# VICTORIAN BAR NEWS

No. 134 ISSN 0159-3285 SPRING 2005

## Welcome to the High Court of Australia, Justice Sue Crennan

**Welcomes: Justice Chris Maxwell, Justice Ashley, Justice Kim Hargrave, Justice Betty King, Master Efthim, Judge Morrish and Judge Leckie ☐ Farewells: The Honourable Justice Winneke AO AC and Justice John Batt ☐ Obituaries: Louise Crockett and Sam Duband ☐ Trouble in Paradise ☐ Life in the Solomons ☐ Interview with Professor Kathy Laster ☐ Working Nets ☐ *The Queen* v *Edward "Ned" Kelly* ☐ A New Court for Victoria ☐ 2005: the Threat of Recession — 1990s Unlearned? ☐ Mate ☐ A Letter from America ☐ It's a Fine Line Between Pleasure and Pain**

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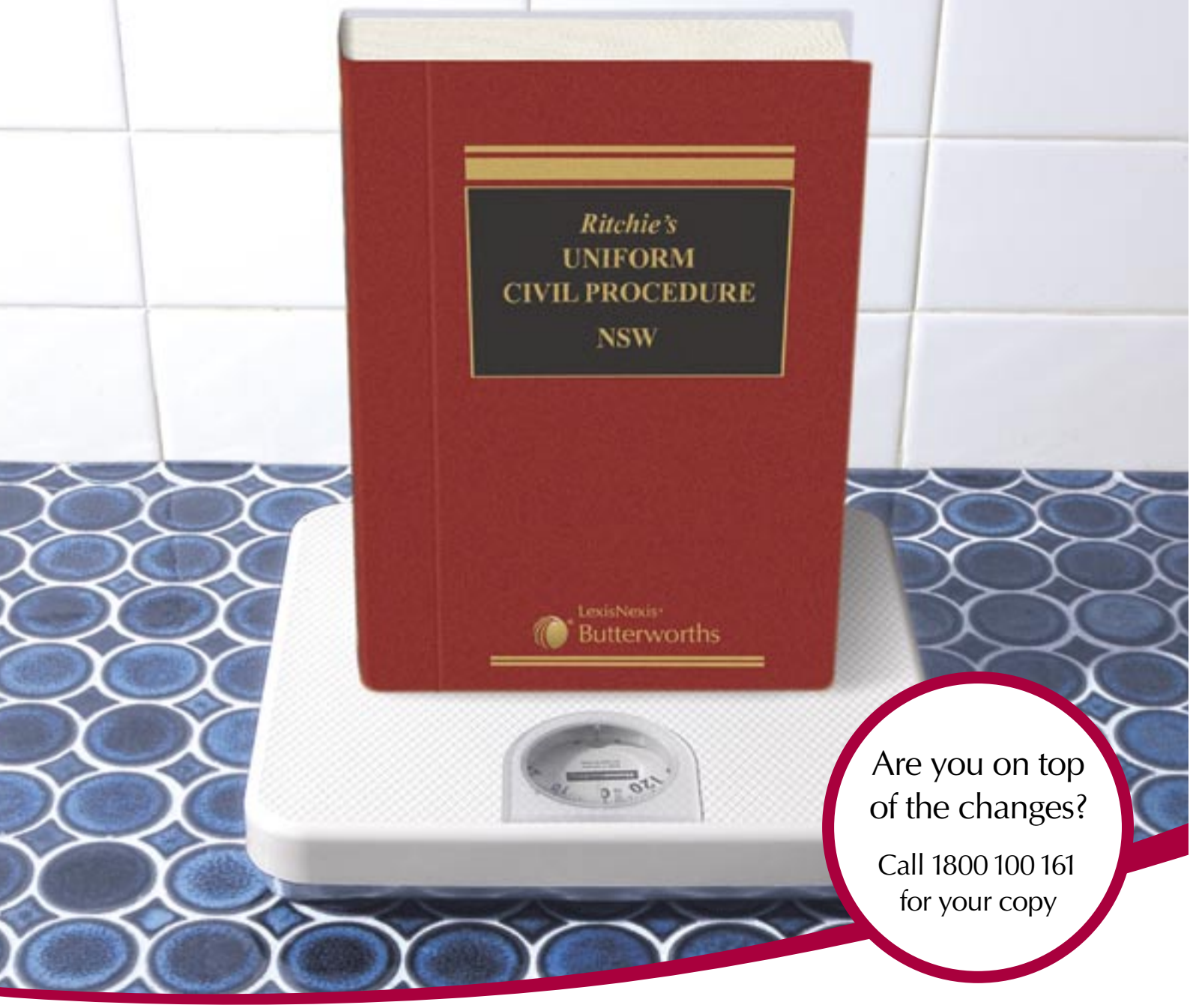


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Published by The Victorian Bar Inc.
Owen Dixon Chambers,
205 William Street, Melbourne 3000.

Registration No. A 0034304 S



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

This publication may be cited as (2004) 134 Vic B.N.

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Victoria 3127
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# Community Interest or Individual Rights?

## BIG BROTHER

THOSE of us who have teenage children are familiar with a television program called "Big Brother". It is a program that probably represents the worst example of "reality" television. Strangers are put in a house together; their every move is captured on television and their every word is recorded. When Big Brother gives them directions they are required to comply immediately. They are in fact guinea pigs, who react to their master's every command but between commands may do as they like.

As the hand of government obtrudes more and more into every facet of life, we seem to have a clear move towards big government throughout the whole western world. At the same time, like our look-alikes in the television show, our behaviour is more and more uninhibited.

Personal responsibility and responsibility for self disappear in the television program. Provided one does what one is told, one can do what one likes on camera and off (although there appears to be no "off camera").

Our real society is moving more and more towards this picture. Individuals, provided they comply with the law, are uninhibited in their behaviour. However, the inhibitions created by the law and the supervision by the law are increasing. The community comes ahead of the individual. The freedom of the individual, insofar as it may conflict with the interest of the community — or the perceived interest of the community — is to be curtailed. The community is, we are told, more important than the sum of its parts.

## A CHANGING ENVIRONMENT

In the early 1960s, when the Victorian government proposed to introduce compulsory breath testing for motorists, the Bar Council under the Chairmanship of Sir Murray McInerney opposed the proposed legislation, on the ground that it infringed the common law right of the individual not to incriminate himself. Today most members of the community would sneer at such opposition. In the community view

the danger of "drunk drivers" to others and to themselves clearly requires compulsory breath testing. The danger to the community represented by drunk drivers is accepted as justifying the clear interference with what was once considered to be a common law right.

More recently, in the 1970s, the Federal government introduced retrospective criminal legislation to deal with the evil of "bottom of the harbour" tax schemes. This was a drastic infringement of fundamental rights. It involved an acceptance of the proposition that a person could be prosecuted and punished for doing something which, at the time at which it was done, did not constitute a criminal offence. The justification was found in the fact that "bottom of the harbour" tax schemes were clearly morally dishonest and people involved in those schemes did not "deserve" to be protected. What they were doing was damaging to the community.

It is many years since Lord Denning said that there was no such offence as "being wanted for questioning". But in Australia today, and in England for some time, detention for questioning is permitted. It may be that in Australia such detention is limited to people who it is believed may have information in relation to possible terrorist activity, but nonetheless the power exists.

When George Orwell wrote *Nineteen Eighty Four* and when Aldous Huxley wrote *A Brave New World*, both contemplated a world in the distant future where the state catered to the needs of the individual and at the same time stripped him or her of any unique individuality.

## WHAT IS NECESSARY?

There is a need to protect the community and the individuals who make up our community from the threat of terrorism. But we should be careful that in defending freedom we do not abolish it.

A little over two decades ago one of the editors visited Uruguay, then in the control of a military junta. He spoke with the director of internal security, who acknowledged that strong measures were being taken against dissidents in Uruguay, but

**There is a need to protect the community and the individuals who make up our community from the threat of terrorism.**

he pointed out that these people were terrorists who wished to "destroy the whole fabric of our society".

On the question of torture of persons detained in custody, the director said that he was opposed to "all unnecessary torture". The conversation that followed elicited the fact that torture was "necessary" only: (a) where the prisoner was guilty and had not confessed; or (b) where the prisoner had information needed by the authorities and which the prisoner had not disclosed.

LIFE SENTENCE

On 20 August 2005 His Honour Judge Higgins completed 20 years' service as a Judge of the County Court. There is, moreover, no evidence that he is about to be released on parole.

Although we tend to miss milestones in this column, this was one we could not let pass without comment. His Honour, was, we believe, the first solicitor appointed to judicial office. We wish His Honour well for the rest of his sentence.

When His Honour is finally released from custody, it will be a significant loss to the legal system and to the Victorian community. His 20 years on the Bench have revealed an unassuming man of high intellect, precise language, strong compassion and intellectual integrity, who has worked assiduously to protect those who are unable to protect themselves.

WELCOME JUSTICE CRENNAN

The appointment has just been announced of Sue Crennan, a former Chairman of the Bar Council, as the replacement for Justice McHugh on the High Court of Australia. This news comes as *Bar News* goes to press.

*Bar News* welcomes the appointment with delight. Her Honour has been described in one of the newspapers as a "renaissance woman". There is certainly a clear basis for this assertion. More fundamentally, however, she is a lawyer, barrister and judge who has made her way through the profession on the basis of her own skills and ability. At no time in her career has she acceded to the view that there should be some form of affirmative action to assist her. She has done it on her merits and those merits are first class.

We welcome your appointment renaissance woman, former Chairman, colleague and friend.

We will say more about this appointment in the next issue.

The Editors

## M.'s More Wit Plea

Dear Editors,

HOW could you allow the august Editors' Backsheet to repeat the appalling prosecutorial malapropism that appeared at the bottom of page 5 of the Winter 2005 Edition of the *Bar News*? Mayhem may indeed be ensured if such poor standards of English usage are allowed to prevail.

Having been given this opportunity to castigate you I feel the need to raise a concern that has been simmering for some time. Why is the Magistrates' Court no longer funny? I cannot recall the last time your "Verbatim" column contained any reference to magisterial wit. Are we on the bench so cowed by the necessity to mind our Ps and Qs that any trace of humour has been banished from our courts? Is it that your correspondents are now such venerable grey-beards that they never descend further down from their Olympian heights than the County Court? Or are proceedings in our courts simply so dull and grey (no pun intended) that no examples of amusing repartee are to be heard?

Whilst it may be unrealistic in these times to expect the replication of the robust humour of a Darcy Dugan or a Brian Clothier, or the sophisticated drollery of a Pat Street, I find it hard to accept that our court, which is by far the busiest in the State, is so boring and lifeless that "bon mots" are never to be discerned.

Or maybe I'm just being a grumpy old M.

Yours faithfully,

Jon Klestadt, M.

## Perceived Sexism and Censorship

Dear Editors

THAT a double entendre in a speech at this year's Bar Dinner should invoke such reaction confirms that the profession has its priorities in order. Perhaps a subcommittee of Bar Council members could be assembled to ensure that there is no future repetition of this outrage.

The plight of David Hicks, the merits of a battered wife syndrome defence and the erosion of rights of suspects in a climate of terrorism concern ought rightly be secondary to "The Thin End of the Wedge," as opined by Alexandra Richards QC in the Winter 2005 edition of *Victorian Bar News*.

I doubt whether I will be able to take my repose tonight such is my distress at the treatment of the female barrister destined to eat her "sangers" alone in chambers whilst her male colleagues regularly feasted at her exclusion.

Glib generalizations pertaining to the deficiencies of male members of the Bar does little to promote the cause promoted by Richards. I neither need nor appreciate being preached to and I find allegedly stereotypical anecdotes of sexism said to be perpetrated by my gender to be trite.

No woman should be discriminated against in any way in any pursuit of her professional career. Let it not be forgotten that some women, like men, are devoid of talent, wit, intelligence or skill. It is imperative that should such women flounder at the Bar, that this outcome not be lamely explained away as being due to sexist reasons.

The very many women with whom I have regular contact at the Bar are rarely (if ever) troubled by the issues raised by Richards. If anything, they are appalled by much of the "obiter" for there is seldom a "ratio" for the whining of their sexual brethren (sic). Rightly, they seek equality of opportunity for all and regard based on merit and worth.

Any historical acts or attitudes which meant that women did not receive the recognition or appointments which they deserved can never be justified. The indubitable sins of the past must never be repeated. They are not eradicated by excessive recognition or appointments inconsistent with ability and experience. Such conduct is gratuitous, transparent, unjustifiable and insulting to women.

In the context of appointment to judicial office there is little doubt that for some years now the horizon has changed. It is good that there are now more female judicial officers. I fear that such appointments have not always been based on merit. An honest analysis of a number of female appointments results in the inescapable conclusion that they have been made in an attempt to redress "the sins of the past". Such an attitude is acceptable if the decision to be made is in regard to two candidates of equal worth but different gender. In those circumstances it is appropriate that the female candidate be selected ahead of the male.

There is much about the latest edition of the *Victorian Bar News* which troubles me. I am troubled that the editors

of this fine publication saw fit to "censor" Mr Junior Silk's speech. I am aware that one segment of the speech was deemed offensive by and caused distress to Her Honour Judge Hampel. It goes without saying that Elliot S.C. meant no such offence or distress to Her Honour. From what I can gather (as I was not present) the comments were neither obscene nor unlawful.

In a profession which makes a habit of "kowtowing" to members of the judiciary I find it regrettable that the editors did not deem it necessary that the members of the Bar be allowed to make their own assessment of the speech. Had the aggrieved party been a seemingly less important member of the profession would there have been such vetting of the speech? I doubt it and I regret that we are not sufficiently robust as to be allowed to exercise freedom of judgment and analysis.

For this issue to be the springboard for the partisan indulgence engaged in by Richards' article is unnecessary and excessive.

In many forms of endeavor and life the views of the "silent majority" are often ignored. On this occasion I believe the "silent majority" is almost all of the able, stable and fine women who comprise the Bar, whose counsel, intellect, good humour and judgment I treasure and value immensely.

Is it not about time that we cease to create issues out of non issues and ensure that all members of the Bar, regardless of gender be treated with the dignity and respect they deserve. Richards' article serves no such purpose. Sexist barristers will be neither edified nor converted. Non sexist barristers may well find it lecturing in nature and so obvious as to compel little more than passing and dismissive attention.

Geoffrey Steward

## Banger

Dear Editors

YOU assert that Queen Victoria directed that diners were to remain seated when the loyal toast was proposed in ward rooms (p.28 [2004] *VBN*). With respect, it was her uncle, King William IV (1765–1837), the "sailor king", who so decreed. He was succeeded by Victoria. After entering the Royal Navy in 1779 William was rapidly promoted to Admiral of the Fleet and the office of Lord High Admiral was revived for him. The "stay seated" direction was the result of his banging his head (involuntarily) on ward room ceilings when toasting his niece.

Splice the mainbrace!

Roy Roebuck

## Esprit de Corps

Dear Editors,

SOME weeks ago, I attended the funeral of Louise Crockett. Naturally, the church was full. Given the esteem in which she and Andrew (and, of course, Louise's father) are held by their friends and colleagues in the law, it was of no surprise that many lawyers were present, most of whom were and are members of this Bar (in its various divisions). Obviously a time for Louise's family and her many friends, the funeral was also an occasion for the true expression of the collegiate nature of the Bar and of the profession generally. If the Bar is to have an esprit de corps

which is more than the economies of scale of accommodation and clerking then the gathering of those to say goodbye to Louise is good evidence that that can and does exist.

Andrew Donald

## A Singular Decision on a Plural Subject

Dear Editors,

IT was with great interest that I read the debate on whether the word *variety* took a singular or a plural verb.

This subject became of legal interest recently when I was presiding in an administrative law proceeding. The matter was to do with a planning application to build a house on a cliff.

This raised a variety of issues. Considerable legal thought went into the question of whether variety was singular or plural. It was suggested that variety was a collective noun, whether a class collective, which is singular, or a distributive collective, which is plural, or a generalising collective, which is usually plural, or a group collective, which can be singular or plural.

To save much legal argument, I decided to treat *variety* as I would the noun *number*. Thus where many is meant or intended, then the noun is plural and takes a plural verb. But where it refers to a numerical figure only, it is singular.

Accordingly, for a variety of reasons I ruled (admittedly only as obiter dictum) that *variety* was plural and took a plural verb. The case is *Clarke* v *Minister for Land and Environment* N.I. [2005] A.R.T. 4 of 2004.

Yours sincerely,

John Walsh of Brannagh Senior Member
Administrative Review Tribunal
Norfolk Island

## Of Stuff and Silk: the Harsh Reality

Dear Editors

GREAT article but there is a harsh reality that Pannam QC has overlooked:

Stuff is very much in vogue, particularly if you enjoy supporting the poor and downtrodden Columbian crop owner.

The legal relationship between Silk and Junior may be a matter of conjecture, the practical and professional relationship is quite clear, i.e. the Junior shall diligently attend to all matters and if lucky the Silk will come along on the hearing day. However, the following can be noted:

(a) From a Junior Counsel perspective there is no more satisfying experience than seeing your Silk turn up.
(b) If the Silk doesn't turn up then there is no fee ride, (indeed there is probably no ride at all). If he does turn up, say thank you and go along for the ride.
(c) Sure the Junior is to give detailed consideration, but don't tell the Silk because he may very well bugger off to the Local Court to do that oh so rewarding plea (financially rewarding!).
(d) Silk will always give careful consideration to the views of the Junior, but the Junior should keep in mind what happened at (c) above.
(e) It is important for the Junior to show loyalty and mutual support to the Silk, otherwise he might not front or at the very least forget he is God. The last thing a Junior needs is a Silk with an identity crisis.

Joint written advices are the best way for a Junior to improve their grammar, because the Silk usually does little else other than demonstrate that at Geelong Grammar six does not equal half a dozen. Pannam QC, however, omitted the following considerations:

(a) The Junior should always read and consider instructions because the Silk won't.
(b) The Junior should always read and consider the relevant statutory provisions, because the Silk won't.
(c) The Junior should always contact his Silk to advise him of the imminent arrival of the advice that both are to give, less grammatical correction, so the Silk can prepare his fee note in good conscience.

Marking up authorities and case searches are very important tasks for a Junior. But the Junior must never give these documents to the Silk before the hearing, otherwise they will be lost in the black hole known as Silk's chambers. Even at the Bar Table keep a copy because it seems this black hole follows thy silken gown. (Copperfield has nothing on some Silks!)

Assistance by the Junior during argument, made unobtrusively and by note will always be ignored. If the Junior has a good point he should feign illness, adjourn and put it in written submissions.

Outlines of argument should always be in draft form; because whatever thought process the Junior had the Silk will change.

The Junior should closely follow cross-examination by the Silk so as to ensure that morning tea and lunch breaks are closely observed.

General: The Junior counsel should expect the following:

(a) The Silk won't front.
(b) If the Silk does front he hasn't read the brief.
(c ) If the Silk has read the brief then his views will not be your views.
(d) If you beg to differ with the Silk's views he will bounce you. Just as the good Pannam QC did to his forlorn Junior in the Federal Court.

Yours anonymously,

Unsigned (for fear of reprisal in the form of Junior Brief to appear on speculative Special Leave application for a minor whippy before Heydon J — don't bank on the Silk fronting for that one.)

# Second Female High Court Judge in Court's History

JUSTICE SUSAN CRENNAN

IN my first week as Chairman, I was delighted that my first official task was to comment on the appointment of Justice Susan Crennan as a Justice of the High Court of Australia after her appointment was announced by the Attorney-General, Philip Ruddock. Justice Crennan will be the second female High Court judge in the history of the High Court. Her appointment also means that, together with Justice Ken Hayne, Victoria now has two "home grown" representatives on the High Court.

Justice Crennan was a distinguished and formidable practising member of this Bar for approximately 24 years and an outstanding leader at this Bar, having been the Chairman of the Victorian Bar in 1993–1994 and President of the Australian Bar Association in 1994–1995. The Bar warmly welcomes the appointment of Justice Crennan.

LAST YEAR'S BAR COUNCIL

I thank the previous Bar Council for its work over the past year. The immediate past Chairman of the Bar Council, Ross Ray QC, served as a councillor for the past thirteen years and brought many years of experience to the task of Chairman. During his term as Chairman, the Bar commenced its first year of insuring its barristers with the Legal Practitioners Liability Committee. On behalf of all members of the Bar, I thank Ross for his long period of service to the Bar and his contribution at every level.

The Bar is fortunate to be able to conduct its professional indemnity insurance with such an experienced and successful organisation. The Bar will always be indebted to Michael Shand QC for his huge commitment on the insurance issues arising over many years and for his work in ensuring that the Bar's new insurance regime proceeded smoothly and efficiently.

Other members of last year's Bar Council not returning to the new Council

are Michael Crennan SC (who served for three years); Michelle Quigley S.C. (who served for three years); Anne Duggan (who served for three years); Kim Knights (who served for two years); Paul Connor (who served for two years) and Christopher Townshend (who served for one year). Each of these Bar Councillors made significant contributions to the work of the Bar Council, particularly Michael Crennan S.C. who served as Chairman of the Counsel Committee and Michelle Quigley S.C. who, for two years, served as Assistant Honorary Treasurer.

THIS YEAR'S BAR COUNCIL

In the recent elections, there were seven new members elected to the Bar Council:

**The Bar will always be indebted to Michael Shand QC for his huge commitment on the insurance issues arising over many years.**

John Digby QC, Michael Colbran QC, Fiona McLeod S.C., Kerri Judd, William Alstergren, Anthony Burns and Liza Powderly. I congratulate and welcome the newly elected councillors and I look forward to working with them in the next twelve months.

THE HONORARY SECRETARY AND ASSISTANT HONORARY SECRETARY

This year, the Bar is most fortunate that Kate Anderson and Penny Neskovcin have agreed to continue their appointments as Honorary Secretary and Assistant Honorary Secretary respectively of the Bar Council. As in most positions of a voluntary nature, the work involved is time consuming and thankless. During the past year, these two barristers have undertaken the work involved in these positions with great patience and fortitude. On behalf of the Bar, I thank them for their enormous contribution to date and I am extremely grateful that I will continue to work with them again this year.

*LEGAL PROFESSION ACT 2004* AND THE ETHICS COMMITTEE

The Victorian Attorney-General, Mr Rob Hulls, recently announced the appointment of Ms Victoria Marles as Legal Services Commissioner under the *Legal Profession Act 2004* ("the 2004 Act"). The Attorney General also announced that the 2004 Act would commence on 12 December 2005. The extent of the Bar's role in the disciplinary regime under the 2004 Act is yet to be known. Investigative power rests with the Commissioner. The 2004 Act also provides for her to refer the investigation of complaints to the Bar. More knowledge will be gained by the Bar after consultation with Ms Marles.

Of critical importance to the Bar is the role of the Ethics Committee. The major role of the Ethics Committee is to give rulings and guidance to its members. At the moment, rulings and guidance are given daily by the members of the Committee on a 24-hour, seven-days-per-week basis

to its members. Clients and barristers need to know that the ruling given by the Committee is correct and that whatever information is confided in the course of requesting the ruling is absolutely confidential to the members of the Committee. Most importantly, in the event that a conduct complaint is made against a barrister, the barrister needs to be assured that he or she is able to rely on the ruling of the Committee in answering to the conduct complaint. This critical issue is not specifically addressed in the 2004 Act

Until the role of the Ethics Committee in the disciplinary regime for barristers is determined, it is difficult to know whether the Committee will continue to give the rulings and guidance it has given in the past. If the Committee does continue to give the rulings and guidance to its members, the status of the rulings and guidance would need to be determined.

ABORIGINAL LAW STUDENTS MENTORING COMMITTEE

Since 1999, the Bar has had close ties with the indigenous legal community through its mentoring program. Victorian universities now have about 30 Aboriginal law students from all over Australia — many of them in distance learning courses. A number of these students participate in the Bar's mentoring program.

Justice Stephen Kaye chaired the Bar's Aboriginal Law Students Mentoring Committee ("ALSMC") from its inception until his appointment to the Supreme Court. Colin Golvan S.C. is now the Chairman of the ALSMC.

Last year, under Colin's reign, the ALSMC determined to extend its work in promoting careers at the Bar to Aboriginal law students by setting up an Aboriginal Barristers Fund to provide financial assistance to Aboriginal law graduates interested in coming to the Bar. The ALSMC was successful in obtaining approval from the Victorian Law Foundation for a seed grant of $25,000 to help set up the Aboriginal Barristers Fund and to provide a small initial corpus for the Fund. The ALSMC is working to establish the Fund. It hopes to be able to offer tax deductible status for donations through the Victorian Law Foundation with a committee of management appointed by the Bar Council. Support for the Fund will be sought from members of the Bar as well as from foundations and corporations.

**Justice Stephen Kaye chaired the Bar's Aboriginal Law Students Mentoring Committee ("ALSMC") from its inception ... Colin Golvan S.C. is now the Chairman of the ALSMC.**

The Victorian Bar has not had an indigenous practising member for over 20 years when Mr Mick Dodson was last in practice. Mr Dodson is now a Professor at the National Centre for Indigenous Studies at the Australian National University and he remains a member of the Victorian Bar on the Academics List.

Currently, the Bar has received and accepted an application from one Aboriginal solicitor to undertake the Readers' Course in March 2006. The Bar has also received a second application from another Aboriginal solicitor for the September 2006 Readers' Course.

LEGAL AID

Legal Aid brief fees on pleas in summary criminal matters have not increased — in some cases, the fees are less than what was being paid more than 10 years ago. In 1993 and 1994, junior counsel of less than two years' seniority were being briefed in legal aid Magistrates' Court summary crime and Children's Court pleas at fees of $300, $290 and $294, with less serious matters at $244. The new legal aid scale brief fee for appearances in summary crime pleas introduced in 2003 is $285 — and that remains the scale today.

For years, the Bar has been working to remedy the situation. Despite that work including public demonstrations over the years, the scales for costs in summary crime have only increased modestly. The Bar will continue to pursue this issue and, to this end, a specialised group of the Bar Council comprising Philip Dunn QC, Paul Lacava S.C., David Neal and Justin Hannebery have met and will continue to meet with Victoria Legal Aid and the Law Institute of Victoria to pursue the Bar's objectives of attaining proper increases in legal aid fees for its members.

THE YEAR AHEAD

I am looking forward to working with all of the members of the Bar Council for the next twelve months. The seven new members will soon understand the current issues before the Bar Council and the thirteen more experienced members provide a wealth of knowledge that has been harnessed and will continue to be harnessed in the future. It remains to say that if any member of the Bar has a query or wishes to raise any issue with the Bar Council, he or she should not hesitate to contact any one of the members of the Bar Council.

Kate McMillan S.C.
Chairman

# 'We Have Thrown Open the Process for Judicial Appointment, Previously Subject to Secrecy and Whim'

ONE of the greatest privileges *and* the greatest challenges I have faced in my six years as Victoria's Attorney-General is the process of judicial appointments. Because I want the community to benefit from the best and the brightest on their judicial benches, I take this responsibility enormously seriously. I have been increasingly puzzled and frustrated, therefore, at the reluctance in some corners, and the sheer obstruction in others, to accept the mantle of judicial office, or to broaden the pool of candidates upon whom this mantle is bestowed.

Without a doubt, one of the most insidious obstacles was the lingering paradigm that left women outside the assumed parameters of judicial office. Seemingly benign, a deft sleight of conservative hand had used that deceptive term "merit" to *ex*clude, rather than *in*clude, women. From Harry Gibbs to Phillip Ruddock, we hear the gloriously straightfaced assertion that "we shall not be appointing a woman, we shall be making an appointment on the basis of merit". This is disguised as an appeal to objectivity — to the sober requirements of legal discipline — employed as an excuse *not* to appoint candidates for whom Australia's benches have been crying out.

With a complete absence of irony, this same appeal to impartiality is wielded to maintain the status quo — to perpetuate the myth that the law, as a profession and as a mechanism of state, is a value-free zone, rather than the harbourer of privilege that we know it to have been. This fiction is the same one responsible for countless injustices in the law, and has

kept that tired little man going round and round on the Clapham omnibus, depriving him of the fare to get out and see a wider world.

Well, it's my hope that, in Victoria, we have reclaimed that word "merit" for a better legal system. It's my hope that we have turned the dichotomy on its head, revealing the truth that "merit" *in*cludes, rather than excludes women, and instead prohibits homogeneity for homogeneity's sake.

I hope that, in Victoria, the legal culture has changed — and has done so irrevocably. This does not mean, by any stretch of the imagination, that there are not pockets of the profession that do not hanker for days gone by or that are not dragging their feet. However, it's my hope that the momentum is irreversible. The face of the Victorian judiciary is gradually transforming and, as it does so, the law and the community are the beneficiaries.

This transformation has only been possible, however, because we have thrown open the process for judicial appointment, previously so subject to secrecy and whim. When I first came to office, I was shocked at how limited the channels for consultation were. A brief conversation, a list at best, from the head of each jurisdiction was hardly going to reflect the breadth of candidates out there, no matter the many good intentions.

I had to change the way in which appointments were made — I had to make sure I was made aware of *every* potential appointment if I were to ensure that Victoria profited from the best and the brightest that the law had to offer. This is why I changed the process. This is why I threw the doors open and started to consult widely. This is why I advertised for expressions of interest, why I spelled out, for the profession and for the community, the criteria on which appointments were likely to be made.

It's my hope that, in changing the culture in which judicial appointments are made, in throwing the doors open and being frank about my desire to secure both the best and the brightest *and* a judiciary that reflects the community it serves, we have sparked an impetus that cannot be reversed. Nevertheless, securing the current number of women on Victoria's Bench has not been an easy task, the judiciary holding little appeal for many women who are looking for financial

security or flexible conditions. Many candidates I approach have been reluctant to abandon hard-won practices or work regimens that have allowed them to balance their professional and personal commitments. Similarly, other potential candidates — both men and women — have been hesitant to forsake the freedom, diversity and collegiality of their existing careers for the perceived constraints of the Bench.

*This* is why I am so determined to shake up the expectations about judicial office that, let's face it, have made it the bastion of privileged men — those who have had no financial trouble going through Law School and building a practice; those free to pursue their professional life because there was a woman looking after hearth and home; those who were not expected to take primary responsibility for children; those for whom the law has been a linear trajectory with no detours. Consequently, I asked the JRT to examine judicial working conditions with a view to creating greater certainty and encouraging more flexibility in the workplace.

More controversially, it seems, this is also why I pushed on with creating the office of permanent part-time Magistrate, as well as expanding the use of acting judges. Let me say, I firmly believe that these reforms are necessary, that they will expand the pool of talented candidates for judicial office in a way that can only benefit the legal system and community. It is not only practitioners with young families to whom this should appeal, but others who may find full-time office unattractive because of disability, study commitments or because they are caring for elderly parents.

I have to be frank, then, about the extent of my disappointment with the Bar's response to these reforms. Rather than embracing their potential, or even waiting to see how they pan out, the Bar is actively working to undermine them, the upshot of the Bar's recent amendments to its Practice Rules undoubtedly being that practitioners will refuse appointment because they do not wish to exclude themselves from further practice in that particular jurisdiction. This is a sensational overreaction, one which snubs, rather than engages with, the promise of reform.

I am aware, of course, of concerns that the reforms fetter judicial independence.

**I still believe that, just as appointing those who hold judicial office is a privilege, accepting judicial office is not an entitlement of the best and the brightest, but a duty.**

I believe, however, that the safeguards are adequate, via a range of mechanisms including fixed five-year terms, non-revocable certificates to undertake judicial duties, and retaining the central role of the court in the appointment and use of acting judicial officers. It will be up to the courts to identify the need for an acting judge in the context of managing their workload, and I believe that the evolution and the maturity of the profession render it capable of adjusting to further fluidity.

More insidious, however, is the concern that the expansion of acting judicial positions and the creation of permanent part-time Magistrates will lead to a two-tier system — that those who accept appointment on this new flexible basis will be regarded as second-class citizens within the judicial populace. Well, today I appeal to all of you not to buy into this rubbish. This prophecy will be self-fulfilling if we let it be — if we subscribe to the conservative fear of difference that has kept so many other reforms at bay. This harbinger of doubt, this malevolent whisperer, speaks to the insecurities that have kept all those whose experience and circumstances are beyond the traditional sphere, outside the senior ranks of the law for so long.

In jurisdictions like the UK, they are reaping the rewards of refusing to succumb to suspicion and I believe that, here in Victoria, it is our collective responsibility to fight those archaic and isolationist attitudes that, at their heart, are not about the preservation of the judiciary, but the preservation of privilege. What is it about the law and the legal profession that make them so reactionary, so afraid of change? Why can't the legal profession be leaders — open to new possibilities at every turn, rather than battening down the hatches at the first sniff of the winds of change?

I still believe that, just as appointing those who hold judicial office is a privilege, accepting judicial office is not an entitlement of the best and the brightest, but a duty. Yes, it is a reward, a recognition of experience and talent. More importantly, however, it is a bestowing of trust, a public service and a reciprocation of the faith that the community has placed in you. After all, legal practitioners are, no matter what their background, a privileged class. Well, with privilege comes responsibility — responsibility to use your experience, your intellect, your mastery of the law to the advantage of your chosen discipline, and of the community.

Rob Hulls MP
Attorney-General

# Bar Defence

WELCOME to *Bar Defence* — a risk management initiative of the Legal Practitioners' Liability Committee for the Victorian Bar — this will be a regular column in *Victorian Bar News* to address risk management issues affecting barristers, with practical tips and ideas to consider in your own practice to minimise the risk of a professional liability claim.

LPLC welcomes any feedback about the column, alternatively suggested topics you would like to see covered in future issues (send your email to justin@lplc.com.au).

Risk management is not something that is best learned by studying text books or law reports, but rather through experience, the exercise of common sense, and effective communication with everyone with whom you deal in the course of your practice – clients, the Court, solicitors, other members of Counsel, clerks and your own staff. Over time, risk management becomes ingrained and cultural — the result of innate awareness to forsee problems and take positive steps to prevent the potential misfortune from occurring. It's about getting on the front foot and being proactive rather than reactive, and paying proper attention to the finer details of record keeping.

## COMMUNICATING WITH SOLICITORS

There is the world of difference between being a successful advocate and being a good communicator. LPLC's analysis of VicBar's claims statistics shows that communication failures between barrister and instructing solicitor are the most frequent underlying cause of claims involving barristers. Fault can of course lie on either side (or even both sides) of the fence, but from a risk management perspective, we are less interested in the adversarial allocation of blame, than in promoting "good practice".

Some common communication problems encountered between barristers and solicitors are described below.

### *Fee disputes*

Solicitors frequently complain that Counsel's fees are excessive. Whatever the reason for the complaint, on closer analysis we find that the genesis of the dispute usually lies in an unmarked brief.

The solicitor who sends an unmarked brief, without any confirmation of the fee arrangement, is inviting trouble, but good communication by the barrister would suggest that before undertaking any work, he or she (a) contacts his clerk to check whether a fee has been discussed or agreed, and if not, then (b) contacts the solicitor and specifies the proposed fee, whether as a lump sum, scale fee or hourly rate. Solicitors usually prefer a total estimate and if it is necessary to qualify an estimate, then do so. Preferably all of this will be confirmed in writing.

Not only is the clarification of the basis for charging fees good practice but, from the commencement of the *Legal Profession Act 2004* on 12 December 2005, it will be a statutory obligation under s.3.4.10(2).

Remember that your insurance policy does not provide cover for claims for refunds of fees or for damages that are calculated by reference to fees or disbursements charged.

### *Brief sitting on the desk (or floor) gathering dust*

Usually the barrister is awaiting further instructions on some aspect of the brief, having telephoned the solicitor and given advice as to what is needed. From time to time, the problem is that the barrister is too busy and puts the brief in the "too hard basket". Weeks and months then go by, often resulting in a limitation period or other deadline being missed (disaster) or more generally the client's case suffers because of delay.

Your best defence to a claim of negligence will be a paper trail evidencing prompt and diligent attention to the brief. The solutions are many and varied, and include:

- Record the date of receipt of all briefs and other correspondence.
- Maintain a system for diarising matters to follow up.
- Keep notes of conversations with instructing solicitors.
- Warn the solicitor of any looming deadlines, preferably in writing.
- Return the brief, with a suitable covering letter, if repeated requests for instructions are ignored. Before returning a brief you should refer to the Bar Rules of Conduct regulating the return of briefs, particularly Rules 96(e), 98 and, for criminal cases, 101.

### *Notifying orders made*

A number of claims have arisen from mistakes in communicating orders made by a Court — either because of errors in transcription or simple delay in returning the brief. Even if your instructing solicitor is in attendance at Court, prompt written confirmation of Orders made in the case is good practice. If the only communication to the solicitor of the orders made is the handwritten notation on the backsheet returned a week or more after the event, then the risk of errors and misunderstandings is obviously increased.

A phone call after the Court appearance, followed by an email or facsimile to the solicitor detailing the terms of the Order and any matters requiring urgent attention will avoid the pitfalls of the brief going astray in the post or in your clerks' office, or for the potential that your handwriting might be misread.

### *The poorly prepared brief*

Here is a common enough scenario. You receive a brief to appear for the plaintiff in an interesting commercial dispute. The case is two weeks from hearing. Upon reading the somewhat limited papers, you become concerned about the state of the pleadings, the lack of discovery and the absence of witness proofs, and suspect that there is a good month's preparation still to be done.

You may not wish to risk offending your instructing solicitor (though this certainly varies from barrister to barrister!), but this is a classic high risk hospital handpass, and a scenario that would often be the breeding ground for a professional negligence claim. So from a risk management perspective, what should you do?

Whilst each case will depend on its own circumstances, we would offer the following suggestions:

- The desirability for the barrister to send a written memorandum to the instructing solicitor outlining the further preparatory steps needed, and by whom. If the solicitor is out of his or her depth (as can often be the case), he or she will probably be grateful for this guidance. The advice might, for the sake of urgency and convenience, first be given orally in conference, but should extend to written confirmation so that there is no room for doubt.
- Canvass with the solicitor (and the client if necessary) whether an adjournment of the hearing date is needed, and if so, the probable terms on which that might have to occur, particularly with respect to costs.
- Above all, these situations call for clear (focused) thinking, patience and diplomacy!

## NOTIFICATION OF CLAIMS/ CIRCUMSTANCES

The LPLC urges barristers to give us "early notification" of claims and facts/matters of which you become aware that may give rise to a claim. We cannot emphasise this strongly enough. All discussions are treated on a confidential basis, and there is no penalty for early notification.

The benefit of early notification is that it gives us the best chance of working with you to nip a claim or potential claim "in the bud" before it becomes a formal dispute. Not only is this the best means for avoiding undue publicity that might attach to a litigated dispute, it also enables commercial relationships to be preserved in many cases. If litigation follows, early notification will have enabled us to identify the issues earlier and often taken steps in mitigation of damage that ultimately results in the claim being resolved at less cost to all concerned.

If you have any doubts about whether a circumstance is notifiable, or wish to discuss a claim or potential claim, our Claims Managers (Justin Toohey and Rolly Briglia on 9670 2001) are available to take your call.

# President, Court of Appeal

## Justice Chris Maxwell

ON 21 June 2005 the Honourable Chris Maxwell was appointed the second President of the Victorian Court of Appeal with effect from 16 July 2005.

Like his predecessor in office, the Honourable John Winneke, Chris Maxwell was an outstanding Australian Rules player. He played in the University Blues 1971 Premiership team and was a member of the 1972 All-Australian University side.

However, His Honour, like his predecessor, brings to his appointment more than mere sporting skills. He brings also a combination of broad education, intellectual integrity, a history of dedicated pro bono work and an innate sense of justice.

His Honour was educated at Melbourne Grammar, the University of Melbourne and Oxford University, and at the Inns of Court School of Law in London. At Melbourne Grammar he was a member of the First Eleven, the First Eighteen and the Athletics Team. At Melbourne University he played for University Blues and was a member of the Blues 1971 A Grade Grand Final Team.

After completing a first class honours degree in Philosophy and History, his Honour interrupted his LLB studies at Melbourne to take up the Rhodes Scholarship. He obtained a BPhil at Oxford before studying for the English Bar. He was called to the Bar as a member of Lincoln's Inn in 1978 and practised at the English Bar for a short time before returning to Melbourne in 1979, to be admitted in Victoria on the strength of his English admission.

In March 1983 he commenced reading with Kenneth Hayne (now Justice Hayne of the High Court), but deferred his reading to take up appointment as Principal Private Secretary to Gareth Evans when, after the 1983 election, Gareth Evans became Commonwealth Attorney-General.

Shortly after his Honour returned to the Bar, Ken Hayne took silk. His Honour completed reading with Ross Robson QC and signed the Bar Roll in 1984. He then completed his Melbourne Law Degree, which had been interrupted by his taking up the Rhodes Scholarship, and graduated in December 1984. He took silk in 1998.

He is a supporter of government schools. His children attend St Kilda Park Primary School, where he served a three-year term as President of the School Council. He has (to quote Victoria Strong, the President of the Law Institute) "devoted considerable time, energy and enthusiasm to developing an after-hours sports program" at that school and has been "a passionate coach of the Under 15 team".

He is a vigorous defender of the rights of the individual. He spent some seven years as Legal Aid Commissioner and served on the Board of Liberty Victoria for six years, two of them as President.

In his involvement with Liberty Victoria, he appeared with Julian Burnside QC and John Minetta in the *Tampa* case, claiming that the Commonwealth had unlawfully detained people rescued by the captain of the Norweigan container ship, *Tampa*.

The proceeding succeeded at first instance but the decision of North J was set aside by a majority of the Full Court; and the Commonwealth passed legislation to prevent an appeal to the High Court.

The Commonwealth then proceeded to seek costs against Liberty Victoria (i.e. against the Board Members of that body, including Chris Maxwell). The Full Federal Court denied the application for costs, Beaumont J saying:

> The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so pro bono. They have acted according to the highest ideals of the law. They have sought to give voices to those who are … voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In so doing, even if ultimately unsuccessful in the litigation, they have served the rule of law and so the whole community.

High profile cases, such as the *Tampa* are, however, just the tip of the iceberg. His Honour has at all times been prepared to put his concern for human rights and the interests of justice before his own professional or pecuniary interests. If there is injustice, he believes that it should be fought; if the rights of the individual are eroded by legislation, then the ambit of that legislation and its validity should be tested.

The current President of Liberty Victoria, Brian Walters S.C., is quoted as saying that Justice Maxwell's "characteristics of legal acumen, a clear understanding of human rights and rare courage made him the perfect choice to replace Justice Winneke".

His Honour has worked tirelessly and without financial reward in the interests of those who could be seen to be oppressed. His sense of justice and fair play are manifest. He is not, however, a Don Quixote tilting at windmills. His Honour is an excellent black letter lawyer, a man of precise legal thought and tight logical analysis. He could described, perhaps, as a "pragmatic idealist". He is also a man of total intellectual honesty. He was not as counsel prepared at any time to present any argument which might, as a result of dubious logic, mislead the court.

Perhaps the best insight into his Honour's thought process is to be found in remarks which he made in his reply to the addresses of welcome on 25 July this year, where his Honour, having referred to the average delay in the hearing of appeals in the Court of Appeal, said:

> There is a very serious problem of delays in the Court of Appeal … These delays are

clearly unacceptable. Reducing them is my first and most urgent project. But one thing is already clear. There is no scope for the judges of the Appeal Division to be asked to work any harder than they do now.

I have been shocked to discover that many already work seven days a week, and late into the night and most nights. Such a punishing regime is unsustainable and it is unsafe. I simply do not see how it can be reconciled with the Crown's undoubted obligation to ensure a safe working environment.

My first priority will be to investigate how the business of the Court can be dispatched more expeditiously. I will be looking to achieve greater efficiency without sacrificing the quality of justice — for example, by being more selective about the cases in which judgment is reserved and lengthy judgments are written.

It is fortunate that, at a time when, by reason of the growth of international terrorism, there is a temptation for government to override individual rights in the interests of community safety, a man such as described by Brian Walters should be appointed President of the Court of Appeal.

We welcome his Honour's appointment and wish him well in his new role.

# Court of Appeal

## Justice Ashley

ON 21 June 2005 David John Ashley was appointed a Justice of Appeal of the Supreme Court of Victoria. At that time he had served almost 15 years as a Justice of the Supreme Court.

At his Honour's welcome to the Supreme Court on 21 August 1990, David Harper QC (now Justice Harper) commented at length on his Honour's academic, sporting and cattle breeding achievements. Of his Honour's sporting achievements David Harper said: "You left school noted for the technical correctness, Boycott-like solidity, and thirst for runs, which marked your career as an opening batsman in the First 11."

Those of us who have appeared before Justice Ashley whether, in the Trial Division or in the old Appeal Division of the Supreme Court, are very conscious that those words apply equally to his Honour's performance on the Bench.

His Honour has always come into Court fully apprised of the issues and, so far as the court papers permit, fully armed with the facts — the "Boycott-like solidity". He has displayed a detailed familiarity with the relevant law which cannot be attributed solely to an encyclopaedic knowledge of all aspects of the law — the "technical correctness". Trials before Justice Ashley have always proceeded at a brisk pace. His Honour has tended to keep counsel to the point and has discouraged any wandering from the main road of the argument. Sometimes, perhaps, one could detect in his Honour's questions the "thirst for runs".

His Honour was the principal judge of the Common Law Division of the court from the inception of the three divisions on 1 January 2000 until his elevation to the Court of Appeal.

His Honour's capacity for hard work, his enthusiasm to identify the key issues, his incisive mind and his impatience with humbug make a welcome addition to the Court of Appeal. But that appointment is a loss to the Trial Division of the Court where his talents, not least his facility to assess witnesses and to master complex fact situations will be sorely missed.

We welcome his Honour's appointment with enthusiasm.

# Supreme Court

## Justice Kim Hargrave

THE Honourable Justice Kim William Spencer Hargrave was appointed to the Supreme Court of Victoria on March 2005. His Honour's qualifications for appointment are highlighted by two statements made at his welcome on March 2005.

Kate McMillan S.C., welcoming him on behalf of the Bar, said that he has been described "as a persuasive advocate, an excellent cross-examiner, calm under pressure, clear and insightful and just plain clever". The immediate past President of the Law Institute, Christopher Dale, described his Honour as "outrageously polite, methodical and ordered, compassionate, thoughtful and intellectual". To this list of his Honour's characteristics, many who know him would add that his Honour is a "man of pragmatic good sense".

His Honour is probably the first member of the Supreme Court to have sailed in the Sydney to Hobart Yacht Race. While still a schoolboy he sailed on the *Winston Churchill*, the only yacht from the original 1945 field which is still afloat.

He was educated at Brighton Grammar and the University of Melbourne. After graduating with Honours in 1977, he served his articles at Corr & Corr (as it then was) and remained with that firm until 1980 when he came to the Bar. He read with David Harper (as he then was). He himself had two readers, Dr Karen Emerton and Kevin Lyons. He took silk in 1994.

His Honour's practice at the Bar was largely in the commercial area. He appeared in major large-scale commissions and enquiries and in most of the major take-over litigation. His Honour was from 1989 to 1990 heavily involved in the National Companies and Securities Commission enquiry into dealings between Bond Corporation Holdings Limited and the Bell Group Limited. From 1991 to 1992 he was involved in the Royal Commission into the collapse of the Tri-Continental Group of Companies. He was also engaged in the Royal Commission into the Metropolitan Ambulance Service.

In the Bond Brewing litigation he was junior to Alex Chernov QC (as he then was). In this context, Kate McMillan adverted to another characteristic possessed by his Honour:

> After the case, there was time for some skiing — where but Vail? Your Honour was a reasonable sportsman — you had been a good footballer, you had sailed and you had done some skiing. Chernov, however, was an elegant and excellent skier. Seduced by his elegance and excellence, after a few runs, you gained false confidence and followed him. You may not have been elegant but you were up there with him — until you came across that sheet of ice. Determined not to admit that you had over-reached yourself, you made no admissions and skied on with cracked ribs — calm under pressure, alternatively, a streak of stubborn determination.

If Christopher Dale's assessment of his Honour's performance in the Intergraph inquiry is any guide, it would seem that Kate's first alternative, "calm under pressure" is the correct interpretation. Of Kim Hargrave and the Intergraph inquiry Christopher Dale said:

> One of the continuing themes that emerged was your Honour's patience and ability to relate to both clients and to junior practitioners … It was your Honour's advocacy skills and calm reasoned approach to decision-making that was greatly lauded. In fact you were described as being somewhat of an "island in the storm" for your ability to maintain a cool head and calm manner even in the most chaotic and trying of circumstances.

When, some ten years ago, *Bar News* asked Kim Hargrave his reaction to taking silk, he replied: "Delight, pride and apprehension". There was no need for apprehension then. There is certainly no basis for apprehension now.

His Honour is a man who can deal with the finer points of the law across the spectrum and at the same time maintain a capacity to see the whole picture. He will dispense commonsense justice according to law.

His Honour has the dubious distinction of being twice required to sing for his supper at Bar dinners. When he took silk in 1995 he was the junior silk for that year, with the consequence that he was required to perform to the delight and/or anguish of the twenty honoured guests. At the 2005 Bar dinner he was the most recently appointed member of the judiciary and once again was required to speak, this time on behalf of the guests.

One of the matters mentioned at his Honour's welcome was his interest in contemporary music and his habit of using extracts from contemporary music as Rumpole would use classic texts. This was evidenced by his Honour's speech at the 2005 Bar dinner where his Honour said:

> When Ross Ray telephoned me, I went "A Whiter Shade of Pale". "Don't Let Me Be Misunderstood", it was an honour, and not a poisoned chalice, to be asked. However, having given the junior silk speech nine years ago, I would have hoped to avoid the burden of the junior judge speech.
>
> So, as this "New Kid in Town" what are my aspirations for judicial life? First to avoid the "Lonely Days" of judicial life. I will try to maintain my friendships at the Bar and not retreat to my Chambers feeling "Alone Again, Naturally". Second, I will seek "Help" … I look forward to getting by "With a Little Help from my Friends" I am sure that together "We Can Work it Out".

This last paragraph accurately reflects his Honour's approach to life and to his judicial role. Self-importance is not in his vocabulary. His Honour's court will be a pleasant one in which arguments will be considered carefully and, where appropriate, discussed at length. There will be no a priori assumption that the judge knows best.

We welcome his Honour's appointment and wish him well.

# Supreme Court

## Justice Betty King

**Welcome speech by Ross Ray QC, Tuesday 19 July 2005, upon the appointment of the Honourable Betty King to the Supreme Court of Victoria**

MAY it please the Court. I appear on behalf of the Victorian Bar to offer our warm congratulations on Your Honour's appointment to this Court.

This appointment crowns a career of service to the Law, the State and the Commonwealth. In the course of Your Honour's 25 years at the Bar, you served as a Prosecutor for the Queen in right of the State, and in right of the Commonwealth. You were a member, and sometime Acting Chairman, of the National Crime Authority. And, of course, for more than five years, have graced the bench of the County Court.

Typically, Your Honour did not stand on ceremony, or wait around bashfully to be welcomed to this Court. The afternoon the appointment was announced, you threw your own welcome with drinks and savouries in the Essoign. You were sworn in the next day, and celebrated American Independence Day sitting in a criminal mention.

Your Honour was educated at University High School, and the University of Melbourne. You were just a couple of years ahead of Justice Dodds-Streeton at University High. It may be a few years before University High rivals the men's public schools on the Court, but Your Honours are certainly a dynamic start.

You served articles with Keith Hercules and certainly were not introduced to crime in that office. Very soon after admission, Your Honour came to the Bar, and read with John Kaufman QC, not because of any fascination with the discretionary trusts about which John has written, but because you'd briefed him in a common law matter while with Keith Hercules, and he was the only barrister you knew.

At Your Honour's welcome to the County Court, you described Ramon Lopez as your "other master". Despite your mutual devotion to matters criminal, Ray Lopez appeared before Your Honour only once in your five years on the County Court. Your Honour presided over what was to have been the first trial in the new courthouse at Wodonga, that of a locally notorious alleged sex offender. And that was the problem. Time after time, jurors realised that they knew one of the witnesses — and one juror, after the opening address, went to pieces at the bizarre nature of what was alleged. Ray can't remember whether it was four or five juries that had to be discharged. In the end, the trial had to be moved to Melbourne.

In 25 years at the Bar, Your Honour practiced almost exclusively in Criminal Law — though, remarkably, after you'd taken silk, and not long before your appointment to the County Court, you developed a practice in the arcane world of taxation and administrative law, appearing in the Federal Court.

In earlier days, you were the Bar representative on the Police/Lawyers Liaison Committee, and were a member of the Criminal Bar Association executive committee — perhaps the single most active Bar committee in making submissions on legislation and proposed legislation to governments, both State and Federal.

Your Honour was an active member of the organising committees, and of the Papers Committees, of the two International Criminal Law Congresses held in Melbourne — the sixth International Criminal Law Congress in 1996 and the eighth in 2002. Your Honour was always ready and willing to take on the difficult jobs on those committees.

Your Honour taught for many years, both at the Leo Cussen Institute and in the Bar Readers' Course. It was a particular pleasure to have you at the Readers' Dinner in May, celebrating your daughter Elizabeth's signing of the Bar Roll. Elizabeth, by the way, had been a member of the Deakin University moot court team that competed internationally in Europe.

Your Honour and the late Lillian Lieder were pioneer women criminal advocates and criminal silks. You both took silk the same year, in 1992, as did your Master, John Kaufman.

There were only 12 silks that year, a good number for a photo — individuals rather than a crowd scene. And the *Bar News* photo is great. Lillian is front and centre, flanked by Your Honour and Noel Ackman. Lillian is standing tall, her rather small wig perched precariously awry, atop her unruly mane of red hair.

Justice Nettle is behind and to the left of Your Honour, standing very tall, the gravitas of a Justice of Appeal already visible in His Honour's rather solemn gaze. Lillian, Your Honour and John Kaufman are all smiling.

David Curtain, the Bar's resident arbiter of fashion and suavity, and also Bar Chairman that year, spoke at Your Honour's welcome. He described Your Honour as "the best dressed silk at the Bar, having had your silk robes hand-tailored".

Curtain failed to mention Your Honour's flair and skill as your own coutourier. Each year, for the Bar Dinner, you created your own ensemble. On the County Court, Your Honour began as you intended to, and did, continue — as an individual. You declined to wear your wig in the photograph for the Judges' gallery, again demonstrating your sense of style before protocol.

On the County Court, Your Honour distinguished yourself as a trial judge, specialising in crime, but also taking your share of civil cases.

Amongst your County Court judicial colleagues, Your Honour is known not only for leopard skin boots, and bright-coloured spectacles frames, but you are also known for sound judgment and industry — and for open-door approachability — called on by junior, and more senior, judicial colleagues alike to discuss difficult cases.

Your Honour personifies judicial independence and does not shy away from hard decisions. You recently imposed life without parole when the prosecutor had asked for something less.

# Supreme Court

## Master Efthim

ON 21 July 2005 John Efthim was welcomed as a Master of the Supreme Court of Victoria. He is the first Master to be formally welcomed by the profession. As Kate McMillan S.C. said at his welcome:

> Your appointment as a Master of this Court was widely acclaimed by the profession. It prompted a number of our members to ask why the profession had not previously given ceremonial welcomes to Masters. The Bar approached the Chief Justice and her Honour enthusiastically approved the proposal.
>
> Your welcome today is the first ceremonial sitting to welcome a Master to the court, at least in modern times. Thus by virtue of your esteemed reputation and presence, you have instigated a change that sets an important and welcome precedent in this court.

John Efthim comes to the Supreme Court after eleven-and-a-half years service as Deputy Registrar of the Federal Court.

He graduated as a Bachelor of Science and Bachelor of Laws from Monash University and subsequently obtained the degree of Master of Business Administration from Monash and a Master of Laws Degree from Melbourne University.

He was admitted to practice in 1977 and, in the 15 years before his appointment as Deputy Registrar of the Federal Court, practised across almost the whole ambit of the law. As (effectively) in-house corporate counsel at Nortel Australia he was involved in the drafting of multi-million dollar supply contracts and the drafting of licensing agreements for software products involving complex intellectual property issues.

He was the inaugural legal officer of the State Superannuation Board and established the legal section attached to that body. He was involved in personal injuries work with the State Insurance Office. He then went to the Crown Solicitor's Office (as that office was then known) and was there involved in common law litigation. While at Crown Law he was also involved with numerous orders to review both as applicant and respondent. This should give him a sympathy for those who now make applications before him seeking leave to appeal from the Magistrates' Court or VCAT.

One of the few fields in which he did not practise at any time was bankruptcy. As Deputy Registrar of the Federal Court, one of his prime functions was to deal with bankruptcy matters. It is a comment on his capacity as a lawyer that those who appeared before him in the bankruptcy jurisdiction in the Federal Court have nothing but the highest praise for him as a lawyer. As a human being, of course, anyone who knows John Efthim cannot speak too highly of him. He is one of those people who have the gift of empathy. He will listen sympathetically, but he will analyse critically.

It was rare for any mediation that he undertook while with the Federal Court not to reach a settlement on at least some of the issues if not total settlement. He disclaims credit, saying that statistics are irrelevant and the purpose of mediation is to empower the parties. But his record in mediation, particularly in Native Title cases was amazingly successful. The Full Federal Court referred one such case to him for mediation and, when it settled, the three judges gave him a framed photograph of that Full Court panel, inscribed and signed in thanks for his mediation and its result.

In the Ansett Superannuation proceeding the respective parties appeared to have taken intractable stances. Justice Goldberg, wholly frustrated by the attitude of the parties, ordered four days of mediation, concurrent with the trial. With John Efthim as the mediator settlement was achieved and payment of entitlements was made prior to Christmas. Greg Combet, the ACTU Secretary is reported to have stated: "If you can't beat them, 'Ef'-Them!"

John Efthim is a supporter of the Carlton Football Club and also an enthusiastic race-goer. When one looks at Carlton's performance this year, one must hope that his choice of horses is better than his choice of football teams. Apparently, he had the capacity, in his own warm way, to explain Carlton's lack of success week by week. To quote Kate McMillan once again:

> Your friends and colleagues at the Federal Court, the Judges and others will miss you. They will miss the Monday morning analysis of why Carlton failed that weekend. They will miss your good humour and friendly gossip that was described as interesting and useful and "made us understand one another better". Your "news" was a subtle

influence in building collegiality within the Court. It has not gone unnoticed that in some quarters you are addressed affectionately as "Chief Poo Bear" and "Spiro".

One has to meet or appear before John Efthim to appreciate properly the significance of this statement. Unassuming, perceptive with no sense of self-importance or of judicial infallibility, John Efthim generates warmth and informality. Except that he lacks the "heavily built Falstaffian figure", John Efthim on the Bench, whether as Deputy Registrar of the Federal Court or as Master of the Supreme Court reminds one of Yates' "affable irregular". Without detracting from the dignity of the court, he generates an informality which puts everyone, including litigants at ease.

We are delighted at John Efthim's appointment and in closing cannot do better than Kate McMillan: "The Federal Court's loss is the Supreme Court's gain. The profession and the Court are well aware of that."

# County Court

## Judge Morrish

**Welcome speech by Ross Ray QC, Monday 15 August 2005, upon the appointment of Her Honour Judge Morrish to the County Court of Victoria**

MAY it please the Court.

I appear on behalf of the Victorian Bar to offer our warm congratulations on the appointment of Judge Morrish to this Court. I address my remarks to Her Honour.

At the Bar, Your Honour is known for thorough preparation and meticulous attention to detail — qualities Your Honour brings to the wider service of the community as a Judge of this Court.

Your Honour was educated at Beth Rivka Ladies College, and at Monash University — graduating Bachelor of Jurisprudence and Bachelor of Laws. You are also a graduate of the National Theatre Drama School.

Your Honour served articles with David Miles at Maddock Lonie & Chisolm. You were admitted to practice on the motion of George Hampel QC and Michael Rozenes — now Professor the Honourable George Hampel, and His Honour Chief Judge Rozenes.

Your Honour practised as a solicitor very briefly with Maddocks, and then with Cohen Frenkel Berkovitch & New.

Your Honour then worked as a solicitor-advocate for the Legal Aid Commission, appearing in criminal matters in the Magistrates' Court, and serving as the first duty lawyer at the Family Court at Dandenong.

Your Honour signed the Roll of Counsel in 1985 and read with His Honour Chief Judge Rozenes.

Your Honour began in the usual way, with a broad mix of work including crash-and-bash, crime and family law. You developed a more specialised practice in criminal law, appearing regularly to prosecute on behalf of the Crown (both State and Commonwealth), but also maintaining a defence practice — both legal aid and private clients. Your Honour was regularly briefed by the Victorian Government Solicitor.

Your Honour served for two years as in-house counsel to the Commonwealth Director of Public Prosecutions in Melbourne, working on a variety of matters including immigration and extraditions, taxation, social security fraud, corporations law prosecutions, asset confiscations, conspiracies and large-scale narcotics importations.

Your Honour returned to private practice at the Bar.

Shortly after returning to private practice, Your Honour appeared on behalf of the Crown in the Court of Appeal against an unrepresented applicant for leave to appeal against conviction.

Your Honour agreed to review, overnight, whether there was any arguable case for the unrepresented applicant, who spoke no English.

Justice Tadgell, speaking for the Court, commended the extraordinary thoroughness of Your Honour's overnight review.

I quote Justice Tadgell: "Neither the Court nor the applicant was entitled to put [Your Honour] to the trouble to which [you] had evidently gone."

Your very thorough review of the best arguments that could be made for the unrepresented applicant was, and again I quote Justice Tadgell, "in the best traditions both of the Bar, and of the administration of justice in this State".

Your Honour was appointed one of Her Majesty's Counsel in 1999.

Your Honour had been about to take a reader, but that was forestalled by taking silk. You have, however, participated actively in the senior mentor schemes, both at the Bar and with the Office of Public Prosecutions — being senior mentor to Sharon Lacy, Ursa Masood and Joanne Smith.

As Senior Counsel, Your Honour moved deliberately to broaden your practice, appearing in commercial and administrative law cases, as well as in crime; and in family law, confiscation of assets, inquests, and professional conduct disciplinary hearings.

From Your Honour's earliest days in the law, you have done pro bono work. You worked as a volunteer at the St Kilda Legal Service. At the Bar, you did pro bono work, both through the Public Interest Law Clearing House and privately.

There is an example of Your Honour's meticulous attention to detail in a rape case which Your Honour took pro bono in the ACT.

A husband was accused of an allegedly brutal assault and rape of his estranged wife. The husband denied the whole

incident. There was no physical or DNA evidence.

Your Honour was examining photographs of the crime scene, which included the prosecutrix wife's suitcase — closed in one photograph, but open in another.

Your Honour examined the photograph carefully with a magnifying glass. In the wife's open suitcase, you were able to identify a paperback novel —– *If Tomorrow Comes* by Sidney Sheldon. You went to the trouble of obtaining and reading that novel. You struck gold!

The heroine of the novel, released from prison, exacts revenge on the men who framed her, by framing them. One of them, she frames for a brutal assault and rape.

Astonishingly, the evidence of the prosecutrix in Your Honour's real-life case was, in every detail, identical to that in the novel — even to the colour of her lingerie.

Knowing the fictional base, Your Honour set your female junior to work on establishing that a particular sex-act alleged was the product of Mr Sheldon's lurid imagination, and not physically possible — not something a male criminal silk could easily ask of his female junior.

For three years, Your Honour served on the Committee of the Criminal Bar Association. The Chairman of the CBA, Lex Lasry QC, is with me at the Bar table today in honour of your appointment.

Both for the Criminal Bar Association, and for the Bar as a whole, Your Honour has been the principal author of, or a major contributor to, a number of very substantial submissions to law reform agencies and governments.

In December 2003, Your Honour was appointed to the Bar Legal Education & Training Committee chaired by Justice Nettle. Your Honour worked on the design, development and implementation of the criminal law aspects, as well as on the overall new mandatory CLE course as a whole.

Your Honour has taught in the Bar Readers' Course, in numerous other advocacy training courses for various bodies, and was a member of the Bench and Bar team that taught in Papua New Guinea last October.

Your Honour has also served on the Bar's Aboriginal Law Students' Mentoring Committee.

Your Honour established and headed a new set of chambers, "Gaudron Chambers". Justice Gaudron officially opened those chambers in March last year. Alas, with Your Honour's appointment to the Court, those chambers are no more.

Your Honour is an accomplished classical pianist, and is fluent in a number of languages. The collegiality and loyalty between Your Honour and those with whom you work is demonstrated in Your Honour bringing with you to the Court, your long-serving secretary, Marlene.

Your Honour was a solicitor when the Director of the Bar 1984 Centenary Review, Simon Wilson — the Bar's own Max Bialystock — recruited you for the *Corps de Dance*.

Hits from that review include "I'm one of the girls who's one of the boys" and — now prophetically — the finale (stolen from the Broadway musical, "See Saw"): "It's not where you start; it's where you finish".

The Bar wishes Your Honour long and satisfying service as a Judge of this Court.

May it please the Court.

# County Court

## Judge Leckie

**Welcome speech by Ross Ray QC, Tuesday 16 August 2005, upon the appointment of His Honour Judge Leckie to the County Court of Victoria**

MAY it please the Court.

I appear on behalf of the Victorian Bar to offer our warm congratulations on the appointment of Judge Leckie to this Court. I address my remarks to His Honour.

In more than 30 years at the Bar, Your Honour has earned the respect of all with whom you have come into contact. You have been an effective and fair Senior Prosecutor for the Queen, and the Bar welcomes your appointment to this Court.

Your Honour's secondary education was at Ivanhoe Grammar School. You sampled a number of alternatives in your legal education. You began at the Australian National University. You returned to Melbourne and transferred to long articles with the late Max Ham at Mallesons. Your lecturers in the articled clerks' course at RMIT included Sir Daryl Dawson, the late Neil Forsyth QC and Haddon Storey QC.

Max Ham practised in wills, trusts and estates, and in family law. One might speculate that, had Your Honour served the full five years long articles with him, Your Honour's career might have followed a very different path.

However, a scholarship took you to Monash, where you completed the degree course, graduating Bachelor of Jurisprudence and Bachelor of Laws.

Your Honour then served short articles with the late Barney Campbell, senior partner of Campbell & Shaw, and an experienced and formidable solicitor-advocate.

You worked as an employee solicitor at Campbell & Shaw for a year, then took a year off travelling, as did many of that generation of Australians.

Upon returning to Australia in 1973, Your Honour signed the Bar Roll and read with Cairns Villeneuve-Smith, one of the great advocates of our Bar, and a distinguished Judge of this Court.

Your Honour was a member of what

was, I believe, the first set of specialist criminal chambers at this Bar — not merely adjacent rooms, but a shared library, and deliberate common purpose. This was in the 70s, and the suite of chambers was on the 12th floor of National Bank House — Latham Chambers.

After five years, that set moved to the 27th floor of Aickin Chambers, joining with some of the criminal counsel from the 1st floor of Owen Dixon East.

The 27th floor of Aickin consisted, then, of 12 criminal counsel and six commercial counsel. It was a dynamic and collegial environment that included the late Ron Castan QC and Justices Merkel, Goldberg and Finkelstein on the commercial side ("the Golan Heights") and included Chief Judge Rozenes, Your Honour, the late Graeme Morrish QC, and Richter QC, Dunn QC, Howard QC and Parsons S.C. on the criminal side — later joined by Judge Hampel ("the West Bank"). Richter, Dunn, Howard and Parsons are all here today, as is Ed Lorkin, the Secretary of the Criminal Bar Association, representing the Association.

While in Aickin Chambers, Your Honour had one reader, Ken McGowan.

Your Honour was the Melbourne member for the National Crime Authority from 1989 to 1993. You were, in that time, Acting Chairman of the Authority for some 18 months.

Your Honour resumed practice at the Bar for a few years. In December 1997, you were appointed a Crown Prosecutor for the State of Victoria.

Your Honour was appointed a Senior Crown Prosecutor in March 2002, and Senior Counsel in December 2002.

From Your Honour's early days at the Bar, you specialised in the criminal jurisdiction, prosecuting for the State and Commonwealth Directors of Public Prosecutions, and defending.

Your Honour is modest and quiet. Like the Phantom, you emerge from the mists, do your work, and then vanish again into the mists.

You are known as a fair prosecutor. The fair prosecutor — quiet, thoughtful, measured and personable — is, of course, the most dangerous. Juries like them.

Your Honour is of Scottish extraction. The Leckies are part of the clan McGregor. It is therefore no great surprise that there is something of the canny Scot in Your Honour's personality.

Shirley Bassey's hit recording of "Hey, Big Spender" came out when you were a student at Monash. She was not singing about Your Honour.

On circuit, prosecuting a culpable driving case, Your Honour attended for a view on the Coryong Road, on the banks of Lake Hume. It was bitterly cold. Everyone, including the judge and jury, was in overcoats, hats and scarves and gloves, except Your Honour. You were in a mid-weight autumn suit — elegant, but surely freezing! Your instructor asked if he could get your coat from the car. "No, thanks." You later explained that your coat was a military-disposals German army greatcoat, and you didn't want the jury to see you in that light.

It was, I hasten to add, a post-war German army greatcoat — warm, and at a good price, but, on that occasion, useless.

When on a lengthy circuit, Your Honour generally leases accommodation out of town. One such place has a deck, with sweeping views of the Ovens Valley to Mount Buffalo and the Alps. In the late afternoon and early evening — a Garden of Eden setting — Your Honour would retire to the deck with refreshments and your .22 rifle.

The eyes of eight Jack Russell Terriers belonging to a local solicitor light up, and they wag their tails with delight, each time Your Honour comes on circuit. They know your bag of fresh rabbits will be theirs.

Indeed, although we can't see his tail, I see His Honour Chief Judge Rozenes' eyes light up at the realisation that he now has a judge who truly loves circuit work.

It's said that Your Honour has one photograph of yourself in shorts, bush hat and boots, holding a freshly caught barramundi. On the reverse, for friends with stronger stomachs, is a photograph of Your Honour in the same costume, but with your foot on the corpse of a freshly shot wild boar — a troubling image in the light of Your Honour's newly acquired sentencing powers.

Your Honour is also a member of a book club, of which Deputy Chief Magistrate Paul Grant is the secretary. Other members include Chief Judge Rozenes, Chief Magistrate Gray, and Judges Howie, Punshon and Morgan-Payler. The book club has being going some five years, so that its record of appointments to the bench is quite remarkable. Paul Grant may need to brace himself for a flood of new members with high expectations.

The book club meets every couple of months at a restaurant, and if there's not much to say about the book, its members have an abiding interest in food to discuss.

Your Honour and your brother and sister continue the Heathcote vineyard begun by your father, and produce, with a little help from John Ellis at Hanging Rock, the Sheoke Hill Shiraz. I'm sure your new judicial colleagues will be hoping for a continuation of the car-boot-sale prices offered to your former colleagues at the OPP.

Your Honour is a good lawyer and advocate — thoughtful and insightful. Your Honour will add to both the humanity and the distinction of this Court.

The Bar wishes Your Honour long and satisfying service as a Judge of this Court.

May it please the Court.

# Court of Appeal

## The Honourable Justice Winneke AO AC

DURING its 170 year history, the Victorian Bar has produced a number of eminent counsel and distinguished members of the judiciary. Occasionally, there have been amongst its midst those of outstanding and extraordinary quality, who were destined to make a special and historic mark in the annals of the law. They include the likes of Sir Owen Dixon, Sir Leo Cussen, Sir Wilfred Fullagar and the Honourable Justice Thomas Weetman Smith. To that unique and elite group must be added the name John Spence Winneke, who retired as the President of the Court of Appeal on 15 July this year, ten years after he took office as the founding leader of the Court.

From the earliest days of his tenure, and during the whole of his term of office, John Winneke displayed and exercised the remarkable personal and professional attributes which had been evident throughout his thirty-three-year career as a member of the Victorian Bar, 19 of them as one of Her Majesty's Counsel. Blessed with a prodigious intellect, boundless energy, and profound wisdom, common sense and judgment, John Winneke brought to his office a vast and intimate knowledge of humankind, legal principle, and of the operation of the law in all its various jurisdictions. A natural leader, John Winneke is a man who commands, but never demands, respect, a man of unquestionable integrity, and a man with a powerful feeling and understanding for what is right and just. With those qualities, his Honour moulded and led a court which rapidly developed into and remained the premier intermediate Court of Appeal in the Commonwealth of Australia.

The background and history of John Winneke was well documented at the time of his appointment to office, but nonetheless bears retelling in some detail. For it was no happenstance that he was such a successful, distinguished and esteemed jurist. He came to the Court eminently equipped for his high responsibilities. His learning, judgment and instincts were all forged during a long and outstanding career as one of the great advocates of the Victorian Bar.

John Winneke was born on 19 March 1938. He was educated at Scotch College and graduated in Law from the University of Melbourne in 1960. After completing his articles with Mr Josh Shaw of Middleton McEarchern Shaw and Birch he was admitted to practice on 1 March 1962.

Eight days later he signed the Victorian Bar Roll. He commenced reading with Gordon Just (later Judge Just of the County Court). During the next 14 years as junior counsel, John Winneke developed an extraordinarily wide, varied and successful practice. He appeared in cases involving virtually every field of law. With consummate ease he ranged into such disparate areas as criminal law, civil juries, defamation law, commercial and equity cases, probate cases and town planning matters. His practice rapidly developed, and he was much in demand both at trial level and on appeal. In addition he appeared before a number of boards of inquiry and royal commissions.

He was counsel assisting Mr William Kaye QC in the "abortion graft inquiry" in 1970, which inquired into allegations of corruption involving members of the Victorian Homicide Squad. He also appeared as counsel in the Royal Commission into the Westgate Bridge collapse, in the Derwent River Bridge Inquiry, and in the Victorian Housing Commission Inquiry.

After his Honour took silk in November 1976, the breadth of his practice did not diminish. As leading counsel he appeared in significant and difficult cases involving personal injury, criminal law, insurance, defamation, contempt, administrative law, commercial law, industrial law, town planning, commercial law and equity. In essence, he could and did appear in any case whatever the issues of law involved. He had an amazing capacity to master the principles of law in areas into which he had not hitherto ventured. He exploited his skills honed in the common law and criminal law. He had a unique and persuasive manner with a jury. He was a brilliant cross-examiner, with an unerring instinct as to when to go on the attack and when to take a witness by stealth. Behind his forceful advocacy lay an incisive analytical mind, and an uncanny capacity for identifying the issue or facts on which the fate of a case may ultimately hinge.

In 1981 he was appointed Royal Commissioner by the Commonwealth and State of Victoria to inquire into the affairs of the Builders Labourers Federation. His report resulted in far reaching and fundamental reforms in the building industry.

In criminal cases he appeared both for the prosecution and for the defence. As a prosecutor he was scrupulously fair and balanced. He appeared in many notable criminal trials. He appeared as senior counsel for Mr and Mrs Chamberlain before Mr Justice Morling in the Royal Commission into their convictions for the murder of their infant daughter. The brief involved a number of technical forensic issues, including difficult scientific questions such as the identity and interpretation of blood stains and damage to clothing. A number of the hearings were interstate and in Darwin. With peerless skill he dismantled and demolished the evidence of a number of key experts in cross-examination. Largely due to his tireless and courageous advocacy, the Commission found that there were serious doubts and questions as to the Chamberlains' guilt, and as to the evidence in the trial leading to their conviction.

As a result of those findings, Mr and Mrs Chamberlain's convictions were quashed, thus redressing an historic injustice.

For many years he was an officer in the Royal Australian Naval Reserve. He appeared in a number of courts of marine inquiry including the inquiries into the collision between *MV Wyuna* and the *Bass Strait Trader* and those into the casualties involving the *Blyth Star*, the *Straitsman* and the *Lake Illawarra*.

Throughout his career, John Winneke gave enormous service to the Victorian Bar. He had nine readers to whom he was a wonderful mentor and friend. Three of those readers were to become judges. His Honour served on the Bar Council between March 1988 and September 1991. He was the longstanding Chairman of the Foley List Committee. Notwithstanding his busy practice, his door was always open to members of counsel seeking his assistance. His sage advice was invaluable. His common sense and good judgment invariably steered counsel away from impending peril.

As the foregoing synopsis reveals, few if any have come better equipped to discharge the difficult tasks and responsibilities of judicial office than John Winneke. On 7 June 1995 he was sworn in as the first President of the Court of Appeal. His appointment was, understandably, greeted with unanimous acclaim from the ranks of the profession, and particularly those who knew him well.

Initially, the Court of Appeal had seven members together with the President. They were each outstanding lawyers. As President, Mr Justice Winneke led from the front. Throughout his time in office he assumed a prodigious work load which few could match. His Honour never shirked the responsibility of writing the leading judgment in difficult cases. In the majority of cases in which he presided he wrote or participated in the judgment of the Court. To those familiar with his unique writing style, his hand and influence can be readily discerned in a large number of the joint judgments of the Court of which he was a member.

As a Justice of Appeal, John Winneke truly excelled. As the presiding judge, he easily directed argument before him to the central issues on which the appeal was to be determined. He was always well on top of the issues in the appeal from the commencement of argument. He was a good listener, capable of readily engaging counsel without being overbearing. His relaxed style invariably brought out the best in counsel. It was truly a pleasure to appear before the Court of Appeal when his Honour was presiding.

Justice Winneke was a humane and compassionate judge. He had a unique skill in communicating with appellants in person. He was able to explain to them, in clear and simple terms, the limitations of the powers of the Court of Appeal to rectify what they saw as an injustice perpetrated on them by lower courts. He was particularly concerned that appellants in person in criminal matters were not deterred from their progress to rehabilitation by the dismissal of their applications for leave to appeal.

The judgments authored or contributed to by his Honour have made a lasting and vital contribution to the jurisprudence of this State. His Honour's profound understanding of legal principle, his good judgment, and his facility of expression, resulted in judgments which are easy to read, and which, invariably, explain in clear terms the basis for the decision made by the Court. He not only knew the law, but he well understood it. Most importantly, he understood the reasons for the legal principles which were applicable to a case, and he understood how they applied to the forensic realities of a trial involving conflicting *viva voce* evidence. His innate understanding of the trial processes was particularly important when reviewing directions by trial judges to juries. His Honour understood the practical realities of those directions, and eschewed any overly technical or academic approach to them. As a consequence, his Honour's judgments have been and are heavily relied on by trial judges as the surest guide to directing juries correctly on a whole host of difficult matters.

Justice Winneke wrote or participated in a large number of significant judgments, which constitute landmarks in the law. It is not possible to list or refer to them all. A few examples suffice. In criminal law, he played a key role in expounding the fundamental principles concerning topics such as similar fact evidence, consciousness of guilt, provocation, relationship evidence, sentencing, and appeals by the Director of Public Prosecutions. In transport accident and accident compensation law, his judgments made a critical contribution to explaining and interpreting difficult pieces of legislation, onto which had been engrafted a hotch potch of poorly drafted reforms. Those judgments constitute object lessons in statutory interpretation. He joined in key decisions relating to claims in tort against public officials and police officers. His expertise in areas such as defamation law was invaluable.

In all areas, both criminal and civil, his Honour's judgments are unique and invaluable expositions of the law in the wide variety of cases which came before his Court. They are the combined product of his exceptional intellect, vast learning, good judgment, and clear expression. As such his judgments, and his contribution to the law, stamp him as one of the greatest jurists the State of Victoria has produced. It is no exercise in hyperbole to rank justice Winneke with the likes of Dixon, Cussen, Fullagar and Smith.

His Honour's role as President of the Court of Appeal went well beyond his judgments. His great personal qualities enabled him to create a unified and harmonious court which, as a team, developed into the pre-eminent intermediate Court of Appeal in the Commonwealth of Australia. Under and as a result of his leadership, the Court gained a high reputation for the quality of its work. His Honour never expected any members of his "team" to do any more than he did. He read every judgment produced by the Court of Appeal, regardless of whether he sat on the Court. Despite his heavy administrative burden, he nonetheless sat in as many appeals as his fellow judges.

From his earliest days in office John Winneke developed and maintained a strong and productive relationship with each of the members of the Court of Appeal. His door was always open to them no matter what their problem, and irrespective of the time at which his fellow judge consulted him. He gave an enormous amount of time to his fellow judges, both on the Court of Appeal, and trial judges. He always knew what the state of each list was, and the state of outstanding judgments in respect of appeals which had already been heard. He appreciated and sympathised with the effects of the workload of the Court on individual judges. His understanding of human nature, and his outgoing personality, enabled him to bring out the best in all his fellow judges. His leadership united and inspired his Court. It is no coincidence that throughout his term in office, only one criminal appeal, and twelve civil appeals, from the Court of Appeal to the High Court succeeded. Statistics reveal that the Court of Appeal determined finally in the order of 99 per cent of the appellate work of the State of Victoria during the first ten years of its existence.

As founding President his Honour was responsible for developing the various procedures necessary for the functioning

of a Court of Appeal. Those procedures enabled the court to function efficiently and as expeditiously as its huge workload permitted. Always conscious that the Court belongs to the whole of Victoria and not just Melbourne, his Honour led the Court of Appeal to sittings in various provincial centres throughout the State. Those sittings were highly successful, and were very much welcomed by members of the local profession as well as members of the local communities. He took the trouble to explain to those communities the role and work of the Court of Appeal in our system of justice.

As President, he was the architect of many important and beneficial innovations. He did not believe in change for the sake of change, but was far-sighted in instituting changes which greatly improved the administration of justice. One example was the introduction of applications under s.582 of the Crimes Act, which play a critical role in streamlining the burgeoning number of applications for leave to appeal against sentence. He periodically met with trial judges of the Supreme and County Courts, particularly to discuss issues involving directions to juries in criminal trials.

Throughout his decade on the Bench, Justice Winneke gave extraordinary and invaluable service to the legal system. He was awarded an Order of Australia in 1999, and in 2004 was awarded the Commander of the Order of Australia. His Honour made a contribution to the law of this State which will endure for generations. He has set the Court of Appeal on a footing which will enable it to continue to provide a high quality of service to our system of justice.

His Honour has not confined his interests in life to the law. He was an outstanding sportsman, playing football, cricket, tennis and golf. It was at football that he excelled. He was best and fairest in A-grade amateurs in 1959, and then played with Hawthorn from 1960 until 1963. John Winneke was a member of Hawthorn's 1961 premiership side, the first premiership won by that august club after 36 years' membership of the Victorian Football League. He played in the first ruck in the premiership team, coached by the legendary John Kennedy. It was his Honour's role in the second semi-final against Melbourne which is the stuff of legends. No doubt overcome by his Honour's presence, champion Melbourne centreman Laurie Mithen "fainted" in front of the Melbourne members. For decades, myth raged about the incident.

Various of his Honour's readers sought in vain to extract a confession. One reader, after a long lunch, nearly managed to "verbal" him. However, at the last moment, realising the danger, Winneke claimed it was one of his team mates who was the culprit.

After his playing days were over John Winneke remained actively involved in football. He was a member of the Hawthorn committee, and then chairman of the VFL Tribunal. Subsequently he was one of the founding commissioners of the AFL Commission.

John Winneke has always been steeped in family values. He comes from a background with a long history in the law. His

grandfather, Henry Christian Winneke, was a judge of the County Court from 1913 to 1943. His father, the late Sir Henry Winneke, was Solicitor-General for the State of Victoria (1951–1964), Chief Justice of the State of Victoria (1964–1974) and then Governor of the State of Victoria (1974–1982). His maternal grandfather was Mr Roger Wilkinson of Home Wilkinson and Lowry. His brother Michael was a distinguished solicitor and was his Honour's associate. His wife, Sue, is a recently retired member of the Victorian Bar. John has two sons and a daughter. His eldest son, Christopher, is a member of the Victorian Bar. He has five grandchildren.

Notwithstanding his many achievements, John Winneke's personality never changed throughout his years in practice or on the Bench. He is at heart a thoroughly decent and humane person, a man of great honesty, kindness and generosity. A modest man, he steadfastly refused offers of a farewell by the profession. He likes people, and people like him. He has a wonderful sense of humour, and is an entertaining and gifted raconteur. There could be no better description of John Winneke than as a "thoroughly good bloke".

The retirement of John Winneke as President of the Court of Appeal marks the end of the legal career of one of the most unique and outstanding members of the Victorian legal profession. He was truly a giant in the law. His legacy and contribution to the law was immense and will endure for generations. The State of Victoria and the legal profession owe an immeasurable debt of gratitude to his Honour. His departure from the ranks of the judiciary, and from the Court, will be sorely missed by so many of his friends and colleagues. All those who knew him so well, who worked with him, and who appeared before him, I am sure share in extending their best wishes to John and Sue for a long, happy and fulfilling retirement.

# Court of Appeal

## Justice John Batt

**Farewell speech by Ross Ray QC, Thursday 2 June 2005, on the occasion of the retirement of the Honourable Justice of Appeal John Batt from the Supreme Court of Victoria**

MAY it please the Court. I appear on behalf of the Victorian Bar to pay tribute to Your Honour's lifetime of professional service in the law.

Your Honour came to the Bar very shortly after admission to practice, remaining with Oswald Burt & Co as a solicitor for only a little over six months. In reading with Sir Ninian Stephen, Your Honour became part of a distinguished judicial line. Sir Ninian had read with Sir Douglas Little, who had read with Sir Norman O'Bryan, who had read with Sir Leo Cussen — all members of this Court.

Sir Leo Cussen was appointed to the Court in March 1906. Had the statute not prevented it, Your Honour might have remained another 10 months to make the collective judicial span into a century. However, counting Sir Ninian's term as Governor-General and Sir Norman O'Bryan's time as an acting judge, there is a full collective century of distinguished judicial and public service.

Your Honour developed a wide and formidable practice at the Bar. The Solicitor-General has referred to Your Honour's prosecution of Christopher Dale Flannery and Laurence Prendergast for rape, obtaining fresh convictions over those set aside on appeal.

Your Honour had a broad commercial practice, including corporate regulatory and investigative cases, and commodities cases from potatoes to iron ore, and from milk to tobacco. Your Honour practised in equity, trusts and contracts, and in general law. You had many taxation cases.

You received a brief from the Commissioner in one case shortly before the due date for filing personal income tax returns. The materials in the brief were a full trolley load of documents. It was clear that, even with Your Honour's extraordinary industry, it was not possible to complete both tasks in a timely fashion. Your Honour applied for an extension in lodging your personal return. It was refused. Your Honour then promptly advised your instructors to make arrangements to collect the trolley of materials. The timely lodging of your tax return was a legal obligation. You could not do both, so you saw no option but to return the brief.

By immediate return communication, Your Honour received an extension on filing your return, and the request please to retain the brief.

Your Honour's five readers were, with respect, a rather eclectic lot — Pritchard, Kennon QC, Bolton, Emmerson QC and Gunst QC. Bolton's jeans and Kennon's entrepreneurial activities were not in complete harmony with Your Honour's vision of a barrister.

Your Honour's tutelage was by example and, although none of your readers regularly wear detachable collars, Bolton is rarely seen in jeans in chambers, and has never been seen in jeans in court. Nor have Kennon's modest entrepreneurial activities been a distraction in his professional life.

All Your Honour's readers testify to the rich educational experience of reading in your chambers. Your Honour worked hard at the Bar, and expected the same of your readers, and juniors.

One junior recalls Your Honour appointing a conference for 5:30 am. You'd both only got into the rickety Perth airport motel at midnight — 2 am, Melbourne time. Preparation had been intense all the previous day in Melbourne, and you had both spent the flight hand-writing documents and submissions.

Alas, the rather spartan motel had neither alarm clocks nor an early morning call service. At 5:30 am, Your Honour was ready, but your junior was not in attendance. You sent your instructor to knock on his door, which woke him, and brought him to work, albeit 10 minutes late. You had a 6:30 am flight on to Paraburdoo.

Like all who have been your juniors, he speaks of the enormous debt of gratitude for knowledge shared, and lessons learned — including that of packing a travelling alarm clock.

The editor of the Federal Court Reports and of the Federal Law Reports credits Your Honour with having set the standard of excellence in law reporting.

Each headnote published in Your Honour's year as editor of the FCRs was a jewel. The crown of published jewels that year was modest. However, they set the standard.

Mr Kline worked closely with Your Honour: first as an employee of LawBook; then as co-editor of FCRs; then with Your Honour as consultant editor. He consulted frequently, and Your Honour always made yourself available and gave prompt and valuable advice.

Your Honour was a stern, but always scrupulously fair, opponent. You were once opposed to a litigant in person. The case was before Mr Justice Mclnerney, also notorious for his scrupulous fairness to parties who failed to appear, or who represented themselves.

Your Honour and Mr Justice Mclnerney reputedly outdid one another in scrupulous fairness. All the bemused self-represented litigant had to do was to sit quietly while the two of you won his case for him.

Your Honour is devoted to your family. In a time when not all fathers attended the hospital at births, Your Honour did so. Your son David cherishes the knowledge that you were at the hospital awaiting his arrival — and drawing submissions in *Prosser* v *Twiss* while you waited — a testator's family maintenance case significant enough to be reported in those days of selective reporting when there was only one slim annual volume of the VRs.

The early introduction of your children, David and Carolyn, to the Commonwealth Law Reports — annotating them for pocket money — paid handsome dividends. They each went on to graduate in law with first class honours, and David with a first class Master's degree from Cambridge. David is now at the Bar, and a reporter for the CLRs.

Carolyn, after being at Blake Dawson Waldron, turned to journalism. In 1999, she won the Columb Brennan Award for Excellence in Court Reporting. She lives in the Hague and writes occasionally for the *Daily Telegraph*.

Your Honour served as a director of Barristers Chambers Limited for some 11 years, and as the Bar representative on the Chief Justice's Supreme Court Rules Committee for some three years.

Your Honour is renowned for excellence, and meticulous attention to detail. I can't say that, even in translation, *The Iliad* is beside my bed. However, a short passage from the speech of Glaucus to Diomedes is surely apposite. The Solicitor-General has ventured into Latin. I hope Your Honour will be tolerant of my attempt at pronouncing ancient Greek:

αιέν άρίστευειν, και υπείροχον έμμεναι άλλων.

For the benefit of probably all but Your Honour and David (who, like Your Honour, also won the exhibition in Ancient Greek I), I explain and translate. Glaucus was telling his Greek enemy Diomedes the precept he had from his father: "Always to be excellent and pre-eminent above others."

Your Honour's excellence and pre-eminence have always been without the martial swagger of Glaucus. A notable, and characteristically courteous and discreet, example is in Your Honour's remarks at your welcome to this Court. Justice Hansen had told the story of *Hedley* v *Roberts*.

Your Honour had been in the Practice Court, modestly waiting your turn. Suddenly, the judge called upon Your Honour for assistance in translating two obscure Latin maxims — a public oral examination in unseen passages.

The judgment credits Your Honour with the translation. However, the translations are juxtaposed so that the translation of one is attributed to the other. In your remarks at your Welcome, only in ancient Greek, did you refer to the transposition.

I shall not attempt the Latin, but shall close with the translation of a particularly apposite passage from Marcus Tullius Cicero's oration in defence of the poet Archias:

> These [literary] studies are the food of youth, and consolation of age;
> They adorn prosperity, and are the comfort and refuge of adversity;
> They are pleasant at home, and are no encumbrance abroad;
> They accompany us at night, in our travels, and in our rural retreats.

May Your Honour enjoy the learning from your varied studies at home and abroad, in travels, and perhaps in rural retreats. On behalf of the Victorian Bar, I wish Your Honour a long, satisfying and happy retirement. May it please the Court.

# Louise Crockett

AT the outset of what I wish to say this morning let me refer to and quote part of, and a few phrases which I take from Ecclesiastes – Chapter 3, which is the first Reading this day, Verses 1–8.

> To everything there is a season and a time
> to every purpose under the heaven.
> A time to be born, and a time to die
> A time to weep, and a time to laugh
> A time to mourn
> A time to keep silence, and a time to speak.

As I stand here, I have a very strong feeling that Louise is saying to me: "Come on, get on with it. People have important matters to attend to. It's Friday and lunchtime is approaching."

Louise was born on 13 April 1961, only 44 years ago. I was informed of her birth and the joy that it brought to Anne, Bill, Rosemary, Peter and Robert on that very day.

I was a young barrister reading in the chambers of one of the leading juniors of the Victorian Bar, Louise's father Bill Crockett. At that time his chambers were in Selbourne Chambers.

To my recollection the news was delivered in a very matter of fact way, and dealt with among the many matters that he was attending to that day, which were probably that he held four briefs for trial and not necessarily in the same list.

At that time Rosemary was nine years old, one can only imagine the excitement of a nine-year-old little girl, who looked forward to helping her mother care for and look after the new baby sister, a task and pleasure Rosemary maintained throughout Louise's life right to the end. She attended medical appointments with Louise and Andrew, when Louise became sick. She quietly ensured that when Louise was in hospital, the nursing staff gave Louise the best care and attention. So it was from the outset that I had the privilege of observing and being aware of Louise's life, sometimes from a distance, sometimes from much closer. I observed this "chirpy" young lady, somewhat demanding at times but always adored by her family, her husband Andrew and Katy and Sarah.

Louise attended Ruyton Girls School from "kinder" to year 12. When the Crockett family were living in Toorak this involved her travelling on the famous Glenferrie Road tram. Although small in stature I am sure that she would have made her presence felt.

In the year 12 exams, Louise's professional future began to emerge. She was marked in the very high 90s for what I think was then called Legal Process. This led her to study law at Monash. In 1981 she graduated with the degree Bachelor of Arts. And in 1983 she graduated as a Bachelor of Laws.

Although Louise completed her studies for her arts and law degrees in 1981 and 1983 respectively, as is usual she did not graduate until the following year in each case, being 1982 and 1984.

I am told that whilst studying at Monash she unsurprisingly possessed many qualities: she was a bundle of energy; she was self-assured and purposeful. She was punctual for this was always important to her.

She drove the cleanest blue Honda Civic to grace the student car park. At student parties and 21st birthdays her flare for style and fashion was to the fore. Her presence was regularly accompanied by, I am told, rustling taffeta.

It was not until her 21st birthday party that it was revealed that at one exam she happened to not be accompanied with the book of statutes to be taken in to the exam — she passed in any event.

Having graduated Louise was articled to Mrs Di Davis of Stedman Cameron, Solicitors. She then followed in her father's footsteps and joined the Victorian Bar, where she joined the Dever List.

She commenced reading with John Ramsden, now a Judicial Registrar on the Family Court, on 1 September 1985, and she signed the Bar Roll on 21 November 1985.

Before briefly looking at Louise's professional career, let me remind you of Louise the lady, the wife, the mother, the friend and companion.

Some 20 ago this March Louise met Andrew Bristow. She adored him and her love was returned; it was not always easy though.

One evening when Andrew was spending some time saying his farewells to Louise, just inside the door of the Crockett apartment they were confronted with Louise's father holding his chest and suffering severe chest pains. Andrew took Bill to hospital in his car. The next day after being discharged from hospital, Louise berated her father, telling him that her courtship would never flourish if he was going to do things like that.

Louise and Andrew were married at the Chapel of St Peter, Melbourne Grammar School, on 30 March 1990. The marriage for Louise had to be perfect – she drafted and redrafted the Order of Service eight times. Although it has been fashionable for the bride to be a little late, Louise appeared with her father and the bridesmaids one hour late.

The florist had failed to deliver the flowers on time. After 20 minutes Bill was for forgetting the flowers. Not Louise. She refused to budge, notwithstanding her father's advice. The bride and her attendants carried flowers when they arrived at the church. Andrew never had any doubt that she would appear. But you can just imagine the concern of many others.

The marriage of Louise and Andrew was always bound with love. It was enhanced by the birth of Katy now 14 and Sarah now 12. Both girls attend St Catherine's School. Katy is able to steer a racing 8 as straight as an arrow, and Sarah I am told, would be able to correct any variance in the course of the eight by giving instructions in fluent Japanese.

The love and affection and flair for fashion brought to Louise by her mother Anne was carried to the next generation. She loved her girls dearly and was proud of their many achievements, this was evident to all. The need for the ladies

Bristow to have their many fashionable pieces accompany them at all times, even to Noosa, has necessitated the hiring of a station wagon and the maintenance of strength by Andrew.

Louise was a sensational hostess. Her dinner parties at home are well remembered and especially her passionfruit soufflés. They always rose. Andrew recounts presents given by her were beautifully wrapped. Andrew's comment to me was that Louise could have been a present wrapper at David Jones.

She was a great raconteur and story teller. She once recounted the occasion when she appeared for a woman at the Frankston Magistrates' Court. Her client told her that her uncle was a QC. Louise having regard to the nature of her client and the charge she was facing, well realised why she had been briefed and uncle was not leading her.

Louise was curious and pursued the matter with with her client to ascertain who was the uncle. She eventually was told by her client that the uncle, the QC, was a Quality Controller.

She was a great and true friend. When she spoke to you, you were the only person in the room with her. Louise was a lady always prepared to express her view and to back it up with reason. On one occasion she wrote to the Queen expressing her view on a matter relating to Princess Diana. She was very proud of the reply she received from the Queen's Lady in Waiting.

On another occasion she wrote to a person who was also suffering from cancer. She did not know him directly. She wrote to help him, which it did significantly. He was greatly supported by her encouragement.

One weakness she had was for chocolate. I am told by one of her colleagues that in the top drawer of her desk in Chambers there was to be found Haigh's chocolate-coated scorched almonds and licorice allsorts.

I should add, having regard to the season, that Louise was an avid Collingwood supporter. On last Sunday she watched on TV the early part of the game.

Louise fought hard not to let her illness interrupt or interfere with her life with her family. It was only recently that she had as a guest in her home an exchange student from America in order to repay the hospitality that had been extended to Katy.

Let me now briefly return to Louise's professional life. Her work at the Bar was mainly in the Family Court. She was an outstanding barrister. In her work she demonstrated her fine intellect. She never went to court without her client's case being fully prepared. She would become short with opponents who sought to have a case stood down supposedly to negotiate, but merely to better confer with his or her client.

A colleague who had been at Monash with Louise and was a fellow barrister, said to me, "Louise may have been short in stature, but she was tall on skills and reputation."

A senior Judge of the Family Court told me that the Judges of that Court trusted her and could rely on her to have prepared her case and that when she herself came onto the Bench and saw Louise at the Bar Table she was always pleased, because she knew the case would have been fully prepared and would be addressed by a very fine intellect and skillful advocate. She told me that Louise was held in great affection by the Court and will be deeply missed by it.

Louise, from her mother, showed in her life the unbounded love and support she gave for her husband and children, which was so important to her. She also inherited from her mother her flair for fashion and style. From her father, she inherited a fine intellectual ability, a little feisty at times when necessary, her skill as an advocate, her dedication to her profession and her love for the law.

Perhaps in racing terms Louise the filly, although small had a beautiful temperament, never ran a bad race and always had the heart to run on to the finish.

Perhaps that which I have been seeking to do today in briefly describing Louise's life was summed up in one of the death notices published on Wednesday which described Louise as a person with:

"A sharp intellect
A wicked humour
And a strong will."

We will all miss her dearly. But we will all be strengthened by our memories of her, the example that she set us, the deep love that she gave to her family, and her strong desire for us to go ahead with our lives.

For sentimental reasons tomorrow I will watch the run of the filly "Dinkum Star" in the William Crockett Stakes at the Valley.

Allan McDonald

# Sam Duband

SAMUEL Duband joined the Corps of Commissionaires (Victoria) Ltd on 16 September 1981. During his 24 years of membership he served in many areas including function centres and the Victoria Racing Club at Flemington. His service with Owen Dixon Chambers spanned 15 years from 1985 to 2000 and was both his principal period of corps employment, and the last before his retirement.

He passed away on 13 August 2005. His funeral at Springvale Necropolis on 15 August was well attended. The Jewish Ex-Servicemen's Association provided an appreciation of Sam's army service, and his long and valuable connection with the Association from World War II. He served in the Signal Corps in Papua New Guinea from 1941 to 1943, and retired to Australia following an injury (broken leg). The servicemen in attendance at Sam's funeral placed poppies on his coffin as a final tribute.

To his colleagues and to me he was a kind and generous person who never spoke ill of anyone. He will be remembered as our oldest working commissionaire and as a great man among men.

# Signing the Bar Roll, 3 August 1948

THIS photo shows a number of eager young men signing the Bar Roll on 3 August 1948. Pen City has offered to provide a Sheaffer Lacquer Fountain Pen to the first correct entry opened by a member of the Bar who has correctly named all the people in the picture.

Good Luck.

# Trouble in Paradise

Raymond Gibson

Raymond Gibson, formerly a Crown Prosecutor in Victoria, is currently on a two-year assignment as Deputy Director of Public Prosecutions in Fiji. Our man in Fiji describes below a recent case where Church and State appear to collide in the Fijian Constitution. He does not intend to express any particular view about the proceedings reported on; but in so far as any view is expressed or implied, it is the writer's own and does not represent any views held by the Office of the Director of Public Prosecutions in Fiji.

*Raymond Gibson.*

FIJI has a reputation as a relaxed Pacific nation with great snorkeling, palm-lined beaches, friendly people… and cheap baby-sitting. Most tourism here is resort-based, with tourists enticed to leave the sanctuary of the hotel to go on expensive fishing charters or mandatory "village visits" where you can drink kava out of coconut shells (bilos) with the village chief. However, an enticement of another kind also exists.

The transsexual and gay prostitutes, who hiss at gutter crawlers along dirty unlit streets, might not decorate the holiday brochures and websites promising a tropical island paradise, but they exist only 100 metres from the international hotels in downtown Suva. The tourists have found them even if they don't rate a mention in tour company's advertisements.

Thomas McCosker, aged 55, probably knew there was something of a gay scene in Fiji (however undercover) when he booked his return ticket there from Melbourne. What he didn't reckon on was that homosexual relations in Fiji were subject to severe laws and he would end up serving a two-year gaol sentence.

The retired teacher arrived in Nadi on 20 March 2005 for a two-week holiday. He met up with Dhirendra Nadan, aged 23, a tall, slim, Indo Fijian. The two retired to McCosker's hotel room for a number of days, engaged in sexual activity, and McCosker took some photographs to record it. Relations turned sour. There was allegedly some discussion between the two over Internet postings of photographs taken and a disagreement over money. At the end of his vacation, on 3 April, McCosker, rather naively went to the police stationed near the Nadi International Airport claiming that Nadan had stolen AUD$1500 from him. After laying his complaint, he went to the airport and checked-in for his flight home, no doubt comfortable in the knowledge that the Fijian justice system would take its course.

**The transsexual and gay prostitutes, who hiss at gutter crawlers along dirty unlit streets, might not decorate the holiday brochures and websites promising tropical island paradise, but they exist only 100 metres from the international hotels in downtown Suva.**

The police investigated the complaint with impressive haste. Nadan was picked up and taken directly to the airport's police post. He was interviewed (always recorded in Fiji by hand) whereupon a more detailed picture emerged. He told police that McCosker had taken nude photographs of him and that the two men had engaged in oral and anal sex. He said that McCosker had reneged on an agreement to pay him modelling fees after the photos were published on the Internet. His hopes of a good earn from becoming a cyber porn star had come to nothing.

Meanwhile, McCosker was quietly relaxing in the airport's transit lounge. He was approached by police and asked to assist with their inquiries. He had little choice. He confirmed some of the essentials of Nadan's story and his digital camera was seized. It contained enough evidence to convict him. Many of the explicit images showed the couple having sex (tendered to the Magistrates's Court as Exhibits 1–18).

Both McCosker and Nadan were charged under two provisions of Fiji's Penal Code ("Code") ss.175 and 177. The

first allegation was one of "… permitting carnal knowledge of the other against the order of nature", (s.175 sodomy). It carries a 14-year gaol sentence, with or without a flogging. The second was one of committing an "… act of gross indecency", between males (s.177). It carries a five-year sentence, again, with optional corporal punishment.

Although delays in the criminal justice system in Fiji are endemic, there were none here. Two days later, each of the accused appeared unrepresented before Resident Magistrate Shah in Nadi. McCosker believed he would simply get a fine and would then be able to return to Melbourne. With a little encouragement from the police, he and his accomplice both pleaded guilty to the two offences, despite the absence of counsel and full disclosure of the prosecution brief.[1]

After the police summary was read to the court, the Magistrate took a dim view of their behaviour declaring it to be "… something so disgusting it would make any person vomit". Though Nadan was 23, the Magistrate said to McCosker, "If you wanted to have fun, you should have stayed in Australia instead of trying to come to Fiji and exploit our young boys."[2] Each defendant received 12 months' gaol for each of the two offences charged (sodomy and gross indecency). The sentences for each defendant were to run consecutively.

Appeals were filed in the High Court against conviction and sentence and both men were granted appeal bail in the High Court by Govind J. On 15 August 2005, the matter was heard in Suva before Justice Gerard Winter, an expatriate New Zealander with a background as a naval legal officer, and a judge not shy of a good legal argument.

Despite being a conservative and deeply religious country, Fiji has a Constitution that is progressive by world standards. Unlike Australia, the Consitution contains a Bill of Rights. Enacted in 1997, the Constitution survived the assault upon it when George Speight and his cohorts stormed Parliament on 18 May 2000 and took the Opposition prisoner for 56 days.[3] The nation has also ratified the International Convention on Civil and Political Rights.

Aside from an argument about the pleas of guilty in the Magistrates' Court being equivocal, the central question for Winter J was whether the Code provisions breached those in the Constitution guaranteeing both the right to privacy and equality before the law. [4]

At the appeal, the Human Rights Commission represented by Dr Shameem was joined as a party, as was the Attorney-General. Ms Khan represented the appellants. The Human Rights Commission supported the appellant's argument that the Code provisions offended the civil rights of the appellants under the Constitution. The Attorney-General supported the State (DPP), represented by Mr Tunidau, in arguing that the appellant's constitutional rights were limited on public interest and moral grounds.

**Despite being a conservative and deeply religious country, Fiji has a Constitution that is progressive by world standards. Unlike Australia, the Consitution contains a Bill of Rights.**

As the Constitution's preamble recognises that Fiji is a Christian country, and that such values underpin the society, Mr Tunidau argued that any interpretation of the provisions had to be constrained by Christian morality. Logically, it followed, although barely touched on in argument, that Christian morality proscribed all homosexual sexual relations. This seemed to be accepted by all without question.

Stressing a peculiar "Fijian interpretation" of the Constitution did not impress Winter J. Nor did the argument that the appeal should be adjourned to allow affidavits to be submitted from members of the main religious faiths practicing in Fiji.[5]

## THE CHRISTIAN CONTEXT

It could not be overlooked that the Constitution had an overtly Christian flavour. Winter J accepted the fact that most ethnic Fijians generally regard themselves as Christians, with approximately 80 per cent belonging to the Methodist faith. This issue was relied upon by State counsel and had to be addressed by Winter J.

He accepted that Christianity framed the Constitution. Article 5 acknowledges that worship and reverence of God are the source of good government and leadership. However, Fiji was a secular state in which there are many faiths and beliefs. He was not prepared to find that the Constitution was pillared upon Christian values alone. The Constitution as a whole reaffirmed human rights and the fundamental freedoms of individuals. He then turned to the Bill of Rights.

## PRIVACY

Winter J found that the State had no business in the bedroom. Both Code offences, therefore, were invalid as they applied to acts of consenting adults in private. "I find this right to privacy so important in an open and democratic society that the morals argument cannot be allowed to trump the constitutional invalidity."[6] He relied on extensive international case law as well as on a finding by the United Nations Human Rights Committee in 1994 that similar laws were invalid in Tasmania.[7]

As a former British colony, Fiji had adopted much of its Code and its anti-gay laws from Britain. However, the Mother Country had repealed such laws in the 1960s following an extensive review from the Wolfendon Committee, which noted, "… there must remain a realm of private morality, which is, in broad and crude terms not the law's business. To say this is not to condone or encourage private immorality."[8] Fiji's ratification of the International Convention on Civil and Political Rights created a "legitimate expectation" that it's penal laws would be interpreted subject to that convention. Here Winter J relied on the High Court of Australia case of *Minister of State for Immigration and Ethnic Affairs* v *Teoh* (1995) 128 ALR 353. In that case, the High Court decided that a State's ratification of any international treaty created a "legitimate expectation" to the world, and to the Australian people, that the executive government and its agencies would act in accordance with the treaty.

The State argued that to invalidate the charges would leave victims of male rape or sexual violence unprotected. His Lordship countered by finding that the common law still had adequate offences to cover such criminality and there were other Code provisions that could be applied.

## EQUALITY

The State argued that s.175 (sodomy) applied equally to both males and females and, therefore, did not discriminate between the sexes. Moreover, it was neutral in terms of sexual orientation. The appellants argued that it was discriminatory as it only applied to gay men and criminalised their primary sexual expression. In practice, however, Winter J found that the law was applied selectively. State counsel could not come up with any

cases where heterosexual couples had been charged under s.175. Ultimately, not much turned on this, as the section was invalid, in this case, as it breached the right to privacy.

Section 177, which criminalises acts between males in public or private, described by the legislation as "any act of gross indecency", was regarded as offending against a male right to equality before the law. Section 38(1) of the Constitution states simply "Every person has the right to equality before the law." Subsection (2) prohibits discrimination directly or indirectly on the ground of sexual orientation as well as the usual other grounds like gender, race and age. Defining equality is not as easy as it seems. Winter J preferred to see it in terms of "… creating symmetry in the lived out experiences of all members of society by eliminating the unequal consequences arising from differences."[9]

Such an approach was not too far removed from that discussed by the Victorian Court of Appeal in *DPP* v *Ellis* although, in a different context.[10] In that case, the differential treatment at sentencing of a female teacher, Karen Ellis, who had repeated sexual relations with her male teenage pupil, compared to the high profile gaoling of a male tennis coach, Gavin Hopper, who had a sexual liaison with a female student, offended against the principle of equality before the law. The female teacher, Karen Ellis, had been given a wholly suspended sentence; Hopper, five years in gaol. The "unequal consequences" of similar behavior demonstrated that equality before the law was breached. [11]

Although urged to go further by Ms Khan, for the appellants, to strike down the provisions entirely, Winter J felt constrained by the Constitution, and refused to do so. His Lordship regarded the appeal as having limited scope, finding it was not his function to act as a self-appointed law reform commissioner. He did, however, urge a wholesale review of the Code relating to sexual offences, which contain many archaic provisions.[12]

## CONCLUSION

Winter J's judgment affirms the primacy of the Constitution as the supreme law in Fiji. Although acknowledging that many members of the community in Fiji may be shocked and disturbed by homosexual activity, he was not prepared to temper the Constitution provisions that enshrine diversity and equality. Indeed, his final remarks relating to the spirit of the Constitution were intended to underscore the importance of tolerance in a diverse community.

Ethnic divisions have rocked this small nation during the coups of 1987 and 2000. While some see both coups as being caused by indigenous resentment over the perceived economic or political ascendancy of the Indo Fijian community, there is no doubt that the word "tolerance" plays a major part in current social dialogue. This is particularly so given the Fijian government's aim to enact the Reconciliation Tolerance and Unity Bill which seeks, if passed, to create a mechanism to grant full amnesty to those convicted of coup or politically related offences.[13] The word "tolerance", in that context, has been enlisted by both sides of the debate surrounding the merits of the proposed Bill.

The reaction to Winter J's judgment indicates that not all are tolerant or permissive of sexual diversity, particularly as it relates to homosexual relations. Two days after the judgment, the Fijian *Sunday*[14] newspaper carried these remarks on the front page (attributed to Methodist Church General Secretary Ame Tugaue):"We do not condone such behavior between two males and this is not what the morals of the Bible teach us … The first wedding on earth was officiated by God and that was of Adam and Eve, such decision [sic] is not allowed by the Christian faith."

Ame Tugaue is not the only one to condemn the judgment. The Attorney-General has also indicated his dissatisfaction with the decision.

Will it be possible for Fiji to retain its conservative moral code when it is, arguably, at odds with its modern Bill of Rights and adherence to United Nations conventions on human rights? The attachment of the people to the three major faiths in Fiji, Christian, Moslem and Hindu, as well as a culture centred on simple family and village life, make tolerance of Thomas McCosker's Fijian vacation activities difficult to accept, whatever the Constitutional provisions might be.

(At the time of writing the appeal period had not expired and it was not known whether an appeal to the Fiji Court of Appeal would be filed.)

Notes

1. Full disclosure to the accused in a criminal case is required under Article 29 of the *Constitution (Amendment) Act 1997* (Fiji).
2. "Australian Gaoled in Fiji for Gay Sex" Fairfax digital, www.smh.com.au.
3. See generally *Speight of Violence — Inside Fiji's 2000 Coup*, Field M et al. Reid Books, 2005.
4. See Articles 37 and 38 *Constitution (Amendment) Act 1997* (Fiji).
5. *Nadan & McCosker* v *State* Criminal Appeal Case Nos: HAA 85 and 86 of 2005 p.10.
6. Ibid. p.20.
7. *Toonen* v *Australia* (common no. 488/1992, 31 March 1994, 50th Session, UNHR Committee … No CCPR/C/50/D/488/1992. IIHRR97.
8. Ibid. p.15.
9. Ibid. p.21.
10. [2005] VSCA 105.
11. Hopper received five years with a three-year minimum term on 2 August 2004 in the County Court at Melbourne. See Fairfax digital, www.theage.com.au.
12. Winter J recommended one all-embracing offence covering all forms of non-consensual or predatory sexual behavior. Ibid. p.9.
13. Bill No. 10 of 2005. The Bill is currently in before a Fijian Parliamentary Committee and is expected to be passed later in 2005.
14. *Sunday*, (Sun (Fiji) News Limited) 28 August 2005 p.1.

# Life in the Solomons

Simon Cooper

As I flew from Brisbane to Honiara, the capital of the Solomon Islands, in July last year, I was making my way to a country that until recently had been a source of ethnic tension and mass murders. As we approached the capital, we flew over the main island of Guadalcanal, giving me a view of the densely forested terrain that swept all the way from the remote southern Weathercoast region of the island to the northern shores.

*Simon Cooper.*

I was met by the friendly and familiar face of Chris Ryan, my colleague in Prosecutors Chambers in Melbourne, who had been in the Solomons for about a year. We had led remarkably similar lives in the law, having been articled in the same year to city firms only a stone's throw away from each other, then admitted to practice together in 1980. We had spent our formative years at the Bar on Ric Howell's List, and regularly kept each other company travelling around the suburbs doing crash and bash and small crime in Magistrates' Courts. After being retained on a regular basis for the Crown we were both subsequently appointed Crown Prosecutors. It seemed hardly surprising that our lives were sharing yet another common theme. Whilst Chris would be returning to Australia in four weeks' time I was just beginning an 18-month period as a Crown Prosecutor in the Solomons.

Our attendance in the Solomon Islands was part of the Australian Government's commitment to rebuilding the region following the recent conflict. The two groups mainly responsible for the violence and economic breakdown were the Guadalcanal Liberation front (the GLF) and the Malaitan Eagle Forces (the MEF). Their activities had prompted many governments in the region to have concerns about the stability of the area politically, economically and socially.

The GLF had been established at the end of the 1990s. Its leader was Harold Keke, and its main bases were located in the remote Weathercoast region. Fighting had become more widespread between the Isatabu, the indigenous people of the island of Guadalcanal, and the increasing number of economic migrants from

A game plan had been devised by Chris before he departed that Rob would essentially be responsible for prosecuting the main MEF matters whilst I would take on the prosecutions involving Keke's GLF. By September the High Court was beginning to hear trials again after a substantial break, and with the Magistrates' Court still operating on a daily basis the office was under pressure to keep the process of criminal prosecutions moving. Before he left Chris had set up the office so that it could deal with the vast workload as efficiently and productively as the administrative problems that plague the Solomons would allow. Soon after he departed I had my first taste of how some of these problems could disrupt the daily routine.

One morning I discovered that the phones had been cut off. This meant that the office had no effective means of communication, and our internet line, which had been connected only the week before, had suffered the same fate. My only option was a trip to the Ministry for Police, National Security, Justice and Legal Affairs, whose office is located on the fourth floor of the Anthony Saru building in central Honiara. Our secretary Margaret told me that this problem was a common occurrence. On arriving at the Ministry I was informed that their phones were also down. The problem was easy to identify — the Telekom bill had not been paid. As I left the office, I saw Victoria Aitken, the Deputy Legal Draftsmen in the Attorney-General's Office, which is situated on the same floor, who told me that they too had suffered the same fate.

A more circuitous process for paying an account could not be imagined. The

the neighbouring island of Malaita. The GLF was opposed to the incursions of the Malaitans in Guadalcanal and sought to establish greater rights for the indigenous islanders through violent means. The Malaitan Eagle Force, which employed criminal methods and intimidation to attain its ends, counter attacked, and in June 2000 took over Honiara and maintained control through the use of force and standover tactics.

In 2000 the governments of neighboring countries intervened to try to bring to a peaceful end the civil unrest that was tearing Guadalcanal asunder. The various factions involved in the civil unrest, or the "tensions" as they were commonly referred to, were invited to sign the Townsville Peace Agreement (the TPA). The GLF refused their invitation to take part in the peace process, and continued to engage in acts of insurrection and violence on the Weathercoast. Whilst things settled down in Honiara after the signing of the TPA, on the Weathercoast Keke's reign of terror continued.

The Regional Assistance Mission to the Solomon Islands (or RAMSI), an alliance of governments from Australia, New Zealand and the Pacific Islands, was formed to assist the ravaged state at the request of the Solomon Islands' government. In July 2003 large numbers of police, administrators and army personnel, mainly from Australia and New Zealand, arrived to help restore the rule of law, make the streets safe to walk in and assist the ailing economy. The Solomon Islands Law and Justice Sector Institutional Strengthening Project was funded by Ausaid, and involved providing advisors to the police prosecutions branch to enable them to better manage and prosecute matters usually prosecuted in the Magistrates' Court. Prison advisors were also appointed to assist in the administration and management of the prison service. Australian barristers were provided to run the major cases in the Magistrates' Courts and conduct the substantial trials in the High Court that arose out of the intervention of RAMSI and the charges that followed relating to crimes occurring during the tensions. The Public Solicitors Office was staffed mainly by Australian lawyers and they had the responsibility for family and civil matters as well as criminal matters.

The Director of Public Prosecutions was Francis Mwaneswala, since appointed a High Court Judge, and his deputy was Ronald Bei Talasasa. There were two local advocates in the office, Samuel Balea and Henry Kausimae. Rob Barry, Nick Goodenough, John Cauchi, Chris and I were the foreign advocates. However, with Chris, Nick and John about to leave we were about to be placed under an increasing workload.

accounts for the water, electricity and Telekom bills for the DPP's Office are issued monthly and sent to the DPP's Office. They are then sent to the Ministry and the Ministry sends them to the Department of Finance. The Department of Finance then has to forward payment to Telekom. The Telekom account is inevitably late, and if the bill is not paid by the due date Telekom cuts off the phone. This in turn necessitates personal attendance at the Ministry because communication by phone is of course impossible.

On day one I was unable to make any headway. On day two I went to the Ministry again, this time with one of our secretaries, Margaret, as her first language was pidgin, which I hoped would help. Only one of the two lifts was operating. Margaret told me that this lift would not stop on the fourth floor, and I assumed this had probably been the case for some time. We decided to take the lift to the fifth floor and walk down one floor, but as soon as the lift doors closed, we were plunged into complete darkness. I had of course tempted fate by saying to Margaret as we got in that as long as it got us to the fifth floor all would be well. The lift recovered its progress but not its lighting, so we made it to the fifth floor and walked down the stairs.

The Attorney-General's Office is also located on the fourth floor on the other side of the Ministry. On the door outside the Attorney-General's Department a sign warns those who enter: "No Betel Nut". This refers to the perennial habit of the vast majority of the population to engage in chewing betel nut, a central aspect of Solomon Islands culture. Most Solomon Islanders form the habit from a

*"Forging every stream" on the way to a view at Marasa.*

*Local kids at Marasa on the Weathercoast.*

*Paul Bannister (Qld barrister) and Simon Cooper at the Weathercoast prior to holding a conference with Solomon Island witnesses.*

very early age. The betel nuts are "palm nuts" obtained from the Areca tree. They are encased in a husk and vary in size from a thumbnail to a fist. The husk is discarded and the nut then chewed. The nut contains arecoline, a mild central nervous system stimulant. Its widespread availability and use in many Asian counties and cultures, makes it the most widely used stimulant in the world. Its regular use stains the mouth, gums and teeth a deep red. When used to excess it can lead to inebriation and dizziness. Walking around the streets of Honiara you readily observe the individuals who are heavy users as they smile at you through heavily stained teeth and lips that appear as though they have had a recent and heavy application of lipstick. The chewers spit their saliva as they chew the nut, staining the footpaths and gravel pathways.

While the Attorney-General's Office banned the practice, the Ministry was somewhat more encouraging to the betel nut chewers. There were no signs forbidding it, and inside the door was a cardboard box serving as a repository for those who had enjoyed a chew and wished to dispose of the husks of the nut. Why was there such a contrast in policy by two geographically and strategically proximate government departments? I suppose that I shall never know.

As Margaret and I entered we caused, according to Solomon Islands standards, a flurry of activity. The accountant liaised with the Chief Accountant who then liaised with an accountant in the Department of Finance. This was obviously not sufficient as the accountant then

liaised with a financial advisor. This process took about 45 minutes, after which I said that we could not spare any more time. We then departed with the Ministry agreeing to contact us to let us know how things were progressing. I wondered how they were planning to contact us with the phones not working — by osmosis?

I couldn't decide which was worse: to be without phones or without electricity, as we had been the preceding week. Fortunately I had been appearing in the air-conditioned comfort of the High Court when the electricity in our office, and those of the Public Solicitors and the Police Prosecutions Branch, who also share our building, had been disconnected. With no phones, air-conditioning or light it was a case of tools down for the morning. Even the backup generator was out. When I returned at lunchtime, Ken Averre, the avuncular Public Solicitor originally from England, looked as though he had just stepped out of a sauna. Through a series of various threats and cajoling, Ken had just managed to have the power reconnected. And the reason for the temporary blackout was, of course, an unpaid bill!

Amidst all this administrative chaos, and with the High Court beginning to hear trials again, I began my first murder trial. The murder had taken place against the backdrop of the Honiara Central Market. On a Friday morning in September of 2001, vendors arrived early as usual to set their goods on the stone tables, preparing for the arrival of customers. One vendor was Leslie Aukona. Another was Miriam Kinta, who was laying out her cabbages near where Leslie was setting up. Miriam asked Leslie if she could borrow his pen. He agreed, and after she had used his pen, she returned it to him. Soon after, Miriam saw Willie Waneburi approach Leslie. On seeing Aukona, Waneburi pulled a yellow-handled knife out of his pants and plunged it into Leslie's stomach. Other stallholders rushed to his aid. He was then transported to hospital where he died as a result of the knife wound. Willie had sped away from the crime scene in a taxi coincidentally owned by the Chief Magistrate. The taxi took him to the nearby area of Ranadi where he asked a woman named Nelly Tolifoa to provide him with shelter, which she refused to do. Eventually Willie fled back to his island of Malaita where he was apprehended by RAMSI forces two years after the fatal stabbing. These are the basic facts of the case of *Regina* v *Waneburi*, a tale of murder played out before the Honiara High Court.

The trial was due to begin on a Monday morning, and about a month beforehand witness subpoenas had been sent to the police to try to effect service on the 20 or so witnesses that the Crown was to call as part of its case. As I was soon to find out, it is one thing to send the subpoenas out, it is another to find the witnesses. As you might expect, the apparent effort expended on finding the witnesses did not really intensify until the day before the trial was due to start. I had arranged for Samuel Balea, one of our two local advocates, to be my junior counsel, to give him experience in the running of a criminal trial. I had arranged for the police to bring the witnesses they had been able to serve to the office of the DPP on the Sunday afternoon before the trial. I was due to meet them at 1.00 pm. By 3.30 pm there was no sign of any police officers or any witnesses. My level of frustration was reaching the same level of intensity as the rain that had begun to fall outside, so I decided that I had had enough for the day. With the trial due to begin at 9.30 am before the Chief Justice Albert Yalmer, and with not a witness to be seen, I was not really looking forward to the dawn of the following morning.

I arrived at the office early on Monday morning to prepare. Slowly but surely about four of our witnesses arrived by the time we were due to go to court. Sam and I threw our robes together and got a taxi to drive us the two kilometres or so to the High Court. There I rose to my feet and told the Chief Justice something of the difficulties that we had been encountering in our attempts to find witnesses. He was extremely polite and accommodating as the tales of woe that I was laying before him were no doubt similar to those that he had encountered on many previous occasions. I requested His Honour's indulgence to permit us an adjournment of 24 hours to allow us time to locate sufficient witnesses to begin the trial. He granted my request but allowed me to open the case to him by outlining the circumstances of the case of *Regina* v *Waneburi*.

By the time that we got back to the DPP's office there appeared to be a breakthrough. As a result of my exhortations we had managed to discover the whereabouts of three more witnesses, and the two Royal Solomon Island Police officers that were of central importance to our case had appeared. I arranged for one of them, a sergeant, to complete some administrative tasks and search for further witnesses. I then briefed his superior officer, an Inspector, on certain aspects of the case. After they had left, I was told that the sergeant had been suspended because he had been convicted of criminal offences and was not allowed to carry out any tasks. It seemed to be a case of one step forward and one step back. We then recalled the Inspector from the Criminal Investigation Branch and placed him in charge of operational matters.

Slowly but surely more witnesses came to the office during the day, and Sam and I interviewed them in the conference room. Nellie Tolifoa, the witness who had spoken to Willie about 15 minutes after the stabbing, had been brought in earlier by police from Ranadi where she lived. I began our interview by showing her a photograph of her house that the police had taken, where she said that Willie had approached her. She gave me a quizzical look but I pressed on, assuming some communication problems brought about by my very basic pidgin and her less-than-perfect English. Then, to my amazement, she let loose with a torrent of a story in which she was present at the market and saw the stabbing firsthand. I got Sam to translate what she was saying and I was not mistaken. She told a tale of being at the market that morning and seeing Willie actually plunge the knife into Leslie's stomach, which was a completely different story to the one in the statement before me that only began with what she had seen at a different location some fifteen minutes after the knifing.

**On the door outside the Attorney-General's Department a sign warns those who enter: "No Betel Nut". This refers to the perennial habit of the vast majority of the population to engage in chewing betel nut, a central aspect of Solomon Islands culture.**

Slowly we worked out what had happened, and a bizarre story began to unfold. The woman sitting before me was not in fact Nellie Tolifoa. She was Nellie Rebita. As so often happens in the Solomon Islands the police had simply gone to Ranadi to get a woman whose name was Nellie and who was a witness for this murder case. Their enquiries had led them to a Nellie, and without making any further enquiries, they simply brought her to our office, being satisfied that she was the witness involved in the case. And so by the strangest of circumstances I had now been delivered up a witness who was present when the stabbing took place and actually saw it, a woman who lived in the same area as our other Nellie, who happened to be at the market at the same time and who had now been unearthed as a result of sheer luck. Willie was not so lucky, as Nellie Rebita's evidence helped convict him of murder for which he received the mandatory sentence of life imprisonment.

After the trial, I experienced my first taste of life on circuit in the Solomons. I was to travel to Gizo, the capital of the Western Province, to prosecute an attempted rape trial. In the Solomons the Magistrates' Court has jurisdiction to hear these cases.

As my plane left Honiara behind and headed towards the Russell Island group we saw splendid views of turquoise water, enormous palm-fringed lagoons, sandy beaches and heavily forested mountains. On the way, the plane landed on a grass airstrip at the small village of Seghe before moving further north west to the village of Munda, on the island of New Georgia, for refuelling. This process consisted of the locals rolling three barrels of fuel across to the plane and then hand pumping the contents into the fuel tank. They stopped every so often for the captain to turn on the engine and check the fuel gauge to ensure that we had enough fuel on board to continue our journey.

For the final leg of our flight, our Captain, an islander called Cornelius, invited me to join him in the cockpit. He had fled the Solomons during the tensions and made his way to Australia and ultimately to Victoria. There in the towns of Sale and Shepparton, where he was sponsored by the local Rotary Club, he learnt how to fly. As we took off, the children playing soccer, chickens, dogs and various other animals on the runway scattered as we became airborne. We rose to our cruising altitude of only 800 feet, sweeping through the occasional cloud, and gazing on spectacular views of the islands below. Leaving the New Georgia mainland behind us we flew to the island of Nusatupe, whose main purpose is to provide an airstrip for the island of Gizo, and the town that bears its name.

The town of Gizo has been the administrative hub of the Western Province for over a century. It is tropical, and the atmosphere is breezy and relaxed. Many

*Simon Cooper holding conference on the Weather Coast.*

Gizo residents walk barefoot through the dusty streets, and those who wear "flip flops" are followed by the ever-present *clip clop* sound.

Walking across the dusty potholed road towards the entrance of the Gizo Hotel, you can see the large leaf haus that plays host to hotel's bar and restaurant. Sitting in the open air dining area gives you splendid views of the nearby islands, particularly Kilimbangara, which still has an active volcano. After checking into my room I walked to the police station where I was to meet Senior Sergeant Greenville Tanito and collect my brief in the matter of the *Queen* v *Dominic Tanaka.*

As I entered the police station, I was instantly reminded that we prosecute in the name of Her Majesty Queen Elizabeth II. Although noticeably fading, the portraits of Her Majesty and Prince Philip (circa 1953) lent a certain dignity to their surroundings. In Senior Sergeant Tanito's office, I noticed a large portrait of the Duke of Edinburgh, in full naval uniform, standing next to a fresh-faced young Prince Charles, whose birthday is celebrated as a public holiday in the Solomons.

Smartly dressed and wearing his badges of office, Greenville Tanito jumped up from his chair and greeted me with a vigorous handshake. "Cooper," he said. "I am surprised to see you." I was somewhat taken aback since he had known of my visit for at least a week. "I was expecting a Solomon Islander," he continued. After overcoming his initial disappointment he was soon to infuse the same in me. "I'm sorry," he began, and immediately I had a feeling of impending doom. "The witnesses for our case were due to arrive on the Solomon Airlines four days ago, but they cancelled the flight." And then as if to reassure me that all was not lost he continued, "But do not worry, they will be here in two day's time." Considering that the case was due to start the following day the news did not really lift my spirits. As if in a further attempt to console me he said, "Don't worry I have spoken to the Magistrate and he is happy to adjourn the case until then."

The courthouse is situated down a dirt track that runs behind the Magistrates' Court office. Here sit both the Magistrates' Court, on a daily basis, and the High Court when it visits Gizo. The only piece of majesty to do with the courtroom is the omnipresence of Her Majesty Queen Elizabeth II whose portrait appears (yet again) directly behind the Bench and above the Magistrate's head. It is the only adornment in an otherwise barren hut. The Magistrate Mr Maina sat in a slightly elevated position looking down at what is the Bar bench. I use the term "bench" as in the Solomon Islands' courtrooms they tend to be benches rather than the tables that are used in Australia. The benches are about a metre high and the top sits at an angle of about 45 degrees, which tends to make those who are appearing feel as though they are back in school, taking notes from the teacher.

Tanito entered the courtroom with a person I hadn't seen before trailing in his wake. He proudly proclaimed that he had "found an interpreter" at a church nearby. With the afternoon creeping on we began the task of calling witnesses on the part of the prosecution. As Mr Maina took his seat, we called our first witness, the complainant. An elaborate process began, which for an observer must have been a little like watching a tennis match. I would ask a question. The question would be translated from English to pidgin for the benefit of the witness. The witness would give an answer in pidgin or Shortland Island dialect, which was then translated back into English so that I could understand the response. Meanwhile an ever-increasing number of onlookers were gathering the outside of the courtroom to watch through the wire grates covering the open air windows.

Despite the complicated process of translation, the proceedings were conducted remarkable quickly. We started at 3.45 pm and by 5.30 pm, with the night beginning to close in, the prosecution case closed. His Worship indicated that he would sit until 6.00 pm but that after that it would be impossible to sit as there was no provision in the courtroom for lighting. The defendant was then called. By the time we got to six o'clock somehow, in the space of two and a quarter hours, we had managed to call, and have interpreted and cross-examined, four prosecution witnesses and the defendant. His Worship then adjourned the case for his decision, and it was only by chance two months later, whilst reading the *Solomon Star*, I learned that Domenic Tanaka had been found guilty.

This is, of course, only a small sample of the way life works here from time to time. This year the prosecutors have been involved in many cases related to the tensions, which are being heard by the High Court. The Court had three judges when I arrived, and now has six. Harold Keke and some of his cohorts are undergoing life sentences after being convicted of killing a Catholic priest, and I am about to start prosecuting four members of the GLF for allegedly executing six Melanesian Brothers who made the mistake of going down to the Weathercoast during the tensions. All in all there is plenty of work to keep the lawyers here in court for many years to come.

# Interview with Professor Kathy Laster

## Executive Director of the Victoria Law Foundation

FOR an organisation with just seven staff members working out of offices in Hardware Lane, the Victoria Law Foundation certainly makes an impact. The philanthropic arm of the law, the Foundation distributes an annual grants budget of over half a million dollars, funding projects aimed at improving the administration of justice, enhancing community understanding of the law and promoting greater access to justice. The Foundation also undertakes major projects related to these goals, such as the recently launched Rural Law Online, a website providing poorly serviced regional communities with accessible legal information. Currently, the Foundation is partnering with the National Trust to redevelop the former Magistrates' Court as part of the historic legal precinct. Aside from its grants and project commitments, the VLF also publishes plain language legal information, provides training for grantees and the community legal sector in areas such as project evaluation and management. It is also the principal coordinator for the 200 or so community outreach events for Law Week. Professor Kathy Laster has been the Foundation's Executive Director for nearly three years.

**What were you doing before you came to the Foundation?**

I started out in law reform, and was Executive Director of the Child Welfare Practice and Legislation Review — we produced the report which eventually became the *Children and Young Persons Act 1989*. After that I worked in what was then the Department of Management and Budget (now Treasury and Finance) on implementation of the then new Equal Opportunity Act and the occupational health and safety legislation. I also had a stint in practice, mainly in community legal centres, and have worked in various capacities in a number of welfare and rights-based agencies including the Brotherhood of St Laurence and the Ecumenical Migration Centre. More recently I was involved in a community development project for the City of Port Phillip. Immediately before coming to the Foundation I was an academic at La Trobe University, and before that at Melbourne University, ANU, and in New York. What appealed to me at the VLF was the opportunity to help people do really worthwhile projects with concrete outcomes, combining my research skills with my more practical leanings.

*Professor Kathy Laster*

**Tell us about the Foundation**

The law was ahead of its time in creating the Foundation, which was established nearly 40 years ago under its own Act. The Chief Justice is, ex-officio, our President, and our Board is composed of senior representatives from all sections of the profession, including a Bar Council nominee. Our statutory objects are very broad, and include improving the administration of justice and the work of the legal profession, facilitating research to advance the law, providing support for law libraries and promoting and undertaking community legal education (including in schools). The breadth of our statutory objects allows us to be very flexible; we respond to changing needs as they arise.

Grant-making is our core work, and many of our other activities stem from or support our philanthropic work. We have funded some exciting projects of late; in June, we agreed to fund a position of Education Liaison Officer at the Magistrates' Court to assist the "People's Court" to provide a better service to the community, and, by popular demand, we have allocated substantial funding to the LIV to conduct a review of the scale of costs in the Supreme Court.

Projects and programs that target disadvantaged sectors of the community are particularly important to the VLF. We have funded the establishment of the Bar scholarship for Indigenous students, which will hopefully attract more Indigenous students to the profession and support them in going to the Bar. We also promote a pro bono ethos within the profession — for example through the Chief Justice's Medal for Excellence and Community Service. Now in its second year, the medal seems to have become the Rhodes of the Supreme Court prizes, rewarding exceptionally talented law students who also demonstrate leadership and commitment to community involvement.

As government has withdrawn substantially from service delivery, it has also reduced funding agencies to a narrow band of "core" business. This has left organisations with little space for reflection, little opportunity to think laterally about their work and how it might be more efficiently delivered. Our grants encourage and support innovation across the sector. In our holistic support for project design and delivery, we have somehow ended up as the public sector's KPMG.

**How do the different elements of the Foundation's work relate to each other?**

Being a grant-maker is not just about signing cheques. Agencies with strong technical skills in their own area often lack the necessary expertise to make their grant fully effective; we assist by providing in-kind support and by match-making. For example, we recently funded research in the Children's Court on case-flow for care and protection applications for children aged 0–3. The Court lacked the very specific research skills, project design and evaluation experience to carry out such a project, so we brought in an academic. We also partnered in an Australian Research Council linkages grant, meaning that our $20,000 grant may well turn into a $200,000 project.

Many of our grants applications are for legal information projects. Through our in-house publishing capacity we have produced resources such as *The Juror's Handbook*, and we are currently developing an updated version of the *We the Jury* video, which is shown to all attending for jury service. Our publishing capacity allows us to partner with other agencies, or take on publishing work ourselves where grant seekers lack the economy of scale, publishing expertise or distribution networks necessary to get information out to where it's most needed. For example, we worked with the National Pro Bono Resource Centre to publish *The Australian Pro Bono Manual.*

People often think money is the solution, when in fact our and other grant makers' experience indicates that they could benefit more from other kinds of help. For example, through our Legal Policy Internship Scheme, we place gifted law students in around 15 public sector organisations, including the Bar Council, the Office of the Public Advocate, and the Victorian Law Reform Commission, to undertake a variety of important projects. The agencies involved enjoy the benefit of the talented "person power" of the students, while the next generation of lawyers are imbued with built-in public benefit thinking which we hope will continue to inform them when they eventually take up leadership positions.

Our role as grantor allows us to clearly identify areas where there are gaps in service or understanding. We

**Grant-making is our core work, and many of our other activities stem from or support our philanthropic work. We have funded some exciting projects of late ... Projects and programs which target disadvantaged sectors of the community are particularly important to the VLF.**

15–21 May 2005

# Law Week

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**THE HIGHLIGHTS**

Law Week once again opened the doors to law, with events fostering better understanding of, and access to law. Law Week also offered the public an opportunity to interact with those that work in the law and to explore the rich cultural history of our legal system.

Melbourne Town Hall was festooned in banners as displays and posters emerged around town (1). Speakers in legal attire, told politically correct lawyer jokes and distributed programs at rail stations around the city (2). Helen D. Harris OAM helped raise the dead at Melbourne General cemetery with her *Law Makers & Law Breakers* cemetery tours (3).

*Bigamy, Theft & Murder* was on display at Federation Square, with the Public Records Office Victoria showing the extraordinary 19thC tale of Frederick Bailey Deeming.

The Hon Rob Hulls MP, Attorney-General Victoria launched the Victoria Law Foundation free Legal Precinct Map at Parliament House (4).

The Supreme Court of Victoria hosted the Victoria Law Foundation display of *Wigs & Gowns* detailing the history and customs associated with legal attire (5).

The Great Arts Censorship Debate was hosted by the Arts Law Centre of Australia in partnership with the Victorian Arts Law Consortium at the County Court.

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take on projects ourselves as "applicant of last resort" because some projects are often too complex. For example, we are currently working to develop law@yourlibrary, a project based on the NSW model, which will provide accessible legal information in all public libraries mediated by trained librarians.

**How has the Foundation changed with you as Executive Director?**
People tell me that the Foundation used to be perceived as a bit stuffy, more like an old-fashioned type of charity. We are now, I think, seen as more facilitative and energetic. When organisations come to us wanting financial support for their project, we like to be imaginative about how we can assist them — even if they do not end up receiving a grant, we help in other ways, and try never to simply say no.

We now have a stronger focus on adding net value to grants, through, for example, our internship scheme, the integration of our grants and publishing programs, and by fostering capacity building amongst grantees, so they are better able to meet the needs of their target groups. The Board has been very encouraging and supportive in what we have done with the grants program, and we now work actively with all parts of the legal sector to achieve public benefit outcomes.

**What do you like most about your work?**
I think my job is the best in the sector! No day is the same, and I am constantly involved in new and exciting projects. I get to deal with all parts of the profession, and I have met many fantastic people who are passionate about access to justice and equity, and who are also very thoughtful. When I started, people told me that when you are a grant-maker, there is no such thing as a free lunch or a genuine compliment, but I think people really do appreciate not just the funding we provide, but the support and encouragement we offer for their work.

**What are the greatest challenges facing the Foundation?**
When I began at the Foundation, it took me some time to understand the culture of the legal profession. Even though it is a very diverse sector, it is nonetheless a tribe with its own yearly cycle, system of etiquette and pecking order. Lawyers by training and inclination are also conservative and risk-averse, and being a centre of innovation in such an environment does pose some challenges. With lawyers, things seem to be either a "scandal" or "a tradition", with nothing in between. We have often found our activities — such as holding a Portia's Breakfast to mark the beginning of the new legal year — are initially faced with some skepticism. When these events are a success, people expect us to keep doing it. There is a temptation to become complacent, but the Foundation should lead through its openness to creativity, invention and new ideas.

Building reputation, in contrast to mere profile, is a slow process. The work we do is often invisible — as it should be. The Foundation is inherently the bridesmaid, and we do not try to overshadow the magnificent work of our grant-recipients. Sometimes, the dynamic nature of the


coordinated by

Victoria Law Foundation

Law Institute Victoria

Prof Tim McCormack delivered the *Law Week Oration* and Criminal Bar Association of Victoria's *Advocating for Justice* lecture at Melbourne Law School. The audience included a number of distinguished guests including the Rt. Hon. Malcolm Fraser (6).

The Victorian Women Law Students' Collective hosted the sell out *Women and the Law Breakfast* with speakers Judge Jennifer Coate, Elaine Canty, Robin Bowles and Debbie Kilroy at the Melbourne Convention Centre (7).

The 8th Victoria Law Foundation *Legal Reporting Awards* were presented by Justice Whelan at the Old Magistrate's Court, RMIT (8).

*The Great Law Week Debate* 'Dr Who? Litigation will be the death of medical practice' saw Monash law and medicine students and alumni battling it out under the discerning eye of moderator Sally 'Dr Feelgood' Cohurn. The event was hosted by Monash Law School and the Law Institute of Victoria at the National Gallery of Victoria.

The Victorian Law Reform Commission provided an education program for VCE students of *Provoking Cinema* at he Australian Centre for the Moving Image (ACMI)

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Photo credit Eli Greig Photomedia 7

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A moot court presided over by Judge Jennifer Coate, President of the Children's Court proved a highlight of the open day activities at the Children's Court (9).

At the Magistrates' Court open day magistrate Clive Alsop, assisted by a Police Prosecutor and barrister Nicola Gobbo acting for the defence, wasted no time in 'sentencing' and 'releasing' visitors (10).

The Sentencing Advisory Council held an interactive hypothetical *You be the Judge* moderated by the authoritative and ever witty Prof Arie Freiberg.

The legal historian, Dr John Bennett, author of ten books on the lives of Australian Chief Justices discussed his research into the lives of the Chief Justices of Victoria in a talk at Melbourne Law School entitled, *Judicial Biography: Does it matter?*

Family Mediation Centre, Relationships Australia and Centacare Catholic Welfare Services provided family mediation information at the new City Library in Flinders Lane.

The Legal Women's Choir were seen revelling in the glorious acoustics under the dome at 333 Collins Street.

Overall some 10,000 people participated in over 100 Law Week events across Victoria.

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organisation can be an obstacle to due recognition. While our responsiveness to changing needs is a great strength, that flexibility does not lend itself to an easy "tagline". I could name scores of examples of the crucial contribution the Foundation has made to the justice system: we funded PILCH's establishment and first five years of operation, we have been vital in championing plain language legal publishing, we supported early, ground-breaking research into court delay and case-flow management (when Ian Scott was Executive Director), and we funded the establishment of many specialist legal centres like Villamanta, the Consumer Credit Legal Service, and the Communications Law Centre. But memories are short, and you're only as good as your last grant.

On a quite different level, the introduction of the *Legal Profession Act 2004* means that the Foundation is no longer a named agency entitled to funding from the Public Purpose Fund, and must compete with any and everyone else for project funding. With no right to infrastructure support, there is potential concern about preserving our independence. Funding worthwhile projects on a basis of need (rather than the preference of the government of the day) has always been a hallmark of the Foundation's achievements. It is ironic that the VLF is facing uncertainty about its future at this point; the Foundation plays such a unique and important role in the justice system that if we didn't exist already, they'd have to (re)create us!

**Funding worthwhile projects on a basis of need (rather than the preference of the government of the day) has always been a hallmark of the Foundation's achievements.**

**What do you hope to achieve with the Foundation?**

Our three-year strategic and corporate aim is "to become and be acknowledged as a model public benefit organisation". Over the last two years, I think we have achieved the first bit: we are now very lean, and have accordingly been able to increase our grants budget five-fold, and we have developed important projects that will leave a valuable legacy. But it is sometimes difficult for people working in the hard-edge of the law to understand what a philanthropic body does and why we need it. Just by existing, the Foundation encourages innovation, by offering the possibility of support. The challenge now, in a politically volatile climate, is to consolidate the goodwill we have generated into an enduring support base.

**What do you do when you're not working?**

My children say that I don't have a life, but that's only partly true. I sing with the Legal Women's Choir, and music and theatre are very important to me. My partner and I also have a weekender where we grow very organic but very unproductive vegetables — just as well we keep our day jobs.

Work/life balance is important, but coming from an academic background I think the boundaries for me are much more blurred. I genuinely enjoy writing, reading and thinking, so I don't feel these are "work".

# Working Nets

Richard A. Lawson

I shouldn't encroach. Examining the different uses and meanings of words is something that Julian Burnside QC does, if I may respectfully say so, exceedingly well. So I trust that I shall be forgiven for examining just one word. It is "network".

It probably comes from "net" and "work" — two little words that decided to team up. I can't think of many other words that have been happy to join "work". Most just sit beside it without actually joining. Thus one has fast work, hard work, dirty work and nice work (if you can get it). However, a batsman needs good footwork rather than good foot work.

So what is "network"? The results of fishermen and fisherwomen repairing their equipment? Whatever it is, it's not quite the same as "a network". Putting the "a" at the front makes for a change because "a network" can bob up in all sorts of places. Indeed, it would seem that "a network" can be inanimate or animate. Public transport can have a network. Telstra does, apparently. Scientists look down their microscopes and see little ones or look through their telescopes and see big ones. And this has been going on for quite some time. Didn't the ancient Romans have a road network, even if Julius Caesar never used an expression that resembled "via netalabora"?

The trouble began with animate networks — in particular those that can be ascribed to individuals or groups of people. Here it should be clearly understood that it is not necessarily a good thing to have a network. One should hesitate before saying "I have a network" (as opposed to a dream) because this could be regarded as an admission against interest. Unless you enjoy solitude, it is preferable to have a circle of friends rather than a network of them. A network of friends sounds odd. People will think you have chosen the wrong collective noun.

Accordingly, I have come to the tentative view that, for individuals and groups, networks should be treated with caution,

*Just Chatting: Richard A. Lawson*

if not suspicion. Spies have networks. Terrorists have networks. But surely not barristers.

The trouble worsened, of course, when someone decided to turn "network" from a noun into a verb. Remember verbs? The active ones were where something was happening. I walk, you walk, he walks, she walks. The passive ones were where, again, something was happening but less obviously so. I worry, you worry, he worries, she worries. Now, alas, we have to put up with people networking. I network, you network, he networks, she networks. I don't like it at all. For a start, what does it mean? What exactly is one doing if one is networking? It is a difficult question to answer because "to network" is a verb close to the traditional active–passive dividing line.

**For individuals and groups, networks should be treated with caution, if not suspicion. Spies have networks. Terrorists have networks. But surely not barristers.**

I am told that a dictionary definition is difficult to formulate. It is easier and more helpful to give examples. A trained observer can identify networking when they see it: "Look, over there, those people are networking"! Apparently it is becoming an increasingly common feature of Bar Dinners. Here it can be seen moving up the hierarchy like a wave. Readers network juniors, juniors network silks. But I understand that the reverse is uncommon. As a rule, nobody networks readers.

People who are actually in the throes of networking, may not even be aware of it. I may even have unconsciously indulged myself at this year's Dinner when, at the time, all I thought I was doing was chatting to the others on the table. It remains an open question, incidentally, whether, if one is not oneself networking, one can "be networked" or one can "get networked". For all I know, I may have been or gotten networked at this year's Dinner. But I flatter myself I suspect that very few, if any, colleagues would want to network me. Yet people who don't knowingly network may be the most susceptible to being or getting networked themselves.

There is a further question which should be explored but the relevant research is a bit thin. Once you have been networking for a while, do you have a network or are you in one? I think that it would be nicer to have one than to be in one but who can say? Things could get very sticky if one were in a network and didn't like it. It might be very hard to get out. You could even end up lost in a network (as opposed to a masquerade).

Networks are probably not very noble things, but I fear that they are here to stay.

Do you want to be an advocate or a networker? If only they were mutually exclusive.

# *The Queen* v. *Edward "Ned" Kelly*

## A theatrical representation of the trial of Ned Kelly

*Bernard Caleo as Ned Kelly, Geoff Smith as You*

Kelly stood trial on 28 and 29 October 1880 for the murder of Constable Thomas Lonigan at Stringybark Creek on 26 October 1878.

ONE hundred-and-twenty years after his trial, Thomas Wright and Nicholas Harrington wrote a theatrical representation. With minor revisions by Judge Michael Strong, this was performed as a reading at the 18th Biennial Conference of District and County Court Judges of Australia held in Melbourne's magnificent County Court building in June 2005.

Readers may recall the first performance of this work in 2000 where the re-enactment in the Supreme Court was followed by the re-trial on which, it should be noted, the current Chief Judge of the County Court appeared to defend the prisoner. (*Bar News* Winter 2000).

In the 2005 reading, the characters

*Thracy Vinga as James Gloster and Nick Harrington as Dr Samual Reynolds.*

*Paul Elliott QC as the prosecutor Smyth.*

*Nick Harrington, director.*

*Judge Fran Hogan addresses the judges.*

*Colin Duckworth as Sir Redmond Barry.*

*Julian Ireland as Edward Living.*

*Kelly and the Judge.*

*Mark Robins as PC McIntyre.*

*ng Bindon and Judge Michael Strong as Old Bindon.*

were in costume, but were mainly static. The challenges therefore were to engage the (mostly) judicial audience; to do so without the benefit of action, or variable lighting; to do so in the broad daylight and open surrounds of the majestic Waldron Hall — and all of this early on a Sunday morning following the Conference's "Big Night Out" at the Essoign Club the night before.

The cast who faced this task under the direction of Nick Harrington were Bernard Caleo as Ned Kelly, Judge Strong as the narrator — Old Bindon — the barrister who represented the prisoner, looking back on the ignominy of his inadequate representation, Geoff Smith as Young Bindon at the time of the trial, Paul Elliott QC reprising his role as prosecuting counsel Smyth, Colin Duckworth as Justice Redmond Barry, and Mark Robins, Thracy Vinga, Julian Ireland and Nick Harrington as various police and civilian witnesses.

And rise to these challenges they did! With few rehearsals, the performance went off without a hitch and the powerful script, adapted faithfully by the writers from newspaper accounts of the period, carried the audience along with it. The extraordinary exchange between Kelly and Redmond Barry before the sentence of death was passed was truly moving. The audience not only turned up for the performance, at 10.15 am, but remained awake — perhaps due in no small part to an excellent warm-up session from 9.30 am from Professor Arie Freiberg, Dean of the Faculty of Law, Monash University and Chair of the Victorian Sentencing Advisory Council. He made the topic of sentencing a stand-up comic sensation. No transcript is available.

*The Court scene.*

This performance of Tom Wright and Nick Harrington's work was an excellent one, warmly received and highly praised by the audience. Thanks go to all those who helped make the production possible, including the County Court staff who helped behind the scenes. The Irish connection was maintained with an introduction by Judge Fran Hogan of our County Court and with Judge Kevin O'Connor of the New South Wales District Court, who happened to bring his violin to the Conference and, with overnight notice, played an Irish air as a most fitting overture.

Judge Meryl Sexton

# The Essoign Wine Report

## By Andrew N. Bristow

### M. CHAPOUTIER AUSTRALIA 2002 SHIRAZ

M. Chapoutier Australia is the first joint venture abroad for the renowned Rhone Valley firm. The 55 hectare estate at Mount Benson is part of the Limestone Coast region and is cultivated with organic methods.

The grapes for this wine are destalked and are vinified in opened concrete vats. Fermentation and maturation lasts between three weeks and a month. After pressing, the wine is put into French barriques for 10–18 months' ageing. The percentage of new wood does not exceed 20 per cent in order to encourage the fruit aromas and characteristics of the wine to develop fully.

The wine has a bouquet of blackcurrant and blueberries and some peppery smoky overtones.

The wine colour is an intense red colour.

The wine has a very round structure, slightly woody and very soft. It has discrete round tannins with fruit throughout, with an aftertaste of limestone from the soil. This wine is ready to drink now, but should improve with two to three years' cellaring. It is available from the Essoign Club at $31.00 a bottle ($26.35 takeaway).

I would rate this wine as a junior planning Barrister, expensive but pleasant and able to do the job competently.

# A New Court for Victoria


On Friday 9 September 2005 in the presence of about 300 distinguished persons, judges and guests, the Attorney-General of Victoria, the Honourable Rob Hulls, and the Minister for Children, Sherryl Garbutt, launched the first Children's Koori Court in Melbourne. Created under the *Children and Young Persons (Koori Court) Act 2004* — the first legislation of its type in Australia — its principal mission is to help reduce the overrepresentation of indigenous children in the criminal justice system. This new division of the Children's Court will have its first sitting on 6 October 2006.

THE Children's Koori Court is an initiative following the success of the four adult Koori Courts at Shepparton, Broadmeadows, Warrnambool and Mildura. The Koori court is a pilot program and constitutes the implementation of one of the major recommendations from the State Government's Aboriginal Justice Agreement with Victoria's Koori communities, designed to tackle the alarming rate of indigenous over-representation in the criminal justice system.

The launch began with a traditional smoking ceremony; the gutteral sounds of a didgeridoo; three traditional dances performed by young persons from the Code School; and warm welcomes from representatives of the Koori community Peter Rotumah and Aunty Joy Wandin Murphy.

In his remarks launching the Court, the Attorney-General said:

"Every story has a beginning, a formative stage that shapes it and lays the foundations for the road ahead. Most people understand this and increasingly we emphasise the importance of the early years of life, as we talk about nurturing and reading more to the nation's children; as we lament precious time lost to detention for those children the nation does not claim; as we imagine the despair and bewilderment of those on whose theft and grief this conflicted nation was built. Despite this, the significance of beginnings seems to elude some in high office, those who would start our story in the middle, a tale of ANZAC and the quarter-acre block. In doing so, in failing to acknowledge or take responsibility for the past, these people and their wilful blindness condemn our shared account to a tarnished and unresolved future.

In Victoria things are different. In Victoria, we know that until we make amends for the destruction and denial in this nation's early chapters — until we tackle it, resolve it, redirect it — the stain will remain on the episodes to come. Reconciliation is as much about our future as it is about the past.

There is a continuing challenge before us, and the jurisdiction that we launch today represents one way that we can respond to it. This court embodies our shared recognition that, just as genuine reconciliation depends on acknowledging and rectifying the early chapters of our collective story, so it depends on cementing a positive future for what, in my view, are this nation's most vulnerable youth.

Few people would deny the susceptibility of indigenous young people. Tragically, in this state alone, Koori kids are nearly 10 times as likely to be the subject of child protection orders or in out-of-home care and, just as tragically, indigenous youth are over 16 times more likely to be in juvenile detention than non-indigenous Victorians.

These figures are even more appalling than the equivalent for Koori adults and,


*Dancers from the CODE School at the opening ceremony of the launch.*

*Police Commissioner Christine Nixon and the Minister for Children, The Hon. Sherryl Garbutt.*

*The Attorney-General presents an art prize at the launch.*

given that approximately 57 per cent of Victoria's burgeoning Koori population is under the age of 25, the urgency of this predicament is even more profound. We cannot forget the Royal Commission into Aboriginal Deaths in Custody's unambiguous warning that the tragic reason for "the disproportionate number of deaths was not the rate at which Aboriginals were dying in custody, but the rate at which they were being taken into custody". We must, therefore, keep striving to reduce this rate — to divert indigenous Victorians from the unforgiving cycle of the criminal justice system.

It is, of course, my hope that this inaugural Children's Koori Court will follow in the larger footsteps of its adult equivalent. Now operating in four locations around the state, the adult Koori Court jurisdiction is, quite frankly, the "resounding success" for which we had all hoped, its achievements reflected in the removal of its sunset clause by Parliament earlier this year. Dr Mark Harris of La Trobe University conducted a two-year evaluation of the program and found that it has significantly reduced recidivism, in turn reducing over-representation in the prison system.

The evaluation also indicated:

- reduced breach rates for corrections orders and failures to appear;
- increased Koori community participation in the administration of law;
- a less alienating forum for defendants;
- a mechanism for taking cultural considerations into account in sentencing;
- integration of service providers involved in tailoring corrections orders;
- reinforcement of the status and authority of Elders and Respected Persons, thereby strengthening the Koori community, and;
- effective broadcasting of the Koori Court vision, to the extent that they have received support from some sectors that had previously been sceptical.

Participants, including police, indicate that, rather than considering the Koori Court to be a less serious option, defendants appear to be far more confronted, particularly given the presence of Aboriginal Elders and Respected Persons, whose importance cannot be underestimated. Well, I want to see the same steady decline in Koori young people sitting in prisons and police cells, and instead see them completing their CBOs, reconnecting with their families and culture and, one by one, shaking off the vicious cycle of crime and alienation.

The Children's division will, of course, also be a two-year pilot. However, it is my hope that its philosophy of support, its informal atmosphere and its emphasis on strong family ties will answer the call from the Royal Commission into Aboriginal Deaths in Custody for greater reinforcement of the family and, with great humility, go a small way to mending the fractures of the past.

Unlike the Koori Court story, however, the national story is at a crossroads. We must seize every chance that comes our way to wrest it from its initial violence and tragedy and propel it into healing and, ultimately, happier waters. We are the authors of this tale — we dictate

the plot, and decide what characters and qualities endure. We can make its remainder inspiring, and can mirror its promise in the individual stories of all those who come before jurisdictions such as this we launch today. As a nation, as a wider community, we owe an enormous apology to the indigenous children of yesterday — to those who have grown up swimming in grief and who, as adults, still carry their quiet despair — a legacy that drips down the generations. I can think of no better development in our collective account, then, than to show compassion and respect to the indigenous children of tomorrow — to give them the tools to write their own story; to steer them out of contact with criminal justice system and, instead, to send them home."

In responding, the President of the Children's Court, Judge Jennifer Coate, said:

"It is a moment of such mixed emotions today. I feel personally proud to be able to lead the court at such a moment in the 99-year history of the Children's Court of Victoria.

As a Court we feel optimistic and enthusiastic about what the Koori Elders and Respected Persons will be able to offer us and the young Koori people in this new division of the Court to whom we must apply the law applicable in this State. To have their assistance in engaging young Koori people and their families and to have the benefit of their wisdom and words to us and the young people and their families is an invaluable addition to our work.

But that pride I feel today is tempered with sadness and sorrow at the history of the justice system and the law generally as it has impacted on the lives of many Koori people in this State, as it has been a sorry one indeed. It has been a history of sadness, despair, bewilderment, trauma and tragedy.

I have been and continue to be uplifted and inspired by the capacity of the many and varied Koori people involved in this project (despite that sorry history) to agree to walk together with us into court and to make new history — one that contains hope and healing. Personally, I feel compelled to observe and remark upon the strength and courage and resilience of the Koori people who have supported and encouraged the development of this court and the trust they have implicitly placed in us to work with them in that development.

To be able to see and feel and hear that strength of purpose and commitment is nothing less than inspirational to those of us from the non indigenous community lucky enough to have been involved in this project.

We started this work in June of 2004 with the establishment of a state-wide reference group made up of a cross-section of community and government agencies including Koori organisations, Rajac reps, VALS and VACCA, Vic police, the indigenous issues unit and Juvenile Justice and VLA and the court. This group was responsible for developing an appropriate legislative and operational model.

*President of the Children's Court of Victoria, Judge Jennifer Coate.*

Whilst our Koori Children's Court model has drawn heavily on the experience and learning of the adult Koori Court model, from the outset, it has been agreed that a Children's Court model must be adapted to children and young people and therefore contains some significant differences.

It was important for all of us to emphasise that part of the purpose of the Koori Children's Court was to achieve more culturally meaningful sentences for young Koori people, to endeavour to engage them and thereby assist them to choose a life path away from further offending.

It was also important that young Koori people were not persuaded to consent to the jurisdiction of the Koori Court by having to plead guilty, so it was decided that the Court will also hear matters where a young person as been found guilty.

We also thought it important not to exclude those matters where family violence formed part of the offending as we noted that those young persons may well be most in need of the support and guidance available to them through the Koori Children's Court.

In preparation for our first sitting on 6 October, in the last week of August most of the court staff and all of magistrates who will sit in this first Children's Koori Court Division participated in a training program with the Elders and Respected Persons together with some lawyers, police prosecutors, and juvenile justice workers and some of our court clinicians, including our director Dr Pat Brown.

It was a week full of laughter, sadness, wisdom, discussion, watching, learning, listening and thinking and powerful words and thoughts. We all learnt a lot about a lot of things and I again wish to thank in particular those Aboriginal Elders and Respected Persons who participated in that week. Without them, the entire experience would have been stripped of its richness and quality.

Just before I finish, I want to single out one person who amongst many other tasks was responsible for putting that training together and ensuring that everyone was looked after, but most importantly our Elders and Respected Persons. She has also put in a huge amount of personal effort and time in travelling around to many metropolitan Aboriginal communities explaining to and encouraging elders to participate in the Koori Courts generally.

Anyone who saw Rosie Smith during our training week participating in our mock Courts would now be anticipating that she might be about to get a Logie for her performance as the errant niece of her Uncle Daniel. That is not my gift to give Rosie, although you deserve one, but equally you deserve the recognition of this Certificate of Appreciation for your excellent Service to the Elders and Respected Persons of the Koori Children's Court.

I know this new Division of our Court will be a great success and thank you to all of you for being here today to give it the spirit of cooperation and hope our young Koori people coming to it both need and deserve."

The launch concluded with a musical interlude performed by Mr Kutcha Edwards. After the last notes had died down, the real buzz was felt, the palpable sensation that something new, hopeful and worthwhile had just happened.

And it won't do barristers any harm, either.

# 2005: the Threat of Recession – 1990s Unlearned?

## The illusion of Bank finance and the use of residential equity

Tony Radford

*Tony Radford*

ON the eve of a new tax year I write with an interest in public affairs.

I write prompted by the apparent lack of public consciousness of and/or the apparent lack of public reaction to the recently published figures in the metropolitan dailies in Australia (March–May 2005 inclusive) of the levels of private debt by Australian citizens to Australian banks over the years 2000–2005, particularly since mid-2002. (Most of the investment was by onshore or permanent residents.) These levels do contrast with the final phase cooling of the Australian residential realty market in the second quarter of 2005, following the March 2005 increase of 0.25 per cent in bank rates as authorised by the Reserve Bank. Earlier similar rises occurred in May and June 2002 and November and December 2003.

The absence of a consciousness or a reaction to the size of the debt is mirrored in the failure by Australian Federal Government and semi-government regulatory authorities to bring in legally enforceable effective mechanisms to restrain unmitigated excessive borrowing by persons and companies (and by banks from overseas sources). Governments have looked at mirrors whilst twiddling their fingers, unable or unwilling to interfere further in the area of private consumer decisions (including those by companies) on matters of free enterprise.

Commencing in 2000–2001, the more prominent features of the Australian economy for the last five years (at least to the end of March 2005) have included: the general stability of the economy; the increase in the strength of the Australian dollar; heavy investment in residential realty markets in capital city metropolitan areas and surfcoast areas relatively close by; strong commercial investment by developers in greenacres, bayside and in-fill areas; considerable consumer spending on whitegoods, furniture, personal apparel, holidays, travel and motor vehicles; lastly, the low interest rates themselves and the absence of any real inflation.

Considerable realty investment has occurred, with substantial numbers of home owners using equity to seek investment in not only second but third properties, including properties in outer urban and country areas. Additional features of the residential realty market include use of trumped-up hype for realty prices; the use of hype and the incidence in 2000–2001 of the Federal Government first home buyer's $7,000 home deposit scheme (and its variations) and in Victoria the Victorian Government's $5000 grant; the hype and this scheme combined with aggressive and competitive advertising by banks and other financial lenders. The highlight of this advertising was perhaps a sustained campaign by the CBA on GTV 9 in the 2002–2003 summer Test Cricket season in Australia, using the words "equity, ma … a … ate"), one ad featuring a top order batsman.

Each Australian capital city together with adjoining residential areas has its own residential market. This includes the more populous Sydney area, with limited access to harbour views and chronic under supply of reasonably priced residential properties, a feature almost replicated — but in a slightly cheaper environment nonetheless — in Melbourne, with six or seven precociously priced inner suburbs.

At least within the Melbourne metropolitan area there are additional pressures exerted by the enforcement by the Victorian Government and local Councils (the latter at times reluctantly) of the new planning policies (*2030, Greenwedge & ors*).

The driving of demand of both old properties and new, especially within the "inner/middle-ring" suburbs to prices barely tempered by the rate rise referred to earlier, is one effect of these policies. Ultimately, and sometimes with rapidity, these prices influence others further out from the CAD.

The net effect of the rise in realty(debt-fuelled) demand has resulted in entry levels for new (first) home buyers to be way in excess of market predictions. Those levels did not deter 175,000 persons entering the market aided by the bonus, at least to end March 2005.

These features and others have seen Australian financial lending institutions lending to borrowers here, and themselves borrowing offshore, at levels unparalleled, surpassing even the mid-1980s investment surges. (The latter was canvassed by this writer in the article "Investors' thoughts from abroad — lending in the Australian Economy — 1980–1991" in the *VBN* No. 83 Summer 1992). The borrowings of the "LandBoomers" of the late nineteenth century appear quite tame compared to the twentieth century phenomena.

Much of the current lending for residential real estate has been, at least

since 2002, at prices not capable of being sustained or maintained in the intermediate or long term.

Negative gearing — a more major factor — was alive and well in place by the early 1990s.

*The Age* in late June 2005 contained a report of false claims for grants totalling $4.1 million and of this money to be the subject of recovery steps by the Victorian Revenue Office (which administers the schemes within the State).

Both negative gearing and the home grants scheme may need to be reviewed by all governments together with housing policies if there is a broad acceptance of the need to find better ways to increase the stock available for first home buyers at much lower levels of entry.

In the climate of the features of the economy referred to above, for the past five years particularly at the peak of residential prices, it is relevant to pose a number of questions. One wonders precisely what questions — reflecting due care (and/or diligence) — were asked by institutional and other lenders and their advisers legal and otherwise and on the other hand by would-be-borrowers and their own advisers legal and otherwise as to the nature and quality of the proposed investment — all this before documentation. Some basic questions can be raised.

1. Whether the lender seeks to lend in the transaction at all?
2. Whether the lender should prudently seek to lend as much as they have sought to?
3. Whether the lender should not seek more than one property as security?
4. Whether or not the lender should take additional securities as well as real securities?
5. Whether or not the prospective lender is in possession of a written valuation, especially one based on a list of parcels of realty of comparable qualities?
6. Whether it is prudent to lend beyond 75 per cent or at least 80 per cent of the "alleged" (market) value of the proposed realty?
7. Whether or not the prospective borrowers should not be wholly responsible at least for the first 10–20 per cent of the purchase price by way of deposit?
8. Whether the borrowers have a proven capacity:
   (a) to save for the deposit or pay for it from established reserves; and
   (b) to fund any new regular payment commitments under any proposed mortgage(s) from their own financial resources?
9. Did the prospective borrower sight a written valuation of his own before bidding?

At least prior to the 1990s it was regarded as standard banking practice in Australia to practice fundamentals such as ensuring the amount borrowed was not disproportional to the intrinsic value of the realty and to ensure that the would be borrowers had at least a 10 per cent ownership in a property by way of paying for the deposit themselves from their own resources. A more basic theme/tenet was to ensure that the amount loaned was equalled by the amount of actual cash held by the bank at the time of the loan.

One of the features of the borrowing splurge of the past five years is a sudden focus by banks on an apparent "source" of finance which had been apparently overlooked by potential consumers. Others had never even thought of a second investment.

**Much of the current lending on residential real estate, has been at least since 2002, at prices not capable of being sustained or maintained in the intermediate or long term.**

The CBA advertisement of "equity, ma ... a ... ate" was an interesting ad focusing on home owners — the latter pictured in dwellings of various types and sizes (albeit with emphasis on the male owners). The pitch was at "middle" Australia. These advertisements were seen as novel, merely conversational, vaguely amusing if not benign. They were perceptively as harmless as a leisurely haircut, or a workout with a Pilates expert or a personal trainer.

Another feature was of "spending the kids inheritance" pitched at the vendors' market. The legitimacy of this can be questioned.

Free enterprise reigns — but what happened to the "nest egg" and the de facto superannuation in the solid family home? Ever heard of "overcapitalization"?

Ever heard of overspending?

There are many facets to society in Australia. Aspects of consumerism include the public in buying items including realty, their mood to do so shaped in part by their own perceptions of need, the time spent in searching for the "right buy", but also by what they think they ought to do in terms of what their neighbours or peers would think if they did not buy realty or personalty and/or have just a hint of large expenditure every now and then. Further, bragging can always be tolerated and tales can go on in ever-increasing circles. Estate agents' firms rise and fall in such a climate, at least in Melbourne where transfers of estate agents from one firm to another seem to be more prevalent in the past five years (and to rival that of the exit of has-beens from AFL clubs to others and back). At least one of the more prominent (Melbourne) estate agents on a billboard erected mid-June 2005 proclaimed: "... We are responsible for the boom."!

The Federal Government has taken no fresh steps to restrain excessive borrowings by the Australian public since the mid 1990s. It has itself largely concentrated upon attempting to encourage confidence and buoyancy in the economy with tax handouts and other reforms favouring the taxpayer, FTAs and the like.

It has equated spending growth at large with success and happiness for all.

Spending as such has taken place. But such spending has been without regard to the consequences. This is the policy and result of the application of strict laissez-faire.

The Commonwealth Government has sought at times to stress its own fiscal responsibility. It has further sought to lampoon the Keating threat of the banana republic of the late 1980s and early 1990s and to remind the public of the (peak) 17 per cent interest rates which then occurred.

Let it be accepted that the Reserve Bank of Australia operates under its own act and charter.

It is submitted that at least since 2002 there have been far too many public statements emanating from the Parliamentary side of Government in Canberra — through either or both the office of the Prime Minister or that of the Treasurer — not of course within direct hearing or sight of the Reserve Bank — but noting that it was not the right time to raise interest rates. This theme continued throughout the 2004 election period. It has continued unabated.

Such statements portrayed great naivety about fairly significant parts of the economy (such as the rural sector

and the effect there of the long drought in particular) as well as ignoring the dangers of an over-spending population alive in rampant consumerism. (No interest for twelve months and like phrases have been common in the retail sales sector.)

One might, however, have expected that good corporate governance applied to both Government and private industry and business, supposedly all working together for the benefit and for the welfare of all people, not merely the shareholders of the banks.

One of the features of the Australian political and social landscape of the twentieth century and the twenty-first century has been that members of the public are largely unaware of the extraordinary levels of private debt of farms throughout Australia.

This feature, in a sense, was reflected in late 2004, when the Federal Treasurer read the full budget speech in 30 minutes. In the speech there was not one significant reference to drought crisis nor any suggestion of the warranting of a scheme for a subsidy to needy farmers.

A scheme was announced in May 2005 — six months later, after a much publicised trip to the back of Wentworth by the Prime Minister. It was better late than never.

However, still nothing has been said by any senior (or other) Minister about the amount of private debt — in any sector.

This is a "head in the sand" attitude by the Federal Government and other authorities.

The most recently published sets of figures showing the current levels of private debt, and further figures showing the quarterly levels of the Balance of Trade and the Balance of Payments, bring sharply into focus the danger of repeats of the errors of the 1990s recession. The mountain of individual farm debt is now to be ranged alongside the individual household borrowings in the non-rural sector. It is noted also that current bank card credit levels are an average of $2,500, also.

Overseas borrowings by banks are of tsunami proportions.

Significantly, the 0.25 per cent rate rise of March 2005 led to a "cooling off" of realty prices, a cooling off that was long overdue. It has been the only step taken by any Federal authority.

There may be no necessary connection in general terms between this cooling off and a fluctuation of prices on the ASE in late May 2005 of Multiplex Constructions and Mirvac and later relevant press articles about each company and also by one of them.

Nonetheless, there are timely warnings to the industry at large and ought to be to consumers in general, particularly in the residential realty markets, about the dangers of excessive investment and excessive prices in domestic realty. Comparisons suggest that house prices reached in mid-2004 are way in excess of comparable prices overseas. Reduced levels of Australian retail purchases reported in August 2005 appear to be of diverse origin, including the prolongation of the drought reflected in far higher temperatures in Autumn and a tightening of general consumer spending initiated by customers themselves.

The echoes of the excess borrowing of the late 1980s and 1990s, evidenced in the Tri-Continental and Estate Mortgage fiascos, are one matter.

The author's concern is that like the availability of water, it takes time for people to realise that excessive use of one resource asset will diminish its availability and also — contrarywise — will considerably raise its price.

It is suggested therefore that the lending institutions, their shareholders, advisers commercial and legal of lending institutions, the borrowers in the Australian financial markets and their advisers legal and commercial, take a good long hard look at the size of personal debt in the Australian economy.

Further, Government and semi-government authorities should be rigidly independent and independent of each other in giving far better protection for the public than has been accorded by the regulatory regime since the mid 1990s. This is because the borrowings that have taken place are exorbitant and grossly excessive.

It has been extraordinary that post 2000, there has been only five rate rises, each of only 0.25 per cent. These occurred in the face of the continual sharp rises in the residential house prices. These rate rises were too late and too little.

Australians have had a good time in the past five years running rampant in the chocolate factory.

It is time now that they lose weight and dine more lightly, ignoring the quiet entreaties of the real estate auctioneers.

Canberra should also take note.

*A copy of this article, written in late June 2005, was sent to the Governor of the RBA. Receipt of it by him was acknowledged by the Secretary of the RBA (as requested by the Governor), but without comment.*

*The article now published has been updated to take account of events to the date it was submitted to the editors in late August 2005.*

# Mate

THE serious business of parliament descended into solemn farce on 18 August 2005 when security staff received an important memo. They were forbidden, it said, to address parliamentarians as "mate". This tiny, ridiculous incursion into the domain of manners and language sparked a lively debate.

The edict was withdrawn within 24 hours. In the meantime, parliamentarians competed with each other to display their hearty egalitarianism. This was especially noticeable among those of ostensible proletarian disposition, but conservatives were equally anxious to avoid the unhealthy taint of aristocratic pretensions in public. Mr Howard is famously given to calling people "mate" when moving among the public.

Hansard records the following:

> Unparliamentary Language
>
> Mr PRICE (3.18 pm) — Mr Speaker, can you confirm that attendants and security personnel have been banned from using the word "mate"? Could you advise the House what is unparliamentary or un-Australian about the word "mate"?
>
> The SPEAKER — I thank the Chief Opposition Whip. I am not aware of the point that he has raised, but I will make some inquiries and report back as appropriate.
>
> Mr ANDREN (3.18 pm) — Mr Speaker, mate, do you intend to make a statement about the correctness of the eviction of the member for New England from the chamber yesterday and why he was asked to withdraw the word "bribe" …

In the Senate the mood was similar:

> Senator SIEWERT (Western Australia) (1.27 pm) — If you were to ask someone to guess which country you were talking about when you described a place where the right to silence was being removed and workers could be thrown in jail for failing to incriminate themselves or dob in a mate, …?

*Mate* is a very old word, but Senator Siewert captured its Australian connotations perfectly. *Mate* is first recorded in the 14th century. Johnson equates it with the Saxon *maca* and the Dutch *maet* — a match, an equal; and the Icelandic *mate* — a friend. The OED2 says it comes from the old Teutonic word *gamaton*, meaning messmate. A *messmate* is one who shares a meal: it is an exact parallel of *companion*: a person who breaks bread with another (Latin *com-* with + *pan-is* bread).

*Mate* has a variety of meanings. Johnson, with his customary succinctness, offers: A husband or wife; a companion, male or female; the male or female of an animal; one that sails in the same ship; one that eats at the same table.

The restrained prose of the OED2 gives the following senses:

> A habitual companion, an associate, fellow, comrade; a fellow-worker or partner. Now only colloquial. See also messmate, playmate, schoolmate.
>
> A form of address by sailors, labourers, etc.
>
> One of a pair or one of a wedded pair. A fitting or worthy partner in marriage.
>
> Of things: The fellow of a pair; a counterpart or parallel. Thus: "Every Nerve hath its mate or Companion". (1668 Culpepper & Cole Bartholomews Anatomical Manual.)
>
> A point on tramway lines which is cast solid and pairs or "mates" with the movable tongue or switch on the other rail; an "open" or "fixed" point. orig. U.S.
>
> Nautical uses. a. An officer (now only on a merchant vessel) who sees to the execution of the commands of the master or commander, or of his immediate superior, and in the absence of the master takes command of the ship. In the Royal Navy the title has been changed to Sub-lieutenant.

It will be immediately obvious to Australian readers that these definitions, although not inaccurate, are not complete: they do not capture what *mate* really means in Australian vernacular English. *The Australian National Dictionary* (Oxford, 1988) does a bit better:

> An equal partner in an enterprise; an acquaintance, a person engaged in the same activity; one with whom the bonds of close friendship are acknowledged.

*The Macquarie* (3rd ed, 1997) offers, along with the usual standard meanings "… a comrade, friend, intimate; a form of address 'how are you going, mate'; and (formerly) one of two men who helped each other without formal agreement in usually hard tasks, as fencing, land clearing, goldmining etc …"

By contrast, in 1859 in *Life in Victoria* W. Kelly wrote that *mate* was "the fashionable colonial term". One hundred years later, Sidney J. Baker wrote in *The Drum* that *mate* and *mateship* are "… standard English in all the senses used in Aust., although they are probably used more often in Aust. than elsewhere. The main Aust. contribution has been in sentimentalising the terms."

Especially during times of war, Australians have valued mateship above most other values. In the trenches of France, at Gallipoli and Tobruk and Bougainville, Australians knew what a mate was, and the word was valued and the sentiment was genuine.

John O'Grady (who, under the pseudonym Nino Culotta, wrote *They're a Weird Mob*) discussed *mate* in "Aussie English" (1965) and caught both its emotional force and its odd ambivalence:

> Your best friend. When your mate is in trouble, you go to his assistance, no matter what he's done. The word is also used loosely as a general form of address for acquaintances and strangers. "G'day mate", "How ya goin', mate?" … etc.

This gets to the heart of it, and illustrates the problem of it. When used to refer to another in the third person, *mate* is a word which carries the stamp of genuine intimacy. This is the sense which only Australian English gives it. But in casual use as a mode of address it carries no claim to special affection, just a carefree assertion of social equality. Perhaps this is why it sounds oddly unfit on the lips of politicians. When politicians say *mate* to

a member of the public (generally during an election campaign, typically in a factory where they affect cheerful interest in obscure industrial processes and a hard hat) it is obvious that the word carries neither a bond of intimacy nor any genuine sense of equality: the politician could not bear to work there, and the workers look at the politician with the curiosity reserved for members of an alien species.

When push comes to shove, Australian politicians wish to be seen as egalitarian, even if it is a sham for some of them. Little wonder that the strange directive in Parliament House was withdrawn within 24 hours. It was just un-Australian.

* * * * * * * * *

There is another use of mate which has nothing to do with friendship. A game of chess ends with the statement *Mate* or (in full) *Checkmate*. The expression comes from Arabic *Shah mat* — the King dies. *Shah* is immediately familiar as a reference to the ruler, and this is why, at appropriate times, a player says *check*: it is a warning that the opposing King (*Shah*) is threatened. By an odd coincidence, an archaic meaning of *checkmate* was an equal in a contest, a rival, match; an equal in power or rank. OED2 cites this usage in examples between 1509 and 1651. In this obsolete sense, it is synonymous with *mate* in its ordinary sense.

Chess was called *chatrang* in old Persian, from the Sanskrit *chaturanga*, literally "the four angas or members of an army" (elephants, horses, chariots, foot-soldiers). It first emerged in something approximating its modern form in the 6th century AD, in India. It spread rapidly through the middle east. Muslims brought it to Spain in the 10th century, and a chess set dating from the 11th century was discovered in the Hebrides in 1831. Although universally popular for a long time, and called "the Royal game" since the 15th century, it was banned for a time by King Louis IX, in 1254.

Julian Burnside

# Verbatim

## 'Sprouting' Big Children

### County Court

24 May 2005
Coram: Wood J
*R.* v *Rigoli*
N. Crafti for V. Rigoli
S. Kennedy for P. Rigoli
P. Tehan QC for L.J. Rigoli
Bruce Charles Adams sworn and examined.

**Mr Silbert:** Mr Adams, is your full name Bruce Charles Adams?
**Adams:** It is, yes.
**Mr Silbert:** What is your occupation?
**Adams:** Brussels sprout vegetable grower.
**Mr Silbert:** Are you co-director of Adams Farm Services Pty Ltd?
**Adams:** I am, yes.
**Mr Silbert:** Does that trade as Adams Farms?
**Adams:** No, we've just changed it, it's actually Adams Farms Pty Ltd.
**Mr Silbert:** Is the main business conducted by you the growing and distribution of brussels sprouts?
**Adams:** Yes, it is.
**Mr Silbert:** How long have you been involved in that, Mr Adams?
**Adams:** About 30 years.
**Mr Silbert:** Do you produce sprouts for the local, interstate and overseas market?
**Adams:** That is correct.
**Mr Crafti:** I just want to ask one final question because I can't resist asking it. Do you realise the trauma you're caused to little children by the growing of brussels sprouts over the last 20 years?
**Adams:** Is this off the record? Those little children are now big children. The health food of the nation.

## 'Seized' Representative Attending Mediation

Email dated 5 August 2005 from partners in major Melbourne law firm:

I would also like to agree on personnel who will be attending the mediation on behalf of all parties. I propose to have my underwriter there together with a representative who will be seized and able to take decisions. We did discuss the prospect of a representative of your client from overseas as well as the insurer having actual conduct. Could you please update me on these issues?

## Serious Injury Application

17 December 2002
*Tasevski* v *Gilbertsons P/L*
Mr G. Colquhoun for Plaintiff
Mr J. Ruskin QC with A. Moulds for Defendant

**Mr Colquhoun:** My learned friend seemed to make, I would contend, a fairly slight attack on the plaintiff in respect of his residual capacity for employment. The defendant's court book does include a vocational assessment at pages 95 to 98 of the defendant's court book. The report went through the employment history, the pluses and minuses for this man and went through a number of factors and they were low motivation regarding return to employment, advanced age — a man who was then about 55 — which I tend to take personal exception to, although I haven't quite reached that milestone. I think my learned friend Mr Moulds just said look at Mr Ruskin, if Your Honour pleases.
**His Honour:** A mere child, Mr Colquhoun, a mere child.
**Mr Colquhoun:** If Your Honour pleases. Low level of English skills, lack of transferable skills, personal belief and confidence in his ability to work in another vocation.
**His Honour:** Are we still talking about Mr Ruskin or have we now moved to someone else?
**Mr Colquhoun:** I think the serious injury is bringing my learned friend Mr Ruskin back to court every day, Your Honour, day in and day out. On the following page, however, "Recommendations", there are no recommendation arising, so there's …

# A Letter from America

## Retirement of Justice Sandra Day O'Connor from the US Supreme Court

*A wise old man and a wise old woman reach the same conclusion**

Peter Vickery QC

JUSTICE Sandra Day O'Connor, with the delivery of a three-sentence letter to the White House on 1 July 2005, unexpectedly announced her retirement as an Associate Justice of the Supreme Court of the United States. She was the first woman ever to become a member of the Court. Her appointment by President Ronald Reagan in 1981 was confirmed unanimously by the Senate, and marking the significance of the occasion, the Court abandoned its formal use of "Mr Justice" as the form of address, opting for the simpler and gender-neutral, "Justice". She contributed to a leap in Federal judicial appointments for women in the United States.

Justice O'Connor maintained a pivotal position in a precariously balanced and ideologically polarized Court for nearly a quarter of a century. She often delivered the deciding vote in 5–4 decisions dealing with some of the most important and contentious public issues of the day. She retired from a court presided over by William H. Rehnquist, Chief Justice of the United States.[1] A fellow member of the Rehnquist court, Justice Antonin Scalia, said in a statement on 1 July, "The statistics show that during her tenure she shaped the jurisprudence of this Court more than any other Associate Justice."

A striking example of her ascendancy, and indeed its controversial role in shaping recent world events, is provided by the case determined by the Supreme Court on 12 December 2000 when Justice O'Connor joined with four other justices to decide the 2000 presidential election in favour of George W. Bush (*Bush* v. *Gore*).[2] Never before had a court of the United States been called upon to determine the result of an election at this level. It should be noted that the Court was careful not to over extend its critical role in deciding the political outcome by specifically confining the decision to the particular facts before the Court, the majority cautioning with the observation: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."

*Justice Sandra Day O'Connor.*

Since her appointment, Justice O'Connor became one of the most keenly observed justices on the Court. Initially, most commentators identified her as part of the Court's conservative faction. However, within a few terms, Justice O'Connor developed the confidence to emerge from the Rehnquist shadow, and implant her unique "brand" on the decisions of the Court. Although it is fair to say that she generally sided with the conservatives, she would often pen a concurrent opinion which sought to narrow the scope of the majority opinion, or would adopt a classically liberal stance in dissent from the conservative view.

The pointer on the notional "Judge-Meter" settling on "moderate conservative", she approached her task, not with the objective of reverting to the Jeffersonian ideals of the 18th century or creating strikingly new constitutional principle, but rather with the object of defining law which would be practical, workable and readily understandable to the American people. As stated by Eugene Volokh, a former law clerk to Justice O'Connor who now teaches constitutional law at UCLA, "Justice O'Connor's view was that the work of the law is making the law work". Justice O'Connor did not find comfort in the concept of the rule of law as being "the law of rules". As she stated in a dissenting opinion in 2004 in a case in which liberal and conservative members struck down state sentencing guidelines as unconstitutional, "If indeed a choice is to be made between adopting a balanced case-by-case approach … and adopting a rigid rule that destroys everything in its path, I will choose the former."

Although it is perhaps difficult to define her core judicial philosophy, the hallmark of Justice O'Connor's judicial approach may be described as "judicial minimalism" — deciding cases pragmatically by no more law than was necessary to deal with the particular set of facts before her. This maximized the opportunity to keep options open for the future, particularly when supported by the use of well placed qualifications and exceptions which could be picked up and developed in later cases when different facts and circumstances might arise for decision.

She was elevated to the Supreme Court presided over by Chief Justice Warren E.

*A phrase often cited by Justice O'Connor. See for example: "Portia's Progress" (1991) 66 New York University L R 1546 at 1558. The phrase has been attributed to Justice Jeanne Coyne of the Minnesota Supreme Court.

Burger from a middle-level appellate court in Arizona. This was a court situated below the Arizona Supreme Court, the highest appellate court of that State — an indicator of the relative rarity of well credentialed women lawyers at the time. Her judicial career on the bench of the US federal Supreme Court has been hailed as opening up a set of opportunities for women that would not have existed without her and marks notable change during that period.

Many observers of the Court have speculated that the roots of Justice O'Connor's judicial pragmatism can be found in her remarkable personal history. She was born in El Paso, Texas, and grew up as a self-described "simple cowgirl" working a desolate Arizona cattle ranch owned by her parents, named with all the character and style of a Reagan Hollywood western — "the Lazy B". In reflecting on her earliest ambitions she said: "I wanted to be a cattle rancher when I was young, because it was what I knew and I loved it." This was in spite of what appeared to be a difficult and lonely life on the ranch in her early childhood. The ranch itself was not supplied with electricity or running water until Justice O'Connor was seven, and with the nearest neighbours living over 40 kilometres away, the family spent most of their days in complete isolation. By all accounts she read profusely in her early years, and was then sent away to live with her maternal grandmother in El Paso for formal schooling. She attributes much of her later success to her grandmother's positive influence.

Justice O'Connor attended Stanford University, where she majored in economics graduating in 1950, initially with a view to managing the family property. Serendipitously, a legal dispute over her family's ranch stirred her interest in law sufficient to encourage her to enroll in the Stanford Law School. She continued at Stanford for her law studies, graduating in two years (instead of the customary three), serving on the Law Review, and finishing third out of a class of 102 (first in the class was William H. Rehnquist who later became the Chief Justice).

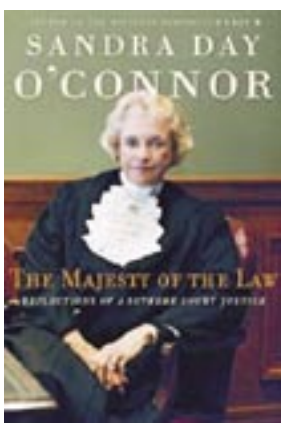
Her professional life was initially confined by the all too familiar inhibitors to female advancement. A five-year interruption to private practice to have children was compounded by discrimination from a male-dominated profession in which women of her day were fortunate to obtain job offers, let alone judicial appointments. Justice O'Connor personally experienced the refusal of law firms to employ her as a lawyer in the early 1950s following her graduation from the Stanford Law School, in spite of her exceptional grades. She was, however, offered a job as a secretary. Undaunted, she turned to the public service, obtaining her first legal job at the local county attorney's office, taking a position as Deputy County Attorney of San Mateo County, California from 1952–53 — a job she secured by offering to work initially for no pay.

The issue of a replacement for Justice O'Connor has already given rise to a "fourth of July" political furore. Her retirement has left only one remaining woman on the Supreme Court, Justice Ruth Ginsburg, and the situation has recently been compounded by the need to appoint a new Chief Justice.

The President's nominations must be approved by the Senate. This process combined with the central position occupied by the US Supreme Court in the governance of the country, guarantees that the appointments will be highly politicized and the subject of exhaustive public scrutiny, with little guidance as to the outcome.[3] The Republicans, Democrats and other political groups have mobilized for the campaign ahead, which remarkably includes advertising in the mass media.

There is a dark moment in the film "Lawrence of Arabia" when, half way into the longest desert trek he's ever attempted, our hero drops his Mark III

*The Rehnquist Court. Rear: Justices Ruth Ginsburg; David Souter; Clarence Thomas; Stephen Breyer. Front: Justices Antonin Scalia; John Paul Stevens; Chief Justice William H. Rehnquist (dec'd 3/9/2005); Justices Sandra O'Connor (ret. 1/7/2005); and Anthony Kennedy.*




*Cover: The Majesty of the Law: Reflections of a Supreme Court Justice (Random House)*

service compass. The compass enables the navigator to know precisely where the navigator is and where the navigator is going — something for which the French require philosophy and the Americans psychotherapy. It is to be hoped that our American friends do not delay too long in finding the Mark III and restoring equilibrium to the legal polity.

Justice O'Connor has written two books. The first book, *Lazy B: Growing Up On A Cattle Ranch in the American Southwest*, recounts her early life lessons of rugged self-reliance and a simple love of the outdoors. The second of her two books, *The Majesty of the Law: Reflections of a Supreme Court Justice*, describes her quarter century as a Supreme Court justice. She makes mention of the mail alone, upon her appointment, as being a huge burden. As the Court's first woman justice, she received many letters of encouragement — there were also plenty of messages from detractors who questioned whether it was appropriate for a woman to serve

in the nation's highest court. She devotes much of her latest book to discussing the subject of women in the legal profession and in American society.

Permit me to conclude with three selected extracts from recent writings of Justice Sandra Day O'Connor which provide some insight into her work — the first demonstrating remarkable foresight in dealing with future race relations (arising from the University of Michigan's law school race-based affirmative action program); the second illustrating a depth of understanding on the principles of the independence of the judiciary and the rule of law; and the third concerned with striking the delicate balance between national security and individual liberty in the context of the threat of modern terrorism.

The first extract is from her 2003 majority opinion in *Grutter* v *Bollinger*, which determined that public universities in America, at least for the time being, can take race into account in affirmative action admissions policies — however, as she observed, this approach may be short-lived:

> We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. This court has long recognized that "education is the very foundation of good citizenship." For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity …
>
> We take the law school at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as possible. It has been 25 years since Justice Powell first approved of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

The second extract is from an address delivered by Justice O'Connor in opening the Arab Judicial Forum in the Kingdom of Bahrain, September 2003:

> Alexander Hamilton, one of the Framers of the United States Constitution, wrote in The Federalist No. 78 to defend the role of the judiciary in the constitutional structure. He emphasized that "'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' … [L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." Hamilton's insight transcends the differences between nations' judicial systems. For only with independence can the reality and the appearance of zealous adherence to the Rule of Law be guaranteed to the people. As former US President Woodrow Wilson wrote, government "keeps its promises, or does not keep them, in its courts. For the individual, therefore, … the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts." As we embark today on the work of this Judicial Forum, I hope that we shall keep in mind the importance of independence to the effective functioning of the judicial branch.

The third and most recent extract is from her 2004 majority opinion in *Hamdi* v *Rumsfeld*, which ruled that a citizen of the United States seized by American forces in the Afghanistan theatre of conflict could challenge his detention in US courts:

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens … [It] would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge …
>
> Any process in which the executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.
>
> … We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

In the light of these observations in *Hamdi* v *Rumsfeld*, the need for law to accommodate social change recognized in *Grutter* v *Bollinger*, and the critical role of an independent judiciary in securing basic freedoms cited by Justice O'Connor in the Arab Judicial Forum, one is driven to consider the plight of the Australian, David Hicks. He appears to have been seized by US forces in circumstances remarkably similar to the American citizen, Mr Hamdi, yet is facing criminal prosecution before a tribunal devised and administered by his accusers from the executive arm.

Justice O'Connor has provided a legacy of immediate relevance for Australians. Whatever the outcome of the process, Mr Hicks should not be abandoned — he is deserving of a fair trial before a court of law presided over by an independent judge. We ought not be complicit in accepting less.

The building housing the US Supreme Court is situated in the heart of the nation facing Capitol Hill in Washington DC, physically separated by some distance from the White House. "The Republic endures and this is the symbol of its faith" — so said Chief Justice Charles Evans Hughes in laying the cornerstone on 13 October, 1932. It is an imposing edifice. Sixteen marble columns at the main entrance support the pediment and draw the eye upwards to the architrave above. Incised into the stone are the simple words "Equal Justice Under Law". They surely are there to sustain a fundamental principle of democratic society, and not to witness its demise.

Notes

1. William H. Rehnquist, the 16th Chief Justice of the United States, died in office on 3 September 2005 at his home in Arlington, Virginia. The Chief Justice battled thyroid cancer since being diagnosed last October and continued to perform his duties on the Court until a precipitous recent decline in his health. Chief Justice Rehnquist was appointed to the Supreme Court as an Associate Justice in 1971 by President Nixon and took his seat on 7 January 1972. He was elevated to Chief Justice by President Reagan in 1986.
2. Justice O'Connor joined Chief Justice Rehnquist, and Associate Justices Scalia, Thomas and Kennedy to stop a manual recount of votes in Florida, thereby guaranteeing the election of George W. Bush as President.
3. President Bush on 5 September 2005 nominated the conservative Judge John Roberts, of the Federal DC Circuit Court of Appeals, to be Chief Justice of the United States. As at 19 September there has been no presidential nomination to replace Justice O'Connor.

# It's a Fine Line Between Pleasure and Pain

*The victorious Bar Team with coach Tommy Hafey.*

SOME of us might have lost briefs as a result but there was no denying the pride and excitement experienced following our inspiring win. It started as a game of footy to raise some money for charity and evolved into a fiercely fought match between Barristers and Solicitors, officially the "RecLink Legal Football Challenge Cup", on 25 June 2005 at Punt Road Oval. Some 250 spectators saw the Solicitors coached by legend Allan Jeans while the Bar had the privilege of Tommy Hafey and his words of wisdom before, during and after the match.

In a situation not dissimilar to receiving a brief on the morning of the hearing, we entered battle with an abundance of enthusiasm, experience, excitement and of course ego. Whilst our relatively youthful opponents possessed more speed and endurance (as well as couple of former AFL players), there was, in our view, no substitute for a big interchange bench.

In a last minute flurry of interest, akin to those "Christmas Eve" bail applications, the Bar numbers grew from about 15 to a playing list of about 35 by kick off.

In comparison to the Solicitors, the Bar had a restricted pool of individuals to draw from to field a competitive team, in terms of both numbers and youth. By consent therefore, the Bar was loosely expanded to include relatives of members of the Bar and Clerks. Fortunately, this meant that we were able to recruit some young legs and talent to combine with the experience of champions from days gone by, such as Mordy Bromberg.

At one end of the spectrum was John Dever, a "senior" member of the team, while at the other end were the Dever boys whose combined age was still less than the average age of the Bar team. A couple of boys from out Ringwood way, courtesy of a distant relative at the Bar, provided some talent and size, one being big "Chico" who gave the team a real focal point by dominating at full forward.

Proving that genes account for something, Ben Rozenes took control of proceedings early on, directing play from the centre, and kicked the first goal of the game. The most "senior" member of our team, Phil Kennon, was a solid performer all day and provided stiff competition to opponents who were about half his age. For his efforts, he was rewarded with the most courageous player award.

It was an exceptional team effort, particularly in circumstances where our first

*To the victor go the spoils — Matt Fisher and Tommy Hafey hold the "RecLink Legal Football Challenge Cup" aloft.*

*The performance of the Bar Team was appreciated by fans old and young.*

*Tommy Hafey provides some insightful words of motivation.*

game as a team was on the day (our first "training run" together was during the pre-match warm-up). On at least a few occasions, team-mates did not even know the name of the person they were kicking the ball to or who was kicking it to them. Some performances are worthy of mention. The best player award was presented to Justin Brereton who was outstanding and dominated whenever the ball was close to him. Tim Bourke was terrific in the ruck and was more than competitive against former Tiger Brendan Gale.

Dan Christie and James Gates added power and strength running the ball out of defence. Jamie Gorton, Chris Winneke, Paul Santamaria and Steven Grahame — the latter two finding themselves reluctantly as "senior" members of the team — were fine contributors without whom victory would not have been ours.

Interestingly, Simon Northeast found himself playing for the Bar. His was a good game and it is thought that Tommy Hafey had a little something to do with his playing persuasion.

More than footy was the winner. In excess of $8000 was raised for RecLink, which will enable them to organise sporting and recreational activities for those in our community who are less fortunate. Special thanks should go to Michael Green for his encouragement, financial support and assistance in organising certain aspects of the game and to John Dever for his support both financially and physically. The exact score at the end of the day is not that important (victory being its own reward), although the final siren saw the Bar win by three goals, a significant margin in a low scoring affair.

This match was the first between the two arms of the profession in about a decade. It is hoped that the success of this game will translate into an annual event. Given the obvious sadness and disappointment emanating from our opponents at the conclusion, we can expect to face substantial opposition next time. While it's not expected to be a big pre-season over summer, more structured training sessions are planned in the lead-up to the 2006 match. Our gratitiude goes to those volunteers who gave of their time and effort in organising and/or working on the day, particularly Tommy Hafey.

Without such support, the day would not have been the success it undoubtedly was.

The position of captain "came my way" probably more because of my part on the organizing committee than any other sensible basis. It was a role that provided me with the opportunity to be part of a group of individuals who came together as a team, and, on a warm winter afternoon, displayed the sort of camaraderie and fighting spirit that is legendary at the Bar.

Matt Fisher

*The Bar Team — exhausted but elated after an inspirational victory.*

# The Oxford Companion to the Supreme Court of the United States (2nd edn)

**By Kermit L. Hall**
**Published by Oxford University Press, 2005**

AS its title suggests, this recent offering from OUP is for those who would like to know more about the history, personalities and role of this great common law court.

In very large measure the book satisfies this expectation with the breadth of its political, legal and biographical sweep through the history of the Supreme Court of the United States.

In much the same way as OUP's *Companion to the High Court of Australia* excites with the promise of a revealing glimpse behind the scenes of the third arm of government, this book takes the reader into the judicial antechamber and provides a seat at the justices' conference table. The ritual of the collegiate handshakes before each conference probably says more about the institution itself than a minute textual analysis (so beloved of socio-legal academics) of the published decisions.

The pen portraits of the justices, past and present are revealing, but in some instances pedestrian. The great Oliver Wendell Holmes never in his life read a newspaper. This is not mentioned. Nor is his most famous aphorism, "The life of the law has not been logic; it has been experience." Similarly, Justice Robert Jackson's faintly absurd and even trivializing opening remarks as Chief Counsel at the Nuremburg War Crimes trials do not rate a mention. The biographical aspect of the book could have benefited from an infusion of quirkiness. It is, after all, a history of the Court rather than a legal textbook.

That said, the Trivia section of the book, whilst brief, does contain the unexpected. For example, the writer was pleased to note that twenty quill pens are placed at the Bar tables on each and every day the Court is in session and that US government attorneys appearing before the Court adhere to the tradition of wearing "morning clothes (sic)". The book describes in considerable detail the tradition of the judicial conference and how, shortly before the conference begins, the justices assemble in the antechamber at the sound of a buzzer. Who it is who presses this buzzer is mysteriously left unexplained. To this reviewer, it appears to be a role of the greatest significance in American jurisprudential firmament: no buzzer, no conference, no nothing. *Quis custodiet custodies ipsos*?

The history of the court and of its justices provides an understanding of the way in which the court operates and why the opinions of justices through the years very often reflected their personal traits and predispositions. The tenure and approach of Justice William O. Douglas reminds one of Starke's time on the High Court of Australia.

It is a wonderful book and a joy to read or, perhaps more accurately, to dip into. For those who are interested to learn and understand more of such a significant institution in the Western world, it is a splendid addition to the bookshelf. It should be recommended reading for David Hicks' father!

The reviewer looks forward with great anticipation to a similar *Companion Volume to the House of Lords and Court of Appeal.*

Neil McPhee

# Opinion

## of the Solicitor-General regarding the claim of the Government of Victoria to the Territory (known as the Riverina) lying between the Murray and Murrumbidgee Rivers, together with maps showing the course of the River Murray

**William Applegate Gullick**
**Government Printer, Sydney, 1912**
**18 pp including an Appendix of 17 fold-out maps of south-eastern Australia showing the history of discovery of the course of the River Murray.**
**7s. 6d. at time of publication (1912), "several hundred dollars" at time of acquisition (2004) by the Education Resource Centre Library of the University of Melbourne.**

IT is the serendipitous reward of the researcher to happen upon material unrelated to the current research being undertaken but which is of more than passing interest. Unfortunately, the exigencies of the current research require its temporary abandonment coupled with an intent to return and further explore this peripheral material at a more convenient time. Thus it was my experience to be investigating the views of the Victorian Solicitors General regarding the jurisdiction over the River Murray in the tri-state area where the states of Victoria, South Australia, and New South Wales abut (that is, the Mildura-Renmark area). The search engine spat out this particular pamphlet that had only recently been included in the University of Melbourne Library catalogue after its acquisition last year.

In 1911 the Acting Premier of Victoria wrote to his New South Wales counterpart asserting Victorian sovereignty over the land lying to the south of the Murrumbidgee River and a straight line from the source of that river (near Nimmitabel in NSW) to Cape Howe (the present coastal boundary point). If correct, the Australian Alps, most of the Australian Capital Territory (but not the City of Canberra) and Cooma would be within Victoria and the towns of Balranald, Hay, Narrandera, Wagga Wagga, and Gundagai would be border towns.

This was the third time Victoria had raised the issue: in 1906 the legal advice to the Victorian Government concluded that: "Victoria has not any valid claim to insist now that the proper boundary between Victoria and NSW is a line drawn from Cape Howe to the source of the Murrumbidgee." The subject was dropped until the Premier of Victoria, Sir Thomas Bent, took it up again in 1908 initiating discussions between the states which petered out and remained dormant until the most recent claim by the Acting Premier in 1911. It was a time of state assertion of disputed territory as South Australia was part way through its (ultimately unsuccessful) claim in the High Court of Australia (12 CLR 667, 1911 and thereafter on appeal to the Privy Council 18 CLR 115, 1914; [1914] AC 283) that its present border with Victoria should be "shifted" some two and a quarter miles (or 3.6 km) eastward.

The genesis of the Victorian claim lay in an 1851 letter written by Sir Thomas Mitchell pointing out that the boundary described by the 1850 Imperial Act (establishing the Colony of Victoria) ran from Cape Howe to the Murrumbidgee source of the Murray and thence along the Murrumbidgee to the Murray, and thence along the Murray to the SA border. As Surveyor-General of NSW both before and after the establishment of the Port Phillip District of the Colony of New South Wales as the independent Colony of Victoria (in 1851) surely Sir Thomas Mitchell was in a position to know!

In response the NSW Solicitor-General, Walter Bevan, prepared an opinion which was ordered by the NSW Legislative Assembly to be printed and published.

The NSW solicitor's opinion was reliant upon four threads which, in apparently decreasing importance, included an analysis of the 1850 statute defining the proposed border ("… a line drawn from Cape Howe to the nearest source of the River Murray and thence by the course of that river to the eastern boundary of the Colony of South Australia" — the solicitor's conclusion being that "that river" could only be referenced to the preceding nominated river, that is, the River Murray).

Bevan then sought to show that Mitchell's 1851 interpretation was in error. In the course of the exploration westward of the new colony from Sydney, the River Murrumbidgee was fully known while knowledge of the Murray upstream from the confluence of the two rivers was scant (it being known then as the Upper Murray or the River Hume). Mitchell's interpretation was founded upon the Murrumbidgee being a known source (one of several) of the Murray whereas the source of the Murray proper was yet to be found. However, at the time of the 1850 statute this was no longer the case, as was demonstrated by the appendix of maps dating from the 1820s through the 1850s, many from the office of the Surveyor-General and bearing Mitchell's initials, indicating that he was aware of their import, and demonstrating that the course of the upper reaches of the Murray were known at this time.

Further, the solicitor traced the history of the proposed border and the Port Phillip District. Whereas the 1850 border was in terms of westwards from Cape Howe, the earlier manifestations were eastward from the SA border. It is possible to construe the 1850 definition as a straight line from Cape Howe to the nearest source of the Murray (being the Murrumbidgee) and thence along that river (the Murrumbidgee) to where the Murrumbidgee ceases (where it enters the Murray) and thence (along the Murray) to the SA border. In the opposite direction, from the SA border along the Murray to its source and thence to Cape Howe leaves little room for an interpretation utilising the course of the Murrumbidgee and its source.

A contemporary history of the political lobbying for a Murrumbidgee border (premised upon the Riverina being better governed from Melbourne than Sydney because of the closer proximity of the former) also supported the solicitor's opinion. Had the Imperial Parliament legislated for a Murrumbidgee border it is difficult to reconcile this intended border with the rueful disappointment at the failure of their lobbying efforts by its proponents.

The value of the NSW solicitor's opinion and the decision of the NSW parliament to print (and widely publish) that opinion is demonstrated by the fact that the claim of Victoria was not proceeded with although Cumbrae-Stewart (1933, reprinted in the *University of Queensland Law Journal* 1965), refers to a civil libel action, *Ogier* v *Norton* (ca 1903), where it was contended that the Murrumbidgee and not the Murray was the true boundary between NSW and Victoria.

Briefless

*(who has now satisfied a long-held ambition of having the place name Nimmitabel included in his published writings)*

## Complications: a Surgeon's Notes on an Imperfect Science

**By Atul Gawande**
**Metropolitan Books, Henry Holt & Coy LLC, New York, 2002**
**269 pages, no index.**
**US$24**

THE writer is a surgeon and staff writer for the *New Yorker* magazine. He is also a teaching professor at the Harvard Medical School. He is one of several New England surgeon/teacher/essayists, for example, Sherwin Nuland, of Yale University Medical School (*How we die*, 1994; and *The Wisdom of the Body: How we live*, 1997), and Jerome Groopman (*The Measure of our Days*, 1998; *Second Opinions*, 2000; and *The Anatomy of Hope*, 2003) also of Harvard. All three write well and knowledgably and this reader would expect a similar high standard in their practice of surgery.

Gawande's research interest is in improving surgical care in the US and developing countries and forms the basis of this collection of essays which have previously been published in the *New Yorker* and the online internet "magazine" *Slate*. I can recall having previously read several of these articles in the *New Yorker*. While this volume lacks an index it does have chapter notes, allowing the reader to delve deeper if desirous of doing so.

Gawande investigates why it is that things go wrong — it is not because there was no need for the word "iatrogenic" that it was coined: this is where the medical care is indeed worse than the disease. An interesting observation is that according to research cited by the author medical malpractice suits do not reduce medical error rates (this is a contradiction of the rationale cited by plaintiff trial lawyers that tort litigation is the only effective learning process for otherwise indifferent tortfeasors). Added to that, fewer than 2 per cent of patients who do have a cause of action actually litigate. And, of the medical malpractice suits filed, only a small minority are held to be victims of negligent care, and the best guide to ultimate success in litigation is the severity of the patient's adverse outcome regardless of causation.

The medical profession has borrowed from other professions in seeking to improve standards — immunity from punishment for voluntary and honest reporting of "incidents" and flight simulators from the aviation industry and "human factor" engineering leading to standardised controls for medical machinery. A recent innovation is the "patient simulator" allowing the surgeon to practise, to experiment, to hone surgical skills or to

rehearse a ticklish operation in advance. Previously this could only be accomplished on real live patients.

The common thread of these essays is to show the limitations of modern medicine and its practitioners to repair our diseased and damaged bodies. There are 14 articles under three sections headed "Fallibility", "Mystery" and "Uncertainty". In truth, these divisions are porous and many of the articles could have been included under any or all of these headings.

Fallibility looks at the limitations of the individual practitioners, those inherent in the training of surgeons ("see one, do one, teach one"), their continuing education and the maintenance and improvement of their skills (including learning from their errors, both their own and those of their colleagues) and the easy road to incompetence by way of drug and alcohol abuse. For completeness I would have liked Gawande to have included the issue of the once competent surgeon who has postponed retirement indefinitely and is no longer able to recognise that their competence has deteriorated and now poses a threat to their patients. Readers might like to consider that their own errors may permit our "patients" to appeal an adverse outcome and the fact that we are under the scrutiny of our fellow practitioners and the bench. Of course, this does not solve the ticklish problem of informing and convincing the elderly practitioner, medical or legal, that now is time to be tending the rose garden.

Thus, while "Fallibility" covers the limitations of individual practitioners, the next division "Mystery" is concerned with that which is unknown to the profession. Despite the marvels of modern medicine there still remain areas where the best the profession can offer is to stand aside and wait and watch and hope. Medicine is not an exact science and not every malady has a remedy and not every adverse outcome is evidence of malpractice deserving of compensation.

The final section "Uncertainty" deals with the necessity of proceeding despite imperfect or incomplete knowledge: decision making under uncertainty. This area has led to a recent "Nobel laureate" in Economics for Daniel Kahneman and should be familiar to *Bar News* readers. It is common experience to us and concerns a judge and jury being called upon to determine a factual happening despite their having no direct knowledge whatsoever of the incident being enquired into, for example, the state of the traffic light facing the defendant immediately prior to the accident. However, they are called upon to proceed upon the basis of the incomplete information allowed them and subject to the filtering process of the rules of evidence and the tactics of the parties and their advocates. Thankfully they are permitted to found their decisions on "the balance of probability" or "beyond reasonable doubt" (whatever that means) and are not required to try for beyond doubt or without doubt. Further, the surgeon's decision making under uncertainty may not allow for unhurried thoughtful contemplation because of the urgent need for immediate action. Consider the difficulty created by the apparent urgency of a simple non-urgent problem with a simple solution! As the old saw goes — hindsight has 20–20 vision.

When should the surgeon ignore "intuition" and be guided only by objective observation? Or vice versa? What about the serendipity of fate where the visiting surgeon with an interest in an obscure area of practice has altered the timing and order of the routine visiting to his local hospitals (because of weekend guests) and just happens to be on hand when this expertise is most urgently needed? Today's biopsy that discloses that which yesterday's failed to detect? When is it best to leave well enough alone and leave nature to its course without interference ("don't do something, just stand there!")? How does a surgeon know?

Of particular interest is the junction of the two professions where the practitioners are called upon to determine a doubtful issue, for example, of child abuse (particularly where the victim is deceased or is unable to assist in the determination). Unlike the actors in the legal drama Gawande permits himself to harbour doubts. This is of contemporary relevance given the well publicised reference by the English Attorney-General allowing the re-investigation of those mothers convicted and jailed for the murder of their children — three mothers have been released so far and the "expert witness" for the prosecution has been struck off the medical register. In January this year, an article in the medical journal *Lancet* finally discredited the hypotheses of Sir Roy Meadow who single-handedly devised Munchausen's Syndrome By Proxy (MSBP) and the so-called Meadows's Law (that infant apnea/SIDS is in reality infanticide) on the basis that unexplained infant deaths are independent of family relations. All the experts consulted by Gawande conceded these cases do not involve direct physical evidence, the only basis for criminal prosecution being a "suspicious" pattern of otherwise unexplained infant deaths.

The author brings his lay qualifications to bear here as a parent who has accompanied his infant daughter to the casualty ward with a suspicious arm fracture. As the accompanying parent the author was grilled by the suspicious medical staff (he suggests that his social status as a fellow practitioner assisted in allaying the concerns of his interrogators). He himself has played the role of the suspicious medico in an instance of a badly scalded two-month old boy. Similarly, as a "patient" (and not as a surgeon), in the essay discussing how the patient and the practitioner arrive at the decisions affecting the patient's care, he relates the powerlessness felt by him a fortnight after the premature birth of his youngest daughter who required major surgery. Notwithstanding his well-informed medical credentials the author surrendered the decision-making to the attending physicians. The author's recollections remind me of the Australian surgeon who, after suffering horrendous injuries in a car smash, wrote of his experience as a patient and compared this experience to his prior conduct as a surgeon — wearing the other man's shoes so to speak.

Let's hope that juries in personal injuries-medical malpractice cases haven't read this book because it places the surgeon as a human undertaking responsibility surrounded by uncertainty and doubt. Instead of expressing outrage at their ability to stuff things up and sue the bastards perhaps we should wonder at what they can accomplish despite the incompleteness of their knowledge.

I shall go out on a limb and suggest that this volume makes for interesting and entertaining reading by members in addition to lay readers.

Briefless

# Limitations of Actions — the Australian Law

**By Peter Handford**
**Lawbook Co, 2004**
**pp: i–lxxxvi; 1-232; Bibliography 233–234; Index 235–244.**

*LIMITATIONS of Actions — The Australian Law* provides in a single volume a comprehensive and up-to-date exposition of the law relating to the limitations of actions in Australia.

As this work is a direct descendant of the section on limitations found in *The Laws of Australia* published in 1994, the work follows the same format with footnotes at the end of each section.

The author has provided a table setting out causes of action and limitations in each state which is in turn cross referenced to paragraphs in the text.

There are specific chapters dealing with general principles such as the running of time and limitations provisions as they relate to contracts, tort, property law and specific provisions relevant to admiralty arbitrations and the like. Some "legislation specific" time limits such as those found in the *Civil Aviation (Carriers Liability) Act 1959* which implements into Australian law the provisions of the Warsaw Convention and the time limits applicable thereunder are not covered in the text.

*Limitations of Actions — The Australian Law* is a timely publication taking into account case law developments and legislative amendments including changes instituted as part of the state and federal government's response to the so-called "insurance crisis". This work is sure to be of practical use to lawyers and others involved in litigation in Australia.

P.W. Lithgow

# Mareva and Anton Piller Orders Freezing and Search Orders

**By Peter Biscoe**
**LexisNexis Butterworths, 2005**
**Pp: i–xxix; 1–314; Appendixes 315–365; Selected Bibliography 367–66; Index 369–378.**

IN the nearly 30 years since *Mareva Compania Naviera SA* v *International Bulk Carriers SA* [1975] 2 Lloyds Rep 509 and *Anton Piller KG* v *Manufacturing Processes Ltd* [1976] Ch 55 were decided in 1975 by the English Court of Appeal, the use of Mareva and Anton Piller Orders has become widespread.

Although originating in England these orders have been given a statutory basis and are now widely invoked in both State and Federal jurisdictions in Australia. Indeed, such is the tactical effect of these types of orders that litigation may effectively be determined by the making of these types of orders — an effect the author aptly describes as "the laws two nuclear weapons" (from *Bank Mellat* v *Nikpour* (1985)FSR 87(CA)).

The author sets out to state that the current Australian law and practice although the law in relation to Mareva (freezing) orders and Anton Piller (search) orders is still evolving. Accordingly both English and Australian authorities are highly relevant in these important aspects of legal practice. The text includes discussion of cases drawn from a wide variety of jurisdictions including extracts from many first instance judgments.

This text provides an extensive analysis of the history and development of Mareva and Anton Piller Orders. There are specific chapters dealing with the position of third parties affected by such orders and chapters on the privilege against self-incrimination and sanctions for non compliance with orders.

To the extent that this work is practically focused, the various appendixes provide much useful material including extracts of Australian and New Zealand legislation and court rules together with several forms of orders made in Australian cases. The appendixes also contain by way of adjunct to the Australian materials, English statutory and court rules materials.

This excellent text will be of great use to students and practitioners. This work is sure to find a niche on the bookshelves of practitioners, many of whom will no doubt have cause to give thanks for the wealth of material drawn together in a coherent manner so as to provide an excellent practical resource in this important and technical area of the law.

P.W. Lithgow

***In the adversary system, truth is best discovered by strong argument on both sides of the question.*** Lord Eldon

The calling of evidence and the testing of evidence, including expert evidence is left to the parties. In recent years, research has confirmed the perception that there are problems with expert evidence including bias, lack of communication, insufficient focus on issues and prolonged, expensive procedures.

There are also issues about competence of some advocates who deal with expert evidence. The courts and law reform commissions are looking to solve these problems. The difficulty is in providing solutions which do not undermine the fundamental qualities of the adversary system. Some solutions are good and some bad.

The conference, conducted by the International Institute of Forensic Studies, in Broome on 16–19 October 2005, will have a number of experts from different disciplines, and a number of lawyers explore and discus these issues. See www.law.monash.edu.au/expertconf

*The conference qualifies for CLE points.*

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