VICTORIAN BAR NEWS

No. 132 ISSN 0159-3285 AUTUMN 2005

ODCE and the Rewards of Patience

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Published by The Victorian Bar Inc.
Owen Dixon Chambers,
205 William Street, Melbourne 3000.

Registration No. A 0034304 S

Opinions expressed are not necessarily those of the Bar Council or the Bar or of any person other than the author.

Printed by: Impact Printing
69–79 Fallon Street,
Brunswick Vic. 3056

This publication may be cited as (2004) 132 Vic B.N.

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Grumpy Old Barristers

THE BBC has recently produced a new series called "Grumpy Old Men". In it, men aged from 35 to 55 vent their complaints about life in modern day society. Those voicing their thoughts include former rock stars Bob Geldof and Rick Wakeman, actor Bill Nygh (of "Love Actually" fame) and media famous restaurateur Rick Stein. The men interviewed are all baby boomers, wild childs of the swinging sixties and seventies when there was free love in the air.

These golden youths of past eras are now balding, pudgy, middle aged men who are not happy with the way things have turned out. One of *Bar News*' editors has been lucky enough to see the series on DVD, as it has not yet hit the shores of Australia. Undoubtedly the ABC or some pay TV channel will bury it away at 11 o'clock, which seems to be the practice for any program with some intellectual content.

There is a wide range of grumps and whinges. They range from the rise of modern technology to body piercing, male earrings, computers, the dreaded DVD, young female fashion including the revelation of the midriff and G-string.

Things are just not what they used to be. Most berate the rise of the computer. What is "surfing the internet" anyway? All complain that their children are so far advanced with technology, that they are the only ones in the household able to work out the five sets of controls to work the DVD, video, television and sound system.

Nostalgia goes back to the rise of the video 30 years ago, when all that was required was the stop and start button. Similarly, with computers, most either shun their use entirely, or complain of the added burden of e-mails and the wretched cost because of the continuing need to upgrade strange hard drives, software and other unfathomable things.

It's hard to understand the language of today. Things were cool in the past but not cool now. The media is not what it used to be. Reality TV has ruined everything. Mindless young comperes, comedians and interviewers are just too much to bear. What happened to sideboards, flares and beads?

Inspired by this series the Bar Theatre Company (In Liquidation) is presently developing a series based on this concept but entitled "Grumpy Old Barristers". "Barrister" is to be a gender free-generic term interpreted, because of social and beneficial factors, to include Judges and Masters.

Selected members of the Bar and judiciary between the ages of 35 and 55 will be interviewed to glean their thoughts on the present state of the law and the profession (or as it is sometimes referred to in present day society, "the law industry"). It is believed that the interviews will be more valid if held after lunch, particularly lunch at the Essoign Club.

There are even thoughts for a second series to cover barristers from the age of 55 and upwards. This could be called "Very Grumpy Old Barristers" but on second thoughts the name, "Benign Old Barristers" has been coined. Debate is still raging as to whether there should be an episode concerning Attorneys-General past and present.

Those approached to be part of the program have been very free with their views and the researchers involved have found an extremely high level of grumpiness. Many complain that to them those under 35 seem even more conservative than the baby boomers have now become. Frustration with technology is evident. Many say that it is difficult to deal with a computer screen on the bench as well as on the Bar table. The extra burden of e-mails and the internet has really not added a lot to the life in the law.

Many then turn to the Courts themselves. What has become of the system? Mediations, pre-trial conferences and statutory offers have ruined the whole thing. No longer are there lists where it was possible to hold more than one brief. The County Court used to be chock-a-block with all sorts of cases concerning wills, contracts, property as well as common law. Now the Court appears to be overwhelmed by crime and the somewhat threadbare civil list is enveloped by serious injury applications.

Some pine for the days when the Magistrates' Courts were actually in the suburbs near the local football grounds. Some find it hard to cope with a Magistrate's Court jurisdiction of $100,000. In the good old 70s and 80s there seemed to be lots of cases in the Supreme Court, most of which got a Judge first time around. It doesn't seem to be the case today.

Back then barristers were barristers. You didn't see male earrings and studs in noses. Females did not have tattoos

and they were rare on males. Nobody questioned wigs and gowns and the concept of acting Judges would have been simply unthinkable. Barristers did not have to spend much of their time filling in log books, BAS forms and all sorts of other forms. The only tip-tap was that of a typewriter.

GRUMPY OLD MOBILE PHONES

The producers have decided that a whole episode will be devoted to "Mobile Phones In The Law". A tiny handful of barristers have been identified as not owning or using a mobile phone. Members of this sect will relate why they find it unnecessary to have the dreaded mobile, and how their lives are happier when some of the time nobody knows where they are.

The contentious issue of mobile phones in court will also be raised. Approaches are to be made to Chief Judge Rozenes concerning his very strict rules on mobile phones in court. Many will have noted the recent feature in *The Age*, where His Honour's Tipstaff sternly enforced the rules by telling the Court, before His Honour ascended the Bench, that all mobile phones should be turned off or, if not, would be confiscated. His Honour ascended to the Bench whereupon his own mobile phone duly went off. It is understood that he is said to have said, "Don't tell the *Bar News*". It was good to see that those assembled in the Court followed His Honour's orders and did not inform the *Bar News*, but rather decided to inform Lawrence Money of *The Age*. The *Bar News* is still investigating the source of the leak.

Rumour has it that a Judges' meeting was hastily convened following *The Age* report, and that signs are to be placed on the back of the doors in all Judge's Chambers stating "Leave Your Phone in Your Chambers or Turn it Off before Robing".

Judge G.D. Lewis is also being approached to discuss and display his wonderful collection of mobile phones that he has acquired by confiscation in Court over many years. His collection ranges from the chunky huge burly models through to the ever-descending size of phones of today, leading to a most recent confiscation which was a phone so small it was hidden in the stud of an earring in a male barrister. There will also be discussion about the most annoying ring tone and barristers who have answered them in Court.

THE GRUMPY OLD *AUSTRALIAN* NEWSPAPER

Whilst on the topic of Grumps, what about *The Australian* newspaper? That Sydney-centric broadsheet has displayed a very grumpy attitude to barristers, the Bench and lawyers in general. Editor Michael Stutchbury goes back many years in his campaign against the profession. Whilst on the *Financial Review*, in the 80s, he was virulent in his criticism of the so-called guilds of the law. He strongly advocated deregulation, abolition of the concept of a profession and the incarnation of a law industry regulated by the Trade Practices Act.

In his present role as editor of *The Australian* he continues to bang on about barristers. Evidently, despite legislative changes, the guilds are alive and well. Last year he spent a great deal of the newspaper's money to send a photographer to photograph judges shopping in Florence on their holidays. This was an outrage because they were part of a law conference which was held overseas. Seemingly lawyers holding conferences overseas is a unique thing in Australian society. It appears that other industries, and in particular the media, and journalists never attend conferences overseas and have never been accused of being on a junket.

Not content with this mind-numbing scoop he has recently been going on about judges taking holidays. This is outrageous. And most recently he has revived the old story of the barristers in Sydney who went bankrupt. This some how or other means that the whole profession in Australia is going down the plug hole.

One wonders what it is in Mr Stutchbury's background that has caused him to continue this relentless campaign against barristers and the law. Was there some traumatic event that has led to this grumpy rage?

Of course he has neglected to report upon one of the results of deregulation and the loosening of the "guild's" hold on conveyancing. He fails to note that a very large conveyancing company recently went under owing its "clients" millions of dollars. These clients included pensioners and poor people who lost their deposits and the proceeds of sale of their properties. Perhaps this would not have happened in the days when it was only solicitors who would handle such things. In any case this crash has led to the Victorian government deciding not to deregulate but to further regulate these non-lawyer conveyancers. And what of journalists? Can't their trade be called a guild? You tell us, Mr Stutchbury.

POSTSCRIPT

The final grump of Grumpy Old Barristers is Very Grumpy Old Barristers. There is nothing worse than old people going on about the past. Don't listen to them.

The Editors

Re Lincoln v Kennedy

Dear Editors

IT is with much dismay that I record my disapproval of the editorial decision to reprint the garbage on the similarities between the assassinations of the two US Presidents Lincoln and Kennedy ("History is Creepy", Summer 2004 *Bar News* 53).

This is an old saw that has been around since the late 1960s and has been discredited on numerous occasions. The single false assertion that "Lincoln's secretary was named Kennedy" is "like the thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions" [per Lord Light LCJ, *R* v *Haddock* (1927) Uncommon Law 24 at 28]. A more complete discussion of this "urban legend" may be found at www.snopes.com/history/American/LincKenn.htm.

It is an interesting phenomenon that grossly inaccurate (but easily verifiable) statements are often taken at face value. Thus, because the falsity of the assertion can be so easily ascertained, the person making the assertion must be fully cognizant of the ease with which the assertion can be tested so it follows that that person would not dare to perpetrate a falsehood. We see this in politics, for example, the debates between the challenger Reagan and the then President Carter, and it may be the basis for "push-polling": Would your choice to vote for candidate X be affected by his being charged on numerous counts of sexual molestation of infant children?

May I draw your attention to Ken Anderson's *Coincidences: Chance or Fate?* (1995) where at page 267 he relates the tale of TV news producer Judith Rogers who, in 1984, awoke one morning with a start. She had had a vivid dream wherein she had "seen" the final scene from the movie Deliverance, directed by Sam Peckinpah. Later that morning at work she glanced at the teleprinter as bells rang to denote an incoming newsflash — the announcement of the death of Peckinpah at the age of 58.

So far as breathtakingly amazing-but-true stories go, this one was a big fat zero as the Bar's movie buffs will tell you. The movie Deliverance was part of the oeuvre of director John Boorman and had s.f.a. to do with Peckinpah. Non-buffs may care to consult any film encyclopedia or maybe just hire out the movie at the local video rental store to verify the identity of the director. Presumably news producer Rogers and coincidence author Anderson [he has written two other books on the topic] could just as easily have consulted Halliwell or rented out the video rather than committing such an egregious blunder that undermines our confidence in any statement emanating from them.

Insofar as the Lincoln-Kennedy assassination story purports to unearth significance in the number of letters in the respective assassin's names I would draw to your attention the stupidity of reliance upon numerology as in the proposed replacement for the WTC twin towers being exactly 1776 feet tall. In theory, given that the towers were felled in 2001 and the US asserted its independence in 1776 the architects could equally justify the replacement by two towers, one of 1776 feet and the other of 2001 feet. If we subtract one from the other we are left with 225 which is exactly the square of 15 which is exactly the sum of the number of the colonies that revolted against English rule and made up the original 13 "united" states PLUS the number of US presidents (two) who had both signed the original Declaration of Independence on 4 July 1776 and who both died exactly 50 years later to the day on 4 July 1826 (John Adams and Thomas Jefferson).

As the late Francis Crick reminded us, the technical word for this sort of idiocy is superstition. I hope the editors are not contemplating an astrology column for future issues.

With further reference to the Lincoln-Kennedy assassinations I would also complain that your published version was "bowdlerised" in that it substituted the preposition "with" for "in" in the second of the two sentences reading: A week before Lincoln was shot, he was in Monroe, Maryland. A week before Kennedy was shot, he was with Marilyn Monroe.

Yours etc.,

Briefless

Different Judge, Guilty Plea

Dear Editors

ALTHOUGH I do not wish to put too unnecessary a dampener on the glowing farewell to Judge Fagan, (*Victorian Bar News* Summer 2004) historical accuracy requires a correction.

Three of the five men charged with intentionally causing serious injury to Gregory Brazel were found guilty of that charge and were sentenced by His Honour to eight years gaol with a minimum of six years to be served before being eligible for parole, such sentences to be served cumulatively upon sentences undergoing. It is true that the Court of Appeal ordered retrials but it is not correct that "at those retrials, 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 His Honour".

In fact, before a different judge the three men pleaded guilty to intentionally causing injury to Brazel and were sentenced to 12 months gaol, concurrent with sentences undergoing.

Sincerely

Geoffrey Steward

In Defence of Wigs

Dear Editors

IN a throwaway paragraph in his letter published in the Spring *Bar News* Philip Opas QC attacks wigs in his usual colourful style — dandruff bags; ridiculous looking; barristers strutting about looking like Gilbert and Sullivan leftovers; not up with the 21st century; and so on. The same old iconoclastic arguments.

I disagree with Opas.

When Mr Justice (Tom) Smith retired in 1983 after 33 years on the Bench he was interviewed for the *Law Institute Journal*. One question he was asked was "Is it necessary for Judges to be wigged and robed?" and he replied — "I am in favour of preserving these traditional trappings. My feeling is that it promotes more efficient conduct of business between the Judge and the Bar. It formalises the whole situation so that people are under strong pressure to behave well and with courtesy to each other and to keep to the point. I think that it makes the job of telling deliberate lies in the witness box much more difficult." The Judge goes on to present further arguments in favour of their retention, *L.I.J.* July 1983 p.657.

I believe wigs are regarded by the profession and the public as the badge of the advocate.

Between 1950 and 2000, my practice at the Bar in Melbourne and on circuit throughout Victoria was mainly in civil juries where the public was directly involved in the administration of justice. And they accepted and respected our Court attire. So did our clients and witnesses. I was never embarrassed by wear-

ing a wig. Indeed I was proud to do so and to follow a great tradition which I hope will continue.

John Mortimer's Rumpole did much to establish the wig, in the eyes of the public, as the badge of the advocate. Indeed Opas in another article in the Spring *Bar News* refers to Rumpole and commends him for quoting Wordsworth. He does not say what a fool he looks in a wig even tho' we know it was a mature one.

The Family Court dispensed with wigs and then reintroduced them in 1988 after a series of attacks on Judges.

In 1997 at a General Meeting and in a subsequent ballot the Bar voted decisively to retain wigs. In 2000 in the face of a threat by the Victorian Attorney-General to legislate to ban wigs, the Bar Council declined to be pressured and said it was a matter for the Victorian Courts not the executive to decide the appropriate Court dress. The Victorian Courts favoured the retention of wigs and such is the present practice.

The Essoign Club's logo features barristers in wigs — enjoying themselves.

The Wigs and Gowns Squadron sails the seas.

The Bar Hockey Team wears bands — no doubt wigs are impractical!

The Bar cricket tie features a wig over stumps.

The Australian Bar Association's ties have always featured wigs.

And so on.

Let us not follow Tasmania's example which demolished its tigers, wished it had not, and now seeks to use the tiger as its cricket identity.

And as my old Tasmanian sportsmaster once said to me: "Colman, go and clean your boots. If you can't be a good footballer at least look like one."

When Sir James Gobbo opened Joan Rosanove Chambers in 2000 he said of her: "I recall clearly seeing her sitting in Court and noting what a strong presence she conveyed and how beautifully turned out she was on every occasion in robes and a lace collar especially designed by her."

In short get with it, Phil. In the 21st century it is cool to wear wigs.

Sincerely

Geoffrey Colman QC

Why the Appointment of Acting Judges is Wrong and Unnecessary

Dear Editors

THE Victorian Attorney-General has determined to press on with his proposal to appoint acting judges (Hulls rekindles acting judges bid, *The Age*, *News*, 22/2/05). The proposal was justified by the Attorney-General, but roundly criticised, in the columns of *The Age* in November last year.

The proposal is dangerous because it threatens to diminish the extent to which there will be open and fearless judicial scrutiny of government and bureaucratic action. It is important to understand why, practically, this is so and the enormous consequence.

Government is the entity in modern society which has the greatest impact on the individual's liberty, property and well-being.

It is government in one form or another, for example, which taxes, investigates offences, and provides benefits which directly affect the availability of health care, education, transport, and many other services. Government at all levels controls the information about its own activities which is necessary for their scrutiny.

Parliament affords no effective control of government. The reverse is the case. It is the executive which controls when parliament will sit, what it will debate, what laws will be passed, and what information that will be given out in parliament.

Parliament does not protect the individual's liberty, property or well-being when any of these things is under challenge from government, and is unable to do so. That work is done by the courts who every day balance the rights of the individual against rights being enforced against the individual by government in one or other form. Government also effectively controls the extent to which most individuals can enforce or defend their rights or positions by determining the

extent to which legal aid is available.

At times governments seek to affect the outcome in the courts of the determination of rights between the individual and the State. Thus Ministers will publicly announce the innocence or guilt of an individual involved in some or other legal process, perhaps a criminal proceeding, or an administrative proceeding involving allegedly improper political conduct. Ministers will publicly attack judges and courts, both generally, but also specifically in the context of a recently delivered decision. Recent examples of such attacks have concerned the preparedness of the courts to allow refugees to test their rights to remain in Australia, sentences handed down in criminal trials, and compensation allowed to victims in accident cases. Attacks occur more frequently these days as politicians pay less regard to the importance of public respect for judicial decisions. At times attacks are even mounted against judges under the privilege of parliament, instead of proper processes being followed, as happened in the case of Justice Kirby at the hand of Senator Heffernan with the apparent support of senior federal government ministers.

This is the context in which the measure proposed by the Victorian Attorney-General is to be viewed, a Bill to allow the appointment of acting judges for five-year terms only, rather than until retirement, with no right of removal save for proven misbehaviour. Mr Hulls has argued (Acting judges are essential; *The Age*, *Opinion*, 19/11/04) that his measure will not undermine the reality or appearance of judicial independence; he points to the use of recorders in England and Wales and to the fixed terms of VCAT members; he contends that the measure is necessary and implies it will further the goal of diversity on the Bench.

The measure is, however, subversive of judicial independence. The measure is also unnecessary as a better measure is available which would preserve the independence of the judiciary and ensure its diversity, while at the same time assisting with variable court workloads, if that is a problem.

Turning first to why the Bill before the Victorian Parliament is subversive of judicial independence.

Any barrister accepting judicial office must give up his or her practice, in short his or her livelihood. The appointee surrenders his or her chambers and ceases to practice as a barrister. Those who briefed the barrister must find others to handle their cases, and quickly do so, and they must establish replacement relationships. At the stage of practice when most are appointed to judicial office — in their fifties — it is the case that many of those who were briefing the barrister will themselves retire or move to other things within the next five years. The appointed judge will not be forming new working relationships with solicitors to replace those that would have diminished in the course of practice. At the end of a five-year appointment there is little practical scope for an acting judge to rekindle a successful practice, and every reason to fear that that will not be possible.

In the case of solicitors or academics who accept an acting judicial appointment the situation is starker. It is virtually inevitable that a partnership or academic position once surrendered will not be recovered, and certainly not after five years.

For the administration of law to be respected and accepted by the community, it is fundamental, as a matter of reality and perception, that judges act independently uninfluenced by government policy or preference.

One can never know whether an acting judge who hands down a very stiff sentence, or who denies a FOI request on a discretionary ground, or who upholds the contested evidence of a senior bureaucrat, has been influenced by the fact that his or her acting appointment is about to lapse and that his or her family will be without means of support if the appointment is not renewed. Measures which subvert judicial independence are accordingly especially insidious, no matter how honestly they are advanced. Our liberties may be compromised by them without our ever being able to establish precisely why this has happened. We may be suspicious as to what has happened, but shall not be able to prove what has happened. The judge in question will probably satisfy himself or herself that the stiff sentence was deserved anyway, or the information about government wrongdoing was not truly accessible anyway, or worse, was not really probative of the wrongdoing which the applicant wanted to investigate.

So much is human nature. Our liberties depend on there being checks and balances which protect us against human nature.

Perhaps the most important of these checks and balances is manifest judicial independence. Once judicial independence is perceived to have been impaired, whatever may be the reality, public confidence in the courts and in the administration of justice is eroded. When this happens rights and liberties become more theoretical than real.

This inheritance is not to be fiddled with, and least of all, when another measure is available which may serve the desired purpose of addressing temporary surges in judicial workload as well or better than the Attorney-General's proposal, without compromising judicial independence. Before addressing the available alternative, let it be observed that the recorder system in England and Wales is no justification for the measure proposed by the Attorney-General. Under that system, as it works in practice, senior barristers sit for one month a year as Crown Court judges. Thus, the English system is no precedent. It is true, as the Attorney-General says, that VCAT members have fixed appointments, but it is also the case that the President of VCAT is required to be a Supreme Court judge with full tenure, and that the decisions of VCAT are subject to review by the Supreme Court, in other words by manifestly independent judges. The Attorney-General's proposal would erode this basis for confidence in the VCAT system.

An alternative to the Attorney-General's proposal which would not erode judicial independence is to allow the appointment of judges on a permanent semi-time basis, for example, on the basis that the appointee would perform judicial work for at least (say) six months of the year, and for such further part of the year as the judge negotiates with the Chief Judge or Chief Justice of the court each year. They would be remunerated accordingly. Such judges would be removable only for misbehaviour.

Such a system would not compromise judicial independence. It would allow the persons best placed to determine the extent of required additional judicial resources in any year — the Chief Judge or Chief Justice of the particular court — to negotiate with the available semi-time judges.

Such a system would better facilitate the achievement of a diversified Bench. The Attorney-General's proposal would add only full-time appointments to the Bench. Thus those who are presently unwilling to accept full-time appointment would not be encouraged to accept appointment as acting judges, such as persons otherwise qualified who want to find more time in their lives for family, or research, teaching, charitable work or other compatible activity than full-time judicial office allows. (It must be

said that full-time judicial office in the higher courts, particularly on the civil and appellate side, allows for little else than judicial work, absorbing most nights, weekends, and holidays so that the judge may research and complete the writing of reserved judgments.)

Such a system would for the reasons given be likely to enrich the judicial resources of the Bench, and probably facilitate the speedier delivery of justice.

Accordingly the Attorney-General's proposal should be strongly opposed, though he is to be congratulated for taking seriously the need for additional judicial resources.

Sincerely,

R M Garratt QC

Standing Corrected

Dear Editors,

THE competition in your last edition of the *Bar News* raises a matter of some interest for me to become involved and write this letter. My father Rex Patkin is the former Master of the County Court. He was so pleased with the article that was published and he eagerly showed it to all his family. However, he also pointed out to us the alteration made by the learned editors. Then he asked our opinion as to who was correct. The editors or the master? I am a school teacher and I eagerly embarked upon the adventure to analyse the question. To my surprise I found the question became more involved the further I examined the issue.

I examined a number of English Grammar books and to my surprise the topic was not considered in many of the books. Then I found the topic, described as "Agreement in Number" in two books, a US book entitled *English Made Simple* and the Reader's Digest book entitled *How To Write and Speak Better*. In the book *English Made Simple* the authors at page 47 say:

> If the subject is singular the verb that goes with it must be singular, if the subject is plural the verb that goes with it must be plural.

Thus the central question is to determine the subject that goes with the verb in the sentence involved. Alternatively one may ask what does the verb relate to? It seems to me that the verb goes with or relates to the word *problems* and not the word *variety*. This means the master is correct.

I am of the opinion that it makes no sense to state that the subject of the sentence is *variety*. Assume we are discussing the various schools in Melbourne. What is the correct expression?

"There are a variety of schools in Melbourne."

or

"There is a variety of schools in Melbourne."

It seems to me to be incorrect to say that the subject of the sentence is the word *variety* and not *schools*. Then it also sounds better to use the word *are* instead of the verb *is*.

The authors in the Reader's Digest work state at page 19:

> The problem of agreement of subject and verb becomes more confusing where there is some doubt in your mind whether the subject of the sentence is actually singular or plural. This often happens when the singular subject is separated from its verb by several words that have a plural sound.

This is the situation in this case, however, the problem in this case is the reverse situation. The plural subject *problems* is separated from its verb by a word that is singular, that is, *variety*. Thus the error Is to assume that the noun nearest the verb governs whether the verb is singular or plural.

I am supported in my conclusion by the authors in the Reader's Digest work who say at page 22:

> "There" can act as a subject, and the number of the verb depends on the real subject that follows.

Now in this case two of the sentences commence with the word *there*:

(2) There ("is"/"are") a variety of problems in terminating a proceeding on the grounds that it lacks merits

(3) There ("is"/"are") a variety of problems for the court to determine if a proceeding gives rise to an arguable case.

Now if one asks: What is the "real" subject that follows the verb?

Surely the answer is *problems* and not *variety*. The real subject is probably not merely the word *problems* but the described problems.

I hope the learned editors and readers of the *Bar News* enjoy the analysis of this issue as much as I enjoyed the research of the answer to your competition. Your comment invites criticism of your action either as "high handed" or as erroneous. Why was the word *erroneous* not also placed in inverted commas? As a mother and teacher I would not have the temerity to describe the Editors' action as high handed. Criticism is another matter. However, I do not criticise the learned Editors as I believe the issues raised (is/are) not a simple matter. In fact the more you analyse the topic the more difficult and interesting it becomes. There is no doubt that agreement is now one of those topics in grammar that sometimes (confuse/confuses) me.

Yours sincerely,

Ruth Trytell

We stand corrected, or do we …? We considered that the subject was "a variety of problems" which we view as singular. We would welcome further comment.

The Editors.

The Law and Order Bidding War

THERE has been, for some time now, in all Australian jurisdictions, what has been aptly termed a "law and order bidding war" — parties striving to outbid their political opponents on "getting tough on crime" such as promising mandatory minimum sentences.

Elements of the popular press publish inflammatory articles critical of particular decisions. At least the initial article breaking the story is usually critical of the judge or magistrate and frequently unbalanced.

Informed public debate on sentencing, or on any other aspect of the administration of justice is to be encouraged. Regrettably, the law and order bidding war is neither informed nor balanced, and generates more heat than light.

Last year, when the courts, the Director of Public Prosecutions and the government were under attack about a suspended sentence upheld by the Court of Appeal, the Attorney-General, Rob Hulls, spoke up in a newspaper article, "A New Voice for Victims". Mr Hulls stressed the importance of a fearless and independent judiciary with discretion to decide cases on their individual merits, and of a fearless and independent Office of Public Prosecutions with responsibility for deciding whether or not to prosecute or appeal, based on all the facts, the law and interests of the community. He rightly described these as "the fundamentals". The Premier, Steve Bracks also joined the debate, affirming the Government's opposition to mandatory sentencing.

In a media release that received little, if any, coverage, my predecessor, Robin Brett, expressed strong support of the measured response on sentencing issues by the Attorney-General and the Premier — for their responsibility and courage in rejecting calls for government intervention in the particular case, and their rejection of mandatory minimum sentencing as the solution for the future.

The Government established the Sentencing Advisory Council chaired by Professor Arie Freiberg, the Dean of the Monash Law School and a leading authority in the field.

As with the sentencing issue, it is important that any substantive law reform should be the result of measured consideration and informed debate. Justice Callinan said in 2002 in another context: "When loud voices clamour for radical change, it is usually time for patience and caution."

CONSULTATION WITH THE BAR ON PROPOSED LEGISLATION

In my December Chairman's Cupboard, I wrote about consultation by the Government with the legal profession on legislation and proposed legislation throughout the process from early policy development through the draft Bill to the introduction of the Bill in the Parliament.

I noted examples of effective consultation, and of other instances in which there was no advance consultation and effectively no opportunity for the legal profession to review the Bills and volunteer comments and suggestions before they were rushed through the Parliament.

The Acting Judges legislation, more formally the Courts Legislation (Judicial Appointments and Other Amendments) Bill 2004, is an example of another variation. In this instance, there was consultation early in the process — by issue of a discussion paper and receiving submissions. However, after that, consultation effectively came to an end.

THE ACTING JUDGES BILL

Last year, the Department of Justice received the various submissions on its Acting Judges discussion paper. The Bar lodged a substantial submission, adamantly opposing the proposal. The Law Institute submission also opposed it. The submissions were not published, but since then the Chief Justice has made public her letter to the Attorney-General communicating her serious concerns and the unanimous opposition of the Supreme Court Council of Judges.

There was no circulation of any draft Bill. Even when the Bill was first read in the Legislative Assembly in October 2004, it was not available.

Only in November 2004, when the Bill was second read in the Legislative Assembly, did it become publicly available. After the second reading speech on 3 November, debate was adjourned for 14 days, as is the usual parliamentary practice.

In November, Justice Sackville of the Federal Court wrote to the Attorney-General expressing the serious concerns of the Judicial Conference of Australia about the proposal and, once it became available, the Bill. Those letters were made public.

The Attorney-General did make himself available to meet with me and other interested members of the profession so that we could put our concerns to him in such discussions — and, on behalf of the Bar, I did meet with him.

In February 2005, the Chief Justice, the Honourable Marilyn Warren, made public her letter to the Attorney-General in response to the discussion paper. The Bar issued a number of media releases, raising concerns and pointing to the unanimous opposition of the heads of all three Victorian courts — the Chief Justice, the Chief Judge of the County Court, and the Chief Magistrate.

Debate on the Bill resumed in the Assembly briefly on 23 February, and in substance on 24 February. Debate was limited to less than two hours by the guillotine of the Government Business Program. Voting was along party lines, and the Bill passed all stages in the Assembly that day. It was immediately passed to the Legislative Council and first read there. Without leave to suspend Standing Orders, it could not proceed further in the Legislative Council that day, and was adjourned to the next sitting day, 22 March.

On 28 February and 2 and 3 March respectively, *The Age* published first an opinion piece by Justice Sackville, "The threat to Victoria's Courts"; then the Attorney-General's response, "There's nothing new or sinister about acting judges"; and then my letter, "A-G is wrong on acting judges".

At the ceremonial sitting of the Supreme Court on 17 March to mark the coming retirement of Justice of Appeal John D. Phillips, His Honour devoted almost the whole of his remarks to the issue of judicial independence. In relation to the proposal in the Acting Judges Bill, His Honour identified the critical distinction between the existing provisions and the new Bill:

> It is one thing to tolerate the occasional acting appointment to this Court for a limited time or purpose; it is altogether different to institutionalise such temporary appointments at the discretion of the Executive.

Acting judges are, His Honour said, "anathema". "Judges of a court properly so called must have security of tenure or, in a relatively small community like this in Victoria, the whole system is put at risk. Our courts have been remarkably free from any taint of bias or corruption; let it remain that way."

Chief Justice Warren's continuing serious concerns and opposition to the proposal in the Acting Judges Bill were publicised in a substantial article published in *The Age* on 21 March.

As of the date of writing this Cupboard, the Bill has been second read in the Legislative Council on 22 March. The Bill was on the notice paper for resumption of debate on 23 March but was not reached. It is now on the notice paper for 24 March.

Another key issue is that of the proposed guidelines for the appointment of acting judicial officers.

Such guidelines are central to the way the Bill has been presented to the Parliament. The Minister of Agriculture, Mr Cameron, in delivering the second reading speech in the Assembly (the Attorney-General being away at a conference of Attorneys-General), gave the Attorney-General's commitment to developing guidelines. He said: "The Attorney-General intends to consult with the various heads of jurisdiction on the development of guidelines for the appointment of acting judicial officers."

That commitment was in the context of a speech that focused on the issue of judicial independence. The speech began: "This Bill will revamp the role of acting judges *and enhance their independence*." (emphasis added).

"Judges of a court properly so called must have security of tenure or, in a relatively small community like this in Victoria, the whole system is put at risk. Our courts have been remarkably free from any taint of bias or corruption; let it remain that way."

Similarly, in the second reading debate in the Assembly, Mr Mildenhall, the Parliamentary Secretary of the Department of Premier and Cabinet, linked the draft guidelines to judicial independence: "The proposed guidelines demonstrate that the Government is intent on preserving the traditions of judicial independence which the Opposition is concerned about."

The Bar has the draft guidelines as part of the consultation process promised by the Attorney-General in the second reading speech delivered on his behalf. It would breach the confidentiality of the consultative process for the Bar to release the draft guidelines. Accordingly we have not done so.

What the Bar did say publicly is that any "guidelines" can be no more than that, and cannot, by definition, overcome the fundamental difficulties we, the Law Institute and all the Judges and Magistrates see in the Bill. As the Attorney-General has acknowledged, the guidelines can be changed by the Government without consultation.

The Bar will determine its response to the Attorney-General's invitation to comment on the proposed guidelines in due course. A committee of the Bar Council is working on that now.

OTHER CONCERNS SPECIFIC TO THE INDEPENDENCE OF THE SUPREME COURT

Justice of Appeal John D. Phillips spoke of the Acting Judges proposal in his remarks referred to above. His Honour's serious concerns about that proposal were set in the context of what His Honour described as an "insidious" and growing perception of the Court as "some sort of unit or functionary within the Department of Justice". The CEO of the Supreme Court is not appointed by the Governor-in-Council, but "appointed by, and . . . ultimately answerable to, the Department of Justice". The Judges' computers are part of the Department of Justice network, and so accessible to the Department. The Supreme Court is "Business Unit 19" in the "courts and tribunals" section of the Department. Recently, the Department made a regulation prescribing a procedure in the Court – a matter for Rules of Court made by the Judges, not departmental regulation. And, of course, the Government last year refused to accept the decision of the independent Judicial Remuneration Tribunal.

LEGAL PROFESSION ACT 2004

I wrote about this in my December 2004 Cupboard before it had passed all stages. It did pass and received Royal Assent on 14 December 2004. There is now a Legal Profession (Consequential Amendments) Bill 2005 before the Parliament.

The amending Bill will further limit the matters that may be delegated by the new Legal Services Commissioner to a "prescribed person" and "prescribed investigatory body" in relation to disciplinary complaints. Delegation of the Commissioner's functions "after an investigation has been completed" (section 4.4.13), including the bringing and prosecution of charges before the tribunal (now VCAT) presently done by the Bar, will not be possible.

Another amendment will empower the Attorney-General to direct the Legal Services Board to pay an amount from the Public Purpose Fund to the Victoria Law Foundation.

The significance of this amendment is apparent only from an appreciation of the provisions in the present Act, how those were changed in the new Act, and how the

new Act will be amended by the amending "consequential amendments" Bill before Parliament at the time of writing.

The present *Legal Practice Act 1996* provides specifically for funding to the Victoria Law Foundation, the Leo Cussen Institute and to the Law Reform and Research Account (for the Victorian Law Reform Commission), with amounts payable to those three bodies limited to 15 per cent of the amount in credit at the end of the previous financial year — sections 381–384.

The new *Legal Profession Act 2004* omits all reference to those three bodies. The new equivalent to sections 381–384 is a single section: 6.7.10. The total amount payable under that section remains 15 per cent as in the present sections 381–384. However, the beneficiaries are at large; also purposes are prescribed, and very broadly:

> [A]ny person or body … for any of the following purposes:
> (a) law reform;
> (b) legal education;
> (c) legal research;
> (d) any purpose relating to the legal profession or the law that the Board considers appropriate.
>
> *Legal Profession Act 2004* s.6.7.10(1) (emphasis added)

The present Act leaves the amount to be paid entirely in the discretion of the Board, the new Act makes the amount subject to the approval of the Attorney-General:

> [A]n amount determined by the Board with the approval of the Attorney-General
>
> *Ibid* (emphasis added) (albeit that the Attorney-General has to give written reasons for any refusal to approve a payment under this section)

I understand that the Department of Justice response to questions on behalf of the Victoria Law Foundation and the Leo Cussen Institute as to the omission of specific sections naming them was that it related solely to "modern drafting techniques".

In the consequential amendments Bill, of the three institutions involved, the Victorian Law Reform Commission is singled out for specific mention. Only in respect of the VLRC is the Attorney-General given discretion, without the need even to consult with the Board, to fix an amount to be paid to the VLRC:

> The Attorney-General may each financial year direct the Board to pay an amount out of the Public Purpose Fund to the Victorian Law Reform Commission and the Board must comply with that direction.
>
> Clause 16 of the *Legal Profession (Consequential Amendments) Act 2005* (inserting after section 6.7.10(1) a new section 6.7.10(1A))

Whilst this amendment is welcome, the Bar Council is seriously concerned about the absence of the dedicated funding for the Victoria Law Foundation and the Leo Cussen Institute to ensure their ongoing work, and with the fact that the up-to-15 per cent previously available for allocation to these three institutions is now open to allocation to any number of other persons and for wider purposes.

ADVOCATES' IMMUNITY

At the time of writing this column, the *D'Orta Ekenaike* decision has been handed down by the High Court of Australia. This issue was added to the agenda of the March meeting of the Standing Committee of Attorneys-General ("SCAG"). Preceding this meeting, there was considerable debate in the media about the justification for the retention, and abolition of, the immunity.

It is apparent that SCAG will consider a number of options, ranging from the abolition of the immunity to defining and limiting it.

It is important that the full implications of any substantive change are considered. And this is not an issue confined to barristers and the Bars, because it affects solicitor-advocates.

We do not suggest that advocates should be above the law. Presently, non-court-related advice is not protected by the immunity. However, there must be proper recognition of the need for finality in litigation and the tension which exists between an advocate's duty to his or her client and the duty to the court.

The reality is that it is not open to an advocate to call the judge or jury to defend his or her conduct in court. The advocate is not simply another professional person engaged in private practice for personal reward. The advocate, like the judge, juror and witness, is an actor in the public functions of the State and an officer of the court.

Ross Ray QC
Chairman

On Judges, Courts and Justice

THE *Justice Statement* is the 10-year blueprint for the Attorney-General's whole portfolio and, almost 12 months since its release, continues to guide far-reaching and radical reform of our entire legal system.

A key component of these reforms is the drive to modernise our courts. We need to ensure that both our legal and broader community have full confidence in a strong, independent and diverse judiciary, operating from within a court system which is second to none in terms of its effectiveness and competitiveness. One key initiative to realise this vision has been to remove existing barriers to judicial appointment to ensure that the best and brightest legal minds are available for appointment. This process has already begun through such reforms as standardising the eligibility criteria for appointment to judicial office, allowing magistrates to work on a part-time basis and increasing the salary of Victorian judges to the levels of their Federal counterparts.

In a further response to the needs and expectations of Victorians for an accessible, flexible and efficient justice system, I have introduced legislation to enable the appointment of acting judges. While I appreciate the Bar's robust contribution to discussion on this important issue, I do not believe that the revamped office of acting judge represents the threat to the independence of our judiciary or the appearance of judicial impartiality that recent public comment might lead us to believe. As the High Court clearly indicated in *NAALAS* v *Bradley*,[1] the appointment of acting judges in State courts does not itself represent a threat to judicial independence. While their Honours cautioned that judicial independence could

be undermined if acting appointments were so extensive as to distort the character of the court concerned, I do not consider that the Bill could give rise to the situation where the number of acting appointees could practically present such a risk. The Bill will not affect security of tenure of existing judges and magistrates, nor will it affect the level of resources allocated to our courts. Let me make it clear at this juncture that acting judges will not be used to replace permanent appointments. And let's also be clear that legislation allowing for the appointment of acting judges has been in place for years. Quite clearly the Government can appoint acting judges and magistrates now, today. However the legislation needs to be more flexible and allow for a broader pool from which the heads of jurisdictions can choose acting judicial officers.

The Bill will not affect security of tenure of existing judges and magistrates, nor will it affect the level of resources allocated to our courts ... acting judges will not be used to replace permanent appointments.

The legislation currently before Parliament is intended to work on a co-operative basis between the judiciary and the Attorney-General. Draft guidelines being formulated in consultation with the heads of each jurisdiction and forwarded for comment to the Victorian Bar Council will uphold the integrity of the office of acting judge and form the basis for developing convention regarding future appointments. This will ultimately ensure that our courts continue to meet the highest expectations of the community into the 21st century and are well-placed to respond to the immense and unpredictable pressures placed upon them well beyond any term of Government.

While it goes without saying that Victoria can take great pride in the professionalism of our judiciary, merely a cursory glance over recent press reveals the scrutiny with which the media examines holders of judicial office across our nation. Public perception of judicial officers' performance is no doubt linked to community confidence in the rule of law generally. This is why I am establishing a new judicial complaints system to investigate serious allegations against judicial officers. In an Australian first, allegations of judicial misconduct will be referred to a three-member committee selected from a panel of judges from various jurisdictions, nominated by their respective Chief Justices. This legislation will also standardise the grounds on which, if substantiated, a judge may be removed from office. Replacing a fragmented, ad hoc system, these reforms will provide greater certainty and transparency in relation to

1. (2004) 206 ALR 315 (upholding the earlier decision in *Re Governor, Goulburn Correction Centre; Ex parte Eastman* (1999) 200 CLR 322 on this issue).

judicial conduct for both the community and judiciary alike.

The commitment to modernising our court system in Victoria does not, however, begin and end with reforms to judicial office. In previous editions of this newsletter I have highlighted a range of other initatives, all with the aim of improving the responsiveness of courts to the needs of our community, particularly the marginalised and most vulnerable. Such reforms, painted with a broad brush, include the continual development of problem-solving jurisdictions, such as the Drug Court, the Sex Worker List, the Family Violence Court and the Koori Court. An increase in the jurisdictional age limit applicable to hear matters in the criminal division of the Children's Court will also ensure that our court system can respond more appropriately to the needs of young people. In addition, a range of initiatives to support victims of crime will assist in their recovery from violent offences, improve their experience of our court processes and examine the potential for developing a Victims' Charter.

As the public interface of justice for many in the community our courts are confronted with a difficult and demanding task. With each matter that comes before the courts, a multitude of competing interests are invariably presented, irrespective of whether the proceedings are initiated by the State or private parties. Striking the right balance in response to these competing interests lies at the very heart of our notion of justice and invites us to question how well, as a community, we have responded in the past and how we may wish to shape the future. At what cost to public confidence in the rule of law do we fail to make our courts responsive to the needs of our community as we enter this new century? How do we best assess the response required and how will we know if the reform agenda is moving too quickly or failing to keep pace with our evolving society? And what may the future hold if we falter or err on the side of conservatism in exploring and, more importantly, acting upon identified opportunities for reform of our civic institutions? These are all questions that the Justice Statement encourages us to ask of our legal system. Amidst all this I remain confident that the modernising of our courts, as outlined, is an essential step in building a secure foundation for the future.

Replacing a fragmented, ad hoc system, these reforms will provide greater certainty and transparency in relation to judicial conduct for both the community and judiciary alike.

Rob Hulls MP
Attorney-General

Legal Practice Act 1996

Practitioner Remuneration Order (includes GST)

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

1. This Order may be cited as the Practitioner Remuneration Order and shall come into operation on the 1st day of January 2005.
2. This Order applies —
   (a) in the case of business to which the Second, Third and Fourth Schedule applies — to all business for which instructions are received on or after the day on which this Order comes into operation; and
   (b) in the case of any other business to which this Order applies — to all business transacted on or after the day on which this Order comes into operation.
3. (1) The Practitioner Remuneration Order commenced 1 January 2004 is hereby revoked.
   (2) Notwithstanding the revocation of the Practitioner Remuneration Order commenced 1 January 2004, the provisions of that Order shall continue to apply to and in relation to business, other than business referred to in Clause 2, in all respects as if that Order had not been revoked.
4. (1) In this Order and in the Schedules, unless inconsistent with the context or subject matter —
   "Folio" means 100 words or figures or words and figures.
   "In print" means in print on a form readily available for sale to the public.
   "Document" has the same meaning as under Section 3(1) of the *Evidence Act 1958*.
   "Typewriting" means the production and presentation of words, figures and symbols on pages or otherwise by means of hand writing, typewriting or the use of word processing equipment or any other form of mechanical or electronic production other than photocopying.
   (2) A reference in this Order and the Schedules to the consideration is a reference —
      (a) where the consideration relates to a matter or transaction and is not wholly monetary, to the sum of the monetary consideration and the value of the real or personal property included in the consideration that is not monetary;
      (b) where the consideration relates to a matter or transaction comprising land and personal property, to the sum of the consideration for the land and the personal property;
      (c) where the consideration or part of the consideration for a matter or transaction is marriage or any other consideration which is not monetary, or where there is no consideration for a matter or transaction, to the value of the subject matter of the transaction;
      (d) where the consideration relates to a mortgage, bill of sale or stock mortgage by which a specified or ascertainable sum is secured, to the sum of the amount secured and the amount of any other specified or ascertainable sum agreed to be advanced and secured; and
      (e) where the consideration relates to the sale of an equity of redemption —
         (i) where the purchaser is the mortgagee and the purchaser employs the legal practitioner who prepared the mortgage — to the sale price; and
         (ii) in any other case, to the sum of the consideration and the amount of any principal sum owing under the mortgage at the time of sale.
   (3) Where the consideration relates to a matter or transaction comprising land under the provisions of the *Transfer of Land Act 1958* and other land, the remuneration of the legal practitioner shall be apportioned according to the respective values of the properties in question and remuneration may be charged in respect of each document necessarily prepared.
5. (1) The remuneration of legal practitioners in respect of business connected with sales, purchases, leases, mortgages, wills, settlements, formation and registration of companies, deeds of arrangement and other matters of conveyancing, including negotiating for or procuring an agreement for a loan, and in respect of other business not being business in any action or transacted in any court or in the chambers of any Judge or in the offices of the Master of the Supreme Court Prothonotary or other officer of any court and not being otherwise litigious business, shall, subject to this Order —
   (a) where the Second, Third or Fourth Schedule applies, be in accordance with that Schedule; and

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

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

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

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

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

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

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

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

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

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

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

(b) in accordance with the First Schedule —

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

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

(c) charges at the rate of $10.60 to $15.40 per quarter hour in respect of business necessarily transacted at the request of the client outside the normal business hours of the legal practitioner;

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

8. (1) In all cases to which the remuneration prescribed by the Second or Third Schedules applies a legal practitioner may, within 14 days from the time of undertaking any business, by notice in writing to his or her client and when any third party is obliged by contract or otherwise to pay that client's costs, by notice in writing to such third party elect to charge under the First Schedule.

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

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

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

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

10. (1) Where a legal practitioner —

(a) is authorised by the First Schedule to make any charge in connection with the sale, purchase, transfer or conveyance of land and is also authorised by the Second Schedule to make any charge in respect of the same land and the transaction is completed at the same time for the same client; or

(b) is authorised by the Second Schedule to make charges in respect of two or more matters or transactions relating to the same land completed at the same time for the same client — then each charge under Part A or Part C of the Second Schedule shall be reduced by one-third or to a sum equal to the highest of those charges (before a reduction) together with the sum of $104.00 for each additional charge, whichever is the greater.

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

(a) for both mortgagee and mortgagor; or

(b) for both lessor and lessee; or

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

11. In respect of loans not exceeding $110,000 where a legal practitioner acts for a society registered under the provisions of the *Co-operative Housing Societies Act 1958* his or her charge under Part A or Part C of the Second Schedule shall be reduced to 75 per cent of the charge otherwise appropriate.
12. The Second and Third Schedules shall not apply to matters or transactions concerning any premises subject to a licence as defined in the *Liquor Control Act 1987* and, accordingly, the First Schedule shall apply to those matters or transactions.

FIRST SCHEDULE

Instructions

1. A charge may be made by way of instructions in addition to the items hereinafter contained in this Schedule having regard to all the circumstances of the case including the following:
   (a) The complexity of the matter and the difficulty and novelty of the questions raised or any of them;
   (b) The importance of the matter to the client;
   (c) The skill, specialised knowledge and responsibility involved;
   (d) The number and importance of the documents prepared or perused, without regard to length;
   (e) The place where and the circumstances in which the business or any part thereof is transacted;
   (f) The labour involved and the time spent on the business;
   (g) The amount or value of any money or property involved; and
   (h) The nature of the title to any land involved.

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

Drawing

2. Any document including memoranda of instructions to counsel not in an action or a proceeding in court —
   (a) not in print, per folio — $13.90 to $22.60
   (b) partly in print, for so much as remains in print, per folio — $6.90
   (c) partly in print, for so much as is not in print, per folio — $13.90 to $22.60

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

Typewriting

3. (1) Per folio — $8.60
   (2) For each carbon copy, photocopy or other machine made copy, per page — $1.50.

Facsimiles

4. Transmitting or receiving written material by means of the legal practitioner's own facsimile machine as follows:
   Transmitting:
   First page $9.00
   Each subsequent page $3.10
   Receiving:
   First page $9.00
   Each subsequent page $1.50

Perusing

5. When it is necessary to peruse any document or part of a document (including correspondence), whether in print or not, per folio — $8.60.
6. When it is not necessary to peruse a document or correspondence but scanning of the document or correspondence is warranted, e.g. to determine the relevance or otherwise of the document or correspondence, per folio — $4.40.

Letters

7. Formal acknowledgment or the like, e.g. letter enclosing documents, requesting a reply, etc. — $22.60.
8. Circular letters — i.e. letters which except for the particulars of address are identical, for each letter after the first — $11.10.
9. Other letters — $33.10 or such charge as is fair and reasonable having regard to items 1, 2 and 3 of this Schedule.

Attendances

10. To file, lodge or deliver any documents or other papers, to obtain an appointment or to obtain stamping of a document, to insert an advertisement, or other attendance of a similar nature capable of performance by a junior clerk — $41.20.
11. Making an appointment by telephone or similar telephone attendance capable of performance by a junior clerk — $17.90.
12. On counsel with case for opinion or other papers or to appoint consultation or conference — $62.60.
13. On consultation or conference with counsel — $154.90.
    After the first hour, per half-hour or part thereof — $77.10 to $120.30.
14. Searching title and other searches, per half-hour or part thereof — $51.30.
15. On settlement of a conveyancing or commercial matter — $49.40 to $77.40.
    After the first half-hour, per half-hour or part thereof — $77.40 to $120.30.
16. Attendance by telephone or otherwise requiring the personal attendance of a legal practitioner or his or her managing or senior clerk and involving the exercise of skill or legal knowledge; per quarter-hour or part thereof — $34.70 to $64.20.
17. All other attendances; per quarter-hour or part thereof — $34.70.

Journeys

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

— per hour or part thereof — $77.40 but not exceeding for any one day — $1,085.50

SECOND SCHEDULE

Part A — Mortgage of Freehold or Leasehold Land

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

Table A — *Transfer of Land Act 1958*

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

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

Table B — General Law

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

Ref. No.	*Consideration $ Not exceeding*	*Col.1 $*	*Col. 2 $*
77	20,000	344	208
78	22,000	362	222
79	24,000	378	235
80	26,000	396	251
81	28,000	414	266
82	30,000	431	279
83	32,000	449	293
84	34,000	467	306
85	36,000	485	322
86	38,000	501	337
87	40,000	519	350
88	42,000	535	364
89	44,000	553	378
90	46,000	570	392
91	48,000	586	408
92	50,000	605	422

93	52,000	614	431
94	54,000	625	440
95	56,000	638	448
96	58,000	646	458
97	60,000	657	464
98	62,000	667	475
99	64,000	677	482
100	66,000	689	491
101	68,000	699	499
102	70,000	709	507
103	72,000	717	518
104	74,000	728	524
105	76,000	738	534
106	78,000	750	542
107	80,000	761	552
108	82,000	771	558
109	84,000	783	568
110	86,000	792	576
111	88,000	802	585
112	90,000	811	594
113	92,000	823	603
114	94,000	835	610
115	96,000	844	619
116	98,000	855	628
117	100,000	864	638
118	110,000	900	663
119	120,000	934	693
120	130,000	968	722
121	140,000	1002	750
122	150,000	1038	778
123	160,000	1073	808
124	170,000	1109	836
125	180,000	1142	863
126	190,000	1176	892
127	200,000	1212	918
128	250,000	1297	991
129	300,000	1383	1064
130	350,000	1469	1135
131	400,000	1558	1206
132	450,000	1644	1275
133	500,000	1729	1346
134	Over 500,000 add per 100,000	88	71

Part B — Deed of Variation or Extension of Mortgage

1. Charges of *legal practitioner for mortgagee* only in connection with deed of agreement for variation of terms of mortgage of freehold or leasehold land including extension of date of payment, alteration of rate of interest or reduction or increase of loan comprising instructions, necessary searches, preparation and perusal of documents, investigation of title, obtaining necessary certificates, necessary inquiries as to other interests in the land, preparation of any necessary accounts, stamping and registration and all necessary attendances and correspondence in connection therewith shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1.
2. Charges of *legal practitioner for mortgagor* in connection with deed of agreement for variation of terms of mortgage of freehold or leasehold land including extension of date of payment, alteration of rate of interest or reduction or increase of loan comprising instructions, necessary searches, preparation and perusal of documents and all necessary attendances and correspondence in connection therewith shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2.
3. Where the *consent of a prior or subsequent mortgagee* is required in order to vary or extend the mortgage, the legal practitioner may in addition charge the following sum for each such consent — $133.60.

Transfer of Land Act 1958

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

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

General Law Land

Where the land secured by a mortgage is land which is not under the provisions of the *Transfer of Land Act 1958*, the following additional charge may be made — $46.30.

Part C — Discharge of Mortgage or Discharge of Part of the Mortgaged Land or Discharge of Mortgage as to Part of the Debt Secured

1. Charges of *legal practitioner for mortgagee* (where no part of the debt secured is received by the legal practitioner) in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, preparation and perusal of documents (including memorandum of discharge of mortgage) and all necessary attendances and correspondence, delivery of discharge of mortgage to the mortgagor, his or her legal practitioner or agent shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the sum of $165.10.
2. Charges of *legal practitioner for mortgagee* (where the debt secured or part thereof is received by the legal practitioner) in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, preparation and delivery of the discharge of mortgage, receipt of amount to be discharged, perusal of documents and all necessary attendances and correspondence and effecting final settlement with mortgagor, his or her legal practitioner or agent shall be in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1.
3. Charges of *legal practitioner for mortgagor* in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, perusal of memorandum of discharge of mortgage, registration at Land Registry, attention to insurance policies and all necessary attendances and correspondence, and effecting final settlement with mortgagee, his or her legal practitioner or

agent, shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2.

Transfer of Land Act 1958

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

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

General Law Land

Where the land secured by a mortgage is land which is not under the provisions of the *Transfer of Land Act 1958*, the following additional charge may be made — $46.30.

THIRD SCHEDULE

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

1. Charges of *legal practitioner for lessor* in connection with lease of land comprising instructions for and drawing lease, settling draft with lessee, his or her legal practitioner or agent, perusal of documents and all necessary attendances and correspondence to effect completion of transaction —
   (a) with material alteration (in duplicate) after amendment — shall be the charges prescribed by Column 1A; and
   (b) without material alteration — shall be the charges prescribed by Column 1B.
2. Charges of *legal practitioner for lessee* in connection with lease of land comprising instructions, settling draft lease with lessor, his or her legal practitioner or agent, preparation and perusal of documents and all necessary attendances and correspondence to effect completion of transaction on behalf of lessee —
   (a) where lease is executed after material alteration (by lessor) after amendment — shall be the charges prescribed by Column 2C; and
   (b) where lease is executed without material alteration (by the lessor) after amendment — shall be the charges prescribed by Column 2D.
3. If the document used (irrespective of the number of folios) is *in print*, the charge of a legal practitioner shall be two-thirds of the charges prescribed by Columns 1B or 2D.
4. If the document used (irrespective of the number of folios) is in a form prepared by a legal practitioner for a lessor for use in connection with *five or more leases* of premises forming part of the same building or development — the charge of a legal practitioner for the lessor for each such lease shall be two-thirds of the charges prescribed by Column 1B.
5. The charges of a legal practitioner upon the *renewal of a lease* pursuant to an option for renewal contained in an existing lease shall be two-thirds of the charge prescribed by Columns 1B or 2D.
6. Charges of legal practitioner in connection with a *disclosure statement* made pursuant to section 17 of the *Retail Leases Act 2003* including instructions, preparation of the disclosure statement, preparation of the notice of objection, perusal of all documents and all attendances and correspondence are not included in Columns 1A and 1B and the legal practitioner may charge additional remuneration in respect thereof in accordance with the First Schedule.

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

191	160,000	1171	879	879	585
192	170,000	1214	911	911	606
193	180,000	1257	944	944	629
194	190,000	1300	977	977	651
195	200,000	1345	1007	1007	671
196	250,000	1454	1091	1091	727
197	Over 250,000				
	add per 200,000	109	82	82	56
198.	* * *	*	*	*	
199.	* * *	*	*	*	
200.	* * *	*	*	*	

Part B — Stock Mortgage And Lien On Wool or Lien on Crop

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

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

Part C — Renewal of Bill of Sale

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

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

Part D — Satisfaction or Discharge of Bill of Sale or Stock Mortgage

1. Charges of *legal practitioner for creditor* in connection with satisfaction or discharge of a bill of sale or stock mortgage comprising preparation and perusal of documents (including memorandum of satisfaction or discharge) and all necessary attendances and correspondence and effecting final settlement with debtor, his or her legal practitioner or

agent shall be the charges prescribed by Column 1.

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

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

Part E — Application by Legal Personal Representative Under the Transfer of Land Act 1958

267. Charges of legal practitioner in connection with an application by a trustee, executor or administrator to be registered as proprietor of real estate or mortgage, including instructions, checking title identity, preparation of application, necessary attendances and correspondence and registration — $209.40.

268. For each additional certificate of title or mortgage produced beyond the first title or mortgage referred to in the application — $19.80.

Part F — Application by Surviving Proprietor

269. Charges of legal practitioner in connection with an application by a survivor of joint proprietors to be registered as proprietor of real estate or mortgage, including instructions, checking title identity, preparation of application and declaration, necessary attendances and correspondence and registration — $232.50.

270. For each additional certificate of title or mortgage produced beyond the first title or mortgage referred to in the application — $19.80.

Part G — Production Fee

271. For production of Crown grants, certificates of title, title deeds, or other documents in the possession of the legal practitioner of the person entitled to the custody thereof at such legal practitioner's office or at the Land Registry, Office of the Registrar-General or elsewhere, including, where necessary, endorsement of an order to register for not more than two Crown grants, certificates of title, chains of title deeds, or other documents — $132.10. for each additional Crown grant, certificate of title, chain of title deeds, or other document beyond the second — $19.80.

FOURTH SCHEDULE

Part A — Negotiating for or Procuring an Agreement for a Loan when the Money is in Fact Lent and the Legal Practitioner is Neither the Lender Nor One of the Lenders

272. In respect of money lent upon the security of real or leasehold estate or personal property — 1.09 per centum upon the amount lent.
Note: If a legal practitioner negotiates for or procures an agreement for the renewal of a loan he or she shall not in respect thereof be entitled to charge remuneration in accordance with this item and his or her charge shall be 0.55 per centum upon the amount of the renewed loan.

273. (1) If a legal practitioner negotiates for or procures an agreement for a loan for his or her client being the borrower or mortgagor through the agency of any person (other than a legal practitioner) to whom a procuration fee is payable then he or she shall only be entitled to remuneration in accordance with the First Schedule in respect of negotiating for or procuring such agreement.
(2) If a legal practitioner negotiates for or procures an agreement for a loan for his or her client being the borrower or mortgagor through the agency of another legal practitioner then the remuneration provided by item 272 shall be divided between the legal practitioners, two-thirds being payable to the legal practitioner for the mortgagee and one-third to the legal practitioner for the mortgagor.

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

Part B — For Negotiating for or Procuring an Agreement for a Loan when the Money is in fact Lent and the Legal Practitioner or The Legal Practitioner's Nominee Company is Either the Lender or One of the Lenders

275. When the legal practitioner, or a nominee company of which the legal practitioner or a partner of the legal practitioner is a director, is either the lender or one of the lenders no remuneration shall be charged for negotiating or procuring the loan, except in the following cases:
(a) when the legal practitioner arranges and obtains the loan from a person for whom he or she acts and subsequently by arrangement with his or her client lends the money and executes or signs the security in his or her own name or the name of a nominee company of which he or she or his or her partner is a director, he or she or such nominee company being in fact trustee or agent for the person aforesaid; or
(b) when the legal practitioner contributes portion of the money in fact lent, and arranges and obtains the remaining portion from another person not being his or her partner as a legal practitioner, not being a co-trustee with him or her in relation to the money lent.

276. In either of the foregoing cases a charge for negotiating or procuring an agreement for a loan may be made at the rate prescribed in Part A in respect of the amount so obtained from such other person.
Note: If a legal practitioner negotiates for or procures an agreement for the renewal of a loan from such other person he or she shall not in respect thereof be entitled to charge remuneration in accordance with item 272 and his or her charge shall be 0.55 per centum upon the amount of the renewed loan.

The Retrospective Application of Appeal Costs Act Caps on Daily Fees for Criminal Adjournments

Applying to certificates granted before 17 December 2004

Ross Nankivell

A number of solicitors have apparently received a notice from the Appeal Costs Board that the amount allowed on their client's claim on an indemnity certificate that was granted before 17 December 2004 has been determined by reference to costs ceilings on daily fees that were not imposed until 17 December 2004.

The relevant costs ceilings were introduced by order of the Attorney-General in the "Appeal Costs (Maximum Amount) Order (No. 1)", published in the *Victorian Government Gazette*, No. S 271 Friday 17 December 2004. The statutory authority in the Attorney-General to make such an order derives from section 17(5) of the *Appeal Costs Act 1998* (Vic), introduced by amendment of that Act by the *Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004*.

The costs ceilings are maximum amounts payable by the Appeal Costs Board for each day in respect of which an indemnity certificate has been granted by the Court under section 17 of the Appeal Costs Act in relation to the costs of the adjournment of the hearing of a criminal proceeding not attributable to any act, neglect or fault of the accused.

Properly construed, neither the relevant sections of the Appeal Costs Act nor the executive order of the Attorney-General imposing the costs ceilings has any retrospective application. For convenience of reference, the analysis is set out in numbered paragraphs.

NEITHER THE ORDER NOR THE STATUTE IS EXPRESSED TO HAVE RETROSPECTIVE EFFECT.

1. The costs ceilings were introduced by the "Appeal Costs (Maximum Amount) Order (No. 1)", published in the Victorian Government Gazette, No. S 271 Friday 17 December 2004. Clause 6 of that Order provides that: "This Order operates on and from the date it is published in the *Government Gazette*." That does not, on its face, suggest any retrospective operation — indeed, arguably clause 6 negates any suggestion that the Order was intended to operate retrospectively.
2. Similarly, section 17(5) & (6) of the Appeal Costs Act 1998 — the section authorising the Attorney-General to make the order — was not intended to have any retrospective application. Several of the 2004 amendments were given retrospective effect, but not the amendments to section 17.
3. The transitional provisions in relation to the 2004 amendments are set out in section 46 of the Appeal Costs Act. Section 46(1) provides that section 17, as amended by the 2004 amending Act, "applies to the grant of an indemnity certificate on or after the commencement of that Act". That does not involve any retrospective effect.

THE POSITION TAKEN BY THE APPEAL COSTS BOARD

4. I am not aware of any written determination on this matter by the Appeal Costs Board. However, the basis of the retrospective application back to the date that the 2004 amendments took effect appears in the notice included in the Board's letter to applicants in cases where the indemnity certificate was granted on or after 9 June 2004:

   > The amount of payment provide [sic] in this certificate has been determined in accordance with the provisions published in the Victorian Government Gazette dated 17 December 2004, under Order No. S271 — "ORDER SPECIFYING MAXIMUM AMOUNT PAYABLE BY THE APPEAL COSTS BOARD" — made under section 17(5) and (6) of the *Appeal Costs Act 1998* (as amended by the *Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004*) no. 34/2004 which was assented to on 8 June 2004.

5. Section 2 of the 2004 amending Act, the Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004, provides that the Act "comes into operation on the day after the day on which it receives the Royal Assent".

The Act received Royal assent on 8 June 2004. That, then, is apparently the basis of the Board's decision to apply the 2004 amendments to section 17 of the Appeal Costs Act as and from 9 June 2004.

THE BOARD'S POSITION IS ARGUABLY NOT CONSISTENT WITH THE STATUTE AND ORDER

6. There are two keys to the analysis of when the costs ceilings come into operation. The first is that section 17(5) of the Appeal Costs Act is merely permissive — it does not impose costs ceilings, it merely provides for their imposition by executive order, in the event that the Attorney-General may choose to impose them. The second is that only a court can grant an indemnity certificate, and that it is upon the granting of the certificate by a court in accordance with the provisions of section 17 that rights are conferred on the grantee.

SECTION 17(5) OF THE APPEAL COSTS ACT IS MERELY PERMISSIVE

7. Section 17(5) is permissive: "The Attorney-General *may* by order published in the Government Gazette, specify the maximum amount payable by the Board for each day in respect of which an indemnity certificate has been granted under this section" (emphasis added).
8. The Attorney-General may order costs ceilings, or the Attorney-General may choose not to order costs ceilings, or the Attorney-General may choose, as occurred in fact, not to order costs ceilings for some time — in this case, more than six months after the 2004 amending Act that conferred the power came into operation.
9. Although section 17(5) of the Appeal Costs Act conferring the power on the Attorney-General came into operation on 9 June 2004 (see paragraph 5 above), until the Attorney-General exercised that power, there were no costs ceilings. Significantly, section 17(3) of the Act, as amended, makes the entitlement under a certificate subject to "the maximum, *if any*, specified under sub-section (5)" (emphasis added).
10. Moreover, the explicit terms of the Attorney-General's Order provide that it comes into operation only "on and from the date it is published in the *Government Gazette*" (clause 6 of the Order), which was 17 December 2004.
11. Thus, until 17 December 2004, there were no costs ceilings to which the provisions of section 17(3) of the Appeal Costs Act were subject. Accordingly the amount that "a party granted an indemnity certificate under sub-section (1) *is entitled* to be paid by the Board", section 17(3) (emphasis added), is "an amount equal to that party's own costs of the adjournment … that the Board considers to have been reasonably incurred and that have not been paid by any other party", section 17(3)).

RIGHTS STEM FROM THE GRANTING OF A CERTIFICATE

12. That rights are conferred upon the granting of the certificate by a court is apparent from the above passage from section 17(3), namely that "A party *granted* an indemnity certificate under sub-section (1) *is entitled* to be paid by the Board" (emphasis added).
13. The basis of the position taken by the Board is apparently that the 2004 amending Act, the *Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004*, came into operation on 9 June 2004 (see paragraphs 4 and 5 above).
14. Significantly, that Act, in the transition provisions it introduced into the Appeal Costs Act, specifically identified and enumerated those amendments that were to apply to "an application to the Board made on or after the commencement of [the amending Act], irrespective of when the indemnity certificate was granted", section 7 of the Appeal Costs and Penalty Interest Rates Acts (Amendment) Act, and section 46(2), (3) and (4) of the Appeal Costs Act.
15. In contrast, the transition provision for the amendments to section 17 is that section 17, as amended, applies to "the grant of an indemnity certificate on or after the commencement of [the amending Act]", section 7 of the Appeal Costs and Penalty Interest Rates Acts (Amendment) Act, and section 46(1) of the Appeal Costs Act.
16. There can surely be no doubt that, on an application considered by the Board on 16 December 2004 based on an indemnity certificate granted on 9 June 2004 under section 17(1) of the Appeal Costs Act, the grantee would be entitled to be paid without reference to the costs ceilings that had not yet come into operation. It surely cannot be that the very same application, were it to be considered by the Board on 17 December 2004, rather than on 16 December, would be subject to the costs ceilings.

THE COSTS CEILINGS ARE SUBSTANTIVE, NOT PROCEDURAL

17. The costs ceilings are not merely procedural, affecting the manner in which the Appeal Costs Board is to deal with all applications on and after 17 December 2004; they are substantive, affecting the amount a person granted a certificate is entitled to be paid.
18. In *Rodway* v *The Queen*, (1990) 169 CLR 515, the High Court discussed the application of both the statutory and common law presumptions against the retrospective application of a statute where such retrospective application would affect an existing right.
19. The High Court was construing a Tasmanian statute, and so looked to section 16(1) of the Tasmanian *Acts Interpretation Act 1931*. The equivalent Victorian provision is section 14(2)(a) & (e) of the *Interpretation of Legislation Act 1984* (Vic), which provides (as material):

> 14. Provision as to effect of repeal etc. of Acts
> …
> (2) Where an Act or a provision of an Act —
> (a) is … amended …
> …
> the … amendment … of that Act or provision shall not, unless the contrary intention expressly appears —
> …
> (e) affect any right … obligation or liability acquired, accrued or incurred under that Act or provision; [or]
> …
> (g) affect any investigation, legal proceeding or remedy in respect of any such right … obligation [or] liability … as is mentioned in paragraph[] (e) … —
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced … as if that Act or provision had not been … amended …

20. The common law rule is to the same effect, namely that "a statute ought not be given a retrospective operation where to do so would affect an

existing right or obligation unless the language of the statute expressly or by necessary implication requires such a construction", *Rodway* v *The Queen,* (1990) 169 CLR 515 at paragraph 4.

21. The High Court noted that the common law rule has no application to statutes that affect merely matters of procedure. They will invariably operate prospectively — "prescrib[ing] the manner in which something may or must be done in the future, even if what is to be done relates to, or is based on, past events", *Ibid.*
22. The statutory amendment in *Rodway* was to substitute a warning to the jury that it is unsafe to convict on the uncorroborated evidence of a person against whom the crime is alleged to have been committed for the previously absolute provision that no person shall be convicted on such uncorroborated evidence, *Id*. at paragraphs 1 & 2. The trial court applied the amended provision and gave the warning rather than directing an acquittal.
23. The defendant appealed his convictions, and failed in the Court of Criminal Appeal, and in the High Court. The High Court held that "there is no right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial", *Id*. at paragraph 8.

APPLICATION OF THE RODWAY PRINCIPLES

24. The Appeal Costs Board application of the costs ceilings to indemnity certificates granted under section 17 of the Appeal Costs Act before 17 December 2004 affects an existing right because rights are conferred upon the granting of the indemnity certificate by the Court. Not only does the language of the statute, or in this case the executive order, not require a construction that they are to operate retrospectively — the very opposite is the case.
25. Everything hinges on the grant of the certificate. The amendment empowering the Attorney-General to impose ceilings was introduced into section 17 which provides for the granting of a certificate by the court. Section 17(3) provides that "a party *granted* an indemnity certificate *is* entitled" (emphasis added). The transitional provisions distinguish between other amendments that apply to an application to Board "irrespective of when the indemnity certificate was granted", and these amendments to section 17 which apply to "the grant of an indemnity certificate".
26. The ceilings imposed by the executive order are not procedural. Although section 17(5) focuses on the "amount *payable* by the Board" (emphasis added), neither section 17(5) nor the executive order "prescribe[s] the *manner* in which something may or must be done in the future", *Rodway* at paragraph 4 (emphasis added). The order affects the substance of the entitlement conferred by certificates granted after the order comes into operation — explicitly stated in clause 6 of the order to be "on and from the date [the order] is published in the *Government Gazette*".

Ross Nankivell is the Legal Policy Officer of the Victorian Bar. He practised for some years as a solicitor, then as a barrister, and was a full-time senior tutor at Monash University before going to the United States, where he taught for 18 years, most recently as Joseph B Kelly Lawyering Skills Professor at Pennsylvania State University.

Legal Profession Tribunal

Publication of Orders

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

Name of practitioner: David Perkins ("the practitioner")

1. Tribunal Findings

   The Full Tribunal found the practitioner guilty of:

   Misconduct at common law in that in the course of his appearance before a member (the Member) of the Victorian Civil and Administrative Tribunal the legal practitioner spoke and uttered words which were abusive of and offensive and insulting to the Member and which were intemperate and vituperative and persisted in making submissions that the Member should disqualify himself after he had ruled on the submissions and declined to hear the legal practitioner further in that regard.

   Misconduct within the meaning of section 137 of the Act in that by reason of the matters referred to in (a) hereof the legal practitioner wilfully contravened rules 4(a), (b), and (c) of the Rules of Conduct of the Victorian Bar in that he engaged in conduct which was:

   (i) discreditable to a barrister;
   (ii) prejudicial to the administration of justice; and
   (iii) likely to diminish public confidence in the legal profession and in the administration of justice or otherwise bring the legal profession into disrepute.

2. The Order of the Full Tribunal made on 21 December 2004 was as follows:
   1. The legal practitioner is reprimanded;
   2. Pursuant to the provisions of section 160(1)(c)(ii) of the Act the legal practitioner's practising certificate be suspended from 25 December 2004 to 25 March 2005;
   3. That the legal practitioner pay to the Victorian Bar Incorporated its costs of and incidental to the proceedings fixed in the sum of $30,000;
   4. There be a stay of 12 months for payment of the costs; and
   5. Liberty to the legal practitioner to apply in relation to the time for payment of costs.

As at the date of publication no notice of appeal against the Order of the Tribunal has been lodged.

Name of practitioner: Alan Herskope ("the practitioner")

1. Tribunal Findings

   The Full Tribunal found the practitioner guilty of:

   Two charges of misconduct relating to the misuse of a discovered document in a County Court action without any dishonesty on his part.

2. The Order of the Full Tribunal made on 13 December 2004 was as follows:
   1. The legal practitioner is reprimanded;
   2. The legal practitioner pay the costs of the Victorian Bar fixed in the sum of $15,145. The costs are to be made payable to the Victorian Bar; and
   3. For payment of costs there will be a stay of three months with liberty to apply.

As at the date of publication no notice of appeal against the Order of the Tribunal has been lodged.

The Legal Reporting Awards 2004 Presentation Ceremony

Monday 16 May 2005
at 12:30 pm

Old Melbourne Magistrates Court
Russell Street, Melbourne

The Victorian Law Foundation is again hosting the Legal Reporting Awards, to promote the highest standard of reporting on legal issues in Victoria. The Awards cover stories in print, on television and radio, and illustrations and photographs published in Victoria during 2004.

Awards will be made in 12 categories:

- reporter of the year on legal issues
- best report in print
- best report on television
- best report on radio
- best news breaking report — all media
- best deadline report — all media
- best report in community media
- best report in multi-cultural media
- best photograph
- best illustration
- Columb Brennan Award for excellence in court reporting
- Tony Smith Award for reporting which promotes an understanding of the work of the courts

The awards testify to the professional skills of journalists in Victoria in covering the courts and legal issues. They recognise legal journalism at its best.

For an invitation, please contact:
jdonovan@victorialaw.org.au

Supreme Court

Justice Kevin Bell

ON 17 February 2005 Kevin Bell was welcomed as a Judge of the Supreme Court of Victoria. His Honour was educated at St Agnes Primary School, Highett, and St Bede's College, Mentone. He completed his tertiary education at Monash University, graduating with degrees of Bachelor of Arts (majoring in Economics) and Bachelor of Laws (with Honours). His Honour served articles with Michael Thornton of the firm, McPherson & Kelly in Dandenong. His Honour is remembered as "a very energetic, inventive and compassionate articled clerk who cared a great deal about other people". Conscientious and ambitious His Honour was soon busy with a variety of cases — as well as with roles at the Tenants Union Legal Service and Western Region Community Legal Centre. At the same time His Honour was co-ordinator of the Brotherhood of Laurence in sponsoring a project to establish a "Poverty Law Practice" in Footscray.

The "Poverty Law Practice" idea was novel. His Honour worked on the project with Denis Nelthorpe. The idea was for a solicitor's practice run by a community-based board that would be a non-profit organisation, but would also charge full fees for work like conveyancing. Those fees would then subsidise the free work for people who could not get legal aid and could not pay. It was a creative solution that drew fierce opposition from a range of people. His Honour's persistence, strength and ability led to accommodations in the professional practice rules that enabled the project to proceed. The "Poverty Law Practice" ran in Footscray for a number of years. It settled into the more conventional framework of a community Legal Centre and became the Footscray Community Legal Centre.

His Honour later worked as a solicitor with GW Legg & Co at St. Albans. It was about this time he established and worked pro bono and at night as a volunteer in a legal service that assisted people who could not afford legal representation in complaints against lawyers. His Honour has always tackled the hard issues and few things are harder than complaints against fellow lawyers. In 1982 His Honour presented a paper on "Reforming the Organisation of the Legal Profession: Complaints, Discipline and Professional Standards". That same year His Honour wrote a chapter "Complaints Against Lawyers" in the legal resources handbook of the Fitzroy Legal Service.

His Honour's commitment both to public interest law and academia continued through his early years in practice. He was a lecturer in legal studies at LaTrobe University with half-time duty as supervising solicitor for the West Heidelberg Community Legal Services. Not content with the two nominally half-time commitments His Honour from 1982 onwards was a part-time member of the Small Claims Tribunal and Residential Tenancies Tribunal. He was also a special parliamentary drafting consultant for the Government of Victoria with special responsibility for the *Residential Tenancies Act 1980* and charged with putting that foundation amending act into plain English as a model act.

During his seven years as an Essendon City Councillor and chairman of various committees he established the Essendon Community Legal Centre as well as the Essendon Community Health Centre and a number of social and sporting facilities.

In May 1985 His Honour signed the Victorian Bar Roll and read in chambers with Peter Heerey, now Justice Heerey of the Federal Court. In 1995 His Honour was founding member of the Bar Indonesian Legal Aid Committee. He served on the Human Rights Committee at the Victorian Bar for the last five and a half years and as a member of the Federal Court Migration List Users Group.

His Honour's involvement in the small Indonesian Legal Aid Committee showed how a few concerned individuals could make a difference on the world stage. The Soeharto regime was in power in Indonesia. Indonesian human rights advocates needed support. Committee members raised contributions from fellow barristers. The Committee brought Indonesian human rights lawyers to Melbourne for advocacy training in the Bar Readers' Course. The Bar waived the course fees. It was this small committee His Honour presided over who paid all the fares and expenses. His Honour billeted some of the Indonesian lawyers in his own home. The Committee so far has brought four Indonesian human rights advocates to Melbourne. The first of them came nearly 20 years ago. Now, nearly 20 years later, three of the four still practice in human rights law and two of them have established a new human rights organisation that employs six human rights lawyers. Three of the four Indonesian advocates read with His Honour. His Honour had five other readers — Anthony Lawrence, Richard Niall, Mark Perica, Peter Gray and Roz Germov.

Throughout His Honour's 26 years in the law he established a successful practice in diverse and often complex areas of law: public law, industrial and employment law, and native title law, and consequently gained a reputation as a respected litigator.

The guiding principles throughout his career has undoubtedly been an innate sense of fairness and justice which has impacted upon both his professional and personal life. His Honour has always approached the law with a high level of respect for the legal process, and with great interest in the potential of new developments in the law to bring about positive change — particularly in relation to social justice issues. His Honour has represented what might be considered to

some as a range of "complex and rough" clients. In the early days of local residents rallying for better housing conditions, he dealt with individuals, unions, Aboriginal elders, as well as State and Federal governments.

The heart of his approach has always been a genuine interest in the people he has been briefed to represent. While taking instructions, His Honour constantly demonstrated a keen understanding of the "political and social context" in which issues arose. By demonstrating a genuine interest in the people he represented, His Honour was always able to gain their confidence and then very effectively advocate their interests in the courts.

On one occasion His Honour represented some 30 Mayne Nickless employees who claimed they had been dismissed a couple of weeks before Christmas for seeking better working conditions. His Honour was able to persuade Justice Ryan that the matter should be expeditiously brought on for trial. Within 14 days of initiating proceedings, on Christmas Eve His Honour's clients had judgment and were reinstated in their jobs. They wanted to do something to thank Justice Ryan. Someone had a bright idea and they assembled beneath His Honour's window in the old High Court Building in Little Bourke Street and facing the lane serenaded him with Christmas carols.

His Honour was appointed one of Her Majesty's Counsel in 1997.

In 2001 His Honour conducted a successful native title claim in the *Rubibi 6* case involving the Yawuru People. Prominent Aboriginal leader Pat Dodson recalls the strong connection His Honour made with many of the Aboriginal people he represented and the significant lengths he went to in order to narrow the cultural divide. In particular His Honour took care to respect their customary laws and provided a detailed explanation of each step of the case to his clients, earning both the respect and appreciation of many elders.

In reflecting upon His Honour's attributes Mr Dodson said:

> To see someone of his calibre and discipline in action was a great privilege and delight. He brings to each task a very balanced and controlled approach. He was also able to very skilfully gather the information needed and overcome the challenges posed by the social, cultural division amongst ourselves, in order to successfully advocate our position in court. We were in very good hands.

In the *Bardi & Jawi* case, involving another native title claim, His Honour was brought in midway through the case and is credited with "turning the case on its head" and saving what was potentially a losing case.

Travelling into remote areas of the Kimberleys and facing oppressive conditions and limited facilities His Honour and colleagues worked tirelessly to gather further affidavits in a short timeframe and painstakingly changed the case strategy after two influential High Court decisions were handed down.

In 1998 His Honour and his family established the Hurley Vineyard at Balnarring on the Mornington Peninsula. His Honour has a passion for wine making. He is presently undertaking a distant learning course at Charles Sturt University. He is eight subjects from completion of a Vigneron's Bachelor of Applied Science degree. When recently asked by a journalist about his interest in wine and wine-making His Honour described his experience in the following way:

> The highs are moments when I am working in the vineyard where I have an epiphanous connection. It might be stimulated by a falling leaf, a bird's call, it may be the sheer beauty of a bursting bud or a beautifully formed pinot noir bunch. I have moments when that is overwhelming. It is a very personal thing.

Described by His Honour's colleagues as a "warm and caring individual who is generous with his time" His Honour is fondly remembered as a lawyer who wanted to make a difference in each endeavour he undertook.

His Honour brings to the Supreme Court Bench a strong sense of the legal profession's ideals. He also bears an equally strong sense of the need to serve the people of Victoria.

The Victorian Bar congratulates His Honour on his appointment and wishes him every success in the voyage ahead.

County Court

Judge Felicity Hampel

EARNING her the nickname "Judge Valentine" and no doubt the gift of flowers from proud husband Professor George, on 14 February this year Her Honour was appointed a Judge of the County Court.

Her Honour was born in Melbourne and educated at Genazzano College. She studied arts/law at Monash University and served her articles with Mr Isaac Apel of Meerkin & Apel. She was admitted to practice in March 1980 then came to the Bar, reading with His Honour Justice Merkel and signing the Bar Roll in 1981.

After an early start in commercial matters Her Honour developed a strong practice in criminal law and anti-discrimination/human rights law. More recently she has added administrative law cases. She took silk in 1996. Her practice has taken her from an assortment of tribunals to all State Courts, the Federal Court and the High Court with appearances in every State and Territory and at times overseas.

Her Honour's appointment comes as no surprise, especially in light of her significant commitment to public interest litigation and the teaching of advocacy.

A large portion of Her Honour's practice has been pro bono work through PILCH, PIAC and Amnesty International. She appeared in many high-profile human rights cases including in the Federal

Court *McBain* (IVF) challenging the right of lesbian women to access IVF technology in Victoria; in the High Court in *Nulyiarimma* (special leave — genocide case) and *MIMA* v *B* (children in immigration); and in the Supreme Court in *Lednar* v *Magistrates Court* (the DNA case).

After many years involvement with the Victorian Council for Civil Liberties, Her Honour became President of her "baby" Liberty Victoria in 1998–2000. She has extensive community involvement with human rights and women's issues, serving as an Adjunct Professor at Monash University, a Board member of the Castan Centre for Human Rights and the Royal Women's Hospital and a committee member of the Human Research Ethics Committee of RMIT University. She was deputy co-convenor of the Victorian State Council of the Australian Republican Movement and following her convictions adopted the title of Senior Counsel, instead of Queen's Counsel, when the alternative became available. She has been a great supporter of the Aboriginal Trust, and those sharing chambers with her enjoyed beautiful works of art by Aboriginal artists on loan from the Trust.

In addition to her work at the bar Her Honour has been a part-time Commissioner with the Victorian Law Reform Commission and has contributed to many of the Commission's references, including the recent report *Defences to Homicide*. She was instrumental in drafting proposed changes to the Equal Opportunity Act to include homelessness and unemployment as grounds of discrimination. These changes are expected to go before parliament later this year.

Some of us know Her Honour was also an early champion for women barristers. Nearly ten years ago she posed the question "Do I Want to Be a Hero?" as keynote speaker to the 6th International Women In Leadership Conference: Vision in Leadership: Women Redefining Power. She was a founding member of the Women Barristers Association, convenor in 1995, and a founding Board member of Australian Women Lawyers. She contributed to the Bar's report *Equality of Opportunity for Women at the Bar* and was a member of the Equal Opportunity Committee. Whether she wanted hero status or not, she was recognised for her contribution to the law and women in the legal profession by her inclusion on the Victorian "Women Shaping the Nation" Honour Roll of the Centenary of Federation.

Her Honour has mentored three readers: Susan Borg, Judge Sandra Davis and Hilary Bonney. She was vice-chair of the Readers' Course committee, having served the readers for more than 14 years and introducing new technology to teaching methods and techniques to the course.

For many years Her Honour has taught advocacy and the principles of natural justice to barristers, solicitors, undergraduates, tribunal members, surgeons and prosecutors at The Hague International War Crimes Tribunal. She is recognised as a talented teacher with a compassionate and uncomplicated manner and a flair for teaching to the level of the student, whether they be reader or silk. She has been invited to teach in the Netherlands, Italy, Scotland and England, in the United States, New Zealand, South Africa and in Singapore. Her work was recognised by the Middle Temple in the UK and she was awarded the Queen's Scarf for her outstanding contribution. She has taught at the Victorian Bar Readers' Course, Leo Cussen Institute, Australian Advocacy Institute, Monash University and the International Institute of Forensic Studies.

In an interview for the WBA film *Raising the Bar* Her Honour said of her life as a barrister: "The Bar has given me opportunities to do things I never dreamed as a young girl I could do." She attributes much to her large family, especially her mother, who encouraged her to aspire to anything her heart desired, and to her husband, Professor George Hampel QC, formerly Justice of the Supreme Court. The indomitable and inseparable team of George and Felicity has no doubt been part of their respective successes — whether instructing advocates or ski school students, travelling or immaculate dressing.

Her Honour has juggled her extensive practice and teaching commitments with her community involvement. When she finds time away from work she has travelled extensively and makes time for skiing in Victoria and overseas, rollerblading, canoeing the upper reaches of the Yarra near the bush "retreat" and dining out in the inner city.

Judging by the warmth of her welcome Her Honour should have a most felicitous experience on the Bench.

Supreme Court

Master Charles Wheeler

ON Friday 18 February 2005, members of the profession gathered in the Banco Court to mark the retirement of Master Charles William George Wheeler from the Supreme Court.

Charlie Wheeler studied law at the University of Melbourne the hard way — part time, while working. He worked in the Department of Defence, at Victoria Barracks, and then in the Commonwealth Solicitor's Office.

In *De Minimis*, the Melbourne University Law Students' Society magazine, there was a column "Rumours to be quashed". There was a rumour to be quashed about Charlie — that, studying only part-time, he took seven subjects in his final year, and passed every one of them.

He served articles with the Commonwealth Deputy Crown Solicitor (Melbourne), Mr David Bell. Bell had been Crown Solicitor, but de-moted himself to become the Melbourne Deputy Crown Solicitor to see the football in Melbourne — surely any man's fantasy come true.

Bell was Crown Solicitor, nominally in Canberra. He was, in reality, always in Melbourne for the footy. In 1954, two journalists, Brown and Fitzpatrick, were before the House of Representatives in Canberra for contempt of Parliament. Prime Minister Menzies called for his Crown Solicitor, and was told that Bell was in Melbourne.

Menzies called Bell, and told him he could be Commonwealth Solicitor in Canberra, or he could be in Melbourne for the footy.

The Deputy Crown Solicitor position in Melbourne opened up, and Bell took it.

Charlie was admitted to practise on 1 November 1963, and signed the Bar Roll shortly afterwards, on 28 May 1964. He read with Ken Jenkinson, later Justice Jenkinson, first of the Supreme Court, then of the Federal Court. Jenkinson also had served articles with the Crown Solicitor, and Charlie was his first reader.

Jenkinson was the son of a journalist and he inherited his father's ear for language. He passed that on to Charlie. They both liked the apt word, the felicitous phrase. They spent happy hours polishing sentences, and were critical of instructing solicitors who had not done so.

Kevin Mahony, now Senior Master of the Supreme Court, was Jenkinson's second reader. Mahoney was a horse of a different colour. He'd served the full 12 months articles with a suburban sole practitioner, not the abbreviated 6 months Jenkinson and Wheeler had served with the Crown; and he'd had stayed on as a solicitor for a couple of years, instead of coming promptly to the Bar as they'd both done.

It's said that there was a book on how many weeks or months it would be before Mahony reacted to Jenkinson and Wheeler's cracks about solicitors. These were the less assertive mid-sixties, but the reaction came in weeks rather than the predicted months.

So began happy professional collegiality all around. Mahony and Wheeler served together as Masters for the whole of Charlie's 14½ years on the Court. Mahony arranged the ceremonial sitting to farewell Wheeler, and Charlie, in his remarks at the farewell, spoke most highly of the Senior Master.

Jenkinson was a great expert in Commonwealth compensation law. And it was no surprise that Charlie's practice was, for many years, in compensation law, both State and federal. Like Jenkinson, Charlie developed a diverse and solid practice.

Charlie has said this was not so much by choice, but at the behest of his clerk, Jack Hyland — that if Jack couldn't think of anyone else, he'd put anything in Charlie's pigeon hole.

In Charlie's court work as a barrister, flashes of humour lit up the room. He and Joseph Santamaria were opposed before Sir Reginald Smithers, arguing about some arcane provision of the Migration Act. Santamaria cited the maxim *Redendo singula singulis*.

Sir Reginald, in his inimitable high-pitched voice, said "What's that?" Less than helpfully, Santamaria said "It's Latin, Your Honour". Charlie chimed in to Santamaria, in a stage whisper, "I thought you'd slipped into your mother tongue, Italian."

Charlie had eight readers: Tom Topham, Michael Wilson, Gerrie Grabau, Lou King, Jacob Fronistas, Hugh Burchill, Bernie Sutherland and Mal Park.

He warned them that they'd not learn much law in his chambers — but they would learn the lore of the Bar. Part of that lore descended even to the particulars of making coffee. He sent one reader off to get coffee for the two of them. The reader returned rather sheepishly a few minutes later to confess that he had four sisters, and that he had never made coffee before.

Justice Pagone (as he then was) brought an espresso machine with him to the Court, and painstakingly instructed his associates into the mysteries of its proper use. Wheeler's coffee-making instructions were much simpler. He gave his reader the basics.

Coffee was a staple in the Wheeler chambers. When Charlie took the coffee machine home over the long vacation, another reader, unused to the regular coffees until he came to read with Charlie, suffered withdrawal symptoms.

Wheeler's readers were an interesting and varied group. Several of them were of mature years. Tom Topham, for example, had been in the Battle of Britain, and had been awarded the Distinguished Flying Cross. He had also been with the

Australian Wool Corporation before studying law part-time.

Topham joined Charlie as co-editor of Butterworths *County Court Practice* — indeed, the 3rd edition was Wheeler & Topham.

Charlie edited, or co-edited, *County Court Practice* for about 15 years.

Frequently Wheeler took his readers to lunch at the RACV club. He also kept them physically fit. Charlie always used the stairs — not only the four flights to his chambers in Owen Dixon, but the 20-some flights to the Workers' Compensation Board in Marland House. He sprinted up those stairs, with his reader panting behind.

Wheeler was, in his days at the Bar, a keen yachtsman. He named his yacht *SWMBO*, spoken "Swimbo" — a reference to Rumpole's appellation for his wife, "She who must be obeyed", taken, of course, from Rider Haggard's novel of that title.

Another rumour definitely to be quashed is that Mrs Wheeler, Wendy, bears any resemblance to Hilda Rumpole. Perhaps, in naming his yacht *SWMBO*, Charlie had in mind the film version of "She", in which Miss Ursula Andress played the lead.

The question has, in any event, been long moot because, some time before his appointment, Charlie "bottled" — in layman's terms, "rolled" — his Boomaroo yacht on the Hawkesbury, just north of the Brooklyn Bridge.

In a yacht club magazine, Charlie wrote this:

> Do you get sick of cruising — making constant decisions of where to sail today, or where to spend tonight? If yes, then the following may be of interest. One needs an honourable and legitimate excuse to cut short a holiday. Have you ever thought of bottling your yacht?

Speaking about the Brooklyn Bridge, if you believe that, I have this bridge for sale. However the premise of the article strains credulity, it is a thoroughly amusing page-and-a-half account of: An excuse to end a holiday, or how to bottle a Boomaroo.

Wheeler was appointed to the Court on 31 July 1990, replacing Master George Brett. Master Brett had retired on 17 September 1988. The Senior Master hopes that he won't have to wait 22 months for Charlie's successor. After all, Charlie's retirement, compelled by his date of birth, has been predictable for some time. However, it's now been over a month with, so far, no visible "movement at the station".

Wheeler's son gave him, upon appointment, a pair of framed two-up pennies. The frame is headed "Masterly Inactivity". The caption is:

2 heads: defendant wins
2 tails: plaintiff wins
1 of each: adjourn for coffee

That remained on his desk throughout his time on the Court. Although readers of *Bar News* were given a heads-up on this two-up philosophy in the article welcoming the Master upon his appointment, it was never raised in any appeal.

A very early case the Master heard was an application to set aside a judgment for debt. The judgment debtor offered no explanation for the two-year delay in applying to set-aside the judgment, and the Master dismissed the application. He predicted an appeal, and that he might be rolled, and there was an appeal. However, his judgment was sustained — a good start to a notable 14½ years' service.

Another case concerned a contract for the sale of a travel agency. It was a term of the contract that any action against the vendor be issued and served within 12 months of the sale. Towards the end of the 12-month period, the wily vendor, knowing a suit was in the air, went to Greece. Within only a few days of the 12-month period, the unfortunate purchaser applied for an order for service in Greece. Master Wheeler did better. He ordered substituted service by fax to the hotel in Greece where the vendor was staying. The vendor was not pleased at the publicity of the suit resulting from the fax, and appealed. Justice Beach gave him short shrift, and again the Master's judgment was upheld.

Perhaps Wheeler's most publicised decision was that in *Stern* v *Coutrelis* in 1999. It made the front page of *The Age*, with banner headline.

He had made an order for substituted service on French defendants in a libel action — for the writ to be sent by post to their Sydney solicitors. The Sydney solicitors asserted that article 15 of the French Civil Code deprived the Victorian Court of jurisdiction.

Article 15 provides: "A Frenchman may be brought before a Court of France for obligations contracted by him in a foreign country, even with a foreigner."

The Master had no difficulty holding that, even if Article 15 were construed to confer exclusive jurisdiction on the French Courts, it was no part of the law of Victoria and of no effect here.

Interlocutory judgment having been entered, the Master awarded the plaintiff $500,000 general damages, $250,000 exemplary damages, and $30,000 interest — a total of $780,000 — a record amount until the recent Ron Clarke award.

Another rumour to be quashed is that this served as a salutory lesson for the Sydney solicitors not to take frivolous objection on behalf of their fancy French clients to the jurisdiction of the Victorian Supreme Court.

In Master Wheeler's Court it was well known and understood that one should not tamper with affidavits. It had been made clear that documents should not be unstapled in any circumstances.

Some had grumbled about this. However, to those inclined to scoff at the Master's attention to the detail of holes where earlier staples had obviously been, there is now a conclusive answer. One such affidavit was found to have an exhibit that had not been in existence on the date that the affidavit was sworn. In the ensuing professional disciplinary proceedings, the offender was reprimanded and ordered to pay $5,500 costs.

Master Wheeler modestly characterised himself as a grey man — without the scarlet and ermine of the Judges of the Court — and out of the spotlight. The only greyness even remotely associated with him is his and his wife Wendy's 2004 long service leave "grey nomads" caravan trip around Australia.

When, some 15 years ago, the then Attorney-General called to offer this appointment, Charlie Wheeler did not hesitate. The Attorney-General asked whether he would be interested — "Yes". The Attorney-General made the offer — "I accept".

Kennan, A-G: "Charlie, you can have time to think it over."
Wheeler: "No, I accept."
Kennan, A-G: "You can have the weekend. Talk it over with Wendy."
Wheeler: "No, I accept."

Another rumour, firmly to be quashed, is that, shortly after Charlie had hung up from the Attorney-General, the phone rang again, and that he answered "Master Wheeler".

The enthusiasm in Charlie Wheeler's immediate, and persistently immediate, acceptance of the offered appointment as a Master of the Supreme Court never dimmed. Although occasionally a little testy about staple holes and mobile phones. Charlie maintained, throughout his 14½ years on the Court, the zest, cheerfulness and good humour he showed

throughout his 26 years' practice at the Bar. His handling of applications to approve compromises attracted particular admiration as expert, expeditious and sensitive.

Sally Baker was Charlie's associate for nearly nine of his 14½ years on the Court. In his farewell remarks, Charlie thanked her and the rest of the Court staff for their support over the years.

The Bar wishes Charlie and Wendy Wheeler all the best in retirement.

Family Court

Justice Wilczek

ON Thursday 10 February 2005 the legal profession gathered in the Family Court at Melbourne to farewell the Honourable Justice Wilczek. His Honour retired after nearly 20 years of distinguished service as a judge of the Family Court. Universally His Honour has been praised as compassionate, fair-minded, thorough, careful and highly capable as both a judge and administrator.

His Honour was born in Czechoslovakia just before the outbreak of the Second World War. His Honour's family escaped Czechoslovakia some years later, just before Russia took control. He spent the next few years in Austrian refugee camps.

Aged 11, he arrived in Australia with his parents and moved to Albury. His father was an engineer but obliged to work as a steward at an army camp under the terms of his assisted passage. His Honour's first home in Australia was a three-roomed corrugated iron building on the Wodonga race course. The jockeys took one room and the stewards another. His Honour's family had the third room but had to vacate on race days!

His Honour daily rode his bicycle into Albury to attend the Christian Brothers College. Despite speaking no English when he started at school His Honour topped the school in English in his matriculation year in 1954. In the following years His Honour worked as a cadet journalist for the *Border Morning Mail* in Albury.

In 1956 he commenced law at Melbourne University, taking up residence in Newman College. While in residence at college His Honour managed to juggle the demands of study with a variety of part-time jobs. One of those jobs was to answer the college's switchboard after hours. Rumour has it that the seemingly random way in which calls were directed on occasions was instrumental in the college's subsequent decision to install an automated switchboard!

At university His Honour was much involved in college life. He dabbled in watercolours and starred on the stage. In 1961 he graduated in law and decided to return to journalism rather than immediately undertaking articles. He did this to ease the financial burden on his parents. He spent the next 12 months working for *The Age* and then completed articles with Frank Corder, solicitor. His Honour was admitted as a barrister and solicitor of the Supreme Court of Victoria in November 1962. He then commenced work as a solicitor with a small suburban practice conducted by Laurie Panttila. Several years later he entered into partnership with John McClusky of Messrs McClusky Wilczek & Co. of Port Melbourne. His Honour was responsible for the firm's common law cases.

The Family Law Act came into operation on 5 January 1976. Early that morning His Honour was the first person to lodge an application for divorce in Victoria under the new Act. This was in His Honour's capacity as a solicitor and not an applicant. Around the same time His Honour was contemplating a move to the Bar but was persuaded instead to join Messrs Ridgeway Pearce and Friedman as a family law partner.

During the period 1978 to 1985 His Honour was a member of the Family Law Committee of both the Law Institute of Victoria and the Law Council of Australia. This period included a time as chairman of the Institute's Family Law Committee from 1978 to 1980.

In October 1985 His Honour was appointed a judge of the Family Court of Australia. On taking up this appointment His Honour became the second judge of the Court based at the Dandenong Registry. His Honour remained in the Dandenong Registry until moving to the Court's Melbourne Registry in 2000.

On the Bench His Honour has displayed the finest characteristics that one hopes to find in a person who knows what it is like to struggle as a child in difficult circumstances and succeeds in rising to the top of their field through ability and hard work. His Honour has shown the quick intellect needed when counsel is exploring a novel proposition, while also taking the time to listen and assist self-represented litigants.

In his time at Dandenong the Court statistics record that in the 12 years from 1988 to 1999 the work of the Court at Dandenong increased dramatically. Files opened there increased from just over 3,500 to nearly 5,000; contact orders sought in ancillary applications increased from just over 1,000 to nearly 2,500; residence orders sought in ancillary applications nearly quadrupled from just over 1,000 to almost 4,000.

As Judge Administrator His Honour was notoriously first in and last out — and often there at weekends. In a small registry like Dandenong, if anyone had a problem, the immediate thought was "the Judge will know". At Dandenong His Honour was asked everything by everyone — and always answered graciously and constructively. One day in the coffee shop opposite the Dandenong Court His Honour exclaimed to a friend from the Bar, "I wish I was a gynaecologist." "Oh," said his colleague, "Why so?" His Honour said, "I have this custody case and both parents are such decent people. I have to dash the dreams of one by giving custody to the other. If I were a gynaecologist I would be giving good news to both people."

This story epitomises the care and compassion His Honour has brought to every case.

Throughout his time on the Bench His Honour was known for his politeness and courtesy, which was extended to parties and practitioners alike. His Honour took time to ensure difficult cases resolved fairly and that emotionally stressed and entrenched people understood what had happened and why. Litigants left the Court knowing they had been part of the justice system. Justice, dignity and fairness do not always align. However, they did in His Honour's Court.

His Honour's judgments were always carefully considered, and reasons for decision thoroughly explained. Appeals were few and far between. His Honour treated practitioners, particularly new and perhaps vulnerable ones, with respect. They received guidance, assistance and courtesy — not criticism. It can fairly be said that the quality of justice in the Family Court of Australia has been enhanced by His Honour's approach, and the community has been the beneficiary.

On behalf of all barristers, particularly those at the Family Law Bar, we wish His Honour a long and fulfilled retirement.

Farewell Anna Whitney

OVER the past 23 years Anna Whitney has worked tirelessly for the Bar and held many different roles, her latest as executive officer. She has supported countless Chairmen in many administrative fields.

Her full farewell will run in the next edition of *Bar News*.

The following is a farewell note for those who wish to contact Anna or send her regards for her retirement from Hartog Berkeley.

Anna Whitney has left the Bar after 23 years of devoted service. She did not want a formal farewell. However, if you met her (and appreciated the way she treated you or dealt with your problem) then you may like to write to her at:
List "G"
525 Londsdale Street, Melbourne 3000.

Justice Robert Redlich, Robin Brett QC, Anna Whitney and Tony Pagone QC.

Michael Thomas Rush

THE Bar lost one of its most esteemed members when Michael Thomas Rush died on 13 November, 2004, six weeks before his 49th birthday, after a prolonged illness.

After graduating from Melbourne University, Michael became an associate to Judge John Read before undertaking articles with Galbally & O'Bryan. He was articled to Frank Galbally, from whom Mick learned and developed the skills and techniques which he later so ably demonstrated as a barrister practising in criminal law.

Mick came to the Bar in 1983 and read with Michael Rozenes QC (now Chief Judge Rozenes). He established Chambers on the 3rd Floor of Equity where he was instrumental in establishing Gorman Chambers.

At the Bar, Michael practised predominantly in criminal law. He quickly established a successful practice and obtained the well-earned reputation as the Barrister you would want on your side if you ever got into trouble. He had a natural affinity with juries. He was a great advocate — he loved to cross-examine, he was quick on his feet. He could lighten up a moment with humour, he could create an atmosphere of great tension. No client ever felt a job was half baked when Mick appeared for him or her. He gave it his all.

It was not only in the criminal law where he made his mark. Mick was briefed regularly by jockeys whose best efforts were misunderstood by the stewards. He

was sought after to appear in enquiries and racing appeals. He sat on appeals at the Harness Racing Board where he developed many close friendships.

Mick was a remarkable mentor and friend to many. In addition to his three readers, countless people benefited from his advice, assistance and encouragement. They included young people leaving school, young lawyers, footballers, family and friends, and indeed friends of friends. On numerous occasions, he appeared pro bono for a young person in strife or an acquaintance temporarily off the rails. This often occurred at a personal cost to him, but thoughts for himself where never a relevant consideration.

Mick had a number of passions. Pre-eminent was his passion for his family. His pride and love for his six children was a driving force of his life. He was thrilled with their successes and their happiness. He sympathised and counselled their disappointments. His loyalty and commitment to his children never wavered.

Michael's love of and commitment to Xavier College, where he attended school, and the Old Xavierian's Football Club, is legendary. Mick loved his football and was part of Xavier's championship team in 1973, which won every one of its games by more than 10 goals. He went on to play in the Old Xaverian's Premiership teams in 1976 and, after a knee reconstruction, in 1978. In 1991, Mick coached the Old Xaverians from B Grade to A Grade. He served on the Committee of the Football Club for many years. In 1999, he was made a Life Member of the Club.

From his earliest days, Mick was captivated by the life of Ned Kelly and other bushrangers. He was frequently in Kelly country in north-east Victoria, camping, wandering or on circuit. The Bar production of the Ned Kelly play allowed Mick to fulfill all his fantasies. He played Constable McIntyre, the sole survivor of the Stringy Bark Creek shootings. He was sensational. In a dimly lit Supreme Court, the character came to life. Michael's Irish brogue was perfect. It is now known why that was so. A tape has recently been found of Mick practising his lines with an Irish accent!

In July 2003, Mick was given three months to live. When surgery was offered, he grabbed the opportunity. Unfortunately the brain tumour with which he was diagnosed at aged 47 proved to be fatal. Despite his illness, Mick faced every day with humour and optimism. Never once did he give up or communicate the sense of despair he must have felt, inspiring those around him by his dignity and courage. Michael is survived by his mother, Geraldine, his children, Martin, Rebecca, Bridget, Daniel, Joseph and Madeleine, his partner Mandy and his siblings, David, Anne, Jack and Mary.

Mick was much loved. He will be sadly missed.

Geoffrey Standish Lester

Born Melbourne, Victoria, on 6 October, 1947
Died Ottawa, Ontario, Canada on 16 February, 2005

GEOFFREY Standish Lester was the second son and third child of Terence and Amy Lester. He attended Deepdene Primary School, Camberwell High School and completed his secondary education at Trinity Grammar School, Kew, in 1965. From there he won a residential scholarship to Trinity College, University of Melbourne, and studied a combined Arts/Law course, graduating from both faculties with honours.

In 1973 he obtained financial assistance from the Federal Government of Canada and went to York University in Toronto to complete a masters degree, majoring in indigenous/Aboriginal land rights. His ground-breaking research led to a doctorate in jurisprudence. Geoff became an important person to the indigenous community in Canada, working on their behalf with the Federal Government and land rights groups. Geoff was invited to be part of the land rights team to work on that part of the new Canadian Constitution which was exchanged with Her Majesty, The Queen in the late 1980s.

In the early 1980s Geoff returned to Melbourne to join the Victorian Bar. He read in chambers with Chester Keon-Cohen. During his time at the Bar he returned to Canada on occasions on Inuit business and met Lynn Jamieson, who was also involved in the Inuit community. In April 1987 Geoff returned to Canada to marry Lynn, and their daughter, Amy, was born on Ottawa in August, 1988.

In 1990, Geoff decided to return to courtroom practice. He took a job in the civil litigation branch of the Federal Government's Department of Justice, based at its Ottawa headquarters. He remained there until his death. During his time as a Department of Justice litigator he handled a wide variety of cases, with focus on public and administrative law, employment law, and commercial and contract law. He was active in both trials and appeals in the federal and provincial superior courts. During his time as a Department of Justice litigator he also maintained a keen interest in the scholarly side of the profession, among other things, contributing articles to *Advocate's Quarterly*.

Geoff Lester was a colourful character, an entertaining storyteller and greatly admired by many sections of the community. He loved his fellow man. He sought justice and he walked humbly before his God.

Geoff suffered a massive stroke and after 28 hours of intensive medical treatment he died on Wednesday, 16 February, 2005. More than 600 people attended his funeral at St Matthias Anglican Church in Ottawa. on Wednesday, 23 February, 2005.

Return to Bangladesh

Carolyn Sparke

Some years ago, by a chance meeting at an International Bar Association conference, Brian Donovan from Australia sat with delegates from Bangladesh. The result was the invitation to teach in Bangladesh.

In 2004, eight delegates from Australia attended — Justice Murray Kellam, the head of delegation, Justice Peter Dutney from Qld, David Ross QC (Vic), Greg Laughton S.C. (NSW), Dan O'Gorman from Qld (the main organiser), RE (Bob) Reed (Qld), Ben Lindner (Vic) and myself.

I have done a lot of travelling, but even I have never before been interviewed on Bangladeshi TV, and asked by a nervous reporter what I thought of their country's Victory Day parade. I can only hope my answer — commending the crowd for its obvious pride in the country — was (a) understandable and (b) showed no hint of the amusement I felt at the situation. But I digress …

In December 2004, as for the previous nine years, a group of Australian lawyers travelled to Bangladesh to work with the Legal and Education Training Institute ("LETI") an organ of the Bangladesh Bar Association, in training local advocates in advocacy. The experience is an eye-opener in many ways.

But first, a very brief potted history. Bangladesh has 140 million people (yes, that's right) as far as they know, crowded (literally) into a country smaller than Victoria. Perched at the top right-hand corner of India, where it shares a border with Burma/Myanmar, it is flat, extremely fertile and very friendly. Over centuries it has been influenced by waves of Hindu, Buddhist and ultimately, Muslim cultures. It has a history of art and literature, and the wealth of the land drew European and Indian traders. That land is very different now. A former district of India, it became part of Pakistan after the partition from India in 1947. The geographic and cultural divisions were too much (the Muslim religion was the only thing they shared), as was the tendency to favour Urdu speaking West Pakistanis. The suppression of Bengali/Bangla, the native language, was the symbol of the oppression which led to increasing unrest. Finally, in 1971, a short but very bloody civil war resulted in the independence of Bangladesh. Pakistan used what the Bengalis described as genocidal tactics, napalming villages and martyring intellectuals, in their suppression of Bengali independence. Ultimately Bangladesh became independent.

Why does that history matter? It is part of the reason the Bangladeshi people welcome us into their country. The country had been strongly English-speaking, given its "Indian" history. It also inherited an English-speaking common law legal system. After independence, the country, understandably given the recent history, strongly embraced Bengali and turned its back on English. Lawyers continued to speak English, as the higher Courts were conducted in English, and remained a last bastion of English-speakers.

From the moment you arrive at Dhaka airport, driving into the noise of the overcrowded traffic, the attendant smog (although apparently much cleaner than previous years), confronting a living mass of people, you realise that this is a world vastly differently from our own. The contrast continues with our arrival at the hotel — to be met with serious security — soldiers in various coloured uniforms, toting sub-machine guns, scanning under cars with mirrors. Alas, it was not for us but for the Indian and Bangladeshi cricket teams, also staying at the hotel.

The teaching itself was both challenging and rewarding. Classes were run on similar lines to the advocacy training we are used to — lectures, followed by workshops focussing on particular aspects

of performance. The students were keen, but their abilities varied enormously. There were some whose English did them proud, and some who (in the words of one of the group) would have sat through four days of teaching listening to us yabber at them incomprehensibly.

Bar Association keeps its meagre library behind locked doors.

There are systemic problems as well. "Corruption" has many faces. The media is surprisingly free, and stories of enquiries into Judges' behaviour were openly reported. Many of the well-placed

such a poor job that the graduates have to be trained again for practice. Their professional admissions course to become an advocate requires not just advocacy-related training, but substantial legal training. For those of our students who were not so keen, it might be understandable

Victory Day parade: Shahid, Dan O'Gorman, Justice Kellam, Abdul Hakim, Justice Dutney and Ben Lindner (Bob Reed hidden).

UCEP students practicing English with Justice Kellam.

Ben Lindner in traditional wedding garb.

However, they were (mostly) keen: keen to impress, keen to learn and keen to ask about Australia.

There are so many financial problems in Bangladesh it is hard to know where to start. The country is poor. Those are mere words until you walk the street to see not only slums (nestled behind our luxury hotel and easily visible from the roof) but people living under canvas tarps on the street — families, dogs, performing their ablutions in their home under a tarp in public space. Mere words, until you see children — so tiny it is hard to know how old they are — collecting rubbish and pounding bricks into dust.

Even the middle class are poor — the people we spoke to at functions openly despaired at the apparent failure of the justice system. There are allegations of abuse of positions of high office. Whilst none of the Judges we were fortunate enough to meet was the target of allegations, the media make no secret of corruption allegations generally. There is no independent DPP. Apparently in years past the question of an independent DPP has been raised, met with great apparent interest by authorities but year after year fails to materialise.

The student lawyers appear to struggle with the notion of getting ahead on "merit". We were also told of the struggle the Bar Association has at targeting its training — some universities at times do

— why bother, when merit may not get you anywhere anyway. We heard these sentiments from time to time from both local people and foreigners — "there are 26,000 lawyers but only 6000 know the law".

Education is clearly a problem. It cannot be available to all, the infrastructure does not exist. Genuine debate rages about providing as much education as possible. In a country which has Islam as a state religion, and which has shown moves towards increasing fundamentalism in recent years, the rise of the Islamic Madrasah schools to fill the gaps is becoming a real challenge to their educational system.

Having said all of that, there were moments of great delight. The students

who achieved a breakthrough in understanding advocacy. Meeting with people among the international community — and there is a literal United Nations of people in the diplomatic and aid community based in Bangladesh — who are trying to establish infrastructure, trying to create opportunities.

And there is Muhammed Mahbubul Huq, an advocate in his own right, but more importantly, an organised, upright, ex-military man who now holds a senior position with an educational program for slum children — "UCEP" — "Underprivileged Children's Educational Program". Visiting one of its many schools — to which the ABA group willingly donates each year — is a delight. Children who would otherwise have no education (and in some ways no identity — population is not registered at birth, he tells me, but upon entering school — thus the slum population is largely unknown) enter the schools, where they learn to read and write, learn about health and hygiene and become "agents of change" in their world. They improve their chances of employment exponentially and become influences on thinking — they tell their parents to wash their hands before eating, and allow girls to have the same rights as boys. Parents, reluctant at first to have a working pair of hands "wasting" their time at school, become converts to the benefits of education as their children obtain "proper jobs". The luckiest children go on to learn trades — car mechanic, weaver, electrician, etc. The school has achieved one mark of a successful society — when you enter the school there is laughter and pride, rather than despair. One former student is now a university graduate and aiming at politics.

Nothing can overcome the fact that the children we saw (as appear in the photos) are tiny — 11 and 12 years old, but the size of eight year olds, and that their opportunites are still few. However, it is remarkable how a small amount of money can provide proper education for a child for an entire year, changing the lives of them and their families.

UCEP school children with Justice Kellam's visit.

Child labour is a real bone of contention within the country. Conversations with Bangladeshis ranged from "there is no child labour in Bangladesh" (from an apparently wealthy industrialist), "there is child labour, but only in the free economic zone and I'm sure they are not being exploited" (I was told the zone is the home of foreign companies using local labour and apparently outside the reach of labour laws), "child labour is alright as long as the conditions are alright", "child labour is a fact of life, and we just have to live with it". The view of foreigners is that it is unacceptable, but how can we know the moral dilemma of this country?

It sounds like I am painting a picture of woe, but there is great deal of upside to life. Ordinary people were extremely energetic. The great strength of Bangladesh is in its ordinary working folk and their great energy.

We were also looked after extremely well by representatives of the Bangladeshi Bar Council. We had drivers and minders who made sure everything ran well. We were welcomed at every turn by dignitaries from the Bangladeshi Bar. Rokanuddin Mahmud, the president of the Bar Council, an elegant foreign-educated man; Amirul Islam, a former president of the Bar and still powerful in the legal fraternity; Muhammad Mohsen Rashid, who worked to make our visit run smoothly, all opened their homes to us. We were also well entertained by so many people it is impossible to name them all (although memorably,

Students (Shelly and others) with the still well-dressed author.

by Sultana, the owner of the only bowling alley in Dhaka).

We were lucky to be asked, as is the case each year, to join the Victory day parade in the company of the Bangladeshi Bar Council. This day, a commemoration of independence, is the most important day in their calendar. The day is wonderfully celebratory, with lawyers rubbing shoulders with the communist party (much to the delight of RE Bob Reed), and people everywhere chanting the slogans of the major political parties. The locals thought it fantastic when Dan O'Gorman led them in a traditional chant. (It was here I had my amusing brush with TV fame.)

We were also able to see some of the courts themselves. The Supreme Court is an impressive recently renovated building in a very recently renovated precinct and is a rabbit warren not dissimilar to ours. However, the Registrar's offices were positively Dickensian, with huge piles of paper for every case, and the prospect of many years (apparently five is the average) of enduring a case until trial. The Practice

It sounds like I am painting a picture of woe, but there is great deal of upside to life. Ordinary people were extremely energetic. Their great strength of Bangladesh is in its ordinary working folk and their great energy.

Court we attended one day was run on the same lines as ours. The proceedings were conducted in English — with plenty of prompting from the front row of counsel when the advocate on his or her (usually his) feet struggled. The judge was as grumpy as any judge who would rather be on summer vacation. Cases were called in a seemingly random order, and dismissed with the same sort of reasons as ours would be: injunctions not urgent enough, applications lacking evidence.

Interestingly, there are aspects of the legal system I suspect we would find archaic.

In the Practice Court one case was accompanied by 10 or 12 men, called before the judge apparently to give evidence of the good character of an applicant. The entire proceeding was confusing to me, but I was reminded of some of the old-fashioned English laws where your capacity to win a case was determined by the number of good character witnesses called.

Our students were generous with their interest and their gifts. As the only woman in the group, I attracted some attention. The students gave me (and tried to teach me to wear) a proper sari. Unfortunately, my natural clumsiness had their carefully arranged sari falling off by the time our official ceremony came around, much to the crowd's great amusement!

We also had fun. The evenings spent with local people who generously welcomed us into their homes were great fun (including the sight of Ben Lindner in full groom's wedding outfit, turban and shoes, playing table tennis and snooker at the home of Mohsen; Ross QC sporting a pencil-thin moustache — literally, having asked me to get him an eyebrow pencil; Ross QC introducing himself at dinner as "Assumed Name").

We taught both in Dhaka, the capital, and in Chittagong.

Chittagong is in the hill tract region, where there is occasional trouble with ethnic and religious minority groups. To get there is a long drive, with enough concern about local unrest to need a military escort the whole way. It was quite something to be speeding along the highways, scattering locals to one side with a band of trusty 303-toting militia leading the way. We really were treated to first class security and support during our stay. Chittagong is a lively city, with bustling streets at night and enough of a middle class to sustain an amusement park. We had a real treat one night — riding the dodgems and the boat on the lake with our very own military escort. The students were, if anything, better and keener than those in Dhaka. Again, the local hospitality was superb. The translation and cultural interpretation support was done by Sadia Arman. She is a Bangladeshi advocate, a former student, and UK-trained. Her work was invaluable.

The teaching challenged our cultural differences at times. Their *Evidence Act 1872* permits evidence of character in a range of contexts that would surprise us, although it also contains some advanced notions of the way in which it deals with confessions. It is interesting to see the way students deal with one of our teaching problems, which involves a man who is "a gambler". Many of the students focus on the fact that, as a gambler, he is a man of poor character and therefore must be lying and must have committed the crime.

There is also some hint of Sharia law. The country is mostly Muslim. In some areas there were many women in full burka, and the wearing of Islamic male dress is usual. Their family law is a formal Sharia code. There are rules surrounding the giving of a dower as consideration for a Muslim marriage. A man is permitted to marry up to four wives where it is "necessary and just" for him to do so. In order to do so he has to obtain the consent of his existing wives, or establish to the "Arbitration Council" that it is necessary for him to do so. Men are permitted, among other things, to divorce in the Muslim way, with the "Talaq" — speaking "I divorce you" three times. A woman may only do so if she has been delegated the power to do so. Following a divorce, a man has certain obligations to maintain his wife and children. I gather from my conversations with people that the reality in such a poor country is that those maintenance obligations are often not met.

It was overall a short, very interesting experience. The role the delegation plays is one of long-term relationship building. One hopes that we are able to support the Bangladeshi Bar in creating an independent well-trained voice, supporting an independent and strong judiciary. May those goals be met.

If anyone is interested in knowing a little more of the work of (and making donation to) "UCEP" — "Underprivileged children's educational program" — please contact Carolyn Sparke.

My thanks to other members of the teaching team who have contributed to this article.

Admission Ceremonies

AT the request of the Chief Justice of the Supreme Court of Victoria, the Secretary to the Board of Examiners for Legal Practitioners has requested the Bar office draw to the attention of members the following matters concerning admission ceremonies.

I. Practitioners moving admissions must be properly attired in wig, gown, bar jacket and Jabot.
2. The usual form of motion:
"May it please the Court: I appear to move the admission of [full name] to be a barrister and solicitor "and an officer" of this Honourable Court, and I so move on the Certificate of the Board of Examiners."

The Bar office has been advised that some members of the profession have not been properly attired at recent ceremonies and others often omit the words "and an officer" in respect of the motions.

Beijing to St Petersburg — By

Richard Phillips

The commencement of a long train journey in a foreign country is a mixture of excitement and trepidation. Particularly so when the train journey is all the way from Beijing through to St Petersburg on the Trans-Mongolian Railway, during the northern winter. This trip, if completed non-stop, would take seven days. Or, if a more leisurely pace is desired, with an organised tour, the same trip can be undertaken in 24 days. This was the option taken by Michael Flynn, Richard Boaden, his wife Marina and yours truly. Joining us were three other people from Australia and our Russian tour guide, Alex.

IT was a feature of this trip that, all the way from Beijing through to St Petersburg, there was snow on the ground although there were not many days when it actually snowed. By and large, each day consisted of blue skies and sun. Sunrise was around 9.30 am and sunset occurred about seven hours later. Most days on the trip, particularly those for essential sightseeing, were clear and crisp. The temperature ranged from +2°C down to –30°C, which is cold!!

Arriving at Beijing airport on a cold evening, 16 December 2004, having confronted the slow bureaucracy at customs and immigration, the full-frontal assault by taxi drivers looking for business, some official and some unofficial, is a shock to the system. Nearly all taxis in Beijing are small Citroën motor cars and three Melbourne lawyers complete with luggage squeezing into one of these vehicles was an effort! Even more of an achievement was getting the taxi driver to understand what hotel we wanted to go to and our actually arriving there without any detours.

Beijing is a city of about 18 million people and has a traffic problem that has to be seen to be believed. I read somewhere that up to 30,000 motor vehicles are sold each month in Beijing. Given that the motor car has replaced the pushbike on the Beijing streets, the enormous traffic problems become apparent. Despite the volume of traffic and the congestion on the roads, the traffic system seems to work. I do not recall seeing one accident in the time I was in Beijing. Crossing the road, however, is not for the faint hearted!

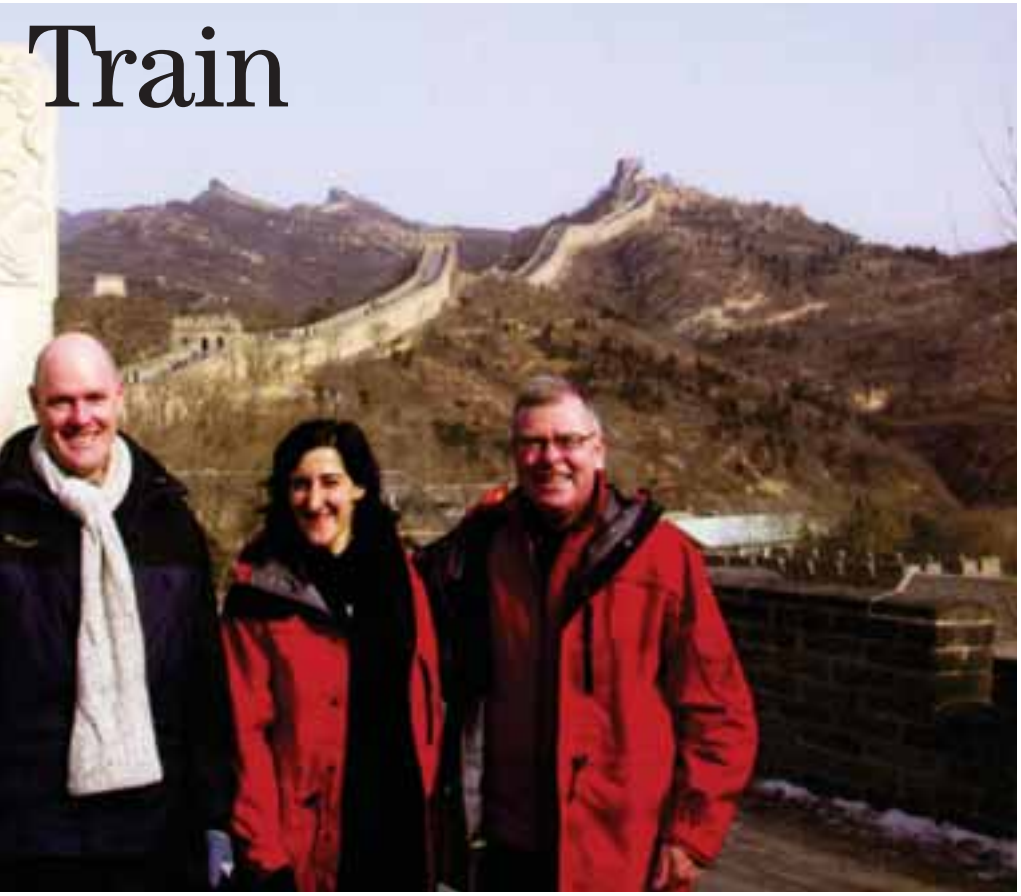
Tiananmen Square is proclaimed as the world's largest city square and it is an enormous open space, as large as 60 soccer fields. All of the policeman who were on duty in Tiananmen Square carried fire extinguishers, which is their main weapon in stamping out self-immolators.

The cultural sights of Beijing are spectacular. The Forbidden City is a highlight of a visit to Beijing. I for one had no idea as to its size and significance in Chinese history. However, the undoubted highlight of the whole trip, for me, was a visit to the Great Wall of China at Badaling. To see this great structure meandering up and down the hills, some of which are quite steep, and disappearing into the distance is a sight to behold.

Beijing makes for an interesting eating experience. The food is not dissimilar to what we Melburnians are used to from most Chinese restaurants, except the price. Our tour group enjoyed a six-course meal complete with alcohol (local beer and wine) for no more than $4.00 per head. One night the tour group was adventur-

Richard Phillips and Michael Flynn in the grounds of Catherine Palace, Pushkin, St Petersburg.

Train



Richard Phillips, Michael Flynn, Maxine Paleologordia, Richard Boaden at the Great Wall of China.

ous enough to have dinner at a restaurant in the Hutong. The meal, complete with plenty of Chinese beer, came just over $2.00 a head. A visit to one of the authentic Beijing duck restaurants was a highlight. The duck was succulent.

The weather in Beijing was chilly and ranged between –1° to +2°C during the daytime. On our last morning in Beijing, 22 December 2004, it was snowing. The first leg of the train journey departed from Beijing's central station at 7.30 am and would deliver us, 36 hours later, in Ulaan Baatar, the capital of Mongolia. The scenery from Beijing to the Mongolian border was bland and uninteresting.

Four of us on the tour group shared a sleeping compartment. Squeezing in the luggage and everything else we were carrying took a bit of organisation but we quickly fell into the routine of doing this throughout the trip. The compartment was not spacious and, with the heating system of the train (coal powered), the compartment was rather stifling and oppressive at night. The toilet facilities on the Chinese leg of the train journey left a lot to be desired but, having been forewarned, we were prepared and armed with the necessaries, i.e., toilet paper. For the first couple of hours of the train trip, we endured a Mongolian family having a very loud "domestic" in a nearby compartment. Hardly an auspicious start to the train trip!

The railway changes gauge at the Chinese/Mongolian border. This means that the bogeys on each carriage have to be replaced. This occurs in a large engine shed at Erlian, between 11.00 pm and midnight. We chose to stay in our carriage and watch this interesting process.

After a fairly restless first night's sleep on the train, we awoke to the sweeping vistas of the Gobi Desert. The Desert disappeared into the distance although here and there were hills and, the closer we got to Ulaan Bator, signs of civilisation started to appear. Small ger encampments were observed and, as we neared Ulaan Baatar, the landscape became more mountainous.

Ulaan Baatar is a city of about one million people sitting in a fairly wide valley surrounded by hills. Two or three large power stations churn out smoke and, given the terrain, an inversion layer of smog hangs over the city. The Soviet influence is still very much to the fore. Despite this, Ulaan Baatar itself was quite a surprise. I had no preconceived notions as to what to expect in Mongolia and the city, whilst exuding Asian influences, had a European feel to it. The country appears to live, at least for the tourist, on its historic past and you are left in little doubt as to the manner in which Mongolians revere Ghenghis Khan. Even the beer is named after him! So was the restaurant where we had dinner (23 December 2004) where the floorshow featured a male singer who sang from his throat!

Richard Phillips, Hutong, Beijing.

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After a night in a comfortable hotel, us intrepid travellers were taken about 75 kilometres into the Mongolian countryside to spend Christmas Eve and Christmas Day in a ger camp at Terjil. A ger is a round, portable tentlike structure which is reasonably large in that four single beds can be accommodated together with its most essential piece of equipment, the stove. The locals are forever coming into the

tent to keep the stove fully fired, which is essential given that, during the night, the temperature dropped down to –30°C. This created the unusual sensation of having a 60 degree temperature difference between inside the ger and outside the ger. The stove inside the ger was very efficient and maintained a steady temperature, when fully fired, of about 30 degrees centigrade.

The Terjil camp was set in a spectacular location, in the hills which were covered in snow. There was no shortage of entertainment. The undoubted highlight was a ride on a rather docile (and bored looking) yak. We also called into a nearby ger camp to meet a nomadic Mongolian family. The locals are nomadic farmers who come down to the lower altitudes during winter with their cattle. Our hosts provided a warming cup of yoghurt vodka and a cup of tea. The curd biscuits that were offered to us were inedible.

On Christmas Day some of the local population came to the restaurant at the ger camp. A genuine Mongolian barbeque is quite interesting. Essentially, a sheep is cut up and put inside a large urn complete with every possible local available vegetable and a load of hot rocks and it is left to sit on a stove for hours. The net result is huge chunks of lamb and vegetables being served which looked very appetising. Some of the tour group tried this for Christmas dinner and were not disappointed.

On Boxing Day, it was snowing and after a fairly hair-raising drive back to Ulaan Baatar (our driver was excellent) it was back on the train for a two-night journey to Irkutsk, in Russia.

If anyone had told me that eight to nine hours of the train journey would be spent in a railway siding at Suchbaatar on the Mongolian/Russian border, I would have scoffed. However, this is actually what happened. As international tourists, we had our own railway carriage. The train arrived at the border station at 3.40 am.

Richard Phillips, at the Winter Palace, St Petersburg.

Michael Flynn and Richard Phillips, sleigh ride, Siberia.

The train, which was quite long, disappeared save for our carriage. We had been warned that there was no restaurant car on this leg of the journey but we were well supplied with biscuits, Pringles (they have taken over the world!) and packet noodles etc. Most of us whiled away the time at the railway siding by reading but one practical hazard of being stuck in a Mongolian railway siding is that the toilets on the train were locked. The call of nature required a trek back to the railway station in bitterly cold weather (it was around –15°C during the day) to the station toilets which, again, left a lot to be desired. Between 10.00 am and 12.30 pm the customs and immigration formalities were attended to and then our carriage was shunted across the border to await our time slot on the main, Trans-Siberian line. The Russian border station had a well-stocked shop, well stocked with vodka that is. Unfortunately, Russian service in shops, hotels and banks lived up to its international reputation of being slow, unhelpful and, at times, surly. The little bank at this railway station could only convert American dollars to roubles if someone came in and made a cash deposit, in roubles.

We were eventually under way at about 4.30 pm.

I cannot leave Mongolia without commenting on the thoroughness of the Mongolian customs and immigration officials. They consisted of young, attractive Mongolian women in immaculately pressed green uniforms with enormous peaked caps. My theory was the larger the cap, the higher the rank! At one point, Michael Flynn had his passport taken away for some time by one of these officials. Apparently, he bore no resemblance to his passport photograph unless he smiled! His passport was duly returned.

The next leg of the train journey was an overnight trip to Irkutsk. At about 10.30

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St Basils Cathedral, Red Square, Moscow.

Russian Orthodox Church, Russia.

Yak, Terjil, Mongolia.

Church of the Spilled Blood, St Petersburg.

pm, the train stopped at Ulan-Ude for half an hour or so. Our tour guide, Alex, heartily recommended the hot dogs on sale at a kiosk on the platform. These hot dogs turned out to be more like a soggy sausage roll, but at least it made change from Pringles! This station was memorable, though, for its atmosphere — right out of a 1930s Hollywood spy film set in Russia, shot in black and white, steam coming from the train (each carriage had a chimney for the coal-fired heating system and the samovar), a platoon of soldiers marching down the platform and no one looking at anybody else.

Irkutsk is a fascinating city, definitely European in its style and feel, although well and truly in the depths of Siberia. What impressed me the most on the trip was the way in which Mongolia and Russia (China to a lesser extent) embraced Christmas. Every Russian city we saw had a large Christmas tree set up in the city square. There were decorations, fairy lights and fireworks displays. Irkutsk was no exception. The city square was ringed with giant ice sculptures and came alive with festivities during the evening. The fireworks display in Irkutsk was impressive.

One of the expected highlights of the trip was a visit to Lake Baikal. The group left Irkutsk on 29 December 2004. On route, through the heavily wooded Siberian countryside, we stopped for a sleigh ride and found an ice slide that provided a great source of amusement and took all of us back to our childhood.

Lake Baikal was very disappointing. The world's largest body of fresh water, some 600 kms long, 80 kms wide and over a mile in depth, was shrouded in mist. This phenomenon is caused by the fact, according to the scientists, that the temperature is so cold and the lake is yet to freeze that it actually gives off this steam like mist. Thus, the sweeping views that are shown on all the tourist books and postcards were denied us.

Our night at Lake Baikal was spent on a home stay in the village of Listvyanka. There is a marine institute in the village and three of us spent the night in an apartment occupied by a lady who worked at the institute and her mother. The apartment was surprisingly spacious and they provided a very nice afternoon tea and breakfast for us the next day. The only difficulty was, of course, that none of us spoke Russian and our hosts did not speak English. Michael Flynn's souvenir of a koala bear wearing a hat with corks dangling from it broke the ice.

Back on the train for another two nights trip to Ekaterinburg, formerly known as Svedlovsk. It was two nights on the train from Irkutsk, which meant that New Year's Eve was spent on the train. To celebrate, we pre-ordered our dinner, an expected sumptuous three-course meal with plenty of beer and vodka. Of course, we had not bargained on the Russian approach to service, mentioned elsewhere in this article. At 8.00 pm, the first two courses of our meal arrived at once, and lukewarm. At least the beer and vodka were cold!

Ekaterinburg is where Tsar Nicholas was murdered during the Russian Revolution and is also the birthplace of Boris Yeltsin. Again, it was very cold but from what we saw of this city, it was quite pretty, well laid out with wide streets with tree-lined avenues, large squares and a vibrant night life. The town hall was built in the neo-classical Stalinist baroque style!

Since the fall of communism in Russia, there has been a slow but determined restoration of the Russian Royal family into the social fabric. The site of the Tsar's murder is now a spectacular Russian Orthodox Church, completed some three or four years ago.

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Siberia looks big on any map of the world. It is covered in trees, mostly pine or larch, punctuated with small villages. Nearly all the houses are constructed of wood and are not dissimilar to those shown in Dr Zhivago. The cities are large and ringed by many apartment buildings in varying stages of decay. The railway is busy with goods trains. In the larger towns and cities, we saw many factories and other buildings derelict or in ruin. All of the shops were well stocked and I saw none of the shortages of food and goods that were widely reported 10 years ago. Whether the average Russian could afford the products was another question.

The overnight train trip to Moscow was uneventful. By now it was 4 January 2005. The highlight of our stay in Moscow was our hotel, the Sovietsky. Built in the early 1950s in the grand scale, it had the most fantastic restaurant, the Yar. This was a restaurant/theatre lavishly decorated and appointed, which took one back over 100 years in time. The food was good and the floor show enjoyable.

Moscow would have to be the place where the world's dirtiest cars are located. This is not surprising given the slush on the roads. Our tour was hampered by a very small tour bus which did not allow much to be seen from the windows and the driver's reluctance, probably due to the traffic, to stop to allow photo opportunities. Accordingly, we seemed to spend two days milling around Red Square and the Kremlin. We did insist, however, that we be allowed to photograph the Lubyanka, the KGB Headquarters. This we did without any problem whatsoever.

We joined the queue to see Lenin but, having got near the front at about 1.30 the Russian guards closed the doors and said come back tomorrow.

St Basil's Cathedral is spectacular, from the outside, but I thought disappointing internally as it is a rabbit warren of small, but prettily decorated, chapels, not the cavernous cathedral I was expecting. The Gum Department Store is now a large shopping mall (similar to the Queen Victoria building in Sydney). The usual range of western, expensive shops were there. Again, it was hard to see how the average Russian could afford to buy anything. The so-called "New Russians", i.e. those with plenty of money, drive expensive cars and are impressively dressed. Our tour guide, Alex, was most insistent that there was no such thing as the Russian mafia. Most of us on the tour were sceptical about this statement!

The final leg of the trip was the overnight express train from Moscow to St Petersburg. St Petersburg is a magnificent city of some four million people. It is hard to comprehend the horrors that befell Leningrad, as St Petersburg was then known, over 60 years ago. During the 900-day siege by the Nazis, almost one million people died of starvation within the city.

Nevsky Prospekt is a grand thoroughfare and almost everywhere one turns, there are palaces, grand homes and grand buildings. I thought St Petersburg had a distinct Parisian feel about it.

The Winter Palace is nothing short of extraordinary, or at least so I thought. One morning, our group was taken by tour bus out into the countryside to Tsarskoye

Selo and to the "Catherine Palace". This was Catherine the Great's summer palace and, at the expense of over-using superlatives, was simply spectacular. There are many more palaces like this around St Petersburg and the city definitely repays revisiting. Sadly, Peterhof is closed during winter.

The Hermitage, one of the world's great art collections, was fascinating although, perhaps given the nature of the building it is housed in, the Winter Palace is disjointed and it is difficult to follow specific art themes. The Faberge egg exhibition was open and, whilst these eggs are very well crafted and beautiful to look at, it is hard to see what all of the fuss is about. The lawyers on the trip were very impressed by the study of Tzar Nicholas.

Our hotel in St Petersburg was the Moskva which, in its 30-year career, has seen the end of the Soviet era and the return of capitalism. To say this hotel is large is an understatement. It is the most impersonal hotel that I have stayed in but, having said that, it was comfortable. Its great advantage for those into classical music and literature is that, across the road, in the St Alexander Nevsky Monastery of the Holy Trinity, in the cemetery, are the graves of Tchaikovsky, Rimsky-Korsakov, Mussorgsky, Borodin, Glinka and Dostoyevsky.

Of great interest, both in Moscow and St Petersburg, was the Metro. The underground railway system in both cities is very efficient and cheap. It surprised me how deep the metro system is in both cities. The Moscow Metro is deep because, being built pre-war, it was designed to act as a large bomb shelter. The St Petersburg Metro is deep because of the rivers that are crossed. Some of the stations in Moscow are cathedral-like in their construction. A ride on the Metro, any distance, was the equivalent of 50 cents.

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One of the most interesting mornings in St Petersburg was spent in the Museum of Political History. This is housed in a building that was once owned by a famous ballerina but was taken over by the Bolsheviks in the Russian Revolution and became their headquarters. The Museum is fairly direct and factual about the Soviet era and made no apologies for the likes of Stalin. The number of people who died under his rule is staggering. Members of his family were not excluded from his terror. The one figure I recall is that in 1937, over 600,000 people were executed for their political beliefs or, more likely, their opposition to Stalin. Throughout the Museum were photographs of people who had been executed (i.e. murdered) during the Stalin years who, since the fall of the Soviet system, have been "repatriated".

St Petersburg was an expensive city although we enjoyed several fine meals. The Russian beer was quite drinkable although Russian wine left a lot to be desired.

An advantage of being in a tour group are the little events that can be arranged which would not happen if travelling alone. I am thinking of the memorable dinner we had on 6 January 2005 to celebrate Russian Orthodox Christmas. We were invited to have dinner at the home, in St Petersburg, of a Russian ceramic painter (he painted small eggs and plates) named Yuri. He was gentleman of imposing stature, about 60 years of age, whose English was quite passable. His wife, who spoke little English, was an excellent cook. The spread they put on for us was sumptuous and we were well plied with vodka. What made the occasion memorable was that Yuri was a great raconteur in the Peter Ustinov mould and we had the most engaging couple of hours learning about life under the Soviet system and the views of a Russian intellectual on just about anything else as well.

In conclusion, the trip was memorable and thoroughly enjoyable. The company was terrific and we all had a great time. I would recommend that if anyone wanted to do such a trip, they do it as part of an organised tour. The bureaucracy that exists in China, Mongolia and Russia is still quite remarkable and, without local knowledge or a guide, can be a big problem. Russia, for its size, is a place where English is not widely spoken. In Siberia, it is difficult to find anybody who understands English. However, with preparation, and the preparedness to be extremely patient, a trip such was this can be, and was for me, immensely rewarding.

Call the Unreasonable Man

Dr Philip Opas QC

It has never been possible to call as a witness a reasonable man, yet much of our law is determined by the standards of conduct in any given circumstance that we unreasonable men and women attribute to him, although he can never be found to affirm or deny how we think he would behave.

GEORGE Bernard Shaw reminded us that the reasonable man accepts the world as it is while the unreasonable man sets out to change the world and all that is in it. Hence all progress depends on the unreasonable man. It is easy and even comfortable to accept the system of law as we receive it without challenging it and justify our inactivity by reference to "tradition". Caught up in an anachronistic time warp within an impregnable fortress on the west bank of William Street we practise our arcana in a language that the stranger does not know. By and large we see nothing wrong with this.

I do — and I want to call the unreasonable man as my witness to change the way we do things and bring our practice into the modern world.

I had my eyes opened some years ago when I left the Bar to accept appointment for a five-year period as Group Legal Officer in charge of the legal affairs of 133 companies within a multinational mining corporation. Within my first week my opinion was sought on a fairly esoteric problem. It happened to be within my area of expertise and I quickly produced a 24-page opinion of which I felt justifiably proud. Within an hour of its issue the Chairman of Directors of the company concerned confronted me waving a copy of my opinion. "Did you write this?" Like George Washington with an axe in his hand and the cherry tree at his feet I could not tell a lie. "Do you know what I think of this?" Without waiting for a reply he fulminated. "It's utter bullshit." Even in the High Court my submissions had not been treated with such dismissive bovine excremental imagery and I flew to my defense. "Keep your shirt on. We're in the business of taking commercial risks. What I want from you is something I can read walking from the twenty-second to the twenty-third floor — preferably one word, yes or no. We'll back your opinion and allow you to be right 65 per cent of the time. We don't want to read what you might say to the High Court. We don't understand it anyway. We can't afford to wait two or three years to find out whether we can or cannot do what we propose. If you say we can do it, we'll go ahead. We have to take risks. That is our business."

After that, I had the pleasurable experience of working closely with hard-headed practical men and learned to understand how they worked. They quickly made decisions involving millions of dollars taking into account all foreseeable risks and options. I realised that in the past, although my legal advice to clients may have been legally correct, it might have been economically impractical to implement it.

That is why I want to call the unreasonable man to help us move into the twenty-first century. We must remove all contraceptive devices from the reproductive organ of progress.

Let us start with the oath. Who today really believes that telling lies after swearing an oath on the bible will lead to eternal damnation? Courts are secular and church domination has disappeared. A significant number of persons giving evidence are atheists and refuse to be sworn on the bible while many others from diverse ethnic backgrounds have other means of attaching solemnity and binding force to ensure that they tell the truth.

Perjury is a statutory crime. It provides suitable sanctions to deter persons telling lies whether by evidence in court or out of court by means of affidavits and statutory declarations. The time has surely come to remove the deity from participation in our legal process. All witnesses in court, not just the atheists, could make the same declaration to tell the truth and equally be subject to the same penalties for not doing so. One size would fit all and remove the present necessity to change the bible for the Koran or whatever other means of taking an oath is sacred to the particular witness. This would not result in witnesses feeling that they could lie with impunity.

Occasionally judges need to be reminded that the courts over which they preside are set up for the convenience of the litigants who resort to them for the ascertainment of their legal rights and the awarding of just compensation for their wrongs. I am dealing now only with the civil jurisdictions. No litigant can feel that it is convenient to be told that once a writ is issued, if the matter is contested, a final decision will not be reached for three years.

If a defendant who owes a substantial debt can have the use of the plaintiff's money for three years by applying it in his own business, a three-year delay in payment, even with court imposed interest at the permitted rate, is a win for the defendant. In the meantime it is not unlikely that the plaintiff will have been bankrupted by inability to receive the debt that is rightfully his money.

Everyone at the Bar will be familiar with the case of the unfortunate subcontractor whose principal refuses to pay his accounts, often finding spurious reasons to claim that work was not carried out in a tradesmanlike manner, or materials supplied were not in accordance with specifications. To stay in business the sub-contractor has to pay wages and the cost of materials supplied. He cannot afford to wait three years to establish his rights. In most cases he is forced to settle the matter for much less than he is owed because he cannot afford to wait for court adjudication. In Shakespeare's day Hamlet

contemplated with equanimity the peace that a bare bodkin might make for several reasons including the law's delays. Those delays have not improved in the centuries that have elapsed since then.

Law is not an exact science, if it is a science at all. As Hippocrates reminds us, "Knowledge is science, belief is ignorance". Ignorance of the law is no excuse for crime and everyone is presumed to know the law. What a lot of rot. Lawyers often cannot with certainty state what the law is in a particular matter. We are all familiar with the case that is won before the judge of first instance but on appeal the decision is overturned by a two to one majority in the Court of Appeal. On a head count, there are two judges each way.

The High Court no longer is subject to appeal from its decisions to the Privy Council. It is free to over-rule its own decisions. It is not unusual for the justices of the court to be divided as to the applicable result, or on occasions to agree as to the result based on irreconcilable reasons. Change of membership of the Court can lead to uncertainty as to the legal consequences, making predictions of the outcome of a case before that tribunal increasingly uncertain. An excellent example is *Teori Tau* v *Commonwealth* (1) (1969) 119 CLR 564 where the Court comprised Justices still highly respected, being Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ. That Court regarded the application of section 122 of the Constitution "Parliament may make laws for the government of any territory" as plenary without restriction applicable to laws made on any subject contained in section 51 relating to the States so that the Defendants were not even called on to defend the proposition.

Barwick CJ, announcing the unanimous decision of the Court at 569, said "We have been able to reach, without any doubt, a clear conclusion upon the question without troubling the Defendants for their assistance." He continued at 570, "Section 122 is concerned with the legislative power for the government of Commonwealth territories in respect of which there is no such division of legislative power. The grant of legislative power by section 122 is plenary in quality and unlimited and unqualified in point of subject matter."

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Counsel for the Defendants whose assistance was not required were R.J. Ellicott QC for the Commonwealth and Administration of the Territory of Papua and New Guinea and K.A. Aickin QC with Daryl Dawson as his junior (both of whom subsequently graced the High Court) for the mining company involved.

This case, which was consistent with earlier decisions, was applied in *Northern Land Council* v *Commonwealth* (1986) 161 CLRl. Again the decision was unanimous and the Court comprised Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ. The judgment at 6 stated, "Such a law (the law under attack by the Plaintiff) is clearly supported by the power to make laws for the government of territories (sec 122 of the Constitution) for that is a plenary power 'unlimited and unqualified in point of subject matter' (citing *Teori Tau*)."

At this stage there is no dissent among thirteen eminent justices of the High Court. However *Newcrest Mining* v *Commonwealth & Anor* (1996–1997) 190 CLR 513 changed that. Two of the justices, Brennan and Dawson, had previously joined in the unanimous decision of *Northern Land Council*. Again there was a seven-member Court, comprising Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

It was held by Toohey, Gaudron, Gummow and Kirby JJ — Brennan CJ Dawson and McHugh JJ dissenting — that the Constitution section 51 (xxxi) fettered the legislative power of the Parliament where property was sought to be acquired for any purpose in respect of which the Parliament has power to make laws."

It was further held per Gaudron, Gummow and Kirby JJ in empowering the Parliament to make laws "for" the government of any territory, section 122 identifies a purpose in terms of the end to be achieved and within the meaning of section 51 (xxxi) states a purpose in respect of which the Parliament has power to make laws. There is no sufficient reason expressed or made manifest by the words or content of the grant of power in section 122 to deny the operation of the constitutional guarantee in par. (xxxi). *Teori Tau* v *Commonwealth* disapproved.

The Chief Justice in a vigorous dissent at 540 said: "Although *Teori Tau* follows in direct line the cases which considered section 122 since the establishment of the Commonwealth, Newcrest sought leave to reopen that decision. In my opinion it is singularly inappropriate to reopen the decision in *Teori Tau* especially when the ground for reopening was described by an unanimous Court familiar with the

jurisprudence of section 122 as 'clearly insupportable'. *Teori Tau* has been followed uniformly and unquestioningly in this Court in a line of cases including *Clunies Ross* v *Commonwealth* (1984) 155 CLR 193."

It is noteworthy that the Court in *Clunies Ross* comprised the same justices as in *Northern Land Council.*

Adding McHugh J to the list, we have fourteen justices convinced of the unchallengeable status of *Teori Tau*. Yet another Court by a bare majority of four against three to the contrary, in one fell swoop, sought to undo the efforts of some of our outstanding jurists spanning almost seventy years. On a head count, there were fourteen justices in favour of *Teori Tau* and only four against.

Since the abolition of appeals to the Privy Council, the High Court is not bound by precedent. In effect it may appear to be legislating, particularly in the way it interprets the Constitution. Parliament may be prevented from amending laws to overcome adverse High Court decisions, because the Court is the sole arbiter of the constitutionality of the legislation.

Change of personnel on the High Court can have a profound influence on decision making. It will be a sad day if political considerations become more important than judicial capacity in the selection of the judges of our highest Court.

Communication technology has enabled national boundaries to be crossed in seconds and momentous transactions can be carried out via the internet. Joint ventures between multinational corporations are entered into daily. The one thing essential to these transactions is certainty. Nobody can afford to wait two or three years to find out whether there is any legal embargo on what is proposed.

There is little wonder that parties seek solutions to their problems out of court. Mediation or arbitration with no publicity is obviously preferable where large corporations are opposed. Delays and adverse publicity may affect share values on the stock exchange and jeopardise valuable projects. Putting oneself in the position of the client, the best side of the court is the outside. When a dispute is litigated, the trial judge usually reserves the decision for some time after which a lengthy judgment is produced. The judge may have written himself or herself into history with an erudite exposition of the law but to the litigant it is legal gobbledegook. He is only interested in the last page. Have I won or have I lost and how much is it going to cost me?

Then comes consideration of an appeal and further anxiety. Lawyers charge by the hour. When I practiced it was required that each brief had to be marked with a brief fee which included all antecedent work acquiring familiarity with the case and the first day in court. Conferences were separately charged for. However, when counsel claims a specialisation in a topic, the client expects that he or she knows the law. The client does not expect to be charged for the time spent by counsel in ascertaining the relevant law. That is assumed to be within the speciality and the client does not expect to pay while counsel learns the law. A quotation that counsel will charge $X per hour means nothing unless the client has some indication in advance of the hours involved. This is to me the most unsatisfactory aspect of present day costing but obviously it is too entrenched to be altered.

These days references to judges in all forms of media state their given names, even familiarly expressed as Tom, Dick and Harry. No doubt this is intended to convey to the lay community that judges are really human. Beneath their disguise of dandruff bag and colourful robes there beats a heart of gold with all the frailty, prejudice and liability to error that is entailed.

I remember a friend of mine, a Supreme Court judge, telling me, "You are not a judge until you have survived three events. 1. Your official welcome to the Bench. 2. The Bar Dinner when the junior silk proposes your toast by inviting all present to laugh at your behaviour at the Bar which should have made you ineligible for appointment. 3. The first time you sentence a man to death."

Happily the third event is consigned to history and I may claim proudly *et magna fui pars*.

When a judge is appointed to a Court he or she may well be called on to adjudicate in any jurisdiction of that Court. For example, an equity lawyer who has never taken part in a criminal trial may be the judge in a murder trial. Conversely, a common lawyer may have to try a case in the unfamiliar territory of the equity jurisdiction — the whispering jurisdiction. Because the judge in either case has to research unknown law and, with the valour of ignorance, believes that new ground is being broken although to the cognoscenti the case was simply run-of-the-mill with which those involved should be fully conversant — the resultant lengthy dissertation in the judgment of elementary principles adds nothing to our knowledge of the relevant law. It is like Captain Cook claiming to have discovered Australia although the Aborigines were unaware that they were lost.

Somehow there has to be a better way of meeting the needs of the community in the twenty-first century for speedy, affordable resolution of disputes and problems. I do not know the solution.

"Call the unreasonable man."
"No appearance, Your Honour."

Supreme Court of Victoria

The Honourable Justice Phillips

The Honourable Justice Phillips

On 17 March 2005 members of the profession gathered in the Banco Court to farewell Justice J.D. Phillips who retired as a Justice of Appeal.

A formal farewell to His Honour will appear in the next issue of *Bar News*. However, the comments which His Honour made, in his reply to the speeches made by the Solicitor-General, the Chairman of the Bar and the President of the Law Institute, contained a stirring defence of the independence of the judiciary and a concerning analysis of how the Executive is tending to undermine that independence.

We reproduce His Honour's words below. We have deliberately omitted the speeches of farewell because we regard it as of real importance that the content of His Honour's address not be obfuscated by being placed in the context of farewell addresses. What His Honour had to say should be known as widely as possible in the legal community.

SOLICITOR-GENERAl, Mr Chairman and Madam President, colleagues in the profession, ladies and gentlemen. Thank you all very much indeed for taking the time to say farewell. I do very much appreciate your attendance, and I thank you, Solicitor-General, you, Mr Ray, you, Ms Strong, for what you have said from the Bar table, and so very generously. It is very humbling to hear such things said in public. I always tried to remember H.L. Mencken's saying that a judge is a law student who marks his own papers, and I am grateful to you for marking mine so leniently. At least you spared me anything like the sardonic reply of the silk, now deceased, to whom a senior solicitor confessed that he had never intended to be a lawyer, the silk responding, "Well, after 25 years in the law, I suppose you could say that you achieved your ambition."

For more than 14 years I have been sitting here, and it has been hard and unremitting, but exciting and rewarding — emotionally, I hasten to add, before I am misunderstood. But for much of that time I have had to bite my tongue, which I know many of you will find impossible to believe! But I refer to policy matters rather than the debate within a particular case. For, during my time on the Bench, and especially as I grew more senior, I have watched with some concern a change emerge in the perception of this Court by others and some blurring of essential distinctions. I want to speak briefly of that now because I have been unable to say much about it until today — and tomorrow, and I mean after 31 March when my resignation becomes effective, I fear that nobody will listen.

As we all know, the independence of the judiciary is a cornerstone of our constitutional system, particularly the independence of this Court, which must from time to time tell the political arms what they can and cannot do according to law. As a court we will rarely, if ever, be popular with politicians, but while I have been sitting here, I have seen what appears to me to be some erosion of this Court's independence. One of the most public examples recently was the refusal of the Executive to accept the decision on remuneration handed down by the tribunal established by the Parliament for the very purpose of freeing both Parliament and the Executive from the invidiousness of the decision-making process over judicial salaries and so ensuring the independence of which I am speaking. Less well known was the refusal of earlier governments to allow that the Court's own chief executive officer be appointed by the Governor-in-Council and its insistence that that officer be appointed by and be ultimately answerable to the Department of Justice, which is what happened. That appears now, if I may say so, to have been but part of a movement towards this Court's becoming absorbed into that Department, and it is that to which I want to draw attention in particular; for such a movement must be reversed if this Court is to have, and to keep, its proper role under the constitution.

Of course this Court must be answerable for its expenditure of public moneys; so much is obvious, but that is a matter for Treasury, not the Department of Justice. This Court is not some part of the public service and it must never be seen as such. Established as a court of plenary jurisdiction and with supervisory jurisdiction over all other courts and tribunals, this Court is the third arm of government, co-equal in concept with Parliament and the Executive. Its role, inter alia, is to control and to limit those other arms according to law and to that end to stand between those other arms and the citizen. Hence the emphasis on the Court's independence, especially from the Executive.

Yet within the Department of Justice this Court is now identified and dealt with — would you believe!! — as "Business Unit 19" within a section labelled "courts and tribunals", a section which indiscriminately includes all three tiers of the court structure and VCAT. This Court is subject to direction on the raising of taxes in the form of court fees — in that these are prescribed by departmental regulation, even if a part of those fees is redirected to the Court by the department at its

discretion. The other day the department used a regulation to prescribe a procedure in this Court, apparently in disregard, if not in defiance, of the convention that such matters are for rules of court. And perhaps most troubling of all: the judges' computers, which were provided by and through the department, are but part of the departmental network. I do not say that departmental officers ordinarily avail themselves of the access that that affords; one hopes the department has some controls in place. But access is possible, and that seems to me altogether inappropriate when the State, in one form or another, is the major litigant in this Court, and sometimes on matters of critical import to the wider community.

Nobody is suggesting that the Executive would ever seek to influence a judge's decision directly, otherwise than by argument in open court, but what has been happening is more insidious. What is evolving is a perception of the Court as some sort of unit or functionary within the Department of Justice, a perception that is inconsistent with this Court's fundamental role and underlying independence. Indeed I think it is fair to say that the Supreme Court, despite its dominant role within the court structure and its constitutional role vis-à-vis the other arms of government, is now seen by some in authority as no different from a tribunal, nowadays the Victorian Civil and Administrative Tribunal in particular. That is simply not the case; yet the distinction between a court and a tribunal has been steadily undermined over the years, and it must be restored if the proper constitutional position is not to be subverted. That is the second point I make, and you will be pleased to hear the last one.

The basic distinction is easy enough. A court exercises judicial power and must be, and be seen to be, impartial and so must be independent of all else. Accordingly, its judges are appointed once and for all, and ideally, without hope of additional gain or reward from anyone, including any other arm of government. Hence Parliament's creation of the specialist remuneration tribunal. In contrast to a court, a tribunal, properly so called, exercises administrative functions but not judicial power, and many things flow from that. Such a tribunal may be an arm of the Executive; its members may be appointed for fixed terms, with the possibility of renewal at the discretion of the Executive; and the need is not so great, to see that their remuneration is fixed independently of the Executive.

You will see, now, how far the distinction between court and tribunal has become blurred. While the Victorian Civil and Administrative Tribunal is staffed by a few judges, it consists mainly of members appointed for fixed terms, capable of renewal at the discretion of the Executive — and hence my alarm when, in addition to its administrative work, that tribunal was given some judicial power to exercise, for the latter is altogether inconsistent with such a form of tenure. There is talk now of acting judges for this Court, and again, because this is a court which is exercising judicial power, such would be anathema. It is one thing to tolerate the occasional acting appointment to this Court for a limited time or purpose; it is altogether different to institutionalise such temporary appointments at the discretion of the Executive. Judges of a court properly so called must have security of tenure or, in a relatively small community like this in Victoria, the whole system is put at risk. Our courts have been remarkably free from any taint of bias or corruption; let it remain that way.

This Court is the third arm of government, co-equal in concept with Parliament and the Executive. Its role, inter alia, is to control and to limit those other arms according to law and to that end to stand between those other arms and the citizen. Hence the emphasis on the Court's independence, especially from the Executive.

There is course a downside to such a method of appointing Her Majesty's judges, but it is one for the appointee to bear. A judge must be, and be seen to be, impartial and so must eschew all other interests which might one day give rise to conflict or the appearance of bias. In my book, the judge must forgo the current cult of the individual: to adapt Edmund Burke, "individuals pass like shadows, but the [institution] is fixed and stable". The judge is sometimes accused of remoteness but in one sense that is no more than the reverse side of the commitment, the total commitment, which is demanded of the appointee. This Court, and hence the community, has been splendidly served by its judges in the past, men such as Cussen, Tom Smith, Adam, Gowans, Newton and Fullagar, both father and son, to name but a few of those now deceased. I said at my welcome that I felt very honoured to have joined a court with such a history and that feeling never left me. I hope that my work here, even if not to the same standard as theirs, would not have been unacceptable to them, and, if so, I am content.

But of course whatever I have been able to do could not have been achieved without the significant help of a number of others and I wish now to acknowledge that.

First are my colleagues on the Bench with whom I have enjoyed working for so long — and here I may be forgiven perhaps for mentioning the particular pleasure it gave me when I was joined on the Bench by one of my pupils and in time, by not one, but two of my grandpupils. Judgment writing in particular requires much more than a decision, and I thank the other judges — particular in the Court of Appeal — for their ready assistance in letting me try out my thoughts and their patience when a rush of blood to the head was threatening to lead me astray. To the Registrar of the Court of Appeal and the Prothonotary and their staffs, to the librarian Mr Butler, the associates and tipstaffs, the secretaries and the messenger, the court maintenance and IT staff, the Chief Executive Officer and his staff, my thanks to all of them for their help whenever it was sought. And special thanks to the court reporting staff who, with my speed, have had particular problems.

To my own tipstaff of nine years or more, Mr Richard King, my thanks for your work both in and out of court. To my secretary since my appointment in 1990, Mrs Susan Young, and more recently Mrs Ann Daish too, my thanks for persevering with good humour through draft after draft after draft; for otherwise my judgments would have contained more errors than they do. To my associate since November 1990, Mr Doug Spence, my special thanks for so much assistance and in ways too numerous to mention, but particularly for tolerance and kindness when all about must have seemed despair. And then there is my family. My children who, though grown up now, still look after their old dad with a patience which I envy and whose love, support and kindly derision have helped me to keep, I hope, some sense of perspective. And of course, my wife, without whom none of this would have been possible, as she well knows, and whom I

cannot possibly thank sufficiently. I came to this Bench just after our 25th wedding anniversary and I am leaving it just after our 40th. That says it all. It's "our time" at last after 40 years, and I only hope that she is looking forward to it as much as I am.

Finally, the profession. I know that I was not the easiest judge to appear before, something that will perhaps not surprise my family either. But I have been deeply appreciative of the way in which the profession has always answered all that I asked of it, if not demanded. In truth I was always seeking assistance, for I was never so sure of my ground as I rather gather I sounded. Those who appeared at the Bar table were at their best when willing to enter into the cut and thrust of debate and — importantly for me — to persevere despite what sometimes must have appeared to be heavy "odds against". I did listen and not infrequently I was persuaded, and for all that I am indebted to you. My experience has taught me that by far the best training for an independent judge is an independent barrister whose skills are tested in the public arena of these courts and whose ability is therefore known before appointment, and does not remain to be discovered only afterwards. But I am in danger of remounting the soap box. I remember what Tennyson said:

> A young man will be wiser by and by;
> An old man's wit may wander ere he die.
> I say no more.

Thank you all again very much indeed for your attendance. I wish you all the very best for the future. Adjourn the Court *sine die*.

It is one thing to tolerate the occasional acting appointment to this Court for a limited time or purpose; it is altogether different to institutionalise such temporary appointments at the discretion of the Executive. Judges of a court properly so called must have security of tenure or, in a relatively small community like this in Victoria, the whole system is put at risk.

ODCE and the Rewards of Patience

"Raising the Bar" On Accommodation

Geoff Bartlett FCPA, FAICD

IN 1997 Barristers' Chambers Limited discussed the possibility of a redevelopment of the Owen Dixon Chambers East site with Spowers, its architects. The initial feasibility studies led to a proposal by the architects, later enhanced and expanded, and finally, when the financial conditions were right, commencement of work in 2000. In 1998, BCL believed that sustainability, the effect on the environment and energy conservation were a means of BCL obtaining some environmental capital which its tenants could enjoy, as well as a good economic solution for the foreseeable future.

BCL built Owen Dixon Chambers in 1960 and, after 40 years service, the refurbishment was well and truly justified. The building contained no real services as such — it had asbestos on some structural steel beams and openable windows with individual home-style air conditioning units protruding from the windows, including those overlooking William Street. Although the lighting was ineffectual and ceiling heights were constricted, the overall design with windows to all rooms above Level 1 suited BCL's tenants.

Geoff Bartlett FCPA, FAICD

The board and management of BCL realised at an early stage that the redeveloped building, in order to be suitable for the ongoing "home" of the Bar, must be ahead of its time in respect of services. BCL also believed that, due to the irregular hours that some of its tenants work, individual control of air conditioning to each room would be an effective and economic alternative to traditional air conditioning. Traditional building air conditioning relies on large boilers and chillers which do not permit savings when only a few tenants scattered throughout the building need service.

In the development process BCL considered all options including demolition and a new redevelopment. However, razing the whole building and placing the remnants into landfill was considered environmentally irresponsible. Accordingly, BCL proceeded with the development of which it and its Architects, Robert Pahor, Director, and Andrew Rutt, Senior Associate of Spowers Architects, are quite proud. The redevelopment had many constraints including:

- minimal floor to floor heights
- overall design
- poor and outdated building fabric
- floor loading limitations
- lack of service risers.

Initially, BCL expressed its wishes to its architects in terms of the motel

standard where lights and air conditioning are activated by a key. Following further discussions, these wishes were expanded and a brief and concept were completed and approved.

By the year 2000, BCL was able to call for tenders for the refurbishment of the Ground Floor as Stage 1. Bovis Lend Lease was selected as the builder, and the initial development of the Ground Floor was commenced. This initial development was financed through cash flow, and completed early 2001.

Following the sale of a property held by BCL in Little Bourke Street, BCL was in a position to obtain finance for the refurbishment of the balance of the building and Stage 2 works commenced in 2003. The contract for this work was let to Hooker Cockram, with Spowers as architects and project managers. Work began in 2003 and was finished in 2005 with the completion of external and basement works.

These works saw the independent chambers model, where rooms are fitted with movement sensors, and doors are electronically controlled, eliminating the need for individual keys, which had previously been a problem for BCL tenants on monthly tenancies who did not always return keys. Windows are also equipped with sensors which shut down air conditioning in the room if the windows are opened. Openable windows were installed in chambers in the curtain wall facing William Street, and in most chambers at the rear of the building.

In order for Spowers to obtain the best use of space and to accommodate the wish that each room have a window, the Essoign Club and the Library (previously located on Level 13) were moved to Level 1. BCL also moved the Readers' area (previously located in Douglas Menzies Chambers) to Level 1 of Owen Dixon Chambers East. This has a twofold benefit in that it facilitates control by The Victorian Bar who conduct the Readers' courses and provides an additional client base for the Essoign Club. Level 1 had a floor plan replicating the ground floor — this previously included many internal offices which were difficult to rent. The remainder of the building then became chambers, the majority of which have openable windows — a major benefit to members.

1960s façade.

2005 refurbishment.

Large chambers.

Level 12 foyer.

Owen Dixon Chambers East is now one of the largest sites in Victoria in which the new VRV air conditioning units have been installed. BCL, along with its consultants, believes that this demonstrates the ability of these highly efficient systems to operate in a commercial environment. The Daikin units used so far have proved reliable. They are controlled by a sophisticated computer program linked to the windows so that, when a window is opened, the system shuts down.

Hooker Cockram's work on this building three floors at a time whilst the whole of the rest of the building was fully occupied and functional was a challenge in both programming and logistical terms, as tenants required an appreciable amount of quiet enjoyment during the day. The builder had also to restrict operations so as to maintain services to occupied floors. This, together with BCL's requirement in relation to warrantees which, in general, were to commence on the completion of the project, added further complexity because the project extended over two years.

BCL in its brief, stressed that this building was for the long term. It would remain the headquarters of the Bar for the foreseeable future. The result speaks for itself. Tenants who previously viewed the building as being downmarket and "past its useful life" have had a complete change of attitude. The building has a new lease of life, and is now the premier site for the Victorian Bar as well as now being a valuable asset. BCL has "raised the bar" on accommodation for the Bar. We thank our tenants for their patience through the renovations. That patience has, we believe, been well and truly rewarded. Owen Dixon Chambers East is state-of-the-art accommodation and should remain so for decades to come.

County Court's New CEO Neil Twist Talks to Judy Benson

On 13 December 2004, following the appointment of former Chief Executive Officer of the County Court Jim Harnett to the position of Public Transport Industry Ombudsman and a brief interregnum by Karol Hill, the Court's Finance Manager in an acting role, Neil Twist took over as the Court's No 1 executive officer. How did he arrive there, what does he do, and what does the future hold? *Bar News* went along to find out.

Where were you before your arrival at the County Court?

I started my legal career as a duty lawyer in a community legal centre and it seemed a natural progression to go on to Victoria Legal Aid, which I did. From there I moved to a position in the legal unit of the Department of Human Services, where I worked for five years. I then moved to the Department's Disability Services Program. I worked in the Western Metropolitan Regional office in Footscray in a position that broadened my managerial rather than legal skills, and from there I was appointed to the position of manager of the Department of Justice's Native Title Unit. And here I am.

I loved the law and I found that I loved management; and in this job both have come together into a career point. I believe it is extremely helpful for a court CEO to have a legal background and to know how courts work.

What does the CEO of the County Court actually do?

In short the role requires all the administrative side of the court's functioning to be well handled so that the judges can perform their roles to an optimum level. The role is an important interface between the Court and the Department of Justice. I manage human resources, finance, business analysis, the management of the facility (which is leased from a private consortium which owns the building), information technology, and also administration of the Registry, which is in the unique position of having dual reporting both to me and the Chief Judge.

I have the benefit of an executive assistant, Janeane, one of whose main tasks is to manage the judicial fleet of cars — over 60 in all — which is almost a full-time job in itself.

I report to John Griffin, who is the Executive Director of Courts in the Department of Justice. I also work very closely with the Chief Judge.

How much contact do you have with the judiciary on a daily basis?
A lot really, everything from a phone call to formal and informal meetings. The situation is that a judge is free to ring me at any time about anything, which is logical and necessary because part of my role and that of my team is to provide a service to judges so that they can perform their role most effectively. While the Court is computerized, the Attorney-General in his Justice Statement has made it clear he wants more computerization to be developed within the Court, for example e-filing of documents in the Registry. This will be a gradual process but even saying that the take-up rate is relatively slow thus far. We are finding that the larger legal firms who have IT and support staff are more attracted to electronic filing than the smaller firms.

What do you hope to achieve in the position in your tenure (of five years)?
The Attorney-General's Justice Statement sets out the vision for justice in Victoria over the next 10 years. My aim is to do what I can to help the County Court play a significant role in fulfilling that vision. I have already mentioned one area in which we are hoping to continue to develop (information technology). A significant number of visitors to the Court comment on how the court exudes an atmosphere which is both professional and friendly. We want to continue to maintain an extremely high level of professionalism and also maintain good relations between staff and judiciary and between the Court and those who use the Court.

From my own perspective I find the work culture here extremely healthy; it is a welcoming place and I have settled in to my role quickly given I have only been here for three months or so. The combination of friendliness and a professional attitude makes the atmosphere very enjoyable, which is not of course to say there are not challenges to be faced.

The Department of Treasury and Finance sets the productivity targets in conjunction with the Department of Justice and the Courts and we then have to report to Treasury and the Department as to how we have performed against the targets.

You mention productivity. How is the Court's productivity measured or evaluated?
Each year the Productivity Commission produces a report which sets out what targets the Courts have achieved, for example, the number of criminal and civil proceedings, their respective throughput, how many take over 12 months to complete and how many will take various shorter periods of time. The Department of Treasury and Finance sets the productivity targets in conjunction with the Department of Justice and the Courts and we then have to report to Treasury and the Department as to how we have performed against the targets.

Court statistics are published in the Productivity Commission Report and in the Annual Reports of the County Court.

Can you comment on any problems in the Court with getting cases on in particular lists?
There is significant management of cases through a list, and the Registry and the judiciary work very closely together to try to make things run smoothly. Of course in some lists the Registry staff are actually in the Court generating the orders made on the spot to try to facilitate the smooth running of those lists with the practitioners.

You earlier mentioned challenges facing the Court. What particular challenges have you identified?
The Attorney-General has a huge vision for the delivery of justice in Victoria over the next 10 years, which he has enunciated in his Justice Statement of May 2004. The challenges for us are contained within this framework; the statement refers in particular to the requirement for increased accessibility of the courts to the community. I believe the County Court is well placed to rise to the challenges.

There is also the potential impact of the change of jurisdiction of the Court. With the Magistrates Court increasing its jurisdictional limit in civil matters, it is difficult to predict how that will impact on the Court's civil list because that development has been very recent. In the criminal area the *Serious Sex Offenders Monitoring Bill 2005* has just passed through the lower house of parliament [on 23 February 2005]. This will require the Court to hear applications for post sentencing orders, so this is an area where the Court's load is likely to increase significantly, but it is hard to predict exactly by how much. As well as the changes just referred to there is expected to be an increasing role for alternative dispute resolution, mediation and more interventionist case management.

The Attorney-General has a huge vision for the delivery of justice in Victoria over the next 10 years, which he has enunciated in his Justice Statement of May 2004. The challenges for us are contained within this framework.

What about the physical Court environment?
The building is spectacular, and a number of pieces from the National Gallery of Victoria will be coming here on long-term loan. A sculpture will be placed near the court lists in the ground floor around the Registry. That will be in place this year.

On the first floor there is an exhibition which the Chief Judge opened recently, showcasing the contribution made in various fields by persons with disabilities. This is something we can do to make the connection between access to justice for all people and the Court in a visual sense.

Is there life after work?
A small amount, about the size of my garden! Although the garden at home is about the size of my dining table and there is not huge scope for creativity I am a very keen gardener, and also enjoy cooking all cuisines. I play a bit of tennis, not competitively, and get out to the theatre occasionally. The capacity to do extra-curricular activities is really tied in with the ebb and flow of work and what is important at any time. You need a sense of humour when the pressure is on and fortunately I have that trait. I think I am going to need it.

Thank you for speaking with Bar News.

Judy Benson

Opening of the Legal Year: Mo

Saint Paul's Cathedral

MATTHEW 5:1–12

Opening Prayer:

HEAVENLY Father in whom is the fullness of light and wisdom, enlighten our minds by your Holy Spirit, and give us grace to receive your word with reverence and humility, without which no one can understand your truth,

For Christ's sake.

SERMON DELIVERED BY THE MOST REVEREND PETER WATSON

Jesus' Sermon on the Mount creates an enormous difficulty for us. The difficulty lies in its internal paradox.

The sermon is sometimes referred to as the law of the Kingdom of God. It is a large part of the teachings of Jesus. In Matthew's Gospel it takes up three chapters, over 100 verses, the longest sustained report of Jesus' moral instruction in the New Testament.

Here is its paradox. On the one hand he says "You must do this" — yet on the other, everyone of us knows that we can't. Well, not as he puts it — the pass mark is 100 per cent. That is brought out in Jesus' words: "But I tell you, love your enemies, pray for those who persecute you. Be perfect, therefore, as your heavenly Father is perfect."

Whoever wants to separate Jesus' miracles from his teachings, because it is judged the former are unlikely to have occurred, but his teachings — that is another thing they are much more acceptable — has obviously never read them properly.

The only Jesus we know, the Jesus of the four Gospels, comes to us as a package. We are no more free to re-invent him than we are to make our own distinctions as to what is acceptable and what is not. And all of it is difficult for us.

At no point do the Gospel writers report Jesus to us in a way that makes him easy to accommodate.

Sir Humphrey Appleby, that quintessential government servant, puts his finger on the difficulty of it, I think. In an episode of "Yes, Minister" where government-commissioned reports are being discussed Sir Humphrey explains to his minister, Jim Hacker, how to kill off a government-commissioned report that, after receiving and reading it, the government now finds unacceptable. Jim wants to know how such a thing could occur. Well, imagine Minister, just imagine, that a government-appointed committee came up with the Sermon on the Mount — that would be impossible, totally unacceptable … The meek inheriting the earth — whoever heard of such a thing!!!"

But, Sir Humphrey is correct — from one point of view the sermon is a series of impossibilities. Starting with the beatitudes and moving through the redefinitions of murder, adultery, divorce, oath-taking, "eye for eye", and love for enemies — all summed up with the statement: "Be perfect as your heavenly Father is perfect" — we are confronted by a set of impossible moral imperatives.

This is not the law of the land where murder and theft and law-breaking can be assessed by my outward actions. I either did it or I didn't. Whilst my motives might be questioned, I am not judged guilty for merely thinking or even enjoying the possibility, but only if I do it. Here Jesus pulls my conscience apart and judges me for my thoughts and desires.

The lawmaker has demanded of his citizens something they cannot deliver. But Jesus knows that he is spelling out a way of life that is stretching our moral capacities to breaking point — but nonetheless he persists and insists: "I have not come to abolish the law but to fulfil it … anyone who breaks one of the least of these commandments and teaches them to do the same will be called least in the Kingdom. Anyone who practices and teaches these commandments will be called great … Unless your righteousness exceeds that of the Pharisees and teachers of the law, you will certainly not enter the Kingdom of Heaven."

So what is he about?

How do we get a handle on this body of Jesus' teaching?

It is, I suggest, by allowing and recognising that the paradox that is in the sermon resides also within ourselves. It attracts us; it beckons the most noble instincts in the human spirit, yet we can never scale its heights. For on the one hand, despite the remark of Sir Humphrey, there is something deeply appealing about the Sermon on the Mount.

The Most Reverend Peter Watson Archbishop of Melbourne delivers the sermon.

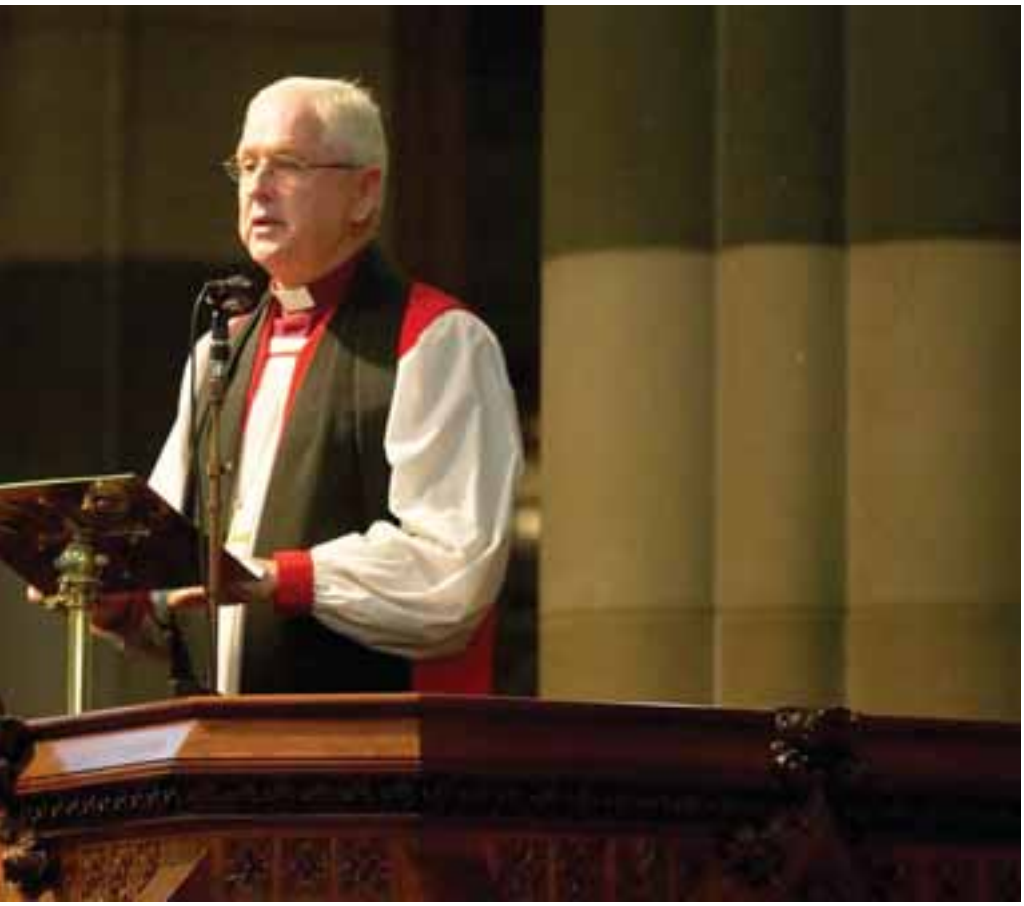
The image of a person who embodies the qualities of the opening beatitudes is an attractive one.

Poverty of spirit and meekness and longing for goodness, and being merciful and pure of heart, to be able to love one's enemies, may be beyond us in their perfection. But they do beckon the most noble instincts in the human spirit.

They are like the clear, unpolluted waters of wilderness streams — rare but beautiful to behold.

Who of us is not attracted?

nday, 31 January 2005



Who does not sometimes wish to possess and exhibit these qualities?

But is not that precisely one of the reasons Jesus speaks in the absolute terms he does? Despite our moral weaknesses, he nonetheless puts his teachings before us and he does it to beckon us in his direction.

Because in these we see the ideal — we see him! — the One who is poor in spirit and meek, who forgives his enemies.

In him we see the horizon to which we are called.

It can be the journey of discovery about ourselves and God.

For there is a world of difference between the person who hears these words of Jesus and seeks to give them some expression, albeit imperfect, and the person who hears these words of Jesus and ignores them and him.

His warnings at the end point up that difference: "Not everyone who says to me 'Lord, Lord' will enter the Kingdom of Heaven, but only he who does the will of my Father in Heaven …

"Therefore, everyone who hears these words of mine and puts them into practice is like a wise man who built his house on the rock …"

I would like to think we could render Jesus' absolute words with a qualification or two, such as: "… but only he who keeps on making the attempt to do the will of my Father in Heaven; or "… everyone who hears these words of mine and keeps on making the effort to put them into practice …"

Well, the fact is he doesn't say that — and as I read it he did not intend his words to be interpreted like that.

We are called upon to scale the heights — "Be perfect".

His words are intended to keep the pressure on us because the focus in being Christian is moral and behavioural.

But he does not set out to dishearten or to crush. He came to save us, not to crush us. So, whilst the moral demands never go away, there is something else.

The Teacher who lays these moral impossibilities upon us is also the one who climaxes his earthly career in a violent death. The four Gospels climax at this point, that somehow his death meets our moral weaknesses.

So the other half of the paradox is thrown up by our recognition that the Teacher who lays these moral impossibilities upon us is also the one who climaxes his earthly career in a violent death.

He is not only the Teacher,

He is the Saviour!

This is the core of New Testament Christianity. The four Gospels climax at this point. Somehow his death meets our moral incapacities.

Justice John Winneke AO, President of the Court of Appeal, and Justice Kenneth Hayne AC, High Court of Australia, prepare to lead the procession into the Cathedral.

Michael Shand QC reads the Second Lesson.

Professor Michael Crommelin, Zelman Cowan Professor of Law and Dean of the Faculty of Law ,The University of Melbourne, reading the prayers.

Justice Kenneth Hayne AC, High Court of Australia, reading the prayers.

Justice John Winneke AO, President of the Court of Appeal reads The First Lesson.

Catherine Gale, Vice President of the Law Institute of Victoria, gives the Reading.

By both his actions and his words at the time of arrest and trial, it is clear he views his death with a certain inevitability.

And it's not that things are out of control and he is the victim of circumstances beyond him.

There may be a storm going on around him, but he is the eye of the storm and it is all calm there.

His prayer in the Garden of Gethsemane tells us what is going on in his mind: "My Father", he prays "if it is not possible for this cup to be taken away unless I drink it, may your will be done."

It is his Father's will that he should die. That is one side of the coin. The other is that they rejected him and killed him because he dared to demand that the goodness of God be reflected in us men and women.

So his death is at one and the same time the declaration of that goodness of God and the answer to our incapacity to measure up to it. Just as when he cured the paralysed man at Capernaum he told him: "Take heart, son, your sins are forgiven."

That is why at the heart of Christian worship there is a simple meal of remembrance or the Lord's Supper or Holy Communion or Eucharist — in it we remember his death, we take bread and eat it, we take a cup and drink from it, to more vividly recall that his death was the declaration of God's love for us.

That is what makes his impossible standard of goodness bearable and possible.

On the one hand, he calls us to his perfection.

On the other, he offers us his forgiveness.

> Blessed are the poor in spirit for theirs is the Kingdom of Heaven.
> Blessed are those who mourn for they will be comforted.
> Blessed are the meek for they will inherit the earth.
> Blessed are those who hunger and thirst for righteousness, for they will be filled.
> Blessed are the merciful, for they will receive mercy.
> Blessed are the pure in heart, for they will see God.
> Blessed are the peacemakers, for they will be called children of God.
> Blessed are those who are persecuted for righteousness' sake, for theirs is the Kingdom of Heaven.

So, having heard these words of Jesus, we determine to put them into practice.

Because that alone is the mark of a genuine follower of Jesus Christ.

And that is bound to make extra difficulties for us. For the lifestyle that follows Jesus and his teachings is at odds with so much in this present world and within our own human natures …

So be it — because the day is coming when that which is unthinkable to the Sir Humphreys of this world will come to be — "the meek will inherit the earth".

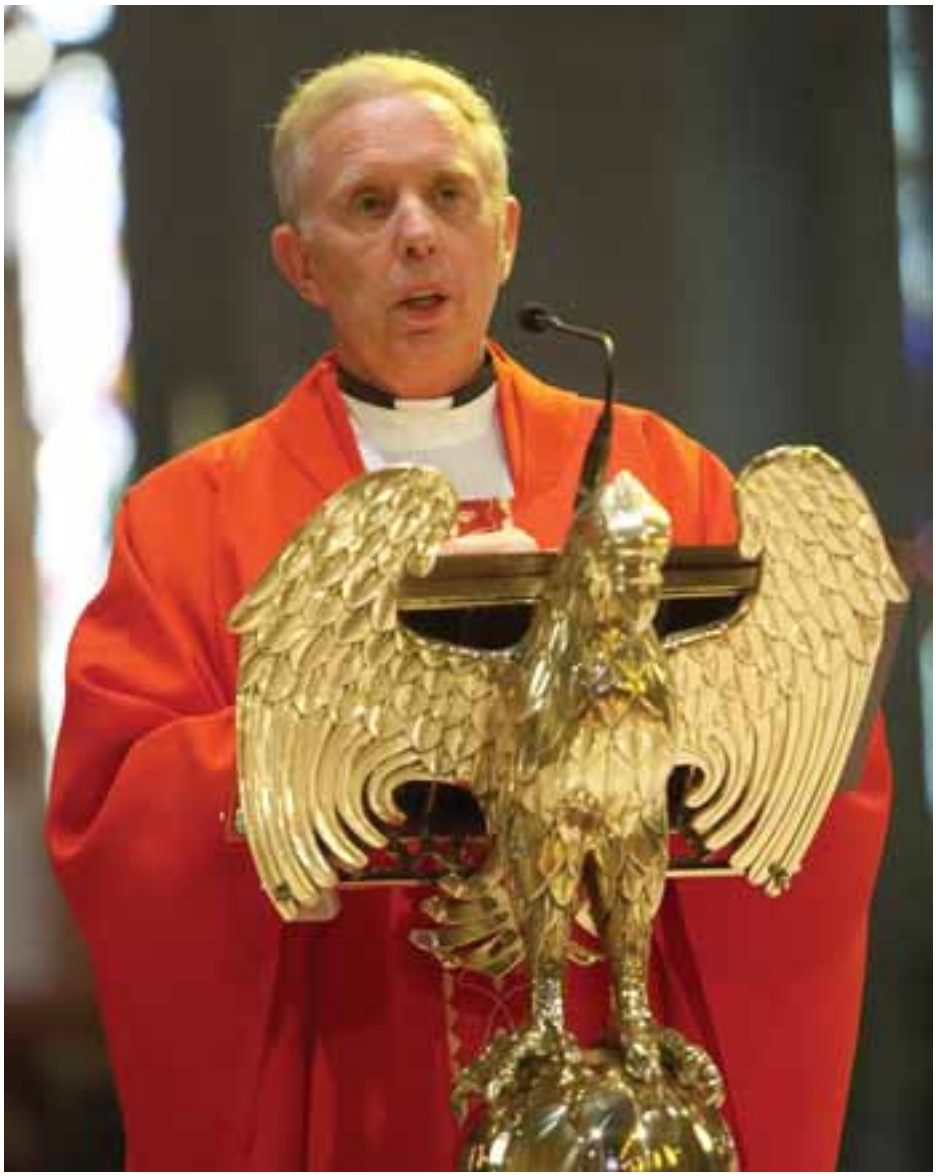
> For his kingdom is coming.
> His will will be done.
> For the kingdom and the power and the glory are his now and forever.

Final prayer:

> May Jesus the teacher give you wisdom.
> May Jesus the Saviour give you goodness.
> May Jesus the Lord give you new life.
> Now and ever.

St Patrick's Cathedral

Mass of the Holy Spirit for the Legal Profession celebrated by Archbishop Denis Hart



Dean of St Patrick's Cathedral Very Rev. Geoff Baron delivering the Homily.

My dear Brothers and Sisters,

Together with Father Geoff Baron, the Dean of St Patrick's Cathedral who will preach the Homily today, I welcome you to St Patrick's Cathedral for the annual Mass of the Holy Spirit, invoking God's blessing on the significant service to our community which is provided by the legal profession. I recognise the distinguished presence of judges and magistrates, barristers and solicitors, members of legal staff and their families.

We are united in praying that God the Holy Spirit, poured out upon the faithful, will give light to minds and hearts that in the exercise of the law, the welfare of our community, and the mutual responsibilities which underpin it may sustain us. Because we are weak and in need of divine assistance, let us call to mind our sins and ask the Lord for pardon and light to walk his way.

HOMILY BY THE
VERY REV GEOFF BARON

In today's opening prayer we ask God for two gifts:

1. Right judgment
2. The joy of his comfort and guidance.

The ability to clarify and discern difficult human situations where rights and duties are at stake, even to the point of litigation, would be a way of describing right judgment. The lawyer's skill is to uncover truths and facts, understand the circumstances, discern human intent and then, weighing up all these elements, arrive at a just and fair conclusion.

The human experience is that when we are in a climate where our rights are respected, we live in peace — with ourselves and others. Peace and justice support each other and grow out of each other. This is true not only personally but at all levels of society.

In *Gaudium et Spes* the *Pastoral Constitution on the Church in the Modern World*: "Peace results from the harmony built into human society by its divine Founder, and actualized by people as they thirst after even greater justice."

On the personal level, we know the inner struggle we experience when our rights are infringed — sleepless nights, righteous indignation, and the need to tell our grievance to anyone who will listen.

We see this to be true even in competitive sport. If a tennis player is the victim of a bad line call, there's an outpouring of indignant emotion and spectators take sides. Thankfully the umpire's decision is final and lawyers are spared the task of litigation!

Last week the church commemorated St Thomas Aquinas (1225–1274). Aquinas was a Dominican friar of extraordinary intellect. His great masterpiece the *Summa Theologica* is a complete synthesis of the Christian mysteries. His intellect was such that he could dictate his thoughts to four secretaries at once as he walked along the road. He was a modest and unassuming man of deep prayer and spiritual insight. His wisdom was not only an intellectual gift. The first reading

Kate McMillan QC gives the second reading.

John Healy and Ann Bryning.

The Hon.Justice Frank Vincent, Michael King and Clarinda Molyneux QC.

Tim McFarlane reading the prayers of the faithful.

The Most Reverend Denis Hart, Archbishop of Melbourne, greets Judge Michael McInerney.

The Most.Reverend Denis Hart, Archbishop of Melbourne, greets The Hon.Justice John Wilczek of the Family Court.

of the day from the book of Wisdom says, "I prayed and the Spirit of Wisdom came to me. I esteemed her more than sceptres and thrones; compared with her I hold riches as nothing — for compared with her all gold is a pinch of sand and beside her silver ranks as mud."

Truth was Thomas's goal; his driving force was the love of God and love of those around him. His wisdom combines compassion with truth.

The lawyers' patron is another Thomas — St Thomas More (1478–1535). In 1935, the year of More's canonization, Fr Ronald Knox (later Monsignor), described him as a man "whose sympathies clearly belonged to the new order of things, who yet died as a protest on behalf of the old order of things … a man passionately interested in people, allowing for their temperaments and sympathizing with their weaknesses."

A constant danger for professional people who work for people in threatened circumstances is that they can lose their sense of compassion. We need to be able to feel for others, and to stand in their shoes because we too are vulnerable.

The English poet Gilbert Keith Chesterton said "children are innocent and so love justice; while most adults are wicked and prefer mercy". When a child protests during a family argument, "It's not fair!" a parent really needs to stop and listen.

How "wicked" we might be as adults is for our own private discernment and conscience. We hope, however, that others will understand our frailty and be ready to forgive.

The second request in today's opening prayer — that God "give us the joy of his comfort and guidance" — is the logical follow on of practising right judgment. The human experience is that when we let our humanity shine through professionalism in an encounter with somebody, we find a sense of joy and personal pride in our work. It's the reward of the moment. And it's a humbling moment because we know we are not above the other, we are with the other.

Ultimately the two Thomases drew their strength and wisdom from God. They were also, in the words of today's second reading, "prisoners in the Lord" and as such were empowered "to lead lives worthy of their vocation".

Today's Eucharist acknowledges your identity as professionals who are bonded together by God's Holy Spirit and who work for the good of others.

We pray that we be faithful to our calling. We pray too that the same spirit that was in Jesus of Nazareth when he read from the scroll in the synagogue of Nazareth, will be with us in our task and in our calling of being agents for justice and peace.

Thanks to Sir Zelman Cowan who kindly sent me his 1978 address, "Sir Thomas More — Lawyer, Scholar and Statesman".

St Eustanthios

ADDRESS DELIVERED BY HIS EMINENCE ARCHBISHOP STYLIANOS

IT gives me sincere pleasure once again to see all of you, members of the judiciary and representatives of the legal profession, gathered in our Church to pray together with us, clergy and laity of the Greek Orthodox Archdiocese, on the occasion of the commencement of the Legal Year.

For the Standing Conference of Canonical Orthodox Churches of Australia (SCCOCA), this wonderful tradition we have established throughout the years means a lot.

Beyond the purely spiritual character of this gathering as a body of prayer, it gives us also the feeling that we are no longer a "minority" of ethnic groups, but rather an integrating part of today's culturally diverse Australia.

Precisely in this spirit of deep interrelationship and solidarity, we shall try to concentrate on the Word of God, as we heard it just a few moments ago from the passage of St John the Evangelist who, as known, was characterised as the "Disciple of Love".

First of all, let me point out the comparison it draws between Law, Grace and Truth — three realities which have a tremendous importance for our life and society.

St John states unreservedly that "the Law was given through Moses; Grace and Truth came through Jesus Christ" (Jn 1: 16). Here we must note, however, that the original Greek text of the New Testament states in the relevant passage that Grace and Truth literally "came into being" (*egeneto*) through Christ, giving a much stronger presence of the divine through God incarnate than the English translation would indicate.

Church choir in full voice.

One might think that the judiciary and other servants of the Law could possibly be more interested in concentrating basically — if not exclusively — on Law itself. Yet, l would not think that this is the true estimation of conscientious judges and lawyers, especially those who vigilantly remember the cautionary words of St Paul that "the letter kills, but the Spirit gives life" (2 Cor. 3:6).

In the same context, one should admit that Law always means positive limits, which is to say concrete boundaries and

Governor Landy and Mrs Landy.

Maria Aivaliotis, Maria Pilipasidis, Demi Vlachogiannis and Voula Lambropoulos.

cases. These of course are, under all circumstances, a kind of obstacle — or at least a restraint — for the moral flexibility of the person who is called to pass judgment.

Another indication of the limited and provisional character of Law by definition, is the mere fact of the given variety of systems of Law throughout history, which expresses the need to always adjust the Law according to ever-changing human conditions.

Having said this, we are now in a position to see more easily that Grace and Truth (which come as an accomplishment, if not the final climax, of the morality of Law) are also higher realities which should never be overlooked or underestimated when resolving moral or social conflict in our society through human tribunals.

These interactions of course become more timely and acute in a period of

Joseph Tsalanidis, Jacob Fronistas, Justice Habersberger and Andrew Panna.

aggressive terrorism, as we have been experiencing this internationally in the past few years.

And we have to underline this in order to remind ourselves that terrorism and counterterrorism are not conditions which allow a sober and balanced judgment in individual cases of conflict.

Perhaps the greatest challenge, and the most difficult task, for any judge in assessing a criminal case lies in applying the correct proportion of Justice and Grace. Only in such a fair proportion can we be sure that Truth is served accordingly for the benefit of all, as well as for the improvement of the individual offender.

For, it is not a secret that, when the proportion of Justice and Grace is not applied correctly, we experience extreme decadence in all fields of social life.

Bearing in mind all the mentioned conditions faced by the members of the judiciary and the servants of the Law, we feel once again obliged to pray fervently for all of them to have a peaceful new Legal Year and ceaseless enlightenment from above in exercising their difficult duties.

Sisters and brothers, God bless all of you, your co-workers and families.

Temple Beth Israel

A large number of barristers, solicitors, and members of the judiciary and associates attended Temple Beth Israel for the opening of the Legal Year. Members of the judiciary present included Justice Alan Goldberg, Justice Shane Marshall, Justice Stephen Kaye, Chief Judge Michael Rozenes and Judge Rhonda Harbison. Also in attendance was Shadow Attorney-General Andrew McIntosh.

Rabbi Frederick Morgan gave the address and uplifted the minds of those present in readiness for the legal year. The *Bar News* was tardy in requesting the Rabbi's words and unfortunately he did not keep his notes. *Bar News* will be more efficient next year.

Justice Stephen Kaye; Judge Marilyn Harbison; and Andrew McIntosh, Shadow Attorney-General.

Justice Alan Goldberg and Barbara Rozenes.

Kingsley Davis, Sue Deal and Peter Weiss.

Chief Judge Rozenes and Judge Harbison.

Simone Jacobson, Charles Shaw and Kirsten Abbott.

CommBar President's Report 2005

David H. Denton S.C.

THIS is my last report as the President of the Commercial Bar Association and thus brings to an end 10½ years of my Association with CommBar. I recall when first I had the thought of establishing the Association in 1994 of approaching the then leader of the Commercial Bar, Alan Goldberg QC. Alan was enthusiastic in his support for the establishment of an association of commercial barristers to stand as its representative and as its voice both at the Bar and in the community. His initial leadership was instrumental in the acceptance of the Association as a legitimate grouping of barristers practising in commercial law.

Upon Goldberg's appointment to the Federal Court Bench I ventured to raise with Allan Myers QC the prospect of taking over the Presidency, as Allan was then considered the outstanding leader in commercial law at the Australian Bar. Myers was also enthusiastic in his support of the aims of the Association and readily provided leadership in those years after his appointment as President, for which I was and remain grateful.

Upon Myers' retirement from the position of President I was most fortunate to be able to accept appointment in my own right as President of the Association. I have enjoyed the past four years as President and was very pleased to host the culmination of its activities at the CommBar First Decade Cocktail Party in the Supreme Court Library in November 2004, which has figured so prominently in *Victorian Bar News*.

I am pleased to report that the Association has the active support of the Chief Justices of the Supreme Court and of the Federal Court. CommBar has been asked to and does provide representation on behalf of commercial barristers on the Supreme Court's Commercial List Users Group and in its activities has assisted in the recent release of the Commercial List's "Green Book" Practice Note. Further, I am grateful that the Chief Justice of the Supreme Court has determined to consult with the President of CommBar on the annual appointment of silks.

When I look back over the past decade I can report that the Association has responded to requests from the Bar Council for its views on matters affecting commercial law and practice, and has successfully convened meetings and dinners with the Australian Corporate Lawyers' Association, the Commercial Law Association of Australia Limited, and the Commercial Law Section of the Law Institute of Victoria.

Without doubt the singular success of the Association has been the delivery of hundreds of continuing commercial legal education seminars to the Bar as a whole.

Without doubt the singular success of the Association has been the delivery of hundreds of continuing commercial legal education seminars to the Bar as a whole. I believe that it is fair to observe that every other specialist Bar association has now sought to replicate the activities of CommBar in the delivery of continuing legal education.

With my recent appointment as a Professorial Associate at the Sir Zelman Cowen Centre, Victoria Law School, at Victoria University, I feel that it is now appropriate that I stand down and hand over the responsibility for the future conduct and development of CommBar to a new President.

In retiring I would like to thank those barristers who have assisted me in my role as President and in my earlier other positions in CommBar and without ignoring the many barristers who have so assisted I would like to add a special note of thanks to Albert Monichino for his fulfilment of the role as Vice-President (Convener). Without his assistance CommBar would not exist as efficiently and effectively as it now does.

I also take this opportunity to stand down as Chair of my treasured Corporations and Securities Law Section, a position I have held for eight years, and I personally express my gratitude to John Dixon as my Deputy Chair, Caroline Kenny as Section secretary and last but not least to Dino Currao as my hard working Assistant Secretary.

I also wish to thank each and every Chair of the 10 Sections of CommBar and their supporting secretaries and assistant secretaries. Without the work of the secretaries and assistant secretaries the continuing commercial legal education component of CommBar would be non-existent.

I am particularly proud of CommBar's implementation of Bar Council Policy to promote, wherever possible, into positions of responsibility, women members of the Bar. Once more I think it can be said without fear of contradiction that, outside of the Women Barristers Association, CommBar is the most representative association of any Bar Association concerning interests of women barristers. I do now wonder whether those same ideals should also be extended to ensuring that there is adequate promotion of barristers from minority groups as well. However, I shall leave that for the consideration of the new President and perhaps the Bar Council.

I have enjoyed my association with CommBar and with all of those who have served in CommBar over the last decade. I am proud to be a "Bar man" for my part (if I can be forgiven use of the expression) and I am so very happy to see that what I took part in starting is very much an integral part of Bar life.

Portia's Breakfast

On a beautiful morning in the first week of the legal year, the Victoria Law Foundation, in conjunction with 12 other agencies including Victorian Women Lawyers, the Judicial College of Victoria and the Victorian Women Barristers' Association, hosted the second annual Portia's Breakfast. Nearly 300 guests congregated in a lively Hardware Lane to enjoy this informal event marking the beginning of the new legal calendar.

WITH attendances doubling since, last year, Portia's Breakfast has become a regular feature of the legal year celebrations. The 300 guests included members of the judiciary, the Bar, law firms big and small, government departments, law schools, public agencies and community organisations. Many took advantage of this rare opportunity for cross-sectoral networking, with the various arms of the law coming together over coffee and croissants to meet new contacts and to catch up with old friends.

After welcoming everyone to the new legal year, Ms Victoria Strong, President of the Law Institute of Victoria and Victoria Law Foundation Board Member, gave a well received speech on the need to develop more flexible workplace practices in the legal sector. This issue is becoming increasingly pressing, with research by Victorian Women Lawyers showing that dissatisfaction with rigid working hours and conditions is a common experience amongst legal professionals, both men and women. Their report "Flexible Partnership — Making it Work in Law Firms", funded by the Foundation, recommends that firms develop policies for flexible work arrangements at partnership level, including part-time partnerships and transparency with clients about work arrangements.

Her Honour Judge Lewitan; Alexandra Richards QC, Victoria Law Foundation Board Member; and Pamela Tate S.C., Solicitor-General.

Sandra Friel, Department of Justice; Professor Morag Fraser AM, Victoria Law Foundation Board Member; Liz Curran, La Trobe University; and Barbara Ward, Department of Justice.

Jamie Gardiner, Equal Opportunity Commission Victoria Member; Judith Peirce, Victorian Law Reform Commission; The Hon. Justice Mushin; Professor Kathy Laster, Victoria Law Foundation; and Professor Marcia Neave AO, Victorian Law Reform Commission.

Fiona Sharkie, Office of Women's Policy; Dr Helen Szoke, Equal Opportunity Commission Victoria; Fiona Smith, Equal Opportunity Commission Victoria; and Paul Lacava S.C., Victoria Law Foundation Board Member.

Given that relationship building is so crucial to personal advancement in the legal sector, one of the aims of Portia's Breakfast is to model a flexible, family-friendly social function. Portia's Breakfast is one of the few networking opportunities which recognises the personal and family demands that often prevent people

A huge crowd attended Portia's Breakfast in Hardware Lane, enjoying the morning sun, music and conversation.

Gordon Tippett, The Institute of Arbitrators and Mediators Australia (IAMA); Lorna Gelbert, Women's Legal Service Victoria Chairperson; and Julie Van Dort, Consumer Affairs Victoria.

Mary-Louise Brien, Supreme Court of Victoria; Melanie Suda; Lyn Slade, Judicial College of Victoria; and Siobhan Haverkamp, Supreme Court of Victoria.

— particularly women — from attending the "cocktail hour" functions where so many important connections are made. The event is also designed to complement the traditional church ceremonies marking the beginning of the legal year. While such ceremonies have a strong history and are well loved, Portia's Breakfast presents a less formal option. The Breakfast was held on a Tuesday to ensure everyone could attend both the religious and secular celebrations.

While Portia's Breakfast is a free event, many guests generously donated to the gold coin collection, helping raise money for the Women's Legal Service (another of the event's cohosts). Alongside raising funds, Portia's Breakfast also drew attention to the many activities of its host agencies, as well as professional bodies and public sector organisations more generally.

With such a strong turn-out and universally positive feedback, Portia's Breakfast 2005 was a great success. In the words of Victoria Strong, the event has now established itself as a "tradition" — a bit like the Oaks Day of the law!

The Essoign Wine Report

By Nicholas Kalogeropoulos

Vasse Felix Chardonnay 2004

ABC! Anything but chardonnay. Don't drink chardonnay, they say. It's too oaky, too ripe, too sweet, too monotonous and too industrial. Fighting words; but they regretfully apply to far too many Australian chardonnays. But there's no need to tar them all with the same brush.

Margaret River, one of the leading wine growing areas in Australia, almost makes as much top notch chardonnay each year as all the other areas put together and is definitely the exception to the above. (Jeremy Oliver 27/12/2002)

The 2004 Vasse Felix Chardonnay has a brilliant straw colour with aromas of butterscotch, biscuit, melon and spice. The palate is tightly focused with citrus, peach and tropical fruit. The crisp acidity may be seen as a touch high for some but with a 14% alcohol you will need it to cleanse the palate! The French oak further adds to the complexity of this wine. Enjoy on Fridays in the Essoign with roast pork!

The wine is best enjoyed now although will reward cellaring of up to two years. It is available in the Essoign at $26.00 per bottle when dining in or $20.00 per bottle takeaway.

In Conversation with Christine Harvey

Chief Executive Officer of the Victorian Bar

Judy Benson

On 3 October 2004 Christine Harvey took over from David Bremner in the Bar's top executive position. Christine's appointment came after a nationally advertised search by a recruitment consultant to find the best candidate for the position. *Bar News* interviewed the new Chief Executive Officer after four months in the job to find out her vision for the future and what makes her tick.

Christine Harvey.

IT is clear from Christine Harvey's impressive CV that a perspective borne of her qualifications and experience is going to be more legally focused than financial-management oriented. For a start she is a legal practitioner herself, with degrees in both arts and law (with honours) from the ANU and is admitted to practise in the ACT and NSW. Then there is a significant legal experience pedigree, with positions held in the ACT Deputy Crown Solicitor's office; the Commonwealth Crown Solicitor's office; in private practice with large and medium-sized law firms in Canberra variously as a partner, associate solicitor and senior associate; and as a duty solicitor with legal aid. She has even served for five years as a special magistrate of the ACT Magistrates Court.

Set against this, there are the high-powered administrative roles she has held from the 90s onwards. In 1990 she was appointed to the Law Council as a nominee to sit on performance appraisal committees for the Commonwealth Attorney-General's Department and the Office of Parliamentary Counsel; then she held positions as Director of Professional Standards, then Executive Director, of the Law Society of the ACT; Deputy Secretary-General of the Law Council of Australia and in her penultimate position, Chief Executive Officer of the Royal Australian Institute of Architects (RAIA). Would her current position with the Victorian Bar seem a little like semi-retirement after the pressure-cooker atmospheres of the posts held in the recent past?

Christine laughs vivaciously at the suggestion but does concede that she is hoping to achieve more of a life balance in her present position than she was able to achieve in the last ten years, when a great

deal of her life seemed to be spent at airport terminals. (However achieving that goal is proving to be elusive, and may well be some way off, given the hectic pace of the last four months.)

The whole culture of professional associations has undergone a radical transformation since she first developed a career progression in them. In the old days, professional associations were essentially run by part-time volunteers with some administrative support. However, their burgeoning growth as businesses — notwithstanding that they were also 'professions' — has necessitated a radical change in approach as the demands of and growth of membership has spiralled upwards. It would be true to say that if the law was perceived as something of a gentleman's club in the past it is no longer; it is a lobby group actively campaigning and advocating its members' interests in recognition that the members had businesses that needed promotion, protection and management. Christine sees professional associations in broad terms as very similar in terms of structures, problems, politics, and *modus operandi* — whether they be for solicitors, architects or barristers.

What does a Chief Executive Officer do on a daily basis? Run the Bar Council office; attend to all the issues of staffing, human resources, premises and financial management; support the Chairman of the Bar Council in his role and support the specialist Bar Committees as requested. Christine reports directly to the Bar Council and is under contract for a period of five years.

What are the problems and challenges she perceives the Victorian Bar faces? To answer this Christine sets the scene by putting the Victorian Bar into perspective. It does not have the difficulties faced, for example, by a national organization such as the Law Council of Australia, which is a federation of constituent members including the Law Institute and the Victorian Bar. She sees a national body on this model — where more and more is expected of it with fewer and fewer resources — as under a threat to its very existence. A national body could — almost certainly would — have its financial viability decimated if a number of constituent members considered walking out. As against this, the RAIA was set up as a national body in about 1929, and individual members wherever they are in Australia identify with it as a national association, although of course there are State chapters. Whatever the model of a national body there are always tensions, often brought about by geography and the relativities of the positions of influence within them.

The Victorian Bar has a strong identity which is of significant value, however there are, typically, tensions surrounding who is doing what; are they doing it properly; what value am I getting for my dollar; and for the various interest groups within it, what is the Vic Bar doing for me? These issues are a natural outcome of a voluntary membership environment. Of course different groups within the Victorian Bar need and want different things of the Bar but in general Christine believes that there is not enough effective communication to members as to what the Bar Council is doing for its members and how effectively. This is something she wants to improve during her stewardship.

It is clear from Christine Harvey's impressive CV that a perspective borne of her qualifications and experience is going to be more legally focused than financial-management oriented.

How to go about this, of course, is another matter altogether. She is aware naturally that *Bar News* is one vehicle for the dissemination of information and comes out quarterly (modesty prevents the editors from detailing her effusive compliments about the publication!) There is also *In Brief* published on a fortnightly basis, and this raises the question of how barristers prefer their information to be delivered — either in hardcopy format or electronically. There is new information to hand which suggests that electronic means is not the most reliable method of getting the message out — and ensuring it is opened and read. So more thinking needs to be done about the question not only of the best means of communication but the content.

The hot topics Christine sees for barristers at the moment are professional indemnity insurance and the implementation of the new *Legal Profession Act 2004*, which comes into force on 1 July 2005. In terms of the former, she sees it as a breakthrough that barristers will now be brought under the umbrella of the Legal Practitioners Liability Committee. All things considered, Christine is confident that the insurance issue has been substantively settled and that there will be a happy ending to that ongoing saga.

In relation to the new Act, this is bound to have a significant impact on the regulation of lawyers generally, and may bring some fundamental changes. While there will be loss of "RPA" status it is hoped that the Bar will have a substantial role to play in regulation of barristers. The devil will be in the detail, and Christine is actively involved on the Bar's behalf in attending ongoing meetings with the Justice Department on the implementation of the new Act, which will require new regulations to be drafted and a review of the Bar's practice rules to ensure there is compliance with the Act. Christine is confident that this is not a process the burdens of which she shoulders alone: due to the strong sense of volunteerism she sees at the Bar — a willingness by barristers to serve on committees, a willingness to contribute time energy and ideas — it will all come together at the end. And, she says, how refreshing it is to be part of this culture as compared with other associations which — she noted cryptically, refusing to be drawn — have a "very different way of doing business".

What attracted Christine to this job? There was a real attraction in being able to hold a position where she was not required to spend a great deal of time travelling interstate, which in the end she found taxing at the RAIA. This plus a combination of 12-hour days and weekend work made it impossible to have anything other than a working life so she felt it was time to renegotiate and take control of life where there was the realistic prospect of being able to have some time for self, for family, and yet still make an important contribution to work. She wonders how many barristers are able to achieve this? There were many attractions to this position — flexible working hours, less travel and the intellectual powerhouse of being among legal professionals again. While that ideal of "balance" is still there as a goal, she is confident that in this position it will in time actually be achieved.

What is on Christine's new year wish list? First and foremost a desire to see the new regulatory system for barristers settled, explained and understood. Second, and these as a group flow from the status of the Bar as essentially a professional association:

(a) promoting what the Victorian Bar does more effectively both to its own

members and to the outside world, for example, disseminating information about the position papers submitted and the policies formulated;

(b) communicating better to its own members;

(c) achieving a heightened awareness of the Bar's activities outside the Bar and elevating the Bar's influence;

(d) improving the timely and effective consultations between the Victorian and Commonwealth governments and the Bar, the deficiencies here being not on the barristers' side;

(e) lifting the image of barristers as a subset of the group of "lawyers".

On the latter point Christine believes that the image of lawyers generally held by the public is appalling, not assisted by wayward journalism and by barristers in NSW being subject to bankruptcy proceedings for not having paid their taxes. While this latter issue has been largely confined to NSW, Christine considers that the aftershock (and the wider issue of compliance with taxation laws) will be felt nationally.

On a personal note Christine has three children, two of whom are completing tertiary and secondary studies in the ACT, while one is attending secondary school in Victoria. She enjoys gardening and long walks around Melbourne parks, which she has taken to with relish from an exploratory viewpoint now that she is a Melbourne resident. She also enjoys reading for pleasure, taking in movies and galleries, and has expressed a desire to investigate the delights of rural Victoria when time permits. She favours the direct and candid approach to interpersonal relationships, calling a spade a spade rather than a horticultural assistance device, and likes to know where she and others stand without the elaborate rituals of game playing. She dislikes untidiness intensely and has been having something of a field day going through the accumulated detritus of the Bar and getting it organized and either retained and filed if it is useful or tossed out if not. Even a cursory glance around the Bar's new premises on the fifth floor of Owen Dixon East will attest to the outstanding success the new Chief Executive Officer has achieved in imposing order on the chaos.

The hot topics Christine sees for barristers at the moment are professional indemnity insurance and the implementation of the new *Legal Profession Act 2004*, which comes into force on 1 July 2005.

Christine's family provides an insight into the strong work ethic that drives her. Her father, now aged 84, was a partner at Mallesons and still undertakes legal consulting work for a variety of organizations. As well as this he regularly flies to Sydney for meetings to honour a commitment to the Australian Vietnam Veterans' Trust. Her parents had three daughters and her mother put all her energies into securing a first rate education for them. One of Christine's sisters a journalist in Sydney and the other is a deputy principal of a primary school in the ACT. She recalls that in her family there was no suggestion that a girl could do other than anything at all she set her mind to.

Christine is honoured now to be working for a Bar which she knows leads Australia in its attitudes to equality for women at the Bar. She has found everyone to be very welcoming and she feels she has come back "home" to be again among lawyers and legal issues. She says she loves it and is never bored — and the passion and honesty with which that is said is instructive.

In time, she hopes she will be able to recognize the male barristers even when in wigs and gowns ("they really all do look the same!"). In this, as in all things she attempts, there is absolutely no doubt Christine Harvey will succeed beyond even her own imaginings.

Conference Update

3 May–7 May 2005: Bali. Inter-Pacific Bar Association. 15th Annual General Meeting and Conference. Contact IPBA 2005 Bali Secretariat. Tel: 62 21570 5800. Fax: 62 21570 5798. Email: info@IPBA2005bali.com.

10 May–12 May 2005: Canberra. Security in Government Conference 2005. Contact SIG 2005 Secretariat. Tel: (02) 6250 5486. Fax: (02) 6273 4041. Email; sig2005@ag.gov.au.

29 May–5 June 2005: Mykonos. Tenth Greek/Australian International Legal and Medical Conference. Contact Jenny Crofts. Tel: 0420 2140. Fax: 9421 1682. Email: jycnycrofts@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) 3236 1180. 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: 1312 988 5107. Fax: 1312 988 6178. Email: sullivanksl@staff.abanet.org.

11 August–13 August 2005: Surfers Paradise. Annual Conference of the Royal Australian New Zealand College of Psychiatrists, Section of Forensic Psychiatry. Tel: 9509 7121. Fax: 9509 7151. Email:info@conorg.com.au

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

3 November–6 November 2005: Wellington, New Zealand. 25th Annual Conference. Australian and New Zealand Association of Psychiatry, Psychology and Law. Contact (03) 9509 7121. Fax: (03) 9509 7151. Email: infor@conorg.com.au.

Rough

SIR Arthur Conan Doyle modelled the character of Sherlock Holmes on the great and popular professor of surgery at Edinburgh University, Dr Joseph Bell. Bell was an uncannily observant diagnostician; his clinical techniques are reflected and magnified in the investigative techniques of the Holmes character. According to Conan Doyle's biographer Martin Booth, Dr Bell was "…a sparse and lean man with the long and sensitive fingers of a musician … an angular nose … and a high pitched voice". A fair description of Holmes.

Holmes also had the engaging urbanity which characterised Bell. When his patience was tested by the duller wits around him, Holmes would, at worst, speak "with some asperity". It is a characteristic feature of Conan Doyle's writing that the exasperation of the educated classes was expressed by nothing harsher than speaking "with some asperity" (unless, of course, it expressed itself in acts of murder).

Asperity is a useful word, but not often heard these days. The OED2 gives a series of quotations for its various senses, the latest of which is 1866. (Note, however that the Sherlock Holmes stories were all written after that date: *A Study in Scarlet* was first published in 1887, and *The Case-Book of Sherlock Holmes* was published in 1927).

Asperity means roughness or harshness; sharpness of temper or manner. It comes from the Latin *asper* rough. It can refer to things or people, to physical characteristics or to manner, but its use in reference to physical properties is archaic (in 1662 H. More wrote of viewing "…the Asperities of the Moon through a Dioptrick-glass"; in 1750 Johnson spoke of "The nakedness and asperity of the wintry world."). If it is used at all nowadays, it is used figuratively (asperity of speech or action, for example) rather than literally.

Some judges with literary flair or a taste for variety have used it, but in the 20th century it is rare. In the Australian federal jurisdiction it appears in only five cases. Three of the occurrences refer to harshness of agency:

> 1965: "… the asperity of the common law towards an innocent party purchasing goods from a person who has all the trappings of ownership but in truth has no proper title to the goods…" (*Pacific Motor Auctions Pty Ltd* v *Motor Credits (Hire Finance) Ltd* (1965) 112 CLR 192 (Privy Council))

> 1993: "Any condition which presses with particular asperity upon a person may be described as a hardship" (*Re Kabalan* 40 FCR 560 per Gummow J)

> 1997: "This construction is then said to remove any apparent asperity in a construction of a statute which would release a debtor by virtue of a composition in respect of the adoption of which the creditor had been disenfranchised." (*Pyramid Building Society (in liq)* v *Terry* 189 CLR 176 per Gummow and Gaudron JJ)

The other two refer to harshness of manner:

> 1997: "This offer produced a response from Mr Woodward which rejected, with some asperity, the new terms (*BNWP Enterprises Pty Ltd* v *Unisys Australia Ltd* per Foster J)

> 1998: "The memorandum records that the Department rejected this proposal (and, it seems, did so with some asperity)." (*Re Minister for Immigration; Ex parte SE* per Hayne J)

Perhaps one reason *asperity* is not often used is that it is grammatically inflexible: it is a noun which has no living relatives, so it has no related adjective or adverb or verb. *Asperity* does have ancestors, but they are long dead. So *asper* was an adjective meaning rough or harsh or severe; Johnson also recognises *asperous* as meaning the same thing. To *asperate* meant to roughen; *asperation* was the action of roughening.

Grammatical inflexibility leads to (or results from) the ossification of a word: ultimately it dies out altogether or is found only in one or two standard constructions (examples include: one *fell* swoop; woe *betide* …; *figment* of the imagination). A word which permits variations for each of the principal word types will generally be more useful than one which does not. A near synonym of *asperity* is *roughness*. It is much more flexible than its elegant equivalent and has prospered accordingly. The family includes:

nouns: *roughness*; *rough* (e.g., a *rough* of a casting, a preliminary; also the unkempt ground adjacent to the fairway in golf; and the small culinary delicacy of our youth, the coconut *rough*); *roughage* (so important in modern diets)
adjectives: *rough*; *roughsome*
adverb: *roughly*
verbs: *to rough* (to rough up a person; to rough out a plan); *to roughen* (i.e.: to make a surface rough);

Rough has gone through several spelling changes: *ruhe*; *roughe*; *rouch*; *roch* and (according to OED2) *ruff*. Only two instances of this last (and most obvious) spelling are given: one is a letter written by Jane Austen in 1811 ("We walked Frank last night to Crixhall ruff, and he appeared much edified."). As the reference is to a place, it seems that the spelling is an archaic colloquialism.

The second is from the *Illustrated London News* of 27 November 1847: "Will you let the jury know what 'Ruffs' are? I believe it is an electioneering name for ruffians". This is not evidence of the spelling (and may not be put forward as evidence), since *ruffian* is a distinct and different word. *Ruffian* dates from the 16th century and means "a man of a low and brutal character; one habitually given to acts of violence or crime". The Macquarie Dictionary defines it as "a man of a low and brutal character; one habitually given to acts of violence or crime". In *Wind in the Willows* the Magistrate refers to "the incorrigible rogue and hardened ruffian whom we see cowering in the dock before us". It is sometimes used these days in a softer sense, to refer to a person of rowdy manner; it has a certain affection about it which its history would deny.

In any event, *rough* and *ruffian* are not related, except in their sound and in aspects of their meaning.

Ruff has other meanings, apart from its brief, unorthodox connection with *rough*. Everyone knows that the frilly starched piece at the neck or wrist of Elizabethan courtiers is a ruff. Fewer would recognise that a ruff is also a fish, a bird, a

candlewick, a cardgame and a state of high excitement.

The ruff is a sea-bream. It is also the name for a freshwater perch, which was named *aspredo* by the Elizabethan scholar Dr John Caius, for its rough, prickly scales. (Caius was a Cambridge graduate, who wrote the first known treatise on an epidemic — probably influenza — the "*Boke or Counseill against the Disease commonly called the Sweate*" (1552). He was also a generous contributor to Gonville College — as it then was — and subsequently Master of Gonville and Caius College — as it became and now is. The *aspredo* is no longer called by that name, just as *asperity* has slipped from regular use.

Ruff and Honour was a card game in Elizabethan times, but seems to be obsolete now. The associated verb *to ruff* is the act of trumping at cards when the player cannot follow suit.

The ruff is also a bird, the male of a bird of the sandpiper family (*Tringa* or *Machetes pugnax*), which displays during the mating season by a ruff and ear-tufts: as alluring to the female sandpiper, presumably, as the displays of the Elizabethan courtiers. This connection with display may explain what is otherwise the oddest meaning of the word: *the highest pitch or fullest degree of some exalted or excited condition; an exalted or elated state; elation, pride, vainglory.* These uses of *ruff* are confined for the most part to the reign of Queen Elizabeth I and the Stuarts. Once the asperity of the Stuart monarchs was washed away by the rough justice of civil war, *ruff* in all its meanings has fallen into obscurity.

Julian Burnside

Verbatim

Clearly We Do Not Know What We Are Doing

The following extract is taken from an advertisement for a seminar to lawyers in a particular specialist area.

> "… In providing legal services, legal experts use a mosaic of epistemologies and, as part of their epistemology, a mosaic of deduction, induction and abduction. This paper is concerned with some of those domain epistemologies insofar as they determine the requirements of (1) the interface of a shell suited to the legal domain and (2) the computational epistemology generic to the diverse range of potential legal applications. (product name) is explained as a shell for the legal domain designed to give effect to interface requirements of the domain epistemology as well as the computational epistemology that can provide legal services through that interface. It is a smart shell, the user-friendliness of which acts "as if" it has legal expertise; its program epistemology validates simplicity …"

Statutory Interpretation

Court of Appeal

Australian Airships Ltd v *Primus Telecommunications Pty Ltd*
Vickery QC with Arthur for the Appellants
Garrett QC with Nolan for the Respondent

Nettle JA: But the effect of misleading and deceptive conduct is not ordinarily to be measured by hermeneutic analysis. Generally speaking one is more concerned with common sense questions of fact and degree than precise semasiology. And as often as not the problem is with whether words have had or are likely to have had the purpose or effect of misleading or deceiving, despite rather than because of any supposed literal meaning. The tool of textual analysis has a role to play — logically it is the starting point of inquiry and practically it informs the range of meanings liable to be considered — but the outcome of the analysis depends as much upon the subject matter, circumstances and the personalities of the *dramatis personae* as upon a dictionary. Common experience, and consequent cynical, appreciation of the human capacity to shape meaning as much by what is not said as by what is uttered, allows for no other conclusion.

Interpreting a Contract

Federal Court of Australia

2 June 2004
Australia Risk Analysis Pty Ltd (Control/Administrator appointed
Corum: Heerey J
M. Clarke for Applicants
Macaulay S.C. with Maiden for Respondent

His Honour: There's some aphorism I seem to remember somewhere. It's not what the parties meant to say but what the words they used mean.
Mr Macaulay: It may be from this passage here, Your Honour. It reads as follows:

> It must be remembered at the outset that the Court, while it seeks to give effect to the intention of the parties, must it give effect to that intention as expressed. That is, it must ascertain the meaning of the words actually. There is often an ambiguity in the use of the word intention in a case of this character. The word is constantly used as meaning motive, purpose, desire, as a state of mind and not as meaning intention, as expressed.

His Honour: Yes, the origin of that aphorism I had in mind is from *Shader* v *Whitman Machine Pulleys*.
Mr Macaulay: Yes, that was the last passage, "What is the meaning of what the parties have to say," not, "What did the parties mean to say."
His Honour: It's interesting. It anticipates the postmodernism approach to deconstruct the …
Mr Macaulay: Yes, I think Humpty Dumpty said something along the same lines, Your Honour.

Continued on page 78.

Computer Defense

Richard A. Lawson

I have succumbed at last. Having been presented at Christmas with a computer, it could not be kept it in its box forever unopened. When I brought it to chambers in the New Year, my colleagues on the floor were unanimous in their surprise and in their congratulations.

Welcome to the 21st century. Everything else had been in the BC era, meaning, "Before Computer".

Initially, my attitude towards it was strongly contradictory. One voice was saying: "I'll take you back and get a refund". But another was asking: "How did I cope without you?"

I fear that the confounded thing is potentially addictive, in the manner of tobacco, aerobics classes, gambling, chocolate, shopping, mobile telephones and strong drink. But, apparently, most solicitors will regard you as odd if you don't have one. Or your clerk will. Or your children. But for me, these reasons are unsatisfying. For a start, I don't have any children. And most people, solicitors included, probably regard me as odd anyway. There must be something more: an answer that satisfies.

So it was that it was urged upon me by a colleague that one's computer should be thought of as the new power-tool of our profession. "Once you're on-line you can download anything"! she gushed. "Wisconsin Appeal Reports, editorials from the *Nova Scotia Law Journal*, supplements to the *New Zealand Planning Digest* — you name it."

"I didn't know that Wisconsin published any appeal reports," I admitted. "Exactly," she countered. "Get with it."

... it was urged upon me by a colleague that one's computer should be thought of as the new power-tool of our profession. "Once you're on-line you can down-load anything"!

Richard A. Lawson

"I see. But why should I be concerned with the views of the editor of the *Nova Scotia Law Journal*? I would think he or she is unconcerned with mine." "Don't be smart."

"And why would our planning gurus be worried about traffic congestion in Rotorua?" "Do you mind?"

I wasn't trying to be difficult. But "exactly, get with it, don't be smart and do you mind?" — even when regarded jointly and severally — were as unsatisfying as any fear of being regarded as odd.

Alas, I have searched in vain hitherto for an answer that satisfies. To the edict — Write an essay, not exceeding 500 words, entitled "Why I Love My Computer" — I have responded poorly. Two months of head scratching has only produced a very short list, namely:

1. The design is pleasingly compact — rather like an oblong frisbee.
2. It doubles as a CD player.

The opposing list is somewhat longer:

1. It wants one to spell as an American.
2. It leads one into a near-permanent state of incompleteness. One edits and polishes documents ad nauseam.
3. It can lull one into producing documents which only look flash. Never mind content. Both Magna Charta and the American Declaration of Independence (to name two solid documents from the past) were written without a pagination button or a spreadsheet.
4. It can erode further one's promptness in the way faxes did.

   Thoughts that enter one's head such as "I've got that affidavit in draft form on disk, I'll knock it out next week" — are habit forming.

   One suspects that the level of compliance with court-ordered time limits is inversely proportional to the number of computers in solicitors' offices.
5. It can enslave, if not ruin one, by "software updates". They can't all be as important as claimed. Come back loose-leaf filing instructions, all is forgiven.
6. It fuels consumer snobbery. I will never again contemplate criticizing my niece who "needs" 13 mobile phones or anyone who enjoys watching the SBS test pattern on a two-metre plasma screen.
7. It can distract one from pondering more important forensic questions such as whether one's client will fall to pieces under cross-examination.
8. It means one's picture (mug shot?) is on-line for all solicitors to see. No wonder many brief us under protest.
9. It has sounded the death knell of the open-door policy at the Bar. We are told it is a magnet for thieves and we all lock our doors.

I believe, regrettably, that I may never find a satisfying answer as to why I should rejoice in my computer ownership. It may be that no such answer exists. On the other hand, the new shoes with which I was also presented at Christmas haven't generated any rejoicing either. All they do is hurt.

Happily, my ambivalent attitude to my computer has mellowed. I thought I coped quite well without it. But it would be uncharitable to take it back and get a refund.

Law Week: A–Z Calendar of Events

Law Institute of Victoria: 15–21 May 2005

Date	Event	Details	Audience
Friday 20 May	Ballarat Court	Court tour at 3 pm. No booking required.	General
ALL WEEK	Bigamy, Theft and Murder	The extraordinary tale of Frederick Bailey Deeming on display, also FREE law brochures, Federation Square, Information Centre, cnr Swanston and Flinders Streets.	General
ALL WEEK	Blue Hills On Stage	School performances around the state of court-room drama written by the former Chief Justice JH Phillips. Script, wigs and gowns available for loan contact lawweek@victorialaw.org.au	Education
	Bush Lawyer Competition	Rural Law Online, new website of free legal information, is running a competition for the best joke, poem or short story/anecdote on your experience of a bush lawyer. Winners will be announced on ABC Country Hour and RLO website. Great prizes to be won! For details of how to enter go to www.rurallaw.org.au	General
	Careers Expo Monash University Clayton	4.30–7.30 pm. Bookings essential 9607 9468 or lnewson@liv.asn.au	Education
	Careers Expo Satellite Broadcast	Schools Television will broadcast a program they made of the Careers Expo held at Victoria University earlier in the week.	Education
Thursday 19 May	Careers Expo Victoria University Melbourne	A legal careers expo run by the Law Institute of Victoria at Victoria University 4.30–7.30 pm. Bookings essential 9607 9468 or lnewson@liv.asn.au	Education
Friday 20 May Saturday 21 May	Cemetery Tours — Melbourne General	Helen D. Harris OAM guided tour of the graves of some of Melbourne's most notorious "Law Makers and Law Breakers" at Melbourne General Cemetery, College Crescent, Carlton (opposite University of Melbourne halls of residence) 10.30 am (2 hrs) $20. Bookings essential 9604 8141, inquiries 9604 8155.	General
Sunday 15 May	Cemetery Tours — St Kilda	Visit the graves of lawyers, judges and others from famous cases with Friends of St Kilda Cemetery Inc cnr Dandenong Road and Hotham Street, St Kilda East 2 pm. Cost $5 (under 18 yrs free). No prebooking, assemble inside main gates.	General
Tuesday 17 May	Child Maintenance and Support Settlements	CPD: Financial Matters — Drafting Applications for Child Maintenance, Child Support and Property Settlements. Part of the Young Lawyers Lecture Series.	Legal
ALL WEEK	Community Legal Centre — Central Highlands	TBA.	General
ALL WEEK	Community Legal Centre — Geelong	Activities yet to be announced, including joint events with Deakin Geelong Law Students' Society.	General

	Consumer Law Centre		
Saturday 21 May	Court Tours	FREE guided tour of our stunning legal buildings: *Supreme Court *Magistrates Court *Children's Court. ***Supreme Court Library (with that Dome!) will feature an historical display of Wigs and Gowns ***Children's Court tours at 11 am and 2 pm and a Moot Court (play act) of Criminal and Family Division cases presided over by Judge Jennifer Coate, President of the Children's Court of Victoria at 12 pm.	General
Monday 16 May	Darebin Community Legal Centre	A panel discussion, including practitioners, former prisoners and magistrates, on the experiences of women prisoners. Presented by the Darebin Community Legal Centre. State Library Theatrette, 4–6 pm. Free. Bookings (TBA).	General
Monday 16 May	DNA Science for Legal Professionals	Presented by The Gene Technology Access Centre and Walter and Eliza Hall Institute of Medical Research. Exclusive to LIV members. Small workshop group includes lab work and lunch.	Legal
ALL WEEK	Electoral Education Centre Display	TBC.	Education
ALL WEEK	Family Mediation Centre Ringwood	FREE family dispute resolution and mediation advice.	General
Wednesday 18 May	Great Law Week Debate	Doctor Who? Litigation will be the death of medical practice. Monash law & medicine students and alumni battle it out. Moderator Sally "Dr Feelgood" Coburn. Hosts Monash Law School and Law Institute of Victoria at Clemenger Auditorium, National Gallery of Victoria 5.30 pm registration, 6 pm start. FREE Bookings essential sam.hawkins@law.monash.edu.au or 9905 2326.	General
Thursday 19 May	Human Trafficking Public Forum	Presented by Young Lawyers Section, Law Institute of Victoria.	General
ALL WEEK	Information Victoria Display	A range of legal resources including books, videos and CD-Rom are available as well as FREE legal information brochures and booklets, 356 Collins Street, Melbourne.	General
Tuesday 17 May	Law Institute of Victoria Public Seminar	TBA.	General
Tuesday 17 May	Law Institute President's Luncheon	With special guest George Brouwer, Victorian Ombudsman, at Le Meridien.	Legal
Tuesday 17 May	Law Week Oration	International Humanitarian Law TBC.	Legal
Friday 21 May	Lawyers and the Arts	Information and networking session where lawyers can meet the arts community and find out how they could get involved. Refreshments provided. Federation Hall, Victoria College of Arts 4.30 pm – 5.30 pm. FREE Refreshments provided. Contact Arts Management Advisory Group 9376 6680 mail@keepbreathing.com.au	Legal
ALL WEEK	Legal information sessions	Victoria Legal Aid are holding FREE legal information sessions for the general public at 350 Queen Street, Melbourne 12–1 pm. Inquiries 9269 0562. 16 May Power of attorney 17 May Social security issues 18 May Family law 19 May Child support legal service 20 May Parking fines/ticket inspectors — your rights.	General

Monday 16 May	Legal Reporting Awards	This invitation-only event recognises legal journalism at its best in covering Victorian courts and legal issues 12.30 pm — 1.30 pm. Contact jdonovan@victorialaw.org.au or 9604 8155.	Legal
Wednesday 18 May	Legal Women's Choir under the Dome	At 333 Collins Street, the acoustics will be spectacular!	Legal
ALL WEEK	Maribyrnong City	Council Library.	General
Monday 17 May	Melbourne Legal Precinct Map Launch	TBA.	General
ALL WEEK	Mental Illness Fellowship Resources	A range of resources to help legal professionals in their work with clients suffering a mental illness.	Legal
ALL WEEK	Old Melbourne Gaol	Special 2 for 1 offer during Law Week. To qualify you need to show a copy of the Law Week program, cnr Russell and Victoria Streets, Melbourne.	General
Wednesday 18 May	Provoking Cinema	For VCE Students. Vic Law Reform Commission Chairperson Prof Marcia Neave to discuss recent report recommending changes to defences to homicide, including provocation. Includes excerpts from movies and documentaries that deal with defences to murder. ACMI Cinema 1, Federation Square 10.00 am–12.00 pm FREE Bookings essential 8619 8619.	Education
ALL WEEK	Public Library Displays	Throughout Victoria, displays will feature legal resources and also provide a range of FREE law brochures and booklets.	General
Tuesday 24 May	Researching Chief Justices	On Empire Day John Bennett will speak at University of Melbourne.	Legal
	Rural Law on Country Hour	"Rural Law" is the theme of ABC Radio's regional program "The Country Hour" presented by Libby Price. with launch of the new Rural law online website www.rurallaw.org.au.	General
ALL WEEK	Rural Law Online Regional Library launches	TBA.	General
Wednesday 18 May	Schools Television Ads Against Racism	Award ceremony of school competition to produce the best short advertisement against racism, organised by Victoria Law Foundation and Equal Opportunity Commission Victoria in conjunction with Schools Television. Entries broadcast on the big screen at Federation Square.	Education
ALL WEEK	Self-Guided Court Art Tours	Pick up a FREE tour booklet covering the art and architecture of the Children's, County, Federal and Magistrates' Courts from any of the courts and proceed to tour in your own time!	General
Monday 16 May	Social Justice Essay Writing Awards	To be presented at Deacons.	General
Wednesday 18 May	The Changing Face of Privacy	Public lecture presented by Victorian Privacy Commissioner Paul Chadwick and launch of Privacy Victoria Awards Competition at the State Library Theatrette, Latrobe Street, Melbourne 11 am. FREE Bookings — TBA.	General
Monday 16 May	The Great Arts Censorship Debate	Prominent persons from the arts and the law will meet to debate the affects of censorship, defamation and obscenity laws on the arts. Sponsored by Holding Redlich at the County Court, cnr William and Lonsdale Streets, Melbourne, from 5.30 – 8.30 pm. FREE Refreshments provided.Contact Arts Law Centre of Australia 02 9356 2566 or artslaw@artslaw.com.au.	General
	VCAT Open Day	TBC.	General

ALL WEEK	Victorian Arts Law Week	Arts Law Centre of Australia hosts a series of events to educate artists and arts organisations about the legal issues affecting their creative work. There are workshops and seminars for musicians, filmmakers, dancers, writers, visual artists, craftspeople and arts managers. Most events are FREE. Details at www.artslaw.com.au	General
ALL WEEK	Wigs and Gowns	Library, Supreme Court of Victoria.	Legal
Saturday 21 May	Wills Public Seminar	Law Institute of Victoria, TBC.	General
Tuesday 17 May	Women and the Law Breakfast	Victorian Women Law Students' Collective presents Judge Jennifer Coate, Elaine Canty, Robin Bowles and Debbie Kilroy at Melbourne Convention Centre cnr Spencer and Flinders Streets 7 am to 8.30 am. Bookings essential womensbreakfast@hotmail.com.	Legal
Friday 20 May	You Be the Judge	How would you sentence an offender if you were the judge? Interactive session by Prof Arie Freiberg, State Library Theatrette, Latrobe Street, Melbourne 2–4 pm. FREE Inquires Pru or Nina at Sentencing Advisory Council 9603 9033.	General
	Young Lawyers Movie Event	TBC.	Legal

www.vic.lawweek.com.au

Annual Golf Competition

THE annual golf competition between the Law Institute of Victoria and the the Bench and Bar for the Sir Edmund Herring Trophy was conducted at the Kingston Health Golf Club on 21 December 2004. The Bench and Bar team comprised a meagre 16 players who faced the Law Institute's might with 34 players. Despite their numbers the Bench and Bar team showed their true colours and once again retained the Sir Edmund Herring Trophy.

The leading scorers for the Bench and Bar were Frances O'Brien S.C. and Shane Newton with a score of +6. They were closely followed by Judge Keon-Cohen and Peter Druce (masquerading as a barrister) with +5. Other leading contenders were Frank Parry S.C. and Peter Fox with a score of +4, Bryan Keon-Cohen QC and Robert Miller with +3 and John Richards S.C. and Robert Shepherd with +3.

Among the solicitors Philip Duffy and Steven Harris had the top score of +7, but many of their team failed to flatter, dragging down their average to less than that of the Bench and Bar team.

Following the event there was much discussion as to whether the date should be changed. The contest used to be played on the last Friday in January, but due to declining numbers this was abandoned some years ago and the date changed to shortly prior to Christmas. There are now several other competing golf events close to Christmas which have substantially eroded the numbers representing the Bench and Bar. Another possible date being considered is the Thursday before Easter. No new arrangements will be entered into regarding an altered date without the holding of a meeting of Bench and Bar golfers to discuss the various alternatives.

Gavan Rice
Golf Coordinator

Wigs & Gowns

THE Wigs & Gowns Squadron annual sailing day was again held on the waters of Hobson's Bay and hosted by the Royal Yacht Club of Victoria.

A light south westerly proved idyllic conditions for the yachts (and one boat) that set out in a short "cruise in company" around the sticks off Hobsons Bay under the watchful eye of Rattray QC in his restored motor launch *Argo*.

To describe the participants as the "usual suspects" or even the "usual crew" grossly understates the quality of the sailors who participated. For the first year, Judge ECS Campbell sailed in his Ian Oughtred designed canoe sterned gunter rigged ketch *Rosa-Jean*. Campbell had spent the past year building *Rosa-Jean*, ably assisted by his Associate, Dick Travers, who had turned his hand to everything from swaging to casting the tabernacle. This puts a whole new perspective on multi-tasking within the County Court.

Also participating, for the first time, was Andrew Green in his 42 ft timber ketch *Charisma*. Other significant participants included Peter H. Clarke aboard his 42 ft timber motor sailor *Renaissance* who sailed the course alongside Ross Macaw's beautiful motor sailor *Maree Louise IV*.

The winner of the Neil McPhee Perpetual Trophy was Judge Campbell sailing *Rosa-Jean*, with Peter Clarke sailing *Renaissance* winning the Thorsen Perpetual Trophy.

A barbecue lunch was enjoyed by all on the lawns of the Royal Yacht Club of Victoria after the cruise.

Next year is hoped to be bigger and better again — participating is winning!

James Mighell

Judge Campbell and his crew aboard Rosa-Jean.

Crew of Marie Louise*: Ross Macaw (skipper), Phil Kennon, Barry Hess and Anthony Krohn.*

Crew of Renaissance*: skipper Peter Clarke, Daniel Harrison and Judge Frank Walsh.*

Crew of Rosa Jean*: Judge Tim Wood, Judge Stuart Campbell (skipper) and Dick Travers.*

Crew of Charisma*: Andrew Green (skipper), Brian McCullagh and Bruce Cameron.*

Bar Regains Tennis Trophies

IN a stunning return to form, the Bench and Bar team (albeit minus any Bench members this year) successfully regained both tennis trophies in the annual match against the Law Institute played on 21 December 2004. As in the past several years, we were blessed with glorious weather, and the grass courts at Kooyong were a fitting venue for the triumph.

The first and oldest trophy is the Judge J.X. O'Driscoll cup, which from the evidence of the inscriptions thereon, was instituted in 1967. This makes it the second time in three years that this perpetual trophy has been won by the Bar. Once again, the strength of the Bar lay in its long and competent "tail", if that be an appropriate term to use in a tennis context.

Particularly strong performances were put in by Andrew Fraatz and Hamish Redd who won their four sets in convincing enough style to take out on behalf of the Bar the second trophy going on the day, the Flatman-Smith trophy for best performed pair.

Other commendable performances were by Nick Harrington and John Simpson who performed well in the A section to win two of their three sets, whilst Chris Beale and Ray Gibson, although winning one set only were still very competitive in the A section. Kerry Judd and Catherine Mukhtar also formed a formidable pairing for the Bar.

Once again we thank Kooyong Club and its staff for hosting us so obligingly on the day. Clearly this is a tradition worth retaining for the opportunity to mingle with our professional colleagues in a most enjoyable manner. Winning the trophies is now becoming an expectation rather than a unattainable goal. If there are any other players at the Bar interested in becoming involved, they will be warmly welcomed. Notices will be posted up in early December this year.

Chris Thomson

Bar Cricket

THERE is something charming, and something vaguely absurd and old-world, about barristers and solicitors playing serious to semi-serious cricket against one another. Anyway, former greats and wannabes who probably never will be took the day off work on 20 December last year and headed out to East Malvern for the annual battle for the Sir Henry Winneke trophy. The Captain of the solicitors' team, Jim Ryan, came up from Colac, as he does every year, to skipper the solicitors' team. Jim is on the wrong side of 60 but he bowls nagging wrong-uns which are always hard to hit and usually pick him up two or three wickets. But they also have Brent Lodding who plays District Cricket for University and a couple of others who actually have youth and talent on their side. We were missing our regular skipper, Chris Connor, and while some of our number are young and fit, most of us are not.

The solicitors batted first and when their opener, Brent Lodding, started to score a freely against our opening bowlers, it appeared that youth and talent were going to carry the day. But enter Mordy Bromberg. Keeping up to the stumps to the medium pace of Marc Felman, Mordy stumped Lodding and we were on our way. Two overs later Marc bowled another of the Institute's gun batsmen. Then enter Mordy Bromberg again, diving to his right and taking a spectacular one-handed catch in front of first slip.

At three for 51 off 21 overs, the Law Institute was in some difficulty. A 40-run partnership between the next two batsmen was broken when, you guessed it, Mordy Bromberg caught another one, this time off Simon Zebrowski. Simon Zebrowski took another wicket in his next over and then — you guessed it again — Mordy stumped another one, this time off Peter Lithgow's bowling.

The Law Institute finished with seven for 146 from its 40 overs, a run rate of about 3.5 per over.

East Malvern is a very big ground and unfortunately you have to be able to run quite a few threes, because fours are very hard to hit. Lachlan Wraith and I opened for the Bar and we were doing a lot of running. We took 10 off the first over and were averaging 6 an over when Lachlan (22) missed a straight one in the sixth over when we were on 35. I was caught (15) three overs later with our score on 45. But at five per over, and only two wickets down, we were well ahead of the run rate.

Marc Felman batted really solidly, and although he lost Michael Wilson (14), David Carlile (7), and Simon Zebrowski (2) on the way, we notched up five for 98 by the 25th over. We needed the bottom half to score 50 runs in 15 overs. A bit shaky but gettable.

Well, no need to worry really. In came Mordy Bromberg to make a quick 22 not out and we passed the Law Institute score with only five wickets down in the 35th over. Mark Felman top-scored with 58 not out.

Quaint and all as it might be, the former greats and wannabes still like to beat the solicitors, especially having been on the wrong end of these games so many times. To do it so comfortably is an added bonus. Expect the Institute to do a recruiting drive for next year's game.

The Bar team was David Neal (captain), Marc Felman, Lachlan Wraith, Michael Wilson, David Carlile, Simon Zebrowski, Mordy Bromberg, Suresh Senathirajah, Peter Lithgow, John Davis and John Gordon.

Do I need to say who was man of the match?

David Neal

Equity and Trusts

By Michael Evan
Butterworths, 2003
Pp: v–lxxvii; 1–711; Index 713–728

SOME readers will be familiar with one or more of the three editions of the previous work by this author published under the title *Outline of Equity and Trusts*. In his preface to *Equity and Trusts* Michael Evans states that the current text is a really a fourth edition of this previous work. Indeed the current text is an expansive dissertation of the various principles that one would expect to find in a textbook dealing with equity and trusts. The author's stated objective is that the book is a current and accessible statement of the complex principles of equity and trusts.

There are 27 chapters to the book. Chapters 1 and 2 begin with a basic exposition of the nature of equity and equitable rights titles and interests. Chapters 4 to 11 deal with equitable assignments, estoppel, fiduciary duties, unconscionable transactions, penalties and forfeiture, confidential information, subrogation, contribution and various minor doctrines. Chapters 12 to 19 deal with trusts, covering the nature, creation, variation on termination of trusts, charitable resulting in constructive trusts, duties and powers and rights and liabilities of trustees and beneficiaries. Chapters 21 to 26 deal with equitable defences and the equitable remedies of specific performance, injunctions, declarations, and equitable damages and equitable compensation as well as various minor remedies. Finally, chapter 27 deals with the taxation of trusts. The content is complemented by a detailed table of contents and a comprehensive and user-friendly index.

The book has been marketed as a concise yet comprehensive statement of the principles of equity with a format designed to meet the needs of both students and practitioners. It fulfils that description. The author has an excellent ability to communicate complex principles in clear language. The range of material in the book provides a sound coverage of the principles that fall under the respective classifications of equity and trust law. The author is himself a practitioner, and the style of writing and layout of the book reflects an appreciation that practitioners often begin their research by turning to a comprehensible and reliably comprehensive reference book. *Equity and Trusts* provides such a starting point although such a description may understate the depth and detail conveyed. The book has abundant detailed explanations and critical analyses of the guiding principles and the main authorities which underlie the relevant principles. The author gives readers a historical, conceptual and doctrinal context for the basic principles. The book also contains brief, highlighted summaries of leading cases interspersed amongst the text.

It provides explanations and constructive commentary in such a way that the reader is invited to think creatively and yet be informed of the principles that guide any creative thinking to find a solution. Such a book will have an enduring value in a personal library because electronic research tools make it relatively simple to update and supplement the benefits of a sound textbook. This book is one of a number of the available texts dealing with equity and trusts. Nevertheless it is a recommended addition to a practitioner's library.

Joycey Tooher

Equity and Trusts — Commentary and Materials (3rd edn)

By G.E. Dal Pont, D.R.C. Chalmers and J.K. Maxton
Law Book Company, 2004

THIS casebook is a companion to *Equity and Trusts in Australia* by Dal Pont and Chalmers. Mr Dal Pont has taken on the research, writing, editing and control of this edition, save for chapter 26 (Superannuation trusts) by Lisa Butler.

This edition of the casebook has seen the authors' focus change to an Australian context from an Australian and New Zealand one. This has allowed the extension of some parts by increasing the length of case extracts or introducing new case extracts, without increasing the size of the book.

As a casebook, the authors have prefaced any extract (Preface, page v) with a statement of principle. They then develop some of the matters raised in the extract, as well as other pertinent or parallel matters, through further commentary or questions. The casebook is broken up into eight parts:

I. The nature of equity;
II. Equitable interests in property;
III. Relationships of trust;
IV. Unconscionable conduct;
V. Unfair outcomes;
VI. Trusts;
VII. Equitable defences; and
VIII. Equitable remedies.

There is an increasing influence of equity over the commercial world, with the introduction of, for example, various statutory regimes that deal with unconscionable conduct and misleading and deceptive conduct.

In those circumstances, the reader will readily appreciate that an understanding of the background to equitable principles, with relevant case extracts, is a great starting point for those submissions to a court in a claim for equitable relief.

As a casebook, the text is aimed at students of law. However, the text serves as a useful introduction to equity and the ethical principles that lie at its centre.

W.G. Stark

Concise Legal Research (5th edn)

By Robert Watt
The Federation Press, 2004

THE ability to undertake concise legal research is one of the most fundamental skills required by barristers in private practice. As a result, this text, whilst primarily aimed at students, will be of some use to those members of the Bar willing to take the time to improve their research skills.

The original edition of this work, published in 1993, came about as a result of the author's work in teaching the subjects of Legal Research and Advanced Legal Research at the School of Law, University of Technology, Sydney, one of the two faculties that was involved in the setting up of Austlii (Preface to 1st edition). Chapter 1 deals with citation. It outlines the citation of sources of law, such as legislation or case reports. It also recommends standard citation rules for these sources of law. This material is primarily aimed at the student reader.

Chapter 2 deals with primary source material. After a brief outline of the history of Australian constitutional law, researching Australian legislation (and to a lesser extent UK legislation) is discussed.

Chapter 3 deals with delegated legislation. After defining subordinate legislation, the chapter outlines where to find delegated legislation.

Chapter 4 deals with law reports. It provides a brief outline of the differ-

ence between authorised reports and other reports, and describes where to find reported cases. Chapter 5 looks at secondary sources. It covers "current awareness" sources, such as *Australian Current Law* or the *Australian Legal Monthly Digest*. It also covers textbooks, legal dictionaries and so forth. This chapter outlines a research strategy for using secondary sources of law.

The remainder of the text provides useful insights into researching the law in New Zealand, Canada, India, the USA, the European Union and International law. Finally, the author provides a list of non-commercial internet addresses for legal research.

The text is a useful starting point for those wishing to take a refresher course in legal research, and for students who are first approaching the daunting task of legal research.

W.G. Stark

Intellectual Property In Australia (3rd edn)

McKeogh, Stewart and Griffith
Butterworths, 2004
Pp. lxvi plus 685 pages, including indices. Paperback

This is an excellent general overview of the Australian law of intellectual property. It is concise, reasonably comprehensive, clearly written and up to date. Barristers needing to research or prepare a case in depth would no doubt wish to consult more widely, but even for them this is an excellent place to start. It contains more than enough information to answer most preliminary or general queries. Due to its simplicity of expression and easy to follow layout, I also think this book would be useful to students of intellectual property at both an undergraduate and graduate level.

Unlike Gaul, the book is divided into six parts. The first is introductory and contains an overview of the nature of intellectual property, a discussion of policy issues, and a general chapter about the enforcement of intellectual property rights. The second part concerns confidentiality, including breach of confidence. The third part contains chapters about copyright, designs and related rights, including circuit layouts.

The fourth part deals with patents, including the patent system, validity of patents, ownership and exploitation of patent rights, infringement of patent rights and a separate chapter about plant breeders' rights. The fifth part concerns business reputation, including passing off and trademarks. A final part has chapters about international aspects of intellectual property protection and the commercialisation of intellectual property, both of increasing importance in a century awash with cliches about "globalism" and "knowledge".

I have found the book of considerable practical assistance. It has contained a usable description of the law on most areas of intellectual property about which I have consulted it. The explanations are easy to understand, particularly for those who are not intellectual property experts. In certain areas, such as copyright and patents, practitioners would require detailed and updated reference to cases, statutes and other materials which can only be obtained from a specialist looseleaf work. But this is a good book to have in chambers to look up those intriguing general IP points that can be so troubling.

Michael Gronow

Australian Evidence (4th edn)

Ligertwood
Butterworths, 2004
Pp. lxxx plus 712 pp, including index. Paperback

THIS is a welcome new edition of one of Australia's two best general evidence textbooks (along with the Australian edition of *Cross on Evidence*, now edited by Justice Heydon). "Ligertwood" continues to contain a comprehensive and well set out treatment of its subject matter. The book is in some ways more oriented to the academic user than the legal practitioner. One may rather have *Cross* in Court if compelled to argue a difficult admissibility point at short notice. Nevertheless this is a good book to read when struggling with the increasing overall complexity of this area of our law, which has so far resisted simplification and codification.

The present edition of Ligertwood still opens with chapters about the fundamental principles of evidence, including an analysis of both the mathematical and non-mathematical approaches to probability. It then discusses the trial process including the reception of evidence and degrees of proof. A third chapter concerns character evidence, and the fourth is about corroboration and related rules. A fifth chapter entitled "The Adversary Context" concerns restrictions on access to information such as legal professional and other privileges, and public policy restrictions.

Chapter 6 (rather obscurely called "Party Presentation and Prosecution") deals with the burden of proof, the making of "no-case" submissions and how material facts may be determined by a Tribunal from information presented by the parties. The seventh chapter deals with documentary and testimonial evidence, and the admissibility or inadmissibility of things like prior statements. A final chapter deals with the hearsay rule and its exceptions.

Overall, I would recommend this work to barristers who want a wholly Australian treatment of the subject, particularly as an adjunct to *Cross* and (if you practice in the Federal, New South Wales or Tasmanian jurisdictions) a good quality annotated Evidence Act, such as Odgers' *Uniform Evidence Law*.

Michael Gronow

Australian Commercial Law (25th edn)

By C. Turner
Law Book Company, 2005

THE 25th edition of any work marks a milestone. This text stretches back to a work titled Australian Mercantile Law, written by Sir Keith Yorston and Edward Fortescue that was first published in 1939.

The current edition of the text is divided into five parts:
1. Introduction
2. The law of contract
3. Commercial transactions
4. Business organisation
5. Allied areas of law.

The introduction gives a very brief introduction to and a history of the Australian legal system.

Each chapter in Part 2 covers the basic requirements for a contract. For example, Chapter 3 deals with offer and acceptance (in eight pages).

Another example is Chapter 7, which deals with consent of parties, mistake, misrepresentation and unconscionable conduct. This chapter includes a useful fold-out page that covers six essential topics for the formation of a contract: offer and acceptance; intention to create legal

relations; form or valuable consideration; legal capacity; genuine consent and legality of objects.

Each chapter in Part 3 covers a different type of commercial transaction. As an example, Chapter 16 deals with the law of electronic commerce, an area of law that would not have been in contemplation when the text was first written in 1939. The 25th edition gives a relatively broad coverage of this growing area of the law. It deals with the Electronic Transactions Acts of each State, and then lists three types of electronic contracts, and details their formation and validity.

"Shrinkwrap" contracts are where a package, such as software, is supplied wrapped in plastic, with a note that if the plastic is opened, the opener accepts the terms and conditions contained inside the package. It has been held that these contracts may be valid, because the purchaser can return the product after having opportunity to read the terms, if a notice is placed on the outside to that effect (see *ProCD Inc* v *Zeidenberg* 86 F 3d 1447 (7th Cir 1996).

"Clickwrap" contracts are formed on the internet. The user assents by clicking a button marked: "I agree" or "I accept". The user is given the opportunity to read the terms and conditions before accepting them.

"Browsewrap" contracts are where a user may download software, without any unambiguous consent to the terms of the contract. For example, the terms and conditions may be hidden down the page where the user cannot see them without browsing fully down the page. In *Specht* v *Netscape Communications Corp* 306 F 3d 17 (2d Cir 2002) Specht downloaded Netscape's SmartDownload software. To do this, he simply pressed a button "download". The only reference to the terms and conditions could be seen if the user scrolled down the page where there was a link to a web page that contained the terms and conditions. The court held in these circumstances that these terms and conditions did not bind Specht.

Chapter 22 deals with property law. It gives a very brief introduction to property law in Australia, covering 35 pages, including 14 pages dealing with native title.

Part 4 covers partnership and company law.

The chapters in Part 5 deal with torts, trusts, intellectual property, bankruptcy, workplace relations, criminal law and business ethics.

Each chapter in the text contains suggestions for further reading on any topics that are of interest to the reader, as well as journals and relevant internet sites.

The text is also full of case studies, relating to a large number of the topics under discussion.

As a result, the text is a useful work for those who are practically minded, and are looking for a short answer to a problem.

The text is a useful starting point for students who are new to the commercial world, or perhaps for business men or women looking for an answer to a relatively minor question of contract law.

However, because of its large scope it can only deal with each area that is covered very briefly.

W.G. Stark

The Complete Guide to the Law and Managing Bodies Corporate

Victoria Law Foundation, 2003
By Julie Van Dort

RECENT figures suggest that some 15 per cent of Victoria's population reside in multi dwelling developments. The view over Docklands from the writer's window suggests that this percentage is likely to increase as the years go by.

The *Subdivision Act 1988* and the *Subdivision (Body Corporate) Regulations 2001* sets up the legal framework within which residents of low-rise and high-rise multi-unit developments live, work, play and generally conduct their lives. The Act and the Regulations are (at the time of writing) the subject of a parliamentary review. This is not entirely surprising because the legislation that governs subdivisions certainly admits of differing interpretations and leaves many questions that arise on a day-to-day basis about the management of owners' lives open for debate.

It is therefore timely and useful that the Victoria Law Foundation has published *The Complete Guide To the Law and Managing Bodies Corporate.*

This reviewer's practice has, over the past couple of years, come to include a great many body corporate disputes and this useful publication has been of great assistance when it comes to advising clients on the meaning or supposed meaning of the provisions in the Act and Regulations.

The text is divided into seven parts with additional appendices and an excellent comprehensive index.

The guide works through the *Subdivision (Body Corporate) Regulations 2001* and looks at topics such as property management, financial management, appointments and delegations and meeting procedures.

It provides the text of the Regulations, together with commentary and, usefully, case studies, checklists for body corporate managers and owners and document precedents.

Perhaps the most important aspect of this publication is the commentary that draws together the underlying objectives of the Regulations, the ethos of the Act and the spirit of, in some cases, not easily reconcilable provisions of the Regulations, into a comprehensive statement of the law and practice in managing bodies Corporate.

The publication is to be highly commended and should be on the bookshelf of every practitioner, solicitor or barrister, whose practice touches and concerns multi-unit developments.

Neil McPhee

Verbatim *continued from page 68*

A Trade Skill

NSW Court of Appeal

Green v *Green* (1989) 17 NSWLR 343.

THE case concerned the rather bizarre domestic situation of a deceased who had one wife at law, one de facto wife and an ongoing relationship with a third woman whom he met in Bangkok. He fathered seven children, spread across all three relationships.

In his reasons for judgment, Gleeson CJ stated at 346: "The deceased appears to have maintained simultaneous domestic establishments with all three women and their respective children. In terms of division of his time he appears to have given preference to Margaret Green, but it seems that he spent two nights a week, regularly, with the respondent and, at least according to her evidence, gave what she regarded as a plausible explanation of his absences. Presumably, over a number of years, he managed to achieve this result with the other women. This is consistent with his apparent success as a used car salesman."

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