VICTORIAN BAR NEWS

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CommBar Celebrates Its First Decade

Welcomes: Judge Sandra Davis and Judge Morgan-Payler ☐ Farewells: Judge Warren Fagan and Judge William Michael Raymond Kelly ☐ If Hedda Met Hamlet — Would They Still be Bored? ☐ The Twilight of Liberal Democracy ☐ Indian Rope Trick ☐ BCL: The Open Door to the Bar ☐ Chief Justices Warren and Black Address Senior Counsel ☐ The Heirs of Howe and Hummel ☐ Launch of the Trust for Young Australians Photographic Exhibition ☐ Mother's Passion ☐ The Bar's Children's Christmas Party ☐ Here There Be Dragons ... ☐ Victorian Bar Superannuation Fund: Chairman's Report ☐ The Readers' Course ☐ Wigs on Wheels Around the Bay ☐ Verbatim ☐ Wine Report ☐ Sport/Bar Hockey 2004 ☐ Advanced and High Performance Driving

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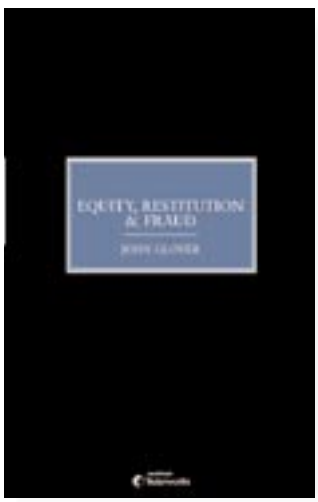

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Issues Raised by Victorian Government's Proposal to Appoint Acting Judges

ACTING JUDGES

THE Victorian Government has introduced legislation (The Courts Legislation (Judicial Appointments and Other Amendments) Bill 2004) to make provision for the appointment of acting judges.

The Bill proposes that acting judges may be appointed for a period of up to five years and are eligible for re-appointment. Acting judges who have previously served as members of the judiciary may be appointed up to the age of 75. Other practitioners may be appointed up to the age of 70.

We have expressed concern in these pages on earlier occasions as to the problems, whether perceptual or real, of appointing judges whose continued tenure of office depends upon the goodwill of the executive.

A litigant, whose challenge to the validity of legislation, or the interpretation placed on it by the executive, is dismissed by a person whose tenure as an acting judge is to expire within 12 months but who may be re-appointed at the discretion of Cabinet, must necessarily have some doubt as to whether justice has been done.

A similar doubt must necessarily be engendered in the mind of a person convicted by an acting Magistrate or by an acting Judge of the County Court in circumstances where the Magistrate or Judge is "up for re-appointment", the executive is lamenting a breakdown in law and order and the verdict depends upon resolving a straight conflict of evidence between two people.

It is unlikely, because of their training, conditioning and the general ethos of the profession, that acting judges and magistrates will behave otherwise than with the utmost propriety. But procedural fairness involves not only doing justice.

The proposal has been attacked, both eloquently and with concise logic by the Australian Council of Judges. Few who heard the comments of Justice Sackville, the Chairman of the Council, to John Faine on the ABC about a month ago can have any doubts as to the unwisdom of the government's proposal.

It must also be manifest that justice has been done.

The proposal has been attacked, both eloquently and with concise logic by the Australian Council of Judges. Few who heard the comments of Justice Sackville, the Chairman of the Council, to John Faine on the ABC about a month ago can have any doubts as to the flaws in the government's proposal.

MEASURING THE ILL WIND

In the last issue of *Bar News* we observed that in Victoria, at least, "a barrister's lot is not a happy one". It is unlikely that the appointment of acting judges will have much effect on the availability of work — except insofar as it may remove some of our competitors, at least temporarily, from the market. David Denton in his interesting analysis which appears in these pages, quotes statistics which would indicate that while the number of barristers needing to be fed by commercial litigation in this State has increased significantly over the last ten years, the size of the pie to feed them has declined dramatically. If his statistics have any significance — and they must — and if they can be extrapolated over the Bar as a whole, the picture is indeed a grim one.

We need more judges, an efficient

docket system, shorter turnaround times and firm commitments for starting dates. Unless they can be achieved litigants who can choose will litigate in New South Wales rather than in Victoria.

That the judiciary are aware of this fact and are doing what they can — without additional judges — to cope with the problem is indicated by the fact that with less than one month to go of her first year of office, Chief Justice Warren can point to the fact that no case in the Supreme Court this year has been marked but not reached.

PUBLICISING COMMITTAL PROCEEDINGS

The publicity given to the recent committal proceedings concerning the death of David Hookes has raised once again a concern which we have felt in relation to other high profile prosecutions.

In the case of the Hookes' inquest the prosecution expressed concern at the publicity and has supported an application to repress the publication of any photos of the accused. But the committal proceeding continued to be reported and reports of the evidence given appeared in news items on television and radio and in the newspapers.

The problem associated with the publication (pre-trial) of evidence given against an accused is not new. There have been occasions where the pre-trial publicity has been such as to require a change of venue and even to render it doubtful whether a fair trial could be obtained.

In normal circumstances, evidence at a committal proceeding is limited to prosecution evidence and evidence obtained from the prosecution witnesses in cross-examination. In other words, the evidence does not give a rounded picture of events, but rather presents, basically, one side of the case.

Jurors are (probably fortunately) human beings, who bring their own life's experience, prejudices, passions and sympathies with them into the jury box. It is the function of the trial judge to ensure by careful directions that the impact of the prejudices, passions and sympathies is minimised. However, when a high profile case obtains high profile publicity at the committal stage, potential jurors will often form very clear views as to the merits of the prosecution long before they are chosen for the relevant jury panel.

It is true, of course, that the juror is bound by oath to take his directions as to the law (including the fact that he or she can act only on evidence presented at the trial) from the trial judge. But jurors are reluctant to acquit those whom they "know" to be guilty. A juror is unlikely to be happy to acquit where the juror recalls damning evidence given at the committal proceeding (as printed in the newspaper) which evidence, because it is inadmissible, is not before the jury at the trial.

The reporting of committal proceedings can, at least in the case of high profile cases, result in a potential juror being presented with half or three-quarters of the evidence in the newspaper and to his or her reaching a firm conclusion as to guilt or innocence long before he or she is summoned for jury service. This can lead to convictions which are unsafe and unsatisfactory.

On the other hand, committal proceedings should be open to the public in accordance with the general common law principle of open justice. It is many centuries since the Court of Star Chamber was abolished, and open justice does require that committal proceedings not be closed to the public.

There is another reason apart from the general public interest criteria for conducting such proceedings in public and for allowing the proceedings to be reported. Occasionally, a potential witness knows nothing of the proceedings until he or she reads the Crown evidence which he or she knows to be mistaken. Occasions have occurred when the publication of committal proceedings has resulted in fresh witnesses coming forward to assist the defence.

The dilemma is not an easy one to solve. But it is one that requires a solution. It may be that there should be an option to a defendant to have committal proceedings conducted in camera.

This is a matter that goes to the heart of our system of criminal justice and raises an issue much more fundamental than that of how to save money by appointing acting judges.

A BIT ABOUT WORDS

For many years now Julian Burnside has provided us with an entertaining analysis of the use of the English language. Those readers who have enjoyed what he has written in these pages over that time will be delighted to know that they can obtain a collected version of "A Bit About Words" which is being published by *Scribe* under the title "Wordwatching".

The Editors

Bar Council's Role in Legislation

THERE have been a number of significant developments in the last three months which impact on our Bar's members and which warrant detailed reporting.

LEGAL PROFESSION BILL 2004

The *Legal Profession Bill 2004* passed quickly through the Legislative Assembly in early December. This was the culmination of a four-and-a-half year review of the *Legal Practice Act 1996*, initiated by the Attorney-General in June 2000. At every stage of the process, the Bar was involved and made full and detailed submissions.

On a strictly limited confidential basis, we and the Law Institute, and other parties considered by the Government to have an interest, were given in September 2004 an exposure draft of the Bill, and the opportunity to discuss it in the Implementation Committee before it was introduced into the Parliament.

The Bill is long — 538 pages, with an explanatory memorandum of 147 pages. According to the Shadow Attorney-General, it is the second largest Bill brought into the Victorian Parliament, "pipped at the post by some 20 pages by the Gambling Bill".

The Bar commends the Attorney-General and the Government for the full, thorough and timely advance consultation process leading up to the preparation of the Bill.

As long announced, the major structural changes are in the establishment of a new Legal Services Board and Legal Services Commissioner, and the vesting of jurisdiction in the Victorian Civil and Administrative Tribunal in relation to the hearing of what are termed "civil complaints" and "disciplinary complaints". Significantly, the Legal Services Commissioner is not only the Chief Executive Officer of the Board, but is independent from the Board in relation to complaints.

A "civil complaint" covers a dispute in relation to legal costs up to $25,000,

claims of pecuniary loss as a result of an act or omission by a "law practice" or "Australian legal practitioner", and "any other genuine dispute … arising out of, or in relation to, the provision of legal services". A barrister is an Australian legal practitioner who engages in legal practice and who practises solely as a barrister.

A "disciplinary complaint" relates to conduct "to the extent that conduct, if established, would amount to unsatisfactory professional conduct or professional misconduct".

INVESTIGATION OF COMPLAINTS

The power of the professional associations, the Bar and the Law Institute, in relation to disciplinary complaints is significantly reduced. It is not merely that the Legal Services Commissioner is to be the "single point of entry" for all complaints about legal practitioners — a "one stop shop for complaints against lawyers" — as had been previously announced, and was reiterated in the Attorney-General's 16 November 2004 media release. Rather, as the Attorney's media release states, "The Commissioner will operate independently from the legal profession and government", and from the Legal Services Board itself, in relation to complaints and investigations of, and prosecutions for, professional misconduct.

The Bill does give the Commissioner extremely wide power to delegate "any function of the Commissioner" to "a person who is, or is a member of a class that is, prescribed by the regulations". There are only a few "key" functions the Commissioner is not permitted to delegate. These are precisely defined and include those of receiving complaints, summarily dismissing a complaint under clause 4.2.10 (on the ground, for example, that the complaint is "vexatious, misconceived, frivolous or lacking in substance") without investigation, and the function of investigating disciplinary complaints.

Although not able to delegate investigating disciplinary complaints generally, the Commissioner is explicitly empowered to refer a disciplinary complaint to "a prescribed investigatory body" for investigation, recommendation and report to the Commissioner. Such investigatory bodies are to be prescribed by regulation and, until regulations are made, the transition provisions in Schedule 2 of the Bill, clause 8.14, provide that the Law Institute and the Bar are taken to be "prescribed persons" for the purpose of delegation by the Commissioner under clause 6.3.12(2) and "prescribed investigatory bodies" required for there to be the referral of an investigation.

Under the present *Legal Practice Act 1996*, the Bar, as a Recognised Professional Association (RPA), is authorised to receive disciplinary complaints; to summarily dismiss a complaint as frivolous, vexatious, misconceived or lacking in substance; to investigate complaints; and, after investigation, either to bring a charge in the Tribunal or, in relation to unsatisfactory conduct (as distinct from misconduct), subject to certain defined limitations, to administer a reprimand or caution, or take no further action. The Bar

is authorised to delegate these powers, and has done so to the Ethics Committee.

Under the new Bill, and regulations yet to be made, the Bar and its officers, employees and committee members (the latter presumably intended to cover in particular the Ethics Committee, though it refers to committee members), will presumably be confirmed in their transitional status as a "prescribed person" to whom the Commissioner may delegate any function other than the precisely defined, non-delegable, key functions and a "prescribed investigatory body" to which the Commissioner may refer the investigation of particular disciplinary complaints.

The Commissioner therefore will be able to refer disciplinary complaints to the Bar or Ethics Committee for investigation, recommendation and report. It will be at the discretion of the Commissioner as to which disciplinary complaints are referred, and whether some, most or even all disciplinary complaints are so referred. Although the Bill forbids delegation of the function of investigating disciplinary complaints, there is no limitation on the referral of such complaints for investigation.

Similarly, in relation to the disposition of complaints, the exception to the general power of delegation is precisely limited to "summarily dismissing a complaint under section 4.2.10".

Properly construed, the Bill does not forbid the delegation of the Commissioner's powers under clause 4.4.13. That clause provides for what is to happen after an investigation has been completed — "the Commissioner must deal with the matter in accordance with this section". Clause 4.4.13 is in Division 3 of Part 4.4 of the Bill, but it is only "investigating disciplinary complaints under Division 3 of Part 4.4" that is non-delegable. Clause 4.4.13 relates to the Commissioner's functions "after an investigation has been completed".

It is not possible in this column to provide members with a detailed analysis of the entire provisions of the Bill relating to complaints investigation. Suffice to say, that the issue will be whether and to what extent the Commissioner, who is to be, in relation to disciplinary complaints, independent of both Government and the Legal Services Board, will delegate functions or refer investigations to the Bar or Ethics Committee.

In connection with the Legal Service Commissioner's independence from both the Government and the Legal Services Board — his or her position of, in some respects, absolute power in relation to disciplinary complaints — it should be noted that there is no provision for any review of the Commissioner's decision summarily to dismiss any complaint (civil or disciplinary) under clause 4.2.10.

Under the equivalent provision in the Legal Practice Act, section 141, summary dismissal by a Recognised Professional Association or, indeed, by the Legal Practice Board itself, of a complaint on the ground that it was found "frivolous, vexatious, misconceived or lacking in substance" had to be notified to the Legal Ombudsman as soon as practicable by the RPA or Board, section 141(3). Also, the complainant was empowered to refer summary dismissal by the RPA or Board to the Legal Ombudsman.

As in the case of the Commissioner, the exceptions to the Board's power to delegate are limited to a few precisely defined "key" functions. The Board's power to delegate, and the exceptions thereto, are set out in clause 6.2.19. There is no exclusion relating to the issue, suspension or cancellation of practising certificates.

Similarly, there is, under the Legal Profession Bill, no review of a decision by the Commissioner under clause 4.4.13(3)(b) or (c) to decline to prosecute where the Commissioner is satisfied that the Tribunal would reasonably likely find unsatisfactory conduct and, in defined circumstances, to administer a reprimand or caution or take no further action. Under the Legal Practice Act, sections 152(1)(b) and 153–156, the Legal Ombudsman has to be given notice of any decision by an RPA or the Board, the complainant can then apply for review of the decision, and the Legal Ombudsman has then to review it.

PRACTISING CERTIFICATES

Responsibility for the issue, suspension and cancellation of practising certificates is a vital part of professional regulation, with obvious links to professional standards and discipline. Under the present Act, the Bar is responsible for this as an RPA. Under the new Bill, those functions are assigned to the Legal Services Board.

However, as with the power of delegation by the Commissioner, the Board is given wide power to delegate "any function of the Board" to "a person … prescribed by the regulations". Also, as in the case of the Commissioner, the exceptions to the Board's power to delegate are limited to a few precisely defined "key" functions. The Board's power to delegate, and the exceptions thereto, are set out in clause 6.2.19. There is no exclusion relating to the issue, suspension or cancellation of practising certificates.

As with referrals and delegation in relation to disciplinary complaints by the Commissioner, the vital question will be whether the Board will delegate its functions in relation to practising certificates to the Bar.

The Bar has constantly stressed the importance of its role and that of the Ethics Committee in the framework of professional regulation. Together the Bar and the Ethics Committee establish, explain and amend rules of conduct and maintain and enforce high standards of professional conduct by barristers for the benefit of the public and the proper administration of justice. The quality and cost effectiveness of the Bar's present role in professional regulation was confirmed in an independent audit and report obtained by the Attorney-General in 2003.

Both the New South Wales *Legal Profession Act 1987* and, more significantly, the very recent *Queensland Legal Profession Act 2004*, explicitly provide for the issue of practising certificates by the bar associations. Investigation of disciplinary complaints is by referral to the two professional associations. Significantly, the Queensland Act was largely derived from the April 2004 model provisions endorsed by the Standing Committee of Attorneys-General. The Victorian Bar had hoped for similar explicit provisions in the Legal Profession Bill.

COSTS DISCLOSURE

Members of the Bar will need to examine closely the provisions concerning costs disclosure and review in Part 3.4 of the Bill. The fundamental obligation of costs disclosure is set out in clause 3.4.9. The matters required to be disclosed to the client are numerous, detailed and onerous.

The obligation on a barrister retained by a solicitor is, in some respects, less onerous and is set out in clause 3.4.10. In

general terms, it amounts to information which will enable the solicitor to make the necessary disclosures. However, the onerous requirements of clause 3.4.9 would apply with full force in the case of direct access briefs.

Clause 3.4.13 requires additional costs disclosure where a law practice (which by definition includes a barrister) negotiates the settlement of a litigious matter. Barristers are excepted from this requirement only if they are instructed by a solicitor and the solicitor makes disclosure. Curiously, clause 3.4.13 requires such additional disclosure "before the settlement is executed", not before the settlement is agreed or concluded.

Clause 3.4.11 requires that initial costs disclosure under clause 3.4.9, which applies to solicitors, and only to barristers in direct access cases, be in writing. It also requires disclosure by the solicitor retaining a barrister to be in writing. Clause 3.4.15 in relation to the additional disclosure required where a settlement is negotiated, seems to assume, but does not explicitly say, that must be in writing.

The additional disclosure required where a settlement is negotiated is a reasonable estimate of the amount of legal costs payable by the client (including costs of another party the client is to pay), and a reasonable estimate of the contributions towards those costs likely to be received from another party. This may be of particular relevance in mediations.

The effect of failure to make any of these required costs disclosures is that the client is not required to pay the legal costs unless they have been reviewed by the Supreme Court Taxing Master. Further, any such non-disclosure is a factor to be taken account of by the Tribunal in determining whether a costs agreement is fair, just or reasonable on application by the client to have it set aside.

The provisions requiring service of a signed bill of costs before legal proceedings to recover those costs may be commenced are almost identical to the equivalent provisions in section 106 of the Legal Practice Act. The only significant addition appears to be that the Bill must include or be accompanied by a written statement setting out various avenues open to the client to have the costs taxed, to have any costs agreement set aside, and to make a complaint to the Legal Services Commissioner in relation to the costs, and the relevant time limits. This requirement in clause 3.4.35 appears to apply to barristers' bills as well as to solicitors' bills.

Clause 3.4.39, in terms of costs review by one law practice retaining another, provides for solicitors to apply for taxation of the whole or any part of a barrister's bill.

Once the Legal Services Commissioner has given notice to a practitioner of a civil complaint about conduct, no proceedings may be commenced in relation to the subject matter of the civil dispute involved until the complaint is determined or dismissed and any appeal rights are exhausted — clause 4.3.2. This may cause considerable delay in collection of fees. Although clause 4.3.3 requires that where there is a costs dispute, the unpaid costs must be lodged with the Commissioner, that is subject to reduction or waiver if the Commissioner is satisfied it would cause undue hardship.

PROFESSIONAL INDEMNITY INSURANCE

Clauses 3.5.2(4) & (5) of the Legal Profession Bill provide that professional indemnity insurance "must be with the Liability Committee unless the law practice is a barrister" and that "A barrister may choose to apply for insurance with the Liability Committee and that Committee may provide, or refuse to provide, the insurance".

However, those clauses are subject to clause 3.5.2(7) which provides that "The Victorian Bar Council may, on or before 28 February 2005, resolve that all barristers are to insure with the Liability Committee and, if the Victorian Bar Council so resolves, the insurance for a barrister must be with that Committee despite subsection (4)".

The Bar Council has made no decision yet on whether to resolve that all barristers are to insure with the Liability Committee.

This will be a decision for the Council once the legislation has been passed and received the Royal assent, and after the Council has carefully considered all available options. As at the time of writing, the Bill is before the Legislative Council. It is expected to be passed, and may receive Royal assent before the Christmas break. The issue may therefore come before the Bar Council, at the earliest, at its scheduled meeting on 16 December.

The Bar welcomes the option in the Bill to enable barristers to insure with the LPLC because it would appear to offer our members future certainty and continuity with professional indemnity insurance. At the same time, the Bar has enjoyed good relations with the commercial insurance market and therefore intends to make a

decision only after careful consideration of all available options.

The Bar Council has invited the Liability Committee to place before it a proposal for insurance by that Committee and to that end we have made available our claims history data base for inspection by the Committee on a confidential basis. The Council has also invited both Great Lakes and Suncorp Metway to place before it any proposals they may wish to make in support of the Bar continuing to place its professional indemnity insurance with the commercial market. We will keep members informed of developments.

CONSULTATION ON PROPOSED LEGISLATION

Until recently, the Government has regularly consulted the legal profession on legislation throughout the process — in the early policy development, before the draft Bill goes to Cabinet, and before the final Bill goes into Parliament.

Good examples of effective consultation are the Legal Profession Bill (as outlined above) and the *Crimes (Dangerous Driving) Act 2004*. With the latter, we were involved in development of policy through a discussion paper and, on a confidential basis, given the draft Bill before it was finalised and went to Cabinet.

Unfortunately, this process is not being replicated with some very significant legislation.

Both the Bar Council and the Law Institute Council are seriously concerned at the Government's failure to consult the profession in relation to the *Major Crime (Investigative Powers) Act 2004*. It was hastily passed into law with only a little over four weeks between first release of the Bill when it became a public document upon second reading in the Legislative Assembly on 5 October and final debate in the Assembly on 3 November 2004.

The Bar and Law Institute read about the Investigative Powers legislation in *The Age* newspaper. After "first reading" in the Legislative Assembly on 16 September 2004, at which the Bill is neither read nor made available to Members of Parliament or anyone else, the Bar contacted the Department of Justice, but was not able to obtain a copy of the Bill. Only when it was second read, and was in the public arena, were we able to access it on the Parliamentary Documents website.

The second reading was on 5 October 2004, in the final week before the Federal election. The Bill was brought on for debate on 3 November with a Government Business Program guillotine on debate. It passed all remaining stages in the Assembly on 4 November and was first read in the Council on that day, passing all remaining stages in the Council on 11 November and receiving Royal Assent on 16 November.

The *Major Crime (Seizure of Assets) Bill 2004* was second read and first became available the same day as the Investigative Powers Bill, and was similarly rushed into law, passing the final stages in the Parliament on 11 November and receiving Royal Assent on 23 November 2004.

The Bar, the Criminal Bar Association, the Law Institute and Liberty Victoria held a media conference on 29 October and issued a joint media release calling on the Government to refer the Investigative Powers and Seizure of Assets Bills to a Parliamentary Committee to allow genuine public debate and consultation.

The Investigative Powers Bill was 177 pages of complex and far-reaching provisions, involving the Supreme Court in the criminal investigative process, authorising a "Chief Examiner" to conduct secret investigations, with no right to silence or right against self incrimination in the person being interrogated, and indefinite and unlimited imprisonment for failure to attend or co-operate.

Despite our request for consultation and careful consideration, the Government proceeded, as summarised above.

The *Occupational Health and Safety Bill 2004* presently before the Parliament is following a similar course, becoming available only upon second reading on 18 November, with debate adjourned to early December.

Although certainly there was consultation in the Review and Report on the *Occupational Health and Safety Act 1985* by Chris Maxwell QC, the Victorian Bar was not involved or consulted about the Government's proposed legislative response. We had understood there were to be amendments to the 81-page Occupational Health & Safety Act 1985. Only after second reading on 18 November were we able to access the entirely re-written 171-page Occupational Health & Safety Bill 2004.

Neither the Bar nor the Law Institute is aware of any urgency, practical or political, in the passage of the *Occupational Health & Safety Bill 2004*. There are a number of very significant issues that, in the public interest, must be worked through before the legislation is passed. The two associations made joint representations to the Premier in late November, urging his Government to defer the progress of the Bill. It is hoped that we will have an opportunity to at least raise these issues of concern with the Government, before the Bill is passed.

The failure to consult and the rapid passage of legislation must also impact on the Opposition. The Shadow Attorney-General had only two weeks, within which to review the complex, 538-page Legal Profession Bill and 147-page Explanatory Memorandum that effect sweeping changes to the regulation of the legal profession in Victoria. The apparently substantial briefing he had from the Government is no substitute for sufficient time to examine the Bill and to allow the Opposition to consult with interested parties.

The Government's recent failure to consult appears inconsistent with the Government's 2002 election promise of democracy and accountability. The Premier's statement on democracy and accountability claimed that the Government had made Victoria a leader in open and accountable government and promised that a Bracks Government would continue the restoration of democracy in Victoria and to improve the opportunities for all Victorians to be heard and to have a say on issues that matter to them. Moreover, consistent with this approach, in 2002 the Department of Justice advised the Bar that consultation with the profession would be routine as a matter of policy.

We look forward to a return to effective consultation on all significant legislation.

BEST WISHES FOR THE HOLIDAY SEASON AND SUPREME COURT VACATION

May I, in this last Chairman's Cupboard for the year, thank each member of the Bar who has contributed to the work of the Bar and the Bar Council over the past year. I particularly thank all members of the Bar Council and our retired Executive Director, David Bremner, and our new Chief Executive Officer, Christine Harvey, for their strong and effective support and for the seamless transition. I extend best wishes to all members of the Bar and Bar Administration for the holiday season and the Supreme Court vacation.

I have found the few months that I have been Chairman immensely rewarding. I look forward to the year ahead, which I know will present us with many challenges.

Ross Ray QC
Chairman

Human Rights: the Direction for Victoria

READERS of this journal will know that, earlier this year, I released a groundbreaking document called the *Justice Statement*, our vision for a legal system founded in a conviction that the law should be a vehicle for equality. As I have canvassed in previous editions, the Statement signals myriad possibilities within the existing civic and legal framework to make the law more accessible and meaningful for every Victorian. I am convinced, however, that we will only ever be partially successful while we fail to grapple properly with the broader concept of human rights.

Many readers will be part of the momentum that is gathering in legal sectors around the nation for a greater focus on human rights. As a profession, though, we need to explain to the wider community that human rights are simply the international extension of the "fair go", that iconic concept that Australians have historically embraced but wrestled with less successfully in reality. It is time to put the fair go back on the agenda and talk about the place of rights in Australian society — what they are, how they're experienced, and how they might be recognised and protected.

Together, we must find a way for the language of rights to be heard again in circles where the discourse of political expedience has prevailed. We must do our part by making this language common parlance in Victoria, marking out the shared values that we wish to protect, and the *Justice Statement* therefore calls for a community discussion about the best way to uphold rights within the Victorian context.

Australia is the last developed nation to tackle the concept of human rights in any structured way. Whether they are best recognised through a formalised legal document, such as an entrenched Charter or a Statute, or through less proscriptive mechanisms, will depend on whether we can develop a consensus on what rights

and freedoms we cherish and on what duties we owe each other. It will also depend on whether we believe that they are adequately protected by the complex array of machinery already in place, from international law, the Constitution, to an evolving legislative process and body of common law; even the scrutiny of the media and, of course, the ballot box.

If our answer to these fundamental questions nevertheless leads us to conclude that a formal instrument is necessary, we will in fact have only completed one very small step in the process. In grappling with the possibility of legal recognition, we must tackle the further and myriad queries that arise from such a proposition. What form should such an instrument take? What powers should the judiciary have in respect of it? What rights should be recognised? Should corresponding responsibilities be included? What role should an Attorney-General have in the process? What remedies might be available to complainants? Should there be exceptions?

As a profession, we need to explain to the wider community that human rights are simply the international extension of the "fair go", that iconic concept that Australians have historically embraced but wrestled with less successfully in reality.

These are just some of the pieces in the puzzle that we must reconcile. We must be clear, however, that legislative acknowledgment of people's rights does not automatically create utopia. We must ensure that we do not create a system in which those at the margins continue to be excluded by the mysteries of legal machinery.

I believe that every member of the legal profession has a particular duty to grapple with these questions, and to lead the debate with a humility and pragmatism that helps some sectors of the community overcome the suspicion with which they have come to regard these supposedly "big picture" issues.

It is an exhilarating time as we get ready to embark on this crucial discussion. At the time of writing, the Government favours a 12-month community consultation process, led by a panel of eminent Victorians, and I expect it to begin early in the New Year. As practitioners, you are the ones that will challenge, enforce and live out the community's decision and I invite you to be at the frontline of the debate. It is only in a community that recognises that human rights lie at the heart of every properly functioning society, that we have any chance of making the promise of the law a reality.

Rob Hulls, MP
Attorney-General

Misplaced Reference

Editors

Dear Editors

IT has come as a pleasant surprise to me that whether mathematicians are humourous is apparently open to question. However, whether they are pedantic is not. Therefore I write to point out a misprint in your report of my toast made at the Bar Dinner.

The word "counsel" has unaccountably replaced the pronoun "he" at the start of the fifth line of the third stanza, to the detriment of both sense and scansion. The reference should be, of course, to the Attorney, the subject of the preceding stanza.

Yours faithfully,

Kristine Hanscombe

Atkin's Dissent

Editors

Dear Editors,

I read recently the editorial in the Autumn 2004 edition of the *Bar News* entitled, "The New Despotism", in which you expressed concern at the erosion at a national and international level of the rule of law in the name of freedom and national security. Such encroachments are not new; nor are the criticisms of them.

I was reminded by your editorial of the dissenting opinion of Lord Atkin in *Liversidge* v *Anderson* 9942 AC 206. The case was an action for false imprisonment by the appellant, who had been detained without trial under Regulation 18B of the *Defence (General) Regulations 1939*. The Regulations provided for the detention of persons of hostile associations. The material words of the Regulation were as follows:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations and that by reason thereof it is necessary to exercise control over him he may make an order against that person directing that he be detained.

The appellant sought to throw onto the respondent, the Home Secretary, the onus of supporting the detention, and sought particulars of the reasonable grounds for directing that the appellant be detained.

The case was heard by the House of Lords in September 1941. The opinions of the Law Lords were published on 3 November 1941, little more than 12 months after the Battle of Britain had been fought over the skies of England, at a time when naval battles raged in the North Sea and North Atlantic, Australian troops held Tobruk, which was besieged by Rommel's forces in North Africa, and Hitler's armies were advancing on Moscow. Ten days later, on 13 November 1941, the *Ark Royal* would be sunk off Gibraltar by a U-boat.

The majority upheld the decisions below that on the detention order being proved, the onus was on the appellant to show that the order was invalid.

The crescendo of Lord Atkin's dissenting opinion still resonates:

> I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war time leaning towards liberty, but following the dictum of Pollock C.B., in *Bowditch* v *Baichin*, cited with approval by my noble and learned friend Lord Wright in *Barnard* v *Gorman*:
>
> > In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.
>
> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case, I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles 1.
>
> I protest, even if I do it alone, against a strained construction put upon words, with the effect of giving an uncontrolled power of imprisonment to the Minister. To recapitulate, the words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. They are used in the Defence Regulations in the natural meaning, and, when it is intended to express the meaning now imputed to them, different and apt words are used in the Defence Regulations generally and in this regulation in particular. Even if it were relevant, which it is not, there is no absurdity, or no such degree of public mischief as would lead to a non-natural construction.
>
> I know of only one authority which might justify the suggested method of construction: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean different things.' 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'" (*Through The Looking Glass*, c. vi) After all this long discussion, the question is whether the words "If a man has" can mean "If a man thinks he has". I am of opinion that they cannot, and that the case should be decided accordingly.
>
> If it be true (as, for the foregoing reasons, I am profoundly convinced that it is) that the Home Secretary has not been given an unconditional authority to detain, the true decision in the two cases before us ought not to be difficult to make. In the *Liversidge* case, the plaintiff has delivered a statement of claim averring that he was wrongly imprisoned by the respondent, the Secretary of State. The respondent traverses the wrongful imprisonment, and contents himself with the admission that he ordered the appellant to be detained under the regulation. The appellant asked for particulars of his reasonable cause to believe (a) as to hostile associations, (b) as to necessity to control him. In my opinion, the appellant is not bound to rely on the traverse, though as a matter of pleading that, in my opinion, amounts to a positive allegation of authority to detain for which particulars may be asked. The appellant's right to particulars, however, is based on a much broader ground, a principle which again is one of the pillars of liberty, in that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who from the nature of his office cannot be sued, and the validity of whose judicial decisions cannot in such proceedings as the present be questioned.

Subsequently, *Liversidge* v *Anderson* was described by Lord Reid in *Ridge* v *Baldwin* as a "very peculiar decision." In *IRC* v *Rossminster Ltd* [1980] AC 952 Lord Diplock said:

> For my part I think the time has come to acknowledge openly that the majority of this House in *Liversidge* v *Anderson* were

expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right.

Minds will differ now, as they did in November 1941, as to what encroachments on liberty are reasonable in the interests of national security. The issue, however, is well travelled.

Yours faithfully,

Michael Wheelahan

Pedants' Picnic Fruitful

Dear Editors

THANK you for the opportunity to share in such a fruitful pedants' picnic. There are so many delicious morsels upon which one can chew whilst debating the propriety of S.C. or SC.

First of all, let us examine the danger of the door to Senior Counsels' chambers being broken down by military police and the hapless barrister being carted away to indefinite detention for failing to punctuate their post nominals. David H. Denton RFD, S.C. (*Victorian Bar News* No.130 p.13) quite correctly points out that it is an offence under section 80B of the *Defence Act 1903* (Cth) for a person to falsely represent oneself as being the person upon whom a service decoration has been conferred. Denton then goes on to state that the Star of Courage is a service decoration.

The problem is that the Star of Courage is not a service decoration as such. The Australian Honours system contains within it a group of Australian Bravery Decorations. They are the Cross of Valour, the Star of Courage, the Bravery Medal, the Commendation for Brave Conduct and Group Citations. Whilst the Star of Courage has been awarded to members of the Australian Defence Force, it, and other decorations within that group, have and may be awarded to anyone in the Australian community for acts of bravery.

Rest easy, good silks! You are safe from the clutches of the Military Police.

Secondly, "Bloggs RFD SC" could not possibly be the holder of the Star of Courage. The Governor General has by Order dated 4 April 2002 directed the order of wearing Australian Honours and Awards. The Star of Courage comes well before the Reserve Force Decoration. It even comes before Member of the Order of Australia. Therefore, if a Member of the Order of Australia were also to be the holder of a Star of Courage, the post nominals would be SC, AM. Be very careful with the comma!

Sad to say that the post nominal associated with being Senior Counsel does not rate a mention and, therefore, comes after all. Bloggs RFD SC, you are safe. With or without your punctuation, you could only be Senior Counsel.

The only solution to the problem of SC/S.C. is to change title altogether. Perhaps Victorian Counsel.

Gerry Butcher RFD (Not R.F.D.)

Editors v Masters

Dear Sirs,

Re : A Competition, or The Editor's Competition or The Master's Competition.

I refer to your recent publication of my paper "The Relevance of Merits When Extending Time" in the Spring edition at page 39. I appreciate the fact that you have published the paper and I thank you and I hope the paper contributes to some understanding of the law.

However there is a problem. On page 41 the following statements are[1] made:

1. In the middle column line 2, "What must be appreciated is that there "is" a variety of methods to deal with the hopeless case."
2. In the third column about 14 lines from the bottom, "There "is" a variety of problems in terminating a proceeding on the grounds that it lacks merits."
3. Then on page 42 in the first column it is said about 19 lines from the bottom of the page, "There "is" a variety of problems for the court to determine if a proceeding gives rise to an arguable case."

Now I have received a multitude of calls from barristers, magistrates, judges and masters of the courts admonishing me for my bad grammar. Little comment has been made on the merits of the article; Maybe the readers are of the opinion my article lacks merit?

The editors, or one of them, have or has, altered my draft of the paper which uses the word "are" to "is", in each of these sentences. I have placed the relevant word "is" in brackets just to eliminate any dispute as to the particular word "is" in the sentence with two is'.[2]

So I suggest a Competition or The Editor's Competition or The Masters' Competition.

Or maybe, The Competition between the Editors and the Master.

Who is correct? The Editors of the *Victorian Bar News* or the Master?

This competition should be open to all readers of the *Bar News*. So I call on all fellow pedantic members of the Bar to consider this matter for after all English grammar is an important aspect in our profession as lawyers.

Now I have another problem. Many of the readers do not believe me when I say the editors altered my draft of the paper. So I need an admission by the editors that my draft of the paper did use the word "are" in those sentences.

Now what about the prize for the competition! I challenge the editors to put up the prize of a bottle of wine for consumption at the Essoign Club to the three best entries submitted to the Bar News in this competition if they were wrong, If I was incorrect to use the word "are" then I will provide the prizes to the three best entries in the competition. Thus I am assuming the use of the word "is" in these sentences can be categorised as correct or incorrect.

I thank you again for publishing the paper and I hope to continue research into areas of the law that may be relevant to members of the Bar in their daily work in the Practice Court.

Yours Sincerely,

Rex Patkin

Notes:

1. Note the word is "are" for the subject of the sentence is "statements" and that is plural.
2. I must admit I am having trouble with the two ises. Is it, ises, is' or is's?

The Editors admit that one of them did alter the text as provided by the former Master, and did so in what he or she regards as a very masterly way. The Editors regretfully but firmly adhere to their view that the appropriate verb in the context of both sentences was "is". We take the view that there are many problems but there is only one variety. We would, however, welcome criticism of our action either as "high handed" or as erroneous.

The Editors

County Court

Judge Sandra Davis

ON 26 October 2004 the Attorney-General the Honourable Rob Hulls announced the appointment of two new County Court judges, Judge Sandra Davis and Judge William Morgan-Payler. Both declined a formal welcome. However, in this article *Bar News* — having interviewed Judge Sandra Davis on the eve of her embarking on the Serious Injury List — discovered a modern renaissance woman appointed to the Bench and spills the beans on what makes Her Honour tick.

EDUCATION

Her Honour was born in Melbourne and was educated at Mount Scopus College. She completed her VCE in 1973, attaining distinctions in English, English Literature and General Excellence, in addition to taking out the college prizes in English Literature, French and the Principal's prize. Her Honour was school captain, house captain and participated in debating, but recalls that her performance in the college musical mercifully did not require her to sing a single note. Proving herself early on to be a well-balanced all-rounder, Her Honour played hockey and softball within and outside school, winning best and fairest awards in both fields.

Her Honour gained a BA with first class honours in politics from Monash University in 1978; a Master of Science (Economics) from the London School of Economics and Political Science in 1980, with distinctions in international law and her thesis; a Master of Arts in comparative and international politics from Brandeis University (USA) in 1986, and a second class honours degree in Law from Melbourne University in 1988.

Her Honour also pursued her love of languages by studying Russian, French, Italian and Hebrew at universities in Paris from 1974 to 1976 and at Melbourne University, where she studied Japanese in 1989. Her Honour speaks French and Hebrew, knows some Italian and Japanese, and is currently learning Spanish. She has a "list" of top 10 languages she would love to master, a terrifying thought for any interpreter trying to pull the wool over Her Honour's eyes in court, or for any witness or litigant tempted to break out into any tirades of non-English invective. Beware.

WORK AND LAW

As a graduate student, Her Honour taught at Brandeis University and at Monash. Her launch into the law occurred in 1990 when she was articled to Tom Yuncken at Arthur Robinson & Hedderwicks where she obtained a thorough grounding in litigation and trade practices. The following year she was Associate to Justice George Hampel in the Supreme Court and must have liked what she saw and experienced because in 1993 she was called to the Victorian Bar.

Her Honour's practice at the Bar encompassed administrative, employment, equal opportunity and commercial law. She appeared in all courts from Magistrates to High as well as the Commonwealth and Victorian AATs and also appeared as counsel assisting boards and tribunals including the Dental Board of Victoria and the Criminal Injuries Compensation Tribunal. Her Honour remembers with particular gratitude the experience she gained from junior briefs to various senior counsel including Julian Burnside QC, Anthony Howard QC, and Douglas Graham QC, and with affection the camaraderie with friends and colleagues at the Bar. They were clearly formative and influential days.

VCAT

Presaging her penultimate port of call, Her Honour sat as a legal member of the Department of Infrastructure Review Panel from 1997 to 1998 and was a sessional member of the Guardianship and Administration Board of Victoria for three years from 1995 until her full-time appointment to VCAT. Just a month before the AAT became VCAT, Her Honour was appointed a Deputy President of the AAT, then moved through senior member of the VCAT sitting extensively in the General List (FoI and TAC cases) to become Deputy President of the Guardianship List in 1999, then Deputy President of the Occupational & Business Regulation List in 2000, hearing appeals from disciplinary and occupational decisions of a wide variety of bodies including the Medical Practitioners Board, the Racing Appeals Tribunal, the Business Licensing Authority and the Director of Liquor Licensing. Her Honour recalls while she was acting in this latter capacity, Justice Merkel of the Federal Court of Australia appeared before her at the Tribunal in a liquor licensing application. Her Honour had to hold on tightly to her chair to resist the temptation to stand up every time Justice Merkel moved. From 2004 Her Honour was also head of the Human Rights Division of VCAT and Deputy President of the Anti- Discrimination List and was active in that capacity amongst other things in utilizing her qualification and extensive experience as a mediator to resolve disputes.

Her Honour counts it as one of the great privileges of her working life to have been part of the transformation and transition from the Victorian AAT to the model tribunal under its first President, Justice Kellam and now its current President, Justice Morris. Her Honour found at VCAT the culmination of an intense interest she had developed at the Bar in the process of decision-making exemplified in administrative law. Her Honour admits she often found it frustrating at the Bar to only be able to advocate for one side (so early did her judicial temperament obviously manifest itself). Her experiences at VCAT afforded her the opportunity to gain a good grounding in timely decision

making (and Her Honour prepares all her own decisions and even word processes them herself, one suspects with lightning speed).

Her Honour pays warm tribute to her colleagues at VCAT, for their skill and professionalism. She recalls that every day brought personal and professional rewards: the satisfaction of having conducted a fair hearing, the satisfaction of people feeling they had been fairly and courteously dealt with (even when they were unsuccessful) and the ongoing attempt to empower the disenfranchised in the "little picture" which became in essence the unfolding of a much bigger picture — of valuing individual struggles and aspirations.

CAREER HIGHLIGHTS

Her Honour counts her work in the Guardianship and Anti-Discrimination Lists as a particular privilege, demonstrating amply the part played by the administration of justice in a democracy, as well as the importance of not making assumptions about people from their appearance, background or circumstances. Her Honour's own background as a child of post-war multi-lingual immigrants from Egypt has given her a personal perspective to bring to bear in this regard. Her Honour has also greatly enjoyed the cases involving the intersection of law and medicine, such as those relating to withdrawal of treatment or consent to participation in medical research.

OTHER INTERESTS AND ACTIVITIES

Her Honour has been involved in a wide range of extra-curricular activities. She has written a chapter on the summary criminal jurisdiction in Victorian for the Laws of Australia series; delivered numerous lectures to community groups, research institutes and aged care providers as well as specialist medical practitioners in relation to the amendments to the *Guardianship and Administration Act 1986* (in force 1 January 2000); and sat on a number of committees, including Royal Melbourne Hospital Research and Ethics Committee from 1997–2001. Most recently in 2004 she was a member of the Implementation Committee for the transfer of the Legal Profession Tribunal to VCAT, the Bill for which was introduced into parliament in mid-November this year.

Her Honour also maintains a keen interest in politics, international relations, ethics and ethnic and indigenous affairs.

A PERSONAL NOTE

Her Honour regularly jogs, walks and goes to gym. She also enjoys tennis and skiing.

Her Honour has been married since 1976 to Dr Stephen Davis, Professor of Neurology at Royal Melbourne Hospital and they have a son, who is completing commerce at Melbourne University, and a daughter, who has just finished VCE. They have all been supportive of Her Honour's career throughout and their reaction to Her Honour's recent elevation was no exception. All were palpably thrilled. A few mornings after her appointment, her son greeted her with : "Good morning Judge, can you make me a bagel?" Lessons in humility and perspective from one's family are sure to keep Her Honour's feet on the ground even when her ideas and ideals are intent on taking flight.

Bar News wishes Her Honour a long, satisfying and rewarding tenure on the County Court Bench.

County Court

Judge Morgan-Payler

THE Bar welcomes the appointment to the County Court of Judge Morgan-Payler, former Chief Crown Prosecutor for the State of Victoria. By this appointment, the County Court gains a man of unbounded talent and experience who over the years will greatly enhance the justice system in Victoria.

His Honour is an interesting man who brings to the position a broad range of experiences in the law going back three decades.

His Honour was born in 1946 and raised on a farm at Phillip Island. He was educated at Cowes State School and Caulfield Grammar, after which he entered Monash University in its first intake of law students together with his immediate former colleagues at the OPP, McArdle, Horgan and Leckie. His colourful university career included what by all accounts was his first brilliant plea, an entreaty on his own behalf to the unsatisfactory progress committee. In addition, he taught taxation law to students at Prahran Tech concurrently with studying the subject at university, giving rise to his quip that he could never afford a week's sickness as he was just one step ahead of his own students.

His Honour, like many, was involved in political activities in the heady days of the late 60s and brings to his new job a long held concern for the underdog. In 1972, he commenced articles at J N Zigouras & Co, Solicitors, where he remained until 1974 practising in most areas of law. In 1974 he commenced reading with John Walker and remained at the Bar until 1994 with a four-year interlude between 1977 and 1981 working for Aboriginal Legal Services in Victoria and Darwin. He had five readers, Reg Keating, Steve Russell, John Lavery, Caroline Burnside and Jane Gibson, and took silk while Senior Crown Prosecutor in 1996. His practice for the most part was defence work, and it is probably a great compliment paid to him in his latter years at the Bar that the OPP actively sought his services knowing what a formidable opponent he had been.

In the years leading up to his appointment, His Honour appeared in notable High Court cases including *Thompson* (1999), *Palmer* (1998), *Pavic* (1998) and in the Supreme Court the well known murder trial of *Domisevic*. Another nota-

ble case of His Honour of more distant times involved a plea by Morgan-Payler on behalf of his client charged with offensive behaviour arising out of public masturbation, when His Honour told the late Jack Maloney SM that the defendant had changed his ways and now had his problem firmly in hand. Of perhaps more significance, His Honour successfully argued in the Northern Territory Court of Criminal Appeal that the principle that a subjective belief as to consent constituted a defence to rape applied to the criminal code of the Northern Territory.

In 1994, and to the surprise of some, His Honour had a change of career direction, becoming Senior Crown Prosecutor at the OPP. His steady rise within that organisation over the next 10 years ends with his current appointment, and was characterised by a sense of dedication coupled with fairness. His Honour more recently had the increasingly common and difficult task of explaining the decisions and actions of the OPP to family members of the victims of crime, a task which required the sensitivity and intelligence which His Honour has always clearly displayed. He will be sorely missed by all those at the OPP with whom he worked.

In recent times, an unrepresented (deliberate) accused made a final address before Justice Teague and a Jury considering his murder trial. He said:

> ... There are really only two things that 1 have need of for this trial. The first of these was a list of depositions and evidence confirming just how poor and just how ridiculous the prosecution's case would be. This was obligingly supplied by the Office of Public Prosecutions. The other thing I had need of was a prosecution barrister with no brains at all, and hereto once again the OPP has come to the fore and generously supplied the solution. What the hell would 1 need to have a barrister for when it is plain and obvious that the prosecution one has gotten all the evidence 1 needed anyway.

The accused was convicted. Morgan-Payler prosecuted the trial.

His Honour has had a fruitful marriage for many years now to Tina, whose wit and intelligence is every bit his equal. They have two grown sons and graze cattle on their Otways property under the full blast of the southerly winds.

His Honour has an attraction for cooler climes and when time allows enjoys nothing better than trout fishing in the mountain streams of Tasmania, with his fisher friend Philbrick. It is said that on previous trips Philbrick has brought along his own chef, the proprietor of Jean-Jacques. Recently, in lieu of the chef, Morgan-Payler invited Dr Lester Walton to fish for trout, leading to the conclusion that if Philbrick can bring his own chef, Morgan-Payler can bring his own psychiatrist. His Honour is the current President of the Victorian Fly Fishing Association.

The County Court by this appointment gains a Judge of great talent, intelligence and experience. We wish His Honour many years of happy service to it.

People Over 35 Should be Dead. Here's Why …

ACCORDING to today's regulators and bureaucrats, those of us who were kids in the 40s, 50s, 60s, or even maybe the early 70s probably shouldn't have survived.

Our baby cots were covered with bright coloured lead-based paint.

We had no childproof lids on medicine bottles, doors or cabinets, and when we rode our bikes, we had no helmets. (Not to mention the risks we took hitchhiking.)

As children, we would ride in cars with no seatbelts or air bags. We drank water from the garden hose and not from a bottle. Horrors!

We ate cake, bread and butter, and drank soft drink with sugar in it, but we were never overweight because we were always outside playing.

We shared one soft drink with four friends, from one bottle, and no one actually died from this.

We would spend hours building our go-carts out of scraps and then rode down the hill, only to find out we forgot the brakes.

After running into the bushes a few times, we learned to solve the problem.

We would leave home in the morning and play all day, as long as we were back when the street lights came on.

No one was able to reach us all day. NO MOBILE PHONES!

Unthinkable!

We did not have Playstations, Nintendo 64, X-Boxes, no video games at all, no multi channels on cable, video DVD movies, surround sound, personal mobile phones, personal computers, or Internet chat rooms.

We had friends!

We went outside and found them.

We played brandy, and sometimes, the ball would really hurt. We fell out of trees, got cut and broke bones and teeth, and there were no lawsuits from these accidents.

They were accidents.

No one was to blame but us. Remember accidents?

We had fights and punched each other and got black and blue and learned to get over it.

We made up games with sticks and tennis balls and ate worms, and although we were told it would happen, we did not put out very many eyes, nor did the worms live inside us forever.

We rode bikes or walked to a friend's home and knocked on the door, or rang the bell or just walked in and talked to them. Little League had tryouts and not everyone made the team. Those who didn't had to learn to deal with disappointment. Some students weren't as smart as others, so they failed a grade and were held back to repeat the same grade.

Horrors!

Tests were not adjusted for any reason. Our actions were our own. Consequences were expected.

The idea of a parent bailing us out if we broke a law was unheard of.

They actually sided with the law. Imagine that!

This generation has produced some of the best risk-takers and problem solvers and inventors, ever.

The past 50 years have been an explosion of innovation and new ideas.

We had freedom, failure, success and responsibility, and we learned how to deal with it all. And you're one of them! Congratulations!

Please pass this on to others who have had the luck to grow up as kids, before lawyers and government regulated our lives, for our own good!

People under 30 are WIMPS!

County Court

Judge Warren Fagan

MAY it please the Court, I appear on behalf of the Victorian Bar to pay tribute to Your Honour's career of over 20 years at the Bar, and over 20 years as a Judge of this Court.

You graduated Bachelor of Laws from the University of Melbourne and served articles at Pavey, Wilson, Cohen & Carter with Mr Godfrey Alexander Carter. You were Mr Carter's third articled clerk, following Judge John Campton of this Court and the late Neil McPhee QC. You were admitted to practise on 1 March 1962, and signed the Bar Roll on 21 June that year.

You have the distinction of having had two masters — first William Crockett (later Justice Crockett) and, when Crockett took silk, you completed your pupillage with John Somerville (later Somerville QC and Judge Somerville of this Court).

The breadth of your practice was remarkable, even in those days of the all-rounders. Administrative law was your particular specialty, and you practised extensively in town planning and local government law. You also practised in personal injuries, crime, commercial and equity, and in family law.

You even appeared in the Supreme Court as a litigant in person. One Friday, the late Garth Buckner and Your Honour appeared in the Practice Court before the Honourable Sir George Pape seeking an injunction to prevent Collingwood from playing in the Grand Final the following day.

You both belonged to a supporters' group within the Collingwood Football Club, one of the advertised benefits of which was a guarantee of tickets in the event of Collingwood making the Grand Final — a repugnant concept for many of us.

You alleged your contract with Collingwood and a contract between Collingwood and the League to give effect to the guarantee. Obstinately, the then President and General Manager of the VFL refused to honour the alleged promise. You said you'd see them in Court on Friday — and, true to your word, you and Garth Buckner were both in the Practice Court that morning.

One shudders at the enormity of the undertaking as to damages, had Sir George been minded to grant the injunction. However, the VFL representative detected a gleam of interest in the Judge's eye, and feared he just might. The matter was stood down, and two fine tickets were miraculously produced.

Those were the days when Collingwood regularly made the Grand Final, but also regularly lost as, to your dismay and to Buckner's habitually unconcealed fury and frustration, they did that year.

Your Honour's chambers are in what others describe as "Collingwood Corner" — Judges Fagan, Hanlon, Bowman and Hicks. You yourselves call it the Barwick Wing — not in honour of the former Chief Justice, Sir Garfield Barwick, but of "Dougy" Barwick, the Collingwood half-forward in the 1990 premiership team that won by eight goals, no less.

You came straight to the Bar after admission. Apart from your year's articles at Paveys, you had no contacts in practice. A brief to appear before the Board of Enquiry into Scientology on behalf of an organisation concerned about the practices of that cult enabled you to demonstrate your skill — and you never looked back.

Many an instructing solicitor recalls the first visit to your chambers — a slightly dishevelled, sometimes absentminded-looking, bespectacled smile from a fog of cigarette smoke (Camels without filters in a never-ending chain), surrounded by books and papers that seemed in total disarray.

They very soon saw the intense concentration you brought to every case. They did not see, but saw the results of, your working till two and three in the morning on the next day's brief.

The intensity of your concentration was in marked contrast to the style of one of your leaders. You were junior to Philip Opas in a number of murders. Opas QC gathered his thoughts while strumming a guitar — a practice which, in your customary state of intense concentration, you did not find soothing or stimulating of productive thought.

Your Honour is also known for your directness, both as an advocate and on the Bench. Again, in contrast, a certain Queen's Counsel, then prominent in Town Planning and Local Government law, was renowned for his circumlocution in conferences. The learned leader would regale his client, instructor and junior at length about past triumphs.

On one occasion, you were the junior. After about an hour of white rabbit anecdotes, you excused yourself from the conference. You were the hero of the town planning and local government junior Bar.

You served on no fewer than 10 standing committees, representing the Bar — including 10 years on the County Court Practice Committee and Bar/Law Institute County Court Practice and Procedure Committee.

The Solicitor-General has already mentioned the "Fagan Report". As Chairman of the Criminal Bar Association County Court Listing Committee, you took a leading role in the preparation of a substantial report on delays in the criminal law. Its comprehensive examination of the administration of the criminal law won universal applause. That report was submitted to the Bar Council, and became the submission of the Bar to State Government. The Government of the day adopted some of its proposals, and the next Government adopted the Fagan Report as policy.

You had five readers, Peter Fox, Robert Mackay, Clive Sharkey, Ralph Greenberger and Michael Stiffe. Fox, Greenberger and

Stiffe are still in practice at the Victorian Bar, and are all in Court today. You were a conscientious and generous master, both in chambers, and in hospitality in your shared ski lodge at Falls Creek.

Your Honour was a friend to the caretaker of Owen Dixon Chambers, Bill Brown, and used occasionally to join him at the Great Western Hotel in King Street, along with Justices Fogarty and Frederico of the Family Court (as they then were not), Eugene Cullity, Neil McPhee, John Monahan and others. Bill Brown had his own special glass at the Great Western, and always had his beer in that glass. Although you and the rest of that company achieved much at the Bar, not one of you achieved the distinction of your own individual glass at the Great Western.

On the Bench, Your Honour is a courteous, sound and compassionate judge. The Solicitor-General has spoken of your service, both on this Court and as Deputy President and President of the Administrative Appeals Tribunal, and of your staunch judicial independence and impartiality in often highly political cases.

In this Court, you took the tough assignments such as, for example, the cigarette handling case. Something in the order of $1 million worth of cigarettes were being transported in a pantechnicon that was hijacked somewhere near Violet Town. The accused were caught unloading the cigarettes in Flemington.

They claimed to have been hired casually to do the unloading by a man in the pub where they all happened to be drinking, whom they didn't know and hadn't met before. Remarkably, none of them really thought about the significance of the surgical rubber gloves they were asked to wear during the unloading.

The trial was in July 1985, less than a year since Your Honour's appointment to the Court. There were 13 accused. The trial lasted some 70 days — at the time, the longest criminal trial in the County Court. Judge Douglas prosecuted and Terry Forrest QC, Pat Tehan QC, Doug Salek QC and Federal Magistrate McInnes (as none of them then were) were among the defenders.

McInnes told Your Honour that his client wished to give sworn evidence, but that Forrest's client had threatened to kill him if he did. You asked Mr McInnes what he wished you to do. McInnes said simply that he thought Your Honour should be apprised of the fact.

Forrest, on instructions, stated that his client would never have said that — but this defensive submission was immediately undercut by Forrest's client who said darkly, and clearly audibly, from the dock: "Your Honour, the only box he'll be getting into is a pine box." Your Honour thought that might be a convenient time to adjourn.

Mr McInnes's client, on more mature consideration, elected to make an unsworn statement. One of the accused, who had the bends, had been dismissed from the trial. Eleven of the accused were convicted. The one accused who was acquitted was neither Mr McInnes's nor Mr Forrest's client.

More recently, Your Honour presided over the *Brazel* assault trial. I wish today to record the Bar's admiration of Your Honour's conduct of that difficult trial in dealing firmly with outrageous conduct on the part of the accused. One accused "propelled an article [a bag of excrement] into the jury box", striking a juror, who then applied to be excused, and was. You had the accused removed to another court with video link. The accused then bared their bottoms to the camera. They were then given only audio link.

The first trial had been aborted due to the publication in a certain Melbourne daily newspaper of inadmissable matter that had come out in the absence of the jury. You were determined that neither this outrageous conduct, nor anything else, would abort the second trial. The Court of Appeal ordered new trials, and at those trials, the convicted accused pleaded guilty to the original charges of intentionally causing serious injury on which they had been convicted by the jury at the trial before Your Honour.

Notably, for their outrageous conduct at the trial before Your Honour, Justice Osborn sentenced them for their contempts to imprisonment of 12 months, 14 months and four years respectively, to be served cumulatively.

Perhaps in retirement, you may be able to work on your golf. When attending the Australian Bar Association conference with the English and Scottish Bars in the early nineties, you had the opportunity to play a round at St Andrew's — the home of golf since the 1400s, and of the Royal and Ancient Golf Club, the governing body of golf throughout the world (except in the United States of America).

The night before your visit to St Andrew's, there had been a ceremonial dinner at Hopetoun House — the ancestral home of Australia's first Governor-General — with pipers, haggis and rare and choice single malt, all in abundance. It is said that the Australian contingent that made it to St Andrews the next day were not in as good form as they might have been. One disreputable hearsay account has Your Honour's club going further from the tee than the ball.

On behalf of the Victorian Bar, I wish Your Honour a long, satisfying and happy retirement.

May it please the Court.

County Court

Judge William Michael Raymond Kelly

WILLIAM Michael Raymond Kelly retired as a judge of the County Court of Victoria on 30 June 2004, after 24 years of service on the bench. He did so, without a formal farewell, to continue looking after his terminally ill wife, Michelle. She died some months later.

Kelly, as he has always been known by his friends, is one of the more memorable members of the Victorian Bar. If nothing else, his dress has always marked him out in a profession not noted for its reticence. If a black jacket and waistcoat, striped trousers and a Homberg or Bowler hat didn't invite attention, a monocle and a watch-chain with a Hunter at its end certainly did. Kelly maintains that he dressed in this way because he could buy two or more pairs of trousers for every one jacket and because he didn't have to think about what he would wear. The real reason, which he expressed one day in an expansive moment, was that in this world, which was grim, grey and dreary to many, he had a duty to add a little colour to brighten their day.

Having served his articles at Weigall & Crowther, Kelly came to the Bar in 1958. He believes that the staff at the Titles Office held a champagne party upon being relieved of his efforts as an articled clerk to master the intricacies of the Torrens System. He read with John Mornane.

Kelly was a born barrister. Perhaps be inherited some of his aptitude from his father, Sir Raymond Kelly, who was Chief Judge of the Commonwealth Court of Conciliation and Arbitration. But the main thing that Kelly seems to have inherited from that lineage was a determination not to practice in the industrial jurisdiction. He began his practice at the Bar in Petty Sessions, as most young barristers did then. They were happy times, There were fewer than 200 practising barristers and they all knew one another. The annual intake was about half a dozen. The work was not arduous, but it did develop real skill in advocacy at an all too basic level. And it left plenty of time to relish one's successes and to lament one's failures in congenial company while waiting around at court or afterwards in Gibby's coffee lounge.

Chambers were in short supply and to avoid junior barristers practising from the corridors of Selborne Chambers, the Bar rented space in Saxon House (now demolished) a couple of doors down in Little Collins Street, There, in what was known as the bargain basement, Kelly shared chambers with Hampel, Segal, Tolhurst, Williamson, Magennis, Dyett and Dawson. When the shift came to Owen Dixon Chambers in 1961, the new chambers seemed incomparably luxurious.

Kelly's practice developed and, as he moved out of Petty Sessions, crime began to overtake civil work. He began by prosecuting for the Crown and those briefs were supplemented by others from the Public Solicitor. In the end, Kelly was doing mainly, although never exclusively, criminal work. This was something he enjoyed. His interest lay in the criminal law, not only in its practice, but also in its theoretical and historical underpinnings. And he was fascinated by the challenges it presented to an advocate and by the insight it gave into the human condition which so starkly reveals itself in the criminal courts.

In 1977 Kelly took silk. This was seen at that time as a brave move for one who practised in the criminal law, but it wasn't really so for Kelly. By this time he had also developed a healthy appellate practice in criminal law and there wasn't much competition in this area at a senior level, His appellate work flourished and led to a number of notable appearances in the High Court. In 1979, Kelly argued two landmark cases in that court. The first was *Ward* v *The Queen* which concerned a murder on the bank of the Murray River and raised the question of the true boundary between Victoria and New South Wales. The second was *O'Connor's Case* which questioned the defence of intoxication at common law. Before *O'Connor's Case* was heard, Kelly had accepted the offer of an appointment to the County Court, but that was not generally known. Somehow the then Chief Justice, Sir Garfield Barwick, heard about it. At the conclusion of argument, he summoned Kelly to his chambers and tried to dissuade him from wasting his outstanding talents as an advocate by going on the bench. Kelly was unpersuaded and so began a long and distinguished career as a County Court judge.

Kelly says that it was difficulty with provisional tax that dictated his decision to join the court, but in truth the County Court appealed to him. He had always enjoyed the fellowship of the Bar and there was a good deal more of that in the County Court than in the other courts.

He could indulge his interest in the criminal law without having to justify his existence by writing interminable judgments. And there was a security in being a judge of that court which would enable him to enjoy his family life in a way that practice as a criminal barrister, however successful, could never do.

Although Kelly didn't relinquish his individuality as a judge, his application of the law was careful and accurate. There may have been an element of intuition in this, but it was more likely the scholarship with which he always uncovered the fundamentals of a doctrine before applying it to the circumstances at hand. As the years wore on, Kelly was constantly sought out by his fellow judges with the problems which they inevitably encountered. He never stinted in the advice he gave (sometimes at length) freely and enthusiastically. By dint of learning and experience it was invariably correct. Kelly's departure will leave a large gap in the resources of

the court. His innate respect for the law did not, however, prevent him from occasionally tilting at the Court of Criminal Appeal in a provocative ruling. It may be that these were practically the only occasions on which he was overturned by that court.

During the 24 years that Kelly was on the bench, the County Court grew very much larger. Its administration became more complex and procedures needed to be put in place. Kelly regarded many of the innovations as a threat to his independence, which he took very seriously indeed, He resisted the new managerialism (as he called it). Computerism as an end in itself, particularly the internal website, was an anathema to him. But he was forced to succumb and was even forced (eventually) to give up smoking cigars in chambers, but only after threatening to join, fully robed, the gaggle of smokers out on the footpath. His individualism may have placed some strain on a Chief Judge suffering increasing administrative burdens, but forgiveness was inevitable because of the enormous contribution Kelly made to the real work of the court.

Perhaps it was the freedom to run his own court in his own way that made circuit work appealing to Kelly, Perhaps it was the closer contact between the profession and the judge which harked back to the camaraderie of the Bar. Perhaps it was the opportunity to indulge in those things such as good food and wine, which were restricted (for good health reasons) at home. Whatever it was, Kelly relished circuit life and he will long be remembered in many a circuit town.

Notwithstanding his undeniably strong personality, Kelly was probably a lenient judge. He had a tolerance for the miscreants appearing in his court and even a liking for many. He believed that it was his duty if possible to keep people from gaol rather than putting them there. And despite occasional expostulations about the state of the law, the profession or things in general, he treated counsel with tact, understanding and humour. The guidance he gave was unobstrusive and sympathetic. Counsel enjoyed appearing in his court.

Kelly's concern for the law had a practical application in the Charge Book which he compiled. It's now used by all the judges on the court. It arose from a conversation between the Solicitor-General and Kelly in which the Solicitor-General complained that he had frequently to defend trial judges in the Court of Criminal Appeal against errors or omissions (particularly on circuit) which would not have occurred if there had been proper references ready at hand when preparing a charge. The result was a loose leaf folder containing standard directions upon most matters that were likely to occur in the ordinary trial. This Charge Book, as it became known, was resisted at first by judges who wouldn't admit that they needed it and by others who feared that charges would become mechanical. Some even thought that a departure from the standard charge would become a ground of appeal. Those fears were never realised and the Charge Book, kept up to date by Kelly, became standard equipment for trial judges.

His Honour Judge Kelly is one of the most widely known and respected members of the legal profession, He is still remembered by many as a friend and worthy colleague at the Bar. He is certainly known to many both from within and outside the profession from their appearances in his court. He is known to generations of barristers from his participation in the Bar Readers' Course. He is known for his good company on circuit and in the Essoign Club. He retires with the goodwill of all. They know that judges of his calibre are becoming harder and harder to replace.

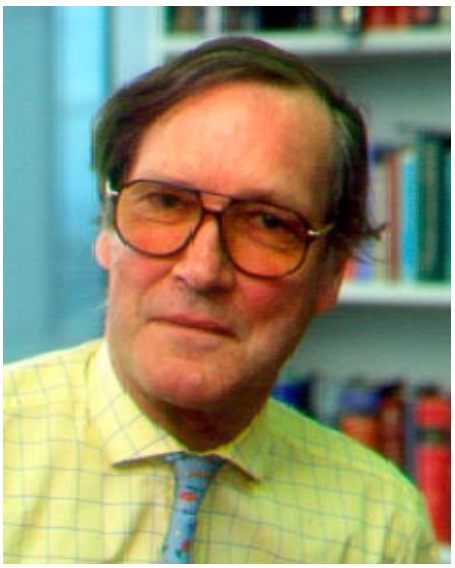
If Hedda Met Hamlet — Would They Still be Bored?

[To the tune of the Beatles' song When I'm Sixty-Four]

Geoffrey Gibson

A Christmas Message from that other Stage

Hamlet and *Hedda Gabler* are the two best known plays of their authors on the stage. Their characters are still raising hell around the world. What do they have in common?



Geoffrey Gibson.

BOTH are Scandinavian. Denmark ruled Norway for a long time politically and for longer culturally. The Norwegians felt inferior to the Danes, who in turn felt inferior to the Germans. The dying Hamlet gave the nod to Fortinbras, the Norwegian adventurer and man of action. Whether Hedda was the model of Scandinavian womanhood of her time is unlikely. What is certain is that Hamlet is about as unlike a Viking as you could get — until he gets deported and turns into Errol Flynn. Before that he is a dedicated quietist. We might add that by the time the creator of Hedda got round to describing the Norse, the last traces of the Vikings had been extirpated leaving a most grimly prosaic people to confront the elements.

Both heroes have distinguished sires. Hamlet is the son of a king. Hedda is the daughter of a general. Norway was not then a martial entity and probably did not have many generals, but there was something elective about the office of king in Denmark.

They are both relatively young. Hedda is 29 and Hamlet 30. A knowledgeable Greek taxi driver told me that most girls level out by 28. (A Greek taxi driver may not have felt the need to comment on the position with the boys.) Both of these people should be in their flowering time. Neither is. On the contrary, both are wilting.

On any view they come from a privileged background and they have too much time on their hands. Hedda probably is more used to getting her way than Hamlet and might be the paradigm spoilt child. (You could divert yourself by discussing which of the local schools for girls could have offered Hedda the best way of finishing.) They certainly have enough time to mope and feel sorry for themselves. They think too much — partly because they have nothing else to do. The son of a soldier would not have hesitated if it was proved that his uncle had grabbed the throne and mounted his mother after topping his father. The daughter of a maid would not be fixated on two pistols to the point where she asks someone to kill himself "beautifully" with one of them. Working people have neither the time nor the inclination to play dice with God like these two heroes.

Each repudiates their lover. (Since for Hamlet this has included Jean Simmons, Marianne Faithfull and Kate Winslet, this is a significant sacrifice, if not prima facie evidence of genuine insanity; on the other hand, Hedda could cut through her husband like a knife through butter).

Each is bored — terminally. The word is I think ennui. Hedda could have uttered those words — all of the ways of the world seem "weary, stale, flat and unprofitable". It is this characteristic which makes each of them look to us like common garden neurotics. (It was a big problem up north at the end of the nineteenth century — at the beginning of *Uncle Vanya*, the doctor says "life here is so dreary and stupid and sordid"; only about six years separated the two plays.)

Each is self-centred. They are not egotists, but egoists, the chip-on-the-shoulder, the-world-owes-me-a-living type. They think they have something to give to the world and because of that self belief they may give nothing. It is impossible to think what Hedda may have been like as the mother of the child she was carrying when she terminated both. It is not easy to see Hamlet as a father either, although he must have been capable of giving in the past because of the loyalty shown to him by others later.

Their emptiness drives each to contemplate suicide. Hamlet thinks about it a lot and does not go through with it (which must be at least one advantage of being slow on the uptake); Hedda thinks about it once and does it immediately.

They each represent the central problem of our age, the death of God. (The

reverse problem is those who think that God is alive and appropriate to determine the fate of nations.) Both Hamlet and Hedda give the impression that for them God is dead. They lack a moral bedrock to guide them in a crunch. Hamlet is all intellect and no faith; it is the lack of conviction that inhibits him. With Hedda it is the opposite — there is nothing to restrain her — it is as if she existed before Moses had pronounced the injunction against murder. Hedda is morally sterile; Hamlet is intellectually pregnant.

The conventional call is that Hamlet has too much conscience and Hedda too little. This is misleading. To say that Hamlet is inhibited by his conscience is simply to restate the question — why does he fear the consequences of his actions? In his terms, why does conscience make him a coward? Hamlet is the intellectual lost soul; Hedda is the moral lost soul. What makes Hedda a coward, and it is the only thing, is her fear of scandal — her fear that her veneer might fall. You wonder if history may have been different if Hamlet had had more Sunday school and Hedda had had less.

They are both students of and studies in power. Hamlet sees himself acted on by others. Hedda wants the power of life and death over others — and gets it at the cost of her own life. Eventually Hamlet loses his life to forces out of his control. There is a sense of chaos — "time is out of joint; these things do not happen" – but Hamlet's condition is the result of the chaos; Hedda causes it.

Each is articulate but unable to articulate their position. Each is revolted by a rotten world but cannot find anything in their own emptiness that enables them to go the distance.

The difference is that Hedda does not just have contempt for the world, but an indifference to life. The Mosaic code has gone west. A woman who can do what she did to a former lover —– destroy his life work and then invite him to kill himself beautifully: that is, for her gratification — is evil. The difference between Hedda and someone like Hitler may to some be just one of arithmetic. That is not so for Hamlet. He can give; Hedda can only take.

Hamlet and Hedda may in truth represent the difference between building castles in the air and living in them. For whatever reason, Hamlet pretends to be mad. He is not mad at all; he is just another stress case. But there must be a real risk that Hedda was in truth mad. She tries to bring a former lover back under her power by driving him to drink, knowing this will break him; while he is going on his bender, Hedda tells his current mistress, Thea, whom she has already put under her power, that her lover will come back wearing vine leaves; Hedda is still talking of his coming back with vine leaves after he has been arrested for resisting arrest while drunk in a brothel; when Hedda burns his life work, she tells an imaginary Thea that she is burning their child and is reminded of how she used to pull the hair of Thea and threaten to burn it when they were at school; then she seeks to procure a beautiful suicide. The reason? "For once in my life I want to feel that I control human destiny." If that does not represent at least moral insanity, you would not want to get too close to too many others as sane as Hedda.

What I have just said is based on the traditional view of Hamlet. My own view is that people have been very unfair in criticising Hamlet for not acting more quickly. He obviously has a fine mind. He has a philosophical disposition. He is finishing his education at Wittenberg — then called a learned seminary of the arts, where that suave German exponent of liberal love and confession, Martin Luther, nailed his theses to the door — for the reason that it is only in Europe proper that you can get a decent education. (Laertes is shooting back to France as fast as he can.) The north is backward and Hamlet knows that its "swinish" customs are revolting to Europe. Hamlet is not I think a religious man but obviously has what any civilised person in the west has, a basic subscription to the Mosaic law.

He is at a difficult time in his life — he loses his father and the succession; his mother marries too fast and beneath herself, and too close; and the family of his girl, two of the most waspish and boring people in Elsinore, are putting the frighteners on her. It is then that he gets an absolute supernatural injunction to exact revenge — but in no way to hurt his mother. The ghost wants Hamlet to be the instrument of a "vendetta".

It is no wonder that he "pauses" — and pauses long enough to let events intervene and relieve him of having to make a decision. Such as killing his King and pleading in his defence that he was ordered to do so by a jumpy ghost. (Just think how that version of the superior orders defence would have gone down in Nuremburg.) For Hamlet to have done anything other than pause would have been to take him back across the line that is supposed to separate us from the lions and the tigers (and the Texans). Hamlet was not built for this. Not many of us are, thank heavens. It may be as well to remember that in the most blood-soaked play of the lot, the hero was driven to describe the Eternal City as "a wilderness of tigers".

The conventional call is that Hamlet has too much conscience and Hedda too little. This is misleading.

How would they have taken it all back at the university of Wittenberg? How would the uppity champions of Protestant European civilisation have received an avenging Scandinavian Prince with blood on his hands?

"Sounds like a good way to spend the vac for a sweet little Danish boy like you, H. What took you so long? You planted your uncle for popping your dad and giving it to your mum, and then you sent your mum off to the same convent that you wanted to commit your girlfriend to before she went bonkers and topped herself. This was after you had shafted the Prime Minister (Polonius) by mistake but before you put away his son in a rigged duel after he saddled up a mount in the Blood Feud Handicap by setting his own odds. (Your rough mates probably told you that he would be a pansy because he was working out with the Frogs.)

"Now you are contemplating some deal with the Norsemen who are even madder than you or the Swedes. No wonder there is so much 'angst' lying around up there, up North. If you keep going like this, people will go screaming mad, and a Norse artist will paint someone screaming and claim the painting as a work of art. Then, H, your lot will have redefined what it is to be civilised.

"We gather you dispatched your uncle with a one-man hat trick — a chandelier, a sword and poison. Have they not yet heard of gunpowder up there, H? But we suppose that he did send you off to England to get the Poms to put you away — 'Do it, England' he said, possibly because there is a dude over there who does not hesitate to top a wife who does not come up to scratch in the Sires Production Stakes. (The Poms, by the way, H, are no relation to us.) Anyway, you thwarted the Poms by putting Rosencrantz and Guildenstern, not main players I might say, away in straight sets.

"We do not think your uncle can add your mum to his score-line — that has

to go down as an own goal — he only got her because he was not prepared to back the son of the PM at the loaded odds on offer in the fencing. And your old man, it seems, has to remain scoreless. (After that ripping yarn about your dad getting it through the ear in the orchard, do you feel up to a second Apple Danish?)

"If this is the way the flower of Denmark spend their weekends — one of your toffy mates referred to 'carnal, bloody and unnatural acts and casual slaughter' — some dude might write a book about it one day and call it *Slaughterhouse Five*. Christmas Dinner with the family must be very cosy — your lot would make the Borgias look like the Elsinore Girls Choir on a picnic. You would have to be sure that you were taking your White Lady from the right goblet. All this slaughter within the immediate family, H, does make those ancient Greek stories look very soft and tame — as weak as water.

"By the way, H, what did that old PM ever do to you? You got him, his daughter, and his son — another hat trick. Now, we know the nights are long and cold up there, old boy — they can get a bit brisk down here — but do you not think it is time to stop playing being Vikings again and contemplate entering the 14th century while the rest of Europe cruises through the 16th century? 'Casual slaughters' are just not good enough. Down here, we take the view that if something is worth doing, it is worth doing properly. That, H, is what makes us civilised, and where we leave the others for dead.

"Anyway, H, the boys here think they may have found another girl for you up your way. There was a guy through here recently called Fortinbras. You would probably call him 'a delicate and tender prince'. He is in fact a hellraiser on the loose while his uncle the king is crook in bed. Fortinbras would rather have a fight than a feed. (He will probably knock off Denmark some day.) He was just back from his latest dust-up — against the poor Poles over a piece of land the size of a paddock. If you had to cast someone to play him, you would probably go for someone like Rufus Sewell — unshaven — threatening, but so beautifully spoken. He told us he had been chasing a Norse girl called Hedda. She is well bred, the same age as you, and unhappily married. He liked her because she was feisty and her old man was a general. He was a bit coy about why he went off her, but we Germans put a lot of store on discipline, and Hedda sounds to us like just the girl to bring you into line, H.

"The only concern we have is that you are not Fortinbras, and Hedda is certainly not the dainty Ophelia. We do not want you to be punching above your weight. One thing Fortinbras did say was that Hedda has a real thing about a pair of duelling pistols she got from her daddy. She goes bonkers over them. (Settle down, H, we know the time lines are a bit out of joint, but we can tell you positively that Freud has not been born yet, and that if Ibsen does not exist, Freud will have to invent him.) So, H, if she pulls out her pistols, and gives you that old far away look, and says you are beautiful, just go and take a running jump into the nearest fiord — in the deep end. Pronto, Tonto. Capisce?

Ever since those Norse got out of their Viking phase, H, they have been undergoing an extreme makeover, and trying to be nice to everyone, particularly the girls.

"Ever since those Norse got out of their Viking phase, H, they have been undergoing an extreme makeover, and trying to be nice to everyone, particularly the girls. Hedda has it all. She calls it being 'empowered'. The boys up there do not like it much — I can assure you that it will never be a goer down here, mate — but on reflection it could be just your go. Not even you, H, could claim that you are a man's man. Indeed, if we just put your appetite for blood to one side, you could be history's first sensitive new age guy.

"But, H, Christmas is near, and we want you to rise above the bestiality induced by a temporal ghost (we have mixed views on holy ghosts just now); we implore you to put the vendetta back into the time and place you got it from and perhaps, H, even give the law a chance. We know that you have sounded off about 'the law's delay and the insolence of office' but they are just facts of bloody life — just ask the lawyers — and just look at the body bags up there, H.

"At the very least, at this time of year, can you join with us in resolving to try to reduce the Rage Toll? Happy Christmas, H, and heaven knows that you would be going bad for the next year to be worse, Happy New Year."

And Merry Christmas and a good New Year from me — and from Hamlet too. He interrupted me while I was taking the dog for a walk in Golden Square the other night. He said he had learnt the nocturnal ghost trick from his dad. He did say that he was still a bit dirty — and I can understand why — that he was not invited to the big wedding in Denmark earlier this year. He is, after all, a prince of the blood royal, and members of the incoming family were people of an indeterminate class invited from the other end of the earth (this is to put it politely) — and he thinks there comes a time, as surely as it must have by now, for bygones to be bygones. He has had enough, he said, of the old times past, the "auld lang syne" of those other wild men across the sea. He gets jittery every Christmas because every time he hears a Christmas carol or someone lights a candle, he just waits to hear someone say "may flights of angels sing thee to thy rest" and off he goes again — that is why he wants us to have a good Christmas and New Year.

The Twilight of Liberal Democracy?

Gerard Nash QC

The strong line taken by the Australian Government in relation to "boat people" and the recent spate of legislation designed to protect the community against terrorists have both raised, in slightly differing ways, the question of how far the freedoms which are the hallmark of a "liberal democracy" should be curtailed in the interests of the common good.

WHEN we talk of "democracy" or of "building and creating democracy in Iraq" we are talking of having a government freely elected. A liberal democracy, however, requires more than free elections. A liberal democracy is one which necessarily accepts and upholds basic rights of the kind which the common law has evolved. The fact that the government is freely elected has little or no impact on such individual rights at the coal face. It is essential that the courts protect those rights and it is necessary for the community to recognise those rights as being fundamental to the system under which we live.

There has always been a tension between the interests of the community and the rights of the individual. In feudal days the Crown saw itself as the arbiter of the common good and the interests of the community tended to be equated to the interests of the King. The tension was between the interests of the ruler and the existence of any rights in the subject.

Magna Carta, which has come to be treated as a charter of liberties, was designed or intended to inhibit the power of the monarch by reference to the rights of his subjects (as represented primarily by the barons) rather than to be a general charter of liberties. Despite its baronial source, Magna Carta has throughout the centuries been seen as a symbol of the freedom of the individual under the law and as a statement that the executive is subject to the law.

There can be no doubt that Clause 39 of the great charter purports to provide immunity from arbitrary arrest or detention. It provides:

> No freeman shall be taken [and/or] imprisoned or disseised or exiled or in any way destroyed nor will we go upon him nor send upon him except by the lawful judgment of his peers or [and/or] by the law of the land.

Subject to the ambiguity (represented by "[and/or]") created by the use of the Latin word "vel", this clause seems to constitute an undertaking that, in today's terms, the ordinary citizen may be imprisoned only pursuant to a lawful judgment made in accordance with the law.

It must be remembered that, when King John in 1215 agreed to abide by the law, he was not agreeing to abide by such law as he should promulgate, but rather to abide by the law of the land, to which he was subject.

In an absolute monarchy not subject to legal restraints, conflicts of interest are resolved in favour of the ruler. However, the development of a constitutional monarchy changed that situation. Today the tension between the interests of the community or of government and the rights of the individual is resolved by the judiciary according to law.

The existence of a strong and independent judiciary has contributed significantly to the protection of individual freedoms. In a society where the executive de facto controls the legislature, it is only the judiciary which inhibits the absolute power of government.

In Australia, there has historically been a tendency to rebel against or resist heavy-handed authority. This manifested itself in the fiasco of the Eureka Stockade and finds expression in the Ned Kelly legend. This "agin the government" attitude, combined with the myth that we are an egalitarian society has led to the philosophy that everyone should be given "a fair go".

Gerard Nash QC.

On the other hand, there has always been an element of xenophobia in the Australian psyche, revealed starkly by our treatment of the Chinese on the 19th century goldfields and elsewhere and by our treatment of the Aboriginal people over two centuries.

However, in the 1950s and through

into the late 1970s, although there was a tendency to resent migrants as a whole, we tended to approve of the migrants we actually knew. The people we knew were fellow human beings whom we accepted into our society. This is not the case today.

Today we live in a narrow materialistic society which is not prepared to let newcomers into the country merely on the ground that they are destitute, desperate and prepared to risk their lives to get here. This is not just a governmental policy; it is a policy endorsed by the electors of this country.

Sociologists tell us that people born between the end of World War I and the end of World War II are to be categorised as "traditionalists". The characteristics of the traditionalist is that he or she works hard not for money but for status, has a keen sense of obligation to the community but is also very conscious of his individuality and his responsibility to himself and others as human beings.

The "baby boomers", born between 1945 and 1960 or thereabouts, belong to what is described as the "me" generation. A baby boomer works for material gain and does not have the same consciousness of community responsibility as the traditionalist.

The "X generation", born between about 1960 and 1980 are a group who "work to live" rather than "live to work" and are less concerned with the future than baby boomers or traditionalists. Like the baby boomers they are egocentric and generally have little sense of responsibility either for themselves or others.

The difference between the generations is not, however, an explanation of the complete indifference which the majority of people in this country have to the plight of those who are held in immigration detention. It would seem that that indifference is spread right across the generations.

We have become a mean and niggardly people, each of whom is preoccupied with "me". We have approved and encouraged the hard line policy of government in relation to boat people. It is a policy akin to that adopted by Marshall Foch in World War II when he executed deserters "pour encourager les autres". A similar approach by the British military establishment was made famous — at least in this country — by the film "Breaker Morant".

For us to rest easy in our beds while men, women and children, whose only offence is that they have come to this country without an invitation, are confined for years in detention centres, requires us to forget that these people are human beings. It is probably important to our peace of mind that they be only counters in a game. They can then be treated harshly to discourage other people from coming here without an invitation. Logically, the more harshly they are treated the greater the general deterrent on others.

A considerable time ago Gareth Evans was proposing a Bill of Rights for Australia. At that time, it seemed to many of us that a Bill of Rights was unnecessary because we believed that the courts would protect, in a much more flexible way, the rights of the individual without creating what has sometimes been called a "rogues charter".

We have become a mean and niggardly people each of whom is preoccupied with "me". We have approved and encouraged the hard line policy of government in relation to boat people.

While the courts are required to apply the law as laid down by the legislature, questions of policy and philosophy do enter into the interpretation of ambiguous legislation. The judiciary have a major role to play as a buffer between the state and the individual. For that reason, where two interpretations of a legislative provision are open, one of which favours the rights of the individual and the other implements a draconian government policy which cuts across a "fundamental freedom", one would expect a court imbued with the common law traditions to lean in favour of protection of the individual. It is the individual who needs protection in our society, not the government.

The view which the majority of the High Court appear to have taken in *Al-Kateb* v *Godwin* (2004) 78 ALJR 1099 has, with respect, undermined that faith and defeated that expectation.

Al-Kateb was a stateless person born of Palestinian parents in Kuwait. He arrived in Australia by boat without a visa. He applied for a protection visa and failed. An application for judicial review of that refusal also failed. He requested that the Minister remove him from Australia to Kuwait or to Gaza. However, the receiving countries refused to co-operate. Consequently, attempts to remove him from Australia were unsuccessful.

He sought a declaration that he was being unlawfully detained and sought habeas corpus, mandamus, directing his removal from Australia and an order prohibiting his continued detention.

The issue before the High Court was whether the relevant provisions of the Migration Act, when properly construed, authorised the indefinite detention of an "unlawful non-citizen" in circumstances where there was no real prospect of his removal from Australia.

The majority of the court, McHugh, Hayne, Callinan and Heydon JJ held that the relevant sections did authorise such indefinite detention and that the legislation was constitutionally valid.

Gleeson CJ, Gummow and Kirby JJ dissented.

Gleeson CJ (who dissented as to the meaning of the legislation) enunciated the philosophy which, with respect, should underpin all judicial reasoning in a liberal democracy.

> Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment … A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value respected by the courts, and acknowledged by the courts to be respected by Parliament.

Gummow and Kirby JJ dissented both as to the meaning of the legislation and as to its constitutionality. They held that the relevant provisions in the Migration Act, if they had the meaning attributed to them by the majority, were unconstitutional. It was for the judiciary not for the executive to determine whether the detention fell within the power pursuant to which it purported to be exercised.

Gummow J said:

> The continued viability of the purpose of deportation or expulsion cannot be treated

> by the legislature as a matter purely for the opinion of the executive government. The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch. III. The location of that boundary line itself is a question arising under the Constitution or involving its interpretation … Nor can there be sustained laws for the segregation by incarceration of aliens without the commission of any offence requiring adjudication, and for a purpose unconnected with the entry, investigation, admission or deportation of aliens.

Kirby J expressed himself somewhat more succinctly:

> Indefinite detention at the will of the Executive, and according to its opinions, actions and judgments, is alien to Australia's Constitutional arrangements.

The approach adopted by the majority of the High Court accords with the philosophy of the community and with the philosophy of the executive. It may or may not accord with the intention of the legislature when the legislation was passed.

One cannot but conjecture that the probability is that Parliament just did not consider the possibility that a person, whose visa had been cancelled or who had no visa or whose deportation had been ordered, would not be removed from the Australia in a relatively short time. There is certainly no basis for concluding that Parliament contemplated indefinite detention of "unlawful non-citizens" at the behest of the executive.

As a reaction to the events which occurred in New York on 11 September 2002 and the events which have occurred much closer in Bali and Jakarta, our legislators have passed a plethora of legislation which is directed to the protection of the community at the expense of the individual.

During World War II individual rights were curtailed in the interests of defence. The executive, the legislature and the courts accepted that the state had the power to pass legislation and to make regulations to protect its own existence.

After World War II, when we moved into the era of the Cold War, the Menzies government introduced the Communist Party Dissolution Act. The High Court held that Act to be beyond power.

Dixon J accepted as applicable to the Australian situation the statement in *Black's American Constitutional Law, 2nd Ed.*, that it was "within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities". But his Honour went on to say (at 189):

> The extent of the power which I would imply cannot reach to the grant to the executive government of an authority the exercise of which is unexaminable, to apply as the executive government thinks proper the vague formula of sub-ss.(2) relating to prejudice to the maintenance and execution of the Constitution and the laws, and by applying it to impose the consequences which under the Act would ensue.

Since that decision was handed down there has been a drift not only in Australia but in other western "democratic" countries towards a greater interference and control by government in and of the day-to-day life of the people and a gradual acceptance of that interference and control by the community.

That acceptance, if accompanied by the adoption by the courts of a narrow positivist and black letter approach to the law, will see us moving ever so slowly to a position similar to that of the German jurists who found themselves helpless in the face of the laws imposed by the Nazi state. The drift is a drift, however slight, towards totalitarianism.

Every power conceded to, or abrogated to itself by, government involves a proportionate diminution in the rights of the individual.

I am not concerned to argue whether the anti-terrorist legislation which has been enacted in this country over the last three years is necessary or desirable. My concern is that it has been accepted almost without comment by the community and — more alarmingly — by the legal profession. Whether necessary or not, it constitutes another nail in the coffin of individual freedoms.

Every power conceded to, or abrogated to itself by, government involves a proportionate diminution in the rights of the individual. I am not concerned to argue whether the anti-terrorist legislation which has been enacted in this country over the last three years is necessary or desirable.

It is probably true that the individual at the bottom of the pecking order has always had very limited rights because of the social and economic barriers to full enjoyment of those rights. However, in a liberal democracy of the kind which we purport to have the individual does have rights — all individuals have rights — which are protected from governmental or bureaucratic interference.

The amendments to the *Australian Security Intelligence Organisation Act 1979* represent just one aspect of the anti-terrorist legislation. But they illustrate the erosion of fundamental rights.

Under sections 34D and 34F a person may be detained for questioning by ASIO pursuant to a warrant issued by a "prescribed authority".

If a person is so detained and during the period for which the warrant is operative he or she discloses information indicating that the warrant has been issued or a fact relating to the content of the warrant or to the questioning or detention of the person in connection with the warrant he or she commits an offence: section 34VAA.

Further he or she is also prohibited for a period of two years after the expiration of the warrant from revealing any information which is "operational information" derived as a result of the issue of the warrant or the doing of anything authorised by the warrant: section 34VAA.

Under section 34VA the Minister may by regulation prohibit or regulate access to information, access to which is otherwise controlled or limited on security grounds, by lawyers acting for a person in connection with proceedings for a remedy relating to a warrant issued under section 34D.

The effect is that individuals may be arrested and questioned by ASIO but may not reveal to their legal advisers, in many circumstances, the facts which would support an allegation that ASIO had exceeded its powers, had acted improperly or otherwise in its dealings with them had acted contrary to law. They may not tell their lawyers everything that happened during detention or while being taken into detention until at least two years later because it may reveal "operational information". The Minister may prohibit their lawyers from having access to information which may be vital to the question of whether the detention was legal or illegal.

Further by section 34X a court of a state or territory does not have jurisdiction to provide any remedy relating to a warrant issued under section 34D or the treatment of a person in connection with such a warrant at least so long as the warrant is in force.

The rule of law, as we know it, — the right to prerogative and injunctive relief against bureaucrats exceeding their powers — is removed. A person detained pursuant to section 34D can seek relief only from the High Court pursuant to s.75 of the Constitution in respect of any illegality associated with the detention or the treatment while in detention. One suspects that the executive might well have preferred to remove recourse to section 75 if it had been possible.

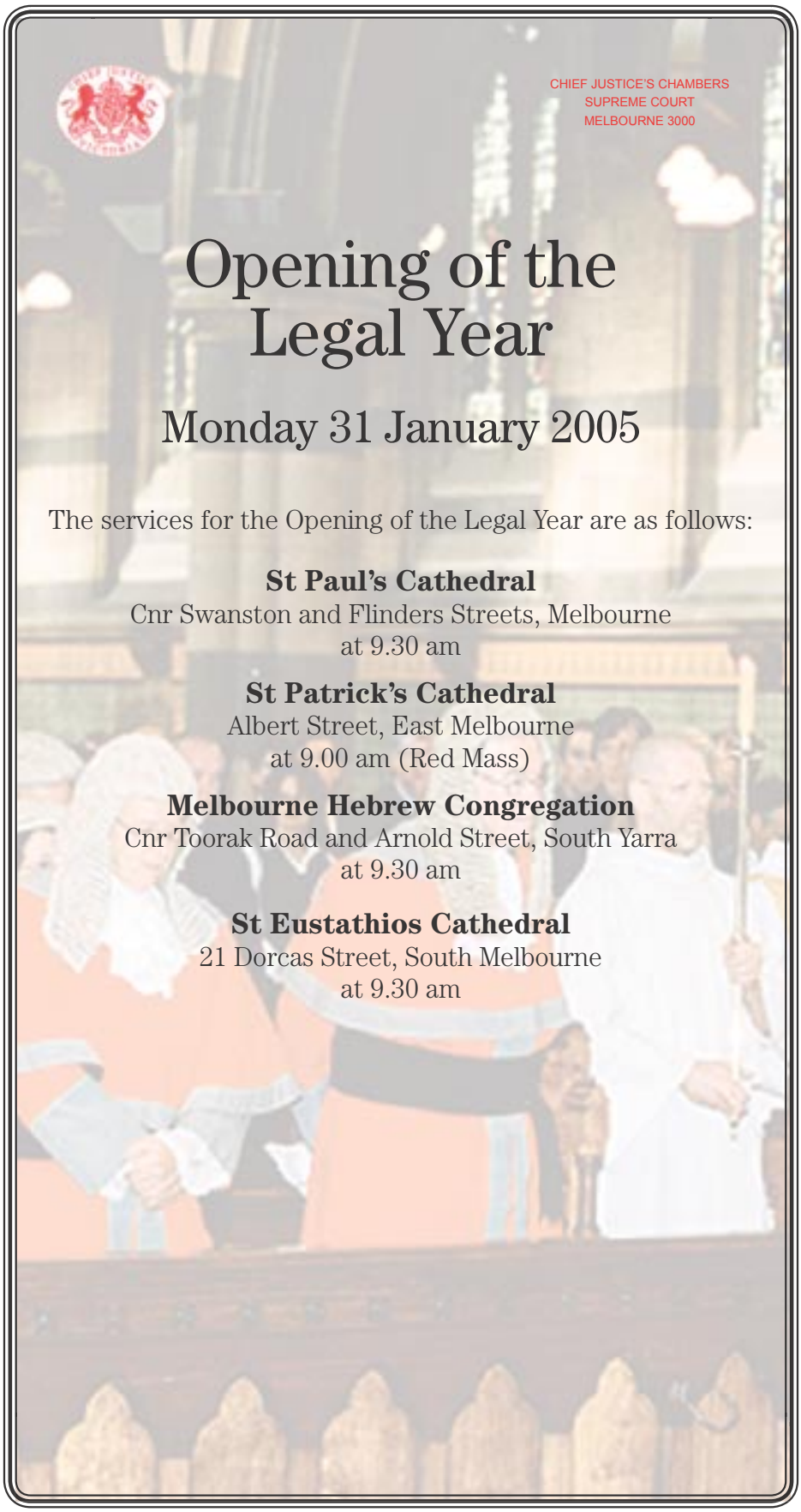
The terrorist threat led to the invasion of Iraq, an invasion which, it appears to be accepted by a large percentage of eminent international lawyers, was illegal. It has also resulted in what the military call "collateral damage". The Australian community as a whole seems to feel no responsibility for the dead and mutilated non-combatants who have been injured in the Iraq war. We have not even bothered to "demonise" those people in order to desensitise ourselves. Our attitude reflects a meanness in our society which does not sit well with our image as an open, warm hearted and hospitable people.

Our treatment of illegal immigrants, our lack of concern about the powers given to ASIO, our indifference to the "collateral damage" involved in our invasion of Iraq, all reflect a mean and narrow society of greedy people.

We are also moved by fear, fear of terrorist outrages, fear of a recession, fear of increasing interest rates, fear that our comfortable lives will be disrupted by physical or economic harm.

Societies which are in fear move to the right and act ruthlessly. They generate zealots. Zealots generate crusades and jihads. Whether the enemy is a red under the bed or a Muslim terrorist, the fight against the enemy, whether we call it a crusade or a jihad, is clearly something that justifies the abrogation of individual rights and even of individual lives.

We live in a time and a society in which our freedoms are being eroded by fear and fundamentalism — not only Islamic fundamentalism. We should be aware of the zealot and the fundamentalist because the man or woman who knows that he or she is right can perform, and justify, the most horrific acts in pursuit of "the cause".



Indian Rope Trick

Jim Shaw

IN the Winter 2001 edition of this publication there appeared an article headed "Indian Summer Holiday to Chennai Courts and Bar". I wrote that piece, and entitled it simply "Indian Summer". The editors, displaying the dislike of succinctness and the love of the prosaic that is habitual among members of our profession, decided in their wisdom to quadruple the number of words in the heading. Pleased, no doubt, with their efforts, and wishing to claim all credit for their flash of creative brilliance, they printed the article without a byline.

In October 2004 I returned to the subcontinent. An Indian summer is defined in the *Concise Oxford Dictionary* as a "period of calm dry hazy weather in late autumn in northern US and elsewhere" or "(fig.) tranquil late period of life etc". While October may indeed be fall [sic] in the United States, it is winter in India and spring in Australia. The ability to describe Indian cities as tranquil at any period of life would be a privilege reserved for the deaf or insane. I have therefore determined that this humble offering shall be enigmatically entitled "Indian Rope Trick" ("supposed Indian feat of climbing unsupported rope") and leave things to Paul Elliot's discretion.

I will not try to claim that the purpose of this, or the previous journey to India, was to examine the workings of the Indian legal system. In fact this trip was for the purpose of examining the workings of the Australian cricket team. The team's four Test tour was labelled the "Final Frontier", as Australia had not won a series in India for 35 years. As many readers are doubtless aware, Australia won the series 2–1. Counsel was fortunate enough to see the fourth and final Test at Wankhede Stadium, Mumbai, in its entirety. The match lasted only three days with all but 11 overs on the first day lost to unseasonal persistent drizzle. Australia, chasing a modest total of 105 in the fourth innings, was bowled out for a mere 93.

When not watching cricket, lying on the beach or eating, your correspondent found time to visit two of India's court houses.

The first of these was the Mumbai High Court. Mumbai was called Bombay until 1995. With a population of 16 million it is the largest city in the country. It is also the capital of the State of Maharashtra. It sits on seven islands which, through a process of land reclamation, have been joined together to form an artificial isthmus. Mumbai can claim as its own the prolific Bollywood filmmaking studios, Sachin Tendulkar, and a very great number of taxi drivers. It is believed to contain the largest slum in Asia.

Ricky Ponting (captain), Damien Martin (player of the series) and Jim Shaw (hanger-on) savour the moment.

When not watching cricket, lying on the beach or eating, your correspondent found time to visit two of India's court houses.

Construction of the Bombay High Court commenced in 1871 and was completed in 1879, taking about half the time it took to remove the scaffolding from the front of the old County Court building in Melbourne. Whether the builder was faced with any claims for liquidated damages for late completion is not known. The main tower is 57 metres high and the architectural style has been described as Early English Gothic.

It is a busy place, this Mumbai High Court. On the day of my visit several courtrooms were devoted to "chamber summonses". There also appeared to be a phenomenal number of appeals listed. One court room had at least 20 appellate matters listed on the one day. Perhaps they were leave applications. Perhaps I misunderstood the court lists. Maybe they just get on with it.

In many respects the Mumbai High Court resembled its counterpart in Chennai (see "Indian Summer Holiday to Chennai Courts and Bar" (2000) 117 *Vic Bar News* 51). The Cantonment Court in Pune did not resemble either.

Pune (or Poona as the British colonists spelled it, presumably for ease of pronunciation) is a modern university city of 2.5 million inhabitants. It lies 184 km south-east of Mumbai. It's main claim to fame these days is the presence of the Osho Commune International. The Commune was founded by the Bhagwan Rajneesh, or Osho (1931–1990). He is considered to be legendary, infamous, controversial or idiotic depending on whom you ask.

Storage at the Cantonment Court, Pune.

The Bhagwan ran into a few problems when he set up in Oregon, USA, in the 1980s. He was accused of everything from tax evasion to sexual assault. This did not stop his followers, mostly disaffected middle-class Westerners known as the Orange People, from signing up by the score. He was eventually thrown out of America, and prohibited from entering several other countries.

The author's sister, Fleur Shaw-Jones, with D.V. Bhusari, Advocate and notary.

Jim Shaw at the entrance to the High Court in Mumbai.

These days the devotees, still mostly disaffected middle-class Westerners, swan about Pune in full-length burgundy-coloured robes. The colour might be an attempt to distance the current crop from their saffron-clad brethren of yesteryear. At night they wear white robes which would really show up the dirt, although the street where the Commune is situated is by my reckoning one of the cleanest in all India.

The Cantonment Court is a modest affair on MG (Mahatma Gandhi) Road, a retail thoroughfare in the heart of the city. It's a bit like having the Melbourne Magistrates' Court in the Bourke Street Mall between HMV and the Pancake Parlour.

One reaches the registry by way of a small car park which on this particular day contained one car, two motorcycles and a wheelbarrow. On the walkway outside the registry stand two wooden desks, side-by-side. On each sits a name plate announcing in gold letters the incumbent's name and the fact that he is an "Advocate & Notary". One of these men, one D.V. Bhusari, greeted us warmly and insisted that we accompany him on a guided tour. He pointed to the car. "My car, my car," he said proudly. No mention of who owned the wheelbarrow. Mr Bhusari showed us offices where the court staff laboured diligently and one room in which bundles of documents tied with string were piled from floor to ceiling. "Storage," he said. The Advocates' Association rooms, although modest, had nine full-length deck chairs (or were they chaises longues?), in a neat line against one wall. Something for the Essoign Club to consider.

This was all pleasant and interesting enough. Then Mr Bhusari asked if I'd like to see the courtroom itself. OK, I thought, no harm in that. Given that it was 5.30 on a Saturday afternoon, I thought it would be, to say the least, unlikely that the court would be sitting. However, one should take nothing for granted in India.

"This is Jim Shaw, he is an advocate in Australia," Mr Bhusari announced as we entered the courtroom. The magistrate, who to my alarm was seated on the bench, robed, blinked. Apart from his two clerks, sitting in front of and beside him, the room was empty. I was standing in the middle of it wearing shorts, a short-sleeved shirt and thongs. I had a small backpack over my shoulder and had not shaved for several days. I murmured something respectful but probably inaudible. His Honour (or do they still call magistrates Your Worship?) murmured something less audible and I fled in as dignified a fashion as was possible in the circumstances.

Not that the Australian cricketers didn't have their fair share of indignities heaped upon them. The crowd at the Wankhede chanted "Ind-ia, Ind-ia" incessantly. They only stopped to sing numerous impromptu versions of the national anthem (for which everyone rose spontaneously to their feet) and to insult the Australian players. Well, three of the Australian players. I'm not sure where they're getting their information but according to the throng assembled in the Sachin Tendulkar Stand "Jason (Gillespie) is a bastard", "Ponting is a donkey" and "Clarke is a homo". And they reckon Australian crowds are tough. I don't know what Sir Richard Hadlee was complaining about.

CommBar Celebrates its First Decade

On one of those marvellous spring evenings in Melbourne on 10 November 2004, in the presence of over 170 judges, masters, registrars and counsel, and in the uplifting surrounds of the Supreme Court Library, the Commercial Bar Association celebrated the 10th anniversary of its founding.

THE attendance of so many heads of jurisdictions by Chief Justices of the Supreme Court and the Federal Court and the Presidents of the Court of Appeal and VCAT, together with the Federal and Supreme Court commercial judges, was a key factor to the success of the evening.

It was a wonderful occasion for the Commercial Bar and Bench glitterati, rising stars and supernovas to meet together away from the arena of the courtroom. Many of those attending extended their appreciation to Chief Justice Warren for her permission to use the Library and, as it turned out, the Court's grand piano, for the function.

It was overheard in passing that with so many judges representing all levels of appeal it was difficult not to recall, with utmost respect of course, the wit of A.P. Herbert writing in Punch Magazine in 1933 in his case of *Board of Inland Revenue* v *Haddock* that: "The institution of one Court of Appeal may be considered a reasonable precaution; but two suggests panic … the legal profession is the only one in which the chances of error are admitted to be so high that an elaborate machinery has been provided for the correction of error … In other trades to be wrong is regarded as a matter of regret; in the law alone it is regarded as a matter of course…"

Whether Herbert was truly correct was left open for banter over drinks and canapes catered by the Essoign.

During the course of the evening David Denton S.C., President of CommBar, welcomed those attending and recounted that the Commercial Bar Association was formally established at a meeting of approximately 100 members of counsel in the Essoign Club on 24 November 1994. The first President of the Association was Alan Goldberg QC, now a Judge of the Federal Court, followed by Allan Myers QC, now amongst many other things, President of the NGV. He recalled that in Alan Goldberg's inaugural address he had said that the development of the law required, at times, the voices of barristers to be heard and that this was no less true than in the area of commercial law, which, by its nature, embraced many areas of practice. He had then stated that it was the intention of CommBar to be an advocate in the interests of commercial barristers and to encourage the meeting of junior and senior members of counsel in an informal manner. It was noted with pleasure that the Honourable Justice Goldberg was present on the evening to hear his mission statement of a decade earlier being enthusiastically repeated and reindorsed.

As many will be aware, since its inception CommBar has developed in a number of areas. It is the single largest provider of continuing commercial legal education to members of the Bar generally and now formally comprises

David Denton S.C., President CommBar.

The Commercial Bar and Bench "glitterati, rising stars and supernovas".

Chief Justice Marilyn Warren, Justice Garry Downes and Chief Justice Michael Black.

Justice Mark Weinberg, Justice Ron Sackville, Andrew Panna, Cornelia Fourfourkis-Mack.

Glen McGowan, Justice John Winneke, Jocelyn Cole and John Bleechmore.

Albert Monichino, Chief Justice Michael Black and Simon Marks.

10 specialist commercial law practice sections.

CommBar has been at the forefront of ensuring equality of opportunity for counsel and currently 35 per cent of the office holders of CommBar are women members of counsel. It has prepared many responses to Government at the request of all chairmen of the Bar since 1994. It also supplies the Bar's representatives on the Supreme Court's Commercial List Users' Group under the chairmanship of Justice David Byrne.

The President then turned attention to the perhaps gloomy but nevertheless provoking editorial of the Spring 2004 edition of *Victorian Bar News* dealing with diminishing workloads for counsel. This brought about a mischievous analysis of the state of the Bar and Bench over the past decade. It was revealed that in 1994 the Bar comprised 1261 members of counsel, including 118 silks, and in 2004 there were 1532 members of counsel, including 210 silks, which was a 22 per cent increase in overall numbers.

By comparison in 1994 there were 25 Supreme Court judges, including the Chief Justice; in 2004 there was now a standing Court of Appeal and a separate Trial Division composed of 32 Supreme

Court judges comprising the Chief Justice, the President, 10 judges of Appeal and 20 Trial Division judges. The Victorian District Registry of Federal Court had also grown from nine judges, including Chief Justice Black, in 1994 to 14 judges in 2004. This was a combined courts increase of 35 per cent in judicial numbers.

With that sort of growth in both the Bar and the Bench over the past decade it would have been expected that litigation must have also increased. However, the roguish review of the state of the Law List from 10 years ago to 2004 disclosed that on 4 November 1994 there were 34 commercial cases listed for Supreme Court directions supporting a Commercial Bar of about 550. This was contrasted to the Law List for 5 November 2004 which comprised a total of 26 commercial cases listed for directions supporting a Commercial Bar of about 850. This represented a 23 per cent decrease in listed work over a decade! On future projections the Commercial Bar

Kate Anderson, Chief Justice Marilyn Warren, Stuart Anderson, Justice Alan Goldberg and

COMMBAR — THE COMMERCIAL BAR ASSOCIATION

2004 EXECUTIVE

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Peter O'Callaghan QC.

Pianist Matthew Toogood entertains guests.

Jennifer Davies and Caroline Kirton.

Albert Monichino (Vice-President and Convenor), Melanie Sloss S.C. (Senior Vice-President), David Denton S.C. and John Dixon (Treasurer).

would grow to 1100 in 10 years time and all would depend on 20 commercial cases being listed for directions on 7 November 2014!

Notwithstanding these light-hearted observations the mood of those attending was not observed to be too adversely affected, which was in no small part due to the rousing, eloquent and entertaining address by Chief Justice Warren. The Chief Justice observed that all were there to celebrate and mark the excellence of commercial law advocacy in Victoria. The text of Her Honour's warmly received speech follows:

"One only has to reflect on the impact of the establishment of the Commercial List in the Supreme Court almost 25 years ago. The style and format of the List has been adopted and adapted widely. This court heard through the 1980s and 1990s the dominant commercial litigation in the nation. The judges who determined the cases carved the commercial niche for which this State was known. Some of the judges are still with the Court; one has gone to a higher court; many of the counsel in those cases now adorn (judicially speaking) the Supreme Court and the Federal Court (in Melbourne).

"In a sense, the formation of the Commercial Bar Association ten years ago was a culmination of a golden commercial era in Victoria. Now, why do I focus on Victoria and its excellence?

"Sydneysiders often quip that "the only good thing to come out of Melbourne is the Hume Highway", without realising that the same joke works the other way for Melburnians as the highway links both cities.

"The Melbourne–Sydney rivalry: we have been at it for the past one and a half centuries. Sydney is now feeling very confident about itself, especially since the 2000 Olympics.

"The Melbourne and Sydney Bars are alike in many respects. They reflect the rivalry between our two great cities. It can be no secret that, throughout modern legal history, each Bar has vied for the title of being the nation's best.

"Mr Justice Young in his 2003 editorial in the *Australian Law Journal* entitled "I'm Proud to be a NSW Male Lawyer" said that the chances of the "best lawyers" emerging from NSW are greater owing to the fact that NSW is the busiest litigation State.

"But what makes a successful commercial law barrister? Experience, as Mr Justice Young pointed out, is certainly a factor. What else? Does it come down to how many lawyers there are in one State, the rivalry, the fight to get "on top"? The average barrister at the Commercial Bar in Melbourne is at least as busy as the average barrister practising commercial law in Sydney. The cases are also no more taxing in Sydney than they are in other States.

"What about the legal education factor: the top Melbourne law schools? In a worldwide survey recently conducted by *The Times* newspaper in London, Melbourne decisively trumped Sydney in having the top-ranked schools overall. This is reflected in the quality of the Melbourne law schools and professors. Melbourne commercial barristers and solicitors were educated at those law schools.

"As a judge who sat in the Commercial List and the Corporations List of this Court for three years, I believe I can say from a very informed (and authoritative) position that Victoria has an outstanding Commercial Bar and (in the cross-jurisdictional sense) an outstanding and leading commercial judiciary.

"Let us remind ourselves, and others, of that fact. Let us celebrate and toast an integral component of that excellence on its 10th anniversary: the Victorian Commercial Bar Association."

And so it was that an idea born of a decade ago to promote the exchange of ideas and the informal meeting of all levels of commercial barristers had been successfully sustained and it appears that CommBar is set for another triumphant decade.

BCL: The Open Door to the Bar

Paul Anastassiou, Chairman, Barristers' Chambers Limited

The Victorian Bar can be justifiably proud of its accessibility to all lawyers who wish to pursue a career at the Bar. This openness is fostered by the excellent Readers' Course and by the mentor/reader tradition. The openness of the Bar is underpinned by the accommodation system managed on behalf of the Bar by BCL.

BCL's primary objective is to provide chambers for all barristers. BCL aims to establish and maintain chambers in a way that fosters the Bar as a college. The benefits of this collegiate environment should not be underestimated. The close proximity of barristers to one another enables the sharing of knowledge and experience and brings with it the obvious benefits of sharing resources.

In the BCL system no one need seek the approval of an incumbent group in order to gain access to chambers. There are no fees on entry and nobody is asked to commit to a long-term lease. The barriers to entry to the Bar — both economic and, for want of a better description, social — are removed. The Victorian Bar is virtually unique in this regard.

In other places entry to the Bar requires the new barrister to pay quite substantial sums of money to purchase chambers or a right of access to particular chambers. This investment can only be recovered upon leaving the Bar if the goodwill of the chambers concerned is maintained so that there are ready buyers. This economic reality leads to an exclusiveness in the admission of new entrants and, aided in some jurisdictions by a floor based clerking system, a closely held approach to the allocation of work amongst barristers on a particular floor.

We are fortunate at the Victorian Bar that our predecessors had the foresight to arrange for the Bar as a whole to provide chambers. In loyalty to that tradition, BCL has undertaken perhaps the most difficult task in its history by fully refurbishing Owen Dixon Chambers East. The refurbishment project took about seven years to plan and two years to execute. Despite the difficulties of undertaking such a major refurbishment project while keeping Owen Dixon Chambers East operational, the project has been a great success. The refurbishment, save for some additional works in the basement and to the exterior of the building, will be completed by early December. The project will be brought in on budget and pretty much on time, notwithstanding that there was a delay of about six months in the commencement of the project. In short, BCL, with significant financial support from the Bar, will have secured for this and the next generation the core asset of the Bar bequeathed to us by our predecessors. This means that the Bar can continue to be an open and accessible institution in the years ahead.

We should not, however, take it for granted that the BCL system, which has always been there, will always continue. It goes without saying that the continued viability of BCL is dependent upon a critical mass of barristers continuing within the BCL system. It is difficult to be precise about what the critical mass is, as it depends on numerous variables including the number of chambers BCL has commitments to at any given time and the demand for particular chambers that might be vacated.

Since the abolition of the rule that barristers must take chambers from BCL in 1994, numerous private chambers have been established. The ever-present threat that a new set of private chambers may be established, without warning, places BCL in a very difficult position when it comes to deciding whether it should establish a new set of chambers, or continue existing chambers. This threat diminishes BCL's ability to carry vacant chambers. Ideally, there would be a small percentage of vacant chambers to allow for flexibility within the BCL system. Unfortunately, given BCL's financial commitments, it cannot prudently carry many vacant chambers. In part this is because the establishment of private chambers could suddenly create an over-supply within the BCL system which it may not be able to carry. The simple reality is that the more barristers leave BCL the more it will be forced to contract, and the more BCL contracts the less able it will be to meet the diverse needs of the Bar.

It may be said that BCL, like any other company, is required to cope with the forces of competition. That proposition might be true but has to be viewed against the purpose of BCL as a facilitator of low-cost entry to the Victorian Bar. Further, the Bar should be aware of what BCL is competing against and of the limitations upon its ability to do so.

BCL's objective is to provide a range of chambers to meet the diverse needs of the Bar. BCL chambers range from large chambers with substantial common areas and fit-out to small chambers in the $600 to $800 per month range. BCL aims to have a mix of chambers which will meet the demands of barristers as their respective needs change. Private chambers, on the other hand, are invariably established by a core group who can set up and configure a particular set of chambers tailored to the demands of the group. BCL recognises the demand for group accommodation, and has endeavoured to meet this demand, to some extent at least, by offering chambers for group arrangements when new chambers become available. BCL also recognises this demand by allowing members of an already established group priority for chambers allocation where that is appropriate.

BCL cannot, however, immediately meet demand for group accommodation whenever a new group is formed.

Barristers who wish to establish private chambers can readily take advantage of ad hoc opportunities in the market place to lease or buy premises. Again, the premises and the standard of fit-out can be selected to meet the demands of a particular group. BCL, on the other hand, must enter into long-term arrangements aimed at meeting demand for the mix of chambers required by the Bar as a whole. This means that BCL is not in the same position as a small group might be to negotiate one-off arrangements when a favourable opportunity arises.

There are other compromises, no less significant, for barristers in remaining within the BCL system. First, as a general rule chambers are allocated according to seniority. This rule, while arbitrary, is fundamental to the openness of BCL. The consequence of this rule is that often barristers have to wait to get a room they want and they do not always get to pick and choose their neighbours. These compromises are the price for maintaining a system which makes the Bar open and accessible.

BCL will continue to do its best to earn the support of the Bar by providing chambers at competitive market rates and by offering additional services such as the phone system and the internet system. However, BCL cannot match every perceived advantage potentially available to those who wish to establish their own chambers. In the end BCL's continued viability depends heavily upon sufficient loyalty to the principle that the Bar should foster openness and accessibility for all.

Chief Justices Warren and Bla

Chief Justice Warren, Supreme Court of Victoria.

THE appointment as Senior Counsel of and for the Supreme Court of Victoria is a significant event.

This year there is an added significance because it is the first year that the Chief Justice of the Supreme Court has assumed the responsibility for appointment.

The significance for the Court and the occasion is marked by the constitution of the Court this morning and the representation of all jurisdictions.

With the universal support of the judges of this Court I assumed the responsibility of appointment of Senior Counsel at the request of the Victorian Bar this year. The judges of this Court urged me to assume the burden of appointment because the Court regarded the appointment of Senior Counsel as so important.

This is because Senior Counsel play a very important role in the administration of justice across the State and in this Court, in particular.

Judges look to the leaders of the profession to provide leadership. There is an expectation that Senior Counsel will perform that role: that is to lead. Your appointment ought mark a change in your practice such that you assume the more difficult and complex cases. More often than not, the cases in which you appear should be of a calibre and difficulty that justify your retainer, your appearance as Senior Counsel.

Above all else, there is an expectation that in the performance of your leadership role you will fulfil the paramount duty of the advocate to the Court. The duty is that described by Sir Gerard Brennan as the duty to assist the Court in the doing of justice according to law.

There is, therefore, an expectation by the Court that you will perform the role as signified by your new title, that you will be Senior Counsel and leaders of your profession.

There is the additional expectation that you will demonstrate the qualities of integrity and courage in the performance of your role as Senior Counsel.

Above all else, there is an expectation that in the performance of your leadership role you will fulfil the paramount duty of the advocate to the Court. The duty is

ck Address Senior Counsel

New Silks 2004 in Banco Court — from back row: Glenn McGowan, Susan Pullen, Richard W.McGarvie, Michael Wheelahan, James Elliott, Ray Elston, Frank Saccardo, Duncan Allen, Jennifer Davies, Peter William Collinson and David Mark Maclean.

ON 30 November, 2004 The Honourable Chief Justice Warren appointed as Senior Counsel the persons listed in order of precedence.

Mr Raymond Alwyn ELSTON S.C.
Prosecutor for the Queen, Crown Prosecutors' Chambers, 4th Floor, 565 Lonsdale Street, Melbourne 3000

Mr Francis Dennis SACCARDO S.C.
C/- List D, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Duncan Leslie ALLEN S.C.
C/- List P, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Ms Jennifer DAVIES S.C.
C/- List D, Owen Dixon Chambers, 205 William Street, Melbourne 3000

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

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

Mr Glenn Charles McGOWAN S.C.
C/- List A, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Ms Susan Elizabeth PULLEN S.C.
Prosecutor for the Queen, Crown Prosecutors' Chambers, 4th Floor, 565 Lonsdale Street, Melbourne 3000

Mr Richard Wallace McGARVIE S.C.
C/- List H, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Michael Francis WHEELAHAN S.C.
C/- List D, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr James Dudley ELLIOTT S.C.
C/- List A, Owen Dixon Chambers, 205 William Street, Melbourne 3000

that described by Sir Gerard Brennan as the duty to assist the Court in the doing of justice according to law.

Your appointment is one of personal significance for each of you. Justifiably, it is a time of great celebration and joy for each new Senior Counsel and his or her family and friends. The Court congratulates you upon your appointment as Senior Counsel of and for the Supreme Court of Victoria.

Chief Justice Black, Federal Court of Australia.

THE Court congratulates each of you upon your appointment as Senior Counsel in and for the State of Victoria. I will say a little more about your appointments and the role of Senior Counsel in a moment but I would first like to extend a welcome to those members of your family – including the very young – and your friends who are present at this ceremonial sitting this morning. We are all very pleased that they are able to be here.

When the Court first received announcements in this courtroom, they were announcements of appointment as one of her Majesty's Counsel for the State of Victoria. As you may have seen in the notes about today's ceremony, that title was used in colonial times. The early appointments in Victoria were of course themselves an evolution of something much older still. A few years later we received the announcements of the appointment of Senior Counsel. The title had changed, but the appointments were still made by the Governor in Council on the recommendation of the Chief Justice of Victoria. This year the appointments have been made not by the Governor in Council – the Executive Government having no role in the process any more – but by the Chief Justice of Victoria.

Although the foundation for the appointments has changed from the Executive Branch to the Judicial Branch, there has not been any change in the essential fact that appointments as Senior Counsel in Victoria represent, here as elsewhere, a recognition of professional eminence at the Bar. Nothing in this respect has changed. Moreover, it is recognition based upon your reputations amongst your professional peers. Again nothing has changed. Your appointments are therefore rightly an occasion for congratulation.

Your appointments come at an important time in our legal history. We are now well into the second century of federation and we are beginning – in this year – the second century of federal courts created by the Parliament. An uncertain world presents new challenges for everyone concerned with the administration of justice. In such a world, the leaders of an independent profession have especially important responsibilities.

Your appointments come at an important time in our legal history. We are now well into the second century of federation and we are beginning – in this year – the second century of federal courts created by the Parliament.

History shows that Senior Counsel – like Queen's Counsel before them – have a powerful leadership role in their profession. They have set, and continue to set, the standards of independence, integrity and learning that others will follow. These standards remain constant and of fundamental importance.

Senior Counsel must also set, by example, not only standards of excellence – that almost goes without saying – but standards in other areas of great importance to the courts and to the community. These are standards in matters such as fair conduct, courtesy to those whose business is in the courts – not just to other barristers – and particularly high standards in managing litigation effectively and efficiently.

In these and in other matters the courts and the community will rely upon you as leaders of the profession. I suggest too that, of its nature, leadership carries with it wider obligations to the community.

The Court is happy to recognise your precedence as Senior Counsel in and for the State of Victoria. We wish you well in your important roles as Senior Counsel and we wish you well in your continuing careers as members of the Bar.

Thank you all for your courtesy in informing the Court of your appointments.

The Court will now adjourn.

The Heirs of Howe and Hummel

Brien Briefless
Graduate scholar emeritus, Department of Geomatics, University of Melbourne

WITH the passage of a hundred years since the heyday of their law practice in New York during the late nineteenth and early twentieth centuries, the shenanigans of William Howe and Abraham Hummel permit us to today view them as the Bar's likeable villains whose tough or dirty tactics raise a smile whenever the legal profession meet for drinks after work. It may be that the distance of time permits us to derive some amusement that was never appreciated by their immediate contemporaries: their fellow practitioners and other victims. Not so their descendants whose close proximity and their manner of practising law should and does give us ulcers and turns our hair white because we are more directly affected by their behaviour.

The reputations of Howe and Hummel can be briefly described thus: Francis Wellman, in his *The Art of Cross-Examination* describes William Howe as "one of the most successful lawyers of his time in criminal cases", while Arthur Train's description of him was as a cross between a Coney Island barker and a costermonger.

It is of note that Rovere's slim volume of only 113 pages provides five (out of a total of 364) entries chosen by the editor of *The Oxford Book of Legal Anecdotes*. [To put this in context, F.E. Smith (Lord Birkenhead) scores seven anecdotes sourced from three different books and Clarence Darrow also contributes five entries from the much thicker biography by Irving Stone. So far as batting averages go, Howe and Hummel are heavy hitters.]

Howe and Hummel's firm defended, over its 40-year life, more than a thousand people indicted for murder or manslaughter and William Howe appeared on behalf of more than 650 of them. In the meantime their firm saw nothing untoward in representing both parties to a civil action (no suggestion of Chinese Walls back then!), kept a stable of professional witnesses and specialized in blackmail, judge and jury fixing, subornation of perjury and the fabrication of evidence. Abraham Hummel was regarded as an accomplished pickpocket and, although wealthy, delighted in refusing to pay his creditors, believing that the defence of cases brought against him was good training for the young apprentice lawyers in the office. Hummel's fight against his second disbarment which lasted over four years and was prosecuted by District Attorney Train is considered a classic US legal struggle with Hummel availing himself of all means, fair and foul, to hold off by delay, and possibly defeat the ultimate result.

They were perfectly suited to a time when the criminal Bar consisted mainly of de-frocked priests, drunkards, ex-police magistrates and political riff-raff of all sorts.

Jeffrey O'Connell's book is an attack on the US system of common law tort litigation with its heavy reliance on substantial contingent fees. But it is not only the plaintiff's lawyers who are the successful showmen as shown by his description of a leading insurance defence lawyer who takes great pains to play down his affluence and authority:

> In court he wears a baggy tweed jacket with elbow patches and badly frayed sleeves. His shoes are scuffed, and one of them is coming apart at the seams. He carries a battered briefcase. He carefully avoids smoking his custom-made cigars in front of the jury and makes a point during the trial of eating in the courtroom cafeteria, where the jurors eat, rather than at his usual luncheon place, the baronial University Club. Speaking of such poses he asks with a smile, "Why should the other side have a monopoly on sympathy?"

Having dressed for the part, now consider the same lawyer's performance. He is defending a suit brought by a middle-aged businessman whose wife was killed in a car smash involving the defendant:

> [Counsel] had his attractive blonde secretary come into the courtroom at the end of the trial and sit next to the plaintiff-widower. Following counsel's instructions, she asked the man an innocent question, smiled, patted his hand and quickly left. "Just one look at the cold expressions on the lady jurors' faces was enough to tell me that we were home free," counsel recalls with a smile. "When the jury came back with [their] verdict for the defence, the plaintiff's lawyer never knew what hit him. You see, the entire interchange took place while he was facing the jury in the midst of his closing argument."

Richard Rovere, *Howe and Hummel: Their True and Scandalous History*, Michael Joseph, London, 1947.
Sydney Zion, *The Autobiography of Roy Cohn*, Lyle Stuart, Secaurus, 1988.
Nicholas von Hoffman, *Citizen Cohn*, Doubleday, New York, 1988.
Jeffrey O'Connell, *The Lawsuit Lottery: Only the Lawyers Win*, Free Press, New York, 1980.
James B. Stewart, *The Partners: Inside America's Most Powerful Law Firms*, Simon and Schuster, New York, 1983.
James B. Stewart, *The Prosecutors: Inside the Offices of the Government's Most Powerful Lawyers*, Simon and Schuster, New York, 1987.
Kim Eisler, *Shark Tank: Greed, Politics, and the Collapse of Finley Kumble, One of America's Largest Law Firms*, St Martin's Press, New York, 1991.

O'Connell relates an incident (also covered in greater detail in Stewart's *The Partners*) wherein a partner in the prestigious Donovan Leisure law firm perjured himself in an affidavit in the late 1970s and consequently was sentenced to a month in gaol.

The format of both the Stewart books is to devote a chapter to a particular piece of litigation. Thus in *The Partners* there is a chapter on the *IBM-Telex* case and another on the *Kodak-Polaroid* case (where the Donovan Leisure partner perjured himself). On the criminal side, *The Prosecutors* has chapters devoted to the Hitachi sting (involving industrial spying against IBM), the McDonnell-Douglas bribery scandal and the first of the Wall Street "insider trading" prosecutions.

The road to the top is described in *The Partners*:

> Associates at Cravath [Swaine and Moore] are considered for partnerships in groups based on their year of graduation from law school, though there may be some spillover from one year to the next. During the period of frenzied discovery in 1974, the group of senior IBM team associates were entering the last crucial year or two before the fateful decision, and competition among them reached a fever pitch. There was Mullen, from the law class of '68, who appeared to be on his way to an all-time record for billable hours logged; and there were four associates from the class of '69: Rolfe, Sahid, Saunders and John Cooper. Competition was especially fierce between Rolfe and Sahid. The feeling was that probably only one or two out of the eligible group would actually be made a partner, and Sahid seemed to have had an edge ever since his Telex counterclaim triumph. When Sahid scored another triumph by billing 24 hours in a single day, Rolfe — in a move that became the subject of legend in the firm — flew to California, worked on the plane and, by virtue of the change in time zones, managed to bill 27 hours in one day.

Left unsaid by Stewart is the value provided to the firm's client who was paying top Cravath dollar for the 27th hour billed by the presumably jet-lagged and exhausted Rolfe.

Comparable to Kurt Vonnegut's classic description of the practice of law from (if my memory serves me well) *God Bless You, Mr Rosewater* (1965):

> In every big transaction, there is a magic moment during which a man has surrendered a treasure and during which the man who is due to receive it has not yet done so. An alert lawyer will make that moment his own, possessing the treasure for a magic microsecond, taking a little of it, passing it on.

is Stewart's "Not even the best, and most expensive, lawyers can stop the resolute flow of cash. As Kern himself concedes, they can only hope to be there when it changes hands."

The ego of the criminal lawyer is touched upon in *The Prosecutors* when a carefully crafted and painstakingly negotiated plea bargain in the Hitachi sting case almost sank when counsel for one of the co-defendants decided to needle the prosecutor: "You'd better sign those papers or you'll lose at trial," he taunted. The prosecutor's response was to storm off with the plea bargain agreement until the cooler heads of the other defence counsel could persuade him to return.

And it is not only the defence: US Attorney Rudi Guiliani's desire for publicity (as a launching pad for a political career) saw him participating in an undercover operation in 1986 in which he decked himself out in an outrageous disguise and went to Harlem to purchase cocaine. Upon his successful return he called a press conference and posed for photographs. Fortunately, no prosecution resulted. Otherwise such prosecutions may have been challenged on the basis of the publicity stunt depriving any defendant of a fair trial.

Guiliani's antics were but a faint echo of those of an earlier US Attorney: the late Roy Cohn. Cohn — swindler, perjurer, tax evader on a grand scale, briber, political fixer, hypocritical homosexual, betrayer of his clients, publicity hound and unashamed toady — was a true heir of Howe and Hummel.

There was no in-between with Cohn — you either loved him or hated him. At the time of his dying from AIDS in 1986 one of his ex-clients, estranged from him since she'd been forced to sue him for the return of a $100,000 loan, had a tearful reunion with him. She recollects, "And I said the strangest thing I've ever said, I said 'Don't worry, Roy, the only thing I really care about is are you still my best friend?' This man had ruined my life sometimes in 50 ways …"

Conversely, at a Columbia alumni gathering the columnist Leonard Lyons offered to introduce Roy to the financier Benjamin Buttenweiser. Buttenweiser stared at Cohn's proffered hand with distaste and announced he had no desire to touch it. Cohn's hackles rose and he stated that he did not believe Columbia alumni should be so rude. Buttenweiser was prepared for this and responded by quoting Oscar Wilde to the effect that a gentleman is never unintentionally rude.

On his deathbed, despite being disbarred he sought to put in the fix (legal or political or both) for the benefit of friends and clients. Yet others were to say that it, AIDS, "couldn't have happened to a nicer guy, so there is a God after all".

Even among the homosexual population of New York where everybody had dying lovers and dead friends, there was gloating over his dying and one man even boastingly claimed credit for arranging for Roy to catch the disease by putting him together with an infected lover. Such was the hatred and loathing that Cohn attracted.

As the son of a politically appointed New York state judge, Cohn was wheeling and dealing in his early teens — in high school, college and law school. It was political clout that enabled him to enter Columbia Law School despite his poor college grades. With the passage of time Cohn would recall that he was a straight-A student. Similarly, his first job out of law school was in the US Attorney's office where in his words, he recalled that:

> by then I had been in courtrooms for two and a half years on an almost daily basis as an assistant US attorney and had prosecuted more than 200 defendants, with no losses, not one acquittal marked up against me.

However, his then colleagues remember it differently. Cohn's technique was to indict somebody, issue a press release, indict him again and issue another press release on the superseding indictment. Each indictment in the file had its corresponding press release clipped to it, each press release featuring Cohn's name. Cohn was responsible for a lot of indictments that never went anywhere, which were obtained primarily for the publicity and later had to be dismissed for lack of evidence. His contemporaries remembered Cohn as an object of derision in the US Attorney's office, as a publicity hound who would indict anyone.

This method was followed in his later private practice. He would initiate suits in a blaze of publicity and later, quietly negotiate a settlement. To go to trial was a defeat for Cohn who was a fixer, a person who could not last the distance in extended litigation which interfered with

his jet setting and social celebrity lifestyle. On the few occasions when he was forced to trial the most common result was a loss because of Cohn's lack of preparation and diligence or even by default. With the passage of time these losses would be fondly remembered by Cohn as a rip-roaring victory wherein Cohn had stomped all over his opponents. His employee lawyers were similarly handicapped by an out-of-date library resulting from Cohn's refusal to pay his debts including those owing to the law publishers. Their legal research was conducted mainly in the Fordham University law school library or the court's library.

Not all of the employees' experiences were hard grind. One recalled:

> One day I'm sitting with Tom when Roy pops his head in the room and says, "Tom, do you want to go to lunch with so-and-so?" a well-known person, associated, I guess, with the criminal elements. Tom said, "No, Roy, I'm busy …." When he left, Tom looked at me and said, "I don't want to go to lunch with 'em. These guys are always getting shot in restaurants."

Cohn's fame (or notoriety) was gained in the early fifties where as a US Attorney he participated in the prosecution of Julius and Ethel Rosenberg and then was appointed as counsel to the staff of Senator Joseph McCarthy of Missouri. This period of about three years would shape his life and he would be forever linked to the "Atom spy" trial and the "commie hunting" Senator McCarthy.

During the Rosenberg trial it appears that the prosecution (and particularly Cohn) enjoyed *ex parte* audiences with the trial judge Irving Kaufman. There are suggestions of evidence fabrication during the Army-McCarthy congressional hearings with Cohn in the thick of it.

After the Rosenberg trial Cohn, through political influence, joined McCarthy as his chief counsel, edging out the then young Bobby Kennedy who served on McCarthy's staff subordinate to Cohn. It was the beginning of an enmity that saw them come close to fisticuffs during the public Senate hearings and was later to result in Bobby, by then JFK's Attorney General, prosecuting Cohn on four separate occasions which Cohn beat, in some cases narrowly, with some surreptitious assistance from FBI director J. Edgar Hoover.

Cohn's fisticuffs may have only been show — as with others, it made headlines but it has been suggested that Cohn always ensured there was somebody about to restrain him when he exploded.

A common link between Roy Cohn and the nationwide (and international) "megafirm" Finley Kumble is that both were the subject of ongoing critical comments in *The American Lawyer* which sought to bring to public attention the unethical and illegal conduct of both firms and also their common heritage of ex-employees who were dismissed and now look back on their subsequent periods of unemployment with satisfaction as the beginning of their happiness and enlightened contentment.

The demise of the firm Finley Kumble in the 1980s carries with it the truth of the adage that one should be nice to people on your way up because you're sure to meet them again on your way down. Certainly there were no tears shed by their professional colleagues, all of whom had been victims of FK's abrasive discourtesy and hard-ball tactics.

Among their clients there was a marked reluctance to pay outstanding fees once the rumours of the fast-fading survival came to light and at this time the principals were negotiating their own futures seeking new positions elsewhere while reassuring staff and other partners that all was well and issuing emphatic denials of the firm's deep financial troubles. The message of closure of the newly-opened London office was delivered by the champagne-drinking Concorde-travelling partner who saw no reason to stint while the firm was going down the gurgler. The headline in Steve Brill's *American Lawyer* said it all: "Bye-Bye FK — The Firm Everyone Loves to Hate is Falling Apart."

In their time both Finley and Kumble had screwed their employers, their partners, their adversaries, their employees, their collegiate law firms (when acting on the same side) and their clients. Kumble's dictum regarding clients was to find its way into *The Oxford Dictionary of American Legal Quotations* (1993):

> Praise the adversary. He is the catalyst by which you bill your client. Damn the client. He is your true enemy.

And he reprimanded the firm's Miami partner for not insisting on a top dollar minimum retainer from Kumble's own aunt who had sought assistance on a minor problem: "Aunt, schmaunt," said Kumble, "if she can't pay her retainer, she can go elsewhere." Truly, FK was scrupulously fair — they screwed everybody equally without fear or favour.

The fear and loathing engendered by the firm was reflected internally. Andrew Heine was recruited specifically to head up the firm's litigation department. In his first days at the firm he seemed particularly nervous. Partners informed him that they had a million-dollar "key man" insurance policy on Kumble, lest anything happen to their primary rainmaker. Heine listened with interest. But he was so accustomed to being disliked that he began to tremble when it was suggested that a similar policy be taken out on him. "One of you bastards will push me out the window," said Heine with no hint of joking.

Prior to the firm's collapse it was unable to collect its debts and as a consequence its liabilities at the collapse blew out to $83 million. One of the partners had presciently observed, "When word gets out that we are wounded, we're going to have a hell of a time collecting our bills. People hate to pay their lawyers. What they hate worse is to pay their ex-lawyers." Less than two years previously, when the firm was the second largest in America (behind Baker & McKenzie) it had splurged $11 million on renovating its New York office.

An opposing lawyer was to tell his concurring client, "I don't know what we'll eventually get, but winning a dollar from these bastards (Finley Kumble) will feel like a dollar and a half from anybody else."

While one can understand the *schadenfreude* enjoyed by FK's "victims" one must also feel some sympathy for partner Davis Ellsworth who had paid $322,000 into FK to join the partnership in January 1987 because his previous firm had "overborrowed itself to death". Thirteen months later his capital contribution was gone and he was jointly liable for the firm's debts which, if apportioned equally, averaged out at more than $415,000 for each of the 200 partners.

In Eisler's introduction to his book he summarised FK's contribution with:

> [t]heir concepts and practices transformed law from a gentlemen's profession into a coldhearted business. But Finley Kumble's big-and-tough public image masked the Keystone Cops manner in which the firm's managers lurched from crisis to crisis.

I think it a fair conjecture that the FK story, its successful growth and subsequent rapid failure spanning less than two decades, would provide quite a few entries for a later edition of the OBLA or any other anthology of legal anecdotes.

Launch of the Trust for Young Australians Photographic Exhibition

At the Federal Court on 22 November 2004

Chief Justice Black

Caption.

DISTINGUISHED guests, including my judicial colleagues, and including of course the teacher at Warrego School, Mr Colin Baker, children of Warrego, and the grandmother and great grandmother who are here with the children.

May I invite you to accompany me for the next 10 minutes or so on a journey. To some extent it is a personal journey but it is the sort of journey that will be familiar to you all. It is the journey that I will illustrate with events — with slides if you will. It is a journey that arrives here in the Commonwealth Law Courts building in Melbourne, but which I hope does not end here.

The journey begins in a sultry day at Nowalangi when a sudden and violent rush of wind down the escarpment seemed to give a deep significance to the stories I was being told about the rock paintings. Not long after that, I had the privilege of being present, as a Chief Justice, at the opening of the Supreme Court of the Northern Territory. Those of you who know the building will have seen a wonderful mosaic of Venetian glass that forms the floor of the central part of the main hall.

The mosaic depicts the dreamtime legend of the seven Napaljarri sisters who travelled through Wirlpiri country pursued by a Jackamarra man. They eluded their pursuer by flying into the sky, where they travel forever across the Milky Way. They are Seven Sisters of the Milky Way. It is a very beautiful work. But what makes the mosaic particularly memorable in my mind is the memory of the dancing by men and women from Kormilda College at Darwin, some of them from the Roper River country near Mataranka, and some of them from south of Nhulunbuy. They danced on, and over, the mosaic on that memorable day in December 1991. What is also memorable was the way in which the artist, Norah Napaljarri Nelson, from Yuendumu, spoke about her work. The depth and beauty of the experience, and the way in which it was described by the artist, was unforgettable.

Tom Pauling, the Solicitor-General for the Northern Territory, said to me afterwards that it should be the beginning of a long journey. He also said that it would never leave one the same.

I was reminded of that dancing and the singing some years later when, *Mabo* having been decided, our Court began to hear native title cases. In a step of which I am rather proud, and which we took collegially, the Court amended its Rules so as to acknowledge that evidence might be taken by way of dance, by way of song or by way of telling stories. (We also amended our Rules to make it clear that evidence could be given by groups of people, according to the Aboriginal way.)

I thought of this later still, not many years ago, when I was at Yolgnu in north-eastern Arnhem Land as a speaker at the Garma Festival. I was there as a Balanda "law man". It was late in the afternoon and women from the remote Wessel Islands performed a dance that is traditionally performed in the evening, as the sun goes down. It was a dance that reminded me of a large flower slowly closing its petals as the daylight fades. The dance, was plainly deeply rooted in the history and culture of the dancers. It was immensely moving, and unforgettable.

Cross-cultural comparisons are very dangerous but permit me to say that it was the equal of the dying swan in a performance of Swan Lake. Probably, it was more profound, for reasons that I think we will all readily appreciate.

The photographer Josephine Kuperholz and children from Warrego who are the subject of the photographs show Chief Justice Black around the exhibition.

Let me show one or two other slides before we come south again.

This time we are on the edge of the Great Victoria Desert where the evidence is that the stories of the desert people reflect, as a form of mythologised history, the rising of the waters at the end of the last Great Ice Age when the sea encroached upon the Nullarbor Plain. That was over 7000 years ago.

So one cannot but have wonder and respect for the people and the culture of those indigenous Australians with whom we share this ancient land.

And then I come back to Melbourne. I open the newspaper and I read — as I read every year — that the life expectancy of the general Australian population is going up and is now something like 77 years at birth for males. I read that the life expectancy of Aboriginal and Torres Strait Islander men is 56.3 years, a difference of 20.7 years, and an inequality gap that is increasing per year. The figures for females are better, but the inequality gap is increasing at a faster rate.

The story that then unfolded about the Warrego Primary School, about its remarkable Principal, Colin Baker, and his wife Sandra, and about the local community was and is truly inspiring.

Infant mortality figures are 19.2, per thousand infants in the Northern Territory compared with eight for indigenous Canadians and compared with 4.6 for non-indigenous Australians. Detention rates are quite appallingly disproportionate. And so it goes on.

I read figures of this nature every year.

As I have mentioned, some of the figures are getting worse.

When one reads these figures and when one is aware — as a practical person living in the real world, that there are dreadful problems — the natural reaction is to ask is there some great plan that can change this? Is there some series of points and policies that we can believe in and work for? Is there some great vision?

I suppose that people in public life, and perhaps particularly lawyers — and possibly scientists as well — are keen to find fundamental principles. The scientists search for a "theory of everything". We search for principles which, if properly applied, will solve problems.

I suppose we are all keen, too, to ask the experts — "You know all about this, what do you advise?"

Then we get disillusioned when the answers are not simple. Or there may be no answers at all.

These are, rightly, matters of the gravest concern to all of us.

There is a functioning school in this community ... It has exceptional rates of attendance. It has exceptional improvements in literacy and numeracy. It has wonderful children who are enthusiastic about going to school.

And so it is that in this troubled state of mind, I was fortunate enough to have been asked if the Court would host an exhibition of photographs by a distinguished photographer of whom I knew, Josephine Kuperholz, about a school of which I knew nothing except that it was a place where remarkable things had been done.

I also knew that my friend and colleague David Angel, had hosted an exhibition of great photographs, by Josephine Kuperholz, in that building where our journey today began. In the Supreme Court of the Northern Territory there are many fine works as well as the Seven Sisters mosaic, and the Court there sees itself as a place in which exhibitions of art and other public purposes may be served.

Dr Sykes may not have realised it at the time, but there was no way in which her request could have failed.

The story that then unfolded about the Warrego Primary School, about its remarkable Principal, Colin Baker, and his wife Sandra, and about the local community was and is truly inspiring.

Through the work of these people and the community, and with the support of the Trust for Young Australians, quite remarkable things have happened.

There is a functioning school in this community. It is tiny, but its story is wonderful. It has exceptional rates of attendance. It has exceptional improvements in literacy and numeracy. It has wonderful children who are enthusiastic about going to school. They are developing skills that have not been available to others.

Suddenly one is reminded of the truth that a huge change for the good can come about from small things. One is reminded too that an aggregation of small things can change the world. In one sense, of course, the Warrego School is not a small thing — it is a very big thing, just involving very few people. But viewed as a small thing, based upon the goodwill of some and the imaginative application of a charitable fund, may we not see through the gloom something of the way for the future? We see the immense value of the work of individuals even in circumstances that might otherwise bring about despair.

I had the pleasure of seeing the photographs at lunchtime today. I venture the suggestion that they are technically brilliant and also very moving. I am delighted that the photographer, the photographs, the Principal and children of the Warrego School along with their grandmother and great grandmother have chosen to have their exhibition "Leadership at Warrego" in our wonderful Commonwealth Law Courts building, here in Melbourne.

And what better title than "Leadership at Warrego". Surely this is leadership of the most inspiring and important kind. But we must support it.

Let there be hundreds of Warregos!

It is now my privilege and my pleasure to declare the exhibition of photographs by Josephine Kuperholz "Leadership at Warrego" open.

If you would like to assist the children at Warrego School please send donations to Dr Helen Sykes, Trust for Young Australian, 5 St Vincent Place, Albert Park 3206, T 96457977. All donation are tax deductible.

Mother's Passion

RECENTLY Australians (or a small sample of them) voted for Australia's favourite words. In first place, apparently, came *mother*, followed by *passion*. It is a little surprising that people have favourite words: words, as Johnson observed "are the daughters of earth, while things are the sons of heaven". Words are simply the signifiers of things; they are groups of letters, marks on a page. They mean, as Humpty Dumpty said, what we want them to mean (at least, so long as enough of us agree what we want them to mean).

While some words make nice shapes on the page, and some words sound pleasant, the idea that a word itself may be a subject of affection is interesting and a little curious. This is no criticism: I have my own favourite words. But what is it that appeals to us: the words themselves, or the images, ideas and associations they carry?

Most mothers I have met seem to be very nice people, but I am not terribly enthusiastic about the word itself. *Mother* is not particularly attractive in sound or appearance: but for most people, at most times, it is a word highly charged with meaning and association. Many other words, such as *brother*, *friend* and *love* have strong, evocative associations; likewise *death*, *terrorist*, and in a past age, *Communist*).

The power and popularity of *mother* is probably because, for most of us, it is a word whose powerful and favourable associations trace back to our earliest years. After those early formative years experience diverges. So, for example, Oedipus and Hamlet probably did not have identical views about mothers.

From the 11th to the 16th century, *mother* was variously spelled *modder* or *mudder* or *moder*. Its primary meaning has been stable always and its figurative extensions are obvious (*mother country*, *mother earth* and *mother church* all carry the sense of deep affection and nurturing associated with motherhood). The word for mother has a similar sound and shape in many languages: *Mutter* (German), *moeder* (Dutch), *moder* (Swedish and Danish), *matka* (Polish and Czech, *majka* (Serbo-Croat), *mat* (Russian), *mitera* (Greek) and *muter* (Yiddish). In Swahili the word is *mama*: thought to be the first sound uttered by human infants, this is an informal alternative in many languages. Only Swahili is sensible enough to adopt it as the formal word for *mother*.

There are one or two less happy meanings of the word. Francis Grose (1811) recognizes *mother* as slang for a bawd and also for the owner of a bawdy house. Modern American slang uses *mother* as meaning *mother fucker*. This is generally reckoned a harsh term. When saying *mother* in America, context is everything.

But there is another very odd meaning of *mother* in standard English: "Dregs, scum. In the 16th century the dregs or scum of oil; later applied chiefly to the scum rising to the surface of fermenting liquors." (OED2). Happily, this meaning seems to have died out in the mid-19th century. However, the same sense is still current in the compounds *mother of vinegar*: "a ropy mucilaginous substance produced in vinegar during the process of acetous fermentation", and *mother of grapes*: the solid mass of skins, etc., left after the grapes have been pressed. Eric Partridge speculates that these meanings may have arisen from the early similarity between *mudder* and *mud*. I do not know whether this usage accounts for the recent expression "mother of all wars" etc. Still, the core signification of *mother* seems secure, if the Australian vote is any guide.

Passion is a more interesting choice as a favoured word. Its most commonly accepted primary meaning now is an overpowering feeling or emotion, or strong sexual affection. Dorothy Parker, sharp-eyed and bitter, wrote in 1937:

> By the time you say you're his,
> Shivering and sighing
> And he vows his passion is
> Infinite, undying
> Lady, make a note of this:
> One of you is lying.

Passion is comfortably at home in that verse, but it only got there after a long journey, and its siblings and cousins have

also travelled far on other, intersecting, paths.

Latin *pati — pass-* means to suffer. From this we get *passion*: originally a painful affliction or suffering. It took on a primary association with the suffering of Christ on the Cross. Thus the Passion Plays tell of Christ's suffering as the central event of the Easter story, and that story is also the subject of some of the finest and purest of Bach's music: the St John Passion, and the St Matthew Passion.

Pati- also led to *patient* which originally meant enduring pain, affliction etc. without discontent or complaint. Later it came to mean long-suffering, forbearing, or calmly expectant.

The passionfruit was once a common and profligate ornament on garden sheds and sunny fences. It is now an expensive seasonal fruit for all those in whose gardens practicality has yielded to fashion. The passionfruit is so called because its flower contains within it the shape of the cross.

The original sense of *passion* is preserved in *compassion*: literally *suffering with*. No-one would use *compassion* as suggesting sexual affection, although that is a strong element of *passion* as it is commonly understood today.

The Greek *patho-* is almost identical in meaning with *pati-*. It means suffering or illness. *Pathos* has been naturalized in English, meaning the characteristic of speech, writing, music, or art which arouses a feeling of pity or sadness etc. It is not to be confused with *bathos*, which is a ludicrous descent from the sublime to the ridiculous. *Bathos* is a Greek word meaning deep: it is preserved in *bathysphere*, a spherical vessel specially adapted to surviving at great depths in the ocean.

From the Greek *patho-* we also have *pathetic* which properly signifies something which affects the emotions, especially producing a sense of sadness. However, *pathetic* has slipped in the world and can now have an edge of derision or scorn: the sense of pitiability is present, but so is the suggestion that the object of pity is responsible for their own plight. The observation that a footballer *played a pathetic game or made a pathetic effort* conveys no sense of sympathy. This use of *pathetic* is quite common and is displacing its original sense, which is never scornful of the subject.

The modern meanings of *pathetic* have led to some confusion over the expression *pathetic fallacy*. This was first coined in 1856 by John Ruskin, in *Modern Painting*, volume III: "All violent feelings … produce … a falseness in … impressions of external things, which I would generally characterize as the 'Pathetic fallacy'". The *pathetic fallacy* is the error of attributing feelings to non-human objects. It is especially seen among owners of pets who attribute to their dog, budgie or guppy the most sophisticated and nuanced emotions, based on slim evidence and great hopes.

Just as the primary meaning of *passion* has shifted whilst *compassion* remains true to its origins, so *pathetic* has slipped but *sympathy* still bears its original sense at close to full value. *Sympathy* is, etymologically, an exact synonym for *compassion*: each means *suffering with*. However, they are not interchangeable. *Compassion* is stronger, because it has only one meaning. *Sympathy* was weaker in its original sense, which is an affinity between things by virtue of which they are similarly affected by the same influence. So one person responds to another's bereavement in like manner as the person bereaved (a polite fiction, mostly). But equally, currencies can move in sympathy with interest rates or oil prices. *Sympathy* is good, *compassion* is nobler and truer. It is out of favour today, as betokening the bleeding heart.

Pati- gives us *patient* in its other sense: the person suffering a disease and receiving treatment. This presents a nice symmetry, because *patho-* also gives us *pathology*: knowledge of diseases, and the various disease-related words ending *–pathy*, such as *adenopathy* (diseases of the glandular system); *arthropathy* (disease of the joints: now ousted, linguistically, by *arthritis* etc.); *homeopathy* (the theory of treatment by minuscule quantities of an active ingredient, for example truth in politics); *naturopathy* (the theory that disease can be cured by natural agents); *osteopathy* (disease of the bones); and *psychopathy* (disease of the mind). The commonest form of this derivation is in *psychopath*, which in lay terms means a person of deranged mind, but technically refers to a specific cluster of mental symptoms which were described in detail in Hervey Cleckley's book *The Mask of Sanity*. They centre on a near-complete absence of emotional feeling: no ability to feel sympathy, empathy or *eupathy* ("a happy condition of the soul").

The psychopath derives virtually no emotional response from actions which would fill normal people with disgust, loathing or regret. Medea was probably a psychopath, and her children, if given the chance to vote for their favourite word, might have voted for *passion* or *pathos* ahead of *mother*.

Julian Burnside

The Bar's Children's Christmas Party

Santa Claus and the kids.

The southern hemisphere is a contrary place, weather-wise at Christmas. It always turns on a hot and humid day for Santa's special arrival at the Botanic Gardens. It is as if the gods want to make things hot and sweaty for Santa's visit to the offspring of the Victorian Bar.

IT was no different this year, hot and sultry as usual. A pinkish Santa (under his splendid beard and hair, the property of the Victorian Bar) was carted to the Rose Pavilion in the gardens by a youngish ranger who happened to lose her keys, but managed to start the cart with Paul Connor's key to his chambers. Santa was a little upset to find on his arrival that some atheist had parked his red car in the space that the elves had set aside for Santa's sleigh and totally ignored the signs "No Parking. Reserved for Reindeer". Some believed that this was a deliberate ploy by the *Australian* newspaper to disrupt the barristers' Christmas party and that the red valiant belonged to one of its journalists. It is common knowledge that the *Australian* views such occasions as Christmas parties for barristers' children as another example of the lazy guild, that is the Victorian Bar, going on yet another junket. Why should barristers have Sundays off? Why should their privileged children get presents? There should be a tax audit on all who attended to see whether they were claiming the party expenses as a tax deduction, and were there judges present enjoying more of their very lazy holidays paid for by the tax payer? In any case Mrs Claus had to drive Rudolph and friends around and around the gardens until Santa was finished and free to give out presents to the solicitors' children.

But nothing the media could say could spoil the enjoyment of the children. And so many there were, young and not so young and eager.

As the photographs on these pages testify, even the Shadow Attorney-General came along to ask for a present. Santa told him that he would have to wait a few years for his really big present but that he would have to make do with his child's present, a gold embossed copy of Hansard featuring the great parliamentary speeches of Andrew Mclntosh.

The photographs further testify to many happy offspring of the Bar who enjoyed a traditional and congenial afternoon. Many of the presents were put to use immediately. Paul Connor, the new organiser, after the retirement of Michael Gronow, must be thanked for all his efforts in getting Santa there and making sure everyone got lollies and a present. The Bar's Santa suit is available for hire to like-minded guilds including the journalists' union.

Antonia Samargis plays with her bubble gun.

Paul Elliott QC as Santa Claus hands out lollies to the youngsters.

But nothing really changes. Although Twister the clown and Milo the magi-

Robbie McIntosh.

Isabella Combes and Fran.

Samuel Combes about to open his present.

Patrick Southey and daughters Scarlett, 5, and Pip, 3.

Paul Connor and son Michael, 7, duel with balloon swords made by Paul.

Danny Masel with Alex and Patricia.

James Paterson with his children Mack, Henrietta, Oliver and Fletcher.

Ian Stewart, Francis and Florence.

Fletcher Paterson shows his sister Henrietta how to operate his spinning top.

Santa Claus arrives at the Rose Pavilion

The Shadow Attorney-General asks for a present.

15-month-old Davier Belmar on the shoulders of Sophie Osborn with Santa. Claus.

cian were not available because of their Australian Idol commitments, and therefore did not drive away without Santa, alas the ranger forgot to pick up the now very red Santa after the gifts were given, and the lollies devoured, so he trudged wearily back to the spot where the red valiant sat instead of the red-nosed reindeer to continue his toils until the great day. To be politically correct he waved farewell and wished everyone "Holiday Greetings".

Here There Be Dragons …

Carolyn Sparke and Nick Kalogeropoulos

The Australian Corporate games, held on the weekend of 20 November 2004 featured, among other sports, Dragon Boat racing. Nick Kalogeropoulos, the manager of the Essoign club, put together a mixed team of barristers (who answered the flyers he put up around chambers) and Essoign staff, almost all without any Dragon Boat experience, to compete at the games. It was a hilarious, if not entirely successful day, as the following article explains.

WELL it wasn't quite the edge of the world but at Docklands on 20 November 2004 the intrepid crew of the *Essoign Dragon Boat* took to the water. Hardworking, committed (after all they had been to two whole training sessions) and enthusiastic, the day was hilarious, even if unsuccessful.

The intrepid band, led by Nick Kalogeropoulos, consisted of a mixed bag of barristers and Essoign staff. Many hardy souls — Alexandra Richards, Sion Turner, Amber Harris, Arushan Pillay, Bruce Nibbs, Rufus Daniell, Carolyn Sparke, Colin Harris, Fiona McLeod, Jacob Fronistas, Nha Nguyen, Stephen Roseman, Teri Konstantinou, Chris Carter, Lisa Marretta, Anita Perry, Karen Seow and Pieboy (Rodney Storey) mingled happily — a hearty crew (especially Bruce) if ever we saw one.

First the training — two whole training sessions — how professional is that? Was this team committed or what? The first training session, held on a cool Melbourne night, honed everyone's skills as they learned to "dig in the paddles", lean out rather than in and reduce the amount of scooping and splashing on the people behind. By the end of the evening, Greg "the super coach" was complimenting everyone on their skills. After five beers he was still complimenting everyone on their skills. A warm glow was had by all.

A week later, the next training session (only five sleeps to go). With the great assistance of Stephen Blewett of the Bar (there are hidden skills everywhere among the denizens of Owen Dixon) the newcomers were schooled in who to watch and how to rock and by the end of the session we were feeling quietly confident. We had learned to watch the people at the front of the boat, paddle in time with them, how to paddle fast and how to paddle long and hard, as well as rocking in time with the paddling to help the boat surging forward. Stephen kept urging us that we had to have "a good start". After all, with the dragon boats and the 21 bodies on board weighing a tonne and a half of weight, a good start to overcome all that inertia is extremely important.

The Fearless Dragon Boaters of 2004: (back row) Lisa Marretta, Anita Perry, Sion Turner, Ryan (Mascot); (middle row) Alexandra Richards QC, Karen Seow, Amber Harris, Arushan Pillay, Teri Konstantinou, Nha Nguyen, Bruce Nibbs, Colin Harris, Rodney Storey, Stephen Roseman, Jacob Fronistas; (front row) Rufus Daniell, Chris Carter, Carolyn Sparke, Fiona McLeod S.C, Nicholas Kalogeropoulos

We knew we were amateurs, we knew we were in for a good time, and we quietly thought we might actually do well.

Race day arrived … Nick arrived early full of encouragement. A few of the others arrived early full of enthusiasm but without their ID tags. A mercy dash back to the Sports and Aquatic Centre so they could get substitute ID tags, a few latecomers and panic was starting to set in. Lisa and Rodney and Nick had made a stupendous effort providing the mobile Essoign trolley full of sandwiches, quiches and alcohol (!) for the assembled crew. But nonetheless we still didn't have a full team. Ten minutes to race time … the skies clouded over, no sign of our stragglers. We line up hopefully at the quay, hoping that they arrive in time for us to actually get on a boat without forfeiting the first round. One minute to race time … the last bodies run down the quay and jump on board. We are completely unbalanced, everyone

The elusive orange buoy that resulted in the team filling a protest with the officials.

sitting in places they are unfamiliar with and the boat threatens to tip over at every stroke.

As one witty member of the crew pointed out, a few of our number had been

All strapped in and ready to race!

"in Essoign" (unavoidably detained, of course!). Nonetheless we managed to get to the starting line without tipping over. The anxious moments of the start of lining the boats up getting ready to go …, followed by "10 seconds to start" … "ready" … "pop" a stunned silence settled across everyone followed by the announcer saying "well …. go". The expected starting gun was more of a fizzle. However, we got into it, full steam ahead.

The races last about a minute and a half, (well they do if you are us, anyway). It's a very long minute and a half and we all felt we were all about to hit the water about 20 times during that particular race. When everyone rows in time, it is a joy to behold. The boat surges underneath, everyone rocks in time and it is literally a "well oiled machine". On this particular occasion we had the "caterpillar" affect where the caterpillar had been the victim of some bizarre personal injury. We were all over the place.

We finished the race in 1 minute 18 seconds. The winner had finished in about one minute and eight seconds. All right, so there was room to improve. As our fearsome leader pronounced "it can only get better from here". During the break we did some carbo loading (thanks, Lisa, for the brilliant sandwiches — we can all highly recommend breakfast, lunch or dinner at the Essoign any time). We lined up, balanced our weights, reminded ourselves that we ought to be rocking in time, watching the front and generally geared up for what was going to be a much better second race.

An hour later the race was on again. Buoyed with new-found confidence and a newly balanced boat, we headed for the start. We almost managed it — slow and steady and basically in time we headed for the starting line. We were there in good time and seemed to have it under control. Again, the starter's gun, this time a fully fledged "bang!" We were off! ... well … in a kind a shambling and rambling way, we were off. There were moments when the boat did surge just as it was supposed to, but others felt we were about to land in the drink. Try as we might we began badly again although this time it seemed we were gaining. Again a noble last.

However, in the second race we finished in one minute 17 — managing to shave a full second off our last place time.

Between races Nick encouraged us. After all, in the other races (there were other races staggered during the course of the morning) the losers had finished by much slower times than we had. We were not the slowest team on the day and we were exceedingly well dressed and very enthusiastic. As an aside — many thanks to Fiona McLeod's husband Livio Andolfotto, for hours of hard work and enthusiasm creating a fabulous set of matching "the Essoign" T-shirts, complete with dancing barristers.

Stylish and enthusiastic, we were not to be beaten.

After some more carbo-loading the decision was made that, given our last placing in the competition the only thing left was a bit of piracy — to board some of the other dragon boats.

The third heat was on. We were relaxed, although not necessarily confident. We had a new "sweep" this time — a stern voice giving us excellent guidance.

We learned later he was a member of the navy team. We had thoroughly disheartened ourselves between races watching the navy team. They were a genuine well-oiled machine — paddling in complete unison with long strong strokes, they finished their heat in 58 seconds. (It doesn't seem human to finish the race in such a short time and leave everyone else for dead. We figured they were on steroids, practising in their spare time, and probably faced uncertain disciplinary techniques if they were to lose.

In our third race — a protest!

After getting in place, waiting for the other boats to line up at the start, a gentle cross wind blew us sideways into the floating buoy which marked the starting line. Once the gun went, half of us were off and others had their hands in the air to signal that they were not ready. Neither the starter nor the sweep saw the hands and we continued paddling. With the right hand side of the boat unable to paddle past the float it was always going to be a shambles. Be that as it may, with style and panache we finished that heat again with enthusiasm although we added 0.1 seconds onto our previous time — finishing in one minute 17.1 seconds.

Then it was on for young and old — the

sight of Alex Richards in full fury outlining the exact nature of the protest to an official, who was desperately trying to defend herself was quite a sight to see. Most of us were clustered around her although only a few were actively arguing. As one member of the crew wryly noted, with two silks and a hand full a juniors floating around, "I wonder what that protest cost?" A few of us were wondering which tribunal would deal with the protest. A valiant effort was made by Alex and Nick but turned down at the end of the day. All of us suspected we had legitimate grounds for protest but wondered whether the fact that we had come last, last and last may have had something to do with knocking the protest back.

The day finished on an extremely enthusiastic note — the Telstra team had tipped their boat over — at least we had not actually fallen in the water.

Many of the teams who were now limbering up for the finals performed a variety of exercises, chants, and bonding techniques. Many of these were interrupted by various of our crew sending puppies into the centre of their teams; Sion doing a very respectable and somewhat rude rap dancing moment; chanting with enthusiasm about ourselves and derogation of others and generally carrying on with a fair bit of bad behaviour. We felt we were doing a public service as it was important at all times when racing not to be distracted by the noise and rhythm of boats on either side. We were therefore assisting these teams with their concentration techniques.

It was a very funny day and a great bonding experience.

Many of us forget that the staff of the Essoign Club see more of some of us than do our families at home. The Club is an integral part of our life at the Bar and we are an integral part of the Club's life. Nick did a great job organising a crew and lending enthusiastic leadership in a way that made us all feel like we were out to have a good time, achieve something competitive and get to know the people "on the other side" a bit more personally.

There was much talk about entering into more regular competition — rowing on the Yarra or possibly even more dragon boating. There was also more talk about other competitions. Colin is a triathlete, there are runners and cyclists in the group and there was a great deal of enthusiasm at the prospect of a billy cart race. With any luck Nick has begun a great tradition of shared team activities at Owen Dixon.

Victorian Bar Superannuation Fund: Chairman's Report

Extract from the Chairman's report at the forty-fifth Annual General Meeting of the Victorian Bar Superannuation Fund held 9 November, 2004.

PAST CHAIRMAN

I would like to say something about our past chairman, Ross Robson QC. Ross did not stand at the last elections.

A motion of appreciation was passed at the 2003 AGM. However, little was said of the great service that Ross provided to the Fund over 23 years.

In 1980, when I was a member of the Bar Council, I put forward Ross's name as a suitable trustee. I had known Ross well since first year at Melbourne University. I have a lot of respect for his commercial acumen and judgement. Fortunately for the Fund, Ross accepted the Council's invitation to act as a trustee.

At that time Sir James Tait was still Chairman. The Fund's assets were about $1 million. Now they are about $110 million. The trustees picked the stocks. Little, if any, research was done. Brokers' advice was sometimes taken but mostly ignored. From those days the Fund has come a long way. The use of professional managers and later asset class specialist managers, the appointment of an asset consultant/investment advisor, member investment choice and unitisation of members' investments all happened while Ross was a trustee. He was Chairman from November 1997 to October 2003, replacing Dr Ian Spry QC.

I remember that Ross played a significant role in the trustees' very important decision not to accept Barristers Chambers' invitation to invest in Four Court Chambers, now Douglas Menzies Chambers. This was a very sound decision and typical of his contribution to the Fund. The value of the property fell significantly afterwards. In any event, a large real estate investment would not have been a suitable one for a small superannuation fund like ours.

Ross Robson QC.

Throughout all these developments Ross displayed the great commercial judgement that I mentioned earlier.

The Fund and the Bar is indebted to him for this distinguished service.

Philip Kennon QC
Chairman

The Readers' Course

Paul Santamaria, Chairman, Readers Course Sub-Committee

IN 2004, about 100 men and women signed the Roll of Counsel. That was the result of the decision of the Bar Council in 2003 to increase the number of places in the Readers' Course from 40 to 50 places for each of the March and September courses, in response to the apparently increasing demand of persons wishing to become barristers.

In fact, in each of the March and September 2004 courses, about 55 readers undertook the Course; the additional readers were lawyers from Vanuatu, the Solomon Islands and Papua New Guinea. Since 1987, the Victorian Bar has taught advocacy to 89 lawyers from countries in the Pacific region. It is the only Bar to do so; equally, it is important that the Bar continues making its own modest contribution to the acquisition of legal skills, in particular, of advocacy in developing countries near to Australia.

As at August 2004, there were 142 persons on the waiting list for places in the Readers' Course. During this year, the Bar Council considered whether the demand for places in the Course could be ameliorated by the introduction of a third Readers' Course. The Readers' Course Sub-Committee of the Bar examined the possibility of conducting a third Course; ultimately it recommended to the Bar Council that there should not be three Readers' Courses and that the status quo should continue for the foreseeable future. The Bar Council adopted that recommendation. In the meantime, the Applications Review Committee revamped the relevant regulations governing the way in which applications would be received by the Bar and the system by which places would be allocated to applicants, with the purpose of achieving greater equity and certainty for applicants.

The Sub-Committee concluded that the waiting period of 12 months or so was not unreasonable. Moreover, it was not feasible to introduce a third course, in view of the substantially increased demands on mentors and teachers in the Course, which would necessarily have straddled the July vacation. In short, it was expecting too much to expect judges and barristers to contribute three times a year, on top of their existing voluntary contributions to the Course and their own work load.

The Readers' Committee of the Bar continues to learn from its experience and to subject the Course to its own scrutiny and criticism. The Committee seeks to achieve the appropriate balance between sound instruction in the course of criminal and civil trials and active practical advocacy. We aim to get readers up on their feet, not with a lot of notice to prepare, and to prosecute and defend, to appear for plaintiffs and defendants.

Over the last 18 months or so, the Committee recommended to the Bar Council that the duration of the Readers' Course be reduced from three months to a shorter period. A common criticism of the Course expressed by some mentors and readers was that there was too much "lay about" time and that many readers' financial situation made it imperative for them to be able to commence accepting briefs earlier.

In March 2004, the duration of the Course was nine weeks; in September 2004, the Course was 10 weeks. The Committee believes that 10 weeks enables the Course objectives to be achieved and for readers to be able to obtain a solid grounding in advocacy in that time.

The content of the Course evolves over time. The emphasis in the curriculum has always been to teach advocacy by having the readers undertake a multitude of moot courses and practical sessions. In the last two intakes, the readers have also received additional instruction in the structure and procedures of criminal and civil trials. For example, Justice William Gillard has taken the session "The Opening Address" of a civil trial; retired Justice of Appeal Robert Brooking has taken the session on "The Closing Address" in a civil trial. Justice David Byrne has continued to take several sessions on evidence in each Course including the all-but impenetrable topic of cross-examination on documents. For several years, readers have enjoyed the substantial benefit of the active instruction of Justice Ken Hayne of the High Court, Chief Justice Black (a former Chair of the Readers' Course Committee), Justice Gray, Chief Justice Warren (who has taken seminars on ethics in company with Justices Buchanan and Harper), Justices of Appeal Charles and Eames, Justices Coldrey, William and Morris, and Judges Curtain and Gaynor. Without Max Perry, the Course would be robbed of many moments of wit and sardonic humour – mostly at the expense of others – and a good measure of sound instruction in criminal advocacy. The present Course capitalises on the wisdom and experience of those who have been involved in advocacy instruction over many years. To name only one person is probably unfair; but one cannot fairly overlook the substantial contribution of retired Justice George Hampel, presently the Professor of Law, International Institute of Forensic Studies, Monash University (often sitting in Prato, Italy).

Much could be said about the strong commitment of judges, and senior and junior barristers to the teaching of advocacy in the Course. I do not believe that there is another advocacy course in Australia which is as intense over such a period of about two months. For the Committee, an especially gratifying feature is the support given to the Course by the Chief Justices of the Federal Court and the Supreme Court,

Paul Santamaria.

the Chief Judge of the County Court and the Chief Magistrate. Again, I suspect that no other course in Australia enjoys that measure of support, which is so important in a variety of ways. The existence of that support lets readers know that the highest echelons of the legal profession in Victoria regard their instruction as advocates as important in the public interest and that readers are expected to achieve the highest standards in their performance as advocates and in discharging their ethical duties. There is no doubt either that the greater the involvement of judicial officers in the Course, the less intimidating their Courts will be for these new advocates starting off in their careers at the Bar.

By way of recent example, in March 2004 the Masters of the Supreme Court agreed to trial a moot court in a civil application before them. And so in March, four of the Masters agreed to sit as Moot Masters, starting at 4:30, straight after court. The exercise was a great success. With the success of that evening, the Committee decided that it should approach Chief Justice Black, Chief Justice Warren and Chief Judge Rozenes to see if they would be prepared to nominate groups of judges from each of their courts to conduct civil moots in their respective courts, on the final Thursday evening of the Course. We were delighted with their unanimous response; judges and masters were conscripted behind the scenes and the concept of the "Super Thursday" Moots bore fruit. With the co-operation of these judges, every single reader appeared in a superior court in a moot conducted by a judge or master in actual courtroom conditions. Accordingly, the Committee is grateful to Chief Justice Black, Justices Heerey, Finkelstein and Weinberg, Chief Justice Warren, Justices Williams and Hollingworth, Chief Justice Rozenes, Judges Wood, Anderson, Chettle and Lewitan as well as Masters Mahony, Wheeler, Evans and Kings who acted as the moot judges on this inaugural "Super Thursday". The Committee looks forward to the continued participation of their courts in our courses in 2005.

The Readers' Course is supervised and administered by Barbara Walsh, Elizabeth Rhodes and Deborah Morris. The Bar is fortunate to have them, because of their dedication to the needs of the readers and their commitment to ensuring that the standards, which the Course seeks to impart to the readers, are acknowledged and observed by the readers during their undertaking of the Course.

Wigs on Wheels Around the Bay

wigs on wheels
Victorian Bench and Bar Bicycle Users Group

AT 5.30 on a Sunday morning, most barristers would be asleep (or perhaps still partying). But not all! On 17 October members of Wigs on Wheels, with some relatives and friends, assembled on the steps of Owen Dixon Chambers West to set off from the Docklands starting line on the Smith Family/Bicycle Victoria "Around the Bay in a Day Ride".

Several hours later, considerably sore and tired but very satisfied, all of the WoW group made it back to Melbourne. The ride travelled over the West Gate Bridge to Geelong and Queenscliff, by ferry to Sorrento, and back to Melbourne, a total distance of 210 kilometres. A total of 8,904 riders participated, some riding in the opposite direction. It is a big corporate event; there were teams from many companies and government organisations, as well as from several Melbourne law firms.

Sore and tied but satisfied after 210 kms.

The Wigs on Wheels group (formally titled the Victorian Bench and Bar Bicycle Users Group) was convened in 2003 by David Levin QC to bring together judges, barristers, judges' associates and court administration staff interested in cycling, either as commuters or for leisure. The group has held three "Lycra Breakfasts" at the Essoign Club, the most recent on Ride to Work Day on 6 October 2004, organised a ride along the Lilydale to Warburton Rail Trail, and held bicycle maintenance evenings at Cecil Walker Cycles. Anyone interested in cycling is welcome to join Wigs on Wheels. No skill or previous experience is needed: to join just simply send an email to dlevin@vicbar.com.au and be added to the list. David Levin took his interest in cycling to a new level in 2004 by becoming a council member of Bicycle Victoria.

Realising that 210 kilometres in a day was a little more ambitious than riding to work, the WoW group organised some Sunday morning training rides (Port Melbourne to Frankston and back) starting in May. Peter Riordan S.C. did not need to attend these training rides, as he demonstrated on 17 October by dashing off on the dot of 5.30 and arriving back some hours ahead of the next rider in the WoW group.

On the day the starters (and finishers) were David Levin QC, Carolyn Sparke, Carey Nichol (and son Pat), David Parsons SC, Mark Dreyfus QC (with son Tom and friend Matthew Kaminsky), Peter Riordan S.C., Andrew Laird, John Buxton and Richard Harris.

Conditions on the day were near perfect — a temperature of 23 degrees, a very light breeze and light cloud clearing to a fine afternoon. The flaw in the day was a long wait for the ferry at Queenscliff — up to three hours for some, but sitting in the spring sunshine even this wasn't too difficult.

Several other Wigs on Wheels members rode with other groups, including Justice Peter Buchanan, Mark Goldblatt and David Curtain QC. Characteristically, Curtain QC organised not to wait for the ferry, having a private boat transport him from Queenscliff to Sorrento. WoW expect him to offer the boat to WoW members next year.

Verbatim

Sticky Business

Coram: Morrow J
L. Barker for Accused

Mr Delany: Could the witness be shown back the transaction documents. I think it's B and C.
His Honour: Yes.
Mr Delany: Would you look at those two documents, or look at the one that you made the notation on of the registration number, please. You see that one? Top left-hand corner of … ?
His Honour: Yes, pass it over here please for a minute?
Mr Delany: There are staples on these things Your Honour.
His Honour: They are exhibit stickers on it from the committal procedure is it?
Mr Delany: Yes, Your Honour.
His Honour: Well they shouldn't be there.
Mr Delany: Right, I will tear those off and get my instructor to tear the committal sticker off. (To witness): I want you to have a look at this.
His Honour: Someone has put an adhesive sticker on it. They should be shot.
Mr Delany: That might be a bit extreme Your Honour.
His Honour: I just can't understand why someone would disfigure an original document.

Having Moved Courts without Knowing!

County Court

23 August 2004
Judge Pannan and a jury of six.

Mr Scanlon: If Your Honour pleases, the matter is proceeding.
Her Honour: I'm sorry you finished up in the other Court, but this happens to us all the time. We never quite know where we are.
Mr Scanlon: We collectively apologise. We didn't look at the law list, any of us here, and we don't have a Jens defence, but we do apologise.
Her Honour: I did suggest to him last week, Mr Scanlon, that he'd be late for his own funeral.

History is Creepy

ABRAHAM Lincoln was elected to Congress in 1846. John F. Kennedy was elected to Congress in 1946. Abraham Lincoln was elected President in 1860. John F. Kennedy was elected President in 1960. Both were particularly concerned with civil rights.

Both wives lost their children while living in the White House. Both Presidents were shot on a Friday.

Both Presidents were shot in the head. Now it gets really weird.

Lincoln's Secretary was named Kennedy. Kennedy's Secretary was named Lincoln.

Both were assassinated by Southerners.

Both were succeeded by Southerners named Johnson. Andrew Johnson, who succeeded Lincoln, was born in 1808. Lyndon Johnson, who succeeded Kennedy, was born in 1908.

John Wilkes Booth, who assassinated Lincoln, was born in 1839. Lee Harvey Oswald, who assassinated Kennedy, was born in 1939.

Both assassins were known by their three names. Both names are composed of 15 letters.

Now hang on to your seat.

Lincoln was shot at the theater named "Ford". Kennedy was shot in a car called Lincoln made by "Ford".

Lincoln was shot in a theater and his assassin ran and hid in a warehouse. Kennedy was shot from a warehouse and his assassin ran and hid in a theater.

Booth and Oswald were assassinated before their trials.

And here's the kicker ...

A week before Lincoln was shot, he was in Monroe, Maryland. A week before Kennedy was shot, he was with Marilyn Monroe.

Creepy huh?

Wine Report in Association with the Essoign

By Andrew Bristow

Cape Mentelle Sauvignon Semillon 2004

THE 2004 Cape Mentelle Sauvignon Semillon (53 per cent Sauvignon, 47 per cent Semillon) from Margaret River in Western Australia is an excellent vintage as a result of the mild and dry conditions resulting in a long ripening period which has produced grapes of excellent flavour intensity.

The wine has a bouquet of passionfruit and citrus with a waft of vanilla derived from barrel fermentation.

The wine colour is a light lime, but will become a deep yellow with age.

The wine is creamy and textural, with vibrant, flamboyant citrus flavours that finish crisp and clean, with great length. It is ready to drink now and in particular over coming summer months as it drinks well cold. It will last for the next 3 to 5 years. It is available from The Essoign Club at $29.50 a bottle ($25.05 takeaway).

I would rate this wine as late-starting Barrister for large law firm, confident and seeking early appreciation now, but with some complexity and will not take much time to reach maturity.

Bar Hockey 2004

SYDNEY

WE repaired to Sydney to the Olympic No.2 ground to play the New South Wales Bar team on Saturday, 16 October 2004.

Although it had seemed that we would have lots of players, in the event we had 10, and were indebted by the loan to us from the New South Wales squad of a reasonably useful left inner.

This generosity was probably contributed to by the fact that New South Wales had about 15 players anyway, and the player just wanted a run.

This game was keenly contested, and the final score might well be said to have flattered us somewhat.

Following an even opening period, an interchange of passes between Gordon and Michael Tinney put Gordon free down the left wing and he advanced into the area and finished with a precise shot.

Shortly thereafter, we went 2–nil up through Andrew Tinney, and thus the matter stood at half time.

On a hot day, the advantage in numbers was clearly assisting New South Wales, and they pulled a good goal back, so that the result with about a quarter of the game to go seemed somewhat open.

In this respect, the New South Wales team was considerably assisted by the presence of Gunasama Niraswamy, a former (but not former enough) Fijian International and State League 1 player in Victoria, who has remained extremely fit.

Fortunately at this stage we received a penalty stroke which was taken by our ring-in, given a complete refusal of all of our stars to take the penalty themselves. At 3–1 up we were in control of the game, and Richard Clancy scored a further goal to seal a good 4–1 win.

A very pleasant and memorable dinner was thereafter held in Mosman, and New South Wales proved as always outstanding company both on and off the field.

All the Victorian Bar team played well, with Sharpley in goals perhaps the difference between the teams, with excellent performances from Clancy, Michael Tinney, Sexton and Gordon being particularly noteworthy.

The scales of Justice up.

Michael Tinney stars.

Bunchardt — an elegant swipe.

NSW attack

NSW–Victoria amity after the game.

Our supporter with Michael Tinney.

LAW INSTITUTE

Last year I wrote that if the solicitors got their game together we would be in trouble, and this year they did get their game together.

Confronted by not one but three State League 1 players, together with a squad of 15 of whom only three were over 30 (our squad has no one under 30, and only four under 40), we were in real trouble.

As with the New South Wales game, the final result was a bit misleading.

The score at half time was nil–nil, with Clancy aided in midfield by Tweedie and Parmenter who were additions to the Sydney squad; we were holding out very well.

Unfortunately, with about 20 minutes to go we took the lead, through Michael Tinney, and this appeared to infuriate the solicitors into even greater efforts. From a short corner they finally got the ball past Sharpley in goal, and my goal line save unfortunately trickled onto a foot. A penalty stroke to them and one all.

Soon after, they scored a further goal deflected unluckily into his own net by Niall.

We were still well in the game with five minutes to go, when following an unfortunate umpiring error, a turnover led to a third goal.

We thereafter threw caution to the winds and, of course, they managed to score two more goals in the last two minutes to win 5–1. A more accurate result would have been 3–l.

It will be all but impossible for us to defeat the solicitors until at least one or more of their State League 1 players defects to the Bar, if they continue this somewhat unsporting habit of sending out youthful striplings to compete with our relatively geriatric crew.

Nonetheless, the game was played to an even higher standard than previous years, and we can take considerable satisfaction from the fact that we were very competitive until effectively the last couple of minutes.

Once again, Sharpley in goal was outstanding. We missed Wood, who got as far as the touch line but didn't play, on the back line, and Clancy, Tweedie, the Tinneys, Sexton and Parmenter all played exceptionally well. No one disgraced themselves.

If this process of youthful selection by the Law Institute team continues, we will have to consider taking out some form of equal opportunity case based upon discrimination against those who are aged and who suffer from physical impairments associated with the aging process. Otherwise, it may take a while before the scales of justice returns to us.

Ben Stockman from the Doncaster State League 1 team won the Rupert Balfe Award for the second year running, and deservedly so. Running indeed is a word that comes very much to mind when one seeks to describe Stockman's all action style.

Before the game against LIV — confident.

After the game.

Where we excelled.

Drinks followed the game at the State Hockey Centre and we look forward to correcting the result (of the game) next year if we are able.

Those who played in Sydney were Sharpley, Niall, Dreyfus, Clancy, Sexton, Brear, Andrew Tinney, Michael Tinney, Gordon and me.

In the game against the Law Institute, all of those players played again, and were augmented by Appudurai, Tweedie, Parmenter and Morgan.

Philip Burchardt

Advanced and High Performance Driving

IN recent years I have enjoyed the benefits of being taught advanced and high performance driving techniques by genuine experts (which I thought I was until I did the course). I suspect there are plenty of barristers and judges with sports or high performance cars and a desire to enjoy them safely who would benefit from the knowledge these experts can teach.

The John Bowe Institute of Driving is a high-level teaching group on good driving technique and has been so for a number of years. As their website (www.johnbowe driving.com) indicates, John Bowe himself is a four-time Australian champion and has been at the top of Australian motor sport for over 20 years. He is the only race driver to win the Australian Drivers' Championship, Australian Sports Car Championship and Australian Touring Car Championship. In 2002 his appearance on the grid at the Canberra 400 was his 150th V8 Supercar start, making him fifth on the all time list.

Under John there is an experienced team of instructors led by David Cuff, all of whom have significant high-level motor racing experience. These instructors are also contracted by the Confederation of Australian Motor Sport (CAMS) to conduct the driver evaluation required for hopeful competitors to obtain their competition circuit racing licence.

The courses available include Advanced Driving and High Performance courses and it is necessary to have done the first before proceeding to the second. The courses run all day in your own car and involve a variety of practical teaching in all aspects of car control. Due to the way the courses are organised the risk of either mechanical or panel damage to vehicles is extremely low but chances of enjoying the experience are very high. The main Victorian venues for the courses are Calder Raceway, Sandown International Raceway and Winton Motor Raceway (near Benalla). I have recently suggested to David Cuff that in 2005 he might consider conducting a specialist day for members of the Bar and Judiciary who are interested. He has agreed if there are sufficient numbers of people participating.

At present it is tentatively proposed to conduct courses for barristers and judges as follows:

- Advanced driving course at Calder Raceway on Thursday 3 March 2005 at a cost of $265.00.
- A subsequent High Performance course at Calder Raceway on Thursday 14 April 2005 at a cost of $350.00.

These events can only be held if there is a sufficient level of interest. It would therefore be helpful to know how many people would be interested in these courses. For that purpose, expressions of interest or further inquiries can be made to David Cuff at the John Bowe organisation on 9827 1217 or to me direct on 9225 7434 or 0411 132 943, and I will pass them on.

Lex Lasry QC

Brooking on Building Contracts (4th edn)

By D.J. Crennan, B.A. Shnookal and M.H. Whitten
Lexis Nexis Butterworths, 2004
Pp. i–1, 1–378; further references 379–380; Index 381–390.

BROOKING on Building Contracts is an excellent work in the field of building and engineering contract law. The fourth edition states the law as at 1 January 2004 and is relevant to building and construction practitioners as well as non lawyers involved in the building and construction industry. Reference is made to the leading decisions in this area of the law as well as to relevant Commonwealth, State and Territory legislation. The book is well organised and keeps the reader's attention.

The chapters dealing with the law of contract as it applies to building contracts will also be of great assistance to practitioners in other areas of contract law. Current principles applied by the courts are identified and clearly explained. The book contains specific chapters dealing with tenders (Ch 5) and a related topic bills of quantities (Ch 15), assignment (both statutory and equitable) (Ch 13) and subcontracts (Ch 14).

The book deals extensively with the law in the most common areas of building disputes: Time for Completion (Ch 6), Rise and Fall Clauses (Ch 7), Progress Payments, Final Payments and Quantum Merit (Ch 8), Approval and Certification to Works, Progress Certificates and Final Certificates (Ch 9), Variations of Contract (Ch 10), Defective Works (Ch 11), Liquidated Damages (Ch 6) and Common Law Damages for Breach of Contract (Ch 11) and Determination of the Building Contract (Ch 12) both under express contractual provisions and at common law.

The book also considers the duties that particular professions (architects and engineers) owe to the owner, the builder and third parties both at common law and in performing certification under the relevant contracts (Ch 17). The role played by the tort of negligence in relation to builders and related professions and local authorities is conveniently summarised with emphasis on pure economic loss claims (Ch 16).

The various avenues and methods for building dispute resolution (statutory and non-statutory) are discussed. In particular arbitration (Ch 18).

Finally, the book contains an interesting chapter headed "Building Operations" (Ch 19) which discusses problems that may be encountered during building operations with adjoining owners. It deals with the torts of trespass to land and nuisance and considers rights of supports, underpinning and interference with easements.

This book is to be commended to all who practice in or have an interest in the law relating to building and engineering works.

P.C. Golombek

Uniform Evidence Law (6th edn)

By Stephen Odgers S.C.
Lawbook Co 2004

THIS book is a commentary on the "Uniform Evidence Law" meaning the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW). It also (in Appendix F) deals with the latest State Act, the *Evidence Act 2001* (Tas) to come within the ambit of "Uniform Evidence Law".

The main objective of the book is to provide assistance in the understanding and application of that uniform legislation. Although that legislation is referred to as "uniform" it can only be said that it is substantially uniform. There are important differences between the three Acts and the book highlights these differences.

The legislative provisions are identified by shading of the text which makes them readily distinguishable from that commentary. Where the statutory provisions differ they are identified as "Cth Act only" or "NSW Act only".

In order to assist readers who wish to be informed of the background to particular statutory provisions in the uniform legislation the commentary makes reference to the reports of the Australian Law Reform Commission namely the 1985 Interim Report (ALRC 26) and the 1987 Final Report (ALRC 38) and also to the Draft Act prepared by the ALRC.

There are six appendices to that commentary which will in particular assist NSW and Federal jurisdiction practitioners; namely:

- *The Evidence Regulations 1995* (Cth);
- *The Evidence Regulations 2000* (NSW);
- Extracts from the *Criminal Procedure Act 1986* (NSW);
- Extracts from the International Covenant on Civil and Political Rights; and
- Table of Notices required by the uniform legislation.

The book contains a comprehensive table of cases and statutes, and the index refers the reader to both commentary paragraph and section numbers.

The sixth edition will be of great assistance to busy practitioners required to apply the uniform legislation.

P.C. Golombek

Cross on Evidence (7th Aust. edn)

J.D. Heydon BA (SYD) MA BCL (OXON) Justice of the High Court of Australia
Lexis Nexis Butterworths, 2004

CROSS on Evidence is a scholarly text on the law of evidence. It is a book that is well known and extensively used by both practitioners and law students. The Australian edition commenced in 1970 and is now in its seventh edition. Each edition improves on its earlier edition.

The book deals with the rules of evidence in a most comprehensive way. The common law rules are clearly identified and the principles underlying the rules are explained. Recent authority is cited. The table of cases is extensive and up to date. All relevant statutory provisions for each State and Commonwealth Territory and jurisdiction are referred to.

General problems and aspects of the *Commonwealth Evidence Act 1995*, *NSW Evidence Act 1995* and the *Tasmanian Evidence Act 2001* are adverted to and their application explained. The table of statutes is comprehensive. Case law construing these provisions is cited.

Although the book is lengthy (1,382 pages) it is very manageable. Contents headings and sub-headings are easy to follow and the index, with its numerous topics and references to paragraph numbers, makes the law in this complex area readily ascertainable.

A number of subjects have been significantly rewritten in this seventh edition, in particular the subjects of presumption of continuance, views, judicial notice, complaints, proof of foreign law and privilege. The seventh edition also has new material on the subjects of the role of common experience, the findings of legislative facts and on aspects of opinion evidence.

The seventh edition will provide the practitioner and the law student with a practical and definitive explanation of the law of evidence in criminal and civil jurisdictions throughout Australia.

P.C. Golombek

The Mortgagee's Power of Sale (2nd edn)

By Clyde Croft and Jan Johannsson
Lexis Nexis Butterworths, 2004
Pp. v–xii, Table of Cases xiii–xxx, Table of Statutes xxxi–xxxvii, 1–212, Appendix 213–232, Bibliography 233–4, Index 235–245

THIS book describes the law relating to the existence and exercise of the power of sale by a mortgagee of land. The first edition was written solely by Dr Croft and published in 1980. Considering the long history of the mortgage and the frequency with which mortgagees have recourse to the power of sale, the book is remarkably concise. Its brevity is due to the fact that it does not purport to be a work on conveyancing, civil procedure or mortgages themselves.

The book is written in the "transactional" fashion, arranged chronologically by reference to the steps involved in exercising the mortgagee's power of sale. The first chapter briefly describes the nature of mortgages (both legal and equitable) and the distinction between a mortgage and a charge. Not being a treatise on such things, the book is quick in its description, but provides a list of more comprehensive works should the reader require more detail. The authors then describe the source of the power of sale, and conditions precedent to its exercise. A separate chapter is devoted to the mortgagee's right to possession, which must of course be triggered prior to the recovery of possession, described in the following chapter. The exercise of the power itself is explained in three chapters: an introductory chapter, which deals with general concepts; two chapters devoted to the mortgagee's duties in exercising the power of sale; and a chapter which sets out the circumstances in which the mortgagee is allowed to purchase the property. A chapter on the effect of sale on the mortgagor is followed by a two chapters dealing with the distribution of the proceeds of sale: one in the case of general law land, and one for registered land. That division is in contrast with the rest of the book: where appropriate, the other chapters are split so that the discussion of general law mortgages and that of registered mortgages appears separately but in a single chapter.

Finally, the authors have provided thirty precedents, each relating to either general law or registered land, in an appendix. While the currency of precedents included in a bound volume is obviously limited, the mortgagee's power of sale is created by ancient rules of the common law and equity, and by well-worn statutes to which judicial statements of interpretation have rusted on. The authors' precedents will no doubt remain relevant for some time. Further, those who swear by old editions of *Bullen and Leake* will welcome them.

For a book that frequently deals with the archaic, its language is refreshingly succinct. Where arcane concepts are described, they are explained with remarkable clarity. One minor irritation is the publisher's practice of including in the body of the text the entire citation of each case specifically mentioned. That system might shorten the book by reducing the number of footnotes, but it interrupts the flow of the text. It is also at odds with the authors' practice of omitting the year and jurisdiction from textual references to the most commonly cited statutes.

The Mortgagee's Power of Sale is a lucid and practical book which deals with an important and frequently exercised power.

Stewart Maiden

Conference Update

17 January–28 January 2005: Delemont, Switzerland. 13th Edition of the International Tax Law Post Graduate Diploma Programme. Contact: website www.college.ch/?page=tax&r=clownalpha

18 January 2005: Sydney, NSW. 2005 Constitutional Law Conference and Dinner. Contact Ms. Belinda McDonald. Tel: (02) 9385 2257. Fax: (02) 9385 1175. Email: gtcentre@unsw.ed.au

13 March–19 March 2005: Kitzbuehel, Austria. Outsourcing and Offshoring Conference. Contact Dennis Campbell. Fax: 43 662 825 171. Email: cils@cils.org

20 March–24 March 2005: Broadbeach, Queensland. 19th Biennial Lawasia Conference; 34th Australian Legal Convention; 44th Queensland Law Society Symposium; 12th Conference of the Chief Justices of Asia Pacific. Contact Amanda Sever. Tel: (07) 3222 6809. Fax: (07) 3222 5850. Email: amanda.sever@lawasia.asn.au

20 March–23 March 2005: Capetown, South Africa. Fourth World Congress on Family Law and Children's Rights. Contact Gail Fowler. Tel: 61 2 9999 6577. Fax: 61 2 9999 5733. Email: lawrights@capcon.com.au

29 May–5 June 2005: Mykonos. Tenth Greek/Australian International Legal and Medical Conference. Contact Jenny Crofts. Tel: 9429 2140. Fax: 9421 1682. Email: jennycrofts@ozemail.com.au

29 June–2 July 2005: Dublin. The Australian Bar/Irish Bar Joint Conference. Contact Dan O'Connor. Tel: (07) 3238 5100. Fax: (07) 3235 1180l. Email: mail@austbar.asn.au

2 July–8 July 2005: Bali. Tenth Biennial Conference of the Criminal Lawyers Association of the Northern Territory. Contact Lyn Wild. Tel: (08) 8981 1875. Fax: (08) 8941 1639. Email: info@thebestevents.com.au

3 July–9 July 2005: Amalfi Coast. Europe Asia Medico-Legal Conference. Contact Rosana Farfaglia. Tel: (07) 3236 2601. Fax: (07) 3210 1555. Email: conference@qldbar.asn.au

4 August–9 August 2005: Chicago, Illinois. 127th Annual Meeting of the American Bar Association. Contact ABA International Liaison Office. Tel: 1-312-988-5107. Fax: 1-312-988-6178. Email: sullivankash@staff.abanet.org

31 August–4 September 2005: Fez: Union Internationale Des Avocats 29th Annual Congress. Contact website www.uianet.org

15 September–22 September 2005: Rome. Pan Europe Asia Medico-Legal Conference. Contact Rosana Farfaglia. Tel: (07) 3236 2601. Fax: (07) 3210 1555. Email: conference@qldbar.asn.au

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