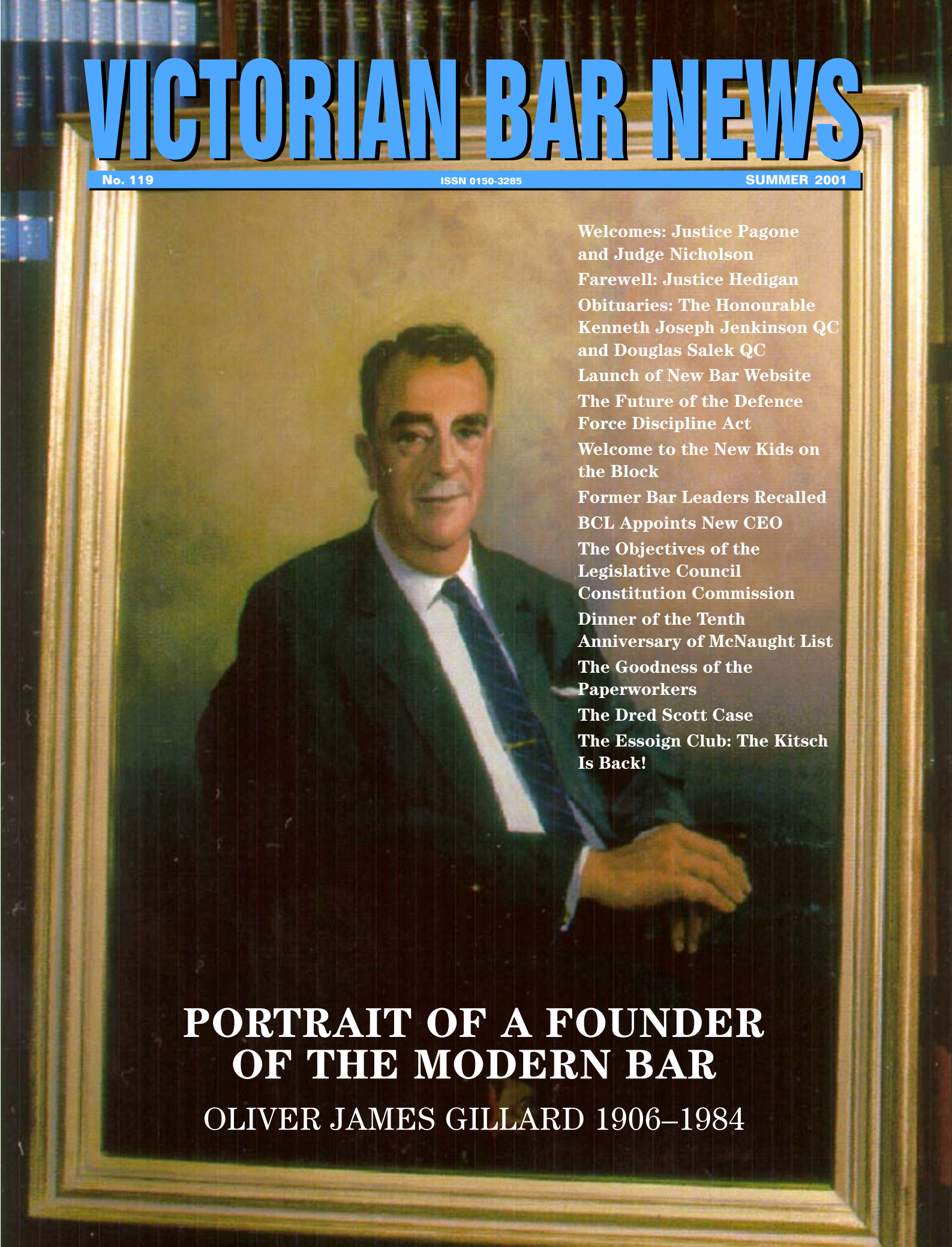
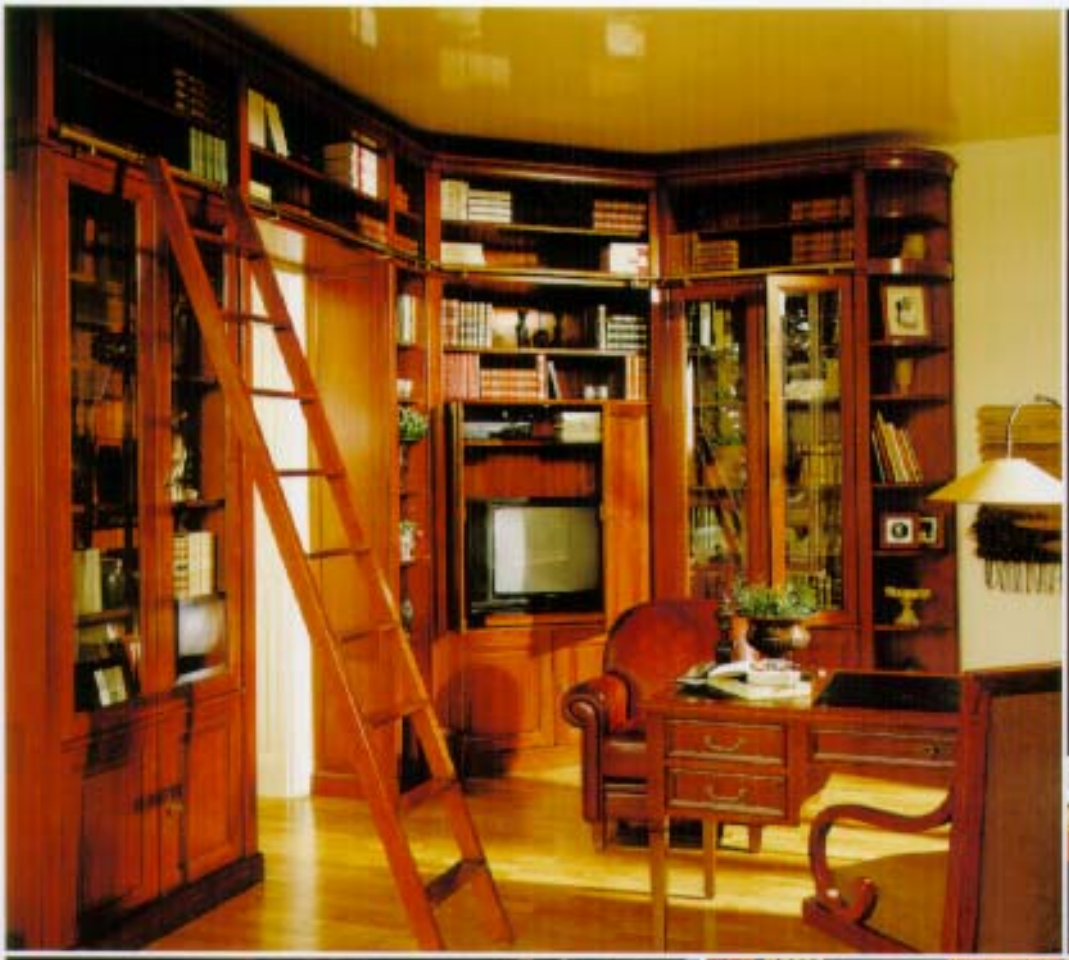
VICTORIAN BAR NEWS

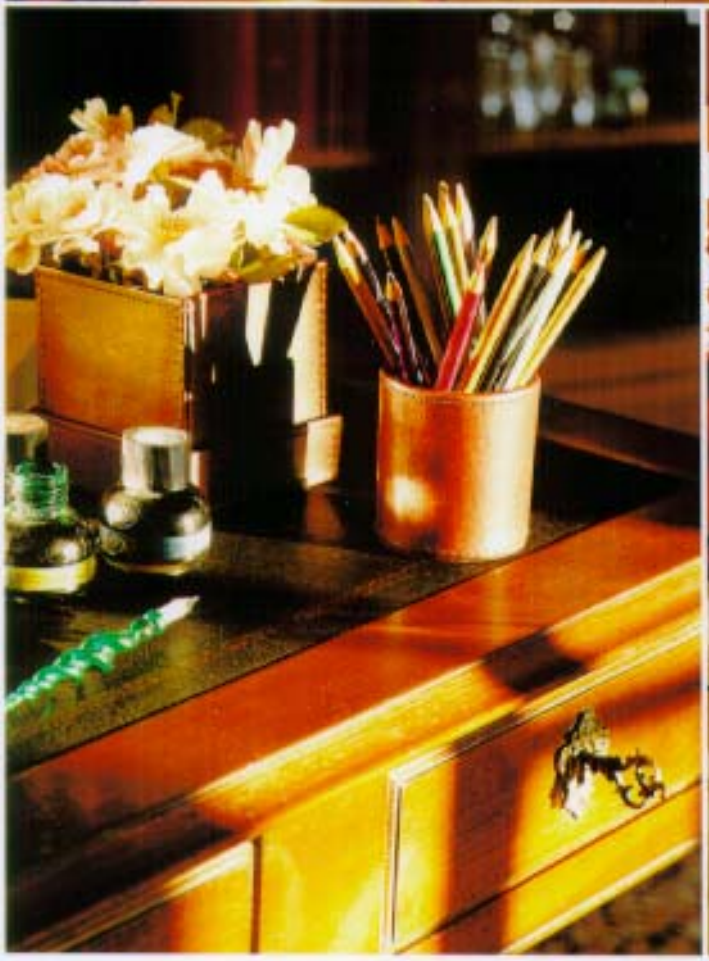
No. 119 ISSN 0150-3285 SUMMER 2001



PORTRAIT OF A FOUNDER OF THE MODERN BAR

OLIVER JAMES GILLARD 1906–1984





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The Kitsch Is Back!

Dinner of the Tenth Anniversary of McNaught List

The Goodness of the Papersellers

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for the year 2001/2002
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Looking Back on 2001

It's that time of the year again. That time of the year seems to be getting earlier and earlier each year. Christmas brochures are now getting stuffed into letter-boxes in mid October. November television blares that Santa can bring a Nintendo or Play Station at bargain basement prices. The radio intones that fairy lit tinsel trees should be installed as quickly as possible.

And so it seems that that time of the year is getting earlier for the law and the Bar. Each year the courts seem to close earlier and earlier. Judges want "iron clad guarantees" around about the middle of November. An adjourned case won't be seen again until the second half of 2002. Socially the yuletide spumante emerges just as the corks of Cup week are being swept away. Just as Easter, Anzac Day, the Queen's Birthday, the July vacation, Show Day, (even though not an official holiday anymore), and Cup week cut great chunks into the court's sittings, both officially and unofficially, so too sitting days in December seem to shrink.

But have things really changed, or is this just imagination brought on by the mental fatigue of a long and rigorous year? Perhaps it's just old age. Does a close scrutiny of the legal year show that the courts are sitting any less? Indeed in reality are increased sitting days feasible? Could the courts sit longer in January or would witnesses, juries and experts be available when the great January sojourn to the beach is in full swing. Is the closure of courts for most of January simply a reflection on what happens across industry and business throughout Australia?

Again, is it just imagination or does it seem that the schools are closing earlier than usual. By the first or second week of December most of them seem to have shut up shop. Perhaps two more weeks in December would make the school fees a little bit more realistic, perhaps two more weeks in court in December would make them easier to pay.

It's traditional at this time of the year to look back over the year and to analyse

the highs, lows and important events. The majority of barristers will look back over years to see whether the highs and lows have crystallised into an increase in income. Have there been too many no-win no-pay cases that did not win? Have there been too many clients and solicitors who have promised much and delivered nothing? Is there more work about and will there be more work about next year. These are the more mundane concerns of everyday life at the Bar. It is usually only when the larger picture impinges upon this smaller picture that there is a reaction and thoughts of what the Government is doing to the profession.

The recurring theme throughout the year has been the proposed review of the *Legal Practice Act 1996*. Reviewers of the Act were appointed in June 2000 and have put out issue and discussion papers, and submissions have been made by the Bar Council and Law Institute in response. The parameters of the review are contained at page 11 of the Winter 2000 edition of the *Bar News*. Of concern are the many groups who are vehemently critical of the Bar and seek to take the Bar's powers of making rules and of discipline away. The National Competition Council's press release issued in August 2000 highlighted the wide-ranging attacks on the Bar as being self-interested and against public interest. The final review will be issued on the 20th of December this year and it is hoped that a balanced review of this complex and unwieldy legislation has been made and will be carried out not to the Bar's detriment.

Ever since the days of the Hilmer Report the Bar has been accused of being a "guild", only interested in its self-protection and self-promotion. The concept was that guilds, alias professions, should be abolished and reorganised as industries being deregulated, but regulated by the government. It is interesting to note that the teaching profession doesn't seem to be heading in this direction. The State Government has announced that a professional organisation will be set up for the teaching profession.

Many teachers have said that this will elevate teaching into a true profession and will gain it respect, and an ability to promote itself and its members. Dare we say that this is the creation of a new guild?

The year was also marked by the after effects of the forced resignation of the Chief Magistrate, Michael Adams

QC. Allegations were raised concerning the handling of the affair and whether indeed the Chief Magistrate did receive fair treatment. However, it appears that the Magistracy has settled down to an extent. It is hoped that there will be no further repercussions. It is interesting to note that the overwhelming majority of appointments to State Courts have come from the Victorian Bar.

Wigs were to go but have stayed. The government has decided that, indeed, the wearing of wigs is a matter for the courts and the courts in Victoria have decided that the wearing of wigs is appropriate. Therefore it is good to see that the majority wishes of the Victorian Bar have prevailed.

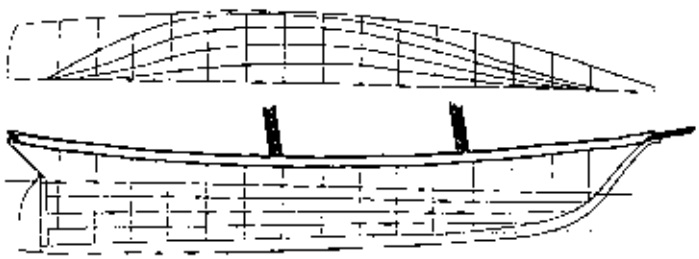
Queen's Counsel have gone and the second batch of Senior Counsel is featured in this edition. The Attorney-General stated that those who wished to give up the Queen's name and change to Senior Counsel should do so. Considering the number of true believers swelling the ranks of Queen's Counsel, it is surprising that only three of these have decided to change to Senior Counsel. Perhaps we can look forward to further announcements in the new year.

One problem that will never go away is that of Legal Aid. A review of fees has been promised and is in train. No one is holding their breath but it is hoped that some reality will come into the fees being paid to criminal counsel. The stark reality is that many counsel simply cannot afford to accept legal aid fees and concentrate solely on private work in order to survive. If fees were increased then the standard of representation would increase and perhaps the number of appeals would decrease. The question of the extension of legal aid to cover wider ranges of cases is still under debate and the Criminal Bar Association is battling manfully for it members.

So that Christmas feeling descends. That feeling that the last few weeks must be got through. That functions must be attended which would have been appreciated scattered throughout the year. That when Christmas Day is reached it is with a sense of relief, as well as enjoyment.

A bright light in the year is the Victorian Bar Children's Christmas party. This has continued to prosper. Parents and children alike find it to be a relaxing and enjoyable day in the Botanical Gardens. There has been much relief among the organisers this year, as Santa's script to be presented to the children has been passed by the Bar's Censorship Committee. But just by a whisker!

The Editors



NOTICE OF RACE

WIGS & GOWNS SQUADRON

The annual race for the NEIL R. McPHEE QC TROPHY will be held on the waters of Hobson Bay on Thursday, 20 December 2001. The race will be conducted by the Royal Yacht Club of Victoria. The starting line will be an imaginary line between the race control tower at the eastern end of the marina at RYCV and a buoy moored approximately 150 yards generally to the east thereof. The race is to be a stern chaser around fixed marks and over approximately five nautical miles. Invitations are extended to yachts of all types.

Yachts will meet at the NE end of the Royal Yacht Club of Victoria marina from 1100 hours onwards. The start will be at 1200 hours.

The race will be followed by a luncheon and drinks at the Royal Yacht Club of Victoria. Visitors and non-sailors are welcome.

It would be appreciated if those sailing and/or attending the after-race celebrations could contact RATTRAY QC (7240) or MIGHELL (8334).

Launch of Bar's New Website: First Point of Contact for Many People

Same location — www.vicbar.com.au — but now with far more information to assist practitioners and people wanting to use the services of the Bar.

Launched 25 October 2001.

NEW BAR WEBSITE LAUNCHED

THE Attorney-General recently launched the Bar's new website. While the site is located at the same address www.vicbar.com.au, the site has been completely revamped. The site now contains a large amount of information about the Bar and the wider legal system that will be of great use to practitioners, people who wish to use the services of the Bar and also people who are seeking information about the Bar.

Details of the improved website are contained in a separate article in this issue, but there are some aspects of the new site that I should mention. First, the website will provide the first point of contact that many people may have with the Bar. For this reason, the website will serve to promote awareness of the Bar. Secondly, the new site contains a very large amount of information about the Bar as a whole, individual practitioners, the Clerks and activities related to the Bar. I encourage all members of the Bar to explore the new site and acquaint themselves with the great variety of information which is conveniently placed in a single location. Finally, I should thank the people who have played a role in the development of the new site — Michael Shand QC who supervised the project on behalf of the Bar Council; David Bremner, the Executive Director of the Bar; Wendy McPhee of the Bar's administrative staff; and the many members and staff of the Bar who also contributed their time and effort. The website design was performed by Icon Art, a specialist website development firm, and Imago Computer Solutions, the Bar's computer database consultant.

By housing the great majority of Victorian barristers in close proximity to each other, Owen Dixon Chambers served to reinforce the collegiate spirit that underpins the ethical standards of the Bar.

PORTRAIT OF SIR OLIVER GILLARD

The Bar Council recently held a function to unveil a portrait of Sir Oliver Gillard. The function was attended by many members of the Gillard family, including Lady Gillard, and many distinguished members of the legal profession. The portrait was unveiled by the Honourable William Kaye QC, who was a colleague of Sir Oliver at the Bar and a fellow judge of the Supreme Court of Victoria. Mr Kaye recalled the times during which Owen Dixon Chambers was planned and built. He also paid tribute to the exceptional contribution that Sir Oliver made to the development of Owen Dixon Chambers, the Victorian Bar and the administration of the law.

The building of Owen Dixon Chambers has left a permanent legacy at the Victorian Bar because it drew almost the entire Victorian Bar together in a single building. By housing the great majority of Victorian Barristers in close proximity to each other, Owen Dixon Chambers served to reinforce the collegiate spirit that underpins the ethical standards of the Bar. When newer members of the Bar work in close proximity to each other they learn more than the rules of conduct, they learn the principles that underpin those rules and the reasons why they provide the cornerstone of life at the Bar. This experience begins an experience that lasts for the whole of a person's time at the Bar.

The building of Owen Dixon Chambers came at an important time for the Victorian Bar. It provided the Bar with an important single base and served as the main location for barristers well into the late 1970s, when the Bar began to expand in size significantly. While the Victorian Bar has long since become too large to be housed in a single building, the important cohesive effect played by Owen Dixon Chambers still prevails today. While the Bar may

have outgrown the original building, it will never outgrow the reasons for which it was built. The unveiling of Sir Oliver Gillard's portrait in Owen Dixon Chambers provides a fitting reminder of these principles.

INQUIRY INTO POWERS OF ENTRY, SEARCH, SEIZURE AND QUESTIONING

The Law Reform Committee of the Victorian Parliament recently released a discussion paper as part of its wide-ranging inquiry into powers of entry, search, seizure and questioning by authorised persons.

The discussion paper reviews investigatory powers across all of Victorian law. The main issues raised are: whether Victoria should adopt a set of "stand alone" principles for legislative powers of entry, search, seizure and questioning; the principles applicable to judicial officers in the issue of search warrants (as set out in Tillet's case); principles for the exercise of powers to enter and search, including powers to execute search warrants; the parameters of the privilege against self-incrimination; and powers to arrest and detain. The discussion paper examines statutory powers to produce documents, which includes a consideration of legal professional privilege and the principles governing duties of confidentiality.

The areas addressed by the discussion paper, and the proposal to consider the adoption of a set of "stand alone" principles to govern intrusive powers, could have a significant effect on the administration of justice. The consideration of the execution of search warrants and role of legal professional privilege raise issues of particular concern to the legal profession. The Bar Council is preparing a detailed submission to the inquiry, and will keep members of the Bar informed of the progress of this important review.

AMENDMENT TO "DISCLOSURE" RULES OF CONDUCT

The Bar Council recently resolved to adopt some minor amendments to rule 197 of the Rules of Conduct, which governs disclosure requirements for barristers. Members of the Bar may recall that a new rule 197 came into effect on 1 July 2001. During the time that the rule has operated, it has become apparent that some small changes would assist the objective of the rule.

Two amendments have been made to rule 197. The first is an addition to rule 197(a)(i), which adds to the definition of "disclosable event" the filing of a debtor's petition against a barrister, pursuant to the *Bankruptcy Act 1966* (Cth). The second amendment is an addition to rule 197(a)(ii). This amendment adds a "composition" pursuant to Part X of the Bankruptcy Act, to the range of debt agreements that are "disclosable events" for the purposes of rule 197. That part of the sub-rule previously extended only to agreements or arrangements.

The amendments will take effect from 1 February 2002. A copy of the amendments will be posted on the Bar's website shortly.

AUSTRALIAN LEGAL CONVENTION

In October the Law Council of Australia conducted the 32nd Australian Legal Convention in Canberra. I attended on behalf of the Bar Council, and was accompanied by members of the Bar Council and Bar staff. The convention was opened with an address by the Honourable Justice Kirby, who delivered a speech on the state of Australian law in the times after the events of 11 September 2001. The convention was attended by members from all Bar Associations and Law Societies in Australia, as well as members from other legal bodies, representatives of government and many distinguished international guests. The convention was closed at a function in which the Chief Justice of Australia delivered his speech on the state of the judicature in Australia.

The convention also marked the final appearance by Ms Anne Trimmer in the capacity of President of the Law Council. The following day Mr Tony Abbott assumed the role of President. On behalf of the Bar, I would like to thank Anne for her fine work during her time as President, and also to welcome Tony to the role of President.

AUSTRALIAN TAXATION OFFICE

I recently met with representatives of the Australian Taxation Office to discuss matters of mutual interest.

The ATO has established a department to deal with tax collection issues relating to the professions, including the legal profession. A sub-group within that department is the Complex Legal Recovery Unit which focuses on the legal profession and whose role is to liaise with professional associations such as the Bar in dealing with matters of specific concern to the ATO and the profession.

As a result of the meeting, it has been agreed that the ATO and the Bar will co-operate in two areas — education about ATO procedures and policies and the provision of specialist assistance with tax matters.

The ATO will work with the Bar's CLE Committee in presenting seminars. Some of these seminars will be presented as part of the Bar's CLE and Readers' programs and will covers topics such as ATO policies and procedures. The objective is to inform members of the Bar of the ATO's policies and procedures in order that they may comply with and obtain the greatest benefit from them. The ATO has agreed to provide the Bar with a list of topics that will form the basis of the seminars. It is anticipated that the seminar seminars will commence in early 2002.

The Bar and the ATO will also establish a contact database that will enable members of the Bar to have direct contact with specialists in the ATO who can assist with problems or provide guidance on tax issues.

RICHARD FULLAGER QC

Richard Fullagar QC died on suddenly 18 November 2001. Mr Fullagar signed the Bar Roll on 4 November 1949 and took silk on 26 May 1964. He served on the Bar Council during 1972–4 and was Deputy Chairman in 1974. Mr Fullagar was appointed to the Supreme Court of Victoria on 29 January 1975. He served with distinction on the Court until his retirement in 1994.

In 1997 Mr Fullagar was appointed Chairman of the Legal Profession Tribunal. He was due to retire from that position on 19 November 2001. The Bar Council was preparing to hold a function to farewell Mr Fullagar on the occasion of his retirement. The function was intended to pay tribute to the great service that Mr Fullagar provided to the legal profession, the community and the administration of justice as Chairman of the Tribunal. The role of the Tribunal is both important and demanding. Mr Fullagar discharged the responsibilities of Chairman in an admirable manner.

At the time of his death, Mr Fullagar had completed over fifty years service to the Victorian Bar and the administration of the law in Victoria. This period of service was remarkable not simply for its length, but also the quality of the contribution that he made to the Bar and those people with whom he worked. On behalf of the Bar I extend our thanks for his long service, and our sincere condolences to his family and friends.

Robert Redlich
Chairman

Taking Stock

THE culmination of 2001 offers a good opportunity to take stock of the achievements of the Bracks Labor Government, as well as to consider the forward agenda for the immediate and long-term future.

This year has seen the achievement of a legislative and policy agenda which has turned this State around from the legacy of the previous Kennett government.

This year, we have seen the passage of legislation to provide the same rights to same sex and de facto couples, by amendment to 57 Acts, which were previously seen as only giving rights to married couples. This was achieved despite strident opposition from the Liberal Party.

We have engaged the broader community in widespread consultation on issues of law and order in this State, through the independent reports by Professor Arie Freiberg on a review of sentencing in Victoria and on drug courts. This has resulted in the introduction of legislation, this session of Parliament, to establish a pilot drug court in Victoria. This initiative heralds a new approach to drug and alcohol offending, by establishing a model of therapeutic jurisprudence, which will intensively manage drug and alcohol offenders. By this means, it is intended to treat the causes of crime, while offering a means of breaking the cycle of drug and alcohol offending. This will build on the already successful CREDIT and Diversion programs which operate around Victorian Magistrates' Courts.

Similarly, consultation around the sentencing review has opened up the opportunity for public eduction and input about how sentencing takes place; whether there is a need for reform and, importantly, how community views can be better taken into account in that process.

This year also saw the injection of funds into Community Legal Centres (CLCs), which provide a primary avenue for access to justice for Victorians. Coupled with this was the finalisation of the Commonwealth and former State Government's review into the operation of CLCs. The hard-fought battle to keep CLCs alive within their communities was successful. The funding provided will assist CLCs to keep operating and to provide more outreach work.

Another highlight this year was the realisation of our pre-election commitment

to re-establish the Victorian Law Reform Commission, which was warmly received. The Commission has already released two discussion papers: one on community ownership of property and one on reforms for victims of sexual offences. The establishment of the Privacy Commissioner also heralds a new approach in Victoria to meeting the important challenges of privacy complaints and systemic reform.

Major reform has been opened up for extensive consultation in relation to the regulation of the legal profession in Victoria. The final report of Professor Peter Sallmann and Richard Wright puts forward a model which would provide a single-entry complaints system, in turn providing for a comprehensible and accessible model. I look forward to receiving the views of the legal and broader community on this model.

My commitment to diversifying judicial appointments has been further progressed this year with a total of 14 appointments to the courts. This includes seven female appointments. I remain committed to identifying and remedying impediments to progress for women in the legal profession. Significant in this regard is the Bar Council's equal opportunity briefing policy, which was immediately implemented by the Victorian Government Solicitor. It will be further promoted through the new process of tendering out government legal services. Successful firms will be required to demonstrate a commitment to both equal opportunity briefing and work allocation practices, as well as to the provision of pro bono services.

A significant pro bono initiative has evolved through the Attorney-General's Pro Bono Working Group, chaired by Chief Justice John Phillips. This initiative will see the collaboration of private firms with the legal aid and community legal sector in the secondment of solicitors and other forms of assistance to Victoria Legal Aid and CLCs. I believe that all those involved will benefit from the experience, as will the Victorian community.

Next year will see the establishment of the Judicial College of Victoria, which will perform the task of providing ongoing education to members of our judiciary. The College is a first for Australia and will ensure that Victoria's judicial officers continue to lead in the provision of access to justice.

In 2001, the Aboriginal Justice Agreement continued to bring indigenous Victorians and the Bracks Government together to introduce initiatives to ensure access to and representation within the justice system. These initiatives include consultation with communities about setting up a Koori Court in Victoria; swearing in 13 Koori Bail Justices and 12 Koori Mediators; as well as the appointment of an Aboriginal Liaison Officer to provide support for indigenous defendants and improve cultural awareness in the Magistrates' Court.

For the immediate future, the Government has introduced into Parliament a Bill to introduce the new offence of industrial manslaughter. Again, Victoria leads the way in addressing corporate liability for loss of life in the workplace and ensuring accountability for workplace safety.

Where do we go in the future? We continue to build an infrastructure which ensures an accessible and accountable legal system. We are engaged with all jurisdictions of the justice system in building a plan for our future. The events of September 11 have shaken our reality, but with consultation, debate and listening, we can work together to build a community which is robust, diverse and harmonious.

I extend my thanks to all those members of the judicial, legal and broader community who have engaged in this process to date and look forward to a future of rebuilding this community together.

Rob Hulls
Attorney-General

Practitioner Remuneration Order

ON 12 November 2001, the Legal Costs Committee met and, pursuant to s.111 of the *Legal Practice Act 1996* (Vic) ("the Act"), made a Practitioner Remuneration Order ("PRO") which sets out the fees that a practitioner may charge for non-litigious legal services. The Order revokes the Practitioner Remuneration Order which commenced on 1 January 2001 and will come into operation on 1 January 2002. The Order is subject to disallowance by the Parliament.

Practitioners are informed that although the PRO has been previously increased to take GST into account, this PRO has been entitled as "includes GST" in order to avoid any doubt that PRO charges are GST inclusive.

Legal Practice Act 1996

PRACTITIONER REMUNERATION ORDER
(includes GST)

We the Honourable Geoffrey Michael Eames a Judge of the Supreme Court of Victoria nominated by the Chief Justice thereof, Peter Arnold Shattock and Philip Laurence Williams being two persons nominated by the Attorney-General, Ariel Weingart and Peter Bardsley Murdoch QC being two members nominated by the Legal Practice Board, Marija Terese Johnson being a person nominated by Victorian Lawyers RPA Ltd, and Nicholas Joseph Damian Green QC being a person nominated by Victorian Bar Inc. and being the seven persons authorized in that behalf by the *Legal Practice Act 1996* do hereby in pursuance and exercise of the powers thereby conferred upon us order and direct in manner following:

1. This Order may be cited as the Practitioner Remuneration Order and shall come into operation on the 1st day of January 2002.

2. This Order applies —
(a) in the case of business to which the Second, Third and Fourth Schedule applies — to all business for which instructions are received on or after the day on which this Order comes into operation; and
(b) in the case of any other business to which this Order applies — to all business transacted on or after the day on which this Order comes into operation.

3. (1) The Practitioner Remuneration Order commenced 1 January 2001 is hereby revoked.
(2) Notwithstanding the revocation of the Practitioner Remuneration Order commenced 1 January 2001, the provisions of that Order shall continue to apply to and in relation to business, other than business referred to in Clause 2, in all respects as if that Order had not been revoked.

4. (1) In this Order and in the Schedules, unless inconsistent with the context or subject-matter —
"Folio" means 100 words or figures or words and figures.
"In print" means in print on a form readily available for sale to the public.
"Document" has the same meaning as under Section 3(1) of the *Evidence Act 1958*.
"Typewriting" means the production and presentation of words figures and symbols on pages or otherwise by means of hand writing typewriting or the use of word processing equipment or any other form of mechanical or electronic production other than photocopying.
(2) A reference in this Order and the Schedules to the consideration is a reference —
(a) where the consideration relates to a matter or transaction and is not wholly monetary, to the sum of the monetary consideration and the value of the real or personal property included in the consideration that is not monetary;
(b) where the consideration relates to a matter or transaction comprising land and personal property, to the sum of the consideration for the land and the personal property;
(c) where the consideration or part of the consideration for a matter or transaction is marriage or any other consideration which is not monetary, or where there is no consideration for a matter or transaction, to the value of the subject matter of the transaction;
(d) where the consideration relates to a mortgage, bill of sale or stock mortgage by which a specified or ascertainable sum is secured, to the sum of the amount secured and the amount of any other specified or ascertainable sum agreed to be advanced and secured; and
(e) where the consideration relates to the sale of an equity of redemption —
(i) where the purchaser is the mortgagee and the purchaser employs the legal practitioner who prepared the mortgage — to the sale price; and
(ii) in any other case, to the sum of the consideration and the amount of any principal sum owing under the mortgage at the time of sale.
(3) Where the consideration relates to a matter or transaction comprising land under the provisions of the *Transfer of Land Act 1958* and other land, the remuneration of the legal practitioner shall be apportioned according to the respective values of the properties in question and remuneration may be charged in respect of each document necessarily prepared.

5. (1) The remuneration of legal practitioners in respect of business connected with sales, purchases,

leases, mortgages, wills, settlements, formation and registration of companies, deeds of arrangement and other matters of conveyancing, including negotiating for or procuring an agreement for a loan, and in respect of other business not being business in any action or transacted in any court or in the chambers of any Judge or in the offices of the Master of the Supreme Court Prothonotary or other officer of any court and not being otherwise litigious business, shall, subject to this Order —

(a) where the Second, Third or Fourth Schedule applies, be in accordance with that Schedule; and

(b) in any other case, be in accordance with the First Schedule.

(2) Where the business undertaken is the whole of the work for which some charge or charges is or are prescribed by the Second or Third Schedules but is not substantially completed but this occurs at the request of or with the concurrence of the client or the client chooses to make use of any of the work done, the charges which may be made shall be a rateable part of the relevant charges prescribed by those Schedules proportionate to the extent of the work done or the work so made use of, as the case may be.

(3) Where the business undertaken is a portion of the work for which some charge or charges is or are prescribed by the Second or Third Schedules —

(a) if it is completed or substantially completed, the charge which may be made shall be a rateable part of the relevant charges prescribed by those Schedules proportionate to the extent of the work so undertaken; and

(b) if it is not completed or substantially completed, and this occurs at the request of or with the concurrence of the client, or if the client chooses to make use of any of the work done, the charges which may be made shall be a rateable part of the relevant charges prescribed by those Schedules proportionate to the extent of the work done or the work so made use of.

(4) In all cases where matters or transactions for which charges are prescribed by the Second or Third Schedules —

(a) involve work which in normal circumstances is not usual and necessary to complete such matter or transaction on behalf of a client, or require the consent of any Government, public authority or third party in respect of business transacted and performed, a further charge in respect thereof may be made in accordance with the First Schedule; or

(b) are of unusual difficulty or complexity, or involve skill or responsibility which in normal circumstances is not usual and necessary to complete the matter or transaction on behalf of a client, a further charge in respect thereof may be made which is fair and reasonable having regard to all the circumstances of the case.

6. The charges in the First Schedule relate to ordinary cases, but in extraordinary cases the Taxing Master may increase or diminish such charges if, for any special reason, he thinks fit.

7. In addition to the remuneration prescribed by clause 5, there may be charged —

(a) disbursements for duties or fees payable at public offices or fees payable to municipalities or public authorities, surveyors, valuers, auctioneers or counsel, or for travelling and accommodation expenses, duty stamps, postage stamps, courier or delivery charges, electronic systems of communication and other disbursements reasonably and properly incurred and paid;

(b) in accordance with the First Schedule —

(i) payments necessarily made for correspondence between legal practitioners where one legal practitioner is employed as agent; and

(ii) charges by an agent against his or her principal or such lesser amount as is reasonable having regard to the charge that the principal legal practitioner may be entitled to make to his or her client; and

(c) charges at the rate of $9.80 to $14.20 per quarter hour in respect of business necessarily transacted at the request of the client outside the normal business hours of the legal practitioner;

(d) expenses reasonably incurred in microfilming of files and the storage and retrieval of files so microfilmed.

8. (1) In all cases to which the remuneration prescribed by the Second or Third Schedules applies a legal practitioner may, within fourteen days from the time of undertaking any business, by notice in writing to his or her client and when any third party is obliged by contract or otherwise to pay that client's costs, by notice in writing to such third party elect to charge under the First Schedule.

(2) Upon such election, the client may terminate the retainer and the First Schedule shall apply in respect of services rendered prior to the termination of the retainer.

(3) (a) A third party obliged to pay a legal practitioner's client's costs may pay either the amount charged under the First Schedule or the amount which, but for the legal practitioner's election, would have been payable under the Second or Third Schedule, whichever is less, in full satisfaction of his obligation.

(b) The client shall pay the difference between the amount charged by the legal practitioner and the amount payable by the third party.

9. Where a matter or transaction to which the Second Schedule applies comprises land the title to which is a right to occupy the land as a residence area pursuant to Division 11 of Part I of the *Land Act 1958* or a licence pursuant to Section 138(1)(g) of the *Land Act 1958*, the appropriate charge shall be the charge specified in that Schedule for a similar transaction comprising land under the provisions of the *Transfer of Land Act 1958*.

10. (1) Where a legal practitioner —

(a) is authorised by the First Schedule to make any charge in connection with the sale, purchase, transfer or conveyance of land and is also authorised by the Second

Schedule to make any charge in respect of the same land and the transaction is completed at the same time for the same client; or

(b) is authorised by the Second Schedule to make charges in respect of two or more matters or transactions relating to the same land completed at the same time for the same client —

then each charge under Part A or Part C of the Second Schedule shall be reduced by one-third or to a sum equal to the highest of those charges (before a reduction) together with the sum of $95.90 for each additional charge, whichever is the greater.

(2) Where, in connection with any transaction to which the Second Schedule or Part A, C or D of the Third Schedule applies, a legal practitioner acts —

(a) for both mortgagee and mortgagor; or

(b) for both lessor and lessee; or

(c) for both creditor and debtor —

the legal practitioner may not, in respect of the transaction, charge more than he or she would have been entitled to charge if he or she were acting only for the mortgagee, lessor or creditor as the case may be.

11. In respect of loans not exceeding $110,000 where a legal practitioner acts for a society registered under the provisions of the *Co-operative Housing Societies Act 1958* his or her charge under Part A or Part C of the Second Schedule shall be reduced to 75 per cent of the charge otherwise appropriate.

12. The Second and Third Schedules shall not apply to matters or transactions concerning any premises subject to a licence as defined in the *Liquor Control Act 1987* and, accordingly, the First Schedule shall apply to those matters or transactions.

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FIRST SCHEDULE

Instructions

1. A charge may be made by way of instructions in addition to the items hereinafter contained in this Schedule having regard to all the circumstances of the case including the following:

(a) The complexity of the matter and the difficulty and novelty of the questions raised or any of them;

(b) The importance of the matter to the client;

(c) The skill, specialised knowledge and responsibility involved;

(d) The number and importance of the documents prepared or perused, without regard to length;

(e) The place where and the circumstances in which the business or any part thereof is transacted;

(f) The labour involved and the time spent on the business;

(g) The amount or value of any money or property involved; and

(h) The nature of the title to any land involved.

Notes:

(1) A charge shall not be made pursuant to this item in respect of the sale, purchase or transfer of land where the consideration does not exceed $60,000.

(2) The charge pursuant to this item in respect of the sale, purchase or transfer of land where the consideration exceeds $60,000 shall not exceed 0.3 per centum of the consideration.

Drawing

2. Any document including memoranda of instructions to counsel not in an action or a proceeding in court —

(a) not in print, per folio — $12.80 to $20.90

(b) partly in print, for so much as remains in print, per folio — $6.40

(c) partly in print, for so much as is not in print, per folio — $12.80 to $20.90.

Note:
There are approximately three folios in each A4 page.

Typewriting

3. (1) Per folio — $7.90

(2) For each carbon copy, photocopy or other machine made copy, per page — $1.50.

Facsimiles

4. Transmitting or receiving written material by means of the legal practitioner's own facsimile machine as follows:

Transmitting —
First page $8.20
Each subsequent page $2.80
Receiving —
First page $8.20
Each subsequent page $1.50.

Perusing

5. When it is necessary to peruse any document or part of a document (including correspondence), whether in print or not, per folio — $7.90.

6. When it is not necessary to peruse a document or correspondence but scanning of the document or correspondence is warranted, e.g. to determine the relevance or otherwise of the document or correspondence, per folio — $4.10.

Letters

7. Formal acknowledgment or the like, e.g. letter enclosing documents, requesting a reply, etc. -— $20.90.

8. Circular letters — i.e. letters which except for the particulars of address are identical, for each letter after the first — $10.30.

9. Other letters — $30.60 or such charge as is fair and reasonable having regard to items 1, 2 and 3 of this Schedule.

Attendances

10. To file, lodge or deliver any documents or other papers, to obtain an appointment or to obtain stamping of a document, to insert an advertisement, or other attendance of a similar nature capable of performance by a junior clerk — $38.00.

11. Making an appointment by telephone or similar telephone attendance capable of performance by a junior clerk — $16.60.

12. On counsel with case for opinion or other papers or to appoint consultation or conference — $57.80.

13. On consultation or conference with counsel — $143.00.
After the first hour, per half-hour or part thereof — $71.10 to $111.10.

14. Searching title and other searches, per half-hour or part thereof — $47.30.

15. On settlement of a conveyancing or commercial matter — $45.60 to $71.40.
After the first half-hour, per half-hour or part thereof — $71.40 to $111.10.

16. Attendance by telephone or otherwise requiring the personal attendance of a legal practitioner or his or her managing or senior clerk and involving the exercise of skill or legal knowledge;

per quarter-hour or part thereof — $32.00 to $59.30.

17. All other attendances; per quarter-hour or part thereof — $32.00.

Journeys

18. For time spent occupied in necessary travel to and from or necessarily spent in any place whether in or outside Australia more than sixteen kilometres removed from any place of business or residence of the legal practitioner the charge to be made, in addition and having regard to any appropriate charges made under Part A hereof, shall be —

per hour or part thereof — $71.40 but not exceeding for any one day — $1,002.00.

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SECOND SCHEDULE

Part A — Mortgage of Freehold or Leasehold Land

1. Charges of "legal practitioner for mortgagee" in connection with mortgage of freehold or leasehold land comprising instructions, investigation of title, necessary searches, obtaining necessary certificates, preparation and perusal of documents, enquiries as to outgoings, preparation of requisitions on title, preparation of accounts, all necessary attendances and correspondence, arranging and effecting final settlement of transaction, stamping and registration of mortgage shall be —
   (a) in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1 of Table A; and
   (b) in the case of any other land, the charges prescribed by Column 1 of Table B.
2. Charges of "legal practitioner for mortgagor" in connection with mortgage of freehold or leasehold land comprising instructions, preparation and perusal of documents, answers to requisitions on title, checking accounts, all necessary attendances and correspondence and arranging and effecting settlement of transaction, shall be-
   (a) in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2 of Table A; and
   (b) in the case of any other land, the charges prescribed by Column 2 of Table B.
3. The First Schedule shall apply to a "transfer of mortgage" but so that the charges shall not exceed —
   (a) in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1 of Table A; and
   (b) in the case of any other land, the charges prescribed by Column 1 of Table B.

Table A — *Transfer of Land Act 1958*

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor.

Ref. No.	*Consideration*	*Col. 1*	*Col. 2*
	$ Not exceeding	*$*	*$*
19	20 000	237	164
20	22 000	255	174
21	24 000	269	185
22	26 000	288	197
23	28 000	305	208
24	30 000	319	218
25	32 000	337	230
26	34 000	351	241
27	36 000	370	252
28	38 000	384	264
29	40 000	400	275
30	42 000	416	288
31	44 000	433	299
32	46 000	449	311
33	48 000	467	322
34	50 000	482	334
35	52 000	492	339
36	54 000	501	346
37	56 000	510	354
38	58 000	520	360
39	60 000	532	367
40	62 000	542	373
41	64 000	552	378
42	66 000	561	387
43	68 000	570	392
44	70 000	580	398
45	72 000	590	405
46	74 000	600	411
47	76 000	608	420
48	78 000	619	426
49	80 000	629	433
50	82 000	639	440
51	84 000	649	447
52	86 000	657	452
53	88 000	667	459
54	90 000	677	464
55	92 000	688	471
56	94 000	695	479
57	96 000	705	486
58	98 000	716	493
59	100 000	727	499
60	110 000	760	520
61	120 000	792	543
62	130 000	825	567
63	140 000	858	590
64	150 000	889	610
65	160 000	922	633
66	170 000	955	656
67	180 000	988	677
68	190 000	1020	700
69	200 000	1053	722
70	250 000	1133	778
71	300 000	1214	836
72	350 000	1297	892
73	400 000	1378	946
74	450 000	1460	1002
75	500 000	1540	1058
76	Over 500 000		
	add per 100 000	82	58

Table B — General Law

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor.

Ref. No.	*Consideration*	*Col.1*	*Col. 2*
	$ Not exceeding	*$*	*$*
77	20000	344	208
78	22 000	362	222
79	24 000	378	235
80	26 000	396	251
81	28 000	414	266
82	30 000	431	279
83	32 000	449	293
84	34 000	467	306
85	36 000	485	322
86	38 000	501	337
87	40 000	519	350
88	42 000	535	364
89	44 000	553	378
90	46 000	570	392
91	48 000	586	408
92	50 000	605	422
93	52 000	614	431
94	54 000	625	440
95	56 000	638	448
96	58000	646	458
97	60 000	657	464
98	62 000	667	475
99	64 000	677	482
100	66 000	689	491
101	68 000	699	499
102	70 000	709	507
103	72 000	717	518
104	74 000	728	524
105	76 000	738	534
106	78 000	750	542
107	80 000	761	552
108	82 000	771	558
109	84 000	783	568
110	86 000	792	576
111	88 000	802	585
112	90 000	811	594
113	92 000	823	603
114	94 000	835	610
115	96 000	844	619
116	98 000	855	628
117	100 000	864	638
118	110 000	900	663
119	120 000	934	693

120	130 000	968	722
121	140 000	1002	750
122	150 000	1038	778
123	160 000	1073	808
124	170 000	1109	836
125	180 000	1142	863
126	190 000	1176	892
127	200 000	1212	918
128	250 000	1297	991
129	300 000	1383	1064
130	350 000	1469	1135
131	400 000	1558	1206
132	450 000	1644	1275
133	500 000	1729	1346
134	Over 500 000		
	add per 100 000	88	71

Part B — Deed of Variation or Extension of Mortgage

1. Charges of *legal practitioner for mortgagee only* in connection with deed of agreement for variation of terms of mortgage of freehold or leasehold land including extension of date of payment, alteration of rate of interest or reduction or increase of loan comprising instructions, necessary searches, preparation and perusal of documents, investigation of title, obtaining necessary certificates, necessary inquiries as to other interests in the land, preparation of any necessary accounts, stamping and registration and all necessary attendances and correspondence in connection therewith shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1.
2. Charges of *legal practitioner for mortgagor* in connection with deed of agreement for variation of terms of mortgage of freehold or leasehold land including extension of date of payment, alteration of rate of interest or reduction or increase of loan comprising instructions, necessary searches, preparation and perusal of documents and all necessary attendances and correspondence in connection therewith shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2.
3. Where the *consent of a prior or subsequent mortgagee* is required in order to vary or extend the mortgage, the legal practitioner may in addition charge the following sum for each such consent — $123.40.

Transfer of Land Act 1958

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor

Ref. No.	*Amount of loan (if unvaried) or (if varied) the amount of the loan as varied*	*Col. 1*	*Col. 2*
	$ Not exceeding —	$	$
135	20 000	120	60
136	35 000	164	82
137	50 000	196	98
138	Over 50 000 add per 25 000	22	11
139	*******		

General Law Land

Where the land secured by a mortgage is land which is not under the provisions of the Transfer of Land Act 1958, the following additional charge may be made — $42.70.

Part C — Discharge of mortgage or discharge of part of the mortgaged land or discharge of mortgage as to part of the debt secured

1. Charges of *legal practitioner for mortgagee* (where no part of the debt secured is received by the legal practitioner) in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, preparation and perusal of documents (including memorandum of discharge of mortgage) and all necessary attendances and correspondence, delivery of discharge of mortgage to the mortgagor, his or her legal practitioner or agent shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the sum of $152.40.
2. Charges of *legal practitioner for mortgagee*(where the debt secured or part thereof is received by the legal practitioner) in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, preparation and delivery of the discharge of mortgage, receipt of amount to be discharged, perusal of documents and all necessary attendances and correspondence and effecting final settlement with mortgagor, his or her legal practitioner or agent shall be in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1.
3. Charges of *legal practitioner for mortgagor* in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, perusal of memorandum of discharge of mortgage, registration at Land Registry, attention to insurance policies and all necessary attendances and correspondence, and effecting final settlement with mortgagee, his or her legal practitioner or agent, shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2.

Transfer of Land Act 1958

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor.

Ref. No.	*Amount of Principal Debt Discharged*	*Col.1*	*Col. 2*
	$ Not exceeding —	$	$
140	100 000	164	142
141	200 000	245	218
142	300 000	327	273
143	Over 300 000 add per 100 000	27	22

General Law Land

Where the land secured by a mortgage is land which is not under the provisions of the *Transfer of Land Act 1958*, the following additional charge may be made — $42.70.

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THIRD SCHEDULE

Part A—Lease of land whether or not under the Transfer of Land Act 1958 but not including leases exceeding 21 years, leases not capable of being reduced to an annual rental or periodic leases determinable by notice

1. Charges of "legal practitioner for lessor" in connection with lease of land comprising instructions for and drawing lease, settling draft with lessee, his or her legal practitioner or agent, perusal of documents and all necessary attendances and correspondence to effect completion of transaction —
   (a) with material alteration (in duplicate) after amendment — shall be the charges prescribed by Column 1A; and

(b) without material alteration — shall be the charges prescribed by Column 1B.

2. Charges of *legal practitioner for lessee* in connection with lease of land comprising instructions, settling draft lease with lessor, his or her legal practitioner or agent, preparation and perusal of documents and all necessary attendances and correspondence to effect completion of transaction on behalf of lessee —
   (a) where lease is executed after material alteration (by lessor) after amendment — shall be the charges prescribed by Column 2C; and
   (b) where lease is executed without material alteration (by the lessor) after amendment — shall be the charges prescribed by Column 2D.
3. If the document used (irrespective of the number of folios) is *in print*, the charge of a legal practitioner shall be two-thirds of the charges prescribed by Columns 1B or 2D.
4. If the document used (irrespective of the number of folios) is in a form prepared by a legal practitioner for a lessor for use in connection with *five or more leases* of premises forming part of the same building or development — the charge of a legal practitioner for the lessor for each such lease shall be two-thirds of the charges prescribed by Column 1B.
5. The charges of a legal practitioner upon the *renewal of a lease* pursuant to an option for renewal contained in an existing lease shall be two-thirds of the charge prescribed by Columns 1B or 2D.
6. Charges of legal practitioner for lessor in connection with a *disclosure statement* made pursuant to section 8 of the *Retail Tenancies Reform Act 1998* including instructions for and drawing of the disclosure statement, instructions for and drawing of the notice of objection, perusal of all documents and all attendances and correspondence necessary in negotiations on the disclosure statement are not included in Columns 1A and 1B and the legal practitioner may charge additional remuneration in respect thereof in accordance with the First Schedule.

Ref. No.	*Total rental for period of lease including premium (if any)*	*Legal practitioner for Lessor*		*Legal practitioner for Lessee*	
		Col. 1A	*Col.* 1B	*Col.* 2C	*Col.* 2D
	$ Not exceeding —	$	$	$	$
144	15 000	191	164	164	109
145	20 000	255	192	192	126
146	22 000	275	207	207	137
147	24 000	299	223	223	149
148	26 000	319	240	240	160
149	28 000	343	256	256	170
150	30 000	364	273	273	181
151	32 000	384	289	289	193
152	34 000	408	306	306	203
153	36 000	428	322	322	214
154	38 000	452	339	339	226
155	40 000	472	354	354	235
156	42 000	493	372	372	246
157	44 000	518	387	387	258
158	46 000	537	404	404	268
159	48 000	561	420	420	279
160	50 000	581	436	436	291
161	52 000	595	447	447	299
162	54 000	608	455	455	305
163	56 000	622	464	464	311
164	58 000	634	476	476	316
165	60 000	649	486	486	323
166	62 000	662	496	496	331
167	64 000	674	505	505	337
168	66 000	688	514	514	344
169	68 000	700	524	524	350
170	70 000	714	534	534	355
171	72 000	727	543	543	364
172	74 000	740	553	553	370
173	76 000	752	562	562	377
174	78 000	765	574	574	383
175	80 000	778	584	584	388
176	82 000	792	594	594	396
177	84 000	804	603	603	402
178	86 000	816	613	613	410
179	88 000	831	623	623	415
180	90 000	844	633	633	421
181	92 000	858	643	643	428
182	94 000	870	652	652	434
183	96 000	884	662	662	443
184	98 000	896	671	671	448
185	100 000	908	681	681	453
186	110 000	953	714	714	476
187	120 000	996	747	747	497
188	130 000	1039	780	780	520
189	140 000	1082	813	813	542
190	150 000	1127	846	846	564
191	160 000	1171	879	879	585
192	170 000	1214	911	911	606
193	180 000	1257	944	944	629
194	190 000	1300	977	977	651
195	200 000	1345	1007	1007	671
196	250 000	1454	1091	1091	727
197	Over 250 000 add per 200 000	109	82	82	56
198	*	*	*	*	*
199	*	*	*	*	*
200	*	*	*	*	*

Part B — Stock mortgage and lien on wool or lien on crop

1. Charges of *legal practitioner for both creditor and debtor* in connection with stock mortgage, lien on wool or lien on crop comprising instructions, preparation and perusal of documents, searches, attention to adjustment account (if any) and

all necessary attendances and correspondence to complete transaction on behalf of creditor and debtor shall be the charges prescribed by Column 1.

2. Charges of *legal practitioner for creditor only* in connection with stock mortgage, lien on wool or lien on crop comprising instructions, preparation and perusal of documents, searches, attention to adjustment account (if any) and all necessary attendances and correspondence to complete transaction on behalf of creditor shall be the charges prescribed by Column 2.
3. Charges of *legal practitioner for debtor only* in connection with stock mortgage, lien on wool or lien on crop comprising instructions, preparation and perusal of documents, attention to adjustment account (if any), searches and all necessary attendances, and correspondence to complete transaction on behalf of debtor shall be the charges prescribed by Column 3.
4. The charges prescribed in Column 1 shall only apply where Rule 10 of the Professional Conduct and Practice Rules 2000 made pursuant to the *Legal Practice Act 1996* does not prohibit the legal practitioner from *acting for both creditor and debtor.*

Ref. No.	*Consideration*	*Col. 1*	*Col. 2*	*Col. 3*
	$ Not exceeding —	$	$	$
201	10 000	136	108	88
202	12 000	149	119	96
203	14 000	165	131	105
204	16 000	180	142	114
205	18 000	193	153	124
206	20 000	208	164	135
207	22 000	222	174	143
208	24 000	235	185	153
209	26 000	251	197	160
210	28 000	266	208	170
211	30 000	279	218	180
212	32 000	293	230	190
213	34 000	306	241	197
214	36 000	322	252	207
215	38 000	337	264	217
216	40 000	350	275	226
217	42 000	364	288	234
218	44 000	378	299	242
219	46 000	392	311	252
220	48 000	408	322	263
221	50 000	422	334	269
222	52 000	431	339	275
223	54 000	440	346	280
224	56 000	448	354	288
225	58 000	458	360	293
226	60 000	464	367	299
227	62 000	475	373	305
228	64 000	482	378	311
229	66 000	491	387	316
230	68 000	499	392	322
231	70 000	507	398	327
232	72 000	518	405	334
233	74 000	524	411	339
234	76 000	534	420	343
235	78 000	542	426	349
236	80 000	552	433	354
237	82 000	558	440	360
238	84 000	568	447	365
239	86 000	576	452	372
240	88 000	585	459	377
241	90 000	594	464	382
242	92 000	603	471	387
243	94 000	610	479	392
244	96 000	619	486	398
245	98 000	628	493	404
246	100 000	638	499	410
247	Over 100 000 — such additional charge as is reasonable having regard to the responsibility involved in and the complexity of the transaction.			

Part C — Renewal of bill of sale

1. Charges of *legal practitioner for creditor* in connection with the renewal of a bill of sale comprising instructions, preparation and perusal of documents and all necessary attendances and correspondence shall be the charges prescribed by Column 1.
2. Charges of *legal practitioner for debtor* in connection with renewal of bill of sale comprising instructions, perusals and all necessary attendances and correspondence shall be the charges prescribed by Column 2.

Ref. No.	*Consideration*	*Col 1*	*Col. 2*
	$ Not exceeding —	$	$
248	10 000	56	33
249	14 000	61	34
250	18 000	66	38
251	22 000	71	43
252	26 000	76	46
253	30 000	82	48
254	34 000	88	51
255	38 000	94	53
256	42 000	99	58
257	46 000	104	61
258	50 000	109	65
259	Exceeding 50 000	109	65

Part D — Satisfaction or discharge of bill of sale or stock mortgage

1. Charges of *legal practitioner for creditor* in connection with satisfaction or discharge of a bill of sale or stock mortgage comprising preparation and perusal of documents (including memorandum of satisfaction or discharge) and all necessary attendances and correspondence and effecting final settlement with debtor, his or her legal practitioner or agent shall be the charges prescribed by Column 1.
2. Charges of *legal practitioner for debtor* in connection with satisfaction or discharge of a bill of sale or stock mortgage comprising instructions, perusal of memorandum of satisfaction or discharge, registration and all necessary attendances and correspondence and effecting final settlement with creditor, his or her legal practitioner or agent shall be the charges prescribed by Column 2.

Ref. No.	*Consideration*	*Col. 1*	*Col. 2*
	$ Not exceeding —	*$*	*$*
260	10 000	56	33
261	14 000	61	34
262	18 000	66	38
263	22 000	71	43
264	26 000	76	46
265	30 000	82	48
266	Exceeding 30 000	82	48

Part E — Application by legal personal representative under the Transfer of Land Act 1958

267. Charges of legal practitioner in connection with an application by a trustee, executor or administrator to be registered as proprietor of real estate or mortgage, including instructions, checking title identity, preparation of application, necessary attendances and correspondence and registration — $193.20.
268. For each additional certificate of title or mortgage produced beyond the first title or mortgage referred to in the application — $18.20.

Part F — Application by surviving proprietor

269. Charges of legal practitioner in connection with an application by a survivor of joint proprietors to be registered as proprietor of real estate or mortgage, including instructions, checking title identity, preparation of application and declaration, necessary attendances and correspondence and registration — $214.70.
270. For each additional certificate of title or mortgage produced beyond the first title or mortgage referred to in the application — $18.20.

Part G — Production fee

271. For production of Crown grants, certificates of title, title deeds, or other documents in the possession of the legal practitioner of the person entitled to the custody thereof at such legal practitioner's office or at the Land Registry, Office of the Registrar-General or elsewhere, including, where necessary, endorsement of an order to register —

for not more than two Crown grants, certificates of title, chains of title deeds, or other documents — $121.90.

for each additional Crown grant, certificate of title, chain of title deeds, or other document beyond the second — $18.20.

****

FOURTH SCHEDULE

Part A — Negotiating for or procuring an agreement for a loan when the money is in fact lent and the legal practitioner is neither the lender nor one of the lenders

272. In respect of money lent upon the security of real or leasehold estate or personal property — 1.09 per centum upon the amount lent.

Note:
If a legal practitioner negotiates for or procures an agreement for the renewal of a loan he or she shall not in respect thereof be entitled to charge remuneration in accordance with this item and his or her charge shall be 0.55 per centum upon the amount of the renewed loan.

273. (1) If a legal practitioner negotiates for or procures an agreement for a loan for his or her client being the borrower or mortgagor through the agency of any person (other than a legal practitioner) to whom a procuration fee is payable then he or she shall only be entitled to remuneration in accordance with the First Schedule in respect of negotiating for or procuring such agreement.

(2) If a legal practitioner negotiates for or procures an agreement for a loan for his or her client being the borrower or mortgagor through the agency of another legal practitioner then the remuneration provided by item 272 shall be divided between the legal practitioners, two-thirds being payable to the legal practitioner for the mortgagee and one-third to the legal practitioner for the mortgagor.

274. The remuneration prescribed under item 272 or 273 shall not include disbursements reasonably incurred in travelling from any place of business and home respectively of such legal practitioner and disbursements otherwise reasonably incurred in the inspection of the property mortgaged or charged and in procuring the agreement for the loan which disbursements may be charged in addition to the remuneration so prescribed.

Part B — for negotiating for or procuring an agreement for a loan when the money is in fact lent and the legal practitioner or the legal practitioner's nominee company is either the lender or one of the lenders

275. When the legal practitioner, or a nominee company of which the legal practitioner or a partner of the legal practitioner is a director, is either the lender or one of the lenders no remuneration shall be charged for negotiating or procuring the loan, except in the following cases:

(a) when the legal practitioner arranges and obtains the loan from a person for whom he or she acts and subsequently by arrangement with his or her client lends the money and executes or signs the security in his or her own name or the name of a nominee company of which he or she or his or her partner is a director, he or she or such nominee company being in fact trustee or agent for the person aforesaid; or

(b) when the legal practitioner contributes portion of the money in fact lent, and arranges and obtains the remaining portion from another person not being his or her partner as a legal practitioner, not being a co-trustee with him or her in relation to the money lent.

276. In either of the foregoing cases a charge for negotiating or procuring an agreement for a loan may be made at the rate prescribed in Part A in respect of the amount so obtained from such other person.

Note:
If a legal practitioner negotiates for or procures an agreement for the renewal of a loan from such other person he or she shall not in respect thereof be entitled to charge remuneration in accordance with item 272 and his or her charge shall be 0.55 per centum upon the amount of the renewed loan.

Legal Profession Tribunal: Publication of Orders

UNDER section 166 of the *Legal Practice Act 1996* ("the Act"), the Victorian Bar Inc. as a Recognised Professional Association, is required to provide the following information in relation to orders made by the Legal Profession Tribunal ("the Tribunal") against its regulated practitioner:

1) Name of practitioner: Basil Stafford ("the legal practitioner")
2) Tribunal Findings and the Nature of the Offence
   a) Findings
      The Tribunal found the legal practitioner guilty of unsatisfactory conduct:
      i) as defined by paragraph (a) of the definition of "unsatisfactory conduct" in section 137 of the Act in that he engaged in conduct in the course of engaging in legal practice that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner;
      ii) as defined by paragraph (b) of the definition of "unsatisfactory conduct" in section 137 of the Act in that his conduct in contravening Rule 74(b) of the Rules of Conduct of the Victorian Bar Incorporated by failing to reply to a letter dated 17 May 2001 from the Ethics Committee of the Victorian Bar Incorporated when required to do so was a contravention not amounting to misconduct; and
      iii) as defined by paragraph (b) of the definition of "unsatisfactory conduct" in section 137 of the Act in that his conduct in contravening Rule 74(b) of the Rules of Conduct of the Victorian Bar Incorporated by failing to reply to a letter dated 13 June 2001 from the Ethics Committee of the Victorian Bar Incorporated when required to do so was a contravention not amounting to misconduct.
3) Nature of Offence
   a) The legal practitioner failed to return a brief to the instructing solicitor within a reasonable time of being requested to do so and failed to reply to letters from the Ethics Committee of the Victorian Bar Incorporated when required to do so. The legal practitioner pleaded guilty to the offences.
4) The orders of the Tribunal were as follows:
   a) In respect of the first charge, the legal practitioner is reprimanded and is to pay a fine of $250.00 to the Legal Practice Board by 30 September 2001.
   b) In respect of the second charge, the legal practitioner is reprimanded and is to pay a fine of $250.00 to the Legal Practice Board by 30 September 2001.
   c) In respect of the third charge, the legal practitioner is reprimanded and is to pay a fine of $250.00 to the Legal Practice Board by 31 October 2001.
   d) The legal practitioner is to pay to the Victorian Bar Incorporated its costs of these proceedings, fixed by the Tribunal at $1,000.00, by 30 November 2001.
5) As at the date of publication no notice of appeal against the orders of the Tribunal has been lodged. The time for service of such notice has expired.

Amendment to Rule 197 of the Rules of Conduct

AT its meeting on 8 November 2001, the Bar Council resolved to adopt an amended Rule 197 with effect from 1 February 2002. Pursuant to section 74(2) of the *Legal Practice Act 1996*, the Legal Practice Board and the Legal Ombudsman have been given notice of this change to the Rules of Conduct.

Rule 197 deals with disclosure requirements for barristers. The Rule has been amended by extending the definition of "disclosable event" by including in 197(a)(i) the filing of a debtor's petition pursuant to the *Bankruptcy Act 1966* (Cth) and, in 197(a)(ii), a composition pursuant to Part X of the Bankruptcy Act.

The amended Rule is set out below.

VICTORIAN BAR COUNCIL

AMENDMENT TO DISCLOSURE RULES OF CONDUCT

TO BE EFFECTIVE 1 FEBRUARY 2002

Part X — Obligations of Disclosure

Disclosure Requirements

197. (a) In this Rule, a "disclosable event" in relation to a barrister

means any of the following:

(i) the making of a sequestration order against, or the filing of a debtor's petition by, the barrister pursuant to the *Bankruptcy Act 1966* (Cth);

(ii) the entry by the barrister into a debt agreement pursuant to Part IX of the *Bankruptcy Act 1966* (Cth), or an agreement, composition or arrangement pursuant to Part X of that Act;

(iii) the disqualification of the barrister from managing or being involved in the management of any body corporate under any law in force in any jurisdiction within Australia, including disqualification from managing corporations under Part 2D.6 of the Corporations Law; or

(iv) the conviction of the barrister of an offence under any law in force in Australia or in any overseas country, or a finding that such an offence is proved against the barrister, where the maximum penalty for the offence is a term of imprisonment of more than 12 months, or where fraud or dishonesty is an element of the offence.

(b) Where, after the commencement of this Rule, a disclosable event occurs in relation to a barrister, the barrister must within 28 days after the disclosable event occurs:

(i) inform the Ethics Committee in writing of the occurrence of the disclosable event; and

(ii) provide the Ethics Committee with written details of the circumstances giving rise to the disclosable event sufficient to enable the Ethics Committee to determine whether the occurrence of the disclosable event in relation to the barrister, or any of the circumstances giving rise to it, may affect the barrister's suitability to engage in legal practice as a barrister for the purposes of paragraph (b) of the definition of misconduct in section 137 of the Legal Practice Act.

(c) A barrister in relation to whom a disclosable event occurs must, within 14 days after receiving a written request from the Ethics Committee to do so, provide such further information concerning the disclosable event or any of the circumstances giving rise to it, as the Ethics Committee may require.

Transitional Provisions

(d) Where a disclosable event (other than a disclosable event of the kind referred to in paragraph (a)(iv) of this Rule) has occurred in relation to a barrister at any time within a period of five (5) years before the date of commencement of this Rule, the barrister must within 28 days after that date of commencement:

(i) inform the Ethics Committee in writing of the occurrence of the disclosable event; and

(ii) provide the Ethics Committee with written details of the circumstances that gave rise to the disclosable event sufficient to enable the Ethics Committee to determine whether the occurrence of the disclosable event in relation to the barrister, or any of the circumstances that gave rise to it, may affect the barrister's suitability to engage in legal practice as a barrister for the purposes of paragraph (b) of the definition of misconduct in section 137 of the Legal Practice Act.

(e) A barrister in relation to whom paragraph (d) of this Rule applies must, within 14 days after receiving a written request from the Ethics Committee to do so, provide such further information concerning the disclosable event or any of the circumstances giving rise to it, as the Ethics Committee may require.

Commemorative Plaque Enlarged

The Editors

Dear Sirs

Members of the Victorian Bar who fell in the Great War 1914–1918

I read with interest the article on this subject by Andrew Donald in your issue of Spring 2001, at pp. 43–4. Members of the Bar may welcome a little more information about the individuals concerned which I have derived from several books of reference which happen to be in my possession.

All five of the men commemorated on the plaque you illustrate — F.S.F. Carse, E.W. Connelly, M.B. Higgins, E.N. Hodges and M.N. Mackay — had studied at the University of Melbourne. Accordingly a biographical note, with photograph, is given for each of them in H.W. Allen, *The University of Melbourne Record of Active Service . . . in the European War, 1914–18*, the foreword of which is dated March 1926. All but Hodges served at Gallipoli, as well as in France. Carse, Higgins and Hodges were exact contemporaries (1899–1904) at Melbourne Grammar School and are the subjects of biographical notes in the centenary edition of *Liber Melburniensis*, published in 1965. The fathers of Higgins and Hodges were themselves members of the Victorian Bar and are the subjects of entries in the *Australian Dictionary of Biography*.

Carse graduated LLB in 1908. He had held a commission in the Field Artillery and was a candidate at the Federal election of 1913. Enlisting in May 1915 as a lieutenant, he arrived at Gallipoli in July. Invalided to England in October, he served in France from July 1916 until his death. On 1 May 1917, after suppressing a fire in an ammunition dump, he was hit, while walking back to his dugout, by a stray shell and died the next morning.

Connelly was educated at Carlton College. He began the articled clerks' course in 1905 and successfully completed it. He had served six years in the Cadets and three years as a 2nd Lieutenant in the 8th Infantry Battalion, Bendigo. Enlisting in September 1914 with that rank, he was at the Gallipoli landing on 25 April 1915. He was wounded on that day and, after recovering and a period of service in Australia, served in France from November 1917 until his death.

After leaving school, Higgins went to

Oxford, rowing bow in the crew which defeated Cambridge in 1910. He graduated in law in that year and was called to the English Bar in 1911. He returned to Melbourne where he graduated in Arts in 1913. Enlisting in November 1914 as a private soldier in the 8th Light Horse, he was commissioned in February 1915 and served at Gallipoli from May. He took part in the charge at The Nek on 7 August 1915 and was one of the few officers not killed or wounded: see the list in the *Official History of Australia in the War of 1914–1918*, Vol. II, p. 623. He is mentioned on p. 714 of that volume in another connection. In December 1916 he was shot through the head by a sniper while advancing with the front line at Magdhaba on the Sinai Peninsula.

Higgins was the only child of Henry Bournes Higgins, a justice of the High Court of Australia 1906–1929, and figures in some detail in John Rickard's biography *H.B. Higgins: the Rebel as Judge*, published in 1984. Mr Justice Isaacs described the grief of Mervyn's parents as "well nigh devastating": the father himself wrote "My grief has condemned me to hard labour for the rest of my life".

Hodges was the son of Sir Henry Edward Agincourt Hodges, a judge of the Supreme Court of Victoria 1890–1919, and graduated LLB in 1908. He went to England to join the British Army and obtained a commission in the Army Service Corps in July 1915. Three weeks later he was in France, attached to an ammunition column, of which he became Adjutant. He was subsequently Adjutant to the senior mechanical transport officer of a corps and at the time of his death was under orders to take up an appointment at GHQ. He served on the Somme in 1915; at Messines; and later in operations in Flanders for which he was awarded the Military Cross. He attained the rank of Captain but died of pneumonia on 23 June 1918.

Mackay was educated at St Andrew's College and Corporate High School, Bendigo. He won the Supreme Court Prize with first class honours, when only just 20, and graduated LLM in 1911. Early in 1915, he appeared in his first High Court case. He had been commissioned in the Citizen Forces 1911–1914 and was appointed Captain in the 22nd Battalion in May 1915. He married a week before he sailed and served at Gallipoli from August to the evacuation in December. He went to France in March 1916 and was killed in August at Pozieres, where I have visited his grave in the British Cemetery.

Mackay's father, George Mackay, published — probably in 1916 — a memorial of his son's life and character: *Major Murdoch Nish Mackay, LL.M.: Scholar and Patriot.* I have a copy of this 44-page booklet which summarises Mackay's career, gives extracts from his letters and quotes tributes from those who served with him and from various judges, barristers and others at home.

Yours sincerely

Peter Balmford
Fellow of the Faculty of Law
Monash University

Stung Into Action

The Editors

AS an ordinary member of an increasingly insignificant minority group (white, Protestant, Anglo/Celtic heterosexual male) I have been finally stung into action upon perusing a memorandum dated 15 October 2001 to women readers, March and September 2001 re lunch with the Women Barristers Association. This memo states that on Friday 19 October 2001 the Readers Course will be addressed by the Sexual Harassment Conciliators, God bless them (my words), and then the Women Barristers Association (why?).

Following this momentous event "the WBA is planning lunch for this year's women readers in the Essoign Club which will provide an opportunity to meet other women barristers informally, find out more about the work (?) of the WBA and for them to get to know each other.

As the only male member (Honorary) of the Gippsland Women's Law Association which enabled me to join in their festivities, in the last millennium, husband (not partner) of a female lawyer, son of a female scientist (who was one of about three women in her Faculty at the University of Melbourne) and brother of a female doctor, may I suggest that to promote harmony and to avoid division on gender lines between all the readers, that the WBA invite all the readers to their lunch and not pack off the boys like unwanted children so that their single gender activities can be carried out in a "veil" (is this topical?) of secrecy.

Yours sincerely,

A.D. (Sandy) Robertson

P.S. May I add my support to the editorial in the *Bar News* relating to censorship at the Bar Dinner. No wonder no-one goes any more. Furthermore, may I assume that if and when the Bugle sounds for the formation of the third AIF in the current hostilities, the WBA will be stripped bare of its membership by women of "fighting age" desperate to embrace their emancipation and equality (superiority?) by joining the boys and donning the khaki and green in service of their native land?

CHIEF JUSTICE'S CHAMBERS
SUPREME COURT
MELBOURNE, 3000

15 November 2001

Dear Practitioner

OPENING OF THE LEGAL YEAR — MONDAY 4 FEBRUARY 2002

The Services for the Opening of the Legal Year are as follows:

St Paul's Cathedral
Cnr Swanston and Flinders Streets
Melbourne at 9:30 a.m.

St Patrick's Cathedral
Albert Street
East Melbourne at 9:00 a.m.
(Red Mass)

Melbourne Hebrew Congregation
Cnr Toorak Road and Arnold Street
South Yarra at 9:30 a.m.

St Eustathios Cathedral
221 Dorcas Street
South Melbourne at 9:30 a.m.

I hope that many of you will find time to celebrate this event with your colleagues. Family and friends are also most welcome.

Members of the judiciary, Queen's and Senior Counsel and the Bar are invited to robe for the procession in the various robing rooms in good time for the start of the procession, in which all members of the profession are invited to join. Marshals will be present at the services to indicate the order of the procession.

Yours sincerely

John Harber Phillips AC
Chief Justice

Supreme Court

Justice Pagone

GAETONE (Tony) Pagone was appointed as a member of the Supreme Court of Victoria in October of this year.

His Honour was educated at De La Salle and then at Monash University where he completed his bachelor degree in arts and law as well as obtaining a diploma of education. He did not immediately embark upon a legal career, but taught for a short time at the Lilydale Secondary College.

However, the law called and he completed his articles at the then firm of F. Owen & Associates and was admitted to practice in 1980.

As anyone associated with his Honour knows teaching has been an important part of his life. Not surprisingly, he took up a post at Monash University where for a time he taught law. Whilst at Monash, he had the privilege of spending some time at Cambridge University, where he completed a Masters Degree in law with honours.

His Honour then decided that he should come to the Bar. He signed the Bar Roll in 1985 and chose Allan Myers QC as his mentor.

As would be expected, his Honour was much in demand as a junior counsel as continued as such until he took silk in 1996. On taking silk he had conducted a successful and busy practice until his appointment. He continued to maintain his interest in teaching through the postgraduate courses at Monash.

Whilst His Honour will be remembered as specialising in revenue cases, being much in demand by the Commonwealth, his practice has not been confined to that area. Aside from general commercial work, His Honour's keen interest in civil liberties has led him into such cases. Indeed, at one time his Honour served on the then AAT in Victoria sitting as a sessional member in the Anti-Discrimination List.

His Honour's interests are varied and had led him to being the proud proprietor of a restaurant in Carlton known as "Sicilian Vespers". His Honour was also a keen member of a dining and discussion group known as the Eggleston Society. As befitting a man with a professed admiration for Machiavelli, his Honour became a devotee of the ancient game of Royal Tennis. Members of his then chambers were treated to a running description, via fax, of his progress through the various royal tennis courts in England and Scotland, his opponent being Mr Justice Kellam. His Honour is married to Margaret Pagone and they have two children.

We wish His Honour success in his appointment.

County Court

Judge Nicholson

JUDGE Nicholson's appointment to the County Court on 3 July 2001 drew support from a wide section of the community including the judiciary, the profession, and her many friends and acquaintances. It is rumoured Her Honour has set a new record for the numbers in attendance at her swearing in ceremony and at her official welcome on Tuesday 31 July 2001. She was welcomed to the County Court by the Chairman of the Victorian Bar Council and the President of the Law Institute.

Such widespread support may be attributed to Her Honour's extensive curriculum vitae which may be summarised by the chairman's opening words "Your Honour comes to the court after not one but two successful careers. First in government and second at the Bar".

Her Honour was raised in the inner Melbourne suburb of Yarraville and educated at Catholic Ladies College. After the completion of her secondary schooling she was offered a place at law school but due to her mother's ill health was not able to take it up and in its stead commenced work with the Commonwealth Government whilst undertaking part-time studies.

In 1974 Her Honour graduated with a Diploma in Arts from what is now Swinburne University and the following year commenced a Bachelor of Laws at Monash University. Over a period of twelve years in the Commonwealth Public Service Her Honour held many notable roles which included acting as a liaison officer to visiting delegations of foreign dignitaries, including on one occasion escorting the then Prime Minister of Singapore, Mr Lee Kuan Yew, upon his visit to Melbourne.

Her Honour obtained her Bachelor of Laws in 1981 and completed her articles at the Leo Cussen Institute in 1982 and was admitted to practice later that year. She came to the Bar and first read with Phillip Dunn QC. When he was tempted overseas by a juicy brief, she completed her reading with Brind Zichy-Woinarski QC.

Her Honour quickly distinguished herself as a diligent and capable barrister, and her early practice at the Bar involved a significant amount of criminal work, but it soon developed into a wide practice in many areas of law including building disputes, franchise cases, coronial inquests, and a range of administrative law matters including disciplinary tribunal proceedings and racing matters.

Her Honour developed a reputation as an advocate who could put her case even in the most difficult of circumstances. One such case was recounted in the well known legal drama series "Janus". The case involved a complaint of sexual assault. It was an unusual case because the complainant, the defendant and several witnesses were hearing and speech impaired. The whole of the trial had to be conducted with the use of sign language interpreters. It was the first trial of this kind in Australian legal history.

In addition to her many achievements at the Victorian Bar, in 1993 Her Honour was also admitted to the Bar of Ireland where she obtained the Irish degree of Barrister at Law.

Notwithstanding the demands of a busy practise Her Honour has made significant contributions to the administration of the law. During her early years she worked as a volunteer in several Community Legal Centres, such as the Fitzroy and St Kilda Legal Services. Her Honour also taught for many years at the Leo Cussen Practical Training Institute where she was affectionately dubbed "Judge Julie". She has also served as a moot master at the University of Melbourne.

Her Honour is well known as a keen fan of the horses. She has followed this interest both as a spectator and a rider. She took many briefs involving cases concerning horses. This interest and experience no doubt played a part in Her Honour's appointment late last year as the Deputy Chairperson of the Racing Appeals Tribunal. This appointment was especially notable because Her Honour was the first member appointed to the Tribunal who was not a judge.

A keen sportswoman Her Honour does not to do things by halves. Her Honour has been known to ski the Klein Matterhorn, putt the 18th at St Andrews and speed down hills as a member of the Scooter Squadron. Her Honour has also maintained a lifetime of loyalty to the Western Bulldogs and regularly attends their matches and is an enthusiastic member of the "Watchdogs".

Modest in accepting accolades, Her Honour attributes her achievements to her mother Bernadette and describes her as "the most significant role model in my life". As one of nine children Bernadette taught herself the skills to rise to the position of personal private secretary to Prime Minister Harold Holt and was awarded a MBE for her services. At her welcome, Her Honour paid tribute to her mother for her inspiration and encouragement and for the example she set by working hard and long hours combining a career and motherhood. Her Honour also recalled her mother's encouraging advice "that women should pursue whatever career they choose and to follow that dream and no matter what your background and difficulties in life, you can achieve".

Such is the breadth of experience Her Honour brings to the County Court. The community will be well served by the appointment of Judge Nicholson and the Bar wishes her well.

Openings of The Legal Year Australian Society in the 21st Century

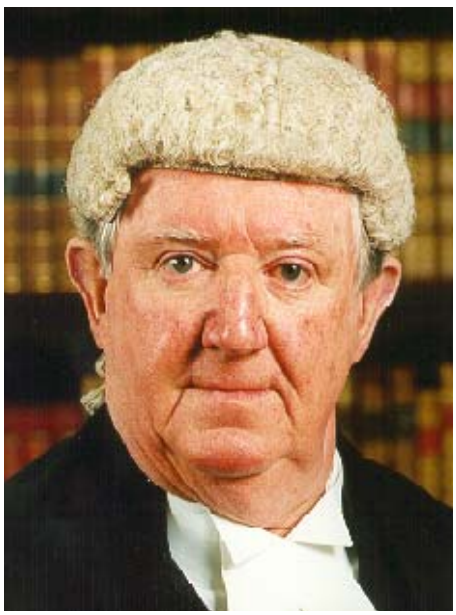
Q. Why church services?

A.
1. A display of ritual pageantry.
2. An occasion of due solemnity.
3. An expression of the place of the principles of the rule of law in society.
4. An expression of the importance of the law as a system of security for, if not also comfort of, society.
5. An expression of the moral and spiritual guidelines — as seen by the church, for the practice of law.
6. The occasion for renewed contact with a church, by non regular "church-goers".
7. A forum of new ideas and language.
8. A respected mark of the start to the commencement of the sittings of the courts (and tribunals) of Victoria, for a New Year.
9. A public church service — including some of the active officials court and legal practitioners — so the public can see them, in public.
10. A useful walk (for members of the Bar).

Tony Radford
Victorian Bar Nominee on the Chief Justices' Committee for Religious Observances

Supreme Court

Justice Hedigan



JOHN Joseph ("Jack") Hedigan was educated at De La Salle College, Malvern, (a school which also produced Chief Justice Phillips and Justice Teague), the University of Melbourne and the University of Michigan. He was dux of De La Salle College, obtained an Honours degree in Law from the University of Melbourne and a scholarship to the University of Michigan where he obtained an LLM degree.

Despite the temptations of a lucrative career in the law in Michigan, he returned to do articles with Corr & Corr and signed the Bar Roll in 1957. He read with Olaf Moodie Heddle and took silk in 1973. He was appointed to the Supreme Court in January 1991 and retired in August this year.

As a barrister, His Honour's huge and successful practice in the common law area and his capacity to hide a keen intellect and an erudite mind behind a veneer of bluff heartiness led many to underestimate his very broad knowledge of the law and his capacity for precise legal analysis. To some who did not know him well and who did not know his academic background, the manifestation of these qualities by His Honour on the Bench came as something of a surprise.

At the Bar he showed a somewhat mercurial temperament and sometimes a certain intolerance towards those whose wits were less quick or who were too slow to seek his point of view. In his speech on the occasion of the retirement of His Honour, the then Chairman of the Bar Council, Mark Derham QC, said:

> At the Bar you were an all-rounder, at home in almost all jurisdictions and areas of law. You developed a reputation as a fearless advocate, utterly uncompromising and combative in the presentation of your client's case. Scholarly opponents called you "volatile", while the less articulate complained of a "short fuse".

When His Honour was appointed to the Bench, there were many that feared the impact of that "volatility". But it did not manifest itself.

In the course of a trial he might well interrupt to ask a pertinent, and sometimes deadly, question. He would not, however, browbeat counsel into accepting his viewpoint, but would listen to an answer and analyse it. Even where in an exchange with counsel he had committed himself strongly to a particular viewpoint, he was prepared to change that viewpoint if persuaded by the logic of counsel's submissions. Although reluctant to listen to nonsense, he managed for the most part to abide by the stricture he gave himself on his appointment: "Shut up and listen".

In the Winter issue of *Bar News* David Bennett gave the following pen portrait of Jack Hedigan listening to submissions being put by Geoffrey Robertson QC.

> A quick look at the judge to get a sense of how he was taking things.
>
> No special occasion here — that was obvious. Hedigan J's usual unimpressionable manner was unchanged. He sat in the same seat as had Barry J and obviously had the same control over proceedings. The baton had passed. Jack Barry. Jack Hedigan . . . the memory of the former somewhat dimmed these days.

Jack Hedigan was a first-class judge. He was and is a compassionate man with a first-class intellect, an understanding of people and a tolerance of their foibles and weaknesses. On the Bench he sought to ensure that justice and the law did not drift too far apart.

He presided for a long time over the commercial list and managed it both in the interests of efficiency and in the interests of ensuring justice. He was later the driving force in the establishment of the major torts list which he managed from 1995 until his retirement this year.

The departure of Jack Hedigan from the Bench is a loss to the Supreme Court of Victoria and it is a loss to the law of this State. He leaves his stamp on the court, not only in the judgments he has handed down but also in the form of the major torts list which he played such a major role in creating.

That retirement, however, gives this "affable irregular" more time for his wife Helen, and his children Anna and John, for his gardening, his horse racing and for Collingwood Football Club.

> An affable irregular
> A heavily build Falstaffian man
> Comes cracking jokes of civil war as though to die
> By gunshot were the finest play under the sun
>
> *W.B. Yeats*

We wish him well in his retirement.

The Honourable Kenneth Joseph Jenkinson QC

ON 24 August 2001, the Honourable Kenneth Joseph Jenkinson QC died. He was born on 14 November 1927 at Kew, the son of Harold Bentley Jenkinson, a journalist with *The Herald & Weekly Times*.

He was educated at Xavier College, Kew, where he excelled as a student, middle distance runner and cricketer. Shortly before his seventeenth birthday, he sat for his Leaving Pass. His marks were the highest for the school and accorded him recognition as "Dux Elect". However, as was the custom in those times, to be awarded Dux of the school, a student needed to return and complete Leaving Honours. Even then the young Jenkinson displayed his virtue of being little concerned with personal fame or fortune and chose to proceed to the University of Melbourne rather than return to school.

At the University, he studied and completed an honours degree in pure History, at a time when such distinguished members of staff as Max Crawford and Manning Clark were able to mould students from vastly different backgrounds. He particularly enjoyed the opportunity to be a fellow student with ex-servicemen, whose experiences of life were obviously so much broader at that stage than his own. An added attraction of the Arts faculty was the opportunity afforded for him to meet with Rachel, the daughter of W.A. Fazio, then a leader of the Criminal Bar.

Accordingly, Ken in due course studied and completed his law degree at the University. Rachel and Ken were married during his course and he was able to combine his full-time studies with work as a clerical assistant at the Commonwealth Crown Solicitors Office, where he subsequently served his articles of clerkship. He did not waste the weekends. Through his father's contacts, he was able to work at *The Herald* as an assistant reporter with Alf Brown for football and Harry Hopman for tennis.

On 2 October 1953, Ken signed the Bar Roll. His entry was no. 500. There had not been an entry on the Roll for some time. S.E.K. Hulme, AM, QC holds no. 499 and had signed the Roll on 17 July 1953. Ken read in Equity Chambers with Bill Fazio and thus was exposed to practice in criminal law. He succeeded in developing a broad practice that ranged between crime, Commonwealth employees' compensation, equity, property law, matrimonial law, common law, and revenue and taxation. He was able to maintain large chambers when Owen Dixon Chambers opened. From 1964 until 1970 he took readers. Those who had that privilege in turn are Master Wheeler, A.W. Adams QC, Senior Master Mahony, Hepworth, Beaumont QC, Kemelfield and Lally QC. To them and many other counsel who regularly sought his advice and assistance, Ken was most generous.

His advocacy was marked by calmness, precision in analysis of principle and brevity. The characteristic pregnant pause, followed by a substantive response to a proposition put to him as counsel by the Court, contrasted with the garrulous haranguing of the Court as displayed by some others. On 4 November 1970, Ken took silk and, as was to be expected, flourished as a leader. In particular, he enjoyed appellate work.

However, his initial foray into criminal law was to have its influence upon his practice at that time. During 1972 and 1973 he constituted the Board of Inquiry into Prison Discipline. He displayed the qualities needed for success as a member of the judiciary. In 1973, he became Chairman of the Council of the State College of Victoria, which later became the Hawthorn Institute of Education. Between 1973 and 1975 he served as a member of the Bar Council. In 1974 he was appointed as a member of the Prisons Advisory Council.

On 18 February 1975, Ken was appointed as a Justice of the Supreme Court of Victoria. There he quickly established himself as a judge who was thoroughly prepared on all issues relevant to a case before him and who expected counsel to be in a similar position. He did not waste time and voiced his displeasure when counsel were wasting the time and resources of both the Court and clients. His judgments were lucid and well constructed. He commenced his reasons for judgment with a precise summary of the issues that were to be determined by the Court. In use of this style, he emulated that of Sir Hayden Starke.

On 1 November 1982 Ken resigned upon being appointed a Justice of the Federal Court of Australia. That appointment brought with it a wider variety of litigation and exposure to advocacy throughout Australia. On that court, he joined his close friend John Keely.

Although it was somewhat controversial at the time for a Supreme Court judge to do so, Ken's decision to accept that appointment was rewarding for him. He replaced Deane J, who was appointed to the High Court. Whilst on the Supreme Court, Ken had been engaged in a significant amount of taxation work. Appointment to the Federal Court enabled him to continue with taxation law and in addition be exposed to a wider variety of work in administrative law, intellectual property, trade practices, insolvency and immigration. He was not totally deprived of criminal law because in 1983 he was appointed as a Judge of the Supreme Court of the Australian Capital Territory, where he was able to indulge his interest in trying criminal cases.

On 5 June 1997, Ken's retirement from the Federal Court was acknowledged by the profession with glowing tributes as to his contribution to the judicial life of this country. Upon his retirement, he was able to continue to be as widely read as ever and devote more time to basking in Rachel's and his enjoyment of the next generation of their family. As counsel and judge, he had always been conscious of the need to balance his professional life with his family life. He did not become idle. Between 1997 and 1999, he was Presiding Member of the Spanner Crab Fishery Assessment Advice Committee and of the South East Fishery Allocation Advice Panel. From 1999, he was a lecturer in the Law Faculty Graduate Program, University of Melbourne. Further, he consulted and provided a number of reports for the Australian Fisheries Management Authority, the last of which was completed in March 2001.

Ken endured his struggle with cancer

with his customary strength and resolve. He was devoted to and is survived by Rachel, their children Simon, Rachel Anne, Sarah and Elizabeth and their respective families.

Amongst the personal papers carefully maintained in Ken's study was found his transcription of a passage from Arthur Miller's autobiography, *Timebends: A Life.* Obviously Miller's observations in that passage, which follows, appealed to and aptly reflected Ken's own philosophy:

> I began to see that to me the idea of the law was the ultimate social reality, in the sense that physical principles are the scientist's ground — the final appeal to order, to reason, and to justice. In some primal layer Law is God's thought. (p. 584)

W.F.L.

Douglas Michaelis Salek QC

DOUGLAS Salek will be remembered not only as a fine criminal barrister, but as a man of style, wit, theatricality and a true friend of the Bar.

Douglas was too young to die at the age of 48. He had fought lung and throat cancer for four years, had survived the removal of one lung and the removal of a tumour in his throat. But over those four years he was appointed silk in 1999 and continued his flourishing and successful criminal practice, specialising in appellate court advocacy.

Doug had many friends at the Bar and indeed loved the Bar itself and its way of life. He loved acting and was a great mimic. Sometimes he mused about whether he would have been a better actor than barrister. The eulogies at his funeral, at a memorial dinner at his beloved Savage Club and at the Criminal Bar's gathering at the Essoign Club testified to the fact that as a barrister he led a varied, stimulating and full life. His life was not only filled with the law but with his love of the theatre, travel, food, wine, and the company of friends.

Douglas Michaelis Salek was the second son of Alan and Mary Salek and the grandson of Sir Archie Michaelis who had a profound influence on his grandson. He was educated at Melbourne Grammar where he first revealed his abilities as a mimic and actor. In his final year at school he was awarded the inaugural Barry Humphries prize for the liberal arts for his title role as *Richard III*. He matriculated with honours, and attended Monash University obtaining Bachelor of Jurisprudence and Bachelor of Law Degrees in 1974.

In 1975 he went to London where he worked for two years with a commercial law firm, Coward Chance (now Clifford Chance). Douglas returned from London in 1977 and read with His Honour Michael Kelly, now Judge Kelly. He became a great friend of Kelly's and to the last was able to mimic that Kelly lisp so well. He became a significant criminal trial barrister and later successfully took up the rigorous work of practice in the Court of Criminal Appeal.

Douglas appeared in many significant cases concerning the administration of criminal justice. In the High Court these included, *Kesaravagh* on insanity, and *Pavic* and *Swaffield* on confessions. In the Court of Appeal *Parker* and *Anderson* on expert evidence, and *Lucas* on DNA evidence. In his later years he appeared in many appeals against conviction and sentence and was well recognised for his hard work, research and incisive arguments.

Doug had been a smoker of about 40 cigarettes a day from the time he left school, and in 1997 he was diagnosed with lung cancer at the age of 44. His right lung was removed and after a period of treatment he resumed his practice. In 1999 he was diagnosed with throat cancer which was successfully removed. Douglas resumed practice and was appointed a Queen's Counsel late in 1999. It was whilst recuperating in hospital from his throat cancer that his great friends Elliott QC and Wilson QC were able to break the news to him by phone that he had obtained silk before they hurried to the hospital with the Chief Justice's letter. Later, the Chief Justice, on enquiring as to his health and asking how he had found out about his appointment whilst in hospital, when told that his thespian friends had opened the letter and telephoned him, replied, "You mean the letter marked Strictly Private and Confidential!"

Douglas combined travels to London (where he had spent many happy years), with Paris and France whose cooking he loved to emulate and New York, whose martinis he loved to drink.

In December 1999 a few days after celebrating his appointment as silk, Douglas was informed that cancer had entered his remaining lung and that he was living on borrowed time. He used this borrowed time to great effect.

In January 2000 he undertook an extensive American and European tour before returning for chemotherapy. He travelled to the Australian Bar Association conference in New York in 2000. He became a great campaigner against smoking. He joined Quit Victoria where he worked on legal research, debates and seminars and was also a member of the Tobacco Control Committee.

Doug was an integral member of many of his friends' families and much-loved godfather to many of his close friends' children. In the year 2000 he established an annual prize at Melbourne Grammar to enable a student involved in theatre to travel overseas to study. Douglas was involved in many theatrical performances with his great mates Paul Elliott and Simon Wilson. Perhaps his most notable performance was in the 1984 Victorian Bar Review where his mimicry of the then Premier John Cain and Hartog Berkeley QC (Warthog Darkley) was outstanding. Later he would join John Cain as a member of the Tobacco Control Committee.

He performed in many productions for the Tin Alley Players and at the Melbourne Savage Club, where he performed in and directed many play readings. Douglas was one of the founding members of the Criminal Bar Association and served on its committee as well as being the Vice-Chairman of the Gordon and Jackson List.

He dealt with his terminal illness with a resilience and good humour that will always be remembered. Even a few days before he died he was still able to lunch at Bamboo House with his close friends and expressed his concern about his clients' interests in relation to a brief in which he was to appear the following Wednesday. He died on the Sunday. Douglas Salek is survived by his mother Mary and his two brothers, Ian and Andrew.

He will never be forgotten as a fine barrister, a great friend and a man of style.

Editors: Due to an oversight in production, the full text of Douglas Salek QC's obituary notice, as printed above, was not included in the Spring issue.

Appointment of Senior Counsel

The following were appointed Senior Counsel for Victoria on 27 November 2001.

Mr Ian Pitt S.C.
C/- Best Hooper, Solicitors,
563 Little Lonsdale Street,
Melbourne 3000

Mr George G. McGrath S.C.
C/- List F, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr Herman Borenstein S.C.
C/- List A, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr Colin G. Hillman S.C.
Prosecutor for the Queen,
Crown Prosecutor's Chambers,
4th Floor, 565 Lonsdale Street,
Melbourne 3000

Mr David A. Parsons S.C.
C/- List R, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr Leslie Glick S.C.
C/- List A, Owen Dixon Charnbers,
205 Williarn Street, Melboume 3000

Mr Peter N. Rose S.C.
C/- List B, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr Brian E. Walters S.C.
C/- List F, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr David G. Collins S.C.
C/- List G, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Ms Julie A. Dodds-Streeton S.C.
C/- List A, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr David H. Denton RFD, S.C.
C/- List A, Owen Dixon Chambers,
205 William Street, Melboume 3000

Mr Richard J.H. Maidment S.C.
C/- List B, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr Richard J. Manly S.C.
C/- List Af Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr Mark E. Dean S.C.
C/- List Bs Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr David F.R. Beach S.C,
C/- List D, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Mr Geoffrey G. McArthur S.C.
C/- List W, Owen Dixon Chambers,
205 Williarn Streetl Melbourne 3000

Mr H. John Langmead S.C.
C/- List W, Owen Dixon Chambers,
205 William Street, Melbourne 3000

Editors Note: In accordance with new editorial policy to meet the Christmas deadline, full details of the new silks will appear in the Autumn issue of *Bar News.*

Portrait of a Founder of the Modern Bar

Oliver James Gillard 1906–1984

By Matthew Groves

Oliver James Gillard was born on 6 June 1906 about "a drop kick" from Victoria Park, Collingwood. He was the youngest of five children produced by Eugene Thomas Vincent and Lucy Challis Gillard. The family led a modest life. Oliver Gillard was educated at Stawell High School. He later attended the University of Melbourne University, graduating with a Bachelor of Arts in 1927 and a Bachelor of Laws the following year. For part of his undergraduate years Oliver Gillard taught at Essendon High School, but he moved into the law with an appointment as a law clerk to a Melbourne solicitor Vincent Nolan. He worked for Nolan from 1926 to 1931.

Matthew Groves

GILLARD was admitted as a barrister and solicitor of the Supreme Court of Victoria in early 1931, and was called to the Bar almost immediately. He signed the Roll of Counsel on 16 April 1931. During this period the effect of the Great Depression was felt throughout Australia, and the Bar was no exception. Seven counsel signed the Victorian Bar Roll in 1931, but only three of whom managed to establish a career as a barrister.[1]

Oliver Gillard moved quickly to establish himself at the Victorian Bar. He developed a general practice, as was common at the time. His career was interrupted by World War II. He served in the AIF (Australian Imperial Force) from 1941 to 1943. In 1943 he was appointed as legal officer with the Commonwealth Department of Transport, and served in that capacity until returning to practice at the Victorian Bar in 1944. Oliver Gillard's practice flourished from almost the moment that he returned. He was appointed one of His Majesty's counsel on 24 October 1950.

Oliver Gillard's rise at the Victorian Bar during the post-war years coincided with a time of great prosperity for the Bar. During this time the Victorian Bar gained many new members, which caused the Bar to outgrow its existing facilities. For most of its existence the Victorian Bar has been housed in Selbourne Chambers. Those chambers were built in 1881 (three years before the Law Courts) and was the home of the Victorian Bar for many decades. The expansion of the Bar in the post-war period created a demand for chambers that was met by the establishment of Equity Chambers and, very soon after, chambers in three other buildings. Many members of the Victorian Bar thought that "this migration resulted in a weakening of the collegiate life of the Bar but, nevertheless, conservatism induced many to oppose a change which would result in leaving Selbourne Chambers."[2]

The number and standard of chambers increasingly became the most important affair of the Victorian Bar. Many barristers thought that Selbourne Chambers should be entirely renovated, while others thought it was so overcrowded, poorly lit and uncomfortable that it should be abandoned. Some proposed the bold idea of constructing a new building, designed to serve exclusively as barristers' chambers. The problem was so large, and each of the possible solutions carried such significant consequences to the Bar, that every practitioner carried a strong opinion on the issue and participated avidly in each discussion.

As one of the leaders of the Victorian Bar Oliver Gillard was heavily involved in these discussions, even more so upon his election to the Bar Council in 1957. During 1957–58 the Bar Council resolved to acquire a site opposite the Supreme Court and construct a new chambers to house the entire Bar. The proposal sparked great debate. The "accommodation" matter, as the entire debate is termed in the Bar Council minutes of the time, came to a head in the special Council meeting held on 30 May 1958. The meeting was attended by 150 members of the Bar (around 95 per cent of the Bar at the time) and chaired by Oliver Gillard. The minutes of that meeting record that motions to confirm the Council's decision to commission an architect to design a new building, to authorise the Council to "continue its efforts to obtain premises to house the whole Bar" and to approve the purchase of land required for the new building were each carried overwhelmingly. A proposed amendment to remove the stated aim that the new building should "house the whole Bar", which would have defeated the main purpose it, was not carried.[3]

Many barristers suggested that support

At the unveiling of the portrait of the late Sir Oliver Gillard: (left to right) Roger Gillard QC, Honourable William Kaye AO QC, Graeme Gillard, Honourable Justice Bill Gillard and Robert Redlich QC. (Front) Lady Jane Gillard.

for the new building was due in no small part to the manner in which the Oliver Gillard presided over the meeting. As each point came for discussion, he allowed an equal discussion by the supporters and opponents of the various proposals. This approach made the meeting entirely fair, at least so far as the rules of natural justice were concerned (if they were at all applicable at the time). Oliver Gillard could take credit for that because he selected the speakers. His selection also affected the quality of the debate. When a barrister was required to speak in favour of new building, Oliver Gillard would select the most skilled and admired barrister at hand. When argument against the new building was required, he selected the most junior, nervous and least weighty barrister his eyes could find. This tactic was long remembered. Almost 20 years later, at the occasion of Oliver Gillard's retirement from the Supreme Court of Victoria, the Chairman of the Victorian Bar noted "Your ability to chair general meeting of the Bar after general meeting with tact, authority, persuasion and guided democracy has set a standard which may never be equalled. For this achievement alone — and there are many others — you will always be gratefully remembered by the Bar."[4]

If the negotiation of the decision to construct the new building drew upon the skills and energy of an advocate, management of the project required the hard work and attention to detail necessary to fulfill the plan. Much of this responsibility was assumed by a building sub-committee, comprised of Oliver Gillard (Chairman), J.B. Tait QC and R.M. Eggleston QC, with significant assistance from R.L. Gilbert. R.A. Smithers QC also provided considerable assistance to the project.

In 1959 the Victorian Bar purchased from the Guest family a parcel of land at 205–221 William Street. Oliver Gillard dismissed the first conceptual drawings of the proposed building produced by the architect, and resolved that the only building which would satisfy the Bar's specifications of providing suitably sized rooms with windows and easy access between rooms was a floor plan with a layout in the form of the letter "T". The plans were redrawn to accommodate this design. Oliver Gillard resolved that each room should be capable of being air-conditioned, and after conferring with Chrysler of USA at his own expense, specified that each room should have installed beneath its window a grate to which an air-conditioning unit could be fixed. Tenders were called to erect the building and it was eventually awarded to Costains of UK. The firm had just entered the Australian building industry and considered it to be prestigious to erect, as its first building contract, chambers to accommodate the Victorian Bar. The building was erected largely under the supervision of Oliver Gillard. He was occasionally accompanied by fellow Bar Council members, who would inspect the building site each Sunday with a representative of the builder.

The capital to fund the new building was advanced to the Victorian Bar by some members of counsel who had benefited from the sale of Selbourne Chambers and

the balance by Commonwealth Bank of Australia and MLC Insurance. The difficulty was finding a second lender who was prepared to rank behind the first lender. A member of the Bar hit upon the idea that the Chairman of MLC's Board might move his fellow directors to make this loan if he were made one of Her Majesty's Counsel, for the State of Victoria. In addition to being given the first security over the new chambers, the Commonwealth Bank was also offered office space on the ground floor. It leased this area reluctantly because it considered it would do little business. Some years later the Commonwealth Bank conceded that its branch at 221 William Street was the second most prestigious in Australia.

The new chambers were called "Owen Dixon Chambers" (with the consent of the Chief Justice of High Court). The chambers were opened in 1961, by the Prime Minister of the day, Robert Menzies QC. The function was attended by many other dignitaries including the Premier Sir Henry Bolte, Federal and State Attorneys-General and Solicitors-General, almost every judge of the High Court, Supreme Court, Commonwealth Industrial Court, Arbitration Commission, County Court, General Sessions, members of the Bars of all other States, and the President and Council members of the Law institute of Victoria. By this time Oliver Gillard had retired as Chairman of the Bar, but received many thanks on the day. The Chief Justice of the Supreme Court of Victoria, Sir Edmund Herring, praised the honorary work that many individual barristers had given in the planning, financing and construction of the building. He then added that the entire project ". . . would not have come to completion but for the fact that the Bar had somebody who would give the lead and would not be daunted. I refer to Mr Oliver Gillard."[5]

When Sir Owen Dixon addressed the invited guests, he recalled his time at the Victorian Bar as "the happiest period of my life". He also applauded the standard of accommodation provided by the new chambers, which was quite comfortable for the day. Dixon recalled the times when even the smallest comfort in chambers was thought unseemly. The sight of carpet in chambers caused one practitioner to remark "Goodness me, what are you doing with a carpet on your floor? You are a barrister, not a company promoter!"[6] But Sir Owen Dixon warmly welcomed the move of barristers' chambers into the twentieth century.

Ceremony to Unveil the Portrait of Sir Oliver Gillard

ON Tuesday 16 October 2001 a function was held to unveil the portrait of the late Sir Oliver Gillard. Sir Oliver was a distinguished member of the Victorian Bar and the Supreme Court of Victoria. He was also instrumental in the planning and building of Owen Dixon Chambers.

The function was attended by Sir Oliver's widow, Lady Gillard, and his sons the Honourable Justice Bill Gillard, Roger Gillard QC of the Victorian Bar and Graeme Gillard, and many other members of the Gillard family. Among the honoured guests were the Honourable Sir Richard McGarvie QC and the Honourable Mr William Kaye QC.

The Chairman of the Bar, Robert Redlich QC, addressed the gathering and paid tribute to Sir Oliver's role in the building of Owen Dixon Chambers. He reminded guests that the building of Owen Dixon Chambers marked an important phase in the life of the Victorian Bar because it drew the great majority of the Bar within a single building. He also noted that the close proximity of members of the Bar was crucial to the development and maintenance of the ethical standards of the Bar. The Chairman explained that Sir Oliver's strong support for the establishment of Owen Dixon Chambers was motivated by a desire to ensure that these values could be preserved and strengthened.

The Chairman paid thanks to Federal Magistrate Maurice Phipps and Sarah Hinchey, who were instrumental in selecting the artist and commissioning the portrait. He also paid tribute to the artist Paul McDonald-Smith, who attended the unveiling. The great likeness of the portrait is testimony to Mr McDonald-Smith's artistic skills. He drew from reproduced images provided to him by Sir Oliver's son Justice Gillard, and also a portrait of Sir Oliver that was painted during his tenure as the Chancellor the University of Melbourne.

The portrait was formally unveiled by the Honourable Mr William Kaye QC. As the Chairman noted, Mr Kaye was a most fitting person to unveil Sir Oliver's portrait. He read with Sir Oliver and, like Sir Oliver, he provided a significant contribution to the Victorian Bar and the Supreme Court of Victoria during his distinguished tenure as a judge of that court. Mr Kaye

recalled Sir Oliver with great fondness and reminded those present of the significant personal and professional contribution that Sir Oliver had made to the Victorian Bar and the administration of the law of Victoria. Mr Kaye also recounted some memories of the times during which the Victorian Bar resolved to support the building of Owen Dixon Chambers and also the grand ceremony held to mark the opening of the new building.

Sir Oliver's portrait is now hung on the ground floor of Owen Dixon East, just outside the offices of Foley's List. It sits opposite the smaller portraits of the more recent former chairmen of the Victorian Bar. Sir Oliver would no doubt be pleased that his portrait takes this pride of place in our Bar.

The Honourable Mr William Kaye AO, QC unveils the portrait of Sir Oliver Gillard.

Left to right: Mark Derham QC, Robert Redlich QC, Honourable William Kaye AO QC, Honourable Richard McGarvie AO QC, Honourable Justice Bill Gillard and Honourable Leo Lazarus QC.

Although many of the barristers housed in Equity Chambers opposed the push for a new set of chambers, almost all members of the Victorian Bar came to agree that the facilities of Owen Dixon Chambers met every requirement of Victorian barristers. The building itself created an environment which promoted camaraderie and communality among its occupants. The new building had nine levels, but the foundations were constructed with the capacity to support the addition of at least four new floors if required. Almost immediately after the new building was opened it was accepted that new floors should be added. The need was so vital that the Bar Council resolved that "there should be no objections to acceptance of solicitors as tenants in Owen Dixon Chambers if the implementation of the building scheme could not otherwise be achieved".[7]

During the period of establishing the new chambers the Victorian Bar Council through the efforts of Oliver Gillard, Reginald Smithers and Robert Gilbert also appointed new clerks and established the superannuation scheme. The trust deed for the superannuation scheme was drafted by Gillard and Smithers one evening, after other members of counsel, initially requested to undertake the task, did not seem to be able to find the time to do it. The object of the scheme was that the superannuation trust would end up owning Owen Dixon Chambers Each counsel would pay "an inflated rent" and retire at the age of 60 with a "nest egg" of $100,000. A number of other measures were put in place. In this day and age you would describe them as "progressive moves". Oliver Gillard enticed the proprietors of a well known Melbourne restaurant to run the new dining room. But he and his fellow Bar Councillors were unable to obtain a liquor licence for the new dining room because of opposition mounted by adjoining hotels. Indeed, those hotels were probably represented by members of the Bar in opposing its application for a liquor licence. This speaks volumes about the Bar.

In 1962 Oliver Gillard was appointed a Judge of the Supreme Court of Victoria. Despite the extraordinary amount of time that Oliver Gillard had given to Bar Council matters, committees and the like, it was widely accepted that he maintained the largest practice at the Victorian Bar. Oliver Gillard's appointment to the Supreme Court of Victoria was notable also because, at that time, he was only the second graduate of a government high school to be elevated to that Court.[8]

During his time on the Bench Oliver Gillard continued the commitment of service that he had maintained at the Bar. He filled a number of public and private offices including Chairman of Churchill Trust, Chairman of Youth Advisory Council, President of Boy Scouts' Bayside Association, Grand Master of United Grand Lodge of Victoria, Chairman of the Chief Justice's Law Reform Committee, Member of the Diocesan Council of the Anglican Church and Canon of St Paul's Cathedral and Chancellor of Melbourne University.

In 1975 he was knighted for his service to the community and the law.

Oliver Gillard retired from the Supreme Court of Victoria on 12 May 1978. At the ceremony to mark the occasion Daryl

Dawson QC, then Solicitor-General of Victoria, stated:

> We shall miss Your Honour's deep knowledge of and instinct for the law. We shall miss the vigour with which Your Honour presses an argument to its conclusion, unperturbed, indeed, delighted, to meet with equal vigour from the Bar table.[9]

In his reply, His Honour acknowledged that life on the bench had not diminished his love of advocacy. He stated:

> Nothing gives me greater joy than to see a really good barrister pertinaciously putting his submissions to the Bench and attempting to remove the pre-conceptions that the judge might possess. In order that there be no misapprehension as to what I am referring to, I do not mean discourtesy, I do not mean abrasive insolence. What I mean is a mastery of the facts and a retrieval of the law, and, armed with confidence based upon that knowledge, counsel gets up and with pertinacity presses his submissions, and even when I overrule them I still admire his efforts.[10]

He also devoted much of his farewell speech to his frustration with the volume and complexity of statutes being passed by Parliament. He asked rhetorically:

> Are you prepared to accept all this legislation brought down binding your clientele in terms that you will not understand — I certainly do not — and be unable to advise your clients precisely what they can or cannot do? This, I believe, is the unfortunate trend in our community today, and I look forward to the year 2000 AD, by which time, thank God, I will not be here, the individual will be so encased and enmeshed by legislation he will like a little lava inside a cocoon, unable to do anything.[11]

Have these sentiments turned out to be true? The creation of ombudsmen and administrative appeal tribunals and the massive increases in the volume of administrative law cases and talk-back radio programs may give some clue to the answer that Oliver Gillard would have given to his own question.

Oliver Gillard died on 7 September 1984. He had suffered ill health after being immobilised by a stroke in 1979. At his funeral the Dean of Melbourne eulogized that he would take up too much time if he were to speak of everything "Sir Oliver" had done in devoting himself to the affairs of the community and to public life. Only nine months before his death, whilst seated in a wheelchair, Oliver Gillard imparted to two of his sons that he thought he had worked too hard during his professional life and had devoted too much of his time to public life. He regretted he had not spent more time with his family. This regret did not diminish the exceptional affection in which he was held by his family. Oliver Gillard is survived by his wife Jane Mary Gillard and three children, two of whom chose to enter the law. One of his sons was appointed a Judge of the Supreme Court of Victoria in 1997.

The Bar has a strong tradition of remembering those who have provided great service, but the recent unveiling of Sir Oliver Gillard's portrait in Owen Dixon Chambers occurs at a particularly appropriate time. The renovations for Owen Dixon Chambers will be finalised shortly. The renovations will revitalise the entire original building, including the Essoign Club and the Bar's administrative offices. While the building clearly requires renovations, it should not be forgotten how well it has served the Bar. For many years it provided the main physical location of the Victorian Bar, and it still houses a very substantial number of barristers. More importantly, the building has and continues to provide a place where barristers meet and mix, sometimes by design and sometimes by choice. In all cases the constant social and professional interaction of barristers in the building forges the strong bonds that underpin their professional ethics, upon which the Bar, and the law itself, are founded. At his retirement from the Bench, Oliver Gillard acknowledged that many qualities such as hard work were required for success in the law, but honesty remained the most important quality.[12] The physical structures used by the Bar naturally encourage honesty among barristers. The constant face to face contact between barristers, by which barristers constantly encounter their fellow colleagues, means that they are constantly subject to the harshest possible judgment — that of their peers. This close contact also provides the Bar's greatest benefit — the constant presence of other barristers to provide their advice, experience, support and friendship.

At his retirement from the Bench, Oliver Gillard acknowledged that many qualities such as hard work were required for success in the law, but honesty remained the most important quality.

The establishment of Owen Dixon Chambers was probably the single most significant event to secure the foundation of these features of the Bar. It is these features, and the collegiate spirit they foster, which serve to distinguish the Bar from the community of solicitors.

For these reasons, the legacy Oliver Gillard left to the Victorian Bar is the foundation of the modern Bar as we know it today. The actions of Oliver Gillard and his colleagues during the late 1950s did so much to shape the Bar. It is easy for current members of the Bar to take the efforts and contribution of their colleagues for granted. It is appropriate to stop and remind ourselves what they have done and continue to do. The Bar is, and always will be, the sum total of the work, the commitment and the spirit of each and all of its members. The work of past members of the Bar has a particular importance because it is bequeathed to subsequent members with only the condition that they enjoy that contribution in the same spirit in which it was given. For all of us, Oliver Gillard made an enormous contribution and we each owe him a great debt.

NOTES

1. The other two were H.A. Winneke (later Chief Justice of the Supreme Court of Victoria and then Governor of Victoria) and K.W. Bailey (later Solicitor-General of Australia).
2. "Owen Dixon Chambers" (1961) 63 *ALJ* 301 at 301–2.
3. Victorian Bar Council, Minutes dated 30 May 1958.
4. Farewell to Sir Oliver Gillard (13 May 1978), Transcript of Proceedings, p. 3.
5. C. Brennan, "Opening of Owen Dixon Chambers" (1961) 35 *LIJ* 394 at 395.
6. "Owen Dixon Chambers" (1961) 35 *LIJ* 399 at 400–1.
7. Victorian Bar Council, Minutes dated 28 July 1963.
8. The first was Justice Edward Hudson. The history of the Judges of the Supreme Court are discussed in fine detail by Charles Gunst QC in "The Supreme Court of Victoria 1852–1980: A Statistical Analysis"(Thesis submitted in partial fulfillment of the requirements for the degree of Masters of Law, Monash University, August 1981).
9. Farewell to Sir Oliver Gillard (12 May 1978), Transcript of Proceedings, p. 1.
10. Ibid, pp. 7–8.
11. Ibid, pp. 11–12
12. Ibid, p. 8.

Launch of New Bar Website

THE Victorian Bar has significantly revamped its on-line presence by launching a user-driven website, www.vicbar.com.au, that demystifies the Bar and makes the best use of available technology.

The website is targeted at the public and members of the legal profession alike.

The website was launched by the Victorian Attorney-General, Mr Rob Hulls MP, on 24 October. Mr Hulls stressed the site's importance and its role in making the public more comfortable with the workings of the law.

"What many in the profession value, the tradition and trappings of such an old profession are what distance lawyers from the community . . . We can break down this perception by embracing a modern approach and embracing reform," Mr Hulls said.

"The website is a very commendable initiative in that it improves access to the Bar and its range of services. I congratulate all those involved in its development. This is a very important website."

The Chairman of the Bar's website project team, Michael Shand QC, said: "The website seeks to take a lot of the mystery out of the Bar. Our prime objective has been to enable people readily to obtain information about the Bar and its members — information not only for members of the legal profession but also for the public who have an interest in the services barristers provide."

The website gives unparalleled access to the Bar's members and its services. It comprises more than 250 web pages with more than 60 documents attached that can be read on-line using Acrobat Reader. It provides the latest legal news from day to day. It discusses what barristers do and why an independent Bar is important. It explains legal terms and answers frequently asked questions about the law. It also has information on how to take advantage of the Bar's legal assistance scheme and about complaints against barristers.

"The design of the website incorporates a menu structure intended to efficiently guide users of the website to the information they require," Michael Shand QC said.

The site features details of all the clerks and interesting images of the life and history of the Bar.

Melbourne-based Icon Art undertook the design and construction of the website. Icon Art is a marketing and communications firm with expertise in web design, content, desktop publishing and public relations. The integration of the website and the Bar Council databases was carried out by Imago Computer Solutions Pty Ltd (Bruce Gilligan).

Above left: Attorney-General, Mr Rob Hulls MP launching the website.

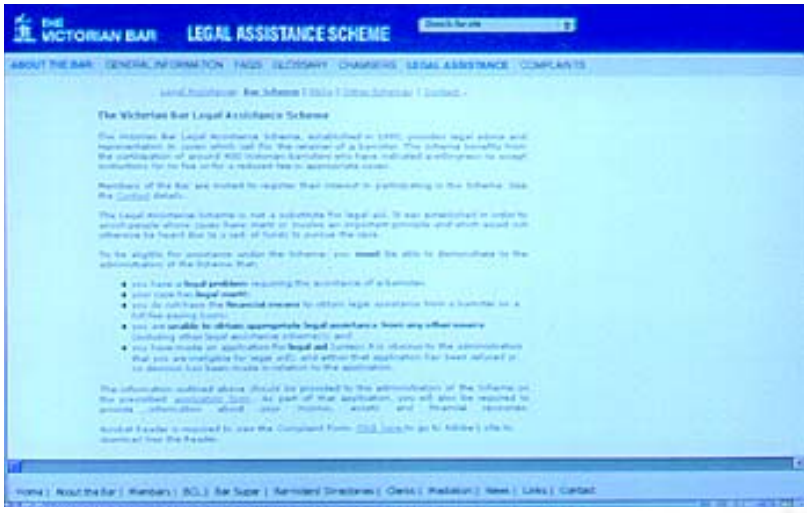
Above: Bar Council Chairman, Robert Redlich QC.

Left: Executive Director, David Bremner; Michael Shand QC and Attorney-General, Rob Hulls examining a close-up of a projected page.

Below: Michael Shand presenting the new website at the launch.

The About the Bar channel of the site is primarily directed to the public. There is general information about the Bar including details of its size and composition generated live from the Bar's database.

The history page also features an explanation of the Silks' Tapestries on the walls of the Lonsdale Street entrance to Owen Dixon Chambers West. The FAQs and Glossary pages give answers to common queries about the law and its practitioners; the chambers page lists the address of each set of chambers at the Bar.



The Legal Assistance section explains the Bar's scheme and its eligibility requirements. It includes useful links to other legal assistance schemes that may be of assistance. The drop-down menu shown in the image is available on every page of the site providing a shortcut to the particular pages listed.

The Complaints section explains to both the public and members of the Bar the process by which the Bar Council through the Ethics Committee discharges its statutory function in relation to complaints about the conduct of members and disputes about pecuniary loss and costs.

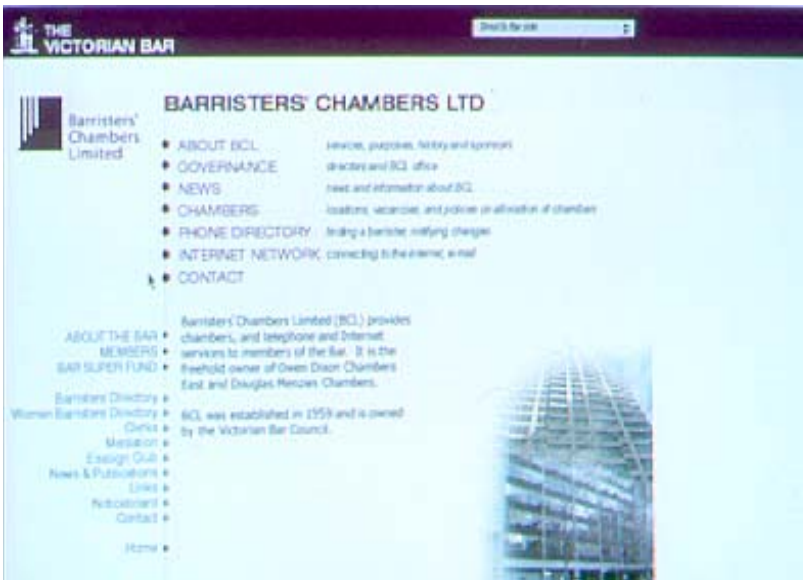
The Members' section has a wealth of information about the Bar of interest to members.

The Governance section contains details of all the Bar's committees and its constitution, rules and regulations. Bar Council and other committee members are listed and each name is hyperlinked to that member's profile.

The membership section has details on subscriptions, practising certificates, professional indemnity insurance, practising interstate, taking silk, parental leave, the Bar library and the Essoign Club.

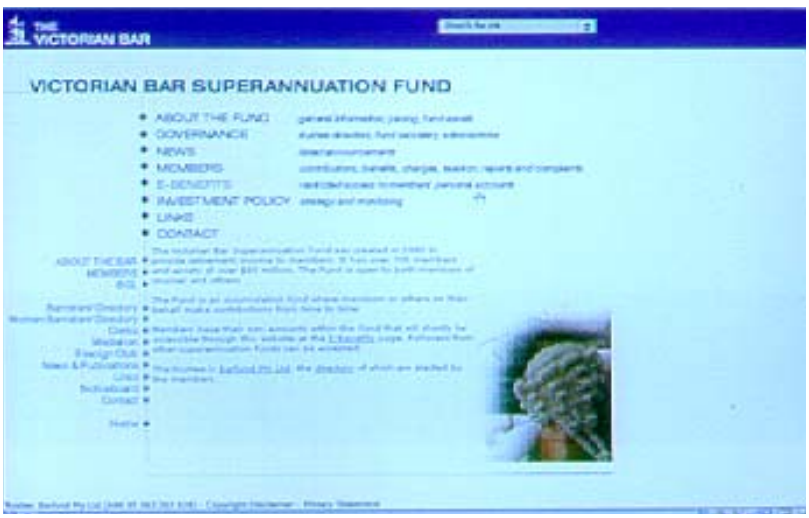
There are pages on each of the associations within the Bar — Children's Court, Commercial, Common law, Criminal, Family and Women Barristers.

The pages on "Coming to the Bar" answer many questions students and prospective members may have about applying to become a member of the Bar and undertaking the Bar Readers' Course.



Barristers' Chambers Limited has its own section on the site providing information about the company, its history and services, its board of directors and staff.

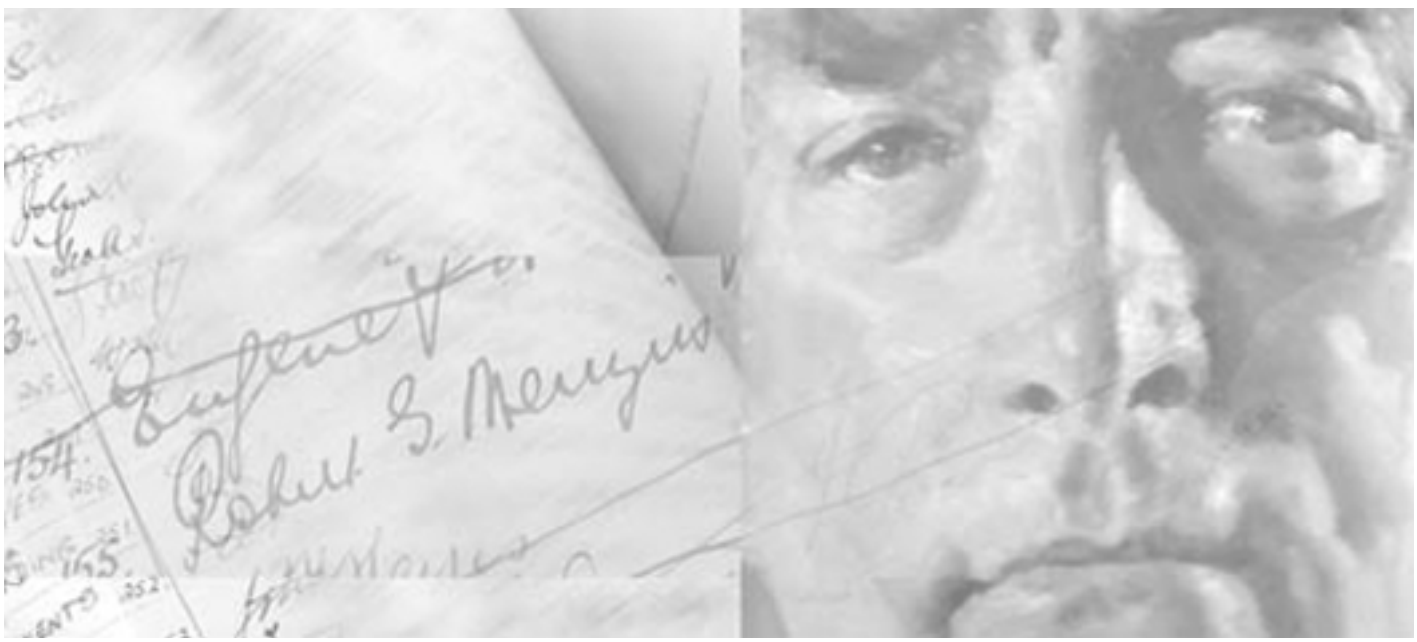
Of particular interest are the pages on current news, BCL chambers and current vacancies, the phone directory giving phone numbers of barristers and Bar staff and the internet network.

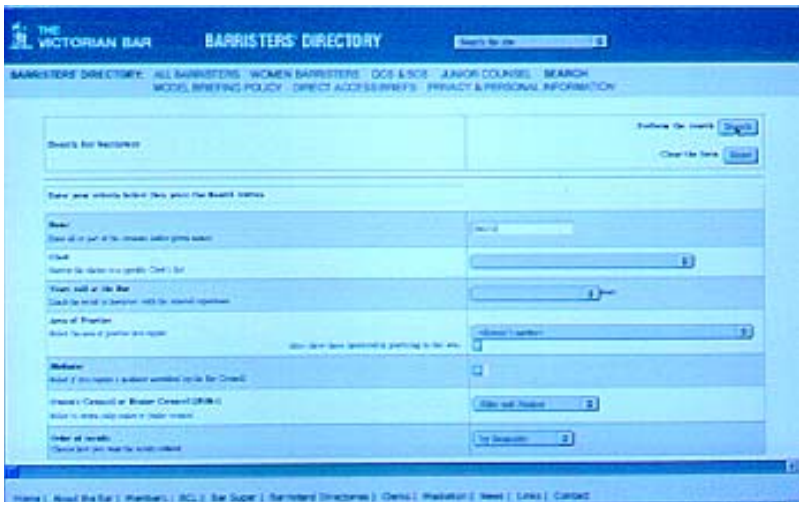


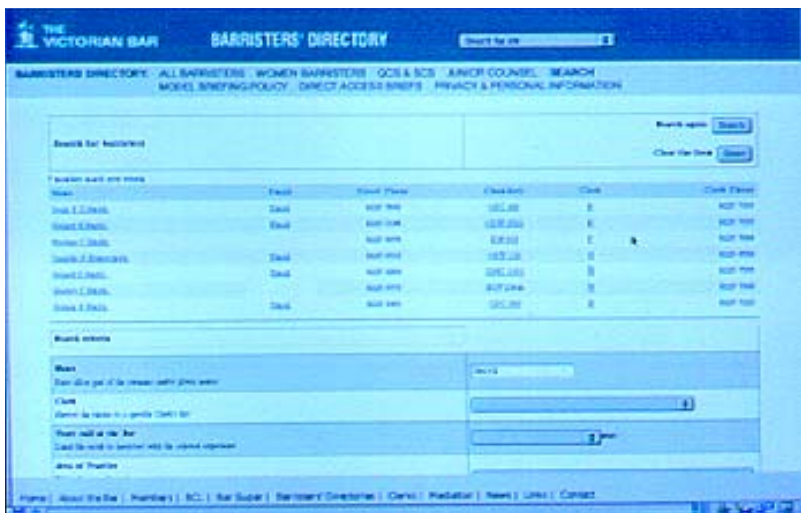
The section on the Victorian Bar Superannuation Fund contains extensive information including news and developments in superannuation. There are details of the directors of Barfund Pty Ltd, the Administrator, Aon Consulting, the Fund's asset consultant and the investment managers retained by the Fund.

A feature of the site, soon to be introduced, will be on-line password access for a member via the E-Benefits page to the Administrator's database containing details of the member's contributions and account balance.

It is expected that members will also be able to change on-line their choice of investment funds. A seminar was held on 6 December 2001 to explain to members the options available under Member Investment Choice.

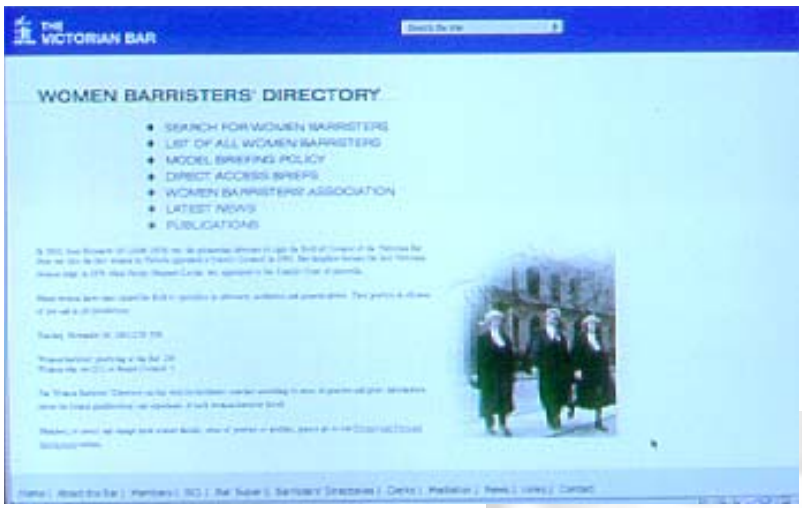






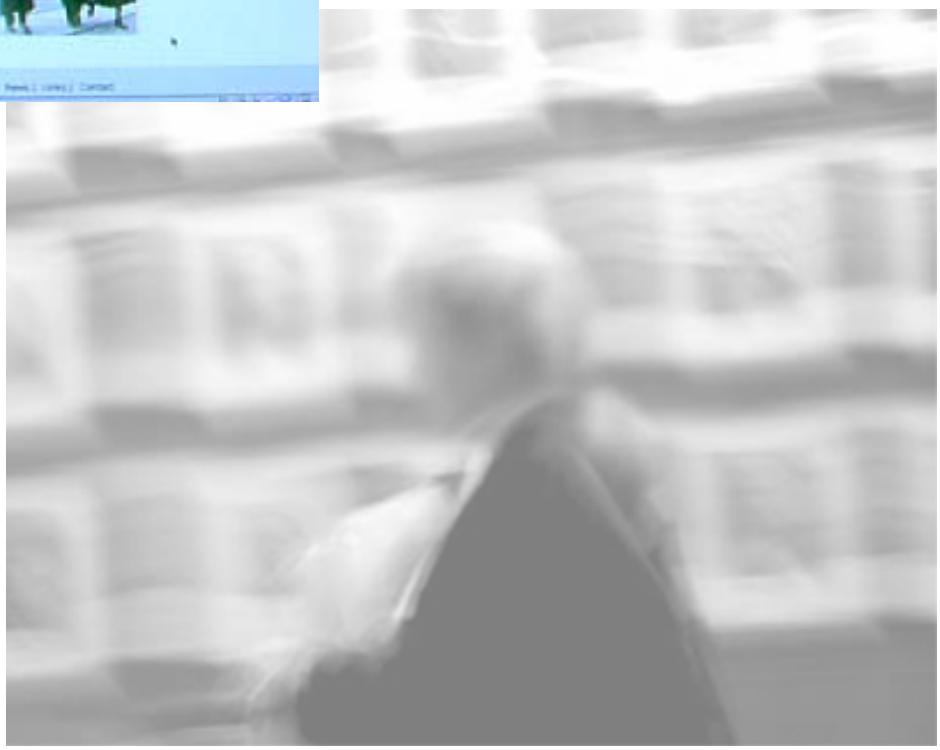
The main directory has details of every practising member of the Bar, generated live from the Bar's database. The search form (pictured) gives a range of choices to find the barrister desired for the case in question, for example, all barristers under two years call who practise in criminal law or any other field of law selected.

The search then produces a list of names, each of which is hyperlinked to the profile of the barrister. It is hoped in the near future to have in place on-line access for members to their profiles so they can change them from time to time as they see fit.



The Women Barristers' Directory pages incorporate the material that existed on the Bar's previous site and seek to further the Bar Council's equality of opportunity policies. The new site for women barristers has the same search mechanism and options as those in the main directory for all barristers but also links to the Women Barristers' Association pages.

There is comprehensive information on the Bar's alternative dispute resolution scheme including a list of accredited mediators, each of whose names are hyperlinked to their profile. Again, the list is generated live from the Bar's database. The Bar's mediation centre is also featured.



Many people — barristers, clerks and staff — helped with the development of the new website. The Bar's gratitude is expressed in the Acknowledgments page on the website, a link to which can be found on the home page. The organising committee comprised Michael Shand QC (Chair), Mark Derham QC, David Levin QC, David Bremner, Executive Director, Geoff Bartlett, Secretary of Barristers' Chambers Limited, and Ian Green, Network Administrator.

A significant contribution in support and assistance was made by Miriam Potts, assistant to Michael Shand QC, and Wendy McPhee, secretary to the Executive Director and the Executive Officer, pictured.

Lessons from the Rear-View Mirror

Leo Cussen Lecture by Justice Hayne, Melbourne, 31 October 2001

It was inevitable that, during the years 2000 and 2001, a lot of time would be spent looking at what had happened over the previous 100 years. That examination was useful in many ways. It reminded us all of what has changed and it gave us a chance to think about whether particular changes were good or bad and about whether they had gone too far or not far enough. But, unless we seek to apply the results of what we saw when we were gazing in that rear-view mirror to what we are to do now and in the future, the exercise has been little more than a wallow in the warm bath of nostalgia. The challenge that now must be faced is what are the lessons to draw from the past for the future development of the legal system.

THE last 100 years produced many changes affecting the legal system in Australia. Most fundamental of all was federation under the Constitution which, with very little amendment, remains our basic law. The importance of that change was profound. Recently we have had to consider whether some changes should be made to our constitutional arrangements and, no doubt, those issues will have to be examined again. But I do not wish to spend time, now, on those questions of constitutional change, important as they are. There are other changes that have happened during the last century to which I want to draw attention. First, there have been changes in the way in which norms of behaviour are defined. Second, the way in which both criminal and civil litigation is conducted has changed radically. Third, there have been great changes to the way in which the profession goes about its work. Last, there are two phenomena that we must all grapple with, sooner rather than later, the law as panacea and change itself.

NORMS OF BEHAVIOUR

Once was the time when identifying legal norms of behaviour, which is to say the rights and duties of members of society, was relatively straightforward. Much more often than not the content of these norms was to be found in, or could readily be traced to foundations in, judge-made law. And behind that judge-made law there lay moral precepts founded in a set of

Justice Hayne of the High Court of Australia

beliefs which, according to one's point of view could be seen as generally held by a largely homogeneous society or generally held by that part of the society in which power resided. The law of homicide, the law of theft, the law of contract could all be traced to such roots. Whatever may have been the difficulties at the edges (and there were many) the core of the relevant law was reasonably straightforward. Thus, the rights and duties of persons, both natural and juridical, were generally capable of relatively simple expression.

Over the century just passed, two things happened that I think it is important to observe and understand. First, society either became, or was seen to be, more complex. Some of that complexity came about because of technological development and change. But probably more importantly than that, society was no longer seen as monochromatically homogeneous. Difference was recognised, accepted, celebrated. The accommodation of difference thus became an important social issue which found its reflection in the law. Much more consideration was given to the position of indigenous Australians. Reference need to be made only to *Mabo* v *Queensland* [No 2][1] and to other cases about native title to make that point. Equal opportunity and anti-discrimination legislation became commonplace. Even such areas of the common law as the law relating to provocation in homicide came to acknowledge that the subjective qualities of an accused, including age, sex and ethnicity, had a part to play in the proper application of principle.[2]

Secondly, much more attention came to be directed to the relationship between the individual and government. Government did more, and more was expected of government. What government did, or did not do, had direct and immediate consequences for many citizens. The regulation of the relationship between individual and government took on far greater significance to the way in which individuals lived their lives. It became more important

to examine the decisions that were taken in government and that affected individuals, and to consider how and why they were made.

The consequence of the two changes I have mentioned that was most obvious to lawyers was the growth of the statute book. Legislatures, both federal and State, passed more and more statutes. In 1901, in the first year of the new federal Parliament, it passed 17 Acts occupying 228 pages. In the same year, the Victorian Parliament passed 59 Acts occupying 546 pages. The comparable figures for 2000 were Federal Parliament: 174 Acts, 5382 pages; Victorian Parliament: 101 Acts, 3787 pages. There is no reason to think that this trend will abate. The legal system must recognise this fact and consider carefully what follows from it.

Plain English drafting is now the norm. For my own part, I applaud that fact but I regret that it has brought with it a seemingly irrepressible desire to define every word used in an Act.

Some, but by no means all, of the issues that are presented concern the way in which statutes are prepared. Criticism is often levelled at those who draft legislation. Usually, the critic complains that the drafting is obscure. Often, however, criticism of that kind may be unfair. In truth, the criticism should be directed at the instructions given to the person who drafted the particular legislation.

Plain English drafting is now the norm. For my own part, I applaud that fact but I regret that it has brought with it a seemingly irrepressible desire to define every word used in an Act. Wary of allowing the language to speak for itself, the drafter imposes on words meanings which are either blindingly obvious or are remarkably far removed from the ordinary meaning of the word being "defined". The inevitable consequence of succumbing to the desire to define is that the reader must hunt through the Act pursuing an apparently endless chain of definitions which one day will, no doubt, include a statement that "the indefinite article includes the definite article and (were it not an impermissible Latinism) vice versa". In the end, that is by the by.

The central problem that is presented by the statutory deluge is logically anterior to the problem of drafting. It is to identify what is to be the overall legislative scheme and where the particular legislation is to fit into the fabric of the law as a whole. Unless the drafter knows what is the intended shape of the whole scheme to which the legislation is to give effect, it is inevitable that there will be doubts and difficulties about how it all fits together. In turn, as the volume of legislation in force increases, those who direct and effect its preparation must know where in that general legislative scheme the particular proposals will fit and equally must know where it will fit in the entire legal system. If that is not done, there will inevitably be considerable difficulty in understanding what the legislation means and how it is to operate. The consequences of that are obvious — doubt, uncertainty, litigation, cost, time, trouble.

Those who work with legislation, however, cannot attribute responsibility for all difficulties to those who prepare or instruct the preparation of legislation. It should go without saying that careful attention must be directed first and last to what it is that the statute says. All too often, however, it is apparent that those who use legislation have not done so. It cannot be emphasised too strongly that it is a fundamental failure for a lawyer who is confronted with a problem to which a statute is relevant not to read the relevant Act and apply it. And necessarily that involves, these days, being certain that the form of the legislation that is being considered is the form relevant at the time which is in question. All too often, even in the High Court, it emerges that attention has not been given to identifying the relevant form of the Act and that insufficient time has been spent reading and understanding what is written in it.

To return more directly to my principal inquiry about what challenges for the future emerge from the lessons of the past, two other features emerge from consideration of the change in the way in which norms of behaviour are identified. The imperial march of negligence continues. Whether that is good or bad is not to the point that I now seek to make. It has meant that lawyers now tend to see all forms of damage as potentially compensable and compensable only through an action for negligence. This has led, in some jurisdictions, to the modification or abolition of common law rights to make certain kinds of claims or to make claims in certain circumstances. Such changes are often criticised but the criticisms made may not always reveal a sound basis for criticism. So mesmerised have we become with the action in negligence, and the right to bring such an action, that not only are actions which should properly be founded in some other tort wrongly forced into the negligence mould, insufficient attention is given to whether there are discernible foundations for the action of negligence that lie beneath Lord Atkin's biblical allusion. Lawyers must give attention to understanding and articulating the foundations of and underlying purposes of the cause of action which is propounded so often.

If the purpose which underpins the tort of negligence is to compensate the injured, why is the cause of action fault based? Why is it only the careless who must compensate? If the purpose is to deter careless behaviour, what role does a duty of care play? Why is the remedy not available in any and every case in which a person suffers damage as a result of another's failure to take reasonable care? If the purpose is to foster better loss distribution, why do we shut our eyes to whether parties are insured? I am not to be taken as saying that there are no answers to these questions. I think that there are, but much of the debate that has taken place in recent years would suggest that there may be no common agreement about what those answers are. If that is so, the debate should be brought to the surface and argued out. Only then can the law of negligence develop in a principled way.

Lawyers must give attention to understanding and articulating the foundations of and underlying purposes of the cause of action which is propounded so often.

Some of these issues are now matters of lively debate in the United States of America in connection with the preparation of the Restatement Third on Torts. An early draft of that revision of the Restatement discarded reference to duty of care in formulating the rules about negligence. The American Law Institute rejected the draft and returned it for revision. There is, therefore, a rich source of material directing attention to issues which all too often in this country appear

to have passed without explicit consideration in debates about the place that actions for negligence have in the legal system. It is time that they became matters for debate here.

The last feature of developments in connection with identification of norms of conduct to which I want to draw attention concerns the way in which norms of conduct now find expression. It is convenient to do that by reference to statute, but examples in judge-made law can readily be found. In pursuit of what Gleeson CJ some years ago referred to as the Holy Grail of "individualised justice"[3] we find increasing use in statutes of provisions which confer discretions upon decision-makers. There are many examples. Income taxation legislation contains many provisions in which the Commissioner is required to make discretionary judgments. The *Evidence Act 1995* (Cth) gives many discretions to trial judges about the admission or rejection of evidence. These examples could be multiplied. The problems presented by this form of legislative provision are not widely understood. So, it is said, all too often, that a judge asked to exercise a discretion under the Evidence Act must do so "judicially" as if that provided complete guidance to the judge and parties about how to go about the task. It does not. It tells the judge absolutely nothing about how to make the decision. If the inquiry stops at that point, it suggests only that the judge is to act like Plato's philosopher king and that the judge can safely be guided by his or her own intuitive sense of justice. That is not a sufficient criterion to ensure justice according to law. More definite criteria must be identified in and from the legislation, and, I hasten to add, they can be.

The example I give may, perhaps, appear to be trivial, but it is an example which I hope serves to illustrate the existence of a much deeper problem with which the law must grapple. Inevitably, there is tension between prescription of a single all-embracing rule and the achievement of what may be thought to be a "just result" in an individual case. Human behaviour, and human circumstances, are so infinitely various that the prescription of a single rule may not, in every case, produce what would generally be seen to be a just result. That problem is not solved by deferring it. Thus it is not solved by saying to a decision-maker, do whatever you think is just. In the field of negligence, it is not solved by saying that a duty of care is to be imposed whenever it is "just and reasonable" to do so.[4] That does no more than restate the problem in other words. It does not solve it. If a discretionary rule is adopted and no proper attention is paid to giving the decision-maker sufficient guidance about what is meant by "just" in the circumstances, all that has been done is to defer the problem. The inevitable consequence of deferring a decision in this way is to provoke litigation designed to articulate the principles that the decision-maker should bring to bear upon the problem. The inefficiency of that approach is self-evident.

The identification of the real point of difference between parties must take place out of court.

Nor is the problem solved by removing discretion from the process of judgment. It is not so long ago that there was little or no discretion to be exercised in fixing sentence for a criminal offence. The sentence was prescribed by law and sentencing was more a ritual than an exercise of judgment. Now, of course, sentencing legislation provides for the exercise of discretion by judges according to principles that are stated in the legislation[5] and are well developed in the case law. Those principles start from the premise that a sentence should be fixed by reference to more than a broad description of the offence (as "theft" or "assault") and whether the offender has committed other offences. The legislatively determined premise is that sentencing must take many more factors into account. The way in which that is to be done is far from easy, but there is a great deal of discussion and development of the relevant principles to be found in the decided cases. Now we see in the United States, and elsewhere, the emerging of a view that individual circumstances of the offender or the offending do not matter in fixing a sentence. All that needs to be taken into account can be identified in a two-dimensional graph or chart, one axis of which represents the nature of the offence and the other the criminal history of the offender. Whether that is a desirable path to pursue is a choice for legislators, not judges. It is important to recognise, however, that it is a choice which represents a fundamental departure in the field of criminal law from the general trend of the law towards the very particular and individualised treatment of cases.

LITIGATION

No review of the law in the past century is complete without reference to "access to justice" and "the cost of litigation". I have no doubt that it is well recognised, both in the legal community and in other circles, that these are two of the most pressing challenges for the legal system. I do not propose to enter upon the details of the debates that swirl around these subjects. Rather, I want to invite attention to what I think are a few of the more immediately pressing issues that are presented in this area.

Technology is seen as offering the means of solving at least some of the problems of cost of and access to justice that we now face. That may very well prove to be right but technology is no panacea. There is one fundamental danger to which far too little attention is being given. Developments in technology enable the assembly and ordering of large amounts of information. An unsophisticated user of the equipment can readily gain rapid access to individual pieces of the information that is stored and, with a little more skill, can assemble sets and subsets of the data according to chosen organising principles. What technology will not do, or at least will not do yet, is order information according to its forensic significance. Technology may tell you every document that contains a reference to a particular subject matter but it will not rank those documents according to their legal or forensic significance. The consequence is that lawyers, all too readily, agree to the creation of a massive database concerning a particular issue but fail to apply any discrimination to its creation or use until long after it has been assembled. For the barrister, this process first began with ready access to photocopying equipment. Soon, solicitors were sending all the available documents to counsel for their consideration rather than, as had previously been the case, reading the documents for themselves and identifying those few which were central to the dispute between the parties. Now, instead of photocopied documents, we have entered the era of the CD Rom with images of every document. But still no discrimination occurs until far too late in the piece. Often enough, it occurs at the point of final address and then only at the insistence of the judge.

Litigation is expensive and time-consuming. It is expensive because lawyers are skilled professionals. The amount of time consumed should, however, reflect the amount of thought that goes into decid-

ing the real point of contention between the parties, not the amount of time that is consumed by identifying what that point is, or considering peripheral points.

The identification of the real point of difference between parties must take place out of court. All too often it now occurs in court. Whether it is to be done orally or in writing, it is plain that the statement of issues between parties in a civil matter will have to be reduced to writing. If pleadings are thought not to achieve that result then let us do so in some other way, but it simply must be done and done out of court. Although the oral tradition of the common law court is one which I consider to be of inestimable benefit, and therefore to be preserved, more and more litigation will depend upon written work for the use of the parties out of court and written work for use by the judge in or out of court. No doubt, the skills of Australian lawyers in this area must be improved. Whether, as one author suggests,[6] the issue in a case can always be captured in 75 words or less, it is an aim to which all should aspire. The writing of all lawyers at all levels of the system must be examined. Does it do the job it must? Does it communicate the point quickly and accurately? If it does not, what are we to do about that?

Hitherto, I have said virtually nothing about the criminal law. In that area there are some deep-seated issues of principle which I would suggest the experience of the last 100 years does not call into question. An accusatorial system leading, in the more serious crimes, to trial by jury, is not without its difficulties, but for my own part I see no reason yet to challenge those premises of the criminal law system. Rather, the pressing challenge for lawyers and judges is to make the accusatorial system of trial by jury work better than it does now. Trials have become too complex. Directions to the jury have become too complex. Too often, driven by the fear of the exceptional case, directions to juries are made longer and more complex than once was the case. It was, after all, Sir Leo Cussen to whom reference was made in the joint judgment of the High Court in *Alford* v *Magee*[7] when it was said that the function of the trial judge is to instruct the jury on so much of the law as they need to know to guide them to a decision on the real issue or issues in the case. Juries do not require a general disquisition on the criminal law. Yet often enough that is what is given to them.

More specific to the legal profession are the challenges that have come from a change in the balance between pursuit of the law as a profession and the conducting of a business. Both elements have always been present in the practice of the law.

THE PROFESSION

The way in which the legal profession has gone about its work has changed markedly since I was admitted to practise. In 1969, when I was admitted, the practising profession was very largely male but, even then, was no longer of uniform ethnic origin. The Bar that I joined in 1971 was, still, almost entirely male and of Anglo-Celtic background. Its civil work was based in motor vehicle accident work in the same way as, some years earlier, it had been largely based in landlord and tenant work. Taking silk was a very perilous step for it brought with it an obligation not to appear without a junior who would receive a fee fixed at two-thirds of the silk's fee. Self-promotion of any kind, either at the Bar or among solicitors, was not only frowned upon, it was regarded as a serious ethical offence. Solicitors' firms had, at their head, senior partners in their very late 50s or 60s. All practices at the Bar and on the solicitors' side were almost always based entirely within the State. Interstate admission was very rare and then was usually a relic of some long past move by the practitioner concerned.

Much has changed over the last 30 or so years. Of those changes I single out only some. I choose those I do because they may serve to identify some challenges not all of which may be as well recognised as they should be. The most obvious is that the face of the profession has changed and it is continuing to change. No longer are graduates from the law schools predominantly male and of Anglo-Celtic origin. How we deal with that fact not only will reveal much about the profession, it will shape the way in which the profession is organised and does its work. Are we doing enough to recognise these changes and deal with them appropriately? The challenge is one that confronts society as a whole, but what are lawyers doing about it in the law?

More specific to the legal profession are the challenges that have come from a change in the balance between pursuit of the law as a profession and the conducting of a business. Both elements have always been present in the practice of the law — the self-abnegating pursuit of some higher ideal and the pursuit of commercial success. We cannot for a moment delude ourselves into thinking that the commercial element of practising law has emerged only recently. It has always been there. But the balance appears to have changed. Glossy promotional brochures, time costing, the apparently ruthless disposal of partners above about age 55, the panel system and competitive tendering for work from clients, the pyramidal work structure of one partner plus two associates plus four solicitors plus twelve articled clerks and paralegals are all signs or symptoms of what has changed. What we need to do, however, is not simply to observe the changes or even, if this is thought appropriate, complain about them. What we must do is understand whether these changes present difficulties or opportunities, changes or advantages and we must deal at once with the difficulties and dangers. Of those, there are, I think, two that require consideration.

The graduates emerging from our law schools are the best and brightest we have seen. Or at least the difficulties of obtaining law school admission suggest that they should be. Yet all too often we find that many of this generation are turning away from the law in the years immediately after admission to practice. Why? Is this telling us anything about the way in which the law is being practised today? Do we have a proper balance between the professional ideal and the commercial desire or, as some would have it, commercial imperative? Are our young graduates being used in the practice of the law or are they being used as highly paid clerks? Are principals and associates (to whom the young graduate looks as role model or awful example of what lies ahead) practising law or are they administering large commercial enterprises in which legal decision-making is relegated to others to generate the draft which they will sign? Sir James Gobbo considered these issues in last year's Leo Cussen Lecture and I need do little more than refer to what is said there about the topic.

The second of the difficulties and dangers is closely related. No client likes being told "no". No client likes being told "you will lose". Very often, however, lawyers should give the client such bleak but steely-eyed advice. Are we seeing the

commercial urge to placate the client, lest the client go elsewhere, dull that resolve? Does the client shop around until congenial advice is given, presumably in the hope, Micawber-like, that something will turn up? If that is happening, why is it happening? Is the law just another commodity to be bought by the metre or the tonne, or do its practitioners owe obligations beyond themselves and their clients?

I would hope that you would find, on careful analysis, that the difficulties and dangers I mention do not exist. But I fear we all must ask the questions. If we do not, we risk serious damage.

THE LAW AS PANACEA

The variety of issues that come before the courts is now greater than ever before. There are many reasons why that is so but in many cases it will be found that the rights that are claimed are said to be based either in particular statutory provisions or in some over-arching statement of individual rights. I am not concerned to say whether the making of such claims is good or bad any more than I am concerned to say whether the time of the courts is well spent dealing with such claims. Those are matters for others to consider. What I do want to draw to attention, however, is a pressing need for us all to consider whether the law can or should be regarded as a universal solution for an individual citizen's hurts or all of society's problems.

The legal system is a human system administered by fallible individuals. While it is to be hoped that those who participate in its activities will act justly and wisely, wisdom, fairness and experience are not the exclusive province of the legal system. Not every social problem, not every hurt suffered by an individual, requires or even admits of a legal solution and it would be quite wrong to think that they did.

Sometimes, however, it seems that a contrary view may inform what is suggested that the law can do. Because some legal principles can be stated at a high level of abstraction and some statements of individual rights are phrased in aspirational rather than normative terms, it is suggested that judges have an ability to decide some cases according to no principle other than an intuitive and individual sense of what is fair, just or reasonable. Furthermore, for like reasons it is suggested that judges may, in the name of "policy" decide cases in a way that will further some end seen by the speaker as socially desirable. Thus resort to law is seen as a panacea. "Sue, that will provide a solution."

Fairness, justice and reason should all be terms that can be applied to particular legal principles. In the High Court there will often be cases in which difficult choices must be made and those choices must be informed by considerations subsumed in the rubric "policy". But judges are not free to roam as they please in search of what seems to the individual to be a good or desirable outcome. Judges are bound to do justice according to law, not as if each were a philosopher king in whom all knowledge and wisdom resides. That is why the law cannot be seen as a panacea. Society must deal with its various difficulties in various ways. The law cannot solve them all and no one, least of all those who are in the legal system, should think it can.

CHANGE

Finally, there is the phenomenon of change itself. It is rightly said that the law is a conservative force in society. Litigation almost always concerns events that are past, to which, with very few exceptions, the law that is applied is the law that was in force at the time of the events. Courts and litigation lawyers are, therefore, generally looking backwards. Even those who prepare agreements designed to govern the future relations of parties or give advice about how future conduct should be ordered, do so with their eyes in the rear view mirror of what has been found in the past to be the applicable law.

The rate of change in society now appears greater than once it was. Whether history will identify the changes of the late 20th and early 21st century as being as dramatic as, for example, the changes brought about by the industrial revolution, may not matter. What does matter is that business, community and social relations are changing. The legal system must be able to consider whether those changes require it to change. And it must undertake that task much more often than once was thought necessary.

In order to do that, it is essential to identify the elements of the system that are properly regarded as fundamental. It is, therefore, necessary to have a clearly developed understanding of what is meant by the rule of law, of what is meant by judicial independence, of why judicial independence is important. Especially is that so when debate on even the most complex issues is all too often conducted through the medium of seven-second sound bites. If the principles I have mentioned are important, and I think they are fundamental to the way in which our society is organised, all participants in the legal system must understand what they mean and why they are important. Only then can the debate be conducted on a sound basis.

Just as it is important to identify and understand fundamental principles, it is equally important to understand what is not important and what is not fundamental. No doubt that is why what used to be a sharp distinction between civil law inquisitorial systems and common law adversarial systems of litigation can be seen to be becoming blurred. The civil law systems are increasingly taking on aspects of the common law adversarial system. Common law adversarial systems are learning from the civilian traditions.

Unless we know not only what we do but why we do it, we will learn nothing from what has passed.

If we are right to think that the pace of change in society will continue unabated, or even increase, the legal system must be prepared to deal with change. It is not enough to say that what has been done in the past is best unless we know why that is so and can articulate those reasons. That, we can do, only if we have examined the fundamental underpinnings of our legal system.

Of all the lessons that we may learn from looking in the rear view mirror, it is that which stands out. Unless we know not only what we do but why we do it, we will learn nothing from what has passed. And I need hardly remind you that unless we learn from it, we will be condemned to repeat it.

NOTES

1. (1992) 175 CLR 1.
2. *Masciantonio* v *The Queen* (1995) 183 CLR 58 at 67.
3. Gleeson CJ, "Individualised Justice — The Holy Grail", (1995) 69 *Australian Law Journal* 421.
4. *Caparo Industries Plc* v *Dickman* [1990] 2 AC 605 at 618 per Lord Bridge of Harwich. See now *Sullivan* v *Moody*; *Thompson* v *Connon* [2001] HCA 59.
5. See, for example, *Sentencing Act 1991* (Vict), s. 5.
6. Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 2nd ed. (1995), "Issue-Framing".
7. (1952) 85 CLR 437 at 466.

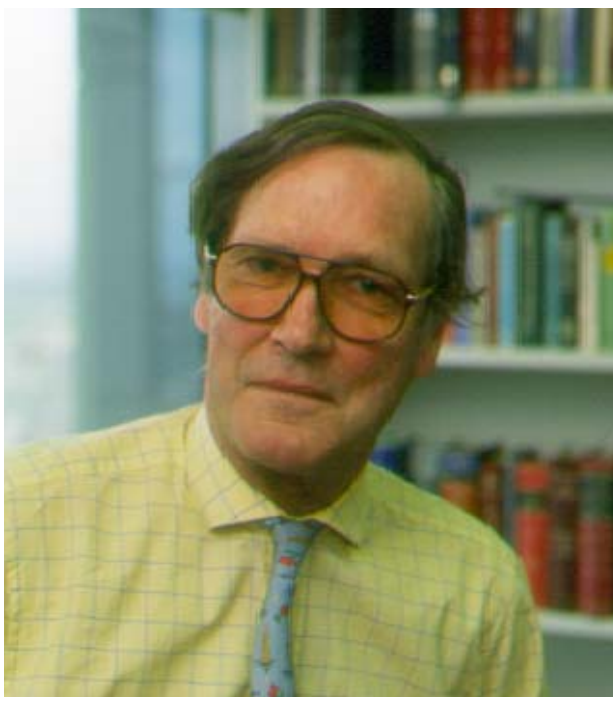
Judicial Overservicing: Bringing Home the Bacon

By Geoffrey Gibson, Partner, Blake Dawson Waldron

Thou hast most traitorously corrupted the youth of the realm in erecting a grammar school; and, whereas before, our forefathers had no other books but the score and the tally, thou has caused printing to be used, and contrary to the King, his crown and dignity, thou hast built a paper mill. Part of the indictment of Lord Saye by Jack Cade in *2 Henry VI*, 4.7.30 to 35.

Il dover mio farò. Ma voi? (I shall do my duty. But you?) The question of the King to the Grand Inquisitor in *Don Carlos*, Act V.

ONE of the worst charges laid against lawyers is that they overservice. They do more work than they need to so that they can charge more. Overservice therefore equals overcharge. Nearly all commercial lawyers — both solicitors and barristers — now charge by the hour. The more time they clock up, the more they charge. Lawyers therefore have a vested interest in doing more work. They certainly get no incentive to be short. Stockbrokers charge commission on transactions and when they increase their turnover just to increase their commission, they are guilty of "churning". The word has entered their ethical lexicon. Deliberate overservicing is a serious ethical offence. Even if there is no offence, the tendency to do more work than might reasonably be required can give rise to huge bills, and huge profits.



Geoffrey Gibson

Are the judges now complicit in overservicing by continuing to increase the demands they are making on litigants and their lawyers? Is the judiciary part of the problem by supplying the platform that gives rise to so much more work for which the lawyers can send bigger bills? The trend is toward Court managed lists everywhere. The Australian Law Reform Commission endorsed the docket system of the Federal Court, and the recent overhaul of the English rules was based on the express premise "that there should be a fundamental transfer in the responsibility for management of civil litigation from litigants and their legal advisers to Courts" (*ALRC* 89 Managing Justice par. 6.16).

The result is an increase in the management of the process and an increase in the work to be done in the process; this leads to the parties and their lawyers being required to put in more hours; the ineluctable result is higher bills; is this process playing into the hand of the lawyers? Is it warranted — is it warranted in the sense of being worth it? Or to use the revolting phrase of the managers, are the litigants getting value for the management provided by the judges?

You see many cases where the parties have to keep going back to court for directions for one reason or another. Some judges do not appear to understand that this exercise can be very expensive — each time you have to go back, it costs more money, and each time there is an order made, there is more money to be spent in complying with it. The size of the problem became apparent to me on seeing thirty or so lawyers turn up about once a month in a class action (the *Longford* case) where orders were made that started to resemble a chapter of the Australian Constitution. You can talk about case management being supervisory, collaborative, or a team effort, but the parties are there to win, and you do not usually have to go far before you find at least one party who is prepared to put a spanner in the works no matter what the cost — the kind of litigant that takes John McEnroe as its model.

Then I heard of a commercial matter that could have settled apart from the issue of costs. It was in a court-managed list of a superior court elsewhere. The plaintiff was asked how much had been spent to get to mediation. The answer was north, as they say, of $150,000 — about

twice what I paid for my first house north. This is an unbelievable amount of money for a party in what was a simple enough case to spend before the trial starts — before the trial preparation starts, before a real punch is thrown — before in fact the clock really starts ticking over. Well, perhaps we can no longer think that way; perhaps we now have to see the clock as ticking over in a big way from the day the writ issues. That is when the whole "team" cranks into action. This litigant had expended more to get to mediation than a judge of that court would have made in one year after tax. It was something of the order of the cost of the average first home for Australian homebuyers. It was more than four years of full-time adult ordinary time earnings for an Australian male. Do we really think the system is healthy, much less efficient, if it can tolerate this kind of aberration?

Some judges seem to delight in flexing their muscles to test the output of modern law firms, organisations the workings of which are almost entirely foreign to most of the judges. Some judges are keen to say that a national firm, or an international firm, should be able to turn documents over faster than was previously thought possible. They should be assured that it is not the proprietors of the firms that get tested or worried by these exercises — they just count the profits, large profits, while young lawyers wonder why they went to university for five years to study law, and their clients mutter the same complaints against the lawyers that have been uttered for centuries.

This time, though, the lawyers have got the judges behind them. Sometimes lawyers can be called back for ten or even twenty hearings for directions. As a result, cases which you could have got to trial for $10,000 can now cost a lot more than $50,000, sometimes more than $100,000, before the trial itself commences. Cases used to be fought by individuals; now litigation is conducted by "teams". Call it grist for the mill, call it blood to a tiger, but this prolongation of the agony is right up the alley of the big firms and the Bar. These sagas remind you of those long running television series, like "Bonanza".

At least the Supreme Court of Victoria was candid in describing the Rolls Royce nature of its Commercial List as a facility not created for the needy, but for those with resources:

> . . . it should be remembered that the List is primarily intended for the resolution of real disputes between parties engaged in trade or commerce, who have the resources to incur the additional expenses caused by the procedures necessarily devised for a judge-controlled list intended to provide relatively speedy trials.
>
> The Commercial List has not been devised for government or charitable bodies or for individuals not engaged in business, but if parties of that kind have genuine commercial disputes suitable for resolution in the List they can issue proceedings in the List so long as they are willing to carry out the comparatively rigorous directions customarily given. (*Guide to Commercial List Civil Practice*, Supreme Court of Victoria, 1992, revised 1996.)

Some day someone of a different ideological caste may wonder whether these are the right cosmetics for the face of justice in Australia in the year 2001. It certainly does not have the egalitarian air that the Office of Chancery professed more than a century before the white man arrived here:

> It is the refuge of the poor and afflicted; it is the altar and sanctuary for such as against the might of rich men, and the countenance of great men, cannot maintain the goodness of their cause. (Holdsworth, *History of the Laws of England*, Volume 5, 286, describing Chancery in 1651. This, says Holdsworth, was "the traditional view". The functions of the Old Bailey in London are still said on its face to be "to punish the wrongdoer and protect the children of the poor".)

The purpose of this note is to look at some of the problems with Court managed cases and some possible solutions. The *ALRC* (above par. 6.31) said the jury was still out on the impact of case management on legal costs. These observations may be anecdotal but they come sorely felt.

PROBLEMS

The traditional problems with our civil procedure can develop new magnitude in court-managed cases.

Pleadings

A significant part of Court management of a case is taken up with directions about pleadings and particulars. Pleadings were devised in the early middle ages when trials were by ordeal or battle. Pleadings were designed to crystallise issues of fact for the jury. They turned into cruel exercises of gamesmanship. The relevant rules were reformed in Victorian England. Together with the monarchy we have retained that basic model in Australia. Our present combination of the ancient and not so ancient recalls the remark made about Merovingian society as being an "alliance of decrepitude and barbarism" (Ferdinand Lot, *La fin du monde antique et le début du moyen âge* (Paris, 1927) 496).

The system has two fatal flaws. Appropriately for a venerable English institution, it is a product of the class system. It contemplates two classes of allegation, pleadings and particulars, like First Class railway compartments and Second Class railway compartments, or Gentlemen and Players. Commonly the real case only appears in particulars. But the judges ruled that you do not plead to particulars (*Pinson* v. *Lloyds and National Provincial Foreign Bank Ltd* [1941] 2 KB 72). The result is that you do not get a joinder of issue on the real case. It simply floats around in the documents and is left to be uncovered during the trial.

You know you have a problem when you read in the Rules (such as the Victorian RSC Rule 13.10(2)) "that particulars shall be given if they are necessary to enable the opposite party to plead or to define the questions for trial" even though it is still the rule that you do not plead to particulars. [O12 R5(1)(b) of the Federal Court Rules allows the Court to make an order for particulars of a statement of the nature of the case on which he (the party) relies.] Day in, day out, courts continue to allow particulars to be given in an attempt to make clear what is unclear — whether the pleading discloses a cause of action or defence, or whether it might be characterised as embarrassing. If it is not good as a matter of law, the particulars cannot save it. If it is not good as a matter of pleading, the particulars will not improve it.

Why, an observer may ask, do we bother going through the ritual in the first place? Why bother with a mating dance if the parties rarely achieve satisfaction? Why not have a rule that says each party must set out each proposition of fact and law that that party will put and let nature take its course as it does now?

A major premise of court management — sometimes articulated, sometimes not — is that the court knows better how the parties should present their case than do the parties and their lawyers. That is an absolute contradiction of the basic premise of our adversarial procedure as it developed over a millennium. But the dispute is, as they say in ADR circles, the dispute of the parties, and you would think that sensible lawyers would realise the

value in presenting that case to the best advantage, rather than indulging in games about how far the skirts can be lifted up as the case drags on. Experience of forensic contests does suggest that the real issue only emerges well into the trial and the process is not then assisted by pleadings. On the other hand experience equally suggests that most cases eventually come down to something like "he hit me on the nose; no I did not; or, he welched on the deal; no the deal was never made in the first place". Pleadings, in the formal sense, can assist to sterilise allegations of criminality or dishonesty, and they may be required to ensure jurisdictional compliance in representative proceedings, but even in these cases the question is whether the benefit warrants the cost.

Discovery

Until recent times — at least until recent times in legal terms — discovery was alien to the common law. It only came into the common law in any substantive way when the practice of equity and common law was merged in England. The leading textbook published shortly after that (Bray, *The Principles and Practice of Discovery*, London, 1885, page 1) characterised discovery as an exercise in extortion. The right was described as a right of a party to proceedings, before the determination of any matter in question:

> to extort on oath from another party to those proceedings — (1) all his knowledge, remembrance, information and belief . . .; (2) the production of all documents in his possession or power relating to such matter.

Three years before that definition was given, the process had already gone off the rails when two English judges said people were entitled to go after not just those documents that related to matters in issue, but those that might lead fairly to a train of inquiry (*Compagnie Financiere et Commerciale du Pacifique* v *The Peruvian Guano Co.* (1882) 11 QBD 55, 63). Train of inquiry is a polite term for paper chase which is a polite term for witch-hunt.

The problems with the resulting witch-hunts are well known. These are some of the worst paper mills in litigation. The two activities most dreaded by young lawyers — due process and discovery — are regrettably as profitable for the partners as they are banal for the staff solicitors. At first blush, the *Longford* fire class action might seem to be complex litigation *par excellence*. On the other hand, the causes of the fire had been examined, at a cost of millions of dollars of public money, by a Royal Commission, and the legal issue of the right of consumers to recover for economic loss on the failure of an essential service might be difficult, and perhaps ripe for appellate review, but it does not take long to state. Nevertheless, the main protagonists and, apparently, even some of the lesser third parties, have managed to spend millions of dollars each on complying with directions about discovery, and in attending numerous directions hearings, both by the court and the registrar, on how the process should be effected. A major firm had to be spoken to firmly by its professional body because too many of its articled clerks were having their articles prostituted doing discovery.

No one has ever devised a test to measure the value that parties get from discovery, but it is very easy to measure the cost. It is relatively precise and certainly prodigious.

Discovery has always been an invasive procedure, and one that puts many business people off going to law on that count alone, just as the risks of invasive procedures put people off surgery (and the judges are very emphatic in ruling that people must be expressly warned of those risks). But the reach of discovery is now destructive. While millions of dollars of shareholders' funds can be drained in complying with orders on discovery, in a court which says it has abolished general discovery, the clear inference is that the people of lesser means, those for example who could not afford the rigours of a Commercial List action, can simply go under when exposed to the demands of contemporary discovery.

The main difference between getting discovery over a period of time in response to an accumulation of orders, and in the expedited fashion in operation in a Commercial List, is that in the former case, to use the language of a former Australian Prime Minister, they just do you slowly. Where the directions are spread out over a period of time, the tendency to diversify the reach of discovery, and increase its extent, becomes harder to resist, and the corresponding burden on the litigant harder to bear. No one has ever devised a test to measure the value that parties get from discovery, but it is very easy to measure the cost. It is relatively precise and certainly prodigious.

Witness Statements

The evidence of a witness will fall into one of two categories: statements that are contentious, and statements that are non-contentious. A witness statement is not good for the first; it is not needed for the second. Those courts that run on witness statements traditionally allow that where issues of credit will be paramount, the witness statement should be silent and the witness should give the evidence in the witness box. But if witness statements are at best unnecessary and at worst undesirable, why do we retain them?

Witness statements do in truth give the system a bad name. The ordinary litigant has a bit of trouble in understanding the distinction between a pleading, a proof of evidence, a witness statement, an affidavit, and evidence in the witness box. A lot of litigants think that just as it is in order for them to take a tactical position in a pleading, so it is in order to take a tactical position in their evidence, on their oath. A Florentine notary made some droll remarks on the role of the advocate in the thirteenth century:

> . . . an advocate's function is to . . . palliate lies, veil falsity under the image of truth, instruct his party in his positions and answers, and induce witnesses to corroborate whatever he wants proved or confuted. (Boncompagno of Signa, *Rhetorica Novissima*, 3, 2 in *Bibliotheca iuridica medii aevi*, ed. Augusto Gaudenzi et al (Bologna 1888–1901) 11, 259.)

An Australian lawyer assembling witness statements in 2001 can come uncomfortably close to this model.

When lawyers are involved in compiling witness statements, they are seen by some to be fulfilling the role of a script-writer. It is notorious that a huge amount of work of what might otherwise be called high intellectual calibre goes into distorting instructions from witnesses so as to present the best veneer on what might be called the case (as opposed, perhaps, to the truth). The courts apparently expect the exercise to be one of gamesmanship. The Victorian Commercial List direction, above, says (par. E.2.04.3):

> The same date is fixed for the provision, by exchange of each party's statements to

the other. The object is to avoid revision and editing of statements to answer the evidence of the opposing party.

Any court procedure which is expressly predicated on the possibility of the doctoring of the records of evidence that it creates is bad and should be scrapped on that count alone. It is the kind of problem, including the perceived complicity of the lawyers, that led to the demise of unsworn statements in the criminal jurisdiction. At least in that jurisdiction there was a juristic reason why litigants should have been able to make a statement assisted by their lawyer and not on oath. This has never been the case in the civil jurisdiction.

Court Books

If you speak to young lawyers who have left the litigation department of a big firm, if you speak to them say in an exit interview, and ask them why they have left, the answer will very frequently refer to Court Books. They are seen as an exercise in inanity that served no useful purpose but which consumed hours of work, frequently through the night or over weekends, to the grateful pleasure of their employers. Just how many pages of these massive books of documents are ever necessary? Assuming that these great collocations can be of some assistance to the court, does that assistance in any way warrant the enormous expense and drudgery involved in producing it? Judges who feel the need for the comfort of a Court Book should be invited to visit the war-room of one of the big firms when one of these production lines is in process and consider the wall-eyed desolation of the young lawyers engaged. The solicitors' side of the profession is losing a lot of bright young lawyers to the Bar, or merchant banks, because of institutions like Court Books, and increasingly, it must be said, barristers are being recruited back into the discovery process to make up for a shortage of manpower back at base.

Directions Hearings

The problems with the procedures of court-controlled lists do not seem to get less the more often they are considered by the judge in charge of a case. Each time an order is made, someone has to do something to comply with it. This increases the costs of getting ready for trial, and the delay of getting to trial. It is all done on the footing that all of these steps will increase the prospect of a fair and orderly trial. Assuming pleadings and discovery and witness statements and Court Books do have this effect — an assumption that may remain forever unverified by measured empirical observation — are they worth the effort?

You could divide the attitude of judges in giving directions in these lists into three categories (or a combination of those categories): the democratic; the didactic; and the dictatorial. If dictatorial is just a pejorative epithet for decisive, and the judge knows what he or she is doing, then plainly the last is the preferable model. Combinations of the didactic and democratic are likely to lead to a spread of directions less defined but probably more pervasive and suppositious, and taking longer to fulfil, than others. On the other hand, the radically decisive judge — the imperative judge that the Americans refer to as Rambo style — frequently leads to problems at the other end by directing that too much be done by too many too soon.

But when did we acquire the need to have the judges direct the lawyers on how they should present their case? Our system of trial grew up with the judge just sitting there watching counsel for each side present their case to the best of their ability and the judge then deciding which was the better case. It was based on the survival of the fittest at the independent Bar; the quintessential example, if you like, of capitalism in action. When did we feel the need to map out all this framework with a view to eliminating as far as possible any element of surprise or even drama in a trial? Why should we not proceed on the footing that trials are conducted by members of a learned profession, who are trained for that purpose, who know how to run a trial, and who should be left to run it as best they can in the interests of their client? If the new dispensation is proceeding on the footing that it is there to protect the weak against the strong — if you like, to maintain a level playing field — then it is obviously open to the most serious question.

Bench and Bar have proceeded on the footing that the judges should not be seen to be running the show like the headmaster of some grammar-school, but should preside over the contest like an independent umpire, certainly not someone who gets involved in the contest itself. One of the difficulties with these long progressions of directions hearings, and the increasing familiarity of a judge with a case, is that they do lead to a different relationship between the judge and the parties and their lawyers at the start of a trial than before. Whichever way you look at it, the position of a dispassionate judge who only intervenes when necessary has gone well and truly west. The era of the inquisitor has arrived.

There is a further problem. Judges tend to allow themselves to be more idiosyncratic and proprietorial during management sessions (directions hearings) than at trial. This attitude can then spill over into the trial, where the audience does not consist mainly of lawyers, and where the consequences are more final. When the judge starts to behave like an inquisitor for the trial, both litigants and lawyers get worried. There are very good policy reasons why sensible superior courts forbid their judges to act as Royal Commissioners, and when judges start to act that way they are behaving more like members of the executive branch than the judicial branch of government. If you like your metaphors mixed, it is hard to stay above the dust of the arena if you come in as part of the assembly line.

One of the reasons why costs are blowing out is the unnecessary use of counsel for directions hearings. Occasionally it will be more economical to have junior counsel attend, possibly all day, for one short matter rather than have a partner stand around for the same period. But increasingly there is a tendency to retain counsel to appear at a directions hearing when there is no call for counsel. There is even a worrying tendency in some lists for senior counsel to appear, sometimes apparently out of habit rather than anything else. When we are talking about management of cases, we are *ex hypothesi* talking about management. We are not normally talking about penetrating the highest altitudes of juristic science, or what Sir Owen Dixon, who probably never attended a directions hearing in his life, would have called the basal concepts of our jurisprudence. If there has to be a serious pleading point argued, it may be a matter appropriate for counsel. On the rarest of occasions, it might be appropriate even for two counsel. But this will be very very rare, and certainly much more rare than appears to be the case at the moment.

It is not unknown for Senior Counsel to attend at directions hearings, sometimes for a number of matters, charge $5000 for saying nothing or next to nothing — and certainly nothing that could not have been said just as well by junior counsel, or even on a good day by the solicitor — and then wander off for a spot of lunch at the club. It is therefore convenient that these sessions generally take place on Fridays — in the morning. This kind of abuse is

demeaning for the institution of Senior Counsel; it is demeaning for the Bar as a whole. It is not what the institution of silk was created for. The cult of modern management does not require that its acolytes parade in court in silk gowns (much less with horse-hair perukes). There was one memorable day when three of Her Majesty's counsel turned up at a morning directions hearing for one corporation (which was not directly in the line of fire) where it was inevitable that none of them would be called on to say anything; $15,000, or so, worth of silence worthy of Carmelite nuns.

For the most part directions hearings involve essentially ministerial matters. Judges are of course entitled to have proper assistance in running the court, but one would hope that in most cases solicitors practising in the relevant areas would be able to provide the requisite level of managerial know-how. It may be said again that the Crown did not create counsel in its own image to participate in management exercises. (Well, perhaps, the Crown did in Tudor and Stuart times, but the relevant ministerial exercises were then a little more consequential, not to say terminal.) For that matter, there can be few cases nowadays that require two counsel to settle, if that is the word, the pleadings. If you strip away the mystique, pleadings are forms. If litigation lawyers cannot fill those in properly, what else can they do? Sure, there is some skill in pleading — some have it and a lot do not — but it takes two or three hours to learn the rules and a year or two to understand them. They seem to some significantly less complicated than Form II Algebra and people do not compile large fortunes doing those kinds of sums.

There is another consequence of spending as much, if not more, time and money in preparing a case than in fighting it. We are developing a class of counsel who in truth practise like solicitors doing paperwork almost exclusively, with the occasional hardly threatening outing for directions. There are many barristers who have nearly forgotten how to fight a case, or who at least show a marked disinclination to do so when invited. In the US apparently, the class actions have got so unwieldy that very few ever get to trial with the result that almost none at the class action Bar knows how to run a trial. We are facing the same problem in Australia across the board of commercial litigation. In time, this may affect the quality of the field from which the judiciary is drawn. As it is some governments apparently have some difficulty in understanding the concept that trial lawyers make the best trial judges.

The Requirements of the Court

Just who does benefit from the massive build up that we now require of parties — pleadings, discovery, witness statements, Court Books, position statements, lists of contentions, draft submissions, and so on? Do judges need all this preparation? Has the judiciary become a pampered if not protected species?

Is it a good idea for judges to read so much before the start a trial? If they do, they are likely to start to form ideas, and then they are on the verge of pre-judgment (in other words, prejudice) before hearing a word from either party. One of the most able and fair judges we have known thought the judge should not read too much. Lord Denning said that he did not believe in the United States system of written briefs. He thought the Socratic method was to be preferred.

> But in the Court of Appeal a judge should not ask questions too soon: nor too many. He should let the advocate open the case in his own way. Not interrupting him until a convenient moment arrives. For myself I do not read the papers beforehand. Only a glance at them to see what the case is about. Lord Atkin used to read them in detail. With the result that he made up his mind before counsel had opened his mouth, and asked devastating questions from the outset. The litigants thought that the case was prejudged before their counsel was heard. (*The Family Story*, 1981, 205.)

It is important to understand that one of the most admired English judges of the last century is here accusing another of the most admired English judges of the last century of the worst sin a judge can commit — prejudice — and the accusation is that the judge knew too much before entering the court. Of course, these things were said and done in another hemisphere and in another century when life was very different, but if those distinctions are determinative, I should not have to worry further about pleadings or discovery.

The trouble with going deeply into the material beforehand is that you do form impressions. In the way of things, those impressions may be as unfounded as they are difficult to shift later on; half way through the submissions of the respondent, you understand what the case is about — or at least you think you do, because you are now worried about whether you followed the case of the applicant. It does indeed bespeak an unfortunate breakdown between the Bench and the Bar if judges think they are better placed to get on top of a case by going at it alone rather than having it explained to them by counsel whose job it is to present the case.

Indeed, does the judge under our laws of procedure have to get on top of the case before it starts? Or is the judge just there to decide which party has presented the better case? The question shows how silly it may be now to be invoking the old dichotomy between the adversarial and inquisitorial modus of trial. But the discussion does show the risk of the appearance of prejudice. And as Lord Denning observed, this can lead to the ultimate disaster for the administration of justice — the litigants can see it, and think that their case has been prejudiced.

Is it a good idea for judges to read so much before they start a trial? If they do, they are likely to start to form ideas, and then they are on the verge of pre-judgment (in other words, prejudice) before hearing a word from either party.

So, one of the consequences of our over-preparation for trials is that the judge may be too personally involved in its conduct, and the image of an impartial observer of a contest has been replaced by that of a determined participant in the process, and a central part of our notion of due process in a civil trial, at least as we understood it until a generation ago, is being eroded.

SOLUTIONS?

On the grounds that I have assigned, I would abolish, at least for most cases, pleadings, discovery, witness statements and Court Books. The parties would get a trial date when the proceedings commence, and in the interim each side would be required to state its case and both would be required to submit the dispute to mediation. There may be some loss of preparedness for trial, but just think of the savings. For $150,000 you could, with two counsel, spend fifteen days at trial, and you can get to learn quite a lot about a

case during fifteen days of trial. Assuming that such a total abolition program does not presently have the numbers, I will consider some alternatives.

In my view, and again at least for most cases, witness statements and Court Books should at least be scrapped, the first on the grounds of moral and intellectual honesty, the second on the grounds of economic rationalism. At the very least the time has arrived when the evidentiary onus has passed to those who would seek to retain these procedures to justify them.

The choice for pleadings is either to scrap them or to revise them by abolishing the distinction between pleadings and particulars, requiring all allegations of fact to be pleaded, and trying to enforce rules against evasive responses (*ALRC Report*, above, *Recommendation 87*). Notwithstanding a statutory endeavour I will come to, there is something odd about enforcing frankness, and it is difficult to break the habits of a lifetime. I myself, and again at least for most of the cases, would prefer to see pleadings scrapped. Instead, there would be a standing direction or rule that each party is to set out the contentions of fact and law on which it relies in a summary way. You could then if you wanted to require the parties to crystallise the issues between them after the mediation and before the trial. In terms of the parties' knowing where they stand when the trial starts, it is important to understand that in most cases they will have fully explored the extent of their dispute and tried to resolve it in the course of a mediation where, experience suggests, you frequently learn much more about what is exercising the other side than you ever do from their pleadings. Lawyers who go into a mediation and behave as if they are conducting some sort of trial by ambush are not doing their job.

The choice for pleadings is either to scrap them or to revise them by abolishing the distinction between pleadings and particulars.

Triers of fact are used to waiting for hours, days, or weeks for the real issue that they have to try to emerge from the foliage of pleadings and particulars. Why not let the first laws of advocacy operate on the presentation of a case from its inception? If you have a good point, make it clearly and do not degrade it or hide it; if, in response, you want to play cat and mouse with the Court, you may have to pay the price. As Sir Owen Dixon remarked on the obligations of counsel:

> He must also keep steadily before him the necessity of justly gaining and retaining the confidence of the Court. That means that he should feel that the Court knows that it can rely upon him without misgiving as one who will competently ascertain and present for judicial examination his client's real or strongest case and will do so intelligibly, definitely and with candour. The obligation of candour rests on simple moral grounds. But at the same time it is a paradoxical if cynical truth which needs no elaboration that in advocacy candour is a weapon. ("Lecture on Professional Conduct" (1953) in *Jesting Pilate*, Law Book Company, 1965, 134.)

The obligation of candour now rests on more than moral grounds. All lawyers in Victoria are obliged by Act of Parliament to act with candour in all dealings with courts and tribunals (*Legal Practice Act 1996*, s. 64(f)). This statutory duty of candour is over and above the legal obligation of honesty.

There may well be a similar choice in respect of discovery. Experience with limited discovery suggests that it can wind up worse than general discovery. In the *Longford* class action, Justice Merkel made it clear on a number of occasions that the Federal Court had abolished general discovery, but then had to face phalanxes of consenting adult attorneys submitting to orders which wound up casting a far wider net than an order for general discovery, and which cost the parties many millions of dollars, notwithstanding that the fire that started the action had been the subject of a Royal Commission and was the subject of a prosecution in the Supreme Court. It looks to be a fact that although a government has conducted an inquisition, this will not stop the lawyers for parties to an apparently adversarial contest embarking on any equally expensive number of inquisitions of their own.

My preference would be to abolish discovery entirely, but if not police a lot more rigorously the efforts to get general discovery where none is being formally allowed by the Court. I recognise that lawyers who principally act for plaintiffs may have a different perspective. The mediation process will not of course require a party to disclose a document that is against its interests, but the parties would still be able to subpoena limited classes of documents for production at the trial — the subpoena is nowadays an instrument of discovery *de facto* although not *de iure* — and they ought to be reasonably assured that if the mediation process has worked, they will have been told by the other side of the documents they have which they say work in their favour. If you look at the residual benefit of the process of discovery and then measure that against the costs, including the costs in terms of invasion of privacy, then this is another instance where in my view the evidentiary onus, to put it at its lowest, has passed to those who say the institution should be retained.

The courts need to monitor the number of times they are requiring parties to come back before them, and the number of directions they are imposing on parties. It may be possible to get some empirical evidence of the value of these procedures by having one stream of cases where none of them apply and one where all of them apply. Perhaps the views of the parties might be consulted. The courts need also to check the sources of their feedback about what is happening out there. If the people they are talking to are content with the process, the judges might be asking what is the source of that contentment — forensic, or fiscal. The judges need to be checking those who pay for the system, not just those who get paid by it. In litigation, as in most things, you get what you pay for, but if the judges are going to be responsible for telling litigants how much litigation they should have, the judges will need to be very well informed on how much litigation the litigants want or can afford. They will not get a balanced view if they are talking mainly to lawyers, government, and corporations.

If judges are to accept responsibility for the way in which cases are managed, they will need to have more responsibility for the costs of the exercise. One way to do this would be to bring back the requirement of a certificate for counsel in non-trial matters, and the requirement that there be a certificate for two counsel whenever two counsel are briefed, with an indication that such a certificate would be given only in the rarest cases for non-trial matters. The courts should be vigilant to ensure that the costs of pre-trial procedures do not outweigh the costs of the trial, or put the trial beyond the means of the parties.

The courts need to have more power to manage themselves. The Chief Justice or judge of each court needs to be able to deal with problems of judges who sit too long on judgments, or, apparently, who

refuse to sit at all. It is plainly undesirable that this kind of problem be left until it gets to the stage of a public scandal and can then only be dealt with, if at all, by the Parliament. One way to avoid this is to give the chief of a court the powers of the CEO of a corporation, possibly on advice from a number of the other judges, to take appropriate action to ensure that the members of the court are doing what they properly can for the proper administration of justice. There is an element of rough justice — "physician heal thyself" — about this. Judges can hardly expect to be taken seriously for berating lawyers for not performing on time, or just not coming up to scratch, if they are tolerating members of their own number who are repeat offenders against one or other judicial duty. One of the oldest complaints against the lawyers is delay — it is what Clause 39 of *Magna Carta* was mainly about — and some judges are guilty of excessive delay.

CONCLUSION

It was historically inevitable that the judges would think that the *laissez-faire* attitude to litigation inherited from Victorian England had to change and that they had to take more responsibility for managing litigation, but the paternalism — if you must, maternalism — has become more than some parties can decently be asked to bear, and it is time now to shift at least some of that responsibility back to those whose profession it is to carry it. Let the Bar do what its members are trained for — representing people in Court and presenting their case as best they can; let them earn their money as advocates rather than as paper-hangers, script-writers or barrow-boys. The object of the exercise is not to pamper the lawyers — either the Bench or the Bar — but to provide a fair and affordable way of resolving disputes. We are not now achieving that object and the profession as a whole is failing in its duty. It would be a very bad result for everyone involved if court-managed lists for litigants came to be seen, no matter how unfairly, as cash-managed trusts for lawyers — or just another way for the rich to get rich and the poor to get poorer. Everyone knows the final murderous prescription for the lawyers that Jack Cade accepted from Dick the Butcher (*2 Henry VI* 4.2.78) but, paradoxically perhaps, Cade had first declared he would make it a felony to drink small beer.

The Future of the Defence Force Discipline Act

Speech by Air Commodore Andrew Kirkham RFD, QC to the RAAF Staff College Course.

THE Commonwealth Parliament's power to legislate in respect of military justice derives from s.51(VI) of the Commonwealth Constitution, viz.:

> The Parliament shall, *subject to this Constitution*, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
> (VI) The naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth.

The defence power has been described as a "purposive" power, which means that whether a particular Commonwealth Act falls within s.51(VI) depends on whether the Act is for the purpose of the defence of the Commonwealth and is, in some real way, connected with that purpose — *Stenhouse* v *Coleman* (1945) 69 CLR 457 at 471.

The scope of the power may vary according to prevailing facts and circumstances. Hence as technology has advanced, air defence has come to be accepted as within the intended reach of the provision as well as naval and military defence.

Acting pursuant to s.51(VI) and on the basis that the power to legislate with respect to the naval and military defence of the Commonwealth includes a power to provide for the discipline of the defence force because defence demands the provision of disciplined forces, the Commonwealth legislature passed the *Defence Force Discipline Act 1982* ("the DFDA") which set up a system of service Tribunals and conferred upon them a comprehensive system of criminal law that significantly reflected the criminal law applicable to the civilian population. Ever since federation, as in the colonies before federation, there has been legislative authority for the maintenance of discipline in the armed forces.

Air Commodore Andrew Kirkham RFD, QC

Between 1989 and 1994 the High Court of Australia considered three challenges to the jurisdiction of a service tribunal to hear charges bought under the Act — *Re Tracey Ex Parte Ryan* (1989) 166 CLR 518; *Re Nolan & Anor Ex Parte Young* (1991) 172 CLR 460; and *Re Tyler & Ors Ex Parte Foley* (1994) 181 CLR l R.

In the first case a staff sergeant was charged pursuant to s.55(1)(b) of the DFDA with making an entry in a service document with intent to deceive that was false in a material particular.

In the second case a staff sergeant was charged pursuant to s.55(i)(a) of the DFDA with falsification of service documents and pursuant to s.61(1) of the DFDA of using a false instrument.

In the third case a Wing Commander was charged pursuant to s.47(1) of the DFDA with dishonestly appropriating the sum of $24,761.40 being the property of the Commonwealth with the intention of depriving the Commonwealth thereof.

In each instance offences of the same or a substantially similar nature existed in the criminal law applicable to the civilian population.

The nature of the challenge to the jurisdiction in each instance involved the assertions that:

(a) the respective charges were not laws appropriate to the discipline of the defence forces;
(b) there was an infringement of the applicant's civil and constitutional rights to a trial in the ordinary courts for an offence against the general law of the land;
(c) for a service tribunal to hear the charges involved the exercise of the judicial power of the Commonwealth which the tribunal was not qualified to exercise, not having been appointed a judicial officer pursuant to Chapter III of the Constitution.

Chapter III of the Constitution deals with the judicature and defines with precision how the judicial power of the Commonwealth shall be exercised. In particular it requires that judges have assured tenure to ensure their independence from the government of the day.

The majority of the judges in each of the three cases have held, inter alia:

(a) no relevant distinction can be drawn between the power exercised by a service tribunal and the judicial power exercised by a court.

Rather the question was whether such a tribunal was exercising the judicial power of the Commonwealth under Chapter III of the Constitution.

(b) The powers bestowed by s.51 are subject to the Constitution and thus subject to Chapter III.

The presence of Chapter III means

that unless, as with the defence power, a contrary intention may be discerned, jurisdiction of a judicial nature must be created under Chapter III and that it must be given to one or other of the courts mentioned in s.71 namely the High Court, and such other courts as the Parliament creates or such other courts as it invests with Federal jurisdiction.

(c) The defence power is different because the proper organization of a defence force requires a system of discipline which is administered judicially, not as part of the judicature erected under Chapter III but as part of the organisation of the force itself.

Thus the power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code standing outside Chapter III and to impose upon those administering that code the duty to act judicially.

(d) As a matter of history and of contemporary practice, it has commonly been considered appropriate for the proper discipline of a defence force to subject its members to penalties under service law for the commission of offences punishable under civil law even where the only connection between the offences and the defence force is the service membership of the offender.

Such legislation is based upon the premise that as a matter of discipline, the proper administration of a defence force requires the observance by its members of the standards of behaviour demanded of ordinary citizens and the enforcement of those standards by military tribunals, i.e. Parliament can take the view that what is good for society is good for the regulation of the defence forces and give effect to that view by creating service offences which are cumulative upon rather than in substitution for civil offences.

The above represents the views of Mason CJ and Dawson J who took the widest and most supportive view of the military tribunal's jurisdiction in all of the decisions.

The second joint judgment of the majority was delivered by Brennan and Toohey JJ who, expanding their initial views in the later cases, were concerned more with the limits of the jurisdiction to try offences rather than the content of the offences themselves.

They considered:

(a) That service offences created by the Act are essentially different from offences created or recognised by the ordinary criminal law and that the jurisdiction to punish for the commission of service offences and the jurisdiction to punish for the commission of criminal offences are created for different purposes.

Further service offences are created by a law which in accordance with the traditional and constitutional view is supplementary to the ordinary criminal law.

The exception which permits the vesting in military tribunals of jurisdiction to hear and determine charges of service offences is explicable only on the footing that service offences are not of the same character as offences against laws of the Commonwealth.

(b) If service offences created by the Act were to be characterised as ordinary offences against the law of the Commonwealth, the purported vesting in service tribunals of jurisdiction to hear and determine charges of those offences would be invalid because the jurisdiction to hear and determine charges of offences against laws of the Commonwealth can be vested only as prescribed by Chapter III of the Constitution.

The exception which permits the vesting in military tribunals of jurisdiction to hear and determine charges of service offences is explicable only on the footing that service offences are not of the same character as offences against laws of the Commonwealth.

(c) *Proceedings may be brought against a defence member or a defence civilian for a service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.*

The support available from s.51 (VI) for a particular prosecution for a service offence varies with the circumstances.

Though the meaning of s.51 (VI) does not change its application depends upon fact, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law.

In some circumstances conduct amounting to a service offence calls for proceedings to be taken before a service tribunal in order to maintain or enforce service discipline in other circumstances it does not.

The minority judgments considered that the legislation involved an unjustifiable denial of the applicability of the Constitution's fundamental and overriding guarantee of judicial independence and due process to laws of the Parliament providing for the trial and punishment of members of the armed forces for ordinary (in the sense of not exclusively disciplinary) offences committed within the jurisdiction of the ordinary courts in times of peace and general civil order.

Essentially the minority would allow service tribunals to hear only exclusively disciplinary offences, e.g. the offences in Part III Division 1 of the DFDA, i.e. offences relating to operations against the enemy and some in Part III Div 3, i.e. offences relating to insubordination and the like, but considered that they lacked the jurisdiction to hear offences of the type charged in each of the three cases.

Of course the military's point of view is that the prosecution of a CO on base for frauds committed on base and in the context of his engagement as an officer in the RAAF substantially served the purpose of maintaining and enforcing service discipline.

This was the case with Wing Commander Foley in the third of the cases I have mentioned to you.

Subsequent to coming into force of the DFDA, cases in the UK and in Canada raised issues concerning the independence of court martial proceedings.

In the case of *Re Tyler* reference was made to *R* v *Genereux* (1992) 88 DLR (4th) 110 in which case a member of the Canadian forces was charged with narcotics offences and desertion.

He was convicted before a general court martial but on appeal contended that his right to trial by an independent tribunal as guaranteed by s.11(d) of the *Canadian Charter of Rights and Freedoms* had been infringed.

The Supreme Court of Canada by majority held that the statutory provisions governing courts martial were insufficient to

guarantee their independence from the executive.

The decision was based on s.11(d) of the *Canadian Charter of Rights and Freedoms* which guarantees a person charged with an offence the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

In the view of the majority of the court the essential conditions for independence, namely security of tenure, financial security and institutional independence, were lacking in the tribunal.

Particular emphasis was placed on the possibility of perceived influence by the executive on the exercise of the tribunal's judicial function.

When considering *R* v *Genereux* in the context of *Re Tyler* Mason CJ and Dawson J noted that s. 11(d) has no counterpart in Australia and expressed their agreement with the conclusion reached by Brennan and Toohey JJ that if there is to be found outside Chapter II a requirement of sufficient independence on the part of service tribunals exercising disciplinary power, that requirement was met by a general court martial constituted in accordance with the Act.

Brennan and Toohey JJ noted that s. 11(d) of the *Canadian Charter of Rights and Freedoms* had no express analogy in the Australian Constitution.

They considered that if there were any analogy, it would be found in Chapter III governing the courts in which the judicial power of the Commonwealth is or can be vested.

They noted that a court martial under the Act does not exercise the judicial power of the Commonwealth, and Chapter III has no application to a law creating or conferring the jurisdiction of a court martial.

They concluded that in any event, the constitution of a general court martial pursuant to the DFDA answers the requirement of independence of a service tribunal exercising disciplinary power.

The matters which they took into account in coming to that conclusion were that:

i. eligibility for membership of a Court Martial ("CM") under the DFDA is in effect confined to officers; (s. 116 DFDA)
ii. a person is eligible to be the Judge Advocate ("JA") of a Court Martial if and only if, he is a member of the JA's Panel; (s. 117 DFDA)
iii. the JA's Panel is constituted by officers appointed by a Chief of Staff on a nomination of the Judge Advocate General; (s. 196(2) DFDA)
iv. an officer is not eligible for appointment unless enrolled as a legal practitioner for not less than five years; (s. 196(3) DFDA)
v. the JA fulfils the function performed by a Judge in a trial by jury; (s. 134 DFDA)
vi. the position of the Judge Advocate General ("JAG") is dealt with in Part XI of the Act. His appointment is made by the Governor General on a full or part-time basis for a term not exceeding seven years; (s. 179(1) and s. 183(1) DFDA)

It should be noted that the same Act allows an appellant or a Chief of Staff to appeal to the Federal Court of Australia on a question of law involved in a decision of the Tribunal. In turn there may be an appeal from the Federal Court to the High Court.

vii. an appointee to the JAG's position must be or have been a Justice or Judge of a Federal Court of a Supreme Court or a State or a Territory; (s. 180(1) DFDA)
viii. a CM is convened by a Convening Authority who is an officer or an officer included in a class of officers, appointed by a Chief of Staff to be a Convening Authority; (s. 102 DFDA)
ix. a Convening Authority shall not appoint as a member or as the JA of a CM an officer whom he believes to be biased, likely to be biased or likely to be thought on reasonable grounds to be biased; (s. 118 DFDA)
x. the accused may object to a member of the CM to the JA on similar grounds; (s. 121 DFDA)
xi. the JAG has security of tenure within the period of his appointment;
xii. historically members of a CM have always been chosen on an ad hoc basis, necessarily so given the exigencies of war;
xiii. Part IX of the DFDA contains provisions for the review of a decision of a CM;
xiv. the *Defence Force Discipline Appeals Act (1955)* (Commonwealth) provides a right of appeal to the Defence Force Discipline Tribunal against conviction though only by leave of the Tribunal on a ground that is not a question of law. (s. 20)

It should be noted that the same Act allows an appellant or a Chief of Staff to appeal to the Federal Court of Australia on a question of law involved in a decision of the Tribunal. In turn there may be an appeal from the Federal Court to the High Court.

The majority in *Re Tyler* held that the provisions of the DFDA established an independence on the parts of CM commensurate with the system of service tribunals for the discipline of the defence force.

Following this case and in a growing climate of intense public scrutiny of military justice procedures culminating in a Senate Inquiry by the Joint Standing on Foreign Affairs Defence and Trade into Military Justice Procedures, Australian Defence Force ("ADF") had on 17 November 1995 asked Brigadier Abadee, one of the Deputy Judge Advocates General (DJAG) of the ADF and a Justice of the Supreme Court of New South Wales, to undertake a study into arrangements for the conduct of trials under the DFDA. The primary focus of his study was to determine whether trial arrangements under the DFDA satisfied current tests of judicial independence and impartiality.

Brigadier Abadee's report ("the Abadee Report") concluded that, whilst the existing arrangements for the conduct of trials under the DFDA satisfied existing legal requirements of independence and impartiality, there were legitimate concerns about appearances and perceptions of the ADF's system of military justice which presented compelling arguments for change, and he detailed 48 recommendations for change.

Since its delivery to Chief of the Defence Force ("CDF") the Abadee Report has been under detailed consideration by the Chiefs of Staff Committee and CDF, and as a result of that consideration the ADF has agreed (or agreed in principle) with 39 of Justice Abadee's recommendations, partially agreed with one recommendation, and disagreed with eight recommendations.

Implementation of the recommendations that have been accepted by the ADF has recently commenced.

The Abadee Report was reviewed during the recent Senate Inquiry by the

Joint Standing Committee on Foreign Affairs, Defence and Trade into Military Procedures. That Committee's report was tabled in Parliament on 21 June 1999.

In his foreword to the Senate Committee's report Senator MacGibbon acknowledged that "the Committee accepted that the post-Abadee arrangements will significantly improve the impartiality and independence of the military justice system".

During a press conference Senator MacGibbon stated that overall the Committee found that the system of military justice "works very, very well indeed". He stated further: "It's a very good system and about 98 per cent of it . . . works very well".

The Senate Committee itself made a total of 59 recommendations, 45 of which relate to inquiries, seven of which relate to discipline (the Act) and seven of which relate to administrative action.

These are presently being considered.

It is not necessary to set out all of the Abadee Report's recommendations in this paper.

However, among the more important of his recommendations that have been accepted are the following:

1. The multiple role of convening authorities in both convening and reviewing CM and Defence Force Magistrate ("DFM") proceedings should be eliminated.
2. Prosecution Guidelines similar to those in operation in various States or the Commonwealth with suitable modifications should be introduced.
3. The present system of the JAG nominating officers to the JA's panel, appointing DFM's and recommending the appointment of s. 154(1)(a) reporting officers should be retained.
4. No command or control (other than administrative should be exercised over JAs, DFMs and s. 154(1)(a) reporting officers in respect of their judicial duties.
5. There should be no reporting on JAs, DFMs and s. 154(1)(a) reporting officers in respect of their judicial or legal duties.
6. Fixed term tenure for JAs/DFMs and s.154(1)(a) reporting officers should be further considered.
7. The Judge Advocate Administrator (JAA) should be under command of the JAG.
8. Duties of a judicial nature including the appointment of a JA/DFM for a particular trial or the nomination of a s. 154(1)(a) reviewing officer be allocated by the JAA.
9. The JAA should be under command of and be reported upon by the JAG and the Director General Defence Legal Office (DGDLO).
10. Consideration should be given to the establishment of a Court's administration unit independent of the Convening Authority and outside the chain of command and reporting chains.
11. There should be a prohibition upon an officer's performance as a member of a CM being used to determine his qualifications for pay or appointment.
12. Similarly the performance of CM members and Presidents should not be considered as part of efficiency reporting.

There is currently being produced an ADF Prosecuting Policy in respect of which the JAG and each of the DJAG's have had input.

The proposed policy requires consideration of alternatives to charging, and sets out factors to be considered in the decision to prosecute.

A non-exhaustive list of factors considered to be relevant in deciding in a given case whether charges under the DFDA should be preferred or proceeded with have been set out and include:

1. consistency and fairness;
2. operational requirements;
3. deterrence;
4. seriousness of the offence;
5. interests of the victim;
6. nature of the offender;
7. prior conduct;
8. degree of culpability;
9. effect upon morale;
10. delay in dealing with matters.

Factors that are not to influence the decision to prosecute are:

1. The race; religion; sex; sexual preference; natural origin; political associations, activities or beliefs or service of the alleged offender or any other person involved.
2. Personal feelings concerning the offender or any other person involved.
3. Possible personal advantage or disadvantage that may result from the prosecution of a person.
4. The possible effect of any decision upon the service career of the person exercising the discretion to prosecute.
5. Improper direction from higher authority in respect of a specific case.

The implementation of the recommendations contained in the Abadee Report will undoubtedly have the effect of increasing the impartiality and independence of the military justice system.

Having regard to that fact and the fact that the whole of the military justice system has been exhaustively reviewed by the recent Senate Inquiry and substantially withstood that scrutiny, I think it is unlikely that there will be any significant changes made to the military justice system in the foreseeable future unless forced upon the ADF and Parliament by a reversal of the High Court decisions.

Having regard to the fact that the whole of the military justice system has been exhaustively reviewed by the recent Senate Inquiry and substantially withstood that scrutiny, I think it is unlikely that there will be any significant changes made to the military justice system in the foreseeable future.

In the most recent High Court decision, i.e. *Re Tyler*, Justice McHugh changed his position (if not his views) to support the validity of the DFDA. Reviewing the cases of *Re Tracey* and *Re Nolan* he noted that in *Re Tracey*:

> Mason CJ, Wilson and Dawson JJ held that a service Tribunal need not be constituted in accordance with Chapter III of the Constitution to hear and determine charges under military law if the charge is sufficiently connected with the regulation of the defence forces and their good order and discipline.
>
> If the offence is so connected, it is for the Parliament to say whether the offence is necessary for the regularity and discipline of the defence forces. Brennan and Toohey JJ took a more limited view of the power of the Parliament. Their Honours held that a service Tribunal not appointed in accordance with Chapter III of the Constitution had jurisdiction to hear a service offence only if the proceedings could reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.
>
> In determining whether the proceedings could be so regarded, the accessibility and appropriateness of hearing the charge in a civil court was a variable factor to be weighed according to the circumstances.

He noted that in *Re Nolan* the High Court by a majority again rejected a challenge to the power of the Parliament to invest a DFM who had not been appointed in accordance with Chapter III of the Constitution with jurisdiction to hear charges under the Act, and noted that Mason CJ and Dawson, Brennan and Toohey JJ had followed the views that they expressed in *Re Tracey*.

He noted that although the divergent reasoning of the majority judges in *Re Tracey* and *Re Nolan* meant that neither of those cases has a *ratio decidendi* that did not mean that the doctrine of *stare decisis* had not relevance or the decisions in those cases had no authority as precedents.

He stated:

> A Court bound by a previous decision whose *ratio decidendi* is not discernible is bound to apply that decision when the circumstances of the instant case "are not reasonably distinguishable from those which gave rise to the decision" . . .
>
> Although 1 remain convinced that the reasoning of the majority justices in *Re Nolan* and *Re Tracey* is erroneous, I do not regard that as a sufficient reason to refuse to give effect to the decisions on those cases.
>
> They are recent decisions of the Court where after full argument on each occasion the Court upheld the validity of the Act (the DFDA) in circumstances where the facts are not readily distinguishable from the present case . . .
>
> I am unable to see any legally relevant distinction between the three cases. Like cases should be decided alike.
>
> Uniformity of judicial decision is a matter of great importance.
>
> Without it, confidence in the administration of justice would soon dissolve . . .
>
> Furthermore, for the Court now to hold that a service Tribunal had no jurisdiction to try this case after reaching the opposite conclusion twice in the past five and a half years would defeat the expectations of the Parliament and those concerned with the administration of discipline in the defence forces.
>
> Both the Parliament and those responsible for the administration of service discipline could be fairly excused for thinking that the constitutional question had been settled.
>
> Moreover, the two decisions are confined to the special position of the defence forces and give effect to a tradition that has existed in this country from its earliest days.
>
> The decisions have no authority outside the situation of the defence forces.
>
> Accordingly in my opinion the Court should continue to follow *Re Tracey* and *Re Nolan* in any case whose circumstances are not readily distinguishable from the circumstances of those two decisions notwithstanding that they contain no binding *ratio decidendi*.

I would expect McHugh J's position would guide a majority of High Court judges in the future.

As a consequence of the decisions of the majority of the justices in the three cases and McHugh J's disinclination to re-litigate the issues raised in the three cases and further the significant refinement of the independence of service tribunals following implementation of the Abadee Report recommendations I consider that there is no immediately foreseeable challenge to the constitutional validity of service tribunals. This means that the basic rules that govern your involvement with the DFDA are not likely to undergo any fundamental change in the near future.

Former Bar Leaders Recalled

The following is the text of the address given by Justice Stephen Charles to the Annual Dinner of the Building Dispute Practitioners' Society at the Hilton Hotel on 27 June 2001, reprinted from the Society's quarterly *BDPS News* by kind permission.

Justice Stephen Charles

THOSE of you who travel into the city from the south-east may use Kingsway. You will know the King's Bridge. It was completed in 1961 at considerable expense to the community. In 1962 a man called Noble drove over it with a very large vehicle. The bridge broke. In the ensuing uproar, the Premier, Sir Henry Bolte, decided there would be a Royal Commission. John Starke was then the leader of the Victorian Bar and probably of the Australian Common Law Bar. He regularly acted interstate in major matters. Starke was briefed for the principal contractor Utah Construction Co. During the course of the Royal Commission, Starke also defended Robert Peter Tait, a man of unsound mind who murdered the unfortunate Mrs Hall, an 80-year-old, in Hawthorn. Sir Henry Bolte decided to hang Tait. A devoted supporter of capital punishment, Bolte said that every time he proposed hanging someone, his party's electoral vote increased 10 per cent.

I had arrived at the Bar late in 1961, supporting myself by living as a resident tutor in Trinity College. When briefs for the inquiry were delivered, I had the enormous good fortune to be asked to act as Starke's second junior, his real junior being S.E.K. Hulme. My function was to index the transcript, in other words to do all the hard work. The dogs' bodies of the Commission were John Winneke, now President of the Court of Appeal, junior to B.L. Murray, and Xavier Connor for the Country Roads Board, and myself. For us the Commission was untrammelled bliss, watching some of the best cross-examiners of the Bar — Starke, Murray, Sir Oliver Gillard, Daryl Dawson, John Young, Ninian Stephen, Noel Burbank and Sid Frost — taking the witnesses to pieces.

Conditions were somewhat cramped at the Bar table, there were so many counsel present. The only available location large enough to accommodate the Commission and counsel was the Hawthorn Town Hall, which had a recording and sound magnifying system which enlivened proceedings by frequently broadcasting radio transmissions of passing taxis. The system would suddenly broadcast "there's no-one here" followed by the taxi driver's expletives non-deleted. Starke himself was a huge man, a dominating and very intimidating cross-examiner. I sat at the Bar table between Starke and Dawson. On occasions it was like being beside a rhinoceros of uncertain but potentially very hostile disposition. Starke had gout. If any tomato had passed his lips in the preceding 24 hours, his left foot ached frightfully. If you so much as touched his leg or shoe the result was a bellow of pain mixed with rage followed by many expletives.

The President of the Commission was Judge Esler Barber, then of the County Court, who conducted proceedings with gay camaraderie and easy informality. He was assisted by two engineers, Professor Louis Matheson (later the first Vice-Chancellor of Monash University) and Professor Neil Greenwood. The central issue of the Commission's enquiries, and the root cause of the bridge's failure, was transverse welding of high tensile steel, and the failure of the welders to preheat the steel. Sir Esler Barber was an unusual choice for an engineering inquiry. His forte was divorce. In those days if persons petitioning for divorce had committed adultery, they had to ask the Court to exercise discretion in their favour. So a sealed and confidential discretion statement would be filed by the petitioner naming the person co-operating in adultery. On one such occasion the discretion statement was handed up to Sir Esler Barber who opened it with his usual panache and extracted a current list of members of the Australia Club.

Early in the proceedings in 1962 1 had the first of the eye problems, cysts in my eyelid, which have plagued me for 40 years. I was sent off late one morning to the eye specialist, who proceeded to cut out the cyst. I returned to the Commission shortly after lunch with an enormous bandage around my head leaving only one eye showing. A witness was just finishing his evidence and, as the next witness moved to take the box, I attempted to sneak in inconspicuously beside Starke. Starke took one look at me and then said loudly across the silent courtroom, "Your Honour, you've got to treat 'em rough. It's the only way to keep juniors in line these days."

Starke of course went on to become a judge of the Supreme Court and a knight of the realm. Years later I had to speak as junior silk at the Bar dinner and went to him for assistance. He had appointed as associate a man somewhat deaf. I asked to speak to Starke. The associate said he was sure he would see me. I said, "Would you care to

check?" There was a pause. "I suppose his Honour would cash a cheque for you."

In 1968 another building dispute arose between the Gas & Fuel Corporation and Snam Progetti, the constructor of a steel pipeline which was to carry natural gas from Longford to Dandenong. Snam Progetti later became part of Transfield. The dispute related to the increased and hidden costs of construction, in particular due to the steel welds of the pipeline. I was junior to Ninian Stephen for the Gas & Fuel Corporation. Daryl Dawson, whose name had been made in the King's Bridge Commission and who was a brilliant cross-examiner, with a tongue like a whiplash, was acting for the contractor. It was an immense pleasure being led by Stephen. He always exhibited perfect unruffled Scottish calm. Difficulties only occasionally arose in conferences with clients because of the unfortunate conjunction of our names. Whenever Stephen addressed me, as he often did in conference, others present were frequently left with the impression that he spent a great deal of time talking to himself — and naturally assumed that a person of such distinction would address himself formally.

After the matter had proceeded for some three months, on 29 June 1970, Ninian rang me one evening and invited me to his chambers. I went expecting a pre-short vacation drink. Ninian said, "I've been under a lot of pressure recently and I'm going across the road." Freely translated that meant "I've been offered a position on the Supreme Court and I am leaving you in the lurch." It was a Tuesday and our arbitration was to resume in a week. Most fortunately for me a new silk was briefed, Robert Brooking. Justice Brooking had not yet become the author of *Brooking on Building Contracts*, the first edition of which was not published until 1974, the foreword of course by Sir Ninian Stephen. The second edition of this excellent work emerged in 1980 with the added authorship of David Bennett and a third edition is now available. It was not for nothing that the editor of Hudson, Ian Duncan Wallace QC, in the 1998 *International Construction Law Review* described Justice Brooking as surely the pre-eminent judge in construction law matters in the Commonwealth, in the same article singling out Justice David Byrne for his outstanding work in the trial of construction cases. Justice Brooking retires next March, and will, I fear, be quite irreplaceable. He has been a great judge of the Supreme Court, pre-eminent in many fields as well as construction. However, the Court of Appeal's loss, which will be irreparable, may be the gain of practitioners in building disputes, depending upon whether you can persuade him to undertake work as an arbitrator. There could be no-one better qualified. After all this, I can only say that the brief in the Snam Progetti matter, involving more than three months of arbitration on the part of Ninian Stephen and myself, was completely mastered by Justice Brooking in four days. He was ready to recommence the arbitration by the next Monday.

The Westgate Bridge collapsed during construction on 3 November 1970. The next day I was on the still standing southern span with David Walsh of Mallesons, briefed for the Lower Yarra Crossing Authority, neither of us realising in how much danger we had placed ourselves by climbing onto the uncompleted span. Keith Aickin was my leader and we worked together for ten months on the case. Aickin was a man of the greatest intellectual distinction, a classics scholar, very quiet and measured, appearing often in the Privy Council and in the High Court, dealing with the law lords and judges on equal terms and himself later a High Court judge. He was an extraordinarily thoughtful and kind leader. I had previously acted as his junior in a number of constitutional cases involving interstate trade. On one occasion we had worked up the argument at his house the night before the High Court appeal, finishing very late. Our argument was due to start the next morning at 10.15. At 9.30 in Chambers I received a phone call from Aickin telling me that he had been asked to meet the Chief Justice, Sir Garfield Barwick, in his chambers that morning, and might not arrive until precisely 10.15. Absent the warning I would by then have been a nervous wreck. Not many leaders would have been so sensitive.

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The engineering designer of the Westgate Bridge had been Freeman Fox, an English firm whose senior partners Sir Ralph Freeman and Sir Gilbert Roberts were early witnesses in this second inquiry. Another Freeman Fox partner to give evidence was Dr Oleg Kerensky, whose father, Alexander Kerensky, was one of the leaders of the Russian Revolution and Premier briefly in 1917. Sir Esler Barber's first report on the King's Bridge inquiry had been very well received as having made a substantial contribution to engineering knowledge, and he was asked to act again as President of the Westgate Bridge Commission. By then he had been elevated to the Supreme Court and was shortly to be knighted. The inquiry principally involved issues concerning the design of box girder bridges and the highly complex engineering techniques and arcane mathematical calculations involved. Again, an enormous cast of barristers was present. B.L. Murray, now Solicitor-General, led Jim Gorman and John Mornane for the State of Victoria, the other silks including William Kaye, S.E.K. Hulme and Richard Searby for John Holland Constructions, Barry Beach leading John Barnard for Freeman Fox & Partners, John Young leading Clive Tadgell for Maunsell & Partners, and Peter Murphy leading Allan Goldberg for World Services (the Dutch contractor). It was not so long after this Commission that Young was appointed Chief Justice of the Supreme Court. He then received a letter from John Mornane, comparing him to a sea captain taking command of a quinquereme of Nineveh on the ground that his cargo consisted of ivory, apes and peacocks. Keith Aickin, until then much underestimated as a cross-examiner by the common lawyers, showed himself to be a brilliant and deadly cross-examiner, with the intellectual ability to match and defeat engineering experts in their own field. Westgate lasted many months, and the witness whose evidence was most important in relation to our client did not enter the box until near the end. It so happened at that time that my leader was ill. I had prepared several days worth of good material and my turn to cross-examine arrived shortly before lunch. Until then I had remained silent as the grave throughout the inquiry, just as I had remained mute throughout the King's Bridge Commission. I had asked two questions when the lunch break came. During lunch Sir Esler approached me. "Look here, young Charles," he said, "We are going to finish this witness today. We've been wasting time in this inquiry for eight months and I am not going to have you starting now."

In 1974 the Hobart Bridge collapsed, having been struck by the Lake Illawarra, a cargo ship carrying a load of zinc. I had previously done some work for the Port Phillip

Sea pilots and was offered a brief, as Woods Lloyd's junior, for the pilot who had been bringing the ship into port. I was at that time labouring with Neil McPhee for Monier, which was attempting to protect the intellectual property in its automatic roof tile-making plant at Springvale against various predators who were attempting to improve on Monier's confidential and very effective machinery, and set up other competing plants, principally in Queensland. We were nowhere near trial and were engaged in the long slow process of interviewing and taking statements from witnesses. McPhee was a barrister of quite exceptional ability. He had passed first through Duntroon and had served in the Korean War rising to the rank of Major. On his return to Australia he left the army and, turning to the law, gained a first class honours degree and the Supreme Court prize, beating Cliff Pannam in the process. At a time when most of the defamation work in Australia was handled in Sydney and the leading practitioners were Murray Gleeson and Michael McHugh, McPhee was in great demand in Sydney, his standing being at least the equal of any of the Sydney Bar. I have never known anyone to match his lateral thinking and I was frequently quite unable to follow the convoluted paths of his mind. You had to listen very carefully to anything he said. On the morning I was offered the junior brief for the pilot of the Lake Illawarra, I went to McPhee, told him I had been offered the brief and that I wanted very much to take it and asked his advice. McPhee thought carefully, and then said that he thought that if he were in my position he would have to refuse it, that our solicitor would be most upset if I took the brief. With a very heavy heart I rang the solicitor and told him I could not take the brief for Hobart. The next day I learned that the same afternoon McPhee had been offered the brief for the ANL, the owners of the Lake Illawarra and had accepted it. When, outraged, I complained to Neil he said, "Oh yes, I said if I was in *your* position! The solicitors would have been most upset if both of us had gone to Hobart for three months!"

Which may stand as a lesson to any juniors or solicitors present, contemplating the briefing of silk.

My invitation from Lance Guymer said that each year your Society holds an Annual Dinner featuring a topical guest speaker. He added that my speech should be connected to building disputation. I have spoken of former leaders of the Bar for whom I have unqualified admiration. I hope that can be called sufficiently topical . . . !

Verbatim

On Pinter and Anxiety

Federal Court of Australia

3 April 2001
Aristocrat Leisure Industries Pty Ltd v *Bally Gaming International Inc.*
Coram: Sackville J.
Applicant: A. Franklin and R. Cobden
Respondent: Dr J. Emmerson QC and G. McGowan.

During cross-examination of a witness by Dr Emmerson, and following a significant pause by Dr Emmerson during which silence reigned (whilst instructions were being obtained):
Dr Emmerson: I'm sorry, Your Honour.
His Honour: Here, I am, Dr Emmerson. It's really like a Pinter play, there's long periods of silence punctuated by the occasional question.
Dr Emmerson: In a Pinter play, the long periods of silence produced a sense of extreme anxiety in the audience, as I understood.
His Honour: Yes, Dr Emmerson.
Dr Emmerson: I would like to be as un-Pinteresque as I can, but just one further point I want to check, if I may, Your Honour.
His Honour: Anything to alleviate my anxiety.

Alice in Serious Injury Land

County Court of Victoria

26 June 2001
McLaren v *Atlas Steels (Australia) Pty Ltd*
J. Richards for the Plaintiff
J. Ruskin QC with P. Jewell for the Defendant

Before the commencement of this serious injury application pursuant to s. 135A of the Accident Compensation Act, one of the counsel in the proceeding helpfully asked His Honour's Associate whether His Honour was going to deliver a paper at the Judges Conference in Adelaide. This question was delicately transmitted to the Judge by the Associate.

In the course of delivering reasons by reason of which his Honour would delay the delivery of judgment in the proceeding, His Honour observed — (in what could be described as a firm voice) — as follows:

Normally as counsel are aware, I would defer the making of a decision and the delivery of reasons until tomorrow morning but it is not possible to do that this time around because I will have other responsibilities including preparing to attend a conference of judicial officers commencing tomorrow afternoon in Adelaide. I disclaim the notion that part of those preparations is delivering a paper to the assembled Judges concerning s. 135A. No such offer was made by the Victorian Court because we frankly do not think that the rest of them would believe us.

Submissions Adopted

Victorian Civil and Administrative Tribunal

28 September 2001
Coram: Deputy President Cremean

Ms Wong (Solicitor)**:** I adopt Mr Aghion's submissions.
Mr. Aghion: It's not often that others adopt my submissions.
Deputy President: It's not often the tribunal adopts them, Mr Aghion.

The Thick of It

County Court of Victoria

5 September 2001
Coram: Judge Pilgrim
Victorian Workcover Authority v *Karingal 2 Holdings Pty Ltd*
G. Colquhoun for Plaintiff
B. Griffin for Defendant (a slipping case)

Griffin (cross-examining)**:** The chip itself, you've identified it as a chip. Was it one of those thin French-fry type chips or was it one of the thicker type chips?
Witness: Are you serious?
Griffin: I am asking you this, yes, Mrs

Keepance?
Witness: . . . It was a squashed chip then, the size of something like a five or ten cent piece.
Griffin: I see. That was all you could find on the floor?
Witness: That's correct.
Griffin: When you say it was squashed, how thick was it? . . .

What's in a Name?

Supreme Court of Victoria

15 October 2001
Bolden v *Ian Bolden Contracting Pty Ltd*
R. Meldrum QC and T. Tobin for the Plaintiff
D. Curtain QC and R. Middleton for the Defendant

The transcript of Meldrum's address reads in part as follows:
His Honour: Mr Melodrama, what do you say about the jury deciding the question of negligence and not the question of damages; it is in the area of the damages that the question arises, it may well be that the jury could be asked to make a factual finding as to whether the 1998 injury or, the sequelae of the 1998 injury was in part a result of the 1998 incident — but it is possible, it seems to me, to separate the question of negligence and the question of damages and it's only when one gets into the question of damages that any question of complication arises at all.
Mr Melodrama: Except that it's only in damages that there are complicated questions Your Honour . . .

It's the Thought that Counts

Victorian Civil and Administrative Tribunal

28 May 2001
Temptres Nominees Pty Ltd v *Constantinou*
Coram: Deputy President MacNamara
M. Klemens for the Applicant
M. Lapirow for the Respondents

Deputy President: If you are going to seek to amend your pleading, Mr Klemens, are you in a position to provide me and Mr Lapirow with a copy of the pleadings . . .
Klemens: Yes, I haven't formally done that but I will be able to do that.
Deputy President: I am always intrigued, Mr Klemens, by the use of the word "formally". I don't know whether that means you have got it there but it is not wearing its dinner suit. What you really mean is you haven't done it at all.
Klemens: Well, I haven't done it in terms of the written form, sir, no.
Deputy President: It's up there.
Klemens: It is indeed.
Deputy President: Or a gleam in your eye.
Klemens: It is hopefully more than a gleam.

The Thai Test

County Court of Victoria

16 August 2001
Simkin v *Williams*
G. Hardy for Appellant
P. Reynolds for the Respondent
Appeal against conviction of drink driving offence.

Dr Byron Collins was giving evidence of a reconstruction by him of the eating and drinking by the appellant on the evening in question.
Reynolds: You say do you, Dr Collins, that before commencing the test you gave the appellant food to replicate the effect of the food which he consumed on the evening.
Dr Collins: That is correct.
Reynolds: The evidence is that on the evening in question he had a chilli Thai dinner. Is that your understanding?
Dr Collins: Yes that's correct.
Reynolds: What do you say you gave him as part of the replication?
Dr Collins: I gave him a pastie.
Reynolds: A pastie? (laughing).
Dr Collins: That's right.
Reynolds: He says that he had a chilli Thai dish on the night in question.
Dr Collins: We don't run to Thai breakfasts at "Chez Byron".

Taken as Red

County Court of Victoria

9 October 2001
Willmott v *Friway One Pty Ltd*
Coram: Judge G.D. Lewis
D. Munro and J. Bell for Plaintiff
J. Noonan for Defendants

Munro: Your Honour would have to find unreasonable delay for the penalty to apply.
His Honour: I am aware of what is required there. You would say that the assessment made by Mr Leitl should now be completely out of the picture?
Munro: Yes, and I've got stronger over lunch, because I have now read the letters.
His Honour: I thought you said you'd had a red.
Munro: I don't drink these days, Your Honour, which is most unfortunate.

Judicial Ignorance

Supreme Court of Victoria

Practice Court
15 October 2001
Coram: Ashley J.

Strachan QC: (when the list was being called) I wish to mention a matter about which Your Honour knows nothing.
Ashley J: I am sure there are those who would like to say that about me.

Later reading from a letter tendered as evidence:
Strachan QC: "I apologise for my fraud, I am an uncontrolled gambler and a thief . . ."
Ashley J: I'll bet the police would like to get hold of that!

Appealing is Fun

High Court of Australia

14 November 2001.
Gerlach v *Clifton Bricks Pty Ltd*
s43/2001

Application for special leave to appeal.
Mr Ireland: That third matter was the first matter debated this morning when Your Honours came onto the Bench.
Kirby J: Yes. Are you embracing that or not?
Mr Ireland: Yes.
Kirby J: You take every straw in the wind.
Mr Ireland: Well, but I am worried about my notice of appeal, I am worried about my special — I am sorry.
McHugh J: It is not a straw, you would say it is a solid brick, it is almost an edifice.
Mr Ireland: It certainly has been put very forcefully. I was not sure whether it was for or against me at first.
Hayne J: That is half the fun of appearing here, is it not?

Welcome to the New Kids on the Block

Speech by Justice Pagone at the dinner on Tuesday, 22 November 2001, to mark the occasion of the completion of the Readers' Course by the new members of the Bar, and the signing of the Roll of Counsel.

LADIES and gentlemen, distinguished guests. Thank you to Ross Ray for his unusually kind remarks in introducing me. My presence here is the product of Jack Rush's sense of humour: he must have thought it amusing that me, as the new kid on the judicial block, might be an appropriate speaker to the new readers who are the new kids on the barristers' block. My protestations that I would have nothing meaningful to say were dismissed in Jack Rush's style with a "just say nice things about Barb Walsh"; he omitted to tell me that two people would speak before me on the same topic.

It is hard for me to know what I should say to the newest group of barristers to come to the Bar. You have had three months of instruction and many "old timers" have probably already come to tell you "war stories" of their times in court. My practice as a tax counsel had its occasional amusing moment but is not the stuff of rip-roaring humour or moral insights. The stories I would tell you are more likely to put you to sleep. And then there was the fact that I have just left the Bar, and it seemed a little odd to have the latest refugee tell you what a great place you have just come to.

In thinking about my time at the Bar, I began to realise how much I already miss some aspects of the life that you have just embarked upon. The thing I miss most, already, is the thing that makes the Bar most unsettling and which I did not fully appreciate until I left the Bar: personal freedom. The personal freedom that you have as barristers comes at the very great cost of lack of certainty and of insecurity. You are no one's employee and may either not get work (as happens to some), or you may develop a practice which suddenly disappears (as I have seen happen to others). The insecurity that many of you may be feeling at this moment may stay with you forever. Many of the most successful barristers I know, and who have an apparently inexhaustible supply of work, still fret about whether there will be another brief once they finish the one (or the many) they are currently holding.

Justice Pagone

The insecurity of not having constant employment is a major cause in barristers being overworked or jammed as barristers try to overcome the insecurity by taking on more than they can do. Both (being overworked and being jammed) cause a range of problems that you should at all costs avoid. You should also avoid not looking after your finances. Despite the fear that work may disappear, one thing which I have noticed amongst many barristers is a total inability to look after and to deal with their finances. It is sadly surprising to discover how many barristers are unable as a group to manage fees and income.

The upside of this uncertainty, however, is a very real personal freedom that you should savour and enjoy as long as you can. I used to complain that the freedom was illusory because I was tied to a desk and was constantly trying to keep up with the work, but the fact is that I enjoyed as a barrister a freedom that is enjoyed in few other professions. You may be surprised by the daily number of decisions that you make as a barrister that depend upon no one but yourself. That is not true in other occupations whatever other benefits they may bring. An ability to come and go whenever you like is a great benefit in itself even though you rarely, if ever, choose to exercise it. The pleasure of the benefit, whether you exercised it or not, will be very sorely missed by you (as it now is by me) if you ever lose it.

At the professional level, barristers also have a freedom of immense significance. You are independent from your client and with some (I hope only few) exceptions, you are bound by the cab rank rule that compels you to take whatever brief you are offered.

The duty to accept those briefs is an institutional guarantee of your independence. I can tell you that it was a rule that I observed even though I found myself acting for some who I found entirely objectionable.

One important aspect of the independence of the Bar, at least in this country, and certainly in Victoria, is the relationship of trust and reliance between the Bar and the Bench. One of the most striking things I have discovered in the short time that I have been sitting on the Bench, is how much the judge does and must depend upon counsel: it is a dependence about the accuracy of what is said, about things not having been left out, about the research that has been undertaken, about the accuracy and reliability of submissions, and so on. It may not seem like it from

where you sit, or stand, but the judge does rely upon you enormously, and that reliance is essential to the smooth conduct of proceedings which are at the heart of the administration of justice.

Things do seem quite different from different perspectives. Let me tell you that my own view of judges has changed dramatically since I have become one myself. Until recently I was convinced that all were grumpy and difficult individuals who had assumed a personal and collective campaign to ensure that I should not succeed on behalf of my client no matter what. There was a time when I was convinced that judges were always wrong and that if they ever got it right, it was by sheer accident. Some of you may think that the answer to the question: "What do you call a lawyer with an IQ of 25?" is: "Your Honour!"

In my case, as a barrister, the sense of judges as less than entirely rational was given some concrete reality early one Friday morning when I appeared against Mark Derham QC in the first application for special leave to appeal to the High Court before Justices McHugh and Gummow. I appeared for the applicant which had failed in the Full Federal Court and I was endeavouring to persuade the High Court that they should grant special leave to appeal. My matter was listed first. It was a very busy day in court: the room was filled with leading counsel, solicitors and many hopeful litigants coming to the highest court of law in this country seeking justice, clarity and certainty. I argued that the decision of the Full Federal Court was wrong and that it had not provided to others affected by the same legislation "sufficient certainty" of its meaning and application. To that McHugh, J. said:

> Common experience would indicate that you are unlikely to get certainty out of this Court.

That pretty much concluded my submissions. Recounting that experience reminds me of a particular radio exchange said to have occurred off the coast of Newfoundland, Canada, between a US naval ship and Canadian authorities. The exchange is said to have gone something like this:

Americans:	Please divert your course 15 degrees to the north to avoid collision.
Canadians:	Recommend you divert YOUR course 15 degrees to the south to avoid a collision.
Americans:	This is the Captain of a US navy ship. I say again, divert YOUR course.
Canadians:	No. I say again, you divert YOUR course.
Americans:	THIS IS THE AIRCRAFT CARRIER USS LINCOLN, THE SECOND LARGEST SHIP IN THE U.S. ATLANTIC FLEET. WE ARE ACCOMPANIED BY THREE DESTROYERS, THREE CRUISERS AND NUMEROUS SUPPORT VESSELS. I DEMAND THAT YOU CHANGE YOUR COURSE 15 DEGREES NORTH, THAT IS ONE FIVE DEGREES NORTH, OR COUNTER MEASURES WILL BE UNDERTAKEN TO ENSURE THE SAFETY OF THIS SHIP.
Canadians:	This is a lighthouse. Your call.

Perhaps the moral of the story is that judges are always right. It is a nice metaphor to think of judges as beaming light in the darkened waters of counsel's submissions. In any event, you may as well treat them as the lighthouse and deliver your killer points with caution.

My own view of judges has changed dramatically since I have become one myself.

There is one aspect of my time at the Bar that I would like to mention in particular and which, I suppose, has some connection with navy ships (if only because of the recent litigation involving the *Tampa* vessel). This Bar has an enviable reputation for pro bono work. We may not all agree about the causes taken up, but the commitment that many barristers have made to pro bono work has been fantastic and, sadly, too easily forgotten or overshadowed. Sometimes that work has had enormous consequences. The *Mabo* and *Wik* litigation was, I think, all done pro bono. Lead counsel was the late Ron Castan QC who, with Bryan Keon-Cohen (now also a QC), worked long hours and tirelessly on cases which many thought were hopeless at the time. Sometimes the work is forgotten because it is done by people not in the limelight at the time of the performance, or because subsequent events make us forgot their good works. The debt that this Bar owes to the late Judge Kent cannot be repaid. I personally know of no one who gave up more time than Bob Kent for the benefit of others.

Both Castan and Kent passed away in their prime. However, I am pleased to report that pro bono work is not a health hazard. On the contrary, it is a healthy activity and brings feelings of wellbeing. I commend it to you.

Although I have not really been asked to do so, I would like to thank on your behalf Barbara Walsh and her team for their work in putting together the course. I know that they are paid, but it is not enough for what they do. The Bar has been lucky in having a dedicated, and exploitable, staff who do more than could perhaps be asked of them. Thank you for that.

Finally, I do want to thank the Bar for this free dinner. It is the first truly free dinner I have ever had here. Indeed, it is only now as I look around at the new "art" work and compare what I see here with my new conditions at the Court, that I see how well off the Bar truly is. Those of you who are starting off a career at the Bar may look fondly at this wealth as something to aspire to. That reminds me of the story of the two Catholic priests who had dedicated their life's work to the relief of poverty. There they were in their little parish just out of Dublin ministering to the needs of the poor as best they were able in their modest and unassuming way. After many years their hard work had achieved some degree of general fame, and they were asked to speak at a world conference on poverty in New York. They were picked up from their parish just out of Dublin in a new turbo-charged Bentley and taken to the airport where they travelled first class all the way to New York sipping champagnes and cognacs. At the airport in New York they were collected in a stretch limousine and taken to the finest hotel with views overlooking Manhattan. The conference proceeded for a number of days during which the delegates ate fine food and drank the best wine. Eventually it came their turn to deliver a paper on poverty which they did with much applause and effect. Eventually it came time for the conference to end. The two were collected from the conference centre in an even bigger stretch limousine and taken to the airport from which they travelled, again first class, all the way back to Dublin. Again they were sipping fine wine and cognacs, although in silence and in reflective thought. The silence was finally broken minutes before touchdown when one said to the other "Well, Father Patrick, if that was a conference on poverty, the one on chastity is bound to be a corker".

To the most recent readers, welcome.

The Objectives of the Legislative Council Constitution Commission

Professor The Honourable George Hampel QC

Any progressive modern democratic society must, from time to time, examine its institutions and if necessary look for ways to improve their operation in the interests of the community. For some years now there have been questions asked about the operation and effectiveness of the upper house in Victoria.

I have been appointed with my fellow Commissioners The Honourable Ian Macphee AO and The Honourable Alan Hunt AM as the Constitution Commission Victoria to consider the structure, powers, and practices of the Legislative Council, as well as the number of members and the way they are elected.

THE Commission began its work by publishing a discussion paper designed to raise, in as simple a way as possible, many of the issues which are raised by our terms of reference. We established a website designed to inform and receive comments and questions during the whole process. The Commission is committed to having a broad consultation process that will provide the foundation for our report. This we believe is the first Commission that will review the governance of Victoria and the operation of the upper house on the basis of consultation and public opinion.

Our next step was to hold public seminars at which papers were presented by leading academics with different points of view and discussion encouraged. We then undertook a serious of public consultations in regional Victoria at which members of the public, local council members, and politicians both present and retired, made comments and submission. We also met with a number of councils, who expressed interest in the review of the upper house. This was followed by a number of public consultations in metropolitan Melbourne and some of the metropolitan councils. We then held a further seminar with individuals with special interests and knowledge of the operation of Parliament.

To aid it in carrying out its work the Commission has formulated a number of objectives which are:

- Stimulate interest in and understanding of Victoria's parliamentary and government system, and its Constitution.
- Consider suggestions for change to improve the effectiveness of some aspects of the parliamentary system through:
  - — responsiveness to the community's needs, aspirations and views;
  - — respect for the rights of the majority, minorities and individuals;
  - — balancing economic, social and environmental objectives;
  - — strengthening the accountability of the Parliament to the community;
  - — maximising openness and transparency;
  - — the application of fair and democratic principles;
  - — fostering a capacity to meet the challenges of a changing social, economic and technological environment.

One of the key issues the Commission has to address is whether the Legislative Council acts and should act as an effective house of review. Some of the features of a house of review have been identified as:

- Bringing a range of different perspectives to bear on public policy.
- Scrutinising Government activities, policies and legislation, together with an ongoing oversight of human rights issues raised by Courts, administrative tribunals and ombudsmen.
- Identifying points of concern and requiring the Government to justify or reconsider its policy intentions.
- Allowing more time and opportunity for consideration of legislation.
- Amending and improving legislation or, in some cases, disallowing it.
- Representing strong regional interests.

Delaying the passage of legislation may allow more time and opportunity for scrutiny by members and by interested or affected parties. The issue also arises as to what processes should be adopted to improve legislation and the criteria against which legislative proposals should be reviewed. These criteria may include issues such those covered currently by section 4D of the *Victorian Parliamentary Committees Act 1968,* such as the impact on rights, freedoms or personal privacy or other considerations.

However, in considering the role of the Council, the Commission will also have to consider its relationship with the Legislative Assembly and what some may see as the possibility of it interfering with the Government's "mandate".

The Victorian Legislative Council has made comparatively little use of committees of its own members, favouring committees established jointly with the Legislative Assembly. The Commission will be looking at whether the Legislative Council could use committees more effectively.

The Honourable Ian Macphee AO, the Honourable Alan Hunt AM, and Professor the Honourable George Hampel QC.

The relationship between an effective committee system and the voting system used to elect members of the Legislative Council will also be looked at. The Australian Senate committee system did not reach its full potential until a broader range of members began to be elected to that House.

In Victoria, elections to both Houses use the preferential voting system used for House of Representative elections. The Senate is elected using the proportional representation system. The Commission will look at most appropriate voting system for the Council and will examine the differences between the preferential voting system and the proportional representation system.

We will publish shortly a second paper distilling the issues and options that have arisen during the course of the consultative process. The Commission will be seeking further comment and feedback on that paper to aid it in the formulation of its final report, which is due by 30 June 2002.

Further information about the work of the Commission can be found on our website at www.constitution.vic.gov.au. The Commission can also be contacted at its office at Level 5, Shell House, 1 Spring Street, Melbourne 3001 or by telephone on (03) 9666 5401.

The Commission's aim is to contribute to the good governance of Victoria in the interests of its community within its terms of reference. Recommendations will be based on wide consultation. All members of the Victorian community are encouraged to contribute to the work of the Commission.

Our work has the side benefit of assisting further education. Our discussion paper and hopefully our report will be used at schools and universities and other educational centres in the future.

Barristers as individuals may well be interested in having some input into this process. It is after all an area in which lawyers can make a significant contribution, particularly when it comes to the role of the upper house and the way it may be possible to improve its operation. An upper house that acts a genuine House of review, perhaps with more independence from party political pressures, will give the public confidence in its role and its value.

BCL Appoints New CEO

Daryl Collins

BARRISTERS' Chambers Limited has appointed Mr Daryl Collins as the company's Chief Executive Officer.

Daryl was also invited onto the Board of BCL and has accepted a position as a director.

Daryl comes to BCL after having extensive senior management experience with BHP (now BHP Billiton) including overseas and international experience in marketing, accounting and operational management of aspects of BHP's businesses.

The purpose of creating the new position of chief executive officer was threefold. First, the directors of BCL believe that the task of managing BCL was becoming increasingly complex and time consuming. The appointment of a CEO ensures that many of the necessary activities of BCL, such as renegotiating leases and dealing with the company's bankers, can now be performed by the chief executive officer who has substantial practical experience and expertise in this area. A full-time CEO will have the time to attend to these matters without the "distraction" of professional practice. The appointment also enables the Board to have independent business expertise and input available to it in relation to the ongoing business activities of BCL.

Second, BCL is intending to embark upon a major project, being the complete refurbishment of floors 1–13 of Owen Dixon Chambers East. It is expected that this project will require substantial input from the directors, and the appointment of a full-time CEO will ensure continuity in BCL's management of this substantial project.

Third, the appointment of an independent CEO enhances the Board's ability to concentrate on the strategic development of BCL.

Daryl will work closely with BCL's secretary, Mr Geoff Bartlett, whose chief functions will remain in the financial and company secretarial areas.

Members of the Bar are of course welcome to approach the existing directors or Daryl or Geoff in relation to any BCL issues that they may have.

Competition

Did a well-known silk have a gig at the Evelyn Hotel, Brunswick Street, Fitzroy, on 18 August?

Has he given up his daytime job?

A decent bottle of champagne for the best caption.

Entries to Hartog Berkeley QC.

Dinner for Tenth Anniversary of McNaught List

IN the gothic grandeur of the Chapter House, St Paul's Cathedral, List G celebrated its 10th anniversary earlier this year. Almost 100 guests comprising members, former members, partners and honoured guests gathered for the dinner marking the establishment of the List.

Notably it was the late Ron Castan AM, QC's support of the establishment of the List that gave it instant credibility. The List Committee saw this celebration as an appropriate opportunity to recognise his contribution to the Bar, the profession generally and the List in particular. At the time of his passing, Ron was assisting the East Timorese in writing their Constitution, having renewed acquaintances with Jose Ramos Horta for whom he had acted on behalf of the East Timorese people some years previously.

Because of the enormous volume of pro bono work undertaken by Ron, his commitment to human rights issues and his interest in East Timor, the List Committee under the chairmanship of Noel Magee QC resolved that members of the List would be encouraged to contribute to a fund in his memory for the assistance of the East Timorese.

Dr Horta and Glenda McNaught.

We were delighted to welcome Jose Ramos Horta as our honoured guest, along with Mrs Nellie Castan and Melissa Castan. Mrs Susan Crennan QC introduced Dr Horta who gave a moving insight into the years of struggle for independence, the utter devastation suffered at the hands of the Indonesian military following the vote and their work in establishing an independent nation. It soon became evident that their needs are almost overwhelming — ranging from the most basic means of survival to clean water, education, medical care and the establishment of a stable economy.

The members of the List have responded generously by contributing at this point in excess of $70,000 to the fund. Moreover, apart from financial contributions, several members of the List have offered to spend time in East Timor on a pro bono basis.

We believe that such a project is a "first" for a List at the Victorian Bar and confirms the too often unrecognised generosity of the profession.

Goldberg and Merkel JJ.
Beth Charles and Rachel Goldberg.

Sylvana Wilson, Michael Colbran QC, Mark Settle and Chris Harrison.

Gail Hubble, Melissa Castan, Nellie Castan and Kerri Judd.

Holy Wars

PRESIDENT George W. Bush has never displayed much sensitivity for the nuances of language. Even its basic rules elude him. Consider a few of his famous blunders whilst speaking on public occasions, and try to imagine the qualities of his less-considered private discourse:

> More and more of our imports come from overseas.
> What I'm against is quotas. I'm against hard quotas, quotas that basically delineate based upon whatever. However they delineate, quotas, I think, vulcanize society.
> If you're sick and tired of the politics of cynicism and polls and principles, come and join this campaign.
> You teach a child to read and he or her will be able to pass a literacy test.

He speaks in semantic near-misses, and his grammar lurches from one rough approximation to the next.

During the incumbency of this linguistic torment, the world changed permanently and catastrophically. In the immediate aftermath of the terrorist attack on the USA, President Bush said that America and the rest of the free world would embark on a "crusade against terrorism". He soon changed his choice of words. It became a "war on terrorism". Bush may not be a master of the language, but his spin-meisters quickly saw that *crusade* had connotations which might give offence beyond the intended range.

Crusade is historically associated with the series of assaults by Christian forces against Muslim control of Jerusalem and the Christian shrine of the Holy Sepulchre. There were eight main crusades, between 1095 and 1270. The disastrous 4th crusade culminated in the sacking of Constantinople in 1204, during which the great library there was looted and destroyed. The only extant copies of many classical texts were lost to mankind. It was an event of cultural destruction almost unparalleled in history.

Etymologically, Bush's advisors were wise to drop references to a *crusade*. The word came to English via French and derives ultimately from *crux*, the Latin for *cross*. It was variously spelt *croisad*, *croissard*, *croisada*, *crusada*, etc. Specifically it meant a military expedition by the Christians to recover the Holy Land from the Muslims; and, by transference, any military expedition blessed by the church. In short: a holy war.

The equivalent expression in Arabic is *jihad*. The Western world has reacted with understandable alarm when Osama bin Laden declared a jihad on various nations, including Australia which managed to lift itself from safe obscurity to swaggering prominence in a single idiotic gesture. But it was President Bush who first invoked the language of holy wars.

Our headlong rush into conflict has brought into common currency a number of words previously misused or unfamiliar: *mufti*, *fatwa*, *sheikh*, *shah*, and *mullah* among others.

A *mufti* is a canonical lawyer in Islam: he gives decisions on questions of faith. The word is derived from the active participle of *afta*, which is the 4th conjugation of *fata*: to give a decision. A decision so given is a *fatwa*. A *fatwa* may be benign or dangerous according to the subject matter. Most English speakers first heard of a *fatwa* in connection with Salman Rushdie: it had been decided that, because he had written *The Satanic Verses*, he should be killed wherever he could be found. Even those who are immune to the charms of Rushdie's writings thought this was an unreasonable restriction on free speech. This very harsh and public fatwa gave fatwas in general a bad name in the West.

Mufti is commonly used in the West as referring to civilian clothes worn by one accustomed to wear a uniform. It is thought to derive from the passing similarity between the regalia of a mufti and the English affectation of dressing gown, smoking cap and slippers.

The *mullah* has various meanings in various parts of the Muslim world. In North Africa, a *mullah* is a king, sultan or other leader. Further east, and in the Indian subcontinent, a *mullah* is similar to a *mufti*. He is a man learned in theology and sacred law. The Qur'an uses *mullah* in reference to Allah. Thus, it is a word which maps almost perfectly onto the English *Lord*, signifying a position of leadership territorial, legal or spiritual.

Allah comes from *al ilah*: where *al* is the Arabic definite article, and *ilah* is the Aramaic for *God*. The holy book of Islam is the Qur'an. *Qur'an* means "recitation": it is a recitation of the various teachings of God as received by the prophet Mohammed over the course of 20 years up to his death in 767 AD. It is composed of 114 *surahs* (chapters), arranged according to length, with the longer surahs first. Since the earlier teachings were rather shorter, the book is arranged, roughly, in reverse chronological order. Incidentally, Islam recognises Moses and Jesus as prophets, and the God of the Qur'an is the same God worshipped by Jews and Christians: the crusades were more an argument about the messenger than about the message.

An essential feature of the teachings in the Qur'an is the importance of unquestioning submission to the teachings of the prophet. *Islam* means resignation or submission. It is the 4th conjugation of *salama*: "he was or became safe, secure, or free"; hence *salaam* as a greeting of peace, which is coupled with a gesture of submission. Self-evidently, *salaam* is cognate with the Hebrew greeting *shalom* (peace).

Many muslim words incorporate the name of Allah:

Allah'akhbar "God is great"

Bismillah (bi'sim illah) "in the name of God"

Hezbollah (hezb = party) "party of God": an extreme Shiite Muslim sect.

Inshallah "if Allah wills it"; God willing

Mashallah "what God wills must come to pass"

Like *mullah*, *sheikh* has meanings which vary with geography. Its original meaning was "an old man": specifically a man of 50 years or greater. (In times past, age and wisdom were seen as functionally related. This philosophy was temporarily displaced when the baby boomers graduated from university, and was rediscovered when they began to collect their super-

annuation. The process continues, with resistance from Generation X). A *sheikh* is the chief of an Arab family or tribe; the leader of an Arabian village. It is also applied to heads of religious orders, heads of learned colleges, heads of towns or villages, to learned men generally. It is also accorded to those who have memorized the entire Qur'an at whatever age (a fair achievement, since it is about 300 pages long).

Although closely related in sound and meaning, the *shah* is etymologically unrelated to the *sheikh. Shah* is Persian for *King*. It has left one important trace in English. In that most civilized form of warfare, chess, the game ends when one player places the opponent's king in a position from which it cannot escape. The King is not formally taken, but it is unable to move to a position where it could avoid being taken. The victor announces "checkmate". That triumphant declaration is the anglicised *shah mat*: the King dies.

The crusade I began with was once a *croissard*, which is reminiscent of *croissant*. They are not etymologically related, but there is a connection between them. While *croissade-crusade* came from Latin *crux* (French *croix*), *croissant* is French for *crescent*. In 1683, Vienna was struggling to survive a seige by the Ottoman Turks. A Pole named Kolscitzky, who was learned in Turkish, came to their rescue. He escaped through enemy lines to reach the Duke of Lorraine, who hurried to relieve the city. The Turks were repelled and Vienna was saved. Kolscitzky became very popular and famous. He persuaded a baker to produce a sweet bread roll in celebration of Vienna's victory over the Turks. It was shaped like the crescent on the Turkish flag.

We call them *croissants* because at some point the French took ownership of this Polish-Austrian idea. The crescent they imitate refers originally to the new moon as it grows towards the first quarter: the word comes from the Latin *crescere* to grow (from which we also get *crescendo*, and *increase*). As a new moon grows it is a *waxing crescent* moon (a tautology); after the first quarter it is *waxing gibbous* (from the Latin for *hump*) and then full. As the full moon declines, it is *waning gibbous*, then after the last quarter it is *waning crescent* (a contradiction in terms).

Incidentally, during his perilous journey, Kolscitzky had learned how to make coffee. After the seige ended, he came by a sack of coffee beans abandoned by the retreating Turks. He was the only person in Vienna who knew what coffee beans were for. He opened a café which quickly became famous for the drink and popular for its croissants. He served the coffee with milk and honey, a precursor of the style now known as Vienna coffee. Although the French stole the croissant, they had the good sense to leave Vienna coffee to the Viennese.

Julian Burnside QC

The Goodness of the Paperworkers

Nemeer Mukhtar QC

THERE is something human, *menschlich*, in buying a newspaper from a street seller. My mind's ear has recorded childhood memories of the *Herald* boys near Flinders Street railway station in the late 1960s who held high the final edition of the evening paper and beseeched, "Get ya Her-ald!" with a gusting inflexion on the second syllable. The top performers on the coveted street corner positions gave their calls a mystique by making them barely coherent, like a sharp whipped bleat. There was a bloke near St Paul's cathedral who included a shrill whistle as part of his individualised call. They earned tips for the performance. The sounds were strange and city folk flickered to listen as if to recognise the sound of a native bird. My mates and I used to mischievously imitate them.

Those sellers and their calls disappeared with the evening newspaper. The few street vendors now around the city are anything but boyish, and those who do not depend on sales of confectionary or sirenic magazines look anything but pleased to proclaim the availability of the daily news.

The two paper men who sell papers outside Owen Dixon Chambers East had, to my eye, an amusing pleasure with people despite the uncomfortable conditions. I have seen them both in the rain, in the cold, eating out of a bag, sometimes clasping for the heat from a plastic cup of tea. In summer, I have seen them baking in the bituminised sun, sometimes with a wet handkerchief around their necks for relief. Black newsprint hands. Always circumspect. On approach they look at the buyer, they *fold* the paper, and they *hand* it over. That is the mode of personal service for the delivery of the news of the world. But you'd reckon they could pick a mug a mile off.

They gained my curiosity after I once gave what must have been considered to be a handsome tip. I was cordially asked: "What's ya' name mate? You a barrister?" I hesitated. Mine is a testing name to the unfamiliar. I state my full name to them, not carefully. They each spontaneously said it back to me, correctly and sweetly, and they do so at every purchase as if it was their responsibility to know and to remember names. And it once was. Here is their abridged story.

The paperworkers: John Senior on duty outside Owen Dixon Chambers East. Ron was at home caring for their aged mother.

These two paper sellers are brothers. The oldest is Wilfred John Senior, aged 66, known as John. His younger brother is Ronald Peter Senior, aged 53. They are both bachelors and live with their 83-year-old widowed mother in a house at Braybrook provided by the Ministry of Housing. Each day they rise at 4.30 am to pick up the newspapers from the supplier at Banana Alley and are ready to sell by 5.30 am. They work till noon. What they earn would be pocket money for many children, yet there is nothing else they wish to do, and they wish to work nowhere else than in the milieu of Owen Dixon Chambers.

John and Ron are two of four living children of Richard Albert Percival Henry Senior deceased and Daphne Violet Isabel Senior (nee Shaw), both Tasmanian. Their father was a carpenter by trade and worked around Hobart. He was also a yachtsman who with crew won the Hobart Cup four times, according to John. Their mother was married at 16, having left school at 13 to work as a chamber maid. John and his older brother Herbert were born in Glenorchy and then lived in a country town of Sandford. They did schooling by correspondence. John's memories of life in Tasmania are of rabbiting, fishing and bushwalking. There were only three or four other families in the town. He says his biggest thrill was occasionally seeing an American western movie.

The family came to Victoria and lived in their aunt's house in South Melbourne. Dad worked as an operator at the Batman telephone exchange. The oldest son Herbert became a jump's jockey at Warrnambool for the trainer Tommy Hughes. The family then moved according to where they could find housing. That was in Tylden, a small town between Woodend and Kyneton, where Ron was born. John did some schooling there but confesses to a total lack of interest in studies. He says Tylden was a good place to grow up, and his main recreation as a boy was rabbiting. "Our dogs would start barking, and then the neighbour's dogs would join in, and I knew I just had to go rabbiting." He adds mistily: "Mum was a terrific cook. Dad was doing odd jobs around the area like potato digging. We loved cricket. We loved football."

Their greatest thrill was obtaining a permit from the Melbourne City Council to have the "silver bullet" news stand to replace the shanty canvas-covered frame. Ron explains: "We got the barristers to sign a petition to get the silver bullet stand from the city council. It was headed by Dyson Hore-Lacy."

The next move was to Frankston where Ron and John's parents managed a fish and chip shop in Bay Street. They lived on top of the shop premises. By that time, John had left school and was working for a local newsagent before becoming an office boy in the valuation section of the Land Tax Office in the city.

The Senior family became re-dependent on the Housing Commission who sent them west to a home in Braybrook in which they lived for 43 years. Over time, their two sisters Margaret and Beverley married and left home, and their brother Herbert moved to South Australia. Ron says that Herby's activities as a jockey got him interested at a very young age in gambling. Braybrook, in those days, he says was a swampy area and the SP bookie worked behind a scout hall across a paddock. There was not a lot to do in Braybrook and most boys played football. Ron was not interested in any sport except wrestling, and spent most of his time laying bets for others with the bookie. Ron's life at Tottenham Technical School did not go beyond Form Three. By then, his father was seriously ill and unable to work, making it necessary for him to leave school and go to work. "They were devoted parents," Ron says with conviction, "and it was a happy marriage. We were never well off but we were a very happy family."

Their father died in 1964 when Ron was aged 16. From them on, the relationship between the two brothers and their mother has been one of total devotion.

Both Ron and John spent all their working lives at the general post office in Bourke Street. John spent 40 years as a mail sorter. He stopped in 1986 after being diagnosed with blood cancer. Mail sorting is the only job he has ever done and he says it explains his ready familiarity with names and addresses and his preference for working in the heart of the city. Ron spent most of his working life as a city postman. He started out on a round in Elizabeth Street, delivering mail on foot three times per day. His round later expanded to wider Melbourne up to Chinatown. He learnt to manage Chinese and Greek names. The restaurateurs in Chinatown would feed him, the accountants did not charge for his tax return and a well known firm of solicitors did his will for free, he recollects with pride. Racing tips were given by the building caretakers and the lift drivers.

They have been selling newspapers since 1986 and speak fondly of their familiarity with barristers. Their greatest thrill was obtaining a permit from the Melbourne City Council to have the "silver bullet" news stand to replace the shanty canvas-covered frame. Ron explains: "We got the barristers to sign a petition to get the silver bullet stand from the city council. It was headed by Dyson Hore-Lacy. He did all the work, without charging us. He will be in our hearts." I ask how other barristers, judges or magistrates treat them. "Many barristers have said that if we ever got into trouble, they would help us without charging. Michael Adams [*scil* the ex Chief Magistrate] once said to us that if we ever left, he would call the police and make them bring us back. Some of the Judges come for a paper. They have chat and then walk away laughing." I ask if they know the barristers' clerks. "Some of them are very good to us. Foley's office, Peter Roberts and Duncan's let us use the phone to ring home."

What was your most unpleasant experience outside Owen Dixon Chambers?

John becomes solemn and tells me that someone once stole $144 from his money tin at the stand. When I asked what was the happiest day in his life, he says it was the day when a barrister, on learning of the theft, gave him $150 and asked for $6 change.

I ask about marriage. It has never appealed to them they tell me separately. Nothing to do with sexuality, they each hastily say. They did not want the responsibility and were always happy at home with mum. John's interests are the Western Bulldogs and the Test Cricket and going with his brother to the dogs or the trots. Ron still loves the horses, dogs and trots. Their social life? It is to be found at the Braybrook hotel where they can play the pokies, sometimes have a meal, and see their friends. Have you ever been lonely, I asked John. "A few times," he says dreamily, "but not whilst I've got Ron and mum. There is nothing we wouldn't do for each other."

They have never travelled beyond seeing their now deceased brother Herbie in Adelaide. John's wish is to travel to the USA, he says, to see the wildlife such as bears and cougars, and to see cowboy country — just like the westerns. Ron is not really interested in travel because, he says dutifully, he has responsibilities as his mother's carer.

The Dred Scott Case

Julian Burnside QC

DRED Scott was born a slave in Virginia, in 1799. He was owned by Peter Blow. The Blow family moved to St Louis, Missouri, in 1830. Missouri had been acquired in 1804 in the Louisiana purchase. It had been admitted to the Union in 1820, as a slave State, as part of the Missouri Compromise. The Missouri Compromise allowed Missouri into the Union as a slave State, but otherwise prevented the admission to the Union of slave States above 36°30' north latitude. In effect, it guaranteed that slavery would not spread to the other States in the Louisiana Purchase. It had been a hotly contested measure. Since Eli Whitney had invented the cotton gin in 1794, cotton had been a great source of wealth in the southern States, but its profitability depended on slave labour to pick the cotton.

In 1830, Blow sold Scott to Dr Emerson, an army surgeon. Emerson took Scott with him to his various postings. They spent the next 12 years in free States, principally Illinois. They returned to St Louis in 1842. Emerson died in 1846. His executors were his wife, and her brother John Sanford.

In 1846, Scott sued Mrs Emerson in the St Louis Circuit Court. In form, it was a petition for freedom, based on the fact that he had spent years in a free State, and was therefore released from slavery.

Judge Alexander Hamilton heard Scott's case. A technicality in the evidence led to its failing. The Judge granted leave for a new trial. He won; but the decision was reversed by the Missouri Supreme Court in 1852.

By this time, Mrs Emerson had remarried. Her new husband was an abolitionist. She made over Scott to her brother and co-executor, John Sanford. Sanford lived in New York. Thus Scott was able to sue in the Federal jurisdiction, since the suit was between residents of different States. The action was for assault.

Sanford (erroneously called *Sandford* in the Court record) filed a plea in abatement on the basis that Scott was a slave and therefore not a citizen. Accordingly, so the argument went, there was no suit "between citizens of several States" and the Federal jurisdiction was not attracted.

The matter was argued in December 1855, and was re-argued in 1856. Powerful interests wanted to retain the institution of slavery: American plantation owners, as well as English manufacturers and merchants. Slavery had been abolished in Britain and its Colonies by the *Emancipation Act 1834*, but that did not prevent English commerce from benefitting from it indirectly. Such was still the position when Roger Casement undertook his tour of investigation in the Congo Free State (1901–04), and Brazil (1906–11).

The first question in issue resolved to this: was a slave capable of being a citizen under the Constitution, so that his action against a citizen of another State would attract the Federal jurisdiction?

Chief Justice Taney and Justices Wayne, Nelson, Grier, Daniel, Campbell and Catron said that the answer to the first question was No. Taney J said:

> The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? *We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution*, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, *they were at that time considered as a subordinate and inferior class of beings* who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them . . .
>
> They had for more than a century before been *regarded as beings of an inferior order, and altogether unfit to associate with the white race* either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. (*emphasis added*)

The ideas expressed, and the intensity of the language used, strike the ear as shocking, especially in light of the introductory words of the Declaration of Independence (1776):

> . . . We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Taney J dealt with those words in this way:

> The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included . . . for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted . . .

McLean J (dissenting) did not agree in the result on this issue, but expressed himself in language not much more felicitous than that of Taney J:

> In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and, in this view, have recognised them as citizens, and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of

> Louisiana and Florida . . . (per McLean J at 533).

Curtis J (dissenting) found in the words of the Constitution ample authority for the proposition that a slave could be a citizen of the United States.

The second question was whether a slave could become a free man by entering a free State. The question had precedents in English case law. In 1678, it had been held that if a Negro slave came into England and was baptised, he thereupon became a free man. If he were not baptised, he remained "an infidel" and was not freed: *Butts* v. *Penney* 2 Lev 201. This rule was later relaxed: in *Smith* v. *Brown & Cooper* (1705) 2 Salk 666, Holt CJ had said:

> As soon as a Negro comes into England, he becomes free: one may be a villein in England, but not a slave.

In *Somerset* v. *Stewart* (1772) 98 ER 499, Lord Mansfield had decided on a *habeas corpus* application that a Virginian slave who had arrived in London must be set free. Lord Mansfield's decision is famous for its declamatory final sentence "The black must go free". It is less well-remembered that his Lordship had tried to avoid having to decide the matter. He had said in the course of argument:

> . . . Contract for the sale of a slave is good here; the sale is a matter to which the law properly and readily attaches . . . *The setting 14,000 or 15,000 men at once free . . . by a solemn opinion, is much disagreeable* in the effects it threatens . . . An application to Parliament, if the merchants think the question of great commercial concern, is the best, and perhaps the only method of settling the point for the future . . . (*emphasis added*)

The majority in Dred Scott's case held that the English authorities had no application in the different constitutional framework of the American Union. Specifically, the 5th Amendment prevented the slave being freed by passing into a free State. So far as relevant it provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

To allow that a slave be freed by virtue of travelling to a free State would involve a deprivation of property without due process. It is an interesting irony that the slaves were deprived of liberty without due process; but they were not considered "people" for Constitutional purposes.

For good measure, six of the seven judges in the majority held the Missouri Compromise to be unconstitutional, as contravening the 5th Amendment. Thus they struck down the measure which had, in effect, quarantined slavery to the southern States where the cotton industry was the principal source of wealth, and slave labour was the principal engine of that industry.

The *Dred Scott* case [sub nom *Scott* v *Sandford* 60 US 393] was decided by the US Supreme Court on 6 March 1857. It provoked bitter controversy. It was one of the precipitating causes of the American Civil War (1861–65). Abolition was the great question over which the war was fought. During that war, on 19 November 1863 Abraham Lincoln famously re-stated the founding proposition of the American Union:

> Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal . . .

In so saying, he was unequivocally advancing the cause of abolition. His address at Gettysburg is regarded as a clarion call for the abolitionist cause.

The *Dred Scott* case resulted in the resignation of Curtis J, and blighted the reputation of Taney J. He was a decent man and a fine lawyer. He had voluntarily freed his own slaves, at great personal cost, and had 35 years earlier described slavery as "a blot on our national character".

The decision was an exercise in strict construction which reached an unpalatable result by chaining the words of the Constitution to their historic origins. It is now regarded as a stain on the record of the US Supreme Court. In 1992 Scalia J. — himself no bleeding-heart liberal in matters of construction — said that ". . . the Court was covered with dishonour and deprived of legitimacy" by the Dred Scott decision.

On 28 July 1868, in the aftermath of the Civil War, the effect of the decision was overturned by the 14th amendment.

The Essoign Club:

The Kitsch Is Back!

Artist Nicole Newman with her work entitled "Guess Who's Comming To Dinner".

JUST when you thought it was safe to get out the Pro Harts and Ken Dones again, along comes "Kitsch to Yiddish", an exhibition of sculpture and prints by Nicole Newman at the Essoign Club that'll blow your socks off! Egad, man! There should be a law against it. Any more female flesh up there on the 13th floor and you'd think it was the Men's Gallery. There'll be wigs on the green, you say, if not a piece of lettuce stuck between the teeth or in a bit of horse-hair. Maybe you don't need that excuse not to appear in court, after all! *Anything*, not to confront the female figure head on, with profanities and fannies, forensic examinations of pubic hair, and all that post-Pop, post-Warhol, postmodernist, deconstruction stuff you've been avoiding at cocktail parties. Beware, the Kitsch is back!

Newman was born in Paris, but that didn't stop her. She grew up in Australia and studied at the National Gallery School of Art, Melbourne, and the San Francisco Art Institute in the 1970s, receiving a post-graduate degree from the Victorian College of the Arts. She held her first exhibition in 1972 at Realities in South Yarra, which was to be opened by Barry Humphries as Barry Humphries, before Harry M. Miller got wind of it and kiboshed his appearance. I first saw Newman's work at an unforgettable exhibition at Avant Gallery, in South Yarra, in 1975 (a couple of years before a wag painted a "j" in front of Avant, to make Javant — by a devotee of my poetry, no doubt). Newman brought all the detritus of contemporary pop icons into a serious artspace: gigantic Lifesavers, lollypops, icecreams, 1970s kitsch. The *pièce-de-résistance* ("Resistance is useless!") was a chandelier composed of four unbelievably vulgar female heads, "with disgusting peach-pink cheap-underwear coloured complexions, gold glitter, scarlet or striped wigs, scarlet thick lips, nasty sunglasses, gold doilies and garish plastic flowers in their hair, sprout[ing] a light apiece from the top of each head".* Dougie Lucas, eat your heart out!

Maitland Lincoln, Robyn Henderson and Justice Nathan.

Newman makes objects, at first "cheap plastic objects": vacuum-formed and often painted on the inside, like neon signs, such as transparent male torsos with huge luscious female lips for guts, which adorned the psychiatrist's office in *Alvin Purple*; or "brash and unrepentant females . . . and buxom beauties", "vigorous vulgarities",

*Carol Parker, Vogue Australia, May 1975.

Javant Biarajia, Mary Baczynski, Nichole Newman (the artist), Joan Mesiti and Judge Michael McInerney.

comic book heroines, brandname objects and ready-mades. (Her mother would complain, "Nicole, who's going to buy this stuff? Why don't you make it pretty?" When feminists defaced Newman's *Bio Beauty*, depicting a life-size brassy broad popping out of a jar of "vitamin enriched Bio Beauty" crème, at an exhibition in Sydney, she concealed the news from her mother — to avoid an "I told you so!" lecture.)

After extruded or vacuum-forced plastic, Newman's sculptures began to appear in plywood and zinc flashing — industrial or commercial materials. She began manipulating domestic forms, such as cutlery, into her work (e.g., *Brazen Polish*, 1989–90, with its row of 18 old silver-plate dinner forks set in a "suitcase" that doubles as a woman's torso, which could well be Eve's ribs, or a "cuntlery box"). The domestic is never too far away: the perky maidservant of French farce, the loyal post-Marilyn Monroe *hausfrau* of domestic cleaning agent television commercials, the *amoureuse* with the stiletto heels, the *fétichiste*, the — you get my drift.

Museums are full of objects, and magazines are full of sex objects — and, come to think of it, vice versa. Newman decided to combine the two. "The body is used as a compositional element in a satirical and provocative manner," she once explained. Newman plays with body image, the female form as male property, only to be subverted into wildest abandon men sometimes fear, and so laugh at. And if you look closely, you'll find in simple kitchen objects, such as scissors or knives, slender Siegfeld showgirls legs for tines and long vampish fingers terminating in tapered painted nails for blades.

As well as the body whole or part, Newman uses the tongue, especially in her works on canvas and paper. Once again, she subverts male relegation of the female (a woman's tongue is an object of scorn, out of bed). Her tongue-in-cheek is Mame-Loshn (that's Yiddish to you, Gloria). Now, Yiddish has for a century at least been disabused as a language, "the cast-off daughter", with a literature thought fit only for women and girls (it's too long a story to tell here, but it's fascinating and you should read Max Weinreich's *History of the Yiddish Language* for starters), so, Newman has confronted this by taking Yiddish clichés, proverbs and idioms and cutting them up (*gehakteh leber is beser vi gehakteh mesers*, "Chopped liver is better than chopped knives") into new expressions, new ways of seeing the world, lust for life, funny ways, humour. I mean, can we talk here? — This is the language that gives for "Get serious!", *Tukhes oyfn tish*! ("Buttocks on the table!" — *cf.,* *Mixed Metaphors* on the far wall, opposite the bains-marie). Newman blurs the boundaries — as she pushes them — between good taste and kitsch, what is socially acceptable and obscene, feminism and sexploitation, art and craft, and language and mishmash (a Yiddish word). As art critic Robert Nelson wrote: "The dimension of language that Yiddish foregrounds is the absurd. Newman's images are absurd in just this way."

Newman's "Kitsch to Yiddish" exhibition is Essoign of the Times.

Javant Biarujia is the author of Afternoon of a Fawn Cardigan. *Robert Kelly awarded him the Robert Duncan Poetry Prize in 1998 for his poem on Robert Mapplethorpe. Calques, a collection of poems currently in preparation with Monogene, features one of Nicole Newman's prints on the cover.*

Javant Biarujia

Invitation to Join the Bar's Cricket Fraternity

Q Why play cricket?

A
- fun
- friendship
- skills matching and in a variety of conditions
  - — weathers
  - — grounds
  - — times
  - — opponents
- aesthetic qualities of many grounds
- circles of friends
- hand/eye co-ordination improvement
- good way to avoid mobiles
- no longer — to polishing your "sledging" skills.

Q Why play for the Bar

A
- get to know a few more counsel
- meet a few new solicitors
- learn how to win and lose, gracefully
- show that you do not treat your batting or bowling or fielding lightly i.e. no easy beat
- all of the above
- drive your friends (and those closer) silly with tales of your exploits.

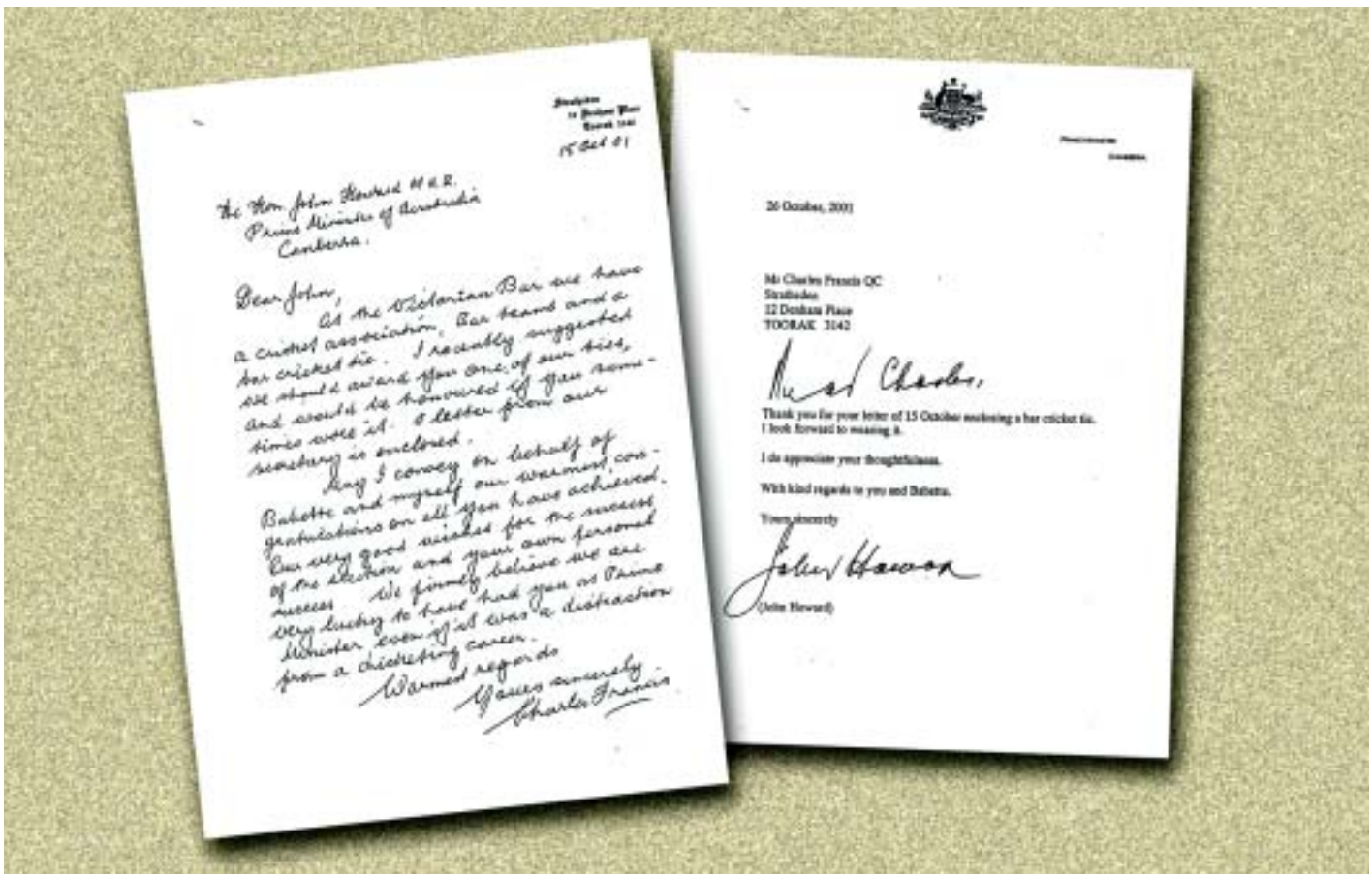
Q Why play for the Bar now?

A
- There are at least three games planned for 2001–2002:
  - — on 17/12/01 v L.l.V. (2 games — 2 × XI)
  - — on 15/1/02 v Singapore Club — (1 × XI)
  - — in late March 02 v MSJ — (2 games — 2 × XI)

Q How?

A Please ring either Chris Connor (7685) or Tony Radford (7737) both with List S.

Cricket Fans Write



Income Tax Text Materials and Essential Cases (3rd edn)

By Michael Kobetsky, Michael Kirkis and Ann O'Connell
The Federation Press 2001
pp i–xxvii, 1–635, Index 636–641

INCOME Tax Text Materials and Essential Cases is now in its 3rd edition. This edition has been revised to include the changes resulting from the reforms announced in *A New Tax System* (1998) and a *Tax System Redesigned* (1999) together with a new chapter on GST. Amendments to the book to cover developments after 1 May 2001 will apparently be available on the Federation website.

The text is primarily a teaching resource, however, some knowledge of tax is essential for all those involved in business and particularly for those advising on business transactions. The ubiquitous nature and influence of taxation considerations is highlighted by the GST requirements introduced on 1 July 2000.

All the major topics of tax law are covered including personal services, business and property income (Chapters 3–5), fringe benefits, capital gains and GST (Chapters 7, 8 and 18), partnerships, trusts and companies (Chapters 13–15), deductions (Chapters 10 and 11) and other incidental matters such as residency, timing, tax accounting and anti–avoidance measures (Chapters 6, 12 and 16).

The text contains a significant number of summaries and extracts from relevant cases together with references to other specific tax texts such as the *Master Tax Guide* and *Australian Tax Handbook*. This cross-referencing enables the reader to more fully explore issues identified by the use of this text where appropriate.

While no-one other than the tax professional can expect to be fully abreast of the current position in taxation, this book enables the user to have a clear grasp of general principles and concepts of tax law. This knowledge is a necessary adjunct for all those involved in or advising on the myriad business and commercial transactions occurring on a daily basis. This work will be useful to students and in addition is a practical resource for those requiring an overview of taxation principles and concepts.

P.W. Lithgow

Criminal Law (Text and Cases) (9th edn)

L. Waller and C.R. Williams
Butterworths Australia 2001

AS the back jacket states, it is an introductory text on the criminal law, with a collection of cases and commentary designed to explore complexities and stimulate further thought. The text is primarily a teaching guide, with authoritative judgments and the reasoning of principles major cases in each area, followed by a number of illustrations. This text on the criminal law is divided into three parts.

Part one comprises an introduction and general background including discussions of the theories of the law, its workings and concept of/principles of *mens rea* (the intent), *actus reus* appeals, aims of criminal law and mercy, and jury trials.

Part two covers substantive crimes including: assaults, sexual offences, murder and manslaughter, property offences and drug offences.

Part three general doctrines including attempts, the extent of participation, conspiracy and a range of defences such as insanity, duress, intoxication and those that are not dealt with elsewhere such as provocation (as a defence reducing murder to manslaughter), the book selects major principles and provokes thought by asking readers to consider different discussion papers and judgements and also compares and contrasts the English with Australian authorities. There are a number of companion titles. The book also examines proposals for change in a number of areas of law.

Further reading refers readers to interesting articles and reports including the subject of personality disorder, mental illness and preventative detention where the well known (infamous) case of Gary David is discussed.

R.J. Stubbs

Annotated Criminal Legislation Victoria

Gerard Nash QC
Butterworths

THIS text has been extracted from *Bourke's Criminal Law Victoria*, a two-volume looseleaf service which would be very familiar to those practitioners working in the criminal law area.

The decision to "extract" this particular text is a welcome one as it provides a handy, portable, and compact reference (without the need to carry a two-volume looseleaf set to court) covering the major piece of criminal law legislation in Victoria: *Crimes Act 1958*. This legislation is reproduced with commentary, providing an overview/discussion on each section including discussion of the relevant and major cases in the each area.

Useful are the internal cross references to paragraphs of the Act or other commentary where same or related issues are discussed in other contexts. The paragraph system of square brackets provides ease of use. There is an extensive index and also useful are the references to particular cases for specific points such as the English position as a comparison or the history of a particular section of the legislation.

The author breaks down the elements of each provision and sets out: generally the matters that the prosecution need to prove, matters for the defence to raise or consider, penalties, position at common law, discussion of meanings of words and phrases. This is a detailed text, an invaluable reference and a readily accessible tool for practitioners.

R.J. Stubbs

Fundamentals of Trial Techniques (2nd Aust. edn)

Thomas A. Mauet and Les A. McCrimmon
LBC Information Services 2001

AS one who has recently answered the call of the Bar and therefore having undertaken the Readers' Course this publication is of invaluable assistance in providing an overview of both the advocate's challenge and responsibilities in presenting a case. This book does not simply describe the procedures but rather is a detailed step-by-step "how to" reference with examples used for each procedure undertaken in a trial.

The authors go into great detail about the preparation necessary in conducting a trial. There is no doubt that some of the advice is common sense and would seem obvious to more experienced practitioners. But the delight in this book is in reading the examples, and acknowledging the penny drop when considering a real situation, such as building cross-examination/closing the gate, or cross examining on

documents, tendering exhibits (always a tricky area fraught with difficulties and tactical considerations).

The authors have, of course, drawn extensively from both the State and Commonwealth Evidence Acts and it is useful to have these handy to cross reference. As one would expect there is a concentration on examination in chief and cross-examination, so that a large proportion of the book deals with witnesses under these two conditions.

Each chapter offers signposts, and the books consists of: preparation for trial (including opening address), examination in chief, selecting and persuading a jury, opening address, exhibits, cross-examination, closing arguments and objections.

It is easy to read, well set out, and the examples used are drawn from both criminal and civil scenarios. This work is ideal for junior advocates but for senior practitioners there is always need for a handy reminder of how to do *that* particular thing. *Fundamentals of Trial Techniques* should be a fixture in every advocate's library.

R.J. Stubbs

Minister of the Crown: Vernon Wilcox

Published by V.F. and J.R. Wilcox
pp. 1–227, Paperback

This privately published "personal story of life, politics and people" contains cameos from history reaching back to the days before World War II as seen from the point of view of a former Attorney-General of the State of Victoria.

Vernon Wilcox held the seat of Camberwell for 20 years. He initiated the building of the underground rail loop and, as Attorney-General, it was he who gave his fiat to authorise D.O.G.S. to challenge State aid to non-government schools. In these reminiscences written with a simplicity and economy of style which make extremely easy reading, he gives a reader an insight into pre-war Melbourne and into life as a Cabinet Minister under Henry Bolte.

Geoffrey Blainey says in the foreword: "This book is quietly revealing about Bolte and his skill as a leader." It is equally revealing of the operations of the Liberal Party Cabinet during the years that Vernon Wilcox was a member of the Ministry. Although Sir Henry Bolte opposed the appointment of Vernon Wilcox to the Cabinet, once he was a member of the Cabinet Bolte supported him.

The dual role of the Attorney-General is illustrated by Vernon Wilcox giving his fiat to enable a challenge to be mounted, even though the Cabinet was opposed to that challenge.

It is not a book to sit down and read in one session. It is a book to dip into on a sunny afternoon. It will make very good holiday reading.

Copies can be obtained from the Law Institute Bookshop.

Gerard Nash QC

Conference Update

25–26 January 2002: Bangkok. 2002 and Beyond: The Asian Economies. Contact: Catherine Toft, International Bar Association, 271 Regent Street, London, W1B2AQ-UK. Tel: 44(0)20 7629 1206. Fax: 44(0)20 749 4460. e-mail: confs@intebar.org.

21–23 February 2002: Adelaide. Superannuation 2002: A National Conference for Lawyers. Contact: Dianne Rooney. Tel: 9602 3111. Fax: 9670 3242. e-mail: dirooney@leocussen.vic.edu.au.

16–20 March 2002: 10th National Family Law Conference. Contact: Patricia Allen, Family Law Section, Law Council of Australia. Tel: (02) 6247 3788. e-mail patricia@lawcouncil.asn.au.

27–29 June 2002: Edinburgh. Inaugural World Conference of Barristers and Advocates. Tel: (07) 3236 2477. Fax: (07) 3236 1180. e-mail: mail@austbar.asn.au.

2–5 July 2002: Prato, Tuscany. International Institute of Forensic Studies inaugural conference on Expert Evidence: causation, proof and presentation. Contact: Jenny Crofts Consulting on (03) 9429 2140.

7–10 July 2002: Paris. Australian Bar Association Conference. Tel: (07) 3236 2477. Fax: (07) 3236 1180. e-mail: mail@austbar.asn.au.

12–14 July 2002: Brisbane. 20th AIJA Annual Conference. Contact: Website www. AIJA .org.au/programs.htm.

4–7 October 2002: Brisbane. Biennial Conference 2002: Reconstructing "The Public Interest" in a Globalising World: Business, the Professions and the Public Sector. Contact: Susan Lockwood-Lee. Tel: (07) 3875 3563. Fax: (07) 3875 6634. e-mail: S.Lockwood-Lee@mailbox.gu.edu.au.

20–22 October 2002: Sydney. The AIJA's Third Technology for Justice Conference. Contact: Website at www.ALTA.org.au.

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