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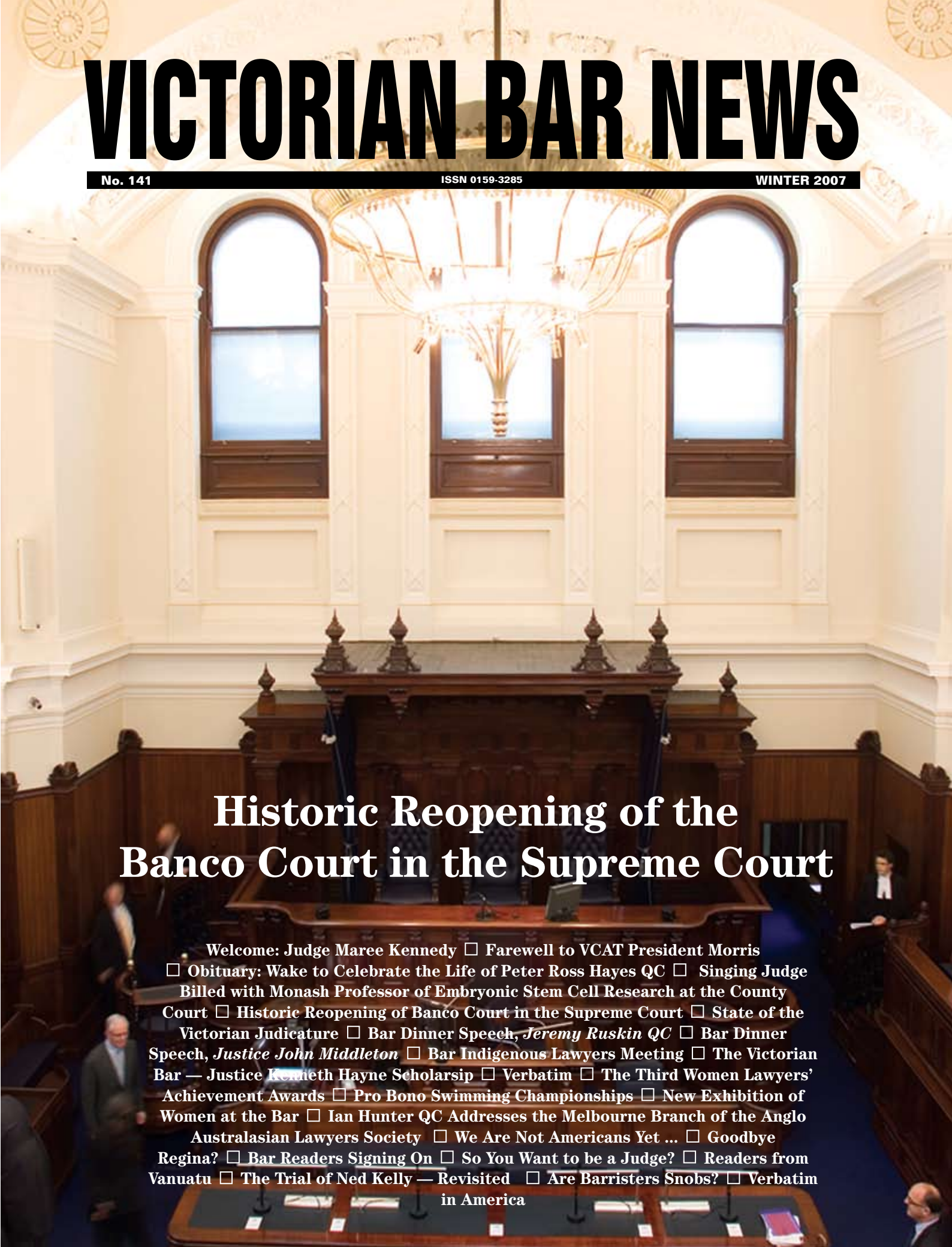

Historic Reopening of the Banco Court in the Supreme Court

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Advertising
Publications Management Pty Ltd
38 Essex Road, Surrey Hills,
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Telephone: (03) 9888 5977
Facsimile: (03) 9888 5919
E-mail: wilken@bigpond.com

Whither the Legal Profession or Where is the Law Industry Going?

MELBOURNE University recently held a reunion lunch for some of the baby boomers of the law school. The Chancellor of the university and the Dean of the law faculty outlined the new plan for the future — the graduate degree. Alumni meetings are being held to explain the direction the university is taking. Strange advertisements have appeared on the television, selling the graduate degrees in law, medicine and the other professions.

It is indeed a vision for the future — a radical change for the university. Instead of a four-year law degree, or five-or six-year combined degree, a law student will complete a three-year arts, science or commerce degree and then do a law degree in two years. It will be a very intensive two years, with four years of study being crammed into two. Will it mean that a student will need VCE marks of 99.4 per cent to begin an arts degree? In any case during the three years of the undergraduate degree the pressure will be enormous to obtain marks to get into the hot-house law faculty.

So much for smelling the roses at university and enjoying a well-rounded experience other than pure study.

It is all about getting the right marks. Undoubtedly Monash, Deakin, La Trobe and the Universities of Technology will benefit by gaining students who do not want to go down the graduate degree path. But the entry levels to these universities will undoubtedly rise. This leads to the question of whether you really need such high grades at school level to be a good lawyer. Are many being shut out who would contribute greatly to the profession and therefore society? And what of those who study law?

It seems to be very fashionable to say, "I am studying law but I couldn't possibly

ever contemplate practising law: far too vulgar and doesn't pay enough."

Despite all the modern liberal educational trends, overwhelmingly, parents want their children to be a doctor or alternatively say that they got the marks to get into a law school, even though they'll never practise. It is such a badge of honour to get into these degrees for parents and children.

Medicine has a psychological/personality test to sort out those with 99.4 per cent score but not the persona to be a good doctor.

No such test exists for prospective lawyers, and if there was one suspects many of those practising at the Bar and in the Judiciary would probably fail it. But if you fail the medico-psych test what do you do? Law of course; you've got the marks, even though you've never ever contemplated being a lawyer and you still don't. Therefore many places in the law schools have been taken by "non lawyers". Many people who would make good barristers and solicitors (or Australian Lawyers and Officers of the Court) are being kept out.

The law schools should limit the number of students who don't want to practise and encourage those who have a real vocation, even though they may not have the required marks. All this talk of getting a well-rounded education from a law degree is over-rated. Jurisprudence, public international law, conflict of laws and constitutional law are not a great help in dad's business or in the merchant bank — although criminal law could come in handy.

The market push to study law reveals a conflict of views of lawyers in society. Everybody is supposed to hate lawyers — just read the newspapers and listen to the jokes. The latest attack on the Bar following the tragic death of Peter Hayes QC reflects this innate hatred. Tall poppyism and chip-on-the-shoulder journalism at its worst, reflected in a series of arti-

cles attacking the Bar but backed by no evidence other than unfounded rumour. Lawyers are supposed to be dreadful, amoral people, yet more and more seem to want to become one.

Even if a student decides to practise law, the fashionable types of law to follow are very narrow. The legal media seem to promote only one aim: the study of commercial law, leading to life in one of the top-tier law firms. Those who follow other areas of law are deemed to be second rate. Having got the 99 per cent, then the next step in the chain is to get a summer clerkship in one of these firms, and get enough honours to do articles at these esteemed establishments.

But having set this as a target, the media emphasises what this really means when it talks of legal burn-out.

Is it such a great legal achievement to work 80 hours a week, allotting every six minutes of your day to some faceless corporate client, to claw your way into "the partnership" in your thirties, only to be given the chop by the young turks when you turn 50? Supposedly the work is intellectually challenging — just ask those feverishly working on discovery, due diligence and the intricacies of a commercial lease.

But perhaps these are just the musings of baby boomers, or in the case of one editor, pre baby boomer, who had it all too easy, who could swan about a law school for years, pursuing theatre, sport and debating, interspersed with long spiritual dialogues in now defunct hostelries safe in the knowledge that there would always be a job at the end of the degree.

But in this modern high-tech society you have got to get real. Professions, solicitors and barristers are a quaint thing of the past. Graduates now become legal industrialists — power-dressed Australian lawyers toting a computer and "blackberrying" to the world.

Factories now no longer exist. They are now known as industrial campuses. Perhaps this is equally a good description of the law faculties of the future.

APPOINTMENT OF EDITORIAL SECRETARY

John Stevens has been appointed Editorial Secretary to co-ordinate material for publication. His number is 9225 8270, fax 9225 6161, email johnstevens@vicbar.com.au. John is a former journalist who will liaise with the editors, who remain in charge of policy and layout.

The Editors

The Civil Justice Review

ON 22 May 2007, Chief Justice Warren delivered the first Victorian State of the Judicature address. Her Honour's address is available on the Supreme Court website and is published in full in this edition of *Bar News*. She described the role and work of judges; the increased complexity of litigation and length of trials; and the many strategies the Court has implemented, and is working on, to address the issues — such as specialised lists; more intense judicial management of criminal trials since 2004, accelerated since January 2007, with criminal matters coming before a judge within 14 days of the committal.

The Victorian civil justice system is now the subject of a major review by the Victorian Law Reform Commission (VLRC). Dr Peter Cashman, formerly Associate Professor of Law at the University of Sydney, is now the full-time VLRC Commissioner in charge of the civil justice review. A division of the VLRC has been established for the review comprising Dr Cashman, Justice Harper, Judge Hampel, and Professor Ricketson of our Bar and Dr Iain Ross, former Vice-President of the Australian Industrial Relations Commission and now partner at Corrs Chambers Westgarth.

The Bar Council established a working group, which I chaired. That group included Albert Monichino as secretary, Nemeer Mukhtar QC, George Golvan QC, David Beach S.C., David Clarke, Mark Moshinsky, Martin Scott and Jonathan Redwood. I acknowledge the valuable contribution which that group has made. Other members of the Bar including Kris Hanscombe S.C., Andrew Kirby, Lachlan Armstrong and Robert Craig have also made valuable contributions on aspects of the Review. On 15 December 2006, the Bar lodged a major submission (105 pages) which can be found on the Bar website.

The VLRC has recently issued an exposure draft summary of civil justice reform proposals as at 28 June 2007 which has been posted on its website. The exposure draft has foreshadowed reform

proposals in a number of areas including pre-action protocols, the adoption of "overriding obligations" on participants in civil proceedings (including both parties and lawyers), additional alternative dispute resolution options, expert evidence, class actions and costs. These proposals deserve careful consideration.

DELAY AND THE COST OF LITIGATION

The Civil Justice Review has been prompted by widespread concern at the delays and cost of litigation. The Bar has contended that delay itself can lead to significantly higher costs of litigation; the additional time allows parties to become involved in protracted interlocutory disputes. As Chief Justice Gleeson observed in his State of the Australian Judicature Address:

> Litigation is a perfect example of Parkinson's law: work expands to fill the available time.

Delay itself has insidious consequences. Apart from leading to higher costs, it produces anxiety and frustration in the litigants; it can prejudice the recollection of witnesses and the fairness of the outcome;

it disadvantages the economically weaker party who can be forced to settle for less; it fails to meet the needs of business for finality and expedition; it deters people from going to court and undermines confidence in the administration of justice.

The remedying of delays in our civil justice system must be a high priority. As the Chief Justice Warren observed in her State of the Victorian Judicature Address (page 17), competent and timely justice for all citizens is no less essential to our society than adequate education, health, transport and economic infrastructure.

In the review of our civil justice system, aside from the specific technical reform proposals, there are some overarching issues to address.

SETTING STANDARDS FOR EXPEDITION

First, what are appropriate standards for the progress of civil litigation? In its submission to the Civil Justice Review, the Bar suggested target periods for civil litigation as set out below. The range recognizes that each proceeding has different complexity.

a. The target period between commencement of the proceeding and the completion of all interlocutory steps (i.e. readiness for trial).	6–12 months
b. The target period between readiness for trial and the commencement of the trial.	2–6 months
c. The target period between conclusion of the trial and the handing down of judgment.	1–3 months
Therefore the target period between commencement and judgment.	9–21 months
d. The target period to get an appeal on for hearing after filing a notice of appeal.	6–12 months

A GOVERNMENT POLICY ON STANDARDS FOR EXPEDITION

Second, the Government should as a matter of policy set and publish the appropriate targets for the progress of civil litigation. The public are entitled to no less. This is the most tangible way to plan making the courts more accessible to ordinary Victorians and to speed up the course of justice.

It is hoped that the VLRC will provide valuable advice to the Government in this regard. Indeed the first of its Terms of Reference is "To identify the overall objectives and principles of the civil justice system that should guide and inform the Rules of Civil Procedure …" The significance of formulating the policy is that specific reform measures can then be assessed as to how well they advance the policy.

MONITORING LITIGATION

Third, the Government needs to put in place a comprehensive computerized system of monitoring litigation across the Supreme Court, the County Court and the Magistrates Courts to monitor the progress of litigation, the causes of delay and the effectiveness of measures to address it. There is no such system currently in place. [7.2] Bar's submission.

The Courts Strategic Directions Statement which was endorsed in 2004 by the heads of jurisdictions and the President of VCAT recommended that a properly funded Courts Statistics and Information Resource Centre or other appropriate system should be established (recommendation 17 — pp 23, 48 and 112).[1]

Chief Justice Warren observed in her recent address (page 18) that the courts must be accountable to the community. That includes she has said, "courts collecting detailed data as to what they do, how long things take, how many things and the types of things they do and then making that data publicly available." In essence, one has a better prospect of addressing the problem of delay by understanding all about it.

CASE MANAGEMENT

Fourth, the critical role of judicial case management needs to be recognized — it is essential to the timely conduct of litigation. In its submission to the Review (section 20), the Bar spoke of the need for more intensive, and in particular early, judicial case management — ideally there should be an individual docket system — otherwise there should be an early case management conference to identify key issues at the earliest stage, tailor discovery to the issues, and reduce or eliminate the need for most interlocutory applications; and there should be a pre-trial review conference. Federal Court Chief Justice Michael Black has been reported as saying:

> We need to reassert the ideals and benefits of judicial case management. These include a sharp and early focus on the essential issues, an insistence that the court's timetables and directions are complied with, and co-operation rather than confrontation in the procedures leading to trial.

The Supreme Court of Victoria in its submission to the VLRC notes that for 2005/2006 there were 6,504 civil proceedings commenced (page 3). During that period, 1,372 civil cases were in judge-managed lists. Other cases, in the Civil Management List, came under the management of the Masters.

An allied question which the VLRC has under consideration is that of the desirability of earlier and more determinate trial dates.

Currently, different courts have different strategies in this regard. Whilst cases in the Commercial List of the Supreme Court are set down for trial as soon as the strict interlocutory timetable has been met (and generally within 12 months), cases that are not judge managed will not currently be set down until the parties have completed their witness statements. This practice postpones the trial date for a considerably longer period.

The recently introduced Federal Court Fast Track List offers the prospect of a trial within six months from commencement of the proceeding. At the initial directions hearing, known as the Scheduling Conference, the presiding judge will set a trial date for the case which, except in urgent cases, shall be between two and five months from the date of the Scheduling Conference, depending on the relative complexity of the case. Urgent cases will be heard on shorter notice.

The Scheduling Conference is set down not less than 45 business days from the date of the filing of the application.

FINANCIAL RESOURCES

Fifth, the issue of the adequacy of the financial resources allocated to our justice system. The Bar welcomes the State Government's recent decision to allocate $45 million to reduce court delays by appointing two additional Supreme Court judges, two additional County Court judges, plus additional support staff and resources in the courts, Corrections Victoria and Office of Public Prosecutions. There is no doubting that further increases in funding in the years ahead will be needed to speed up the delivery of justice to community expectations.

ALTERNATE DISPUTE RESOLUTION

Sixth, the role of alternate dispute resolution. There is considerable scope for greater use of the various available methods — mediation, arbitration, expert

determination, special referees and early neutral evaluation. The challenge is for the Courts to work more closely with the profession to make this happen and develop specific measures and protocols.

In his State of the Australian Judicature Address, Chief Justice Gleeson said:

> Both within and outside the court system, there is increased emphasis on various forms of alternative dispute resolution. Arbitration has long been an important alternative to litigation, and has certain advantages, especially as a form of resolution of commercial disputes. Other procedures, such as mediation, conciliation, and early neutral evaluation, are also widely used. The courts have never had the capacity to resolve by judicial decision all, or even most, of the civil cases that are brought to them. Most legal disputes never come before courts; and most court cases are resolved by agreement between the parties rather than judicial decision.

Chief Justice Warren in her recent address observed that "Given the success of mediation, the courts should have the confidence to pilot other methods of dispute resolution, in particular, in appropriate cases, judicial dispute resolution." It is encouraging to see that the VLRC including in its draft proposals the suggestion that a wider range of ADR processes should be available to the courts.

COURT GOVERNANCE

Finally, the present discussion shows significant challenges ahead for the civil justice system. The need for further substantial funding increases from Government is likely to raise questions whether there should be a more focussed policy adopted on Court charges and fees. Should a major corporation have access to unlimited Court days (say a six month trial) and pay only the same nominal court sitting fee as any other litigant? Should there be economic disincentives imposed for delays caused by a litigant?

All the issues that arise in the current debate including the above give pause for reflection whether our current Executive model of Court governance is the most appropriate to meet the challenges ahead. The authors of a 2004 report on Court governance[2] see our traditional model as "clearly problematic in achieving efficiency and effectiveness of the Court" because:

> It sets up a misalignment of authority and responsibility, in which those who have the core operational authority (judges) lack clear authority over the necessary resources to carry out that responsibility. What makes this particularly strange is that it seems to be at odds with the espoused management rhetoric of all the governments in question.
>
> All of them subscribe to the principle that those responsible for programs should be accountable for the delivery of outputs or outcomes, and should be given the freedom to manage the necessary inputs and processes.

Chief Justice Warren recognized the issue in her recent address (p 27):

> There has been discussion raised again recently about court governance models. At some point it would be desirable to achieve uniformity, or at least consistency, between states so that state courts adequately reflect acceptable independence and standards alongside those courts within other systems. Perhaps it is a topic for the Standing Committee of Attorneys-General.

The Courts Strategic Directions Statement in 2004 (section 5.6) usefully canvassed the alternative Australian models of Court governance and concluded that its governance recommendations for the review of the Victorian arrangements "must be given first priority".

THANKS

In this my last Chairman's Cupboard, I thank the members of this year's Bar Council for their substantial, and entirely voluntary, service to the Bar — in particular the two Vice-Chairmen, Peter Riordan S.C. and Paul Lacava S.C., the Honorary Treasurer, Michael Colbran QC and the Assistant Honorary Treasurer Will Alstergren — all of whom newly this year came into that group of positions on the Council. Membership of the Bar Council involves not only attending the meetings of the Council but the inevitable subcommittees and undertaking preparatory work to advance the deliberations of the Council. All members of the Council have in the past year made substantial contributions to this work. I also express my great appreciation to the staff of the Bar office for bearing up so well in a challenging year.

It remains for me to take this opportunity to thank you all for the privilege of serving as Chairman.

Michael Shand
Chairman

Notes

1. It is intended to post the various documents referred to in this article to a Courts section of the Bar website.
2. *The Governance of Australia's Courts, A Managerial Perspective* John Alford, Royston Gustavson and Philip Williams (2004) AIJA.

40 Years of Very Small Steps on the Path to Reconciliation

NEARLY three months ago I was privileged to stand on ancient and breathtaking terrain in south-west Victoria and witness the law's long awaited recognition of the native title rights of the Gunditjmara peoples.

This recognition had been a long time coming, 11 years after the Gunditjmara lodged their application under what was then a fledgling legislative scheme. In many ways, however, that journey was a drop in an ocean of memory and longing for a people who, for 200 years, had fought with tenacity and grace for recognition that they and their children belong to their country, that they are charged with its care.

Seeing generations of Gunditjmara as they awaited the Court's pronouncement spoke volumes of the symbolic, as well as pragmatic, value of the law. It spoke of the value of autonomy and recognition, of paying respect, of the capacity to participate as equal parties to a dispute — and as equal parties to its resolution.

We could be forgiven for assuming that such participation was commonplace, 40 years on from the 1967 referendum when a young nation finally acknowledged the existence of people it had so brutally colonised. Shamefully, however, we remain adrift on a sea of injustice. Dispossession was no accident of history but a deliberate policy: one of violence and suppression, of intentional estrangement from country, severing of custom, one of premeditated exclusion from civic and legal participation.

Far from the benign act that we tend to mythologise, this nation — through its Constitution, through countless pieces of legislation — was founded on a denial of the rights of this land's first peoples. We remain complicit in this state-sponsored racism unless we find ways to set it right — unless we acknowledge that, just as legal mechanisms were

used to exclude Indigenous Australians, they must now be used to bring them justice.

The Referendum, the Royal Commission on Deaths in Custody, Bringing Them Home, *Mabo*: these were all wake-up calls to a sleepy little nation beguiled by stories of ANZAC and the fair go. The depth of our soporific state, however, means we've been unable to rouse ourselves and acknowledge that citizenship is not just about the capacity to vote or claim entitlements, nor even just about the rights and responsibilities of the individuals who bear it. Instead, most crucially, perhaps, it is about the responsibility of the nation charged with their collective care.

This responsibility means, quite simply, having the guts to say, loudly and without qualification, we are deeply and profoundly sorry.

We are sorry for the self-delusions of white virtue that thieved children from their mothers and left generations swimming in grief; we are sorry for the violence, alienation and rampant discrimination; and, perhaps more than anything, that racism and appalling disadvantage persist.

For this is the story that most defines our nation; this is the story on which we must make good. Just as the dispossession of this land's first peoples is this nation's greatest tragedy, their survival its greatest act of heroism. Reconciliation is our greatest opportunity for redemption and in Victoria, because we are sorry, we are working to make amends. The Aboriginal Justice Agreement, the numerous other partnerships across Government, and, more broadly, Victoria's Charter of Rights and Responsibilities are all opening doors to new possibilities.

I hope, also, that our celebration in south-west Victoria three months ago was another small step towards national healing, offering respect and vindication to those who have long deserved it and formally recognising profound spiritual relationships at law. It was joyous, moving and, frankly, very humbling to be present at a day of such significance, intimacy and triumph for the Gunditjmara peoples; and, for Government, a chance to face the past with humility and the future with resolve.

Significantly, the occasion proved there is an alternative to the confrontation of the adversarial system, and in Victoria we have now shown that we can find resolution if we mediate rather than litigate, the Gunditjmara claim being the second in Victoria to be determined by the Federal Court with the consent of all parties.

I do not pretend, however, that we are not still learning. Nor do I pretend that access to justice is truly meaningful without access to social infrastructure and services, to amenity, to full participation in the civil process, to diversity, to culture and connection, to elected representation, to self-determination.

However, legal representation and participation can make a genuine difference — it can bridge the chasm between disadvantage, whether systemic or indi-

vidual, and access to justice, it can help Indigenous voices be heard by and take on a legal system originally designed around their exclusion, and help create hope for some who have only ever had a negative experience of the law.

I know that many of the Bar have been striving to make this difference and I urge you to continue to do so. By working towards land, economic or social justice we can find cause to celebrate progress since the momentous events of 40 years ago; we can find opportunities for insight and understanding that bring genuine reconciliation within our reach.

Rob Hulls
Attorney-General

Media Release

Government Legal Work Redresses Gender Imbalance

Social justice and equal opportunity are the winners in the 2005–06 annual report of the Government Legal Services Panel, released in May by the Attorney-General, Rob Hulls.

Firms on the Panel are required to adhere to social justice policy outcomes, including reporting on the briefing of women barristers for government work.

Mr Hulls said more than half the government and panel's legal briefs were given to women barristers, while firms listed on the panel exceeded their social justice commitment by providing $5.2 million in pro bono work for community and other specialist legal centres.

"Law firms went above and beyond their commitments, delivering pro bono services worth nearly $1.5 million more than required under the panel system," Mr Hulls said.

"The firms are to be commended for supporting legal services that assist some of the most disadvantaged people in our society, such as the homeless, and ensuring that public interest cases can be brought to the courts."

Mr Hulls said he was also delighted to see the gender imbalance in the legal profession being redressed to some extent.

"Women barristers only represent one-fifth of the Victorian Bar, but they receive 52 per cent of the briefs from government departments, the Victorian Government Solicitor's Office and firms on the Government Legal Services Panel.

"It is an excellent result and a big step in the right direction, but the pressure to positively allocate more work to women will have to continue for some years more, despite women having already surpassed their representation at the Bar.

"We still need a critical mass of women at senior levels in the profession, which also needs to embrace structural changes that will allow women to have families and return to the profession." Mr Hulls said the Children's Court accounted for the highest number of junior briefs to women, providing a good grounding in gaining skills during the early years at the Bar.

The report shows that government departments briefed women in 58 per cent of cases, the Victorian Government Solicitor's Office briefed women in 32 per cent of cases and panel firms briefed women in 30 per cent of cases.

Mr Hulls said not only was the volume of work for women barristers impressive, but also the nature and quality of that work which was reflected in the share of fees women barristers receive.

County Court

Judge Maree Kennedy

Maree Kennedy was always on my horizon. Her dark good looks, slash of red lipstick and her ferocious intelligence made her hard to miss. We only really came to know one another well after we took silk together in 2002 and shared chambers on the sixteenth floor of Owen Dixon West in more recent times.

Maree did her articles with Andrew Guy at Arthur Robinson & Hedderwicks where she worked closely with Melanie Sloss S.C., then a Senior Associate of the firm. She was admitted to practice in March 1987 and took up an associateship with Justice Keely in the Federal Court for 12 months. In 1988 and 1989 she taught full-time at Monash University in property and administrative law, while beginning and completing her Master of Laws. She signed the Bar Roll on 1 September 1990, reading with the now Justice Stephen Kaye.

Stephen Kaye has described her as articulate, hard working and very clever. His fellow readers described her as his favourite. She describes her experience with Stephen as galvanising. She says she has always followed his injunction to do anything that came her way.

Over the next 17 years at the Bar she did just that and practised in crime, tax, commercial, insolvency, immigration and just about every public law stoush between the Commonwealth and the State of Victoria of the last 10 years.

Her early years at the Bar were marked by substantial work in the area of immigration on behalf of the Immigration Legal Centre. Mary Crock, now Professor of Administrative Law at Sydney University with whom Maree worked, described her as "an extraordinarily talented barrister distinguished by her humanity". The ultimate compliment occurred after some years when Maree was briefed by the Commonwealth in immigration matters.

One of Maree's regular briefers described her as much loved by business and government for her ability to cut a swathe through complex commercial problems. She is famous for getting to the point early and staying there. In a recent appearance in the County Court she appeared for the Respondent. The Plaintiff had subpoenaed all her potential witnesses but had called none of them. Maree called no witnesses and tendered one document only.

Judge Coish delivered an extempore judgment in favour of Maree's client. Counsel for the Plaintiff was later heard to mutter, "Maybe the Chief Justice is getting it right". Of course he was wrong again as Maree took silk in 2002.

Maree's capacity to get to the point and stay on the point is only matched by her prodigious capacity for work. 6.00 a.m. starts were the norm, even when she wasn't running a case.

She continued to use her own name of Kennedy when her married name of Cussen would inevitably have invited more than mere acknowledgement of her connection to Sir Leo Cussen.

She was led by David Habersberger, Peter Jopling, Ray Finkelstein, Richard Tracy, Tony Cavanagh and Kevin Bell amongst others.

Her juniors describe her as uncompromising in her standards and adding real value strategically and substantially to every piece of work. She says she asks nothing more of them than she herself did as a junior.

She was a loyal companion in chambers where her domestic joys and travails, which included two tiny children and the management of a busy demanding practice, were the source of immense merriment. At tea time one night at home in the middle of an injunction application, Maree was on the phone to an instructor when the microwave burst into flames. Her instructor spoke on, blissfully unaware of the conflagration whilst Maree doused the flames and provided calm and lucid advice.

Her recent Bar CLE on Legal Professional Privilege was widely admired and the impetus for her appointment to a committee of the Australian Law Council looking into the privilege.

Maree's son Daniel was recently asked to create a family crest and motto. He identified the family motto as "Now is a good time". This was obviously a good omen, though when Daniel was told of the appointment all he wanted to know was would there be a party and could he stay up late. His four-and-a-half year old sister was more concerned about whether there was a uniform and what colour it was. The purple of the County Court she thought (correctly in my view) would suit Maree.

Modest in her outlook and demeanour, the County Court is lucky to get someone of Maree's talents and breadth and depth of experience.

We wish her well in her appointment to the County Court.

F.I. O'Brien S.C.

Farewell to VCAT President Morris

Farewell address by Michael Shand QC Chairman of the Victorian Bar Council Thursday 19 April 2007, on the occasion of the retirement of the Honourable Justice Morris from the Presidency of the Victorian Civil & Administrative Tribunal.

MAY it please Your Honour, and may it please the Tribunal — this being the last occasion on which Your Honour will sit as the Tribunal, I appear on behalf of the Victorian Bar and I am sure I speak for everyone here today and the community at large to pay tribute to Your Honour's achievements in nearly four years' service as the President of this Tribunal.

In June of 2003, Your Honour became President of the Tribunal. It had grown since 1998 on the firm foundation laid by the inaugural President, Justice Kellam.

VCAT plays a huge role today in the administration of justice in Victoria — at the late annual report, it had 8 judicial members, 7 Deputy Presidents, around 38 full-time members, 143 sessional members and 197 employees, total applications lodged last year of almost 89,000 and roughly the same number of cases finalized.

Your Honour has been an outstanding judicial administrator. You have been a champion of the Tribunal, giving strong and informed leadership and an effective voice to the public, explaining the workings of the Tribunal to countless community groups.

As the Attorney-General said, on the announcement of Your Honour's intention to retire: "VCAT is a leader in this country in the administrative law jurisdiction; this is due, in large part, to the efforts of Justice Morris."

The President of the Administrative Decisions Tribunal of New South Wales, His Honour Judge Kevin O'Connor AM has written in the following terms:

> I am writing to record my appreciation for the contribution that Justice Morris made to the work of Tribunal members generally in New South Wales over the last four years.
>
> Stuart gave excellent presentations on the topic of giving reasons for decision. The quality and skill of those presentations continues to be commented upon very positively.

Justice Stuart Morris.

His warmth and good humour will be missed.

On behalf of the members of the Tribunal that I head — the Administrative Decisions Tribunal New South Wales — may I wish Stuart well for the future.

Early in Your Honour's Presidency, you made a tour of regional Victoria, designed to highlight the importance of courts and tribunals sitting in regional areas throughout the State.

You did of course have considerable experience in this regard. Your previous tour of rural shires was in 1985 and 1986 as Chairman of the Local Government Commission — to conduct hearings into forced amalgamations to reduce 211 Victorian municipalities to 40 — a surefire way not to win a popularity contest!

Your Honour conducted one hearing in the Shire Hall at Metcalfe — north of Kyneton. Metcalfe had lost its railway-stop, its school, its post office and finally its pub. Metcalfe farmers had not, however, lost their spirit.

In a break in the hearing, Your Honour went to use the conveniences. Over the electric hand-dryer was a handwritten sign which read: "Press button to hear Commissioner Morris."

Nearly 20 years later, Your Honour's 2004 tour as President of VCAT was immensely more welcome.

Throughout Your Honour's Presidency, you have spoken and listened to people — in community groups, local councils, professional bodies and industry associations.

So I am confident in speaking, not only for the Bar and the legal profession, but also the public who have benefited from Your Honour's service at VCAT.

Within only a few months of taking office at VCAT, Your Honour initiated what you named "Operation Jaguar" — a review designed to improve efficiency in the Tribunal, with particular focus on the Planning and Environment List — you aimed to achieve a process, you said, that was sleek, swift and efficient like the big cat.

Operation Jaguar was a great success. Times were reduced; new procedures introduced.

Over the period of Your Honour's Presidency, the median time for the determination of planning disputes has been reduced from 22 to 16 weeks; and the median waiting times in the Civil Claims List are down from 21 to 8 weeks.

As Your Honour has said before, statistics are not the "be all and end all". Your Honour gave leadership to all at VCAT, encouraging in them confidence to write timely and succinct reasons for decision and a strong sense of commitment to the objectives of the Tribunal.

Under your stewardship, VCAT has conducted a wide range of professional development activities for its members, including its own decision writing course in June 2006 and a seminar for members deciding fair trading disputes.

Through your drive and energy, the Tribunal offers better amenities for its members and the public — the library on level 4, the improvements to level 6 and, with the assistance of the former CEO, John Ardley, the new mediation centre on level 2. As one Deputy President said the other evening at a dinner in your honour: "He's made it a great place to work."

In a break in the hearing, Your Honour went to use the conveniences. Over the electric hand-dryer was a handwritten sign which read: "Press button to hear Commissioner Morris."

At the same dinner, the Justice Department Secretary Ms Penny Armytage singled out the introduction of Court Network in VCAT, in which she described Your Honour's role as "pivotal".

Your Honour has been a strong supporter of the use of technology in the administration of justice. You have recognised the difference it can make to the transparency of the process. In particular AustLii combined with the websites of the Courts and tribunals has, as you have said, "made possible the rapid and widespread dissemination of decisions and the reasons for them". And at no direct cost to the public. These are an important counter to the filter of what you have called "shock jock" radio presenters and tabloids.

VCAT Online last year attracted an increasing number of users who lodged more than 51,000 applications online, representing 78 per cent of all applications made to the Residential Tenancies List.

By Your Honour's leadership, you have strengthened VCAT in its core objectives to be cost effective, timely, accessible, fair and impartial and quality decision makers. In the Tribunal and in the Supreme Court — both as a trial judge and in the Court of Appeal — Your Honour conducted proceedings fairly, efficiently and with dignity. Typically, the Court of Appeal in planning appeals from VCAT would include either the Chief Justice, Justice Osborn or Your Honour.

In a significant number of cases before the Tribunal, including complex planning cases, both parties are unrepresented. These can present considerable challenges to any judge or Tribunal member.

Your Honour displayed a particular gift in hearing these matters. Impeccably fair, Your Honour struck just the right balance. Cases proceeded with a degree of informality such that the unrepresented litigant was not intimidated and felt able to put his or her case. At the same time Your Honour upheld the authority and dignity of the Tribunal.

In one case, an unrepresented litigant was having difficulty making his point. He was from the Indian sub-Continent, and Your Honour took a wild guess that he might follow cricket. You asked "Mr X, do you follow cricket?"

That elicited a rather puzzled, "Indeed Sir, I do, very much."

"Well, let me put it this way, you have just bowled a `wide'." "Ah, thank you, Sir" and the man smiled — he understood.

His next proposition was much more on point: "Now you are on the pitch." Your Honour has delivered significant judgments across the broad range of the Tribunal's jurisdictions — from (in alphabetical order) anti-discrimination through freedom of information, gaming, health, occupational health and safety and professional discipline to valuation and compensation.

Your decisions both on the Court and the Tribunal, if not always popular, were bold, humane, compassionate and fearless. They were eloquent and well reasoned.

Your Honour gave intellectual leadership to the Tribunal, and as a fair and sound judge, true to the oath you took, and remarked upon in your welcome speech, you discharged" [your] duties according to law, and to the best of [your] knowledge and ability, without fear, favour or affection" — even though, on occasion, that involved offending government, developers, or objectors.

Your Honour will be much missed and on behalf of the profession and the public, I extend to you sincere thanks for your service as President of VCAT.

I wish you every happiness and new challenges for the future.

May it please the Tribunal.

Farewell by Justice Stuart Morris, President of the Victorian Civil and Administrative Tribunal

A speech given at a hearing of the Victorian Civil and Administrative Tribunal on 19 April 2007.

I would like to thank Mr Shand for those kind words. I would also like to thank so many of you for coming to this farewell sitting this afternoon.

When I was 16 my sister gave me a copy of Irving Stone's book, *Clarence Darrow for the Defense*. Darrow was a famous American lawyer. He was also a man who engaged in career change. Darrow had been a company lawyer, but, when aged 38, he decided to defend labour activists and other social underdogs. Darrow was a free thinker, a civil libertarian, a man with a social conscience; intellectual integrity was his hallmark; and he was a man who became involved in fascinating cases in the fight for human rights. One of his most famous trials was the Scopes "Monkey" trial in 1925, when Darrow defended the right to teach the theory of evolution in high schools.

I have read and re-read that book many times. It was instrumental in my decision to study law; and it has inspired me in the practice of the law, both as a barrister and as a judge.

A judge is, of course, required to faithfully interpret and apply the law. A judge is also required to exercise any discretion in accordance with law. But it remains true that one of the privileges of having been a member of the Victorian Civil and Administrative Tribunal has been the opportunity to consider important social questions and seek to resolve them fairly and wisely. In this respect it is inevitable that values formed many years ago — whether from family, or schooling, or from reading — play a role.

Decisions about public questions are often controversial; and it is rarely possible to make a decision that will please everyone. Indeed, VCAT seems to get its share of cases where it is inevitable that someone or other will be actively displeased by whatever decision is made. I suppose I have had my share in that category. But I'm not complaining.

I have been extremely fortunate to have been charged with the responsibility of deciding an array of cases with a social policy dimension: for example, what is meant by "fair" trading, when girls can play football with boys, when is a document a cabinet document, whether the sperm of a deceased man could be exported to another state. I have also determined many major planning cases, particularly in relation to the adoption of fair procedures. Cases about end-of-life decision-making — such as BWV, RCS and Mrs Maria Korp — have also been extremely challenging.

For good or for bad, I have approached the task of resolving controversial cases by striving for the goals of intellectual rigour, promoting fundamental values — particularly values about the freedom of the individual — and eschewing cheap populism. However, only time will tell whether I have achieved these goals.

John Maynard Keynes once said that when men espouse new ideas this often involves rehashing some idea or theory learned as a youth.[1] So, at the risk of adding further proof to his aphorism, I would also reflect on another book I read before I was 20. In *The Structure of Scientific Revolutions*, Thomas S Kuhn argues that the progress of science depends on identifying the circumstances where existing paradigms fail to explain nature; and then engaging in a "paradigm shift" to provide a better explanation. I suppose the classic example was the paradigm that ruled from ancient times to the sixteenth century, to the effect that the Earth was at the centre of the solar system. This paradigm was so powerful, and universal, that Copernicus did not publish his theory to the contrary until he was about to die. Copernicus' theory, that the Earth revolves around the Sun, required a paradigm shift of the type identified by Kuhn.

There is a quotation of Keynes that expresses a similar idea. He said:

> The difficulty lies not in the new ideas, but in escaping from the old ones.[2]

I mention these things, because in many ways VCAT is a paradigm shift, an escape from old ideas. Even after nine years, VCAT is a new idea. It is a new idea to vest substantial judicial power in a tribunal. It is a new idea to extend administrative review to most corners of government. It is a new idea to bring tribunals under one umbrella, maintaining specialisation while obtaining the advantages of bulk. Some of these new ideas have been uncontroversial; others less so.

But what is unquestionable is that VCAT has achieved its makers' goal of being expert, inexpensive, timely, accessible, independent and fair. For example, planning cases are determined by experienced town planners, or engineers, or specialist planning lawyers. Building disputes are resolved by specialists in this field. Civil claims are typically resolved in eight weeks; and residential tenancy disputes usually take only three weeks. In many lists of VCAT, litigants routinely appear in person or, if represented, are represented by a professional other than a lawyer. The success of VCAT is also highlighted by the fact that over the last four years some 18 new jurisdictions have been vested in the tribunal.

The fact that VCAT represents such a positive paradigm shift in the way justice is delivered to the ordinary person is extremely satisfying. Indeed, I have been

immensely proud to have been the leader of VCAT.

The fact that I have decided to leave the Bench before becoming entitled to a pension has attracted comment. Certainly such a decision does not fit the conventional paradigm. But I have spent thirteen years in public life — five as a local councillor, two and a half as a tribunal member, one and a half as a commission head, and four as a judge and as head of Australia's largest tribunal — and I am engaging in my own, personal, paradigm shift. I suppose the difference is that I have not concentrated this public service in the last part of my career, but have spread it out, moving from challenge to challenge. For me, that has worked.

I wish to emphasise that when I came to VCAT the organisation was already strong under the leadership of Justice Murray Kellam. I hope I have made it stronger. Certainly I am convinced that many of the changes that have strengthened VCAT are now embedded; and that the tribunal will continue to prosper.

The leader of any organisation depends on others. And often it is those "others" who contribute so much to the success of the organisation.

The Vice Presidents and Deputy Presidents of the tribunal have provided me with enormous support. In some ways each of these presidential members has been running their "own" tribunal, efficiently and without fuss, whilst drawing on the overall strength of VCAT. John Billings runs the Guardianship List with great care and competence. Sandra Davis, Marilyn Harbison and Cate McKenzie have been outstanding contributors, particularly in anti-discrimination. Anne Coghlan is efficiency personified; Michael Macnamara is a brilliant lawyer; Bernadette Steele manages residential tenancies and civil claims with new ideas and energy; and Cathy Aird runs our Domestic Building List with aplomb. The indefatigable Helen Gibson presides over the Planning and Environment List; and we now have Mark Dwyer on board and in charge of land valuation. John Bowman is a great civil all-rounder — a "civil" all-rounder, that is an odd expression for a Collingwood supporter. I thank all these presidential members for their support. I also thank former presidential members, including Richard Horsfall, Damien Cremean and Michael Levine.

VCAT is also fortunate to have many talented and dedicated members, who shoulder most of the day-to-day workload. Their contribution has been outstanding.

The senior staff of VCAT — the present and immediate past CEO, the present and immediate past Principal Registrar, and the Listing Co-ordinator — have all provided me with tremendous service. The staff of VCAT play a critical role in achieving high standards of service; and in delivering justice to the quarter of a million parties who use the tribunal's services each year.

I have also received wonderful and loyal support from my associates over the years; and from my secretary, Robyn Weeden.

The fact that I have decided to leave the Bench before becoming entitled to a pension has attracted comment. Certainly such a decision does not fit the conventional paradigm.

Outside of VCAT, I have also received valuable support. From my fellow heads of jurisdiction, from the Attorney-General, from my fellow judges on the Supreme Court, from the Judicial College of Victoria, from Crown Counsel and from Court Network. I recall the judicial pay dispute of Easter 2004 with affection; and the professional training days we have held at VCAT with the support of the JCV. And notwithstanding decisions like *Buttigieg* v *Shire of Melton*, VCAT has had excellent relations with successive Ministers for Planning and the Department of Sustainability and Environment. VCAT has also been served by the Victorian Government Solicitors Office, Victorian Legal Aid, the Public Advocate and State Trustees. I have also been fortunate to enjoy constructive associations with professional organisations such as the Victorian Bar, the Law Institute, the Victorian Planning & Environment Law Association, the Municipal Group of Valuers and the Planning Institute of Australia.

In my time I have sought to engage with the stakeholders of the tribunal, particularly local government. I think I have spoken to almost 50 councils over the past four years. I want to say that my dialogue with local government has been valuable in explaining Victoria's planning appeal system. I have been warmly received by councillors and council officers; I appreciate that.

As this is a farewell speech, I suppose it is customary to now talk about the Department of Justice. Well, I have found the Department — and in particular Penny Armytage and John Griffin — to be enthusiastic supporters of VCAT and what the tribunal stands for. Of course, we can always do with more money. But I have found a high level of co-operation and shared vision with departmental officers. I thank them for that.

I do not want to forget the practitioners who appear before the tribunal. Anyone who has sat on a court or tribunal will know that the attitude of practitioners contributes so much to work satisfaction. My first case was not a welcome introduction: I was asked to rule on some twenty evidentiary questions by enthusiastic counsel. As so often happens, as the case developed the rulings turned out to be largely irrelevant. I described the experience at the time as like sitting an oral examination. Fortunately that experience did not set the trend. Rather I have found practitioners — both lawyers and non-lawyers — immensely helpful, co-operative and honest in their dealings with the tribunal.

In any job the support of family is important. The job as President of VCAT is no exception. I have been blessed with a close and loving family. I thank Jenny and my children for all their support.

In my early days here the then CEO John Ardlie was asked how things were going with the new president. He replied that VCAT was going for a ride and he was getting on board. I know some had hoped for a longer ride. But the trip has been rewarding, rarely boring, and the vehicle is still intact. It's now time for a new driver.

Notes

1. "The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back." *The General Theory of Employment, Interest and Money* (1935) Ch 24 "Concluding Notes".
2. *The General Theory of Employment, Interest and Money* (1935).

Wake to Celebrate the Life of Peter Ross Hayes QC

Speech by Ross Robson QC, at a wake held on 7 June 2007

CELEBRATE PETER'S LIFE

WE are gathered here today to celebrate the life of Peter Hayes who passed away on Monday 21 May 2007. We were all shocked and stunned by Peter's death. It affected many of us far more that we had expected. I hope these few words will do justice to our remarkable friend.

Peter Hayes was born on 30 October 1948, the second son of Bob and Nancy Hayes and brother of Robert. Peter attended Carey Grammar School before moving on to Scotch College. He graduated from Monash University B Juris, LL B (Hons). Peter was articled to Michael Winneke at Gillott, Moir & Winneke. Peter was admitted to practice on 1 March 1973 and signed the Bar Roll that day. He read in the chambers of the Honourable Clive Tadgell AO, QC. Peter took silk on 29 November 1988. Peter provided extensive service to many Bar organizations, too many to list.[1] His clerk Glenn Meldrum wishes his loyalty and support for his list to be remembered.

Peter was a unique individual, the like of whom we will probably never ever meet again. His vibrant and warm personality made a significant impact on all he met and each of us in this room who had the privilege of knowing him will have special memories of Peter that we will cherish forever.

Peter had wonderful qualities. He was warm, generous, witty and compassionate. He wore his heart on his sleeve and all who came into contact with Peter were struck by his genuine friendliness and easy charm. Peter loved people and delighted in their company. He could gain the confidence and friendship of a person as soon as he met him or her. The stories that I am about to relate could be multiplied many times.

Peter Ross Hayes QC.

JOKES ABOUT PEOPLE

Peter had an endearing characteristic of being able to make jokes about a person that the butt of the joke could laugh along with. One of my favourites is Peter's observation to his junior when in earnest conversation with Roger Gillard: "Don't interrupt Roger when he is interrupting." This epitomises the quickness of Peter's wit and also the way he could have a joke at someone else's expense that was not spiteful or hurtful.

COMPANION

When Peter first came to the Bar, those fortunate enough to be encompassed within his orbit were constantly entertained by the stream of stories and experiences that he generously shared. Peter emanated energy, enthusiasm good

humour and affection, which those that circled around him basked in. He was a great companion. Every minute was an adventure, stimulating and fun. The old saying "never a dull moment" must have been coined with Peter in mind.

As I mentioned previously, Peter read in the chambers of Clive Tadgell, an experience for both Clive and Peter. Peter was a "fashionable junior" and he often acted as junior to Stephen Charles, Alex Chernov and Bill Ormiston. They all became firm friends and perhaps assisted by the experience they all later sat on the Court of Appeal of the Supreme Court of Victoria, along with Peter's pupil master Clive Tadgell.

One of Peter's first trips overseas as counsel was as junior to Stephen Charles: a trip that took them to San Francisco to confer with a major corporate client. At the conference with executives of the client, Peter in his usual enthusiastic manner offered all sorts of opinions and advice. Stephen could hardly get a word in. After the conference, Stephen turned to Peter and said "I think it is a good idea to let your leader kick a goal occasionally." One of the great aspects about Peter was that he was the one who would tell you that story and many similar stories at his own expense.

ASIO

Peter had the knack of paying attention to what he considered was important and ignoring what he thought was unimportant. On one occasion, he was briefed by ASIO in an inquiry into the security services. A whole bevy of serious-looking men turned up in his chambers and wheeled in a huge safe. Peter was given strict instructions that the secret documents that ASIO provided him with were to be locked in the safe every night. He was instructed to memorise the combination. Naturally every morning Peter had forgotten the combination and the same group of men would return to open his safe. I am sure that the ASIO officers were often surprised to find a half-eaten sandwich or other item of food along with the top secret papers in the safe. If perchance a document was not locked up I am sure we can all sleep easy, confident that our national secrets were safe as only Peter could locate a document in the sea of paper in his chambers.

MISCHIEVOUS

I think we should add mischievous to Peter's endearing characteristics as well. For example, one day, Peter met Michael Black in the street, before Michael went to the Federal Court, and said: "Michael, I heard a rumour you are to be appointed Chief Justice of Victoria." Michael, seeking to establish the strength of the rumour, said to Peter: "Who started that rumour?" Peter paused as if searching his memory and then said, "I think I did."

Peter gave the Mr Junior Silk speech in 1989. One of the judges he was toasting was Mr Justice Fullagar. Peter said that his Honour was busy writing his three-volume work on how not to hear a case, loose-leaf service of course. Only Peter could get away with a comment like that.

STATE OF CHAMBERS

His chambers had to be seen to be believed. He went through briefs like hot dinners and each brief when finished with was cast into the corner onto an existing mountain of documents. Peter had a constant stream of people in and out of his chambers: colleagues, juniors, solicitors, secretaries, clients and friends. Peter loved talking. After court if the phone didn't ring he had his secretary ring around several of his favourite solicitors and leave a message to call Peter. When they rang back, Peter would give the impression that they were instigating the contact and chew over every aspect of the cases they were working on together.

PETER UNDERSTOOD PEOPLE

Peter understood people. For example, if he was offered a piece of confidential gossip he would usually reply, "No need to worry — it won't go beyond the 16th floor." As all who practice at the Bar know, that is a pretty accurate prediction of what usually happens to gossip.

Peter also understood himself. In a famous Western Australian case, Peter's instructors had obtained a psychological profile of the other side's client that pointed out some unusual characteristics. Peter's junior and instructing solicitor were shocked to see that the analysis also fitted Peter's personality and showed it to Peter with completely straight faces, holding their breath. As Peter read the profile he started to laugh and said as he tossed it away, "Sounds like me."

THE SIXTEENTH FLOOR

The sixteenth floor of Owen Dixon Chambers West — those lucky few who shared that floor with Peter will never forget the experience. Andrew McIntosh, Chris Maxwell, Kim Hargrave, Simon Whelan, John Larkins and many more who are still at the Bar will forever recall the sheer energy and force of personality that emanated from the north-east corner which was the happiest spot in the building.

LOYALTY TO FRIENDS

Peter maintained a great friendship with the late Ian Sutherland and Peter Kennedy, his close friends from Monash. Peter's eulogy at Ian Sutherland's funeral will surely rank as one of the finest ever heard by those that were there, that sad day. He spoke with such empathy, knowledge and sincerity that those fortunate enough to hear it were deeply moved and retain wonderful memories of Ian.

THE BOOMGATE

A picture of Peter's life would not be complete without the full story of the car park boomgate. Peter and Mary had been invited to Canberra to provide some youthful company to their Royal Highnesses Prince Charles and Princess Diana during their first royal tour of Australia. Mary went on ahead and Peter left, naturally, at the last moment to head out to the airport to fly to Canberra. He left his car park pass behind and his entreaties to the car parking attendant to allow him to leave without the card fell on deaf ears. Peter crashed his car through the boomgate as you would expect and managed to get to Yarralumla to carry out his duties. A few days later back in chambers, we were all surprised to see a member of the Victorian Police Force arrive at Peter's chambers asking to see "a Mr Peter Hayes" about a damaged boomgate. I don't know what Peter said to the constable but all was sorted out to the satisfaction of the police and the car park owners. One thing we can be sure of is that Peter would not have mentioned Prince Charles or Princess Diana. Peter was no name dropper. Peter was completely oblivious to rank and title. To Peter, all that mattered was the person.

PETER'S READERS

Peter had 11 readers: Stephen O'Bryan, Peter Costello, Graeme Clarke, Nunzio Lucarelli, Michael Hines, Charles Scerri, Jocelyn Scutt, Paul Anastassiou, Blair Ussher, Kathy Williams and Godfrey Cullen. Each of his readers treasured their only too brief time with Peter. Peter took silk in 1988 and as is the custom his eleven readers entertained him to a dinner. Peter's speech in response treated his readers as his cricket team from the Western suburbs and described their character and legal abilities in cricketing

terms. If I recall correctly Peter Costello and Don Bradman may have been mentioned in the same sentence.

Peter was kind and generous to all and particularly to his readers and those just starting at the Bar. He would ensure each of his readers got juicy briefs as soon as they were able to take briefs, usually junior to Peter. Kate McMillan read in the chambers of Peter's good friend Ian Sutherland. For three days after she signed the Bar Roll and became eligible to take briefs the phone remained silent. On the fourth day it rang. It was Peter. "Kate, can you do a couple of consents in the practice court for me?" Her successful career was off and running. Peter had obviously heard from Ian Sutherland of Kate's plight and typically lent a hand. One could multiply stories like that one hundredfold.

Being a junior to Peter had its risks, however. Peter would often say just before a case was to begin: "Look you start the case. I'll be across in ten minutes." A day or so later he would turn up to make the final submissions and usually win the case. On the other hand, many of Peter's juniors carry with pride the red bag generously bestowed by Peter in recognition of their efforts in acting as Peter's junior.

PETER'S SUPPORT FOR JUSTICE

Peter was a wonderful and courageous barrister. There are some things that should be said, however, to show his true character. Over the last twenty years, Peter took on more hard cases than possibly any other barrister at the Bar. Often he took these cases on a "no win, no fee" basis. The investors in Pyramid would not have received a penny but for the efforts of Peter and his junior Michael Hines, instructed by the late David Fogarty of Deacons. Against all odds he battled the State of Victoria and ultimately won through. There were many more cases like Pyramid. They were difficult as often the life savings of his clients were at risk. These cases are very emotional as so much rides on the outcome. Despite the toll they took on Peter, he could never turn a victim of injustice away from his door. He had the gift of getting straight to the point and encapsulating his arguments in a way you could not forget. He was the barrister to have in a last ditch fight. He was the barrister to have in any fight and the huge practice he had bears testimony to the view that the profession had for his abilities.

Peter railed against any hypocrisy that he saw in the law. He argued for procedures to speed up cases and reduce technical delaying tactics. He was a relentless advocate for justice.

PETER'S CHILDREN

Peter dearly loved his children Sarah, William and Jane. We all remember the wonderful photograph of them that Peter had in his chambers and the pride he expressed in their achievements. It is important that they know the high esteem Peter was held in and the great friendships he forged at the Bar. They should know and be proud that their father was one of the giants of the Victorian Bar and a wonderful human being.

MARY

Mary and Peter married in 1972. After nearly 30 years of marriage they separated. Any celebration of Peter's life must acknowledge the unfailing love and support Mary gave Peter during their marriage and the dignity and patience she displayed during their marriage.

SUMMARY

How do we sum up Peter's life? Once in a lifetime comes along an individual that with the sheer force of his personality and humanity leaves an indelible mark on all fortunate to meet him and share his life with him. Peter was such a man. How would you describe him: Woody Allen — Oscar Wilde — F.E. Smith. You can't — he was one out of the box and we are all richer for having known him and poorer for his passing. Vale Peter.

Note

1. Peter served on the Bar Library Committee in 1973 and 1974 and, briefly, on the New Barristers Committee in 1974. He was Assistant Honorary Secretary of the Bar Council from March 1984 to May 1985, and Honorary Secretary from May 1985 to February 1986. In that connection, he was a member of the Applications Review Committee, the Readers' Practice Course Committee, and the Bar Executive Committee. He served on the Bar Company Law Committee in 1986–87. Peter served as Chairman of his List Committee (List M) from 1991–1992 and 1994–1994.

Singing Judge Billed with Monash Professor of Embryonic Stem Cell Research at the County Court

The very talented Judge Liz Gaynor, the mystery singing judge.

THE daily murmur of lawyers and their clients disappeared last night when Waldron Hall was opened to supporters of Cure MS, a passionate group of volunteers who raise money for scientific research into a cure for the auto-immune disease multiple sclerosis. Alan Trounson, Professor of Stem Cell Sciences and Director of Monash Immunology and Stem Cell Laboratories at Monash University, told the 180-plus guests that he is ready to do the first clinical trial using stem cells which will impact on a cure for auto-immune diseases like multiple sclerosis and diabetes. The cost of the trial will be in the order of $15 million and the funds need to be raised before the trial can proceed.

"The race is on. And if we don't do it the Americans or someone else will. We have the medical science, the know-how and now all we need is the money," said Alan, the pioneer of human in-vitro fertilisation (IVF) techniques.

The County Court generously hosted the evening and the very talented Judge Liz Gaynor, the mystery singing judge, entertained and charmed all present with a brace of Irish ballads — proving the acoustics of the County Court. Unaccompanied her clear voice filled the hall and left the audience silently in awe of her musical accomplishments.

Cure MS currently supports Professor Claude Bernard, Multiple Sclerosis Research Lab who works with Professor Alan Trounson. Professor Bernard is internationally renowned for his research into the underpinnings of MS and the development of new therapies for people with the disease.

To donate:

1. Make a cheque payable to Cure MS
2. Send your credit card details by phone or fax
   Card no: _____ expiry date: mm yy
   Address: The Treasurer, PO Box 5044, Glenferrie Sth, VIC 3122
   Fax: 03.9815 0132

All donations over $2 are tax deductible and will be receipted by Monash University.

Cure MS Committee: Sarndi Addison, Goldie Batrouney, Belinda Burke, Jenny Davies, Amanda Derham, Margie Lilley, Felicity Sladen, Sandy Rush, Gill Thomas, Di Diamond Walford, Jill Wells, Jennie Wilmoth.

Historic Reopening of Banco Court in the Supreme Court

Prue Innes

The historic Banco Court in the Supreme Court was reopened on Tuesday, 15 May, after extensive refurbishment works, taking the court back to its original 1884 appearance.

"GUIDED by our heritage architecture consultants, we have renovated the court to restore the design features of the 1880s, while ensuring it is a thoroughly modern and comfortable court," the Chief Justice, Justice Marilyn Warren, said.

"The Banco Court work represents the completion of the first stage of works in the Melbourne Legal Precinct Masterplan, and other major works at the court will follow, including work on other courtrooms and other areas of the court.

"The Court congratulates the Government on its commitment to delivering the highest quality court facilities for Victoria," the Chief Justice said.

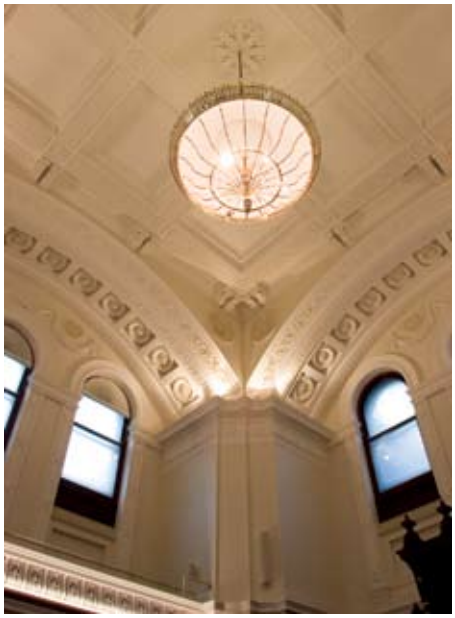
Using contemporary photographs and design features of Queens Hall at Parliament House as a guide, the paintwork is a pale whitewash that resembles what would have been in the original courtroom, and the 1880s décor has been faithfully recreated.

The chandelier is a replica of the chandelier in Queens Hall, and the old crimson carpet has been replaced with navy blue. The woodwork has all been restored, and a new dock for prisoners has been built. The original Bar table has been restored.

The court will be considerably more comfortable, with underfloor heating, air conditioning, and cushioned seating. A state-of-the-art audio-visual system has been installed with two large plasma screens, the lighting has been upgraded, and electronically operated doors will be

Chief Justice Warren.

Attorney-General Rob Hulls.



more easily operated by disabled people as well as enhancing security.

Double thickness windows will reduce external noise, and a new sound system has been installed.

"Our heritage building is a magnificent court complex, but it must be kept suitable for the demands of modern litigation. We are confident that these works will be enjoyed by all court users," the Chief Justice said.

State of the Victorian Judicature Address

Delivered by the Honourable Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria, Banco Court, Tuesday 22 May 2007

INTRODUCTION

THIS is the first time in the history of the courts of Victoria that the Chief Justice has delivered a state of the judicature address. It is an event that now occurs, it seems, almost annually, across Australia and overseas in the common law world. Usually, on those occasions, the address focuses on important matters of principle, such as the application of the rule of law and judicial independence. Invariably, there are occasions when the addresses focus on providing an overview of the state of the judicature in the relevant jurisdiction. It is the latter that I will particularly focus on this evening, given that it is the first time such an address has been given in Victoria.

In the address, I will focus on the following areas:

First, judge time and the value of that commodity to the governmental structure of modern society.

Secondly, the judicial role, including the impact of court governance structures and public expectation and perception of the role.

Thirdly, an overview of Victorian courts and tribunals.

Fourthly, the future for the Victorian judicature, in particular, the role of the Supreme Court, the changing roles of other jurisdictions in the State, the impact of technology and the role of judicial leadership in the future of the Victorian judicature.

JUDGE TIME

The most precious commodity any court has is judge time. By judge time, I do not simply mean the time a judge sits in court. Judge time is made up of many components.

1. **The time spent on court preparation:** the reading of the papers of the file, the written submissions, the witness statements or depositions, the Law Reports that apply, the applicable Act or Acts of Parliament and, sometimes, Hansard, to understand what was intended when the law was introduced. Sometimes, such preparation can be done quickly, one hour, two hours a day. Sometimes days or, in a big case, weeks. Barristers and solicitors put in hours, days, even weeks, sometimes months to prepare their clients' case.

   If you cumulate that time, let us say three days' preparation for a two-party case, it leads to a two-party preparation time of six days. Generally, by comparison, judges try to pull together sufficient time for a day's preparation. It has been said that the Bench should always be a step ahead of the Bar.

   In addition to this snapshot of court preparation, there needs to be time for judicial reflection: what is the issue in the case? What are the problems faced by either side? Is there something that the parties have overlooked or made a mistake on?

   Sometimes a judge will be assisted by high calibre, very experienced legal representatives. Sometimes the parties will only be able to afford a very junior barrister. Sometimes the parties have to represent themselves. This creates a pressure for judges who must see that justice is rendered "without fear, favour or affection". In the Supreme Court we now have an Unrepresented Litigants' Co-ordinator who saw 385 individuals in her first year. We are now working with the Victorian Bar to develop a no cost, volunteer duty barrister service for the higher courts in Victoria.
2. **The next component of judge time is time in court.** Generally judges, as former busy barristers, are skilled at moving things along. They do not receive training on courtroom time and motion, but based on experience and instinct most judges are pretty good at it, certainly so far as the Supreme Court is concerned, and I would expect other courts. Judges do not like to see public money wasted because parties are unprepared, not ready or technology lets us down. When that happens, judges, in my experience, will usually move things along and not stand for any prevarication, procrastination, obfuscation or incompetence. However, there are constraints imposed on judges by rulings of the High Court and appellate courts. Ultimately, a judge must see that justice is done.

   There are times when cases take longer than expected. For example, the *Pong Su* drug trafficking case took 135 court days over its original estimate, the *Salt Nightclub* case took 132 court days over its estimate, the *Strawhorn* police corruption case involved, in effect, three trials, a total of 244 court days. Recently, *Premier Building Services* v *Spotless Group & Ors* ran for 71 days.

   Of course, these overruns have a ripple effect across the Court because the Court engine has to keep running, a bit faster and harder, up hill with the same amount of fuel — judge time.

   The Supreme Court has led the way in Victoria in judicial management with the Commercial List and other specialist lists.

   Since 2004, criminal trials have been more intensively judge managed and that has been accelerated since January 2007 with matters coming before a judge within 14 days of the end of the committal hearing. Since January 2007 much stricter

requirements are made of civil parties before a trial date is allocated. In summary, first, each party knows what the other party's evidence will be, secondly, the case will have undergone at least one round of mediation and, thirdly, a certified trial estimate from counsel retained in the case will have been given. Without the evidence, mediation or a certified estimate being on the table, a trial date will not be given (except in very unusual circumstances).

It has not stopped with trials. Equally, there is much more intensive judicial intervention and management of both criminal and civil appeals. Listing has intensified, particularly in sentence and accident compensation hearings. A new master has been appointed to manage and direct civil appeals. A new practice direction has been applied to civil appeals essentially to strip appeals down to their bare issues and to identify matters that warrant a fast track approach.

3. **The third component of judge time is the after court process of writing the judgment.** Sometimes it is possible to deliver judgment on the spot. Certainly that is encouraged and if there is enough preparation time for a judge, it is more likely. Now for those who may not understand, the judgment is the explanation for the outcomes. Judges are not allowed to say "you win, you lose" they are required by law to explain their reasons for their decision. In a criminal trial a jury is able to say "guilty" or "not guilty" without explaining why, but for every decision the judge makes before the verdict and later, when deciding the sentence, the judge has to explain how the decision was reached. This requirement, to give reasons for the decision, is imposed on judges in all trials and appeals, both criminal and civil. The reasons cannot be written by someone else perhaps the way a report or memorandum might in government or private enterprise. The reasons must be those of the judge and no one else. They must be set out logically, find and state the facts, the issues, the law and how and why the judge reaches a particular conclusion. Deciding the case and preparing the reasoned analysis is the hardest thing a judge does. It is our fundamental role. Our judgments are our "product". They fill the Victorian Reports and occupy the judgment websites.
4. **Lastly, in the overview of judge time, there is what I will call "other" time.** It is made up of involvement in court management and administration, court committees (both internal and external) law reform processes and general extra-curricular work such as speaking to the Bar, the profession, other courts, universities, professional groups and the public generally. Judges are very much in demand. Included in the "other time" is judicial education.

Judges recognise that they must keep up to date with the law, remain in touch with the community and its expectations and mix with their colleagues from other courts so as to share ideas and innovations. Most judicial education in the Supreme Court is done in judges' own time (on leave, at lunchtime or before or after court). Roughly, based on internal surveys, I would estimate that most judges spend over 20 per cent of their time on the "other" category.

Before that estimate is leapt upon to suggest that if judges drop the "other" time category of the work there would be a 20 per cent increase in the available judge time, that is simply not so. The "other" category is important and in some aspects, compulsory. Let me give a few examples: the Adult Parole Board, the Forensic Leave Panel, the Council of Legal Education, the Council of Judges, the Judicial College of Victoria, the Victorian Law Reform Commission, internal management committees, various user and consultative committees, extensive advisory committees, working parties and steering groups established with government with respect to court funding and resources.

Judges do not clock on at 9.00 am, take lunch between 1.00 and 1.30 pm and then clock off at 5.30 pm. Unfortunately, judges work very, very long hours. Their work practices are not ideal but it is the only way they can get through their work, render justice according to law and keep their court going.

The work practices of judges provides the context for judge time. In the last year the Supreme Court conducted an internal occupational health and safety survey of its judges. It is completing another on the masters. Such survey work is probably the first of its kind in the world, certainly in Australia.

We, at this Court, have begun an important process.

In summary, the survey revealed that all judges work long hours, some far too long, that judges' workloads are unsustainable for health reasons and that steps ought be taken to reduce the strain. Significantly, the survey disclosed that the situation is not simply one of working long hours (many people in modern society have to do that), but it was the dangerous level at which judges are working on a sustained basis that was of concern. This reality is borne out by retirements of judges before the compulsory age and often after the minimum service. This has particularly been the experience with appellate judges.

The Court has set about internal steps to improve the quality of judicial life and, importantly, to ease the judicial burden by allocating reasonable time to write the judgment straight after the case finishes. This is proving possible by the new practice directions that demand responsible time estimates from parties. The benefit to the community is that judgments are starting to be delivered in a timely way: for example, in commercial cases within six weeks, in the Practice Court either immediately, or within a week. One phenomenon is apparent. The Court is shifting responsibility for the conduct of cases more towards the profession rather than the focus being entirely upon the judge and his or her capacity to conduct the trial or preside over the appeal. One of the worst strains that a judge faces is the outstanding judgment. We are looking at all avenues to ameliorate that strain, but it is difficult without additional judges. Recently, the State Government announced funding for two additional judges and one additional master for the Supreme Court. There was also an announcement for two additional judges for the County Court. The funding is the beginning of the recognition by government of the importance of cases being heard, managed and decided as quickly as possible. Victoria must be able to match up with its interstate and interjurisdictional comparators. Victorian citizens should be confident the serious criminal trials and appeals will be disposed of by prompt, energetic and sharp judges — not slow, tired and worn out judges.

Equally, Victorian business and litigators should be able to bring their cases to Victorian courts to be disposed of in the same way. There should be no need to resort to other jurisdictions save for jurisdictional reasons.

As a further measure to support and assist judges, the Supreme Court is developing, for consideration by government, a new status of senior judge whereby judges will not simply retire at 70, but subject to agreement by the Attorney-General and the discretion of the Chief Justice be able to stay on a part time basis as is now commonplace in North America.

The judges of the Supreme Court are very pleased at the recent State Budget announcements and its marking for the first time in the history of the Court the assessment and analysis of the true numbers of judges needed to meet the litigation needs and expectations of the Victorian community.

I have spoken of judge time and placed it in the context of judicial health. Judge time must also be placed in the context of court delays. Internal research conducted by the Court in the last 12 months disclosed that there is general agreement between the Victorian legal profession (barristers and solicitors) and the judges of the Supreme Court that acceptable delay times in the Supreme Court ought be:

- Criminal Trials — six to eight months
- Civil Trials — four to six months (with judgment within one to three months)
- Appeals — six to 12 months.

We do not meet expectations across the board yet, although the increase in judge numbers will be invaluable in achieving that goal. Indeed the period 2000–2006 was difficult for the Supreme Court and, indeed, other jurisdictions. At one point, criminal lodgements increased by 50 per cent. This was partly due to the policy implemented by the Court from February 2004 that the Supreme Court would return to hearing major criminal trials, not only homicide cases. As a result, the Court heard and will continue to hear appropriate cases such as major drug trafficking, police corruption and terrorism matters and, in due course, major and complex corporate matters, sexual offences and other criminal cases. At the same time the policy decision as to non homicide cases was implemented, a long series of underworld cases came into the Court that increased judges' workload. For some time, the number of outstanding criminal trials in the Supreme Court has stood around 80, it used to be about 50 and rarely over that number. Currently, the figure of 80 is constant. The Court is taking all steps to reduce that number, including the allocation of additional judges from civil to crime and early and ongoing pre-trial judge intervention and management. However, there will always be circumstances beyond the control of the Court: surges in criminal activity, improved police investigation, technological advances in forensic science, the quality of counsel both for the prosecution and the defence and the ordering of retrials by the Court of Appeal. Government increased judge numbers by three during 2005–2006 but the numbers will need to be reviewed and, if necessary, rejustified by the Court in 2008. I believe, at this point, those additional judge numbers will be required for the types of reasons I have canvassed: delays, work volume, timeliness and judge health.

There is mediation now offered by the Court of Appeal. From top to bottom of the judicial hierarchy in Victoria, mediation is a primary judicial expectation.

I turn then to our civil trial workload. Internal research by the Court disclosed a 45 per cent increase in civil matters initiated in the five-year period 2002–2006. There was a commensurate 40 per cent increase of matters finalised in that period (achieved, in part, by a clearing out of "old wood", redundant files not recorded). However, between 2002–2006 the clearance rate was consistently below 100 per cent resulting in an increaseed backlog. In the two years 2004 and 2005, no civil trial having been allocated a trial date was marked "not reached". However, in 2006, there were 14 instances. Cases that are unable to be given a judge on the fixed date are unacceptable. The cost to the parties is substantial and it leads to injustice. The solutions lie in the justification to government of the need for greater judge numbers, better pre-trial management now achieved through the civil practice directions and expanded availability of court-based alternative dispute resolution.

I would add one rider — the consequences of the *Charter of Human Rights and Responsibilities Act 2006*. It will commence a new jurisdiction for Victorian courts and tribunals, in particular, the Supreme Court, and we are yet to know the impact on courts' workloads.

As for appeals, in civil matters the Court of Appeal has generally had a clearance rate of about 100 per cent but the time for finalisation of the civil appeals is in the order of 12 months, well above the six to eight months acceptable to the legal community and judges. In criminal appeals the clearance rate has remained above 100 per cent resulting in a reduced backlog. However, the impact of appeals from long criminal trials already determined will doubtless have an impact. We are yet to observe that impact.

Of course, there are always judicial management techniques available. The Victorian courts and tribunals have all embraced mediation, both external and court-based. There is mediation now offered by the Court of Appeal. From top to bottom of the judicial hierarchy in Victoria, mediation is a primary judicial expectation. Indeed, it started in the County Court through Justice Kellam and expanded to the Supreme Court through Justice Smith many years ago, I daresay, as a national leader.

I hope to explore other ADR initiatives, including the effective Canadian technique of judicial dispute resolution at least on a pilot basis. We are also exploring other means of shortening cases: CHESS time, stripping to bare issues and joint expert positions. We have engaged with interest in the Victorian Law Reform Commission reference on civil procedure. The Supreme Court provided a detailed submission identifying the extensive arrangements already implemented by the Supreme Court that reflect the announced thinking of the review. In this regard, in many respects the courts are ahead of the reformers. Public statements are sometimes made to suggest that there is a lot more that could be done in courts to speed up court processes. The fact is, most Victorian courts by varying means have exhausted their presently available court tools: mediation, wider ADR, varying levels of judicial management — in effect a docket or quasi-docket system, the application of the "rocket docket" approach of the District Court of Columbia in the US. There is not much left. Indeed, before the Woolf reforms were introduced in England, a study was made of the Victorian Supreme Court Commercial List and Victorian measures were adapted for England. What we now have in Victorian courts is, ultimately, a tough "rump" of cases, (about three per cent of cases started) that are hard fought, tough to decide and take a deal of judge time whether they are trials or appeals. What is more,

these cases, from judges' viewpoint, are relentless.

Consideration of judge time also includes the changing nature of judge work both at this time and in the near future. We see a different type of criminal and civil trial these days (and inevitably, different issues arising on appeals). Criminal trials have become longer and more complicated. The English experience in the *Jubilee Line* case that fell away after almost two years and the *Blue Arrow* case which lasted 13 months demonstrate how challenging complex litigation will be in the future for Victoria. When we observe the federal experience of the *C7* case, we read that the length of these cases was the fault of the parties, their lawyers, the prosecution, the defence, indeed, anyone but the judge. Judges continue to voice frustration at lawyers' behaviour. The Victorian Supreme Court recently completed the commercial trial in *Spotless* after 71 court days (judgment is reserved). Another commercial case, *BHP* is due to start in August 2007 estimated to last eight months. The Court has the *Benbrika* terrorism trial in hand with an estimate of 12 months preceded by about five months intensive pre-trial management. There are the two civil matters of *Gunns* and, also the *Biota* pharmaceutical case. In *Biota* the parties cannot give an estimated duration except to say "a very long time". Gunns, it is estimated will last more than twelve months.

Ultimately, there is a limit to judges' capacities. The announcement of the VLRC of the endeavour to shift the burden, including the ethical responsibility, to the legal profession is welcome. That said, it will still fall on the judge to ultimately enforce the goal. Business interests, governments, treasury officials, the media and, most importantly the community, all express frustration sometimes at how long cases take. Their frustration should not be vented on judges. In our democratic society we have an adversarial system: the case must be proved by the accuser or the claimant; the case must be decided by an independent party, the judge. The privilege of that system comes at a cost. In the Supreme Court we have done almost everything we can within our power — as things stand the tool-box is exhausted and there is a limit to what can be asked of judges. To maintain and build a modern democratic society there are some basic prerequisites — the tangible essentials of adequate education, health, transport and economic infrastructure and, also, the provision of those intangible elements such as competent and timely justice for all citizens. In the latter case this prerequisite can only be delivered if there are sufficient judges to do the work.

Of course, if government commits to increased judges the courts must be accountable to the community. This does not mean some crude accounting or auditing method that interferes with judicial independence. It means at least two things: first, courts collecting detailed data as to what they do, how long things take, how many things and the types of things they do and then making that data publicly available; secondly, it means courts must demonstrate and engage in a dialogue with government and the community about what they do.

Let me give examples: at my invitation the highest levels of government are accepting my personal invitation to tour the Court and talk to us about our work; all members of Parliament are shortly to be invited to do the same; earlier in Law Week 2007 judges took members of the public on "talking tours" of the Court.

Much of what I have said might sound as if Victorian courts and tribunals are gloomy places. Not so. All Victorian judicial officers are proud of their institution and honoured by the privilege given to them to serve the Victorian community. We are universally committed to achieving the highest quality of justice for the community we serve. Are there any obvious solutions to propose to government?

1. **Expansion of the jurisdiction of VCAT** but with security of tenure for all members to ensure judicial independence.
2. **Legislative provision to shift more of the litigation burden to the lawyers:** to give judges expanded legislative power to compel expedition measures in both civil and criminal trials.

Combined with appropriately increased judge numbers these measures would see Victoria forge ahead in court systems.

Clearly linked to the timely dispatch of court business is the quality of judicial appointments made to the courts and tribunals and the quality of the advocates who run the cases before the courts.

It is essential that those appointed to busy trial jurisdictions bring the intellectual strength, experience, work capacity and personal commitment to fit in quickly and share the workload. Much is said these days about the importance of cultural, gender and social diversity in courts and tribunals. Of course, it is very important and our courts and institutions have progressed a long, long way in the last ten years. However, in a context of the limited commodity of judge time, all judicial appointees ought to be capable of quickly sharing the workload competently and responsibly — unless government compensates for diversity by funding extra, more experienced appointments to meet the time needed for more diverse appointees to be able to reach their full potential. It is undesirable for the judge time of a competent, experienced judge to be further burdened or distracted by the training of an intellectually capable but inexperienced judge. Perhaps the solution lies in the appointment of part- or full-time retired judges to be on hand to provide advice, training and counselling to new appointees.

These comments should not be interpreted as indicating the courts are currently suffering from the appointment of judges requiring such assistance. However, if diversity rather than experience and immediate capability become the dominant factor in appointment considerations, extra judges would be required to maintain the existing work capacity of the courts.

However, even the most competent and experienced judges should be able to rely on the counsel before them. In cases, advocates owe a duty to the Court to assist it in doing justice, even if it means going against their clients' interests. Sometimes, this obligation needs to be reinforced. A little while ago, it was suggested that the Victorian commercial Bar (and the reputation of its commercial lawyers generally) had declined significantly because of the size of the profession, generational change, the reduction of commercial litigation by alternative dispute resolution measures and, importantly, the erosion of the stature of the Commercial Bar and legal profession, the latter for various reasons. From a judge's perspective, the highest quality counsel is important. The Court of Appeal has repeatedly commented on the problems arising where inexperienced prosecutors and defence counsel appear in trials. It has also insisted on counsel fulfilling a supportive role to the Court on appeals. The Office of Public Prosecutions and Victoria Legal Aid have responded at both trial and appellate levels to the call of the Court.

Twenty years ago senior counsel generally appeared for both sides in major criminal trials, including homicide cases. Regrettably, that has changed and seems now to be shifting back. This is partly

reflected in the numbers of crown prosecutors who are senior counsel and, very importantly, the preparedness of senior members of the Victorian Criminal Bar to accept the sometimes less well paid prosecution or defence brief because of their commitment to the administration of justice in this state. It is often insufficiently recognised just how much the Bar and the profession contribute to the system for limited or, even sometimes, no reward. If those barristers were not prepared to do so the system would break down. Equally, the Bar and the profession make a substantial contribution to the court system for no payment at all through what is called the pro bono system. Given the numbers of unrepresented litigants in the Supreme Court alone, large slabs of judge time would be lost without the support of those barristers and lawyers. It is a benefit government reaps cost free because of lawyers' commitment to the legal system that the Victorian community expects to enjoy.

As for the Victorian Commercial Bar and profession, the judges of the Supreme Court think they are pretty good and capable of matching it with the best. I expect with the widely consultative and intensive approach now taken to the appointment of senior counsel in the State an even stronger Bar will emerge who will impose higher standards on the legal profession and vice versa. They will also push judges that much further to stay one step ahead of those in front of them in court. My only suggestion to Victorian barristers and lawyers is that they should communicate more to each other, government, the community and the media about the good things they do and the human interest stories that usually lie behind those who have been helped.

THE JUDICIAL ROLE

I turn next to the judicial role. Some of this topic I have covered in talking about judge time. I hope you have a better knowledge of what we do day in, day out. Now, I need to focus on some things the person in the street might regard as high sounding. These are called the rule of law and the independence of the judiciary. Lawyers use those terms often but usually do not explain them. I will try. The rule of law means that our society is not just governed by Parliament and politicians. It means that our society is controlled by the law. The law is made by Parliament and, often, by the courts under the Common Law system. The law is interpreted, applied and enforced by the courts. The Supreme Court can override everything, even what governments do. So, if a citizen thinks government has done something against or outside the law, that citizen has the right to go to the courts and the courts, generally speaking, have the power to do something about whatever has happened. The courts also play the same role in legal disputes between citizens. The courts are also the place where the criminal law is enforced by the prosecution. The independence of the judiciary means that whenever in court every citizen, government, institution or corporation is entitled to know that the judge will decide the case independently, without any party feeling or sensing that the judge is biased or pressured to decide one way or the other.

In Victoria, the way judges work, judge time is affected by something called court governance. Across Australia and around the world there are three systems generally available. First, there is the executive system where the courts fall under a government department, which provides funding for judges' salaries, court staff, administration, computers and buildings and services, even the paper judges write on and the pens they write with. The judges are not employees of the government department, but everything else to do with judges and courts is fairly much provided by and under the control of that government department. The government department, in turn, is under the financial control of the Treasury and Premier's departments, which have to be persuaded as to how much funding to give to a court for its operations, judges and staff, computers, the building environment and all the things that make a court work. Before the government department and the Treasury and Premiers' departments will approve any funding they need to know that the courts are fitting in and performing in accordance with government policy. This is a very simple description but basically that is how the Executive Model of court governance works.

The second system is where the government gives a parcel of funding it thinks is enough directly to a court or a court authority that is not part of any government department. The individual court or the court authority then decides how the funding is to be spent. This system is called the Separate Executive Model. The third system is called the Federal Model and provides for substantial administrative autonomy for federal courts.

The Executive Model of court governance applies in all Australian states except South Australia, although there are local variations to the model. The Separate Executive Model applies in South Australia. The Federal Model applies in the federal courts system. In Victoria, we have the Executive Model. What are the benefits and disadvantages of that model? That question cannot be answered exhaustively at this time but I will provide some comment on the Executive Model. Sometimes there are problems for courts where time is taken up persuading Justice, Treasury and Premier's Departments as to the needs of courts. It may be difficult in a competitive environment to persuade departmental officials why an item is important, more important and deserving of support than something else such as a new police building, hospital or educational institution. This means that courts have to spend a lot of time persuading and educating government departments and justifying their position. So, a disadvantage of the Executive Model is the time required of courts to participate in that system. Another disadvantage is the jockeying for position that courts find themselves in; having to compete for resources and funding for something so fundamental as the "rule of law".

Perhaps the greatest disadvantage of the Executive Model is that it is at odds with "judicial independence". One of the main participants in litigation in Victorian courts is the State Government (through the State of Victoria, individual ministers, heads of government departments including the head of the Department of Justice and the Crown). The litigation includes challenges to ministerial and administrative decisions where citizens challenge the State, personal injury claims against government authorities, electoral challenges and naturally, criminal and summary prosecutions and appeals. Reverting back to my brief description of judicial independence, can Victorian citizens be satisfied that their judges are truly independent where one day they are meeting to persuade government officials why more funding is needed and then, the next day, hearing a case where the government is a party? I wish to say that in my experience of working in Government (which started in 1974) relations between the courts and the Department of Justice (and its predecessors) has never been better. Both the courts and the Department of Justice have worked hard to achieve a cooperative but as independent and respectful arrangement as might be possible. Indeed, the Victorian example of the Executive Model is among the best of its type. The ques-

tion is, can judicial independence be truly achieved under this model?

Are there any benefits of this system? Firstly, the courts do not have to be troubled by the minutiae of government structures; it is all provided for them. Secondly, via the departmental structure they have a voice within government that can be very effective. Thirdly, the community has the benefit of a very cost effective system that compares very favourably in economic terms with the other models.

There has been discussion raised again recently about court governance models. At some point it would be desirable to achieve uniformity, or at least consistency, between states so that state courts adequately reflect acceptable independence and standards alongside those courts within other systems. Perhaps it is a topic for the Standing Committee of Attorneys-General.

The last component of the judicial role I will address is public expectation and perception of the courts. The importance of the media to the courts cannot be overstated. The media provides the community with a window into the courtroom. The media now involves the printed, filmed, electronic, digital and blogged forms. The community knows much more about courts than ever before. This is very good. Indeed, this morning, for the first time in Victorian legal history an admissions ceremony for new Australian lawyers in the Banco Court was prepared for a podcast. Generally, it is in the public interest to know what courts and tribunals do day in, day out. Sometimes the media leads a campaign of criticism of courts, and individual judges' performance. Provided the criticism is not personalised, pejorative, abusive or sexist then judges will generally accept robust criticism as part of the job. Yet, it should be remembered that judges do not answer back and that convention should not be disabused by the media. In Victoria it has rarely occurred. Sometimes, opinion polls are conducted by the media to test judges' community standing, performance rating or acceptability. Generally, those surveys are indicative of very little except how many took the time over breakfast, morning tea or lunch to view an item and then respond. Usually the numbers are modest and not scientifically sufficient to provide an accurate indication of the community's opinion. They convey a view and no more. Governments and courts should be circumspect in reacting to them. Nevertheless, they are often interesting and make interesting reading.

Central to public expectation and perception of the courts is the role of judicial education. Victoria is in a very advantageous position. It has the benefit of the Judicial College of Victoria to meet local education needs and the National Judicial College of Australia to meet needs that could only be met on a national scale. As a result, all judges, magistrates and tribunal members have the benefit of orientation and update programs, awareness and community relevance programs, as well as theoretical and practical legal training. There is an expectation by the heads of the Victorian courts and tribunals that all judges, magistrates and tribunal members will actively participate in ongoing judicial education. There is now broad acceptance that all judicial officers should have at least five days provided per year for judicial education. This time is over and above judge time and viewed as a minimum. The remaining aspect of judicial education is to observe that adequate provision comes at a cost which has been recognised by government. As judicial education expands in Victoria, in all likelihood so will its cost.

THE VICTORIAN COURTS

Generally, across the board the Victorian courts are functioning well. Their detailed position, function and performance is well explained on the various websites of the courts including annual reports. However, it is appropriate to observe important changes in jurisdictions that have occurred in the last two years and which will continue into 2008.

First, the Magistrates' Court. Since 1 January 2006 it has exercised power in civil matters up to $100,000. In criminal matters the court has extensive summary jurisdiction including matters that not long ago were indictable offences heard in the County Court or, even still, are tried as indictable in some interstate jurisdictions. The right of appeal in criminal matters to the County Court remains. The right of review on error of law to the Supreme Court also remains. There has been a steady increase in those types of appeals to the Supreme Court.

The increase of power of the Magistrates' Court has raised its importance and status in the Victorian courts system. It has also added to the appellate work of the Supreme Court.

The Magistrates' Court has also embraced dramatic innovations with the Drug Court, the Koori Court and more recently the Neighbourhood Justice Centre. These problem-solving courts at the lower end of the court system have proved effective at overcoming recidivism and associated social problems elsewhere. Problem solving courts, nowadays called therapeutic justice, doubtlessly will help to redirect some individuals from what was previously inevitable journey to the higher courts — a very desirable outcome.

Since 1 January 2007 the County Court has exercised unlimited monetary jurisdiction in all civil matters. As yet there has not been an identifiable shift of civil litigation from the Supreme Court to the County Court. Patterns of forum of choice will be worked out by practitioners in time. The County Court is the main trial court of Victoria and it is appropriate that it exercises unlimited monetary jurisdiction. The Court also has the range of judge numbers and a built environment that reflects its busy trial volumes and status. The only observation to make is that it is generally desirable that the more complex and significant civil cases should be heard in the Trial Division of the Supreme Court to be determined at an authoritative level to obviate, where practicable, the need for a significant matter being determined authoritatively via a court of three judges on the Court of Appeal. One fact is evident; the criminal 32 and civil workload of the County Court, the main trial court in Victoria will remain constant for the foreseeable future.

Next, I turn to VCAT. Its workload has grown greatly, now hearing over 90,000 cases per year. It is efficient in terms of the dispatch of its business and its cost. While many of its disputes are small, each one is very important to the individual litigant. VCAT has proved to be a relief valve for the courts. The court system would have laboured without its existence. There are rights of review on an error of law to the Supreme Court from VCAT decisions. There has been a general increase in numbers of appeals, particularly planning appeals. One particular phenomenon of VCAT is its unlimited monetary jurisdiction in important areas, such as fair trading and domestic building contracts — in those areas it has what is known as exclusive jurisdiction. Cases that only a few years ago would have been heard in the Supreme Court are heard now in VCAT. This of itself demonstrates the need for security of tenure of tribunal members.

At this point, I have little more to say about the Supreme Court except that its work appears to continue to become more difficult and complex. This will continue as the Court hears more prosecutions by

the Commonwealth Director of Public Prosecutions and enforcement 33 proceedings by the Australian Securities and Investments Commission. It should usually be the case that Victorian individuals and corporations are prosecuted when appropriate in the superior court of the state. The only other observation about the Supreme Court is that in all likelihood over time there will be an expansion of the appellate function of the Court commensurate with the expanded powers of the lower courts and tribunals. What would previously have been heard and decided at first instance before a Supreme Court judge will come before the Supreme Court exercising an appellate function, rather than a trial function.

So far as the overview of Victorian courts is addressed, I emphasise that judges, magistrates and tribunal members are under constant pressure to decide cases. The court system in Victoria is busy. Let us look at the finalisation numbers for 2005–2006:

- In criminal
  Supreme Court — Trials: 61 (including pleas 182)
  Supreme Court — Appeals: 426
  County Court — 450 (including pleas 2,294)
  Magistrates' Court — 125,432 (including 24,705 crimes family violence matters)
- In civil
  Supreme Court — Trials: 227 (all cases finalised 5,296)
  Supreme Court — Appeals: 362
  County Court — 2,361 (all cases finalised 6,016)
  Magistrates' Court — 9,234
  VCAT — 89,475

These figures highlight the points: justice takes time and judge time is a commodity to be valued and used wisely.

THE FUTURE

I have tried to provide a broad-ranging overview of the courts and tribunals of Victoria from a perspective of the judicature. I wish to conclude on three topics: information technology, alternative dispute resolution and leadership.

1. **IT:** Victorian courts and tribunals have been transformed in technology uptake in the last three years. It is now expected that judges, staff and court users will have basic computer skills. Probably, the time is close when IT competence will be a prerequisite for judicial appointment. Most courtrooms across the State now have computer access. The County Court has excellent facilities and the Supreme Court is undergoing an upgrade to expand its IT capacity. It also has a world leading edge e-litigation practice direction. The Supreme Court even has an e-master. In March 2008 the roll out of the Department of Justice Integrated Court Management System (ICMS) will commence, starting with the Supreme Court. The facility will match the courts with the profession and provide one-stop electronic filing, electronic file management and, most importantly, enable even better data collection to better explain the court story.
2. **ADR:** Mediation is now accepted as part of the court system in Victoria. It saves immeasurable judge time and provides extensive savings to government. Without mediation the court system would have collapsed. Given the success of mediation, the courts should have the confidence to pilot other methods of dispute resolution, in particular, in appropriate cases, judicial dispute resolution. Given the impact of technology and IT on courts, the challenge lies before us to find the next wave of innovation that will revolutionise the courts and tribunals as we know them.
3. **Leadership:** as courts and tribunals become larger the traditional structures of internal management and leadership become more cumbersome and provide a poor fit. If I take the Supreme Court, its original legislation contemplated a council of judges (made up of four) who were responsible for administering the Court. The role of the Chief Justice was not defined and for over 150 years was traditionally regarded as the leader of all but one among equals. Contrast this with other jurisdictions where judicial roles, functions and governance are well defined. In Victoria, there have been additions to Supreme Court legislation to describe the role of offices such as the President of the appellate division of the Court, the Court of Appeal and, also, the Senior Master. The Chief Justice's function remains undefined. The Court will shortly expand to 37 judges and nine masters (who, possibly, in due course will become associate judges) — very different from the four judges who constituted the Supreme Court in 1852. Further, the legislation does not recognise the modern internal structures of the Trial Division and the roles of the Principal Judges.

In the County Court there is a similar brevity in the legislation despite that there are soon to be 59 (together with five acting judges) constituting the court. By contrast, the legislation for the Magistrates' Court and VCAT is more reflective of the size and complexity of those institutions. There are also the related jurisdictions of the Children's Court and the Coroner's Court. In Victoria, unlike South Australia, each court is separate and functions entirely separately from other courts (other than on appeals or judicial reviews). It might be that government would wish to overview and modernise court governing legislation. Such a project may tie in with any consideration of court governance models.

I raise these matters under the rubric of leadership. When it is thought about, generally, court leaders are not trained to be leaders. They come to lead significant institutions and are assumed to know instinctively how to perform. Judicial leadership in modern courts is challenging. Recently, the heads of Victorian courts (the Chief Judge, the Chief Magistrate and I as Chief Justice) participated in a National Judicial College program for all Australian court heads. It included a senior judge from Canada and a leader of the corporate sector. The program was inspiring and innovative. A few weeks ago, with the support of the Department of Justice, the group of five leaders of the Supreme Court commenced a training program on leadership. It involved the President of the Court of Appeal, Justice Maxwell; the Principal Judge of the Criminal Division, Justice Teague; the Principal Judge of the Common Law Division, Justice Smith; and the Principal Judge of the Commercial and Equity Division, Justice Byrne; and myself as Chief Justice. The program involves our meeting and learning from leaders in government, the military, private enterprise, the community and other sectors as to how to improve our leadership roles and translate that improvement into the Court to facilitate the ongoing modernisation of the institution. It is, we believe, the first program of its kind in any court, at least in Victoria.

The judiciary of the Victoria is one of which all Victorian citizens may be proud. I hope these remarks assist discussion in the future development and improvement of the state of the Victorian Judicature.

That is the completion of my remarks. I thank you for you attendance.

A copy of this address is now available on the Supreme Court website: *www.supremecourt.vic.gov.au.*

Bar Dinner Speech

Jeremy Ruskin QC

Jeremy Ruskin QC.

MR Shand, honoured guests, distinguished guests, frenzied true believers, millionaire shareholders in Slater & Gordon and, of course, my fellow underdogs.

The good news is that I am not going to follow the multifarious advices I have been given in relation to this speech. I am not going to read the full text of my bar-mitzvah speech, although nothing much has changed. I am not going to give you a highly emotional lecture upon a topic close to my heart, namely the rule in *Foss* v *Harbottle*, especially now that Graeme Uren has explained what it is.

Finally I am not going to say a word about the rise and rise of Justice Tony Pagone — hereinafter referred to as "Phoenix J." — except to say welcome to the new job; or is it the old job? or is it the new Tony? or is he — as I have often suspected — a covert Italianate Doppelganger? I don't know, but what I do know is, concerning the next appointment to the Supreme Court, the smart money's on ... Stuart Morris.

Rather I have decided to take my lead tonight from the beginning of a speech given by one of our honoured guests, Justice John Middleton, upon the occasion of his thirtieth wedding anniversary. Middleton J. held a lavish dinner to celebrate this event and he commenced his speech this way: "You all know my wonderful wife" (he paused for a minute or two to remember her name) and continued "but now its time to talk about me".

So now it is time to talk about me (not him). Unfortunately our time is limited. But to do justice to this important topic I have chosen to talk tonight about three marvellous lawyers, no longer with us, whose path I was lucky enough to cross. The first is Neil McPhee QC, whom I met in the following troubled circumstances.

In the 1970s my mother, the famous journalist, wrote a column in the *Australian Jewish News*, in which she belted the living daylights out of anybody whose views she disagreed with, often members of the family and of course judges who gave light sentences. I see some of you here tonight.

On this occasion into her focus came one Frank Knopfelmacher. Knopfelmacher was an academic, an intellectual, whose views were slightly right of those of Andrew Bolt, if that is possible.

He was Czech, who spoke with a heavy accent out of the side of his mouth. He famously said on ABC television: "The

President, Australian Bar Association Stephen Estcourt QC.

Chairman of the Bar, Michael Shand QC.

Justice Elizabeth Curtain, David Curtain QC, David Beach S.C., David Martin, Michael Fleming, Justice Tony Cavanagh, Justice David Byrne and Justice Richard Tracey.

only good communist is a dead communist!"

For some reason he annoyed my mother, and in her column she gave him a couple of rockets, variously describing him as Australia's most appalling self-hater.

This was said to be defamatory and a letter of demand arrived at my mother's home, when I was doing my articles at Galbally & O'Bryan.

It was necessary therefore to see the famous defamation expert, Mr Neil McPhee QC. My mother was kept outside and in I walked. I met a small man with a large frown and a gruff voice. He said — I think a little impolitely — "I have read all this crap your mother wrote. Tell her to apologise."

"Why don't you tell her" I said. "No, I said, you tell her," said McPhee. "No, you tell her," I said and this went on for a while.

Then he said, "She's your mother." I said "Yes, but she's your client". He said "But she was your mother before she was my client"; I said "but I had no choice" and that went on for a while.

In the end marshalling unusual courage I said to McPhee: "Look, Mr McPhee, I'm only an articled clerk and I know nothing about this defamation stuff but I am adamant that my mother should not apologise under any circumstances. Is that clear?" A sly look came over his face — a look that I got used to many times in the years that followed — and he said, "Bring her in."

My mother strode in and before any introduction she said, "Under no circumstances am I going to apologise." McPhee said "I quite agree with you. I wouldn't apologise myself. But the problem is this: your son insists that you do and he's an expert in this area. You must be very proud of him." Twenty-five years later my mother is still furious she ever apologised to Frank Knopfelmacher and blames me, but we are beginning to work it through with an expensive therapist.

McPhee was a brilliant lawyer with a labyrinthine mind. In another life he advised Machiavelli. Here is an example of his tricky behaviour.

In 1992 the *Herald Sun* published an editorial about the then Police Commissioner, Mr Kel Glare, which he regarded as defamatory and a writ was

In a carefully understated opening Sher told the jury: "This is the most serious libel anyone could ever publish about any person anywhere in the world."

Ruskin makes a point.

John Richards S.C., Kim Galpin and Michael Ruddle.

issued. Sher QC acted for Glare. In a carefully understated opening Sher told the jury: "This is the most serious libel anyone could ever publish about any person anywhere in the world."

McPhee told the jury: "It's just a little bit of fair comment — that's all. And it is fair comment that stops the tanks of totalitarianism from thundering down William Street."

In a carefully crafted non-leading question, Sher asked Glare: "How distraught were you when you read this completely disgraceful article?" Glare gasped, looked at his feet, looked at the jury, looked at the judge, stood to attention, clenched his teeth and said: "Sorry, your Honour, ... just expressing ... emotion."

McPhee asked our witness, the writer of the editorial, Piers Ackerman: "How did you feel when Mr Sher told the jury that you were a malicious journalist?" A large polka dot handkerchief was produced and a torrent of tears crashed into the polka dot.

I thought we'd reached the tie-breaker.

On the morning of the third day the trial Judge, Justice Frank Vincent, who is one of our honoured guests, gave a lecture to the readers before court time. In 45 minutes — as you would expect — his Honour taught the readers the whole of the criminal law, liberally interspersed with helpful autobiography. Then the Judge said this: "I've got this libel trial. Two of Australia's greatest barristers are appearing in it. You can come with me to court and watch how they operate. But one thing I can promise you: there will be no personal bickering or personal attacks of any kind."

It was five-to-one that morning. The case was looking bad. McPhee suddenly started to rustle his papers in a loud way. He then placed four arch lever folders, one upon the other, with such geometric incongruence that, if I may use a couple of words from a jurisdiction in which I practice, it was reasonable foreseeable that they would fall to the floor, proximate to Sher, which they did.

Sher swung around, and glared at McPhee. His face was like thunder. He looked like a wild man from an Emily Bronte novel. I was sitting between these two, and I felt like the lawyer in the Steven Spielberg movie "Jurassic Park II" who, sitting on the toilet, is approached on each side by a tyrannosaurus and torn apart. I wondered: was Sher going to kill McPhee in the 11th Supreme Court? Worse was I going to perish in some act of serial strangulation? Even worse, was I going to survive and have to do the case myself? Had I read the brief? I think we all know the answer to that question.

Consumed with these selfless reflections, a miracle happened: the Judge said it was lunch time. Sher thundered through

the court door leaving some of the hinges in tears; McPhee sauntered off as if he was going to the footy.

At 2.15 Sher continued to eviscerate Ackerman. Body parts hit the floor. Then I heard it. Three little noises. Sher swung around again. This time, placing his hand in the traditional Wyatt Earp pose, with the index finger as the barrel, he pointed straight at the head of the Judge and said: "He's doing it!" "What?" said the Judge with a look of panic. "I said he's doing it!" said Sher. "That's what I thought you said," said the Judge. "Mr Sher, who is doing this thing?" Sher said: "McPhee! McPhee! Mr McPhee! He is the one who's doing it!" "Okay, okay, Mr Sher, can you tell what he is doing?" Sher replied: "Biro! Biro! He's clicking his biro. Indeed it's worse, much worse. He is clicking a series of biros, he is clicking them seriatim, he is clicking them deliberately, and he is clicking them loudly. This is part of a vast pre-planned forensic tactic!"

"Stop!" said the Judge. And then, like the great judges, adopting what I call the placebo tone, the Judge said: "Members of the jury, a matter of law has arisen, and as you know that is my function. Or putting it differently, the lions have got out of their cage and are trying to eat the trainer. I'm going to try and put them back in but in the meantime why don't you pop into your jury room and I will see if I can sort it out." And then in what I regard as the greatest judicial understatement of the twentieth century, which deserves its own place in the Guinness Book of Records next to those guys with long fingernails, Vincent J said, "I fear, Mr Sher ... you may have become emotional."

The Judge then said, "Stand up, Mr McPhee." The little Scot stood up and looked at his feet, rather in the style of a seven-year-old caught in scripture class with a shanghai. In the pocket of his Bar jacket were eight biros. I am sorry to say five were set in the immediate pre-click position. "What have you got to say?" said the Judge. McPhee said: "Well, ... as a matter of fact, ... I didn't do anything." "Yes you did," said the Judge. "I didn't see it but in your case there is a presumption of guilt. You've been doing it all your life."

The Judge then said, "Stand up, Mr McPhee." The little Scot stood up and looked at his feet, rather in the style of a seven-year-old caught in scripture class with a shanghai.

Justice Ken Hayne, Justice Michelle Gordon and Justice Bill Gummow.

The throng.

Well, it was not a good day for the defenders of the fourth estate. The defence of fair comment seemed to have dissolved into the ether, our witness had been murdered by Sher and our Senior Counsel rebuked by the Judge. So it was a pensive McPhee who walked back with me at the end of the day. After a little while he said: "The Judge is a bit odd isn't he?" I said: "They're all odd." He said: "No, but I mean what do you think about this presumption of guilt — that can't be right can it?" I said: "But, Neil, it's only in your case." He smirked and then said: "I guess there's a fair bit in it."

But, you know, the readers and young barristers remembered the wise words of Vincent J about role models, and the next day in the Magistrates' Courts, from Northcote to Kaniva, the biros were clicking: "They were doing it."

As my good friend Mae West would have said of McPhee, "When he was good he was very very good, but when he was bad he was better."

.....

I realise I am so young as I look down upon you all from this comfortable spot where one of you is going to be lucky enough to be next year — look for a red spot under your plate — that I did not know my next person of interest, Cairns Villeneuve-Smith as a barrister. He famously defended an Aboriginal called Stuart and was ostracised by the Adelaide community and came to Melbourne. He

gave a terrific speech at a Bar Dinner many years ago when he told the story of his marvellous father Villeneuve-Smith KC who famously went to jail for telling the Judge he was nothing but a posturing self-aggrandizer. Luckily we don't have judges like that in Victoria ... please don't point.

Villeneuve-Smith was a wonderful common lawyer who famously pole-vaulted his friends into immortality by writing a long epic poem about a case on circuit, which can be read in the Bar Chamber. If you ask Geoffrey Nettle, Justice of Appeal, he will tell you it contains 112 dactylic hexameters, which is helpful.

The Villain (as we called him) knew how to play the barristers on a break. Here is how he dealt with one victim.

"And so I finish my summary of the address of Counsel for the plaintiff, Mr Tobin. If I may say so it was most helpful and relevant. I now come to the address of Counsel for the defendant, Mr Ruskin. Here it's a bit difficult to know where to start. I don't want to do him an injustice (he's about to do the greatest injustice since the slave trade), but if I understood him at all (he didn't) he put to you the following astonishing proposition (eyebrows moving rapidly): because that plaintiff is a hairdresser she cannot have a sore neck. Do you remember him saying that? He then ferociously appealed to your common sense. Well you will know what your common sense is on the one hand and Mr Ruskin's version of it on the other, and you will ask yourself whether one bore any remote relationship to the other. This is of course a matter for you (more rapid eyebrow movement). Then Mr Ruskin said to you many times: She can't have it both ways, she can't be a hairdresser and have a sore neck. She can't have it both ways, she can't have it both ways. Well ....this is just a comment of mine. She can ...! and she has...! And she did! The plaintiff got record damages, but as McPhee used to say "You've always got to be in the big cases — even if they're self-generated."

And so I was lucky to be the counsel of choice in the next case for the TAC again before the same Judge. It was a difficult case involving Ms Harris who was involved in a bad car accident and 15 minutes later had a miscarriage. I know what you're thinking — coincidence. But the Judge for some reason had trouble understanding this.

My opponent was the magnificent Howard Fox QC, a barrister who spoke Swahili and used big words in English. He constantly interrupted my cross-examination, accusing it of containing ineluctable shibboleths. "Quite right," said the Judge, "if we knew what they were — but I will allow the objection anyway."

Simon Wilson QC and Paul Elliott QC.

We then came to the hard part of the case — causation. Clothing myself in my sensitive new-age voice, which was a kind of a hybrid of that Judge whose picture I saw in the paper a couple of weeks ago, that dreadlock rapper Justice Michael Kirby, and Ertha Kitt — I swooned, or crooned: "Ms Harris, did you notice a seat belt mark on your tummy?" I know what you're thinking: only a common lawyer could craft such a magnificent question. Trapped like a rabbit in the lights, Ms. Harris looked at the Judge and said: "I don't know what to say." The Judge said: "Don't worry. I do — and I will. In the meantime just be yourself." "Oh, thank you!" she said and then turned to me and bellowed "What the bloody hell would you know, you little turd!" — which was true, though not entirely responsive as the Judge was kind enough to say in his reasons for judgment. Amazingly we lost the case. But discontent, we strode across the road to the Court of Appeal. Now there's a top spot. It is an ethereal haven of wisdom and justice, and so tranquil it's like going to a yoga class.

On this occasion the Chairman of the Court was the indomitable Mr Justice Ormiston. And so the appeal went like lightning.

Anyway ... towards the end of the fourth day, when we had discussed every single case that had ever been decided in South Africa upon this elusive topic of causation, frolicked through the ecclesiastical reports and had a fulsome look at the Berne Convention on copyright just in case, the Judge said to me in a voice as I recall it, tinged with calm: "Mr Ruskin — where are we!!?" I said, "I imagine we're still on page two of the appeal book." He said: "How on earth did that happen?" I said: "I can't imagine, your Honour." He said: "Well it's your fault! Why do you always complicate things? This is a simple case. Look, the Judge saw the plaintiff, the Judge liked the plaintiff. I read the transcript and I liked the plaintiff. We all liked the plaintiff ... you lose" — all reduced to a concise 90-page judgment with 150 footnotes.

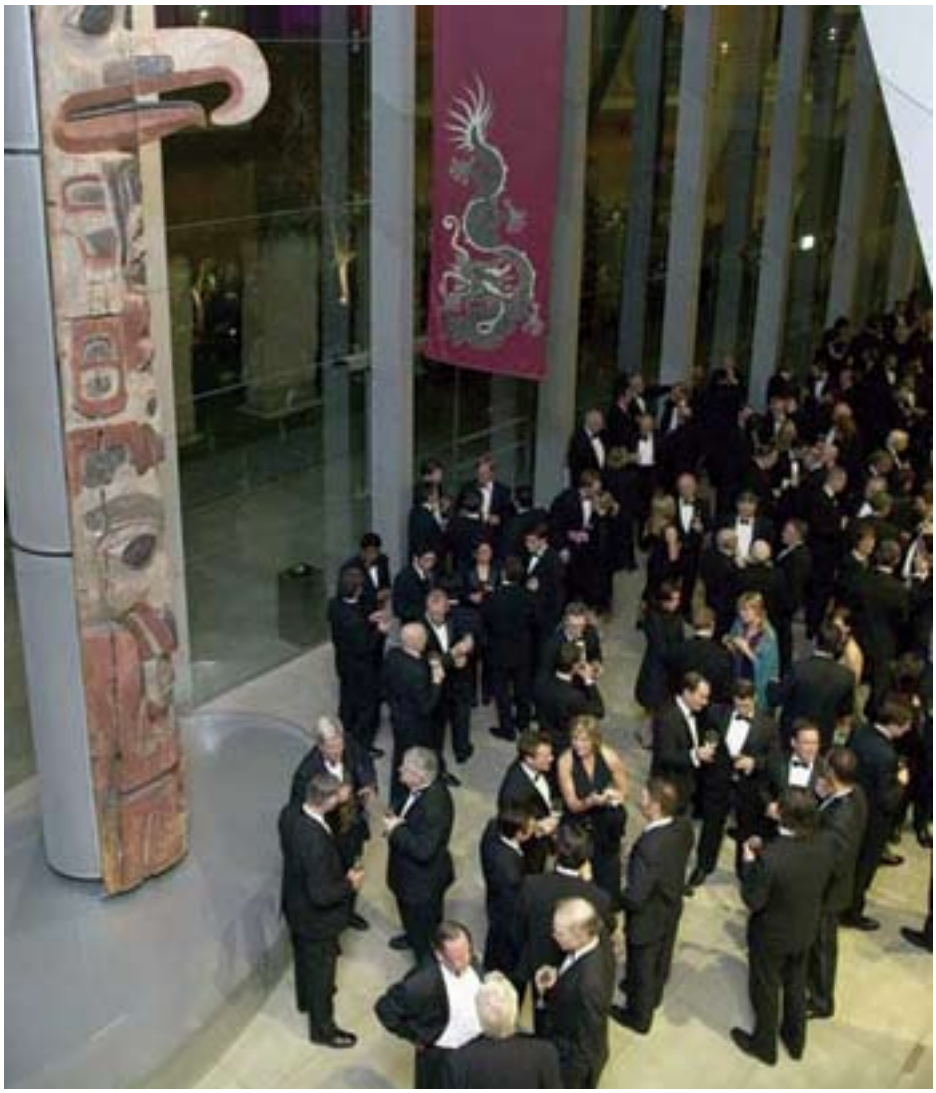
Did I just hear Justice Tony Cavanough say: "What's wrong with that?" Could someone make sure he has an early night?

.....

From the monstrous injustices of Judge Villeneuve-Smith and the Court of Appeal, to a forensic rock star, Frank Galbally. For those of you who didn't know Frank Galbally (whom we called "Mr Frank"), he was the pre-eminent practitioner of the Criminal Law in the 1950s, 1960s and 1970s. He was a tall, fine-looking man with a velvet voice. He quoted from the Bible. He sure knew how to massage those vowels.

I was lucky enough to work in his office for six years or so with such famous people as Tony Howard, now Judge Howard, one of our honoured guests, who in those days rather regarded himself as the thinking woman's Che Guevera — metrosexual, of course, knowing Tony. The paradox of Frank Galbally was this. If you were guilty you went to Frank Galbally who got you off and then you weren't guilty.

I used to nick off and watch his final addresses in murder trials. They typically



Pre-dinner drinks in the museum.

began like this: Placing his hands in the final benediction position, he would say: "They took his broken body from the cross, and laid its bleeding form upon his mother's lap. And if you wish to see this pitiful scene forever portrayed in marble, I invite you to view the magnificent "Pieta" by Michelangelo himself, in Vatican City, in the country of Italy."

Thus the jury were given a thumbnail sketch of religion and fine arts but more importantly would understand that Mr Frank's client (the killer) was at least as worthy as Christ if not a whole lot better.

And that is how you get a 90 per cent acquittal rate in over three hundred murder trials.

As a young articled clerk or solicitor, you would follow Mr Frank to the Melbourne Magistrates' Court. People would swoon and gasp as the great man walked in to register his appearance. Registrars at the central desk would stand in line to serve him. The conversation would typically go like this: "Good morning, David"; "Andrew, Mr Frank." "Yes, of course, Andrew". "What have you got today, Mr Frank?" "Well now ... who have you got, Andrew?" "We have Magistrate Smith." "No, I don't think so." "What about Mr Jones?" "No, that will not do at all. What about the Justices?" The Justices of the Peace were three men (in those days) who tried summary offences. They could be a tad right wing. If any of us mortals told them about the standard of proof, the eyes might glaze over, but when Mr Frank said, "Now, you must be completely satisfied and beyond all reasonable doubt!", it was like an entirely new concept.

The paradox of Frank Galbally was this. If you were guilty you went to Frank Galbally who got you off and then you weren't guilty.

And Mr Frank would say: "Andrew, we have a *Proudman* v *Dayman* case."

I don't know if *Proudman and Dayman* works as well as it did in the 1970s but the way Mr Frank used it, it was authority for the proposition that if you had an honest and reasonable belief in anything at all, you would get off. And it is a true story that when Mr Winton Hayes knocked off a Rolls Royce and replaced the registration number with "WH-007" ... you guessed it, he had an honest and reasonable belief that he was James Bond; and he refused to answer any questions from the prosecution, including his name, on grounds of national security.

Winton is still driving today, probably chauffeuring Tony Mokbel around Brighton so he can report in to his favourite Judge, the great E.W. Gillard J.

Mr Frank's greatest case was the Krope murder trial in 1978. Bill Krope had killed his father — in self-defence, with 27 bullets, as you would. This trial was vintage Mr Frank. First it was a domestic killing. Second Bill Krope's mother was charged with conspiracy to murder after she had gone on television saying that the killing was a good idea — I suspect with the blessing of Mr Frank. And most importantly of all, Bill's sister was the reigning Miss Australia, Gloria Krope.

I mean, how many of you have been able to look the trial Judge in the eye and say, "We now call Miss Australia!" And into the witness box strode the gorgeous Gloria in riding boots, straight off the cover of *Vogue*, to receive Mr Frank's contrivedley absent-minded question — "Is your full name Miss Australia?"

Mr Frank delivered his final address at about 11.30 on a Thursday morning, timed to coincide with the sun coming through the windows of the 12th court, so as to give the illusion of a halo above Mr Frank's wig. This confirmed to the jury that which they already knew, namely that they were in the presence of a supernatural advocate.

Mr Frank's final address commenced this way (again placing his hands in the final benediction position): "2000 years ago Aristotle said 'We cannot love those we fear!, ... And if you find my client Bill Krope guilty of murder, then pack your bags and get out of Australia!"

Some of the jury members began to cry and I wondered whether it was the sheer power of the address or the fear of deportation.

I was there when both of the Kropes were acquitted. I saw tears in Mr Frank's eyes — perhaps he was not supernatural after all. The enthusiastic young articled clerk Terry Forrest, now the famous Terry Forrest QC, raced up to him and said: "Congratulations, Mr Frank!" "Thank you Tony!" said Mr Frank. "Terry, Mr Frank." "Of course, Terry. Now listen carefully, Terry. Bill Krope, his mother, Gloria, John Walker QC (who acted for Mrs Krope) and I are going to walk down Lonsdale Street to St Francis Church to pray and to thank God for what He ... and I have achieved ... and Terry ... for Christ sake tell the press!!"

Mr Frank could turn error into triumph such as when he appeared before Sally Brown, now Justice Brown, one of our honoured guests in her previous incarnation as the Chief Magistrate. In the course of his emotional plea, it was pointed out to Mr Frank that he had addressed Her Worship — on no less than 19 occasions — by the appellation — "Sir!", when as Her Worship pointed out, she was in fact and without doubt, one of those other people, called a woman. Mr Frank grasped the sensitive gender issue in both hands, looked Her Worship firmly in the eye and said profoundly: "In this matter, Your Worship is completely correct!" There followed an avalanche of apologies of such variation, intensity and duration that Sally soon realised that if she wished to leave the building alive and by midnight, it would be necessary to give Mr Frank's ghastly and entirely undeserving burglar a bond. And so the greatest advocate in the Western World left the Melbourne Magistrates' Court triumphant — as usual.

.....

As I look back on my own bewildering career, festooned as it has been with forensic catastrophe — of the type that Mr Shand was kind enough to remind you of in his introduction — I think often of these brilliant lawyers, Neil McPhee, Cairns Villeneuve-Smith and Frank Galbally. To the extent that I have succeeded in this great racket in which all of us here tonight variously engage, it is because they have inspired me and made me laugh. To the extent that I have failed, fairness demands that I blame them entirely.

As the *Talmud* says: "Their memory is a blessing."

Thank you all for listening. Good night, good luck and don't click your biros!

Bar Dinner Speech

Justice John Middleton

MR Chairman, distinguished guests, ladies and gentlemen.

On behalf of the honoured and esteemed guests I thank you for your invitation to the 2007 Bar Dinner. I am delighted to be here tonight and be introduced by the song "What a Wonderful World". And so it is.

The format of Bar Dinners has changed over the years culminating in the "razzmatazz" of tonight's event with photographs and music, but one thing has remained constant — that is the tendency of speakers to talk about themselves. I have been allocated approximately 10 minutes to speak. I was given free rein as to what I should talk about so in my allocated time I am going to speak to you about myself. Ten minutes is hardly enough time, but I will do my best, and give edited highlights. I am quite upfront about the content of my speech. Unlike Ruskin, I will not pretend to talk about Frank Galbally, Neil McPhee and others, but in reality tell you all about the important part I played in their lives.

I thought some of you might be interested in what it is like to be a judge in the wonderful world of the Federal Court of Australia, if only out of curiosity. For those of you who do not keep a diarised note of such things, I was appointed on 31 July 2006. This coincided with the beginning of a concern in all courts with occupational health and safety issues and the management of stress. We all have different ways of dealing with these issues. In dealing with stress, it is important to ascertain for oneself the cause of stress, so to the extent possible, one can avoid situations which give rise to unnecessary feelings of anxiety.

My good friend Justice Finkelstein has dealt with stress by being instrumental in the pilot of the Fast Track List which has been introduced into the Victorian Registry of the Federal Court. I liked the earlier name, the "Rocket Docket", and the reference to me as one helping out with the list as "Johnny Rocket". I should point out that this List has not been introduced to help practitioners or litigants. Its sole purpose is to institutionalise by a court direction the already existing practice of Justice Finkelstein not to accord natural justice, to decide the case himself without recourse to the submissions of counsel, and to otherwise quickly dispose of the proceedings. The introduction of the Fast Track List has accomplished much for Justice Finkelstein's anxiety levels now that his approach has been formally condoned by the Federal Court itself by way of a practice direction.

Personally, I find the intrusion of any litigation into my life to be the root of all stress. I try in all legitimate ways to avoid it. Going to court otherwise interrupts a perfect day. I try to focus upon "trees of green, red roses too, skies of blue, and clouds of white". It is difficult to do this in the courtroom although the design of the Federal Court allows me to gaze (in thought) to the skies of blue and clouds of white. As a judge, going to court not only means having to hear the case, which in itself involves listening, mastering the issues, controlling the trial process, but one then needs to either decide on the spot or reserve one's judgment. We are told by Justice Heydon in a speech presented in Darwin in August 2006 that if possible it is desirable to deliver judgments ex tempore. This adds the extra burden of having to know something about the case before your associate writes the judgment.

Then there is the stress of accountability. This arises whether one actually hears a case or not. Michael Wheelahan S.C. has taken it upon himself to keep a score of the number of judgments handed down by those three judges appointed to the Federal Court in the middle of last year, namely Justices Jessup, Tracey and Middleton. It is like the stats in football. The basis of the accountability is that each judgment placed upon the internet whether it be as a single judge or as a member of the Full Court is given one point, and if you are appealed successfully that point is deducted. If the High Court of Australia positively goes out of its way to be critical of your judgment,

Justice John Middleton.

an extra point is deducted. If the High Court of Australia goes further, and in a unanimous judgment, says that your conclusions "were arrived at without notice to the parties, were unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this Court" as the High Court stated in *Farah Constructions Pty Ltd & Ors* v *Say-Dee Pty Ltd*, handed down on 24 May 2007 setting aside orders of the Court of Appeal of New South Wales, then all accumulated points are deducted and you start from scratch.

On the plus side, a mere concurrence in a judgment of another member of the Full Court is given a point. Whilst one may make jokes about the habitually concurring judge, even the shortest of concurrences has its potential difficulties. Thus when Lord Justice Stirling expressed his concurrence with a judgment of the Master of Rolls and said "and I do not think I can usefully add anything", the third member of the Court Lord Justice Cozens-Hardy might have been a little bit more tactful than to say simply "I agree". When Lord Justice Morton having expressed his entire agreement with a judgment of the Masters of the Rolls added "If I delivered a judgment, I should only be repeating in less felicitous language what has already been said by Lord Greene MR", judicial courtesy plainly indicates that the two worded judgment of Lord Justice Tucker "I agree" was intended to follow the judgment of Master of the Rolls Lord Greene and not Lord Justice Morton. I only mention these examples to indicate that even in a concurring judgment, apart from putting aside the rigorous intellectual endeavor in determining whether or not one should concur, care must be taken in the expression of the concurring judgment itself.

The length, quality and extent of intellectual endeavor in my judgments has not influenced the score. I do not place all my judgments on the Internet, as some others do, in an endeavor to improve the stats. Judgments not placed on the Internet are not counted by Wheelahan. I am involved in many judicial activities outside the field of judgment writing. No points are allocated in respect of such judicial activities, no matter how time-consuming or important. I only mention these matters because they explain the fact that, by now the more astute of you would have guessed, I am coming third. In fact, although Wheelehan hasn't investigated this aspect, Justice Gordon only appointed in the last month or so, is probably well ahead in the judgment count.

Apart from accountability, there is also the stress associated with the possibility of criticism and the pointing out of a judge's shortcomings in the public arena. It is best to avoid getting involved in what the press may characterise as "landmark" decisions. If the journalist agrees with a decision, he or she refers to you politely as Justice John Middleton; if he or she doesn't agree with you, it's either just John Middleton or in one case recently Middleton. Judges, of course, have never been keen to expose or admit their shortcomings. Prior to the opening of the Royal Courts of Justice in England in 1882 by Queen Victoria, Lord Chancellor Selborne called a meeting of the judges at which a draft of the address to the Queen was considered. It contained the phrase "Your Majesty's judges are deeply sensible of their own many shortcomings", whereat Master of the Rolls Jessel strongly objected saying "I am not conscious of 'many shortcomings' and if I were I should not be fit to sit on the bench". After some wrangling as to the terms of the address Lord Justice Bowen suggested a compromise: "instead of saying that we are "deeply sensible of our many shortcomings" why not say that we are "deeply sensible of the many shortcomings of each other?". So far as public criticism is concerned, perhaps I should be happy that the press have only had a few occasions to comment upon or criticise my published judgments. Of course, on the Wheelahan count, there are so few of them. One recalls the incident of the Birmingham newspaper which contained a criticism in the following terms of Justice Darling who was holding the local assizes in England "… If anyone can imagine Little Tich upholding his dignity upon a point of honour in a public house, he has a very fair conception of what Mr Justice Darling looked like in ruling the Press against the printing of indecent evidence. His diminutive Lordship positively glowed with judicial self-consciousness. No news-

paper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the imprudent little man in horsehair, a microcosm of conceit and empty headedness. One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he selected a new judge from among the larrikins of the law. One of Justice Darling's biographers states that "an eccentric left him much money. That misguided testator spoiled a successful bus conductor".

Other than avoiding litigation and writing judgments, and thus public criticism by the press, my anxiety level is reduced by belonging to a gym and employing at great expense a personal trainer. But I am not sure it is working to avoid stress altogether. The personal trainer is in a position to hurt me both physically and psychologically. The physical part being the fact that exercise hurts; the psychological part is that no matter how much the client exercises he can never look as good as the personal trainer, so there is a sort of hopelessness built into the system. Lots of jobs allow one to hurt people physically — boxers, police, dentists come to mind — but only personal trainers get to make people feel bad emotionally too. I overheard one personal trainer, pointing to an exercise machine, saying to his customer "see the little picture of the guy on the side of the machine, sit down and do what he is doing until you look like him". Then I heard David Curtain QC protest that the guy in the picture was a skinless guy with no genitalia, to which the personal trainer smiled and said "no pain, no gain". (I was just joking when I referred to Curtain).

The other main way to relieve stress on the occasions when it is unavoidable is to have lunch with some friends. My three adult children, although still at home, do not respond to my coming home and hugging them, as is the preferred way of relieving stress found by one member at the Bar, namely Fiona McLeod S.C. (if one believes the press). But even in lunch as a member of the bench one does not avoid all stress. I find that I am not as welcomed to the Flower Drum restaurant as I once was and now actually need to make a booking in advance. My wife (Judith) and I now have a daily budget for entertainment and dining which I must ensure I do not go beyond. My eye now goes only to the portion of the wine list which describes the local wine, and certainly not the cellar list. Long gone are the days when I actually was mentioned in the press as a favoured patron of the Flower Drum Restaurant. A friend of mine at the Bar, Tim Walker, obviously with too much time on his hands and still not over his days as a journalist, sent a letter in September 1997 to Simon Mann, then the business editor of *The Age* newspaper, concerning an article in the Epicure section about my patronage of the Flower Drum. The letter was never published because of a restraining order, but as nearly 10 years has elapsed since it was written, I now feel more comfortable in publishing it myself.

> Dear Sir,
> At page four of today's Epicure section of your newspaper, reference is made to one John Middleton QC as a "legal luminary". No exception could be taken to the context in which the name of Mr Middleton QC appears, it being entirely appropriate that he is referred to amongst other persons whose public identity is associated with restaurants, but unlike those other persons it should be noted that the celebrity status of Mr Middleton QC is owed entirely to his patronage of restaurants and not otherwise.
>
> Moreover, I question the use of the expression "legal luminary". My edition of the *Shorter Oxford English Dictionary* gives three senses to the word "luminary": one, a natural light-giving body; two, an artificial light; three, a source of intellectual, moral, or spiritual light; a person of "light and leading". In the third extended sense of the word, *Chambers Concise 20th Century Dictionary* specifies the connotation of "one who illustrates any subject or instructs mankind".
>
> Excluding for present purposes, as I think we may, the proposition that Mr Middleton emits either natural or artificial light, one is left to grapple with the notion that Mr Middleton is a person who has by some means enlightened mankind. I will not waste your time by a reasoned refutation of this latter proposition, the absurdity of which needs only to be stated to be realised.
>
> Mr Middleton will no doubt seek to draw some comfort from the fourth sense of the word given by the *Macquarie Dictionary*, viz, "a famous person, celebrity".
>
> Accepting this fourth sense of the word for the sake of argument, it may be seen that we return full circle to the reason why Mr Middleton's name was used in the first place: i.e., a person famous for his lunching exploits at Melbourne's more expensive restaurants. To conclude, I suggest any future reference to Mr Middleton QC as a "luminary" have substituted for the superlative "legal" with "lunching".

The dinner scene.

Well my time has expired. I thank Jeremy Ruskin for his great contribution tonight. He is an excellent advocate and a great contributor to the Bar. We belong to a great institution, and it is at times like this that we can all celebrate together as members of the Bar. Even Ross Gillies QC has come tonight, his first appearance at a Bar Dinner in 40 years. Ruskin thinks he came to hear him speak, when I know he came to hear my reply.

Some of you may conclude by this 10 or so minute insight into my judicial life that I am overcompensated. If I am overcompensated, I am not overcompensated enough. I am still looking at ways to make household or other budget cutbacks, in view of my current revenue shortfall. Judith and I are currently looking at laying off our dependants (i.e. our kids) in a professional, stress-free manner. This should enable an increase in the daily budget for personal entertainment and living.

This speech has had absolutely no worthwhile content. Most of it has been fabricated and is completely untrue. I hope, however, I have entertained. At the end of a long and hard fought case before Sir Edward Woodward involving the Toyota company, after the completion of all evidence and submissions, I stood up and stated "Oh, what a feeling!", and jumped in the air. Tonight after some 10 months on the Bench and avoiding stress, I leave you with: "Yes I think to myself … What a wonderful world!".

Bar Indigenous Lawyers Meeting

Colin Golvan S.C.

The Indigenous Lawyers Committee of the Bar has launched its Indigenous Barristers' Fund at a function in May.

PROFESSOR Mick Dodson, a member of the Bar (and currently head of Indigenous Legal Studies at the Australian National University), who was in active practice at the Bar in the 1980s, formally launched the Fund, saying that the existence of a Fund to assist Indigenous Barristers "in my time" would have made a big difference in promoting the Bar as a serious career option for Indigenous law graduates.

Professor Dodson acknowledged the commitment of the Bar in taking serious steps to enable Indigenous law graduates to overcome practical financial hurdles in addressing the prospect of professional careers at the Bar, and described his "pride" in being a member of a Bar which was adopting initiatives such as the setting up of the Fund to help overcome the absence of Indigenous representation amongst its members.

Abbie Burchill, Treasurer of the Indigenous Law Students and Lawyers Association of Victoria (known as Tarwirri), also spoke at the function. Abbie is a senior solicitor with the Commonwealth DPP and spoke of the difficulty faced in a particular instance of getting a law firm to accept Indigenous law students in its clerkship program.

The function was very well supported by members of the Bar, including the judiciary (with a number of Federal, Supreme and County Court judges and magistrates in attendance, as well as Justice Ken Hayne of the High Court and Chief Justice Diana Bryant of the Family Court), and a number of Indigenous law students. The Committee has made a point of inviting Indigenous law students to an annual social function at the Bar, and the function itself has been very helpful in establishing contacts between the students, barristers and members of the judiciary.

Following the launch, the Fund has received donations from a number of barristers, supplementing the initial support of the Victoria Law Foundation and the Tallis Foundation. Members of the Bar are encouraged to make donations to the Fund (details are available from Denise Bennett at the Bar Office).

Robin Brett QC, Mark Moshinsky, Hans Bokelund, Vinod Nath, Chief Justice Diana Bryant (F.C.) and Jack Fajgenbaun QC.

Michael Dodson.

Colin Golvan S.C.

The Committee has continued its long-established mentoring program, and currently most (of about 20 Indigenous law students studying at Melbourne universities) are being mentored by barristers. The mentoring program has been invaluable in establishing long-term contacts between Indigenous law students and barristers and has created a considerable amount of goodwill between the students and barristers over a period of years.

The Committee has also established a clerkship program, supported financially by the Bar and Tarwirri (co-ordinated by Committee members Paul Hayes and Daniel Star), with the second round of the program being conducted in July.

The result of the various activities of the Committee is being realised with the Bar welcoming its second Indigenous barrister (after a long gap since Mick Dodson's time at the Bar), with Hans Bokelund signing the Bar Roll in May. A number of Indigenous lawyers have indicated a strong interest to the Committee in coming to the Bar, with there being two further Indigenous applicants for up-coming Readers' Courses. As a further aid to Indigenous lawyers coming to the Bar, the Bar has guaranteed at least one place in each Readers' Course for an Indigenous applicant and has waived the usual fees for undertaking the Course.

The Victorian Bar – Justice Kenneth Hayne Scholarship
The Victorian Bar Legal Education Trust

THE Bar Council has decided to support the establishment of the Victorian Bar – Justice Kenneth Hayne Scholarship at the Melbourne Law School of the University of Melbourne.

It has also decided, as a separate initiative, to establish in the new financial year a charitable trust to further legal education at Victorian law schools.

The Bar Council invites your immediate financial support for the Victorian Bar – Justice Kenneth Hayne Scholarship.

Justice Hayne's contribution to our Bar and to the legal community has been enormous. This year marks the tenth anniversary of his appointment to the High Court. The Bar Council has therefore decided to support the establishment of this scholarship and to hold a dinner in the Essoign on Thursday 13 September 2007 in honour of Justice Hayne.

Because of His Honour's links with the University of Melbourne it has been decided that this first scholarship should be established at the Melbourne Law School.

The Dean of the Melbourne Law School, Professor Michael Crommelin, has expressed delight at this initiative.

The precise definition of the criteria governing the annual grant of the scholarship by the University of Melbourne will be settled with the University but it is intended that in general terms the scholarship will be awarded to a student whose financial position and sound academic performance warrants assistance with a scholarship.

The Bar Council therefore seeks your support for the Victorian Bar – Justice Kenneth Hayne Scholarship by way of a donation.

To comply with University requirements and the conditions for tax deductibility of the contributions, your cheque or that of your clerk on your behalf should be made payable to the University of Melbourne to be forwarded to the Executive Officer of the Bar, 5th floor ODCE under cover of the accompanying pro forma letter addressed to the University of Melbourne.

THE PROPOSED CHARITABLE EDUCATIONAL TRUST

The Bar Council has resolved to establish a charitable trust to further legal education through the establishment of scholarships, prizes and by other means. It is planned that the Trust will be established in the next financial year with deductible gift recipient status.

The idea for establishing the Trust sprang from the proposal for the Victorian Bar – Justice Kenneth Hayne Scholarship.

It is anticipated that in future years scholarships or prizes will be established at various universities offering legal education to be named in honour of other past or present members of the Bar who have contributed strongly to the Bar as an institution and to the development of the law.

The award of such a scholarship will provide an opportunity for the Bar to inform students at the various university law faculties, and the wider public, about the Bar, its roles and responsibilities. The Trust will also enhance the Bar's standing as a public-spirited professional collegiate institution. Several of the major law firms currently provide scholarships to law students and endow academic Chairs. These philanthropic gestures not only assist students but also help reinforce the ties between the profession, academia and students.

Members will be given further details of the Trust and encouraged to make donations once it is established. The Bar Council hopes that the same generosity displayed with respect to the Barristers' Benevolent Association will ensure that the proposed Trust will fulfil its objectives.

Should you have any queries relating to this proposal please do not hesitate to contact either myself or the Honorary Treasurer.

Michael W. Shand, Chairman,
Victorian Bar Council

The Victorian Bar — Justice Kenneth Hayne Scholarship

THE Victorian Bar Council encourages all members of the Bar to contribute to the fund being collected for the purpose of establishing this scholarship at the Melbourne Law School of the University of Melbourne.

Many silks and members of the judiciary have already generously provided donations of $1,000. The amount of any donation is of course in your discretion and will be kept confidential unless you indicate otherwise.

If you wish to make a donation towards the Victorian Bar – Justice Kenneth Hayne Scholarship fund, please complete the form below to enable your donation to the University of Melbourne to achieve status as a tax deductible donation.

Your donation and the signed donation form should be returned to the Executive Officer of the Victorian Bar, 5th floor ODCE in good time before 30 June. A receipt will be issued to you directly by the University of Melbourne.

Michael W. Shand,
Chairman,
Victorian Bar Council
8 June 2007

The Dean
Melbourne Law School University of Melbourne, Victoria 3010
Dear Professor Crommelin,

Donation: Scholarship Fund

I enclose my cheque for $_____ [I have authorized my clerk to forward you $_____] as an unconditional donation to the University of Melbourne.

In making this gift to the University I express my wish that it be applied to the establishment of an annual scholarship to be styled The Victorian Bar – Justice Kenneth Hayne Scholarship. I understand that the giving of any such scholarship will be at the discretion of the Dean, but that preference may be given to a student whose financial position and sound academic performance warrants assistance with a scholarship.

Yours faithfully

To: Clerk _____

I authorize you to pay $_____ as an unconditional donation to the University of Melbourne.

In making this gift to the University I express my wish that it be applied to the establishment of an annual scholarship to be styled The Victorian Bar – Justice Kenneth Hayne Scholarship. I understand that the giving of any such scholarship will be at the discretion of the Dean, but that preference may be given to a student whose financial position and sound academic performance warrants assistance with a scholarship.

(Please sign and print name)

Verbatim

Lack of Knowledge

26 April 2007
Coram: Judge Wodak
Kehoe v *Coles Myer Limited*
David Purcell, counsel for the Plaintiff on the hearing of a consent application to adjourn the proceeding.

Counsel: Your Honour, the parties have agreed the case be adjourned.
His Honour: What date did you have in mind?
Counsel: About Oaks Day.
His Honour: Could you please put that in English, 1 don't speak Racing.
Counsel: About 7 November 2007.
His Honour: That's two days after Guy Fawkes Day, isn't it?
Counsel: I don't know, I'm not a pyrotechnician.

Looking for Furphys

County Court

17 April 2007
McCabe v *Brotherhood of St Laurence & Anor*
G.E. Chancellor for Plaintiff and B.Y. Knoester for Defendant.

And prior to that, can you remember any of the sort of events that may have contributed to a panic attack?
Things like people — we have a very secure property and a man climbed over our gate and actually came into the house yard and I looked up and there was a strange man standing in the yard and I slammed the door and got very upset.
When you say you have a reasonably secure property, what is it that secures the property?
We have high and low electric fence and we have a big lock on the gate.
His Honour: As a matter of curiosity, what did he want?
He wanted to buy an old furphy that we had — a furphy's a big water.
I know what a furphy is?
Yes, well it was …
We've got a lot of them here.
Well, this one was a rusty old one that was sitting in our property.
Those, too.

The Third Women Lawyers' Achievement Awards

On 8 May 2007 in the Queens Hall of Parliament House Victoria, 200 solicitors, barristers and judges attended the third Victorian Women Lawyers/Women Barristers Association Women Lawyer Achievement Awards, sponsored by Greens List and Brooklyn Legal. The event was attended by the Attorney-General, the Honourable Rob Hulls, the President of the Law Institute of Victoria, Geoff Provis, and the Chairman of the Victorian Bar, Michael Shand QC.

THE awards are biennial. The first awards were held in 2003 where the guest speaker was the now Chief Justice of the Supreme Court of Victoria, Justice Marilyn Warren. In 2005 the guest speaker was the Solicitor-General of Victoria, Pamela Tate S.C., and for these Awards, the guest speaker was the Chief Justice of the Family Court of Australia, Justice Diana Bryant.

Simone Jacobson, the current convenor of the WBA welcomed the guests and said:

SINCE the last dinner in 2005, two important publications of research have been released — the Bendable and Expendable Report by VWL in 2006, and the 2006 national AWL survey on gender appearances. Bendable and Expendable has shown there to be barriers to the career advancement of women to senior partnership level, and the need for flexible work practices to overcome these barriers. The 2006 national AWL survey has shown that women do not appear as advocates in superior Courts in equal numbers to men. One of the startling statistics for the Federal Court was that only 5.8 per cent of appearances by senior counsel were by women, and the average length of hearing by male senior counsel was 119.7 hours whereas it was 2.7 hours for female senior counsel.

Caroline Kirton, then President of AWL, said of the survey statistics: "Women advocates are not being regularly briefed in more complex and senior matters and are thereby being denied the same opportunities for advancement afforded to male advocates. This is a matter which should be of serious concern to the legal profession as well as the Australian community."

Simone Jacobsen welcomes the assembled guests.

Reference was made to the exhibition about women barristers in Victoria being displayed over law week in May in the Supreme Court library. The exhibit then moved for some weeks into the foyer of Owen Dixon Chambers East.

The judges of the 2007 Awards were Her Honour Judge Felicity Hampel, Fiona McLeod S.C. and Dr Vivian Waller. The judges were the three winners of awards in 2005.

The individual nominated must have achieved professional excellence in her field and have influenced other women to pursue legal careers or opened doors for women lawyers in a variety of job settings that historically were closed to them or advanced opportunities for women within a practice area or segment of the profession.

Therefore the awards recognise professional excellence but much more. The judges were impressed by the extraordinary depth of experience and the accomplishment of each of the nominees. Many have achieved success whilst juggling other significant commitments to family and community.

Each of the award winners has made a contribution to the advancement of women generally and women in the profession over many years. By their example and by their tireless advocacy for women generally, they show us what can be achieved with passion and commitment.

In addition to initiatives by the profession, we all need inspiration — to be inspired by leaders of the profession who have overcome the impediments described in the Bendable and Expendable report, and the 2006 gender appearance survey.

As leaders of the profession, they create more leaders. Progress occurs when courageous, skillful leaders seize the opportunity to change things for the better.

Simone Jacobson then introduced the Attorney-General, the Honourable Rob Hulls MP, Attorney General for the State of Victoria.

The Attorney-General, the Honourable Ron Hulls said:

I believe a quiet revolution has begun in Victoria's legal system: a revolution, or perhaps evolution, in the way that women are represented and participate in the law. This is due in no small part, of course, to generations of early trailblazers — women like Joan Rosanove who were prepared to beat a path, often alone, through the jungles of convention and misogyny.

It is also, of course, due to the generations of women who paved that path after them. One only has to take a look around to see the breadth and depth of talent and time that women have offered the law and the confidence they inspired in its users as a result.

Gradually, timidly, inch by inch, legal culture is changing — emerging from the primordial ooze of exclusivity that held it captive for so long. Of course, this change was never going to be the stuff of great velocity. Centuries of privilege were never going to be undone in only decades. However, we are seeing progress and it is my humble hope that, over the last seven years, the Bracks Government has contributed to this progress.

I feel both privileged and proud that 50 per cent of my appointments to Victoria's benches have been women. I have been determined to appoint from the widest assembly of candidates — a collection that represents the best and brightest that the legal profession has to offer. This is what "according to merit" means and it is precisely because we should appoint on the basis of merit, rather than homogeneity or the old school tie, that we throw the doors open.

Nevertheless, I still encounter throwbacks to the Jurassic era when consulting over these appointments. Attitudes still lurk in some of the less fragrant corners of the profession that a woman who has "only been at the Bar for 15 years" is a relative infant, while a woman who drives a sports car may apparently be too unstable!

These relics are an infuriating diversion, but not a barrier, particularly as the number of those who express these views is receding as rapidly as their peddlers' hairlines — either that or they have simply learned to keep this trash to themselves!

What is a genuine impediment, however, is the sincerely felt reluctance of many women to accept appointment because they themselves feel they have more to prove; because they know that they will be under closer scrutiny; because they don't wish to desert the relatively small numbers at the Bar, because they juggle myriad considerations when contemplating their career.

Overcoming this impediment is a complex task. It requires change in the ranks of the judiciary and senior positions in the law to offer more support and diversity to women, who are often appointed at an earlier stage in their career. It also

Attorney-General Rob Hulls presents Alexandra Richards QC with her award.

requires the creation and retention of a critical mass — at the Bar, on the Bench, in the private, corporate and public sectors of the profession — and it is my hope, again, that the state has contributed to some positive change in this respect.

The Government's Legal Services Panel has, for some years now, required equal opportunity work and briefing practices of its members. I have to say, initially the figures coming back to us painted a stark picture of the true inequity in the profession.

Recently, however, the figures are beginning to improve and I'm pleased to report that, while in 2003/04, 42 per cent of briefs from Panel firms went to women, in 2005/06 it had risen to 52 per cent. Similarly, while in 2003/04 only 21 per cent of the fees being paid from Panel firms went to women practitioners, in 2005/06 it rose to 32 per cent.

With women at only 20 per cent of the Victorian Bar membership, women barristers are in fact appearing in all jurisdictions in greater percentages than their representation at the Bar. Women were briefed to appear in the Supreme Court in 28 per cent of matters and they invoiced 24 per cent of the fees, better than the national average of 19.2 per cent. The requirement to report on briefing choices, then, does appear to be influencing cultural change.

Things will not transform completely, however, until wider systemic change occurs. First, we need a broader cultural shift about the way we work as a society.

Lawyers are some of the worst offenders in this regard. We have, perhaps more than any others, built professions around long hours, competition and running the gauntlet, demanding women fit into these parameters or fall by the wayside. For too long we assumed that "equality" meant women proving that they could work in the same way as men — the majority of whom who have long had the luxury of support at home. For too long we hoped that things would improve as more women entered the profession.

Instead, however, the victory lies in professional life evolving — in changing the way that all of us work so that neither the women who continue to assume responsibility for community and family life nor the men who should do so as well feel constrained to say "I have to" care for my kids/partner/elderly parent/community but feel free to say "I choose" to structure my life this way.

Further, we must come to an understanding as a wider community that the pursuit and recognition of more women in the law does not just benefit the women concerned, or those who aspire to follow them. I want to be Chief Law Officer of a system that benefits from all the expertise, energy and experience available to it, a system that better represents those that it purports to assist.

Perhaps most importantly, however, is the transformation of public and legal life so that, by participating, by leading, by seeing their diversity reflected in power structures, women have confidence in their capacity to continue to drive reform, to stem the flow of benefit to a privileged few and open it up to all.

This, then, is the ultimate obligation of every person in this room. For all our concerns about the slow pace of change in the legal profession, it remains an incredibly privileged vocation. With privilege, however, comes responsibility — a responsibility to use the law to better the lives of all women, all Victorians.

We must remember that it was not long ago that a partner in a major law firm earned notoriety for allegedly warning Articles applicants who had studied "feminist legal theory" they would be "subject to close scrutiny" for fear that their interest in a "cause" would render them incapable of objectivity. Strangely,

though, for hundreds of years, men have valiantly toiled in the cause of their own self-interest without, apparently, suffering the same fate. Perhaps it is just an extraordinary coincidence that, while white, middle-class men have occupied senior positions in public life and the law, men are the ones who have benefited.

The hallowed halls of the Melbourne Club, and of the Parliament and legal institutions of recent history are scarcely sanctuaries of serene impartiality. When we offer an alternative to these harbourers of privilege, when we celebrate women who not only inspire others, but promote the wider interests and possibilities of the law, all of us benefit. That is why I am delighted to be here tonight to present these prestigious and well deserved awards.

Then the awards were presented to the winners.

The awards were presented to Alexandra Richards QC; Professor Jenny Morgan of Deputy Dean of Melbourne University Law School and Paula O'Brien of PILCH (winner of the Rising Star award).

The Chief Justice Diana Bryant of the Family Court of Australia addressed the gathering after the announcement of the awards and said:

THERE is no question that women are slowly but surely becoming prominent in the Australian legal community and more particularly on the bench. At a regional leadership conference for Australian and New Zealand heads of jurisdiction, the first of its kind ever held in Australia, there were seven women Heads of Jurisdiction out of a total of 30. The proportion may not seem great but the imagery is, particularly when they are spread evenly across all jurisdictions, from the Chief Justice of New Zealand to Federal, Supreme, District and Magistrates' Court. That group and its representation heralded in my view the positive side of the appropriate recognition and appointment of women to judicial office.

Similarly, the number of women being appointed to judicial office is increasing in what I suggest is a generally satisfactory way. For example, on the NSW Supreme Court in 2002 there were four women on the bench. There are now nine. The percentage has gone from 6.25 per cent to 15.25 per cent. In Victoria, there were four in 2002. There are now seven. The percentage has gone from 11 per cent to 20.5 per cent. In South Australia there was one and now three, the percentage going from 7 per cent to 21.5 per cent. In Western Australia there were two, now four, the percentage rising from 11 per cent to 20 per cent. In Queensland there were seven, now eight, rising from 24 per cent to 33 per cent of the bench. In

Chief Justice Diana Bryant delivers the after dinner address.

Tasmania there is now one. The Northern Territory has remained constant with one and in the ACT there are now two. Those figures are quite significant in my view.

In District and County Courts (not including Reserve Judges but including Acting Judges), in NSW there are 17 women judges up from 14 five years ago, forming nearly 26 per cent of the bench. In Victoria there are 20 women judges up from 15, forming nearly 33 per cent of the bench, in South Australia, two up from one, forming around 11 per cent; in Western Australia, eight up from two, forming nearly 30 per cent; and in Queensland seven up from five, forming 20 per cent of the bench.

Women have also been appointed to Courts of Appeal. In NSW there are two, in Victoria there are two (including the Chief Justice) and in Queensland there are two.

As far as federal courts are concerned there is of course one woman on the High Court, 14 on the Family Court representing just over 34 per cent, six on the Federal Court representing 12.5 per cent and 12 in the Federal Magistrates Court representing 25 per cent. In the federal appellate division, all of the women judges in the Federal Court sit on the Appeal Division and in the Family Court four out of the nine appeal judges are women, including myself, and it is common now to have an all-female bench consisting of members of the Family Court Appeal Division.

The High Court deserves mention, as it always does. We would now, as we have for many years, find it unthinkable for the High Court bench not to include a woman.

In real terms the percentage of just over 14 per cent lags behind most of the other superior courts, and an appointment of a second woman to the High Court bench would certainly send a positive message to the community at large and the legal community about the status and appropriate recognition of women.

We should not forget that the Canadians have seen fit to appoint four women judges to the Supreme Court, one of whom is the Chief Justice. We seem to be a little way off achieving that just yet.

In general though, as far as judicial appointments are concerned, the percentage of women on the bench is increasing and significantly so in the last five years.

The appointment of women to benches throughout Australia has been made by Governments who are generally electorally aware that almost half of their constituent voters are women and have been influenced by an awareness of systemic discrimination against women and the need for some activism.

Gender analysis has played an important role in raising awareness of issues confronting women in the law. The growth in feminist jurisprudence has been remarkable, and many Australian women academics have contributed enormously to its development and growth, including Jenny Morgan, who is justly a recipient of an award tonight. Feminist legal theory is now an accepted part of university curricula and a number of law journals are devoted exclusively to discussion of women and the legal profession.

The profession has also responded to growing awareness of systemic discrimination against women by developing responsive policies and practices. The Law Council of Australia adopted a national model equal opportunity briefing policy for female barristers and advocates in March 2004. Since that time, private firms, insurance companies and government agencies have adopted the policy, including some of the top-tier firms.

Should we then congratulate our-

The awards ceremony dinner in the elegant setting of Queens Hall in Parliament House.

selves on our achievements and sit back and relax? I hardly need to ask, let alone answer, that rhetorical question at a function such as this. The very giving of achievement awards, which acknowledge professional excellence and influencing and assisting the progress of other women, makes it obvious that the Victorian Women Lawyers and the Women Barristers Association do not believe that their work is anything like completed yet.

Regrettably, not all members of the media have yet accepted the legitimacy of women as lawyers and particularly as appointees to senior judicial office. You will remember the articles written at the time of the appointment of Marcia Neave to the Court of Appeal, one with the title Justice Wears a Skirt. When the Attorney-General took issue with the thesis of the writer, the author then feigning the air of someone who is heard and misunderstood, suggested that it was about "politics" and not "gender". The problem about this is that no similar comments seem to have been made about men.

These are curious comments from the media at a time when the judiciary is coming under increasing public criticism for being "out of touch" and "elite". It is strange that there would be support for a narrow conception of merit that perpetuates the appointment of stereotypical judges.

I regret to say that the editor of the *Australian Law Journal* appears from time to time to be a fellow traveller of this kind. You will recall that the article in question argued that the law was being "feminised" by the appointment of women to top legal judge jobs, including the Victorian Chief Justice, the Solicitor-General and the then President of the Children's Court.

One would hope that those whose views are so stridently expressed are dwindling in number and potency, particularly when the subjects of their criticism are performing well — indeed, as well — as their male counterparts.

At about the time that these articles were appearing in the press I gave a speech to the Australian Women Law Students Collective which I entitled, subtly enough I thought, "Shutting the Stable Door — women and judicial office". I posed the question at one point "are we now satisfied with these achievements? Has the 'horse' of gender equality now bolted so quickly and so far that we can confidently shut the stable door, secure in the knowledge that our profession has eschewed discriminatory practices and views?"

As I have already said, this function itself indicates that the two organisations concerned believe that there is still much to do.

And there is. One of the effects of the appointment of senior and experienced women to courts is that it is diminishing the number of senior women in the profession and at the Bar in particular. Women are still seriously under-represented at the level of senior partnerships in solicitors' firms.

The appointment of senior women from the Bar has not been matched by the appointment of Senior Counsel. I use Victoria as an example. At present there are 343 women at the Bar and 16 women members of Senior Counsel out of 1671 barristers in total and 227 members of Senior Counsel. Women represent 20.5 per cent of all barristers but only 7 per cent of members of Senior Counsel.

Of the 16 women members of Senior Counsel at the Victorian Bar, only two have more than six years' experience. One of who is Alex Richards, a recipient of an award tonight. Ten of them have less than four years' experience as Senior Counsel and the numbers being appointed are concerning as well. In 2004 there were four from 23, a total of 17 per cent. In 2003 there were six from 21, a total of 28.5 per cent. In 2004 there were two from 11 appointments, 18.9 per cent. In 2005 there was one from 15, 6.7 per cent and in 2006 one from 13, 7.7 per cent.

The concerning figures come from the last three years and the last two in particular: two and then one in the last two years.

This is not because the Chief Justice of the Supreme Court is not supportive of the appointment of women as Senior Counsel. She is a clear supporter of the advancement of women. But the problem I think is two-fold. One is the few women who have sought to become Senior Counsel in the last few years. It is hard to know whether this is a lack of experience, those more experienced women having already been made Senior Counsel or appointed, or whether it is simply a reluctance to take on that role because of its obligations.

If it is the former, then we all need to encourage women in the law in whatever areas to obtain appropriate experience in all aspects and, at the Bar particularly, in all courts and if it is the latter then we all have an obligation to encourage other women to aspire to appointment as Senior Counsel.

Clearly it is too early to shut the stable door.

In 2005 in a speech at this function, Pamela Tate described the Bar's subtle pressure on her not to apply for silk. I would hope that that kind of pressure would not be applied now and I think it can also be said that the "horse" of gender equity and the law has by no means bolted. Perhaps we can say it's been taken out for a short trot under a tight rein.

And for all of the hyperbole by some members of the press *The Age* editorial can be relied on for good common sense. On 25 September 2005 the editorial said: "That the appointment of women to high legal office is still seen as peculiar reflects poorly on the community as a whole."

As I have the opportunity this evening to talk to you I want to say something about the Family Court and its role in the wider judicial landscape. I do so because as someone who has been involved in the practice of family law for over thirty years, as a solicitor, as a barrister, and as a judge and head of jurisdiction in two courts, there has been a theme, at some times more obvious than at others, that family law is somehow a soft option and that it is not real law. This has sometimes been made worse by the fact that there are a number of women who practice in family law. Many do so by choice but as with systemic discrimination, there is the added twist that if women's status is not seen

Alexandra Richards QC: A Profile

The following citation was read prior to Alexandra Richards receiving her award

ADMITTED to practice on 2 March 1981, Alexandra Richards signed the Bar Roll on 17 May 1984, and was appointed a QC on 24 November 1998.

Practising in taxation, commercial law, insolvency and ADR, she is also Chair of the Commercial Bar Association's Revenue Law Section and Vice-President of the Tax Bar Association. She has appeared in the High Court of Australia , including in *FCT* v *Montgomery* (1999) 198 CLR 639 and *FCT* v *Spotless Services* (1996) 186 CLR 404.

In recognition of her commitment to pro bono work, she was appointed a member of a task force established by the Attorney-General of Australia to advise on the national co-ordination of the pro bono activities of the legal profession and is a member of the National Pro Bono Advisory Council to the National Pro Bono Resource Centre.

With an active interest in international humanitarian law, she was selected and trained under the auspices of the ICJ to conduct interviews of victims of the violence in East Timor in 1999. From March to June 2003, she acted as consultant to the Office of Prosecutions, International Criminal Tribunal for Rwanda (UN) based in Arusha, Tanzania.

Alexandra Richards QC

Alexandra served on the steering committee of AWL and in 1997 became the inaugural President of Australian Women Lawyers until 2000. As President, she led an organisation whose principal objective was to ensure access to justice for Australian women generally, and the Board's deliberations primarily addressed issues involving equal opportunity, anti-discrimination and affirmative action principles.

Alexandra has been at the "cutting edge" of the formation of three significant organizations namely AWL, WBA (being an inaugural committee member) and VWL (being a founding member). Purposes common to all three organizations are advancing opportunities for women in the law and through her leadership and service on those committees she has been instrumental in advancing opportunities for women in the legal profession. She is the current Chair of the Equal Opportunity Committee (formerly the Equality Before the Law Committee) of the Victorian Bar and is also a board member and executive member of the Victorian Law Foundation.

as being comparable with men's, then the areas in which they predominantly practice will suffer a similar regard.

At some times, more in the past than the present I hope, women have been pushed into doing family law against their wishes. This has led to somewhat of a backlash, which I think is unfortunate. For example, whilst I understand the reasoning I think it was unfortunate that the Bar's survey of women in courts did not include a survey of women who practice in the Family Court. It was the only Court that was excluded. And intentionally or not it sends a message, which I think is unfortunate.

Recently the Family Court has pioneered a new way of hearing cases about children; that is, parenting cases, through the Less Adversarial Trial, or LAT.

LAT is a significant change in the approach to trial procedures in Australia. It has major benefits for those experiencing family breakdown and who require a hearing before a judge. It is consistent with the broader trend in civil litigation towards stronger case management and more active judicial involvement. It is also consistent with the Family Court's role as a specialist superior court, which tailors its practice and procedure to best meet the needs of separated families and particularly children.

This much was acknowledged by Chief Justice Gleeson at the recent 35th Australian Legal Convention when he said: "As its name implies, the Family Court is a specialist court, and in certain respects its procedures are atypical, and tailored to its special role. In particular, disputes concerning children are dealt with in a fashion that is self-consciously less adversarial than the ordinary civil trial process."

The two evaluations reports commissioned by the Family Court demonstrate that, in its pilot phase at least, a less adversarial approach brings significant benefits to litigants when compared with a traditional trial.

A less adversarial trial is a proceeding that does no harm to relationships, that tries to change parties from combatants into cooperative parents, that tries to help parents deal with issues which we always understood were there but not dealt with, to provide them with outcomes that will prevent further conflict, not sustain it.

I think it is also of enormous potential benefit to practitioners and advocates, including of course women.

It is a furphy that all lawyers crave the "cut and thrust" of trial and relish the opportunity to decimate their opponent. It is precisely this fallacious view of advocacy and the qualities a lawyer must possess to be an "effective" advocate that I suspect is contributing to the unprecedented number of law graduates who are turning away from legal practice as a career choice.

The Less Adversarial Trial provides a forum in which counsel can exercise their skills without being combative and aggressive. It is a process that encourages the use of incisive and creative reasoning and rewards the ability to think and act constructively rather than destructively.

I see the Less Adversarial Trial as presenting an opportunity to encourage more people — men and women — to undertake family law. It is an exciting, innovative and, ultimately, rewarding step forward.

The next awards will be held in 2009.

Pro Bono Swimming Championships

NO doubt many watched the "golden" performances of Michael Phelps and Libby Lenton at the recent World Swimming Championships. What few would know is that a number of barristers were putting in "sterling" performances of their own in assisting a number of swimming officials deal with their legal problems.

As occurred with the Commonwealth Games in Melbourne in 2006 an number of barristers volunteered to be available, should the need arise, to appear, pro bono, if any swimmer or official traversed the law in some way. This did not happen by accident but was the result of careful planning and meetings, in the months prior to the Championships, with all interested parties. A protocol was established with the Melbourne Magistrates' Court, Victoria Police, the Games Organisers and those representing the pro bono lawyers.

The result was that with this level of co-operation between all, the matters handled by the Court went through the system smoothly. Matthew Fisher appeared for the scantily clad Russian diving coach who faced the Magistrates' Court on assault charges. Florian Andrighetto had the distinction of appearing for the emotionally expressive father who was also a Ukrainian swimming coach, in the result the intervention order was removed. Unfortunately that was not the end of the matter for him as he had to appear before the FINA Disciplinary Panel where he was supported by Tony Nolan S.C. and Will Alstergren, who were able to secure what might otherwise have been a life ban to six years. It is understood the coach intends to fight that suspension as well by appealing the suspension to the Court of Arbitration for Sport.

All counsel were briefed by leading sports law solicitor, Paul Horvath, who was instrumental in setting up and organising the pro bono scheme.

It is appropriate that all are recognised and thanked for their contribution to the scheme, including those who offered their services.

Tom F. Danos

New Exhibition of Women at the Bar

As part of Law Week 2007, Victoria Law Foundation and the Women Barristers Association collaborated on an exhibition to highlight the experiences and achievements of some of Victoria's most prominent women barristers over the past 100 years.

The result, Women Barristers in Victoria Then and Now, tracks the key developments in the history of women barristers in Victoria, providing an overview of the personal experiences, challenges, significant achievements and contributions of women barristers to the legal profession.

Images and anecdotes, from Joan Rosanove to some of the most senior women in the legal profession today, paint a picture of life at the Victorian Bar against a backdrop of milestones in women's legal history.

According to Simone Jacobson, convener of the WBA, the exhibition shows how life for women barristers has changed over the years, as both a historical reflection and an ongoing story.

"We hope that by highlighting to the legal industry and wider community the challenges faced by, and the significant achievements of women barristers, we can further improve opportunities for women at the Bar and in the legal profession in general.

"We also hope that the exhibition will inspire more young women to a career in law, in particular at the Bar."

The exhibition ties in with the ongoing development of the Victorian Bar's Oral History project. This multimedia initiative captures the recollections of retired and practising men and women barristers of the Victorian Bar, and is accessible via *www.vicbar.com.au*.

Women Barristers in Victoria Then and Now is currently on tour, and will be on display in chambers, schools, universities and courts across Melbourne and Victoria.

For more information contact Simone Jacobson, simonejacobson@vicbar.com.au.

Women Barristers in Victoria – then and now

The early days

This exhibition tracks the key developments in the history of women barristers in Victoria, providing highlights of their personal experiences, challenges, significant achievements and contributions to the legal profession.

KEY DATES

1841 The first barristers are admitted to practise law in Victoria, although this applies only to men.

1897 Flos Greig enrols as Victoria's first female law student at the University of Melbourne.

1903 The Victorian Parliament passes the *Women's Disabilities Removal Act* enabling women to become legal practitioners.

> *"No person shall, by reason of sex be deemed to be under any disability for admission to practise as a barrister and solicitor of the Supreme Court of Victoria any law or usage to the contrary not withstanding."*
>
> *Women's Disabilities Removal Act* (Vic) No 1873 of 1903, section 5

Above: Flos Greig
Photo courtesy of the Law Institute Journal

1905 Flos Greig becomes the first woman admitted to practise law in Victoria, but it is almost another twenty years before the first woman joins the Victorian Bar.

Joan Rosanove

On 2 September 1923, Joan Rosanove (née Lazarus) became the first woman to sign the Bar Roll in Victoria.

When Joan appeared in the High Court in 1924, she was asked *"And with whom is my learned friend appearing?"* Joan retorted, *"I am appearing with myself. I am the leader of the female Bar."*

During her first two years as a barrister, Joan had no proper chambers of her own. When one of Joan's colleagues, Philip Jacobs, offered her his chambers the news sparked an emergency meeting of the chambers' directors. They threatened to cancel Jacobs' lease if he lent his room to Joan.

Humiliated, Joan left the Victorian Bar in 1925 and established a thriving legal practice as a solicitor specialising largely in matrimonial and criminal cases.

Above: Joan Rosanove QC
Photo courtesy of Peg Lusby

"To be a lawyer you must have the stamina of an ox, and a hide like a rhinoceros, and when they kick you in the teeth, you must look as if you hadn't noticed it." Joan Rosanove QC

In 1949, Joan returned to the Bar and accepted a position as a reader to the less experienced Edward Ellis. Joan soon became a prominent barrister in matrimonial law. She could argue a case standing all day – a feat that male barristers had previously deemed too physically demanding for women who sought success at the Bar.

In 1965, Joan was appointed Victoria's first female Queen's Counsel.

Since her death in 1974, Joan has continued to be remembered for blazing a trail for women at the Bar. In 2000, the Victorian Bar named Joan Rosanove Chambers in her honour.

"I can never see why it is not considered the hallmark of success to have a brain like a woman!" Joan Rosanove QC

The pioneers

Norma Ford (née O'Connor) joined the Bar in 1951 and was one of the first women barristers to practise in areas of law other than matrimonial law.

"Being at the Bar was a very pleasant and satisfying experience for me. It was a happy period of my life. I felt quite included and accepted by barristers and judges." Norma Ford

Allayne Kiddle joined the Bar in 1959. She encountered support from her fellow barristers, but also some peculiar assumptions.

Above: Allayne Kiddle

"By and large, being at the Victorian Bar was a lonely experience when I was doing my reading... For the most part, my work consisted of writing opinions for my master [William Kaye], statements of claim and other matters relevant thereto... When I was first interviewed by Mr Kaye, he said 'My name's Bill' and then asked me what my name was. The clerk on the other hand called me 'Snooks' or anything else he fancied at the time."
Allayne Kiddle

Above: Molly Kingston

"Although there were no overt prejudices, nevertheless we were well aware that the Bar was seen to be a man's domain... I really think this has deterred a lot of women from going to the Bar."
Mary (Molly) Kingston

"I was a bit like a striped and spotted dog. There was nobody else around my age who actually wore a skirt, [who was] available. So there was no one to share with, other than other men."
Lynnette Schiftan

Above: Lynnette Schiftan

"Being a woman was never an advantage to me; one always had to prove one's worth no matter what the circumstances."
Molly Kingston

Barristers are specialist advocates. Barristers are independent – each barrister works alone.

Barristers argue cases in court; they give advice; they settle (finalise) documents. Typically, a barrister is engaged through a solicitor. Barristers also conduct, and appear in, mediations and arbitrations.

Excellence is recognised by appointment as Senior Counsel (SC) – formerly Queen's Counsel (QC) – referred to as 'silk' because of the distinctive silk gown.

The tides of change

From the late 1970s and into the 1980s, women barristers were a visible presence at the Bar, even though they represented only a small proportion of the Bar as a whole.

"If you asked me how things were in the mid-1970s for women, I would have to say that from my observations, things hadn't improved much from my mother's time. She [Joan Rosanove], Molly Kingston and a few other brave stalwarts were battling on – they were the true women before their time."
Justice Margaret (Peg) Lusink

Above: Justice Margaret (Peg) Lusink

The late Lillian Lieder QC and Betty King QC (now Justice King) joined the Bar in the mid-1970s and both took silk in the early 1990s. They were the first women barristers practising in criminal law to take silk.

"Lillian Lieder had the courage to come into this male-dominated Bar at a time when women were thin on the ground. Lil truly was a pioneer. She took the boys on at their own game and won. She earned their respect and their friendship." Justice Betty King

Above Left: Justice Betty King
Above Right: Lillian Lieder QC

KEY DATES
1976 First Victorian woman appointed to the Family Court of Australia (Justice Margaret (Peg) Lusink)
1982 First woman elected to the Bar Council (Rachelle Lewitan)
1983 First female Victorian judicial officer (Francine McNiff) appointed to the Children's Court
1985 First woman appointed to the County Court (Judge Lynnette Schiltan)
1985 First female magistrates appointed (Margaret Rizkalla and Sally Brown)
1987 First woman appointed to the High Court (Justice Mary Gaudron)

"Whilst in the past a female barrister had been expected and indeed may have expected, to practise exclusively in the area of family law, such is no longer the case... Similarly, whilst almost folkloric stories abound of women barristers in lace collars, or coloured stockings not being 'seen' by some members of the judiciary... such [stories] will necessarily fade as by sheer force of numbers women at the Bar are no longer a recognisable minority group."
Linda Dessau (now Justice Dessau) – Extract from 'A Necessarily Short History of Women at the Bar', *Victorian Bar News*, Winter 1981

Above: Judge Rachelle Lewitan
Left: Justice Linda Dessau

Breaking down the barriers

By 1990, women made up 50 per cent of law school graduates in Victoria, but women were not represented in similar numbers at the Bar or in its senior ranks.

Women Barristers Association
In 1993, several women barristers met to discuss the establishment of the Women Barristers Association (WBA), the first of its kind in Australia.
"*The WBA gave women a voice.*" Judge Rachelle Lewitan (inaugural convenor of WBA)

"While some men resented us, there were also senior barristers who were very supportive of young women at the Bar, and took them under their wing, perhaps because they had daughters of whom they were very proud, and believed they should have the same opportunities as their sons." Judge Susan Cohen

In 1998, the Victorian Bar Council released its ***Equality of Opportunity for Women at the Victorian Bar*** report by Rosemary Hunter and Helen McKelvie. The key findings revealed that women received disproportionately fewer briefs than men and were leaving the Bar earlier and in larger numbers than men.

"The research clearly shows that barriers to women's advancement at the Bar do exist and that further steps can be taken to achieve equality of opportunity." Neil Young QC, then chairman of the Victorian Bar Council.

KEY DATES
1993 Women Barristers Association (Victoria) is established
1993 Susan Crennan QC becomes the first female chairman of the Victorian Bar Council
1996 First woman appointed to Supreme Court of Victoria (Justice Rosemary Balmford)
1997 First woman appointed to the Victorian Court of Appeal (Justice Susan Kenny)
1997 Australian Women Lawyers is established as the peak body for women lawyer associations throughout Australia

Above Left: Joan Rosanove QC with daughter Peg Lusink and grandson John Larkins
Above Left: Ada Moshinsky QC

Work-life balance

"I look on my life primarily as a barrister, for that is my chosen career. But although I love my work and am actively 'on the job' for long hours each day, I never forget that I am a wife and a mother, for unlike men, women are to divide their lives into watertight compartments and keep their careers entirely free from the personal relationships entailed by a home and children."
Joan Rosanove QC

"I loved life at the Bar because it was rich. Lifelong and diverse and allowed me to have a challenging and satisfying career, happy marriage and bring up three wonderful kids."
Ada Moshinsky QC

"The life of a barrister is incredibly demanding and that's never going to change ... If you are trying to raise young children, it is very difficult to balance both, even with a supportive partner. But if you can do it, it's a wonderful job."
Judge Liz Gaynor

"What I say to women coming to the Bar is that you need to think very carefully about what sort of safety nets you have in place. And it is difficult because ultimately I decided that makeshift childcare was just not going to work out, and so it meant investing the expense of effectively having to employ someone full-time, and that's been the only way that I've been able to manage."
Judge Fran Hogan

"The Bar gave me the flexibility to work my own hours, so I could take a day off when I needed to, or I could leave work early to pick up my kids and take them to a football game."
Judge Rachelle Lewitan

In 1996, the Victorian Bar adopted a parental leave policy so that rental payments for chambers are reduced for a six-month period for a barrister who is pregnant or has the care of a young child.

The Victorian Bar's Oral History website, accessible via **www.vicbar.com.au**, is a multimedia resource that captures the recollections of men and women barristers in Victoria through audio interviews, articles and photos. It also includes the documents, surveys and reports mentioned in this exhibition.

This exhibition is a joint production between the Women Barristers Association and Victoria Law Foundation.
Designed by **scimitar.com.au**

The new millennium

"In our quiet crusade against the persistent status-quo, in both its overt and more subversive forms, we must look to leaders and mentors across the generations.

"A career in the law for a woman is truly fulfilling and rewarding. But it cannot occur in a vacuum. The links in the chain, made by the helping hand of our role models and mentors, must continue to span the generations." Chief Justice Marilyn Warren

On 1 April 2004, the Victorian Bar Council adopted the ***Equality of Opportunity Briefing Policy*** (also called the Model Briefing Policy). The policy requests clients, barristers' clerks and solicitors take reasonable steps to identify and genuinely consider engaging female barristers as counsel, and to monitor and report on the nature and rate of engagement of women as counsel.

"In recent years, the appointment of women to judicial office has begun to redress the imbalance on the Bench, but has had the unfortunate side effect of depleting the Bar of some of its most senior women. Nevertheless, having women in positions of seniority has a trickle-down effect upon the entire profession, and provides young lawyers with role models."
Solicitor-General Pamela Tate SC

Above: Solicitor-General Pamela Tate SC

Above: Chief Justice Marilyn Warren of the Supreme Court of Victoria
Photo courtesy of Chief Justice Warren
Above left: Justice Susan Crennan of the High Court of Australia
Left: Chief Justice Diana Bryant of the Family Court of Australia

A snapshot of men/women barristers in April 2007

Source: The Victorian Bar

Female Senior Counsel in April 2007

From left to right
Top: Fiona McLeod SC, Chris Maxw SC, Jennifer Dallas SC, Kristen Hanscomb SC, Jane Dixon SC, Samantha Richards QC, Kate Shaw, Elspeth Strong SC, Jennifer Batrouney SC, Clarinda Mokrzecki QC, Frances O'Brien SC, Pamela Tate SC
Above: Michelle Gordon SC, Michelle Quigley SC, Michael Williams SC, Kate McMillan SC, Helen Symon SC, Melanie Sloss SC, Moira Kennedy SC, Debbie Mortimer SC

KEY DATES

2000 Diana Bryant QC appointed first Chief Federal Magistrate
2003 Pamela Tate SC appointed Solicitor-General for Victoria
2003 Justice Marilyn Warren appointed Chief Justice of the Supreme Court of Victoria
2004 Chief Federal Magistrate Bryant appointed Chief Justice of the Family Court of Australia
2005 First Victorian woman barrister appointed to the High Court of Australia (Justice Susan Crennan)

A 2006 nationwide survey on courtroom appearances conducted by Australian Women Lawyers found women were still underrepresented, especially in superior courts, and their appearances were shorter in duration.

"Women advocates are not being regularly briefed in more complex and senior matters and are thereby being denied the same opportunity for career advancement afforded to male advocates."
Caroline Kirton, President of Australian Women Lawyers

"We are clearly not getting equality of opportunity in briefing practices if women are rarely appearing in criminal and commercial matters in superior courts."
Justice Marcia Neave

Women barristers: respective percentages of briefs and fees earned

Panel arrangements*	% briefs to women	% fees invoiced by women
2005/2006	52%	32%
2004/2005	53%	26%
2003/2004	42%	21%

*refers to law firms briefing out government work to barristers
Source: Victorian Government Barristers Briefing Report 2005–2006

Law firms, corporations and the public (as the users of legal services) can all help to redress imbalances in briefing practices. As a starting point, visit www.vicbar.com.au and click on the Women Barristers Directory.

Aspirations for the future

"There needs to be greater recognition of the contribution women make to the Bar. Women barristers are well-prepared, insightful, compassionate and analytical."
Judge Liz Gaynor

"What we need is equality of participation, not merely equality of opportunity."
Solicitor-General Pamela Tate SC

"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."
Justice Marcia Neave

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References are available at **www.victorialaw.org.au**

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Ian Hunter QC Addresses the Melbourne Branch of the Anglo Australasian Lawyers Society

Wednesday 14 March 2007

MY Melbourne connections go back a long way and it is a great delight to have an opportunity to renew them. I first came to Melbourne in 1980 after finishing my first case as a silk in Hong Kong and I decided to return home the long way. It was an opportunity to visit my aunt who had emigrated from Scotland 40 years earlier and lived in Balwyn. Then my son who is now 30 met a girl from Melbourne, came down here, loved it and ended up going to RMIT and buying a unit down in St Kilda where he still lives and works. It was in 2000 when I took a weekend off from a Singapore arbitration panel chaired by Andrew Rogers of Sydney that I discovered the dubious pleasures of street-side property auctions. Finally, I have a daughter-in-law who lives in Sydney and is about to produce our first grandchild.

When your energetic secretary, Paul Hayes, and I had lunch in London about six weeks ago and he invited me to speak to you, I readily accepted. It gives me the opportunity to congratulate you on the formation of the Melbourne branch of the Society and to give you a little of the background on the origins of the Society, to the extent that others may not have already done so.

The origins of the Society go back to 1990 when Gary Downes, Ken Handley and I were in Auckland for the Commonwealth Law Conference. It was my year in office as President of the Union Internationale des Avocats and I decided to attend the Conference in that capacity. I had met Gary for the first time in Interlaken at the annual conference of the UIA the previous year and we had

Ian Hunter QC.

begun what has turned out to be a long friendship. There was agreement between all three of us in Auckland that with the abolition of state appeals from Australia to the Privy Council in 1986 a real effort was now needed to maintain and further our close legal connections and traditions. Until appeals were abolished there had been a regular trail from Australia to the UK of the leading advocates and solicitors coming to London to argue cases.

That idea then germinated although looking back it seems to have taken a long time to actually form the Society. In the meantime I had been admitted to the New South Wales Bar in 1992 and took silk there in 1994. The Society itself was formed in June/July 1998.

It is a single Society with an Australian Chapter and a UK Chapter. I am delighted that the Australian Chapter now has two branches. For obvious reasons I cannot speak about the Melbourne branch. But I can say, having been to meetings of the Sydney branch, that the membership is rather different in the two countries. In Sydney there is a much greater proportion of established practitioners whether they be barristers, solicitors or judges. In London the make-up of our membership is very different. The majority of our membership by far comprises young Australian and New Zealand lawyers who have come over to the UK to join one of the big firms in London. Some of them will of course join Australian firms like Mallesons and Minters (whose support for the London Branch and indeed the Society in general has been unstinting and much appreciated). Many will join firms like Linklaters and Freshfields who employ large numbers of young Australasian lawyers. And over the last few weeks I have noticed reports that some of the big US law firms, like Fried Frank, whose presence in London is becoming increasingly noticeable, are recruiting Australian and New Zealand lawyers.

These young lawyers are worked formidably hard and it is not at all easy to get them to evening meetings for that reason. The other difficulty we have is finding out who has arrived and who has gone back home. Our database is constantly being updated. The meetings that we have that are most popular are practice-directed. For example we have an event in June put on by Mallesons on the subject "Working with In House Counsel in Large

Transactions: are you providing value?"

That's just a little glimpse into the sort of things we are doing in London. The whole of the London Committee joins with me in welcoming you to the fold. We wish you well and if there is anything we can do for you in London you have only to ask. I very much hope to develop as close relations with you as we have with our friends in Sydney. You will be sent our programs as a matter of course. If you are in London at the right time we will be very disappointed if you do not join us.

Turning now to my topic or perhaps I should say topics, when I had lunch with Paul I asked what the sexy topics in Melbourne are currently. Hence the subject of my address. My input into both topics is going to be a very personal one and to some extent, particularly as regards judicial independence, possibly a bit controversial.

I do not propose to rehearse at length the importance of judicial independence or the reasons why it is a keystone of our constitutional arrangements in both countries. There is no need to do so in company like today's. But it is relevant to bear in mind that other centres of power in our contemporary society, the executive, large corporations and the media need regular reminding of the central importance of the principle.

The crucial need for judicial independence in any society that purports to be a democracy can best be appreciated when the principle is seriously eroded or undermined. Some of us remember Zimbabwe 25 years ago when it was one of the most successful African countries. Just look at it today. In 2005 a delegation of senior barristers including Stephen Irwin QC, Chairman of the Bar Council in England, and Glen Martin S.C., President of the Bar Association of Queensland and Treasurer of the Australian Bar Association, visited Zimbabwe. Irwin reported:

> ... the judicial system in Zimbabwe has been profoundly compromised [in recent years]. The appointment of the higher judiciary is subject to political interference. Zanu-PF enforces the removal of judges whose independence represents an impediment to government policy. Judges have been the subject of psychological and physical intimidation and threats of violence. Magistrates and prosecutors seen as unsympathetic to the government have faced actual violence and attacks on their families and property ... we have concluded that the Zimbabwe justice system has ceased to be independent and impartial. The legal culture has been subverted for political ends.

The conclusion of Roy Martins QC, Dean of the Faculty of Advocates in Scotland, was that:

> the independence of the legal system and the judiciary in particular in Zimbabwe has been severely compromised … the country's legal system has been distorted and subverted for the illegitimate maintenance of political power.

And Pakistan. On the three occasions since independence that military coups have brought an end to democratic rule in Pakistan the judiciary have failed to impede extra-constitutional regime change but have abetted and endorsed the change of power. Commentators report that the present military government, like previous ones, has devised ways of keeping the judiciary weak. It uses judicial appointments to ensure that allies fill key posts. The Chief Justices of the High Courts wield critical administrative powers over the allocation of cases to judges and are accused of directing cases to pliant judges.

I have spoken of Zimbabwe and Pakistan as examples of gross threats to judicial independence. No one would think of the United States in the same context. Yet there was real concern in 2000, in the United States and elsewhere, when a decision of the Florida Supreme Court, whose members had all been appointed by Democratic governors, was overruled by the Supreme Court where the decisive votes in favour of the second President Bush were cast by judges who were appointees of the first President Bush.

In different countries the problems raised by the necessity of defending and protecting judicial independence may be of very different orders of magnitude. But they still exist.

Let's go back a bit in time, to 1178 to be precise. It was in that year that Henry II appointed members of his personal household "to hear all complaints of the realm and to do right" — the origins of the Queen's Justices of today in the UK. But it was not until the Glorious Revolution of 1688 that the rule of law was established in place of the will of the monarch. This led 13 years later to the Act of Settlement in 1701 which secured the victory of judicial independence over the power of the executive.

Then we come to the eighteenth century which was a period of political and constitutional theorising with the doctrine of the separation of powers finding expression in the works of Montesquieu, in particular in his "L'Esprit des Lois" in 1748. It was his contribution to the constitutional debate which played so strongly with the founding fathers in the United States who explicitly adopted the notion of the separation of powers.

In the UK with its unwritten constitution there has never been a complete separation of powers. The doctrine has been honoured in the breach. Until very recently the Lord Chancellor, effectively the Minister of Justice, was a member of the executive sitting in the Cabinet and participating in political decisions, he was a member of the legislature i.e. member of the House of Lords and speaker of that Chamber and he sat as a judge in the House of Lords.

The previous Lord Chancellor, Lord Irvine, is and was a very political animal and declined to take the political backseat in Cabinet which his predecessor, Lord Mackay of Clashfern, had adopted. In his early period in office he occasionally sat as a judge in the House of Lords. As a result he came under great pressure from another judge in the Lords, Lord Steyn, not to do so and in particular not to do so where the actions of the executive were under examination. He complied with that pressure and the current Lord Chancellor, Lord Faulkner, made it clear from the outset that he would not take part in the judicial business of the House.

Much of the British constitution is governed by constitutional convention, and Parliament by convention has long respected the independence of the judiciary. Only once has a High Court judge been removed by resolution of Parliament. That was in 1830 in the case of Sir Jonah Barrington who was a judge of the High Court of Admiralty in Ireland. Then in 1983 the provisions governing the removal of Circuit Judges were operated in the case of a judge who admitted to smuggling.

Another important aspect of judicial independence is that for many years judges were handsomely rewarded in monetary terms. The difficulties that can arise when that is not so were vividly brought home to me on a couple of occasions. In 1983 I argued a case in the Court of Appeal in Nairobi on appeal from the High Court in Mombassa. I led the head of one of the leading law firms in Kenya. I remember him telling me that the local judges were so badly paid that they were allowed to supplement their income by going into business. Unfortunately

the judge earmarked as the next Chief Justice had been forced to excuse himself because his haulage business had just gone bust. My friend also told me that for a number of years he had written a report for the World Bank on the justice system in Kenya and that he was distressed for the first time to have had to write that it could no longer be assumed that the Kenyan judicial system was free of corruption. Then a few years later I was involved in an arbitration in India and I was told by a very senior local lawyer that a particular local High Court judge was known to be taking bribes and it got to the point where the local Bar Council resolved to refuse to appear in front of him.

No dissertation is needed from me as to the importance of judicial independence and the fact that at its root is the protection of the rights of the citizen against overweaning power, wherever that threat may lie, whether it be the executive, central or local government, big business or the media. It is not a perk or privilege attached to the office of judge. It is central to the rule of law. As Lord Denning said famously in the Gouriet case, which I had the privilege of arguing in the Court of Appeal at its earliest stage: "Be you ever so high, the law is above you."

There are powerful forces in any modern society who are determined, almost regardless of cost, to get their own way and who find that the law, and the judges who are the embodiment of the law, are liable to thwart them. These forces are often represented by ambitious and self-righteous people who are not used to taking "No" for an answer and who, when thwarted, are liable to turn on those who they perceive are standing in their way.

As democratic societies have become much more complex over the last 40–50 years and application of the rule of law has moved routinely into areas of daily life where its involvement was not previously of any great moment — I have in mind the rationalisation and vast expansion of judicial review — so the pressures on the independence of the judiciary have increased greatly.

All of us have our own favourite examples. For me one memorable example was the occasion in 1990 when Lord Donaldson famously warned the then Lord Chancellor, Lord Mackay to "get your tanks off my lawn". I appeared regularly before John Donaldson after the National Industrial Relations Court was set up in 1971 and later when he was in charge of the commercial list and later Master of the Rolls. I had a lot of time for him as I did and still do for James Mackay. But Donaldson perceived the Lord Chancellor to be attempting to interfere with the running of the Court of Appeal and he was also very critical of the way in which the reforms in the Courts and Legal Services Act of 1990 were seen as a threat to the independent Bar and to the quality of the administration of justice.

Lord Donaldson spoke out again in 2005 just before his death when Tony Blair called on the judges not to block the government's anti-terrorism proposals. He indicated that the judges would continue to interpret the law independently of what the government might wish to see happen and added:

> It's the job of the judges to ensure that the government of the day does not exceed its powers which is the permanent desire of all governments.

The position in the UK in recent years has not been improved in this context by the wholesale incorporation of European law into English law and the incorporation of the European Convention on Human Rights directly into English law with the Human Rights Act. The frustration of certain ministers who have not got the decisions from the Courts that they were arguing for, particularly on issues of immigration and asylum, was at one time leading some ministers, apparently seriously, to publicly question whether the powers of the judiciary in relation to judicial review should not in some way be curtailed. The proposition is a preposterous one, not least because so much of what the Bench is concerned with in this domain is statutory construction arising directly out of elucidating the intention of the legislature.

Examples in other jurisdictions of course abound and I am interested to know more about the challenges to judicial independence here in Victoria and elsewhere in Australia.

I was fascinated to read the address of Chief Justice Spigelman to the Law Society of NSW at the Opening of the Law Term Dinner just six weeks ago when he addressed, specifically in the context of the institutional arrangements for the independence of the judiciary, a particular issue concerning the NSW government's proposal to appoint "community representatives" to the Conduct Division of the Judicial Commission. He appears to have been particularly concerned at the failure of the government to consult him as head of the NSW judiciary before going live with a proposal about which he clearly has considerable doubts.

The principle of judicial independence is one of the keystones of a democratic society whose relevance and importance is as compelling today as it ever was.

The common man no longer walks backwards tugging his forelock in the presence of authority (except possibly in the military). What judges do is for the most part in the public arena.

It was born out of the abuses of royal power in the period down to the Act of Settlement in 1701. Kings no longer abuse their power because they have none. But those who are the transferees of such powers, namely, governments, big business and the media are no less willing to abuse their powers than seventeenth century monarchs. The principle of judicial independence remains an eternal one. But the context in which the challenges have arisen in recent years is very different.

We live in a very different world to that of 40 years ago and that fact has to be in the forefront our thinking about judicial independence. For example, we no longer live in a society which is as respectful of authority in general, and judicial authority in particular, as it used to be. The common man no longer walks backwards tugging his forelock in the presence of authority (except possibly in the military). What judges do is for the most part in the public arena. Some of their decisions are of genuine public interest and many of those will be truly controversial. The courts choose to go in one direction. There is a respected body of public opinion which would like to see a different result. Few judges would complain these days about a spirited debate developing in the media about such decisions as long as the debate is balanced and well-informed. Unfortunately it often is not.

It is not just the press who are liable to attack the judiciary. It is an increasingly popular sport among politicians. Sandra Day O'Connor, the now retired United States Supreme Court Justice, has been speaking about the problem in the States in recent years. She has been speaking out about what she called the danger of

edging towards dictatorship if Republican right-wingers continue to attack the judiciary.

The issue came to a head for her as a result of the comments of Tom Delay, the former Republican leader in the House of Representatives, about the right to die case (removal of life support) in Florida involving Terri Schiavo. Delay said: "The time will come for the men responsible for this to answer for their behaviour"; and he called for increased scrutiny of "an arrogant, out-of-control, unaccountable judiciary that thumbed their nose at Congress and the President". O'Connor's response was to say that such threats "pose a direct threat to our constitutional freedom". She observed that death threats against judges were on the rise and that the situation had not been helped by a senior senator's suggestion that there "might be a connection between violence against judges and the decisions they make". With perspicacity she commented that if the courts did not occasionally make the politicians mad they would not be doing their job.

The answer to this issue has surely to be that informed, even if critical and sometimes highly critical, debate is to be welcomed provided that it is balanced and responsible. Where it is not, it is a judgment call for the higher judiciary as whether to respond and in what form, but they should not be afraid to do so where circumstances require.

There has in recent years been quite serious tension in the UK between the government and the judiciary. Sentencing policy is one area where this has occurred. Parliament seems determined to limit the judges' discretion as to the appropriate sentence to award and the judges understandably have been determined to retain, or perhaps regain, what they would regard as appropriate sentencing discretion. The previous Chief Justice, Lord Woolf, was more than prepared to defend the position of the judiciary where necessary to do so and the present Chief Justice, Lord Phillips, is following in the same recent tradition.

I said I would make some personal comments and I turn to these now. I should emphasise that although I notice that my CV that you have says that I am a Deputy High Court judge and for a number of years I was a Recorder of the Crown Court, the views which follow should be treated as those of an outsider viewing in. I would be the first to admit that over the last 40 years times have changed. I have no difficulty with that. Indeed when I was involved in Bar politics 20 or more years ago I was constantly urging that change and reform (all of which has now occurred) should happen more quickly than it did.

My perception is that there has been in recent years a certain dumbing down in the quality of people being appointed to the High Court Bench. If I am right about that then I think it is a matter of great regret which could lead to an erosion of the independence of the judiciary. On the other hand, as I will explain, I recognise that in some respects things needed to change. Thirty years ago the leading members of a leading set of commercial chambers like mine would almost invariably go on the High Court Bench. Some practitioners in the so-called magic circle sets of chambers were taking silk as early as 35 or 36 years of age and going on the Bench before they reached 50. This meant that by the time they were considering the Bench they had in all probability paid off the mortgage, educated the children in private school (or as we would say, public school) and may well have bought a second home in the country. Essentially they were reasonably well off. Their salary as a judge would go to day-to-day living expenses but not expenditure of a capital or extraordinary nature. In short they had a measure of financial independence.

Parts of this scenario no longer apply. Even at the commercial Bar few silks are now appointed before the age of 40. The retiring age of judges is 70. Changes to judicial pensions brought in a few years ago mean that the point at which a full judicial pension is earned was lifted from 15 years to 20. So 50 is the oldest that any one can join the Bench and get a full pension and high flyers are being appointed at about 46 and upwards. What that means in practice is a greatly reduced period in which the would-be judge is earning significant sums in silk. He or she is likely to be a good deal less financially secure than was previously the case.

That is one aspect of the matter and I admit that it is viewing the matter from a commercial Bar perspective. On the other hand, I have always felt that relatively young and successful commercial silks who are made up to the High Court Bench are not best placed when it comes to participating in the work of the criminal division of the Court of Appeal, telling circuit judges vastly more experienced in the area of criminal work where they have gone wrong. My impression is many more appointments to the High Court are being made from experienced criminal practitioners than used to be the case and I think that is greatly to be welcomed.

Returning for a moment to commercial chambers, it is a very long time indeed (over 10 years now) since a leading full-time member of my chambers went to the Bench. The most senior members (other than the head of chambers, Gordon Pollock QC who is still heavily engaged as an advocate) are all very busy but largely, though not exclusively, as commercial arbitrators. The London legal market is a very specialised one. With a few exceptions, experience used to have it that by one's middle 50s work as a silk began to tail off as young solicitors tended to brief the newly elevated young silks in their late 30s whom they had instructed as juniors. The result was that the experienced silks moved on to the Bench.

In the last 20 years that has all changed. Speaking personally, it was one of the best decisions I ever made not to go on the full-time Bench. But to some extent in the early 1990s when the decision for me first started to raise its head, my decision to continue to do what I had been doing for some considerable time, namely, engage in commercial arbitration as arbitrator was somewhat pioneering. Today I notice that in chambers it is increasingly becoming the career path of choice for a number of my younger colleagues. The key is professional fulfilment which many of us find is more readily available as arbitrators than on the Bench, together with the fact that family life is a good deal easier than it would be on the Bench.

Returning, if I may, briefly to financial independence a number of things are interesting. My impression is that increasing numbers of judges are retiring from the High Court Bench before the statutory retiring age. Maybe they have decided that the pleasures of family life outweigh the increased pension they would achieve by working on. I am aware (anecdotally of course) that a number of retirements and resignations form the High Court will occur at Easter this year and rumour has it that upwards of 20 new appointments are about to be made to the High Court Bench.

It is for obvious reasons impossible to know but my suspicion is that there may be people being appointed to the Bench these days who are earning more on the Bench than they did in private practice. What is wrong with that, you may say? Well, in a sense nothing. What worries me is that if I am right in this suspicion and that some appointments are being made from the ranks of practitioners who have never been able to earn (or perhaps retain

after tax) enough to give them real financial independence, they may be tempted more readily to fall in line with what the executive might like to see happen than might otherwise be the case.

What about judicial promotion? Promotion from the High Court Bench in England to the Court of Appeal brings with it a considerable salary increase. Might that be a factor for an aspiring-member of the appeal court to bear in mind? These are some of the difficult issues (to which I confess I do not know the answer) in relation to matters of promotion. There is much more promotion from the ranks of circuit judge to High Court judge in recent years and I welcome that. On the other hand, there is much to be said for the Australian practice (with, as I understand it, a very few exceptions) of appointing from the Bar direct to the court where the appointee is likely to spend the greater part of his or her judicial time. From the viewpoint of independence of the judiciary the practice has much to be said for it.

There is a lot more I could say about judicial independence, for example, in relation to the Judicial Appointments Commission and the introduction of a welcome measure of transparency to appointments to the Bench at all levels. But time is moving on and I do want to say something about commercial arbitration.

In the time available to me I think the most profitable course is to speak briefly about the various different types of international arbitration in which members of my chambers are involved, with particular reference to my own areas of experience in this field.

I joined chambers as a pupil in 1968 and virtually my first case was a shipping arbitration conducted in the hearing room in the basement of the Baltic Exchange. You had to cross the floor of the Exchange to get to the arbitration room and since women were not allowed on the floor of the Exchange at that time they could not participate in the arbitration. But that was not perceived to be a problem at the time since there were so few women lawyers, How times have changed — and for the better, I hasten to add. Apart from a certain amount of trade union work which I did in the early years of the Industrial Relations Court, I did little else but shipping and construction arbitration during the 10 or so years until I took silk in 1980.

The first time I sat as an arbitrator was in 1976 when I chaired a shipping tribunal for an afternoon hearing in Diano Marina in Italy. Since then I have sat in some interesting parts of the world but I recall none as beautiful as that.

From about 1980 onwards I have been involved in increasing amounts of reinsurance work. Prior to the late 1970s there was very little reinsurance work. Since then there has been an enormous explosion of business both in England and in the States. The reason is simple. The amounts of money that tend to be involved are huge and it is not uncommon for the sums in issue to be so great that the financial integrity of insureds, who may even be Fortune 500 companies or some of the biggest insurance players in the market, may be called into question. The reality is that they have no option but to fight and since the business is often governed by contracts containing arbitration clauses, the resulting dispute of course ends up in arbitration.

I will speak shortly about some aspects of my arbitration work at the present time in the insurance and reinsurance field. But first let me speak more broadly about the involvement of my chambers in arbitration over the years.

Lord Mustill who was a leading silk in chambers for many years before he went to the Bench and ended up in the House of Lords was very much in the vanguard of chambers' involvement in arbitration. Together with another member of chambers, Stewart Boyd QC, he authored the main textbook on the subject, *Mustill and Boyd on Commercial Arbitration.*

There have been some interesting developments in the shape of chambers over the years. As I am sure applies here, the maxim is "Once a member of chambers, always a member of chambers." The practical result is that judges who retire invariably come back into chambers and as often as not they come back as arbitrators. We maintain a list of door tenants, many of whom are retired judges who arbitrate from chambers' address and are clerked by chambers' administration. We currently have as former practitioners with us and now as arbitrators the Lords Mustill and Steyn. Lord Millett arbitrates out of Essex Court Chambers, although he was not in my chambers when he was in practice. Sir Anthony Evans, who retired a few years ago from the Court of Appeal, is busy as an arbitrator; and it would be no surprise to see Lord Saville, who together with Toby Landau drafted the Arbitration Act of 1996, coming back in to chambers when his duties as Chairman of the Bloody Sunday enquiry permit. With the obvious exception of Lord Saville they are all in demand for all types of international arbitration, ICC (International Chamber of Commerce) arbitrations emanating out of Paris though regularly conducted elsewhere, LCIA (London Court of International Arbitration), ICSID arbitrations under the aegis of the World Bank and all manner of ad hoc arbitrations.

Then there are a number of practitioners in chambers who still engage in some advocacy but to a greater or lesser extent are engaged full-time as arbitrators. The work each does depends on their known expertise, which of course differs from one arbitrator to another.

I was reading recently the report of a sub-committee of the Commercial Court Committee set up to enquire on the working of the 1996 Arbitration Act some 10 years after it came into force. Arbitration being private and confidential (one of its great advantages for the business community) it is virtually impossible to obtain reliable data. But the authors of the report estimate that there are annually between 5,000 and 10,000 arbitrations governed by the English Act. So there is a lot of work.

My own work as an arbitrator is divided up in practice between various types of legal business. There is a certain amount of straightforward business disputes. For example, the Russian business community appears to hold its local court system in less than high regard so there is a certain amount of that work coming either to London or elsewhere in Europe of that kind. I am involved in a certain amount of construction arbitration in London. There are a number of London arbitrators who do little else and are very experienced in the field. I do an occasional such arbitration.

But the bulk of my arbitration work as arbitrator is in the field of insurance and reinsurance and I wanted to close my remarks by talking a little about the differences in this area between arbitration in London and in the States where I have been sitting a good deal for a number of years.

Having said that, the first case I would mention is an insurance tribunal which I sat on in Melbourne four or five years ago. It concerned an open cast mine in the Mojave desert in California and involved a spat between rival groups of insurers. I was appointed by one group, and an English colleague of mine was appointed by the other group, and we appointed the head of my Sydney chambers, David Jackson QC, to be the third arbitrator and chairman. The case was governed by Victorian law and was very well argued by members of the Victorian Bar, so well

argued over the course of a week that, if I remember correctly, we split 2–1.

Reinsurance arbitration in London and the States, which usually means New York, often raises the same types of issues and the players in the market are often the same. But some of the procedures and indeed approach to the arbitral process is very different. For someone like me who is engaged to a similar extent in both systems the divergences are fascinating.

Let me talk in particular about differences in approach to the process. In the UK I am usually either the third arbitrator and chairman of a tribunal composed of market men appointed by each party or a member of a three-person panel, often three silks. I was supposed to be sitting in London next week with Ken Rokison QC and Jonathan Hirst QC but I am happy to say the case settled a couple of days ago so I can put the files I brought down with me in the shredder and enjoy a few more days with my family in Australia. By the way, when I refer to market men I mean former underwriters or brokers.

But in either case I very rarely remember who appointed me and in any event it is entirely irrelevant because what all three of us are concerned to do is to get the right answer. I am happy to say that my experience is that the market men behave no differently in this respect to the lawyer-only panels. From the outset there is no ex parte communication between appointor and appointee. Reasoned awards are invariably given.

In the States things are different, very different. Efforts are being made there to embrace a system of three truly neutral members of the panel. But it does not appear to be what the industry there yet wants and it is not the way it generally happens at the present time. Nor are reasoned awards the norm.

The party-appointed arbitrators to a greater or lesser extent are expected to support the case of the party that appointed them. *Ex parte* communications take place up to an agreed point, which is usually immediately before briefs are exchanged for the main substantive hearing. What this means in practice is that the only arbitrator who can be assumed to be wholly neutral is the third arbitrator and umpire (as they are called in the States).

That being so there is what to outsiders would appear to be an extraordinary process for selection of the umpire. A considerable amount of time and effort is spent by each side drawing up a list of candidates for the post. Each side submits a list of three to the other party and that other then strikes two of the three names, leaving one on each side. The choice of the umpire is then decided by lottery, literally. The two party-appointed arbitrators will identify a day in the near future and one will take evens the other odds. The deciding factor is the chosen digit first or second after the decimal point of the closing figure of the Dow Jones index for the chosen date.

Different from the UK system it certainly is. I have made it clear when accepting party appointments in the States that when it comes to any decisions of importance I will vote my conscience and they should not appoint me unless they are prepared to accept that. I know for a fact that there are many other US arbitrators who approach their duties on a similar basis. But it should certainly not be assumed that all do.

Just a few words in conclusion. The subject I have just been talking about raises the issue of personal integrity. Whether one is sitting judicially or as an arbitrator it seems to me that personal integrity lies at the heart of what all of us do. It is or should be second nature to all of us. There are all sorts of ways in which the issue can up. Many of our American legal friends find it difficult to understand (or at least sometimes claim that they do) how an advocate can appear in a case in front of an arbitrator from the same set of chambers. But the same sort of issue can arise in the States where, for example, the reinsurance arbitration world is a relatively small one and it is common for advocates and arbitrators in a particular case to know each other well and to be on terms of friendship. The same of course can apply on the Bench.

In linking up the two parts of this address it has been suggested to me that if serious inroads are made into judicial independence parties may choose to have their future disputes resolved by private adjudication. I suppose that is always possible. There have been to my knowledge in the UK no serious inroads into judicial independence although the threat is always there, as we can see. That is not the reason there is so much commercial arbitration. All of the arbitration work that I am engaged in arises from the fact that the parties have put an arbitration clause in their contract which may have been concluded years ago. The case that I was supposed to be doing next week involved excess of loss reinsurance contracts concluded as early as 1945. Commercial arbitration is favoured in my opinion (I am not talking now about reinsurance arbitration in the States) because the parties wish to avoid washing their dirty linen in public and the confidentiality of the proceedings is an important consideration and also because in areas where the business is particularly specialised they like to know that at least one member of the tribunal has the necessary expertise to bring an informed mind to bear on the problem.

Let me conclude by again wishing Rodney Garratt QC and his Committee good fortune at the Melbourne Branch. I sincerely hope I can visit you here just as often as I can.

We Are Not Americans Yet ...

Michael King

There are some things that we just do not do. We do not put our hands on our hearts during the playing of the national anthem, put the month before the day in dates, or cut our food into small pieces, transfer our forks to our right hands and then scoop up our food like babies.

UNTIL quite recently, we tended to preserve our cultural identity in our use of language, too. Our speech, verbal or written, is our cultural trade mark. Our method of communicating tells other people and ourselves who and what we are. It is merely trite to observe that language changes. It develops and evolves. In the process, it successively annoys each generation (often quite rightly), but it cannot stand still. We do not speak or write in just the same way as our forebears in the eighteenth century, and they did not use Chaucerian English.

However, is it a part of the gradual evolution of English that we adopt wholesale, in what is really a very short space of time, a whole new way of saying and writing things, with all the cultural baggage that comes with it, from one particular place? Perhaps. We should be aware, though, that we are in a unique position in history. There is another nation on earth, kindred to an extent, that happens to speak a language rather reminiscent of English. It also exerts a cultural (including linguistic) influence quite disproportionate to its numbers, but consonant with its economic power. Churchill famously observed that the English and the Americans were two peoples divided by a common language — and his mother was an American. We are divided, though, now hardly at all.

A top 10 to be avoided:

"I guess"	"I figure"
"train station"	"guys"
"cookies"	"store"
"nood" (for nude)	"schedule"
"line" (for queue)	
no definite article	

Its perceived vulgarity, its incorrectness according to our standard English and its, in any event, strangeness, were long rejected. Every tongue has its own idiosyncrasies, and theirs were not ours. Even now, hearing the letter zed pronounced "zee" still grates on most sensibilities. We instantly recognise it as foreign — but there are many, many other examples. Familiarity breeds a certain acceptance with some people, though. Repetition seems to make the alien sound normal. Even so, some would argue that we should fight for our Greek in the face of the Roman onslaught. Pressure from the latter will not last forever, and the former is worth keeping.

"... TALKING SOMETHING THAT WAS NOT VERY DIFFERENT FROM ENGLISH"

It is curious that, although almost everyone has their particular dislikes when it comes to Americanisms, they will use others left, right and centre without a qualm. While objecting to, say, "sidewalk", they will still pepper their sentences with "tad", "rookey", "flashlight" (for torch), "bathrobe" (for dressing gown), "I guess" (once used by novelists and script-writers as the surest way of indicating an American), "I figure" (and the appalling "go figure!") and "deck", instead of pack, of cards. This last is readily picked up when playing "solitaire" (for patience) on the computer screen. Of course, computers almost rival television now as disseminators of the American tongue. In addition to everything else, they teach "upper and lower case" (where we say capital or small letters), "access", "source" and "impact" as verbs and American spelling.

Now, is there anything "wrong" with any of this? Well, that is not really the relevant question. None of this (with perhaps some exceptions, to be touched on later) can be said to be, objectively, right or wrong. In a sense, it is just a phenomenon, neither correct nor incorrect. It may be a matter of taste. The point, though, is that it is not our language, not our culture. It is the imposition or the adoption of something alien. If our use of language defines us, then we should be aware of the definition we really want.

Something so elemental and every-day as the food we eat, literally and figuratively close to our hearts, is involved. Our names for foods are usually part and parcel of our most basic culture and identity. What are we to make of it then when, rapidly, chips are becoming "fries", bread rolls "buns" (as in hamburger "buns"), biscuits "cookies" (try to find a packet labelled "biscuits" in a supermarket now — even those loudly trumpeted as being "proudly Australian made and owned") and dry biscuits "crackers"? Relatively recently, historically, little sweet high-risen cakes are called "muffins" (how many children today know that the age-old type of flattish bread, not dissimilar to crumpets, eaten toasted, with butter and honey, are the real muffins? They have to be differentiated in today's American-dominated supermarket as "English muffins"). Stones and pips in fruit, we are now told, are "pits". So, we are offered in shops (not "stores") "pitted" olives, cherries and dates. A serving of something, too, is called "regular" — to avoid saying "small". Lemon rind is called "zest" on every cooking program, and cold meats are "cold cuts".

In the late 1880s, Rudyard Kipling, who himself married an American, wrote of his first landing in San Francisco after journeying in China and Japan, "Three

hundred thousand ... walking upon real pavements in front of real plate-glass windowed shops, and talking something that was not very different from English. It was only [later] that I discovered the difference of speech ... Where we put the accent forward, they throw it back and vice versa; where we use the long a, they use the short; and words so simple as to be past mistaking, they pronounce somewhere up in the dome of their heads. How do these things happen?"

How those things happened there is one thing. It is not so very difficult to see how they are now happening here.

THE LAW AND SPORT

Our own field of the law has been assailed by American television. The witness box has become the "stand", and witnesses don't go into it, but take it. This is in order to give, not their evidence, but their "testimoany". Security for a loan becomes "collateral" and losing litigants "appeal a decision", instead of against it. Inexperienced counsel in a Melbourne court has been heard to turn to her opponent and say "your witness". Any of these things may be heard nightly on our news services, simply because the script writers and readers and reporters have an unvaried diet of American television. The makers of Australian drama which feature court-room scenes have barristers wandering around court, too, while examining witnesses, or addressing juries or the Bench. Barristers and solicitors are not to be referred to as such any more, either, apparently, but simply as "lawyers". Well, they are, of course, but so is everyone from the Chief Justice of the High Court down to the most junior articled clerk, and usually a more specifically descriptive term is needed. Firms of solicitors now more and more call themselves "Smith and Co., Lawyers".

It is extraordinary, really, when it is thought about in cultural terms, that games which are not even played in this country (or by hardly anyone), and all that popularly surrounds them, intrude upon our language. It is not enough that people of all ages wear baseball caps (which are singularly ill-suited to keeping the sun off the back of the neck in our hot country) and windcheaters which proclaim in huge letters that the wearer plays grid-iron or basketball or baseball or some such thing for a team no-one here has ever heard of. They are also starting to inter-lard their speech with "time out", "out of left field", "first base", "ball park" (as in, e.g., figures), "touch base" and "hard ball". Dressing rooms or changing rooms are becoming "locker rooms". "Inductions" into "halls of fame" is sheer Americanism.

THE STAMP OF APPROVAL

Of course, for a while, most people in the community recognise something as an Americanism which is being introduced. It will appear in advertising, say, either because the company is American and we get their advertisement directly, or because advertisers here think that it is clever or smart or the latest thing, showing that they are at the leading edge of commerce and popular culture. It will be repeated on Australian television soap operas, because the writers also think it smart and that it reproduces what the watchers of their offerings see every single night on the cheap wall-to-wall American television progams. Presumably the popular success of the latter will rub off on them. They therefore have their characters speak of "fixing" breakfast or a drink, of automobiles and "cookies" and addressing each other as "buddy".

At last, it will receive the imprimatur of being used on the news bulletins and in newspapers and it is accepted, at first self-consciously, then brazenly.

Thus, to make things sound more serious or dramatic, they borrow from American news services "heist" for robbery, "hike" for rise (in prices), "slammed into" for crashed, and "deal" for agreement (and, worse, "cut a deal"). Pervasive American usages appear almost overnight, as with the impertinent reference to people simply by their surnames: even an eighty-year-old nun will be mentioned as "Smith" (just look at *The Age*). There have even been examinations on American television of the disappearance of finite verbs: listen to any voice-over on a commercial station"s news story in the evening, where it has been copied blindly, "John Smith meeting the P.M. today — health, education and transport among the topics discussed". It is a sort of pidgin English.

We have a definite etiquette when referring to or addressing public figures. It has changed somewhat since the seventeenth and eighteenth centuries, but we simply do not address the head of government as *Mr* Prime Minister, just because all the television interviewers have been brought up on "Mr President". He is addressed as "Prime Minister", just as the head of a State government is addressed as "Premier" and any other member of the government as "Minister". Similarly, just because they talk of "President Bush" there is no such person as "Prime Minister John Howard", heard all the time now. He is *the* Prime Minister, *Mr* Howard. We do not have "Minister Smith", either.

Now, though, we are given the American style of using what are really descriptions, as titles. Consequently, "Box Hill man Tom Brown" (any relation of Neanderthal man?), "truck driver Bill Robinson was asked ...", "crash survivor, Joan Jones, was flown to hospital".

DEFINITELY NOT

One of the most noticeable of these recent phenomena is the disappearance of the definite article. "Prime Minister John Howard" has been observed above. "Rod Laver Arena", too, though, was first commented on, then joked about, then accepted. "Hamer Hall" has since followed. It has always been The Robert Blackwood Hall at Monash University — now the definite article is invariably omitted. So, too, we are served up "A spokesman for Royal Melbourne Hospital"; "that was played by pianist John Lilf"; "Mining giant CRA today issued ..."; "... took place in Bourke Street Mall today" (which should be pronounced with a short *a* — not Maul, to rhyme with wall: see the false analogy, below).

Our own field of the law has been assailed by American television. The witness box has become the "stand", and witnesses don't go into it, but take it. This is in order to give, not their evidence, but their "testimoany". Security for a loan becomes "collateral" and losing litigants "appeal a decision", instead of against it.

It was a long struggle on the ABC news to get rid of the introduced "protest" as a transitive verb. Of course, it *does* take a direct object when meaning to proclaim or maintain (as in, protest his innocence), but the Americans use it so that it must have an almost opposite meaning to what they intend, as in "the angry crowd protested the law/ the government"s action/ the dictator's visit".

The ABC, amongst others, though, has

not rid itself of the trans-Pacific pernicious misuse of verbs. They would have it that, in the Olympic Games, "X placed third".

VERBS

The North Americans will not acknowledge that there are transitive (which take a direct object) and intransitive (which don't) verbs. Perhaps this has something to do with their deep dislike of the passive voice. In the above example, they could simply say that X *came* third; but as it stands, one is left asking, X placed *what* third? If they insist on using that verb in the sense they mean, they must say "X *was placed* third".

They do not use the perfect tense, either, but only a simple past tense. They will not say, for instance, "I have seen it", but only "I saw it". Both exist in English, but they have different nuances and thus different uses. The latter, simple past, would have a speaker of English (as opposed to American) adding something further, or else instinctively asking, "Oh, when?" Americans will say, "I just arrived", instead of "I've just arrived"; "You forgot me already?" instead of "Have you already forgotten me?" or "We already did that" (apart from American television, watch SBS sub-titles for this and other Americanisms). Perversely, though, they are addicted to "gotten"!

Apropos of which, they have great difficulty with the spelling of past tenses. English reveals its Germanic origins in its vowel changes here, as every small child learns. It might be *jump* and *jumped*, but it is also *run* and *ran*. *Swim*, *swam* and *swum*, for example, add an extra dimension, as the second is the simple past and the last the past participle. Perhaps because, as just seen, the Americans do not like using the perfect tense, and therefore not the past participle, they mix up the vowel changes between these and the simple past. So, e.g., they say "They *sunk* the boat", and blaze forth the film title, "Honey, I *Shrunk* the Kids". They have even invented one, thoughtlessly employed here, "*snuck*", for sneaked.

They also have great difficulty with the verb to lie: "Lay down!" and "I was laying on the ground", have made some inroads here. We say come *and* see, not "come see", "go visit", etc.

SPELLING

It is not just in the case of vowel changes that they mis-spell past participles. "Traveled" loses an l, presumably because it is simply regarded as too much of a good thing. Indeed, so much American misuse of the language is through sheer ignorance. They have never had what could be regarded as an authoritative touchstone as to what was correct or acceptable. On the contrary, there were a number of early Americans who consciously set out to "create" an American language. Webster, for example, of dictionary fame, became part of the American search for identity. His is a standard reference in North America, to be sure, but not of a brand new language, such as Esperanto, but of a mangled English — an English shorn of perceived unnecessary "excrescences", of otiose letters and spellings. What we might regard as innocent evidences of evolution, development and origins of language were pruned away piecemeal, to reduce words to a just-recognisable, but stripped down, simplicity. Simple words for simple folks.

English reveals its Germanic origins in its vowel changes. It might be jump and jumped, but it is also run and ran. Swim, swam and swum, for example, add an extra dimension, as the second is the simple past and the last the past participle.

However, even this was by no means consistent nor always logical. "Ax" lost its "e", but not hoe — perhaps a trio of such implements would have seemed too festive to Puritan farmers. Why use two *l*'s in, say, "travelers" or "jewelry" (which lost an e, too), when one could do the work of both? It would have been logical to omit one of the *l*'s in their beloved billion, though, surely? One might have thought, too, that the phonetic s would have been used for both verb and noun in "licence", but they chose the "c" even for the verb. Why oddly manipulate the word to give "maneuver" (thus only partly eliminating the French origin), instead of going the whole hog and coming up with "manoover"? Similarly with "mustache" — if you are going to drop the "o" and stress the first syllable, why not make a proper job of it and give the world "mustash"? We say aeroplane, not "airplane".

It is akin to tearing off "useless" architectural frills, such as wrought iron lacework, leaving stark, utilitarian concrete boxes — and, incidentally; losing clues as to the historical development of the world"s richest language. "Catalog" and "dialog" replace our spellings, but to what end? If people can't master *catalogue*, why not introduce "rondayvoo", as well? When verandah and yoghurt were borrowed, they were transliterated into English in a way that attempted to reproduce the way they were pronounced (the latter, by the way, has a short *o*). Why strip away the *h* as the Americans do?

A few years ago, the comedian, Shaun Micallef, called one of his television series "The Micallef Programme", and said in the first episode that it had been spelled "The way the ABC spells it — the French way"! This illustrates the extent to which our language has been Yankified. It is the French spelling — just as catalogue or aide or restaurant are — but then it is originally a French word. "Program" has all but swamped us now, but it is merely another example of our friends" pruning.

YOU SAY "OO", I SAY "YOU"

"u" (and eu) is usually pronounced in English as "you" (as in dune or therapeutic). Americans pronounce it "oo" — although, even then, they can use the other sound if they want to: as in beautiful, music, fabulous and, well, you; but the lazy American pronunciation is creeping in here: overnight we have, "*nood*", "mar*soo*pial", "melal*oo*ca", "pharma*coo*tical", "ps*oo*do", "egz*oo*berant", etc. Sometimes there is a half-way house: on the ABC news, "Attack on the US Cons*uh*late on the Arabian Penins*uh*lar". As with all sounds in language, what we hear every day begins to sound normal, even if it is incorrect or of only relatively recent introduction. Our parents and grandparents never said "nood". Pronounce it "n*you*d" a few times and it will sound normal again.

Americans use the "oo" pronunciation anyway, but it is sometimes difficult to know when they are adopting a particular pronunciation simply as a result of their frequent "false analogy", itself a consequence of ignorance. In English we occasionally use a different pronunciation through force of circumstances. So, one cannot sensibly very easily use a "you" sound after the letter *r*: thus, rude, brute, etc. — but that is not a template for all words with a *u* in them. That is to say, "nood" doesn't of necessity follow.

However, it is amazing how often Americans do use the false analogy: they think that they see the word "iron" and so pronounce irony "ionee" and environment

"envionment"; they think that they see the word "tire", so they say "en*tire*ty". This is so strong that it even leads them to ignore other vowels that are present: caramel is usually pronounced "*car*mel" and anyone who has seen the film "Gentlemen Prefer Blondes" will recall Marilyn Monroe pronouncing her friend's name throughout as "*Dor*thy". The second syllable of compost, of course, indicates a pole, so the Americans give it a long o and they have long detected a bovine presence in the Russian capital.

One aspect of pronunciation which seems to cause all sorts of difficulties these days is that of emphasis. If we think of any polysyllabic word, emphasis must be placed somewhere. In English it is generally placed on the first syllable of a word — but not always. For various reasons (to do with the origin of the word, or the part of speech it is being used as or for reasons now quite undiscernible), we sometimes emphasise a later syllable. This is simply learned, picked up by ear, as are other aspects of speech in all societies.

Thus, in the case of many nouns — present, record, suspect, contract, contrast, protest, convict, attribute, conflict and so on — the emphasis is on the first syllable. However, when used as verbs, the emphasis moves to the second syllable.

There is no hard and fast rule in English, either, regarding words we have borrowed from the French: some have been thoroughly Anglicised, while others have not. In massage, harassment, garage, e.g., the emphasis is on the first syllable. Gerard and Bernard, too, have the emphasis on their first syllables. In moustache, princess, romance, renaissance, e.g, the emphasis is on the second. The last letter in the Greek alphabet has the stress on the first syllable, it is not "om*ee*ga".

People, though, should not run away with the idea that at least with the Americans it is all consistent. Not at all. In all of the above examples of emphasis, the Americans perversely employ the very opposite of our usage.

So, too, in adult, aristocrat, pergola and formidable, where the emphasis is properly on the first syllable, and in estate, robust, research and laboratory, where it is on the second, the American perversity would have the opposite in each case.

"S" & "X": Sometimes in English we pronounce an "s" as a "z", but mostly not. We need only consider the differences in "close" used as an adjective or as a verb, or "use" as a noun or a verb. Contrast mouse and spouse (depending on the individuals concerned, the plural can be "spice") with, say, blouse and carouse. Why the Americans refuse (cf. refuse as a noun) to see this is a mystery. They almost always pronounce an *s* as a *z* (although, it is true, not in mouse) - including when employing "use" as a noun. Then, of course, their perversity shows itself and they say "housses"!

We pronounce an "x" as an "x" - in example, through a transmogrification due to a similarity of sound, something akin to "egsample" has emerged. Creeping in lately, though, is the American "egzit" , "egscur*zh*on" and "egzile" (exit and "excurs*h*ion" and exile are surely not too difficult to retain).

On the subject of *s*'s, it always seems so odd that Americans cannot accept a compound plural for what it is and must add an additional *s*: as in "accommodation*s*", "medication*s*" and "protection*s*". They also like to sprinkle *s*'s around generally, as in "anyways" and "for Heaven 's sake*s*".

Prepositions: these are, strangely, a great bother to Americans. They don't use them when they should, and do use them when they are not called for. They often simply misuse them. Many Americans say "in back of" instead of simply behind; or "outside *of*", when we simply say outside (outside the room; outside Melbourne), or "off *of*".

However, they also omit prepositions when we would employ them, as with their use of nouns adverbially: so, "I will see you Monday"— we say, *on* Monday; "it will be hot Thursday"; "she is poolside", "courtside", etc.; also, "Monday through Friday", "one through nine".

For us, the word "in" indicates a presence inside something, but "into" indicates motion. Americans do not use the latter, hence: "he went in the room"; "are you coming in the house?" Some are just idiomatic: we would say he should be *at* school — the Yanks say "in" school.

Very likely. Most adverbs in English are formed by adding "ly" to the adjective. When the adjective itself already ends with those letters, it can be seen to call for a slight adjustment in usage. That is why in English we have always avoided *likely* as an adverb. We say "it is likely that ...", or "It will probably ...". Creeping in now, though, is another Americanism picked up from the television, "The war in Iraq will likely continue ...", "She will likely come ...".

Another excruciating imported adverbial expression is "any time soon", as in "The war in Iraq will not end any time soon".

A MISCELLANY

There are so many American words, expressions and general usages which were once so foreign, so obviously, almost aggressively, peculiar to the United States, which are now either firmly rooted in the rest of the English-speaking world, like linguistic capeweed, or are lurking, like cane toads on the periphery of Darwin:

- "Billion" is almost a lost cause now. It is not just that English and American had different names for the same thing, and that we supinely adopted theirs — as it might be with footpath and sidewalk. No, we had a separate meaning for billion: it actually means *a million million*, as opposed to a thousand million, which is the American, and therefore now our, meaning. Americans, of course, talk of "a trillion" when they mean a true billion — Heaven knows, in the case of money, the latter is big enough, but "a trillion dollars" sounds quite mind-boggling.
- Schedule, too, is now a problem. Not just in its pronunciation (we can again see the false analogy with the hard pronunciation of the "ch" in school), but even in its use. We used employ it very sparingly — with them it is rampant. Where we say that someone or something is due, they insist that they are "skeduled". They don't have timetables or progamme guides, but skedules.
- As with billion and schedule, the word "trash" has a meaning in English. Iago's "He who steals my purse steals trash" has the meaning of something tawdry or meretricious, surviving in our trash and treasure stalls at fetes. It does not mean household rubbish. Although this extension of its meaning is not difficult to follow, it is not our usage or meaning. Correspondingly, there is no verb "to trash". We do not have trash or garbage cans, but rubbish bins or dustbins. Precinct, too, is a perfectly valid word in English, but usually used in the plural and to describe the immediate environs (often enclosed) of something: as in the precincts of the court. Now we are told we have pedestrian precincts, the Greek precinct, the legal precinct, and so on. It used be associated for us with, say, the New York police, but now these "precincts" are everywhere. As for "down town" (as in "down town Melbourne") — what on earth does it mean? Why do people use it when none of us ever has before, and what do they wish to convey by it?
- Other Americanisms are not irrational, either — it is just that they are not a

part of our own language. The above-mentioned sidewalk, fall (for autumn), perhaps even cookies, make reasonable literal sense. However strictly logical a case one may make for it, though, why must the lifts in Owen Dixon Chambers tell us that they are "elevators"? Why can they not announce the first and second floors, and so on, and not "level one", etc.? At least they recognise that our ground floor is not the first floor, as it is in the good old U.S. of A.

- Motor vehicles have a whole separate North American lexicon to themselves: a bonnet is a "hood", a bumper bar a "fender", a boot a "trunk", a windscreen a "windshield", and so on. To mend some of these they turn a spanner into a "wrench". Petrol, of course, is "gas". "Trailers" mean something different to us — they are not caravans.
- The adjective "mean" (close with money) has become, in American, unkind or unpleasant. "Cute", an abbreviation of acute, and originally employed in relation to children to mean precocious (as in describing someone like Shirley Temple as being "cute"), metamorphosed into meaning sweet and, now, even good-looking. Children, cute or otherwise, until very recently stayed the night with a friend. Now they have "sleep overs", imported from America. It is amazing, too, that just because teachers (and parents) in Australia watch American television, they have introduced, overnight, "graduations" for schoolchildren instead of speech-nights, "principals" instead of headmasters or headteachers, "canteens" instead of tuckshops, "grades" instead of marks and so on. Soon it will be "flunk" instead of fail, if such a concept still exists. So pervasive is the American cultural iconography, and the apparent need here to identify with what is seen daily on the screen, that advertisers in Australia of necessaries for the beginning of the school year employ on our television animations of those rather oddly-shaped yellow school buses which are evidently the norm there, but have never been so much as sighted on our roads (although how long it will be before they are introduced is anyone's guess). In Victoria, at least, State schools or Government schools are not and never have been "public" schools as they are in America (and New South Wales).We have the Associated Public Schools.
- There is the very odd usage — and the subject of a thousand plots of American "situation comedy" series, hence our inundation by it — of asking the boss for a "raise". We can't even properly translate it as a "rise", because the usage did not really occur in English. We would just speak of more pay, or higher wages. Almost as frequently paraded before us on the screen has been the spectacle of Americans "quitting" their jobs (presumably when they don't receive a raise). The verb to quit in English was borrowed directly from the French and followed their usage: i.e., to physically leave somewhere, as in "he quit the room" or "he quit Melbourne". It has now largely fallen into disuse, although in the law we still speak of notices to quit. However, we resign from employment (and there are other idiomatic expressions). It is not difficult to see the evolution of the American usage — it is just that it is not ours, at least, not until now, when even the ABC news tells us of ministers "quitting". From American television, too, the use of "honey" as an endearment has oozed into our culture, and "Hi, honey, I'm home!" is an American cultural cliche. "Pooch" and "mutt" for dogs, as well: what on earth is the derivation of those? "Critter" is presumably a backwoods' contraction of creature. "Drugs", for medicines, has been heard on ABC radio. We could do with a cup of tea or do with a change of scenery — Americans could "use" one.
- The ABC news blindly parrots the American "travel advisory"— advisory what? Do they mean advice? They have also adopted willingly "military" as a noun: "the US military in Iraq";"A spokesman for the Australian military" — military what? Do they mean armed forces, or, more specifically in given circumstances, the army or navy? We also have served up the dreadful "tour of duty" and reporters pronouncing the rank as "lootenant". On the unfortunate occasions when there is a rail collision to report, we call it a goods train, Americans a "freight train". They will hopefully instead stop at railway stations, or just stations, not "train stations".
- Participles used as adjectives have been savagely attacked. Leading actors have become "lead" (although hopefully not leaden) actors, and there are corresponding "lead" roles; driving schools are "drive" schools, finishing lines "finish lines" and frying-pans "fry-pans" : but riding clubs have not been unseated; and why not "swim-pools" (although we do have "swim-centres") and "waitrooms"? Speaking of waiting, we do so in queues, not "lines".
- We use full stops, not "periods", and exclamation marks, not "points".
- Status and data have a long *a* (as in base) — nor is the latter *darta*. Era takes a long *e*, and is not "error". Nobody has trouble with paediatrician, so why omit the diphthong from paedophile and pronounce it with a short *e*? That would be a foot fetishest.

WRONG?

For those who say that the Americanisation of English is inevitable and/or desirable how does one deal with the situation of the American usage being not just different, or arguably ugly or misconceived, but outright *wrong* according to our usage? So, for example, in English *alternative* means, strictly, the other choice (of two) but has come to mean simply another option. *Alternate*, however, whether used as an adjective or a verb, means (of two), *first one then the other*. The meanings of the two words are clearly quite different and are not interchangeable. Americans use alternate (stressing the first syllable of the adjective) when we would say alternative: e.g., "he took the alternate route" (pronounced "rout" — see above re the inconsistency in pronunciation of borrowed French words).

Or, when the American pilot announces to his passengers impatient with the delay in taking off, "We will be in the air momentarily" (with full equal stress being given to each syllable), he will cause alarm in those who speak English and take him to mean "for a moment only", but will reassure those who speak American and understand him to mean "*in* a moment".

There are usages adopted here with alacrity that are new even to the Americans. "Titled" simply means something has a title — but it is *en*titled such-and-such. The former is displacing the latter, even though many Americans still use entitled correctly. Similarly, spelling adviser with an o is making ground,

It is not difficult to see the evolution of the American usage — it is just that it is not ours, at least, not until now, when even the ABC news tells us of ministers "quitting".

although, again, it has not been fully adopted even on the other side of the Pacific. It is ludicrous to see in Melbourne "Financial advisors" plastered across a building, even when an older sign correctly stating "advisers" is still in place beside it.

Should our usage be entirely changed, submerged, superseded by what we have hitherto regarded as incorrect, for some reason? Why? We just need to be a little conscious, a little aware, a little thoughtful before we speak, to retrieve what we once had.

There is no such thing as "*at age* 12". It is "at the age of", or, possibly, "aged".

We seem to lose some of the variability, nuance and richness of our own language when we unquestioningly adopt, say, "I guess". It is used indiscriminately here now, as it is in North America. However, it displaces everything from "I suppose", "maybe" and "perhaps" to "I think" and "I believe". If we ever wanted to express the idea of speculating, we would generally stress it by saying "I would hazard a guess", or something along those lines. All of the above words and expressions are to be jettisoned now, it would seem, even when we are trying to communicate an educated opinion or deeply-held belief. All are to be replaced with "I guess".

We had in English, too, the idiomatic "I reckon". Elsewhere they use the strangely equivalent "I figure": but the latter is not ours. It is an invader. We do not "figure" things out, we work them out.

Once upon a time, the ABC, like the BBC, and the leading newspapers of record, could be turned to for a fairly authoritative adjudication. The script for, say, the Channel 10 News might sound as though it had been written by a Los Angeles advertiser, but the ABC was just quietly there in the background getting it right. No longer. They now quite actively seek to pursue the lowest common denominator. If one wishes to see all that is American run riot and foisted upon our culture (and if the nightly viewing on Channel 9 is a little too much to ask), simply read *The Age* or read the sub-titles on SBS. Fairly recently *The Age* changed its century-old spelling of "color", "flavor", etc., by inserting a u. Very well (although spelling such words without a *u* was of fairly long standing, in an old-fashioned way, in English-speaking countries, presumably on the understanding that it was more Roman). However, this was simply cosmetic and overly obvious. Every other Americanism mentioned here has been adopted by *The Age* with a vengeance. SBS's translators invariably insist on such things as "that could turn on a dime", "he was attacked in the parking lot" and "wise up", although the Spaniard or Dane speaking on the screen didn't say that (incidentally, the guidelines given to the sub-titles must insist on the politically correct "Ms", as it is always used, even if the German or Frenchwoman referred to was quite distinctly called *Frau* or *Mademoiselle*).

Should our usage be entirely changed, submerged, superseded by what we have hitherto regarded as incorrect, for some reason? Why? We just need to be a little conscious, a little aware, a little thoughtful before we speak, to retrieve what we once had.

Goodbye Regina?

David Ross QC

TWO States have now farewelled the Queen from criminal cases. They have replaced the Queen with the name of the State. The first was Tasmania. The technique used was a simple one. They amended their Criminal Code in 2003 by enacting "'Crown' means the State of Tasmania".[1]

The second was Western Australia. In recent times the parliament made far-reaching amendments to the criminal law. One new piece of legislation was *Criminal Procedure Act 2004*. Schedule 1 clause 3 (3) says this: "An indictment must be commenced in the name of the State of Western Australia".

Look at a few cases in the law reports to see how it works. First, examples from Tasmania. Some are rulings by trial judges. *Tasmania* v *Farmer*[2] was on admissibility of evidence. On the fitness to be tried is *Tasmania* v *Drake*.[3]

Now Western Australia. A District Court case became important because the accused reneged on a promise to give evidence against another accused in *Western Australia* v *Maharaj*.[4] And what about *Western Australia* v *Dick* where there is a careful ruling on the phrase "in company".[5] Appeals were *Krakouer* v *Western Australia*[6] and *Houghton* v *Western Australia*.[7]

In Victoria it would be so simple to replace the Queen in a criminal case. One way would be to enact alterations to the Schedules in the Crimes Act similar to the Western Australian model. Check their Schedule and form your own conclusion.

The simple question, however, is how wedded are we to having the Queen in our criminal courts. Imagine *Victoria* v *Brown*. The prosecutor would announce an appearance for Victoria or perhaps for the State. In directions to the jury the trial judge would sum up Victoria's case. Are you aghast? Tassie and WA aren't. They're handling it with real style. And I don't think the Queen would give it a second thought. She may heave a sigh of relief.

And for my part I suppose I'll now have to become VC: Victoria's Counsel.

Notes

1. *Criminal Code (Miscellaneous Amendments) Act 2003* section 4 (a).
2. *Tasmania* v *Farmer* (2004) 148 A Crim R 99 (Slicer J).
3. *Tasmania* v *Drake* (2006) 160 A Crim R 240 (Evans J).
4. *Western Australia* v *Maharaj* (2004) 36 SR (WA) 52 (Februry DCJ).
5. *Western Australia* v *Dick* (2006) 161 A Crim R 271 at 279 [37] (WA, Johnson J)
6. *Krakouer* v *Western Australia* (2006) 161 A Crim R 347.
7. *Houghton* v *Western Australia* (2006) 32 WAR 260; 163 A Crim R 226.

Bar Readers Signing On

ON Thursday 24 May 2007, the 48 people who had successfully completed the March 2007 Readers' Course signed their respective Rolls — the 46 Victorians, the Victorian Bar Roll; Tom Lowman and Alain-Frederic Obed, both from Vanuatu, the Roll of Overseas Counsel.

The Bar thanks the Chief Justice and Judges of the Supreme Court, the Chief Executive Officer of the Supreme Court, Michael McGarvie, and the Librarian, James Butler, for the privilege of holding this ceremony, once again, in the magnificent Supreme Court Library.

This is the second signing we have had in the Supreme Court Library — the first was last year, on Thursday 9 November 2006. Until then, at least for the past several years, Readers had signed the Roll in the presence of the Bar Council in the Bar Council Chamber.

The greater formality and inclusivity of the ceremony in the Supreme Court Library has been well received by the last two groups of Readers, their mentors, and those of their family and friends, who have been able to attend.

Signing the Roll of Counsel is a significant professional milestone. It is also a matter of personal commitment — personal commitment to the independent Bar and the role of an independent Bar in the administration of justice in this State.

For more than a hundred years, since the *Legal Profession Practice Act 1891*, every person admitted to practise in Victoria has been admitted as a Barrister and Solicitor of the Supreme Court of Victoria. The most recent statute governing the practice of law in Victoria, the *Legal Profession Act 2004*, substituted, prosaically, admission as "a lawyer", but with the same effect.

In other words, so far as the statutory framework is concerned, there has been no distinction between barristers and solicitors in Victoria in relation to admission, and the right to practise as one or the other, since 23 November 1891 when the *Legal Profession Practice Act 1891* came into force. On that day, every person who had been previously admitted as a barrister was deemed to have been admitted as a solicitor, and vice versa.

A Bar Association was established in December 1891, based on each applicant for membership declaring in writing that he would practise exclusively as a barrister — in substance, the very undertaking required now.

The December 1891 Bar Association lasted about two months. It was

Chairman Shand addresses the readers.

Bar Council seated in foreground, signing at the central library table, the Chairman congratulating a reader.

The Chairman congratulates Andrea Lawrence. Anand Naidu (partly obscured) signing the Roll with Honorary Secretary Penny Neskovcin.

Readers after the signing, holding practising certificates.

The Chairman making a presentation to Alain-Frederic Obed from Vanuatu.

The Chairman congratulates Alison Sampson.

denounced in the Parliament and in the press as a "conspiracy for the purpose of defeating the Act", of "a desperately and thoroughly despicable character", and as "this newest form of Communism". The Attorney-General of the day said he "thoroughly deplored the Bar's action." On 4 February 1892, the Association dissolved itself.

Sir Arthur Dean, in his History of the Bar of Victoria, A Multitude of Counsellors, from which the above historical information and quotations are drawn, concludes that between February 1892 and the establishment of the Committee of Counsel in June 1900, and of the Roll of Counsel in September 1900, barristers continued to practise as such, but without any formal organisation.

From 21 September 1900 when, amongst others, Sir Frank Gavan Duffy, Sir Henry Higgins and Sir Hayden Starke (all later of the High Court) and Sir Leo Cussen (later of the Supreme Court) signed the Roll, this Bar has existed on the basis of the personal undertaking of each member to practise exclusively as counsel.

On behalf of the Bar Council, the Chairman, Michael Shand QC, welcomed the forty-six new members to the Bar, their signing the Roll having perfected their undertaking and made them members.

So You Want to be a Judge?

WHEN the young lawyer just out of articles stands in the Banco Court and swears, or affirms, that he or she "will well and properly demean" himself or herself (or whatever the modern version of that oath may be), he or she looks up with awe and wonder at those superior beings gracing the Bench.

A little later in life, particularly in the case of those who come to the Bar, the nascent ambition to join the judiciary comes to the surface and most of us, consciously or subconsciously, would like to receive an offer. Later in life, offers of judicial office are made to some. Many decline. Others accept. Some of those who accept find that they thrive in the relatively regulated atmosphere of the Court. Others, it seems, desperately miss the freedom and creativity of life at the Bar.

If the system of judicial appointment in California, as described in the April issue of the *California Bar Journal*, were transferred to Victoria, it might well put a damper on ambition and cause many of the best potential appointees to set their sights firmly away from judicial office.

If you want to become a judge, here's how it works. Any lawyer in good standing with 10 years of practice may submit an application to the governor's office. The 10 page application forms for the superior and appellate courts are available at his website, and contain 61 questions, ranging from the number of years of civil litigation or criminal practice experience, to community service, to number of languages spoken. Sitting judges wishing to be elevated to the appellate bench answer different questions and submit a different form.

The governor has local vetting committees in many counties that do their own screening. Their proceedings are secret.

The governor then sends the application to the Commission on Judicial Nominees Evaluation (JNE), a group of up to 38 people, who evaluate each applicant: The commission is an agency of the State Bar, created by statute. The evaluation process, described by one commissioner as daunting, is different for the trial and appellate courts, but applicants are asked to submit names of 75 people who know them well, as well as everyone they've litigated with or before or against.

The commission independently seeks input from district attorneys, public defenders, judges and attorneys in the same practice area. If the county is small, every lawyer who practices in the county is asked for input. The goal is to receive a minimum of 50 random responses.

Local bar associations also evaluate judicial candidates.

The comment form asks about the candidate's professional ability, experience and reputation, judicial temperament, work ethic and bias.

A team of two evaluates candidates for the superior court; teams of four do the vetting for the appellate bench. Each candidate is interviewed by one team.

Anyone who submits a negative comment receives a phone call for corroboration and the candidate has an opportunity to respond.

After 90 days, the entire commission submits a summary report to the governor, with one of four ratings: exceptionally well qualified, well qualified, qualified or not qualified. Any candidate found not qualified has the right to appeal.

All JNE proceedings are confidential and commissioners do not make public the ratings or the basis for the ratings for the trial courts.

Helen Zukin, a former chair, said JNE balances two interests — those of the candidate and those of the people of the state who are entitled to a qualified judiciary. "We want to be very, very careful so there isn't an error and someone is foreclosed" from a judgeship, she said.

The ultimate appointment power rests with the governor.

Readers from Vanuatu

Will Alstergren

The Victorian Bar celebrates its 99th and 100th readers from the South Pacific Region and Ludlows presents the South Pacific Region readers with their own robes in celebration.

IN March 2007, Tom Loughman and Alain-Frederic Oben became the 99th and 100th lawyers of the South Pacific Region to attend and complete the Victorian Bar Readers' Course.

The Victorian Bar Readers' Course started in 1978 and within eight years lawyers from the South Pacific Region began attending the course. The first lawyer from the South Pacific Region to attend the Readers' Course was Robert G. Aisi who was from PNG and attended in the 1987 Readers' Course. Since then there have been 74 readers from PNG, 13 from Indonesia, 18 from Vanuatu and 5 from the Solomon Islands. Many of those ended up being public prosecutors or defenders.

Barbara Walsh, the Manager of Legal Education and Training, was the first coordinator of the program and worked with the late Robert Kent QC to develop strong relationships with the law societies and organizations of the South Pacific Region. Barbara has also organised and managed over 20 of advocacy workshops in the South Pacific Region.

Barbara has worked extremely hard to ensure that the South Pacific Region readers are well taken cared of and learn a great deal from the Victorian Bar Readers' Course. Barbara's role as the Victorian Bar's legal education officer has now been taken over by Deborah Morris. Barbara continues to run the workshops to the South Pacific region, having already completed a workshop in Fiji in January. She has organised the next workshop with Ian Hill QC as leader to PNG in July.

In the case of Tom Loughman, he is from a Public Solicitor's Office doing civil cases and defending accused in criminal cases. Tom's brother attended the

Will Alstergren, Andrew Tolley (Ludlows), Alain-Frederic Obed, Tom Loughman and Debbie Morris (Legal Education Officer).

Tom Loughman, Alain-Frederic Obed, Jason Pennell and David Shavin QC.

Alain-Frederic Oben, Tom Laughman and Will Alstergren (making presentation to Vanuatu readers).

Victorian Bar Readers' Course in 2001. Alain-Frederic Oben works in the Public Prosecutors office as a prosecutor. Tom Loughman read with Will Alstergren, and Alain-Frederic Oben read with Jason Pennell, both on the 18th floor of Owen Dixon West.

By all accounts both readers enjoyed their reading period and found the course extremely instructive and useful. Both lawyers' advocacy improved dramatically during the time as a direct consequence of the enormous amount of help that each reader receives during the course by the long list of volunteer members of Counsel and the Bench who contribute to the course every year.

The course was co-ordinated with an enormous amount of professionalism by Deborah Morris, with the help of Barbara Walsh.

LUDLOWS HELP CELEBRATE THE ADVOCACY TRAINING FOR SOUTH PACIFIC REGION LAWYERS

Andrew Tolley, Managing Director of Ludlows, has been extremely helpful and generous towards the Bar and in particularly the readers in the last few years. He has hosted, on a number of occasions, a readers' function to introduce them into what has been described as the best advocates, outfitter in Australia. Andrew was always concerned that Readers from the South Pacific Region did not have the ability to be able to purchase wigs and gowns for appearances and often had to share them in their home countries. Accordingly, Andrew has offered to give each reader who attends the Victorian Bar Readers' Course from the South Pacific Region a free gown, bar jacket and jabbo.

Jack Fajgenbaum QC, John Digby QC, Paul Lacava S.C. and Paul Elliott QC.

Will Alstergren, Michael Shand S.C. (Chairman, Bar Council) and Peter Riordan S.C. (Senior Vice-Chairman, Bar Council).

Tom Loughman and Alain-Frederic Oben were provided with their bar jackets and gowns at a recent function on the 18th floor of Owen Dixon West. Both Alain and Tom were incredibly proud of the opportunity to attend the Bar Readers' Course and of having their own bar jackets and gowns to take back to Vanuatu. Tom, in his speech to his fellow readers with members of counsel present, thanked Ludlows, the Bar Readers' Course, his fellow readers and particularly Deborah Morris for her incredible efforts during their three-month stay.

The Trial of Ned Kelly — Revisited

Paul Elliott QC

In May 2000 under the auspices of the now defunct Bar Theatre Company, the Bar wrote and produced a play concerning the trial of Ned Kelly. Following the theatrical production of the actual trial, a re-trial was conducted to see whether Ned could have been acquitted.

NICHOLAS Harrington directed and co-wrote the play with Tom Wright. The then Chief Justice Phillips, having written a book concerning the trial of Ned Kelly, was of great assistance in allowing the production and re-trial to take place in the Banco Court. The Winter 2000 *Victorian Bar News* contains many photographs and a detailed description of the play and the re-trial. The production was part of Law Week 2000. Because of the limited number of seats available in the Banco Court, many members of the Bar were unable to attend. For many years there has been a number of requests for the video of both performances to be shown in the Essoign Club to a wider audience.

Therefore after much prevarication about the quality of the videos and threats of legal proceedings, it was arranged for the videos to be shown at the Essoign Club during Law Week of 2007.

But what could not have been foreseen, in the period between production and re-presentation, was the demise of two leading members of the cast.

Therefore it was fitting that the dinner in the Essoign Club in May of 2007 was dedicated to the memory of Douglas Salek QC and Michael Rush. Michael Rush was a Ned Kelly expert. He was one of the driving forces behind the production with his detailed knowledge of the Kelly story and the trial. Even though he had never acted before, he gave a professional performance as Constable Mclntyre, the chief prosecution witness. His performance was memorable because in the first act of the production he had to act out the actual evidence of the Constable at the trial of Kelly before Justice Redmond Barry. In the second act he had to undergo the experience of being cross-examined by Michael Rozenes QC (as he then was), which was a somewhat more testing time than the cross-examination of Kelly's actual counsel, Bindon (effectively performed by Jim Shaw of the Bar).

Director Nick Harrington and former Chief Justice Phillips.

Although in 2000, Michael Rush had no knowledge of the cancer that eventually struck him down, Douglas Salek was in full remission of the lung cancer that had caused one of his lungs to be removed approximately a year prior to the performance. Although Douglas was battling cancer at the time of the production, his portrayal of James Gloster, witness for the prosecution, was pure Salek. During the course of rehearsals he engaged not only the director, but numerous members of the cast, in a constant dialogue as to the nature of the accent he was to use.

Should it be Somerset, Devon, Dorset or Cornwall? He listened to multi-various tapes before settling upon a Devon accent, much to the relief of the cast.

It was an emotional experience to see both Michael and Douglas performing on the video shown in the Essoign Club in 2007. It brought back memories, not only of their friendship and professional talents, but also of the good humour, fun and banter that they brought to all around them during their lives.

The dinner and showing of the video was part of Law Week. Those who attended the function, who had not seen the production before, agreed that the standard of acting in the first act and the standard of advocacy expressed in the second act were extremely high. It was good to see former Chief Justice Phillips present and full of vim and vigour.

In the first production Bernard Caleo (not a member of the Bar) was outstanding in his portrayal of Ned Kelly. Simon Wilson QC had taken to the part of Justice Redmond Barry with great gusto. The exchanges between Barry and Kelly at the end of the trial sounded theatrical to many present, until they were informed that these were the actual words used between the Judge and the convicted Ned Kelly. It is a chilling historical fact that when Kelly informed Barry that he would join Kelly very soon in another place, some few days after Kelly's hanging Barry died from blood poisoning caused by a carbuncle in his neck, which troubled him throughout the trial.

The retrial highlighted the adversarial skills of Julian Burnside QC prosecuting and Michael Rozenes QC defending. Many of the actors from the first act reappeared to be cross-examined in a different manner. Mark Robins, in playing one of the witnesses, highlighted that a barrister playing a witness can be a very difficult proposition to cross-examine. Justice Coldrey was suitably judicial in endeavouring to contain opposing Counsel and ensure that Kelly, perhaps, got a fairer trial than he did the first time around.

Nicholas Harrington addressed those present at the dinner concerning the difficulties involved in writing the script, directing barristers, and organising lights, costumes and make-up in the Banco Court. He paid tribute to Doug and Michael and to the assistance of the producer Richard Bourke who is now in America, and his co-writer Tom Wright.

The dinner and the play owed a lot to the efforts of Professor Kathy Laster and Joh Kirby of the Law Foundation who were great supporters in getting it put on during Law Week. The dinner and production were also ably organised on behalf of the Bar by Mei-Leng Hoi and Katie Spencer, together with Joady Donovan of Law Week. It is hoped that at some time in the future the Bar will be able to again put on a theatrical production of this quality.

Rohan Hamilton, Cahal Fairfield and Stuart Rowland.

Paul Lacava S.C., Judge Michael Strong and Ross Nankivell.

Rohan Hamilton, David Pannifex Mark Robins and Paul Elliott QC.

Richard Vabre, Simon Wilson QC, Bernard Caleo, Nick Harrington and Mei-Leng Hooi.

The audience.

Are Barristers Snobs?

Richard A. Lawson

THE other week, someone called me a snob. It was at a dinner party. One of those dos where you'd rather be home watching a bit of telly. I was seated next to an overly inquisitive woman who was firing questions at me constantly. And my answers were only upsetting her. When I stated my occupation, she scoffed and said that barristers were nothing but a bunch of snobs. I was taken aback, naturally. But was she right?

I don't think so. We aren't snobs. It's just that if one is trying to make a living by speaking publicly, then displaying a confident manner whilst doing so probably helps. An air of confidence, yes, but not an air of superiority.

So much is true if one is in court. But what of other times? Here the explanation is less obvious. Out of court we tend to be a quiet lot. We don't walk around discussing our cases. Barristers passing each other in a chambers corridor or on the William Street footpath are content just to exchange a nod of recognition. They don't want chapter and verse about your latest court drama. If you've had a triumph, they'll have had a disaster. And if you've had a disaster, they'll have had a triumph. Either way, it is likely to be a tiresome, lop-sided conversation.

Richard A. Lawson.

Incidentally, if I've had a disaster, I take a solitary stroll in the Flagstaff Gardens and repeat my cross-examination (this time effectively) to a large elm tree. But I digress. Things are no better if you bump into a non-barrister. If you give them chapter and verse, they won't know what you're talking about. Or they'll think you need a very long holiday. Better to say nothing.

The result of all this is that non-barristers mistakenly see us as quiet, aloof creatures who have an air of superiority. Apparent snobs. So what is to be done ?

Well, if one examines how barristers behave in lifts, one gets a better understanding of the problem. Behaviour in lifts, by the way, is a subject which has been neglected by social researchers. When Kenneth Clark in *Civilisation* asked "why did the Roman Empire collapse?", he confined himself to a few remarks — noting that Gibbons' exhaustive treatise on the subject had filled nine volumes. And an exhaustive study of how barristers behave in lifts would fill several volumes too. So, likewise, I will only make a few remarks. And it is convenient to concentrate on the lifts in Owen Dixon East. Observing a polite silence is the over-riding principle and practice of lift behaviour. Especially in East. Yet the silence still allows much scope for a shifting atmosphere and mood. The tension at 9:30 am. can become dismay by 4:30 pm. Then one must consider the numbers in the lift, the spread of seniority, the proportion in robes, the presence of judges, the presence of bicycle couriers (brandishing their water bottles like Tour de France riders), the presence of solicitors, of clients or of a cluster of readers. And, until recently, one needed to consider the presence or absence of a Bar Notice. I say "recently" because, lately, such notices — at least in East — seem to be disappearing from the lifts.

Bar Notices can announce an upcoming meeting or an upcoming meal where everybody who is likely to turn up will be under 32: the sort of thing that frightens me. It is more interesting if a Bar Notice announces a new judicial appointment. Here, however, special care must be exercised.

It is convenient to concentrate on the lifts in Owen Dixon East. Observing a polite silence is the over-riding principle and practice of lift behaviour. Especially in East.

On one occasion, I was heading home from chambers in the late afternoon. I entered an East lift at an upper floor — the second person on board. High on the back wall was a prominent, brand-new Bar Notice announcing a judicial appointment. But, in accordance with the principle and practice of polite silence, I said nothing.

Then we stop-started all the way down picking up passengers. During this descent, the Notice generated a sequence of very audible responses from colleagues who successively entered the lift, a floor at a time, as appears:

Two floors down: "What a good appointment!"

Another floor down: "How wonderful, my old mentor's been made a judge!"

And another: "Who the hell is he?"

Then the first floor: "Not him, surely!"

One could tell that our "first floorer" had just finished a long conference in the Essoign Club. Yet the other speakers were equally surprising exceptions to the principle and practice of polite silence. They may have been better advised to take a solitary stroll in the Flagstaff Gardens.

Speaking up can incline one's listeners to the view that one is envious, bitter, twisted or worse. Better to keep quiet and be mistaken for a snob.

Verbatim in America

FROM a book called *Disorder in the American Courts*, things people actually said in court, word for word, taken down and now published by court reporters who had the torment of staying calm while these exchanges were actually taking place.

Attorney: Are you sexually active?
Witness: No, I just lie there.

Attorney: What is your date of birth?
Witness: July 18th.
Attorney: What year?
Witness: Every year.

Attorney: What gear were you in at the moment of the impact?
Witness: Gucci sweats and Reeboks.

Attorney: This myasthenia gravis, does it affect your memory at all?
Witness: Yes.
Attorney: And in what ways does it affect your memory?
Witness: I forget.
Attorney: You forget? Can you give us an example of something you forgot?

Attorney: How old is your son, the one living with you?
Witness: Thirty-eight or 35, I can't remember which.
Attorney: How long has he lived with you?
Witness: Forty-five years.

Attorney: Now doctor, isn't it true that when a person dies in his sleep, he doesn't know about it until the next morning?
Witness: Did you actually pass the bar exam?

Attorney: Is your appearance here this morning pursuant to a deposition notice which I sent to your attorney?
Witness: No, this is how I dress when I go to work.

Attorney: What was the first thing your husband said to you that morning?
Witness: He said, "Where am I, Cathy?"
Attorney: And why did that upset you?
Witness: My name is Susan.

Attorney: The youngest son, the 20 year old, how old is he?
Witness: Uh, he's 20.

Attorney: Do you know if your daughter has ever been involved in voodoo?
Witness: We both do.
Attorney: Voodoo?
Witness: We do.
Attorney: You do?
Witness: Yes, voodoo.

Attorney: Were you present when your picture was taken?
Witness: Would you repeat the question?

Attorney: So the date of conception (of the baby) was August 8th?
Witness: Yes.
Attorney: And what were you doing at that time?
Witness: Uh ...

Attorney: She had three children, right?
Witness: Yes.
Attorney: How many were boys?
Witness: None.
Attorney: Were there any girls?

Attorney: How was your first marriage terminated?
Witness: By death.
Attorney: And by whose death was it terminated?

Attorney: Can you describe the individual?
Witness: He was about medium height and had a beard.
Attorney: Was this a male or a female?

Attorney: Doctor, how many of your autopsies have you performed on dead people?
Witness: All my autopsies are performed on dead people.

Attorney: ALL your responses MUST be oral, OK? What school did you go to?
Witness: Oral.

Attorney: Do you recall the time that you examined the body?
Witness: The autopsy started around 8:30 p.m.
Attorney: And Mr Denton was dead at the time?
Witness: No, he was sitting on the table wondering why I was doing an autopsy on him!

Attorney: Are you qualified to give a urine sample?
Witness: Huh?

And saving the best for last ...

Attorney: Doctor, before you performed the autopsy, did you check for a pulse?
Witness: No.
Attorney: Did you check for blood pressure?
Witness: No.
Attorney: Did you check for breathing?
Witness: No.
Attorney: So, then it is possible that the patient was alive when you began the autopsy?
Witness: No.
Attorney: How can you be so sure, Doctor?
Witness: Because his brain was sitting on my desk in a jar.
Attorney: But could the patient have still been alive, nevertheless?
Witness: Yes, it is possible that he could have been alive and practicing law!

Criminal Laws in Australia

David Lanham, Bronwyn F Bartal, Robert C Evans and David Wood
The Federation Press, 2006
Pp v–xlix; 1–519; Index 521–526

THE authors have provided a succinct account of the criminal law over the nine Australian jurisdictions. The text is in a convenient compact hardcover form. In the introduction the authors note that the interpretation of the law by the High Court has developed in a way which will have, as far as possible, a uniform application throughout Australia despite the differences between the jurisdictions that apply a criminal code and those that rely on the common law.

The authors' discourse on the method of interpretation provides a matrix for the remainder of the text; one which practitioners and students will find helpful.

The authors postulate a threefold analysis of the anatomy of crime in order to solve problems more fairly than the traditional approach of applying the physical element (actus reus) and the mental element (mens rea). To the first two elements, the authors add the absence of a defence as a third factor to make up criminal liability. For example, if a murder is described by reference just to the physical and mental elements, it ignores the defence of self-defence which justifies intentionally killing and provides exoneration. At the same time the authors recognise that what is often referred to as a defence, such as intoxication or alibi, is in reality a denial of a physical or mental element of the crime and should not be subject to their proposed threefold analysis. It is perhaps for this reason that the first chapter is about defences and the second is on provocation.

There follows chapters on homicide, personal injury, dishonesty, crimes with diminished fault elements, preliminary crimes and accomplices, all of which provide a fresh perspective compared to other criminal texts.

Whilst the text in not exhaustive, the authors have succeeded in putting the criminal law in Australia into perspective by identifying and focusing on the elements of each crime, with references to important authorities, thus enabling both practitioner and student to develop their research in a specific manner to reach the correct conclusion.

The text has the added advantage of being intellectually stimulating and easy to read and comprehend.

C.J. King

Principles of Federal Criminal Law

By Stephen Odgers
Thompson Lawbook Co, 2007
263 pages, softcover

THE *Criminal Code Act 1995* (Cth) commenced on 1 January 1997. To date many Commonwealth offences are contained in the *Criminal Code Act 1995* (Cth) and the process of progressively transferring further offences found in other Commonwealth legislation continues.

Stephen Odgers' work deals exclusively with the provisions of Chapter 2 of the Criminal Code entitled "General Principles of Criminal Responsibility". Chapter 2 applies not only to all offences in the Criminal Code Act but to all Commonwealth offences committed on or after 15 December 2001, unless expressly excluded by an Act.

Chapter 2 of the Criminal Code is divided into seven parts, codifying the general principles of criminal responsibility, including the elements of an offence, circumstances in which there is no criminal responsibility (defences), extensions of criminal responsibility, corporate criminal responsibility, proof and geographical jurisdiction.

The Criminal Code codifies the "physical" and "fault" elements, burdens, voluntariness including self-induced intoxication and mental impairment. The Commonwealth law in relation to attempts to commit an offence and accomplices are also codified. Terms and phrases such as "intentional", "recklessness" and "negligence" are defined.

The author dissects each part of Chapter 2, providing comprehensive comments and authority including reference to the historical underpinnings of the legislation, the "MCCOC" Report, being the Report published in 1992 by the committee set up by the Standing Committee of Attorneys-General (the Model Criminal Code Officers' Committee) to prepare a uniform criminal code for all Australian jurisdictions. The author identifies potential problems with the legislation as well as providing practical examples of how the statutory principles may be applied.

For those involved in Commonwealth offences this work provides valuable assistance in understanding the codification of criminal responsibility and what impact the common law will continue to have in interpreting the provisions of the Criminal Code.

J.V. Gleeson

Butterworths Intellectual Property Collection 2007

Lexis Nexis Butterworths 2007

THE *Butterworths Intellectual Property Collection 2007* comprises the text of the *Copyright Act 1968*, the *Designs Act 2003*, the *Circuit Layouts Act 1989*, the *Trade Marks Act 1995*, the *Patents Act 1990* and the *Plant Breeder's Rights Act 1994*. It also includes some extracts of the *Trade Practices Act 1974* relating to intellectual property.

The work includes the Berne Convention, the Agreement on Trade Related Aspects of Intellectual Property Rights (Trips), the WIPO Copyright Treaty and extracts of the Australia–United States Free Trade Agreement (predominantly Chapter 17 — Intellectual Property Rights and Side Letters relating to those rights). The Collection also includes extracts of the *Archives Amendment Bill 2006* and the *Intellectual Property Laws Amendment Act 2006,* together with amendments made by the *Copyright Amendment Act 2006*, the *Intellectual Property Laws Amendment Act 2006* and the *Trade Marks Amendment Act 2006.*

The legislation includes amendments in force as at 1 January 2007. The compilation has a table of contents and each discrete Act also has Tables of Provisions and Amendments but the work suffers from not having an overall index. Users should check the full text of the Trade Practices Act as they may require recourse to additional sections to the extracts included in the Collection. For instance, the consumer protection provisions extracted from the Trade Practices Act include Sections 52 and 53 but not Sections 55 and 55A and only parts of other sections are included where the whole section may need to be reviewed.

The Collection is a useful "one stop" repository of the statutory framework of intellectual property law. Its principal usefulness is in conjunction with other texts or cases rather than as a stand alone resource.

Schools and the Law

By Des Butler and Ben Matthews
The Federation Press, 2007
Pp 262, Softcover

THIS concise text by two Queensland University of Technology academics provides excellent analysis of the major legal issues confronting schools, principals, teachers and students throughout all Australian jurisdictions.

The first chapters deal with "children's rights" and duty of care/vicarious liability issues. The authors provide a short history of the development of child rights from the Dark Ages through to their ultimate recognition by the United Nations in the *Declaration of the Rights of the Child 1959* and their relationship in the current legal context. They also provide commentary on a number of recent cases that deal with the issues of duty of care and vicarious liability as they relate to students in various contexts including in and out of classrooms, playgrounds and on school-related activities outside schools. The issues of bullying and the conduct of third parties are also discussed.

Statutory requirements for child safety is dealt with on a state-by-state basis with the aid of graphs showing the mandatory reporting requirements of each state relating to child abuse and neglect. Student misconduct including truancy, criminal activity, bullying and harassment is also discussed as well as equal opportunity and discrimination within schools.

Finally the authors discuss the issue of information privacy within the education system and the overlap between Commonwealth and State legislation with respect to the collection, storage and use of "personal information". There is further discussion on the use of freedom of information legislation to gain access to material.

The test is written in an easy, reader-friendly format and will be useful to teachers and principals as well as legal practitioners.

J.V. Gleeson

Australian Corporations Legislation 2007

Lexis Nexis, Butterworths

THIS edition incorporates the Corporations Act and Regulations, the ASIC Act and Regulations, the Corporations (Fees) Act and Regulations, the Corporations (Review Fees) Act and Regulations together with other related legislation and pending legislation. The related legislation includes excerpts from the Acts Interpretation Act. The foreword to this volume is written by Emeritus Professor H.A.J. Ford, AM. He reminds us, that the *Corporations Act 2001* and the *Australian Securities Investment Commission Act 2001*, which commenced on 15 July 2001, marks a significant stage in the operation of governments. Such cooperation is necessary because the Australian Commonwealth Constitution did not give the Commonwealth Parliament clear plenary powers to legislate about corporations and financial markets. Prior to that, cooperation had been by way of an acting uniform of laws. The uniform accompanying the legislation was first enacted in 1961.

At the time the 1961 Act was enacted, it contained 399 sections. *The Australian Company Law and Practice* by Wallace and Young published in 1965 was contained in only one volume. Now the Corporations Act runs to some 1,369 sections, ignoring the transitional provisions contained in Chapter 2. It is a reflection of the continuing complexity of the corporate world as well as the willingness of successive governments to regulate the market.

This edition contains an important foreword which introduces the format and content of the new national legislation. It also explains the investigative powers of ASIC and its internal divisions. Both the criminal and civil proceeds are discussed and explained. The book includes a comprehensive table of changes.

Needless to say this volume is an essential volume for any person who wishes to practice in corporations law or for that matter the wider commercial legislation which necessarily relies upon incorporated bodies.

J.V. Kaufman

Understanding Contract Law (7th edn.)

By D Khoury and Y S Yamouni
Lexis Nexis Butterworths Australia, 2007
Pp i–xxvi, 1–480, Glossary 481–485, Index 487–499

UNDERSTANDING Contract Law, when first published, was primarily a general text for students in business faculties. This work has now developed from that primary aim to be a more comprehensive text increasingly aimed at law students and lawyers. In later editions the authors have approached topics with a greater depth of analysis so that the work is now a general reference to contract law.

Of particular use are the flow charts found at the beginning of each chapter dealing with a substantial element of the law of contract. The flow charts identify and refer the reader to the appropriate paragraph or paragraphs within each chapter dealing with particular aspects of each topic. This enables quick access to a particular area of interest for the user. Of similar utility is the glossary, which also refers to appropriate paragraph numbers where further discussion of particular defined terms can be found.

The style of the work is easy to read with footnotes kept to a non-intrusive minimum. There is frequent reference to cases and the case notes in the text are clearly highlighted. At the end of each chapter there is a list of suggested further readings for those users who require further reference to academic treatment of aspects of the law of contract.

Understanding Contract Law continues to be a valuable text for students but it is also an extremely useful and easy to use standard reference for practitioners in relation to the law of contract in Australia.

P.W. Lithgow

Equity

By S B Thomas and V Vann
Lexis Nexis Butterworths Australia, 2007
Pp i–xvi, 1–283, Index 285–297

MANY years ago when I was a young law student, it always seemed that equity was something seen but not studied. A sort of legal mirage shimmering gloriously on the horizon but not actually able to be grasped by students or their teachers. In the course of studying contracts, concepts of unconscionability and undue influence would be mentioned. Although in property law, equitable interests and assignments were studied, these concepts were always exceptions and anomalies. The concepts of fiduciary obligations were alluded to in company law, partnerships and employment law. The only substantive study of equity seemed to be in relation to trusts, and seemed to be interminable discussion of charitable trusts, 19th century wills and occasionally the foibles of expectant heirs.

Equity was never taught as a single unified subject. The maxims of equity would be wheeled out, referred to and put back in their "box" as some sort of odd incident of the law. Equally equitable

remedies were glossed over as being something a successful party could expect having established a cause of action, but rarely studied in any depth.

It was not until the 1980s when seminal decisions such as *Commercial Bank of Australia Ltd* v *Amadio* (1983), *Baumgartner* v *Baumgartner* (1987), *Walton's Stores (Interstate) Ltd* v *Maher* (1988) and *Commonwealth* v *Verwagen* (1990) seemed to breathe new life and interest into equity. In fact, equity had always been at the forefront of the law, it just wasn't taught that way.

This new work, *Equity*, by Thomas and Vann is one of the Nexis Lexis Study Guide Series and it brings together all the common themes of equity in one book. The style is easy to read, and summaries of various cases, including facts and issues, and the decision are set out concisely within the text. It is perfect for students and busy practitioners as a guide to and through aspects of equity.

While this book is sure to be of great use to students, it will equally be of interest and provide accessibility to those experienced lawyers who have an interest in the law, and the history and development of equity.

I commend this book to practitioners who require an overview, particularly those who may have forgotten much or only learned a little of equity.

P.W. Lithgow

How Judges Sentence

By Geraldine Mackenzie
The Federation Press, 2005

THIS interesting book is based on research interviews conducted with 31 Queensland judges as part of the author's PhD. It seeks to explore the practice of sentencing from the perspective of the sentencing judge.

The judges addressed a series of nine open questions, which were presented to each of them in advance of the interview. Many of the judges also spoke generally with the author, raising topics outside the scope of the questions.

The book draws on direct quotes from the transcript of the interviews to discuss various principles, from media influence to sentencing purposes. The commentary is intelligent and informed. The author is an academic who teaches and researches criminal law with a particular focus on sentencing.

The judges' comments reveal the private reasoning and decision making underlying the sentences handed down. At points the judges' individuality shines through. For example, one quote setting out a judge's view that sentencing is definitively a science is followed by a quote from another judge explaining how it is an art. However, common themes also emerge, such as the desire to achieve balance between the needs of society and the victim on one hand and the offender on the other, and that judges tend to find sentencing, particularly imposing imprisonment, the most difficult task they are called upon to discharge in their office.

In the climate of calls for "law and order" at every election and media campaigns for harsher sentences, it is interesting to hear the judges' own plea for the retention of sentencing discretion. The capacity to tailor the sentence to fit the individual circumstances is seen by the persons responsible for its imposition as vital to achieving sentencing goals.

While we may wish the interviews were with 31 of our own Victorian judges, the commentary draws heavily on NSW and Victorian practice and makes frequent reference to publications relevant to those jurisdictions in the discussion. It also includes material from other jurisdictions, including the UK and America. In fact, the bibliography covers no less than 12 densely printed pages. Practitioners need not fear that this work is limited to Queensland issues.

For the criminal practitioner, reading this book will let you stand for a moment at the shoulder of the judge, listening to his or her thoughts.

For all of us, reading the judges' own personal thoughts on their methodology, attitudes and approaches can only improve our capacity to engage in and understand the on-going debate about sentencing.

L.M.E.

Islam Its' Law and Society (2nd edn)

By Jamila Hussain
Federation Press, 2004

THIS is the second edition of an absorbing work designed to provide an introduction to Islamic law and culture. It remains as timely and relevant as ever.

Islam is professed as a religion by more than a quarter of the world's population, including an increasing number of Australians. Australian lawyers in family law, international trade and other fields will be assisted by gaining a basic working knowledge of Islamic law. All of us will be assisted by broadening our knowledge of such an important part of human society.

The book provides a readable outline of the elements of Islamic family law, inheritance, banking, criminal law, reproductive technology, commercial law, and general jurisprudence, as well as the relevant legal process, laws of evidence and the cultures in which Islamic law is applied.

Hussain includes chapters on Islamic History, the position of women in Islamic society and Muslims in Australia.

Throughout the book, the legal concepts are presented in their broader cultural and even political frameworks.

Each chapter covers a topic in a manner that allows it to be read on a standalone basis. No doubt busy practitioners will appreciate being able to acquire a solid overview of the application of Islamic law in their field by reading only the relevant chapters. Over seven pages of references in the bibliography will aid the serious researcher to move on to deeper research, once this introduction is mastered.

This second edition has been expanded to include a new chapter on Islamic laws of war and peace. This chapter seeks to expose some common Western misunderstandings of Islamic teachings and to provide an accessible, reliable resource for finding the actual content of Islamic beliefs. In view of the ongoing controversies about Islamic thinking in this area in public debate, this chapter is a valuable addition.

The author does not shy away from criticising interpretations and applications of Islamic law by some Muslim populations. The tensions between liberal and fundamental interpretations of the Quran are frankly discussed.

As the author acknowledges, no small book could cover the entire topic of Islamic law and culture, and all its variations worldwide. In a little over 220 pages, it does not seek to be a encyclopaedia of Islamic law.

The author seems well qualified for the task she undertakes. She was born in Australia, is of Anglo-Irish descent and has converted to Islam. She studied Islamic law in Malaysia for two years, and lectures at the University of Technology, Sydney, in Islamic Law and Asian Law and Culture and at the University of Western Sydney in Comparative Law.

The book is squarely aimed at persons such as this reader, who knew far too little about Islamic law and culture. It provides a workable insight into one of the world's great religions and its legal systems, while maintaining brevity and accessibility.

L.M.E.

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