VICTORIAN BAR NEWS

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Supreme Court Takes Wings

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Welcome Justice Neil J. Young.

Farewell The Honourable Mr Justice William Frederick Ormiston.

The American Way.

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Lazy Holidays

JANUARY in Victoria was traditionally the legal summer vacation. Many barristers — but by no means all — would take a portion or the whole of the month as leave prior to the ceremonies marking the opening of the legal year, usually (as was the case this year) the last Monday of the month. While on holidays, many of the pursuits often engaged in during time out are given leisurely scope — engaging with one's family and friends (who had forgotten what you looked like, so late did the midnight oil burn so often during the year); relaxing, in the sense of temporarily not pacing up and down chambers worrying about clients' liberties, case concepts, jury verdicts and grounds of appeal; reflecting on matters (albeit briefly) outside the realm of the Commonwealth Law Reports; and reading more extensively than the aforementioned series. Even the fourth estate appears to have been engaging in the latter task over summer, especially its brushing up on Shakespeare, because it appears hell bent on fulfilling (in a metaphorical sense) the exhortation in Henry VI part 2 (Act IV ii) "the first thing we do, let's kill all the lawyers".

On Friday 13 January 2006 the front page of the *Australian Financial Review*'s lead story ran the headline "Get back to work: stern ruling for lawyers on leave". The editorial on page 61 picked up the cudgel and congratulated the chief justices of NSW and Victoria for "insisting the court system should mirror community values" by enforcing greater productivity on its employees (judges) in line with the new industrial laws demanding "employee flexibility and availability". It bemoaned how the legal profession had escaped the scrutiny of the employment minister, the Productivity Commission and the National Competition Council. The legal system, it said, was here to serve the public and so lawyers and judges have to move with the times and if this involved giving up holidays, so be it.

The lead article conceded that the decision had been taken by Victoria's Chief Justice that the superior courts should resume on Monday 16 January, two weeks earlier than usual, so that status of things was a given, a fiat. And so the superior courts did resume. The editors of *Bar News* can attest to that, being on

circuit in Geelong for two weeks from the 16 January. Elsewhere, there was palpably a frenzy of activity not only in the courts but in Tribunals and at VCAT. The perceived vice, and the gravamen of the article, however, was that lawyers had not wholeheartedly "embraced" the summer sitting schedule, nor had they shown much enthusiasm for charging back into chambers on the first business day in January, preferring — as the columnist put it — to stay at the beach or on the ski slopes of Europe and North America. They had their heads in the sand (or was it the snow?) and refused to have any truck with work routines, their practices, much less access to justice. They had simply gone AWOL and were not there. Where the bloody hell were they?

It would be comical, or tragi-comical, if the whole beat up — one could not grace it with the epithet "story" — had an iota of truth to it — at least as far the facts in Victoria were concerned. Unfortunately the wage slaves of the fourth estate appear to exhibit profound problems, issues even, with describing and reporting the real world, inhabiting as they do a nether region within a corporatized protected industry ruled over by press barons. In this semi darkened demi-monde a single unnamed source allegedly of reliable information can be held responsible for and accountable as the voice of the whole group. Strange, the picture painted by the journalist's source bore no resemblance to the view of things as seen by *Bar News*. Perhaps an analysis of the number of pages in each issue of the *Fin Review* in January, and the number of regular and indeed occasional contributors strangely absent, and a cover price/cost per page benefit might also yield some interesting results. Surely no journalists were actually on holidays in January were they? Where is and what of the public's right to know and access to news during January? Wasn't it the print media which invented the term "silly season"?

On the ground, as every barrister knows, the reality is that listing cases during January is inherently problematic in circumstances where there are numerous parties involved, and a cohort of experts and witnesses some of whom have made commitments well in advance of setting court dates. Where possible and practicable, cases were in fact listed and were heard and determined in Victoria during January. Did the *Fin Review* send its reporter to observe and trumpet the range of activity that *Bar News* saw and took part in? Silence. That, apparently, is not a story. Barristers quietly, professionally and diligently going about their daily lot do not deserve a front-page headline.

It is curious how — by sleight of hand — the rhetoric of only a year ago has been overtaken by a new and insidious tendency: unless we all worship at the

altar of productivity all the time we are worthless contributors to society and worse economic beings. Blame could be meted out to the chill winds of change howling through the industrial relations landscape but that would be too simplistic. One really needs to look no further than the legal profession to find a worthy focus of blame, a suitable scourge as Shakespeare's character discerned. A year ago, "family friendly policies" could be written about and even spoken of without being met by a smirk or a snort of derision. Not any more. The President of the Court of Appeal on his appointment made a commitment to dealing with the backlog of cases in the Court of Appeal but not at the expense of making the appeal judges work any harder because as the President quickly and correctly pointed out, this was impossible as they were already working at dangerously high levels if their health and well-being was to be taken into account. Funnily enough, from at least feudal times on, that is exactly how and why the holy day (holiday) came into being; it was a day off for the peasants, serfs and sundry labourers in the field so that they could spiritually refresh themselves. What a quaint concept. Hardly "productive".

Clearly no-one in the legal profession is entitled to a holiday, especially in January, so in future, forget it. But the Commonwealth Games in March? That is another matter entirely. On a recent perambulation through the public areas of a local Magistrates Court in the last week of February, *Bar News* spotted a notice conspicuously displayed at the co-ordinator's counter in large type telling everyone that from 15–26 March 2006, no police matters, no criminal matters, nothing requiring police prosecutors or police witnesses would be heard. Full stop. Apparently the constabulary are required for duty elsewhere. Is this to be read as a holiday for the criminals and crime hearings? Whatever it is, lazy lawyers are probably to blame.

HONOUR FOR THE CHIEF

Along with the announcement of Professor David de Kretser AO as the new Governor of Victoria to succeed Governor Landy was notice that the Chief Justice of Victoria the Honourable Marilyn Warren is to be appointed Lieutenant General of the State of Victoria. This is indeed good news; the Bar and the State can have every confidence that her Honour will discharge her additional duties with distinction, dignity and dispatch.

From the time when Victoria ceased to be a colony and became a state in 1901 until the retirement of Sir John Young, the position of Lieutenant-Governor was always held by the Chief Justice or by the former Chief Justice until his death or retirement from the Office. This practice actually began even earlier with the appointment in 1886 of the then recently retired Chief Justice, Sir William Stanwell, as the Lieutenant-Governor.

There was a departure from the practice when Sir John Young retired as Lieutenant-Governor in 1995 and without disrespect to the three distinguished Victorians who have held the office in the meantime, the appointment of Chief Justice Warren is a welcome return to the former practice.

The welcome to Justice Marcia Neave and the farewell to Master Bruce occurred as we were going to press, and will appear in the next issue.

The Editors

Letters to the Editors

Judiciary Imposes and Pays Own

Mr P. Scanlon QC
Judges Disciplinary Tribunal

Dear Sir,

RE: Judge Bourke

I refer to your letter of 18 August and note the recent decision concerning the misbehaviour of His Honour Judge Bourke. Your decision did not come as a surprise to me, as word had filtered through from Hamilton that His Honour was enjoying his time on circuit a little too much. Without wishing to cast aspersions on any member of your esteemed Tribunal (particularly your Treasurer), I was not reassured when I discovered which members of Counsel had been briefed to appear before His Honour in the civil list. His Honour considered an appeal against your decision, but, in view of his long list of prior convictions for similar offences and the lack of available character evidence, he decided that he had probably been treated fairly leniently. For my part, I welcome those parts of your order which prohibit him from partaking of alcohol, and require him to pamper me for 48 hours. May I enquire what enforcement procedures are open to me should His Honour breach your orders?

Please accept my gratitude for the mercy shown by the Tribunal in what, I'm sure, was a difficult case for you. It is very refreshing to find a judicial body that not only imposes a fine, but pays it from its own funds.

Kind regards

Denise Weybury
Deputy Registrar

Circuit Life

Ms Denise Weybury
Registrar,
High Court of Australia

Dear Registrar,

THE Judge's Disciplinary Tribunal met this evening to deal with a series of complaints made by members of the Victorian Bar about the behaviour of His Honour Judge Bourke following his attendance at the Hamilton Court hearing matters in the Warrnambool Civil List.

The Tribunal has determined that His Honour has breached the primary tenet of circuit life in that he, without consultation with members of the Victorian Bar and in a devious and most secretive way, snuck off and paid the bill at a Judge's dinner.

It may be said in his defence (which the Tribunal rejects) that there was a Judge's dinner every night. Be that as it may, the breach is nonetheless unforgivable. The Tribunal having heard all the relevant evidence and having sat till approximately 3 am on Thursday morning have come to the following conclusions:

1. We dismiss out of hand His Honour's assertion that he was entitled to make a contribution.
2. We dismiss His Honour's assertion that he did not sledge at the billiard table.
3. We accept that His Honour's judgment was impaired.
4. We accept the assertion that His Honour's Associate looks more like a Judge than does His Honour.
5. We dismiss out of hand any suggestion that His Honour's tipstaff was anything other than a gentleman during the pool contest.

6. We accept that the Court recorder, Mr Pennington, was suffering extraordinary pain requiring the infusion of copious amounts of medication on the night and that he played no part in His Honour's decision to attend to payment of the account. Mr Pennington has no recollection of the evening and indeed was unable to give evidence before us.
7. We find unanimously that His Honour's sledging at the pool table did not cease there and indeed continued when he addressed members of the Bar at the Bar table by asserting that their "negotiating skills must be better than their snooker skills".
8. We find as a matter of fact that notwithstanding the state of his hands he was able to pour himself a beer (at no cost to himself) whilst the eminent barman, Ray, was engaging in the Pride of Erin with our social secretary around the billiard table over which she had so recently potted the black to ensure a fiscal result to the Tribunal.

Having regard to the above findings we have imposed upon His Honour a fine which represents, in our joint view, the severity of the crime. His Honour is required to accept this travel voucher in the sum of $600 in circumstances where he is ordered to take his wife to, say, Sydney/Adelaide/Hobart for a weekend of rehabilitation and hotel detention. His Honour will be required to attend to the needs of his wife for the entire period of 48 hours. He will be further required to ensure that she is indulged and pampered for every moment of the weekend and His Honour shall not partake of alcohol.

In the event that any of the above are breached a further fine will be imposed and consideration will be given to His Honour's future as a Judge of the County Court.

Given that you are now a member of the High Court we felt it appropriate that you should be initially informed of the penalties imposed. In the event that you believe it should be referred to the President of the Court of Appeal, the Chief Justice of the Supreme Court or His Honour's Chief Judge, then kindly do not hesitate to so report.

Should His Honour wish to appeal he will be aware that under Section 134AB (his favourite Section) the Tribunal will sit between 5 and 7 pm, Monday to Thursday for the next 28 days at Star Chamber, Star of the West Hotel, Port Fairy.

We look forward to your confirmation that His Honour has discharged his obligations under this Order to your satisfaction.

Kind regards,

P.A. Scanlon QC
G. Lewis S.C.
N. Bird
P. Jens
G. Collins

Tipstaff ~ Ich Dien

I am often astonished at just how many practioners (yes! barristers too) are unfamiliar with both the word "Tipstaff" and the function this unique group of people perform.

The first recorded mention of the word "Tipstaff" can be found about the 14th century when England was ruled by both the Barons (Baronial law) and the Bishops (Ecclesiastical law). Both these groups had at their disposal men of standing within the community who were given the task of bringing before their respective courts persons so ordered. These men were called Tipstaves and it is thought that this was because their "badge of office" was a large ornate staff. One can only speculate as to the many functions the staves were put to.

Down through the centuries the staves gradually reduced in size until by the reign of Queen Victoria they were nothing more than truncheons with a carved crown or acorn on top. Some had removable crowns or acorns to facilitate the placement of a warrant within the hollow staff. A fine but plain example can be viewed within the library of the Supreme Court of Victoria. Unfortunately, as with much of the historical traditions and accoutrements of the legal world, these magnificent pieces have now been relegated to either dusty storage rooms or museums.

Today only the word lives on in describing those men and women (yes, there are women Tipstaves) who, together with an Associate, make up the chambers staff of a judicial officer. Victoria is one of the last remaining states where Tipstaves still perform a function and then only in the County and Supreme Courts. Federal Courts have Court Officers where a significant number are casually employed and can work for a number of judicial officers.

Unfortunately, it has recently become fashionable for newly appointed Judges and Justices to be offered the choice of either a Tipstaff or a second or junior Associate. Granted, that for a judge sitting on a commercial and equity bench the chance to have a second Associate is an extremely attractive one as this person can be used as a researcher. However, as this person is usually a recent law graduate or junior lawyer they neither have maturity nor life experience, both essential attributes for a Tipstaff. Much of a Tipstaff's chambers duties may appear to be somewhat mundane, and I would suggest a simple test for those aspiring to be a Judge's second Associate. Ask yourself whether you have the mental aptitude to fetch copious quantities of coffee, buy lunches, obtain prescriptions, have the car serviced, collect dry cleaning, arrange catering for chambers guests, as well as carry out mind-numbing amounts of amendments to legal publications. Should you simultaneously have management of a jury, then all of the aforementioned duties will still await your attention.

Whilst on the subject of juries, it is only since the introduction of second Associates that a situation regularly occurs whereby, out of court, a jury is under the direct and personal control of a qualified lawyer. This fact appears to have escaped scrutiny by the profession and does little to ensure that juries are not exposed to out-of-court, well-meaning, legal opinion. Surely it cannot be too long before a barrister, at the commencement of a jury trial, seeks to have a junior Associate acting as Tipstaff stood aside.

It should also be noted that a large proportion of Tipstaves are traditionally recruited from former Defence officers, as they universally possess all the attributes necessary to discharge both court and chambers duties. To understand the importance of this unique position one has to be aware of their duties, something that some judicial officers fail to grasp or appreciate. I'm sure that many judges would also be surprised to learn that most Tipstaves possess tertiary or management qualifications.

With the ever-increasing meddling by the Victoria Public Service into the day-to-day activities of court personnel, together with the current "changing of the judicial guard", Tipstaves it would seem are now an endangered species, and it is patently obvious that unless the profession speaks up now Tipstaves will soon be relegated to the same dusty storage rooms or museums as their namesake.

David Hadfield MSLAET ADip.AME
JP(NSW),
former Tipstaff of the Supreme Court

Letters continue on page 55

Launching the Legal Year

NEW SILKS

ON 30 January 2006, the first day of the Legal Year, I had the pleasure of appearing on behalf of the Victorian Bar in the High Court in Canberra to inform the Court of the members of the Bar who had been appointed as silks for the State of Victoria. All of the silks appointed in November 2005 attended the ceremony, many with their families. It was a special occasion for them. In the evening, the Australian Bar Association hosted a dinner for members of the High Court, the new silks and their families in the Great Hall of the High Court. In all, it was a most enjoyable occasion with many of the new silks enjoying a long night of celebration.

NEW BAR WEBSITE

The new Victorian Bar website was launched officially by the President of the Court of Appeal, the Honourable Justice Maxwell, at a reception held in the Essoign on 9 February 2006. The first four interviewees in the Bar's Oral History Project — Charles Francis AM QC, Dr Philip Opas QC, Judge Liz Gaynor and Brian Bourke — were present at the official launch. The Bar also welcomed Mr Colin Neave AM, the Chairman of the Legal Services Board, and Ms Victoria Marles, the Legal Services Commissioner, to their first Bar function since their appointments.

The launch of the new website is described elsewhere in this edition of Bar News. The new website is faster, more functional and will serve the Bar well for some years. The Bar expresses its gratitude to Icon Inc Creative Communications for their design and construction of the website and to the Bar's database consultant, Bruce Gilligan, of Imago Computer Solutions Pty Ltd and his assistant, Peter Avram, for their innovative data base work. Thanks are also due to Michael Shand QC for his oversight of this substantial project on behalf of the Bar Council and to Kate Anderson and Penny Neskovcin for their work in updating the content of the site.

REVIEW OF LEGAL EDUCATION AND TRAINING SERVICES

In March 2006 the Attorney-General instituted a review of legal education and

training services in Victoria in the context of the *Legal Profession Act 2004*. It is intended that the review evaluate the legal education system which qualifies law graduates for admission to practice and to assess the appropriate requirements for post-admission continuing legal education. The review is being conducted by Ms Susan Campbell, formerly Professorial Fellow in Legal Practice at Monash University, assisted by an Advisory Committee whose members are able to contribute educational and professional perspectives and experience. Ms Campbell will be consulting widely with the Victorian legal profession. The Bar Council, with the assistance of the CLE Committee and the Readers' Course Committee, is in the process of finalising its submissions for the review.

LEGAL AID

The Bar Council continues in its attempts to increase the brief fees to barristers for Legal Aid work. The members of the Bar Council "Legal Aid portfolio" attended a recent meeting organised by the Criminal Bar Association. The Managing Director of Victoria Legal Aid, Tony Parsons, and a representative from the Law Institute of Victoria also attended the meeting. In turn, I have raised Legal Aid with the Attorney-General and further submissions on behalf of the Bar on the issue will be forwarded to him in the near future.

MARCH 2006 BAR READERS' COURSE

On behalf of the Bar, I welcome all of the readers who commenced reading on 1 March 2006. In particular, I welcome Linda Lovett, the first indigenous reader since the 1980s. I also welcome the two readers from Papua New Guinea — Michael Koimo and Charles Mendes — and the two readers from the Solomon Islands — Henry Kausimae and Miriam Lidimani.

ADVOCACY SKILLS TRAINING WORKSHOP IN VANUATU JANUARY 2006

Recently, the DPP Paul Coghlan QC headed a team comprising Ian Hill QC, Michael Tovey QC, David Parsons S.C., Julie Condon, Martin Grinberg, Ronald Gipp and the Manager of Legal Education for the Bar, Barbara Walsh, to conduct a five day intensive advocacy skills training workshop for government lawyers of Vanuatu. More than 50 government lawyers participated at the workshop from the offices of the Attorney-General, the Director of Public Prosecutions and the Public Solicitor.

On behalf of the Bar, I thank all of those members who, year after year, have taken time out of their practices to teach in these courses on a voluntary basis and often in trying and difficult conditions. The South Pacific programme rests entirely on the personal efforts of those barristers who are members of the team and Barbara Walsh.

SPORTING ACHIEVEMENTS

Henry Jolson QC, President of the Australian Bobsleigh and Skeleton Association, and bobsleigh coach, Will Alstergren, continued their successes with the Australian women's bobsleigh team, two-man bobsleigh team, and men's skeleton team — all of which qualified for the Winter Olympics — the first Australian women's bobsleigh team and the first Australian men's skeleton team to do so. The Australian women's bobsleigh team came a very creditable fourteenth place in the Winter Olympics.

Kate McMillan S.C.
Chairman

The Promise of Reform in Victoria's Courts

COURTS should be the centre, the heart, of the communities they serve. The Bracks Government knows this and, since coming to office, has committed over $100 million to court infrastructure. New, state-of-the-art court complexes now exist at Warrnambool and Mildura, with Latrobe Valley and Moorabbin on their way, while a quiet technological revolution is also taking place, earmarked to create a single electronic registry, expanded on-line service, electronic filing, and information-rich case management.

Support for the courts, however, must go beyond their physical structure, beyond systems. In valuing our court system, we *must* ensure that it has the confidence and respect of the public. We should not assume, however, that strength lies in atrophy. Instead, it lies in their independence, and in their capacity to be robust and flexible and connected, as entities, with the community that they serve. This is why we established the Judicial College of Victoria, an instrument for harnessing the intellect and passion of the judiciary for the law as an evolving body of knowledge, one which sends a message that the judiciary wants to remain engaged. It is also why we established the Sentencing Advisory Council, a body which is, in many ways, the interface, the exchange between the public and the courts.

Beyond strengthening the foundations of the courts themselves, however, we must be sure that they are, in fact, facilitators of justice and, accordingly, our courts have been engaged in a wave of transformation of the way they conduct their everyday business. The Magistrates' Court has embraced restorative justice. From the diversion and CREDIT programs, through the Drug Court to the Family Violence and Koori Court divisions, Victoria is benefiting from flexibility, compassion and foresight at the coalface of our legal system. This momentum will continue, with an innovative program proposed for Sunshine, Latrobe Valley and

Melbourne CBD Magistrates' Courts for offenders with complex needs, while the new Neighbourhood Justice Centre will bring immediacy and meaning to justice for specific communities. The restorative justice train has left the station and is gathering speed. There is, however, much more that we can do.

For too long, our legal system has been shaped around the fist on the table and it is time to change the way we view disputes. In doing so we must acknowledge the fundamental right to have our day in court if we so choose. However, increasingly, criminal jurisdictions are acknowledging the benefits of an inquisitorial process while, in the civil sphere, parties are opting out of prolonged litigation. Currently, of course, there are options for non-adversarial resolution within the state court and tribunal system. We should be asking, however, whether these can be reprioritised as the main game, rather than a sideshow, and I have asked Victoria's Crown Counsel, Dr John Lynch, to examine whether the role of Supreme Court Masters can be revamped to lead the charge for a new form of quasi-judicial mediation.

I have asked Victoria's Crown Counsel, Dr John Lynch, to examine whether the role of Supreme Court Masters can be revamped to lead the charge for a new form of quasi-judicial mediation.

This being said, we must not limit our imagination to the potential once disputes are on the court conveyer belt. Our *first* port of call should be the most appropriate way of resolving the dispute. This means shunning the knee-jerk reaction and one way may be to encourage mediation *before* filing, rather than leaving it to be ordered once the battle lines are drawn. This would no doubt frustrate the flamboyance of practitioners who enjoy the gothic drama of throwing down the gauntlet on behalf of their client. Nevertheless, it would send the message that we want disputes resolved early and appropriately, free from the bluster and shirt-fronting of the courtroom.

Rather than close our doors to change, we must recognise that justice lies in the partial dissolution of the rigid structures that tradition has ordained. I believe then, that our courts' future lies in unity, in functioning as a genuine system in the process of constant evolution. There is much work ahead of us, however, if we are truly to engage with the promise of a single court system. One road, flagged by the courts themselves, is the need for simplified civil procedure rules. Accordingly, the Victorian Law Reform Commission, in close consultation with the courts, will conduct a wholesale review of the rules of civil litigation. Similarly, I don't need to tell readers that current legislation concerning the establishment and operation of the courts is archaic, anomalous, and

disjointed and therefore we are determined, in the coming months, to explore the possibility of a single consolidated Courts Act.

Within the walls of this well-designed system, of course, must be an exemplary service. One example already proving worthwhile is the introduction of a form of docket system in the County Court, known as the Criminal Pilot List. The success of the docket system in the Federal Court is well known, of course, and the County Court reports that this List has effectively halved the waiting period from committal to trial by enabling relevant judges to conduct intensive case management of criminal cases assigned to them from committal to resolution. Results like this speak volumes for the benefits of engaging with procedural reform. In a similarly positive step, the Magistrates' Court is challenging the conventions of court business with the introduction of longer sitting times for matters heard by judicial registrars and the scheduling of matters throughout the day rather than the 10 am "cattle-call". These changes are significant and I hope spark reform that reaches all jurisdictions in time.

Consistent with a more effective approach to the administration of the law is the burgeoning focus on specialisation in courts here and around the globe, a focus which recognises the need to hear matters in an understanding environment. Already we know that specialist jurisdictions minimise trauma and reduce delays. Equally important is their symbolic value, their capacity to send the message that the criminal justice system treats sexual offences, for instance, seriously. However, I believe we can take these benefits further.

In Manitoba, for example, judicial positions on their specialist sexual offences court are highly sought after because of its cutting edge jurisdiction and, in keeping with our emphasis on continuing professional development, I have also asked Dr Lynch to work with the courts and Judicial College to explore a system for strengthening and increasing judicial education. Such a system would confirm our belief both in the importance of lifelong judicial learning and in the responsibility that all judicial officers have to maintain and improve their knowledge and skills for the benefit of the community. Let's be clear here: I see specialisation as operating at the pinnacle of one's craft — not a second class act, but an example to all who believe in the effective administration of the law.

Finally, it is my hope that all of the reforms implemented, as well as those waiting in the wings, will foster a climate of greater cooperation between all Victorian jurisdictions. In addition to the increase in shared resources and cross-jurisdictional support the judiciary is currently experiencing, we *can* take this momentum further by beginning to share court facilities, and by coordinating courts administration.

The introduction of a form of docket system in the County Court, known as the Criminal Pilot List has effectively halved the waiting period from committal to trial.

Coordinated administration is a concept growing in acceptance in Australian jurisdictions and we are currently considering the coordination of physical, administration and judicial resources in the Victorian context. This includes exploring the concept of a single costing directorate and the redevelopment of the old County Court building into a Justice Complex. Such a Complex could be used to conduct all hearings of a particular nature, such as criminal hearings, from two or more jurisdictions, combining the expertise and resources of superior jurisdictions that previously operated in isolation into a single, quality, Criminal List.

We *must* constantly explore ideas that may see the public better served. The Bar, of course, has an important role to play in any reform, not just in our courts but in continuing reform of the profession itself. As you will be aware, the long-awaited reform of professional regulation is now in place, and we have moved our focus to the regulation of government lawyers and, more relevantly to readers, to those mechanisms that shape the face of the profession. A review of the way legal education is conducted in Victoria is currently underway, Victoria now being the only Australian jurisdiction that requires no formal training in its articles year. I look forward to its recommendations in due course and, in the meantime, encourage readers to participate and engage with open mind in the possibilities ahead.

Rob Hulls
Attorney-General

Bar Defence

Notification of claims/circumstances to the LPLC — when, what and how?

WHILST all practitioners would no doubt be aware that professional indemnity insurance is "claims made" (i.e. that the policy responds to claims made against the Insured within the period of insurance, rather than necessarily to events occurring or work performed within the period), it is apparent that many barristers are still uncertain of what is involved in the notification process.

The first point to be made is that the LPLC as the Insurer has no standing to intervene until a notification is made to it by or on behalf of the insured barrister. The policy provisions are simply not triggered until a notification to the LPLC occurs. Occasionally the LPLC receives complaints directly from claimants — in such cases, we will write and seek a formal notification from you, and will not respond to the claimant without consulting you.

Clause 19 of the LPLC policy for barristers requires immediate notice in writing to be given of any claim first made against the barrister during the period of insurance, or circumstance which may give rise to a claim of which the barrister becomes aware during the period of insurance. A "claim" is defined as a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages. This therefore covers notification of matters such as:

- receipt of a writ, summons or Legal Services Board complaint in which civil compensation is sought;
- receipt of a letter of demand asserting an entitlement to compensation or damages, whether that assertion is explicit or whether it is to be otherwise inferred from the terms or tenor of the letter;
- receipt of correspondence threatening joinder to civil proceedings or which recommends or suggests you should notify your insurer; and
- any awareness of facts/circumstances which a barrister would reasonably regard as having the potential to give rise to a negligence claim.

HOW DO I NOTIFY?

To formally notify a claim or circumstances which might give rise to a claim, we ask that you complete a notification form which is available on the LPLC website (www.lplc.com.au). This provides the LPLC with your personal details, the name of the claimant or potential claimant, details of the brief which has given rise to the problem and your first awareness of that claim or circumstances, the identity of your instructing solicitor, and a short description of the nature of the allegations made or anticipated. If the claim is in writing, then you should attach a copy, together with any other major document that may assist in readily identifying the subject matter of the claim and its details (for example, if the claim arises from a written memorandum of advice, it really assists our capacity to understand the problem if a copy of the memorandum can be provided).

You may telephone our claims managers at any time (Justin Toohey and Alex Macmillan: 9670 2001) if you wish to discuss any aspect of your notification. They are both very experienced solicitors with practical working knowledge across a broad range of legal practice areas, and will be well placed to guide you in responding to the problem.

It is not necessary in the first instance to provide voluminous materials. Confine your notification to statements of fact (not opinion) and do not make any statements that might be construed as an admission of liability. At the initial stage, our goal will be to gain an overview of the background and circumstances giving rise to the notification. Often that is all we will require, because many claims do not develop beyond the notification stage. If and when the matter does develop, or if we feel that more information is required, we will ask you for it.

Solicitors from the LPLC's external panel of lawyers are appointed to investigate and defend claims only once legal proceedings have commenced. Very occasionally the complexity or magnitude of a particular claim or notification may necessitate the appointment of a panel solicitor before litigation, but this will occur in consultation with you.

PROFESSIONAL CONDUCT MATTERS

Disciplinary complaints which focus solely on conduct issues are not covered by the LPLC policy, and if a complaint is solely confined to conduct matters then it is not a matter in which the LPLC will get involved.

However, often such complaints are combined or overlap with a pecuniary loss claim, or often a matter may start out as a conduct complaint but the circumstances are such that it is obvious some civil action could follow. In these situations, the LPLC should be notified of the complaint immediately. The LPLC has an interest in responding to pecuniary loss claims, and if the conduct/civil complaints proceeds in tandem (or follows on afterwards), there will need to be consistency in the response to both. By way of illustration, whilst it may in some situations be advantageous to plead guilty to a conduct complaint, the impact of doing so in the context of an ancillary civil complaint needs to be addressed with the LPLC — bearing in mind that the policy contains the usual provision forbidding admissions of liability being made without the LPLC's consent. For this reason, where there is a pending or anticipated civil claim, it is advisable to ask the LPLC to review responses to Ethics Committee complaints.

COST DISPUTES

In some cases, solicitors or clients complain that the barrister's fees are excessive, and seek that they be reduced or waived. This type of fee dispute does not involve any element of claim for compensation or damages beyond the question of the barrister's fees. It is a common feature of all professional indemnity policies that such claims for refunds of fees or for damages calculated by reference to fees charged by the barrister are excluded from cover, and as such do not require notification. However, if the claim for refund of fees is only one aspect of a broader damages claim, as is often the case, then the LPLC policy will respond to the balance of the claim. Claims for fee refunds or waivers are generally made by way of set-off and/or counterclaim to fee claims initiated by the barrister. The safest course is to notify the LPLC of any such counterclaim, which will enable the LPLC to then assess the claim made and advise you of policy response.

WILL NOTIFICATION AFFECT MY PREMIUM?

The LPLC encourages early notification. It has been one of the hallmarks of success of the solicitor's scheme for the past 20 years, and has many advantages, and no disadvantages:

- Early notification and investigation of claims enables many matters to be "nipped in the bud" and either avoided altogether, or at least minimised. This is not only in financial terms, but also in terms of the maintenance of professional relationships with solicitors and clients.
- If the claim is unmeritorious, early notification enables us to work with you and establish the basis of the defence of the matter from the outset. Our experience and professional objectivity can be very useful in this regard.
- Early notification and consultation with the LPLC enables you to be confident that whatever (s)he does will have the LPLC's clearance.
- Finally, early notification enables the LPLC to more accurately reserve for its potential liabilities. Accuracy in reserving is critical to the LPLC's ability to price cover for future years at the level which fairly reflects the cost of claims incurred, and to provide stable premiums over time for the profession.

There is therefore no penalty for notification. Furthermore, the LPLC's current premium structure is not affected by the number of notifications an individual barrister may make.

WHAT IF I DON'T NOTIFY WHEN I SHOULD?

The LPLC operates pursuant to a statutory framework which is ultimately designed to ensure that cover is available to consumers of legal services for provable and compensable negligence. The LPLC cannot and will not avoid indemnity by reason of any non-disclosure or breach of policy condition by an Insured barrister. However, the policy does include a counter-indemnity from the barrister to the LPLC in certain situations, such as when any breach of policy conditions has prejudiced the LPLC — an example of this would be a late notification in which the barrister's delay has operated to deprive the LPLC from taking action which would have avoided a claim altogether, or would have mitigated the damage and enabled a lower settlement with the claimant to be achieved. This is a powerful incentive to notify at the earliest opportunity.

If having considered all of the above you still have a doubt as to whether or not something should be notified, you should contact the LPLC on 9670 2001 and speak to one of the claims managers for further guidance.

Legal Profession Act 2004

ON Monday 12 December, the *Legal Profession Act 2004* ("the new Act") will come into operation. The new Act replaces the *Legal Practice Act 1996* which has been repealed.

The new Act introduces a number of changes to regulation of barristers' practice and the role played by the Victorian Bar in regulation. One of those changes relates to the role of the Ethics Committee. This bulletin addresses that matter only.

Under the new Act, the Victorian Bar Inc Practice Rules (as amended) continue to apply to practice by barristers. Rule 7 permits the Ethics Committee to grant dispensation from the operation of a certain rule or rules in special circumstances. The Ethics Committee of the Bar will continue to be available to give rulings after Monday 12 December.

In the past, rulings given by the Ethics Committee were regarded by it as binding. If counsel sought and obtained a ruling from the Ethics Committee and acted upon it then the Ethics Committee would not take disciplinary proceedings thereafter against that counsel, provided the relevant facts were fully and accurately stated. The Ethics Committee was able to take that position because under the old Act, save for the role played by the Legal Ombudsman, it was the body delegated with the power to investigate most of the complaints against barristers and where necessary laid charges.

Under the new Act the situation has changed. The new Act establishes the office of the Legal Services Commissioner ("LSC") who is responsible for receiving and investigating all complaints alleging misconduct or unsatisfactory conduct by barristers. The decision whether or not charges will be laid is now a matter entirely for her. What role, if any, the Ethics Committee may play in the process is not yet clear. The Act enables the LSC to refer complaints to the Bar for investigation and report back to the LSC. The Bar hopes that that will occur and has made representations to that effect. Even so, the decision concerning action after the completion of an investigation is to be made by the LSC. Discussions are continuing but nothing has yet been finalised.

So far as rulings are concerned, the Ethics Committee cannot presently guarantee that a ruling given from Monday 12 December onwards will be binding in the sense that it will be recognized and given effect by the LSC. Since the LSC has the final decision concerning the laying of charges, there can be no assurance by the Ethics Committee or any of its members that a ruling given by them will be recognized by the LSC and given effect.

Until the situation is clarified by the LSC by a clear statement of how the LSC will regard rulings and what status, if any, will be attributed to them, then rulings given by the Ethics Committee and its members can only be regarded by barristers as advisory. They cannot be relied on as binding.

The Ethics Committee and its members will continue to do their best to assist barristers by making themselves available to assist with giving rulings and ethical advice. However, neither the Ethics Committee nor its individual members can accept any responsibility for the consequences of a ruling being acted upon by counsel if the LSC were later to take a contrary view. It is important that members should understand the basis upon which ethical rulings will hereafter be given by the Ethics Committee and its members.

In future (save for urgent cases where it is practically impossible to do so, for example if counsel is at Court seeking a ruling by telephone), counsel seeking a ruling from the Ethics Committee or one of its members should set out the reasons why a ruling is being sought and the background facts giving rise to the request in writing and in electronic format. Thereafter, a written ruling will be given and the records kept by the Committee. If any member of the Bar has any questions about the matters raised herein they should feel free to contact either myself or any member of the Ethics Committee by telephone.

Paul Lacava
Chairman Ethics Committee

Federal Court

Justice Neil J. Young

HOW does one welcome to the Bench a barrister whose CV suggests that he has done everything? The Honourable Justice Neil Young was appointed to the Federal Court of Australia on 24 November last year. His appointment had been predicted nearly a week earlier by the *Financial Review* which on 18 November reported that "A Crazy Horse from the Victorian Bar is the hot tip …". The reference, of course, was to the backup band for the 1970s musician Neil Young.

The newly appointed Justice of the Federal Court may not have his own backup band. But since his birth on 7 January 1952 he has managed to do many things and to do them all well.

He completed the Melbourne LLB with first class honours in 1973 and graduated in 1974. During 1974 and 1975 he was a tutor at the Melbourne University Law Faculty and also at Ormond College, while at the same time serving with Bernie Walter at Mallesons. At that firm he worked closely with Tom Bostock, Peter Kelly, David Welsh and Ian Murray. This was the beginning of his establishment of an impeccable legal pedigree. From Mallesons he went to serve a stint as Associate to Sir Ninian Stephen during 1975 and 1976. Then he enrolled as a graduate student at Harvard in the 1976–77 academic year, taking out an LLM from that University in 1977.

At Harvard he met a young woman called Inga from Iceland. In they married in London, with the now President of the Court of Appeal, Chris Maxwell, as best man.

During the 1977–78 year he worked as an Associate with a New York firm of Attorneys, Curtis Mallet-Prevost Colt & Mosle. In 1978 he returned to Australia to work as a solicitor with Allen Allen & Hemsley in Sydney.

In 1979 he signed the Role of Counsel, reading with Ron Castan QC and when he was overseas with Jack Fajgenbaum QC. Mention was made at his Welcome that his pedigree through Ron Castan traces back to SEK Hulme QC who in turn read with the Honourable Keith Aitken of the High Court who read with the Honourable Alistair Adam of the Supreme Court who read with the Honourable Wilfred Fullagar of the Supreme Court and later of the High Court, who read with the Honourable Charles Lowe of the Supreme Court. This extract from the modern version of Genesis indicates very high quality breeding indeed.

Eleven years after signing the Bar Roll, he was appointed one of Her Majesty's Counsel for the State of Victoria in 1990.

Neil Young's service to the Bar and to the legal profession in a great many administrative and leadership roles has been considerable. He was Vice-Chairman of the Bar Council from 1995 to 1997, a Director of Barristers' Chambers Ltd. from 1994 to 1998, Chairman of the Bar Council from 1997 to 1998, and President of the Australian Bar Association from 1999 to 2000.

He has been associated in one form or another with the Faculty of Law at Monash and the Faculty of Law at Melbourne for many years.

Since 1999 he has been a Member of the Court of Arbitration for Sport Geneva, which someone suggested gives him an unfair advantage over those with whom he competes in sailing or golf.

His Honour established his reputation at the Bar primarily as a commercial lawyer. Only shortly after completing his reading period, he was briefed to appear on behalf of the editor of *The Age*, Ranald McDonald, in the Norris Newspapers Inquiry. He was subsequently involved in the 1983 ASIO Royal Commission, acting for the Federal Government, the NCSC Inquiry into Bond Corporation and Bell Resources, the ASC Inquiry into Coles-Myer Limited and Yannon Pty Ltd and in the Longford Royal Commission. He appeared in such monster cases as *National Australia Bank* v *Bond Brewing Holdings Ltd.* and the Olympic Dam Joint Venture litigation between Western Mining Corporation Ltd and BP.

But he has also appeared in a number of public interest cases and in many of them on a pro bono basis. He appeared in the High Court for Polyukovich to challenge the 1988 retroactive amendments to the War Crimes Act. In *Cunliffe* he appeared to challenge the amendments to the Migration Act that prevented lawyers from immigration assistance unless they were registered migration agents, in the Yorta Yorta litigation against the State of Victoria and the *D'Orta* v *Ekeniake.*

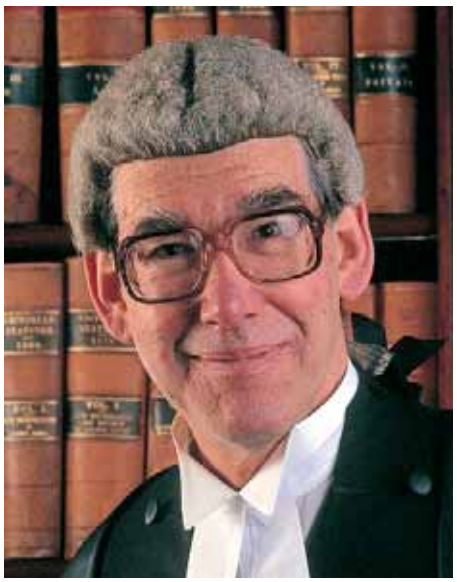
His Honour has a justified reputation as being unflappable. He is calm, precise, courteous and often inexorable. At the Bar he made a formidable opponent. Perhaps because of his impeccable legal breeding, his calm demeanour and quiet logic, he always seemed to project the confidence of the inevitable victor. In so many cases the confidence was justified by the result. Outside the law his dedication to golf and sailing appeared to be outweighed only by his misguided support of Essendon.

His passion for the Bombers did not, however, prevent him for appearing for Greg "Diesel" Williams who, after the Bombers had beaten Carlton, reacted to abuse from an Essendon player by "pushing away" a field umpire who got between them. In that case His Honour ultimately lost but the interlocutory injunctions he obtained enabled his client, who had been suspended for nine weeks, to continue playing for most of the season.

Those who appear before him will find him calm and patient, although we anticipate that he will not resist the temptation to ask the incisive question which, at least in some cases, will bring the real issues to the surface and shorten proceedings considerably. With a pedigree such as his, how can he fail to be a success.

We welcome His Honour's appointment and the highly deserved recognition of his merits.

The Honourable Mr Justice William Frederick Ormiston



ON behalf of the Attorney-General, may I express his gratitude, and the gratitude of the State of Victoria, for your Honour's extended and devoted service to the administration of justice in this State, on the occasion of your Honour's retirement from the Supreme Court. Your Honour has dedicated yourself to 48 years of service to the law, including over 22 years as a member of the Supreme Court, with more than ten of those as a Judge of Appeal.

Your Honour leaves the Bench knowing that you, and the contribution you have made to the practice of the law and to legal scholarship, are held in high esteem. Indeed, your Honour's legal reasoning has been approved not only in the High Court of Australia but also in the Supreme Court of the United States.

Your Honour was born in Melbourne in 1935. Your Honour attended Melbourne Grammar School from the age of five and by the time your Honour left school at the end of 1953 your achievements were considerable. Your Honour won numerous prizes for subjects ranging from Greek and Roman history to English literature and languages. These aptitudes have remained amongst your Honour's strengths throughout your career.

Melbourne Grammar School proved to be the genesis of an insatiable appetite for learning and a lifetime of enduring friendships. At the age of five you were seated in the same class as the Honourable John Batt, and the friendship has continued and developed since that time. James Merralls QC was to join you at the Senior School, and you and Mr Merralls also have remained firm friends since that time.

With the award of several scholarships, including a Senior Government Scholarship, your Honour undertook a law degree at the University of Melbourne where you were a prize-winning student. Your Honour was a member of Trinity College.

At University your Honour was the Business Manager for the first volume of the *Melbourne University Law Review* in 1957. During that year, the Review was edited by another future appellate judge of the Supreme Court of Victoria, the Honourable J.D. Phillips, and Mr Justice Charles, yet another future appellate judge, was a member of the Review. Typography has been one of your lifelong interests and the initial design of the Review owed much to your contribution.

After graduating LLB (Hons) in 1958 your Honour studied with Professor Gower at the London School of Economics and Political Science. This was said to be the beginning of the development of your Honour's "acute" understanding of company law.

In 1958 your Honour was articled to Mr G.V. Harris, a principal at the firm of Oswald Burt & Co. and you were admitted to practice in 1959. You then worked at Whiting & Byrne for a short time. You read for the Bar with the late Mr Justice Griffith, whom you have described as a "marvellous master, willing to help in all circumstances and blessed with an exceptional knowledge of the law and its intricacies". At your Welcome to the Supreme Court it was observed that in your Master you had "encountered one of the few whose knowledge of the law was as fine as yours was to become". Your Honour signed the Roll of Counsel on 18 December 1961.

Your Honour was a junior for 14 years and you took silk in 1975. Your Honour had five readers: Geoffrey Gibson, A.X. (Tony) Lyons, the late Tom Roach, Rohan Walker and Michael Adams QC. your Honour's natural aptitude for legal thinking was soon apparent and, in combination with your dedication and thoroughness, your Honour developed a "very successful practice which ranged over a wide field" including commercial matters in the Federal Court and the then Trade Practices Tribunal, company law, common law, industrial law and some criminal matters "despite the strong demand for [your Honour's] services in ... equity".

From the very beginning of your Honour's years at the Bar, you dedicated yourself to the legal profession, teaching scores of newcomers the art and the discipline of drafting pleadings. Your Honour was dedicated to being a practitioner of the highest order and dedicated to the profession as a whole, in particular the institution of the court. When the late Mr Justice Griffith went to the Bench, having been the founding librarian of the Victorian Bar Library, your Honour assumed the role of Bar Librarian for eight years. When Supreme Court listing procedures were changed in 1983 your Honour, while still at the Bar, authored a "detailed, lucid and innovative" report on the operations of the Supreme Court Listing Procedures.

Your Honour has given "tireless service" to a number of committees, most notably the Supreme Court Library Committee and the Supreme Court Rules Committee, at first representing the Bar. Your involvement with the Library Committee has continued for over 30 years and with the Book Sub-Committee for almost as long. Membership of these Committees was no token involvement. When there were monthly librarians' meetings, you attended every meeting. I am assured that your Honour knows by name every book bought by the Library over those 30 years, and still takes home some books most nights, reads them, and makes a decision on each book as to whether it is a worthy acquisition for the Library.

Your Honour was appointed to the Supreme Court on 22 November 1983 to fill the vacancy created by the retirement of the late Sir George Lush. At your Honour's appointment to the Supreme Court it was recalled that "books invaded your Honour's chambers like Mongol hordes". If there were more than three people in your Honour's chambers, then one always had to stand. However, what set your Honour apart from many other practitioners at the Bar, and what has become a hallmark of your Honour's judgments, is that these tomes are not mere set pieces — they are the tools of your legal scholarship which is renowned and admired. Your Honour's commitment to

accuracy and scholarship was noted even while your Honour was a junior, one of your leaders observing that to have you in court was "quite marvellous, it was like having the Australian Digest at your elbow, save only that, when nudged, it fell open at the right page."

Your Honour was not content to rest on these hardcopy bibliographic laurels, not even in the latter years of your career. Your Honour's uptake of, and expertise with, electronic technology is reputed to be unsurpassed on the Bench, and it has been noted "there are few who can use electronic research functions better than [your Honour]". You were Chairman of the Courtlink Executive Committee on Court Computerisation.

Your Honour's analytic skills and legal scholarship were well suited to the Bench. In the 1985 case of *R* v *Lawson and Forsyth*, your Honour conducted an extensive historical examination of the law of self-defence and the requirement in *Viro's* case of an unlawful attack as a condition to a successful plea in self-defence. Your Honour dutifully followed the test laid down in *Viro* on grounds of precedent but doubted whether the requirement of an unlawful attack could be historically supported or justified by authority. Your Honour observed that: "if those rules are to be changed, perhaps it is better done by the High Court itself". Persuaded by your Honour's scholarship, and no doubt taking the hint, the High Court overruled *Viro* in *Zecevic* v *DPP* (Vic), with Justices Wilson, Dawson and Toohey relying upon your Honour's judgment in *Lawson* as providing what they described as "an exhaustive examination of authority" to support their view that "[w]hilst in most cases ... the attack said to give rise to the need for the accused to defend himself will have been unlawful, as a matter of law there is no requirement that it should have been so".

In 1994, your Honour decided the case of *Vroon BV* v *Foster's Brewing Group Ltd*, where you concluded that while the primary mode of ascertaining the existence of a contract is through pinpointing the offer and acceptance there may be occasions where a manifestation of mutual assent must be implied from the circumstances. In a testimony to the importance and enduring nature of your Honour's judgments, *Vroon* has been considered in numerous cases, including decisions of the Federal Court, the New South Wales Court of Appeal, the Queensland Supreme Court and the High Court of New Zealand as well as being discussed by legal academics in many journal articles.

Your Honour's decision in *Statewide Tobacco Services Ltd* v *Morley*, is another decision that is frequently cited throughout Australia. This concerned the extent to which a director who takes no effective part in the management of a company can be made liable for its debts in circumstances where it continues to trade while insolvent.

Among many other contributions to the law, your Honour participated in the Woodhouse Royal Commission into personal injury law, and you have presented papers to the American Bar Association and the Australian Judicial Conference on subjects as diverse as the formalities prescribed for the execution of wills, the application of principles derived from abuse of process in criminal proceedings, and the use of witness statements, court books and summaries in civil litigation. Occasions of this type have also led to a number of long-standing friendships with judges from other jurisdictions — especially the United Kingdom and New Zealand.

Your Honour's analytical and scholarly skills, fuelled by your capacity for tireless work, led to your Honour's elevation to the Court of Appeal on 7 June 1995. Indeed, your Honour was involved in drafting the amendments to the *Constitution Act 1975* which set up the Court of Appeal. You were appointed with seven others, at the time of their appointments, Mr Winneke QC (to become President Winneke), Mr Justice Brooking, Mr Justice Tadgell, Mr Justice J.D. Phillips, Justice Hayne, Mr Stephen Charles QC and Mr Frank Callaway QC.

Your Honour's skills of legal scholarship and an uncompromising commitment to exactitude were continuing assets in the appeal jurisdiction. On occasion your Honour's research went back to medieval times, as it did in the exorcism case of *Vollmer*. More recently, your Honour has conducted an exhaustive analysis of the power to enter judgments *nunc pro tunc* in *Hartley Poynton Ltd* v *Ali*, engaging in similar historical research.

As evidence of your Honour's national stature, during 2000 you were appointed as an Acting Judge of Appeal of the Supreme Court of New South Wales with Chief Justice Malcolm from Western Australia and Mr Justice McPherson from Queensland to hear the appeal in *Heydon* v *NRMA*. This lead to the great battle of the footnotes between your Honour and the legal publishers of the *New South Wales Law Reports*. The editor, being inexperienced in the publication of footnotes, first failed to publish your Honour's 492 footnotes at all — and then — still to your Honour's horror — published them in the body of the judgment. Suffice to say that the battle was won by your Honour and volume 51 was reissued.

The United States Supreme Court has also approved of and relied upon judgments of your Honour in the context of the Deep Vein Thrombosis litigation. Specifically in the field of the interpretation of international treaties, Justice Scalia, in dissent but with the support of Justice O'Connor, adopted your Honour's construction of the word "accident" in the Montreal Protocol No. 4 to the Warsaw Convention as requiring the allegation of a specific event or mishap to hold a carrier liable, and not merely an omission or failure to take some precaution. The view favoured by your Honour has since been accepted by the High Court of Australia.

Finally, this farewell would be incomplete without an acknowledgment of the contribution of your Honour's family. Your Honour was fortunate to meet Sarah Doran, herself a law graduate, in the University Library, and has been even more fortunate to share a long and happy family life with her. Your Honour is the dedicated father of three sons, and the adoring grandfather of three grandchildren — Tom, Will and Olivia. It is hoped your retirement will provide an opportunity to continue your Honour's passion for music and cricket. It may also provide further opportunities for travelling with Mrs Ormiston to the West Country of England and visiting the theatre in London. I also understand your Honour will continue to read a Sunday lesson at St John's Church in Toorak.

Your Honour can retire from the Bench proud in the knowledge that you have made a significant and lasting, generous and noble, contribution to public life and to the legal institutions of this State. Your Honour's outstanding knowledge of legal principle and legal history will be sorely missed.

On behalf of the State of Victoria, may I extend to your Honour the warmest of farewells and very best wishes to you and to your family for your retirement.

Ms P.M. Tait
Solicitor-General for State of Victoria

TODAY I have the honour and pleasure to appear on behalf of the Victorian Bar to reflect on and to pay tribute to your Honour's lifetime of

dedicated service to the law and to the administration of justice.

In your Honour's remarks at your welcome to this court on 25 November 1983 your Honour paid tribute to your former master, the late Mr Justice Griffith. That affectionate high regard was mutual. In the preface to the 1965 first edition of his authoritative book, Probate Law and Practice, Justice Griffith recorded your singular contribution in the proofing and checking of substantial sections of that book. I quote, "During the preparation, checking and amendments of manuscripts, galleys and then page proofs, the pupils for the time being in my chambers have helped during time which otherwise would have been their leisure. But in particular I acknowledge my gratitude to my friend and former pupil, Mr W.F. Ormiston of the Victorian Bar for his kindness in checking substantial sections of the galleys and page proofs."

Your Honour's progress at the Bar was due entirely to your extraordinary talent and industry. You soon developed a reputation for legal scholarship and your analytical skills became well known. Your Honour has been an energetic and tireless worker, both at the Bar and on the Bench. It has been said of your Honour that from time to time you have exhibited a touching and naïve certainty about the power of the rule of law. For example, when the Westgate Bridge was being built there was a discussion that there was a real danger that someone might go to the top of the bridge and jump off it. Your response, "No, they won't because it is illegal to park cars on the bridge."

Your work ethic has always been such that you have gone to your desk and perhaps to some you may have seemed remote. Nothing could be further from the truth. At the Bar and on the Bench your door was always open to anyone wanting assistance. If you were engaged, you would call the enquirer as soon as you became free. You always made time to help others.

Wholeheartedly and with your customary thoroughness and attention to historical origins and detail, you immersed yourself in the issue. Scholarly examination, discussion and exposition should not be rushed. However, not all your enquirers shared your Honour's fascination for the intricacies of the law. Even those who did, did not always bargain on being engaged for as long as it took.

Indeed, the story is told of one of your colleagues on the court who came home one evening unconscionably late for dinner. His conversation with your Honour had been fruitful and fascinating, however it had kept him late. He explained to his wife, "I've just had an attack of the Willies."

While at the Bar your Honour served on no fewer than ten committees, committees of the Victorian Bar Council and as the Bar representative on other professional committees such as the Chief Justice's Supreme Court Rules Committee. You were at some time chairman of four of those committees. Each committee was significant and active; they include the Library Committee, the Supreme Court Practice and Procedure Committee and the Law Reform Committee. Moreover, your Honour is known as a stayer. You were on the Bar Library Committee just short of 20 years, only cut short by your appointment to this court. You were on the Law Reform Committee just short of 12 years and were chairman of that committee for four of those years. Your Honour also served on the Chief Justice's Supreme Court Library Committee for the whole of your more than 22 years on the court and you were on the Rules Committee for 20 of those years.

Adding to that, your service on those committees as the Bar representative, you were on the Library Committee for more than 30 years and 26 years on the Rules Committee. Surely something of a record.

Your Honour's love of books and your immense collection of books are both legendary. The Solicitor-General has quoted Justice Charles' reference to your books as mongrel hordes which invaded your chambers. Your chambers and your home have been characterised as having given the impression that they have become inhabited by a bibliographical magpie.

Your fascination with books and with language would occasionally divert you from what could be called the main game. The Honourable John Batt tells the story, as counsel, of being in a tight spot in an argument he was putting to your Honour. He made reference to *Fowler's Modern English Usage*. This led to an engaging and mutually satisfying discussion on the merits of the various editions of Fowler: the first edition by H.W. Fowler based on the strict applications of classical Latin and Greek roots and derivations, the revision by Sir Ernest Gowers, and the much more relaxed edition by R.W. Birchfield.

History does not relate, whether the diversion sufficiently distracted your Honour from pressing counsel on the point in which he was in difficulty. Many of us here today wish we were as adept as John Batt in distracting your Honour when we found ourselves in difficulty with our arguments.

Your Honour has always been a man of constant habits; a coat and a tie every day, even on holidays, a cup of coffee upon arrival in chambers, another at 10 am, a pot of tea with lunch in a teapot made from loose tea, not those ubiquitous nasty little bags. Anyone seeking to

disturb the routine, particularly on short notice, does so at their peril. Last year on 6 October the President sent word that the Chief Justice had called a meeting of judges in the Old High Court Library at 11.30 am. You strode into the President's chambers and thundered, I repeat thundered, your displeasure at the short notice of yet another meeting. Only when you got to the Old High Court Library did you learn that the meeting was to celebrate your 70th birthday. That celebration reflected the deep affection in which you are held by all members of the court, young and old.

Your Honour has been an outstanding judge of this court. You served nearly 12 years in the Trial Division, including the heady frenetic times in the Commercial List and you were a foundation member of the Court of Appeal. You have served on the Court of Appeal for more than ten years.

For years the public and the legal profession have been refreshed by the full strength, fine quality and strong brew that your Honour has served day in and day out. It is with regret that today we are marking the end of your extraordinary and first class contribution to both the legal profession and to the public.

It is fitting that today there sits in the jury box a de facto Court of Appeal of former Appeal justices. Your longstanding friends, The Honourable Clive Tadgell, The Honourable John D. Phillips and The Honourable John Batt. They will be able to determine whether the comments made on this occasion are appealable or whether the judgment has been excessive. We think not.

On behalf of the Bar I wish your Honour a fond farewell. We trust that your Honour and your wife, Sarah, enjoy a long and happy retirement and with the same vigour and enthusiasm that you have conducted your career in the law.

Kate McMillan S.C.
Chairman, Victoria Bar Council

A Farewell to Michael Kelly

ONCE, on a hot, hot day,
Back from a Shepparton summer circuit,
When dust had barely the strength to rise,
I, in shorts, sagging shorts,
Sockless,
A flapping shirt, unbuttoned to the day,
Pretence of a sun boy.

Along the Town Hall street,
Suddenly, with fearful vision, I saw
The iron-creased three-piece suit,
The zebra trousers
Buttoned,
Buckled with golden links,
The cigar cutter,
The jangling ornaments,
Fobbed.
The black hat,
The polished shoes,
The monocle,
And the silver-tipped cane.
No spats today, I regret to say.

Defiance of summer,
Like the man who broke the bank at Monte Carlo,
Acceptance of a stylish integer
And the unswerving determination
To be the singular self.
Pie-eaters just gazed.
Beggars burrowed deep into despair,
"How could such a man not be fazed
By the summer air?"

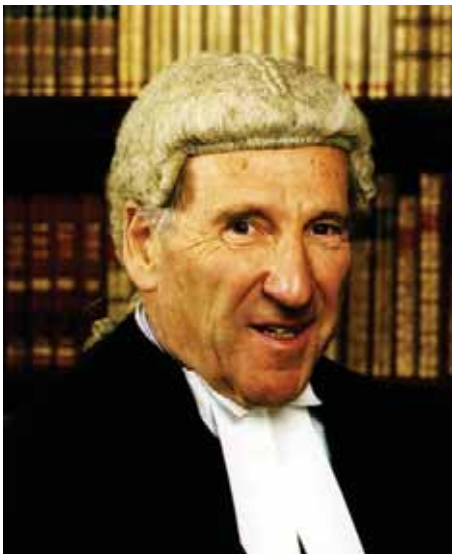
I, in the meantime, fearful of judicial disdain,
Hid behind a lamp post,
Along with the smell of chips and sauce,
Vinegar and fries,
Tattoos and lacerated pasts.

Watching, I was transported
By the elegance and élan
Of Damman's tobacco shop,
Of the subterranean Melbourne hatter,
Of Haighs, not the chocklateers, but
The tailoring checkmate squires.

The pavement was alive
With the abundance of difference,
Of extravagance,
Of felicitas,
The indifference to indifference,
The jaunt of authority,
And so, may it ever be,
In memory and in fact,
To endure in joyful hope
Which is so much harder
Than cruising comfortably with fear
Like the new-world politicians.

Judge S.P. Gebhardt

Kenneth Marks



ON 4 December 2005, the Honourable Kenneth Henry Marks died after a long illness.

Into his 81 years he packed a remarkable amount — bomber pilot, equestrian, racehorse owner, successful advocate, Supreme Court Judge, Royal Commissioner, mediator and arbitrator.

"Ken" Marks was born in St Kilda on 10 September 1924 and educated at what was then known as Melbourne Church of England Grammar School. His biography indicates that his years at that school were not happy ones, although he seems to have retained many close friends from those days.

At the early age of 16 he enrolled in an arts/law course at Melbourne University. But in 1943, part-way through his course and against the opposition of his parents, he joined the RAAF. He became a Lancaster bomber pilot, flying fifteen missions over Europe before the war ended in that theatre. In his own words he "returned to Australia just in time to see *Rainbird* win the 1945 Melbourne Cup".

He returned to his studies at Melbourne University in 1946 with an inquiring mind, a belief in the rights of the individual and a thirst for equality. In pursuit of his ideals, he joined the Labour Club and the Communist Party in 1948. However, visits to Eastern Europe and the sight of Soviet oppression in Czechoslovakia and Poland disillusioned him. He lost his faith in the workers' paradise. In his biography, *In Off the Red*, he said, "I have lacerated myself for my stupidity, unwittingly supporting evil."

He completed his law degree and, after serving articles with Cedric Ralph, he was admitted to practice on 1 September 1950. He signed the Bar Roll on the same day. He read with Sir John Starke, and one could often see the influence of his master in his succinct and pragmatic approach to the problems he faced.

At the Bar he had a broad practice. The breadth of that practice is perhaps illustrated by what David Jones said at his welcome as a judge of the Supreme Court of Victoria. David Jones referred to Ken Marks' "great scholarship, dedication and tenacity, whether it be arguing some constitutional point about electoral boundaries before the High Court, wallowing in offal before an arbitrator, seeking out the cause of extensive bushfires or urging a jury to award fair and adequate damages to a badly injured plaintiff".

Ken was heavily involved in issues of compensation for injuries and his work was largely responsible for the passing of the *Motor Accidents Act 1973* which brought in a system of compensation for persons injured in motor accidents.

His interests were wide. He was a member of the Board of the Faculty of Law at Monash University and a member of the Alternative Dispute Resolution Committee of that University's Commercial Law Centre. He had an interest in science and technology and was concerned to ensure that they were applied for the benefit of the individual.

Ken Marks took silk in 1967. He served on the Bar Council for many years, including a stint as Deputy Chairman and then as Chairman. Part way through his Chairmanship, on 15 June 1977, he was appointed a judge of the Supreme Court.

As a judge he was quick, concerned and thorough. He certainly did not hesitate to make it clear to counsel how his mind was working and what problems, if any, he had with the argument being put to him.

In a farewell written in *The Age*, Rabbi John Levi and William Ormiston said: "In the early 1980s litigation was an entirely reactive process whereby the judge appeared at the appointed time and sat largely silent until the hour fixed for adjournment. Marks fixed one aspect of that very quickly as it was impossible for him to sit silent; his interventions were notorious."

On the Bench he was not just a skilful, hardworking, meticulous and vocal judge. His enquiring mind, which had led him to an interest in alternative dispute resolution, also caused him to look at case management as a way of streamlining and speeding up litigation. He became the judge in charge of the newly revamped Commercial List in 1986, which was created pursuant to the new Rules of Court introduced at the end of 1985.

He ran the Commercial List with efficiency and speed, and left his mark throughout the whole of the Supreme Court's civil business. It is not unfair to say that his actions changed the face of civil litigation in Victoria. Many of the changes which have occurred would have taken place in any case. But he was the catalyst, the initiator and the original driver.

He was the first judge of the Supreme Court to refer a question to a Special Referee (on 25 July 1985) in *Inter-Computing Pty Ltd* v *Falcom Australia Ltd.* In 1990, in *Bond Brewing Holdings Ltd* v *National Australia Bank Ltd*, he appointed a professor in New York to make enquiries and to give his opinion as a special expert and subsequently conducted, with the referee, a telephone conference in open court in which counsel for the parties took part.

He was Chairman of the Supreme Court's Computerisation Committee and Chairman of the Computer Assisted Transcript Committee.

He retired from the Supreme Court on 28 January 1994. At his farewell he spoke strongly against the choosing of judicial appointees, primarily with a view to making the Supreme Court "more representative". He said, "Editorial and other media comment appear to throw doubt on the hitherto accepted principle that judicial officers are best chosen predominantly for their capacity to perform well the tasks required of a judge of a superior court. If these comments are taken seriously and the executive yields to them, the maintenance of the traditional reputation of the courts will falter. It is not sufficient to appoint judges by reference solely to extraneous characteristics which might seem attractive to persons ignorant of the demands of a good justice system."

Following his retirement he was immediately appointed to chair the Standing Review and Advisory Committee on Infertility to review State legislation in the field of IVF. Subsequently he became nationally known as the Royal Commissioner who inquired into the death of Perth lawyer, Penny Easton, and

who carried out that Inquiry with courage and determination in the face of strong attacks from the Keating government.

He was a man of many parts, dedicated, complex, loyal, impatient, persistent and caring, self-critical and anything but self-important. He did not take himself seriously. But he did take his work seriously and he did take life seriously. He was a very hard man to move once he had determined in his own mind what he thought was right. But he was very concerned to do what was right.

At his farewell he adverted to the importance of the independence of the Bar in terms which revealed both his concern for those who cannot defend themselves and his innate dry sense of humour: "There also appears to be a failure to understand the notion of independence of the Bar. It is its independence and the individualism of its members and the competition between its members which enabled the weak to be fearlessly defended against the strong, the poor against the rich and the subject against authority. *The Law Reports* are littered with evidence that these things are so. It may well be that the Bar and, for that matter, the Bench is a wonderful sanctuary for egomaniacs. I cannot think of better therapy or a more useful end to which this rampantly common human proclivity might be put."

He leaves behind his wife, Sheila, two daughters, Kate and Geraldine, and three grandchildren. To them we extend our sincere sympathy.

Judge Bruce McNab

The following eulogy was delivered by Judge John Nixon at a service held at Flemington Racecourse.

WINDBAG, as Robert,[1] implied, loomed large in Bruce's psyche.

If anyone had the temerity to ask Bruce "when were you born?" he would invariably reply "in the year *Windbag* won the Cup". Whether the questioner was any better informed is one matter but as any keen racegoer knows *Windbag* won the Melbourne Cup at this very track in 1925. So at the time of his death Bruce was in his eighty-first year. Perhaps the fact that he was so attached to *Windbag* was a factor contributing to Bruce's lifelong interest in racing but I'm more inclined to think that it had far more to do with his intense dislike of long or misleading submissions by counsel.

Robert has detailed Bruce's background and the family relationship and I will only say this. At Scotch College Bruce was not only an outstanding scholar but also an accomplished cricketer, footballer, tennis player and table tennis player. At the University of Melbourne he was a resident of Ormond College while completing his law course. Bruce was indeed an outstanding law student and he won the Supreme Court prize awarded to the top student in the course. In achieving that high honour Bruce relegated Richard Newton, later to become Mr Justice Newton of the Supreme Court of Victoria, to the position of runner up. Richard Newton had been an odds on favourite to take the title and the loss of the odds on favourite may have contributed to Bruce's racing motto "Odds on look on". Bruce's sporting achievements for Ormond College were well recorded and on more than one occasion he delved into the archives at 346 Burke Road to obtain a copy of the *College Magazine* which he would read to me in order to provide corroboration of his sporting prowess at cricket while we were having a quiet chardonnay or two. As a batsman he held down No. 11 position in the batting order, and as a No. 11 batsman he made Glenn McGrath look like Ricky Ponting. His claim to fame was as a bowler. Knowing Bruce as you all did, no one would visualize him running in like Brett Lee delivering thunderbolts — that wasn't his form. No, Bruce was a slow medium bowler who, from a short run, loped in and if the conditions were favourable he could occasionally swing the ball both ways. To those who know their cricket Bruce was a bowler in the mould of Bill Johnston.

On many occasions Bruce regaled me about the final of the inter-collegiate match between Ormond and Newman. Bruce prided himself on having total recall and I must say that his story had the ring of truth about it as on each occasion he described the match to me he was very consistent and the *College Magazine* confirmed his story. Ormond batted first and were all out for a paltry 114. Bruce didn't trouble the scorer. At stumps Newman was 0/52 and one of the openers was heard to say to his partner, "We'll get the runs without loss — there's nothing to this bowling." I hasten to add that Bruce had not bowled on that first day. I've heard the story so many times I felt as though I was actually at the match. Coleman opened the bowling when play resumed on the second day and Bruce was at first slip. The Newman opener snicked the first ball and as the Ormond Magazine recorded McNab took the most spectacular catch ever seen on the University Oval. It became 2/52 by the conclusion of the over. Bruce opened the bowling from the other end and according to the write up in the Ormond Magazine McNab was unplayable. I'm well aware that a lot of barristers had similar feelings when appearing in Bruce's court. Newman collapsed and were dismissed for 85. Bruce took 7/12 and in the Magazine he was written up as a devastating bowler, a match winner and no doubt in today's terminology he'd be "Man of the Match".

It wasn't until some years later that Bruce confessed that he had written the article himself.

Bruce signed the Bar Roll in April 1948 after finishing articles with his Uncle, Frank McNab earlier that year. He was much in demand and established a very wide general practice very quickly as his Clerks Arthur Nicholls and Percy Dever extolled his virtues. Bruce incidentally was at the Bar for twenty-four-and-a-half years and was a Judge of the County Court for precisely the same time. Bruce was much sought after as counsel appearing for Boards of Inquiry, and he regularly appeared in that rather relaxed atmosphere. It rather suited his style and they were lucrative briefs.

Bruce held the retainer for the former State Electricity Commission of Victoria and for many years he was successful in exculpating the SEC from liability following fires alleged to have been caused by its electrical transmission equipment. He developed what was termed the "McNab theory". This theory maintained that fires could not be started by accidental contact between electrical conductors or power lines. The SEC got away with this theory for many years and it's not putting it too highly to say that the SEC, relying on the theory, saved millions of dollars.

However, following the disastrous bushfires in the Western District in 1976 Sir Esler Barber presided over a Board of Inquiry into the fires. The McNab theory was exposed as being total nonsense by the Inquiry but by that time Bruce had retreated to the safety of the County Court Bench and it was left to Alan McDonald, later Mr Justice McDonald, to salvage something from the carnage. As counsel assisting Sir Esler Barber I had immense pleasure in telling Bruce that his so-called theory was "bunkum". Bruce thought for a minute and dryly replied, "Oh well, Jack, think of all the money I saved the State for all those years."

As part of his extensive general practice at the Bar, Bruce appeared for the stewards in a number of Racing Appeals before the VRC Committee. His claim that he never lost for the stewards was correct but it should be viewed in context — no one else did either. Sir Robert Menzies and Sir John Young each appeared on one occasion only before that august body representing rank miscreants. Each vowed that he would never again appear after his experience before the Committee of the time. Appellants had a dismal record indeed in that jurisdiction.

Bruce's lifelong interest in racing overlapped into his life at the Bar and as some may remember he ran a Book on the appointment of silks and judges. Bruce had an uncanny knack of having deadly accurate odds on appointments, often appearing to know about appointments before the appointee himself. Over the years he made a small fortune from this enterprise, and his winnings often provided a bank for the following Saturday. Bruce would never admit it but the fact was that he was very friendly with the proprietor of Ravensdale & Sons and had a standing arrangement to be notified the very moment silk gowns or judges' robes were ordered.

As a barrister Bruce was a master tactician, a formidable opponent who always had his clients' interests at heart and who achieved good results for them, often in very difficult cases. He had a wicked sense of humour. It was, given his record at the Bar, inevitable that Bruce would be promoted, if that be the right word, to the Bench and that duly occurred in 1972. Bruce's timing was impeccable. He was appointed to the County Court on the Friday before Derby Day, he was sworn in on the following Monday and, of course, Tuesday was Cup day so he was paid for a public holiday.

Shortly after his appointment I appeared for a defendant in an industrial accident cause which was listed before Bruce. Having been opposed to him at the Bar I knew that life for me wouldn't be easy. Liability was in issue but realistically I was hoping to get perhaps a reduction for contributory negligence of perhaps up to one-third. The case finished within the day and Bruce reserved. He announced that he would give judgment the following day. Marie told me that while he was writing his judgment at home she heard a burst of raucous laughter from Bruce and she enquired as to what was so funny. Bruce apparently replied, "I've just fixed Jack right up. I've stitched him up." Indeed he did and the only solace I got out of the case was that his assessment of damages was quite low. Bruce didn't like giving money away even if it was somebody's else's money.

Bruce never lost his sense of humour while he was on the Bench but he was not always what is now described as politically correct. Bruce on one occasion presided over a burglary trial at Geelong. The accused, whose surname was Burr, had a record of convictions for burglary which extended over several pages. The Burr family was akin to the Timkins in that wonderful series "Rumpole of the Bailey". In spite of what Bruce regarded as overwhelming evidence of Burr's guilt the jury returned a verdict of not guilty. While the jury remained in Court, Bruce announced "Discharge Mr Burr from the Dock" and then added "By the way, Mr Burr, don't do it again"!

On the day following Bruce's death the Bar Council on behalf of the Bar inserted a notice in the daily papers in which it was said amongst other things that he had served as a Judge of the County Court for a remarkable 25 years. In a sense that is right but I prefer to regard Bruce as a remarkable Judge of the Court over that time.

He was a remarkable Judge because first and foremost he had a great knowledge of the law and the ability to apply the law succinctly to the facts of the case before him. Juries loved him and the jurors literally hung on his every word. He maintained his sense of humour and displayed at all times a great understanding of human nature and people, leavened, mostly at appropriate times, with wit. Bruce possessed what is sometimes called "the common touch" and he was as much at home with the racecourse tout as he was with the Governor of the State. As a Judge of the County Court Bruce displayed great commonsense as well as practical wisdom. Probably he was a Judge of the Court in the right era given his temperament; he was very impatient with any judge who sought a day out of Court to write a judgment or prepare reasons for sentence. As a judge he was incisive, accurate and he got it right. In all respects he was an ideal County Court Judge.

Bruce dealt promptly and efficiently with his workload on the Court except perhaps for his last case before he retired from the Court in June 1997. Bruce was in the WorkCover List at the time and he heard evidence over several days in what counsel in the case regarded as a cause célèbre. Bruce reserved for almost a fortnight and the expectation was high that the decision would clarify that area of the law. Bruce delivered judgment as follows: "The Applicant is a malingerer. Application dismissed." Bruce's door was always open for a brother or sister judge to discuss any problem and he was always willing to help or advise, that is if you could find him.

Whilst the door of his chambers was always open it was quite another thing to find Bruce there. As Robert said, at lunchtime he adjourned just a little early so that he could make the Savage Club, and when he adjourned his Court at the end of the

day he was in the lift making his way home before anyone could say "protest".

The Racing Appeals Tribunal commenced its operations in January 1984. Jim Forrest, Judge Forrest of the County Court was appointed Chairman, Bruce was a Deputy Chairman and I was fortunate to be "tail end Charlie". Bruce loved his work on the Tribunal, which was the final avenue of appeal in thoroughbred racing, harness racing and greyhound racing. In 1990 when Jim Forrest retired, Bruce was appointed Chairman and he held that position until 2001 at which time he retired as Chairman but remained as a member of the Tribunal until January 2004. His knowledge of and expertise in the racing industry was extensive, and many a miscreant met his match on appeal although, contrary to what occurred before the inception of the Tribunal, a number of appeals have been allowed.

Bruce was instrumental in arranging annual conferences between the Racing Appeal Tribunals of the other States and Territories and in more recent times with New Zealand. This all came about when Bruce in the mid 80s was at a law conference held in Vienna. He met up with the late John Kable — a very talented Tasmanian barrister who headed that State's Tribunal. No doubt, knowing them both as I did, the meeting would have been held in a bar. As a direct result very beneficial conferences have been held regularly and these conferences, held at the time of an important local race meeting, have led to a valuable exchange of information and knowledge. How else would Bruce have attended two Brisbane Cups, two Sydney Cups, two Adelaide Cups, two Launceston Cups, the Alice Springs Cup, the Darwin Cup, the Auckland Grand National, the Christchurch Guineas and the two-day meeting of the Cairns Amateurs? Some may ask why no Perth Cup? Well the reason is obvious – the Perth Cup is run in the long vacation.

However, there was indeed a Perth Conference held at a far more suitable time. Never will I forget the day in the Committee Room of the WA Turf Club. Two things were notable: Wilson Tuckey was the Chairman of the Club and Bruce over the afternoon had one or two chardonnays. He couldn't back a winner so for a diversion he told anyone who would listen that he was an expert in reading palms and thus could predict a person's future. The news spread like wildfire and a few minutes later there he was seated like royalty in an armchair with a queue of at least 10 women awaiting their turn. Wilson Tuckey's wife was second in line and the anticipation on her face had to be seen to be believed — she was literally shaking with excitement and she was not alone in that. Bruce fancied himself as a fortune-teller and he continued reading palms until well after the last race and the bus was ready to take us back to the hotel. No one has ever provided better free entertainment in any committee room on a race day.

Bruce loved his racing and inasmuch as the Tribunal has played a part in the racing industry then it can be truly said that he has made a giant contribution.

He loved to have a punt and now that he's no longer with us those of you who have shares in Tabcorp had better keep a keen eye on the stock market. But Bruce really was a modest punter who concentrated mainly on the multiple forms of betting. However, he had at least one huge result. Libby and I were overseas in 1978. When we left Bruce had a battered old Subaru which was so old it probably had miles rather than kilometres on the clock. It was before the days of government cars. On the very day we returned Bruce telephoned and said, "Marie and I'll come round for a drink to welcome you back." The McNabs arrived in a brand new Toyota Crown with all the trimmings. Bruce introduced himself as Quaddie Mac and I think he liked that name. He'd won a huge quadrella, at of all places, Werribee. An old aunt had phoned him and said that she had a strong tip for a horse called *Idee Fix* — I can remember the horse's name as Bruce also told me this story more than once. *Idee Fix* was 100/1. It was in the third leg of the quadrella — he had a fancy himself in the first two legs — so he took those one out and with *Idee Fix* in the third leg he took the field in the final leg. Bruce was on top of the world, as well he ought to have been, but he did rub salt into the wound by saying, "If you'd been here Jack I'd have told you about *Idee Fix.*" That would have been a first! Bruce loved trifecta betting and he was a numbers man; he often took three, four and six as his Trifecta numbers simply because he lived at 346 Burke Road.

He had some favourite sayings and if a leading trainer had two horses in the one race with one a short-priced favourite and the other at long odds, he'd say to me, "Remember the old maxim, Jack — ignore the selected and back the neglected."

He was a man who loved racing right throughout his life and he loved nothing more than a day at headquarters — i.e. here at Flemington.

Bruce was not only a remarkable judge for almost a quarter of a century, he was, as Robert said, a remarkable family man. He was married to Little Marie as he affectionately called her for almost half a century. I have no doubt that he was devastated by her death last June. Bruce and Marie produced three great sons and to date there are no less than 10 grandchildren who were devoted to Grandpa Bruce and to Marie.

The last six months or so were not kind to Bruce and as a friend for so many years it was indeed sad to see him in a steady decline and so obviously unhappy with and frustrated by his predicament.

But I prefer to remember the many happy days which we spent together; some of those days were in this very room — Bruce proudly wearing his McNab tartan tie — if I hadn't known him better I'd have thought that his wardrobe only extended to that one tie. Other times were spent at the Malvern Hotel — i.e. after Court of course and on a Friday — a very happy table which included mine host, Adrian Schrader, Rollo Roylance, Bill Guillano, Geoff Rickards, the late Kevin Curtain and others — those were indeed happy days. At Seabrook Chambers on Grand Final Eve — Bruce in his towelling hat which was once a white hat but time hadn't been kind to it — he was generally first to arrive and often the last to leave — happy times at 346 Burke Road, at our house, at Noosa as well as at Anglesea. Those are my memories of Bruce — memories which I will treasure forever. He was indeed a remarkable man in so many respects who never took himself too seriously. He loved life.

He was much loved by all who knew him.

Farewell, Bruce. Rest in Peace.

Footnote

1. Bruce McNab's oldest son.

WITH the passing of Bruce McNab, the Victorian Bar has lost one of its greatest characters. In a golden era of advocacy, which included such legends as Starke, Revelman, Rapke, Crockett, and Coldham, McNab stood out in winning the respect and friendship of his contemporaries at the Bar. Academically gifted (he was a Supreme Court prizewinner) and equipped with a fine, incisive mind, he made his mark before both judges and juries with his advocacy. McNab never took silk, yet it was typical that after his appointment to

the Bench that the then SEC, for whom he had held the retainer, replaced him with the services of a QC. But McNab's greatest contribution to the Bar was his wicked sense of humour and his infectious love of life. He became legendary with his book on the appointment of silk each year. Unbeknown to many, George Ravensdale, the Court outfitter, was a close neighbour. With inside knowledge as to who had ordered silken robes, McNab was able to lay his odds with great accuracy.

Racing was his lifelong love and he was able to combine his profession with his pleasure, serving on and then chairing the Racing Appeals Tribunal. His career as an owner of racehorses was less distinguished and rare success was the occasion of great celebration.

In 1971, the third floor of the old Owen Dixon Chambers was one of those nodes of comedy and entertainment that occur rarely in the history of the Bar. Along with McNab, Scurry (the inaugural head of the Crimes Compensation Tribunal), Nixon (later Judge, QC) and "young" Dee (later Judge, QC) formed the nucleus of a remarkable gathering of some of the greatest wits of the Bar. Assembling at the Metropolitan Hotel each Friday, the wins and losses, heartaches and joys of each week would be relived and dissected and subjected to the sharp focus of McNab's humour. Promptly at 6, he would retire to go home to his family, for they were his greatest love.

McNab was fortunate to enjoy the love and devotion of his wife Marie and he valued her and his sons more than any success in his professional career.

McNab only had two readers and I was fortunate to be one of those. He taught me little law but a lot of his legal wisdom. He inspired devotion from his staff — his long-serving secretary Marilyn Sebire followed him to the County Court to become his Associate. As a judge he was both efficient and merciful. Appeals from his decisions were few, and successful appeals even fewer.

With a practicing Bar approaching 2000 advocates, there will never be the intimacy that was part of a Bar of only a few hundred, and it is to be regretted that there is unlikely to be another barrister so universally respected and enjoyed as Bruce McNab.

Tony Lewis

Law Week Program

AS one of the biggest events on the legal calendar, Law Week will return in 2006 renewed, refreshed and ready to open the doors to the law from 21–27 May. A national event jointly coordinated in Victoria by the Law Institute of Victoria and the Victoria Law Foundation, Law Week aims to promote greater community understanding of the law through an innovative series of events and activities held across the State.

Law Week 2006 will bring together law firms, courts, government departments and a range of public benefit organisations to contribute to a comprehensive program which includes legal careers expos, behind-the-scenes court tours, mock trials and much more. Public information sessions will be held covering legal issues such as body corporate law, family dispute resolution, human rights, animal welfare and a host of other topics.

There are a number of events and activities taking place during Law Week 2006 of particular interest to barristers.

Please note bookings are essential for a number of Law Week events. For dates, times and information on other events during Law Week 2006, visit www.vic.lawweek.com.au.

Date	Event	Details
All Week	Parliament House Tours	All tours are free of charge and conducted weekdays at 10 am, 11 am, 12 pm, 2 pm, 3 pm and 3.45 pm — no booking required.
All Week	Cemetery Tours	Join a guided cemetery tour and visit the graves of some of Melbourne's most notorious law makers and breakers — Melbourne General, St Kilda and Brighton Cemeteries — various dates and times. Further info via the Law Week website www.vic.lawweek.com.au.
All Week	Bendigo Law Courts / Children's Court Centenary Exhibition	Includes information on some of the Children's Homes and Industrial Schools. With talk by the new President of the Children's Court and a moot Children's Court in costume performed by local schools.
Tuesday 16 May	Women and the Law Breakfast	Presented by the Victorian Women Law Students' Collective and Maurice Blackburn Cashman. Speakers include: Family Court Chief Justice The Honourable Dianne Bryant, Leslie Power SBS In-House Counsel and mystery guest. Time: 7–8.30 am. Tickets $25. Bookings essential — contact Katie Elder kee@deakin.edu.au.
Thursday 18 May	A Lawyer with Heart Charity Art Auction	Leo Cussen Institute together with the National Heart Foundation of Aust (Vic Div) Charity Art Auction at Cliftons, Level 1, 440 Collins Street. Time: 5.30 pm–8 pm. Tickets $20 inc. refreshments. Bookings essential — contact Linda Baxter or Nathalie Chasen 9602 3111 by Monday 1 May.
Tuesday 23 May	"The Lawyer as Activist" with Justice Maxwell	Fitzroy Legal Service presents "The Lawyer as Activist", a human rights seminar with Justice Maxwell, President of the Court of Appeal in the Supreme Court of Victoria. Venue: Law Institute of Victoria, 470 Bourke Street. Time: 1 pm–2 pm. FREE.
Wednesday 24 May	The Law Week Oration	The Law Week Oration and annual lecture of the Criminal Bar Association of Victoria (CLE accredited) by Lex Lasry QC with special guest at Melbourne Law School. Venue: 185 Pelham St, Carlton. Time: Drinks from 5.30 pm, Oration 6–7.30 pm. Bookings close Wednesday 17 May. Contact Marina Loane 8344 0074 or email m.loane@unimelb.edu.au with "Oration" in subject.
Wednesday 24 May	The Great Law Week Debate	The Great Law Week debate considering the topic, "The road to hell is paved with good intentions — we have more to fear from the State than terrorists" with speaker Tim Costello AO. Time: 5.30 pm. FREE. Bookings essential — contact Ben Wallis 9905 2326 or marketing@law.monash.edu.au.
Thursday 25 May	Animal Welfare — A Legal Challenge	Presentations by Lawyers for Animals, Animals Australia and Voiceless as well as Justice Maxwell, President of the Court of Appeal, Supreme Court of Victoria. Venue: Kitten Club, 267 Lt Collins Street. Time: 6.30 pm–8.30 pm. FREE.
Thursday 25 May	Human Rights seminar	Human Rights Law and Human Rights Activism in Contemporary Australian Society hosted by Public Interest Law Clearing House (PILCH) and the new Human Rights Law Resource Centre. Venue: Allens Arthur Robinson, Level 34, 530 Collins Street. Time: 5.30–7 pm Cost: $5 including refreshments. Bookings essential on 9225 6680 or pilch@vicbar.com.au.
Friday 26 May	Legal Women's Choir	At 333 Collins Street, the acoustics will be spectacular! Time: 1 pm and 1.30 pm.
Saturday 27 May	Guided tours of the Supreme and Magistrates' Courts	*Supreme Court: 9.30 am Gun Alley speaker and official welcome, then tours at 10 am and 11 am, including the elegant domed library and display of winning entries from the Legal Reporting Awards. *Magistrates' Court: tours at 10.30 am, 11 am and 11.30 am. After an info session in Court 1 visitors will be "sentenced" to proceed through the dock to the cells! After touring the cells, visitors will be "released" and proceed to Court 2 for more serious matters!

Eulogy for the Honourable Xavier Connor AO QC*

Michael J. Crennan S.C.

Xavier Connor AO QC.

MORE than sixty years ago, on the morning of 15 August 1945, a young infantry officer in Northern New Guinea faced a difficult series of decisions. His battalion had the day before captured a Japanese held airstrip, some 15 kilometres behind enemy lines. He had that morning been ordered to lead a platoon to attack a Japanese position up the track. As they set off, word came through by radio that an armistice had been settled with the enemy high command. The young officer was determined in the face of that news that his men, many of whom had survived combat in the Middle East, should not be put in harm's way unnecessarily. Although he had nothing but a few words of Japanese, he managed to communicate the news of the armistice to the enemy troops he was facing. They seemed to accept it. However, this successful negotiation was threatened by an unexpected development — a flight of RAAF fighter-bombers, which had not yet been informed, arrived on the scene and bombed the Japanese. When Xavier Connor, for he it was, first told me this story some 15 years ago, I asked him whether he was able to convince the Japanese that, despite the assault from the air, peace really had broken out. He replied with his characteristic understatement, well, yes, but it did take longer the second time. Not a bad preparation for the life of a barrister.[1]

Well, Xavier saved his men and himself for the life that lay ahead. And what a life it was to be. Marriage, four children, eleven grandchildren, and over a half century of unremitting public service. It is that life, and the spirit in which he lived it, that we celebrate today.

Francis Xavier Lockington Connor was born on 12 December 1917. He died in the fullness of his years, on 27 December 2005, 10 days into his 89th year. Much of his early youth was spent in rural Victoria. He remembered with particular affection the El Dorado area where his father was the publican at the famous pub at Tarrawingee, the small junction where the Beechworth Road turns north from the Alpine way. He remembered tales — tall tales, I think — of argument about the relative merits of draft horse and tractor. He often said that he remembered it as a kind of paradise for a small boy. His son

*I gratefully acknowledge the assistance of Xavier Connor's family in compiling these remarks. Paul Connor esq. helpfully made available relevant parts of Xavier's extensive files, and notes made by him, and shared some of his own reminiscences of Xavier. I discussed various aspects of Xavier's career with the Honourable Justice Hansen of the Supreme Court of Victoria and Judge Leo Hart of the County Court. Both contributed valuable insights. Peter Heffey was able to shed light on the Xavier's consultancy with the faculty of law at Monash University.

Peter now has a well-known legal firm in the nearby centre of Wangaratta, a short drive from Xavier's early haunts.

Apart from a younger brother who died in a tragic accident at the age of five, Xavier was an only child. A great deal of the burden of his upbringing fell to his mother, whose support he always remembered with much gratitude. In recent correspondence he wrote this: "My mother was a trained nurse and made the most extraordinary sacrifices to send me to a Jesuit boarding school."[2] As a young schoolboy he was taken to a football match at Essendon and hailed by one of the demigods running out onto the field, and thereupon formed an instant, lifelong and passionate devotion to the Essendon football club.

On leaving school he studied law part time, commencing at the University of Melbourne in 1935. He also worked as a clerk of courts. Like much of his generation the development of his career took second place to the defence of his country. When the war broke out he was a member of the Melbourne University Rifles. He enlisted in the AIF in 1941 and reached the rank of major in the 2/7 Australian Infantry Battalion. He served in New Guinea as you have heard. Like many notable colleagues and friends in the law, he served his country with distinction, seeing in it no particular glory but grim necessity.

In 1944 he married Lorna Landy, a well-known singer at the time. There is a wonderful photograph of the dashing young officer with his glamorous bride on the steps of Xavier chapel. Their marriage was to be lifelong and one of the bulwarks of his life. Xavier's devotion to Lorna was always very evident. Their four children: Christine, Peter, Damien and Paul are here today. They were good enough to amass eleven grandchildren for Lorna and Xavier.

In 1949 Xavier was called to the Victorian Bar. He read in the chambers of Murray McInerney, later Mr Justice McInerney of the Supreme Court. He was in active practice as a barrister until judicial appointment in 1972, but his connection with, affection for and service of the Victorian Bar were lifelong. His practice was broad with special emphasis on common law and personal injuries, a highly competitive field with many expert practitioners. His style of advocacy was described in the *Australian Law Journal* as marked by "care and quiet courtesy"[3]. He took silk in 1962. He had one reader, Leo Hart, later Judge Leo Hart of the County Court, who is here today. He made a great success of it and on several occasions he went to argue cases at the Privy Council in the days when an appeal lay to that body from the High Court.[4] He formed many close friendships at the Bar. One of his oldest and closest friends, Judge Leo Lazarus is here today. The high regard in which he was held by his peers is evidenced by the fact that he was chairman of the Victorian Bar Council from 1967 to 1969.

From 1970 to 1972 he acted as a consultant to the Faculty of Law of Monash University in relation to the law of torts. Peter Heffey, who was the lecturer in torts, said that Xavier's consultancy was far from nominal. He provided detailed assistance and gave a number of fine lectures to the undergraduates.

He was an active member of the ALP until judicial appointment. He was a member from 1956 to 1972, and chairman of a number of important committees. He was president of the Kew branch of the ALP in 1959–60. He was a member of the Participants, a group formed to foster reform in the Victorian ALP, and, with a number of other prominent lawyers, including Richard McGarvie QC, as he then was, and Frank Costigan, together with other Labor figures of the day, played a significant role in federal intervention in the Victorian branch in 1970. He was a member of the Advisory Council that took over the running of the Victorian branch after intervention.[5]

Xavier was a deeply thoughtful and devoted practitioner of his Catholic faith from whose teachings he drew many of the central concepts of social justice which animated his public and professional life. He was a member of the Campion Society and was, with his friends Tom Butler and Gerard Heffey, one of several lawyers in the Catholic Workers group. The intellectual roots of the Campion Society, which lay in part in the writings of Maritain, and the English Catholics Belloc and Chesterton, were always evident in the homely and unpretentious manner in which he spoke about his faith.

Notwithstanding his well-known Labor connections, it was a Liberal government, in the person of Senator Ivor Greenwood, which appointed him to the Supreme Court of the ACT in 1972. He took a quiet satisfaction from this, of course. Five years later, in 1977, when the Federal Court of Australia was set up, its Chief Justice, Sir Nigel Bowen swore in Xavier as a foundation member of that court, together with Justices Keely, Northrop (who is here today), Ward, J.B. and C.A. Sweeney, Franki, Nimmo, Blackburn, Smithers, Fox, Forster, Woodward, Riley, Evatt, St John, and Brennan.[6]

On the occasion of his welcome to the Supreme Court of the ACT, Xavier wryly observed that the court conducted its business almost literally in the shadow of the High Court: "It will be a constant source of comfort to me in my daily task to know that such a kindly body so near at hand will always be available to not only tell me what the law is, but how it should be administered."[7]

Xavier needed to have no fears. According to the correspondent of the *Canberra Times* for 4 December 1980, the callover in Xavier's court on 1 December 1980 set down every single case in the list for hearing, and if that does not sound impressive to non-lawyers, the report went on to say that record had only been met once before, by Sir Thomas More. Xavier was and is remembered with the greatest respect and affection by the ACT Bar as a careful, fair and unfailingly courteous judge. He was, as Jack Waterford pointed out in the *Canberra Times*, a witty judge — the only Supreme Court judge known to have quoted Bing Crosby — in a divorce case — and Banjo Patterson — in a defamation case — where he observed to Clancy of the *National Times* that his time would have been better spent droving in Queensland. His decisions were marked by a great care to protect individuals from arbitrary or illegitimate exercises of power: he set aside convictions against women who had protested at an Anzac day march because their actions did not constitute a breach of the peace, as alleged, and he awarded damages to a citizen against the police in circumstances where the arrest power had been used even though a summons could have been used.[8] In noting his retirement the *Australian Law Journal* noted: "His Honour has earned the general respect of the legal profession and the public for his courtesy and compassion, his approach to the law as being primarily a mechanism for doing justice, and his complete unpretentiousness whether on or off the bench."[9]

Xavier retired from judicial office in 1982. In his case, retirement was only a form of clearing the decks for a further burst of activity.

He continued as Chairman of the Parole Board of the ACT until 1985, a post which he had taken up in 1978. He spoke of this role in a recent letter: "I always took the view that it was much more in the public

interest to have prisoners spending the latter part of their sentences in the community under supervision than to have them going out into the community with sentences completed… I cannot recall any prisoner whom we paroled in my time committing an offence when on parole."

He held the rank of Colonel in the Australian Army Legal Corps from 1969 to 1974. He continued as President of the Courts Martial Appeal Tribunal until 1985, then the Defence Forces Disciplinary Tribunal until 1987. In 1988–89 he was Chairman of the Defence Forces Disciplinary Board Review.

He conducted a number of very important inquiries, which are briefly set out below:

> 1982–83: Board of Inquiry into the introduction of a Casino into Victoria.[10]
> 1983–84: Chairman of the Committee on the Special Broadcasting Service (SBS) which recommended against amalgamation with ABC.
> 1984: Commissioner assisting the Senate Select Committee inquiring into Allegations Concerning a Judge.
> 1985–87: President of the Australian Law Reform Commission, succeeding the Honourable Justice Michael Kirby. Tim Smith, (who is here today) now Justice Smith of the Supreme Court of Victoria worked on the reference on evidence, the report of which eventually led to very substantial overhaul of the Commonwealth Evidence Act. This was one of the prodigious number of references successfully concluded in Xavier's time as President. On the occasion of Xavier's appointment to this post, *The Age*'s headline read: "Once, twice, three times retired, but Mr Connor is back again".[11]
> 1988–89: Chairman of Defence Forces Disciplinary Board Review.
> 1990: Various reports and submissions on behalf of the Victorian Bar. These included submissions to the Law Reform Commission of Victoria, the Trade Practices Commission in relation to its inquiry into the professions, and the Sackville report. This continued in the first half or so of the 1990s. He was also a member of a committee which drafted the present Constitution of the Victorian bar.
> 1991: Further report to Victorian Government relating to Casinos.
> 1991–92: Chairman of the Board Inquiry into Judicial Remuneration in Victoria

Justice Hartley Hansen, with whom I discussed these remarks, made two very significant observations about Xavier. The first was regarding his perfect probity. Justice Hansen was junior counsel assisting Xavier in the Casino inquiry and he remembers how stringently Xavier avoided the slightest hint of impropriety. The second was in relation to his work for the Bar. Justice Hansen played a very significant role in settling a number of the submissions referred to, and he recalled that Xavier's analysis of the Bar's rules was always grounded in his sense of the public interest in the Bar's proper governance. In all matters in which he was engaged, Xavier's groundwork was always a firm grasp of principle. He always sought that out, and articulated it. What were those principles? Let us listen to what Xavier himself said in an address in New Zealand in 1986 where, as he described it, he expressed his philosophy about law:

> When ordinary members of the community look at the law, what do they hope to find? I think they want to find something quite simple — they want the law to work — they want it to be able to be easily used. They do not want it to get in the way and frustrate them. They hope the law will help them achieve their other aspirations. They hope that if they have to go to court, the court will be able quickly, efficiently and fairly to hear their cases and reach decisions that are acceptable and reasonable. They hope that when they are in business, the law will help them carry out their business affairs efficiently and simply not impose undue burdens on them either as producers of goods or as consumers of them. They hope that the law will protect their individual human rights, such as the right to privacy, liberty and security, as well as their rights as members of groups ... These aspirations are reasonable ones and the outstanding challenge to all of us…. is to play our part in having these aspirations realized.[12]

I think that when Xavier said "all of us" he meant just that: all concerned with the law, as lawmakers or those concerned in the administration of justice: solicitors, counsel, judges, and those bodies whose duty it is to administer certain areas of the law.

Xavier's words are simple, but it is a simplicity which is only available to a great spirit who has meditated long and hard about the moral and philosophical dimensions of his calling. They are decent, but with a decency few of us can easily match.

I began these remarks by referring to the spirit in which Xavier lived his life. It was unassuming yet noble. He found it difficult to ascribe ignoble motives to others. Often his strongest imprecation was to say in an exasperated voice: "I cannot understand how anyone would want to do such a thing." For Xavier, the legal imperative *audi alteram partem* — roughly, you must hear both sides — was not just a technical rule, but a principle by which life was to be guided. He had strong principled views on a number of matters which led him into long-term disagreements with others. But, while he was not shy of stating his views, he did not approve of divisiveness itself, and frowned on attempts to promote or continue it. He was the most delightful of company: a lunch with Xavier truly made life seem worth living. He loved his family, his faith, and his profession. He loved the companionship of his friends and colleagues in the law and elsewhere and they returned that love. His was as noble a spirit as anyone could expect to meet.

Notes

1. Xavier published a detailed account of this extraordinary few days on the 50th anniversary of the events: see Xavier Connor: "The Last Day in Battle" *The Age* 15 August 1995. His account seriously underplays the personal heroism he showed.
2. Xavier College, which he attended from 1926 to 1934. Xavier's gratitude took a practical form: his mother lived with Xavier's household for a number of years before her death in her 101st year.
3. (1972) 46 ALJ 308.
4. In all three of those cases he led Frank Costigan, as he then was, later to be Frank Costigan QC, well known as head of the eponymous commission and another Chairman of the Bar Council.
5. The critical role played by these and other prominent lawyers, although acknowledged privately by Labor figures, has not been adequately treated in histories of the period.
6. See report in *The Age* 8 February 1977.
7. Welcome to Mr Justice Connor; Transcript of Proceedings at Canberra on Thursday 9 March 1972, at p.7.
8. See Jack Waterford: "Connor J.: Judgments that followed the heart" *Canberra Times* 17 March 1982. Xavier retired from the Bench on St Patrick's day 1982, as the date of this report may suggest to alert readers.
9. (1982) 56 ALJ 320.
10. See an interesting progress report on the Inquiry in *The Melbourne Herald* 19 December 1982 at p. 43.
11. *The Age*, 18 April 1985.
12. Address by Xavier Connor to the 11th ALRAC in Wellington New Zealand, August 1986.

Documents, Defendants, Destruction: Lawyers' Ethics and Corporate Clients

John T. Rush QC, Joint Australian/Irish Bar Conference, Dublin, 30 June 2005

INTRODUCTION

MR Tom Poulton is managing partner of Allens Arthur Robinson one of Australia's most prominent legal firms. He was reported in *Business Review Weekly* recently as stating:

> We don't run this place as a holiday camp — we expect our people to treat the client as if they were God and put themselves out for clients.[1]

No doubt this "jump how high" attitude is beneficial for fee revenue and service reputation[2] but at what cost? Perhaps that cost was demonstrated by the relationship between senior partners of Allens and client James Hardie NV as detailed in evidence before the Special Commission of Inquiry into the corporate restructure of James Hardie established by the New South Wales Government in 2004.

Despite its Dutch registration (consequent upon the restructure) James Hardie was Australia's largest manufacturer and distributor of asbestos products. The legacy of its operations in Australia is death and disablement for thousands of people both in the past and for decades into the future. Last year, over a period of months, the corporate restructure of 2001–02 was investigated by this Commission, with powers of a Royal Commission. The conduct of the lawyers to James Hardie, Allens, also came under close scrutiny. The evidence of that conduct led to submissions that Allens partners involved in the restructure of James Hardie failed to disclose material matters to Justice Santow of the New South Wales Supreme Court at the time of the application for approval of the restructure.[3]

John T. Rush QC.

Rolah McCabe, when 51 years of age, commenced action against British American Tobacco Australia Service ("BAT") in the Supreme Court of Victoria 2002. She had contracted lung cancer. She alleged in her claim that BAT knew that cigarettes were addictive and dangerous to health, that BAT marketed cigarettes to children, that BAT ignored or publicly disparaged research demonstrating the dangers to health from smoking. Clearly, BAT discovery would be important — documents relating to the tobacco company's knowledge of addiction, its research into the chemical propensities of tobacco, its knowledge of the health effects of tobacco would be critical to the McCabe case.

BAT retained national law firm Clayton Utz for the defence of this proceeding. This firm was intimately involved in discovery. Clayton Utz had been advisors to the tobacco company at the time of the refining of the magnificently named "document retention policy".

Justice Eames of the Supreme Court of Victoria (now Eames JA of the Victorian Court of Appeal) after 16 days of hearing on an interlocutory application ordered that the BAT defense be struck out save as to damages — because of the BAT abuse of discovery procedures and destruction of documents.

Eames J found the process of discovery was subverted by BAT and its solicitor Clayton Utz with the deliberate intention of denying a fair trial to the plaintiff and the strategy to achieve that outcome was successful.[4]

The evidence before Justice Eames disclosed a relationship and conduct on the part of Clayton Utz solicitors whereby it could be said it treated their large corporate client "like God" but again at what cost?

In this paper I will examine the relationship between each of these large corporations and their lawyers as demonstrated by the evidence in each matter. The conduct of the corporate lawyers concerned will be evaluated against the fundamental ethical duties and responsibilities of a lawyer to the Court, to the administration of justice and eventually to the client.

A DISCLAIMER

I was counsel for the Unions and Victims Groups in the Commission of Inquiry into James Hardie. I was counsel for Rolah McCabe. I also appeared for Mr F. Gulson, former Australian company secretary and legal counsel then W.D & H.O. Wills, part of the BAT group, when he gave evidence in proceedings in the United States the

District Court of Columbia in February 2005. His evidence is referred to later in this paper. It may be said my views are subjective or biased as a consequence of my role in each of these cases.

In this paper I attempt to deal with the evidence. The reader can draw his or her own conclusions.

JAMES HARDIE/ALLENS

In this paper I deal with just one aspect of the relationship between James Hardie and its lawyers Allens disclosed at the Commission hearings. There were other matters causing similar concerns.

In August 2001, James Hardie made application to Santow J of the Supreme Court of New South Wales for orders permitting a scheme of arrangement whereby shareholders in the Australian company JHIL would receive one for one share issue in the Dutch company JHINV. In short the proposed restructure moved James Hardie offshore away from its asbestos liabilities.

A significant feature of the proposed scheme was that JHINV, the Dutch company, would subscribe for partly paid shares in the Australian company JHIL and the Australian company and I quote from the affidavits supporting the application:

> Would be able to call upon JHINV to pay any or all of the remainder of the issue price of the partly paid shares at any time in the future and from time to time. The callable amount under the partly paid shares will be equal to the market value of the James Hardie Group as at the scheme record date ...[5]

The transcript of the application before Santow J demonstrates that central to His Honour's concerns was an assurance that the proposed scheme of arrangement would not impact adversely upon persons seeking compensation as a consequence of injury sustained by use of James Hardie products. He asked a number of pertinent questions to this issue:

> What effect will this have on asbestos claims against Hardie?
>
> Is there any possible basis upon which a call upon partly paid shares upon a Dutch company could be resisted under Dutch law? Is that with the explanatory memorandum because it is a fundamental matter. I don't know whether it is dealt with at all?
>
> One would need to make sure every step is taken not only of disclosure but every step is taken to ensure that a call must be met.[6]

As at the scheme record date the market value was approximately $1.8 billion.

The concerns of Santow J were direct and focused. The obvious reason for his concern was that it had been made clear to the Court that the particular purpose of the partly paid shares was "to ensure [JHIL] had access to funding going forward to meet potential liabilities".[7] The creditors, Santow J had at the forefront of his mind, were persons with "asbestos claims against Hardie's".[8]

Despite the assurances given to the Judge, the cancellation of the partly paid shares was an option that was in the mind of James Hardie and Allens at the time of the application. The cancellation of the shares had been canvassed, was under active consideration, in the months prior to the application before Santow J. Indeed the winding up or liquidation of JHIL was seriously contemplated.

Santow J during the course of the application received correspondence from Allens on behalf of client James Hardie.

On 9 August 2001 prior to the Court application Allens wrote to His Honour's Associate:

> The partly paid shares are to be issued by JHIL to ensure it has access to funding going forward to meet any potential liabilities.[9]

After the first hearing day and the questions of Santow J in another letter to the Court dated 13 August 2001 Allens stated in part:

> As stated by counsel in response to this query, the scheme will not affect the position regarding asbestos claims. The former subsidiaries of JHIL against which almost all proceedings have been taken in the past in relation to asbestos claims were transferred to an independent medical research and compensation foundation in February 2001 ... That said, it cannot be said that JHIL will never be held liable. JHIL will have, through existing reserves and access to funding in the form of partly paid shares, the means to meet liabilities which will or may arise in the future whether in relation to asbestos related claims or other obligations to other persons.[10]

The statements made to Santow J and the materials put before him were to the same effect. "At anytime in the future" JHIL would have available to it "access to the capital of the group through the partly paid shares to meet any claims from whatever source ever found against them".[11] Santow J specifically asked whether there was any time limitation to be placed on the entitlement to the call. He was informed there was no such limitation.[12]

Despite the assurances given to the Judge, the cancellation of the partly paid shares was an option that was in the mind of James Hardie and Allens at the time of the application. The cancellation of the shares had been canvassed, was under active consideration, in the months prior to the application before Santow J. Indeed the winding up or liquidation of JHIL was seriously contemplated from time to time in the 12 months before the application.[13]

In the months after the application the question of how to retreat from the statements made to Santow J became a real concern for Allens. One poses the question — how did these solicitors fulfil their overriding duty to the Court or was their obligation solely directed to their deity, James Hardie?

Now consider the following evidence that emerged at the Commission.

Advice from relevant Allens partners to James Hardie specifically referred to the potential that a Judge upon the application for restructure may seek to rigorously enquire as to the creditors position post reconstruction specifically asbestos claimants. Advices from Allens specifically noted that the existence of the partly paid shares may satisfy the judge that there was sufficient protection for JHIL creditors and that as a consequence the rigorous examination could be avoided.[14] This was significant — the partly paid shares of potential value $1.8 billion was used as a device to reassure the Court and avoid scrutiny of the true position in relation to the James Hardie overall asbestos liabilities.

Mr David Robb, Allens partner and a senior advisor to James Hardie in the restructure, was present in Court at the time of the application and was a party to the reassurances given to the Judge. He gave the following evidence:

Q: You were aware that it was always considered an option by your client from the very inception of the scheme and the separation that the partly paid shares (that would eventually be part of the JHINV, JHIL matter) could be cancelled?
A: I was.
Q: And at no time did you ensure that Santow J was made aware of that potential for cancellation.
A: No.

In his evidence Robb agreed that important matters and information were not referred to Santow J so as to avoid a rigorous investigation of the inter-company transactions by the Court.[15] Such matters included the existence of a put option that if exercised would have removed JHIL from the JHINV group. Robb agreed the put option should have been disclosed to Santow J and attributed the fact that it was not to the circumstance that its existence had "escaped memory".[16]

Mr Peter Cameron at the time of this application was the senior Allens partner involved with James Hardie and he had a history of close involvement over years in James Hardie corporate restructuring. He is now a director of JHINV. He sought to justify the non-disclosure to Santow J of the potential for cancellation of the partly paid shares on the basis that the director's duty to disclose occurred only in circumstances where they had the fixed intention to bring about the cancellation of the partly paid shares — as the directors had not actually decided to cancel the partly paid shares at the time of the application there was no duty of disclosure to the Court. He did not speak to the lawyers' duty. Cameron stated it was not "necessary to canvass with His Honour the gamut of options ... where there was no intention in respect of those options".[17]

If JHIL had not formed an intention concerning the cancellation of the partly paid shares at the time of the Santow J application this, obviously, would have been a matter of vital concern to Santow J.[18] Implicitly, by silence, the Court was being told the very opposite.

In cross-examination Robb and McDonald agreed with the proposition that without full and frank disclosure Santow J could be misled in relation to the matters before him.[19]

In the application before Santow J there was no contradictor. The Judge was entirely reliant upon James Hardie and its lawyers. The duty imposed, particularly on lawyers in such a situation is heavy: a duty of full disclosure and the utmost good faith.[20]

By early 2002, only months after the application, lawyers at Allens were meeting to discuss the cancellation of the partly paid shares. Notes reveal concern as to reputation, a risk ASIC may enquire ,and that Peter Cameron thought it was too soon.[21] By July 2002 an Allens internal memorandum detailed what in effect could be described as a "brainstorming" meeting to discuss the cancellation of the partly paid shares. The Allens lawyers[22] recognised the difficulties and the conflict posed by the potential cancellation of partly paid shares after the reassurances that had been given to Santow J. The notes record that neither JHIL nor Allens were "willing to justify to the Court that creditors' interests [would] not [be] affected".[23] It was submitted to the Commissioner that the notes upon reasonable interpretation, reveal the invention of a version to explain the cancellation of partly paid shares.

Best position.
Cancel partly paids.
T/F ordinary shares.
Say, no int [intention] to T/F [transfer] at time of scheme. Didn't cross anybody's mind to do this. Reason had P/P shares was to have greater flexibility. Had intention to deal with it later.
Going to be weaker than what can be said for a T/F.[24]

The Commissioner accepted evidence from the writer of the notes that he recalled (two years later in evidence) that the word "say" was used in the sense of "assume" and that the solicitors were not making up or inventing a story.[25]

In March 2003 18 months after the Santow application the partly paid shares were cancelled.

The criterion then for a Court's intervention as set by the Victorian Court of Appeal was whether the conduct of the other party amounted to an attempt to pervert the course of justice or contempt of court. Attempting to pervert the course of justice had not been argued on the application for strike-out.

At no time did any lawyer from Allens admonish James Hardie that the cancellation of the partly paid shares was an act that could amount to misleading or wrongful behaviour having regard to the assurances that had been given to Santow J.

It would seem the Allens lawyers concluded it was not in the interests of the client or of Allens to publicly disclose the cancellation of partly paid shares noting in part "nothing Santow can do — ASIC might do something".[26]

Mr D.F. Jackson QC, the Special Commissioner, in his report commented on the evidence before him concerning the application before Santow J. He stated:[27]

If there were any doubt as to whether JHIL and Allens had a duty of full disclosure as to matters bearing upon the impact of the scheme on creditors it would have been resolved by the questions asked by Santow J, in particular on 10 August 2001, which made clear that he regarded the practical efficacy of the partly paid shares as protection for JHIL's creditors as an important matter.

Further the Commissioner stated:[28]

It seems to me that JHIL's plans for itself after the restructure ought to have been disclosed. Those plans went beyond mere consideration of the theoretical possibilities in my view. The circumstances were such that anyone familiar with JHIL's internal strategic planning over the 1998–2001 period and with the knowledge of the true purpose of the partly paid shares (i.e. stakeholder management) would have formed the view that their cancellation was almost inevitable. The JHIL board senior management, and Allens were so placed.

The Commissioner found Allens and JHIL were in breach of their duty of disclosure in the proceedings before Santow J but found the failure to disclose was not deliberate.[29]

Mr Tom Poulton was reported in the *Sydney Morning Herald* in relation to the submissions made to the Commission concerning this Allens conduct as stating the allegations "were outrageous" — "we believe our James Hardie legal team acted properly and ethically at all times".[30]

On the above analysis it is reasonable to conclude that the Allens legal team acting for James Hardie obeyed the strictures

of Poulton in that the corporate client was treated "like God". The lawyers put themselves out for their client. But the relationship urged by Poulton on Allens lawyers is one that has the clear potential to produce the conduct described. When lawyers treat the client like God, lawyers incline to become one with the client. Lawyers' duties to the Court will conflict with what they see as duties to their clients. The active participation of lawyers with the activities of their corporate client blur the legal boundaries — but more of that later.

McCABE v *BAT*

I turn now to the McCabe case.

Eames J struck out the defence of BAT on the basis that BAT and its lawyers Clayton Utz subverted the process of discovery. Eames J found the primary purpose of the BAT document retention policy was to provide a means of destroying damaging documents under cover of an apparently innocent housekeeping policy. Eames J found that BAT warehouse documents in an attempt to remove documents from its possession, custody or power and the discovery process but that, nevertheless, it could ultimately have access to such documents.[31]

The evidence disclosed there was no doubt that BAT had destroyed thousands of relevant documents. BAT did so urgently taking advantage of a brief "window period" when no litigation was on foot against it in Australia. It did so in the knowledge such litigation was not merely likely — but a near certainty.

The Victorian Court of Appeal overturned the decision of Eames J.[32] The Court of Appeal (somewhat surprisingly) overturned several major factual findings of the experienced trial Judge. The Court of Appeal (contrary to the trial Judge's finding) held the evidence had not established that the primary purpose of the document retention policy was to ensure the destruction of material hurtful to the defence of future litigation.

The Court of Appeal took (what I would contend was) the more benign view that such destruction could be seen in terms of practical document management.

The trial Judge concluded the conduct of BAT meant that the plaintiff had been denied a fair trial and that inferences could not adequately address the unfairness created by document destruction.

> The defendant's decision to destroy documents was predicated on the fact that a claim brought by a plaintiff at a later time might well have merit and would succeed unless steps were taken to deny a fair trial to the plaintiff. Failure of a claim where a plaintiff had been denied a fair trial could never be seen to be a just result .[33]

The Court of Appeal took a different tack.

Whereas the trial Judge saw his role as exercising the inherent power of the Court to ensure a fair trial, the Court of Appeal focused upon the existence of any obligation falling on BAT to retain documents in the circumstances. The Court of Appeal encapsulated its reasoning as follows:

> As indicated at the outset, it seems to us there must be some balance struck between the right of any company to manage its own documents, whether by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side. The balance can be struck, we think, if it be accepted that the destruction of documents, before the commencement of litigation, may attract a sanction (other than drawing of adverse inferences) if that conduct amounts to an attempt to pervert the course of justice or (if open) contempt of court ...[34]

The criterion then for a Court's intervention as set by the Victorian Court of Appeal was whether the conduct of the other party amounted to an attempt to pervert the course of justice or contempt of court. Attempting to pervert the course of justice had not been argued on the application for strike-out. On this basis the Court of Appeal found contrary to Eames J conclusion, that the destruction of documents prior to the commencement of litigation, even though litigation was apprehended, was not a breach of any rules of the Court relating to discovery.

BAT knew, as a consequence of a number of advices provided by its lawyers, that there was a high likelihood of adverse consequences should it destroy documents in the face of almost certain future litigation:

> It is understood that the destruction of documents now or in the past by Wills contravenes no law or rule in Australia and that, in that sense, Wills can do what it likes with its documents. Presumably, if a Court disapproves strongly of the destruction of the documents, then it might draw adverse inferences from that fact.[35]

As is cogently reasoned by academic writers Cameron and Liberman,[36] in such circumstances, for the Court of Appeal to focus on "obligations" or "requirements" to retain documents may be appropriate if a Court is dealing with a charge of attempting to pervert the course of justice and the lawfulness of the conduct. Eames J was not. He was Judge in a civil dispute charged with a duty to ensure justice between the parties. The Court of Appeal misconceived the real question for determination. The real question was:

> What should happen to the proceedings between the plaintiff and defendant in a civil case given the defendant has deliberately destroyed documents so that the plaintiff cannot have a fair trial.[37]

BAT had a "right" to manage its documents. That adverse consequences including strike-out may result in legal proceedings consequent upon the destruction of documents did not deny BAT the right to manage its documents as it chose. Where the intent of that management is to deny future plaintiffs the benefit of highly relevant documents in civil litigation it may be thought the Court should have available to it a full array of powers, including in extreme circumstances the ability to strike-out, so as to ensure a fair trial to both parties. Without such a sanction a defendant may well think it is worthwhile taking the risk of destroying important documents. This does not deny a defendant rights over its documents but rather is to say where it does certain things with its documents certain consequences may follow.

The Court of Appeal gave little consideration to a line of English authority that Eames J considered formulated important principles. The Court of Appeal considered the case of *Arrow Nominees* v *Blackledge*[38] was hardly relevant because it was not about the pretrial destruction of documents. It might be thought the reasoning of Chadwick LJ is apposite to this case. He stated:

> Where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the Court as to render further proceedings unsatisfactory and to prevent the Court from doing justice, the Court is entitled — indeed I would hold bound — to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is

> no part of the Court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the Court is to do justice between the parties; not to allow its processes to be used as a means of achieving injustice.

Leave to Appeal to the High Court supported by the Attorney's General of New South Wales and Victoria was refused. Whilst on the leave application no endorsement was given to the Court of Appeal decision it was decided that the McCabe case was not a proper vehicle to decide this important point.

I now turn to the role of lawyers. The intention behind the destruction of documents by BAT was an important matter in this proceeding. Eames J had seen and heard the witnesses relating to this matter. Mr Brian Wilson, partner at Clayton Utz, a lawyer with a close involvement with W.D. & H.O. Wills, the company subsequently incorporated into BAT, and the lawyer who had given the advice as to document strategy, was not called by BAT. No explanation was given as to why Wilson was not called. He did not seek to be represented on the application for strike-out, however he obtained leave to be represented on appeal.

Wilson had been responsible for a legal advice to BAT dated 2 March 1990. Eames J found that document set out a strategy for destruction of documents which he referred to as "the Clayton Utz strategy".[39] The advice informed BAT that the "intention" behind destruction of documents was a critical element. The advice acknowledged that the potential for findings of contempt of Court or interference with the course of justice were potentially associated with the intentional destruction of relevant documents pre-litigation. Wilson noted in the advice that the destruction of documents had already occurred in situations where litigation had been and was still contemplated but said the wording of the document retention policy, which the evidence disclosed had the involvement of Clayton Utz, was important. It was important Wilson said because it demonstrated the "intention" behind the destruction of documents i.e. for good management — efficiency — costly space requirements and the like.

Eames J found that this advice was in effect:

> Wilson was telling Wills that dire consequences could be avoided if they asserted innocent intention and employed statements of such innocent intention that he was now feeding to them.[40]
>
> The advice was, in effect, get rid of the documents but claim innocent intention.[41]

On 2 April 1990 a conference was held in Wilson's Sydney office to discuss the written advice. Present was legal counsel to BATCO (UK parent) Nick Cannar, Fred Gulson legal counsel to the Australian subsidiary,[42] and a junior solicitor with Clayton Utz who took notes. The notes record:

> Keep all research docs which become part of the public domain and discover them.
>
> As to other documents get rid of them and let other side rely on verbal evidence of people who used to handle such documents.
>
> To shred all docs in Australia more than five years old (docs will still be available offshore).[43]

Wilson's partner Mr Glen Eggleton gave evidence before Eames J. He agreed that if the note accurately reflected the oral advice Wilson had given then it was improper advice for a solicitor to give to a client.[44]

The Court of Appeal found that Eames J was not justified in reaching the conclusions he did about Wilson or the Clayton Utz strategy earlier referred to. He "read more into the letter of advice than we discern".[45] As to the notes of conference, the Court of Appeal said that what was set out was merely an elaboration of the written advice. Eggleton's admission as to it not being a appropriate advice could be put down to "the circumstances attaching to the cross-examination",[46] whatever that may mean.

The evidence given by Gulson in the US Federal Court District of Columbia In February 2005 puts a fresh light on the purpose of the document retention policy and the intention for the destruction of documents. It is supportive of the findings made by Eames J. Gulson stated in evidence:

(i) The document retention policy was a contrivance designed to eliminate potentially damaging documents while claiming an innocent "housekeeping" intention ... the whole purpose was to keep evidence out of the Courts.

(ii) Clayton Utz reviewed the BAT policy made minor alterations to adjust it to Australia.

(iii) That Wilson did advise in 1990 on a "strategy" and that the strategy was to the effect "that as long as we could argue that the documents being destroyed under the document retention policy were not being destroyed due to litigation concerns, then it was legal ... which is why the policy had to be written in such a way as to indicate other justifications for its existence".

(iv) In relation to the meeting and notes of the meeting of 2 April 1990 Gulson recalled Wilson offering the advice "... to keep documents that were in the public domain, and to destroy adverse research documents that the public or plaintiff's counsel would not be aware of".[47]

Wilson had advised BAT in written advice in 1990 that important to a charge of "intention to interfere with the administration of justice" was the actual "intention with which the act was done". He stated:

> Applying that law, there is no doubt that destruction per se is likely to have the effect of interfering with the administration

> of justice. This is subject, however, to the test of intention ...[48]

It may be thought the evidence that was before the Court in the McCabe proceedings, now supported by the evidence of Gulson in the USA, demonstrates clearly the true intention of the document retention policy. More particularly it raises the question of the nature of the relationship between lawyers and corporate clients. I have not the time or space in this presentation to detail the entire relationship between Clayton Utz and its client. On what I have detailed at the very least it may be said, the relationship was such that it blurred the giving of clear, forthright advice as to the client's legal responsibilities, that the lawyers lost sight of their responsibilities as officers of the Court.

DUTIES AND ETHICS

It is right and proper that lawyers have strong, close working relationships with their corporate clients. Friendships, collegiality is often the result of such a working environment. Yet it is essential that that relationship always remain a professional relationship and that it be the basis for the lawyer when necessary offering strong independent judgment and advice.

In a paper to mark the Centenary of NSW Bar Heydon J described the relationship between the mega firms and the corporate clients as follows:

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

In both the cases discussed in this paper the law firms had long and intimate associations with the corporate clients. Solicitors from Allens became in-house counsel at James Hardie, solicitors for Clayton Utz joined the BAT group. The intertwining of firm with client does not assist the giving of dispassionate legal advice.

No doubt the pressure on partners to make budget and produce billable hours is enormous. Competition between the large firms is great and creates even further pressure to perform for the client. All this is understandable. But when the lawyer is really one with the client, is a participant in the activities of the client, the proper lawyer/client relationship evaporates, and the actions of the lawyer become indistinguishable from the actions of the client. The professional is no more. The lawyer is not a "wise counsellor" exercising independent judgment with an intellectual and emotional distance from the client. Rather the lawyer is more akin to a "hired gun", willing and unquestioning in the implementation of corporate strategy.[49]

What is demonstrated by the James Hardie and BAT litigation is a phenomenon not exclusive to these companies and the legal firms that acted for them. It represents the norm — that is the provision of "legal service" to corporate Australia has become nothing more than that — lawyers acting as merely compliant service providers to the corporate client.

Membership of the legal profession entails privileges, those privileges carry corresponding obligations.

> Members of the legal profession have a monopoly upon the right to represent litigants in Court for a fee and certain other kinds of service ... In return a community expects that they will acknowledge obligations and responsibilities which override considerations of financial reward …[50]

The primary obligation of a lawyer is not to the client but rather it is a duty to the Court and to the administration of justice. It is not a single duty. What is generally referred to as a lawyer's duty to the Court is:

> A number of different duties, which can be broadly classified as the duty of disclosure to the Court, the duty not to abuse Court process, the duty not to corrupt the administration of justice, and the duty to conduct cases efficiently and expeditiously.[51]

The evidence referred to of lawyers relationships with corporate clients and consequent conduct referred to in this paper has only been exposed because in each case legal professional privilege did not apply either because of waiver[51] or special rules in relation to commissions. One hopes that it does not represent the "standard", that it is not just co-incidence that with the stripping away of legal professional privilege that such conduct was exposed. I must say I do not believe it to be coincidence. The abuse of legal professional privilege calls into question its very reason for existence in the civil law. This issue requires a separate paper.

I think Mr Poulton, whilst insisting on excellent service by members of his firm to corporate clients, may be better advised to emphasise that at all times the lawyers' primary obligations are to the Court and more generally to the administration of justice. He may do well to point out there is more to lawyers' work than the ability to make money. He should insist that when acting for and advising clients the lawyer at all times has at the forefront of his/her considerations the fundamental duty to the administration of justice; that in the end it is not only in the best interests of the lawyer, it is also in the best interest of the client that a lawyer act in such a way.

When I was admitted to practice I was told it was fundamental to a fulfilling and honourable career. It still is.

Notes:

1. *Business Review Weekly* 3 March 2005 "Best Large Law Firm".
2. Allens was reported in the above article as winning awards for "Best Big Law Firm" and "Best Large Professional Services Firm".
3. See submissions to Special Commission of counsel assisting; submissions of MRCF; submissions of unions and victims groups.
4. Eames J *McCabe* v *BAT* [2002] VSC 73 [384].
5. Affidavit of D.E. Cameron, company secretary JHIL in support of application 9 September 2001.
6. Transcript of proceedings before Santow J: Commission exhibit 224 Vol 2 Tab 37 at 480–481.
7. See Commission exhibit Ex 278 Vol 3 Tab 19 at 58.
8. See footnote 6.
9. See Commission Ex 278 Vol 2 Tab 19 at 58.
10. See Commission Ex 278 Vol 3 Tab 28 at 214.
11. See footnote 6 at 480.
12. See Commission Ex 224 Vol 2 Tab 37 at 441.
13. Note Quinlan of Allens of conversation with Robb 5 February 2001 "Liquidation of JHIL within 12 months". See Commission Ex 79: Robb note of conversation with MacDonald, CEO James Hardie "Timetable to winding up of JHIL". See Commission Ex 205.
14. See Commission Ex 80 Tab 6 at 152.
15. See Commission transcript 2884–2886.
16. See Commission transcript 2962.
17. Commission Ex 224 statement P Cameron at para 69.
18. As to the supervisory function of the Court and protection of creditors see *In Re Citibank of Melbourne Ltd* (1897) 3 ALR 220: *Cleary* v *The Australian Co-operative Funds* (No. 2) [1999] NSWSC 991.

19. See Commission Transcript 3024.
20. *Thomas A. Edison* v *Bullock* (1912) 15 CLR 679 at 681.
21. See Commission Ex 302 "JRB4".
22. D. Robb, M. Ball, J. Blanchard.
23. See Commission Ex Statement J. Blanchard at para 32.
24. See Commission Ex "JRB12".
25. See Commission report at para 26.84.
26. See Commission Ex 302 "JRB 12".
27. See Commission report para 25.37.
28. See Commission report para 29.87.
29. See Commission report para 25.91.
30. *Sydney Morning Herald* 29 February 2004.
31. Eames J [289].
32. *BATAS* v *Cowell* [2002] VSCA 197 Phillips, Batt, Buchanan JJA 6 December 2002.
33. Eames J [373]
34. Court of Appeal [173].
35. Advice Foyle memorandum. See Eames J [28].
36. "Destruction of documents before proceedings commence: What is Court to do: Cameron & Liberman", *Melbourne University Law Review* [2003] Vol 27 at 273.
37. Cameron & Liberman at 284.
38. [2000] All ER (D) 854.
39. Eames J [37].
40. Eames J [39].
41. Eames J [34].
42. Gulson was not called before Eames J. He gave evidence in February 2002 for the USA in a case brought by US Government against various tobacco companies.
43. Eames J [42].
44. Eames J [44].
45. Court of Appeal [91].
46. Court of Appeal [94].
47. Gulson testimony "written direct" United States District Court for District of Columbia — *USA* v *Phillip Morris et al* Civil Action 99-CV-02496 (GK).
48. Eames J at [38]. Note: It is of no consequence that destruction occurs outside litigation. See *R* v *Rogerson* (1992) 174 CLR 268 Mason CJ at 277.
49. See "Hired Guns and Smoking Guns": *McCabe* v *British American Tobacco* Cameron *UNSW Law Journal* Vo1. 25 (3) 678.
50. Gleeson CJ speech University of Sydney, 7 May 1999.
51. Cameron "Hired Guns and Smoking Guns".
52. Eames J found BAT had waived legal professional privilege. Decision reversed by Court of Appeal.

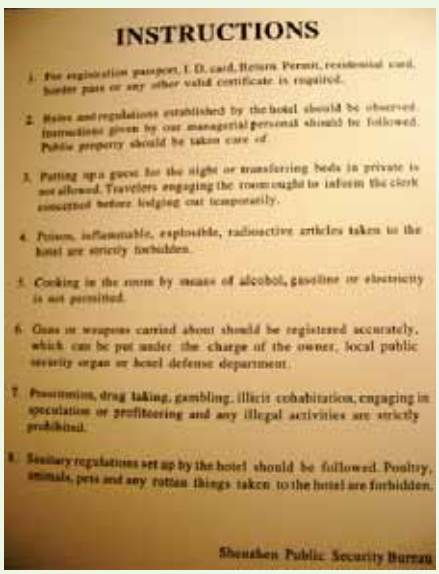
Signs, Signs, Everywhere are Signs . . .

An eclectic selection from England, Scotland, Ireland and China as photographed by Tony Lewis.

Children.

Closed.

Insomnia, Dublin.



Instructions.

Legal Eagle, Dublin.

Abrakebabra, Dublin.

Queen of Tarts, Dublin.

Winning Defence Lawyers, Edinburgh.

A Touch of Humanity

IN August 2005, the Board of Examiners granted Brigitte Huhn, an articled clerk with the firm of Nevin Lenne & Gross, leave to complete the balance of her articles on a part-time basis of three days a week, on the ground that she was suffering from acute myeloid leukaemia.

On 21 September 2005 her principal, Charles Morgan, discovered that she was terminally ill and had only a few weeks to live. He sought the assistance of the Board of Examiners to expedite her admission. The next scheduled admission ceremony was Tuesday, 18 October. But Ms Huhn treating doctor had advised that 18 October might well be too late.

The Board of Examiners dispensed with requirement of service of the balance of articles and dispensed with time requirements relating to notice and affidavits; and Bill Lally, as Chairman of the Board of Examiners, requested the Acting Chief Justice to arrange a special sitting for the purpose of admitting Ms Huhn before 18 October. The Acting Chief Justice organised for the Court to sit on Tuesday, 4 October 2005, at 9.30 am especially for the hearing of the motion for admission to practice of Brigitte Huhn.

On Tuesday, 4 October 2005, at 9.30 am, a Full Court assembled in the Banco Court being constituted by the Chief Justice (who had by then returned from overseas), the President of the Court of Appeal and Nettle JA. A video link had been arranged to enable the applicant and her family to attend the Supreme Court at Wangaratta. Mr Monti of Counsel moved her admission in Melbourne and members of the legal profession and public attended in numbers at both the Banco Court in Melbourne and at the Supreme Court at Wangaratta.

At the conclusion of the hearing the applicant was presented with the order of the Court which had been signed by the Deputy Prothonotary at Wangaratta immediately after the Court had made the order.

The effect of the actions of the Board of Examiners, and particularly its Chairman, Bill Lally, and the actions of the Court enabled Ms Huhn and her family to achieve her ambition of being admitted to practice. If it had not been for the compassionate reaction of the Board and of the Court, she would not have achieved this. By 18 October she was in a coma and she died on 31 October 2005.

Her principal, Charles Morgan, in a letter expressing his gratitude to Bill Lally, summed up his reaction to the steps which led to Ms Huhn's admission: "At times one's faith in the law and the legal profession weakens. Brigitte's admission, and what led to it, made me proud of my profession."

The speed and compassion with which the Board of Examiners and the Supreme Court reacted to Ms Huhn's circumstances makes one proud to be a lawyer.

A Pause to Reflect

ON Tuesday 28 February 2006 the Melbourne Catholic Lawyers Association held another of its occasional mass and breakfast meetings. This one was a full house affair, because many had come specifically to hear Julian McMahon speak on the subject "reflections of defence counsel acting in a capital matter". Julian had been junior counsel, led by Lex Lasry QC, for Tran Van Nguyen who was executed in Singapore on 2 December 2005.

Julian spoke quietly, simply, yet movingly of the defence team's involvement with Van Nguyen's case, going back to their initial brief to generate documents prior to the setting down of the trial at first instance in 2003. Over time but especially after the court's finding of guilt and passing sentence, the legal aspect of the case appeared to merge with a variety of other elements including the human and the religious. The Singapore Court sentenced Van Nguyen to death in March 2004 but a personal transformation was already under way and on 17 August 2004 — his birthday — Van Nguyen was baptized into the Catholic faith. The case achieved particular notoriety in the press after October 2005, by which time it was fairly clear that there was no real prospect of Singapore granting any clemency to Van Nguyen.

There were many threads to the theme of Julian's talk but one stood out clearly above the rest: how opposition to the death penalty — the current Australian position federally — should be articulated often and vigorously in all quarters so as to encourage a more universal approach to opposition to the imposition of mandatory death penalties.

In some ways this picks up and develops a theme enunciated in the same forum on 25 October 2005 by Judge Frank Walsh, who had been invited to look back on a long and distinguished career on the Bench and make observations as he saw fit on the judicial lot. His Honour reflected on how trends in the globalization of news, communication, media, trade and economics (for example) appeared not to have had much effect on, or parallel, in the field of law, in particular sentencing. For the same offence a person in Australia might receive a relatively short custodial disposition (or, for a first offence, a suspended sentence, which might even be reduced on appeal) but in another part of the world a person might be executed for the same offence.

As we ponder why this is so in an era in which globalization extends further into all walks of life we are reminded that it is necessary to be eternally vigilant in relation to matters of life and liberty.

Further information on the Melbourne Catholic Lawyers Association can be found on its website at www.mcla.asn.au.

Farewell Speech of the Honourable Mr Justice William Frederick Ormiston

On 23 February 2006 William Frederick Ormiston retired as a Justice of Appeal of the Supreme Court of Victoria. In his reply to the addresses from the Solicitor-General, the Chairman of the Bar and the President of the Law Institute, his Honour took the opportunity to lament the bureaucratic inhibitions imposed on the Supreme Court.

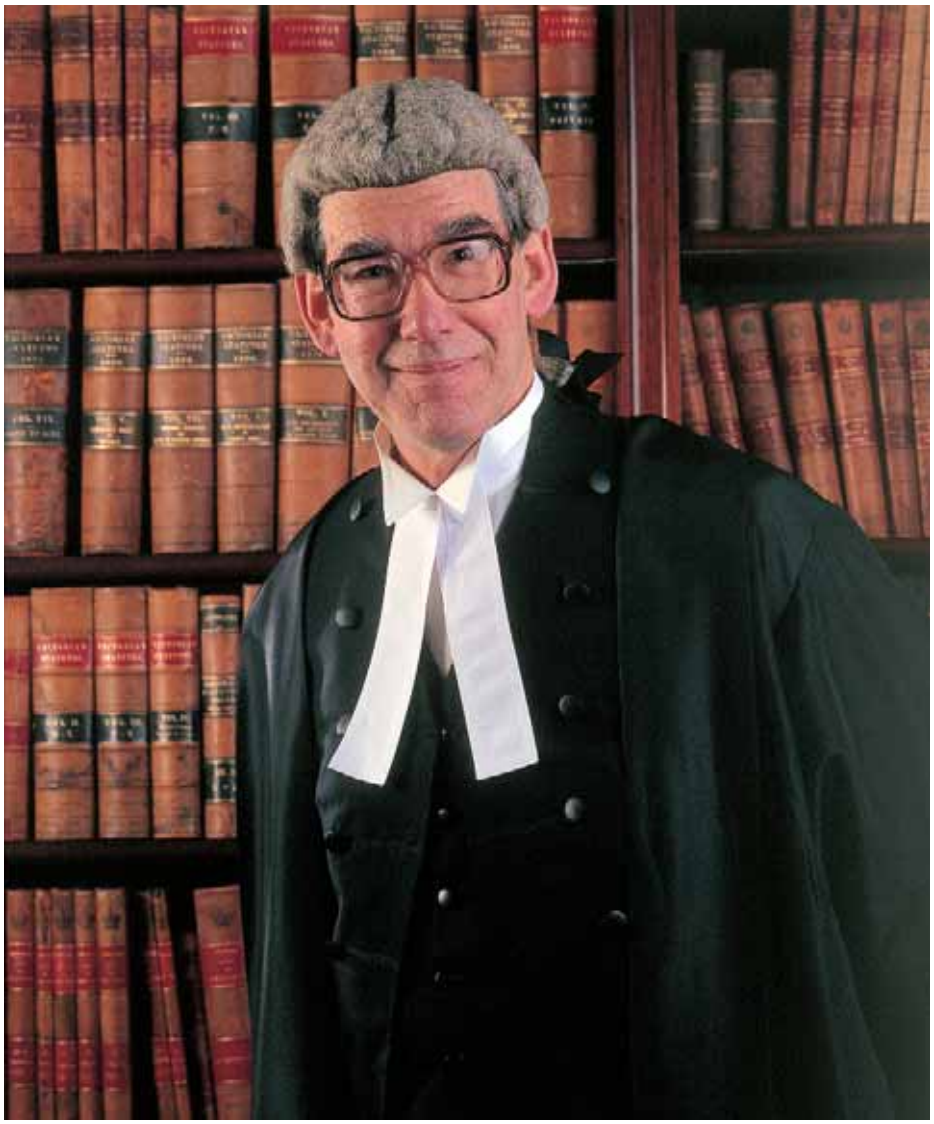
His is not the only voice that has recently expressed concern at the subordination of the Supreme Court to the bureaucracy of the public service. The court does not have its "own" staff. All of the staff, it seems, belong to the public service. Even the CEO of the Supreme Court owes a loyalty not only to the Chief Justice but to the Secretary of the Department of Law.

THANK you, Ms Tate, Ms McMillan, Ms Gale, for your very kind expressions of goodwill on my retirement and for your very generous comments about my career, especially on the Bench of this Supreme Court. I have simply tried to do my best and I apologise that in doing so I have taken too long or have been unduly abrupt or crabby with counsel, who no doubt were doing their best with intractable material.

If I have achieved anything, I ascribe it largely to luck. I have had the good fortune to have had a tolerant family, very excellent teachers and invaluable friends and colleagues both at the Bar and on the Bench. I began life as a spoilt only child, but that made it easier, when John Batt said regularly, some 55, 60 or so years ago, that it was time to do our homework, for me to believe that there was no choice, and so I had to do the same. I was lucky at school in that having no sporting talents other than enthusiasm, I found study easier than sport. Having left school I had the great good fortune to be taught at Melbourne University by teachers such as Professor Zelman Cowen, Professor David Derham, Harry Ford, Dr Norval Morris and Mr Arthur Turner, among others, and then at London University by Professor Gower, a young barrister called Robert Goff, Professor De Smith and Sir Jack Jacob. But then I have also been fortunate enough to have had colleagues who not merely knew and understood much law, but who were genuinely devoted to it. So I shall mention a few friends and colleagues in the law, excluding those who are presently sitting. Of those who went from school to university with me I mention my old friends John Batt and Jim Merralls, both of whose knowledge was and is encyclopaedic. Then, from my university days right through my time at the Bar and ultimately also as colleagues from the outset of the Court of Appeal were my good friends John David Phillips and Clive Tadgell. When I came to the Bar I had the special privilege of reading with Dick Griffith, whose generosity included instilling in me a knowledge and love of the whole range of legal literature. On the Supreme Court itself, when I first came to the court, I had such good friends as Peter Murphy, Ken Marks and Sam Gray. Again, I had the good fortune to have as my first Chief Justice Sir John Young and, as the first President of the Court of Appeal, Jack Winneke. So you may see that I was truly spoilt in having such close friends and colleagues for whom an understanding of the law was second nature.

Through this all my wife Sarah and my sons, in particular Simon and Charles, had to put up with my comings and goings, my odd hours, a view of the bald patch on the back of my head and a distant lost look at times when I should have been concentrating on them, rather than on some legal problem. I cannot begin to thank them for their tolerance and understanding.

Then I wish to say something in particular about my staff, who likewise have been supportive and understanding and have had to put up with my temperamental outbursts as the frustrations of judging and at those who control the courts



Mr Justice Ormiston.

got under my skin. Tony Tonkin, Terry Bates and Doug Spence, as my associates, have largely borne the brunt, but smiled benignly as I expostulated and ultimately subsided. My tipstaves too, Jock Mann, who had his own eccentricities, especially about getting me my lunch and afternoon tea, certainly no fresh tea, always the tea bag; Trevor Peters, Bruce Ellaway and John Van't Hoff have likewise had to put up with my outbursts and demanding requirements. The same can be said for my secretaries, though at one remove, in particular Gemma Tobschall and Sharon Denton. Finally there is my driver, John Smith, who has likewise looked tolerantly on my ups and downs, but regrettably his loyalty to me and the court for over 20 years will not, it seems, be fairly recognised or rewarded.

Which brings me to the first critical matter I wish to raise on this, my final opportunity to say something in heat and without fear of repercussion, or at least I hope so. I have always had the highest regard for the court staff, in that I also include of course people such as the Prothonotary and his staff, the Registrar of the Court of Appeal, Philip Cain (and the Registry staff) and the Library staff, especially James Butler who is, I believe, a court librarian *sans pareil* in Australia. But what has concerned me in recent years is an attitude by some to these members of my staff, especially my associates, my tipstaves and my driver, which seems not to recognise the importance of faithful staff in the running of a body such as the Supreme Court. Their role, their experience and their loyalty has provided me, and countless other judges, with that support which has meant that I have been able to concentrate on the judicial function I was appointed to carry out, that is, of deciding cases. The less I had to be distracted by minor matters such as the payment of bills and the making of appointments and the sitting at the end of phones waiting for the interminable music to stop, the more I have been able to concentrate on reaching the correct decision in each case.

Associates have a special loyalty towards the individual judges who have chosen them to act in that role, as in effect their aides-de-camp, but I have considered every other one of my staff to have acted in the same way and to have provided support to the judges as a whole, and for that the judges have been and should be duly grateful. Because the associates, tipstaves, secretaries and driver that I have had each worked for me for a number of years, I knew that I could rely on them and that others could rely on them because their loyalty was to this Court. They have not been mere public servants, answerable only to the state of Victoria, and waiting to be deployed from department or business unit to department or business unit as the bureaucracy would dictate, but they have seen their role as supporting the judges and the Court. They have had no ambition to move beyond the Court to take on other roles, to go into practice or to take on other posts in the bureaucracy.

I have always had the highest regard for the court staff, in that I also include of course people such as the Prothonotary and his staff, the Registrar of the Court of Appeal, Philip Cain (and the Registry staff) and the Library staff, especially James Butler who is, I believe, a court librarian *sans pareil* in Australia.

It is therefore distressing to me to have learnt recently how little thanks they are to get when I leave, and how little it is understood that their loyalty is to the Court, not merely to some state polity. Nor do I have much time for the concept of part-time or temporary associates who come and go, loyal no doubt to the judges

who have employed them, but with very little experience of the other judges or of the Court as it functions as a whole, for they move away within one or two years to their appointed callings, either as barristers or solicitors. They may well be, and frequently are, bright, qualified lawyers — some of my best friends have held such offices in the past — and many are very conscientious, but I do not believe that those persons should be engaged or used as surrogate judges to do a judge's research or judgment writing except as a most basic level. I would deprecate strongly the thought of any associate drafting a judgment. That is the task that we judges have been engaged to do and for which we are paid not inconsiderable salaries. It is not a task to be delegated.

The result of recent changes is, I very much regret to say, that the old style associate and tipstaff, without legal training, are being seen as unsuitable to give judges so-called "modern" support. By contrast, the new cadre's lack of experience is already evident, and their knowledge of the law is frequently superficial and not burdened by the kind of experience that a judge should bring to the task. As the old staff are pushed out of the Court and into "redeployment" in the Public Service, if they can tolerate it, so the administration of the Court will deteriorate for want of loyalty and of experience in its day to day running.

Some of you have enquired why I should wish to leave the court at this time, before I reach my statutory retiring age of 72, and a small group have been kind enough even to suggest and to try to persuade me to stay in office until that time. Now I will acknowledge that I have gained great satisfaction from my time as a judge, whether hearing trials or deciding appeals. In more general terms I have likewise gained much pleasure from studying the law in all its aspects, whether in acquiring, as has been essential, an understanding of the rules of court and of evidence, or in studying, on the other hand, the historical basis of some common law or equitable principle. More especially I have enjoyed the company of my fellow lawyers for 44 years; 22 years at the Bar and 22 years with my colleagues on this Bench. I think it will be a shock next Monday to realise that I shall not be wending my way in, as usual, to my chambers, where, as barrister or judge, there was always somebody who would put up with my chatting about the law or who would merely pass the time of day. I shall miss the collegiate aspect of both institutions, though I may come back to the Essoign Club occasionally for lunch.

I must explain briefly what has persuaded me to go. The truth is, though I have still enjoyed writing judgments, or some of them, that task has at my age become much more burdensome to me. Whatever understanding I felt I had at last gained of some aspect of the law has been constantly threatened by new legislation or by new case law, including that of my own Court. I have begun to feel that I was desperately climbing up a large sand hill, where the sands keep on sliding away so that I keep treading at the same level, with the pinnacle just as high, but somehow of a constantly changing appearance. For example, I once knew something about the Companies Act, simply and beautifully drafted in 1957, but the modern gargantuan, *The Corporations Act 2001*, defies consistent and intelligent analysis, especially when the section numbers keep chopping and changing.

The next burden, one that has really started to depress me, is the volume of reading required for each appeal. Every night, as many of you know, I have packed away in my bags volumes of appeal books, pages of submissions and lever-arch file after lever-arch file of ever-changing authorities. Moreover, it seems that we are under instructions from on high to read every exhibit and every page of transcript for certain appeals, whether civil or criminal, such that I have been spending more of each weekend than before, and well beyond one o'clock every morning, just to get myself ready for a particular appeal or appeals, so finding it harder and harder to get around to writing the judgments already reserved. So I have just become too slow for the task. The profession and the public rightly have called for prompter and more succinct and practical

JUSTICE Ormiston's complaint comes on the heels of an earlier complaint by Justice Phillips whose farewell speech was published in the Autumn 2005 issue of *Bar News*. Among the statements in that farewell speech was the following:

> What is evolving is a perception of the Court as some sort of unit or functionary within the Department of Justice, a perception that is inconsistent with this Court's fundamental role and underlying independence.

The views expressed by Justice Phillips were endorsed on 2 June 2005 by Justice Batt, not a man known for excessive flamboyance or hyperbole. Justice Batt said:

> At his farewell less than three months ago, Mr Justice Phillips spoke eloquently about the importance of judicial independence and the threat of its erosion that has gradually been occurring, particularly by the Supreme Court's being treated as if it were an administrative unit within the Department of Justice. I could not improve upon what he said, but wish to associate myself publicly with his remarks and to say that, even since then, I have noticed what seems to me, though I hope I am wrong, another instance of similar treatment of the Court.

One cannot but ask how a judiciary which does not control its own funding, whose staff is controlled by the executive through the Department of Law and which is categorised as an administrative unit, "Business Unit 19", can, without constant effort, difficulty and self-sacrifice, properly fulfil its vital role of preventing abuse of government power, of standing between the individual and government and ensuring that we have government under the law, not law according to government.

The categorisation of the Supreme Court as an administrative unit within the Department of Justice involves a psychological downgrading of the status of the Court. It is at one with the decision some decades ago to replace judges' gold cards with free train tickets.

The Chief Justice, as published in *The Age* of 24 February did say:

> The bureaucracy does not tell justices what to do. The Court, as part of our structure of government, is independent. As part of Victoria's constitutional arrangements, the Supreme Court is the third arm of government.

This beautifully spun message does not (as might first appear from the sub-editor's headline "Chief Justice Rejects Interference Claim") negate or deny

judgments and I cannot keep up with that demand. It is better that I pass the baton on to those who are younger and fitter than I am.

But the third burden, one that I find truly intolerable, is the constant interference by the bureaucracy. I shall not expand on this for I have mentioned one aspect already, and J.D. Philips said all that could be said last year. It is enough to say that, whatever I might have continued to do, constant nagging irritations from the Department (and its representatives within the Court) and its ignorant meddling, though most "plans" have been recycled a number of times in my judicial career, thereby rarely containing little more than superficial window dressing, has become a constant distraction which I can no longer tolerate. I could go on and on, but the fate of Business Unit 19 (as once was the unhappy description of the Court) has left me in despair. So I will feel an enormous burden has been lifted from my shoulders when Friday night arrives.

You may ask what I will do and to that I must confess that I am unsure what other modest talents I have. Certainly nothing that requires eye and hand coordination, but I shall try to adapt new gadgetry and ideas to some interests and pleasures I had when I was young. For example, I can use my new computer to revert to listening to those hardy old series, "Much Binding in the Marsh" and "Take it from Here", as transmitted on-line from BBC Radio 7. But I shall also try to use it to learn or brush up a language or two. I once had an ambition to be an architect, but I couldn't draw a circle or even a straight line, and my mathematics suffered accordingly, but I shall still travel the world with architecture handbooks in my luggage, whereby I can combine my interest in both that subject and in history by visiting cathedrals, churches, castles and chantries. Then, if my wife allows me, I can spend more time watching the cricket as I used to, but this time using Foxtel to bring me cricket from, say, South Africa or India. And those books that everybody has spoken about; I have actually removed most of those law books and sold them, not at very great sums, if I might say so, but it is amazing what books I have discovered, bringing them all down from on high to below, all those little books on 18th century poetry and the like, or on music or on art; books that I had forgotten all about. So I am going to get great pleasure just at picking those off the shelves and reading them again, or perhaps for the first time. And I might try a little writing, though I think my reminiscences would be unutterably boring and full, I am afraid yet again, of interminable sentences!

Enough of complaints and my desires in old age. I must finish by saying how important I believe is the administration of justice and this Court's role in it. In particular the Court of Appeal in practical terms supervises justice at the highest level in this state and, if it occasionally goes wrong, then so far that has been relatively rare. But the range of cases that are heard are important to the community in every sense. There is hardly any form of civil claim that cannot be considered by the Court, even at times it is confined to legal review of what is resolved in some tribunal. But to my way of thinking the administration of the criminal law, and in particular its proper review by the Court of Appeal is essential to a civilised and just community. What is decided by the court on a day to day basis is critical to the balance between citizen and State, between citizen and citizen and between proper discipline and the reasonable freedom of individuals, so that the rule of law can be maintained in a way which preserves the public's interest in general. There are many judges who will maintain that respect for the law and who will continue to sit on this Court. I know that they will do their best to ensure for the people of this State that the law is duly administered, without fear or favour, for all affected by it.

Thank you all so very much for coming and allowing me to indulge myself today once again. I am sorry that my reasons have again been so long. I am touched greatly by your generosity and good wishes.

Adjourn the court *sine die*.

the validity of the complaints made by Ormiston JA. Rather it highlights the concern which we should have at any psychological or other pressures inhibiting in any way the independence of the third arm of government.

The response of the Attorney-General (apparently speaking as a member of the executive and not as the first law officer of the Crown) to Justice Ormiston's complaints reveals the (somewhat alarming) attitude of government. *The Age* quotes the Attorney-General as follows:

> Despite Justice Ormiston's somewhat vague and non-specific comments about a hard-working public service, he has served the judiciary well over a long period of time and is entitled to express his view at his farewell. The government will continue to work with the Courts to ensure they remain relevant in the twenty-first century.

The first sentence can only be categorised as totally inaccurate and as patronising in the extreme. Apparently the Attorney-General does not believe that there is any truth whatsoever in the adage: "He who pays the piper calls the tune." The second sentence suggests that the Courts are becoming irrelevant and will only remain relevant with the assistance of the executive. This is a worrying suggestion at a time when most lawyers are aware of the increasing need for a stronger and independent judiciary if the rule of law is to survive.

There are three arms of government, executive, legislature and judiciary. In this country, where there are only two significant political parties, both strongly disciplined, the executive (generally) exercises de facto control of the legislature. The judiciary is the only arm of government which is truly independent of the executive. Consequently, it represents the only restraint on executive action, the only body which can in any way stem the erosion of individual rights by a government concerned to "protect democracy" regardless of the price.

Every bureaucratic or psychological impediment, which makes the role of the judiciary more difficult, strengthens the power of the executive and undermines the rule of law.

A unanimous Bench of three members of the Court of Appeal, first Justice Phillips, then Justice Batt and finally Justice Ormiston, appears to have found that such impediments exist. This is a matter which should alarm thinking members of the legal profession.

It is an issue on which the Bar Council should formally record its concern and one which it should, as a matter of urgency, raise for discussion with the Attorney-General.

Gerard Nash QC

Reflections on the Silk Road

Fifteen Senior Counsel, appointed in the order of precedence, announced their appearance in the Supreme Court and Federal Court on 6 December 2005.

Bar News asked Christopher Joseph Wren, David John Neal, Barry John Hess, Brendan Michael Griffin, Anthony Aloysius Nolan, Christopher James Ryan, Paul James Cosgrave, Michael Richard Pearce, Christopher John Blanden, Gregory John Lyon, Stewart Maxwell Anderson, Michael Phillip McDonald, Simon Edward Marks, Michele Muriel Williams and Michael William Thompson to respond to the questions, "How has taking silk affected your practice?", or "How will taking silk affect your practice?". These were the responses received:

Front row, top to bottom:
Christopher Joseph Wren
David John Neal
Barry John Hess
Brendan Michael Griffin
Anthony Aloysius Nolan
Christopher James Ryan
Paul James Cosgrave

CHRISTOPHER WREN S.C.

The first indication was via a telephone message from a delighted insider at 9.00 am whilst I was preparing for a hearing into an environmental effect statement for the Geelong By-Pass at the Geelong Racing Club. The hearing was being conducted, propitiously, in the "Silk's Room" of the Club. The most immediate effect thereafter was of the great pleasure of telling my wife and chambers colleagues who were already suspicious due to a number of "unusual phone messages" having been left. The next effect was one of distraction whereby the pleasure of the appointment dissolved to trepidation that could not be alleviated by the subsequent receipt of many messages of goodwill and congratulations. Such trepidation increased with one message noting, "It is interesting how much more knowledge people think you have acquired over the last week." As to how taking silk will effect my practice, it is too early to say other than it may enable me the time to obtain a golf handicap.

BARRY J. HESS S.C.

For me, taking silk was an exciting time which also required an assessment of my current practice. The appointment confronted me with the need to review my practice focus and generally reassess the cases I have been involved in and how I would now run them as senior counsel. Other considerations were the way my appointment would affect my role as mentor, the expectations of clients, other members of the Bar and the legal community generally.

Having said this, for me it is a stimulating time to be now practicing as a senior counsel. Changes in litigation practices, advances in technology, rapid changes in science and keeping abreast of the complexities of patent and intellectual property law remain at the forefront of my thinking and interest. This will give me the challenge to play a leading role in the development of this area of law as well as the opportunity to return my practice to broader areas of commercial law and dispute resolution. Like many before me, I too look forward to the challenge this will present and the contribution I might make to the long and valued tradition of senior counsel.

B.M. GRIFFIN S.C.

The most immediate effect of taking silk was the removal of the quite onerous and

Second row, top to bottom:
Michael Richard Pearce
Christopher John Blanden
Stewart Maxwell Anderson
Michael Phillip McDonald
Simon Edward Marks
Michele Muriel Williams
Michael William Thompson
Absent: Gregory John Lyon.

ongoing obligations to prepare pleadings in complex cases. Outstanding paperwork is every barrister's nightmare and hopefully some of the sleepness nights might be a thing of the past. There is more scope to concentrate on the case concept and not become distracted with other important but subsidiary issues. In addition, the appellate work has increased which, as a leader, is much more demanding if not sometimes daunting.

I have always been interested in the development of the law and hopefully there is more opportunity now to work at the boundaries rather than applying established principles. I would also like to provide ongoing assistance in the pro bono work area, particularly with the Public Interest Law Clearing House. It handles some very meritorious claims which, without assistance, would never be properly investigated or prosecuted. I believe that I will have some greater flexibility with my workload to give something back to the profession which has given me so much. Hopefully before I retire I might also achieve my dream of one day being able to understand the law of negligence.

ANTHONY NOLAN S.C.

In 1979, when I joined the Victorian Bar, it was first and foremost the home of advocates. The trial was the real battleground of advocates. Since then commercial litigation has dramatically changed. Increased competition, directions hearings, the success of alternative dispute resolution, the preparation of court books, the use of witness statements and written submissions have increased the amount of time juniors are required to prepare cases for trial and lessened the time spent on the real battleground. Taking silk will (hopefully) enable me to increase the time spent on the real battleground. In this light taking silk presents the same challenge I faced 27 years ago — to be an effective advocate for my clients.

MICHAEL PEARCE S.C.

Upon the appointment I decided to retain two major junior briefs. Both were matters in which I had been involved for a long time and in which I was led. They were also due for completion shortly after my appointment and were both completed in early February.

I have returned one brief. I have retained another three briefs in which I have been re-engaged as senior counsel. I have been engaged in two new matters as senior counsel since the appointment.

So far, so good.

How will taking silk affect my practice?

Only time will tell, but I hope in the usual way.

STEWART M. ANDERSON S.C.

The most enjoyable part of taking silk is working with juniors in the preparation of cases. Having juniors allows you to stand back from the case and focus on how best the case may be presented in Court. I have also found that whilst the Court quite properly expects more of you as a silk, the Court also gives you a greater latitude to develop and present your argument.

I have also been briefed in new areas of practice which brings with it its own challenges.

MICHAEL MCDONALD S.C.

In the short term, taking silk has had little effect on my practice as I have continued to spend considerable periods of time working on matters in which I was part heard at the time of my appointment. As regards the new matters in which I have been briefed, the obvious difference has been the assistance which I have received from the juniors who have been briefed with me. Looking to the future, I expect that taking Silk will result in me being relieved of the burden of drafting pleadings, submissions and affidavits. After 16 years as a junior, this is work I am happy to delegate to others.

MICHELE WILLIAMS S.C.
Crown Prosecutor

The day the new silks were announced was a day of mixed emotions — excitement, joy, surprise and relief. I was surprised that I was the only woman, but in some ways that has made it more special. Having left school without completing Year 10, I returned to study after my children were born so it has been an amazing journey. It has been wonderful to share the experience and celebrations with my family, friends and colleagues. With the taking of the "bows" in the Supreme and Federal Courts it was an honour to be formally recognised and an acknowledgment of 20 years hard work and endeavour. My daughters travelled to Canberra with me where the new silks from all the States were presented to the High Court. I observed with interest that we all had slightly different "uniforms", the New South Welshmen and Queenslanders wearing the longer wig. I felt proud of myself and my fellow colleagues with our rosette; Victoria is the only State to wear the rosette. In particular, my rosette has special significance to me, being Judge Frank Walsh's rosette, handed on to me on his retirement. I wear it with honour and pride.

On the down side I can say — contrary to popular opinion — I did not wake up the next morning with my income doubled. On the positive side, the warm response from the legal fraternity on my appointment has been almost overwhelming. I thank everyone for their congratulations and well wishes.

MICHAEL THOMPSON S.C.

It is early days, but so far so good.

The Practice of Government Law

A speech delivered at the Annual General Meeting of the Law Institute of Victoria's Government Lawyers' Group on 5 December 2005 by Justice Stuart Morris, Justice of the Supreme Court of Victoria and President of the Victorian Civil and Administrative Tribunal

"WHERE do you live, Mr Murdoch?"

"Oh, come on, I am not interested in your formal address, I want to know where you eat and sleep on a regular basis. Where is that place, Mr Murdoch?"

After a few more questions along the same vein, Rupert Murdoch's counsel, Mr Alec Shand QC, objects. "These questions are not relevant." And, being a Sydneysider, he added, "Mr Morris is engaging in an outrageous attack on the integrity of an outstanding Australian."

The presiding member of the Commonwealth Administrative Appeals Tribunal, Justice Morling, was required to decide whether Rupert Murdoch should be permitted to take over the Channel 10 network. The year was 1980. His initial impression was that Shand had been right. "What is the relevance of these questions, Mr Morris?" he said.

At that point I identified a provision in the Broadcasting Act that required a person to be an Australian resident if they were to control a TV network. Further, I explained that this contention had been formally raised by my client, the Australian Labor Party; but, apparently, Mr Shand and his legal team — from the top end of town — had overlooked this.

In some ways the two days I spent cross-examining Rupert Murdoch about his residential status and about media power were the most fascinating in my legal career. In the end we failed to persuade Justice Morling that Murdoch was a not a "fit and proper person" to own a TV network; or, for that matter, was not an Australian resident — even though he spent most of his time in New York and

Justice Stuart Morris.

London. Of course, the law had been tailored for the rich: by maintaining houses in three countries, Murdoch could be regarded as a resident of all three! But the lawyers' journey was a fascinating one and demonstrates so much about the rewards of practising government law.

The Channel 10/Murdoch saga started with a phone call in which I was asked to be junior to Alistair Nicholson in a case before the Australian Broadcasting Tribunal. Naturally, we were being asked to act pro bono. At that stage Murdoch was being represented by the indomitable Roddy Meagher[1], his junior being Henric Nicholas.[2] Counsel assisting the tribunal was none other than the theatrical Tom Hughes QC. Hughes had the chairman of the tribunal, former television executive Bruce Gyngell, in the palm of his hand.

My leader, Big Nick, who had only taken silk the year before, was obviously nervous against these heavy-hitting opponents. In fact, I remember overhearing a comment made by Meagher to Hughes during a break on the first morning of the case: "Hey Tom, these Victorians don't like it when we play the man!"

But, as ever, Big Nick was fearless. When Rupert Murdoch was called to give evidence — to the effect that Murdoch was an honourable man — Big Nick moved in his seat, thirsting for battle. His face, already glowing, glowed brighter. You could see his fists clench, then unclench, then clench again. At that stage Roddy Meagher and Tom Hughes went into a huddle. They emerged with a joint submission — which the tribunal accepted without a mere blink of the eye — that the appropriate course was for all six witnesses to give evidence together. Further Nicholson was to be confined to a total of 30 minutes of cross-examination. And here's the rub. Even if Nicholson directed his question at a particular witness, for example Murdoch, the question could be answered, not by Murdoch, but by any of the six witnesses at their choice!

Things weren't looking good.

At the start of the second day of the hearing Big Nick said to me: "We might have to walk out of these proceedings. If I take the lead, make sure you follow me." I quivered. Big Nick then added: "I will just set the bastards up first."

Shortly thereafter Nicholson made a series of obsequious submissions to the tribunal along these lines: "Sir, please understand that I am only seeking to clarify your rulings, sir, so we can ensure we comply with them. Sir, as I understand

it, sir, you have ruled that my cross-examination should be confined to a total 30 minutes. And, sir, as I understand it, sir, if I ask any witness a question another witness is permitted to answer that question in lieu of the person to whom it was directed." And so on. On obtaining assent to each of the propositions he put, Big Nick proclaimed, this time without the "sir": "Well, in that case, we have no further point being here." Thereafter he marched for the door, with me in tow, television cameras bringing up the rear, in what must be one of the most celebrated "walk outs" in the history of governmental law in Australia.

Subsequently this case was considered by the High Court of Australia. And the Broadcasting Tribunal's decision was overturned. The case is often referred to by government lawyers – it is known as *R* v *Hardiman; ex parte Australian Broadcasting Tribunal*[3] — as it is regularly cited in the context of when an administrative tribunal should contest a proceeding challenging its procedure or decisions.

Incidentally, this case was raised in federal parliament. There were questions of the Prime Minister. Subsequently, to put the Murdoch matter beyond doubt, the Broadcasting Act was changed so that to own a TV station one needed to be an Australian citizen, not an Australian resident. Ironically Murdoch later became a United States citizen in order to own an American television network.

Although the Murdoch case stands out as a highlight, I was fortunate to appear in many cases during my career which involved matters of public interest or the actions of government. All these cases revolved around the same themes. I would like to speak more about these themes. These themes distinguish the practice of government law from other branches of the law.

In the first place, government law is not usually about money. Further, unlike criminal law, it is not usually about liberty. Government law is usually about power. Sometimes the fight will be between different repositories of power: federal versus state; local versus state. But most often the dispute will be between the governor and the governed. This is not unique to our system of governance. In any system of governance there will be a tension between the rulers and the ruled; and, from time to time, courts and tribunals will need to resolve those tensions.

A few years ago Justice Gaudron on the High Court made these remarks about executive power:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the court should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[4]

I see that other judges have taken up the same theme.[5]

Another example of the tensions that can develop over power concerns freedom of information legislation. I am sure that all modern politicians value freedom of information laws. But there is a natural tendency for politicians to be more enthusiastic about these laws when they are in opposition, rather than in government.

Not only does government law tend to be about power — its existence and how it should be exercised — but the decisions of courts and tribunals on such matters often have ramifications far beyond the immediate case at hand. The decision before the court might be whether a minister can exercise a particular power. Or it might be whether a tribunal should release a certain type of document; or allow a particular type of development. These decisions help shape society. Public law decisions, which go beyond the immediate controversy, often have broad ramifications for the way our economy is organised, the nature of our civil and political rights and the social values which order our society.

One of the beauties — and challenges — of practising in the field of government law is that it demands a broad understanding of our political, social and economic systems. Just as the practice of personal injury law requires a deep understanding of the intricacies of the vertebrae and the practice of the criminal law may require a Rumpolian knowledge of gunshot wounds and bloodstains, the practice of government law is enhanced by an understanding of real world politics, of parliamentary democracy, of the bureaucracy and of the exercise of power itself. The practice of any branch of the law is a broadening experience. The practice of government law is no exception. It broadens the lawyer into the important and exciting world of governance.

To practise government law one does not need to be engaged by government. Indeed, as a barrister, my client list was dominated by the private sector, not government clients. The practice of government law is not just about representing or advising governments. It is also about questioning, or resisting, the exercise of government power. Indeed, this is often

the most exciting aspect of the practice of government law. There can be no greater challenge than seeking to advance the underdog's interests against the power of the State.

Another unusual aspect of the practice of government law is that it is usually conducted under the scrutiny of the media. Indeed, media management — I would hesitate to use the word "manipulation" — is often associated with a dispute about government power. This is obviously a delicate area for lawyers. Although a lawyer is entitled to assist the media to ensure the accurate reporting of litigation, it is not the lawyer's job to massage the media. Having said that, it would be foolish to think that the opening statements of some advocates have not been designed to be consumed by readers of *The Age*, rather than by the presiding member. And, if the media was not an important player, why would it be that in long running freedom of information cases it sometimes happens that all the documents are released on the very morning of the hearing. This is another of the special peculiarities of the practice of government law.

Another lesson we can learn from cases such as the Murdoch case is that there are wonderful opportunities for young lawyers to be involved in major government law litigation by choosing to act pro bono. The annual report of the Public Interest Law Clearing House for the last financial year illustrates the point. Young lawyers have acted in a miscellany of matters in what might broadly be called government law — whether it involves trade practices, aspects of taxation law, environmental law or freedom of information. If the opportunity arises — especially if there is no paid work going — young lawyers should grab the opportunity to be engaged in pro bono work. Doing it beats reading about it.

I welcome the continued involvement of those concerned with government law in the affairs of the Law Institute. As an area of special practice, I am sure you have chosen wisely.

Notes

1. Later Meagher JA of the Court of Appeal of New South Wales.
2. Now Nicholas J of the Supreme Court of New South Wales.
3. [1980] HCA 13; (1980) 144 CLR 13.
4. *Enfield City Corporation* v *Development Assessment Commission* (2000) 199 CLR 135, at 157. (Original footnote omitted from quotation.)
5. See for example the endorsement by Hayne J in *SAAP* v *Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24, at [211].

The Essoign Wine Report

By Andrew N. Bristow

RUFUS STONE HEATHCOTE SHIRAZ 2003

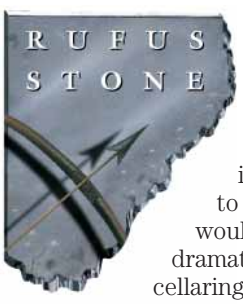
TYRRELLS planted their Heathcote vineyard in 1994 on the ancient russet-red Cambrian soil which is found at the foot of Mt Camel at the southern end of the Colbinabbin Range. The vines are relatively low yielding and produce grapes which are commended for their ability to fully ripen, yet still retain excellent levels of natural acidity and fine grained tannins.

This wine is 100 per cent shiraz. It was fermented in potter tanks for 10 days for maximum extraction. The wine was fermented in 70 per cent French and 30 per cent American oak. Because of the concentration and intensity of the fruit in 2003, a higher than usual percentage of new oak was used.

This wine is particularly young but still has a bouquet of fruit and a softer vanillin characteristic.

The wine colour is dark red to deep purple.

The wine has a complex structure with a large amount of fruit on the front palate. It has a long finish with acidity on the back palate which shows it is too early to drink now and would improve dramatically with cellaring. In contrast the 1999 is now drinking brilliantly, showing its complexity has developed into a very good wine. It is available from the Essoign Club at $35.00 a bottle (or $29.75 takeaway).



I would rate this wine as a (full-time) academic barrister, which will spend a number of years in a quiet dark place before being appointed to high judicial office.

Supreme Court Takes Wings

On 10 February 2006 the Attorney-General announced revised plans to upgrade the Supreme Court of Victoria, the withdrawal of the original proposal, and resubmission of a fresh application to Heritage Victoria. The new proposals now supersede an earlier application to Heritage Victoria in May 2005 following consultation with various stakeholders including the Bar Council. The Supreme Court has welcomed the initiative; in a press release issued on the same day as the announcement, the Chief Justice said: "[The plans] will enable the Court to continue its unbroken 150-year history of operation on a consolidated site; to move forward into the 21st century; to meet the demands of its present and future workload in criminal and civil trials; and to deliver justice in a manner appropriate for the State's highest court".

It is universally acknowledged that there is a pressing, indeed urgent, need to upgrade and develop the Supreme Court precinct. But what precisely do the most current proposals involve? What considerations were taken into account? What was the rationale for the revised application? Will the proposals (as *The Age* foreshadowed in an editorial on 21 February 2006) result in the condemnation of history for compromising Heritage values? Will future generations really ask "What were they thinking?," if Courts 2 and 3 as well as Sir Owen Dixon's Library in the old High Court Building are replaced with a sick bay, a reception desk and a broom cupboard? What of the exterior development? It is always useful to start with some facts.

THE NEW HERITAGE APPLICATION

The application now provides for retention of key areas of the Old High Court Building including the entire facade, entry foyers, front third of the building and all of courtroom 1. See the floor plan on pages 46–47.

OLD HIGH COURT RETENTION

The Old High Court is retained to the extent of the ground and first floor of the front southern wing, central circulation passages and former courtroom 1. This represents approximately 45 per cent of the ground floor area of the building. In the process the principal address and front facade of the building is retained, as is the return facades to the east and west to a depth of 20 metres. The external works to the retained portion of the building will include the full cleaning and restoration of the facades and roof. Subject to detailed examination of the brickwork it is proposed that the Virginia creeper, which currently covers part of the facade, will be retained. It is not anticipated that there will be any alteration to the facades other than in relation to minor services works. Within the building the main central entry and circulation corridor at ground level is to be retained, as are the flanking rooms accessed off this corridor. The corridor area will be restored to its original form and finishes. The rooms on either side, which are of moderate significance, will be adapted and refurbished for court use, retaining where possible that fabric which is original. The Old High Court courtroom 1 would be fully restored, as it existed in 1925. This will include conservation of all original internal fabric, including furniture and fittings.

THE NEEDS OF THE SUPREME COURT

The needs for a modern higher court facility created significant design challenges given the limited size and nature of the existing site along with the obvious Heritage constraints. The concept design follows months of consultation with court user groups and members of the legal profession.

The proposal for redevelopment of the Supreme Court is to take into account the needs of the Court and wider justice system, while dealing sensitively with the Heritage components of the older buildings. The consolidation of the facility onto the existing site has been driven by the desire to maintain key Heritage buildings and courtrooms as operating court facilities for many years to come. The concept design reflects a set of fundamental needs of the Supreme Court, which include the following:

- The custody centre will be near or underneath all relevant courts (including the Court of Appeal).
- The Registry will be nearby and accessible to the main public entrance and courts.
- A goods delivery will occur through the entire facility from one secure point.
- The CEO's office will be accessible

to judges, general administration and public areas.

- The public will enter through one interface to orientate their way to all courts and support services.
- Judges will be located in the one building but within reasonable distance to courtrooms.
- Masters will be located close to where their respective courts are.
- Security services for the whole complex will be central and close to the main public entrance.
- Support services will be located centrally but accessible to the entire facility.
- Civil courts will over the years be incorporated into criminal courts due to their location near custody lift cores (as part of future proofing).
- Jurors will be able to access all courts easily and securely from the one jury pool area.

The proposal addresses current risks and concerns about security, public safety, courtroom capacity and public liability, particularly relating to occupational health and safety constraints and disabled access to the facility.

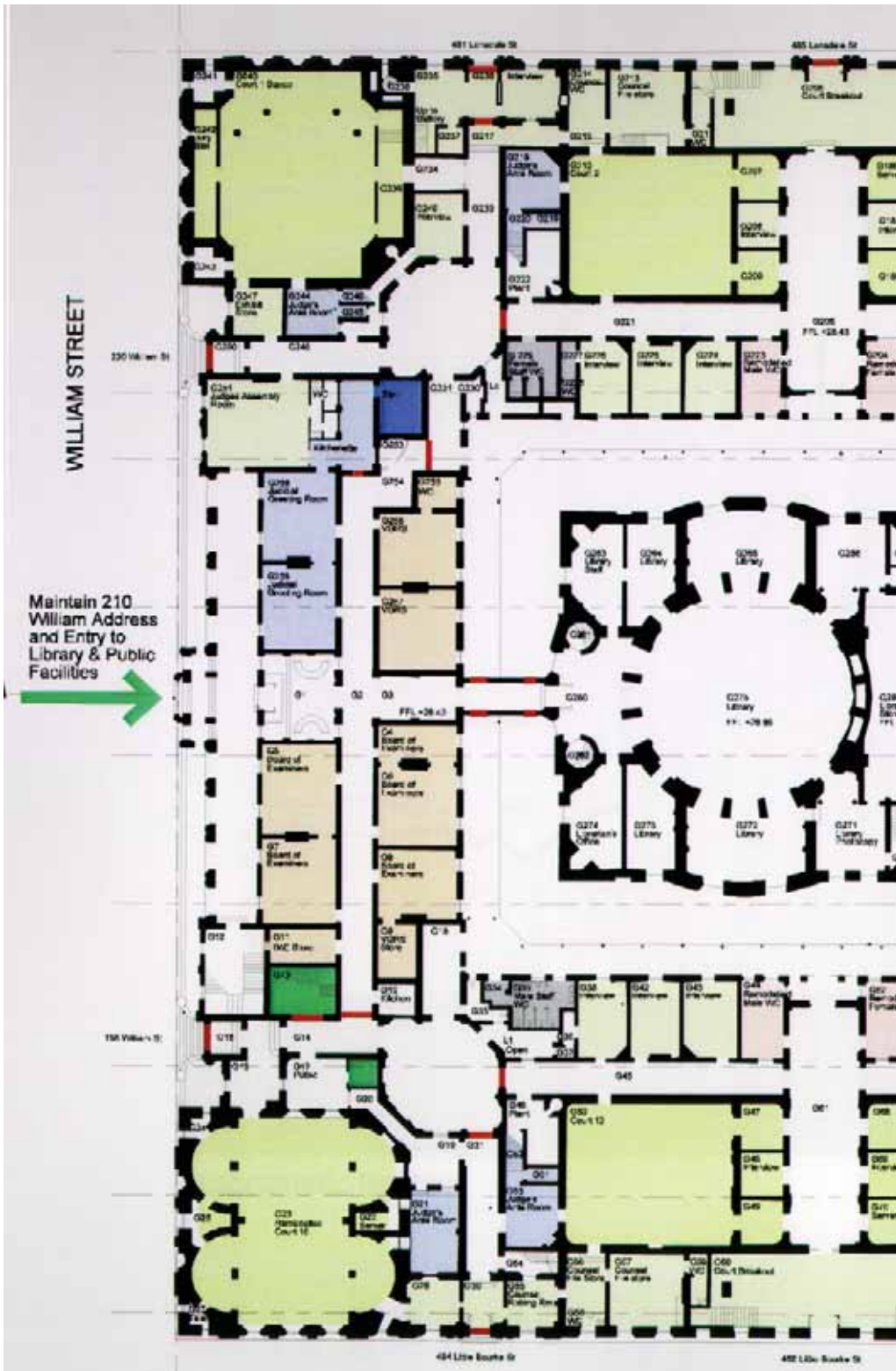
HERITAGE WORKS PROPOSED

The proposed works to the Supreme Court buildings involve extensive refurbishment and upgrading of existing court facilities, and active restoration and reconstruction (valued in excess of $40 million). The focus of the works is to ensure that the facilities within the buildings are commensurate with the standard expected for all modern contemporary court buildings, recognising the limitations which arise as a result of Heritage constraints. In general the works involve localised activities, spread over the buildings as a whole, other than for the proposed roofing of the courtyard, partial demolition of Courts 5 and 8 and partial demolition of the Old High Court.

REDEVELOPMENT FEATURES

The primary Supreme Court redevelopment features are as follows:

- The current four buildings will be totally integrated into one purpose-built facility.
- A 13-storey tower will provide 30 new courtrooms with the ability to expand to 36 and beyond in the future. (See front cover for design.)
- A single public entrance and secure perimeter is based on modern court design standards and will provide appropriate disabled access.
- An increase in overall courtroom numbers (from 28 to 41) will meet projected court demand.
- Specialised criminal courtrooms will be provided for major criminal trials (potentially for all court jurisdictions).
- There will be secure direct person in custody access to all new criminal courtrooms.
- A separated jury pool area will provide

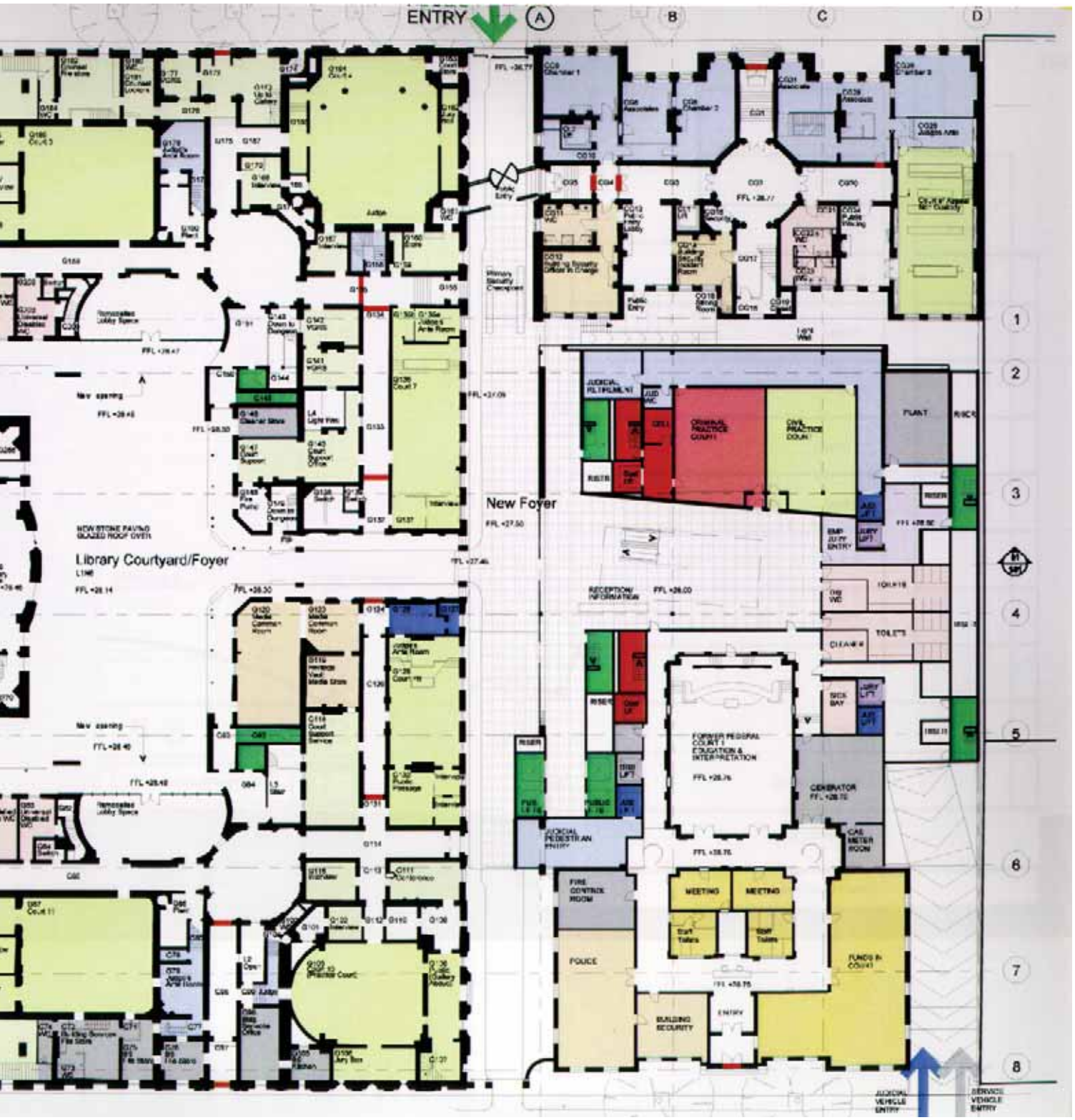


access to all courtrooms.

- There will be secure judicial/staff car-parking and access.

The design concept is shown in the illustration below. The current proposals are under active consideration by Heritage Victoria, and its response is awaited.

There are those who are concerned that one of the remaining "great buildings" of Melbourne is diminished, not only by a design which some regard as totally unsympathetic but also by the fact that the new structure towers over the dome of the Supreme Court library. Many feel that to diminish the dome in this way diminishes our Heritage physically and otherwise.



Un-round Numbers

Richard A. Lawson

I have belatedly completed the Bar's pro bono survey questionnaire. My only regret about the survey is its apparent importance. How is it that we have reached a stage where statistics are needed about the honorary work barristers do? Never mind. If this helps to counter, if not silence, some of the Bar's more tiresome critics, then so be it.

Of course, nobody else will gather statistics that put barristers in a good light. Such as the widespread occurrences of defendants-in-person receiving quiet, sound, pro bono advice outside the parameters of any formal pro bono scheme. Or even the number of work experience students we take.

Statistics can be alluring. The underlying cause of this is a deep-seated fascination with round numbers. This year it is 150 years since George Bernard Shaw was born, 250 for Mozart and a very round 300 for Benjamin Franklin. These are numbers to warrant an extra fuss being made. Such numbers are, by the way, not as round as we might think. Using ten numerals for counting has always been an arbitrary practice. If we used only six, then the heximal equivalents of 150, 250 and 300 would be three very un-round numbers indeed.[1] But let's not quibble about that. The point is that very few of us, if any, are likely to be remembered by anyone at all in the years 2106, 2206 or 2256 or whatever the years will be in which one would have celebrated one's 150th, 250th or 300th birthday were one alive.

From when I was very little, I seem to recall that there were certain statistics which were designated as vital. Weren't they the ones about births, deaths and marriages? Perhaps they still are. Some of them were even described as crude as well as vital. Crude birth rates and the like. This left one pondering the polite or refined birth rates and questioning why those rates had been ignored.

There have been other times, I confess, when I have become obsessed by statistics. This has meant that I have become a repository of a variety of useless and disconnected information. I know how many (and which) Australian swimmers have broken 50 seconds for the 100 metres freestyle; the date and reading of Melbourne's highest recorded shade temperature; the identity and depth of Australia's deepest freshwater lake; the quarter by quarter scores for the 1965, 1984, 1985, 1993 and 2000 Grand Finals; the number of 19th century American Presidents born in the State of Virginia; the highest possible break in snooker (which is more than the regular 147 point maximum); the five gases which are the coldest ones at their point of liquefaction; the ten most populous cities with predominantly English-speaking inhabitants. And so on.

Quarter by quarter scores.

From when I was very little, I seem to recall that there were certain statistics which were designated as vital. Weren't they the ones about births, deaths and marriages?

As with other things, however, some statistics are prone to being produced in plague proportions. In the sphere of games and pastimes, the paramount example is cricket. A bowler with the fifth-best economy rate for a spinner in a chasing innings at the SCG in one-day internationals staged between India and Australia is of no greater interest on that account. Nor is the one with the fourth-best economy rate. In supposedly more serious pursuits, it is economic "research" where statistics have run rampant. You know the ones. They come up on the news. "For the December quarter there has been a 0.7 per cent fall, seasonally adjusted, in the non-farm sector index of business sentiment." Surely not. Moreover, we are told that this was "in line with the expectations of market analysts". Really?

For the most part, the Bar has hitherto been spared such excesses. One just hopes that the pro bono survey doesn't give the Bar's critics any bright ideas. I don't want to know how many of us are under 40, with chambers in Latham, who have attended a religious service for the opening of the legal year and who have a practice dominated by building mediations. Nor do I want to know how many of us did their degree at a non Victorian university, who subscribe to the Commonwealth Law Reports, who have taken more than three readers and who gave up smoking at least five years ago. Still less do I want to know how many of us fall into both categories. The concern is that the meddling critics do. But perhaps I am naive. They may already know. If so, goodness knows what they will seek to do with the information.

In all, one nevertheless can remain quietly confident. The Bar can be expected to survive any outbreak of a statistics plague. There must have been a lot of people born in 1756 apart from Mozart. The powers-that-be didn't keep very good tabs on him. But few are remembered as well.

1. The heximal equivalents of what we call 150, 250 and 300 are, respectively, 410, 1054 and 1222.

OHMS: Some Reflections on the Business of Our Courts

Brien Briefless MBA (Harv), DBA (Whart), DEc (LSE)

THE recent receipt of a letter from the County Court of Victoria in a postage-paid envelope with OHMS in large bold letters adorned across the front redirected my mind to a matter with which I have been concerned for some time. [For those readers born after Armstrong and Aldrin's 1969 moon landing I shall return to the quaint subject of OHMS government postage later.]

Because of the reference in the letter to the external clients of the Court my first thoughts went back to last year's retirement address by Justice J.D. Phillips of the Supreme Court of Victoria, which in turn took me back to an interview with the then recently appointed Chief Justice (see Jason Silverii, "Supreme Court reclaims jurisdiction", 78(7) *Law Institute Journal* 24, July 2004 — coincidentally the same issue carried a report, also by Silverii, on the release of the Attorney-General's Justice Statement setting out the proposed directions of the Victorian justice system over the next decade).

When did the Victorian community, the public, become "external clients of the Court"? Is the convicted prisoner serving a long stretch a grateful client of the Court? Are civil litigants aware that generally only 50 per cent of them will become satisfied clients? Surely, the mission statement of the Court should aspire to a higher satisfaction quotient than a mere 50 per cent! How on earth can the Court's CEO expect the ISO 9001:2001 "World's Best Practice" tick for compliance/accreditation with such a low rate of client satisfaction? Can the Court simultaneously deal with two clients whose interests are diametrically opposed without being compromised? Are there internal clients of the Court? Who are they? What is wrong with the old-fashioned terminology of serving the public, except that it may possibly conjure up the vision of a meek cardigan-wearing middle-aged man who lacks the get-up-and-go to obtain real employment: a public servant.

The fact of the matter is that the courts exist to resolve disputes that in a less civilized society would be settled with sticks and stones, with the attendant drain on our medical and hospital resources. The courts exist to serve the needs of the community and unlike a commercial enterprise they should not be seeking to expand their business. Indeed a utopian society would have court officers and staff drawing unemployment benefits. Similarly for employees of penal institutions. Are penal inmates referred to as clients by senior management?

Why is this so? Unfortunately the management of our public service institutions do not enjoy the connotation of themselves being cardigan-wearing public servants and wish to cloak themselves in the garb of practitioners of a profession — a profession which does not deal with the public (it being too infra dig to have any association with the mobile vulgus) or render service to the community but instead renders services to its clients. Thus the resort to style over substance in order to pander to their vanity when they have nothing otherwise of which to be vain. They are unable to comprehend that a public institution and its officers are here to further the public good and not the other way about: it is not the role of the public to further the interests of the public institutions and their officers.

Is it possible for a disappointed litigant to bring a suit in negligence against a judicial officer based upon a breach of the duty of care owed to a client? This is against the whole line of authority that confers absolute privilege on such judicial officers and even prosecution officers (I have never been able to figure out the basis on which a well-known Melbourne business figure was supposedly suing the DPP for wrongful prosecution after his judge-directed acquittal). Is it that the immunity from suit can be lost merely because some mid-level bureaucrat suffering from an inferiority complex seeks to boost his self-esteem?

Bar News readers may be surprised to learn that Justice Phillips's retirement speech of 17 March 2005 was widely reported and commented upon editorially: not only in *Bar News* (issue 132, page 48, Autumn 2005) but also *The Age* and elsewhere, and it figured in a National Press Club address by Richard Ackland. Consequently it can be found at many websites besides that of the Supreme Court of Victoria. [Doubting readers should do a Google search for the phrase "Business Unit 19".] Readers will recall that Justice Phillips spoke with regret on the increasing erosion of the independence of the courts (and in particular the Supreme Court). Your correspondent encourages readers to read the whole speech rather than rely upon his single-sentence summary.

I confess to some reluctance in broaching the subject of the article based on an interview with the Chief Justice six months into her office. Initially I feared that the journalist may have inadvertently written an unbalanced account of the Chief Justice's views and an assessment of her views as reported could be erroneous. In the 18 months since the publication of the article there has been (to my knowledge) no complaint or request for correction. It is a brave or foolhardy editor or journalist who declines to act upon a complaint or request of a Chief Justice. Thus I have concluded that the *LIJ* article was "accurate".

The thrust of the article was that the

Supreme Court was actively seeking to grow its business by taking over cases that were previously brought in the County Court as evidenced by the then recent transfer of an important drug trafficking case from the County Court to the Supreme Court after an unopposed application by the Director of Public Prosecutions. This had followed from the Supreme Court's encouragement of the DPP to "look to [the Supreme] Court on the basis that it has the senior criminal judges in the state and [it] will endeavour to accommodate these trials". The *LIJ* report included the concurrence of the DPP's office in fully supporting the Chief Justice in this initiative. Unfortunately the article fails to explain the DPP's rationale in bringing this trial before what was later thought to be the less appropriate forum of the County Court. The article also does not canvass the issue of appeals from the County Court on the ground that it was a less appropriate forum in which to prosecute a major non-homicide trial.

The Chief Justice also indicated that the Court was seeking to attract more complex civil trials and has issued an invitation to the legal profession to closely consider the Supreme Court.

The Chief Justice's initiative does not canvass the costs penalty incurred by a successful litigant imposed by the Supreme Court (General Civil Procedure) Rules 2005 (S.R. No. 148/2005), in particular Rule 63.24: Money claim in wrong court. There is an exception to the penalty imposed by this rule where the case has been transferred to the Supreme Court under the *Courts (Case Transfer) Act 1991*. Presumably a case that has been thus transferred with the approval of a judge is, by definition, not a claim in [the] wrong court. However, this does not assist the party whose solicitor has taken up the CJ's invitation to commence proceedings in a forum that may later be held to be "wrong". Perhaps Rule 63.24 should be headed "Money claim in less appropriate court".

Similarly the article does not explain why it was that the DPP's application for "uplift" to the Supreme Court was unopposed. Surely no practitioner would approve of such an uplift merely to draw on the higher professional fees allowed for? Presumably their decision not to oppose the DPP's application was on the instructions of their client and only arrived at after full and frank advice to that client with that client wishing to avail himself of the Court with the senior criminal judges in the state and which will endeavour to accommodate his criminal trial. Maybe it was explained to the client that opposing the DPP's application would require further additional funding?

The thrust of the article was that the Supreme Court was actively seeking to grow its business by taking over cases that were previously brought in the County Court as evidenced by the then recent transfer of an important drug trafficking case from the County Court to the Supreme Court after an unopposed application by the Director of Public Prosecutions.

It is this minimal reference to the lay client in the article that causes concern. It may be that the CJ, when issuing her invitation to the legal profession to closely consider the Supreme Court, meant for the profession to always keep in mind the interests of the profession's clients and that it was unnecessary to expressly spell this out as it was obvious to all, with all understood to include the CJ, the profession, the officious bystander, and everyone else (even Uncle Tom Cobley). Well, it wasn't that damn obvious to your correspondent but I suppose it is not unreasonable for the CJ to cast her message only at those with a higher IQ than that of your correspondent, who is admittedly a bit of a dill. And it certainly didn't come out in the article. Otherwise, the lay clients may well rue the veracity of George Bernard Shaw's dictum that all professions are conspiracies against the laity. In fairness to the CJ, the article reports her as saying the "aim was to provide a better service to litigants …", and providing "a best practice, best standard service to the citizens of Victoria", and includes a reference to the need to dispose of a large number of common law trials quickly because the plaintiffs are ill.

Of further concern to me is the intent of the CJ to "grow the business" of the Supreme Court at the expense of the County Court. If the Qantas subsidiary JetStar can grow the business by creating further demand or by "stealing" passenger seats from Virgin Blue then well and good — I am sure that Allan Fels and Graeme Samuel will applaud. It is a different matter, however, if JetStar can only grow by cannibalizing Qantas sales. One of the ear-

liest and more successful of the business "how to" books was that of the 1970s CEO of the American car rental company Avis, Robert Townsend, who described a similar idea in his *Up the Organization*. Having dreamt up the idea of a no frills budget subsidiary of the parent car rental business he sounded out his top executives on the idea. One responded in no uncertain terms that "I don't know what you call it, but us Polacks call it pissing in the soup".

Thus, while I disagree that the business of the Supreme Court (or any court) is to "grow the business", at least such growth, if sought should be at the expense of a competitor such as the Federal Court or perhaps the Supreme Court of NSW or perhaps some of the alternative ADR providers springing up lately. The County Court is not a competitor and if growth of the Supreme Court's business can only be achieved at the expense of the County Court then no amount of seasoning will disguise the taste and smell of urine in the consommé.

It is this sort of biz-speak that has the Federal Productivity Commission in a recent report purporting to assess and rank the nation's courts on their productivity. How? It is not as though we wish to compare a Victorian dairy with its NSW counterpart where each are producing similar litre cartons of milk. How does one compare the Federal Family Court with the NSW Land and Environment Court? Or the WA Mining Warden's Court with the Queensland Court of Appeal? In regard to the major drug trafficking case uplifted from the County Court to the Supreme Court; does this result in an improved productivity score for the County Court in that it has successfully disposed of the case with minimal expenditure of resources?

How about the successful defence submission early in a criminal trial where the trial judge, upholding the submission, directs the jury to return an acquittal. Years later, upon the hearing of the DPP's appeal (brought by way of a case stated) the Court of Appeal upholds the DPP's case stated, which result does not in any way prejudice the acquitted defendant. Does the criminal trial, completed early with the judge-directed acquittal earn the Productivity Commission's praise? What happens to the next years productivity assessment after the Court of Appeal has upheld the DPP's case stated?

All this biz-management cant reminds me of the Northern Territory defendant in a case where an expert witness responded to a defence suggestion that he was mistaken by saying, "That's why I'm the expert." The defendant was reported to have turned to a friend in court and, mouthing the words "I'm the expert", gestured as if masturbating.

As earlier promised, I now return to the postage-paid OHMS envelope carrying the recent correspondence from the County Court. Back in the days before user-pays and economic rationalism the government instrumentalities were exempt from government fees and charges — thus the electricity generating utility did not pay postage charges and the Post Office did not pay for its electricity consumption. Such government instrumentalities used OHMS emblazoned envelopes in lieu of postage stamps. On this point alone the presence of the OHMS on a postage-paid envelope is an anomaly. Perhaps this was the result of some economically minded management executive utilizing a vast unused store of such envelopes that was the subject of an over-order back in the 1960s. If so I would applaud such initiative. Alas it is not so — witness the return address at 250 William Street and the printed square "Postage Paid Melbourne Vic. Aust. 3000" located at the top right placing the origin of these envelopes in the last few years with the Court's new location.

What on earth would inspire a nameless bureaucrat in the Court to order such stationary in the 21st century, long after inter-government immunity from charges was done away with? Isn't it totally out of place in these days of management-speak, mission statements, style taking precedence over substance, ASA-certified compliance and other meaningless artifacts designed solely for the purpose of justifying the huge fees charged by outside consultants? It is speculation only but I have a suspicion that those who are horrified by the appellation "public servant" do, deep down, harbour the desire to be seen as authorized to act On Her Majesty's Service (à la the debonair James Bond): deep down inside every public servant there is a Walter Mitty who dreams of slaying dragons and rescuing fair maidens.

Perhaps I protest too much — surely the existence of OHMS envelopes is an indication that the privatization of our courts is not imminent, for which we should be grateful.

[STOP PRESS: this article was written and submitted, and the decision made to publish, before the occasion of Justice Ormiston's retirement address (see the front page report in *The Age* by Fergus Shiel — 23 February, 2006). While *Bar News* has covered Justice Ormiston's retirement elsewhere in this issue we are of the view that his observations on the "business of our courts" reinforce the tenor of this article.]

Melbourne Justice Museum

THE Old Magistrates Court on the corner of La Trobe Street and Russell Street has seen a thing or two in its time. Former home of both the Supreme Court and the Magistrates Court, it has witnessed the legal battles of some of Melbourne's most notorious people, including Australia's best known criminal, Ned Kelly, infamous mobster and police informer Squizzy Taylor, and 13 dissidents from the Eureka Stockade.

Later this year, ghosts from both the right and the wrong side of the law will be welcomed back into the majestic old court as the building becomes the home of the new Melbourne Justice Museum. Also encompassing the Old Melbourne Gaol and City Watchhouse, the Museum will invite the public to engage with contemporary and historical issues of human rights, justice and citizenship. These broad areas will be explored through exhibitions featuring personal histories and character studies of people who have had some interaction with the institutions formerly housed in the three buildings.

Former Chief Justice the Hon Professor John Phillips AC cut his teeth as a barrister in the Old Magistrates Court, and certainly has a story or two to tell about the building.

In his barrister days, Professor Phillips tells how he would discreetly hustle his more illustrious clients into court via a pathway behind the City Watchhouse, keeping their run-ins with the law as private as possible. Things ran smoothly until the late 1970s, when alleged armed robber Raymond "Chuck" Bennett was shot dead at the Magistrates Court, and the murderer escaped using the back stairway leading to the car park. Nobody was ever charged, but unfortunately for Professor Phillips' distinguished clients, the incident lead to the closure of the back lane.

Professor Phillips also recounts an anecdote about the building from the 1890s, when the Court was frequented by a policeman with the nickname "Tomtit".

"Tomtit was an associate of John Wren (notoriously the subject of Frank Hardy's controversial novel, *Power Without Glory*) back in the days when Wren was running illegal totaliser in Collingwood," says Professor Phillips. On the odd occasion that the police would work themselves up to launch a raid on Wren's tote (in their horses and buggies, no less), Tomtit would climb to the roof of the old Magistrates Court and let free a pigeon carrying a warning to Wren of the impending arrival of the constabulary. The system might have been quaint, but it was effective — Wren managed to keep his betting shop open for over 10 years.

Professor Phillips is a member of a Legal Reference Group convened by the Victoria Law Foundation to advise on the development of the museum project. David Neal SC and Paul Lacava S.C. (who is also a member of the Foundation's Board) represent the Bar on the group, sitting alongside Magistrates Brian Barrow, Clive Alsop and Heather Spooner, Judge Paul Mullaly QC from the County Court, State Coroner Graeme Johnstone, Bill O'Shea from the Law Institute of Victoria, and ABC broadcaster Jon Faine.

The Museum is due to be launched to the legal profession during May this year. In the meantime, the Foundation is collecting scandalous, quirky or memorable stories about the former legal precinct to include for possible future use in resource collections and exhibits. At the end of the year, the best anecdote will receive a prize awarded by the National Trust. Please forward all "tall tales but true" to Professor Kathy Laster (klaster@victorialaw.org.au).

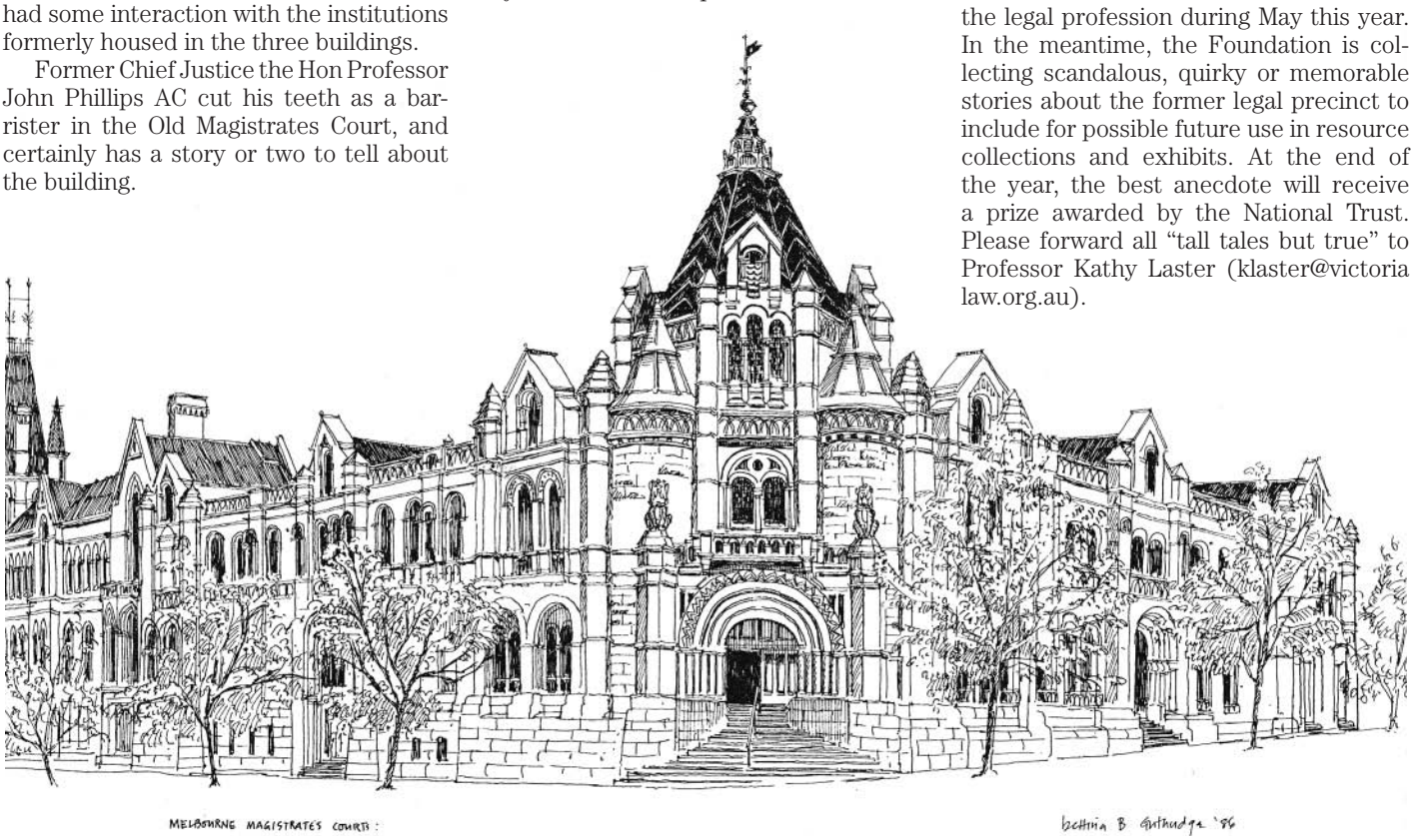


Illustration by Bettina Guthridge 2005 for the Melbourne Legal Precinct Map published by Victoria Law Foundation.

The American Way

On Monday 3 October 2005 John Roberts took the ceremonial Investiture oath in the crowded Supreme Court to become the 17th Chief Justice of the United States.

Julian McMahon

PRESENT were of course all the other Supremes, as they are called, President Bush, Attorney-General Gonzales and about 300 others, including four Australians. John's wife Jane Sullivan Roberts had studied and worked in Melbourne over the years and has many friends here. Roberts had already taken the Constitutional oath several days earlier at the White House, on the afternoon following confirmation by the whole Senate of the President's nomination.

Photographs of any kind, let alone television cameras, were forbidden in the Court room.

The ceremony was short and rich in tradition. Unlike in our Courts, those assembled were obliged to remain completely silent and still for about 10 minutes prior to the justices entering the Court. Roberts entered the Court but was seated below and in front of the Bench, in a chair once occupied by Chief Justice John Marshall, appointed in 1800, while the eight other justices took their usual custom-made chairs. Once the Court opened, the Attorney-General presented Roberts to the Court, in a few words advising the Court that the Senate had approved the President's nominee and found him to be suitable to hold the office. The clerk, elevated but to the left of and lower than the Bench, and in morning dress, read the letters patent of appointment signed by the President, printed on parchment several feet long.

A clerk then led Roberts up to his central chair on the Bench, and Stevens J administered the oath. Symbolically and actually Chief Justice Roberts then took his seat. Stevens J made a very short and warm welcome speech. He thanked the President for appointing Roberts, and observed that the new Chief Justice had appeared before the Supreme Court as an advocate more times (39) than all the other eight justices combined had done in their pre-judicial careers. The new Chief Justice then adjourned the Court, and it was all over in fewer than ten minutes.

Judge John G. Roberts is sworn in as the 17th Chief Justice of the United States by Associated Supreme Court Justice John Paul Stevens. Judge Roberts' wife Jane is seen holding the Bible. White House photo by Paul Morse.

Chief Justice John Roberts acknowledges the audience after being sworn in on Thursday, 29 September 2005, during ceremonies in the East Room of the White House. White House photo by Krisanne Johnson.

President George W. Bush signs the commission appointing John Roberts as the 17th Chief Justice of the United States prior to swearing-in ceremonies. White House photo by Eric Draper.

Jack and Josie Roberts look on as their father takes the Oath of Office. White House photo by Eric Draper.

After a brief adjournment, the Court heard argument in two cases. The era of the Roberts Court had begun. Before the new Chief Justice swore in several lawyers as the newest members of the Supreme Court Bar, Stevens J reminded those present that the flag above the Court building was no longer flying at half mast: the period of mourning for the recently departed Chief Justice Rehnquist was over and the Court was looking to the future. By coincidence, 3 October was also the start of the new legal year.

As is customary, each case was listed for one hour. Atop the podium on the bar table are two small lights, white and red. The white flashes at 25 minutes, and the red at 30 minutes. The advocate sits even if mid word, let alone mid sentence, when the red light goes on. However, the applicant can reserve a right of reply simply by sitting before the 30 minutes are

used, and banking the time. This system meant two cases were fully argued in exactly two hours. In both cases there were two respondents, and their allocated 30 minutes time was split, 20 minutes and 10 minutes. The subject matter — interpretation of an employment statute in the first case and tax law in the second — was a reminder that the Court deals with relatively routine matters as well as cases of great public moment. In the employment case, the issue was whether, under the statute, workers should be paid for the time it takes to move to and from a change room at the entrance to a plant, where safety gear is donned, to the worksite, which may be say a 20-minute walk.

No one would be surprised to read that the standard of advocacy was very high. All those who spoke were relaxed, none of the advocates or justices was much bothered by the papers, and the hearings were very much like an appellate hearing would run here, but perhaps with less formality. Advocates wore suits (in some cases morning dress); justices also wore a black robe. I think the tradition is that counsel who appear for the federal government tend to wear morning suits. Most readers will know that the art of applications in the US Supreme Court is in the written submission. The appearance is to support the written submission and answer questions. The justices had many questions and fired them rapidly. Roberts was active in questioning from the outset.

One striking difference was security. The Court has its own stand-alone security service, and the standard and level of security seems more extensive than anything in Australia, including for our Prime Minister. Even in the hearing itself, a number of security officers stood just behind counsel and with their backs to the Court watching the public continuously.

SOME COMMENTS ON THE PROCESS OF APPOINTMENT

The entire process from nomination in July 2005 to appointment had been fascinating to observe. After watching quite closely for 10 weeks, I came to the view that my initial distaste for the process was a misjudgment. The Chief Justice is appointed for life, and heads one of the three branches of government. At 50, if blessed with good health, Roberts CJ could easily outlast three or four, even six or seven Presidents if they held office for one term only. Stevens J is sitting at 85. Rehnquist CJ died last year in his 80s. America has had 43 Presidents but only 17 Chief Justices. At 50, Roberts is the youngest Chief Justice since Marshall CJ, who presided over the Court for more than three decades at the beginning of the nineteenth century and is said to have shaped the nation's early life perhaps more than anyone apart from Washington. The comparison between Roberts CJ and Marshall CJ has been the subject of much commentary.

Further, the nature of the US Constitution and American society means that Supreme Court decisions are extensively analysed and debated publicly in a way that rarely happens here. Issues of state education and religion, abortion, segregation, and other institutional and personal liberties all excite enormous passion and debate. The personal philosophy of each of the justices is seen to be very important, and that of the Chief the most important. It seems no exaggeration to say that to many Americans, the personal and legal philosophy of the justices is seen as very influential in shaping American society as the Court adjudicates on key policy issues.

The Chief Justice also serves ex officio on numerous key cultural institutions such as the Smithsonian and the National Gallery and the list goes on.

It is clear that a strong Chief Justice has a large influence on the direction of the Court. For instance, the diaries, notes and other released documents show that when Earl Warren became Chief Justice in 1953, his intellectual energy swung the Court, until then quite divided, to the view that a strong majority was required in *Brown* v *Board of Education*, the landmark case of modern US constitutional law that announced the illegality of segregated schools. This 1954 decision presaged the *Civil Rights Act of 1964*; and in time it brought about radical social and constitutional change. It has been interesting for me to read about that case in particular. The Court, more than 50 years ago, allowed the lawyers to present evidence from psychologists, sociologists and historians to show that segregation had a harmful effect on the ability of black children to learn, even when black children were in separate but (supposedly) equally resourced facilities.

In that environment, it is worth assessing the nomination process as it currently exists. It is brutally public. Once the President nominates a candidate, there is a delay of some weeks before the candidate is questioned by the Senate Judiciary Committee. During that delay, the debate rages. It is usual for a nominee to call on most if not all of the Senators to answer questions. Lobby groups and individuals from both sides of politics work the media relentlessly to win public support and influence the Senate. Many old associates, from junior high school onwards, voice opinions about the nominee. Whatever the nominee has written on constitutional or other topics that can be obtained is scrutinized. Hence Roberts' opinions written as a government lawyer became significant in the debate.

The news coverage was extensive and daily for weeks. Roberts had been nominated in July as an Associate Justice. The process was interrupted by the tragedy of

JOHN G. ROBERTS Jr.

Current job: *Court of Appeals for District of Columbia Circuit*
Born: *1955 in Buffalo*
Education: *1979: JD Harvard Law School; 1976: BA, Harvard College*
Career highlights: *Roberts was appointed to the US Court of Appeals for the DC Circuit in 2003 by President Bush. Previously, he practiced law at DC's Hogan and Hartson. Between 1989 and 1993, he was the principal deputy solicitor general in the Bush administration. During the Reagan administration, he served as an aide to Attorney-General William French Smith from 1981–1982 and as an aide to White House counsel Fred Fielding from 1982–1986. He was a law clerk for Judge Henry J. Friendly of the US Court of Appeals for the 2nd Circuit, in New York, and later for Chief Justice William Rehnquist, who was then an associate justice.*

Hurricane Katrina. Then Rehnquist CJ, for whom Roberts, as a young graduate, had clerked, died on 3 September 2005. So the President then nominated Roberts to replace Rehnquist CJ rather than O'Connor J.

Finally, the Senate Judiciary Committee's 18 members questioned Roberts publicly for about four days, sometimes long into the evening. This was shown live to air. The questions covered any area of interest to the Senators. Roberts thus discussed much of American jurisprudence live to air. Discussion ranged from abortion to constitutional history and theories of interpretation to international trade, and pretty much anything in between. One of the contentious issues was the limited responses given on issues likely to become before the Court. Another was the question of access to some but not all documents Roberts had written as a government lawyer. The candidate was grilled by experienced and well briefed Senators.

At the end of the process, a number of factors had become clear. The legal philosophy of Roberts was well understood. Further, the entire Committee, and for that matter almost all the Senators, were of the view that Roberts was simply an outstanding lawyer, with many comments circulating in the press, notably from those who voted against him for specific reasons, such as "the most impressive we have ever seen" etc. Opinions were divided as to whether the Senators could predict which way Roberts would vote on difficult issues, but there was a consensus that the rule of law, and faithfulness to the law rather than "judicial lawmaking" would be paramount. The vote in the Senate was 78–22 — all 55 Republicans, the independent, and 22 out of 44 Democrats voting in favour of the nomination — a very strong show of support for Roberts. In 1986, the vote for Rehnquist as Chief was 65–33.

Thus the process was validated. The Judiciary Committee and the Court were strengthened as institutions in the public eye. The community, including influential and well-financed lobby groups, had had a chance to influence the outcome. In the end proven merit, suitability for high office, the well publicized life history and his skill became the critical factors. In such a large country, with its particular forms of democracy and patronage, the public, intellectual (and populist) scrutiny seemed to achieve a result many were satisfied with — a meritorious appointment. A few weeks later Harriet Miers failed to impress the Senators or many others and was quickly thought insufficiently learned. She withdrew her acceptance of her nomination.

And a footnote for local history. Roberts, then a Washington appellate attorney, came and watched a morning of the jury trial of Boris Beljajev before Judge Higgins in the County Court in 1999. One suspects not many other US Chief Justices have closely watched our County Court at work. He enjoyed watching that trial a great deal, and much discussion was had on the differences between systems. I am sure Judge Higgins would have welcomed a 30-minute red light at times for me and others in that trial.

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A comment on philanthropy. While I was in Washington, an obituary for Constance Motley was published. She was the first black woman on the Federal Court, and the first to argue a case before the Supreme Court, where she won on nine of 10 appearances. As a 15 year old, at a centre for black youths, she told the white philanthropist funding the centre, a Mr Blakeslee, that the board lacked grass roots support, hence the limited use of the facility. Impressed, and learning she was too poor for college, he funded her every cent through college and then law at Columbia. Motley later said he never asked for anything in return. Motley went on to be a key player in the civil rights movement, including working on Brown's case.

Definitions in Abundance

Dear Editors,

PRIOR to the enactment of the *Legal Profession Practice Act 1891* there were two classes of legal practitioners in Victoria:

(a) barristers; and

(b) attorneys, solicitors. and proctors.[1]

One of the reforms attempted by the 1891 Act was to amalgamate the two classes of practitioner into one class: barristers and solicitors of the Supreme Court of Victoria.

I observe that the *Legal Profession Act 2004*, which commenced operation on 12 December 2005, contains no less than 25 defined terms which refer to lawyers or their practices and bearing different characteristics:

- associate of a law practice;
- Australian lawyer;
- Australian legal practitioner;
- Australian registered foreign lawyer;
- barrister;
- corporate legal practitioner;
- foreign law practice;
- incorporated legal practice;
- interstate lawyer;
- interstate legal practitioner;
- interstate-registered foreign lawyer;
- law firm;
- law practice;
- lay associate of a law practice;
- legal practitioner associate;
- legal practitioner director;
- legal practitioner partner;
- local lawyer;
- local legal practitioner;
- locally registered foreign lawyer;
- multi-disciplinary partnership;
- overseas-registered foreign lawyer;
- principal of a law practice;
- sole practitioner; and
- supervising legal practitioner.

Unfortunately, apart from the other conceptual difficulties with the new Act, initial excursions into it are anesthetising as a result of the abundance of defined terms.

Yours faithfully,

Michael Wheelahan S.C.

1. See *Wraith* v *Giannarelli* [1988] VR 713.

Bar Launches Updated Website and Oral History

Juliette Brodsky

ON 9 February 2006, the President of the Federal Court of Appeal, Justice Chris Maxwell launched the latest version of the Victorian Bar website (www.vicbar.com.au), plus an exciting new feature of the site, the Bar's oral history project.

The new website is the latest version of a smaller site, first developed in the 1990s by David Levin QC in conjunction with the Bar's then Executive Director David Bremner. The website's second version was launched by the Attorney-General, Rob Hulls, in October 2001 and comprised more than 200 pages of information about the Bar.

The new website continues the philosophy of its predecessor — to present in a straightforward and transparent way the Bar in all its facets to both members and public alike, and to best promote the work of the Bar and its members. To those who perceive the law as mysterious or arcane, the new website illuminates the important role that the Bar plays in the administration of justice, both in the standards it expects of its practising advocate members and the contributions the Bar makes to reform of the law with submissions.

Under the website's new design, the home page features the latest news, CLE seminars, Chairman's speech and Bar Submission. Clients and solicitors have ready access to the barristers' directory, the women barristers' directory and the directories for clerks, mediators, Crown Prosecutors and interstate practicing members. Clerks (and members) will have direct access to the profiles of barristers and can edit them as instructed.

In the section on continuing legal education and elsewhere on the site, there will be a search mechanism that enables searching across both the text of any publication posted to the site and according to area of practice, key words, cases and legislation. As the volume of CLE papers continues to grow, this should prove an invaluable aid to members wishing to make the most of the wealth of learning and experience to be found in published papers.

For the technically minded, the software that underpins the website scans the Bar's databases and automatically collects and displays the latest items on the home page. The site uses the same process to display barristers' profiles, publications and live information about the size of the Bar. The Bar has expressed its gratitude to its database consultant Bruce Gilligan of Imago Computer Solutions Pty Ltd and his assistant Peter Avram for their innovative work in making this happen. Thanks are also due to Michael Shand QC for his oversight of the project on behalf of the

Bar Council and to Kate Anderson and Penny Neskovcin for their work in updating the content of the site.

The site also now has a content management system, incorporating the use of the Macromedia software "Contribute" as well as a web-published database system that permits easier updating of the site.

Both the website's previous and latest version have been designed and built by Icon Inc Creative Communications. The Bar's website has proved very popular. In the three months prior to the launch, 30,000 visitors, News and Publications over 5,000, and the Women Barrister's Directory over 3,000.

BAR ORAL HISTORY PROJECT

An exciting development for the new website is the launch of the Bar's oral history project. In June 2002, Philip Dunn QC proposed to the Bar Council that the time was right for the Bar to record its history. The project was subsequently instigated and implemented by a former ABC broadcaster and journalist, Juliette Brodsky and her associates, web consultant Peter Robertson and film-maker Stewart Carter.

The Bar oral history section features video interviews with present and former members of the Bar in addition to photos, articles, interview transcripts, newspaper clippings and personal memorabilia. We are particularly grateful to Philip Opas QC, Charles Francis QC, Judge Liz Gaynor and Brian Bourke, who generously gave time to be interviewed for the project to date. Considerable support was also provided by Bar Council members Michael Shand QC and Fiona McLeod S.C.

The oral history's dynamic multimedia format enables viewers to choose between watching interview edits (in QuickTime), reading further information about the subjects of the interviews and viewing photographs. Needless to say, the interview material is wide-ranging, sometimes amusing and always thought-provoking.

Standing: Peter Robertson, web consultant; Juliette Brodsky, media consultant; Judge Liz Gaynor, County Court; and Brian Bourke, barrister. Seated: Charles Francis QC and Philip Opas QC.

the website has served over 1.3 million pages to over 160,000 visitors, the Barristers' Directory received almost

The project, conducted in this form, is probably the first of its kind undertaken by any Bar Association in Australia, and is, we hope, a valuable means of enriching public understanding of barristers' work. Feedback or contributions to the project are most welcome. Please contact the author at juliette_b@ozemail.com.au.

Opening of the Legal Year, Mo

St Paul's Cathedral

Sermon preached by The Very Reverend David Richardson, Dean of Melbourne

Genesis Chapter 50 verses 15–21
Romans Chapter 14 verses 1–14
Matthew Chapter 18 verses 21–35

THE fact that everyone's a judge in no way diminishes or denies society's need of particular people to be judges. And those particular people who are called to be judges both focus and clarify the gift and the responsibility that is given to every human being. Again, there are some judgments that need to be made by the generality of women and men, and which highlight and call forth the particular gift of judgment given to us all.

An example — perhaps the supreme one of our age — is what we are to do with and about the nuclear deterrent. A judgment on that highlights the amazing gift and responsibility that has been given humanity for good and ill.

Here is a second. Today is the commemoration day, in Anglican lectionaries, of Charles I and marks the 357th anniversary of his execution. In its day presumably this invited a societal judgement about regicide. Does it still?

But 48 years and 16 days after Charles King and Martyr met his maker, and in another country, another man was making a judgment which highlighted acutely human responsibility for good and ill. It is this third example which serves as my opening, for it highlights how human beings, faced by the unknown, sometimes judge badly and sometimes learn and grow from the experience.

In September last year, a biography appeared of Judge Samuel Sewall, diarist and pamphleteer, theologian and nature-writer, businessman and poet, philanthropist and gourmand, family man and inveterate campaigner against periwigs. Born in London in 1652 Sewall arrived, aged 9, in 1661 in Boston where he would spend most of his life, much of it deeply immersed in the public affairs of the young Puritan colony of New England.

The pivotal adventure of Sewall's life and the one which gives Richard Francis' biography of him its title is that he was one of nine judges at the Salem witch trials. The book is called: *Judge Sewall's Apology: The Salem Witch Trials and the Forming of a Conscience.*

Alone among those involved, after all the hysteria had died away, Sewall came to acknowledge that the courts had made errors of judgment. In fact, he went rather further, taking the blame upon himself and writing a formal apology, which he caused to be read out in his own presence to the whole congregation of the meeting house that was his place of worship, on 14 January, in the year 1697.

Sewall's biographer sees his subject as an emblem of how the 17th century anticipated our own time, an anticipation especially apparent in the account of the witch-hunt that began in Salem Village in 1692 and of which we, or most of us, know mostly, I should guess, through Arthur Miller's play, *The Crucible*, in which the witch-hunt serves as a parable about the McCarthyism of 1950s America.

Richard Francis argues that the trials represent a paradigm shift in consciousness: the idea of the Devil's literal agency in the world being replaced by a more metaphorical notion of evil. At the beginning, the Devil's work was seen as the evil wrought through the witches themselves, and incarnate in them. But, as the tide of opinion turned, people began instead to locate Satan in the false consciousness of the trial judges.

This, says Richard Francis, was a shift from a dualistic and mediaeval view of good and evil towards a more modern, psychological view — increasingly grounded in the contradictions and complexities of individual conscience. In making his apology — and in doing so without trying to shift the blame for his own actions onto

The sermon delivered by The Dean of Melbourne The Very Reverend David Richardson.

nday 30 January 2006

John Landy, AC, MBE, Governor of Victoria, reading the Gospel.

The Dean greets the Judges.

The Reading read by The Honourable Clive Tadgell, Chancellor of the Anglican Diocese of Melbourne.

Michael Shand, QC, Senior Vice-Chairman of the Victorian Bar Council, reading the First Lesson.

The Judiciary.

evil forces beyond his control — Sewall seems to embody this shift to modernity.

It is a shift which, at least in some quarters, is again under challenge. Since 11 September 2001, when the twin towers of the World Trade Centre in New York were destroyed and some 3,000 human lives lost, one has witnessed a ready willingness again to divide the world into two: evil and good — an "axis of evil" implacably opposed to, and aggressively threatening, the forces of righteousness.

Sam Sewall was no great theologian, but then probably history is dependent less on the great theologians than on the rich in spirit — persons of goodwill and enlightenment, whose words and deeds shift inherited and outworn patterns of thinking. In truth, the Christian Scriptures are generally ahead of the Church, offering a more generous God than the punitive God of some ecclesiologies, and more forgiving than the contemporary secular society. Besides, 300 years after Salem and Sewall's apology came McCarthy and his "ism", which suggests that enlightenment and progress are not simply a forward movement, but rather a forward and backward movement — more like a see-saw than a progress. The Christian Scriptures and their vision are still ahead of us, waiting for us to grow into them.

"Joseph said to his brothers, 'Do not be afraid. Am I in the place of God? Even though you intended to do harm to me, God intended it for good, in order to preserve a numerous people. So have no fear, I myself will provide for you and your little ones.'" (Gen. 50:19)

There have always been the rich in spirit, those who give generously who do not return evil for evil. The Matthean teaching about forgiveness in today's reading picks up a similar theme. Peter has learnt in the school of Jesus that forgiveness must take the place of vengeance. But Peter is still interested in precise measurements and numbers — is still asking about the limits of generosity and forgiveness. How many times must I forgive — once, twice, three, or four times? But Jesus' answer abolishes all limits, whether you care to translate it as seventy times seven or as seventy-seven times. The words are reminiscent of Lamech's song of revenge (Gen. 4:23–24) which sings of vengeance not forgiveness — and of a vengeance multiplied by the same factor: "I have killed a man for wounding me, a young man for striking me. If Cain is avenged seven fold truly Lamech [is to be avenged] seventy-seven fold."

As Matthew's community — "the forgiving community" — understands it, the world, which still bears the mark of Adam's fall, is to be restored to wholeness through the disciples of Jesus. In Matthew's version of the story, unlike Luke's, there is not even any requirement that the erring brother should repent. Forgiveness should be offered to all! As Paul wrote in Romans Chapter 13 at verse 8a, a mortal never reaches the limits of God's love: "Owe no one anything except to love one another for the one who loves another has fulfilled the whole law."

Margaret and Ron Palmer, Andrew Panna and Stephen Palmer.

The Honourable Chief Justice Black of the Federal Court of Australia and Peter Gray.

And, since I've now mentioned Paul, let me turn to the situation about which we heard in today's second lesson.

It looks as though, among the "saints in Rome", there were two groups of Christians: one called (presumably by the others) "the weak" (14:1); the other described, one assumes by themselves, "the strong". It's a not unfamiliar tale, you see. "The weak" were strictly vegetarian, drank no wine and observed special holy days. "The strong" didn't do any of that, but treated all foods, drinks and days alike. "The weak", setting great store by their disciplined practices, tended to be censorious and passed judgment on "the strong" who seemed, in their eyes, careless and indifferent. "The strong", who did not feel bound by religious rules, despised those who kept them. Such situations, where the strict condemn the lax and the free despise the rigid, are not unknown even now.

Paul places himself with "the strong", he says so in Romans Chapter 15 at verse 1, and recognises that "the strong" are right. In truth, if "the weak" were right — if it were true, for example, that by abstaining from alcohol they could win favour with God, then the whole of Romans — whose thesis is that our religious works give us no basis to stand before God, only God's grace through faith does so — would be wrong.

So Paul concludes that, of itself, nothing is unclean, everything is clean — the teaching of Jesus incidentally in Mark Chapter 7 verses 17–23, where Jesus declares all foods clean. But, being

Alan Hands and Hamish Austin.

The Procession led by The Honourable Mr Justice Hayne of the High Court and The Honourable Justice Ormiston of the Court of Appeal.

Richard Kendall QC, Andrew Panna and Douglas Meagher QC.

Colin King, Kristy Pattison, Alistair and Peter Lithgow, and Her Honour Justice Dodds-Streeton.

Chief Magistrate Ian Gray, Charles Gunst QC, Deputy Chief Magistrate Paul Grant, Magistrate Duncan Reynolds and Magistrate Kate Hawkins prior to the procession into the Cathedral.

shown to be in the right, gives "the strong" no ground for complacency. For the other Christian person is just that — a Christian, my brother in Christ, my sister with whom I shall stand before God's judgment seat. I am not the judge. Then too, I mustn't forget that those who disagree with me also have a conscience. I have no monopoly on morality. I may think their conscience misguided, but if I ignore it they will be hurt. And if I hurt them, I am found to be disobeying God's command to love them.

Paul's generosity of spirit, his sympathy and sheer pastoral wisdom, are all displayed in this discussion about a special issue engulfing the young Roman Church. But still more important is that the command to love, the prohibition on playing God, and the need for solidarity in the community of faith, have all been stressed. They are emphasised in each of today's three readings.

Let me return to the reading from Matthew.

After the discussion on forgiveness in Mattew Chapter 18 verses 21–22, a parable has been inserted which, not being illustrative of repeated forgiveness, is not strictly appropriate. It is about the inconceivable mercy of God, which contradicts all human notions of justice. So incomprehensibly great is God's goodness towards us — God's righteousness, restores where we would destroy, and forgives where we would punish.

An old friend of Samuel Sewall, Ezekiel Cheever, near the end of a long and hard life, said: "The afflictions of God's people — God by them did as a goldsmith — knock, knock, knock, knock, knock, knock to finish the plate — it was to perfect them not to punish them."

Evident from these three readings today, is a God whose nature is love, whose mercy is wide, and whose forgiveness is assured. Tragedy or human evil may tempt us to turn away from such a God, may lead us to want to play God ourselves, may tempt us to get revenge, or compensation. It is not the Christian way.

We who own the faith of Jesus know that ultimate freedom is a free soul, delivered from sin, and able to rise above the changes and chances of the world — like Judge Sam Sewall making his apology for his part in wrongdoing, aware of the trials and hardships he has been party to inflicting, aware too of his own trials, including the deaths of eight of his 14 children, but with no bitterness about the past because he was able to see it as preparation for eternity; alive, even in his despondent days, because his vitality is grounded in an everlasting hope; inviolable, amid the graft and barratry of social systems; accepting the divine mercy, and yet not too much at ease in Sion.

St Patrick's Cathedral

Mass of The Holy Spirit for the legal profession celebrated by Archbishop Denis Hart

Archbishop Denis Hart.

My dear Brothers and Sisters,

It is a great joy to welcome you once again to St Patrick's Cathedral at the beginning of another legal year. I welcome you all: judges, magistrates, administrators, practitioners and students of the law, barristers, solicitors, members of legal staff, and your families, friends and supporters.

We have come to ask God's blessing upon the work you have before you, important and noble work in the service of our whole community. The scripture readings we will soon hear remind us that this work can and must be infused with the highest values: integrity and wisdom, insight and power, reverence for the Lord and his Law and all that he has made.

Let us open our hearts before the Lord, who is the Judge of all, full of tender mercy for us and generous forgiveness.

HOMILY

Dear Brothers and Sisters,

IN his first Message for the World Day of Peace on New Year's Day, Pope Benedict XVI took up a theme which seems to be a particular concern to him: the relationship between peace and truth. The great truth about the world in which we live, the Pope suggested, is that it is founded on an order planned and willed by the love of God; and that the "irrepressible yearning and hope dwelling within us" is an ever-present sign of our need to be connected to this truth about ourselves and our world.

A few weeks ago the Pope returned to this theme in his Address to the Diplomatic Corps accredited to the Holy See (9 January 2006).

The Pope made four main points. First, he linked truth and justice. He calls commitment to truth "the soul of justice". He contrasts all that is selective and tendentious, manipulative and oppressive, with "truth and truthfulness, which lead to encounter with the other, to recognition and understanding".

Second, he linked truth and freedom. Every person has a right to pursue the great truths in freedom: the truth about good and evil, about the goals and horizons of life, the truths of the spirit, the truth of our relationship to God. Fundamental human rights, including freedom of religion, have been guaranteed in international treaties, and governments have a duty to see that these rights are respected.

Third, the Pope linked truth with forgiveness and reconciliation. Truth demands that we are honest about the wounds that have been inflicted on people, communities and nations. All of us, and all our communities, have been at various times the victims of crime and its perpetrators. Without accepting the truth of history, even where it is most unpalatable, there can be no reconciliation. Without forgiveness, sometimes given, sometimes accepted, there is no path forward to peace.

Justice Neil J. Young.

Fourth, he links truth and hope. Hope for a better future opens up new energies in society, but we must honestly face the tragedies that blight the hope of so many people: the natural disasters whose effects are exacerbated by lack of effective prevention or help, and the human disasters caused by our own violence or injustice or negligence, which have produced some many exiles and refugees, so many homeless and hungry, so many lost and lonely people around the world.

In the synagogue at Nazareth Jesus unrolled the scroll of the prophet Isaiah, as we have just heard in today's gospel, and read: "The spirit of the Lord is upon me: he has anointed me to bring good news to the afflicted, liberty to captives, sight to the blind, freedom to the oppressed ..." They are grand words, stirring, awe-inspiring. They are about you and me, for we have been called to share in Christ's mission. It is your responsibility and mine to carry it forward in the world of today. Each of us can, and indeed must, be ready to say: "The spirit of the Lord is upon me..."

Pope Benedict has invited us to reflect about the importance of truth. Truth is also a grand and awe-inspiring word, but as we all know, truth and untruth are everyday realities, never far from any of us, and the great realities often come to us in the smallest forms. In fact, much of your day-to-day work at every level of the legal profession is concerned with truth. You spend time establishing facts: the time of the offence, the reliability of the witness, the exact location of the boundary, the most relevant precedents, the whereabouts of the records, the precise amount of money, the specific words that were said. In your work you must often piece together painstakingly the fragments of a larger truth. You know better than most that the "whole truth" cannot always be found, but that it is always worth striving for.

Law, of its nature, is inimical to the culture of relativism, which recognises no truth as definitive, but speaks only of "my" truth and "yours". The rule of law, which you serve, is based on a conviction that truth can be sought and found, and that it must continue to be sought, no matter how imperfect our finding often is.

Of course, none of you underestimates the difficulties of the task: the law has too long a history and has seen too much to imagine that truth is easily found or that even the surest answers are beyond challenge.

You and your profession do not accept the relativistic idea that each one of us is the ultimate criterion of truth. The law, by age-old instinct, knows that such relativism is ultimately destructive: it weakens our sense of relationship with

Justice Susan Crennan, Justice Frank Vincent, Justice Bernard Teague and Justice Bernard Bongiorno.

one another; it undermines the possibility of being committed together to building a future, which we can share in peace.

All in the legal profession have inherited, and you strive to carry forward, the great task of building a community where we can live together in peace. If this ideal is threatened you seek to defend it, if it is wounded to heal it, if it is timeworn to renew it, if some part of it has become worthless to replace it with what will give new life.

As you go about these tasks, I would like you to think of them in the large context suggested by the Pope and the Gospel. You serve the truth, and so you are in the service of the justice which is the basis of a true and peaceful encounter with one another; you are in the service of that freedom which is the right of every human person from conception to death; you are in the service of the forgiveness and reconciliation without which there is no healing for our wounds; you are in the service of the equitable and dignified future which is the hope of every age.

Those are large tasks. That is why we must not be afraid to say of ourselves: The spirit of the Lord is upon me. We are not masters, but servants. Of ourselves, we can do nothing. Our strength is in our connection with what is greater than ourselves: it is ultimately in our connection with Truth itself.

Let us pray for ourselves and for one another and ask that the Spirit of truth come upon us, to inspire and to strengthen and to humble, and that God bless the work that we have begun.

Justice Bernard Teague, Justice Frank Vincent, Katrina McGill, Judge Frank Shelton, Archbishop Denis Hart, Jayne Richardson (Executive Committee, Melbourne Catholic Lawyers Association), Judge Frank Dyett, Very Rev. Geoff Baron.

Melbourne Hebrew Congregation

Justice Mandie of the Supreme Court, with Daniel Star holding the Torah.

I would like to welcome the distinguished members of the judiciary and all the members of the legal profession to this traditional service to mark the opening of the legal year for 2006. I would also like to welcome Mr Tony Lupton, State member for Prahran representing the Attorney-General of Victoria, and Mrs Helen Shardey, State member for Caulfield.

You should realize that you are part of a legal culture and legal tradition which goes back thousands of years and finds its beginnings, its genesis, in ancient Jewish laws and customs.

Today you are involved in the interpretation, application and enforcement of myriad laws, criminal and civil. You have a hierarchy in your legal system. At the apex are the judges, but all legal practitioners are dedicated to upholding the law and ensuring that members of our community do the same.

There is nothing new in the nature and structure of our legal system in Australia. It finds its roots in the Torah.

We have in our Torah 613 commandments, 365 negative laws and 248 positive ones. A total of 613. Commandment no. 491 in the book of Deutoronomy, the fifth volume of the five books of Moses,

Greg Levine.

Michael Sifris Q.C.

Desirae Krigsman.

Chief Judge Michael Rozenes.

Justice Weinberg.

Rabbi David Rubinfeld.

Judge Susan Cohen and Helen Shardey MP (Shadow Minister for Health)

George Golvan QC, Daniel Star and Justice Stephen Kay.

chapter 16 verse 18. The verse begins "Judges and officers shall you appoint in all your cities". The Bible gives the formal command that such courts be established in every city of Israel with a sanhedrin, a high court. In addition to judges the Torah requires the appointment of officers of the court who would have the responsibility to enforce the decision of the judges and would circulate in the markets and streets to enforce standards of honesty and summon violators to the court for adjudication. The verse ends "And they shall judge the people with righteous judgement". Just to appoint people to staff the courts is not sufficient; they must be qualified and righteous, so they will judge honestly and correctly. The rabbis tell us, if the community has a hand in appointing unqualified judges, God holds them all responsible for the resultant perversions of justice.

This is the commandment of the Torah, but the Talmud elaborates and explains the system that includes the variety of courts, each with its own distinct level of jurisdiction.

The authority of Jewish courts extends to all facets of Jewish law, civil, criminal, and religious. If two Jews are involved in a dispute, it is required according to the Bible, to turn to a Beis Din, a court of Jewish law. A Beis Din consists of a group of judges who hear and decide all cases. No jury exists in Jewish law. The judges who try the case also interrogate the witnesses, weigh the evidence and issues involved, and hand down both the verdict and the sentence.

The lowest level of courts consists of three judges. Such a court deals with ordinary monetary claims, i.e. loans, thefts, personal injury, property damage and the like. The next level of court is called a lesser court of three judges. These courts hear capital cases.

The highest court of the judicial system is the court of 71 judges known as the higher court. They were over and beyond all courts. They would judge entire cities who have done wrong.

There are different types of penalties: lashes, death penalties, excommunication and other penalties as well. We have an obligation and commitment to follow and adhere to the Bible's justice system.

There is nothing new in the nature of many of our laws in Australia. You will find reflections of many current laws in the ancient writings of the Talmud. For example, tractate Bava Metzia focuses on laws for the resolution of disputes that arise in daily life and commercial transactions such as rival claims to the ownership of property. There are laws in relation to loans, promissory notes, the responsibility of a bailee, the hiring of craftsmen and the work of labourers. So you can see that Jewish traditions and laws provide an ancient base for the development of many modern laws.

You should be proud to be part of such an ancient and enduring culture and set of traditions.

We have to appreciate and be thankful for the Australian justice system. The Jewish community in Australia, indeed all faiths and religions in Australia, are able to practice their religion, their culture, their tradition, heratige and customs and yet conform with the Australian legal system. Australians should be proud of their justice system.

In the second chapter in the *Ethics Of The Fathers*, states Rabbi Chanina, the deputy high priest says, "Pray for the welfare of the government, even a non–jewish government because if people did not fear it, a person would swallow his fellow alive." We have to pray for the welfare of the government to assure the peaceful conduct of day-to-day living. Just like we need to pray for their welfare so do we have to pray for the justice system that the courts of law exonerate the innocent and indict the guilty, and your judgement should be accepted.

India Sets the Trend Against Mediation

The Times of India, 3 January 2006

NEW Delhi: The ongoing protest against the functioning of a mediation cell in the Tis Hazari court complex took an ugly turn on Monday with lawyers affiliated to the Delhi Bar Association attacking its office during a day-long strike, which paralysed the courts on the first working day of the year.

Hundreds of lawyers, after holding a demonstration outside the court complex, marched towards the mediation cell in the third floor of the building, breaking through police barricades, shouting slogans against the CJI Y K Sabharwal and Delhi HC chief justice Markandey Katju.

They attempted to barge into the mediation cell but were stopped by a police posse. The lawyers then vented their ire by pulling down the name-plate of the cell and breaking it into pieces. PTI

"Tired of Court Case" Leads to Man on Fire

The Times of India, 3 January 2006

NEW Delhi: A 45-year-old man tried to burn himself alive outside the Patiala House courts on Saturday evening. Suraj Prakash Gupta, an Inderpuri based travel agent, has been admitted to the RML hospital with 80 per cent burn injuries.

Gupta drenched himself with petrol and set himself afire near gate number 2 around 4.30 pm. The New Delhi district police later said that Gupta was mentally unstable.

According to the police, there was a dispute between Gupta, who is also a transporter and one of his clients recently, over delay in payment. The client got a case registered against Gupta and this had apparently caused him immense depression. Before the self-immolation bid, he said that the case should have been dismissed.

"He was devastated after the case was registered because he believed that it was the other party which was guilty. He resented the fact that he was having to do the rounds of the court," said a relative of Gupta. TNN

Verbatim

It's Not Unusual

Melbourne Magistrates Court

15 December 2005
Coram: Mr J. Mornane
Mr M. Gibson for Informant
Ms K. Blair for defendant
While the victim of a stabbing was giving evidence during a committal hearing, his mobile phone rang. The ring tone was set to the tune of Tom Jones' song "It's not unusual".

Victim: I'm very sorry for that, your Honour.
Mr Mornane: That's alright, it's not unusual!

Childhood Fantasy

County Court of Victoria

15 March 2006
Coram: Judge Morrow
D.J. Parsons v *Muni Contractors Pty Ltd and Ors*
For Plaintiff: Paul Scanlon QC and Fiona McLeod
For first Defendant: John Bingeman QC and Alan Middleton
For second Defendant: Ross Middleton
For third Defendant: Jim Parrish

Mr Scanlon: What they say in relation to this case is just go down the line — Mr Bingeman, "We don't say he shouldn't be compensated, but it is not me," Mr Bingeman, "we say, it is the other two." Mr Middleton says, "We don't say he should not be compensated, we just say it's not me, it should be the other two." Bang, Mr Parxish comes along and says, "I'm with them, it's not me but it's the other two." It is amazing because I think at the start of the case we said that you might think at the end of the day this is just a blue between the defendants, that is why we are here. That is exactly what has happened.

It is sort of an obscene thought, I know, but I was in bed last night and I'm thinking about Mr Parrish
Mr Parrish: I want a right of reply, your Honour.
Mr Scanlon: It was almost a frightening thought, here with my wife, and I'm thinking about Mr Parrish, Mr Bingeman and Mr Middleton, and I thought, you're going mad, but what I was thinking about was this: I was thinking about primary school and I had this vision of Mr Middleton behind the shelter shed with Mr Bingeman and Mr Parrish and there is this pall of smoke coming over the top of the shelter shed.

Sister Josepha comes around the corner and there is this smoke everywhere, and they have dropped their fags and A. Middleton is standing there just with the box of matches — because he hasn't done much in the case, he just sits there quietly — he's got the matches and Sister Josepha says, "Have you been smoking?" Mr Middleton says, "No, I haven't, but they have." "Mr Parrish, you been smoking?" "No, I haven't, but they have." And it went down the line.

The reason I thought of that was because the same thing has happened in this case, is that none of them were prepared to say there is no negligence by the defendants here, they wouldn't be prepared to say that because the stench and the observation of smoke or negligence is so strong in this case that they couldn't say to Mr Foreman or Sister Josepha that there is no negligence, because the smell of negligence and the smoke of negligence is too strong. So we will go for the next best defence and that is it is not me, it is them.

Poor old Mr A. Middleton gets caught up in this because he just stands there with his box of matches, and the real tragedy about this is that Mr Parsons wanders by and he wasn't smoking, and he got called into the office. That is how he got caught up in this fight between the defendants.

Youth Is Wasted

Supreme Court of Victoria

Friday 4 November 2005
Coram: Gillard J
Insurance Manufacturers of Australia Pty Ltd v *Christopher Heron*

Mr Austin: That is right. And in Gugliotti's case, which behind tab 15, your Honour, Justice Fullagar, a distinguished judge of this court ...
His Honour: They are all distinguished judges of this court, Mr Austin. Which Justice Fullagar?
Mr Austin: Richard.
His Honour: The later one. All right. They are all distinguished judges. Yes, go on.
Mr Austin: I won't say that again.
His Honour: You can when you get to about 50 and you have been doing it for 25 years and you are a silk and you can stand up there and say — yes, go on.

Beetlejuice

Federal Court, Tasmania

Coram: Marshall J
Bob Brown v *Forestry Tasmania*
Debbie Mortimer S.C., Peter Tree S.C. and Travis Mitchell appeared for Bob Brown

The witness was an expert on the broad-toothed stag beetle and was being examined on the best methods for collecting specimens.
Counsel: If logs in excess of 50 centimetres diameter could not be easily rolled in dry forest, what would be the best method available to locate the species?
Witness: Well, it's kind of tricky really, because obviously Meggs did say that he considered that pit-fall trapping was not a good way — an effective way. Certainly, I would say that the strike rate for pit-fall trapping was probably getting close to that of log rolling, but I certainly do agree that it's not an ideal situation because it will of course kill the beetle unless you do use dry traps. So the other option could have been to actually set dry traps. It's a lot more labour intensive, it means that you have to basically be there every day for a certain amount of time to check it.

So there are other options, but I guess the big problem is resources, time and money is going drive what you ultimately do.
Counsel: Because the advantage of dry trapping is intended to be that the beetle doesn't die, but if you only come back every month to check the trap it is dead anyway?
Witness: That's true, and also you have to be fairly spot on anyway because you will get other things in there, and if you're not fairly quick the larger things will eat the smaller things. It's a beetle eat beetle world out there.
His Honour: It sounds like Sydney.

Portia's Breakfast

Over three hundred people gathered in Hardware Lane on Tuesday 31 January to celebrate the start of the legal year with a delicious buffet at the annual outdoor event, Portia's Breakfast.

The free and informal breakfast, the crowd at which grows every year, was inaugurated in 2004 as a secular, alternative way to mark the beginning of the legal calendar. Organised by the Victoria Law Foundation, the event is co-hosted by Australian Women Lawyers, Equal Opportunity Commission Victoria, Judicial College of Victoria, Leo Cussen Institute, LIV Young Lawyers' Section, Sentencing Advisory Council, Victorian Law Reform Commission, Victorian Women Lawyers, Women Barristers' Association and Women's Legal Service Victoria.

THIS year's breakfast included the first ever Legal Laneway Raffle, with fabulous prizes including an hour-long massage from Orchid Day Spa, a night for two in Punt Hill Serviced Apartment, a Crumpler bag, a voucher from Discurio, and an enormous gift pack from Rap Products. It was a very happy start to the day for the winners, and for the beneficiaries, the Women's Legal Service Victoria, who earned more than double the amount raised from the gold coin donation scheme in the past.

The morning's MC was Victoria Law Foundation Board Member and Principal at Maurice Blackburn Cashman, Liberty Sanger. Liberty spoke about the event as a networking opportunity and a chance to catch up with old friends and meet new people. Keynote speaker Victoria Marles delivered her first public address since becoming Legal Services Commissioner and CEO of the Legal Services Board in December 2005. The Legal Women's Choir, back by popular demand, delighted the crowd with "Miss Otis Regrets" and "Dream a Little Dream", receiving warm applause, some shy singing along, and a fair amount of toe-tapping.

The Melbourne City Council sponsored this year's event as part of their support for both the Legal and the Hardware Lane Precincts. As Liberty Sanger pointed out, this year's breakfast was also heavily subsidized by the local businesses surrounding Hardware Lane, with coffees at "public benefit prices" provided by Café Max and neighbouring café, Relax Dine Unwine, who also provided colourful fruit platters. The cafés opened early and provided hot coffees all morning, while Brunetti Carlton kindly donated trays of delicious Italian pastries and biscotti.

Next year's breakfast — under the new name "The Legal Laneway Breakfast" is bound to be bigger and even better. See you in the laneway!

Crowd busy chatting at Portia's Breakfast.

This secular celebration marks the start of the legal year and models flexible, alternative ways of working and networking across the legal sector. Hosted by Victoria Law Foundation in conjunction with 10 other legal agencies, the event is now in its third year and attracting over 300 guests. The Legal Women's Choir sing at the breakfast

Victoria Marles, Legal Services Commissioner; and Liberty Sanger, Victoria Law Foundation Member and Maurice Blackburn Cashman Principal speaks.

Victoria Marles delivered her first public address since becoming Legal Services Commissioner and CEO of the Legal Services Board (Dec 2005).

Susan Aufgang, barrister; Dr Helen Szoke, Chief Executive Officer, Equal Opportunity Commission Victoria; and Lyn Slade, Chief Executive, Judicial College of Victoria.

Professor The Honourable George Hampel QC, Monash University; Victoria Marles, Legal Services Commissioner; Her Honour Deputy Chief Magistrate Popovic and Professor Kathy Laster, Victoria Law Foundation.

Mary Polis, Victorian Law Reform Commission (VLRC); Sue Tait and Rai Small, Office of Police Integrity; and Her Honour Judge Lawson, County Court of Victoria.

Elspeth McNeil, The College of Law (Victoria); Shelly Lipe of Piper Alderman; Her Honour Judge Cohen; and Mirella Trevisiol, barrister.

COMMBAR Celebration

What do Court Architecture and Commercial Litigation have in common?

Albert Monichino

On a balmy summer evening on Tuesday 6 December 2005 in the impressive modernist foyer of the Commonwealth Courts building in William Street, Melbourne, over 300 judges, registrars, masters, barristers and solicitors (comprising those in private practice and government and corporate counsel), turned out for a cocktail party arranged by the Commercial Bar Association of Victoria, known as COMMBAR.

THE honoured guests were Chief Justice Michael Black of the Federal Court of Australia, Chief Justice Marilyn Warren of the Supreme Court of Victoria, Justice Christopher Maxwell, President of the Court of Appeal of the Supreme Court of Victoria, Judge Michael Rozenes, Chief Judge of the County Court of Victoria, and 25 or more judges of the Federal Court and the Supreme Court of Victoria (both judges of the Court of Appeal and Trial Division).

In 2004 COMMBAR celebrated its tenth anniversary at a cocktail party held in the Library of the Supreme Court of Victoria. On that occasion, barristers, judges and other judicial officers attended. Emboldened by the success of that celebration, this year, for the first time, COMMBAR extended an invitation to a number of solicitors and government and corporate counsel. Over 100 solicitors were in attendance at the function held on 6 December 2005.

Albert Monichino, Junior Vice-President and Convener of COMMBAR, extended a welcome on behalf of the COMMBAR President, Peter Bick QC, and the COMMBAR Executive, comprising Melanie Sloss S.C. (Senior Vice-President), John Dixon (Treasurer) and John Digby QC.

He reminded the barristers present that when at the Bar Justice Goldberg (coincidentally the inaugural President of COMMBAR) offered junior barristers the following advice:

> You have never really won a case until you have won over your opposing instructing solicitor.

Peter Bick QC, President of COMMBAR, with Chief Judge Michael Rozenes of the County Court of Victoria.

He reminded his fellow members of the Bar of the wonderful opportunity that the evening presented in that regard.

Mr Monichino then introduced Chief Justice Black. He noted that his Honour was the second Chief Justice in the history of the Federal Court and had been at the helm of the Court for half of its short life. He noted that the Federal Court enjoyed a reputation as a leading superior court due, in large part, to his Honour's qualities as Chief Justice, and in particular his qualities of leadership, innovation and vision. He also referred to his Honour's passion for architecture.

Chief Justice Black then delivered a speech in which he traced the development of Melbourne's legal precinct over the past 125 years and used it to illustrate

the changes in the environment in which the commercial legal sector works. He pointed to the reality, and the consequences, of a national and international market for legal services and to the exciting opportunities (and dangers) that this presents to commercial law practitioners in Victoria. His Honour's speech is reproduced below:

Address by Chief Justice Black to the Commercial Bar Association

THANK you for your introduction.

I am very pleased to welcome the Chief Justice of Victoria, the President of the Court of Appeal, our judicial colleagues from the Supreme Court and of course the members of the Commercial Bar Association.

I am particularly pleased to welcome you to this building. Its architecture bears upon a theme that I want to make the subject of my brief address to this important gathering of commercial lawyers in Melbourne. What, you may ask, has architecture got to do with it?

I want to begin by talking about the legal precinct.

Architecturally, the legal precinct in Melbourne is the most coherent, cohesive and distinguished of any legal precinct in Australia or New Zealand or, for that matter, just about anywhere else. In terms of coherence — I am not speaking now just of architectural merit — I cannot think of a better example anywhere. Sydney, of course, has the advantage of the High Court, the Federal Court and the Supreme Court being located in the one building on a magnificent site with views of Sydney Harbour. The Supreme Court of New South Wales also has the advantage of occupying the original Supreme Court building as well — the Greenway building of the 1820s. It is now a superbly restored, and cherished, early Colonial building and is still in use. But the legal precinct of Sydney is widely dispersed.

In Melbourne, we celebrate the remarkable foresight of the early Victorians who, with money from gold and wool, and trade through the port of Melbourne, built what was then, and remains, one of the finest public buildings on the continent, the Supreme Court of Victoria. It anchors the legal precinct to the south over the next 125 years. Their successors had the vision and the foresight to build the legal precinct around the Supreme Court, substantially along the Williams Street axis.

[Incidentally, the first gold escort passed outside our front door here, down William Street from the diggings, to opposite were the County Court now stands, just over 100 years ago. With the permission of the State Library, we have a contemporary representation of that moment in our collection here.]

When the High Court was established in 1903 it sat in the Supreme Court and when the first architectural manifestation of Chapter III of the Australian Constitution emerged, it was in Melbourne. With the building of the first permanent home for the High Court at 450 Little Bourke Street, another outstanding example of the architecture of its age was added to the Melbourne legal precinct. And so it has gone on.

The Victorian Bar showed the same foresight and vision as their forebears when they built the original Owen Dixon Chambers opposite the Supreme Court in the early 1960s. It was a remarkable

Chief Justice Black.

achievement for its time and of course it has been modernised and extended since.

Then the County Court was built and so it has gone on: the fine new Children's Court was opened in the 1990s, and the new County Court was added to Melbourne's rich legal architectural Heratige.

This building [the Commonwealth Law Courts, Melbourne] was conceived in the early 1990s. The Court fought against the proposal that it should be housed in an office building, of which several horrible examples were offered to us at the time. The fight was successful. When this building was, deservedly, the recipient of awards for architectural excellence, it reflected something about this city and its legal precinct. It reflected a commitment to excellence and also a spirit of innovation and excitement. This building is of international significance in the development of courthouse design. It has also had a powerful influence on the next federal courthouse, which I sat in for the first time in Adelaide last week.

Perhaps more importantly still, many of the difficulties that were presented to the architects here, by an irregularly shaped site above an underground railway station, were seen as providing opportunities for innovative solutions. And so it was, I like to think, our legal precinct reflects much about what we all like and admire in our city.

What has all this got to do with commercial law, you may have been asking?

Superficially, of course, a cohesive legal precinct does provide good opportunities for the efficient conduct of commercial litigation. Taxi rides from one end of town to another are not particularly efficient. There is merit in having everything together. But there is much more to it than this.

Commercial litigation is now conducted in Melbourne in circumstances that are radically different from those that pertained when this legal precinct first began to develop. Indeed they are radically different from anything that has been before.

The legal precinct in Melbourne was created in February 1884 with the opening of the new Supreme Court. The New South Wales and Victorian railway systems — on separate gauges — had just been joined at the border. It nevertheless still took longer then to get to Sydney than it takes today to fly from Melbourne to Los Angeles, Tokyo, Jakarta or Bangkok.

When the High Court building in Melbourne was first commissioned in 1928

Ian Stewart and Jeffrey Gleeson of counsel, with Justice Bernard Bongiorno and Chief Justice Marilyn Warren of the Supreme Court of Victoria.

nothing much had changed. It certainly took much longer for the Justices to travel to Brisbane or Perth for their sittings than it takes today to fly to London, Ottawa or Washington — and back.

When this building, the Commonwealth Law Courts in Melbourne, was in its early stage of planning, a national market for legal services was barely recognised, much less understood. Even less understood was the notion that there might be an international market for legal services. Globalisation and its potential impact upon Australia was virtually unknown outside a small circle of economists and visionaries. Interstate barriers to admission had been, or were being dismantled, but insofar as Victorian practitioners could now gain admission in some of the smaller States they did so, I suspect, with a faint air of superiority.

Within this legal precinct there are many layers of history, tradition, scholarship, independence and excellence. Let it be realised, though, that if these great advantages are not put to use the work will go elsewhere.

What a different world we live in today!

The workings of a national market for legal services are apparent nearly every day to those of us whose function it is to hear cases in all the States and Territories of Australia. We are now used to national firms but we should perhaps remember that there are also international firms. One would expect the litigation departments of national firms to think nationally and internationally. They do. Briefing practices reflect this.

When we sat in Adelaide last week on the occasion of the first sitting in the new Commonwealth Law Courts on Victoria Square, seven senior counsel who were appearing in the cases before the Court at that time were invited to move the Court. Only one of them was from Adelaide. The others were from Sydney and Melbourne. In this instance, most were from Melbourne but in some hearings over which I preside in cities outside Melbourne — and even in Melbourne itself — the leading counsel (at least) may be predominantly from Sydney.

This is not a State/federal "thing", and my point is not to complain about this but to draw attention to it. The world really has changed. It is now six o'clock in Melbourne — I can be in my chambers in Sydney at nine o'clock tonight without any difficulty at all — provided I leave now.

Many commercial clients move in exactly the same way and, electronically, they move around the world sourcing, we should remind ourselves, aspects of legal services elsewhere in Australia, and in the region and indeed beyond. They do so without regard to time zones.

What does this mean for the Commercial Bar Association here in Victoria?

The point is, I think, that practitioners everywhere have to realise how competitive and national the market is in at least some of the areas in which commercial litigation takes place. As I have said, we see much evidence of this.

Whereas the barriers to practise were once seen as inconveniencing practitioners in Victoria who might, on occasions, wish to practise elsewhere, it should now be clearly understood that there are other places vying for the work that would, once, have been thought to "belong" locally.

In such a world, reliance upon how things were done and what used to happen will not answer competitive pressures. Even old habits are eventually forgotten. What is needed is, first of all, a recognition that we are part of a national profession and that this reflects a national market (or vice versa). Viewed in that way, there is no reason to lament what some have described as a vortex centred elsewhere. Rather, the national character of the market can be seen as a great opportunity. The opportunity is there for those who are simply better, or, as a very bare minimum, at least as good.

The fact of the matter is that just as the creative people of this city have, over time, made imaginative and contemporary use of what they had to work with, and have created an outstanding legal precinct, so the same challenge and the same opportunities present themselves today to the commercial lawyers of this city and this State.

The qualities that need to be fostered are well known to everyone here. Obviously, they include a constant focus upon the real issues in litigation and the pursuit of those issues, and only those issues. They include a rejection of the sloppiness of thought and preparation that produces, for example, dozens of lever arch folders containing thousands of documents to which little, if any, reference is ever made. They involve a vigorous examination of the various ways — some of them not involving the courts at all — in which controversies may be settled quickly, efficiently and justly. To mix my metaphors somewhat, the soil here is very fertile. Within this legal precinct there are many layers of history, tradition, scholarship, independence and excellence. Let it be realised, though, that if these great advantages are not put to use the work will go elsewhere.

Although my deepest roots are here in Port Phillip and, professionally, in the Victorian Bar, I am saying this as a member of a Court which has, as one of its functions, the provision of what can be seen as part of the infrastructure for the national economy. Of course — like all courts — it has many other very important functions but in the present context I think it appropriate to underline the role of courts and commercial litigation in the economic affairs of the nation. The same observations about the national economy can of course be made to a gathering of commercial lawyers anywhere in Australia.

The challenge now is to recognise what is happening and — here in Victoria — to build upon the rich resources that exist in this city. To this extent, the creation, over 125 years, of Melbourne's outstanding legal precinct is an example to be guided by.

So in this context, I welcome the members of the Commercial Bar Association. I wish you all a very happy festive season and … a very exciting New Year.

What then do architecture and commercial litigation have in common? Perhaps it is that both require innovative solutions. In the case of architecture, innovative solutions are required to deal with the need for modern court facilities to cater for the demands of modern litigation. In the case of commercial litigation, innovative solutions are required to enable Victoria's commercial litigators to adapt to the national nature of the legal services market so as to expand or at least retain their market share.

The Bar Children's Christmas Party

ON his election to the Bar Council William Alstergren was given the formidable task of organising the Bar childrens' Christmas party. Past members of the Bar Council who had taken on this much sought after appointment were forced to give up the job because of the extreme stress involved. Will took on the task with great eagerness. He organised interfacing forums and workshopped the project with the relevant stakeholders. Arising from these person-to-person/one-to-one ongoing encounters, the consensus was that the childrens' Christmas party needed to be lifted a cog or two to provide suitable entertainment for the offspring of the Victorian Bar. To this effect it was decided that Santa Claus should enter the Botanical Gardens on a real sleigh drawn by real reindeer.

How was this to be achieved? Will threw himself into the task enthusiastically and decided that the best way to obtain a sleigh was for him to become the coach of the Australian Womens' Bobsleigh team at the Torino Winter Olympics. Santa and his helpers thought this was a fine idea. Will then went into training with the women but with the real purpose to obtain a bobsleigh for the December gathering of Bar children.

He headed off to Lapland in late November in order to negotiate with the Lapish authorities for the purchase of a bobsleigh with four white reindeer (hopefully one with a red nose) under the guise of obtaining same for the Australian bobsleigh event at Torino.

However, negotiations with the Claus family proved to be extremely difficult. The Lapish authorities demanded that there be a worksafe inspection at the gardens to ensure that there would be no maltreatment of reindeer. The relevant Santa Claus bobsleigh committee was split about the temperature in Australia during December.

The date for the children's Christmas party was fixed in early December 2005. Panic struck as Alstergren was nowhere to be seen. Rumours raced through the Bar that he was lost somewhere in the area of the North Pole while testing an appropriate bobsleigh. Reports surfaced in the press that he had been spotted in Germany in a bobsleigh not being pulled by three reindeer but by three members of the Australian Olympic team.

What was to be done? There was no one to organise the party, let alone provide a bobsleigh and reindeer. Luckily three members of the Bar very ably stepped into his shoes and organised the party at short notice. The three luckless individuals who took on the onerous task were Sarah Fregon and Jason Pennell and Alstergren's Reader, David Turner. They did a magnificent job, having to purchase large amounts of lollies and place them into many multifarious bags for the children.

Then there was another snag, the Botanical Gardens refused to allow the usual rotunda for use of the Bar unless the Bar entered into a contract with the caterers employed by the Gardens. This would have meant considerable cost, well in excess of the means of the majority of parents of Bar children. Further the Gardens refused to provide the usual golf cart for the transport of Santa into the Gardens because of insurance problems and the fact that previous magicians and clowns had caused stress to the employees of the Gardens who drove the cart.

Again a solution was provided by the new committee. Jason Pennell drove Santa into the Gardens in his faithfully restored bright red Volvo sports car. Tourists of all nationalities greeted Santa with much applause and the clicking of cameras, as he drove triumphantly into different areas of the Gardens where the assembled throng were breathlessly gathered. Bags of lollies were strewn about and laughter ensued.

It is obvious that the last year or two at the Bar have been extremely fertile. The number of children present at the festivities was up by over 50 per cent. Does this mean that many of the Junior members of the Bar have private means or that indeed the fortunes of the Bar have turned around considerably so that there is a good living to be done to support a gaggle of children? In any case as the photographs on this page testify it was a beautiful day and it was a great party. Santa threw the lollies, gave the presents and engaged the tourists. What more can be said? There is nothing more touching than a four-year-old thrusting her hand into Santa's hand and asking for an iPod for Christmas.

The Botanical Gardens.

Paul Elliott QC




Gifts for all.

Santa throws the lollies.


Santa and friends.

Freya and Prudence Halse.

A satisfied customer.

Lili, Loulou, Sam, Samuel and John Gordon.

Peter Boone, Stephanie, Suzanne Curtain and Rowena.

Helen, Emelyn, Lachlan and Meaghan Armstrong.

Julie, Nina, Craig and Ruby Dowling.

Ashley, Colleen, Connor and Glen Megowan.

Lucy, Lachlan, David and Amelie McAndrew.

Charlie, Peter and Kate McMillan.

Miguel, Sophie and Javier Belmar.

Advocacy Workshop

Port Moresby, 10–14 October 2005

Julie Condon

On Saturday 8 October 2005, Paul Coghlan QC, DPP, Ian Hill QC, Leslie Fleming M, Geoff Steward, Ron Gipp, Martin Grinberg, Barbara Walsh and I braved a dreary Melbourne dawn to fly to Port Morseby, Papua New Guinea, for the October 2005 Legal Training Institute Advocacy Workshop.

THE team was lead by Paul Coghlan QC, and for each member it is a return visit to Port Moresby. Later that day we land at Jackson Airport, stepping out into the furnace of tropical heat. Driving through the outskirts of the city and into Boroka, we stop at the local supermarket. Even in the most mundane of tasks, security permeates every aspect of life in Port Morseby as the parking lot is heavily patrolled by guards. Welcome to Papua New Guinea.

We drive on into the Holiday Inn, past two security checkpoints, gates more than two metres high, and Dobermans to arrive at our home for the next week and the site of the five-day intensive workshop. The schedule for the week is punishing, both for the teachers and students. We cover the fundamentals of advocacy such as case concept, leading evidence, cross-examination and final addresses/submissions. The majority of the workshop is concerned with the practical, not the theory. Two cases, one civil and one criminal (both based on cases from PNG) are used as the models for practising the skills of courtroom advocacy.

The focus of our teaching is substance and style. Each trainee performs two or three roles per day over the five days and is given an individual critique by the teachers. Evidentary matters such as hearsay, cross-examination on documents and use of notes to refresh memory are also covered. As for the 57 trainees, they are on the cusp of admission to practice. The Victorian Bar five-day workshop forms part of a one-month advocacy course, modelled on the Leo Cussen formula.

Late Saturday afternoon we assemble to allocate roles for the coming week, review the materials for the workshop and discuss our activity for the one free day, Sunday. A trip to the beginning of the Kokoda trial is in the offing. All we need to do is secure a police escort and we are set.

Sunday arrives overcast and cloudy. Thunder rumbles at the foothills of the Owen Stanley Ranges. The prospect of a trip out of the bounds of Port Moresby is, for me, an exciting one. This is my third trip to PNG and I have never seen much beyond the compound of the Holiday Inn. Around lunchtime we set off in the hands of our driver, Paku, kindly on loan from the Legal Training Institute. Bomana War Cemetery is to be our first stop. The road leading out of Port Morseby reveals much about life beyond the city limits. Hundreds of people gather around a dry, dusty soccer game. Roadside markets sell paw paw, bananas, betel nut and limes. However, where I was expecting freedom from the security fences, there was none to be found. The spectre of the lawless "rascals" endures well beyond Port Moresby. Bomana is immaculately maintained. Frangipanis and flame trees sit silently above the endless rows of headstones. They are all sad to read, in particular the ones that tell us nothing about the soldier who died. He is just that.

Our plans for the Kokoda Trail have stalled. The police escort has been and gone. The decision is made to drive on and soon we are winding up the foothills of the Owen Stanley Ranges into lusher, more tropical surrounds. Paku, concerned about the absence of police protection, ensures our safety by picking up some wontoks from his local village. Lunch consists of the sweetest bananas I've ever tasted, picked up from a roadside stall for one kina. The trip goes without a hitch. The country around the beginning of the Kokoda Trail reminds me of Central Australia. Red earth and eucalyptus trees.

The Advocacy Workshop is officially opened on Monday morning by Mr Chronox Manek, Public Prosecutor. He ends his speech by telling the students that being an effective advocate is about knowing "where you are going and how

The national anthem is sung as the PNG flag is slowly raised. Pastor Ken Iskov reads the morning prayer and a fantastic African proverb, "It's hard for corn to get justice in a court full of chickens."

Members of the team heading out for dinner in Port Morseby.

Shrine at Bomana War Cemetary.

Advocacy workshop teaching team.

Legal training institute workshop participants.

Bomana War Cemetary.

you are going to get there". These words reverberate throughout the week, echoed by all of us in the course of teaching. The national anthem is sung as the PNG flag is slowly raised. Pastor Ken Iskov reads the morning prayer and a fantastic African proverb, "It's hard for corn to get justice in a court full of chickens." Mr Kerenga Kua, President of the PNG Law Society, reminds us of the importance of the Rule of Law. The reality of PNG's law and order problems is effectively brought home as he exhorts these future lawyers to denounce political and judicial corruption. Finally Coghlan QC begins as he will end, with one word. Preparation. Repeated countless times, he will tell the students that good advocacy is about preparation. In fact, Hill QC is of the view that DPP actually means "Doing Proper Preparation".

For the next five days we begin at 8.30 am and finish at 4.30 pm. "Intensive workshop" is indeed an accurate description. However, it is a rewarding week, for students and teachers alike. There is nothing more fulfilling from our perspective, than to witness the improvement in the students' advocacy skills over the five days. The first couple of days see some challenges in the students making eye contact with us, making themselves heard and a lot of wayward hands. By the end of the week not one hand is in a pocket and no-one is whispering.

The week flies by. Friday afternoon arrives for the official closing ceremony. One of the students, Tauvasa, is called upon to speak on behalf of the group. He tells us that the word "preparation" is "embedded upon our brains". Expressions of gratitude from the students resonate throughout the week, culminating in Tauvasa's parting sentiment, telling us that we have "brothers and sisters in Papua New Guinea upon our return".

Mr Kerenga Kua thanks us for our efforts telling us we have "contributed to the development of Papua New Guinea". This statement captures the spirit of the workshop. We, as a group, feel privileged to be given the opportunity to make such a contribution. Any member of the Victorian Bar who has the opportunity should take it. While the security measures may appear daunting, they are a reality of life in Papua New Guinea. As I mentioned at the outset, every member of the team was on a return trip to Port Morseby. I have been there three times and have never felt unsafe. As Australians we experience it for seven days and then have the luxury of hopping on a plane back home. Mr Chronox Manek, wontok to Paul Coghlan QC, closes the workshop and we retire to enjoy a cocktail party kindly hosted by the Legal Training Institute. It's a great opportunity to mix with members of the local profession and the students. Exhaustion overtakes most of the team as we ready for a 6.00 am start heading home. It's always with a touch of sadness that I leave PNG. While I'm always relieved to be escaping living in a compound, the sadness comes from leaving the students. Without exception they are warm, hard working and grateful for our efforts. This is part of what makes this a rich and rewarding experience.

Thank you to Barbara Walsh of the Victorian Bar and Pauline Mogish of the Legal Training Institute in Port Morseby. This workshop is a marvellous legacy of the late Robert Kent QC. The passion and commitment of all participants but in particular Barbara Walsh and Paul Coghlan QC (both on their 15th and 9th trips respectively) has kept the legacy alive. May it long continue.

So

TIME for another essay on words. It can be difficult meeting so rigid a deadline. Speed compromises quality and constrains imagination, so pressure can mean the difference between an essay which is just so, and one which is just so-so. So, here we go.

English words may be divided into: 1. the long and unfamiliar, such as *abirritation* (a depressed condition of the tissues), *chathernwise* (in the manner of a sauce containing chipped entrails), and *trichotillimania* (compulsive pulling of hair); 2. the long but familiar, such as *encyclopedia*, *hippopotamus* and *accommodatingly*; 3. the short but unfamiliar, such as *hod* (an open receptacle for carrying mortar), *alt* (a halt), and *dod* (to make the top or head of something blunt, rounded, or bare); 4. the short and familiar, such as *such*, *as* and *and*; and 5. the short but tricky, such as *let*, *mug*, *to* and *so*.

The words in this last group are so familiar to us that it is easy to overlook the number of different senses in which they are used: so much so that we let it pass our notice that we derive the sense more from the context than from the word itself. They are chameleon words, passing almost unnoticed in their various accommodating disguises. It is an interesting and challenging task to try to define the main senses of these words, and then sit down with a good dictionary to see how far short of the mark we have fallen.

If the extent of a word's treatment in the dictionary can be taken as a fair proxy for the word's chameleon character, the examples above are among the most difficult in our language. The OED entry for *mug* shows that it has at least six different meanings and can be a noun or a verb. *Let* is a noun, a verb and a participial adjective, it has at least three different meanings, two of which are direct opposites. The OED entry for *so* contains over 40 principal divisions and about 100 sub-divisions. The OED entry for *to* contains over 50 principal divisions and more than 100 sub-divisions.

So is one of those short, obvious, familiar words which are difficult to tie down. Because it is short and grammatically adaptable, it is used in many idiomatic constructions and more are emerging. Johnson identifies 21 different shades of meaning or modes of using *so*. Chief among its defined meanings are *in like manner*; *to such a degree*, *in consequence of*, *provided that*, *thus it is*. In addition it can be used as an expletive or abrupt beginning or end to an observation. Its use expands when it is compounded with other words: *so what*, *so-and-so*, *so far so good*, *so much*, *just so*, *so-so* and *so on and so forth*.

It is common these days to hear (generally young) people say *I am so looking forward to the holidays*, or *he is so dumped*. These are novel constructions, fairly based on existing idioms which have no greater claim to legitimacy than age confers.

What these new usages have in common is that they use *so* as an all-purpose intensifier. Inserting *so* before the key element of the sentence lends emphasis to that element. The OED recognises *so* as an intensifier (see sense 14) and offers illustrative quotations such as:

> In the time of *so great* and excellent philosopher. (1557 North)
>
> The bones of *so dogged* Contentions. (1626 W. Sclater)
>
> I thought I had never beheld *so interesting* an object. (1780 Mirror)
>
> A man is *so in the way* in the house. (1853 Mrs. Gaskell)

In particular the quotation from Mrs Gaskell seems to provide a good foundation for the modern constructions noted above. But there is another new use of *so* which breaks new grammatical ground: *I am so not doing that or He is so not invited*. These strike the ear oddly at first, but they do useful work. By placing the intensifying *so* immediately in front of not, the negative is emphasised. This is difficult to achieve otherwise without circumlocution: *I am most emphatically not doing that* or *He is most certainly not invited.*

Of course, it is possible to construct sentences containing *so not* which do not aim for the same linguistic effect and break no conventions: *A stylophone, a musical instrument like a small electronic organ, was held not to be a keyboard musical instrument and* ***so not*** *exempt from purchase tax — Times* 13 October 1970. Wherever *so* is used as meaning *thus* the construction *so not* passes without complaint.

However, when *so* is used as an intensifier in front of *not*, traditionalists become uncomfortable, or apoplectic, and mutter darkly about the decline in standards and the collapse of English and the future of the world in the hands of these infant barbarians with incomprehensible text messaging and feckless lives and too much television and recreational drugs; and it comes as a surprise and a paradox to see that these querulists formed their views about the ultimate perfection of language and society when they were at university during the 1960s …

It is acceptable in standard English to say that a thing is *not fair*, or to say that it is *unfair* and to say that it is *so unfair*. I see no difficulty in saying that the thing is *so not fair*. If anything, it is an improvement on *so unfair*, because it acts as an intensifier specifically for the neagtive. In the same way, *I am so not going to the party* and *he is so not my boyfriend* give particular intensity to the negative, which is the speaker's true intent.

It might be thought that the modern construction is not entirely without precedent: *They that vomite out such monstruousnesse, are* ***so not*** *ashamed of their own shame …* (1561 T. Norton *Calvin's Institutes*). Somehow, although it is tempting to read this in the modern idiom, I think it is more likely that Norton was using the idiom Marvell later used: *As he loved not to make work,* ***so not*** *to leave it imperfect.*

But so what? The new usage is immediately understandable and has the advantage of being brief, direct, understandable and forceful. So use it.

Julian Burnside

Wigs and Gowns Regatta

Crew of the Marie Louise, *left to right: Ross Macaw, Melanie Sloss, Cameron Macauley, Will Houghton, Sue Macaw, Glenn McGowan and Justice Geoffrey Nettle.*

THE 18th Wigs & Gowns Regatta was held in perfect conditions on Hobson's Bay on 19 December, 2005.

A light south-westerly provided the perfect breeze for all competitors to enjoy the cruise in company.

Andrew Green, sailing a 33ft William Garden sloop, *Charisma*, was awarded the Thorsen Trophy.

After a post-race meeting of the handicap committee, the Neil McPhee Memorial Trophy was awarded to John Digby sailing his 42ft masthead sloop, *Aranui*.

Due to the generosity of Judge Frank Walsh, the inaugural Frank Walsh Perpetual Trophy was awarded to Judge Stuart Campbell sailing his 22ft double-ended gunter rig sloop, *Rosa Jean*.

Following on-water activities, a barbecue lunch was attended by over 30 of the Bar's finest sailors.

Crew of the Charisma *left to right: Jon Davis; Brian McCullagh, Skipper; Andrew Green, owner; and Bruce Cameron.*

Judge Walsh and Peter Rattray QC man the starters' boat.

James Mighell and Judge Stuart Campbell.

Bench and Bar Retain Tennis Trophy

FOR the first time in the 40 year history of the O'Driscoll Cup, the annual challenge tennis match between the Bench and Bar on the one hand and the Law Institute on the other hand, the Bench and Bar have won the trophy on consecutive occasions, after a triumphant success on 20 December 2005.

The O'Driscoll Cup is named in honour of Judge J.X. O'Driscoll, a well known character of the 60s and 70s on the County Court Bench.

In a pattern similar to recent years, in the A section the Institute dominated. However, this year Patrick Montgomery and Jamie Gorton did provide stern opposition on behalf of the Bar, winning two of their four sets. Garry Bigmore and Michael O'Brien were victors in one set, and Howard Mason and Nick Harrington performed similarly.

However, as in recent years, the Bench and Bar definitely dominated the B section. Tishler and Lindner were outstanding, winning all three sets, and having thus come to the notice of the selectors, may well look forward to promotion in the next match. Gatford and Danos, and Fennessy and Thomson performed creditably, winning two sets apiece. Thus the Bench and Bar overall won 11 sets, narrowly defeating the Institute who won 10 sets. The overall games tally was dead even at 81 games won each. Thus, by the narrowest of margins, one set, the Bench and Bar were the 2005 champions.

The Flatman-Smith trophy for the best performed pair was this year won by the star Institute pair of De Silva and Price who won all three sets in the A section and conceded only two games in doing so.

The match was played in brilliant sunshine on the Kooyong grass courts. As in every year, the contest was played in a wonderful spirit, and the convivial atmosphere continued up on to the Terrace Bar afterwards, where the accompanying photograph shows some of the proud Bar team displaying their trophy. The trophy was in turn presented to the chairman of the Bar Council, Kate McMillan, at the recent ceremony to launch the new Bar website, held in the Essoign Club. Hopefully, a suitable cabinet will be erected in the club shortly, in which the trophy can be on permanent display.

Many thanks to the organisers generally, and particularly to Peter Maybury of the Institute and Richard Smith from the Bar for their assistance in securing the Kooyong venue once again.

There has been some interest expressed this year in holding one or two other events against teams comprising Solicitors from regional Victorian circuit towns. Any other members of the Bar interested in participating in such events or in the annual match pre-Christmas this year, should not hesitate to speak to any of the team members, in particular to Richard Smith, Tom Danos or Chris Thomson.

Chris Thomson

Susan Gatford, Tom Danos, Chris Thomson, Howard Mason, Ben Lindner and Gary Bigmore QC.

Patrick Montgomery.

Jamie Gorton.

Simon Tisher.

Nick Harrington.

Ocean Swimming

LATE last year Geoff Ambrose and Leighton Gwynn started swimming at the newly opened RACV Club (located conveniently across the road from Equity). The idea was to get a bit fitter, lose a little weight, the usual thing.

Geoff couldn't swim more that 50 metres without a rest and Leighton struggled with a morbid preoccupation with sharks (even in the pool).

Fast-forward to January and these unlikely watermen are competing in several of the summer's annual ocean swimming events.

Eschewing Lorne's Pier-to-Pub, the duo made their debut at the Torquay Danger 1000, held at the usually benign front beach. As chance would have it, freak conditions on the day had the course looking something like the "Fifty Year Storm" scene from Point Break. Undeterred, the brave aquanaughts pulled on their goggles, girded their loins and plunged headlong into the surf along with over 1,500 other competitors and the Richmond footy team. Geoff managed to place 106th in his age group, in a field of 109 swimmers. Leighton did somewhat better, but due to a transponder error his actual time and placing will forever be a matter of conjecture.

The next swim was the Queenscliff Bluewater Challenge. Geoff's attempt to win the encouragement award again failed, finishing 95th out of his age group field of 96. Leighton tore up the 1,200 metre course with a personal best 16:36.

Geoff retired early from the remaining ocean swims of the season, citing a desire to "spend more time with his family", but Leighton went on to earn himself the people's ovation and fame forever in the Cerberus and Bluff-to-Beach swims.

Both men are reportedly already in training for next year's calendar of events. Geoff had these words to say when asked about the 2007 Pier-to-Pub: "You're going down, Bracksy, you're going down!"

Geoff Ambrose

Swimmers Gwynn and Ambrose.

Is Your Resume This Good?

Financial Post, *Toronto, Friday 23 February 2001*

Employment Wanted

Former Marijuana Smuggler

Having successfully completed a ten year sentence, incident-free, for importing 75 tons of marijuana into the United States, I am now seeking a legal and legitimate means to support myself and my family.

Business Experience – Owned and operated a successful fishing business: multi-vessel, one airplane, and one island and processing facility. Simultaneously owned and operated a fleet of tractor-trucks conducting business in the western United States. During this time I also co-owned and participated in the executive level management of 120 people worldwide in a successful pot smuggling venture with revenues in excess of US$100 million annually. I took responsibility for my own actions, and received a ten year sentence in the United States while others walked free for their cooperation.

Attributes – I am an expert in all levels of security. I have extensive computer skills, am personable, outgoing, well-educated, reliable, clean and sober. I have spoken in schools to thousands of kids and parent groups over the past ten years on "the consequences of choice", and received public recognition from the RCMP for community service. I am well-traveled and speak English, French and Spanish. References available from friends, family, the U.S. District Attorney, etc.

Please direct replies to
Box 375, National Post, Classified,
1450 Don Mills, ON, M3B 3R5

Vic Bar XI Triumphant

THE Vic Bar XI retained the Sir Henry Winneke Trophy by winning the annual cricket match against the Law Institute of Victoria, which was played on Monday 19 December 2005 at the East Malvern Cricket Ground.

The weather gods were generous to us once again, with the rain over the weekend clearing up to a beautiful early summer day.

The final scores were: Vic Bar 6/167 defeated the Law Institute 7/166. The trophy was first contested in 1965. The Bar has now won the trophy five times over the last seven years, and is also the current holder of the Phil Opas Trophy, the "Hit or Miss" Cup and the Singapore Cricket Club Shield.

The toss was won by the Bar, and the skipper, trusting to his team's ability to chase any reasonable score, inserted the Solicitors.

The Bar's opening bowlers, Simon Zebrowski and Justin Hannebery (1/14 off 8 overs), removed both openers by the time 27 runs were scored. The third wicket did not fall until 64 runs were on the board, courtesy of our change bowler, Marc Felman (1/29).

More wickets then came our way to Dugald McWilliams (1/35) and Chris Connor (1/36). When Zebrowski returned to the crease to complete his allotted 8 overs, he took two wickets in one over to have the Solicitors 7/137 off 37 overs, but with some frenzied hitting until the compulsory closure the Institute reached 7/166 off 40 overs. Simon Zebrowski finished with 3/24 off eight very quick overs.

After being fortified with a generous luncheon, the Bar set out in the chase, not having anticipated until their opponent's last flurry, that the required total would be quite so daunting.

Fortunately, there were sound contributions from all the batsmen, and outstanding efforts from our "draft pick-ups" in Cam Truong (42) and Dugald McWilliams (43 n.o.). In addition, Marc Felman reprised his brilliant innings from last year's win, scoring a stylish 31 runs.

By the end of the 37th over, the Bar had reached 6/147, still 20 runs from victory. The win came quickly without any trepidation, and with 8 balls to spare from the powerful striking of McWilliams and Peter Lithgow (7 n.o.) who had the good fortune to hit the winning run. The Bar's winning score of 6/167 was achieved in 38.4 overs.

The Bar team was: Chris Connor (c), David Neal S.C. (v.c.), Peter Lithgow, Justin Hannebery, Justin Castelan, Marc Felman, Simon Zebrowski, Jim Shaw, Paul Adami, Cam Truong, Dugald McWilliams.

The Bar's next match is against the Vaughan Springs XI to be played on Sunday 9 April 2006 at "Cricket Willow", Shepherd's Flat (past Daylesford) where it will seek to retain the "Hit or Miss" Cup which it won last year.

Barristers/ Solicitors Golf Day

Bar News *Golf tournament winners: Robert Miller, Brian Keon-Cohen and Gavan Rice.*

THE annual golf-match between The Bench/Bar and The Law Institute was held, as in past years, at Kingston Heath. The event fell on Tuesday 20th December. Unfortunately, this was the day before the Judge's day, when the County Court plays the Supreme Court (with a few silks roped in) at Peninsula Golf Club. It seems the latter event (where several counsel were invited and attended) has unwittingly compromised the former (where all counsel are invited, but very few attended).

At Kingston Heath, the entry fee ($130.00 for green fees, lunch, and drinks and finger-food afterwards) was perhaps considered too high; the weather was delightful; the food, it must be said, was very average; the course was as well-presented and challenging as always; and the after-action drinks enjoyable. But for whatever reason, very few barristers — only five in all — turned up at Kingston Heath. No judges arrived — no doubt saving their energy for hostilities the next day. About a dozen solicitors only arrived, making for the smallest field in living memory.

Somehow or other, the Bar (it seems with the help of some solicitors) won the Sir Edmund Herring Trophy, which was duly presented to the Bar's most senior representative (and worst scorer on the day) Bryan Keon-Cohen QC. The calculations leading to this result remain a total mystery. Keon-Cohen's acceptance speech — a nod to the assembled multitudes — was the shortest ever heard. The trophy looks very fine on Keon-Cohen's mantelpiece, where it is reputed to have been securely bolted in.

The entire format is now being revamped by Gavan Rice, Bryan Keon-Cohen and Bob Miller. It would be a shame to abandon a long-running and enjoyable tradition, given the large numbers of counsel, judges and solicitors who regularly play golf, and an even larger group who regularly brag about their exploits. For 2006, a date currently suggested is Friday 8 December and a new venue in the Melbourne sand-belt is presently under negotiation. Comments or suggestions would be welcomed, and should be directed to any of the three exponents of bragging-rights mentioned above.

Bryan Keon-Cohen QC
Gavan L Rice

Transnational Commercial Law: International Instruments and Commentary

By Roy Goode, Herbert Kronke, Ewan McKendrick and Jeremy Wool
Pp. v–l; 1–1020; Index 1021–1058

INTERNATIONAL commercial law consists of a series of United Nations conventions, European Community directives, regulations, model laws and rules. International commercial disputes can be resolved by national courts or by arbitration conducted by such bodies as the International Chamber of Commerce.

There are international instruments that apply to international sales contracts, electronic commerce, electronic signatures, agency, banking, insolvency, conflicts of laws, civil procedure, assignment of receivables and commercial arbitration.

The authors have provided a compendium of all the international instruments that are relevant to transnational commercial law, which include the Principles of International Commercial Contracts (the "UNIDROIT Principles"); the Principles of European Contract Law (the "PECL") and the United Nations Convention on the International Sale of Goods (the "CISG").

The text is an invaluable reference for any practitioner whose clients trade internationally. Whilst all States are bound by a treaty once ratified, only some treaties are immediately effective as part of the States' domestic law, as they may be required to pass enabling legislation to incorporate the treaty as part of domestic law. For example, at the time of publication of this book, the CISG has been ratified by 63 countries, including Australia and its major trading partners. The first chapter provides a helpful summary on the operation and ratification of treaties and explains the *Vienna Convention on the Law of Treaties.*

The remaining eleven chapters cover a group of related international instruments and have an introductory text that explains the objectives and relevant issues relating to the instrument, thereby providing a concise overview of the instrument and the context of its operation.

Practitioners will find it very convenient to have the full text of an instrument provided proceeded by a concise introductory explanation, and in the case

of conventions, followed by a list of the countries that have ratified them. The book also contains comprehensive tables of national legislation, international treaties, conventions and model laws. This is an invaluable addition to the library of anyone who practises in the field of international commercial law.

C.J. King

Douglas and Jones's Administrative Law (5th edn)

By Roger Douglas,
Federation Press, 2006
Pp v–1viii, 1–858, Index 859–868

ADMINISTRATIVE Law, 5th edition, by Roger Douglas is one of the foremost texts on administrative law for students and practitioners. Like the earlier editions, this edition has an explanation of the substantive areas of law that precedes case extracts illustrating the relevant legal principles.

The author's new linear format is easy to follow and commences with the role and development of administrative law and the gathering of information about government decisions. It is followed by an examination of the Auditor General's and Ombudsman's supervisory and investigative roles and administrative review on the merits, together with a chapter on delegated legislation.

The author then addresses in detail all the grounds for judicial review, and as in previous editions, devotes a chapter to each head of judicial review with the relevant case extracts, including the most recent decisions.

This text is up to date and reflects the developments in administrative law by legislative and judicial means including failure to provide reasons for a decision, the "no evidence" ground of review; and decisions that can be attacked on the grounds of flawed reasoning. As the author notes, the text also reflects the settled nature of administrative law and its acceptance by government who set its parameters by legislation and accept it as a legitimate method of review that makes decision makers accountable.

Administrative Law is an essential addition to the library of students, lawyers, public servants and anyone who is interested in administrative law.

C.J. King

Concise Corporations Law (5th edn)

By Julie Cassidy
Federation Press 2006
Pp iii–xliv; 1–367; Index 368–371

IN her 5th edition of *Concise Corporations Law*, Julie Cassidy has again provided a comprehensive overview of the significant areas of the corporations law that is ideal as a "ready reference". It is easy to follow and includes summaries of the leading cases.

The text outlines the constitutional position and the historical development of corporations law, both in Australia and elsewhere. It compares corporations with other business entities and examines the law in respect of formation and structure of a corporation.

The author deals extensively with the appointment, removal and duties of directors including the changes effected by CLERP 9 and recent judicial responses to corporate collapses in respect of directors' statutory and equitable duties.

No text on the corporations law would be complete without an examination of the forums in which corporate decision making takes place — board meetings and general meetings — and the author has provided a simple outline of the important provisions of the law as they apply to these meetings. Developments in the remedies available to members, such as statutory derivative action and the oppression remedy, introduced by the CLERP Act, are also covered succinctly.

The 5th edition of *Concise Corporations Law* is an excellent starting point for anyone seeking to keep up to date with this ever important and changing area of law.

C.J. King

Unconscionable Conduct — The Laws of Australia

Edited by Paul Vout
Law Book Co, 2006
Pp i–lxvi, 1–549, Bibliography 551–558, Index 559–572

UNCONSCIONABLE Conduct — The Laws of Australia brings together in a single volume the parts from *The Laws of Australia* covering unconscionable conduct. This work includes five principal parts, the first of which relates to actionable misrepresentation, excluding the statutory alternatives to general law misrepresentation claims (i.e. section 52 of the Trade Practices Act and related State and Territory Fair Trading Act equivalents). This part discusses fraudulent and innocent misrepresentation together with analysis of issues such as whether silence can constitute a misrepresentation and whether there may exist a duty of disclosure so as to avoid misrepresentation at common law.

The second part deals with estoppel. This aspect of the law has been subject to recent analysis and development by the High Court in cases such as *A* v *Hayden* (1984) 156 CLR 532; *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387; *Foran* v *Wight* (1989) 168 CLR 385; *Commonwealth* v *Verwayen* (1990) 170 CLR 394 and *Giumelli* v *Giumelli* (1999) 196 CLR 101.

Duress and undue influence are also subject of discrete parts and include discussion of the principle in *Yerkey* v *Jones* (1939) 63 CLR 649 as re-stated by the High Court in *Garcia* v *National Australia Bank Ltd* (1998) 194 CLR 395.

The general notion of unconscionability is analysed, particularly since cases in the High Court which reinvigorated these equitable doctrines such as *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447; *Muschinski* v *Dodds* (1985) 160 CLR 383; *Stern* v *McArthur* (1988) 165 CLR 489 and *Commonwealth* v *Verwayen* (1990) 170 CLR 394.

The final part deals with unconscionable dealing itself, including the extensive statutory unconscionability provisions such as are found in the State Consumer Credit and Fair Trading statutes.

Each part contains both an analysis of the law and discussion of what defences may be open in regard to claims made for unconscionable conduct, together with commentary on remedies or relief available to an aggrieved party.

This text provides in one volume a scholarly and up-to-date analysis of many of the important aspects of the law of unconscionable conduct in Australia. The full development and extent of the modern law of unconscionable conduct including the statutory unconscionability provisions as enacted in the Trade Practices Act, the ASIC Act and the various State Fair Trading Acts and Consumer Credit laws remains to be seen. *Unconscionable Conduct — The Laws of Australia* provides the ideal introduction and analysis of this important area of law for students, academics and practitioners alike.

P.W. Lithgow

Interpreting Statutes

Suzanne Corcoran and Stephen Bottomley (eds)
The Federation Press, 2005
Pp v–xi, Table of Cases xii–xviii, Table of Statutes xix–xxii, 1–317, Index 318–330

IN this age when governments appear to take great pride in the quantity (if not quality) of their legislative output, it is unsurprising that the Honourable Chief Justice Spigelman has observed that "[t]he law of statutory interpretation has become the most important single aspect of legal practice" (2001) 21 *Aust Bar Rev*. 224. Aside from a good legal dictionary, about the only book of common application to every legal practice is a good book on statutory interpretation.

Corcoran and Bottomley's book, *Interpreting Statutes*, takes a different approach from the several other Australian texts on statutory interpretation. Rather than approaching its subject on a holistic basis, the book presents a series of essays, each directed at explaining a theoretical premise of interpretation, or the application of interpretative theories to a particular area of law. The rationale for the book, says Corcoran in the introduction, is "to consider the fundamental importance of statutes and their interpretation across various fields of regulation".

With one exception, each of the essays is authored by a practising academic. The Honourable Justice Finn contributes a chapter on the interaction of statutes and the common law.

Four initial chapters deal with the need for, and theories of, statutory interpretation. Somewhat anomalously, they are interrupted by a chapter on constitutional interpretation — which, while fundamental, appears lonely in part one.

Part two of the book is devoted to an analysis of statutory interpretation as it applies to certain selected legal areas. Separate chapters are devoted to human rights law, native title law, corporations law, employment law, criminal law, law enforcement immunity, discrimination law, family law and health law. In addition to targeting a specific legal area, most chapters approach their subject from a particular identified perspective. For example, the chapter dealing with discrimination law compares the interpretive approaches of tribunals and courts, while the chapter about family law considers judicial approaches to legislation regarding parenting orders. In contrast, the chapters on human rights and corporations law adopt a more general approach to their subject matter.

While each chapter is interesting in its own right, and the first part of the book is of general academic interest, the book seems to fall between two stools as a work of practical application. For general practitioners, it is probably too specialised and academic. For practitioners who specialise in a particular area of law, the short chapter relevant to his or her practice is likely to provide inadequate justification for purchasing the entire book.

Stewart Maiden

Verbatim

Continued from page 67

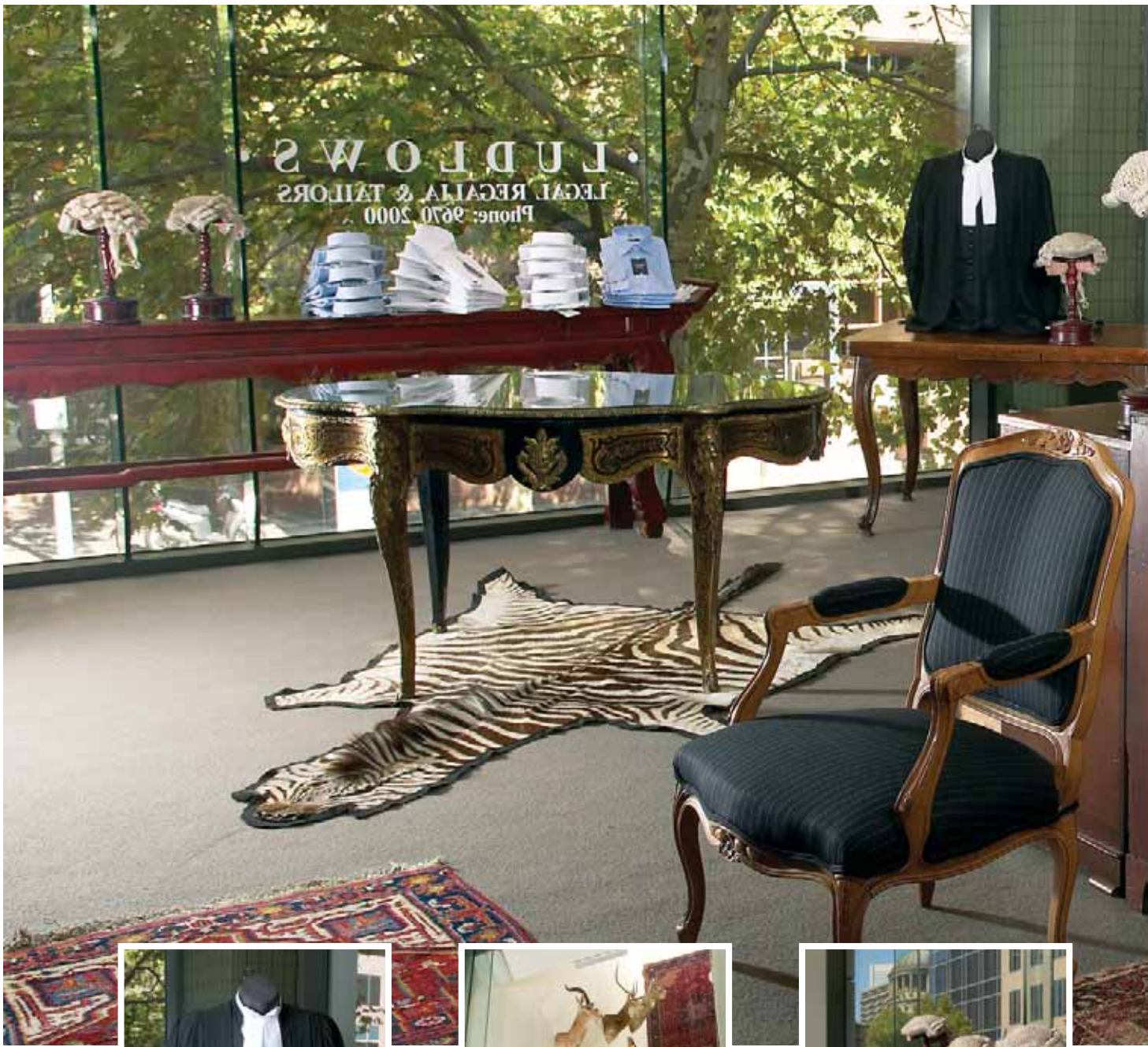
Point Taken

County Court of Victoria

8 March 2006
Coram: Judge McInerney
Ross Failla v Woolworths Ltd
Plaintiff: Trevor Monti
Defendant: Ross Middleton

---- When you saw Mr Healey?
---- Yes.
---- Was that the former Melbourne footballer?
---- Yes, yes.
His Honour: Mr Gerard Healey?
---- That's correct, yep.
Mr Monti: Gerard Healey, yes.
Witness: He was in Rye and then moved to Rosebud — to Frankston and then of course he got popular as they a11 do and, yeah, forgot about everything and sold everything up.
Mr Monti: It hasn't happened to Mr Middleton yet.
Witness: You'd never know. He could finish up in the Supreme Court.
Mr Middleton: Good point.

THE LEGAL WEA



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