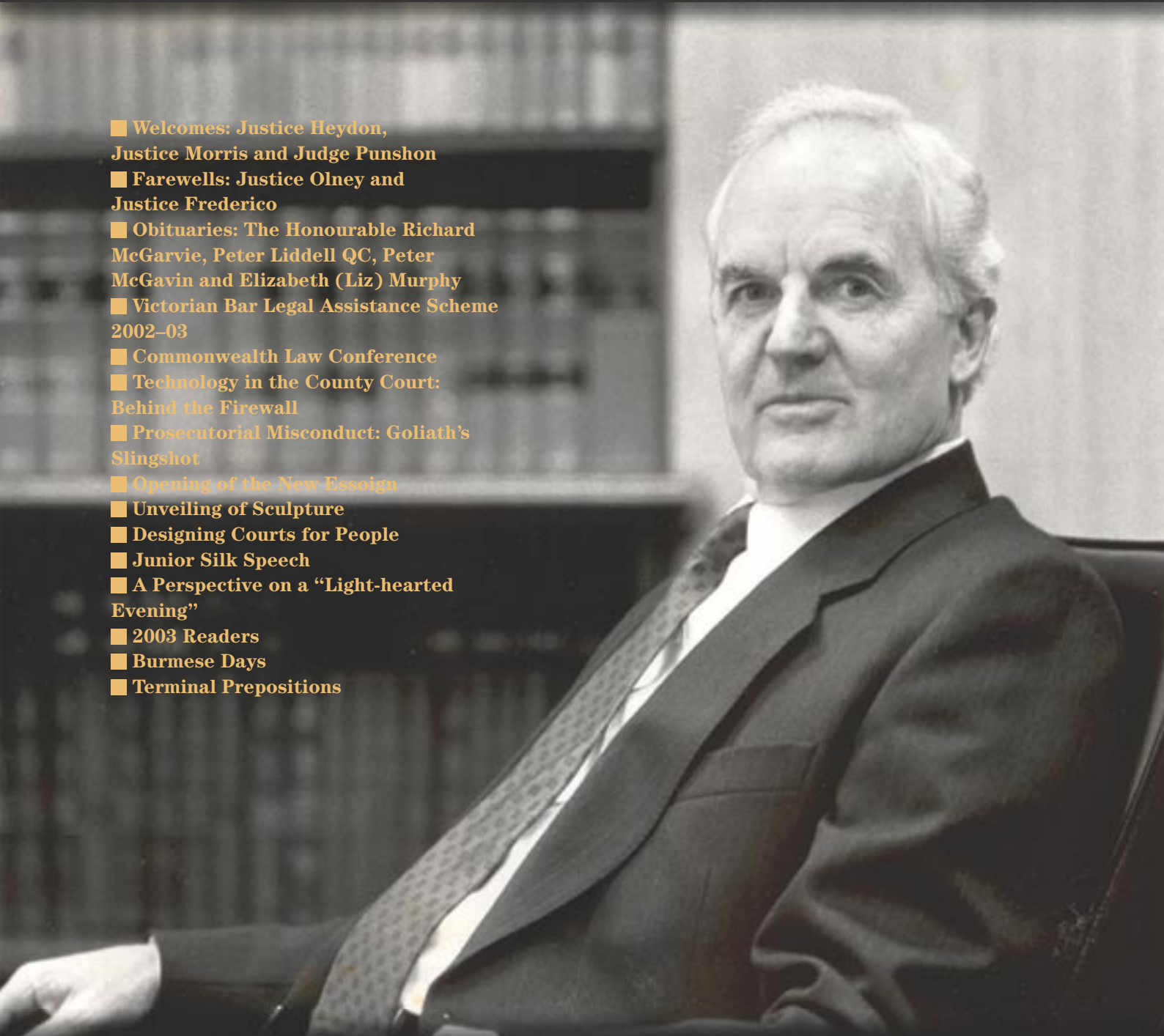


VICTORIAN BAR NEWS

No. 125

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WINTER 2003

- 
- Welcomes: Justice Heydon,
Justice Morris and Judge Punshon
 - Farewells: Justice Olney and
Justice Frederico
 - Obituaries: The Honourable Richard
McGarvie, Peter Liddell QC, Peter
McGavin and Elizabeth (Liz) Murphy
 - Victorian Bar Legal Assistance Scheme
2002-03
 - Commonwealth Law Conference
 - Technology in the County Court:
Behind the Firewall
 - Prosecutorial Misconduct: Goliath's
Slingshot
 - Opening of the New Essoign
 - Unveiling of Sculpture
 - Designing Courts for People
 - Junior Silk Speech
 - A Perspective on a "Light-hearted
Evening"
 - 2003 Readers
 - Burmese Days
 - Terminal Prepositions

Tributes to the Honourable Richard E. McGarvie AC

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VICTORIAN BAR NEWS

No. 125

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Contents

EDITORS' BACKSHEET

- 5 First Editor Combined a "Passionate Idealism with Realism"

CHAIRMAN'S CUPBOARD

- 7 Statistics Versus Obligations

ATTORNEY-GENERAL'S COLUMN

- 9 Tackling Violence — the Challenge of Genuine Leadership

CORRESPONDENCE

- 11 Letters to the Editors

WELCOMES

- 13 Justice Heydon
15 Justice Morris
17 Judge Punshon

FAREWELLS

- 19 Justice Olney
19 Justice Frederico

OBITUARIES

- 21 A Man Who Was Prepared to Listen: The Honourable Richard McGarvie
22 He Was Fair, Even-tempered and Wise: Tribute to the Honourable Richard E. McGarvie AC
25 Peter Liddell QC
26 Peter McGavin
28 Elizabeth (Liz) Murphy

LEGAL ASSISTANCE COMMITTEE

- 29 Victorian Bar Legal Assistance Scheme 2002–03

32 VERBATIM

ARTICLES

- 33 Commonwealth Law Conference
36 Technology in the County Court: Behind the Firewall
40 Prosecutorial Misconduct: Goliath's Slingshot

NEWS AND VIEWS

- 44 Opening of the New Essoign
48 Unveiling of Sculpture
50 Designing Courts for People
53 Junior Silk Speech
57 A Perspective on a "Light-hearted Evening"
58 2003 Readers
60 Burmese Days
63 A Bit About Words/Terminal Prepositions

64 CONFERENCE UPDATE

LAWYER'S BOOKSHELF

- 65 Books Reviewed



Welcome: Justice Heydon



Welcome: Justice Morris



Welcome: Judge Punshon



Farewell: Justice Olney



Farewell: Justice Frederico



Designing Courts



Commonwealth Law Conference



Opening of the new Essoign



Unveiling sculpture



Junior Silk speech



2003 Readers

*Cover: The Honourable R.E. McGarvie AC
(See report on pages 21–25).*

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for the year 2002/2003

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Telephone: (03) 9888 5977
Facsimile: (03) 9888 5919
E-mail: wilken@bigpond.com

First Editor Combined a “Passionate Idealism with Realism”

DEATH OF FIRST EDITOR

THE Honourable Richard Elgin McGarvie AC the first editor of *Bar News* died on 24 May this year. “Dick” McGarvie who retired from the Supreme Court to become Governor of Victoria in 1992 managed in a unique way to combine a passionate idealism with realism. A tribute appears elsewhere in this issue.

OF TERRORISTS AND WARS, OF NATIONAL SECURITY AND THE EROSION OF RIGHTS

Since 11 September 2002 governments in the “free world” have had a justification for proposing security controls for eroding individual rights — especially the rights of free association and free speech — in the name of national security.

In the USA, a nation commonly and inaccurately described as “America” it was said to be “unAmerican” to oppose the war in Iraq. In Australia it became “unAustralian”.

Words such as these, while amorphous and meaningless, carry a large emotive content. They suggest that the “dis-senter” is no longer a full member of the community to which he or she belongs or has betrayed that community. They carry a smear but no substance. They are ugly words which substitute emotion for reason.

It is disturbing that the “free society”, which the invasion of Afghanistan and the invasion of Iraq were designed to protect, finds it difficult to accept free speech when the views expressed are inconsistent with those of the establishment. Equally disturbing is the fact that today loyalty is seen as a one-way street.

There are detained a number of people, including at least one Australian, at the American Base in Cuba. They were captured in an undeclared war against the then government of Afghanistan, but, it is said, they are not prisoners



of war, and therefore are not entitled to the benefits of the Geneva Convention; they are not incarcerated in the United States, and therefore are not entitled to the protection of US law. They are people just “held” by the US authorities by virtue of the power which Mao Zedong said came out of the mouth of the gun.

In a democracy and in a “freedom loving nation” one would expect government to protect, so far as it could, the interests of its individual citizens. The Australian citizen held at Guantanamo Bay owes allegiance to the Commonwealth of Australia. Historically, and as a matter of present law, allegiance is a two-way relationship. The citizen owes a duty of fidelity and allegiance to the sovereign (now the State) and in return the sovereign (or State) owes a duty of protection to the citizen. As Field J (cited with approval in *Ex Parte Teh*) said in *Carlisle v United States*:

By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he

lives, or to his sovereign in return for the protection he receives.

In the aftermath of World War II William Joyce, “Lord Haw Haw”, was executed for treason because, although a US citizen, he held a British passport and was, therefore, “under the protection of” the King while he was broadcasting on Hitler’s behalf from Nazi Germany. It was the protection of the Crown which established his duty of allegiance and converted his speeches from Berlin to treason.

The Commonwealth of Australia, however, considers it is under no obligation to extend its protection — even in the form of representations to its American ally to comply with the rule of law — to an Australian citizen apprehended by soldiers of the United States in Afghanistan.

The argument that such a person is a terrorist misses the point. It equates to the argument that technical defences should not be taken on behalf of persons who drive under the influence of alcohol. It reveals the same ignorance, or abandonment, of principle which leads the layman to ask how you could appear for

a man who committed such dastardly crimes.

Among the freedoms we purport to believe in, and which we trace to Magna Carta and the Bill of Rights of 1688, are freedom from arbitrary arrest, equality before the law, the inability of the authorities to use torture and the right to silence. None of these freedoms, as it appears from newspaper reports, are available to those confined in Guantanamo Bay.

Once we accept the proposition that not all Australian citizens have the same rights or will be accorded the same protection by the State, it is only a short step to accepting the proposition, not only that membership of certain groups should be outlawed, but that such membership may properly be treated as justifying the detention of people without trial.

Fortunately, the High Court just over half a century ago (83 CLR 1) took the view that there was no constitutional basis for legislation of a much less draconian nature.

There can be no question that there are in existence groups which are properly described as "terrorist groups" and which, for whatever reason, are prepared to use random and horrifying violence against our society.

These groups wish to use violence to impose their will on what is loosely termed "western society". They are largely intolerant and "fundamentalist". But they reflect only one aspect of a worldwide movement to place "the cause," "freedom", "the State" or some political ideal above the rights of the individual.

We all believe in the rights of the individual, in equal opportunity, in equality before the law; but it seems we are not prepared to pay the price. The price of freedom is not just eternal vigilance; it is giving those whom you regard as "the enemies within" the same rights as those possessed by the "virtuous" members of the community.

The democratic state in which all men have equal legal, if not economic, rights is a relatively modern invention. Government of the people by the people and for the people did not even have the standing of a theory 300 years ago. Universal suffrage was unknown 150 years ago.

Once there are certain groups within our society, or certain individuals within our society, who do not have the full protection of the law, who may be imprisoned without trial or arrested "on suspicion"; against whom the executive may act without fear of judicial interference; we have moved away from the experiment

in liberal democracy with which we have flirted for such a short time and are on our way back to the security of totalitarianism or absolutism.

In which case, one must ask, what is it we are purporting to defend?

REALITY STRIKES IN FRANCE

According to the "Times Online" of 3 June 2003: "The French legal system is in danger of becoming unbalanced as male judges find they have become a small minority".

This imbalance in the French judicial system stems, it seems, not from any affirmative action program but from a difference in standards. According to Dominique Perven, the French Justice Minister: "The women are more serious in their approach, harder working, more determined and they stick to it better. I have to accept that they are of a better standard."

The result is that in France it has been suggested that male defendants and claimants could lose confidence in a system dominated by females; and Dominique Perven has suggested that a quota system could be introduced if men failed to obtain more posts through their own talents, although "there is no question of quotas for the moment".

It is hard to know what lesson we in Australia should draw from this — that affirmative action should be applied to solve any apparent imbalance? That domination of the judiciary by males is the "natural" order of things and domination by the female results in "imbalance"? Heaven forbid that we should draw the conclusion that women are cleverer, more hard working or more committed than men.

Perhaps it will come to pass that as the late John Birrell used to contend, the white Anglo-Saxon Protestant male will become an endangered species.

The comment by the Vice President of the French Magistrates Union, Veronique Imber, is worth quoting: "No one ever talked about quotas when the judiciary was dominated by men, as it always used to be." But she went on to "accept that it is not healthy when a profession is overwhelmingly single sex, whether it is men or women. We must find ways of getting men back into the judiciary, but quota is not one of them. We must encourage them, but we must not appoint any old idiot just because he happens to be a man".

Francoise Toillon, who is just finishing her judicial training course, said that the problem was one of men's makings, that

in an egalitarian appointments process they had allowed themselves to be marginalised.

It is to be hoped in this country we continue to appoint the best people to judicial appointments, irrespective of their sex. We believe that the number of women appointees in the last two or three years is an indication of the change in the shape of the profession rather than a reflection of any policy of affirmative action. It would be unfortunate to implement such a policy now with view to reversing preferences when the balance swung the other way.

NEW ESSOIGN CLUB

The new Essoign Club has opened with a flurry of activity. It provides a more congenial environment, is more readily accessible and bodes well to be a centre of social activity. We congratulate all those involved in the transition.

THE COST OF DISCIPLINE

It appears that the figures quoted on the cost of discipline in the last issue of *Bar News* were inaccurate. The cost of discipline has not grown at the rate we indicated. A letter from the Ombudsman correcting that error is published in this issue.

The article by the Chairman dealing with the role of the Ombudsman, which was published in the same issue, attracted a letter from the Ombudsman correcting "inaccuracies contained in" that article, and which was circulated to members of the Bar in May. A letter in response from the Ethics Committee is published in this issue.

The Editors

Corrigenda

The Autumn issue of *Bar News* contained some errant captions to photographs as follows:

P. 38 Top right hand photo should read Judge Rachelle Lewitan.

P. 38 Buddhist temple photo captions should read:

(Top) Angela Perry, Oscar Roos and Tom Rowan.

(Bottom) Judge Rizkalla, Chief Magistrate Mr Ian Gray and Robert Lancy.

P. 39 Top left hand photo should read Byrne J, Paul Anastassiou S.C. and E. Teri Konstantinou.

P. 40 Judge Sheldon should read Judge Shelton.

Statistics Versus Obligations

RECENT newspaper reports present a conflicting message for Victorian barristers concerning their economic circumstances.

The *Financial Review* (26 June 2003) reported that:

... barristers have emerged as some of the most profitable workers in the market for professional services ... At the Bar, the money keeps rolling in. Average incomes for barristers are \$312,300 and top Sydney silks leave the rest of the nation behind.

The following day the same newspaper, citing as its source the Australian Bureau of Statistics, stated the Victorian Bar had suffered a body blow.

The Australian Bureau of Statistics has revealed that average incomes at the Victorian Bar have been overtaken by those at the Bar of Western Australia.

It reported a national average income for barristers of \$312,300 and an average income for Victorian barristers of something less than \$250,000.

It is no secret that the fee income of our NSW brethren has traditionally been higher. There are, no doubt, numerous factors to explain this phenomenon, including the marking of so called "disappointment fees", a practice not adopted by the Victorian Bar. Also, it may be that there is greater restraint in the marking of fees by Victorian barristers.

Mark Twain wrote: "There are three kinds of lies — lies, damned lies and statistics." At the very least, statistics often do not reveal the whole truth, or tell the whole story.

For example, barristers committed to legal aid work — truly providing "access to justice" — earn very much less than any sort of average. The 1997 Price Waterhouse review commissioned by the Bar Council in connection with legal aid fees estimated the maximum income a criminal law barrister performing legal aid work could earn at a very low figure. And the research of the Bar Council working with the Criminal Bar Association throughout 2003 indicates that there has been little, if any, change in that area.



Anecdotal evidence from a random sampling of barristers' clerks indicates that court appearance work has been slow for the whole Bar in 2003. The combination of a long Easter break, other public holidays, and lack of availability of judges may be in part an explanation.

On the other side of the coin, in the last two years, after a succession of major commercial trials in Melbourne, the pendulum, for commercial work, seems, for a time, to have swung in the direction of New South Wales.

In any event, the Bar Council has asked for details of the Australian Bureau of Statistics figures and proposes to examine all relevant data and issues. The information is of great importance in an era of increasing costs of practice and the extensive financial commitments of the Bar.

Statistics are one thing. There is, however, great optimism at the Bar. This is reflected in the decision to renovate Owen Dixon Chambers East. The decision to renovate ODCE, like the decision to build it, was not an easy one. The substantial financial commitment, the recognised disruption to barrister tenants could already be said to be justified by the renovated first floor of that building dedicated to common Bar areas — the new Essoign, Readers' course facilities, Griffith Library, Forsyth Room and Bar Council Chamber.

Confidence in the future of the Bar is

also evident in the 80 or so readers who sign the Bar Roll each year, and in the continuing substantial voluntary contributions of numerous barristers to the community of the Bar, on the Bar Council and its many committees, as appointees on numerous external community legal and educational boards and committees, and through the many subject area Bar Associations.

All this indicates the preparedness of the individual barrister to make significant commitments. That commitment on this scale is forthcoming from a group of 1500 lawyers, comprising different backgrounds, each independent of the other, each experiencing the "joys and horrors" the "rewards and drawbacks" of a barrister's life, says much for the underlying values that are the foundation of the voluntary association which is the independent Bar.

It would be easy to lose sight of the core values in the day-to-day difficulties of maintaining a practice and paying the rent or insurance, not to mention putting food on the table. Yet, the barrister exemplifies the notion of the independent legal profession perhaps best described by Sir Owen Dixon:

Because it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the Bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence, and owing allegiance to none.

The separate duties owed by the barrister to the court and to the client are not conflicted by partnership or the commercial pressure of bending to a client's wishes. A rule of practice fundamental to that independence is "the cab rank rule" — the requirement that the barrister accept a brief and not discriminate in any way concerning the acceptance of that brief.

In a paper delivered to the Commonwealth Law Conference in Melbourne in April entitled "The Immunity of the

Advocate” Charles JA referred to a passage from the judgment of Brennan J in *Giannarelli* which explains the importance of the rule:

Whatever the origin of the rule, its observance is essential to the availability of justice according to law. It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal presentation should be available only according to the predilections of counsel or only on the payment of extravagant fees. If access to legal representation before the Courts were dependent on counsel’s predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful. If the cab rank rule be in decline — and I do not know that it is — it would be the duty of the leaders of the Bar and of the professional associations to ensure its restoration in full vigour.

No other professional is bound by such a rule. Neither the accountant, the physician nor the solicitor is bound to accept the unseemly client.

We recognize the rule as Brennan J observed as an essential element of independent representation. I do not believe the rule is in decline at the Bar. On the contrary, as barristers, we recognize the importance of this rule — it is fundamental to the justification for the Bar’s continuing existence. Further, whilst the thrust of my comments in this article are not directed at a defence of the advocate’s immunity, the comment of Charles JA in his paper on this aspect is worthy of repetition.

Insofar as the cab rank argument bears on the question of the advocate’s immunity, it is not merely that barristers may be unfairly exposed to vexatious actions. A much more serious consequence is that if barristers lose their immunity for in court negligence, it is likely to become more difficult, if not impossible, to insist upon compliance with the rule ... I question, with respect, whether those who discount the importance of the cab rank rule have given sufficient weight to this possibility when concluding that the advocate’s immunity should be abolished.

Another aspect of “commitment” for a barrister is that of service — service to the community. As members of the Bar we assert public obligations of service to the community and we accept that such obligations constrain the individual pursuit of self-interest. This explains our ethical rules. It explains the “cab rank rule”. The acceptance of public obligation is a hallmark of a “profession”. The independent Bar strongly promotes this principle of service. Yet I perceive in the wider legal profession this attribute is substantially eroded — that the culture of business, profit and competition is consuming the notion of conduct for the public good.

How is the community to view the phenomenon of the conglomeration of large legal firms — firms driven by budget, billable hours and profit. The nature of legal services so offered was colourfully portrayed by Heydon JA in a paper to mark the centenary of the New South Wales Bar:

They moved to high rise suites which were Babylonian in their splendour ... Less and

less was the relationship one between professionals and clients in which the overriding goal was the collaborative performance of a task in a skilful and ethical way. More and more, it was a relationship between business and customers in which the overriding goal on both sides was the making of profits.

The blind pursuit of profit, the unquestioned implementation of competition policy and so-called business principles endangers “professional” life.

I do not here use the word “profession” as a “badge of exclusivity”. Rather as Gleeson CJ has stated:

It should be seen as an acceptance of responsibility and encouraged. Provided they understand the reason for their existence, and accept that the public interest is the ultimate test of the legitimacy of their practices, the professions are more necessary than ever and well worth keeping.

The Bar must continue to maintain those core values that legitimise “professional” life. It would be in the interests of the national profession if its peak body were to re-examine some of the more recent initiatives proposed, particularly so called multi-disciplinary practices. Whilst average income and statistics are of importance, it would be in the interests of the national profession to ensure a continuing focus on the lawyer’s underlying duties and obligations. By so doing, we better ourselves and advance confidence in the legal profession.

Jack Rush QC
Chairman

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Tackling Violence — the Challenge of Genuine Leadership

TAKING RESPONSIBILITY

AS Chief Law Officer there is a continuing challenge to strike the right balance between the interests of those accused of criminal offences and those against whom offences have been committed. I will always defend the fundamental principles of our system that safeguard a fair trial and consistent and considered process. However, I am determined that it be capable of addressing the complexities of crime and, in particular, the experience of individuals who suffer sexual and family violence, the large majority of whom are women and children.

Rape and sexual assault; sexual abuse of children; stalking; family violence and homicide: these monstrous crimes shame us as a community and confront us as individuals. Yet, as a society, we still struggle to understand the nature and extent of these crimes, or to develop an adequate response. We must all own this failure, including those in the highest positions of leadership who must acknowledge their responsibility to protect the vulnerable. Unlike the national leadership, this Government understands its responsibility to victims of crime. It knows that a measure of any democratic society is how it treats its most vulnerable members.

This means that a government has a responsibility to ensure that its legal system responds adequately to the devastating effects of crime — a responsibility that is perhaps even more appropriate where the crime is so often the result of the most horrendous breach of trust. This means that a government must constantly interrogate the law, demanding it be effective and fair in its treatment of alleged offenders, and compassionate to those who experience crime.



SEXUAL OFFENCES — VLRC INTERIM REPORT

This is why we referred the almost overwhelming area of the law relating to sexual offences to the Law Reform Commission. The Commission was asked to investigate legislative, administrative or procedural changes to ensure that the criminal justice system took sufficient account of the needs of complainants in sexual offence cases. This was no small task, but the Commission has developed 107 recommendations, contained in an Interim Report released in early June, and spanning the entire criminal justice process. The Commission is now seeking submissions from the community. It is an enormous body of work — often confronting in its detail — and I encourage all of you who have experience in this area of the law to make what contribution you can to this important process.

FAMILY VIOLENCE AND STALKING

Of course the law relating to sexual offences is not the only area in which we can make a real difference. Despite reforms over the last 20 years, the law designed to respond to family violence is still inadequate. One in four women have or will experience domestic, or family violence in their lifetime. This horrifying statistic speaks volumes of our failure to address one of the most significant social problems in our community, a problem which becomes even more palpable when we realise that many women simply never report the violence they experience, and of those who do endure it, the majority have the care of children.

Of course, for the law to respond to this epidemic, reform must be staged on a variety of fronts. Amendments to the Crimes (Family Violence) Act have just been passed to ensure that intervention orders may be made by consent. For more comprehensive reform, the operation of the whole of the Act has been referred to the Law Reform Commission, which will examine mechanisms for improving the lives of this silent mass of women and children.

Concurrently, we are developing a model for the establishment of a dedicated family violence division of the Magistrates' Court. This Government believes that our courts are critical in breaking the cycle of violence, and a dedicated division would enable the involvement of those with expertise in the area, such as social workers, police, and specialised judicial staff.

In addition to reform of family violence legislation, the Government is reviewing the operation of the criminal offence of stalking. Stalking and predatory behaviour are increasing problems in our community and, once again, the large

majority of victims of this kind of offence are women. We have introduced legislation to make “cyber stalking” illegal and will alter the requirement that the victim be aware of the stalking in order for it to be an offence, to ensure that the criminal offence is brought into line with 21st century behaviour.

At the other end of the scale, however, are some interesting results from the publication of the last seven years of data regarding Intervention Orders collected from the Magistrates’ Court. Amongst other things, the data indicated that a high proportion of Intervention Orders were being accessed by parties involved in neighbourhood or community disputes, rather than traditional stalking. We are conducting a review of these provisions to examine whether this access is appropriate, or whether a different mechanism may be used to resolve these disputes.

TACKLING INJUSTICE ON EVERY FRONT

Of course, broader issues of violence must also be interrogated and I have referred the issue of defences and partial excuses to homicide to the Law Reform Commission, including whether

provocation should operate to reduce a murder verdict to manslaughter. As most readers would be aware, provocation has been criticised for excusing male violence towards women, as it is mostly men who raise the defence, often in the killing of their partners.

Additionally, my Department is currently implementing the recommendations of the Review of Services of Victims of Crime, conducted in our first term of government. Their implementation will deliver a collaborative, cohesive approach to counselling and support services for victims of violent crime and will complement the access to pain and suffering compensation to victims of violent crime that was returned in our first term in office.

Of course, all of these initiatives can go only so far in redressing injustice if our legal system does not have the confidence of the community. Victims of crime need to feel confident that they are understood by our legal system and represented within its ranks. The Judicial College of Victoria, now formally in operation, will ensure that the judiciary has access to information about the complexities of sexual and family violence and will indicate that the judiciary wants to connect and

engage with the community over which it adjudicates.

A crucial part of this message is, of course, our commitment to ensuring that the best and the brightest candidates take judicial office in Victoria. I am determined that Victoria’s judiciary has the most appropriate skills, flexibility and a breadth of experience. A community advised and represented by a diverse profession is more confident in the capacity of the law to be meaningful, to be compassionate and to deliver real justice.

CONCLUSION

Injustice cannot be remedied with a single piece of legislation, initiative or appointment. It requires a sustained and realistic approach — an acknowledgment that improvement will be incremental. In acknowledging this, however, we must also acknowledge that the rule of law in and of itself cannot produce equality. Violence, sexual or otherwise, must be tackled head on by those in a position to change both the perception and the reality of the law.

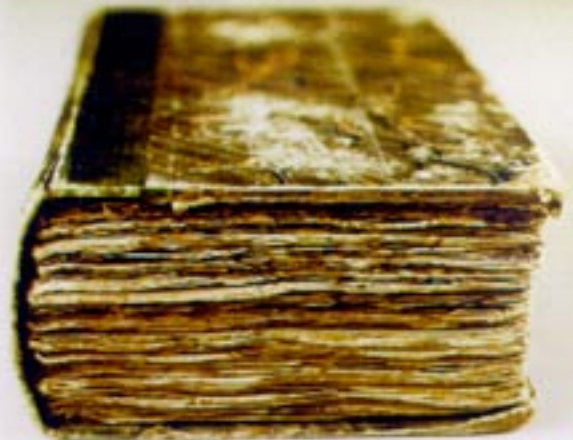
Rob Hulls
Attorney-General

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The True Cost of Discipline

Dear Editors

THE autumn edition of *Bar News* carried what many would regard as an alarming item about the spiralling cost of regulating the legal profession in Victoria. Any reasonable reader would have been justifiably outraged to learn that the cost of regulation “rose from about \$6,000,000 to \$11,000,000 last year”. What’s more, according to the *Bar News*, the “vast majority” of this money was “consumed by the ever-increasing permanent staff of the Ombudsman”.

What a scandal! A budget blow-out of more than 80 per cent, and nearly all of it going apparently into the pockets of bureaucrats. A startling story worthy of wider coverage, except for one thing — it was not accurate.

The last two annual reports of the Legal Practice Board disclose a quite different picture. In the last financial year the total cost of legal regulation was \$12,747,673. That figure includes the combined operating costs of the Legal Practice Board, the Legal Professional Tribunal and the Legal Ombudsman as well as public funds spent by the Law Institute and the Bar on their various functions as recognised professional associations. In the previous financial year that spending was \$11,328,327. The article did not state clearly that the “about \$6,000,000” starting figure was from 1996.

So, instead of a staggering 83 per cent increase in the cost of regulation in a single year, as some may have assumed from the *Bar News*, the real increase was in the order of 12.5 per cent. Even this figure is cause for concern, however, none of that increase can be attributed to the office of the Legal Ombudsman. Indeed, spending by my office actually fell over the same period from \$1,630,000 to \$1,510,000. Instead of consuming the “vast majority” of the regulatory budget, my office accounts for less than 12 per cent of the total funds spent. Furthermore, contrary to the claim in the *Bar News*, there has been no increase in the size of my permanent staff for at least four years.

I don’t expect the Bar to share my views on the future of regulation. However, it is not too much to expect that the *Bar News* set out relevant facts fairly and accurately so the reader may reach his or her own conclusions as to the assertions made in the article.

As to whether it has “been demonstrated that the Ethics Committee operates in a manner which is inferior to the Ombudsman”, my recent letter to counsel dealt with some aspects of this. Interestingly, the authors of the article did not suggest that my office operated in a manner which was inferior to the Ethics Committee. Moreover, such an argument is not to the point as, in my view, it is far more important that the public has complaints investigated by a body which is independent of either branch of the profession.

Yours sincerely,

Kate Hamond
Legal Ombudsman

Response to Legal Ombudsman

Editors

By letter dated 12 May 2003 the Legal Ombudsman (“the Ombudsman”) wrote to all members of counsel purporting to “correct some of the inaccuracies contained in the article by the Chairman of the Victorian Bar Inc., Mr Jack Rush QC, in the last issue [Autumn 2003] of *Victorian Bar News*.”

In her letter to counsel the Ombudsman stated that she wished to respond in particular to the claim by the Chairman of the Bar that her office had never raised with the Bar “any significant criticism of the Bar’s disciplinary system”.

The Ombudsman said that “This statement ignores extensive correspondence and discussions over a number of years between this office and the Bar concerning the investigation of complaints and the handling of disputes.” The Ombudsman then set out what she says are the more recent matters which have caused her concern as follows:

Disputes

The Ombudsman stated that “her office has expressed concern that the Bar has been reluctant to deal with costs/pecuniary loss disputes in accordance with its obligations under the *Legal Practice Act 1996*. The matter has been raised with the Bar on a number of occasions but the problem still persists. The reluctance of the Bar to properly deal with disputes means that consumers are denied access to conciliation and hearings in the Legal Profession Tribunal, since the

Bar is the only body with statutory power to handle such disputes at first instance.”

The Committee has taken great pains with the Ombudsman to explain to her the Committee’s approach in accepting costs and pecuniary loss disputes. The Committee takes serious issue with the allegation made by the Ombudsman that the Committee does not comply with its obligations under the Act. The Committee has striven at all times to act in accordance with the law and to have regard to its duties under the Act. The Ombudsman and the Committee hold different views about the acceptance or otherwise of disputes. The Committee has not been persuaded that the view of the Ombudsman is correct on this issue.

The Committee has explained to the Ombudsman that in assessing whether or not to accept a dispute, it has regard to the information placed before it. Depending on that information an assessment can be made whether to accept the dispute. The Committee only accepts disputes which are genuine in the sense that there is some authentic and plausible basis for the dispute disclosed by the “details” that must be given by the complainant to initiate a dispute under s.123(1) of the Act. A mere assertion of a dispute, which is unsupported by proper details that disclose the existence of a dispute, will not be accepted by the Committee.

Withholding of Documents

The Ombudsman stated that “her office became concerned that relevant documents had been withheld from complaint files requested by the Legal Ombudsman for review. Eventually, but not until her office provided a copy of advice received from counsel to the Bar and the threat of court action the omitted documents were made available. By omitting documents from files requested by the Legal Ombudsman for review the Bar was not complying with its obligations under the Act.”

Again the Committee takes serious issue with the allegation that it does not comply with its legal obligations. On this issue too, the Ombudsman and a majority of the Committee hold different views. The Committee has not been persuaded that the view of the Ombudsman is correct but it considered that it was not a matter that should be the subject of legal proceedings. Its view was that the requested documents (which were administrative in nature) were unrelated to the Ombudsman’s review of conduct investigations conducted by the Ethics

Committee. The Ombudsman took a contrary view even though the documents had been made available to her at meetings of the Committee and to members of her office at inspections of Ethics Committee files pursuant to her monitoring role.

Regard to Irrelevant Considerations

The Legal Ombudsman stated that “concern has been expressed that, in considering complaints, regard may have been given to the effect that an investigation of a complaint could have on the premium a practitioner would pay for professional indemnity insurance. Such a consideration is not relevant to, nor should it in any way influence, the deliberations of a regulator entrusted with the statutory duty of investigating complaints, and thus the protection of the public.”

The Committee also takes serious issue with this allegation made by the Ombudsman. Again, the Ombudsman and the Committee hold different views. The Committee has not been persuaded that the view of the Ombudsman is correct. The issue relates to conduct complaints. The Committee's view is that where a conduct complaint on its face is without substance or misconceived, it should be dismissed. In circumstances where there is insufficient information the Committee does not classify complaint unless or until the complainant can provide further information to enable it to deal properly with the matter. It is incorrect and misleading for the Ombudsman to allege, in effect, that the Committee takes the barrister's insurance into consideration in relation to an investigation of a conduct matter.

In the regulation of barristers, the Committee considers that the interests of the barristers should not be disregarded. The Committee fails to see how the views of the Committee on this issue can be in derogation of the obligation to protect the public. Indeed, the Committee's concern about increases to the barrister's insurance premium is in the public interest. The recent media coverage of the increase in insurance premiums for the medical profession is a prime example of the issue being in the public interest.

Delegations

The Legal Ombudsman stated that “In the lengthy article there was no mention of the fact that the Government has had

to introduce emergency retrospective legislation to remedy the problems arising from the manner in which the Bar and the Law Institute had sought to delegate their regulatory powers. At stake was the legal validity of most, if not all, regulatory actions performed by the two professional associations since the Act came into force. The existence of proper delegations, complying with the requirements of the Act, is fundamental to the lawful performance by the Bar and the Law Institute of their regulatory duties under the Act.”

This criticism by the Ombudsman does not raise any criticisms of the Committee and its role in carrying out investigations of conduct complaints or its role in attempting to settle disputes.

General

In the past the Committee has enjoyed excellent relations with the Ombudsman. The Ombudsman or her representative regularly attends meetings of the Committee at the invitation of the Bar. The Ombudsman has in the past complimented the Committee on its carrying out of its functions under the Act. It can only be assumed that the recent flurry of criticism of the Committee is motivated by the current review of the Act. Whilst that is understandable in a political sense, the Committee is not prepared to leave unanswered the serious allegations now made by the Ombudsman.

Kate McMillan S.C.
Chairman, Ethics Committee

Brisbane's Simple Ecumenical Service

Dear Editors,

EACH year, when I receive the Autumn issue of your fine journal, containing images of the “Opening of the Legal Year” services at various cathedrals, churches, synagogues, and temples, I am struck with the thought that we at the Queensland Bar are — at least in one respect — wiser and more accommodating than our colleagues in Victoria.

In the first place, more than a decade ago, the “Opening of the Legal Year” for Queensland was relocated from February to July — an expedient for which the sug-

gestion is generally credited to Dowsett J., then a Supreme Court Judge, before his transition to the Federal Court. It makes sense, at least in Brisbane's climate, not to process in full-bottomed wigs and red regalia, in the hottest months of the year.

Secondly, Queensland has long had a tradition of a single ecumenical service, rotated between various places of worship, conducted with the co-operation and representation of all major religious communities, and attended by legal practitioners of every faith — and, one suspects, in many cases, no faith at all.

Perhaps this is more feasible in Queensland, as compared with Victoria, because the vast majority of the legal profession are (at least nominally) members of one or another Christian denomination. This has not, however, been an impediment to participation by Queensland practitioners from non-Christian religious traditions.

Over recent years, Chief Justice Paul de Jersey — himself a prominent lay member of the Anglican Church hierarchy — has made a concerted effort to broaden participation in these events. Two years ago, the service was hosted by the Greek Orthodox community, with the participation of His Honour Judge Samios. Last year, the venue was the Salvation Army Temple.

Queensland has a long history of sectarian division, especially between Catholic and non-Catholic Christians. The success of these events lies in the fact that they bring together members of the legal fraternity of all religious backgrounds — along with many who are not regular participants in any form of religious observance — in a spirit of professional fellowship and goodwill. It serves to emphasise what we have in common with our colleagues, rather than what divides us.

I do not know whether such an arrangement would be either practicable or acceptable in Victoria. But I can commend the Queensland practice as an experiment which has proved highly successful.

Yours faithfully

Anthony J.H. Morris QC
Brisbane

High Court of Australia

Justice Heydon



Friday, 14 February 2003

MR J. Rush, QC: May it please the Court. On behalf of the Victorian Bar, I welcome Your Honour to Melbourne. It is of note that it is but two years to the day since Your Honour was sworn in as a justice of the Supreme Court of New South Wales and the Court of Appeal. On Tuesday I had the honour of representing the Victorian Bar at the ceremony to mark the presentation by Your Honour of your commission to the Chief Justice. We are delighted to continue the extension of Your Honour's welcome on the occasion of Your Honour's first visit to Melbourne.

Your Honour was born in Canada. Your father, Sir Peter Heydon, was in the diplomatic service and was then secretary at the embassy in Ottawa. Your father's diplomatic postings resulted in your being educated in London, Wellington and Rio de Janeiro before returning to Sydney to attend the Sydney Church of England Grammar School. In 1964, Your Honour graduated from the University of Sydney with a first class honours Bachelor of Arts degree and the University Medal in history. You won a Rhodes Scholarship to Oxford University and won the Martin Wronker Prize for the top first class honours degree in law. You went on to

graduate work in law, still at Oxford, and graduated Bachelor of Civil Law, winning the Vinerian Scholarship for the highest first class honours degree in that course.

Those were heady days at University College, Oxford. Your Honour was in distinguished Australian company. Fellow Australian students there included David Hodgson (now Justice Hodgson of the New South Wales Court of Appeal), John Finnis (now Professor of Law at Oxford and a Fellow of the British Academy), and the late Dr Peter Wilenski (sometime Professor, Chairman of the Public Service Board, Secretary of Transport, and of Foreign Affairs, and Australia's permanent representative to the United Nations). The distinguished legal philosopher H.L.A. Hart was Professor of Jurisprudence and Leonard Hoffmann (later Lord Hoffmann) was Praelector in Jurisprudence.

At Oxford, Your Honour was, in Kipling's words, both a "flannelled fool at the wicket" and a "muddled oaf at the goal". You played cricket in a team called "The Barnacles", and what has generously been described as a "vigorous" game of rugby. Thirteen years later, in Sydney, you were still playing a "vigorous" game of rugby when it was suggested by the then William Gummow that it was not fitting for the Challis Professor and Dean of the Law School to be seen kicking heads on a Saturday afternoon. Your Honour adopted Justice Gummow's suggestion that you cease playing rugby, and his other suggestion that you go to the Bar.

Whilst at Oxford, Your Honour showed great adaptability and played in the Oxford-Cambridge Australian Rules football match. This was long before New South Welshmen at large developed any appreciation for the greater refinement and skills of that game. Julian Disney (then a Rhodes Scholar from South Australia, now Professor of Public Law at the Australian National University) was your captain, and you played, I am told, a reasonable game with the Oxford team.

Now, over 35 years since your completion of your degree and undergraduate work at Oxford, Your Honour is still remembered for your initiative as an undergraduate in establishing a scholarly

magazine. George Cawkwell, a Classics Oxford Don, recalled recently the stir when Your Honour secured and published an article on Jane Austen by the distinguished philosopher Gilbert Ryle — trumping the English Department.

In 1967, you became a Fellow of, and Tutor at, Keble College, Oxford. You also lectured at the Inns of Court School in London. From Oxford, you visited the University of Ghana as a lecturer in 1969. In 1973, Your Honour returned to Australia to a Chair at the University of Sydney law school and, in 1978, became Dean of that law school — the youngest person to become Dean of any Australian law school.

Your Honour has been a prolific scholar, continuing to publish long after you left the university and its imperative to "publish or perish". You have published textbooks on restraint of trade, economic torts, trade practices law, evidence and equity; and casebooks in most of these areas. All your books seem to have gone into multiple editions — most recently, the October 2002 fourth edition of Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*, of which Your Honour is co-author with Justice Meagher and Dr Leeming of the New South Wales Bar.

In one of the New South Wales Bar centenary essays published last year, Your Honour described *Equity Doctrines and Remedies* in the following terms:

It is beyond question that no greater legal work has been written by Australians —

and:

It has extremely strong claims to be placed on, and indeed, at the top of, a short list of the greatest legal works written in the English language in the twentieth century.

If only we could all review our own work! To be fair to Your Honour, I think you were referring to the first edition. Your Honour's 1978 work on trade practices, published in collaboration with Mr Bruce Donald, has been described as "an essential tool for any lawyer professing to advise in the area".



The bench of the High Court of Australia prior to Justice Heydon's appointment; L to R: Justices Hayne, Gummow, Gaudron, Chief Justice Gleeson, Justices McHugh, Kirby, and Callinan.

Your Honour read with Mr Peter Hely, now Justice Hely of the Federal Court, and commenced active practice as a barrister in 1980. You rapidly built an extensive practice in this Court, the Federal Court and the New South Wales Supreme Court. Your Honour served as a member of the New South Wales Bar Council for five years, from 1982 to 1987. You took silk in 1987.

Your Honour has been a great defender of the independent Bar. In your essay last year, "The Role of the Equity Bar in the Judicature Era", Your Honour wrote of the nonexistent monopoly of the Bar, the constant propaganda disseminated by competition theorists and ideologues against the Bar that resulted in key tactical decisions in litigation tending to be made without the restraining influence of counsel.

Your Honour is regarded as a master of the Dixonian judicial method — a master at setting each explication of the law in the framework of the established and developing judicial principles. You have strongly endorsed the judicial philosophy of former Chief Justice Sir Owen Dixon, in particular as expressed in Dixon's 1955 address at Yale University, "Concerning Judicial Method". A significant passage from Dixon's 1955 Yale University address was quoted by Chief Justice Spigelman in the New South Wales Court of Appeal judgment in *Harris v Digital Pulse Pty Ltd*, delivered last Friday. The court rejected the extension of exemplary damages to equity for breach of fiduciary duty. Your Honour's judgment in that

case, largely adopted by Chief Justice Spigelman, contains the memorable phrase: "In short, equity does not bear the same relationship to the instinct for revenge as the institution of marriage does [to] the sexual appetite."

I am not sure that that is how Dixon would have expressed it, but typically Your Honour made your point with extreme clarity, and we can only look forward to reading Your Honour's further judgments in this Court.

You have replaced on this Court Justice Mary Gaudron — a Judge held in the highest regard by the Australian legal profession. You have joined a Court that has justifiably obtained and maintained the highest of reputations in the common law world. It is a reputation and a history of which the Victorian Bar is immensely proud.

The Victorian Bar congratulates Your Honour on your appointment and looks forward to your contribution to this great Court. May it please Your Honour.

Heydon J: Thank you, Mr Rush. Yes, Mr O'Shea.

Mr W.P. O'Shea: May it please Your Honour. On behalf of the Law Institute of Victoria and the solicitors of this State, I have great pleasure in welcoming Your Honour here to Melbourne. Your Honour, as we have heard, has an outstanding reputation as a jurist and someone who has already made a significant contribution to the law in Australia. The solicitors of the

State are confident that Your Honour will make an enormous contribution to this High Court. Your Honour has a reputation for being extremely hard-working and of considerable intellect.

Your appointment is indeed a meritorious one. As we have heard, Your Honour has an impressive list of educational and professional credits to his name. After completing a Bachelor of Arts at the University of Sydney in 1964, Your Honour became a Rhodes Scholar. Your Honour completed a Bachelor of Arts and a Bachelor of Civil Law — both with honours — at Oxford University. Your Honour then completed a Master of Arts at Oxford. During this time, Your Honour was also a Fellow and Tutor at Keble College, Oxford. In 1973, Your Honour was admitted as a barrister in New South Wales and also became a professor at the University of Sydney's Law Faculty, being appointed Dean of the Faculty in 1978. Your Honour was appointed a Queen's Counsel in 1987, before being appointed to the New South Wales Court of Appeal in 2000.

As my counterpart at the New South Wales Law Society, Mr John North, recognised at Your Honour's welcome this week, Your Honour is a prolific legal author and editor. Generations of Australian students have relied on your legal texts on evidence, trusts, and equity, some of which you co-wrote with other eminent members of the legal profession.

It has been said of Your Honour that any person not associated with you could not conceive of your enormous capacity for

work. I might recount a story by Mr North which sums up Your Honour's capacity for hard work. When very busy, you have been known to test the patience and sincerity of solicitors who have requested an urgent conference by offering to meet with them at 5 am. It is a testament to Your Honour's expertise, skill and reputation that almost invariably the solicitors agreed to meet with you at that time. I suppose, for a number of lawyers in our branch of the profession, they could have dropped in on their way home.

Another story which the former chairman of the Australian Law Reform Commission recounts is about how he mentioned to Your Honour the evening before you were about to leave for a trip overseas his desire for you to give some consideration to drafting a particular Act, prior to your return from your trip. He arrived at work the next morning to find your draft of the Act on his desk — notwithstanding you were scheduled to leave the same day.

Again, I cannot claim authorship or responsibility on the following story that comes from the New South Wales Law Society, but I am also reliably informed that, according to Mr North, Your Honour is "an entertaining after dinner speaker and a gifted mimic, who can recount an amusing incident in a day's proceedings, accurately imitating all the parties involved to the great delight of those listening".

Your Honour brings to this Court great experience, wisdom and skill. On behalf of the Law Institute of Victoria, it is with great pleasure that I wish you a long, happy and fulfilling term as a Judge of this Court. As the Court pleases.

Heydon J: I am very grateful to Mr Rush and Mr O'Shea for their kind remarks, and I am also very grateful for the attendance of so many counsel and solicitors here today. While my links with the Victorian Bar and the Victorian Bench have not been as close as I would have liked, I do have some Victorians as old friends, like Mr Justice Callaway and Mr Karkar. More recently, I appeared at the Bar with or against quite a few Victorian silks: for example, Mr Justice Charles, Justice Merkel, Justice Goldberg, Justice Finkelstein, Mr James Merralls, Mr Alan Archibald and Ms Susan Crennan. More recently, I have had quite extensive dealings with Mr Alan Myers. In those circumstances, it is natural that I formed a very high opinion of the quality of Victorian counsel. It would be impossible not to

have done so, and it is pleasing to see some of those people here today.

Any visit to the High Court in Melbourne automatically triggers recollection of the distinguished Victorian jurists who have sat on the Court. It would be invidious to discuss the living, but one recalls the remarkable abilities of Chief Justice Isaacs, Mr Justice Starke, Chief Justice Dixon, Mr Justice Fullagar, Mr Justice Menzies and Mr Justice Aickin. It is perhaps a uniquely illustrious line.

I should give particular mention to Sir Keith Aickin. He and my father served in the Australian Ministry in Washington during the Second World War when Sir Owen Dixon was the Minister there. Sir Keith did me various acts of kindness late in his career. Quite apart from his acute powers as a lawyer, he was, as no doubt many present will remember, a gentleman of the most faultless courtesy. His premature death was a great loss to the High Court and I think a great loss to the country. In future, I think he will come to be regarded more highly than he now commonly is.

Supreme Court

Justice Morris

THE appointment of Stuart Morris QC as a Judge of the Supreme Court on April 8 2003 is received with universal acclaim, both at the Bar and in the wider community; indeed, notwithstanding His Honour's well known association with, and membership of, the Australian Labor Party, it was a mark of respect that Shadow Liberal Attorney-General, Andrew McIntosh (a former member of this Bar) publicly applauded His Honour's appointment.

Stuart Morris was born in Wentworth, New South Wales, on 21 July 1950, the son of parents who both practised as doctors in that town, having moved from Melbourne primarily to minister to the medical needs of the large Aboriginal community in the Mildura/Wentworth area. Their social conscience, and dedication to the welfare of the less privileged, had a marked impact upon His Honour and has been a significant influence on his professional and public life.

Should some great natural catastrophe affect Australia and affect Melbourne in particular, an archaeologist who viewed the physical ruins of Melbourne would infer easily that there was once a great material civilisation in existence here. If no literary remains of that civilisation survived except for the Victorian Reports and the contributions to the Commonwealth Law Reports of Victorian judges, future historians would be able to infer that in this State there thrived as well a great legal civilisation of the highest intellectual quality.

I look forward very much to participating in appeals from the Supreme Court of Victoria, the other Victorian courts and the Federal Court sitting in Melbourne in Canberra, and also hearing special leave applications here, and I look forward to the centenary sittings of the Court here in its birthplace in October. I repeat again my thanks to all of you for your attendance.

After early education in the country public school system, Stuart was sent to board at Wesley College in Melbourne, then a single-sex school, and somewhat more abstemious institution than at present: it was here — no longer under the watchful eye of his parents — that Stuart appears to have acquired his penchant for mischief. In his leaving year — together with certain other members of the Wesley boarding house — Stuart was "sprung", sharing a bottle of alcoholic cider. Despite a strong plea from Stuart (he never did excel in that field), the Headmaster's Methodism prevailed: hence, the commencement of His Honour's short, but successful, stint "down the road" at Melbourne Grammar where, apart from excelling as a vigorous (if less than skilful) rover, he was dux of humanities.

His Honour commenced law/economics at Monash University in 1968. From the outset His Honour excelled: academically, politically and on the sporting field



(football). After completion of His Honour's year in economics, he took a year's "sabbatical" to serve full-time as General Vice President of the Australian Union of Students. He was particularly active in the environmental movement, with the newly established Public Interest Research Group (PIRG), founded in the United States by the environmental campaigner Ralph Nader. It was at Monash that Stuart had the good fortune to meet, and marry, Jenny Morris (same surname), then a PhD student (and subsequently graduate) in Urban Geography.

His Honour graduated LLB with first class honours and the Supreme Court prize in 1973. In 1974 he commenced articles at Slater & Gordon under Michael Higgins, now Judge Higgins of the County Court and Vice President of the Victorian Civil and Administrative Tribunal, of which His Honour will serve as President commencing June 2003. Whilst serving articles, His Honour was elected to the Council of the Shire of Sherbrooke, serving on that Council for four years, the latter two as Shire President (then the youngest in Victoria). It was in this period that he "cut his teeth" — and no doubt, on occasion, his opponents' — in local politics.

His Honour signed the Bar Roll in April 1976 and read in the chambers of Graham Fricke, later Judge Fricke of the County Court. He quickly established himself as a "colourful figure" — to use the vernacular — whilst reading with Fricke, a fact which can be verified by the Bar's current Manager (Legal Education and Training), Barbara Walsh who was then Fricke's secretary. Subsequently, His Honour himself had two readers, John

Thwaites (now Deputy Premier) and Sarah Lindsey.

Stuart signed the Bar Roll in 1976, and consistent with his long-standing interest, and involvement, in local government, planning and environment, his practice developed a heavy concentration in those areas. He became known for his quick, if on occasion somewhat vulgar, wit as well as his outstanding advocacy, intellect and strategic thinking. No case in which he appeared was ever dull.

His early years also saw some notable appearances in prominent defamation litigation and the broader field of administrative law. It was in the latter capacity that His Honour appeared as junior counsel to Alistair Nicholson QC (now Chief Justice Nicholson of the Family Court) on behalf of the Australian Labor Party, before an Australian Broadcasting Tribunal inquiry into the proposed acquisition by News Ltd/Murdoch interests of Channel Ten. During the course of this inquiry His Honour, in tow with his leader, perfected the unusual technique of tribunal advocacy known as the "walk out": in the face of the Tribunal's persistent "panel system of cross-examination", (and various other breaches of the rules of natural justice) His Honour and Nicholson QC simply "walked out", a procedure subsequently endorsed by the High Court in issuing mandamus and prohibition against the Tribunal: *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13. It should be noted that the Tribunal was chaired by "the first man on television", Bruce Gyngell, counsel assisting was T.E.F. Hughes QC, and Senior Counsel for the Murdoch/News Corp Corporation interests was R.P. Meagher (now of the New South Wales Court of Appeal). It is a useful precedent for those who appear before Morris J in his capacity as President of VCAT, in the event that natural justice principles may be seen to be endangered by His Honour's penchant for efficiency and practicality!: as to which, see *City of Brighton v Selpam Pty Ltd* [1987] VR 54 (an appeal from a decision presided on by His Honour's predecessor Tribunal).

As a diversion from the Bar, in 1983 His Honour accepted a full-time appointment as Senior Member of the Planning Appeals Board of Victoria (predecessor to the Planning Division of VCAT), where he remained until 1985. In that capacity he conducted hearings with maximum efficiency, minimum tedium and his (by then) well established sense of humour. In one case, for example, he was hearing

an application by Bob Jane for a permit to extend the Calder Park speedway, known as "The Thunderdome", a critical issue in which was the noise made by a particularly fast and noisy type of dragster known as "a top fueller". Discussion ensued as to how this vehicle might be described in a permit condition proposed by His Honour, so as to impose restrictions on its use. His Honour asked Bob Jane how "top fuellers" might be described for that purpose. Jane thought for a moment, then replied "I'd call them nitro fuel jet cars — I mean, your wife could understand that", to which Your Honour responded proudly: "My wife's got a Ph.D".

Bob Jane again considered the matter and then offered the observation: "Well, tell her to put some nitro in it, and it will really go."

In 1985 His Honour took on one of the more interesting and controversial roles of his varied professional career: that of Chairman of the Local Government Board, charged with the task of "inquiring" into the feasibility of reducing Victoria's 211 municipalities to around 40. In that capacity, a particular duty was to address and/or chair public meetings throughout rural Victoria enquiring into the proposed reform of local government. This gave rise to significant levels of what might be traditionally described as "odium, ridicule and contempt" directed at His Honour by vested rural interests opposing this (correctly) perceived council amalgamation program. Tomato pelting and flour bomb throwing followed His Honour's rural progress, somewhat redolent of his student politics days in the heady times of the late 1960s. In one incident His Honour is said to have "escaped" rural anger by retreating to a backroom lavatory at a country municipal hall, taking the opportunity to avail himself of the facilities. On turning to dry his hands he noted the following graffiti on the newly installed high-tech hand dryer: "Press this button for a 20 second speech by Stuart Morris".

Ironically, His Honour's recommendations — though politically unpalatable at the time — were subsequently implemented by the Kennett Liberal Government, bringing much needed reform and efficiency to local government in Victoria.

His Honour returned to the Bar in 1987 and quickly established himself as a leading junior in the planning, environment, local government field, renowned particularly for strategic advice and case presentation on behalf of a large and loyal array of private, corporate

and government clients. In addition he appeared in a number of significant environment cases on a pro bono basis, including a high-profile land clearing case for the Friends of the Earth and other pro bono cases instructed by the Environment Defenders Office. His Honour took silk in 1991 and broadened what was already a very significant practice into the field of land valuation, quickly becoming a Senior Counsel of first choice (he has appeared in most of the reported valuation cases in the last decade).

As a leader in his field His Honour's advice and counsel were naturally sought from junior (and indeed fellow Senior) Counsel. In that capacity he was selfless: the door of his 18th floor chambers in ODCW (when he was not otherwise in conference, which was frequent) was always open, and he gave of his time generously. Lack of confidence never having been a flaw in Stuart's character, the cynical

might suggest this was because as he considered he knew just about everything on any given topic, he was more than happy to share those views with others, including opponents, concerning the merits or otherwise of their cases! Notwithstanding, his views were well considered, based on intellectual rigour and always worthy of strong consideration.

In 1999 His Honour gained pre-selection for the Upper House State seat of Waverley for the Australian Labor Party. Despite suggestions that His Honour conducted his campaign with less "shoulder to the wheel" than might normally be expected (that is to say attendance at fewer chook raffles, and less handshaking and baby kissing than is usual for a "maiden" candidate) His Honour achieved a huge swing, losing the seat by less than 1000 votes (less than 1 per cent). Strong anecdotal evidence suggests that had His Honour been elected he would

have "walked" into the position of Labor Leader in the Upper House of Victorian Parliament: Parliament's loss was the Bar's gain, and now that of the Supreme Court.

His Honour has been married to Jenny for 30 years and they have four children: Sam, Cassie, Victoria and Todd (naturally, named after a recently retired Melbourne footballer of some note). Sam (Law) and Victoria (Engineering) are at University, and the younger two at school. Jenny Morris is, in her own right, a leader in the field of transport planning.

Justice Stuart Morris is an outstanding appointment to the State's highest Court. His unique combination of common sense, humour, and intellectual rigour will enhance its reputation and efficient operation.

The Bar welcomes his appointment.

County Court

Judge Punshon



ON Friday 11 April 2003 at a ceremonial sitting at the County Court, His Honour Judge Roy Punshon was welcomed by Jack Rush QC, chairman of the Victorian Bar, and Bill O'Shea, president of the Law Institute of Victoria. The

following edited extracts are from both addresses.

His Honour has practised at the Bar, specialising in criminal law, for nearly 30 years.

His Honour has deep roots with working people of this State. His father, Frank, and his father before him, were both waterside workers. His mother, Elva, was fore-lady of the Nugget factory, until she married. His father saw the support of the family as his responsibility. His Honour was one of five children.

Justice Frank Vincent of the Court of Appeal had an early and lasting influence on His Honour, personally and professionally. His father, Frank Vincent senior, was also a wharfie, and worked with His Honour's father at the King Island ferry terminal.

Frank Vincent junior, now Justice Vincent, encouraged His Honour not to leave school, but to transfer from technical school to high school, so as to matriculate and go to law school.

His Honour was educated at Williamstown and West Newport Primary

Schools, at Altona North, then Footscray Technical Schools, then at Footscray High School. His Honour graduated bachelor of laws from the University of Melbourne.

His Honour is a strong believer in the state education system — and actively supports it on a state education website.

Justice Vincent assisted His Honour in obtaining articles with Jim Hill at Slater & Gordon, with whom he had served his articles. His Honour came under the influence of the "gun" lawyer at that firm, Michael Higgins (now Judge Higgins).

After admission, His Honour took a year off to travel around Australia. His Honour travelled with his best friend from law school, Philip Toyne, who later became head of the Australian Conservation Foundation. He was instrumental in handing over Uluru to the Aboriginal people. He established the Pitjantjatjara Legal Service in Alice Springs.

His Honour returned to Slater & Gordon, doing workers' compensation and personal injuries.

Robert Richter QC persuaded His Honour to come to the Bar — he said he

would have more spare time to read books. His Honour has never had spare time at the Bar. His Honour had been a voracious reader before he became a barrister.

His Honour read with Ted Hill, Jim Hill's brother. His Honour was Ted Hill's first reader.

Jim Hill as a solicitor, and Ted Hill as counsel, were the leading practitioners in workers' compensation. And His Honour had practised in that area at Slater & Gordon. It was therefore scarcely surprising that His Honour's practice at the Bar began in workers' compensation.

It was His Honour's mentor, Ted Hill, who encouraged the switch to crime. A couple of years in compensation was followed by two years travelling in Europe and Asia.

His Honour returned to the Bar in 1977 to the purity of criminal practice, to which His Honour since been dedicated.

For over 15 years, His Honour had chambers on the third floor of Equity Chambers. His Honour began in the room next to Sir Eugene Gorman. Des Whelan, the first Chief Judge of the County Court, was in the room the other side of Gorman.

His Honour's friend Phillip Toyne was instrumental in a large number of Victorian barristers working in Alice Springs in the Aboriginal Legal Service. Justices Eames and Coldrey of the Court of Appeal and Supreme Court, and Judge Howie of this Court, spent substantial time there, as did David Parsons S.C. Justice Vincent was a regular visitor.

His Honour was one of many others who served there. In the early eighties, His Honour relieved Judge Howie for two-and-a-half months in Alice Springs. His Honour made another trip to far northern South Australia, briefed by Phillip Toyne. This was not only work — it represented in a

practical way his deeply held convictions concerning Aboriginal people.

His Honour represented clients in a number of high-profile cases including the long-running Coronial Inquest into police fatal shootings of suspects.

In many other regards, His Honour's three decades as a criminal lawyer have been characterised always by intellectual rigour, respect for the law and passion for justice.

In November 2000, His Honour was in the first group of men and women to be appointed Senior Counsel (rather than the old title of Queen's Counsel).

His Honour has been a role model for fellow barristers over many years. His approach to each case, as if it were his first, is a lesson that has not been lost on those who have worked with him. They talk of his unparalleled skills in cross-examination, the thoroughness of his preparation, his sharp intellect and his dauntingly high standards. His Honour had seven readers: Michael Cosgrave, Mordy Bromberg, Chris Beale, Sean Cash, Michael O'Connell, Moira Jenkins, and Gerard Mullaly. All attest to his guidance, his care and concern, and unfailing loyalty.

Over and above the demands of a busy practice, His Honour has always been passionate about political views, deeply committed to social justice, and fervent in his belief that the legal profession has a role in promoting a fairer and more just society.

This is reflected in his years of service on the Criminal Bar Association, as a member of Liberty Victoria, and in his tireless promotion of legal aid.

His Honour's work as Vice-Chair under Chief Judge Rozenes, then chair of the Criminal Bar Association, has rightly earned plaudits across the legal profession. The Criminal Bar Association has never been more influential in government

policy, or more relevant in the contemporary justice debate, than it was under His Honour's stewardship.

His Honour's role in attempting to achieve some fairness in fees for barristers doing legal aid work was significant and vital to the increase in legal funding.

His Honour is deeply committed to social justice. His Honour is a member and former committee member of Liberty Victoria.

His Honour has always been supported by a strong family. His partner of some 18 years, Margaret Fried, is a lawyer with the Department of Justice. They have three children, Larry aged 13, Rex aged 11, and Miranda aged eight.

Throughout his career in the law, His Honour has maintained a reputation as being scrupulously fair — as being straight forward — as holding on to maintaining his principals — these attributes explain why His Honour is so highly regarded at the Bar — they are attributes that will make him a fine judge.

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Federal Court

Justice Olney



ON 30 April 2003 a packed courtroom in the Commonwealth Law Courts building in Melbourne heard addresses marking the retirement of the Honourable Howard William Olney as a judge of the Federal Court of Australia.

His Honour was born in Western Australia and educated at Perth Modern School. Like Fort Street High School in Sydney and Melbourne and University High Schools in Melbourne, this selective entry State school has produced many eminent Australians, including Prime Minister Bob Hawke and the current Attorney-General Daryl Williams.

His Honour graduated in Law from the University of Western Australia in 1956 and went into private practice where he was mainly concerned with industrial law, first as a solicitor and then at the Independent Bar. He took silk in 1980.

For two years His Honour served in the Legislative Council of Western Australia as an Australian Labor Party member. The fact that he was appointed to the Supreme Court of Western Australia in 1982 by the Charles Court Coalition government is striking testimony to the widespread respect his Honour had achieved in professional and public life. His Honour served on the Supreme Court until 1988 when he accepted joint commissions for both the Federal Court and the Family

Court and moved to Darwin. After two years in Darwin His Honour moved to Melbourne, resigning the Family Court commission.

An earlier connection with Melbourne occurred when on the Supreme Court His Honour heard a major mining case concerning a dispute over the royalty agreement between Lang Hancock and his partner Peter Wright and Hamersley Iron Pty Ltd for the production of iron ore from Mt Tom Price. The parties elected to retain what are sometimes referred to in Perth as Wise Men from the East. S.E.K. Hulme QC and Frank Caraway appeared for Hamersley and Doug Williamson QC, Jeffrey Sher QC and Peter Heerey for Hancock and Wright. His Honour found for Hamersley but on appeal the Full Court reversed that decision two-one. Hamersley appealed in one of the last Australian cases to go before the Judicial Committee of the Privy Council.

That august body restored His Honour's judgment: see (1985) 64 ALR 19 and "A Last Hurrah — Privy Council Days" *Bar News*, Spring 1986, 30. In the course of delivering their opinion their Lordships said (at 21) that they had "read and re-read with respectful admiration the lucid narrative accounts in the several judgments below of the operation of the beneficiation process" and (at 28) that part of that process was "so vividly

described by Olney J at the end of his judgment".

His Honour's career in the law is notable for his involvement with Aboriginal Australia. This goes back to his days in the profession when he undertook pioneering legal work for a number of Aboriginal communities, setting up incorporated bodies in the Kimberley and Pilbara regions of Western Australia. He served two terms as Aboriginal Land Commissioner under the *Aboriginal Land Rights Northern Territory Act 1976* and conducted 24 enquiries. From 1994 he was a Deputy President of the National Native Title Tribunal. In his role as Federal Court judge he heard the trials of two major native title cases, *Yorta Yorta* and *Crocker Island*. In both cases His Honour's judgment was upheld by the Full Court of the Federal Court and the High Court.

At His Honour's farewell Mr Tom Pauling QC, Solicitor-General for the Northern Territory, said that His Honour had "broken down walls of mistrust and suspicion and shown (himself) to be a paradigm of impartial justice according to law". His Honour's combination of courtesy, good humour, human insight and fine legal skills have made his career a most successful one.

We wish him a long and happy retirement.

Family Court

Justice Frederico

FREDDIE served as a distinguished member of the Family Court from 1976 until his retirement in April 2003.

It is said that his pursuit of the law commenced somewhat unconventionally in that at three years of age he set out from his home in Brighton to walk to the city accompanied by his dog to join his

father at Selbourne Chambers. He had walked a considerable distance before he was found and returned home.

His primary and secondary education was more conventional in that he attended Koska Hall (where he was Dux) and Xavier College (where he found rowing). Whilst at Xavier at 16 years of age, due to a failure to diagnose appendicitis,



he became severely ill and was given two hours to live. Following emergency surgery his chances of survival were increased to 5 per cent but after a lengthy recovery period he resumed active sporting and academic life (perhaps in that order). He was cox of the first eight at Xavier.

He obtained his law degree at Melbourne University where he was a resident at Newman College. His passion for rowing did not abate and on one occasion he forgot to attend a French examination as he was at a rowing training session. His advocacy skills came to the fore and he was permitted to sit a specially set exam a few days later, which he passed.

On 10 September 1956 Freddie signed the Bar Roll. Family law has only ever a small part of his practice which was predominantly that of a common lawyer. In the later period of his time at the Bar he was highly sought after in defamation cases and in 1976 was Chairman of the Joint Committee on Defamation Law.

His manner on the Bench did not change significantly in the 27 years he was a Family Court Judge. It was said of his late father who was a County Court Judge for 14 years that he "was a kind man and if there was a hint of abruptness, it was always tempered by that dry, even at times sardonic, wit for which many of us remember him most" (*Vic Bar News* Winter 2001). Much the same could be said of Freddie, who was invariably quietly spoken and polite to both practitioners and litigants. He was, however, always anxious to deal with the real merits of the case before him and made it clear if he was not being "assisted" by a line of questioning or an aspect of submissions.

In 1988 he was appointed Judge

Administrator of the Southern Region of the Family Court and undertook his responsibilities with quiet efficiency. He was particularly proud of his success in the planning development and construction of the new Federal Courts complex where he worked closely with Chief Justice Black of the Federal Court. For his whole time on the Bench he was greatly assisted by his associate, Pam Carnell whose diligence and knowledge of the "system" became legendary.

A review of Freddie's time on the Bench would not be complete without reference to his role in the Judges Duty List and his involvement with the Ballarat Family Court Circuit. For many years he spent significant periods as the Duty List Judge in Melbourne. Cases were dealt with expeditiously, ex tempore judgments were usually given and the outcome was invariably both practical and legally correct. For more than quarter of a century Freddie regularly sat as the Family Court Circuit Judge at Ballarat. In that time he earned the respect of and formed friendships with the diverse group of family lawyers who appeared before him at Ballarat.

It is not possible to accurately summarise Freddie's involvement with rowing. He was a member of a number of victorious Kings Cup crews and represented Australia in international rowing. He coached a number of Head of the River school crews (Xavier College, St

Kevin's College, Melbourne Grammar and Brighton Grammar). He coached the first Newman college crew to win the intercollegiate boat race and has understandable pride that he coached the first Australian crew to win an international gold medal with the coxed fours at St Catherines, Canada, in 1967 and a world championship bronze in 1977 with the first ever Australian lightweight eights. He was the president of the Victorian Rowing Association for approximately 20 years and gave generously of his time to countless rowing activities. In 2000 he was awarded the Australian Sports Medal in recognition of his tremendous contribution to the sport of rowing.

In 1978 Freddie's wife Beth died of cancer, leaving him to care for their four children, before he married Genevieve with whom he now has two children. He has always been a devoted father and whilst proud of each of his children is delighted that one of them practices law.

His other interests include loyalty to the Collingwood football club, a love of the island of Vanuatu and a general interest in and knowledge of history and geography. He was president of the Victorian Branch of the Order of St Lazarus from 1984 to 1990.

Freddie has made a significant contribution to the community, both on the Bench and off it. The Bar wishes him a long and happy retirement.



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A Man Who Was Prepared to Listen:

The Honourable Richard McGarvie

THE Honourable Richard Elgin McGarvie AC was Governor of Victoria from 1992 to 1997. He was also a barrister, a legal educator, an author, a Supreme Court judge and a family man. He graduated with the Supreme Court Prize in 1950 and on completing articles came to the Bar on 1 February 1952 where he read with Sir George Lush. He was Vice-Chairman of the Bar from 1971 to 1973 and Chairman of the Bar Council from 1973 to 1975. He was appointed to the Supreme Court of Victoria on 1 June 1976 and served on that Court until his appointment as Governor of Victoria on 23 April 1992. He died on Saturday 24 May 2003.

One matter that is seldom mentioned by those who relate his history is the major role which he played on the Council of Legal Education and in particular as Chairman of the Committee which came to be known as the ACAC Committee ("the Academic Course Advisory Committee"). As Chairman of that Committee he was the person primarily responsible for establishing the 11 areas of knowledge which today provide a guide throughout Australia for admission of overseas graduates or practitioners.

It is well known that he was an independent lecturer in contracts at the University of Melbourne. His major role as a consultant in the subjects of contracts and industrial law at Monash University is less well known. He brought to the teaching of these subjects a pragmatic appreciation of the realities of practice. He straddled with ease the two worlds, that of the academic and that of the practitioner.

All of us remember him from a different perspective. Those such as Ray Northrop, who served with him in the Navy, and those such as Xavier Connor, who worked with him in reforming the Labor Party, have a perspective quite different from that of those who appeared against him in court and who appeared before him when he was on the Bench



The Honourable Richard McGarvie AC.



Richard McGarvie with his wife Lesley.

(some of those perspectives appear in the extracts which follow). In every aspect, however, the overwhelming characteristic which emerges is that of "caring".

Dick McGarvie was essentially a compassionate man who, despite his own strong intellect, listened with care and attention to whatever was put to him. He had the capacity to see the other person's point of view, to listen to it and evaluate it. It would be too much to say that he was "prepared to suffer fools gladly", but he did not dismiss them. His whole approach was based on the assumption that the other person had something worthwhile to say.

When he listened to you with his head slightly on one side, he did so in a way that indicated the importance of what you were saying and that your views mattered. To him they did. This characteristic extended to his relationship with all groups, with all persons, with all ages. He could listen as intently and seriously to the words of a friend's four year old as he could to the arguments put to him by senior counsel in court.

His work as a teacher and as a writer, as Chancellor of Latrobe University and as Chairman of the Academic Course Appraisal Committee, was all sandwiched in — the phrase is appropriate because much committee work was done over sandwiches in his chambers at lunch time — between his judicial duties. He did not allow his commitment to these other interests and responsibilities to interfere with his duties as a judge of the Supreme Court. Somehow he fitted them in.

Equally, although he worked hard, he managed to fit in time for his family. He enjoyed all aspects of his role as Governor but the greatest joy it gave him was the opportunity to spend so much time with, and working with, his wife, Lesley.

He combined, apparently without effort, a passionate idealism with a total sense of what was practicable. His design of a republic model which would preserve

all the essential features of Australia's current constitutional system illustrates both aspects of his character. Although careful not to take sides in debate between monarchists and republicans, he was utterly determined that any constitutional change should not undermine the sound foundations of Australian democracy. He drew attention to grave flaws he perceived in the proposed Republican version that John Howard put to referendum. After the referendum failed he, with others including Jack Hammond, organised

the Corowa Conference in the hope of igniting thought and debate on the Head of State issue.

Unlike many people who obtain high office, Dick McGarvie did not thrust himself forward. Where there were views that he felt needed to be heard he was prepared to express them and to espouse them passionately. But he remained balanced and logical, and, above all, accepting of others.

Too often we see people through what we consider to be their public persona.

The true persona of Dick McGarvie, as I saw it, is revealed by the statement of a teenaged girl (not a member of his family) on hearing of his death: "But he was so young. I don't mean that he looked young but he was young."

Unlike most of us as the years passed he did not put his ideals on the back burner. He continued to pursue them.

He was a remarkable man and we shall miss him.

G.N.

He Was Fair, Even-tempered and Wise:

Tribute to the Honourable Richard E. McGarvie AC

Read by Richard W. McGarvie on behalf of the family

THERE is a wonderful, lyrical, Irish film called "Waking Ned Devine" in which, through a twist of a very funny plot, a man is present to hear his own funeral tribute. Looking out at all your faces it occurs to me what a great pity it is that Dad cannot be here today to see you all and hear the words spoken about him. I know how much he would have loved to have been here — to have shaken each of your hands, listened with real interest to what each of you had to say, and spoken quietly, sincerely, and I suspect this week very sadly, about the topics of the day. He would have gently probed your views about the Australian Head of State issue, and referred you to his book, *Democracy: Choosing Australia's Republic*, into which he put so much work, and which contains a lifetime's experience, learning and, above all, wisdom.

The Head of State issue and the importance of maintaining Australia's democratic system and constitutional strength dominated Dad's so-called "retirement years", in which he continued to work as hard as he ever had. The republican model he devised, after much careful thought and hard work, was, like all great solutions, devastatingly simple. The McGarvie Model, as it came to be known, would retain all of the features of Australia's democratic system by vesting



Richard W. McGarvie

in an Australian Constitutional Council the Queen's only remaining constitutional function — of appointing or dismissing the Australian Head of State on the Prime Minister's advice. It was the second-most favoured model at the 1999 Constitutional Convention, runner-up to the ill-fated Australian Republican Movement model, which Dad always regarded as deeply flawed. With perspicacious supporters from all sides of politics, and every sec-

tion of the Australian community, Dad remained to the end a fervent believer in the inevitable certainty of his model's ultimate success, should Australia ever finally get around to becoming a republic.

His love of Australia and the community he lived in was reflected in everything he said and everything he did. He devoured books on Australian history, politics and constitutional affairs. He could recite the entire Banjo Paterson ballads: "The Man from Snowy River", "Clancy of the Overflow" and "The Man from Ironbark" as well as Henry Lawson's "The Fire at Ross's Farm" — by heart. He taught his children and grandchildren to do the same.

Dad was always very proud of his family. He was the greatest and kindest husband, father and grandfather any family could wish for. He was fair, even tempered and wise. He would always consult each member of the family when any important decision needed to be made and would genuinely listen to, and take account of, all views.

In all of his dealings with us, he was just and ethical, and encouraged all of us to maintain the highest standards. When any suggestion was made that we engage in questionable behaviour, he would gently persuade us of the correct course. For example, if one of us as children

suggested we ring home to be picked up from the local railway station on a public phone by shouting into the earpiece to save using a coin, Dad would point out that such behaviour was not honest. All of his children recall his system of imposing fines for misbehaviour which came out of our pocket money. In fact, my youngest sister, Ann, regularly ended up owing Dad money by the end of the week, but he was too kind to enforce the debt and would wipe the slate clean. His system of having each child open Christmas presents one at a time in order of age from youngest to oldest ensured that everyone participated in appreciating all gifts given. His love of reading was instilled in us all. Every birthday and Christmas present every year to everyone was a book which he had carefully chosen for each of us.

He was meticulous in his preparation for everything he undertook. However, despite the enormous effort he put into each of his careers, in the time we have known him — as a barrister, a QC from the age of 37, a judge for 16 years, Chancellor of La Trobe University for 11 years, Governor of Victoria for five years, and a passionate constitutional commentator to the day he died — he always made time for his friends and for those he loved. When we were young, Saturday mornings were set aside for fabulous games of hide-and-seek at our home in Beaumaris, where Dad would always be “he”, and all the kids in the neighbourhood would join in.

Dad always told us that he believed the way to get the best out of others when working on any project was by doing much of the preparation and work himself but giving credit for any successful outcome to them. In the event of rare failure, Dad would always shoulder the responsibility himself. Dad was always a source of wise advice in troubled times. He had a tremendous capacity for logical thought and an uncanny ability to see how others would view or interpret events. His advice was always impeccable.

All of his life Dad has had the most amazing work ethic. To each of us he would say that a job worth doing was worth doing well and he always acted on his own advice. When we were growing up it was not unusual for the study light to be burning well after midnight and again from 4 am when he was preparing or running a case as a barrister, or toiling over yet another reserved judgment as a judge. As a result, if there was one thing Dad never had enough of it was sleep. He became the master of the catnap and could fall asleep at the drop of a hat — at the dinner table,

immediately after the opening bar of a Melbourne Symphony Orchestra concert, in front of any television program other than news and current affairs, in the car whenever he wasn't driving, or at any family gathering immediately after lunch.

As a result of his upbringing on a dairy farm at Pomorneit East, in Western Victoria, Dad was an accomplished bush carpenter who could build work benches, tree houses, dog kennels and even ferret hutches and who could fix practically anything with twisted fencing wire. He could ride as well as any stockman, could shoe a horse, catch and skin a rabbit, milk a cow or kill a snake with single bullet, or a length of fencing wire if no gun was handy.

Dad's first career after leaving the farm was as a sailor. He joined the Royal Australian Navy, which he chose purely because of his impatience to enlist as a serviceman in the latter years of World War Two. The Navy was then the only one of the services that would allow boys to enlist at 17. Dad's two years as an ordinary seaman and later an able seaman on the lower deck of a destroyer had an important formative part in his life. He not only developed his love of the sea, he was also exposed for the first time to people and ideas from all walks of life. This helped shape his progressive social and political views. He always retained his nautical skills and could deftly knot, splice and

As a result of his upbringing on a dairy farm at Pomorneit East, in Western Victoria, Dad was an accomplished bush carpenter who could build work benches, tree houses, dog kennels and even ferret hutches and who could fix practically anything with twisted fencing wire. He could ride as well as any stockman, could shoe a horse, catch and skin a rabbit, milk a cow or kill a snake with single bullet, or a length of fencing wire if no gun was handy.

whip ropes. While his rope work skills were useful when he later took up sailing, serving as a seaman on a naval destroyer did not teach him much about small boat sailing. After the war, he taught himself to sail a yacht by trial and error, exposing his young wife and friends to the many perils of Port Phillip Bay. On many occasions Mum would find herself swimming frantically after the yacht after a capsize while Dad attempted to right the boat. Dad finally learned to sail skilfully without actually drowning anyone in the process. We always speculated that it may well have been these hair-raising years which gave rise to Dad's favourite expression, reproduced on the back of today's order of service: “Worse things happen at sea.”

He took all of the family out sailing as often as he could manage it and instilled in us his love for the sea. The moment the yacht was launched from the beach Dad would be ecstatic. He would begin each voyage by roaring with delighted laughter and launching into a loud but entirely tuneless rendition of a British naval song, “Sons of the Sea”, the most memorable line of which we all joined in being “jolly great lumps of duff” which apparently describes some type of inedible naval pudding. Often Dad would take my brother Michael and me sailing around the bay from Beaumaris, sleeping overnight at such exotic locations as “on the beach at Altona”.

Family holidays were spent in the early days at Apollo Bay, where he loved nothing better than early-morning swims, freshly baked bread and jam, walks in the forest and cricket on the beach — using balls he carved from the thick stems of kelp washed up in the surf. In later years, the family would go camping at places like Tidal River at Wilson's Promontory, Lerderderg Gorge and Sheeppyard Flat near Mansfield.

Throughout his life, he retained a passion for growing vegetables, and liked nothing better than getting out into the garden tending his crop. Many a night he would be found in the backyard with a torch on a search and destroy mission for snails and slugs. Spare Saturday mornings were often spent shovelling horse manure in the veggie patch while whistling “The Road to Gundagai” out of the side of his mouth. Dad's passion for gardening had to be restrained during his years at Government House, although he was seen on occasions eyeing the croquet lawn as if assessing its potential to be dug up for a vegetable patch.

One thing which was never restrained

Farewell Drinks for Former Governor Richard McGarvie

Friends and colleagues of the late “Dick” McGarvie gathered in the Essoign on Friday 6 June 2003 to remember and celebrate the life of a man who contributed so much to the Victorian Bar, the legal profession generally, and the Australian community.



Honorable Xavier Connor QC, Clive Harris, Richard McGarvie, Judge Ross and Stuart Murdoch propose a toast to the memory of the late Richard McGarvie.



Robin Brett QC, Richard McGarvie, Judge Ross and Jack Rush QC.



Ian Fehring, Mark Carey and Michael Richards.



Greg Wicks, Gerry Nash QC and Rohan Hamilton.



Dimity Lyle, Judge Campbell, Roger Gillard QC and Tony Southall QC.



Richard McGarvie with Elspeth Strong.

was his ability to laugh and his wonderful dry sense of humour. Most importantly, he always had the ability to laugh at himself. One of his aides, Damien Farrell, tells the story of one of many visits Dad made as Governor to schools throughout Victoria. A group of children had listened with rapt attention to Dad's description of the role of Governor and of life at Government House. At the end of the session, Dad asked whether there were any questions. A serious-looking boy at the front raised his hand and, no doubt to the consternation of his teacher, asked "Why have you got such a large gap between your two front teeth?". Dad dissolved in laughter.

Despite his huge workload as a judge of the Supreme Court, university chancellor and subsequently as Governor, Dad always made time for his grandchildren. All of us fondly remember sunny afternoons at Government House when Dad would play hide-and-seek as he had done with us years before. Government House was hide-and-seek heaven. One of his grandchildren, then aged about three-and-a-half, found the prospect of hiding in one of literally hundreds of rooms somewhat daunting. He would wisely take the precaution of telling his grandfather where he proposed to hide. He would whisper: "Grandpa, I'm going to hide under the ottoman in the ballroom, but don't find me first." Dad always obliged.

While at Government House, Dad and Mum had the great idea of really getting to know all of their grandchildren as individuals, by taking each of them over seven years, one after another, on holidays to Australian islands — such as Lord Howe, Flinders, Kangaroo, and King Island. No matter how busy Dad was writing his book, researching or debating constitutional affairs concerning the issue of Australia's Head of State, they always made time to spend two weeks each year with another grandchild.

Dad always considered himself lucky but, from what we could see, he made his own luck. He was a practical optimist. While he believed that things would turn out for the best, he always worked long and hard to ensure that they did. Usually he would prove to himself and us that his optimism had been justified by moving mountains to bring about the desired result.

Throughout his life, Dad enjoyed the best of health and did everything he could to maintain his physical vitality. He exercised regularly, ate moderately and sensibly and had regular medical check-ups. We all remember Dad pounding the

floor, running on the spot in his bedroom each morning doing his Canadian Airforce designed "5BX" exercises. Until his final days, he had been to hospital just twice in his life for minor ailments and very rarely had days off sick.

Right to the end, Dad counted his blessings. Ten weeks ago, Dad suddenly contracted a debilitating illness — subsequently diagnosed as Guillain-Barre syndrome. This neural disease progressively robbed him of all use of his legs and arms and left him entirely dependent on my ever-faithful mother and nursing staff to minister to all of his needs. While retaining all of his powerful mental faculties, he found himself physically as helpless as a baby. It must have been torture of the acutest kind, for a man of his immense strength and independence, to have had to rely so heavily on others for his welfare. Despite this, he remained always dignified and optimistic.

He told my younger sister Robyn: "I'm like the king on the chessboard. I remain still while everyone moves around me." While he agreed that the paralysis was the worst thing that had ever happened to him, he hastened to add: "If the worst-ever thing happens at age 76, then I've been very lucky."

Peter Liddell QC

Mr. Liddell I wonder if you would enlighten the court, in terms of the anabranch, whether we are dealing with an anastomosis or a bifurcation.

THUS spoke Gibbs C.J. in the course of argument in *Hazlett v Presnell* (1982) 149 CLR 107. Neither my learned leader nor I in the course of our studious preparation had dealt extensively, or at all, with this conundrum. We had always believed that the issue related to ownership of an island in the Murray River and not medical negligence.

Liddell, however, was equal to the task and responded in the following terms:

Your Honour, I think the answer is most simply stated by saying it depends very much upon the side of the river upon which one is standing.

Peter Anthony Liddell was born on 27 February 1934. He was educated at St.

On one occasion in his final weeks he was holding court, propped up in a hospital chair, unable to move from the neck down. In attendance were a retired judge and his wife, Mum, a daughter-in-law, physiotherapists and nurses. He spoke with nothing but glowing praise for the medical services and care he had received, the extraordinary medical technology being deployed for his benefit, and of how lucky he was.

He was undoubtedly luckiest of all in his marriage to my mother, Lesley. Their marriage was always loving, strong and happy. As a couple, they always presented a united front and did everything they could to ensure that their children grew up knowing that their parents would always remain together. They did, for 49 wonderful years. Some of their happiest years were those spent working together in partnership as Governor and Governor's wife. They spent more time together in those years than ever before. Their profound love for each other was never better shown than during the course of Dad's final illness. Mum spent all day every day beside Dad's hospital bed encouraging, comforting and nursing him. She made the unbearable bearable. Their love for each other was boundless.

Kevin's and graduated from the Melbourne University with an Honours Degree in Law in 1956. He did articles with Norris Coates & Herle and signed the Bar Roll in April 1958 reading in the chambers of the late H.R. Newton. Liddell took silk in 1974 at the age of 40.

As junior he was widely sought after in a practice of remarkable breadth, as perusal of the Victorian Reports during the sixties and seventies will testify. The firm of Alexander Grant Dickson and King was one of his principal supporters during this period. As Sir Reginald Ansett was a client it was only a matter of time before he commenced working in the aviation field and ultimately held a retainer for ATI. Liddell appeared as silk in a number of Royal Commissions notably, perhaps, the Inquiry into the Petroleum Industry. As well he had a penchant for appearances in some of the more exotic South East Asian Jurisdictions such as Papua New Guinea, Fiji and East Timor.



From the seventies Liddell's days of wine and roses were played out upon his beloved Flinders Island in the Furneaux Group where he purchased a cattle property.

Initially his only means of conveyance was a push bike, never having held a driver's licence. Shortly after purchasing the property, however, he found the skeletal remains of an old tractor and through the industry of his friend "Badger" Dennis it was brought back to life. The sight of Liddell astride this machine approaching the pub in the main (and only) street of Whitemark was bloodcurdling, only to be outdone by the sight of its exit. He rode rather than drove the vehicle reminiscent of T.E. Lawrence in the film urging his camel on at full tilt.

Sometime later Liddell did procure a driving licence from the local constabulary which conduct most of the tests in a building with which Liddell had considerable familiarity. This led to the acquisition of a motor vehicle of sorts. It eventually perished by immersion on a tidal flat while its owner was off in the distance catching flounder, having failed to appreciate the ratio decidendi of tidal law. Its demise, however, was not altogether a source of sadness as for a considerable time its door mechanisms had been salted up, leaving the boot as the only means of access and egress.

Apart from his exploits as a Formula 1 tractor driver and fisherman, he excelled as a sportsman as the legendary host of the annual Richmond Park Cricket matches played between teams variously described as Convicts v Gentlemen and North v South. The level of libation was usually not insignificant due to either the

trying weather, or the state of the pitch or the over abundance of special Flinders Island March flies but the effect was the same. By the end of the day players were unable to determine whether they were convicts or gentlemen or indeed whether they came from the north or the south.

It was an occasion of sadness for those who knew him when he retired from prac-

tice in June 1995. It was hoped that he and his wife Jan would be able to enjoy many fruitful years on the Island. It was not to be. Jan cared for him with utter devotion for the remainder of his life. He is survived by this three children, all of whom are married.

P.G.

Peter McGavin

WITH the death of Peter Edwin John Laurie McGavin on 19 February 2003 the Bar lost one of its last links with the 1939–45 War.

The McGavin family were English but had had a long connection with the Indian Civil Service. His father Alan was a Magistrate in India. His mother Hazel Bain had been a nursing sister with the first A.I.F. They were married in India in 1919.

Under the British Raj Peter and his older brother Alan had an interesting and sometimes exciting boyhood. On one occasion, whilst attending to their pet rabbit in its hutch, a cobra was about to strike. Fortunately their father saw it in the nick of time and shot it.

When Peter was only seven he and his brother went to board at St Edmund's School in London until 1937. His father then retired and the family decided to move to Australia where they lived at Black Rock.

In 1940 shortly before his eighteenth birthday, Peter enlisted in the Second A.I.F. and thereafter served in the 2nd/14th Battalion in which his brother was an officer. The battalion was commanded by the late Colonel Philip Rhoden, a prominent Melbourne solicitor.

From the beginning of his military career as a recruit at Puckapunyal, Peter was known by his comrades in the 18th Platoon as a colourful personality and somewhat of a rebel. In his disciplinary brushes with his Platoon Commander Peter began to hone his legal skills. Their relationship has been described as somewhat like that of the matador and the bull. Peter refused to clean his boots unless the Army provided him with boot polish. Rather than having to supply the entire battalion with boot polish, it was decided not to charge Private McGavin for refusing to clean his boots.

The brushes continued and when at the height of the New Guinea campaign his Platoon Commander forwarded further



complaints concerning Private McGavin to Colonel Rhoden, he received back a curt note — "I have one war on my hands fighting the Japanese and cannot handle another; so would you please stop".

In battle, however, Peter showed his finest qualities. During 1940–42 the 2nd/14th fought in Palestine, the Western Desert and Syria. At all times under fire, Peter's courage and calm were an inspiration to the comrades fighting alongside him.

Recalled to Australia in 1942 the Unit then fought in the Owen Stanley Ranges Campaign, at Gona and in the Ramu Valley. It was on the Kokoda Trail that the battalion showed its ultimate greatness.

As the High Commissioner for Australia later said at a memorial service in 1998: "At that time a downward thrust if successful, would have exposed the entire Australian mainland to invasion — the Battles of the Kokoda Trail marked the turning of the tide. There was a victory not only of the jungle battlefield, but a victory of courage and tenacity. A victory of sacrifice and selflessness."

At the same service Colonel Rhoden

said of his Battalion: "Although outnumbered six to one or more and certainly out-gunned — the battalion turned its undoubted professionalism and its experience and ability to the limit — it was the ability to hold on after all hope is dead, continuing to fight until there was scarce breath left in the body. The troops were fully aware of Australia's dependence upon them."

On the Kokoda Trail all men carried a minimum pack load of 45 pounds and a rifle. In addition all men were required to take their turn in carrying the Bren machine guns and ammunition. All this was done in mud and tropical rain pours, and for five weeks the men were continually in wet clothes. When the battles of Kokoda were finally won, of the 546 members of the Battalion who fought on the trail only 89 survived.

In 1945 the Battalion moved on to Borneo and Balikpapan but by this time Peter had become gravely ill and had to be hospitalised and later discharged. Fortunately his constitution was unusually robust.

Of Peter himself Colonel Rhoden said that "he was a popular member of the Battalion, who acquired those qualities of courage, endurance, mateship and sacrifice so dear to the members of his Battalion".

At that time (in marked contra-distinction to the present) servicemen received little or no counselling whatever. They were simply told to forget about the war and to get on with their lives.

Peter McGavin tried to do just that by enrolling in the Melbourne Law Faculty and by playing an active part in student life. He proved to be a good student and had one unique academic distinction — he obtained the Exhibition in Roman Law whilst in a drunken condition. The examination was fixed for the afternoon but when Peter arrived at the library about 10 o'clock he was wrongly informed the exam had been that morning. To console himself he repaired to Norton's Hotel where he drank until lunch time. About 1 p.m. he came back to the cafeteria for some coffee only to learn the exam was in fact that afternoon. After more coffee Peter duly sat the exam but required frequent comfort breaks. To everyone's surprise he obtained the Exhibition.

At times Peter hankered after the Bohemian life. He was a superb pianist with a beautiful touch and a rare talent for melody. He had an excellent ear and invariably played without music. He spoke French and German proficiently and at

times hankered after a life in which he played the piano in the cafés of Europe. His favourite pieces were Fats Waller's "Aint Misbehavin'" and the music from "Show Boat", but he was also no mean player of the Greig A Minor Concerto. Throughout his life, whenever there was a piano at a party, Peter invariably was urged to play on until the small hours of the morning.

On 11 December 1948 Peter married Alison Affleck who worked at the University Commission as a secretary. The marriage proved a very happy one and they were always devoted to each other. In order to support his wife and himself Peter became Associate to Sir Edmund Herring and continued his law course part time.

In 1950 Peter was admitted to practice and on 6 October 1950 he signed the Bar Roll and soon developed the standard junior practice of that era — landlord and tenant, "crash and bash", police offences and other small civil claims. He loved cricket and played an active part in arranging cricket matches for the Bar XI against the services and the Governor's XI. As a cricketer he had a sound batting technique and was a competent medium fast bowler.

In 1953 Peter was offered the post of a Crown prosecutor in Tasmania. In 1955 he returned to Victoria where he worked briefly as a barrister, and then as a solicitor doing many court appearances. Finally he re-signed the Bar Roll on 15 February 1968. At this stage he developed a relatively large circuit practice and in particular at Ballarat.

Peter was spending so much time at Ballarat that eventually in 1975 he acquired a large house on Black Hill in which his family was very comfortably accommodated. From that time on he controlled the Ballarat County Court and Supreme Court lists, but also did further work in the circuit towns of the Western district, to which he drove in his large Rolls Royce (later changed to a "Merc").

Peter was a sound lawyer with a fine grasp of legal principles. He was a delight to his clerk in that he could be sent anywhere and do anything. As a barrister he was noted for his deep, rich and beautifully modulated speaking voice. In many ways Peter reminded one of Rumpole, and was not dissimilar in build. He knew much of Shakespeare and the *Oxford Book of Verse* by heart, and often quoted appropriate passages in address. He was a fine and fearless advocate, an opponent to be feared, who fought hard for his clients'

rights. At times he was angered by what he perceived as some injustice to his client.

On one such occasion at Ballarat when Peter was appearing for a plaintiff the two defendants were represented by Norman Fowler and John Roberts respectively. At the end of the day there was an unusually robust interchange with Roberts. Next day, to Fowler's consternation, immediately before the opening of the Court Peter placed on the Bar table in front of him what appeared to be a pistol. The consternation of Roberts was even greater, until later in the day when it was ascertained that the weapon was, in fact, a water pistol.

Out of court there was no more delightful companion. Peter might attack his opponent with the utmost vigour and then disarm him by inviting him out to dinner. He was a brilliant and witty conversationalist, a superb raconteur with a huge fund of stories, who enjoyed nothing more than spending an evening with his fellow lawyers. If there were a piano he was soon playing and amongst his enormous repertoire were many of the favourite songs of Noel Coward.

Declining health and, in particular, failing eyesight due to cataracts led to his retirement on 19 February 1987. He had hankered after a rural life and he and Alison acquired a 10 acre property at Smythe's Creek, on which they ran horses and chickens. By this time his eyesight was negligible.

After laser surgery Peter, to his great joy, was able to read again, and, although his health was poor, his mental vigour remained unabated almost to the end. He loved to sit and discuss politics, history, or philosophical issues and, in particular, cricket, of which he had an encyclopaedic knowledge.

Peter died on 19 February 2003 and was buried in the Ballarat New Cemetery. He is survived by his wife Alison and four of his children, Virginia, Alan, Andrew and Peter. He will live on in the memories of his many friends as an unforgettable Dickensian character.

C.F.

Elizabeth (Liz) Murphy



LIZ Murphy was born on 10 October, 1927. She was the older of the two daughters of Dr George and Angela Murphy (nee McCumiskie) of Armadale.

Largely because of their mother's poor health Liz, as she was known to her many friends, and Judith, her sister, were sent to board with the Mercy Nuns at Ballarat East. Their father was a General Practitioner in High Street, Armadale. One of my earliest recollections of Liz, who was a second cousin, was on a bleak cold day when an Aunt of mine took Liz and her sister, together with my older brother Bob and myself to the zoo. She was aged 9 or 10 and we still have a photograph of the occasion. When first at the Bar, Liz lived in a unit below the same Aunt who owned a block of flats in East Melbourne. I well recall in one of her first years at the Bar following the Bar Dinner, many members of counsel descended upon Liz's unit and a good night was had by all.

Liz's mother died when she was only about 13 years old and she and her sister continued at Ballarat East in the boarding school until they finished their schooling. I felt it was a great compliment to Liz, and indeed to her sister Judith, that four Nuns who had been in Liz's class at school drove from Ballarat to attend her Requiem Mass at the Sacred Heart Church, Sandringham.

Another early recollection of Liz was after Melbourne's Grand Final win in 1948. I might say that as years passed Liz became a very ardent and committed supporter

and member of the Melbourne Football Club. My late father's first job in the law was in his home town of Echuca where he did clerical and minor legal duties on holidays with Jack Mueller's father who was a local solicitor. Jack Mueller would need no introduction to supporters of Aussie Rules Football. On Grand Final night Jack brought a number of the Melbourne players to my home where my parents were having a "singalong". Jack drove Liz back to St Vincent's Hospital where she was doing her nursing course and deposited her at the nurse's home. This major event in Liz's life was oft repeated by her.

Prior to Liz undertaking the law course, she had done nursing at St Vincent's Hospital in her early post-school years and subsequently travelled to England where she did specialist courses in anaesthetics and resuscitation. Some time after her return to Melbourne, she decided to change career direction and became a sales representative with Nicholas Aspro. She started with that company in Melbourne and was later transferred to Sydney where she spent something in the order of 10 years doing the New South Wales circuit. Liz became the leading salesperson for Nicholas Aspro which is perhaps proof of the forceful personality that she displayed at the Bar. Liz believed that she had no long-term future with Nicholas Aspro because she was a female and in those days (late 60s, early 70s) she had no potential for promotion. She returned to Melbourne and undertook her Matriculation studies before commencing a law course at Melbourne University. Several members of the profession, including quite a number at the Bar, studied at Melbourne University in her time. I understand she became somewhat of a known personality.

A further experience of my own relating to Liz occurred whilst she was a law student but relates to the period when back in Victoria she was travelling the countryside with Nicholas Aspro. I was briefed in Ballarat to defend a person accused of culpable driving which resulted after the accused had spent the greater part of the afternoon in a hotel at Wendouree. On his journey home he came into collision with another vehicle, an occupant of which was killed. Liz, who, whilst on these country circuits, always seemed to managed to get to the races when they were at Ballarat, came across the accident scene soon after

it occurred when returning from Dowling Forest to Ballarat City.

The defendant had made certain incriminating admissions to the police at the scene of the accident and when, by pure chance, I learned that Liz had been a participant in the post-accident activities, I quizzed her as to his capacity in her opinion to give a statement at the scene. Liz advised me he was comatose without doubt and was prepared to say so in court. She felt he would not have been in a fit state to make any statement. I called her as a defence witness at the trial before Judge Jim Forest and a jury. The learned trial Judge, who had quite a background knowledge of Liz from early days, had no hesitation in accepting her as an expert witness because of her English qualifications in anaesthetics and resuscitation. The jury eventually acquitted my client who immediately, with his recently acquired entourage of Born Again Christians, displayed his Bible to me, as did his support group, and advised me that it was the man upstairs who had looked after him. I suggested that at the next Church meeting they might perhaps recite a prayer for Liz.

Liz did her articles with Galbally & O'Bryan (articled to Peter O'Bryan). This was a plumb position which she obtained. However, Liz was keen to try her wares at the Bar and after finishing articles joined the Bar in 1979. She remained at the Bar for approximately 15 years, but her health made it difficult for her to continue, and after her retirement she moved to a retirement village on the Mornington Peninsula, at Mornington, where she became heavily involved with Probus. The Probus Group from Mornington was very well represented at her funeral.

At the Bar Liz was instrumental in organising, setting up and running the first aid facility. This has become a permanent Bar facility. Her background in nursing was of invaluable insistence in that endeavour.

Her earlier nursing involvement resulted in Liz acting on a committee with Dame Rita Buxton in an appeal for funds for a rehabilitation centre at St Vincent's Hospital. This was a very successful effort and the Board of St Vincent's Hospital recognised her efforts by making her a Life Governor. Liz was very proud of this honour.

Liz was also to the fore in the introduc-

tion of female members at race clubs. Liz saw no reason for females to be denied membership and fought for their rights. The race clubs had previously drawn white lines across the ground areas over which females were not allowed to tread. This was like a red rag to a bull, as far as Liz was concerned, and she was very instrumental in changing the perception of ladies within such organisations. She became a member herself of both the VATC (as it then was) and the VRC. She used to regularly attend race meetings at both venues. She made many friends on the racecourse including race course dignitaries.

Another of Liz's passions was the Melbourne football club, and even in her later days whilst living in the retirement village and, with limited resources, she often found her way clear to pay for the football club membership despite her membership of the MCC. Before she became an MCC member, Liz would watch the football from a regular spot on the wing, frequently in the company of Judge Chester Keon-Cohen and his son Edward. After obtaining her actual MCC membership she was a regular in the stand in front of the Long Room where she would often save a seat for Chester who would arrive later. As indicated Liz was a member of the MCC in her later years, but she was a lifetime cricket fan. She loved attending the Boxing Day Test Matches and many other cricket games at her beloved "G". In both cricket and football Liz became, at least in her own view, something of an expert. She was able to intelligently discuss the activities which had occurred on any particular day relating to any particular game. In football often her acclaimed best players were adjudged similarly by the scribes.

Because of her ill health Liz retired from the Bar in 1994, but retained a very keen interest in her associates and legal friends. Basically a non-drinker Liz would regularly, when in attendance at race meetings, be in the company of various judicial officers such as Bruce McNabb, John Nixon, Cairns Villeneuve-Smith and others. On her somewhat infrequent visits to Melbourne in recent years Liz would try to fit in lunch in the Essoign Club and would sit at the "Head" table where she always seemed welcome.

Liz's passing has robbed the Bar and the profession of an "identity". There are, these days, too few identities within the profession and it is the poorer for Liz's passing. I believe Liz is now experiencing the peace which she so justly deserved.

G.T.

Victorian Bar Legal Assistance Scheme 2002–03

THE Victorian Bar, through its legal assistance scheme ("the scheme"), continues in its endeavor to increase and improve the accessibility of pro bono legal assistance provided by Victorian barristers to the community. The scheme, which is now in its third successful year of administration by the Public Interest Law Clearing House (PILCH), is overseen by the Bar's Legal Assistance Committee (LAC) to which PILCH reports regularly. The scheme costs about \$84,000 pa to operate and, whilst it is substantially funded by the Bar, it is appropriate to acknowledge the significant financial assistance of almost \$29,000 provided to it for 2002/2003 by the Legal Practice Board as its contribution to the Bar's access to justice program.

Over 400 barristers — more than 25 per cent of the practising list — have volunteered to participate in the scheme. Many others, although not formally registered, welcome requests to assist when approached. The Bar Council extends its thanks to those barristers who volunteer and provide their work to the scheme. Such generosity on the part of the Bar is noteworthy, particularly in light of a public misconception that lawyers are generally greedy and self-interested professionals.

Applications received by the scheme are assessed on the basis of legal merit, lack of means and whether assistance is required in the "interests of the administration of justice". The majority of applications come from individuals, many with complex legal problems and no other options for legal assistance. Referrals made to barristers may be for advice, drawing documents and/or appearance work. Matters dealt with cover diverse areas of law including administrative law, migration, crime, family, general commercial and civil, personal injury, employment, debt and bankruptcy and tenancy and discrimination.

Demand upon the scheme continues to

increase. In 2002–03 the scheme received 289 inquiries, an increase of approximately 32 per cent compared with the previous year. Of these inquiries, 70 referrals were made to barristers, an increase of 43 per cent. Where appropriate, applicants were also referred to other services such as Victoria Legal Aid, an ombudsman, a community legal centre or another community-based organisation.

As well as operating the scheme, PILCH also administers its own public interest referral service and, since October 2002, the Law Institute's legal assistance scheme. This "one-stop shop" arrangement sees the three major organised pro bono schemes in Victoria being housed in the same office and sharing the same administrative structure. This provides a number of advantages, including maximising public access to the services, improving cross referral between schemes and ensuring consistency of approach. The Bar is pleased to be a part of this model of co-operative pro bono service delivery, which is an Australia-wide first.

The scheme has recently welcomed Susannah Sage as its first part-time Manager, employed by PILCH. Susannah's credentials, which are wide and varied, include a recent stint as a technical advisor to the justice sector in the Solomon Islands and, before that, working as an associate to a judge of the Federal Court. Her primary role will be to manage the scheme and its clients, while fostering the development of pro bono work at the Bar.

In 2002–03 migration law was the area of greatest need, with many applications to the scheme coming from asylum seekers held in detention. The LAC's Asylum Seekers' sub-committee, convened by Michael Gronow, has continued to meet in 2002–03 in order to assist in the co-ordination of pro bono legal assistance to refugees. Members of the Bar, PILCH and other organizations represented on the sub-committee have been involved in



Samantha Burchell, Co-Executive Director of PILCH; Susannah Sage, Manager of the Victorian Bar Legal Assistance Scheme and Paula O'Brien, Co-Executive Director of PILCH.

a number of successful initiatives during 2002–03. These have included:

- Assistance in the provision by committed lawyers at Legal Aid Victoria of a duty solicitor scheme at migration directions days at the Federal Court and the Federal Magistrates Court.
- The conduct of an “audit” of organizations involved in the provision of pro bono legal assistance to refugees in Victoria. The results of the survey will assist those advising refugees and asylum seekers in identifying the bodies and organizations best able to help them and in preventing duplication of effort.
- Working with the Federal Court and the Federal Magistrates Court schemes in coordinating the provision of assistance.
- Assisting in the conduct of two very successful and well attended seminar programs to educate barristers in the conduct of migration cases. These were organized respectively by Julian Burnside QC and Rachel Doyle.
- Finally, promotion of a mentoring scheme whereby less experienced

barristers can receive guidance from those more experienced when acting pro bono in migration/asylum seeker matters.

The sub-committee is pursuing the possibility of obtaining additional private funding to employ a part-time lawyer/migration agent to work with both PILCH and other interested bodies in this very important area of need.

This is by no means a comprehensive statement of all the pro bono activities of

The sub-committee is pursuing the possibility of obtaining additional private funding to employ a part time lawyer/migration agent to work with both PILCH and other interested bodies in this very important area of need.

Victorian barristers. While the focus of this report is on the work of the scheme, it is important to acknowledge that barristers also give generously of their expertise and time in many other ways. This includes participation in the work of other refugee and migration organisations such as Spare Lawyers for Refugees, the Refugee Information and Advice Network, the Asylum Seekers Resource Centre and several interstate organisations, especially in South Australia and Western Australia. Members of the Bar also support the schemes administered by the Federal Court and the Federal Magistrates Service, community legal centres and by accepting pro bono matters directly from clients and others in the course of running their own practices. PILCH and the LAC act co-operatively with these schemes, activities and bodies in coordinating the provision of pro bono legal assistance.

The work of the Bar scheme, along with the additional activities outlined, constitutes a very important community service which the Victorian Bar can feel justly proud of. However, this work can and should never be seen a substitute

Victorian Bar Legal Assistance Scheme Case Studies

FAMILY LAW

THE Victorian Bar Legal Assistance Scheme ("the scheme") responded to an inquiry from the Family Court of Australia seeking assistance for an otherwise unrepresented litigant in a long running and complex child contact matter. The litigant was required to make legal argument concerning the applicability of section 19N of the Family Law Act and the admissibility or otherwise of statements made to a counsellor. Counsel responded to the request from the scheme at short notice, conferred with the client, prepared legal argument and appeared on behalf of the litigant the following day.

MIGRATION LAW

Following an inquiry from the Immigrant Women's Domestic Violence Service, the scheme referred a matter to counsel to assist a migrant woman and her daughter who were taken into immigration detention following the refusal of a visa. The Law Institute of Victoria Legal Assistance Scheme was also involved, and referred the matter to a solicitor for further assistance.

The solicitor and counsel worked together on behalf of the clients to obtain documents from the Department of Immigration relating to the visa refusal, and to file an application with the Federal Magistrates Service for a

review of that decision. They also successfully applied for a bridging visa to have the clients released from detention. The Immigrant Women's Domestic Violence Service was able to arrange accommodation for the clients, who are now living in the community pending the hearing.

DEBT RECOVERY

Counsel assisted a client of the Consumer Credit Legal Service who was facing bankruptcy proceedings under a creditor's petition. Following a motor vehicle accident, the creditor had obtained a default judgment against the client in the Magistrates' Court. The Consumer Credit Legal Service believed the client had a complete defence to that action, as the client was not involved in the accident. The default judgment had come about as a result of the client's disability, which meant that he did not respond to the court summons. With assistance from counsel arranged through the scheme, the original judgment debt was set aside, and the proceeding was settled (including costs). Further, the creditor's petition was dismissed, and the client was able to protect his family's home from seizure.

CRIMINAL LAW

In late 2002, a young man was involved in the theft of number plates and pet-

rol. Five months later he represented himself in the Dandenong Magistrates' Court where he pleaded guilty to two theft charges and was convicted and sentenced to 75 hours of community work over six months. The conviction and sentence were appealed to the County Court. With the assistance of counsel arranged through the scheme and Youthlaw, a young people's legal centre, the appeal was allowed. The order of the Magistrate was set aside and the sentence reduced to a bond for 12 months and a fine of \$100 with a compensation order of \$53.

MERITS ADVICE

The Law Institute of Victoria Legal Assistance Scheme received an application from a client wanting to challenge a judgment debt arising from a County Court proceeding. The creditor had instituted recovery proceedings in the Supreme Court, and the Sheriff's Office had advertised the family home for sale to pay the debt. Before referring the complex matter to a solicitor, counsel's opinion was sought through the scheme on the merits of an appeal from the County Court judgment. Counsel advised that the appeal did not have reasonable prospects of success. Based on that advice the client took out a loan to pay the judgment debt and avoid having the family home sold.

for the provision by governments of an adequate and just legal aid service for the whole of the community.

In conclusion I am pleased to offer the Bar's thanks and appreciation to the Co-

Executive Directors of PILCH, Samantha Burchell and Emma Hunt (and to Paula O'Brien who has recently replaced Emma whilst she is on maternity leave), and to all of their staff, who have operated the

scheme with commitment, dedication, professionalism and good humour.

Anthony Howard
Chair, Legal Assistance Committee



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Verbatim

A Misleading Title

An article in *The Australian Law Journal*, Volume 63, p.250 is entitled "A Lawyer's Guide to Misleading or Deceptive Conduct".

Gillies — No Fun

County Court of Victoria

20 March 2003

Coram: Judge Duckett

Strachan v J. Wilson Pty Ltd

J.V. Kaufman QC with L. Feaweader for Plaintiff

Gillies QC with R.C. Forsyth for Defendant

Gillies QC: So the situation is that at around about 11 o'clock on the Monday morning you're buying a couple of cans for consumption on the tram? ... Mm'hm. You consume the two cans on the tram and then, having got off the tram, went to the bottle shop and bought another two cans, and then sat down in the bus shelter and had a can of beer while you were waiting for the bus?

Plaintiff: Yes. I would have done exactly that, exactly that way too.

Gillies QC: That doesn't strike you as being strange in ...?

Plaintiff: I came from the city, and when

I leave here today I will be getting a few cans for the tram trip home, for sure.

Gillies QC: But you deny that you're an alcoholic?

Plaintiff: I'm not an alcoholic.

Gillies QC: Okay, but you regard that as moderate, normal drinking?

Plaintiff: Well, I don't know what you would class as moderate, normal drinking, but I wouldn't want to go to the football with you because apparently you would only have one can. But to me, I'd class totally different.

Gillies QC: What, you need to have a beer on the tram, do you?

Plaintiff: It kills time. I don't mind about having a can of beer and reading the paper on the way home.

Unsatisfied Appetites

Supreme Court of Victoria

3 April 2003

Interceramics Australia Pty Ltd v Quadric Pty Ltd

Coram: Byrne J

Martin QC with Fyfe for the Plaintiff
Shaw for the Defendant

His Honour: There is an old Polish story, Mr Shaw, that says if you want the fish you have got to have the bones. Now if you want to get rid of the \$3.1 million agree-

ment, you may also lose your \$70,000 discount. It goes the other way, of course, for Mr Martin.

Mr Martin: Mr Oszczeda (an earlier witness) was of course Polish.

His Honour: Yes, that's right.

Mr Shaw: I don't think we got the fish or the bones from Mr Oszczeda.

Horsing Around

County Court of Victoria

R v Carman & Wilson

Sharpley for Carman

S. Lindner for Wilson

Halpin prosecuting

His Honour: Yes, understand what your submission is I think. I don't think I have any difficulties understanding it, it's just a question of is there any evidence open to go to the jury on this question. It seems to me there has to be.

Mr Sharpley: Yes, well I won't flog the horse any more Your Honour.

His Honour: Yes.

Mr Halpin: May I respond, Your Honour, perhaps to my friend's comment about objective and subjective once more.

His Honour: Your horse is also dead.

Mr Halpin: Probably Your Honour, but I won't be giving him the last rites.

High Court Not Routed

Or Nothing Comes from Nothing

THE following are extracts from the High Court transcript in an Application by Theodore Rout heard on 14 March 2003.

Mr T.J. Rout: Appeared in person.

Kirby J: You are Theodore Rout and you are the applicant in the application for leave to issue a proceeding before the Court now?

Mr T.J. Rout: Yes.

Kirby J: We have the written documents that you have placed before us. You now have the opportunity to advance some oral arguments. Do you understand you are limited in time?

Mr T.J. Rout: Yes, I do, yes.

Kirby J: Very well, you proceed to advance the arguments you wish to put.

Mr T.J. Rout: Okay, I might point out that the High Court of Australia, the legal system and I are victims of a mythological peer review organisation that does not exist and is staffed by volunteer workers of which there are none. So I am responsible for more than just proving there is another set of dividing and multiplying by zero and that it is incorrect. I have also proven in 1993 that Einstein's ... relativity is law. Now, all this data is related to, directly and indirectly related to, fusing

of hydrogen which is ... I proved that the speed of light is alterable and controllable and I have delivered the evidence verbally in the Supreme Court on 29 August. I then went on in September last year to prove that time and the speed of light equal one another, such you alter one, you alter the other, and this in turn enables the altering of the speed of light within Einstein's relativity.

Now, I am given no credit or recognition for any of my work at any time. I have proved in 1994 that energy is ceasing to exist naturally in the phenomena because

Continued on page 66

Commonwealth Law Conference

Melbourne Convention Centre,
14–17 April 2003



Cherie Booth QC

The 2003 Commonwealth Law Conference was originally to be held in Zimbabwe. The crisis in government in that country meant that it could no longer be said that the rule of law prevailed. Under the present Zimbabwean regime it would have been difficult to discuss the concepts of human rights, common law and freedom of speech. In those circumstances a decision had to be made to change the venue and it was agreed that the Law Council of Australia would host the 13th Commonwealth Law Conference in Melbourne in April of 2003.

THE Prime Minister of Australia, the Honourable John Howard MP, opened the conference on the 14th of April at the Melbourne Convention Centre. The conference had not been held in Australia since 1965 and the Prime Minister noted in his speech as follows:

... in 1965, the last time this conference was held in Australia, it was opened by my very distinguished predecessor Sir Robert Menzies. The world was a very different place in 1965 than it is now, and when one makes statements like that audiences often expect

the utterer of the words to then go on and describe how things have deteriorated since. I think in the area of the governments of the Commonwealth and the rule of law, it is fair to say that things have advanced greatly since 1965. The rule of law is more widely respected in Commonwealth countries now than I believe it was then.

These then were some of the opening words to a conference which was attended by more than 150 international judges, 30 chief justices, 200 speakers and 1300 delegates from Commonwealth countries around the world.

Law Council President Ron Heinrich, the host of the conference on behalf of the Commonwealth Lawyers' Association, said:

Lawyers from developing countries will sit side by side with colleagues from more prosperous countries to discuss and debate a broad spectrum of common issues and concerns. It is very rare that lawyers from such broad walks of life have this kind of opportunity to come together.

The conference was a great success and the Law Council of Australia, together



The Prime Minister, John Howard.



Daryl Williams QC, Attorney-General.

with the Law Institute, are to be congratulated on the organisation of a conference of such a scale within such a limited time frame.

Cherie Booth QC addressed the conference on Human Rights in relation to the Commonwealth. Her address was centred on the subject of the Commonwealth:

... the common commitment which members of the Commonwealth have made to three core values — human rights, the rule of law and democracy — and the “wealth both economic and otherwise — which flows from that common commitment ...” For the Commonwealth to be true to its namesake, it must actively promote democ-



Cherie Booth QC and Justice Linda Dessau.

racy and human rights as core common commitments for its members, and remind states about the wealth and advantages that flow from the realisation of those commitments.

Other keynote international speakers included the Right Honourable Christopher Patten CH, the External Relations Commissioner of the European Commission; Lord Woolf of Barnes, Lord Chief Justice of England and Wales; the Right Honourable Beverley McLaughlin, Chief Justice of Canada; the Right Honourable Justice Albie Sax of the Constitutional Court of South Africa; Geoffrey Robertson QC, and Kapal Singh.

In addition to overseas speakers, the Chief Justice of Australia, the Honourable Justice Murray Gleeson AC, and the Federal Attorney-General the Honourable Daryl Williams AM QC PM delivered the traditional State of the judicature and State of the nation addresses respectively.

... in 1965, the last time this conference was held in Australia, it was opened by my very distinguished predecessor Sir Robert Menzies. The world was a very different place in 1965 than it is now.

Many members of the Victorian Bar presented papers and took part in the conference. The business sessions fell within six streams: human rights and the rule of law, criminal law and practice, litigation in the new millennium, technology and the law, commerce and corporations law and the legal profession and its future.

Members of the Victorian Bar and judiciary who spoke included Richard Bourke on the death penalty; Justice Hayne and David Curtain QC on restricting litigiousness; Justice Marilyn Warren together with Ms Cherie Booth QC on the Commonwealth — women and the law; Henry Jolson QC on mediation and the courts; Jonathan Beach QC on issues concerning multiple litigants; Justice Stephen Charles on the liability of advocates; Paul J Hayes and Henry Jolson QC on sports law; Geoffrey Sher QC together with Justice Kirby and Geoffrey Robertson QC on jurisdictional issues arising from international e-commerce and publications via the internet; Alan Myers QC on fiduciary duties of the new millennium; and Judge McInerney and Judge Harbison on technology behind the firewall, concerning technologies in the Court.

There was an active social program commencing with the welcome reception on Sunday, 13 April, and a gala dinner dance at the Exhibition Buildings, which was truly an uplifting event. The other highlights of the social calendar were many dinners and home hospitality put on by the lawyers of Melbourne. Bar member Paul J Hayes claims that the party which he hosted was, of course, the social highlight of the conference. Those who attended have not disagreed.



Christopher Patten CH.



Geoffrey Robertson QC.



Cherie Booth QC with Prime Minister, John Howard.


The Commonwealth Lawyers Association held its Annual General Meeting at which the current President Dato Cyrus Das of Malaysia relinquished his office to a new President. The conference was also notable for an exhibition of those

who both provide facilities, education and computer backup to the law. Overall the conference was a success largely to the efforts of the conference chairman Mark Woods and his deputy Roderick Smith.

Following this article is a paper pre-

sented by Judge Marilyn Harbison at the conference in reply to the presentation of Judge Michael McInerney concerning technology and the courts. It is hoped that other papers from the conference will be published in *Bar News* in the future.

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Technology in the County Court: Behind the Firewall

A commentary on the presentation of His Honour Judge Michael McInerney by Her Honour Judge Marilyn Harbison, Judge in Charge of the Business and Damages Lists, County Court of Victoria, given at the Commonwealth Law Conference.

IT is worthwhile observing that there needs to be a specific purpose to use technology for it to be of assistance in the courtroom. Technology of any description is generally very expensive and has to be continually maintained and updated. We are all familiar with examples of situations where technology does not assist us to conduct our lives usefully, and in fact in many occasions makes it harder. My favourite example is that of computer personal organisers. I can't understand how they work, and why anyone would want to use anything other than a pen and pocket diary. I have to confess that although I may seem to be parading myself as a learned speaker on new technology, I don't even know what a firewall is.

My point is that the use of technology in the courtroom is not attractive to me because it is new or exciting or different. Courts are naturally rightly suspicious of change for its own sake. We need to ensure that we do not embrace technology just because it is exciting but because it has some purpose that assists us with the task which we have to perform as judges in the modern world. Badly designed computer systems can be as crippling to courts as they can be to business enterprises.

In my view, we have embraced the technology which Michael [McInerney] has described for two reasons. Firstly, it is the environment in which the business community and the legal practitioners with whom the Court must deal on a daily basis now conduct all their business. Secondly, the Court's attitude to its relationship with the community has fundamentally changed.

I will talk about the first proposition first.

I do not need to tell you that the way in which lawyers practice their craft has changed to an extent unrecognisable in future generations. When I did my articles, my firm used a blue ink photocopier and



Judge Marilyn Harbison.

letters were all dictated to stenographers who took shorthand or were handwritten. I won't elaborate any further — such observations by aging baby boomer lawyers are now commonplace.

However, it is fundamental to our use of technology to understand that we are now dealing with an environment in which exchanges between solicitors and counsel now take place in a technological environment unfamiliar to baby boomer judges. Lawyers now correspond by fax or e-mail and even mobile phone text message. The typed letter posted by normal prepaid post is fast becoming extinct in our daily lives.

At the County Court we have set ourselves the task of utilising these changes in the legal profession to assist us to manage the work that we have to do. It is apparent to anyone coming from a private legal firm that the resources available to the courts are generally far inferior to those available to the partner of a city legal firm, or

indeed to the executive officers of those businesses who instruct the firms of solicitors. It is no use complaining — what we have tried to do is to use the solicitors' own facilities for communication within their firms and with their opponents in order to streamline our own workload and to manage it effectively.

Our first task was to reduce the level of in-court appearances required by practitioners, be they barristers or solicitors. It is not until you watch the proceedings from the Judge's side of the Bench that you realise how much time is wasted in court with matters that really do not require a personal appearance of anyone, let alone that of a highly qualified lawyer. Although I am sure my Chief Judge would never allow me to say publicly that our Court did not need more judges (it is an article of faith within all levels of the judiciary that more judges will always be needed and that you can never get enough judges no matter what your case load) I often wonder why we are so judge-centred in looking at the requirements of the Court. Often what we need is not more judges but an analysis of what we require judges to do, so that the judges that we do have are being used productively. Paradoxically, it is often the most senior

It is not until you watch the proceedings from the Judge's side of the Bench that you realise how much time is wasted in court with matters that really do not require a personal appearance of anyone, let alone that of a highly qualified lawyer.

and experienced of legal practitioners who are most likely to insist on a personal appearance in court before a judge about a trivial matter. Our first task has been to encourage the legal profession to become far more discerning as to what matters needed to be placed before a judge at all.

Our orders module provides a template for the management of a civil trial. The template is designed to remove all unnecessary work from the Court and redirect that work into solicitors' and barristers' offices.

Those orders are supported by a Consolidated Practice note which deals with the whole civil jurisdiction of the Court, and which is in effect a handbook to assist in understanding and utilising the orders which are on the template.

These standard form orders give an indication of how we expect a case to progress and they help to crystallise issues which really will need a determination by a judge before trial.

Solicitors work out between themselves what the template for their particular case is, what the appropriate timeframe should be for the provision of exchanges of information between practitioners before trial, the nature of interlocutory steps to be completed, and even the exact date and length of the trial — having regard to their commitments, their client's commitments and the intricacies of the case to be tried. It is only in those cases where agreement cannot be reached on these matters, or where the agreement that is reached is not within the Court's guidelines for appropriate orders, that the matter needs to go to a judge.

I have found it extraordinary when I first was given the task of conducting directions hearings that practitioners would passively wait for me to set dates for interlocutory steps when I was the only person in the courtroom who had no idea what work would be required for those steps to occur.

I think it a common trap in case management regimes that there are far too many directions hearings listed by the Court. Well-meaning judges often consider that case-management requires this. In our system most files are now case-managed to trial without any directions hearings at all.

I might say that it is vital that any system such as this is not ruled by an inflexible system of proforma orders. I appreciate that that may lead to much more unnecessary and artificial interlocutory activity rather than less. It is absolutely vital that there is access to a

judge to decide contested issues to do with the template or the timetable as soon as this can possibly be done, so that these issues cannot be used to hold a matter up for trial or to artificially increase the costs of a trial. We must be alert against creating opportunities for practitioners



Judge Michael McInerney.

to manoeuvre themselves into favourable costs opportunities through rigid court processes.

It is vital to stress that the templates which we establish must always be subject to the imprimatur of a judge — a system in which responsibility for the progress of a file was handed back to the legal profession through uncritical acceptance of "consent orders" would undermine the principle we have established that it is the Court in control of the litigation, not the parties.

On the whole, we have found that the profession is comfortable with our procedures because they mirror their own work practices. The great advantage of this accessibility is that it is accessibility not just to a few practitioners who understand this particular jurisdiction, but to any articulated clerk who is able to access the internet or indeed to any litigant in person. I have a dread of specialists list in which specialists charge high fees to appear. My memory as a young practitioner is of some such lists in which it was impossible for an outsider to understand the procedures, let alone the in-jokes between counsel and the Bench. Any system of case management within a court should be absolutely transparent and should not have to rely upon counsel coming to know the predilections of a particular judge. It should also be a system which is common across the whole jurisdiction of the court and not confined to the particular predilections of

a few reforming judges and those counsel who know how the judge likes his or her orders.

The advantage in having our orders and procedures so transparently clear is that it gives the opportunity for the profession to educate each other as to our procedures and to monitor each other's performance in the light of the template which we provide. Our best allies in case management have been the high volume plaintiffs' and defendants' firms who are able to fashion their own internal procedures on the basis of the Court's requirements. In this way efficient firms can obtain trial dates much faster than firms who do not take advantage of the Court's procedures. However, in order to take advantage of the procedures, one does not need to be a mega firm. Many country and suburban practitioners with very small practices are able to very usefully and effectively utilise the Court's procedures to obtain early trial dates and to enforce the Court's regime of case management against large city firms in which files are continually lost or correspondence goes unanswered.

In effect the Court is acting as a quality assurance agent within each legal firm and between the firm of solicitors and counsel engaged in the case — setting accessible parameters for the completion of work and sketching out the framework which will be provided to the trial Judge as to the way in which the trial is to proceed.

I think that we have observed a change in the attitude of the legal profession as a result of the procedures that we have instituted. Obstructive activity by practitioners is now rare. Often defendants' firms are as anxious, if not more anxious, to prepare for trial as plaintiffs' practitioners. Practitioners are more aware as to what issue it is that they wish to have decided at trial. Counsel are less likely to fight on all issues and concede on none. Any obstructive attitude is now not only obsolete but very expensive.

Lawyers are now more likely to see trial preparation as a joint project to be undertaken by cooperation between all parties than as unrestricted warfare.

As a consequence I think that we have been able to reduce the volume of Hydra-headed Practice Court interlocutory applications. When I first started doing Directions, I was occasionally confronted with practitioners wishing to have arid arguments about whether or not a particular interrogatory they sought to administer was really a Request for Further and Better Particulars or the other way round. Practitioners still occasionally

refuse to file a Defence until they have seen an Amended Statement of Claim, whilst their opponents refuse to file an Amended Statement of Claim until they have seen the Defence. All trial judges have seen cases in which the extent of interlocutory activity on the file was only exceeded by the extent of its irrelevance to the issues in dispute between the parties. Often these disputes are driven by the personalities of the legal practitioners involved, rather than the real interests of the clients.

But it is much easier for the Court to intervene as circuit breaker whenever issues such as this now arise. It is also bracing to know that not only the solicitors but the clients can now look up the progress of their case on the internet through Court Connect, where the full details of all cases and all interlocutory and final orders made are available to them.

The second aspect of the use of the technology in the Court that I identified, was my view that the Court's attitude to the community has changed.

Along with many courts, we now take unto ourselves the responsibility for the efficient progress of litigation through the Court. It is not just a matter of practitioners certifying that a case is ready for trial. The Court will take responsibility for the progress of the trial from the time the proceedings are instituted in the Registry, until the time when the file is archived in the Registry. But the problem is that we have not in the past known how big or small our potential workload is, or what type of work it is that we are actually likely to be having into the future. In a jurisdiction as large as the County Court of Victoria, with so many individual proceedings of different classes, it is impossible for any real responsibility to be taken by the Court until we know what work it is that we have and have formed a view as to how appropriate it is for that work to be timetable in a particular way.

It is my view that although "justice delayed is justice denied" was an appropriate catchcry for early proponents of case management, the emphasis should in any appropriate case management sys-

tem, now switch from timeframes for disposition to ensuring that each individual piece of litigation is disposed of within a period of time which is appropriate to it. You can do as much injustice by forcing on a case in which the parties have not had fully time to prepare as you can by letting a case languish in a list which should have been disposed of long ago. The trick is to know what cases you have and what is an appropriate pattern of disposition for each of them.

From the use of CLMS we can start to obtain this information over an entire jurisdiction. We can also manipulate our workload by keeping accurate lists of certain types of cases, by predicting the way in which cases will settle or not settle, by predicting different case flows in circuit locations, or by listing similar cases in the same lists in a way that is far more effective than any manual recording system would be in a court of this size.

We have established in this Court the principle of trial date certainty, which means that we really will have a judge available on the day that the proceeding

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is listed for trial. The trial date is given at a very early stage of the proceedings at the first Directions Hearing where the entire timetable or template for the file is established.

Although there is abundant access for practitioners to come back to the Court to change that trial date, if they can convince a judge that there is sufficient justification for that to be done, it is the foundation stone of our Case Management System that a proceeding managed through our Court must be ready for trial on the trial date allocated to it. I usually tell practitioners who ask for proceedings to be adjourned sine die that I have no idea what that term means. It is not a procedure that is used at all in the Court. Every proceeding is given a trial date and is expected to be ready to be heard on the date given, not adjourned off to a black hole never to be heard of again. Of course, if we are not able to provide a judge on that day, then the whole purpose of what we are doing collapses.

We cannot expect the profession to work towards a fixed trial date if there is any doubt as to whether the trial really will start on the date allocated.

I will now come back to where I started, which is the ability this technology gives us to manage an entire jurisdiction over a large geographical area.

The video link is able to take place because of the technological facilities that we have but it really only makes sense as a case management tool because we are able to give to those practitioners in circuits the complete range of orders or templates available to city practitioners. Country practitioners know as well as city practitioners what is required of them. There should never be any need for any country firm to brief a Melbourne agent in any interlocutory matter. As well as being able to appear like this in a video link, they can also appear by a video link to the Practice Court in Melbourne. The same orders are on the orders module and on the Court Connect facility, as in Melbourne, and circuit practitioners will of course have the same capacity for e-filing as their city counterparts.

I was reminded by our former Chief Judge that many years ago if insurance matters were to be dealt with in circuits then a local firm was instructed by the insurance company to deal with them.

Now such work is invariably dealt with by law firms in Melbourne — or even in some cases, adding greatly to the aggravation, by law firms in Sydney.

I regard the fact that local firms in country areas have this type of access to the Court as being one possible means of assisting country communities to keep their legal practitioners and therefore assist their local business community to function.

I finish by saying to you that I think it is very narrow to talk about the administration of justice within the courts as being something which occurs on the day of the trial itself.

Of course it is very important to focus on the procedures that manage trials once they are under way to ensure that they are fair and effective.

But it is my personal view that we can have much more effect on the reputation of the legal system within the general community and the availability of justice within the community by the way a

proceeding is treated in its interlocutory stages. On the day of the trial the prospects are much more limited. The trial judge is faced with pleadings which have already been prepared. He is faced with a history which cannot be altered as to the progress of the case.

It is gratifying to be able to make a contribution to this process. There may be in future in this Court fewer occasions in which a trial judge has to sit on an inadequately prepared trial under the gaze of a bemused litigant who does not understand why the matter has taken so long to get before a judge, who has only on the day of the trial been told how much the litigation has cost, and who, whether he obtains a judgment in his favour or not, may leave the courtroom with nothing but a half-articulated despair that the matters which had troubled him for so long and which he thought were going to be resolved at trial, have not been, for reasons which he regards as unintelligible.



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Prosecutorial Misconduct: Goliath's Slingshot

The ideal is that the American Prosecutor represents the people, the state and the government. Many see the prosecutor as the good guy who wears the white hat and is on the right side of the law — seeking justice and the American way.

This article considers whether that perception is entirely accurate and explores what is referred to in American jurisprudence as prosecutorial misconduct.

HISTORY OF THE AMERICAN PROSECUTOR

IN the early Middle Ages, when no formal system of criminal justice existed in England, the victim acted as police, prosecutor and judge. This private approach reflected the philosophical view that a crime involved a wrong against the individual.

Reformists such as Jeremy Bentham and Sir Robert Peel were instrumental in developing a public system of prosecution. In 1879, Parliament passed the Prosecution of Offences Act, conferring limited prosecutorial powers on the Director of Public Prosecutions.

These developments in England were



Ashley Halphen is a member of the Victorian Bar who practices in the area of criminal law. He is the Vice-President of Reprieve Australia, an organization that provides legal and humanitarian assistance to those facing execution by the state around the world. He is currently working at the Office of Capital Post-Conviction Counsel in Jackson, Mississippi.

replicated in colonial America. Before the American Revolution, the victim maintained the sole responsibility for apprehending and prosecuting the suspect. In the eighteenth century, the population in colonial America grew. Large urban areas began to develop and the crime rate increased. The private mode of prosecution was no longer able to sustain order. In response, a system of public prosecution evolved which sought to manage the crime problem in a manner that better suited the interests of society as a whole.

Virginia became the first colony to appoint a public prosecutor. Other colonies followed suit and prosecutors were initially either appointed by the court or the governor.

The elected prosecutor emerged in the

1820s, coinciding with the country's move toward a system of popularly elected officials. Mississippi was the first state to hold public elections for its district attorneys. By 1912, almost every state had followed this trend. Today, only the District of Columbia, Delaware, New Jersey, Rhode Island and Connecticut maintain a system of appointed prosecutors.

DUTY

The citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes and who approaches his task with humility.

Robert H. Jackson (District Attorney)

In *Berger v United States*, 295 US 78, 88 (1935), the United States Supreme Court defined the prosecutor's role as: "A representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Ethical strictures are modelled on this judicial pronouncement, placing a special obligation on a prosecutor to "seek justice". The overriding responsibility is not to convict, but to act as guardian of the rights of the accused and to enforce the rights of the public.

Closer examination of this responsibility reveals a tension between a prosecutor's affirmative duty to protect and promote the truth and a negative duty to refrain from any conduct that impedes the

discovery of the truth; a tension between winning at all costs and doing justice.

THE CULTURE

Winning has become more important than doing justice. Nobody runs for the Senate saying I did justice.

Alan Dershowitz

"Seeking justice" has found its own expression in practice where the concept is tantamount to securing a conviction, engrained to the point that a tally-keeping mentality has evolved. Take, for example, the State's Attorney's office at the Cook County Criminal Courts in Chicago where there used to be an ongoing competition among prosecutors to be the first to convict defendants whose total weight exceeded 4000 pounds. Men and woman were marched into the office and weighed. The competition was referred to as the "two-ton contest" or, because most of the defendants were African American, "niggers by the pound".

In the United States, winning is everything: it is the measure of personal success and the yardstick for career advancement. In a system of justice that relies on elections rather than appointments, convictions are regarded as an essential prerequisite for election and promotion.

As one writer observes: "A prosecutor must give the people what they want — someone who is tough on crime. Seeking the death penalty helps prove the prosecutor running for election is not soft on crime like his opponents. Prosecutors seek convictions to campaign on them by reminding voters of their notorious cases. Prosecutors use their 'wins', especially those in the death penalty context, in campaign advertisements. Campaigning on their trial success, their convictions, has been deemed by some as essential to be elected as a prosecutor."

The natural by-product of this mentality has been a resort to misconduct. The types of misconduct range from improper remarks during closing argument to outright illegal activity.

PROSECUTORIAL MISCONDUCT

1. *Illegal Activity*

There are a small yet significant number of cases where prosecutors have acted unlawfully during the conduct of a trial.

There are eight reported cases, the most recent in 1979, where prosecutors accepted bribes in exchange for discontinuing proceedings that were under way. There are known instances where pros-

ecutors have extorted money by demanding payments to forgo prosecuting certain felonies. As recently as 1977, a prosecutor was disbarred for offering to make "problems disappear" in a land development matter. Eight cases were cited between 1915 and 1984 involving prosecutors misappropriating public funds.

In New York in 1975, a prosecutor was disbarred after pleading guilty to unlawful imprisonment. In 1984, a state's attorney was suspended for three years for filing a false police report. A prosecutor in Minnesota was suspended indefinitely in 1988 for fixing traffic tickets to people to whom he was indebted. In 1989 a New Jersey prosecutor was suspended for the theft of evidence. In 1996, an Illinois prosecutor was disbarred for conspiring to purchase drugs.

2. *Improper Comments*

I have never yet tried a case where the state's attorney did not say that it was the worst, cold blooded, inexcusable, premeditated case that ever occurred.

Clarence Darrow

Inflammatory remarks or unduly impassioned oratory directed at a jury's prejudices is known as "overreaching". Examples include name-calling, making improper remarks about defence counsel and even expressing derogatory comments to the judge.

Defendants in criminal trials have been branded such things as "a demon", "a mutant from hell", "scum", "a gross animal", "young Mr Hitler", "a lying raping murderous dog" and "Mr Mentally Retarded".

In Oklahoma, the prosecutor involved in the capital trial of Jay Neill had this to say to the jury in closing argument, "disregard Jay Neill ... you're deciding life or death on a person who is a vowed homosexual".

In an argument recently criticized by the Supreme Court, the prosecutor said about the defendant, "You got this quitter, this loser, this worthless piece of [expletive]. He is as mean as they come. He is lower than the dirt on a snake's belly."

An Oklahoma prosecutor in closing argument in the trial of Jimmy Slaughter could not resist the temptation and after reciting the gruesome details of the murders went on to say that, "the defendant has truly lived up to his name".

Defence attorneys are also not immune. In Florida, a prosecutor attacked the integrity of his adversary when he said, "See this man here who claims to

be a lawyer in good standing ... he is a mercenary, a hired gun ..." Elsewhere, in an Illinois courtroom a prosecutor said to a jury, "He may be small but he's a pretty dirty trial lawyer."

Even the judiciary has not escaped the acidic wrath of the prosecutor's tongue. In California, a district attorney was suspended for saying to a grand jury in open court that the judge was "nothing but a crook".

Inflammatory remarks or unduly impassioned oratory directed at a jury's prejudices is known as "overreaching". Examples include name-calling, making improper remarks about defence counsel and even expressing derogatory comments to the judge.

Courts acknowledge the latitude that should be given to zealous advocacy during heated cases. At the same time, there is also an insistence on the need to enforce proper boundaries during closing argument and to maintain the necessary professionalism consistent with the gravity of the case.

Overreaching includes the presentation of gruesome physical evidence that holds little probative value. One prosecutor in Illinois displayed the actual bloodied and brain-splattered uniform of a murdered police officer on a headless torso mannequin. In another case, this time in Mississippi, a prosecutor took the clothes of the deceased, displayed them to the jury and laid them on the floor for the jury to see. When describing how the deceased was killed, the prosecutor stomped the ground around the clothes in a dramatic manner. On appeal, it was argued that the use of theatrical performance in closing argument was calculated to inflame the jury. Interestingly, the Court noted that, "nothing indicated that the prosecutor's demonstration was grossly overreaching ..."

The blatant arrogance of certain prosecutors in Jefferson Parish, Louisiana, was documented in *The New York Times* as recently as 5 January 2003. The report noted that when the father of a death row inmate walked into a courtroom he

couldn't believe his eyes: "There was a noose swinging from the prosecutor's chest ... The noose was on a necktie. Then he saw ... two prosecutors wearing ghoulish ties, one with a dangling rope, the other with an image of the Grim Reaper." The prosecutors later explained that: "The neckties were jokes."

3. Improper Conduct

(i) Suppressing the truth

In the celebrated case of *Brady v Maryland*, 373 US 83 (1963), the court held that a prosecutor has a constitutional and ethical duty to disclose favourable evidence to the defence. Favorable evidence is defined as anything that has the potential to illuminate the truth and even exculpate an accused person. In almost every petition filed on behalf of a condemned person, a ground for relief sought will invariably include a Brady claim.

In 1979, Isaac Knapper was accused of murdering a tourist. He was convicted, but more than a decade later the Louisiana Supreme Court reversed his conviction because prosecutors didn't disclose a police report undercutting their case. The report documented the arrests of three men for a different robbery five blocks away using the gun that killed the tourist.

In the United States, there is a market for just about everything, especially information about crimes and the people who commit them. Those who "jump on the bus", and testify that a defendant confessed to them while in prison together may have never even met the defendant before. It is not uncommon for a prosecutor relying on this sort of testimony to provide immunity in the form of a reduced sentence.

Prosecutors are notorious, in violation of *Brady*, to fail to "reveal the deal". In the case of Anthony Carr, the prosecution knowingly presented false testimony that the informer did not receive any favourable treatment for testifying against him. The court was assured of the fact that the informer was not offered or promised anything in exchange for his damning testimony. The court was misled. The informer was in fact facing 45 years in prison when he testified and the agreement was that no time would be served. The defence attorney in the later appeal argued, "His reward was purchased with the life of Anthony Carr." It is worthy to note that, aside from the informer's evidence, there was no evidence linking Carr to the capital murder. The case is still the subject of appeal proceedings.

In another case, Charles Munsey's con-

viction was overturned. He was charged with murdering a woman. During the trial, prosecutors suborned perjury from a witness who claimed that Munsey had confessed to him while they were in prison together. Prosecutors knew that the witness and the defendant had never been in prison together, yet persisted with the evidence anyway. The perjury came to light when another man later confessed to the crime.

In Louisiana, prosecutors remained tight lipped while a young man languished on death row for almost six years. If not for the act of a good Samaritan who anonymously delivered a video to the defendant's attorney, he would probably still be there. The video was footage of the defendant playing basketball at precisely the same time as the murder occurred.

Leslie Dale Martin was granted a stay twenty minutes before his execution was scheduled to proceed on 8 February 2002. Absent forensic or eyewitness testimony, the most compelling evidence at his trial was the testimony of a "jailhouse snitch" who told the jury that the defendant had made a full confession to him when in custody together.

In the week preceding the scheduled execution, the attorney acting for Martin discovered that the trial prosecutor had not disclosed the fact that the snitch had previously given evidence of another confession in another capital trial. Nor had the prosecutor disclosed the snitch's medical reports confirming an admission to a psychiatric hospital and a diagnosis as a pathological liar.

The impact that these matters may have had on a jury will never be known, Leslie Dale Martin was executed on 10 May 2002.

ii) Subverting the truth

The erosion of the truth by deliberate, proactive measures has been egregiously pursued by prosecutors in a multitude of different cases.

Zollie Arline was convicted in 1972 of manslaughter. Arline claimed self-defence, saying he used a club to protect himself after the victim attacked him with a knife. Police gave the knife to the prosecutor who not only hid it from the defence but exaggerated its absence at trial. "Did you see any knives?" he asked each witness, always getting "no" for an answer. Arline's conviction was reversed because of this deception and the charges against him were dropped.

In Texas, a prosecutor coached a state eyewitness to ensure that the intimate

relationship he was having with this witness was a fact not revealed to the jury.

In another case, on an extremely hot day, alibi witnesses went mysteriously missing when required to give evidence. They were apparently escorted to the district attorney's air-conditioned office and could not be located when sought. The defence was forced to rest prematurely.

In 1994, prosecutors argued alternative theories to convict two people in two separate trials. In one case, reliance was placed on confessional evidence. In the other case, police witnesses were called to challenge the truth of the same confessional evidence in what was ultimately a successful strategy to convict the co-accused.

In 1998, San Diego prosecutors determined to convict four gang members for murder, lavished witnesses with privileges and arranged for the witnesses (who were all in custody) to be relocated to private cells with a television, showers and conjugal visits.

SAFEGUARDS

A trial judge has a number of powers available to circumvent the ill arising from any misconduct. These powers include admonishment in the form of a curative jury instruction, permitting the defence to formally respond or ordering a mistrial. In more serious circumstances, a prosecutor can even be held in contempt or reported to the relevant disciplinary authority.

A convicted defendant can seek an order for a mistrial on appeal. Where the misconduct is intentional, as when the state presents or fails to correct false or misleading evidence, then the state must show, beyond a reasonable doubt, that there is no reasonable likelihood that the error affected the verdict. This is in contrast to situations where the misconduct is not considered as flagrant. In these circumstances, the burden is on the appellant to show that but for the misconduct, it was reasonably probable that the result of the proceedings would have been different.

An order for a new trial is considered costly to taxpayers and converse to seeking justice because of the resultant delays. Consequently, trial courts and appellate courts are extremely hesitant to grant such relief.

SANCTIONS

Prosecutors just don't prosecute prosecutors.

Lawrence Marshall

As these legal safeguards are designed to protect a defendant, prosecutors are left unscathed. Some argue that consequences should be directed at prosecutors to specifically deter them from future misconduct. Suspension, disbarment, damages, criminal penalty or professional embarrassment are the key sanctions to curb the utilisation of improper means to pursue convictions.

Bodies such as state bar agencies have proved inadequate in addressing prosecutorial misconduct. This is so because complaints are rare. Third parties must take the necessary action but prosecutors have no clients and defence attorneys hesitate to antagonize their adversaries with whom they deal on a regular basis.

Appellate courts that overturn convictions because a defendant's rights have been violated by prosecutorial misconduct rarely identify the prosecutor by name and are only likely to do so when the opinion is an unpublished one. Prosecutors also enjoy immunity from civil suits and are unlikely to be criminally prosecuted.

The research is illuminating; of 381

convictions recorded since 1963 that were reversed on appeal due to prosecutorial misconduct, not a single prosecutor received a public sanction or faced trial for misconduct. Only two of the cases resulted in charges being filed that were each dismissed before trial. In another study, a search for disciplinary action since 1998, revealed only one record of a prosecutor who received public sanctions for misconduct. In Illinois, only one public sanction was issued in twenty-six years.

The Office of Professional Responsibility was created by the Justice Department in 1975 to investigate complaints against state attorneys involved in the violations of legal and professional standards. A recent study revealed that out of a total of 200 complaints made to the Office, no action was ever taken.

THE AFTERMATH

As a commentator points out the reality is that: "The only check on prosecutorial misconduct is the morality of the individual prosecutor."

The overall inaction leaves one with

little optimism. The consequences erode the very foundations of the justice system: "From the perspective of the criminal justice system ... there is an incalculable cost in damaged integrity that may be difficult to repair, and which affects the social fabric in a manner that implicates more widespread consequences. Separate and apart from the raw tally of identifiable misconduct in scores of cases involving experienced and high ranking prosecutors at the state and federal level, there is an equally troubling evisceration of fundamental protections."

Of the 381 defendants, 67 had been sentenced to death. Nearly 30 of these inmates were subsequently exonerated, a further 25 were convicted again but did not receive death sentences. Martin Luther King once remarked: "Injustice anywhere is a threat to justice everywhere." In the context of a public agency with an abundance of resources and power, no degree of impropriety ought be tolerated, or else behold the insidious and sweeping implications.

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Fax/mobile (03) 9621 1529

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Bruce Wilson or Andrew Tidley



LUDLOW'S



The Essoign dining room and bar in full swing following the opening on 26 May 2003.

Opening of the New Essoign

On 23 May 2003, Tony Howard QC, Chair of the Essoign Development Committee, launched the new Essoign on Level 1 of Owen Dixon East, and traced its development and the facilities now available to Victoria's barristers, judicial officers and guests.

YOUR Honours, members of the Bar and ladies and gentlemen, as Chair of the Essoign Development Committee, I am delighted to welcome you all to the new Essoign. The opening of the new Essoign this evening is indeed a special moment in the history of the Victorian Bar. In 2001, following BCL's decision to refurbish Owen Dixon Chambers East, the Bar Council seized the opportunity to revitalise the Essoign Club by redeveloping it as a private venue which would meet the needs of all Victorian barristers, judicial officers and their guests well into the 21st century. It was intended that the new Essoign would combine its operations with a number of significant Bar activities which were



Rufus Daniell, Head Chef, serving up a monthly changing modern eclectic menu in the Essoign dining room.

to take place on the first floor of ODCE, namely those of the Bar Council, Readers' Course, Continuing Legal Education, the McPhee and Forsyth meeting rooms and the Griffith library.

The Bar Council's decision to establish the new Essoign was taken in light of the fact that the old Essoign Club was not apparently serving the needs of all counsel. Although it numbered approximately

600 members, very few of these were the younger or female members of the Bar. In fact, only a small percentage of its members actually used its facilities on a regular basis. For example, it was reported that less than 100 used the Club one or more times per week.* Moreover, the Essoign Club operated only for limited hours, for lunch or afternoon/evening drinks and, being on the 13th floor at the back of ODCE, it was in an inconvenient location. Financially, the Club was just breaking even (if that).

In March 2002, the Essoign Development Committee (EDC) was established with the task of developing the new Essoign. The EDC comprises Michael Colbran QC (also Chairman of the Essoign Club), Phillip Dunn QC and Sara Hinchey (also members of the Essoign Club Committee), Paul Santamaria S.C., David Bremner, Executive Director of the Victorian Bar, and Sharyn May of Bibra & May food and service consultants, in addition to myself. In December 2002 the

*This picture emerged from the report of a well regarded firm of food and service consultants, Bibra & May, retained by the Bar Council to report on the viability of the old Essoign Club in its proposed new location on the 1st floor of ODCE.

committee was joined by the Essoign's new manager, Nicholas Kalogeropoulos.

It is appropriate that tonight I pay special tribute to a large number of people and organisations who have provided inspiration, drive and support to the new Essoign project. They are:

- the members of the Bar Council between 2001 and 2003, particularly the former Chairman Robert Redlich QC (as he then was, now Justice Redlich of the Supreme Court) and the current Chairman of the Bar Council, Jack Rush QC;
- the members of the EDC who have worked in a tireless and dedicated way to bring the project to fruition;
- the Directors of BCL, its CEO Daryl Collins, Company Secretary, Geoff Bartlett and their staff;
- David Bremner and his staff;
- Robert Pahor of Spowers architects and project managers, his staff and other BCL consultants; and finally
- the builders, Hooker Cockram Ltd. [On 15 May 2003 David Judd, Managing Director of Hooker Cockram formally handed over Level 1, ODCE to Ross Robson QC, Chairman of BCL.]

I want to especially mention the contribution of Judge Graham Crossley of the County Court, or "Croc" as he is affectionately known, who is present here this evening. Croc originally drew the logo — the dancing barristers — for the Bar's sesquicentenary celebrations. He kindly agreed to the use of it by the original Essoign Club and now by the new Essoign. The logo is a symbol of the joy and unity which we share at the Bar and highlights the meaning of "essoign", namely an excuse for not appearing in Court!

Our vision is that, as the social and professional hub of the Bar, the new Essoign will provide a welcoming environment for and reflect the diversity of its members — young and old, male and female and those from a range of backgrounds, all of which characterise the modern legal profession. We are confident that this vision will be realised considering the special features of the new Essoign which I will briefly outline:

- The new Essoign is a private venue for you and your guests. There will be no members of the public or current clients, litigants or witnesses.
- The venue is conveniently located on the first floor of ODCE with easy access (and departure) via the ground floor staircase next to the Commonwealth Bank for those who want to avoid waiting for the lifts.



Kirsty MacMillan and Sharon Johns enjoying lunch in the Essoign dining room.



Jenny Brennan, Penny Treyvaud, Sharon Johns and Kirsty MacMillan of the Family Law Bar.



John de Koning, Julie Davis, John Saunders and Michelle Williams making use of the ever-popular round tables.

- You can see for yourself what a wonderful vista there is across William Street to the Supreme Court. Indeed, you can sit here with a beer or coffee and aspire to high office!

Our vision is that the new Essoign will provide a welcoming environment for and reflect the diversity of its members — young and old, male and female and those from a range of backgrounds, all of which characterise the modern legal profession.

- I am sure you will agree upon the elegant design and ambience which the new Essoign provides. It is indeed a modern place for a modern era.
- The new Essoign provides an important networking opportunity, particularly for readers and younger counsel, given its interaction with the other Bar activities taking place on this floor. The Essoign will become the place where opportunity knocks.
- There are different and varied dining options available to you. These range from the informal café/lounge/take away area to the more sophisticated, quieter dining experience in the bistro with table service and "fast-track" meals for those on the go. The orders will go to the kitchen via a centralised computer facility.
- Additionally, the new Essoign has expanded hours of operation — from 7.00 am to 7.00 pm — and provides breakfast for the first time. Lunch will lead into an afternoon/evening bar for those wanting a drink at the end of a long day. We are looking forward to live jazz (and Happy Hour from 5 pm to 7 pm) on a Friday evening.
- Importantly, the new Essoign can cater for Bar association and clerking dinners and for members' special occasions and functions such as birthdays, bar mitzvahs and weddings. Last night, the first Readers' Dinner was held here for about 140 and it was a great success.
- We have new staff. Following many years of outstanding service, Jayne Menesdorffer, the head chef and manager of the old Essoign Club, has decided to retire. We thank and acknowledge her for her wonderful efforts over the years. We have found that we need two people to replace her! As mentioned, Nicholas Kalogeropoulos has been appointed as the manager of the new Essoign. Some of you will have already had the pleasure of meeting him. Rufus Daniell has recently been appointed as the new head chef (to commence on 23 June). Both come from a most impressive food and service background. Nicholas, Rufus and the staff look forward to providing you with the highest standards of comfort and culinary excellence.
- Finally, there is the no-smoking policy.

The new Essoign commenced operations on Monday 26 May. The Bar Council, the EDC and the many others that I have mentioned, can only realise the vision outlined if current members continue to

support the Essoign as they have done in the past and if others join and actively use it. Reactions to date have been overwhelmingly positive and many have indicated that they would like to join the new Essoign.

We want you to share in the process of transforming our vision into a reality. We want you to be:

- inspired by the Essoign;
- to see it as the place to be at the Bar; and



Colin Harris, Bar Manager, serving one of the many wines available by the glass in the Essoign.

- indeed, for it to become the reason you get out of bed in the morning and come to work (and, as my wife says, perhaps the reason you come home).

It is now my pleasure to introduce to you Jack Rush QC, the Chairman of the Bar, who, with “a face that could launch 1000 ships”, will declare open the new Essoign.

Jack Rush QC then formally opened the new Essoign.

Am I Just a Frustrated Lawyer?

Nicholas Kalogeropoulos, Manager, The Essoign

EVER since I met my wife, who is a solicitor, I've wondered what it would be like to be a lawyer. I imagined discussing cases with her after work, having long heated debates about the law, the system and counsel; it would be great. But spending five years at law school wasn't attractive so I decided not to pursue this calling. However, whilst studying hotel management, I used to spend a lot of time at that other bar and I kept wondering — how hard could it be? If I had been a lawyer I would definitely have gone to the Bar, especially being the shy kind of guy I am (not!). Being a barrister would be great, the theatrics, the showmanship, intimidating witnesses, swaying the jury and just talking a lot. I loved the bit where you get to talk a lot. But I was brought back down to earth when “The Practice” finished and I was quietly informed that the Australian legal system does not work in a similar fashion. There was no roaming around the courtroom, leaning over the witness or crying in front of the jury. My aspiration to go to the Bar was all but quashed; I was destined to work behind the bar rather than at the Bar.

Thinking my legal candle was all but extinguished, I received a surprise call from a recruitment company in October last year.

“There is an opening at the Essoign Club for a manager” they said.

“The who? The what?” I replied.

“The Essoign, a private club for members of the Victorian Bar.”

Shock, could this be it, a chance to work for the Bar, behind the bar? I did some research. I enquired of a legal friend as to why barristers had their own club? “Because they can”, was the glib reply.

The Bar Council's brief was simple and to the point. It was looking for an experi-



Nicholas Kalogeropoulos, Club Manager, looking forward to lifting the profile of the Essoign by creating a professional and friendly environment for all members.

enced, hands-on manager to assist in the re-development of the Essoign and then continue with the daily management of it. Until then, I had been managing Dracula's Cabaret Restaurant catering for up to 340 people a night and leading a team of 30 vampires — someone (a non-lawyer of course) suggested I would be very suitable for a gang of blood-sucking barristers! Before that I had my own corporate restaurant, Alley Blue Kitchen & Bar on Little Bourke Street, where I was host to many lawyers.

I had two interviews with the Essoign Development Committee. I arrived at the first scheduled time. Unbeknown to the panel of five who were to road test me, I had arrived home from Dracula's at 3.15am. With three hours sleep I walked into the Chairman's Room prepared and ready to represent my biggest client — me! I really was at the Bar. It was quite a daunting experience being in a room with people whose surnames finished with Q and C. But they all made me feel at ease

and listened intently as to why I was the man for the job. One of the main questions was why I wanted to work for the Essoign. I couldn't tell them my real reason — my dream! “Life balance” was the answer. Not having to finish work at 3.00 am five nights a week would be a Godsend. I would get to see my wife and to me that sounded great, to others maybe not. The yearning to work for a brand new venue and have an input into the Essoign from the ground up was not only a challenge but one that has ultimately proved to be a most rewarding experience. To assist in providing a haven for the members of the Essoign, one that would offer quality food and beverages with friendly yet attentive service was too good to pass up. The running of a venue for me involves not only the meeting of budgets and financial viability, but to be a part of helping members and guests experience hospitality in all its forms — food, beverage, ambience and above all service — and to know that patrons depart happy and content and that my team contributed to that experience.

Well, it must have worked; here I am in the middle of June writing an article for *Victorian Bar News* right in the thick of things! After 14 months of planning and fine tuning, the Essoign opened on Monday 26 May 2003 to an incredibly positive response from all members of the Bar and Judiciary. A most successful opening launch was held on the preceding Friday and a very popular function for about 100 women barristers and judges was held on 12 June. The Essoign has seen many new and old faces. We have had well over 150 new applications to join the Essoign Club — just ask me or a staff member for an application form.

With its new operating hours, the Essoign is now open daily from 7.00 am

No-smoking Policy at the New Essoign

IN the course of developing the new Essoign, the Bar Council, BCL and the Essoign Development Committee (EDC) decided the new venue would be smoke free. The views of a number of interested parties concerning this issue were canvassed. These included Bar Council members, BCL, members of the Essoign Club and its committee, members of the Bar and staff members of the new Essoign. Particular regard was had to BCL's policy that there be no smoking within any of its premises, and to the personal and legal difficulties surrounding the issue of subjecting workers to a smoke-filled environment. While the views of smokers were considered, another important consideration was providing for the comfort of non-smoking members of the Essoign.

The Bar Council and the EDC were very conscious of the obvious effect of the new policy for smokers. This was a contentious issue for some and enquiries were made as to the feasibility of building an outdoor deck which would accommodate the needs of smokers. Unfortunately the significant cost of

doing so and the delay to the ODCE project defeated this proposal. Members who want to smoke will now have to do so outside the premises of the new Essoign.

It is instructive to consider the New York experience in this regard. On 4 April 2003 it was reported in *The Age* that a New York restaurant had "... cooked up a way to beat the city's tough new smoking ban. Italian restaurant Serafina Sandro unveiled a "Tobacco Special" menu ... boasting such delicacies as gnocchi made with tobacco, and fillet mignon in a tobacco-wine sauce, garnished with dried tobacco. Tobacco pana cotta — an Italian cooked cream dish — is available for dessert, followed by a strong glass of tobacco-infused grappa." However enforcement of the ban in New York has proved to be problematic. Shortly following *The Age* article, another article appeared in the *Herald-Sun* under the heading "Smoking Kills — Bar Worker Murdered". It was reported that "A New York bouncer has been stabbed to death as he tried to enforce the city's new ban on smoking in bars. Dana "Shazam"

Blake was attacked by two men at Manhattan's trendy Guernica nightclub. Police say he was knifed in the lower abdomen and died in hospital."

Apparently such smoking bans evidence a worldwide trend. In Holland, Dutch café proprietors are also fuming over the issue. *The Age* of 31 May 2003 reported that the favoured pastime of smoking marijuana in Amsterdam coffee shops where "you can smoke a 'joint' chosen from the menu and not bother with the coffee" is under threat by a proposed ban on smoking. One proprietor offered a novel solution: "We can set up a special fan that will waft a range of marijuana fumes through the premises. Customers can sit back and enjoy without actually smoking"!

The closest the new Essoign has come to the New York experiment was to have served smoked chicken salad entrée at the first Readers' Dinner held at the new venue on Thursday 22 May. So, be gentle on the staff of the new Essoign if they seek to enforce the ban ... and please, don't ask for any marijuana fumes to be wafted in from the kitchen!

for breakfast. It will remain open all day to service the needs of the Bar, Judiciary and guests with morning tea, snacks, lunch, afternoon tea and drinks. Both the dining room and the café/lounge have proved very popular, offering, as they do, a wide range of dining options. The support that members showed the club on the first day of trade was overwhelming (180 people were served in the café and dining room), however, there were consequential delays in service and food delivery. The idea of hiding in the cool room at this point and chanting "is it over, is it over?" sounded appealing to the staff but they soldiered on and did not rest until all meals ordered had left the kitchen. Thankfully these were only teething problems to be expected in any new venue, and we have all been working hard to deal with them. The staff are settling in well and we encourage constructive comments on any aspect of our operation.

A selection of "fast track" meals in the dining room is available and highlighted on the menu for members in need of a quick lunch. Those who want an even speedier meal or to take away can use the



café which offers a wide selection of pre-prepared meals, coffee and cake. The café is open until 5.00 pm daily so as to serve the needs of counsel who finish court outside the traditional meal times. For those who are still hungry there are tasty morsels in the form of tapas with a drink after 5.00 pm. We also have Happy Hour on a Friday evening with all drinks at reduced prices from 5.00 pm to 7.00 pm. And, of course, we can put on great functions and dinners for the Bar's jurisdictional associations, clerking list, for the Judiciary, groups of chambers or those members with individual needs. For example, we can serve up an intimate dinner for 30 or so in the Bar's Richard Griffith library which has direct access to the kitchen.

After nine years of devoted service as head chef and manager, on 24 June Jayne

Menesdorffer is leaving the Essoign to run the Philip Island food store. We all wish her well. Our new head chef is Rufus Daniell who has been cooking with great distinction for over 25 years. Rufus is classically trained; he has extensive experience in à la carte modern eclectic dining and he is eager to develop the continuing success of the new Essoign. Rufus comes to us after three years at the Kent Hotel in Carlton (previously owned by barrister Michael Ruddle) where he has assisted in the service of over 400 meals a day. Before the Kent, Rufus was head chef at the fashionable and innovative Candy Bar on Greville Street, Prahran, and, before that, the proprietor of the Hardware Street Café on Hardware Lane. Rufus commences with the Essoign on Monday 23 June — please call in and sample some of his delights!

There are great plans afoot for the new Essoign, including special wine and food tastings. I hope to see many new patrons there especially the younger and female members of the Bar. Everyone can feel welcome and relaxed in the new venue ... after all, it is your place at the Bar!



Unveiling of Sculpture

In Owen Dixon Chambers East on Monday the 31st of March 2003 the Former Chief Justice of Victoria Sir John Young unveiled the sculpture in the foyer of Owen Dixon Chambers East. In March 2003 the sculpture was presented to the Bar by the donations of the Senior Bar. The Sculpture Committee comprised Hartog Berkeley QC, Robin Brett QC, Peter Jopling QC, Michelle Gordon and Campbell Thompson.

The following is the text of Sir John's speech together with the words of the sculptor Paul Selwood about his concept and how it relates to Owen Dixon Chambers.

ON 31 March 2003 — two years after the germination of the idea for it — a ceremony was held to unveil the new sculpture in the foyer of Owen Dixon Chambers East. How did the idea for the sculpture come about?

When plans for the renovation of Owen Dixon East were gaining momentum in 2001, Peter Jopling QC put a proposition to the then Bar Council Chairman that it might be appropriate to commission — as a gift by the silks to the Bar — an artwork to grace the foyer of ODC East just as the silks' tapestries in ODC West were

conceived to decorate and enhance that space. The Bar Council ultimately agreed, and authorized the establishment of a Committee to carry the idea forward. The Committee invited Ms Elena Taylor, senior assistant curator of Australian painting and sculpture at the National Gallery of Australia and Ms Bronwen Coleman, Project Director of Urban Art for the Docklands Authority to advise it regarding the selection of a panel of sculptors to be approached to tender for the commission, and to assist it in the development of a detailed artist's brief.

Hartog Berkeley QC and Sir John Young KC, KCMG "lift the veil".

The Brief was that the proposed theme of the work should be a contemporary one that was both innovative and engaging of passers-by.

The 13 sculptors who were invited to and did submit proposals included Inga King; Rick Amor, Peter Cole, Buku Larnggay Mulka Centre, Adrian Mauriks, Neil Taylor, Robert Bridgewater, Jilmara Arts, John Kelly, Bruce Armstrong, Maningrida Arts and Culture, Bronwyn Oliver, and Paul Selwood.

The selection process took place around September 2002 and the unanimous choice was Paul Selwood, a sculptor resident in NSW. The commission of the metal sculpture coated in zinc and painted red — costing \$80,000 — proceeded.

In his speech at the unveiling ceremony, The Honourable Sir John Young AC KCMG said: "The donation of a sculpture to the Bar is an act which would not have entered anyone's head as a possibility 50-odd years ago when I joined the Bar, and it demonstrates how our community has



Hartog Berkeley QC, Michelle Gordon, Paul Selwood (sculptor), Robin Brett QC, Peter Jopling QC and Bronwen Coleman, Project Director of Urban Art, Docklands Authority.
The Sculpture Committee comprised Hartog Berkeley QC, Robin Brett QC, Peter Jopling QC, Michelle Gordon and Campbell Thomson. Campbell Thomson did not attend the unveiling.

changed and indeed how prosperous it has become. But it demonstrates much more than that: it demonstrates not only that we have become a much more sophisticated community but also that we have become much more aware of the various talents — particularly artistic talents — that make up our community. No historian worth his salt would consider attempting to describe a community of a past era without at least studying not only the great events of the period — the politics, the wars, major disasters and the like — but also the artists of the day and their work — the writers, the painters, the sculptors, the musicians, the playwrights, the actors and indeed every form of human activity.

When plans for the renovation of Owen Dixon East were gaining momentum in 2001, Peter Jopling QC put a proposition to the then Bar Council Chairman that it might be appropriate to commission — as a gift by the silks to the Bar — an artwork to grace the foyer of ODC East.



Hartog Berkeley QC.



Sir John Young speaking and unveiling the sculpture.

“If we wish to understand our own times and our own community so must we listen to and try to understand what all sections of the community, particularly the writers and artists, are saying. It is the writers and the artists who so-to-speak hold the community up to a mirror, and

it is for us to see what the mirror reflects. Our need to understand is especially true when we look at contemporary art. Those not deeply immersed in contemporary art on being confronted with a new work are apt to react hastily, thoughtlessly and often ignorantly and to express their conclusions accordingly. Of course everyone is entitled to his or her own opinion but opinions are more valuable if they are properly informed, and I hope we shall be properly informed about this sculpture.”

The sculptor's notes of his concept describe the piece thus: “One of the themes of my sculpture over a long period of time has been the Australian landscape ... from drawings of cliffs, rocks, caves and the effects of weathering, I have synthesized forms and evolved an abstract language to make sculpture that expresses insights about that landscape; deep shade against highlight, the architecture of cliffs, the rhythmic line of ridges converging in valleys. Having classical ideals in mind, I want my sculpture to be by a system of logical order. I want the sculpture to engage the force of gravity, both structurally and conceptually. In this sculpture all the assembled plates are vertical as are the lines formed at their intersection; a vertical line, by extension, connects to the Earth's centre, it conveys stillness, balance and the experience of gravity as a metaphysical presence. While the sculpture is abstract, images of mountains and ranges have informed it and been my reference. Rather than an object, the sculpture presents a pattern of shapes and tonal values that change with the movement of the viewer around the work. The aesthetic resolution of the sculpture, the harmony of its composition from all points of view will reward and engage the viewer. A working title for the piece, “The Mountains”, is mainly for identification. Yet it suggests many metaphors. The structure consists of six steel plates, each shaped to synthesise a land form. The first three are assembled into a triangle, through its sides, creating, in plain view, a six-pointed star. The system of interlocking triangles forms a very stable and rigid structure.”

What is the view on the ground? Concierge John Rutter isn't saying much, though he has heard plenty of comments on it from his workstation a few meters away. One comment overheard by *Bar News* was to the effect that the structure resembled a collapsed Parisian urinal ... but the jury is still out. What is certain is that the piece will provoke both thought and artistic controversy for some time to come.



Designing Courts for People

Daryl Jackson

A highlight of Law Week 2003 was the seminar “Designing Courts for People” held in the Ceremonial Court of the County Court, chaired by Chief Judge Michael Rozenes, and featuring architect Daryl Jackson, interior designer Geraldine Maher, and Judge Michael Strong.

WITH their unique knowledge of the building, the speakers articulated the rationale and “feel” of their vision of the court complex. Speaking about the architectural and design elements, Daryl Jackson highlighted the need to convey to users of the court an understanding of the decision-making processes and the significance of “justice” for the community. Daryl discussed the vision for the complex and outlined the planning process which incorporated the ideas and opinions of court users including judges. He talked about the need for the building to be expressive of an “evolving democratic institution; itself part of the modern city, but without losing the representative power or role of the judiciary”.

The technical needs of a modern courtroom also required incorporating



Judge Michael Strong.

state-of-the-art technology in the courtroom in an unobtrusive way. Behind its

dramatic façade, the building provides aesthetically pleasing and functional spaces for jurors, victims, the public and the legal professionals.

Chief Judge Michael Rozenes outlined a brief history of the project which commenced in 1997 with calls for expressions of interest, and culminated in the official opening of the new County Court complex on May 31 2002.

The building is owned by The Liberty Group Consortium Pty Ltd, a wholly owned subsidiary of Challenger International, and is leased to the Victorian Government for 20 years. The Liberty Group also provides IT services, building and maintenance services and court user management and security. The County Court is the largest single jurisdiction court in Australia accommodating 46 courtrooms, registry and administration areas, secure custodial



Chief Judge Rozenes.



Question time.



Professor Kathy Laster, President Victoria Law Foundation; Eugenie Mitrakis board member; Chief Judge Rozenes and interior designer Geraldine Maher.

centre accommodating up to 60 persons in custody, jury administration and associated areas accommodating up to 400 in the jury pool, ample judicial accommodation for judges (presently numbering 58), their associates and tipstaves, as well as facilities for other users such as corrections, police, Court Network and others.

Introducing architect Daryl Jackson, His Honour described the building as an impressive architectural statement, a distinctive and identifiable public building, with imaginative use of space and light.

The exterior plan of the complex

reflects the city with both low and high rise components, the Williams St façade, a series of folded etched zinc, anodized aluminium or white polished pre-cast concrete forms, leads the eye along to the dramatic entrance and to the Supreme Court Dome, enhancing the physical presence for legal jurisdiction in the State. Daryl quips that “already the wits at the Bar are calling it the guillotine”.

The interior has four circulation zones that clearly segregate the judges and juries from each other and from the public and their legal advisors, and allow for persons in custody to be isolated except when appearing in court. The segregation

of these zones is achieved by “deeply cut access corridors or lane-ways of light” that allow “contact” with the exterior. All courts achieve natural light either through a central light well or perimeter windows.

Discussing the use of materials, colours, light and space, the selection and placement of details such as the innovative “in-court” technology and the artworks strategically placed throughout, Geraldine Maher gave us a sense of the “challenge of transferring concepts of peace, fortitude, prudence, magnanimity, temperance and justice into a built form in a modern yet respectful way, whilst addressing pragmatics of budget, technology, security and function”. The use of natural materials including specially selected timbers, zinc and natural fibres for integrity, stability and warmth, the angled walls envelop the proceedings whilst niches and alcoves provide for privacy and solace.

His Honour Judge Michael Strong spoke about the idea that the County Court complex has provided judges with modern facilities and areas for work and reflection without a sense of dislocation from the community. He remarked on the wonderful flow of the zones as separate yet connected areas, and spoke of the ease and warmth of feeling which is afforded to all County Court users.

Law Week 2003 was jointly coordinated by the Victoria Law Foundation and the Law Institute of Victoria. Tours and lectures in courts are a regular feature of this high profile week. The Executive Director of the Victoria Law Foundation, Professor Kathy Laster described the seminar at the new County Court and the open days at

Chief Judge Rozenes' Introductory Speaker's Notes

A Brief History:

- September 1997 — Kennett Government called for expressions of interest.
- December 1999 — Bracks Government approved the project.
- June 2000 — building commenced.
- Building opened on 27 May 2002.
- Completed the legal precinct — if VCAT -> old County Court.

This is a PPP:

- The building is owned by TLG (a wholly owned subsidiary of the Challenger Group).
- It is leased to the Victorian Government for 20 years.
- TLG provides:
 - IT services;
 - building and maintenance services; and
 - security.

Size:

- Nearly 44,000 sq metres, 1,480 rooms, it is the largest court complex in Australia.
- Forty-six courtrooms.
- Present occupation for:
 - 58 judges and their associates and tipstaves;
 - a registry and administration of approx 60; and
 - cells and jury facilities.
- Facilities for other users:
 - Corrections;
 - Court Network;
 - Police;
 - OPP;
 - Security;
 - VGRS;
 - Others.

Future growth:

There are two vacant floors capable of being turned into an additional eight

courts and further accommodation for judges and staff for future expansion.

Features:

- Four circulation zones to ensure that the public, the judges, the juries and the prisoners don't trip over themselves.
- A fully integrated court technology system
 - video and audio recording;
 - remote video and audio recording;
 - video and telephone conferencing;
 - remote witness facility; and
 - real time transcript.
- The building is an impressive architectural statement — a distinctive and identifiable public building — with imaginative use of space and light.
- By comparison to the old building — it is "squat" rather than tall and this permits the thousand-odd people that need to be in court by 10.30 to get there in good time.
- The court rooms are large and airy.
- The jury rooms similarly so.
- The judges are supported by state-of-the-art technology and library facilities and the court is at the vanguard of leading edge case management systems.

When the system is completed the County Court will be a world leader in case management and judicial IT support.

At the recent Commonwealth Law Conference, judicial delegates from all over the common law world marvelled at what is being achieved here.

Architect: Daryl Jackson

Interior designer: Geraldine Maher

courts as "an opportunity for the people of Victoria to visit these significant public buildings and approach the law and the legal system on their terms".

A virtual tour of the County Court is available in the General Information area of the County Court website www.countycourt.vic.gov.au with further information on the facility and its owner, The Liberty

Group available at www.thelibertygroup.com.au

Watch for next year's Law Week calendar of events and other feature events throughout the year on www.victorialaw.org.au.

Aileen Duke
(Victoria Law Foundation)

National Pro Bono Resource Centre

We wish to advise the the National Pro Bono Resource Centre is now operating out of the White House at the University of NSW.

The Centre has been funded by the Federal AG's Department to support and promote pro bono legal services in Australia through research, projects, information and events.

The Centre's website is online at www.nationalprobono.org.au listing our details, activities and publications including the Centre eNewsletter *National Pro Bono News* which will be published every two months. The first eNewsletter is available at the site and we invite you to subscribe for updates on pro bono news.

Should you be interested in an article about the Centre for *Victorian Bar News*, please contact:

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Publications Coordinator

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Junior Silk Speech

Speech by Pamela Tate S.C.
proposing the toast to the guests
of honour at the Annual Dinner
of the Victorian Bar held at ZINC,
Federation Square, Melbourne,
on Saturday 24 May 2003.



MR Chairman, honoured guests, other distinguished guests, ladies and gentlemen. It is my privilege this evening to propose a toast to our honoured guests.

It may interest Judge Strong to know that the influence of Gilbert and Sullivan upon the law extends well beyond his chambers in the County Court. Indeed, it is rumoured to extend to the chambers of Chief Justice Rehnquist of the United States Supreme Court, who, after seeing a performance of Gilbert and Sullivan's *Iolanthe*, has adopted four gold stripes on each sleeve of his black robe to emulate the Lord High Chancellor.

The Bar does not anticipate that the appointment of the Honourable Justice Heydon to Australia's ultimate appellate court, the High Court of New South Wales,¹ will have a similar effect on judicial dress.

Judicial dress is only one of the many changes to which newly appointed judges must become accustomed. Notoriously,

they must resist the urge to rise to their feet upon the tipstaff's command "All stand".

Fortunately, our new judges have all been issued with the official 2002 "Guide to Judicial Conduct" published for the Council of Chief Justices of Australia.²

But alas — the official Guide is incomplete. No doubt it wasn't prepared with the particular challenges in mind that face judges sitting in the State of Victoria. Nor was it prepared in contemplation of the idiosyncratic applications that might be made by members of the Victorian Bar.

To remedy these deficiencies, the Bar has prepared a handful of Guidelines of its own.

The first Guideline cautions new judges to be wary of applications for extended luncheon adjournments on the ground that counsel has only that one opportunity to obtain that of which his wife deprives him. The Bar considered it necessary to issue this Guideline upon hearing that the Honourable Justice Nettle (with whom

I had the pleasure to read) granted an adjournment to Simon Wilson QC on the basis of Wilson's wife's refusal and neglect and deliberate omission to feed her husband red meat — a breach which could only be remedied by a long lunch at the Essoign Club. The Bar does not condone the granting of adjournments based on "conjugal neglect" — what might be called "Wilson adjournments" — for fear of opening the floodgates.

No doubt Justice Nettle's former mentor, the Honourable Justice Hayne, will ultimately persuade him to adopt his more frugal approach to the grant of an indulgence.

The Bar's Guidelines also prescribe that a new judge ought not to damage the language. This Guideline was found necessary in light of Her Honour Judge Gaynor's fondness for creating new words. Her Honour is responsible for inventing the verb "to junior". At the Bar her Honour was not "led" by Senior Counsel (like the rest of us) — rather, Her Honour

“junior” Senior Counsel, including the likes of Robert Redlich QC (now the Honourable Justice Redlich). No doubt the choice of a verb was considered, by Her Honour at least, to reflect who it was that truly had the active role in the matter. One can only be grateful that a junior is not known colloquially as a “roger”.

Her Honour is responsible for another Guideline — this cautions judges to refrain from being advocates. In a recent criminal trial over which Her Honour presided a question was asked of a witness to which objection could be taken. Sure enough, with lightning speed, the words “I object” echoed throughout the courtroom. Her Honour looked to the Bar table to identify the source of the utterance. Gradually it dawned on her that the origin of the words could be traced to the Bench. She declined to make a ruling.

The Bar recommends that on the Bench the new judges avoid the pose of the crouched judicial figure. This can be achieved if, before they direct the tipstaff to adjourn the court, they check first that

The Bar recommends that on the Bench the new judges avoid the pose of the crouched judicial figure. This can be achieved if, before they direct the tipstaff to adjourn the court, they check first that their robes are not caught on the wheels of their chair.



Sir John Young and the Honourable William Kaye.



Jack Rush QC, Chairman of the Victorian Bar.



The Honourable Chief Justice Gleeson AC, Chief Justice of the High Court of Australia.

his slightly taller cousin, George Hampel. The time came for him to announce his appearance. Inevitably, the gown got caught in the chair. Justice Oliver Gillard, a formidable but fair man, said that he was willing to accept His Honour’s appearance from a kneeling position. His Honour protested that although he was bent over, he did have his feet on the ground.

It is rumoured that the Chief Judge has also been taking lessons in closing the court from his lifelong friend, Justice Finkelstein. It was Justice Finkelstein after all who, in his salad days as a judge, left the Bench, intending to reserve, with the simple statement that he would “consider the matter”. Returning to the courtroom in search of a tardy associate, he found a sea of faces all eagerly anticipating the delivery of a judgment.



Judge Michael Strong.

their robes are not caught on the wheels of their chair. The Bar anticipates that compliance amongst the new judges will be uneven. Few will have the aplomb which the Honourable Justice Morris displayed this week when confronted with a recalcitrant chair.

Little hope is held in this regard for the new Chief Judge of the County Court, Chief Judge Rozenes, although it is well known that he is at least familiar with the problem. As a first-year solicitor His Honour was sent by Frank Galbally to appear for the defence in a murder trial — Mr Frank (as he was known) told His Honour, “You’ll need to start by yourself, just pick the jury and I’ll be there shortly.” His Honour quickly borrowed the gown of

The official “Guide to Judicial Conduct” warns that it’s necessary for a judge to avoid any conflict of interest or appearance of bias, including bias based upon professional or personal association. The Bar’s Guidelines go further and warn against any appearance of judicial conspiracy. It has to be said that on this score those of our honoured guests who have accepted appointment to the County Court are guilty of an aggravated breach — for what else but a conspiracy could explain the combined appointment to the County Court of those who attended the Readers’ course of September, 1981, or those who formed friendships with them. His Honour Judge Bourke joins two fellow readers already appointed to the Court



Steve Wilmoth, Dan Flynn and Tony Southall QC.



Robert Taylor, Mark Moshinsky and Greg Ahern.



Charles Gunst QC, Maree Kennedy S.C. and Tim Seccull.



David Levin QC, Andrew Laird and Ian Percy.



David Pannifex, Barbara Phelan, Jenny Brennan, Keith Boulton and Richard Brear.



Jim Doherty, James Gordon, Gina Schoff and Andrew Maryniak.



Chief Judge Rozenes, Judge Douglas and Judge Punshon.



Judge Rachelle Lewitan.



Frank Parry S.C. and Judge Jane Campton.



Susan Pullen and Michelle Williams.



Sue Walpole and Mick Dodson.



Justice Hayne.



John Simpson, Mirella Trevisiol, Frank Parry S.C. and Andrew McIntosh MP.



Erin Gardner and Elspeth Strong.



Sue Crennan QC and Tom Hurley.



Karin Emerton, Jenny Beard and David Neal.



Andrew Broadfoot and Simon Tisher.

and will share the Bench with judges linked by friendships, His Honour Judge Roy (Dubya) Punshon; His Honour Judge Gullaci, Her Honour Judge Gaynor, and His Honour Judge Coish.

Another of our honoured guests is also from the same illustrious group of readers from September 1981. He is Dr Michael Dodson (Mick Dodson), whom we honour tonight for his service to the indigenous

women as equal participants within the legal system. Their appointment contributes to public confidence that the system of the administration of justice is itself a fair system.

Finally, this occasion should not pass without a reference to the boast made by Justice Peter Young of the New South Wales Supreme Court, that he is “proud to be a New South Wales male lawyer”.³



Susan Borg, Maurice Phipps FM, Heather Gordon, Murray McInness FM and Lesley Fleming M.

community and social justice. His Honour Judge Howie has also demonstrated throughout the course of his life his commitment to the legal rights of Aboriginal people.

Of course, the overarching Guideline for judicial conduct must be preserving the Rule of Law. This is a principle to which Charles Francis QC has dedicated his professional life and for which we honour him tonight. Compliance with this Guideline is perhaps particularly effortless for the Honourable Justice Young of the Family Court as His Honour not only preserves the Rule of Law; he owns it; trains it; races it at Cranbourne, and profits from its winnings.

Amongst our honoured guests are five female appointments to the Victorian Judiciary: the Honourable Justice Dodds-Streeton; the Honourable Justice Williams; Her Honour Judge Gaynor; Her Honour Judge Campton, and Her Honour Judge Wilmoth. Their role is, thankfully, a far cry from the request made of Allayne Kiddle, the second woman to sign the Roll of Counsel in Victoria, to prepare the flowers for the opening of Owen Dixon East.

These five appointments, in addition to their individual importance, have a broader public significance because the exercise of authority and judgment by these women encourages other judges; barristers; solicitors, and clients to view



Justice Cummins, Justice Heydon and Justice Hansen.

He advises:

far from complaining about the operation of the federal system, non-New South Wales lawyers should realize that federation has given lawyers from less populated States the opportunity to achieve heights that would otherwise be unattainable.⁴

I pause to express the collective gratitude of the Victorian Bar.

While he concedes that very occasionally a lawyer from some other State may emerge who is worthy of appointment to the High Court, he observes that:

the chances of the best lawyers emerging from New South Wales [are], at least in the present state of the economy, much greater.⁵

Perhaps Justice Young is unaware of the warning given by Sir Gerard Brennan in *McKinney's* case⁶ of the dangers of the High Court inappropriately prescribing a rule of practice for application in all Australian jurisdictions based on experience gleaned only from New South Wales.

The common aim must be not to appoint a judge like Justice Powers, of whom it was lamented when he was on the High Court, that all the matters that came before him were *ultra vires*.

In Victoria, we celebrate the appointment of our new judges — to them we say:

May each decree
As Statute rank
And never be
Reversed in banc.
All hail!⁷

Ladies and gentlemen, would you please charge your glasses and be upstanding for the toast to our honoured guests.

Our honoured guests.



Sir Ninian Stephen, Judge Lazarus and Judge Rendit.

NOTES

1. See Sir Anthony Mason, “The Centenary of the High Court” (Paper presented at the Constitutional Law Conference Dinner, Parliament House NSW, 21 February 2003).
2. Published by The Australian Institute of Judicial Administration Incorporated.
3. (2003) 77 ALJ 83.
4. *Ibid*, 84.
5. *Ibid*, 84.
6. *McKinney v The Queen* (1991) 171 CLR 468, 483.
7. Gilbert and Sullivan, *Trial by Jury*.

A Perspective on a “Light-hearted Evening”

2003 Bar Dinner

Olyvia Nikou S.C.

WE may never know for certain why the numbers attending the annual Bar Dinner increased this year from last year by more than 50 per cent to 413.

Perhaps it was curiosity regarding the new venue “Zinc” at the recently opened Federation Square. Directly overlooking the Yarra, the venue presented tranquil privacy despite being right in the heart of Melbourne and its relatively large capacity of 500.

Perhaps the calibre of the speakers was the magnet.

Jack Rush QC welcomed the guests and introduced the Honourable Chief Justice Gleeson AC. With his customary impeccable manners, Chief Justice Gleeson respected the request (threat?) to keep his speech short and toasted all the Bars of Australia within the three to four minutes limit he was allocated.

His Honour Judge Michael Strong then underscored the celebratory tone of the evening by some very witty singing and reflections on the trials and tribulations of judicial office and the judicial system. He abided by his 10 minute limit which he pointed out to Chief Justice Gleeson exceeded the time given to the Chief Justice of the High Court of Australia. The frequent laughter punctuating his presentation at regular intervals was a clear indicator of appreciation of the humour of his words. The strong applause at the end was a measure of the quality of His Honour’s musical talent.

Pamela Tate SC gave the Junior Silk’s address and the queue of people waiting to congratulate her immediately afterwards was sufficient testament as to how well it was received. She congratulated the Honourable Justice Heydon on his appointment to the “High Court of New South Wales” and welcomed the appointment of five women to the Victorian judiciary. Ms Tate S.C. also cautioned newly



Ian Mawson, Olyvia Nikou S.C. and Justice Peter Young.



Chief Judge Rozenes.

appointed judges from granting counsel extended luncheon adjournments to remedy “conjugal neglect”.

Next was His Honour Chief Judge Rozenes who did not concern himself with threats of time limits imposed on him.

Thankfully, his speech was so entertaining, we didn’t need to concern ourselves with His Honour speaking for over twice as long as his allocated 10 minutes.

With his tongue very firmly in his cheek, His Honour wondered out loud whether Chief Judge Waldron wanted his old job back. Chief Judge Rozenes was also gracious enough to translate the Yiddish joke for those of us whom he iden-

With his tongue very firmly in his cheek, His Honour wondered out loud whether Chief Judge Waldron wanted his old job back.



At the Zinc, Federation Square, 413 were in attendance for the 2003 Bar Dinner.

tified as not practising in the commercial jurisdiction.

This was as humorous and polished a public speech as anyone would have been lucky to enjoy anywhere. The Chief Judge's mobile phone rang at the precisely calculated moment to facilitate one of His Honour's jokes. This all amounted to evidence that the only ones who should be concerned are professional comedians

and public speakers should His Honour wake up again at 2 am and reconsider the wisdom of accepting the position of Chief Judge of the County Court.

Perhaps the tone of the evening also owed something to the fact that we are inching forward to represent a broader cross-section of our community (albeit at a glacial speed). In 1992 approximately 19 per cent of the attendees were female. In 2003 the proportion of females present was nearly 28 per cent.

The wines (Mantons Creek "The Three Pinots" Sparkling 2001, Portee Chardonnay 2000, Yellow Hammer Hill Shiraz/Malbec 2001, Koppamurra Cabernet Sauvignon 2000 and Cape Mentelle Semillon Sauvignon 2002) didn't do any harm. The Flaming Bombe Alaska added a touch of retro but the main meal, though tasty, could only be described as "Osso Buco" by the very imaginative or those with an avant garde interpretation of Italian cuisine.

The custom which has developed over the years of some people "running a book" on the length of the speeches so as to ward off boredom was not necessary on this night, (although nothing prevented some hard core gamblers from so doing).

There was nothing pompous about this light-hearted evening which was aptly summarised by the frequently heard comment throughout the night: "I don't go to these Bar Dinners very often but I'm glad I chose this one to attend."

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On Thursday 29 May 2003, 46 readers from the March intake (pictured above with Barbara Walsh, the manager of the Readers' course) signed the Bar Roll at a ceremony in the newly-refurbished Bar Council Chamber on the first floor of Owen Dixon East.

IMMEDIATELY after this picture was taken, the Readers proceeded to the Essoign Club — preempting its formal re-opening by one day — to enjoy the traditional post Roll-signing dinner with their mentors, the first group to sample the fare at the new facilities. Joining the Readers and their mentors at the dinner were a number of guest participants from



Back Row: Peter Agardy, Vicki Marty, Elizabeth Miller, Richard Antill, Gino Pierorazio, Thomas Pikusa, David Kent-Hughes, Theodosios Alexander, James Boulton, Russell Hammill, Simon Tisher, Simon Rubenstein, Jason Kane, Simon Zebrowski.

Centre Row: Barbara Walsh, St John Hibble, Claire Harris, Jane MacDonnell, Jeremy Smith, Diana Piekusis, Frank O'Loughlin, Shane Tyrrell, Nabil Orow, Michael Schulze, Scott Johns, Suzanne McNicol, Elizabeth Langdon, Deborah Morris.

Seated Row: Elizabeth Rhodes, Penny Cefai, Malcolm Harding, Patrick Montgomery, Daniel Holding, Anne Kajir, Alexandrina Manova, Niki Wilson, Jason Harkess, Amanda Ring.

Front Row: Andrew Fraatz, Hamish Redd, Sergio Petrovich, Jennifer Beard, Marcus Hoyne, Alastair Ritchie, James McQuillan, David Purcell, Garry Hindson

the Readers' course, including President of the Court of Appeal The Honourable Mr Justice John Winneke AO; Appeal Justices The Honourable Stephen Charles, Geoffrey Eames and Peter Buchanan; the Honourable Justices David Byrne and David Habersberger of the Supreme Court; His Honour Michael Rozenes, Chief Judge of the County Court; Justice Peter Gray of the Federal Court; Justice Linda Dessau of the Family Court; Professor

George Hampel QC and Felicity Hampel; and magistrates Lesley Fleming and Donna Bakos.

The after-dinner address was given by Judge Liz Gaynor who entertained the gathering with witty and humorous reflections on life on the County Court Bench, including the perils of having one's jokes immortalized in the transcript of proceedings and the even greater hazard of having one's droll judicial pronouncements misin-

terpreted by and in the Court of Appeal. Although this was by all accounts a hard act to follow, further entertainment was provided by some of the Readers themselves. Jason Harkess sang a solo rendition on life at the Bar to the tune of "New York New York"; and St John Hibble, Claire Harris and Elizabeth Miller performed a sketch "Not the News". For those who can remember (because the hospitality was lavish) the evening was a huge success.

Burmese Days

Simon McGregor

Before I visited the Union of Myanmar, the former British colony of Burma, I knew little more than that it was a poor Asian country under military rule. I also suspect that this was more than many of my fellow Australians knew. First hand experience, however, revealed to me that contradictory forces within Myanmar have created this simplistic caricature. The reality is a fascinating region poised at a political and legal crossroad.



Author realises sunglasses are compulsory atop Mandalay Hill.

THE contradictions abounded. We were in a taxi travelling the tree-lined streets of Yangon (formerly Rangoon), in Myanmar. Our taxi pulled up at a red light, where a destitute newspaper seller noticed my wife's interest in *Time Magazine's* article on Aung San Sui Kyi, the country's long-suffering leader of the National League for Democracy.¹ Smelling further sales, he promptly produced a copy of the Michigan University's *Journal of Democracy* featuring a similar story, and sold it to us for the equivalent of US\$3. He did this openly on a main street, so clearly there was no risk of law enforcement. Now, at this price I know it wasn't free press, but it was much cheaper than that journal would be in America or Australia. The regime under which the newspaper seller worked seemed to actually value currency above control. And as for his product range, I doubt that any *Herald-Sun* street vendor in Australia would have had contraband academic publications on hand!

The contradictions continued. In the old imperial capital of Mandalay, The Moustache Brothers are a circus-style troupe who incorporate political satire



Simon McGregor meets Bar Councillor Daw Khin Mar Mar Lutt.

into their act.² They were imprisoned for 12 years as a result. Although now free, they remain banned from "public performances". Nonetheless, knowledgeable travellers can visit their house, for a fee, and observe a "demonstration" of their art, which appears to be at least as lucrative as their original performances.

Modern Army bases stand in striking contrast to adjacent shanty dwellings. Geo-politically, Myanmar is sandwiched between the two most populous nations on earth, China and India. As a result, Myanmar, a nation of about 50 million

people, has almost as many soldiers in uniform as the United States of America.

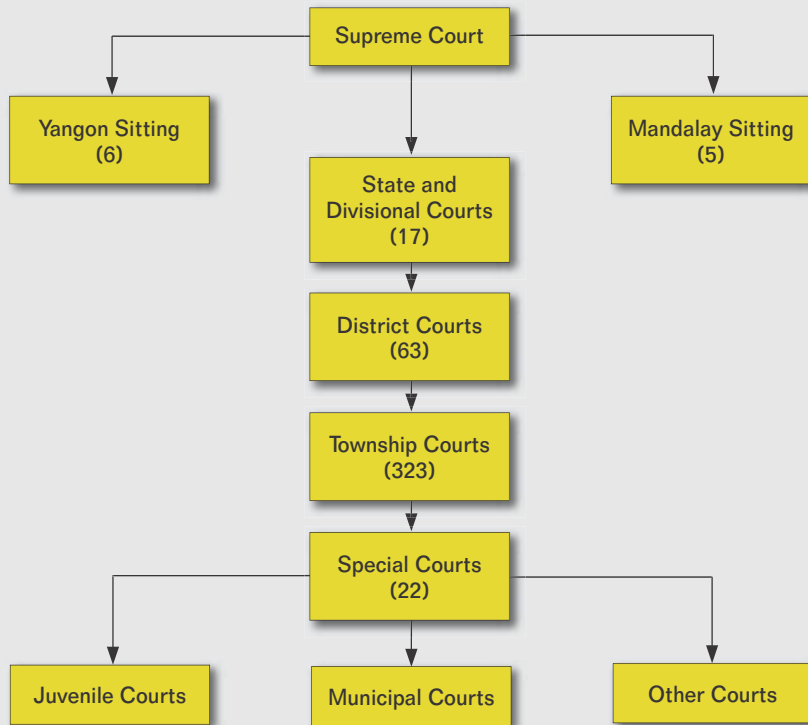
Apart from military installations, technology is low and the emphasis is on life's simple pleasures. People are friendly and honest. They also possess a nifty style of dress which is not nearly so garish as other Asian cultures can appear to western eyes.

Between December and February each year, Myanmar is a flowering garden of paradise, but during the wet season lasting the other nine months of the year, conditions are so hot and stifling that even the locals can't sleep. This landscape is inhabited by ethnic groups so diverse that only love of food and devotion to Buddha seems to be all they have in common.

This ethnic diversity is the first clue to unraveling some of these contradictions. Before the colonial era, the region experienced many dynastic shifts, as various cultural groups gained ascendancy for a time, and dominated the others by force of arms. For most of this time, the Bamar people (the lowlanders who make up the current leadership) held sway.

Before Myanmar obtained independence from Britain in 1948, the law of the Union was comprised of a hybrid of cus-

Structure of the Myanmar Court System



Source: Government of the Union of Myanmar, Supreme Court, *The Judicial System of the Union of Myanmar*, Yangon, 2001, at p.29.

tomary ethnic law, Buddhist law, colonial era statutes and case law, to which has now been added post-independence statute and case law. Deputy Attorney-General U Khin Maung Aye advised that precedents from Singapore, Malaysia and India were more persuasive than those from the more culturally remote “western” common law nations like Australia and the UK. The Constitution is being reviewed, which provides a focus for reformers hopes that some elements of democracy will be restored in this process. Although the current Constitution provides for a Parliament, it has not been allowed to sit since the eleven Generals who comprise the State Peace and Development Council (SPDC) took over. Highlighting this legal contradictions of the status quo, these Generals now refer to themselves as “Cabinet”.

As a fellow practitioner of a common law background, I was impressed by the coherent way in which indigenous and non-Christian religious law could be combined with western Christian-based law, in a society where clearly the political will to achieve this end exists. When Australia’s own difficulties in this area are consid-



Julie Delejak experiences life in an outer suburb of Mandalay.

ered, this system reflects nothing less than the “native genius” described by the Union’s preeminent jurist, Dr M. Muang.³

Unfortunately, according to my values, this legal overview is merely a formal position in this country. The de facto position is that following a succession of coups commencing a few years after independence, the entire machinery of government is appointed or approved by the military.

On the law-making process, Mr U. Kyaw Sein, Director of the Attorney-General’s Legislative Drafting Department, explained to me that the legislation he

drafted was only debated by the Cabinet, and thence directly proclaimed to be law. Interestingly, this Cabinet also includes the Chief Justice.

The Judiciary of the Union are recruited directly from law school. They are gradually promoted from clerks, to junior Magistrates and so forth through the hierarchy of courts shown opposite.

The Deputy Attorney-General asserted that the Judiciary was independent from the Executive, because the Department of Justice was separate to the Attorney-General’s office, and each had their



The life of contemplation, Bagan.

own “Member of Cabinet”. Nonetheless, Judges are reviewed at each promotional stage by the Executive, and many eventually transfer to join the Attorney-General’s Department, which is viewed within today’s Union as a more prestigious posting.

Signs of corruption are all around. I spoke to one father who despaired of educating his children because he could not pay the bribes required to induce teachers in the “free” State education system to actually teach his child. I also witnessed disgruntled private drivers being forced to hand cash to traffic police in order to drive down the public roads.

Hence the dilemma for democratic activists and other potential tourists: after years of abuse and neglect, the country no longer possesses the institutions which constitute a democracy. Both parliament and an independent judiciary have been gone for so long that even if the SPDC was willing to restore them, few people would be capable of operating them. For instance, since 1990, the non-military universities have been open for only about five years. As a result, many degrees have been truncated into intensive courses lasting only a few weeks. Various capacity building projects will be necessary before any transition to democracy is to be effective. Building this capacity involves spending some money, and from that exchange, the military government will make a profit

of some sort. Further, if any capacity is built, the SPDC will be in the best position to take advantage of any renewed trade opportunities.

The country has economic problems, and these have added momentum to the SPDC's efforts to rehabilitate its international image. Despite coming off a low base, Myanmar is still experiencing net international "dis-investment" as traditional sources of investors, such as Singapore, move toward more lucrative markets like Vietnam, and multi-nationals such as Pepsi respond to consumer pres-



Market in Yangon.

sure groups and withdraw. Hyperinflation has seen the local "kyat" currency drop to about 1/10th of its value in 1995. Most Burmese work two jobs, seven days a week, in an attempt to pay for their food and "under the table" expenses connected with the free State education. This military government's response has been to stick its head in the sand, as evidenced by their omission to compile a national budget for 2000.

It seems that the absence of democratic process has contributed to an absence of accountability.

This nation of approximately 50 million people is served by only 500 judges, none of whom any longer have the assistance of juries. The number of private legal practitioners is also surprisingly low, totalling only 14,000. The Attorney-General's Office is comparatively large at around 2000 practitioners, as most commercial work and litigation involves the government. As in our system, criminal matters are conducted by specialist State Prosecutors. Legal aid is available only to citizens facing the death penalty.

Within the profession, gender balance is remarkably good. Member of the Myanmar Bar Council, Mrs Daw Khin Mar Mar Latt, told me that both the judiciary and practitioners were comprised of women and men in roughly equal numbers. She noted, however, that their highest court, the Supreme Court, contained



Buddhist initiation ceremony, Mandalay.



Bilingual police station, Ngapoli.

no female judges, and this was a point of some contention. I nodded knowingly.

Within the Union, there is no distinction between solicitors or barristers, but practitioners have varying "rights of audience" in the courts. After completing a law degree or sufficient time as a clerk in the Attorney-General's office, one may join the independent Bar as a "Pleader". After at least one year has elapsed, you may sit an exam to become an "High Grade Pleader", where one remains until you have accumulated at least ten years of experience. At least one year of this experience must be in a different District or ethnic State from that of your birth. At this time, you may sit your final examination to become an "Advocate", whereupon you have a right of audience in the Supreme Court and can justify charging your clients significantly higher fees. Most Pleaders aspire and eventually become Advocates.

Due to our common colonial background, certain similarities exist between Australia and Myanmar. Depending on your perspective, this may pique your interest in what can be done to assist the people of Myanmar, or just prompt you to appreciate the vigour of the governing systems we have in Australia. Either way, the caricature of Myanmar is not as simple as it seems, and the way forward involves, first and foremost, having to deal with the non-democratic leadership.



Art and censorship in Mandalay.

NOTES

1. The 1990 elections were the first free elections since Independence from Britain in 1947. The NLD won 78 per cent of the vote, but the military junta (then referred to as SLORC) arrested many of the candidates and did not allow them to take office.
2. In Myanmar, bribes to traffic policemen are commonly dropped into their helmet. The Moustache Brothers did a sketch where a peasant proudly showed off her wide-brimmed coolie style hat, saying, "It's wide enough to cover all of me!". A nearby policeman then produced his own hat, saying "And my one is wide enough to cover all of Burma!"
3. Muang, M., *Burma's Constitution*, Martinus Nijhoff, The Hague, 1959, at p. vi.

FURTHER READING

- Collis, M., *Trials in Burma*, Faber & Faber, London, 1938.
- Government of the Union of Myanmar, Supreme Court, *The Judicial System of the Union of Myanmar*, Yangon, 2001.
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- Muang, M., *Burma's Constitution*, Martinus Nijhoff, The Hague, 1959.
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- Orwell, G., *Burmese Days*.

Terminal Prepositions

ENGLISH grammar, like English history, is scattered with myths the origins of which we can only guess at. One is that infinitives must not be split. Perhaps times are changing for that one: there seems now to be a tendency to boldly split infinitives that have never been split before.

Another is that a sentence should not end with a preposition. That idea has three remarkable features. First, that the ardour with which it is embraced has built progressively over the centuries, whilst many other aspects of proper grammar have fallen into disuse. Second, that even into the 21st century it continues to be repeated and insisted on. And third, that the desperate need to avoid a terminal preposition drives otherwise rational people into grammatical contortions of the most grotesque sort.

The word *preposition* comes from the Latin *prae-position-em* which is self-explanatory: it seems to insist that the thing be put *before* the noun or pronoun it governs. In the *Oxford Companion to English*, Tom McArthur explains that, because of the original meaning of *preposition*, “the classical prescriptive rule emerged for standard English that sentences should not end with a preposition.” Nevertheless, in early times of innocence, even writers of the first rank ended sentences with prepositions, leaving the relative far behind. Shakespeare was a frequent offender:

- Now all the blessings of a glad father, compass thee about. (*The Tempest* v. i. 180)
- The day is broke, be wary, looke about. (*Romeo and Juliet* iii. v. 40)
- And let me speake to th’ yet unknowing world How these things came about. (*Hamlet* v. ii. 391)
- Indee I am in the waste two yards about. (*Merry Wives of Windsor* i. ii. 44)
- We have some secrets to confer about. (*Two Gentlemen of Verona* iii. i. 2)
He was not alone:
- A great altar to see to. (*Bible* Joshua xxii. 10)
- They are the fittest timber to make

great politiques of. (Bacon *Of Goodness and Goodness of Nature*)

- ... let us descend and see if we can meet with more honor and honesty in the next world we shall touch upon. (Aphra Behn *Oroonoko or The Royal Slave*)
- The subject was too delicate to question Johnson upon. (Boswell *Life of Dr Johnson*)
- “Yes,” said the good lady, who now knew what ground we were upon. (Charlotte Brontë *Jane Eyre*)

The Fowler brothers published *The King’s English* in 1906. They inadvertently gave offence by its opening sentence. Longer than is now fashionable, other than in the law reports, it occupies an entire paragraph. It reads:

The compilers of this book would be wanting in courtesy if they did not expressly say what might otherwise be safely left to the reader’s discernment: the frequent appearances in it of any author’s or newspaper’s name does not mean that that author or newspaper offends more often than others against rules of grammar or style; it merely shows that they have been among the necessarily limited number chosen to collect instances from.

A reviewer dismissed the book out of hand on account of that sentence. But the Fowler brothers had not intended to be provocative. The matter was of no account to them: *The King’s English* contains no discussion of terminal prepositions. As H.W. Fowler remarked in a note in the 1930 edition:

... it had not occurred to us to examine seriously the validity of what, superstition or no, is a widespread belief.

The sentence irritated a lot of people who, as irritated people tend to do, wrote corrective letters. H.W. Fowler got his quiet revenge in *Modern English Usage* (1927), with an entry under the topic: Preposition at End. Having ignored the subject in 1906, Fowler amasses, in just two pages, overwhelming evidence

to demonstrate that the anxiety which afflicts so many English speakers is nothing but a “cherished superstition”. He marshals dozens of examples of final prepositions in work by the great writers of English. Burchfield, in his 3rd edition of *Modern English Usage*, describes the phenomenon as “one of the most persistent myths about prepositions”.

Fowler’s research suggests that the original culprit was Dryden, who “went through all his prefaces contriving away all the final prepositions he had been guilty of in his first editions”. (It is lucky for us all that Dryden wrote after Shakespeare, or we might have lost the reassurance Shakespeare offers by his frequent excursions into the forbidden territory). Dryden’s zeal left its mark on generations of school children. Even now, when most people are taught very little grammar, most seem to know the “rule” about final prepositions. The matter is made the more absurd (and difficult) because some words are both prepositions and adverbs, in which case the dictates of usage and folklore are different according to the role played. Examples of prepositions which can also be adverbs are: *about*, *beside*, *beyond*, *forth*, *inward*, *midway*, *near*, *off*, *round*, *round about*, *since*.

Despite the tenacity of the superstition, it remains true that style is the determining consideration. Some sentences would be absurd with the preposition at the end; others may be constructed with the preposition at the end or not according to taste; others again will be unreasonably distorted if the imagined rule is allowed to intimidate good sense.

In the following examples, the alternatives do not work, even as a joke:

- She went into the church (*The church is what she went into*).
 - I look forward to meeting you (*Meeting you is what I look forward to*)
- In the following, the choice is one of taste: more formal or less?
- I wanted a seat from which I could see the game. (*I wanted a seat I could see the game from*.)
 - For which firm do you work? (*Which firm do you work for?*)

In some sentences, only recasting will remove the supposed problem:

- The bed had not been slept in. (*No-one had slept in the bed*)
- What did you do that for? (*Why did you do that?*)

At the end of his entry about final prepositions, Fowler offers the following advice:

Follow no arbitrary rule, but remember that there are often two or more possible arrangements between which a choice should be consciously made; if the abnormal, or at least unorthodox, final preposition that has naturally presented itself sounds comfortable, keep it; if it does not sound comfortable, still keep it if it has compensating vigour, or when among awkward possibilities it is the least awkward.

It was some years later that a departmental memo, which had gone to extreme lengths to avoid a final preposition, drove Churchill to note in the margin: "This is the sort of bloody nonsense up with which I will not put". It is a sentiment most would agree with.

The durable myth that educated people should not end a sentence with a preposition was neatly exploited by a Chicago reporter in the aftermath of the Loeb-Leopold trial (1924). After 12 years in prison, Dickie Loeb was stabbed to death by another prisoner, James Day. Day was charged with his murder. His defence was that Loeb had made a homosexual advance, and that he was defending himself. With more wit than taste, the journalist wrote: "Richard Loeb, despite his erudition, ended his sentence with a proposition."

Julian Burnside



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20–21 October 2003: Second National Pro Bono Conference: Transforming Access to Justice presented by the National Pro Bono Resort Centre in conjunction with PILCH. Contact Ann Johnson. Tel: (02) 9385 7776. E-mail: ann@nationalprobono.org.au.

6–9 November 2003: Geelong. Annual Conference: Forensic Psychiatry at Work presented by RANZCP. Contact the Conference Organiser Pty. Ltd. Tel: 9509 7121. Fax: 9509 7151. E-mail: info@conorg.com.au.

24 November 2003: London, UK. International Intellectual Property Law presented by Hawksmere. Contact Claire Vipas. Tel: 44 20 7881 1813. Fax: 44 20 7730 4672. E-mail: Claire.vipas@hawksmere.com.

12 April 2004: Capetown. Second World Bar Conference presented by the South African Bar. Contact Dan O'Connor, Secretary ABA. Tel: (07) 3236 2477.

Australian Civil Procedure (5th edn)

By Bernard Cairns

Law Book Co. 2002

pp. v-lxxxviii, 1-629, index 631-664

ASSOCIATE Professor Cairns is a prolific contributor to the law of civil procedure in Australia. He was the principal consultant to the Queensland Justice Department in the project that resulted in that State's revolutionary *Uniform Civil Procedure Rules* of 1999, and has become somewhat of an institution at the University of Queensland, where he has taught civil procedure for many years. The first edition of his text was published in 1981.

After describing issues of jurisdiction and case management, the book follows a predictable course through the typical litigation process, ending with chapters on costs, appeals and the execution of judgment. Somewhat anomalously, chapters dealing with equity proceedings and with partnerships as parties appear at the end of the book. These would more appropriately have been included in the course of discussion rather than as an afterthought.

The book attempts to describe the litigation of civil trials in all superior Australian jurisdictions, with a brief but useful reference to the appeals process. The chapter on case management deals separately with the systems used by the superior courts of record in each State and Territory, as well as the Federal Court. Where citations are provided, the author has provided references to the relevant provision of the rules of each of those courts. In situations where the practice in some courts differs markedly from that in others, each method is dealt with separately. Where procedural variations exist in respect of particular subject matter (for example, in personal injuries litigation and building cases) those variations are considered in some detail.

While the book is thorough, it does not stray beyond the appropriate boundaries of a civil procedure text. The chapters dealing with pleadings and evidence are comprehensive but focused on procedural aspects. Likewise, the chapter on trials sets out the theory and practice of the adversarial hearing, but does not drift into issues of advocacy.

The author pays suitable attention to the commercial issues surrounding litigation, spending some time discussing the procedures involved in settlement and "alternative" dispute resolution and the

practical realities of legal disputes. Such discussions will not surprise busy litigators (nor be of enormous benefit to them) but are appropriately included in a text also intended for use by students.

The utility of the book could be enhanced by a comparative table of rules. While the reader could achieve the effect of such a table by reading the text in conjunction with the comprehensive table of statutes included, such a process is cumbersome. A comparative table would make the book a handy reference as well as a useful text, and would be a welcome inclusion in future editions.

Many of the repetitions and redundancies which plagued earlier editions have been removed, reducing the size of the book without depriving it of useful material. However, that purge was far from Stalinist in its thoroughness, and a reader could be forgiven for feeling the occasional tingle of *déjà vu* while reading.

Cairns' book provides a useful overview of the civil justice system and a general introduction to principles of procedure. It also provides a means to compare Victorian civil procedure with its federal counterparts and that of other states and territories. In that regard it is an excellent textbook and a useful aid to practice. However, the reader should refer to more specialised works for a detailed examination of civil procedure in any particular jurisdiction.

S.J. Maiden

The Law of Trade Secrets and Personal Secrets (2nd edn)

By Dr Robert Dean

Law Book Co. (Thomson Legal & Regulatory Limited) 2002

pp i-lxxxviii, 1-686 (hard cover)

DR Robert Dean has returned to practice at the Victorian Bar and, perhaps, reintroduces himself to practice with the second edition of his text on the law of trade secrets. The work has now been extended by two chapters to include a chapter on the statutory protection of private information and a chapter on freedom of information and its impact on the author's main subject.

In 1990 when the first edition of this work was published the use of computers was novel but increasing. By 2002, and the second edition, computer technology,

data storage and instantaneous communications including the internet, are common place and an intrinsic part of most personal and commercial lives.

This text generally covers the protection of trade and personal secrets by common law and statute. Breaches of confidence involving both the employee and fiduciary relationship are covered in some detail. As far as the development of the common law is concerned not much has changed since the seminal judgment of Justice Megarry (as he then was) in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47. The application of the equitable principles identified by Justice Megarry have of course been dealt with by the Courts in many and different factual circumstances. In this respect Dr Dean again includes an appendix to his work which categorises secret information cases by subject matter. Likewise, cases involving the grant or refusal of Anton Piller relief are also included in an appendix categorised by subject matter.

Perhaps the most recent advances in the area of trade and personal secrets has been the development of the common law in respect of privacy (*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199) and statutory protection of trade, personal and privacy secrets and rights.

The text updates and canvasses most of the relevant case law, literature and statutory materials in relation to the topic. In particular, the chapter on protection of computer software and output has been almost wholly revised and updated to keep track with what is a fast changing area of the law.

In the first edition of this work Dr Dean stated in the preface:

The object of the book is to examine the law in a way which will afford to those who need to find a reference to a particular aspect of any topic the opportunity to do so without difficulty. To this end the book attempts to set out the law with respect of secret information in what is hoped is a coherent structure making maximum use of headings and a detailed index.

In my opinion the second edition satisfies the objects indicated by Dr Dean and is a useful work for all commercial lawyers. The book's wide ranging and practical coverage of what is sometimes a difficult topic makes it a very useful reference.

When writing this review I had occasion to return to the first edition of Dr Dean's work and note that the introduc-

tory page had been corrected subsequent to publication with a white sticker revising the reference to the author's occupation and qualifications. No doubt the second edition is probably also sold with such a corrective sticker.

S.R. Horgan

Principles of Equity (2nd edn)

Parkinson, ed
Law Book Co. 2003
pp 1082, including index (soft cover)

THIS is one of the better legal text books I have used recently. It sets out lucidly, concisely and authoritatively all the main principles of equity. It maintains a consistent style throughout, notwithstanding a diverse (though often distinguished) authorship. The layout and sub-headings make the information both easy to find, and easy to digest.

All main equity topics are covered. They include the history and nature of equity, unfair dealing and equitable relief against it, obligations of trust and confidence, equitable assignments and assurances. There is also extensive treatment of equitable remedies, including specific performance, injunctions, constructive trusts, equitable compensation, tracing, declarations, rescission, and rectification and equitable defences and set off.

Some of the chapters are very good indeed. The chapter on equitable assignments, for example, is clear and well written, and includes a concise statement of nearly everything a practitioner would want to know about the subject. The

chapter on specific performance grounds its discussion of the issues and authorities well in an elegant use of classic and modern statements of principle.

There are some odd omissions. For example, the discussion of undue influence is based largely on the House of Lords' decision in *Barclays Bank v O'Brien* [1994] 1 AC 180, and hardly mentions *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, which is important to the present law in Australia. In a book which concentrates on Anglo-Australian equity jurisprudence, I would have expected at least a discussion of the differences between the approaches taken in the two cases, even if the author considers the House of Lords' analysis to have been preferable to the High Court's.

Nevertheless, overall this is a valuable work, and a worthy alternative or better still, companion, to the classic Australian equity texts Meagher Gummow and Lehane's *Equity Doctrines and Remedies* and Spry's *Equitable Remedies*.

Michael Gronow

Professional Liability in Australia

By Walmsley, Abidee and Zipser
Law Book Co. 2002
pp i-lxi; 1-771

THE categories of negligence are "never closed" said Lord Macmillan in *Donoghue v Stevenson*. And in his foreword to this book on professional liability, Mr Justice McHugh notes that the law in

the area, the law of professional liability, "has been one of the growth areas of the Australian common law". One factor he mentions, bringing about this development, "has been the transformation of Australia from an agricultural and industrial economy to a predominantly service economy".

The book deals with the professional liability of the following to each of which is devoted a chapter — doctors; solicitors; barristers, accountants and auditors; building professionals; valuers; and insurance brokers. Each chapter has its own table of contents. In chapter 1 (pages 1 to 149) there is an in-depth discussion of the general principles of law in the area. Having considered the liability of the professional groups concerned (chapters 2 to 8) the book then sets out in appendices some helpful practical items such as draft statements of claim (Appendix 2 and 3). Appendix 1 also sets out some other items relevant to practice (including, for some reason, the Hippocratic Oath).

There is no doubt that this book is a worthwhile addition to the law in this area in setting it out succinctly and in very readable fashion. Extensive tables of cases (usefully setting out citations) and statutes and a very good index also help the reader who may be after a quick answer on some technical point. The book might, however, have included a short discussion on the liability of arbitrators and mediators — a very important issue given the growth in ADR in recent times.

Nevertheless anyone working in this area will find this book a helpful and rewarding source.

D.J. Cremean

High Court Not Routed

Continued from page 32

it ceased to exist and in September 1994 I proved that energy can be created from nothing which in turn proves that nothing is of a ... state of energy. Now, I required to increase the speed of light within a fusion engine so as to fuse the four hydrogen atoms which I claim become susceptible to fusing through the increased speed of light. Now, I have given no credit to ...

Kirby J: Mr Rout, you are now in the High Court of Australia which is the highest court in our country and you are seeking to have the Court give you leave to proceed with an electoral petition.

...

Mr T.J. Rout: No, it does because the dividing and multiplying by zero, the set

that they are adhering to, enables me — it causes things to cease to exist. Now, I have proven everything is on nothing so if everything is on nothing and you multiply it by zero, then the entire universe and the world does not exist. I have proven it conclusively. I am not hiding, am not hiding, it is then and in there in the universities, they hide behind their ... labels and they hide behind their status and they hide behind protected by the media who will not expose them. So I have proven it.

...

Kirby J: Did you work at one stage for a university yourself?

Mr T.J. Rout: No, I am a self-made scientist. I am the man responsible for having

developed the superior science.

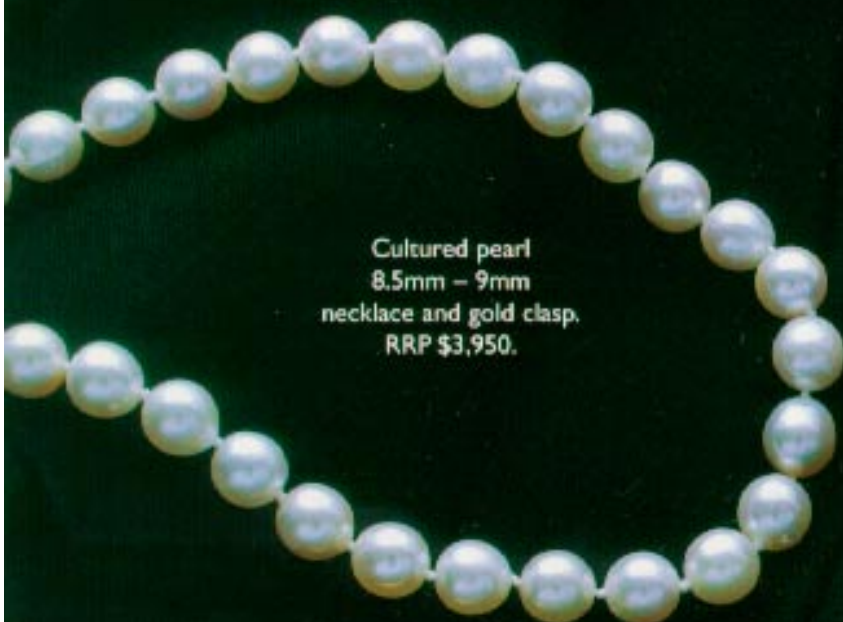
...

Kirby J: Yes, thank you very much, Mr Rout. I will ask Justice Heydon to give the reasons of the Court for the ruling that will be made and announced on this application.

Heydon J: On 14 February 2002 the Chief Justice dismissed an application by the applicant for leave to issue process being an electoral petition annexed to an affidavit of 5 January 2002. The applicant seeks leave to appeal against the Chief Justice's order. The applicant has not demonstrated any error in the Chief Justice's conclusion or in his order. The application for leave is dismissed.

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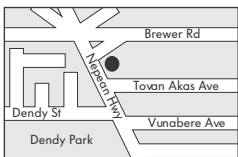
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