VICTORIAN BAR NEWS

No. 137 ISSN 0159-3285 WINTER 2006

First President of the Children's Court passes on the Baton

Welcomes: Justice Robert Redlich, Justice Marcia Neave, Honourable Justice Anthony L. Cavanough and Judge Paul Grant ☐ Farewells: Justice Stephen Charles, Master Bruce, Justice Alwynne Rowlands AO and Brian Shaw QC ☐ Obituary: Paul Ahearne ☐ Defending Unpopular Causes in a Climate of Fear ☐ The Dreyfus Affair ☐ First Indigenous Woman at the Bar: Linda A. Lovett ☐ Children's Court of Victoria Celebrates its Centenary — and a Baton Change ☐ Farewell to First President of the Children's Court: Judge Jennifer Coate ☐ A Tribute to His Honour the Late Bill Morgan-Payler ☐ A Bit About Words/ Chaps ☐ Bar Dinner ☐ David Hicks and the Military Commission — Is Australia Turning its Back on International Law? ☐ Women Barristers Association's Third Annual "Meet and Greet" at the Essoign ☐ Speech at Dinner for Justice Susan Crennan ☐ Victorian Bar Legal Assistance Scheme (VBLAS) ☐ Twenty-five Years of the Victorian Bar Readers' Course ☐ Galveston Decision ☐ Advocacy in Practice ☐ Australian Bar XI: Hong Kong Tour, Easter 2006

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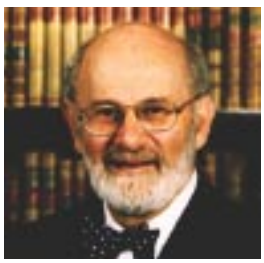

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Farewell Justice Rowlands AO

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

Registration No. A 0034304 S

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

This publication may be cited as (2006) 137 Vic B.N.

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Diminishing Rights

A BILL OF RIGHTS?

A debate on Victoria's Bill of Rights, sponsored by Deakin University Law School, took place at the Melbourne Town Hall on 22 May this year. Julian Burnside QC and Robert Stary, a western suburban solicitor, argued in favour of the proposed Bill of Rights. Peter Faris QC and Professor James Allan from the University of Queensland argued against the introduction of such legislation.

The main arguments put against the proposed legislation were: (a) that it takes power away from the elected legislature; (b) it leaves too much in the hands of "unelected judges"; (c) it is ineffective; (d) it is not necessary.

The proponents of the Bill referred to the stringent provisions of the current anti-terrorist legislation (which have been canvassed in part in these pages in previous issues as highlighting the need for such a Bill). They also pointed to the decision of the High Court in *Al-Kateb*, where the majority of the High Court held that an "illegal non-citizen" against whom a deportation order was made could, if there was no country to which he could be deported, be held in custody indefinitely.

The rights of the individual can clearly be curtailed by an omnipotent parliament. Even in a federation, there is little protection for the individual except where the legislature strays outside its proper sphere of activity.

Usually legislation which inhibits individual rights or restricts prior freedoms is enacted for a "good" reason. There is an evil which requires to be righted or a mischief to be corrected. However, once a particular power has been given to the executive, to the bureaucracy or to the police or security forces, it is seldom abandoned.

The history of the last 50 years is replete with examples of legislation which has removed rights which were once regarded as sacrosanct — for example, the right against self-incrimination (compulsory breath testing), the right not to be convicted of an offence if one's act was not unlawful when performed (bottom of the harbour legislation).

When compulsory breath testing was introduced, the then Chairman of the Bar Council pointed out that such legislation abrogated the basic common law right of the individual not to incriminate himself or herself. We now accept that driving under the influence is such an "evil" thing that compulsory breath testing is "good". We seldom stop to consider that it does in fact cut across what the common law courts once regarded as "rights" of the individual.

When John Howard as Treasurer introduced legislation to punish people involved in "bottom of the harbour" schemes, he did so because such schemes were "evil". The community accepted, without much concern, except that expressed by the lawyers, the operation of retrospective criminal legislation.

Now legal professional privilege is under attack.

LEGAL ADVICE AND CONFIDENTIALITY

Many forms of "privilege" are rules of evidence, for example, public interest immunity, where the courts are concerned to balance competing public interests. In the case of claims to public interest immunity, it is not uncommon for courts to look at the documents to determine whether the claim to immunity has been made out. It is also not uncommon for courts to decline to look at the documents for the purpose of deciding this question, because to do so could place the judge in a position where, if the claim to immunity were upheld, he should disqualify himself.

Legal professional privilege is not a rule of evidence. It is a substantive rule of law. The Federal Government has now introduced legislation giving to Royal Commissioners the power to determine, by looking at documents for which legal professional privilege is claimed, whether that claim should be upheld.

Royal Commissioners are not judges. They are appointed ad hoc and, no matter what their qualifications, they do not have the tenure of judges. More importantly, they are themselves the tribunal which will determine the facts.

The legislation will give to an ad hoc tribunal power to read documents which may not be admissible in evidence before it. If a Commissioner reads such a document and finds that it is the subject of legal professional privilege, will he then disqualify himself? Will the Royal Commission start again from scratch under the auspices of another Royal Commissioner?

What happens if the Royal Commissioner makes a mistake, finds that the document is admissible because it is not privileged, relies on the document, publishes a report which is damning of the individual and a court subsequently finds that the document is privileged?

The legislation that is proposed undermines a fundamental principle, not just a right of the individual, but a principle of the administration of justice.

It is in the interests of the community, as well as of the individual, that litigants, whether engaged in civil or criminal litigation be able to confide in their lawyers. It is equally important that, subject to the exception in relation to fraud or participation in a criminal purpose, individuals be entitled to obtain honest and informed advice from their lawyers.

Certainly, if the federal legislation goes through, any person involved in an activity which may become the subject of a Royal Commission would be advised to think twice before communicating frankly with his or her lawyer.

Once again, the target is well chosen — or perhaps the evil is seen as justifying in the remedy. AWB is in disgrace. Our wheat export trade has been damaged. Since AWB is "evil", to give the Royal Commissioner such a power in this case is clearly "justified" in the interests of the community was a whole.

INDIVIDUAL RIGHTS OR COMMUNITY INTEREST?

The trouble is that, if we think only of the "interests of the community as a whole", then the rights of the individual do not matter.

Once we focus on the interests of the community, and ignore the interests of the individual, we necessarily move into an amoral world in which any action which is seen to benefit the "community as a whole" (an undefined term which probably, at least until recently in this country, meant the Anglo-Celts) is justified.

That some people suffer is unfortunate. It is to use a term borrowed from the Iraq war "collateral damage".

Most of us know that we have done nothing wrong; and, therefore, we have nothing to fear. What happens if someone makes a "mistake"?

The extent to which the rule of law is under threat is aptly illustrated by the Law Week Oration by Lex Lasry, the text of which is set out in this issue. We commend it to our readers.

OUTSIDE THE RULE OF LAW

Many years ago, one of the editors inadvisedly said to his blue-rinse Texan hostess on Thanksgiving day: "I don't believe in killing people." Her response was clear, forthright and very positive. As she (literally) thumped the table she said: "I do. I believe in killing commies!" Our papers and our television sets have recently noted with joy, or at least satisfaction, that a leading Al Queda operative has been killed as a result of a US air strike. A number of other people perished with him.

It may be necessary in war, or in warlike situations to kill without warning, to kill without trial and even to kill without making any attempt to capture. For those who believe in the Christian philosophy, however, the death of another human being should not be a matter for happiness, or even for satisfaction. September the 11th represents a turning point in history. In many ways, however, it differs only in scale from every air strike which is made in retaliation.

Those of us who do not believe in capital punishment — and that is the official view of every government in this country — find it difficult to applaud the execution, whether with or without trial of even the most evil human being. A killing in retaliation or revenge is not thereby justified, any more than the fire bombing of Dresden was justified by the deaths of Londoners caught in the blitz.

The killing of a terrorist who is actively engaged in bombing, murder or assassination may be necessary. It is not a cause for rejoicing or even for smug self-satisfaction.

VALE JUNIOR SILK

Amongst the social functions which have occurred since the last issue is the first Bar Dinner under the "new format", designed to be user friendly, non-controversial and contrary to a tradition which goes back to at least 1919 when J.B. Tate was "Mr Junior". Few of us can remember before that.

Until 1971 the person given the task of being the "keynote speaker", and of denigrating the distinguished guests in a polite manner, was the person who had most recently signed the Bar Roll. In 1972, it was decided that the job was too hard to impose on the youth of that time and the role was transferred to the "Junior Silk". There were probably good reasons for this change and certainly it resulted in more polished performances.

Jeff Sher was the first "guest speaker" to replace Junior Silk. His speech appears in these pages. It is more serious in content than those to which we have become accustomed. This is probably "a good thing". Certainly it provides more food for serious thought than have the speeches of past years.

It is, however, a pity to see a tradition abandoned because on one occasion, rightly or wrongly, umbrage was taken at the content of a Junior Silks' speech.

CHANGES IN THE COURT OF APPEAL

The face of the Court of Appeal has changed with the departure of Charles JA since the last *Bar News*, the elevation of Redlich J from the Trial Division to the Court of Appeal and the appointment of Professor Neave.

The last appointment has been the subject of some debate. It has been criticised in one letter to the *Australian Financial Review* under the title "Judge Them on Experience".

There can be no doubt that those who go to the Bench, whether it be to the Trial Division or the Court of Appeal, with a wealth of trial and appellate experience have an easier row to hoe than any appointee from academe. Judges need wisdom, intelligence, a knowledge of the law and a compassionate understanding of humanity. Intelligence and a knowledge of the law are characteristics (or should be characteristics) of all those who reach eminence in any branch of the law. Neither wisdom nor compassionate understanding are necessary products of years in practice.

There is no question that Justice Neave possesses intelligence of a very high order and a very broad and detailed knowledge of the law. There is no evidence that her years as an academic have prevented her from developing wisdom or compassionate understanding. The evidence is to the contrary.

We wish her Honour well in her new role.

WHERE HAS ALL THE WORK GONE?

Many members of the Bar, particularly those who work in the personal injury area have noted a drastic decline in their workload. The following extract from the *Herald Sun* in late May 2006 may explain it:

> Reforms outlawing many personal injury claims in Victoria have led to a huge drop in the number of court cases. Figures from the County Court show public liability law suits dropped from 1,734 in the year before the reforms to 84 last year. The drop in all causes of action for personal injuries was from 5418 to 801.

Since this appears to be a drop of 83 per cent it means that those who work in the personal injury area now have available to them 17 per cent of the work which was available a year earlier.

The Editors

Busy Winter for the Bar

APPOINTMENTS AND FAREWELLS

RECENTLY, there have been ceremonial welcomes for Justice Tony Cavanough to the Supreme Court, Judge Paul Grant to the County Court and to the Presidency of the Children's Court and for Justice Christopher Jessup to the Federal Court. Justice Robert Redlich has been elevated to the Court of Appeal.

In addition, the appointments of Richard Tracey RFD QC and John Middleton QC to the Federal Court have been announced and their welcomes will be in held in the coming weeks.

At the Federal Magistrates' Court, Heather Riley and Philip Burchardt have taken their places on the Federal Magistrates' Court.

There have been ceremonial farewells for Justice Stephen Charles from the Court of Appeal, Judge Jennifer Coate from the Presidency of the Children's Court and Judicial Registrar Jonathan Ramsden from the Family Court.

Sadly, on 10 June 2006, Judge William Morgan-Payler died after a long illness. The address of Chief Judge Rozenes honouring Judge Morgan-Payler appears elsewhere in this edition of the *Bar News*.

QUEEN'S BIRTHDAY HONOURS

On behalf of the Bar, I wish to congratulate the members of our Bar who were honoured in the Queen's Birthday Honours — the Honourable Shane Stone AC QC, the Honourable William Ormiston AO, Richard Searby AO QC and Justice Sally Brown AM.

RETIREMENTS FROM THE BAR

In the past, there has been no practice by the *Bar News* of recording significant retirements from the Bar. In the preceding 12 months or so, three silks have retired who deserve mention — Hartog Berkeley QC, Brian Shaw QC and Michael Crennan S.C. — all of whom retired from full time practice within that time. Tributes to Hartog Berkeley and Brian Shaw appear elsewhere in this edition of the *Bar News*.

After more than 23 years at the Bar, Michael Crennan retired on 30 June 2006. Michael signed the Bar Roll on 18 November 1982 and he took silk on 28 November 2000. He was a member of the Bar Council and Chairman of the Counsel Committee for three years (2002–2005). He was also a member of other committees. In addition to his Bar Council commitments, Michael made substantial contributions to many submissions made by the Bar, in particular, submissions arising from inquiries by the Victorian Law Reform Commission, the Australian Senate and the Trade Practices Commission in the 1990s, and more recently, to the submissions on advocates' immunity. Michael also represented the Bar at the many meetings on the drafting of the *Legal Profession Act 2004*.

On behalf of the Bar, I wish Michael a long and satisfying retirement and thank him for the work that he has done for the Bar over the years.

LEGAL AID

In November 2005, members were informed of the decision of the Board of Victoria Legal Aid ("VLA") to adopt a protocol for the indexation of fees paid to legal practitioners for state and criminal law legal aid services.

On 21 June 2006, the VLA approved fee increases in legal aid criminal matters commencing from 1 July 2006. These details of the increases have been circulated to the Bar. In summary, the increase in the fees payable for pleas in the County Court and Supreme Court, trials in the County Court and the Supreme Court and appeals represents an increase by 23.7 per cent on the current fees in an overall sense but not in relation to all brief fees payable to counsel. The Board also approved an indexation increase of 2.5 per cent to all summary crime, committal and Children's Court fees.

ADVOCATES IMMUNITY

Recently, a sub-committee comprising Mark Derham QC, Michael Crennan S.C., Charles Shaw and Mathew Groves prepared the Bar's submissions on the three "modification options" proposed by the Standing Committee of Attorneys-General in respect of advocates' immunity from civil suit. These submissions were approved by the Bar Council and subsequently endorsed by the Australian Bar Association and the Law Council of Australia. On behalf of the Bar, I thank Mark, Michael, Charles and Mathew for the substantial contribution made by them in drafting and settling the submissions.

PROFESSIONAL STANDARDS SCHEME

The Bar has received applications from around 300 members to join the proposed Victorian Bar Professional Standards Scheme. The Bar Council, with the assistance of a sub-committee is preparing an application for approval of the scheme with a view to lodging the application with the Professional Standards Council in the near future.

ANTI-DISCRIMINATION POLICY FOR THE BAR

On 25 May 2006, the Bar Council approved an Anti Discrimination Policy for the Victorian Bar. The policy affirms the Bar's opposition to all forms of dis-

crimination, harassment and vilification in the provision of legal services by its members, the seeking of legal services from its members, the manner in which members conduct themselves in relation to each other and in the employment of staff.

HUMAN RIGHTS LEGAL RESOURCE CENTRE

On 29 April 2006, Michael Shand QC and I were the guests at a dinner held by the Human Rights Legal Resource Centre ("HRLRC") to celebrate the establishment of the HRLRC by the Public Interest Law Clearing House (Vic) ("PILCH") and Liberty Victoria in January 2006. The HRLRC is "the first centre to pilot an innovative service delivery model to promote human rights … [a model that] draws together and coordinates the capacity and resources of pro bono lawyers and legal professional associations, the human rights law expertise of university law schools, and the networks, grass root connections and community development focus of community legal centres and human rights organisations". The speakers at the dinner included Professor Paul Hunt, the United Nations Special Rapporteur on the Right to Health, and the Reverend Tim Costello AO, the Chief Executive Officer of World Vision Australia.

VICTORIAN BAR LEGAL ASSISTANCE SCHEME

On 30 March 2006, the Chairman of Victorian Bar Legal Assistance Scheme ("VBLAS"), Mr Ross Macaw QC, hosted a reception at the Essoign to thank members of the Bar who have undertaken pro bono work during the past year through VBLAS, the PILCH scheme, the Federal Court Order 80 Scheme, the Federal Magistrates Court Part 12 Scheme and other pro bono work not part of any formal arrangement. The Honourable Justice Young of the Federal Court spoke at the reception about the origins and development of the Order 80 scheme in that Court and the role of VBLAS in that scheme. The text of that address appears elsewhere in this edition.

JOINT SUBMISSION BY THE BAR AND PILCH

The Bar and PILCH produced a joint submission to the Senate Legal and Constitutional Legislation Committee on the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*. A sub-committee comprising Ron Merkel QC and Jack Fajgenbaum QC worked on the submission on behalf of the Bar. Ron Merkel also spoke to the submission on behalf of the Bar and PILCH at the Committee's public hearing in Canberra. On behalf of the Bar, I thank Ron Merkel and Jack Fajgenbaum for their substantial contribution to the joint submission.

DINNER FOR JUSTICE CRENNAN

On 27 April 2006, the Bar hosted a dinner in celebration of the appointment of Justice Crennan, a former Chairman of this Bar, to the High Court. On the night the Essoign was packed to capacity. The dinner was attended by Justice Hayne and Judges of the Supreme Court, Federal Court and Family Court, retired judges, members of the Federal Magistrates' Court, the Victorian Magistrates Court, retired barristers and members of the Bar. Frank Costigan QC gave a masterly and warm tribute to Justice Crennan which is included in this edition of the *Bar News*. Justice Crennan responded to the tribute in a substantial and humorous manner entertaining the audience with anecdotes about present and former members of the Bar.

MR MORDECAI MAHLANGU

Mr Mordecai Mahlangu, a senior partner of one of the major firms in Harare, Zimbabwe, recently visited Melbourne. Mr Mahlangu is a noted human rights lawyer. He represented the former Chief Justice of Zimbabwe, Anthony Gubbay, who was driven from office by the Mugabe Government. Mr Mahlangu was able to attend an afternoon tea in the Chairman's room where members of the Bar Council, the Human Rights Committee and the Bar were able to discuss the current political situation in Zimbabwe with him. Mr Mahlangu urged the Bar to keep in contact with the members of the Bar in Zimbabwe.

SIR ALBERT PALMER, CHIEF JUSTICE OF THE SOLOMON ISLANDS

On 9 June 2006, I was delighted to host an afternoon tea for the Chief Justice of the Solomon Islands with other members of the Bar and Barbara Walsh, the Manager of Legal Education for the Bar. Barbara has assisted in the past in the numerous Advocacy Skills Training Courses conducted by the small group of volunteers from the Bar in the Solomon Islands. Also attending the afternoon tea were the President of the Court of Appeal, Justice Maxwell, and Appeal Justice Geoffrey Eames.

VISIT TO MELBOURNE BY CANADIAN FEDERAL COURT JUSTICES

Michael Shand QC and I hosted an informal morning tea for three Canadian justices of the Federal Court of Canada — Justice Eleanor Dawson, Justice Carolyn Layden-Stevenson and Justice Anne MacTavish — all of whom were visiting Melbourne with the Chief Justice of Canada, the Right Honourable Beverley McLachlin PC. In April 2006, Chief Justice McLachlin delivered the 14th Australian Institute of Judicial Administration Oration entitled "The Twenty-First Century Court: Old Challenges and New in the Banco Court of the Supreme Court of Victoria".

MY THANKS

The Bar Council year is coming to an end in September 2006. On behalf of the Bar, I thank all members of the Bar Council and other members of the Bar for their contributions to the ongoing work of the Bar. In particular, I wish to thank the Senior Vice Chairman, Michael Shand QC, for his commitment to the work of the Bar Council and his unswerving ability to "get the task done" at all times. The voluntary work undertaken by the members of the Bar, particularly the work done by Michael Shand and the heads of the committees of the Bar, carry the workload of the Bar.

The Honorary Secretary of the Bar, Kate Anderson, will be retiring from that position in September 2006. Kate has been the Honorary Secretary since 2003. Together with the Assistant Honorary Secretary, Penny Neskovcin, Kate undertakes a thankless and time consuming task with efficiency, diligence and patience. I am indebted to her for the work that she has done for me and the Bar during the year. On behalf of the Bar, I thank her for her substantial and significant contribution to the workings of the Bar. I also thank Penny for her contribution to the work of the Bar and I look forward to her continuing contribution to the Bar Council.

Kate McMillan S.C.
Chairman

"We Must Inspire a Confidence in all Victorians for a Justice System and Principles That Have Meaning"

FEW issues so divide a community or test a responsible government as finding the right balance in the sentencing and prevention of criminal behaviour. This challenge is, of course, a theme running through the law since time immemorial — the authority of the state, our community's safety, and the population's confidence in the rule of law all depending on an effective and measured response to crime.

Some governments rise to this challenge more thoughtfully than others, of course — the "lock 'em up and throw away the key" approach seen by some as the easy way out. This is not the view of the Bracks Government and, in a unique and unprecedentedly complex period in our history — one in which the world has grown smaller and seemingly much more threatening — we know that we must hold fast to values such as judicial independence, to the presumption of innocence, and to the law's obligation to exercise compassion, as well as condemnation.

We must also, however, have the sense to acknowledge where the system has failed — where these failures are eroding the community's confidence in the courts and, ultimately, in the justice for which we all feel so strongly. Let's be clear — no matter how much we tackle the causes of crime, no matter how much we divert people away from recidivism, or how much we improve the law's response to victims of crime, our work can be undermined by one seemingly lenient sentence.

The ground that we cover — hard fought and hard won — in family violence reform; in defences to homicide

reform; even in sexual assault reform and Indigenous justice, are too often eclipsed by a public perception of "crims" walking free.

So how do we respond to this perception? Do we go down the path, then, as the Victorian Opposition is no doubt gearing up to do, of mandatory or "minimum" sentencing? The short answer is no, and it is crucial that those who oppose this fettering of judicial discretion, which will lead to much fewer guilty pleas and the further traumatising of victims, speak out against this simplistic approach.

What we can do, however, is have the maturity to acknowledge the flaws: to recognise that, within an otherwise solid foundation, a crack has developed between the law's application and the public's perception of the sentencing process. This is why we established the Sentencing Advisory Council and this is why we asked it to review the suspended sentences regime.

As you know, last month the Council presented its final report, a report which recommended the phasing-out of suspended sentences by 2009, their replacement with orders that demand greater accountability and the immediate restriction of the use of suspended sentences for serious violent and sexual offences.

The Government intends to act immediately on the latter recommendation to restrict the use of suspended sentences for serious offences, as well as requiring judges and magistrates to consider a number of criteria when applying a suspended sentence for any other offence.

Upon receipt of the second part of the Council's report, we will then consider the broader recommendations to phase out and replace suspended sentences with a new range of orders that mean justice is more clearly seen to be done.

The simple fact is, the Victorian public regard suspended sentences, particularly for serious offences, as "get out of jail free" cards. Victims of violent offences no doubt find it bewildering, to say the least, to see perpetrators convicted, admonished but, for all intents and purposes, free to walk out into the sunshine and resume their lives seemingly unaffected.

As the Sentencing Advisory Council says in its Report:

> Many in the broader community have difficulty reconciling the legal classification of

a wholly suspended sentence as a custodial sentence that is more severe than other conditional orders, when its practical consequence is that the offender is permitted to remain in the community under the sole restriction that he or she refrain from committing further offences during the period of the order.

I don't pretend I haven't struggled with this question. Ultimately, however, I will not see public confidence in the law — and in the quiet revolution in which we are engaged — eroded. No doubt some readers will strenuously disagree with me and find occasion to tell me so. This is as it should be.

More broadly, we must explain to Victorians that the right to the law's protection, compassion and impartial adjudication; the right to advice and representation; belong as much to their neighbours, family and friends as they do to the tabloid's latest quarry.

I urge you, nevertheless, to remember that the strength of our convictions for a fair and independent justice system are diminished if they are not shared by every Victorian. This is why we must inspire a confidence in all Victorians for a justice system and principles that have meaning. In doing so, we must explain that this system evolves and is not static, but that its foundations — the presumption of innocence, judicial independence — must endure.

More broadly, we must explain to Victorians that the right to the law's protection, compassion and impartial adjudication; the right to advice and representation; belong as much to their neighbours, family and friends as they do to the tabloid's latest quarry. If we can make this message resonate and address the flaws in the system as we find them, then governments will be better equipped to rise to that perpetual challenge: of safeguarding individual liberties; of meeting forcefully the invidious effects of crime; of finding the right and responsible balance.

Rob Hulls MP
Attorney-General

Letter to the Editor

O Tempora, O Mores!

Dear Editors

I sometimes find myself, like a frightened forest dweller, watching as one by one all of the mighty trees of tradition which have sheltered me and my forebears over the years are cut down by would-be improvers. At this year's Bar Dinner I saw one more such leafy glade deforested and sent off for pulping.

As a barrister I believe in the rule of law and am fiercely proud of our democratic traditions. Whilst the self-seeking demagogues who pollute the benches on both sides of Parliament in Spring Street and Canberra may be free with our democracy, I for one thought that the Victorian Bar would never do the same in order to pander to the whims of would-be improvers. To my disappointment, there was no Loyal Toast at this year's Bar Dinner. This was a small thing I know, but sometimes small things are important. Perhaps my memory is mistaken, but as I recall it the Republican Vote was roundly defeated at the referendum, now only a few years ago, and Queen Elizabeth II remains our head of state. We all know that the office of QC was rudely abolished by our State Government, showing its usual scant regard for the dictates of voters. But how sad I was to see the harmless but honourable tradition of the Bar toasting our sovereign cast into the rubbish heap by the Victorian Bar Council without any cause, let alone any democratic mandate, to do so.

I will not dwell at any length on the guest speaker's speech. Like most war stories of an accomplished advocate it had its moments, but I thought it a very poor substitute for the Junior Silk speech. The tradition of a speech being delivered by the most Junior Silk (and before that the most Junior member of Counsel) praising our Honoured Guests at the Bar Dinner, albeit praise mingled with the odd gentle jibe, was a splendid tradition. If sometimes the humour was a tad coarse, no offence was ever intended and none sensibly could be taken. How all too easy it is for us as barristers, let alone those of us who have become Judges, to puff ourselves up with self-importance, and how helpful it is to be reminded on occasion that we are all fallible, and often funny, human beings. But no, no longer can the Victorian Bar give or take a joke. We are now all too lofty and our personalities all too eggshell. Let us hereafter confine ourselves to safe popularist topics when speeches are made lest there be some faint fear of giving offence.

No doubt the Bar Council will say, as was in fact said that night, that the large numbers of attendees at the Bar Dinner, some 400 with a long waiting list, was thanks to the new format. But that is merely bald speculation which would never be admitted in any court which I know. None of the persons I spoke to at the Dinner even hinted at that being the reason for their attendance, and indeed several indicated to me that they were there in spite of the changed format rather than because of it. And so as another year slips by, the would-be improvers leave an ever-growing swathe of devastation behind them and I sometimes wonder if soon there will be no traditions left. This will no doubt make the would-be improvers happy in their bland, sterile conformist world to come.

Yours faithfully

Marcus Tullius Cicero

Report of Disciplinary Proceedings

UNDER section 166 of the *Legal Practice Act 1996* ("the old Act"), the Victorian Bar Incorporated ("the Bar"), as a Recognised Professional Association, is required to publish the following information in relation to an order made by the Legal Profession Tribunal that a legal practitioner who is a regulated practitioner of the Bar was guilty of misconduct. Schedule 2, clause 8.3(2) of the *Legal Profession Act 2004* ("the new Act") provides for the Victorian Civil and Administrative Tribunal ("VCAT") to hear and determine a matter that was pending in the Legal Profession Tribunal immediately before the commencement day (of the new Act) as if (a) the matter were a proceeding commenced at VCAT; and (b) the old Act continued to apply in respect of the matter (both substantively and procedurally).

On 6 March 2006 the Civil Division of VCAT in its Legal Practice List made the following orders against Gregory S. Lucas.

1. Name of Practitioner: Gregory S. Lucas ("the practitioner").
2. Tribunal Findings and the nature of the Offence:
   The practitioner pleaded guilty of one charge, namely that:
   (a) He was guilty of misconduct within the meaning of s.137(a)(i) of the old Act in that he wilfully or recklessly contravened or failed to comply with s.314 of the old Act by engaging in legal practice without holding a practising certificate for the period 1 July 2005 to 27 October 2005.
3. The orders of VCAT were as follows:
   (a) The charge of misconduct by the practitioner found proven.
   (b) The practitioner is fined $5,000.00.
   (c) The practitioner is ordered to pay the Victorian Bar's costs of the proceedings, fixed at $4,400.00.
   (d) A stay of three months is granted in relation to payment of fine and costs.
4. No notice of appeal against the orders has been lodged. The time for service of such notice under the old Act has expired.

Barristers Acting as Migration Agents

THE *Migration Act 1958* restricts the giving of "immigration assistance" and the making of "immigration representations". The Act permits individuals to be registered as migration agents with the Registrar of Migration Agents. A person who is not a registered migration agent must not give immigration assistance, and must not ask for or receive any fee or other reward for making immigration representations.

The Act recognises the position of persons who are qualified as lawyers and admitted to practice as legal practitioners. The provisions of the Act do not "prohibit a lawyer from giving immigration legal assistance" including legal representation in certain situations "before a court".

Some barristers are registered as migration agents. As such they have the right to appear before migration tribunals where the right to appear is confined to migration agents. This raises the question of whether a barrister (registered as a migration agent) can also do other work traditionally carried out by a migration agent, such as the giving of "immigration assistance"?

The Ethics Committee considers that where such other work involves filling in forms, or corresponding with the Immigration Department, and attending to other administrative or documentary requirements, that is work ordinarily done by migration agents or solicitors who are migration agents and is not work that should be done by a barrister even if that barrister is registered as a migration agent.

Rule 118 states:

> A barrister shall not be engaged in any vocation incompatible either with his or her position as, or with the proper discharge of his or her duties as, a barrister. In engaging in another vocation, the barrister should have regard to the following considerations:
> (a) another vocation must not be such that a barrister's association with it may adversely affect the reputation of the Bar or the barrister's own reputation;
> (b) another vocation must not prejudice a barrister's ability to attend properly to the interests of his or her clients.

The Committee takes the view that the "vocation" of a migration agent does not create an incompatibility within Rule 118. The Committee proceeds on the assumption that registration as a migration agent is necessary if a barrister seeks to appear as a barrister in certain migration tribunals. In that situation, registration may be seen practically as a qualification needed in order to appear or advise in connection with an application.

The ethical difficulty arises in a different way. It arises where a barrister wishes to do the work of a migration agent, not for the purposes of immigration legal assistance, but for immigration (non-legal) assistance.

The Committee considers that Rule 120 applies in these situations. It provides:

> A barrister shall not act as, or perform the work of, a solicitor, save as permitted by these Rules.

Rule 120 prohibits a barrister from performing the work of a solicitor and applies to a barrister whether acting in the course of his/her practice as a barrister or otherwise. It reflects the undertaking by each member of counsel given to the Bar Council upon signing the Bar Roll.

If a barrister who is a migration agent is required, for example, to undertake work that may be characterised as solicitors' work (such as preparing application forms for a visa application — see the definition of "immigration assistance" in s.276 of the Act) the Committee's view is that the work will be prohibited by Rule 120. That view is strengthened when regard is had to the possible problems that can arise when barristers perform such work, for example, dealing with trust moneys.

Further, Rule 128 states:

> A barrister who is asked by any person to do work or engage in conduct which is not barristers' work, or which appears likely to require work to be done which is not barristers' work, must promptly inform that person:
> (a) of the effect of Rule 120; and
> (b) that, if it be the case, solicitors are capable of providing those services to that person.

The Committee's view is that, in any particular case, a barrister who is acting as a migration agent must comply with this rule whenever it appears likely that the work will involve the work of a solicitor.

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Court of Appeal

Justice Robert Redlich

In welcoming him to the Supreme Court on 11 November 2002, Jack Rush QC said of Justice Robert Redlich:

> Your Honour's thoroughness and attention to detail in the preparation and presentation of a case have been likened to that of a Swiss master craftsman who takes a clock apart completely so as to know every tiny piece and then puts it all together again.

Those who have appeared before his Honour in the 3½ years since Jack Rush spoke those words are unanimous in the view that his Honour has taken that same thoroughness and attention to detail with him to the Bench.

Those who appeared before him in the case of *R* v *Lam & Ors* speak of his Honour's complete dedication to the job in hand and his capacity by reason of that work ethic combined with intellect and courtesy to repeatedly give prompt and unchallengeable rulings (some 31 of them) on difficult and complex issues.

The editors are aware of at least one counsel in that case — losing counsel – who consistently referred to his Honour's mastery of the detail of the case and to the huge workload which his Honour imposed upon himself during the conduct of that trial.

His Honour has shown himself not only to be a first class lawyer, with a first class mind but also a first class trial judge. He is also a man who lacks a large ego or a sense of self-importance. He does, however, have a fierce commitment to justice and the rule of law. There are many who regret that he will no longer be available as a trial judge.

No doubt now he will be able to burn the midnight oil reading Appeal Books rather than transcript. The intellectual rigour which he has shown as a trial judge (and which he showed as counsel) will have a new outlet.

We welcome his Honour's appointment.

Court of Appeal

Justice Marcia Neave

JUSTICE Marcia Neave, recently appointed to the Court of Appeal has had, on any account, a stellar legal career. She attended Melbourne University Law School from which she emerged with the Supreme Court prize. In so doing, she collected more exhibitions than any other student since Sir Zelman Cowen. Upon discerning this, Sir Zelman, who was Dean of the Law School at the time, offered her a tutorship immediately — and without interview. She proceeded to write the first Australian casebook on the law of property with Ronald Sackville, now a Justice of the Federal Court. It was acknowledged widely as a huge and brilliant work — even if some like me, who were not much interested in property law, rather suffered through it.

Justice Neave left Melbourne University to become Dean of Law at the University of Adelaide. She was one of the first three women in Australia to be appointed to a Chair in Law. After five years there she returned to a personal Chair in the Law Faculty at Monash University. She has been appointed a Fellow of the Hauser Global Law Faculty at New York University Law School, one of only two Australian academics to have been so recognized. She is also a Fellow of the Academy of Social Sciences in Australia, a distinction she shares with a number of other judges including Justice Paul Finn of the Federal Court, Justice Michael Kirby of the High Court and retired Justices Sir William Deane, Sir Anthony Mason and Sir Ninian Stephen.

In parallel with her distinguished academic career, Justice Neave has demonstrated a continuing, practical commitment to law reform. She was for a time Director of Research with the NSW Law Reform Commission. She headed the Victorian Government's inquiry into prostitution in 1985, an appointment greeted in the *Herald-Sun* under the headline "Mother of Two to head Brothel Inquiry." From 1986–1992, she was a part-time Commissioner of the old Victorian Law Reform Commission. She headed

the Commonwealth Administrative Review Council for five years until 2000. She was appointed Foundation Chair of the reconstituted Victorian Law Reform Commission in 2000, a position she occupied until her nomination to the Bench.

She was made an Officer of the Order of Australia in 1999. Her citation read: "For service to the law, particularly in relation to law reform in the area of social justice as it relates to issues affecting women, and to legal education." In 2001 she received a Centenary Medal for her work with the Administrative Review Council.

Despite these formidable achievements, Justice Neave's appointment has not been without its critics — and in particular from one columnist in the *Herald-Sun*. Referring to this, the President of the Law Institute, Ms Cathy Gale, in her welcoming speech said that she had been disheartened by the criticism, particularly as it appeared founded on the view that in the appointment of a judge, attitude counted more than experience. She responded "that diversity within an organization is a strength, not a weakness, and I believe that (Justice Neave's) contribution to the Bench will indeed be a great strength".

Justice Neave's contribution, while based on her legal brilliance, is likely to be made on even broader foundations. She brings to her position many personal qualities and an experience of life that qualify her splendidly for judicial office. She is a legal polymath. She possesses an almost unique capacity to master, quickly and confidently, very different areas of legal speciality. This has been nowhere better illustrated than in her recent tenure as Law Reform Commissioner. In that role she has had to conduct inquiries inter alia into the law relating to homicide, workplace privacy, tenancy, sex offences, bail and intellectual disability. It is a measure of her grasp (and that of her research team) that the Commission's recommendations in every one of these areas have been implemented in legislation or are included in Bills which are before the Parliament.

Her Honour has communication skills of the highest order. It is not possible to achieve the outcomes just described unless one is capable of speaking clearly, directly, openly and honestly to the widest diversity of interested parties, whether they be professional organizations, community groups, people suffering disadvantage, members of staff, academics, policy advisers, politicians and many others.

This is accompanied by a rare measure of open-mindedness. Despite the attempt of her journalistic critic to assign her a particular legal or judicial orientation, Justice Neave is well known for her willingness and capacity to approach new problems with intellectual rigour, a commitment to arriving at conclusions based on the interrogation of evidence, self-awareness, and independence of mind. We all have biases. But it is her Honour's ability to see and acknowledge her own, as a precondition to engaging in informed and impartial decision-making, that marks her out.

Finally, Justice Neave brings to her new role a thoughtfully founded and highly developed ethical sense. It was noted several times in the speeches welcoming her appointment that she had been, throughout her career, committed not just to principled decision-making but also to the achievement of justice for people less privileged than herself. This is complemented in her personal life by a commitment to values such as openness, trust, integrity, reciprosity, and respect. It is these qualities, as much as any other in the purely legal sphere, which qualify her for her new appointment and ensure that she will make a most distinguished judicial contribution.

Supreme Court

Honourable Justice Anthony L. Cavanough

ON 16 May 2006 the Banco Court was packed for the welcome to Justice Anthony Lewis Cavanough on the occasion of his appointment to the Supreme Court of Victoria. The Bench was also graced by the presence of Chief Justice Marilyn Warren AC and Justice of Appeal Peter Buchanan, the most senior member of that Court present in Melbourne. This innovation in the conduct of Supreme Court welcomes is to be applauded.

The formal milestones of Justice Cavanough's career are impressive enough. After education at Stella Maris Primary School and St Bede's College Mentone, he graduated from Monash University Bachelor of Economics and Bachelor of Laws with Honours. With his now colleague Justice Kevin Bell he was equal runner-up for the Supreme Court Prize. He served articles with Mr Matt Walsh of Mallesons. After admission to practice in February 1979 he became Associate to Sir Gerard Brennan, then a Judge of the Federal Court and President of the Administrative Appeals Tribunal. He signed the Bar Roll on 19 June 1980 at a celebratory dinner at which Sir Alistair Adam addressed the new readers, the second intake of the Bar Readers' Course. He read with Peter Heerey at Latham Chambers and after a successful practice as a junior, during which time he had six readers, John Buxton, Denny Meadows, Samantha Burchell, Peter Morrissey, Katherine Rees and Peter Gray, he took silk in 1996. He was a member of the Bar Council and served on a number of Council committees, including joint committees with the Law Institute. For three years he served as a sessional Hearing Commissioner for the Federal Human Rights and Equal Opportunity Commission.

Behind the foregoing lies a career at the Victorian Bar of a man whose intellectual capacity, integrity, commonsense and diligence are matched by a warmth, humour and courtesy which have made him many life-long friends along the way.

His time with Sir Gerard Brennan introduced him to the field of administrative law which was to become his great specialty. In the mid 1970s modern administrative law at the federal level in Australia was launched with the establishment of the Administrative Appeals Tribunal and the introduction of the Administrative Decisions (Judicial Review) Act, the Freedom of Information Act and the office of Ombudsman. It usually takes a few years for major legislative changes to work their way into the tribunal and court system. So by the time his Honour joined Sir Gerard, federal administrative law was still in something of a Garden of Eden period (it was much later that the serpent intruded in the form of privative clauses, the mysterious doctrine of jurisdictional error and other complications).

While in Canberra his Honour shared a house with Jack Hammond, another Associate of Sir Gerard's (and the one who had pipped the two second place-getters for the Supreme Court Prize). His Honour's tastes in music were always of a somewhat conservative and middle-brow kind. One night the Cavanough/Hammond establishment was done over. The thief did a thorough job and removed everything that was not nailed down, including Jack Hammond's record collection. But there was one exception. The discriminating burglar left untouched his Honour's Bing Crosby records.

In reading with Peter Heerey on the 12th floor of Latham Chambers his Honour joined a stable from which four have gone on to judicial office; as well as his Honour, they are Justice Sally Brown (Family Court), Justice Susan Kenny (Federal Court) and Justice Kevin Bell (Supreme Court). Comparisons with Mr Bart Cummings spring to mind.

Latham Chambers was one of the first of the modern chambers to be established by the Bar itself outside Owen Dixon Chambers. In the chambers where his Honour read, and stayed (after an initial interlude at Equity Chambers, of which more anon) for his remaining 26 years at the Bar, were Don Ryan (now of the Federal Court) Graeme Thompson, Craig Porter and David O'Callaghan. Others on the 12th floor included Ross Sundberg (now of the Federal Court), Robert Osborne (now of the Supreme Court) Jeff Sher, Richard Stanley, Jack Forrest, Tom Danos, John Emmerson, Chris Jessup (now of the Federal Court) and David Martin. It was a most congenial environment, as witness the fact that most of those not beguiled by offers from Attorneys-General remain there to this day.

In Equity Chambers his Honour joined Father Frank Brennan SJ (St Ignatius Loyola, the founder of the Jesuit Order, was keen for its members to have varied experiences — whether the Victorian Bar, with crash and bash cases in the magistrates' courts, was quite the sort of thing he had in mind must remain a matter for speculation). Others were Colin McDonald, now a silk in Darwin, Gerard Maguire, Mick Dodson and Maureen Smith. In those pre-IKEA days the long deserted chambers were fitted out with desks built by somebody's father, 40-year-old curtains and other fittings consistent with the earnest ambience of socially aware chambers.

A famous chambers-warming party included many Bench and Bar notables from the Celtic Club — Kevin Anderson, Murray McInerney, Jim Gorman, Frank Vincent, Brian Thomson and honorary Celt, Len Ostrowski. Also present was a young James Allsop from Sydney (now of the Federal Court). A Protestant guest (such was the tolerance and generosity of the hosts that even these were included) enquired as to the meaning of the freshly painted "Frank Brennan SJ" on the door. Quick as a flash James responded "Son of a Judge, of course".

The morning after there appeared over the door of the suite a coat of arms with the crossed keys of St Peter. This was removed, but the name "Vatican Chambers" stuck.

His Honour's practice flourished, especially in the field of administrative law, but also in other areas, including some *causes célèbres* such as the *Bank of Melbourne* case (led by Neil McPhee and Joe Santamaria) and *Giannarelli* (led by Peter Heerey). But so successful was he on behalf of clients complaining of breach of natural justice, or very unreasonable decisions on a Wednesday (known in the trade as Wednesbury unreasonableness) that governments, and particularly the Federal government, paid him the sincerest form of flattery by increasingly retaining him.

His Honour was a prodigious worker and burner of much oil at midnight and later. As a natural consequence, he was not the earliest of risers. Once he took silk, his juniors would wait anxiously for the 10 am call: "I'm just getting on the train, can you hold the fort till I get there."

But not all was work. His Honour excelled at cricket and would turn out for the annual Bar v Law Institute fixture. His abiding passion, however, was, and remains, the turf. His Honour's late father, Maurice Cavanough, was the author of the

definitive history of the Melbourne Cup, first published in 1960 and subsequently updated in a further eight editions before his death in 2001.

His Honour each year organises for the Bar's Melbourne Cup Calcutta a table made up of past and present Lathamites and others of similar ilk. His Honour is in charge of all investment decisions, which for a long time have been successful to an extent that would excite envy amongst Macquarie Bank executives (well, almost).

However, the inevitable happened in 2005 and the table became a loss leader. But of course there were no recriminations, and all concentrated on recollection of past glories, which must surely come again.

Of all his Honour's fortunate experiences in the law, none have proved of greater value than his meeting his wife Gabrielle, then a solicitor with Freehills. They were introduced on the steps of the Supreme Court by his old friend Michael Fleming, fellow St Bede's boy, Monash Eco/Law grad, Brennan Associate, Heerey Reader, and Lathamite.

His Honour and Gabrielle have two daughters, the elder of whom is following her parents into the law. At Law School Amanda was given the exercise of writing a headnote. She showed a draft to his Honour. As his many juniors will attest, production of a draft document and a red pen trigger obsessive compulsive behavioural reactions in this otherwise well-adjusted and mild-mannered man. His Honour made many helpful suggestions for the improvement of the content, style, structure, grammar and syntax of the draft. Unfortunately Amanda's lecturer did not greet the settled draft with the admiration one must be sure would be felt by any counsel or judge who read it. A dismal mark was received. Demands on his Honour's time for academic assistance by his daughter have much diminished.

The Bar is delighted with his Honour's appointment and is confident he will add lustre to the Supreme Court of Victoria.

County Court

Judge Paul Grant

HIS Honour Paul Douglas Grant was welcomed to the County Court Bench on 26 April 2006.

His Honour was born and raised in Altona. There is a family connection with the area stretching back a number of generations.

His Honour attended Altona High School and assumed that his destiny lay in teaching. Almost as an afterthought, law was included as a preference and Monash University obliged with an offer to undertake arts and law degrees. His Honour enjoyed his years at Monash, including developing snooker skills, reading the great Russian authors, spending many hours listening to music in the John Medley Library and learning the piano. These extra-curricular pursuits were interspersed with some study before graduating Bachelor of Arts in 1975 and Bachelor of Laws in 1977.

A move to Geelong soon followed. Articles were served at the firm of Fraser Desmond & Hampson, before admission to practice in early 1979, and subsequent employment with Hodges Hall & Co, also in Geelong. Exposure to Court appearance work persuaded his Honour to pursue the art of advocacy.

During this time, and in keeping with a keen sense of social justice, time was also spent as a volunteer and committee member with the South Barwon Legal Service. There was, as always, a full life away from the law. There were many fun-filled times attending card nights that extended well into the following day, as well as impromptu volleyball and three or four-a-side football matches in what was then known as Kardinia Park. Match breaks were regularly taken at the nearby Sawyers Arms.

A crowning moment in his Honour's many sporting achievements came in a cricket match between Geelong lawyers and the local police. His Honour played a masterful opening stand that more than offset the less than effective bowling efforts of his team mates.

In about 1980 serious consideration was given to a position outside the law. Fortunately, his Honour thought the better of it, and instead, decided to try his hand at the Bar. His Honour read with the late Graeme Morrish QC, recognising and learning from his mentor's considerable skills as a lawyer and advocate. They became good friends. The Bar Roll was signed in June 1980 and it marked the beginning of an enduring interest in the criminal law. A busy criminal practice was soon established.

His Honour's legal career took another turn in 1985 when he joined up with friends Peter Gordon and Rob Stary at Slater & Gordon, to set up a branch office in Footscray. Together they built up a bustling legal practice. There was further work as a volunteer, this time with the Western Suburbs Legal Service. It was an exciting and rewarding time. It also provided opportunity to put some polish on snooker skills at the Footscray Mechanics Institute. And one cannot forget the many lively discussions enjoyed with friends over chocolate cake at the famous Cockatoo Cafe.

In 1988 His Honour was appointed a Magistrate and sat in the City Court and the Children's Court. The first years on the Magistrates Court Bench were a valuable and enjoyable learning experience under the auspices of such learned Magistrates as John Dugan and, as she then was, Sally Brown, now her Honour Justice Sally Brown. There followed nine years at Broadmeadows with Bob Kumar, a person who had greatly impressed his Honour when he appeared in his Court as counsel.

In 2001 his Honour became the State's co-ordinating Magistrate and in 2003 came appointment as Deputy Chief Magistrate. In 2004 came appointment as supervising magistrate for Koori Courts in Victoria. This role was tackled with his Honour's customary enthusiasm, visiting Koori Courts throughout the State and working with elders. In the role of President of the Children's Court, his Honour hopes to expand the Children's Koori Court to rural areas.

Throughout his legal career, his Honour has exhibited a tireless and enthusiastic commitment to social justice. This has in part been evident by membership of the Victorian Death Review Committee, the Community Council Against Violence Working Party, advisory group for health services for abused Victorian children, and the Metropolitan Regional Aboriginal Justice Advisory Committee.

His Honour continues to enjoy a range of interests outside the law, including membership of a particular bookclub whose members include a number of brother Judges.

Despite deep affiliation with the Western suburbs, the "Dees" hold unswerving support. It is rumoured that a Melbourne guernsey presented at a milestone birthday remains one of his Honour's prized possessions.

His Honour is a proud family person. He is devoted to his wife and friend Lisa, and to sons Tom and Phil. They have recently returned from an inaugural overseas holiday and eagerly look forward to many further overseas travels together.

His Honour is widely regarded in the legal profession as a fair-minded, compassionate and good lawyer. There are countless friends within the legal profession, as well as registrars and court staff of the various courts in which his Honour has worked to date.

His Honour acknowledged at the Welcome his very positive impression of the way his friend, Magistrate Bob Kumar, treated all people who came before him with respect, regardless of background or circumstances. It is this very same quality in his Honour that endears him to so many. The role of President of the Children's Court was previously held by her Honour Judge Coate. She is widely recognised as having led the Children's Court with distinction. The Bar is confident his Honour will prove a worthy successor and will further enhance the reputation of that Court. The Bar wishes his Honour a long and fruitful career on the Bench.

Court of Appeal

Justice Stephen Charles

ON Thursday 6 April 2006 a large body of judges, practitioners, family and friends gathered in the Banco Court to farewell the Honourable Justice Charles upon his retirement from the Supreme Court of Victoria.

His Honour was appointed a Justice of Appeal on 13 June 1995, one of the three new members of the Court appointed directly from the Bar, the other two members being Winneke P and Callaway JA. In relating aspects of his Honour's background, the Chairman of the Bar, Kate McMillan S.C. said:

> Your Honour's education as a boarder at Geelong Grammar School came at considerable family sacrifice and personal effort. The Solicitor-General has detailed the merit scholarships won by you at school. After school, you worked for a year as a labourer on the Snowy Mountain Scheme to raise money to go to the University.
>
> With your brothers, Arthur and Howard, still at Geelong Grammar School, your family circumstances did not allow you to remain in residence at Trinity beyond your first year.
>
> For the remaining three years of your law course, Your Honour was received into the family of an old school friend and fellow law student — now retired Associate Professor Charles Coppel, who is in court today.
>
> Professor Coppel is the son of the late Dr E.G. Coppel KC, a brilliant legal scholar and barrister, one of very few to earn the higher doctorate, Doctor of Laws.
>
> Dr Coppel served for several years as an Acting Judge of this Court, and was honoured for his services to the law by being made a Companion of the Order of St Michael and St George.
>
> Many of Dr Coppel's friends from the Court were regular visitors to the Coppel home. Thus Your Honour got to meet and know Judges such as Tom Smith and Sir Alistair Adam — also Sir Richard Eggelston of the Commonwealth Industrial Court and several members of the High Court.
>
> As a student, and as a recent law graduate, Your Honour played a role in the movement to abolish the White Australia Policy.
>
> In 1958 and 1959, Your Honour and Professor Coppel served as President and Secretary respectively of the Melbourne University Students' Representative Council.
>
> With the conservative Bolte and Menzies Governments in Melbourne and Canberra, the Melbourne University SRC was the radical leader in the National Union of Australian University Students. Your Honour and Professor Coppel strove mightily in urging the NUAUS to come out against the White Australia Policy. Queensland, in opposition, threatened secession from NUAUS. But ultimately opposition to the policy was carried.
>
> Your Honour was also a member of the small Immigration Reform Group, which in 1960 published a paper against the White Australia Policy: Control or Colour Bar.
>
> The diverse group included academics and recent graduates — it included Sir James Gobbo; Justice Howard Nathan; Professors Vincent Buckley and Hume Dow, both of the English Department; and Professor Max Charlesworth of the Philosophy Department.

His Honour had an outstanding career at the Bar. Ms McMillan said:

> After your reading period with the late Mr Justice Harris of this Court, Your Honour's practice soon took off — although you were not always in the high-flying commercial and civil jurisdiction. It has been said that in your early years at the Bar, Your Honour specialised in prosecuting dirty books and

plays for the then responsible minister, Ray Meagher. Your readers and colleagues recall the many exhibits lying about your chambers. "The Lecherous Milkman" was one.

The harvest of one extensive government sweep of the porn shops filled your chambers with glossy magazines in sealed plastic covers. Not all visitors to your chambers at that time visited you for your ready smile and dazzling wit. Even the visible covers were decidedly distracting. At the hearing, there were three bundles of the choicest samples, still all sealed and stapled up for prosecution, defence and the court. Your Honour raced through the exhibits and it is said that the learned Stipendiary Magistrate nearly did himself an injury, hastily wresting with the staples, trying to keep up with Your Honour's presentation of the case.

Back to more serious matters — Your Honour was the first-ever Assistant Honorary Secretary of the Bar Council — appointed in 1966. Then, in 1967, upon your election to the Council, you became Honorary Secretary.

With only a couple of breaks, Your Honour was a member of the Bar Council from 1967 to 1986. You served as Chairman of the Bar Council from September 1983 until March 1985.

Your Honour served many years on several Bar Council committees. In particular, you chaired the Ethics Committee and you were Chairman of the Company Law Committee for six years.

As well as your work and career at the Bar, Your Honour was a lecturer in mercantile law at the University of Melbourne. You also taught mercantile law and principles of property and conveyancing in the Council of Legal Education Course at the Royal Melbourne Institute of Technology — an outstanding teacher in a constellation of extraordinarily good teachers, including Sir Daryl Dawson teaching introduction to legal method, Sir Edward Woodward teaching torts, Justice Chernov teaching equity, and Mr Ray Dunn teaching criminal procedure.

In 1987, Your Honour succeeded Chief Justice Michael Black of the Federal Court as Chairman of the Readers' Practice Course Committee. You chaired that committee for five years. Your Honour and Chief Justice Black were prime movers in the establishment, and the first 12 years, of the Readers' Course. You still teach in that course.

From 1996 to 1998, Your Honour chaired the Steering Committee for the landmark report Equality of Opportunity for Women at the Victorian Bar. No doubt prior to undertaking your equality work Your Honour made full disclosure of the equality reigning in your own home as highlighted in the article entitled, "These Four Men Cook Dinners for Their Wives" published in the *Australian Women's Weekly* on 20 July 1966.

Although such role-reversal-aberrations occurred only at three monthly intervals, this was afforded a full-page spread with colour photographs!

The dinners did not continue after the article but they had served a purpose. Your Honour had progressed from "sherry soup" — described as little more than Bonox, water and sherry — to your final effort, a decorated standing crown roast with sophisticated embellishments.

Both in the establishment and development of the Readers' Course and in the area of equality of opportunity, Your Honour changed the landscape of the Bar. You did so with your customary charm, grace, sensitivity and modesty. As the Solicitor-General has observed, you smoothed the way for a high level of survey responses from judicial officers and courts. Nationally, you served on the council of Australian Bar Association for three years and as President in 1985–86.

Before your appointment to the Court of Appeal in 1995, Your Honour was a member of the Commonwealth Administrative Review Council for four years and a member of the Victorian Barristers Disciplinary Tribunal for five years.

Your Honour's appointment in 1995 as a foundation member of the Court of Appeal was greeted with acclaim by the legal profession and particularly the Victorian Bar.

The Chairman then referred to his Honour's career on the Court of Appeal citing the decision in *Cleane Pty Ltd* v *ANZ Banking Group Ltd* [1999] 2 VR 573. She continued:

> Your Honour's judgment, with which President Winneke concurred, was adopted by the English Court of Appeal in *Locabail (UK) Ltd* v *Bayfield Properties Ltd.*
>
> The issue was automatic disqualification of a judge for financial interest where the judge held shares in a corporate party to the case at hand.
>
> The High Court in *Webb* v *R* had rejected the "real likelihood" or "real danger" of bias test applied in the House of Lords. That divergence remains — the test in Australia being reasonable apprehension by a fair-minded lay observer.
>
> However, the English Court of Appeal quoted from Your Honour's judgment in *Cleane* and adopted the principle of a case-by-case assessment of the apprehension of bias.
>
> The English Court of Appeal judgment in *Locabail* was delivered in November 1999. It was not until June the next year that the High Court heard the appeal in *Cleane*. It was heard with *Ebner* v *Official Trustee in Bankruptcy* (2000) 205 CLR 337.
>
> The majority judgment in the High Court noted, with interest, the adoption of Your Honour's judgment by the English Court of Appeal and noted also that court had included Chief Justice Lord Bingham, who had contributed a chapter on judicial ethics to Cranston's *Legal Ethics and Professional Responsibility*, addressing the issue of disqualification.
>
> Subject to the different test for apprehended bias, the High Court adopted the English Court of Appeal formulation based on Your Honour's judgment and upheld the Court of Appeal decision in *Cleane* on that basis.
>
> There is a certain novelty in being upheld on the basis of a foreign decision that followed the decision being appealed.
>
> I should say that there is no truth in the rumour circulating that those in attendance today are entitled to one CLE point!

With a touch of humour the Chairman said:

> Your Honour's skills and abilities surfaced early in life. As a student, Your Honour committed to memory all the songs and patter of Tom Lehrer. The introductory patter about Lehrer states: "Even before he came to Harvard, he was well known in academic circles for his masterly translation into Latin of *The Wizard of Oz*, which remains, even today, the standard Latin version of that work."
>
> In your retirement, you may consider spending a pleasant evening with the three retired Jurisprudential musketeers (The Honourable John Batt, the Honourable J.D. Phillips and the Honourable William Ormiston) debating the faithfulness of Mr Lehrer's Latin *Wizard of Oz*. You could distract Mr Justice Callaway from his continual work in the Court by referring to him any infelicities in Mr Lehrer's Latin.
>
> Maybe you could even sing a few Lehrer songs together — "Be Prepared" and "Poisoning Pigeons in the Park" — and perhaps "We Will All Go Together When We Go".
>
> Lest I be misunderstood, I should explain that the latter song refers, not to recent retirements, but to the threat of nuclear holocaust. However, the song is thus:

We will all go together when we go!
All suffused with an incandescent glow!
There will be no more misery
When the world is our rotisserie?
Universal bereavement:
An inspiring achievement!
Yes, we will all go together when we go.

The Chairman concluded:

In your capacities as barrister, teacher, leader of the Bar and judge, Your Honour has been an outstanding person. In undertaking all of your roles, you have brought to the task an enviable depth of intellectual rigour and you have applied yourself assiduously throughout your career. In addition, you have earned a reputation for unfailing courtesy and charm, together with an unparalleled ability to remain calm at all times.

Your farewell today gives the Bar an opportunity to acknowledge and thank you for your valuable and significant contribution to the administration of justice, to this Honourable Court, to the legal profession and to the public.

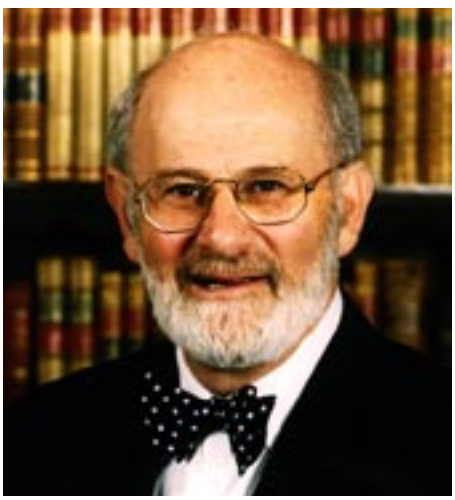
The Victorian Bar wants you to know that it holds Your Honour in the highest esteem, that you have our respect and our gratitude and that it regards you as one of its much loved sons.

On behalf of the Bar, I wish Your Honour a warm and affectionate farewell from this Honourable Court and I trust that you and your wife, Jenny, enjoy a long, happy and satisfying retirement.

Afterwards his Honour and his wife hosted a large gathering in the library of the Supreme Court. His Honour had declared that it would be the first and last time they could host such a function in one of Melbourne's finest rooms. Within weeks, his Honour was on a flight to Prado in Italy where he was to be a guest lecturer in comparative criminal law. We are sure that his Honour's wide range of interests from art to golf will well occupy him in the years to come.

Supreme Court

Master Bruce



THE law relating to costs is fundamental to the administration of justice in our society. It regulates both the nature and level of the charges that can be made by practitioners to their clients; and, the costs and expenses that can be recovered by parties to litigation pursuant to court orders made in their favour. There is perhaps no other subject which creates such confusion and friction between practitioners and their clients. Historically it has been something of a public relations nightmare for the profession.

So far as the Bar is concerned there is usually to be found a general air of lofty disdain in relation to the subject. For example, when asked by clients about the financial consequences of party/party and solicitor/client costs differential we are all too frequently minded to say that the question should be directed to our instructors because it is really solicitors' business!

However, the problem is more widespread. Roger Quick, writing in his preface to one of the two leading textbooks on the subject[1] has observed:

> In Australia there is currently little understanding of the law of costs. In the past solicitors have understood it better than either barristers or judges. Numerous things have meant that of recent times knowledge of this area of the law has declined even among solicitors; these include the use of costs draftsmen to draw bills of costs between parties to proceedings because of the intricacies and complexities of the scales of court costs with which such bills must comply, or increasing use of time costing systems to calculate solicitor and client costs which do not require a knowledge of the legal principles underlying the assessment of costs, and the absence of any recent comprehensive statement of the law of costs,

This was Tom's special field of expertise. He served the Supreme Court of Victoria for more than 32 years as its Taxing Master, a curious title which immediately engenders fear in many lay clients — "not another tax"! It makes sense, however, if one of the meanings of its Latin root is kept in mind — *taxare*, to appraise or assess. And that is what Tom did: appraise or assess bills of costs in the astonishing number of between 1000 and 1500 a year.

There must be something very special about the office because in just over 100 years since it was established in 1905 we have only had five Taxing Masters. The first two, Morris Phillips (1905–1923) and Edgar Trebilco (1923–1943) between them served for 42 years.[2] Then Louis Oliver (1947–1961) served for 14 years[3] followed by Cyril Fyffe who served for 12 years.

I venture to think that the principles and practice of the Taxing Master's Office underwent a greater change under Tom's regime than had happened in all of the years prior to his appointment. There was also a dramatic increase in the burden of work that the Taxing Master was required to perform as the size and business of the Supreme Court expanded to its present levels.

So far as the Bar is concerned, in Tom's time we have experienced the end of brief and refresher fees; the recognition of daily and time based fees; the abolition of the two-counsel rule (the compulsory retainer of junior counsel to appear with

silks); the abolition of the two-thirds rule (junior counsel charging two-thirds of their leader's fee); the requirement to detail the tasks and the time taken for their performance; etc. etc. The result is that the taxation of barrister's fees has become far more complex than it ever was before Tom's time.

There have also been the elaborate legislative changes requiring legal practitioners to provide costs information to clients; and the detailed regulation of costs agreements. These changes appear in the *Legal Practice Act 1996* and the *Legal Profession Act 2004* as well as earlier legislation. Then again with the collapse of legal aid schemes there has come the judicial recognition of litigation funding and various "success fees" which would have mortified Tom's predecessors. Tom also had to grapple with the impact on cost assessments of all of the modern office information technology systems and all of the current forms of electronic communications and research. These changes have added considerably both to the Taxing Master's workload and to accommodating them to traditional costs principles.

In *Dimos* v *Watts*[4] Ormiston JA described Tom as "... one of the most experienced taxing officers in the common law world …", as indeed he was, but in addition he was as well one of the most learned, hardworking and efficient Taxing Masters. What characterised his approach to the taxation of costs, as everyone who appeared before him quickly learned, was careful preparation and a meticulous attention to detail informed by a complete understanding of the underlying principles of this area of the law which he drew from all over the Commonwealth. For him this area of the law was no arcane mystery, as it may seem to others, but a vital aspect of the administration of the law as indeed it is. Tom realised that at the end of the day it was his unique task to achieve a fair balance between the interests of successful and unsuccessful litigants; and, between practitioners and their clients. This task he carried out with consummate ability, flair and courtesy. He would speedily deal with the often mundane, but nevertheless important, items in a bill, but when it came to a point of principle or a novel point he expected thorough researched argument after which he would deliver ex tempore reasons.

His remarkable success as a Taxing Master can be measured in various ways. Under the Rules of Court[5] the Taxing Master can be required to review items ruled on in a taxation and to give written reasons for the decision on review. This was a right not often exercised. Further if the decision on such a review was thought to be unsatisfactory then the matter could be further reviewed by a Judge,[6] usually sitting in the Practice Court. During Tom's 32 or more years there were very few such judicial reviews and even fewer that ever found their way to the Court of Appeal. Indeed the statistics show that overall the number of judicial reviews of his rulings were insignificant; and, the success rate of those reviews were minuscule compared to the numbers of taxations which he conducted over the years. Then again if the unqualified respect and trust of the profession is any guide then Tom had it to the full, I take leave to say that few judicial officers of our Court have enjoyed such a reputation.

Tom's personal background and some humorous and other anecdotes about him can be found in Kate McMillan S.C.'s splendid and well researched farewell speech which she delivered on behalf of the Bar at his retirement sitting. It is easily accessible on the Bar's website. What I wanted to record here is nothing about that urbane, cultured — essentially European — man with multi-faceted interests in music and the arts; or, his long time and rich contribution to tertiary education, but rather of the marvellous unsung but critically important role that Tom played for such a long time in the administration of justice in this State.

I have known Tom for a very long time. We were contemporaries at the Melbourne University Law School. After graduation I indulged myself for a time in the groves of academe. He became a solicitor. Later when I underwent, if that is the appropriate verb, articles of clerkship I had a desk in a corner of his office. Although I was formally articled to one of his partners I really served my articles under his guidance and I learned a lot from him.

So having thus confessed my long-standing association with Tom I nevertheless take leave to think that I am correct in saying that he was by far the best Taxing Master that has served any Australian Court.

I have only one reservation, it is this. Because Tom's rulings on a multitude of important questions of practice and principle have been but rarely challenged, the corpus of his learning is denied to most of us. To put it another way, the fact that you can ransack the reported and unreported decisions of the Supreme Court of Victoria and find little in the way of any judicial consideration of Tom's rulings means that most of us are denied access to this rich resource which was built up over so many years. If only he would follow in the tradition of Phillips/Trebilco and Oliver, and produce a text on costs we would be even more grateful to him than we are for his long judicial service.

Notes

1. Quick and Gainsworthy, *Quick on Costs* (1996, looseleaf). The other is Dal Pont's *Law of Costs* (2003).
2. And between them they produced three editions of Victoria's first specialist text on the subject, Phillips and Trebilco's, *Bills of Costs* (1916), (1924) and (1932).
3. He also wrote a text, *The Law of Costs* (1960), which supplanted Phillips and Trebilco's work as the then leading text on the subject in Victoria.
4. [2000] VSC 154 at [24].
5. Order 63.56.1.
6. Order 63.57.

Family Court

Justice Alwynne Rowlands AO

LAST OF THE ALL-ROUNDERS

EARLY this year Justice Alwynne Rowlands AO retired as a Judge Administrator and Judge of The Family Court and as a Presidential Member of the federal Administrative Appeals Tribunal after a long and distinguished legal career. While in the federal jurisdiction he mostly sat in Sydney, after 1989, where he now lives with his wife, Marelle, although they spend some months each year in their holiday house at Blairgowrie. He last sat in Melbourne as the presiding judge in the Full Court in 2005.

Prior to the Family Court he was on

the County Court and was the foundation President of the Victorian AAT (the predecessor of VCAT). The latter was an exciting time as FoI opened the workings of the Victorian Government to the public gaze, much to the delight of the newspapers. That was a period of front-page headlines. The Family Court, of course, ended all that.

The President of the New South Wales Bar Association, Mr Michael Slattery S.C., said at the Judge's Sydney farewell:

> It is particularly important that a judge have what we at the Bar rather like to think of as a judicial temperament. On the Bench your Honour undoubtedly represented and represents a model of fine judicial temperament, unfailing courtesy, a true judicial gravitas and the succinct judgment which were the hallmarks of your Honour's judicial style … Your Honour's approach has always been to attend directly and exactly to the legislation you were called upon to apply, and to avoid the merely adventurous. Your Honour once described the role of judges as that of non-political professional umpires who call the shots as they see them rather than as they may desire them.

The judge has described judicial independence as independence from the executive but not from the law.

Probably the judicial work Alwynne Rowlands most enjoyed was that of Judge Marshal of the Royal Australian Navy and then Judge Advocate General of the Australian Defence Force, in the period from 1987 to 1996, because of his long-time association with the Naval Reserve in which he is the only reservist to have been confirmed in the rank of Rear Admiral.

In 20 years at the Victorian Bar, culminating in silk in 1982, Justice Rowlands had an even broader practice than his range of judicial appointments suggest.

Early, when practising criminal law he did 12 rape cases in 12 months (1968), more than a decade later he did 12 national wage cases for the Federal Government. Along the way he had a large common law circuit practice in the Western District and did a series of high-profile marine cases, generally acting for the Seamen's Union. These included the Hobart Bridge, the Noongah, the Straitsman, the Blythe Star and the Melbourne/Evans court martial. He also did administrative law matters and the academic and medical salaries enquiries.

This was all mixed with planning cases with clients as diverse as BP and the National Trust. Once, as he passed a BP service station in Richmond, he said to his three young children, "that's your father's contribution to the aesthetics of Melbourne". Nonetheless, Diana proudly followed her parents into the law, Rebecca and Rosalind preferred economics and industrial design respectively. At present the retired Judge has six grandchildren and is hopeful of more.

Among his happiest memories are the social life of the Bar during the sixties and seventies. This included circuit, the old common room (where you sat at table in order of arrival — High Court Judge alongside reader), restaurant lunches with the "red faces" and sailing on the Bay and the Gippsland Lakes.

He had four readers: Maguire, P.W. McDermott, G.M. McDermott and Devries and warned them all against narrow specialisation.

At the farewell in Melbourne, Judge Wood, in purple, sat with a Full Court of the Family Court to represent the County Court. Kirkham QC spoke for the Bar and the Defence Force.

The Bar wishes Alwynne Rowlands all the best and hopes that he enjoys retirement as much as he obviously did the life at the Bar and on the Bench.

Farewell

Brian Shaw QC

BRIAN Shaw retired from full time practice at the end of April 2006. He graduated from the University of Melbourne with first class honours degrees in both Arts and Law. He won the Final Honours Prize and the Dwight Prize, as the top history honours student and he won the Supreme Court Prize as the top student in Law. He went to Oxford and placed first there also in a competitive Bachelor of Civil Law class, winning the Vinerian Scholarship.

Brian was admitted to practice on 2 March 1959, signed the Roll on 3 April 1959 and took silk in 1974. He read with Sir Ninian Stephen. Upon retirement, Brian had been in practice more than 47 years, and of that, more than30 years as one of Her Majesty's counsel. He was also admitted to practice as a silk in every other Australian State.

Brian served as Chairman of the Bar Council for two years (1981 to 1983) and before that as Vice-Chairman for two years (1979 to 1981). He has been the leading taxation silk in Australia and prominent in all areas of commercial practice.

During Brian's most recent appearance before the High Court, in *Commissioner of Taxation* v *McNeil* on 14 June 2006, Justice Gummow summarised the significant contribution Brian has made to the legal profession, as follows:

> Before we adjourn there is one further matter that should be said. The Court understands that this may be the last occasion on which it would have the assistance of leading counsel for the appellant. Mr Shaw signed the roll of counsel as long ago as 3 April 1959. Shortly thereafter, he

first appeared in this Court. He was led by Gillard QC in the case of *Ferrum Metal* 105 CLR 647. The judgment in the present appeal, when it comes to be reported, will appear, I imagine, in volume 225 or thereafter of the *Commonwealth Law Reports*. Thereby hangs a tale. In the last 45 years Mr Shaw has appeared in more than 80 cases in this Court which have been reported in the *Commonwealth Law Reports*. The Court acknowledges with gratitude the assistance provided over that period and wishes Mr Shaw well.

On behalf of the Bar, I wish Brian a long and satisfying retirement.

Hartog Berkeley

HARTOG Berkeley retired from full time practice at the end of June 2005. Hartog was admitted to practice on 1 June 1959 and he signed the Roll on 25 June 1959. He took silk in 1972. He read with Tom Hughes in Sydney and William Harris in Melbourne. He was admitted to practice as a silk in every other Australian state.

Hartog is well remembered by his friends and colleagues at the Bar, not only for his colourful and engaging personality but also for his formidable and forceful reputation as a barrister and as a leader of the Bar. He was generous with his time in assisting other members of counsel and has given a lifetime of service to the Victorian Bar.

Hartog served as Chairman of the Bar Council for two years (1979–1981). He was a member of the Ethics Committee and its Chairman for two years (1976–1977). He was President of the Australian Bar Association for two years (1979–1981) and he was Solicitor-General for the State of Victoria for ten years (1982–1992).

Hartog's substantial contribution to the Bar is illustrated not only by his contribution to the Bar Council and the Ethics Committee but also by his contribution to many other Bar committees, some of which were (but not all) as follows: the Practice Sub-Committees-Causes (1972–1973), the Legal Aid Committee (to December 1972), the Accommodation Committee (Chairman) 1973–1976), the Bar Secretariat (1976/77 to 1980/81), the Joint Standing Committees Bar and Law Institute (1976/77 to 1980/81), the Applications Review Committee (May 1976 to June 1977), the Equality Before the Law Committee — Chairman 1993 to 1994 and the Bar Centenary Committee (1984, 1980/81 and Chairman 1981 to 1984). Also he was a member of the Committee of Management (1979–1981) of the Barristers' Benevolent Association of Victoria and the Bar's Appointee to the Victorian Law Foundation (1979 to 1981). He was also a member of the Past Practising Chairmen's Committee, Chairman of the List G (1996/97) and a member of the Board of Examiners as well as its Chairman. He was an ex officio member of the Law Reform Committee (1976/77 to 1978/79) and on the Law Reform Committee Panel–Administrative Law (1993/94).

Hartog was a major "mover" in the acquisition of two substantial pieces of artwork by the Bar. In 1985, a committee comprising Berkeley QC (then Solicitor-General), Shaw QC, Charles QC and Byrne QC was formed to consult with the Victorian Tapestry Workshop and the Silks' Tapestry was commissioned. It is hanging in the foyer in Owen Dixon Chambers West and, it has been said that if you look very carefully, one of the barristers depicted in the Tapestry bears a remarkable resemblance to Hartog. In 2002, Hartog together with Peter Jopling QC, Robin Brett QC, Campbell Thompson and Michelle Gordon persuaded some ninety Queen's Counsel and Senior Counsel to donate $1,000 each for the commission of the sculpture by noted Australian sculptor, Paul Selwyn. The sculpture was unveiled by the Honourable Sir John Young at a reception on 24 March 2003 and it is located in the foyer of Owen Dixon Chambers East.

On behalf of the Bar, I wish Hartog a long and satisfying retirement and I thank him for his substantial contribution to the Bar over his time at the Bar.

Paul Ahearne

Address by Jack Keenan QC at St Patrick's Cathedral on Tuesday 11 April 2006 at the Requiem Mass for the late Paul Ahearne, barrister-at-law.

PAUL Darrell Ahearne was born in Hobart on 10 February 1921. He was the son of a builder. The family came to Melbourne and he went to school at De La Salle College in Malvern.

After his schooling, at the age of 17, Paul started work with the Department of the Treasury Taxation Branch. He remained with Treasury until 1942, when he enlisted in the Royal Australian Air Force. He served in its meteorological service.

In 1943, he was seconded to the 2/12 Field Regiment of the 9th Division, 2nd AIF. He took part in the landings at Lae and Finschhafen, and served in New Guinea 1943 to 1944. He is said to have been one of the pioneers of meteorological co-operation with artillery — and was often behind enemy lines, sending up his weather balloons.

On at least one occasion, he narrowly missed death. He was advancing, and found himself face to face with a Japanese soldier. An Australian voice from behind him called out "Paul! Duck!" He did, and the bullet from a Western Australian kangaroo shooter whizzed over him, cutting down the Japanese soldier.

After the War, he was a student at Newman College within the University of Melbourne. He was a good athlete, and a member of the College athletic team.

He returned to the Treasury Taxation

Branch, and achieved a series of rapid promotions through Assessor grade 2 to Assessor grade 4. He also continued his studies part-time. He graduated Bachelor of Arts and Bachelor of Laws, and had additional subjects in Accountancy with the Commerce Faculty.

Paul served his articles with Gordon Rennick of Rennick & Gaynor — then a solicitor at the Office of the Deputy Commonwealth Crown Solicitor in Melbourne. The Deputy Crown Solicitor then was one E.F. Whitlam, the father of E.G. Whitlam. Paul was admitted to practice on 1 December 1949.

Paul continued with the Crown Solicitor's Office, and achieved another series of rapid promotions from Legal Officer Grade 1 in 1949 to Senior Legal Officer in March 1955.

In September 1957, he became Senior Clerk and Deputy Registrar for Victoria of the High Court of Australia. Melbourne was then the Principal Registry of the High Court, and in those days, the Registrars had judicial functions similar to those of Masters in the Supreme Court.

Paul was High Court Deputy Registrar at the same time that Daryl Wraith was an Associate to the late Sir Douglas Menzies. Wraith says that Paul enjoyed the confidence of all members of the High Court in those busy years.

Paul served as Deputy Registrar until he came to the Bar in March 1965. Paul signed the Bar Roll the same day as Daryl Wraith.

Sir Douglas Menzies, upon hearing of Paul's intention to come to the Bar, called him into his Chambers. Sir Douglas wished him well and gave him a piece of advice: "Put your chest out Mr Ahearne, and keep your head up as a barrister."

Paul read with the late Arthur Webb. He was Webb's last reader, Webb taking silk in December1966.

Upon going to the Bar Paul specialised in taxation and commercial law, and built up a busy practice.

Paul frequently recounted to his colleagues the advice he had received from Sir Douglas Menzies. Those colleagues included the late Judge Jim Howden, Judge Leslie Ross, myself, Arthur Adams QC, the late Julian Zahara, the late Rob Webster and Scottie McLeod retired Magistrate.

This group was known as the "Tall Girls' Club", and Paul, although a Commercial and Taxation lawyer, used to enjoy the camaraderie — and the cut and thrust of the ribbing between Common Law colleagues which so frequently occurred.

We used to congregate at Bell's Hotel after a successful or adverse result of one of our merry band. One way or another, we'd celebrate or commiserate.

Paul's contribution to this Club was always one of measured, detached views of the emotional issues under discussion, such as the shortcomings of Judges and opposing barristers.

The "Tall Girls' Club" was dissolved very publicly by announcement of Judge Howden, in Court, in his remarks at the Ceremonial Sitting to Welcome him to the County Court.

Paul kept up his practising certificate, and was a member of the practising list right up to his death.

He never applied for silk, and said, a little ruefully, that he had never had a silk's income.

In 1998, Paul described himself as "in the sunset years, with numerous erstwhile supporters retired and deceased".

In recent years, he described himself as "still enjoying undiminished intellectual alacrity, but suffering the bitter biased slings of ageism". He described himself varyingly as "the gradually-vanishing semi-retired", "the almost retired — in a protracted swan song" and as in a state of "inchoate retirement". He said he maintained his practising certificate "mainly to cover a continuing pro bono commitment" — a long drawn-out Estates case in which he believed his client was wrongly treated, and for whom he acted without fee.

At the grand age of 85, Paul was surely the oldest person on the practising list. And he practised right to the end. His last fee slip was in December 2005.

All the time he was at the Bar, Paul's measured life was one which saw concentration upon his religious duties. He attended Mass frequently, and I well remember him giving me, some 15 years ago, St Thomas A'Kempis book, *The Imitation of Christ.*

This was a book which was read from daily by St Ignatius of Loyola, who used to encourage others to read it too.

In particular, St Thomas A'Kempis had great devotion to the Blessed Sacrament, and Paul Ahearne had dog-eared pages 443–450 of the copy he gave me. Those pages dealt with the "Blessed Sacrament".

I was able to retrieve, with the assistance of my wife, my copy of this book and I have it here beside me, and I shall always keep it within easy reach for reference as I grow older.

In life, Paul Ahearne was an ardent Collingwood Football Club supporter, a member of the Naval and Military Club and for many years lived with Norma McKinnon, in an inspiring spiritual friendship of mutual support.

That friendship endured many financial hardships because it was one essentially of a close spiritual affinity characterised by constant prayer and consideration for each other and in particular, other persons who were in need of spiritual refurbishment.

In the meantime, he pursued his legal practice in typical scholarly fashion. He was able to quote Latin phrases at will. He performed his work without fear or favour, and was a formidable advocate.

Paul was much inspired by the late Bishop Fulton Sheen, I am told that in the last few weeks when he realised that his tenure of life was limited, he prayed to the soul of the late Bishop Fulton Sheen in the hope that some miracle might deliver him from the ill-health which had overcome him. He was much taken by the compulsive oratory of that exceptional Bishop, who is remembered from the 1950s and 60s as a mesmerising radio, and even perhaps television, figure — putting so eloquently the doctrines and teachings of the Catholic Church. He was in effect a Billy Graham of the Catholic Church. I am told he visited Australia and that Paul remembered well, for one short moment, seeing the Bishop in Melbourne.

Paul Ahearne leaves behind him memories of intellectual jousts, religious faith, a well-versed legal mind, and a compassion for others based upon a sincere, deep religious conviction that the hereafter was to be sought more than the here and now.

The restless search for money, social position, and judicial appointment which beset so many of us in practice at the Bar, did not trouble Paul Ahearne.

May his dear soul rest in peace and our deep sympathy is extended to his soul mate in a very real sense, Norma McKinnon, and to his brother Max's family: Tony, John, Elizabeth, Margaret, Gerard, Damian, Pauline and Maureen — and to their families.

LAW WEEK ORATION 2006

Defending Unpopular Causes in a Climate of Fear

Lex Lasry QC

THAT I am delivering this lecture in 2006 is a great honour for me. Apart from the distinguished company in which I am making this speech, it is a particular honour to be doing so the year after it was delivered by Professor Tim McCormack.

Tim and I have not known each other all that long but in a short time we have formed a strong friendship and since I have known him, Tim's compassion and depth of intellect have always amazed me.

In 1963 Martin Luther King wrote a book entitled *Strength to Love* in which he asserted that:

> The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.

I chose tonight's topic particularly with lawyers in mind, because where the unpopular cause is embodied by an individual accused of serious crime, it is inevitably left to lawyers to defend them. We do live in times of challenge and controversy.

Because an undermining of the rule of law and due process has been led by the United States in recent times, I want to refer to some of the unpopular causes in which lawyers in the US have distinguished themselves and where the rule of law has been defended. I take three examples.

In the 1840s, the United States lawyer William Seward, who later became Abraham Lincoln's Secretary of State, defended a black man named William Freeman, who had stabbed four white people to death and wounded several others. One of the miracles of the case was that Freeman got to trial without being lynched by the local community, bent on

Lex Lasry QC

revenge. At trial, Seward established that Freeman was in fact insane. In the course of the trial, when addressing the jury the following inspirational words came from Seward:

> I plead not for a murderer. I have no inducement, no motive to do so. I have addressed my fellow-citizens in many various relations, when rewards of wealth and fame awaited me. I have been cheered on other occasions by manifestations of popular approbation and sympathy; and where there was no such encouragement, I have at least had the gratitude of him whose cause I defended. But I speak now in the hearing of a people who have prejudged the prisoner and condemned me for pleading his behalf ...

And, immortalised by Hollywood, who among us old enough to recall could forget the 1950s movie with Spencer Tracey and Frederick March "Inherit the Wind", depicting the great Clarence Darrow in the *Scopes* trial in Tennessee in the early 1920s. Darrow was defending a teacher, John Scopes, who was accused of breaking a state law by teaching Darwin's theories of evolution and had the rare privilege of cross-examining the prosecutor — something I have long wanted to do.

In the 1930s lawyer Sam Leibowitz, a Jewish New Yorker, went to Alabama and defended the "Scottsboro Boys" — nine young black men who were accused of raping two white women and who, in those days, were lucky to make it to trial before being lynched. They were in fact innocent — a little like the famous middleweight boxer Rubin "Hurricane" Carter who served many years gaol for a murder he did not commit, despite the exposure by Bob Dylan in his song "The Hurricane". The important thing about Sam Leibowitz was that he did his job under threats of death and courtroom attacks requiring state troopers to protect him because of both his cause and his religion.

And presently as we speak, Clive Stafford Smith — British lawyer now in the US with our own Richard Bourke — has done in excess of 300 death penalty cases in Louisiana and Texas, acted for British detainee Moazzam Begg, recently released from Guantanamo Bay, and now represents most of the other Guantanamo detainees.

The unpopular cause has been described as a vital respect in which the law must serve our society, which is often misunderstood by the layman and almost as often disregarded by the lawyer. In the criminal law such unpopular causes, in the form of publicly maligned accused people, are required to be defended regardless of the means of the accused and certainly regardless of the offence they are alleged to have committed.

In 1963 the US Supreme Court in *Gideon* v *Wainwright* overturned that Court's earlier view of the entitlement to counsel under the 6th Amendment to the US Constitution and extended it

to all indigent accused. And in 1992 the Australian High Court effectively agreed in *Detrich* v *R* and it was one of the great humanitarian judges of that Court, Justice Deane, who specifically echoed the sentiment expressed 20 years earlier in the US Supreme Court.

In her researches on this topic of defending unpopular causes, Professor Abbe Smith from Georgetown Law School has come to the view that the promise of the US Supreme Court in *Gideon* v *Wainwright* has not been met in the US.

One of the authorities she relies upon for that conclusion is Stephen Bright who in 1994 was the director of the Southern Center for Human Rights in Atlanta, Georgia, and Visiting Lecturer in Law at the Yale Law School. He had been involved in representation of those facing the death penalty at trials, on appeals, and in post-conviction proceedings since 1979. He wrote a lengthy analysis of some of the very poor quality of representation in capital proceedings under the title "Counsel for the poor: the death penalty not for the worst crime but for the worst lawyer": At the end of his article he concluded:

> So long as juries and judges are deprived of critical information and the Bill of Rights is ignored in the most emotionally and politically charged cases due to deficient legal representation, the courts should not be authorized to impose the extreme and irrevocable penalty of death. Otherwise, the death penalty will continue to be imposed, not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers.

I can recall Clive Stafford Smith telling me that in an early death case he was involved in, the trial lawyer had slept through much of the proceedings. Clive felt optimistic on the basis that he only had to stay awake to do a better job.

Fortunately we do not face that kind of dilemma in Australia.

While I am on death penalty cases, let me refer to a current death penalty case that looks like an unpopular cause right in the middle of the climate of fear.

I have watched on with what I hope is not misplaced professional pride as lawyers who apparently believe in the principle have defended Zacarias Moussaoui, the only person to be charged in an American courtroom in direct connection with the events of September 11.

Can you imagine what it would be like to defend a person who laughed and sneered as the prosecutor played to the jury the recording of people losing their lives in the World Trade Center towers and ridiculing the families of those people as they wept through the proceeding's? He then enters the witness box and jousts, not with the prosecutor but with the defence lawyer. Indeed he agrees with what is being put to him by the prosecutor. In particular, on the question of whether he should be executed, Moussaoui apparently said that he would try to kill Americans if his life was spared finishing with the phrase "Any time, anywhere."

And one of his defence counsel was Gerald Zerkin who is publicly criticised by his client for being both American and also for being Jewish, carrying on the Sam Leibowitz tradition.

I think that's really what drives the crlminal defence lawyer, the determination that his client get a fair trial ... regardless of the crime, the infamy of the case, the notoriety of the client, the difficulty of the case ... no matter how unpopular you might become by doing it.

And earlier this month that jury in Alexandria, Virginia, said life imprisonment rather than death. Perhaps some of them thought there had been enough death.

In this era that case was probably the epitome of an unpopular cause within the fear of terrorism. The US Government spent four years and millions of dollars prosecuting this man who did not in fact participate in the attacks on September 11. He was in custody at the time. Georgetown Law Professor David Cole pointed out when interviewed on Australian radio that the absurd part about this was that the Americans have Khalid Sheikh Mohammed, the alleged mastermind of the September 11 attacks, in custody at Guantanamo Bay. He has been there for three years. However, they can't try him because he has been tortured and his trial, at least in any civilian criminal justice system, would turn into a trial of the US Government and their interrogation techniques.

In Australia the willingness of lawyers to defend unpopular causes has usually been in good supply. A privilege of being Chairman of the Victorian Criminal Bar Association is leading a group of lawyers who do this kind of work day in and day out and often for very limited reward.

A local example, still talked about, occurred 40 years ago in March 1966. Three Victorian barristers represented two small-time criminals who broke out of Pentridge Prison in December of 1965, allegedly killing a prison warder in the escape and a second person while on the run.

Phil Opas QC and Brian Bourke defended Ronald Ryan; Jack Lazarus defended Peter Walker. The case changed Opas' professional life and he left the Bar. Ultimately it ended Ryan's life on 3 February 1967; he was the last person to be hanged in Victoria. In magnificent fashion Brian Bourke just keeps on going.

Contemporary colleagues of mine continue this tradition. For example, Chris Dane QC vigourously defended Bandali Debs, ultimately convicted of the brutal murder of the two police in Moorabbin. Before he was DPP, the late Geoff Flatman (later Justice Flatman of the Supreme Court) defended in the Walsh Street murder trial. Amidst a media frenzy Colin Lovitt QC defended Greg Domaszewicz at the murder trial and inquest into the death of Moe toddler Jaidyn Leskie. Lovitt's attitude to such cases hit the mark when he said: "I think that's really what drives the crlminal defence lawyer — the determination that his client get a fair trial ... regardless of the crime, the infamy of the case, the notoriety of the client, the difficulty of the case ... no matter how unpopular you might become by doing it."

These were all cases where public notoriety was extreme. Everybody had a view and few of those views if any were sympathetic.

However, unpopular causes are not only represented by clients who have already been publicly condemned as dangerous, guilty and unworthy by the media and police before they stand trial.

There are different unpopular causes that also need to be defended in a climate of fear — the rule of law itself; due process and the independence of the judiciary.

The role of lawyers in the 21st century is changing in response to the challenges directed at the rule of law as Australia becomes dominated by pragmatic social conservative governments both at a State and Federal level.

We are now without enough politicians as leaders who will take an idealistic risk and lead the nation on human rights

and civil liberties. Instead the economy, fear of terrorism and border security dominate. Our Federal leaders have a well developed, carefully spun instinct for job preservation and they watch the public mood with great care. They react to it by the development of policy which will meet with electoral approval based on economic prosperity, making little allowance for the idealism which might lead the community to social improvement.

And so the security of political incumbency is underpinned by, among other things, a climate of fear of terrorism and more generally a fear of "the other" (whether it be on the basis of religion, race, ethnicity or political beliefs).

It is lawyers, particularly those concerned with the criminal law and other human rights issues, who must become more involved in the debate because it is lawyers who understand the consequences and the potential of the erosion of the individual freedoms we take for granted. And that means unpopular causes.

It might be the defence of those charged with terrorism or it might be the public debate which has been magnificently led by Julian Burnside QC on the sorry state we now have in Australia where, authorised by the judgment of the High Court in *Al-Kateb* v *Goodwin* in 2004, a person can be detained indefinitely in immigration detention.

So far as those charged with terrorist offences are concerned, defending the unpopular cause is now hampered by the 2004 National Security Information (Criminal Proceedings) Act. That Act among other things provides that the Federal Attorney-General is entitled to be treated as a party to criminal proceedings, thus signalling to the jury that the particular matter is so serious that it requires not just the Commonwealth Director of Public Prosecutions but the assistance of Phillip Ruddock himself.

The practical effect of that legislation is that during such a trial in which the Attorney-General is participating, if the counsel for the accused wants to ask questions of a particular witness or to adduce particular evidence, and the Attorney-General believes such evidence might in some way jeopardise national security, he can halt the proceedings in order to issue a certificate which would require the court to be closed and a secret hearing conducted from which the accused might be excluded to decide whether the evidence could be called.

The judge is required to give primary weight to the Attorney-General's certificate in deciding whether or not to admit the evidence. That certificate cannot be challenged. In May 2005 this Act was extended to all civil litigation rather than just criminal trials. That means that those who wish to challenge preventative detention or control orders may be precluded from dealing with the material on which they were detained or controlled.

In circumstances where Federal politicians compete with each other only to demonstrate who could be tougher on terrorists or refugees and who see lack of significant public sympathy for such people, it is left to lawyers to make the public argument which is often a defence of the rule of law itself. It is left to lawyers to remind the community about the rule of law. It is the role of lawyers to remind the community that due process has a meaning which is critical to avoiding the abuse of executive power. In the current climate of fear this is the sometimes unpopular cause.

Fifty-six years ago courageous Australian lawyers, including the great Ted Hill QC and Ted Laurie QC, then juniors rather than silk, stood in the High Court in November and December 1950 representing the Australian Communist Party itself and various trade unions who successfully challenged the validity of the Menzies Government's *Communist Party Dissolution Act* of that same year. The Act was largely based on the naval and military defence power of the Commonwealth under section 51 of the Constitution

At the time there was a deep and public fear of communism. Winston Churchill had coined the phrase "iron curtain" in a speech in 1946 and spoke of the risks of Soviet expansion. The Soviet Union blockaded Berlin from 1948 to 1949. Australian troops were in Korea and the People's Republic Of China came into existence. Joe McCarthy, the Senator from Wisconsin, had begun his campaign of vilification and the FBI had started to inquire into whether certain movie stars were communists.

In an article published last year in the *University of Western Sydney Law Review*, Justice Michael Kirby referred particularly to the Communist Party Dissolution case. He placed it into a personal context which was that he was then 12 years old and his great uncle, who was a decorated Gallipoli veteran, was also an idealistic communist.

Very briefly, one of the interesting things about that case in the modern climate is that the *Communist Party Dissolution Act*, had it survived the challenge, would have both instantly dissolved the Australian Communist Party, and also provided a procedure by which groups of persons possessing communist affiliations or connections could be the subject of an application to the Governor-General in Council to be declared an unlawful association. When you read the case you will see a different method but some interesting parallels between the criteria for selection of organisations that might the subject of such a declaration and the modern efforts under the criminal code to broadly criminalise organisations which can be designated as terrorist.

As Justice Kirby noted, the majority of the Court intellectually led by Justice Owen Dixon held that the Act was unconstitutional. Justice Kirby drew attention to the dissenting judgment of the Chief Justice, Sir John Latham, and particularly his quote from Oliver Cromwell saying that "being comes before well being" — a quote which implied that the very existence of the Commonwealth of Australia was under threat.

It is left to lawyers to remind the community about the rule of law. It is the role of lawyers to remind the community that due process has a meaning which is critical to avoiding the abuse of Executive power. In the current climate of fear this is the sometimes unpopular cause.

In my own time I remember several causes that were extremely unpopular. One such cause was the opposition to the war in Vietnam. Still feeling the effects of the communist threat and in an "all-the-way-with-LBJ" atmosphere, which bears a striking resemblance to our present relationship with the Bush White House, Australia sent troops to prop up a corrupt regime in Saigon, supposedly to prevent the communist invasion from the north — the domino theory prevailed. A favourite act of resistance of mine during that period was by the great Mohammed Ali who risked everything rather than accept compulsory enlistment in the US Army. In passing I have to admit that his world title fight against George Foreman in what

was Zaire in 1974 is, to me, perhaps, the most inspiring sporting event in modern history.

Of course ultimately that cause converted from an unpopular cause to a popular cause. The Whitlam government was elected and then was quickly floored and defeated by a man I detested at the time and who I now admire enormously for his outspoken courage — Malcolm Fraser has become our conscience.

The most recent trigger point for the change of climate was obviously September 11. Now in this country the pressure from the fear of terrorism seems to me to have caused our community to lose a further degree of its sense of moral outrage at some of the developments which are occurring in the name of defending public safety.

For example, that public fear has triggered a debate about whether torture might in some circumstances be not only tolerated as a necessary evil, but even legally recognised and supervised.

As American congresswoman Jane Harman found out, it is now necessary to think like a post-9-11, lawyer. She asked a Dick Cheney staffer whether he was worried that the Vice-President might be charged after shooting his hunting partner in the face. She was told that her problem was that she was examining the matter like a pre-9-11 lawyer. Post 9-11, the Vice-President had all the constitutional authority he needed to take that shot!

Now there are several categories of unpopular causes that require urgent defence. Regrettably the rule of law may be the most unpopular cause that requires defending in these modern post 9-11 times.

One of the arguments that has been raging in the United States in recent times has been the extent to which the Authorization to Use Military Force given to President Bush a week after September 11 in 2001 permits curtailment of statutory rights by allowing so-called warrant-less wire-taps in the US and the establishment of the demonstrably unfair and unjust (to the extent there is any difference) military commissions at Guantanamo Bay. But as the rule of law and due process is compromised in the name of the war on terror, we would do well to consider the principles under which the Nazi leaders were dealt with at the end of World War II. This was a catastrophic regime for Europe and the world, and at the insistence of the United States war crimes trials were held for the very reason articulated so clearly by Justice Robert Jackson when he opened the Nuremburg trials in November 1945 and emphasising the need for fair trials said:

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.

So, my topic is not just about defending unpopular causes. It is about defence in a climate of fear — currently, the fear of a random terrorist attack as occurred in September 2001 in the US.

As many have observed because it is obvious, fear weakens the determination to protect rights where an assurance is given that to diminish those rights will protect us and, in any event, if you have nothing to hide you won't need those rights anyway. And people buy that logic.

Thus, we are kept in fear of terrorism though no terrorist attack has yet occurred on Australian soil.

On the strength of that concern the support for a US President who seems almost devoid of principle or talent for his office reached record highs. Now with incompetence after *Hurricane Katrina* and the American public seeing the dishonesty of the rationale for the war in Iraq and the deaths of many American servicemen, let alone Iraqis, the support has reached record lows.

Here in Australia, such momentum as the Federal Opposition had generated prior to the *Tampa* incident and 11 September quickly dissipated and has never returned and neither has the idealism — it is just too risky. Me-too-ism is safer.

All this occurred under the stewardship of a Prime Minister who quickly recognised the benefits of incumbency and the ease with which frightened voters would be content to empower police forces and intelligence agencies in a way they could not previously have dreamed of.

One feature of what is happening is a government and social tendency to exclude particular groups from the entitlement to basic human rights. That is said to be necessary because we live in different times. The case of David Hicks is such a case. This case is poisoning our credibility.

Those who defend the present arrangements accuse him of being a terrorist and deserving of the fate that has befallen him. But just examine a few features of the military commission process that he has been trapped by and ask yourselves why our government not only condones the process as fair but encourages it, demonising Hicks himself for daring to pursue habeas challenges in the US courts.

Through weakness or wilful blindness, the Australian government (unlike the British Government) simply refuses to engage on this issue. The Prime Minister looks into the lens of the camera with that slightly angular expression he gets and says "We disagree that it is unfair" and after all if he did not go through this process he could not be charged with anything here and since we have spent so much time demonising him, we couldn't have that, could we? For those concerned about due process and the rule of law, the sight of John Howard and George Bush fawning over each other last week is almost too much to bear.

However, there are a few problems with the Hicks case that have made it harder for the Australian government to demonise him in order to demonstrate that he deserved his punishment even if it was not imposed after a trial.

The first problem is that David Hicks is an Australian with an ordinary decent father who has stood with his son at every step of the way. Australians like that.

The next problem is that for obvious reasons there are no Americans at Guantanamo Bay and when, by some oversight, they have found their way there they have been quickly pulled out and placed into the US civilian system.

And the English don't like Guantanamo Bay; they do not think it's justified and all their citizens have been released. And nuisances like Attorney-General Lord Goldsmith and Lord Steyn have expressed their outrage publicly about the way the system at Guantanamo works.

Thirdly, there is another nuisance known as Major Dan Mori of the US Marine Corps. He may not be photogenic, but he is made for television. He is articulate, reasonable and everybody loves him.

And worse for the Government, Major Mori is credible — why? Because he is a marine doing his job. Whenever I have made speeches about this case I am regularly asked about what is happening to Major Mori's career? It is assumed it would be under threat. The Australian government's support for Guantanamo is unsustainable. In many ways the unpopular cause has become popular because many

Australians see the injustice. So what does the Government do? They just ignore it and hope that this flawed process will find Hicks guilty of something — anything — and then they can say it wasn't a trophy trial — whoops, sorry — wrong trial.

On a topic dear to my heart let me demonstrate how pragmatism and the desire to capitalise on the fear of terrorism has compromised the Prime Minister. The topic is capital punishment. Australia abolished capital punishment in the 1970s by, among other things, a Federal Act of Parliament. In 1990 we ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights. That protocol is aimed at the abolition of the death penalty as a matter of human rights and human dignity. Mr Howard's position? He is against the death penalty for pragmatic reasons — what are they? Mistakes can be made — never mind the principles. He is against the death penalty for Australians. Whether he likes it or not his message to the electorate is that he is for the death penalty for terrorists and Saddam Hussein. Why? Because he knows that a large proportion of Howard's battlers feel that way and rather than lead on principle he compromises Australia's standing on the issue.

These days another sometime unpopular cause is the defence of our judiciary in the face of regular, populist and sometimes hysterical criticism. Within the modern media there is now an outrage Industry. One of the results of this outrage industry is that comments about the criminal justice system which would normally attract condemnation are forgiven — indeed pass without comment, signifying acceptance.

It is very much an issue in the United States. The Executive Director of an organisation known as "Justice at Stake", Bert Bradenberg, in referring to the US criminal courts says we are in a cycle of public criticism of judges at the moment. Criticism, he says, is not a bad thing. Judges are public servants and certainly not beyond criticism. However, the point he makes is that unlike previous eras there is now an outrage industry in tabloid newspapers and cable news services. In ensuring that the role and independence of our judges is protected and thus the rule of law itself is protected, this is something that we as lawyers must be careful of.

The outrage industry that operates both in the US and here tends to be triggered by a particularly bad case where a horrible crime has been committed and a judicial decision has, for example, excluded important evidence or imposed a lenient sentence. The outrage will be manifested as either complaints about the sentence imposed, or the fact that a criminal has been allowed to go free. Rather than reporting the detail of how the decision or sentence came to be passed, and exercising their editorial judgment by educating the public about the importance of an independent judiciary, the media solution is often to turn the judge into the villain. The idea is to exclude him or her from the mainstream and accuse the judge of being unaccountable.

Attacks on judges like this are very harmful because they undercut the credibility of the courts and they empower governments to accept the public assertion often beginning with victims groups that judges are out of touch with the community.

Judges are human — I do not have any doubt that some judges and magistrates are influenced by this pressure. However, often the result of the public discussion is that politicians begin an analysis of how the discretion of judges can be contracted with measures like minimum mandatory sentencing.

In addition, recently, we had to endure the Commissioner of the Australian Federal Police suggesting that in a trial where a jury had heard all the evidence that his police could find against Jack Thomas and brought back a verdict of "not guilty" on the two most serious counts, the jury had somehow got that wrong. It was time, he suggested, that more inadmissible evidence was put before juries so they could know the full story and would not be embarrassed when they acquitted accused people in ignorance of that evidence. And who expressed outrage about that? Me. That was it.

We simply must defend the independence of the judiciary and the criminal justice process at all costs. It is our most important means of preserving the rule of law. Political interference with the process is per se to be regarded as undesirable, particularly when supported by law enforcement agencies. I have been to countries where judges are compromised and once that happens, public confidence in the system collapses and the risk of anarchy is high. Sierra Leone is such a place.

There are a huge range of causes to be defended both individual and Institutional. We as lawyers have the responsibility to conduct that defence and we should do it with pride. As Mohammed Ali would say:

Me; we.

The Essoign Wine Report

By Andrew N. Bristow

NARKOOJEE PINOT NOIR 2004

NARKOOJEE is a boutique winery, which was a dairy farm owned operated by Edna and Athelstone Friend, since the early 1940s. Their son Harry planted the first experimental vines in 1980. Narkoojee means "place of flowers".

The 2004 Pinot Noir grapes were picked on 7 April 2004 during vintage conditions that were very cool. This produced grapes with full, ripe flavours and excellent acid retention.

This wine has a bouquet of mulberry, blackberry and black cherry with hints of toasted oak and tobacco.

The wine colour is a deep red cherry.

The wine is rich, full-bodied with full flavours of mulberries, blackberries and black cherries, mouth filling with fine astringent tannins following through to a long sharp finish on the back palate. It is heavier than the usual Pinot. Someone who likes the Shiraz will like this wine. It has 13.5% alcohol. It is ready to drink now and will improve with age with its deep fruit and strong tannins. It is available from the Essoign Club at $36.00 a bottle or $7.50 a glass (or $30.60 takeaway).

I would rate this wine as a junior commercial barrister, a bit expensive now, but probably able to justify the price in a few years time.

The Dreyfus Affair

Julian Burnside

ONE hundred years ago, in July 1906, Alfred Dreyfus was finally pardoned. The affair which bears his name had lasted 12 years before Dreyfus was vindicated.

On 26 September 1894, the French Intelligence Service intercepted a message which had been sent to Lieutenant-Colonel von Schwartzkoppen at the German embassy in Paris. This document — later known universally as the *Bordereau* — demonstrated that someone on the general staff of the French Army had leaked important military secrets to the Germans. An analysis of the contents of the *Bordereau* suggested that the author must have been an artillery officer and must also have spent time in four other sections of the army.

Colonel Sandherr was asked to investigate the matter and examined a list of artillery officers to see whether any of them fitted the profile of the probable author. He lighted on the name of Alfred Dreyfus, an artillery officer and a member of the general staff. Sandherr was openly anti-Semitic. He noted that Dreyfus was a Jew and did not pursue any further possible suspects. He reported to the Minister of War, General Mercier, that the spy in the army ranks was Captain Dreyfus.

A handwriting expert from the Bank of Paris was asked to examine the *Bordereau* to see whether it had been written by Captain Dreyfus. He said it had not. Commandant du Paty de Clam called Dreyfus in and asked him to take some dictation, on the pretext that he, du Paty, had injured his hand. On this feeble pretext, he dictated a note which included a number of the key words from the *Bordereau*. At one point during this minor farce, du Paty waited until Dreyfus crossed one leg over the opposite knee and then asked some pointed questions. His theory, as he explained later to the court martial, was that any increase in Dreyfus's heartbeat would be reflected by corresponding movement of the leg draped over the opposite knee. As he noted no such response to his pointed questions, he inferred that Dreyfus was not only a spy but also dangerously able to disguise his own emotional reactions.

The sample of Dreyfus's handwriting, obtained in this peculiar way, was shown to a self-styled handwriting expert, one Bertillon. Bertillon had devised a method of handwriting analysis based on statistics and, knowing in advance that the army wanted Dreyfus's writing to correspond with that in the *Bordereau,* he found it to be so. He later explained in his evidence to the court martial that the obvious differences between handwriting in the *Bordereau* and Dreyfus's own handwriting, could be explained by the fact that Dreyfus had cunningly developed the skill to imitate the handwriting of others. Thus, the greater the difference between Dreyfus's handwriting and the writing in the *Bordereau*, the greater the evidence of Dreyfus's deceit and dissimulation.

Even General Mercier could see the weakness of the case against Dreyfus. He equivocated, realizing that to charge Dreyfus and fail would be a disaster for the army. The proceeding would reveal that there was a spy in the army, and a failed prosecution would reveal the inability of the army to hunt out the spy and bring him to justice. But his hand was forced. On 31 October 1894, word was leaked to Edouard Drumont of *La Libre Parole* that a Jewish officer had been arrested on a charge of espionage. *La Libre Parole* was a fiercely anti-Semitic newspaper and it published the allegation and Dreyfus's name. It then pursued a campaign of public vilification of Dreyfus. The campaign formed the backdrop against which the court martial took place, from 19 to 22 December, 1894.

Dreyfus was represented by Edgar Demange, one of France's finest trial lawyers. Demange asked that the court martial be held in public. The request was refused. Colonel Picquart attended the hearings of the court martial on the instructions of General Mercier. He reported that the prosecution was not going well, and that the judges appeared to be hesitant about Dreyfus's guilt. Accordingly, General Mercier instructed Major Henry to provide a secret dossier to the judges. Major Henry approached the judges out of session, and told them that it was essential for national security that the existence of the documents not be disclosed either to Dreyfus or his counsel. The secret dossier included documents forged by Major Henry himself.

The documents in the dossier quickly convinced the judges that Dreyfus was guilty. After being stripped of his rank and publicly humiliated, Dreyfus was sent to Devil's Island. There he was held in solitary confinement. His only company was the guards, who were forbidden to speak to him.

In March 1896 another document was intercepted by the statistical section. That document, later known as *le Petit Bleu* identified the spy in the French Army as being Major Walsin-Esterhazy. Colonel Picquart, who had been instructed to investigate the background of the Dreyfus Affair, was thus able to compare Esterhazy's writing with the handwriting of the *Bordereau.* Having previously been convinced that Dreyfus was guilty, Picquart was soon convinced that Dreyfus was innocent.

By September 1896, Picquart was trying to convince the senior officers of the general staff that Dreyfus was innocent. Unfortunately for Picquart, and for Dreyfus, the officer who worked most closely with Picquart in his investigation was Major Henry. Major Henry realized that the closer Picquart got to the truth the more exposed was Henry himself, as it was Henry who had forged the documents in the secret dossier. Consequently, Henry set to work falsifying further documents designed to incriminate Dreyfus, and he kept Esterhazy informed of the progress of Picquart's investigation.

In late October 1897, Picquart was transferred from his position and was sent on a series of missions to increasingly remote parts. It was some time before he realised that he had been removed from the investigation without being told.

With Picquart safely out of the way, Major Henry then produced a letter allegedly written by the Italian Embassy to the German attaché, identifying Dreyfus by name as the spy in the French Army.

In the meantime, Dreyfus's wife Lucie and his brother Mathieu had been actively trying to have an inquiry into Dreyfus's guilt convened. Largely because of Mathieu's efforts, a photograph of the original *Bordereau* was published in a newspaper on 11 November, 1897. Thus it was that it was seen by Monsieur de Castro, a South American stockbroker. Remarkably, M. de Castro recognized the handwriting of the *Bordereau* as that of one of his clients, Major Esterhazy. He contacted Mathieu Dreyfus and the campaign then developed a head of steam. Esterhazy was tried by court martial but — astonishingly — he was acquitted, despite all the evidence against him.

On 13 January, 1898, the journal *L'Aurore* published a "letter to the President of the Republic". It was written by Emile Zola. The banner headline read "J'Accuse …!". In the article which has ever since been famous under that name, Zola wrote:

> I accuse General Mercier of having made himself an accomplice in one of the greatest crimes of history …
>
> I accuse General Billot (Mercier's successor as Minister of War) of having in his hands decisive proof of the innocence of Dreyfus and of having concealed them …
>
> I accuse the judges of the (Dreyfus) court martial of having violated all human rights in condemning a prisoner on testimony kept secret from him ...

Together with George Clemenceau, the political editor of *L'Aurore*, Zola forced France to face the fraud which had been worked in Dreyfus's court martial. For his troubles, Zola was charged with criminal libel and was convicted. During that trial, General Mercier swore confidently that Dreyfus was guilty and asserted that the security of France was at stake. The press published the names and addresses of the jurors in Zola's case and reiterated the General's message. Not surprisingly, in these circumstances, Zola was convicted and heavily fined.

On the 30 August, 1898, Major Henry confessed his perjury against Dreyfus and his falsification of the documents. He was imprisoned, but committed suicide while awaiting trial.

A year later, Dreyfus' re-trial took place, at Rennes in Brittany, in order to avoid the passionate atmosphere of a trial in Paris. It is a measure of the level of anti-Semitism still prevalent in France at the time, that Dreyfus was again convicted, by a five to two majority. But he was found guilty of treason "with extenuating circumstances". Just 10 days later, on 19 September, 1899, the President of France signed Dreyfus's pardon. Dreyfus accepted the pardon, but only on condition that he was entitled to continue to pursue a campaign to demonstrate his innocence — a pardon, after all, proceeds from an assumption of guilt.

Six years later, on 12 July, 1906, after a further inquiry, all three chambers of the Supreme Court of Appeal sat jointly and anulled the verdict of the second trial. The court proclaimed Dreyfus innocent.

Dreyfus was subsequently reinstated in the French Army. Notwithstanding all that had gone before, the parliamentary vote on the question of Dreyfus's reinstatement was not unanimous: the Chamber of Deputies voted 432 to 32 and in the Senate the vote was 182 to 30. He saw active service in the First World War and died in 1935.

The possibility of secret trials and trials in which evidence is concealed from the accused and their counsel already exist in Australia as a matter of law. There are several different pieces of legislation which achieve that lamentable result.

In 1943 one of his granddaughters, Madeleine, was deported to Auschwitz where she died. Lucy Dreyfus followed her husband to the grave in December 1945.

Thirty years after the death of Alfred Dreyfus, on 28 October 1965, the Second Vatican Council released its "declaration on the relation of the church to non-Christian religion", familiarly known as Nostra Aetate. In that document, the Roman Catholic Church declared that the death of Jesus Christ cannot be charged against the Jews of today and it actively denounced anti-Semitism. In 1973, the French Republic passed a law prohibiting any demonstration of anti-Semitism. In 1990, Prime Minister Michel Rocard declared:

> In France, anti-Semitism is not a matter of opinion, it is a crime.

Notwithstanding these developments, it was not until September 1995 that the French Army first admitted publicly that Dreyfus had been wrongly convicted. It had earlier refused a gift of a statue of Dreyfus offered to it by Prime Minister Pompidou.

On the 100th anniversary of J'Accuse, the French Parliament honoured Emile Zola's role in the Dreyfus affair. The President, Jacques Chirac, apologized on behalf of France to the families of Dreyfus and Zola.

Two matters made the Dreyfus Affair possible:

(a) a secret trial and the use of evidence concealed from the accused and his counsel, and

(b) racial or religious prejudice which ran so deep as to blind people to any concern about the quality of justice accorded to Dreyfus.

Anti-Semitism no longer exists in any significant measure in Australia, at least not in the virulent form which characterized 19th century France and the first half of the 20th century in Western Europe generally. However, there are other groups who are sufficiently unpopular that, for practical purposes, most members of the community do not regard the rights of those people as mattering. Those unpopular groups include alleged paedophiles, alleged terrorists, Aborigines, people with mental disorders and Muslims. This is not to say that the feeling against each of those groups runs as deep and as strong as anti-Semitism at the time of Dreyfus's trial. But it is strong enough that a large number of people in our society do not regard the rights of those groups as being important enough to deserve recognition or protection.

The possibility of secret trials and trials in which evidence is concealed from the accused and their counsel already exist in Australia as a matter of law. There are several different pieces of legislation which achieve that lamentable result.

Division 105 of the Commonwealth Criminal Code provides that a member of the Federal Police may apply for a preventative detention order in relation to a person. A preventative detention order will result in a person being jailed for up to 14 days in circumstances where they have not been charged with, much less convicted of, any offence. The order is obtained *ex parte* and authorizes that the person be taken into custody. When the person is taken into custody pursuant to the order, they will be given a copy of the

order and a "summary of the grounds" on which the order was made. The summary need not include any information which is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act (2004))* (the NSI Act).

Thus a preventative detention order can be made not only without a trial of any sort, but in circumstances where the subject of the order will not be allowed to know the evidence which was used to secure the order.

Division 104 of the Commonwealth Criminal Code allows a senior member of the Federal Police to obtain a control order against a person. A control order can include an order confining a person to a single address for up to 12 months, without access to telephone or the internet. The orders are obtained *ex parte*. When the subject of the control order is served with the order, they are to be given a summary of the grounds on which the order was made, but not the evidence. Thus, a person's freedom of movement can be grossly interfered with for up to 12 months in circumstances where they have no opportunity to know the evidence on which the order was obtained much less to challenge it. The summary of the grounds on which the order was obtained need not include any information disclosure of which is likely to prejudice national security within the meaning of the NSI Act

That brings me to the provisions of the NSI Act. It is perhaps the most draconian piece of legislation ever passed by an Australian Parliament in time of peace. The Act as originally passed was confined in its operation to criminal proceedings. In early 2005 it was amended so as to extend to civil proceedings as well. It provides that, if a party to a proceeding knows or believes that they will disclose in the proceeding information that relates to national security, or the party intends to call a witness and that witness would, by their presence in court or by the evidence they could give, disclose information that relates to national security, then the party must notify the Commonwealth Attorney-General of the fact. The party must also notify the opposite party and the court. The court is then required to adjourn the proceeding until the Attorney-General acts on the matter. If the Attorney-General chooses, he may sign a conclusive certificate to the effect that the evidence proposed to be called, or the proposed calling of the witness, would be likely to prejudice Australia's national security interests. The certificate must then be provided to the court and the court must hold a hearing to decide whether or not to make an order preventing the evidence or witness from being called.

During that hearing, the court must be closed. The Act authorizes the court to exclude both the relevant party and his or her counsel from the closed hearing in which the question will be decided whether or not the evidence may be called or the witness brought to court.

In deciding the balance between the interests of a fair trial and the national security interests, the statute directs the court to give the greatest weight to the Attorney-General's certificate that the evidence would present a risk of prejudice to national security.

These provisions are immediately alarming to anyone who understands the essential elements of a fair trial. They are all the more alarming when the real breadth of the provisions is understood. Their breadth comes from two things:

(a) the notion "likely to prejudice national security" is defined as meaning that there is a "real, and not merely remote, possibility that the disclosure will prejudice national security";
(b) the definition of national security which means: "Australia's defence, security, international relations or law enforcement interests".

The apparently uncontroversial definition of national security is rendered astonishingly broad by the definition of "law enforcement interests". That expression is defined as including interests in:

(a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;
(b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;
(c) the protection and safety of informants and of persons associated with informants;
(d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.

By reference to this definition, Australia's national security is affected by each of the following things, for example:

(a) evidence that a CIA operative extracted a confession by use of torture;
(b) any evidence which tended to reveal operational details of the CIA, Interpol, the FBI, the Australian Federal Police, the Egyptian Police, the American authorities at Guantanamo Bay, etc.;
(c) evidence which tended to show the use of torture or other inhumane interrogation techniques by any law enforcement agency.

These provisions are likely to have

powerful effect in several types of case. First, in cases of people charged with terrorist offences. In such cases, confessional statements may be received, but evidence that torture or other improper practices were used to obtain the confession may be excluded, in the name of national security. Second, where a person is the subject of a preventative detention order or a control order and they seek judicial review of the order. Third, in cases where a person's ordinary rights have been interfered with because of an adverse security assessment by ASIO. In those circumstances, it may prove impossible to have effective access to the material on which ASIO acted and thus impossible to challenge its accuracy.

There may be examples of the second type, but we are not allowed to know. The secrecy provisions surrounding control orders and preventative detention orders means that, in effect, the general public will not learn of them until many years have passed.

However, examples of the third type can already be identified. An adverse security assessment from ASIO can result in a person's passport being cancelled, or their job application being refused, or (for foreign visitors) a visa being refused or cancelled. In those circumstances, getting access to the material which provided the foundation for the adverse security assessment may prove difficult or impossible. Attempts to challenge the material can be met with a certificate of the Attorney-General.

Adverse security assessments from ASIO create another, related problem. An adverse security assessment will result in the cancellation of a visa or passport as the case may be. Cancellation of a passport may be challenged in the Administrative Appeals Tribunal. The Administrative Appeals Tribunal Act contains provisions enabling the Attorney-General to grant a certificate which, in substance, prevents the applicant "and the applicant's lawyer" from being present in the Tribunal whilst certain evidence is given and submissions are made on behalf of the Government. Here is the text of one such certificate, issued early in 2006:

> I, Philip Maxwell Ruddock, the Attorney-General for the Commonwealth of Australia … hereby certify … that disclosure of the contents of the documents … described in the schedules hereto, and the schedules, would be contrary to the public interest because the disclosure would prejudice security.
>
> I further certify … that evidence proposed to be adduced and submissions proposed to be made by or on behalf of the Director-General of Security concerning the documents … are of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security.
>
> As the responsible Minister … I do not consent to a person representing the applicant being present when evidence described … above is adduced and such submissions are made ….

In those short paragraphs, by official certification, the Attorney-General produces the conditions which led to the false conviction of Alfred Dreyfus. Note that the paragraph which forbids a person representing the applicant being present when evidence is adduced and submissions are made does *not* depend on the identity of the applicant's representative. It is a curious thing that the government's lawyers are to be trusted with sensitive material, but no lawyer acting for the applicant is to be similarly trusted. Thus, the applicant who seeks to have his passport restored will face an impossible burden in knowing what evidence must be called, because he will not know the nature of the case against him, either in advance or by the end of the hearing.

Fair trials are one of the basic assumptions of a democratic society. It seems a pity that we have abandoned the possibility of fair trials, ostensibly to help save democracy from terrorists. These measures suggest that the greatest danger to democracy in Australia is the Federal government. (In case this is seen to be an attack on the Howard government, it is worth noting that the Labor opposition did not oppose the measures.)

In December 2004, the House of Lords decided a case about English legislation which provided for detention of people thought to present a terrorist risk if they could not be deported. In an 8:1 decision, the House of Lords determined that the laws did not comply with the Human Rights Act. Lord Hoffmann said "…the real threat to the life of the nation, in the sense of a people living in accordance with its tradition laws and political values, comes not from terrorism but from laws such as these."

How much more forcefully could that be said of Australia's "anti-terror" legislation.

We have been alert long enough: it is time to be alarmed.

Julian Burnside

First Indigenous Woman at the Bar: Linda A. Lovett

Georgina Schoff

ON 11 May 2006 Ms Linda Lovett signed the Bar Roll, becoming the Bar's first female indigenous member. Twenty-five years ago Mick Dodson — now Professor in Indigenous Studies at the Australian National University — was the first indigenous lawyer to sign the Bar Roll; Lovett is only the second.

Lovett initially trained to be a dental nurse through the Aboriginal Health Service, a career that was interrupted by her decision to start a family. Three children later, she decided to begin a law degree which she completed at Deakin University through the Institute of Koori Education. The Institute put her in touch with other indigenous students studying for degrees at Deakin.

During the second year of her degree Lovett took advantage of the Victorian Bar mentoring program which paired her with her Honour Judge Felicity Hampel, then a silk practising in crime.

Lovett recalls nervously arranging to meet Hampel S.C. in her chambers for what she thought would simply be a quiet chat about her studies. Instead she was amazed to be swept up into Hampel's busy practice. There was a witness to be seen immediately and in the afternoon an appearance at VCAT. On the way back to chambers Hampel gave a radio interview by telephone from her car and the next day Lovett was able to observe her Honour appear in a Supreme Court trial. By the end of the week Lovett had determined that she wanted one day to come to the Bar.

Whilst studying her law degree Lovett gained employment at the Department of Justice in the Indigenous Issues Unit, a position that she enjoyed so much that she almost did not finish her law degree. During that time she was instrumental in establishing the Indigenous Law Students and Lawyers Association, one of 63 initiatives under the Aboriginal Justice Agreement of 2000. Another of those initiatives was the establishment of a scholarship for indigenous law students through the Department of Justice, of which Lovett was the recipient in the final year of her law degree.

Linda A. Lovett.

Having completed her degree, Lovett was offered articles at Victorian Legal Aid. That too was a first for an indigenous lawyer in Victoria. In March 2003 Lovett was admitted to practice as a barrister and solicitor of the Supreme Court of Victoria and obtained employment with Victorian Legal Aid at its Preston office. She soon applied for and obtained a permanent position at the VLA's Sunshine office where she appeared in the Magistrates' and Children's Courts almost every day at contest mentions, bail applications, pleas and extradition hearings. She comes to the Bar with court experience that many other new barristers are yet to gain.

Until she applied to come to the Victorian Bar Lovett had no idea that she was the first indigenous female to sign the Bar Roll. Indeed, she says she was amazed to discover that this was the case. But on reflection she thinks that many indigenous lawyers take up positions within their communities or with government departments where they feel they can work directly with their communities.

Perhaps through her role as a barrister Lovett will have the opportunity to serve the indigenous community as many before her at the Victorian Bar have done. But for now Lovett simply wants to master the skills necessary to practice at the Bar. She hopes to practice in criminal law and to one day prosecute or defend in the Supreme Court. Lovett is reading with Jane Dixon.

Children's Court of Victoria Celebrates its Centenary — and a Baton Change

On Friday 21 April 2006, at a function attended by many members of the judiciary, the Bar, solicitors and government officers, the Children's Court of Victoria celebrated 100 years since its inception in 1906. It marked the occasion by:

launching an exhibition — made possible by the generosity of the Law Foundation of Victoria — of documents, artefacts, photo-graphs, archival and historical material and memorabilia of and about the Children's Court spanning the past 100 years;

announcing the retirement of the outgoing inaugural President of the Children's Court, Judge Jennifer Coate and the appointment of its next President, Judge Paul Grant;

exhibiting and displaying an array of materials to be placed in a time capsule in the Court's foyer to be opened in 100 year's time; and

announcing that the school that won the time capsule competition was Shelford Girls' Grammar (the school had created and produced a video about the operations of the court to be placed in the time capsule).

In honour of the centenary celebrations and to formally launch the centenary exhibition, special guest Attorney-General Rob Hulls gave the following address.

THIS jurisdiction touches the face of human frailty in almost all its forms. In dealing, as it does every day, with the extremities of human experience and their effects on the truly vulnerable, this court has a rare and precious opportunity — the capacity, in a small way, to make good our promise to the next generation.

In a perfect world, of course, we wouldn't need a Children's Court. In a perfect world all children would live free from the long-term poverty, social exclusion, relationship breakdown, family violence, substance abuse, mental illness and disabilities which extract such a heavy toll on families and their most treasured charges.

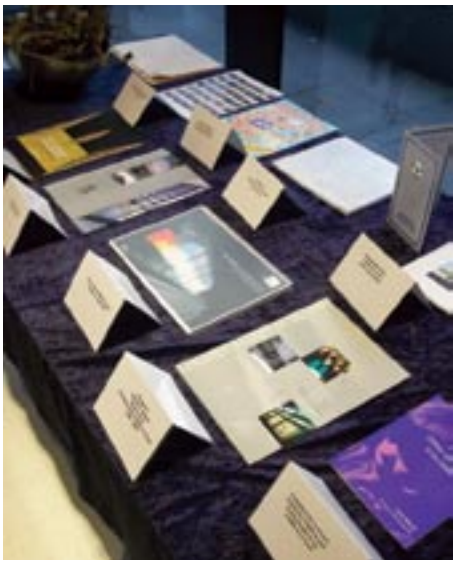
As long as children need to come before this court, however, it is upon us to ensure that they are treated with compassion and in a way that returns to them their opportunity to be children, their opportunity to greet each day in hope, security and innocence. This court is entrusted with a weighty responsibility, and today we can celebrate the fact that it is meeting this obligation better than ever before.

Attorney-General Rob Hulls.

Because of the importance with which the Government views this jurisdiction, when we first came to office we established the Court, until that time a division of the Magistrates' Court, as an independent court. In doing so, we also provided that it be headed by a County Court judge, to be known as the President of the Children's Court of Victoria.

The Court's recent history has been marked by diligence, integrity and imagination, and all who have been involved in its operation over the last few decades should be very proud indeed. This exhibition, however, put together by the Victorian Law Foundation and commemorating the Court's centenary, shows us that these

An enthusiastic crowd of well-wishers at the Children's Court Centenary celebrations.



Time capsule contents.

qualities have not always been present as the jurisdiction has struggled with changing attitudes about poverty, disadvantage, and the very nature of childhood itself.

The exhibits around us are at once sad and uplifting. The concept of childhood was only just emerging at the time this jurisdiction was created and, as this exhibition indicates, before 1906 children were dealt with in adult courts, using the same procedures and often penalties as those meted out to adults. The establishment of a Children's Court, then, was the first step in recognising that youth and consequent lack of power and legal standing meant that children needed care and protection.

We could be forgiven for assuming that this brought an end to the horrendous punishment routinely meted out to children whose only offence may have been begging. It is chilling, then, to read that:

> From 1906, when a child was found guilty of an offence, the Children's Court had the power to … order that the child be whipped ... [to] be done by a constable, parent or guardian no more than three times with a cane.

It is just as sobering to remember that, until the 1960s, believe it or not, the official definition of neglect criminalised children who were simply orphaned, receiving charity or simply deemed to be "uncontrollable". As this exhibition recounts:

> Police dealt with neglected children in the same way as they dealt with children committing crimes. Often, police would … arrest the child on the street. Sometimes bystanders or even the child's parents would report the child ... The police did not need a warrant to arrest a child. The child would be charged with being "neglected" or "uncontrollable".

For the child, this often ended not only in a conviction but in being placed in the care of the state in a children's home or industrial school.

This is, on the face of it, unimaginable to us. Everyone here, whether as professionals or simply as parents, would struggle to fathom how any civil society could conduct itself in this way. Yet it is a phenomenon with which one sector of the population is only too familiar.

The business between Indigenous and non-Indigenous Australia remains unfinished and it is to our collective shame that the establishment of this Court initially did little to ensure fairer decisions about removing Koori children from their families, many being placed in dismal circumstances in reformatories and industrial schools. As the exhibition recounts:

> Aboriginal children being taken by police... would be charged before [this] court with being … neglected and in need of protection and custody. This continued until 1985, [while] before the 1960s, Aboriginal children often appeared … without legal representation.

We owe, as a nation, an enormous apology to the Indigenous children of yesterday — to those who have grown up swimming in grief and who, as adults, still carry their quiet despair. I am proud, therefore, that we have now established the Children's Koori Court to show compassion and respect to the Indigenous children of today and tomorrow: a court that follows in the footsteps of four grown-up and successful cousins and which I hope will go some way to

Minister for Children Cheryl Garbutt receives a DVD to be placed in the time capsule from Shelford Girl's Grammar students Kylie Dolan, Francesca Kopeman and Molly Scanlon.

steering the burgeoning number of Indigenous young people away from the criminal justice system and towards community, hope and home.

This latest development in the Children's Court story shows how far we have come collectively over the past century, and how optimistic we can be about our future.

One of the sources of this optimism, of course, is to be found in the people who contribute to the functioning of this Court and I would like to pay tribute to those groups and individuals: officers from Juvenile Justice; members of the Salvation Army and Court Network who provide invaluable information, advice and support services; Victoria Legal Aid whose duty lawyers serve their clients so diligently; and the interpreters who make sure that the court's proceedings are accessible to all.

It is also my privilege, of course, to thank Judge Jennifer Coate for her magnificent contribution as first President. Judge Coate has served in this jurisdiction since 1995, first as Senior Magistrate, then Deputy Chief Magistrate and, since 2000, has been an exemplary first President.

She has presided over enormous change, from computerisation; the development of judicial and community education programs and guidelines for professionals; and the increase of the age of the court's jurisdiction to 18 years under this Government's reforms; to a range of initiatives which have made the jurisdiction far more effective, accessible and welcoming for those it is designed to help.

Newly appointed President of the Children's Court, Paul Grant.

Judge Coate is someone with outstanding judicial ability who has acted as superb representative of the Court and a powerful advocate for those who lack the capacity to advocate for themselves. She returns to the County Court to expand her judicial experience and, on behalf of all Victorians, I thank her enormously for her unparalleled contribution.

It is also my great pleasure today to welcome Paul Grant, who as you know, was announced this week as incoming President. Paul will bring immeasurable skills, intelligence and compassion to his position and I look forward to the next successful chapter in the Children's Court story on Paul's watch, charged as he is with this crucial responsibility.

There is, quite simply, nothing more important than the opportunities we give our children, and the energy and the faith we invest in the early years of life.

There is a familiar saying that it takes a village to raise a child and, at the dawn of its second century, this Court can and must be a symbol of how we want to raise those who have no choice but to invest their trust in us — of how we accept our obligation to vindicate this trust. In declaring this exhibition open, then, I wish this Court and, more importantly, all who come through its doors a bright, happy and promising future.

The exhibition of the centenary of the Children's Court was exhibited in Bendigo from Law week until 16 June but returns thereafter to the foyer of the Children's Court until at least the end of the year. Members of the public and any interested practitioners are encouraged to view the exhibition of documents and memorabilia over the next six months, after which the exhibition may tour to other provincial centres within Victoria.

A welcome to His Honour Judge Paul Grant appears elsewhere in this issue of *Bar News*.

Farewell to First President of the Children's Court: Judge Jennifer Coate

On 27 April 2006, the Children's Court formally farewelled its inaugural President before a Court packed with well wishers, practitioners family and friends.

From the Bar table there were warm, humourous, even touching, wishes extended by Mr Bill O'Shea, Immediate Past-President of the Law Institute of Victoria; Superintendent E. Dunne, from Victorian Police Prosecutions; and Ms Gill Callister, Executive Director, Office of Children, Department of Human Services.

On behalf of the Victorian Bar, its Chairman Kate McMillian S.C., gave the following address:

Judge Jennifer Coate giving her farewell speech.

I appear on behalf of the Victorian Bar to pay tribute to Your Honour's distinguished service as the First President of the Children's Court of Victoria. The Children's Court celebrates the centenary of its statute this year. Indeed just last week Your Honour hosted the launch by the Attorney-General of the exhibition now on display to mark that centenary. That exhibition was assembled with support from the Victorian Law Foundation.

Until June 2000 the Children's Court was a division of the Magistrates' Court. The *Children and Young Persons (Appointment of President) Act 2000* established this Court as an independent court. It also provided for the appointment of a President and that the President should be a judge of the County Court. Promptly upon passage of that Act Your Honour was appointed to the County Court and appointed the First President of this Court. However, Your Honour's leadership of this Court significantly predates your appointment as President. Since December 1995 you had been the Senior Magistrate of the Children's Court, and in September 1996 you also became a Deputy Chief Magistrate. Thus Your Honour has been the effective head of this court for more than ten years.

Many of Your Honour's important committee appointments began in 1996 and 1997. To name a few: Chair of the Health Services for Abused Victorian Children Advisory Group; Chair of the Anglicare Steering Committee for Group Conferencing Restorative Justice; Member of the Intercourt Family Violence Committee Protocols Committee chaired by Justice Brown; Member of the South Pacific Council of Children's and Youth Courts; Member of the Australian and New Zealand Youth and Children's Court Standing Committee; and Council and Board Member of the Australian Institute of Judicial Administration.

Both within Australia and internationally Your Honour has been an influential and effective leader. You headed the very successful 2002 International Congress on Children and Youth Rights held in Melbourne. Inactivity on the part of the Central Committee of the International

Association of Juvenile and Family Court Judges and Magistrates had raised a real threat that the 2002 Congress would have to be postponed. Your Honour made the decision locally that, and I quote, "We must and we shall continue." You did, and your local leadership made the event go ahead and in the words of your New Zealand counterpart His Honour Judge Beecroft you "made it a raging success".

Judge Beecroft — the Principal Youth Court Judge of New Zealand — had hoped to be present today and he has asked me to pass on his congratulations and best wishes to you. There are very few Australians that a New Zealander would publicly acknowledge looking up to and this is not a reference to Your Honour's height, but Judge Beecroft speaks of your gracious personality, your principled approach to every issue, your unflagging enthusiasm and your dedication to youth and youth justice principles.

His Honour said that you will be sorely missed on the committee and Council of Australia New Zealand and South Pacific Children's and Youth Courts. He said that Your Honour's role in the development of those courts was pivotal. The Victorian Children's Court has the best record of any Australian Children's Court in relation to keeping children out of detention, whether on remand or under sentence and in a variety of supportive, non-custodial dispositions. Your Honour has consolidated and built on that record. Your Honour has worked tirelessly in the development of the new Act scheduled to come into operation in October — the *Children Youth and Families Act 2005*. This exhaustive 542-page statute will repeal and replace the current 1989 Act.

Your Honour has also played a key role in developing group conferencing in the criminal jurisdiction. The group conferencing program was introduced in 1995, utilising a general discretion under the 1989 Act. The program was under the auspices of Anglicare, hence the significance of Your Honour's ten-year chairmanship since 1996 of the Anglicare Steering Committee that advised and assisted the Department of Human Services in developing group conferencing. In 2001 and 2002, group conferencing was expanded in Melbourne and extended to Gippsland and Hume on a three-year pilot. When the new Act comes into operation, group counselling will be available throughout Melbourne and the whole of rural Victoria.

In the child protection jurisdiction Your Honour worked closely with the Department of Human Services to ensure the continued independence of the Court and the retention in the new Act of a legal process in which the family can present its position to the Court. Your Honour has also presided over the establishment and commencement of the Koori Children's Court in September 2005. In this Your Honour drew on the knowledge and experience of your successor Judge Grant in his capacity as the supervising magistrate for Koori Courts. You, yourself, were the first to participate as the Children's Court Officer in the Koori Children's Court.

Since 2001 Your Honour has been a part time Commissioner of the Victorian Law Reform Commission. Justice Neave has praised your contributions to the Commission's work in a variety of areas including but going beyond children's issues, your precise, measured and careful approach and your very practical insights into the on-the-ground implications and not always obvious consequences of proposed reforms.

Your Honour's red, striped and bright-coloured hose is legendary. On one occasion the solemnity of the court was broken by a loud exclamation from a small child, "Look Mum, it's Mary Poppins." Your imaginative awards at the Annual Children's Court Christmas party, said to be the best in the legal precinct, will also be missed: awards such as to an advocate when, after considerable delay, he attended your court, he won the "I heard the page but ignored it" award. The advocate who gave the most creative excuse as to why I shouldn't have to walk from Queen Street where pre-hearing conferences were held to South Melbourne for consequential directions won the "Fashionable but uncomfortable shoes" award.

Your Honour has been a firm, but fair and compassionate Children's Court Judge. One counsel recalls a child protection case in which she represented parents who, at the end of the day, lost custody of their child. Your Honour explained the reasons at length and in terms the parents could understand. You expressed the hope that they might perhaps one day be in the situation to resume their role as custodial parents.

Yesterday Your Honour sat on the County Court Bench at the swearing in and welcoming of His Honour Judge Grant. Today Judge Grant is sitting with Your Honour in this court. The association with Judge Grant goes back some 14 years to March 1992. Your Honour's first assignment as a magistrate was to sit with Magistrate Grant as he then was. There is a pleasing symmetry in Judge Grant now sitting with you at your farewell and being introduced by you to the Court that you now hand over to him.

In his remarks last week at the launch of the centenary exhibition, the Attorney-General described Your Honour as, and I quote, "An exemplary First President who had brought diligence, integrity and imagination to the task." The Victorian Bar agrees wholeheartedly with the Attorney-General's description of Your Honour. In addition we would say, like all of the audience here today, that we hold Your Honour in very high regard.

On behalf of the Bar I thank you for your unparalleled service as the First President of the Children's Court of Victoria and I wish Your Honour well in your full-time and permanent service on the County Court.

In her response to the well wishes, Judge Coate reflected on her term as President this way:

Thank you so much for your generous words. I have contemplated this moment for a long time now.

On Sunday April 30 my fourth consecutive appointment as head of the Children's Court either as Senior Magistrate or President will end. I came to the Children's Court for three years, nearly eleven years ago. Although there never seems like a right moment to go, this is the one I have chosen.

With the transition of the age increase [to the criminal jurisdiction of the Court] well underway, the Koori Children's Court up and running, a new model of ADR legislated for and a new Act on the horizon, the Court is about to start a new phase in its development, in its second century on earth. 2006, as many of you would have heard last Friday, marks the first one hundred years of the Court. The Court has come of age and I hope you agree with me that it is wearing its age well.

Today, you have heard much about what I have done for the Court. But I see it differently. I see what being part of this Court has done for me over the past decade, how it has enriched me so deeply and personally in so many ways.

THE PIONEERING SPIRIT

Both before and during my years here, I have learnt much from and about the pioneering spirit of the judiciary who have worked in this Court. As some of you would have heard me say last Friday at the centenary of the Children's Court,

Judge Jennifer Coate and sitting magistrates of the Children's Court.

Kate McMillan S.C.

Ms Gill Callister makes a farewell speech as representative of the Department of Human Services.

Superintendent Emmett Dunne makes a farewell speech on behalf of the Prosecution.

Mr. Bill O'Shea makes a farewell speech on behalf of the Law Institute of Victoria.

Victoria Police Chief Commissioner Christine Nixon (centre) and invitees listening to Judge Jennifer Coate's farewell speech.

there is much to learn from these first one hundred years.

"One can see many mistakes, some misguided views, some inappropriate laws and some grave errors of policy dotted throughout the history of the Court.

But there is an underlying theme in the judicial history of this Court of the striving of many passionate and committed judicial members to use the law and their statutory powers to achieve better lives for children and young people who have come before the courts over the decades.

I pay my respects to them, past present and future.

I have come to understand what Isaac Newton meant when he said: "If I have seen a little further, it is by standing on the shoulders of giants."

Greg Levine is one such giant for me. It was Greg's courage and perseverance when he was Senior Magistrate before I came to the Court which had a powerful influence on the Government's decision to build a new court.

He refused to be silenced about the need for a new building and the proper resourcing of it and that's what we achieved.

Another giant in this Court has been and remains Peter Power. He has brought to life a wish of mine that we had no way of achieving without him. He is simply the first and last word on the law relating to the Children's Court. His constantly updated 12 chapters of research materials on the website are second to none.

HOPE

Here, I have learned much more about hope than I had ever understood. I have seen the hope of the committed advocates in this jurisdiction strive to get the results their clients are seeking even when the odds are poor. (And so is the pay.)

The hope of juvenile justice and child protection workers who try to get the formula right to address the reasons children and young people are brought to the court.

The hope in all of us who are the decision makers at this court that the decision

we make is the right one for that infant, child or young person.

That hope is always kept alive because of what is at stake — the ultimate hope of a better future for an infant, child or young person.

INSPIRATION

I have been inspired by the work and dedication of my colleagues. I have seen the thought, the analysis, the anxiety and the hard work that goes into their decision making in this Court. I have been inspired by and constantly found new energy through their cooperation and good humour.

I have been inspired by the dedication of judicial colleagues across Australia and the South Pacific and New Zealand working in this same area and in many jurisdictions across the South Pacific, many with nothing else to work with in the way of resources but energy and a vision of a better system.

I have been inspired by the Elders and respected members of the Aboriginal Community who have been prepared to sit with us, despite the history that passes between us, to try and find ways to improve the sentencing responses of this Court for young Koori people.

I have been inspired by many of the professionals that work in and around the jurisdiction, the lawyers, the social workers, the psychologists, the clinic staff led by their dedicated Clinical Director Dr Patricia Brown, the police and the police prosecutors, the pre-hearing conveners, the security staff, and the Salvation Army and the Court Network service.

I have been and remain inspired by the extraordinary work of people like the foster carers who provide their warmth and support and care for those children and young people who need it.

RESPECT

Here, I have learned the real value of respect, which does not reside in the judicial title, the judicial gown and most definitely not the judicial wig.

I have learnt this in many ways and from many people but the most profound understanding of respect and its importance, I have gained from working with the Elders and respected members of the Aboriginal community in the Koori Children's Court. By listening to and watching them, it has enriched the meaning and importance of the word "respect" for me.

LEADERSHIP

Here, I have learned that leadership itself achieves nothing without the diligence and support and selflessness of those one hopes to lead. I have experienced that diligence and support not only from my colleagues but from the Court staff.

The Principal Registrar Godfrey Cabral and our current Principal Registrar Leanne de Morton have my gratitude and admiration. It is their work and professionalism and demeanour that are the daily face of the Court.

Any who know Leanne would describe her as not only the consummate professional, but simply unflappable, and so she is.

Even the chap that came to the registry counter seeking to rely on the Magna Carta, and requesting the court copy so he could refer to it, did not realize that our Leanne was having a little trouble understanding the true nature of his request. Ultimately, in endeavoring to both understand his request and accommodate it, she decided he must be looking for a protective worker called Maggie Carter, and so paged Maggie Carter to the upstairs registry counter. She believed him to be looking for a protective worker called Maggie Carter, she duly paged her to the counter.

The Court staff and the Court coordinator have been and remain the engine room of any court. During my time here I have been blessed with such fine coordinators as Sue Higgs and now Angela Carney. We simply would not function without our clerks and without our support staff here at Melbourne, Russell O'Callaghan and Janine Williams.

I have learned that no President can lead a Children's Court without people like Janet Matthew and David Whelan. Some of you have heard me speak of them often. It is because it is not possible to say enough about them. They have been much more to me than professional staff over the years, but have proven to be the source of friendship, support and humour.

There are many people in many government departments who have given our court guidance and support over the years and responded to many requests for assistance in many ways. I cannot possibly mention them all, but I do want to acknowledge John Griffin, the Executive Director of Courts, who has been nothing short of our constant champion, and Mick Francis who has done his best to look after us.

Some of my personal development and enrichment here has come in some surprising guises.

PLEADINGS

It may come as a surprise to you to hear that I have also learnt something about pleadings in this Court. It may come as a surprise to you, because we are not a court of pleadings.

I reminded Ross Nankivell recently that he taught me pleadings at Law School. I also reminded him, in case he didn't remember, that I found it hard. I struggled to achieve the elegant simplicity Ross tried to instil in us.

And now it has been found. In the

recently introduced adjournment forms, some of you will know there is a section which requires the applicant to fill in the reason for an adjournment. This inspired applicant wrote: "Seeking an adjournment."

LOGIC

I have learnt much about logic.

No more shall I struggle with "All men are mortal, Socrates is a man and therefore he is mortal."

We now have the post-modern version. Thanks to one of my vigilant colleagues who picked up this piece of logic when enquiring of someone who was meant to be at court at 9.30 am, but did not arrive until 11am what the reason was for being late and received the answer, I thought court started at 10.00!

CLARITY OF EXPRESSION

I have learnt much about the need for clarity of expression in this Court and indeed the legislation directs us to do our best to ensure that we are understood by all in the courtroom.

I knew I had most certainly failed the day I was asking questions of a legal practitioner, in an endeavour to establish something of the history of the case and the child's parentage, and he asked (albeit in a slightly hesitant way) "Is Your Honour concerned that she is the mother of the child?"

I reassured him that I was confident that I was not.

So you can see my life has been immeasurably enriched by this past decade.

The longer I stay here, the less I feel I know and the more I feel there is to do, so best I go now before I realize that I know nothing and have only just begun to do what is needed.

My leaving has been made so much easier by the announcement of Judge Paul Grant as the new President of the Court. Judge Grant has been a valued friend and a much esteemed colleague for many years.

He has enjoyed a distinguished legal career on the Bench in the Magistrates Court and I have every confidence that he will not only maintain but grow in that reputation as President of the Children's Court. I am delighted that he has chosen to come onto this track and take over the running here.

There remains one task left for me to complete.

You have heard much of the race I have been running for the last decade. The crucial moment has arrived when the baton change must happen for the next President to commence the next decade. Go your hardest, Mr President.

VICTORIA LAW FOUNDATION

Legal Reporting Awards 2006

Reporting Award for Judge's Daughter

THESE awards were presented by The Honourable Chief Justice Warren AC on Wednesday 17 May 2006. At the presentation, the Chairman of the Communications Committee of the Supreme Court, the Honourable Justice Eames said:

> Informed, balanced, journalism — like sound, fair, decision-making by judges — requires experience, wisdom and courage. Given the time constraints, the uncertainties, and the pressures that attend both tasks, errors will be made from time to time. On both sides, however, error ought not likely be regarded as proof of a lack of integrity or an absence of conscientiousness.
>
> It is important that we speak frankly about our differences. There is a very important public interest in open and accountable justice and accurate reporting in the business of the courts is critical to those principles. As judges, we should not allow self-interest, self-importance or undue sensitivity to criticism to stand in the way of the media fulfilling its role. But, equally, the media need to understand the principles that guide judges when imposing restrictions, at times, on their work.
>
> These awards present an opportunity for the legal profession and the judiciary to acknowledge and reward good journalism in the difficult and specialist field of legal reporting.

The award for best report on radio was awarded to Catherine Harper, daughter of the Honourable Justice Harper. Of that award Eames JA said:

> The judges noted that this year there was a heartening increase in the number of entries in this category, with some fascinating matters discussed. It proved to be a hard task to select the winner, but the judges were very impressed with the discussion of an Australian citizen who was motivated to save lives, and was caught up in what some saw an inappropriate application of the law on people smuggling. It showed how cautious one must be about pre-judging cases, especially when they involved an alleged offence which has strong public disapproval. Congratulations to Catherine Harper of SBS radio, for her program "Hoa Nguyen — a People Smuggler and Proud of It". The judges thought this was a beautiful and dramatically told story.

A Tribute to the Late His Honour Bill Morgan-Payler

By His Honour The Chief Judge Rozenes of the County Court of Victoria on Thursday 22 June 2006

WE are here this afternoon to pay tribute to the memory of the late Judge Bill Morgan-Payler; to express to his wife, Tina, and his sons Joe and Liam, our sincere sympathy and sorrow; and to acknowledge the debt which this Court and the Victorian community at large owe to Bill for the dedicated service which he rendered to the law as defence counsel, prosecutor, and finally as a Judge of this Court.

I desire to acknowledge the presence on the Bench with us today of the Honourable the President of the Court of Appeal and acting Chief Justice, Justice Chris Maxwell, who represents the Justices of the Supreme Court. I acknowledge the presence in court also of Ms Pamela Tate S.C., Solicitor-General for Victoria (representing the Government); Dr John Lynch, Crown Counsel; Mr Paul Coghlan QC, Director of Public Prosecutions for Victoria; Mr Mark Pedley, Deputy Director of Public Prosecutions for the Commonwealth; Ms Kate McMillan S.C., Chairman of the Victorian Bar Council; Ms Elissa Watson, representing the Law Institute of Victoria; and Ms Penny Armytage, Secretary of the Department of Justice.

Bill Morgan-Payler was born on 23 May 1946. He grew up on Phillip Island, where his parents had a farm. His grandfather was an Archdeacon in the Church of England who had come to Australia seeking a cure for tuberculosis.

Bill matriculated in 1963, having been educated as a boarder at Caulfield Grammar School, and was in the first intake at the new Monash University Law School.

Amongst his colleagues that year were Judge Julian Leckie and Senior Crown Prosecutors John McArdle QC and Geoffrey Horgan SC, who, together with his dear fishing mate John Philbrick, provided much of the information for this tribute.

His Honour Bill Morgan-Payler

According to Geoffrey Horgan, Bill led a sort of double life at the university, combining membership of the Labor Club with friendships among the sports coats and ties of the Law School. Although Bill was an agnostic, or a "lapsed Anglican" as Geoff Flatman once put it, and of radical political disposition, he had what Geoff Horgan described as a patrician style about him. Notwithstanding that, he was, however, to retain his concern for the underprivileged all his life.

He worked as a research assistant in the Economics Department the year that he graduated, and in 1970 taught taxation at what was then known as the Prahran Institute of Technology.

He met his lovely wife, Tina, when she was just 16. They married when Bill was — as they say — still tidying up a subject or two at the end of his course. She was devoted to him, and supported Bill in everything he did. She was by his side to the very end.

He did his articles with John Zagouris in 1971, signed the Bar Roll in 1974, reading with John Walker, and then resigned in 1977 to work for the Aboriginal Legal Service first in Darwin and then in Victoria, returning to the Bar in 1981.

He had five readers: Reg Keating, Steve Russell, John Lavery, Carolyn Burnside and Jane Gibson.

He practised for the most part as defence counsel, and it was a great compliment to him when the Government appointed him together with the late Geoff Flatman and Paul Coghlan to their respective positions at the newly revamped ODPP in 1994.

Bill became the Chief Crown Prosecutor in 2002 when Geoff Flatman was appointed to the Supreme Court and Paul Coghlan was appointed DPP. To say that he was highly regarded as a prosecutor is to greatly understate his forensic skills and impeccable courtroom demeanour and the complete fairness with which he discharged his prosecutorial duties. He prosecuted in the most significant cases in the Supreme Court such as *Domaszewicz* and *Lewis*, to mention just two, and argued important cases in the High Court such as *Thompson* (1999), *Palmer* (1998) and *Pavic* (1998).

Trial Judges in the Supreme Court relished the prospect of him appearing for the Crown. As one remarked, he was

the "prosecutor of choice" — able to focus on complex areas of law like few others could.

He was much admired by those who were opposed to him and who appeared with him. He was universally acknowledged as an understated but formidable advocate, always compassionate and always scrupulously fair. His very fine personal qualities won him the affection and friendship of his many colleagues in the profession.

In 1977 Bill went to join Dyson Hore-Lacey QC working in Darwin for the Northern Australian Aboriginal Legal Aid Service. They were colloquially known as Lacey & Morgan. At that time Richard Coates, now the Northern Territory DPP, and Judge Roy Punshon were working in Alice Springs for the Central Australian Aboriginal Legal Aid Service. Richard reports — and this is not meant to be a slight on the other two, or for that matter against the many other wonderful members of the Victorian Bar who worked in the Territory — that former Justice John Nader always claimed that Bill was the best advocate to appear in the Territory. This must have been so, because in the *Queen* v *Bird Bill* he persuaded Nader J to fully suspend the sentence of a young Aboriginal man who had embezzled over half a million dollars. Unfortunately the CCA didn't agree.

Richard Coates reminds us of other notable cases such as *Queen* v *Forscutt*, where Bill secured an insanity verdict for an accused who shot dead his next-door neighbour for mowing the lawn on a Sunday morning, and *Queen* v *Breedon* (aka the Parap butcher), where he gained a strong recommendation for mercy from the convicting jury, although the accused had dismembered the body of his victim and scattered the parts around the NT. The case was subsequently won on appeal, with the court holding that the NT Criminal Code's felony murder provisions were to no effect.

Upon his appointment to this Court, Bill, in his usual modest (and may I record novel) way, eschewed a welcome, and so his numerous talents and exploits went unheralded in this court.

The *Bar News*, however, recorded his arrival as a Judge in the same edition as it recorded the retirement (premature as it turned out to be) of Judge Michael Kelly. It was a most apt juxtaposition. It was as if the mantle had been passed. The author[1] of the article noted that the County Court had gained a Judge of "unbounded talent and experience", and predicted that Bill would, over the years, greatly enhance the justice system in Victoria.

He brought to this Court the very broadest knowledge of criminal law and procedure, together with a unique experience in the conduct of difficult criminal trials and appeals.

Many, including the Chief Justice, wondered how it was that he was appointed to this Court rather than the Supreme Court. I can only say that we were lucky. I am sure that all the Judges of this Court will join with me in acknowledging that he would, in the fullness of time, have joined the ranks of the great criminal Judges who sat in this Court.

Whilst at the Court he worked with great diligence and energy, even after he was diagnosed with cancer and through his battle with that disease. He fought to the very end, refusing to be beaten. His example of conscientious service, and his preparedness to do his share and often more — even though he was clearly in great difficulties — set new standards of behaviour for us all.

He brought to this Court the very broadest knowledge of criminal law and procedure, together with a unique experience in the conduct of difficult criminal trials and appeals.

Bill's rise to high office was not confined to the law. He became a reluctant president of the Fly Fishing Association of Victoria. He and John Philbrick and others would make trips to Tasmania, where they had some sort of rights to the occupation of a derelict hut adjacent to a near-perfect trout stream. Bill kept a photo of the hut on his desk. He loved equally "Misery Farm", his farm amongst the clouds at the back of Apollo Bay, and he loved the Victorian high country.

John Philbrick reported that — and here I quote in full so as to do justice to both of them:

> The contemplative world of fly fishing suited Bill's personality, and gave him an opportunity to escape from the pressures of his professional life. He loved his fly fishing. Not just catching trout, although he caught his share. He loved his trips into the Australian bush. Trout streams are invariably located in beautiful and secluded places. The aesthetics of fly fishing appealed to him. He appreciated quality fishing literature and tackle, and amassed a large library of fishing books and a startling number of rods, reels and other sundry items of angling paraphernalia. And at the end of the day he enjoyed a drink and a hearty meal with his fellow anglers. Above all, Bill derived great pleasure out of fishing with his sons, Joe and Liam.
>
> His great love was fishing small tributary streams which were neglected by most anglers. Late in March this year he made what he knew was almost certainly his last trip to Tasmania. He had three days in which to fish. The first day he fished sitting in a swivel chair at the front of a raft skippered by his fishing companion, John Philbrick. At one stage he was reckless enough to stand up to cast at the same time as Philbrick suddenly turned the raft, causing him to teeter precariously on the edge and almost fall overboard. That evening, when reflecting on this near miss over a drink, he dryly observed that had he fallen overboard, an appropriate obituary notice in the Owen Dixon Chambers lift would have been, "It is with somewhat less regret than normal that we announce that Judge Morgan-Payler was drowned yesterday by Philbrick at Brumby's Creek Weir in Tasmania."
>
> He was fishless after the first day, and his strength was ebbing. By the second day he was losing hope. It was late in the season, and the weather was threatening to deteriorate. The second day he drove to fish the North Esk River. Something made him stop at a bridge over a tiny tributary, and he made what turned out to be an inspired decision to fish this creek. The angling gods must have been smiling on Bill because a short time later he hooked and landed the first of a number of beautiful chunky trout.
>
> A famous angling writer once wrote:
>
> "The man of rods and lines and hooks
> Is always one-and-twenty."
>
> He was right. Bill's worries were forgotten, his face lit up with a look of pure joy, and he was a boy again. For the next few hours he was in his wonderful angling paradise. He spent the rest of the day having the most wonderful, unhurried fishing on this lovely little creek. When he reached the final tiny pool by the bridge where he had left his car, he made what proved to be his last cast. His fly went under, and he was fast into a large fish which he duly landed. The following morning he was totally exhausted but content, for he had enjoyed what he later said was the perfect angling day.

Bill served as a Councillor and Vice-President of the Victorian Fly Fishers' Association. In 2004 he was elected as President, a position he held until his death. He bravely continued to attend meetings until the last month, as he did with his duties at the Court.

Judge Meryl Sexton reminded me of the two common themes that have emerged from people's comments about Bill. One was his commitment to his work. The other was his sense of humour. These two qualities were captured in a scene only a few weeks before his death.

Judge Meryl Sexton reminded me of the two common themes that have emerged from people's comments about Bill. One was his commitment to his work. The other was his sense of humour.

An e-mail had just been circulated to the whole County Court community telling against the dangers of running in the County Court corridors: a serious subject of occupational health and safety for all staff, but an amusing one as well if you can picture wigged and gowned Judges racing up and down the corridors anxious not to waste valuable court time.

Bill had worked a full day in a trial, and as he drove through the County Court basement carpark he paused to speak to a colleague. Exhausted as he must have been, he had nevertheless checked his e-mails, because he admonished the younger Judge thus: "And remember, there's to be no running in the corridors!" It had obviously struck his funny bone, in spite of everything.

On behalf of the County Court community I extend to his wife Tina and his sons Joe and Liam and his family and friends our deepest condolences, and hope that they take some comfort from knowing of the high regard in which Bill was held by the Court and by the profession.

We will all miss him.

Adjourn the court sine die.

Note

1. David Brustman.

Chaps

WHAT an odd little word this is. Actually, it is three different words with the same form.

The first word is a variant of *chop*: a *chap* is "an open fissure or crack in a surface, made by chopping or splitting". It is rarely used like this nowadays. A related meaning is "a crack in the skin, descending to the flesh: chiefly caused by exposure of hands, lips, etc., to frost or cold wind". In that sense, it is more common as the participial *chapped lips* or (less commonly) *chapped hands*. As a plural, *chaps* also signifies the jaws of a person or animal; and by extension the jaws of a vice. *Chappy* meant talkative, in the 17th and 18th centuries. Some time in the mid 18th century, *chaps* in this gave way to *chops:* "get your chops around this" sounds like slang but is a very old usage. *Down in the chops* is a 19th century colloquialism meaning depressed; to *lick one's chops* is to gloat.

The second meaning of *chaps* is best gathered from cowboy movies. When they were popular in the 1950s and 1960s, they often showed chaps wearing *chaps*, which are made of leather with fronts of dogskin with the hair on. In this context, *chaps* is an abbreviation of *chaparreras*, which in turn comes from *chaparral*, the dense, thorny scrub common in Mexico and Texas, through which the cowboy heroes often rode. *Chaparral* comes from the Spanish *chapa*, the scrub oak. Chaps were worn over the pants to protect the legs while riding a horse.

Neither of these meanings springs to mind when someone refers to *chaps* these days. The commonest current meaning of *chaps* is caught by Oscar Wilde in *A Woman of No Importance*: "One must have some occupation nowadays. If I hadn't my debts I shouldn't have anything to think about. All the *chaps* I know are in debt."

Oscar Wilde wrote *A Woman of No Importance* in 1893. His use of *chaps*, etymologically speaking, was not modern even then. As a casual reference to another man, it had been in use since about 1750. Wilde's other use of *chaps* was not modern either, but he was caught at it, and that was a serious mistake. In 1895 he was sentenced to two years' hard labour.

Chap is an abbreviation of *chapman*, a person whose business is buying and selling, a merchant. The abbreviated form emerged in about 1600. As the OED wryly notes, it "… seems to have come into vulgar use in the end of the 16th c. but it is rare in books, even in the dramatists, before 1700." Apparently the dramatists then, as in Wilde's time, were a bit racy.

The etymology of *chapman* shows that it is related to the German *Kaufman*, and the Dutch *Koopman*. (In keeping with the early fashion of artisans and traders taking their surname from their occupation, Chapman, Kaufman and Koopman are common surnames). *Chap* was a barter or bargain from the 15th to the 17th century.

For a century or two, *chap* was also a vulgar reference to a customer, but it gradually lost the commercial connotation. Dr Todd's edition (1818) of Johnson recognises this usage, but notes that "it usually designates a person of whom a contemptuous opinion is entertained". (It could be that the element of contempt mirrored the attitude of the English upper classes to those who were "in trade" — an attidude which sharpened as the industrial age generated vast wealth for some chaps but not for most gentlemen.) Interestingly, the use of *chap* mirrors the use of *customer* outside its original commercial setting. Until the 1950s it was common to hear someone referred to as an *odd customer* or a *queer customer*, where *chap* would have been equally appropriate.

Customer was generally a guarded expression, and *chap* was at first; but by the time Wilde wrote *A Woman of No Importance*, *chap* had largely lost its pejorative edge: the sense is friendly rather than scornful. When he used it in *Picture of Dorian Gray* it is sympathetic and affectionate: "The poor chap was killed in a duel at Spa a few months after the marriage".

The Old English form of *chapman* was *céapmann*. It holds the clue to another mercantile connection: a *céap* was a market, and also a price, barter, or merchandise. It is recorded in this sense since 1000 AD. In its sense as a market, it is still found in place-names like Eastcheap and

Cheapside. In the same sense, it led to constructions such as *good cheap* (early 14th century) i.e. a good market, meaning (from a buyer's perspective) that prices were low. The equivalent construction *dear cheap* was also common, and meant a bad market, or a time of shortage; it now looks like an oxymoron.

By the 16th century, *good cheap* was a quasi-adjective: "He marvelled at how it was possible for so much victual to be found in the town and so *good cheap*…" Marlowe *Doctor Faustus* (1588).

Likewise in Henry IV, Part I (1598) Falstaff says: "Thou hast saved me a thousand marks in links and torches, walking with thee in the night betwixt tavern and tavern; but the sack that thou hast drunk me would have bought me lights as *good cheap* at the dearest chandler's in Europe."

This usage led to the use of *cheap* by itself as an adjective meaning *inexpensive*. This was rare before the 16th century, but the transition seems to have been completed early in the 17th century. It is an interesting phenomenon: *cheap* was a noun, meaning market, etc. for at least 500 years and then in the course of a century it switched to being an adjective meaning inexpensive. *Cheap* is now used only as an adjective. It can be neutral, or have pejoriative overtones: it can suggest good value (*cheap price*) or low worth (*cheap victory*, and *cheap shot*).

Chap is now a bit toffy — it has a faded air of affectation about it. *Bloke* is matey. *Bloke* is much newer than *chap*: the OED's first quotation dates from 1851, when Henry Mayhew recorded London street talk. For the next 70 years, it was used hesitantly by authors, because of its colloquial origins. Despite this tentative start, *bloke* has now effectively replaced *chap*, at least in Australian speech.

Interestingly, unfairly, neither *chap* nor *bloke* can refer to a woman. Occasionally the jocular coinage *chapette* is heard, but it is not a real word and does not look like suriviving to the point of recognition in a dictionary. Not in the sense of a female chap, at least. The online Urban Dictionary recognises *chapette*, but defines it as "a mamon; one who pretends, and acts big shit; one who is full of shit."

Just in case this sense of it catches on, it is probably best not to refer to a woman as a *chapette*. The danger is obviously unrecognised by Chelsea, whose website notes: "So what do you all think about this word 'chapette' I made it up and my friend Ashtyn made fun of me for it …for everyone who dosent (sic) know what a chapette is it is a girl kinda like the word *dudette* but better…"

Well, I don't think she was the first to coin it, but her intentions are good. And she is not quite accurate about *dudette*; it does not exist either. Surprisingly, however, *dude* admits two feminine forms. So even if you can't use *chapette* and *dudette* does not exist, you can choose from *dudess* and *dudine*. Although these words are recognised by OED, I suspect that they will remain in the obscure back rooms of language.

Just as *chap* drifted from vulgar to affected, *bloke* is slowly beginning to look a little dated as *guy* and *dude* weasel their way into the Australian English. *Dude* is nearly as old as *bloke*, but is American rather than British. Originally it signified a dandy; now it is hip and classless. *Guy* is also American in origin, although influenced by reference to the effigy of Guy Fawkes, traditionally burned each 5th November in remembrance of the Gunpowder Plot. As a neutral reference to a man, it emerged in the 1840s, a few years before *bloke*.

It would be strange to refer to a woman as a *guy* or a *dude*, and impossible to refer to her as a *chap* or a *bloke*.

Still, as a general greeting *Hey guys* is understood as including women. I suppose that is some kind of progress, centuries after the first strange-looking customer was called a *chap*.

Julian Burnside

Bar Dinner

Jeffrey L. Sher QC gave the 2006 Bar Dinner address on 3 June at the Essoign, reflecting on his 44 years at the Bar.

At this year's Bar Dinner the tradition of having the distinguished guests "roasted" by the most junior silk at the Bar was discontinued. Instead of junior silk, the Bar had as its guest speaker Jeff Sher, one of the Bar's most senior and distinguished silks.

His speech was a serious one directed to emphasizing what the Bar is all about and what the role of a barrister really means. That speech is set out below.

Jeff Sher QC.

KATE McMillan, honoured guests, distinguished guests, fellow members of the Bar, and if I have yet to address you: ladies and gentlemen.

After 44 years of successfully avoiding making a speech at a Bar function my luck has well and truly run out.

This is my third speech within the past 12 months.

Nonetheless I welcome this particular opportunity for there are two messages I would like to convey: one for the junior Bar, the other for the whole Bar.

Firstly, let me direct my remarks to the junior members of the Bar here tonight, including the younger silks.

I wish to speak to you about "opportunity" and what may happen to you as a consequence of signing the Roll of Counsel.

I believe there is a message for the junior Bar in my own experience.

It was as a junior silk that a brief came my way which led to me acting in some important and interesting cases and for an exceptional group of clients.

It also brought me into contact with leading members of the Australian Bar.

To tell you my tale, I need to recount some legal history.

In 1973 Justice Woodward of the Federal Court, a member of this Bar, was appointed by the Whitlam Government to conduct a commission of inquiry into Aboriginal land rights in the Northern Territory.

This followed the failure of the plaintiffs in the *Gove Land Rights* case to establish that Aboriginal native title was recognised by Australian common law.

Ted Woodward was an inspired choice.

He made recommendations which resulted in 1976 in the enactment by the Federal Government of the *Aboriginal Land Rights (Northern Territory) Act.*

This Act gave traditional Aboriginal owners the right to make a claim to "unalienated crown land" which meant that land in towns was excluded from the operation of the Act.

In June 1978 the Larrakia clan made a claim to an area near Darwin known as the Cox Peninsula.

Whilst the Cox Peninsula is in the general vicinity of Darwin it was inaccessible in the wet other than by boat.

In the dry most of it was a four-hour drive away.

This claim became known as the Kenbi Land Claim.

The Northern Territory Government of the day generally opposed land claims, certainly those near towns, and sought to frustrate claims by excluding from the operation of the Act land near the four major centres of population in the territory; namely, Darwin, Alice Springs, Katherine and Tennant Creek.

The technique used was to make regulations under the Northern Territory Town Planning Act providing that certain areas of land were to be treated as though they were part of the towns to which they were adjacent.

Darwin, which before the regulations came into force had occupied an area of 142 square kilometres, was increased to 4,350 square kilometres, a bigger area than greater London.

Darwin now included the whole of the Cox Peninsula.

Katherine at the time of the regulations was 33 square kilometres.

The regulations increased the area to 4,690 square kilometres — bigger than Darwin with a tenth of the population.

That was too much for even the Northern Territory to think they could get away with so in 1979 they made more regulations and reduced the area to 650 square kilometres.

In 1979 Justice John Toohey (then of the Federal Court) acting as the Aboriginal Land Commissioner conducted a preliminary hearing to determine whether the Cox Peninsula was available for claim.

The Northern Territory government relied on the regulations to argue that the land claimed was land in a town and further argued that the motives of the administrator could not be called into question when he made the regulations, he being the representative of the crown.

These arguments were upheld.

The ruling was based on dicta in some earlier High Court decisions.

This ruling meant the end of the Kenbi Land Claim.

The Northern Land Council, having already briefed a Queensland silk to act for the claimants and who had advised that a challenge to the ruling was bound to fail, decided to seek a second opinion from a Victorian barrister.

I'd taken silk about four years earlier, since when I'd appeared in a few town planning cases usually concerned with attempts by Lindsay Fox or Alan Bond to obtain a planning permit to build a shopping centre.

I would not have described myself as an expert in town planning.

But it seems others thought otherwise.

Further, the NLC thought they had a town planning problem.

Well — they had a problem all right, but it was not a town planning problem.

It was about the proper interpretation of the Land Rights Act and administrative law.

Kate McMillan S.C., Chairman of the Bar Council with the Honourable Clive Tadgell AO, Mick Heeley (Chief Justice Warren's husband) and Chief Justice Warren.

So when I was briefed to give a second opinion about a possible challenge to Justice Toohey's ruling a twofold mistake was made, firstly, as to the nature of the problem and, secondly, as to my expertise.

However, I seized the moment.

I opined that there was an arguable basis for prerogative relief in the High Court and, to my surprise, was then briefed to seek such relief.

That's called "putting your mouth where your money is".

As the application for an order *nisi* for *mandamus* was listed to be heard in Sydney, a friend of mine at the Sydney Bar, Bruce Oslington, was briefed as my junior.

We obtained an order *nisi* from Sir Harry Gibbs. It was returnable before the Full High Court.

The application for an order absolute was heard in September 1980.

It was the first case heard in the main courtroom of the new High Court building.

I must confess that it only dawned on me on the morning of the case, when I saw the size of the audience, that this might be an important case.

There were, of course, a lot of public servants in the crowd.

Of course they were all at work!!

Jim Thomas QC, leading Pat Keane, both of the Queensland Bar, appeared for the Northern Territory.

After argument the court reserved and a little over a year later granted *mandamus* permitting a challenge to the regulations.

What then followed was a discovery battle which also ended up in the High Court.

The NLC sought discovery from the Northern Territory.

This was unsuccessfully opposed.

When discovery was given, the Northern Territory claimed legal professional privilege for most of the documents.

Our response was to assert that the privilege could not be relied on as what was sought to be protected fell within the "crime or fraud" exception.

As you are all barristers and as all barristers are experts in the laws of evidence, you will know all about that.

The argument was heard by Justice Bill Kearney, formerly of Papua New Guinea, who had succeeded Justice Toohey as the land commissioner.

Before he ruled, Justice Kearney inspected some of the contested documents.

He held that there was prima facie case that the communications with the Territory's legal advisers had come into being as part of a plan to defeat the land claim and that the privilege could not be relied on to resist discovery and inspection.

This decision was then unsuccessfully appealed to the Full Court of the Federal Court where Justice Kearney's decision was upheld.

There was then an appeal to the High Court.

The appeal was unsuccessful.

The decision is reported in the CLRS.

It is a leading case on the law of evidence and discusses whether privilege applies to communications with government lawyers and the crime or fraud exception.

The documents then became available for inspection and what a beautiful collection of documents they were.

They included a file which some honest public servant had labelled, "how to defeat land claims".

It was not until October 1988 that the challenge to the regulations came on for hearing before Justice Olney, (one of tonight's honoured guests) who by now was the Land Commissioner.

As luck would have it I was jammed so Frank Costigan QC and Ross Howie took over the brief.

Frank and Ross came back from Darwin wearing large smiles.

"How did it go?" I asked.

"Pretty well," said Frank.

He was right, for in December 1988 Justice Olney ruled that the town planning regulations were not a valid exercise of power.

As one might have now expected, this decision was then challenged in the Full Federal Court.

The challenge failed.

Then application was made for special leave to appeal to the High Court.

It was refused.

So, by the middle of 1989, the claim having been made more than a decade earlier, with four visits to the High Court, four hearings in the Full Federal Court and numerous appearances before a succession of commissioners, the Kenbi land claim was able to proceed on its merits.

In the meantime the NLC had decided to brief me in some other matters; quite a few in fact.

These included two land claims for the Jawoyn people.

The first of these was for a place known to the Aborigines as "Nitmiluk", based on the grasshopper dreaming.

It is known to the white community as the Katherine Gorge.

In the early 1980s together with our instructing solicitor Robert Blowes, David Parsons and I travelled to an Aboriginal reserve, then known as Bamyli, about one hour out of Katherine.

It ceased to be called Bamyli when a prominent politician decided he wanted to have his photograph taken at an Aboriginal settlement.

So the settlement was renamed Barunga.

It sounded more Aboriginal.

When we arrived our clients were assembled under a shelter about the size of the average courtroom.

This shelter had no sides; just a roof, in case it rained.

The gathering comprised men, women and children sitting, standing, some even lying down, together with a collection of emaciated dogs which wandered in and out.

David made the introduction.

"Now listen here, you mob.

"We're here to talk to you mob about this land claim business.

"Now this bloke here is that old man lawyer, Jeff, from down Melbourne way I told you about.

"He's been helping that Larrakia mob up near Darwin.

"He's here to help you get that country of yours back from that government mob."

I wasn't too pleased about being described as an "old man".

Many of the claimants were as old as, if not older than me.

How would David describe me now?

David continued, "Now we want to talk to you about the stories for that big mob of places you showed Robert and I the last time we were here.

"So we are going to go to those places and you can tell us the special stories for them".

I had planned to say something after David's introduction but whatever it was that I had planned to say, I was now at a loss as to how to say it.

David had acted for blackfellas for years in Alice Springs and knew how to communicate with them.

I had no idea.

In the absence of anything intelligent or even intelligible from me, David explained that we were now going to their ceremonial and special places and they would accompany us and tell us about them.

So this is what we did.

Now don't get fussed by my reference to Aborigines as "blackfellas".

Some may say that such language is not politically correct, but that is how they referred to themselves.

"Aborigine" and "Aboriginal" are white-fella words.

In the days which followed we traversed the Katherine Gorge Park from the Katherine River to Edith Falls about 70 kilometres away.

We visited many sites.

We drove or walked through the countryside accompanied by large numbers of blackfellas, their kids and often their dogs.

I learnt to drive a four-wheel drive — well — sort of!!

If you are tempted to use a four-wheel drive I would advise you not to attempt to climb a one-in-three gradient other than in low first gear.

You won't make it.

We slept out under the stars.

We sat around the camp fire.

We waded through streams often with water up to our chests.

We got to know our clients.

It was physically demanding but intellectually and emotionally stimulating.

One of our first visits was to a place called Jurrangluk which, on being visited, we were told we had to "touch sweat" on a particular rock otherwise a snake might bite you.

Robert, David and I took no chances.

We wiped perspiration from under our arms and rubbed it on the rock.

That's what is involved in "touching sweat".

These land claims sometimes involved considerable risk.

On one occasion I was standing under a rock ledge listening to witnesses explaining to the commissioner the significance of some rock art.

We had descended into a beautiful valley down a 20–30 foot escarpment.

There were a large number of overhangs which created recesses and caves.

Upon the walls of these caves much rock art had been painted over the centuries.

I say "over the centuries" because one site we visited had been carbon dated as 40,000 years old.

As I stood under an overhang through which tree roots were growing, I noticed a rather unusual looking root.

It appeared to have some stripes on it.

I asked Peter Jatbula, one of the claimants who was standing next to me; "what's that Peter?"

He replied, "That's a cheeky bugger Jeff."

Needless to say I then moved from a position two feet below a poisonous snake.

We visited some spectacular sites, including previously unknown ceremonial bone settings.

These comprised thighbones taken from a kangaroo from a young man's first kill.

They were arranged in circles.

There were a lot of these bones so these settings must have been very old.

We saw two of these settings, one from the window of a helicopter as we flew past a cave on the side of a hill.

To learn about their social structure, to camp out with them, to traverse and learn about their country, to hear their life histories, gave me an insight into my aboriginal clients I could never have otherwise gained.
It was an unforgettable experience.

On another occasion we went to a large water hole which had been cut off in the dry leaving its inhabitants to wait there for the next wet.

On one side of the water hole was a 20–30 foot cliff which a number of us climbed.

The number included Tom Pauling, one of the Northern Territory's counsel.

Tom is a Territorian and has spent most of his life there.

He told me that the freshwater crocodiles we saw in this water hole (and there were at least half a dozen of them) were the biggest freshwater crocs he'd ever seen.

Freshwater crocs are alleged to be harmless.

I wouldn't have wanted to take a risk with these beauties because they were 3–4 metres long. They usually grow 1–2 metres.

On another occasion at Leilyn (Edith Falls), site of Bolong, the rainbow serpent, which is an indescribably beautiful series of waterfalls with a large pool at the base of one of them, I saw a group of blackfellas part like the Red Sea as a large snake passed through their midst. Amongst our clients was Raymond Fordimail who had been born at the Forty Mile. Hence his name.

There was Sarah Flora, Rita St George, Ricky Rance, Samuel Bullfrog, Robert E Lee, Penny Plumjam and Sandy Barraway amongst others.

Even some of the whitefellas had delightful names.

One of the Katherine town councillors was Jimmy Forscutt.

His name was too much for David who called him "Jimmy Foreskin".

In the Kenbi land claim one of the claimants was named the "Prince of Wales". I don't think he was related!!

To prove that the claimants were members of a "local descent group", it was necessary to establish the genealogy of each claimant.

To do so we used anthropologists, one of whom was also a linguist and spoke 14 languages. She had taught herself to speak Jawoyn.

Learning about their social structure, camping out with them, traversing and learning about their country, hearing their life histories, gave me an insight into my Aboriginal clients I could never have otherwise gained.

It was an unforgettable experience.

When we were preparing the Kenbi claim for a hearing on the merits David persuaded me that we should accompany three of our clients into the shark and crocodile infested Arafura Sea to catch a turtle. This related to their right to forage.

We set out in a 14-foot aluminium runabout powered by a 25 hp motor.

Any doubts I had about the sea being shark infested were dissipated when something long and dark went hurtling past our boat at great speed.

When a turtle was found and speared it had to be got into the boat. This was accomplished by jumping into the water and pushing the turtle into the boat.

Needless to say neither David nor I volunteered for this task.

Two of the blackfellas did so.

I've never seen two blackfellas move as fast as those two did in and out of the water, apart from Cathy Freeman at the Sydney Olympics.

It was a considerable distance to the turtle-hunting grounds so when we decided to return we were miles from land.

Meanwhile the wind had come up, so our journey back to dry land, which took nearly two hours, was through waves of about three feet.

Michael Thompson SC, Stephen Estcourt QC and John Gibson.

Lydia Kinda and Magistrate Sue Blashki.

Judge Leckie and Simon Cooper.

Reserve Judge Frank Walsh; Bill Stuart; Eileen Stuart, 95, the oldest member of the Victorian Bar and Acting Judge Dyett.

I still recall some of my thoughts on this journey back which are largely unprintable.

But they included: "How in the bloody hell did I find myself here?"

Aboriginal claimants had a number of natural enemies, apart from the Northern Territory Government of the day.

These natural enemies included mining companies. Let me tell you of two interesting incidents that demonstrate how some mining companies that approached land claims.

In one claim in which David appeared as counsel, Peko-Wallsend opposed a favourable recommendation by the commissioner because, so it said, within the land claimed was an important mineral discovery, the location of which they refused to disclose because it was "commercial in confidence".

In due course, as might have been expected, a recommendation was made to the minister in favour of a grant of land.

Undaunted, Peko-Wallsend made private representations to the minister disclosing the location of the mineral discovery without even notifying the claimants that these representations were being made.

The minister gave this representation short shrift as the location of the discovery had been deliberately withheld from the claimants and, more importantly, the commissioner.

When the minister made his decision, which was favourable, but before it was implemented, Peko-Wallsend sought administrative review from the full Federal Court.

I was briefed to lead David in the full court.

Dick Conti appeared for Peko.

Dick was not a man prone to boasting but he seemed strangely confident.

To our joint amazement Peko were successful in a majority decision.

So we then appealed to the High Court.

We felt pretty confident about our chances on this one.

How little did we know.

To our further amazement, the High Court rejected the appeal, and in a leading administrative law case held that the minister should have taken into account the material disclosed to him by Peko.

I have disclosed the name of this mining company because the case is reported in the CLR.

You probably would like to know what then happened.

Well, the minister, as directed by the High Court, took this secret information into account and decided to grant the land anyway.

The second occasion was even more extraordinary.

The second land claim for the Jawoyn people involved a number of elderly claimants.

A mining company, which on this occasion shall remain nameless, had

Chris Blanden S.C., Tim Donaghey and Mark Dean S.C.

Kerri Judd, Leonie Englefield and Ingrid Braun.

Mark Robins, John Langmead S.C., Glenn McGowan and Michael Shand QC.

expressed its opposition, and a few days before the hearing of the claim was to commence asked the NLC to agree to an adjournment. They said that they needed more time to prepare. This, notwithstanding they had known about the claim for more than a year and the date for the hearing had been fixed for months.

The NLC refused to consent to an adjournment as a great deal of time, energy and resources (including hiring helicopters) had gone into the preparation.

Further, a number of the senior traditional owners were very old and might not still be alive if the hearing was adjourned for any length of time.

Following the refusal of their request, the mining company's lawyers did not respond.

On the morning of the hearing as we were about to start, we were surprised to hear the sound of an approaching helicopter. It landed nearby.

From it emerged a number of gentlemen in suits and ties, who had a shorthand stenographer with them.

One of these gentlemen identified himself as a partner of a large Melbourne firm and announced his appearance for the mining company. He sought an adjournment.

It was opposed.

After a relatively lengthy argument an adjournment was refused.

The whole team then packed their bags, put away their note books, and marched back to their helicopter which then took off. They did not stay to contest any part of the claim although the Commissioner invited them to do so. So the hearing proceeded.

At lunchtime, Robert, David and I discussed what had happened. We concluded that the event had been orchestrated, probably to provide a basis for an injunction application in the Federal Court in Melbourne.

Melbourne was where the mining company had its head office and the solicitors were from a large Melbourne firm.

We decided that it would be best if someone who knew the history of the claim should be in Melbourne to resist any application.

It was David or me.

David was handling the first lot of the witnesses so it was me.

So we got on the phone.

Robert dictated an affidavit to his Darwin office which was then faxed to the NLC's Katherine office where it was sworn.

Either Qantas or Ansett was then telephoned to book me a late flight to Melbourne.

Together with Robert's affidavit and the exhibits, I took a late flight out of Darwin back to Melbourne, following a hair-raising ride from Katherine which normally took three hours.

I do not recall what time it was when I got back to Melbourne or whether I even

went home, had a shower or even a shave, but at 10.15 the next morning I was in the Federal Court.

Our suspicions proved to be well founded.

Counsel for the mining company announced his appearance and said he was seeking an *ex parte* injunction to stop a land claim proceeding.

Ex parte indeed!

I announced my appearance, tendered Robert's affidavit and gave some evidence from the Bar table.

(Well, you do that in land claims.)

No one asked to cross-examine me.

I don't recall who my opponent was.

I wish I did.

But I remember the look on his face when I announced an appearance.

The application was refused; so I went back to the Territory.

The land claim proceeded.

In the course of acting for the Northern Land Council I was briefed in much other interesting litigation.

This included a challenge to the agreements made with the Commonwealth Government pursuant to which the Ranger Uranium Mine had been established on Aboriginal land.

The agreements pursuant to which the Ranger Uranium Mine went ahead were incredibly complicated.

They must have been drafted by the obfuscation department of the Crown Law Office.

Our brief took us to New York to consult with experts and witnesses who had been involved in the original negotiations with the Federal Government.

The Government had been very anxious for the mine to proceed but wanted the NLC to consent to it.

The NLC was led at the time by Galarrwuy Yunupingu — Australian of the Year in 1978 at the age of 26.

Amongst our instructions from Galarrwuy were certain instructions about a fishing trip on which he'd been accompanied by the then Prime Minister, Deputy Prime Minister and Minister for Aboriginal Affairs.

When the boat left shore Galarrwuy was opposed to the uranium mine, as was the Northern Land Council.

When it returned he was in favour of it.

Proceedings were issued and I looked forward to airing our instructions and to the cross-examination.

I wasn't going to ask how many fish had been caught even as a lead-up question.

However, before we got to court the case was discontinued by the NLC.

Richard Attiwill, Justice Kellam, David Martin, Danielle Galvin and David Brookes.

Stephen Estcourt QC representing the Australian Bar Association.

We were never told why.

I suspect politics intervened.

To give you an idea of what the blackfellas were up against from the Northern Territory Government of the day, which I am tempted to describe as "a bunch of cowboys", let me tell you about another incident.

When Kakadu National Park was established on Aboriginal land it was necessary to create a township.

So Jabiru was established, pursuant to agreements with the traditional owners.

Because of their concerns about the effects of alcohol on their people and a desire to curtail its consumption, the traditional owners had insisted that there be no takeaway liquor licences in Jabiru.

The Northern Territory Government agreed to this condition.

However, both Kakadu and Jabiru proved a great tourist success.

So the government decided to grant a licence for a takeaway liquor outlet.

The NLC got wind of this plan.

I was briefed to advise the traditional owners what they could do.

We were contemplating an application in the Northern Territory Supreme Court for an injunction when a further thought occurred to us.

Kakadu, being a national park, was under the control of the National Parks & Wildlife Commission who were sympathetic to the traditional owners.

So after the matter was drawn to their attention they thought fit to make a regulation banning takeaway liquor outlets in the national park.

In the course of acting for the NLC I found myself opposed by many quality counsel.

They included David Bennett QC, now the Commonwealth Solicitor-General; Ian Barker QC, then the Northern Territory Solicitor-General and subsequently president of the New South Wales Bar Association; Dick Conti QC, now Justice Conti of the Federal Court; Jim Thomas QC, who was subsequently appointed to the Queensland Supreme Court and then to the Court of Appeal; and Pat Keane who became the Queensland Solicitor-General.

Another Queenslander, Bill McMillan, appeared for the Katherine Town Council in the Katherine Gorge Land Claim.

Bill had been involved in some litigation for Vietnam veterans concerning the effect on them of the sprays used by US Forces to defoliate the jungle.

Within seconds of learning this interesting fact, David had nicknamed Bill "Agent Orange".

I've also mentioned Tom Pauling, now

Michelle Florenini, Jack Rush QC, Kate McMillan S.C. and Chief Justice Gleeson.

Meredith Schilling and Peter Fox.

the Solicitor-General for the Northern Territory.

These were quality members of the Australian Bar and a pleasure to appear against. They brought out the best in us.

One of my prized photos is of the lawyers in the Katherine Gorge Land Claim which shows the Commissioner, formerly from Papua New Guinea, counsel from three states, Victoria, New South Wales and Queensland and counsel from the Territory.

Why have I recounted these experiences tonight? What is my message to the junior members of this Bar which I promised to deliver?

Well it is this: when you sign the Roll you open the door to a world of opportunity.

What happened to me has happened to others and could happen to you.

Success at the Bar is not a matter of luck — it requires hard work. But the opportunity for success can be a matter of luck. When it occurs — seize the day!

This brings me to my second message.

David Parsons and I are not the only members of this Bar to appear for Aboriginal land claimants in the Northern Territory.

Ross Howie (an excellent recent appointment), Ian Gray (now the Chief Magistrate), Frank Costigan QC, Anthony Young and Tom Keely were amongst others who undertook this work.

The late Ted Laurie QC came out of retirement to do the very first land claim.

For the Central Land Council, the late Ron Castan QC and Bryan Keon-Cohen frequently gave advice and appeared.

Ron Castan, Ross Howie and Bryan Keon-Cohen and others have also acted for other land councils and Aborigines throughout Australia.

It was in that role that Ron Castan and Bryan Keon-Cohen formulated the argument for Eddie Mabo in his case against the State of Queensland.

When the history of the High Court is written, it is my respectful opinion that *Mabo* v *The State of Queensland* will be regarded as one of its most important decisions.

In the absence of an apology from our current Prime Minister, it probably constitutes the most valuable contribution yet made in this country to the concept of reconciliation. The author of the leading judgment, Sir Gerard Brennan, is here tonight.

I mean no disrespect nor do I seek to diminish the quality or importance of the many other judgments Sir Gerard has given in the course of a long and distinguished judicial career, but it is my opinion that his judgment in *Mabo* is as excellent a judgment as he has ever written.

Contributions made by Victorian barristers to Aboriginal land rights is only part of the story. Members of this Bar have frequently been involved in the defence and advancement of the rights of Aborigines in other arenas.

When Geoffrey Eames was appointed to the Victorian Supreme Court he had not been around often in recent years.

A number of people asked "who's Geoffrey Eames?"

Well they should have asked David Parsons or me.

Geoff helped establish the Central Australian Aboriginal Legal Aid Service in Alice Springs.

He also worked for the Central Land Council and the Northern Land Council.

I'm told by a source, whose identity I promised David I would never reveal, that the reason why Geoff was preferred for appointment to the Central Australian Aboriginal Legal Aid service was that the local football team needed a good ruckman.

Geoff was the tallest applicant.

Geoff worked as senior counsel for Aborigines in the Maralinga Royal Commission.

He was senior counsel assisting the Royal Commission into Aboriginal Deaths in Custody.

His appointment to the Supreme Court came as no surprise to those of us who knew of his work.

And in similar vein, so was the appointment of another humanitarian, Frank Vincent.

Frank spent a lot of time in the Northern Territory doing criminal work for Aborigines caught up in the tentacles of the criminal law.

Acquittals of such people were infrequent before members of this Bar turned up to defend them.

Frank introduced into some courts in the Northern Territory such quaint doctrines as the onus of proof and reasonable doubt.

He secured acquittals where there had been few before.

He cross-examined police and other witnesses who had never been cross-examined before.

I'm told some of them claimed they enjoyed the experience.

I must tell Frank that witnesses are not meant to enjoy cross-examination.

For years Frank contributed to assisting blackfellas in the Northern Territory, usually pro bono.

But a word of warning; don't ask Frank to tell you any of his war stories — you could be in for a long chat.

Other members of this Bar such as John Coldrey, Jim Duggan and Bill

Morgan-Payler (all now members of the judiciary), Dyson Hore-Lacy, Remi van Der Weil and Don McIvor did work for Aborigines who probably would not have been represented.

There are others. I can't name them all.

Members of the Victorian Bar have regularly provided assistance to the disadvantaged members of our society; and fought for worthy causes.

Whilst there are far too many occasions to mention in this speech, I do wish to mention two recent occurrences.

We all know that earlier this year the Singapore Government decided to carry out the death penalty imposed on a young Asian Australian.

The undeniable fact is that he was a drug smuggler.

In other words, he was a participant in an appalling trade.

Whether you believe his explanation as to how he came to be a drug smuggler or not, he did not deserve to be executed.

Nobody could have failed to have been impressed by the dignified way in which Lex Lasry QC and Julian McMahon fought for their client.

Perhaps that was to be expected of them.

In the forefront of those opposing this draconian penalty, which has no place in a civilised society, were members of this Bar.

Robert Richter QC was in the forefront.

Many members of this Bar were amongst those protesting the death penalty and holding up the traffic at the corner of Lonsdale and William streets on the day of the execution.

That the protests were not successful is not to the point.

It was a worthy cause and members of this Bar were there.

The other occasion is related to events such as the litigation concerning the boat people detained on the *Tampa*.

Australia is not alone in experiencing a refugee problem.

It is a worldwide problem; ask the Spanish who are flooded with refugees from Africa.

Ask the French and the Dutch.

The United States of America is regularly invaded by "refugees" from Mexico.

They can walk across the Rio Grande.

To cross the Indian Ocean on foot is somewhat more difficult, unless you are Ron Barassi.

When the Federal Government decided that Australia needed protection from unwanted migration and applied the "Pacific Solution", members of this Bar were at the forefront in protesting the indiscriminate nature of the government's actions.

There is a humanitarian need to deal with true refugees seeking asylum with both compassion and expedition.

The Bar Dinner crowd networking between courses.

Some thought the Federal Government's approach failed to provide for true refugees and a speedy resolution of their claims for asylum.

Further, incarceration of people in a South Australian desert or on a remote Pacific island, disturbed many members of the community including members of this Bar.

There is no doubt that amongst the boat people, including those on the *Tampa*, were true refugees whose human rights appeared to have been sacrificed on the altar of populist expediency.

In the forefront of members of this Bar seeking to invoke the rule of law protesting the treatment of these people were Julian Burnside QC, Chris Maxwell QC, (now Justice Maxwell and one of tonight's honoured guests), Jack Fajgenbaum QC and many others.

You may not agree with them but what cannot be gainsaid is that it was appropriate for someone to speak out on behalf of these disadvantaged and unrepresented people.

That is what those members of this Bar did; and without fee.

A recent survey conducted by the Victorian Bar Council disclosed that last year over 180 members of this Bar provided in excess of 10,700 hours of pro bono work worth nearly $4 million for the members of our community who needed the assistance of counsel but were unable to afford it.

These figures come from the answers to the survey that not all barristers answered.

The true figures would be greater.

It is no accident that many of the humanitarian counsel whom I have mentioned tonight have been appointed to the Bench, appointments which I regard as entirely appropriate and which others would go so far as to say were necessary.

It is said that the price of freedom is eternal vigilance.

Who amongst our society shall be vigilant if not this Bar?

Today, there is no doubt that if we wish to preserve our freedoms and liberties we need the Victorian Bar.

For that matter we need every Bar in Australia.

I both support and would encourage the existence of an Australian Bar.

In truth the Victorian Bar is not much different from the Bars of other States and Territories other than perhaps we are just that little bit better!

The Victorian Bar has a long history of defending the underdog.

The Victorian Bar has a long history of upholding human rights.

The Victorian Bar has a long history of seeking to ensure that the rule of law applies to all members of the community, particularly those who have neither the wherewithal, intelligence, experience or skill to defend themselves.

We should all be proud of this institution to which we belong.

I certainly am.

So join with me in a toast.

Let's toast ourselves — we are entitled to do so.

I give you: the Victorian Bar.

David Hicks and the Military Commission – Is Australia Turning its Back on International Law?

Peter Vickery QC

At the request of the *Bar News,* this article outlines some of the findings of a report delivered to the International Commission of Jurists, Victorian Section, in June this year. The full report is posted on the ICJ Australia website www.icj-aust.org.au.

David Hicks, an Australian citizen, was captured in November 2001 near Kondoz, Afghanistan, in the closing days of the war between the Taliban government of Afghanistan and the Northern Alliance supported by the United States. He was subsequently confined at a US naval base at Guantanamo Bay on the southeast corner of Cuba where he remains imprisoned.

He is to be tried by a US Military Commission for serious crimes which carry a maximum penalty of life imprisonment. The Military Commission system was established by order of the President of the United States shortly after the attacks of September 11, 2001, without the approval of Congress. No American citizen or member of the US armed forces is subject to this system of trial. It is reserved exclusively for what the US Department of Defense describes as "non-resident aliens with no constitutional rights".

The United States claims that international human rights and humanitarian law does not apply to David Hicks and the other Guantanamo Bay prisoners. Nor does it recognize that this body of international law applies to the Military Commission system it has established to try them. It takes this position in the face of having become a signatory to, and

David Hicks

ratifying, the Third Geneva Convention Relative to the Treatment of Prisoners of War (the "Geneva Convention") and the *International Covenant on Civil and Political Rights 1966* (the "ICCPR").

The legal black hole it has created for David Hicks and the other detainees is not filled by resort to the constitutional rights provided for in the US Constitution, a cherished birthright of American citizens, or any of the complementary domestic laws of the United States. On the contrary, excavation of the hole is complete with a denial of fundamental rights which we are entitled to expect from a civilized system.

The Military Commission process has been invented to fill the gap. It is a special system of trial which applies only to the prisoners held at Guantánamo Bay and like places. It is a system established wholly outside the conventional civil and military court structures of the United States. The Commission will try not a single US citizen nor any member of the US military.

Consider this hypothetical: A citizen is charged by the police with an offence of aiding others to attack members of the police force and destroy items of police property. The presiding judge who determines the law at the trial is a policeman. A jury is selected for the trial by the police. The jury consists entirely of policemen. The Chief of Police then reviews the decision of the jury before the decision becomes final. How could the citizen be guaranteed a fair trial under these circumstances? Still less, how could such a system even approach the appearance of a fair trial?

The system designed to try David Hicks is starkly similar. Pursuant to the President's order, the Military Commission appointed to hear David Hicks' case will consist of a Presiding Officer who is a judge advocate of the US armed forces and at least three other military officers. The Presiding Officer acts as the judge and the other officers, who have no legal training, act as the jury. The members of the Commission are appointed by Secretary of Defense Donald Rumsfeld, who also approves the charges prepared by the Prosecution. The Prosecution team are also military officers. Following a decision by the Commission and review by a review panel consisting of other officers of the armed forces, the decision is then

Detainees sit around the exercise yard in Camp 4, the medium security facility within Camp Delta at Naval Station Guantanamo Bay, Cuba. In Camp 4, highly compliant detainees live in a communal setting and have extensive access to recreation. Photo by US Army Sgt. Sara Wood.

passed on to the President of the United States (who is the Commander-in-Chief of the US armed forces) for review and final decision.

Consider this second hypothetical: A citizen is arrested by a policeman on suspicion that he may have committed some unspecified crime. He is imprisoned for two and a half years before he is charged with any offence. When he is finally charged it is proposed to try him before a new tribunal which is wholly outside the established court system. Further delays occur with inevitable legal challenges to the new tribunal which could only have been expected by its architects. Four and a half years then pass, yet still no trial has occurred and no definite time frame for a trial set down.

Indefinite delay of this kind is a clear violation of the international standard which requires that anyone detained on a criminal charge shall be entitled to a trial within a reasonable time, otherwise the person is to be released. This standard is contained in the ICCPR, an international treaty to which both the United States and Australia are parties.

The tragedy is that this is not a hypothetical. In fact it summarizes the reality of the inordinate delay suffered by David Hicks imprisoned at Guantanamo Bay.

Consider yet a third hypothetical: A prisoner awaiting his trial is subjected to prolonged isolated detention where he sees no one and speaks to no one but his interrogators for months. He is subjected to an orchestrated and relentless program of verbal abuse from his prison guards. However, under the system of trial he faces, evidence obtained as a result of this treatment is not prohibited because no physical pain or physical suffering amounting to torture was involved or could be proven. Nevertheless, such conduct would clearly breach international standards which prohibit cruel, inhuman and degrading treatment, and a fair trial could not occur if evidence obtained by these means was to be considered by the jury.

David Hicks faces the possibility of such evidence being used against him. Whether or not he has been subjected to such abuse or worse remains to be seen. What is alarming is the fact that it was only on 24 March this year, and in response to considerable public pressure on the matter, that the US Department of Defense took steps to prohibit the reception of evidence at a Military Commission trial that was obtained by the use of physical torture.

Even then the Military Instruction falls well short of international standards. Importantly it does not exclude evidence obtained by techniques involving severe mental suffering which is not accompanied by physical torture. It is not hard to imagine a hideous array of examples which would fit within such a parameter. It is obviously unfair for David Hicks to be exposed to a trial system which does not exclude evidence obtained by these means — and yet the potential is there for this to occur.

Some improvements have been made to the trial procedures to be used by the Military Commission and Australia has participated in this exercise. These matters are set out on the website of the Federal Attorney-General "David Hicks Frequently Asked Questions". The Attorney-General's website is at pains to point out the steps that have been taken to make the system appear to be fair and to assert that this is the case.

However, they fall well short. To take one example, the appointment of an independent Australian observer to observe an unfair process does not make the process fair.

The "reform" measures, such as they are, do not address the deep-seated structural issues which militate against the possibility of a fair trial being conducted in accordance with international standards. In fact they seek to disguise a fundamental assault on the rule of law and the traditional values placed in a fair trial which have been developed over centuries.

The United States has exempted all of its citizens from trial by Military Commission. Moreover, the British government has publicly denounced the system and has extricated its citizens from its operation. The Australian government however, has been conspicuous in refusing to take similar action in relation to one of its citizens.

In January this year 422 current and former members of the United Kingdom and European Parliaments rallied together in support of a submission made to the Supreme Court of the United States in the Hamdan case. The submission strongly censured the system of trial by Military Commission as being fundamentally flawed and incapable of providing for a fair trial by international standards.

Further, in February this year the Economic and Social Council of the United Nations published its report on the arbitrary detention of detainees at Guantanamo Bay and the proposal to subject them to trial by Military Commission. The first recommendation of the Economic and Social Council Report was that:

> Terrorism suspects should be detained in accordance with criminal procedure that respects the safeguards enshrined in rel-

evant international law. Accordingly, the United States Government should either expeditiously bring all Guantanamo Bay detainees to trial, in compliance with articles 9(3) and 14 of the ICCPR, or release them without further delay. Consideration should also be given to trying suspected terrorists before a competent international tribunal.

This month Australian lawyers, in support of the International Commission of Jurists Australian Section, have also taken a stand on international law and have condemned the inherent unfairness of the trial planned for David Hicks and the failure of our government to put an end to this terrible injustice. Set out below is their open letter to the Prime Minister of Australia sent on 3 June 2006:

As Australian lawyers we wish to bring to your attention that the imprisonment of David Hicks at Guantanamo Bay and his proposed trial by Military Commission are illegal under international law.

Whether or not David Hicks is in fact guilty or innocent is not the issue. The illegality lies in the process of indefinite detention and unfair trial by Military Commission, a process which expressly has no application to any American citizen.

Notwithstanding contrary positions adopted by the United States, the protections of international humanitarian and human rights law, as reflected in the Geneva Convention and the Civil and Political Rights Covenant, remain applicable to Mr Hicks. Both the United States and Australia are parties to these treaties and are bound by them. However, Australia has failed to comply with its obligations and fulfill its responsibilities under international law and has been complicit in the conduct of the United States.

The imprisonment at Guantanamo Bay and the unfair trial of David Hicks by Military Commission are an affront to international legal standards, indeed all civilized legal standards. The President of the United States has claimed the unilateral authority to try persons nominated by him as suspected terrorists in a system which is wholly outside the traditional civilian and military judicial systems. He seeks to conduct such trials before persons who are his chosen subordinates. The Military Commissions deny the basic rights to an independent and impartial trial and the procedures do not exclude evidence obtained by coercion including the use of cruel, inhuman or degrading treatment.

The system also denies the fundamental right to an expeditious trial. David Hicks was in custody for two and a half years before he was charged on 10 June 2004. He has now been imprisoned for four and a half years without a trial. It is not fairly open to attribute this inordinate delay to Mr Hicks and his lawyers. It was the unjust system of trial by Military Commission which gave rise to his legitimate court challenge, a process which in any event occupied a small proportion of the total period. Further, there remains no explanation for the unconscionable delay prior to Mr Hicks being charged.

If Australia fails to join the United Kingdom in condemning these violations, it not only fails in its duty to one of its citizens, it also plays a part in undermining international legal order. This is not in our own interests nor is it in the interests of our strategic partner. It is therefore imperative that Australia encourages the United States to respect the principles of the rule of law and the protection of the bed rock freedoms which are enshrined in the major international law treaties.

The menace of terrorism is real. However, to meet the danger the world needs not only a military solution, but renewed and sustained commitment to the rule of law and to fundamental principles of human dignity and respect for human rights. This is the shared heritage of a civilized world. Unless we are vigilant, terrorism may achieve the destruction of these values. We should not give it such a victory.

The Hon. John Dowd AO QC, President, International Commission of Jurists Australian Section on behalf of all of the Australian lawyers who are signatories to this letter published on www.icj-aust.org.au

The letter remains open for signature by Australian lawyers. Contact Glenn McGowan SC, Chair ICJ (Victoria) mcgowan@aickin.com.au

Verbatim

No Sledge-ing

Court

Coram: Martin M.
Robert Burns acting for applicant wife for Intervention Order
Defendant husband self-represented.

At the conclusion of the wife's evidence-in-chief His Honour invited the husband to cross-examine. One of his first questions was "When I knocked the door in, I did not bring the sledge hammer into the house — did I?"

A Relative Perspective

County Court of Victoria

8 March 2006
Galley, Collis QC and Ryan for Plaintiff
Dyer for Defendant

The Plaintiff was a man who on the evidence could not work more than 500 yards without pain.
Dyer: It's one of the — well, regrettably one of the sad facts of life with many people, your Honour.
Her Honour: But I'm not talking about the sad facts of life with just any person. I've got to assess the impact on this man. Now, if he had been a big, fat, sedentary barrister who just spent most of his leisure time in the Essoign Club, well, you'd say: "Well so what that he can't walk 500 yards? He's probably never walked more than 500 yards in his life." But this was a man who was clearly physically active.

Women Barristers Association's Third Annual "Meet and Greet" at the Essoign

Theme: "Refresh Your Wardrobe and Your Contacts"

The Women Barristers Association with Victorian Lawyers hosted the third "Meet and Greet" event on Wednesday 14 June 2006. Lexis Nexis was the principal sponsor for the third year.

GUESTS arrived from 5.30 p.m., comprising over 100 women barristers, including some senior counsel (Alexandra Richards QC, Fiona McLeod S.C., Crown Prosecutor Michele Williams SC, Jennifer Davies S.C.) and solicitors from various law firms both small and large, such as Maddocks, Russell Kennedy, Baker & McKenzie, Blake Dawson Waldron, Allen Arthur Robinson, Corrs Chambers Westgarth, Phillips Fox, Australian Government Solicitors, Customs and local government. Attendees enjoyed Asian inspired finger food (Peking duck rolls, ricepaper rolls, sushi, san-choi bow) from the Essoign and wine tasting, compliments of Winsome McCaughey's winery (Seven Sisters Vineyard), and her Baddaginnie Run label. The wines included their shiraz 2003 and 2004, merlot 2004 and verdelho (white) 2003 and 2005.

Participants in the fashion parade.

At 6.15 p.m., Virginia Jay, Convenor of Victorian Women Lawyers, welcomed guests, and spoke about the gender appearance data due to be released this year by Australian Women Lawyers. She then introduced Winsome McCaughey who spoke about the Seven Sisters winery which reflects seven generations of her family being associated with its land since 1856 — when her great grandmother, a widow with 13 children, arrived from Scotland to the land where the winery was established in 1996 (near the northern end of the Strathbogie Ranges, and traditional country of the Taungwurrung people). For more information about her see www.baddaginnierun.net.au

The next speaker was Marianne Webster of "Fitted for Work" who spoke about the services provided by this organisation she founded to help unemployed women return to the workforce. Attendees were invited to bring old suits to donate to Fitted for Work which they did. The services of Fitted for Work include offering business clothing and presentation skills to women who may have been out of work for a long time or who have never had a job. Attendees were also invited to continue donating clothes, volunteer in the Fitted for Work boutique or consider donating to this organisation. For more information, see www.fittedforwork.org. Guests were then asked to fill their glasses as the fashion parade was to begin.

The music came on, lights intensified and the 12 models paraded (with turns) down the Paris-inspired five-metre catwalk in Melbourne fashion

Rosemary Peavey, solicitor.

Kaajal Fox, Articled Clerk.

Christine Melis, solicitor.

Jane Forsyth, barrister.

Michelle Sharpe, barrister.

Caitlin Tierney on catwork.

Simone Jacobson, Convenor of Women Barristers Association.

designer Tiffany Treloar's winter and spring/summer range, to music of Nina Simone.

The models included barristers Michelle Sharpe and Jane Forsyth, solicitors Christine Melis and Rosemary Peavey, articled clerks Kaajal Fox and Caitlin Tierney, a professional model, stockbrokers (being sponsors of a door prize) and two younger non-lawyers including daughter of barrister Trish Dobson, Kate Dobson.

The models were a mix of ages from 19–45, and sizes from 8–14. All models had professional hair (by Frank Burgemester, Lygon Street, Carlton) and make-up (Clinique and Estee Lauder by Lisa and Belinda of Terry White, Sunbury) for the event.

The fashions ranged from conservative, to the more outlandish, with some fun top-hats featuring in the parade.

After the parade, Tiffany Treloar spoke about her designs, and in particular her use of technology to create her fabrics. She uses photographs and digital images she creates, using Photoshop, and arranges for them to be printed straight onto fabrics. For more information on her fashions see www.tiffanytreloar.com.au. Models were given gift bags by Tiffany Treloar.

Simone Jacobson (Convenor of Women Barristers Association) thanked Tiffany Treloar for bringing the clothes, and co-ordinating and choreographing the parade, and presented her with a bouquet of flowers. Simone spoke about how the event came together — from one contact, to another leading up to this event — and pointed out that a list of attendees (with direct phone numbers and email details) was included in showbags for people to take home. Simone also explained to female solicitors how to find female barristers, and to consider briefing female barristers by going into the Vicbar website, checking the women barristers' directory and searching the area of practice.

Principal sponsor Lexis Nexis, Greens List and other sponsors (such as Austock and Terry White who provided door prizes) were thanked, and Adele Bernard of Lexis Nexis spoke warmly about Lexis wanting to continue supporting this event, which she said was their premier legal event they sponsor in Australia. All sponsors received bottles of wine as token of thanks.

After some further mingling and talking about the fashions and wines, Caroline Kirton, President of Australian Women Lawyers, encouraged all present to attend the first national AWL conference in Sydney on 28–30 September 2006. Guest speakers include judges from around Australia, including the Chief Justice of the Supreme Court of Victoria. For more information about the conference, see www.womenlawyers.org.au

Michelle Sharpe, WBA Assistant Convenor, and Caroline Kirton called the door prizes — Christine Melis, solicitor at Minter Ellison and a model in the parade won a $300.00 handbag donated by Austock. Shirley Power, a law student soon to embark her legal career, won a hamper of Ecotanical cosmetic products (donated by Terry White). She later said the prize affirmed for her that she had chosen the right career path. The event concluded at 8.30 p.m. and each guest was asked to take home a Lexis Nexis showbag, including various stationery items, rocky-road and information from Lexis Nexis, added to which were items from Austock, samples of cosmetics from Terry White, a list of stockists for Tiffany Treloar's clothes and a contact list of those who attended.

All in all it was a successful evening in terms of numbers of attendees, the speakers, the outstanding wine and food and the novelty of a fashion parade being the first ever at the Essoign. A special thanks to Nicholas Kangeropoulous at the Essoign who is a pleasure to deal with and accommodated the designer, and staging company's requirements.

Thanks also to Christine Harvey and Geoff Bartlett for organising security and access to the first floor for the night.

Speech at Dinner for Justice Susan Crennan

27 April 2006

Frank Costigan QC

WE are here this evening to pay tribute to one of our own.

This dinner is not a welcome, nor is it a farewell to a former leader of our Bar.

Welcomes form part of the liturgy of the legal profession. They express the warmth and the congratulations of the profession to a newly appointed judge. In the case of a newly appointed Justice of the High Court they occur around the country as each State has its own ceremony. I am not sure the process is yet complete. I do know they are a source of great satisfaction and pride to the new judge.

Tonight is different. The Victorian Bar has already publicly taken part in the welcomes. There is no farewell from the Bar which requires acknowledgment or regret. In a very personal sense we have come here to recognise the very great contribution that Susan Crennan has made to this Bar and to thank her for it. I will not dwell on the great contribution she has made to the Victorian and Australian community in a number of areas. I note for the record her past and continuing membership of the Council of Melbourne University, her association with both the Royal Women's and Royal Melbourne Hospital, her time as Commissioner for Human Rights and her strong connections with Melbourne University Law School.

What I would like to do briefly is turn to her life at the Bar and the great contribution she has made to the Bar and to recall some memories.

Her contribution to this Bar has been one of leadership, it has been professional, and it has been personal.

Let me deal briefly with each of these areas.

Susan Crennan was a member of the Bar Council for seven years between 1988 and 1994. During that time she looked after the books as honorary Treasurer, she monitored our behaviour as a member of the Ethics Committee and she represented us to the outside and often critical world as our Chairman, and for one year as President of the Australian Bar Association.

On an occasion such as this it is, I think, valuable to recall some of the people with whom she worked whilst she was on the Bar Council. She was Treasurer to Kirkham in 1991/1992, when Jessup

Frank Costigan QC.

Guest of Honor Justice Susan Crennan addressing the guests.

was senior Vice-Chairman, and was senior Vice-Chair to Jessup in 1992/1993. In 1993/1994 she became Chairman. Her senior Vice-Chair was Hansen: her junior Vice-Chair was Habersberger. Her Treasurer was Kellam. The current Chair, Kate McMillan, was already a member of the Bar Council and headed for greatness. The Executive Director was Ed Fieldhouse and the Executive Officer was Anna Whitney. Many of these people are here tonight.

This was a formidable team to lead, but lead she did.

Many have come tonight to pay her honour. They include some 12 current and past judges, appointed from the Victorian Bar. Apart from the guest of honour there are 12 former and current Chairmen of the Bar. And many other distinguished guests and friends.

In April 1992, whilst she was Treasurer, Ken Hayne was appointed to the Supreme Court of Victoria. His appointment to the Court of Appeal was in 1995. He therefore cunningly avoided being officially welcomed by our guest, though she looked with great pleasure and admiration at his inevitable rise to the heights of the High Court. The Victorian Bar is immensely proud of its two High Court judges. Their contribution to the development of the law in this country has been and will be large.

Those of us here who have occupied the position of Chairman know only too well how constant and repetitive are the fires which need to be dampened. Many issues which arose during Susan's time as Senior Vice-Chairman and Chairman had also appeared in similar form prior to her taking up office and have reappeared from time to time since she left. They included:

- an attempt in the South Australian Parliament to abolish the Bar;
- a decision by the NSW Government to abolish the office of Queens Counsel;
- an attempt by the Commonwealth Attorney-General's Department to abolish the monopoly of the legal profession in certain areas;
- a submission by the Commonwealth Attorney-General's Department to the Trade Practices Commission to bring the Bar under the auspices of the Law Institute;
- a campaign by the Commonwealth Attorney-General's Department to make legislation "user friendly";
- and finally (and I am reluctant to recall this matter in the presence of so many distinguished judges) the announced policy of Paul Keating to give judges sex education.

All these matters required constant consideration and careful response. This they got from Jessup with Crennan at his side and from Crennan when she took office. The Bar was then and still is immensely grateful for that work

Relations with the then Victorian Attorney-General, Jan Wade, who occupied the Office from 1992 to 1999, were often difficult: they were always conducted with courtesy and good manners but with great firmness and resort to principle. No better example can be found than of her support for the principle of independence of the Office of Director of Public Prosecutions during the difficulties caused to Bongiorno during that time.

PERSONAL

The essential danger about speaking in a personal sense about a close friend is that the speaker himself runs the risk of becoming the subject and the friend becomes merely an appendage to a small autobiography.

Never fear. I do not propose to reveal to this distinguished legal gathering any of my past present or future failings. However, I would not wish this occasion to pass without some reflections on the personal qualities of our guest. She is known to all of you one way or another: each of you, I am sure, if asked could recount some act of kindness, or some support, intellectual or advisory, which she has provided in a difficult time. Likewise you could speak of the warmth of her personality and the great fun she was and is to be with, and the wit and humour she has brought with her to her friends. I will not attempt to guess at what you would say if you were called on. However, I can speak from my own experience of sharing some

His Honour Judge Frank Walsh AM, Julie Davis and Rohan Hamilton.

Elizabeth Brophy, Kathryn Rees and Dimity Lyle.

Peter Vickery QC, Colin Lovitt QC and Tim North S.C.

Kate Anderon, Alexandra Richards QC, Kevin Lyons and Chris Horan.

Gerard Meehan, Roisin Annesley and Jack Keenan QC.

Kate Millan S.C., Sue Tsalanidis, Jospeh Tsalanidis and Meg O'Sullivan.

S.E.K. Hulme AM QC, Listing Master Kathryn Kings, George Beaumont QC and John Barnard QC.

Honourable Stephen Charles QC, Jeffrey Sher QC and Hon. Jack Hedigan QC.

Frank Costigan QC, Margaret Barnard, Cameron Macauley S.C. and Melanie Sloss S.C.

Marie Santamaria, Paul Santamaria S.C., Justice Susan Crennan, Joseph Santamaria QC and Susan Santamaria.

(Back)Felicity Marks, Jack Hammond QC and Peter Fox. (Front) Ivan Brewer, Susan Brewer and Lucy Cordone.

Frank Costigan QC, seated, QC, with S.E.K. Hulme AM, QC and Justice Susan Crennan.

Robin Brett QC and David Curtain QC.

Michael Shand QC, Jennifer Futcher, Brendan Griffin S.C. and Michael Thompson S.C.

20 years on the 17th floor with her, including the four or five years when I shared a secretary with her and Michael. Others on the floor, in no particular order, were Cummins, Weinberg, Berkeley, Hedigan, Barnard, Chernov, Hansen, Bongiorno, Jolson, Kennon, and the Santamaria brothers. We all knew that her door was always open and her counsel was always available.

I have travelled with her and her husband and daughter in Europe. A highlight was my 60th birthday lunch on a warm winter day in Rome when she and Michael and young Kathleen (as she then was) and two of my daughters toasted each other and gloried in the pleasures of friendship.

But enough of that.

As I prepared this short address I pondered whether I could find a word which was the complete opposite of that extraordinary German word "schadenfreude". I was hoping to find a way to express the feeling of pleasure which we all have in the presence of Sue's achievements. I thought a good German dictionary might provide the answer. But it did not. There have been attempts made over the years to solve this linguistic problem and much discussion in the *Times*. Gore Vidal's oft quoted statement "whenever a friend of mine succeeds, a little something in me dies" is clearly not the answer. A writer in the *Times* produced a complex German compound noun (Erfolgtraurigkeit: I refuse to attempt to pronounce it). Neither answer is adequate or even accurate.

Can I do better than say on behalf of all here present, and those members of the Bar not present, how much we treasure our memories of our guest, how much we take pride in her accomplishments, and how much we thank her for the pleasure she has given us and the very great contribution she has made to the integrity of the law.

May I ask you to join with me in toasting our guest, Justice Susan Crennan.

Victorian Bar Legal Assistance Scheme (VBLAS)

A "thank you" function to thank those who have been engaged in the Victorian Bar Legal Assistance Scheme was held in the Essoign Club on 30 March 2006.

In his welcome address, the Honourable Justice Neil Young outlined in some detail the operation of Order 80 of the Federal Court Rules and the administration of the pro-bono referral service pursuant to that order. The text of his Honour's address is set out below.

IT is with great pleasure that I welcome you to this function. Its purpose is to thank all those who have contributed their time and skill to the Victorian Bar Legal Assistance Scheme.

The Scheme was established in 1995. The Scheme, which is now in its sixth year of administration by PILCH, has made an important contribution to pro bono practice in Victoria. Its activities extend, of course, far beyond the Federal Court. The Scheme deals with referrals from community legal centres, Victoria Legal Aid and all of the various courts in this State. Nonetheless, the Federal Court remains an important area of work.

This evening I would like to reflect on Order 80 of the Federal Court Rules and the Court's experiences of the pro bono legal assistance scheme to date.

Order 80 represents the first pro bono assistance scheme established by an Australian Court. The statutory rule came into effect on 7 December 1998. As Chairman of the Victorian Bar Council around that time, I was involved in discussions concerning the drafting of Order 80 and the implementation of the proposed scheme in Victoria. I recall the Honourable Justice Merkel's enthusiasm for the project, which his Honour had conceived after attending an international conference celebrating the 50th anniversary of the Declaration of Human Rights in Washington DC. Justice Merkel initiated a series of consultations in each of the States between members of the Court and the local Bar and Law Institute, with a view to establishing a panel of barristers and solicitors who were prepared to offer their assistance under the scheme.

The conceptions which underpin Order 80 are simple and effective. Under Order 80, a judge may, if it is in the interests of the administration of justice, refer a litigant for pro bono legal assistance. In considering whether it is in the interests of the administration of justice to make a referral, the judge may take into account the litigant's financial position, the potential for the litigant to access legal assistance outside the Federal Court scheme, and the nature and complexity of the proceeding.

The basic process is this. When a judge decides to refer a matter under Order 80, the judge's associate provides a certificate to the Registrar setting out the terms of the referral. There is a specific registrar in each Federal Court registry responsible for administering the pro bono referral process. In the Victorian Registry, the Deputy Registrar refers the matter to PILCH and the Victorian Bar Legal Assistance Scheme who maintain a register of practitioners who have volunteered their services in particular areas of practice. Usually three to four practitioners are identified by PILCH who are then approached to accept the referral. Once a practitioner accepts, the Registrar provides the practitioner with copies of the court documents and other necessary information.

One of the important safeguards for litigants under Order 80 is that a practitioner who has accepted a referral can only cease to act for the litigant in certain circumstances, including where the litigant has consented in writing, or where the practitioner has been granted leave of the Registrar. Order 80 also provides that practitioners acting pro bono can recover their fees and disbursements where a costs order is awarded in favour of the litigant.

Usually, a referral under Order 80 is made in general terms — for example, a judge may make a referral for the litigant to be represented in a proceeding. Sometimes a referral under Order 80 is narrower in scope — for example, the referral might be limited to providing advice to the litigant on grounds of appeal and, subject to that advice, drafting documents and appearing at the appeal. In other circumstances, a litigant may be referred for pro bono representation at a case management conference or mediation. The practitioner who had accepted the referral may be called upon to assess the chances of success of the appeal,

and to take further steps as appropriate, including taking steps to obtain a further referral for pro bono assistance.

When Order 80 was being drafted, the question arose whether a practitioner should be required to disclose openly to the court the basis upon which he or she applies for leave to cease to act for a litigant. It was decided that the grounds for ceasing to act should be kept confidential. As enacted, Order 80 provides that an application for leave to cease to act may be heard by the Registrar in chambers and may be heard *ex parte*. The applicant is served with a copy of the application. The application and any related correspondence is kept confidential, is not part of the proceeding in relation to which the referral is made, and does not form part of the court file. This procedure is intended to afford a litigant a degree of protection against the potentially prejudicial effects of a practitioner's application for leave.

The number of referrals under Order 80 is impressive. From its introduction in 1998 to the end of 2005, there have been a total of 1032 referrals under the Order 80. There have been a considerable number of referrals in the areas of administrative law, bankruptcy, corporations, crime, human rights and equal opportunity, industrial relations, intellectual property, native title, and trade practices. However the greatest proportion of referrals, both nationally and in Victoria, have been migration matters — some 835 migration matters have been referred nationally, with 218 in Victoria. Interestingly, though, the number of migration references has fallen in most jurisdictions since 2003 (the exception is NSW, which had 31 referrals last year).

Migration appeals occupy a significant proportion of the court's time and raise some troubling issues in relation to access to justice. Justice Merkel's comments at the National Pro Bono Conference in 2003 highlight a particular problem of pro bono representation of migration cases on appeal in the Federal Court:

> Plainly, there is an understandable groundswell of sympathy in the legal profession for the plight of asylum seekers. Many barristers and solicitors offer to appear for unrepresented asylum seekers in the courts in order to challenge decisions of the Refugee Review Tribunal. However, there is a real, but not well understood, problem in that area. The Tribunal conducts merits review. Review in the courts has been strictly limited to, putting it simply, errors of law or jurisdictional errors that affect the outcome of the case. Most cases decided adversely to asylum seekers in the Tribunal are decided on credibility issues — issues of a forensic kind that solicitors and barristers are well equipped to deal with. Yet generally their role comes into play only after the case has been lost at the Tribunal level, making the task on judicial review extremely difficult. Thus, so many well intentioned pro bono cases have proved to be fruitless because the effective representation arrived too late.

Judges in the Federal Court are keenly aware that a Federal Court appeal is usually the "last stop" for migration litigants, and are concerned to assist litigants with potentially meritorious claims to obtain pro bono legal representation. Referrals are only made after the case has been carefully considered by the judge. Conversely, practitioners know that if the Court refers a matter under Order 80, the case may be one that raises real issues and the Court considers that the interests of justice would be served by legal representation. In my time at the Federal Court, out of the ten or so migration cases that have come before me, I have made one referral under Order 80. Generally speaking, the experience of the Federal Court has been that referrals have resulted in representation of a high standard.

Order 80 has, I think, been such a success because of the mutual respect and cooperation that exists between Bench and Bar. A sign that the process is working well is the fact that State Supreme Courts have introduced or are planning to set up similar schemes. For example, Rule 66A of the Supreme Court Rules of NSW establishes a pro bono scheme and there are indications that the Supreme Court of Victoria is considering introducing provisions based on Order 80 of the Federal Court Rules.

Order 80 owes its success primarily to the commendable work done by practitioners acting pro bono in the Federal Court. There has been no shortage of practitioners who have been willing to assist. Approximately 25 per cent of Victorian barristers — and now possibly a greater percentage — have volunteered to participate in the Victorian Bar Legal Assistance Scheme. A large number of barristers, senior and junior, regularly appear pro bono in the Federal Court. It as important to the courts, and to the community, that pro bono assistance schemes, such as the Victorian Bar's Scheme, continue to meet the many demands placed upon them.

I would like to thank all those who have supported the Scheme, including those present here this evening, for your commitment to pro bono practice.

Twenty-five Years of the Victorian Bar Readers' Course

Speech by Kate McMillan S.C. at a dinner held on Thursday 11 May 2006 in Owen Dixon Chambers Melbourne

I was delighted to be invited to address this dinner of newly signed members of the Victorian Bar and to mark the first 25 years of the Victorian Bar's Readers' Course.

I do so with a sense of nostalgia and with a sense of pride in what the Victorian Bar has achieved over those years.

I also do so with the benefit of some lessons learnt over those 25 years. One of them is that it is dangerous to give an open-ended invitation to barristers — or former barristers — above a particular age to give their reminiscences. I would fix that age at about 30.

About 20 years ago I presided, as Chairman of the Bar Readers' Course, at a dinner such as this. That group of Bar readers was a particularly vigorous one and they were restive because they were keen to produce a revue. But first there was a guest speaker. He was a retired judge for whom everyone had much affection. The problem was that he went on and on — and on. Moreover, he spoke from speaking cards, which he produced from the left pocket of his suit. At about card number seven he had been going for 45 minutes and there seemed to be at least three more cards to go. The readers were getting very restive. I calculated that at the current rate of progress — about six minutes per card on average — he would finish within the hour. Keen to avoid a scandal, I looked sternly at the audience hoping that they would restrain themselves and would continue to look interested. (Looking interested and engaged irrespective of one's actual feelings is one of the acquired skills of a barrister. Some hypocrisy may be involved here but it is acceptable, if not overdone.)

In any event, when what I took to be the last card hit the tablecloth, I had a great feeling of relief. I was about to rise to thank his Honour for "an extremely interesting and engaging address" when he thrust his right hand into his right suit pocket and produced another handful of prompt cards. Without pausing he began Part Two of his Reminiscences, starting at card 11.

I shall try to avoid making the same mistake, but since this is a celebration of 25 years of the Bar Readers' Course, a few recollections about how it used to be will serve to illustrate how far the Course has now come.

When I joined the Bar it was possible to take a law degree, to spend a year or two in a solicitor's office and then to be admitted to practise and to sign the Bar Roll on more or less the same day. This is what I did. I was still 23 years of age when, as a new member of the Victorian Bar, I drove off in an aging Fiat 500 to the Court of Petty Sessions at Broadmeadows, there to uncoil from the tiny Fiat and cross-examine my first police witness. I had never examined a witness in my life, much less cross-examined one. In fact, I had never appeared for a defendant before. I had made a submission on a point of law, but that was in a moot case — which I had lost.

When I joined the Bar it was possible to take a law degree, to spend a year or two in a solicitor's office and then to be admitted to practise and to sign the Bar Roll on more or less the same day. This is what I did.

I did of course have a Master — the late Edward Lloyd. For the following nine months I learnt a great deal from him — some of it through stories, some of it by discussion and some of it by watching other advocates, including himself. The stories were what I remember best — including those he told about his own triumphs and very occasional losses.

There were about 300 practising barristers at the time and I soon came to know nearly all of them, and they me. I read some books about advocacy, which I actually found quite useful and, fundamentally, I learnt on the job.

A Master would provide much good advice, but the practical training was achieved largely by trial and error. One's Master did of course have friends — many of them. Some of them were specialists in particular areas. They were all happy to help. I remember these people with affectionate gratitude, even to this day. Most of them became judges — one became a High Court judge — and I think they have all now completed their legal careers. The so-called "open door policy" of the Victorian Bar was very strong and advice to a younger barrister on any specific issue was always freely given. The issue was meant to be specific and the policy was not meant to extend to advising you how to conduct a whole case, although that is sometimes how it ended up, such was the generosity of one's older colleagues.

Learning "on the job" was encouraged

by some Bar customs that later fell into disuse. We were encouraged to lunch in the common room, which was on the ninth floor of the then newly built Owen Dixon Chambers. Barristers gathered there for morning tea and for afternoon tea as well. The strict rule was that one sat at the next vacant seat. This meant that you might be seated next to someone of great seniority — and apparent ferocity — whom one was not allowed to address as "Mister …" but whom one felt reluctant to call by either the first name or the surname alone — as was the requirement. The point of it all was, though, that one very soon became part of a group of people who had a strong collegiate bond.

(It has to be said that some of this was very blokey. This used to irritate my Master and I remember at morning tea one Monday, when the sole topic of conversation was the previous Saturday's VFL games, he asked — in a brief pause in the conversation: "Anyone read any good pacifist novels lately?" "Don't be silly Woodsy," came the reply. There were only three women at the Bar at that time — all of them wonderful people and great pioneers in their own distinctive ways. I recall them with affection and respect too.)

Much teaching of the art of the barrister came through the stories of great triumphs and great losses. Some of them were no more than war stories but many illustrated a striking point about advocacy and were worthy of retelling anyway, as stories.

Let me give just two examples from a much later era — I tell them because I was there when they happened. Justice Susan Crennan, who was also there, has told them at one of her judicial welcomes and they are now, I am pleased to say, consequently in the Commonwealth's archives. You will see the point of the first story when I tell it.

It occurred in the *DOGS* case, the High Court challenge by the Council for the Defence of Government Schools the constitutional validity of grants of Commonwealth money to the States for the purpose of assisting non-government schools owned and run by religious bodies. The challenge was founded upon s.116 of the Constitution which forbids the Parliament of the Commonwealth making a law with respect to the establishment of any religion. Leading counsel for the DOGS, Neil McPhee QC, was one of the finest barristers that I ever saw and unquestionably one of the great cross-examiners of his time. The hearing was before Justice Lionel Murphy and McPhee had to make his case by calling witnesses from the Catholic Church, including members of an order of nuns. McPhee was trying to establish that these nuns — who were members of a teaching order — were in fact, through the grant of Commonwealth money to support their schools, engaging in work that would attract the prohibition in s.116 to the law that had authorised the grant.

Looking, as he often did, in an impishly friendly and confidential way at the witness, he said: "Sister Mary, I suppose, at your school, you and the other nuns pray from time to time." "That we do indeed, Mr McPhee." He established that they prayed every day.

"What do you pray for?" "We pray for many different things, Mr McPhee."

"Well, what sort of things?" he pressed.

It was "apparent to the Bar Council that the standards of the very junior Bar were capable of improvement". It was therefore "intended to provide a course of training in the skills required by a practising advocate". Thus was the Readers' Course born.

This is when, under the classical rule of cross-examination McPhee should have stopped and left well alone. "What sort of things?"

"Well, this morning, for example, we prayed for you, Mr McPhee."

I was at the Bar table at the time as junior counsel for the Commonwealth. The other version of the story is that the nun said: "We pray for people like you, Mr McPhee." But I think the gentler version is better, and much truer to the witness as I remember her.

The next day McPhee again broke the rule that one does not ask a question unless pretty sure of the answer. He said to another nun, "I suppose you would wish for a perfect world, Sister?"

"We should all wish for a perfect world, Mr McPhee."

"And I suppose, Sister, in a perfect world you would prefer all your staff to be Catholic?"

The answer was immediate. "Oh dear no, Mr McPhee, I can't imagine anything worse than a staffroom full of Catholics."

The consequences here were trivial. No harm was done to the case and there were two good stories to tell about Neil McPhee. We tell them still. But in other circumstances and in other hands, the errors — if that is what they really were — could have had very serious consequences.

Stories like these, sometimes grossly embellished, were part of the way in which we learnt. There were also mechanisms of support. The first time I came back from Petty Sessions, my Master said, "You look pretty upset. You're surely not going to tell me that the Magistrate believed the police!" "How did you know?" I replied. I soon learnt about things like that.

On another memorable occasion, the late Don Campbell QC — a great advocate but a crotchety one with a gammy leg — saw a young common law barrister in apparently deep distress. The conversation went something like this:

"What's the matter with you, Sonny? You look as though you're about to be hanged."

(We were taught, and expected to observe, the difference between being hanged and hung. In those days it was, distressingly, still relevant at the Bar.)

"Yes, Donny, I've had a terrible loss for a plaintiff."

"Oh dear," said Donny, "Tell me about it."

The young barrister told the sad tale of a dreadful loss for a deserving plaintiff, at the end of which Don Campbell replied, "Deary, deary me. That's bad! Never mind, it happens to us all. It's happened to me once or twice." And then there was a long pause. "Though, I'm bound to say … never anything like as bad as that."

The Bar was of course very, very much smaller then. There were some 300 of us but our number then grew quite rapidly and by the end of the 1970s there were concerns that not everyone coming to the Bar really had a career at the Bar at heart.

There were some interesting resolutions of the Bar Council. One of them, reported in the *Bar News* for the Spring of 1979, recited that there "may have been a decline in the standards of the very junior Bar" and it was resolved to investigate these standards and if necessary to consider what restraints there should be on the signing of the Bar Roll. The Roll was then temporarily closed. I should point out that in earlier days one could sign the Roll more or less whenever one wanted — the only requirement was to find a Master who would take you and a clerk.

Some months later, there was another meeting of the Bar Council at which, so the records tell us, it was accepted that "there had been no decline in the standards of the junior Bar" but on the other hand it was "apparent to the Bar Council that the standards of the very junior Bar were capable of improvement". It was therefore "intended to provide a course of training in the skills required by a practising advocate".

Thus was the Readers' Course born. The records are not inconsistent with the suspicion held at the time that the course was started in response to the perceived problem of dilettante solicitors swelling the numbers at the Bar and taking advantage of the facilities the Bar had to offer without seriously intending to pursue the Bar as a career. One of the most valuable of those facilities was the ability to lease chambers at a rent that even a newcomer could afford. In contrast to the position in Sydney, good chambers were available for lease and, indeed, in those days, chambers could not be bought at all. The Bar was very proud of this, which it saw as a manifestation of the principle of a Bar open to all those of talent. (Note that there is some inconsistency here.)

But whatever prompted the development of the Victorian Bar's Readers' Course it was certainly innovative and progressive from the very beginning. Even in the late 1970s, legal education outside the formal teaching of law courses was in its infancy. Judicial education, which is now an obvious and accepted part of judicial life, was then a highly controversial idea. There was no "judicial education" as we would understand it today. Nor, as best as I can recall, had there been any substantial teaching of advocacy, in any formal way, in Australia at that time. Some formal teaching of advocacy began at Monash University in that era but my recollection is that it was after the Bar Readers' Course had begun. The teaching of advocacy through daily contact with one's readers could hardly have been called "formal".

So, whatever the motives for the establishment of the Victorian Bar Readers' Course — they may have been mixed and I do not think it matters very much at all what they were — the idea attracted the support and the talents of some remarkable people (including George Hampel QC and, later, Felicity Hampel) who had a passion for teaching advocacy.

The early facilities were primitive but the Course rapidly developed a very high reputation, which quickly spread interstate. For the first time, aspiring barristers were required to "perform" before a critical audience, whose task it was to offer constructive comments. We also ventured — for the first time anywhere — into the use of video technology. This really was an innovation. I recall the purchase of the first video machine. It was a very big deal indeed. The machine itself was large, very heavy and very expensive. It was seen as a vulnerable item — an attractive object of theft. It cost some thousands of dollars in the money of the early 1980s. A large cupboard was constructed especially to keep it in. It was fitted with a substantial lock. We also booby-trapped the cupboard so that if anyone tried to open it to steal this valuable device, bells would ring and an imitation police siren would sound.

Many people worked to develop the Readers' Course. Some 50 barristers, many of them very senior, helped with each course. There was also much support from the judiciary and from some people outside the law. Enduring and invaluable contributions were made in my time by Mrs Anna Whitney and Ms Barbara Walsh. Their administrative abilities and their "pastoral" talents were quite remarkable. They were key ingredients in the success of the Course. What a pleasure it is to see Barbara Walsh here tonight! She deserves the thanks, and the applause, of us all.

The Course soon became a model for other readers' courses in New South Wales and Queensland, and some of the experience gained in our Readers' Course was used by Mr Hampel QC (later Justice Hampel) and Felicity Hampel (now Judge Hampel) to teach in places as diverse as Port Moresby and the Inns of Court in London.

I had the satisfaction of being the Chairman of the Readers' Course from September 1981 until 1987.

As well as providing practical lessons in advocacy — and some theory as well — the Bar Readers' Course as I knew it — no doubt it is the same now — provided what today would be called a "cohort" of people who pass through the course together. This, I believe, was a valuable collegiate experience — an appropriate and practicable adaptation to serve a very much enlarged Bar.

When I was Chairman of the Course — and I am sure it was the same after me — I was keen to underline some of the positive and attractive aspects of life at the Bar, but I was also keen to warn against some of the unattractive aspects, the most notable of which, in my view, was (and still is) the tendency of brilliant professionals to arrogance. This is a most unattractive quality, disliked by judges, jurors and clients alike. Solicitors do not like it much either. Confidence, of course, is another thing entirely — especially the real confidence born of a total mastery of the facts and the law of a particular case. A barrister who has confidence of that nature will leave an arrogant opponent at a very serious disadvantage.

I was also keen for readers to understand the positive aspects of the collegiate life at the Bar, which I still think is very important. I am reminded to urge readers to attend Bar functions, including the forthcoming Victorian Bar Dinner.

To sum up — 25 years ago the Victorian Bar showed great leadership by establishing and then developing the Bar Readers' Course. One of the most satisfying aspects of a career at the Bar which, overall, I found very satisfying indeed, was my involvement in the development of that course. I have retained a connection with it ever since and it is a connection that I am very happy to celebrate tonight.

Do I have some concluding observations to a group of barristers about to embark upon what one great barrister of an earlier age once described as "the most interesting profession in the world"? I will venture just a few. If you ask a group of senior lawyers "Why be a barrister?" you would, I imagine, get a reasonably wide range of answers but I suspect that they would cluster around the points that I will now briefly make.

Being a barrister involves playing an integral part in the functioning of one of the fundamental institutions of our democracy — the courts.

For anyone really interested in the law, and with a sense that the law and its institutions can be — and indeed should be — a force of good in society, a career at the Bar offers much satisfaction. To me, there was always something intensely satisfying in taking a case and developing it to the very best of one's ability. The satisfactions were not confined to the dramas of the common law action; they extended equally to intellectual engagements on points of law with judges — at first instance and on appeal.

There is a very creative aspect to the work of a good barrister. You write your own script and then you perform it and yet the script has to be infinitely adaptable. The performance always matters and the outcome always matters.

Every case is important to the client but you will all have cases that are of decisive importance in people's lives.

That is an immense responsibility and, an immense privilege, but also a source of very great satisfaction.

Some would say that the courts are, more than ever, forums in which great social issues are determined. To be involved in these cases is especially satisfying for counsel. But the same can be said about cases that involve the dynamic economy of this country, such as those in the fields of intellectual property, or competition law, to take just two examples. There may indeed be the highlights but my experience was that satisfaction and excitement was to be found almost every day. It all depends upon how one looks at it, and how one goes about it.

As a good barrister in the common law system you must be prepared to work in the frontier lands — to those areas where incremental development of the law is possible, but has not yet occurred. Good barristers are to be found where the boundaries of the known legal world are being explored. Of course they are explored in great cases such as the *Tasmanian Dam* case: they were especially exciting but the boundaries can be explored in smaller cases too. They are all very important.

There will of course be times when you wonder whether you are completely mad to be doing all this. The boundary lands are difficult, challenging places.

But the challenges are everywhere. There is an undeniable tension when the jury knocks late at night in an empty courthouse, and the judge is called, and the barristers come back into the court, and the accused is brought into the dock and his family gather around him, and it is plain that the jury has at last reached a verdict, and they line up in front of the jury box waiting for the judge, and the judge is still not there, and then the judge arrives and the court is opened and the associate asks the jury whether they have reached their verdict — and they have. "How say you …?" What is to become of the rest of your client's life?

Nerves in those situations — and in many others — a part of what it is to be a barrister. But somehow the challenge, the excitement and the worthwhileness of it all keeps you coming back — and back. That was my experience — I do hope it is yours too.

On this 25th anniversary of the Victorian Bar's Readers' Course may I offer each and every barrister who has signed the Roll of Counsel today my very best wishes for a satisfying and thoroughly worthwhile career at the Bar.

Galveston Decision

Robust Judicial Criticism

Sometimes members of the Bar complain that members of the judiciary in the course of argument have been unduly harsh in their criticism of counsel's argument. Very seldom does that criticism spill over into the judgment handed down.

Those whose sensibilities have been offended should take note of how gentle our courts really are. The extract below is taken from a decision of District Judge Kent in the United States District Court sitting at Galveston, Texas.

THE proceeding involved an action brought by a seaman against a dock owner for personal injuries suffered while he was working on board a vessel using the dock. The issue was whether the three-year federal statute for maritime personal injuries applied or whether the Texas two-year statute of limitations for personal injury cases applied.

Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact — complete with hats, handshakes and cryptic words — to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed, Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See *Fed.R.Civ.P.* 56(c): see also *Celotex Corp.* v *Catrett*, 477 US, 317, 323, 106, S.Ct, 2548, 2552–53, 91 L. Ed.2d 265 (1986). When a motion for summary judgment is made, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. See *Anderson* v *Liberty Lobby, Inc.* 477, CJ.S. 242, 250, 106, S.Ct, 2505, 2510, 91, L Ed.2d, 202 (1986). Therefore, when a defendant moves for summary judgment based upon an affirmative defense to the plaintiffs claim, the plaintiff must bear the burden of producing some evidence to create a fact issue some element of defendant's asserted affirmative defense. See *Kansa Reinsurance Co. Ltd* v *Congressional Mortgage Corp, of Texas* 20 F.3d 1362, 1371, (5th Cir.1994); *F.D.J.C.* v *Shrader & York,* 991, F2d, (5th Cir.1943).

Defendant begins the descent into Alice's Wonderland by submitting a Motion that relies upon only one legal authority. The Motion cites a Fifth Circuit case which stands for the whopping proposition that a federal court sitting in Texas applies the Texas statutes of limitations to certain state and federal law claims. See *Gonzales* v *Wyall.* 157, F.3d, 1016, 1021, n. 1 (5th Cir.1998). That is all well and good — the Court is quite fond of the *Erie* doctrine; indeed there is talk of little else around both the Canal and this Court's water cooler. Defendant, however, does not even cite to *Erie*, but to a mere successor case, and further fails to even begin to analyze why the Court should approach the shores of *Erie*. Finally, Defendant does not even provide a cite to its desired Texas limitation statute. (FN2) A more bumbling approach is difficult to conceive — but wait folks, There's More!

FN2. Defendant submitted a Reply brief, on 11 June 2001, after the Court had already drafted, but not finalized, this Order. In a regretful effort to be thorough, the Court reviewed this submission. It too fails to cite to either the Texas statute of limitations or any Fifth Circuit cases discussing maritime law liability for Plaintiff's claims versus Phillips.

Plaintiff responds to this deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument, although Plaintiff does at least cite the federal limitations provision applicable to maritime tort claims. See 46 USC § 763a. Naturally, Plaintiff also neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action. Instead, Plaintiff "cites" to a single case from the Fourth Circuit. Plaintiffs citation, however, points to a nonexistent Volume "1886" of the *Federal Reporter* *671 Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. Ultimately, to the Court's dismay after reviewing the opinion, it stands simply for the bombshell proposition that torts committed on navigable waters (in this case an alleged defamation committed by the controversial G. Gordon Liddy aboard a cruise ship at sea) require the application of general maritime rather than state tort law. See *Wells* v *Liddy* 186 F 3d, 505, 524 (4th Cir. 1999). (What the ...)?! The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!). And though the Court often gives great heed to dicta from courts as far flung as those of Manitoba, it finds this case unpersuasive. There is nothing in Plaintiff's cited case about ingress or egress between a vessel and a dock, although counsel must have been thinking that Mr Liddy must have had both ingress and egress from the cruise ship at some docking facility, before uttering his fateful words.

Further, as noted above, Plaintiff has submitted a Supplemental Opposition to Defendant's Motion. This Supplement is longer than Plaintiff's purported Response, cites more cases, several constituting binding authority from either the Fifth Circuit or the Supreme Court, and actually includes attachments which purport to be evidence. However, this is all that can be said positively for Plaintiff's Supplement, which does nothing to explain why, on the facts of this case, Plaintiff has an admiralty claim against Phillips (which probably makes some sense because Plaintiff doesn't). Plaintiff seems to rely on the fact that he has pled Rule 9(h) and stated an admiralty claim versus the vessel and his employer to demonstrate that maritime law applies to Phillips. This bootstrapping argument does not work; Plaintiff must properly invoke admiralty law versus each Defendant discretely. See *Debellefeuille* v *Vastar Offsore, Inc.* 139 F.Supp.2d, 821, 824, (S.D.Tex.2001) (discussing this issue and citing authorities). Despite the continued shortcomings of Plaintiff a supplemental submission, the Court commends Plaintiff for his vastly improved choice of crayon — Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about Plaintiffs briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.

[1][2] Now, alas, the Court must return to grownup land. As vaguely alluded to by the parties, the issue in this case turns upon which law — state or maritime — applies to each of Plaintiff's potential claims versus Defendant Phillips. And despite Plaintiff's and Defendant's joint, heroic efforts to obscure it, the answer to this question is readily ascertained. The Fifth Circuit has held that "absent a maritime status between the parties, a dock owner's duty to crew members of a vessel using the dock is defined by the application of state law, not maritime law." *Florida Fuels, Inc.* v *Citpo Petroleum Corp*. 6 F.3d, 330. 332, (5th Cir.1993) (holding that Louisiana premises liability law governed a crew member's claim versus a dock which was not owned by his employer); accord *Forrester* v *Ocean Marine Indetn. Co.* 11 F.3d, 1213, 1218, (5th Cir 1993), Specifically, maritime law does not impose a duty on the dock owner to provide a means of safe ingress or egrcss. See *Forrester*, 11 F.3d at 1218. Therefore, because maritime law does not create a duty on the part of Defendant Phillips vis-a-vis Plaintiff; any claim Plaintiff does have versus Phillips *672 must necessarily arise under state law. [FN3] See *Florida Fuels*, 6 F.3d at 332–34.

FN3. Take heed and be suitably awed, oh boys and girls — the Court was able to state the issue and its resolution in one paragraph ... despite dozens of pages of gibberish from the parties to the contrary!

[3] The Court, therefore, under *Erie*, applies the Texas statute of limitations, Texas has adopted a two-year statute of limitations for personal injury cases. See *Tex Civ. Prac. & Rem.Code* § 16.003. Plaintiff failed to file his action versus Defendant Phillips within that two-year time frame. Plaintiff has offered no justification, such as the discovery rule or other similar tolling doctrines, for this failure. Accordingly, Plaintiff's claims versus Defendant Phillips were not timely filed and are barred, Defendant Phillips' Motion for Summary Judgment is GRANTED and Plaintiff's state law claims against Defendant Phillips are hereby DISMISSED WITH PREJUDICE. A Final Judgment reflecting such will be entered in due course.

CONCLUSION

After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavoured, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odour of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's Motion for Summary Judgment is GRANTED.

At this juncture, Plaintiff retains, albeit seemingly to his befuddlement and/or consternation, a maritime law cause of action versus his alleged Jones Act employer, Defendant Unity Marine Corporation, Inc. However, it is well known around these parts that Unity Marine's lawyer is equally likable and has been writing crisply in ink since the second grade. Some old-timers even spin yarns of an ability to type. The Court cannot speak to the veracity of such loose talk, but out of caution, the Court suggests that Plaintiff's lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action [FN4].

FN4. In either case, the Court cautions Plaintiff's counsel not to run with a sharpened writing utensil in hand — he could put his eye out.

IT IS SO ORDERED.
147 F.Supp.2d 668, 2001 A.M.C. 2358

Advocacy in Practice

J.L Glissan QC

I recently had occasion to consider the life of an advocate from the perspective of the Bar. This was in the context of becoming sole author once again of this advocacy text, when my former companion at arms, Sydney Tilmouth, decided to put aside the robe of the advocate in favour of the seat of judgment. It was in that melancholy context that I pondered the stages of a barrister's life. In the nineteenth century (the age of men), a cynic said that there were three ages — the first, in which he cares only for the work, the second, in which he cares only for the money, and the third, in which he cares for neither the work nor the money.

I realised that that analysis would not do for the twenty-first century, but the idea stayed with me. After all, Shakespeare gave us seven ages of man, and Humphrey Tilling six ages of cricket. Now the law is, of necessity, shorter than life and neither so important nor so noble as a game of cricket but I reasoned there were at least five ages of the Bar.

They are not necessarily chronological, and they are not gender specific.

The first is the age of wantage — this is the age at which the aspiring barrister wants everything, and wants for everything. Your wig is white and your gown is black. The age when you can only open your diary in subdued light or wearing sunglasses because of the risk of snow-blindness. The age when you rush to greet a solicitor who, six months before your call, you cheerfully crossed the street to avoid. The age when you keep a full set of double entry account books which remain totally virgin on the credit side. The age when you look forward to the end of the financial year in the confident expectation that the Commissioner will pay you money. The age when you go to the common room, listen to the war stories of senior members and actually find them interesting. The age when you take the day off to celebrate your spouse's birthday and nobody notices. The age when a brief to appear in the motion list of the District Court on an extension of time application is more terrifying in prospect than a brief to appear in the Full Court of the High Court because it is so much more likely to happen. The age when you take a solicitor you don't like to a lunch you can't afford in the hope of getting a brief to appear before a judge you don't know. The age when all judges seem intelligent or at least earned and all opponents seem intimidating.

The next age is the age of usage. The age of the coming advocate. You have begun to acquire a practice. Your wig is less white, your gown is crumpled. You receive briefs from solicitors — who practice out of the boots of cars — old cars. This is the age when it is safe to open your diary, even in full daylight. The age when you become busy enough that you cast aside the double entry account books and move to a more traditional method of barristerial accounting — you buy a shoe box. The age when your anticipation of the end of the financial year is coloured more by apprehension than by expectation. The age when you only go to the common room for a quick coffee and then only when you are sure it is otherwise empty. The age when you forget your partner's birthday, but you at least remember his or her name. The age when brief is not the word that you would use to refer to the time it takes to do the advice for which you are asked. The age when you take a solicitor you don't need to a lunch you don't enjoy by way of thanks for a brief you didn't do. The age when judges have become fallible, and sententious, but remain unreceptive to your quick intellect.

The third age is the age of bondage. This is the age in which you are really established. Your wig and gown are now a daily part of your life, and all three are grey. The age when you receive a constant flow of work from solicitors who have offices, and staff. Some of them even have practicing certificates. This is the age when your accounting system has become so complicated you need a second shoe-box. The age when you know that at the end of the financial year you have to file a partnership return, acknowledging your silent partner, the Deputy Commissioner of Taxation. The age when you no longer remember where the common room is located. In this age your practice develops in a new direction. You begin to go to the Family Court, but alas, only as a consumer.

The age when brief is no longer an appropriate word for material which arrives, not in multiple volumes, but in multiple boxes. The age when a solicitor

you don't know takes you to a lunch you don't need in the hope of getting you to accept a brief you don't want. The age when you recognise with contempt the truth of the definition that a judge is merely a lawyer who once knew a politician. The fourth and fifth ages are somewhat alike.

The fourth age is that of adage — the age of seniority. This is the age at which you have made enough mistakes to justify putting them on paper. The age when you get a new gown but not a new wig. The age at which your diary has become an annoying irrelevance forced on you by your clerk. The age when solicitors come to you either by force of habit or through the force majeure of juniors. The age when your accounting system has entirely been taken over either by your accountant or by your trustee. The age when your new silent partners, the banks, have replaced the Deputy Commissioner of Taxation. The age when you have reached your present position in poverty, because every 10 years you give a house to someone you hate. The age when the Family Court has ceased to be a threat and has become an old friend. The age at which you have rediscovered the common room and tell younger members, at every opportunity, how clever you were, hoping they will not notice the tense. The age when a solicitor you don't remember takes you to a lunch you can't eat because of a brief you can't find. The age when you are kind and considerate towards judges, because most of them used to be your juniors.

And now the fifth and final age — the age of anecdotage. This is the age when your wig, your gown and your diary have become utterly irrelevant. The age when, an Honorary Member of Chambers, you walk in perpetual circles looking for your name on the door of the room you have sold. The age when, again, you have the expectation of receiving money from the Commissioner of Taxation. The age when your stories in the common room suffer from two defects: first, they are wrong, tedious and no longer funny and secondly, no one mentioned in them is still alive. The age when a brief to appear in the motion list of the District Court is an unlocked for pleasure. The age when lunch is a thing of the past and judges all treat you with exaggerated and pitying courtesy.

Vade atque vale, Sydney Tilmouth.

Book reviewed on page 75.

Fisher and Lightwood's Law of Mortgage (2nd Aust edn)

By E.L.G. Tyler, P.W. Young and Clyde Croft
Lexis Nexis Butterworths, Australia 2005

THE second Australian edition of "Fisher and Lightwood" comes ten years after the first Australian edition. The authors point out that the second edition has built on the work of the first edition, but with substantial parts rewritten, expanded and rearranged in ways that reflect current thinking.

The second Australian edition takes its form from the tenth English edition of Fisher and Lightwood, with the addition of, for example, chapters 4 and 28 to deal with the Torrens system.

The ten years since the first edition has seen the usual growth in case law, together with a few seminal decisions. However, the major changes have been in statute law, particularly in the corporations (the *Corporations Act, 2001*, as well as the CLERP reforms) and consumer rights areas (such as the *Fair Trading Act, 1999*) (Preface, page vii).

The second edition has been restructured so that more emphasis is placed on the Torrens system when dealing with mortgages over real property.

There are over 850 pages of text, with a further 120 pages of case and legislation tables.

There is a new chapter on mortgagor's rights (chapter 12).

There is no doubt that this text deserves its reputation as "the bible" for questions relating to any aspect of mortgage law.

The text is written in (relatively) plain English, explaining difficult legal concepts clearly. For example, paragraph 8.10 (page 246) defines floating charges as follows:

> Mortgage debentures almost invariably create a floating security. Such a security is an immediate equitable charge on the assets of the company for the time being, but it remains unattached to any particular property and leaves the company at liberty to deal with its property in the ordinary course of its business as it thinks fit until the charge crystallises or becomes fixed to the assets charged (including future assets of the description of the assets charged which come into existence after the crystallisation of the charge: see *Ferrier* v *Bottomer* (1972) 46 ALJR 148).

The text is broken into 12 parts, ranging from mortgages and charges, parties to mortgages, the mortgagor's rights, void or imperfect securities, transfer and devolution of mortgages, the mortgagee's remedies, priorities of mortgages, incidence of mortgage debt, discharge of mortgage, accounts and costs, and taxation considerations to miscellaneous matters.

Chapter 1 in Part 1 starts with an outline of the mortgage in history ("In almost all developed societies throughout the ages, it has been expedient for people to be able to borrow on security. The form of the transaction has differed from age to age and from place to place" page 12). In this history lesson, the authors also point out that there are only four kinds of consensual security known to Australian law: (i) pledge; (ii) contractual lien; (iii) equitable charge; and (iv) mortgage.

Chapter 1 then proceeds to provide a detailed overview of mortgages and other securities generally.

Chapter 2 deals with charges and liens; chapter 3 covers mortgages of land at common law; chapter 4, which deals with mortgages of Torrens system land, is new for the Australian edition. In Part 1 there are also chapters that deal with mortgages of chattels, mortgages of ships and aircraft, mortgages of things in action, debentures, special securities and second and subsequent mortgages.

Part VI, "the mortgagee's remedies", includes chapters on the mortgagee's remedies; the personal remedy; the appointment of a receiver; the mortgagee's right to possession; the mortgagee's power of sale; foreclosure and judicial sale; procedure on foreclosure and insolvency of the mortgagor.

As an example of the comprehensive nature of Fisher and Lightwood, chapters 21 and 22, dealing with foreclosure, are included because the authors (while admitting that the remedy has only been rarely encountered with respect to mortgages of land — page 520) claim that "economic conditions are likely to make the remedy of foreclosure more attractive". The authors point out that foreclosure is also a remedy available for mortgages over other property, especially leasehold and valuable personal property.

Part IX, "discharge of the mortgage", includes chapters on redemption; redemption proceedings; the release of the debt or security; waiver and allied concepts; merger; destruction or loss of

the property; and discharge or modification by statute.

Chapter 32 covers redemption. There are ninety-three separate topics covered in the chapter, ranging from rights of redemption all the way through to extinguishment of the equity of redemption by time on mortgages of land.

The second Australian edition of Fisher and Lightwood is a "must own" for all practitioners who practise in property law and any aspect of mortgage lending law.

W.G. Stark

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 to 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

Estate Planning, A Practical Guide for Estate and Financial Service Professionals

Michael Perkins and Robert Monahan
Lexis Nexis Butterworths, 2005
Pp i–xi, 1–425 (including index)

THE book follows the structure for an undergraduate course which is taught by the authors in the Faculty of Law of the University of Technology in Sydney. Upon reading, it is fair to say that the book is designed to introduce students to the basic concepts that are relevant to estate planning. For example, at page 7 the authors emphasise that it is necessary to understand the cultural background of the client, such as their religious beliefs and their cultural heritage, when offering advice as to how they should manage and make provision for their estate.

Whilst the book covers many topics, such as the nature of trusts, the making of a will and succession, I found of particular interest the way the authors dealt with the taxation of estates. Whilst the law of income taxation is a well travelled path, the CGT Legislation and the rulings of the Commissioner create difficulties, particularly in the surrender of life interests. The authors' discussion of this topic is very helpful.

Under the heading "Responsibility" the authors examine as estate practice the financial service industry and managing the client–advisor relationship. The matters may be outside a strict legal framework but are an important part of the estate planning industry.

At the back of the book as appendices to the versions and chapters the authors include forms and precedents. Amongst the forms is one which I would describe as an interview sheet. It is well designed. The authors have given careful thought to the content of the appendices which will be of considerable assistance for such planners.

What is perhaps a little unfortunate is that the book does not contain a list of cases nor of statutory references. The book is New South Wales slanted. For a Victorian practitioner, even though much of the Wills Act is reflected in the New South Wales legislation, there are important differences. In particular the Part IV provisions of the *Administration and Probate Act 1958* do not follow the New South Wales legislation, in definition as to the class of persons who may make a claim, nor do the Victorian provisions reflect the claw back provisions contained in the New South Wales legislation. Notwithstanding, it is a guide to have on one's shelf for those practitioners who are involved in advising in this area.

John V. Kaufman QC

Carter's Guide to Australian Contract Law 2006

By J.W. Carter
Lexis Nexis Butterworths
Pp vii–xlv; 3–640; Index 641–659

THIS text is essentially both a student guide and the basis for a set of lecturer's lesson plans. It covers all the traditional contract areas of study such as formation, terms, performance discharge, rescission, remedies and defences in a simple and easy to understand style, nicely set out with relevant sub-headings. There is a "quick quiz" section after each chapter and a CD with more expanded problems and solutions. It has a glossary of contract terms and a "how to" chap-

ter that includes sample contracts and instructions for drafting.

The introductory chapter defines and explains the origins and philosophical background to the development of contract law, putting the topic in perspective. It includes what the author refers to in the glossary as a "Contract continuum"; a diagrammatic representation of the life of a contract that makes it easy for the reader to conceptualise the formation and performance stages of a contract. This will be particularly helpful when analysing a contractual problem.

The chapters on the substantive elements include an extended discussion on at least one case to highlight a particular principle, and the relevant contractual principles discussed in each chapter are underlined for clarity and easy reference.

Whilst the book is primarily a "starter text" for students, it will also serve as a ready reference for practitioners who wish to quickly refresh their memory on basic principles.

C.J. King

Rules of Evidence in Australia: Text and Cases

By Kenneth J Arenson and Mirko Bagaric
Pp vii–xlvi, 1–629, Index 631–639

THE law of evidence is an area that many students and practitioners have difficulty with. Often that difficulty is not realised until confronted with an evidentiary problem that requires an immediate answer. This is especially so because the laws of evidence vary between State and Commonwealth jurisdictions.

What are referred to as the Uniform Evidence Laws apply in the federal courts, Australian Capital Territory, New South Wales and Tasmania, with the possibility that they may be adopted by other States. Currently, the Victorian Law Reform Commission has recommended that Victoria adopts the Uniform Evidence Laws, with minor changes to mirror the current provisions of the Commonwealth and New South Wales Evidence Acts 1995. Meanwhile, the Evidence Act 1958 (Vic) and the common law apply in Victoria. Different rules apply between the Victoria and the Uniform Evidence Acts, for example, the rules relating to the exception to the admission of hearsay evidence and the production of original documents.

Whilst there are many texts on evidence law, the authors have produced a concise format that will be an invaluable resource for anyone who wishes to keep abreast of this subject. Each chapter follows a logical sequence that provides an introduction, definition and explanation of the legal principles and rule of evidence. This is followed by edited judgments that have the essential passages necessary to illustrate the issues. There are questions with an analysis and discussion of the issues posed in the questions demonstrating how to apply the rules to solve evidentiary problems. Where relevant, the Uniform Evidence Acts are considered and compared to the common law and State legislation.

The text explains the law of evidence in a comprehensible manner and is an ideal reference for all those involved in litigation.

C.J. King

The Arbitrator's Companion

By Geoffrey Gibson
The Federation Press, 2001

INTERNATIONALLY, arbitration has become a very big ticket item. Corporations that specialise in putting large amounts of time and money into countries not famous for their strong public institutions have, understandably, been attracted to the prospect of resolving disputes about their investments in *fora* unaffected by the "vicissitudes" of national courts. The proliferation of Bilateral Investment Treaties, the use of the International Centre for Settlement of Investment Disputes (ICSID) and the prospect of enforcing arbitral awards in jurisdictions with well established legal systems (potentially against the off-shore assets of the country in which the investment was made) have done much to promote the use of international arbitration.

In Europe (at least) it is also well accepted that properly conducted domestic arbitration can have the advantages of relative speed, reduced cost, informality and, significantly, privacy. All this has made arbitration (be it domestic or international) a substantial part of the practise of many major law firms in the UK and Europe.

As Geoffrey Gibson notes in his very readable guide to arbitration, in this country there has been much less enthusiasm for the arbitral process. While there are a number of eminent arbitration practitioners in this country (and at this Bar), generally speaking, in Australia there seems to have been some reluctance to embrace the virtues of arbitration. No doubt this reflects the generally high quality of justice dispensed by courts throughout Australia. Perhaps, it also reflects the Australian practitioner's instinctive sense of the warnings sounded by the Rt Hon Sir Michael Kerr LJ in his important work "*Arbitration* v *Litigation — the Macao Sardine Case*".[1] Whatever the reasons, there is no doubt that Gibson's helpful book will help foster a better understanding of arbitration and its potential advantages.

The book is divided into five parts under the following headings: 1) the law relating to arbitration; 2) the practice of arbitration; 3) elements of law for arbitrators; 4) glossary of legal terms for arbitrators; and 5) sources of law for arbitrators.

Part 1 begins with a discussion of arbitration generally, putting it in its historical and legal context. It continues with a useful summary of the procedural and jurisdictional issues likely to face an arbitrator, and explains the major decisions of Australian and UK courts in relation to these matters. Part 2 is a very practical guide to what happens when. Each of the pertinent steps in arbitration is identified, with useful precedents indicating how things should be done. Part 3 touches on areas of the law likely to arise in a commercial arbitration. This section is clearly directed at "expert" arbitrators without legal training. Most barristers will profess (if not possess) a greater depth of understanding of these issues than appears in this work. For lay arbitrators, however, this section provides a concise and practical guide to some important legal concepts. Part 4 is a glossary of legal terms, which does a similar job. Part 5 contains extracts from (NSW) legislation, Arbitral Rules and Conventions most likely to be of use.

This is a concise and practical book. It is full of tips designed to keep the arbitral process nimble and free from the heaviness and delay that can beset formal litigation. The suggested informal approaches to procedure and evidence will clear a quick path to the heart of a dispute. Importantly, however, the author pays due regard to the need to balance such efficiencies against the protections that formality provide. While the informality of arbitration invites one to dispense with the complex procedural and evidentiary requirements of formal litigation, this

creates risks. In particular, the prospect of one party feeling (particularly in retrospect) that it was prejudiced by the procedure adopted and did not get an opportunity to properly articulate its case. The need to balance these issues is neatly and cleverly pointed out at various places in Gibson's work. The section on evidence, which notes the link between the law of evidence and the principles of procedural fairness, is a good example. There is even a nod (albeit begrudging) to the role of pleadings.

If Gibson has his way, practitioners in this country will stop talking "a lot of nonsense" about pleadings, and start to pay greater attention to the potential advantages of arbitration. If that occurs, and arbitrations proliferate, barristers and others finding themselves in unfamiliar arbitral territory would do very well to have this "companion" at hand.

Note

1. *Arbitration International*, [1987] Vol 3, p.79

A.T. Strahan

Death Investigation and the Coroner's Inquest

By Ian Freckelton and David Ranson
Oxford University Press
Pp i–lix, 1–780; appendices 781–894, bibliography 895–915, index 916–930

HOT off the press, this substantial and learned tome co-authored by Dr Ian Freckelton of the Victorian Bar and Associate Professor David Ranson (Deputy Director of the Victorian Institute of Forensic Medicine) was launched by the Chief Justice of Victoria, The Honourable Marilyn Warren at a function at the Melbourne Coroner's Court on 31 May 2006. The Chief Justice — who also wrote a Foreword to this volume — touched on the ancient and historical antecedents of the coronial function, and paid tribute to the internationalist perspective of the book, which is the probably the single most distinguishing feature putting this work in a league of its own.

The authors have drawn on a vast array of scholarly writing from England, Canada, Wales and Ireland, to name just a few sources, to illuminate the practice of law and medicine in Australia and New Zealand. However, they are also conscious that this is a work set in a regional context so there are liberal references throughout to theory and practice in Papua New Guinea, Singapore, Hong Kong and Fiji, as well as the Pacific region generally.

This is a work of intense scholarship, not only by reason of its setting within broad historical and geographical references. At the same time it is a tome without borders, considering its topics from the vantage points of every state in Australia; comparatively with overseas jurisdictions; and not just from the theoretical vantage point but from a practical, applied, forensic and advocacy standpoint. It is also cross-disciplinary, so whether you are a lawyer with an interest in the medicine or a doctor with an interest in the law, or a crime investigator, or a member of parliamentary counsel with a brief to draft law reform proposals, there will be something of relevance and interest in this volume to the task at hand.

Even a "dip in where ye may" approach reveals that this is a scholarly and erudite offering where the authors intersperse their encyclopaedic knowledge of medicine and law with extracts from poems and other literary allusions and quotations, as well as numerous photographs, drawings and illustrations. The authors state that their hope or expectation is that the book will divert, inform, challenge and confront. One only has to glance through the intriguing array of colour photographs of the various types of gunshot wounds to find the latter expectation alone thoroughly met.

However, this is not to say that it is a work which is everything to everyone and hence nothing to anybody. Its detail is as useful a map to the issues as any practitioner in any discipline would want, as the following list of Contents amply demonstrates:

Chapter 1: Death Investigation from an Historical Perspective, looks at the system of death investigation.

Chapter 2: Death Investigation from an International Perspective, looks at the forms of death investigation.

Chapter 3: Death Investigation: Operational Roles, looks at the operation of the modern coronial office.

Chapter 4: Deaths and Other Reported Incidents, sets out the legal framework in Australia and New Zealand but also refers to the UK context, Canada, Ireland, Asia and the Pacific.

Chapter 5: Powers of the Coroner, examines the coroner's power to undertake investigations and monitor the results of findings and recommendations.

Chapter 6: Death Scene Investigation and Chapter 7: Specialist Death Scenes and Investigations, together cover the practical aspects of investigating particular types of deaths.

Chapter 8: International Disaster Management: Mass Fatalities, covers those natural disasters including the tsunami and Louisiana hurricane, as well as those that occur in military conflict such as in Bosnia and Serbia and also terrorist events such as the Bali bombings and civil unrest.

Chapter 9: The Role of the Forensic Pathologist, covers the role, training, and skill sets of forensic pathologists.

Chapter 10: The Autopsy: Medical Issues, examines autopsy procedures including a description of radiographic techniques which although intrusive yield a wealth of probative information about causes of death.

Chapter 11: Autopsies: Legal and Cultural Issues, examines families' rights to oppose the conduct of procedures and discusses the difficult balance between public health, and investigative, personal and cultural considerations that have been considered by the courts in recent years.

Chapter 12: Identification of Human Remains, covers modern techniques used in identification.

Chapter 13: Specialist Medical and Scientific Investigations, covers a wide range of investigations.

Chapter 14: The Interpretation of Injuries and Medical Findings, includes whether the findings give rise to homicide.

Chapter 15: The Medical Report and the Giving of Expert Evidence, covers how the results of medical investigations are documented and presented in the coroner's court, including practical guidance for medical practitioners and other experts who are asked to a give evidence or write reports.

Chapter 16: Advocacy, outlines the process in the coroner's court, given that it is inquisitorial not adversarial and requires different techniques; there is considerable discussion of how the techniques may best be deployed on behalf of families or those at risk of adverse findings on recommendations in inquests.

Chapter 17: Inquests, sets out in detail the process and procedure at Inquest hearings, their parameters and the requirements of procedural fairness. Australian and New Zealand case law is the focal point but international case law is extensively drawn upon.

Chapter 18: Inquest Findings. Recommendations and Reports, is supplemented by 10 detailed appendices, including one providing examples of coronial findings and recommendations.

Chapter 19: Appeals, Reviews and Opening of Inquests, concludes the sequence of legal chapters by dealing with an assessment of the permissible grounds for applications for review.

The final chapter — The Future — poses some questions about the strengths and weaknesses of the coronial function and advances some proposals for reform to ensure the office remains relevant, dynamic and alive to community expectations.

This project must have seemed initially like a Herculean task but has been executed by Renaissance men in the true sense of the word, resulting in a feat of modern superhuman effort. It is enlivened by extensive case studies from diverse jurisdictions and an abundance of illustrative and reference material. No one involved in death investigations and inquests should be without a copy of this essential resource.

Judy Benson

Advocacy in Practice

Being the fourth edition of Cross Examination: Practice and Procedure

By J.L. Glisson QC
Lexis Nexis Butterworths, 2005
Pp v–xxv, 1–255, Index 257–263

THE art of advocacy is communication and before one can communicate, the listener's attention must be engaged. The author engages attention immediately in an entertaining manner, by his reproduction of W.S. Gilbert's Iolanthe's, *The Lord Chancellor's Song* and his Preface, in which he outlines his view that there are five ages of the Bar. The age of wantage, when new barrister's wig is white and gown black; the age of usage, when the wig is less white and gown crumpled; the age of bondage, when the wig and gown are part of daily life and grey; the age of adage, when a new gown is purchased but not a new wig; and finally, the age of anecdotage when one's wig, gown and diary have become utterly irrelevant and "lunch is a thing of the past and judges treat you with exaggerated and pitying courtesy".

Doubtless, many readers of the text will spend time contemplating which age they fall into!

The text is comprehensive and describes how to prepare for and conduct a case. It is clearly written, describing the basic techniques of advocacy, preparation and case analysis followed by the opening, examination in chief, cross-examination, re-examination, rebuttal and reply, objections and the closing address. The chapter on cross-examination includes a section on the seven deadly sins of cross-examination that draws on Professor Irving Younger's well known "Ten Commandments of Cross-examination" that will be familiar to recent Bar Readers' Course participants. Extracts of cross-examinations, including Oscar Wilde by Carson; Vaquier by Hastings and Askin by Evatt are reproduced.

There is a separate chapter dealing with appeals. Checklists are provided throughout the book which summarise and underscore the key elements.

Those who have recently come to the Bar will find the text an invaluable resource. A concise chapter on etiquette and ethics describes how to address the judge and opposing counsel and generally conduct oneself in court. The author's six rules of "semantic abominations" and advice on how to cite case law will be helpful to new barristers. For example, one should not "seek to tender" a document, simply tender it. The use of "we" is a regal term, the royal "we", and not appropriate for use in court.

The book has something to offer for new and experienced barristers alike.

Colin King

Partnership Law (6th Edn)

By Geoffrey Morse
Oxford University Press, 2006
Pp i–xlix, 1–325, Index 327–336

IN 1890, the Partnership Act (UK) became the law codifying much of the existing common law of partnership. The Bill (which became the Partnership Act) had first been drafted in 1879 by Sir Frederick Pollock although in the succeeding decades the Bill was substantially altered but not necessarily improved. Shortly after the Partnership Act (UK) became law, that legislation was more[1] or less[2] (usually more) copied in all of the then Australian colonies and New Zealand as part of the colonies' domestic law. In addition, Malaysia, Singapore and the Anglophile provinces of Canada (together with such exotic locations as the Isle of Man, the Cayman Islands and Scotland!) adopted a form of the English Act. Today, partnership law as practised in these jurisdictions remains centred on the wording of the Partnership Act as interpreted and applied by the courts over the succeeding century or more.

The sixth edition of *Partnership Law* by Professor Geoffrey Morse provides a broad view of partnership law as developed by the courts in those many common law jurisdictions who adopted a form of the *Partnership Act 1890* (UK). The author notes the book's initial purpose of serving as a student text, however its role is now much wider and it provides a comprehensive guide and text for legal practitioners and others in relation to partnership law. Practitioners in all Australian jurisdictions will draw useful insights from this work.

Of particular relevance to Australian lawyers are the chapters dealing with relationship of partners and outsiders (chapter 4), partners to each other (chapter 5), partnership property (chapter 6) and the chapters dealing with termination whether by way of dissolution or winding up or insolvency (chapters 7 and 8).

In addition there is discussion of possible developments and issues related to limited liability[3] and international partnerships.

Although the work is not specifically tailored to the various state Partnership Acts in Australia, this work is a useful adjunct to *Higgins & Fletcher — The Law of Partnership in Australia and New Zealand*.

Partnership Law provides an up-to-date and accessible general reference to the law of partnerships and provides an extremely wide analysis drawing substantially from courts in many different jurisdictions, all of whom are joined by the need to interpret similar provisions to those first found in the *Partnership Act 1890* (UK). This work is to be commended to those who have specialist interest in commerce and commercial relationships and in particular to the formation, regulation and dissolution of partnerships.

P.W. Lithgow

Notes

1. Queensland, Victoria, Tasmania and New Zealand copied the UK Act, but renumbered the sections. New South Wales and South Australia enacted almost identical Acts to the UK Act.
2. Western Australia based its Act on the 1879 Bill but essentially followed the UK Act.
3. Sir Frederick Pollack had made provision for limited partnerships in the original Bill but this was excluded from the *Partnership Act (UK) 1890*.

Principles and Methods of Law and Economics: Basic Tools for Normative Reasoning

By Nicholas L. Georgakopoulos
New York, Cambridge University Press, 2005

PROFESSOR Georgakopoulos is Professor of Law at Indiana University School of Law. Professor Georgakopoulos received his Master's Degree and Doctorate from Harvard Law School, where he specialized in finance and the regulation of financial markets. His publications are cited prominently, so it is said, including citations, by the US Supreme Court and the Securities Exchange Commission.

Professor Georgakopoulos' book is a textbook on the principles and methods of law and economics. The work examines in detail the relevance of economics to the analysis of legal problems, in particular in framing of laws. The publishers claim it does so in the context of moral philosophy, political theory, egalitarianism and other methodological principles.

The book is divided into two parts, the first deals with the principles whereby economics overlaps with legal issues, and the second describes the economic tools available for empirical application of the economic principles including statistics, probability distributions and pricing uncertainty.

What is the relevance of this to the practising barrister?

Economics essentially deals with the theory of the efficient allocation of scarce resources. However, in an advanced society such as ours, the allocation of scarce resources is usually dictated or influenced by law. It is in this field, where one is looking for efficiency, equity, and efficacy, that the principles of economics and law overlap.

Laws are able to create rights and obligations which may assist the market to achieve a satisfactory resolution of competing interests. For example, the law may facilitate damaged neighbours of a polluting factory achieving satisfactory compensation for the pollution. Market forces may then permit production to continue where both the producer and the neighbours negotiate a satisfactory regime of production and compensation. In this case the market aided by the law regulates the degree of pollution that is tolerable to the neighbours and the producer without regulation by government.

Professor Georgakopoulos examines how economic tools such as this may be used in normative reasoning on legal issues. Normative reasoning is to be distinguished from positive or descriptive reasoning. Normative reasoning seeks to establish what the law should be. Descriptive analysis focuses on what is and is not applicable to scientific studies and analysis. Professor Georgakopoulos applies these economic principles in areas such as tort and the distribution of wealth in taxation.

The work may be of interest to those framing the law but has little practical use for a barrister. On the other hand, it will provide the reader with a useful introduction to the overlap between economics and law which is relevant in many legal areas such as insurance, personal injuries, contract, trade practices, industrial relations and consumer protection.

It is, however, not a book for the faint-hearted. Although it is said to be an introductory work, it is quite technical, and in particular in describing the economic tools to assist and assess normative legal reasoning.

R. McK. Robson

Australian Constitutional Law & Theory: Commentary & Materials (4th edn)

By Tony Blackshield and George Williams
Federation Press, 2006
Pp v–x1vi, 1–1417
Appendix 1418–1452
Index 1453–1474

AUSTRALIAN Constitutional Law, 4th edition, by Blackshield and Williams is one of the foremost texts on constitutional law. This text has evolved from the first edition in 1996 and is still the primary recommended text for constitutional law in most Australian universities. That is not to say that the text is limited to students; it is equally relevant to practitioners, researchers, government officials and politicians who need to appreciate and understand the principles and basis for our constitutional framework.

The book incorporates developments in immigration and terrorism law that have occurred in the three years since the publication of the third edition in 2002. The fourth edition is not a slightly amended version of the third, but has been substantially rewritten. The format is the same as previous editions, each chapter commencing with an explanation of the topic, then supported with commentaries from relevant sources and case extracts, supplemented by a list of references for further reading.

The fourth edition is comprehensive in its coverage of constitutional law and retains all the classic constitutional law cases and includes significant new cases such as *Al-Kateb* v *Goodwin* (2004) 219 CLR 562 that confirmed the continued detention of a detainee under the *Migration Act 1958* (Cth) and who has no prospect of being removed form Australia.

The recent changes to the industrial relations law brought about by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) relies partly on the Commonwealth's corporations power under s.51 (xx) of the Constitution, rather than its industrial relations power under s.51 (xxxv). Those readers who have an interest in industrial relations will find the extensive chapters on the industrial relations and corporations power an ideal way of reviewing the constitutional framework before embarking on further research. The Commonwealth's use of the corporations power has only evolved since the decision in *Strickland* v *Rocla Concrete Pipes Ltd* (Concrete Pipes Case) (1971) 124 CLR 468 that overruled *Huddart Parker & Co Pty Ltd* v *Moorehead* (1909) 8 CLR 330, and resulting in the constitutional foundation for the *Trade Practices Act 1974* (Cth).

The chapter on constitutional change includes a new section on a Bill of Rights in Australia, a particularly topical issue. It provides extracts from the Constitution of the United States of America and South Africa, the *Human Rights Act 1998* (UK); and the *Human Rights Act 2004* (ACT) that came into force in 2004, together with extracts from relevant papers on the topic.

There are new sections including the separation between church and state, and remedies in constitutional law.

The earlier editions of this text have been an excellent foundation for those commencing a study of constitutional law and also an excellent reference text for others. The fourth edition continues the tradition.

C.J. King

Australian Bar XI: Hong Kong Tour, Easter 2006

WEDNESDAY 16 April 2006 saw the gathering of a motley group of lawyers purporting to represent the Australian Bar cricket team on a three match tour to Hong Kong. Team shirts and "baggy blacks" were distributed, and the team previously only existing in emails became a reality.

The Australian Bar XI had not played or toured since an English tour in the mid-1980s, however, two members of the 2006 team, Larry King and Thos Hodgson had played on the English tour some 20 years earlier.

The team was made up of "cricketers" from New South Wales, Queensland and your correspondent, the sole Victorian. Your correspondent/player was "selected" on availability, (although my children maintain the illusion that I was selected on "form").

Three games had been organized and the first was a 35 over game against the Kowloon Cricket Club.

After a short taxi ride we found ourselves welcomed at the Kowloon CC (which includes swimming pool, squash courts, restaurants and bar) on one of the most expensive pieces of cricketing real estate on the planet. Kowloon made 9/206 off the 35 overs. The Australian Bar needed about six an over for victory. After a slow start the Australian Bar powered home, knocking 80 off the last nine overs to win with an over to spare. After a great match a team dinner was put on by the Kowloon CC and most of the team retired for an evening at the Happy Valley Races.

Thursday was a rest day, which was in fact a euphemism for a day spent on a junk cruising the Hong Kong harbour and eating at a restaurant on Lanna Island a never-ending procession of splendid Chinese food. Consumption of beer was required.

Having won one victory, the Friday saw the team heading to the Hong Kong Cricket Club for a 35 over game, this time against Craigengower CC.

The HKCC had kindly made the Australian Bar XI and accompanying family members honorary members for the days that we were there.

Queenslanders dominated the batting, taking the team to 7/224 and then Craigengower lost early wickets to finish at 9/160. The team was regaled with hospitality after the game and a warning that the HKCC side to be played the next day over 45 overs was likely to be a tougher prospect.

Saturday saw a strong HKCC side stumble to 4/20, however HKCC rallied to 7/236 off 45 overs with one of the HKCC openers completing his century off the final ball of the innings.

The target of 237 looked achievable until a middle order collapse (including your correspondent — dodgy lbw from local umpire), however the late order got the Australian team home with an over to spare. Talk of the modern day "invincibles" went on well into the Hong Kong night.

In all it was a great tour both on and off the field. Many happy memories and lasting friendships between players and their families were made (together with a cherished "baggy black). May we hope for further tours and perhaps a second (or third) Victorian representative.

It was a privilege to play at both KCC and HKCC and to be treated with such hospitality by the clubs. To the members of the Australian Bar team — many

thanks, particularly to our captain Lachlan Gyles.

Tour Stars

Nick Bilinsky	79 v KCC and 81v HKCC
Dave Caroll	37 v KCC, 28 no v CCC and 41 v HKCC
Stewart Roberts	50 no v HKCC
Phil Greenwood	29 no v CCC
Rob Anderson	3/31 v KCC, 34 v CCC and 3/44 v HKCC
Dave Crawford	2/44 v KCC, 76 v CCC and 3/46 v HKCC
Richard Scruby	30 v KCC and 29 v HKCC

Your correspondent fielded well.

Peter Lithgow

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