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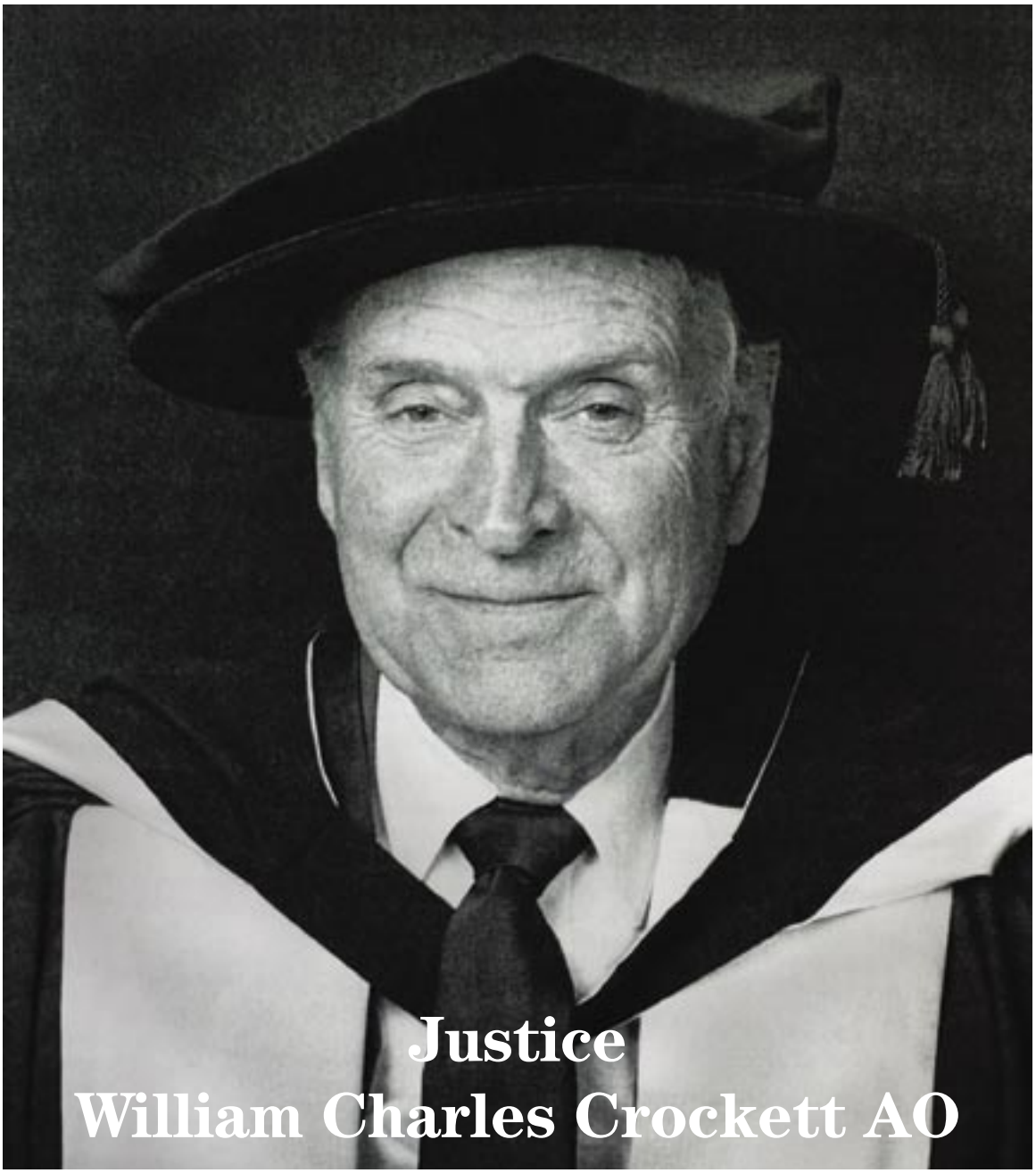

Justice William Charles Crockett AO

Practitioner Remuneration Order ☐ Farewell to His Honour Mr Justice Frank Hortin Callaway ☐ Welcome to Brigadier The Honourable Justice R.R.S. Tracey RFD ☐ The Problematic Proviso: The Vice of *Weiss* ☐ Talking With Liars and Bullies ☐ The Process of Appointment of Senior Counsel in Victoria ☐ *Opening of the Legal Year: 30 January 2007* St Paul's Anglican Cathedral, St Patrick's Roman Catholic Cathedral, The East Melbourne Hebrew Congregation, Buddhist Observance, New Legal Year Launched in Sunny Laneway Tradition ☐ New Silks' Ceremony in High Court of Australia ☐ The Essoign Wine Report ☐ Women Barristers Talk: Hearts and Minds, the Next Step ☐ Issue ☐ VIP Breakfast with Major Mori ☐ Protecting Rights in a Climate of Fear ☐ Children's Christmas Party ☐ Bar Takes Tennis Trophy Hat Trick ☐ Wigs & Gowns Regatta

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Why the Sea is Boiling Hot and Whether Pigs Have Wings

THE CHARTER OF HUMAN RIGHTS

VICTORIA has enacted a Charter of Human Rights and Responsibilities which came into force in large part on 1 January 2007. That charter has as its purpose to protect human rights by (inter alia) "ensuring that all statutory provisions whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights" and by imposing an obligation on public authorities to act in a way that is compatible with human rights.

Under s.25 of the Charter, a person charged with a criminal offence has the right to be presumed innocent until proven guilty. Under s.22 all persons deprived of liberty must be treated with humanity and with respect and dignity of the human person. Under s.27 a person must not be found guilty of a criminal offence because of a conduct that was not a criminal offence when it was engaged in.

IS THE CHARTER NECESSARY?

It is surprising that it is necessary to state these rights. They are rights which are fundamental. They are not new rights. They are rights which the courts have derived from Magna Carta and which are also set out in the International Covenant on Civil and Political Rights. They represent fundamental principles, expressed in clause 39 of Magna Carta as long ago as 1215.

> No free man shall be taken and [or] imprisoned or disseised or imprisoned or exiled or in any way destroyed nor will we go upon him nor send upon him, except by the lawful judgment of his peers and [or] by the law of the land.
>
> It is suggested that, interpreted in its then context, the reference to the "law of the land", is necessarily a reference to the basic common law and then existing statute law, not to such laws as King John might from time to time think it appropriate to pass. Otherwise that clause would be totally ineffectual.
>
> In the 13th Century the legislative authority for the country was the King who, with the advice of his council or parliament issued new laws or ordinances. Even after the establishment of parliamentary government the King continued for some time to be the initiator and by far the most important factor in the making of new laws. In 1349 it was said that "the King makes the laws with the assent of the peers and the commons and not through the instrumentality of the peers and the commons". See Holdsworth, *The History of English Law*, Vol. 2, p.435.

That a Charter of Human Rights is considered necessary, and rightly considered necessary, indicates the parlous state of the common law today as protector of the rights of the individual.

In this country we have accepted that separation of powers between the judiciary and the other two branches of government is absolute. Unfortunately, the majority of the court in *Al-Kateb* v *Godwin* [2004] HCA 37 took the view that the executive could, at least in the case of a person ordered by the executive to be deported, detain a person indefinitely without trial.

Gleeson CJ dissented on a question of fundamental principle which he stated as follows at [20]:

> A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of the legal value respected by the courts, and acknowledged by the courts to be respected by Parliament.

Gummow and Kirby JJ held that for such a power to be exercised by the executive was unconstitutional.

Gummow J said at [140]:

> [I]t cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. The location of that boundary line itself is a question arising under the constitution or involving its interpretation, … Nor can there be sustained laws for the segregation by incarceration of aliens without the commission of any offence requiring adjudication, and for a purpose unconnected with the entry, investigation, admission or deportation of aliens.

Kirby J expressed himself somewhat more succinctly at [146]:

> Indefinite detention at the will of the executive, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements.

As already stated, the majority of the High Court held that the executive could order such indefinite detention without trial.

But it is not only in this case that we see evidence of a movement back towards the dark ages of the Star Chamber and detention without trial. The legislature of the Commonwealth of Australia has passed legislation which permits detention without trial and which inhibits the victim of such detention in taking any steps to attack the legality of such detention. See sections 34D to 34X of the *Australian Security and Intelligence Organisation Act 1974*.

The effect of these sections is that individuals may be arrested and questioned by ASIO but may not reveal to their legal advisers, in many circumstances, the facts which would support an allegation that ASIO had exceeded its powers, had acted improperly or otherwise in its dealings with them or had acted contrary to law. They may not tell their lawyers everything that happened during detention or while being taken into detention until at least two years later because it may reveal "operational information". The Minister may prohibit their lawyers from having access to information which may be vital to the question of whether the detention was legal or illegal.

Our Attorney-General, the Chief Legal Officer of the Commonwealth, the head of the legal profession, has indicated that although he would not condone the use of torture to obtain a confession, the fact that some milder form of coercion has been exercised should not prevent a confession from being admitted into evidence.

In the "fight against terrorism", we seem to have abandoned many common law principles, and much of the moral code which we have developed over centuries. We are abrogating the very rights which that fight purports to be protecting.

Topically, this abandonment of principle appears very clearly in the case of David Hicks to whom the Australian Government has failed to extend the protection to which, as an Australian citizen, he is entitled. The duty of allegiance carries as its concomitant the Sovereign's obligation of protection. See *Joyce* v *DPP* [1946] AC 347 where Lord Jowitt LC said at 368:

> The principle which runs through feudal law and what I may perhaps call constitutional law requires on the one hand protection, on the other fidelity: a duty of the Sovereign to protect, a duty of the liege or subject to be faithful.

This principle, fundamental to the concept of allegiance, appears to be one of which the executive of the Commonwealth is unaware. Obligation begets obligation. Loyalty is a two-way street.

HICKS: A QUESTION OF JURISDICTION

Historically the criminal law of England was seen as extending to all those within the realm and to all those who owed allegiance to the Sovereign, wherever they might be. It did not extend to aliens (or foreigners) outside the King's dominions.

Kenny *Outlines of Criminal Law*, Cambridge University Press, 1902 at pp.411-412 says:

> According to International Law a State ought only to exercise jurisdiction over such persons and property as are within its territory. And in criminal matters it cannot always exercise jurisdiction over an offender even though he actually be within its territory. For it is forbidden by International Law to try foreigners for any offences which they committed outside its territorial jurisdiction ...
>
> International Law, although forbidding States to exercise criminal jurisdiction over any foreigner for an offence committed by him outside their territorial jurisdiction, nevertheless leaves unlimited their power to punish their own subjects.

A general exception to this principle was to be found in the crime of piracy. Piracy appears to have its origins in international law rather than in the common law: see *Anonymous (1604) Moore KB* 756. There was no common law offence of piracy; but the courts of all nations exercised jurisdiction to punish piracy *jure gentium*. A pirate was said to be *hostis humani generis*: see *R* v *Marsh* (1615) 3 Bulst 27. As Pickford J expressed it in somewhat less pretentious terms, in *Bolivia Republic* v *Indemnity Mutual Marine Assurance Co. Ltd.* [1909] 1 KB 785 at 791, a pirate is "the enemy of the human race".

The United States of America derives its common law from 17th and 18th century England. Yet, contrary to the common law tradition, it has purported to extend its criminal jurisdiction to non-citizens outside the United States. Paradoxically, the United States District Court has held that it has no jurisdiction to examine or to police the legality of the trial of such persons in the custody of the US military.

It may be argued that international terrorists, or those alleged to be terrorists, may be seen as akin to pirates in that they are "the enemy of the human race". But the United States does not call on international law to justify its claim to try and to punish a person such as David Hicks. Rather it relies on its own domestic legislation. It appears that Hicks has now been charged with the offence of giving material support to terrorism, on the basis of US legislation passed long after he was detained in Guantanamo Bay. A remarkable extension of domestic criminal jurisdiction — in relation to which the established courts of the United States have no jurisdiction!

In its treatment of alleged terrorists the United States has ignored the principles of international law. There appears to be no question that its treatment of the Guantanamo Bay prisoners has violated the principles of the Geneva Convention and of the International Covenant on Civil and Political Rights.

Hicks has now, after five years of illegal confinement in inhumane conditions, pleaded "guilty" before a kangaroo (or perhaps jack rabbit?) court. That plea may well be seen as no more than a plea for freedom. If so, the Australian Government, and we as the electors, have much of which to be ashamed.

The Editors

The Right to Independent Counsel

ON Saturday 20 January 1649, John Cooke as counsel began his prosecution of Charles I on a charge of high treason and other high crimes.

A civil war had raged in England between the King and the English Parliament since 1642. The King had raised an army to fight Parliament's army. The King's army was defeated. In November 1648, the successful Puritan forces offered the King a compromise to restore him to "safety, honour and freedom"[1] if he accepted regular biennial Parliaments which, as Justice Kirby has written, would control the army, pay outstanding remuneration and approve the appointment of the principal ministers.[2] The King declined. On 15 December 1648, the Council of Officers voted that the King be moved from the Isle of Wight, where he was prisoner "in order to bring him speedily to justice".[3]

Charles I stood in court, with John Cooke a few feet to his right. He was leaning on his white silver tipped cane. John Cooke rose, unscrolling the parchment on which the charge was written that he had signed as Solicitor-General for the Commonwealth. Geoffrey Robertson continues the narrative in The Tyrannicide Brief:[4]

> "My Lord President", he began. This is the point at which he felt the sharp tap on his shoulder from the King's cane. "Hold!" Charles commanded, poking Cooke again. The lawyer ignored him, and addressed Bradshawe: "My Lord President, according to an order of this High Court to me directed for that purpose …" Now Cooke suffered a third blow from the cane, hard enough to dislodge its silver tip. The King motioned for him to pick it up, but the lawyer refused. Instead, he took a deep breath, looked the King squarely in the eye and threw down the legal gage that commenced the trial …
>
> Under the astonished gaze of several thousand of his hushed subjects, the King bent down to pick the silver tip from the floor at Cooke's feet … It was the moment for which Cooke could never be forgiven — the moment when the King was forced to bend, almost prostrate at his prosecutor's feet, while the law, which he was no longer above, took its course.

On Saturday 27 January 1649 the President of the Court returned with a finding of guilty and the King was to be put to death by the severing of his head from his body. On Tuesday 30 January 1649 the sentence was carried out.

In 1660, following the death of Oliver Cromwell and the ouster from office of his son Richard, the monarchy was restored with King Charles II taking the throne.

John Cooke was put on trial as were eight others out of the total of 59 Commissioners who had signed the death warrant of the King. Cooke's defence was that he had asked the Court only to give to such judgment "as shall be agreeable to justice" and that he had done no more than follow the instructions of his brief. The finding of the Court of guilt on the part of Charles I was its responsibility. "The counsellor is to make the best of his client's cause, then leave it to the court."

Geoffrey Robertson continues the narrative:[5]

> It was a vain hope. But calmly and logically, although at risk of his life, John Cooke was articulating for the first time what has now become the bedrock principle of the English bar: the duty of counsel to accept any brief that is offered with an appropriate fee and to make the best argument he can for his client's cause, irrespective of the danger to himself or to his reputation. Even the press seemed to understand the point: it reported the next day that Cooke "appealed to all barristers as to whether they had not very often pleaded in a cause, where they could have wished with all their hearts that the verdict had gone against them".

The Lord Chief Baron Orlando Bridgeman responded directing the jury that every step that Cooke had taken as prosecutor of the King was an overt act that proved his guilt of treason.

The jury returned a verdict of guilty and the Lord Chief Baron sentenced Cooke to death by being hung, drawn and quartered. The sentence was carried out to the letter. Geoffrey Robertson spares us no detail of the barbaric execution.[6]

Counsel at the independent Bar act without fear or favour in support of the cause in which they are briefed. Our Rules of Conduct which bind all Victorian practising barristers and have the force of law provide expressly that, save in prescribed circumstances, a barrister must accept a brief from a solicitor to appear before a court, to advise or to draw pleadings or any other document in a field in which the barrister practises or professes to practise.

This is the "cab rank" principle which is fundamental to the way Victorian barristers practise, and to the role of an independent Bar in the administration of justice.

The independent Bar is an integral part

of our democratic society governed by the rule of law. Sir Owen Dixon put it thus:

> It is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the Bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence, and owing allegiance to none.[7]

Prior to David Hicks pleading guilty to one charge before the United States Military Commission, the Chief US Military Prosecutor, Colonel Morris Davis, was reported as having "warned David Hicks' military lawyer, Michael Mori, that "politicking" on behalf of his client could result in charges under the Uniform Code of Military Justice" and "cited Article 88 of the Code which prohibits the use of contemptuous language against the President, Vice-President, Secretary of Defence and Congress".[8]

This was not the only reported comment by Colonel Davis about lawyers representing Guantanamo Bay detainees. In March 2006, at a press conference at Guantanamo Bay, Colonel Davis is reported to have said it was "'ironic' that big law firms representing large defense contractors like Boeing Corp. allow their lawyers to represent Guantanamo Bay detainees pro bono".[9]

Commenting on Colonel Davis's statements about Major Mori, the Chief Defense Counsel for cases before the military commission, Colonel Sullivan, has described Major Mori's conduct as "absolutely proper"; and said that, in pressing David Hicks' case in Australia, "Major Mori is fulfilling his duty as an officer and as an attorney".[10]

Colonel Davis has said it was never his intention to charge Major Mori or remove him from the case. He was still reported as maintaining that Major Mori's statements, for example, that the President, Secretary of Defense and Congress "intentionally created a rigged system that guarantees convictions in order to cover up wrongdoing", are improper.[11]

In controversies of this kind, we should not lose sight of the principle that, in a democratic society governed by the rule of law, a client has a right to independent counsel. We must be ever vigilant to protect that right. It is eroded whenever counsel is subjected to threats, recrimination or punishment for doing no more than lawfully discharging their duty to their client under their retainer. The issue is the proper administration of justice just as the immunity of the party, witness, counsel, jury and judge for words spoken in court has been said to lie in "the public interest in the 'effective performance' of its function by the judicial branch of government."[12]

We should not lose sight of the principle that, in a democratic society governed by the rule of law, a client has a right to independent counsel. We must be ever vigilant to protect that right.

On Thursday 1 March 2007, 48 readers including two from Vanuatu began the Victorian Bar Readers' Course.

Our Bar Readers' Course is long established and highly regarded. Our system of individual mentors, and individual senior mentors, gives Readers accommodation in their mentor's chambers for the nine months reading period, and individual support. Our system of BCL chambers and accredited barristers' clerks provides affordable chambers and administrative support. Our open door policy is an ongoing network of support, not only for new members, but for the whole Bar.

All going well, the new readers will sign the Roll of Counsel of the Bar in May and become practising barristers. I wish them well.

Michael Shand
Chairman

Notes

1. CV Wedgewood, the *Trial of Charles I*, Penguin (1964), 28.
2. Address by Justice Michael Kirby to the Anglo-Australian Lawyers' Association in the Great Hall of Gray's Inn, London on 22 January 1999 entitled *The Trial of King Charles I — Defining Moment for Our Constitutional Liberties* — available on the High Court of Australia website.
3. Wedgewood, 44.
4. Geoffrey Robertson *The Tyrannicide Brief* (Vintage Books London 2006) p. 154.
5. Ibid, 314.
6. Ibid, 337.
7. Sir Owen Dixon Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21 April 1952 in *Jesting Pilate* (Law Book Co 1965) at 245.
8. *The Australian* 3 March 2007 "Mori charges could be laid after trial"; see also *The Age* 3 March 2007 "Mori could be taken off Hicks case, derailing trial" and *The New York Times* 5 March 2007 "Terror Case Prosecutor Assails Defense Lawyer".
9. *Legal Times* 28 March 2006 "Top Law Firms Join Forces in Landmark Detainee Case".
10. *The New York Times* 5 March 2007 "Terror Case Prosecutor Assails Defense Lawyer".
11. Ibid.
12. *D'Orta Ekenaike* v *Victoria Legal Aid* (2005) 223 CLR 1 at [42] per Gleeson CJ, Gummow, Hayne and Heydon JJ [footnote omitted].

Admission Ceremonies 2007

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

Tuesday 14 August
Tuesday 18 September
Tuesday 16 October
Tuesday 13 November
Tuesday 11 December

Success of Victoria's First Neighbourhood Justice Centre

THREE years ago I had the enormous privilege to witness a moment in the life of New York's Red Hook Community Justice Centre, a moment that sparked the momentum for perhaps Victoria's most unique legal reform project. Housed in a renovated schoolhouse in Brooklyn, this Centre was administering justice at the cutting edge, engaging with a local community to find solutions to the offending patterns of locals who came before the court. While I was there, a woman came before the judge who had been in contact with the court when her son was up on various drug charges. Upon questioning the young man and his family, the judge discovered that the boy's mother also had an addiction.

Although the woman had not been charged, the judge drove home the importance of her own rehabilitation to her son's recovery and she agreed to undergo treatment. Returning before the court, she reported an incredibly positive turn around, an enrolment in a counselling course and an optimistic future for both her and her son. I have no doubt it gave that young man a much better chance of getting off the cycle of drugs and crime and his family and community a better chance of supporting him.

Obviously, similar stories were being played out across Victoria already. Insightful and compassionate magistrates were already using the rather ad hoc array of opportunities available to them through Diversion and CREDIT programs or sentencing options to steer people onto more constructive paths where they could. However, there was no jurisdiction with the freedom to focus solely on a local community.

I returned inspired and determined, then, to see what we could do in Victoria to increase creativity and local participation in the law and, in consultation across the legal system, decided to establish a Victorian form of neighbourhood justice — one that drew its strength and authority from the participation of a ready, able and willing community. After three years of hard work from countless numbers of people, on Thursday 8 March I was

incredibly proud to open Victoria's first Neighbourhood Justice Centre, also the first of its kind in Australia.

Located in the City of Yarra, this one-stop shop houses on-site services for victims, civil litigants and community facilities; while people's offences can be considered at the same time under the same roof, presided over by just one magistrate who knows the community and who can immediately connect offenders with appropriate services to address the causes of their criminal behaviour, many of which will involve doing work needed by the local community. The task of the NJC, then, is to know the people of the City of Yarra; to restore faith in justice for some who lost it long ago, to help this particular community draw on its myriad strengths, to build on its faith and hope in one another. Its job is to know what will work and what will not: in short, to find local solutions to local problems.

None of this means, of course, that this Centre is a soft option. As readers will be keenly aware, too often the language of reform and genuine results is misrepresented by those of mean spirit and even less imagination as "letting people off the hook". This could not be further from the truth. The NJC is about using the mechanisms available to any court to make sure the law works; about harnessing the sense of accountability offenders feel when they belong to a community.

Extraordinarily, when legislation was being debated in the House last year to establish the NJC, the State Opposition vehemently opposed it, one member, notoriously afflicted by foot in mouth disease, even labelling it "apartheid justice"! This, of a Centre designed to unite a community, not divide it — a community that helped choose its magistrate (a long time member of the Victorian Bar), a community that got this project off the ground, a community that will be crucial to its success.

Well, I wish its opponents had seen it — I wish they'd emerged, blinking, from the gloom of the Melbourne Club and seen lawyers, judges, social workers, health workers, Government Ministers and, most importantly, hundreds of local community members come together on the day of the NJC's official opening to show that they want to make a difference. It was an amazing day, full of life and hope — a signal of the direction in which justice is heading and, on a personal note, the reason my job is such a privilege.

The chance to kick off reform of this kind is also, however, what the privilege of Government as a whole is about. In its own small way, the NJC represents the belief that Governments have an obligation to the community and to the disadvantaged; it represents the belief that we can't pretend that dysfunction or offending behaviour doesn't happen, that we can't pretend disadvantage doesn't exist or have knock on effects. It represents the belief that we must continue to find better ways of doing justice, of bringing relevance and meaning to the law for all Victorians.

The NJC is for and of the people of the City of Yarra but its meaning, as the best kind of change always does, will also resonate across the system as a whole. I encourage all members of the Bar to get down to Collingwood and spend some time at the NJC — to spend some time at the face of the way we will be doing justice in the future.

Rob Hulls
Attorney-General

Symptoms Not Seen

Dear Editors

Re: Article "Surviving the Law", by Geoff Gibson — Bar News, Spring 2006

I have no doubt that in his article "Surviving the Law" Geoff Gibson was seeking to explain the untimely passing of Brendan Griffin in the context of pressures which can be imposed by the competitive life which is life at the Bar, and which affects different individuals in different ways. However, in the course of drawing his comparisons, I think he has done a disservice to the careers (and now memories) of Woods Lloyd and Neil McPhee. For my own part, I was unable to see the purpose of bringing the lives of either of these former barristers into the context of the article; but insofar as it suggests that Woods Lloyd had an alcohol problem, and was in the business of "drinking himself to death", I simply cannot agree with it. Nor can I agree with the underlying suggestion that Neil McPhee used to find solace and release of stress in his abuse of alcohol. I knew both Woods and Neil very well. I shared chambers with Woods for many years prior to his death; and I was close friends with Neil for all the years I was at the Bar. At no time did I see the symptoms which Geoff describes in either of them. It is, I think, erroneous to say that Woods died from a disease which was the "product of stress and alcohol". As I understand it, he died from what was then an untreatable cancer. Likewise, Neil died from similar causes.

I am not familiar with the particular episodes which Geoff describes to draw the conclusions which he did. I would simply say that "one swallow does not make a summer". Both men enjoyed a drink, but never to the point where it interrupted with their professionalism. The same — I would like to think — could be said about the majority of the Bar. In any event, Neil McPhee and Woods Lloyd were consummate practitioners whose reputations and memories should not be sullied or undermined by suggestions that they were "alcohol abusers".

Yours faithfully

John Winneke

Sounds Familiar

Dear Editors,

IT pains me to say that it appears that you have fallen into the same trap as that which you say members of my own profession collapse into. In your editorial, you make reference to an article by me in which you imply that I am of the view that press scrutiny is making the "judiciary uncomfortable". In fact, that statement is a quote from the Australian Press Council, not by me, and it is appropriate that you should report it as such. In fact, my article comes to very much the same conclusion as your own and for that reason has the headline "Balance is the Key". However, a reader of your editorial, who had not read my article, would draw the conclusion that I thought the media was without fault in its reporting of the judiciary. That is not the case and the following section from my piece makes that clear:

> Community standards are a relevant factor in sentencing and the media is entitled to report where decisions are out of kilter with those expectations. And the media is entitled do so in a manner people can understand. And the cases in Western Australia of Button, Beamish, Mallard and Mickelberg show the media has a role in bringing to public attention cases of injustice. But there is a difference between questioning the reasons for a judge's decision and ignoring those reasons and focusing on the decision without any context, balance or reference to the laws that must be applied by the judge. Those are the lines that are increasingly being crossed. The shrill and simplistic comment by those who don't bother to read or understand a decision they criticise damages not only the reputation of courts and journalists, but the administration of justice.

I see no acknowledgement in your piece of the important role the media plays in bringing miscarriages of justice to public attention. But above all, it does not appear that you have even fully read my article, or have chosen to take one bit of it out of context. Hmmmm ... that sounds familiar.

Regards

Marcus Priest

Legal Profession Act 2004

Practitioner Remuneration Order (Includes GST)

WE the Honourable Marilyn Warren, Chief Justice of the Supreme Court of Victoria, Peter Arnold Shattock and Philip Laurence Williams being two persons nominated by the Attorney-General, Ariel Weingart and Peter Bardsley Murdoch QC being two members nominated by the Legal Services Board, Margaret Cairns Gourlay being a person nominated by Law Institute of Victoria Ltd, and Nicholas Joseph Damian Green QC being a person nominated by Victorian Bar Inc. and being the seven persons authorised in that behalf by the *Legal Profession Act 2004* do hereby in pursuance and exercise of the powers thereby conferred upon us order and direct in manner following:

1. This Order may be cited as the Practitioner Remuneration Order and shall come into operation on 1 January 2007.
2. This Order applies:
   (a) in the case of business to which the Second, Third and Fourth Schedule applies — to all business for which instructions are received on or after the day on which this Order comes into operation; and
   (b) in the case of any other business to which this Order applies — to all business transacted on or after the day on which this Order comes into operation.
3. (1) The Practitioner Remuneration Order commenced 1 February 2006 is hereby revoked.
   (2) Notwithstanding the revocation of the Practitioner Remuneration Order commenced 1 February 2006, the provisions of that Order shall continue to apply to and in relation to business, other than business referred to in Clause 2, in all respects as if that Order had not been revoked.
4. (1) In this Order and in the Schedules, unless inconsistent with the context or subject matter:
   "Folio" means 100 words or figures or words and figures.
   "In print" means in print on a form readily available for sale to the public. "Document" has the same meaning as under Section 3(1) of the *Evidence Act 1958*.
   "Typewriting" means the production and presentation of words, figures and symbols on pages or otherwise by means of hand writing, typewriting or the use of word processing equipment or any other form of mechanical or electronic production other than photocopying.
   (2) A reference in this Order and the Schedules to the consideration is a reference:
      (a) where the consideration relates to a matter or transaction and is not wholly monetary, to the sum of the monetary consideration and the value of the real or personal properly included in the consideration that is not monetary;
      (b) where the consideration relates to a matter or transaction comprising land and personal property, to the sum of the consideration for the land and the personal property;
      (c) where the consideration or part of the consideration for a matter or transaction is marriage or any other consideration which is not monetary, or where there is no consideration for a matter or transaction, to the value of the subject matter of the transaction;
      (d) where the consideration relates to a mortgage, bill of sale or stock mortgage by which a specified or ascertainable sum is secured, to the sum of the amount secured and the amount of any other specified or ascertainable sum agreed to be advanced and secured; and
      (e) where the consideration relates to the sale of an equity of redemption:
         (i) where the purchaser is the mortgagee and the purchaser employs the legal practitioner who prepared the mortgage — to the sale price; and
         (ii) in any other case, to the sum of the consideration and the amount of any principal sum owing under the mortgage at the time of sale.
   (3) Where the consideration relates to a matter or transaction comprising land under the provisions of the *Transfer of Land Act 1958* and other land, the remuneration of the legal practitioner shall be apportioned according to the respective values of the properties in question and remuneration may be charged in respect of each document necessarily prepared.
5. (1) The remuneration of legal practitioners in respect of business connected with sales, purchases, leases, mortgages, wills, settlements, formation and registration of companies, deeds of arrangement and other matters of conveyancing, including negotiating for or procuring an agreement for a loan, and in respect of other business not being business in any action or transacted in any court or in the chambers of any Judge or in the offices of the Master of the Supreme Court Prothonotary or other officer of any court and not being otherwise litigious business, shall, subject to this Order:
   (a) where the Second, Third or Fourth Schedule applies, be in accordance with that Schedule; and
   (b) in any other case, he in accordance with the First Schedule.

(2) Where the business undertaken is the whole of the work for which some charge or charges is or are prescribed by the Second or Third Schedules but is not substantially completed but this occurs at the request of or with the concurrence of the client or the client chooses to make use of any of the work done, the charges which may be made shall be a rateable part of the relevant charges prescribed by those Schedules proportionate to the extent of the work done or the work so made use of, as the case may be.

(3) Where the business undertaken is a portion of the work for which some charge or charges is or are prescribed by the Second or Third Schedules:

(a) if it is completed or substantially completed, the charge which may he made shall be a rateable part of the relevant charges prescribed by those Schedules proportionate to the extent of the work so undertaken; and

(b) if it is not completed or substantially completed, and this occurs at the request of or with the concurrence of the client, or if the client chooses to make use of any of the work done, the charges which may be made shall be a rateable part of the relevant charges prescribed by those Schedules proportionate to the extent of the work done or the work so made use of.

(4) In all cases where matters or transactions for which charges are prescribed by the Second or Third Schedules:

(a) involve work which in normal circumstances is not usual and necessary to complete such matter or transaction on behalf of a client, or require the consent of any Government, public authority or third party in respect of business transacted and performed, a further charge in respect thereof may be made in accordance with the First Schedule; or

(b) are of unusual difficulty or complexity, or involve skill or responsibility which in normal circumstances is not usual and necessary to complete the matter or transaction on behalf of a client, a further charge in respect thereof may be made which is fair and reasonable having regard to all the circumstances of the case.

6. The charges in the First Schedule relate to ordinary cases, but in extraordinary cases the Taxing Master may increase or diminish such charges if, for any special reason, he thinks fit.

7. In addition to the remuneration prescribed by clause 5, there may be charged:

(a) disbursements for duties or fees payable at public offices or fees payable to municipalities or public authorities, surveyors, valuers, auctioneers or counsel, or for travelling and accommodation expenses, duty stamps, postage stamps, courier or delivery charges, electronic systems of communication and other disbursements reasonably and properly incurred and paid;

(b) in accordance with the First Schedule:

(i) payments necessarily made for correspondence between legal practitioners where one legal practitioner is employed as agent; and

(ii) charges by an agent against his or her principal or such lesser amount as is reasonable having regard to the charge that the principal legal practitioner may be entitled to make to his or her client; and

(c) charges at the rate of $11.50 to $16.70 per quarter hour in respect of business necessarily transacted at the request of the client outside the normal business hours of the legal practitioner;

(d) expenses reasonably incurred in microfilming of files and the storage and retrieval of files so microfilmed.

8. (1) in all cases to which the remuneration prescribed by the Second or Third Schedules applies a legal practitioner may, within fourteen days from the time of undertaking any business, by notice in writing to his or her client and when any third party is obliged by contract or otherwise to pay that client's costs, by notice in writing to such third party elect to charge under the First Schedule.

(2) Upon such election, the client may terminate the retainer and the First Schedule shall apply in respect of services rendered prior to the termination of the retainer.

(3) (a) A third party obliged to pay a legal practitioner's client's costs may pay either the amount charged under the First Schedule or the amount which, but for the legal practitioner's election, would have been payable under the Second or Third Schedule, whichever is less, in full satisfaction of his obligation.

(b) The client shall pay the difference between the amount charged by the legal practitioner and the amount payable by the third party.

9. Where a matter or transaction to which the Second Schedule applies comprises land the title to which is a right to occupy the land as a residence area pursuant to Division 11 of Part I of the *Land Act 1958* or a licence pursuant to Section 138(1)(g) of the *Land Act 1958*, the appropriate charge shall be the charge specified in that Schedule for a similar transaction comprising land under the provisions of the *Transfer of Land Act 1958.*

10. (1) Where a legal practitioner:

(a) is authorised by the First Schedule to make any charge in connection with the sale, purchase, transfer or conveyance of land and is also authorised by the Second Schedule to make any charge in respect of the same land and the transaction is completed at the same time for the same client; or

(b) is authorised by the Second Schedule to make charges in respect of two or more matters or transactions relating to the same land completed at the same time for the same client:

then each charge under Part A or Part C of the Second Schedule shall be reduced by one-third or to a sum equal to the highest of those charges (before a reduction) together with the sum of $112.10 for each additional charge, whichever is the greater.

(2) Where, in connection with any transaction to which the Second Schedule or Part A, C or D of the Third Schedule applies, a legal practitioner acts:

(a) for both mortgagee and mortgagor; or

(b) for both lessor and lessee; or

(c) for both creditor and debtor:

the legal practitioner may not, in respect of the transaction, charge more than he or she would have been entitled to charge if he or she were acting only for the mortgagee, lessor or creditor as the case may be.

11. In respect of loans not exceeding $110,000 where a legal practitioner acts for a society registered under the provisions of the *Co-operative Housing Societies Act 1958* his or her charge under Part A or Part C of the Second Schedule shall be reduced to 75 per cent of the charge otherwise appropriate.
12. The Second and Third Schedules shall not apply to matters or transactions concerning any premises subject to a licence as defined in the *Liquor Control Act 1987* and, accordingly, the First Schedule shall apply to those matters or transactions.

FIRST SCHEDULE

INSTRUCTIONS

1. A charge may be made by way of instructions in addition to the items hereinafter contained in this Schedule having regard to all the circumstances of the case including the following:
   (a) The complexity of the matter and the difficulty and novelty of the questions raised or any of them;
   (b) The importance of the matter to the client;
   (c) The skill, specialised knowledge and responsibility involved;
   (d) The number and importance of the documents prepared or perused, without regard to length;
   (e) The place where and the circumstances in which the business or any part thereof is transacted;
   (f) The labour involved and the time spent on the business;
   (g) The amount or value of any money or property involved; and
   (h) The nature of the title to any land involved.

   Notes:
   (1) A charge shall not be made pursuant to this item in respect of the sale, purchase or transfer of land where the consideration does not exceed $60,000.
   (2) The charge pursuant to this item in respect of the sale, purchase or transfer of land where the consideration exceeds $60,000 shall not exceed 0.3 per centum of the consideration.

DRAWING

2. Any document including memoranda of instructions to counsel not in an action or a proceeding in court:
   (a) not in print, per folio — $15.00 to $24.40
   (b) partly in print, for so much as remains in print, per folio — $7.40
   (c) partly in print, for so much as is not in print, per folio — $15.00 to $24.40

   Note:
   There are approximately three folios in each A4 page.

TYPEWRITING

3. (1) Per folio — $9.30
   (2) For each carbon copy, photocopy or other machine made copy, per page — $1.70.

FACSIMILES

4. Transmitting or receiving written material by means of the legal practitioner's own facsimile machine as follows:
   Transmitting: First page — $9.70.
   Each subsequent page — $3.30
   Receiving: First page — $9.70
   Each subsequent page — $1.70

EMAIL

Receiving written material by means of electronic transmission (email) as follows:
First page including copy of first page — $9.70
Copy of second and subsequent pages, per page — $1.70

PERUSING

5. When it is necessary to peruse any document or part of a document (including correspondence), whether in print or not, per folio — $9.30.
6. When it is not necessary to peruse a document or correspondence but scanning of the document or correspondence is warranted, e.g. to determine the relevance or otherwise of the document or correspondence, per folio — $4.80.

LETTERS

Including sending by electronic transmission (email)

7. Formal acknowledgment or the like, e.g. letter enclosing documents, requesting a reply, etc. — $24.40.
8. Circular letters, i.e. letters which except for the particulars of address are identical, for each letter after the first — $12.00.
9. Other letters — $35.70 or such charge as is fair and reasonable having regard to items l, 2 and 3 of this Schedule.

ATTENDANCES

10. To file, lodge or deliver any documents or other papers, to obtain an appointment or to obtain stamping of a document, to insert an advertisement, or other attendance of a similar nature capable of performance by a junior clerk — $44.05.
11. Making an appointment by telephone or similar telephone attendance capable of performance by a junior clerk — $19.30.
12. On counsel with case for opinion or other papers or to appoint consultation or conference — $67.50.
13. On consultation or conference with counsel — $167.00. After the first hour, per half-hour or part thereof — $83.20 to $129.70.
14. Searching title and other searches, per half-hour or part thereof — $55.30.
15. On settlement of a conveyancing or commercial matter — $53.30 to $83.50 After the first half-hour, per half-hour or part thereof — $83.50 to $129.70.
16. Attendance by telephone or otherwise requiring the personal attendance of a legal practitioner or his or her managing or senior clerk and involving the exercise of skill or legal knowledge; per quarter-hour or part thereof — $37.40 to $69.20.
17. All other attendances; per quarter-hour or part thereof — $37.40.

JOURNEYS

18. For time spent occupied in necessary travel to and from or necessarily spent in any place whether in or outside

Australia more than 16 kilometres removed from any place of business or residence of the legal practitioner the charge to be made, in addition and having regard to any appropriate charges made under Part A hereof, shall be:
per hour or part thereof — $83.50
but not exceeding for any one day — $1,170.80

SECOND SCHEDULE

PART A – MORTGAGE OF FREEHOLD OR LEASEHOLD LAND

1. Charges of legal practitioner for mortgagee in connection with mortgage of freehold or leasehold land comprising instructions, investigation of title, necessary searches, obtaining necessary certificates, preparation and perusal of documents, enquiries as to outgoings, preparation of requisitions on title, preparation of accounts, all necessary attendances and correspondence, arranging and effecting final settlement of transaction, stamping and registration of mortgage shall be:
   (a) in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1 of Table A; and
   (b) in the case of any other land, the charges prescribed by Column 1 of Table B.
2. Charges of legal practitioner for mortgagor in connection with mortgage of freehold or leasehold land comprising instructions, preparation and perusal of documents, answers to requisitions on title, checking accounts, all necessary attendances and correspondence and arranging and effecting settlement of transaction, shall be:
   (a) in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2 of Table A, and
   (b) in the case of any other land, the charges prescribed by Column 2 of Table B.
3. The First Schedule shall apply to a transfer of mortgage but so that the charges shall not exceed:
   (a) in the case of land under the provisions of the Transfer of *Land Act 1958*, the charges prescribed by Column 1 of Table A; and
   (b) in the case of any other land, the charges prescribed by Column 1 of Table B.

TABLE A: *TRANSFER OF LAND ACT 1958*

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor.

Ref. No.	*Consideration*	*Col. 1*	*Col. 2*
	$ Not exceeding	$	$
19	20 000	237	164
20	22 000	255	174
21	24 000	269	185
22	26 000	288	197
23	28 000	305	208
24	30 000	319	218
25	32 000	337	230
26	34 000	351	241
27	36 000	370	252
28	38 000	384	264
29	40 000	400	275
30	42 000	416	288
31	44 000	433	299
32	46 000	449	311
33	48 000	467	322
34	50 000	482	334
35	52 000	492	339
36	54 000	501	346
37	56 000	510	354
38	58 000	520	360
39	60 000	532	367
40	62 000	542	373
41	64 000	552	378
42	66 000	561	387
43	68 000	570	392
44	70 000	580	398
45	72 000	590	405
46	74 000	600	411
47	76 000	608	420
48	78 000	619	426
49	80 000	629	433
50	82 000	639	440
51	84 000	649	447
52	86 000	657	452
53	88 000	667	459
54	90 000	677	464
55	92 000	688	471
56	94 000	695	479
57	96 000	705	486
58	98 000	716	493
59	100 000	727	499
60	110 000	760	520
61	120 000	792	543
62	130 000	825	567
63	140 000	858	590
64	150 000	889	610
65	160 000	922	633
66	170 000	955	656
67	180 000	988	677
68	190 000	1020	700
69	200 000	1053	722
70	250 000	1133	778
71	300 000	1214	836
72	350 000	1297	892
73	400 000	1378	946
74	450 000	1460	1002
75	500 000	1540	1058
76	Over 500 000 add per 100 000	82	58

TABLE B: GENERAL LAW

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor.

Ref. No.	*Consideration*	*Col. 1*	*Col. 2*
	$ Not exceeding	$	$
77	20 000	344	208
78	22 000	362	222
79	24 000	378	235
80	26 000	396	251
81	28 000	414	266
82	30 000	431	279
83	32 000	449	293
84	34 000	467	306
85	36 000	485	322
86	38 000	501	337

87	40 000	519	350
88	42 000	535	364
89	44 000	553	378
90	46 000	570	392
91	48 000	586	408
92	50 000	605	422
93	52 000	614	431
94	54 000	625	440
95	56 000	638	448
96	58 000	646	458
97	60 000	657	464
98	62 000	667	475
99	64 000	677	482
100	66 000	689	491
101	68 000	699	499
102	70 000	709	507
103	72 000	717	518
104	74 000	728	524
105	76 000	738	534
106	78 000	750	542
107	80 000	761	552
108	82 000	771	558
109	84 000	783	568
110	86 000	792	576
111	88 000	802	585
112	90 000	811	594
113	92 000	823	603
114	94 000	835	610
115	96 000	844	619
116	98 000	855	628
117	100 000	864	638
118	110 000	900	663
119	120 000	934	693
120	130 000	968	722
121	140 000	1002	750
122	150 000	1038	778
123	160 000	1073	808
124	170 000	1109	836
125	180 000	1142	863
126	190 000	1176	892
127	200 000	1212	918
128	250 000	1297	991
129	300 000	1383	1064
130	350 000	1469	1135
131	400 000	1558	1206
132	450 000	1644	1275
133	500 000	1729	1346
134	Over 500 000 add per 100 000	88	71

PART B — DEED OF VARIATION OR EXTENSION OF MORTGAGE

1. Charges of legal practitioner for mortgagee only in connection with deed of agreement for variation of terms of mortgage of freehold or leasehold land including extension of date of payment, alteration of rate of interest or reduction or increase of loan comprising instructions, necessary searches, preparation and perusal of documents, investigation of title, obtaining necessary certificates, necessary inquiries as to other interests in the land, preparation of any necessary accounts, stamping and registration and all necessary attendances and correspondence in connection therewith shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1.
2. Charges of legal practitioner for mortgagor in connection with deed of agreement for variation of terms of mortgage of freehold or leasehold land including extension of date of payment, alteration of rate of interest or reduction or increase of loan comprising instructions, necessary searches, preparation and perusal of documents and all necessary attendances and correspondence in connection therewith shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2.
3. Where the consent of a prior or subsequent mortgagee is required in order to vary or extend the mortgage, the legal practitioner may in addition charge the following sum for each such consent — $144.10.

TRANSFER OF LAND ACT 1958

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor.

Ref. No.	*Amount of loan (if unvaried) or (if varied) the amount of the loan as varied*	*Col. 1*	*Col. 2*
	$ Not exceeding:	$	$
135	20 000	120	60
136	35 000	164	82
137	50 000	196	98
138	Over 50 000 add per 25 000	22	11
139	*******		

GENERAL LAW LAND

Where the land secured by a mortgage is land which is not under the provisions of the *Transfer of Land Act 1958*, the following additional charge may be made — $50.00.

PART C — DISCHARGE OF MORTGAGE OR DISCHARGE OF PART OF THE MORTGAGED LAND OR DISCHARGE OF MORTGAGE AS TO PART OF THE DEBT SECURED

1. Charges of *legal practitioner for mortgagee* (where no part of the debt secured is received by the legal practitioner) in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, preparation and perusal of documents (including memorandum of discharge of mortgage) and all necessary attendances and correspondence, delivery of discharge of mortgage to the mortgagor, his or her legal practitioner or agent shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the sum of $178.10.
2. Charges of *legal practitioner for mortgagee* (where the debt secured or part thereof is received by the legal practitioner) in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, preparation and delivery of the discharge of mortgage, receipt of amount to be discharged, perusal of documents and all necessary attendances and correspondence and effecting final settlement with mortgagor, his or her legal practitioner or agent shall be in the case

of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1.

3. Charges of *legal practitioner for mortgagor* in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, perusal of memorandum of discharge of mortgage, registration at Land Registry, attention to insurance policies and all necessary attendances and correspondence, and effecting final settlement with mortgagee, his or her legal practitioner or agent shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2.

TRANSFER OF LAND ACT 1958

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor.

Ref. No.	*Amount of Principal Debt Discharged*	*Col. 1*	*Col. 2*
	$ Not exceeding:	$	$
140	100 000	164	142
141	200 000	245	218
142	300 000	327	273
143	Over 300 000 add per 100 000	27	22

GENERAL LAW LAND

Where the land secured by a mortgage is land which is not under the provisions of the *Transfer of Land Act 1958*, the following additional charge may be made — $50.00.

THIRD SCHEDULE

PART A — LEASE OF LAND WHETHER OR NOT UNDER THE *TRANSFER OF LAND ACT 1958* BUT NOT INCLUDING LEASES EXCEEDING 21 YEARS, LEASES NOT CAPABLE OF BEING REDUCED TO AN ANNUAL RENTAL OR PERIODIC LEASES DETERMINABLE BY NOTICE

1. Charges of *legal practitioner for lessor* in connection with lease of land comprising instructions for and drawing lease, settling draft with lessee, his or her legal practitioner or agent, perusal of documents and all necessary attendances and correspondence to effect completion of transaction:
   (a) with material alteration (in duplicate) after amendment — shall be the charges prescribed by Column l A; and
   (b) without material alteration — shall be the charges prescribed by Column 1B.
2. Charges of *legal practitioner for lessee* in connection with lease of land comprising instructions, settling draft lease with lessor, his or her legal practitioner or agent, preparation and perusal of documents and all necessary attendances and correspondence to effect completion of transaction on behalf of lessee:
   (a) where lease is executed after material alteration (by lessor) after amendment — shall be the charges prescribed by Column 2C; and
   (b) where lease is executed without material alteration (by the lessor) after amendment — shall be the charges prescribed by Column 2D.
3. If the document used (irrespective of the number of folios) is in print, the charge of a legal practitioner shall be two-thirds of the charges prescribed by Columns 1B or 2D.
4. If the document used (irrespective of the number of folios) is in a form prepared by a legal practitioner for a lessor for use in connection with five or more leases of premises forming part of the same building or development — the charge of a legal practitioner for the lessor for each such lease shall be two-thirds of the charges prescribed by Column 113.
5. The charges of a legal practitioner upon the renewal of a lease pursuant to an option for renewal contained in an existing lease shall be two-thirds of the charge prescribed by Columns 1B or 2D.
6. Charges of legal practitioner in connection with a disclosure statement made pursuant to section 17 of the *Retail Leases Act 2003* including instructions, preparation of the disclosure statement, preparation of the notice of objection, pemsal of all documents and all attendances and correspondence are not included in Columns 1A and 1B and the legal practitioner may charge additional remuneration in respect thereof in accordance with the First Schedule.

Ref. No.	*Total Rental for period of lease including premium (if any)*	*Legal practitioner for Lessor*		*Legal practitioner for Lessee*	
		Col. 1A	*Co.1B*	*Col. 2C*	*Col. 2D*
	$ Not exceeding:	$	$	$	$
144	15 000	191	164	164	109
145	20 000	255	192	192	126
146	22 000	275	207	207	137
147	24 000	299	223	223	149
148	26 000	319	240	240	160
149	28 000	343	256	256	170
150	30 000	364	273	273	181
151	32 000	384	289	289	193
152	34 000	408	306	306	203
153	36 000	428	322	322	214
154	38 000	452	339	339	226
155	40 000	472	354	354	235
156	42 000	493	372	372	246
157	44 000	518	387	387	258
158	46 000	537	404	404	268
159	48 000	561	420	420	279
160	50 000	581	436	436	291
161	52 000	595	447	447	299
162	54 000	608	455	455	305
163	56 000	622	464	464	311
164	58 000	634	476	476	316
165	60 000	649	486	486	323
166	62 000	662	496	496	331
167	64 000	674	505	505	337
168	66 000	688	514	514	344
169	68 000	700	524	524	350
170	70 000	714	534	534	355
171	72 000	727	543	543	364
172	74 000	740	553	553	370
173	76 000	752	562	562	377
174	78 000	765	574	574	383
175	80 000	778	584	584	388
176	82 000	792	594	594	396
177	84 000	804	603	603	402
178	86 000	816	613	613	410

179	88 000				831	623	623	415
180	90 000				844	633	633	421
181	92 000				858	643	643	428
182	94 000				870	652	652	434
183	96 000				884	662	662	443
184	98 000				896	671	671	448
185	100 000				908	681	681	453
186	110 000				953	714	714	476
187	120 000				996	747	747	497
188	130 000				1039	780	780	520
189	140 000				1082	813	813	542
190	150 000				1127	846	846	564
191	160 000				1171	879	879	585
192	170 000				1214	911	911	606
193	180 000				1257	944	944	629
194	190 000				1300	977	977	651
195	200 000				1345	1007	1007	671
196	250 000				1454	1091	1091	727
197	Over 250 000 add per 200 000				109	82	82	56
198	*	*	*	*	*	*	
199	*	*	*	*	*	*	
200	*	*	*	*	*	*	

PART B — STOCK MORTGAGE AND LIEN ON WOOL OR LIEN ON CROP

1. Charges of *legal practitioner for both creditor and debtor* in connection with stock mortgage, lien on wool or lien on crop comprising instructions, preparation and perusal of documents, searches, attention to adjustment account (if any) and all necessary attendances and correspondence to complete transaction on behalf of creditor and debtor shall be the charges prescribed by Column 1.
2. Charges of *legal practitioner for creditor only* in connection with stock mortgage, lien on wool or lien on crop comprising instructions, preparation and perusal of documents, searches, attention to adjustment account (if any) and all necessary attendances and correspondence to complete transaction on behalf of creditor shall be the charges prescribed by Column 2.
3. Charges of *legal practitioner for debtor only* in connection with stock mortgage, lien on wool or lien on crop comprising instructions, preparation and perusal of documents, attention to adjustment account (if any), searches and all necessary attendances, and correspondence to complete transaction on behalf of debtor shall be the charges prescribed by Column 3.
4. The charges prescribed in Column 1 shall only apply where Rules 8 and 9 of the Professional Conduct and Practice Rules 2005 made pursuant to the *Legal Practice Act 1996* does not prohibit the legal practitioner from acting for both creditor and debtor.

Ref. No.	*Consideration*	*Col. 1*	*Col. 2*	*Col. 3*
	$ Not exceeding:	$	$	$
201	10 000	136	108	88
202	12 000	149	119	96
203	14 000	165	131	105
204	16 000	180	142	114
205	18 000	193	153	124
206	20 000	208	164	135
207	22 000	222	174	143
208	24 000	235	185	153
209	26 000	251	197	160
210	28 000	266	208	170
211	30 000	279	218	180
212	32 000	293	230	190
213	34 000	306	241	197
214	36 000	322	252	207
215	38 000	337	264	217
216	40 000	350	275	226
217	42 000	364	288	234
218	44 000	378	299	242
219	46 000	392	311	252
220	48 000	408	322	263
221	50 000	422	334	269
222	52 000	431	339	275
223	54 000	440	346	280
224	56 000	448	354	288
225	58 000	458	360	293
226	60 000	464	367	299
227	62 000	475	373	305
228	64 000	482	378	311
229	66 000	491	387	316
230	68 000	499	392	322
231	70 000	507	398	327
232	72 000	518	405	334
233	74 000	524	411	339

234	76 000	534	420	343
235	78 000	542	426	349
236	80 000	552	433	354
237	82 000	558	440	360
238	84 000	568	447	365
239	86 000	576	452	372
240	88 000	585	459	377
241	90 000	594	464	382
242	92 000	603	471	387
243	94 000	610	479	392
244	96 000	619	486	398
245	98 000	628	493	404
246	100 000	638	499	410
247	Over 100 000 — such additional charge as is reasonable having regard to the responsibility involved in and the complexity of the transaction.			

PART C — RENEWAL OF BILL OF SALE

1 . Charges of *legal practitioner for creditor* in connection with the renewal of a bill of sale comprising instructions, preparation and perusal of documents and all necessary attendances and correspondence shall be the charges prescribed by Column 1.

2. Charges of *legal practitioner for debtor* in connection with renewal of bill of sale comprising instructions, perusals and all necessary attendances and correspondence shall be the charges prescribed by Column 2.

Ref. No.	*Consideration*	*Col. 1*	*Col. 2*
	$ Not exceeding:	$	$
248	10 000	56	33
249	14 000	61	34
250	18 000	66	38
251	22 000	71	43
252	26 000	76	46
253	30 000	82	48
254	34 000	88	51
255	38 000	94	53
256	42 000	99	58
257	46 000	104	61
258	50 000	109	65
259	Exceeding 50 000	109	65

PART D — SATISFACTION OR DISCHARGE OF BILL OF SALE OR STOCK MORTGAGE

1. Charges of legal practitioner for creditor in connection with satisfaction or discharge of a bill of sale or stock mortgage comprising preparation and perusal of documents (including memorandum of satisfaction or discharge) and all necessary attendances and correspondence and effecting final settlement with debtor, his or her legal practitioner or agent shall be the charges prescribed by Column 1.

2. Charges of legal practitioner for debtor in connection with satisfaction or discharge of a bill of sale or stock mortgage comprising instructions, perusal of memorandum of satisfaction or discharge, registration and all necessary attendances and correspondence and effecting fmal settlement with creditor, his or her legal practitioner or agent shall be the charges prescribed by Column 2.

Ref. No.	*Consideration*	*Col. 1*	*Col. 2*
	$ Not exceeding:	$	$
260	10 000	56	33
261	14 000	61	34
262	18 000	66	38
263	22 000	71	43
264	26 000	76	46
265	30 000	82	48
266	Exceeding 30 000	82	48

PART E — APPLICATION BY LEGAL PERSONAL REPRESENTATIVE UNDER THE *TRANSFER OF LAND ACT 1958*

267. Charges of legal practitioner in connection with an application by a trustee, executor or administrator to be registered as proprietor of real estate or mortgage, including instructions, checking title identity, preparation of application, necessary attendances and correspondence and registration — $225.90.

268. For each additional certificate of title or mortgage produced beyond the first title or mortgage referred to in the application — $21.30.

PART F — APPLICATION BY SURVIVING PROPRIETOR

269. Charges of legal practitioner in connection with an application by a survivor of joint proprietors to be registered as proprietor of real estate or mortgage, including instructions, checking title identity, preparation of application and declaration, necessary attendances and correspondence and registration — $250.70.

270. For each additional certificate of title or mortgage produced beyond the first title or mortgage referred to in the application — $21.30.

PART G — PRODUCTION FEE

271. For production of Crown grants, certificates of title, title deeds, or other documents in the possession of the legal practitioner of the person entitled to the custody thereof at such legal practitioner's office or at the Land Registry, Office of the Registrar-General or elsewhere, including, where necessary, endorsement of an order to register:

for not more than two Crown grants, certificates of title, chains of title deeds, or other documents — $142.40.

for each additional Crown grant, certificate of title, chain of title deeds, or other document beyond the second — $21.30.

FOURTH SCHEDULE

PART A — NEGOTIATING FOR OR PROCURING AN AGREEMENT FOR A LOAN WHEN THE MONEY IS IN FACT LENT AND THE LEGAL PRACTITIONER IS NEITHER THE LENDER NOR ONE OF THE LENDERS

272. In respect of money lent upon the security of real or leasehold estate or personal property — 1.09 per centum upon the amount lent.

Note:

If a legal practitioner negotiates for or procures an agreement for the renewal of a loan he or she shall not in respect thereof be entitled to charge remuneration in accordance

with this item and his or her charge shall be 0.55 per centum upon the amount of the renewed loan.

273. (1) If a legal practitioner negotiates for or procures an agreement for a loan for his or her client being the borrower or mortgagor through the agency of any person (other than a legal practitioner) to whom a procuration fee is payable then he or she shall only be entitled to remuneration in accordance with the First Schedule in respect of negotiating for or procuring such agreement.

(2) If a legal practitioner negotiates for or procures an agreement for a loan for his or her client being the borrower or mortgagor through the agency of another legal practitioner then the remuneration provided by item 272 shall be divided between the legal practitioners, two-thirds being payable to the legal practitioner for the mortgagee and one-third to the legal practitioner for the mortgagor.

274. The remuneration prescribed under item 272 or 273 shall not include disbursements reasonably incurred in travelling from any place of business and home respectively of such legal practitioner and disbursements otherwise reasonably incurred in the inspection of the property mortgaged or charged and in procuring the agreement for the loan which disbursements may be charged in addition to the remuneration so prescribed.

PART B — FOR NEGOTIATING FOR OR PROCURING AN AGREEMENT FOR A LOAN WHEN THE MONEY IS IN FACT LENT AND THE LEGAL PRACTITIONER OR THE LEGAL PRACTITIONER'S NOMINEE COMPANY IS EITHER THE LENDER OR ONE OF THE LENDERS

275. When the legal practitioner, or a nominee company of which the legal practitioner or a partner of the legal practitioner is a director, is either the lender or one of the lenders no remuneration shall be charged for negotiating or procuring the loan, except in the following cases:

(a) when the legal practitioner arranges and obtains the loan from a person for whom he or she acts and subsequently by arrangement with his or her client lends the money and executes or signs the security in his or her own name or the name of a nominee company of which he or she or his or her partner is a director, he or she or such nominee company being in fact trustee or agent for the person aforesaid; or

(b) when the legal practitioner contributes portion of the money in fact lent, and arranges and obtains the remaining portion from another person not being his or her partner as a legal practitioner, not being a co-trustee with him or her in relation to the money lent.

276. In either of the foregoing cases a charge for negotiating or procuring an agreement for a loan may be made at the rate prescribed in Part A in respect of the amount so obtained from such other person.

Note:

If a legal practitioner negotiates for or procures an agreement for the renewal of a loan from such other person he or she shall not in respect thereof be entitled to charge remuneration in accordance with item 272 and his or her charge shall be 0.55 per centum upon the amount of the renewed loan.

Justice William Charles Crockett AO

Eulogy for the Honourable William Charles Crockett AO, delivered on Thursday, 15 February 2007, by the Honourable Allan W. McDonald.

THAT which I wish to say this afternoon is in honour of the Honourable William Charles Crockett AO, who was born on 16 April 1924 and died on 6 February 2007, aged 82 years.

Although during his life, Bill Crockett's work involved him being seen in the public arena in the application and the administration of the law, he was a private man. He was proud of his work and his achievements, however he was a modest man. He was a wise man, an intellectual disciplinarian, a man who understood people: a compassionate man.

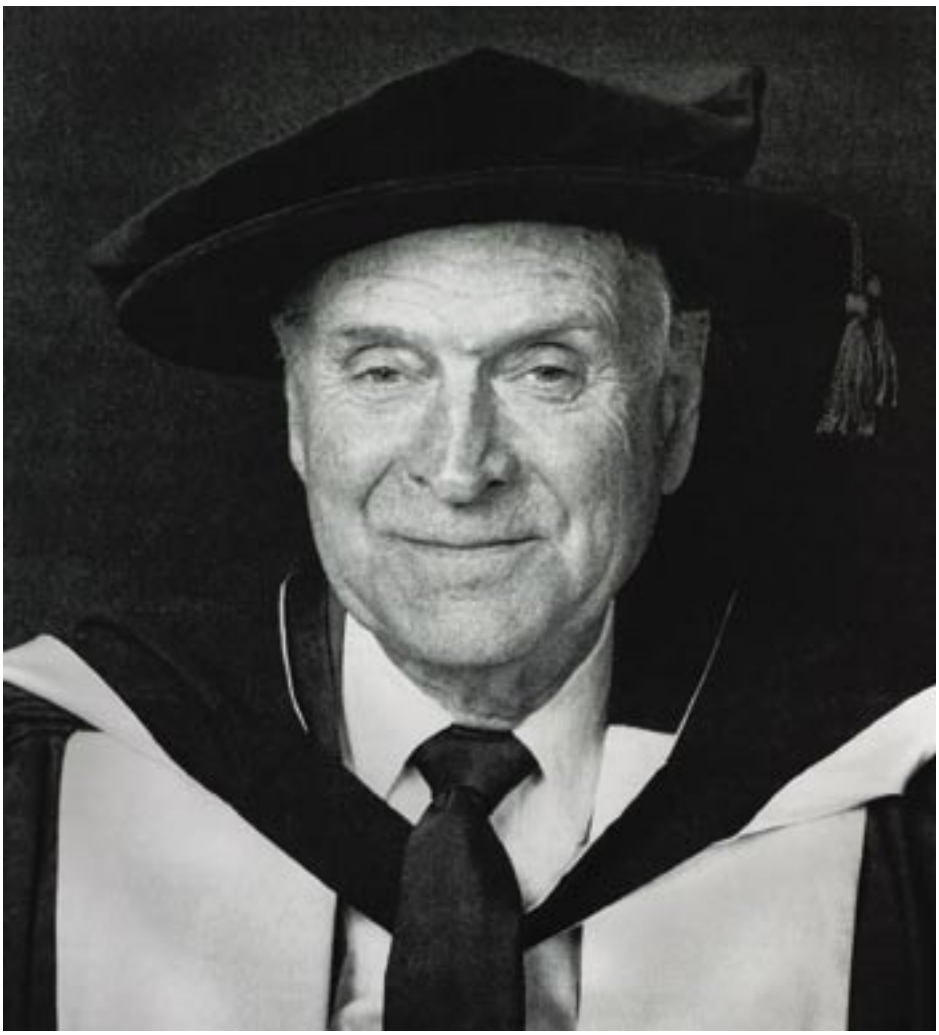
On a number of occasions when I have sat in the pews of a church listening to a eulogy being delivered I have wondered if in some way it is directed to the "Keeper of the Gate" to assist in the gaining of entry for the deceased. That is not my purpose. If Bill Crockett has elected to cross the "River" and I believe that he would probably have made that election, and if he is still outside the "Gate" and I believe that would not be the case I would not dare to interrupt that which is being said by one of the most articulate persuasive and skilled advocates of the Common Law of Australia.

Bill Crockett was the only child of Russell and Winnie Crockett. Russell until 1929 conducted a men's clothing shop in Horsham, but with the onset of the depression the business was lost. The family moved to Williamstown where, at the age of four, Crockett commenced his education at the Williamstown State School.

The family life of the Crocketts was a very frugal life. Bill's mother had great ambitions for her son. She found work in a cake shop and earned sufficient money to send Bill, as a boarder, to The Geelong College for the last two years of his secondary education.

In 1939 and 1940 Crockett attended that school. In 1939 he won the U16 athletic championship. It should be noted that in 1940 there were two other students at The Geelong College who later joined Bill on the Bench of the Supreme Court of Victoria, Richard Fullagar and Barry Beach.

I should add a footnote: when I joined the Supreme Court in 1988 Crockett was very proud of the fact that four old Geelong Collegians were on the Supreme Court Bench together. He insisted that the four of us have a photograph taken in full ceremonial robes for the school archives.



Justice William Charles Crockett AO.

Having matriculated, and aged 16, Crockett commenced a law course at Melbourne University. After being awarded a number of exhibitions along the way he completed his Bachelor of Laws degree in 1944, being awarded the Supreme Court Prize. He sat honours exams in 1945 and attained the degree of Master of Laws. Later in his life the Universities of Melbourne and Monash each conferred on Crockett the honorary degree of Doctor of Laws.

In the citation which was read on the occasion of the conferring of that honorary degree by the University of Melbourne it was said, inter alia, "It would be true to say that his Honour has a been a model Supreme Court Judge both at the trial level and as an appellate Judge. He is quick, courteous and more often than most, correct."

On 10 April 1945 Bill joined the navy and then discharged on 28 November 1946. He served as an able seaman on the HMAS Barwon. On being discharged Crockett returned to the law. He became an articled law clerk to Stuart Brown in Horsham, living in a room at the Royal Hotel. On admission to practice on 1 March 1948 the Order recites his address as the Royal Hotel, Horsham, much to the displeasure of his mother.

Straight after being admitted to practice Crockett signed the Bar Roll.

Immediately his decisive mind, his intellect and his advocacy became apparent and he built up a very successful practice.

In 1961 I had the great good fortune to become a reader in Bill's chambers. I witnessed a man rising to the top of his profession. No matter how hard I tried I could never be in chambers of a morning earlier than him. I saw how pleadings drawn by him and opinions written were presented to his secretary on large tape recording wheels for her to type. The tape recorder was about the size of a large car "fridge". One reason he gave me when agreeing to take me as a reader was the fact that he was soon to be leaving Selbourne Chambers for chambers then being built, Owen Dixon Chambers. I never attended the conferences conducted by Crockett in Selbourne Chambers. His room was too small for me to be included when a solicitor and client were present.

Crockett was too busy to spend time on the decoration of his new chambers. He left that to his secretary. The Sunday he moved chambers, I assisted him. On seeing for the first time the red carpet that his secretary had chosen, he uttered an expression I have never forgotten. He said, "She has all her taste in her mouth."

In 1962 Crockett took silk. His services as a barrister were much in demand in civil and criminal work. He always seemed to be too busy as a trial lawyer to be engaged in appellate work. He appeared in Royal Commissions, an inquiry into a maritime disaster and an inquiry into an air crash in which some 24 passengers and the crew were killed. He was retained by the VRC stewards. When the security of the currency was seen to be challenged with forged $10 notes being circulated, he was called to lead for the prosecution after the first trial had resulted in an acquittal. The security of the currency was re-established when the prosecution was successful. Crockett treasured an exhibit from that trial which was displayed in a small frame hung on the wall of his Chambers: a forged $10 note marked "Exhibit".

Having seen him in court I have always held the view that Crockett, together with such counsel as Tony Murray and Alec Southwell, changed the form and style of advocacy before courts and particularly when addressing a jury. Histrionics put aside, and not resorted to, rather the pertinent issues were identified and analysed. When juries were addressed they were addressed in a matter of fact manner and in a language they could understand.

Bill's life away from the law involved his family, racing and travel.

Bill married Anne on 20 December 1950. I note the time as being during the Bar's long vacation. They had four children — Rosemary, Peter, Robert and Louise. Bill loved his family dearly and was proud of them. His heart was broken when Louise died some 18 months ago. I will never forget him attending her funeral service in a wheelchair racked by the tremors of Parkinson's Disease and being severely battered in spirit. The burden he carried in his heart was greatly increased with Anne's death. During the last years of his life and after his retirement, Crockett suffered extremely bad health. Rosemary, a nurse, put her personal life aside and assisted and cared for her young sister and her parents. When Anne died she moved into Bill's apartment to care for him. Had it not been for her, Bill could not have maintained his independence and lived in his home. I am sure you join me when I express our condolences to Rosemary, Peter, Robert, Louise's husband Andrew, his daughters-in-law and his grandchildren.

As I said Bill's recreation from the law, other than being a Collingwood football supporter, was horse racing. He was a member of the Moonee Valley Racing Club. He served on the Committee for 14 years, the last 10 of which saw him as the Vice-Chairman. He was involved in rebuilding the facilities for members and patrons at the Moonee Valley track. His advice and sound judgment was sought and accepted by his Club and the racing industry. Crockett, the Chairman of the Moonee Valley Racing Club Bill Stutt, and the CEO Ian McEwan, were together responsible for the promotion and advancement of the "Cox Plate" as the leading "weight for age" horse race in the southern hemisphere. Bill was proud to have his work at his Club honoured and acknowledged by the "William Crockett Stakes". When Crockett was awarded the rank of the Order of Australia in 1987, the citation read "For service to the law and horse riding". The error he never sought to correct but I am sure it could be said in part that he did give service to horse riding as part of horse racing.

I must recount a story told to me by his family. Anne enjoyed horse racing and enjoyed a punt. One day when she was not accompanying Bill to the track she gave him money to invest on a trifecta. He forgot to do this and on realising that he ascertained the "pay out". On returning home Anne asked him if he made the investment. "Of course I did", he replied. Anne had her doubts and Bill was faced with a good cross-examiner. She asked him to present the tote ticket. It was then that he conceded that he had forgotten to make the bet. Anne refused to have Bill pay her, saying she would only receive payment from the tote.

One of Bill's great pleasures was travelling with Anne to Europe. They had a flat in London for some 12 years and each year they lived in London for a period of time. While diverting from recounting Crockett's achievements in his life, I should recount that when I was reading with Bill I saw and realised that he had great admiration for his former Master, Sir Gregory Gowans, whom Crockett acknowledged, had a great encyclopaedic knowledge of the law. Crockett's secretary's husband was killed when struck by the rotor blade of a helicopter. I drew the Statement of Claim and Bill settled it. The trial on the issues of liability and damages took place before Gowans J and a jury. Crockett opened the case to the jury, following which Gowans sent the jury out. Gowans enquired as to why the case was being put in negligence when in the admitted circumstances the issue of liability was absolute under the Wrongs Act (Damage by Aircraft) provisions. I was in trouble being confronted with why I had not pleaded the case that way. I was not assisted by reminding Bill that he had settled the Statement of Claim. He did not enjoy being caught out by his former Master. However, Crockett had his victory later. I was being led by him before the Full Court. Gowans J was in the lefthand chair. Phil Opus QC was addressing the Court on behalf of the appellant and made a statement as to the tax law. Gowans in his classic acerbic style said, "That is not correct." Crockett said to me that he thought Phil Opus was correct. I could not assist but I was dispatched to the library to look at the point. I found that Opus was correct and brought back to the Court a textbook pointing out the relevant paragraph to Crockett. We were being watched by Gowans. Crockett quietly handed the book to Opus and suggested he read the marked paragraph. Opus then said, "Your Honour Mr Justice Gowans, I am like the clock that stopped, I must be right twice the day." He then read the paragraph to the Court. Gowans was furious, not at Opus but at Crockett and myself, as he knew what had happened.

Crockett was appointed to the Supreme Court in December 1969 on the death of Sir John Barry. Crockett was 45 years of age. At that time a veteran law reporter wrote of Crockett, "A first class trial lawyer. From the moment he arrives in court

he gives the air of a man in charge of the situation." This was true. He was a first class trial and appellate judge and always in his court was in charge of the situation. At the outset of his judicial career his efficiency and desire to analyse the issues quickly and get on with the matter caused some counsel to consider him rather "prickly". That soon settled.

At the time of his appointment a member of the common law Bar and who had frequently appeared against Crockett was John Mornane. Mornane would do almost anything to get an early brief before a new judge conducting a jury trial. This was to the disquiet of a number of new judges whose practices at the Bar had been that of equity lawyers. In an early trial before Crockett and a jury, and while counsel for the plaintiff was addressing the jury, Mornane in a voice which could be clearly heard said that he had made a note of a comment of his opponent as being "dishonest". Crockett immediately sat down counsel for the plaintiff and told Mornane to stand. He then said to him that if there was one more interruption from him

LL.D for Crockett J

Reprinted from Summer 1995 Victorian Bar News

IN September this year one of the great common law judges of the Victorian Supreme Court "Bill" Crockett was awarded the degree of LL.D. (*Honoris Causa*) by the University of Melbourne. This recognition of his Honour's service to the law and the outstanding role which he has played on the Supreme Court is richly deserved.

The editors are delighted to print below the address which his Honour gave to the graduates on that day.

A great English barrister F.E. Smith was a famous orator. He became Lord Chancellor as Lord Birkenhead. All law graduates will have heard of him — at least I hope they have. His services as a speaker were difficult to obtain. An old friend, the headmaster of a great school, managed to procure him as occasional orator to speak at the school's annual speech night. Birkenhead, who was a very prickly fellow, expected to speak early and then get away. However, he was forced to sit through the lengthy process of the award of prizes, school reports and so on to his mounting chagrin and his perceptibly lessening patience. At last the headmaster announced: "And now Lord Birkenhead will give you his address." The Lord Chancellor strode to the lectern and snapped, "22 Picadilly, London, SE2", turned on his heel and departed.

I wondered whether I might employ the same tactic. After mature consideration I thought not.

First of all, Chancellor, may I say how greatly honoured I am by the University and Council by the conferment upon me today of the degree of Doctor of Laws *honoris causa*. I am, of course, aware that that degree is one of the most prestigious awards which is within the gift of the University to bestow.

I am also most beholden to Council for the generosity of the sentiments expressed in the citation given in support of the award. May I just add that I am particularly delighted that the award in recognition of any contribution I may have made to the law has come from my own university.

Next, may I congratulate all those who have graduated today and particularly those who are taking out their first degree. My bachelor's degree was conferred just half a century ago, I think to this very month. I am afraid that after such a lapse of time which has brought me close to God's "use-by date" that I recall nothing of the event itself. However, it must be so as the University of Melbourne Law Society has on the basis of alumni records recently made me an honorary life member in recognition of the fact. That conferment was, of course, held on this site but in that great example of Australian bluestone gothic, the old Wilson Hall, which was later destroyed by fire. However, I do remember the great relief it was to have finally reached the end of my immediate tertiary education.

I am sure you, too, are feeling that sense of relief that the grind of endless study is — at least for most of you — at an end.

I know I felt then, and I hope you feel now, a sense of indebtedness to the University which has given you the opportunity to acquire knowledge and, perhaps more importantly, the thirst to continue to do so. You can now call the University of Melbourne your university and speak of it with pride as the great teaching institution which it is and of which you and I have been privileged to be a part.

If the opportunity arises to repay in some measure that debt, do not fail to accept it. I must confess I have felt guilty in the past of doing too little to repay the University for what it did for me. I tutored the correspondence students, participated in a few moots and for some years undertook the task of correcting the examination papers of Professor Zelman Cowan's students as to which incidentally if there is a more dreary way of earning a dollar I have yet to hear of it.

It was much later, when I was a senior judge, that I realised that I had in fact been doing rather more for the University than I thought had been the case. That was work done as assessor for the Governor of the day in his capacity as Visitor to the University. Being Visitor does not mean that Mr McGarvie may call socially on the Vice-Chancellor for a sherry or two. The term has a technical meaning and the office itself is one of ancient lineage.

Perhaps a brief description of it may be of some interest to you.

In the Middle Ages what were to become great university colleges or hospitals in England were founded by the high and mighty. They might be members of the Royal Family, aristocrats or senior churchmen but always they were persons of great wealth. That wealth was needed to establish the institution in question. It was a kind of medieval equivalent of today's "every gift over $2 is tax deductible". At all events, the founder originally had the right to visit to see how his money was being spent and how his heirs were being deprived of their inheritance. It is a commonly held belief that that right had become obsolete by the 19th century unless express statutory provision for its existence has been made.

Indeed, real doubts existed until relatively recently as to whether the principal right that had for centuries been

he would discharge the jury on his own motion and order Mornane to pay the costs of the trial. Not another word was heard from counsel for the defendant.

Justice Crockett served on the Supreme Court for 26 years retiring on 16 April 1996. The last 10 years on the Bench saw Crockett as the senior puisne judge. Sir John Young, when I spoke to him last week, and who told me that it was a great sadness that he could not be here today as he is recovering from a fractured leg, referred to Crockett as being a judge who was seen to be the strength of the Court. That he was. He was a fine man, an extremely hard worker, he had a quick decisive intellect and as a judge when applying the law was compassionate.

I add a postscript, I have delivered this eulogy from prepared notes. Why do I tell you this? After delivering the eulogy following the death of Louise, the old reader spoke to his Master and enquired whether he was content with what I had said. He replied by saying, "It was good that you had prepared some notes."

exercised by visitors may not also have fallen into desuetude. That right was one enabling members of the institution to bring their disputes to the Visitor for resolution. Those doubts are now well and truly laid to rest. The office of Visitor is one created by the common law. The common law recognised that the Visitor had not only jurisdiction to entertain disputes but the power to enforce his rulings.

Indeed, the Visitor has exclusive jurisdiction over questions arising from the interpretation, application and observance of the laws of the foundation.

If no Visitor should be appointed then, in the case of a university built from public funds, the Crown is its Visitor. There is, as I have indicated, no doubt now that the Visitor's dispute resolution jurisdiction is anything but obsolete. It has in the past 40 or 50 years undergone something of a renascence both in Australia and England from whence of course it derives. Indeed, visitations in all jurisdictions have become a growth industry. The earliest Visitor of which I am aware was Geoffrey De Merton who founded Merton College Oxford in about 1384. Visitors were mostly members of Royalty. They were best positioned to make wealthy endowments. However, the practice has continued long past the days of personal endowments for members of the Royal Family in Britain and even the Privy Council to hold the office.

That is not much help to us in Victoria. Yet the Royalty connection has been maintained. Each of the universities in this State is set up by its own Act of Parliament. Each university is a corporation. By each Act the Governor of the day is appointed Visitor to the University. Petitions to the Governor are by no means infrequent. But the view taken here — and in the other States — is that a vice-regal representative cannot embroil himself in political or other disputation. Like the monarch whom he represents he or she must stand above all that and preserve strict neutrality.

How then was the petition to be dealt with? That did not bother the common law one little bit. It invented the notion of the regal or vice-regal personage acting through an assessor who hears and determines the petition. He then writes a judgment in the name of the Governor who by convention signs it and thus adopts it as his own. He gets all the credit for his Solomonesque judgment while the assessor gets all the hard work. The part played by the Visitor's assessor is, I think, very akin to that of the writer of the speech prepared by the Government for the Governor to read when he opens Parliament. Everyone knows the statements made in it are not necessarily the Governor's own opinion. Indeed, the contrary may be true but he is required by constitutional convention to utter the words.

You will have guessed by now that the assessor has invariably been — in this State at least — either the Chief Justice or his senior puisne judge. And that is how I have found myself from time to time for some years hearing petitions from members of the major State universities. One comfort to an assessor is that there is no right of appeal from a determination. Nor will the assessor substitute his discretion for one properly exercised by a university officer in whom is vested discretionary powers. This includes the power to pass or fail a student upon examination.

The principal complaint of petitioners concerning such matters as assessment of a student's scholastic work, admission to a course, admission to a degree etc. is that an adverse ruling was given with the petitioner having had no opportunity to be heard. That is, the allegation is one of procedural unfairness — or what used to be called breach of the requirements of natural justice. Then, differences arise over the interpretation of the University's statutes or agreements made under them such as, for instance, those which affect staff members' pension rights.

Suggestions that the jurisdiction is anachronistic and should be abolished are made from time to time but its great advantages of informality, privacy, cheapness and expedition are likely to lead to its preservation for many years yet.

An English judge recently defined the visitorial jurisdiction in these words:

My final conclusion, therefore, is that the visitor's role cannot properly be characterised either as supervisory or appellate. It has no exact analogy with that of the courts. It cannot usefully be defined beyond saying that the visitor has untrammelled power to investigate and right wrongs arising from the application of the domestic laws of a charitable foundation.

I should, I think, say no more on the subject, otherwise I might seem to be touting for business or encouraging members of the University Corporation to bring suit against the University.

Again I congratulate the graduates, express the hope that you all have a successful and enjoyable professional career and present my felicitations to the relatives and friends (including my own) who have attended here this morning so full of pride at the scholarly achievements of their kinsmen and kinswomen.

Farewell to His Honour Mr Ju

On the occasion of his retirement from the Court of Appeal of the Supreme Court of Victoria delivered on Thursday 22 February 2007

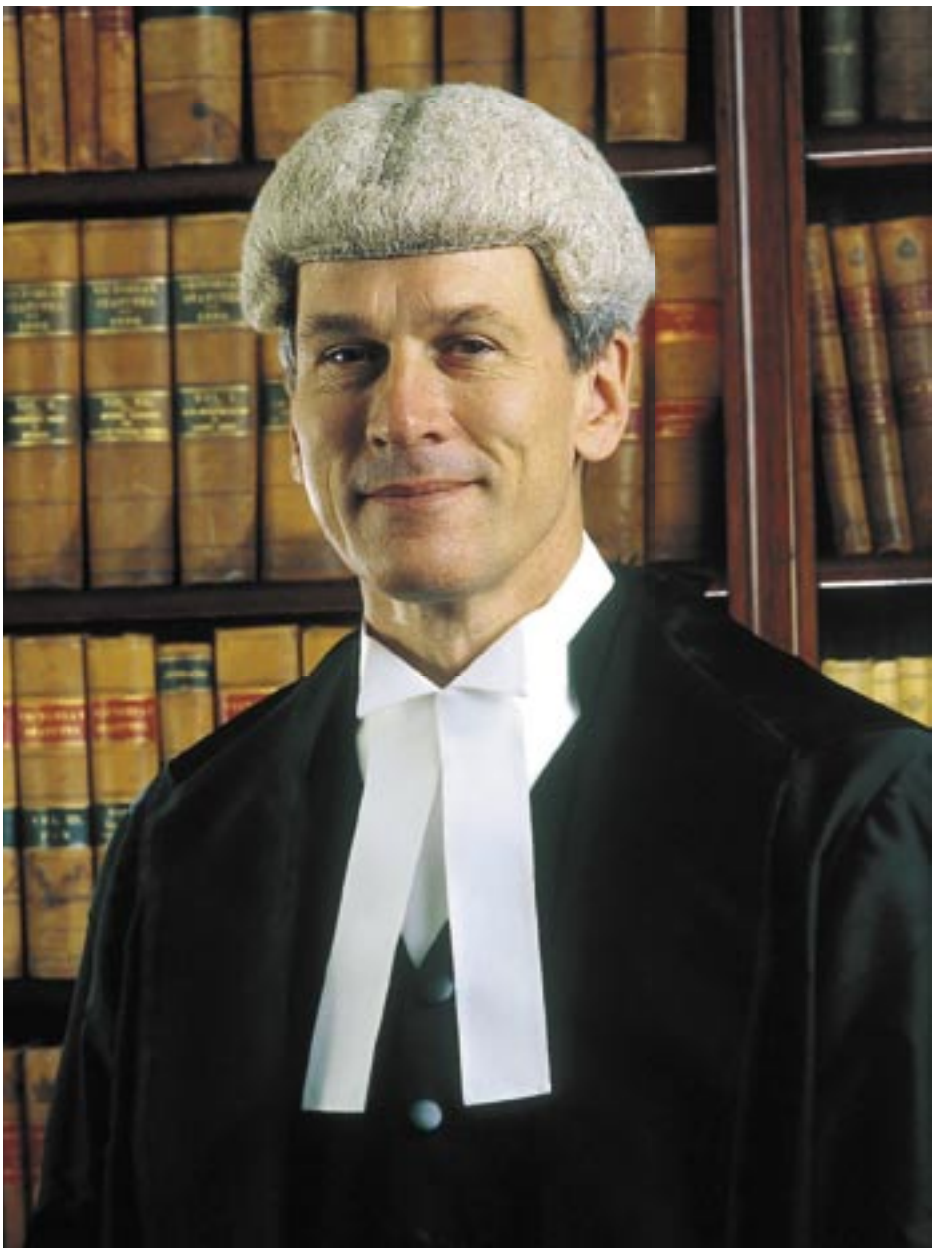
In a recent admissions ceremony your Honour referred to the book commonly called the *Politics* in which Aristotle describes law as "a kind of justice":

> Law is not perfect justice. It is only a kind of justice. It is a fallible, human project, a practical means by which we are to do our best, in the circumstances of real life, to achieve justice.

On this day in which your Honour is farewelled as a judge by the legal profession and the State of Victoria, no one could doubt that you have dedicated 37 years of service to the law (including 11 years as a Judge of Appeal of the Supreme Court) to doing your best, in the circumstances of real life, to achieve justice.

On behalf of the Attorney-General, may I express his gratitude, and the gratitude of the State of Victoria, for your Honour's extended and devoted service to the administration of justice in this State on the occasion of your Honour's retirement from the Supreme Court.

Your Honour was born in Sydney on 10 November 1945, and in your infant years your family moved to Melbourne. Your Honour attended Melbourne Church of England Grammar School (now Melbourne Grammar School) from 1958 to 1964. During your time at Melbourne Grammar, you were awarded a Wadhurst entrance scholarship, a Junior Government Scholarship, and a Senior Government Scholarship. You matriculated with Special Exhibitions in Latin and French, a General Exhibition and a Trinity College Exhibition. The following year, when, in Melbourne Grammar custom, you repeated Matriculation, you obtained four first-class honours as well as being Bruce House Captain, Prefect, school librarian and a Cadet under officer.



His Honour Mr Justice Callaway.

These achievements aside, your fellow students at Melbourne Grammar recall that from your very first day it was clear to them that they were in the presence of an exceptional intellect. One friend remembers that in your first English class, your teacher gave all of the students five minutes' free time to do whatever they wished. To their surprise, at the end of the five minutes, she asked what each student had been doing. One student reported that

stice Frank Hortin Callaway

he had been looking forward to play-time and another was considering the merits of his favorite ice-cream. When it came to your Honour's turn, you announced that you had spent your five minutes reading the dictionary. This confirmed to your fellow students that instinctively you were a scholar. Although you left Melbourne Grammar at the end of 1964, you have maintained your affiliation with it.

Your practice was initially in those areas in which you had significant experience, mainly commercial and equity matters, restrictive trade practices law, administrative law, constitutional law and taxation.

Your Honour's academic success continued with the completion of a first-class Honours Law degree at the University of Melbourne, where your excellence was recognised by the award of the EJB Nunn Scholarship, the Robert Craig Exhibition in Company Law and the Supreme Court Prize. Your Honour was also actively involved in student life throughout your university career, becoming Book Review Editor of the *Melbourne University Law Review* in 1966 and Editor in 1967. Your Honour completed a Masters of Laws at the University of Melbourne in 1974. A generation of company lawyers since that date have relied upon your Masters Thesis, supervised by Professor Harry Ford, and published in 1978, on the winding up of companies on the just and equitable ground. Your Honour's love of the power and exactitude of language was evident in your other work, *Drafting Notes*, which I amongst hundreds at the Victorian Bar have used on a regular basis and which is used to train those studying at the College of Law in New South Wales.

Your Honour was articled to Mr Colin Trumble at Mallesons, and your admission in April 1969 was moved by Mr James Merralls. You became a partner of Mallesons after just five years at the firm at the age of only 29. Perhaps prophetically, in anticipation of your future decisions appearing in the Victorian Reports, you kept your advices in bound leather volumes. In 1977, you left Mallesons to read with Mr Ross Sundberg and you signed the Bar Roll on 21 July 1977.

Your practice was initially in those areas in which you had significant experience, mainly commercial and equity matters, restrictive trade practices law, administrative law, constitutional law and taxation. Just as your Honour had accumulated accolades at Melbourne Grammar School, the University of Melbourne and Mallesons, you were quick to establish an excellent reputation at the Bar. One colleague described your submissions as invariably directly on point, incisive, clear and without a word wasted. Certainly this did not go unnoticed by other counsel, even those as eminent as Michael McHugh QC. In an action brought under the *Trade Practices Act 1974* (Cth) in relation to an alleged anti-competitive arrangement made between bakers of bread in the ACT, *TPC* v *George Weston Foods*,[1] your Honour, as a junior of three years' call appearing for two of the defendants, argued for judgment in their favour on the ground that there was no case to answer. Legend has it that when your Honour had completed your submissions, Michael McHugh stood up and declared: "I adopt everything my learned friend has just said."

Later that same year, you appeared, unled, before the Judicial Committee of the Privy Council in *Coachcraft Ltd* v *SVP Fruit Co Ltd*.[2] This was a challenge to the validity of a special resolution passed at an extraordinary general meeting of the respondent company. On that occasion, the Privy Council was persuaded by your worthy opponent, Stephen Charles QC, (later a fellow Justice of Appeal of this Court). That persuasion did not occur, however, without the recognition by Lord Wilberforce that the "argument was attractively put by Mr Callaway for the appellant".[3] You returned to the Privy Council some years later to succeed in a mining royalties dispute in *Hamersley Iron Pty Ltd* v *National Mutual Life Association of A/Asia Ltd*.[4]

By this point in your career, you had a well-established reputation for perfectionism. You would never take work if there was the remotest chance of a clash. You were always fastidiously prepared, whether this involved completing submissions three weeks before they were due, or, as rumour would have it, on the advice of Mr Jack Winneke allegedly having 10 quid at the ready to slip to the Privy Council librarian so as to gain access to all the necessary library materials.

There was only time for you to have one reader, Albert Monichino, before you were appointed Queen's Counsel in 1987 — not only in Victoria, but also Tasmania and Western Australia. From then on you let it be known that you would only be taking appellate work. Some thought that such a bold step could mean professional suicide for any barrister, but your practice thrived, both in Victoria and interstate.

There was only time for you to have one reader, Albert Monichino, before you were appointed Queen's Counsel in 1987 — not only in Victoria, but also Tasmania and Western Australia.

Soon thereafter you also took silk in NSW,[5] South Australia[6] and New Zealand.[7] During this time, you appeared regularly before the High Court of Australia, on one occasion opposed to Jim Merralls QC in *Brown* v *West*[8] on the limits of the power of the Executive. You appeared in the High Court on a matter involving the construction of the expression a "proprietary maritime claim" within the meaning of the *Admiralty Act 1988* (Cth)[9] and in the Constitutional case of *Re Tracey: Ex Parte Ryan*,[10] where the Court accepted your Honour's argument that the power exercised by service tribunals stands outside Chapter III of the Constitution.

Your Honour also appeared in immigration matters[11] and in matters involving taxation law, including *Coles Myer Finance Limited* v *Federal Commissioner of Taxation*.[12] Such as it was, when the Victorian Court of Appeal was created in 1994, you were perfectly placed for the State of Victoria to recognise your specialist advocacy, and appoint you to the appellate Bench.

Upon your appointment, the Bar said that it looked "forward to receiving the benefit of [your] Honour's clarity and pithiness in previously clouded areas of law".[13] That expectation has been rewarded. Your civil law decisions are highly regarded for their lucidity and intellectual rigour and have been approved by the High Court. Most recently, in *Stingel* v *Clark*,[14] concerned as it was with limitation periods on proceedings for intentional trespass to the person, Gleeson CJ, and Callinan, Heydon and Crennan JJ, preferred your dissenting judgment in the Court of Appeal as "the better view".[15] They went on to permit discretionary extensions of time by applying the earlier decision of *Mason* v *Mason*,[16] in which you gave the leading judgment. Your Honour's learned judgment on letters of credit in *Fletcher Construction* v *Varnsdorf*[17] and on the construction of the provisions of the *Corporations Act 2001* (Cth) designed to avoid constitutional inconsistency in *Tat Sang Loo* v *Director of Public Prosecutions*[18] are amongst my personal favourites, despite my being on the wrong side.

Your greatest contribution from the Bench, however, has been your significant contribution to Victorian criminal law, where it has been said that you have "brought order to chaos". Your decisions span the breadth of the criminal law process. Your decision in *R* v *Best*[19] is the leading Victorian authority to date on similar fact evidence and the first comprehensive Court of Appeal interpretation of s.398A of the Crimes Act. Your decision in *R* v *TJB*[20] is the standing authority on the severance of presentments in relation to sexual offences. The process of granting leave to appeal against convictions where a plea of guilty has been recorded but where the accused could not lawfully be convicted is guided by your judgment in *R* v *Tait*[21] and you have also provided standard principles in relation to jury directions in *R* v *Kotzman*.[22] The manner in which the Office of Public Prosecutions drafts presentments has now changed under the guidance of your decision in *R* v *Coffey*.[23] I understand that within the Court, you have established a "Red Book" of principal sentencing cases[24] from the Court of Appeal, which over many years you and your associates have updated and circulated to all members of the Court. I am told that this Book has been so successful that it is now in its second edition as the *Blue Book*.

Your associates are unanimous in viewing you as their "professional ideal". They all recognised that you are a deeply compassionate judge whose justice was always tempered by the plight of those who came before you.

It is clear from all of this that your Honour has been at the forefront of Victoria's developing jurisprudence and has never shied from this task. Just last September, your Honour handed down your decision in *TSL* v *Secretary to the Department of Justice*[25] which was one of the first decisions to engage with Victoria's new Charter of Human Rights and Responsibilities. Your Honour was required to construe the word "likely" in s.11 of the *Serious Sex Offenders Monitoring Act 2005* (Vic). Section 11 refers to a medical expert's assessment of the likelihood of serious sex offenders re-offending. Your Honour, while acknowledging that the Charter is not yet wholly in force, drew from the recognition in the Charter that a human right may only be subject to such limitations as can be demonstrably justified in a free and democratic society, to observe that "the nature of our society is a legitimate factor to take into account in construing … legislation".[26] This will no doubt be an important first step in the judicial consideration of the Charter. While other jurisdictions such as the United Kingdom, New Zealand and Canada have well-established jurisprudence on human rights laws, this is a novel area for Victorian courts and we are sad to think that we will not have more judgments from your Honour to guide us as you have guided us in the past.

Your associates are unanimous in viewing you as their "professional ideal". They all recognised that you are a deeply compassionate judge whose justice was always tempered by the plight of those who came before you. Former President Winneke is known to refer to your "nose for injustice". There is no doubt, however, that you are nonetheless shrewd in judgment, perhaps best illustrated in your own words from *R* v *Bernath* where you surmised that "(t)his was not a case of the serpent's beguiling or of a trap for the unwary innocent as opposed to a trap for the unwary criminal".[27]

When Albert Monichino finished reading with your Honour, you gave him a book of *The History of the Peloponnesian War* by Thucydides and inscribed in it: "There is more to life than law." Now that your Honour is retiring you will have more time to spend on your vast array of interests outside the law. Your Honour is widely read and cultured, and has interests in all things ancient, classic, linguistic, military and travel-related. These interests are active pursuits. You speak several languages fluently and are not averse to completing intensive summer courses at universities around the world. All evidence suggests that you will complete many more adventures abroad, returning regularly to bestow upon your many godchildren further gifts of illustrated classical works in ancient Greek.

Your Honour can retire from the Bench proud in the knowledge that your career has been characterized by excellence, dedication, compassion, and generosity, and that you have made significant contributions to the clarity and substance of the law of Victoria, most particularly in criminal law, where all those who will come before the courts, be they lawyers, jurors, victims or defendants, will have the benefit of your judgments.

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

Notes

1. *Trade Practices Commission* v *George Weston Foods Ltd* (No. 2) (1980) 43 FLR 55.
2. (1980) 28 ALR 319.
3. *Coachcraft Ltd* v *SVP Fruit Co Ltd* (1980) 28 ALR 319, 327.
4. (1985) 60 ALJR 70; 64 ALR 19.
5. 1988.
6. 1990.
7. 1994.
8. (1990) 169 CLR 195.
9. *The Owners of the Ship* Shin Kobe Maru v *Empire Shipping Company Inc* (1994) 181 CLR 404.
10. (1989) 166 CLR 518.
11. For example, *Chan* v *Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.
12. (1993) 176 CLR 640.
13. William Gillies, "Justice of Appeal Callaway" (1995) 93 *Vic Bar News* 37.
14. (2006) 228 ALR 229.
15. (2006) 228 ALR 229, 238. Warren CJ expressed a dissenting view, similar in terms to that of Callaway JA, which also found favour with the High Court.
16. [1997] 1 VR 325.
17. [1998] 3 VR 812.
18. [2005] VSCA 161 (Unreported, Victorian Court of Appeal, Winneke P, Charles JA, Callaway JA, 29 June 2005).
19. [1998] 4 VR 603.
20. [1998] 4 VR 621.
21. [1996] 1 VR 662.
22. [1999] 2 VR 123.
23. [2003] 6 VR 543.
24. Including, for example, *R* v *Bernath* [1997] 1 VR 271 (used as authority for the proposition that appeal judges must be careful not to exceed their jurisdiction when assessing what weight sentencing judges should put on particular aggravating and mitigating factors); *R* v *VZ* [1998] 7 VR 693; *R* v *Tran* (2002) 4 VR 457.
25. [2006] VSCA 199 (Unreported, Victorian Court of Appeal, Callaway Acting President, Buchanan JA, Coldrey AJA, 29 September 2006).
26. [2006] VSCA 199, [15].
27. [1997] 1 VR 271, 277.

Farewell Speech by The Honourable Justic

Solicitor-General, Mr Shand, Mr Provis, learned counsel, ladies and gentlemen. I thank those who have spoken for their undeservedly kind remarks about my work as a judge and for their good wishes. I thank you all for your attendance this afternoon.

His Honour Mr Justice Callaway.

THE administration of justice is a collective endeavour. It is not only the responsibility of judges, but also of the profession, and the judges could not perform their own role without the support of their staff. In my case, I have been particularly well served by my associates, secretaries and tipstaves and assisted, too, by the staff of other judges, of the Court and of VGRS. I am truly grateful to them all.

Even with all that support, particularly in recent years I have found the work to be very burdensome. I make no complaint: it "comes with the territory". But I am now convinced that the State would be better served by the appointment of someone younger, or at all events fresher, to the Court of Appeal. That is one of the main reasons I have decided to retire at 61 rather than 70.

It is not because I regret accepting appointment. I have never regretted being a Supreme Court judge. My reasons for that are those expressed by Sir Edmund Herring at the end of his speech in the Twelfth Court on 31 August 1964 the day before he retired as Chief Justice. (The relevant passage is quoted in Stuart Sayers' biography at pages 340–341 and reported in the opening pages of [1964] V.R. at 47. I leave you to read it for yourselves.)

> And now the time has come for me to lay down my office, but before I do so there are two matters to which I feel bound to draw attention. The first is this, that under the Australian constitution the great common law courts of Australia are the Supreme Courts of the States. Federal Parliament has no power to set up common law courts and so it is that to the Supreme Courts of the States the citizen must continue to look for protection from illegal arrest and other encroachments upon his liberty. It is to these Courts that he must come for a writ of *habeas corpus.* These Courts and their prestige must therefore, at all costs be sustained so that they will continue to attract the finest characters and the best legal brains that we can produce. As a community we will pay heavily if we allow our Supreme Court to be relegated to a position of inferiority.
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> The second matter I feel I should mention is that the principle of the independence of the judiciary from the executive is

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fundamental to our freedom. What happens when this principle is departed from is evident from what is going on in many lands today. We must see to it that our citizens all understand that an independent judiciary is the greatest bulwark of their liberties and their best defence against totalitarian rule ...

Everyone asks me what I am going to do ... I shall return to my first loves: history and philosophy and those aspects of human experience that, even now, are best expressed in religious language.

Nor have I regretted the quantity of our criminal work. What is more important, I ask rhetorically, than the protection of the community and the liberty of the subject?

The other main reason that I have decided to retire is the decision of the High Court in *Weiss* v *R.* (2005) 80 ALJR 444, 223 ALR 662. Much might be said against that decision without disrespect to the High Court. I confine myself to one point. Their Honours' construction of the proviso amounts to this: a trial miscarries through no fault of the accused, his grounds are meritorious and they are upheld by the Court of Appeal; but he is denied a retrial because three, or perhaps only two, judges of appeal are satisfied that he is guilty. As a very experienced criminal judge said to me last year, it amounts to saying to an appellant, "You have not had a proper trial and you are not going to."

Sir Edmund Herring referred, among other things, to the importance of an independent judiciary. Trial by jury is of no less importance, not only as a means of involving the community in the criminal justice system but as a protection of our liberties. The proviso, as previously understood for a long time, applied only if the error at the trial made no difference or conviction, by a jury, was inevitable. I find it hard to believe that the British Parliament, when it enacted the Criminal Appeal Act 1907, or the Victorian Parliament, when it enacted the *Criminal Appeal Act 1914*, intended such a departure from our legal norms as *Weiss* v *R.* decides.

When the House of Lords decided *Director of Public Prosecutions* v *Smith* [1961] AC 290, Sir Owen Dixon said that it contained propositions that he could never bring himself to accept. For that reason, in *Parker* v *R.* (1963) 111 CLR 610 at 632, the High Court declared its independence from the House of Lords. *Weiss* v *R.* contains propositions that I could never bring myself to accept, but I cannot declare my independence from the High Court.

Everyone asks me what I am going to do. At least initially, in the words of someone I met when I was on holiday last year, I intend to do retirement and I intend to do it very well. Again like Sir Owen Dixon, I shall not be reading the law reports. I shall return to my first loves: history and philosophy and those aspects of human experience that, even now, are best expressed in religious language.

I end as I began, by thanking you all for your support over these last 12 years and for your attendance this afternoon.

Welcome to Brigadier The Hon Tracey RFD

At his swearing-in as DJAG-ARMY before the Honourable Ju Court on 20 February 2007

Delivered By Brigadier Ian Westwood AM Chief Judge Advocate

May it please the Court.

It is a testament to your Honour, and the service that you have unstintingly given over many years, that today's ceremony is conducted in this ceremonial court by the Chief Justice and in the presence of many distinguished guests from both the law and the services. These include your wife Hillary, your family, the Honourable Justice Frank Callaway of the Victorian Court of Appeal and late of the AALC, the Honourable Justice Lander from your Honour's own court, Commodore His Honour Judge Tim Wood, the Deputy Judge Advocate General Navy, Major General Greg Garde, Air Commodore Andrew Kirkham, a former Deputy Judge Advocate General Air Force, Captain Paul Willee, former Head of the Military Bar, senior Navy, Army and Air Force officers and fellow members of the Defence legal fraternity.

Your Honour graduated Bachelor of Laws with Honours from the University of Melbourne in 1969. This was followed by a number of years in academe and included post-graduate qualifications from both the University of Melbourne and the University of Illinois. It was during this period of your Honour's career that you volunteered for military service in the Australian Army Legal Corps as a Reserve officer.

Your Honour's subsequent attainments and success, in both the broader legal profession and within the legal corps, are a reflection upon your Honour's capacity for work and the intellectual rigour brought to it. Within the broader profession, your Honour took silk in 1991, and was appointed to the Federal Court of Australia in 2006.

So far as your Honour's military service is concerned, you were one of the initial appointments to the panels for judge advocates and Defence Force magistrates established when the Defence Force Discipline Act commenced in 1986. It was from these early days that your Honour became the subject of enduring military fame by being the subject of the first Constitutional challenge to the validity of the Defence Force Discipline Act in the matter of *re Tracey; ex parte Ryan* (1989) 166 CLR 518. Fortunately for the military careers of many in court today, this challenge was unsuccessful.

Notwithstanding the demands of your Honour's practice over the years, you always found the time for Reserve service.

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stice Michael Black AC, the Chief Justice of the Federal

Honourable Justice Black and Brigadier The Honourable Justice R.R.S. Tracey RFD.

This included a preparedness, invariably at short notice, to spend your Christmas vacations reading the proceedings of the Blackhawk and other significant boards of inquiry with a view to reporting on their legal adequacy. This is indicative not only of the service that you have rendered over the years, but also of the support and forbearance of Hillary and your family in accommodating the demands of both your practice and your military service.

It did occur to me that these demands must have take their toll because I understand that on a recent flight from Darwin after attending to Defence business, when the steward proffered a hot towel, your Honour somewhat optimistically misheard "cocktail" and indicated that you would have a brandy and dry.

As a deputy Judge Advocate General, your Honour will be required to provide the final binding legal advice in connection with the internal review processes. This will provide your Honour with an insight into the workings of the summary justice system. I have no doubt that your Honour's tact and diplomacy will rise to the occasion of gently correcting the commanding officer who occasionally falls into legal error. This is often unwitting, as in the case of the Commanding Officer who was asked to explain his understanding of satisfaction beyond reasonable doubt for the purposes of a review of the proceedings. The officer indicated that he drew up a list of the elements of the offence and placed a tick against an element each time the prosecution proved the point.

Conversely, if the defence disproved a point, a cross was entered. At the end of the evidence, the commanding officer added up the ticks and crosses for each element. If the ticks outnumbered crosses, then he was satisfied as to that element beyond reasonable doubt. It will be your Honour's task to explain that such logical and straightforward approaches are, of course, quite wrong. Ideally this will be achieved in such a way that the Commanding Officer writes a letter of thanks for the light that you will have shed upon his legal darkness.

Similarly, the robust approach taken to matters of procedure may provide the occasional challenge. There was, for instance, the case where the accused was defending a charge of assault on a superior officer. At the end of the prosecution case, the commanding officer asked the regimental sergeant major if there was any reason why the accused could not be called as part of the prosecution case. On having been assured that there was not, the commanding officer called the accused on his own motion and asked the one question, "Did you point your rifle at LT AB or not, answer yes or no." The accused answered yes. It is possible that rather like your Honour's approach to the hot towel, that the accused was unduly optimistic when he subsequently elected to make an unsworn statement as part of the defence case.

On behalf of the Judge Advocate General, Major General The Honourable Justice Len Roberts-Smith, your comrades in the Services and the wider Defence Legal Office, we congratulate your Honour on your appointment as the Deputy Judge Advocate General Army and the opportunity which this will afford you to continue the service and contribution which have been hallmarks of your Honour's many years in the Reserve Forces to date. We wish you well, and congratulate you on your recent promotion to Brigadier.

If the Court pleases.

The Problematic Proviso: The Vice of *Weiss*

Phillip Priest QC*

IN his retirement speech on 22 February 2007, Justice Callaway made it plain that one of the factors motivating his decision to retire from the Court of Appeal was the High Court's judgment in *Weiss* v *The Queen* (2005) 80 ALJR 444; 223 ALR 662; [2005] HCA 81.

He is not alone in his expressed dismay. *Weiss* caused a shockwave to sweep through the ranks of criminal appellate lawyers and judges. The High Court radically altered the ambit of the proviso, sweeping away decades of accepted wisdom.

It is argued in this article that in reaching its conclusions in *Weiss* the High Court ignored many decisions of authority. Doubtful implications were drawn from the historical roots of the statutory formula. Indeed, the main premise underpinning the High Court's decision is dubious.

The unfortunate result is that the application of the proviso is now fraught with unnecessary difficulty. For the sake of intermediate appellate courts the High Court urgently needs to rethink *Weiss*.

Before turning to the decision itself, it is necessary to examine the legislative and historical context in which the case fell to be decided.

THE WORDS OF THE PROVISO

Weiss was concerned with the proviso (venerably so called) found in s.568(1) of the *Crimes Act 1958* (Vic.), which provides:

> (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal *if it considers that no substantial miscarriage of justice has actually occurred.* [Emphasis added.]

*With thanks to Sarah Leighfield of the Victorian Bar.

Phillip Priest QC.

The origins of the proviso in s.568(1) can be found in s.4(1) of the *Criminal Appeal Act 1907* (UK). Its equivalent is to be found in the criminal appeal statutes of nearly all Australian States and Territories.[1] There is a New Zealand[2] and a Canadian[3] equivalent.

Three points concerning the structure of s.568(1) should be noted at the outset. First, on an appeal against conviction, the appellate court shall allow the appeal if it thinks:

- the "verdict of the jury" should be set aside on the ground that it is "unreasonable or cannot be supported having regard to the evidence"; or
- the judgment of the court before which the appellant was convicted should be set aside on the ground of a "wrong decision of any question of law"; or
- that on any ground there was a "miscarriage of justice".

Secondly, if one of these grounds is satisfied, the proviso then comes into play. Thus, if the court is of the opinion that the point raised in the appeal might be decided in favour of the appellant (presumably on the ground that there was a "wrong decision of any question of law, or on any ground there was a miscarriage of justice)," it may dismiss the appeal if satisfied that "no substantial miscarriage of justice" has actually occurred.[4]

Thirdly, as a matter of logic — if nothing else — the proviso can have no application to the first ground upon which an appeal shall be allowed i.e. that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, since that is the statutory basis upon which jury verdicts are set aside as "unsafe and unsatisfactory"[5]. If a jury verdict falls into that category, obviously it cannot be saved by the proviso.[6] However, as will be seen, the ratio of *Weiss* may, on one view, render this ground somewhat superfluous.

INTERPRETATION OF THE PROVISO PRE-*WEISS*

Until *Weiss*, the analysis of Fullagar J in *Mraz* v *The Queen* (1955) 93 CLR 493 at 514 generally was regarded as the classic exposition of the operation of the proviso. He said:

> It is very well established that the proviso to s.6(1) [of the *Criminal Appeal Act 1912* (NSW)] does not mean that a convicted person, on an appeal under the Act, must

show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant *may thereby have lost a chance which was fairly open to him of being acquitted*, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried. [Emphasis added.]

Later cases in the High Court incrementally added to and explained this formulation, but its essence seemed never to be in doubt. Thus, for example, Barwick CJ in *R* v *Storey* (1978) 140 CLR 364 at 376 spoke of "a real chance of acquittal". He expressed the view:

> If error be present, whether it be by admission or rejection of evidence, or of law or fact in direction to the jury, there remains the question whether none the less the accused has really through that error or those errors *lost a real chance of acquittal.* Put another way, the question remains whether a jury of reasonable men, properly instructed and on such of the material as should properly be before them, would have failed to convict the accused: or were the errors such that if they were removed a reasonable jury might well have acquitted. [Emphasis added.]

It was recognised that there may be circumstances where, even if the jury would have come to the same result despite the impugned misdirection, the proviso could not be applied. Gibbs CJ (with whom Stephen and Murphy JJ agreed) observed in *Quartermaine* v *The Queen* (1980) 143 CLR 595 at 600–601:

> Ordinarily, when there has been a misdirection of law, the proviso to s.689 [of the Criminal Code (WA)] will be applied if the Crown establishes that if there had been no misdirection the jury would (or must) have come to the same conclusion. However, Wickham J, who delivered the judgment of the Court of Criminal Appeal in the present case, recognized that even if this were established "there might still be a substantial miscarriage of justice if the trial was so irregular that no proper trial had taken place", in that "there had been a serious departure from the essential requirements of the law". The Court of Criminal Appeal was right in taking that view of the law ...

In *Wilde* v *The Queen* (1988) 164 CLR 365 at 372–373 this view was said to be "undoubtedly correct":

> [T]he proviso *was not intended to provide, in effect, a retrial before the Court of Criminal Appeal* when the proceedings before the primary court have so far miscarried as hardly to be a trial at all. It is one thing to apply the proviso to prevent the administration of the criminal law from being "plunged into outworn technicality" (the phrase of Barwick CJ in *Driscoll* v *The Queen* (1977) 137 CLR 517 at 527); it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso ... [Emphasis added.]

The question remains whether a jury of reasonable men, properly instructed and on such of the material as should properly be before them, would have failed to convict the accused: or were the errors such that if they were removed a reasonable jury might well have acquitted.

Later still, in *Glennon* v *The Queen* (1994) 179 CLR 1 at 8–9, 12–13, the High Court held of an impugned misdirection that where the misdirection is not fundamental, the appellate court must be satisfied that, in the absence of the misdirection, "the jury would inevitably have reached the same verdict". And in *Grey* v *The Queen* (2001) 75 ALJR 1708; 184 ALR 593 at [25], Gleeson CJ, Gummow and Callinan JJ made it clear that, where there has been a departure from the requirements of a properly conducted trial, it cannot be said that there has been no substantial miscarriage of justice, unless an appropriately

instructed jury (acting reasonably, and applying the correct onus and standard of proof) would inevitably have convicted.[7]

In relatively recent times, however, judicial uncertainty as to the meaning of the proviso has been expressed. As has been noted above, the body of s.568(1) permits an appeal to be allowed if there be a "miscarriage of justice", whereas the proviso permits dismissal of an appeal if there be no "substantial miscarriage of justice". The judicially perceived tension between the body of the provision and the proviso has been the subject of a deal of discussion,[8] culminating in *Weiss*.

WEISS IN THE COURT OF APPEAL

The appeal to the High Court in *Weiss* was, so it seems, prompted by certain observations of Callaway JA in the Court of Appeal with respect to the correct application of the proviso.

Before turning to those observations it is worthwhile briefly setting out the factual context in which they were made.

The appellant, Bohdan Weiss, was convicted of the murder of Helen Grey. Ms Grey was beaten to death on 24 November 1994. At his trial, Jean Horstead, with whom the appellant was living in 1994, was an important witness against him. She gave evidence that, on the night of the murder, the appellant had confessed to her that he had killed Ms Grey. She said that she had at first provided the appellant with a false alibi. Some years later, however, after she had left the relationship with the appellant and moved to America, she had decided to tell the truth. Evidence was led that, some time after Ms Grey was murdered, the appellant formed and maintained a sexual relationship with a female other than Ms Horstead. Over objection, the prosecution was permitted to adduce evidence in cross-examination of the appellant that at the time he began his relationship with the other female she was not yet 15 years old. (It was not disputed on appeal that evidence of her age should not have been adduced.) To maintain a sexual relationship with a girl under 16 years was a serious crime. The prosecution did not later suggest that maintaining a sexual relationship with an under-age female went to the appellant's credit.

In the Court of Appeal, the Court (Callaway and Batt JJA, and Harper AJA) unanimously held that the evidence of the female's age should not have been admitted. Callaway JA (with whose reasons the other members of the Court agreed) held that her age was not relevant, that it could not be led to bolster the credit of Ms Horstead and that, if it did have any significant probative value, it was outweighed by its prejudicial quality. The Court of Appeal nonetheless dismissed the appellant's appeal, holding that the proviso to s.568(1) of the *Crimes Act 1958* applied.

Following discussion of the state of the authorities concerning the proviso and its application, Callaway JA concluded that a distinction should be drawn between an appellate court asking whether, without the wrongly admitted evidence, "the jury at the appellant's trial" would inevitably have convicted him, and asking whether, without that evidence, "any reasonable jury", properly instructed, would inevitably have convicted him. On the former test (the "this jury" test) Callaway JA concluded that the appellant's conviction was inevitable; on the latter test (the "any reasonable jury" test) he was of the opinion that it could not be said that the appellant's conviction was inevitable.

Weiss was a joint judgment of six members of the High Court (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). In the Court's analysis, the root question was one of statutory construction. The words of the statute govern, not the various judicial attempts at interpretation.

Given some earlier Victorian decisions, Callaway JA concluded that the relevant test was the "this jury" test and that the appeal should be dismissed. He outlined the parameters of the debate as follows:[9]

> Putting fundamental irregularity to one side, there are two expressions that are used to describe cases where the proviso does not apply. One expression refers to the loss of a chance of acquittal, whether a "real chance" or a "chance which was fairly open". The other expression is that the conviction of the appellant was inevitable. It is clear from the authorities that they are different ways of expressing the same test. I have always proceeded on the basis that the proviso may be applied where the wrong decision on a question of law or other irregularity made no difference and that that is all that is meant when it is said that an appellant's conviction was inevitable. *It was "inevitable" in the sense that this jury would still have convicted the appellant in the absence of the irregularity, not that he or she would have been convicted by any reasonable jury.* In other words, I have not regarded the proviso as inapplicable simply because, for reasons wholly unconnected with the wrong decision or other irregularity, a reasonable jury might have acquitted the appellant or confined the proviso to cases where a verdict of acquittal would be perverse. I have adopted my customary approach in this case, believing it to be normal practice in this State, but I acknowledge that I have been troubled by some statements of high authority. *If the test were inevitability, in the sense that any reasonable jury properly instructed would inevitably have reached the same conclusion as this jury, I could not apply the proviso to this case.* A new trial would have to be directed. [Emphasis added; footnotes omitted.]

With these words in mind it is timely to consider the High Court's treatment of the proviso on appeal from the Court of Appeal's judgment.

THE "EXCHEQUER RULE"

Weiss was a joint judgment of six members of the High Court (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). In the Court's analysis, the root question was one of statutory construction. The words of the statute govern, not the various judicial attempts at interpretation. According to the Court, the task of construction was not to be accomplished "by simply taking the text of the statute in one hand and a dictionary in the other".[10]

It was pointed out that the *Criminal Appeal Act 1907* (UK), from which the proviso is drawn, was enacted against the backdrop of the Exchequer rule.[11] In criminal cases the rule was stated as being that "if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial"[12]. Having regard to history, the High Court concluded that the proviso contained in s.4(1) of the 1907 Act was intended to abolish the Exchequer rule.[13] So much might be accepted.

Moreover, the High Court thought that history and the Exchequer rule also shed light on the drafting of the section. As we have seen, s.568(1) of the *Crimes Act*

1958 provides that the Court of Appeal shall allow an appeal against conviction if there is a "miscarriage of justice"; but may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. Under the old Exchequer rule, "miscarriage of justice" was any departure from trial according to law, regardless of the nature or importance of that departure. According to the High Court's analysis, the use of the words "substantial" and "actually occurred" in the proviso were intended to require the appellate court to consider matters "beyond the bare question of whether there had been any departure from applicable rules of evidence or procedure"[14]. Again, so much may be accepted.

THE HIGH COURT'S ERROR

Once the view is arrived at that the proviso was intended to require consideration of matters beyond the question of whether there had been a departure from applicable rules of evidence or procedure, the next question to arise is, what matters are to be addressed in deciding whether a substantial miscarriage of justice has actually occurred? The Court said: "The question becomes, when is that intervention justified?" And that, in turn, requires examination of when a court should conclude that "no substantial miscarriage of justice has actually occurred".[15]

It is at this point that, with respect, the Court fell into error.

The Court made it plain that an appellate court is required to decide for itself whether a substantial miscarriage of justice has actually occurred. To look to inevitability of result, or to a "fair" or "real chance of acquittal", and thus to look to what a jury (whether the trial jury or a hypothetical reasonable jury) might have done is, in the High Court's opinion, "to distract attention from the statutory task as expressed by criminal appeal statutes".[16]

It might be accepted undoubtedly as correct that an appellate court must decide for itself whether there has in a given case been a substantial miscarriage of justice. The section requires no less. In a breathtaking glide, however, and contrary to a long line of authority, the High Court concluded that the task of deciding whether a substantial miscarriage of justice has actually occurred "is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence".[17] Why that is so is not expressed with any clarity, if at all.

Approaching the determination of the meaning of the proviso as one of statutory construction, then it is submitted that there simply is no justification for reading into the words of the section the implication that the appellate court must approach the matter in the same way that it decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. Such an implication — if it is to be found — could only flow from the words "the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal 'if it considers that no substantial miscarriage of justice has actually occurred'". Nothing in these bare words — even paying due regard to the historical underpinnings of the Exchequer rule — is capable of founding the approach now dictated by the High Court.

Indeed, the words of the statute point the other way. To approach the matter in the manner suggested by the Court in *Weiss* is arguably to render the first ground for intervention by an appellate court found in the body of s 568(1) of the *Crimes Act 1958* (and its equivalents) superfluous.

THE "CURATIVE" CANADIAN CRIMINAL CODE

The High Court does not appear to have considered the position in Canada.

In that country the proviso[18] is described as "the curative provision". It is regarded as placing a burden on the Crown to justify the denial of a new trial despite the presence of error in the court from which the appeal is brought. Satisfaction of the onus is a condition precedent to the application of the proviso. However, the proviso need not be applied even if the onus is met.[19] The question to be asked is whether the verdict would necessarily have been the same if the error had not occurred.[20]

The leading case upon the application of the proviso in Canada is that of the Supreme Court of Canada in *R* v *Khan* [2001] 3 SCR 823; (2001) 160 CCC (3d). Arbour J (delivering the judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ) described the position as follows:

> [27] In every case, if the reviewing court concludes that the error, whether procedural or substantive, led to a denial of a fair trial, the court may properly characterize the matter as one where there was a miscarriage of justice. In that case, no remedial provision is available and the appeal must be allowed. I will now examine these propositions in more detail.
>
> [28] This Court has enunciated on numerous occasions the proper test for the application of the curative proviso (see *Colpitts* v *The Queen* [1965] SCR 739; *Wildman* v *The Queen* [1984] 2 SCR 311; *R.* v *B* (FF) [1993] 1 SCR 697; *R.* v *Bevan* [1993] 2 SCR 599). *It can only be applied where there is no "reasonable possibility that the verdict would have been different had the error ... not been made"* (*Bevan*, *supra*, at p. 617).
>
> [29] The jurisprudence reveals that the proviso will generally be applied, in accordance with the above principles, in two types of situations. A. W. Mewett has described the two possible approaches in "No Substantial Miscarriage of Justice", in A. N. Doob and E. L. Greenspan, eds., *Perspectives in Criminal Law* (1985), 81, at p. 94:
>
> > What we see are again two fundamentally different views of the application of the proviso. One view proceeds on the basis of asking whether, absent the error or wrongly admitted evidence, the rest of the evidence is so overwhelming as to make the outcome of a retrial a virtual certainty; the other of asking whether, ignoring the rest of the evidence, the jury might have been influenced by the error or the wrongly admitted evidence.
> >
> > On the one hand, appellate courts will maintain a conviction in spite of the errors of law where such errors were either minor in themselves or had no effect on the verdict and caused no prejudice to the accused. This accords with the original purpose of the section, as described early on by Taschereau J., writing for the majority of this Court, in *Chibok* v *The Queen* (1956) 24 CR 354 at p. 359:
> >
> > It would indeed be a shocking impediment to the proper administration of criminal justice, if criminals were allowed to go free because of a *trivial error in law or of an oversight of no material consequence.* [Emphasis added.]
>
> As stated by Lamer CJ, for the Court, in *R.* v *Tran* [1994] 2 SCR 951 at p. 1008, "[s]ection

686(1)(b)(iii) is designed to avoid the necessity of setting aside a conviction for minor or 'harmless' errors of law where the Crown can establish that no substantial wrong or miscarriage of justice has occurred."

[30] The case law is replete with examples of situations where either the triviality of the error itself, or the lack of prejudice caused by a more serious error of law, justified the application of the curative proviso. *In all those cases, the appellate courts were convinced that the error could have had no effect on the verdict*. Because of the nature of the errors and of the issues with respect to which they were made, it was possible to trace their effect on the verdict and ensure that they made no difference. Generally, the errors concerned evidence that was insignificant to the determination of guilt or innocence or benefited the accused by imposing a more onerous standard on the Crown. Errors in the charge to the jury respecting a very minor aspect of the case that could not have had any effect on the outcome or concerning issues that the jury was otherwise necessarily aware of were also cured by the application of the proviso. Similarly, in some cases the errors concerned preliminary findings that would nevertheless, as a matter of law, inevitably have resulted in the same finding made by the trial judge.

[31] In addition to cases where only a minor error or an error with minor effects is committed, there is another class of situations in which s.686(1)(b)(iii) may be applied. This was described in the case of *R.* v *S* (PL) [1991] 1 SCR 909 at p. 916, where, after stating the rule that an accused is entitled to a new trial or an acquittal if errors of law are made, Sopinka J. wrote:

> There is, however, an exception to this rule in a case in which the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction.

Therefore, it is possible to apply the curative proviso even in cases where errors are not minor and cannot be said to have had only a minor effect on the trial, *but only if it is clear that the evidence pointing to the guilt of the accused is so overwhelming that any other verdict but a conviction would be impossible*. [Some citations omitted; further emphasis added.]

Thus it may be observed that the Canadian test seems to revolve around inevitability of result which, as we have seen, is one of the matters which animated Callaway JA's judgment in the Court of Appeal in *Weiss*. It is surprising that the High Court apparently paid no regard to the entrenched Canadian position when so revolutionising the application of the proviso for Australian courts.

NEW ZEALAND COURTS REJECT *WEISS*

Weiss has not been followed in New Zealand.

In *R* v *Sungsuwan* [2006] 1 NZLR 730, two of the Judges of the Supreme Court, Elias CJ[21] and Tipping J,[22] considered that the New Zealand proviso[23] could properly be applied in situations where the ground under s.385(1)(b) (wrong decision on a question of law) had been made out.

The approach in New Zealand is either the "this jury" test or the "any reasonable jury" test. Thus in *R* v *McI* [1998] 1 NZLR 696 Thomas J[24] said of the application of the proviso:

> In my view, it is clear Parliament did not want convicted persons to go free or obtain the benefit of a new trial on the basis of an error of law or irregularity unless the error or irregularity would have made a difference to the outcome ... *The question therefore becomes; on the whole of the admissible evidence, could a reasonable jury have failed to convict?...* The necessary consequence of the proviso is that it is not every error of law or breach of the rules of evidence or procedure which have evolved to ensure a fair trial for an accused which is necessarily fatal. Any such error or irregularity needs to be material to the outcome of the trial. Unless it is, no injustice has been done. The impact of the fact the proviso has been enacted cannot be ignored. In enacting it, Parliament clearly indicated that it is not every lapse or breach of the rules of procedure or evidence, even though the lapse or breach may amount to a miscarriage of justice, which need result in a successful appeal. [Emphasis added.]

And Tipping J[25] observed:

> [I]t is important to recognise that the Court is not thereby invited to come to its own view about whether the appellant was in fact guilty of the crime or crimes alleged. Rather, the Court is required to assess whether, without the error or deficiencies of process, the jury would still have convicted. It is what the jury would have done without the errors or deficiencies which is the issue, not what the Court thinks of the ultimate merits of the conviction. If, in spite of the errors or deficiencies, the jury would have convicted anyway, there can be no prejudice to the appellant from those errors or deficiencies... [*T]he test for application of the proviso should be framed as follows. Before the proviso may be applied, this Court must be sure that the jury would without doubt have convicted had the matter or matters giving rise to the initial miscarriage of justice not been present.* [Emphasis added.]

In *R* v *Howse* [2003] 3 NZLR 767 at [45] the New Zealand Court of Appeal endorsed these views. On appeal, the Privy Council affirmed statements of the law in Australia (pre-*Weiss*)[26] to a similar effect and said the proviso applied only in cases where the dismissal of the appeal would not countenance a "radical or fundamental error".[27]

Weiss specifically was considered by the Court of Appeal in *R* v *Haig* [2006] NZCA 226.[28] William Young P and Chambers J said that "[d]espite the English and Australian decisions to which we have referred, the weight of authority in this jurisdiction is such that we think it appropriate to continue to apply the existing New Zealand principles".[29]

HOW IS THE PROVISO NOW TO BE APPLIED?

As has been seen, *Weiss* now dictates that an appellate court is to approach the application of the proviso in the same way as it approaches a complaint that a verdict is unsafe and unsatisfactory. This raises the question, what room is left for the second and third grounds of s.568(1), which permit appellate intervention if the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or if on any ground there was a miscarriage of justice? To answer this question it is necessary to determine for what *Weiss* stands.

The following observations from *Weiss* contain the ratio:

> [41] [The statutory task of applying the proviso] is to be undertaken in the same way an appellate court decides whether the verdict of the jury

should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. *The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. There will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction. In such a case the proviso would not apply…*

[42] It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier … *It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration.*

[43] There are, however, some matters to which particular attention should be drawn. First, the appellate court's task must be undertaken on the whole of the record of the trial including the fact that the jury returned a guilty verdict … *But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury.* The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial. Secondly, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present and that the standard of proof is beyond reasonable doubt.

[44] Next, the permissive language of the proviso ("the Court ... may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal ...") is important. So, too, is the way in which the condition for the exercise of that power is expressed ("if it considers that no substantial miscarriage of justice has actually occurred"). *No single universally applicable description of what constitutes "no substantial miscarriage of justice" can be given.* But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence *properly admitted at trial* proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty.

[45] *Likewise, no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt …* [Footnotes omitted, additional emphasis added.]

Although it is not an easy task to determine comprehensively all of the implications of *Weiss*,[30] a few propositions may be distilled:

- There may be many cases where the natural limitations attendant upon appellate review lead an appellate court to the view that it cannot reach satisfaction beyond reasonable doubt. (This seems to be directed towards, for example, those cases which turn on the credit of witnesses judged from demeanour.)
- There are cases in which it would be possible to conclude that the error made at trial would (or at least should) have had no significance in determining the verdict returned by the jury. (Presumably, for example, those cases that do not turn on demeanour.)
- No single universally applicable description of what constitutes "no substantial miscarriage of justice" can be given.
- No single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved guilt beyond reasonable doubt.
- There may be cases where it would be proper to allow the appeal and order a new trial, "even though the appellate court was persuaded to the requisite degree of the appellant's guilt".

On a practical level a cynic might observe that *Weiss* now permits an intermediate appellate court to say to an appellant: "You've not had a proper trial according to law before this jury (whose constitutional function is to determine guilt or non-guilt), but we're going to deny you a proper trial before another jury because we think that you're guilty. We will be your jurors and we will try you."

THE HIGH COURT POST-*WEISS*

Immediately following *Weiss*, the High Court delivered judgment in *Nudd* v *The Queen* (2006) 80 ALJR 614; 225 ALR 16. Much of the language was redolent of *Mraz*.[31] Only the Chief Justice[32] and Kirby J[33] mentioned *Weiss;* and then only in passing. It excited hope in some quarters that *Weiss* was, perhaps, quietly to be swept under the judicial carpet.

However, the proviso was again up for grabs in *Darkan* (2006) 80 ALJR 1250; 228 ALR 334. Somewhat disappointingly, the majority[34] repeated that "[a]n appellate court invited to consider whether a substantial miscarriage of justice has actually occurred is to proceed in the same way as an appellate court invited to decide whether a jury verdict should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence".[35] In so doing it "must make its own independent assessment of the evidence and determine whether, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty".

In dissent, Kirby J made some further important observations as to the application of the proviso:

[139] … The ordinary postulate of the Australian legal system is that a person, accused of a crime, is entitled to a trial that conforms to the requirements of the law. Most especially, in the trial of serious criminal charges, *the person is normally entitled to have the jury, as the "constitutional judge of fact", resolve contested questions of fact by the application of the applicable law correctly explained to them by the presiding judge …*

[140] A legal mistake in *peripheral mat-*

ters, such as on non-fundamental issues of procedure, an insubstantial error in admitting this or that piece of evidence or a misdirection on a particular point of fact or law arising in the trial may not touch the fundamental requirement of having a trial "according to law". *But where the error that is established involves a mistaken direction with respect to an essential ingredient of the offence and a misdescription to the decision-maker (here the jury) of the content of that ingredient, a real question is presented as to whether the outcome then truly answers to a trial "according to law".*

[141] Clearly, the language of the "proviso" is only enlivened when mistakes have happened. The mistakes which [the proviso] contemplates include, explicitly, "the wrong decision on any question of law". However, the "proviso" is manifestly to be understood against the background of the fundamental assumption that *high standards of lawfulness are observed in the conduct of criminal trials* …

[142] … The appellate court, deciding the "proviso" question, is obliged to reach its own conclusion according to the statutory criteria. However, necessarily, it does so *in the context of a legal system that observes high standards of compliance with the law; is protective against miscarriages of justice and wrongful convictions; and ordinarily applies the rigorous criterion for proof of criminal guilt*, namely proof beyond reasonable doubt. [Footnotes omitted; emphasis added.]

And later he observed:

[161] … (1) … *In a court of error, such as this, where a serious mistake of law is revealed, there is a strong reason of principle why such mistakes should ordinarily be marked by the provision of relief and an order for a retrial. Indeed, this is the primary instruction of the Code itself ("shall allow the appeal").*

(2) The foregoing is especially so where the mistake has involved a misdescription to the jury of the ingredients of the offences charged against the appellants. Misdirections of such a kind are more serious than others. … *The increasing insistence of appellate courts upon the accurate explanation to juries of the central ingredients of the offence(s) charged is, in my opinion, a reason for the greater caution in the intermediate courts in the application of the "proviso" in recent years. Nothing said by the Court in* Weiss *suggests a reversal of that caution.* It really speaks for itself. *If the decision-maker in the trial (the jury) is misled as to its essential function and provided with an incorrect statement of the applicable legal components of the offence, the postulate of a trial according to law is not fulfilled. No amount of appellate reasoning can then replace that normal entitlement belonging to all persons accused of serious crimes. The "proviso" assumes that the essential postulate has been fulfilled* … [Footnotes omitted; emphasis added.]

It is probably too early to discern any trends in the judgments of intermediate appellate courts so as to predict those cases where the proviso will not stand in the way of a successful appeal.

Although Kirby J was in the minority, it might be argued that his observations are to be regarded as of general application.[36] Again, some propositions may be isolated:

- An accused is normally entitled to have the jury resolve contested questions of fact by the application of the applicable law correctly explained to them i.e. "according to law".
- A legal mistake in peripheral matters may not touch the fundamental requirement of having a trial "according to law".
- But where the error that is established involves a mistaken direction with respect to an essential ingredient of the offence and a misdescription to the jury of the content of that ingredient, a real question is presented as to whether the outcome then truly answers to a trial "according to law".
- The proviso is to be understood against the background of the fundamental assumption that high standards of lawfulness are observed in the conduct of criminal trials.
- The appellate court, deciding the proviso question, does so in the context of a legal system that observes high standards of compliance with the law; is protective against miscarriages of justice and wrongful convictions; and ordinarily applies the rigorous criterion for proof of criminal guilt.
- Where there is a serious mistake of law, there is a strong reason of principle why such a mistake should ordinarily be marked by the provision of relief and an order for a retrial. That is the primary instruction of the legislation (i.e. "shall allow the appeal").
- The proviso assumes that the essential postulate of a trial according to law has been fulfilled.
- If the jury is misled as to its essential function and provided with an incorrect statement of the applicable legal components of the offence, the postulate of a trial according to law is not fulfilled.

INTERMEDIATE APPELLATE COURTS POST-*WEISS*

Warren CJ recently observed of the invocation of the proviso post-*Weiss* that this "is a more complex and difficult process than was previously so".[37] That observation echoes earlier observations made by the Court of Appeal (Vic.) as to "internal tensions" to be found in the propositions laid out in the High Court's judgment.[38]

It is probably too early to discern any trends in the judgments of intermediate appellate courts so as to predict those cases where the proviso will not stand in the way of a successful appeal. However, post-*Weiss* the proviso has not been applied where there has been a misdirection touching the burden of proof,[39] incorrect admission of opinion evidence[40] or tendency evidence,[41] or a failure properly to direct on propensity evidence.[42] Nor was the proviso successfully invoked for misdirections on crucial identification evidence[43] or on consent in a rape case.[44] Similarly, where the prosecutor made an inflammatory address,[45] or indulged in improper cross-examination of the accused, the proviso was not applied.[46] And where a judge made very strong comments in summing up adverse to the accused,[47] and in another case left to the jury a possible basis for conviction not relied upon by the Crown,[48] the proviso did not defeat the appeal.

AN UNRESOLVED QUESTION

A tantalising question — which will require resolution at some future time — is whether the *Weiss* approach is applicable to appeals against conviction in Commonwealth cases. On one view, *Weiss* dictates that once error is found, an appellant is, in effect, tried by the appellate court. It is for the appellate court to determine whether guilt is established beyond reasonable doubt. Some would argue that to apply *Weiss* in Commonwealth cases is to infringe s.80 of the Constitution.[49]

A PARTHEON SHOT?

As we have seen, the High Court's extraordinary decision in *Weiss* arose out of Callaway JA's decision in the Court of Appeal.

In one of his last criminal cases before retirement,[50] Callaway JA implicitly suggested that *Weiss* dictated that the Court was required in that case to send it back for a retrial rather than dismiss the appeal by invoking the proviso (which seems to be the opposite of what the High Court in general intended).

Rajakaruna (No 2)[51] involved convictions for rape of two prostitutes and associated offences. One of the complainants made a complaint of rape, and was seen by the person to whom the complaint was made to bear obvious injuries. Between the time of the alleged rape and the complaint, however, the complainant spoke to another person who observed no injuries. Without directly cross-examining the complainant on the matter, counsel for the defence floated the argument in his final address that this evidence indicated that the injuries might not have been inflicted at the time of the rape, but at some other later time.

Counsel was criticised to the jury by the trial judge for putting this argument without first cross-examining on the topic. The Court of Appeal found this criticism to be wrong. It was held that the proviso could not be applied. Callaway JA's reasons for not applying the proviso are instructive. He said:[52]

> [5] Before the decision of the High Court in *Weiss* v *The Queen* this Court might have held that counsel's argument was so speculative that the judge's error made no difference despite the importance of the injuries to the prosecution case. I do not stay to consider whether that would have been our conclusion. *Before we can apply the proviso, we are now required, on the whole of the record, to say that we ourselves are satisfied beyond reasonable doubt that the applicant was guilty*. There being no question of consciousness of guilt, if we disbelieve his assertions in the record of interview, the case is no better than if he had said nothing in his own defence. The prosecution case then depends on the credibility of the complainants. *To be satisfied beyond reasonable doubt that the applicant was guilty, one would need to see them give their evidence and be cross-examined.* [Footnotes omitted; emphasis added.]

CONCLUSION

The words of the proviso cannot carry with them the burden found by the High Court in *Weiss*. As a matter of language the proviso permits a court to ignore a miscarriage of justice that is not substantial. Nothing in the clear words of the proviso — regardless of its historical *raison d'etre* — requires an appellate court to approach its application in the same way that a court must approach a complaint that a jury verdict is unsafe and unsatisfactory. To approach its interpretation in that way simply is to read words that are not there.

At one level, *Weiss* has placed an unwarranted extra burden upon intermediate appellate courts resting on dubious foundations. The extent of the proviso's practical application is in greater doubt now than it was before *Weiss* was delivered.

At another level, judges of intermediate appellate courts are left with the unpalatable alternatives of either refusing to apply it (which has the potential to undermine the authority of the High Court), or applying it in circumstances where conscientiously the judges believe it to be in error.

Weiss is wrong. It should be reconsidered.

Notes

1. *Criminal Appeal Act 1912* (NSW), s.6(1); *Criminal Law Consolidation Act 1935* (SA), s.353(1); Criminal Code (Q), s 688E(1) and (1A); *Criminal Appeals Act 2004* (WA), s.14(2); *Criminal Code Act 1924* (Tas), s.402(1) and (2); Criminal Code Act (NT), s.411(1) and (2). By contrast, the proviso is not found in the *Federal Court of Australia Act 1976* (Cth); as to the effect of which, see *Conway* v *The Queen* (2002) 209 CLR 203 at 218–219 [35]–[36] per Gaudron ACJ, McHugh, Hayne and Callinan JJ, 230–231 [76]–[77] per Kirby J.
2. *Crimes Act 1961* (NZ), s.385.
3. Criminal Code (Can.), s.686(1).
4. It is interesting to note that, by comparison, the Canadian equivalent limits the application of the proviso to "a wrong decision on a question of law" i.e. the second ground only. In a curious oversight, the Canadian legislation, and the cases based upon it, do not appear to have been resorted to as an aid to interpretation by the High Court in *Weiss*.

   So far as is relevant, s.686 of the Criminal Code provides:

   (1) On the hearing of an appeal against a conviction …, the court of appeal
   - (a) may allow the appeal where it is of the opinion that
     - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
     - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
     - (iii) on any ground there was a miscarriage of justice;
   - (b) may dismiss the appeal where
     - (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
     - (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
     - (iii) notwithstanding that the court is of the opinion that on *any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred,* or
     - (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby … [Emphasis added.]

5. See *M* v *The Queen* (1994) 181 CLR 487 at 492; *MFA* v *The Queen* (2002) 213 CLR 606 at [25].
6. See *R* v *Gallagher* [1998] 2 VR 671 at 675, where Brooking JA seems to accept that the proviso cannot be applied to the first ground. Brooking JA's judgment contains a thorough discussion of the topic.
7. Cases decided by the High Court where it was held that the proviso could not be applied include: *Krakouer* v *The Queen* (1998) 194 CLR 202; 72 ALJR 1229 (misdirections on the elements of the offence and burden of proof despite the strength of the Crown case); *Driscoll* v *The Queen* (1977) 137 CLR 517 and *Storey* v *The Queen* (1978) 140 CLR 364 (misdirection or non-direction on propensity evidence); *Farrell* v *The Queen* (1998) 194 CLR 286 (failure to admit psychiatric evidence bearing upon the credibility of a critical witness); *Gilbert* v *The Queen* (2000) 201 CLR 414 (conviction for murder where manslaughter had not been left to the jury); *Grey* v *The Queen* (2001) 75 ALJR 1708 (non-disclosure of evidence materially affecting credit of a crucial witness).

   Cases where the High Court has applied the proviso include: *Suresh* v *The Queen* (1998) 72 ALJR 769 (evidence of non-recent complaint admitted without objection in a sex case, where the defence relied upon it as a prior inconsistent statement); *Wilde* v *The Queen* (1988) 164 CLR 365 (failure to sever an indictment where, however, the Crown case was extremely strong and the defence extremely weak); *Festa* v *The Queen* (2001) 208 CLR 593; 76 ALJR 291 (misdirection concerning identification evidence).
8. See *R* v *Gallagher* [1998] 2 VR 671; *Grey* v *The Queen* (2001) 75 ALJR 1708; 184 ALR 593 at [25], [52]–[56]; *Festa* v *The Queen* (2001) 208 CLR 593; 76 ALJR 291 at [110]–[123], [197]–[199], [222]–[228]; *Conway* v *The Queen* (2002) 209 CLR 203; 76 ALJR 358; *Ugle* v *The Queen* (2001) 211 CLR 171; 76 ALJR 886; *TKWJ* v *The Queen* (2002) 212 CLR 124.
9. *R* v *Weiss* (2004) 8 VR 388; 145 A Crim R 478 at [70].
10. (2005) 80 ALJR 444; 223 ALR 662; [2005] HCA 81 at [10].
11. Following *Crease* v *Barrett* (1835) 1 Cr M & R 919 at 933 [149 ER 1353 at 1359] the rule was taken to mean that courts had renounced all discretion, and, "where evidence formally objected to at *Nisi Prius* is received by the Judge, and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial" — *Wright* v *Doe dem Tatham* (1837) 7 A & E 313 at 330 [112 ER 488 at 495] per Lord Denman CJ.
12. *R* v *Gibson* (1887) 18 QBD 537 at 540–541 per Lord Coleridge CJ. Compare *R* v *Grills* (1910) 11 CLR 400 at 410 per Griffiths CJ.
13. *Weiss* at [18].
14. *Weiss* at [18].
15. *Weiss* at [30].
16. *Weiss* at [40].
17. *Weiss* at [41].
18. See fn 5 above.
19. *R* v *Arcangioli* [1994] 1 SCR 129 at 146.
20. *Colpitts* v *The Queen* [1965] SCR 739 at 744.
21. At [6].
22. At [113].
23. Section 385(1) of the *Crimes Act 1961* (NZ) relevantly provides:
    (1) On any appeal ... [the Court] must allow the appeal if it is of opinion:
        (a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
        (b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
        (c) That on any ground there was a miscarriage of justice; or
        (d) That the trial was a nullity —
        and in any other case shall dismiss the appeal:
        Provided that [the Court] may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
24. At 701–2.
25. At 711–12.
26. In particular, at [36] Lord Carswell said of observations in *Wilde* v *The Queen* (1988) 164 CLR 365 at 372, 373, 374, per Brennan, Dawson and Toohey JJ. — "Their Lordships agree with these statements of the law and consider that they are correct."
27. *R* v *Howse* [2006] 1 NZLR 433; [2005] UKPC 31 at [34]–[35].
28. See also *The Queen* v *Wilson* [2006] NZCA 150.
29. At [60].
30. In a case concerning whether manslaughter should have been left to the jury on a charge of murder, the Court of Appeal (Vic.) in *R* v *Gill* (2005) 159 A Crim R 243 at [28], in commenting on the High Court's judgment in Weiss at [43], said:

    With respect, we regard those propositions as giving rise to some internal tensions, given that, for the purpose of assessing the application of the proviso, the appellate court must put aside the jury's verdict, while at the same time bearing in mind that the jury returned a guilty verdict; must bear in mind that the issues in a trial are shaped by the forensic decisions of counsel, while at the same time also bearing in mind that under the rule in *Gillard* [*Gillard* v *The Queen* (2003) 219 CLR 1] forensic decisions of counsel are to be ignored; and, subject to the modifications mentioned, must endeavour to decide the case itself, as would occur in an appeal in a civil matter, but with the difference that, if in the end the appellate court is not satisfied beyond reasonable doubt that the evidence below established that the accused was guilty of the offence charged, the court must ordinarily order that a new trial be had.
31. *Nudd* at [6] per Gleeson CJ; at [158]–[159] per Callinan and Heydon JJ.
32. *Nudd* at [2] (fn 2), [6].
33. *Nudd* at [57] (fn 83), [87] (fn 126), [112] (fn 153).
34. Gleeson CJ, Gummow, Heydon and Crennan JJ.
35. At [84], citing *Weiss* v *The Queen* (2005) 80 ALJR 444 at 454–455, [41] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; 223 ALR 662 at 673–674.
36. See and compare the judgment of the majority at [96].
37. *R* v *Redmond & Anor* [2006] VSCA 75 at [23]. Lies were wrongly left as to consciousness of guilt. The proviso was not applied.
38. See fn 28 above.
39. *R* v *Nguyen* [2006] VSCA 158.
40. *Keller* v *R* [2006] NSWCCA 204.
41. *Gardiner* v *R* (2006) 162 A Crim R 233 (NSW, CCA).
42. *R* v *VA S* [2006] VSCA 159 at [32]–[33].
43. *R* v *Hackett* [2006] VSCA 138.
44. *W* v *R* (2006) 162 A Crim R 264 (Tas, CCA).
45. *Livermore* v *R* [2006] NSWCCA 334.
46. *Oldfield* v *R* [2006] NSWCCA 219.
47. *Taleb* v *R* [2006] NSWCCA 119.
48. *Robinson* v *R* (2006) 162 A Crim R 88 (NSW, CCA).
49. Section 80 of the Constitution provides (so far as is relevant):

    The trial on indictment of any offence against any law of the Commonwealth shall be by jury ...
50. His last conviction appeal was *R* v *LRG* [2006] VSCA 288 (see at [35]).
51. [2006] VSCA 277.
52. At [5].

Talking With Liars and Bullies

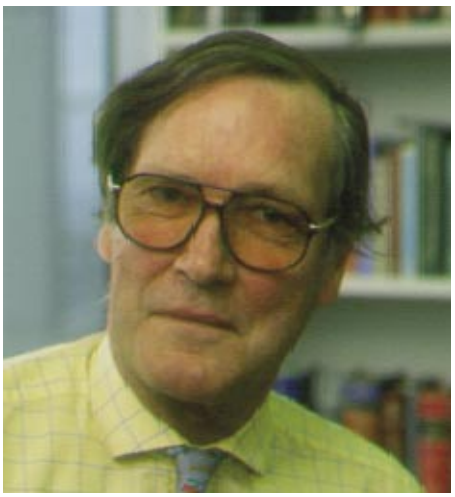
Geoffrey Gibson

TRUTH in negotiating is a little like truth in advertising — often scarce and generally suspect. Bullying comes to us with nature — since all animals are not created equal, some have the power to prevail over others.

When lawyers are talking about a possible deal, as in negotiating to settle a case, and they are talking about, say, the readiness of the victim to settle, or how much the other side may be able to offer, their devotion to veracity may seem to be less evident than when they are talking to a judge. You frequently hear statements that have as much truth value as when Captain Renault said to the owner or Rick's Café: "I am shocked, shocked, to find that gambling is going on in here." You expect a degree of vigour and chest-beating in negotiation. Lawyers used to use the word "puff" to describe how people in business talk up what they have on offer.

People can also get heated about either the principle or the money (generally the latter under the guise of the former). It is also common to hear people warning others of the bad consequences that may flow from not reaching a deal. Warnings are one thing. (Presumably their own advisers have done the right thing and given warnings.) Threats are something else. Shortly after Captain Renault collected his winnings, Major Strasser discussed the options available to the Resistance hero with Ilsa. The second alternative? "My dear, Mademoiselle, perhaps you have already observed that in Casablanca human life is cheap. Goodnight, Mademoiselle." This was not a subtle threat. It is, however, the kind of thing that is becoming sadly frequent in negotiations between lawyers that take the form of mediation.

Lying and bullying are dealt with under the headings of honesty and integrity. Where you are dealing with negotiating a settlement of litigation, there is a legal context. Under our common law of evidence, such discussions are privileged from being



Geoffrey Gibson

compelled to be read in evidence in court. The discussions are like a "without prejudice" offer to settle a case. In mediation, the parties also frequently agree that the proceedings are confidential. The result then is that the proceedings cannot be revealed to anyone outside. The prohibition extends beyond the courtroom. (It is as well for the parties to expressly stipulate the confidentiality as the law seems reluctant to imply that term.)

The privilege and confidentiality are confined to parties and the subject of the discussion. A privilege is not an immunity. An act of bankruptcy does not cease to be an act of bankruptcy because it takes place in the course of negotiations. If one party punches or shoots another party, the ordinary legal consequences follow, as they do if one party steals from, or blackmails, or defrauds another. It would be as absurd for the party charged to plead that the crime was committed in the course of negotiations, as it would be for an arsonist charged with burning down a church to say that they struck the match in the course of an act of prayer or confession.

We might therefore consider what various parts of our law have to say about lies or threats offered in, say, a mediation. We can look briefly under five headings – criminal law; civil wrongs (torts); contractual obligations; commercial law (trade practices); and the law dealing with obligations owed by those who represent the interests of others, such as lawyers and officers of corporations or representatives of government (called fiduciary obligations).

If I obtain financial gain by deception, I am guilty of the crime of theft. Now this happens daily and it has been going on since any notion of property was developed. It has been going on in settlement discussions, on both sides, for centuries, and will continue. It is only rarely discovered in a way that can be proved because the exercise we are talking of is like a poker game. You have to pay to see. Jeffrey Archer got caught and went to gaol because he took his fraud into the witness box. I shall come back to our criminal law near the end of this note.

In the form I have referred to, the crime of theft involves the civil wrong of deceit. If a party obtains financial advantage by lying about their means they could be sued, if the deceit is discovered and can be proved, for the damage caused by the decision induced by the lie, to pay or accept an amount of money. Because they have been unjustly enriched, they may also be accountable under our law of restitution.

If a party or their lawyer says something false that damages the reputation of another, they may be exposed to an action for defamation. There may be a defence of qualified privilege within the meaning of that term in the law of defamation, but that is very different from and a much more diffuse concept than the privilege described in our law of evidence. And when lawyers and witnesses claim an absolute privilege for what they say in court, there is no general immunity. The ordinary consequences follow if the

witness lies in the witness box or the lawyer threatens or insults the court.

If it is the lawyer who publishes the libel, it makes no difference for that part of our law if the lawyer does so expressly on instructions. That assertion, if sustained, may be critical on an issue of qualified privilege, but it has no bearing on whether the lawyer is liable for publication. Defamation is not a part of the law that you want to flirt with.

There is another civil wrong that may be relevant where people of unequal power are trying to reach a bargain. The tort of intimidation is not often invoked, and when it is, it is mainly invoked in an industrial dispute that has turned very nasty. It can be constituted by the use of unlawful threats against a party to induce that party to act against their interests. Take a bad case. On one side there is an impoverished cripple of little understanding and even less capacity. On the other side there is a publicly listed company with a team of lawyers. The lead lawyer looks the victim straight in the eye and says that although this little case does not register on their radar, they have the means and the motivation to run the case for weeks and, if necessary, to take it on successive appeals. Therefore, they say, the victim should take their offer, which is the only one they will ever make, even though the lawyer for the victim says that offer is inadequate to the point of being derisory. That is intimidation. If the threats are unlawful, and there is damage, there may be an actionable wrong.

So far as I know, this tort has not been invoked in the context of settlement discussions. If the intimidation has failed, there may be no real damage. If it has worked, the victim will not often be motivated to do something about it. The litigant who kicks down the door may be the one who was psychiatrically down at the time of settlement and under-represented, but has recovered and is now ready and able to complain. Similar considerations may arise when a party seeks to set aside a settlement on the grounds of undue influence.

Our law of contract provides that where people have agreed to seek to procure a result, there is an implied term of the agreement that each side will do what it can to enable the other side to get the benefit of the bargain. If therefore parties to a dispute enter into a legally binding agreement to seek to resolve the dispute by a process of negotiation, the law will imply a term of that agreement that they will negotiate in good faith.

As often as not, it is plain enough that one party does not wish to negotiate at all, let alone in good faith, and there is not much point in mumbling about refined legal obligations. But reasonable people with decent lawyers occasionally benefit from being reminded of the necessary basis of any successful negotiation. That is why, perhaps, you tend to find that the people who first refer to good faith may be the last to show any evidence of observing it. Ultimately the whole process rests on agreement, and without at least some goodwill, if not good faith, you will not convert the agreement to negotiate into an agreement to settle.

The Americans have a useful application of the doctrine of good faith. They say it is to be implied in contracts where the parties are not equal. Key examples for the Americans are insurance and employment. They then say that because the obligation arises by operation of law, breach of it is a civil wrong, and not just a breach of contract. Because there has been found to be a tort, the guilty party can be punished with exemplary damages for abusing their power and throwing their weight around. You might think that this would be a salutary remedy to have in Australia. It would be interesting to see if any parliament in Australia would be prepared to introduce such a law.

Commercial law relating to negotiations consists mainly of statutory additions to the common law of contract. State and federal laws prohibit misleading and deceptive conduct. Some provisions are criminal as well as civil. The conduct complained of has to occur in trade and commerce (a limitation that was first put there for constitutional reasons).

Whether negotiations in a mediation occur in trade or commerce will depend on the context. A court ordered mediation with lawyers on each side may be one thing. An attempt to resolve, before litigation, a dispute between shareholders or partners, or under an insurance policy, or about the sale of a painting, where lawyers happen to be present, would be something else. It is very common, and more than a little worrying, in the mediation of commercial disputes, for the lawyers far to outnumber the fee paying litigants. You get more jockeys at the barrier than horses. If you wish to say that lawyers engaged in trying to resolve a commercial dispute are carrying on their profession rather than taking part in trade or commerce — are we so old-fashioned that we have to pretend that there is an exclusive dichotomy? — then the relevant mediation might have a more sterile air than its sponsors would prefer. What do you say to lawyers who turn up and say, "We are here to be commercial"? Why are they there at all?

The significance of being able to make a claim for misleading conduct is that if it is not available the party aggrieved has to consider an action for fraud. Fraud is something which it is nasty to allege and difficult to prove. The introduction of the relevant trade practices laws removed the temptation to make such a claim when it should not have been made in the past.

There is also a difference in this part of the law from the law of libel in a lawyer expressly making a statement on the basis of instructions. With the law of defamation, "A said B murdered C" translates into "B murdered C". But this is not the case for the purpose of establishing a misrepresentation for misleading conduct. In the context of negotiations some assertions made by lawyers might implicitly be made, and only made, on instructions, but some lawyers get so close to identifying with their clients that this might be a dangerous assumption.

The function of equity is to remind us that lawyers and other representatives of the parties in dispute are in it for the parties, and not for themselves. If their own sense of vainglory conflicts with their duty, they must deal with it immediately. We have all had to sit through grandstanding by lawyers or posturing by executives where this very basic rule gets forgotten. We have all had to watch in action legendary nay-sayers who are heroic with other people's money behind them and who appear to enjoy playing with the lives of others. They remind you of the lament of Gloucester to the Old Man on the heath:

> As flies to wanton boys, are we to the gods.
> They kill us for their sport.

The notions of undue influence and clean hands may also be invoked in response to an endeavour to enforce a settlement procured unconscionably. In a sufficiently dire case, a party can move to set aside an agreement obtained by conduct that is unconscientious (equity) or unconscionable (limited under statute).

To come back to the criminal law, we describe as contempt of court the common law crime of interfering with the course of justice. That offence may be constituted by putting undue pressure on a litigant to deter them from pursuing their legal rights. Bullying a litigant into accepting a settlement that is manifestly

unfair would be a clear instance of this crime. If the threats or pressure brought against the victim as litigant amount to contempt of court, this head of unlawfulness could supply the link to enable a claim for damages to be made for the tort of intimidation.

Now, this dry recital of basic legal propositions will be unnecessary for all but a tiny number of negotiations in which we as lawyers are engaged. As I remarked, the misbehaviour under discussion is dealt with by reference to considerations of honesty and courtesy. If you hear an act of bullying described as an animal act, it is because courtesy is what separates us from animals.

But you do sometimes get an impression that some people — parties or lawyers — think that they may be operating in a zone where the Queen's writ does not run, a cone not of silence but of lawlessness. It is as if they are trading on the very proper and necessary reluctance of lawyers, including judges, to pull back the veil from the negotiation and mediation process. Mediation may have been damaged by being assimilated into the court process, but one way to kill it would be to open it up for inquiry in court or before a committee of professional ethics.

Yet a noticeable tendency remains for one side to play the man. It is usually the bigger side and it frequently looks like they have chosen their mark. This is a form of bullying and it is sickening. I am told by leaders of the common law Bar, whose opinion I value and whose judgment I trust, that they now think it is good practice for lawyers acting for a plaintiff in claims involving personal injuries to go into the opening session of a mediation without their client for fear of exposing their client to intimidation by the other side.

This is very worrying indeed. Some lawyers are, as a matter of course, not prepared to take their clients into a meeting with the other side because they do not trust the lawyers for the other side to be able to control their own clients and have them behave properly. (These people will usually be representing professional litigants.) A lawyer who said that in a commercial context at the other end of town would be regarded as meshugga.

If it is the lawyer who is engaged in the misbehaviour, and if the mediation is one that has been ordered by a court, you have an officer of the court acting in a manner calculated to interfere with or abuse a process ordered by the court. For all I know, some judges may take the view that such misconduct might of itself constitute the criminal offence of interfering with the course of justice.

However that may be, the profession plainly needs to get its act together. You usually find that it is easier to catch bullies than liars. And in the end, Major Strasser did have the courtesy to get shot. Or, if you prefer your allusions from more remote age, shortly before Rome was sacked, it sent out two ambassadors to negotiate with the Goths. They did so, Gibbon said, "perhaps in a more lofty style than became their abject condition." When they sought to talk down to Alaric the Goth, he replied, "The thicker the hay, the easier it is to mow", and laughed out loud.

Conference Updates

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.
15–21 September 2007, Kos, Greece — Kos 2007, presented by the Greek 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.
7–14 January 2008, (held annually) Cortina D'Ampezzo, Italy — Europe Pacific Legal Conference.
17–24 January 2008, St Petersburg, Russia — East West 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 & Oxford — Britain Pacific Legal Conference (dates to coincide with the first cricket test Australia–England).

The Process of Appointment o

The current process and the Bar Council report to members

ON 21 February 2007, the Chief Justice released and posted on the Supreme Court website a summary of the current process of appointment of Senior Counsel in Victoria.

On 23 February 2007, the Chairman of the Bar Council issued and circulated to all members a report of the review of the process by the Bar Council.

Some matters in the Chief Justice's summary are reproduced in the Bar Council report. Each document is set out in full below.

BACKGROUND INFORMATION

On 28 November 2006, the Chief Justice appointed 13 new Senior Counsel. This brought the number of Senior Counsel on the practising list to 228: 13 per cent of the total number of 1,672.

Soon after the announcement, the Chairman of the Bar Council received correspondence, both public and private, about the merits of the appointment process. The correspondence extended over a period of months from December 2006 through February 2007 and focussed on a number of issues:

(a) Whether the process was sufficiently transparent; whether the identity of the members of the Supreme Court advisory committee and their period of tenure should be disclosed;
(b) Whether the basis for selection of Senior Counsel should be more clearly articulated;
(c) Whether any restriction is or should be placed on the number who may be appointed as Senior Counsel;
(d) Whether any feedback or reasons should be given to unsuccessful candidates;
(e) Whether unsuccessful candidates should be given the opportunity to seek a review of the decision affecting them; and
(f) Whether the Court is best placed to assume the burden of being the ultimate decision maker in the process, rather than the principal consultant.

The current system of the Chief Justice making the appointments pursuant to Rules of the Court has been operating for three years. The Bar Council felt it timely to review how the process has worked and whether any change was desirable.

Other developments also made the review timely — the review by the South Australian Attorney-General of the process there; and the resolution of the Council of the Australian Bar Association to consider the merits of adopting a national protocol.

The Bar Council considered the matter carefully, having before it, amongst other things, the correspondence addressed to the Chairman; the Chief Justice's 21 February 2007 summary of the Victorian process; protocols from other Australian States and Territories; and the protocol for England and Wales.

At its meeting on 22 February 2007, the Bar Council unanimously resolved to confirm its support for the current Victorian process.

The Appointment of Senior Counsel in Victoria Summary of Current Process

APPLICATIONS for appointment of Senior Counsel are governed by the Rules of Court: Ch2 Rules 14.13. The Rules provide for such appointment by the Chief Justice. They confer no right of review or appeal. The Chief Justice makes the appointment by signing an instrument of appointment.

CRITERIA FOR APPOINTMENT

The Rules provide that a person who is admitted to the legal profession in Victoria and who is, and for many years has been, practising exclusively or mainly as counsel, whether in Victoria or elsewhere within Australia, may be appointed Senior Counsel in and for the State of Victoria. They do not otherwise specify criteria for appointment.

Ordinarily the Court issues a notice calling for applications for the appointment of Senior Counsel by a particular date towards the end of August. It states in part:

> The designation of a practitioner as Senior Counsel is intended to recognize those whose standing and achievements justify an expectation on the part of the public and the judiciary that they will provide outstanding services, as counsel, to the administration of justice.
>
> Senior Counsel must be, and be seen by the judiciary and by their peers to be, deserving of such recognition. Qualities required to a high degree for appointment as Senior Counsel are learning and skill, integrity and independence, maturity and a sense of public responsibility.

Once the deadline for applications has passed, the Court's staff processes the applications received, and prepares a table of applicants, setting out their respective areas of practice, year of signing the Roll and whether they have previously applied. The Court writes to the named referees seeking a written report by a stipulated date on the applicant's

f Senior Counsel in Victoria

suitability for appointment. The referees, who are usually superior court judges, then provide the Chief Justice with a written confidential report.

SUPREME COURT ADVISORY COMMITTEE

The Chief Justice appoints an advisory committee consisting of seven members of the court — two judges of the Court of Appeal, a senior judge from each of the three divisions of the Court (Crime, Commercial and Equity and Common Law) and two additional judges who are more junior. The more senior appellate judge chairs the committee. Its composition may change from year to year. Members of the committee are given, on a strictly confidential basis, a hard copy of each application and the reports received from the referees.

The committee meets frequently over a period of four to six weeks and provides the Chief Justice with its views as to who are, say, the 20 top-ranking applicants.

CONSULTATION

The Chief Justice then consults with the following officer holders concerning those applicants who practise the office holder's jurisdiction and for that purpose sends to them on a strictly confidential basis the names of the applicants:

Chief Justice of the Federal Court
Chief Justice of the Family Court
Chief Judge of the County Court
President of VCAT
Solicitor-General
Chairperson and Vice-Chairperson of the Bar Council
President of Law Institute of Victoria
Directors of Public Prosecution (Cth and State)
President of the Industrial Relations Commission
Chairperson of the Criminal Bar Association
Chairperson of the Common Law Bar Association
President of the Commercial Bar Association

Where relevant, chairpersons of other Bar Associations may also be consulted. Those consulted, however, are not given copies of the applications or reports from referees.

Ordinarily, the Chief Justice of the Federal Court consults with the Victorian Federal Court judges before meeting with the Chief Justice, as does the Chief Justice of the Family Court. The Chief Judge of the County Court consults with six judges of his court, four senior and two junior. The President of VCAT usually consults with his Deputy Presidents.

CONSIDERATION BY THE SUPREME COURT ADVISORY COMMITTEE

The Chief Justice next discusses the results of that process of consultation with the committee which then further considers the ranking of the applicants, having regard to the results of the consultation. That ordinarily occupies two or three meetings of the committee and, by early November, it furnishes the Chief Justice with its list of recommended appointees.

In the meantime, the Chief Justice herself further considers the matter and consults further with the Senior Puisne Judge of the Court and the President of the Court of Appeal.

Following these processes the Chief Justice makes a final decision on the composition of the list of successful candidates. The Chief Justice recalls the materials provided to the committee and all copies of applications and reports are destroyed. The Chief Justice retains her notes of the consultative process.

The Chief Justice announces the successful candidates, having first written to all candidates advising them of the outcome of their applications. In accordance with Rule 14.15 the appointment of Senior Counsel is in writing, signed by the Chief Justice and sealed with the seal of the Court. Successful candidates announce their appearance as Senior Counsel at a ceremonial sitting of the Court.

The particular strengths of the above process that the Chief Justice oversees are, first, the width and depth of consultation and, secondly, the confidentiality of the process which allows for candour in the consultation process, as well as the tangible contribution to the decision-making process from those knowledgeable and experienced in the relevant jurisdiction.

Appendix

ORDER 14

ADMISSION TO PRACTISE AND SENIOR COUNSEL

PART 2: SENIOR COUNSEL

Rule 14.13 inserted by S.R. No. 133/ 2004 Rule 5.

14.13 Qualification

Rule 14.13(1) amended by S.R. No. 147/205 rule 5(2)(h).

(1) A person who is admitted to the legal profession in Victoria and who is, and for many years has been, regularly practising exclusively or mainly as counsel, whether in Victoria or elsewhere within Australia, may be appointed Senior Counsel in and for the State of Victoria.

Rule 14.14 inserted by S.R. No. 133/ 2004 rule 5.

(2) A person who is so appointed shall have full authority within Victoria to do all things that Queen's Counsel or other Senior Counsel within Victoria may do and in the same manner and form.

14.14 Application

(1) A person who is qualified to be so appointed may apply in writing to the Chief Justice for appointment as Senior Counsel.

(2) Such applications shall be made at such time each year and in such manner as the Chief Justice from time to time directs.

(3) An applicant shall provide with the application such information as the Chief Justice requires.
(4) An application under this Rule and all information provided to the Chief Justice relating to the application are confidential and are not open to inspection by any other person save at the direction of the Chief Justice.

Rule 14.15 inserted by S.R. No. 133/2004 rule 5.

14.15 Appointment

(1) Appointment as Senior Counsel shall be in writing, signed by the Chief Justice and sealed with the seal of the Court and shall be announced in such manner and form as the Chief Justice determines.
(2) A person so appointed shall have and may exercise in Court such precedence as the Chief Justice directs at the time of the appointment.
(3) The appointment shall be entered on the Roll kept by the Prothonotary for the purpose.

Review of the Process of Appointment of Senior Counsel

TO members of the Bar:

From 2004 the Chief Justice of the Supreme Court of Victoria, at the request of the Victorian Bar Council, has undertaken responsibility for the appointment of senior counsel in Victoria.

Following recent criticism of the selection process, the Bar Council has reviewed the process in place for the appointment of senior counsel in Victoria. In so doing the Bar Council was conscious that the current selection process has only been in place for three years and that the nature of the decision being made by the Chief Justice will inevitably lead to some applicants being extremely disappointed.

On 22 February 2007, the Bar Council unanimously resolved to confirm its support for the current process of appointment of senior counsel by the Chief Justice.

For the purpose of assisting the review by the Bar Council, the Chief Justice released a document (available in full on the Supreme Court website and the Bar's website) summarising the current process for appointment. The process includes the following:

(a) The Chief Justice appoints an advisory committee consisting of:
    (i) two judges of the Court of Appeal;
    (ii) a senior judge from each of the crime, commercial and equity and common law divisions of the Court;
    (iii) two additional more junior judges.

The committee is provided on a strictly confidential basis with a copy of each application and the reports from referees named by the applicant. The committee meets frequently over a period of four to six weeks and provides the Chief Justice with its views on the top ranking applicants.

(b) The Chief Justice then consults with the following office holders concerning those applicants who practise in the office holder's jurisdiction and for that purpose sends to them on a strictly confidential basis a copy of the name or names of all applicants:
    Chief Justice of the Federal Court.
    Chief Justice of the Family Court.
    Chief Judge of the County Court.
    President of the Victorian Civil and Administrative Tribunal (VCAT).
    Solicitor-General.
    Chairperson and Vice-Chairperson of the Bar Council.
    President of Law Institute of Victoria.
    Directors of Public Prosecution (Cth and State).
    President of the Industrial Relations Commission.
    Chairperson of the Criminal Bar Association.
    Chairperson of the Common Law Bar Association.
    President of the Commercial Bar Association.

Where relevant, chairpersons of other Bar Associations may also be consulted. Those consulted, however, are not given copies of the applications or reports from referees.

(c) Before meeting with the Chief Justice:
    (i) The Chief Justice of the Federal Court consults with the Victorian Federal Court judges;
    (ii) The Chief Justice of the Family Court does likewise;
    (iii) The Chief Judge of the County Court consults with six judges of his court, four senior and two junior; and
    (iv) The President of VCAT usually consults with his Deputy Presidents.
(d) The Chief Justice next discusses the results of that process of consultation with the committee, which then further considers the ranking of the applicants having regard to the results of the consultation. This ordinarily occupies two or three meetings of the committee and, by early November, the committee furnishes the Chief Justice with its list of recommended appointees.
(e) In the meantime, the Chief Justice herself further considers the matter and consults further with:
    (i) the Senior Puisne Judge of the Court; and
    (ii) the President of the Court of Appeal;
(f) The Chief Justice makes the appointments.

The Bar Council agrees with the observations of the Chief Justice that the particular strengths of the above process include the width and depth of consultation, the confidentiality of the process which allows for candour in the consultation process as well as the tangible contribution to the decision-making process from those knowledgeable and experienced in the relevant jurisdiction. Such a process of its nature cannot be fully transparent and open.

Further, the Bar Council considered that there are the following further advantages:

(a) The selection process is principally in the hands of the most senior judicial officers in the State;
(b) By reason of her position, the Chief Justice has an unparalleled capacity to engage in candid consultation with the many members of Courts and

Tribunals in the State; and

(c) Because of the significance of the quality of the performance of barristers in court, the Bar Council considered that the best selection process would maximise the input from judges and tribunal members, who actually observe the barristers at work.

The principal criticisms of the current process are that they do not include provisions for feedback or a right of review. With respect to these matters, the Bar Council reviewed the processes currently in place in New South Wales and England.

In New South Wales, after publication of the list of successful applicants, any unsuccessful applicant may discuss his or her application with the President of the New South Wales Bar Association, who is a member of the Selection Committee. With respect to such a provision the Bar Council noted the following:

(a) There is no obligation on the President to disclose any matters to the unsuccessful applicant and presumably, if references are given in confidence, the President would be unable to disclose such confidential information as the basis for rejection.

(b) As the person appointing Senior Counsel in Victoria is the most senior judicial officer in the State, it would be unreasonably onerous to expect her to consult with unsuccessful candidates on an individual basis.

In England, there is provision for a complaints committee to receive complaints "about the operation of the system". It is not a review of the merits of the application. Because Victorian Senior Counsel are appointed by the most senior Judge in Victoria, the Bar Council considers it inappropriate that there should be provision for appeal from her decision.

In summary, the Bar Council considered that the advantages of the current process greatly outweighed any perceived disadvantages. It needs to be understood that every process of appointment will have its disappointed applicants.

From time to time, the Bar Council may request the Chief Justice to consider adjusting the selection process if it considers improvements can be made to it within the existing framework of the process.

Michael Shand
Chairman
Victorian Bar Council

Opening of the Legal Year: 30 January 2007

Ecumenical Observance

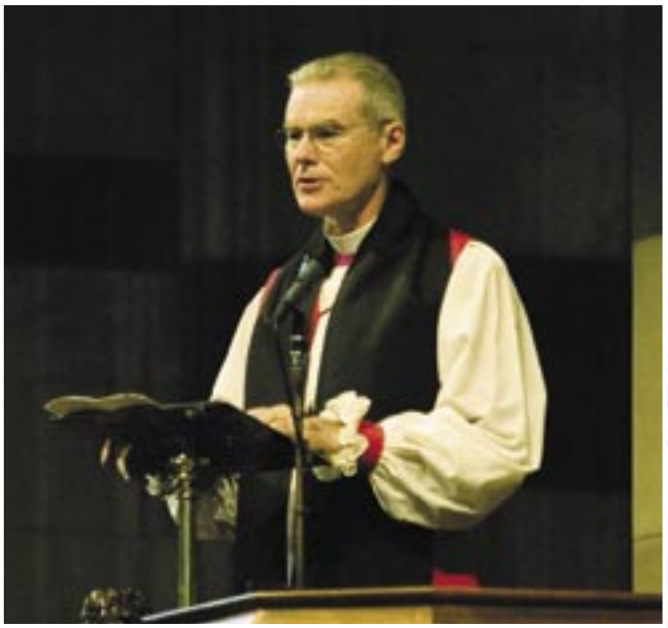
St Paul's Anglican Cathedral

Address by the Archbishop of Melbourne The Most Reverend Dr Philip Freier

Deuteronomy 30:8–14
Psalm 19:7–10
2 Corinthians 8:7–12
Luke 10:30–37

THE proposition put in the ancient wisdom of the book of Deuteronomy is plain enough: follow the precepts of God and you will prosper. "Then you shall again obey the Lord, observing all his commandments that I am commanding you today, and the Lord your God will make you abundantly prosperous in all your undertakings, in the fruit of your body, in the fruit of your livestock, and in the fruit of your soil. For the Lord will again take delight in prospering you, just as he delighted in prospering your ancestors, when you obey the Lord your God by observing his commandments and decrees." As the Psalmist says (Ps 19.1), "The law of the Lord is perfect reviving the soul." The vision of a world where the divine law is the animating source of human aspiration is a powerful one and has motivated many attempts to develop a theocratic society where the behaviour of the members of the society were brought into conformation out of aspiration or compulsion with the divine law. Monasticism and Puritanism might be seen as aspirational versions of this project and the Inquisition its compulsory counterpart.

Few if any here today would make the same sort of claims of the law under which you practice as solicitors, barristers or members of the judiciary. Each person here will have their own stories of the fallibility of the law. Is there a lawyer amongst you has not failed in a case or a magistrate or judge who has never had a decision appealed against? We have practices and procedures in the law which enable as far as is possible for the fallibility of law to be tested, and in this way reach a result that all can share a confidence in. This reality may well be the source of the necessary and healthy aspirational character of members of the legal profession to improve the way the law meets the needs of the society it serves and shapes. After all, the law touches the most treasured freedoms that we can enjoy, our liberty and the continued use of our property, and has sanctions of compulsion that are able to curtail both. Even without making anything beyond a social claim for the law we must admit its importance and seriousness for the wellbeing of the society and those individuals who form it. It is entirely proper that there is a recognition of the demands these responsibilities make on the members of the profession and the high degree of professionalism and commitment to duty that you willingly give. It is also proper that any transgressions of this professionalism are the subject of public alarm and media discussion but unfortunate for the majority who uphold high standards that the examples of fail-



The Archbishop of Melbourne The Most Reverend Dr Philip Freier gives his sermon.

People have sometimes referred to the two dimensions of loving God and loving our neighbour as the vertical and horizontal dimensions of Christian faith. Just as the cross on which our Saviour was crucified had a vertical and a horizontal element so our faith has these same two dimensions. In Australia we are fortunate that belief in God is permitted to be a matter of conscience and free will. This is not universally the case, even though the

The Dean of Melbourne, The Very Reverend David Richardson.

Chairman of the Bar Council, Michael Shand, QC, reads the Second Lesson.

ure are often the only reports about the profession that the public receives.

St Paul's encouragement of the Corinthian Christian community to excellence and his urging that they continue on the way that they have started is a helpful point of reflection in the course of any career. Paul of course is talking about a work of compassion and mercy for the Christians in Macedonia, but who amongst us could not benefit from reflecting on the motivation we had when first commencing in the career or vocation that consumes so many of our waking hours and years of our life?

Jesus taught that the relationship we have with God and the relationships that we have with each other are in the centre of what God, his Father is concerned about. Jesus showed by his life and made possible through his death and resurrection a right relationship with God. From the divine perspective the world is in the process of redemption as it absorbs the world changing transformation that was made possible in Christ. From our human perspective, as people who seek to follow Christ or even consider his claims over us, we are often aware of the situations where this transformation is desperately needed.

sway of the compulsory atheism of various totalitarian regimes appears to be waning throughout the world. In a society where we are free to believe in Christ as a matter of conscience and choice we are usually in a situation where we are also free to choose how we operate in this horizontal dimension of being a faithful follower of Jesus Christ. I mean by this that as long as we broadly follow the laws of the society in which we live, the society itself is not concerned about the internal state of our souls, whether we harbour a grudge, or are people whose lives are shaped by greed or envy. This is left to the individual

who is free to choose to commit to a transformed life or not. Your experience of human nature may have brought you to a similar conclusion, this is the nature of the individual freedom we have in our society that sees such matters as the subject of aspiration rather than compulsion.

Since this is a matter of choice it is important that we return to the biblical sources of how Jesus teaches us to live in this horizontal dimension. Two principles stand out. Firstly that Jesus leaves to us his work of telling the people of the world that God has good news for them. This means calling people to new life, conversion, baptism and incorporation into the life of the church. We recognise this need not just in the places and cultures who have not heard this message during their history but also amongst the people and lands that have been the cradle of many generations of Christian believers.

The horizontal dimension of Christian faith will mean that Christians seek to shape the community in which they live so it better reflects the purposes of the God whom they have known as loving and restoring. Australian society will have the influence of the Christians who are part of their number and in Australian society we should expect the followers of Jesus Christ will be vigorous citizens. Freedom to worship and to share the good news of the gospel are values that Christians have always expressed even when the society in which they have lived was unsupportive. Sometimes claiming this freedom has been costly and many have forfeited their property, their freedom and their lives on this account over the two millennia of Christian faith. Christians know well that the legal code that arises from the consensus of public opinion is not inevitably permissive or enabling of the freedoms they seek. But a society that concedes these freedoms stands to gain far more from its Christian members than one that does not.

Jesus taught that Christians should love their neighbour as themselves and when he was asked "Who is my neighbour?" responded by telling the parable of the Good Samaritan. Jesus' teaching is that help in a time of need is the clearest expression of love for the neighbour and that the neighbour is the one whose need has come before us. It is easy enough to imagine the scene that Jesus described, and occasionally we might have a life experience that seems similar to the occasional situations of coming across someone in distress or urgent need where our involvement is decisive for their well-being.

Justice Dodds-Streeton, right, and Justice Williams, with students from Shelford Girls Grammar, Melanie Bolitho, Emma Rotstein, Kylie Dolan and Francesca Kuperman.

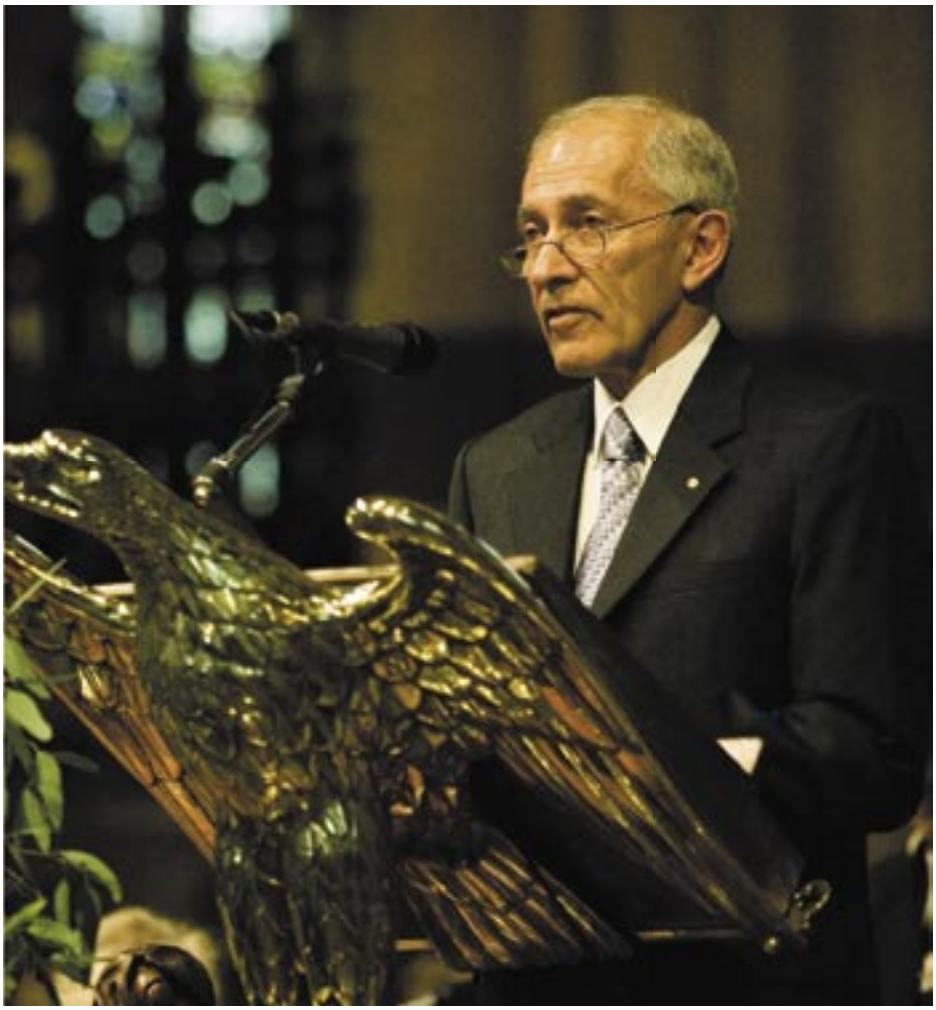
Like the Good Samaritan in the Gospel story today you are often the people who come upon the troubled and the needy; they come to your offices or chambers in search of representation or advice, or for the application of the law in your courts.

Jesus' teaching in the parable of the Good Samaritan is demanding and one which we are all conscious of ignoring or rationalising as we encounter the world and its pain. The parable of the Good Samaritan also shows something else that in addition to personal acts of mercy we might do as individuals there is a secondary way to show love and compassion which is just as important. Remember that the Samaritan came upon the injured traveller and rendered him immediate assistance but the lasting effect in his restoration and recovery was the Samaritan's willingness to provide for his lodgings while he returned to his health and well being. This is the secondary element of love for neighbour and is the reason why Christian Churches have been for many generations the founders of such institutions for the compassionate service of others.

I'm sure that we need to practice both the primary and personal part of love for neighbour as well as the secondary and indirect part as we respond to the world and its needs. There are many opportunities that you have through your work to encounter the "bruised traveller who has suffered in the journey". If you have the time to be attentive to the stories of the people whom you encounter I'm sure that there are many layers of need that go far deeper than the presenting issue or matter of concern. The generosity of members of the legal profession in providing services without charge or fee is a good example of the application of this primary dimension of love of neighbour. The pro bono work

The Most Reverend Dr Philip Freier and Chief Commissioner Nixon.

Chief Justice Bryant.



His Excellency Professor de Kretser reads the Gospel.

by members of the profession is a great testimony to your commitment to invest in this interior and unregulated dimension of human and societal relationships. Just as the Good Samaritan took the traveller to a place of rest and recovery, what I am calling the secondary dimension of love for neighbour, so you entrust those whom you encounter to what we call the "legal system". Even though it is less immediate than the primary manifestations of love for neighbour your contribution to the confidence and quality of outcomes of the system is also an expression of love for neighbour. It is equally something that may well be interior and unnoticed but also involves the vigorous debates that happen between the members of a healthy profession as you keep each other accountable to the aspirations and integrity of your calling.

Relationships between countries could be considered to fall into this secondary area. As we know economic justice and the capacity of any nation to meet the needs of its people are the platform for a peaceful society within a country and for the peaceful interaction between states. The growth of globalisation means that we are all more aware of this interaction. In this way we should be concerned that the policies of our governments build the platform of peace and justice as one nation interacts with another or as the economic interests of corporations, which are no longer just identified with any individual nation, work across national boundaries. Love of neighbour will work its concern into this secondary area. You will know far better than I do the dimensions of international law and the means available to influence good environmental, labour and human rights outcomes outside of our own country.

I have quoted some words from John Wesley's covenant service in my column in the *Melbourne Anglican* this month, I would like to read it to you now as I close and encourage your reflection on these words and what they say about the Lord's call for us to be partners in the mission of God.

> Christ has many services to be done:
> some are easy, others are difficult;
> some bring honour, others bring reproach;
> some are suitable to our natural inclinations and material interests,
> others are contrary to both;
> in some we may please Christ and please ourselves;
> in others we cannot please Christ except by denying ourselves.
> Yet the power to do all these things is given to us in Christ,
> who strengthens us.
> Therefore let us make this covenant of God our own.
> Let us give ourselves to him,
> Trusting in his promises and relying on his grace.

Roman Catholic Observance (Red Mass)

St Patrick's Roman Catholic Cathedral

Homily for the Red Mass by Father Joe Caddy, Chief Executive Officer, Centacare Catholic Family Services

AMERICAN author Cormac McCarthy's latest novel *The Road*[1] published last year is a grim story set in post-apocalyptic times. A father and his young son walk alone through burned America. Nothing moves in the ravaged landscape save the ash on the wind. It is cold enough to crack stones, and when the snow falls it is grey. The sky is dark. Their destination is the coast, they hope it will be warmer there, although they don't know what, if anything, awaits them. They have nothing; just a pistol to defend themselves against the lawless bands that stalk the road, the clothes they are wearing, a cart of scavenged food — and each other.

The Road is a moving story of a future in which nearly no hope remains. Frightening in its vision of that future *The Road* presents a scenario of where we might headed if we ignore the world of community and allow the world of the individual to reign free and unrestrained.

The love between the Father and Son is the only sign of hope in the story. It is fragile and yet extremely powerful (or perhaps empowering) and through it survival is ensured (and while I won't tell you the ending of the story) it is through that love and survival that the story leaves us with a glimmer of hope for a new and emerging community.

In some descriptions of the community of God expressed in the Trinity the Spirit similarly is described as that warmth and love existing between God the Father and the Son — a Spirit that empowers.

It is the Spirit that our readings today, the traditional readings for the Red Mass, invoke. Drawing on three different elements of the scriptures — the prophet Isaiah, John the evangelist, and Paul the apostle — they give us a vibrant picture of the Spirit of the Lord:

Most Reverend Denis Hart DD, Archbishop of Melbourne.

Justice Cavanough.

Reverend Joe Caddy.

- Spirit sent by the Father in Jesus' name;
- the Spirit of wisdom;
- the Spirit that will remind us of all that Jesus has said;
- the Spirit that brings understanding of what has been revealed.

The Spirit was given to the prophet Isaiah as part of his being commissioned to:

- bring good news to the poor;
- bind up the hearts that are broken;
- proclaim liberty to captives;
- bring freedom to those in prison;
- proclaim the Lord's year of favour …

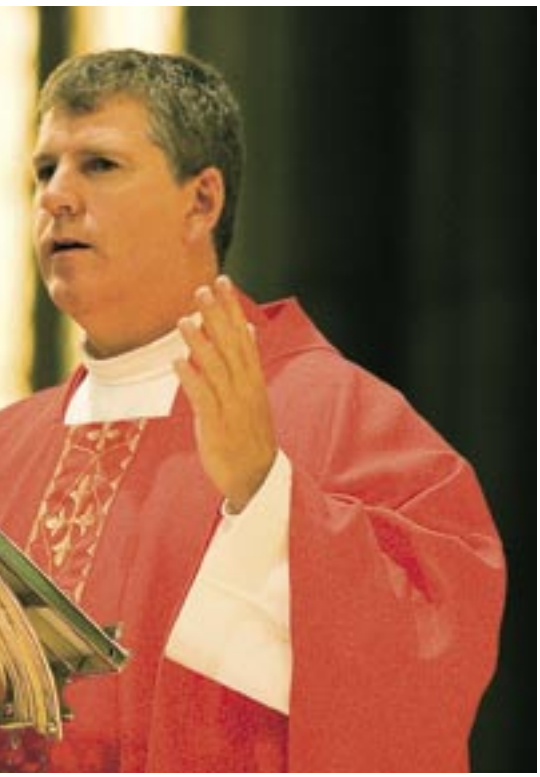
Each of us is enlivened by the Spirit. God is with us, as individuals, and as a community of believers. We not only have the teaching and example of Christ to guide us, but we are infused with the Spirit that gives us a "wisdom and perception of what has been revealed".

We know from our own experience, and Cormac McCarthy's story throws further light on the fact, that for the human person to flourish individual survival is not enough; community is necessary.

God's plan for humanity has always been a social one. He promises Abraham that his descendents will number as

many as the stars and will become a great nation. The Exodus from slavery in Egypt and the 40 years in the desert is the journey towards the Promised Land and the nation that will be built. Jesus himself came to inaugurate the Kingdom of God.

When he was asked in Matthew's Gospel what was the greatest commandment of the law Jesus replied, "You must love the Lord your God with all your heart, with all your soul and with all your mind." Then he emphasised the communal dimension. The second greatest law he said, which resembles the first, is this: "You must love your neighbour as yourself."



In Catholic social teaching the foundational principle of human dignity recognises that each human person is made in the image and likeness of God. Again this in turn gives rise to a social dimension, the second basic principle of Catholic social teaching, the notion of common good. The principle of common good acknowledges that my human dignity meets your human dignity and that a series of rights and obligations emerge that are to apply to all in the community setting.

So our behaviour towards one another and our ways of relating are vital to the full human flourishing of individuals and communities. Today we celebrate this as we mark the opening of a new year for the legal profession. The law to a large degree represents the governing arrangements that we put in place in civil society to help us towards the outcome that Jesus promised when he said that "he came so that we might have life and have it to the full". (John 10:10)

The rule of law underpins a great deal of our social and material well being and security. Nothing brings this home more starkly than to contrast our situation with the lawlessness characterised in Cormac McCarthy's novel *The Road* and again by Mel Gibson in his recent film "Apocalypto". Lawyers and those associated with the legal profession are central to the effective operation of this civilising system.

Stuart Rowland.

Justice Tracey, Kevin Andrews and Patrick Sweeney.

But orderliness and due process are not of themselves sufficient to deliver a society that enables all to thrive. Justice — fairness — is of central importance. And lawyers are also often better placed than others to identify the opportunities for improvement in the operation of the institutions and rules that maintain the rule of law.

Understanding of rights and obligation; access to redress; protection for the weak — these are all areas where there have been great advances in this society over the centuries, and over recent decades. But all of us are conscious of the scope for further improvement. I am acutely aware through the work of Centacare Catholic Family Services and my experience as a prison chaplain that there are too many who come to the attention of the court and are subject to the sanctions of the criminal law because such other social systems as housing, health (especially mental health) or education have failed them.

Custodial sentencing is a central part of our current criminal legal system. It is an area where, in particular, there have been steady advances over time in terms of clarity and rationality in sentencing, in respect for the rights and well being of prisoners, and in working to develop more effective alternatives.

When he was asked in Matthew's Gospel what was the greatest commandment of the law Jesus replied, "You must love the Lord your God with all your heart, with all your soul and with all your mind." Then he emphasised the communal dimension.

But it remains an area of great human suffering, where many of the commonly accepted and shared objectives for those imprisoned are not met.

It is not a matter of being hard or soft on crime — there is plenty of evidence that more, or longer or harsher prison sentences do not reduce crime. The issue is whether we are effectively addressing the collection of needs of the society and of the individuals involved.

Koori courts, drug courts, community legal centres, non-custodial sentencing generally, effective education within prisons, and so on all do make a difference. There may be a short-term dollar cost but in the longer term proper formation and the creation of opportunities for disadvantaged individuals and groups will be less expensive in both public dollars and human misery.

The faith and salvation of each of us is not just played out as individuals, but as individuals who have a role in the com-

munity — with friends, family and as members of a profession.

Lawyers, while they have the same range of personal obligations that we all share, do encounter a particular range of opportunities, challenges and obligations.

Your patron saint, St Thomas More, is recorded by his son-in-law William Roper, as putting the just application of the law above personal assessments:

> this one thing I assure thee on my faith, that if the parties will at my hand call for justice, then were it my father stood on the one side and the devil on the other side (his cause being good) the devil should have right.[2]

Clearly the effective and just application of the law is a matter of morality and is in the interests of us all.

So too is the broader call to work for justice and for those who are the poorest.

But orderliness and due process are not of themselves sufficient to deliver a society that enables all to thrive. Justice — fairness — is of central importance.

This work is not always directly advanced in the drafting of particular documents, or the advocating or considering of particular cases. But the understanding gained from that work can and should inform that broader understanding, and the appropriate action in that sphere.

We also see many examples of lawyers, as with other professional people, and others with special talents, using their professional skills to advance the activity of schools, hospitals, community service organisations, or those needy individuals who are not in the position to pay for services.

I am highly aware of the great amount of effective pro bono work on behalf of individuals and the organisations that serve them. The society owes the members of the legal profession a great debt for this work, and the Catholic community has perhaps benefited disproportionately in this area.

Finally I invite you to hear the words of today's reading from St Paul to the Ephesians as your own and as we embark on a new legal year I offer those words as a blessing to each of you:

Justice Cavanough, Chris Melis, Judge Frances Hogan, Justice Elizabeth Curtin and Judge Frank Dyett.

Most Reverend Denis Hart DD, Archbishop of Melbourne; Stuart Rowland; Anthony Krohn and Daniel McGlon.

Justice Cavanough, Simon Crawford and Justice Bongiorno.

Gerard Meehan, Reverend John Caddy, Judge McInerney and Róisín Annesley.

> May the God of our Lord Jesus Christ, the Father of glory, give you a spirit of wisdom and perception of what is revealed, to bring you to full knowledge of him.
>
> May he enlighten the eyes of your mind so that you can see what hope his call holds for you, what rich glories he has promised the saints will inherit, and how infinitely great is the power that he has exercised for you. (Ephesians 2:17–19)

Notes

1. Cormac McCarthy; *The Road*, Picador 2006.
2. William Roper, *The Life of Sir Thomas More.*

Jewish Observance

The East Melbourne Hebrew Congregation

Address by Rabbi Shamir Caplan

ESTEEMED Judges, barristers, members of the legal profession, representing the State Government Mr Tony Lupton, representing the Opposition Mr David Davis, Rabbi Heilbron, synagogue President Danny Segal, welcome to everyone present today. Thank you for coming this morning to East Melbourne Hebrew Congregation. On behalf of the board, I would especially like to thank Kliger Partners and Madgwicks for their generous sponsorship of the morning tea in our social hall, to which everyone is invited following the service.

Moments ago, we read together from a passage in Deuteronomy, in which Moses reminds the Jewish People that they are to utilize judges — to establish a court system — who are to decide justly in the popular disputes presented to them. The book of Deuteronomy itself is in fact largely Moses' recapitulation of the events and teachings contained in the past four books of the Torah.

And it so happens that the establishment of this system of judges that Moses is referring to in Deuteronomy is first mentioned in Exodus; indeed, the public Torah reading two weeks from now will include these very verses.

And when you read that section of Exodus, you realize two surprising things. First, the concept of establishing a judicial system in the Torah isn't explicitly attributed to God. It didn't even come from Moses, the Giver of the Law. Chapter 18 tells us that Yitro/Jethro, Moses' father-in-law, who in point of fact was a pagan priest, is the one who conceived of this innovation. And Moses, and his people, accepted this suggestion, because, as our sages teach us, we must accept truth when we are presented with it, regardless of its source. And further, by implication, this passage takes for granted that there is profound truth in the world around us, taught by people other than our co-religionists, that we can and should learn from. In countless ways, the Torah expects of us a deep sensitivity and respect for the Other. Given the news these past few weeks, I humbly submit that clerics of all stripes would do well to remember this message.

Rabbi Shamir Caplan.

And so, Jethro tells his son-in-law Moses, who has just led his people from their terrible slavery in Egypt, you are not doing the right thing. Your people are coming to you — the whole nation turns to you — to resolve their differences, to help them understand the practical applications of the divine law. And it's simply too much for you. Find worthy judges from among your people, prepare them well, let them adjudicate. And if there are issues that they cannot resolve, let them be referred to you, the "ultimate appellate court", for after all you, Moses, are the one who received the revelation of the divine law originally.

This sounds like very practical advice on effective client management. Wonderful! But ladies and gentleman, we have a problem. Because this conversation between Jethro and Moses takes place a few pages *before* we read about the revelation itself! Jethro is telling Moses how to efficiently adjudicate the law, before the law exists. Moses only receives the Ten Commandments, the beginning of the revelation of the Torah, two chapters after

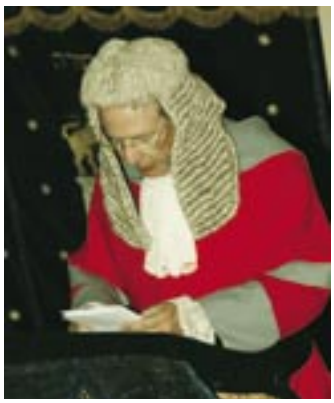
George Golvan QC

Vivien Lewenberg.

Lydia Kinda.

Kingsley Davis.

Tom Danos.



The Honourable Justice Mandie.

Judge Lewitan.

Hamish Rotstein.

Simone Jacobson.

Justice Kaye and law student Nasiya Morris.

this conversation!

Some Biblical commentators explain this anomaly by saying that the conversation with Jethro and Moses actually took place "after" the revelation of the Ten Commandments, and in this instance, the Biblical narrative is not in chronological order. Which begs the question, why is it that the Torah needs to locate this conversation before the giving of the Ten Commandments?

Perhaps the message is this: before we can speak meaningfully about the laws themselves, we must first clarify how they are to be given real expression; how the law is to be systematically applied in real life. Without a means of bringing the law to the people, the law itself cannot live.

And what's more, it cannot rely on one person, however well-intentioned. What is called for is a judiciary, a system of legal adjudication. And by establishing this thousands of years ago, the Torah is emphasizing that Jewish law is based on principles, not personalities.

Not that the Torah is suggesting that Moses would project his personality into his role as law-giver and judge. Rather, it is simply underlining a vital notion, one that is definitional to law itself – that is, that law must be based on principles, not personalities … not the personalities of the judges, nor of the accused. The rule of law is the means of building a stable and civil society. One need only read the opening passages of the constitutions of the Victorian Bar, or the Law Council, to see that this notion is well-ensconced in the legal psyche of Australia.

And Judaism recognizes this truth not just "within" the Jewish legal framework, but within civil society as well. The primary expression of this idea is the rabbinic dictum, Dina d'Malchuta Dina, that is, the law of the civil authority has Jewish legal import. In other words, to be a truly devout Jew, one must also follow the laws of the civil authority. So, paying your taxes essentially becomes a religious exercise! One wonders what the ATO would do with that!

And by extension, this means that the work of those assembled here today in the legal profession, as you strive to fairly present people's cases to the best of your abilities, or when you work to adjudicate justly, then your work is holy work.

And while the civil year has just begun, we await another New Year's Day this Saturday, which marks the Festival of Tu b' Shevat, the Jewish New Year for the trees. It is with that in mind that I quote the famous teaching of R' Elazar ben Azariah, in the Chapters of our Fathers, who used to say:

> Anyone whose wisdom exceeds his good deeds, to what is he likened? To a tree whose branches are numerous but whose roots are few; then the wind comes and uproots it and turns it upside down, as it is said in Jeremiah "and he shall be like an isolated tree in an arid land and shall not see when good comes; he shall dwell on parched soil in the wilderness, on a salted land, uninhabited." But one whose good deeds exceed his wisdom, to what is he likened? To a tree whose branches are few but whose roots are numerous; even if all the winds in the world were to come and blow against it, they could not budge it from its place; as it is said (also in Jeremiah) "And he shall be like a tree planted by waters, toward the stream spreading its roots, and it shall not notice the heat's arrival, and its foliage shall be fresh; in the year of drought it shall not worry, nor shall it cease from yielding fruit."

Indeed, while wisdom is of course a crucial part of the picture, it must be translated into action. It is our good deeds — our constant striving to apply the wisdom of the law justly and fairly to people in their real lives — that establishes the most profound roots in our society, that yields the sweetest fruit. May we be blessed to humbly go about our business, and to always sense the sacred nature of our work … and may our strivings for justice always bear fruit. Amen.

Justice Habersberger and Phillip Sheezle of Rigby Cooke.

Joshua Kohn, Rabbi Shamir Caplan and Deborah Mandie.

Buddhist Observance

The Fo Guang Yuan Art Gallery

THE Buddhist ceremony this year was the third of its kind and is unique to Melbourne.

The ceremony was in the temple of the Fo Guang Yuan art gallery in Queen Street, which is a wonderful space and an amazing art gallery. There is also a wonderful kitchen that serves vegetarian cuisine at lunchtime.

The shrine room at the top of building was used for the ceremony.

There was chanting, a reading of the Heart Sutra, an opening prayer from Master Hsing Yun and guided meditation from the Venerables Young Wei and Miao Lai, who are both connected to the temple. Their tradition is the Buddha Light International Association, a Chinese tradition in Buddhism.

Participants were also given the unique opportunity to ask questions of the Venerable Miao Lai.

An engaging Dharma talk was given by the Venerable Chi Kwang Sumim around the subject of justice and what that means from a Buddhist perspective. She is from a Korean tradition of Buddhism.

Everyone left the ceremony calmer, filled with tea and beautiful sweets and with a gift from the Fo Guang Yuan Temple.

Venerable Young Wei, Venerable Chi Kwang and Venerable Miao Lei.

New Legal Year Launched in S

Brilliant sunshine and hot cups of coffee greeted more than 400 people in Hardware Lane early on the morning of 30 January at a celebration to mark the start of the legal year.

THE Legal Laneway Breakfast, formerly "Portia's Breakfast", is now one of the biggest and most inclusive networking events of the legal calendar. Victoria Law Foundation hosted the successful event with Australian Women Lawyers, Victorian Equal Opportunity and Human Rights Commission, Judicial College of Victoria, Legal Services Board, Leo Cussen Institute, LIV Young Lawyers' Section, Sentencing Advisory Council, Victorian Law Reform Commission, Victorian Women Lawyers, Women Barristers' Association and Women's Legal Service Victoria.

Julian Gardner, Public Advocate, Office of the Public Advocate, and Dr Helen Szoke, Chief Executive Officer, Victorian Equal Opportunity and Human Rights Commission

The Honourable Justice Neave AO and Elizabeth Bennett, Associate to Justice Neave, Court of Appeal, Supreme Court of Victoria and Professor Morag Fraser AM, Board Member, Victoria Law Foundation.

Sue Tait, Manager Complaints, Office of Police Integrity, Michael McGarvie, CEO, Supreme Court of Victoria, and His Honour Judge Grant, President, Children's Court of Victoria.

His Honour Judge Grant, President, Children's Court of Victoria, Professor Kathy Laster, Executive Director, Victoria Law Foundation, Mick Francis, CEO, and Chief Magistrate Gray of the Magistrates' Court of Victoria.

A who's who of the legal sector attended the breakfast, including most heads of jurisdiction, members of all courts, heads of legal sector agencies, judges, solicitors, barristers, government lawyers and academics. The lively scene provided the backdrop for a live cross from The Law Report on Radio National.

Guest speaker her Honour Justice Marcia Neave congratulated Victoria Law Foundation for its pioneering work in making the law accessible for 40 years, and launched a new pocket-sized edition of the Foundation's Legal Precinct Map. The annual raffle raised over $700 for Women's Legal Service Victoria and featured prizes generously donated by local businesses, including a night for two at the Sebel Hotel with breakfast at Treasury Restaurant.

Sunny Laneway Tradition

Paul Lacava S.C., Council Member, Junior Vice-Chairman, The Victorian Bar Inc. and Board Member Victoria Law Foundation, draws the raffle with help from Justitia, aka Lorin Clarke of Victoria Law Foundation. Over $700 was raised for Women's Legal Service Victoria (WLSV).

Dan Perkins, Lawyer, Corrs Chambers Westgarth, Jamie Gardiner, Victorian Equal Opportunity and Human Rights Commission, and Matt Drummond, Journalist, Australian Financial Review.

Katherine Wynn, student intern at the Sentencing Advisory Council helping pass round the delicious Brunetti cakes.

The Honourable Justice Neave AO, Court of Appeal, Supreme Court of Victoria, addresses the crowd at the Legal Laneway Breakfast 2007.

Michael Brett Young, CEO, Law Institute of Victoria, and Kerry O'Shea, Manager, Communications, Legal Services Board.

New Silks' Ceremony in High Court of Australia

Tim Margetts S.C.

On 29 January 2007 12 of the 13 Victorian silks appointed on 28 November 2006 took their bows upon the announcement of their appointment before the High Court.

BY early afternoon, many who had travelled up earlier in the day had gathered in the Garden Terrace Restaurant of the Hyatt Canberra for some "light" refreshment before the formalities commenced. Time moved quickly and around 2.30 pm all counsel made their move to the High Court robing room which, for many of us, was a first experience (and possibly the last!).

Whilst robing, we met some of our colleagues from New South Wales and Queensland who, like all of us, were a bit uncertain how the afternoon would unfold, but unanimously "relieved" that we had not been given "speaking" roles.

The Victorians were also somewhat challenged by our counterparts from New South Wales and Queensland who robed in their full bottomed wigs.

We were ushered into the High Court and took up our nominated seating, which for the Victorians was behind the new silks from New South Wales and Queensland. At this time, our Chairman, Mr Michael Shand QC, emphasised that the rosettes (a Victorian tradition) were much more becoming than a full bottomed wig and indeed far less expensive. We all felt better, having been reminded of the economic implications of the different wig and robing traditions.

The announcement of the appointments of Queen's Counsel and Senior Counsel by the Chairman of the respective Bars proceeded smoothly, there being one Queen's Counsel from the State of South Australia who wore no wig. Chief Justice Gleeson, on behalf of all the members of the Court, congratulated the newly appointed Senior Counsel and made a short speech noting that the announcement of the new silks in the High Court at the commencement of the law term had come about with the development of a national bar, and the ceremonial sitting itself signified the national character of the legal profession. The Chief Justice touched briefly upon the debate currently receiving some attention in the media over the process of selection of Senior Counsel. After the Chief Justice's address the Court was adjourned and a reception was held in the foyer of the High Court. Cheese and tomato sandwiches and French pastries were in abundance, as well as Australian sparkling wine!

The new silks from all States were not

Back row: Michael Shand, Ian Martindale, Mark Gamble, Christopher Caleo, James Mighell, Anthony Kelly.
Front row): Mark Taft, James Montgomery, Jane Dixon, Timothy Margetts, Richard Smith, Matthew Connock.

given much time to enjoy the hospitality as photo sessions were hastily arranged and organised by the ABA and other State Bar Associations. As some preferred the afternoon tea and champagne, the photographer had trouble getting together all the new silks, but eventually everyone made it to the steps for the group photos. Kindly, some of the appointees from NSW and Queensland offered to lend their full bottomed wigs to the Victorians for the photos, but we graciously declined.

ABA. The Honourable Justice Callinan AC, who was made a lifetime member of the ABA that evening, proposed the toast to the new silks, and the Queensland DPP, Ms Leanne Clare S.C. responded, focusing her speech on the role of the DPP in Queensland and the need for independence.

After the dinner concluded we all slowly made our way back to the Hyatt Hotel and to the Garden Terrace Bar, where the day had begun many hours ago. At this time some of our colleagues from

After the photo session and the reception, most of the appointees and their guests headed back to the Hyatt Canberra, hoping for a swim in the pool, as by this time it was very hot. Unfortunately water aerobics were underway, and I think it is fair to say no one wanted to join the class, although a few of us could have clearly benefited from the exercise.

In the early evening, we headed back to the High Court for the dinner in the Great Hall. As most of us were not driving, the dinner progressed in a most relaxed manner. Speeches were made by the past and incoming presidents of the New South Wales and Queensland joined us, but for the first time the new silks from Victoria out-numbered our counterparts from the other States. The celebrations continued for some hours, but not without challenging moments, the least of which being that the hotel closed the bar at about midnight. Fortunately, through intense negotiation with the hotel management, agreement was reached for the ongoing supply of drinks until the night came to a halt, when the last few standing, to use a term recently used in the debate about the silk selection process, "retired hurt".

The Essoign Wine Report

By Andrew N. Bristow

BERESFORD SHIRAZ 2004

BERESFORD Wines was established in 1985 by Rob Dundon. Rob Dundon is the chief winemaker who commenced his winemaking career in 1974 with the Hardy Wine Company in McLaren Vale and going on to form Beresford Wines in 1985

Rob's uncompromising dedication to winemaking has become his trademark.

Working with Rob is Scott McIntosh. Scot learned his craft in the McLaren Vale at Maglieri Wines.

Winestate magazine in its May 2006 edition rated the wine with five stars and said: "Great wine with an attractive, complex and stylish nose. Super palate with lovely softness. Has length, complexity and intensity of lip-smacking black cherry flavours and quality toasty oak."

This wine's bouquet exhibits typical McLaren Vale shiraz aromas of pepper, spice and dark berries.

The wine colour is a deep dark red with a touch of purple.

The palate is soft, juicy, luscious dark berries with spicy characters and subtle ground black pepper. The finish is long with a lingering finish of well-balanced oak and fruit with an excellent tannin balance. Although drinking well now, this is a wine with aging potential. It has 14.0 per cent alcohol. It should be drinking well for at least the next four to eight years. It is available from the Essoign Club at $32.00 a bottle or $7.50 a glass (or $27.20 takeaway).

I would rate this wine as middling barrister with good prospects, able to do a Supreme Court cause if called upon, but not given the opportunity often enough.

Women Barristers Talk: Hearts and Minds, the Next Step

Speech by the Honourable Justice Marcia Neave AO at the WBA Anniversary Dinner held on Thursday 23 November 2006.

THANK you so much for inviting me to speak at the Women Barristers' Dinner. This is the second time I have had that honour. Although I was never a barrister I have been involved with the Women Barristers' Association in many ways in the past. In 1998 I was a member of the Steering Committee chaired by Justice Stephen Charles, which oversaw the production of the Report on Equality of Opportunity for Women at the Bar.

That Report interviewed women barristers about their experiences, examined the briefing practices of law firms and collected statistics on women barristers in the superior courts. It provides a valuable yardstick for measuring the progress of women at the Victorian Bar over the past eight years.

In my speech at the 2001 Women Barristers' dinner I looked at the ways in which the historical over-representation of men in the legal profession had shaped the nature of law and the ways the law had, in turn, reflected and shaped social attitudes about the role of men and women. I argued that law traditionally reflected the perception and reality of men and that women's disadvantaged position in society was unlikely to be recognised and addressed by law unless there were significant increases in the number of women at senior levels in the profession, including women judicial officers, senior practitioners and law reformers.

The Attorney-General was present at the Women Barristers' dinner in 2001, when I argued for the appointment of greater numbers of women judges. I can assure you that it never entered my mind then that I might be considered for judicial office myself. I want to congratulate him on the improvements to the gender balance of the judiciary which have occurred over the past five years.

Ten years ago Justice Rosemary Balmford, whom we are honouring tonight, was the only woman Supreme Court judge in Victoria. Today nearly 15 per cent of Supreme Court judges,[1] 35 per cent of County Court judges[2] and 34.26 per cent of magistrates are women.[3] The improvements in Victoria may be contrasted with the rather disappointing figures for the federal magistracy, to which only 18.5 per cent of women have been appointed since that judicial office was established in 1999.[4]

Other figures about the composition of the legal profession are less encouraging. For some years now 50 per cent or more of law graduates have been women, but this is not reflected in the gender composition of the Bar or of law firms at senior levels. It is ironic that the proportion of women barristers (21 per cent)[5] is now lower than the proportion of women County Court judges and magistrates. The majority of Bar Readers in the last intake were men. I also note that only 7 per cent of silks are women.[6] These figures may have declined a little because of recent appointments to the Bench, but they are very low.

The recently released Gender Appearance Survey,[7] indicates unsurprisingly that women make up a minority of the counsel appearing before any judicial officer. There is also evidence that the participation of women has declined in more senior or complex matters. Even more disturbing was the finding that in the Federal Court, the average length of hearing for a male who was junior to senior counsel was 223.6 hours, whereas for a female junior counsel in the same position, it was 1.4 hours.

Unfortunately we still see relatively few women barristers in the Court of Appeal, and very often they do not have speaking parts, although those who do are extremely capable.

A recent report by the Law Institute of Victoria[8] surveyed firms of different sizes to determine their composition and working hours. Large firms were more likely to have women partners, but proportionally large firms did not have more women partners than small firms. Of the 39 firms with between four and 20 partners, only two firms had three women partners and no firm had more than three. The Report concluded "women at partnership level in Victorian firms are a minority". In the commercial arena the world looks a little brighter for women. It was reported in *Lawyers Weekly* that while there were slightly fewer women working in-house,[9] than in firms, 30 per cent of senior positions in-house were held by women.[10]

The figures I referred to above are not peculiar to the legal profession. For feminists, academics and activists who have worked on issues of gender equality for many years, they are part of a familiar pattern. Women have certainly made some gains, but improvements are patchy and women still face significant obstacles in a number of areas.

On the one hand women are clearly better off than we were 50 years ago. Women are now more prominent participants in political life and civil society,

Judge Judith Cohen, Justice Rosemary Balmford and Justice Marcia Neave.

although the majority of senior positions in academia, the law and commerce and industry are still occupied by men. This year the enactment of the Victorian Charter of Rights and Responsibilities formally recognised the right to equality before the law. The Equal Opportunity Act makes it unlawful to discriminate in areas such as education, employment and the provision of goods and services on the grounds of gender, pregnancy and marital status. The criminal law principles which treated women as unreliable witnesses in sex offence cases were repealed many years ago. Recent reforms to sexual offences laws based on recommendations made by the Victorian Law Reform Commission will make it less stressful for complainants in sexual offence cases to give evidence.[11] Violent men who kill their partners are no longer able to rely on the partial excuse of provocation.[12] The high incidence and terrible human cost of family violence is better recognised and there are now more remedies for women who are assaulted by their partners.

On the other hand there is still a substantial gap between the rhetoric and the reality of gender equality, both at the Bar and in the broader workforce. Compared to many other women, barristers are a well educated and privileged group, but the patterns of gender segmentation which exist in the general workforce are apparent at the Bar, where women are under-represented in the senior ranks of the profession. While I do not have figures on the comparative earnings of male and female barristers, I think it is highly likely that women barristers generally earn less than their brothers. Again this reproduces the position of women in the broader community.

Women barristers, like their sisters in other parts of the workforce, still find it difficult to achieve a satisfactory balance between family and work responsibilities, particularly if they are single parents.

In the general community women are over-represented among victims of family violence and sexual assault. Family violence is not a class-based phenomenon and I would be prepared to bet that there are some women at the Bar who have had to deal with this issue personally. Many years ago I participated in a seminar on family violence attended by a number women who were senior members of the legal profession. After the seminar I was told by three women present that they had been the victims of violence earlier in their lives.

The issues which women barristers confront reflect the strategic dilemmas faced by women in the whole community. Broadly the question we need to consider is "Where do we go from here"?

At this point in history we may be approaching the outer limits of the law as an instrument for improving the lives of women.

Areas where legislative reform is obviously needed have been identified and largely addressed. Apart from industrial relations changes which make it easier for women to combine paid work and family responsibilities — which are not on the horizon at the moment — I do not think that legislative reform is likely to deliver significant gains for women in the future.

Procedural and administrative changes can also improve the position of women — particularly women from disadvantaged sections of the community. The changes to procedures in sex offence cases and the establishment of specialist family violence courts are recent examples. But again I think that such changes will have limited capacity to address the complex questions of gender inequality which are likely to arise in the future.

Common law changes have also improved the position of women in the past. Developments of constructive trusts principles to enable women in de facto relationships to claim an interest in property owned by their partner are one example of doctrinal changes which have benefited women. Another was the abandonment of the common law principle that a man cannot rape his wife, which survived until 1991.[13] Though courts are not law reform bodies, the changing composition of the judiciary is likely to result in better understanding of how rules which are apparently gender neutral may have a different impact on men and women.

In the past women looked to law reform to improve their position. I have argued that legislative changes and common law developments are now less likely

to provide answers to the problems that young women are likely to confront in the future. We now need to think about the more subtle strategies which may help to change the hearts and minds of both men and women in the area of gender. Hence the title of this talk.

How do we consolidate past successes and make further improvements? Although there are no simple answers to this question, I want to talk about four inter-related strategies which may be useful to women in general and to women barristers in particular. These are:

- focusing on cultural and institutional change;
- cultivating allies;
- the importance of leadership; and
- the importance of women supporting women.

FOCUSING ON CULTURAL AND INSTITUTIONAL CHANGE

The first strategy requires us to identify institutions and practices in the legal profession and at the Bar which reinforce the structures of gender and to think about how they can be changed. I recently re-read Lord Woolf's report on civil procedure reforms which emphasises the need to win the hearts and minds of practitioners if the huge machine of the civil justice system was to be re-calibrated. Gender is a much more entrenched institution than the civil justice system and it will take a correspondingly greater effort to disturb the pre-conceptions that exist about the appropriate roles of men and women.

To deal with issues of culture I think it is important to look at both the culture of masculinity and the culture of the legal profession. There is now a large and fascinating research literature on the topic of the culture of masculinity, which my associate and I have had great fun reading. Unfortunately I could not quite decide how to work in quotes from an article called "Why Marcia, You've Changed! Male Clerical Temporary Workers Doing Masculinity in a Feminised Occupation."[14]

Research on masculinity and work shows that when women begin to enter an area of work in significant numbers, what is seen as men's and women's work is redefined. Throughout history men have tended to vacate a field of work when larger numbers of women begin to enter it and to find new areas which they can define as their own. As a result women tend to be segregated into the less prestigious and well paid areas of the particular profession or occupation. This pattern is already apparent in Law Schools, where I predict that the majority of legal academics will eventually be women.

Ruth Hamnett, Fiona Ryan and Fiona Forsythe.

Anne Sheehan and Caroline Kirton.

An entertaining example of this phenomenon is described in Joan Eveline's work on the changes which occurred in the Western Australian mining industry. When women started to get jobs driving heavy machinery, which was previously seen as "a man's job" men began to take on heavier and dirtier tasks, and driving big machines came to be seen as a task for women. [15]

It may be worth thinking about whether a similar pattern exists in the legal profession and at the Bar. In law firms my impression is that some young male lawyers now see working very long hours as a mark of masculinity, in the same way that doing dirty work become a defining feature of masculinity in the mining industry. Young women lawyers often adopt these patterns for a time, but I have the impression from a group of women I have recently mentored that, in the long term, this may well drive them out of private practice.

The literature I have referred to above suggests that women barristers need to think about whether their increasing numbers have led to the re-emergence of patterns of gender differentiation. For example, are women seen as more suited to opinion work or to the less lucrative areas of practice? Do they tend to get briefed in particular areas such as property law or family law? What is it about the culture of the Bar which results in young male barristers having more access to speaking roles in court than young women? If so how can these patterns of gender differentiation be changed.

CULTIVATING ALLIES

In order to create cultural change it is essential for men and women to work together.

Many successful women speak of the help and support they were given by peers at early stages of their career. In my case it was at Ron Sackville, now Justice Sackville's suggestion, that we wrote a property law text together. Although he was only a little more senior than I was, his support gave me the confidence to put my foot on the first step of the academic ladder.

Sadly some men in the community see themselves as being harmed by the improved status of women. Discussion of the difficulties which face women barristers and women in the workforce sometimes produces hostile or sceptical responses from men. I was struck by a recent example. In my recent speech at the Bar Readers' Dinner, which did not deal with gender issues at all, I made the off-the-cuff remark that it was probably still harder for women barristers than for men to balance work and family responsibilities. A man at the next table muttered, (not particularly *sotto voce*) "rubbish". If that response is representative of views held by some men at the Bar, women still have a long way to go.

When I spoke to women barristers in 2001, I referred to Deborah Rhode's work in the United States, which argued that the first step towards gender equality is to convince those in power that there is actually a problem. Many barristers acknowledge the practical and structural difficulties faced by women at the Bar. I think it would be a useful strategy to convince them to articulate their support and contribute their advocacy to women's causes.

There are other small ways in which male barristers can support women. Most of us have been in situations where a member of a group makes a racist, homophobic or anti-Semitic comment. I think that many of us are prepared to say that we object to such comments. It seems to me to be less common for men to react adversely to misogynous remarks or comments which denigrate the achievements of women barristers. I don't recall

any American men speaking up when Arnold Schwarzenegger chided his political enemies by calling them "economic girlie-men".[16] We need to persuade those who are sympathetic to women's causes to speak up when necessary.

On a more serious note, this is already happening in the world outside the law, where attempts are being made to enlist men who abhor violence in the cause of reducing violence against women. Saturday is Stop Violence against Women Day. Its great to see more men this year wearing white ribbons.

If we are making alliances with men it may also be useful to draw attention to the areas in which men have benefited because women have placed issues on the agenda. Men are likely to benefit if there is greater flexibility in working hours; men may also benefit from a culture which encourages them to balance the joys of work with the joys of family life.

Women should be reminding men that we are not seeking to pole vault over them but to create an environment of equality, which benefits us all.

ENCOURAGING LEADERSHIP.

My third strategy focuses on the importance of leadership in working towards gender equality at the Bar and in the broader community.

Research done in the 1980s by Professor Fay Gale shows that women are more likely to succeed in universities in which Vice-Chancellor and senior Professors are committed to gender equality.[17] Similar findings have been made in the corporate world, where the support provided by senior managers can change workplace dynamics and ensure that women's talents are recognised and developed. As a young legal academic I was very grateful for the mentoring and support provided to me by some senior legal academics. Initially all of them were men, but as more women were appointed to Chairs I also received some support from women.

The Bar, of course, does not work like a university or a commercial entity. Its structures are more diffuse and individualised. Nevertheless there are both male and female leaders at the Bar who are widely respected and who have the capacity to provide leadership on gender issues. The Bar Council made an excellent start by commissioning its 1998 "Report on Equality of Opportunity For Women" at the Bar. It needs to keep up that momentum. I note the presence here of both men and women who have given important leadership in the area of gender equality.

THE IMPORTANCE OF WOMEN SUPPORTING WOMEN

I have already spoken of the important role that allies and peers can play in breaking down gender stereotypes and encouraging individuals to make the best of their talents. When women first moved into areas which were previously monopolised by men it was common for them to take on masculine colouration. Unfortunately this sometimes made it difficult for them to support their female colleagues, for fear of being seen as different or incapable.

While this attitude was understandable, I hope it no longer exists. One of the purposes of the Women Barristers' Association is to provide that support. It is interesting, therefore, that I have heard some women lawyers question the need for a distinct organisation for women. In their view, we have now reached the position where we can afford to be gender blind. I do not agree with that view. I congratulate and support the work done by the Women Barristers' Association providing support for its members.

In 1998 Neil Young (as he was then) Chairman of the Bar Council wrote to the Steering Committee of the Project on Equality of Opportunity for Women at the Victorian Bar, to Justice Charles, who chaired that Committee, to thank us for our work. In the letter he said that:

> the research findings indicate that women generally find it more difficult to gain entry to, and support from, the mainstream of the Bar. This difficulty may have significant effects for individuals in terms of recognition, work satisfaction and success.

This was written by the then Chairman of the Bar Council just over seven years ago. Though things have improved for women barristers, there is still room for change.

I cannot conclude this speech without saying a few words about the Honourable Rosemary Balmford. Another speaker will be talking about her career at some length, but I would like to briefly pay tribute to her achievements (I hope she does not mind me referring to her as Rosemary). When I was at Melbourne Law School Rosemary had a reputation as an excellent teacher.

American research shows that women judicial officers often have different career paths from male judges. Rosemary practised as a solicitor and was a senior member of the federal AAT, before she was appointed to the Supreme Court. Her success helped to demonstrate that practice as a barrister is not an essential requirement for judicial appointment. It blazed a trail for many other women who have now become judicial officers. We should all be grateful for Rosemary's outstanding example.

Notes

1. According to figures available on the Victorian Supreme Court website.
2. According to figures available on the County Court website
3. According to figures provided by the Magistrates' Court.
4. According to figures available on the Federal Magistrates' court website.
5. According to the Victorian Bar website.
6. According to the Victorian Bar website.
7. This survey did not cover Victoria.
8. *Bendable or Expendable? Practices and attitudes towards work flexibility in Victoria's biggest legal employers*. Law Institute of Victoria, 2006.
9. Forty-five percent of in-house lawyers were women, as opposed to 52 per cent of private practice lawyers.
10. Harpley, K, "Women in House", *Lawyers Weekly* 2006.
11. Sexual Offences: Final Report, Victorian Law Reform Commission, August 2004, the implementation of which led to a series of reforms, including the amendments in the *Crimes (Sexual Offences) Act 2006*.
12. Defences to Homicide: Final Report, Victorian Law Reform Commission, November 2004, resulting in a number of legislative amendments in the *Crimes (Homicide) Act 2005*.
13. The Australian authority is *R* v *L* (1991) 103 ALR 577. In England the rule was abolished by *R* v *R* [1991] 2 WLR 1065.
14. Henderson, K.D., Rogers, J.K. *Gender and Society* Vol 15, No 2 (April 2001) pp. 218–238.
15. "Gender and Sexuality in Discourses of Managerial Control: The Case of Women Miners" in *Gender, Work and Organization* Vol 9, No 5, November 2002.
16. Speech by California Gov. Arnold Schwarzenegger Tuesday, August 31, 2004, cited http://www.cnn.com/2004/ALLPOLITICS/08/31/gop.schwarzenegger.transcript/.
17. This work was expanded upon at the University of Western Australia. See for example "Creating Opportunities: An Evaluation Of The Leadership Development For Women Programme 1994–1997" University of Western Australia, cited http://www.osds.uwa.edu.au/about/activities/ldw/successes/evaluation/opportunities/.

Issue

THE dominant meaning of *issue* is changing. It is now commonly used to mean *problem* or *difficulty*. It is common, and mildly irritating, to hear otherwise well-spoken people say "I have an issue with the way he is treating me" or "He has personality issues". It has emerged as a euphemism: it is less confronting than *problem*, especially in the phrase *personality issues*.

Issue has many meanings, but problem was not one of them, at least until very recently. As a noun, the principal meanings of *issue* are:

- the action of going, passing, or flowing out
- a place or means of egress
- outgoing; termination
- a discharge of blood or other matter from the body
- offspring, progeny
- produce, proceeds; profits arising from lands or tenements
- that which proceeds from any source; the outcome or product of any practice or condition
- the outcome of an action or course of proceedings
- a point or matter in contention between two parties
- the action of sending or giving out officially or publicly; an emission of bills of exchange, shares, etc.
- the set number or amount (of coins, notes, stamps, copies of a newspaper, books and periodicals, etc.) issued at one time, or distinguished in some way from those issued at another time.

As a verb, the principle meanings are:

- to come forth ("I did never know so full a voice issue from so empty a heart" Shakespeare, *Henry V* Part I, 4: iv)
- to proceed as an outcome ("And of thy sons that shall issue from thee, which thou shalt beget, shall they take away; and they shall be eunuchs in the palace of the King of Babylon": King James Version of the Bible, 2 Kings 20:18)
- to be published ("His Majesty did resolve to Summon a great Council of all the Peers, and commanded Writs to issue out accordingly")
- (as a transitive verb) to give or send out authoritatively or officially; to send forth or deal out in a formal or public manner.

This last sense is the commonest. So, government agencies issue passports, licences, permits, etc.

The notion of a thing being produced as the result of an earlier process is inherent in most senses of *issue*, as verb and as noun. Oddly, this is the sense that is now disappearing from the noun, although it survives intact in the verb.

One principal use of the noun is a *point or matter* in contention between two parties. This meaning of the word has a specifically legal background. It emerged from the system of pleadings. The OED gives it as "The point in question, at the conclusion of the pleadings between contending parties in an action, when one side affirms and the other denies". Despite this arcane beginning, this has become the commonest intended sense.

The idea of "a point of contention" may be the reason for the emergence of the new sense. A point at issue can also be a problem; often it is. Take the following recent headlines from the ABC's website:

- Drugs in sport a hard issue to tackle.
- Depression: A medical or social issue.
- The north faces a weighty issue.
- Wheat export issue divides growers.
- But raising this almost-taboo subject for public discussion at this week's conference can only lead to a better understanding of this disturbing issue.

In most, if not all, of these examples it makes equal sense to understand the reference as *problem* rather than *point for debate*.

But recourse to recent dictionaries confirms our fears (and vindicates the ABC website, Kath & Kim, and all others who like the new meaning). The current edition of the *Compact Oxford Dictionary* has, as its first definition of *issue*: "an important topic for debate or resolution". It refers to the phrase *make an issue of* as meaning *to treat too seriously or as a problem*.

The *Encarta Dictionary* gives as its definition: "subject of concern: something for discussion or of general concern; main subject: the central or most important topic in a discussion or debate".

The *Merriam-Webster Dictionary* recognizes *problem* as one of the meanings of *issue*. Older and larger dictionaries give this meaning less prominence.

The *American Heritage Dictionary* acknowledges the new meaning also: its fifth definition is: *a personal problem or emotional disorder*.

The *Cambridge Advanced Learners' Dictionary* is slightly more conservative: it acknowledges *problem* as an available meaning, when *issues* (plural) is used. It gives as examples:

> All the people in the study had low self-esteem and had issues with their bodies.
> Anna has major issues with her employer.

The *Cambridge Dictionary of American English* is at once more adventurous and more restrained. It appears to acknowledge that the singular form has shifted meaning, but does not quite take the change to its full extent:

> "Issue": a subject or problem that people are thinking and talking about *There continues to be a great deal of debate over the abortion issue. Isn't the need to hire more staff what's really at issue here (= the subject of the disagreement)?*
>
> *I like my hair this way, I don't see why you have to make an issue of it (= cause it to be a problem).*

The new meaning can fairly be said to have established its place in our language.

The earlier, original meaning of *issue* is outcome or product. Thus, Aphra Behn in *Rover* (1677): "That what to you does easy seem, and plain, Is the hard issue of their labouring Brain." And Dickens in *David Copperfield*: "Of course my aunt was immediately made acquainted with the successful issue of the conference, and with all that had been said and done in the course of it."

It is surprising that this sense of *issue* has almost disappeared, because the notion of *coming forth* is present in most other meanings of the noun. So, a *share issue* and an *issue of a magazine* are both current usages; and *issue* as a verb always refers to a thing being produced. Tom Paine wrote: "By perseverance and fortitude we have the prospect of a glorious issue; by cowardice and submission, the sad choice of a variety of evils …" (*The American Crisis*, 1790). That

sentence would not be written today, and would be understood properly by only a few readers.

In *Modern English Usage*, Fowler protested that the construction "to issue a person with a thing" was not to be recommended. He gives the example "The company was issued with two gas masks per man" and observed that the construction was "not to be recommended". Presumably, although Fowler does not enlarge on the point, his objection was that, where *issue* is used as a transitive verb, the direct object of the verb should be the thing which is *issued*, not the person to whom it is issued. Little did he know how trivial his complaint would look to later readers. Despite that small quibble, *issue* as a verb has remained true to its origins. Perhaps we can look forward to the time when to say "Don't issue that" will mean "Don't make that into a problem". I hope not: I really would have an issue with that.

Julian Burnside

VIP Breakfast with Major Mori

Laura MacIntyre

OVER 200 legal VIPs including judges, senior members of the Bar and heads of legal sector agencies were in attendance at the State Library of Victoria on Friday 2 March for breakfast with Major Mori. Appointed by the United States Department of Defence in November 2003, Mori has since become a prominent critic of the military commissions set up to try Guantanamo Bay detainees.

Alexandra Richards QC, Victoria Law Foundation Board Member, chaired the event with The Honourable Rob Hulls MP, Attorney-General of Victoria, introducing Major Mori, and describing him as a man of "guts, imagination, supreme energy and optimism … in pursuit of a just cause, not only in the interest of a client, but of justice itself".

"Major Mori embodies the finest of the legal profession, and reminds us that it is both a privilege and a vocation," the Attorney-General said.

The morning of the breakfast was a hectic one for Mori, as it coincided with the announcement of revised charge against his client, Australian Guantanamo Bay detainee David Hicks. Hicks, who has already served five years in detention, has now been charged with material support of terrorism. A prior charge for attempted murder was dropped by the military commission.

Major Mori stressed that he could not comment on the import of the new charge without first speaking to his client, but did offer his own opinion about the impact of the decision, "Today could be one step closer to another unfair trial for David Hicks. Hopefully Australia will stop relying on assurances from the US government, and start to make decisions on its own," he said.

Lex Lasry, Rob Hulls, Alexandra Richards and Major Mori.

The session, presented by Victoria Law Foundation in partnership with Victorian Equal Opportunity and Human Rights Commission, offered a unique professional development opportunity to members of the judiciary and senior legal professionals. The presentation gave a first hand insight into the Hicks case and its wider legal, social and political ramifications. The Major began with an overview of conditions faced by David Hicks in detention, and went on to describe the legal and political obstacles he has faced thus far in his campaign to secure a fair trial for his client.

The level of interest amongst the attendees was high, and a sea of hands went up during the brief question and answer session. Former Chief Justice Professor John Phillips AC opened, enquiring about the reaction of the American legal profession to the case. Mori reported that despite vocal opposition, input from senior members of the American legal profession had been largely excluded by the operation of the *Military Commission Act 2006*. In response to a follow-up question regarding wider public opinion, Mori stressed that since the Act affords American citizens immunity from charges of the kind laid against Hicks, the case had a relatively low public profile in the United States.

Major Mori was quick to respond to queries about a possible plea bargain: "Well, first we need a real offence. He can't plead guilty to something that is not a crime. David Hicks has already pleaded not guilty — he was never offered the Godfather deal." Mori also expressed concern for his client's mental and physical health if he remains in solitary detention: "He [Hicks] needs to get out of Guantanamo."

The breakfast was one of only two public appearances by Major Mori in Victoria. It followed on from a public lecture at the University of Ballarat, held as part of the Foundations' firm commitment to promoting regional access to legal information. More than 700 members of the local community attended the lecture. Ballarat has previously taken centre stage in the ongoing campaign to raise awareness about the case. In 2004, the Eureka Dawn Lantern Walk was dedicated to remembrance of David Hicks in its 152nd Anniversary year.

Protecting Rights in a Climate of Fear

The following speech was delivered by Julian Burnside QC on 13 December 2006 as the Equal Opportunity Commission's Sixth Annual Oration.

IN a climate of fear, protection of human rights becomes extraordinarily difficult. It brings to the forefront the tension between the majoritarian principle of democratic rule and the humanitarian principle of protecting the powerless and marginalised. In that setting, protection of human rights presents its greatest challenges.

The maintenance of civil liberties depends on the delicate balance between the government's authority and its self-restraint. That balance will be compromised if any of three conditions are satisfied. The first is when the political opposition is either weak or absent. The second is when the press is weak or compliant. And the third is when the life of the nation is at risk from civil disturbance or external threat (whether real or imagined). The first two conditions have existed in Australia in varying degrees for a decade. The third was delivered on September 11, 2001.

The terrorist attack on the United States was shocking. It transfixed the world as the Twin Towers exploded and collapsed in a giant cloud. The nightmare image of the second plane finding its target may be the defining image of this new century.

The response of western governments to September 11 might be the defining characteristic of the twenty-first century.

Adequate protection of human rights depends on a number of things. First, Parliament must exercise restraint in legislating where human rights are affected. They should recognize that human rights are a basic assumption in democratic systems, and that majoritarian rule does not justify the mistreatment of unpopular minorities.

In the wake of September 11, ASIO's powers have been greatly increased. They now have power to hold a person incommunicado for a week, and force them to answer questions on pain of five years' jail.

Julian Burnside QC.

The person need not be suspected of any offence.

The Federal Police now have power to obtain a secret order jailing a person for up to a fortnight, without a trial and without the person having committed any offence. They can obtain a secret control order, placing a person under house arrest for up to 12 months without access to telephone or internet. In each case, the person affected by the order is not allowed to know the evidence against them. These laws betray the most fundamental assumptions of a democratic society.

The protection of human rights also depends on the executive showing restraint and decency in administering laws which have the potential to affect human rights. In this, the Howard Government has a miserable record, a record made all the worse by their hypocritical maundering about "family values" and a "fair go".

The idea of a fair go was nowhere to be seen when Mr Ruddock instructed the Department of Immigration to argue the case of Al Kateb. Mr Al Kateb had arrived in Australia seeking asylum. He was held in immigration detention. He was refused a protection visa. He asked to be removed from Australia, because he found the Woomera detention centre unbearable. Unfortunately, he could not be removed because he is stateless — there is no country in the world to which he could be returned. The Migration Act provides that a person who comes to Australia without a visa must be detained and must remain in detention until they get a visa or until they are removed from Australia. This is the mandatory detention regime. People held in detention have not committed any offence: they are held in high security jails because an Act of Parliament orders it.

What of Mr Al Kateb? They refused him a visa, but could not remove him from Australia. The "fair go" Howard Government argued that Mr Al Kateb could be held in detention for the rest of his life if necessary. That argument was found by the High Court to be legally correct and constitutionally valid.

It is deeply shocking that any government in a western democracy is prepared to argue for the right to jail a person for life without trial, and without suspicion of any offence. If nothing else about the Howard Government is remembered, let it always be remembered that they argued for the right to jail an innocent person for life.

Family values cannot be reconciled with the indefinite detention of refugee families in conditions which drive children to attempt suicide.

ASIO has vast powers and seeks, wherever possible, to avoid any scrutiny of its activity by Courts. Mahommad Sagar has been held on Nauru by Australia for five years, even though Australian officials accept that he is a refugee. He has been adversely assessed by ASIO, and they

refuse to tell him why. They argue that they should not have to reveal to him — or to anyone — what facts they took into account in deciding to assess him adversely. Although ASIO refuse to tell any other government why they have adversely assessed Mohammad Sagar, Sweden has agreed to receive him. Their decision is an eloquent recognition of both the cruelty and the stupidity of Australia's position.

The protection of human rights also depends on the public remaining aware of the importance of human rights to the health of our democracy. It is easy to support the idea of human rights for ourselves, our family and friends, our neighbours and so on. It is less easy to stand up for the rights of the unpopular, the marginal, those we fear or hate.

Public sentiment about locking up innocent men, women and children in detention centres has shifted over the past few years. But the trigger for change was the revelation that Cornelia Rau had been wrongfully held in detention for about a year. Public outrage seemed to reflect the perception that she was one of "us", not one of "them". Her rights mattered but, by implication, the rights of the others in detention did not.

Mr Ruddock made himself popular during the 2001 election campaign by vilifying refugees. He created a climate in which they were seen — quite wrongly — as a threat to the community. When Howard and Ruddock lied about the so-called children overboard affair, when they used the language of "border protection" to justify the Pacific Solution, they deliberately created a climate in which the public were able to think that asylum seekers were people whose human rights did not count if we wanted to stay safe.

That sort of thinking — so easily influenced by governments — is profoundly dangerous to the cause of human rights.

The Howard Government has abandoned David Hicks. Several things are clear about the Hicks case. First, he is not alleged to have hurt anyone at all. Second, he has not broken the law of Australia, USA or Afghanistan. Third, the most serious allegation against him is that, fighting with the Taliban (then the lawful government of Afghanistan) he pointed a gun in the direction of an invading force, as the American troops were. It is not alleged that he fired at them. Fourth, he has spent five years in Guantanamo Bay, mostly in solitary confinement. Fifth, the treatment he has been subjected to in Guantanamo breaches the Geneva Convention concerning the treatment of prisoners of war and it breaches Australian and US standards for the treatment of criminal suspects.

Hicks now faces the prospect of a trial in front of a military tribunal which even the prosecutors have acknowledged will not be a fair trial. Howard, Ruddock and Downer remain supremely unconcerned about Hicks' fate. They have done nothing at all to help him.

The conduct of the Howard Government is impossible to reconcile with the values and assumptions which are basic to our democratic system. By encouraging a climate of fear, the government has greatly expanded its own powers at the cost of individual rights and freedoms. By exploiting the climate of fear, the Government has been able to engage in terrible abuses of human rights which would not otherwise be tolerated, but they pass without complaint as "border protection" or the war on terror.

The basic values of our democracy, so hard won, are always at risk. In a speech in Boston on 28 January 1852 Wendell Phillips said:

> Eternal vigilance is the price of liberty — power is ever stealing from the many to the few ... The hand entrusted with power becomes … the necessary enemy of the people. Only by continual oversight can the democrat in office be prevented from hardening into a despot …

He might have been speaking of the Howard Government.

The Victorian Government has begun a move in the opposite direction by passing the The Charter of Human Rights and Responsibilities. Whilst the Charter cannot affect Federal laws, it serves as a timely reminder that human rights are fundamental. The Charter will affect the way legislators and bureaucrats go about their work; it will give the courts the power to identify legislation which breaches basic human rights and have the Parliament consider whether it wishes to persist in those breaches. Its most powerful effect is that it puts the assumption of human rights to the forefront: they will no longer be an optional extra. In addition, it serves as an important reminder that human rights are for all people, not just our friends and family. The unpopular, the unworthy, the feared and despised are also entitled to be treated as human beings, because they are.

What is needed however is a Federal Charter of Rights. The major human rights abuses in Australia are committed by the Federal Government: indefinite detention of asylum seekers, even though they have committed no offence; secret jail orders; secret control orders; secret hearings in which a person's fate can be blighted forever.

In December 2004 the House of Lords decided a case concerning UK anti-terrorist laws which allow terror suspects to be held without trial indefinitely. By a majority of 8 to 1 they held that the law impermissibly breached the democratic right to liberty.

Lord Hoffman said:

> The real threat to the life of the nation … comes not from terrorism but from laws such as these.

The Law Lords recognised what the public have forgotten: that human rights exist for the protection of everyone, and in doing so they also protect our basic values. When Howard or his ministers murmur comforting words about values, they are lying. The case of Mr al Kateb, and David Hicks; the treatment of Cornelia Rau and the victims of the Pacific Solution and the hundreds of refugee children in detention camps: all these things tell you what sort of people Howard and his ministers are. If they can mistreat one unpopular group, they will mistreat another, and another.

It is a matter of regret that the first law officer of the country is a person whose grasp of legal basics has been so blunted by politics. Ideally, the Attorney-General should try to ensure that law and justice are synonymous. The possibility of innocent people being held in executive detention for life is something Mr Ruddock argued for. Asylum seekers held in detention can be subjected to solitary confinement: not by virtue of any regulations, but at the whim of the executive government through its private prison operator. Mr Ruddock has supported this system. All asylum seekers held in immigration detention are liable for the cost of their own detention, even if they are ultimately found to be refugees. Mr Ruddock has actively supported this.

The laws which permit these things are not merely unjust. They are a disgrace to the nation and a stain on our history. Mr Ruddock still wears the badge of Amnesty International. Such open hypocrisy diminishes the high office he occupies.

Do not wait until it is your turn. Human rights matter, especially in a climate of fear.

Children's Christmas Party

Botanical Gardens, 10 December 2006

IF anybody wants to organise an outdoor party on a date when it's guaranteed to be hot, and not rain, then co-ordinate your date with that of the Bar Childrens' Christmas Party. Year after year after year, Santa has trudged into the Botanical Gardens in sweltering conditions. But this year's Christmas Party took the prize for hot weather.

It was 42 degrees, and heavy bushfire smoke enshrouded the Botanical Gardens. Out of this sweltering haze emerged Santa Claus lugging a large sack for the eager throng of barristers' children who languidly lazed in the shadows of the Tennyson lawn deep in the bowels of the Gardens.

The RSPCA had quarantined the reindeer. It was cruel to expect animals to be about on a smoke-laden 42 degree day, decreed the animal inspectors. Although the conditions did not prevent multifarious members of the Bar and their offspring congregating to celebrate a white Christmas. Santa's bobsleigh had been seconded for an air-conditioned shopping centre opening on that day. So how was he to travel the long distance from Gate C on Anderson Street to the far flung lakes and grassy inclines of the Tennyson lawns?

Wil Alstergren, the overburdened organiser of this stellar event, was stumped. The Botanical Gardens' staff refused to transport Santa in their golf cart because no insurance company would cover the risk of Santa melting in the heat and causing a nasty pile up.

But Wil had a brainwave. He would borrow a blue Porche and organise his son Finn to drive Santa into the Gardens. Thus father and son became Elf and Chief Elf on this momentous occasion. Santa Claus was rather shocked, though, when he found out that Finn was five years of age. He was quickly replaced at the wheel of the Boxster by his father.

Bureaucracy is the bane of the existence of all Christmas parties. So it was that a Botanical Gardens security guard approached a now sopping Santa standing in a blue Porche at a locked Gate C of the Gardens. The guard announced that he could not give much assistance because he was due to attend a large wedding in another far flung corner of this domain. After threats of mandatory injunctions and Anton Pillar orders the guard eventually unlocked the gate, and Santa proceeded at a veritable pace through the winding tracks that ensnared the clumps of bougainvillea and fig trees. Donuts were done on the lawn. Japanese tourists screeched with joy at the sight of a large red man throwing lolly bags into the air. Cameras snapped as he headed off into the distance, intoning "Happy Christmas" in Japanese.

The Bar and its children.

The Porche shuddered to a halt, almost hurtling the standing Santa into the crowd of children who enshrouded the now steaming vehicle. Children grasped Santa's hand as he strode to the shade of the trees, his helpers lugging large bags of toys for the children.

Children jumped into the air to catch the bags of lollies. But many were brushed aside by eager adults keen to savour jelly beans, freckles and smarties on the pretence that they needed them for their other children at home. As the pictures on these pages testify the heat was no impediment to the joy of the children present. Myriad presents were grasped, the coloured paper torn asunder and, usually, cries of delight ensued. Parents were offered new clerks, new fee books and a change of jurisdiction to cheer them up for the coming year.

Santa's body was encased by ice packs but to no avail. As the afternoon wore on he began to shrink. After the presents had been given he endeavoured to leave. But each parent insisted on an individual photographic portrait of their child with Santa. Eventually his helpers side by side escorted him back to Gate C, the blue Porche having been repossessed.

Some of the more cosmopolitan

Santa arrives in his Porsche.

Santa waves.

The children throng.

Lollies are thrown.

A fairy receives her present.

Santa and the Alstergrens.

Santa and the Simpsons.

Santa and the Freckeltons.

Santa and friends.

Santa departs.

parents suggested that Santa and his friends should retire for refreshments at the other Botanical. Santa feebly agreed that a glass of mulled wine might do something to revive his spirits. And so it was that Father Christmas entered the portals of the Botanical Hotel. He managed to devour a few cooling lagers before bureaucracy struck again. A security guard appeared and said that the hotel did not tolerate people who looked like they were one of the Village People. The guard was not embued with Christmas spirit and asked Mr Claus to exit. It was only after many pleas were made on his behalf by the skilled barristers surrounding him that he was allowed to remain and endeavour to regain the many litres of fluid lost in the joy of giving. But to this day many of those present in the Botanical Hotel believe that it was the Village People who had attended on that day and not the embodiment of St Nicholas.

The Bar Children's Christmas Party would not be possible without a lot of hard work put in by many members of the Bar and the staff of the Bar. In particular Wil Alstergren should be thanked, together with his wife Kate, who spent hours putting the lolly bags together. Denise and Mel from the Bar Council office spent much time organising parking permits and placating the bureaucracy of the Botanical Gardens. Finally Gillian Elliott was extremely helpful in assisting her Santa Claus with the heavy bags of toys.

Bar Takes Tennis Trophy Hat Trick

FOR the first time ever in the 39 year history of the competition between the Bench & Bar against the Law Institute for the O'Driscoll Cup, named after the late Judge J.X. O'Driscoll, the Bench & Bar team has succeeded in winning the Cup for three consecutive years. In earlier times it was a struggle for the B & B team to just win the occasional match, as testified by the string of LIV successes engraved on the trophy.

This new streak of competitiveness quite coincidentally coincides with the migration of Patrick Montgomery from the LIV ranks to those of the Bar. Whereas the previous B & B strategy was to choose bunnies to blunt the LIV's strong "A" section attack, and concentrate our forces on the Institute's rather longish "tail" in the "B" section, we now can put forward genuine firepower to match and blunt the Institute's premier shock troops, while still maintaining a concentrated attack on its rather longish "tail".

Thus Patrick and his new (in this competition at least) partner, Michael O'Bryan, won two of their sets against the Institute's stars, lowering their colours only to the perennial Institute sharpshooters, Peter Mayberry and Mark da Silva. Even there, our stars managed to break Mayberry's serve, "the first time this had been done since 1978" as our man confidently asserted in his post-match press conference. As usual, we have included the compulsory photograph of our man in action, so he can satisfy his family that his career at the Bar is indeed progressing in stellar fashion. Autographed enlargements are available from the editors for his many fans.

Michael O'Bryan made a very worthy debut, lending valuable support to Patrick. We hope to see more of Michael in future matches. Also strong in an even "A" contingent were John Simpson and Jonathon Redwood, while Tom Danos and Howard Mason were valiant contributors to the Bar's cause against tough competition.

The stars of the day, however, were Ted Fennessey and John Goetz. Though Ted's hairs grow a little greyer each year, his guile and tenacity are not in the least diminished. This year he was ably backed up by John Goetz, and the dynamic duo won all four of their sets in "B" section which led to their selection as the winners of the second perpetual trophy awarded at these events, the Flatman–Smith trophy for the best-performed pair. This is the fourth year of this prize, struck to commemorate the passing in close

Chris Thomson accepting the O'Driscoll trophy on behalf of the Bar, flanked by Pat Montgomery, Peter Boyle (LIV) (both standing), John Simpson, John Goetz and Jake Fronistas.

Simon Tisher.

Howard Mason.

succession of two sadly missed stalwarts of the competition, their Honours Justice Geoff Flatman and Judge Tony Smith.

Mention should also be made of other stout defenders of the Bar's reputation, all of whom won at least one set and so made a material contribution to our win: Richard Smith, exhibiting his new silken outfit, and prevailing despite the hindrance of his partner, this very unworthy scribe; Christine Boyle, making her maiden and very much appreciated appearance; Jake Fronistas, a man with history at this event; and the very capable duo of Ben Lindner and Simon Tisher.

The event was, as always, a most enjoyable occasion, naturally rendered that much more exciting by our remarkable triumphs. Peter Mayberry, LIV captain, was, as always, extremely gracious in his remarks in handing over the trophy. Kooyong provided its usual marvellous backdrop, with fine weather and grass courts in excellent condition, as well as a fine environment on the terrace to enjoy post-match conviviality.

Thanks to Danos and Smith for again assisting with team recruitment and selection, and to the editors of this august production for supplying the photographer to record for you, dear readers, as well as for posterity, a visual record of this momentous occasion.

Chris Thomson

Ted Fennessey.

Price and Gaylard (LIV).

Lucinda Murdoch (LIV).

John Simpson.

Peter Mayberry (captain, LIV).

Chris Thomson in customary pose (pity his results don't always match the effort!)

"T C" Teoh (LIV)

Will Mulholland (LIV)

Bar team.Christine Boyle, Jon Redwood, Jake Fronistas, Howard Mason, Richard Smith, Tom Danos, John Goetz, John Simpson, Chris Thomson, Pat Montgomery, Michael O'Bryan.

Ted Fennessey and John Goetz, winners of the Flatman-Smith trophy for the best-performed pair.

Wigs & Gowns Regatta

18 December 2006

THE twentieth Wigs & Gowns Regatta was held in perfect conditions on Hobsons Bay on 18 December 2006.

A light south westerly provided the perfect breeze for all participants to enjoy the cruise in company. A course was set from Hobson's Bay south east into the channel and north down to Station Pier where yachts rounded a mark and were then close hauled to the finish line set off the Royal Yacht Club of Victoria's marina.

Race officials, handicap committee and the press enjoyed a spectacular view of the start from the committee vessel *Argo*. Line honours went to John Digby QC aboard his 42ft masthead sloop *Aranui.* At a press conference following the event, Digby put the success down to tight crew work and hours of preparation. A somewhat shortened course was required for Judge E.C.S. Campbell in his Oughtred designed canoe-sterned ketch *Rosa-Jean.*

After returning to shore, participants endured a tense wait whilst the handicap committee met to assess final placings.

Paul Lawrie and crew aboard Easybeat.

Andrew Green, Bruce Cameron, Brian McCullagh John Davis and Michael Simon aboard Charisma *— recipients of the 2006 Neil McPhee Trophy.*

The Frank Walsh Perpetual Trophy was awarded to Julian Smibert and Paul O'Dwyer S.C. sailing *Coranto,* a Clansman 30.

The Thorsen Perpetual Trophy was awarded to Paul Lawrie sailing *Easybeat*, a Sonata 6, the smallest boat in the fleet.

Andrew Green sailing his 33ft William Garden sloop *Charisma* was awarded the Neil McPhee Trophy.

Next year is hoped to be bigger and better again — participating is winning!

James Mighell

Charisma *(foreground) and* Aranui *on Port Tack.*

Paul Lawrie and crew with the Thorsen Trophy awarded for the 21st time.

Peter Rattray QC, Melanie Sloss S.C. and James Mighell S.C. watch on as Andrew Green receives the Neil McPhee Perpetual Trophy for 2006.

Judge E.C.S. Campbell and crew hard at work aboard Rosa Jean.

Contract Law in Australia (5th Edn, 2006)

By Carter, Peden and Tolhurst

IT is always a pleasure to see a new edition of a significant and well regarded legal text come onto the market. The fifth edition of *Contract Law in Australia* is no exception.

This latest edition continues the style, content and format of previous editions, although it is noted that some chapters have been shortened for the ease of use of law teachers and reference by practitioners. Two new chapters appear in the text, namely "Good Faith" (chapter 2) and "Assignment of Contractual Rights" (chapter 17).

The text, at 991 pages including the index, is as comprehensive as its predecessors. The inclusion by the publishers (whether intentionally or otherwise) of 10 utterly blank pages after the index is presumably to facilitate the creation and use of crib notes by students. This innovation is to be commended and encouraged in all future publications from Butterworths.

The fact that the text itself is well over 950 pages in length does make this reviewer wonder how on earth a text of such breadth and depth can be a useful tool for students in the modern law school curricula where Contract Law (Contract Lite?) is taught in a one-semester tsunami of cases, principles and so-called Socratic dialogue.

Whilst the modern trend to shorter courses on such foundation subjects is to be rightly deplored, this is not the fault of the authors or the publisher but it does lead one to ask about the identity of the audience the book is intended to reach.

In this reviewer's not so humble opinion, the book is now of such a respectable vintage (it's been around for over 21 years) the authors can rightly claim it as primarily a practitioner text and should, after the style of Chitty, produce only clothbound versions. The reviewer's copy (although freely acquired and gratefully accepted) is softcover, which somehow just doesn't have the gravitas that the book would otherwise convey as a hardback version strategically laid on the Bar table in front of an appellate bench.

This reviewer would like to see an extension to the introductory chapter where it addresses the jurisprudential underpinnings of the law of contract (contractual promises are, after all, the only way in which we are able to predict the future) and a discussion of the good faith principles from an historical perspective (would the great common lawyers of the past such as Lords Blackburn and Jessel have countenanced the brutal Hobbesian approach towards an overarching doctrine of good faith adopted by the Victorian Court of Appeal in *Esso Australia Resources Pty Ltd* v *Southern Pacific Petroleum NL & Ors* [2005]VSCA 228.

The additional chapter on assignment of contractual rights should be compulsory re-reading for all practitioners under 75 years of age. This reviewer is driven to constant distraction by the number of contracts that come across his desk with clauses that recite the ability of the non-regal parties to assign contractual rights and liabilities.

The reviewer was disappointed to see that there is no reference to the statutory regime that controls and qualifies domestic construction contracts in Victoria, but then again you can't cover everything in a volume of general principles. Perhaps there is a market for a second volume dealing with specific contracts, again a la Chitty.

All in all this is a splendid volume and well worth its place in chambers or within easy reach of the busy solicitor's desk.

Neil McPhee

The Law of Insider Trading in Australia

By Gregory Lyon and Jean J du Plessis
The Federation Press, 2005
Pp. v–204, Bibliography 205–212, Index 213–218

THE Law of Insider Trading in Australia is principally an analysis of the legislative provisions in the *Corporations Act 2001* (Cth) which prohibit insider trading.

The authors deal first with the complex character and operation of the prohibition, including an examination of key elements such as who is an "insider", what is "inside information" and when is information "generally available". The range of defences and exceptions to the prohibition is then examined, noting that none has been judicially tested. The authors then consider the criminal penalties and civil remedies for proven breaches of the insider trading provisions, with particular focus on the relatively recent availability of civil penalties. The final chapter deals with the difficulties of enforcement and the inter-relationship between insider trading and continuous disclosure.

The text includes a very useful appendix of Australian civil and criminal insider trading cases to which can now be added the decision of the NSW Court of Criminal Appeal in *Hannes* v *DPP* delivered on 24 November 2006 (2006) NSWCCA 373. The appendix highlights the relatively few prosecutions and civil proceedings that have been instituted in this area.

The exposition is detailed and systematic and brings together key concepts essential to an understanding of this area of the law. It also addresses the fundamental questions of whether Australia's insider trading laws are necessary, desirable and effective.

The authors display an authoritative command of their subject. This comprehensive work will be an essential reference point for those prosecuting or defending insider trading cases and those with an academic interest in the area.

P.W. Almond QC

Magna Carta Lecture

THE Society was represented at the 2006 Magna Carta Lecture, hosted jointly by the British High Commission and the Honourable J.J. Spigelman, AC, Chief Justice of NSW, at the Banco Court, Sydney, on 13 September. The lecture was delivered by Lord Falconer of Thoroton, the Lord Chancellor, on the topic: The Role of Judges in a Modern Democracy.

This annual series of lectures was inaugurated in 2002 by the British Government and forms part of a program of significant support it gave to celebrations marking the Centenary of Federation in 2001.

This also included a generous donation to an Australia–Britain Society project that culminated in the commissioning that year of a monument to Magna Carta set in a parkland site to the west of Old Parliament House in Canberra and now designated "Magna Carta Place".

In some preliminary remarks before delivering the lecture, Lord Falconer commented that he was the first Lord Chancellor in 1,100 years to visit Australia while England held the Ashes.

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