

# VICTORIAN BAR NEWS

No. 139

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SUMMER 2006

## Appointment of Senior Counsel

Welcomes: Justice Elizabeth Curtain, Judge Anthony Howard, Judge David Parsons, Judge Damien Murphy, Judge Lisa Hannon and Magistrate Frank Turner □ Farewell: Judge Barton Stott □ Charles Francis Talks of County Court Judges of Yesteryear □ Postcard from New York City □ Bar Welcomes Readers Class of 2006 □ Milestone for the Victorian Bar □ 2006–2007 Victorian Bar Council □ Appointment and Retirement of Barfund Board Directors □ Celebrating Excellence □ Retiring Chairman's Dinner □ Women's Legal Service Victoria Celebrates 25 Years □ Fratricide in Labassa □ Launch of the *Good Conduct Guide* □ Extending the Boundary of Right □ Council of Legal Education Dinner □ Women Barristers Association Anniversary Dinner □ A Cricket Story □ The Essoign Wine Report □ A Bit About Words/The King's English □ Bar Hockey



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*Cover: Victorian Senior Counsel 2006, photographed on the steps of the Victorian Supreme Court shortly before the ceremonial sitting on Tuesday 5 December 2006 (Anthony John Kelly absent overseas). See text on page 6.*



*Welcome: Justice Elizabeth Curtain*



*Welcome: Judge Anthony Howard*



*Welcome: Judge David Parsons*



*Welcome: Judge Damien Murphy*



*Welcome: Judge Lisa Hannon*



*Welcome: Federal Magistrate Frank Turner*



*Farwell: Judge Barton Stott*



*Charles Francis Talks of County Court Judges of Yesteryear*



*Postcard from New York City*



*Launch of the Good Conduct Guide*



*Celebrating Excellence*



*Milestone for the Victorian Bar Mediation Centre*



*WBA Anniversary Dinner*

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for the year 2006/2007

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# Something Lost, Something Gained

AS summer approaches and simultaneously the calendar year draws to a close, it is timely to review our collective report card for 2006 before the new year with all its myriad problems has to be dealt with. How have we fared as a profession? What remains to be done? Have we achieved closure where it was meet and right to do so or is there still unfinished business?

## LOST CONFIDENCE?

One challenging perspective was provided by the Reverend Tim Costello, chief executive of World Vision, when he posed the question "Have Lawyers Lost Their Confidence?" Speaking at a breakfast at the Essoign Club in October, jointly sponsored by the Melbourne Catholic Lawyers Association and the Christian Lawyers Society at which about 100 solicitors and barristers attended, Reverend Costello drew on the biblical story of the young lawyer who, living in a Civil Code society and yet steeped in deeply religious theocratic Mosaic law, asked what he had to do to inherit eternal life. Although it was a spiritual question it emanated from the law surrounding that young man in his daily life and practice. In the ensuing dialogue with Jesus, he was asked what the law taught on the point. "Love the Lord your God, and love your neighbour as yourself," he replied. "Then go and do likewise. But the lawyer persisted and, seeking to justify himself, asked "who is my neighbour?" There follows one of the most famous parables in all of the Bible, arguably in literature: the story of the Good Samaritan. This very story became one of the central ideas in the speech of Lord Atkins in *Donoghue v Stevenson* [1932] AC 562 when the English House of Lords laid down the principles of the law of negligence in tort, finding a new duty which arose not from contractual relations but in terms of an intrinsic relationship between those bound together by the owing of duty and those to whom it is owed. Reverend Costello concluded that faith — like law — must address all of



life in order to answer the big questions. Similarly the law — which deals principally with relationships with each other — has much to teach by way of analogy about faith and relationships with the spiritual. Further, any sort of relationship between humankind and their God was impossible without meaningful and rich relationships with each other, whether this be on the personal, professional, societal, national or sovereign plane.

Reverend Costello went on to draw a parallel between the position of Islam in the contemporary world and the concept of the separation of Church and State, which was still a novel concept in the early twentieth century. For much of the past 2000 years (he said) religion had been poured onto disputes like "oil onto fire", whether those disputes centred on land, resources or opportunities. The law enabled those disputes to flourish (as Dickens expanded upon in *Bleak House*), to an inter-generational art form. While it took the West two millennia to resolve that tension, Islam has only just embarked on that same quest, and so it follows that it will inevitably take time for that resolution to occur.

In concluding, the speaker exhorted lawyers to seek out that authenticity which demonstrated that they cared about their neighbours — whether each other as colleagues, or clients, or the greater system they served.

In echoes of that sentiment, the President of the Court of Appeal, Justice Chris Maxwell, presiding at admissions ceremonies in November for new entrants as officers, barristers and solicitors of the Supreme Court of Victoria, bestowed on the enthusiastic throng in the Banco Court some words of wisdom. He invited the recent admissions in particular to try to remember in future years why essentially they had chosen to enter the profession of being a lawyer in the first place; and he encouraged them to engage in 'activism', not in the narrowly party political or demagoguery sense of that expression, but in the sense of committing themselves to 'making a difference'. While clearly this is excellent advice at any time, and above all inspiring to hear on the day of one's admission to an ancient and honourable profession, it was also something of a clarion call on the desirability and even necessity of returning to basics.



## RIGHTS GAINED

Generations of law students have been invited, as part of their studies in constitutional and administrative law, to ponder whether — in either the federal or the State spheres — there should be an entrenched bill of rights. (Discuss.) That question has now been answered resoundingly in the affirmative in Victoria. On 25 July 2006 the Victorian *Charter of Human Rights and Responsibilities 2006* was assented to and passed into law. The Charter comes into force in two phases. From 1 January 2007 all statutory provisions (primary and delegated legislation) must comply with the Charter; from 1 January 2008 all policy and all decisions of public authorities must comply with it.

In preparation for this brave new world, members of the Bar will have noticed that, in some quarters, seminars are being offered in the new year to discuss what impact the Charter may have on practice, procedure, and jurisprudence in Victoria, what its impact may be among the judiciary, and whether any lessons can

be learned from considering the United Kingdom experience of its Human Rights Act. What are we to make of this legislation in circumstances where the President of the Court of Appeal is reported to have said that every case potentially raises questions of human rights?

The first striking feature of note which is obvious from the title of the legislation itself is that the concept of “rights” is counterbalanced with that of “responsibilities”. Section 1(2)(a) of the Charter provides that one of its main purposes is to set out the human rights that Parliament specifically seeks to protect and promote. These are enunciated in Part 2 (sections 8–27). Some rights, such as freedom of expression (section 15(3)), specifically provide that special duties and responsibilities attach to the right, and may also be subject to lawful restriction. Other rights (sections 26 and 13) declare rights against double jeopardy and a right to privacy and reputation respectively which are expressed in absolute terms.

In Part 5, section 44(2)(a) provides for a review of the Charter after four years

of operation to determine *inter alia* whether additional human rights should be included in the Charter; and whether further provision should be made as to “remedies” that may be awarded for a breach of the Charter. And there’s the rub. Not a great deal appears to flow from the Charter by way of remedy for any breach of it other than a declaration. While that is a start, it could legitimately be asked, what next? Clearly it will be necessary to watch this space.

## WE WERE WRONG

In the previous edition of *Bar News* we referred to Commander Tim Wood in the article concerning his welcome on being appointed Deputy Judge Advocate General for the navy, and his promotion to the rank of Commodore.

Of course we should have referred to His Honour as Commodore rather than Commander. We apologise for this mistake and thank the numerous souls who pointed out our error.

The Editors

# Appointment of Senior Counsel in and for the State of Victoria and Ceremonial Sitzings of Full Courts of the Supreme Court of Victoria and the Federal Court of Australia on Tuesday 5 December 2006

THE Honourable Chief Justice Marilyn Warren AC did, on 28 November 2006, appoint as Senior Counsel for the State of Victoria the persons listed below, in order of precedence:

James Damien Montgomery  
Richard Hunter Smith  
Andrew Konstantine Panna  
Ian Douglas Martindale  
Timothy John Margetts  
Anthony John Kelly  
James Harold Mighell  
Jane Alison Dixon  
Mark Andrew Gamble  
Iain Ronald Jones  
Matthew Neil Connock  
Philip Mark Taft  
Christopher Mark Caleo

Ceremonial Sitzings of both the Supreme Court of Victoria, and of the Federal Court of Australia took place on Tuesday 5 December 2006.

A Full Court of the Supreme Court of Victoria was constituted by the Chief Justice, the Honourable Marilyn Warren AC, the President of the Court of Appeal, the Honourable Chris Maxwell, and the Principal Judges of the three Divisions of the Court: the Honourable Justice Teague of the Criminal Division, the Honourable Justice Byrne of the Commercial and Equity Division, and the Honourable Justice Gillard of the Common Law Division. This was the last day of sitting in the Banco Court before it closed for renovations which will extend well into the new year.

A Full Court of the Federal Court of Australia was constituted by the Chief Justice, the Honourable Michael Black AC, and the Honourable Justices Gray, Ryan, North, Finkelstein, Weinberg, Kenny, Young, Tracey RFD, and Middleton. The sitting was in Court One of the Federal

Court of Australia, the ceremonial courtroom.

The Chairman of the Bar Council, Michael Shand QC presented the new silks to the Full Court of the Supreme Court, and spoke briefly at the sitting of the Full Federal Court of Australia, expressing the Bar’s great pride in the appointments.

All the new silks attended both sittings, except for Anthony John Kelly S.C., who was overseas. Numerous family, friends, and other counsel and judges attended both sittings, and the generous morning tea in the grand Library of the Supreme Court.

The cover photograph for this edition of *Bar News* was taken by David Johns on the steps of the Supreme Court shortly before the first ceremonial sitting.

# The Bar — What Should We be About?

THE Bar Council has begun a process of settling on a strategy for the future of the Victorian Bar. Strategy documents can sometimes be pious statements of good intention, but short in specific insightful analysis of where an organization should be heading, and for what purpose. Without a strategy, the organization can drift, buffeted by the winds of change this way and that, and react to events rather than head with a sense of purpose in a particular direction.

Another way of approaching the issue is ask who we are and what are we about. That at least informs the starting point of our journey and may help answer what we should be about. The question is more challenging than first meets the eye. The Victorian Bar is an association of more than 1,600 independent barristers – an immensely diverse and talented group of people.

Recent comments by the Federal Attorney-General have raised the question of the proper role of a professional association of lawyers — should the association focus on their particular profession rather than on social policy to avoid what he calls the risk of “the professional equivalent of imperial overreach”? The Attorney also distinguishes what he calls “fashionable issues” that are “issues of personal political conviction not professional solidarity”.

The question is when should the members of a professional association, through their association, act with one voice in taking a position on an issue of public interest.

There is no doubting that each professional association has an important “trade union” role. The Bar’s constitution lists as one of its purposes “to seek to promote the welfare of members of the Victorian Bar”. That is number 16 in a list of 18 purposes. If an association fails in this regard, the members have their remedy at the next election of the governing body.

The purpose first named in the Bar’s constitution is “to maintain in the public



interest a strong and independent Bar in the State of Victoria”.

The second is to promote, foster and develop within the executive and legislative arms of the Government of Victoria and within the general community, an understanding and appreciation that a strong and independent Bar is indispensable to the rule of law and to the continuation of a democratic society.

The object first stated in the constitution of the Law Council is just as outwardly focused: “to promote and defend the rule of law in the public interest”. The New South Wales Bar’s constitution

provides: “to promote the administration of justice”.

The distinguishing feature of all the above professional associations is that the public interest informs the principal objects of the association, and that the rules that bind its members, in each case, are intended to further that public interest.

None of this is to diminish the significance of the duty each barrister owes to his or her client to seek to advance and protect the client’s interests to the best of the barrister’s skill and ability. It is, though, understandable that while individual barristers must necessarily look to their client’s interests their collective association should have a wider focus. The strength of numbers makes possible what an individual cannot achieve. In the end the question is what matters to the collective body.

As Chief Justice Murray Gleeson recently observed, the idea of the rule of law in a liberal democracy is a core Australian value; it is bound up with individual autonomy — the freedom to make choices — “it is only if people know, in advance, the rules by which conduct is permitted or forbidden, and the rights and obligations that flow from their conduct, that they are free to set their personal goals and decide how to pursue them”.

It is hardly surprising then that our legal professional associations have as their primary objects the promotion and defence of the rule of law.

When the Executive Government criticizes an association’s emphasis in its public activities on issues of social policy or public interest, the members of the association will be a good judge of their association’s conduct. At the Law Council of Australia summit of constituent bodies held in Canberra on Saturday 2 December, there was unanimous support for the work that the Law Council had done.

Criticism from government may in fact bespeak the effectiveness of the association’s work in the public interest. That

**The question is when should the members of a professional association, through their association, act with one voice in taking a position on an issue of public interest.**

engagement with government on issues of social policy and public interest can be both constructive and healthy to a democratic society governed by the rule of law.

The legal profession has strongly pressed the issue of the delay in bringing David Hicks to trial.

In December 2001, having previously trained with Al Qaeda training camps, David Hicks was captured near Baglan, Afghanistan, fighting with Taliban government forces. He was taken in January 2002 to the US military base at Guantanamo Bay, Cuba, where he still remains in detention. No time frame has been set for Hicks' trial as the fifth anniversary of his imprisonment comes nigh.

The right to a fair trial without undue delay is fundamental to a society governed by the rule of law. The touchstone of the common law in safeguarding the accused in criminal proceedings is fairness.<sup>1</sup> Gladstone's maxim "justice delayed is justice denied" rings as true today as it did when first spoken. An Australian citizen deserves no less. Undue delay affects

the value of evidence adduced at trial; it may prejudice the accused's capacity to present their case and the capacity of the Tribunal to provide a fair judgment in the case.

It is timely for the Federal Government to revisit this issue.

#### BEST WISHES FOR THE FESTIVE SEASON AND COMING VACATION

On my own behalf and on behalf of the Bar Council, I wish members of the Bar all the best for the festive season and coming legal vacation. May the new legal year find you refreshed and renewed in energy.

Many of you will have resumed practice in January. I invite you all to attend the religious services to mark the formal commencement of the legal year on Monday 29 January 2007. Each service with its own unique liturgy offers spiritual nourishment, fellowship and space for quiet reflection.

There is an ecumenical service at St Paul's Anglican Cathedral followed by morning tea in the narthex immediately

after the service. Legal Studies students from various schools, both State and private, have also been invited to attend. The preacher will be the new Anglican Archbishop of Melbourne, the Most Reverend Dr Philip Freier. The Governor of Victoria, Professor David de Kretser AC, has advised that he will attend this service.

There is also the Red Mass at St Patrick's Cathedral; a Jewish service at the East Melbourne Hebrew Congregation; and a Buddhist observance at the Fo Guang Yuan Art Gallery. There is no Greek Orthodox service in 2007. Complete details of times and places appear elsewhere in *Bar News*.

Michael Shand  
Chairman

Note

1. *Jago v District Court of New South Wales* (1989) 168 CLR 23



**Victoria Law Foundation**  
in association with

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You are cordially invited to  
**Celebrate the Opening of the Legal Year**

**Legal Laneway Breakfast** (previously *Portia's Breakfast*)

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# Taking the Legal System to Even Stronger Ground

I feel thrilled and privileged to begin another term as Victoria's Attorney-General.

Over the last seven years a quiet revolution has taken place in our justice system — reinvigorated, modernised, more open and transparent, it has undergone a wholesale transformation and I'm excited to remain involved as the momentum continues.

This momentum exists because the Bracks Government has had a vision for the legal system — a vision articulated in our Justice Statement and upon which we now have an historic opportunity to build.

We have this vision because we know that a properly functioning justice system is integral to strong and healthy communities. We also know that justice is meaningless unless it is accessible, which is why we have increased funding to VLA and CLCs almost every year we've been in office and opened two new Legal Aid offices and five new Community Legal Centres throughout the State.

I'm pleased to say that we can now take this incredibly important investment a step further, having committed to an \$8.8m package in partnership with VLA, which will, amongst other things, deliver 17.5 new legal positions to the CLC sector across the state. The Justice Policy we took to the recent election also committed to establishing a Homeless Persons' Liaison Officer at the Melbourne Magistrates' Court, a position which will work within existing services to assist and support the myriad needs of homeless court users and which, in time, I hope we will be able to extend to other locations.

Of course, the last seven years have also seen a shift in the way the legal system responds to victims of crime. Pain and suffering compensation has been reintroduced while a new, statewide Victims Support Agency and Helpline has been established and a Victim's Charter enacted to enshrine the rights of these vulnerable Victorians. Family Violence Divisions of the Magistrates' Court now operate at Heidelberg and Ballarat, while we have recognised the wider failings of



the law in relation to both sexual assault and family violence and are implementing sweeping reform.

We have implemented these reforms because the Bracks Government believes that all governments have a responsibility, on behalf of the community, to acknowledge the experiences of victims of crime. I am delighted, then, that in addition to these undeniable improvements, further acknowledgement will be made through a 30 per cent increase in pain and suffering compensation payments.

There are, of course, a great many other reforms on which we will be building. The Bracks Government believes in smarter justice, justice that tackles the causes of crime and steers people away from its vicious cycle.

This is marked by the success of the Drug Court in Dandenong; by the extraordinary reduction in recidivism sparked by our Koori Courts; and by the enthusiasm with which locals have embraced the groundbreaking Neighbourhood Justice Centre in Collingwood which commences operation in January, despite the Opposition branding this innovative proposal as 'apartheid justice'. I look forward to exploring more avenues for therapeutic justice as the opportunities arise.

Meanwhile, the face of the judiciary is evolving. With new heads at the helm of every jurisdiction and diversity increasingly reflected on the Bench, Victorians have more reason than ever to be confident in those making decisions about them.

In fact, just under 50 per cent of our judicial appointments have been women, with Victoria's first female Solicitor-General and the first female Chief Justice leading the way; while the Sentencing Advisory Council and Judicial College are connecting the community to the law and bolstering faith in an independent judiciary. I am pleased, however, that we can now strengthen the work of the Judicial College, having committed funds to enable it to provide continuing professional development to all judicial officers upon the direction of the heads of jurisdiction.

Much has been done. Following early moves to re-establish the Law Reform Commission and enshrine the independence of the DPP, more recently the Government enacted a Charter of Rights and Responsibilities. Despite the opposition it met from the other side of the Parliament, our third term in office will now enable us to cement the Charter in the everyday workings of government, as well as to expand the role of the Equal Opportunity Commission to address issues of systemic discrimination.

Of course, while every aspect of the legal system has been revolutionised under the Bracks Government, we should not think that the work has all been done. Our vision, our intention, is to do a lot more — to do more for alternative dispute resolution, to do more for Legal Aid, including lobbying the Commonwealth to loosen its stranglehold on funds, to do more for our courts, to do more for legal consumers and victims of crime. I feel enormously proud that we have been given the opportunity to act on these intentions and I look forward to continuing to work with the profession as we take the legal system to even better and stronger ground.

Rob Hulls  
Attorney-General

# Supreme Court

## Justice Elizabeth Curtain



IT is hard to believe that her Honour Justice Elizabeth Curtain was first welcomed to the County Court 13 years ago. At her Honour's Welcome to the County Court in 1993 she told of having read in *The Age* a reference to "Justice Elizabeth Curtain". It was speculated whether the Solicitor-General, Douglas Graham QC may have told the reporter more than he had told her about future prospects. Thirteen years later the Justice Elizabeth Curtain, as reported in *The Age*, has now come to pass.

Her Honour's time as a Judge on the County Court was extremely fruitful. She heard cases mainly in the criminal area, and naturally during these years heard a wide variety of cases, in all areas of the Court.

As well as serving the Court, Her Honour has sat on many committees and served the community in a wide variety of roles. These included being a member of the Executive of the County Court of Victoria, a member of the Executive of Australian Judicial Conference, the Youth Parole Board and a member of the Victorian Criminal Trials, Charge Book Committee. Her Honour was also Deputy Chairman of the Victorian Racing Appeals Tribunal, the Alternative Chairman of the Youth Parole Board and Alternative Chairman of the Youth Residential Board.

Away from the law she was also Director of the Jesuit Social Services Limited,

which conducts a range of diverse community social service programs providing assistance to those in need. Since her education at Mandeville Hall, Loreto Convent, her Honour has had a close relationship with the Loreto Sisters. Her Honour was a Member of the School Council of Mandeville Hall from 2000 to 2002. She also assisted the Sisters in their work in the Loreto Vietnam Australia Program at the Phy My Orphanage in Ho Chi Minh city in 2001 which assisted young Vietnamese students in rural and inter city areas.

After graduating from Melbourne University, she completed her articles at Cole and O'Heare.

Her Honour came to the Bar in October 1978 and read with Ms Lyn Opas QC (later Judge Shiftan of the County Court). After practising at the Bar for nine years her Honour was appointed to the Administrative Appeals Tribunal (from its inception) in 1985 to July 1987, and was also a Member of the Motor Accidents Tribunal. Her Honour was appointed a Prosecutor for the Queen for the State of Victoria from 1987 to 1993 when she was appointed to the County Court. Her Honour also taught advocacy in the Bar's 1999 Trial Advocacy Workshop in Dhaka, Bangladesh, and the 2005 Advocacy Course, Port Moresby.

But life has not always been all that serious for Elizabeth Helen Curtain. During her time at the Bar she formed many close friendships and thoroughly enjoyed the collegiate spirit of the Bar. Her hobbies include theatre and acting, and she had a memorable role in the 1984 Victorian Bar Review particularly playing the bombshell-blond Barrel Girl, Debbie, to the lecherous compere, "Fabulous Phil", played by Paul Elliott QC. It was of great regret to many present at her Honour's Welcome in the Supreme Court that her close friend Douglas Salek QC was not there, having passed away some five years earlier. Douglas was responsible for many of the scripts in the Bar Review and often claimed credit for writing many of the lines uttered by her Honour, not only on stage but in Court. Of course Fabulous Phil had no connection with one of her, now fellow, brother Judges.

Her Honour is also closely associated with the Essendon Football Club and in particular was a Member of the Essendon Football Club Womens' Network. At her Honour's Welcome Michael Shand QC, Chairman of the Bar, made reference to many other Essendon supporters who find themselves on the Bench. He made reference to his Honour Judge Howard being the natural successor on the County Court and to Justices Eames and Coldrey as Essendon supporters. The omission of Justice Gillard was quickly rectified by an outcry amongst the many barristers and solicitors present in the Banco Court.

Her Honour made particular reference in her speech, in reply, to her long-term partner Bruce Houston and her family with whom she has always had close ties. In particular she referred to her mother and father who were the licencees of the Beaconsfield Hotel and her happy background growing up in St Kilda.

After her Honour's Welcome, a cocktail party was held at her home for eighty or so of her closest friends and relatives. It was a great evening that reflected the many and varied aspects of Elizabeth Curtain's life and it was thoroughly enjoyed to the hilt by all present. We trust that her Honour's appointment will be a great success. The only thing missing is when and where will be the third Welcome.

# County Court

## Judge Anthony Howard



**H**is Honour Judge Tony Howard QC was sworn in as a Judge of the County Court on 9 October 2006.

His elevation marks the latest evolution of an interest in law that dates back to the hanging of Ronald Ryan in February 1967. His Honour was then a 17-year-old school boy living and working part-time near Pentridge Prison. On the eve of the execution he joined the 3000-odd demonstrators holding vigil outside the jail. He later described the electric atmosphere of that protest and said that, although he probably hadn't realised it at the time, that event was a seminal moment in his life which led him to the practice of criminal law.

That path saw him complete school at Xavier College before enrolling at Monash University (B Juris 1971; LLB 1973) and later obtaining a diploma in criminology from the University of Melbourne (1975). At Monash his Honour was a president of the Law Students' Society and a staff member of the student newspaper *Lot's Wife*. Following university and still sporting a Ho Chi Minh-style beard and moustache he was articled to Frank Galbally at Galbally & O'Bryan. Post-admission he practised as a solicitor for 18 months before coming to the Bar where he read with John Walker QC.

He signed the Bar Roll in 1975. As a junior his Honour was given red bags

by three of his leaders, Sue Crennan QC (now Justice Crennan of the High Court), John H Phillips QC (later Chief Justice Phillips of the Supreme Court) and Peter O'Callaghan QC. His Honour took silk in 1992. Throughout his career at the Bar he practised principally in crime, appearing on both prosecution and the defence briefs.

His Honour was always popular and widely respected among his colleagues at the Bar but his Honour's relationship with Linda Dessau of Counsel (now Justice Dessau of the Family Court) was surely his most productive. The pair met at the Bar in 1979, married and produced sons Ollie and Josh. Replying to the profession's Welcome, his Honour paid generous tribute to many of his family, friends and former Bar colleagues. Needless to say that Justice Dessau filling all three categories was singled out for particular thanks.

More conventional milestones in his Honour's barristerial career included three years in Hong Kong as a Crown counsel and senior Crown counsel and appearing in the Sandline Commission of Inquiry in Papua New Guinea in 1998. Closer to home, his Honour was senior counsel assisting, for a limited part, at the Metropolitan Ambulance Service Royal Commission in 2002. He also appeared in the Stewart Royal Commission in 1985 regarding phone-tapping, the Aboriginal Deaths in Custody Royal Commission in 1988–90 and the Tricontinental Royal Commission in 1990–92.

Judge Howard's contributions to the Bar and to the wider community have been rich and varied. Among other things, he has served as a member of the Victorian Bar Council (and also as a member of its executive committee), a trustee of the Royal Melbourne Hospital Neuroscience Foundation and founder (in 1999) subsequently chair of Lawdons, a 300-strong group of lawyers supporting the Essendon Football Club and been involved in various kindergarten and school groups. He has also been heavily involved in pro bono work through the Bar's Legal Assistance Committee and the Public Interest Legal Clearing House (PILCH).

Probably Judge Howard's two most

conspicuous contributions to the Bar are his role in the redevelopment of the Essoign Club as part of the renovation of Owen Dixon East and his sustained promotion of equal opportunity briefing policies for women barristers.

In 2002 the Bar Council gave his Honour the task of chairing the committee that designed and established the Essoign in its current premises. The club's success today in many ways embodies his Honour's vision for it at a time when its future was being widely questioned.

Even at his Welcome ceremony his Honour touched upon the need to promote equal opportunity for women barristers. This has long been a cause dear to his Honour. In 1998 he was a member of the steering committee that produced the landmark report "Equality of Opportunity for Women at the Victorian Bar". He carried his interest in the issue forward, ensuring the adoption of an Equal Opportunity Briefing Policy in Victoria and later nationally through the Law Council of Australia.

After 31 years at Bar — and almost 14 of those as silk — his Honour had not been contemplating a career change when the Attorney-General phoned. His Honour said that only two days earlier he had ordered and paid for 1000 new business cards.

As the Victorian Bar's Chairman Michael Shand QC said in his Welcome speech, so much achieved to such good effect in the course of Tony Howard's career at the Bar augurs well for the County Court.

The Bar wishes his Honour a long and fulfilling career on the County Court Bench.



# County Court

## Judge David Parsons



HIS Honour's primary school education began at Bairnsdale West Primary and then Ringwood Primary School. His family moved to Sydney where His Honour attended Manly Primary and Epping Boys High. NSW gave his Honour a love of the game they play in heaven. He continued to play rugby when his family moved back to Melbourne where he did his HSC at Melbourne Grammar. There his Honour starred in both the swimming team and the 1st XV.

His Honour then attended Trinity College for two years before completing his law degree with honours while living in various digs in Carlton. His Honour played in a Victorian U20 Rugby team that achieved the rare distinction of beating NSW in Sydney in a curtain raiser for an Australia-Ireland international. His Honour kicked a field goal that was the final difference between the sides. While his Honour was an enthusiastic player he found training less than exciting. He could be heard to say, half way through a session with the University club, "I'm off to practise my kicking." His Honour would put up a few spiral punts at the side of the spotlight oval. He would next be seen by his team mates at their local, the Gresham Hotel.

After completing articles at Weigall and Crowther while volunteering at the Fitzroy Legal Service, his Honour travelled to Alice Springs to work at the Central Australian Aboriginal Legal Aid Service. He was the

third lawyer employed there after James Montgomery and Peter Faris. There was much laughter in Alice when he turned up for work in the colonial rig of shorts and long white socks. Thereafter his Honour sported jeans plus R.M. Williams boots and shirts.

His Honour's first day as the duty lawyer in the Alice Springs Magistrates' Court was a rite of passage. It was the day after the Show Day long weekend. Aboriginal people had come from far and wide for the festivities. His Honour acted for 127 of them facing charges from drunk and disorderly to aggravated assault. It was a long day but his Honour dealt with every case.

His Honour appeared many times before local magistrate Bob "Scrubby" Hall. Scrubby once convicted a witness, mistakenly believing him to be the defendant. One trusts this was a learning experience for his Honour. At the time he possessed only one bright red tie. One morning his Honour fronted Scrubby in the said tie together with a brand new satin cowboy shirt of a different shade of red. Scrubby's eyebrows rose as he looked down from the Bench in amazement. His Honour responded "It's my birthday, your Worship!"

Justice Eames joined CAALAS soon after his Honour. Apparently he was much taller than the other prospective applicant. The football team needed a new ruckman. His Honour and Justice Eames became great friends and played for the mostly Aboriginal Pioneers football team in the Alice Springs A grade competition. His Honour was a robust full forward. One of His Honour's most prized souvenirs is a photograph of the two young and long-haired lawyers with Prime Minister Gough Whitlam visiting the Legal Service in Alice Springs.

After two-and-a-half years in Alice, his Honour made the obligatory round the world trip before returning to work for the Aboriginal Legal Service in Darwin. After 18 months His Honour went to the Darwin Bar, appearing for Aboriginal people in criminal cases and Aboriginal land claims.

His Honour's communication skills with Aboriginal people are legendary. The Institute of Aboriginal Studies made

a film starring his Honour that is still used to help teach how to relate to Aboriginal people. An earlier edition of the *Bar News* contains the speech by Jeff Sher with his Honour's introduction of Sher to their joint clients in the Nitmiluk (Katherine Gorge) land claim. His Honour's open, bright-eyed, infectious and sometimes mischievous good humour instantly disarmed his clients.

Solicitors who instructed his Honour in Land Claims in the often trying conditions of the Territory speak of how His Honour made hard work fun.

In a more recent native title case on Mornington Island in the Gulf of Carpentaria His Honour had to drive a big mob of traditional owner witnesses in a bus from the north to the south of the island. His Honour led the singing:

Telephone to glory

Oh what joy divine

I can feel the glory

Moving down the line...

At the end of the bus trip they were all having such a good time that they kept on singing. No one wanted to go home.

His Honour returned to Melbourne and signed the Bar Roll in 1982, reading with Robert Richter QC. His Honour had six readers, Campbell Thomson, Reg Marron, Angela Bolger, Garry Livermore, Irene Bolger and Mark Champion.

His Honour has contributed to the Bar by his service on many committees and his contribution to the Bar Readers' Course. His Honour has also generously and enthusiastically taught advocacy in Vanuatu and Papua New Guinea.

His Honour developed a practice as a leading advocate in Aboriginal land claims and native title cases around the country. His Honour took silk in 2001. His Honour also defended and prosecuted in major criminal trials, most recently that of Tony Mokbel. He suggested to Justice Gillard that it might be a good idea to cancel Mr Mokbel's bail...

His Honour has contributed to the Aboriginal community in many ways outside his legal practice. He is a long-time Board member and was Secretary of the Koorie Heritage Trust. He was an organizer for the Michael Long "Long Walk" to

raise awareness of Aboriginal disadvantage and raise money for Aboriginal leadership programs.

His Honour has been a board member of the Melbourne Community Foundation for nine years. He chairs the governance committee of this philanthropic trust, which raises money for diverse charitable

purposes. The committee meetings are well attended. His Honour always provides good wine.

His Honour is married to Christine Nathan and they have three children, one of whom is studying law at Monash.

His Honour was a long-time member of Aickin Chambers, many of whose number

have also worked for Aboriginal people in the Territory and been part of the same book club before preceding him to the Bench. The Bar wishes him every success in the knowledge that he will continue to contribute in this fine tradition.

# County Court

## Judge Damien Murphy



JUDGE Murphy's journey to the County Court bench has been one marked by a wide variety of legal experience and commitment to legal reform.

From the family dairy farm at Leongatha, His Honour was one of eight children and was sent to the Marist Fathers' Chanel College in Geelong at Lovely Banks, (it closed in the early 1970s and is now an international school) where he was Dux and Peter Chanel Scholar in 1968. His Honour is the second former student appointed to judicial office after Judge Mulvaney. His school experience also left him barracking for Geelong and led to a committed football career, which was highlighted by one quarter in the University Blues Firsts and many seasons in the Monash University Whites.

Then, from Chanel College to Monash to study Economics and a short-lived career at a large petroleum company as a financial analyst, then to study law at Melbourne University, graduating Bachelor of Laws in 1977 and Master of

Laws in 1995. After Articles at Oakley Thompson, His Honour then became Associate to The Honourable Justice Michael Kirby, then Deputy President of the Commonwealth Conciliation and Arbitration Committee and Chairman of the Australian Law Reform Commission. Two further years were spent at opposite extremes of legal practice with the black hats and the white hats depending on your point of view and then to Ministerial Advisor to The Honourable Jim Kennan SC, then Attorney-General of the State of Victoria.

On His Honour's own admission, his career in the law came about as a result of the Dean of the Faculty of Economics at Monash declining to accept him into its Honour's year. Whilst travelling after finishing as a financial analyst, he viewed the criminal trial in Los Angeles of Daniel Ellsberg, the leaker of the Pentagon papers, and thus began his Honour's strong beliefs in the freedom of information and the need for members of the judiciary to play an important role in the balancing exercises under the FOI Act.

His Honour has retained a strong connection with the Law Faculty at Melbourne University where he lectured and first met the late Justice Richard McGarvie; he kept in contact with him and attended the Corowa People's Conference in 2001 where Justice McGarvie advocated the minimalist republican model (shortly after His Honour had sworn an oath to the Queen). His Honour has kept in close touch with Dean Michael Crommelin and Professor Cheryl Saunders, and Justice Weinberg of the Federal Court.

In 1996, his Honour was in the first Reader's intake of that year. That intake featured such luminaries as Hardingham QC, Serry QC, Bartfield QC, Williams S.C. and Marks S.C. His Honour is the

first County Court appointment from that group. Reading with Judge Strong, His Honour commenced practice in a wide area with particular expertise in employment law and industrial relations. His Honour's ability to understand research promptly, helped by experience in Law Reform, enabled His Honour to undertake a wide-ranging cross-section of work.

In 1994, His Honour was appointed to Judicial Registrar in the Industrial Relations Court. Appealed in only his first case and, undaunted, His Honour went ahead and wrote over 200 Judgements, many reported and none appealed further than the Federal Court (there were few appeals at all). His Honour was the Judicial Registrar mentioned in *Bill Gibbs and McAllion Lloyd Pty Ltd v Kinna* (1998) VSCA 52, a decision on Anshun estoppel. One hopes that His Honour's judgements will not become more familiar in the Court of Appeal. When the IRC's functions were taken over by the Federal Court, and after a short time in the Federal Court, His Honour returned to the Bar.

His Honour was heavily involved with Labour lawyers being both President of the Victorian and Australian Labour Lawyers. During his time with the Labour Lawyers he was involved, unsuccessfully, in the campaign to reinstate The Honourable Justice Staples, Deputy President of the Conciliation and Arbitration Commission, who remains a firm friend of his Honour's, and opposed the ID Card.

Returning to the Bar in 1997, His Honour recommenced a busy practice, being involved in a number of leading cases, in particular *Collie v Merlaw Nominees Pty Ltd (in Liquidation)* (2003) VSCA 40 in which His Honour appeared for the appellant also *Nolan v Collie* (2003) VSCA and in *Rankin v Marine Power International Pty Ltd*

(2001) VSC 50, a leading case on common law wrongful dismissal.

His Honour has made a great contribution to the wider legal community, having been involved in the Collingwood Community Legal Service and as Commonwealth Nominee on the Legal Aid Commission, Bar Human Rights

Committee, the Law Reform Committee, and the Legal Assistance Committee together with the Committee of the Industrial Bar Association and Labour Lawyers. As well, His Honour has made many submissions to Parliamentary Committees and other bodies on everything from the Privacy Discussion Paper

to the Review of the *Evidence Act 1958* on his Honours own behalf and on behalf of the Bar.

His Honour is the proud father of Julian, who is just completing his schooling and is Captain of Trinity Grammar, and Georgia in year ten. We wish His Honour well in his appointment.

# County Court

## Judge Lisa Hannon



ON 10 October 2006 the legal profession, family and friends welcomed Lisa Hannan as a Judge of the County Court. Her Honour was educated at Presentation Convent in Windsor and at Monash University graduating Bachelor of Arts and Bachelor of Laws. While at university she worked at the Springvale Legal Service. She was articled to Peter O'Bryan of the firm of Galbally & O'Bryan and admitted to practice in 1987. Her Honour developed a strong criminal practice with particular emphasis in sexual offence cases. She appeared both for the defence and prosecution. Her Honour also regularly appeared at the medical practitioner's board, the Administrative Appeals Tribunal, both Freedom of Information and Administrative Review Applications, and in coronial inquests for families for government and agencies and private organisations. At times her Honour also practiced in the Children's Court in both Criminal and Family divisions, before the

Victims of Crimes Assistance Tribunal; before the Mental Health Review Board and also in equal opportunity hearings and civil work.

In addition to a busy practice her Honour made time to contribute to the common good of the Bar serving on many committees: The Bar Equality before the Law Committee, The Women Barristers Association Committee, The Dever's List Committee, and Criminal Bar Association Committee.

Earlier in Her Honour's time at the Bar she was an instructor at the Leo Cussen Institute, the Bar Reader's Course, the Bail Justice's training program and the Department of Human Services training program for Children's Court advocates.

After ten years in practice her Honour was appointed to the Magistrates' Court where she has served for the past eight years. While serving as a magistrate her Honour was a member of the Magistrates' CLE Committee, and became editor of the Magistrates' Penalty Book and co-editor of the Magistrates' Bench Book.

Her Honour is no stranger to long and complex cases. Six months after her appointment to the Magistrates' Court she was appointed to hear the Carlos Cabal and Marco Pasina extradition hearing, which is the longest running and most complex extradition hearing in Australian legal history. Her Honour heard argument from Sue Crennan QC (now Justice Crennan of the High Court), Ron Meldrum QC, Tony Pagone QC, Remy van de Wiel QC, Robert Richter QC and David Galbally QC. The extradition issues were so complex that at one stage counsel Professor Edmund Aughterson of the Queensland Bar (the author of the leading Australian text on extradition) was brought in by

one side to present argument. The Cabal case involved two Victorian Supreme Court judgments, one Court of Appeal judgment, 22 Federal and Full Court judgments and three High Court judgments. There is also a determination of the Human Rights Committee established under the international covenant on civil and political rights. It is a testament to her Honour's legal acumen that her decisions were never upset in any of the appeals. Finally, after all conceivable avenues of appeal were exhausted, Mr Cabal was extradited.

When her Honour had been on the Magistrates' Bench a little over three years, she was appointed State Supervising Magistrate for the criminal jurisdiction. His Honour the Chief Magistrate describes her Honour's work as head of the criminal division as "superb".

Most recently her Honour was one of the adjudicators at the Bar's Great Debate, the topic of which was "Are Judges human?". Her Honour opened the adjudicator's remarks with "I'm the only unbiased judge, because I'm not one — I'm a magistrate. And there's overwhelming evidence that magistrates are human".

David Curtain QC spoke for the negative — arguing that judges are not human. In her Honour's summary she agreed with fellow adjudicators about Curtain's arguments saying, "I have no idea what he said ..."

Her Honour's appointment to the County Court Bench is warmly welcomed. The Bar wishes you a long and satisfying career serving as a Judge of the County Court.



# Federal Magistrates Court

## Magistrate Frank Turner



**F**RANK Turner was educated at Scotch College, where he represented the school in rugby and first broke his nose. Before university, his Honour was a musician. His Honour studied law at Melbourne University and signed the Roll of Counsel on 16 October 1975, less than three months after he was admitted to practice on 1 August 1975. His Honour had come late to the law and was keen to go promptly to the Bar.

His Honour read with Pat Dalton QC and very quickly became a practitioner in the byzantine area of industrial law. His Honour appeared in many proceedings before the Australian Industrial Relations Commission, the Federal Court, the State Industrial Relations Commissions and the Supreme Court of Victoria. His Honour's practice, as is often common with industrial relations, led him all over Australia and much of his time was spent in Sydney, and his Honour is one of few people who really appreciate how difficult it is to travel and master the complexities of the law.

Pat Dalton QC was a good teacher and his Honour a good learner. His Honour represented the State of Victoria in many national wage cases as Pat Dalton's junior and appeared for many large corporations including Normandy Resources and other large corporations, particularly in the mining area. His Honour would often travel to remote locations for wage cases. His Honour developed a reputation for industry ability, clarity and thoroughness.

His Honour's expertise was such that for a time during the 1980s, his Honour was poached by Allens Arthur Robinson to strengthen and head up their industrial law practice and remained there for five

years working extremely hard. His Honour then returned to the Bar.

His Honour is a very hands-on person and could be described as an all-round mechanical renaissance man. He welded an enormous rose arbour at his previous house and he always likes to fix things with his welding equipment and handyman gear. Being very mechanical, his Honour is also very mechanically minded. He enjoys four-wheel driving, fishing and other traditional pursuits. His garage is huge and full of tools. His Honour is a more than useful campfire cook, oil painter and owner of a well-stocked cellar. He often travels up north with his friends and goes four-wheel driving with his Honour David Morrow, a long-time friend.

His Honour met his wife Helen, who was a secretary to Richard Seaby QC, as they worked together on the same floor. Of his three children, Richard, Andrew and Caroline, Richard has studied law and Andrew works with lawyers. Although the Bar welcomes his Honour's appointment to the Federal Magistrates' Court, it regrets that the appointment is to Sydney, for ten years, as his Honour's legal expertise and talent will be missed in Melbourne.



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# County Court

## Judge Barton Stott



ONE'S first impression of his Honour Judge Barton Harold Stott (barrister and QC between 1967 and December 1989 and distinguished Judge of the County Court for nearly 17 years) may have been of a man of reserved, perhaps even distant, temperament. If that was one's first impression (reinforced by references to a "Towering Iceberg" as compared with the perhaps better known "Towering Inferno") it would be quite wrong, as then fellow occupants of Seabrook Chambers (that Mecca of Bar hospitality) could attest. Although a private man, Stott was well able to enjoy a good time and was a person of great good humour who inspired long and loyal friendships.

His family was the first priority in his life and he was supported whole-heartedly in his long and illustrious career by his wife Kay, his loyal secretary and associate Kath Lambert as well as his trusted tipstaff Ken.

The details of his background and professional career were accurately and thoroughly set out in the Farewell Address by Peter Reardon SC at Judge Stott's retirement on Thursday 19 October 2006. Some of the salient facts are incorporated in what follows.

After a brief but stimulating career in the Royal Australian Navy where Stott achieved the rank of Able Seaman and

retains to this day a love of all things nautical, Stott commenced his legal career as a Clerk of Petty Sessions. Part of Stott's early training took place in the Victorian Crown Solicitor's Office, which exposed Stott to a serious amount of old law title work which (and this will be no surprise to those familiar with his Honour's meticulous attention to detail) Stott actually enjoyed. After serving as a law clerk at Hedderwicks, Fookes & Alston (including his period of articles), Stott was admitted to partnership but later went to the Bar where he read with Alec Southwell, later QC, and later still a Judge of both the County and Supreme Courts.

Stott learnt well under the renowned eagle eye of his Master, including the discipline of using time well. This was later put into good effect when His Honour developed a very substantial paperwork practice. Readers were amazed at Stott's ability to return at lunchtime after doing battle in court and then be in a position to dictate a number of Statements of Claim before returning to court in the afternoon.

As a barrister, Stott developed a deserved reputation as a great "all-rounder" which suited him perfectly for the demands of circuit practice, particularly in Ballarat where His Honour spent a number of years on the Supreme Court circuit for four months of the year, carrying out very competently both jury and causes work in the Ballarat list.

It is fair to say that Stott enjoyed the conviviality of circuit life and he retains many friendships from those days in both branches of the profession.

As a barrister and judge, Stott was tough, independent, hard working and professionally competent in a quiet and dignified way and in a tradition quite removed from the tendency for self-promotion so endemic in these more business-orientated times of the law. As a barrister and judge, he was fair, concise and focused on solving a problem rather than exacerbating it. His Honour regarded prolixity as a grievous misdemeanour. Beneath his quiet and reserved manner a very strong sense of justice lurked and sometimes emerged (having dealt, of

course, fairly and thoroughly with the evidence and issues) in strong support for the underdog (as one of the leading four banks could attest in relation to one piece of litigation). His industry is emphasised by the fact that those familiar with his Honour's work in the Defamation List calculate that Stott dealt with a substantial list every fortnight for 15 years and gave no fewer than 900 rulings/judgments, expeditiously resolving sometimes complex legal arguments and issues with great precision.

To truly know a man he must be observed where he is most comfortable, that is, in his own habitat. To visit Stott at his Peninsula home was a revelation which underlined his love of and knowledge of nature, his belief in hospitality, his genial manner and love of fellowship. It is not widely known that Stott had to deal with considerable personal hardship towards the end of his judicial career but all these obstacles were confronted and overcome with his customary determination, with the help of his family and that of his network of good friends. To be at his Farewell and observe the weight lifted from his shoulders as he stood (in actions without precedent at legal farewells) and blew kisses in the direction of the well of the court room and the jury box was to make all present realise that whilst a great career had come to an end, a wonderful and doubtless fulfilling retirement was about to commence.

We wish him and his family joy and good health in retirement.

# Charles Francis Talks of County Court Judges of Yesteryear



*Charles Francis.*

Charles Francis served in the Royal Australian Air Force during World War II. He signed the Roll of Counsel in February 1949 and retired from the Bar on 11 November 2002. He is one of the few remaining people who remember the County Court as it was during the first half of the 1950s, when judges were fewer and more idiosyncratic. In this interview with *Bar News* Charles talks about the County Court as it was when he came to the Bar.

**Bar News:** *Charles, you signed the Roll of Counsel, I suppose, in the first half of the last century?*

**Charles:** I signed it in February 1949, and so what you're saying is unfortunately correct.

**BN:** *Have things changed much in those years?*

**Charles:** Enormously.

**BN:** *And, in respect of the County Court, how have things changed?*

**Charles:** Well, first of all there was no County Court building.

Certain courts in the Supreme Court building were allocated to the County Court. They were mainly on the south side of the building adjacent to Little Bourke Street, and the important courts were the tenth, eleventh and twelfth courts which then were the first, second and third County Court. They also sat in the small court which I think now is a Master's

Court which looked out east into the lane between the Supreme Court and the old High Court. They also had a room at the back of the library which was set up as a conference room and as a court.

All the County Courts were in the Supreme Court building and the judges' chambers were in the Supreme Court building too. They were up on the first floor on the east side of the building. Those chambers in general were not as good as the main chambers at the front.

The second and I think quite significant difference was that County Court judges had no associates. When they were sitting one of the clerks from the County Court office would act as what they called a Bench clerk. But often the clerk would disappear for quite a lengthy period to go to the County Court office to do his duties there. So from time to time the judge had to swear the witness in. The fact that they had no associates was, I think, something that a number of the County Court judges very much resented.

The gap between the County Court at that time and the Supreme Court was very marked. The maximum jurisdiction of the County Court was \$500. So they didn't hear any very big claims. It was clear they were significantly inferior in status to the Supreme Court and I think the gap was wider then than it is now.

**BN:** *And the numbers were different.*

**Charles:** Oh yes, at that time there were nine County Court judges only and today I believe there are 57 and a few reserve judges. So there's a big difference in the numbers.

**BN:** *And you say they resented their position. How did this show?*

**Charles:** Well, if you inadvertently referred to a Bench clerk as an "associate", which some of us did mistakenly, you were always greeted with a fairly hostile remark and would be told that they had no associate, I think there was obvious resentment



when those remarks were made by some of the judges.

**BN:** *Did this reveal itself in their temperaments at all — unhappiness?*

**Charles:** I think most of them were reasonably happy but there were several, and I'll speak about this later, who obviously were not happy being County Court judges and that's partly by reason of what happened historically at the Bar. When the war ended in 1945 and everybody came back from the war, there were many barristers who just had no idea what was going to happen. Now some of those barristers were offered positions on the County Court and I think a few years later when they saw how successful some of these contemporaries were in what was a golden era, they must have wished that they were still at the Bar earning big money, whereas County Court judges were only paid £1,500 a year. That £1,500 a year, in 1949, would translate into approximately in value \$150,000 today but then there was rapid inflation and the value of their salaries probably dropped to below \$100,000 today and I think they were not happy about that.

**BN:** *And was there a catch up in terms of income do you know?*

**Charles:** There was a catch up but it was slow in coming and the catch ups were not as much as they would have hoped.

**BN:** *You mentioned the Bench clerk. Did the Bench clerk also operate in General Sessions?*

**Charles:** Yes. The Bench clerk did operate in General Sessions. There was no associate either in General Sessions or in the County Court. You know General Sessions, of course, was the criminal branch, as it were, of the County Court. The County Court had no criminal jurisdiction and the County Court judges alternatively sat in what was termed General Sessions but they were treated as judges just as they would be in any criminal court with a judge.

**BN:** *And theoretically, of course, they were merely Chairmen of General Sessions. Theoretically, they could sit with Justices of the Peace.*

**Charles:** Yes. There were some debates about whether as Chairman of General Sessions they were entitled to the title of "Your Honour". Some people contended that, as they were only Chairmen of General Sessions, they should be called "Your Worship" but the judges made it pretty clear that they were not going to accept that.

**BN:** *Apart from the personnel, what other changes do you see?*

**Charles:** Those are the main changes. I

think the judges then were in many ways more forceful personalities than they are today. There was a wide variety of personalities and some of them were very colourful.

**BN:** *And of course you'd see more of them and know them better: with only a small number you come into more personal contact with the individual judges.*

**Charles:** I got to know all of them pretty well.

**BN:** *Who were they?*

**Charles:** Well, I'll talk about them in order of seniority. At that time they didn't have any chief judge. They had a senior judge

**County Court judges were only paid £1,500 a year. That £1,500 a year, in 1949, would translate into approximately in value \$150,000 today.**

and the senior judge was ordinarily the judge who was most senior in terms of appointment.

When I came to the Bar the senior judge was Len Stretton who had been appointed in 1937 and became senior judge in 1946. He was a very interesting man. His family were steeped in the law. He had recollections as a small boy of being taken up Goldsborough Mort Lane by his father to visit the Law Courts and, as they were going up there, there was a water pump beside the building on the south-western corner of Goldsborough Mort Lane and Little Bourke Street. That building subsequently became O'Donohue & Lynch's office, but at that time it was a building in which barristers lived. As they were walking up the lane, there was a barrister outside dousing himself. He had some clothing on but he was dousing himself under the pump and Stretton's father turned to the boy and said, "He must be an equity lawyer because they have to come to court with clean hands."

**BN:** *I take it this would have been in late 19th century, early 20th century.*

**Charles:** It would have been around 1900.

**BN:** *Yes.*

**Charles:** Stretton I found a very friendly man and I got on well with him. A lot of the time he sat in workers' compensation, and sitting in workers' compensation he was to some extent away from the Bar.

But always about 11.30 in the morning he'd have a break and he'd have tea and biscuits and he would invite the barristers to join him and they would have conversations about what was happening at the Bar and what was happening in the judiciary. Stretton was always very interested in the Bar and what was happening at the Bar.

Sitting as Chairman on the Workers' Compensation Board, theoretically that was a magistrate's position although for a long time they had a County Court judge as the Chairman. There were suggestions that as they were sitting in what was a magistrate's position they should be called "Your Worship". But the view of the judges was that as they were judges they should be called "Your Honour".

On one occasion Maurice Ashkanasy, who tended to be cheeky, went down before Stretton and at an early stage in the proceedings he called him "Your Worship" and was mildly reproved. He did it a second time, again Stretton indicated some objection. Then a little later, Maurice Ashkanasy did it quite deliberately to cheek Stretton and then having done it, elaborately apologised. Stretton said to him, "Oh Mr Ashkanasy, there's no need to apologise, I realise how difficult it is for you to get over the habits of a lifetime."

Stretton had been, when he was at the university, a great scholar of English and he wrote beautiful English. He was also in his young days quite a good poet. In 1939 he was appointed to sit on the inquiry into the Black Friday fires, of January 1939. They were very severe bushfires, and when he wrote his report the opening part of the report was in such beautiful English that at a later stage it was prescribed as compulsory reading for VCE students so that they could see just how well English could be expressed.

One other thing I remember about Stretton — and I remember this with joy — I was appearing for a young man who was charged with theft and he alleged that the confession that had been obtained from him was only obtained after he was knocked about by the police. In his evidence in chief on the *voire dire* he went very well, and then in cross-examination he handled things reasonably comfortably until suddenly the Crown Prosecutor, as his master stroke, produced the police records. In the police records used at the police station there was a column for him to write in any complaints and he had not written anything in this.

He was tackled on this by the Crown Prosecutor, and at that stage he stumbled and I was troubled. I didn't know where I

was heading. I wasn't very experienced at that stage. Then Stretton sent the accused a magnificent lifeline. He said, "Young man, when you're bitten by a lion, do you complain to another lion about it?"

Anyway we were successful on the *voire dire*. He was acquitted and he went on to a distinguished career. He was a successful businessman and later he became mayor of the city where he lived. At that time if he had been convicted that would have been an enormous stumbling block to his career.

The next judge I wanted to talk about was Cliff Book. Cliff had been a Crown Prosecutor for most of his life at the Bar. He became a judge in 1943. Although he'd been a prosecutor there were no signs of that when he came to be a judge.

He was always quiet and courteous and very fair and most of us thought he was a very good judge. He was also very active within his own church but he was not a colourful person in the same way that Stretton and some of the others were.

Now, the third most senior judge was the infamous Jimmy Moore who was regarded as a "bad man judge", probably the worst of the 20th century.

Jimmy was a real problem for all of us in the fifties. Unless you had had a fight with Jimmy Moore I don't think you really were considered to be a barrister. It was part of the training of a barrister to have a fight with Jimmy Moore; and it wasn't hard to do.

There was one young barrister. I won't mention his name (but I'll call him the flamboyant barrister because he was flamboyant) who was appearing in his first criminal trial. He made what I think was a very bad mistake. He asked a number of his relatives to come and watch him in action and he drew Jimmy Moore as the trial judge.

At the start of the trial the flamboyant barrister stood up addressing Jimmy Moore with his hands in his pockets and Jimmy said, "Young man, take your hands out of your pockets when you're speaking to me." Instead of doing this the barrister argued that he had a constitutional right to keep his hands in his pockets. So for nearly 20 minutes there was a heated argument between him and Jimmy Moore. (I'm sure the client wondered what on earth was going on.) But eventually he took his hands out of his pockets and obeyed the direction of the judge.

Jimmy was very much an interrupting judge. He thought all litigation should be conducted as he thought fit, and he was fairly critical if you weren't conducting the

litigation in the way he thought it should be conducted. This probably reached its peak in 1958 in a case at Hamilton.

This was a husband and wife maintenance case. In the Magistrate's Court the husband had won and there was then an appeal under the provisions of the Maintenance Act to General Sessions. They had the misfortune to draw Jimmy as the judge. The respondent husband, whose name was Tom Atterby, was a farmer and his wife alleged against him that he knocked her about and that there was cruelty.

One feature of this case was that Mrs Atterby's parents had come out from England. Until they came out from England there was apparently no trouble between them. But her parents did not want her living on a farm, they wanted her living in the town of Hamilton.

The husband claimed that he hadn't been cruel, that there'd been no knocking about and that she had ulterior motives for making those allegations. Tom Atterby's counsel Gillespie-Jones wanted to cross-examine to establish those ulterior motives and Jimmy wouldn't let him cross-examine along those lines. Jimmy said, "Look. The case that's been made against you is that you were cruel and that you knocked her about, and you've simply got to deal with that case." Gillespie-Jones didn't agree with this and in the first half hour there were at least 15 interruptions to his cross-examination by the judge.

Eventually Gillespie-Jones came to the conclusion that it was impossible for him to conduct the litigation properly and he staged what was a famous walk-out. He complained that as counsel he was not being treated properly; that he was not allowed to put his case. He and the instructing solicitor and the client all walked out of the Court. The judge then simply proceeded and made an order for the wife. As a result of that the husband sought writs of prohibition and *certiorari* against the judge and a long affidavit was filed dealing with the judge's behaviour.

Jimmy did what was not very wise. Before the wife had any opportunity to put in an answering affidavit, he himself put in his own affidavit as to what had happened in the Court. In his own affidavit Jimmy admitted that there had been 15 interruptions to the cross-examination in the first half hour. There were a lot of matters set out in Jimmy's affidavit explaining why he had done particular things and those matters were very much used against Jimmy by counsel when the

application for prohibition and *certiorari* came on for hearing.

The Full Court came to the conclusion that Jimmy had interfered unreasonably and that there'd been no fair trial. They set his judgment aside. Jimmy was very hurt by that determination but the Bar were overjoyed. The case was referred to in the newspapers in big headlines as the case of the interfering judge.

Murray McNerney as senior counsel conducted the application for prohibition and *certiorari*. Murray hadn't been a silk very long and I was his junior at the time. We made a careful analysis of it all and, on the basis of our analysis, there was, on average, an interruption every 1 minute 47 seconds. On Jimmy's figures it was not very much different. The Full Court were very scathing about Jimmy's behaviour during the course of the hearing, although when they came to deliver their judgments they treated him more kindly whilst issuing a writ of *certiorari* against him.

Ian Gray (later Mr Justice Gray), always known as Sam Gray, appeared for the wife and in effect was Jimmy's counsel. It was often said of Sam Gray that he provided the copy book answer to the cocktail party question, "What do you do when you know your client is guilty?" He conducted the case very ably and did all he could, but the judge's position was unsalvageable.

Many people used to try to get away from Jimmy's court under one pretext or another. On one occasion when he was junior counsel, John Starke wanted to get away from Jimmy and he went over to make an application for an adjournment. Jimmy said to him rather tersely, "Mr Starke, my court is not here simply for your convenience. My court is here for the convenience of the public" to which Starke replied, "I'm aware that your Honour's court is a public convenience."

I had fairly rough treatment from Jimmy on a number of occasions, but very late in his career I had my revenge.

I went up to Shepparton to appear for a woman who'd been injured in a railway accident. At the relevant time she was sitting in the toilet in the train. The train ran into another train which was stationary on the line and she was thrown forward against the door of the toilet and received back and head injuries. Interestingly, the railways pleaded against us contributory negligence which included the particular "sitting too far forward on the toilet seat". Where they got that information I don't know, but that was one of the particulars of contributory negligence.

Now there were three things operat-

ing against me in that trial. First of all, the woman was a German and Jimmy had fought in the First World War and hated all Germans. Secondly, she was Roman Catholic — that emerged during the course of the trial — and he disliked Roman Catholics, not quite as much as he disliked Jews, but they carried, I think, about a 7lb penalty. Thirdly, he was always on the side of statutory authorities. He laboured very hard on the railways' behalf.

We were before a jury and we sat until 5.30 p.m. I had had a pretty rough day but I was determined that no matter what happened, I'd be polite to the judge. At 5.30 Jimmy adjourned and announced that he'd continue at 7.30 that night.

Just before 7.30 p.m. my opponent, Norman O'Bryan, and I walked in and sat down at the Bar table. The jury were brought in and, as they walked past me, the foreman turned to me and said, "How do you ever manage to remain pleasant to a bastard like that?" Well, that encouraged me and I was able to remain calm during the remainder of the case.

We were hoping for a reasonably big award of damages and we thought that the maximum damages we were likely to get at that time in relation to her injuries was £5,000. The jury, to our delight and slight worry, came back with a verdict for £5,100 which we were able to hold 2/1 on appeal. I felt at that stage that for most of the things that Jimmy had done to me I'd got my own back. He was rather horrified that this German woman got this very large verdict.

The next judge, and I'll only speak about him briefly, was Len Reid. Len had been in the 1914–18 war. He'd served in the A.I.E. with some distinction but was left with some permanent disabilities as a result of the war. He had a very big running down practice at the Bar acting mainly for defendants and insurance companies. He also did some inquiries. He was counsel assisting the inquiry on the "Pyjama Girl" which was quite a famous case. The Pyjama Girl's body was found in a drain near Albury in 1934. Nobody identified her at the time. But 10 years later she was identified as Linda Agostini by means of the dental work done on her teeth. There was then a coroner's inquiry into her death and Len was counsel assisting. There was still argument as to whether the Pyjama Girl was in fact Linda Agostini as was claimed. The Coroner found that she was Linda Agostini.

One unfortunate thing about Judge Reid was his facial expressions. He gave

clear indications by his facial expressions of exactly what he was thinking. Often you would receive a summing up for an accused which didn't read too badly, but the judge's expressions as he was summing up to the jury made it extremely plain that he didn't believe the defence that was being raised.

On one occasion he got into somewhat of a fight with Alec Southwell (later Mr Justice Southwell) in a case before a jury. There was no shorthand writer and in the midst of the argument the judge said that he wished what was being said by Southwell was being recorded, to which Southwell replied that he wished the case was being televised so that the Full Court could see how his Honour looked during the course of the trial. It was a fairly famous interjection.

The next judge I want to mention is Norman Mitchell.

Norman had been a good cricketer. He had on occasions opened the batting for Victoria but he had the misfortune to live in one of the great eras of Victorian cricket. Victoria at that time had two very good openers, Woodfull and Ponsford, so that Norman very rarely got into the team unless Woodfull and Ponsford were away. I think in ordinary circumstances Norman would have been a regular member of the team.

Norman was a bit of a larrikin but he had great experience of life and a great knowledge of people.

One day in 1946 he was standing outside his chambers when Mr A. E. Hocking walked past. Mr Hocking was very prominent in the National Party, which was in power at the time. As he went past he said to Norman "How would you like to be a County Court judge?" to which Norman replied "That'll be the bloody day". About a week later he was appointed to the County Court Bench.

After he went to the Bench Norman hardly ever read another law report or law book. He relied on his experience and his knowledge of people to achieve what was almost invariably a correct result but his behaviour on the Bench was a source of amusement from time to time.

On one occasion, Dick Griffith (who was later Mr Justice Griffith of the Supreme Court) was appearing before Norman. Dick was very proper in his phraseology and on one occasion when Norman made a comment which was helpful to Dick's argument, Dick said "I'm very grateful for what drops from your Honour", Norman looked at him in amazement. A little later Norman again made comments which were helpful.

Dick repeated, "I'm very grateful for what drops from your Honour". Norman very elaborately looked down under his chair at that remark.

On another occasion, (it was Dick again appearing before him) Dick read an extract from the Third Edition of *Halsbury*. At that time we had the Third Edition of *Halsbury* and the Third Edition of *Halsbury* was bound in green. The Second Edition had been blue. The Third Edition, I think, had probably been coming out for nearly 10 years. Norman said, "What book is that Mr Griffith?". Dick Griffith said "It's *Halsbury*, your Honour". Norman said "But that's a green book". So in 10 years he never apparently looked at *Halsbury* and was surprised to find that the Third Edition had come out bound in green.

Norman could be quite witty and make very appropriate remarks. One of the people who was not exactly an ornament to the Bar was Dave Sonenberg. Dave associated with ladies who today would be referred to as "escorts" and was known for this behaviour. He was conducting a criminal trial for an accused where a sexual assault was alleged and, rather unfairly, he attacked the woman who alleged that she'd been assaulted. He put it to her that she had deliberately dressed herself to look innocent. Amongst other things, Sonenberg suggested to her that she hadn't put much makeup on, to which the judge interjected, "Mr. Sonenberg, I appreciate that she may not have as much makeup on as the women to whom you are accustomed."

The next judge on the Court I wanted to mention was Leo Dethridge. Leo was also appointed in 1946 and he was a great man for the underdog. He always tried to work out who was insured and who wasn't insured. At that time there were many car accidents in which one of the drivers was insured and one was not insured and Leo would almost invariably find for the driver whom he thought was uninsured. Once or twice that led to disasters. He picked the wrong one. He was a friendly judge and he very much enjoyed hospitality when he was on circuit. He was a judge who was well liked by the Bar.

The other judge appointed in 1946 (there were a string of them appointed that year) — was Freddie Gamble. Of all the judges on the County Court at that time, I think undoubtedly Freddie had the most brilliant mind. He was interested in all sorts of areas which most members of the Bar were not particularly interested in at that time. He was very interested in psy-



chology, psychiatry and all sorts of medical matters, and his knowledge was very wide.

Freddie had come to the Bar in 1924 and he had a brilliant start to his career. He was reputed to have earned 1,000 guineas in his first year at the Bar. Certainly he got off to a great start. He had a very quick brain and very quickly grasped an argument or grasped the facts of a case. He also had a rich variety of other talents. He was an extremely good artist (he painted in oils) he was quite a good pianist; and he was also extremely good with his lathe. He did a lot of woodwork of very high quality.

Unfortunately, when he got on to the Bench Freddie rather lost interest in life on the Bench. Very possibly he wished he was back at the Bar where with his particular talents he would have made a fortune in the post-war period, which turned out to be a much better time for the Bar than everyone expected. But as a judge Freddie began to drink far too much in public, and often he appeared in restaurants and other places in a fairly drunken condition. This became a matter of concern to his brother judges and they met to discuss it. Finally they appointed one of their number as a delegate to go to see him and complain about his behaviour. The delegate went down and said he was a delegate appointed by his brother judges to tell Gamble that they were very perturbed by his behaviour off the Bench. Gamble promptly replied, "I'm appointing you a delegate to go back to my brother judges and tell them I'm very disturbed by their behaviour on the Bench."

Freddie always wore a morning suit and earlier on in the day he was always extremely dignified. He was very dignified in his court and he would run a good court. On one occasion there was a racehorse which was injured in an accident when the float ran into a train. The owners of the racehorse suggested this would have been a great horse but for the train accident and the accident had ruined what was a champion racehorse. The solicitor for the railways had done a lot of preparation. He had traced out the racing history of the horse and he gave that to Bill Patterson who was conducting the case on behalf of the railways. Bill said to one of the strappers who was in the box eulogising the horse, "Now you say this horse never had a chance to show his true colours." Bill then nominated a race in which the horse had run at Rutherglen not long before the accident and said that in a field of 19 he came 15th. The strapper said, "Well, you wouldn't have expected him to run well

that day." Bill Patterson said "Why not?" and the strapper replied, "Well, he'd been gelded only a fortnight before." Bill said "What difference would that make?", to which the strapper said, "I'd like to see you running a fortnight after you were gelded." Gamble, with great dignity, turned to the strapper and said, "You larrikin, how dare you speak to counsel like that."

On one occasion the flamboyant barrister who I mentioned had his hands in his pockets before Jimmy Moore was appearing before Judge Gamble and they were going at it hammer and tongs. Eventually the barrister said to his Honour "I'm only trying to do the best for my client, your Honour", to which Gamble replied, "Yes that's what worries me."

Gamble had a great ability to charge a jury. He was extremely persuasive and if he charged your way, you almost invariably won but if he charged for the other party, you lost. He was in fact a brilliant jury advocate. Juries obviously liked him and he was pleasant to them and they were readily persuaded by what he said. So he was a very important man in any jury trial.

The remaining judges were Judge Mulvany and Judge Stafford. Judge Mulvany had been a silk and had been a very able counsel. He was probably one of the most clever of the judges at that time but he tended to be cold and unapproachable and he also tended to be very rigid. He had a hearing defect in his right ear, and, in order to hear the evidence, he always sat side on, which was a little disconcerting because it was as if he wasn't listening to you, but in fact that was how he heard better.

He used language which even at that time was becoming archaic and he was very rigid in what he had to say. I remember on one occasion, I was appearing against a young man in a breach of promise case and Mulvaney referred to him as a "cad". That was I think one of the last times I ever heard that word used in court.

Judge Stafford came to the Bench in 1948. Stafford tended to be very slow, and was also extremely thorough and he was a good lawyer, but he was greatly troubled by ill-health. He had heart problems almost from the moment he came to the Bench and that sometimes created difficulties.

On one occasion he had two accused before him and was minded to let them have a short taste of Pentridge before he released them on a bond, so that they would be warned as to what would happen in the future. They were sent out to Pentridge to await sentencing.

Whilst they were out there, unfortunately for them, Stafford had a heart attack and they were entirely forgotten. They kept telling the prison authorities that they should be brought to the court and the prison authorities kept telling them that they went to the court when the judge thought fit.

After about seven or eight months it was finally realised what had happened and they were eventually brought before a court. They were then given a sentence which covered the period they had already served out at Pentridge.

Those are the nine judges who were on the Court when I first came to the Bar and they were the only judges until 1954. In 1954 Archie Fraser, who was known as "Golden Throated Archie" because of his rasping voice, was appointed a County Court judge and became Chairman of the Licensing Court.

Then, in the mid 50s, you had the appointments of Judge Norris, Judge Nelson and Judge Dunn. They were all fairly outstanding judges and a little different from the then existing members of the court. Their calibre is indicated by the fact that all three of them were later elevated to the Supreme Court.

Judge Norris was probably the most interesting of the three. He had very prominent teeth and SEK Hulme said of him, rather wittily, that he was the only man he knew who could eat apples through a picket fence. This was because of his prominent teeth. One year at the Bar Art Exhibition where there were very serious works of art, SEK contributed a not so serious work of art. It was Norris eating apples through a picket fence.

**BN:** *Was it because there were so few judges at the time that these men made such an impression or impact on the Bar or was it because they really were characters?*

**Charles:** I think the answer to that is that they really were diverse characters. Most of the judges in the County Court later seemed to me to fit far more into a similar mould. They did not have marked personal characteristics which you remember, whereas these men certainly were characters. I think there is a variety of reasons for that. Some of them were moulded by the First World War. A number of them, of course, had practised during the Depression which was a very hard time for the Bar. They'd had lives of hardship and adversity that had moulded their characters in a way different to how so many of us are moulded today.

# Postcard from New York City

Georgina Costello

**T**HIS morning, a Monday morning, I went to work. Rugged up in a coat and scarf, umbrella in hand, laptop over my shoulder, a brown-bag of toast pegged under my elbow, I walked rapidly around the pavement puddles, bought my takeaway coffee from Joe's, swooped past the newspaper stand for a New York Times and tumbled into the subway for the daily commute to my downtown office - a screeching lurch of metal train on scratchy tracks.

Having arrived in my office in New York Plaza (about 100 metres from Wall Street), I hung up my coat, dropped everything else on the floor, next to the lawyerly floor-piles of folders and bulldog-clipped pages, and logged into my computer. Today's work started with legal research. Unlike the Butterworth's subscription many of us are used to, an online case search here is typically billed by the search. For example, Aa key word search for federal cases in, for example in Massachusetts, costs the client \$100. A thousand dollars later, I found one case.

Next, I went to a meeting with a pro bono client, in a conference room looking out at the Statue of Liberty. My client, a Tibetan asylum seeker, had arrived at JFK six months ago, around when I did. He paid a Chinese people smuggler to arrange the journey. I came here on one of 10,5000 E-3 visas annually allocated to qualified Australians. After seeing my client off, I logged reluctantly into an on-line database of millions of pages of scanned-in documents, to continue searching for things relevant and useful to our case. Fifty pages in, eyes weary from doing this all the prior day (day Sunday), but knowing that the sooner I finished it, the sooner I could go home, I was interrupted by an email telling me that the Bar exam results would arrive tomorrow.

The reminder of the New York Bar exam made me feel despondent. My



*Georgina Costello outside the UN building.*

first eight weeks here were spent cramming for this test. Studying for the Bar exam is about as interesting as reading cases on taxing legal costs. To pass, you must learn the following New York law subjects: Agency, Commercial Paper, Conflict of Laws, Corporations, Domestic Relations, Equity, Federal Jurisdiction, Future Interests, Insurance, Mortgages, New York Practice & Procedure, New York Professional Responsibility, Partnership, Personal Property, Secured Transactions, Trusts, Wills, Workers' Compensation, Constitutional Law, Contracts/Sales, Criminal Law/Procedure, Evidence, Real Property and Torts. Then there are a further 6 multi-state subjects. Not to mention

an extra exam on legal ethics. You have to memorise all these subjects for a closed-book exam that takes 15 hours over three days. Just marking the exams takes the examiners four months.

The exam itself takes place in a large convention centre in mid-town Manhattan and in a couple of other, smaller locations. Each year, about 10,000 candidates sit the exam. About 6,000 or 7,000 pass. When you enter the exam room, you look around at thousands of pallid would-be New York lawyers sitting ready to write, chewing on their pencils and tapping their fingers on laminated desks. Two giant roller doors slowly close behind you as you set your watch to exam time, say a final prayer/

expletive/mnemonic and eye the queue for the loo (already 30 people long five minutes into the exam). On the third day of the exam, runners registered at the same convention centre for the New York marathon. As a group, they were thinner than the Bar examinees. I wasn't sure which queue was least appealing.

The Bar exam is a popular hurdle, perhaps because admission to practice in New York is lucrative. Starting salaries at large Manhattan firms are US\$150,000.006 figure US, plus the bonus. Many US law graduates face significant college debts (often more than US\$100,000), and are hungry for these jobs. The typical big firm attorney here bills 2,000 hours a year, often eats breakfast lunch and dinner at the firm and takes a chauffeur-driven car home each day after 8pm. On the weekends, and late at night, lawyers check their BlackBerry for emails, like a crack addict focused on a hit. If you miss that message, who knows what will happen?

Some differences I have noticed practicing law here: no wigs, wordier written submissions, more female commercial litigators running big matters, a significant commitment to pro bono work by very successful commercial firms, movie stars in local shops ... I mean stores, and the need to put "R"s in words like "car" to be understood.

It is now 8 pm and I'm about to go home for the day. Writing this has meant putting off some document review to tomorrow. Not to worry, it will still be there. It has been six months since I arrived in New York, and in that time I have sat the NY Bar exam, found an apartment to rent (that's another story, almost as hard as the Bar exam, because Manhattan's rental vacancy rates are less than 1 per cent) and seen Mr Big, a former star of Sex And The City twice in the street. He now appears in Law & Order, which they film around the corner from where I live. Tomorrow, if I find out that I have failed the exam, I guess I'll have to study for it again. I suppose it will be like losing a trial. Begin again, hoping you learned something last time. If I pass, maybe I'll run the New York marathon next year.

*Georgina Costello was a Melbourne barrister until moving to New York City to work as a trial attorney at Fried Frank Harris Shriver & Jacobson LLP in May this year.*

P.S. The next morning, Georgina found out she passed the New York Bar exam.

# Verbatim

## Così Fan Tutti?

Coram: Byrne J  
*Premier v Spotless & ors*

**His Honour:** Why should I restrain him [Mr Dreyfus] from asking leading questions unless I was persuaded in that fact this is a witness in his camp? I note he and Mr Burnside have been fairly cosy about this witness and that troubles me a little bit. It well may be Mr Dreyfus is a — I won't say a mere creature.

**Mr Dreyfus:** As I pointed out to Your Honour in opening, we have got a partial alliance with every other party in this case on one issue or another, which of course gives rise to some complexities in the conduct of the case.

As to my cosiness with Mr Burnside, I read with Mr Burnside; I would be disappointed to think we didn't have some degree of closeness.

**Mr Burnside:** After sales service.

## Thumbs Up

24 October 2006  
*Premier v Spotless*

**Mr Dreyfus:** Just in relation to that, Mr Devcic, Mr Goss was the primary building contractor for this project, that is, for the construction of the 49 units?

**Mr Devcic:** That's what I was told, yes.

**Mr Dreyfus:** You spoke to him after August of 2005?

**Mr Devcic:** Yes, I did.

**Mr Dreyfus:** How many times did you speak to him?

**Mr Devcic:** The exact number I'm not sure but I would be able to count it on one hand. Probably half a dozen times.

**Mr Dreyfus:** You've got six fingers, do you?

**Mr Devcic:** Sorry. I will put the thumb up with the other hand and then I do, yes.

## Elastic

Coram: Judge Gaynor  
Hore-Lacy S.C. and D. Gibson for Plaintiff  
B. McTaggart for Defendant

Hore-Lacy in his closing address:

**Her Honour:** No. It's not that I'm being dense, I don't understand what you're saying, Mr Hore-Lacy.

**Mr Hore-Lacy:** No, well, neither do I,

your Honour, but — the court seems to be saying that whilst you cannot take it, it is the subjective knowledge of the plaintiff. However, where the medical reports are similar to the knowledge of the plaintiff, the knowledge that he had, it confirms the knowledge of the plaintiff.

**Her Honour:** Are you sure?

**Mr Hore-Lacy:** Am I sure? Well, that's a very elastic word, your Honour. I'm never sure of anything, I might say. Yes?

## Filipino 'Dwarf' Judge Loses Case

A Philippines judge who said he consulted imaginary mystic dwarves has failed to convince the Supreme Court to allow him to keep his job.

Florentino Floro was appealing against a three-year inquiry which led to his removal due to incompetence and bias. He told investigators three mystic dwarves — Armand, Luis and Angel — had helped him to carry out healing sessions during breaks in his chambers.

The court said psychic phenomena had no place in the judiciary.

The Bench backed a medical finding that the judge was suffering from psychosis.

The Manila trial judge had asked the Supreme Court to dismiss the complaint and return him to the Bench, after being sacked in April.

"They should not have dismissed me for what I believed," Mr Floro told reporters after filing his appeal in May.

The judge said he had made a covenant with his dwarf friends that he could write while in a trance and that he had been seen by several people in two places at the same time. Judge Floro reportedly changed from blue court robes to black each Friday "to recharge his psychic powers".

In a letter to the court he said: "From obscurity, my name and the three mystic dwarves became immortal." However, the Supreme Court said dalliance with dwarves would gradually erode the public's acceptance of the judiciary as the guardian of the law, if not make it an object of ridicule.



# Bar Welcomes Readers Class

Signing of the Bar Roll  
by the September 2006  
Readers on Thursday  
9 November 2006 at  
5 pm in the Library of  
the Supreme Court of  
Victoria.

THIS was the first occasion on which the signing of the Bar Roll took place in the grand setting of the Supreme Court Library, and with the mentors and representative family and friends of those signing the Roll able to be present. What follows is the text of the Chairman's remarks.

On behalf of the Bar Council, I extend a warm welcome to you all to this ceremony for signing the Bar Roll.

The Bar very much appreciates being able to hold this ceremony in this beautiful Library of the Supreme Court. Our sincere thanks to the Chief Justice; to the Court, and its Chief Executive Officer, Michael McGarvie (who is here today); and to the Librarian, James Butler.

The Court and its Library date back to 1884. The oldest series of law reports in the Library dates back to 1220 AD, and the oldest textbook is *Statham's Abridgement*, printed in 1490.

I am sure you will agree that this magnificent building, with the former Chief Justices of the Court looking down on us, is a memorable setting for this ceremony.

This is the first time we have held this ceremony here. In the recent past, the Roll has been signed in the Bar Council Chamber — with only the Council and those signing the Roll present.

Signing the Roll marks the beginning of a unique professional career. Today, each one of the readers who signs the Roll becomes a barrister.

Holding the ceremony here, we are able to include each reader's mentor, and representative family and friends. We're delighted you can all join us this afternoon.

The Bar Roll was established on 21



*All the Readers after the signing.*

September 1900. Twenty-three barristers signed the Roll on that day.

The first person to sign the Roll was John Burnett Box. He was the first Chairman of the Bar Council. He was admitted in Victoria in 1869, and had practised as a barrister here since then. He was appointed to the County Court in 1905.

Others who signed the Roll that day include: Sir Frank Gavan Duffy (later Chief Justice of the High Court of Australia); Sir Henry Higgins and Sir Hayden Starke (both Justices of the High Court); Sir Leo Cussen, Mr Justice Schutt and Sir James Macfarlan (all Judges of the Victorian

Supreme Court); and Mr Justice Dethridge (appointed first to the County Court, and then Chief Judge of the Commonwealth Court of Conciliation & Arbitration).

In other words, more than a third of the 23 barristers who signed the Roll that day became Judges: three on the High Court; three on the Supreme Court; one on the Court of Conciliation & Arbitration; and one on the County Court. I wish the September 2006 new barristers even better prospects of advancement!

In any event, since 21 September 1900, every Victorian Barrister, including Sir Robert Menzies and Sir Owen Dixon, has signed the Bar Roll.

# of September 2006



The first woman to do so was the late Joan Rosanove QC, who signed as number 207 on 10 September 1923.

Of the 42 Victorian practitioners who are about to sign the Roll this evening, 14 are women. They join the 326 women on the practising list (20 per cent) out of a total of 1,631.

I now call upon the Honorary Secretary of the Bar Council, Penny Neskovic, to call each Victorian practitioner who has successfully completed the September 2006 Bar Readers' Course to sign the Roll. [The Victorian Readers then signed the Roll.]

For almost 20 years, since 1987, the

Victorian Bar has provided places in each Readers' Course to lawyers in the South Pacific Region — from Papua New Guinea; Vanuatu; the Solomon Islands; and from Indonesia.

Jacob Kausiama and Florence Williams, both from Vanuatu, are the one-hundredth and one-hundred-and-first South Pacific readers to complete this course. I now call upon them to step forward and sign the Roll of Overseas Counsel. [The Vanuatu Readers then signed the Roll of Overseas Counsel.]

Jacob and Florence, you are, as I've said, the one-hundredth and one-hundred-and-first South Pacific lawyers to



*Simon Pitt (Assistant Honourary Secretary) standing while Bar Reader Christopher Young signs the Roll.*



*Michael Shand about to shake hands with Bar Reader Sascha Dawson.*

complete the Victorian Bar Readers' Course. Congratulations!

I understand that you both participated in the week-long Advocacy Skills Training Workshop for Government lawyers in Vanuatu in January.

We're delighted that you came here to Melbourne for the full Readers' Course. Those conducting the course have noted your active and conscientious participation throughout the course — and that you have both made many friends here.

Our first course in Vanuatu was in February 1995. It was led by the late Robert Kent QC. He was then a Judge of the Supreme Court of Vanuatu, and was





*Readers from Vanuatu, Jacob Kausiama and Florence Williams, are presented with gifts by the Chairman, Michael Shand QC, after signing the Roll of Overseas Counsel.*



*Michael Shand shaking hands with Bar Reader Tony Elder.*



*Michael Shand shaking hands with Bar Reader Georgia King-Siem.*



*Chairman of the Bar Council Michael Shand QC addresses the gathering.*

the founder of the Bar's South Pacific program.

In addition to our Advocacy Skills Courses in Vanuatu, 15 ni Vanuatu law-

yers have now completed the Bar Readers' Course.

The magnificent Tapa Cloth from the Kingdom of Tonga was presented to us by

Jennifer La'au — the Vanuatu lawyer who attended the Bar Readers' Course in 2000. That hangs in pride of place in the foyer of Owen Dixon Chambers West. It is much admired; and is an ongoing symbol of our friendship and professional connections with Vanuatu.

Jacob Kausiama is an Assistant Legal Officer. He represents the needy in Vanuatu community in both civil and criminal proceedings. Florence Williams is State Counsel in the Office of the Solicitor-General.

I have great pleasure in giving you each a small token of remembrance of your participation in the Readers' Course; of friendships here; and of your connection with the Victorian Bar. Congratulations again and best wishes for your future practice of the law.

I now address all of you who have today signed the Bar Roll.

On behalf of the Bar Council, I extend our warmest congratulations on becoming members of the Bar. We wish each one of you a long and satisfying career as a barrister.

As part of the application to sign the Roll, you each gave a written undertaking not to practise "otherwise than exclusively as counsel".

That undertaking was conditional on the Council granting your application. Your signing the Roll today perfects your



undertaking, and makes you a member of the Victorian Bar.

We are an independent Bar. We are each self employed. None of us can employ another barrister, or go into partnership, or work for a firm.

We act for our clients without fear or favour. We observe the cab rank principle with briefs which come to us.

We owe a paramount duty not to mislead the Court. We also have a duty to advance our client's interests to the best of our skill and diligence.

We aim to observe the highest standards of ethics and competency, not as lofty ideals, but from day to day, from one brief to the next.

Although each of us is independent, we are not alone. There are now 1,673 of us. There is camaraderie at the Bar. Please feel free to talk to your fellow barristers, in particular more senior members of the Bar. Talk to us about your cases, and ask for help if you need it. We have a long tradition of our doors being open – so long as we're not on the other side!

Our Bar has a proud tradition of pro bono work, that is to say, working for no fee or a reduced fee. You all know of the Nguyen case in Singapore — the young man who was hanged.

That case was done pro bono. Lex Lasry QC and Julian McMahon appeared without fee. The case came into the public spotlight towards the end — but Lex and Julian were involved in that case for three years!

More than a quarter of the Bar have volunteered to participate in the Victorian Bar Legal Assistance Scheme, administered by PILCH — the Public Interest Law Clearing House. Well over half of last year's readers volunteered for that.

Our Bar has a proud tradition of service. I would encourage you to get involved in the life of the Bar. Join a committee, volunteer to help, stand for the Bar Council. There is so much going on and much that you can contribute.

I would like to take this opportunity, on behalf of the Bar Council, of publicly thanking those who have made the Readers Course a success: the Chairman of the Readers Course Committee, Ian Hill QC; the members of the Readers Course Committee; our guest speakers and par-

ticipants; mentors; and most important of all, our staff — Barb Walsh and Deborah Burns.

Finally, congratulations on your successful completion of the Readers' Course and joining the Bar. All the best for your future careers!

To family members and friends of our new barristers, thank you for joining us at this ceremony. We are sorry we could not invite you to the dinner. Numbers do not permit — but we hope you have enjoyed being part of this ceremony.

## Board of Examiners

THE Board of Examiners for Legal Practitioners approves candidates for admission to practice as barristers and solicitors in Victoria. Practitioners from both the sides of the profession are appointed to the Board by the Council of Legal Education. The members of the Board provide their services on a voluntary basis.

For the most part the work of the Board is done out of hours with hearings at night time, sometimes going late into the night. The Board sit at least 20 times a year with judgments to be written and delivered, appeals to be contended with and, on one occasion, a special sitting of a Full Court.

On 31 December 2005, Bill Lally QC retired as a member of the Board of Examiners. Bill has been a member of the Board of Examiners since January 1998 when he became a deputy member of the Board. In January 2002, Bill

became a principal Board member and served as Chairman of the Board in 2005. Bill has served on the Board with distinction and has made an outstanding contribution to its work.

On 29 November 2006, a dinner was held at the RACV for four retiring members of the Board — Bill Lally, Gail Owen OAM, Tina Millar and Simon Begg. Those at the dinner acknowledged the enormous contribution that the four of them have made during their combined 40 plus years of service on the Board.

It was a tribute to the importance of their work that the President of the Court of Appeal, Justice Maxwell, was present at the dinner. On behalf of the Supreme Court, Justice Maxwell delivered a witty and engaging speech as well as thanking the retiring Board members for their unstinting and voluntary service to the profession.



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# Milestone for the Victorian Bar

The Victorian Bar Mediation Centre celebrated its tenth anniversary on 12 October 2006 at the Essoign Club. The evening was to mark this significant milestone and to highlight the involvement of a number of special people in the success of the Centre. In attendance were invited guests from the State courts and VCAT, users and staff of the Centre, and mediators from the Victorian Bar. Unfortunately members of the Victorian Bar Council, including the Chairman, Michael Shand QC, were unable to attend due to a clash with the Bar Council meeting.

David Levin QC, the outgoing Chair of the Dispute Resolution Standing Committee, commenced the formal part of the celebration by acknowledging the involvement of Bill Martin QC, George Golvan QC and Henry Jolson QC as three of the leading supporters of mediation at the Victorian Bar and noted an apology from Henry Jolson QC who was unable to attend but wished the celebration well.

David thanked the staff of the Centre for their dedication over the years which had contributed significantly to the success of the Centre. David welcomed Professors Boulle and Wade from Bond University who have done so much to assist in the establishment of mediation as a recognised subject for study and invited Ross Maxted, Chair of the Dispute Resolution Committee Standing Committee, to address the gathering.



*Helen Henry, Tim McFarlane, Frances O'Halloran, Pauline Hannon, David Levin QC and Pauline Adams.*



*Margaret Lothian, Anthony Nolan S.C., Julian Ireland and Judge Damien Murphy.*

## Ross Maxted, Chair of the Dispute Resolution Committee, Victorian Bar

**T**HANK you David, and also for the superb stewardship of the Committee in your capacity as Chair since late 2004 until last week. I have also been asked by the Chairman

of the Bar Council Michael Shand QC to apologise for his absence. Michael who is a great supporter of ADR in all its forms is otherwise engaged until a little later this evening in a Bar Council meeting next

door and he hopes to join us shortly.

On 9 October 1996, John Middleton QC, then merely the Chair of the Victorian Bar Council, opened the refurbished Bar Mediation Centre. It was then known



# r Mediation Centre



*Michael Heaton QC, Peter Lauritsen, Peter Lithgow and Louis Vatousios.*



*Elizabeth Brophy, Gerald Hardy, Martin Randall, Beatrice Mellita and Cary Nichol.*



*Ross Maxted, chair of the Dispute Resolution Standing Committee.*



*David Levin QC.*



*Dr Laurence J. Boulle, Bond University.*

before refurbishment as Four Courts Chambers. The centre came about after the Supreme Courts mediation "Spring Offensive" campaign and other dedicated mediation court initiatives in the early to mid 1990s. A need for a dedicated forum for conducting mediations away from barristers' chambers and their corridors and into a neutral dedicated facility

was identified by the Victorian Bar in association with Barristers Chambers Ltd and hence the Centre was established.

Ten years on and the Mediation Centre now located in Douglas Menzies Chambers has seen thousands of disputants pass through its doors and has, without doubt, been the venue for hundreds of successful settlements of troublesome disputes. The

Centre only this year has also undergone extensive further electronic upgrade for clients' use and to improve communication to the Centre and to assist in the better operation of the centre.

We have been fortunate to have had a dedicated body of mediation centre staff for many years. Helen Henry and Pauline Hannon are the longest-serving original



members of staff who commenced in October and November of 1996. We all wish to thank the staff for their unstinting dedication, professionalism and consideration in the management of the Centre and all who have had contact with it.

It is sometimes forgotten how the mediation process requires both persons and facilities conducive to confidence, confidentiality and care. It is always much more than providing space, tables and chairs. The work of the staff does much to build upon such an environment, conducive to dispute resolution where clients can feel comfortable and confident in a supported and safe environment and invariably where the parties are often making final and lasting decisions.

The Bar now also employs a full-time Disputes Manager, Liz Rhodes, who does an excellent job in assisting enquirers from outside the Bar and with court staff in finding a range of mediators or allocating mediators in the rotation systems.

The Bar Council also in April this year altered the accreditation processes for mediators in order to reinforce that the Bar provides in this State some of the most pre-eminent mediators. The Bar implemented a new accreditation scheme for approval for accreditation of mediators, and also for the advancement of those current practising mediators to the advanced level, providing confidence to both the courts and the parties that these persons are highly capable individuals who can be confidently entrusted with the responsibility of attempting to settle matters that for whatever reason have reached litigation.

All this change in accreditation is occurring at a time when governments of ALL persuasions and politics seem for once curiously united in the commitment to ADR. This is I hope not seen by the public service or its governments finance departments as an opportunity or chance to not properly fund the proper and necessary operation of either the courts and tribunals in order to do their job, nor to not properly fund the proper and respected methods of mediation with properly dedicated and resourced facilities and to provide well trained and caring staff with appropriately experienced and properly remunerated mediators.

The Victorian Bar now has 384 accredited mediators, including more than a dozen who have been accredited as advanced mediators, more than 50 who nominated to undertake pro bono mediations for recent sporting events and associated disputes, and more than 150 who



*Ross Maxted and Danielle Huntersmith.*

are participating in the Magistrates' Court mediation scheme since its increased jurisdiction.

It is therefore a genuine occasion to mark the tenth anniversary of the Mediation Centre and the growth of mediation services.

We have an array of honoured guests — individuals from the local legal community. We have representatives from the State Magistrates Court, VCAT, the County Court and the Supreme Court, people who have done so much to encourage mediated outcomes as a quicker, cost-effective and emotionally less challenged environment than a court and its trappings for resolving disputes. Mediation can allow the parties the opportunity (provided they are shown how it can be achieved), to produce a result which often goes beyond the immediate dispute and one which is more far reaching than that which could be ordered by a court or tribunal in any formal proceedings and is much more likely to be in keeping with the parties' needs, deep non-disclosed desires and their own respective interests.

Professor Laurence Boulle and Professor John Wade of Bond University, who have done so much to promote mediation in Australia and raise the standards of mediation in Victoria, are present tonight. Various other persons who have had a significant role to play in raising the

profile of mediation in Victoria including the staff of the centre are also honoured guests. It is a great pity that Bill Martin QC who for most of these ten years who was the Chair of the Bar's Dispute Resolution Committee is unable to attend – he is sailing somewhere between Tahiti and Fiji, no doubt enjoying himself after many years' hard work.

Laurence Boulle has been invited by the Committee to speak on the National Mediator Accreditation Proposals currently before the Federal government, Laurence had a major role in the outcomes and he will provide details of the progress of this. The actual funding to facilitate a discussion on what might be considered suitable standards for mediation in Australia was made available by the Federal Attorney-General in 2004. The funding was to be disbursed by National Mediation Conference Pty Ltd. That organisation established a nationwide committee to consider what should be done and it appointed Professor Boulle in late 2005 as the facilitator. His extensive work led to a draft proposal which was passed unanimously by the Eighth National Mediation Conference in Hobart in May 2006 and has now moved into the implementation phase.

Laurence needs little introduction, however, briefly, Laurence Boulle joined Bond University as a foundation staff member in 1988. He served as Chair

of the Federal Government's National Alternative Dispute Resolution Advisory Council 1999–2003 and in 2004 was appointed to the National Native Title Tribunal (the specialist mediating body for Native Title matters operating independently of the Federal Court's native title jurisdiction) as a part-time member. He is

accredited as a mediator of the Supreme Court of Queensland and conducts a private mediation practice. For many years he and Professor John Wade, also from Bond, conducted mediation courses for the Victorian Bar. I did my course in 1993 along with many others at the Bar. Laurence Boulle has also been the editor

of the *ADR Bulletin* since 1997. He has written on constitutional law, employment law, mediation and dispute resolution. His latest book, *Mediation Principles, Process and Practice*, published in 2005, is a highly recommended text.

I ask you to welcome Professor Boulle.

## Laurence Boulle, Professor of Law, Bond University

IT is a great pleasure to congratulate you on the occasion of the tenth anniversary of the Victorian Bar Mediation Centre. It is particularly flattering that you have invited an academic to talk to a group of practitioners. You well know that the Centre has worked very well in practice, but as academics we always say, "it may work in practice but does it work in theory?"

All anniversaries coincide with others. This is the very day on which the Northern Territory's voluntary euthanasia scheme came into being. That scheme suffered an early demise, so to speak; yours is merely in its robust adolescence.

It is also fitting to acknowledge the pioneers of mediation amongst the ranks of Melbourne barristers. This includes Henry Jolsen QC, Bill Martin QC, George Golvan QC, Mark Hebblewhite, David Levin QC, and many others who in the late 1980s and early 1990s were pioneers in shifting the legal culture in the direction of dispute resolution. I turned to Google to discover who in Melbourne might be the best mediator of them all — I obtained 526,000 hits in .29 of a second. As usual so much information but so few answers.

The Bond Dispute Resolution Centre has thoroughly enjoyed its long association with the Victorian Bar. This goes back to the early 1990s when we conducted the first mediation workshops for Melbourne barristers and has continued ever since. Each year we welcome a number of barristers to our mediation workshops on the Gold Coast and to our advanced workshops in Noosa. We are also delighted to note that your incoming chair, Ross Maxted, is a "graduate" of one of the early Bond mediation workshops.

Much has happened in terms of mediation developments over the past decade. Back then, as they say, there were no iPods, Big Brother or Virgin Blue. Simultaneously with those developments, mediation has become more institu-

tionalised and accepted within the legal culture and by prospective clients, and, sadly some might say, it has become more respectable. For some lawyers and other professionals practice has boomed, and become relentless and demanding. In the past there has been a syndrome of "recovering lawyers", there is now a syndrome of "recovering mediators", though there are also frustrations among private mediators about the lack of consistent demand for their services.

There has in recent years been an increasing emphasis on standards and codes of conduct, and I was delighted that your outgoing chair David Levin QC played a prominent part in the development of the proposal for accreditation to a National Mediation Standard. The Law Institute of Victoria, VADRA and several individual Victorian mediators were also involved in the extensive consultation process underlying the initiative. As with the ADR Standards document produced by NADRAC some years ago, there has been an attempt to balance the need for some degree of consistency in mediation practice with the value of diversity in forms and styles of mediation throughout the country. I hope it has succeeded in this objective. It is important to emphasise, for those who have heard inaccurate rumours, that the proposed scheme is an entirely voluntary one and does not constitute a licensing system for current or prospective mediators. There are currently committees working on the details of the scheme, for example in relation to training, the code of conduct, the national register of mediators accredited according to the standard, and so on. The real effectiveness of the system will be determined by which institutions, public and private, buy into it once it is established.

It is worth noting in passing that your own recently revised Bar accreditation scheme for mediators is in some respects even more advanced than the national standard. I have no doubt that this will

allow for significant "grand-parenting" into the new scheme.

However, if we look globally at the mediation field, developments are occurring at a frenetic pace. While we have in the past looked to North America for inspiration, in recent years the countries of Europe, including the United Kingdom, have taken significant steps in the development of mediation as a profession. In a number of European countries there is now legislation or other forms of regulation for mediator standards, quality and accountability. While in this country we have opted for a self-regulation model there is little doubt that European developments have much to teach us. Certainly our practice of four or five days' mediation training does not even compare with some civil law countries which require between 150–600 hours of education and training over extended periods of time.

As regards the future there is no doubt mediation will survive both within the legal culture and outside it. It will never be completely dominated by one profession. It will be modified and transformed by innovation, consumer demands, competitive marketing and lessons from abroad. Already med-arb has become an accepted feature of the ADR landscape and in due course one can anticipate customers demanding the services of lawyer-mediators without any legal representation. However, the process-based model taught in training workshops has tremendous potential value in terms of its ability to assist parties to communicate, negotiate and generate interest-based solutions. It will remain the start-up kit for mediators for generations to come.

The Bond Dispute Resolution Centre sends fraternal greetings to you and looks forward to a fruitful continuing association with the Victoria Bar Mediation Scheme. Hopefully, weather permitting, we shall be together again in ten years' time to reflect on another decade of achievement.

# 2006–2007 Victorian Bar Council



*Front row:*

Michael Colbran QC (Honourary Treasurer)  
Peter Riordan S.C. (Senior Vice-Chairman)  
Michael Shand QC (Chairman)  
Paul Lacava S.C. (Junior Vice-Chairman)  
Jack Fajgenbaum QC

*Middle row:*

Richard McGarvie S.C.  
Charles Shaw  
Simon Pitt (Assistant Honourary Secretary)  
Mark Moshinsky  
Kate Anderson  
Tony Pagone QC

*Back row:*

Fiona McLeod S.C.  
Tony Burns  
Justin Hannebery  
John Digby QC  
David Neal S.C.  
Daniel Harrison





*Absent:*  
Timothy Tobin S.C.  
Kerri Judd  
Cahal Fairfield  
William Alstergren (Assistant  
Honourary Treasurer)  
Michelle Sharpe  
Penny Neskovicin (Honourary  
Secretary)

## Victorian Bar Superannuation Fund

# Appointment and Retirement of Barfund Board Directors

An extract from an address to the Barfund Board on 2 October 2006 by the Chairman, Philip Kennon QC

**F**OLLOWING the recent board election I would like to welcome our two new directors, previously alternate directors, David Collins and Stephen McLeish. They replace Jonathan Beach and Melanie Sloss.

Jonathan and Melanie have retired after a combined 18 years of remarkable service.

Jonathan was appointed as a trustee in 1993 before Barfund was incorporated. Ever since, Jonathan has made a magnificent contribution to Barfund's development, standing and service. His views on any issue were always highly valued. Major developments over this time include



*Jonathan Beach QC*



*Melanie Sloss S.C.*

the appointment of our investment advisors, the introduction of member investment choice, unitisation and an allocated pension and the recent grant, after much effort by all, of our APRA Licence.

Melanie became a director in 2001. Her dedication and attention to detail were always well beyond the call of duty. Melanie was the major contributor to many complex

and never-ending compliance issues. Her efforts in relation to Barfund's successful APRA Licence application were enormous.

On behalf of the board I thank them very much.



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# Celebrating Excellence

Australian Women Lawyers' Inaugural Conference, Sydney 29–30 September 2006

WITH about 200 attendees, the theme of the inaugural Australian Women Lawyers conference at the Sheraton Sydney, “Celebrating Excellence”, brought together an array of women lawyers who have all excelled in their various specialities. Although all but one of the speakers, were female judges, lawyers, or academics from around Australia (with the exception of His Honour Chief Justice Spigelman who opened the Conference on Thursday evening) the substantive issues raised in the papers were equally applicable to men and women alike. The conference offered papers on various aspects of the three streams, Property, Litigation and Corporate Governance. In addition there were three joint Human Rights Plenary sessions. Each speaker gave a personal anecdote during their speech. Nicola Roxon, Shadow Attorney-General, related how on leaving the High Court as Associate to join a Trade Union, Mary Gaudron had presented her with a silver hippo, saying “where you are going you will need a thick hide”. Professor Kim Rubenstein told of running for Prime Minister at school mock-elections where her party was successful but she herself failed to win her seat. Which taught her the lesson that if you are not for yourself who are you for? Professor Hilary Charlesworth encouraged us with her successful career, notwithstanding her spectacular failure at Articles and in private practice. Mary-Jane Crabtree commented that one’s career can be a success even if it doesn’t go to plan; she had always planned to become a vet.

The conference closed with a Gala Dinner with the speaker, June McPhie, President of the Law Society of NSW, who is based in Cooma, explaining how she had warned the local newspaper of the potential danger to the public after being bitten by a disease-infected bat, only to be rewarded with the headline “Bat Bites Lawyer and Dies”.

After two solid days of papers, Saturday night was for relaxation, catching up and cementing new friendships. The entertainment was provided by a female comic trio of singers The Chandeliers who



*Present High Court Justice Susan Crennan and former Justice Mary Gaudron.*

encouraged diners to take to the dance floor. Excellence in dance was enthusiastically undertaken with judicial diners leading the way.

With so much to choose from it is hard to focus on any one highlight but perhaps it was Mary Gaudron QC’s entertaining, informative and challenging speech about the rule of law, followed by the warm public congratulation and best wishes to Her Honour Justice Susan Crennan QC on her appointment to the High Court Bench for

what she knew from personal experience would inevitably be a lonely and demanding role, and acknowledgment of the difficult and often lonely task ahead, followed by Her Honour Justice Susan Crennan QC leading the standing ovation at the end of Mary Gaudron QC’s speech.

Special thanks to then President of AWL, Caroline Kirton, and the AWL committee for all their hard work and efforts in organising this outstanding inaugural conference.

In opening the conference, the Honourable Justice Mary Gaudron said:

MADAM President, Your Honours, Friends, Ladies and Gentlemen, I cannot tell you what a thrill it is to be here at the Inaugural Conference of Australian Women Lawyers. When I spoke at its launch in Melbourne on 19 September 1997, I said that I welcomed the formation of Australian Women Lawyers because: “it seem[ed] to me that it [was] an acknowledgement by women

lawyers, albeit, perhaps belatedly, that they are different and [also] an assertion of their right to be so.”

I added that: “I welcomed it because it [also] seemed to me to have implicit in it a demand that the legal profession take stock of itself and of those practices which ha[d] resulted in the under-representation of women in important areas of legal practice and in the judiciary, not because

women should have a larger share of the spoils of legal practice, but because they ha[d] the potential to improve the law and the administration of justice.

The holding of this conference on the theme “The Pursuit of Excellence” seems to me to indicate a real determination on the part of the women lawyers of Australia to improve the law and the administration of justice.

It is, I suppose, a truism that law—more particularly, the rule of law—is indispensable to social welfare, and to economic and commercial activity. There was a time, not so very long ago, when we could comfortably think of social, economic and commercial welfare in terms of the body politic constituting the nation state. Our tendency was to think in terms of our own nation state. In the face of the geopolitical changes wrought in the past twenty or thirty years and the consequential globalisation of commerce and industry, we can no longer afford such insularity. The absence of or a breakdown in the rule of law in any nation state inevitably has consequences for us all.

The absence of or a breakdown in the rule of law is usually first indicated by the absence of equality—by the oppression of ethnic or religious minorities, for example, or the suppression of political dissidence or, as often as not, by the unequal treatment of women.

There is nothing pretty about a society that lacks the rule of law. The opposite of the rule of law is not, as you might suppose, anarchy. It is coercion and corruption. It is the rule of might, of armed militias and, sometimes, of religious fundamentalists. Its consequences are poverty, ill health, dislocation, refugee camps and, even, terrorism.

Fortunately, our own nation state is one based, in large part, on respect for the rule of law. Indeed, the rule of law cannot exist without respect for and confidence in our laws, our lawyers and our legal institutions. Ironically, that respect depends, in part, on openness to criticism—criticism of our laws, our lawyers and our legal institutions. Not all criticism is either fair or informed; and from time to time, its purpose is short-term political or commercial advantage, rather than ensuring just legal outcomes. Such criticism has the potential to undermine confidence in our judicial institutions and, ultimately, in the rule of law. The only effective counter to criticism of that kind is the pursuit of excellence.

It probably does not advance the discussion very far to say that, in a legal con-

text, the pursuit of excellence necessarily entails the pursuit of just legal outcomes. Fundamental to the notion of a just legal outcome is the principle of equality. I call it “the principle of equality” because it is so described in international law. However, in truth, it is probably incorrect to assert the existence of such a principle in the Australian context. True it is that we have State and Federal anti-discrimination laws. We also have a limited constitutional guarantee with respect to the equal application of State laws to persons resident in other States—a guarantee

**The holding of this conference on the theme “The Pursuit of Excellence” seems to me to indicate a real determination on the part of the women lawyers of Australia to improve the law and the administration of justice.**

which has benefited barristers who wish to practice interstate but, I think, few other Australians. And, of course, we glibly boast that we are an egalitarian society. But we do not accept the principle of equality as a yardstick by which to measure whether laws are good or bad; or to inform as to the meaning of laws that are ambiguous or uncertain; or as to the application of laws or the exercise of discretion. Moreover, we do not have a well-developed idea of what is meant by “equality”. And although we repeat the mantra that “all are equal before and under the law” we often do not fully understand what that entails.

Equality is not uniformity; it is not sameness. How could it be when we are all different with different talents, different intellectual abilities, different needs, different interests, different priorities and different personalities. Equality is the recognition of relevant difference and, where there is relevant difference, adaptation appropriate to that difference. Thus it is that equality allows for individual talent or, as was said in the French Declaration of Human Rights in 1789:

all ... are equally eligible for all honours, places and employments according to their different abilities, without any other distinction than that created by their virtues and talents.

But the principle of equality allows only of relevant difference. It does not permit of distinctions based on differences which are of no consequence, which is generally the case with respect to race, religion, or sex. I say “generally the case” because those differences may give rise to different needs which must be acknowledged if there is to be real equality.

Because the principle of equality allows for individuality, it does not permit of stereotypes. Thus, for example, it does not permit of views such as those expressed by Jeremy Bentham in his *Principles and Morals of Legislation*—views which were influential in Anglo-Australian jurisprudence well past their use-by date. Thus, he could claim that men were entitled to superior legal rights because they had physical power, whereas women were “delicate, inferior in strength and hardness of body, in point of knowledge, intellectual powers and fairness of mind”. Of course, no-one would say that to-day—at least no-one whose name one would care to mention at the inaugural conference of Australian Women Lawyers. That is not to say, however, that similar generalisations are not said—or worse, in a legal context, thought but not articulated—of people of different faiths or cultures and, even, of our indigenous Australians.

If there are to be just legal outcomes, it is imperative that our lawyers and member of the judiciary be sensitive to the question whether, in any particular case, there are relevant differences which should be taken into account or whether there are differences which, being irrelevant, should be ignored. Particularly is this so in areas, of which there are many, where the outcome depends on personal evaluation, such as the assessment of credit or the exercise of discretion. It is not unusual in some quarters to scoff at notions such as “cultural and gender sensitivity”. Whatever one might think of that expression, it does refer to matters which are essential if the principle of equality is to be implemented. Indeed, one is entitled to wonder to what extent lack of cultural sensitivity has resulted in the unequal treatment of Aboriginal Australians by our legal system.

For want of a better expression, let me say something about “cultural and gender sensitivity”. Doubtless, these are attributes much to be desired in judicial officers—particularly those engaged in trial and first instance work. But, in truth, they are qualities necessary for any good litigation or trial lawyer. They are necessary to enable the lawyer to put the client's



real case and to make a fair and informed evaluation of the witnesses and their evidence. Few, if any, lawyers receive training in these matters; and, by and large, it would be naïve to expect these qualities to develop in the normal workplaces of busy barristers and solicitors. Perhaps more disturbing, is the fact that these qualities are not usually taken into account in assessing whether the person concerned is or is not a good lawyer.

I know that I run the risk of being accused of thinking in stereotypes or of using over broad generalisations, but I have long thought that there was a good chance that women lawyers might be more sensitive to genuine difference and more alert to reasoning based on irrelevant distinctions than most of their male counterparts. It is for this reason that in launching the Australian Women Lawyers I spoke of the hope that women would make a significant difference to the administration of justice and regretted their underrepresentation in important areas of legal practice and in the judiciary.

Although not ten years have passed since the launch of Australian Women Lawyers, there seems to have been significant improvement in the position of women within the legal profession and within the judiciary. That is not to say that the present position is ideal but there has been a growing involvement of women in the professional organizations and a noticeable presence in important commercial litigation in all States. Women have been appointed to high judicial office in significant numbers, particularly in Victoria and Queensland. There have been appointments to the Federal Court and, of course, we were all thrilled by the appointment of Sue Crennan to the High Court. I am sure you will permit me as Patron of Australian Women Lawyers to use this occasion to offer Sue our warmest congratulations and best wishes for what, I can assure you, is, inevitably, a lonely and demanding life.

As I said, the position of women in the legal profession may not yet be perfect but developments in the past decade do provide grounds for optimism. They do, I think, give us reason to look to the future rather than dwell on past events. And so, what of the future? Earlier on, I said that we could no longer comfortably think of the rule of law solely in term of nation states or, indeed, our own nation state. There has long been an international aspect to the practice of law whether in terms of ascertaining the country in which a matter should be litigated, which coun-

try's laws should determine the outcome or, even, whether there was some international treaty that should be applied. The past quarter of a century has seen these issues rise to the fore in several areas of legal practice. In the main, these issues still remain to be determined by national courts. Indeed, even the recently created International Criminal Court has jurisdiction only when national courts fail to act. However, I think a number of issues emerge as critical for the rule of law.

The first issue relates to the content of international law that is to be applied in our own courts. To take an example which, I am sure, will be familiar to many of you, it is sufficient to refer to the International Treaty with respect to the Abduction of Children, which is often the subject of litigation in our Family Court. And there are other areas of the law in which the rights and obligations of the parties depend, ultimately, on the terms of treaties negotiated at an international level. And I do not think that there is any real prospect of a diminution in the importance of international treaties to legal outcomes in Australia any time in the near future. I do not criticise this development: I think it is inevitable. But as lawyers, we are all concerned to ensure just outcomes and those outcomes depend not only on the way the law is applied but on the content of that law. Thus, I would encourage those of you who are involved in specialist professional bodies where international law has a role to play to think seriously as to how best to have an input into its content.

The second matter relates to the courts of other countries. It is inevitable that the rights of Australians will, from time to time, fall for determination by reference to international law as applied in other countries. I can assure you that we can

hardly expect other countries to respect international law and treaty obligations if we do not do the same. The time has come when, if only for reasons of enlightened self-interest, we must respect international law in the same way that we respect our national laws.

The final matter I wish to raise concerns the wisdom or otherwise of leaving the application of so much international law to domestic tribunals. In the field of international commercial law, the decision seems to have been made that, to a large extent, international arbitration is preferable to resort to national courts. This is an area of which I am largely ignorant but one of my former associates, Lucy Martinez, is going to talk about tomorrow. However, there is a real possibility that in areas governed by international treaties, different national courts will take a different course, whether in interpretation or in application. It may be that it is time for consideration to be given to the establishment of specialist international appellate bodies to ensure uniformity. That would be an important step towards an international rule of law.

It may seem that, in these last remarks, I have strayed somewhat from my topic. However, I have mentioned them not just because I think the pursuit of excellence in the law is necessarily going to require an understanding of international law but because I think equal justice truly requires the development of an international rule of law.

As I have said many times, I believe women lawyers make and will continue to make an important and distinctive contribution to the law and the administration of justice. I believe that you are well placed to ensure equal justice and thereby maintain what, I think, is Australia's greatest asset, the rule of law.

## 6 DAY AIR TOUR

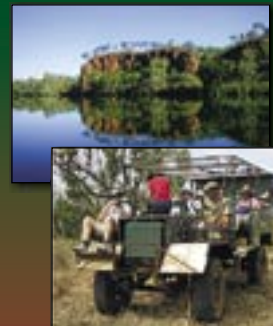
ex Melbourne across Australia's Northern Territory  
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NORTHERN TERRITORY

# Retiring Chairman's Dinner



*Chairman Michael Shand QC and Retiring Chairman Kate McMillan S.C.*

THE Retiring Chairman's Dinner was held in the Essoign on Thursday 26 October 2006. This is always a very special occasion, hosted by the new Chairman in honour of the Retiring Chairman, Bar Councillors and others who have rendered exceptional service.

At this dinner, the Bar recognises and celebrates those who have served and, in many cases, continue to serve the Bar on various Boards and Committees, and in working on submissions to Government and Law Reform agencies.

Fittingly, at this dinner, there is also recognition of the support, the sacrifices, and the affection of partners and spouses which free and enable the Bar members to do all they've done for the Bar. It is the only regular dinner in the Bar year to which partners and spouses are invited.

The Chairman, Michael Shand QC, said of Kate McMillan S.C. that she "served with distinction as Chairman. She was assiduous in her duties and always looked after the best interests of the Bar."



*Wendy Kennon, Diana Sher, Jeff Sher QC and Philip Kennon QC.*

Kate McMillan's year as Chairman saw a number of major initiatives, not least the much postponed commencement of the remainder of the *Legal Profession Act 2004* on 12 December 2005.

Only a very few sub-sections of the Act<sup>1</sup> came into force nearly a year earlier, on 15 December 2004. The whole of the rest of the Act only came into force on 12

December 2005, a few months into Kate's term as Chairman.

Former Associate Professor Susan Campbell conducted her review of legal education and training services in Victoria during Kate's year — including review of the Bar Readers' Course and the Bar CLE Program.

Work on the Professional Standards



*Melanie Sloss S.C. & Kate McMillan S.C.*



*Paul Cosgrove S.C. and Michelle Gordon S.C.*



*Cathryn Wheelahan and Michael Wheelahan S.C.*



*Ian Hill QC, Denise Bennet and Ian Matthews.*



*Fleur Forsyth, Simon Pitt and David Neal S.C.*



*Kate McMillan S.C. and Paul Lacava S.C.*

Scheme continued, and the decision was taken to prepare an application to the Professional Standards Council. The Council approved an Anti-Discrimination Policy for the Bar.

There were increases in a number of Legal Aid fees, and there was agreement with Victoria Legal Aid to establish a scheme for briefing both senior counsel and a junior in a wider range of criminal cases than the previous VLA Handbook had permitted.

There were major submissions on matters such as Advocates' Immunity and the Federal Bill (ultimately withdrawn) that would have extended offshore detention and processing of refugee claims by persons arriving in Australia unlawfully by sea. Other significant submissions addressed proposed increases in the jurisdictions of the County Court and Magistrates' Court; and the Victorian Associations Incorporation Act and Coroners Act, both under intensive review. There was also the ongoing review of the Crimes Act.

The new Bar website came online, and was launched by the President of the Court of Appeal. The first fruits of the Oral History Project became accessible on the new website: interviews with Charles Francis AM RFD QC, Philip Opas OBE QC, Judge Liz Gaynor and Brian Bourke.

The Chairman spoke of Kate McMillan's 23 years service to the Bar which began with her joining the Bar Library Committee only a couple of years after she



*Mark Dreyfus QC.*

came to the Bar; and went on to include: 12 years on that Committee; 11 years on the Bar Council; a remarkable eight years on the Ethics Committee — Chairman of that Committee for four of those years; three years on the Counsel Committee; and six years on the Supreme Court Board of Examiners.

He spoke of the lasting legacy of portraits in Owen Dixon Chambers, in respect of which Kate has played a significant role in their commissioning, acquisition or acceptance — and their unveiling: the portrait of Sir Ninian Stephen; portraits of 10 Supreme Court Judges spanning years from the appointment of Sir Charles Lowe in 1927 to the retirement of Sir Alistair Adam and Sir Douglas Little in 1974, the gift of the family of the late Garrick Gray; the portrait of Mr Justice Crockett; and the Images of Women in the Law series including, most recently, the portrait of Chief Justice Warren.



*Michael Colbran S.C.*

The Chairman spoke of grand occasions in the Essoign master-minded by Kate McMillan: the sell-out dinner to celebrate Susan Crennan's appointment to the High Court; the wildly successful Great Debate; and the second Living Legends dinner in August 2003.

Beyond the Bar, the Chairman spoke of Kate's membership of the 13th Commonwealth Law Conference Committee, which worked for two years organising the very large and very successful conference here in Melbourne in April 2003.

All six other retiring members of the Bar Council attended the Dinner: Mark Dreyfus QC, David Beach S.C., Philip Dunn QC, Iain Jones S.C., Rachel Doyle and Liza Powderly.

The Chairman said that Mark Dreyfus "brought to Council deliberations a perspective beyond that of the Bar. His keen intellect and experience will be missed."



Mark played a significant role in the Bar insuring with the LPLC. He also served four years on AAT Consultative (Heavy Users) Committee; four years on the Ethics Committee; and several years on the VCAT Consultative Users Groups and the Equality Before the Law Committee. Since November 2003, Mark has been the Bar's Law Council of Australia Director.

David Beach served on the Bar Council for a total of almost 14 years: three years in the junior category; seven years in the middle category; and the best part of four years in the senior category. He was Assistant Honorary Treasurer for five years, from 1994 to 1999. Most recently, he was Honorary Treasurer 2004–05 and 2005–06.

Over the course of the years, David served on many committees — and for significant terms of years: six years on the Accident Compensation Bar/Law Institute Committee; five years on the Counsel Committee; 15 years on the Common Bar Association Committee; nine years on the County Court Business Process Re-engineering Committee; 10 years on LawAid; 11 years on Melbourne Bar Pty Ltd; and nine years on the Professional Indemnity Insurance Committee — and these are only the stand-out examples of five or more years' service.

The Chairman described David as an outstanding Treasurer.

David Beach continues as Chairman of the Trustees of LawAid. He has also joined the Indigenous Lawyers Committee, and the Working Group on the Civil Justice Review.

Philip Dunn served 11 years on the Council. The Chairman said he would be "greatly missed" from the Council: "For a very long time, you have been the leading criminal lawyer on the Council. It was your idea to record an oral history of the Bar which we now see happening on the Bar's website. We will also miss your unfailing good humour."

Iain Jones, who was recently appointed Senior Counsel, served on the Council for three years. He had previously served for two years on the Bar Law Reform Committee.

The Chairman noted Iain's three years on the Counsel Committee and two years on the Applications Review Committee. The Counsel Committee is one of only two Committees established in the Bar Constitution (the Ethics Committee is the other); and membership of the Counsel Committee is limited to the Bar Council. Particularly in this first year of operation of the new *Legal Profession Act 2004*

on Practising Certificate applications and renewals, the work of the Applications Review Committee has been very substantial.

Rachel Doyle served on the Council for three years. She served three years on the Bar/BCL Accommodation Committee, and a year on each of the Counsel Committee and the New Barristers' Standing Committee.

Of her, the Chairman said: "I am sure Rachel will return to the Council in the years to come, and be one of the future leaders of this Bar."

Liza Powderly served on the Council for a year. The Chairman said that in that short time she made a real impact and made a substantial contribution to the organization of the ceremony for the signing of the Bar Roll by the September 2006 readers in the Supreme Court library in the presence of the Readers' mentors, family and friends.

Of the retiring Bar Council members, the Chairman said: "All have contributed to the work of the Council. All are missed."

In connection with Bar Council retirements, the Chairman also noted the retirement from the office of Honorary Secretary of Kate Anderson after "three years distinguished service" first as Assistant Honorary Secretary, then as Honorary Secretary of the Bar Council. He expressed pleasure that "Kate is now an elected member of the Bar Council".

The Chairman singled out for special mention the three retiring members of the Ethics Committee who were present at the Dinner: Cameron Macaulay S.C. retiring from five years on the Committee; James Merralls AM QC, retiring from four years on the Committee; and Michelle Gordon S.C. retiring from four years on the Committee.

It has been said that the work of the Ethics Committee is an enormous and constant commitment; that members of that Committee are available to be called 24 hours a day, seven days a week. Legal vacations apart, the Committee meets fortnightly, with substantial materials requiring careful scrutiny before each meeting.

The Chairman noted that, over and above their extraordinary commitment and service on the Ethics Committee, each one of them had also served on other committees, and in other ways.

Cameron Macaulay had served five years on the Professional Indemnity Insurance Committee, and is a member of the Professional Standards Education

Committee, and Deputy Chair of the Commercial Bar Association Section on Insurance & Professional Negligence.

The Chairman said: "It was Cameron's hard work that ensured we have a *Good Conduct Guide*, the book we published the other day. Thank you Cameron for this work, and all you have done on the Ethics Committee."

"Jim Merralls has served on a number of committees, but what stand out are his 13 years on the Law Reform Committee; his 28, or so, years on the Council of Law Reporting in Victoria; and his Editorship of the Commonwealth Law Reports since 1969 — some 37 years and still counting. Jim is the elder statesman of the Bar."

Michelle Gordon made a significant contribution to the work of the Ethics Committee. She continues to chair the Continuing Legal Education Committee and her contribution in this area is invaluable.

Michelle also organized the annual Opening of the Legal Year breakfast in the Chapter House at St Paul's Cathedral. That breakfast was common to all the various observances marking the Opening of the Legal Year. Michelle established the breakfast and was its sole organiser and driving force over many years.

Other notable retirements include Jonathan Beach QC as of 1 October 2006 from some 13 years service variously as a Director and Deputy Chairman of Barfund and Melanie Sloss S.C. from some five-and-a-half years service as a Director of Barfund. A tribute to their years of service by the Chairman of Barfund, Philip Kennon QC, appears elsewhere in this edition of *Bar News*. The Bar is indebted to both of them for their invaluable service.

On behalf of the Council, and of the Bar, the Chairman thanked everyone present. He thanked all who had served the Bar, and their partners and families.

He concluded: "Thank you all for coming this evening. This is always a very special celebration — and a particular honour for the new Chairman to thank the retiring Chairman and Council members, and all of you who have done so much for the Bar."

#### Note

1. *Legal Profession Act 2004* ss. 3.5.2(7) & (9) and 8.1.1(1) (provisions enabling the Bar to insure with the Legal Practitioners Liability Committee; and those authorising funding of the establishment of the new regulatory framework — the new Legal Services Board, the Legal Services Commissioner and the transfer of jurisdiction to VCAT).

# Women's Legal Service Victoria Celebrates 25 Years

Graeme Thompson

THE Women's Legal Service of Victoria hosted a birthday party after 25 years service to the Victorian community. It was definitely a party occasion and yes there was lots for present and past members of the board, staff and volunteers, guests and honoured dignitaries to celebrate after so much impressive service to women clients. There were toasts by Pamela Tate S.C. and the Honourable Justice Brown both of whom acknowledged the many talented and distinguished women and men lawyers who had contributed to the organisation. The chair of the Women's Legal Service, Jennifer Dillon who has given such committed service to this organisation introduced the guest speaker Magistrate Di Fingleton.

Ms Fingleton is a Magistrate at Caloundra Magistrates' Court and former Chief Magistrate of Queensland. There is no doubt Magistrate Di Fingleton is an extraordinary human being. She spoke of her experience as being a judicial officer and being sent to prison and then resuming her place on the bench. Her message for us all is, "Never give up, never give up, never ever ever give up ...." Amongst the themes of her speech is that women need to be constantly vigilant and to explore and examine the systems. If they do not, their voice will not be heard but when all else fails her message was "make sure you survive!" Here is an edited version of her speech:

"Let's face it! It is very unusual for a judicial officer, who has been to prison, to resume their place on the bench. One reason was so that I could be recognised as a person capable of putting the past behind her and showing resilience. Another reason was to that I could go up or down. Actually I love being a magistrate and administering justice, I believe, fairly, humbly, with compassion and insight, but with toughness when required.

So, to the topic, then, of my speech — what is resilience and why women lawyers need it.

It was when I was at my lowest point,



*Gillian Dallwitz, Manager, Women's Legal Service Victoria and Family Law Legal Service.*

in prison for six months, that I undertook reading in and around the topic of "Resilience", both as an intellectual exercise and as an attempt to see some way through the mire which had become my life!

At the half-way where I spent the last four months of my sentence, life was easier but still the loneliness, the wait. They don't call it "doing time", for nothing!

As part of my sentence, I performed community service at the Abused Child Trust, an organization which, as the name suggests advocates for and provides therapeutic treatment for abused children and, importantly, their families. My duties at the Trust involved researching the topic of Resilience. As part of my research, I read Anne Deveson's book *Resilience*, published by Allen & Unwin.

Ms Deveson's book grew out of a discussion she had with friends, when they were questioning the tendency in Western



societies to label people as victims, and to focus on their problems, rather than working with the strengths and their resilience.

Resilience is not, on the face of it, a very complicated idea. Not a new idea, either. Seneca — the Greek philosopher said 2,000 years ago — "We must expect anything" ... "there is nothing which Fortune does not dare". In less affluent and comfortable times, life itself was tougher, every day and no-one survived who was not tough. These days it has



come to mean an ability to confront adversity and still find hope and meaning in life. Put more simply, in the colloquial — “What doesn’t break you makes you strong”.

Resilience can and needs to be found in communities dealing with disasters — wars, floods, famine. We are all familiar with the resilience in nature — the green growth after the bushfire. We are also familiar with those people who stay

The sort of humility I mean is that which has come to me from experiencing love and kindness at a time when I thought I had lost so much, from people, especially women, who had themselves never had much nor had much to look forward to.

Some of the women I met in prison, with so much pain in their past and current lives, showed me great and small

It is indeed a huge compliment to be told that I can inspire people through my experiences and what I have learnt from them and how I can articulate it into a message of hope. I hope in some way I have done that tonight.

However, a suggestion — some may consider a surprising suggestion. Until we have a sufficient network of strong and more importantly, powerful women in positions of power, who feel free and secure enough to support us fully, I think it is a good idea to have a strong male mentor or two to help you through a career’s many hiccups and difficulties, especially if you want to make a difference. That man can be a judge or magistrate, a senior barrister, or a senior partner in a law firm. The image I see of myself as the first female Chief Magistrate of Queensland, was as one of those female figureheads on the front of sailing ships in times gone by — fighting the huge seas, alone, vulnerable.

Although I had some powerful friends in high places — male and female, (still do) — once the matter of the complaint against me got as far as an investigation by the CMC (said by the High Court to have been totally unnecessary), many of those powerful people were helpless to comment ... Somewhere along the line, some strong male mentor may have been able to stave off the rollercoaster of disaster which lay in wait for me.

So, my advice may be unexpected but I stand by it and many of you may have already worked that out. You will, however, always get your strength from your feminist network.

Back to our celebration tonight. Last year, I attended a function to launch the book *A Woman’s Place*, published by the Supreme Court Library of Queensland. I am honoured to be one of the entries in this book, which records 100 years of Queensland Women Lawyers. In the Foreword, The Honourable Mary Gaudron says something which I think is of great relevance to the achievements of the Victorian Women’s Legal Service. She said:

Equality is fundamental to the maintenance of the rule of law. It is the cornerstone of justice. Equal justice requires not only equal treatment by and under the law, but equal access to law.

Congratulations on 25 years of providing equal access to the law for so many women.”



to rebuild after a bushfire, while others leave. Or those who stay on the land, despite years and years of drought.

In the case of indigenous communities in Australia — violence, alcoholism and unemployment can lead to despair. Noel Pearson, the Aboriginal leader from Hopevale has said that “with resilience comes strength and action; without it comes weakness and victimhood”.

I should immediately add that the greatest lesson for me out of the past few years of adversity, has been “humility”.

kindness. It is as significant to receive a small gift of toiletries or stationery from a woman who receives a small amount of money per week for meaningless work in a prison, as it is just as wonderful to receive the gift of a wonderful book from a friend who has put much thought into her choice. The gifts of humour and being trusted with a woman’s story, were also of great significance to my ability to withstand the deprivation of the one thing I always believe I was assured of in my life — my personal freedom.



# OPENING OF THE LEGAL YEAR 2007

MONDAY 29 JANUARY 2007

*Ecumenical Observance*

**St Paul's Anglican Cathedral**

Corner of Swanston and Flinders Streets, Melbourne, at 9:30 a.m.

*Roman Catholic Observance (Red Mass)*

**St Patrick's Roman Catholic Cathedral**

Albert Street, East Melbourne, at 9 a.m.

*Jewish Observance*

**The East Melbourne Hebrew Congregation**

488 Albert Street, East Melbourne at 9:30 a.m.

*Buddhist Observance*

**The Fo Guang Yuan Art Gallery**

141 Queen Street, Melbourne at 9 a.m.

***Please note:***

- (1) Please note the different commencement times: 9 a.m. at St Patrick's, and for the Buddhist observance; 9:30 am at St Paul's and the Synagogue.
- (2) Customarily Judges and Counsel robe (with wigs) for the observances at St Paul's Cathedral, St Patrick's Cathedral and at the Synagogue. Also, decorations are worn. Robes are not worn at the Buddhist observance.
- (3) All members of the profession are invited to join the processions. Marshalling for the processions occurs about 15 minutes before the service time.
- (4) The Governor of Victoria, Professor David de Kretser AC, will be attending the ecumenical observance at St Paul's Cathedral.
- (5) Those attending the ecumenical observance at St Paul's Cathedral are warmly invited to remain briefly after the service for tea, brewed coffee and biscuits immediately after the service in the Narthex at the rear of the Cathedral.  
This was a very successful addition last year — a good mix of junior and senior members of the profession, academics, Magistrates and Judges socialised together briefly after the service. VCE Legal Studies students from a number of schools, both State and private, will be attending the service in 2007, and have also been invited to the morning tea and coffee.
- (6) There has, for many years, been a breakfast in the Chapter House of St Paul's Anglican Cathedral, at 7:45 a.m., common to all the observances and preceding them. The Chapter House common breakfast has been discontinued.
- (7) The Greek Orthodox Archbishop is unable to be in Melbourne on 29 January, so there will be no 2007 service at the Greek Orthodox Cathedral of St Eustathios.

# Fratricide in Labassa

Raymond Gibson

Our man in troubled Fiji files his latest report

THERE is an ambulance service in Labassa, a large sugar-cane based town on Fiji's second largest island, Vanua Levu, but unless you are only a few kilometres out of town you will be struggling to find someone with a telephone. Very few village homes have a landline. Vodafone, Fiji's only mobile carrier, has managed to penetrate even remote areas in ways that would make even Coca Cola envious, but reception is usually iffy. Even if you can't ring anyone it is common to see a cell-phone dangling from a teenager's neck. Their forefathers wore a Tabua (whales tooth). Today's status symbol is Nokia.

When Viliame Gauna "Meki" of Soasoa settlement got speared in the midriff, on 29 November 2004, with his brother, Noa Bukai's four-metre long fishing spear, he was doomed. His instinct was to pull the spear out even if it was buried deep inside his large girth. Acting on it, it was a fatal impulse. He stumbled down an embankment to his own house "vale", 20 metres from his brother's vale and the site of the confrontation he should have avoided. He lay on the grass and complained of being hot and tired. A few village women tried to sit him up and fanned him with pot-lids. It did no good. His eight children, distressed, gathered around him sucking up the oxygen he so badly needed. Froth came from his mouth. He looked at his wife of 20 years and said "Diula, I am dead". He then bled to death on the grass.

When the police finally arrived he lay on the same spot covered by a mat. It was about 9 p.m. and no one had thought to bring a torch much less a camera. It didn't matter so much. All the villages told the police that Noa Bukai had speared his brother and Noa was lingering around the crime scene, waiting for his arrest, having initially run off. With Noa safely in custody, and Meki going nowhere except to the local morgue, the police returned, at a civilised hour the next day, for the crime scene search.



Raymond Gibson

Noa had some cuts on his torso so before he could be interviewed he was taken to the Labassa Hospital. There he was found to have five largish lacerations, all superficial, but requiring stitches nonetheless. The Indian doctor's opinion, in doctor-speak, "... consistent with wounds inflicted from a sharp object". Sharp object, my foot. Noa later that night told police in his interview with them how it really happened.

Meki had attacked him with a cane knife, he said, after accusing him of pitching soap stones on the tin roof of Meki's vale and waking up the eight children. Noa denied any such thing and he had a good alibi too. He had intended to go fishing that fateful day but the boat was being painted. He had wandered around Labassa market and found a group around a Kava "grog" bowl. Of course, he joined them and topped it up with a few bottles of beer with a friend under a Baka tree to escape the always-stifling afternoon heat. After eating "some barbeque" he had got a taxi home, arriving at about 8 p.m. After

throwing his shirt on a mosquito net, his wife Lomavata told him Meki had been looking for Noa and complaining about the stones. No matter. His bad mood would pass.

Twenty minutes later Meki was outside his vale with a torch and swearing at him. He came out, he told police, and there was Meki, with his cane knife and torch. After a heated exchange Meki, despite the superiority of arms also grabbed Noa's fishing spear resting against the side of the house. They struggled over the spear, which snapped in two. Meki hit him with the knife and he ran off, wounded, to avoid further blows. As to how he got speared — he must have fallen on it, said Noa. He, for one, did not see it. His brother's death was a complete shock to him.

Back at the Soasoa settlement, someone must have seen episodes of CSI because one alert villager told everyone it was a crime scene and not to go tramping around the place.

The next day police found the alleged murder weapon in two pieces. The spike was as long as a man's forearm; the handle made from a solid bough of a tree. The police also found a smashed torch and some large pieces of soapstone. Again, no one had a camera.

Nearly two years later Noa's trial commenced in the High Court before Judge Gates, a British expatriate and long time resident of Fiji. Unlike many accused in Fiji, even those on murder charges, Noa was lucky to be represented. His sharp, legal aid counsel, Ms Samanunu Vaniqi was not yet 30. Having spent three years in Labassa, as the only legal aid lawyer serving the whole island, she was keen for a transfer. It is common for young practitioners to appear in murder trials. No counsel of choice for the poor, you take what you can get.

Two days before the trial I flew into Labassa to meet the informant (investigating officer "I.O.") and interview the witnesses.



*Where the incident took place at the rear of Noa's house.*



*Meki's house where he lived with his eight Children.*



*Where Noa kept his large spear.*

Labassa has one decent hotel, the Grand Eastern, but a film crew, shooting a tropical island based reality television show, had booked it out for weeks. Great. In the centre of town, the Takia Hotel, above the Bounty nightclub, had rooms: \$30 per night with fan. I checked in. The faded Russell Drysdale prints in each room brought the whole feeling down, if that were possible. My room was directly over the nightclub, but they promised an upgrade. At least it had an air conditioner that was loud enough to drown out everything.

Eating out was not a problem as the dozen Chinese and Indian restaurants (all unlicensed) across the street had ample fare so long as you were done by 7 p.m. None were listed in the directory and as for a booking, you grabbed a table and if one was unavailable there was always the same nondescript place next door with exactly the same fare on offer. Oh well. I had curried Walu (local Mackerel) on rice and went over to the Bounty nightclub for a quiet one or two before retiring. As the inside of the nightclub was almost in complete darkness my white face was conspicuous. Rowdy groups, drinking Fiji Bitter out of long necks, sat in cubicles along the walls. I felt safer back in my room with the air conditioner as my only friend.

In Fiji, as in most developing countries, people find you rather than the other way round. The next morning I went to the

**As there were no crime scene photos prepared I took my digital camera to take some, later to become, in their entirety Exhibit P1.**

Labassa Magistrates' Court to adjourn a case only there to find, outside court, my I.O. Corporal Mosese and his five witnesses in tow.

"Here are the witnesses you wanted Sir, but I have to go now because I must rest at home." As all the witnesses only spoke Fijian, that presented an immediate problem.

"Well I generally prefer the I.O. to be present and I did want to see the crime scene."

He obliged my strange ways and so we all marched up the six flights of stairs to my office.

Our star State witness was 13-year-old, illiterate, "S". Although she had made an impressive statement, it seemed that rather than merely interpret Fijian into English, Corporal Mosese was more interested in giving me his version of events. I gave up and got our driver to take us to the crime scene.

Soasoa Settlement lies in some dry but well forested foothills 10 kilometres out of Labassa. The houses are generally rudely built timber and iron one-room shacks. Having been informed that the accused and the deceased's family had moved on since the incident, there was no way we could ring ahead to forewarn the present occupants. Such trifles are never a problem in Fiji and, once there, we were welcomed with friendly smiles.

As there were no crime scene photos prepared I took my digital camera to take some, later to become, in their entirety Exhibit P1.

On day one, the assessors were empanelled. Appointed, with some secrecy by the court registrar, no challenges are allowed unless there is good cause, such as a conflict of interest. The assessors act like a jury giving an opinion on guilt, rather than a verdict. They do not have to be unanimous and the judge, who has the final say, is not bound by their opinion. This gives rise to the curious scenario that a judge will sometimes rule as inadmissible, material, such as propensity evidence, yet, having heard it, he or she will have to decide on guilt. Then, such mental gymnastics are not unknown in the law.

It is the way of children that they can relate sometimes a tragic event more directly than an adult. In simple short





Noa's house.



View from Meki's house.

sentences "S" told how she followed her father, who carried a torch, up the embankment to see Noa. Holding his hand, her dad confronted Noa. A big argument occurred and Noa smashed the torch, grabbed his fishing spear, took a step back and put it hard into Meki's stomach. In cross-examination she denied that Meki had a knife.

Meki's wife followed but her weeping interfered with a coherent flow. Meki had no knife and her daughter was there. Noa had his spear and in the darkness Meki yelled out, "I am injured. This boy has struck me with the spear." Pure *res gestae*.

When the I.O. was called, defence counsel wished him good morning and

addressed him by his first name. There was ample room to attack him over an unsatisfactory crime scene investigation but the chance was missed. And then in re-examination I put: "You found no cane-knife senior in your search." Suddenly the judge was interested and began to probe. The lack of torches and a somewhat dilatory approach to the investigation began to emerge. Defence counsel jumped on the bandwagon by asking further questions but never with any hint of criticism and always in the polite was she had conducted herself throughout. Courtesy is next to godliness in Fiji.

We adjourned for day two with defence counsel telling me there would be no dock statement (still used in Fiji) and she would call her client. Noa approached me as I was leaving and shook my hand in front of the assessors, who are not sequestered during the trial, and are free to mingle outside court though they are warned not to speak to anyone.

The day of Noa's big moment he wore an overlarge white shirt with "Avis" printed above the pocket even though he had never held down a job that involved literacy. He began his testimony by honouring the judge, defence counsel, the assessors, the public and "even Mr DPP lawyer". Then, with leave, involving the court clerk to play himself and he, the deceased, he re-enacted the scene complete with the spear, Exhibit P1. Where were the rubber gloves, the anxious concerns about HIV and hepatitis transmission, the occupational health and safety preoccupations, I wondered? As the play unfolded, one thing emerged: Noa handled the spear as though it were an extension of his body.

"If I speared Meki the point of the spear would have been deeper in him as this is a strong spear and I can kill a big shark with this." As the autopsy report did

not refer to the depth of the wound, the judge asked, "How do you know how deep the wound was?" "Rumour," he replied. Note to self: save this for the final address.

After the demonstration and some lacklustre cross-examination through the court clerk acting as the interpreter (no professional interpreters in Fiji), we adjourned for final addresses. Back to the Takia and more curry on rice.

The next morning defence counsel addressed for 30 minutes; the summing up lasting only 20 minutes. An hour later the assessors were ready. "How say you, assessor one?" His moment in the sun was not going to be robbed from him with a simple "guilty" or "not guilty". He began. "Having listened to all the evidence, and read the agreed statement of facts, and the witness statements tendered, and seen all the exhibits, and listened to counsels' statements..." and on he went. He then found Noa "guilty". The other assessors followed suit. The judge agreed. Sentence immediately followed.

Noa did not flinch. He took the news, and the mandatory life sentence that followed, as though he had just been told his dinner had gone cold.

When the judge left court, Noa came down from the dock and went over to the I.O. and resignedly shook his hand. Content with the result, Corporal Mossese could not stop beaming. The assessors milled around this scene and shook hands with everybody, including mine. I put out my hand, but aware of the strictures in Australia in talking to jurors, it was an awkward moment.

I wrote the date and the letter "g" next to my copy of the charge, slowly packed my papers, threw my wig and gown into my robing bag and walked out into the joyless, hot Labassa afternoon.

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# Launch of the *Good Conduct Guide*

On Wednesday 18 October 2006 before about 100 invited guests, the *Good Conduct Guide* was launched in the Neil McPhee room. An initiative of the Bar Council, the project was managed through the authorship and production phases by the Professional Standards Education Committee, chaired by Paul Willee QC. Every barrister on the Bar Roll received a complimentary copy of the book, which provides (inter alia) commentary and guidance on the application of the Bar Rules to everyday professional dilemmas.

In launching the Guide Legal Services Commissioner, Victoria Marles said:

IT is gratifying to see the culmination of the work that went into the *Good Conduct Guide*, and to be asked to launch it on behalf of its authors and producers. It is even more gratifying to be able to express the view that the finished work well justifies the funding provided by the Legal Practice Board.

The *Good Conduct Guide* is of particular significance to my role as Legal Services Commissioner.

As you know, the office of the Legal Services Commissioner is new. The role of the Legal Services Commissioner was created by the *Legal Profession Act 2004* (the new Act) to establish a “single gateway” for the fair, independent and efficient handling of complaints about lawyers.

With respect to complaints, and also with respect to members of the Victorian Bar, I can say that the number of complaints received about barristers is relatively low.

Receiving and processing complaints is not all that the Legal Services Commissioner is charged with doing. There are three statutory objectives of the Legal Services Commissioner. These are to:

- ensure that complaints against practitioners and disputes between law practices or practitioners and clients are dealt with in a timely and effective manner;
- educate the legal profession about issues of concern to the profession and to consumers of legal services; and
- educate the community about legal

issues and the rights and obligations that flow from the client-practitioner relationship.

In order to do this, the staff of the Legal Services Commissioner includes complaints officers, enquiries officers and a Mediation Manager and a Communications Manager.

It is also worth noting (and emphasising) that the Legal Services Commissioner may receive two types of complaints, and unlike the Legal Ombudsman can deal with civil disputes.

The first type of complaint the Legal Services Commissioner may receive is a civil complaint involving a civil dispute.

A civil dispute is any of the following:

- a costs dispute in relation to legal costs not exceeding \$25,000;
- a claim that a person has suffered pecuniary loss as a result of an act or omission by a law practice or a practitioner; and
- any other genuine dispute between a person and a law practice or a practitioner arising out of, or in relation to, the provision of legal services.

The majority of civil complaints received by the Legal Services Commissioner so far have been costs disputes.

The second type of complaint the Legal Services Commissioner may receive is a disciplinary complaint.

A disciplinary complaint is a complaint about conduct to the extent that the conduct, if established, would amount to unsatisfactory professional conduct or professional misconduct. These are new



Róisín Annesley

terms, different to those used in the old *Legal Practice Act 1996* (the old Act).

The number of disciplinary complaints received by the Commissioner so far is almost double the number of civil complaints. This is particularly relevant given that the *Good Conduct Guide* is something of an educative tool, which may maintain professional standards and prevent disciplinary complaints being made.





*Paul Willee QC, Kerri Judd, Gerard Meehan, Kate McMillan S.C., Melanie Sloss S.C. and Paul Lacava S.C.*

this function. It is expected that this close and co-operative relationship between the Victorian Bar and the office of the Legal Services Commissioner will continue.

The manner in which complaints against lawyers are managed and the profession is regulated is vital to consumer confidence in the system and to its effective operation. For this reason I am impressed by the proactive nature of the Good Conduct Guide.

From my perspective as the Legal Services Commissioner, the *Good Conduct Guide* plays a very important role. It details the regulatory system and explains the legal practice rules (now called legal profession rules) with which each practitioner should become familiar.

With regard to good conduct, I might emphasise that it is not necessarily intuitive, and what is intuitive is not necessarily good professional conduct. It is therefore critical that there is a formally documented explanation of what is stand-



*Victoria Marles, Michael Shand QC Chairman and Kate McMillan S.C.*



*Christine Harvey, Tony Parsons and Gerald Lewis S.C.*



*Paul Elliott QC and Andrew Clemens.*



*Cora Annesley, Tim North S.C., the author and Brendan Annesley.*



*Cameron MacAulay S.C., Justice Stuart Morris and Paul Lacava S.C.*



*Paul Willee QC, Doug Meagher and Chief Judge Rozenes.*

Everyone (including the profession and the public alike) benefits when professional standards are maintained.

In handling complaints, the Legal Services Commissioner investigates disciplinary complaints and attempts to resolve civil complaints. This is where the professional associations, and most relevantly the Victorian Bar and the Ethics Committee have a role. Under the new Act, the Legal

Services Commissioner may refer a disciplinary complaint to a prescribed investigatory body — of which the Victorian Bar is one — to investigate and then report to me. The Commissioner may also delegate certain powers and functions with respect to civil complaints. Earlier this year, the Legal Services Commissioner delegated to the Victorian Bar the function of resolving civil complaints. My office also retains

ard acceptable practice.

I understand that the principal aim of the *Good Conduct Guide* is to provide a resource to members of the Victorian Bar — a place where they can look for the answers to the most frequently occurring ethical problems in actual practice. Its aim was to do so in a way which enabled the problem and its remedy to be easily, and thus rapidly found in the text, and which



was fairly portable and so accessible in Court, or in chambers or at home. It was to do so in a way which both explained the ethical principles and rules of the profession and illuminated them by practical example and simple but interesting prose.

There are a number of excellent examples in relation to a barrister's duty to the court and to the client in the *Good Conduct Guide*. Some of these are appropriately and relevantly drawn from the family law and wills/probate context. These are two areas of law where my office receives a significant number of complaints.

The 10 chapters of the *Good Conduct Guide* meet the aim of providing an instructive and readable manual suitable for everyday use. It also directs the busy practitioner to other resources — for those problems beyond its scope.

The chapters of the *Good Conduct Guide* range across a considerable breadth including the regulatory regimes relevant to barristers, independence, how barristers are retained and their duties to each individual client, conflicts of duties and interest, fees, the direct access rules, etiquette, general professionalism and relations with fellow practitioners, and the more common grounds of ethical complaints.

The compilation of such a compendium must have been a difficult task for an author working in the new regulatory context, with the (large) new Act that has not yet been considered by the Courts. I understand that the Bar is also currently reviewing the legal practice rules in light of the new Act.

I commend the work to you all as a well-presented exploration of good conduct, and a most helpful book for the everyday practitioner.

It gives me great pleasure to launch this *Good Conduct Guide* authored by Róisín Annesley, produced for the Victorian Bar, under the direction and with the guidance of the Professional Standards Education committee. It is in all of our interests — regulators and practitioners — that the members of the Bar uphold the highest standards of ethics and good conduct. The *Good Conduct Guide* is an important part of addressing that need.

In commending this work to you, I congratulate all of those involved in its production.

*In her response, author Róisín Annesley paid generous tribute to her mentors, her parents and those who had supported her through her creative endeavours.*

# Extending the Boun

## Flos Greig, Joan Rosanove and Women Lawyers

Pamela Tate S.C., Solicitor-General for Victoria, delivered this address at the Tenth Ethel Benjamin Commemorative Address, 22 September 2006, in Dunedin, New Zealand

Ethel Benjamin was New Zealand's first woman lawyer. Born in 1875 in Dunedin, she graduated in law from the University of Otago in 1897, and was admitted to practise in the same year, giving effect to the recently passed *Female Law Practitioners' Act 1896* that enabled women to enter the profession. The Otago District Law Society unsuccessfully sought to prevent Ethel Benjamin wearing the traditional wig and gown in court and excluded her from Bar dinners. Throughout her legal career, she was a fierce advocate for women's rights, and took on many cases involving wife abuse, the arranging of separations and divorces, and enforcing maintenance. For the past 10 years, the Otago Women Lawyers' Society (OWLS) has commemorated Ethel Benjamin by inviting speakers to give a Commemorative Address in her honour. This has been sponsored by the New Zealand Law Foundation. Previous speakers have included the Rt. Honourable Dame Sian Elias, Chief Justice of New Zealand, the Rt. Honourable Beverley McLachlin PC, Chief Justice of Canada, and Dame Sylvia Cartwright, former Governor-General of New Zealand.

IT is a great privilege and honour to have been invited to present the Tenth Ethel Benjamin Commemorative address, and I thank you for the opportunity. On a personal note, I am particularly delighted to deliver this address in the city in which I was born, Dunedin, and on a day, 22 September 2006, which, in one of life's happy coincidences, is 27 years to the day on which I left New Zealand to undertake postgraduate study at Oxford University, 22 September 1979. I have enjoyed returning to Dunedin many times since, on one occasion staying for 18 months, and am very pleased to be return-

ing today for such an auspicious occasion.

One of my earliest memories of Dunedin was as a young girl, aged about five, accompanying my father to watch the formal procession through the town, of members of the University Council and academic staff for the University graduation ceremony. Dunedin being rather cold, I recall being dressed in a blue double-breasted coat of which I was particularly proud, made of sturdy Scottish cloth. I stood hand-in-hand with my father as we watched the array of coloured hoods and gowns of the academics in the procession and then, in an air of excitement, joined

# dary of Right

## d Mary Gaudron – Three Australian

the gallery in the Town Hall to watch the graduates being “capped”. My only other recollection of the event was that there was an eruption of applause at regular intervals although it was not clear to me at the time precisely what this was for. It also seemed, from where I stood, that the ceremony went on rather longer than it needed to.

While a graduation ceremony was perhaps an odd choice as an outing for a young girl, it had the effect, which no doubt my father intended, of conveying clearly to me that tertiary education was something to be prized. It conveyed to me that an endorsement from this type of institution was something to aspire to and, perhaps subliminally, that being female would be no bar to its achievement. The ceremony caused me to share the view of Flos Greig, the first woman to be admitted to legal practice in Australia, who asked rhetorically, “Who that once possessed it, would yield education for any bribe the universe could offer?”<sup>1</sup>

The importance of tertiary education for women was clearly understood by Ethel Benjamin, both for the intellectual fulfillment that it offered, and for the opportunity it could provide to women to become economically independent, integrated persons in “body, mind and soul” and autonomous moral agents.<sup>2</sup> Otago University invited Ethel Benjamin to reply to the address of the Vice-Chancellor at her graduation ceremony, as you well know. This befitted an institution known for its encouragement of the education of women and for the value it accords to academic excellence. In what must have seemed at the time an extraordinarily brave statement, she referred to Sarah Grand, the English 19th century feminist, and said:

For centuries women have submitted to the old unjust order of things, but at last they have rebelled, and as Sarah Grand has it:

It is the rebels who extend the bound-

ary of right, little by little narrowing the confines of wrong and crowding it out of existence.<sup>3</sup>

What I wish to speak about today are three Australian women lawyers, rebels if you will, whose professional lives have extended the boundary of right. I have chosen to discuss the stories of three women who practised law at different historical stages over the last century in order to present what might be called “the Australian story”.

**I have chosen to discuss the stories of three women who practised law at different historical stages over the last century in order to present what might be called “the Australian story”.**

The first woman whose life I wish to discuss is Flos Greig, whom I mentioned a moment ago, admitted to practice in 1905, the second is Joan Rosanove, the first woman in the State of Victoria to sign the Roll of Counsel in 1923 and later to take silk (become Queen’s Counsel) in 1964, and the third is Mary Gaudron, the first woman to be appointed Solicitor-General in New South Wales and thus in Australia in 1981 and later the first woman appointed as a Justice of Australia’s ultimate appellate and Constitutional Court, the High Court of Australia, in 1987. I wish to discuss the lives of these women, their clear individual merit, and the professional hostility and exclusion they experienced despite that merit. I wish to consider these women not simply as individuals but as representing stages of acceptance for women within the legal profession in Australia, stages that you will not be surprised to learn have not in all respects proceeded in a linear fashion.

I want to look at the common themes of these women’s lives, their experience of the legal profession and of law as an institution. I also wish to consider the challenge which remains to further narrow the confines of wrong.

### FLOS GREIG

Perhaps the closest Australian counterpart to Ethel Benjamin is Flos Greig. Born Grata Matilda Flos Greig, she embarked on her law degree not knowing whether she would ever be admitted to practice, just like Ethel Benjamin, yet she had first determined to be a barrister and solicitor from when she was “quite a child, a school girl”.<sup>4</sup> She was known not for “the trouble she caused”,<sup>5</sup> as Dame Sylvia Cartwright mentioned of Ethel Benjamin in the 1997 commemorative address, but rather as “that girl with the Terrible Name”.<sup>6</sup>

She was not the first woman in Australia to be intent on studying law. In 1900 in Western Australia Edith Haynes’ application as a student-at-law under articles was accepted by the Barristers’ Board (as it was called) but she was warned that her admission as a legal practitioner might not be approved. The Board wrote to Edith Haynes in these terms:

[t]he Board cannot guarantee ... admission, even if you comply with all of the provisions of [the Legal Practitioners Act of 1893] and of the regulations framed thereunder.<sup>7</sup>

In order to ensure that its message was clear, the Board continued:

It must be distinctly understood by you that you accept all risk of the Court eventually refusing your application.<sup>8</sup>

The refusal came earlier than the stage of admission to practise. When Edith Haynes sought to undertake the intermediate law exams, the Board refused to permit her to do so. She obtained an order nisi for mandamus from the

Supreme Court of Western Australia to compel the Board to allow her to sit the exams. Her father, a silk, appeared for her on the return of the order nisi. He did not argue for any guarantee that Edith be admitted to practise. Admission was two years away and he argued only that she be permitted to take the intermediate law exams, continuing to accept the risk that admission to practise might ultimately be refused.

The Full Court of the Supreme Court rejected the Haynes' argument and discharged the order on the ground that to make it absolute would be futile, "the time and money which would be expended would be quite wasted".<sup>9</sup> While the Legal Practitioners Act permitted qualified "persons" to be admitted, the Court considered that it would be an extreme step to consider that a woman was a person without express legislative sanction. Counsel for the Board argued that "the fact that no woman has been admitted raises the very strong presumption that they have no right to be admitted".<sup>10</sup> Justice Burnside agreed and said:

I am not prepared to start making law.<sup>11</sup>

Edith Haynes never completed her legal studies.

Reasoning of the same form, as you will know, was used elsewhere. Although the word "person" was governed by a rule of statutory interpretation to include both men and women, that rule could be displaced when the context revealed or made manifest a contrary intention. The Western Australian Supreme Court held that because no woman had previously been admitted to practise law under the relevant legislation, the legislation made manifest a contrary intention with the consequence that, in that context, the word "person" referred only to men. In particular, this reasoning was adopted in South Africa in the case against the Incorporated Law Society in 1909<sup>12</sup> and in the case of Mabel French in Canada in 1906<sup>13</sup> to exclude women from the practice of law. As Margaret Thornton has argued, under the guise of neutrality the courts endorsed the proposition that a person's gender was the "primary determinant of whether a person should be permitted to practise law".<sup>14</sup>

In New South Wales women fared no better. In 1898 Ada Evans enrolled at Sydney University law school when the much-feared Dean was on sabbatical leave. As Bek McPaul tells the story:

On his return, [the Dean] Professor Pitt Cobbitt demanded to know: "Who is this woman?" There followed a series of doors slamming, chairs banging on floors and bells ringing. Professor Pitt Cobbitt summoned Miss Evans to his presence and attempted to dissuade her from continuing her course, pointing out in his own crisp manner that she did not have the physique [for law] and suggesting Medicine as much more suitable.<sup>15</sup>

Ada Evans persisted with her studies and graduated in law in 1902.<sup>16</sup> She was then required to be registered after graduation as what was then called a "student-at-law" for two years. She applied to the Supreme Court of New South Wales for that registration and was rejected on the ground of absence of precedent.<sup>17</sup> She sought admission to the English Bar but was again refused on the same basis of an absence of precedent.<sup>18</sup>

By contrast, Flos Greig did not take the path of commencing litigation. We know that she knew of Ethel Benjamin and presumably thus of the legislative option and the enactment of New Zealand's Female Law Practitioners Act in 1896. In an interview she gave to *The New Idea* in 1905 she referred to "Miss Ethel Benjamin, who had been practising in Dunedin, New Zealand, since 1896 or 1897".<sup>19</sup> It may have been that Ethel Benjamin provided for Flos Greig the necessary precedent, not to persuade a court, but to support her efforts and those of her friends<sup>20</sup> in lobbying for a legislative amendment to allow women to enter the legal profession in the State of Victoria.<sup>21</sup>

In April 1903 the Victorian Parliament passed the Women's Disabilities Removal Bill,<sup>22</sup> also known as the "Flos Greig Enabling Act",<sup>23</sup> which amended the Legal Profession Practice Act. The private members' Bill was passed, as a matter of "the very greatest urgency"<sup>24</sup>, five days after Flos Greig became the first woman to graduate in law from the

University of Melbourne.<sup>25</sup> The member of the Legislative Assembly who proposed the Bill, John Mackey (also a lecturer in Equity at the University of Melbourne) said:

If this House passes the Bill, it will remove one of those anomalies, one of these inequities of the law that have given rise in the minds of women to the belief that they cannot get justice from a Parliament that is composed solely of men.<sup>26</sup>

The Act was passed before women achieved suffrage in the State of Victoria, New Zealand of course having led the way yet again.<sup>27</sup> Indeed, in the Victorian Parliament, the passing of the Act was urged by one Parliamentarian on the basis that it would show that, as he put it:

it is not necessary for women to have the suffrage in order that we shall have a Parliament that is prepared to do justice to them, and place them on an equality with men in the occupations of life.<sup>28</sup>

So much perhaps attests to the somewhat difficult relationship between those women who sought entry to an otherwise exclusively masculine profession and those who sought legal equality by means of the right to vote, a relationship the complexity of which the North American academic, Mary Jane Mossman, has recently written.<sup>29</sup>

The Victorian Parliamentary Debates also record concern that, if the Bill were to be passed, a woman "might become Crown Prosecutor, Chief Justice or Acting Governor".<sup>30</sup> The concern expressed is ironic because Victoria's current Chief Justice and Lieutenant-Governor is a woman, viz. Justice Marilyn Warren. However, there was no cause for immediate panic as her Honour's appointment as Chief Justice took place in 2003, exactly 100 years after the Flos Greig Enabling Act was passed.

Flos Greig expressed some comments of her own on the chop-logic of her time when she said:

I notice that most men, when it comes to an argument as to what women could or could not do, generally argue: "You have not, ergo, you cannot." Even those who have studied Whately and Mill. They will rarely make allowance for the fact that men for generations have been trained to do what women are now doing for the first time. The best swimmers are those that have lived by the sea; the best axemen are those whose early

**The concern expressed is ironic because Victoria's current Chief Justice and Lieutenant-Governor is a woman, viz. Justice Marilyn Warren. However, there was no cause for immediate panic ...**



home was in primeval bush. Opportunity is everything ...<sup>31</sup>

Flos Greig thus became the first woman to be admitted to practise law in Australia on 1 August 1905, completing two years as an articled clerk after the passing of the enabling legislation. She was soon retained as legal advisor to the Australasian Women's Association and assisted in the drafting of the legislation which established the Children's Court.<sup>32</sup> However, her belief that "opportunity is everything" is something which Mary Gaudron was later to challenge.

The other five States soon passed enabling legislation similar to Victoria's: Tasmania in 1904,<sup>33</sup> Queensland in 1905,<sup>34</sup> South Australia in 1911,<sup>35</sup> New South Wales in 1918<sup>36</sup> and Western Australia in 1923.<sup>37</sup> The status of Ethel Benjamin as precedent was a critical factor in the passing of this legislation as was the consequential desire by Australia not to be thought of as backward. In the South Australian Parliamentary debates, New Zealand was expressly referred to as a place in which there were female practitioners.<sup>38</sup> As the Honourable Mr Duncan said:

Regarding the Bill, if it obtained in other States, and particularly in New Zealand, they could not go far wrong in giving ladies here the same advantage.<sup>39</sup>

Some of the members of the South Australian Parliament were more cynical. Some considered allowing women to practise law was a thing of no importance – it would do neither good nor harm and the legal profession as an institution would remain impervious. That remained to be seen. In an off-hand remark, the Honourable Mr Moulden said the admission of women to the legal profession would be:

Like chips in porridge, they won't do much harm.<sup>40</sup>

As for Ada Evans in New South Wales, who had suffered the wrath of Professor Pitt Cobbitt, she arranged a deputation to the Attorney-General for legislative change and it was because of her efforts and the efforts of the Feminist Club of New South Wales in joining her in that deputation that the Women's Legal Status Act 1918 was passed.<sup>41</sup> Ada Evans obtained the registration as a student-at-law she had sought and was admitted to practise as a barrister of the Supreme Court of

New South Wales in 1921. This was now 19 years since she had graduated. She was soon offered briefs but refused them on the ground, as Bek McPaul writes:

that [by then] she considered herself incapable of handling them, not wishing women's standing in the profession to be undermined by a show of incompetence.<sup>42</sup>

At first sight this reaction to an offer of work may seem extraordinary from someone who had made such protracted efforts to participate — perhaps also a reaction that is disappointing. However, it seems to me that it is explicable if considered in the then Australian context in which the standing of women within the legal profession was clearly fragile. This was not something to be risked, perhaps particularly so for someone who had had the courage to engage with the university administration, the judiciary and the legislature to achieve a degree of professional acceptance for women.

## JOAN ROSANOVE

Had Joan Rosanove been able to engage in conversation with Ada Evans, and perhaps also with Flos Greig, she would have conveyed to them what her experience of professional life taught her; as she famously said:

To be a lawyer you must  
Have the stamina of an ox, and a hide  
Like a rhinoceros, and when they  
Kick you in the teeth you must  
Look as if you hadn't noticed it.<sup>43</sup>

And kicked in the teeth she was. Like Ethel Benjamin, she was also a member of a cultural minority, born into a Jewish family, the significance of which Chief Justice Beverly McLachlin spoke of in her Ethel Benjamin commemorative address in 2003.<sup>44</sup> According to Joan Rosanove's biographer, Isabel Carter, Joan Rosanove herself attributed her determination to fight against entrenched prejudice, in order to establish herself as a woman barrister, to be due to the tradition throughout history of the Jews' battle against persecution.<sup>45</sup>

Joan Rosanove attended court from the age of 17 as clerk to her father, a solicitor. Before that, at the age of 15, she had walked with her father through the "traditional Melbourne home"<sup>46</sup> for barristers, Selborne Chambers, and had said to him: "I am going to be here some

day."<sup>47</sup> Barristers' chambers in Melbourne are arranged rather like the Inns of Court in London, with barristers congregating together.

Joan passed her compulsory university law exams in 1917 and was admitted in 1919, at the age of 21, having completed her articled clerks' course. She was used to being inside courtrooms and made many successful court appearances early in her career, including cross-examining the then Prime Minister in a libel case, with several members of the junior Bar jealously watching.<sup>48</sup> In 1923 she took what she later described as the "blindly optimistic"<sup>49</sup> step of signing the Roll of Counsel, undertaking to work exclusively as a barrister, and was the first woman in Victoria to do so.

The local newspaper, the *Evening Sun*, commented upon her and her dress, noting that:

[W]hen she argued her case ... admiration of her eminently legal mind was added to admiration of her appearance.<sup>50</sup>

The paper went on to say:

It was frankly admitted that she was there on terms of equality — even superiority in many cases — with members of the stronger sex.<sup>51</sup>

For the first three years at the Bar she had little work. She was unable to obtain a room in the principal set of barristers' chambers and rented a tiny backroom office in a dilapidated building. She has been described as like "a fringe-dweller on sufferance [and not as she wished to be, occupying] a place among barristers on equal terms."<sup>52</sup>

What work came she made the most of, appearing in appeals as well as at first instance. On one matter, she took her place at the elongated Bar table in the High Court, the first woman ever to appear there. As she did so, flanked by male King's Counsel and their juniors, one of the most senior barristers rather patronizingly said:

And with whom is my learned friend appearing?

Joan responded in her ebullient and quick-witted way:

I am appearing with myself. I am the leader of the female Bar.<sup>53</sup>

But those who wielded power within

the establishment did not welcome her presence. She was to come face to face with the brutality of professional exclusion. In 1925, a male colleague of hers, Philip Jacobs, was about to leave for London for a year and offered her the temporary use of his room in Selborne chambers. He made the offer, as he put it, "to get the fellows used to having a woman there".<sup>54</sup> Practising from Selborne would have been a symbol of unequivocal professional acceptance. The male establishment was to have none of it. A protest meeting was called and the directors of Selborne chambers told Philip Jacobs that if he allowed Joan Rosanove to use his room, they would have no option but to cancel his lease.<sup>55</sup> While they could not stop her appearing in court, the profession could ensure that within its social and cultural practices it remained impervious to her presence.

Humiliated, Joan Rosanove left the Bar and worked as a solicitor from home, and later a city office, not returning to the Bar for more than another twenty years. I might add that the Victorian Bar has since sought to atone for the wrong it committed, and perhaps to narrow the confines of that wrong, by naming a new set of chambers "Joan Rosanove chambers" which it opened in April 2000. Given that history, I am especially proud to have my chambers there.

In the years away from the Bar Joan Rosanove developed a hugely successful practice, dealing with some criminal matters, including murder trials, but largely with what were then called matrimonial causes as "streams of women"<sup>56</sup> sought her advice on suing their husbands for maintenance. She lobbied politically against the inequalities for men and women in the divorce laws;<sup>57</sup> at the time a woman could be divorced in some States for one act of infidelity alone but a man could not be so divorced without the infidelity being coupled by cruelty or desertion.<sup>58</sup> She said she felt personally ashamed that in spite of all her attempts to achieve parity she had never been able to alter the provision that a woman might not sue for divorce after one act of adultery by her husband.<sup>59</sup> She wrote scholarly and exhaustively in favour of establishing uniformity of grounds for divorce throughout Australia<sup>60</sup> and, on behalf of women, argued that they should not lose their nationality when they married foreigners.<sup>61</sup> The relevant legislation was changed.<sup>62</sup>

In 1949 Joan Rosanove re-signed the Bar Roll. She was opposed in a divorce matter by another barrister who has also

been admitted on the same day back in 1919.<sup>63</sup> Almost immediately after their renewed contest, he was appointed a Supreme Court Judge.<sup>64</sup> The contrast with Joan's situation was great. She could still not secure a room in Selborne chambers and so decided to conduct her affairs in the Supreme Court library. Somewhat similar to Ethel Benjamin's circumstances, the rest of the Bar considered that her use of the Supreme Court library should be restricted. She was eventually able to practise from Selborne Chambers but

**In 1954 Joan Rosanove applied to become a Queen's Counsel. The Chief Justice, Sir Edmund Herring ... wrote to her in these terms: ... I have very reluctantly come to the conclusion that it would be wrong for me to grant your application.**

only by purporting to "read" with a male barrister much her junior whose room she remained in when he moved inter-state.<sup>65</sup> If this was to be her professional home she was to make it to her liking by painting the walls in pink, mauve and yellow with a blue ceiling and lace curtains. Her practice blossomed.

Despite the success of her practice, acceptance by the institutional agencies of the law proved much more difficult, in particular the taking of silk.

I should perhaps digress for a moment to explain, at least to the non-lawyers in the audience, the process in Australia, and in Victoria in particular, of taking silk. Much like New Zealand, taking silk or becoming a Queen's Counsel, now Senior Counsel, is a milestone in a barrister's career because it is seen as a recognition of excellence and usually involves taking on only the more complex work where a second barrister or "junior" accompanies and assists the silk. The application must be supported by judges acting as referees. While practice varies between the States, where in some instances the granting of silk is now in the hands of the Bar alone, responsibility for appointment in Victoria lies with the Chief Justice of the Supreme Court.<sup>66</sup>

In 1954 Joan Rosanove applied to become a Queen's Counsel. The Chief

Justice, Sir Edmund Herring, interviewed her and asked her for a record of her earnings for the previous year. The earnings were so high he assumed that it could not have been a typical year. The day after the interview he wrote asking her for a record of all her yearly receipts since she had resigned the Bar Roll. She provided records for the previous six years which showed the earnings to be consistently high.<sup>67</sup> The Chief Justice wrote to her in these terms:

I have given very careful consideration to your application for Silk ... The granting of Silk is never a matter of course. It is primarily the exercise of a judicial function ... Consequently personal considerations cannot enter the matter, and sex is immaterial. Nor can the duration of the applicant's practice or the income derived therefrom be regarded as in any way decisive. These matters are proper to be considered, but only with such important considerations as the nature of the practice, the Courts in which it is carried on, the importance of the cases handled by the applicant ... [and so on]. I have very reluctantly come to the conclusion that it would be wrong for me to grant your application.<sup>68</sup>

Joan had predicted such a rebuff when she had given a talk to a meeting of the Legal Women's Association some years earlier. While she recognized that the Bench were courteous and unprejudiced, she said:

[I]f any of you suffer any illusions that women lawyers receive any real recognition, whatever their ability and qualifications, it is time those illusions were dispelled.<sup>69</sup>

Rumour had it that the Chief Justice considered Joan's work too specialized. Eventually he retired and the new Chief Justice granted Joan's repeated application in 1964, ten years after she had first applied.<sup>70</sup> Eventually, her legal career spanned 50 years and she acted in more than 20,000 matrimonial cases.<sup>71</sup>

During the course of the years in which Joan's application for silk was refused, another woman applied in South Australia and was successful, Roma Mitchell (later Dame Roma Mitchell).<sup>72</sup> Indeed, Dame Roma was to become the first woman judge of a superior court in Australia.<sup>73</sup> The then South Australian Chief Justice, in his 80s, wanted all judges to be referred to without distinction. He issued a direction that Roma Mitchell was to be known as "Mr Justice Mitchell."<sup>74</sup> Fortunately,

he was later persuaded of the absurdity of this.

Dame Roma was later Acting Chief Justice in the last few months of her judicial career<sup>75</sup> and became Governor of the State of South Australia.<sup>76</sup> She was held in enormous esteem by the profession but there was clearly a friendly rivalry between Roma Mitchell and Joan Rosanove.

Joan was known for her rich but dry sense of humour. She was in San Francisco when she heard of the announcement of Roma Mitchell as the first female QC in Australia; with the edge of sarcasm for which she was noted, she quipped:

I couldn't have heard about it in a nicer place.<sup>77</sup>

Joan Rosanove's husband, Mannie, must have shared her sense of humour for, in another incidental remark which is close to my heart, when asked what sort of cook Joan was, he replied, "As a cook, she was a brilliant lawyer."

## MARY GAUDRON

The need for single-minded determination and pluck, together with a passion for the law and the encouragement of law reform in the face of obvious injustice — "extending the boundaries of right", as Ethel Benjamin would have it — is illustrated also in the career of Mary Gaudron in the context of a more recent stage of the participation of women in the legal profession. Her career, while inspirational for all women in the law throughout Australia, also illustrates the continuing imperviousness of the legal profession in its institutional character, even in contemporary times.

Mary Gaudron was appointed to the seven-member Bench of Justices of the High Court of Australia in 1987 and retired in 2003. She learnt of the existence of Australia's written federal Constitution at the age of eight at the time of the referendum to amend the Constitution to ban the Communist Party. Doc Herbert Evatt (who was later to become a High Court Judge, Federal Attorney-General and actively involved in the creation of the United Nations<sup>78</sup>) was campaigning on the back of a truck through small country towns for the "No" vote which was ultimately successful. Mary was growing up in just such a town. She asked him what this "Constitution" was all about and he sent her a copy.<sup>79</sup> She was ultimately to deliver judgment in the High Court in about 115

substantial Constitutional cases.<sup>80</sup>

Mary obtained a scholarship to the University of Sydney, and obtained the University Medal at Sydney University Law School after studying part-time and while nine-and-a-half months' pregnant when sitting her final exams.<sup>81</sup> She completed her articles, lectured in Succession at the University, signed the New South Wales Bar Roll and applied for membership of a good floor of barristers' chambers at the Sydney Bar.

Acceptance of that application would have been symbolic — just as it would have been for Joan Rosanove — of unambiguous acceptance into the heart of the legal profession. Between the time when Joan Rosanove faced hostility in 1925 and the time when Mary Gaudron, a medal-winning student, was applying for chambers in 1968, many more women were studying law and much social and cultural progress had been made generally in relation to the status of women. Surely there would be no repeat of the exclusion Joan Rosanove experienced.

This time the humiliation of exclusion came with an attempted reassurance. Mary Gaudron was told her application for chambers had been rejected but that she was to understand that her rejection was not based on "anything personal" — it was just that "she was a woman".

One might be tempted to explain the address she gave a few years later to the annual Bar and Bench dinner, representing the junior Bar, as an example of revenge as a dish best served cold. The "junior" speech for the night is a brief to amuse — I have myself had to deliver this form of address and it requires a toast and a "roast" of the new judicial appointments, all to be done with unerring tact.

Mary began her speech<sup>82</sup> by criticizing the legislation recently introduced by the State Attorney-General on the grounds that it infringed civil liberties. She then said that she was about to come to his appointments. I understand that the room was "deathly silent".<sup>83</sup>

**Mary Gaudron was told her application for chambers had been rejected but that she was to understand that her rejection was not based on "anything personal" — it was just that "she was a woman".**

Mary said that she had checked the biography of all of the appointments in *Who's Who*. She went on to say:

That check ... revealed that his appointments all had a single common characteristic. It was not their religion, their politics or their schooling but it was something so apparent that one should be able to use it to predict future appointments.<sup>84</sup>

While the room remained breathless, a senior Judge from the New South Wales Supreme Court stormed out, declaring noisily that he did "not propose to listen to any more of this rubbish".<sup>85</sup> Uncharacteristically, Mary was silenced and did no more than propose a toast to the Attorney. On later inquiry it was revealed that, with respect to each of the new judicial appointments, *Who's Who* had made mention of the appointee's father but there was no mention of a mother. Mary had intended to say: "Presumably, to be eligible for appointment to judicial office under this Attorney one needs to be motherless."

Mary Gaudron continued to thrive despite the early hostility and built a practice in which she appeared in all jurisdictions, with a focus upon industrial and defamation law. She appeared, unled and successfully, before the High Court in her second year at the Bar<sup>86</sup> and appeared before the Commonwealth Arbitration and Conciliation Commission in the major *Equal Pay Case*.<sup>87</sup> This led to her appointment as a Deputy President of that Commission, where in particular she contributed to a decision in a significant test case providing for maternity leave to be included in an industrial award.<sup>88</sup>

In 1981 she was appointed the Solicitor-General for New South Wales and appeared frequently in the major Constitutional cases of the day before the High Court. She gained a reputation for "outstanding and ingenious advocacy"<sup>89</sup> and I now find, in also occupying the role of a State Solicitor-General, that I often rely upon arguments she presented successfully to the Court which invariably illustrate a depth of understanding of Australian federalism and the integrated system of federal and State courts.<sup>90</sup>

In 1987 Mary was appointed to the High Court at the age of 43, one of the youngest appointments to the Court.<sup>91</sup> On the Bench she became known for her towering intellect, a formidable grasp of logic and an unrelenting urge to make theoretical sense of what lay before her. She insisted on "the inalienable responsibility of courts



and their judges to maintain an open, free and just society ... [acting] in accordance with the judicial process"<sup>92</sup> — marked by impartiality and independence from the legislature and the executive.<sup>93</sup>

She delivered significant judgments in the area of discrimination, direct and indirect.<sup>94</sup> She developed more generally a theory of discrimination based upon the recognition that discrimination can arise in the uniform treatment of those who are not the same but who require, because of their circumstances or history, additional or special differential treatment; as she put it, discrimination "lies [not only] in the unequal treatment of equals but in the equal treatment of unequals".<sup>95</sup> She also contributed to the recognition of an implied right under the federal Constitution to freedom of communication on political and governmental matters,<sup>96</sup> culminating in the decision in *Lange v Australian Broadcasting Corporation*.<sup>97</sup>

Might I say, parenthetically, that Australia is forced to rely upon an implied constitutional right as there is no express right of freedom of expression at the federal level equivalent to s.14 of the *New Zealand Bill of Rights Act 1990*. The State of Victoria has sought to remedy that, in so far as it can, by the enactment of its own Charter of Human Rights and Responsibilities, but that is another story.

Since retiring from the High Court of Australia, Mary Gaudron sits as a Judge of the Administrative Tribunal of the International Labour Organisation in the Hague, and has continued to champion the rights of women. For the record, she was replaced on the High Court by a male Judge.<sup>98</sup> However, during the course of the last year, the second female Justice of the High Court has been appointed, Justice Susan Crennan.

## INTERNAL REFORM OF THE PROFESSION

I have reflected on the individual circumstances and achievements of each of these three women, Flos Grieg, Joan Rosanove and Mary Gaudron, to illustrate that Ethel Benjamin and her successors in New Zealand have had their counterparts with parallel lives in Australia. But I have also sought to do more than this — by demonstrating in detail both the professional capacity of these women and the hostility and exclusion which they faced despite that capacity, I have sought to identify with some precision the particular site of that hostility. I have sought to show that it

is ownership by men over the formal and informal symbols of acceptance within the profession which has restricted women's lives.

Mary Gaudron once said that the trouble with the women of her generation was that they thought if they knocked the doors down, success would be inevitable.<sup>99</sup> They thought that if the formal barriers to entering the legal profession were dismantled, it would only be a matter of time before women were properly represented in all fields of legal endeavour. However, while women have been graduating from the law schools in droves for some years, the decades which have followed Mary Gaudron's entrance to the profession have not seen, in Australia at least, proportionate representation of women in complex court matters nor in the decision-making institutional roles.

I will spare you all of the statistics but the most recent survey published by Australian Women Lawyers in August of this year was revealing. Monitoring court appearances by gender,<sup>100</sup> it revealed disproportionately low rates of appearances by women in the superior courts around Australia when compared to their numbers within the profession. The survey revealed that women were not appearing in major trial work but rather in matters of short duration — for example, in the Federal Court the average length of a proceeding for male senior counsel was 120 hours, whereas for female senior counsel the average length of a proceeding was three hours.

The survey also showed that women were appearing much more frequently before Masters than in appeals.<sup>101</sup>

The explanation for under-representation of women, viz. that it will only be a question of time, has long since been rejected as "dishonest".<sup>102</sup> As the Australian Women Lawyers put it, "the 'trickle up' theory is not working".<sup>103</sup>

As a further instance of irony, when the Australian Women Lawyers sought to advertise their Inaugural Conference which is to be held in Sydney next week, to discuss why the trickle-up theory has not worked, they were confronted by the very resistance I've described in detail today. The New South Wales Bar was happy to transmit by email to all its members information about the annual Bench and Bar chess match, and the cancellation of such an important event as the Australian Lawyers Surfing Association's annual general meeting. However, it refused to allow its email service to be used to advertise the conference of the Australian Women

Lawyers.<sup>104</sup> Unless I am mistaken about the popularity of surfing, even in a place like Sydney, the refusal cannot have been on the basis that it would be of interest only to a minority.

As we have seen, the formal barriers to women's practice of the law came down with the early enabling legislation. The statutory obstacles or impediments to opportunity were thus removed. As Flos Greig thought "opportunity was everything".

The lives of Joan Rosanove and Mary Gaudron demonstrate that the removal of formal legislative impediments, while necessary, are not sufficient and indeed do not go far in achieving acceptance for women in the legal profession.

The focus of the enabling legislation may in this sense have been misconceived — might I suggest that the ideal should not have been couched in terms of equality of opportunity (as Flos Grieg thought, or as did Mary Gaudron and women of her generation early in their careers) but rather as equality of participation.

If the ideal for women lawyers is equality of participation in the profession then the forms of hostility and exclusion in the lives of the women I have described can be seen not as merely incidental to the development of the women's professional lives but as directly contradicting that participation. The symbolism attendant upon the refusal to be accepted into barristers' chambers, the exclusion from the professional home, is thus not simply an annoyance or a hindrance to the development of a professional career to which the women otherwise had an equality of opportunity. It is, rather, a direct repudiation of their participation.

So too the repeated refusal to award silk to a candidate of clear merit and proven practice also reflects an unwillingness genuinely to accept female participation in the profession.

The site of hostility is not to be identified (or identified any longer) with the legislature. Nor can it be identified with the modern executive. It is my view that we should see the history of exclusion of women from equality of participation as lying in the belief by the profession that as an institution the legal profession was, and should remain, impervious to women. This view has it that women should be permitted to practise law but that should not be seen as requiring any other change by the profession — the profession should remain just as it was, something to which men have an entitlement and in relation to which women are naturally outsiders. The

profession is thus seen as the property of men.

It is this attitude which was expressed in 1911 in the South Australian Parliament by the Honourable Mr Moulden, that the admission of women to the legal profession would be a matter of no consequence. As you will remember, he said:

Like chips in porridge, they won't do much harm.

If the site of professional exclusion and hostility to women is seen as occurring within the internal cultural practices of the profession — and the associated symbols of formal and informal acceptance — then it is possible to see the array of rejections suffered by all the women whose lives I have described as traceable to the same source. We should see those rejections for what they are — that is, express or implied assertions of property rights by men over the symbols of professional acceptance and confirmation, without moral justification. This is so whether the symbols take the form of appointments as senior counsel, presentation of oral argument in courts and tribunals, the taking of witnesses, the occupying of chambers, or the myriad of senior institutional decision-making roles throughout the legal profession.

If the profession was to recognize clearly that these symbols do not “belong” to men, that there is no moral ownership of those symbols by men, then the latter-day successors of Flos Greig, Joan Rosanove and Mary Gaudron, will not be seen as dislodging men from that to which they are entitled. They ought perforce not be subject to the same rejections or resistance.

Finally, might I say that Flos Greig, Joan Rosanove and Mary Gaudron and the other Australian women I have mentioned have lived glorious and inspirational lives — as did Ethel Benjamin. They lived their lives in good grace with resilience, good humour and singled-minded determination over extended periods. Their passion for the law and their respective efforts at law reform extended, as Ethel Benjamin would have hoped, the boundaries of right. We must trust that we, together with the profession which those women chose to join, can crowd the wrongs out of existence.

#### Notes

1. Quoted by Ruth Campbell in “That Girl with the Terrible Name” (1975) 49 (Victoria) *Law Institute Journal* 502.

2. Carol Brown, “Ethel Benjamin — New Zealand's First Woman Lawyer” (BA (Hons) thesis, University of Otago) (1985), 20 (quoting from Ethel Benjamin's address in reply at the Graduation Ceremony to the *Otago Daily Times*, (10 July 1897), 6).
3. *Ibid* 21.
4. Ruth Campbell, *op. cit.*, 502.
5. Dame Sylvia Cartwright, “The Trouble She Caused”, (Speech delivered at the Ethel Benjamin Commemorative Address, Otago Women Lawyers' Society, Dunedin, New Zealand, 8 May 1997), 33.
6. Campbell, *op. cit.*, 502.
7. *In re Edith Haynes* (1904) VI W.A.R. 209, 211.
8. *Ibid* 211–212.
9. *Ibid* 212 (Parker A.C.J.) (See also McMillan J, 212).
10. *Ibid* 210 (argument of Pilkington).
11. *Ibid* 214.
12. *Schlesin v Incorporated Law Society* (1909) Transvaal Supreme Court Reports 363 referred to by Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Hart Publishing) (2006), 157–158.
13. *Re French* (1905) 37 New Brunswick Reports 359 referred to by Mossman, *op. cit.*, 156–157 and by Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (OUP) (1996), 58, fn.67.
14. Margaret Thornton, *op. cit.*, 59.
15. Bek McPaul, “A Woman Pioneer” (1948) 22 (1) *Australian Law Journal* 1, 2.
16. See Ruth Campbell, *op. cit.*, 503.
17. McPaul, *op. cit.*, 2; (see also Linda Kirk, “Sisters Down Under: Women Lawyers in Australia” (1996) 12 *Georgia State University Law Review* 491, 494).
18. McPaul, *op. cit.*, 2.
19. Ruth Campbell, *op. cit.*, 503 (see also 502, fn 1).
20. *Ibid* 503.
21. *Ibid* 503; Linda Kirk, *op. cit.*, 493. In 1894 an earlier attempt to amend the Legal Profession Practice Act had been unsuccessful: see Linda Kirk, *op. cit.*, 493.
22. Linda Kirk, *op. cit.*, 493.
23. *Ibid* 493; Ruth Campbell, *op. cit.*, 503. The long title was *An Act to remove some Anomalies in the Law relating to Women*. The short title was the *Legal Profession Practice Act 1903* which was to be “read and construed as one with the *Legal Profession Practice Acts 1891 to 1895*”.
24. Victoria, Parliamentary Debates, Legislative Assembly, 5 March 1903, 2821 (Mr Mackey).
25. Linda Kirk, *op. cit.*, 493–494.
26. Victoria, Parliamentary Debates, Legislative Assembly, 5 March 1903, 2821.
27. In New Zealand women were afforded the right to vote in 1893. In Australia the franchise was extended to women in South Australia in 1894, Western Australia in 1899, New South Wales in 1902, Tasmania in 1903, Queensland in 1904 and Victoria in 1908. The federal franchise was extended to women in 1902.
28. Victoria, *Parliamentary Debates*, Legislative Assembly, 5 March 1903, 2821 (Mr Mackey). Later Mr Mackey repeated (at 2821): “I said it had nothing to do with the female franchise”.
29. See Mary Jane Mossman, *op. cit.*, especially 24, 32–33.
30. Linda Kirk, *op. cit.*, 493.
31. Flos Greig, “The Law as a Profession for Women”, (1909) 6 *Commonwealth Law Review* 145, 150.
32. Jill Ewing, “Laying the foundation stone for legal women” (1992) (*Victorian Law Institute Journal* 159, 160.
33. *Legal Practitioners Act 1904*.
34. *Legal Practitioners Act 1905*.
35. *Female Law Practitioners Act 1911*.
36. *The Women's Legal Status Act 1918*.
37. *Women's Legal Status Act 1923*.
38. South Australia, *Parliamentary Debates*, Legislative Council, November 16, 1911, 535.
39. *Ibid* 536.
40. For another example of the use of this expression see Dryden's *Limberham*, Act IV, Scene I: “[T]hat [a note] is a chip in porridge; it is just nothing.”
41. Linda Kirk, *op. cit.*, 494–495, and see also 494, fn. 21. An earlier Bill had been introduced in 1916 but was shelved after the Second Reading.
42. Bek McPaul, *op. cit.*, 2. See also Linda Kirk, *op. cit.*, 495.
43. Isabel Carter, *Woman in a Wig*, (Lansdowne Press) (1970).
44. “Building a Bridge to Equality: A Duty for Lawyers”, (speech delivered at the Ethel Benjamin Commemorative Address, Otago Women Lawyers' Society, Dunedin, New Zealand, 29 April 2003), 42.
45. Isabel Carter, *op. cit.*, 4.
46. *Ibid* 125.
47. *Ibid* 125.
48. Isabel Carter, *op. cit.*, 20–22.
49. *Ibid* 33.
50. As reported by Isabel Carter, *op. cit.*, 34.
51. *Idem*.
52. Isabel Carter, *op. cit.*, 125.
53. *Ibid* 36.
54. *Ibid* 42.
55. *Ibid* 42. See also the Honourable Sir

- James Gobbo AC, Governor of Victoria, "Official Opening of Joan Rosanove Chambers" (2000) 112 *Victorian Bar News*, 53.
56. Isabel Carter, op. cit., 58.
  57. Ibid 65.
  58. Ibid 146.
  59. Ibid 146.
  60. Joan Rosanove, "Australian Divorce Laws", (1954) 27 *Australian Law Journal* 672.
  61. Isabel Carter, op. cit., 65. See also 145.
  62. See the *Nationality and Citizenship Act 1948* (Cth).
  63. The barrister was Arthur Dean. See Isabel Carter, op. cit., 126.
  64. Isabel Carter, op. cit., 126.
  65. Ibid 127.
  66. Until recently, the Attorney-General made the announcement on the recommendation of the Chief Justice. This was so in Joan Rosanove's time: see Isabel Carter, op. cit., 152, 156. In Victoria responsibility now lies solely with the Chief Justice.
  67. Isabel Carter, op. cit., 153.
  68. As reported by Isabel Carter, op. cit., 154.
  69. Isabel Carter, op. cit., 155.
  70. The new Chief Justice was Sir Henry Winneke.
  71. Isabel Carter, op. cit., 163.
  72. In 1962.
  73. Susan Magarey (ed), *Dame Roma: Glimpses of a Glorious Life* (Axiom Publishing) (2002), 68
  74. Ibid 66. The Chief Justice was Sir Mellis Napier.
  75. Ibid 83, 193–195.
  76. Ibid 252–267.
  77. Isabel Carter, op. cit., 156.
  78. Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP, Melbourne) (2001), 253.
  79. Ibid 293.
  80. Cheryl Saunders, "Interpreting the Constitution" (2004) 15 *Public Law Review* 289, 289.
  81. David Bennett, "Mary Gaudron's 'Mr Junior' Speech and High Court debut", Geoff Lindsay and Carol Webster (eds), *No Mere Mouthpiece: Servants of All, Yet of None* (Butterworths) (2002), 262–263.
  82. This account of the speech is based on the description given by David Bennett QC, in *No Mere Mouthpiece: Servants of All, Yet of None*, op. cit., 263.
  83. Ibid.
  84. Ibid.
  85. Ibid.
  86. *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166.
  87. In *re State Equal Pay Case* [1973] AR 425.
  88. *FMWU v ACT Employers Federation* (Maternity Leave Case) (1979) 218 CAR 120.
  89. Blackshield, Coper and Williams (eds), op. cit., 294.
  90. See, for example, *Forge v ASIC* [2006] HCA 44 at 22 which applied the reasoning in *The Commonwealth v Hospital Contribution Fund* (1980) 150 CLR 49 at 50 where the High Court had accepted Mary Gaudron's argument as State Solicitor-General for New South Wales.
  91. Blackshield, Coper and Williams (eds), op. cit., 295.
  92. Justice Susan Kenny, "Concepts of Judicial Responsibility: the Contribution of the 'One of Seven'", (2004) 15 *Public Law Review* 283, 284.
  93. Ibid 7 (citing the *Hindmarsh Island Case* (1996) 189 CLR 1 at 25 (Gaudron J.)).
  94. *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.
  95. *Castlemaine Toheys v South Australia* (1990) 169 CLR 436, 480. See also *Street v Queensland Bar Association* (1989) 168 CLR 461.
  96. For example, *Nationwide News v Willis* (1992) 177 CLR 1.
  97. (1997) 189 CLR 520.
  98. The Honourable Justice Dyson Heydon AC.
  99. Mary Gaudron, "Speech to Launch Australian Women Lawyers", (Speech delivered at the Australian Women Lawyers Launch, Grand Hyatt Hotel, Melbourne, Victoria, 19 September 1997).
  100. Australian Women Lawyers Gender Appearance Survey (August 2006) (Gender Survey).
  101. For example, in the New South Wales Supreme Court 27.8 per cent of the appearances before a Master were by women, whereas only 9.9 per cent of the appearances before the Court of Appeal were by women.
  102. Mary Gaudron, "Speech for Women Lawyers Association of New South Wales" (Speech delivered at Women Lawyers Association of New South Wales 50th Anniversary Gala Dinner, New South Wales Parliament House, Sydney, New South Wales, 13 June 2002).
  103. Caroline Kirton, President, Australian Women Lawyers, Explanatory Memorandum to the Gender Survey, 6.
  104. See Marcus Priest (ed), "Hearsay", *The Financial Review* (Sydney), 4 August 2006.

# Conference Updates

**8–15 January 2007, (held annually) Cortina D'Ampezzo, Italy** — Europe Pacific Legal Conference.

**1–7 April 2007, (pre Easter week) Cervinia Italy/Zermatt, Switzerland (The Matterhorn)** — Europe Oceania Legal Conference

**9–16 April 2007, (post Easter week) Venice/Verona, Italy** — Pan Europe Pacific Legal Conference

**1–4 July 2007, New York, USA** — USA Pacific Legal conference (Will be scheduled to begin just after the 2007 Australian Bar Association conference in Chicago)

**6–13 July 2007, Lake Como, Italy** — Europe Asia Legal conference

**18–24 July 2007 St Petersburg, Russia** — East West Legal Conference

**12–19 August 2007 (held annually) Perisher Blue, NSW** — Australasian Legal Conference

**21–27 September 2007, Taormina (Sicily), Italy** — Pan Europe Asia Legal Conference

**29 September–6 October 2007, (held annually) Heron Island, Great Barrier Reef** — Pacific Rim Legal Conference

**28 December 2007–3 January 2008 Khyber Pass, Peshawar Pakistan** — Indus Pacific Legal Conference

**29 June–5 July 2008 Positano, Italy** — Europe Asia Legal conference (indicative dates)

**July 2009, Lipari, Sicily, Italy** — Europe Asia Legal Conference

**July 2009, Stratford-upon-Avon and Oxford** — Britain Pacific Legal Conference (dates to coincide with the first cricket test Australia–England)

Conference Director:  
Lorenzo Boccabella, email:  
info@educationcpe.com  
www.conferences21.com.



# Council of Legal Education Dinner

Colin Galbraith served as Honorary Secretary to the Council of Legal Education for 21 years, from February 1985 to February 2006. On 31 October 2006 the Chief Justice hosted a Council of Legal Education dinner to thank him for his services to the Council.

In his remarks that evening he made a number of comments of interest, some of them relating to the personnel of the Council, past and present, others relating to the more serious issue of the way in which the ethos of our profession has changed as “time costing” and “meeting budget” have replaced “service to the client” as the dominant factor in our working lives. At the request of the editors, Colin has kindly provided *Bar News* with a copy of the notes he used for his address that evening. Those notes are printed below (unedited).

I would like to start by thanking the Chief Justice for doing me the honour of putting on this dinner and all of you for coming along. The courtesy, patience and support each of you has extended me over the years have made the role of secretary to the Council a pleasure. Her Honour has indicated that it is ok for me to say a few words so, given the strong judicial presence, I will obey the implicit command.

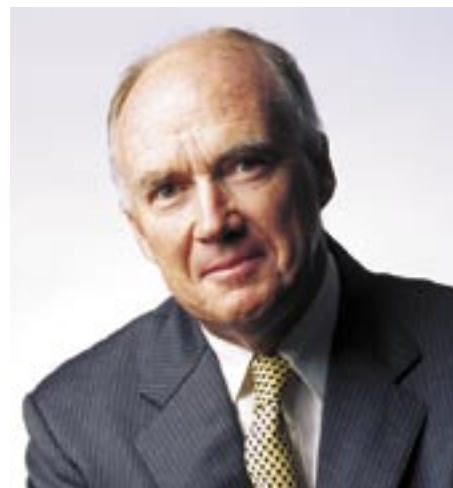
I commenced my term as secretary in 1985 – and thus became the fourth secretary of the Council in its history with the Council having been formed in 1904. The first secretary, Sir Arthur Robinson, combined the role with being a member of Federal Parliament (as member for Wannon for a short period) and subsequently as a member of State Parliament. During this time he held various ministerial portfolios, including Attorney-General. His term as Attorney-General included a key role in relation to the famous Police Strike in 1923 when he authorised the appointment under Monash of a special constabulary to keep law and order and presided over a cabinet meeting which resolved that the 636 sacked policemen would not be reinstated. They never were. The strike included the unusual event of the picketing of a law firm’s offices — the law firm being Arthur Robinson & Co.

The second secretary of the Council was George Forrest Davies who held the

position for 25 years. Forrest Davies was a well-known Melbourne lawyer and First World War veteran.

He was succeeded by John Harper in 1946 and John held office for an extraordinary period of 40 years. John was a brilliant lawyer who made a significant contribution to corporate Australia both as a lawyer and as a leading non-executive director. John was a great teacher and mentor and he brought to his role as secretary a real empathy for all the applicants to the Council regardless of their diverse backgrounds and circumstances. He loved his role as secretary and felt honoured by his association with the judges whom he held in great esteem. John was also famous for his vagueness. I recall a time when, as a young lawyer at Arthur Robinson & Co, I sat across the desk from John in his room with Ian Renard (now, of course, the University of Melbourne’s Vice Chancellor) discussing a particularly difficult legal issue. John turned and looked out the window apparently deep in thought then swivelled his chair so that he looked straight across the table at us and said: “I know what we’ll do — we’ll get Ian Renard” and promptly started to dial Ian’s office. A rather bewildered Ian spluttered “But I’m here, Mr Harper” to which John replied “Yes, so you are, now where were we?”

As you know, I ceased to be Secretary of the Council at the start of this year



Colin Galbraith.

and no longer have the pleasures of God (in God’s various forms) being invoked by applicants to bless me, of being variously addressed including as “Honoured and Honourable Galbraith, Esteemed (or Estimable) Secretary” and, rather worryingly, as “Honorary Galbraith” before on occasions being requested to indulge the applicant in the circumstances of their “personal agony”. I will also miss the many Christmas cards from successful applicants who undoubtedly had been successful in putting something over me.

The task and the privilege of the adjectives have fallen to Anne Ferguson. At the risk of embarrassing her may I say that she has a great contribution to make — she is a wonderful lady, a fine lawyer with a brilliant academic background and a wonderful ethical sense. If the recommendations made by Sue Campbell are adopted, her role as secretary will cease; the challenge is there in those circumstances to endeavour to capture Anne’s enduring contribution in some other form.

I hope you will indulge me by allowing me to make some brief comments in relation to the legal profession — please recognise that my comments are very much made from the perspective of the narrow confines of commercial legal practice.

When I started in the law a very long time ago, the legal profession held a much more esteemed position in the business

and general community than it does today. The Melbourne Bar was led by an eclectic, intellectually gifted and charismatic group whilst, amongst the “real lawyers” in the commercial law firms (!!!), there was a group of iconic figures very broadly respected within the profession who drove the practice of the law in their firms and the wider profession with a daunting discipline, always from a strong, consistent and coherent ethical base. Many were generalists acting as comfortably in dealing with the problems of real people as with those of corporations. These great lawyers also moved in and out of boardrooms with ease and frequently joined the boards themselves. They were sought after by chairmen and senior executives alike for their dispassionate counsel — they defined the phrase “trusted adviser”. These were people who were prepared to step outside the restrictions of their legal brief and venture principled commercial advice, sometimes telling their client that whilst their proposed course of action did not contravene any law they should not embark on it.

Recognising the problems and exceptions which generalisations entail, may I venture that we have seen over recent years a significant decline in the Commercial Bar in Melbourne and, indeed, in the reputation of commercial lawyers generally. I think that there is a number of reasons for this. First, obviously enough, are the facts that the legal profession has grown significantly in size and that the roles which lawyers play have become considerably more diverse; frequently, the line between a lawyer acting as a lawyer and as a businessman or woman is blurred. The problems which this latter point invites are obviously particularly acute for that large number of commercial lawyers who are employed within businesses but are certainly not restricted to them. Secondly, in relation to the Commercial Bar, is the point that we are probably seeing generational change where a considerable number of really outstanding commercial barristers have moved to the Bench. The third issue, obviously particularly affecting commercial litigators in the firms as well as the Bar, is that there is less significant commercial litigation than in the past, partly due to the cost of litigation and partly due to alternative dispute methodologies and, in the takeover arena, the emergence of the Takeovers Panel. But the fourth issue as I see it is part of a wider phenomenon which has hit the business legal profession.

That is that its stature and importance in the community have been significantly eroded.

Whilst both medium and large commercial law practices have prospered in the context of a time of considerable growth in Australian business and the Australian economy (the vast majority of practising lawyers have not, in their working lives, experienced a recession), they have done so on the back of a series of large transactions and essentially their model depends very much on a transactional flow (which allows them to throw large teams of lawyers at the task with the leverage this entails, coincidentally, producing an enhanced fee outcome). This has sometimes meant that there is a loss of emphasis on servicing the client, on developing the relationship.

Client loyalty has eroded; Clients spread their work around and are increasingly driven by price rather than quality. This has been fuelled by hourly rate charging so that law firms have allowed themselves to become regarded as just another set of commodity purveyors contributing to a client perception that you can shop around in the supermarket for the best price. The frequency of tenders called by clients for transactions based on price alone bears this out.

I think this has given rise to a dangerous potential outcome.

Corporations, their boards and their management need wise counsel, they need independent trusted advice — the dispassionate hard-nosed trusted adviser — a person tuned not only to the commercial realities of the situation but with a reliable legal and ethical perspective — a person who is ultimately prepared to give the tough, perhaps unwelcome, advice. In the toughest of circumstances, where is that advice to come from? There is an urgent need for lawyers to recapture this trusted adviser role. I am confident the cycle will turn.

But this means that the legal profession must again earn its stripes. The Council has its role to play. Obviously this entails the Council continuing to be vigilant about

the maintenance of standards whilst being meticulous in dealing fairly with the applicants whose requests come before it — applicants whose careers frequently depend on the Council’s deliberations.

I think for the future more and more attention will be given by the Council to the content and quality of law courses and practical training programs with the Council stressing the need for a sound, principles based approach to academic courses and emphasising the jurisprudential underpinnings of law in society. For my part, I firmly oppose the notion of university law courses becoming technical training institutions.

I mean no disrespect to the universities in Victoria — indeed we have been fortunate in the enduring quality of legal education in Victoria and are rightly proud of each of our institutions. Nevertheless, given the extraordinary funding and competitive pressures and the increasing social equity issues (as illustrated by the socio-economic profile of law students), a more activist role for the Council is essential.

May I close by thanking each of you for the courtesy and patience you have shown me. In particular may I comment on the roles played by five people.

Many of you will know Lorraine Cornabe who has assisted me in my role for the Council ever since I was associated with it — and who continues to assist Anne. Lorraine has been, for many lawyer immigrants to Australia, their first contact here and the face and voice of the Council. Lorraine is herself an immigrant from Calcutta and she has approached her role with considerable empathy and remarkable efficiency and precision. I know that the Chief Justice has written to Lorraine to express the Council’s thanks to Lorraine and I know this was deeply appreciated.

Each of David Harper, Gail Owen and Jack Fajgenbaum has been associated with this Council over a longer period than me. David’s role as chairman of the Academic Course Appraisal Committee has been invaluable over many years. Jack’s service on many committees, his wise counsel and his ready good humour are greatly appreciated. Gail Owen’s contributions at this Council and elsewhere in the law have been wonderful over a very long time and I have particularly enjoyed her willingness to speak her mind! Last and certainly not least is Sandy Clark — his industry and intellect have underpinned this Council for over two decades and his contribution nationally is unparalleled in Australia.

**May I venture that we have seen over recent years a significant decline in the Commercial Bar in Melbourne and, indeed, in the reputation of commercial lawyers generally.**

# Women Barristers Association Anniversary Dinner



Celebrating the 10th Anniversary of the appointment of the Honourable Rosemary Balmford to the Supreme Court of Victoria on 23 November 2006

**E**ACH year, the WBA holds a dinner to celebrate new appointments. This year, that dinner celebrated also the 10th anniversary year of the appointment of the first woman to the Supreme Court of Victoria, the Honourable Rosemary Balmford. More than 100 people attended the dinner which was, this year, sponsored by E-Law.

The Chairman of the Bar, Michael Shand QC, the CEO of the Bar, Christine Harvey, and the President of the Law Council of Australia, Tim Bugg, were among the guests, which also included Judges, Magistrates, barristers (both males and females), and some solicitors.

Since last year's dinner, 16 women have been appointed to various courts: the Honourable Justice Susan Crennan to the High Court; the Honourable Justice Marcia Neave AO to the Court of Appeal, the Honourable Justice Elizabeth Curtain and Masters Robyn Lansdowne and Melissa Daly all to the Supreme Court; and Their Honours Judges Lisa Hannan and Sue Pullen to the County Court; Federal Magistrates Kate Hughes and Heather Riley to the Federal Magistrates Court; and Magistrates Luisa Bassani, Fiona Stewart, Carmen Randazzo, Pauline Spencer, Sarah Dawes and Judicial Registrar Angela Soldani, all to the Magistrates' Court. Michele Williams



*Justice Balmford*

S.C. who was appointed Senior Counsel last November, was recently appointed a Senior Crown Prosecutor.

Justice Marcia Neave spoke at the dinner. The text of Her Honour's address, *Hearts and Minds — The Next Step*, is published on the Bar website and has been distributed to all members of the WBA. Regrettably space does not permit its inclusion here.

What follows is the text of the Tribute to Honourable Rosemary Balmford, the principal guest of honour at the dinner, delivered by Caroline Kirton, who is Assistant Convenor of the Women Barristers Association, and the Immediate Past President of Australian Women Lawyers.

Tonight, we celebrate the 10-year anniversary of the appointment of the

Honourable Rosemary Balmford to the Supreme Court of Victoria in March 1996. We're delighted that Rosemary Balmford has been able to join us this evening.

Rosemary's appointment to the Supreme Court was in March 1996. However the judicial story began three years earlier, in July 1993, with Rosemary's appointment to the County Court.

Victoria got off to a slow start with judicial appointments, with our first woman judicial officer appointed in only 1983 – that was the appointment of Francine McNiff to the Children's Court.

In March 1985, Lynne Opas QC took her place on the County Court Bench under her married name as Judge Shiftan.

In September 1985, Judge Margaret Rizkalla was the first woman appointed to the Magistrates' Court. Justice Sally



Brown was appointed to the Magistrates' Court in October 1985.

There were a number of appointments to the Magistrates' Court in the 1980's, including Justice Linda Dessau and Judge Wendy Wilmoth.

However, since Judge Shiftan's resignation from the County Court in 1988, there had been no woman on the County Court, and, of course, never any woman on the Victorian Supreme Court.

When I signed the Roll of Counsel in November 1990, there was no woman on the Bench of either the County Court or the Supreme Court.

Rosemary Balmford's appointment as a Judge of the County Court in July 1993 began the modern era of judicial appointments in Victoria. Justice Elizabeth Curtain's appointment to the County Court followed in November 1993.

Nineteen-ninety-three was a good year. Master Kathryn Kings was appointed a Master of the Supreme Court in March 1993. Rosemary Balmford was appointed to the County Court in July 1993. Justice Susan Crennan was elected Chairman of the Bar Council in September 1993. And Justice Elizabeth Curtain was appointed to the County Court in November 1993.

In March 1996, Rosemary Balmford was appointed to the Bench of the Supreme Court. I well remember the delight of women at the Bar to at last have a woman on the Supreme Court Bench.

In the decade or so since Rosemary Balmford's appointment to the County Court, there has been significant progress in appointing women to the Benches of Victorian Courts.

We now have seven women Judges on the Supreme Court, including the Chief Justice. We also have three women Masters on the Supreme Court. There are 20 women Judges on the County Court. There are 37 women Magistrates.

In the County Court, that's just over a third of the Judges: 20 of 57. It's also close to half the Supreme Court Masters: three of seven. It's about a third of the Magistrates: 37 of 108. Of the Supreme Court Judges, the proportion is only: seven of 35 — one-fifth of the Judges. But Justice Marilyn Warren is the Chief Justice.

Rosemary Balmford is a shining example for women in the law.

She was admitted to practice on 1 March 1956 — the Olympic Games in Melbourne were in November that year.

Rosemary Balmford managed what is now called "work-life" balance brilliantly.



*Tim Bugg President, Law Council Australia; Christine Harvey, CEO Vic Bar; and Caroline Kirton.*



*Justice Neave*

Having served articles at Whiting & Byrne, (now incorporated into Corrs Chambers Westgarth), and got admitted, she went overseas for a year.

She then resumed at Whiting & Byrne as an employee solicitor. She was, at the same time, Resident Tutor in Law at Janet Clarke Hall, and an Independent Lecturer at the University of Melbourne.

Her Conveyancing lectures were in the early morning. She worked all day at Whiting & Byrne. Her JCH Tutorials were in the evening.

She made partner at Whiting & Byrne in 1960, less than 4 years after admission. And her son, Christopher was born in November 1964.

Those who remember those times recall that very few of the large city firms of solicitors had even a woman solicitor — much less a woman partner.

All through this time, and beyond — from 1958 when she returned to Whiting & Byrne, to 1967 — she was on the Committee of the Legal Women's



*Judge Jane Campton and Judge Susan Pullen.*

Association — and she was President in 1965 and 1966.

In the 1960's, generally, once you became a partner in a respected city firm of solicitors, you stayed there. Rosemary Balmford did not. In 1969, she left Whiting & Byrne and began part-time study for an MBA.

She finished with a full-time year, and



*Judge Lisa Hannan, Michele Williams S.C and Carman Randazzo S.C.*

went straight from that into the Executive Directorship of what became the Leo Cussen Institute for Continuing Legal Education.

Rosemary Balmford established the Leo Cussen Institute from scratch. She rented some rooms. She took in an electric kettle from home. The first files were kept in a cardboard box. She did everything: planning, policy, budgeting, premises, staff and programs.

By 1975, the Practical Training Course at the Leo Cussen Institute was not only the best in Australia — it also had an enviable reputation internationally in the Common Law world.

In 1977, Rosemary Balmford resigned from Leo Cussen, and spent a year writing a book *Learning about Australian Birds*.

There then followed some five years as Assistant Solicitor for Special Projects at the University of Melbourne. This was followed by 10 years as a Senior Member of the Administrative Appeals Tribunal.

Then, in 1993, she was appointed a Judge of the County Court and, in 1996, a Judge of the Supreme Court.

After retirement due to statutory requirements, Rosemary served as a Reserve Judge for approximately another two years.

One of the very good things this Bar has done these last few years is to establish the series of Images of Women in the Law.

There have been women barristers for a very long time. Joan Rosanove QC signed the Roll in 1923. But all the “images” around chambers have been exclusively of men.

Inescapably, the image projected by the art work in Chambers was that of a profession engaged in by men — or at least in which only men achieve eminence.

The significance of the image projected by the bar in artwork, was brought home to me one day two years ago, when I walked through the foyer areas of Owen Dixon Chambers East and West with my

nine-year-old son. He innocently asked me “Why are there all these pictures of old men?”

In 2003, the Bar approached the five women who had been Judges of the Supreme Court — Justices Rosemary Balmford, Susan Kenny, Marilyn Warren, Julie Dodds-Streeton and Katherine Williams. They were asked to participate in a photographic portrait.

The immediate and unanimous response of the other four Judges was to suggest a portrait of Justice Balmford

**All her professional life, Rosemary Balmford has worked, and networked with, and supported others. She has been a friend and “more than a mentor” to fellow women Judges ...**

alone — in recognition of her unique achievements. Characteristically, Justice Balmford preferred to be photographed with the group.

Justice Balmford had been a friend and mentor to the women who followed her onto the Court — “more than a mentor”, one of them said. That portrait, which hangs in the foyer to Owen Dixon West, reflects the “more than a mentor” relationship. It reflects also the collective strength of the five appointments.

Another powerful Image of Women in the Law is the wonderful photograph of Justices Balmford, Warren and Dodds-Streeton — the first sitting of the Full Court constituted entirely of women Judges. They are in ceremonial scarlet, and Justice Balmford is presiding. This was for the admission ceremonies in August 2002.

All her professional life, Rosemary Balmford has worked, and networked with, and supported others. She has been a friend and “more than a mentor” to fellow women Judges. She has been a friend, and mentor, and inspiration to the eight young people who served as her Associate on the Supreme Court. She has been, and continues to be, a good friend and shining example for women in the law.

We celebrate this 10-year anniversary of Rosemary Balmford’s appointment to the Supreme Court.

# A Cricket Story

Tony Radford

“I played against Don Bradman AC.” The proof. Two young men, one from Horsham (Vic.) and one from Bowral.

SIR Donald Bradman was born on 27 August 1908. From Bowral teams he joined St George Grade Club at 19; was first selected in the NSW Shield XI in its first match of the 1927–28 season; picked in two Australian XIs, then the Australian Test side (v England) in 1928–29; then rarely out of State and Australian XIs before retirement.

His personal life has been much written about, his cricketing career and statistics well documented, with a natural emphasis on the major matches in which he played.

Until mid-2006 however, there had been no comprehensive account nor one published volume of records of the detail of most of the minor matches in which he played.

The late Dr William (Bill) Cropley Radford AO MBE (Milit)FACE (a former Director of the Australian Council for Educational Research and a part time-lecturer in Measurement in Education at University of Melbourne) was born at Crowlands (near Ararat, Victoria) on 20 May 1913. His primary and secondary school days were in Horsham, Victoria, where his father was headmaster of Horsham State School. He wished to teach and on completing Leaving Honours (Year 12), spent 1930 and 1931 teaching at Horsham State School.

Bill Radford played senior cricket with Mercantiles in Horsham in the 1928–31 years. From the age of 15, he usually opened the batting. He played in Country week in Melbourne in season 1930–31.

From the time he came to reside in Melbourne in 1932 to attend Teachers' College and University of Melbourne, he played very few games of cricket. In 1933 he started playing B Grade pennant tennis with Parkville on Saturdays, a sport he continued until his late 1940s. He died in late November 1977.

When the writer was about 10 years



Tony Radford

old, one home-cricket coaching session along a long hard-earth driveway in Balwyn was memorable, to a point.

Discussion focussed on a proper grip of the bat. “Wrists behind the handle!” “Why Dad?” “More strength to hit the ball and to defend. Don Bradman did!” “How do you know that?” “I played against him once.”

I think we then went inside for a soft drink where he spoke of the match in which he had played against the Don.

The Don had come in. The captain had (under protest from the hapless fieldsman) placed my father at silly mid-on.

That fieldsman told me that Bradman hit the first two balls straight at him, for 4s. For the rest of the eight ball over, the captain yielded and Radford fielded at deep square leg!

Apparently the Don made a large score. Radford, later, just nudged the scorebook with the bat.

For several decades, in a leisurely fashion the writer has researched for proofs

of this family story, but without success. I had thought of a possible Country XI match at or near a border town such as Narracorte or Penola, Nhill, Wentworth, Corowa or Albury.

Another possible clue was an Army match either either in Melbourne or Brisbane, as two massive WWII transit points for different war zones. Both men were in the army.

There are no Victorian Teachers' College Cricket Sporting Records from the 1930–40 era. The Army HQ records for 1939–1948 of St Kilda Road, of Balcombe and Bandiana brought no return.

Librarians and other staff at the MCC the VCA, the NSWCA, the Mortlock Library (SA) and the Bradman Museum at Bowral have been kindly and prompt with responses.

At least by January 1931, the Don had established a capacity for large scores with repeated success at all senior levels. On 16 January 1931 for the Australian Test XI v the West Indies (on tour “down under”), he made 223; on 24 January 1931 for NSW against Victoria, he made 33 and 220.

As was (and still is) a custom in cricketing countries, hospital staff occasionally arrange social sporting events, “ringing in” known sports people.

Such has been the critical link in the information I received recently from interstate.

In mid-June 2006, Alfred James, an Honorary Research Librarian with NSW Cricket, published: *The Don versus the Rest* — The Scorecards of the Minor Matches played by Sir Donald Bradman 1920/1921 to 1962/63.

The publication is a limited edition of only 100 copies.

A short letter I received in mid-September 2006 came six years after earlier correspondence from the same friendly source, the NSW Cricket Head (Honorary) Research Librarian Colin



**SOUTH AUSTRALIAN CRICKET ASSOCIATION XI**  
vs  
**SOUTHERN DISTRICTS**  
Played on the Showground, Strathalbyn on 30 November 1938

SOUTHERN DISTRICTS			
N STAGG	c. Whittington, b. McInnes	2	
F ZANKER	b. Waite	0	
RD MEYER	not out	57	
A GOLDSWORTHY	c. Ellis, b. Waite	2	
J BYRNES	c. Walker, b. Scott	8	
EL RODDA	lbw, b. Ellis	0	
LD TUCKER	st. Walker, b. Ellis	25	
D POTTS	b. Ellis	4	
K PARKER	b. Scott	3	
V PAYNE*	did not bat	-	
W RADFORD	did not bat	-	
Extras		5	
Total		8 wickets (dec.) for	106
Fall : not known			

	O	M	R	W
McInnes			24	1
Waite			3	2
Scott			5	2
Ellis			67	3

S.A.C.A.			
KL RIDINGS	lbw, b. Zanker	52	
RS WHITTINGTON	c. Tucker, b. Zanker	54	
DG BRADMAN*	c. Meyer, b. Payne	131	
CL BADCOCK	not out	15	
RA HAYMENCE	c. & b. Payne	16	
J TREGONING	c. Tucker, b. Potts	47	
MG WAITE	c. Tucker, b. Stagg	73	
CW WALKER+	not out	0	
MJ McINNES	not out	4	
JA SCOTT	did not bat	-	
RS ELLIS	did not bat	-	
Extras		7	
Total		7 wickets for	399
Fall : not known			

	O	M	R	W
Zanker			73	2
Tucker			74	0
Meyer			77	0
Payne			57	2
Byrnes			38	0
Radford			28	0
Potts			27	1
Stagg			18	1

S.A.C.A. won by 3 wickets and 293 runs on the first innings

DGB hit 131 runs in 63 minutes (16 fours and 2 sixes). He had also hit the trial ball from the M... The match marked the opening of the new turf pitch.

9 Dec. 1938	16 Dec. 1938	24 Dec. 1938	30 Dec. 1938	7 Jan. 1939	14 Jan. 1939
Bradman's XI	SA vs NSW	SA vs Q'ld	SA vs Vic.	SA vs Q'ld	SA vs Vic.
DGB: 118	DGB: 143	DGB: 225	DGB: 107	DGB: 186	DGB: 223

**GLADESVILLE MENTAL HOSPITAL vs VICTORIAN SCHOOL TEACHERS**  
Played on the No. 1 Ground, Gladesville Hospital on 8 January 1931

VICTORIAN SCHOOL TEACHERS			
R WRIGHT	c. McCoy, b. Bradman	17	
R BAIRD+	c. McCoy, b. O'Sullivan	0	
W RADFORD	lbw, b. Nolan	4	
J KERSHAW	lbw, b. McCoy	5	
W WILKINSON	c. & b. Cullip	32	
S JOBLING	b. Bradman	1	
IG KEOGH†	b. McCoy	2	
S HARRIS	b. O'Sullivan	9	
I MADDERN	b. O'Sullivan	0	
W NEAGLE	b. O'Sullivan	6	
CH SAUNDERS	not out	9	
W DOUGLASS	b. Douglass	20	
Extras		7	
Total		132	
Fall : not known			

	O	M	R	W
Fisher			11	0
O'Sullivan			55	4
Douglass			3	1
McCoy			34	2
Bradman			3	2
Cullip			19	1

GLADESVILLE HOSPITAL			
DG BRADMAN	c. & b. Keogh	202	
EL WADDY	retired	53	
JE CUPITT	m. Baird, b. Keogh	39	
WJF MCCOY*	retired	36	
C FOWLER	lbw, b. Wilkinson	26	
CS DOUGLASS	b. Wilkinson	9	
MCH CULLIP	not out	17	
GH O'SULLIVAN	did not bat	-	
C NOLAN	did not bat	-	
AN OTHER	did not bat	-	
AN OTHER	did not bat	-	
Extras		27	
Total		6 wickets for	411
Fall : not known			

	O	M	R	W
Wilkinson			71	2
Jobling			32	0
Kershaw			65	0
Wright			25	0
Keogh			95	2
Radford			24	0
Douglass			46	0
Neagle			32	0
Saunders			4	0

Gladesville Hospital won by 4 wickets and 279 runs on the first innings

30 fours and 7 fives, including one hit which 'displaced a tile on the roof of a building across the... The Victorians played several matches in Sydney between 4 and 18 January 1931.

16 Jan. 1931	24 Jan. 1931
Aust. vs W.I.	NSW vs Vic.
DGB: 223	DGB: 13 & 220

Clowes. He had earlier sent me reports of matches in Holbrook and Albury circa 1932-33 where the Don and others of a NSWCA side played local (NSW) sides. NSWCA exhaustive searches were otherwise fruitless.

The recent short letter enclosed photocopies of pages from the book of two minor

matches in which the Don had played, where a "Radford" had also played.

One of these involved a (most powerful) South Australian Cricket Association XI v Southern Districts at Strathalbyn Showgrounds (SA) on 30 November 1938.

That did not involve any relative of mine.

The other did.

That was a match played on 4 January 1931 at Gladesville Mental Hospital. (NSW) The Hospital XI included the Don and at least one other Bowral player, one J.E. Culpitt, a friend of the Bradman family.

A touring Victorian School Teachers' XI, batted first, making 132.

W. Radford at No 3 was out lbw to Nolan for 4. The Don took 2 for 3.

Then the Hospital batted; the Don opened, making 202, with 30 fours and 7 fives. Radford took 0 for 24. The Hospital

XI made 6/411.

The Victorians played other matches in Sydney between 4 and 18 January 1931.

It is most pleasant to now have these records — for the nation — and for family reasons

It is just as pleasant also to now dispel the "doubts" — and satisfy the skeptics — of several decades, of the authenticity of the (Victorian) (W.) Radford/Bradman story.

The Don was not a doubter, for he had rightly denied playing in any match involving a Victorian Country XI in Victoria. That specific denial came in a response to a letter I had written to him in 1999 seeking, first, copyright permission to use an extract from the final edition of *Farewell to Cricket* for the front cover of a menu for a Victorian Bar Cricket Dinner. (That consent was granted.) I had raised also the question of him having played a match against a Victorian country XI in Victoria.

**The Don was not a doubter, for he had rightly denied playing in any match involving a Victorian Country XI in Victoria. That specific denial came in a response to a letter I had written to him in 1999 ...**

It is hoped that Alfred James book could be further reprinted to meet a demand.

That demand would emanate not just from family members and friends of players for and against the Don in one or more of the 349 matches now reported.

An index of those involved as players — both in the sides with the Don and against with their nicknames — if known, is included.

The famous “honeymoon tour” matches to Canada and the USA by Arthur Mailey’s Australian XI (with wives) in 1932 is chronicled.

In late 1940 three matches were played by the Defence Forces — Bradman for the Army Physical Education Instructor’s School at Frankston (Balcombe), — all played in Frankston and a fourth against the MFB by that Army XI, at the Richmond Cricket Ground. (This last match is referred to in Frank Tyson’s book on the Richmond CC.)

The new book of the minor matches played by the Don is a gem.

On a further personal note, when the writer was about 14, he also learnt from his father that in WWII amongst the Army ranks at El Alamein in the 9th Division was a logistics person with the nickname “Braddles”.

Where did that name come from, I wonder?

My thanks for the lives of two great men.

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## The Essoign Wine Report

By Andrew N. Bristow

KIRRIHILL ESTATE CLARE VALLEY RIESLING 2005

Kirrihill Wines was established in 1999 and is located in the gently rolling hills of South Australia’s famous Clare Valley wine region. The winery was purpose built and is unique. The open-air “winery without walls” provides an inspiring 360 degree view of the vineyards and hills. The cantilevered roof and sail-cloth provide shade for the stainless-steel fermentation tanks and allow an abundance of natural light, creating a bright and open working environment.

The fruit for this wine came from two blocks of old vines. The growing season in Clare in 2005 was widely considered to be almost perfect, with a warm spring and mild summer combining with regular rainfall to provide even and consistent vine growth and fruit ripening. The grapes from each vineyard block were picked and processed separately, with each being crushed and de-stemmed, then chilled prior to draining and pressing. The free run juices were cool fermented in stainless-steel, and the resultant wines racked and stabilised.

This wine’s bouquet exhibits classic lemon zest and spiced lime aromas.

The wine colour is a pale lime/yellow colour of brilliant clarity.

The palate is rich and concentrated, yet fine and delicate, with intensely focused fruit backed by mouthwatering acidity. The finish is clean but with astringency on the back palate.

Although drinking well now, this is a wine with aging potential. It has 12.0 per cent 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 two to four years. It is available from the Essoign Club at \$26.00 a bottle or \$6.50 a glass (or \$22.10 takeaway).

I would rate this wine as a mature-aged entry barrister, a bit unsure of itself, but appropriate to be used during the summer vacation.



**The Essoign Club will close on Thursday 21st December 2006 and re open on Thursday 18th January 2007.**

**On behalf of the committee, management and staff we thank you for your support over the year and wish you a Merry Christmas and a safe and prosperous New Year in 2007.**

The Essoign

# The King's English

TWO thousand and six marks the hundredth anniversary of the first edition of *The King's English*. It was written by Henry Watson Fowler and his brother Francis George Fowler. It was immediately popular. The second edition was published just two years later, in 1908. A third edition was published in 1930. It is still in print.

My affection for this book began 50 years ago, when my father decided that my English education needed to be supplemented. Coincidentally, it was the same year that *My Fair Lady* premiered: the first, and probably the only, celebration of philology in a Broadway musical.

The structure of the *King's English* is that of a fairly orthodox grammar. Even so, the chapter titled *Airs & Graces* includes such sub-headings as: *Elegant Variation*, *Archaism*, *Trite Phrases* and *Cheap Originality*. Part II collects together a wide range of examples selected by the Fowler brothers to illustrate some of their pet subjects. These are drawn together under such teasing headings as *Antics*, *Wens* and *Hypertrophied Members*, *Omission of as*, *Other Liberties Taken With as*, *Journalese*, and *Commercialisms*.

On the first page of *The King's English*, the Fowler brothers laid out the governing principles of English vocabulary as they saw them:

Prefer the familiar word to the far-fetched.  
Prefer the concrete word to the abstract.  
Prefer the single word to the circumlocution.  
Prefer the short word to long.  
Prefer the Saxon word to the Romance.  
These rules are given roughly in order of merit; the last is also the least.

In their discussion of the "Saxon not Romance" principle, on the second page of the book, they set the tone of what is to follow:

There are, moreover, innumerable pairs of synonyms about which the Saxon principle gives us no help. The first to hand are *ere* and *before* (both Saxon), *save* and *except* (both Romance), *anent* and *about* (both Saxon again). Here, if the "Saxon" rule has nothing to say, the "familiar" rule leaves no doubt. The intelligent reader whom our writer has to consider will possibly not

know the linguistic facts; ... At sight of *ere* he is irresistibly reminded of that sad spectacle, a mechanic wearing his Sunday clothes on a weekday.

And speaking of *anent*, they note:

The Oxford Dictionary says drily (of *anent*): "Common in Scotch law phraseology, and affected by many English writers"; it might have gone further, and said 'affected' in any English writer"; such things are antiquarian rubbish, Wardour-Street English.

*Wardour Street* English is so named after the London street famous for its antique shops. H.W. Fowler gave us more about it in *Modern English Usage*:

As *Wardour Street* itself offers to those who live in modern houses the opportunity of picking up an antique or two that will be conspicuous for good or ill among their surroundings, so this article offers to those who write modern English a selection of oddments calculated to establish (in the eyes of some readers) their claim to be persons of taste and writers of beautiful English ...

The magnificent thing about *The King's English* is that the reader is never left in doubt about the authors' views on a subject. The idea of dinner or a glass of wine with the authors is at once exciting and terrifying. In their unblinking criticism of the faults they find, the Fowler brothers make only slight allowance for the fame and reputation of the author, but some of their sharpest barbs are reserved for the pretentious amateur:

**Airs and Graces:** Some of the more obvious devices of humorous writers, being fatally easy to imitate, tend to outlive their natural term, and to become a part of the injudicious novice's stock-in-trade. *Olfactory organ*, once no doubt an agreeable substitute for "nose", has ceased to be legal tender in literature, and is felt to mark a low level in conversation.

**Elegant variation:** An educated writer's choice falls upon archaisms less hackneyed than the amateur's; he uses them, too, with more discretion, limiting his favourites to a strict allowance, say, of once in three essays. The amateur indulges us with his

whole repertoire in a single newspaper letter of 20 or 30 lines, and — what is worse — cannot live up to the splendours of which he is so lavish: charmed with the discovery of some antique order of words, he selects a modern slang phrase to operate upon; he begins a sentence with *ofttimes*, and ends it with a grammatical blunder ...

**Metrical Prose:** The novice who is conscious of a weakness for the high-flown and the inflated should watch narrowly for metrical snatches in his prose; they are a sure sign that the fit is on him. (*ouch!*)

It is interesting to see how, after 100 years, the simple principles of vocabulary set out in *The King's English* are as good and serviceable now as when they were written. Winston Churchill instinctively followed the principles laid out in the opening chapter of *The King's English*. On 4 June 1940, he famously said in the House of Commons:

We shall not flag nor fail. We shall go on to the end. We shall fight in France and on the seas and oceans; we shall fight with growing confidence and growing strength in the air. We shall defend our island whatever the cost may be; we shall fight on beaches, landing grounds, in fields, in streets and on the hills. We shall never surrender ...

(It has often been suggested that the speech consists only of Saxon words, except for *surrender*, which comes from French, but the observation is not accurate. Of course, as so often, context is everything: the Belgians had surrendered the week before; the evacuation from Dunkirk had ended earlier on the day of Churchill's speech, and the French were on the brink of capitulating (Romance word). In the circumstances it would not have made quite the same political point to acknowledge that *defend* and *confidence* come to us from French.)

As well as providing a durable guide to good prose, *The King's English* is a snapshot of the language 100 years ago, as it was seen by two very keen observers. They regard *placate*, *transpire*, and *antagonize* as unacceptable Americanisms which should be resisted. They list a number of imported words they regard as fully naturalised: *tête-à-tête*, *ennui*, *status quo*, *raison d'être*, and



*négligé*. Fair enough: they can probably be used without affectation. But the list also includes *eirenicon* which is not seen at all these days. It means *a proposal tending to make peace; an attempt to reconcile differences*. (What a pity that we apparently have no need of it.) They doubt whether, in 1906, *camaraderie* is naturalised English: but nowadays most speakers would scarcely recognise it as a foreign import.

And consider this passage from the *London Times*, and their criticism of it:

The two Special Correspondents in Berlin of the leading morning newspapers ... report a marked *détente* in the situation. — *Times*.

Of this they say:

*Entente* is comprehensible to every one; but with *détente* many of us are in the humiliating position of not knowing whether to be glad or sorry.

Most readers today would not have the same difficulty: *détente* is widely used.

Another bit of showing off by the *Times* attracts their attention:

It was he who by doctoring the Ems dispatch in 1870 converted a *chamade* into a *fanfaronnade* and thus rendered the Franco-German war inevitable. — *Times*.

Of this they say:

We can all make a shrewd guess at the meaning of *fanfaronnade*: how many average readers have the remotest idea of what a *chamade* is? and is the function of newspapers to force upon us against our will the buying of French dictionaries?

This is an interesting mark of the way things have gone. Few Australian readers would recognise either word; no Australian newspaper is likely to use either. In fact, Australian newspapers rarely provoke the need for an English dictionary, let alone a French one.

Other foreign words which attract their criticism include *epochmaking*, to *orient* and *morale*:

The French for what we call *morale*, writing it in italics under the impression that it is French, is actually *moral*. The other is so familiar, however, that it is doubtful whether it would not be better to drop the italics, keep the *-e*, and tell the French that they can spell their word as they please, and we shall do the like with ours.

We have done as they suggested.

It is interesting to see how prominent foreign expressions were, in those gilded Edwardian days:

To say *distrain* instead of *absent* or *absent-minded*, *bien entendu* for *of course*, *sans* for *without* ... *quand même* for *anyhow*, *penchant* for *liking* or *fancy*, *redaction* for *editing* or *edition*, *coûte que coûte* for *at all costs*, *Schadenfreude* for *malicious pleasure*, *oeuvre* for *work*, *alma mater* (except with strong extenuating circumstances) for *University* — is pretension and nothing else ...

Of that collection, *penchant* and *Schadenfreude* are more or less common; *alma mater* and *distrain* are recognisable; *redaction* and its Anglo-participle *redacted* are only seen in technical usage. The others border on freakish, but they must have been common enough in use 100 years ago to attract comment.

A century on, *The King's English* is still an engaging and provoking book. It is

treasured, or at least respected, by generations of readers and writers who choose to ignore or disregard the assessment of H.W. Fowler in the *Oxford Companion to the English Language*:

Fowler was a gifted amateur scholar ... he remained essentially unaware of the linguistic controversies sweeping through the Universities of Europe and the New World. He did not read the learned journals and books in which scholars ... were propounding the doctrine of prescriptive linguistics. His models were the classical languages of Greece and Rome, modified to suit the facts of the English language as he saw them. The responses of writers and scholars to his work have varied, journalists tending towards praise and even adulation, academic linguists towards caution and even reproach.

Sadly, the *Oxford Companion* has no entry for F.G. Fowler, but in dedicating *Modern English Usage* (1926) to the memory of his brother, H.W. Fowler wrote:

I think of it as it should have been, with its prolixities docked, its dullness enlivened, its fads eliminated, its truths multiplied. He had a nimbler wit, a better sense of proportion, and a more open mind, than his twelve-year-old partner; and it is a matter of regret that we had not, at a certain point, arranged our understanding otherwise than we did ...

I am with those who praise the Fowler brothers. In this book, preserved as in aspic, are the enduring treasures of our language; and the manners and disposition of a time which has gone forever.

Julian Burnside QC





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# Bar Hockey

## Victorian Bar's Miserable Failure to Beat the Law Institute Team

ON Thursday 12 October 2006 the Victorian Bar Hockey Team spectacularly failed to obtain an appropriate result against the Law Institute of Victoria (LIV) Hockey Team.

The Bar side assembled as usual at the State Hockey Centre and we were pleased to see a superabundance of players. No less than 14 had turned up. We were even more pleased to see that the Law Institute team seemed bereft of numbers, mustering ultimately only eight.

A call for volunteers to play for the opposition produced a positive response only from Brear whose decency shone through as ever.

Starting therefore with 13 players against nine, I felt confident that we might do better than last year.

We dominated play from the start, although the two State League One players playing for the LIV Team remained a constant threat on the break, very ably assisted by a State League One woman's player at centre forward.

Despite missing numerous chances we went 1-0 up when Clancy (who had attended from Canberra for the game — an endeavour beyond the call of duty) scored off a short corner and we went to half time at 1-0.

We were still 1-0 up with approximately twenty minutes to go when a short pass by the writer to Tweedie led to a tackle by one of the LIV stars who went through on goal and obtained a penalty stroke which was then converted by Schokman. The game continued in a predictable manner. The solicitors defended in-deep and we counter attacked.

Their counter attacks were made the more dangerous by the relative lack of pace of Wood and myself on the back line, although Sharpley played outstandingly in goal. Tweedie and Clancy in particular were playing extremely well.

The Bar was particularly pleased to welcome back Philip Goldberg on this occasion who had not played for eight years. Despite being somewhat rusty,

and as he might himself concede slightly heavier than in previous times, Goldberg was playing very well.

Against the run of play the LIV team

scored another goal, but we were able to equalise following a superb run by Tweedie and a crisp short from Robinson.

Two all with five minutes to go was



*The defeated rabble: (rear) Riddell, Elden, Wood, Goldberg, Collinson, Sharpley, Robinson, Andrew Tinney and Gordon and (front) Clancy, Tweedie, Burchardt and Morgan.*



*Schokman with the Rupert Balfe trophy.*

pretty good going, but then collective madness ensued. Riddell, who had played extremely well, and Wood pushed forward leaving only — (gulp) — me at the back. A turnover led to an attack in which the solicitors had 3 against 1, and easily bypassing me and with slightly greater difficulty Sharpley they were able to score the winner.

The Bar forwards did manage to miss a quite substantial number of chances during the game, but while that is so it is fair to say that scoring goals always looks a lot easier when you are in defence. Gordon, Morgan, Collinson, Robinson as well as Goldberg all did extremely well upfront.

While it was disappointing to see a game slip away that we might otherwise have won (Michael Tinney was much missed) the game was as ever played in a very good spirit. Everyone who played from the Bar Team did their best, and



beating a team with two players in their early twenties who are still playing at top grade is always going to be a big problem even if the other side was nominally undermanned.

The game was extremely well umpired by Lou Cirillo and another appointee arranged by Tony Dalton from the Mentone Club.

The game was well celebrated after the event in the bar at the State Hockey Centre and we looked forward to

Schokman joining the Bar at some point, in which case results are likely to change dramatically.

For the fourth year in a row Schokman won the Rupert Balfe Award for the Best Player on the night. It was richly deserved. Rumours that the Bar Team has taken out a contract on Schokman's knee to ensure his not playing next year are as defamatory as they are true.

Philip Burchardt FM

## Unexpected Victory in NSW

HAVING lost ignominiously to the solicitors, I was concerned as to how the Bar Hockey Team would fare in its game against the NSW Bar in Sydney.

We had a full side three or four days before the game, but late cancellations meant that we had to borrow two players from NSW.

When we gathered at the Kyeemah Leagues Club ground, prettily situated just opposite the International Airport, it transpired that we had nine players. Simon Makin and Robbie Thorburn of the Gordon Hockey Club very kindly made themselves available to play for us.

Fears that the year had finally come when we would be overrun proved unfounded. We actually won the game 4 goals to 1, an astonishing form reversal.

Having started cautiously (not aided by the writer's first four passes being superbly executed to the opposite team) we obtained a short corner which Clancy hit in and following a save Tinney scrambled the ball home.

By half time Clancy had scored off another short corner and we seemed to be doing fairly well.

Fears that we would be overrun were well and truly put to rest when Ross Gordon scored early in the second half, and when Michael Tinney capped an outstanding performance with a superb shot we were 4-0 up with only a quarter of an hour to go.

As is so often the way when numbers are down, everyone was playing very well, with John Morgan covering a lot of ground at right inner and Clancy as always excellent in central midfield.

A moment of lack of concentration on our part allowed Andrew Scotting, who organises the NSW Team, to score a soli-

tary reply but we held on for a comfortable win.

The Kyeemah venue is from the point of view of the visiting team absolutely ideal. It is close to the airport, has a leagues club (with excellent food and drink facilities) literally right next door, and the surface itself is a good one.

The game was ably umpired, and our two ring-ins both played extremely well (a matter of some heartache to the NSW team) but they played no better than the three players we gave them last year in Melbourne.

This fixture has been running now for some years and it is pleasing that although it is always a bit of a struggle for the away team to get the numbers, we have nonetheless been able to continue it.

We owe a considerable debt to Andrew Scotting who continues to organise the NSW Team and venues and obviously to those who came up and took part.

Richard Brear very kindly arranged for the Rupert Balfe-Lycester Meares Cup to be engraved, and photographs will doubtless accompany this article of its presentation after the game.

It was particularly pleasing to see that Peter Callaghan QC is still playing for the NSW Team. Peter's energy, commitment and love of the game continue to be impressive given the fact that he is now somewhat over 21 years of age.

We look forward to seeing our NSW colleagues down in Victoria next year but await with dread the continuing prospect that a current Australian International is due to sign the Bar Roll in the relatively proximate future.

Those who took part in this very enjoyable and successful game were Sharpley, Wood, Burchardt, Thorburn, Clancy, Brear, Gordon, Morgan, Tinney, Robinson and Makin.

All of those named played excellently.

Philip Burchardt FM

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## Australian Cases on Contract — 2006 Edition (7th Edn)

**Edited by M.P. Ellinghaus**  
**Code Press distributed by Lexis Nexis**  
**Pp i–xii, 1–698, Index 699–713**

*Australian Cases on Contract* began a life in 1983 as *The High Court of Australia on Contract 1950–1980*. In the original format the book contained abridgements of judgments delivered in 160 cases on contract by the High Court in the period 1949–1980 together with four Privy Council cases.

The work has now evolved to include not just High Court cases but also a number of Federal Court and State Court decisions while the period covered extends from 1905 to 2005.

Notably in the 2006 edition, cases such as *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* and *Vodafone Pacific v MI Ltd* (both dealing with an implied term of good faith) (and see also *Far Horizons Pty Ltd v McDonalds Australia Ltd*); *FAI Traders Insurance v Savoy Plaza Pty Ltd* (subsequent conduct of parties as an aid to interpretation) and *Ringrow Pty Ltd v BP Australia Pty Ltd* (enforcement of penalties) amongst others have been added. Eleven cases have been deleted from the previous edition.

It is to be hoped that the author might consider including cases such as *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622 and on appeal at 631; *Abigroup Contractors Pty Ltd v ABB Service Pty Ltd* [2004] NSWCA 181 and *Fletcher Challenge Energy Ltd v Electricity Corp of New Zealand Ltd* [2002] 2 NZLR 433 (all dealing with the formation of contracts and *Masters v Cameron*) in the next edition.

Professor Ellinghaus does not merely provide edited extracts of cases. The unique editing style reduces the text of judgments by the deletion of pages, passages, phrases and single words. Occasionally some explanatory or linking text is inserted. The editor does not hesitate to connect parts of sentences to form new sentences where this is possible. All judgments in each case (including dissenting judgments) are reproduced in the abridged form.

As the author acknowledges in his opening, the judgments as presented in

*Australian Cases on Contract* are best described as “abridgements” and in doing so the editor seeks to retain the words (and meaning) of the original judgment, without (hopefully) affecting their sense, style or meaning.

It is possible to establish the extent of the abridgement by reference to the square brackets indicating the page number in the original report. Pages of the original judgment are reduced to a paragraph or two, and paragraphs to sentences.

The work arranges the cases chronologically, however I would suggest that each case could usefully have relevant catchwords referred to under the heading in the text. It is possible to search for cases by topic or catchwords in the Index, however the Index unhelpfully then requires the Table of Cases to be consulted to ascertain the page number for each case in the text.

*Australian Cases on Contract* will be of interest to lawyers and students alike. It provides a ready access to a vast array of material from a number of jurisdictions relevant to an understanding of Australian contract law. It is usefully updated with current cases.

The style of abridgement may not please legal purists, but as a guide and aide memoir to lawyers, students and to those interested in the development of Australian contract law this work is commended.

P.W. Lithgow

## Contract: General Principles — The Laws of Australia

**Edited by J.L.R. Davis**  
**Published by Thomson LawBook Co, 2006**  
**Pp i–cxlviii; 1–898; Index 899–944; Word and Phrases 945–946; Bibliography 947–958**

*CONTRACT: General Principles* — *The Laws of Australia* has previously been published as part of the *Laws of Australia* encyclopedia. This book usefully provides in a single volume a comprehensive guide to contemporary contract law in the Australian context.

The style of this volume follows the format of the *Laws of Australia* encyclopedia. Each chapter contains section headings that set out a summary statement of the law followed by discussion

and analysis with footnotes to relevant cases and legislation at the end of each section.

The book also contains cross referencing to other relevant parts or topics found within the *Laws of Australia* encyclopedia.

The work deals with contract under the familiar headings of formation, parties, terms, performance and breach, etc. The section dealing with vitiating factors includes discussion of the requirements of the Statute of Frauds, mistake and illegality. It should be noted that matters such as misrepresentation, duress, undue influence and unconscionable conduct are given relatively short exposition due to the coverage of these specific topics more fully elsewhere in the *Laws of Australia* encyclopedia. Similarly, special aspects of contract law such as sale of goods, guarantees and insurance contracts are not subject to detailed exposition in this text.

For ease of reference, each section is delineated by shading on the edge of the pages, and at the beginning of each part a table of contents directs the user to particular sections (i.e. Part 7.1 — Formation — sections include Negotiations, Intention, Offer and Acceptance, Options, Consideration and Sufficiency of Agreement). The text usefully contains a very comprehensive table of cases and index and a small but useful index of words and phrases.

This single volume usefully combines comprehensive and scholarly treatment of the law with ample cross-referencing to cases and articles. *Contract: General Principles* is sure to become one of the standard references for lawyers, students and others interested in Australian contract law.

P.W. Lithgow

## The Constitution of Victoria

**By Greg Taylor, (Chapter Seven by Dr Nick Economou), Foreword by the Hon Sir Daryl Dawson**  
**The Federation Press, 2006**  
**Pp i–xlii, 1–520, Bibliography 521–540, Index 541–550**

*THE Constitution of Victoria* provides a scholarly and comprehensive excursion through the intricacies of the legal foundation of the political entity — the State of Victoria. While it is no doubt true to say that Constitutional Law is generally

thought of as the study or analysis of the Australian Federal Constitution, the position of state constitutions in Australia as little understood and rarely studied documents will be challenged by this work.

Recent (further) rumblings about the Federal-State balance in light of the High Court decision in *NSW v Commonwealth* [2006] HCA 52 has brought a level of renewed debate about the true meaning of the federal nature of the Commonwealth/State relationship. Further, the changes in Victoria to the electoral system provided for by the *Constitution (Parliamentary Reform) Act 2003* which provided for, amongst other things, fixed four-year terms for both the Victorian Legislative Assembly and the Legislative Council, and the reform of the Upper House provinces into eight regions, each electing five legislative councillors, with the consequent possibility of the election of so-called minority, or special interest, members of Parliament, has shown that State Constitutional law is relevant and topical today.

While *The Constitution of Victoria* usefully provides some historical background, the majority of the text and discussion is of current Victorian constitutional law. The chapters dealing with the Crown and Executive Council and Cabinet include comprehensive discussion of the power and position of the Crown, the Governor, the Premier and Ministers in Victoria. There is also a useful discussion on the position of the Attorney-General in light of some of the recent developments as to whether the Attorney-General should act so as to "defend the Courts".

Two chapters are devoted to Parliament-Structure and Powers (Chapter 5) and Workings and Practice (Chapter 6). The new mechanism for resolving a deadlock between the houses is extensively discussed. There are also interesting diversions into topics such as qualification and

disqualification of members of parliament, contempt, parliamentary privilege and the honourific titles of members.

The final two chapters deal with judicial power and questions relating to amendment of the constitution (including possible "entrenchment" of a constitutional provision).

This book published "as near as possible to the sesquicentenary of Victoria's Parliament" and is a valuable and scholarly contribution to an important, but often underestimated area of public law in Australia. The work is written in an easy style and usefully concentrates on the current Victorian constitutional position. Accordingly, this work is not some musty tome about arcane practices largely rooted in a dim colonial past, but is a modern, up-to-date and scholarly work dealing with a Constitution of relevance and importance to all Victorians. This relevance is highlighted by the significant recent electoral changes that passed their first test in the 2006 Victorian State Election. *The Constitution of Victoria* should have a place on the bookshelves of lawyers, parliamentarians and politicians, judicial officers, public servants and those interested questions of public law in Australia generally and Victoria more particularly.

P.W. Lithgow

## Unconscionable Conduct, The Laws of Australia

**Edited by Paul Vout**  
**Pp. 1-LXVI, 1-572**

THE book originally appeared in the title of *Unfair Dealing In The Laws Of Australia Encyclopaedia*. It provides a comprehensive analysis of the con-

cepts of the misrepresentation, estoppel, duress, undue influence and unconscionable dealing. Its sections are referenced to the related titles and subtitles in the Laws of Australia,

I found the book easy to follow as it led me through the various topics, and the format employed was designed to express in simple terms the un-simple. To give one example in relation to inducement the authors' wrote [35.2.4x]:

The onus of proving the inducement is on the recipient, his understanding of the representation must be the subject of evidence. This is ordinarily satisfied by calling the representee or his servant or agent to give direct oral evidence to the effect which the representation had on his mind.

That simple proposition is supported by reference to a number of cases which are cited in the footnotes. It is evident from the footnotes that the authors have done much research. The propositions that are developed are supported by reference to decided cases. For a practitioner, this is a very important starting point, whether it be the writing of an opinion or the presentation of the case before the Court. A further example may given in reference to unconscionability, where in Chapter 3 they explore in detail the various notions of unconscionability such as the exploitation of vulnerability, the abuse of the position of trust or of confidence, the harsh and oppressive exercise by one party of his or her rights, the denial of obligation and the unjust retention of property.

This is a book I would thoroughly recommend for any person whose practice involve the application of commercial law. The views of the authors are expressed succinctly and are of valuable assistance.

John V. Kaufman QC

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