VICTORIAN BAR NEWS

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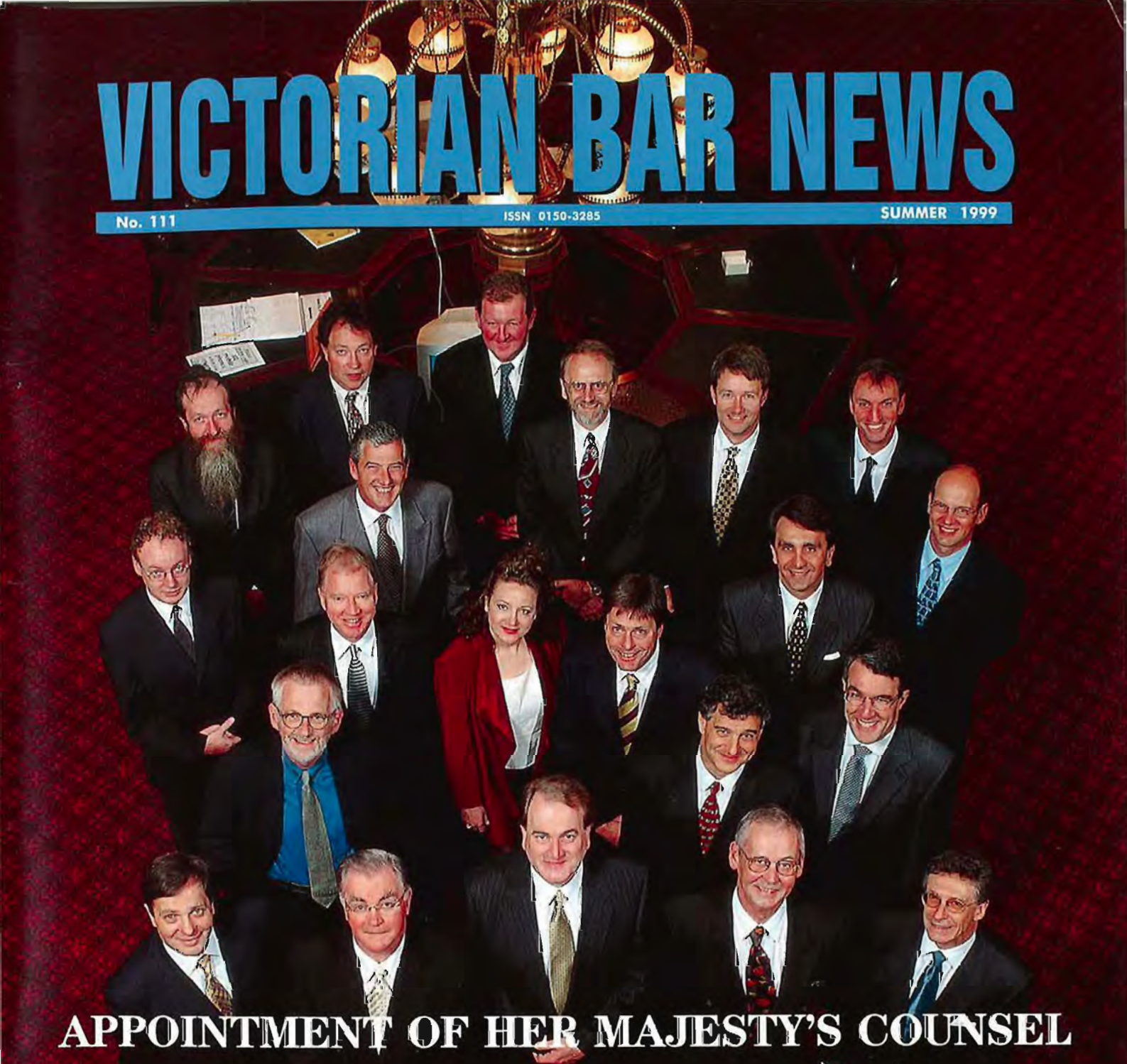

APPOINTMENT OF HER MAJESTY'S COUNSEL

Welcome: Judge Kent and Registrars Benjamin and Wilson

Farewell: Judge Rendit

Refurbishment of Courts 13 and 10 of the Supreme Court of Victoria

Ceremonial Sitting for the Presentation of an Oar Mace of Admiralty to the Federal Court of Australia

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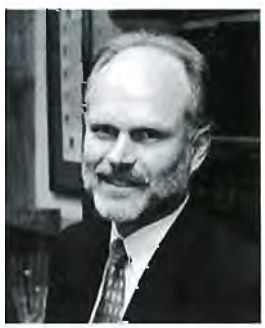

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Ceremonial sitting for the presentation of an Oar Mace of Admiralty

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Of Change — of No Change

THINGS are different since the publication of the last *Bar News*. Victoria has a new Premier, and of more direct importance to the Bar, a new Attorney-General. There was always going to be a new Attorney-General with the retirement of Jan Wade — but not of the Labor Party.

Things may be different in the State of Victoria; but not in the sovereign State of Australia. We still have a constitutional monarchy. What are the ramifications of these changes and no changes?

Will Premier Bracks and Attorney-General Robert Hulls make any difference to the Victorian Bar? It could not be said that Jeffrey Kennett liked lawyers, particularly barristers. As well as his own personal problems in the courts the Kennett/Wade Attorney-Generalship did not have a record of being barrister friendly. This was not only limited to the Bar, but was particularly aimed at the large union solicitor firms. The abolition of common law rights for workers was grounded on one of the recurring planks of the Liberal government that lawyers were those making the most out of the common law industrial system. Take away the system, take away the lawyers and things will be better. Of course things were worse for those for whom the system was to benefit — the workers. The last two years have shown that there is no doubt that those injured at work through the negligence of their employers are financially worse off than before the abolition of common law.

And what about the Victorian WorkCover Authority, the organisation which wears two hats: that of insuring the employers and minimising compensation payments to workers, and that of the protector of the workers upholding the occupational health and safety laws by prosecuting employers. The last few years have shown that its administration was obsessed with cutting the cost of legal fees. Again the lawyers (and to a lesser degree the doctors) were the villains in the WorkCover compensation system. Thus the VWA decreed that it would not pay its barristers the scale fees set by the government itself. Barristers would take a percentage cut on the scales and would not get conference fees nor circuit fees, nor any other ordinary fees for that matter. Cost cutting was imperative Those solicitors' firms acting on behalf of the VWA had their fees cut to the bone. Tendering was all the rage, reviews and audits dominated the lives of these solicitors often to the detriment of the health of some. Many large firms have decided it is simply not worth the trouble for the paltry fees and opted out of being on the VWA panel. The bonus-based bureaucrats who ran the organisation congratulated themselves. Legal costs were cut. They justified their performance-based contracts by this exercise. But what has been the overall result?

The VWA is $176 million in the red. The administration is being blamed by the new Labor government for this blow out.

In reply it has been said that the financial crisis was caused by common law payouts. The judgments of juries and judges are too high, and therefore show that the system should have been abolished. But this is fallacious. What has been forgotten is the manner in which many of these common law cases have been run in the courts. The cutting of legal costs has meant a lack of preparation and lowering of advocacy standards. Advice to settle on reasonable terms has been ignored, and many cases have gone to verdict which should never have been fought. Therefore there have been many verdicts in excess of the amounts for which the cases could have been settled with proper negotiation. Pay low fees and get low standard representation.

And so the new Labor government has pronounced that common law rights for workers will be reintroduced. The Act was going to be introduced before Christmas, but problems have arisen. In what form will it be introduced? Will it be the same as the provisions in the Accident Compensation Act before abolition, or will further limitations be placed upon a worker's right to obtain damages for negligence and/or breach of statutory duty? How will the employers pay for common law?

Some have said that there may have been a gap for the two years in which it has been absent — that no premiums were paid to cover the common law aspect. But it does not appear that the employers' premiums have been lowered in the absence of claims for negligence. Therefore where did all the money go? Will it be necessary for premiums to rise? These matters need to be sorted out, and the sooner the

better. It is to be hoped that these administrative difficulties are not such that the present system continues for years to come.

And what does the new Labor government plan to do to the existing structure of the Victorian WorkCover Authority? Will there be profound changes in its management, in particular, in the areas of common law rights? Will there be change in the overall attitude to lawyers?

And what about industrial safety? Deaths and serious injuries at work are rising. Occupational health and safety self-regulation is not working. Can the Chinese walls in the VWA remain up? How can the same organisation insure employers and fight compensation claims against workers, and then prosecute the same employers for breaches of the industrial safety laws? Will there be a wholesale change in the structure? We look forward to next year.

The referendum was lost in every State. The "yes" vote could not even hold on to Victoria. Perhaps the greatest surprise was that the Turnbull Sydney-dominated republican push failed to win its home State of New South Wales.

The churlish recriminations following the defeat were unbelievable.

Perhaps the real message is that it was not John Howard's view which destroyed the "yes" vote. It was the same view as that which voted in the Labor government of Victoria — the same views of the disillusioned rural voter, the increasingly disenfranchised industrial worker and the majority of the population who have had enough of a group of people who seek to impose a cult of personality, power and wealth upon the public.

The messages should have been clear from Mr Kennett's defamation defeat. That jury of six typified the majority of Victorians who replaced Mr Kennett with a Labor government, but then refused to place a republic in place of the Queen. Just as people became tired of Mr Kennett's style so the style of Mr Turnbull and the elitists who surrounded him turned the public off. Rich entrepreneurs, media magnates, entertainers and sports announcers pushing their own wheelbarrows were the reason for the failure of the vote.

It was not an overwhelming desire to have a directly elected President. If these minimalist changes to the Constitution did not get through, how can it be said that others will be able to sell the more profound changes to the Westminster system inherent in direct election. Time alone will tell, but the presumptions made by the media and the press and the republican movement do not appear to have changed. Until those presumptions change a republic will be doomed to failure.

GST

We are still awaiting some news from the Bar Council and its representatives as to what will be happening with the GST in relation to its effect on barristers. Perhaps in the first edition of the 2000 *Bar News* we can perhaps look for some guidelines as to our financial future.

WE WERE RIGHT

In the Winter 1999 issue of *Bar News* we drew attention to the fact that "temporary" or "probationary" judicial appointments could be seen as undermining the independence of the judiciary.

On 11 November this year the High Court of Justiciary in Scotland, acting as the Court of Criminal Appeal, held that it was unlawful for the Crown in Scotland to prosecute a person charged with an offence before a judge who had no security of tenure and whose appointment was subject to annual renewal. Such a prosecution infringed Article 6 of the European Convention on Human Rights which provides that a person charged with a crime is entitled to a hearing before an independent and impartial tribunal.

Their Lordships said that a judge who had no security of tenure was not "independent" within the meaning of Article 6. A short term of office was not necessarily objectionable.

"However, a term of office expiring not upon the completion of a particular task, or the cessation of a particular state of affairs, but at the end of a fixed period of time of relatively short duration, was liable to compromise the judge's independence if the appointment could be renewed": *Times Law Reports*, 17 November.

THE EDITORS

Justitia's Breast

THE sun doth caste Justitia's breast
upon my room.
I'll move to west to avoid the gloom.

Anon

Significant Welcomes and Farewell

NEW ATTORNEY GENERAL

ON behalf of the Bar Council I congratulate The Hon. Rob Hulls MLA on his appointment as Attorney-General of Victoria, and look forward to a productive relationship between the Bar and Government.

I have met with Mr Hulls several times since his appointment, and he has already indicated his substantial agreement with the Bar Council on matters such as legal aid, common law rights, cross-vesting legislation and freedom of information legislation. He also indicated in his recent address to the November 1999 intake of Bar Readers that he will bring his experience as a legal aid solicitor to bear on his role as Attorney. With the Commonwealth Government foreshadowing a further reduction in legal aid for Victoria — in the order of $5.5 million — it will be crucial that the legal profession and the State Attorney unite in opposition to this abdication of responsibility by the Commonwealth Government.

The Bar Council is also particularly pleased at the consultative approach which Mr Hulls has adopted in relation to the profession and other groups – as exemplified in the recent meetings held to discuss proposed amendments to the Freedom of Information Act. We hope that this consultative approach may continue through the life of this Government. It has always been my view that Governments of any colour ignore the views of the legal profession — and particularly the Bar — at their peril. The Victorian Bar represents a body of legal expertise upon which Governments can, and should, draw. Though the Bar Council may sometimes feel compelled to give broad comment on the principles or philosophy which underpin Bills being prepared for Parliament, we also undertake to provide a practical and technical assessment of the workability of any new legislative arrangements upon which we are consulted.

JUDGE KENT

On 10 October, the Attorney announced the appointment of His Honour Judge

Robert Kent to the Bench of the County Court of Victoria. The Attorney commented that the appointment of Judge Kent marks a turning point for the appointment of judicial officers in this State, with a greater emphasis now to be placed on litigation experience. I commend the Attorney on the formulation of this principle and look forward to many more judicial appointments of Judge Kent's calibre.

Judge Kent, a member of this Bar since 1972, has a long-established reputation as one of this country's best criminal advocates, and has shared his knowledge of criminal process and advocacy with countless lawyers through the Bar Readers' Course. A staunch supporter of an independent legal profession and an independent judiciary, Judge Kent has extensive experience in establishing legal systems in Cambodia and in Vanuatu, where his Honour served for several years on the Supreme Court of Vanuatu. On behalf of the Bar Council I extend my best wishes to Judge Kent.

RON CASTAN AM QC

Finally, and sadly, I must note the death of Ron Castan AM QC on 21 October 1999. Ron, a friend to many of us, was one of Australia's outstanding lawyers, with an expertise and passion for the principles of equality before the law and access to justice. He had an extensive practice in the areas of constitutional law, land rights law, international law and public interest litigation generally. He was always concerned to bring to the practice of law an engagement with the most immediate and urgent problems of suffering and injustice. This was evidenced in the advice on constitutional law which he was providing to the leaders of the East Timorese community — whom he counted as his friends — right up to the moment of his death. It is testament to Ron's greatness as a lawyer and as a person that his passing united in sorrow the Australian legal profession, and countless others in the Aboriginal community, the Jewish community, and in the world of politics and of humanitarian work. We now have a responsibility to accept the challenge which he issued to all those who work in the law.

David Curtain
Chairman

Commitment to Justice

OUR justice system is the backbone of our democracy. Access to justice is vital to maintain the public's confidence in the justice system and ultimately the viability of the justice system rests on the public's confidence.

Access to justice is an all encompassing concept. My vision is to develop a system that is fair, accessible and understandable.

Already I have challenged the Commonwealth Attorney-General to seriously address the crisis in our legal aid system. I will not cower to the Commonwealth's threats in relation to the legal system by slashing a further $5.5 million per year. First, it is a travesty of justice to support and promote a legal system that delivers one system for the rich and another system for the poor. Not only that, however, an efficient and effective legal system cannot operate where litigants are forced to represent themselves. As Mr Justice Toohey of the High Court observed some years ago about legal aid:

> What good is a legal right if the person who holds that right cannot afford to secure its enforcement? . . . If, as a society, we base our affairs upon rule of law, we carry a responsibility to provide for its enforcement. If rights can only be exercised by the rich, they are not rights but assets bought at a price. The rule of law then effectively becomes the privilege of the few.

Access to justice is not limited to funding representation. Over the next four years, I will:

- reinstate compensation for pain and suffering of victims of crime where the victim is unable to otherwise obtain compensation;
- introduce an independent community-based Law Reform Commission to promote progressive and innovative changes to our laws and justice system. Its charter will specifically focus on promoting victims' rights and reviewing the experience of children in the courts;
- ensure that no community legal centre will be forced to close and that community legal centres retain their independence.

To provide the community with an

effective justice system, it is vital that people understand their rights. The Government will conduct an education campaign to improve the understanding of ordinary Victorians about their legal rights and citizenship responsibilities.

The Government believes the independence of the DPP is essential to maintaining the public confidence in the justice system. We will shortly be introducing a Bill to enshrine the independence of the DPP in the Victorian Constitution.

In particular, the Government will promote an awareness of the basic civil and political rights of the disadvantaged.

As a first step to fulfilling the Government's commitment to improving justice, we have introduced amendments to the Freedom of Information Act which narrow the restrictions imposed on access to information implemented by the Kennett Government. In particular this includes limiting the abuse of the Cabinet document exception; narrowing the definition of "commercial confidentiality" whilst protecting trade secrets; and removing the $170 application fee for "deemed refusals". A unique requirement to Victoria has been introduced. This is the requirement that a Minister who wishes to appeal a decision made by VCAT must table his or her reasons in Parliament.

Following the *Re Wakim* decision last year, I repeatedly called on the previous Kennett Government to recall Parliament to deal with the ramifications of the decision. The Kennett Government failed to do this. The Bracks Government has moved rapidly to overcome the difficulties arising from the decision, which struck down the cross vesting of State jurisdiction in Federal Courts. The Federal Courts (State Jurisdiction) Bill will restore certainty to legal processes which has been lacking since the decision.

The Kennett Government showed contempt for the independence of the office of the Director of Public Prosecutions — an independent statutory appointment and an important watchdog. In fact, the former Attorney-General passed amendments to impede the independence of the DPP because he dared to consider taking contempt proceedings against the Premier.

The Government believes the independence of the DPP is essential to maintaining the public confidence in the justice system. We will shortly be introducing a Bill to enshrine the independence of the DPP in the Victorian Constitution. The Bill will restore the power of the DPP to bring contempt of court proceedings independent of the Attorney-General and the Solicitor-General.

I have introduced an entirely new approach to the office of the Attorney-General. I will invite members of the profession to contribute to the development of legislation and policy initiatives. Your views are invaluable, and I will consult with you wherever possible. Together, we can restore the public confidence in the justice system.

Rob Hulls
Attorney-General

Practising Certificates

APPLICATIONS for practising certificates for 2000/2001 by practitioners who held a practising certificate as at 31 October 1999 were to be submitted to the Victorian Bar Recognised Professional Association (RPA) by 31 October 1999 in order to avoid surcharges for late applications. By 31 October, 91 per cent of the Practising List had applied for practising certificates for 2000/2001. Applications received in November and December incur a surcharge of 25 per cent and 50 per cent, respectively, of the practising certificate fee. Applications submitted in the first three months of the year 2000 might attract a surcharge of 200 per cent.

The State Government introduced the surcharge scheme in order to eliminate delays to the production of practising certificates caused by late applications. We understand that 97 per cent of solicitors had applied for their new certificates by 31 October.

During 1999, the *Legal Practice Act* 1996 was also amended to require barristers to provide their RPA on or before 31 May with proof of professional indemnity insurance for the next financial year. In the past, barristers were required to renew their professional indemnity insurance by 30 June. Commencing in the year 2000, barristers must therefore renew their professional indemnity insurance prior to 31 May in order that on or before 31 May they can provide proof of professional indemnity insurance to their RPA. If proof of insurance is not provided, the RPA must give notice to the practitioner that the practising certificate previously issued does not take effect i.e. the certificate will no longer authorise the practitioner to engage in legal practice.

Insurers will be advised of the new timetable.

David J.L. Bremner
Executive Director

Inconsistent Verdicts

Dear Editors

Osland v. *The Queen*

IN the Chief Justice's "Lesbia Harford Oration" published in the *Victorian Bar News*, his Honour refers to the judgment of Justice Callinan in *Osland* v. *The Queen* quoting his words:

> 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.

For the sake of both clarity and accuracy, I draw your readers' attention to the grounds of appeal, the written submissions, and the transcript of oral submissions, in the High Court in *Osland* v. *The Queen*. No submission was made by counsel for the Appellant, Ms Osland, that the High Court (or indeed any Court) "should adopt" such a defence. The contrary was so.

The appeal centred in the first two grounds of appeal, namely those relating to the inconsistent verdicts arising at the trial — of a "hung jury" for the co-defendant David Albion, and conviction for murder in respect of Ms Osland.

The violence to which Ms Osland was subjected was referred to in the context of the inconsistent verdicts grounds, and submissions for the appellant were that "battered woman syndrome" is *not*, and ought not to be, a "defence": Trns 88. Further, not only is "battered woman syndrome" not useful terminology (submissions with which Justice Kirby agreed), but it is misleading, with a potential for creating confusion for both judge and jury:

> . . . we do not consider that the expression "battered woman syndrome" assists the Court or assists persons who are accused, rather we would prefer to adopt the expression "battered woman reality", if there has to be a short-hand expression of that nature.
>
> The other way, of course, to give it a long-hand term, is that the sort of evidence that comes in under this popularly known expression "battered woman syndrome" is evidence that goes directly to the question of self-defence and provocation and, in our view, the use of this expression "battered woman syndrome" in this trial is substantially responsible, in our submission, for the fact that inconsistent verdicts eventuated: Trns 52.

Yours faithfully

Jocelynne A. Scutt (Dr)

Feelings of *déjà vu*

The Editors

Dear Sirs

IT was with some feelings of *déjà vu* that I read Mr Lindeman's piece, "New Injury Claims for Employees" in the last edition of *Victorian Bar News*.

I then recalled that I had read the first edition of this piece as written submissions for the defence in a prosecution in the Bendigo Magistrate's Court on 28 June this year that were all rejected by Magistrate Coburn. The matter is on appeal to the Supreme Court on an issue of retrospectivity.

Is the *Bar News* being used for making further submissions or has there been a dreadful mistake? Might a restaurant review have accidentally gone to the Prothonotary and the submissions to *Bar News*?

Yours faithfully

Paul Mulvany
Slater & Gordon

Judge Kent

THE queues formed early outside the Eigth Court of the County Court on 11 November 1999. Before an overflowing courtroom His Honour Judge Kent was welcomed to the County Court by the Chairman of the Victorian Bar Council and the Vice-President of the Law Institute of Victoria.

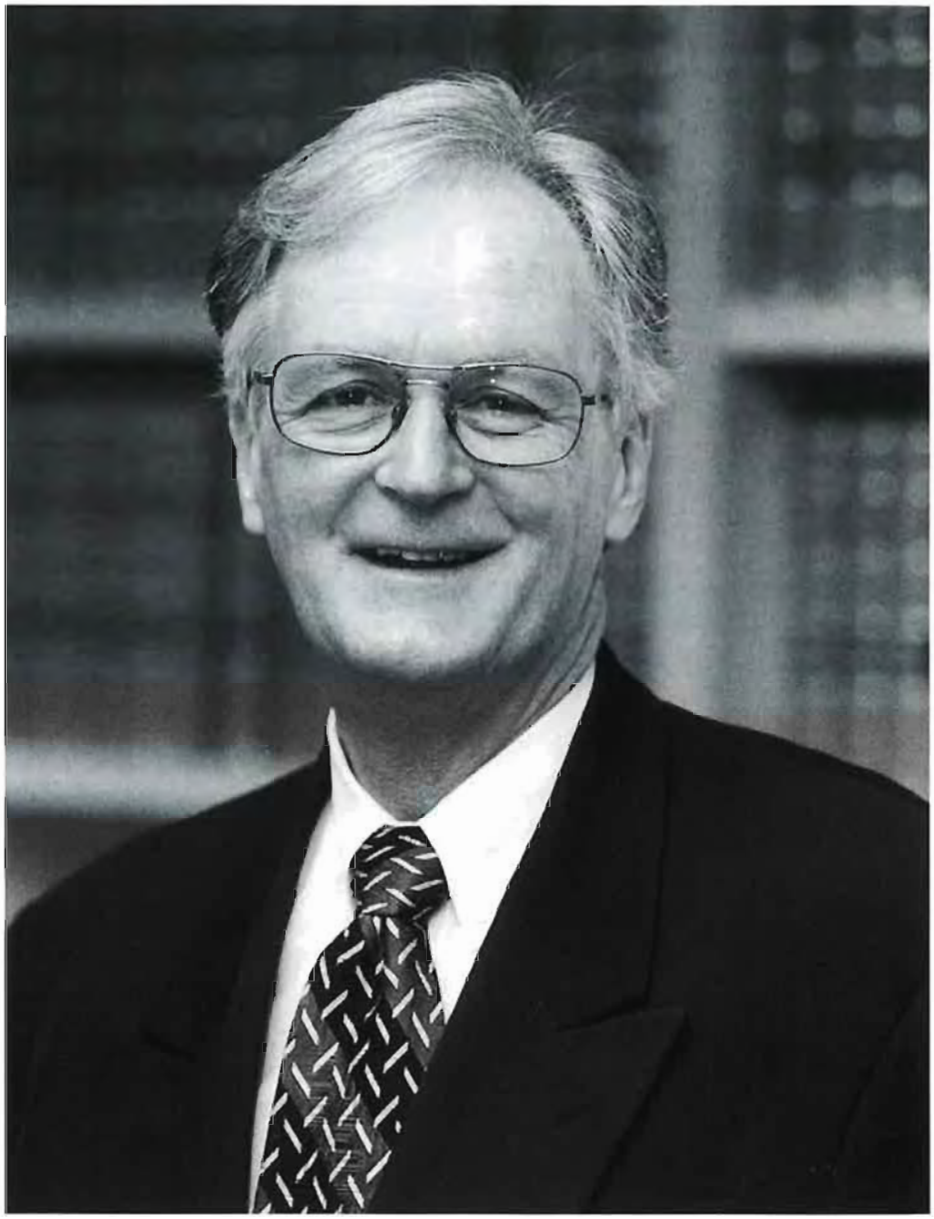
The Chairman's opening words truly reflected the views of the assembled and all of those who have had the good fortune to know His Honour when he stated:

> Your Honour is truly one of this State's outstanding lawyers, one of this State's outstanding advocates and one of the great supporters of an independent legal profession, an independent Bar and an independent judiciary. Your career has been marked not only by ability and achievement but also a strong belief in the principle of equality before the law and a strong belief in the obligations of the legal profession to provide opportunity and instruction to its new members and to give fair treatment and assistance to the underprivileged.

His Honour's curriculum vitae is vast, varied and outstanding. No welcome is capable of doing it justice.

Robert Keith Kent was born on 28 December 1944 in Maryborough and was educated at Maryborough High School. Having obtained his Matriculation His Honour travelled to Melbourne and worked in the Crown Solicitor's Office. Thankfully he there met the now Registrar of Criminal Appeals, Jack Gaffney who persuaded him to obtain a law degree at the University of Melbourne rather than exercise an option to do a Diploma of Public Administration. Having left the Crown Solicitor's Office His Honour then worked in the Companies Registration Office and commenced his law degree part-time. Whilst completing his law degree he was an associate to His Honour Judge Just.

His Honour obtained his Bachelor of Laws with Honours from the University of Melbourne in 1969. He was then articled to John McArthur of Wisewould, Duncan and Hanger. Having completed his articles His Honour then was admitted to practice as a barrister and solicitor of the Supreme Court of Victoria in 1970. He worked as a solicitor for Colin and Robert Taylor for two years and then decided to come to the Bar.



Judge Robert Kent

At his welcome with some trepidation His Honour revealed that he first approached Van Tolhurst to see if he could read with him. As Van Tolhurst already had a pupil His Honour wandered down the corridor and knocked on the door of a tiny smoke-filled room and enquired of Michael Kelly whether he could read with him. Michael Kelly replied, "That would be an extremely foolish thing, but you're welcome."

A friendship of what is now of some 30 years duration had commenced. It is probably appropriate that Judges Kent and Kelly now occupy rooms alongside

each other in Judges Chambers. In his often moving and always humble response at his welcome, His Honour described Judge Kelly as "a great lawyer and a great humanitarian and a great man".

His Honour was appointed one of Her Majesty's Counsel in 1988. In his last trial prior to taking silk, His Honour appeared on behalf of a 16-year-old boy charged with the shotgun murder of his father whilst his father was sleeping. The trial took place in the Supreme Court at Shepparton before Mr Justice Phillips as he then was. The deceased was a school teacher and sporting identity in the district. There had been implicit suggestion that the reason for the killing of the deceased was prolonged sexual interference by him of the 16-year-old accused boy. His Honour was not able to obtain at any time such instructions from his client. The account of such abuse came for the first and only time by the accused as he stood shaking and sobbing as he gave his evidence. Those who regard the art of cross-examination as being the most powerful tool of an advocate would perhaps re-assess that view had they witnessed the audacious, masterful and breathtaking manner in which he elicited the evidence in chief from the accused boy. Suffice to say he was acquitted. Such was the effect of his advocacy in that trial that the day following the verdict and prior to a plea to manslaughter being made, His Honour was somewhat embarrassed and taken aback when a female juror from the trial sought to secure his services in respect of an acrimonious ongoing divorce dispute.

Whilst a member of the Victorian Bar His Honour has been a member of the Victorian Bar Council from 1987 to 1993, a member, executive, Victorian Bar Council from 1991 to 1993, Chairman of the Victorian Bar Readers' Practice Course from 1991 to 1993, Chairman of the Victorian Bar Applications Review Committee, Chairman of the Victorian Bar New Barristers Committee, Chairman of the Legal Aid Committee, Chairman of the Victorian Bar Fees Committee, a member of the Victorian Bar Ethics Committee, Chairman of the Criminal Bar Association of Victoria from 1990 to 1992, a member of the Committee for Continuing Legal Education for Developing Countries in the South Pacific Region, a board member of the Leo Cussen Institute for Continuing Legal Education and a member of the Teaching Committee, Australian Advocacy Institute of the Law Council of Australia.

His Honour's passion, commitment and selflessness in the field of advocacy teaching and training is something to behold. For 18 years His Honour has been involved in advocacy training in the Victorian Bar Readers' Practical Training Course and advocacy seminars and workshops at the Leo Cussen Institute. He has been the workshop leader and instructor in teacher training courses conducted for the training of advocacy teachers, the workshop leader and instructor in advocacy workshops conducted by the Australian Advocacy Institute, a member of the teaching faculty of the Trial Practice and Advocacy Course, Monash University, Melbourne, an instructor at the Victoria Police Prosecutors Training Programme, the course leader at the Civil Advocacy Workshop conducted at the University of the South Pacific for the practitioners of Vanuatu in 1995, a member of the advocacy teaching team in Singapore in January 1995 and part of an Australian Bar Association Advocacy Teaching Team in Bangladesh during December 1996, 1997 and 1998. That latter involvement shall see His Honour again return to Bangladesh in December of this year.

For nine consecutive years His Honour was the course leader of the Victorian Bar Criminal Advocacy Workshop conducted for the Legal Training Institute of Papua New Guinea in Port Moresby from 1990 to 1998 inclusive. With the indispensable and highly professional assistance of Barbara Walsh, Manager/Legal Education and Training at the Victorian Bar, His Honour headed that team in Papua New Guinea which contained some of this State's most highly regarded judicial officers including Justices Vincent, Coldrey, Eames, Harper, Judge Crossley, Leslie Fleming M. and barristers Paul Coghlan QC, Bill Morgan-Payler QC, Ross Ray QC, Rowan Downing QC, Andrew McIntosh, Geoff Steward and Frank Gucciardo. The conditions and hours involved were demanding in the extreme. However, His Honour has always remained grateful to the then Chairman of the Bar Council, Mr Bill Gallard QC as he then was, who without question allocated funds for a small team from the Victorian Bar to commence what was to become an annual pilgrimage in 1990. Moreover, as the team leader His Honour took on the vast majority of the workload whilst other extremely hardworking and motivated team members looked on in awe at His Honour's capacity to give of himself unstintingly, good humouredly and inspiringly. At the request of Chief Justice Amet he also conducted workshops for the judiciary in Papua New Guinea.

His involvement in the affairs of the Third World does not end there. He sponsors the education of a little girl in Cambodia and for some five years has paid for the education of a child in Vanuatu.

His Honour is also no stranger to judicial office having been a Justice of the Supreme Court of the Republic of Vanuatu between 1993 and 1995. As the Chairman stated at His Honour's welcome:

> Your commitment to the independence of the judiciary is undoubted as we know from your decision in one particular Vanuatu case to withdraw on the grounds that the Chief Justice had attempted to improperly influence your decision. It was an act of courage and honesty which enables us to have the highest expectations of your judicial career. We are, you might say, believers in the gospel of His Honour Judge Kent.

Courage, integrity and ability have of course been the hallmarks of his Honour's distinguished career. At considerable personal expense His Honour has always put his personal advancement far beneath the interests of those in need, be it clients, readers, fellow barristers, students or any deserving or questionably deserving human being.

There are many who believe that His Honour could have sat on the Bench of any Court in the Commonwealth, however, by being appointed to the County Court he will play a very important role in arguably the most important court in the State as not only will he deal with matters of great substance, but those who are commencing their careers in the County Court will not only have the opportunity to appear on behalf of their clients, but will also be considerably edified by His Honour's knowledge of the trial process and its various components.

There are those who fear that His Honour will not tolerate fools gladly. That may well be so but he will tolerate them nonetheless as long as those appearing before him display integrity and demonstrate that they have prepared their case to the extent which His Honour will no doubt require.

His Honour has been a keen sportsman for a number of years. Thankfully (in his own best interests) he has ceased to follow the fortunes of the Collingwood football team with as much interest as the cricketing and football-ing achievements of his sons Neil and Ian. The Vice President of the Law Institute of Victoria at his welcome took her life in her own hands when she stated that: "Your Honour is known as a moderately talented cricketer who played a little bit too long." His Honour interposed, "I'm playing on Sunday."

Indeed he did in a veterans match three days after his welcome. His Honour played for Long Island, bowling what used to be medium pace. He was somewhat chuffed by the fact that in his four overs he bowled no full tosses, no wides, was not too far down the leg side and took two wickets, one of them a stumping!

His Honour had a total of 13 readers whilst at the Bar, seven of whom came from Vanuatu and the Solomon Islands. Readers who were lucky enough to be instructed by His Honour nonetheless had to be broad shouldered when it came to the review of their performances by His Honour. He mischievously used to boast to them of his ability to be able to immediately ascertain whether or not a policeman giving evidence was a witness of truth. The test was whether they had, fat pudgy fingers. Should they possess such physical characteristics it meant that they were not.

Woebetide any reader leading evidence or cross-examining who used words such as "decamp", "acquiesce" or "vehicular transportation". His Honour could never quite accept the use of such words rather than "leave", "agree" or "car"; this of course was because His Honour regarded communication rather than pretentious vocabulary as being crucial.

His Honour practised largely in the criminal jurisdiction in his 27 years at the Bar. His last trial was the successful defence of a man charged with murder and fittingly his last day was spent at the Readers' Course. His Honour appeared in some of the most famous and difficult trials in this State's history, notably, the Mallendar trial and the trial of Haig who was charged with four counts of murder. One of His Honour's last visits to the High Court, a Court before which he had often appeared, resulted in inter alia, the Court finding that to permit the cross-examination of an accused as to whether he knows of any reason why the complainant should fabricate the charge is improper and may result in a miscarriage of justice: *Palmer* v. *R* (1998) 151 ALR 16.

The appointment of His Honour to the County Court is one which has universally been accepted by the entire profession, not only with approval but joy. It was not surprising that at his welcome His Honour displayed the sort of humility, humanity and humour for which he is well known.

The community will be well served by the appointment of a man of high intellect, ability and compassion. The Bar is genuinely excited by this appointment and those who have been fortunate and privileged to work with His Honour know that the same privilege and good fortune will now extend to those who appear before him.

The New Family Court Registrars:

Elizabeth Benjamin and Mark Wilson

In Family Court registries around Australia, the large volume of interim matters requiring determination until recently could only be dealt with by judges sitting in the Duty List. A major consequence of this has been that delays in the final hearing of cases were compounded as judges were not available for trials. The recent amendments to the Family Law Rules now allow a new class of Registrars to hear and determine interim parenting applications. In May of this year the Melbourne Registry was fortunate to have two very experienced barristers appointed to the new office of Registrar of the Family Court.

Registrar Benjamin

ELIZABETH Benjamin comes to the Court with significant family law experience and an abundance of common sense. She completed her articles in 1980 with Adrian R. Bieske. She signed the Bar Roll on 18 May 1982 and read with Nathan Moshinsky QC. In her early years she practised in commercial and criminal litigation. Eventually her forte for family law became the greater part of her practice. She has appeared in many matters associated with the family law jurisdiction including appearances before the Guardianship and Administration Board, the Childrens' Court and in the Supreme and County Courts in de facto property cases.

Elizabeth Benjamin

Her contributions to life at the Bar have been greatly appreciated. She lectured the new readers in the Bar Readers' Course in family law. For many years she was moot master in family law cases. Elizabeth was the honorary treasurer from 1990 to 1992 and secretary from 1992 to 1996 of the Family Law Bar Association.

Registrar Benjamin has enjoyed a reputation as a conscientious barrister who has fought hard to promote her client's case. She was never the shrinking violet when having to deal with difficult issues or hostile clients. She was known on occasions to quote the conduct of her client's behaviour with adaptations of Latin maxims: "And the husband said to his wife 'In nomine patris hop on the matress . . .". One of her more memorable lines about a Lebanese husband was "If the camel once gets his nose in the tent, his body will soon follow"!

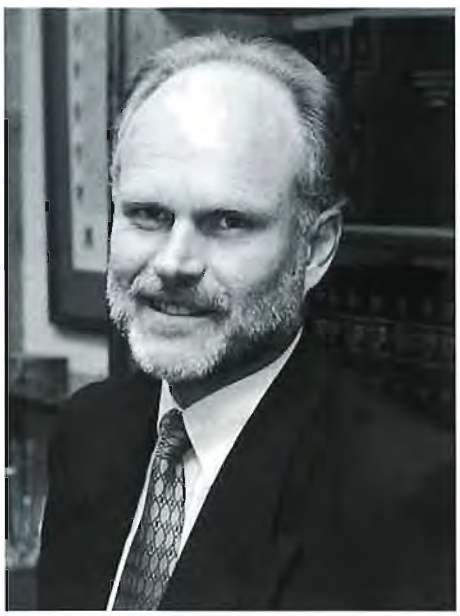
As one of the senior Registrars of the Court, Registrar Benjamin will bring style, wit and vitality to the day-to-day rigours of the duty list.

Registrar Wilson

Mark Wilson was born on 11 January 1955. He graduated from Melbourne University LLB Honours in 1977. He completed his articles with Vera Fowler in 1977. He was a solicitor at Ryan Carlisle before coming to the Bar in September 1981. He read with John Ramsden, now Judicial Registrar Ramsden.

Mark has been a specialist family law practitioner for many years. Always the shrewd tactician, he had the artful knack of putting his opponent at ease about the case outside court and then quietly and succinctly demolishing him when before the Judge. As a barrister he has always enjoyed a reputation for fairness and even-handedness in the conduct of his cases. Mark Wilson has been a hardworking barrister with a strong sense of justice. All of these qualities make him a very worthy Senior Registrar of the Family Court.

On a personal note I understand one of the highlights of his career at the Bar was going to Brisbane in 1992 with his now comrade in arms, Elizabeth Benjamin. His hobbies are said to be wine, food and jogging in that order. He is a Collingwood supporter (currently in remission). He has four children to whom he is a devoted father.



Mark Wilson

The Bar warmly congratulates Registrars Benjamin and Wilson and wishes them a fulfilled and happy career.

Graeme Thompson

Monash University Law Faculty Seeks Property Law Placements

THE aim of the placements is to enhance the student's vocational and skill development and to enable them to experience workforce learning. The project team is excited by this opportunity to promote practical interaction between law students and members of the profession and to foster the relationship between the Monash Law Faculty and the profession.

The project team has written to a number of members of the profession, both solicitors and barristers, who practise in the area of property law, seeking their involvement by placing students as described. The response from the profession has been very positive.

Members of the Bar who have not yet returned their response forms are encouraged to do so as soon as possible to assist with planning of placements. The project's Professional Affiliation Co-ordinator, Ms Elspeth McNeil, is happy to provide information or answer queries about the program: 9905 5319 or elspeth.mcneil@law.monash.edu.au.

Judge Rendit

PETER Uno Rendit was born on the 11 June 1929. His Honour attended Box Hill High School and Melbourne High School. He obtained his law degree at Melbourne University in 1952.

He was articled to Mr F.S. Newell of the firm of F.S. Newell and Marsh. He was admitted to practice on 15 February 1954, and after two years employment as a solicitor with Rylah & Rylah signed the Bar Roll in 1956 and read in the chambers of Phil Opas.

He was appointed silk in 1976 and became a judge of the County Court from 1977. Therefore he served 22 years on the Bench.

His Honour was a member of the Bar Council from 1963 to 1972 and served as Honorary Secretary from 1964 to 1967. He had three readers: Lyn Boyes QC, David Munro and Julian Burnside QC.

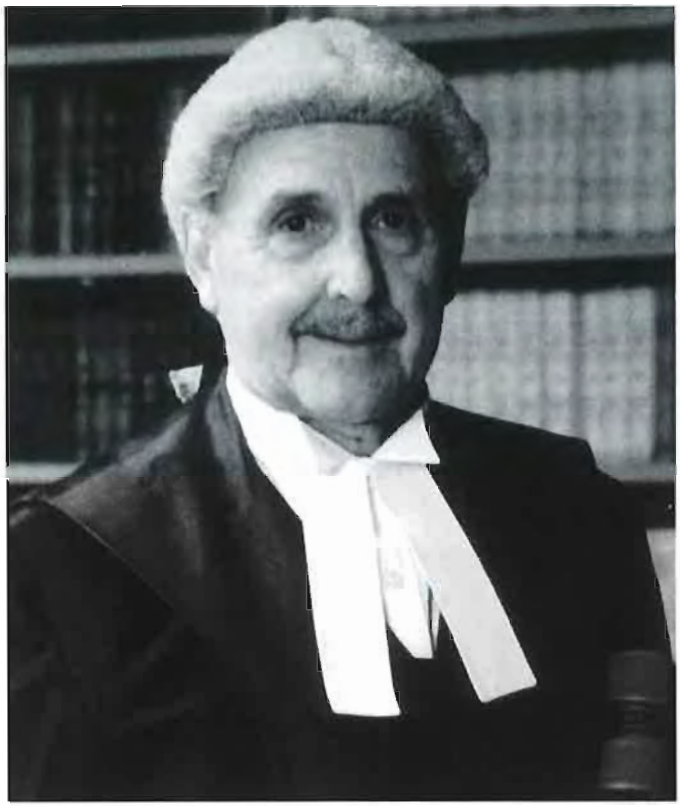
He was well known as the joint author of *Workers' Compensation Victoria 2nd Edition* with Kevin Anderson. Published in 1966 the foreword to that edition was written by the late Judge Jethridge who said:

> For this edition Mr Anderson [has a] lucid collaborator Mr Rendit, whose knowledge of the subject, gained from extensive experience as counsel before the Board, makes him an ideal choice for the role vacated by Mr Beach.

His Honour was also an independent lecturer in professional conduct at Melbourne University from 1967 to 1977 and a member of the Board of Examiners. Therefore he was well versed in professional conduct upon his appointment in 1977.

Because of his long experience in the jurisdiction he was prevailed upon by the Chief Judge to sit on the Workers' Compensation Board from 1978 to 1979 as Chairman and again in 1980 to 1981 as Deputy Chairman.

He married Caroline Kelly on 23 March 1985 and is said to have never forgotten an anniversary. Honour's recreations include music, boating and his holiday home at Blairgowrie. His Honour recently attended a football match at the MCG between Collingwood and Melbourne. He could not be categorised as a regular viewer of the Demons as he announced that the last time that he had attended a football match was in 1948 when he witnessed the Essendon–Melbourne grand final. He did remark that the Melbourne Cricket Ground looked somewhat different.



Judge Peter U. Rendit

Over the years as counsel His Honour appeared in a number of important reported cases including *Nicholas* v. *The Victorian Railways*, as junior to the late E.F. Hill, and a case on hearing loss that was said to be the format of the leading case of *Stevenson* v. *Buchanan & Brock*. Other important cases were the *Estate of Patterson* v. *The Union Steamship Company* against E.F. Hill, *Geresy-menk* v. *MCC* before Judge Harris, Jack Wood and John Dynon.

It was not only in the field of workers' compensation, and later accident compensation, that His Honour made his mark as a judge. His judgments in the common law area were also as lucid and erudite as in the jurisdiction in which he mainly practised.

At his recent farewell many stories were told about His Honours' experiences on circuit. At his welcome His Honour said that he feared that there had been a repeal of the "Old Pals Act" whose provisions forebade the repeating of circuit stories in Melbourne. His Honour noted that the repeal had been passed by him unnoticed but stated that he'd had a dark foreboding about likely treachery and an evening up of the score or simply a sadistic desire to observe his unexpected uncomfortable squirming as the tales were told.

His Honour stated that he had sought advice from an unknown legal quarter as to how to deal with the scurrilous disclosures. His Honour stated that his instructions were:

> They are gentlemen and gentlewomen and would not break faith with me for I have always enjoyed circuits, bringing, as it does, the Court close to the local profession and to those appearing before it to an extent not achievable in Melbourne.

However, he was sternly warned, beware of wolves when hunting in packs. Make a "no comment" answer.

Therefore toward the innocent occasions that were referred to at his welcome and at the later dinner held in his honour, His Honour stuck to the firm view of "no comment".

His Honour will always be remembered as a complete gentleman and his loss will be greatly felt to the profession.

Speech by His Honour Judge Peter U. Rendit

Delivered at a dinner at the Victoria Club on 14 October 1999. The dinner was hosted by the Accident Compensation Bar Association to mark his then imminent retirement.

Mr Parrish, Your Honours, Ladies and Gentlemen.

I address Mr Parrish in a representative capacity, in the absence of the chairman of your association, Mr Robin Gorton QC, who is engaged in a renascent experience in Italy at this time, and in a personal capacity, as the principal organiser of this occasion.

May I say at the outset how honoured I am that you have seen fit to hold this dinner for me. The proposal for such an occasion, when first mooted by Jim Parrish with me earlier this year, was naturally pleasing. However, the period of gestation was lengthy, and I wondered whether my performance on the bench after that initial enquiry, which of course was made then for the purpose of securing this venue for tonight, would cause the invitation to wither on the vine of the first approach. Did I thereafter have to please in court my future hosts, and, if so, how could I please them all when, before me, they were in contest with each other?

I thought at the time that my predicament was a great argument against probationary and fixed-term judicial appointments.

Farewell occasions are ones when the retiree looks at the assembled numbers and asks himself are they here to make sure that the retiring judge is actually going, or are they present with genuine warmth and affection. This is the dichotomy for the retiree; for him there are no halfway houses between these two positions.

If the retiring judge was at the Bar in the fifties and early sixties, he will inevitably recount the farewell given to a judge who reached the statutory retiring age in the early sixties. He was not a well-liked judge, at times pompous, ponderous and pedantic, and rather meddlesome in the conduct of a party's case. Needless to say, most who appeared before him had little of good to say of him. When the day of his formal court farewell arrived, the Bar Council was so concerned that no one would turn up, that it sent a clarion call throughout Selborne and other chambers calling on members of the Bar to attend, so that it could not be said that the Bar had been disrespectful to the retiring judge. Well, the Bar responded magnificently; it was a full house, and even I was there. As one member of the Bar was leaving the court he was asked why he had attended. He replied "To make sure that the bastard was really going."

We who practise or have practised in the area of workers' compensation and accident compensation are a special breed. The work, complex and unending, is not well understood or appreciated by those who work in other areas of the law.

I am not unmindful that the organisers of this dinner resorted to similar tactics, as a notice in the lifts of Owen Dixon Chambers and perhaps elsewhere was put up, in effect sending out a clarion call for attendance at this dinner. Well, may I say it is clear from the attendance tonight that the Bar of today has the same *esprit de corps* as the Bar of the early sixties.

May I thank Lyn Boyes for his most generous remarks concerning me, although I must confess they were rather overlaid with the unamusing calumny with which you were regaled. Let me say, I forgive him and those of you who passed on your personally coloured interpretation of these neo-fictitious events.

We who practise or have practised in the area of workers' compensation and accident compensation are a special breed. The work, complex and unending, is not well understood or appreciated by those who work in other areas of the law.

When I look back at the judges before whom I appeared at the Workers' Compensation Board, the one who looms large in my memory is Judge Stretton. Workers' compensation legislation was first enacted in Victoria in 1914. It then formed part of the jurisdiction of the County Court, and remained so until 1937 when a workers' compensation board was established with Judge Stretton as its chairman. The judge would sit with two lay members, one an employer/insurance company nominee and the other a Trades Hall Council nominee, at premises in Bank Place. Stretton was a large and kind man with a great sense of humour, but with a rapier tongue. He was renowned for his prose, especially the introductory section of his report into the 1939 bushfires, which was much studied in schools for its use of language which vividly created the hot moisture-sucking atmosphere and the tinder-dry forest floor that existed immediately prior to the fires breaking out. Judge Stretton would often adjourn in the course of the morning, ostensibly to allow settlement discussions to be had, but he in the meantime would have a cup of tea or coffee. He would invite counsel in to join him, especially if it was counsel who had just started to appear before the Board.

I earlier referred to his rapier tongue, and perhaps this is best illustrated when on one occasion the retiring judge whom

I previously mentioned, tackled Stretton along the lines of: "It has come to my ears that on a recent occasion you said something disparaging about me. I'm sure you did not, and I'd like to hear your assurance that you didn't." Stretton thought for a while. The other judge prompted him by mentioning the supposed occasion. "I remember being present," said Stretton hesitantly, "but I didn't say anything." And then: "Ah, I remember now. I assure you I did not say a word. Someone mentioned your name, and I joined in the general laughter."

Stories about Stretton are endless. The next judge I wish to mention is Judge Gamble. He was a silver-tongued orator with a great command of language who could sway a jury to his way of thinking, if he were so minded, the more so if a party was an attractive young lady. Outside court he was an elegant rake and stories abound as to his various exploits, the nature of which I will leave to your imagination. Then there was the kindly Leo Dethridge, before whom I had my first criminal trial in No. 3 courtroom in the old High Court building. They were the judges of the Worker's Compensation Board when I first went down there.

Of course, later there were others, especially when the Board moved to the H.C. Sleigh building on the corner of Bourke and Queen Streets, and then to Marland House. The first lay members that I met were Messrs Parkes and Wilkinson, but the two that stood out were Jack Wood, the Trades Hall nominee, and John Dynon, the insurance nominee. I think Jack Wood was an outstanding person, who, if he had done a law course, would have matched most in the jurisdiction, as he had a sharp intellect and did not practise a blind acceptance of every worker's claim, but was able to see the persuasiveness of a case against a particular worker, when it was there, but if it wasn't, then the worker had a strong ally. No one could complain about that.

The barristers who appeared before the Workers' Compensation Board in those days were men of high calibre. One need only look at the early reports to see this. Among them were D.I. Menzies, George Lush, Cliff Menhennit, Frank Nelson, Peter Murphy, Clive Harris, Dick McGarvie, Dick Griffith, Xavier Connor, John Keely, to mention just a few who graced the Bar table in those days in the compo jurisdiction.

But for me, the one who stood out even in that company was Ted Hill. To my mind he had no peer, and fought ferociously for his client, especially if his client was the underdog and impecunious. It was not uncommon in appropriate and deserving cases, for him to decline a fee. He was legendary, and took his combative style to the Privy Council, where one Law Lord, who attempted to deride and ridicule his case, met Ted Hill at the peak of his indignation, with Ted telling the Law Lord that he would not have come halfway around the world to present the case if he did not think it had great merit. Whilst this exchange was going on the other Law Lords sat back, enjoying their colleague getting his comeuppance from a colonial, and a communist to boot.

I had the privilege of being his junior on a few occasions, but mainly of being an opponent. He understood where I came from — the Baltic part of my ancestry. He once said to me as we discussed this, without referring to the invasion of the Baltic states by the Russians during the Second World War, "Bloody Russians". He was at that time aligned with Peking.

In 1985, the Workers' Compensation Act was replaced by the Accident Compensation Act. Whilst the Workers' Compensation Act needed some amendments, that is all it needed. Nevertheless the new regime itself heralded a constant tinkering with the Act. It is a sad commentary that since December 1992, when Reprint No. 3 came out, there have been six other reprints in the space of seven years. Under that Act, the Accident Compensation Tribunal was established. The Tribunal itself did an excellent job, but, as I am informed, rorting of the system occurred in the layers of the hierarchy beneath the Tribunal, and it was this together with the tinkering which gave the compensation scheme a poor name.

In 1992 the Accident Compensation Tribunal was abolished. It was a disgraceful action on the part of the government, and contained a threat to the independence of the judiciary generally. Good men had given up their practice to take a judgeship on the Tribunal. Sacrifices had been made, lives reorganised and fashioned on the basis that their tenure was secure and that at the end of their term of office they would receive a pension. Most of these persons have now overcome their shabby treatment, but some still live with the scar from it. In 1992 the jurisdiction was returned to the County Court, and I must record the importance of the work of Judge Just during this transitional period of establishing the Accident Compensation jurisdiction within the general jurisdiction of the County Court, and generally of his interpretation of this difficult legislation.

I have said all this to indicate the fine tradition that has been handed to us by our predecessors. The Accident Compensation Act is important legislation which is enacted for, amongst other things, the safety of persons in the workforce, the provision of compensation to and the rehabilitation of persons injured at work, and, as such, commands us to apply diligence to our labours. Times are now hard.

Bureaucrats have supplanted professional leadership, and the responsible minister has not been interested in our views; there is the very unsatisfactory Medical Panel procedure, which fragments the legal process at the expense of the litigants.

But I say to you, there will be a change, a change which will put in place a fairer compensation system where the emphasis is not on economic rationalism but on the welfare and wellbeing of the injured employee, bounded only by the community's financial capacity to meet the cost of the community's legitimate expectation in this regard, and not governed by bureaucratic or economic criteria. It will not be a return to the rorts system of the late eighties. It is in the future, but at that time, you as practitioners hopefully will seek opportunities to be pro-active in the input process and in the obtaining of a return to court resolution of claims as causes, and court control of associated matters.

When that time comes, remember those men of stature to whom I have previously referred, and take on their mantle, and act as you know they would act. You must once more assert your leadership role in society and inform the community, the politicians and the media of those matters of which you have peculiar knowledge by reason of your practice and experience in this area and continue to do so, until, perforce of the matters you raise and the soundness of your arguments, you are heard. This will dispel any misinformation or misleading information about accident compensation and its dispute resolution, which may then be current in the community. If you do this, then

the enduring tradition of the Bar and of the wider profession will be upheld. This task is your duty.

Today I received the sad news of the death of Kevin Anderson early this morning. Kevin was a most endearing robust and colourful person who had a myriad of interests. For us here, it is the writing of his book on the Workers' Compensation Act which primarily brings mention of him tonight. He, of course, appeared before the Workers' Compensation Board from time to time. The book was widely used. When I attended the First Lawasia Conference in 1968 in Kuala Lumpur, local practitioners would constantly refer to the book. In fact, at the Law Council Conference in Perth in 1973, Kevin and I were standing together when a local practitioner said, "Why there is Anderson and Rendit". His passing denotes the close of a chapter in the continuing story of Workers' Compensation.

I see Tom Mees and Frank Ellis here, old friends and adversaries. For me, their presence, as well as that of Mr Justice Ashley, adds very much to the occasion. I regret very much that Bill Magennis and Frank Costigan, who were intending to come, were unable to do so at the last moment.

Let me finish with two stories.

The first relates to the use of language and the know-all quality of some judges. Keith Aicken was appearing in an appeal before the High Court. The appeal concerned margarine. In the course of the morning session he argued his case, referring to the substance as mar'garine. Mr Justice Kitto, who was a difficult man, was a member of the court on this appeal. He said to Aicken that the word is mar'jarine. Aicken thereafter used the preferred pronunciation of Kitto J.

Following the luncheon adjournment, Aicken returned to court and said that before he continued with his argument, he wished to address Kitto J. He informed the judge that over the luncheon adjournment he had consulted the Oxford Dictionary and that this revealed that the correct pronunciation was mar'garine, and that the pronunciation mar'jarine was used by the lower and common classes. He then reverted to his original pronunciation, with Kitto J sulking for the remainder of the case.

The other story concerns Professor Wright, and is to be found in one of Gillespie-Jones' *The Lawyer Who Laughed* books. Professor Wright was the Professor of Physiology at Melbourne University between 1939 and 1971. In 1971, he became Director of the Peter MacCallum Institute. When opposed to Ted Hill in a cancer case, you would find Professor Wright among his medical armoury. Professor Wright was known as Pansy Wright, but his name was really the opposite to what he was in actual life. He was a fearless man, and often advocated unpopular causes. He was not afraid to speak his mind.

On the occasion which I wish to relate, he was lecturing to his class at the university. He was speaking of genetics and heredity, how the form of the human body can change over a period of time, perforce of the environment or of the constant performance of the same activity. When he had completed his lecture, a smart young student said to him that he could not see how what he was saying was true. The student said, "Look at the Jews. They have for thousands of years been practising circumcision. No Jew has been born circumcised." Professor Wright is said to have replied, using a little of poetic licence, "For your answer I would refer you to Shakespeare's *Hamlet*, where the lines appear 'There is a divinity that shapes men's ends, rough-hew them as you will.'"

However, may I give you the precise quotation, for it sums up where we are today in this jurisdiction and where we can hope to arrive:

Act 5, Scene 2, Line 10:

There's a divinity that shapes our ends,
Rough-hew them how we will.

Thank you for honouring me tonight, and extending your generous friendship towards me which I reciprocate to you all most warmly.

For a Scot, He is an Exceedingly Gay Person

STATESMEN. No. 680

THE LORD ADVOCATE

Andrew Graham Murray is the eldest son of the late Thomas Graham Murray, who was for some years Crown Agent for Scotland. He, being partner in Tods, Murray and Jamieson, the biggest firm of Writers to the Signet in Scotland, very naturally sent his son to the Scottish Bar, via Harrow and Cambridge. The son disappointed his friends at the former place by doing no work at the latter; but when he was called to the Scotch Bar at the mature age of twenty-five (which was two-and-twenty years ago), his own wit and his father's support made him known at once; while his ability as a cross-examiner, and the celerity with which he picked up the points of the most intricate case, have since brought him to the top of the tree. He was a Queen's Counsel only five years ago; but he was appointed Solicitor-General when Lord Darling was put on the Bench, and last year he became Lord Advocate, in succession to Sir Charles Pearson. He has been Sheriff of Perthshire; and in Parliament he is the Conservative elect of Buteshire.

He is so fond of sport that he studies each of its branches as though it were an exact science; for he is a Scotchman. He is a good shot, a keen golfer, and a precise billiard player; but although he has driven a tandem up to the Parliament House, he has never been seen on the top of a horse. Yet he rides a bicycle. Being devoted to dancing, he goes out a great deal; and although he has a grown-up family he can give most young men points as a keeper of late hours. He is, indeed, so hard that he can dance till five in the morning and come up smiling in Court before ten; while he has been known to leave a ball at two, get up a case, and be dancing again at four. He is popular in the Parliament House; he has a good head, and his knowledge of Caledonian affairs is unplumbed. In the House of Commons he made his mark on the Scotch Land Bill; but being a Harrow boy he has sent his son to Eton. He is very unlike his father, and, for a Scot, he is an exceedingly gay person.

He can mend a bicycle.

Extract from *Vanity Fair*,
22 October 1896

Aaron Ronald Castan

Born 29 October 1939
Died 21 October 1999

ON 21 October 1999, eight days before his 60th birthday, our best friend died.

For over 40 years our lives had been intertwined. With his reassuring presence, his powerful moral compass, his remarkable integrity, his clear vision of justice and his gentle unchanging goodness, he helped change us for the better.

Our grief over his untimely and unexpected death was shared by many in the legal and in the indigenous communities with whom he worked and who were inspired by him. They were anxious that his life be celebrated and that people should be galvanised into continuing to do that which he did — working for the good of our country and everyone in it.

On Monday 15 November 1999, over 200 people attended a dinner to celebrate his service to the law and the Australian indigenous community. The Honourable Justice Michael Kirby spoke at that dinner. His address is the tribute to Ron and is printed below.

Jack Fajgenbaum
Alan Goldberg
Ron Merkel

Ron Castan Remembered

By The Hon. Justice Michael Kirby AC CMG, Justice of the High Court of Australia, at the Koorie Heritage Inc. dinner, held on 15 November 1999, to honour the memory of the late A.R. Castan AM QC.

LET WORLDS COMBINE

Let these two worlds combine.
Yours and mine.
The door between us is not locked.
Just ajar.

WE reach into poetry to express our thoughts about the life and work of Ron Castan. There is something in poetry and music in their rhythms, rhymes and harmonies — which help us to transcend ordinary expression. So I reach for the poem of Jack Davis, an Australian Aboriginal poet.[1] It is a poem written for the worlds of Aboriginal and non-Aboriginal Australians. But it applies equally to the worlds of Jews and Gentiles; men and women; Anglo-Celts and later migrants; gays and straights; old and young. The worlds which Ron Castan shared with all of us:

There is no need for the mocking
Or the mocked to stand afar
With wounded pride
Or angry mind.
Or to build a wall to crouch and hid.
To cry or sneer behind.
****
Your world and mine
Is small.
The past is done.
Let us stand together,
Wide and tall
And God will smile upon us each
And all
And everyone.

I can remember the first time that I met Ron Castan. It was in Sydney in the 1980s. It was at a function organised by the Friends of the Hebrew University of Jerusalem, to which he was to devote much time. He was already a leading member of the legal profession of Victoria. He came to the Sydney dinner as the newly elected President of the Council for Civil Liberties. I think the organisers had expected only one of us to accept. But we both did. Each of us spoke about issues touching liberty.

As I watched Ron Castan make his address — with fire and passion combined in equal measure with intellect and feeling — I asked myself: who is this restless spirit? Who is this radical man so different from my Sydney stereotyped image of a Melbourne silk with their envied rosettes and their studied politeness? I could see that I was in the presence of a man with a mission.

As I looked at Ron Castan he seemed to be a person on the fast track for appointment to the senior judiciary. When Sir William Deane in late 1995 was appointed Governor-General, it could easily have happened that Ron Castan might have been appointed in his place to the High Court of Australia. Justice Deane was, after all, a leading expositor on the Court of the law as it affected Aboriginal Australians. Ron Castan was the leading advocate in the well of the Court for Aboriginal reconciliation through law. So the call could readily have gone to him. But on 14 December 1995 the Federal Attorney-General telephoned me. History had another plan for Ron Castan.

Everyone in the law knows that the common law system shares its laurels between the judges and the advocates. It is advocates, as much as judges, who shape the destiny of the common law. By their imagination, learning, courage and forensic skills, advocates create the agenda and map the course of the greatest legal developments. Ron Castan was to be one of the most important of the cartographers. His legacy is indelible.

Before my arrival on the High Court, he had already made his mark in many cases such as *Salemi*,[2] an important decision in the field of migration and administrative law. In my time on the Court I saw him in many cases, large and small. He appeared in the *Levy Case*[3] to advocate the extension of a constitutional immunity from legislation that would inhibit free speech and public debate. The last case in which he ap-

peared before the Court was of quite a different character. It was the *Figgins Case*[4] which concerned little more than the land law of the State of Victoria. It had climbed to the High Court through the decisions of an arbitrator, a single judge and the Victorian Court of Appeal. Ron Castan won that case. There was no real passion about it. It was just technical land law. It is important to understand this about him. He was a fine, skilful and knowledgeable lawyer. He had the talents to make the most technical questions come alive.

Aaron Ronald Castan AM QC

Yet the biggest contribution which Ron Castan made to the shape of Australia's law, on the brink of a new century, was in the form of the great cases which restated the legal relationship between Australia and the Aboriginal and Torres Strait Islanders whose forebears were in this land before the settlers came. In two hundred years time, and more, they will still talk of *Mabo*.[5] There was no more radical design than that which Ron Castan conceived with his colleagues to rewrite 150 years of settled land law. It was a plan breathtaking in its boldness. It challenged fundamentals. It did so in an area traditionally resistant to change in every legal system — rights in land.

How easy it might have been for the Court to have taken a tiny step, a mere toehold towards a new legal principle. To have held that there was something special in the Murray Islands off the coast of Queensland. To have held out the hope that later, in a hundred years perhaps, a larger and wider principle would emerge in the manner of the common law — from precedent to precedent, as Tennyson said. But instead, the Court, beckoned by the advocacy of Ron Castan and those of like cause, rewrote the major premise. In a moment, 150 years of *terra nullius* was cast aside. A new chapter in the legal rights and national dignity of Australia's indigenous peoples was begun.

Mabo was decided before I joined the High Court. But soon after I arrived came a new test, equally important, in the *Wik Case*.[6] This was the case in which the idea written in *Mabo* was to be extended beyond theory into practice. This was the claim to push the *Mabo* principle into highly practical relevance in the vast areas of our continental country over which pastoral leases had been granted. Ron Castan helped to conceive the idea of *Wik* and to draft its pleadings. In the end he was not its advocate but his mind was present in the concept. The Court was narrowly divided and as is known, the Wik succeeded by the narrowest of margins: four Justices to three.[7] When in 200 years lawyers and others in Australia talk of the critical turning points in our law, *Mabo* and *Wik* will surely be amongst them. And then they will talk of the advocates who conceived, supported, organised and achieved these successes. Ron Castan will be remembered.

He was, of course, always a slightly mischievous advocate. Years ago, when the practice of court dress in Australia began to change, the High Court laid down the rule that barristers appearing at its table should dress in the manner approved by the Court by which they were admitted. In his last case before the High Court, a message was sent to the Justices by Ron Castan. It was received moments before the hearing began. Could he please have permission to appear in Court without a wig? Somewhat provocatively he added, "In the same manner as the Justices themselves." Ashen-faced, we passed his note one to the other. One Justice, I will not reveal her identity, suggested that we could scarcely insist upon the wearing of a wig when we had abandoned it ourselves a decade earlier. As sometimes happens (you may have noticed) there was a difference of opinion amongst the Justices. There were dissenting voices. But the message went back: "If you wear the rosette, you wear the wig." As we sailed into Court, there was Ron Castan at the podium with rosette and wig firmly in place; and a large smile to greet the Justices.

THE LESSONS OF LIFE

As we reflect upon Ron Castan's remarkable career, we are bound to ask why he became the man and the advocate he was. Why did he not just take the highly profitable path of the commercial silk, with fat briefs packed with trust deeds and conveyances in vellum? What rescued Ron Castan from the life of elaborated debt recovery, which is what most of the biggest commercial cases really involve? A life such as his demands that we answer these questions for they are important for an understanding of the law as a profession:

- The first lessons he learned in life were from his parents. From his late father Mossie and his mother Annia, now in her ninetieth year. I am glad that she is present to hear the praise of her son and the love and respect which so many held for him. The values which his parents, Russian Jewish immigrants, instilled in him lasted all his days. His forebears and those of his wife Nellie teach us the fearful losses which the world suffered in the Holocaust and the high moral obligation

we have to prevent its repetition, whether in large and small ways. This the young Ron would have come to appreciate. These were lessons that endured.

- As a Jewish boy at the Carey Baptist Grammar School in Melbourne he learned what it was to be different. Each one of us is different. At school, I too found that I was different. A civilised life teaches that difference is the glory of the human species. As the mind of Ron Castan, schoolboy, was formed, it came to appreciate the richness to be absorbed from different cultures and different identities. Avidly he kept his mind open; and he did so to the end.
- In his professional life it was open-mindedness that helped him to take the leap of the intellect that was to prove so critical in the *Mabo Case*. In Lae in Papua–New Guinea in 1973, led by Bill Kearney QC, he took part in a claim by two groups of indigenous peoples against the Crown. They sought to assert their title to land in the districts of their ancestors. Lionel Murphy once told me that the greatest thoughts that ever occurred in the law happened by serendipity. They do not occur by the processes of logic. They do not emerge by linear reasoning. They spring into the mind from the most unusual sources and at the most unexpected times. And let it be acknowledged that there are real merits in a judge or a lawyer having as a spouse or partner a person who is outside the charmed circle of the law. This is certainly true in my case with my partner Johan. It was also true in Ron Castan's case with his wife Nellie. Nellie has escaped the seductive wiles of the law. When she and Ron Castan were talking about the claims of the native peoples in Papua–New Guinea, she demanded to know why a similar claim could not be mounted for the Aboriginal peoples of Australia. Patiently, Ron Castan began to give the reasons. A Privy Council decision. A hundred and fifty years of case law. Accepted legal doctrine. Statutory provisions enacted on that hypothesis. On and on went the reasons. But Nellie's persistent questioning entered Ron Castan's conscious and unconscious mind. How valuable it is to have someone say: "You are a prisoner of your own absurd hypotheses! Think again! Challenge received wisdom when the world has moved to another plane! Escape the prison of your mind!" This Nellie did and Ron Casten listened. In two hundred years the role of Nellie Castan and of other questioners will be acknowledged. We should all question received wisdom. Sometimes it was right and wise for the time in which it was propounded. Sometimes, viewed with contemporary eyes, it is seen to rest on dubious foundations.[8]

But instead, the Court, beckoned by the advocacy of Ron Castan and those of like cause, rewrote the major premise. In a moment, 150 years of *terra nullius* was cast aside.

- Ron Castan also learned lessons from his work in civil liberties. In his work with disadvantaged people. Drug dependent citizens. Gays and lesbians. Victims of race hate and official oppression. His mind ventured beyond Australia. He became concerned in the rights of the Tibetan people and made a true friendship with His Holiness the Dalai Lama. At the time of his death, he was studying ways in which he, and other Australian lawyers, could support the rebuilding of the rule of law in East Timor after its act of self-determination. His was a mind alert to discrimination and disadvantage in all of its manifestations everywhere.
- But possibly the most profound lessons were learned once Ron Castan became the advocate general for Aboriginal and Torres Strait Islander people. From them he learned lessons of spirituality, forgiveness and the never-ending quest for reconciliation. But he also learned of the demand for justice, of a determination to achieve fairness and of the affront to our history which would never be quietened until the wrongs of the past were corrected. He felt the injuries to the indigenous people with a special sensitivity because of the injuries that had been done to his people in Europe in his lifetime which too many ignore or even deny.
- And then, in the small circle of his family, he learned the lessons of intimate love. From Nellie, his wife, for his children Melissa, Lindy and Stephen, and for his six grandchildren who were the joys of his last days. None of us, however close, ever enters that special private space of a person's closest family. It is in that space that Ron Castan still lives. He is alive in the genes and in the hearts of those he left behind. Kath Walker, Oodgeroo of the Noonuccal, explained, in a very Aboriginal way, the manner in which love and sorrow are entwined. She called her poem simply "Song":[9]

> Life is ours in vain
> Lacking love, which never
> Counts the loss or gain.
> But remember, ever
> Love is linked with pain.
> Light and sister shade
>
> Shape each mortal morrow
> seek not to evade
> Love's companion Sorrow,
> And be not dismayed.
>
> Grief is not in vain,
> It's for our completeness.
> If the fates ordain
> love to bring life sweetness,
> Welcome too its pain."

ABIDING STRENGTHS

I asked colleagues to define the abiding strengths of Ron Castan. The answers they gave differed.

- Some searched in the memory for his intellect. He was very clever. He was quick on his feet. He won the Supreme Court Prize, you know. He was well organised. He was a good technical lawyer. All of these things could be seen deployed in the well of every court in which he appeared.
- Some preferred to identify his professional skills. He was courageous, a wonderful thing in an advocate. He was bold, as Patrick Dodson has averred. He was in many of the big cases. This gave him the intellectual capital and the skills which are irreplaceable and which can only be gained from experience. He was very canny and wily. He was imaginative. He made the judges, his opponents and ultimately all Australians, think freshly.
- Some referred to his personal qualities. His heart and mind were in gear. He had a rare capacity to bring warring factions together. He looked at

judges with a smile as they sent thunderbolts that seemed to destroy an argument. Never dismayed, Ron Castan deftly avoided most and occasionally lobbed a thunderbolt in return.

- But for me the essence of him is not intellectual. It is not professional. It does not even lie in his sterling personal qualities. Judges and advocates come and go and all of these qualities, in different proportions, are common enough. The essence of him was something spiritual. He had a very big spirit. It was big enough for the Jewish people and the immigrant communities from which he himself had come. It proved big enough to embrace the indigenous people whose true champion he was to be. It was big enough for drug-dependent people, down and outs and those who were politically incorrect. It was big enough for his gay and lesbian fellow citizens. It proved big enough for Tibetans, far away, denied their own homeland. It was big enough for the East Timorese and for our Indonesian neighbours, struggling to embrace constitutionalism. It was even big enough (as the *Levy Case*[10]) shows to include ducks and other animals. For Ron Castan, all sentient beings shared the planet. All life was precious. From his parents' knees to the end, he exhibited that element which was taught to him as a child as *Chesed* — the Hebrew word for God's loving-kindness in which all of His creatures have a chance to share. Share, Ron Castan, certainly did. His was a spiritual journey of love unbounded.

And we so cherish Aaron Ronald Castan. Member of the Order of Australia. One of Her Majesty's Counsel learned in the law. Honorary Doctor of Laws. Australian citizen concerned about justice for all. Friend to the Aboriginal and Torres Strait Islander peoples of Australia. Foe to discrimination. We salute his memory. We will keep it as a beacon before us. And lawyers will keep it bright before them, as an example of the best that the legal profession in Australia offers.

Notes

1. J. Davis, "Integration", in Lorraine Mafi-Williams (ed.) *Spirit Song: A Collection of Aboriginal Poetry*, Omnibus Books, Sydney 1993.
2. *Salemi* v. *MacKellar* [No 1] (1976) 137 CLR 388; *Salemi* v. *MacKellar* [No 2] (1977) 137 CLR 396.
3. *Levy* v. *Victoria* (1997) 189 CLR 579.
4. *Figgins Holdings* v. *SEAA Enterprises* (1999) 73 ALJR 720.
5. *Mabo* v. *Queensland* (1988) 166 CLR 186; *Mabo* v. *Queensland* [No 2] (1992) 175 CLR 1.
6. *Wik Peoples* v. *Queensland* (1996) 187 CLR 1.
7. Toohey, Gaudron, Gummow and Kirby JJ; Brennan CJ, McHugh and Dawson JJ dissenting.
8. cf *Victoria* v. *The Commonwealth* (*the Payroll Tax Case*) (1971) 122 CLR 353 at 396–7 per Windeyer J.
9. Kath Walker (Oodgeroo of the Noonuccal) in *The Dawn is at Hand*, Jacaranda, Brisbane, 1966.
10. *Levy* v. *Victoria* (1997) 189 CLR 579.

Sir Kevin Victor Anderson QC

A tribute by The Hon. William Kaye, 20 October 1999

THE law and the law courts occupied 52 years of Kevin Victor Anderson's 56 working years.

In 1929, Kevin at the age of 16 commenced earning his livelihood in the field of the administration of justice when on leaving school he was appointed Clerk of Courts, sitting daily in the Melbourne Court of Petty Sessions. Later, while a part-time law student, he worked in the common law branch of the Crown Solicitor's office. Graduating LLB in 1937, he was admitted to practise as a barrister and solicitor.

His involvement in litigation was suspended during the World War II years when he served as a Lieutenant (Special Branch) in the Operations Division and Naval Intelligence of the Royal Australian Navy. He was present in Tokyo Bay at the Japanese surrender on 2 September 1945.

Following his discharge from the Navy, on 10 January 1946 Kevin signed the Bar roll and resumed his active participation in litigation. While reading with Clarence Stafford (later Judge Stafford) in Selborne Chambers, Kevin appeared as counsel almost daily in Courts of Petty Sessions. He quickly gained the admiration and respect of young counsel for his knowledge and application of the law and familiarity with court procedures. It all seemed to have come so naturally to him. He was a forceful yet cheerful advocate, lessening tension in serious situations between hostile parties and counsel by his unfailing but appropriate sense of humour. Those characteristics also marked his future roles in the law courts and in the corridors of Selborne Chambers and later Owen Dixon Chambers.

Kevin quickly developed a large practice in common law areas, appearing frequently in the higher jurisdictions — County Court and Supreme Court.

He became the mentor of eight junior counsel who read with him. They included one who subsequently became and now is a judge of the Supreme Court in the Appellate Division (Mr Justice Brooking), a Family Court judge (Mr Justice Fogarty), a County Court judge (Judge Dyett), and four Queens Counsel.

Sir Kevin Victor Anderson QC

Then, in October 1962, Kevin was appointed Queens Counsel, after which his busy practice in the superior courts continued to increase.

In 1965 as Chairman of the Scientology Board of Enquiry, he presented to the Government his findings which provoked much public interest.

Notwithstanding the pressures of his professional life, Kevin devoted much time and energy to the affairs of the Bar and to members of the Bar, as well as those of all legal practitioners.

In his 23 years as a practising member of the Bar, both as junior and senior counsel, Kevin appeared in a variety of jurisdictions in the course of a very busy practice. Many of his contemporaries never ceased to express amazement that during those years he wrote and published four legal textbooks, each of which proved to be invaluable aids to members of the legal profession.

In addition, for 13 years he was the editor of the Victorian Law Reports, more recently known as the Victorian Reports.

For some years he served as a member of the Bar Council, becoming the chairman in 1966 and the treasurer of the Law Council of Australia. As chairman of the Bar Council, Kevin was innovative and ever mindful of the changing conditions within society and those associated with the courts and the legal profession.

An incident during his term of office is evidence of his deep concern for others. Kevin was a devout follower of his church. He also showed understanding of and respect for the beliefs of those of other religions. As chairman he followed the practice at the Annual Bar Dinner of reciting a Christian form of grace before meals. During the break in a Bar Council meeting, Kevin made the observation that for some members of the Bar, not of the Christian faith, it was not possible to identify themselves with the words of the Christian grace. He sought a form of prayer in which all, regardless of their differing religions, might share spiritually. Subsequently he adopted a new grace from a passage in Psalm 145, which he recited at the Annual Bar Dinner. This has become the traditional grace recited at annual Bar dinners. Perhaps it might appropriately become known as the Kevin Anderson Grace.

Upon reflection it maybe that Kevin in this incident in 1966 was giving expression to the spirit of the declarations made during the preceding year in *Nostra Aetate* by the second Vatican Council. Be that as it may, Kevin's conduct in this matter was consistent with his concern for the thoughts and well-being of others, regardless of race or religion. He was truly a man of great compassion.

In 1968 Kevin was appointed a judge of the Supreme Court. Throughout the following 15 years Kevin, as a member of the court, discharged his judicial duties with undiminished compassion, patience and wisdom. His courtesy and

understanding of the needs and aspirations of litigants was unfailing. He brought to his judgments, expressed with great clarity, thorough researches of legal authorities. He was a wise and most courteous member of the court.

In 1980 Kevin was knighted by Her Majesty the Queen, a fitting recognition of his services to the Law and the State of Victoria.

On 3 September 1984, Sir Kevin retired as a judge of the Court and his active life in the Law ceased. In the earliest years of his retirement, Kevin, relying on his recollection of many hitherto unrecorded incidents during those 52 years, wrote his interesting work *Fossils in the Sandstone*. It is the repository of much that will remain of interest for those seeking knowledge of the courts in Victoria during former years.

It was always clear that Kevin Anderson found his life as counsel and later as judge a totally fulfilling experience. Yet those matters were at all times subsidiary to his constant devotion to and love for his wife Claire, his six daughters and their children, and his mother and sister Bonnie.

Kevin Anderson will long be remembered by those of us who were privileged to have known him and to have shared friendship with him.

Impressions of a Junior

WRITING something impressionistic about the late Sir Kevin Victor Anderson QC evokes my memories of the days of a much smaller Bar where, at that time, Kevin Anderson QC seemed a perpetual identity.

A burly figure, Kevin Anderson was always around, a regular at lunch in the pre-Essoign alcohol-free Owen Dixon top floor. He was a friendly and avuncular presence, reliably always the same. His occasional staccato delivery was his only departure from the essence of evenness.

It was difficult to realize that this unrushed man was engaged in a remarkable and varied set of achievements. The accompanying text of the eulogy by The Honourable William Kaye AO, a Bar contemporary and a fellow Supreme Court judge, recounts them. Here, though, are some roughly contemporaneous: busy silk, chairman of the Bar Council, editor of the Victorian Reports, author of four well-used legal textbooks, loving husband and father of six daughters, backyard builder of a yacht and a dinghy . . . Kevin Anderson did all this without any evidence of fuss.

Sir Kevin's book of recollections, *Fossil in the Sandstone*, written in 1986 during his retirement, is an outstanding testament to Sir Kevin's love of his life at the Bar and his colleagues. It displays a recall of events, people and cases which is truly breathtaking. Nobody could have written such a book without having been totally immersed in their subject.

In several cases, I was Kevin's junior and, once or twice was opposed to him. Whichever it was, he was always amiable.

In one case, we were briefed together to defend a charge of rape. The defence was consent but there was troublesome evidence about a knife. My memory of that trial is of my uneasy regret about the incongruity of Kevin Anderson, of all people, having to tackle the woman in the case. She seemed a reasonable enough person and had been put upon by life in various ways. Now, Kevin had to make something else of her.

Busy silk, chairman of the Bar Council, editor of the Victorian Reports, author of four well-used legal textbooks, loving husband and father of six daughters, backyard builder of a yacht and a dinghy.

He did his work. I do not recall the eventual verdict, but I do recall sensing with Kevin his relief at being quit of the courtroom that day. As we made for the street and the afternoon daylight, the stone corridor of the Supreme Court seemed especially oppressive.

One explanation for Kevin Anderson's evenness may have been that, as a man who loved people, he invariably succeeded in surrounding himself with them. At a Bar level, he gave his time to eight readers. He, and his beloved wife, Claire, created a large family. The moving words by family members at his funeral brought out the theme of a family man who relished his role at the head of a table of well-loved and loving children and partners.

The family reflections referred often to Kevin's sense of humour. As I heard those references, I recalled Kevin during the testing time as Chairman of the 1965 Scientology Board of Enquiry. This was a highly publicized Enquiry, full of contention and competing pressures. It developed a vocabulary of its own to refer to a testing meter and other processes used by Scientology. As the Enquiry wore on, Kevin Anderson developed an hilarious patter of what seemed to be psychobabble which could be prompted about any subject. He became so adept at it that, at times during the Enquiry, I began to wonder whether Kevin had not crossed to Scientology himself. This amusement was one of his ways, I suppose, of escaping a lonely pressure. Another means of escape was to build a dinghy, and then a yacht, in his backyard.

In his love of friends and companionship, Kevin Anderson found long-term pleasure with a group of fine barristers and men who were his contemporaries at the Victorian Bar. They included (as they were at the Bar) John Minogue, Jim Gorman, Xavier Connor and Murray MacInerney.

Many stories could be told about Kevin Anderson's times with members of that group, even dating back to the days when the young Kevin Anderson was the intrepid and indefatigable leader of the Newman College Hiking Club. One story, told to me by Tess Gorman, will have to suffice here. It shows something of Kevin Anderson's unflappability.

One night, Sir Kevin (at that time) left an official function with his old friends, the ever-affable late Judge Jim Gorman, and his wife, Tess. Kevin's wife, Claire, had died not long beforehand. Although it was late and Kevin lived in

Malvern, Kevin offered to drive his old friends home to Balwyn. ("You can't let him do this, Jim." "Why not? I'd do the same for him."). Jim hopped into the back seat.

As they drove, Sir Kevin displayed to the Gormans the attributes of his new and luxurious car. Sir Kevin explained, however, that the car was really a bit more than he wanted. His reason for buying this particular car was that Claire had liked it.

They arrived in comfort. Tess Gorman describes that she and Kevin alighted from their front doors and stood at the back of the car, waiting for Jim to follow. He didn't. Instead, they heard him calling to be let out; he was locked in. As Jim Gorman became increasingly agitated, all external efforts to open the rear doors failed. Prodding at instrument panel buttons made no difference. Jim began to bounce from one side of the car to the other, pulling and pushing at handles and showing signs of marked claustrophobia. They attempted to wriggle and pull a stoutish Judge Gorman over the top of the front seats. The serious head rests made that route impossible.

Tess Gorman recalls the contrast in the scene. Her husband was trapped like a wild animal, distressed and vocal. A temporarily defeated, but totally composed, Sir Kevin stood beside her on the footpath reassuring her and the anguished face pressing against the window:

> If only Claire were here, she'd know what to do. She loved this car. It was her idea to buy it. I didn't really want it. I must do something about it.

Today, of course, an ever-decreasing number of people recall those days when Kevin Anderson QC was such an important figure around the Victorian Bar. It is easy, therefore, to overlook our debt to Kevin Anderson QC, and others, for the quality of the institution from which, sadly, they have passed on.

David Bennett

Judge Bland

HIS Honour was educated at Melbourne Grammar School and the University of Melbourne. He was admitted to practice on 1 May 1953 having served articles with Ross Grey-Smith. He signed the Bar roll on 18 September 1956. He read in Chambers with Belson, later to become Judge Belson of the County Court. His Honour always had a busy practice at the Bar. He spent much time in the criminal courts. In the last decade or so before his appointment he practised widely in common law and industrial relations. His expertise in the mysteries of the rules of industrial organisations was acknowledged by all practitioners.

His Honour lived and farmed at Gisborne for many years. He also maintained a property in the hills overlooking Noosa Heads in Queensland. His Honour and his family spent most of their vacations relaxing on the beaches in that environment.

Judge Bland

During his time at the Bar and on the Bench he paid many visits to China. These commenced long before that country became part of the international tourist circuit. His Honour contributed to the development of trade between Australia and China and his contributions in that regard were appreciated by the Australian Government and industry and commerce. His Honour played a part in the successful Chinese exhibitions shown in Melbourne of art and culture.

All of His Honour's varied interests contributed to a great breadth of experience and added to his understanding of the needs of litigants and the varied legal issues that arise on a day-to-day basis in the County Court. His Honour's temperament in court was firm and deliberate. He did not suffer fools! Always a hard worker, he was a man of strong character with a deep sense of justice. All of these qualities served the community well during His Honour's time on the Bench. His Honour died on Friday 20 August 1999 and his death is a loss to all who knew him.

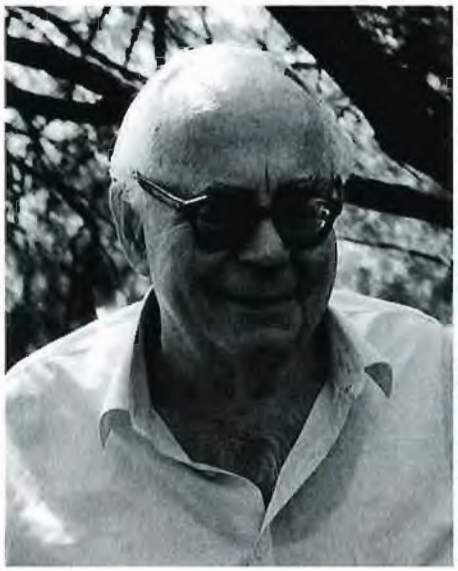
Peter Arthur Wilson

AUSTRALIANS are not an effusive people. To describe someone in superlative terms (save, perhaps, in the field of sport) generally makes the rest of us feel embarrassed. The corollary, however, is that when certain stock phrases are used — and used not in jest but sincerely — they carry a depth of meaning which far exceeds the high-flown plaudits of the mob orator. Thus, to call a man "a gentleman and a scholar" can be used jocularly, but, in the deeper sense, it can be the greatest tribute that one Australian can pay to another.

Peter Arthur Wilson who died on the 8 October 1999, aged 69, was undoubtedly, and in every real sense, a gentleman and a scholar. He was ever courteous, both in and out of court, quietly spoken and with a deep love and knowledge of the law. He was, indeed, a lawyer's lawyer.

He attended Scotch College and Melbourne University, obtaining the degree of LLB. He did his articles with Arthur Robinson and Co. and was admitted to the Bar in 1954, where he read with Olaf Moodie-Heddle. For several years when we first came to the Bar, Peter and I shared some Lilliputian chambers in Saxon House. Even then he was regarded by us junior juniors as something of an oracle, and we resorted to him for such difficult points of law as came our way. He was always patient and helpful. He had a wry and witty sense of humour, and he was an excellent companion.

Not surprisingly, his later career saw him much in demand for opinions and



Peter Wilson

advice, and he moved particularly into the field of property law. One who saw much of him in this field has described him as "the best and most knowledgeable property lawyer in the State".

He was essentially a shy person — a somewhat unusual trait amid a group which consists mainly of extroverts. It was this shyness and diffidence which prevented him from applying for silk, which he richly deserved, and which he would have held with distinction. It did not, of course, restrict the generous use of the time which he devoted to those who read with him and who still acknowledge his wisdom.

His apparently reserved nature was somewhat of a veneer, but did mean that his circle of friends was a small one, but those who penetrated the reserve found a fascinating and many-sided personality.

For he had many interests outside the law. He was well versed in classical studies and in English literature. His appreciation of music was informed and profound, particularly of the great masters, of whom he numbered Beethoven and Vivaldi among his favourites. His family shared this passion for music, and one of his daughters is presently studying as an opera singer in Italy, and we will hear more of her one day.

He was an accomplished and enthusiastic painter. For many years he acted as secretary to the "Myrniong" group of barrister painters who exhibited at Bar functions, and included in their ranks, Justice Kevin Anderson, Judge Eric Hewitt and many others.

He had the joy of a supremely successful and happy marriage to Jocelyn, herself a lawyer and presently a principal solicitor in the office of the Victorian Government Solicitor. His greatest pleasure was to be with her at their holiday home at Shoreham, and with their two daughters, Justine and Alexandra and their grandson, Raymond Peter. With them he was at his ease, unreserved, kindly, and full of fun and laughter.

His friends delighted in his company. His acquaintances regarded him with affection. He had no enemies.

Hon. Austin Asche AC

Noshir Rustomjee

NOSHIR Cowasjee Jamshedjee Rustomjee was born into a wealthy Parsee family in Bombay on 22 September 1917. He was a Parsee by race and a follower of Zarathusthra. Parsees are an ancient race gradually disappearing off the face of this earth and are presently about 80,000 in number. They were the original inhabitants of Persia (Iran) and ruled a substantial part of the known world about 2500 years ago. The two great Persian Emperors, Xerxes and Darius, were members of this race. The Muslim invasions saw them driven out of Persia and they percolated through the Khyber Pass into the north of India and down to Bombay. Although they are to be found in most parts of the world, the last substantial pocket of Parsees lives in Bombay.

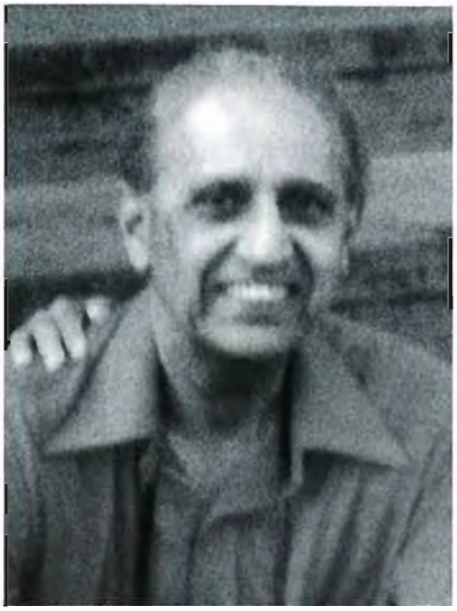
Noshir suffered a cruel blow early in his life when his father was impoverished during the Great Depression. He often recounted to me how he had to keep his trousers up with a piece of string and kept his shoes going with newspaper. These tribulations would have destroyed

a lesser boy, but Noshir soldiered on, completed his education and was admitted to practice as a Proctor of the Supreme Court of the Island of Ceylon in 1943. Roman Dutch law is the law in Ceylon (Sri Lanka) with a smattering of the British common law. The Office of Proctor is, as Sir John Young was wont to say, an ancient and an honourable office. It was the equivalent in Holland of a solicitor in England.

When the Second World War broke out Noshir, who was civic minded, joined the Royal Ceylon Navy Volunteer Reserve as a sub-lieutenant and saw active service during the war. After the war he continued to serve in the Royal Ceylon Naval Volunteer Reserve, rising to the rank of Commander.

Noshir returned to practice after the War and continued on as a proctor until the early 1950s. He was also an examiner in the Ceylon Law College, a post he held until 1971. In the early 1950s Noshir decided to chance his arm at the Bar and became an advocate of the Supreme Court of the Island of Ceylon. The advocate was a forensic pleader in Holland and the equivalent of the "Utter" barrister in England. He was later called to the English Bar by the Middle Temple in 1957.

Noshir had a large and lucrative practice in the District Court of Colombo. His passion for roses was well known and he had a substantial rose garden at his home. For reasons best known to Noshir,



Noshir Rustomjee

he decided to migrate to Australia. He was extremely well off, had a good legal practice, a beautiful home and a loving wife. In addition he wrote a substantial work on the Rent Acts in Sri Lanka which was received with approbation.

He migrated to Australia in 1974 and worked with John Kinnear and Son, for a year as a solicitor, and came to the Victorian Bar in 1975. He was then 58 years old. He had a small practice which kept him busy and enabled him to satisfy his one passion in life — horse racing. He had been a committee member of the Ceylon Turf Club and was also a member of the Victoria Amateur Turf Club. If one was to go down to his room on an afternoon during the week, one would see Noshir crouched over the top drawer of his desk. In it was a transistor radio set. He would be listening to a country race meeting with great interest.

He was a big man in every sense of the word. He had a big booming laugh, an equally big heart and he always greeted his friends at the Bar with great affection. I had the privilege of knowing him for upwards of 30 years and I never heard him utter an harsh or unkind word against anyone, a remarkable quality in a human being. He had a great sense of community service and a love for those less fortunate than himself. He was a member of the Lions Club and did a remarkable amount of work in the Club. One of the pleasures in his life was to attend the Kingston Centre every Sunday, without fail, and push the geriatric inmates around. Little did he know that he would one day suffer the same fate.

Noshir had three brain operations in 1983, 1984 and 1985 and had to leave the Victorian Bar as he was finding it difficult to cope. He enjoyed his life at the Victorian Bar where he made many friends. He died the same way that he lived, peacefully. He now sleeps the sleep of the just. He leaves behind his wife and sweetheart, Iris.

Nimal Wikrama

Carol Anne Keating

Born 17 January 1948
Died 25 October 1999

CAROL completed her schooling at Presentation Convent, Windsor. She worked as a secretary for a short time before marrying at the age of 20. She produced two beautiful daughters, Sally and Emma, who she raised in the early years on her own.

It was while working for John Keating & Associates that Carol was inspired to study law. She completed her law degree "the hard way" whilst raising her two children. Having completed her articles with John Keating & Associates she married John Keating. She then came to the Bar in September 1983 reading with the late Graeme Morrish QC and Robert Richter QC.

As with most things, Carol tackled life at the Bar with passion and vigour. In the early years like most junior barristers she did "the rounds" of the Magistrates' Courts. Those of her colleagues on the sixth floor of Owen Dixon West remember her vitality and energy, her wit and gift of the gab and the camaraderie she shared with all.

Carol's energy continued through her career at the Bar. She moved to Owen Dixon East and graduated to trial work. She was known as a fierce and able advocate specialising in criminal law, and in the true tradition of the Bar fighting the good fight, whether it be for the Defence or the Crown.

On 26 June 1985 Carol appeared in her first case for the Crown before His Honour Judge Shillito announcing "nothing known" in an adjourned bond. She became one of the first female barristers to be regularly briefed by the Crown. On 17 October 1987 it was noted Carol is "now expected to pros-

ecute trials" after completing her first legal aid trial the week before where her client was convicted and jailed. Carol was also one of the few female barristers briefed by the Crown to take circuit work. One of her loyal instructors was Jack Harris from the Crown who also briefed Carol in the early years and later teamed with her on their many circuits to Morwell. It became "their town".

Carol prosecuted her last trial on 13 October 1999 before His Honour Frank Walsh. This was 12 days before she died. Indeed she was briefed to prosecute the Bendigo circuit commencing 25 October 1999 (the day of her death) before His Honour Judge Gebhardt. She reluctantly handed back the circuit briefs the week before she died. It was Carol's courage in keeping working despite her grave illness which is an inspiration to us all.

Carol Anne Keating

In other aspects of her life Carol was a talented horsewoman. As a young woman she rode for the Melbourne Hunt Club and later bred and owned racehorses. Her passion for riding was transferred to the track. She loved the punt, the excitement and the glamour.

It is fair to say Carol's life at times was turbulent. It stood in stark contrast to her house, her home, her roses where she at times achieved a modicum of peace and contentment. Carol leaves behind her children Sally and Emma, her colleagues and friends. She has been a much loved and respected member of the Bar.

For my part I have lost a true and loyal friend. I will miss the hours spent arguing about our cases, about our lives. I will miss the fun times we had travelling overseas, drinks at the Essoign and the races when the champagne flowed freely.

Michelle Williams

108 Years Old Examination Paper for Third Year Law Students

THE editors are indebted to David McKenzie, a former member of the Bar, now with the Legal Aid Office Bendigo and to Wallace Meehan of Foley's List for the appended examination paper.

Readers may wish to test their skill — on a closed book basis.

THE UNIVERSITY OF ADELAIDE

Ordinary Examination for the Degree of LL.B. — Third Year — November, 1890.

THE LAW OF WRONGS

Professor Pennefather, LL.M., and Mr A. Gill, LL.B.

Time: Three hours

I. In what circumstances and to what extent are infants and married women, respectively, now liable as for torts committed by them?

II. Define Contributory Negligence. State the facts and decision in the case of *Davies* v. *Mann*, and discuss the principles upon which it was decided.

III. Enumerate and describe the remedies open to one who has suffered an actionable wrong.

IV. When may the defence of "leave and license" be properly raised in an action upon tort?

V Write notes on the meaning and use of the following terms: "Barratry", "Chance Medley", "Asportation", "Embezzlement", "Larcency as a Bailee", "Misprision", "Dementia Affectata", "Speaking with the Prosecutor", "Embracery", "Slander of Title", "Act of State".

VI. Define the offence of Bigamy. In what circumstances is a second marriage not felonious? Will the invalidity of either the first or second marriage afford a defence to the indictment?

VII. My neighbour has opened a mine on his own land, and in consequence of this a well of mine has become dry, and a mill of mine which has, from time immemorial, been worked by the water from it has become useless. What are my rights?

VIII. *A* is indicted for the manslaughter of *B* and acquitted. He is afterwards indicted for the murder of *B*. Can he plead *autrefois acquit*?

IX. How far does insanity exempt from criminal liability? Discuss the question fully, referring specially to the case of impulses.

X. *A*, *B*, *C*, and *D*, are rival manufacturers. *A*, *B*, and *C*, in order to ruin *D*, agree to sell the articles manufactured by them at below cost prices. Discuss fully the legality of such an agreement.

XI. Examine the classification of crimes into felonies and misdemeanours.

XII. The Glenelg Railway was constructed under the provisions of a Private Act of Parliament. If the sparks from an engine on that line escape and set fire to the property of an adjacent owner will the Company be liable? What must be proved in such a case?

Refurbishment of Courts Supreme Court of Victoria

Reopening of refurbished 13th Supreme Court, set up in part for technology hearing.

COURT No. 13 in the Supreme Court building is one of the most elegant courts in Australia. For some years, however, its magnificence has been spoiled by a partition along one wall. This year it has been refurbished to combine the old and the new. The Victorian design has been restored to its original magnificence and the latest in courtroom technology has been installed in the court to enable computerised case handling of major pieces of litigation.

The refurbished court was officially opened by the Chief Justice on 11 October this year. In a media release prepared in connection with the opening Prue Innes says of the technology which has been installed in the court: "A world-first computer system for managing trials is being developed in partnership between the Supreme Court of Victoria and Ringtail Solutions, a leader in legal technology."

It appears that, following a number of lengthy criminal trials, the Estate Mortgage case and the Aroni Colman litigation, the Supreme Court, in the words of the Chief Justice "saw the potential for a broader use of technology to allow us to deliver faster, fairer and more economic justice".

His Honour said, ". . . the Supreme Court is assisting by becoming a laboratory for the final stages of the development of the Cyber Court Book. This is the first collaboration of such a technical nature sponsored by a court."

The design of the Cyber Court Book,

13 and 10 of the

it seems, "will offer an integrated total solution for the preparation and trial of cases which require technology to assist with the document management. Parts of the technology have been used at the Longford Royal Commission and by many law firms in Melbourne".

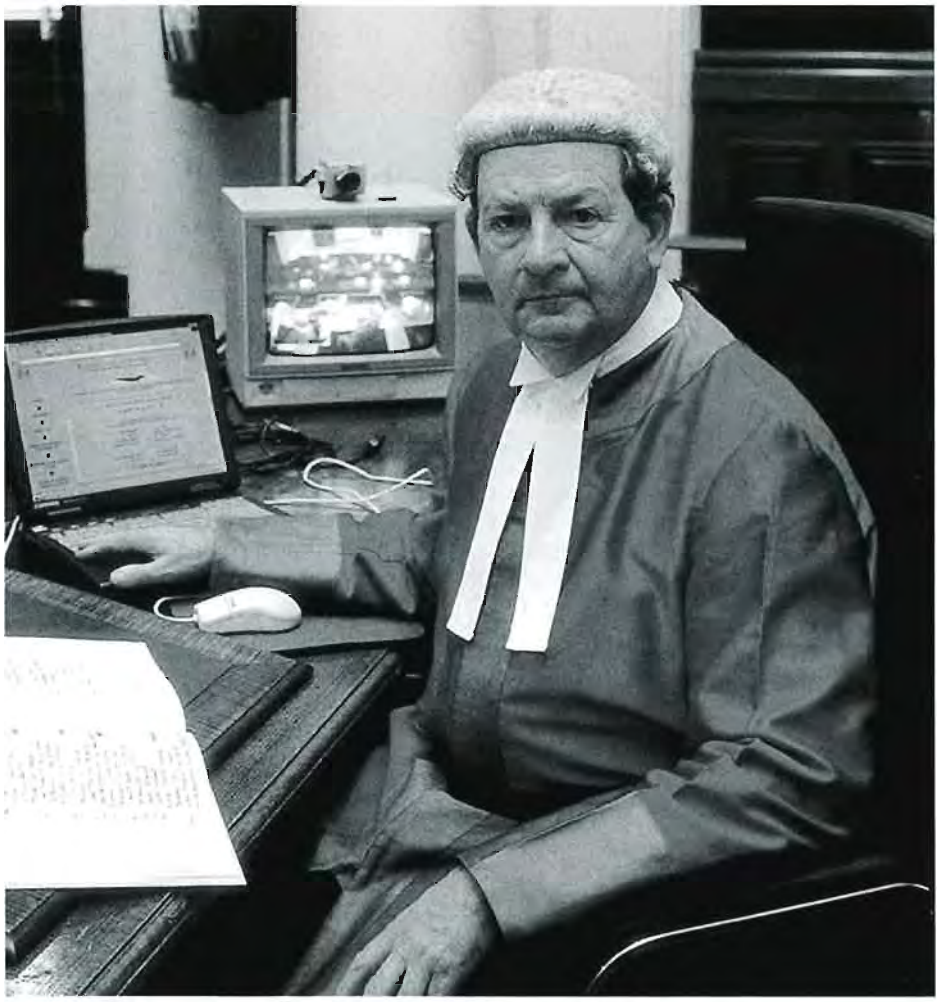
Whatever the ghosts of the 19th century judges might think of the technology, they could not be other than impressed by the restoration. The courtroom is and looks superb.

The 13th Court was designed in 1883 and among the first judges to use it would have been Sir William Stawell CJ, The Honourable Mr Justice Molesworth, The Honourable Mr Justice Higginbotham and the Honourable Mr Justice A'beckett. One cannot help wondering what these judges, from a more leisurely age, a more gentle age (at least at the top of the pecking order) and an age which perhaps saw quality of life as more important than efficiency, would make of the new developments.

Whatever the ghosts of the 19th century judges might think of the technology, they could not be other than impressed by the restoration. The courtroom is and looks superb.

Perhaps more importantly from the point of view of those of us who will be practising during the remaining 12 months of the 20th century and into the 21st, there is a court available in the Supreme Court designed to cope with the problems of "big cases" and "a multitude of counsellors". The aesthetics, although in absolute terms probably more important, merely provide us with an elegant background.

The Court and the Chief Justice are to be congratulated on this development. It represents one more "quiet achievement" among many.



Chief Justice Phillips

Chief Justice Phillips Opens the Refurbished Courts

YOUR Honours, Attorney-General and other distinguished guests, ladies and gentlemen.

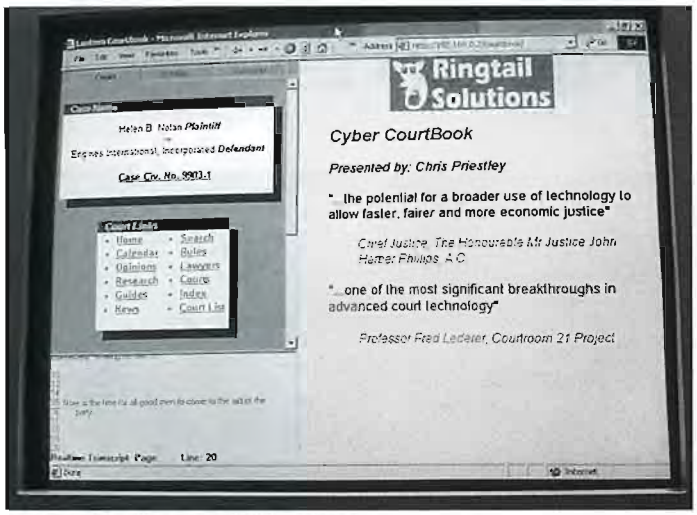
Welcome to this ceremonial opening of our refurbished Courts 13 and 10.

When they were built in 1883 these courts constituted a tribute to the skills of the architects and tradesmen who created them.

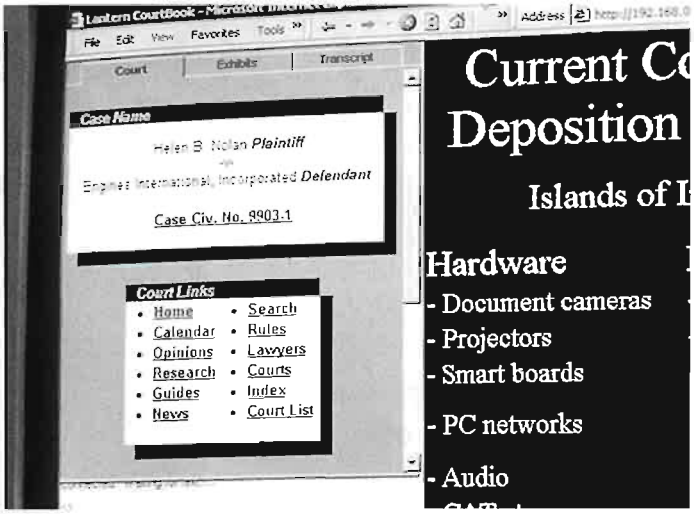
Writing in a newspaper called the *Australian Sketcher*, a journalist of the day described this court, which was then the practice court, as the most tasteful and attractive of any of the courtrooms. He wrote in complimentary terms about its natural lighting and the

Continued on page 32

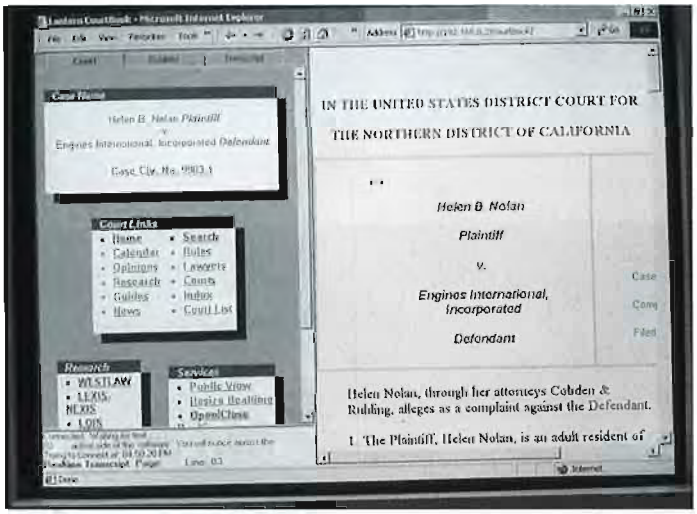
Launch of the Cyber Court Book and Re-launch of



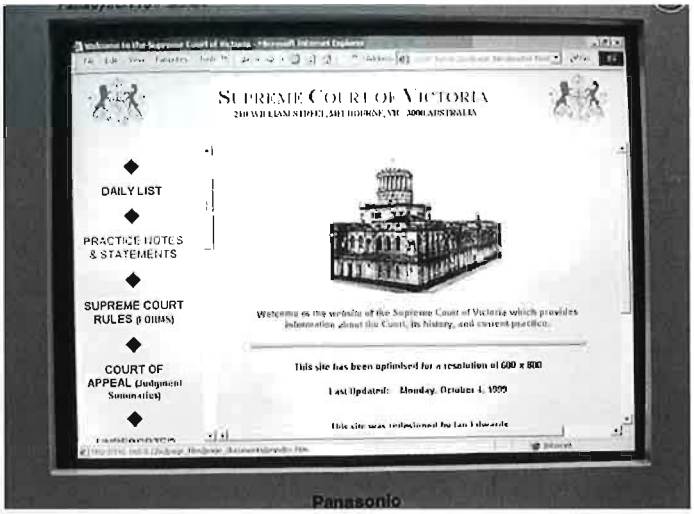
Cyber Court Book home page.



Cyber Court Book home page displaying an image file.



Cyber Court Book showing link to pleadings.



Supreme Court new home page.

Restored Supreme Court Uses Latest Court Technology

A world-first computer system for managing trials is being developed in partnership between the Supreme Court of Victoria and Ringtail Solutions, a leader in legal technology.

The Cyber Court Book will be launched by the Chief Justice, Mr Justice John Harber Phillips, on Monday, 11 October, at 9.30 am, in Court 13, which has just undergone an extensive refurbishment, restoring the original magnificent Victorian design and incorporating courtroom technology for the 21st century.

The Court has gained considerable experience of computer case management, dating from the Estate Mortgage case, and more recently in the Aroni Colman (Max Green) litigation, as well as some significant criminal trials.

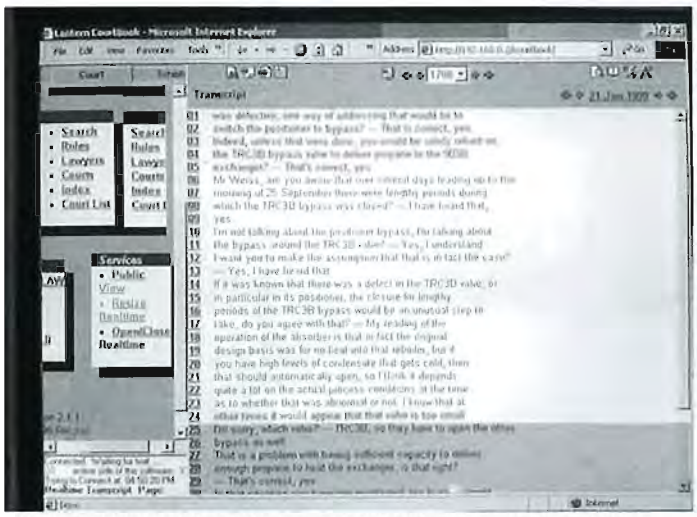
Ringtail Solutions developed ground-breaking software for these very complicated cases, and which also developed the system for electronic appeals in the Court of Appeal.

Following this experience, the Court saw the potential for a broader use of technology to allow us to deliver faster, fairer and more economic justice," the Chief Justice said.

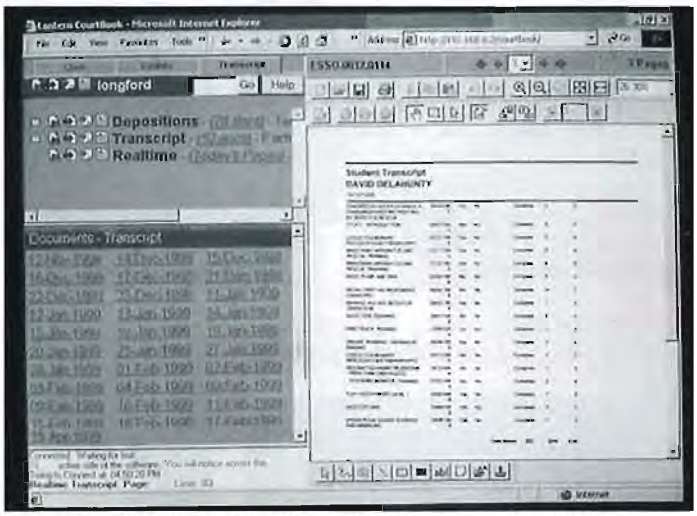
"The Supreme Court is assisting by becoming a laboratory for the final stages of development of the Cyber Court Book. This is the first collaboration of such a technological nature sponsored by a court."

The design will offer an integrated total solution for the

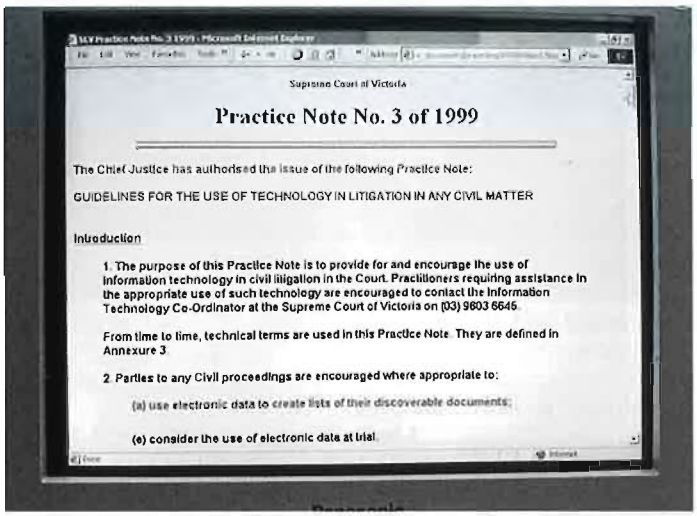
the Supreme Court Website



Cyber Court Book display of transcript search (above) and real time running transcript (bottom left corner).



Cyber Court Book exhibit search and image screen.



Supreme Court of Victoria

Practice Note No. 3 of 1999

The Chief Justice has authorised the issue of the following Practice Note:

GUIDELINES FOR THE USE OF TECHNOLOGY IN LITIGATION IN ANY CIVIL MATTER

Introduction

1. The purpose of this Practice Note is to provide for and encourage the use of information technology in civil litigation in the Court. Practitioners requiring assistance in the appropriate use of such technology are encouraged to contact the Information Technology Co-Ordinator at the Supreme Court of Victoria on (03) 9603 6646.

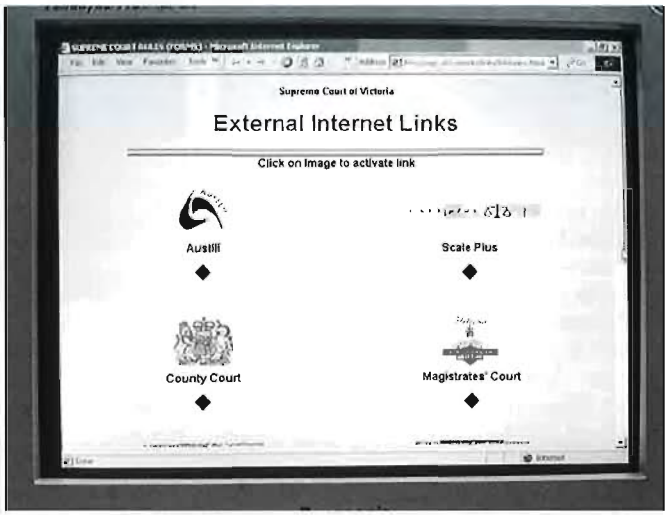
From time to time, technical terms are used in this Practice Note. They are defined in Annexure 3.

2. Parties to any Civil proceedings are encouraged where appropriate to:

(a) use electronic data to create lists of their discoverable documents;

(e) consider the use of electronic data at trial.

Supreme Court Website link to Practice Note 3 of 1999 guidelines for the use of technology in any civil matter.



Supreme Court of Victoria

External Internet Links

Click on image to activate link

Austlii

Scale Plus

County Court

Magistrates' Court

Supreme Court Website page showing links to external sites.

preparation and trial of cases which require technology to assist with the document management. Parts of the technology have been used at the Longford Royal Commission, and by many law firms in Melbourne.

The Supreme Court's Internet site, which will play a key role in expanding access for lawyers and the wider community to the Court, will also be demonstrated. It will include standard forms for lodging cases and applications with the Court electronically.

Bringing together all the electronic systems, the Cyber Court Book is an Intranet-based electronic filing cabinet of the court case, and a presentation shell that integrates other electronic services and applications for access by a browser interface. It will also incorporate an integrated registry system, and new aids for analysing transcripts.

The Cyber Court Book was recently demonstrated at the world's largest international conference on court technology in Los Angeles and was described by Professor Fred Lederer, who heads the Courtroom 21 project at the William and Mary Law School and is the leading American expert in the field, as "perhaps one of the most significant breakthroughs in advanced court technology".

striking contrast of rich dark wood and white walls.

He saw the 10th Court, then called the insolvency court, as an individual courtroom in the complex, with a different sort of ornamentation.

But the years rolled by. Some refurbishment of these courts was attempted but it was never entirely satisfactory.

Part of the ethos of the Supreme Court of Victoria consists of a preparedness to preserve worthwhile traditions while at the same time embracing the most modern technology for the advancement of justice.

And so the decision was taken for a complete refurbishment of this court and Court 10, the results of which you see today.

Many people might have supposed that the skills of 1883 had been lost. You can see they certainly were not.

It is my pleasant duty to acknowledge and thank a number of people who worked on this project.

On my right below the Bench we have as our honoured guests the architects, Mr Stephen McIldowie, Mr Craig Browne and Mr Darren Overend. With them is the principal of the contractors, Ajay Constructions, Mr Alt van Shellem and his son, Mr Russell van Shellem, who was site foreman.

On my left below the Bench, also as honoured guests, are representatives of the trades involved: Mr Wally Lejak representing the painters, Mr Tony Goodwin representing the electricians, Mr Dave Prentice and Mr Ray Bartley representing air conditioners and plumbers, Mr Geoff Hannah representing cabling and Mr Chris Collier representing Rutledge Engineering.

I am sure you will agree that their skills and workmanship, here displayed, are beyond praise.

Please join me in acknowledging the results of their efforts.

The centrepiece of these electronic courtrooms is the Cyber Court Book developed by Ringtail Solutions and which will be demonstrated in a few minutes by Mr Chris Priestly.

By agreement between the court and Ringtail Solutions, the court will become a laboratory for the further development of the Cyber Court Book and allied matters. I believe this is the first time that a court has played such a role in Australia.

I acknowledge and thank Mr Priestly and his colleague Ms Jane Kennedy for their efforts.

The interior of the refurbished 10th Court

Many other people warrant a like mention.

But I particularly thank our respected colleagues, Mr Justice Ashley and Mr Justice Smith. These two judges have devoted hundreds of hours to this project. This time, so fully and freely given, has been, of course, in addition to their usual judicial duties. Throughout, Mr Justice Ashley has carried the heavy burden of holding the court's building portfolio. Mr Justice Smith has been able to bring to bear on the project the great deal of experience he obtained from being the presiding judge in the massive estate mortgage litigation. I also acknowledge and thank Mr Tim Hales from VGRS, Messrs McLean, Chapman and Campbell and other members of our court staff, Ms Amanda Hines and Ms Megan McDougal from Heritage Victoria and Ms Sandra Potter from our staff who is also the Chair of the Association of Legal Support Managers.

I invite those of you who wish to visit the 10th Court after this ceremony.

You will find that its ceiling treatment in particular makes it one of the most beautiful rooms in Melbourne, and of course it too is a fully electronic courtroom.

I shall now ask Mr Priestly to make his presentation. (Cyber Court Book presentation.)

I shall now ask our assistant librarian, Mr Ian Edwards to demonstrate the court's new Website. I am told Mr Edwards has devoted many hours of his own time to developing the Website. If I may say so, such an attitude to his job is typical of our very loyal and devoted Supreme Court staff. There will be a commentary by our librarian, Mr James Butler.

I declare refurbished Courts 13 and 10 and the new Website, open.

Ceremonial Sitting for the Presentation of an Oar Mace of Admiralty to the Federal Court of Australia

Thursday 21 October 1999

THE curious bystander outside the Commonwealth Law Courts on Thursday 21 October 1999 must have been bemused to see flying there together the ensigns of the Royal Australian Navy and the Royal New Zealand Navy. Given any historical awareness, he may have appreciated that the day marked the 194th anniversary of The Battle of Trafalgar but otherwise, the significance of the occasion would have been apparent to him only upon entering Court One where a ceremonial sitting of the Federal Court in Admiralty took place.

The sitting was for the presentation to the Court of an Oar Mace in Admiralty by the Maritime Law Association of Australia and New Zealand, in memory of one of its long-standing members, Captain Don Brooker, RD, RFD, RANR. A New Zealander by birth, Brooker was commissioned in the RNZN whilst at university. As an Australian by adoption, his naval involvement continued as a member and ultimately leader of the Victorian legal panel of the RANR, in addition to his better known achievements as a senior partner of Mallesons Stephen Jaques.

The Bench convened for the occasion comprised Black CJ, Beaumont, Gray, Ryan, Cooper, Tamberlin, Marshall, North, Finkelstein, Weinberg Kenny JJ and the former Justice, The Honourable Ian Sheppard QC. Present also were members of the legal panel RANR and representatives of the RAN, the Company of Master Mariners, the Port Phillip Sea Pilots and the universities. The profession was represented by the Bar Chairman and the immediate past President of the Law Institute.

Black CJ and Gray J.

Had the bystander been unable to understand the significance of what was presented to the Court, he would have noted the address given by Tom Broadmore, the President of the Maritime Law Association:

Tom Broadmore (President of the Maritime Law Association of Australia and New Zealand) addressing the court.

Ryan, Beaumont JJ, Black CJ, Gray, Cooper, Marshall, Finkelstein and Kenny

. . . from at least Elizabethan times the Silver Oar Mace has been associated with the exercise of jurisdiction by the Admiralty Court in England. It is still displayed in courts exercising admiralty jurisdiction in England. The Admiralty Court was in England, for centuries, a separate court independent of other courts of the Crown and jealous of that independence. It was the preserve of the proctors and doctors of civil law, a race apart from the attorneys, solicitors and counsel of Queen's Bench and Chancery. The Oar Mace was a tangible symbol of that independence, of the separate history of the Court and of the separate sources of its jurisdiction.

In accepting the Mace, Black CJ spoke of "the unity and continuity of admiralty jurisdiction and the symbolic place of the silver oar mace", in that replicas of the English mace had been presented in earlier times to courts in colonial North America, Bermuda, Cape Town and colonial Sydney. As he said, the mace presented to the Court, being the companion of one presented in Sydney in 1994, is to be called the Southern Ocean Oar Mace. It is to be displayed publicly in the gallery outside Court One, except when the Court sits in Admiralty, at which time it will repose on the bench as a symbol of admiralty jurisdiction and as part of "an ancient tradition".

At the invitation of the Chief Justice, Cooper J (the convener of the Court's Admiralty Committee and presiding member of the Admiralty Rules Committee) spoke of the formation of the Maritime Law Association in Melbourne in 1974 and of the part which its predominantly Victorian members played in the formulation of and preparation of recommendations for an Australia-wide jurisdiction in admiralty, which culminated in the *Admiralty Act* 1988 (Cth).

Concomitantly with the presentation, the Court was addressed to the memory of Don Brooker. Commander His Honour Judge (Tim) Wood spoke warmly of his involvement in the RANR, whilst Brooker's former partners, Bernie Shinners and Stephen Harper did likewise in respect of his professional achievements, especially in the fields of industrial and maritime law.

Inquiry into Criminal Liability for Self-induced Intoxication

Victorian Bar Council Submission

In February 1999, the Bar Council forwarded a written submission to the Law Reform Committee of the Victorian Parliament in response to a short Issues Paper which the Committee had published in relation to its review of the law relating to criminal liability for self-induced intoxication.

The review had been prompted by knee-jerk media coverage of the acquittal of a high-profile rugby league player named Nadruku, who was charged with seriously assaulting two women in the ACT. Evidence had been tendered at trial that Nadruku had not formed the required criminal intent because of the large amount of alcohol that he had voluntarily consumed.

The law of criminal liability for self-induced intoxication in Victoria is governed by the principles laid down by a majority of the High Court in O'Connor's case (1980) 146 CLR 64. In O'Connor's case it was decided that evidence of self-induced intoxication is relevant to any criminal offence to determine whether the Crown has proved beyond reasonable doubt that a defendant acted voluntarily and intentionally. The Bar Council in its submission to the Committee strongly supported the reasoning of O'Connor's case, and argued against any legislative move, such as had taken place in other jurisdictions, to tamper with the fundamental principle of criminal law that a person, to be guilty, must have a guilty mind.

The Bar Council is pleased that the final Report of the Law Reform Committee, published in May 1999, reflects most, if not all, of the Bar submissions, including the retention of O'Connor's case and the need to address the very serious problem of alcohol and violence in our community through rehabilitative means, rather than through the alteration of the cornerstones of the criminal law. The Bar's submission was prepared for the Bar Council by Dr David Neal and Jonathan Morrow.

I am writing to convey the views of the Victorian Bar Council regarding the Issues Paper published by the Victorian Law Reform Committee as part of the Parliamentary Inquiry into Criminal Liability for Self-induced Intoxication.

The Bar Council believes that it is an ethical principle generally shared in our society that a person should only be held responsible for decisions which are made voluntarily and intentionally. This broad ethical principle supports the more specific principle in criminal law that a person should not be convicted of a serious offence unless he or she has acted voluntarily and with intention to do the acts prohibited.

It follows that if we wish to claim that our criminal justice system properly reflects our society's ethical beliefs, then voluntariness and intention, rather than mere causation, must continue to be the basis of criminal responsibility. It is therefore desirable that the principles enunciated by the High Court of Australia in *The Queen* v. *O'Connor* (1980) 146 CLR 64 (O'Connor's case) continue to state the law in Victoria. For similar reasons it is undesirable to introduce an offence of committing a dangerous act while grossly intoxicated.

The Bar Council has read the analysis of the defence of intoxication presented to the Inquiry by the Criminal Bar Association in a submission dated 29 January 1999. In support of the Association's position we offer the following comments, which are directed at the "Issues for Consideration" set out in the Issues Paper.

1. What do you think about the law as stated in O'Connor's case?

The Bar Council agrees with the decision of the High Court in O'Connor's case as set out in the judgments of Barwick CJ, Stephen, Murphy and Aicken JJ. Leaving aside the anomalous decision of the House of Lords in *DPP* v. *Majewski* (1977) AC 443 (Majewski's case), the legal reasoning in O'Connor's case is entirely supported by the principles of English criminal law. More importantly, the decision in O'Connor's case is consistent with decisions of the Australian High Court both before (*Ryan* v. *R* (1967) 121 CLR 205) and since (*R* v. *Martin* (1984) 58 ALJR 217; *He Kaw Teh* v. *The Queen* (1985) 157 CLR 523).

To the extent that the decision in O'Connor's case involved matters of policy, the majority decision represents a careful, sensitive and successful resolution of the competing community interests in punishing the guilty and in ensuring that the innocent are not convicted. All the judgments in O'Connor's case make it clear that intoxication is never to be considered in itself as grounds for a defence at criminal law. Intoxication is only relevant to questions of vol-

untariness or intent. This is consistent with the insistence by the modern criminal law on voluntariness and intention is a vital component of any criminal justice system that claims to be humane or ethical.

(a) Do you think it is important to maintain the fundamental principle of criminal law that a person is not guilty of a crime unless the act is done voluntarily and intentionally?

Yes. The Issues Paper seems to acknowledge that the principles in criminal law which require that offenders not be convicted of serious offences unless they have acted voluntarily and with intention are of "fundamental importance". However, the importance of the fundamental principles does not simply arise from the fact that the principles are, as pointed out by the Issues Paper, "long established". Their importance has a sound ethical basis.

The principles of voluntariness and intention go to the heart of the Judeo-Christian scheme of ethical responsibility in which our legal system is located. Our belief in the idea of free will dictates that a person is only to be held responsible for acts which are carried out voluntarily and intentionally. In particular, a person is only to be *punished* for acts which follow from a voluntary and intentional decision to do evil. "I did not mean to do it" is a legitimate and well-accepted excuse in our society's system of ethical and moral norms.

The legitimacy of this excuse, based on the idea of free will, is itself the basis of our whole system of criminal responsibility. To remove that legal excuse or "defence" is to radically alter the concepts of both ethical and criminal responsibility. Indeed, to remove that defence would effectively remove the presumption of innocence, which involves a presumption that a person is innocent of an intent to do evil. As Viscount Sankey famously put it: "No matter what the charge or where the trial, the principle that the prosecution must prove the *guilt* of the prisoner is part of the common law . . . and no attempt to whittle it down can be entertained." (*Woolmington* v. *DPP* (1935) AC 462 at 481, emphasis added). Or as Stephen J noted in O'Connor's case (at 96): "Important legal principles are . . . involved, principles that constitute the foundation of our present notions of criminal responsibility. For criminal liability to be incurred . . . civilised penal systems have, in modern times, insisted that the accused should be shown to possess a blameworthy state of mind."

The broad principles at stake in any reassessment of O'Connor's case are also at stake in many other defences in Australian criminal law, including automatism, insanity, mistake of fact, or even duress. The principles have since been acknowledged by other members of the High Court including, for example, Kirby J in the context of a recent decision on the mental element of the crime of conspiracy to defraud (*Peters* v. *The Queen* (1998) HCA 7 (2 February 1998)). Kirby J stated that the introduction of an "objective criterion" "is out of harmony with one of the most fundamental concepts — perhaps the most fundamental idea — of the criminal law of this country". It is clear that a departure from the principles in O'Connor's case would sit uneasily with other defences, and may endanger the rights of many classes of defendants. The principle of voluntariness and intention inform the law of evidence regarding the admissibility of confessions and other evidence: see, for example, *R* v. *Parker* (1990) 19 NSWLR 177.

As acknowledged by the Victorian Law Reform Commission in 1990, there is no justification for a departure from principle. Any legislative abrogation of O'Connor's case would seriously undermine well-established doctrine throughout the criminal law. Voluntariness and intention are vital components of criminal guilt and should not be removed by legislative presumption.

(b) Do you think evidence of intoxication should be taken into account when determining whether the Crown has proved beyond reasonable doubt that a defendant acted voluntarily and intentionally?

Yes. The critical inquiry is whether, at the time of the crime charged, the accused had the requisite intent in fact (this was held unanimously O'Connor's case). Therefore all relevant evidence bearing on that issue, including evidence of intoxication, should be considered by the tribunal of fact.

Lack of confidence in the tribunal of fact?

The ability of a tribunal of fact to take such evidence into account should not be pre-empted by legislation. Any legislative provision that might prescribe that such evidence cannot be taken into account for a crime of so-called "general intent" (such as s.428D of the *Crimes Act* 1900 (NSW) or s.8.2 of the *Criminal Code Act* 1995 (Cth)), or that such evidence cannot be taken into account "in determining whether an act or omission that is an element of an offence was intended or voluntary" (such as s.4.2 of the *Criminal Code Act* 1995 (Cth) or clause 428XC of the *Crimes (Amendment) Bill (No.4)* 1998 (ACT)), shows a lack of confidence in the fact-finding abilities of the judiciary and the jury, asking them to ignore the reality of the case. To repeat the words of Sir Owen Dixon: "a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code" (*Thomas* v. *R* (1937) 59 CLR 279 at 309).

Intoxication evidence may assist the prosecution

It is not the proper role of the legislature to preclude a defendant from having a jury of their peers assess whether, as a result of their intoxication, they did not have the required intent. Such legislation is rendered absurd by the possibility that the evidence of intoxication may, if taken into account, assist the prosecution, prompting on the part of a jury "a more ready acceptance that mens rea exists on the supposition that intoxication reduces inhibitions" (Murphy J in O'Connor's case at 114).

Intoxication evidence should be weighed in each instance

The precise weight that should be given to evidence of intoxication when determining whether the Crown has proved that a defendant has acted voluntarily and intentionally is a question to be answered by the tribunal of fact in each instance. In the vast bulk of cases, it is likely that any such evidence would be given little weight, if any, in considering voluntariness and intention. However, psychiatric and medical evidence strongly suggests that intoxication, including of course severe or "total" intoxication, does seem to be able to affect a person's ability to appreciate the possible consequences or circumstances (see, for example, the evidence presented in the Nadruku case). It is therefore reasonable that judges and juries should be able to assess such evidence when considering voluntariness.

Artificiality of Majewski

Similarly, it is unreasonable to expect judges and juries *not* to take such evidence into account. Much of the recent legislation that codifies Majewski's case puts tribunals of fact into an impossible position. Even under a provision such as s.428D of the *Crimes Act* 1900 (NSW), evidence of the effect of intoxication upon the voluntariness of a crime of "general" intent will usually be put before the court by the prosecution in order to avert the risk of an acquittal based on lack of intent. Such evidence will also, of course, be led by the defence in respect of any crime of "specific" intent in the indictment. The tribunal of fact will then be required, for no sound or explicable reason, to disregard this relevant evidence in respect of general intent offences.

As Murphy J correctly noted in O'Connor's case (at 114), it is highly artificial for legislation to forbid a jury, in these circumstances, from taking intoxication into account. The tribunal of fact is required to find a fictional non-existing mental state as an ingredient in guilt (see generally the comments of Aicken J in O'Connor's case at 124). The difficulty in applying this sort of legislation in the context of a murder trial is well illustrated, and is extensively commented upon, in the decision of the Tasmanian Supreme Court in *Attorney-General's Reference No.1 of 1996: Re David John Weiderman* [1998) TASSC 12 (26 February 1998).

(c) Do you think O'Connor's case should continue to state the law in Victoria?

Yes. It is desirable that the decision of the High Court in O'Connor's case continue to state the law in Victoria. The decision is precise in its terms and objectives, and brings a high level of certainty and balance to a potentially contentious area of the law.

High burden of O'Connor

In particular, any fear that the principles in O'Connor's case may have led to the widespread acquittal of defendants is unfounded. The evidentiary burden placed by O'Connor's case upon the defence is very high: evidence that the defendant had simply been drinking all day prior to the act charged, for example, will not be enough to mount an intoxication defence. Also, as contended in O'Connor's case by Barwick CJ (at 79), juries are very slow to accept a defence based on intoxication. The experience of members of the Victorian Bar has shown that, through the 1980s and 1990s, this contention is still true.

Nadruku as an inappropriate basis for law reform

It appears from the Issues Paper that impetus for this Parliamentary Inquiry arises, at least in part, out of the recent ACT case of Noah Nadruku (*Suzanne Catherine Small* v. *Noa Kurimalawai*, Australian Capital Territory Magistrates' Court, No. CC97/01904, 22 October 1997).

Cases like that of Noah Nadruku in the ACT have arisen, and may be expected to arise, only very rarely. The findings in that case, which concerned the "general intent" offence of common assault, were extraordinary in many respects. Those findings included:

(a) the vast amount of alcohol consumed by the defendant (around 26 to 30 schooners and stubbies of beer, as well as wine, in an 11-hour period);
(b) the relative inexperience of the defendant as a drinker (having come from a Pacific Island Methodist background); and
(c) the extreme effects of intoxication displayed by the defendant (evidence accepted by the magistrate showed that the defendant was too drunk to speak or be interviewed, was "comatosed", and had eyes "rolling like a poker machine").

The Bar Council is aware of no evidence to suggest that such circumstances are likely to repeated with any frequency. Indeed the weight of evidence strongly indicates that such cases are likely to be extremely infrequent. It is therefore clear that the Nadruku decision is a weak basis for law reform in this area.

Other studies

Other studies suggest that the experience of the Victorian Bar is shared by the legal profession in other jurisdictions. The New Zealand Law Reform Committee reported in 1984 that it was unaware of any reason for supposing that the intoxication defence has led to an increase in crime or any widespread concern. This statement was recently echoed in the Discussion Paper published last year by the South Australian Office of the Attorney-General. Similarly, the Criminal Law Officers Committee of the Standing Committee of Attorneys-General found in 1992 that "the gross nature of the intoxication required to negate voluntariness means that it is rarely relevant".

As acknowledged in the Issues Paper, research conducted by the Law Reform Commission of Victoria in 1986 indicated that to be acquitted, an offender has to be intoxicated to a gross extent, and that the majority of offenders who take alcohol or drugs before committing an offence are convicted despite being intoxicated.

Rarity of intoxication acquittals

Certainly it seems that instances in Australia of acquittal or the quashing of a conviction on the basis of an intoxication defence are very few. An examination of Australian case law reveals only a handful of cases, apart from O'Connor's case and the Nadruku case.

By contrast, there are numerous decisions of Australian courts which apply the principles of O'Connor's case but which show on the part of judge and jury a suitably cautious approach to the intoxication defence: see, for example, *R* v. *Coleman* (1990) 19 NSWLR 467, or *Beattie* v. *Betts* (South Australian Supreme Court No.2426 of 1990). The comments of Starke J in *R* v. *O'Connor* [1980) VR 635 speak for the experience of members of the Victorian Bar generally:

> [O]ver nearly 40 years' experience in this State I have found juries to be very slow to accept a defence based on intoxication. I do not share the fear held by many in England that if intoxication is accepted as a defence as far as general intent is concerned the floodgates will open and hordes of guilty men will descend on the community. (at 647)

We are not surprised by the finding in the recent South Australian Discussion Paper that it is extremely rare for a defendant to be acquitted of all charges on the basis of an intoxication defence, and that most of those acquittals were in relatively minor cases (p.25).

Intoxication defences still run in Majewski jurisdictions

Conversely, it is not altogether clear that the possibility of acquittal on the basis of intoxication is precluded in the Australian and overseas jurisdictions which have codified either Majewski's case or its forerunner, *DPP* v. *Beard* (1920) AC 379: see, for example, *R* v. *Vickberg* (Supreme Court of British Columbia, No. 85756D, 24 April 1998). Also, given the

statistical fact that Australian defendants are increasingly being charged with offences of specific intent, it is unlikely that Majewski legislation would have any significant impact on acquittal rates.

General comments

In the light of this analysis, it becomes clear that many of the arguments outlined in the Issues Paper in favour of altering the principles of O'Connor's case lack both an ethical *and* a public policy basis. If the rationale for abandoning O'Connor's case is the presumed dangerousness of individuals causing injuries while drunk and then being acquitted, then the rationale is simply not supported by the cases. In particular, the Issues Paper notes the apprehension that "a situation may arise where an offender is acquitted of a serious offence leading to community outrage arising from a sense of justice". One may predict from the legal data that there will be only infrequent occasion for the expression of such outrage. And, as the South Australian Discussion Paper notes, "community outrage" in relation to the intoxication defence is itself highly unpredictable, and does not always materialize.

Community outrage — fanned by sensationalist reportage — is a very unstable basis for overturning widely recognised ethical and legal principles of responsibility. Indeed, the community might well be outraged by the imprisonment of people for crimes they did *not* intend to commit. If defendants such as Mr Nadruku are shown to have acted involuntarily or without the required intention, then they must be acquitted. Any community outrage which might follow from such acquittals would be very unlikely to continue once members of the community understood that the principles of voluntariness and intent in the criminal law are firmly based in the ethical norms of our society.

We acknowledge that legislative reform in this area arises from pressing and substantial concerns about levels violence and intoxication in our community. However, these concerns are more appropriately addressed by other legislative and administrative measures, including public education campaigns. As the quotations above suggest, Victoria may well have a level of alcohol-related violence which is as low or lower than those of the Code States, which have never accepted the O'Connor principles. It would not be appropriate for the Victorian legislature, lacking any empirical data relating to levels of alcohol-related violence, to be prompted by a fear of sporadic and ill-informed sectional "community outrage" into tampering with the very basis of criminal liability.

2. If you do not think O'Connor's case should continue to state the law in Victoria:

(a) Do you think legislation should be enacted which distinguishes between offences of specific and general intent?

The statement of the law enunciated in O'Connor's case is supported by the fact that distinctions between offences of "specific" and "general" intent are artificial and unworkable.

It is undesirable to enact legislation that establishes a distinction between "specific" and "general" intent for the purposes of the law of intoxication. In Majewski's case the House of Lords held that evidence of intoxication is not to be taken into account where the offence is one which requires intent solely in respect of the act ("general intent"), but that such evidence is relevant and must be taken into account where a person is charged with an offence which requires some further specified mentality ("specific intent"). Thus, as Murphy J noted in O'Connor's case (at 113), the Majewski principles would require a court to recognise "constructive crimes". Since 1996 this distinction has been adopted by New South Wales (*Crimes Act* 1900 (NSW) s.428).

The distinction upon which Majewski's case is based is offensive to principles of fairness and logic, and is clearly impractical.

Majewski is unfair

Evidence which goes to intent should, by definition, be taken into account in relation to *all* crimes of intent, whether that intent be "general" or "specific". The reasoning of Majewski's case allows the fact of intoxication to amount to criminal intent or recklessness. Whilst a state of self-induced intoxication may be morally or socially blameworthy, the Victorian Bar is of the strong view that it cannot be fairly equated with criminal intent. It is ethically absurd for the very conduct which prevents the defendant from forming the necessary criminal intent to be itself presumed to be that intent (Starke J in *R* v. *O'Connor* (1980) VR 635). For a court to be bound by statute to infer the requisite criminal intent on the part of a defendant charged with a serious crime is anathema to the well-established principle that a defendant's state of mind must be proved, like any other fact. As Hunt J noted in *R* v. *Coleman* (1990) 19 NSWLR 467 at 480, such a statute would come "dangerously close to reintroducing the presumption (impermissible in Australia) that every person intends the natural and probable consequences of his acts".

Majewski is illogical

It is well known that in Majewski's case, Lord Salmon conceded that the majority approach in that case was illogical (at 483–4), and Lord Edmund-Davies suggested that that the Australian approach was, as a matter of logic, superior (at 491). The effect of intoxication on a defendant's capacity is the same whether self-induced or not, so the question of whether the intoxication is self-induced will be logically irrelevant to a defendant's intention at the time when he or she committed the acts charged. Even if it is thought to be ethically acceptable that the act of voluntary intoxication should, at law, be equated with criminal intent, the act of intoxication will not normally coincide with the act charged. In this way, Majewski's case also contravenes the basic requirement at criminal law of coincidence of act and intent.

Indeed, as noted in O'Connor's case (per Barwick CJ, 80–4; see also Stephen J at 104), the use by the Majewski Court of the terms "intent" and "recklessness" are derived from a clear misreading of Lord Birkenhead's judgment in *DPP* v. *Beard* (1920) AC 379, and are entirely foreign to the way in which those terms are used in criminal law. The distinction between crimes of "general" and "specific" intent lacks any defensible conceptual basis. As Barwick CJ put it, "it is exceedingly strange that a person incapable of forming any intent may be found guilty of an offence which requires only an intent to do the physical act involved but may not be found guilty of doing an act to attain a specific result" (84). Constructive crimes based on a dubious distinction between crimes of "general" and "specific" intent should not be introduced into the law of Victoria.

Majewski is impractical

Moreover, the decision in *Majewski* assumes that the division between crimes of "general" and "specific" intent can, despite these conceptual incoherencies, be made easily as a matter of practice. This

assumption is incorrect. As Barwick CJ stated in O'Connor's case (at 81), the classificatory terminology of *Majewski* is "not only inappropriate, but it obscures more than it reveals". The Issues Paper correctly notes that there have been different decisions in the common law world on whether rape is a crime of specific or general intent (see also the comments in O'Connor's case per Stephen J at 102). Decisions on categorisation also cannot agree on the category for the crime of murder (see also the comments of Gibbs J in O'Connor's case at 91). On any sensible use of the terms "general" and "specific", murder must be a crime of general intent; however, it is usually categorised, under the principles of *Majewski,* as a crime of specific intent (see, for example, s.428B *Crimes Act* 1900 (NSW)).

There are also, of course, procedural difficulties which follow from the categorisation. A judge directing a jury on alternative verdicts will need to give different directions on the relevance of intoxication evidence depending on the classification of the offences as being of specific or general intent. There will be additional expenditure of court time and taxpayers' money as evidence will be led as to whether intoxication in particular cases was "voluntary" and "self-induced". Such was the case, for example, in *R* v. *Vickberg* (Supreme Court of British Columbia, No. 85756D, 24 April 1998). Depending on the form of the legislation, evidence will also be led as to whether the drink or drug is taken in bona fide pursuance of medical treatment.

(b) Do you think a separate statutory offence of committing a dangerous act while intoxicated should be created? What should be the elements of such an offence? Should the offence created be a strict liability offence?

For similar reasons, it is not desirable to introduce in Victoria an offence of committing a dangerous act while grossly intoxicated. The creation of a separate statutory offence of committing a dangerous act while intoxicated would be equally artificial. Howard's *Criminal Law* notes that a separate statutory offence "hardly resolves the controversy surrounding the *Majewski* rule; on the contrary, it represents a transparent attempt to evade principle" (5th ed. p.446).

Such a legislative measure would still have the effect of deeming a mental state characterised by intoxication to be a prohibited mental state. It would still equate the voluntariness and intention at the time of consuming alcohol or drugs with the voluntariness and intention of the "dangerous act". The offence would therefore be more harsh than a strict or even absolute liability offence, with no available defence of involuntariness. Such a provision punishes people for crimes they did *not* intend to commit on the basis that they did intend to get drunk.

O'Connor's case does not support an offence

There were some suggestions in the reasoning of the majority in O'Connor's case (per Barwick CJ at 87, per Stephen J at 103, per Murphy J at 114, per Aicken J at 126) that such an offence may be appropriate. However, the Bar Council opposes, as a matter of principle, the creation of serious offences where the offence may involve penal sanctions, where the defendant is denied even the evidentiary defence of involuntariness, and in circumstances where there has not been full public debate in the broader community. The requirement under the general criminal law of voluntariness and criminal intent should not be viewed by a legislature as a challenge to create a separate body of serious offences that are more severe in their operation than absolute liability offences. The carefully qualified obiter dicta of the majority judges in O'Connor's case should not be viewed, as they seem to have been viewed in other jurisdictions (including the Northern Territory), as a general endorsement of the creation of such an offence.

An offence would not have the intended effect

As noted by the Victorian Law Reform Commission, such an offence may even have the paradoxical effect of increasing compromise verdicts for the new offence and diminishing the number of convictions for more serious offences in which voluntariness and intention may have been established. It would certainly complicate and lengthen criminal trials, introducing another offence to be considered. Most importantly, however, and contrary to the suggestion in the Issues Paper, the creation of such an offence would clearly contradict intent as the fundamental basis of criminal responsibility. Many Victorians would regard the creation of such an offence as an unjustifiable intrusion into personal liberty with no obvious beneficial outcomes.

General comments

Both legislative reform options — following the *Majewski* categorisation, or creating a separate offence — are said in the Issues Paper to be supported by the "public policy principle" that it is "morally correct" to hold a person criminally liable for any injury he or she causes whilst intoxicated.

There is no such "public policy principle". On the contrary, principles of ethical and criminal responsibility require a person to have committed an act with intent or at least negligence before liability can be found. The so-called "public policy principle" referred to by the Issues Paper has no foundation in the ethical framework which binds our society and our legal system. Indeed, the "public policy principle" is inconsistent with that framework.

It also begs serious questions about the role of the criminal law as an instrument of public policy in relation to the use of alcohol and other drugs, in a society which generally condones, and sometimes encourages, intoxication. The effect of this is, as Peter Rush notes, "to foreclose discussion of the issues of social order involved in both the role of law and the general exhortation to use alcohol and drugs as a stimulant to social intercourse" (*Criminal Law,* 1997, p.417).

It follows that if the concern behind the "principle" identified by the Issues Paper is that members of our society should be protected from the effects of alcohol and drugs, this concern would be better addressed by other means, including the *Alcoholics and Drug-dependent Persons Act* 1968, and then only after proper and informed public debate. There is ample criminological and medical evidence to suggest that criminal sanctions, such as they are, are a very poor means of deterring people from using alcohol and drugs, and that criminal sanctions are a very poor means of treating people with alcohol or drug dependencies. The Victorian Bar supports the Victorian Law Reform Commission's findings:

> The argument that society would be protected by punishing those few defendants who successfully rely on gross intoxication is false. People cannot be deterred from unintended actions. And because intoxication

only rarely produces such unintended consequences, punishment in the rare cases would not deter people from becoming intoxicated. (VLRC Report No.34, *Mental Malfunction and Criminal Responsibility*, October 1990, Chapter 7 para.220).

Conversely, it may be that Parliament should consider adopting a consistent attitude towards criminal behaviour, and abolish the concepts of voluntariness and intention altogether. If legislation is introduced that would prevent evidence of intoxication from being taken into account in relation to the mental element of certain crimes, and the purpose of that legislation is to protect members of our society from the effects of alcohol and drugs, then as a matter of logic the legislature should face the unpalatable reality that the philosophy of social protectionism requires that many, if not all, crimes should be absolute liability offences: "it would be anomalous to adopt a penal philosophy of social defence in the context of intoxicated behaviour without also applying it to thoughtless and dangerous behaviour generally" (Howard's *Criminal Law*, 5th ed., p.444).

3. If you do not think that O'Connor's case should continue to state the law in Victoria and you do not agree with either of the proposals suggested immediately above, do you have any other suggestions for how the law concerning intoxication and criminal liability could be changed?

O'Connor's case should continue to state the law in Victoria. There should be no legislative change to the sound principles which were enunciated by the High Court in that case and that have been consistently applied by the courts of Victoria.

4. Do you think that evidence of intoxication is evidence that should be considered only at the time of sentencing the offender?

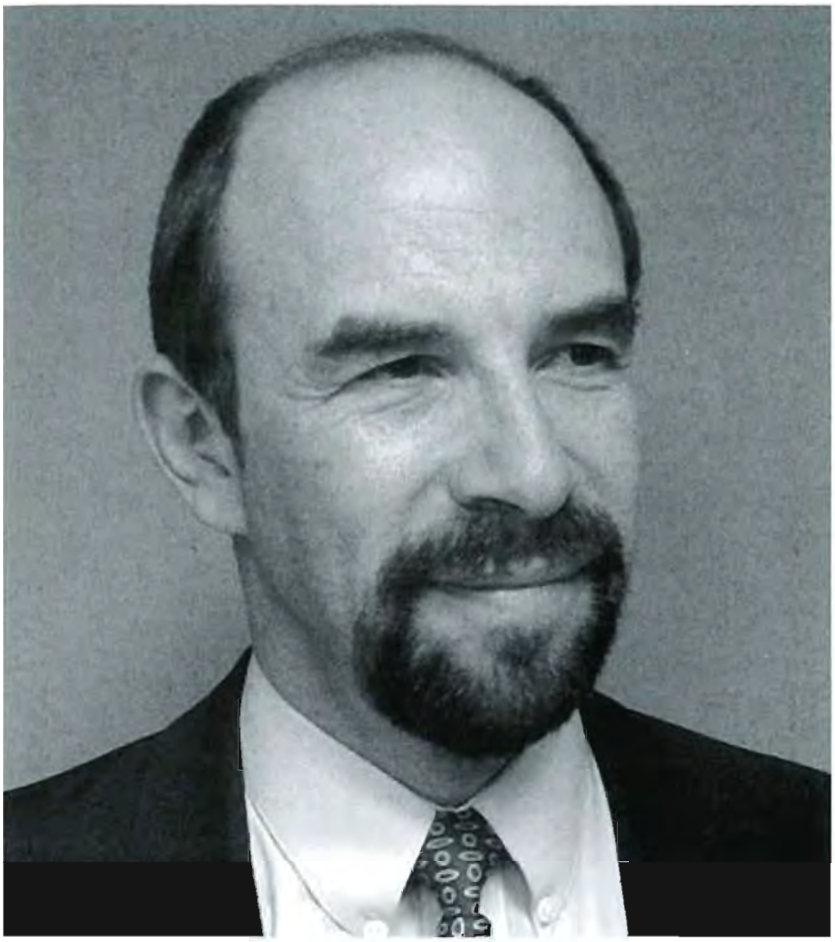
No. If there is evidence that the level of intoxication on the part of the defendant raises doubts as to the voluntariness and intention of the defendant's actions, then intoxication must be considered when determining whether the charge is made out. Such evidence, by definition, goes to the very elements of the alleged crime. Any legislative reform that confines the consideration of evidence of intoxication to the time of sentencing puts the sentencing judge in a position which is just as difficult as that of a jury attempting to operate under the principles of Majewski's case.

CONCLUSION

For the reasons outlined above, any reform to the law along the lines suggested in the Issues Paper would be unnecessary, counter-productive and would run counter to the ethical principles of criminal law and of responsibility generally. These principles ensure that a person charged with a criminal offence will not be found guilty upon a fiction concerning his or her intention.

Please contact me if you require any further information in relation to any of these matters.

David Curtain, Chairman



Jonathan Kenfield

Gerard Nash Interviews the CEO of "Private Judging", Jonathan Kenfield

In a new twist on privatisation and deregulation in the Victorian marketplace, Jonathan Kenfield of Dispute Solutions has turned to privatisation of the judiciary — or perhaps more accurately of the former judiciary. Described in the media as "Have Gavel will Travel" the scheme is not a cost-cutting measure by the Kennett Government but the provision of a panel of arbitrators to operate under the *Commercial Arbitration Act* 1984 drawn from former members of the judiciary.

The "Private Judging" service provides a panel which, at the present time, consists of the Honourable Ken H. Marks QC (formerly of the Supreme Court of Victoria), the Honourable Alex Southwell QC (formerly of the Supreme Court of Victoria), the Honourable John Fogarty AM (formerly of the Family Court of Australia), the Honourable Anthony Graham QC (formerly of the Family Court of Australia) and the Honourable Keith Marks QC (formerly of the Australian Conciliation and Arbitration Commission).

Nash: *Jon, you've got a scheme of "Have Gavel will Travel". Is that correct?*

Kenfield: That's what the newspapers have called it.

Nash: *It's a slight misnomer isn't it. You have no gavel.*

Kenfield: We have no gavels.

Nash: *But this is a system of hiring judges.*

Kenfield: Hiring former judges. At the moment purely former judges from superior jurisdictions to run a private trial. That's right.

Nash: *Where does the idea come from?*

Kenfield: The idea comes from a number of things. One is from American models which have been running quite successfully now for the better part of 20 years. It started in California with a big move towards ADR and organisations over there called JAMS and End Dispute, which have been quite successful in spreading across the States and providing the ability for private clients to come to somebody who is experienced in the law and in decision-making — normally a former judge or a senior member of the Bar in the States — and

they can hire that person to run a private trial.

I remember reading an article nearly ten years ago which talked about the Bench in California having some difficulty retaining some of its younger judges because they were seeing the possibility of earning considerably more money working privately running their own private trials and also disposing of a much higher number of cases, in a way that they considered satisfactory, because they had more freedom to run the cases as they thought they should be run.

Nash: *So you're saying that private judging gives speedier justice.*

Kenfield: Yes.

Nash: *Any real evidence of this?*

Kenfield: As yet, no! The scheme is very new. Speed is anticipated on the basis that the judge will more actively be involved in the management of the case. The scheme is for parties who are willing to submit to this sort of a process so that they have both an interest and a desire to get the case resolved. And the idea is that the judge will become a fairly active manager of the process, so that the non-essential parts of the case preparation, interlocutory stages and so on are cut to a minimum; and we have a model of supposed management efficiency which is willingly participated in by the parties.

Nash: *The only statutory basis of this in Victoria is the Commercial Arbitration Act?*

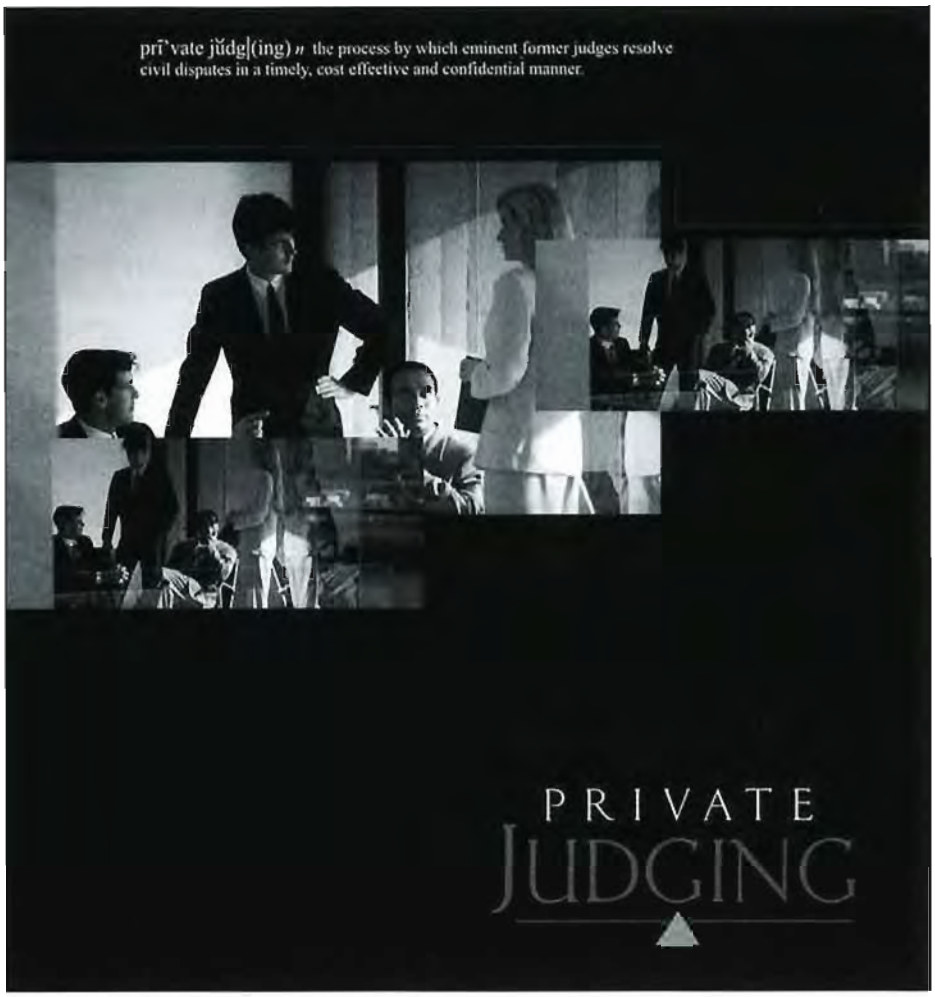
Kenfield: It draws its authority from the Commercial Arbitration Act — that's right.

Nash: *Does that effectively mean that the parties have to enter into an arbitration agreement first?*

Kenfield: Yes it does. We have a specific agreement for private judging and that lays out what the parties require the judge to do in the running of the private trial. In other words, it describes the scope and makes clear what they are committed to in terms of the nature and the character. But at all times it's quite clear that the judge's authority is to arise purely and simply from the Commercial Arbitration Act; and, therefore, there must be an agreement which triggers the Commercial Arbitration Act and its powers and immunities.

Nash: *Which means of course that they are subject to the same reviews as an arbitrator would be subject to?*

Kenfield: That's correct; although there is an assumption that a superior court judge will probably be smart enough to frame an award and run the process in such a way that what I think is the obvious intent of the Arbitration Act is implemented, which is that once the parties have made their bed they should lie in it. There shouldn't be too much judicial interference. We are assuming that by having judges acting responsibly that it will be a pretty final process.



Nash: *You are saying, effectively, that trial judges don't make errors in law?*

Kenfield: I think that's probably a leap beyond what I was actually saying. What I'm saying is that I think that there have been problems with arbitration as practised over the last 10 or 15 years; and some of the problems have been encountered by lay arbitrators, because although they may be very good engineers, accountants or architects, they are not necessarily top-class experts in running a court process and dealing with lawyers and dealing with parties. Hopefully most of those problems will be avoided by having an experienced judge running the process.

Nash: *So that the numbers of errors at law would be only equal to those of trial judges?*

Kenfield: Well, yes. No more one hopes.

Nash: *How do you see this fitting into the Victorian system? Obviously not everyone is going to want to go to commercial arbitration and not everyone who goes to commercial arbitration is going to want to depart from the expert. Many builders and engineers will want builders and engineers to decide whether they were right or wrong.*

Kenfield: I think that's very logical. I think that private judging is clearly not for everybody. It's for people who understand what the process has to offer and want that process and are prepared to pay for it. I think that in technical quality type disputes you are absolutely right. It's highly probable that certainly a defendant is going to prefer to have an expert and quite certainly there will

be plaintiffs as well who would prefer to have an expert in the area of the dispute, so that there is no danger of wool being cast over the judge's eyes. Obviously I have no problem with that because personally I'm a great believer in arbitration and I've been an active arbitrator since the mid-80s myself.

However, what I do hear — and I've been hearing repeatedly over many years — is the general perception amongst commercial lawyers — commercial litigation lawyers — that arbitration is not an attractive option for them in general commercial cases because the arbitration process may not provide any of the advantages of speed. It should provide confidentiality, obviously, but perhaps none of the advantages of speed and lower cost that the process is supposed to be able to deliver.

In those commercial cases where the issues are fundamentally legal, and usually where there will be significant amounts of money involved, but where the parties want as quickly as possible a decision which has real authority, I believe that there is a niche for these judges to work. I think that what we are offering is an additional facility or an additional option which commercial litigation lawyers can then point their clients towards.

Nash: *To get this off the ground presumably you need arbitration agreements which refer to hiring a judge?*

Kenfield: It will be excellent if we now get large commercial contracts nominating the private judging service to resolve disputes instead of other organisations who are currently nominated.

Nash: *And you're really in the situation now that existing arbitration agreements will effectively exclude you? There may be some that will let you in?*

Kenfield: Where there is an existing arbitration agreement which specifies a nomination through perhaps the Institute of Arbitrators or LEADR or some other body if there is a dispute, then clearly that's already covered in that particular contract. What we are is, I guess, a new kid on the block, although I don't think the process we're offering is terribly much a rocket science. And obviously that's one of the reasons why we are trying to get some media attention, so that customers of lawyers can say "We like the idea of this. It's attractive to us". That's part of the reason why we're talking to corporate counsel in large corporations as well. It may well be that they look at the private judging as perhaps a final option, and perhaps we might even get more comprehensive dispute resolution clauses, which suggest a process of dispute resolution which perhaps requires a mediation and then, if that doesn't work, a reference to private judging as a final process.

Nash: *I take it the plan is not to wait until some dispute arises under a contract with an arbitration clause written now but you'd like to pick up some of the existing work that's going to the courts?*

Kenfield: Yes we would.

Kenfield: It will be excellent if we now get large commercial contracts nominating the private judging service to resolve disputes instead of other organisations who are currently nominated.

Nash: *How do you propose to do that?*

Kenfield: A number of ways. We're not looking for a lot of razzle dazzle and we're not going to start doing television advertising campaigns or anything of that sort. The judges themselves and I are very concerned that this remains a very distinguished process and is represented and remains that way all the time. What we are doing, though, is offering private briefings to senior partners and senior litigation partners in major law firms, second-tier law firms and smaller boutique firms. We're looking at getting some publicity and some explanatory information into the courts. We are presenting ourselves, if you like, for examination to the Victorian Bar and to the Law Institute offering to put articles into their various journals so that we're not trying to do anything by subterfuge.

We are saying to the legal profession here's another facility. It's with people that you know and either love or hate as judges, so you have a fairly good idea of what's coming. It's not something so radically different, because it uses existing models and people who are well known.

We are also talking to corporate counsel and major corporations and suggesting that they might want to include us in contracts or perhaps use us if litigation is on foot; and we are also hoping to get some more press attention. We've already had some good national press attention. We have been in the national press so far; and the business journalists are the next people we will be talking to. But it's all fairly much a low-key private briefing sort of basis and hopefully people will say, "Well in certain circumstances this looks to us extremely attractive. The idea of using somebody with the dignity and capabilities of a retired judge is appealing to us; and the idea of getting a final determination which is legally binding is also attractive in certain cases". And so we're hoping people will start beating a path to the door on that basis of perceived need.

Nash: *Are you expecting to get references to the private judging service or references to particular individual members of the service?*

Kenfield: My task is to be the facilitator and front end. My own background is Law Honours from Manchester in England. I have practised in law, I've been qualified as a chartered accountant and I'm currently a chartered accountant and CPA. And I've worked in litigation consulting with major accounting firms since the late 70s.

But I'm basically the first line of contact. I've been arbitrating and mediating since 1983 and I've tutored with the Institute of Arbitrators, been on the national council with LEADR and helped set up the Western Australian Chapter so I've done a lot of work with the introduction of ADR, particularly in Western Australia, and some of the development of ADR, mediation and so forth in Victoria as well over the last seven or eight years since I've been here.

The idea is that the service is an independent service so people come to the independent service perhaps as they come to a clerk at the Bar and they will say, "We have a particular dispute and we're interested in the idea of private judging".

My job is then to conduct some preliminary analyses of what the dispute's all about, who the parties are, what they actually need; and through those discussions, which may be with all the parties or with some of the parties, I can then try to identify the type of process that should be required and who might be the most appropriate judge from the panel that we have.

Last week I was looking for a judge to

mediate a large complex matter which had been referred by the Federal Court; and it occurred to me that we probably didn't have the most appropriate person on the existing panel which has just five judges right now. So the net was widened to talk to a couple of other retired Federal Court judges in Victoria, and then to go interstate as well, to provide some options. The idea is that the judge's neutrality is not compromised, because the initial discussion with all the parties is with me, so that the judge, as with any arbitrator, is not to be exposed to unilateral discussion of any of the parties in advance which could obviously be seen as compromising their independence.

Nash: *Won't you get the situation where one party would be happy with judge A or ex-judge A and the other party won't have a bar of him but would be quite happy with ex-judge B?*

Kenfield: I'd be most surprised if we don't have that situation. It's a remarkable thing with retired judges. People tend to either love them or hate them, for one reason or another; and that may even change from one particular dispute to another, I guess, depending on their known or perceived views or standing on a particular issue.

My job is to find the right fit, so that I listen to the parties and put up what I think is a reasonable nomination — usually I'll give a couple of choices. If the parties come back and say that's not appropriate I'll be looking for somebody who is appropriate. So although the original panel comprises five judges who have been named in the various press reports, as I mentioned previously, if we do have a case where they simply don't fit — and they won't be able to cover every case for obvious reasons either by reason of conflict or simply by background and experience — then it's my job to find the right choice and to negotiate with them until they are satisfied that they have got the right person, the right process and it's going to be efficient, because that's our promise to the parties.

Nash: *Well, I've no other specific questions. Is there anything specific you'd like to say?*

Kenfield: I guess the main thing to add is that what we are seeking to do is to say to the legal profession in particular, and particularly members of the Victorian Bar, that this is an additional option which picks up on, I think, a lot of themes which have been developing towards ADR, access to justice possibly in privatisation of justice over the last ten years or so.

It speaks both to traditional values and also to what I perceive to be the current political bias towards increased privatisation; and we are attempting to introduce an additional service on a responsible basis and to get something established which does show the way towards a responsible form of privatised justice in circumstances where parties require it. We are trying to develop a responsible approach towards privatised justice very much like a private medical system.

If parties want to be able to go to a private system and they want to make a particular type of process choice, then we try to respond to that choice, and we are going to be very conscious of the need to maintain the quality to make sure that we monitor the performance of the judges; and that's part of my job which will be an interesting one, I have no doubt.

I was beginning to talk about the quality side of things. One of the things that we are dedicated to delivering as a sort of modern corporate service is some element of quality control over the process. Obviously there is not going to be any interference with private judging in terms of the judge's decisions or anything of that sort. There could not be. Nevertheless, we, as the managers of the process, will be available at any time. So that, if parties or their legal representatives have concerns about the process itself, there is somebody to whom they can come who will then find some way of talking to the judge about the process that is being undertaken, not the content but the actual process, so that we can have modification and adjustments if necessary of style, of technique, to make sure that what we promised up front, about an efficient and relatively user-friendly process, is actually what's being delivered.

Nash: *Apart from the personnel, how do you see this as differing from commercial arbitration generally?*

Kenfield: We are running an arbitration and frankly, as a long time supporter of arbitration, I see no reason to really depart from that, because the Act provides us with everything we could reasonably need or want. I simply hope that by using our people we can deliver something which is much closer to the model of dispute resolution process that the legislature obviously envisaged when they passed the Commercial Arbitration Act than, perhaps, what is perceived to be delivered in commercial disputes out in the marketplace at the moment.

We sort of look at it as a bit of a selective rebirth of arbitration, although not appropriate for all circumstances. Quality disputes may not be well suited to this. It may well be that you'd still prefer to have a highly qualified technical expert and good arbitrator running quality-type disputes. But for general commercial disputes I believe that the private judging process will deliver a higher quality product than is generally available in the commercial marketplace at the moment. It should be one with which barristers, lawyers and clients are comfortable, because it will be administered by somebody who is known for running a good courtroom in their day.

When Duty is a Pleasure

AS legal adviser to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament I recently had the duty (and pleasure) to review the provisions of the *Prostitution Control (Amendment) Bill* 1999.

Amongst the clauses of the Bill it is proposed to insert a new section 61X into the *Prostitution Control Act* 1994 (the Act), the effect of which will be to incorporate various sections of the *Fair Trading Act* 1999 as though they were provisions of the Act.

One such incorporated provision is section 120 of the *Fair Trading Act* 1999, which provides:

An inspector may do either or both of the following:

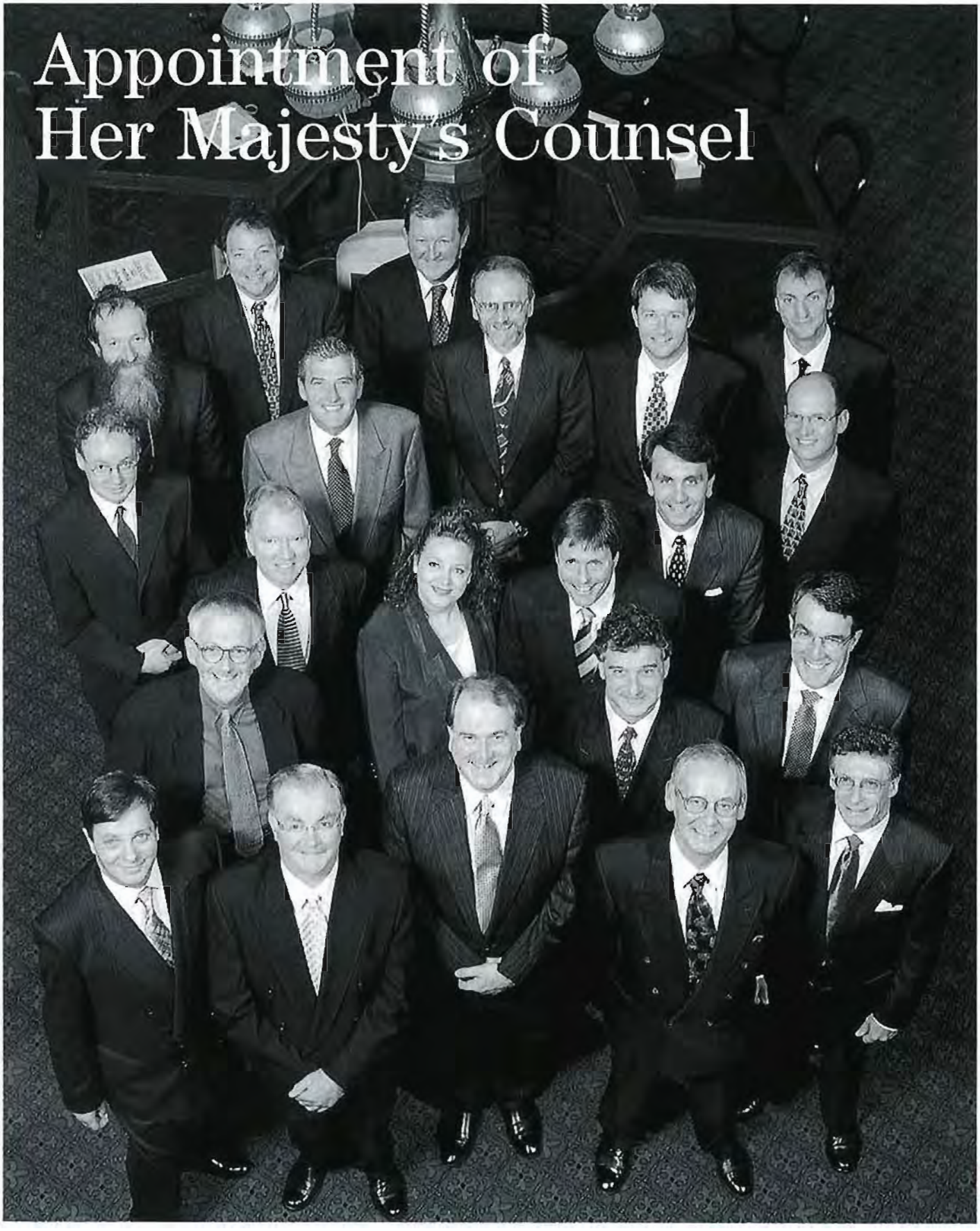
(a) enter and inspect any part of a premises which is, at the time of the entry and inspection, open to the public;

(b) purchase anything on such premises at such a time and such a price at which it is available to the public to purchase.

Quite apart from the apt numbering of the provision, I am sure that some would say — "Nice work if you can get it!"

Andrew Homer
Formerly of the Victorian Bar

Appointment of Her Majesty's Counsel



ON 23 November 1999 the Governor-in-Council appointed as Her Majesty's Counsel the persons listed below, in order of precedence:

Jeffrey Robert Moore
Brendan Anthony Murphy
Russell Lindsay Berglund
Michael David George Heaton
Jeremy Wingate Rapke
Paul David Elliott
John Arthur Smallwood
Bruce Richard St Alban Kendall
Douglas Michaelis Salek
Michael Anthony Tovey
Bruce Robert Geddes
Peter John Hanks
Paul Anthony Scanlon
Terence Michael Forrest
Peter Waddington Almond
Nicholas Joseph Damian Green
Jack David Hammond
Nemeer Mukhtar
Jeremy Hugh Gobbo
Jeanette Gita Morrish
Mark Alfred Dreyfus
Nunzio Lucarelli
Jonathan Barry Rashleigh Beach

The new silks announced their appointments to the Supreme Court of Victoria on Tuesday 7 December 1999. The Bar congratulates each of them.

Name:	**Jeffrey Robert Moore**
Date of Signing Bar Roll:	1 October 1970
Areas of Practice:	All Torts including Professional, Sporting, Public Authority, Transport Accident and Industrial Accident, Occupiers Liability, etc., Contract Liability, Coroners Court, Accredited Mediator
Readers:	Brian McCullagh, John Frankcom, Christine Blanksby, Eugene Trahair
Reaction on Appointment:	Ebullient.
Reason for Applying:	Hopefully, to be appointed as Silk.

Name:	**Brendan Anthony Murphy**
Date of Signing Bar Roll:	4 March 1971
Areas of Practice:	Criminal Law, Coronial Inquests, Road Safety
Readers:	R. Cleary, J. Rutherford
Reaction on Appointment:	Delight.
Reason for Applying:	Time to move on.

Name:	**Russell Lindsay Berglund**
Date of Signing Bar Roll:	1982
Areas of Practice:	Commercial, State Taxation
Readers:	Leonie Kline-Marantelli, John Tesarch, Mary-Anne Hughson, Belinda Lim
Reaction on Appointment:	Great pleasure tempered by the awareness of the task ahead.
Reason for Applying:	It was the right time.

Name:	**Michael David George Heaton**
Date of Signing Bar Roll:	11 September 1975
Areas of Practice:	Commercial, Contract, Corporations, Trade Practices, Property, Negligence, Equity, Mediation
Readers:	Mario Lanza, Mark McNamara
Reaction on Appointment:	Honoured and delighted.
Reason for Applying:	A progressive step. Urging of colleagues and a desire to contribute.

Name:	**Jeremy Wingate Rapke**
Date of Signing Bar Roll:	7 November 1974
Areas of Practice:	Criminal Law
Readers:	Samuel, Browne, Meehan, Ellwood, Page, Eidelson
Reaction on Appointment:	—
Reason for Applying:	—

Name:	**Paul David Elliott**
Date of Signing Bar Roll:	23 November 1978
Areas of Practice:	Common Law, Defamation, Commercial, Mediation
Readers:	Gerard Meehan, Carmen Randazzo, David Pannifex, Bernard Smith, Anthony Krohn, Rohan Hamilton, Hamish Austin
Reaction on Appointment:	Discombobulated.
Reason for Applying:	Challenge.

Name:	**John Arthur Smallwood**
Date of Signing Bar Roll:	1985
Areas of Practice:	Crime
Readers:	Townsend, Shand, Oldis
Reaction on Appointment:	Tiredness.
Reason for Applying:	Tiredness.

Key to appointees

1. John Smallwood
2. Terence Forrest
3. Paul Scanlon
4. Russell Berglund
5. Peter Almond
6. Nicholas Green
7. Jeremy Gobbo
8. Jonathan Beach
9. Michael Tovey
10. Peter Hanks
11. Bruce Kendall
12. Jeanette Morrish
13. Bruce Geddes
14. Nemeer Mukhtar
15. Jack Hammond
16. Mark Dreyfus
17. Douglas Salek
18. Brendan Murphy
19. Paul Elliott
20. Jeffrey Moore
21. Michael Heaton

Absent:
Jeremy Rapke
Nunzio Lucarelli

Name:	**Bruce Richard St Alban Kendall**
Date of Signing Bar Roll:	December 1975
Areas of Practice:	Equity and Commercial Law
Readers:	Ragu Appudurai, Andrew Hawking, Lewis Spaulding
Reaction on Appointment:	Honoured and greatly moved by the goodwill shown to me by Members of the Bar.
Reason for Applying:	To undertake more difficult work.

Name:	**Douglas Michaelis Salek**
Date of Signing Bar Roll:	13 October 1977
Areas of Practice:	Criminal Law
Readers:	Mary Urquhart, Christopher Howse, Dominic Lennon, Paul Lawrie
Reaction on Appointment:	Anything but speechless
Reason for Applying:	To take up the challenge

Name:	**Michael Anthony Tovey**
Date of Signing Bar Roll:	1976
Areas of Practice:	Criminal Law, Health and Industrial Inquests and Prosecutions, Professional and Corporate Compliance
Readers:	Lisa Hannan, Paul Reynolds, Donna Bakos, Damien Sheales, Fiona Ellis
Reaction on Appointment:	A sustained warm inner glow
Reason for Applying:	The hope that I might obtain a mark of recognition in the profession to which I have been committed for many years

Name:	**Bruce Robert Geddes**
Date of Signing Bar Roll:	16 May 1978
Areas of Practice:	Family Law
Readers:	Christine Pollard, Anna Boymal, Mal Ramsey, Robyn Wheeler
Reaction on Appointment:	Delighted
Reason for Applying:	To turn the page

Name:	**Peter John Hanks**
Date of Signing Bar Roll:	22 January 1991
Areas of Practice:	Administrative Law, Constitutional Law, Native Title, Discrimination Law
Readers:	None (not qualified)
Reaction on Appointment:	Pleasure, relief and a touch of insecurity (barrister's phobia).
Reason for Applying:	Several — first, to live out my reputation as a late developer; second, to allow me to clear the mess on my desk; third, to avoid any more of my former students overtaking me; fourth, because I love the job; fifth, to explore the irrationalities, contradictions and ambiguities in Australia's 21st century monarchy.

Name:	**Paul Anthony Scanlon**
Date of Signing Bar Roll:	June 1979
Areas of Practice:	Personal Injury, Medical Negligence, Professional Negligence
Readers:	Judith Downing, Keith Bolton, Christopher O'Neill
Reaction on Appointment:	Honoured.
Reason for Applying:	—

Name:	**Terence Michael Forrest**
Date of Signing Bar Roll:	20 May 1982
Areas of Practice:	Crime
Readers:	Peter Collins, Sarah Dawnes, Julia Condon, Matthew Fisher, Steven Tudor
Reaction on Appointment:	Dad'd be pleased.
Reason for Applying:	—

Name:	**Peter Wadington Almond**
Date of Signing Bar Roll:	20 May 1982
Areas of Practice:	Commercial (now willing to try anything)
Readers:	Ian Percy, Maya Rozner, Robert Peter, Suresh Senathirajah, Jason Pizer
Reaction on Appointment:	Delighted and relieved.
Reason for Applying:	To achieve goal of taking silk before the Year 2000.

Name:	**Nicholas Joseph Damian Green**
Date of Signing Bar Roll:	20 May 1982
Areas of Practice:	Industrial Law and Administrative Law
Readers:	Colin Fenwick, Bernice Wearne, Suzanne Sillitoe, Christine Clough, Maryann Gassert, Celia Conlan, Cornelia Fourfouris-Mack, Mandy Fox, Judy Benson, Tass Angelopoulos and Cahal Fairfield
Reaction on Appointment:	My cup runneth over.
Reason for Applying:	To live life to the full and to branch out into new areas.

Name:	**Jack David Hammond**
Date of Signing Bar Roll:	19 May 1983
Areas of Practice:	Commercial, Administrative Law, Planning, Local Government, Industrial and Employment Law
Readers:	Nicholas Pane, Paul Duggan, Wendy Harris, Matthew Groom
Reaction on Appointment:	Honoured, and amazed at the speed of the Bar's grapevine. I had hardly received notification before the phone started ringing!
Reason for Applying:	For the challenge and opportunity it presents.

Name:	**Nemeer Mukhtar**
Date of Signing Bar Roll:	1982
Areas of Practice:	Commercial, Energy and Natural Resources
Readers:	Annette Eastman, Michelle Gordon (with G. Nettle QC), Tricia Mann, Michael Gronow, Colin Campbell (with C. Maxwell QC)
Reaction on Appointment:	Honoured and relieved.
Reason for Applying:	I prefer not to answer.

Name:	**Jeremy Hugh Gobbo**
Date of Signing Bar Roll:	27 May 1984
Areas of Practice:	Planning, Local Government, Valuation and Administrative Law
Readers:	Paul Graham, Graeme Peake, Andrew Willis, Rob Cochrane, Susan Brennan
Reaction on Appointment:	Delighted, honoured and apprehensive
Reason for Applying:	Improved quality of work and life.

Name:	**Mark Alfred Dreyfus**
Date of Signing Bar Roll:	26 November 1987
Areas of Practice:	Commercial, Defamation, Administrative, Planning
Readers:	Anthony Lang, David Klempfner, Stephen O'Meara, Darren Bracken, Rob Heath, Anthony Klotz
Reaction on Appointment:	Honoured.
Reason for Applying:	—

Name:	**Nunzio Lucarelli**
Date of Signing Bar Roll:	23 May 1985
Areas of Practice:	Commercial Law
Readers:	David Chan, Sophie Panopoulos
Reaction on Appointment:	Honoured.
Reason for Applying:	—

Name:	**Jonathan Barry Rashleigh Beach**
Date of Signing Bar Roll:	November 1987
Areas of Practice:	Commercial
Readers:	Daniel Star, Bernie Quin
Reaction on Appointment:	Delighted.
Reason for Applying:	To get rid of paper-work.

Chief Justice Addresses Newly Appointed Queen's Counsel

ON behalf of the Court, which acknowledges the presence of His Excellency the Governor and Lady Gobbo, I congratulate each of you upon the high honour which has been bestowed upon you. We are indebted to the Attorney-General for his attendance here today to announce your appointments. His presence acknowledges the importance of this occasion, for, in this simple ceremony the Court acknowledges your appointments as an honour of a unique kind.

I am pleased to see a number of more senior silks and others present. Their presence does honour to you new silks and emphasises the importance of your professional advancement.

And, of course, the very welcome presence of so many members of family, loved ones and friends completes the picture.

The first appointment of a Queen's Counsel was made in the 16th century and was conferred on Sir Francis Bacon.

The first such appointment in Victoria was probably that of Richard Davies Ireland in 1863. Of Mr Ireland QC, no more need be said than that he was most certainly a more colourful character than any of us and that he was renowned for his spirited, and successful, defence of some of the men charged with high treason after the Eureka stockade.

It will not, I am sure, be inappropriate on this happy occasion if we pause for a moment to mark the passing during the year of a noted member of your order, Mr Ron Castan QC.

It is not generally known, but I enjoy a substantial legal aid practice. No week goes by without the receipt of some letters from people seeking assistance. These are read with great care and patience by Mr Traves. Sometimes, only sometimes, can help be offered. To do that I must turn to the profession — usually to one of the community legal centres which I hold in the highest regard, or to a generous individual. It was in this way that I came to seek help on a number of occasions from Ron Castan — usually as a mediator — for his skills in that difficult work were formidable. Not once did he decline and I do not recall an occasion when his efforts were unsuccessful. Truly, he was an ornament to the Order of Queen's Counsel and, I would suggest, an inspirational figure for each one of you.

In my view, it cannot be doubted that Queen's Counsel play a vital role in the administration of justice in Victoria. Your appointments involve great privilege and corresponding obligation. The courts and the profession look to you for leadership in all matters touching professional life and practice. We are confident that we shall not look to you in vain.

I extend to you all our very best wishes for professional success and fulfilment.

Oscar Slater

Julian Burnside

ON 6 May 1909, in the Court of Session in Edinburgh, Lord Guthrie received the verdict of the jury in the trial of Oscar Slater. Of the 15-man jury, nine voted Guilty, one voted Not Guilty, five voted Not Proven. His Lordship pronounced the sentence of death by hanging. The execution date was set for 27 May. On the evening of 25 May, the Scottish Secretary commuted the sentence to life imprisonment.

It was only a minor victory for the cause of justice that Oscar Slater was taken off to Peterhead to break rocks for the rest of his life: it was not until 1928 that his conviction was quashed, and he received a gratuitous payment of 6000 pounds in compensation for 19 years of wrongful imprisonment.

The conviction of Oscar Slater was one of the most infamous miscarriages of justice in the English-speaking world, principally the result of an over-zealous police force responding to public reaction to a crime.

At 7.00 pm on 21 December 1908, Marion Gilchrist was savagely murdered in her flat in Queen's Terrace, Glasgow. She had received about 40 blows to the head with a blunt object. She was 80 years old. Some jewellery and some documents had been disturbed, but it was unclear whether anything had been stolen.

Miss Gilchrist had been obsessive about security. Her doors were double-locked; she would not let anyone in who was unknown to her. Ten minutes before she was murdered, Miss Gilchrist sent her servant-girl, Helen Lambie, out to get the newspaper. During Helen Lambie's absence, Mr Adams, who lived in the flat below, heard unusual noises from Miss Gilchrist's flat. He went upstairs, and let himself in. As he was looking around, Helen Lambie returned. At that moment, a man walked calmly out of the living-room, walked past Helen Lambie and left the flat.

Adams went into the living-room, where he found the body of Miss Gilchrist, her head shattered, her blood all over the floor and the mantlepiece. He rushed out of the flat and into the street. The only person nearby was Mary Barrowman, a 14-year-old errand girl. She had seen a man who had run out of Gilchrist's building and "almost knocked her over".

When the police arrived, then, they had three eye-witnesses: Mr Adams, Helen Lambie and Mary Barrowman. Each gave a description of the man they had seen.

Adams was short-sighted and was not wearing his glasses: he could not give a worthwhile description. He had the impression the man was a visitor who was familiar with the flat.

Lambie said the man was 25 to 30 years old, medium height, slim build, clean shaven, wearing a light grey overcoat and a dark cloth cap.

Mary Barrowman's description differed in four respects: he was tall and thin, wearing a fawn-coloured overcoat and a tweed Donegal hat; in addition, his nose was twisted to one side.

Given these descriptions taken by the police, it is depressing to learn that Lambie and Barrowman later identified Oscar Slater as the man they had seen: he was 39 years old, heavily built with a deep chest, a straight nose, and a black moustache. He was described by those who later saw him in court as distinctly "foreign-looking", an observation not made by any of the identification witnesses.

The most remarkable thing to notice at this point is that Helen Lambie was so calm at the time she returned to the flat and found a stranger there: and the stranger likewise remained calm as he walked past Helen Lambie on his way out of the flat. The truth of the matter lies buried in this odd fact, and it died with Helen Lambie many years later.

Unfortunately for Slater, his life was not without shadows, and four days after the murder he was seen selling a pawn ticket in a drinking club. The ticket was for a piece of jewellery. The ticket was for a brooch similar to one which had belonged to Marion Gilchrist. Soon afterwards, Slater left Glasgow for Liverpool, where he boarded a ship bound for America.

When the Glasgow police heard of the pawn ticket, they put all their resources into pursuing Slater. Their suspicions were further aroused when they learned of his having boarded the *Lusitania* under a false name: he had boarded under the name of Sando, one of the aliases he had used in the past.

Unfortunately the police, once aroused, were not to be turned aside. The pawn ticket turned out to be for a brooch which had been continuously in pawn for five weeks before the murder, it was not Marion Gilchrist's brooch — it was an entirely false clue. And although Slater had boarded the ship under a false name, he had stayed in a hotel in Liverpool under the name "Oscar Slater, Glasgow". It soon became clear that his departure from Glasgow had been openly planned for some weeks, so what had seemed like guilty flight was soon explained away.

Despite the changed complexion of the evidence against Slater, the police never again pursued another lead. On the contrary, they followed Slater across the Atlantic and brought extradition proceedings. The principal witnesses in the extradition were Helen Lambie and Mary Barrowman. Both had by now been shown photos of Slater, and they shared the same cabin on the ship to New York. If that were not enough, these two suggestible eye-witnesses were standing in the corridor of the Court when Slater was brought, handcuffed, along the corridor and straight past them into the courtroom. The witnesses identified Slater as the man they had seen on the night of the murder. Slater was extradited.

The trial was marred by the unfairness of the Lord Advocate (prosecutor), Alexander Ure KC. He suppressed the evidence of a witness who would have contradicted the eye-witness Mary Barrowman; he suppressed medical evidence which clearly suggested that the murder weapon was not the tack-hammer which was found in Slater's possession; he referred (inaccurately and improperly) to Slater's shady past; he said that Slater had fled Glasgow the night his name was mentioned in the newspapers, whereas in fact Slater left

Glasgow openly one week *before* his name was mentioned in the press.

The Procurator Fiscal (DPP) withheld evidence which pointed to another suspect: the wealthy son of a prominent Glasgow family; a relative of Marion Gilchrist.

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Public dissatisfaction with the conviction arose almost immediately after the verdict; it increased as various worthies, including Sir Arthur Conan Doyle, took up the fight to free Slater. The government remained firm until 1914, when it held a secret enquiry into the trial. Unfortunately, Slater was not invited to participate. One of the key witnesses was Detective-Lieutenant Trench, who had led the original investigation. By 1914, he had begun to entertain serious concerns about the conviction. The prominent Glasgow citizen was referred to only as A.B. in the proceedings, even though the proceedings remained strictly secret. Despite the evidence of Detective Trench, the Commissioner recommended that no action be taken.

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In the years from 1914 to 1925, Slater occasionally managed to get word to the outside world, and pleaded for his cause to be pursued. But the Great War and its aftermath counted more than Slater's fate, and so he remained in Peterhead breaking rocks, day by day, until July 1927 when William Park published a book titled *The Truth about Oscar Slater*. The book revealed that the investigation (and the later Commission of Enquiry) had evidence strongly suggesting that the stranger who was in Marion Gilchrist's flat on the night of 21 December 1908 was her nephew Mr A.B., who closely fitted the description given by Helen Lambie; who had a dispute with Marion Gilchrist about the terms of her will. Of course, that would explain perfectly why the servant girl Helen Lambie was unsurprised by the appearance of a person in the flat when she returned with the papers on the night of the murder.

Public interest in the case was reignited. On 23 October, a statement by Helen Lambie was published in the *Empire News*. She said that the stranger in the flat was a person she had seen there a number of times before; she had named him to the police; the police had told her she was talking "nonsense"; the police had persuaded her that Slater was not unlike the man she had named; and that accordingly she identified Slater as the man.

Events followed rapidly.

Slater was released on probation on 14 November. On 30 November a special Act was passed to enable the recently created Scottish Court of Criminal Appeal to hear an appeal from a conviction entered in 1909.

The appeal had features of its own which deserve longer treatment than this short article allows. It is enough to say that the appeal succeeded, and Oscar Slater was later given an *ex gratia* payment of 6000 pounds in compensation for nearly 19 years of imprisonment. Despite all, the Scottish Office refused to pay Slater's costs of the appeal.

Slater died in 1948.

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By the time of Slater's appeal, Detective Trench was dead. He died disgraced and broken. His concerns about the case had been entirely right; his attempt to see an injustice corrected led to his being hounded out of the Glasgow police force. After he gave evidence to the secret enquiry, he was charged with *reset* (receiving stolen goods). The offence consisted in his having recovered stolen goods and returned them to their owner: a fact which caused the insurer to write his superiors a letter commending his good work!

Trench was acquitted by direction, but the episode broke him. He died in 1918.

Goods and Services Tax Update

THE Government's new tax system is now taking shape, particularly the Goods and Services Tax (GST) legislation. The Bar Council's office has been monitoring progress with the implementation of the GST and particularly those aspects of the tax regime which affect barristers.

On behalf of all law societies and Bar associations, an application for funding has been submitted to the GST Start-Up Assistance Office. The funding has been requested to support the promotional and informational activities of the law societies and Bar associations as they advise their members on preparations for the implementation of the GST. As at 30 November 1999, we have not been advised of the final response to this application.

On behalf of members of the Victorian Bar, the Bar Council has sought the permission of the Commissioner of Taxation for those barristers to account for GST on a cash basis, including barristers who have an annual turnover of $1 million or more. Under the GST legislation, the Commissioner of Taxation has a discretion as to whether an enterprise with an annual turnover of $1 million or more may be permitted to account for GST on a cash or accruals basis. On the basis that barristers normally account for income tax on a cash basis, the Bar Council has sought the permission of the Commissioner for its members to also account for GST on a cash basis.

The Bar is also planning to issue an information booklet which will assist members with their preparations for the new tax regime. The preparation of the information booklet has been delayed because of the many changes to the tax legislation.

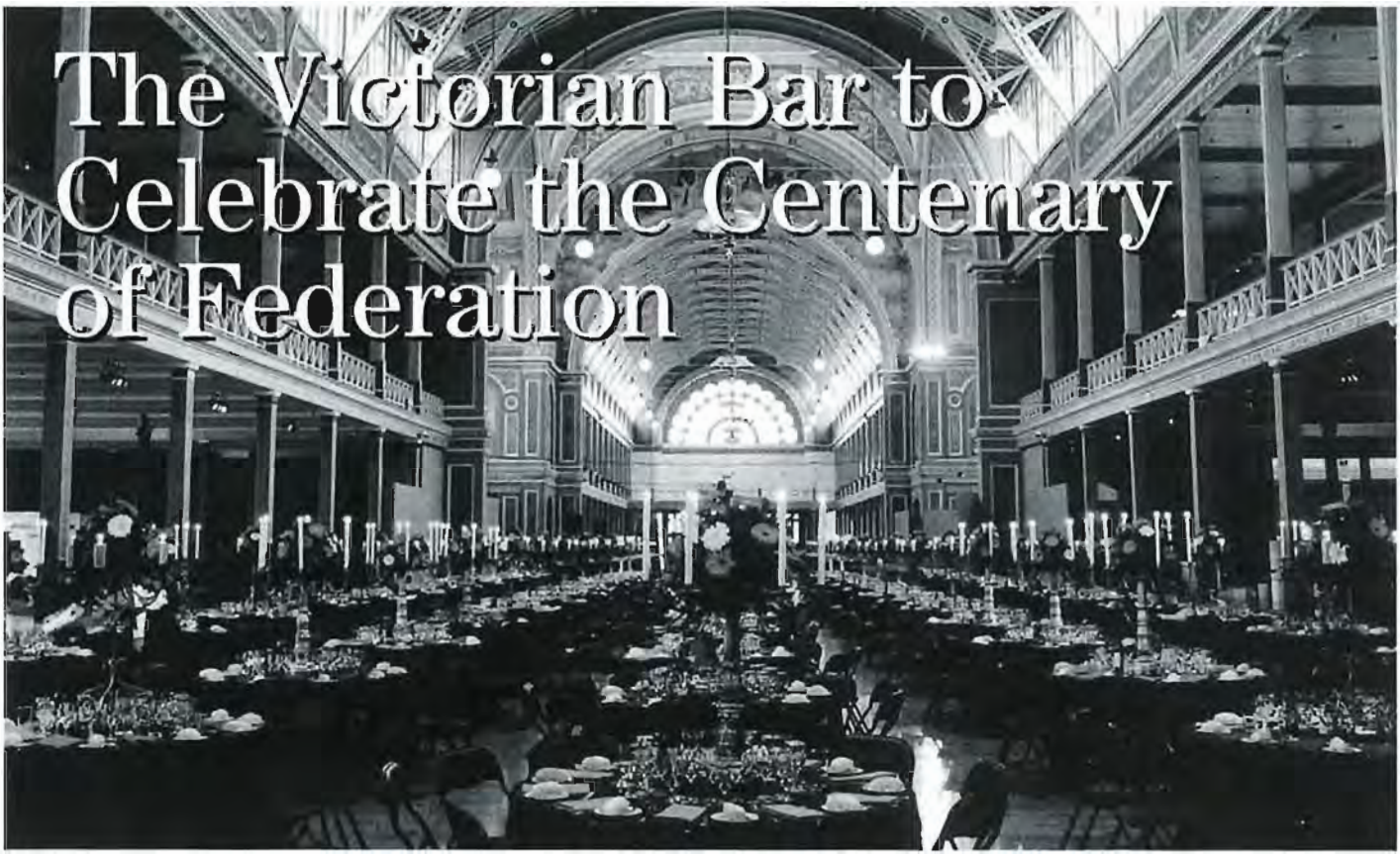
The Bar has also been working with the Clerks on preparations for the GST. The Clerks have established a sub-committee which includes four Clerks and the Executive Director of the Bar. This sub-committee has been giving detailed attention to the issues that barristers

and Clerks will face in relation to the GST. To date, the Clerks, through their sub-committee, have prepared for distribution to members of the Lists a memorandum dealing with the requirements for registration as an enterprise for the purposes of GST and for the obtaining of an Australian Business Number.

The Clerks are also in the process of obtaining professional advice on a number of technical aspects to do with the GST. One particular aspect on which advice is being sought is the extent to which barristers should increase their fees for the net effect of the new tax system. The Australian Competition and Consumer Commission (ACCC) has responsibility for ensuring that enterprises do not profit from the introduction of the GST. The ACCC expects that enterprises, when determining the extent to which their prices need to increase because of the GST, will offset against those price increases the savings that result from other measures of the new tax system, such as the reduction in sales tax. The Clerks are therefore seeking advice on the manner in which barristers should determine the net effect of the GST. It is anticipated that this advice will be available early in the year 2000.

David J.L. Bremner
Executive Director

The Victorian Bar to Celebrate the Centenary of Federation



Royal Exhibition Building, venue for the Bar's "Centenary of Federation Ball", 21 October 2000.

EACH year the Victorian Bar hosts the annual Bar dinner. Occasionally, the Bar is a little more adventurous and more inclusive in its social activities. In 2000, the Bar will put on not only the Bar dinner but also a special event celebrating the centenary of federation. On 21 October 2000 the Bar will hold a "Centenary of Federation Ball" at the Royal Exhibition Building.

For many years the Royal Exhibition Building was the largest building in Australia, attracting spectacular events like the Centennial Exhibition in 1888 and the opening of Federal parliament in 1901, the latter being the subject of celebrated paintings by Tom Roberts and Charles Nuttall. Now restored to its original splendour the Royal Exhibition Building is an appropriate venue for the Bar to commemorate federation with a bash.

The event is in its early stages of preparation under the auspices of a sub-committee of the Bar Council and some co-optees and consultants. The Bar Council plans an evening of fine food and wine, music, entertainment, dancing (and more!), no speeches apart from a quick welcome by the Chairman, less emphasis on formality and more emphasis on colour, movement and excitement. Unlike the Bar dinner and because of the size of the Royal Exhibition Building, we will be able to invite the husbands, wives, partners of barristers and to include judges, magistrates, retired members and others who are part of the Bar's extended family.

Early in the new year, a glossy flyer will be circulated, informing the Bar of the precise nature of the arrangements and entertainment and inviting members to subscribe for tickets. For the moment, members are urged to diarize 21 October 2000 as a night to keep free for the Royal Exhibition Building.

Significant Honour for Bernard Bongiorno QC

ON 22 June 1999 the award of Commendatore–Order of the Republic of Italy was conferred on Bernard Bongiorno QC by the Italian Consul-General in Melbourne. The award (one of Italy's highest honours) recognised Bernard's long and devoted service to the welfare of Melbourne's Italian community through the Italian Assistance Association (Co.As.It.). Bernard has held office in the Association for many years and is currently its President. He succeeded a fellow member of the Bar and Victorian Governor, Sir James Gobbo, in this office. A particular focus of the Association's work is care for the elderly in the Italian community.

Bernard was educated at St Joseph's College in Geelong and the University of Melbourne. He completed his LLB in 1966. After a short period of employment with William R. Hunt he came to the Bar in 1968. In his early years he spent most of his time in the County and Supreme Courts on the Geelong circuit. He was appointed Queen's Counsel in 1985 and became Victoria's Director of Public Prosecutions in 1991. He served the community in this role with distinction for five years. He has since returned to full time practice at the Bar.

In addition to his work for Co.As.It. he has found time to contribute to the work of other organisations including the Australian Institute of Judicial Administration, the Fitzroy Legal Service and Amnesty International. He has served the Bar as a member of the Bar Council, Chairman of the Ethics Committee and as a member of the Equality Before the Law Committee.

In conferring the award the Italian Consul-General, Dr Gianni Bardini, spoke glowingly (in English) about the important role played by Co.As.It. in assisting the Italian community and in the expression of Italian culture to the benefit of all Australians. He paid tribute to the leadership role which Bernard had played in the organisation.

Bongiorno QC awarded Commendatore-Order of the Republic of Italy.

Bongiorno responded graciously, speaking in fluent Italian. (Ruskin QC who was present was heard to say that in so doing he made a lot more sense than usual.) In particular, he emphasised the importance of multiculturalism as a social value in Australia which worked to the benefit of all.

The Bar extends warmest congratulations to Bernard on his well-merited award.

Award

The Honour, given by the state is awarded to a worthy recipient in recognition of the activities he performs that also have the purpose of bettering society through emulation.

An important point is that honours are only awarded on the above basis in order to avoid annulment of their true nature.

The recipient of an award or honour, must show gratitude and must continue to maintain his commitment.

Various Orders were established in the 14th century by Kings to recognise their own noblemen. The nature of awards changed after the 17th century and the honours were given to noble courtiers, public servants, members of the defence force and professional individuals.

Art. 87 of the Italian Constitution gives to the Head of the State the power of distributing awards of the Italian Republic.

Art. 78 of the Albertine Constitution gave to the King the power of creating other orders, a power that the President of the Republic no longer has.

Art. 319 of the Penal code states that the allocation of an award has a more general importance. In fact this article states it is a criminal offence for a public officer to be bribed in

order to nominate a person to receive an award.

1.1 THE ORDER OF THE ITALIAN REPUBLIC

The order was established in 1951 (law 3 May, n. 158) to attribute direct reference to the first order established by the Republic and with the purpose of avoiding the proliferation of various orders through *una reductio ad unum* of the various orders.

Commenda

It is in the spirit of the order to award those who have distinguished themselves in their commitment to establish a better society without taking into account the gerarchic position of the person. In fact an award can be given even to the postman, the nurse or a salesman that in his work has provided a generous commitment and contribution to the progress of society. The honour therefore is no longer an elitist distinction but a democratic recognition. The order of the Republic replaced the Order of the Italian Crown established in 1868 by Vittorio Emanuele II. This Order is the direct descendant of the Order of the Italian Crown established by King Vittorio Emanuele 11 in 1868.

The bestowing of an award is a recognition of merit acquired by Italian citizens and foreigners of both sexes of an age superior to 35 years, in the fields of Science, Arts, Literature, Economics and for results obtained internationally in the field of sport and for public service. The honours cannot be given to senators and members of Parliament during their term in office.

The honours are bestowed with a decree of the President of the Italian Republic subject to a proposal by the Prime Minister of Italy.

The order has five different levels: Cavaliere di Gran Croce (Knight Grand Cross), Grande Ufficiale (Knight Grand Official), Commendatore (Knight Commander), Ufficiale (Commander), e Cavaliere (Knight).

Exceptionally, for a high merit, an award of Cavaliere di Gran Croce can be conferred with the decoration of Gran Cordone.

In the past there were also some giuridical aspects linked to the award.

Art. 356 of the penal code allowed the Grande Ufficiale if called as a witness in court, to refuse to go to court but select a different location. Today, Art. 205 gives this prerogative only to the President of the Italian Republic, the President of the two chambers, the President of the Ministry of Council and the Constitutional Court.

The honours are normally given on 2 June on National Day and 27 December on the occasion of the establishment of the Constitution.

The President of the Republic is the head of the Order.

I.7 FOREIGN ORDERS

In France they receive La Legion D'Oneur established by Napoleon in 1802 and the order of the National Merit established in 1963, in Great Britain the Order of the Garter established in 1347, the United States with the Congress Medal.

Loose translation by a secretary at Co.As.It.

And it was a good day!

SUD

SUD is not the singular of soap and water. Sud is southern Italy. Sud is the cuisine of Sicily, Calabria and Sardinia.

Sud is another of the phoenix restaurants of King Street. It has arisen from the ashes of Slattery's and judging from that man's view that Sydney's cuisine is better than Melbourne's — it's a good thing his name no longer adorns a Melbourne restaurant.

King Street is revitalising itself with real restaurants. Sud is one of them.

This is a keen café. The proprietors, Giovanni Patane and Umberto Lallo, are keen to please. They are upfront proprietors. Giovanni is in charge of the food, and Umberto in charge of the wines. Their greeting at the door of this restaurant is warm and effusive. They have a wealth of experience, having both worked together at Il Bacaro.

But let's not forget the chef. Franco Italia is larger than life. He obviously loves his food. At a recent lunch we talked about Christmas. Christmas is a nice thing to talk about. Perhaps talking about it is better than experiencing it. We have made plans for a Christmas lunch of deboned turkey stuffed with cous cous and glaze fruits. This idea

Southern Italy's cuisine comes to King Street.

sounded great to me as I have also deboned a turkey. Deboning animals gives a great insight into cross-examining orthopaedic surgeons. The roll of the shoulder joint as it is removed, the joy of freeing ribs, the pleasure of bone coming away from flesh. Undoubtedly a Christmas lunch for the common law Bar.

The menu in this long and darkly lit restaurant appears on metal boards. They are headed Wine, Food and Cheese. There is no printed menu as the menu changes so regularly. The owners will extol the virtues of the menu and explain each dish.

On a recent visit I had an excellent silverbeet and potato soup. Although on the surface a simple dish, the underlying stock made it extremely subtle. My companions shared an excellent anti-pasto dish. This was not of the piece-of-salami-pickled-vegetables variety, but was extremely creative. There is of course speciality pasta. The emphasis is naturally on southern cooking and in particular Sicily. A fine example of this cooking is spaghetti with clams.

My companions partook of a main course of abbachio. This is lamb stew but lamb stew of an exalted variety. The dark sauce had been enhanced by the use of orange and lemon zest to heighten its deep wine-based flavour. I didn't partake of this main course as I was going to cook lamb that night. I endeavoured to reinvent this dish for my dinner guests.

I had simple veal scaloppini. The veal was excellent and deftly cooked.

Another main course that sounded interesting was a dish of chicken braised with green olives and capers in the style of Messina in Sicily.

As for desserts, the owners insisted we try their home-made cassata. This did not resemble the cassata we know so well of the Taranto variety. It was delicate and natural flavoured. Other desserts are lemon ricotta cake finished with cream and panna cotta flavoured with nutmeg.

The cheeses are a feature. A selection consists of fontina, gorgonzola, grana padano and pecorino.

The price range is from $9 to $12 for entrée, $17 to $19 for mains, and $7.50 for dessert, and $12.50 for the cheese plate.

The wines again are heavily Italian influenced. Umberto Lallo is very persuasive when it comes to recommending his favourites. We partook of a Verdiccio which was excellent, but the stand out was a large red from Sardinia. The wines are not cheap.

This is a serious restaurant. The prices are such that it is to be taken seriously. It is not a hit-and-run type cafe. The restaurant is open for lunch and dinner from Monday to Friday. Weekend trading in King Street remains a thing of the future.

Overall Sud with its serious food, wine, service and diligent owners deserves its popularity.

SUD: 219 King Street, Melbourne
Phone: 9670 8451
Lunch and dinner — Monday to Friday.

Paul D. Elliott QC

Verbatim

Dog-gone Easement

25 August 1999
Sunshine Retail Investments Pty Ltd v. *Wulff*
Coram: Hedigan J
For the plaintiff: R. Keen (solicitor)
For the defendant: P.G. Cawthorn

Cawthorn, in his closing address, trying to convince Hedigan J. that the residents of a cul-de-sac in Toorak had the benefit of an easement of lost modern grant because they had used a walkway at the side of a block of flats for more than 20 years. It was necessary to prove that the absentee landlord knew of the use.
His Honour: What about dogs?
Mr Cawthorn: What about them?
His Honour: I like them.
Mr Cawthorn: Page 455, clause 19: "The tenant shall not keep any animal, bird or pet on the premises without the written consent of the landlord."

So, if a dog is seen it can't be a tenant's dog. It must be a non-tenant walking his dog.
His Honour: We had various people walking dogs but I must say I don't know when they stopped and when they started. I know Mr McKillop . . .
Mr Cawthorn: He had Bassett Hounds.
His Honour: They are dead too. They passed on to the great kennel in the sky.
Mr Cawthorn: Mr Byrne had the Cavalier King Charles.
His Honour: Someone had the Australian Terriers. Labradors.
Mr Cawthorn: Mr Haskins had the poodles.
His Honour: Well, sure, okay. That's not a bad point.

Putting Up

Geelong Supreme Court

16 August 1999
R v. *Floyd*

Coldrey: I often think that it would be preferable if these summaries of evidence could be read to you by somebody like Sir Laurence Olivier or even our own Leonard Teale but neither of them are with us any more, members of the jury, so you will just have to put up with me.
Juror: We don't mind that.
His Honour: Well, thank you.

Ends and Beginnings

High Court of Australia

21 May 1999
Walker v. *Inline Couriers P/L & Anor*

This was an exciting special leave application involving the correct interpretation of some sub-sections of s. 135A and s. 135B of the Accident Compensation Act.
McHugh J: Yes. Well, I think your time is up Mr Gorton. Yes, Mr Ruskin.
Mr Ruskin: May it please the Court, we say that this case does not raise any matter of public import or principle; it is really a case about statutory interpretation of a local statute in respect of which . . .
Kirby J: You cannot say that since Justice Callinan came on the Court. Every case has to be considered on its own basis and it affects a lot of working people.
Callinan J: This is the High Court of all the States as well as of the Commonwealth.
Kirby J: I used to slip into that mistake until Justice Callinan pointed out that it is erroneous. It is like saying that we just do not worry if it is a local statute.
McHugh J: Well, if it is any comfort to you, Mr Ruskin, if the orthodoxies change, then I am a heretic.
Mr Ruskin: I am really delighted to be, with respect, in such great company.
Kirby J: . . . when one goes to the external document, as Mr Justice McHugh has said, it could not be clearer. Experience teaches that the people who draft the explanatory memoranda are usually Parliamentary Counsel's Office and they are the people who have drafted the text of the statute.
Mr Ruskin: We say two things about that.
Kirby J: Sir Humphrey has got to work on the Minister's speech.
Callinan J: Parliament enacts the text. It does not enact the memorandum.
Mr Ruskin: That is what we would say, your Honour, and it really would be the end of the world as we know it, because people could go round finding what the Minister said about something rather than what the text said.
Kirby J: Bertrand Russell had a very good comment about the end of the world as we know it, and I quote it in *Steel's Case* recently. You might have a look at that when you go back. The end of the world is usually what the next generation finds the beginning of the world.

Accident of Birth

County Court

23 September 1999
Coram: Judge Hanlon
Plaintiff: A.K. Wilson
Defendant: A.T. Prowd

Mr Colquhoun: It's not insignificant in the way . . .
His Honour: We're talking about a lad who is playing under-age football.
Mr Colquhoun: Yes, sir, and who was given no opportunity to . . .
His Honour: How many under-age footballers have you known who looked as if they were going to be the next Len Thompson?
Mr Colquhoun: Sir, I can say this: I was born in New South Wales. I was not indoctrinated at birth and I have absolutely no knowledge.
His Honour: If you were born in New South Wales and you want to talk about Australian Rules football, I rule as a matter of law you don't know what you're talking about.

Luther *v.* Savonarola

Giumelli v. *Giumelli*

Mr McCusker: I think your Honour Justice Kirby, in *Bryson* v. *Bryant*, expressed a wish for a Luther of jurisprudence to come and codify, as it were, draw these lines of authority together, and I do not profess to be that but, in this case, we say that . . .
Gleeson CJ: A Luther of jurisprudence?

Kirby J: Yes. I thought of a Luther. Perhaps I could think of a Pope.
Gleeson CJ: Perhaps we need a Savonarola.

Solicitor Makes Page 3

Melbourne Magistrate's Court

21 May 1999

Peele pleaded guilty to the charge at the Melbourne Magistrates Court on 21 May 1999. He was represented by a solicitor whose name escapes me. The solicitor was about as useful as a prior conviction. His plea was so good that it grabbed the attention of a reporter and as a result the matter made page 3 of *The Age* the following day.

Prime Time at VCAT

Victorian Civil and Administrative Tribunal

29 March 1999
Radmilla Tirbanos-Pricop v. *Transport Accident Commission*
Coram: M.F. Macnamara, Deputy President

The Deputy President: this proceeding takes us into a twilight world of drug trafficking, social security fraud and tax evasion.

Expert Diagnosis

County Court, Melbourne

28 September 1999
R v. *Lanciana*
Corum: Judge Walsh and a jury of 12
Crown: K. Gilligan
Defence: P.G. Priest QC and M.J. Croucher
Verdict: Not guilty

Gilligan: Okay. Now, what happened after you got home?
Witness: Um . . . first couple . . . weeks I slept about 16 to 20 hours a day . . .
Gilligan: Was that your usual habit?
Witness: No.
Gilligan: Can you say why you were sleeping for such long periods?
Witness: Year, well, what I actually — what actually happened to me is, um, two outer blood spots on the brain . . .
Priest: I object. Look, he is giving a medical [opinion] . . .
His Honour: He is in the dilemma [that] he can't ask leading questions. You are not to give evidence of your medical problems. We will hear from experts about these.
Gilligan: Don't say what the doctors told you; just tell us what you were feeling. How were you feeling?
Witness: Shithouse.

A Matter of Perspective

Supreme Court Western Australia

8 November 1999
DPP v. *Kizon*
Coram: Heenan J

Heenan J: Defence counsel are prone to worries and concerns, Mr Richter.
Richter: They are the only ones whose clients might go to gaol.
Heenan J: That's right.
Richter: The Queen ain't going.

Judicial Excitement

VCAT Anti-Discrimination List

4 October 1999
Coram: Judge Davey

Dr Scutt, who was appearing, had just been appointed as Anti-Discrimination Commissioner in Tasmania.
His Honour: Well, then, can I ask are you going to continue practising here after you — are you able to do both jobs?
Dr Scutt: Well, no. I'm staying on my list, Your Honour, and I'm retaining my chambers, because I've got chambers I want to actually retain, that's all.
No, I've got the right to intervene, you see, so therefore you see that — and the way that I read the intervention power is that as long as any court will accept our intervention, then I'll be doing it that way, you see.
His Honour: So you will be popping up all over the place?
Dr Scutt: Yes, I've got my people out everywhere, you see, to pick places where we could intervene, because I actually do think it could be quite useful.
His Honour: It sounds very interesting.
Dr Scutt: I didn't notice excitement on Your Honour's face at the thought.
His Honour: All right. I will now adjourn until 9.30 a.m. Wednesday morning.

1999 Melbourne Cup Calcutta at the Essoign Club

"*Ray singa, in the nine teena nine tee nine-a Fosters 'Mell-borne Gup.*" And with those familiar words, from that familiar race caller, so began the festivities that were the 1999 Melbourne Cup Calcutta at the Essoign Club on 29 October, 1999.

QUITE frankly, the function was a hit. Jack Styring played to a record crowd, who were extremely appreciative of what can only be described as an imaginative Phantom Call. As usual, the atmosphere was electric as John "Sorry I'm two hours late, but I was buying fish at the Victoria Market" Lee wove his spell over the room, auctioning off horse after horse, some of which weren't even running in the Sport of Kings' race of races.

Rivalry for the most ridiculous bid of the day was hot, contested initially between Paul "Red Face" Scanlon (as he then was) and Tim "I'll have a mineral water thanks" Tobin (as he still is). Dermott "We'll just go to $1000" Connors made a late run, as did John "I've clearly got too much money" Middleton, who put in a bid of $2000 for a horse whose name I now can't remember. Red face rocketed to his feet and was heard to bellow "he can have that on his own", while the suave man giggled nervously.

You may be forgiven for thinking, viewers, that things couldn't get any more exciting than this, however, the play of the day was undoubtedly made by Jack "We've got to buy a horse" Keenan, leading a table of very reluctant bidders for the Cup's ultimate winner, Rogan Josh. Never has there been such dissension over a group bid. The crowd applauded politely, Dermott Connors (who clearly knew something we all didn't) glared at his table of wimps, hissing that we "should have put in just one more bid" and Jack was roundly abused by a now tired and emotional John Richards. Needless to say the chaps lined up for their winnings with a little more enthusiasm than existed at the point of purchase.

At the end of the day, there was money scattered all over the club (for reasons which still aren't apparent but had something to do with Paul "AAP Reuter" Jens), John "Leepy" Lee was visibly shattered and the crowd partied until the wee small hours. Areeeeba!

Sara Hinchey

Justice Paul Guest, Ian Hardingham and Judge Leo Hart

Jack Styring performing the phantom call.

R.J. Stanley QC, and Justice Peter Heerey

General view of gathering reacting to the call.

Tony Cavanough QC, Ross Middleton, Jack Forrest QC and Paul

Judge Nixon and Judge Campbell.

Legal Services Market, Competition Policy, Limitation of Liability, Multi-Disciplinary Practices: a Contrary View

A paper delivered by John (Jack) T. Rush QC, on Friday, 11 June 1999, to a seminar organised by the Northern Territory Law Society, "National Legal Services Market".

THAT I appear at this seminar to argue the so-called "contrary view" concerning the law and the market place, concerning multi-disciplinary practices (MDP) and capping of lawyers' legal liability says much about the leadership of our profession and change in legal values in the past decade.

The Victorian Bar does not resist change. In Victoria the Bar has been at the forefront of genuine reform. The Bar has supported matters such as travelling practising certificates, uniform rules of conduct, uniform rules of procedure and other matters. However, the changes we discuss today, although dressed up as "reform" by their proponents are not reform at all. "Reform" envisages correcting what is defective or wrong. The capping of liability, the MDP proposal of the Law Council of Australia, the unrestricted embracing of the market place and competition policy strike at fundamental tenets of the ethical rules and responsibilities of lawyers to their clients and above all to the community which as a profession we claim to serve.

One can point to three general reasons for change in the legal profession:

1. The desire of the profession to adapt so as to advance the interests of the community — genuine reform.
2. A determination on the part of government to force by threat or by legislation change onto the profession.
3. Change brought about by the self-interest of the profession — for generally a minority of the legal profession.

Regrettably the significant factors generating the support of the representative bodies of lawyers for the changes we discuss today are the threats of government and the self-interest of lawyers.

I examine the proposal dealing with capping of liability to demonstrate a change driven by self-interest.

This item was on the Law Council agenda for the 12 months until the decision to support capping of liability at the meeting in December 1998. Although ultimately entitled "Professional Standards Legislation" — a more palatable title for public consumption — the effect of the policy is to cap lawyers' professional liability.

A paper in support of capping was put before the Law Council in 1998. With due respect to the authors, the generality of the reasons put forward to justify the proposed abrogation of common law principles smacked of self-interest.

Arguments put forward for capping included:

(i) Litigation against lawyers meant ". . . professionals are becoming more defensive in their legal work and are giving their clients more cautious advice". If this argument be justified (and there is no evidence to indicate justification) the question may be posed as to whether such a result is a negative for the profession.

(ii) "There is a difficulty in attracting high-calibre professionals into professions due to liability risk". The authors did not justify this assertion with any data. Anecdotal evidence from Melbourne's largest legal firms does not support the assertion with the university's brightest being recruited to the larger firms prior to finishing courses and being offered salary packages the envy of many suburban or country lawyers. So-called "high-calibre" lawyers are head-hunted and swap between legal firms at an almost frenetic pace.

(iii) "Professionals are a target for litigation when something goes wrong and clients look for someone to blame". The implication here is that professional negligence actions are invariably without foundation. Again the basis for such assertions is never put forward. No detail is proffered to suggest that in some way or another litigation against lawyers is an abuse of process.

(iv) Other factors put forward in favour

of capping included overseas clients of lawyers being at the forefront of some claims, inconvenience to lawyers in terms of resources and time to meet such claims.

In summary, I contend that not one convincing argument was put forward to justify this most significant change to common law principles. No argument of any substance was put forward to indicate indemnity insurance was too expensive — not affordable. No materials or research to identify the nature or type of such claims was presented.

At the same meeting, December 1998, the Law Council supported a policy to introduce MDPs to Australia: on the one hand a radical move to widen the scope and nature of legal practices and the role of lawyers by way of introduction of MDPs and on the other hand a policy to significantly limit liability of lawyers in relation to their professional responsibility. No wonder the public is cynical of the motives of lawyers.

The information provided by the Law Society of New South Wales to the Law Council indicated that the cost of claims against solicitors in that State in 99 per cent of claims was less than $100,000. On these figures it can be argued the decision in favour of capping of liability was based on 1 per cent or fewer than 1 per cent of claims. The unanswered question is whether 1 per cent of claims are in fact skewing lawyers' professional negligence insurance. It may be that 1 per cent of claims involve enormously large transactions which in turn return extremely large fees and that the real beneficiaries of capping are this small minority.

The proposal for capping of liability is not limited to the liability of lawyers. The Law Council of Australia proposal is for all "professions" to be given the benefit of a form of statutory capping. Logically, if capping is appropriate for lawyers and other professionals, it is also appropriate for claims against banks, companies and why not governments? There is a total lack of consistency in a campaign to cap the liability for legal professionals and not for other legal entities.

The Victorian Bar has over time maintained a strong public stance against the attempts of some professional groups, including auditors and accountants, to limit liability for negligence. The Victorian Bar Council has argued that such professional groups have been primarily motivated by self-interest with little or no regard for the clients of their professional services. This has been and remains our view. Any other creates a vacuum for credibility. How can we sustain an argument that because we are professionals our liability should be capped at $1.5 million but some other "service provider" such as a life insurance agent or a financial adviser should not be entitled to a cap?

As referred to earlier, legal change is often dressed up or marketed so it can be sold as a benefit to clients or the community. The capping of liability proposal was based on the New South Wales model. The quid pro quo described by the President of the Law Council of Australia in *Australian Lawyer*, February 1999, was as follows:

(i) To ensure that members of the scheme have insurance to cover the relevant level of liability. (There is no recognition of the fact that compulsory insurance is required of lawyers in most Australian States as a precondition of practice in any event).

(ii) Have a system of handling complaints and discipline of members. (Such a system is generally seen as fundamental to a "profession". Most Law Societies and Bars have had such a system since their inception.)

(iii) Have a program of risk management. (These programs should be in place anyway.)

In essence there is no quid pro quo to the community for the capping of liability.

Well you might ask who are the main beneficiaries of capping of liability? What legal entities have pushed for this reform? The answer to the second question may also answer the first. A senior partner at Allen Allen & Hemsley, the large Sydney law firm, in 1998 worked on behalf of seven national law firms in relation to various projects. The "primary project", to use the words of that partner, was limitation of professional liability. I think it fair to say that capping of liability will primarily benefit the big firms at the expense of legal credibility and common law tradition.

An MDP is a practice where the proprietors are members of two or more professions — a simple sounding proposition.

The arguments put in favour of MDPs in the report to the Law Council are easily summarised.

1. Clients may need the services of professionals other than lawyers. The MDP structure is a response to this "requirement" by providing "one-stop shopping".
2. Deregulation to allow MDPs would meet the requirements of open and fair competition as required by the Trade Practices Act.
3. The legal profession has long been criticised as anti-competitive and of holding monopolies over certain areas which should be opened up. MDPs would assist to overcome these criticisms.

The Law Council of Australia had no evidence of a demand for lawyers to practise in MDPs. Indeed, to clothe this change in policy as being caused as a consequence of some demand for change

The Victorian Bar has over time maintained a strong public stance against the attempts of some professional groups, including auditors and accountants, to limit liability for negligence.

is poppycock. The reason for change was put succinctly by the President of LCA (*Australian Lawyer*, February 1999):

> The underlying philosophy of such an approach is to remove the existing restraints on the capacity of the legal profession to compete with other service providers . . .

The reason the Law Council of Australia adopted the radical position it did in relation to MDPs was not for client interest. It was for lawyer interest, big national law firm interest, at the expense of clients and at the threat of ethical and professional obligations. I should also indicate that the Victorian Legal Ombudsman reported, after enquiring into MDPs, that they were a potential threat to the small, yet viable, legal practitioner.

The MDP policy is really driven by fear and self-interest. The fear is the encroachment of accountants into the legal domain. It is the context of the "big six" accounting firms involving themselves in business services, including legal serv-

ices. It is the context of some lawyers seeing themselves in the same market as accountants.

The important differences between the accountancy profession and the legal profession do not appear in the Law Council policy. We maintain that legal practitioners are part of a system which derives from the authority of the State. Legal practitioners have an overwhelming duty to the Court as well as to the client. It is a duty that does not apply in the same way to other professions.

Accountants have a duty to reveal and make public the true state of affairs of a company. A lawyer, subject to overriding duties to the Court, has a duty to maintain and preserve confidentiality and remain free of conflict of interest.

It is impossible to sustain different ethical rules within a partnership or amongst the members of the one firm. MDPs threaten four principles fundamental to legal practice:

(i) The need for a clear and distinct system of control of discipline of lawyers — to maintain standards.
(ii) The independence of the legal profession which is necessary to defend rights of clients and the rule of law.
(iii) Maintenance of client confidentiality as a legal privilege essential to the proper lawyer/client relationship.
(iv) The avoidance of conflict of interest.

The maintaining of these fundamental principles is for the protection and benefit of clients — not lawyers. The protection of clients is the missing focus of the Law Council policy.

New South Wales permitted MDPs by legislation in 1994. There has been little interest in MDPs despite the legislation. So much for the demand for MDPs. The New South Wales legislation requires

(i) lawyer partners to have control of MDPs;
(ii) that non-lawyer partners comply with the legal profession's rules regarding trust money and contributions to fidelity funds.

These are basic and necessary controls.

The 1998 Law Council policy has done away with any form of regulation. Regulation of business structures, according to Law Council policy, is not regarded as critical, is potentially seen as anti-competitive. Thus, a lawyer in an MDP may have his boss and may be answerable to an accountant with a completely different set of responsibilities to a client than the lawyer's fundamental obligations to the client and the lawyer's obligations to the court. At the very least, the Victorian Bar argues, that an MDP should be controlled by lawyer partners in the form set out in the New South Wales legislation of 1994.

There are no barriers to the type of partnerships that a lawyer may enter, according to the Law Council policy. Allen Allen & Hemsley (same firm, same partner) submitted to the New South Wales Law Society that lawyers entering an MDP should not be restricted to other professions as their partners but may also go into partnership with other "service providers" including, for example, marriage counsellors, building inspectors, pest inspection personnel and life insurance salespersons.

Whilst the Law Council of Australia was considering its position in relation to MDPs the International Bar Association met in Vancouver on 13 September 1998. It adopted a draft resolution in relation to the issue of multi-disciplinary practices.

The IBA resolution considered matters which the Victorian Bar Council submits the Law Council just ignored.

The contrast in philosophical approach could not be clearer. The Law Council of Australia policy on MDPs was governed by a philosophy of the market place. The IBA policy was governed by the lawyer's duty to client and community — the lawyer's role as a "professional" person.

In a strong stand concerning MDPs the IBA stated that lawyers must stand for, as a first objective, the ready access to justice and legal services for every member of society together with the preservation of the interests of clients and the public rather than the economic protection of lawyers. It noted the fundamental standards and principles distinguishing the legal profession are for the protection and benefit of the public — the community at large — and not simply for the benefit of those who happen to be the clients of a lawyer at any particular time.

The IBA noted for the proper functioning of the legal profession it was of prime importance that clients trust their lawyers and communicate frankly and honestly with them without fear of any prejudicial effect and this requirement of trust had three important consequences.

(a) Lawyers must work under circumstances which eliminate external influences or pressures deviating from the client's interest by which a lawyer should be exclusively led and this constitutes the core of the rules common to almost all jurisdictions and essential to the rule of law, that lawyers should be independent.
(b) Arising out of the same considerations the requirement that lawyers should be independent, lawyers should scrupulously avoid any involvement with more than one party where the parties have conflicting interests or even potentially conflicting interests.
(c) The lawyers must preserve complete confidentiality as to the information entrusted to them by their clients, and to protect this confidentiality, information provided to a lawyer by his client should be protected be client privilege.

The IBA stated that these issues are in many ways unique to the legal profession because they differ from similar aspects peculiar to other professions in that other professions do not play the pivotal role in the administration of justice and the upholding of the rule of law which the legal profession plays: for other professions, the principles relevant to independence, confidentiality and the avoidance of conflicting interests differ widely from those applying to the legal profession — the IBA observed, as we have, accountants, for example, have duties in which interests of those other than their own client must be given due consideration, and fulfilment of such duties may lead to an actual obligation to disclose and report information obtained from a client without that client's consent.

The IBA recognised commercial interests that militate for MDPs with factors such as economies of scale, one-stop shopping, but these, it said, must be viewed in the light of the overriding public interest in maintaining the essential principle and qualities of the legal profession, in particular as concerns independence, avoiding of conflicting interests and confidentiality.

The IBA noted that where a law practice is conducted in an integrated organisation with other professions, lawyers may be subject to influences which affect their independence in that they may be subject to rules requiring them to

take interests into account other than the interests of the client which they have been engaged to promote.

If MDPs were to exist in any jurisdiction, the IBA resolved that there should be rules to regulate MDPs in such a way as to eliminate the risks of undermining the lawyer's independence, allowing conflicts of interest and eroding confidentiality and client privilege.

The IBA resolved that such rules should contain:

(i) a requirement for the submission of the entire organisation in question, including its non-lawyers, to the regulatory and disciplinary authorities of the legal profession;

(ii) a requirement for the giving of clear notice to clients as to the limitations inherent in forms of integrated co-operation and the risks attaching thereto:

(iii) precise requirements on the avoidance of conflicting interests which exclude the possibility of combining auditing services with consulting services or legal representation;

(iv) precise rules on restriction of access to confidential information;

(v) provision setting out the minimum degree of ownership and/or voting control which lawyers must hold in MDPs and the maximum degree of ownership and/or voting control which non-lawyers may hold in MDPs.

Why the Law Council would ignore these requirements — ignore the New South Wales legislation — is not explained.

The IBA was driven by principle. The Law Council of Australia in relation to its policy was driven by economic protection of lawyers and self-interest. That self-interest is demonstrated by the inconsistency of the Law Council position when one compares its policy on MDPs with its policy on the reservation of legal work for lawyers. The justification for the policy of reservation of core legal work for lawyers was put by the President of the Law Council as follows (*Australian Lawyer*, February 1999):

> The policy recognises that the unique and distinguishing character of a lawyer, in addition to the nature of his, or her, educational and training experience and qualifications, is:
>
> (i) his or her admission to the court to practise law as an "officer of the court" and
>
> (ii) the ethical duties and responsibilities of a lawyer to the court, to the administration of justice and to the client.

These principles it appears are of little significance for the Law Council in its consideration of MDPs but vital for its consideration of the reservation of legal work.

The market place and competition policy have their place but not at the expense of the independence of the profession.

We think the Law Council should review its position and stance.

There is a basic conflict between practise of the law as a profession and practise of the law as a business.

If business and the market dominate legal practise will lose its soul. Of course we work for a living and income but preoccupation with the market place and competition ". . . with the making of money is not conducive to the giving of disinterested yet sympathetic and wise legal advice" (The Hon. Sir Daryl Dawson, Paper to 29th Australian Convention, 27 September 1995 "The Legal Services Market").

Further, if we as lawyers lose sight of the special responsibility to serve the community rather than ourselves, any authority we have in our society will be diminished and we become no different from any other commercial group driven by market forces. The Law Council has lost sight of the philosophical basis of our profession.

What I speak about now has been raised as a concern in recent times by leading lawyers, including former Justices of the High Court, Justice Dawson and Chief Justice Brennan, and the present Chief Justice of the High Court, Chief Justice Gleeson. On 7 May 1999 at a University of Sydney Graduation Ceremony the present Chief Justice stated as follows:

> Nevertheless, I am convinced that if we abandon the idea of a profession, and accept that the pursuit of financial reward is the primary objective of legal practice, the public, and lawyers, will have lost something of substantial value. At one level, the point could be made sufficiently by saying that anyone who thinks the public interest will be served by allowing lawyers to follow the dictates of self-interest has never met a lawyer. But there is more to it than that.
>
> ********
>
> It is not only the public who will lose if professions become mere business associations, and abandon the idea that their members have obligations of service overriding considerations of personal financial advantage, or commitments to standards of behaviour beyond the bare minimum of what is enforceable by legal sanction or by commercial necessity. The members of the professions also will lose.
>
> *******
>
> Nobody entering any profession is entitled to regard it simply as a way of making money. This morning's splendid and colourful occasion, held in these beautiful surroundings . . . was not arranged for the purpose of enabling the Chancellor of the University to present to each of you a licence to make money. If testamurs were nothing more than that they would be distributed by e-mail.

At the Victorian Bar we feel the Law Council has in football parlance "dropped the ball". We believe in change and genuine reform but not at any cost and certainly not at the cost of the independence of the profession. The MDP policy of the Law Council of Australia is a significant threat to that independence and the Law Council perhaps should appreciate that without that independence the Australian legal profession will have little or no attraction in the market place.

Idiom

THE English language abounds in idiomatic expressions which, if taken literally, would be utterly confusing to modern speakers. They are a source of endless trouble to people for whom English is a second or temporary language. For native speakers, the intended sense is learned during childhood by inference from the context: we have no need to analyse *the exception which proves the rule* into its linguistic constituents. We have a vague idea of its meaning; we use it as a conversation filler; we are untroubled by the thought that an exception should disprove (or at least qualify) a rule.

Prove, in this idiom, does not mean *demonstrate* or *validate*. It has the earlier meaning of *test*. It comes ultimately from the Latin *probare*: to test. This sense was current until late in the nineteenth century, but it survives also in the idiom *the proof of the pudding is in the eating*, i.e. a thing is tested by putting it to its intended use. The same sense (and the etymological origins of the word) survives in *proving* a Will: if the Will is proved, *probate* is granted. In Scots law, a trial without a jury is still called a *proof* it is the occasion when the case of the pursuer is tested.

Jot or tittle is an idiom which means any small thing. Curiously, it is close in origin to the idiom which commands attention to every small detail: *dot the "i"s and cross the "t"s*. (That is one place where the urge to use an inappropriate apostrophe is almost irresistible). *Jot* is a variant of *iota*, the Greek name for the letter *i*. Iota is still used alone to mean something small, generally by negation: *there is not one iota of evidence . . .*; in exactly the same way it might be said *there is not a jot of evidence . . .* The meanings are identical.

The ambivalence between *jot* and *iota* is not surprising: until early in the nineteenth century, *i* and *j* were facets of the same letter. In the first edition of Johnson's Dictionary (1755), the entry next after *hystericks* is *I*, and it contains a discussion of that letter, followed by its meaning as the first person singular pronoun. The next entry is *jabber*, followed by other words beginning *ja-*. After *jazel* comes *ice*; after *idyl* comes *jealous*, and so on. So it remained in all the editions in Johnson's lifetime. However, the 8th edition, edited by Dr Todd (1818) recognises that *i* and *j* have ceased to be facets of the same thing, and have separated into two different letters. *Iota* and *jot* are small reminders of the way it was.

So a *jot* is simply the letter *i*. A *tittle* is any diacritic mark in text, such as an accent, a cedilla or a tilde. Nowadays, it refers specifically to the dot above the letter *i*. So reference to *every jot and tittle* is a reminder of the importance of dotting the *i*.

We speak of *letting the cat out of the bag*: revealing a secret deceit. This homely expression traces its origins to Elizabethan times and had become idiomatic by 1760. At country fairs suckling pigs would be offered for sale, but the unsuspecting purchaser would be handed a sack with a cat or a puppy inside. The fraud would be revealed only later when the purchaser let the cat out of the bag. Until that moment, the buyer had *bought a pig in a poke*: a *poke* was a small bag or sack; it is cognate with *pouch* and with the French *poche*. The Scots equivalent of this expression, significantly — and more accurately — is *to buy a cat in a poke*. The same ruse gives rise to the expression *buy a pup*.

In the Roman Catholic tradition, believers *tell their beads*, i.e. count off the beads of the rosary as they say prayers. The expression has a long and interesting history. Originally, a *bede* was a prayer, or more loosely a wish. *Bid* is a variant form of *bede*, and one current sense of *bid* still retains its connection with *bede*: when we bid a person farewell we wish them fortune; when we bid a person goodnight, we likewise express a wish for them. This is a different sense of *bid* from that which auctioneers understand. So, to *bid a bead* is a tautology. *Bidding the bedes* simply meant *praying the prayers*. And one of the prayers — *the bidding prayer* — was a list of intercessions on behalf of the various estates and conditions of mankind in special need of divine help.

The French equivalent of *bede* was *priere* (from Latin *preccare*, whence *imprecation*) which gradually altered to *prayer* and ousted the anglo-saxon *bede*. By this time, however, *bidding the bedes* was an established usage; and an established habit was to count off the prayers using a string of small globules of glass or semi-precious stones strung together in a circlet. These became symbolic for, then synonymous with, the prayers they represented, and came to be called *bedes* (later spelled *beads*). They retained that name even after the metaphysical thing they represented adopted a French name.

As the bedes were said they were *told* — counted — by moving the fingers to the next globule. From the 10th to the 19th century, *tell* had the meaning *to mention or name one by one, specifying them as one, two, three, etc.; hence, to ascertain from the number of the last how many there are in the whole series; to enumerate, reckon in, to reckon up, count, number*. From this we get the *teller* (formerly seen in banks, and currently seen in Parliament on a division); and when the *tally* is known we may say there are so many *all told*. Although these forms survive, this sense of *tell* is obsolete.

****

There once existed in Scotland an order of paupers called the *King's Bedesmen*. They were paid by the King to say prayers for the well-being of the Royal person and their dominion. These were aligned in spirit to the original beggars: an order of mendicants founded in the 12th century by Lambert le Begue (he was a stammerer; *begue* is French for stammer). The Order were called *Beguins*. The sisterhood he founded were the *Beguines* — Lambert was the first to Begin the Beguine. They lived by seeking alms from others. By the 14th century they had come to be called *Beghards*; in the late 14th century they attracted the wrath of the Council of Treves, and later that of the Inquisition. Thus were the beggars disgraced.

Oddly, whilst Pope John XXII attacked the Beghards, he protected the Beguines, who still exist in small communities in the Netherlands.

But for the most part, what had started as a pure religious calling was brought down in society and in language equally.

Julian Burnside

Pen City Winner

Fiona McLeod wins Pen City's Pelikan M800 pen competition in the Spring issue

Fiona McLeod's winning entry:

ODE TO O.D.E.

Oh glorious glass edifice
Bereft of asbestos
And of mice
You stand so mighty and so tall
Symbol of fortune for us all

We tried transform the grand old dame
Keep safe the tenement
And the name
For sake of those who went before
Their former glory to restore

Men of valor
And of vigor
Consuming briefs with unchecked rigor
Now found places on the bench
Or some most often out to lunch

Our meager efforts
All were wasted
Salmon walls we never tasted
Except when dining after noon
In that spare place we called essoign

You suffered most
When builders came
Evictions floor by floor began
For those who stayed the tuneless hum
Of drilling and the hammers drum

The longest summer
Dragged slowly past
The noise the dust and then at last
The silence shouts from near and far
"Come meet the grand new alcazar"

No queue of counsel,
At the lift

Fiona McLeod receiving her competition prize from Pen City's Terry Jones.

No crammed-in clerks, each room makeshift
The sounds of William Street kept out
The change of money
The rabble shout

Gleaming empty and expectant
Anticipating
Each new tenant
What feet will tread your marbled floors?
What scoundrels walk through polished doors?

F. McLeod

ROSEMARY CARLIN'S RUNNER-UP ENTRY

The building looks fine, but as a prosecutor I am most concerned as to whether consent was obtained for this digital generation of chambers.

Entries to Gerry Nash QC, c/- Clerk S, Owen Dixon Chambers East by ***5 March 2000.***

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.

NEW SUMMER Issue Competition — same stunning prize. Read this and enter!

You are the commander of an archaeological expedition to earth from Earth Colony 17. You arrive in the ancient (and now deserted) city of Melbourne in December 4001. The city appears to have been razed except for the Supreme Court and the new (as it is now) Federal Court building, both of which are (strangely) preserved in their present condition, untouched by time. You find Court 13 in the Supreme Court and the mirror windows of the Federal Court of particular interest. Write a short report analysing what you have found and speculating as to the purpose(s) which these buildings served and the society which created them.

The Enlightened Sentencing Project

ON 15 November 1999 the Bar hosted a reception for Judge David C. Mason and Her Honour Judge Anna Forder, in the Neil Forsyth Room. Both are judges on the 22nd Circuit Court of Missouri, USA, which covers the area of the city of St Louis. Their Honours were touring Australia speaking to Judges, corrections officials, parliamentarians and academics about the success of the Enlightened Sentencing Project in St Louis. The project is based on treating offenders through the use of transcendental meditation.

Mark Derham QC, Paul Elliott QC, Sara Hinchey, Judge David Mason, Judge Anna Forder and David Curtain QC.

The sentencing project began in 1996. The use of transcendental meditation is made as a condition of probation for those offenders which the Court considers likely to benefit. Judge Mason emphasised that meditation was recommended for selected offenders who were facing minor drug, theft or assault charges. It was not an alternative to incarceration.

The offenders have to undertake a six-week course. The prisoner must attend two introductory lectures, after which there follows four days of meditation training for one and a half hours each day. Then they are asked to employ the techniques that they have learnt twice daily for about 20 minutes.

Those selected to embark upon the project are supervised by qualified instructors to make sure that the meditation process is being properly used and appears to be beneficial to the offender.

Judge Mason does not use the technique himself but Judge Forder does. She stated that studies have shown that the use of meditation has seen decline in the recidivism rate. The aim is to overcome stress. The offenders are often poor and have been drug abusers and have poor employment and school records. The studies in the USA showed that not only does it affect the crime rate, but generally raises the self-esteem of the offender. It is particularly useful in the rehabilitation of those who commit domestic crimes of violence.

Judge Anna Forder; Michael King, organiser of the visit by the US judges and he a director of the Institute of Vedic Law, Justice and Rehabilitation; and Peter Murdoch QC.

The transcendental meditation program is sponsored by the Vedic Institute of Law, Justice and Rehabilitation. Transcendental Meditation Centres are situated at the Maharishi FDIC College at 345 Grimshaw Street, Bundoora, and in other suburbs throughout Melbourne.

The Judges have spoken throughout Australia. In Australia the program is organised by Byron Rigby, Psychiatrist, and Mr Michael King, the director of Vedic Institute of Law, Justice and Rehabilitation.

It will be interesting to see whether this program is adopted in Victoria. In any case both Judges Mason and Forder proved to be interesting and stimulating guests of the Bar.

Delegated Legislation in Australia

by D. Pearce and S. Argument
Butterworths, second edition 1999
pp. xxvi + 374 pp, hardback

THIS is a new edition of an essential reference work that has long been out of print. With increasing reliance on delegated legislation by overworked parliaments, this is a subject that is becoming of more rather than less significance. As far as I am aware, this is the only Australian book which deals comprehensively and authoritatively with the legal and constitutional issues that arise in the area.

There are separate chapters expounding the principles and procedures for the making, publication, commencement and parliamentary review of delegated legislation in the Commonwealth and each State and self-governing Territory. The book also covers the various aspects of judicial review of delegated legislation, and has a chapter about the effect of non-compliance with formal requirements. It then has a section about empowering provisions for making delegated legislation. Remaining chapters cover discretions in delegated legislation, repugnance or inconsistency, improper purpose, unreasonableness and proportionality, uncertainty, sub-delegation, incorporation by reference, repeal, proof, severance, interpretation and retrospective operation of delegated legislation.

I found the style and layout of the book clear. The chapter divisions make it easy to find what one is looking for. The text itself is well written, and has extensive reference to, and thorough discussion of, the relevant cases and statutes. The index is set out with many subheadings listed under a smaller number of broader subjects. I found it well structured and easy to use.

This edition retains the good coverage of some of the older Australian cases about delegated legislation that was a particular feature of the first edition. One other commendable feature is the authors' obvious familiarity with the governmental procedures connected with delegated legislation, and their detailed treatment of those procedures. That would, I think, make this book useful for government lawyers and public servants involved in the process by which delegated legislation is made, as well as to private practitioners whose clients' rights are affected by delegated legislation, or who need to argue about its validity in court.

All in all, this is a well-written book on an important (if dry) subject. The first edition had a place in every serious public or government law library. It was sought and consulted long after it became out of date and out of print. I think the second edition will likewise establish itself as a crucial text for those practising in the area.

Michael Gronow

Ethics in Law (2nd edn.)

by Stan Ross
Butterworths, 1998
pp. xxiv + 480, paperback

A cynic might say that *Ethics in Law* would be a short book, like *Tolerance in the Balkans*. He or she would be wrong. For all the bad press and lawyer jokes (some of which are reproduced in this book!), lawyers are in fact extremely concerned with the ethics of the practice of their profession, and how they should be regulated. They recognise that, in spite of recent changes in several States to make lawyers and other professionals more publicly accountable, the essence of being part of a profession (as opposed to merely a business) is to take a role in regulating and setting standards for themselves.

This book is an attempt to give a comprehensive overview of the law in Australia relating to professional conduct and discipline of lawyers. There are some very good Australian books about practising as a solicitor, most notably Riley, *New South Wales Solicitors' Manual*, Lewis and Kyrou, *Handy Hints on Legal Practice*, and the Law Institute of Victoria, *Members' Handbook*. Nevertheless, I am not aware of another up-to-date Australian book which tries to give a comprehensive coverage of legal ethics for the entire country.

The book starts by examining general principles in a part entitled "Accountability and Responsibility: The Framework". It then goes into more detail concerning the composition of the profession in each State and Territory, and the institutions and statutes that regulate it in each jurisdiction, in a part called "Structure and Regulation". The rest of the book is devoted to specific ethical questions affecting lawyers in practice, divided into parts entitled "Lawyer–Client Relationship" and "The Adversary System". As the titles suggest, the former part is mainly concerned with lawyers' duties to their clients, and the latter with duties to courts and other parties in litigation.

Overall, the text is well written and easy to read and understand. The depth, interest and variety of the references in the footnotes was impressive. There are lots of topical references to events and cases in Australia. Some of them were even about lawyers I knew. There was also a good range of reference to international material. In particular, there was an excellent coverage of articles and other sources from the United States, where the theory, if not the practice, of legal ethics is at a more sophisticated stage of development than it is in Australia. There is also a good treatment of the statutory regimes governing lawyers in the different States, and of the Australian and other cases. The author is to be congratulated on the thoroughness and breadth of his research.

The book is obviously intended at least in part for use by students of legal ethics at both an undergraduate and postgraduate level. Among other things, the earlier edition is extensively referred to in the author's other book (jointly written with Peter MacFarlane): *Lawyers' Responsibility and Accountability; Cases, Problems and Commentary*, Butterworths, 1997. Nevertheless, the depth of the treatment of the subject matter means it can also be used by practitioners, including those specialising in the area.

A couple of omissions made this book harder to use than it needed to be. One is the absence of a bibliography. It is difficult to follow the references from the footnotes alone, particularly when frequently cited references are, as per normal practice, not given a full citation on subsequent occasions. Another omission is a table of statutes. Given the heavily statutory nature of the regulation of lawyers, and the comprehensive treatment of the regimes in this book, this latter omission is particularly hard to understand. In addition, I found the index next to useless when attempting to locate passages on particular subjects within the book.

In spite of those shortcomings, I think this is a book which it would repay many

of us to study and to have around. It is good from the point of view of stimulating thought and discussion about important ethical issues. It also contains a comprehensive and accurate treatment of the law relating to many ethical questions that arise for lawyers in practice. In each case, it is a book which repays close study.

A plaintiffs' practitioner in the medical negligence field once said to me that it was almost impossible to persuade eminent doctors to break ranks and give evidence against medical colleagues, while lawyers appeared to be lining up to attack each other. That is probably an illustration of how much less of a closed shop the law is than it used to be. In such an environment, a book about lawyers' accountability can be an important companion.

Michael Gronow

Understanding Business Law (2nd edn.)

by Brendan Pentony, Steven Graw, Jann Lennard and David Parker
Butterworths 1999
pp. v–vii, Table of Cases ix–xix, Table of Statutes xxi–xxxix, 1–639 including Index

THIS is one of a suite of texts on the vast subject of business law. This particular offering is designed primarily for students of accounting, business, management or marketing who also require knowledge of the Australian legal system and the essential principles and remedies, expressed in a concise and relevant way. The book succeeds in the task and gives paramount consideration to the application of principles to actual problems, identifying the issues under each topic, and identifying the elements of law which impact on the issues under consideration.

The text deals with the law which applies to each facet of business activity and explains the context in which it usually arises. The law is then illustrated by numerous practical examples derived from case law, providing in box format within the text the basic facts, the ratio and the reference. Each chapter has an internal list of contents detailing what is to be covered in the chapter and a brief summation at the conclusion.

For the practitioner the work would serve as a useful checklist of all those aspects of law which impact on business in its various guises, including the increasing use of legislation in an attempt to regulate what was formally done by equity, e.g. the relatively new Part IVA of the *Trade Practices Act* 1974 dealing with the regulation of unconscionable conduct (p. 119–124). The second edition has entirely new chapters on the sale of goods, bailment and trusts.

Consistent with trends in business and commerce generally, matters pertaining to consumers are given some prominence (chapters 7–10), and the increasing complexity and importance of financial transactions and information technology (chapters 11–12).

The work's greatest benefit is drawing together under this one umbrella of business and commercial transactions a formidable collection of topics and the diversity of the law applicable to them. All jurisdictions in Australia are covered.

The index is well complied, helpful and easy to use, and even contains a few surprises e.g. confusion of goods (p. 328), emblements (p. 160), usuance (p. 274), sans recours (p. 302) and terra nullius (p. 4).

For more in-depth treatment of the law relating to business, other texts may be consulted, e.g. Vermeesch and Lindgren's Business Law of Australia, and the accompanying volume of legislation and cases.

Contents:

1. The Australian legal system
2. Contract formation
3. Contract interpretation
4. Apparent contracts: lack of free agreement
5. Contracts: termination and breach
6. Sale of goods
7. Consumer protection and fair trading
8. Consumer transactions 1
9. And 2
10. Consumer credit
11. Negotiable instruments and banking
12. Cheques and plastic money
13. Property
14. Intellectual property
15. Bailment
16. Torts
17. Insurance
18. Debt recovery, bankruptcy and insolvency
19. Agency
20. Non corporate business arrangements
21. Trusts
22. Companies

Judy Benson

The Remedial Constructive Trust

By David Wright,
Butterworths
pp i–xxiii, 1-310

IN this book Mr Wright analyses the theory relative to the remedial constructive trust.

There are three approaches to the theory of the constructive trust. One is the remedial theory that a constructive trust is a means by which a person can recover or gain title to property which is withheld, without legal justification, to the benefit of another person. Another is the institutional theory, which has been traditionally adopted in England, whereby the constructive trust vindicates a pre-existing property right. The third theory is that of a composite theory of the above two. Readers may recall the analysis in *Mushinski* v. *Dodds* (1985) 160 CLR 583 on this point.

As Mr Wright states, the two main aims of the work are to examine the role of equitable property claims, primarily by way of a constructive trust in a common law world, and secondly to investigate what will happen to the concept of a constructive trust with the addition of the word "remedial". In pursuit of these aims, Mr Wright embarks upon a comparative analysis of the approach adopted in England, the United States, Canada, New Zealand and Australia.

This work is not confined to a jurisprudential examination of the competing theories, but offers to the reader a careful analysis of the imposition of a constructive trust upon various relationships. This analysis is a most important step in understanding the nature of the trust and the remedies that are available. The cases cited by the author to support his analysis are examined and commented upon in a way which helps the reader through the developments of law.

Other available proprietary remedies such as subrogation, equitable land, rescission and specific restitution are also discussed by the author. The recent judgment of the High Court in *Maguire* v. *Tansey* is referred to and its importance discussed at length. The case is important for two reasons. First, the case demonstrates that the remedy may be moulded to prevent one party from taking an unwarranted benefit. Secondly, the basis for equitable intervention is not necessarily invoked to recoup a loss, but

is to maintain a high duty owed by a fiduciary.

Unfortunately the decision of the High Court in *Guimelli* v. *Guimelli* (1999) 73 ALJR came after publication. It would have been interesting to have seen the author's comments.

This work has been extensively researched and the bibliography shows the depth in which the author has considered the issues raised in the book.

John V. Kaufman

Lewis' Australian Bankruptcy Law (11th edn.)

by Dennis J. Rose
LBC Information Services 1999

LEWIS' Australian Bankruptcy Law was first published in 1928. D.J. Rose first became the author of the fifth edition in 1967 and has since continued in that role. It has been five years since the publication of the tenth edition and, in the interim, there have been important changes in the bankruptcy law.

The author writes that he intends the book to be an explanation of the general principles of bankruptcy law and as a guide to its details. He has clearly succeeded in so doing.

The chapters are divided into the various aspects of bankruptcy, such as the issue of creditors petitions, the acts of bankruptcy, the creditors proceedings from petition to sequestration, proof of debt and property available for creditors with reference to relation back and after-acquired property, to name but a few. Whilst the author advises that book should not be used as a substitute for reference to the legislation and the decided cases and materials, I have found it to be very helpful. The use by Mr Rose of descriptive headings within the chapters is very clear and important. To pick one example, in chapter 17 he discusses property that is available to creditors with respect to voidable transactions. Under the heading "Undervalued Transactions", we are taken to subheadings such as "Consideration", the "Protection of Successors in Title", "Good Faith" and "Refund of Consideration". As one would expect, there are ample references to decided cases, which are provided under each of the respective subheadings.

The book provides a ready guide to practitioners and those affected by the bankruptcy law to its essential principles, from which they can take further by reference to the Act and the decided cases. For those in practice in commercial law, it is a very useful book to have on one's shelf.

John V. Kaufman

Victorian Civil and Administrative Tribunal, Laws and Procedure

by Dr Damien Cremean, Pamela Jenkins and James Logan
Anstat, 1999

ON 1 July 1998 VCAT was established under the *Victorian Civil and Administrative Tribunal Act* 1998. Under the presidency of a Supreme Court judge the Tribunal is divided into two divisions, namely the civil and administrative divisions, which are each intern supervised by a County Court judge under the title of vice president. The aim is to provide easy access to an inexpensive method of determining disputes and a mechanism for dispute resolution. It has drawn to itself many disparate Tribunals that had formally operated under the one umbrella. Those individual acts, such as the Equal Opportunity Act and the Domestic Building Contracts Act will still operate, but the dispute resolution procedure has been brought under the umbrella of VCAT.

Consequently it has been necessary to evolve a general procedure and rules which are directed towards the particular lists.

The authors of this loose-leaf work have compiled a commentary that goes beyond merely restating the Act and offers an essential guide to practitioners in that field.

It is divided into a number of sections. These sections include the second reading speeches and the explanatory memoranda. The overview takes one through the structure and procedural matters necessary to obtain an understanding of how the Tribunal functions. What is particularly helpful is that in relation to the procedural matters the authors have included reference to the particular sections and the rules that will apply to an application. It is written clearly in a language readily understood by a lay person, without losing any of its precision.

One example of the thoroughness of the commentary is the reference section 59 of the Act in relation to parties to a proceeding. Whilst an incorporated association cannot be a party to a proceeding (section 61), the authors remind us that this is not so under the *Equal Opportunity Act* 1995. Because of the various Acts which are brought within VCAT, such cross references are essential.

The book makes reference to a number of decided cases which are indexed by reference to the particular paragraph number. The edition includes a comprehensive index. To give an example, under "disclosure of information" one is referred to "Cabinet documents" and to "Crown privilage". It is welcome to see a well indexed book, which makes the life of the reader easier.

For the practitioner appearing before the Tribunal, this service is an invaluable aid.

John V. Kaufman

Trindade and Cane, The Law of Torts in Australia (3rd edn)

Oxford University Press, 1999
pp. xcv + 793, paperback, $90

THERE is now no shortage in this country of "home-grown" torts textbooks. Apart from Fleming (the author of which regrettably died after preparing the ninth edition), we have the excellent Balkin and Davis, now in its second edition. We also have this book, which is just out in its third edition. Each book attempts to give a com-prehensive account of the subject from a basically Australian perspective (though Fleming is also influenced by North American developments). Their different styles complement each other, and allow Australian lawyers to choose a book which suits their personal taste and style.

Though "primarily intended for students", Trindade and Cane nevertheless also seems to be used extensively by practitioners, whether as a hangover from University days or otherwise. I often see it on the shelves of my colleagues, especially if they studied at Monash. Having scraped through torts some years ago, I naturally approach the book from the point of view more of a

practitioner. Parts of the book (such as the section "Sources of Australian Tort Law") will only be of interest to students. Others, however, which fulfil the authors' stated intention of providing "an exposition of the rules of tort law", will be of use to everyone.

Its style is a little more didactic (in the sense of "intended to instruct") than some other legal textbooks. That is to say, the authors are as interested in telling the reader how the law came to be what it is and whether it should be, as they are in setting out what the law actually is. For example, there is a lengthy (and interesting) passage called "The Anatomy of the Duty of Care", setting out the twentieth century development of that concept in England, Australia and other places. A practitioner in a hurry to find the law on a particular point might be frustrated with such a treatment, but a lawyer with more time and an interest in the development of the doctrine would be engaged.

At times the authors expound their message very well indeed. Their analysis of some of the problems encountered by torts and the development of solutions to them can be lucid and informative. Also, they often provide impressively pithy and concise statements of the fundamentals of particular torts. Such statements are useful both for getting one's mind around central ideas, and for having a good definition against which to test more detailed propositions about the tort in question.

On the other hand, the authors sometimes raise important theoretical issues which they do not resolve, or even engage. I do not think that this approach assists either the student or the practitioner. It leads to sententious (but not terribly helpful) statements about torts law like, "It is, in fact, a very imperfect attempt to deal with a set of very diverse and extremely complex social problems." If one philosophises in a torts book, there may be an obligation to make it go somewhere.

Intentional torts such as trespass (to land, goods and person), economic torts and conspiracy are well covered in the book, as are negligence, nuisance, breach of statutory duty, and liability for animals. There are also general chapters on damages (for both intentional and unintentional torts), defences to intentional and negligent torts, vicarious liability, contribution and limitation of actions. The rationale for the order of some of the chapters is a little hard to understand. That made it hard in some cases for me to find quickly the part of the text I wanted. One might retort, however, that that is what the index is for.

This edition appears to be up to date. There has been an obvious and thorough rewriting of several sections to take recent developments into account. This includes both statutes and case law, though it would be nice to see a more comprehensive listing of the differing position and the applicable statutes and cases in each state, at least in footnotes to the text on the relevant points. There is a good treatment of recent important changes wrought by the High Court in cases like *NT* v. *Mengel* (overruling the Beaudesert Shire Council decision), *Hill* v. *Van Erp* and *ESANDA* v. *Peat Marwick* (redefining the duty of care owed by professional advisers for economic loss caused to third parties), and *Burnie Port Authority* v. *General Jones Ltd* (absorbing the *Rylands* v. *Fletcher* doctrine into the general law of negligence).

Overall, the book provides a comprehensive and accurate treatment of torts in Australia. It is a useful addition to the literature on the subject.

Michael Gronow

Conference Update

8–15 January 2000: Aspen, Australian Lawyers Conference: Contact Creative Conference Management: Tel. (02) 9692 9022, Fax (02) 9660 3446.
9–16 January 2000: Cortina D'Ampezzo, Italy: Pacific Legal Conference. Contact Rosana Farfaglia: Tel. (07) 3236 2601, Fax (07) 3358 4196.
18 February 2000: Hong Kong: Arbitration Conference conducted by International Bar Association. Contact IBA.
27 February–5 March 2000: Cortina D'Ampezzo, Italy: Fourth Winter Seminar International Association of Young Lawyers. Contact International Association of Young Lawyers.
2–4 March 2000: Launceston, Tasmania: National Superannuation Conference for Lawyers. Contact Dianne Rooney: Tel. (03) 9602 3111, Fax (02) 9670 3242.
24–25 March 2000: Santiago, Chile: Latin American Regional Conference. Contact IBA.
27–28 March 2000: Canberra: First Australasian Natural Resources Law and Policy Conference. Contact Country Conferences: Tel. (02) 6772 8753, Fax (02) 6772 8330.
1–6 April 2000: Hong Kong: Section on Energy and Resources Law Conference. Contact IBA
22–28 April 2000: Venice, Italy: Pacific Legal Conference. Contact Rosana Farfaglia: Tel. (07) 3236 2601, Fax (07) 3358 4196.
28 April–2 May 2000: Vancouver: Tenth Annual Meeting of the Inter-Pacific Bar Association. Contact Inter-Pacific Association 2000, British Columbia: Tel. 604 681 5226, Fax 604 681 2503.
30 April–4 May: Vancouver: Inter-Pacific Bar Association Annual Conference. Contact Jim Fitzsimmons: Tel. (02) 9353 4199, Fax (02) 9251 7832.