# VICTORIAN BAR NEWS

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## Justice Whelan Interview

Welcomes: Justice Richard Tracey, Justice Christopher Neil Jessup, Justice John Middleton, Judge Sue Pullen, Federal Magistrate Philip Burchardt and Federal Magistrate Heather Riley ☐ Farewell: Judge Gebhardt ☐ Obituaries: Brendan Griffin, Nathan Crafti and James Stevenson ☐ Welcome to Commander His Honour Judge Tim Wood RFD QC RANR at his Swearing-in ☐ Unveiling of the Portrait of the Rt Hon Sir Ninian Stephen KG AK GCMG GCVO KBE ☐ New Federal Magistrates ☐ Bill Sutherland: Over 30 Years of Court Service ☐ Justice for Hicks After *Hamdan*? ☐ Dr Nervous ☐ Victorian Bar Takes the Lead in Accreditation of Mediators ☐ The Unveiling of the Images of Women in the Law Portrait of Chief Justice Warren ☐ Launch of the Anglo Australasian Law Society ☐ The Honourable Xavier Connor AO QC ☐ A Gift From the Family of the Late Garrick Gray ☐ Timor: Women, Education and its Future ☐ Forging Futures at the Bar ☐ Jeff Sher's 70th Birthday Party ☐ 'Are Judges Human?' ☐ What's Good for the Goose ... ☐ The Power and the Passion ...


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# Are Judges Human ?

THE Bar recently held a debate on the topic "Are Judges Human?" It was an extremely entertaining evening. There was much wit, coupled with a good dinner in the Essoign Club — even a judge arguing that she was not human! It was a fitting finale to Chairman Kate McMillan's term of office. But the debate raised serious questions. Does society expect too much from its judges through unwanted media scrutiny; does the media expect judges to be "super humans"? Are our judges merely humans doing a difficult job as best they can, unable to defend themselves from misinformed and sensationalistic reporting?

In a recent speech to the Melbourne Press Club, Appeal Justice Eames called for greater balance in media reporting on judicial decisions. He stated that "intemperate and unbalanced attacks on the judiciary can create a false impression of a failed judiciary". He emphasised that the media was putting pressure on judges that might cause them to betray their oath, to curry favour or to avoid abuse in the media.

His Honour's views echo those of many, not only in the legal community, but elsewhere, who are concerned about sensationalist and wrong reporting. The media has over recent years campaigned against certain individuals without regard to the full legal arguments being put on the individual's behalf and the subsequent rulings, decisions and sentencing. Lynch mob mentality is a recurrent theme in the media, particularly in regard to sentencing. These "campaigns" are driven by the overwhelming desire to sell papers and are often supported by short-sighted political views.

His Honour asked the press, in its own Club, to take the opportunity to give a more complete picture of the judiciary and its decisions. The press argues that its reporting is essential to public confidence in the administration of justice. The judges should be accountable in both criminal and commercial spheres and that scrutiny is making the judiciary uncomfortable. (See article of Marcus Priest, the *Australian Financial Review* 1 September 2006, page 57.)

The key is balanced reporting. It seems that the press believes its reporting to be rather more balanced than does the legal profession. The bottom line is what sells newspapers and attracts advertising. Is sensationalist and incorrect reporting easier to read than a balanced report often on difficult, legal and factual issues? The facts and the law often ruin a good story.

Indeed the recent attack by *The Australian* newspaper on the Court of Appeal could not be said to be an example of balanced reporting. The paper was upset about the Court's ruling on the admissibility of the *so-called* record of interview in the "Jihad Jack" prosecution. The Court had the effrontery to rule that the "confession" could not be relied upon by the prosecution and the charges under the terrorism laws should be quashed. This was not to the liking of the author. It seems it was a conspiracy of human rights lawyers. In particular, President Maxwell was singled out for carrying such baggage, evidently to the detriment of his powers of legal reasoning. How his background as a human rights lawyer wrongly influenced a decision of criminal law was not easily explained in the article. The article could be seen as an example of a political/policy view overriding a real and proper analysis of the legal principles involved in the case.

**The media has over recent years campaigned against certain individuals without regard to the full legal arguments being put on the individual's behalf and the subsequent rulings, decisions and sentencing.**

The press's unbalanced reporting is not just limited to judges. The legal profession is always fair game. The case of the Fairfield solicitor who was murdered in his office highlights the problem. It also brings to light whether the right to sue for defamation should end on the death of an individual.

To read the articles in ***The*** *Age* and then the *Herald Sun* concerning the murder would make readers believe they were reading about two different individuals. These were the articles written before the alleged killer was apprehended, who turned out to be a disgruntled family law client.

*The Age* report described a hard-working family man with a teenage family, well respected in the local community. The solicitor was bankrupt through financial dealings not connected with the law. It was a tragic event, the solicitor being at the office simply to copy an assignment of his son at night.

The *Herald Sun* put a very different slant on the course of events. The solicitor's financial misfortunes were highlighted. It was speculated that there may have been more sinister motives behind the murder. Were there connections to the underworld? Had the solicitor been a target through past dealings?

Of course, when the offender was identified there were no underworld or sinister motives behind the killing. However, the insinuations in the article will follow the solicitor's wife and children for the rest of their lives, at school, socially and into employment — a clear case where members of a family should have the right to sue because of the effects of the article on their reputations and feelings.

## PERSONAL HEALTH AND WELL BEING AT THE BAR

The tragic death of a colleague has brought to light the problems of stress and depression at the Victorian Bar. The Bar is different to solicitors who seem to have their own problems relating to stress. Barristers spend a great deal of time alone. Ultimately it is the barrister who makes the decisions; to call or not call evidence; to devise and execute cross-examination; to draft submissions and court documents. In court these can be split-second tactical decisions. Loss of a case leads to reflection on how it could have been done better. It leads to further reflection on what cases are to come in the future. Stress is a large and inherent part of the job, not shared with partners or associates in law firms.

The culture of the Bar does not lend itself to a sharing of insecurities and inner doubt, let alone depression and despair. Collegiate spirit offers limited support. The Essoign Club and the long lunch provide obvious de-stressors. But not all are attracted to this form of therapy with its all too obvious drawbacks. Contrary to popular belief, a large proportion of the Bar is not extrovert and able to discuss freely the problems of practice.

Some at the Bar have expressed the view that other professions are better attuned to dealing with depression. One would have thought that the medical profession would be better suited to treating such problems within its own ranks. However, the recent suicides of young hospital doctors would tend to negate this assertion. The long hours worked in hospitals cannot be seen as the only reason for the recent spate of deaths, particularly in doctors of such a young age.

The Chairman of the Bar has recently written to members to remind them that a service does exist by way of the provision of counselling, guidance or advice. It is known as "The Bar Care Scheme". The object is to assist members and their families to deal with emotional and stress related pressures. It must be said that this was a little known fact at the Bar, and its existence is to be welcomed. Counselling is provided by the Cairnmillar Institute in Camberwell. Full details can be viewed on the Bar website, or for the large section of the computer-challenged members of the Bar. Telephone 9813 3900.

Assistance is also provided by senior members of the Bar. The Bar Council has a list of members willing to assist, not only in regard to emotional problems but also financial ones. In order to seek such assistance members should telephone the Chairman or members of the Bar Council.

In her recent letter the Chairman also reminds barristers that it is not only in regard to emotional problems that assistance is available. The barristers' clerks in consultation with the Bar have compiled a list of professional people who are able to provide advice and assistance to members in respect of financial and taxation issues. The clerks can provide details of such assistance. Further the Bar's Benevolent Fund is available to members or former members who are in financial difficulty. Again the Victorian Bar website contains details for those seeking such assistance.

Some have suggested that the Bar should go further in assisting with emotional problems. It has been suggested that psychiatrists or psychologists should give regular lectures to the Bar in order to provide barristers with some form of assistance to cope with these problems. It has even been suggested that CLE points could be granted for such lectures.

However, the essential problem that lies within the Bar would be a reluctance on the part of barristers to attend. It is not part of the barristorial ethos to be seen to be burdened with problems, especially of a psychological nature. It is this reluctance that has led to the unfortunate recent events and continuing problems within the ranks of the Bar.

## WE WERE WRONG

The Editors in the previous edition wrongly attributed a speech given at a dinner on Thursday 11 May entitled "Twenty-five years of the Victorian Bar Readers' Course" to Chairman Kate McMillan. The speech was given by His Honour Judge Michael Black, Chief Justice of the Federal Court. We apologise for our mistake and hope that readers read the speech with the correct author in mind.

The Editors

# Looking Ahead 12 Months

THE COURTS AND THE MEDIA

THE reaction of some of the Australian press to the recent decision of the Court of Appeal to quash the convictions of Jack Thomas gives cause for concern. Australians were encouraged to be outraged by the decision which was labelled as ludicrous. One commentator called for the legal system to adjust to the reality of a war where our enemy wants to destroy democracy and called for rapid amendments to the law.

The Court decision was an unremarkable application of established legal principles that underpin the freedoms of our democratic society. As the President of the Human Rights and Equal Opportunity Commission, the Honourable John von Doussa QC said, in a recent speech, "[T]his case involves a routine application of long established principles relating to the admissibility of involuntary confessions in a criminal trial that can be traced back to the decision of the High Court in *McDermott* v *R* (1948) 76 CLR 501."

The decision was the outcome of a legal process in the administration of justice according to laws to which all citizens, corporations and governments are bound. That is a process that protects democratic values and one which we should hold dear, not condemn as ludicrous. We can debate the merits of our laws and legal principles and argue for change but we should not condemn the Court that has done no more than uphold the law. On their appointment each member of the Court swore to do just that "without fear favour or affection". The distinction is of huge importance.

There has been debate about the participation of Justice Maxwell, the President of the Court of Appeal in the Jack Thomas appeal. The issue has focused on whether the court's judgment was affected by perceived or apparent bias because of the President's earlier role as President of Liberty Victoria in opposing aspects of the anti-terror law and his experience in other roles during his career at the Bar.

As Mason J (as he then was) said, judges should discharge their duty to sit and should not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: Re JRL; Ex parte CJL (1986) 161 CLR 342 at 352; see also *Ebner* v *Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [19].

No judge comes to a Court without life experience. It is that experience which equips the judge for their role. The experience is often invaluable. The question is whether in the light of that experience a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions in the case.

The Jack Thomas case did not raise an issue about the anti-terror law; it concerned the admissibility of a confession. No application was made for the disqualification of Justice Maxwell for bias and the judgment of the three members of the Court of Appeal was unanimous.

CIVIL JUSTICE REVIEW

Attorney-General Rob Hulls, in his May 2004 Justice Statement identified the need to reduce the cost of litigation and promote principles of fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability in the civil justice system.

In September 2004, the Victorian heads of jurisdiction in their Courts Strategic Directions Statement also recommended a review of the cost of justice to litigants and a review of procedural rules with the aim of simplifying and, where appropriate, harmonising court processes and court rules.

The Attorney-General has now given terms of reference for a civil justice review to the Victorian Law Reform Commission requesting a report in September 2007. Dr Peter Cashman, formerly Associate Professor of Law at the University of Sydney has been appointed to be a full-time Commissioner of the Victorian Law Reform Commissioner, and the commissioner in charge of the Civil Justice Review.

The Bar welcomes this initiative. The task is not an easy one: to identify ways to reduce the cost, complexity and duration of civil proceedings.

Recently, in two addresses, one in the Supreme Court and another at the University of Melbourne, Professor Zuckerman of Oxford University spoke on ways of delivering justice that were effective, efficient and fair. Speaking of England, he said that the system had failed there to achieve the overriding objective of delivering well-founded judgments within a reasonable time at a proportionate cost.

There is no doubting that here in Victoria, as in the rest of Australia, litigation is too costly. It is also too protracted and something needs to be done.

The Bar looks forward to contributing to the work of the Civil Justice Review.

THE BAR COUNCIL

I take this opportunity to thank the previous Bar Council for its work over the past year.

In particular, I record with gratitude the service of those who have left the Council — the retiring Chairman, Kate McMillan S.C., also Philip Dunn QC, Mark Dreyfus QC, David Beach S.C., Iain Jones, Rachel Doyle, and Liza Powderly.

Each contributed significantly to the work of the Bar Council. Each will be missed.

I congratulate and welcome, upon their election to the Council, Tony Pagone QC,

Timothy Tobin S.C., Richard McGarvie S.C., Mark Moshinsky, Kate Anderson, Daniel Harrison and Michelle Sharpe.

I look forward to working with the new Council, and its office bearers — Peter Riordan S.C., Senior Vice-Chairman; Paul Lacava S.C., Junior Vice-Chairman; Michael Colbran QC, Honorary Treasurer; and Will Alstergren, Assistant Honorary Treasurer and with our new Honorary Secretary, Penny Neskovcin and Assistant Honorary Secretary, Simon Pitt.

### THE RETIRING CHAIRMAN

Kate McMillan S.C. served with distinction as Chairman. She was assiduous in her duties and always looked after the best interests of the Bar. Her year in office saw the implementation of the new *Legal Profession Act 2004*, which commenced operation on 12 December 2005.

She served on the Bar Council from 1991 to 1996 and then from 2000 to 2006.

In 1983, not very long after she came to the Bar, Kate became a member of the Bar Library Committee. That began 23 years of service to the Bar and, as a Bar appointee on the Supreme Court Board of Examiners and the Council of Legal Education, more widely to the administration of justice in Victoria. She was a member of the 13th Commonwealth Law Conference Committee, which worked for two years organising the very successful conference here in Melbourne in April 2003. Kate served a remarkable eight years on the Ethics Committee, chairing that Committee for almost four years.

### OTHER BAR COUNCILLORS

Mark Dreyfus QC served on the Council for four years, last year as Junior Vice-Chairman. Mark has served four years on AAT Consultative (Heavy Users) Committee, and four years on the Ethics Committee. He was also a member of the Professional Indemnity Insurance Committee and played a significant role in the Bar insuring with the LPLC. Since November 2003, he has been the Bar's Director on what is now Law Council of Australia Holdings Limited.

David Beach S.C. has been a member of the Bar Council for a total of more than 12 years. He was Assistant Honorary Treasurer for five years and, most recently, served with distinction as Honorary Treasurer for the last two years. David continues to serve as Chairman of the Trustees of LawAid, and has joined the Indigenous Lawyers Committee.

Philip Dunn QC is also a veteran of 11 years service on the Council. Most recently, he has been the senior member of the Criminal Law Portfolio.

Iain Jones and Rachel Doyle have each been on the Council for three years. Iain has joined the Dispute Resolution Committee. Liza Powderly has been on the Council a year.

All have contributed to the work of the Council. All are missed.

Kate Anderson has retired after distinguished service as Honorary Secretary of the Bar Council. We are fortunate that Kate can continue on the Bar Council as an elected member.

I look forward to working with all of the members of the Bar Council during the next 12 months. If any member of the Bar has any query, they should not hesitate to contact me or any other member of the Bar Council.

Michael Shand QC
Chairman

# "Those Involved in Terrorist Activity Must be Stopped and Brought to Justice. Justice, however, is the Operative Word"

AS I write, David Hicks waits for yet another protracted chapter in a demoralising story to unfold. Quite clearly, this story is agonising for the Australian citizen who, regardless of what he may be accused, has spent nearly five years incarcerated by a foreign country and denied rights that all of us should be able to take for granted.

It is demoralising, however, for his country of origin — a nation that protests its reverence for democratic principles and is prepared to send soldiers to kill for them; one that now demands allegiance from aspiring citizens to apparently universal values that presumably include the right to natural justice yet, when pressed, is not prepared to assert this right on behalf of an existing one.

Obviously, I believe, as all of us do, that those involved in terrorist activity must be stopped and brought to justice. Justice, however, is the operative word and completely missing from the process in which Hicks has found himself. The irony of this absence, of course, is lost on those who have the greatest capacity to change it. Irony can be very ironic that way. Nevertheless, a number work tirelessly on behalf of Hicks and the other prisoners in Guantanamo Bay to bring this to their attention.

Recently I was privileged to meet with one of that number, Major Michael Mori, who, like any lawyer dedicated to the craft, accepted his brief and has advocated on behalf of Hicks without fear or favour in what I can only imagine must be a very difficult professional environment. It was

heartening to talk with someone so committed to the rule of law and the principles of natural justice, as unpopular a cause as it now seems to be in some circles.

Of course, I have raised my own concerns within those circles, writing on a number of occasions to the Federal Attorney-General and highlighting the issue on the agenda of the most recent meeting of the Standing Committee of Attorneys-General. In the absence of any will to bring Hicks to Australia to be tried, despite legal opinion that it may be possible, I asked Ruddock to give some assurance that he would be exerting what influence he had over the most recent chapter in the saga to which I referred earlier — the Bush Administration's proposed legislation for the establishment of a new Military Commission system.

**Major Michael Mori, who, like any lawyer dedicated to the craft, accepted his brief and has advocated on behalf of Hicks without fear or favour**

A feature article in this edition by Peter Vickery, QC, spells out at length the myriad concerns with this process, the most enduring one obviously being that this legislation further delays the process, regardless of what its outcome may be. In summary, however, we cannot be the slightest bit confident that, without advocacy from relevant governments, our own Federal one included, this new legislation will not simply reinforce the injustice of the previous process, or bypass the fairly narrow reach of the US Supreme Court's recent decision in *Hamdan* v *Rumsfeld*.

The likelihood remains, therefore, that Hicks and others will be tried not by independent judicial officers, but by military personnel appointed by a designate of the Secretary of Defense. It is also likely that the Commission will not be bound by ordinary rules of evidence and therefore be able to admit evidence considered probative and even obtained through coercion; and that the right of an accused to be present and hear the evi-

dence against them will not apply. These possibilities worry me enormously, as they do anybody concerned with the principles of justice, and I have written to the members of the US Senate and Congress Committees currently considering the legislation asking that these principles be observed.

It is extraordinary to me that Howard and Ruddock have continued to maintain that Hicks will be assured a fair trial. Indeed, until a few months ago, the Government felt so confident of this that it posted this assurance on its website. The fact that it has now been removed is most likely the result of uncertainty created by the US Supreme Court's decision. Nevertheless, I live in hope that the farcical nature of this process is beginning to dawn on the Commonwealth and, while I am acutely aware of the efforts of many at the Bar to bring these issues to the fore, I encourage you to continue lobbying, to write to Ruddock, both as an organisation and as individuals, and to put your concerns in the public domain wherever possible.

Hicks is not a popular case and Ruddock knows it. The Commonwealth is playing politics with the principles of natural justice. Those who value these principles, therefore, whether in public office or private practice, need to take the debate to new ground — to explain to the nation why we cannot demand of aspiring citizens those values we do not hold true to ourselves.

Rob Hulls
Attorney-General

# The Legal Profession Act 2004: a Comparative Look at the Changes to the Civil and Disciplinary Complaints System

Fran O'Brien S.C.

CHAPTER 4 of *The Legal Profession Act 2004* provides for a wholly new system of complaint and discipline.

The 2004 Act creates the "Legal Services Commissioner". The Commissioner is charged under the Act with receiving, attempting to resolve, mediating, investigating, dismissing or referring to VCAT all "complaints" be they "civil" or "disciplinary".

The scheme is structured much as complaints of discrimination under the *Equal Opportunity Act 1995*. Any civil and/or discipline complaint must be lodged with the Commissioner.

This portal structure at least has the virtue of simplicity. It is in marked contrast to the 1996 Act.

Under the 1996 Act civil complaints and disciplinary complaints were defined separately.

The receipt, investigation and conciliation and referral to the Legal Profession Tribunal of civil complaints was essentially the preserve of the Law Institute and the Bar, with some oversight by the Legal Ombudsman.

The discipline complaints could be received, investigated, conciliated, dismissed or referred to the Legal Profession Tribunal by the Law Institute, the Bar and/or the Legal Ombudsman. The Ombudsman also had an oversight role of these processes of the RPAs.

*Fran O'Brien S.C.*

The definition of "complaint" in the 2004 Act is very wide and provides that a complaint may be a civil complaint and or a disciplinary complaint.

Some elements of the 2004 Act definition of "complaint", including "civil complaint" and "discipline complaint" are defined in the Part 4.2 of the 2004 Act called "Making a Complaint".

The definition of "discipline complaints" is further and more particularly defined in Part 4.4 of the 2004 Act which deals with the processes of dealing with a disciplinary complaint and is called the "Disciplinary Complaints and Discipline" part of the 2004 Act.

The definition of "complaint" covers civil complaint, civil dispute, disciplinary complaint, unsatisfactory professional conduct, professional misconduct and findings of guilt for a serious offence, a tax and/or a dishonesty offence, insolvency and/or disqualification under a Corporations Law outside Australia.

A civil complaint has a three-tier definition. It is considerably wider than that covered by the definition of "dispute" under the 1996 Act.

"Civil complaint" is a complaint about conduct to the extent that the complaint involves a "civil dispute"; or a complaint about the "conduct" of a legal practitioner; and the complaint is made by a person who has a "civil dispute".

A "civil dispute" is a legal costs dispute to $25,000.00 or any pecuniary loss suffered as a result of an act or omission of a practitioner.

So the new elements of the definition of civil complaint are the "conduct" of a practitioner, the increase in the amount of disputes to $25,000 (from $15,000) and the right to roll up a disciplinary complaint into a complaint about a civil dispute.

The "conduct" which is now part of the civil complaint definition must mean something falling short of the professional

misconduct or unsatisfactory professional conduct and the extended definition of those concepts found elsewhere in the 2004 Act.

As such "conduct" falls within the definition of civil complaint, such a complaint appears to be confined to a person who has a civil dispute with a practitioner.

As the definition of civil dispute includes "any other genuine dispute" between a person and a legal practitioner, it appears this "conduct" is directed at what could possibly be described as the polite behaviour legislation. It is otherwise difficult to appreciate at what "conduct" this part of the definition is directed.

The right to roll up a disciplinary complaint into a complaint about a civil dispute is probably more a matter of procedural simplicity than substantive right. It allows a complainant to lodge any complaint in the one document.

The Commissioner is given power in section 4.2.11(2) to determine to deal with a complaint involving both as "is appropriate to the subject matter" under Division 1, (the processes for dealing with civil complaints) and Division 2 (the processes for dealing with discipline complaints).

Divisions 1 and 2 give different powers to the Commissioner to deal with the particular complaints. The allocation of the relevant parts of any complaint "as is appropriate", will be an important decision for the Commissioner because of the different powers available to exercise depending on how a complaint is allocated. The use of the word "and" in the section appears to be directed towards ensuring that the relevant parts of a civil dispute containing a disciplinary complaint should be dealt with according to the applicable division.

A "disciplinary complaint" is "a complaint about conduct to which this chapter applies to the extent that the conduct, if established, would amount to unsatisfactory professional conduct or professional misconduct".

This is a considerably easier definition to untangle than the definition of civil complaint.

The definition of "discipline complaints" is further and more particularly defined in Part 4.4 of the 2004 Act which deals with the processes of dealing with a disciplinary complaint and is called the "Disciplinary Complaints and Discipline" part of the 2004 Act.

This is where the definitions of unsatisfactory and professional misconduct are located. They are different in the 2004 Act to that under the old 1996 Act.

The formatting in the 2004 Act of these definitions and their extended application is unwieldy.

However, the following general observations can be made. First, substantial changes are made to what is professional misconduct and unsatisfactory professional conduct.

Secondly, the concept of conduct "capable" of constituting professional misconduct and unsatisfactory professional conduct is introduced.

Thirdly, the definition of professional misconduct is widened to include a failure to "maintain" a reasonable standard of competence and diligence. This change is clearly directed at a failure to abide by the continuing legal education obligations.

The definition substitutes the "good character and otherwise unsuitable to engage in legal practice" test with a test of "fit and proper person". This change is in accord with tests of good character elsewhere in professional regulation statutes.

Only "excessive fees" in contrast to the "grossly excessive fees" test of the 1996 Act, is now required as a test for determining whether such fees are "capable of constituting professional misconduct or unsatisfactory professional conduct". This change from "gross" to merely "excessive" is obviously a very significant change.

Further, the test of merely being "capable of constituting professional misconduct or unsatisfactory professional conduct" means a practitioner will be brought into the disciplinary complaints stream of the system at a very much lower threshold than under the 1996 Act.

The mere contravention of the Act, regulations or practice rules in contrast to the "wilful or reckless" contravention of those regulations and rules under the 1996 Act is now sufficient to be treated as "capable of constituting misconduct. It is now also the test for "unsatisfactory professional conduct".

For example, a single day oversight of the date for renewal of practising certificates being a contravention of the Act or regulations is now clearly capable of constituting misconduct or unsatisfactory professional conduct.

The phrase of the 1996 Act referring to "conduct in the course of legal practice" is substituted in the 2004 Act with conduct occurring "in connection with the practice of law".

This is in accord with the intention of these provisions of the 2004 Act to regulate the disciplinary conduct of all persons "in connection with the practice of law" whether they have practising certificates or not and whether they are "engaged in legal practice" or not.

So lawyers acting in the course of their employment with the Crown or a public authority who remain exempt from the requirement to hold a practising certificate are nevertheless now subject to these complaint provisions.

Equally legal academics and company secretaries admitted to practice though not holding practising certificates are now also subject to them. They are persons whose day-to-day activities could readily be "in connection with the practice of law".

"Unprofessional conduct and conduct unbecoming" is removed, as is a failure to pay an insurance premium. The removal of this latter part of the definition of unsatisfactory professional conduct is consistent with the now mere contravention of the 2004 Act regulations or practice rules as sufficient to be "capable" of constituting unsatisfactory professional conduct.

The removal of the standard test for unsatisfactory professional conduct, "unprofessional conduct and conduct unbecoming" presents more interesting consequences. No standard is substituted.

The "fit and proper person" test for professional misconduct is clear in its application. It appears the omission of a test of personal conduct for unsatisfactory conduct was intentional.

This means that "personal conduct", save for that specifically defined, is now absent from consideration under the unsatisfactory professional conduct rubric of the disciplinary provisions in the 2004 Act. Those specifically defined are the matters referred to above and findings of guilt for a serious, tax or dishonesty offence, insolvency and/or disqualification under the Corporations Law whether inside or outside Australia.

However, as noted earlier, practitioners must be aware a client can make a complaint of mere "conduct" in a "civil complaint". Such a complaint of conduct may or may not be required to involve a "civil dispute". However, the wide powers of the Tribunal to make orders in civil complaints, though unchanged in the 2004 Act leave the potential for orders for apologies or even pain and suffering compensation. It is also a curious addition to the definition of a civil dispute given the removal of the general standard of behaviour from

the unsatisfactory professional conduct provisions.

As with professional misconduct the failure to comply with a condition in a practising certificate (not amounting to misconduct) is retained.

Any person may make a disciplinary complaint. However, the Commissioner may investigate conduct that may amount to a disciplinary matter without any complaint and even if a complaint has been withdrawn.

The RPAs and the legal ombudsman had the power to investigate disciplinary conduct without complaint under the 1996 Act. The power to investigate this kind of complaint where it has been withdrawn is new but probably existed impliedly under the 1996 Act's powers.

This is in contrast to a civil complaint where it appears it is intended that only a person with a civil dispute may make a complaint about the "conduct" of a practitioner or practice with whom that person is in a civil dispute.

The provisions as to the time limits for the making of complaints have also changed slightly. Any complaint must be made within six years after the conduct complained of occurred. This is subject to two exceptions.

First where a "complaint involves a costs dispute" the complaint must be made within 60 days of the bill being payable. Or, and this is the alteration made by the 2004 Act, if an itemised bill is requested, within 30 days of the compliance with the request.

The exercise of the discretion is retained to receive the complaint within four months of the periods above where legal proceedings have not commenced and there is a reasonable cause for the delay.

Secondly a disciplinary complaint may be received outside the six years if there is a reason for the delay and it is in the public interest to do so. This has not changed from the 1996 Act.

Upon the receipt of any complaint but prior to the Commissioner attempting to "resolve" a civil complaint or investigate a disciplinary complaint she may summarily dismiss the complaint.

This is a very important new provision. Under the 1996 Act the power to dismiss civil complaints summarily was exercisable in very limited circumstances by the Registrar of the Legal Profession Tribunal and the Tribunal itself in more expanded circumstances.

In practice under the 1996 Act this could only occur after a complaint had been referred to the Tribunal by a complainant.

The RPAs and the legal Ombudsman had the power to summarily dismiss a disciplinary complaint under the 1996 Act if frivolous, vexatious, misconceived or lacking in substance prior to investigation. However, the legal ombudsman could override such a decision of the RPA.

The powers in the Commissioner to dismiss summarily prior to attempts to resolve, mediate or to investigate are set out in sections 4.2.10 and 4.3.3 and are wider than those of the RPAs, the Ombudsman and the Legal Professional Tribunal under the 1996 Act.

The basis for such dismissal includes: a failure to provide or verify details of complaint as required by the Commissioner; vexatious, misconceived, lacking in substance and frivolous; the subject of a previous dismissed complaint; the subject of another complaint; the Commissioner has no power to deal; in the case of a disciplinary complaint no further investigation is required; a failure to lodge an amount of unpaid costs as required by the Commissioner in a costs dispute.

However, the structure of the 2004 Act requires the Commissioner to notify the practitioner of any complaint. The practical effect of this, as is the case under the *Equal Opportunity Act 1995,* will be that the practitioner will have to request the Commissioner to exercise these powers.

Additionally the Commissioner has to give written reasons to the complainant if any such complaint is dismissed. No obligation exists for the refusal to exercise the power. Given the nature of these powers, review of such a refusal would be open to a practitioner pursuant to Order 56 of the Supreme Court Rules and the Administrative Law Act.

Should the Commissioner exercise these summary dismissal powers, unlike the *Equal Opportunity Act 1995*, the complainant cannot require that the complaint be referred to VCAT for hearing. The complaint is dismissed in the full sense of the traditional meaning of dismissed.

If the Commissioner does not summarily dismiss the complaint the Commissioner may attempt to resolve it and or mediate in the case of civil complaints. In the case of a disciplinary complaint it must be investigated.

The statutory tools provided to assist the attempt to resolve, mediate and investigate in the 2004 Act enact some major changes.

The 2004 Act does not retain the provisions of the 1996 Act where a civil complaint could not be made or lapsed if proceedings had already begun by a practitioner in relation to the subject matter of the civil complaint.

The 2004 Act provides only that that a complainant may not begin proceedings after the complaint has been made and proceedings brought by a practitioner after notice of a complaint constitute a contravention of the 2004 Act such that the proceedings must be stayed.

This means court proceedings for the recovery of costs can commence by a practitioner and then a complaint about those costs can be made and allowed to continue.

This is a very significant change. This means duplication of proceedings, costs, expenses and time. It is a vote of no confidence in our Magistrates Courts, with all their attendant powers of mediation and small claim dispute resolution.

The costs amount in dispute must now be paid into the Commissioner within 21 days of the costs dispute being made. As referred to above, a failure to comply effects a summary dismissal of the complaint. The summary dismissal power and the 21-day time requirement are two new and important procedural changes. The discretion not to require such a payment remains.

The 2004 Act inserts a new stage in the pre-trial procedures in civil complaints with the "mediation" requirement. The Commissioner has discretion whether to require both or any of "the attempt to resolve" and "to mediate" procedures. However, if the complaint is referred to VCAT the procedures of VCAT will almost certainly require mediation again.

The 1996 Act contained only "an attempt to resolve" requirement by the RPAs, and compulsory conciliation was the responsibility of the Register of the Legal Profession Tribunal.

These new stages in the pre-trial procedures certainly mean more time and expense. The discretion not to require these procedures is retained if a case can be made for its exercise.

There are two small but significant changes in the 2004 Act if there is a failure to attend mediation.

First when the client fails to attend, if no reasonable excuse is given within seven days of the failure, the claim may be dismissed by the Commissioner. Under the 1996 Act the Registerer had to dismiss the complaint.

Secondly if the practitioner fails to attend, and no reasonable excuse is

given within seven days of the failure, the Commissioner must give notice to the client of the right to refer the complaint to the tribunal. Under the 1996 Act the Registrar of the Tribunal could make any appropriate order without any hearing.

These are two very significant changes. It leaves the Commissioner with little means to exert serious control over recalcitrant clients and practitioners and makes Tribunal hearings inevitable where one of the parties proves seriously refractory.

A client is taken to have waived privilege if any complaint is made. No similar provision existed in the 1996 Act. This is an important new development.

Where the Commissioner decides to obtain a cost assessment in a costs dispute, she can require a practitioner to provide documents or information for this purpose. In the 2004 Act this is the only basis for the compulsory provision of documents or information at the pre-trial stage of a civil complaint.

The power to require the provision of documents in disciplinary complaints is widened in three ways. First the power is continuous until the hearing of the complaint. Under the 1996 Act it was confined to the period of the investigation. Secondly an authorised deposit taking institution and an "external examiner" can be required to provide documents. Only other legal practitioners were the subject of these powers in the 1996 Act. Thirdly the investigator can make copies of any documents.

The provisions of the 2004 Act empower the Commissioner to refer a disciplinary complaint to the Law institute or the Bar for investigation. Bodies known as "prescribed investigative authorities".

However, unlike the 1996 Act a disciplinary complaint must be investigated and only the Commissioner has the power to lay and prosecute the appropriate charges for hearing by the Tribunal.

The powers of the Commissioner in referring investigations are clearer and more streamlined under the 2004 Act than they are in the 1996 Act.

The mere fact that a reference has been made to an investigating body does not prevent the Commissioner from investigating or further investigating such a complaint. The use of these powers to refer complaints for investigation and recommendation will tap into an invaluable reservoir of experience, knowledge and judgement.

Once the investigation is completed, only the Commissioner may apply to the Tribunal for the relevant orders if there is a "reasonable likelihood that the Tribunal would find a practitioner guilty of professional misconduct". This is the test used in the 1996 Act.

If the Commissioner is not so satisfied she must dismiss the complaint. This is new.

In the case of unsatisfactory professional conduct, in addition to the laying of charges, only the Commissioner may, with the consent of the practitioner reprimand or caution the practitioner, or require the payment of compensation as a condition of not making an application to the Tribunal.

But she must "dismiss" the complaint if satisfied of certain circumstances pertaining to the practitioner's diligence and prior history or if not satisfied there is a "reasonable likelihood that the Tribunal would find a practitioner guilty of unsatisfactory professional conduct. Save for the obligation on the Commissioner to "dismiss" the complaints in the circumstances referred to and the removal any right in the complainant to review her decision other than by prerogative relief, the powers of the Commissioner after completion of the investigation of unprofessional conduct are provided for in the 1996 Act.

The substantive orders of the tribunal in civil complaints remain unchanged from the 1996 Act.

These are set out in ss.4.4.17, 18 and 19 and are little changed from the 1996 Act. They include the power to recommend the removal from the Supreme Court Roll and Interstate Roll, fines, conditional practice, reprimands and any other orders the Tribunal thinks fit.

The power of the Tribunal to impose fines for unsatisfactory professional conduct is changed from $1,000 to $10,000. The specific powers of the Tribunal in relation to costs of disciplinary hearings are not retained in the 2004 Act but are duplicated in the VCAT Act as it pertains to the 2004 Act. Section 109 (the costs provisions) of the VCAT Act is specifically stated not to apply to discipline proceedings.

Schedule 2 Part 8.1 of the 2004 Act abolishes the Legal Profession Tribunal. Part 8.2 makes all members of the Legal Profession Tribunal members of VCAT.

The provisions providing for appeals to the full Tribunal are removed.

This is most fundamental change in the structure system of regulation of the profession. Unlike almost all other Victorian statutes for the regulation of any other professional group and the 1996 Act, lawyers are no longer subject to the judgment of their peers with all the attendant rights at first instance with the right to appeal.

Virtually all other professional regulatory legislation has this two-tiered structure. The Medical Board, the Dentists Board, the Institute of Teaching

Board, the Psychologists Act, and the Physiotherapists Act are examples.

As noted earlier and as is the case in the in the 2004 Act at s.4.4.16, the Tribunal has all of the powers under the VCAT Act which includes injunctions, interim injunctions, declarations, further orders and the imposition of conditions on orders and orders for costs.

Section 75 of the VCAT Act is omitted from the note but is not excluded by the amendments to the VCAT Act in 8.1.3. So it appears the summary power of dismissal at any time during the course of the hearing is available.

Publication of disciplinary action in the 1996 Act required publication in the annual report of the RPAs. This is extensively changed in the 2004 Act.

A register of disciplinary action is to be set up. This is to be kept by the Legal Practice Board. The 2004 Act provides that the register only applies in relation to disciplinary action taken after the commencement of the section but details relating to earlier disciplinary action may be included in the register. The register must be made available to the public on the Board's internet site and the Board may publicise the disciplinary action in any other way it sees fit. These powers of publication are limited only by prohibition against publication until the expiry of all rights and where disciplinary action has been taken against an infirmed person.





# Dual Obligations of Disclosure:

## Rule 197 of the Conduct Rules and section 2.4.27 of the *Legal Profession Act 2004*

COUNSEL are reminded that they are currently subject to two distinct obligations of disclosure (set out below), each of which must be complied with notwithstanding that the different obligations may arise from the same conduct or event. Although the definition of the circumstances warranting disclosure under each regime overlap, they are not co-extensive and counsel need to have careful regard to their obligations should an event occur that may require disclosure under both or either and to act accordingly.

Furthermore, despite the fact that the two disclosure regimes require disclosure to be made to different organs of the Bar, it is not sufficient for counsel to make disclosure to one of those organs when the circumstances require disclosure to be made to both.

For the proper performance of its functions under the Rule or the Act it is necessary for each organ to be informed that proper disclosure has been made to the other. Accordingly, counsel to whom dual obligations apply are also required to inform each organ of the Bar that they have made proper disclosure to the other organ.

### DISCLOSURE UNDER THE CONDUCT RULES

Since 1 July 2001 Rule 197 of the Rules of Conduct has required counsel to inform the Ethics Committee of the occurrence of a "disclosable event" and provide written details of the circumstances sufficient to enable it to determine whether that occurrence may affect the barrister's suitability to engage in legal practice for the purposes of the definition of "misconduct" in s.137 of the *Legal Practice Act 1996*. The disclosure must be made within 28 days of the event occurring and is made by writing to the Investigations Officer of the Ethics Committee (see the full requirements set out in Rule 197).

Under Rule 197, a "disclosable event" in relation to a barrister means any of the following:

(i) the making of a sequestration order against, or the filing of a debtor's petition by, the barrister pursuant to the *Bankruptcy Act 1966* (Cth);

(ii) the entry by the barrister into a debt agreement pursuant to Part IX of the *Bankruptcy Act 1966* (Cth), or a personal insolvency agreement pursuant to Part X of that Act;

(iii) the disqualification of the barrister from managing or being involved in the management of any body corporate under any law in force in any jurisdiction within Australia, including disqualification from managing corporations under Part 2D.6 of the Corporations Law; or

(iv) the conviction of the barrister of an offence under any law in force in Australia or in any overseas country, or a finding that such an offence is proved against the barrister, where the maximum penalty for the offence is a term of imprisonment of 12 months or more, or where fraud or dishonesty is an element of the offence.

### DISCLOSURE UNDER THE *LEGAL PROFESSION ACT 2004*

On 12 December 2005 the *Legal Profession Act 2004* ("the Act") came into operation. By section 2.4.27 a barrister who holds a local practising certificate is obliged to provide the Legal Services Board notice, in the approved form, of the happening of "show cause event" within

seven days of its happening and, within 28 days after its happening, a written statement explaining why, despite the show cause event, the person considers himself or herself to be a fit and proper person to hold a local practising certificate. (See the section for the full requirements.)

The Legal Services Board has delegated to the Victorian Bar its function under section 2.4.27 of the Act. The happening of a "show cause event" must now be notified to the Chief Executive Officer, Victorian Bar, 5th Floor, Owen Dixon Chambers East, 205 William Street, Melbourne.

A "show cause event", in relation to a person, means:

(a) his or her becoming an insolvent under administration; or
(b) his or her being found guilty of a serious offence or a tax offence, whether or not:
    (i) the offence was committed in or outside this jurisdiction; or
    (ii) the offence was committed while the person was engaging in legal practice as an Australian legal practitioner or was practising foreign law as an Australian-registered foreign lawyer, as the case requires; or
    (iii) other persons are prohibited from disclosing the identity of the offender.

The current Rules of Conduct are soon to be reviewed. Unless and until Rule 197 is amended or repealed it still applies and failure to make appropriate disclosure to the Ethics Committee may constitute unsatisfactory professional conduct or professional misconduct under the Act.

Bulletin 2 of 2006

## Admission Ceremonies 2007

The Chief Justice has set down the following dates for Admission Ceremonies in the first half of 2007 as follows:

Tuesday 13 February
Tuesday 13 March
Tuesday 17 April
Tuesday 22 May
TBA June



## Not Silk

The Editors

Dear Colleagues,

LEN Hartnett has drawn to my attention that in my Law Week Oration I referred to Ted Hill as Queens Counsel. That was an error — he was not silk. Len — a devotee of Ted's until the end of his life — assures me that Ted Hill would be "rolling" in his grave at the very thought of such a thing.

I should have known better since I was articled to his brother, Jim, at Slater & Gordon in 1972. However malice-free mistakes happen and even in an extreme case like this I would hope the "mistakor" would be likely to be forgiven by the "mistakee".

Perhaps I had Frank Galbally in mind.

Regards

Lex Lasry QC

## Hunting the Teapot

Dear Prime Minister

Re: *Queen Elizabeth's Tour 2006 and the Quest for a Teapot*

AS a fellow monarchist and lawyer, I write to you with a request that you intercede with the Palace on my behalf to gift a teapot as a companion for my 1954 commemorative cup and saucer.

You will see from the enclosed copies of the *The Victorian Bar News* that I have been engaged in correspondence with the Royals on this issue for several years. Would it be too much to ask for you to approach the Palace on my behalf to secure the much desired item for me?

I look forward to your reply and assistance.

Yours sincerely

Peter Rosenberg

Dear Mr Rosenberg

ON behalf of the Prime Minister, I would like to thank you for your correspondence of 9 February 2006 regarding The Queen's visit to Australia and your search for a Royal teapot.

As this matter is best dealt with by Government House, your letter has been forwarded to the Official Secretary to the Governor-General at Government House, Canberra.

Yours sincerely

Ministerials Officer
Ministerial Correspondence Unit

Dear Mr Rosenberg

A copy of the letter that you wrote to the Prime Minister on 9 February 2006 has been passed to my office for attention.

I understand that your request is that Buckingham Palace gift a teapot as a companion for your 1954 commemorative cup and saucer.

I have had the opportunity to see the correspondence sent to you directly from Buckingham Palace on this aspect.

I regret that there is nothing I can do to assist you further in this regard.

Yours sincerely

Malcolm Hazell
Official Secretary to the Governor-General

Malcolm Hazell
Official Secretary to the Governor-General

Dear Malcolm,

Re: *Request for a Royal Teapot*

THANK you for your letter of 9 March. I note that you have declined to afford any assistance in my endeavours.

Regrettably, I have now turned Republican.

Yours sincerely

Peter Rosenberg

## Board Meeting Dates 2007

The Board meeting dates for the first half of 2007 are as follows:

Monday 29 January
Monday 26 February
Monday 2 April
Monday 7 May

# Federal Court

## Justice Richard Tracey

ON 26 July 2006, Richard Tracey was sworn in and welcomed as a Judge of the Federal Court of Australia. He is a popular man. It was a well-deserved and popular appointment. Needless to say, the Court was packed, and the mood was warm and happy.

The speakers (including the Commonwealth Solicitor-General, David Bennett AO QC and the Chairman of the Bar, Kate McMillan S.C.) painted a true picture of the man.

As counsel, Richard Tracey met Sir Owen Dixon's paradigm, namely that "counsel … brings his learning, ability, character and firmness of mind to the conduct of cases, and maintains the very high tradition of honour and independence of English advocacy".[1]

Richard's late father, Eustace Richard Tracey, was a managing clerk in the law practice of Senator George Hannan. Honesty and integrity were his watchwords — as Senator Hannan has observed, no mean qualities for his sons to inherit.

It is thus surely no surprise that Richard Tracey studied Law — distinguishing himself as a student; as a teacher; and as a barrister.

He and his younger brother, Rowan, began their schooling at South Yarra State School and Toorak Central School. Each in turn won year-nine merit selection to Melbourne High School. Richard went on to an Honours Degree at the University of Melbourne, and a two-year Associateship with Sir Richard Eggleston. Rowan went on to the Royal Military College, Duntroon, where he was the Senior Under-Officer; the Battalion Sergeant-Major; and won the Sword of Honour.

Another inheritance from his father is that Richard is not one for fleeting fancies, or, for that matter, fleeting friendships.

Eustace Tracey served nearly 50 years on the Australia Day Council — its secretary for more than 20 of those years. He was awarded the Medal of the Order of Australia and, by the Polish government, for his good works for the Melbourne Polish community, the Order of St Mary.

So also, Richard has served the community steadfastly. Many activities that he began at Melbourne High he dedicated himself to for decades afterwards.

Richard was a football umpire at Melbourne High. Forty years later, he is a life member, and former President, of the Umpires Association — having umpired for many years, including being a field umpire in VAFA grand final matches in 1982, 1983, 1984 and 1985.

Richard brought certain characteristics to the umpiring world such that it is now said that his Honour was truly a man ahead of his time. He was the man "who invented flooding". Described as "not the fittest nor the fastest umpire but the most formal", it has been suggested that he was not always able to keep up with the play, and took his time to arrive at the scene to dispense umpiring justice.

Players had the time to question his decisions. Being the gentleman that he is, he always provided further and better particulars. Spectators would join in the debate, resulting in endless light hearted abuse — such as, "How would you know? You were 50 metres behind the play"; "Lose weight you're too slow"; "You're too academic"; "Typical professor's interpretation".

Richard was always able to laugh at himself and the game continued. He also regularly stayed on after the game and had a drink with players and spectators from both sides; and the banter about his umpiring would continue with good humour. Richard is, and remains, a much loved character within the ranks of Victorian Amateur football.

His Honour is a fervent Collingwood supporter. In the long 32-year drought from its premiership win in 1958 to its next win in 1990, Collingwood was in nine intervening Grand Finals. Richard was at every one. History does not relate how it was that he came to be on vacation, away from Melbourne, for the 1990 Grand Final — but he was. And, of course, Collingwood won.

Another commitment that began at Melbourne High that His Honour continues to this day is to service in the armed forces. Richard was an outstanding Cadet Under-Officer at Melbourne High. Upon leaving school, he became a Lieutenant of Cadets, and continued to serve in the Melbourne High Cadet Corps — not a widely popular extra-curricular activity of university students in the late sixties. His Honour is, of course, now a Colonel in the Army Reserve, with 30 years service and the Reserve Forces Decoration.

Newman does not leap out as the obvious College of choice in the 1960s for a Protestant from Melbourne High. However, Justice Hayne was senior law tutor, and Newman tutorials in Law were good — even rivalling Merralls' Trinity stable of Law tutors and tutorials. John Grigsby, a newly arrived History master at Melbourne High, and fellow officer of cadets, was a resident tutor in British History (Law) at Newman.

Immediately nick-named "Tracker Dick", Richard was the first, and perhaps only, Protestant President of the Newman College Students' Club. He was quick to assimilate. A photograph in the Newman magazine shows his obvious proficiency in swinging the thurible to produce veritable clouds of incense.

It was during his time as a tutor at Newman that Richard met his future wife, Hilary, then a law student resident at St Hilda's College. Hilary is the daughter of Mr Des and Mrs Mary Cain. Mr Des Cain is well remembered as the senior partner with the firm of Oakley Thompson & Co.

Some of the students from St Hilda's, including Kate McMillan and Richard's good friend, Julienne Parsons, were unwitting participants in his court-

ship when, after each weekly tutorial in administrative law at Newman, they were required to accompany Hilary to the Clyde Hotel where they conveniently "bumped" into Richard.

Hilary provided a breadth to Richard Tracey's lifestyle that was previously unknown to him. He joined in with Hilary's love of racehorses, even to the extent of breeding and racing quite a few. The Traceys struck early success, and one of their horses was good enough to run second at Flemington on Oaks Day. Several others were quite accomplished performers. However, as His Honour has come to realise, the slow ones eat just as much as the fast ones and the fast ones usually break down!

Hilary and Richard are the proud parents of Jack (a law graduate from Melbourne University and Associate to Mr Justice Callaway of the Supreme Court), Phillip (who is employed in the Registry of the Victorian Court of Appeal), Fiona (who is studying Arts at Melbourne University) and Rosie who is in Year 11 at Loreto Mandeville Hall.

For more than 40 years now, Richard has organised annual dinners of the General Committee members of the Newman Students' Club from his era.

For some 20 years, the last eight as President, His Honour has served on the Committee of the Newman Old Collegians. He is also Vice-Chairman of the St Mary's Council, the Catholic Archbishop being ex officio Chairman.

With all that, one may wonder how Richard found time to teach and practise Law.

For many years he did both. He was a full-time teacher at the University of Melbourne. For part of that time, he was also Sub-Dean. He was, at the same time, a part-time Presiding Member of the Social Security Appeals Tribunal — and heard over a thousand appeals. He often appeared in the Federal Court — as did a few other Melbourne academics, such as Justice Weinberg and Dr Ian Hardingham QC. Richard also appeared regularly for students, without fee, in the Magistrates' Court.

In 1979, Richard co-authored *Administrative Law*, a work that was to become a leading text on the subject, and which has since been re-published in three further editions.

In getting admitted to practice, Richard timed things perfectly. By the time he had finished his two-year associateship with Sir Richard Eggleston, and taught 18 months at Melbourne, and a year in Illinois, the ACT six-months Legal Workshop course was up and running. That was significantly more palatable than the whole year's articles required in Victoria.

However, in waiting until 1982 to come to the Victorian Bar, Richard delayed too long. By then, the Bar Readers' course had become an additional requirement.

Based on his two-year associateship and extensive trial and appellate experience, Richard sought a waiver. He had even judged moots in the earlier Readers' courses.

The Bar Applications Review Committee was unmoved. With characteristic good grace, Richard accepted the ruling, and threw himself wholeheartedly into the course. He was what the instructors termed a "very lively" participant.

Richard read with Graeme Uren QC, and had one reader, Richard Waddell. He was granted silk in 1991, after only nine years full-time practice as a junior at the Victorian Bar.

Richard was Chairman of his List Committee for 10 years, and was a Bar appointee on both the Users' Committee and the Migration List Users' Group of the Federal Court. He also served on the Bar Academic & CLE Committee. For six years, he was one of the Bar appointees to the Legal Profession Tribunal.

Nor did Richard's scholarship end upon taking up full time practice. Apart from contributing to further editions of Administrative Law, he established, as founding editor, the *Australian Journal of Administrative Law* in 1993. Published quarterly, it has been described as "an important journal" and "a tremendous resource", publishing articles that are both theoretical and practical. His Honour has been editor for more than 12 years.

In 2003, upon the recommendation of the Council of Law Reporting in Victoria, Richard was appointed the editor of the *Victorian Reports*. It is the editor who decides which judgments are sufficiently significant to merit publication. This involves review of all Court of Appeal judgments, and of those trial division judgments referred to the editor. Richard took pains to recruit good reporters, and to encourage and support the twelve or so reporters in their work.

Richard had a vast practice, especially in administrative law (at both State and Federal levels) and in industrial and military law. He was for many years senior counsel of choice for the Commonwealth in immigration and general administrative law matters. He was briefed with the Solicitor-General in the Tampa litigation in 2001 and more recently in the High Court challenge to the Workchoices legislation. Between 2001 and 2003 he was Senior Counsel assisting the Royal Commission into the Building and Construction Industry.

On 9 March 2005, Richard had the rare distinction of winning two High Court appeals on the one day, namely in the industrial law matters of *Minister for Employment and Workplace Relations* v *Gribbles Radiology Pty Ltd*[2] and *Amcor Ltd* v *CFMEU*.3 He was still winning them even after his appointment; see *McKinnon* v *Secretary, Department of Treasury.*[4]

From time to time, Richard appeared against government interests, notably in Minister of State for *Immigration & Ethnic Affairs* v *Teoh*,[5] a significant High Court decision on international conventions ratified by Australia giving rise to legitimate expectations.

Richard's capacity for work was prodigious. Indeed, the broad smiles of his fellow administrative and industrial law silks present at the welcome reflected not only their shared joy for his Honour in his appointment, but their delight at the significant prospective increase in calls on their services.

Even on vacation, Richard took professional telephone calls. Some years ago, he was holidaying at Port Douglas. He didn't then have a mobile. However, with an immediate family of six, there would usually be someone in the beachside unit to take the call. One day, he'd been called up from the beach about six times in a single morning. Another barrister might have tired of this, but Richard still went up to take the seventh call — a pleasant surprise, because it wasn't one of his Commonwealth instructors. It was notification that he'd won a Mercedes in a raffle.

Although "learned in the law", Richard has not always displayed the same aptitude in matters mechanical. With the brief in a recent security-related case came a massive, combination-lock safe in which to keep the nation's secrets secure. They certainly were secure — secure even from Richard. Passers by his chambers were treated to the spectacle of Richard crouched in front of the safe, muttering darkly. More than once, he had to resort to summoning a Commonwealth instructor to come and open the safe.

In another mechanical lapse, years earlier, Richard put the wrong brake fluid in his old brown Holden Kingswood. In the

ordinary course, this might not have mattered much. However, he was on Mount Kosciusko. The nearest service station was about 40 kilometres down a steep, winding, dirt road. With only first gear and the hand brake, Richard made much better time than he could ever have wished.

Before this appointment, Richard had a couple of brushes with Chapter III of the Commonwealth Constitution.

In 1988, there was a challenge to his jurisdiction as a Defence Force Magistrate on the ground that he was not a Chapter III judge. The High Court upheld his ruling that he didn't need to be — that military justice is outside Chapter III; Re Tracey; ex parte Ryan.[6]

Between 1997 and 2000, Richard served as a part time hearing commissioner of the Commonwealth Human Rights and Equal Opportunity Commission. Such commissioners not being Chapter III judges, decisions they made could not be enforced directly; see *Brandy* v *HREOC*,[7] To obtain an enforceable decision, parties needed to re-run their cases from scratch in the Federal Court. However, by judicious "case management", Richard saved all the parties who came before him that expense and trouble, by guiding them to settlement in every single case. Happily, in his new capacity, His Honour is free to exercise the judicial power of the Commonwealth without fear of a prerogative writ.

In all his many endeavours, Richard has been conscientious, thorough, unflappable and steadfast — and his humanity and humour have shown through.

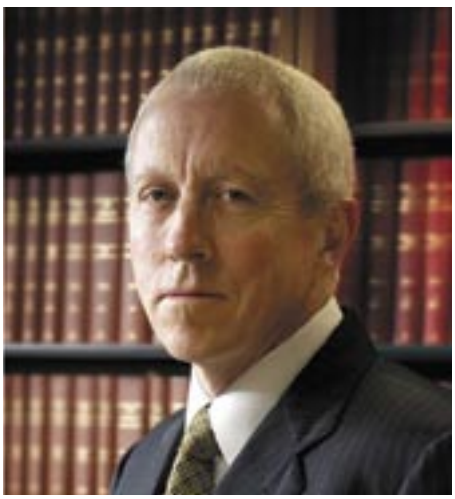
The Victorian Bar wishes the Honourable Justice Richard Tracey long and satisfying service as a Judge of the Federal Court of Australia.

Notes

1. Sir Owen Dixon, Address on taking the oath of office as Chief Justice of the High Court of Australia on 21 April 1952 — *Jesting Pilate* pp 245–46 (Law Book Company 1965).
2. (2005) 214 ALR 24.
3. (2005) 214 ALR 56.
4. [2006] HCA 45 (6 Sept 2006).
5. (1995) 183 CLR 273.
6. (1989) 166 CLR 518.
7. (1995) 183 CLR 245.

# Federal Court

## Justice Christopher Neil Jessup



I first met Chris Jessup in 1976 when we started sharing chambers on the 6th floor of Owen Dixon Chambers. The rooms were small, one B size occupied by Chris and a C size occupied by me. The rooms seemed even smaller by comparison with the grand chambers on the other side of the corridor associated with names like Aickin, Young and Searby.

Small as our rooms were, there was a still smaller room occupied by our secretary, Jackie Bell, who came to us after a long and sometimes tempestuous career as secretary to the late Kenneth H. Gifford QC. Jackie knew a great deal about the workings of the Bar, much more than I did and perhaps more even than Chris, although he had signed the Bar Roll the year before and was then, as now, a very fast learner. Jackie's own territory had just enough room for a chair, a tiny table and an old IBM golfball typewriter. However, her territory was strategically placed so that any visitor had to pass through it before reaching either Chris's room or mine. Undesirable visitors were firmly discouraged and sometimes even refused admission outright.

At this stage, Chris was already building a formidable reputation in industrial relations law. He had honours degrees in both law and economics from Monash University. His father worked in industrial relations at the Altona Refinery, and Chris himself had served articles with Mr Stephen Alley of Moule, Hamilton and Derham, one of the foremost industrial lawyers in Melbourne.

Chris had next read for his PhD at the London School of Economics, which had by then largely shaken off its reputation as a hot bed of drawing room Marxism, while maintaining its reputation as a powerhouse for developing economic ideas. Chris's doctorial thesis, entitled "Some Aspects of the Operation of the Law Upon Trade Unions and Their Organisational Components in Britain and Australia", stood on its shelf, a monument of scholarly research, if in little danger of being read to pieces.

To an outsider, many of Chris's clients seemed to be worried-looking folk, middle management who would have to take the blame if a dispute took a nasty turn or individuals whose own employment was on the line. Chris had invariably done his homework well and, without hearing a word that was said, it was possible to trace the progress of his conferences by the sudden bursts of laughter that punctuated them, the laughter sounding progressively more confident as the conference progressed, often eventually having a touch of devilry about it.

Chris was soon playing a major part in the affairs of the Bar, including being a member of some of its more hard-working committees, such as the Ethics Committee and the board of Barristers' Chambers Limited.

Inevitably, he became a member of the Bar Council and its chairman in 1992. At that time the relationship between the Bar and the government was going through one of its recurring turbulent phases, the government of the day thinking that the independent Bar had become altogether too independent for comfort and that perhaps that it could be brought to heel in the name of "reform". In an attempt to achieve this aim, several commissions of enquiry were set up and various discussion papers produced. There were recommendations that would have had the effect of abolishing the Bar as a truly independent organization.

Chris, no stranger to a stoush in the workplace, was the ideal man to lead the

defence. He helped to marshal a formidable array of intellect and the array itself marshalled formidable arguments. It was a clash between the competition theorists, who inhabited a world untroubled by the need for proof, and the Bar which, by insisting on testing the factual basis for the assertions made against it, showed a stronger, and ultimately more successful, intellectual discipline.

After, and perhaps as a result of, these stirring events, Chris developed an interest in wine. Never one to do anything by halves, he not only established his own vineyard but also undertook another university degree, a Bachelor of Applied Science in wine science from Charles Sturt University. This was done by distance education and appeared to have no impact at all on Chris's exceedingly busy practice at the Bar. From time to time he would head off to Charles Sturt University for two or three days of practical wine making, returning, as usual, well prepared for his next day in court.

Now after 30 years, Chris has moved on to the next phase of his career, as one of a string of excellent recent appointments to the Federal Court. There is no longer laughter in the next room, but the Court has gained an excellent lawyer, a fair-minded and good listener who will find as much enjoyment and amusement in life on the Bench as he did in his practice at the Bar.

# Federal Court

## Justice John Middleton

THE atmosphere at the welcome of Justice John Middleton to the Federal Court was more that of a social gathering in celebration rather than a formal sitting of the Full Federal Court to welcome to the Bench one of the Victorian Bar's most talented and popular members.

His Honour has had a distinguished professional career, spanning over 30 years, rising through the ranks of counsel to become recognised as one of Australia's leading silks, particularly in the areas of commercial law, constitutional law and administrative law.

In 1975 he completed a Bachelor of Laws with First Class Honours from the University of Melbourne, accumulating numerous academic prizes and scholarships on the way before being admitted to practise. His Honour was awarded the Winter Williams Scholarship at Oxford, where he graduated with a Bachelor of Civil Laws, again with First Class Honours. In 1979 he became Associate to Sir Ninian Stephen, then a Justice of the High Court. The experience gained with Sir Ninian was to prove invaluable later at the Bar.

In September 1979 his Honour signed the Bar Roll and began practising as a barrister. He established a substantial practice covering many areas of the law. His Honour gained a reputation as a talented advocate and a practitioner with remarkable ability to quickly identify and isolate the decisive issues and to run with those most likely to carry persuasion with the Court.

His Honour was fortunate to be invited by Alan Goldberg QC to join the 27th floor of Aickin Chambers, or as it became known "Golan Heights", with the late Ron Castan QC, Ron Merkel QC, Cliff Pannam QC and another fashionable junior, Ray Finkelstein. In such illustrious company his Honour's practice as a junior flourished until he became the junior of choice for the then leaders of the Bar. His Honour has now travelled the full circle with his appointment to the Bench, sitting with his former master, the Chief Justice Michael Black, and two of his good friends from chambers, Justice Goldberg and Justice Finkelstein.

In 1991, whilst appearing for the Directors of the State Bank at the Tricontinental Royal Commission, his Honour took silk. It was during the Tricontinental Royal Commission that his Honour, knowing the significant workload that would be required, sought the consent of the Commissioner, Sir Edward Woodward, to sit four days a week. His Honour astutely anticipated resistance to Friday as the rostered day off and sought Mondays instead. This submission was ably supported by Alan Goldberg QC and Peter O'Callaghan QC. What may not have been known to Sir Edward when granting the application was that the Flower Drum was open on a Monday for lunch. It is said that for almost two years thereafter, lunch and conferences flourished on a Monday at his Honour's expense.

His Honour's generosity to junior counsel and instructing solicitors is legendary. A notable example is when his Honour was required to travel to Paris with a number of juniors, including Michael Colbran QC, for an arbitration. After two weeks of hard work, including time out to visit the bar at the Ritz and Versailles Palace, the finale to the arbitration was a dinner hosted by his Honour for his juniors and instructing solicitors. The dinner was to be at the renowned Tour d'Argent. A table in the best position was booked, overlooking the Seine, with the finest food and wine that France has to offer. It is said that the juniors and instructing solicitors took days to recover, whilst his Honour was seen on an early morning jog along the banks of the Seine the following morning.

Throughout his career, his Honour has made a significant contribution to the legal profession by service on various professional bodies. He served on the Bar Council as Treasurer, Senior Vice-Chairman and then Chairman. It was during his time as Chairman that his Honour's talents as an administrator came to the fore. His Honour introduced a portfolio system whereby members of the Bar Council were allocated particular portfolios over which they would have responsibility and report to the Council.

This innovation is still used by the Bar Council today. He was awarded the Centenary Medal with the citation "For services as Chairman of the Bar Council, to the community and education". His Honour was a member of the Supreme Court Board of Examiners and a member of the Legal Practice Board and its successor, the Legal Services Board. His Honour has been very generous in his professional support of fellow counsel, his juniors and other colleagues, particularly in giving credit to his juniors for the contribution which they made to cases.

His Honour's commitment to physical fitness is well known. It is said that his Honour's recent knee reconstruction was not as a consequence of pounding the "tan" but due to some particularly aerobic dancing at a late night venue.

But behind the enduring façade of good humour, warm personality, quick wit and generosity, there is a finely honed advocate with a keen intellect, a steely determination and an ability to do the hard work required, seemingly with ease. These talents, together with his Honour's administrative skills, will ensure that cases allocated to his Honour's docket are determined according to law, with fairness and expedition.

We wish his Honour well for what will undoubtedly be a very successful career as a Judge of the Federal Court.

# County Court

## Judge Sue Pullen

HER Honour Judge Pullen was welcomed in a ceremonial sitting to the County Court on 29 August 2006. Her Honour was educated at Grey Street Primary and Traralgon High School. She attended Monash University, graduating with a Bachelor or Arts and Diploma of Education in 1977. After gaining her diploma, her Honour taught as a secondary school geography teacher at various suburban high schools. At the same time as working as a teacher her Honour studied law at Monash University, graduating with a Bachelor of Laws in 1984. She then served articles with Romuald Martin a sole practitioner in Exhibition Street. Both before and after admission her Honour worked as a volunteer at the Monash-Oakleigh Legal Service, the Citizens Advice Bureau at Kew and the Fitzroy Legal Service. In 1987 her Honour came to the Bar and read with Ross Ray QC. Her Honour began her time at the Bar taking Magistrates' Court work, Family Law, civil cases and some crime. Her Honour soon developed a specialised criminal law practice. Her Honour appeared for the defence through the Victorian Legal Aid and for private clients. Her Honour was also briefed by the Victorian Government Solicitor and appeared as counsel assisting the Medical Practitioners Board.

Her Honour has gained the affectionate nickname of "Boots" — a name bestowed upon her in a good-humoured jest after her Honour was observed in some spirited cross-examination of a Salvation Army officer giving character evidence! In 1998 her Honour was appointed a prosecutor for the Queen. Five years later Her Honour was appointed Senior Counsel, being the first woman to take silk while at the Office of Public Prosecutions. The year after taking silk her Honour was appointed a Senior Crown Prosecutor, once again the first woman to be appointed since the establishment of that office.

In her career at the Bar and as a Prosecutor Her Honour has been diligent, thorough, scrupulously fair, dedicated, conscientious and steadfast. These are the qualities she brings to her appointment as a Judge in the County Court. The Bar wishes her Honour every success in this new direction in her career and warmly welcomes her to the County Court.

# Federal Magistrates Court

## Federal Magistrate Philip Burchardt

*But to live outside the law, you must be honest.*

Bob Dylan "Absolutely Sweet Marie"

THE welcome tendered on 16 August 2006 to his Honour Philip Burchardt, Federal Magistrate, in the ceremonial court of the Federal Court was a fitting recognition of an exceptional man. Philip Burchardt is one of nature's gentlemen. This was evident to the many hundreds of people in attendance.

A Scot by birth, an Englishman by professional formation (a member of Gray's Inn) but an Australian advocate who was always in work, Burchardt was a formidable barrister. He was unfailingly courteous to the Bench, his adversaries and witnesses. This is an uncommon trifecta in a barrister. They are all qualities that will equip him well for the work of the Bench.

Before being called to the Victorian Bar he had plied his trade as an industrial advocate in the tertiary education sector. For the uninitiated, this was no Mickey Mouse forum. Witnesses were typically well educated, and knew their minds and how to back up an argument. However, Burchardt had a happy knack of getting under their guard. He would extract concessions from them by killing them with kindness.

When his Honour came to the Bar he read with Richard Spicer whose practice straddled two improbable realms, namely family law and industrial law. His Honour's choice of mentor was to prove a most canny one. Both realms call for vigorous advocacy tempered by adroit and tactful negotiation. Spicer was and remains a consummate healer of disputes.

Philip Burchardt signed the Roll of Counsel of the Victorian Bar on 25 May 1989.

From the day he took his first brief, his Honour was on a professional trajectory.

His Honour acted for both sides in the thousands of industrial and employment cases which he ran at the Bar. As the Solicitor-General for the Commonwealth, David Bennett QC, acknowledged at his Honour's welcome, in an industrial relations environment where some think that there is only one side, this was no mean feat. It may partly explain the genius he showed as a mediator. His skills as a mediator were exemplary: he was patient, thoughtful, imaginative and fearless. All of these qualities augur well for his life as a Federal Magistrate.

Throughout his 17-year career at the Victorian Bar, his Honour was a member of P.J. Roberts' list. At his welcome his Honour acknowledged the contribution of his clerk. Peter Roberts describes this new member of a Chapter III court thus: "He is a thoroughly professional person, but with a human touch. He's an outgoing personality without being ostentatious. He was a great and loyal supporter of the list. And, above all, he is a dedicated family man."

To hear his Honour pay tribute at his welcome to his wife, Margaret, and her care of their magnificent children, Andrew and Robert, was to hear a husband and father who has his priorities right.

Much has been said elsewhere of his chronic captaincy of the Bar's Hockey Team. I shall not stay to add to that topic here. Suffice to observe that it well illustrates his Honour's ability to fuse duty and pleasure.

There is little doubt that had his Honour not taken up judicial office, he would have taken silk. He possessed all the qualities of a good leader. Foremost amongst them, in his Honour's case, was a force of intellect and a depth of character. Those who had the privilege to lead him remark that there was little left to do but present the case when Burchardt of counsel was their junior.

It is said that one test of a good judge is how the judge conducts his or her court when there is an imbalance of representation or one side is unrepresented. On all reports to date, his Honour is passing the test with flying colours. He is a born listener. But he knows the virtue of timely but decisive intervention. He will strive to get it right. He will look to all those who appear before him to assist him in this endeavour.

To be at table with his Honour is to experience good cheer, good conversation and to witness a superbly urbane operator (in the best sense of that word) in action. One mourns the decreased availability of his bonhomie which his appointment, which took effect on 10 July 2006, must occasion.

The Victorian Bar wishes his Honour much satisfaction and not a little happiness as a labourer in the judicial vineyard.

# Federal Magistrates Court

## Federal Magistrate Heather Riley

ON the 16 August 2006 members of the judiciary and legal profession, family and friends welcomed Federal Magistrate Riley to the Federal Magistrates Court. Her Honour's career as a solicitor has been virtually all in the public sector. She was admitted to practice in Victoria on the 4 March 1985 and in Western Australia on 2 July the same year. She completed the Bar Readers' Course in 1998 and read with Garry Moore of counsel, signing the Roll in 1998. In nearly eight years at the Victorian Bar, her Honour built on her earlier skills and experience. She has appeared in taxation, immigration, insolvency, administrative law and child support cases in both the Magistrates Court and Family Court.

Her Honour has a reputation as one who prepares thoroughly. She enjoys vigorous discussion with her colleagues. Her Honour's natural disposition is retiring yet one is never in doubt as to her position on any issue. These are attributes that abide well for a judicial appointment. The Bar warmly welcomes her Honour to the Federal Magistrates Court.

# County Court

## Judge Gebhardt

ON Tuesday 22 August 2006, as the transcript records, there was "a Gathering in the County Court of Barristers, Solicitors, Law Officials and Others to farewell His Honour Judge Gebhardt on his retirement as a Judge of the County Court of Victoria. It was a grand occasion.

Crown Counsel, Dr John Lynch, spoke on behalf of the Attorney-General; then Bar Chairman, Kate McMillan S.C. spoke on behalf of the Bar; Victoria Strong, the immediate past President, spoke on behalf of the Law Institute of Victoria and the solicitors of this State.

Fittingly, the "and others" in the gathering included, in particular, Paul Collis and Joe Clifford.

Paul Collis is the "promising young Aboriginal boy from Bourke" for whom, more than 30 years ago, Peter Gebhardt, who was then the Headmaster of All Saints College Bathurst, organised an ongoing scholarship. Paul Collis came from Bourke on a scholarship sponsored by the Brotherhood of the Good Shepherd, the Bush Brothers. He was the first indigenous student at All Saints College. He was, Peter said, "an outstanding athlete, an actor, and a scholar. Since leaving school, Paul has worked with underprivileged children. He has worked as an Aboriginal Cultural Studies teacher at Mt Penang Juvenile Detention Centre, and in adult gaols — at the Maitland and Cessnock Correctional Centres. He is now a Lecturer in Aboriginal Studies at the University of Canberra, and heads the Indigenous Students Tutorial Program there. He is completing an Honours Degree and hopes to begin work on a Ph D degree next year.

Joe Clifford is the tenth Indigenous Undergraduate Scholarship student at Trinity College within the University of Melbourne. Peter Gebhardt has been the driving force of Trinity College's activism in support of Aboriginal students and Aboriginal studies. In 1999, he personally funded the first Visiting Indigenous Fellow at Trinity College. Since then, the College itself has funded a visiting indigenous Fellow or Scholar every year. The College now also awards Indigenous Undergraduate Scholarships.

At His Honour's farewell, Judge Gebhardt spoke at length about Paul Collis. He recalled how, as a schoolboy in Bathurst, Paul had told him that he "could hear the bones rattling" from the massacres of Aborigines in Bathurst. His Honour said: "I have only this to say: We should all hear the bones rattling. I do not know what the 'black armband view of history' is; but I know that it is very different from the 'whitewash view of history'".

His Honour went on to say that "When we accept what we have done historically, not individually, we will became a maturer, a more content, and a more independent nation. We have much to learn from [the Aboriginal people], and we should stop thinking that they have to learn everything from us. They know how to deal with the environment in a way which would leave us gasping".

It is typical of the man that Judge Gebhardt devoted his response at his farewell to people and issues: to Paul Collis's experience, thoughts and service — and to issues concerning Aboriginal people and Australia; to His Honour's fellow judges, and the many court officers, each of whom he named and recalled, who served the County Court with dedication and humanity — and to the issues of judicial independence, and of judicial and other court officers' remuneration.

"It is hard to understand why, for so long, and it is not recent, Victorian governments have resented the judiciary and have chosen to pay them less than any other jurisdiction in Australia; and further, to pay Associates in a way which, in my view, amounts to exploitation."

His Honour condemned the hypocrisy he sees in relation to motor vehicles and motor vehicle offences — in particular the numbers of people in custody for driving offences. "If the government, community and media were really committed to tackling the associated problems, then a separate institution would be established where remediation, re-education and rehabilitation would be addressed ..."

In the same vein, His Honour spoke about sentencing generally. He adopted and quoted an English judge's remarks: "Prison makes many criminals, particularly youngsters, worse ... It mostly only works in the sense that when someone is incarcerated, they are not committing offences. Prison is not designed to promote rehabilitation, particularly for sex offenders."

His Honour went on to say that: "[T]he community needs to know what gaols do to people. The growing cry for gaol, especially from the media is something that needs fighting by increasing understanding of the causes of criminality. Public institutions like Parliament, the courts, the schools and the media are all tutors to the public. If, as is too frequent, the media trivialise what is significant, and make significant that which is trivial, that is what the public absorbs. Turning crime into entertainment and mounting constant sensational broadcasts leads to indifference and insensitivity."

These are the issues Peter Gebhardt cares about, as is evident from his devoting his address to them at his farewell from the Bench. They deserve our careful consideration and reflection.

Sir Owen Dixon described the law as, and I quote: "a living instrument and not .... an abstract study".[1] Justice Crennan, in her address on the occasion of her swearing in as a Justice of the High Court,

quoted this passage from Sir Owen Dixon; and went on to speak of "the human qualities needed for the impartial administration of justice according to law".

Human qualities are, above all, what shine through Peter Gebhardt's entire professional life — as teacher, headmaster, poet, lawyer and Judge.

Peter Gebhardt has been part of great traditions, but never fossilised by tradition. He was educated in the traditions of Geelong Grammar School and Trinity College within the University of Melbourne. He completed his law degree but, encouraged by his former headmaster, Sir James Darling, answered the call to teaching.

The natural progression would have been to Oxford and perhaps a year or two at one of the great English public schools. Encouraged by another of Australia's great educators, Sir Brian Hone, he chose Harvard followed by teaching at Milton Academy, just outside Boston.

Peter was a distinguished and progressive headmaster, for about 10 years at All Saints College, Bathurst then for about another 10 years at Geelong College.

In His Honour's words, "[t]hat wise, generous and humane man, [Brian Bourke], directed me back to the law and articles with Brian Flynn". Brian Bourke also introduced Peter to John Kaufman QC, with whom he served his pupillage.

Consistently with the ten years pattern established in his headmasterships, Peter practised at the Bar for almost ten years. He was appointed to the Court in 1996, and served there for ten years.

At his farewell from the Court, Kate McMillan wished Peter and his wife Christina a long and satisfying retirement. Overwhelmingly, the evidence suggests that further considerable achievements are yet to come from this remarkable man.

Note

1. *Jesting Pilate* "Address upon the occasion of first presiding as Chief Justice at Melbourne on 7 May 1952" p 250 at 251



# Brendan Griffin

BRENDAN Michael Griffin S.C. died on 2 September 2006 after an intensely private battle with an illness that he had fought hard but eventually overwhelmed him.

Brendan was born in 1954 the first of six children of Mark and Joy. Mark was a highly regarded general practitioner, practising from a clinic in North Road, Ormond.

He went to school at Xavier and later studied law at Monash University where he excelled both academically and in his extra-curricular activities. Brendan did articles at Maddock, Lonie & Chisholm, and was admitted to practice in 1978. He became a partner in 1980 at the age of 26. He spent four years there, acting primarily for local councils in the typically varied areas of law that councils are involved in. He came to the Bar in 1982 and read with Ron Meldrum. Throughout his years at the bar, whenever he felt he needed another opinion he would always "ask Ron". In the same way he would later demand of his own readers and others that they too could always approach him at any time.

Brendan married Robyn in 1985 and it is fair to say that he could not have achieved what he did if it were not for her unstinting support and her unbridled energy. And he knew it. They had four children, Sarah, Sam, Max and Joe. Anyone who spent any time at all with Brendan was left in no doubt about how proud he was of each of them.

At the Bar, Brendan developed an extraordinarily broad practice, covering personal injuries, commercial litigation, disciplinary tribunals, property law. His clients were as many as they were varied: the Mormon church, the Carlton Football Club, hospitals, doctors, most of the major insurers and insurance brokers, builders and engineering companies, the TAC and the VWA and their predecessors, through to disabled pensioners.

Brendan had two readers: Greg Meese and Nick Klooger. He was a most generous mentor. In 1998 when a case he had been involved in, and which involved a young schoolboy injured after being hit in the head by another student swinging a schoolbag, found its way up to Canberra he was briefed as junior to Bongiorno QC. Brendan paid the airfares and accommodation for his then reader to travel up simply so as to allow him to experience the High Court in action.

His work took him not just throughout Victoria but interstate and overseas to England, Canada and the United States. He particularly enjoyed his time in Salt Lake City, Utah where he was presented by his client with both a personalised bible and a special licence granting a temporary dispensation from the otherwise stringent drinking regulations enforced by the State. Despite (or perhaps because of) his Catholic upbringing and education, there was little doubt about which "gift" Brendan appreciated more.

Brendan did not really go in for the socialising or networking that many see as necessary at the bar. He simply did not need to. That is not to say he didn't enjoy having a "couple" and indeed his social conviviality, sense of humour and bon vivant was engaging to anyone lucky enough to have his company. He was not only respected by solicitors, barristers, clients and judges but they enjoyed his company and often shared his interests. Solicitors stayed intensely loyal to Brendan and briefed him on an ongoing basis for years. Following his passing the family received over 1000 letters and notes from all sorts of people from all walks of life. The majority of those notes came from members of the profession.

The assistance Brendan provided to junior members of the bar over the years was second to none. His door was always open and he was never too busy to answer a query or three. It was not unusual on popping up to see him about some difficulty with a case, to be confronted with several other barristers, junior and not so junior, waiting to ask him questions on almost every conceivable aspect of the law. It was rare that he did not have the

answer to these queries or at least know where one could find it.

Brendan was also generous in so many other ways. Ron Meldrum QC in delivering one of the eulogies at Brendan's funeral at the Xavier College Chapel described this generosity as "instinctive". Brendan's generosity was always immediate and without regard to the impact, current or future, it may have had on him. It was indeed instinctive. The work he did without reward for family, friends and even friends of friends was not advertised or promoted by anyone, least of all him. He never talked about it. He did it simply because he could.

His love of animals and his love of anything mechanical was legendary. The menagerie of animals he kept at the family home was rivalled only by his collection of old lawn-mowers, cars, boats and every other mechanical device one can think of. Some of his more ambitious rebuilding projects included a 1962 Studebaker, a three-wheeled Messerschmidt car, and a decommissioned fishing trawler.

In 2005, Brendan was appointed Senior Counsel. This was a matter of great pride to his entire extended family. Like many Senior Counsel appointed that year, Brendan attended the celebratory dinner at the High Court in Canberra. Unlike most of his fellow appointees, Brendan took not just his wife but his four children as well.

Brendan would have made a very good judge. Geoff Gibson, in a piece written shortly after Brendan's death: He had all the attributes of a good judge. He had wide experience in litigation including before juries and appellate courts, he was fair and sensible and he was not beset by any ideological preoccupation. He was also always courteous and willing to listen and had a great ability to quickly ascertain the real issues in a case.

Sadly, in the last few months of his life, Brendan's thoughts turned dark. He believed, wrongly, that he was not worthy of the esteem in which he was held by family, friends and colleagues. On 2 September 2006, Brendan took his own life. It was a tragedy and a terrible waste. Anyone who was privileged to have known Brendan is the poorer for his loss. It was far too soon. But each one of us is the better for having known him.

## Surviving the Law

WHEN I came back here, about four years ago to the day, I first met Brendan Griffin. He had the room opposite mine in the suite. I was keen to decorate mine so that it did not look like a place of work. I discovered that Brendan was a handyman. He came in with his toolbox and plugged the walls for the paintings.

He was very solicitous for my well-being. When my marriage collapsed it was like a death. I was without a car for two months. Brendan lent me his Daimler. He went on about the Borg Warner components. He knew I did not understand, or care. When I had to get the RACV four times in 48 hours, he apologised. Then I got the thing going one Sunday morning, taking a lady for breakfast. We went to the South Melbourne market via the tunnel and came back the same way. About three weeks later, Brendan walked in with a sad look on his face and two envelopes in his hand. I collected two tickets of $160 each. That was a very expensive breakfast.

Brendan kept a very good library. Mine is not quite as up to date. I keep the Year Books — which are mainly medieval, although there are I think some cases on the 17th century — plus Holdworth's *The History of English Law*. He used to give me the ALJR, the VR and the New South Wales Reports. I gave him *The Guardian* and *The New Yorker*. He conceded that I drew the short straw.

I think that our relationship reached a form of mechanical climax about six weeks ago. I confessed to him that I had for the second time called Eric to fix my dictaphone, only to have Eric diagnose a flat battery. This unashamed exhibition of recidivist practical inanity caused a frisson of excitement that could have been almost erotic.

Brendan took his own life. It came as a great shock to us here. I had seen no sign of stress or of his being unwell. We seemed to be able to laugh off the kinds of problems that occur to barristers who are no longer young. I remember a year or so ago we got the giggles when I was contemplating taking S.C. — Senior Citizen. That morning an old lady at the railway station had said to him that it was Senior Citizens' Week and that "we" get on the train for nothing all week. This was unfair on Brendan — he was significantly younger than I am. He came to the Bar in 1982, which was just three years before I started hearing heavy cases. (Like a number of other lawyers, he seemed to know much more about what happened to those cases as they wound their way through the appeals structure to the High Court than I do — and to be more interested.)

Brendan had a very good general practice. He seemed to be as much at home in front of a jury as before an appellate tribunal. He had all of the attributes of a good judge — he had wide experience in litigation; he was fair and sensible; and he was not beset by any ideological preoccupation. His loss to us is therefore very great.

It is not the first time I have lost a colleague through suicide. In the early 1990s I had a partner who was one of the most astute banking lawyers I have known. John Beaven was English, and punctilious as banking lawyers tend to be, but terrific when he was off the leash. He later became troubled in himself and we knew he was getting psychiatric attention. (Later it became clear that he was manic-depressive and there was a history of suicide in the family.) Yet for some reason he thought he would find the answer to life's problems in Russia. He invested a large amount of his capital in the firm by staying there a long time trying to learn its customs and language.

Unlike the case of Brendan, John was showing symptoms of possible terminal stress. We became progressively more worried and were getting reports from his medical advisers. In response to one alert, another partner and I went down to Rye. When we got there the engine of the car he had used to gas himself in was still running. He left a son aged about ten and a daughter about four. The other partner and I had to go back and tell his then widow.

It became clear to me as we tried to talk things through with the family that John had never wanted to be a lawyer. He would have been happier to be an Oxford Don. I wonder now whether Brendan would have been happier doing something more constructive with his hands than trying to perform under stress at the level he did as a barrister. You do not often get to be constructive at the Bar. Sometimes it seems to me that the object of the exercise is to spend about 25 years fighting, so that when you get to put on a coloured dressing gown you can inflict pain with a clear eye and a cold heart.

It may be at best idle and at worst insulting to look for the reasons for these

kinds of losses, but they are so senseless and shocking that we feel compelled to inquire. I do not know to what extent professional life took a toll on Brendan, but I have seen it exact a high toll on others.

In the 1970s and the first half of the 1980s I had two godfathers at the Bar, Woods Lloyd and Neil McPhee. I did a lot of work with both of them and got close to both of them. It became clear to me over a period of time that Woods had something of a complex about his legal ability. He was, however, one of the great natural advocates of his time. For whatever reason, he hit the bottle very, very hard. In about 1985 I fought a 20-day case with him. (That was about 19 days longer than any other I had fought.) He was immensely difficult. During the day he behaved like a Taipan in court and at night he was obviously drinking spirits very hard until after midnight. He used to ring in the middle of the night asking about our submissions. But when he came to give the final address he put for the moment to one side the submissions I had prepared and held the court enthralled and in complete silence for fifty minutes with an address that in my view sealed the outcome of the case. Woods died a few years later of a disease that was obviously the product of stress and abuse of alcohol.

Neil was different. He used to show singular stress before court and he could certainly drink, but he was not in the business of drinking himself to death as was Woods. Neil and I did a case together one evening at VFL House — it may have been called Harrison House — in the 1980s. It was about a transfer fee involving a Collingwood player. Neil was late; I had no doubt that he had been drinking and had forgotten. Ron Merkel was for Collingwood. He was extolling the virtues of the League rules. This exercise in hilarity caused the Scot and me not to read the Tribunal correctly — John Winneke — who gave a decision we had not predicted. The Scot and I repaired straight to the bar. Neil was ashen faced. He felt guilty because he had not seen what was coming. That was a terrible thing to happen to the Scot. He drank down his liquor in a way that suggested it was not touching the sides. It was as if he had no gullet. I then made a mistake which could have been terminal. I got into the same car with Neil and he drove. His driving, I suspect even when sober, would make Osama's pilots look like sedated Presbyterian gnomes.

Neil was later to die of a disease that may or may not have been brought on by stress, but his position was I think very different to that of Woods Lloyd. John Winneke told me later that he thought Woods did not really want to be a lawyer. That was not the case with Neil. He was a born fighter, but he showed the scars.

The various causes of death are not the same. But how different are they really? If you are driving in the country and you fail to take a curve, lose control and hit a tree, the death is accidental. It comes from the loss of control. But how different is it when the loss of control is because you can no longer stand the pain in you and the only way you can deal with the pain is by driving into a tree? How much worse is it — for you or your family — if you lose control by hitting the bottle?

I cannot imagine the pain or stress faced by John Beaven or Brendan Griffin. I can only think that it must have been unbearable — literally unbearable. We now accept that if someone is subjected to torture, it is not a question of if they will "crack" or "break", it is simply a question of when the system will fail. Forces were unleashed in these men that they could not control and which, as it now seems, led inevitably to their death. Ours is but to mourn their loss, and the pain that they endured before they found their peace, remembering, with Wittgenstein, that you do not live to see your own death.

Brendan wrote a note for me before he took his life. (He left a number of those notes.) In it he asked me to keep writing. He said, "it gives great solace to those who are privileged to read your contributions." That was a very kind and very decent thing for Brendan to say. Brendan was a very kind and decent man. This writing is for Brendan and those of us who are left. We miss him more than we can say.

Geoffrey Gibson

# Nathan Crafti

WHEN Nathan Crafti appeared on WWTBAMillionaire he answered the question "who arrived at US Customs in New York and said 'I have nothing to declare except my genius'"? He incorrectly answered Albert Einstein. To his surprised Anglo Irish friends, of all whom later knew the answer to be Oscar Wilde, Nathan said that as a poor Jewish boy growing up in Caulfield, Albert Einstein was a hero to him.

Educated at Mt Scopus, graduating in 1965 and Monash University, B Juris LLB, where he also obtained a blue in baseball, Nathan was fearless, opinionated, bellicose, generous, charming, intelligent and gregarious, sometimes all at once. Articled to Ken Opat of Opat & Co, and admitted on 1 June 1973 he signed the Bar Roll on 14 September 1978, reading with Phil Dunn. Starting in the Magistrates' Court he initially had a broad general common law and criminal practice. His initial dislike of prosecuting meant that he later had a broad criminal practice mainly for defendants, acting in criminal trials.

He acted for an enormously diverse range of people from the father of the man who described himself as "His Royal Highness Little Joe Rigoli", solicitors in trouble, and school principals accused of possessing pornography. Nathan defended them all with his usual fearlessness. He appeared in all sorts of jurisdictions from the Law Institute of Victoria Tribunal to VOCT, VCAT and Court of Appeal, where he was prepared to appear pro bono and was often commended for his advocacy. ("Mr Crafti in his able argument" *R* v *Jackson* (2004) VSCA 224 at 9.)

He appeared in the Federal Court where he sought leave to be joined as a party and opposed the confirmation of a scheme in which Colonial Portfolio Services Ltd were to transfer its life assurance business to the Colonial Mutual Life Assurance Society Ltd. Appearing on his own behalf, his main cause of complaint, as a long-time policy holder, was the poor performance of his policies and that the proposed scheme would represent a diminution of security for policy holders. Although that was not disputed, and found to be so by the Judge, the scheme was approved nevertheless.

(In the matter of *Colonial Portfolio Services Ltd* (1999) FCA 1779.)

In his capacity as President of the Monash University Baseball Club, on behalf of an applicant for a skilled occupation entry permit, which had been refused, he appeared to give evidence before the immigration review tribunal who set aside the decision, taking into account Nathan's evidence of the applicant's outstanding baseball skills "on the diamond" *Takashi Ksugu* (1997) IRTA 8764. Later he appeared in the Court of Appeal of the Supreme Court of the Northern Territory, *Australian Broadcasting Commission* v *L and Tudor — Stack* (2005) NTCA 7. Unfortunately, the decision was delivered after his death.

Nathan's sense of social justice extended to politics and he would often call into radio programs or participate in blogs championing the underdog and fair play. He once memorably tried to ambush the Federal Treasurer by asking on talk back radio what the Treasurer had done for Legal Aid in the budget. Unfortunately he was recognised by Ross Stevenson who had briefed Nathan in an earlier life and the Treasurer was saved.

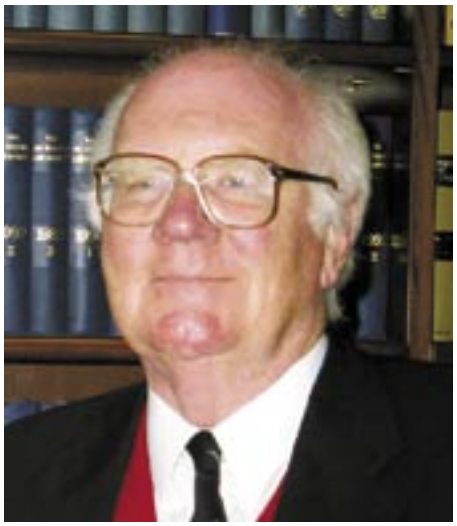
At the Bar he was a man of many enthusiasms. He was involved in the Criminal Lawyers Association, could be regularly found playing chess in the Essoign Club and was always prepared to let his views be known.

Nathan was also a baseball umpire in which capacity he umpired the 2005 Australian Women's Baseball Championship. He and his wife Judith were regular bridge partners and he was actively involved in bridge, and the Australian National Bridge Association.

On 25 July 2005 Nathan transferred from the Victorian Practising Counsel to the Interstate and Overseas Practising Counsel, becoming General Counsel of the Office of Public Prosecutions in the Northern Territory. He embraced Northern Territory life enthusiastically and appeared in many cases and once again had a steady income and regular court work.

Tragically, Nathan did not enjoy good health. You could hear him wheezing before you saw him. Effectively he had the capacity of only one lung and died suddenly of a heart attack on 21 October 2005 in Darwin. He will be missed by all who enjoyed his enthusiasm for life and our sympathy goes to his wife Judith and daughters Gabbi, a lawyer and Associate to Weinberg J, now a solicitor at Allens, and Yvette — all of whom he was immensely proud.

# James Stevenson



JAMES Stuart Stevenson of Castlemilk was born on 14 August 1930 on farming land near Glasgow, was educated at Eton, was first called to the Bar in Scotland and then Lincolns Inn. He was also a qualified chartered accountant.

There was just so much that we did not know about James Stevenson. By the time he came to the Bar on 25 May 1972, he was already 51 years of age and, at a time when many would consider retirement he commenced reading with Peter Liddell, his last reader before he took silk. On Devers' List, he soon became an expert.

James was a charming, decent, courtly man. It was hard to know much about him because of his independence. In later years he was prepared to reminisce and recollect but usually he gave no quarter and sought none.

Many opposition counsel tell the same story. There they were at a regional Magistrates Court, preparing to start at 10.00am, and this story is told in court houses from Dandenong through to Ferntree Gully, across to Broadmeadows and beyond, and counsel, believing they had a winner of a case and no opposition, ready to start and obtain judgment undefended, would find that an older gentleman, wiry and only slightly physically exerted, (as it would afterwards be found that he had walked from his apartment in the city to the court house in question), would walk in the door and then proceed to clean up counsel with a concise argument and cross-examination delivered in cultured deep voice. He was never one to raise his voice or be anything other than completely straightforward. He would then refuse all offers of a lift home saying that he would be fine, thank you.

Apparently he left Scotland in the early 1950s, married and went to live in Los Angeles. He worked as a chartered accountant in Los Angeles as a trusted employee of Paul Getty and the Getty Corporation. He kept with him a key ring given to him by Paul Getty which enabled him to access the Getty Corporation. His only son, James, was born in Los Angeles. Tragically his first wife died and James Stuart Stevenson became James Stevenson, and he travelled to Australia so his son could receive an education at Geelong Grammar. He then arrived at the Victorian Bar.

Life was hard when he first came to the Victorian Bar. Initially, he stayed in Hosies Hotel and it was later suspected, but never proved, that he was sleeping in his chambers. Although James Junior returned to Los Angeles, James Senior had married Clare and remained in Melbourne. His practice was successful and he practised in general common law, insolvencies and companies and would do any work offered to him, although usually it was in the insolvency and company areas, thanks to his background in chartered accounting.

He left the Bar in 2000 and worked with a firm of solicitors. He could regularly be seen working in the Supreme Court Library, or walking up from the solicitor's office with his handwritten advices ready to be typed. A great user of public transport, he and Clare would be likely to turn up anywhere to enjoy a day out, James contentedly reading a book and Clare painting, usually at the seaside.

He had had a heart problem for many years and had a pacemaker inserted. He returned to Scotland only for a holiday and died on 21 July 2006, just before his 76th birthday. He is buried at Carmunnack Church, near his birth place. Survived by his second wife Clare, his first wife predeceased him. He is also survived by his son James, grandchildren James and Jessica and two step-daughters, Roxanne and Kasey from his first wife, whom he had raised in Los Angeles. Our sympathies to them all.

# The Essoign Wine Report

## By Andrew N. Bristow

MR RIGGS WATERVALE RIESLING 2006


AFTER 24 years of winemaking experience, 14 of which was spent at Wirra Wirra in McLaren Vale, winemaker Ben Riggs is now established under his own banner. Ben has successfully entered the arena of producer under the distinctive self-styled moniker, "Mr Riggs". The boutique wine that he makes is made in quantities from 250 to 1,000 cases at most. Made in large quantities are the Shiraz Viognier and the recent release, the "Gaffer" Shiraz, a blend of high-quality McLaren Vale Shiraz. Total production under the Mr Riggs label is set to reach approximately 12,000 cases this year.

The winemaking talents of Ben Riggs and Kerry Thompson were originally combined many vintages ago at Wirra Wirra. Now winemaker at Leasingham, Kerry also owns a fine Riesling Vineyard in Watervale, a sub-region of Clare, South Australia. It is from this vineyard that the grapes are sourced by Ben Riggs for this wine.

This wine has a bouquet of citrus and soft floral characters.

The wine colour is a very light pale straw.

The wine is lively and lifted offering lemon and lime carefully balanced with bright fresh fruit sweetness. It has 12.5% alcohol. It is ready to drink now and should be drunk over the summer months. It should be drinking well for at least the next four years. It is available from the Essoign Club at $32.00 a bottle or $7.50 a glass (or $27.00 takeaway).

I would rate this wine as a junior Children's Court barrister, a bit soft and delicate, but perfect for what is required.



# Interview with the Honourable Justice Whelan

*Bar News* recently raised matters of some concern that appeared to emerge from farewell speeches given by members of the Court of Appeal. The unhappiness or unease these raised is, however, not, universal. *Bar News* discovered that, at least in one area of the Court's activity, the Corporations List and Commercial List, there appears to be an abundance of calm camaraderie and goodwill and an absence of bureaucratic "hassle". The interview with Justice Whelan set out below reveals a Supreme Court — or a branch of the Supreme Court — of which the most significant attributes appear to be collegiality, efficiency and cheerfulness.

*Justice Whelan.*

**BN:** *Judge, you used to be a media personality. Has that role been affected by your appointment to the Bench?*
**Whelan J:** To some extent I did give up the radio because of coming to the Bench. Mainly because I didn't think you could maintain a distinct public persona which was different to the role you have to play when you are the judge. In other words I didn't think it was fair to put people in the position of responding to me in a confused kind of manner because I would have in the public domain this separate personality and image.

So at the time I thought it wasn't appropriate to keep going with the radio and I haven't reconsidered that. I haven't irrevocably committed myself to never going back at all and I did go to our 25th anniversary broadcast at Federation Square where I said a few things on air just as a member of the public who happened to be in the audience. But, yes it does inhibit you a bit. It inhibited me in that respect. I gave up my role as a professional media person and as an amateur too.

Otherwise I don't think it's changed my habits or inclinations very much, save for the inevitable distancing that seems to occur from the professional associations you had at the Bar once you're on the Bench. Partly, I think, that's because you are hearing cases where your former colleagues are involved and personally interested one way or another and partly because the problems you've got and the things you want to talk about in work terms are things you can only really share with other people who are in a similar position, so you tend to drift in that direction.

But it's not as inhibiting as it once was. I mean once upon a time we were told you shouldn't go to a hotel. There used to be a myriad of rules.

The other thing of course is you can't take any risks on drink driving and that's certainly something ... Not that I used to take any risks on it but now if I go anywhere where you are likely to be drinking at all you wouldn't think of driving.

**BN:** *Does this mean that you really spend all your life being conscious of the fact that you represent something rather than being yourself?*
**Whelan J:** I don't find I'm consciously thinking of it but it does occur to me every now and then in some situations. The drinking and driving is one that you are aware of. We don't get pestered for media interviews and otherwise I don't find myself changing my behaviour very much, I must say. I don't think so, anyway.
**BN:** *But your social life has been altered?*
**Whelan J:** A bit. Yes, a bit.
**BN:** *And it's altered by inhibition rather than anything else?*
**Whelan J:** Yes, there's no formal restrictions ever imposed. So it all comes down to the individual's own perception of what they should or shouldn't do.
**BN:** *And you are conscious of the fact that you are a media target, if I could put it that way, as a judge once you step off the beaten track in any way?*
**Whelan J:** Well, yes there's no doubt about that. Yes, you are certainly conscious of that. But we're not conscious or I'm not conscious of being a personality

of much interest to the media and I think that's because judges in Australia have been careful never to present themselves to the media as personalities. There are a few exceptions. But leaving aside the few exceptions, generally judges don't want personal publicity for their personality or for their views and that has the effect that the media's really been trained to have very little interest in us as people because they think there is no story to be had, except for when people retire and so on. You do see a bit of it then but otherwise. I don't have any perception of being of personal interest to the media.

**BN:** *Unless of course you give a very lenient sentence.*

**Whelan J:** Yes, then you might find yourself at least in one of the smaller papers.

**BN:** *To what extent is there any pressure from community expectations and community ideas on the role of a judge?*

**Whelan J:** Oh, well, there's a lot. I think the public still had quite a bit of regard for people in the position of the judge and we don't want to let them down in terms of what they expect of us. In terms, though, of community expectations in crime and so on, I think everyone in society is affected by changing ideas about the sort of situations which the criminal law deals with, which are often pretty volatile and give rise to very strong opinions. The judges aren't immune from that. But they naturally tend to be slow to adapt and I think that's appropriate. That they should be. We certainly wouldn't want the courts responding to every change in public whim or mood, especially as interpreted by the media which are not necessarily a reliable guide to what community aspirations are.

**BN:** *Has the life as a judge been what you expected?*

**Whelan J:** Well, it has really, because, perhaps unlike others, I did have a fairly good idea of what it was likely to be like. I am something of a Pollyanna about it all, in that I do tend to look on the positive side of it rather than the negative. A lot of people, when first appointed especially, find it very difficult because it is a big change.

**BN:** *Is it hard to sit and rule on arguments put to you by your contemporaries?*

**Whelan J:** Oh yes. It's harder when you have to rule on arguments put to you by your former superiors. Well, I don't know if superior is the right word; but people who were senior to you and people who you had been junior to. So you've got to approach that with a lot of humility. Basically just keeping your mouth shut is normally the best policy I've found.

**BN:** *Do you find that difficult?*

**Whelan J:** Yes and that can be a problem ... especially in areas that you know or at least you think you know. The tendency to comment before you're fully informed is one that's not always resisted. But to all those I've done that to, I apologise.

**BN:** *Now, you run a commercial list hearing every Friday. How many files do you need to read before that?*

**Whelan J:** First of all you don't read them every week because a lot of them you know already. There's between half a dozen and 25. That would be the most nowadays. In the 80s they sometimes had as many as 60 in a single list on a Friday. I think the nature of the list has changed a lot since then. The judges in the list at the moment, and there's three of us because we are running the Corporations List in tandem, vary in the extent to which we prepare in advance. Some of us prepare everything meticulously. Some of us try to work out which ones are likely to be an argument. So it all depends. Each individual's approach is different.

**BN:** *Do you find reading a file before you go to court is an advantage or a disadvantage?*

**Whelan J:** It is an advantage, of course. But there is a limit to how much ... Well, different people have different views but there's an issue about diminishing returns in terms of intensive preparation before hearings because you do learn about it very quickly when the barristers tell you, and sometimes a lot more quickly than you could work it out for yourself.

**BN:** *And what about finding yourself in the situation where you have to reverse a lot of previous thinking when counsel start talking?*

**Whelan J:** I don't find that hard, I think. But, of course, one's own perception of one's self in this kind of thing is not terribly reliable. Everybody thinks of themselves as being open minded and I hope I am; but one can never be sure because certainly it's very difficult once you've formed a view on something. It's human nature to stick to it, but I think I'm able to realise when I've been wrong.

**BN:** *What are the remarkable things about being on the Bench or are there no remarkable things?*

**Whelan J:** Well, I did crime for six months.

That was remarkable, in that I hadn't done any crime since my early days at the Bar, when I did do some. The drama of criminal trials was remarkable and that perhaps isn't something which civil lawyers are aware of or have experienced. So that was one thing. In the civil trials, I suppose, the remarkable thing is that from the judge's point of view the conduct of the trial is not very stressful. One has to rule on evidence and so on; but the conduct of the trial doesn't involve the kind of anxiety that it does for the advocates because, well, you don't have to participate in the process as it evolves. Your job principally begins once the trial is finished; so that the burden of the job from our point of view comes after the civil trial rather than during it, which of course is the opposite of what happens for the barristers. They pack up their books and go away and think about the next one whereas we then think ... "mmm ... another reserved judgment to write. When will I get around to doing that?"

**BN:** *Do you have a formula for doing that?*

**Whelan J:** In the Commercial List we now informally, between the three of us, run a kind of system whereby insofar as we have outstanding reserved judgments we give each other the time to write them straight away; so that we don't build up a backlog of reserved judgments; and if one of us has got a number of reserved judgments the others will try to take over the things they might have otherwise been doing in order to get them out of the way.

I think you'll find, if you go back over the last year or so, that the judgments reserved beyond a period of weeks in the Commercial List and Corporations List, I think, are pretty close to nil. I would be surprised if there were more than two or three outstanding judgments in either list at the moment. I think there's one in the Corporations List and two in the Commercial List; and I think I've got both of the ones in the Commercial List.

That's been our aim because it's far more efficient to write the judgment straight after the trial; and the three of us are fairly convinced that that's the way to go, at least in the managed lists anyway.

**BN:** *Can you really remember the demeanour of a witness six months later?*

**Whelan J:** Well, I don't know. But it's not advisable. Of course, not a lot of commercial cases are decided on the demeanour of witnesses. It's becoming more and more common that cases are principally document cases.

**BN:** *And, of course, the rules of evidence don't really seem to apply.*

**Whelan J:** They are certainly applied with much greater laxity than in the criminal jurisdiction where it really matters and points of evidence can be argued about vigorously.

**BN:** *You were talking about getting judgments out of the road. How does that affect you in terms of workload?*

**Whelan J:** The workload as the judge is different to at the Bar. You tend to work fairly long hours by general community standards and it's more relentless than at the Bar in that one doesn't have the ups and downs of the barrister's life. You know that kind of crescendo at the end of a civil trial and then perhaps you might … I mean a lot of people would actually take time off and that sort of thing.

**It's far more efficient to write the judgment straight after the trial; and the three of us are fairly convinced that that's the way to go.**

I didn't tend to do that a lot anyway so I haven't noticed the difference as markedly as some people do. But the workload on the Bench is more relentless and it is very important to avoid procrastination. That's the real danger. Procrastination is the real danger for the judge because there is no deadline in the same sense that there is for the advocate and so any tendency to procrastination tends to involve you eventually in trouble. You've really got to be disciplined in terms of just getting on to things and not letting them sit around. We think — by "we" I mean the three judges in the managed lists at the moment — think that as judges at first instance we've really got to be fairly ruthless with interlocutory things, deciding them pretty much on the spot if we can. And judgments on trial we think we should be getting out quickly. The Court of Appeal can point out our errors later on. Most people want an answer, and they want it fairly expeditiously; so we think that's a pretty high priority.

**BN:** *So the workload probably hasn't changed but the pressures have?*

**Whelan J:** I think so. Yes. As long as you don't let the reserved judgments build up I don't think the pressures are as intense as life as an advocate. The workload itself is fairly demanding but not so demanding that it would come as a shock to most successful barristers who probably in a lot of ways are under more pressure, I think.

**BN:** *And there are not the short term pressures. There's no need to decide anything by tomorrow morning?*

**Whelan J:** Sometimes there is. But when a new point comes up in a civil case you don't have to do anything about it other than go, "Umm, that's an interesting point", whereas when you're the advocate you've got to do something. You've go to think up the answer or say it hasn't been pleaded or whatever. So the advocate is always concerned about the unknown. He or she is always concerned about, "What's the other side going to say? What's the judge going to say? Is there something I've overlooked?" That kind of problem doesn't really trouble the judge so much. We're not so troubled by the unknown. We have other problems.

**BN:** *To what extent do you come into a case seeing a simple issue and listen to counsel give you material on matters which could be relevant but which you don't really think are relevant, or which you think are clear anyway?*

**Whelan J:** Yes, that happens quite a lot. But often you can be wrong and I have been wrong even in the short time I've been here. I've thought something wasn't really central and maybe expressed the view that it didn't seem to be central; and then a while later further down the track you think "... um, perhaps I wasn't right about that ... perhaps it is". So I think you learn to trust the barristers because they know the case better than you, and in the fullness of time you might find that they were right and you were wrong about what the important issues were.

On the other hand I do think this is important. I think it's important to tell people the point that they are going to lose on. In other words ... not to tell them they are going to lose ... you mightn't even know that they are — but the point or the points that a side is vulnerable on, or that you think they could lose on, I think it's important to confront them with it, as they might have the answer, and you need to know.

**BN:** *I remember when Sir Reggie Smithers was in his last year on the Bench. I was appearing before him and I'd been on my feet for two minutes and he said: "Mr Nash, isn't the real problem for you X?" and he was right.*

**Whelan J:** I think that is good too, because it's the natural tendency of the advocate to not focus on the shortcomings and that's fair enough. But as the judge you need to know what their answer is

to the points they'd rather ignore or, not rather ignore, but they don't want to emphasise.

Very long written submissions are a bit of a bugbear at the moment, in that people feel that's got a bit out of control; but, on the other hand, when you have reserved it's often the written submissions you go back to rather than the transcript of the argument.

**BN:** *So advocacy is dead?*

**Whelan J:** No, I don't think it is but it certainly helps to have a good outline.

**BN:** *Where do you see yourself between the over-talkative judge and the over-silent judge?*

**Whelan J:** Naturally I'm right in the middle — at that perfect point! I don't know, I think I probably talk too much at the moment; but hopefully I'll get more silent as time goes on.

**BN:** *I think a number of counsel take the view that they would rather have a judge who engages rather than who listens.*

**Whelan J:** Yes, that's true, but then you never learn anything while you're talking, so you've got to be somewhere in between.

**BN:** *In some ways I suppose the Commercial and Corporations List are the closest thing we've got to a properly managed list with a docket system. But we don't have a docket system, do we?*

**Whelan J:** No. It's a vexed issue because the profession, at times at least, has thought that that's the answer to civil litigation. But there's a lot of problems about it.

The great number of civil cases in the Supreme Court means that it really is impractical to docket every civil case and there are a lot of civil cases issued that don't need judge management and really it would be silly to have judge management. So that's the first point.

The second point is every case in the Supreme Court is subjected to some form of judicial management now. Every case is looked at by a Master, in terms of what the case is about where it's likely to be going and whether an early mediation should be ordered and so on.

The present system is a kind of hybrid, in that there are managed lists for those who want that and then there is the ordinary listing for people who don't. I think the area where we might be able to move is in relation to listing and at the moment the Listing Master and Justice Hargrave are looking at a more docketing-oriented type of approach for listing cases for hearing outside the managed list in the Commercial and Equity Division. So they may come up with something on that score.

Of course Lord Woolf looked at this in detail in England and decided against docketing because it was thought to be inefficient. The risk of docketing is that you have downtime, in that cases settle and you find you get downtime which is thought to be a bad thing. In the managed lists at the moment we deal with that by swapping cases.

It's really part and parcel of what I was saying before, about letting people write the judgment as soon as the case has finished. One way of enabling that to be done is when gaps appear cases are swapped around so that the person or persons with judgment outstanding can utilise the time to do that.

So I suppose the Supreme Court is really on a path of a kind of hybrid between a docketing system and the more traditional system and I think it's likely that reform in that area will maintain some kind of hybrid system rather than going to a Federal Court type of approach.

**BN:** *Isn't the concern of downtime really an overemphasis on the need for a judge's bum to be on a Bench at all times?*

**Whelan J:** Yes, there's no doubt about that. I think a lot of misconceptions in the bureaucracy, and in other places as well, have been founded on the fact that the courts were structured around criminal trials and personal injury trials, where for all intents and purposes reserved judgments were not a big part of the judge's function, and if the judge wasn't actually running a trial it was fairly legitimate to say there was perhaps time which was being under-utilised.

In the civil sphere, particularly in the Commercial and Equity Division, writing the judgment is the whole thing really. Well, 80 per cent of the thing, and you can't do it while you're hearing another case. So the perception that if the judge is not in court, time is being wasted is, particularly in the Commercial and Equity Division, exactly the opposite of the true position, in our view.

**BN:** *Are you aware that there have been complaints in* The Australian *about media not having sufficient space in the courts?*

**Whelan J:** I haven't noticed that.

**BN:** The Australian *was complaining about it in relation to a committal — the committal of the alleged terrorists.*

**Whelan J:** Oh yes. There wasn't room for the media?

**BN:** *That's right. There's also that Westpac case concerning Steve Vizard.*

**Whelan J:** Yes. That was in 7B. Just a bit squeezy. Well they might have a point there.

I think it is a bit of a worry if people feel inhibited to walk into a criminal trial. So many trials involve security issues now, that it does create a bit of an atmosphere where the public perhaps don't feel welcome.

**BN:** *Even entering the courts these days you have to go through the process of security, particularly if you are going to the Court of Appeal, which doesn't have a machine at the moment. You've got to go through the process of being frisked.*

**Whelan J:** I know. It's unfortunate I think because it does create an atmosphere of "authorised personnel only", which of course is not the position at all. So perhaps they've got a point about that. Perhaps that's something we should have a look at.

**BN:** *But how do you solve it?*

**Whelan J:** I don't know. I think we could be more conscious of issues like that. I don't think you'd get any resistance once the issue was raised. It's not any deliberate thing on our part to inhibit people from coming to court. The more members of the public who are interested and want to come to watch, the better.

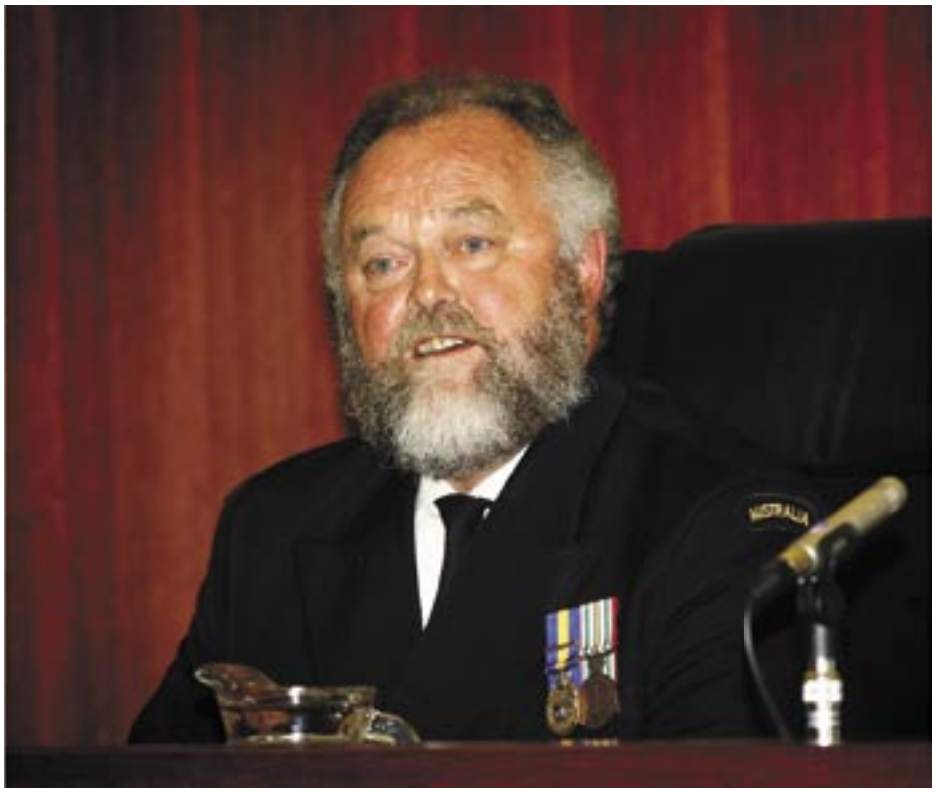
We don't find an awful lot of public interest in the Commercial List cases I have to say. But in the criminal area I know students and so on come and I think that certainly should be encouraged.

***BN:*** *You've departed from the normal tradition of having an associate and a tipstaff? Is there a reason for that?*

**Whelan J:** This is a bit like the point about when is the judge really working. The tipstaff-associate model is excellent in crime and in civil juries and so on; but in a situation like the Commercial List, having two legally trained young people who are prepared to do it for the terrible pay they get is an enormous advantage. They have to deal with the practitioners quite a bit and they need to be able to understand what is the significance of various things they are dealing with. They can assist with judgments in that they can do research, they can check things. I just think it's a more sensible kind of set-up in the Commercial and Equity environment to have two associates so that's why I went that way. Not everybody feels that way and I think the thing is that it's best to cater for different arrangements depending on the kind of case that you're dealing with.

# Welcome to Commander His Honour Judge Tim Wood RFD QC RANR at his Swearing-in

Welcome to CDRE His Honour Judge Tim Wood RFD QC RANR at his swearing-in as D-JAG-N of the ADF before The Honourable Justice Michael Black AC, The Chief Justice of the Federal Court, 12 September 2006, delivered by Captain Warwick Teasdale OAM RFD ADC RANR Head of Navy Reserve Legal Panel Victoria.



*Judge Tim Wood.*

May it please the Court

IT is a testament indeed to your Honour that today's ceremony is conducted in this ceremonial Court by the Chief Justice and in the presence of many distinguished guests, including your wife Margaret, your family, The Honourable Sir Daryl Dawson former High Court Judge, The Honourable John Winneke former President of the Victorian Court of Appeal, The Honourable Alwynne Rowlands former Judge Advocate General of the Australian Defence Forces and Family Court Judge, His Honour the Chief Judge of the County Court Judge Michael Rozenes, senior Navy Army and Air Force Officers and fellow members of the Defence legal fraternity.

Your Honour was born on 15 April 1947. You were christened with the first given name of Tim and the second given name of Deneys. Over the years various people have endeavoured to expand your first name to Timothy and contract your second name to Denis, but for the record you are Tim Deneys Wood. You were educated at Caulfield Grammar School, matriculated, and attended Melbourne University where you graduated Bachelor of Laws. Following your admission to practice in 1970 your Honour took a short service commission with the Royal Australian Navy as a Legal Officer between 1970 and 1974. You held appointments as Command Legal Officer, Fleet Legal Officer and Assistant Director of Naval Legal Services. You served at sea in the aircraft carrier *HMAS Melbourne*. You have been a member of the Naval Legal Reserve since April 1974, and you hold the Reserve Force decoration with two clasps. You were promoted Captain in 2002, some years later than expected, but

that was because the Navy could not find your medical records.

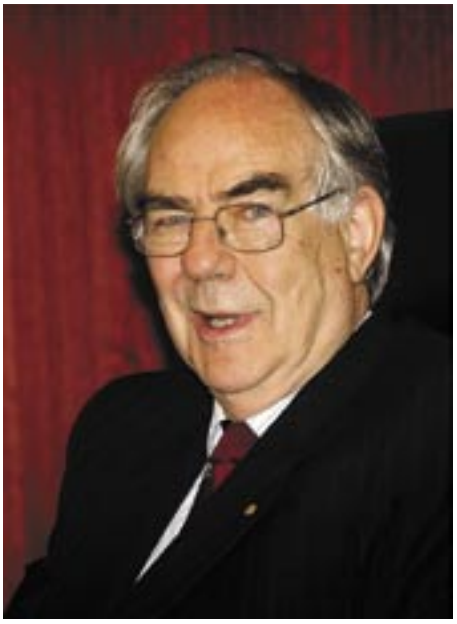
Your Honour signed the Bar Roll in 1974, and read with John Winneke, as he then was. Your Honour's principal areas of law involved civil litigation, primarily in the areas of building and construction law, commercial law, insurance and trade practices. Your Honour also appeared in Courts of Marine Enquiry and before various tribunals including the Administrative Appeals Tribunal. You were appointed as one of Her Majesty's Counsel learned in the law in 1994, and to the County Court of Victoria in 1998.

In the Defence Force your Honour, as both a permanent and reserve member, has had an extensive and varied experience. You appeared at courts martial both as counsel for the prosecution and the defence, and also as Judge Advocate. The trials have ranged from serious criminal offences such as rape, assault and theft, through to piracy and the hazarding and grounding of ships. Your Honour has travelled overseas with the Royal Australian Navy, particularly to the United States, where you were involved in the famous Clark court martial, an Australian Court on American soil.

**Your Honour has travelled overseas with the Royal Australian Navy, particularly to the United States, where you were involved in the famous Clark court martial, an Australian Court on American soil.**

When I joined the Navy Reserve in 1971, at the same time as John Winneke, your Honour had already been in the Navy for almost two years. On my first trip to Canberra, to meet with the then Director of Navy Legal Services, Captain

*Air Commodore Simon Harvey, Colonel John Beckwith, Air Vice-Marshall Andrew Kirkham QC and Brigadier Ian Westwood.*



*Chief Justice Black.*

*The swearing in.*

David Robertson, he detailed you to look after me. This you did, with gusto. I well remember the "steamboat" hospitality of David Robertson, but I must say that I do not remember nearly as well the hospitality extended by you and Margaret during that fortnight in Canberra. You, of course, were ably assisted by Captain Tom Holden, as he later became. We have remained close and firm friends since then.

**Your Honour has, unsung and almost unrecognised by the rest of the Defence Force community, undertaken tasks of many types.**

Your Honour is an exceptional lawyer, a loyal and true officer and friend, and a Judge of exceptional ability and sense of purpose. Your Honour has, unsung and almost unrecognised by the rest of the Defence Force community, undertaken tasks of many types. You have conscientiously and speedily reviewed transcripts of trials and given your opinions objectively and faithfully, as would be expected. It seemed, on occasions, that you were the only Judge who was prepared or able to conduct these reviews, particularly with the expedition they required. On occasions, and particularly around Anzac Day, your Honour would ask to borrow my ceremonial sword and would quietly go off to an RSL Club at Moorabbin or Deer Park or wherever, and give the expected Anzac Day address. Your Honour has been a mentor to a number of members of our Melbourne Legal Panel, and your wise counsel is now to be experienced not only by the Melbourne Panel, but by the Defence Force generally, and the Navy in particular, throughout Australia and overseas.

On behalf of the Melbourne Legal Panel, and I am sure I can also speak on behalf of all those present here today, we congratulate your Honour on the singular privilege you have of serving our nation and the Australian Defence Force as the Deputy Judge Advocate General for the Navy. We wish you well in this high office, and also congratulate you on your promotion to Commodore.

If the Court pleases.



# Unveiling of the Portrait of the Rt Hon Sir Ninian Stephen KG AK GCMG GCVO KBE

On 20 September 2006, in the foyer of Owen Dixon Chambers West, the Rt Honourable Sir Ninian Stephen and Lady Stephen were the guests of the Bar Council at an unveiling of a portrait of Sir Ninian painted by the artist, Mr Rick Amor. Mr Amor is a distinguished portrait artist, a renowned landscape artist, sculptor and official war artist. The Honourable Justice Ken Hayne spoke on this special occasion and unveiled the portrait. Justice Hayne's speech is set out below.

*Sir Ninian Stephen, Justice Hayne and the artist Rick Amor.*

SIR Ninian and Lady Stephen, Chairman, immediate past Chairman, your Honours, ladies and gentlemen.

Barristers, as a race, are contradictory and contrary people. The notion that individuals committed to the separate practice of the law in an adversarial system of justice should form a single professional organisation appears to contradict the fundamental individuality of a barrister's practice.

The apparent difficulty of resolving these tensions may explain why external observers do not understand, or are at least suspicious of, what it is that binds the Bar. How can it be that individuals in sole, not to say solitary practice, committed to competition one with the other both in and out of court, can unite in a single organisation?

The existence and maintenance of the collegiate life of the Bar depends upon the individual barrister's recognition of the undeniable fact that each is part of a colle-

*Kate Anderson, Michael Crennan S.C. and Christine Harvey.*

*Chief Justice Warren with Mrs Elizabeth Chernov.*

*Sir Ninian and Lady Stephen with daughter Sarah Stephen and grandchildren Lucy, Jack and Alice.*

*Justice Crennan and Keith Beard.*

*Bill Nuttall, Director of the Niagara Gallery and Justice Chernov.*

*Michael Shand QC speaking.*

giate body whose reasons for existence go well beyond whatever selfish advantages the individual may derive from membership. Recognising and reinforcing that understanding of the wider purposes of the Bar is very important.

The Bar's collection of portraits is one method of doing that. It is important to recognise those whose contribution, not only to the Bar, but also to the wider life of the nation, should be understood and recalled by the succeeding generations of barristers. The Bar's portraits are one outward and visible means of doing that.

Tonight the Bar recognises one of its own whose contribution to the life of this nation has extended so much beyond the immediate life and work of the Bar. His career is well known to this audience, but it is as well to recall it tonight, if only in the barest outline. Sir Ninian Stephen joined the Bar in 1952. He took silk in 1966 and four years later was appointed to the Supreme Court. In 1972 he was appointed to the High Court of Australia where he served until his appointment as Governor General of this nation in 1982. He served in that office until 1989.

As if these contributions to Australia were not enough, he has thereafter fulfilled many and various large and difficult national and international tasks. Five degrees of knighthood, appointment to the Legion of Honour of France, numerous honorary doctorates, are the symbols of the service Sir Ninian has given, nationally and internationally.

It is right that the Bar should commission and hang his portrait. All of those who set about securing that result, especially Justice Susan Kenny and Mr Peter Jopling QC, are to be commended and thanked for all that they have done to achieve it.

**Tonight the Bar recognises one of its own whose contribution to the life of this nation has extended so much beyond the immediate life and work of the Bar.**

It is especially pleasing that the Bar commissioned Mr Rick Amor to execute the work. For my own part I have long been an admirer of his work. It is work that is exhibited in many public and private collections in Australia and internationally. I think his portrait work is outstanding but, since I am not in court, let me, for once, not try to impose my views upon you. You will form your own judgment.

I have the greatest pleasure in unveiling the portrait.

# New Federal Magistrates

NINE new federal magistrates have taken up appointments to the Federal Magistrates Court since July 2006, three of them in Melbourne.

More federal magistrates will join the Court to fill positions announced by the Attorney-General earlier this year and a vacancy created by the retirement of a federal magistrate to take up appointment as a Family Court judge.

The appointments will enable the Court to address the increased workload that has resulted from the Court increasingly becoming the court of choice of litigants and the expected workload from new jurisdiction in workplace relations and admiralty law and expanded jurisdiction in trade practices and family law. Six of the new positions are directly related to the workplace relations jurisdiction.

Federal magistrates appointed to Melbourne include Heather Riley, Philip Burchardt and John O'Sullivan. Their joint ceremonial welcome was held on 16 August 2006 at the Commonwealth Law Courts in Melbourne.

Federal Magistrate Riley has practised as a barrister in Victoria since 1998 and is an accredited mediator. She has been a barrister and a solicitor with the Australian Government Solicitor, which included appearing in the Commonwealth Administrative Appeals Tribunal and the Federal Court.

Federal Magistrate Burchardt has practised as a barrister in Victoria since 1989 and is a qualified arbitrator and mediator. He has been a senior industrial officer with the Australian Universities Industrial Association, assistant general-secretary of the Federated Australian University Staff Association and industrial officer for the Meat and Allied Trades Federation (Western Australian Division).

Federal Magistrate John O'Sullivan was admitted to practice in Victoria in 2000. He has been a senior adviser to the Minister for Employment and Workplace Relations, a lawyer with Telstra Corporation Limited, a solicitor with Corrs Chambers Westgarth and industrial officer with the Metal Trades Industry Association and New South Wales Farmers Association.

*Federal Magistrates John O'Sullivan, Heather Riley and Philip Burchardt.*

Other new appointments include: Toni Lucev, the first resident federal magistrate in Perth; David Halligan in Parramatta; John Morcombe and Adrian Dangerfield in Adelaide; Keith Wilson in Brisbane; and Frank Turner in Sydney.

The appointments will assist the Court fulfil its objective to be a simple and accessible federal court that deals with less complex general federal law and family matters expeditiously, thus allowing the higher courts to focus on more complex cases and appellate work.

The Court already handles the majority of federal migration, bankruptcy and discrimination matters and is taking an increasing number of family law cases. It began hearing workplace relations cases when jurisdiction was given in late March 2006.

# Bill Sutherland: Over 30 Years of Court Service

Paul Bravender-Coyle

BILL Sutherland was the Senior Master's Associate. He retired recently, but not before having reached an important milestone: over 30 years of service as the Principal Secretary and, subsequently, Associate to the Senior Master, thereby becoming the longest-serving person in the Supreme Court.

Bill was originally the Principal Secretary to the late Master Jacobs, OBE (who was the first Senior Master) and, just over 20 years ago, when Master Mahony was appointed as the new Senior Master to replace Master Jacobs, Bill became his Principal Secretary. The Masters' Secretaries were subsequently renamed Associates.

Bill saw many changes in that time: the Companies (Victoria) Code, the Corporations Law and the *Corporations Act 2001*. Perhaps the most significant change for him was the one which increased the jurisdiction of the Senior Master by allowing him to hear and determine opposed winding up applications (previously opposed winding up applications were heard and determined by a judge).

One of Bill's most important tasks — at least as far as practitioners were concerned — was to examine applications to wind up companies to ensure that they were in order and complied with the rules. He would note any non-compliance in red ink on the checklist. It was rare for him to miss anything! Bill would allow practitioners to see these mistakes so that, if they were not fatal, they might be able to correct them.

Many generations of practitioners will remember Bill as he was a very kindly man who was always generous with his time. Often, with infinite patience, he would explain the requirements of the rules to practitioners who were unfamiliar with them.

Bill was born in Scotland. He enlisted in the Royal Engineers in World War II and landed with his unit in Normandy after the D-Day Allied invasion in 1944.

*Bill Sutherland.*

After some time in France, his unit was posted to Hamburg, which became part of the British Occupation Zone in Germany. He spent a few years after the war in Hamburg and has many stories from that period.

On one occasion a bomb fell, causing a ceiling to collapse, revealing a Maybach and a number of Mercedes Benz staff cars — which had been used by senior officers of the Wehrmacht — still in pristine condition.

Bill was particularly surprised on discovering the Maybach. It was a luxury car of stunning elegance manufactured to the highest standards and flawless craftsmanship. Such cars had been owned by celebrities of the era, as well as royalty and titled nobility, but production had ceased in 1941 because of the War (the marque was revived by DaimlerChrysler in 2003 as a competitor to the Rolls Royce and Bentley). Bill enjoyed its top-quality fittings and finish, and its exclusive interior specifications — including exquisite leather and fine cloth appointments complemented by selected woods and paintwork — which were tailored to the owner's personal requirements and preferences.

Bill and his colleagues enjoyed riding around Hamburg in them.

Bill subsequently developed a life-long interest in the RAF aircraft of World War II.

He came to Australia in the 1950s where, after some time, he came to work in the courts.

In recent years he had been ill and in hospital on several occasions and his legs have become weaker, but still he managed to handle the court files. You would see him slowly pushing his trolley of files across from the Senior Master's Court at 436 Lonsdale Street to the main Supreme Court building.

Bill attempted to obtain a pension from the British government, but was unsuccessful.

On 12 December 2003 a number of counsel and solicitors who practise in the winding up jurisdiction, with the permission of the Senior Master, organised a presentation for Bill in Court 5 of the Masters' Courts. They presented him with a gift of several books about the aircraft of the Royal Air Force in World War II. Simon Gardiner gave a short speech on their behalf.

In his reply, Bill said: "I was putting my stuff into my car the other day when I heard 'Hello, Bill' behind me. I turned around. I recognised the person. I remembered her when she was just an articled clerk." He was referring to the Chief Justice, and he was very pleased that she still remembered him.

Bill subsequently spent some time in the Royal Melbourne Hospital where he was visited by members of counsel. He retired last year at the age of 78 and he very much treasured the letters of appreciation which he received from the Chief Justice and several other Judges.

*Note: I wish to acknowledge the valuable assistance which Simon Gardiner provided to me in preparing this article.*

# Justice for Hicks After *Hamdan*?

Peter Vickery QC

The editors of the *Bar News* have requested an update on recent events affecting David Hicks. There have been significant developments since the last edition went to print.[1]

THE Supreme Court of the United States handed down its decision in *Hamdan* v *Rumsfeld* on 29 June 2006.[2] The Court struck down the Military Commissions set up for the trial of David Hicks and other Guantánamo detainees because their structure and procedures breached a federal statute, the Uniform Code of Military Justice (the "UCMJ"), and violated the Geneva Conventions which were incorporated into US domestic law by the UCMJ.

The US has announced that rather than pursuing a trial before an established Court Martial or a regular criminal court, it has elected to prepare new legislation to revive the Military Commissions and have it passed into law by Congress. To this end a draft bill called the "Enemy Combatant Military Commissions Act of 2006" (the "draft bill") has been prepared and was circulated by the Whitehouse on 26 July 2006.[3]

In spite of reassurances from US Attorney-General Alberto Gonzales that he has a program to try Hicks, with legislation for a new tribunal hopefully in place by November this year,[4] the likely reality is that David Hicks and others will continue to suffer indeterminate imprisonment at the hands of the US Executive without a ruling of a court of law or a trial in sight.

If and when the draft bill passes through Congress and a reinvented Military Commission is created, Hicks will have to prepare to face a fresh set of charges before the new tribunal and, more than likely, a new body of prosecution evidence. Given the need for adequate time to prepare his case, there is no reasonable prospect of a trial in the short term.

However, another, and perhaps more fundamental problem presents itself.

*Peter Vickery QC.*

What is revealed by the draft bill is that a reconstructed Military Commission would be at high risk of nose-diving on the same trajectory as its predecessor following a further round of appeals challenging the new tribunal.

In a typically minimalist fashion, the US Supreme Court in *Hamdan* dealt with only a few of a number of the possible attacks that were open to expose the former Commission as an institution that was fundamentally flawed and in breach of international law. Other arguments remain alive to be advanced in future challenges to a similar body. Indeed, if the United States with the support of Australia, proceeds on its present path, it would be inviting such challenges to be made, resulting in yet further unacceptable and illegal delay.

A clear example arises under the US constitution. International treaties in the United States, once ratified by the President and two-thirds of the US Senate have consented, become the "supreme law of the land" under Clause 2 of Article VI.[5] This is commonly referred to as the "Supremacy Clause". Acts of Congress have equivalent legal standing to such treaties. Thus, if a law of Congress and a ratified Senate approved treaty are inconsistent, the one later in time will prevail as a matter of domestic law.

However, although Congress may override a pre-existing treaty of the United States, to do so would place the US in breach of obligations owed under international law to its treaty partner(s) to give effect to the treaty in good faith. Consequently, courts in the United States are disinclined to find that Congress has actually intended to override a treaty. Rather, they strive to interpret the Congressional act and the international instrument in such a way as to reconcile the two.

International law scholars on Hamdan's behalf argued vigorously before the Supreme Court that because the United States signed and ratified the Geneva Conventions in 1955 it was bound by the terms of these treaties which, upon Senate approval and by force of the Supremacy Clause, became part of the domestic law of the United States. It was further argued that the rights conferred upon Hamdan by the Geneva Conventions were directly enforceable in court, and did not require implementation in federal statutes and regulations.[6]

The Supreme Court declined to deal with the constitutional arguments presented to it, the majority preferring to decide the case on the more limited basis that the Military Commissions went beyond what was permitted by the UCMJ. The Court found that by this statute Congress had directed the President to comply with the "law of

war" in establishing military commissions, including Common Article 3 of the Geneva Conventions, which the Court further found had not been complied with in this case because of procedural shortcomings which precluded a fair trial.

Thus the *Hamdan* decision preserves significant constitutional arguments to challenge any future Military Commissions established to try David Hicks and other Guantánamo detainees. In particular, the draft bill will present ample opportunity to argue that the provisions of the Geneva Conventions and the draft bill may be construed in such a way as to reconcile the two, with the result that important Convention rights remain directly applicable to detainees. This will involve a headlong clash between the power of the President and Congress on the one hand and the position of an individual claiming treaty rights pursuant to the Supremacy Clause under the constitution on the other.

Such a case is likely to take some years to work its way through the US legal system. Meanwhile, David Hicks will remain imprisoned, crushed in the plate tectonics of a major constitutional re-alignment.

The proposed new Military Commission process reflected in the draft bill is virtually a mirror-image of its predecessor. It too fails to provide for a fair trial and would violate international law standards, including Common Article 3 of the Geneva Conventions.[7] What is remarkable is that the draft bill ignores the findings and observations of the Supreme Court in *Hamdan* that similar procedures under the former Military Commission precluded a fair trial and violated the Geneva Conventions.

The draft bill includes the capacity to exclude an accused from parts of the evidence on security grounds, and the capacity to receive evidence obtained by coercion and mental torture at the discretion of the presiding military judge. The draft bill also permits hearsay evidence, including multiple hearsay, if the military judge determines that it is relevant and of evidential value, even though the penalty after a finding of guilt may be life imprisonment or death.

*Alberto R. Gonzales was sworn in as the 80th Attorney-General of the United States on 3 February 2005.*

Further, the Military Commission established under the draft bill lacks the essential independence and impartiality necessary for a fair trial, particularly given the central role given entrusted to the Secretary of Defense.[8] He will appoint the members of the armed forces to hear Commission trials and retains the power to "excuse" selected members in advance of a trial. He will be directly involved in a number of key procedural issues, including the determination of permitted modes of proof, which may even be altered mid-trial. Defense counsel may obtain witness statements and other evidence, but only in accordance with such regulations as prescribed by the Secretary of Defense, who may also define exceptions and limitations as to what evidence may or may not be admissible in a proceeding.

Remarkably, the Secretary of Defense may also, as a matter of his or her sole prerogative and discretion, modify the findings and sentence of a Military Commission, albeit only in a fashion that is not less favorable to an accused than the findings and sentence determined by the Military Commission.

All these powers are presently concentrated in the hands of Donald Rumsfeld, who also happens to be the representative of the Executive who is responsible for detaining the prisoners who are subject to the Military Commission trial.

In short, the same official, the Secretary of Defense, is responsible for the original detention, selecting the members of the tribunals that will hear charges against detainees, prescribing important procedural rules for the running of trials and making the final decision as to a detainee's guilt or innocence. It is not difficult to see how this system might operate, or appear to operate, as an improper influence on Commission trials. As Kennedy J said in *Hamdan:* "These structural differences between the military commissions and courts martial — the concentration

**The Secretary of Defense, is responsible for the original detention, selecting the members of the tribunals that will hear charges against detainees, prescribing important procedural rules for the running of trials and making the final decision as to a detainee's guilt or innocence.**


*Article V1 of the Constitution of the United States containing the "Supremacy Clause" as it was signed in Philadelphia on 17 September 1787.*

of functions, including legal decision making, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress — remove safeguards that are important to the fairness of proceedings and the independence of the court."[9]

Arguably the most sinister proposal in the draft bill lurks deep in its legal text. Under clauses 104(e), 201(c) and 230 of the draft bill, the United States Executive claims the right to detain David Hicks and others "until the cessation of hostilities" without any ruling of a Court or like body, and regardless of the outcome of any Military Commission trial. Under these provisions, for example, a sentence of 10 years imprisonment imposed by a Military Commission can effectively become life imprisonment upon a determination, not of a court of law or even a Military Commission, but the US Executive.

The concept of "cessation of hostilities" has been borrowed from the 1949 Geneva Conventions.[10] It was created in an era when entirely different conditions of warfare existed. In the immediate post-WWII period and in days gone by, most wars had a relatively clear start (with a declaration of war or the obvious outbreak of hostilities) and a relatively clear end (when one side or the other sues for peace and formally surrenders or otherwise obviously stops fighting). Cease-fires depend on temporal and spatial certainties and accepted rules relating to military demarcation lines (separating militarized from demilitarized zones) and the movement of forces. They also depend on an established command structure for their implementation.

The post-modern "war on terror", involving enemies such as al-Qaeda together with its affiliates and sympathizers, has none of these qualities. We now face an amorphous transnational hydra which has no defined organization and is readily capable of mutating into almost limitless forms. Its fanatical and deadly activities are sporadic and unpredictable, and at least for the foreseeable future, regrettably without end. It is totally unrealistic to imagine the cessation of these hostilities with Osama Bin Laden being coaxed on board an up-graded version of the USS Missouri to sign formal instruments of unconditional surrender, as did Foreign Minister Shigemitsu and General Umezu at the surrender of Japan on 2 September 1945.

In fact "cessation of hostilities" in this context is a meaningless concept because hostilities in the "war on terror" are not likely to have an evident conclusion. Consequently, a decision as to whether to release or not based upon the "cessation of hostilities" criterion is likely to be reduced to an arbitrary determination made in the absence of any objective facts to support it, one way or the other.

What the draft bill appears to be saying is that continued incarceration of persons captured in Afghanistan or elsewhere is justified in the present circumstances "to prevent their return to the fight",[11] in spite of the decision being in effect an arbitrary one and the consequence for detainees being potentially life imprisonment. Introduction of powers of this kind is another example of "preventive state" legislation, where in this case the focus is not on what the detainee has done, but what the government and its agencies suspect that the detainee might do in the future.

If the model suggested by draft bill is accepted, it will be up to officials within the Administration to determine the level of risk of a detainee resuming terrorist activities on release. This in itself will involve a problematic and subjective assessment, which will remain the case, even if the decision making function is conferred on some form of tribunal. In effect, by these provisions, the US Executive will be securing a statutory licence to impose indefinite and arbitrary detention, potentially for the life of the detainee, which will be ungoverned by the rule of law.[12]

**If Hicks is repatriated to Australia and his future activities remain a concern, it should not be beyond the capacity of our security establishment to implement more measured and appropriate local arrangements,**

Whatever the theoretical justification for continued detention in some exceptional cases, this level of protection is grossly excessive in the case of David Hicks. If Hicks is repatriated to Australia and his future activities remain a concern, it should not be beyond the capacity of our security establishment to implement more measured and appropriate local arrangements, including taking steps under the new anti-terrorism law which is now in place,[13] should that ever be considered necessary.

In his press release of 28 July 2006, the Australian Attorney-General Mr Ruddock said that those detainees who had been returned to Australia and Britain were not facing charges under the US system, explaining, "Mr Hicks has been charged. That is the substantial difference between him and the people released."

However, this position does not take into account the effect of the *Hamdan* decision, which not only struck down the Military Commissions but also in effect

*Maximum security and isolation cells at Camp V Delta, Guantánamo Bay.*


*An interview room inside the long-term detention facility at Camp V Delta, Guantánamo Bay. A shackle is attached to the floor.*


*The possessions of a "privileged" detainee are displayed in the long-term detention facility at Guantánamo Bay. The items include soap, prayer oil, a comb, ear plugs, a towel and a shaving razor.*

struck down the charges against Hicks instituted before those Commissions. There is no case for his continued detention based on any existing charges. In fact there is no legal barrier to his immediate release and every reason to seek it, particularly if the US persists with the implementation of its new Military Commission legislation.

There is much truth in Gladstone's maxim "justice delayed is justice denied".[14] The principle is of great antiquity and finds expression in Magna Carta: "To none will we sell, to none deny or delay, right or justice." The right to a trial without unreasonable delay or to release is declared in the landmark Charter of Human Rights and Responsibilities recently introduced into Victoria[15] as well as numerous other constitutions and international conventions throughout the world. Long delay between arrest and trial inevitably affects the value of any evidence submitted at a trial when it eventually occurs and may prejudice the capacity to provide a fair judgment of the case. Further, an accused may be prejudiced by mental deterioration resulting from prolonged and seemingly limitless incarceration.

After more than 4½ years' imprisonment, much of it in solitary confinement, David Hicks's basic right to an expeditious trial has been cruelly violated. Months of solitary confinement have exposed him to the kind of torment which the rule of law has never tolerated. Insofar as international law reflects the same principles, the detention of Hicks and others at Guantánamo Bay does not constitute humane treatment and blatantly violates the fundamental protections prescribed for Article 3 POWs in the Geneva Conventions.[16]

What is indefensible is that following the *Hamdan* case, the already inordinate delay is likely to be compounded several times over if David Hicks is exposed to a trial before a re-vamped Military Commission.

Why then punish Hicks with the prospect of yet further substantial delay arising out of the new wave of legal experimentation with the Military Commission process? The established procedure for a trial by Court Martial under the UCMJ is a perfectly adequate, universally respected, and historically proven system of trial. It was expressly approved by the US Supreme Court in the *Hamdan* decision.[17] It would also comply with international law standards. With perhaps only minimal legislative tweeking to confer jurisdiction, the Court Martial structure is already in place to conduct the trial. Alternatively, a trial before a regular criminal court in the United States is also available to produce a relatively expeditious outcome if commenced without undue delay. Again, this could be achieved with relatively minor legislative changes to confer jurisdiction if necessary. It is now arguably far too late, however, to commence even these modes of trial and meet international standards.

If the agenda behind the Military Commission process is to secure the conviction of Hicks and others based on flimsy or questionable evidence, a radical rethinking is required. The objective under our system of law is not to obtain a conviction at all costs, but to dispense justice by trying persons before a competent, independent and impartial court or tribunal after a fair and public hearing. If the US government fears that it does not have sufficient evidence against Hicks to justify a conviction before a Court Martial or a conventional criminal court, there should be no trial and he should be repatriated to Australia without delay.

Much is at stake for the community and the individual. Whatever views one holds as to Hicks's guilt or innocence or society's need for protection against some possible future harm, the destruction of a person at the hands of the State, by indeterminate detention beyond the rule of law, compromises what we ultimately rely upon to guard against all the deep injuries that human conduct can inflict.

After the *Hamdan* case there is a window of opportunity to re-affirm a commitment to our core values of fairness and the rule of law. It is time for Australia to pick up the telephone to Alberto Gonzales, as the British did with all of their citizens, and put an end to this disgraceful episode. The need to make the call is now more pressing than ever.

Notes

1. *Victorian Bar News*, Winter Edition, 20 July 2006, "David Hicks and the Military Commission — Is Australia Turning its Back on International Law?"
2. *Hamdan* v *Rumsfeld, Secretary of Defense* 548 US (2006) ("*Hamdan*")
3. University of Pittsburg School of Law website: http://jurist.law.pitt.edu/paperchase/2006/07/white-house-bid-to-let-military.php [last observed 10 August 2006]
4. Report of Mr Ruddock to the Standing Committee of Attorneys-General in Melbourne, 28 July 2006
5. Article VI, Clause 2 of the US Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."
6. *Hamdan ibid*, "Brief for Petitioner", 6 January 2006, pp. 36–47
7. In *Hamdan* the Supreme Court found that at least Common Article 3 of the Geneva Conventions applied and was breached by the former Military Commission process. Common Article 3 provides that each Party to the conflict shall be bound to apply, "as

a minimum" certain provisions. One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

8. The US Secretary of Defense is Donald Rumsfeld.
9. *Hamdan ibid*, per Kennedy J. (concurring in part) p. 16.
10. Article 118, Geneva Convention relative to the Treatment of Prisoners of War, adopted August 1949: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." It is to be noted that in the draft bill, the important qualifying word "active" has been removed, suggesting that detention by the Executive under the draft bill may be permitted even during periods when terrorist activity is dormant.
11. Draft bill clause 104 (e).
12. For the rationale for a contrary position see: "A Better Way on Detainees", Jack Goldsmith, professor of law at Harvard University, and Eric A. Posner, professor of law at the University of Chicago, *The Washington Post*, 4 August 2006.
13. The *Anti–Terrorism Act 2005* was passed on 3 November 2005 after an urgent sitting of the Senate and received Royal Assent later that day. These amendments were enacted in response to what was perceived by the Commonwealth government as a specific threat and the assessment that a terrorist attack in Australia was feasible and could well occur. This assessment was said to be backed up by an ongoing flow of credible intelligence.
14. William Gladstone (1809–1898) was a British Liberal Party statesman and Prime Minister (1868–1874, 1880–1885, 1866 and 1892–1894).
15. *Charter of Human Rights and Responsibilities Act 2006* Act No. 43/2006, Section 21(5).
16. Report of the Working Group on Arbitrary Detention, United Nations Commission on Human Rights, undertaken on behalf of the UN Economic and Social Council, 15 February 2006.
17. *Hamdan ibid*, the Opinion of the Court at p. 69 and per Kennedy J. at p. 8 (opinion concurring in part).

# Verbatim

## Nothing Left to be Sorry For?

22 August 2006
Coram: The Honourable TRH Cole AO RFD QC
Oil-for-food inquiry

The following exchange occurred during the examination of Jill Gillingham:

**The Commissioner:** I don't think it is accurate to categorise this document as the contrition statement.
**Agius S.C., Counsel Assisting:** I suspect than the evidence will indicate that this is what was left of the contrition statement.
**The Commissioner:** It is the contrition statement without the contrition.

# Dr Nervous

Richard A. Lawson

I had an eye operation recently.

The signs of trouble had first emerged in 2004. When watching the Athens Olympics swimming on the telly, I couldn't see whether Ian Thorpe had won his 200 metres freestyle heat in 1:47.83 or in 1:48.37. This was no good at all. Had Thorpey secured a premier lane for the final or not?

Men rarely go to the doctor — or at least that's true of the men I know. So I squinted along for 18 months until, eventually, the mounting evidence that I was going blind in my left eye (nowadays read, "significantly visually impaired in my left eye") could not be ignored.

When at last I did get to the GP's clinic, everyone else in the waiting room was female. They all tried hard not to stare at me. I felt like the solitary pet dog on a suburban peak hour train. When my turn with the doctor came up, she told me to read out the letters on the wall chart, one eye at a time. The right eye did pretty well — all the way to the row of the smallest letters. But the left struggled even to recognize the giant "E" at the top of the chart for what it was. There was nothing else for it: go to the eye surgeon, go directly to the eye surgeon, do not pass "GO", do not collect $200.

The surgeon turned out to be surprisingly agreeable. He greeted me by saying "call me Nick". His modest examination room housed an elaborately-mounted viewing apparatus. In the manner of John Mills at the periscope in "We Dive at Dawn", Nick gazed down one end of the viewer, while I sat with my bad eye fixed at the other.

One imagines that Nick must have studied thousands of suspect eyes. But that had not dulled his enthusiasm to diagnose the problem with mine. Three visits later — by which time I had had some tests, an elaborate course of drops and a second opinion at Nick's suggestion — he announced that it was Fuch's Heterochromic Cyclitis. Of course it was. I couldn't help being pleased. It was as though I had just had the services of a man who combined the best attributes of Sherlock Holmes and David Attenborough.

*Squinting along.*

"Think of your eye as a pond or a little lake", Nick explained. "It's wet. Little rivulets wash into it constantly and then the fluid goes out through the drainage system on the other side. But your drainage system is blocked, you understand. That's making your eye saturated, pressured and very unhappy. We'll have to dig a new drainage tunnel to restore the outflow."

Nick had me booked in for the operation at the hospital at 3:00 pm. I got there at 1:30 with my overnight bag.

**Three visits later — by which time I had had some tests, an elaborate course of drops and a second opinion at Nick's suggestion — he announced that it was Fuch's Heterochromic Cyclitis. Of course it was.**

The hospital office lady sat me down and started to interrogate me for the purposes of her very lengthy admission form. Name, address, age, next-of-kin, sex. That's right, sex. Wait a second, I thought, can't she see I'm a bloke? Don't worry, just keep answering her questions.

Then I was wheeled upstairs to meet Nick and his surgical team outside the operating theatre. After a bit of a chat, the anaesthetist checked the details on the admission form. Then he muttered "Have you seen what's written next to occupation? Barrister!" "I know," replied Nick reassuringly. "He's okay. That came up when I first saw him. It'll be right."

I had the feeling that this exchange was not supposed to have been overheard and that, although the law of torts was not supposed to be counter-productive, its shadow had just coincided with an unwelcome change in the anaethetist's mood. He jumped in by repeating to me what were the very, very long odds of my not surviving the anaesthetic. But I cut him short. "Please relax", I said, "At about 250,000 to 1, I'm more than happy to take my chances. And yes, it's my left eye only, not my right: we've noted that twice already in the last few minutes. All will be fine."

Here I reveal myself as someone with a strong distaste for professional negligence claims. There were, and are, several surgeons and nurses amongst members of my extended family. I have long been an unashamed fan of the medical profession. If this makes me biased, which it probably does, then so be it.

I had told the anaethetist that all would be fine and it was. I was so calm that my pulse monitor was displaying "62" as I dozed off to leave Nick and his team to dig the tiny tunnel. Before I knew it, I was sitting up in my hospital bed with my formerly-squinting eye fully bandaged to protect the tunnel and the microscopic stitching below.

It can be fun going to hospital. The evening ended in the ward's TV room where the Friday night footy was on. My fellow patients were similarly bandaged. We all gave new meaning to the expression "one-eyed supporters".

# Victorian Bar Takes the Lead in Accreditation of Mediators

Elizabeth Brophy

On 16 February 2006 the Bar Council resolved to introduce new requirements for barristers to become accredited mediators of the Victorian Bar.

*The first group of advanced mediators of the Victorian Bar. Standing: Carey Nicol, Iain Jones, Anthony Nolan S.C., Michael Heaton QC and David Levin QC. Seated: Toby Schnookal, Kristine Hanscombe S.C., Robert Dyer and Ross Maxted.*

THE Bar Council has also made provision for barristers to become accredited as advanced mediators. This provides an opportunity for senior mediators to have their skill and experience acknowledged and allows the market to make discerning choices in relation to the selection of a mediator.

The Mediator Accreditation Sub-committee of the Dispute Resolution (DRC) Standing Committee (Henry Jolson QC, Ross Maxted, Cornelia Fourfouris-Mack and Elizabeth Brophy) developed the scheme in close consultation with the DRC after reviewing accreditation developments around Australia and internationally.

Mediation is now an integral part of litigation and there is an increasing focus on mediation as a process for resolving disputes prior to the issuing of any proceedings. It is therefore very important that mediators who are accredited by the Bar have the appropriate level of skill and experience.

It is also essential that mediators, once accredited, continue to use their skills and update their knowledge so the new requirements mean that accreditation at the Victorian Bar is now limited to a two-year period. In applying for re-accreditation mediators will have to demonstrate relevant recent experience in mediation and continuing legal education in the mediation area during the previous two years. As barristers who were accredited on 1 April 2006 are automatically accredited until 1 April 2008 an application for re-accreditation will not be required until that time.

Henry Jolson QC, a former Chair of the Law Council of Australia, Alternative Dispute Resolution Committee, noted recently that the Victorian Bar in adopting this scheme has taken the lead in accreditation and received positive feedback from others in the field, including the Federal Government, who are in the process of reviewing accreditation requirements.

The new Mediator Accreditation Scheme does not introduce a compulsory scheme for accreditation. Barristers who

are acting as mediators are encouraged to become accredited but there is no requirement to do so. Barristers should seriously consider becoming accredited as there are benefits in such recognition — use of the title "accredited mediator" or "advanced mediator" of the Victorian Bar and inclusion on any court list of mediators managed by the Victorian Bar. And the DRC continues to explore ways in which the Bar can promote the availability of accredited mediators to the market place.

David Levin QC, Chair of the DRC, told *Bar News* in August that applications by mediators to become recognized

as advanced mediators have been quite slow. David said "at this time there are about 380 mediators who are accredited by the Bar and a number of these are senior mediators who would no doubt meet the requirements, but only a handful of applications have been received to date".

Training programs in mediation and alternate dispute resolution have been reviewed. Information in relation to these programs and the Mediator Accreditation Scheme is available on the Bar website. For those applicants who may have been put off by the complexity of the initial application form we are pleased to inform you that the application forms have recently been improved to make the process of application easier.

Any questions about the Mediator Accreditation Scheme can be directed to Elizabeth Rhodes, Manager, or any member of the DRC.

The Scheme will be reviewed in 2007.

# A Decade of Mediation

IN October 1996 John Middleton, the Chair of the Victorian Bar Council, opened the refurbished Bar Mediation Centre in what was then Four Courts Chambers. Ten years on and the Mediation Centre in Douglas Menzies Chambers has seen thousands of disputants pass through its doors and has, without doubt, been the forum for hundreds of successful settlements of troublesome disputes.

The Victorian Bar now has 384 accredited mediators, including 12 who have been accredited as advanced mediators, more than 50 who nominated to undertake pro bono mediations for sporting disputes and more than 150 who are participating in the Magistrates' Court mediation scheme.

To mark the anniversary a small celebration is being held in early October 2006. Laurence Boulle and John Wade of Bond University, who have done so much to promote mediation in Australia and raise the standard of mediation in Victoria, will be present, as will Bill Martin QC, who for most of these ten years has been the Chair of the Bar's Dispute Resolution Committee. Laurence Boulle has been invited to speak on the national mediator accreditation proposals currently before the Federal government, which he has drawn up. Various other persons who have had a significant role to play in raising the profile of mediation in Victoria, including, of course, the wonderful staff at the centre, will be honoured guests and all accredited mediators will have the opportunity to attend.

David Levin QC
Chair, Dispute Resolution Committee

# Blind Man Picked Up for Dangerous Driving

A police officer has described how he pulled over a motorist who was veering across the road and found that he had no eyes.

Omed Aziz, who lost both his eyes in a bomb blast and is also deaf, was caught behind the wheel, with a friend sitting in the passenger seat giving him instructions on when to steer and brake, and how quickly to drive. Aziz, who also suffers from leg tremors, claimed he was perfectly safe and denied a charge of dangerous driving before being convicted in the Magistrates Court.

Constable Glyn Austin told the court he saw Aziz's white Peugeot 405 veer across a white hazard line before turning left. He and a colleague had already seen him successfully negotiate two roundabouts and a corner.

Constable Austin said that when he pulled over the car, Aziz, who wore dark glasses, was fumbling with the controls. When asked if he noticed anything about Aziz he replied: "I did — he didn't have any eyes."

"I attempted to speak to the driver. At that point the passenger leaned across and said, 'He's blind'."

After his arrest, Aziz, 31, confirmed that he was totally blind and had impaired hearing in his left ear as a result of injuries from an explosion in Iraq, before he moved to Britain. He said he had driving experience before being blinded, that he was suffering from depression about his injuries, and was "testing" himself by getting behind the wheel.

Timothy Gascoyne, for Aziz, said his client should be cleared because "the question is not whether his driving was dangerous, but whether being blind makes it dangerous".

"If my client hadn't been blind, he wouldn't have been arrested for dangerous driving."

Prosecutor Peter Love told the court that a blind man controlling a vehicle was "inherently dangerous".

Chairman of the Bench Richard Knight said: "We find he was aware of the real risk of driving with his injuries and therefore this amounts to dangerous driving." Aziz will be sentenced next week

Nick Britten, Birmingham

# The Unveiling of the Images of Women in the Law Portrait of Chief Justice Warren

On 4 September 2006 Her Honour the Chief Justice of Victoria, Marilyn Warren AC, and the Chairman of the Victorian Bar Council, Kate McMillan S.C. unveiled the portrait of the Chief Justice by Peter Churcher which hangs in the foyer of Owen Dixon Chambers West. The speech was given by the Chair of the Equality Before the Law Committee, Alexandra Richards QC.

An abridged version of that speech appears below.

THE "Images of Women in the Law" series had its genesis in the work and effort of the women barristers association who initially proposed the series to the Bar Council. Her Honour Judge Frances Millane was then convenor of WBA and under her guidance and subsequently as Chair of the Equality Before the Law Committee, the series saw its first two works. Her Honour may justly be called "the architect" of the series.

The Bar Council enthusiastically adopted and funded each of the works in the series pursuant to the proposals put to it by the Women Barristers Association and then the Equality Before the Law Committee (EBTL).

The EBTL sub-committee responsible for arranging this third portrait comprises the Solicitor-General, Pamela Tate S.C., who is a consultant to the committee, Mark Dean S.C. and Miguel Belmar Salas.

The Victorian Bar Council has become a leader in the profession and throughout Australia on its initiative in taking up recommendations from the Equality Before the Law Committee over the years. I instance two examples:

- The commissioning of the Equality of Opportunity Report in 1998, a work which remains an invaluable source of reference for studies on the progress of women in the law not only in Australia but also abroad.
- The Equality of Opportunity Briefing Policy which the Bar Council resolved to adopt in 2002 and which was enthusiastically promoted by the Attorney-General for the State of Victoria, the Right Honourable Rob Hulls MP, to government agencies in their briefing practices and later provided the forerunner and model for the national policy adopted by the Law Council of Australia on 28 March 2004.

I take this opportunity to acknowledge the work and dedication of the members of the Equality Before the Law Committee.

*Bar Council Chairman Kate McMillan S.C.*

They are sight unseen, traverse a great number of issues, prepare submissions and presentations and always bring diligence and thoughtful consideration to the

*Chief Justice Marilyn Warren with the artist Peter Churcher.*

*Michael McGarvie, Jacob Fajgenbaum QC and Chief Justice Michael Black.*

oft sensitive and sometimes controversial matters before them.

Images are important. Understandably, in the historical context, the portraits of barristers and judges all around our chambers had been exclusively of men. Look around on your way out: notice the array of photographs of past Chairmen of Bar Council hanging in the foyer of ODCE.

The silks' tapestries which hang high in the grand entrance foyer to Owen Dixon West were the gift of 86 practising silks in 1988. They were designed, and I quote, "to capture the spirit of the Bar and its activities". There is no woman in either tapestry.

Inescapably, the image projected by the artwork in our chambers was that of a profession in which only men are engaged — or, at least, in which only men achieve eminence.

For a very long time now, there have been women barristers — women silks — and women magistrates and judges.

It has taken some time for the "images" around our chambers to catch up with this reality. One may ask why is imagery important?

Walter Lippmann wrote in 1921 in his book, *Public Opinion*, "whether right or wrong, … imagination is shaped by the pictures seen … consequently they lead to stereotypes that are hard to shake."

In *Gender in the Mirror*, Diana Tietjens Meyers argues that the gender imagery produced by patriarchal cultures has a profound and deleterious effect on womens' capacities for self-determination. Cultural "figurations" — visual images, metaphors, stories and myths — work insidiously to transmit gender norms. They "colonise" women's psyches, impairing their powers of imagination, memory, introspection and expression — all abilities that are essential elements for the repertoire of skills which constitute autonomy.

Stereotypes are "mental cookie cutters" as Dr Orit Kamir observes which force a pattern upon a complex mass and assign a limited number of characteristics to all members of a group. Popular images which are shared by those who hold a common cultural mindset — they are the way a culture or significant sub-group within that culture, defines and labels a specific group of people. Stereotypes can have a useful function, for example, stereotyped characters in novels allow the storyteller the luxury of not having to slow down to explain the motivations for every minor character. But as Dr Kamir points out in her work the meaning and significance of stereotypes in popular culture:

> As human beings, each of us has a seemingly infinite number of choices about what kind of person we want to be. In fact, most of us choose to be several persons —

*Tony Howard QC and Justice Chris Maxwell.*

*Virginia Jay and Melanie Young.*

> efficient at the office, sloppy around the house, formal with our boss, … warm and loving with our parents [or children] — we enjoy wearing different personalities for different occasions. If we accept someones else's stereotyped image of what we ought to be, even if the image is a positive one, we sadly, perhaps even tragically, limit the choices that are such a wonderful part of our humanity, and confine ourselves to being narrow and standardised. We become less human and more like robots.

**The choice of Marilyn Warren as the subject of a portrait for Owen Dixon Chambers was obvious and the spontaneous and unanimous decision of the EBTL.**

The choice of Marilyn Warren as the subject of a portrait for Owen Dixon Chambers was obvious and the spontaneous and unanimous decision of the EBTL.

Your Honour's long and constant commitment to the advancement of women in the law, to their support and encouragement is roundly recognised and is valued highly. Your Honour's image as portrayed in Peter Churcher's work will serve generations of women to come, in inspiring their imaginations to undertake a career in the law.

Your Honour was appointed to the Supreme Court on 13 October 1998, and appointed Chief Justice on 25 November 2003.

At your welcome, your Honour expressed confidence that "together the judges and I will take the court to the heights it deserves, that you all seek". Your Honour has far advanced down that path.

Your Honour is an active leader of the Council of Supreme Court Judges and of the heads of courts in Victoria — receptive to new ideas, engaging with your fellow judges and the other heads of courts, and with government.

Your Honour's leadership is reflected in the 2004 Courts Strategic Directions Statement in which the courts and VCAT engage with government.

That statement articulates the need and justification for increased resourcing and support for the courts and VCAT in the context of competing demands in the government budgetary process. It does so also in the context of a clear statement of the fundamental importance of judicial authority and independence.

Your Honour is an active and able administrator, and continues to sit as a judge on the Court of Appeal and in the trial division. Your Honour sits in the Practice Court in regular rotation with the other judges of the trial division.

Your Honour is actively engaged in examining the workloads of judges, and has improved the conditions of associates and tipstaffs.

Your Honour and the President of the Court of Appeal are in dialogue with the Bar on reforms in the presentation of cases, and in case management within the court, and on other matters.

Your Honour, and your husband, Mick Healey, are personally engaged with the judges and their spouses and partners. Your Honour and Mick regularly attend legal and formal functions together, and we are all beneficiaries of the fine relationship that your Honour and Mick so evidently share.

Your Honour's personal commitment, courage, and sheer stamina are extraor-

*Alexandra Richards QC.*

*Justice Geoffrey Nettle and Justice Bernard Teague.*

*Vivienne MacGilvray, Mrs Michaelene Warren and Liam McIntosh.*

*Justice Marcia Neave, Justice Geoffrey Eames and Ron Merkel QC.*

dinary. In addition to your Honour's day job, your Honour is also president of the Victoria Law Foundation, chair of the Judicial College of Victoria, chair of the Council of Legal Education and chair of the Victorian Institute of Forensic Medicine. Your Honour is also patron of Victorian Women Lawyers and the Victorian Court Network. Your Honour assumed the role of Lieutenant-Governor of Victoria on 7 April 2006.

In just short of three years, your Honour's hard work and principled approach have made their mark throughout the whole of the Victorian community.

Peter Churcher was also an obvious choice as the artist for this portrait.

Peter Churcher won the Doug Moran National Portrait Prize in 1996, and first prize in the Kings School art prize in 1999. He has been six times a finalist in the Archibald prize. He is on the Australia Council Visual Arts & Crafts Board, and is an official war artist, appointed by the Australian War Memorial.

He has painted Sir Gustav Nossal for the National Portrait Gallery, former Premier Jeff Kennett for the Victorian Parliament, former Governor-General Peter Hollingworth for Parliament House Canberra, and former president of the Court of Appeal, the Honourable John Winneke for the court.

Peter is a keen portrait artist. His focus is on the human — to tell the person as they are. He believes that images of paint should portray the story at "face value" so to speak.

On behalf of the EBTL committee, I thank both her Honour and Peter Churcher and, of course, the Bar Council, for this important work.

# Launch of the Anglo Australas

The Victorian branch of the Anglo Australasian Lawyers Society was launched in the Essoign Club on 7 September 2006.

*Justice Garry Downes, founder of the Society; Chief Justice Black; and Rodney Garratt QC, President Victorian Branch.*

THE Victorian President Rodney Garratt QC introduced his Honour Chief Justice Black of the Federal Court who gave an excellent speech to mark the inauguration. His Honour noted the reciprocity between the three countries in the exchange of legal principles throughout the Common Law. Although in early days Australia and New Zealand relied heavily on English authority, the pendulum had swung somewhat and it was a common feature for the House of Lords and the English Courts to quote Australian judgments in their decision.

Justice Garry Downes of the Federal Court, the founder and a patron of the Society, then spoke outlining the aims of the Society following its establishment in 1998 in New South Wales.

The Society's aims are to maintain and enhance the long established and active relationship that exists between the legal profession in the three countries. It provides a platform for seminars and lectures on topics of current interest and for talks by distinguished speakers.

Membership comprises members of the Bench and Bar, solicitors, academics and others whose work brings them in contact with the profession. Naturally those in Australia and New Zealand who have worked, studied or taught in the United Kingdom will find the Society to be of great interest and also provide an opportunity to meet each other at gatherings arranged by the committee both in Australia and the United Kingdom.

The Australian Patrons of the Society are the Honorable Murray Gleeson AC, Chief Justice of Australia; the Honourable Phillip Ruddock MP, Attorney-General of Australia; the Honourable K.R. Handley AO, Judge of the New South Wales Court of Appeal; and the Honourable Garry Downes AM, Judge of the Federal Court. The New Zealand Patron is the Rt Honourable Dame Siam Ellas GNZM, Chief Justice of New Zealand, and the English Patrons are the Rt Honourable Lord Irving of Laing (former Lord Chancellor) and the Rt Honourable Lord Goff of Chieveley.

Following the success of the inauguration of the Society, Professor Adrian Zuckerman, Professor of Civil Procedure, University College, University of Oxford delivered a lecture entitled "Lessons for Australia from the Civil Procedure Rules — Successes and Failures of the Woolf Reforms to the Civil Procedure System in England on 19th September 2006. The Committee was very grateful to Chief Justice Marilyn Warren for providing the Banco Court of the Supreme Court as a fitting venue for the lecture. The lecture was a very lively forum for discussion of civil procedure and its reforms in England and Australia. Professor Zuckerman, after some short opening remarks, threw the floor open to discussion and soon questions and views of the Chief Justice and other members of the judiciary and Bar present

# ian Law Society

*Paul Hayes, Secretary of the Victorian Branch.*

*Solicitor-General Pamela Tate S.C.*

*Robin Brett QC, Paul Elliott QC and the British High Commissioner.*

*Richard Cook, Robin Brett QC and David Levin QC.*

flowed, ensuring debate rather than a sterile talk.

Professor Zuckerman was introduced by My Anh Tran, a member of the Bar and Committee, former student of the Professor at Oxford, and winner of the Clifford Chance Prize for Civil Procedure.

Members of the Committee later entertained the Professor at dinner where he espoused a fondness for Stonier's Chardonnay.

The Victorian Committee consists of Rodney Garratt QC, President; Paul Elliott QC and Rick Ladbury of Mallesons, Deputy Presidents; Honourary Secretary Paul Hayes; and Chris Caleo and My Anh Tran.

Those wishing to join should contact the Executive Officer, Malcolm Longstaff, at mlongstaff@ozemail.com.au or Paul Hayes at pjhayes@vicbar.com.au

# The Honourable Xavier Connor AO QC

Paul Bravender-Coyle

THE passing of The Honourable Xavier Connor AO QC, whose life was the subject of a fine and moving eulogy by Michael Crennan,[1] will be regretted by many.

Xavier Connor had — like PG Nash QC (who investigated torture in Uruguay),[2] Robert Richter QC (who investigated the secret trial of Mordechai Vanunu)[3] and other distinguished and eminent members of the Victorian Bar — played a prominent role in the protection of human rights.

In 1992 Xavier Connor was appointed by the International Commission of Jurists in Geneva to observe the closing stages of the subversion trials in East Timor of Gregorio da Cunha Saldanha and Francisco Miranda Branco.

These two men had been charged under the Anti-Subversion Law because of their involvement in organising a procession to the Santa Cruz cemetery in Dili on 12 November 1991. I had earlier taken witness statements from eye witnesses for a report into the incident.[4] According to the eye witness accounts, it began as the funeral of Sebastião Gomes, a student who had been shot dead by Indonesian troops the month before. During the funeral procession to the cemetery, participants unfurled banners, shouted slogans calling for self-determination and independence, and displayed pictures of the independence leader Xanana Gusmão (who is now President of East Timor). As the procession entered the cemetery, Indonesian troops opened fire on the crowd of some 2,000 unarmed East Timorese: 271 were killed and 382 wounded. Gregorio da Cunha Saldanha was among the wounded.

Xavier Connor very kindly agreed to change his previous commitments in order to observe the closing stages of the trials.

The Criminal Code provided that criminal proceedings were open to the public, and the Indonesian Delegation to the 48th Session of the United Nations Commission on Human Rights had informed the session that international human rights organisations would be permitted access to the trials. In addition, the District Attorney in Dili had assured the Legal Aid Institute — which acted for both defendants — that observers from human rights groups could attend.

Before applying for a visa, the Indonesian Ambassador to Australia was informed.

**The only issue for the embassy and the consulate was which of them would receive his application in order to refer it to Jakarta for a decision.**

When Xavier Connor went to the Indonesian consulate in Melbourne to apply for a visa, they told him that he would have to apply to the Indonesian embassy in Canberra.

However, the Indonesian embassy in Canberra said that they could not issue him with a visa: he would have to apply to the Indonesian consulate in Melbourne.

When he returned to the Indonesian consulate in Melbourne, they said that they could not issue a visa: he would have to apply to the Indonesian embassy in Canberra, and so it went on.

This caused him considerable inconvenience, as he told me that he had to cancel a function in Canberra and rearrange his other commitments.

We both knew that the decision whether or not to grant him a visa would not be made by the Indonesian diplomatic or consular officials in Australia, but would be referred to Jakarta where it would be considered at a meeting of senior officers of military intelligence of the TNI (the Indonesian army) which met every Tuesday morning. The only issue for the embassy and the consulate was which of them would receive his application in order to refer it to Jakarta for a decision.

It was painful to watch this gentle, quietly spoken elderly man as, with weary resignation, he trudged off into Lonsdale Street on another futile journey to the Indonesian consulate in Melbourne in what seemed like some bizarre episode from one of Franz Kafka's novels.

I thought how disgraceful it was for the new order dictatorship to force this elderly man to go through this charade.

As the weeks dragged by in this fashion, I contacted the Department of Foreign Affairs and Trade, and Rosemary Greaves from the Department's Indonesia Desk informed me that the Indonesian embassy had come up with a third explanation for not granting a visa: it was now too late to grant him a visa as the trials were now coming to an end, which by then was, indeed, quite true. As the subsequent report tabled at the 49th session of the United Nations Commission for Human Rights put it, he "had his visa application denied on the basis that by the time the authorities had dealt with it the trials would have concluded".[5]

The defendants were subsequently convicted of subversion under the Anti-Subversion Law for publishing leaflets, preparing for, and assisting in organising, the demonstration.[6] Gregorio da Cunha Saldanha was sentenced to life imprisonment and Francisco Miranda Branco was sentenced to 15 years years' imprisonment.

This contrasted with the light sentences — a maximum of 18 months — which at about the same time were handed down to members of the Indonesian military who were involved in the Dili massacre.

Both men were subsequently adopted by Amnesty International as prisoners of conscience. After independence they were elected to East Timor's new Constituent Assembly.

Xavier Connor will also be remem-

bered for the prominent role which he played in protecting the Honourable Justice Bongiorno when, as the Director of Public Prosecutions, his independence was under attack by the government of the day.

**Xavier Connor will also be remembered for the prominent role which he played in protecting the Honourable Justice Bongiorno.**

Bernard Bongiorno QC (as his Honour then was) had considered a proceeding against the then Premier, Jeff Kennett, for contempt of court because of public statements which he had made following the arrest of an alleged serial killer, Paul Charles Denyer, who later pleaded guilty to the murder of three women in the Frankston area in 1993.[7]

In 1993 John Elliott, a prominent businessman at the time, a director Elders IXL Limited and a former Federal President of the Liberal Party of Australia, commenced a proceeding against the DPP (Bernard Bongiorno) and the National Crime Authority alleging that the DPP was rendering advice to the NCA in relation to the alleged theft of some $66m from Elders with a view to charging him. He claimed that this was the culmination of a conspiracy involving the DPP, the NCA and others, and that the DPP was acting unlawfully in breach of his civil rights.[8]

It was alleged in that proceeding that Elliott had made representations to the relevant Minister in the Victorian Government to bring pressure to bear upon the DPP to abstain from laying charges.[9]

In December 1993, the Victorian Government released a draft Bill which, if it had been enacted, would have significantly reduced the independence of the DPP. According to Xavier Connor,[10] the legislation would have created a Deputy Director with powers greater in some respects than the Director. The Deputy's approval was to be required for a range of actions, including bringing contempt proceedings. The Deputy would have been able to veto critical decisions of the Director and, in the event of a disagreement between them, the views of the Deputy would prevail. It would, thus, have permitted a Deputy Director to override or control the DDP's decisions. The Deputy Director was to be responsible to the Attorney-General rather than to the Director. As Xavier Connor observed, it was "contrary to all ordinary notions of good order to make a subordinate directly responsible to the same authority as a superior and to give the subordinate powers of veto over the superior."[11] Xavier Connor, along with the then Chief Justice of the Family Court,[12] prepared a letter which expressed their concern about the effect of the proposed legislation on the independence of the DPP. The letter was subsequently signed by other judges and by senior lawyers.

The Victorian Government subsequently dropped its plans to curb the powers of the DPP: it abandoned its proposal for a Deputy Director and it modified its other proposals.

Notes

1. Michael J Crennan S.C, "Eulogy for the Honourable Xavier Connor AO QC", *Victorian Bar News*, No 136 (Autumn 2006), 25.
2. Including a visit to the curiously named Libertad (Liberty) prison.
3. In 1986 Robert Richter QC went to Israel to investigate the circumstances surrounding the trial of Mordechai Vanunu, an Israel nuclear technician who had been charged with treason for telling The *Sunday Times* newspaper that the State of Israel possessed nuclear weapons. The trial had been closed to the public. After Robert Richter's visit, the conditions of Mordechai Vanunu improved.
4. This was for a report by a US lawyer. Her report — "Tragedy in East Timor, Geneva, International Commission of Jurists", October 1992 — was subsequently tabled at the next session of the UN Commission for Human Rights in Geneva.
5. Ibid. The report concluded that in the experience of Xavier Connor, the Government of Indonesia had not complied with the spirit or the letter of the statement made at the United Nations Commission on Human Rights by the Chairman on 5 March 1992 which, inter alia, urged the Indonesian authorities to "facilitate access to East Timor for additional humanitarian organizations and for human rights organizations".
6. The Anti-Subversion Law permitted a prosecution and conviction of anyone whose words or actions could be construed as disruptive of public order, the state ideology (Pancasila), the government, its institutions or policies.
7. The DPP subsequently decided against charging Mr Kennett with contempt.
8. These allegations are set out in *Jarrett, Elliott and Camm* v *Seymour* (1993) 46 FCR 521; *Jarrett, Elliott and Camm* v *Seymour* (1993) 46 FCR 557; *Elliott* v *Seymour* (!993) 119 ALR 1.
9. Ibid.
10. X. Connor, "Victorian Director of Public Prosecutions" (1994) 68 ALJ 488–91.
11. Ibid at 490.
12. The Honourable Justice Nicholson.

# A Gift From the Family of the

In 1964 and 1965, the late Garrick Gray, a member of the Bar between 1958 and 1966, commissioned the artist, Mr Paul Fitzgerald AM, to paint the portraits of ten judges of the Supreme Court of Victoria.

In order of seniority, the judges were the Honourable Sir Edmund Herring KCMG KBE, the Honourable Sir Charles Lowe KCMG, the Honourable Sir Norman O'Bryan, the Honourable Sir Arthur Dean, the Honourable Sir Reginald Sholl, the Honourable Thomas W Smith AC, the Honourable Sir Edward Hudson, the Honourable Sir Robert Monahan, the Honourable Sir Douglas Little and the Honourable Sir Alistair Adam.

*Mrs Jean Gray and Mr Paul Fitzgerald AM.*

IN December 1965, Garrick donated two of the portraits, those of Sir Edmund Herring and Sir Charles Lowe, to the Victorian Bar. When the refurbishment of Owen Dixon Chambers East was completed, these portraits were located in the Neil Forsyth Room on the first floor.

It had always been Garrick's intention to donate the ten portraits to the Bar but this did not happen in his lifetime. Early this year, the widow of the late Garrick Gray, Mrs Joan Gray, spoke to Daryl Wraith about donating the remaining eight portraits to the Bar. Daryl spoke to Kate McMillan about the proposal and it was enthusiastically embraced by the Bar Council. The Gray family arranged for the paintings to be restored by Paul Fitzgerald and re-framed with small brass plaques placed on each frame identifying the judge.

On 22 August 2006, Kate McMillan hosted a ceremony to mark this generous gift to the Bar by the family of the late Garrick Gray. At the ceremony, the Gray family was represented by Mrs Joan Gray, her children and their families: Mr James Gray and Mrs Rebecca Gray and their three children, Mrs Julie Gosse and Mr Julian Gosse, Mr John Gray and Garrick's sister-in-law, Mrs Barbara Mayes.

Also attending the ceremony were the artist, Mr Paul Fitzgerald and Mrs Mary Fitzgerald, former Chief Judge of the County Court, Glenn Waldron AO QC and Mrs Waldron, representatives of the families of the ten Supreme Court judges and members of the Bar.

Glenn Waldron, who was a very good friend of the late Garrick Gray, spoke about Garrick and the portraits, and he also unveiled them. He spoke about Garrick's wish that the portraits remain together. This has been achieved with the ten portraits now on public display in the foyer of Owen Dixon Chambers East. They have been admired and commented upon by the passing parade of barristers and judges.

The Bar is very fortunate to receive such a gift and is most grateful to the Gray family for their generosity in donating the portraits to the Bar.

# Late Garrick Gray

*Mrs Judy Wardlaw and Mrs Jill Taylor.*

*Mr Robert Monahan and Mr John Monaham.*

*Mrs Julie Gosse, Mr John Gray, Mrs Joan Gray and Mr James Gray.*

*Mrs Ursula Whiteside and Mr Andrew Tulloch.*

*Mr David Sholl.*

*Mr Stephen O'Bryan S.C. and Mr Norman O'Bryan S.C.*

*Mr Glen Waldron AO QC.*

*Mrs Julie Gosse, Mr John Gray, Mrs Jean Gray and Mr James Gray.*

*Bar Council Chairman Kate McMillan S.C. addressing the guests.*

# Timor: Women, Education and its Future

The recent political and military turmoil in East Timor highlights the fragile social environment of the world's youngest nation and one of Australia's closest neighbours. In this environment, the challenges in the education of young adult women, teenagers and girls was the focus of a talk by Sister Alexandrina Pinto, a Timorese, Catholic nun, teacher and educator at the Essoign on Thursday 27 July 2006.

AS a Salesian Sister for 14 years, Sister Pinto was based at Fuiloro, East Timor. She speaks six languages. At Fuiloro, she is in charge of a training centre for more than 50 women aged 19–26 from the villages (many of whom have been victims of abuse) — with courses in computer and word-processing skills, dress making, sewing, basic health and hygiene and spirituality. In 1999, the Centre was completely destroyed by the Indonesian backed militia, and the sisters fled to the hills where they lived for two weeks without water and eating leaves from the trees. There are 70 Salesian sisters in East Timor working in schools and orphanages and parishes who are responsible for the education of thousands of young people.

Attendees at the breakfast included barristers, Crown prosecutors and members of the judiciary including the Honourable Judge Sally Brown, the Honourable Justice Cavanaugh, the Honourable Justice Bongiorno of the Supreme Court; their Honours Judge Howie and Judge Shelton of the County Court; and the Honourable Justice Marshall of the Federal Court.

Simone Jacobson, convenor of the WBA, welcomed the guests and introduced Sister Pinto by stating that the purpose of the breakfast was to achieve an understanding of the difficulties confronting young teenage and adult women gaining an education in East Timor society. Since independence, East Timor has struggled to achieve economic and social cohesion.

*Sister Alexandrina Pinto.*

In her address in response, Sister Pinto said:

> I hope you will be able to understand my English. I am very grateful for the opportunity to share with you something about East Timor. I am 41. I was born in the Mountain of East Timor in a village called Baguia. I was only 11, in 1976, when the Indonesians took over our Country. My father was killed by the Indonesian Military. I have been a Salesian sister for 15 years. I am based in Fuiloro in the Eastern end of the Island, closest to Australia.

We have a women's training centre there. We have courses in computing, dressmaking, basic hygiene and spirituality. We have 120 girls aged 16–22 staying with us. They are from villages at eastern end of the island and many of them have endured various types of abuse. We are not entirely self-sufficient with regard to food, however, we grow all our own vegetables. We aim to give the women skills to be self-reliant. What can I say in a few minutes about our nation?

No doubt you are aware of the recent internal unrest in our country. When I left Dili, less than four weeks ago, there were more than 150,000 refugees in the nation's capital. There were people who had had their homes destroyed or who feared their homes would be destroyed. They sought refuge mainly in church premises, schools, convents, parishes. The biggest refuge is at Don Bosco Comoro, in Dili, near the airport. There are more than 17,000 camped at the school grounds. The stench is very, very strong.

East Timor is the poorest country in Asia.

Our biggest problems are:

1. Malnutrition. People simply do not get enough to eat.
2. Health. Because people are malnourished they suffer from ill health — nearly everyone has malaria. More than 60 per cent have tuberculosis.
3. Education. More than 60 per cent of the population is under age 21. And more than 50 per cent of the people are illiterate — they cannot read or write.

4. Employment. Outside the government sectors; there are few jobs available.

We have high levels of unemployment. Too many people with too much time on their hands to cause mischief. I am conscious I must bring this short speech to a conclusion. Before the breakfast some of you asked "How can we help you"? I hope you will continue to walk with us, understand our problems as a neighbour and a young country and that you will pray for us. I never ask for money. Michael Lynch of the Salesian Missions Office transfers money to help us keep our schools going and assist us to help people themselves. Donations to the Salesian Missions Office are tax deductible. Thank you for your attention. Please pray for me as I will pray for you.

Sister Pinto then presented the WBA with a colourful shawl hand-made by the young ladies at the centre. It will be framed.

After questions and answers chaired by Fiona McLeod S.C., Simone Jacobson expressed a special thank you to Sister Pinto. She said: "We appreciate you coming today to give us your first-hand insights into the difficulties young women face in East Timor. We wish you all the best and look forward to keeping in contact with you. We have a small token of our appreciation today (gold pen). In addition, the WBA will be forwarding a donation to you for your centre, from the proceeds of today's breakfast."

*Judge Shelton, Justice Cavanough and Fiona McLeod S.C.*

*John Monahan and Michael Lynch.*

*Peter Vickery QC, Ron Meldrum QC and Judge Howie.*

*Attendees having breakfast with Sister Pinto at the Essoign.*

# Forging Futures at the Bar

On 14 August 2006 the Women Barristers Association (WBA) together with the Law Students Society of Melbourne University hosted a half-day conference to better inform women law students from all Victorian law schools about life at the Bar for women barristers.

THE conference was opened by the first woman to be appointed to the position of Solicitor-General in Victoria, Pamela Tate S.C., who highly recommended practice as a barrister and spoke of the achievements of women at the bar.

The first speaker at the conference was Alexandra Richards QC, who spoke about the work of the Victorian Bar's Equality Before the Law Committee (of which she is Chairman) and of the impact that her participation in such work had had on her life. A panel of women barristers, which included Simone Jacobson, Caroline Kirton, Samantha Marks and Kim Knights spoke and fielded questions from students about achieving a work/life balance. Following the panel session the students had an opportunity to chat with a woman barrister about the details of life at the Bar within a small group setting.

Caroline Kirton also spoke about the work of Australian Women Lawyers, including the national gender appearance survey released by AWL (see www.womenlawyers.org.au) and the national AWL conference to take place on 29–30 September 2006 in Sydney.

The final speakers at the conference were their Honours Judge Liz Gaynor of the County Court and Justice Betty King of the Supreme Court. Their Honours presented humorous and inspiring accounts of practice as criminal barristers and as judges presiding over criminal cases. All speakers at the conference were presented with a gift bag of chocolates from sponsor KoKoBlack.

The conference concluded with drinks in the Essoign where law students mingled socially with women barristers and judges. The event was a great success and the WBA hopes to host the conference for law students again next year.


*Pamela Tate S.C., Solicitor-General.*


*Alexandra Richards QC.*

*Samantha Marks, Caroline Kirton, Simone Jacobson and Kim Knights.*

*Law students in small groups led by barristers.*

# Jeff Sher's 70th Birthday Party

## Speech by Kate McMillan S.C. on Friday 26 May 2006 at a 70th Birthday Party for Jeffrey Sher QC

TONIGHT it is my great honour and privilege to speak on the occasion of the celebration of the 70th birthday of Jeffrey Sher QC.

Jeff was born on this day, 26 May, in 1936. He was admitted to practice on 1 May 1958. He signed the Bar Roll on 1 February 1961. He took silk in 1975.

Jeff has practised law for just over 48 years — nearly 3 years as a solicitor; over 45 years at the Bar — 30 of those 45 years as a silk. He is a silk in all States and Territories of Australia.

Jeff is one of the silks of renown at the Victorian Bar, indeed, he has a high profile Australia wide. He is a formidable opponent and a brilliant advocate.

Friends variously describe Jeff as tenacious, robust, no pretensions, hard working, bullet proof, warrior like, down to the task, charming, disarming, humourous, and in addition, from the women, as having youthful good looks.

In August 2003, 42 years after signing the Bar Roll, Jeff was annointed, along with others, as a Living Legend of the Bar.

On that night, Justice Alan Goldberg said that the legends were honoured because they exemplified the principles and standards for which a strong and independent Bar stands — integrity, hard work, ability and an absolute commitment to acting in their client's interests.

Alan described Jeff as having a well deserved reputation for utter competence and being relentless in the manner in which he runs his trials and, in particular, the way he cross-examines witnesses. His cross-examination was recently described as follows: "Sher hit a nerve, and without the benefit of anaesthetic, he drilled deeper."

Jeff's career of 45 years at the Bar is marked by its breadth and diversity,

*Diana and Jeff Sher QC.*

*Son-in-law Dr Ian Glaspole and daughters Dr Julia Sher and Kate Richards.*

*Young Jeff Sher — QC in the making.*

nowadays something that very few at the Bar could emulate.

From day one at the Bar Jeff did both criminal and civil work. He moved between the criminal and civil jurisdictions with ease. His practice encompassed a wide range of areas and his practice took him to all courts from the Magistrates Court through to the High Court.

On the criminal side, he appeared in rape cases, murders, stabbings with intent to murder, attempted murders, conspiracy to murder, larceny, drink driving, dangerous driving, culpable driving, armed robbery, bribery, arson, assault and false imprisonment cases.

Some of his high-profile criminal matters were the murder trial of painter and docker Billy Longley and that of Maria Tramonte in Geelong.

He was briefed in the major personal injuries cases for plaintiffs winning in 1978 the highest damages award made by the Victorian Supreme Court for personal injury. This was followed shortly after with the highest settlement awarded to a plaintiff under the age of 18 in Victoria. By

*Kate McMillan S.C.*

*His Honour Judge Leo Hart QC.*

1983 Jeff was described as the only barrister to have got more than a $1 million jury verdict in a personal injuries case in Victoria.

On the civil side, he appeared in all types of matters — corporate, sporting, estates, for newspapers resisting attempts to silence the press, in Royal Commissions and inquiries. He developed a defamation practice unequalled by anyone at the Bar — the *Wainer* libel case, the Jeff Kennett defamation trial and Popovic against the *Herald Sun* are just some that come to mind. There are many, many others.

In the commercial jurisdiction, he appeared in all the high-profile commercial cases: the NCSC inquiry into the cross shareholdings between Elders and BHP, the Battle between Murdoch and Holmes a Court for the Herald and Weekly Times Ltd, Meagher QC against

Packer, Gutnick against Dow Jones, Cathy Freeman against Bideau, Philip Morris against an anti smoking lobby class action, Optus Communications against News Ltd, Air New Zealand against the Ansett administrators, the Shane Warne doping case, NRMA against Heydon, the Village Roadshow case and the list goes on.

Somewhere in amongst all of these cases, he made time to appear as senior counsel for the Northern Land Council. These cases included the challenge by the NLC in the Kenbi land claim in the Cox Peninsula area, the land claim by the Jawoyn Aboriginal people for the Katherine Gorge and the challenge to the mining agreements for the Ranger uranium deposits.

Not only did he run these cases for the Northern Land Council but in his spare time he broadened the musical repertoire of his colleagues beyond the usual rugby songs by introducing them to his own rendition of "Hava Nagila" to the entire cocktail bar in the Paraway motel at Katherine. He has refused all invitations to make it an annual event!

There are many anecdotes to tell about Jeff but he has expressed a fear that these anecdotes may be defamatory. Let me say this. Whatever I say tonight is true and, Jeff, in any event undertakings have been extracted from everyone here tonight that they will not appear for you. However, never fear, I am told that Geoffrey Robertson QC cut his teeth on defamation cases and he might be available for you.

It would be remiss of me in speaking about Jeff to overlook his known failing. All would agree that Jeff's temperament is entirely unsuited to mediations. For some reason, when Jeff attends mediations a switch is thrown in Jeff's mind. He performs in a most peculiar manner. It usually has a sorry ending – he puts on his coat, shoves his chair back under the table and walks out muttering, "I'm not very good at this." I think it's called "throwing a wobbly".

In his early days, Jeff's communication skills were not quite as well developed as they became later on in his career. Whilst a junior on circuit, a nervous witness once asked Jeff what he should do when he was in the witness box. Jeff's advice: "Just watch what everyone else does." The nervous witness went into the box. The tipstaff called "silence" in the court. Jeff's witness looked up at Jeff and yelled "silence".

By the time Jeff was being briefed by well-known businesspeople, his communication skills had improved dramatically. In one particular matter, having advised that there was no cause of action, Jeff was challenged as to why his signature would not be endorsed on a statement of claim. He leant back in his desk chair and said slowly and clearly: "Briefing a barrister is not like ordering a pizza. You can't just get what you want."

Many of Jeff's cases have been written up in the newspapers. One particular case deserves a mention. The trial of *Gutnick* v *Dow Jones* was heard, at first instance, before Justice Hedigan. Jeff appeared for Gutnick, and Geoffrey Robertson QC, of Hypothetical fame, appeared for Dow Jones.

**The consistent theme of all the invitees that I have consulted is that you have been much more than just a fellow barrister — you have been a good friend, a mentor and an outstanding leader of the Bar.**

The media were all over it and here is why — "Hypothetically, it had everything … everything and more. Because what they came for, packing out Supreme Court six with a standing-room only crowd of silks, solicitors and stockbrokers, was this: a clash between two of Australia's greatest barristers. On the one side, out of London, Geoffrey Robertson QC, the silver-maned and beautifully modulated expatriate champion of human rights. On the other side, out of Melbourne, Jeff Sher QC, with a reputation as a clinical merciless courtroom interrogator and infighter. It was the equivalent of a heavyweight championship, the thriller in a manila folder ..."

Melbourne silk David Bennett QC, writing about the case for the Bar News, said he was reminded of Sher in his early days sitting at a tiny desk beside the fireplace in the chambers of Voumard QC at Selborne Chambers. Then, Sher looked like a young blackbird ready to snatch a worm. On this day, Bennett said that Sher looked as though he had eaten the worm, had developed a taste and was ready for more … Jeff was hungry for worms.

Now Jeff was very fair to Robertson. He warned him clearly about the strength of the Dow Jones case. He told Robertson on many occasions that his case was "dead in the water"; "dead in the water in Victoria"; "effectively dead in the water in Victoria" and "to repeat a phrase I used in argument yesterday on this issue they are dead in the water".

The urbane Robertson resisted and fought back all the way: "In particular, I need to … show Your Honour that the whole argument … is not only wrong but to use the phrase that seems to be much in use at the Victorian Bar, 'dead in the water'."

History records that Robertson's "hyperbole out of London" was truly dead in the water, with a very sweet victory in the High Court going to the blackbird.

Jeff, as you know, Diana has arranged for most of your family and good friends from the legal profession to be present this evening to celebrate your birthday with you.

This occasion gives us an opportunity to let you know just how much you mean to all of us.

The consistent theme of all the invitees that I have consulted is that you have been much more than just a fellow barrister — you have been a good friend, a mentor and an outstanding leader of the Bar. You exhibit both the tenacity and toughness that we admire, the skills we all hope one day to display, and, perhaps, most importantly, an innate sense of justice that drives you.

On the night of the Living Legends dinner, (and after you had finished your lengthy mobile telephone conversation with the Attorney-General) you said that it had been a pleasure and a privilege for you to spend your working life amongst the quality and independence of the barristers who constitute the Victorian Bar.

For our part, it has been a pleasure and a privilege for us to spend the greater part of our working lives with you as a good friend, mentor and leader of the Bar. Be in no doubt — you are very much a loved son of the Victorian Bar.

And, Jeff, just in case you harbour any thoughts that your birthday is an excuse to think about retiring, let me disabuse you of such a notion immediately. You are a barrister's barrister and, as far as we are concerned, you are not yet done at the "coal face".

Tonight we not only celebrate your 70th birthday, we also celebrate your 45 years at the Bar and your 30 years as a silk.

I ask you to raise your glasses for a toast to Jeffrey Sher QC.

To Jeffrey Sher QC

# The Great Debate:
# ‘Are Judges Human?’

## Held at the Essoign Club on 31 August 2006

IT is a question that is asked regularly — “Are Judges Human?” A stinging rebuke, the loss of the unlosable case, do not pass go, go straight to gaol, a lack of reason, get on with it — these are the often court reactions that cause the question to be posed. But are judges that inhumane? After all some of them (a decreasing number) used to be barristers, in a previous more human life.

These were some of the background sentiments to the Great Debate. Two teams would go neck to neck to affirm or disaffirm the proposition, to be adjudicated by a panel of three, two of whom were members of the judiciary.

The idea was that of Chairman Kate McMillan (as she then was), and was put into place by the tireless efforts of Will Alstergren. There was much debate as to who would debate. Eventually after some late changes in selection, the teams were: for the affirmative — Caroline Sparke, Jerome Ruskin QC and Ross Gillies QC, for the negative — Rachel Doyle, Judge Elizabeth Gaynor and David Curtain QC. The moderator (i.e. the Master of Ceremonies and time keeper) was the newly appointed Justice John Middleton, the adjudicators being Justice Simon Whelan, Magistrate Lisa Hannan and Paul Elliott QC.

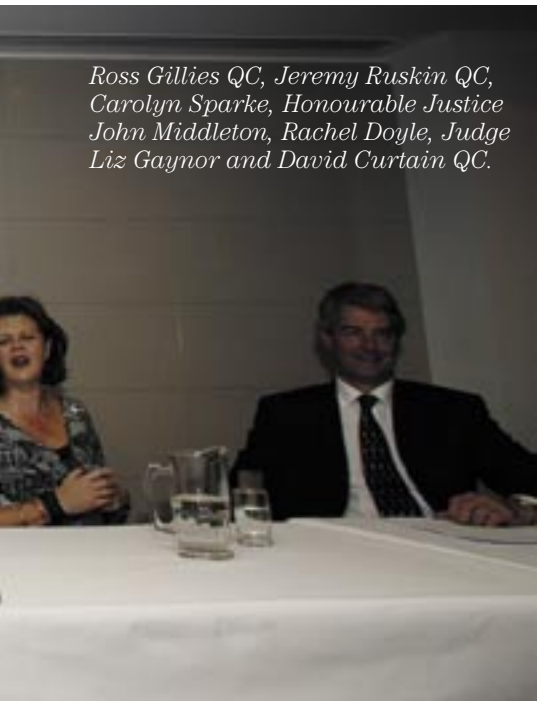
Kate McMillan hosted the evening before a full house in the Essoign Club, who warmed up with dinner and a few wines before the action began.

“Chatham House” rules applied, as it would be hard to capture the humour of the debate and the politically more correct may not have approved of the exact words of the debaters in hard cold print. There were not many of these folk amongst the audience who thoroughly enjoyed the night.

The affirmative, sticking up for judges, asserted that because Judges had virtues and vices they must be human. Caroline Sparke led off, quoting 1701 American Legislation and gave examples of the humanity of the Bench, by virtue of the fact that some had children of their own, some were the children of judges, and some were former barristers. The theme was further developed by Ruskin QC who asserted that he would use the Bible, examples and legal authority to prove the case before talking about himself and his relationship with Jeff Kennett. Ross Gillies QC discussed the seven deadly sins and found the judiciary to be holding a full house. He also described Mr Justice Middleton’s truly human skills to make a fee book talk, talk and even dance with the aid of a golden pen.

The negative was ably led out of the blocks by Rachel Doyle. Judges were not human at all. They came from the same gene pool as barristers. Each court was manned by a different sub-species of barristers, each with different foibles not of a human quality. A very amusing speech.

Judge Gaynor argued that once she had become a judge she had ceased being a human and had transformed into a celestial being — St Elizabeth of Gaynor. She



*Ross Gillies QC, Jeremy Ruskin QC, Carolyn Sparke, Honourable Justice John Middleton, Rachel Doyle, Judge Liz Gaynor and David Curtain QC.*

*Kate McMillan S.C.*

*Carolyn Sparke.*

*Moderator Justice John Middleton.*

*Adjudicator Paul Elliott QC.*

*Rachel Doyle.*

*Jeremy Ruskin QC.*

*Judge Liz Gaynor.*

*David Curtain QC.*

*Adjudicator Magistrate Lisa Hannan.*

*Adjudicator Justice Simon Whelan.*

had acquired the virtue of St Elizabeth of Hungary, and proceeded to sing songs of adulation to the Court of Appeal, the Chief Justice and the Chief Judge. She made life on the County Court seem far from dull. Finally David Curtain ably summed up the negative case and rebutted the opposition. As usual he was polite to many in the room and indeed referred to the Oxford Dictionary in support of the case.

Then it was the turn of the adjudicators. The debate was strictly judged according to the rules of the Debating Association of Victoria (DAV). Each speaker was marked on Matter, 40 marks, Manner, 40 marks and Method 20 marks, a total of 100 each. Paul Elliott QC adjudicated each team as a whole on Matter, Justice Whelan on Manner and Magistrate Hannan on Method. It was neck and neck, down to the last .75 for use of cards and shiny shoes. Finally Lisa Hannan in true magisterial style, found on the one hand and then the other for the debate to be a draw.

Justice Middleton moderated in his inimitable style, adding greatly to the humour of the debate. The evening was a fitting finale to Kate McMillan's term as Chairman, and it is to be hoped that there are more debates to come.

# What's Good for the Goose …

Graham Fricke QC

A RAPE IS A RAPE IS A RAPE … That's what Gertrude Stein might have said. But her proposition that "a rose is a rose is a rose" was more accurate. The conventional image of a rape as a violent act committed by a predatory man upon a female stranger is simplistic. There are many variations on the theme which fall outside that stereotype.

Non-violent rapes occur quite frequently. Of course the threat of violence is often sufficient to induce the victim to submit. Some opportunists have not even needed to bother with a threat: there are recorded cases of men who simply climbed into bed with sleeping women and had their way.

Many rapes, possibly most, involve people who know each other. The incidence of date rapes seems to be increasing. And the pressures used to achieve non-consensual sex are often subtle and sometimes ingenious. Most victims of rape are women. But that is not invariably the case.

There are even sub-categories of rapes in which men are the victims. Male-male rapes occur from time to time. Within a month or two of each other, I encountered two such rapes on the County Court Bench. Some studies suggest that the incidence of homosexual rapes in prison is much higher than in the general community. In one survey, 21 per cent of prisoner respondents reported some form of homosexual attack during their incarceration. The "conventional" form of a male–male rape involves anal penetration, but other types, such as oral rapes, occur from time to time.

We have seen some instances both here and overseas of adolescent boys being persuaded to have sex with mature female teachers. Even if the under-age pupil consents, the teacher will of course be guilty of statutory rape, for consent is no defence to such a charge.

A more intriguing phenomenon is the rape of a mature man by a woman. Is this possible, you ask? The answer is that it is quite possible, both legally and physiologically. The law in Victoria is quite clear. After defining rape in conventional terms, a section of the Crimes Act provides that a person "also commits rape if he or she compels a male person … to sexually penetrate the offender or another person".

*Graham Fricke QC.*

**Most victims of rape are women. But that is not invariably the case.**

What about the physiology? Female-male rapes have been depicted in fiction and in newspaper reports. They feature in the recently released Australian movie, *The Book of Revelation*, in which three women abduct a man in order to indulge their pleasure. The film is based on a novel by Rupert Thomson. In a Victorian case a few years ago, a man claimed compensation under the Crimes Compensation Act on the basis that he had been raped by a woman. I was sceptical of his story. How could he have had an erection if he was under threat? I have since read that erection is an involuntary process and that his story is quite feasible. Albert Kinsey, of the famous Kinsey report (Sexual Behaviour in the Human Male), said so more than 50 years ago. His findings have been endorsed by more recent researches.

According to Michael Scarce (*Male on Male Rape*, p.59) "States of intense pain, anxiety, panic, or fear may cause a spontaneous erection and ejaculation in some men." (See also G Mezey and M King, *Male Victims of Sexual Assault*).

A perusal of a few websites on "male rape" supports the proposition that an erection — or even ejaculation — is consistent with lack of consent, whether we are talking about male–male rape or female–male rape. Some of those sites list as "myths" the suggestion that an erection means that the victim "really wanted it". I am reminded of a date rape case over which I presided some years ago. The accused claimed that he believed his resisting former girlfriend was consenting to his uninvited fondling because her vagina was moist. The same misconception can attend a male rape in which the victim has an erection and this can exacerbate the feelings of guilt, confusion and sexual identity crisis experienced by the victim.

Another myth is that male victims do not suffer anything like the same emotional trauma as female rape victims. They may not have the same fear of becoming pregnant, but humiliation and chronic depression are frequent sequelae of rapes of men. So the depiction of severe post-traumatic depression in *The Book of Revelation* is by no means far-fetched, despite the chortles of the police to whom the victim reports his experience.

# Mentor

THE arrival of a new group of aspiring barristers brings this word to mind. There was a time when we were unenlightened and readers read with *masters*. That word was conceived to have sexist overtones and was abandoned; consigned to the scrap-heap of undesirable words.

This was misguided, although well-intentioned. *Master* in this sense has nothing to do with the sex of the person referred to, as a Master of the Supreme Court knows. A Master's degree in any discipline is equally available to women as to men. And Magistrates can be men or women notwithstanding that *magistrate* comes from the same etymological root as *master*.

*Master* is derived from Latin *magister* and French *maitre*. Its central sense is *a person in a position of authority*. Although it was originally skewed in practice to males, that is only because social arrangements originally favoured males for positions of authority. In guilds and in the academy men held sway: women were not admitted until relatively recent times. Since these arrangements altered, the degrees became available to both sexes, hence its unembarrassed use in academic degrees. It is interesting that the commonest university degree, the Bachelor's degree, is also available to women and is used and referred to without any sense of contradiction, yet *bachelor* in its other use is specifically male.

*Bachelor* is a curious word. Its origins are obscure, and its sense development is also obscure. The Oxford English Dictionary concludes that it comes originally from *baccalaria*, a division of land. This in turn is thought to have come from *vacca*, Latin for cow (from which, of course we have *vaccine*, thanks to Edward Jenner's work on cow pox). Allowing that there are layers of speculation in all of this, it is clear enough that the earliest meaning of *bachelor* was a young knight, not yet old enough to have his own vassals and standard. Although specifically male, the link to land and ownership of land is plausible. From this origin we have the *Knight Bachelor*, a "knight of the lowest but most ancient order; the full title of a gentleman who has been knighted (without belonging to any one of the specially named 'orders')". Relevantly for present purposes, it had at its heart the notion of being junior. By the 14th century, it referred to junior members of a trade guild and by natural extension a junior degree in an academic discipline. Both in the guild and in the University, attaining the rank of master was the goal.

In order to attain the rank of master in a guild, the aspirant would have to produce a piece of work which demonstrated their mastery of the craft. This was called a *masterpiece*. The construction of the word follows the German *meisternstuck*. *Masterpiece* is used differently now, and generally refers to the finest piece of work by an acknowledged master, rather than the graduation piece to become a master.

Trade guilds sometimes have the word *mystery* associated with their names, for example the Mystery of Stationers. And the decision of the House of Lords reported at [1992] 1 WLR 1072 is the *Wardens and Commonalty of the Mystery of Mercers of the City of London* v *New Hampshire Insurance Co*. In this use, *mystery* means art or handicraft. It is a variant form of *mastery*. It comes from the medieval Latin *misterium*, which is an altered form of *ministerium* resulting from confusion with *mysterium*. *Mysterium* led to mystery in its orthodox meaning, but it is easy to see how the exclusive and secretive practices of the guilds gave the impression that their *mastery* was also a mystery.

In any event, there is nothing inherently male about *master*, except the effect of constant association. Perhaps we are lucky that university degrees have retained true to their etymological origins, or we would have a Spinster of Laws and a Mistress of Arts.

Or perhaps another word as a female equivalent of *bachelor* if there were one. *Spinster* is a word with a bit too much baggage. Many word pairs exist to designate the male and female equivalents

in occupation or condition. Sometimes the female word acquires unhappy connotations or taboos: it is an artefact of a structural unfairness in our society over a long time. So: *masculine – effeminate*; *master – mistress*; *sir – madam*; (both *mistress* and *madam* have available pejorative applications, which the male equivalent has not); *dog – bitch* (until the beginning of the 20th century, the female of a dog was called a *slut*). The colloquial words for naughty bits of men may be used with impunity; the corresponding words for equivalent female bits are taboo. And there is *bachelor* and *spinster*. To be a *bachelor* has no adverse connotations, but *spinster* is not so blessed. *Spinster* has an odd history. It ought to be a person who spins: in fact it once was. Originally, a woman (sometimes a man) whose occupation it was to spin, it also referred to spiders and some caterpillers, because of their web-making. This meaning was rare by the early 19th century although it was still in use into the early 20th century. The use of *spinster* as meaning an unmarried woman is recorded as early as 1380, and was officially recognised as a legal designation by 1617. In the sexist way of things, it acquired unfavourable overtones, so that by the 18th century it referred especially to women who remained unmarried beyond the expected age of marriage, and also meant an old maid.

But I digress. In the 1990s the Victorian Bar decided to abandon the designation master (in England: *pupil-master*) in favour of the supposedly sex-neutral *mentor*. *Mentor* is now a very common expression in many areas of activity; every busy person is called on to be mentor to someone just starting in the relevant field of endeavour.

Mentor was an Ithacan noble, and a friend of Odysseus. When Odysseus went off on Trojan duties, he left Mentor in charge of his son Telemachus. In 1699 Francois Fenelon wrote *The Adventures of Telemaque* in which Mentor had a starring role. The book was popular, so Mentor naturally came into use meaning one who advises or protects. Johnson (1755) does not recognise the word.

It is an interesting paradox that *Mentor* is specifically male (since Mentor was a man) whereas *master* is inherently sex-neutral.

*Master* has several natural reciprocal words according to circumstances: *master – servant*; *master – apprentice*; *master – pupil.* The change to *mentor* calls up the need for a reciprocal expression: if you are my mentor, what am I? One common answer is *mentee* which is certainly wrong but understandable: dropping the capital initial, *mentor* looks like an ordinary agent-noun, on the pattern of *editor*, *advisor*, *sailor*, *sponsor*, *vendor* etc. Now it is true that some people might refer to an *advisee* or *vendee* (American lawyers do these things, but they do other abominable things as well) but we do not talk of a boat as a sailee, or a newspaper as an *editee*, or a football club as a *sponsee*, yet that is the pattern implied by *mentee*.

But if we don't like *mentee*, what else is there? It seems, on a careful search of the OED, that there is no English word which denotes the reciprocal relation to a mentor. The nearest is *protégé* which, although French, is almost naturalised. The OED's first quotation for it is from Sheridan in 1778, but it can hardly be considered a naturalised English word yet, because it does not allow any grammatical variants and still carries the French accents and pronunciation. Perhaps it is an appropriate reciprocal, because mentor in this meaning was popularised by a French author. *Protégé* is the French past participle meaning protected and serves the purpose adequately. Given all the riches of the English language, the need to reach into French to find a reciprocal for *mentor* is even more surprising than our need to borrow *Schadenfreude* from German.

Another available reciprocal is *pupil*, but many would not accept it. *Pupil* is also drawn from French *pupille*, but is fully naturalised. It crossed the Channel in the 14th century and meant originally an orphan who is a minor, and hence a ward. A ward is someone under the care of another, which is a fair synonym for *protégé*.

So, *master* is banished because it is perceived as sexist, although it is not; *mentor* is adopted in preference, although it is necessarily sexist; the reciprocal is either a recent French word meaning protected, or else *pupil* which means protected but is not understood that way.

All of which serves to demonstrate that we will have our way with words no matter what the dictionary says.

Julian Burnside QC

# The Power and the Passion …

Matt Fisher

As a diverse group of individuals, we walked onto a dry, hard and mostly unprotected Western Oval. It soon became apparent that the variety of ages, sizes and abilities was overshadowed by an incredible and obvious sense of enthusiasm and camaraderie.

Within a couple of hours, we would leave that inhospitable arena of battle as overwhelming victors. It was as though the Full Bench of the High Court watched the game from a cracked and weathered bench deep in the E.J. Whitten Stand and, having assessed our submissions by hand and foot, delivered a crushing 7–0 judgment in our favour.

On 24 June 2006, the inaugural Reclink Frank Galbally Football Cup between the Bar and Solicitors was played. The match superseded the Reclink Legal Football Challenge Cup (incidentally also won by the Bar) with Reclink remaining the beneficial charity. It is an organization that supports and assists disadvantaged and downtrodden youth, particularly through the involvement of sport and recreational activities.

We were guided by legendary coach Allan Jeans. His pre-match address was something to behold while his advice and insights as the game progressed inspired us all. It was obvious why he was so successful at the elite level with few peers. Allan's comments and his style of delivery will be remembered for some time — we are very grateful for his time and effort.

By the end of the day, about $20,000.00 had been raised — more than double that raised in 2005. Fittingly, the Bar won with a score that more than doubled that of our opposition. Given that this was only the second confrontation between the two teams in the past decade or so, it was a little disappointing for all involved that the match was not slightly closer. It was like commencing a plea in mitigation focussing on sparing your client an immediate custodial sentence and leaving court with a good behaviour bond!

Both teams had fewer numbers than last year with about 20 players each. Consequently, most players had to play all of the game. It was feared that given our more "senior" years (on average), slightly fuller figures (by and large) and lack of physical and match fitness we would struggle, particularly towards the end of the game.

It is a credit to those who represented the Bar that, to a man, everyone contributed to our victory. What makes the win even more remarkable is that the team had never trained together and only about half had played together once last year. We played like a team that had been together for years.

Some individual performances are worthy of mention. The best player award was presented to James Gorton who had plenty of possessions, kicked goals and skilfully set up numerous scoring

*The big men fly.*

opportunities. Dermott Dan provided outstanding drive from the centre with numerous clearances, and in the process demonstrated that he still possesses the skill and ability that made him a force in days gone by. He was assisted beautifully by Justin Brereton who dominated in the ruck all day. Tony Burns added experience and a physical presence that intimidated the opposition. Chris Winneke went in hard all day and from the wing ensured that our forwards were put in the best position to score.

Once again, Mordy Bromberg proved that he can outplay men years younger and showed that he still has an uncanny ability to get possessions and dispose of the ball as though he was still playing at the elite level. At centre-half forward, Shane Lethlean was terrific and his superior marking and kicking contributed to our dominance.

There were a number of multiple goal scorers, however two deserve mention. Ben Ihle was simply unstoppable in the forward pocket and despite an often difficult breeze, was deadly when kicking for goal. Sebastian Reid lined up at full forward and with memories of previous playing days flooding back, took superb marks and kicked some amazing goals. David O'Brien put fear into a number of the Solicitors with his hardness at the ball and sensible use of his body. Put simply, the Solicitors had no answer to our aggressive clearances from the centre bounces or our ferocious firepower up forward.

Given our dominance, the boys down back were rarely troubled. On the few occasions the Solicitors managed to get inside their forward 50 they struggled to score. Duguld McWilliams at fullback provided unmatched size, strength and skill. He was assisted by Michael McGrath and Philip Crutchfield who courageously put their bodies on the line all in the name of defence. Andrew Robinson was a fine contributor all day in various positions.

Centre-half back Dan Christie was in most passages of play when the ball drifted towards the Solicitors' forward line. Along with Mark Gumbleton (fresh from the Bar Readers' Course) and the enthusiastic, experienced and wise Paul Santamaria, he ensured that the ball was moved quickly and efficiently into our attacking zone. Many scoring opportunities were created by their tireless work.

John Dever yet again put his mature body on the line. John managed to keep his opponents honest until the very end and, despite suffering a hamstring injury late in the game, he remained on the paddock. His son, Michael, started the game with fewer games under his belt than most. He was the epitome of courage. As rover, he threw his body into everything and for his trouble received a number of heavy knocks. Michael deservedly won the award for our most courageous player.

Any Solicitor involved in the game will probably tell you that the exact score at the end of the day is not important (as if figures are meaningless!). For the record, the final siren saw the Bar win by 58 points (16.10 to 7.6), quite possibly the biggest winning margin between the teams in the modern era. The margin would have been greater had we not relaxed and taken the foot off the gas in the last quarter. By the final siren, a few hundred people had witnessed what can only be described as an exceptional team effort.

Our gratitude is owed to many. Special thanks, however, should go to Michael Green for his encouragement, financial support and assistance in organising certain aspects of the game and to John Dever for his support both financially and physically.

Once again, I was fortunate to be part of a group that, for a few hours on an overcast winter's afternoon, played footy as though it was their last game with little or no regard for their own physical welfare. For some it will be their last game. For others, it provided a taste of competitive football or reignited memories of former glory days that will see them pull on the boots again. I was proud to be part of that team.

*The men in black — victors again.*

*Allan Jeans addresses as only he can.*

*Exhausted but elated (and a little thirsty ...)*

*Although competitive, the solicitors had no answer to the dominance of the Bar.*

# Justice in Tribunals (2nd Edn)

**By J.R.S. Forbes**
**Federation Press, 2006**
**Pp v–liv; 1–353; Index 354–378**

*JUSTICE in Tribunals* was first published in 2002 and the second edition is in the same format, incorporating the developments since then, and has increased in size by approximately 20 per cent.

The text considers both tribunals established by statute, and the ones that exist as a result of a consensus; such as those in sporting or social organisations, political parties and churches, and described as "domestic tribunals". It explains the limitations in relation to remedies available for the domestic tribunal, noting that because of the absence of an empowering statute, judicial review of a domestic tribunal's decision is only available if the grievance is justiciable as a civil cause of action in contract, breach of trust or unreasonable restraint of trade.

The scope of action is considered in non-livelihood cases and the "club case" of *Cameron* v *Hogan* (1934) 51 CLR 358 where, save for the administration of property, there was no authority for the court to intervene and the grievance was dismissed as non-justiciable.

The text then comprehensively explores the development of the jurisdictional basis to at least partially bypass *Cameron* v *Hogan* by the "Buckley doctrine" in *Buckley* v *Tutty* (1971) 125 CLR 353. In *Buckley* it was held that where a rule unreasonably adversely affected a person's economic interest, it would constitute a "restraint of trade", and would become justiciable. The doctrine's correlation to s.45 of the *Trade Practices Act 1974* (Cth), and the earlier United States case of *Falcone* v *Middlesex County Medical Society* (1961) 170 A 2d 781 (Supreme Court of New Jersey), which adopted a similar approach, is also examined.

The principles of natural justice receive extensive attention, not only the right to be heard, but the onus of proof and the extent to which a tribunal is bound by the rules of evidence, a person's right to legal representation, and the way procedural matters become relevant to the provision of natural justice. A chapter is devoted to apprehended and actual bias. The "growth area" of commissions of inquiry and their judicial oversight to ensure natural justice is afforded to witnesses, also receives extensive attention.

Justice in Tribunals is a compact text, in hard cover and will be an invaluable addition to the library of those who wish to gain a complete understanding of administrative law.

C.J. King

# Law for Directors

**By Geoffrey Gibson**
**The Federation Press, 2003**

GEOFF Gibson has achieved a rare, perhaps unique, feat in his short treatise on the law for company directors. He has written a book about the law of corporations which is short, practical, engaging, and, so far as it goes, informative. It even enlivens key points in the journey with amusing references to (inter alia) the Napoleonic wars, Wagnerian operas and the reign of Queen Victoria.

The book, it must be understood, is said to be written for people who are not lawyers, but in fact are directors. Nonetheless, it would provide a useful primer for lawyers who are not intimately acquainted with the law as it pertains to company directors and wish to become so.

The book is divided into two parts. The first part, in chapters 1 to 19, deals with aspects of corporations law of particular importance to company directors. This includes such matters as corporate governance, the appointment and remuneration of directors, the rights and liabilities of directors, insurance, accounting and disclosure requirements, meetings, prospectuses, related party transactions, insider dealing, oppression, takeovers, insolvent trading, administration and liquidation, and termination.

While these chapters are relatively short, there is a more detailed chapter (chapter 5) dealing with directors' duties, and a detailed chapter (chapter 6) dealing with particular directors. Chapter 5 contains a number of short and interesting case studies which might prove instructive for first-time directors. Chapter 6 includes discussion of delegates, nominees, competitors, groups, independence, executives, and chairmen.

The second part of the book provides a short overview of the Australian law as it may be relevant to the discharge by directors of their duties. The legal system itself is considered, as is the status of companies within that system, competition law, the law of confidentiality and the general principles of equity, the law of contract and intellectual property, the Australian system of industrial relations, as well as intellectual property, media law, misleading and deceptive conduct, negligence, regulatory law, and taxation. There is also a chapter dealing with the interpretation of Acts and contracts, and a chapter dealing with litigation and alternative dispute resolution.

The book was published by Federation Press in 2003 and the law is stated to be that as applying at 28 February 2003. For the most part this is of little consequence as the work chiefly concerns the key principles which have not changed very much since then, and are unlikely to change very much in the foreseeable future. One exception to this, however, is in chapter 30 which deals with media law, and considers the possibility that companies could be defamed in their trading character. Of course, this position has now been significantly altered by section 9 of the uniform defamation code, as enacted in Victoria by the *Defamation Act 2005*.

This book is worth reading for anyone interested in the area, even if they are lawyers. It would be ideal for inclusion on the reading list of any of the various courses which are conducted from time to time for fledgling company directors by the Institute of Company Directors, and other such bodies.

Tim McEvoy

# Family Law in Australia (6th edn)

**By Geoff Monahan and Lisa Young**
**LexisNexis Butterworths, 2006**
**Pp vii–xivi; 1–663; Index 665–689**

*Family Law in Australia* first appeared in 1972 as a comprehensive text on the then current legislation, the *Matrimonial Causes Act 1959* (Cth) and relevant case law. Family law is continually evolving and the authors have evaluated and incorporated the reforms in the text. Whilst the text states the law up to December 2005, the authors have included an analysis of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*.

The text commences with an historical perspective and the development of the law in Australia, with its constitutional foundation. Interestingly, the authors note that an integrated approach to family law, as a discrete area of private law is not possible, given the absence of the conferral of a plenary power that covers

the full range of rights, duties and legal relationships described as family law, since the Commonwealth has no power in respect of "family law", but rather "marriage, divorce and matrimonial causes".

There follows a detailed examination on formation, nullity and divorce, with extensive text on the resultant issues of children financial support and property distribution. Children and parents, their contact rights and financial support are addressed with recognition being given to the financial support for both married and de facto partners.

Property distribution on the breakdown of a de facto relationship (an increasing area of dispute, reflecting changes in society) is the subject of a discrete chapter. The authors point to the problems facing de facto couples who must resolve their parenting disputes pursuant to the Family Law Act but settle property distribution disputes under State legislation, the resolution of which is made more difficult by the partial demise of the cross-vesting scheme.

*Family Law in Australia* is a well established authoritative text that is essential for anyone who practices in, or is interested in, this continually evolving and socially critical area of law.

C.J. King

# An Introduction to the Industrial Relations Reforms

**By Colvin, Watson and Ogilvie**
**Butterworths, 2006.**
**Pp i–xxiv, 1–182, Index 183–190**

*An Introduction to the Industrial Relations Reforms* is an excellent publication.

It is the successor to the *Workplace Relations Handbook* which has appeared in two editions over the last few years.

Like the Handbook, it is aimed at human resources professionals, industrial relations practitioners and students and would also be useful for legal practitioners.

While the quality of the chapters varies to some extent and a considerable amount of understanding is assumed, this is a fundamental text for appreciating and understanding the changes to the Workplace Relations Act by the WorkChoices Legislation.

Chapter 4, The Awards and Statutory Safety Net chapter, by Anthony Longland and Luke Pardy, is undoubtedly the best in the book.

This chapter is not only technically proficient and informative, it seriously attempts to put these reforms into the context of what is intended by the legislation and, in a practical sense, how the writers believe these changes will "pan out".

The book explains very competently how the aim of the legislation is to create a national industrial relations system. It explains how this system is intended to work. The argument for a national system in this country is just about overwhelming given the operation of seven different systems for a working population smaller than California and about one-fiftieth the size of China.

The book doesn't actually say that the other aim (largely unspoken) of the legislation is to end the privileging of unions in the AIRC and in the workplace. However, the codification of the right of entry, the requirement of ballots for industrial action, the removal from Awards of clauses privileging trade union role and activities in the workplace, the prohibition on specified non industrial matters as a reason for taking industrial action make this abundantly plain.

However, the suggested significant reduction in rights for employees, which has been the subject of much publicity, is simply wrong, as this book makes clear.

As the chapter on awards makes plain, the reforms are very likely to lead to an expanded coverage of awards and a greater number of employees potentially being subject to them.

The suggestion that awards are going to be stripped of substantial rights is incorrect. The 27 allowable matters retained in awards cover every imaginable aspect of the employment relationship, including penalty rates, overtime rates, annual leave, public holidays, rest breaks, notice periods, incentives and bonuses. What cannot be included in awards are (for instance) restrictions on an employer using independent contractors, labour hire arrangements, casual or part time employment, their number or proportion.

Further, the idea that award rights are being "grandfathered" so awards won't exist at some time in the future is also incorrect. Awards will apply to any future employee of an employer to whom an award is applicable if they do the work to which the award applies. As the book notes the national system will effectively make awards common rule awards.

For employees in Victoria not covered by awards or certified agreements the Act changes little that was the substance of the minimum terms and conditions of employment under the Workplace Relations Act and in fact expands some rights.

The capacity to enforce by penalty the breach of orders of the AIRC and promptly to address unprotected industrial action are the changes that will most surely serve the large employers the most. Subject as they are to certified agreements, which were often honoured in the breach by a number of significant unions, the large employers have been quick to use the new provisions, obliging the AIRC to address unprotected industrial action. Chapter 7, Responses to Industrial Action, explains this well.

The book deals with all the other aspects of the modern industrial relationship, including termination of employment, enterprise bargaining and the special rules for the building industry. Finally there is a first-rate chapter on disputes about entitlements and enforcement.

It is undoubtedly an extremely useful book for legal practitioners and others interested in or involved in employment issues. The book should be on the shelf of every practitioner who purports to practice in the area of industrial relations.

F.I. O'Brien S.C.

# Uniform Evidence Law (7th edn)

**By Stephen Odgers S.C.**
**Lawbook Company, 2006**

THIS seventh edition of *Uniform Evidence Law* by Stephen Odgers S.C. has been updated to reflect the law and practice as of 31 May 2006.

As with previous editions, it sets out the provisions of the Evidence Act and provides a commentary on the Commonwealth and New South Wales provisions.

This edition is of the same high standard as the previous editions. It contains a detailed analysis of the common law and statutory rules of evidence and how such rules are incorporated, modified or abolished by the Commonwealth Evidence Act. It contains a commentary of relevant

policy considerations. It also contains extensive and detailed referencing to case law.

The commentary relevant to the various provisions of the Act concerning documentary evidence is particularly useful. This commentary is well researched and easy to understand. Much of the commentary is extremely relevant to the modern case which is increasing in length and which will often need to be proved by the adducing of evidence contained in electronic, voluminous and complex documents.

The commentary on hearsay is also particularly useful, as this is an area of the Act which differs from the common law.

This work is of the highest standard both at an academic and practical level. The text is of enormous value to practitioners.

Kerri Judd

## Companies and Securities Law Commentary and Materials (4th edn)

**By P. Redmond**
**Law Book Company, 2005**

THE fourth edition of this text has been printed five years after the previous edition.

The author points out that the text is primarily aimed at law students.

To set the scene, the author states that "Company law … regulates relations between those who supply capital, those who manage the capital fund and business, and the third parties with whom they deal. As the corporation has become the principal vehicle for economic relations, employment generation and wealth accumulation, over the past century, company law has assumed a social significance to match its technical complexity." (Preface, page vii).

The fourth edition has 12 chapters, starting with an examination of partnerships and the historical, institutional and social context of corporate law, through chapters dealing with the corporate life cycle, some consequences of corporate personality, directors and managers, the company in general meeting, the duties and liabilities of directors and managers, shareholder remedies, corporate finance and corporate fundraising to securities marker regulation and takeovers.

The relatively short chapter on partnership goes into some detail about the definition of a partnership (page 3), and examines the fiduciary obligations of partners (page 18).

During the analysis of the history of the corporate concept, the author also takes us on a sociological journey by placing the corporation in its social context in chapter 2. This is territory that is often covered in by social scientists and legal studies students, but not practising lawyers. In that sense, it provides us with a different perspective. The chapter concludes with a detailed case study of the John Fairfax Group of Companies.

The third chapter takes us from the conception of the corporation (incorporation under the Corporations Act), through the various types of corporations to the death of a company through insolvency. The author also analyses the concept of promoters' duties in this chapter.

Chapter 4 is devoted to analysing some of the more common consequences of corporate personality, such as limited liability, piercing the corporate veil and the effect of a corporation being a member of a group.

The chapter that deals with directors and managers (chapter 5) examines corporate governance, the role of directors, the powers of directors, the powers of the members in general meetings (which is analysed further in chapter 6), the appointment and removal of directors and the statutory assumptions that those who deal with the company can make.

Chapter 7 is quite detailed in its analysis of the duties and liabilities of directors and managers. As well as the duties of care, skill and diligence, the chapter provides, among other things, an in depth analysis of the duty to prevent insolvent trading.

Shareholder remedies are examined in chapter 8. Again, this chapter is comprehensive in its analysis of the various remedies that are available to shareholders, including the relatively new statutory derivative action.

Chapter 9 provides an analysis of various types of corporate finance, such as debt finance including debentures, and the raising of share capital. Chapter 10 then details the disclosure requirements for corporate fundraising that apply as a result of the CLERP amendments. Chapter 11 follows with a description of securities market regulation in Australia, including the listing rules of the ASX, ASIC's investigation and information gathering powers, market misconduct and insider trading.

The final chapter deals with takeovers, and includes a section that covers the context of takeover regulation as well as prohibited acquisitions of relevant interests and the requirements for takeover offers, the conduct of the takeover bid and compulsory acquisition.

As the text is primarily a case book aimed at law students, its usefulness to practitioners is probably limited to those who do not practise in the area and are looking for an introduction to company law. The case coverage is up to date as at June 2005, and it is comprehensive.

W.G. Stark

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