parts, as follows:

human rights by Jennifer Neilsen and Gary Martin
6. Criminal law and human rights by Simon Bronitt and Maree Ayers
7. Immigration law and human rights by Mary Crock and Penelope Mathew
8. Family law and human rights by Juliet Behrens and Phillip Tahmindjis
9. Labour law and human rights by Therese MacDermott
10. Environmental law and human rights by Nicholas Brunton
11. Information technology law and human rights by Chris Arup and Greg Tucker
12. Health law and human rights by Ian Freckelton and Bebe Loff

Part 3: Human Rights and Legal Practice and Procedure

13. The operation of anti-discrimination laws in Australia by Peter Bailey and Annemarie Devereux
14. Using human rights laws in litigation: the practitioner's perspective by Kate Eastman and Chris Ronalds
15. Human rights research and electronic resources

If there is a central unifying thread to this diverse and eclectic collection, it might be this: that although human rights is not a prominent part of the Australian legal tradition, it is nevertheless becoming significant as Australian courts and tribunals appear now to be more cognizant and accepting of the legitimacy of human rights obligations and arguments. This is so not simply by virtue of the enactment of the 1948 Universal Declaration and the numerous Charters promulgated since then; but also due to the effects of globalisation, region-alisation and technological advances. Principally, however, the march of human rights into the domain of the law has been advanced because the legal profession has, broadly speaking, recognised it has duties and functions which cannot be disclaimed.

Human rights is, properly, not to be viewed as another category of law separate or separable from other legal categories. This collection reflects this reality. Rather, each chapter on each topic firstly exposes, then analyses, the elements of human rights law that exist within various other categories of law and legal practice. In his foreword, the Hon. Michael Kirby of the High Court of Australia says that this book "chronicles nothing less than a legal revolution. Every chapter records the growing impact of international human rights law on Australian law".

The diversity of potential applications of developments in international human rights law to both the procedural and substantive law is amply demonstrated in the diversity of the contributions. Some developments are expected, especially in the domain of public law — constitutional, administrative, migration, environment and crime. But there are interesting and significant developments now impacting on private law — in family, privacy, equal opportunity, health, intellectual property, labour law — testimony to a reach and an application inconceivable 20 years ago, much less 50.

There are three aspects of immediate and particular appeal to the practitioner in this compilation:

1. Throughout the various offerings, the contributors describe numerous instances where courts and tribunals, faced with difficult decisions, have searched beyond the traditional sources of legal reasoning to a new style of thinking which has relevance to the way litigants seek to order their affairs. This is where a human rights argument can often be a make or break factor
2. Chapter 14 focuses on the various practical questions on which a practitioner contemplating the forensic aspects of a case seeks guidance. When, where, what, and how should human rights arguments be fruitfully pursued and put? What will work and under what circumstances? What didn't? Although the discussion in this chapter cannot be prescriptive for all times and all cases, the points raised provide much food for thought.
3. Chapter 15 complements the useful anthology of pertinent law preceding it by appending citations of useful research tools and many references to Internet sites where additional relevant resources may be located.

Justice Kirby also notes in his foreword that a week would not go by in sittings of the High Court of Australia where a case either does not invoke an international treaty to which Australia is a party, or does not involve the values reflected in or distilled from a variety of international human rights law principles, in some shape or form. There is more than a hint in this single observation that human rights will not be confined always to the rarefied realms, but will percolate through to all forums, in the fullness of time. It is a lesson, and a warning: that the study and pursuit of human rights jurisprudence is an inherently practical and worthwhile one; and that practitioners should be prepared to have human rights arguments and principles in their daily tactical and forensic armoury. A worthwhile read.

Judy Benson

Conference Update

15–17 October 1999: Melbourne, Australian Institute of Family Law Arbitrators and Mediators: Family Arbitration. Contact: Elizabeth Marburg. Tel: (02) 6247 3788.

21–23 October 1999: Sydney, National Conference of Australian Plaintiff Lawyer's Association. Contact: Michael Trinidad. Tel: (02) 9904 8200, Fax: (02) 9411 8585.

21–26 October 1999: Sydney, 46th Congress of Union Internationale Des Avocats. Contact: Jim Robinson. Tel: (03) 9670 8951.

3–7 November 1999: New Delhi, 43rd Congress of Union Internationale Des Avocats.

11–13 November: Manila, International Bar Association Conference. Tel: 44 (0)171 629 1206, Fax: 44(0)171 409 0459.

2–3 December 1999: Sydney, Australian Institute of Criminology Conference on Art Crime. Contact: Conference Coordinators. Tel: (02) 6292 9000, Fax: (02) 6292 9002.

28 April–2 May 2000: Vancouver: 10th Annual Meeting of the Inter-Pacific Bar Association. Contact: Inter-Pacific Association 2000, British Columbia. Tel: 604 681 5226, Fax: 604 681 2503.